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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.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO CERTIFY FOR APPEAL THE COURT'S ORDER DENYING DEFENDANTS' PARTIAL MOTION TO DISMISS** Case No. 2:19-cv-00713-DAK-EJF District Judge Dale A. Kimball Magistrate Judge Evelyn J. Furse

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

("Division") oppose Defendants' Motion to Certify for Appeal the Court's order denying the Defendants' partial motion to dismiss ("Mot.") (ECF 114). Defendants seek an immediate appeal of this Court's ruling that "Section 13(b) of the FTC Act provides for equitable monetary relief" in accordance with "controlling Tenth Circuit case law as well as the structure of the FTC Act and longstanding principles of equity jurisprudence" (ECF 112, at 12). The FTC respectfully requests that the Court deny Defendants' motion because the question raised does not "[1] involve[] a controlling question of law [2] as to which there is a substantial ground for difference of opinion and [3] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Roberts v. C.R. England, Inc.*, No. 2:12-CV-00302, 2018 WL 2386056, at *2 (D. Utah, Apr. 24, 2018) (citations omitted) (brackets original).[1]

I. PROCEDURAL HISTORY

Plaintiffs FTC and the Division 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 ("CRFA"), 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 a Stipulated Preliminary Injunction ("PI") (ECF 54). On November 19, 2019, Defendants filed a Partial Motion to Dismiss (ECF 62) ("MTD"), which Plaintiffs opposed (ECF 72 and 76), and which the Court denied on February 26, 2020 (ECF 112) ("Order"). Defendants have now filed a motion (ECF

[1] Recently, on March 24, 2020, U.S. District Court Judge Barlow denied certification of the same remedy question raised here by the same defense counsel making the same arguments. *FTC v. Nudge, LLC*, No. 2:19-CV-0086-DBB-EJF, Minute Entry for Proceedings Held before Judge David Barlow (March 24, 2020) (ECF 114). Plaintiffs expect to provide the written order or hearing transcript to this Court when available.

114) to certify for appeal the Court's Order under 28 U.S.C. § 1292(b).

II. STANDARD FOR RELIEF

Certification "under § 1292(b) lies wholly within the sound discretion of the court." *Roberts*, 2018 WL 2386056, at *2 (citations omitted). Certification should be limited to "extraordinary cases" because it "serves as a 'procedural screen to avoid a flood of fruitless petitions invoked contrary to the purpose of § 1292(b).'" *Id.* at *2 (quoting *Utah v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994)). Nevertheless, "a district court may certify for appeal an otherwise unappealable interlocutory order if the court determines that 'such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.'" *Homeland Stores, Inc. v. Resolution Tr. Corp.*, 17 F.3d 1269, 1271 (10th Cir. 1994). Because Defendants fail to meet Section 1292(b)'s requirements for an immediate appeal, Plaintiffs request that the Court deny the motion.

III. THE REMEDY ISSUE IS NOT A "CONTROLLING QUESTION OF LAW."

According to Tenth Circuit case law, questions relating only to potential or alternative remedies are not "controlling" within the meaning of Section 1292(b) because they do not relate to the merits of Plaintiffs' claims or the determination of liability on the merits. *Homeland Store, Inc.,* 17 F.3d at 1272 (holding that a question of whether one type of relief is available (when the availability of other types are undisputed) is not an alternate controlling question; and finding that "we need not decide on the availability of any specific type of alternative relief here"). Furthermore, a question that "merely limits the recovery that Plaintiffs may seek" does not constitute a "controlling question" under Section 1292(b). *Jones v. Norton*, No. 2:09-CV-730,

2012 WL 1788184, at *2 (D. Utah May 16, 2012) (denying certification of order that the plaintiffs' state tort claims must be pled as alternative claims to a federal statutory claim). Other circuits have likewise denied certification because "a question regarding the theory on which damages may be recovered cannot be controlling where the issue of liability remains undecided." *Fujitsu Ltd. v. Tellabs, Inc.* 539 F. App'x 1005, 1007 (Fed. Cir. 2013) (unpublished).

Here, Defendants' motion raises a remedy question of whether the FTC may obtain monetary relief under Section 13(b) of the FTC Act—while agreeing that the FTC may obtain injunctive relief (Order at 5). Therefore, the Tenth Circuit's holding in *Homeland Store, Inc.,* 17 F.3d at 1272, forecloses Defendants' attempt to merely limit the recovery that the FTC may seek. Because they raise no "controlling question of law," an immediate appeal under Section 1292(b) is unavailable. *Jones*, 2012 WL 1788184, at *2.

