

Z. Ryan Pahnke (No. 11146)
RAY QUINNEY & NEBEKER P.C.
36 South State Street, Suite 1400
Salt Lake City, Utah 84111
Telephone: (801) 532-1500
Fax: (801) 532-7543
rpahnke@rqn.com

D. Loren Washburn (No. 10993)
ARMSTRONG TEASDALE, LLP
201 South Main Street, Suite 2400
Salt Lake City, Utah 84111
Telephone: (800) 243-5070
lwashburn@atllp.com

Eric G. Benson (No. 10414)
POTTER HANDY, LLP
2700 Homestead Rd, Suite 60
Park City, UT 84098
Telephone: (858) 375-7385
Fax: (888) 442-5191
ericb@potterhandy.com

*Attorneys for Defendants Zurixx, LLC, Carlson
Development Group, LLC, CJ Seminar Holdings, LLC,
Zurixx Financial, LLC, Christopher A. Cannon,
James M. Carlson, and Jeffrey D. Spangler*

**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.

**DEFENDANTS' MOTION
TO MODIFY PRELIMINARY
INJUNCTION ORDER**

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

Judge Dale Kimball

Magistrate Judge Daphne A. Oberg

RELIEF SOUGHT AND GROUNDS FOR MOTION

Pursuant to Federal Rule of Civil Procedure 54(b), Defendants Zurixx, LLC, Carlson Development Group, LLC, CJ Seminar Holdings, LLC, Zurixx Financial, LLC, Cristopher A. Cannon, James M. Carlson, and Jeffrey D. Spangler (collectively, “Defendants”), by and through undersigned counsel, hereby submit this Motion to Modify Preliminary Injunction Order and respectfully request that this Court relieve Defendants from certain obligations and restrictions imposed upon them by the Stipulated Preliminary Injunction (Dkt. 54) entered by this Court on November 1, 2019 (the “Injunction”) that have been rendered unnecessary and unlawful by the United States Supreme Court in *AMG Cap. Mgmt., LLC v. Federal Trade Commission*, 141 S.Ct. 1341 (2021).

ARGUMENT

The Supreme Court’s recent unanimous decision in *AMG* has substantially impacted the potential monetary relief available to Plaintiffs in this case and warrants a modification of the Injunction as the majority of the provisions in that order are now unnecessary and unlawful. *AMG* makes it clear that the FTC did not follow the law in its use of Section 13(b) of the FTC Act in this case as a basis to seek equitable monetary relief from Defendants; the FTC is not authorized to seek—and a court is not authorized to award—equitable monetary relief such as restitution or disgorgement under Section 13(b). *AMG*, 141 S.Ct. at 1344. While Defendants’ prior Motion for Relief from Stipulated Preliminary Injunction Order was premature because *AMG* had not yet been decided, the matter is now ripe as there has, in fact, been a change in the law, as contemplated by the Court in its order denying that motion. (*See* November 24, 2020 Memorandum Decision and Order (the “November 2020 Order”), Dkt. 205, at p. 14.) Indeed,

the Court stated that it would “*expect* that the parties would engage in discussion as to the proper revision of the stipulated Preliminary Injunction Order in light of the change in the law.” (*Id.* (emphasis added).) Foreseeing that the Supreme Court might find the FTC’s use of 13(b) of the FTC Act illegal, this Court noted in its November 2020 Order, the Injunction “by its very title is not a final order and Rule 54(b) of the Federal Rules of Civil Procedure provides that ‘any order or other decision, however designated, that adjudicates fewer than all the claims . . . does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties’ rights and liabilities.’” (*Id.* at p. 13 (alteration added).)

