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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.

**UTAH DIVISION OF CONSUMER
PROTECTION’S OPPOSITION TO
DEFENDANTS’ MOTION FOR RELIEF
FROM STIPULATED PRELIMINARY
INJUNCTION ORDER AND MOTION
TO STAY BRIEFING**

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

District Judge Dale A. Kimball
Magistrate Judge Daphne A. Oberg

The Utah Division of Consumer Protection (“the Division”) agrees with the position of the Federal Trade Commission in its response to Defendants’ Motion for Relief from Stipulated

Preliminary Injunction Order and Motion to Stay Briefing (“Mot.”). The Division responds separately because Defendants once again fail to substantively address the Division’s claims.

There is nothing new in Defendants’ current motion. It is simply a reiteration of the argument in their two prior motions to stay. Defendants’ argument can be encapsulated simply: they believe the resolution by the United States Supreme Court of two cases¹ will eliminate or reduce the FTC’s ability to obtain consumer redress under Section 13(b) of the Federal Trade Commission Act. Defendants contend that the Stipulated Preliminary Injunction was “primarily based” on the FTC’s ability to recover under Section 13(b), and thus it may no longer be necessary. Mot. at 2-3. That is incorrect. Defendants’ argument completely ignores the Division’s claims. Whatever the decision in *AMG*, it will have no effect on the Division’s state law claims.

Contrary to Defendants’ assertion, the Utah Consumer Sales Practices Act (the “CSPA”) provides for substantial monetary relief. In addition, the CSPA provides for fines in the Court’s discretion and the Utah Telephone Fraud Prevention Act (“TFPA”) and the Utah Business Opportunity Disclosure Act (“BODA”) provide for fines of up to \$2,500 per violation. Defendants sold products and services to at least 70,000 consumers and solicited many times that amount. The FTC’s claims, while certainly large, are not the “vast majority of” the claims here, as Defendants falsely assert. Mot. at 1. The preliminary injunction and asset freeze are necessary

¹The two cases are *AMG Capital Management, LLC v. FTC*, No. 18-1501 (cert. granted July 9, 2020) and *FTC v. Credit Bureau Center, LLC*, No. 19-825 (cert. granted July 9, 2020). The two cases have been consolidated and are collectively referred to here as *AMG*.

to ensure that funds remain available to redress consumer harm and to pay fines under the Division's claims, *not* just the FTC's claims.

The CSPA gives the Division the authority to bring suit to recover, for each violation, actual damages on behalf of consumers who complain to the enforcing authority within a reasonable time after it institutes proceedings under the CSPA.² Defendants suggested in oral argument on their pending motion to stay that this remedy should be limited to consumers who have already complained, but they are wrong. The Court should reject Defendants' interpretation of the CSPA and determine that the Division can recover for all consumers who complain after receiving notice of this proceeding.

Some consumers likely will not file complaints. But each consumer who lost thousands or tens of thousands of dollars will likely be motivated to file a claim once they are notified. These consumer redress claims are sufficiently large to justify the preliminary injunction. Assets still need to be maintained to provide the possibility of meaningful monetary relief stemming from the Division's state law claims.

Consumer redress aside, the CSPA, TFPA, and BODA all provide for substantial fines.

The TFPA, for example, says:

Any telephone soliciting business or any person associated with a telephone soliciting business, including solicitors, salespersons, agents, representatives of a solicitor, or independent contractors, who violates any provision of this chapter shall be subject to a civil penalty in a court of competent jurisdiction not exceeding \$2,500 for each unlawful transaction.³

² Utah Code Annotated §13-11-17(1).

³ Utah Code Annotated §13-26-8(2).

Defendants made tens of thousands of telemarketing solicitations and violated the TFPA in each one.⁴ Similarly, the CSPA provides for a fine in an amount to be set by the Court after considering several factors.⁵ BODA allows for administrative fines of up to \$2,500 per violation.⁶ A BODA violation occurs every time a seller of an assisted marketing plan fails to provide certain information to a prospective purchaser.⁷ Defendants did not supply the required information to any of their customers.

In their Answer to the Amended Complaint, Defendants say Zurixx has sold real estate education training to more than 70,000 individuals.⁸ Fines under the three statutes are subject to judicial discretion but are cumulative. Each transaction may result in fines under each of the statutes. If only one \$2,500 fine were assessed for each of the 70,000 consumers, the total would be \$175,000,000. The Division believes this would exceed the ability of Defendants to pay.

It is appropriate for an order to freeze funds in an amount sufficient to cover not just the profits that might have to be disgorged but the civil penalty as well. *S.E.C. v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990); *see also S.E.C. v. Maillard*, No. 13–CV5299 VEC, 2014 WL 1660024, at *4 (S.D.N.Y. Apr. 23, 2014) (government agency “is entitled upon an adequate showing ... to an asset freeze sufficient to preserve its disgorgement remedy as well as assets necessary to pay civil monetary penalties.”). Substantial penalties serve as a deterrent to financial

⁴ See ECF No. 12-88 at p. 92 (Zurixx’s telemarketing application, stating that Zurixx mad over 24,000 calls in three years).

⁵ Utah Code Annotated §13-11-17(1)(d).

⁶ Utah Code Annotated §13-15-6(4)

⁷ Utah Code Annotated §13-15-5.

⁸ See Defendants’ Answer to the First Amended Complaint ¶ 46 [ECF No. 162].

fraud, are available in addition to disgorgement, and can justify an asset freeze. *S.E.C. v. Ahmed*, 123 F.Supp.3d 301, 312-3 (D. Ct. 2015).

Even if there were no remedy available to the FTC under Section 13(b),⁹ the preliminary injunction and asset freeze should remain in place.

Submitted this 6th day of November, 2020.

SEAN D. REYES
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/s/ Robert G. Wing

(Signed by Filing Attorney with permission) /s/

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⁹ It should also be noted that the FTC brought claims under Section 19 for violations of the Telemarketing Sales Rule.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of November, 2020, a true and correct copy of the foregoing **RESPONSE OF THE UTAH DIVISION OF CONSUMER PROTECTION TO DEFENDANTS' MOTION FOR RELIEF FROM STIPULATED PRELIMINARY INJUNCTION ORDER AND MOTION TO STAY BRIEFING** was served electronically via the Court's ECF System upon:

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