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Attorneys for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

FEDERAL TRADE COMMISSION, and UTAH
DIVISION OF CONSUMER PROTECTION,

Plaintiffs,

vs.

ZURIXX, LLC; CARLSON DEVELOPMENT
GROUP, LLC; CJ SEMINAR HOLDINGS,
LLC; ZURIXX FINANCIAL, LLC;
CRISTOPHER A. CANNON; JAMES M.
CARLSON; and JEFFREY D. SPANGLER,

Defendants.

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION FOR
CLARIFICATION OF MAGISTRATE
JUDGE'S ORAL RULING ON THIRD
PARTY DISCOVERY**

Case No.: 2:19-cv-00713-DAK-EJF

Judge Dale Kimball

Magistrate Judge Evelyn J. Furse

INTRODUCTION

Plaintiffs' Motion for Clarification of Magistrate Judge's Oral Ruling On Third Party Discovery ("Motion for Clarification") (ECF No. 96) should be denied for the simple reason that Judge Furse's order does not need to be clarified—Her Honor's order plainly states that third-party depositions should not proceed at this time. Indeed, Judge Furse expressly considered the provision in the Stipulated Preliminary Injunction (ECF No. 54) that permitted third-party discovery to proceed and ordered that no third-party depositions may proceed until the Court rules on the Defendants' Motion to Stay (ECF No. 70). Plaintiffs seek to ignore this Court's plain language, purporting to seek "clarification." This request for clarification, however, is simply a poorly disguised motion for reconsideration. Because Plaintiffs do not meet any of the three bases necessary to warrant reconsideration of Judge Furse's prior order, and further will not suffer any harm in waiting to obtain third-party depositions until Judge Furse issues a forthcoming ruling on the Motion to Stay, Plaintiffs' Motion for Clarification should be denied.

ARGUMENT

I. Magistrate Judge Furse's Order is Clear and Unambiguous—Third Party Depositions are Stayed.

On January 9, Magistrate Judge Furse held a hearing on Defendants' Motion to Stay. *See* Jan. 9, 2020 Minute Entry (ECF No. 95). During that hearing, Defendants argued that third-party document discovery and depositions should be stayed. January 9, 2020 Motion Hearing Transcript ("Transcript") (ECF No. 98) (attached as Exhibit 1 hereto for the Court's convenience) at 10:13–19. Plaintiffs argued that, pursuant to the relevant provision in the Stipulated Preliminary Injunction, the parties should proceed with third-party discovery in totality. *Id.* at 21:22–22:1. However, Judge Furse was unambiguous in stating, "Given the arguments, I think it's okay to go ahead and start third-party discovery that is for documents.

Let's hold off on noticing up any depositions until I can decide the motion." *Id.* at 22:2–5. Indeed, the Court's directive is quite sound in that it creates an efficient means of dealing with the parties' conflicting positions on discovery. Accordingly, there is no reason to clarify the Court's unambiguous directive from the January 9 hearing.

II. Plaintiffs' Motion for Clarification is an Improper and Thinly-Veiled Motion for Reconsideration of Magistrate Judge Furse's Oral Ruling.

Plaintiffs' Motion for Clarification should be denied as an improper attempt at reconsideration under Federal Rule of Civil Procedure 54(b). In bringing a motion for reconsideration, a party must demonstrate that "(1) substantially different, new evidence has been introduced; (2) subsequent, contradictory controlling authority exists; or (3) the original order is clearly erroneous." *Albright v. Attorney's Title Ins. Fund*, No. 2:03-CV-00517, 2008 WL 376247, at *2 (D. Utah Feb. 11, 2008) (citing *Major v. Benton*, 647 F.2d 110, 112 (10th Cir. 1981)). However, reconsideration is inappropriate where: (1) "it merely restates the party's position taken in the initial motion[,]" (2) "absent extraordinary circumstances, the basis for the motion to reconsider must not have been available at the time the first motion was filed[,]" and (3) it is based upon "a mere disagreement with the court's decision[.] . . . rehash[ing] a party's former arguments that were rejected by the court." *Pia v. Supernova Media, Inc.*, No. 2:09-CV-00840-DN-EJF, 2014 WL 7261014, at *2 (D. Utah Dec. 18, 2014) (quoting *Albright*, 2008 WL 376247, at *2). Plaintiffs' motion should be denied because it fails to demonstrate any of the three requisite bases for relief under Rule 54(b).

First, Plaintiffs fail to cite any substantially new or different evidence they have discovered since the Court's oral ruling that would justify their request that this Court reconsider its order, particularly given the fact that there is no dispute that this Court was well aware of the provision in the Stipulated Preliminary Injunction permitting third-party discovery to proceed.

See Transcript at 21:22–22:1 (Plaintiff’s counsel requesting third-party discovery based on the Stipulated Preliminary Injunction). Second, Plaintiffs do not cite any subsequent, contradictory controlling authority as the basis for their need for “clarification.” Finally, Plaintiffs do not argue that this Court’s Order was in clear error or poses manifest injustice that would warrant reconsideration. Because Plaintiffs’ request for “clarification” simply seeks to “revisit issues already addressed,” and does not address any of the three bases under which the Court could reconsider its ruling, reconsideration is not warranted. Thus, Plaintiffs’ Motion for Clarification should be denied.

III. Plaintiffs are not Prejudiced by a Stay of Third-Party Depositions.

Plaintiffs’ claims of prejudice ring hollow. Staying third-party depositions for several weeks—a minimal duration until the Court decides the Motion to Stay—cannot be said to prejudice Plaintiffs. Indeed, Plaintiffs cannot demonstrate any harm that will result from this short stay as this Court emphasized its desire to quickly rule on the Defendants’ Motion to Stay, stating that it “will try and get [the parties] an answer [to the Motion to Stay] shortly after” the parties complete the requested supplemental briefing regarding the Motion to Stay. *Id.* at 22:12–13. Thus, Plaintiffs’ purported concerns of fading witness memories should they not be able to pursue third-party depositions while waiting on this Court’s ruling are unavailing. Waiting mere weeks until a ruling on the Motion to Stay will not result in any demonstrable prejudice to Plaintiffs.

Moreover, any prejudice Plaintiffs may suffer during these next few weeks lies primarily at Plaintiffs’ feet due to their inaction. The Stipulated Preliminary Injunction, which Plaintiffs (again) claim gives them the right to initiate all third-party discovery, including depositions, was issued in November. More than two months have since passed, and Plaintiffs still have not sent out any third-party document discovery, let alone any deposition notices. Given their delay in

pursuing any third-party discovery, Plaintiffs cannot now maintain that a stay of third-party deposition notices limited in duration to mere weeks will cause them prejudice. Accordingly, because Plaintiffs cannot demonstrate that they will suffer prejudice, the Court's order staying third-party depositions should stand, and Plaintiffs' Motion for Clarification should be denied.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion for Clarification.

DATED this 30th day of January, 2020.

Respectfully Submitted,

By: /s/ Eric G. Benson
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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of January, 2020, I caused a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR CLARIFICATION OF MAGISTRATE JUDGE'S ORAL RULING ON THIRD PARTY DISCOVERY** to be served on the following by email:

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