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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, et al. Defendants.	**REPLY IN FURTHER SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING SUPREME COURT CASES** Case No.: 2:19-cv-00713-DAK-DAO Judge Dale Kimball Magistrate Judge Daphne A. Oberg

Defendants Zurixx, LLC, Brand Management Holdings, LLC, CAC Investment Ventures, LLC, Carlson Development Group, LLC, Carlson Development Group, LLC (Puerto Rico), CJ Seminar Holdings, LLC, Dorado Marketing and Management, LLC, Zurixx Financial, LLC, Zurixx Financial, LLC (Puerto Rico), Cristopher A. Cannon, James M. Carlson, and Jeffrey D. Spangler (hereinafter, collectively "Zurixx" or "Defendants") hereby submit this reply memorandum in further support of their motion asking this Court to stay further proceedings in this action pending the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, No. 18-1501 (cert. granted July 9, 2020).[1]

INTRODUCTION

The Supreme Court's decision in *AMG Capital Management* will determine whether Plaintiffs can seek equitable monetary relief against Defendants under Section 13(b) of the FTC Act. Plaintiffs seek about $530 million in damages under Section 13(b) based on the amount of gross sales over the lifespan of the Zurixx real estate educational training business, which dominates all other monetary relief sought by Plaintiffs against Defendants.

As demonstrated in Defendants' Motion to Stay Proceedings Pending Supreme Court Cases (Docket No. 169) ("Motion"), Defendants satisfy the elements outlined in the *Landis* case to warrant a stay of this case until the Supreme Court answers this critical question. *See Metric Const. Co. v. Prof'l Raingutter Servs., Inc.*, No. 1:06CV00125DAK, 2007 WL 4143084, at *2 (D. Utah No. 19, 2007) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). Clarity from the Supreme Court regarding the availability and scope of equitable monetary relief under

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[1] The Supreme Court consolidated *AMG Capital* with *FTC v. Credit Bureau Center, LLC*, No. 19-825 (cert. granted July 9, 2020) for consideration on appeal. Accordingly, any reference to *AMG Capital Management* refers to both cases.

Section 13(b) will significantly reduce the issues to be litigated, will avoid wasted efforts and resources by the parties and Court in the face of uncertainty, and will increase the possibility of a negotiated resolution of the pending claims.

ARGUMENT

I. Tenth Circuit Case Law Regarding Equitable Monetary Relief Under Section 13(b) of the FTC Act is at Risk of Being Overturned by the Supreme Court.

Plaintiffs' recurring argument that binding Tenth Circuit precedent currently allows the FTC to obtain equitable monetary relief under Section 13(b) ignores reality. Plaintiffs' Opposition (Docket No. 182) at 4 and 9, n. 16 (relying on *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1206-07 (10th Cir. 2005)). The Supreme Court's decision in *AMG Capital Management* in a few short months will determine whether the Tenth Circuit's decision in *Freecom* will continue to have precedential value. The FTC knows this, yet refuses to consider the possibility that *Freecom's* ruling on the Section 13(b) monetary relief issue will be affected shortly.

In its petition for certiorari in *Credit Bureau*, the FTC identified *Freecom* as one of the decisions directly at odds with the Seventh Circuit's decision in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019). Petition for a Writ of Certiorari, *FTC v. Credit Bureau Center*, No. 19-825 (U.S. Dec. 19, 2019) at 12; *see also* Brief for the Respondent, *AMG Capital Management v. FTC*, No. 19-508 (U.S. Dec. 13, 2019) at 6 (similarly identifying *Freecom* as in conflict with *Credit Bureau*). Thus, as the FTC has acknowledged, the Supreme Court's decision in *AMG Capital Management* will directly impact whether *Freecom* is still good law in the Tenth Circuit.

In addition, the precedential value of *Freecom* has already been undercut by the Supreme Court's recent decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020). Specifically, in *Freecom*, the Tenth Circuit found that the appropriate calculation of equitable monetary relief under Section 13(b) is "based on gross receipts" rather than the amount of net profits (net revenue minus expenses). *Freecom*, 401 F.3d at 1206 (citations omitted). This holding is in direct conflict with *Liu*, which held that monetary relief is only equitable when it "does not exceed a wrongdoer's *net profits* and is awarded for victims." *Liu*, 140 S. Ct. at 1940 (emphasis added).

