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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FEDERAL TRADE COMMISSION and
UTAH DIVISION OF CONSUMER
PROTECTION,

Plaintiffs,

v.

ZURIXX, LLC, *et al.*,

Defendants.

**FTC’S RULE 72(a) OBJECTIONS TO
MAGISTRATE JUDGE’S STAY ORDER
OF FEBRUARY 12, 2020 (ECF 108)**

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

District Judge Dale A. Kimball
Magistrate Judge Evelyn J. Furse

Plaintiff Federal Trade Commission (“FTC”), in accordance with Fed. R. Civ. P. 72(a), hereby files its objections to Magistrate Judge Furse’s February 12, 2020 Order (ECF 108) (“Stay Order”). Judge Furse has stayed all discovery in this case, with the exception of written discovery to third parties, pending the Supreme Court’s decision in *Liu v. SEC*, 754 App’x 505 (9th Cir. 2018), *cert* granted, No. 18-1501, 2019 WL 5659111 (Nov. 1, 2019).

As explained below, the Stay Order contravenes binding Tenth Circuit law and the express terms of the Stipulated Preliminary Injunction (ECF 54) (“PI”) entered by the Court. It

also harms Plaintiffs and is against the public interest. Thus, the FTC respectfully requests that the Court set aside the Stay Order, open discovery, and order the parties to submit an updated proposed scheduling order within fourteen days from the Court's order setting aside the Stay Order.¹

I. PROCEDURAL HISTORY

Plaintiffs FTC and the Utah Division of Consumer Protection filed their Complaint (ECF 1) on September 30, 2019, alleging that Defendants engaged in a nationwide scheme involving real estate training that violated the FTC Act, the Consumer Review Fairness Act, and Utah state law. Following an *ex parte* hearing, the Court issued a Temporary Restraining Order (“TRO”) against Defendants (ECF 24).

On November 1, 2019, the Court entered the PI against Defendants, which remains in effect. The PI provides that “discovery in this case commenced upon entry of the TRO and may continue,” and further provides that “the parties may engage in any third party discovery authorized by the Federal Rules of Civil Procedure and the Local Rules of this District immediately upon the issuing of this Order.” (ECF 54 at 28, § XXV).

On November 19, 2019, Defendants filed their Partial Motion to Dismiss (ECF 54) (“PMTD”), which Plaintiffs opposed (ECF 72 and 76). After briefing, oral argument was held on February 12, 2020, and the motion is pending with this Court. As to the FTC claims, Defendants argue that the agency is barred from recovering equitable monetary relief for consumer victims under Section 13(b) of the FTC Act.

¹ Although Judge Furse did not address the Utah state claims brought by the Utah Division of Consumer Protection (“Division”) in the Stay Order, she stayed discovery for the Division as well. The Division is filing separate objections to address its argument that *Liu* will have no impact on the scope of discovery to which the Division is entitled.

On December 9, 2019, Defendants filed their Motion to Stay Discovery Pending Outcome of Motion to Dismiss (ECF 70), which Plaintiffs opposed (ECF 84). In Reply, Defendants referenced *Liu* for the first time indicating that the Court should consider staying discovery pending the outcome of that case. (ECF 90). At the January 9, 2020 hearing on Defendants' stay motion, Judge Furse asked defense counsel if Defendants wanted to change their position from staying discovery pending a ruling on their PMTD to staying discovery "until the Supreme Court has had a chance to weigh in [on *SEC v. Liu*]." (Att. A, Tr. of Stay Motion Hearing at 10:23, 21:10-13). Defense counsel responded that waiting for the outcome in *Liu* "would be the prudent thing to do." (Att. A at 10:25-11:1). Following a request from the FTC, Judge Furse allowed additional briefing on this subject, while instituting a stay of all discovery with the exception of written discovery to third parties pending her ruling on Defendants' stay motion. (Att. A at 21:8-22:5).

Plaintiffs filed a supplemental brief on January 23 (ECF 97), and Defendants filed a responsive supplemental brief on February 3. (ECF 107). On January 16, Plaintiffs filed a Motion for Clarification of Magistrate Judge's Oral Ruling on Third Party Discovery (ECF 96), seeking to clarify that the stay had not amended the PI's express authorization of all forms of third party discovery.