Ignoring *Homeland Stores*, Defendants make three misguided attempts at reinterpreting the "controlling question of law" requirement. First, they argue that the remedy issue is a controlling question of law because it "involves a pure question of statutory interpretation" (Mot. at 3). As the Court noted, however, the remedy issue also invokes "longstanding principles of equity jurisprudence" (Order at 12). Second, Defendants claim that the remedy issue is a controlling question of law due to its "significant national import and precedential value," citing several petitions for *certiorari* and two appellate briefs (Mot. at 4).[2] But "controlling Tenth Circuit case law as well as the structure of the FTC Act and longstanding principles of equity jurisprudence" are not "hotly contested" in the Tenth Circuit merely because another circuit has

[2] Defendants cite petitions for *certiorari* seeking review of two Ninth Circuit decisions issued on the same day, and a petition for *certiorari* from the FTC seeking review of a Seventh Circuit decision, as well as two briefs filed in federal appellate courts (Mot. at 4).

split from its sister circuits and overturned its own longstanding precedent (Order at 12).[3] And precedential value alone is not sufficient to meet the "controlling question of law" requirement. *SEC v. Credit Bancorp, Ltd.,* 103 F. Supp. 2d 223, 227 (S.D.N.Y. 2000). Third, Defendants claim that the remedy question is a controlling question of law because it "will control the contours of the remainder of the proceedings in this action" (Mot. at 5). This is also untrue. Whether Section 13(b) allows equitable monetary relief speaks only to the scope of the remedy; it has no bearing on Plaintiffs' claims or Defendants' liability on the merits—matters that must be litigated before the issue of the scope of Section 13(b) needs to be reached.

Finally, Defendants' argument ignores that the Division seeks to recover damages, fines, and civil penalties for Defendants' violations of Utah state statutes (ECF 1 ¶¶ 2, 18 (Complaint)). These additional bases for a monetary judgment are yet another reason why Defendants' application does not involve a "controlling question of law." *See California Pub. Employees' Ret. Sys. v. WorldCom, Inc.*, 368 F.3d 86, 95-96 (2d Cir. 2004) (jurisdictional question not "controlling" because there was an "alternative basis" for jurisdiction).

IV. BINDING TENTH CIRCUIT PRECEDENT FORECLOSES A FINDING OF "SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION."

"The controlling question of law must be one for which there is 'substantial ground for difference of opinion.' This standard is met where the circuits are in dispute on the question *and the court of appeals of the circuit has not spoken on the point*, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." *Roberts*,

[3] The Supreme Court has not acted on the petitions and the courts have not issued opinions on the issues in the two appellate briefs. Even if it had granted the petitions or the appellate courts had ruled, any opinion on the scope of Section 13(b) would not affect the Plaintiffs' claims or Defendants' liability in this case.

2018 WL 2386056, at *2 (citations omitted, emphasis added); *see Kell v. Crowther*¸ No. 2:07-CV-00359, 2018 WL 813449, at *2 (D. Utah Feb. 9, 2018) (same). Because the Tenth Circuit has addressed the issue, there can be no "substantial ground for difference of opinion."[4]

The Tenth Circuit has twice construed Section 13(b) as authorizing equitable monetary relief, first in *Freecom*[5] and then again in *LoanPointe*[6] (unpublished), and "has rejected the reasoning and interpretations of precedent that the Seventh Circuit panel adopted in *Credit Bureau*" upon which Defendants now rely (Order at 7). In its Order, the Court analyzed and followed this binding precedent, stating that, it "feels bound by the controlling Tenth Circuit case as well as the structure of the FTC Act and longstanding principles of equity jurisprudence" (Order at 12). Although the Seventh Circuit's decision in *FTC v. Credit Bureau Center, LLC,* 937 F. 3d 764 (7th Cir. 2019), diverted from well-established and consistent precedent allowing

[4] *See, e.g.*, *Moore v. Kobach*, No. 18-2329, 2019 WL 4228415, at *2 (D. Kan. Sept. 5, 2019) ("Notwithstanding the unclear state of the law in the Supreme Court precedent, the position of the [Tenth] Circuit is clear . . . ."); *Sena v. Corr. Med. Servs., Inc.,* No. 00-1809, 2001 WL 37124887, at *4 (D. N.M. Oct. 29, 2001) (no ground for difference of opinion where "Defendant simply disagrees with Tenth Circuit law"); *Calumet Gaming Group Kansas, Inc. v. Kickapoo Tribe of Kan.*, 987 F. Supp. 1321, 1334 (D. Kan. 1997) ("Finally, given the Tenth Circuit precedent controlling the court's decision here, the court does not believe that there is substantial ground for difference of opinion . . . .").

