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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' OPPOSITION TO PLAINTIFFS' RULE 72(a) OBJECTIONS TO MAGISTRATE JUDGE'S STAY ORDER OF FEBRUARY 12, 2020** Case No. 2:19-cv-00713 Judge Dale Kimball Magistrate Judge Evelyn J. Furse

INTRODUCTION

Magistrate Judge Furse's Order of February 12, 2020 (ECF No. 108) (1) Granting in Part Defendants' Motion to Stay Discovery [ECF No. 70], (2) Granting in Part the Stipulated Motion for Initial Scheduling Conference [ECF No. 67], and Denying as Moot Motion for Clarification of Magistrate Judge's Oral Ruling on Third Party Discovery [ECF No. 96] ("the Order") is neither clearly erroneous nor contrary to law. As a result, the FTC's Rule 72(a) Objections to the Order (ECF No. 110) ("FTC's Objections") and the Utah Division of Consumer Protection's Objections to the Order (ECF No. 111) ("the Division's Objections," and collectively "Plaintiffs' Objections") should be denied.

First, staying discovery in this case as to the Plaintiffs' claims was not clearly erroneous because a decision in *Liu v. SEC*, No. 18-1501, 205 L. Ed. 2d 265 (U.S. Nov. 1, 2019) will impact the contours of how the parties will proceed with this litigation. Second, the Order was not clearly erroneous in its factual finding that the Plaintiffs will suffer little to no harm when they have in their possession all of the Defendants' files which were collected by the Receiver. Third, the Order was not contrary to law, as other courts have stayed proceedings where an impending Supreme Court decision has the capacity to impact a case. Fourth, the FTC, in its objections, conflates the substantive Tenth Circuit precedent as to the FTC's authority under Section 13(b) with Tenth Circuit precedent for ordering a stay. Fifth, the Order is not contrary to law where the order applied the correct factors in determining a stay. Finally, the Order does not contravene the Stipulated Preliminary Injunction where the Order simply postponed some discovery for a finite period of time, as opposed to precluding discovery from being taken in this case. For these reasons, the Plaintiffs' Objections should be denied and Judge Furse's Order should be affirmed.

STANDARD UNDER RULE 72

Pursuant to Rule 72(a), a district court may modify or set aside any part of a non-dispositive pretrial order only when it "is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). A magistrate judge's decision is clearly erroneous when there is "a definite and firm conviction that a mistake has been committed." *Menzies v. Friel*, No. 03-CV-0092-JC-KBM, 2005 WL 2138653, at *1 (D. Utah Sept. 1, 2005) (quoting *Ocelot Oil Corp. v. Sparrow Indus.*, 847 F.2d 1458, 1464 (10th Cir. 1988)). Further, a clearly erroneous decision must "strike the court as wrong with the force of a five-week-old, unrefrigerated dead fish." *Id*. (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988), *cert. denied*, 493 U.S. 847 (1989)).

Similarly, a non-dispositive pretrial order is contrary to law "only if it applied an incorrect legal standard." *Raytheon Co. v. Cray, Inc.*, No. 2:16-MC-898-DAK, 2017 WL 823558, at *2 (D. Utah Mar. 2, 2017) (quoting *Williams v. Vail Resorts Dev. Co.*, No. 02–CV–16–J, 2003 WL 25768656, at *2 (D. Wyo. Nov. 14, 2003)). Because "a magistrate judge is afforded broad discretion in the resolution of nondispositive discovery disputes[,]" "it is extremely difficult to justify alteration of the magistrate judge's nondispositive actions by a district judge." *Blackburn v. United States*, No. 2:18-CV-00116-DAK, 2020 WL 95882, at *1 (D. Utah Jan. 8, 2020) (quoting *Raytheon Co. v. Cray, Inc.*, No. 2:16-MC-898-DAK, 2017 WL 823558, at *2 (D. Utah Mar. 2, 2017)). Accordingly, Plaintiffs' have not identified anything in Judge Furse's Order that is clearly erroneous or contrary to binding precedent or the Stipulated Preliminary Injunction.

I. THE ORDER'S FINDINGS ARE NOT CLEARLY ERRONEOUS.

Judge Furse's Order correctly found that *Liu* will impact how the parties proceed in this case and that the Plaintiffs will suffer little, if any, harm from a short stay. As a preliminary matter, the FTC's argument that the stay is contrary to binding law misapprehends the correct standard of review. Specifically, the FTC contends that the Order "ignores and contravenes binding Tenth Circuit law," as to the FTC's authority under Section 13(b). FTC's Objections at 4–5; *see also* Division's Objections at 4 ("The Division objects to Judge Furse's finding that the Supreme Court's decision in *Liu* could significantly impact how the parties proceed with discovery."). Judge Furse did not rule on the ultimate 13(b) question; rather, Judge Furse expressly found that "the Supreme Court's decision in [the] *Liu* case could significantly impact how the parties proceed with discovery in this case and how the parties value the case[.]" Order at 2–3. This is squarely a finding of fact that is subject to the "clearly erroneous" standard under Rule 72(a). *Raytheon Co.*, 2017 WL 823558, at *2 (quoting *Brigham Young Univ. v. Pfizer, Inc.*, No. 2:06–CV–890–TS–BCW, 2010 WL 3855347, at *2 (D. Utah Sept. 29, 2010)). A finding that the Supreme Court's decision in *Liu* will impact this case is not clearly erroneous because the *Liu* decision will affect the contours of discovery, and how the parties value the case, *as to both Plaintiffs*.