On February 12, Judge Furse issued the Stay Order that extends the discovery stay pending the Supreme Court's ruling in *Liu*. (ECF 108 at 3). The Stay Order also denied Plaintiffs' clarification motion as moot, and declined to issue a scheduling order. (ECF 108 at 4). As the Stay Order notes, the Supreme Court is expected to decide *Liu* by June 29, 2020, and the Stay Order instructs the parties to file a proposed scheduling order within 14 days of that

decision. That means that discovery in this case (except for written discovery to third parties) might not commence until August 2020—almost a year from filing.

Later that day, at the hearing on Defendants’ PMTD, the Court learned about the Stay Order from FTC counsel and inquired whether Plaintiff would seek to appeal it. Now, the FTC respectfully requests that this Court set aside the Stay Order, open discovery, and order the parties to file an updated proposed scheduling order.

II. FTC’S OBJECTIONS

A. The Stay Order Contravenes Binding Law and the PI.

Judge Furse has stayed discovery pending the Supreme Court’s decision in *Liu*, explaining that “*Liu* will address the Securities and Exchange Commission’s ability to obtain equitable monetary relief under a statute similar to Section 13(b) of the FTC Act, which is at issue in this case.” (Stay Order at 2). Judge Furse stated that “the Supreme Court decision in [the] *Liu* case could significantly impact how the parties proceed with discovery in this case and how the parties value the case, and Defendants would suffer harm if forced to engage in discovery and litigation that may not be necessary in light of the *Liu* decision.” (Id. at 2-3).

The FTC incorporates by reference the arguments in its brief in opposition to Defendants’ PMTD (ECF 72) and its briefs in opposition to Defendants’ stay motion (ECF 84 & 97). As demonstrated in those briefs, Defendants’ PMTD and stay motion rely on speculation that ignores binding Tenth Circuit law. Likewise, the Stay Order contravenes and ignores governing law in the Tenth Circuit. It also contravenes the express language of the PI entered by this Court, which provides: “discovery in this case commenced upon entry of the TRO and may continue,” and “the parties may engage in any third party discovery authorized by the Federal Rules of Civil

Procedure and the Local Rules of this District immediately upon the issuing of this Order.” (ECF 54 at 28, § XXV).

The sole question in *Liu* is whether noncompensatory disgorgement is a remedy available under statutes enforced by the SEC. *Liu* does not involve the question at issue in the pending PMTD—namely whether the FTC can obtain consumer redress under Section 13(b) of the FTC Act. Even if *Liu* provides some guidance on a court’s ability to award equitable monetary remedies generally, it is pure speculation to conclude that the Supreme Court’s ruling in *Liu* will answer a question that is not presented in that case.

In the Tenth Circuit, it is long settled that “[Section] 13(b)’s grant of authority to provide injunctive relief carries with it the full range of equitable remedies” *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1202, n.6 (10th Cir. 2005); *see also FTC v. LoanPointe, LLC*, 525 F. App’x 696 (10th Cir. 2013) (“Although the FTC Act ‘does not expressly authorize a court to grant consumer redress (i.e., refund, restitution, rescission, or other equitable monetary relief), § 13(b)’s grant of authority to provide injunctive relief carries with it the full range of equitable remedies,’ including disgorgement of profits.”) (quoting *Freecom*, 401 F.3d at 1202 n.6). A court in this district—in a case involving a similar real state training scheme and the same defense counsel—recently held that *Freecom* is “binding precedent” establishing that monetary relief is available under Section 13(b) of the FTC Act. *FTC v. Nudge, LLC*, No. 2:19-CV-00867, 2019 WL 7398678, at *5 (D. Utah Dec. 31, 2019).

There is no reason for a stay where the governing law is settled. Courts in the Tenth Circuit are bound by Tenth Circuit precedent “absent en banc reconsideration or a superseding contrary decision by the Supreme Court.” *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993). To

supersede Tenth Circuit precedent, Supreme Court decisions must be “indisputable and pellucid” on the law at issue. *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015). *Liu* has yet to be decided and, in any event, does not address the FTC Act. Moreover, even in SEC cases courts in this Circuit and elsewhere have continued to apply binding authority allowing disgorgement while *Liu* is pending in the Supreme Court. *See, e.g., SEC v. Dalmy*, No. 19-CV-00745-RM-NYW, 2020 WL 108664, at *5 (D. Colo. Jan. 9, 2020) (“As the question is still open before the Supreme Court . . . the Court will continue to follow settled precedent and order disgorgement.”); *see also SEC v. Team Res. Inc.*, 942 F.3d 272, 274 (5th Cir. 2019) (affirming disgorgement order because the Fifth Circuit holds that “even when the Supreme Court has granted certiorari in a relevant case, [the Fifth Circuit] will continue to follow binding precedent”).

