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**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' SUPPLEMENTAL
BRIEF IN SUPPORT OF ITS MOTION
TO STAY DISCOVERY**

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

Judge Dale Kimball

Magistrate Judge Evelyn J. Furse

INTRODUCTION

The parties will be forced to proceed with protracted, expensive, and largely unwarranted litigation should the Court deny Defendants' Motion to Stay. Contrary to the FTC's unsupported assertion, the harm to Defendants should discovery proceed while the Supreme Court determines the scope of equitable monetary relief available is not speculative. In *Liu v. SEC*, No. 18-1501 (U.S. Nov. 1, 2019), the Supreme Court will address the SEC's ability to obtain equitable monetary relief under a similar statute, and the Solicitor General, on behalf of the FTC, has conceded that the *Liu* case will likely inform the remedies available to the FTC. The Supreme Court is also likely to soon determine whether to grant certiorari in three cases directly questioning whether the FTC is entitled to equitable monetary relief under Section 13(b) of the FTC Act. All of these cases will impact how the parties proceed in the present action. Indeed, Defendants will be forced to engage in expensive discovery regarding consumer injury that may be mooted, in large part, by these actions pending before the Supreme Court. Such harm is anything but speculative. Further, the Plaintiffs' contention that it will suffer harm if the stay is granted is meritless, particularly given the fact that the Plaintiffs agreed to a stipulated preliminary injunction, which preserves the status quo.

This action should be stayed because, though decisions in certain Supreme Court cases may not be fully dispositive of this case, those decisions will undoubtedly have a profound impact on how the parties proceed through discovery, motions practice, trial, and resolution. Accordingly, Defendants respectfully request that the proceedings in this case be stayed pending the Supreme Court's decision in *Liu v. SEC*, No. 18-1501 (U.S. Nov. 1, 2019), and if certiorari is granted, *AMG Capital Management, LLC v. FTC*, No. 19-508 (U.S. Dec. 13, 2019), *FTC v.*

Credit Bureau Center, LLC, No. 19-825 (U.S. Dec. 19, 2019), or *Publishers Business Services, Inc. v. FTC*, No. 19-507 (U.S. Oct. 18, 2019).

ARGUMENT

I. Courts Have Granted Stays Where Pending Supreme Court Review Of An Unrelated Action May Impact The Case In Some Fashion—Not Only When It Would Resolve The Entire Case.

Contrary to Plaintiffs’ contention, “[i]t is not uncommon for lower courts to stay proceedings in pending matters when cases containing material issues are awaiting determination by the United States Supreme Court.” *Burke v. Alta Colleges, Inc.*, No. 11-CV-02990-WYD-KLM, 2012 WL 502271, at *2 (D. Colo. Feb. 15, 2012). In fact, courts across the country have recognized that a stay is warranted where the Supreme Court is assessing a question of law in an unrelated action that in some fashion impacts a case—but may not be dispositive of the entire case. For example, the decision in *Burke* squarely demonstrates that a stay is warranted even where it is not certain that the Supreme Court’s decision would entirely moot an action—as is the case here. In *Burke*, the plaintiff, who worked as an “Admissions Field Representative,” sued for lost wages under the Fair Labor Standards Act, alleging that defendant incorrectly classified him as exempt. *Id.* at *1. Defendant answered that plaintiff was properly exempt under the “outside sales” exemption of the FLSA. *Id.* Defendant moved to stay the proceedings pending the decision in *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), where the question presented was “[w]hether the [FLSA]’s outside sales exemption applies to pharmaceutical sales representatives.” *Id.* In granting a stay, the *Burke* court explicitly reasoned that:

It is likely that the Supreme Court’s decision in *Christopher* regarding the “outside sales” exemption will directly impact the parties’ discovery efforts and motions practice. **Although it is impossible to know the extent to which the Supreme Court opinion will affect litigation strategies here, it is reasonable**

to conclude that the *Christopher* decision will likely impact this case in some fashion. Not only may it serve to properly focus the parties' discovery efforts, but it may also drive settlement of this case. Waiting less than five months for the Supreme Court decision will likely streamline the scope of discovery and, in turn, the scope of this litigation.

Id. (emphasis added). As in *Burke*, the Court should conclude that *Liu* will likely impact this case both as to the scope of discovery and the possibility of settlement, and thus a stay is warranted.