[5] *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192 (10th Cir. 2005) is binding precedent and not dicta because "[a] necessary antecedent to the Tenth Circuit's discussion of the FTC's burden in proving liability for consumer redress was holding that Section 13(b) allows for monetary equitable relief in the first place." *FTC v. Nudge, LLC, et al.*, No. 2:19-CV-00867-RJS-EJF, Order Denying Defendants' Partial Motion To Dismiss at 11-12 (citing *Freecom*, 401 F. 3d at 1201, 1202, 1207); *see also* Order at 12.

[6] In *FTC v. LoanPointe*, *LLC*, 525 F. App'x 696, 698-99 (10th Cir. 2013) (unpublished), the Tenth Circuit had to construe Section 13(b) as the basis for the monetary relief award at issue in order to determine the standard of review, which was in dispute. ("The same standard of review thus applies to the appeal of an order granting injunctive relief as to the appeal of an order awarding equitable monetary relief."). *See also* Order at 12.

the provision of equitable monetary relief under Section 13(b), that does not change the fact that the Tenth Circuit has already decided this remedy issue. *See* Order at 7 ("The Seventh Circuit's decision in *Credit Bureau* not only reversed its own precedents, but departed from a consensus of other circuit court decisions."); *FTC v. Nudge, LLC*, No. 2:19-CV-00867-RJS-EJF, Order Denying Defendants' Partial Motion To Dismiss, at 13 (Dec. 31, 2019) ("This court cannot ignore or overrule binding precedent. Accordingly, the FTC may seek monetary equitable relief in this action."). Therefore, Defendants are incorrect that "this case presents the Tenth Circuit with its first opportunity to thoroughly analyze and definitively rule on this issue" (Mot. at 8).

Because binding Tenth Circuit precedent forecloses any "substantial ground for difference of opinion" under Section 1292(b), Defendants' motion should be denied.

V. AN APPEAL OF ONE OF SEVERAL FORMS OF RELIEF DOES NOT "MATERIALLY ADVANCE" THE TERMINATION OF THIS CASE.

A legal challenge to the scope of relief will not materially advance the termination of a case, even if it were to significantly lessen the monetary recovery. *Roberts*, 2018 WL 2386056, is instructive. There, Chief Judge Shelby rejected the defendants' argument that class certification in that matter was subject to an opt-in requirement rather than an opt-out notice requirement and he denied the defendants' request for certification under Section 1292(b). *Id.* In particular, the court held that certification would not "avoid unnecessary litigation," explaining, "A successful appeal could affect the class notice, resulting in a smaller class and exposure to lower damages, but the merits of the claims would be unaffected. . . . [A] successful appeal here would not eliminate any of Plaintiffs' claims or narrow the substantive issues." *Id.*

Under Section 1292(b), "the statutory requirement is not whether an appeal might affect the outcome of the litigation, but whether it might advance its termination." *Id.* at *3; *see also*

United States v. $85,688.00 in U.S. Currency, No. 2:19-CV-0029, 2010 WL 4791440, at *2 (D. Utah Nov. 18, 2010) ("regardless of the outcome of any appeal, the case will not be terminated, nor will significant time be saved"). Termination is not advanced where, as here, in spite of the outcome of the requested immediate appeal, significant unaffected claims will remain, especially where unaffected claims and disputed claims have overlapping factual issues.[7] These principles foreclose a finding that certification would "materially advance the ultimate termination" of this litigation, where the legal question Defendants seek to certify implicates one of two forms of relief—but not liability on the merits—as to just three of the nine counts. Even if Defendants were to prevail on immediate appeal, every claim in the Complaint would remain.

Defendants' argument that Section 13(b) does not authorize equitable monetary relief is directed only at Counts I-III of the Complaint. But in these counts the FTC also seeks injunctive relief and, as Defendants concede (Order at 5), the proposed immediate appeal would not affect the FTC's request for injunctive relief.