Because the Stay Order ignores and contravenes binding Tenth Circuit law, it is contrary to the law. And the Stay Order’s failure to consider the express terms of the PI (which authorizes discovery, and explicitly all forms of third party discovery) and the fact that *Liu* would not materially affect discovery in this case even if the Supreme Court rules against the SEC (as further discussed below), makes the Stay Order clearly erroneous.

B. The Stay Harms Plaintiffs and is Against the Public Interest.

Although the Stay Order states that “Defendants would suffer harm if forced to engage in discovery and litigation that may not be necessary in light of the *Liu* decision,” it does not explain what discovery might become obsolete if *Liu* is decided against the SEC. (Stay Order at 3-4). There is no record to support the purported harm to Defendants. Defendants’ stay briefs generally assert that Plaintiffs are seeking “discovery on a broad swath of topics” (ECF 107 at 7),

but fail to explain what “topics” would purportedly become moot if the Supreme Court rules against the SEC in *Liu*.

Indeed, even if the outcome in *Liu* would ultimately limit the FTC’s ability to recover equitable monetary relief for victims of Defendants’ scheme, as detailed in their brief in opposition to the stay motion, Plaintiffs would still need virtually the same discovery to prove their case against Defendants in order to obtain from the Court the proper injunctive relief. (ECF 84 at 3 & 97 at 4-7). Furthermore, the Division’s claims would be entirely unaffected by *Liu* and the Supreme Court’s resolution of that case would have no impact on the discovery to which the Division is entitled—which is essentially the same discovery that would be sought by the FTC. The Stay Order does not address these facts.

The Stay Order concludes that “Plaintiffs will suffer little or no harm [because] [t]he Supreme Court will decide *Liu* [within] less than five months” and the PI remains in effect. (*Id.* at 3). But the Stay Order has modified the PI to limit discovery, and the harm for Plaintiffs and the public interest is, in fact, significant. This case commenced on September 30, 2019, and absent relief from this Court, discovery is now likely to be stayed until August 2020. The stay delays depositions of witnesses, including Defendants and their employees, allowing memories to fade and making it difficult to locate persons who have dispersed since Defendants’ operations have ceased. It also unnecessarily delays the efficient and just resolution of this consumer protection matter.

III. CONCLUSION

For the foregoing reasons, the FTC respectfully requests that the Court set aside the Stay Order, open discovery, and order the parties to file an updated proposed scheduling order within fourteen days of the Court's order setting aside the Stay Order.

Respectfully submitted,

Date: February 26, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2020, I electronically filed the foregoing Objections with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ Amanda Grier
Amanda Grier

Attachment A

January 9, 2020 Hearing on Defendants' Motion to Stay

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

FEDERAL TRADE COMMISSION; and)
UTAH DIVISION OF CONSUMER)
PROTECTION,)
Plaintiffs,)

vs.) Case No. 2:19-CV-713-DAK

ZURIXX, LLC, a Utah limited)
liability company, et al.,)
Defendants.)

_____)

BEFORE MAGISTRATE JUDGE EVELYN J. FURSE

January 9, 2020

Motion Hearing

Transcript Prepared from an Electronically Recorded Hearing

REPORTED BY: Patti Walker, CSR, RPR, CP 801-364-5440

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A P P E A R A N C E S

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1 SALT LAKE CITY, UTAH; THURSDAY, JANUARY 9, 2020; 9:55 A.M.

2 PROCEEDINGS

3 THE COURT: Good morning. We are here in the
4 matter of Federal Trade Commission vs. Zurixx. My name is
5 Judge Evelyn Furse. Could I have counsel please put your
6 appearances on the record.

7 MR. GORDON: Leonard Gordon from the Venable firm,
8 for the defendants.

9 MR. HATHAWAY: Ben Hathaway, local counsel for the
10 defendants.

11 MS. GUERARD: Collot Guerard for the Federal Trade
12 Commission, and my colleague.

13 MR. DOAN: Joshua Doan, also for the Federal Trade
14 Commission.

15 THE COURT: Thank you.

16 MR. WING: Robert Wing with the Attorney General's
17 Office.

18 THE COURT: Thank you very much.

19 MR. GORDON: Seated with us are Jim Carlson and
20 Jeff Spangler, two of the individual defendants.

21 THE COURT: Great. Thank you very much.

22 All right. So I did get your submission regarding
23 scheduling, and obviously then the motion to stay, and I
24 have read those. And I would like to hear from the parties
25 on that. A little bit more time has passed since that was

1 filed, so if there are any changes, I'd like to know about
2 that since that's defendants' motion. If I could hear first
3 from defense.