Further, courts have stayed proceedings pending the outcome of pending petitions for certiorari that may affect a portion—but not all—of the case. For example, the court in *Walker v. Monsanto Co. Pension Plan*, after dismissing several of the plaintiff's claims, stayed certain of the remaining claims pending the Supreme Court's determination of whether it would accept a pending petition for certiorari. 472 F. Supp. 2d 1053, 1055 (S.D. Ill. 2006); *see also Arab Am. Civil Rights League v. Trump*, No. 17-10310, 2017 WL 2501060, at *2 (E.D. Mich. June 9, 2017) (staying the entire case, in part because Supreme Court review in a case presenting the same constitutional questions would “provide guidance regarding the appropriate scope of discovery, and may help to resolve anticipated disputes related to Plaintiffs' outstanding discovery requests.”); *Ditech Financial, LLC v. T-Shack, Inc.*, No. 2:16-cv-2812-JAD-NJK, 2017 U.S. Dist. LEXIS 59745, at *2–4 (D. Nev. Apr. 19, 2017) (staying all proceedings *sua sponte* pending Supreme Court resolution of two petitions for certiorari because they “ha[d] the potential to be dispositive of this case or *at least of discrete issues that it presents.*” (emphasis added)); *Coombs v. Diguglielmo*, No. CIV.A. 04-1841, 2004 WL 1631416, at *1 (E.D. Pa. July 21, 2004) (staying case because “the Supreme Court's decision in *Holloway* may have a significant impact on the case before the court.”); *In re Literary Works in Elec. Databases*

Copyright Litig., No. 00 CIV 6049, 2001 WL 204212, at *2 (S.D.N.Y. Mar. 1, 2001) (finding that “[w]here it is efficient for a trial court’s docket and the fairest course for the parties, a stay may be proper even when the issues in the independent proceeding are not necessarily controlling of the action before the court.”).

Whether the FTC is entitled to equitable monetary relief is an issue that will impact this case significantly, and certainly “in some fashion,” as required by courts across the country. *Burke*, 2012 WL 502271, at *2. As further explained below, the Supreme Court’s opinion in *Liu*, and potentially in *AMG Capital Management, Publishers Business Services*, and *Credit Bureau Center*, will directly impact the focus of the parties’ discovery efforts, and may even impact settlement negotiations. Waiting less than five months until or before June 29, 2020, the last possible day the Supreme Court could issue an opinion in *Liu*, will significantly streamline how this case proceeds.

II. Forthcoming Supreme Court Precedent And The Tangible Harm That Defendants Will Suffer Is Anything But Speculative.

Contrary to the Plaintiffs’ unsupported statements, neither the Supreme Court’s forthcoming decision in *Liu v. SEC*, nor the hardship and inequity that Defendants will suffer should a stay be denied, are speculative. Despite Plaintiffs’ cursory contention that “the ruling in *Liu* may not have any impact on the FTC’s ability to pursue consumer redress,” Plaintiffs’ Supplemental Brief In Support of Plaintiffs’ Opposition to Defendants’ Motion to Stay Discovery (“Plaintiffs’ Supplemental Brief”) (ECF No. 97) at 3–4, Defendants are not required to demonstrate certain impact on a case in order to obtain a stay. Indeed, as the *Burke* court acknowledged, a stay is nevertheless warranted where “it is impossible to know the extent to which the Supreme Court opinion will affect litigation strategies here[.]” 2012 WL 502271, at

*2. However, it is reasonable to conclude that the *Liu* decision will likely impact binding precedent on equitable remedies implied in a statute.

The FTC's actions before the Supreme Court demonstrates the hollowness of their protests here. The Solicitor General of the United States, on behalf of the FTC, conceded that *Liu* likely will have a significant impact on the FTC's authority to obtain equitable monetary relief because the provisions of securities laws at issue in *Liu* are analogous to the FTC's equitable authority under Section 13(b). *See* Brief for the Respondent, *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (filed Dec. 13, 2019) at 4. Specifically, in *AMG Capital*, a case that squarely raises the question of whether the FTC is entitled to equitable monetary relief under Section 13(b), the Solicitor General argued for a stay of that petition, "[i]n light of the overlap between this case and *Liu*, the Court should hold this petition pending the disposition of *Liu*." *Id.* Thus, according to the Solicitor General, there is nothing speculative about *Liu*'s impact on this Court's interpretation of Section 13(b), and a case considering Section 13(b) should be stayed pending *Liu*.

Similarly, several amicus briefs filed in *Liu* also have argued that the SEC's ability to obtain disgorgement directly impacts the FTC's authority to obtain equitable monetary relief under Section 13(b). *See* Brief Amici Curiae Former Federal Trade Commission Officials In Support of Respondent, *Liu v. SEC*, No. 18-1501 (U.S. filed Jan. 20, 2020) at 2–4 ("This *amici curiae* brief is submitted by former FTC senior officials to call to the Court's attention the potentially adverse effect the Court's ruling in this case could have on the FTC's ability to enforce the FTC Act[.]"); *see also* Amicus Curiae of the New Civil Liberties Alliance in Support of Petitioners, *Liu v. SEC*, No. 18-1501 (U.S. filed Dec. 23, 2019) at 10–12, 19–20; Brief

Amicus Curiae Securities Industry and Financial Markets Association in Support of Petitioners, *Liu v. SEC*, No. 18-1501 (U.S. filed Dec. 20, 2019) at 30–32; Brief for Amicus Curiae Americans for Prosperity Foundation in Support of Petitioners, *Liu v. SEC*, No. 18-1501 (U.S. filed Dec. 20, 2019) at 17–19.

