Jason A. McNeill (9711)
mcneill@mvmlegal.com
Eric K. Schnibbe (8463)
schnibbe@mvmlegal.com
MCNEILL | VON MAACK
175 South Main Street, Suite 1050
Salt Lake City, Utah 84111
Telephone: 801.823.6464

Attorneys for Subpoenaed Non-Party
Matt Davis

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

FEDERAL TRADE COMMISSION and UTAH DIVISION OF CONSUMER PROTECTION, **Plaintiffs,** **v.** **ZURIXX, LLC, *et al.*,** **Defendants.**	**DAVIS'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING FTC'S MOTION TO COMPEL** **Case No.: 2:19-cv-00713-DAK-DAO** **Judge Dale A. Kimball** **Magistrate Judge Daphne A. Oberg**

Subpoenaed Non-Party Matt Davis ("Davis"), through counsel MCNEILL VON MAACK, hereby submits his Response to the supplemental brief Plaintiffs filed regarding the FTC's Motion to Compel [Dkt. 229] ("Supp." or "Supplement").

Notwithstanding the Supplement, the FTC has not shown it is appropriate for Davis to bear the significant expenses imposed by the FTC Subpoena. Rather, it is apparent the FTC can more readily bear its costs and the Court should order that it should do so in accordance with FRCP 45(d)(2)(B)(ii).

I. THE EXPENSE OF COMPLYING WITH THE SUBPOENA AND DAVIS'S INCOME ARE SUPPORTED IN DETAIL WITH DAVIS'S RECENTLY SUBMITTED SUPPLEMENTAL BRIEF

The Court should reject the FTC's arguments regarding the expense to comply with the FTC Subpoena and Davis's ability to pay. [*See* Supp. Part I.]

First, the FTC's argument, that Davis has not met his burden "of establishing the existence and reasonableness of the costs or fees incurred," is moot. [Supp. at 1 (cleaned up).] The FTC's argument that Davis "provided only a bare estimate" is not well taken in that the previous "bare estimate" was made in the course of the abbreviated context of a Short Form Discovery Motion under DUCivR 37-1. That local rule limits what may initially be submitted to the Court, but provides the Court may "request further briefing and set a briefing schedule." DUCivR 37-1(a)(7)(C). The Court so ordered and recognized additional exhibits could be submitted. [*See* Dkt. 227 (minute entry stating limit "of no more than five pages, excluding exhibits").] Davis's supplement addressed in detail the tasks necessary to comply with the FTC's subpoena, the expenses to do so that had already been incurred, further expenses that would be required, and was supported by sworn testimony of Mr. McNeill and a business record estimate from SL Legal. [*See* Dkt. 230 at 5-6; Dkt. 230-2; Dkt. 230-3.]

Second, the argument, that "Davis also submitted no evidence of his inability to pay," is incorrect. Davis's supplement included his detailed, sworn declaration establishing his income during 2020 and explaining how it was substantially impacted and reduced by recent events, such as the COVID-19 pandemic and related social distancing that prevents the large in-person seminars where Davis previously earned compensation. [*See* Dkt. 230 at 4-5; Dkt. 230-1.]

Third, Davis's testimony as to his income over the past year is a more reliable indicator

of his inability – *at this time* – to bear the expense of the FTC's Subpoena.[1] The FTC's main argument is that Davis was compensated for his work as a speaker at Zurixx seminars in the amount of "more than $3 million," which *ipso facto* renders insignificant the expense to comply with the FTC's Subpoena.[2] [Supp. at 1.] The FTC's argument is without precedent, as the amount of Davis' past compensation from 2016 to 2019 is not the relevant test or inquiry applied to cost-shifting. Not to mention that the burden imposed by the FTC is occurring now, in March 2021, not two to five years ago. And the FTC cites to gross earnings, ignoring certain obvious expenses that Davis had to pay, such as income taxes and living expenses. The specific evidence of Davis's income over 2020, supported by sworn testimony, is the most reliable indicator to determine whether the expense of compliance representing nearly 20% of Davis's gross (not net) income is significant, and when considering the net figure, the burden is even heavier.