The FTC filed this action and immediately obtained an *ex parte* Temporary Restraining Order pursuant to now overturned legal precedent allowing an award of equitable monetary relief such as restitution or disgorgement to repay consumers under Section 13(b) of the FTC Act. The Supreme Court in *AMG* has now plainly ruled, however, that “[s]ection 13(b) of the Federal Trade Commission Act authorizes the Commission to obtain, ‘in proper cases,’ a ‘permanent injunction’ in federal court against ‘any person, partnership, or corporation’ that it believes ‘is violating, or is about to violate, any provision of law’ that the Commission enforces,” and therefore Section 13(b) “does not authorize the Commission directly to obtain court-ordered monetary relief,” such as restitution or disgorgement. *AMG*, 141 S.Ct. at 1344, 1347 (citing 87 Stat. 592, 15 U. S. C. § 53(b)). In other words, the FTC was never authorized to seek or to obtain any monetary relief from Defendants under Section 13(b) as it alleged. And the Court’s reliance on legal precedent provided to it by the FTC interpreting the relief available under Section 13(b) in issuing the *ex parte* TRO and the Injunction—both of which contain provisions

designed to preserve assets for a potential award of monetary relief under Section 13(b)—is no longer supported by that legal precedent.

Importantly, the Injunction was based principally on the FTC’s supposed authority to obtain monetary relief under Section 13(b) pursuant to then-existing law, which was Defendants’ entire basis for stipulating to such an order.¹ As examined by the Supreme Court in *AMG*, courts’ previous interpretation of Section 13(b), including in the Tenth Circuit (*see FTC v. LoanPointe, LLC*, 525 F. App’x 696 (10th Cir. 2013) and *FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192 (10th Cir. 2005)), had allowed the FTC to improperly deprive Defendants of the due

¹ While the Injunction also cites to Utah Code §§ 13-11-17(1)(b), 13-11-2(4), 13-15-3(1), and 13-2-5(3) as bases for the Court’s authority, none of these statutes, or any case law applying the statutes, confer power to freeze a defendant’s assets prior to a determination of liability. Further, even if the FTC and/or Utah Division of Consumer Protection could obtain such relief under these statutes, the amount of potential monetary damages is miniscule as compared to the relief available under the prior reading of the FTC’s 13(b) power. *See, e.g.*, Utah Code Ann. § 13-11-17(1) (allowing for recovery of actual damages “on behalf of consumers who complained to the enforcing authority within a reasonable time after it instituted proceedings under this chapter” for knowing or intentional violations of the Utah Consumer Sales Practices Act); Utah Code Ann. § 13-15-6(4)(a) (allowing for administrative fines of up to \$2,500 per violation of Utah’s Business Opportunity Disclosure Act, but only as imposed by the division director, as well as reasonable costs and investigative fees). Importantly, the Telemarketing Sales Rule (“TSR”) is not referenced as a basis for the Injunction, nor had it even been pled by the FTC at that point in the case in 2019. Further, the potential damages under the TSR are likewise minimal compared to the FTC’s potential recovery under the former reading of Section 13(b) as such damages must be directly tied to individual consumer loss and are limited to three years prior to the FTC’s assertion of its TSR claims in May 2020. *See F.T.C. v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1280 (M.D. Fla. 2012), *aff’d sub nom. F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323 (11th Cir. 2013) (“Concerned solely with the plaintiff’s injury, Section 19(b) confers no authority to award monetary relief that exceeds redress to consumers.”); 15 U.S.C. § 57b(d) (“No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates...”). To date, the FTC has provided no evidence whatsoever of injury to specific consumers under the TSR that could form the basis for maintaining an asset freeze before a finding of liability and consumer loss. Also, any attempt by the FTC to now move for a new preliminary injunction to freeze and preserve Defendants’ assets based on alleged violations of the TSR back in 2019 would be futile.

process requirements of Sections 5 and 19 of the FTC Act.² Namely, Defendants, prior to being deprived of monetary rights and the concomitant imposition of a receiver, were not provided with: i) notice that their conduct could be construed as violating the FTC Act;³ ii) an opportunity to have their conduct considered by an administrative law judge; iii) the benefit of the “reasonable man” standard set forth in the Act; and iv) an opportunity to appeal to a district court if these processes and rights were not respected. *Id.* at 1349. Given the Supreme Court’s unanimous decision in *AMG*, and the effects it has on the FTC’s ability to pursue monetary relief under Section 13(b), the Court’s basis for entering the monetary and asset preservation aspects of the Injunction is now inconsistent with binding law. Indeed, other courts across the country are recognizing *AMG*’s significant and immediate impact in pending cases involving Section 13(b). *See, e.g., Federal Trade Commission v. VPL Medical, Inc., et al.*, Case No. 5:18-cv-02104-DMG-PLA (9th Cir., April 28, 2021) (vacating preliminary injunction entered to “preserve assets pending a final judgment that could include equitable monetary relief” pursuant to Section 13(b) based on *AMG* decision) (copy of Order attached hereto as Exhibit A).