Although the FTC now claims that the *Liu* decision can have no impact on the calculation of equitable monetary relief in an FTC action, the FTC recently told the Senate the opposite in testimony submitted on August 5, 2020. "[T]he Supreme Court's recent Liu decision may place limitations on the amount of money we can obtain from wrongdoers and ultimately return to consumers." *Oversight of the Federal Trade Commission: Hearing Before the S. Comm. On Commerce, Sci, & Transp.*, 116th Cong. 4 (2020) (statement of the Federal Trade Commission), https://www.ftc.gov/system/files/documents/public_statements/1578963/p180101testimonyftcoversight20200805.pdf.

As a result, contrary to the FTC's assertion, Tenth Circuit precedent is far from resolved. Given the unpredictable status of the law on whether and the extent to which the FTC is entitled to obtain equitable monetary relief under Section 13(b), staying this case to await final, binding precedent with respect to this question will substantially benefit the efficient and accurate adjudication of this action and avoid the substantial harm that Defendants would otherwise suffer by being forced to conduct discovery in mounting an expensive defense against a theory that may soon be discarded.

II. The Supreme Court's Decision in *AMG Capital Management* will Simplify the Issues in this Litigation.

To warrant a stay under *Landis*, the Defendants need only show that the Supreme Court's decision in *AMG Capital Management* will "simplify the issues before the court." *Menchacha-Estrada v. Synchrony Bank*, NO. 2:17CV831DAK, 2017 WL 4990561, at *1 (D. Utah Oct. 30, 2017) (citations omitted). Plaintiffs instead attempt to transform this language into a dispositive-of-all-claims standard by arguing that this case should not be stayed because there are other claims that will remain unaffected by *AMG Capital Management*. Defendants outlined these non-Section 13(b) claims, where there is much less at issue, in the Motion. Motion at 6-7.[2] Removing the possibility of a monetary award of over $500 million will necessarily affect how this case is litigated by the parties, and what types of issues and information in discovery are proportional to the needs of the case based on the amount in controversy under Rule 26(b)(1) of the Federal Rules of Civil Procedure.

Plaintiffs' argument is not consistent with the standard for deciding this motion to stay under *Landis*. Defendants meet the actual standard as shown in their Motion, which explains how the Supreme Court's decision will clarify the scope of relief available to the FTC under Section 13(b), and, in turn, will simplify how the parties proceed with this litigation.

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[2] Plaintiffs submit the conclusory declaration of an accountant retained by the Receiver, Gill Miller, to support the assertion that over $136 million in damages is at issue in Plaintiff's TSR claim under Section 19 of the FTC Act. Plaintiffs, however, ignore the three-year statute of limitations applicable to that claim under 15 U.S.C. § 57b(d). In addition, Defendants object to the Declaration of Gil Miller submitted as Exhibit A to Plaintiffs' Opposition wherein Mr. Miller, without providing sufficient evidentiary support, estimates that Zurixx telemarketers sold "more than $136 million in coaching sessions and other [unidentified] real estate-related products." Miller Declaration at ¶ 3. Mr. Miller does not identify or attempt to quantify these other products, and does not provide sufficient detail for the Court to rely on his estimate.

Regardless of the outcome, the Supreme Court's decision in *AMG Capital Management* will significantly reduce the issues to be litigated, will avoid wasted efforts and resources by the parties and Court in the face of uncertainty, and will allow the parties to adequately assess the possibility of settlement.[3]

Courts have granted stays even where the decision in an unrelated case could potentially impact a portion of a case without resolving the entire case, or even a single cause of action. *See, e.g. Burke v. Alta Colls., Inc.*, No. 11-02990, 2012 WL 502271, at *3 (D. Colo. Feb. 15, 2012) (granting a stay even though "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 Supreme Court] decision will likely impact the case in some fashion" including the potential to "properly focus the parties' discovery efforts" and "drive settlement of this case."); *Rodriguez v. DFS Servs., LLC*, No. 15-2601, 2016 WL 369052, at *2 (M.D. Fla. Feb. 1, 2016) (granting a stay and noting a Supreme Court decision could have "a significant impact on [plaintiff's] entitlement to damages."); *Loftus v. Signpost, Inc.*, No. 19-7984, 2020 WL 2848231, at *2 (S.D.N.Y. June 2, 2020) (granting a stay and noting "[e]ven a decision from the Supreme Court that would not be dispositive of issues in this case could contain guidance that would allow this litigation to proceed on a reasonable and efficient basis."); *Jacobs v. Ocwen Loan Servicing, LLC*, No. 16-62318, 2017 WL 1733855, at *1 (S.D. Fla. App. 13, 2017) (granting a stay even though pending resolution of a D.C. Circuit case "will not dispose of the entire case."); *Arab Am. Civil Rights*

[3] The fact that Defendants cannot definitively state how the Supreme Court will rule in *AMG Capital Management* does not negate the necessity of a stay of this litigation. Although it is unlikely that the Supreme Court will ultimately agree with the FTC, affording it the unfettered right to seek gross revenues from a defendant as a form of "equitable" monetary relief—especially in light of the holding in *Liu* to the contrary—the fact remains that any guidance from the Supreme Court will substantially streamline the remaining issues in this case.