If this case were to proceed before the Supreme Court in *Liu* limits the scope of equitable relief implied in federal statutes, Defendants “will certainly endure defense costs if the stay is not granted, costs that may indeed be wasteful[.]” *Metric Const. Co. v. Prof'l Raingutter Servs., Inc.*, No. 1:06-CV-00125DAK, 2007 WL 4143084, at *4 (D. Utah Nov. 19, 2007); *see Burke*, 2012 WL 502271, at *3 (staying all proceedings, including scheduling and discovery, where a Supreme Court decision “will likely impact this case in some fashion”).

In fact, without a stay, Defendants are certain to suffer hardship and inequity that can be avoided by allowing the Supreme Court to first weigh in on the issue of equitable monetary relief. In the Attorney Planning Meeting Report (ECF No. 66), Plaintiffs indicated that they intend to seek discovery on a broad swath of topics, including, but not limited to: (1) the role of the individual and corporate Defendants; (2) the role of potential corporate and individual Defendants; (3) the extent of unreimbursed consumer injury; and (4) the extent to which Defendants collected or otherwise obtained information about their customers’ financial success. *Id.* at 6–7. Given the breadth of these requested discovery topics and the expense of discovery, whether and what discovery proceeds on these topics necessarily turns on whether the FTC is entitled to the large amount of equitable monetary relief it seeks in this action, as the FTC must demonstrate that the burden imposed on Defendants in responding to discovery requests is proportionate to the needs of the case. Fed. R. Civ. P. 26.

Further still, Plaintiffs propose to serve their expert disclosures by July 27, 2020, with Defendants serving their expert disclosures by August 24, 2020. Attorney Planning Meeting Report at 11. This expert discovery will necessarily involve expensive and time-consuming calculations of purported consumer injury, calculations that will be directly impacted by whether the FTC is entitled to seek monetary relief for its 13(b) claims. In sum, an overwhelming and burdensome amount of discovery that Plaintiffs intend to seek regarding purported consumer injury will be undertaken during the time that the Supreme Court is set to decide the merits in *Liu*, and whether to grant certiorari in the pending petitions.

In arguing that the effect of a decision in *Liu* is speculative, Plaintiffs cite the Memorandum Order in *In re Sanctuary Belize*, No. 18-cv-3309-PJM (D. Md. Nov. 21, 2019) (ECF No. 709), in which the District of Maryland denied a defendant's request for a stay in light of the pending petitions for certiorari in *AMG Capital Management* and *Credit Bureau Center*. See Supplemental Brief at 3. However, *In re Sanctuary Belize* is inapposite to the present action. First, and most significantly, “[d]iscovery ha[d] ended” in that case before the defendant moved to stay the action. Memorandum Order, *In re Sanctuary Belize*, No. 18-cv-3309-PJM (D. Md. Nov. 21, 2019) (ECF No. 709), at 2. Second, the “case ha[d] been pending for over a year, and there remain[ed] just two months before trial leading to a conclusion of the case.” *Id.* The *Sanctuary* court found these facts dispositive of the request for a stay, holding that a quick resolution in the case was imminent and thus warranted. See *id.*

Conversely, the present action is still in its infancy—the Complaint was filed approximately four months ago and a stipulated preliminary injunction was entered only approximately three months ago. See Stipulated Preliminary Injunction (ECF No. 54) (entered

Nov. 1, 2019). Indeed, the Court has not yet entered a scheduling order and no party discovery has taken place.¹ Were the Court to enter a scheduling order, and discovery to proceed prior to the Supreme Court’s ruling in *Liu v. SEC*, the Defendants would certainly face “hardship or inequity” by having to engage in discovery that has the potential to be duplicative, not proportionate to the needs of the case, and wasteful. Staying this case until the Supreme Court provides further guidance on whether the FTC is entitled to equitable monetary relief “will prevent unnecessary briefing and the expenditures of time, attorney’s fees, and resources that could be wasted[.]” *Ditech Fin., LLC*, 2017 U.S. Dist. LEXIS 59745, at *2–3 (staying proceedings pending determination of two petitions for certiorari); *see also Arab Am. Civil Rights League*, 2017 WL 2501060, at *1 (staying proceedings in the case where Supreme Court review “will likely not be fully dispositive[.]” but will settle some issues and simplify them all).