Because there is no longer potential for Defendants to be subject to any equitable monetary relief in this Court under Section 13(b), there is no longer any basis for freezing or preserving any of Defendants’ assets, nor is there a need to utilize a receiver to manage or preserve those funds. Defendants, of course, recognize that *AMG* did not strike down the FTC’s

² *See AMG* at 1349 (“Nor is it likely that Congress, without mentioning the matter, would have granted the Commission authority so readily to circumvent its traditional §5 administrative proceedings.”).

³ “Congress in §5(l) and §19 gave district courts the authority to impose limited monetary penalties and to award monetary relief in cases where the Commission has *issued cease and desist orders, i.e.*, where the Commission has engaged in administrative proceedings.” *Id.* at 1348-49 (emphasis in original).

ability to obtain a “prospective, not retroactive” preliminary injunction under Section 13(b). *AMG* at 1348. Accordingly, Defendants request that the Court modify the Injunction by striking all provisions of the Injunction related to the freezing and preservation of Defendants’ assets and the appointment or use of a receiver, including, Sections: V, VI, VII, VIII, IX, X, XI, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, and XXIII.

CONCLUSION

Based on the foregoing, Defendants respectfully request that this Court modify the Preliminary Injunction in this case to eliminate those provisions related to the freezing of Defendants’ assets and the appointment or use of a receiver. Defendants further request that their assets be released immediately and that the Receiver be removed in this case.

DATED this 12th day of May, 2021.

/s/ Z. Ryan Pahnke _____

Z. Ryan Pahnke
RAY QUINNEY & NEBEKER P.C.

Eric G. Benson
POTTER HANDY, LLP

D. Loren Washburn
ARMSTRONG TEASDALE, LLP

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of May, 2021, I caused a true and correct copy of the foregoing **DEFENDANTS' MOTION TO MODIFY PRELIMINARY INJUNCTION ORDER** to be filed electronically with the Court, which provides notice of the electronic filing to counsel of record in this matter.

/s/ Z. Ryan Pahnke _____

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EXHIBIT A

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 28 2021

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

<p>FEDERAL TRADE COMMISSION, Plaintiff-Appellee, ROBB EVANS & ASSOCIATES LLC, Temporary Receiver, Receiver-Appellee, v. VPL MEDICAL, INC., Intervenor-Appellant, JASON CARDIFF, <i>et al.</i>, Defendant-Appellant, and EUNJUNG CARDIFF, <i>et al.</i>, Defendants, JACQUES POUJADE, Objector.</p>
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No. 20-55858

D.C. No. 5:18-cv-02104-DMG-PLA

ORDER

Appeal from the United States District Court
for the Central District of California
Dolly M. Gee, District Judge, Presiding

Argued and Submitted March 2, 2021
Submission Vacated March 4, 2021
Resubmitted April 28, 2021
Pasadena, California

Before: SILER,* HURWITZ, and COLLINS, Circuit Judges.

Submission of this case was vacated on March 4, 2021. This case is resubmitted for decision effective as of the date of this order.

As the FTC states in its brief, the district court’s July 7, 2020 preliminary injunction order was entered “to preserve assets pending a final judgment that could include equitable monetary relief” in this action under § 13(b) of the FTC Act, 15 U.S.C. § 53(b). In *AMG Capital Management, LLC v. Federal Trade Commission*, 593 U.S. ___, 2021 WL 1566607 (Apr. 22, 2021), the Supreme Court unanimously held “that §13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief.” *Id.* at *8. Accordingly, the July 7, 2020 preliminary injunction is VACATED, and the case is REMANDED to the district court for further proceedings consistent with the Supreme Court’s decision in *AMG Capital Management*.

Each side shall bear its own costs.

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.