The outcome of an immediate appeal would have no effect on Counts VI-IX, and Plaintiffs seek monetary relief as to those counts as well. In Counts V-IX, the Division alleges violations of Utah state law, including the UCSPA, which authorizes monetary recovery on behalf of consumers. Utah Code, §§ 13-2-5(3); 13-11-17(1)(a)-(d). It also authorizes fines, and

[7] *E.g.*, *Huddleston v. John Christner Trucking, LLC*, No. 17-CV-549, 2019 WL 4050527, at *2 (N.D. Okla. Apr. 19, 2019) (disputed issue only involves "subset" of the claims and discovery as to disputed claims and an unaffected claim would "partially overlap"); *Medina v. Catholic Health Initiatives*, No. 13-CV-01249, 2014 WL 12741156, at *1-2 (D. Colo. Oct. 27, 2014) (successful appeal would leave related issues to be resolved, and unaffected claims would remain and require substantial discovery); *Coffeyville Res. Refining & Mktg., LLC v. Liberty Surplus Ins. Corp.*, 748 F. Supp. 2d 1261, 1268 (D. Kan. 2010) (reversal on availability of clean-up costs for oil spill is "unlikely to end the litigation" and instead leaves complex issues including allocation of cleanup and non-cleanup costs).

the extent of the misconduct and injury to consumers are relevant statutory factors in determining fine amounts. Utah Code § 13-11-17(1)(d), (6)(a) & (b). The Division's claims would not be affected by the Supreme Court's opinion in the recently-argued case (that does not involve FTC law), *Liu v. SEC, cert. granted,* No. 18-1501, 205 L. Ed. 2d 265 (U.S. Nov. 1, 2019) (argued March 3, 2019), or any change to monetary relief under Section 13(b) should the Supreme Court act on any pending petition for *certiorari* involving Section 13(b) that does not authorize equitable monetary relief.

Moreover, discovery and analysis of Defendants' revenues would be necessary regardless of the outcome of the requested appeal or any Supreme Court action because the enormity and severity of the consumer injury is a factor that courts may consider in assessing the breadth of an injunction. *Telebrands Corp. v. FTC*, 457 F.3d 354, 358-59 (4th Cir. 2006) (courts consider "the seriousness and deliberateness of the violation" in assessing scope of injunction); *e.g.*, *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1015 (C.D. Cal. 2012), *aff'd*, 644 F. App'x 709 (9th Cir. 2016) (unpublished) (broad injunction against sellers of real estate investment products justified, in part, because the "amount of consumer injury is massive, involving an estimated loss of nearly $500 million [] and almost one million customers").[8]

Plaintiffs seek permanent injunctive relief "to prevent future violations of the FTC Act, the UCSPA, and the BODA by Defendants" (ECF 1 ¶¶ 1, 2 (Complaint)). Because discovery about Defendants' revenues is necessary to assess the proper scope of a permanent injunction, such discovery would be largely unaffected by the outcome of an immediate appeal disputing

[8] Permanent injunctive relief under the FTC Act may be broader in scope than the illegal conduct at issue. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965).

equitable monetary relief under Section 13(b).

Defendants' assertion that an immediate appeal "could obviate the need for voluminous and expensive discovery regarding the amount and calculations of relief the FTC can seek" is misplaced (Mot. at 10). Any effect on discovery would be minimal.[9] "[A] successful appeal here would not eliminate any of Plaintiffs' claims or narrow the substantive issues." *Roberts*, 2018 WL 2386056, at *3. Certification would not "materially advance" the termination of this case.[10]

VI. CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully requests that the Court deny Defendants' Motion to Certify for Appeal.

Respectfully submitted,

Date: March 25, 2020

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[9] *Cf. Pack v. Investools, Inc.*, No. 2:09-CV-1042, 2011 WL 2161098, at *3 (D. Utah June 1, 2011) (post-judgment reversal in an unpaid wages case could necessitate a second trial on the merits "and the work of creating a week-by-week analysis and proof would be rendered moot" (but declining to certify an immediate appeal on other grounds)).

[10] If this Court were to certify an immediate appeal, such certification "shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order." Section 1292(b); *see Moore*¸ 2019 WL 4228415, at *1 (stay pending appeal is within court's discretion). Defendants argue that this Court should also stay this case pending the decision by the Tenth Circuit, and "incorporate by reference their arguments as to why discovery should be stayed as discussed in Defendants' Supplemental Brief in Support of Its Motion to Stay Discovery (ECF No. 107), which Magistrate Judge Furse granted in part," *see* ECF 108. Plaintiffs have filed objections to the stay (ECF 110, 111) and a reply in support of their objections (ECF 120). Plaintiffs also incorporate by reference their arguments in opposition to the stay (ECF 84).

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2020, I electronically filed the foregoing Memorandum with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ *Amanda Grier*
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