II. THE FTC MISAPPLIES THE FACTORS CONSIDERED IN THE TENTH CIRCUIT AS TO WHETHER THE EXPENSE OF RESPONDING TO THE SUBPOENA IS SIGNIFICANT

The FTC appears to have abandoned its prior arguments based on inapposite cases in the

[1] The FTC mischaracterizes counsel's statement at the February 24, 2021 hearing, by asserting he claimed "Davis had only $2,500 in income in the past 14 months." [Supp. at 1.] Counsel stated the $2,500 figure was "year to date" – meaning income in the 1 ½ months that had passed during 2021.

[2] The $3 million figure should be disregarded for purposes of the Motion to Compel because it is unsupported by any sworn testimony submitted by the FTC. Further, the FTC does not explain how the figure could be "uncontested" when it appears in a Complaint for which a motion to dismiss is currently pending. *See Broadbent v. Davis, et al.*, Case No. 2:20-cv-00545, Dkt. No. 17 (Motion to Dismiss). Indeed, at least right now, the summary relied upon [Supp. at 1 n.2] would be inadmissible in evidence because the source materials from which it is drawn have not yet been made available to Davis. *See* Fed. R. Evid. 1006.

Ninth Circuit, and agrees with Davis as to the three the "main factors" courts "routinely apply" [Supp. at 2] in determining whether to protect non-party subpoena respondents "from significant expense resulting from compliance." FRCP 45(d)(2)(B)(ii). [*Compare* Davis's Supplement at 2 [Dkt. 230] *with* Supp. at 2 [Dkt. 229].][3] However, the FTC misapplies such factors to make the erroneous argument that they "weigh against shifting costs to the FTC in this case." [Supp. at 3.]

First, the FTC has not shown that Davis has an interest in the underlying litigation that should preclude requiring the FTC to bear the significant expense of responding to the Subpoena. The FTC does not show how Davis could receive any portion of any monetary recovery in the underlying action, nor does the FTC explain in any detail what impact the underlying action could possibly have upon the separate case filed by the Receiver against Davis, which turns on issues of Utah state law.

Moreover, the FTC's authorities do not support that Davis being compensated for providing speaking services at seminars would make Davis any more interested in the underlying litigation than any other vendor, such as one that provided the meeting space or refreshments. Davis is not alleged to have participated in the design of Zurixx's business model or other activities alleged to have run afoul of the FTC Act or Utah state law. Stated simply, Davis's work for Zurixx does not make him a person interested in the litigation of the sort where courts use that factor as a basis to deny cost shifting.

[3] The FTC acknowledges two additional factors are only "sometimes consider[ed]." [Supp. at 2 n.4.] Those factors weigh in favor of shifting the expense of compliance to the FTC in that the scope of the FTC's subpoena is extremely broad, including 40 separate subjects of requested documents, and because the attorney fees necessary to comply are reasonable. These factors are supported by the sworn testimony of Mr. McNeill and the business record estimate from SL Legal. [*See* Dkt. 230-2; Dkt. 230-3.]

For example, in *Western Convenience Stores*, the claims included one for "price discrimination in violation of the Robinson–Patman Act, 15 U.S.C. § 13, based on Suncor's alleged sale of fuel on preferential terms to 'favored retailers' (such as Dillon Companies, Inc.)." *W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc.*, No. 11-CV-01611-MSK-CBS, 2014 WL 1257762, at *3 (D. Colo. Mar. 27, 2014). The non-party subpoena recipient (Dillon Companies, Inc.) was itself at risk based on the price discrimination claim because it hinged "in large part" on discounts provided to Dillon and was evidenced by "discussions … between counsel for [Plaintiff] Western and Dillon[] regarding a possible covenant not to sue." *Id.* at *23 & n.31. The FTC has provided nothing to show that Davis is at risk in the underlying enforcement action.

