

COLLOT GUERARD
JOSHUA DOAN
AMANDA GRIER
(Each appearing pursuant to DUCivR 83-1.1(d)(1))
600 Pennsylvania Ave., NW, CC-8528
Washington, D.C. 20580
Telephone: (202) 326-3338
cguerard@ftc.gov; jdoan@ftc.gov; agrier@ftc.gov
Attorneys for Plaintiff
FEDERAL TRADE COMMISSION
ROBERT G. WING (4445)
KEVIN MCLEAN (16101)
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84114
Telephone: 801-366-0310
rwing@agutah.gov; kmclean@agutah.gov
Attorneys for Plaintiff
UTAH DIVISION OF CONSUMER PROTECTION

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.

**PLAINTIFFS' REPLY IN SUPPORT OF
RULE 72(a) OBJECTIONS TO
MAGISTRATE JUDGE'S STAY ORDER
OF FEBRUARY 12, 2020 [ECF NO. 108]**

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

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

Plaintiffs Federal Trade Commission ("FTC") and Utah Division of Consumer Protection

(“Utah DCP”), respectfully submit this joint reply in support of their respective February 26, 2020 Objections [ECF Nos. 110, 111] to Magistrate Judge Furse’s February 12, 2020 Order [ECF No. 108] (“Stay Order”). The Stay Order prohibits all discovery, with the exception of written discovery to third parties, pending the Supreme Court’s decision in *Liu v. SEC*, 754 Fed. App’x 505 (9th Cir. 2018), *cert. granted*, No. 18-1501, 2019 WL 5659111 (Nov. 1, 2019).

Defendants’ March 13, 2020 Opposition [ECF No. 119] provides no legally valid basis for overruling Plaintiffs’ Objections or affirming the Stay Order. Defendants fail to (1) address the Utah DCP’s grounds for objection, (2) refute the FTC’s objection that discovery will be virtually the same regardless of the outcome in *Liu*, or (3) cite any authority for the proposition that a trial court may ignore well-established circuit precedent when ruling on a stay request. The Stay Order should be reversed to allow full discovery so that Plaintiffs may expeditiously prosecute this action with a goal of obtaining complete injunctive relief and redress for the tens of thousands of consumers who fell victim to Defendants’ scheme.

I. Defendants Provide No Response to the Utah DCP’s Objection.

Defendants’ Opposition and the Stay Order suffer from the same flaw—both focus solely on the FTC while ignoring its co-Plaintiff, the Utah DCP. The Utah DCP explained in its Objection that it brings its claims under Utah’s Consumer Sales Practices Act and Business Opportunity Disclosure Act, not the FTC Act. *See* ECF No. 111 at 4-5. As such, even if one speculates that the Supreme Court’s decision in *Liu* might alter the remedies available to the FTC under Section 13(b) of the FTC Act (which is not at issue in *Liu*), *Liu* will not affect the remedies

available to the Utah DCP.¹

Defendants do not argue that *Liu* will affect the remedies available to the Utah DCP or the discovery to which the Utah DCP is entitled. Their Opposition mentions the Utah DCP only in passing, and without ever addressing its Objection. *See* ECF No. 119 at 1, 3, & 4. Therefore, the Utah DCP's Objection should be granted, and the Stay Order should be reversed to allow the Utah DCP to take discovery immediately.

II. Defendants Do Not Dispute that the Parties Would Need Virtually the Same Discovery Regardless of Whether Equitable Monetary Relief Is Available Under Section 13(b).

The Stay Order focuses on one form of relief the FTC seeks, equitable monetary relief, but fails to consider that the FTC must first establish each Defendant's liability in order to obtain any form of relief, including injunctive relief. The FTC objected that regardless of the availability of equitable monetary relief under Section 13(b) after *Liu*, the FTC would need virtually the same discovery to prove that Defendants violated Section 5 of the FTC Act. *See* ECF No. 110 at 7 (citing ECF No. 84 at 3 and ECF No. 97 at 4-7). Indeed, before Defendants sought a stay, the parties identified potential topics of discovery in their December 5, 2019 Attorney Planning Meeting Report [ECF No. 66]. Of the seven topics that Plaintiffs listed, and the three topics that Defendants listed, only one ("the extent of unreimbursed consumer injury") was aimed at monetary relief rather than the question whether Defendants had violated state and federal law. *See id.* at 6-7.

Defendants' Opposition does not contend that *Liu* would alter the FTC's need to seek discovery regarding, for example, "the role of the corporate and individual Defendants in the Zurixx business," "the extent to which Defendants collected or otherwise obtained information

¹ Plaintiffs had previously made this point in their January 23, 2020 Supplemental Brief, before the Stay Order was issued. *See* ECF No. 97 at 5.

about consumer financial success,” or “any efforts by Defendants to make any disclosures to prospective or actual purchasers.” *Id.* Defendants similarly do not suggest that the outcome in *Liu* might eliminate their need for discovery regarding, for example, “Plaintiffs’ evidence of consumer complaints,” or “Plaintiffs’ evidence regarding Defendants’ educational training.” *Id.* at 7. Because Defendants do not dispute that discovery will be virtually the same even if *Liu* somehow affects the FTC’s ability to obtain equitable monetary relief under Section 13(b), the FTC’s Objection to the Stay Order should be granted.