4 MR. GORDON: Of course.

5 Would you prefer me at the podium, Your Honor?

6 THE COURT: Yes, please.

7 MR. GORDON: My pleasure.

8 Good morning again, and thank you for hearing us.

9 On behalf of the defendants, we're happy today to
10 have the chance to begin to tell our side of the story.
11 Prior to this action, Zurixx was a successful local company,
12 employing hundreds of employees, Utah residents, with
13 thousands of happy and successful customers. They used the
14 education provided by Zurixx to make money in real estate.

15 To put things in context, Zurixx has served over
16 100,000 customers. Those customers provided Zurixx with
17 routinely very high customer satisfaction surveys throughout
18 their experience with Zurixx. Zurixx was a responsible
19 member of the community, contributing time and money to
20 worthy causes locally.

21 Zurixx was not some boiler room hiding in a
22 basement. It did not hide from regulators, but rather
23 through a self-regulatory effort headed by the Better
24 Business Bureau, regularly met with the FTC to discuss
25 industry issues. All of that ended when the FTC and the

1 Utah Division of Consumer Protection, without any notice or
2 opportunity to be heard, went to this Court and convinced
3 the Court to deliver what was essentially a death blow to
4 Zurixx, freezing the company's assets and appointing a
5 monitor over the company. The shock and collateral effects
6 of that order were something from which the company could
7 not recover. As a result, the owners were forced to agree
8 to a preliminary injunction that essentially shut the
9 company down.

10 I'm not going to tell you that Zurixx's marketing
11 was perfect. No company's marketing is perfect. But few
12 companies operate perfectly. But more importantly, the
13 product was legitimate, the business was not a fraud, and
14 the draconian remedies that the Federal Trade Commission and
15 the Division of Consumer Protection seek are not justified
16 by the facts. We also don't think they're justified by the
17 law.

18 In addition to challenging the factual basis of
19 the claims against Zurixx, that Zurixx essentially delivered
20 nothing of value and that its education was illusory, Zurixx
21 contends that there are substantial legal defects to the
22 plaintiff's case and that the Court should resolve the
23 issues arising from those defects before the parties engage
24 in costly and potentially unnecessary discovery.

25 First, the defendants challenge whether Section

1 13(b) of the Federal Trade Commission Act, which grants the
2 FTC the authority to seek a permanent injunction, comes with
3 it the ability to seek monetary relief. That very issue is
4 being adjudicated, as we speak, in the United States Supreme
5 Court.

6 In the Liu case, the court will decide whether a
7 similar statutory grant to the Securities and Exchange
8 Commission permits the SEC to obtain disgorgement given that
9 court's prior ruling in the Kokesh case that such relief
10 constitutes a penalty, not an equitable relief.

11 As a result of the Liu case pending before the
12 court -- and the Liu case will be argued in March -- we
13 should have guidance from the court soon. The Solicitor
14 General of the United States, acting on behalf of the
15 Federal Trade Commission, asked the Supreme Court to stay
16 considering the cert. petition filed by defendant in the AMG
17 case out of the Ninth Circuit. That cert. petition raised
18 the very issue raised by our motion here, that Section 13(b)
19 of the FTC Act allowed the FTC to obtain monetary relief.

20 The Solicitor General, acting on behalf of the
21 FTC, sought a stay in the Supreme Court for a case dealing
22 with the very issue we're dealing with here, points towards
23 this Court using its discretion to stay these proceedings,
24 particularly discovery, until the Supreme Court can provide
25 guidance on this issue.

1 Further illuminating the lack of clarity on this
2 issue and the controversy surrounding this issue, the FTC
3 has sought a cert. petition of the Seventh Circuit's ruling
4 in the Credit Bureau case. The Credit Bureau case is the
5 case which agrees with the defendants' position that Section
6 13(b) does not come with the sort of implied authority to
7 provide for equitable monetary relief.