League v. Trump, No. 17-10301, 2017 WL 2501060, at *1 (E.D. Mich. June 9, 2017) (staying proceedings in the case given that Supreme Court review would settle some issues and simplify them all, even if not "fully dispositive."); *In re Literary Works in Elec. Databases Copyright Litig*., No. 00 CIV 6049, 2001 WL 204121, 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, stay may be proper even when the issues in the independent proceeding are not necessarily controlling of the action before the court.").

And although the FTC seeks to distinguish the recent stay of litigation involving the FTC in the Northern District of California, the court there with different facts and a more advanced procedural posture nonetheless stayed the case pending the Supreme Court's review in *AMG Capital Management*. There, as here, the defendant "has ceased virtually all of the conduct at issue in this case." *FTC v. Lending Tree Club*, No. 18CV2454JSC, 2020 WL 4898136, *2 (N.D. Cal. Aug. 20, 2020). Through the Receiver, Plaintiffs have already shut down Defendants' business and there is no risk of ongoing offending conduct if this litigation is stayed by the Court. In staying the case the judge in *Lending Tree* also found that "the Supreme Court's decision in *AMG Capital* and *Credit Bureau* is not a speculative future event involving multiple contingencies; certiorari has been granted, and the only event that the parties and the Court are waiting for is the decision itself." *Lending Tree*, 2020 WL 4898136 at *2 (internal quotations and citations omitted).

Plaintiffs' also cite this Court's ruling on Defendants' first Motion to Stay as foreclosing the notion that *AMG Capital Management* will not simplify this case. Plaintiffs' Opposition at 2. However, when exercising its inherent authority to stay cases, this Court must be aware of

changing facts and circumstances. *See Landis*, 299 U.S. at 256 ("We must be on our guard against depriving the processes of justice of their suppleness of adaptation to varying conditions."). This Court's earlier statement that "Defendants' requested stay is premature before the Section 13(b) question itself is before the Supreme Court" is no longer the case. Docket No. 127 at 2. The Supreme Court will now directly address whether the FTC, under Section 13(b), is authorized to seek all, or some calculated portion of, over $500 million in revenues as alleged by Plaintiffs. And given the now-definite nature of a forthcoming Supreme Court ruling as to Section 13(b)'s scope, staying this case until such a ruling will simplify the parties' efforts through discovery, as they asses the claims and any possibility of settlement, and as they prepare for summary judgment and trial. As such, a stay is warranted.

III. Plaintiffs' Ignore the Hardship and Inequity Defendants Will Suffer if this Case is Not Stayed.

In their Motion, Defendants demonstrated that they will suffer harm if this case is not stayed. Motion at 7-9. Plaintiffs, however, attempt to minimize the harm that Defendants will suffer if this case is not stayed and argue that Plaintiffs will be prejudiced by a stay for a few months. Plaintiffs' argument that Defendants will only suffer the hardship of paying litigation expenses ignores reality. The FTC can afford to minimize the cost of lawyers and take absolute and inflexible positions because it does not have to pay legal fees, as evidenced by the FTC Commissioners championing a strategy of taking positions in litigation that they know they may not win. *See* Matthew Perlman, *FTC Commissioner Wants to Bring the Hard Merger Cases*, Law360 (June 20, 2019, 2:10 PM), https://www.law360.com/articles/1171376/tfc-commissioner-wants-to-bring-the-hard-merger-cases; *see also* FEDERAL TRADE COMMISSION, *Statement of Commissioners Rebecca Kelly Slaughter and Rohit Chopra, In the Matter of UnitedHealth*

Group & Davita (June 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1529359/181_0057_united_davita_statement_of_cmmrs_s_and_c.pdf. The FTC ignores the cost to those companies and individuals that the FTC chooses to disfavor.