III. Defendants Do Not Dispute that the Stay Order Ignores Controlling Precedent Regarding the Availability of Equitable Monetary Relief Under Section 13(b).

The FTC’s ability to obtain equitable monetary relief under Section 13(b) is well settled under the Tenth Circuit’s decisions in *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192 (10th Cir. 2005), and *FTC v. LoanPointe, LLC*, 525 Fed. App’x 696 (10th Cir. 2013). Judge Shelby reached this conclusion on December 31, 2019 in *FTC v. Nudge, LLC*, No. 2:19-CV-00867, 2019 WL 7398678, six weeks before the Stay Order was issued. This Court reached the same conclusion when it denied Defendants’ Partial Motion to Dismiss in this case on February 26, 2020. *See* ECF No. 112.

Courts in the Tenth Circuit are bound by 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). The Stay Order, however, does not cite, let alone analyze, *Freecom* and *LoanPointe*, which provide the controlling law here. It is contrary to law for this reason.

Defendants do not dispute that the Magistrate Judge ignored *Freecom* and *LoanPointe* in granting their stay request. Instead, they argue that this approach was permissible because the Stay Order “did not rule on the ultimate 13(b) question.” ECF No. 119 at 3. But none of the

cases Defendants cite suggests that a trial court deciding a stay motion may ignore settled circuit precedent on the governing law.

For example, in *Metric Construction Co. v. Professional Raingutter Services*, 1:06-CV-00125-DAK, 2007 WL 4143084 (D. Utah Nov. 19, 2007), this Court granted a defendant’s stay motion where the same plaintiff had lawsuits pending in both the Court of Claims, where it was awaiting the outcome of a bench trial, and the District of Utah. In both cases, the plaintiff sought damages for the cost of repairing the same roof. This Court reasoned that the moving defendant “will certainly endure defense costs if the stay is not granted, costs that may indeed be wasteful if the Court of Claims awards [the plaintiff] full damages.” *Id.* at 2007 WL 4143084, *4. Here, in contrast, the FTC is not a party in *Liu*, and Defendants face no risk of bearing defense costs in this litigation, only to have the FTC obtain full relief elsewhere.

In *Burke v. Alta Colleges, Inc.*, No. 11-cv-02990-WYD-KLM, 2012 WL 502271 (D. Colo. Feb. 15, 2012), the plaintiff filed suit under the Fair Labor Standards Act (“FLSA”), alleging that his employer had improperly categorized him as being exempt from the FLSA’s mandatory overtime provisions. The defendant answered, asserting that the plaintiff “was properly classified as ‘exempt’ pursuant to the ‘outside sales’ exemption of the FLSA.” *Id.* at 2012 WL 502271, *1. The magistrate judge granted the stay because the same statutory provision, the FLSA’s “outside sales” exemption, was also at issue in a pending Supreme Court case, *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012). Here, in contrast, *Liu* involves the Securities Act of 1933 Act and Securities Exchange Act of 1934, not the FTC Act.

Similarly, in *Campbell v. Oregon Department of State Lands*, 2:16-CV-01677-SU, 2017 WL 3367094 (D. Or. Aug. 4, 2017), the plaintiffs challenged an Oregon senate bill as preempted

by the U.S. Constitution and federal mining laws. The court entered a stay because a pending Ninth Circuit case was addressing the question whether the same Oregon senate bill was preempted under the Constitution and federal mining laws. *Id.* at 2017 WL 3367094, *4-5. Here, in contrast, there is no parallel case involving the FTC Act.

Nor do any of the cases Defendants cite suggest that a magistrate judge may limit the scope of discovery already permitted by a district judge's order. The Stay Order does that here by restricting the third-party discovery allowed under this Court's Stipulated Preliminary Injunction [ECF No. 54] to document discovery only. The Stay Order is contrary to law for this reason as well.

IV. CONCLUSION

For the foregoing reasons, and those provided in Plaintiffs' respective Objections, Plaintiffs respectfully request that the Court set aside the Stay Order, open discovery, and order the parties to file an updated proposed scheduling order within fourteen days.

Respectfully submitted,

March 23, 2020

/s/ Joshua A. Doan
COLLOT GUERARD
JOSHUA DOAN
AMANDA GRIER
Federal Trade Commission
600 Pennsylvania Ave., NW, CC-8528
Washington, DC 20580
Telephone: (202) 326-3338
cguerard@ftc.gov; jdoan@ftc.gov; agrier@ftc.gov
Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

March 23, 2020

/s/ Robert G. Wing (by JAD w/ perm.)
ROBERT G. WING (4445)
KEVIN MCLEAN (16101)
Assistant Attorney General
Utah Attorney General's Office
160 East 300 South, Fifth Floor
Salt Lake City, Utah 84114
Telephone: 801-366-0310
rwing@agutah.gov
kmclean@agutah.gov
Attorneys for Plaintiff
UTAH DIVISION OF CONSUMER
PROTECTION

CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2020, I electronically filed the foregoing Reply with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ Joshua A. Doan
Joshua Doan