8 What's noteworthy, Your Honor, is that in the
9 Credit Bureau case, the FTC did not proceed to the Solicitor
10 General's Office, as it typically does in the Supreme Court.
11 Indeed, for only the fourth time in history, the FTC sought
12 to proceed directly. And in that case, and contrary to the
13 position the Solicitor General took on behalf of the FTC in
14 the Liu case, in the Credit Bureau case, the FTC has urged
15 the Court to consider its cert. petition directly. This
16 conflict between the Solicitor General's Office and the FTC
17 highlights the confusion in this area of the law, the
18 importance of this issue, and influences, we think, and
19 should influence and dictate that the Court stay discovery
20 until these legal issues, which will guide the case, are
21 resolved.

22 In addition, we've challenged the Division of
23 Consumer Protection's authority. We've challenged their
24 ability to regulate conduct that occurs outside of Utah.
25 The division apparently concedes that its complaint did not

1 make the necessary allegations. As the response to our
2 motion to dismiss goes well beyond the four corners of the
3 complaint, we also raise in our motion to dismiss issues
4 related to the statute of limitations and how the Business
5 and Opportunities Act should be construed.

6 As the Judge is well aware, this Court has
7 tremendous discretion over how it controls its docket,
8 particularly with discovery. Staying discovery now is in
9 the interests of judicial economy, and, frankly, we think in
10 the interest of all parties. The issue of what monetary
11 relief, if any, the Federal Trade Commission is entitled to
12 will dictate the course of this litigation. If monetary
13 relief is off the table, I submit that this case will
14 resolve quickly in a settlement. This is what we're going
15 to be litigating over is what the individual defendants owe,
16 similarly with the Attorney General's office, and,
17 respectfully, the plaintiffs are not prejudiced by a short
18 stay of discovery.

19 In the context of the temporary restraining order
20 that Judge Kimball authorized, the FTC has taken possession
21 through the receiver of every document in the company's
22 possession. They have completed, essentially, document
23 discovery. They've got all the e-mails. They've got all
24 the business records. They've got every piece of paper and
25 every bit of data that the company had. There is no

1 prejudice there that they won't be able to start documents
2 review. I'm certain that they have been working on that,
3 and reviewing that, and they can continue to do that during
4 the stay. So there really is no prejudice. I mean, as the
5 Court is well aware, it's the document part of discovery
6 that typically takes the longest. They have all of our
7 data.

8 The businesses are not operating. There is no
9 harm from the ongoing operation of the business. And to the
10 extent that the plaintiffs claim that, you know, the stay
11 will somehow hinder the ability to do redress, we submit the
12 opposite is true. To the extent that the defendants are
13 forced to engage in discovery, it will be spending money in
14 attorneys' fees. Those funds will no longer be available
15 for consumer redress if that becomes necessary.

16 Similarly, to the extent that the defendants have
17 to do discovery, not only will they be spending their own
18 money, but a large part of that discovery will be seeking
19 documents and information from the receiver, who currently
20 is in possession of all the company's records, information
21 that the defendants need to properly defend themselves. The
22 receiver will then have to spend legal fees and other
23 expenses to comply with that discovery, again, depleting the
24 assets. And the receivership, which if there is to be some
25 final monetary award, a large portion of that would be the

1 funds in the receivership estate.

2 In short, staying discovery pending resolution of
3 the issues in the 13(b) issues and the other issues promotes
4 judicial economy. The Court won't have to be dealing with
5 discovery disputes. It saves the plaintiffs money, it saves
6 the defendants money, and promotes a quick and just final
7 resolution of this matter, we believe, Your Honor.

8 So with that, I don't have anything further to
9 say. I'm happy to answer any questions that you might have.

10 THE COURT: So just a couple. What is your
11 position about third-party discovery and whether that could
12 continue?

13 MR. GORDON: I think it would depend on the
14 third-party discovery. If we're talking about tons of
15 documents and tons of depositions, I think that for the same
16 reasons, that the receiver might have to, you know, expend
17 funds. If the FTC and the Division of Consumer Protection
18 want to issue third-party document subpoenas, it seems to me
19 that might be a good compromise.

20 THE COURT: Okay. So as I understood the motion
21 in writing, you were seeking to stay pending the decision on
22 the motion to dismiss. Today you've talked a lot about the
23 Supreme Court. Are you asking Judge Kimball to stay his
24 decision until you get direction from the Supreme Court?

25 MR. GORDON: I think that would be the prudent

1 thing to do. When the Supreme Court is considering the very
2 issue that the Court is going to be considering, I think
3 that's wise. I mean, the conflict between the Solicitor
4 General and the FTC did not fully emerge until after we had
5 submitted our initial motion to stay.