The FTC also ignores the practical implications of proceeding without direction from the Supreme Court. Not only will the issues and proportionality concerns for discovery be simplified should a stay be entered, but, based on the current schedule, Defendants will be forced to engage in costly discovery while waiting for a Supreme Court decision that will determine the amount at issue in this case, a fundamental matter for any litigant. If the Supreme Court issues its decision in *AMG Capital Management* at the tail end of its term ending June 28, 2021, discovery will be all but completed with fact discovery in this case currently scheduled to close on July 22, 2021. These practical implications are both wasteful and avoidable should this Court order a months-long stay pending a no-longer-speculative ruling from the Supreme Court.

Defendants are harmed by continuing to mount a defense against a claim for over $500 million in this case where the Supreme Court may soon determine that the FTC is not entitled to seek Defendants' gross revenues. This harm justifies a stay. *Menchacha-Estrada*, 2017 WL 4990561, at *1 (staying case pending Supreme Court decision because it will "conserve the resources of the parties and the court while avoiding the wasted effort that may be involved in proceeding under an uncertain legal framework."); *Flying J Inc. v. Spring Commc'ns Co., L.L.P.*, No. 1:99CV111TC, 2006 WL 1473338, at *1 (D. Utah May 22, 2006) (stay pending a Supreme Court decision that "will resolve a critical and contested legal issue" is justified when "judicial economy will best be served"). In arguing that a stay will not cause Defendants any hardship,

Plaintiffs ask this Court to consider the remaining, and considerably smaller, monetary relief Plaintiffs seek in a vacuum. It defies logic to conclude that the scope and proportionality of discovery, as well as the parties' incentives to assess their respective settlement positions, would not be altered if the potential monetary relief available is reduced substantially. *Metric Const. Co.*, 2007 WL 4143084, at *4 (granting stay where "litigation may be unnecessarily prolonged and costs unnecessarily incurred because settlement values cannot be accurately determined until the Court of Claims issues its decision.").

Plaintiffs' position on the harm to Defendants of continuing this litigation while the *AMG Capital Management* case is pending at the Supreme Court disregards the realities of litigation and common sense and demonstrates an indifference for the parties', as well as this Court's, resources and time. The Defendants should not be forced to litigate this case through fact discovery with the amount of potential damages available to Plaintiffs in question until the Supreme Court's clarifying decision in a few months.

IV. Plaintiffs' Will Not Suffer Harm if This Case is Stayed.

Plaintiffs acknowledged in their opposition that they have already obtained 19.3 TB of Defendants' electronic data, in additional to six laptop computers, and hard copy documents – basically all of the documentary evidence available from Defendants in this case. And to the extent Plaintiffs do not have some of Defendants' information, it is surely in the possession of the Receiver who will readily provide it to Plaintiffs. Yet Plaintiffs insist that they need to engage in extensive and thus expensive discovery now when they already have access to Defendants' information. Documents will not be lost if the Court enters a stay.

Plaintiffs also point to litigation commenced by the Receiver against former Zurixx

employees and contractors for purportedly "avoidable transfers" as a reason that discovery should not be stayed in this case. Plaintiffs and Defendants are not parties to the Receiver's cases and the Court should not take those cases into consideration in deciding the stay issue. The Receiver's cases must stand on their own merits and the claims proven independently through discovery in those cases, not in this case.

Lastly, Plaintiffs' argument that it will not be able to recover money to compensate injured consumers if there is a brief stay rings hollow where the parties stipulated to a preliminary injunction for that very purpose – to protect injured consumers pending the resolution of the present action. Inherent in Plaintiffs' stipulation to the terms of the Preliminary Injunction is the fact that the restrictions on the transfer of assets are sufficient to protect the funds available to compensate allegedly injured consumers. That Plaintiffs are now concerned that the Receiver's fees will reduce the amounts available to distribute to consumers is not a reason to deny this Motion. This issue has been foreseeable since this action began and will not be further exacerbated by a stay.

CONCLUSION

Because the Supreme Court's decision in *AMG Capital Management* will simplify the issues in this case by clarifying the amount truly at issue, Defendants will suffer substantial hardship if this case proceeds further into discovery, and the prejudice to the Plaintiffs is minimal. Therefore, Defendants respectfully request that this Court stay discovery pending the decision in *AMG Capital Management*.

DATED this 18th day of September, 2020.

/s/ Z. Ryan Pahnke

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2020, I caused a true and correct copy of the foregoing **REPLY IN FURTHER SUPPORT OF MOTION TO STAY PROCEEDINGS PENDING SUPREME COURT CASES** 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

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