First, 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 v. Alta Colleges, Inc.*, No. 11-CV-2990-WYD-KLM, 2012 WL 502271, at *3 (D. Colo. Feb. 15, 2012) (staying all proceedings, including scheduling and discovery, where a Supreme

Court decision "will likely impact this case in some fashion"). Moreover, a stay is warranted even when "it is impossible to know the extent to which the Supreme Court opinion will affect litigation strategies here[,]" *Burke*, 2012 WL 502271, at *2.

As it pertains to the FTC, its actions before the Supreme Court demonstrates the hollowness of their protests here. Indeed, the Solicitor General of the United States, on behalf of the FTC, conceded that *Liu* will likely impact 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, e.g.*, Brief for the Respondent, *AMG Capital Mgmt., LLC v. FTC*, No. 19-508 (filed Dec. 13, 2019) at 4. Thus, Judge Furse's finding that the *Liu* decision could impact this case is not clearly erroneous.[1]

Second, Plaintiffs fail to demonstrate that Judge Furse's factual finding that: "the Supreme Court's 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" is clearly erroneous. Order at 2–3. The FTC has indicated that it intends to seek in excess of $500 million in equitable monetary relief under Section 13(b) jointly and severally against the Defendants. The Solicitor General on behalf of the FTC has argued that the *Liu* case may impact the ability of the FTC to obtain that type of relief. Judge Furse's findings of fact on this issue are not clearly erroneous; indeed, they are clearly correct.

[1] Contrary to the FTC's contention, SEC cases have been stayed pending the Supreme Court's opinion in *Liu*. *See SEC v. Feng*, No. 17-56522, 2019 U.S. App. Lexis 36436, *1 (9th Cir. Dec. 9, 2019) (staying consideration of petition for rehearing en banc pending an opinion in *Liu*).

Finally, the finding that "the Plaintiffs will suffer little to no harm if this case is stayed pending a decision in *Liu*[]" was not clearly erroneous. Order at 3. Judge Furse's order expressly contemplated that Plaintiffs will suffer little harm from a stay because "the stay will be less than five months[,]" and because "Plaintiffs have already obtained much of the discovery and relief they are seeking in this case." Plaintiffs simply reiterate their objection that staying discovery will cause witnesses' memories to fade. However, "[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 a 5-month stay cannot perceivably constitute the cause of witnesses' memories to fade, the Order was not clearly erroneous in finding that Plaintiffs' will suffer little to no harm.

II. THE ORDER NEITHER CONTRAVENES BINDING LAW NOR THE STIPULATED PRELIMINARY INJUNCTION.

Despite the FTC's contentions, the Order does not contravene binding precedent, or the Stipulated Preliminary Injunction entered in this case. As Defendants have previously argued, "[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*, 2012 WL 502271, at *2. Cases the FTC cites to support the proposition that this Court is bound by Tenth Circuit precedent in objecting to the Order are inapposite. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (sanctioning attorney from practicing before the Tenth Circuit because the presiding panel "cannot overrule the judgment of another panel of this court."); *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015) (holding that two prior Supreme

Court cases did not constitute intervening law sufficient to alter the jurisdictional limits of 28 U.S.C. § 2401(b)). Noticeably absent from the Plaintiffs' objections is any contention that a brief stay to await superseding guidance from the Supreme Court is contrary to binding law. To the contrary, Judge Furse's order adequately applied the correct legal standard, and weighed the relevant factors, in granting a stay. Order at 2-3.

Further, the Order does not improperly contradict the Stipulated Preliminary Injunction because it contemplated the relevant provisions in the Stipulated Preliminary Injunction. Plaintiffs made the court firmly aware of the relevant provisions of the Stipulated Preliminary Injunction at the hearing on Defendants' Motion to Stay and in their Motion for Clarification. *See* January 9, 2020 Motion Hearing Transcript (ECF No. 98) at 21:22-22:1; Plaintiffs' Motion for Clarification (ECF No. 96) at 3–4. Yet, the Order found that because "Plaintiffs have already obtained much of the discovery and relief they are seeking in this case[,]" a several-month stay of discovery was warranted. Order at 3. The Order further permitted the parties to proceed with "written third party discovery." Order at 4. Though the Order postpones discovery until a later date, nothing in the Order precludes discovery contrary to the Stipulated Preliminary Injunction. The Order's distinction between party discovery and third-party discovery further indicates that the Court properly considered the Stipulated Preliminary Injunction and ordered how discovery in this case should proceed pursuant to the Stipulated Preliminary Injunction. Accordingly, nothing in the Order was contrary to binding precedent or the Stipulated Preliminary Injunction.

CONCLUSION

For these reasons, Plaintiffs fail to demonstrate that Judge Furse's Order is either clearly erroneous or contrary to law, and this court should affirm the Order staying discovery until a disposition in *Liu*.

DATED this 13th day of March, 2020.

Respectfully Submitted,

By: */s/ Z. Ryan Pahnke*

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of March, 2020, I caused a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFFS' RULE 72(a) OBJECTIONS TO MAGISTRATE JUDGE'S STAY ORDER OF FEBRUARY 12, 2020** 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