6 THE COURT: Okay. So are you seeking that today,
7 a stay through that time?

8 MR. GORDON: Yes, Your Honor.

9 THE COURT: Okay. Thank you.

10 MR. GORDON: Anything else?

11 If you have further questions, I'm happy to answer
12 them.

13 THE COURT: All right. Thank you.

14 Counsel for the FTC.

15 MS. GUERARD: Good morning, Your Honor. Thank you
16 for hearing us.

17 On behalf of the plaintiffs, I have four points to
18 make. One, the scope of discovery in this case does not
19 hinge on the FTC's ability to get equitable monetary relief.
20 The legal issue, that legal issue does not predominate. Why
21 is that? Because the FTC and the division have to prove law
22 violations. We have to prove violations of the FTC Act, the
23 Consumer Review Fairness Act, and Utah has to prove
24 violations of its statutes before we even get to whether or
25 not an injunctive relief is necessary or equitable monetary

1 relief is appropriate. We have to convince Judge Kimball
2 that there have been law violations, and that's what we want
3 discovery on.

4 What does the FTC and Utah have to show? We have
5 to show the factual issues that we've listed on which we
6 need discovery that are in the attorney planning report.
7 That is, Your Honor, ECF 66, and it's at pages six and
8 seven. Those are factual issues on which the plaintiffs
9 need discovery. It's not legal issues.

10 And in addition to the factual issues for
11 discovery that are listed in the attorney planning report,
12 we need to show that the representations, that the earnings
13 representations, that the little time and effort
14 representations, that the hundred percent funding
15 representations are false or are unsubstantiated, that the
16 defendants did not have a reasonable basis for the earnings
17 claim that they were making.

18 We need discovery about what the defendants told
19 the presenters, the people who sold the products at the free
20 events, and at the workshops. And those presenters made
21 millions of dollars. David Freier made \$5.7 million. Marc
22 Hrisko made \$5.2 million. Claude Swails made \$4.6 million.
23 What those presenters made are listed in the receiver's
24 report at 71-12. What kind of guidance, what kind of
25 monitoring, what kind of feedback did the individual

1 defendants or did Zurixx give to those presenters who were
2 making, we contend, misrepresentations and inadequate
3 disclosures?

4 What about the success stories, Your Honor? The
5 testimonials that are featured in the videos, or the live
6 testimonials that come at the live workshops and at the free
7 events, were these testimonials representative of the other
8 students? We need discovery on that. Are the testimonials
9 outliers? Are there are earnings and other representations
10 outliers or were they widespread?

11 We need factual discovery on the relationship
12 between the defendants and the celebrity endorsors. Did the
13 celebrity endorsors come to the defendants and say I'm
14 getting negative feedback from consumers about the workshop
15 presentations you've been telling me to do? We need that
16 kind of discovery to show law violations.

17 We need to know about the gag order that's in the
18 refund settlement agreement, the gag order that prevented
19 consumers from talking to the FTC or talking to the state
20 attorney general, or posting on the Internet about their
21 negative experience with Zurixx.

22 We need discovery of the customer service agents
23 that work for the defendants. What kind of guidelines were
24 they given by Zurixx in terms of dealing with consumers when
25 consumers come to complain. We need factual discovery on

1 the refund policy, when were refunds given and why.

2 The receiver has uncovered two other corporations
3 that are described in his report, which is I think ECF 71,
4 Brand Management Holdings and Dorado Marketing & Management.
5 Those corporations are owned directly or indirectly by the
6 individual defendants. And those are potential adds to an
7 amended complaint should the commission vote out an amended
8 complaint, and we need factual discovery on what those
9 companies did.

10 So those are, Your Honor, some of the areas on
11 which the FTC needs discovery. But that's not all, because
12 the defendants contest each factual issue. And if the Court
13 looks at ECF 66, the attorney planning report, at pages
14 three to five, the defendants claim that our 24 declarations
15 and our 234 complaints are only a small percentage of the
16 happy consumers. But you know, Judge, we have much more
17 evidence than that.

18 We have transcripts from 17 free events and four
19 workshops held in 2019 and 2020 that show that the earnings
20 representations were made. We have declarations from
21 nine -- nine investigator declarations, including from an
22 investigator who is sitting here now. She works for the
23 division.

24 The defendants claim that they have trained and
25 certified the customer service agents and the instructional

1 teams. Well, what was that training? What kind of
2 feedback -- what kind of feedback did the defendants give to
3 the customer service agents who were speaking to consumers?
4 We need that factual discovery.