As another example, in *Valcor*, the non-party subpoena recipient (MEDAL) had "close involvement in the design and/or testing of one of the main ASM parts at issue in this lawsuit, [there was a] common interest agreement between MEDAL and [Plaintiff] Valcor, and MEDAL[]," and "MEDAL has potential financial exposure in this lawsuit if [Defendant] Parker prevails, but it will dramatically benefit if Valcor prevails. Either result directly impacts MEDAL financially." *Valcor Eng'g Corp. v. Parker Hannifin Corp.*, 2018 WL 3956732, at *6 (C.D. Cal. July 12, 2018). There is nothing in the case at bar that shows Davis even remotely has involvement and financial interest in the underlying litigation as did the subpoena recipient in *Valcor*. *See also United States v. Cardinal Growth, L.P.*, No. 11 C 4071, 2015 WL 850230, at *3 (N.D. Ill. Feb. 23, 2015) (ruling Rule 45 does not apply but further reasoning costs should not be shifted because subpoena respondent (P & H) "served as [Defendant] Cardinal's counsel for over a decade. During that period, P & H derived substantial income from Cardinal, drafted and

prepared hundreds of transactional documents, and participated in the design of numerous complex transactions. Thus, P & H 'is not a classic disinterested non-party.'").

Second, the Court should shift to the FTC the expense of complying with the subpoena because the FTC has not shown Davis "can more readily bear its costs than the requesting party." *New Mexico Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, No. CV 12-526 MV/GBW, 2016 WL 10296569, at *1 (D.N.M. May 11, 2016). The FTC uses an unreliable indicator of Davis's ability to bear the expense by focusing on four years of prior compensation in an amount that is not supported by admissible evidence, and disregarding the need for Davis to pay taxes on compensation and living expenses. While the FTC has the luxury of avoiding both, Davis does not. The more reliable indicator is Davis's 2020 income by which the specifically documented expenses to comply are unquestionably significant.

Even more flawed, the FTC wholly ignores that in the Tenth Circuit this is a comparative factor. The FTC (as of yet) has given this Court no information and no evidence regarding its own ability to bear the cost of compliance when compared to Davis. And it's obvious why – it is the FTC. "Arguing that any person or entity … is better able to absorb the costs of discovery than is the United States Government is nonsensical." *Simon v. United States*, No. 15-CV-00538-REB-KMT, 2017 WL 10541425, at *4 (D. Colo. Mar. 8, 2017). Contrary to the FTC's implied assertion, there is no wholesale exception when the party serving the subpoena is the United States because it is ultimately funded by taxpayers. [Supp. at 5.] *See id.* (ordering United States to pay portion of expenses even though subpoena respondents (affiliated with the Indiana Pacers) had substantial wealth, case was of public importance, and respondents had interest in outcome of litigation).

DATED this 5th day of March, 2021.

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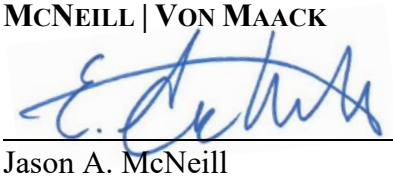

Jason A. McNeill
Eric K. Schnibbe
Attorneys for Subpoenaed Non-Party Matt Davis

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MCNEILL VON MAACK, 175 South Main Street, Suite 1050, Salt Lake City, Utah 84111, and that pursuant to Rule 5(b), Federal Rules of Civil Procedure, a true and correct copy of the foregoing **DAVIS'S RESPONSE TO PLAINTIFFS' SUPPLEMENTAL BRIEF REGARDING FTC'S MOTION TO COMPEL** was delivered to counsel of record this 5th day of March 2021, by filing of the same through the Court's CM/ECF System, and by electronic mail to the following:

COLLOT GUERARD
cguerard@ftc.gov
JOSHUA DOAN
jdoan@ftc.gov
AMANDA GRIER
agrier@ftc.gov
THOMAS HARRIS
tharris1@ftc.gov
ATTORNEYS FOR PLAINTIFF FEDERAL TRADE COMMISSION

ROBERT G. WING
rwing@agutah.gov
THOMAS M. MELTON
tmelton@agutah.gov
JONI OSTLER
joniostler@agutah.gov
KEVIN MCLEAN
kmclean@agutah.gov
ATTORNEYS FOR PLAINTIFF UTAH DIVISION OF CONSUMER PROTECTION

/s/ Camille Coley