III. A Stay of These Proceedings Will Not Prejudice Plaintiffs.

Plaintiffs fail to demonstrate how they would suffer prejudice if this Court grants Defendants’ requested stay. Indeed, “[c]ourts have long acknowledged that a delay inherent to a stay does not, in and of itself, constitute prejudice.” *Campbell v. Oregon Dep’t of State Lands*, No. 2:16-CV-01677-SU, 2017 WL 3367094, at *3 (D. Or. Aug. 4, 2017) (quoting *PersonalWeb Techs., LLC v. Facebook, Inc.*, Nos. 5:13-cv-01356-EJD; 5:13-cv-01358-EJD; 5:13-cv-01359-EJD, 2014 WL 116340, at *5 (N.D. Cal. Jan. 13, 2014)). Because Plaintiffs’ bare assertion that they will suffer prejudice is inherent to any stay, the specific harm Defendants will suffer should a stay not be entered outweighs the Plaintiffs’ unspecified harm.

¹ Significantly, on January 30, 2020, Plaintiffs notified the Defendants that they intend to serve their first third-party document subpoenas on or about February 6, 2020 or as soon thereafter as service may be effectuated.

First, Plaintiffs' argument for the purported prejudice they will suffer should this Court grant Defendants' Motion for a Stay is based on the flawed premise that "the longer discovery is postponed, the longer this case will drag on." Plaintiffs' Supplemental Brief at 7. As discussed above, and in Defendants' Reply, a stay will "properly focus the parties' discovery efforts," and in turn preserve the Court's and the parties' time and resources. Defendants' Reply in Further Support of Their Motion to Stay Pending Outcome of Motion to Dismiss (ECF No. 90), at 3–4; *see supra* at 5–6. Therefore, staying discovery may very well benefit all of the parties by streamlining the issues that will dictate the course of litigation, thus allowing a more expeditious resolution of this case.

Second, contrary to Plaintiffs' contention, witnesses' memories will only be affected minimally, if at all, as Defendants are only seeking—at most—a five-month stay of proceedings. The Supreme Court will decide *Liu* by June 29, 2020. Plaintiffs' assertion that this sort of a stay would adversely affect witnesses' memories cannot serve as a basis for prejudice. *See Burke*, 2012 WL 502271 at *2 (rejecting plaintiff's argument that a stay will result in further degradation of witnesses' memories because "[p]laintiff has identified no non-speculative prejudicial impact which would result from waiting up to five months to proceed with discovery."); *F.M. v. Walden*, No. 1:13-CV-00264 ACT, 2013 WL 8481607, at *6 (D.N.M. Aug. 6, 2013) ("Plaintiffs' generalized concern with respect to the memories and availabilities of witnesses is not persuasive. . . . The concerns raised by Plaintiffs apply to any plaintiff in any civil case."). It is inconceivable that a five-month stay will significantly impact witnesses' purported memories or ability to find them.

Finally, Plaintiffs' contention that they will be prejudiced by the increased costs the Receiver incurs during the stay period is a self-imposed prejudice. Plaintiffs' Supplemental Brief at 7 (claiming that "costs to the receivership" will diminish their ability to redress consumers). Indeed, it was **Plaintiffs** who demanded that the stipulated preliminary injunction include a provision appointing a Receiver to prevent the purported dissipation of assets. Stipulated Preliminary Injunction (ECF No. 54) at 19. Thus, Plaintiffs cannot now claim that they will be prejudiced by continued dissipation of assets **by that same Receiver's activities**. Plaintiffs simply cannot have it both ways—demanding appointment of a receiver to prevent asset dissipation and then blaming that very same Receiver's activities for dissipating the same set of assets. Instead, should the Court enter a stay, Plaintiffs' interests, as well as the assets at issue in this case, are sufficiently protected by the Stipulated Preliminary Injunction. *See Arab Am. Civil Rights League*, 2017 WL 2501060, at *2 (finding that, regardless of the length of stay, Plaintiffs' interests are protected by a nationwide injunction). Therefore, Plaintiffs fail to demonstrate that they will suffer prejudice from a short months-long stay.

CONCLUSION

Given that the Defendants will suffer substantial hardship if this case proceeds to discovery, and that the prejudice to the Plaintiffs, if any, is minimal, the Defendants respectfully request that this Court stay discovery pending the Supreme Court's decision in *Liu*, and if certiorari is granted, the outcome of *AMG Capital Management*, *Credit Bureau Center*, or *Publishers Business Services*.

DATED this 3rd day of February, 2020.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 2020, I caused a true and correct copy of the foregoing **DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO STAY DISCOVERY** to be filed electronically with the Court, which will send notice of electronic filing to counsel of record in this matter.

/s/ Z. Ryan Pahnke