5 The defendants claim that they worked with
6 something called URS, a part of the Better Business Bureau.
7 Well, what were the defendants hearing from URS about their
8 representations to consumers at the events? And the
9 depositions -- the asset related depositions that the FTC in
10 Utah took of Mr. Spangler and Carlson indicates to us that
11 URS had problems with the representations that were made.
12 Well, we need factual discovery on it.

13 Your Honor, Zurixx claims that we have all of the
14 documents. But Your Honor is an experienced litigator.
15 Documents are not self-explanatory. You need depositions to
16 explain documents. And you need discovery -- documents
17 don't talk about phone calls that were made or meetings
18 between celebrities and the defendants. What kind of
19 feedback were the celebrities, the endorsors giving to the
20 defendants?

21 So in sum, regardless of whether Section 13(b)
22 authorizes equitable monetary relief, we don't even get to
23 that issue until we've been able to prove law violations,
24 and we need discovery on facts.

25 My second point, Your Honor, is the harm to the

1 plaintiffs, to the FTC and Utah. The longer that discovery
2 is delayed of the defendants and of their employees, the
3 customer service agents, the managers -- you know, memories
4 tend to fade. Notes that they may have taken may be
5 destroyed. We don't have every single document of the
6 defendants or of their employees.

7 We need discovery, as I mentioned earlier,
8 regarding these two potential corporations. We need
9 discovery to find out what the celebrities told the
10 defendants about the presentations and what they were
11 hearing from customers. And the longer that we delay
12 discovery, memories fade. It's hard to find people. It's
13 harder and harder to find people.

14 So there is very concrete harm to the FTC and to
15 Utah. And there is harm to the receiver because the
16 receivership costs will increase. I mean, the receiver now
17 has pending before Judge Kimball a motion for approximately
18 \$400,000 in reimbursement. Our goal is to accomplish
19 factual discovery quickly and either move for summary
20 judgment or go to trial.

21 My third point, Your Honor, is that it's unlikely
22 that Judge Kimball is going to grant the defendants' motion
23 to dismiss. First of all, it's unlikely that Judge Kimball
24 is going to buck, to disagree with the Tenth Circuit ruling
25 that the FTC has equitable monetary relief as set forth in

1 the Freecom decision and then in the LonePointe unpublished
2 decision. And it's unlikely that Judge Kimball is going to
3 disagree with Judge Shelby in the Nudge case, and Your Honor
4 sits on that case as well.

5 In that case, Judge Shelby rejected the very
6 arguments that defendants are making regarding the authority
7 of the FTC to seek and the authority of the court to issue
8 equitable monetary relief. And Judge Kimball also notes
9 that the defendants raised a motion to stay everything in
10 the Nudge case pending resolution of the Liu petition for
11 cert. argument before the court, and he rejects that as well
12 in a footnote.

13 Your Honor, the defendants raise for the first
14 time in their reply the Liu petition for cert. It's
15 improper, Your Honor, to raise something new for the first
16 time in a reply. That's improper. We have not -- Utah and
17 the FTC have not had an opportunity to brief Liu. And if
18 the Court is inclined to stay discovery based on this new
19 argument to which the plaintiffs have not been able to
20 respond, then we seek leave to file a written response and
21 explain to the Court why disposition of the Liu case,
22 regardless of how it goes, does not affect whether or not
23 the FTC, a different federal agency, has equitable monetary
24 relief authority, whether we can seek monetary redress for
25 consumers or whether the Court has authority to grant it.

1 So right now, Your Honor, we oppose the motion to
2 stay vigorously. We need fact discovery. We need to prove
3 law violations. Law violations come first. Later on is
4 what's the appropriate remedy.

5 That's all I have to say, Your Honor.

6 Utah, do you have anything you want to add?

7 MR. WING: No. We join with the FTC's argument.

8 MS. GUERARD: If there are any questions, I will
9 be glad to try to answer them.

10 THE COURT: I have one question, and I will start
11 by giving you permission not to answer it because it is a
12 bit of an awkward question.

13 One of the defendants' arguments is basically that
14 once there is a decision on the potential realm of
15 liability, then they will be in a much better position to be
16 prepared to settle the case, and given the circumstances of
17 the business, they will be willing to do that -- or likely
18 willing to do that. And I just would be interested in your
19 thoughts on that issue as far as saving the FTC, the
20 receiver time and money if that is indeed the case. But
21 like I said, I give you permission not to answer that as
22 settlement talks are, of course, confidential.

23 MS. GUERARD: We are going to engage in settlement
24 negotiations this afternoon with the three individual
25 defendants present, which I think is very important to have

1 the actual parties who are involved as well as their
2 co-counsel. Your Honor, I can't predict what's going to
3 happen, so it's very hard for me to answer that question.

4 I've had a number of cases where defendants --
5 where settlement negotiations have fallen down because of
6 the amount of money that the FTC believes a defendant is
7 able to pay. But I've had also negotiations reach
8 successful settlements when we have been able to agree on
9 monetary relief.

10 So I'm sorry I can't answer that specific
11 question.

12 THE COURT: No problem.

13 MS. GUERARD: Thank you so much.

14 THE COURT: Thank you very much.

15 Anything further?

16 MR. GORDON: Very briefly, Your Honor. Thank you
17 for the opportunity.

18 When I listened to my colleague's description of
19 why the FTC and the Division of Consumer Protection need
20 discovery and the topics on which they need discovery, I
21 heard again and again things that should be in the documents
22 that they already have possession of. They know what one of
23 our presenters made to the cent. They obviously have a
24 great deal of information about what our presenters were
25 told and what they did. They've got transcripts. They've

1 got all of our e-mail. They've got all of our
2 communications. They've got all of our data.

3 To the extent there are documents in the file, our
4 CRM, our customer relationship management software, which
5 has every note, every interaction with every customer that
6 we had, we don't have that currently. We're willing to, you
7 know, defer getting that to save money and hopefully resolve
8 this case sensibly.

9 She talked about the need for guidelines. Those
10 are in our documents. They talked about policies. They
11 talked about training. They talked about communication
12 regarding URS. Again, that all should be in the e-mail and
13 documents that they already have.

14 And, again, we're not saying they never get
15 discovery. But given the volume of material that they've
16 got, we don't think there is significant prejudice, if any
17 prejudice, to deferring this discovery until these important
18 issues are resolved.

19 Regarding why we didn't raise the Liu issue
20 earlier, it was the Solicitor General's filing of a petition
21 seeking a stay in the Supreme Court that really highlighted
22 for us that this is an issue that ought to be brought to the
23 Court's attention, and that's why we raised it when we did.

24 And finally, on settlement, I think it speaks for
25 itself. If the FTC cannot get monetary relief, this case

1 will be dramatically easier to settle. I don't think there
2 can be any serious quibble with that.

3 Thank you, Your Honor, unless you have further
4 questions.

5 THE COURT: I think that's everything.

6 MR. GORDON: Thank you very much.

7 THE COURT: Thank you.

8 So I always like to try and give parties an answer
9 at the time of the hearing on a motion like this, but I
10 don't think I can do that today. So I apologize. I do
11 think, given the shift in the request from pausing discovery
12 until the motion is decided, to pausing discovery until the
13 Supreme Court has had a chance to weigh in, I think it does
14 make sense to give time for the FTC to provide their
15 thoughts on that issue. Since the burden is on the
16 defendants, I will also give the defendants an opportunity
17 to respond to that.

18 What sort of time frame would the plaintiffs like
19 for that?

20 MS. GUERARD: Your Honor, if we could have two
21 weeks, we can do that.

22 And notwithstanding what's put into the stipulated
23 preliminary injunction, I think it's at page 28, that the
24 third-party discovery can begin, and notwithstanding the
25 footnote in the attorney planning report about the

1 third-party discovery, may we begin third-party discovery?

2 THE COURT: Given the arguments, I think it's okay
3 to go ahead and start third-party discovery that is for
4 documents. Let's hold off on noticing up any depositions
5 until I can decide this motion.

6 And so two weeks puts that briefing due
7 January 23rd.

8 And how long do you anticipate needing to respond
9 to that?

10 MR. GORDON: Can we get ten days, Your Honor?

11 THE COURT: We can do that. So we'll look for a
12 response on the 3rd of February. And then I will try and
13 get you an answer shortly after that.

14 Good luck this afternoon. If you have wild
15 success, do let me know.

16 MR. GORDON: We shall, Your Honor.

17 THE COURT: All right. Thank you all very much.

18 MR. GORDON: Thank you. We appreciate your time.

19 THE COURT: We'll be in recess.

20 (Whereupon, the proceeding was concluded.)
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C E R T I F I C A T E

I hereby certify that the foregoing matter is transcribed from the stenographic notes taken by me and is a true and accurate transcription of the same.

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