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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.

**RELIEF DEFENDANT STEPHENIE J.
SPANGLER'S MOTION FOR SUMMARY
JUDGMENT**

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 56, Relief Defendant Stephenie J. Spangler, by and through undersigned counsel, hereby moves this Court for an order of summary judgment: (1) holding that Plaintiffs the Federal Trade Commission ("FTC") and Utah Division of Consumer Protection ("UDCP") are not entitled to an order from this Court requiring her to disgorge (allegedly) ill-gotten funds, and (2) dismissing her as a relief defendant.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiffs have alleged that “Relief Defendant, Stephenie J. Spangler,” “has received . . . funds or other assets from Defendants that are traceable to funds obtained from Defendants’ customers through the deceptive and unlawful acts or practices described herein.” (Second Amended Complaint ¶ 203, (“SAC”), ECF No. 219 at 51.)
2. Plaintiffs have alleged that Ms. Spangler “will be unjustly enriched if she is not required to disgorge the funds or the value of the benefit” she allegedly received from Defendants. (SAC ¶ 204, ECF No. 219 at 51.)
3. Plaintiffs have alleged that “Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court,” “in the exercise of its equitable jurisdiction,” to “award ancillary relief, including . . . the disgorgement of ill-gotten monies” (SAC ¶ 207, ECF No. 219 at 52.)
4. Plaintiffs have alleged that “Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants’ violations of the CRFA, including . . . the disgorgement of ill-gotten monies” (SAC ¶ 208, ECF No. 219 at 52.)
5. Plaintiffs seek “an order requiring” Ms. Spangler “to disgorge all funds and assets, or the value of the benefit received from the funds and assets, which are traceable to Defendants’ deceptive and unlawful acts or practices” (SAC, ECF No. 219 at 54.)

LEGAL STANDARD

Under Federal Rule of Civil Procedure 56, a court shall grant summary judgment where “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). “[S]ummary judgment is proper if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Patel v. Hall*, 849 F.3d 970, 978 (10th Cir. 2017).

ARGUMENT

In their Second Amended Complaint, Plaintiffs rely on two statutes as the basis for this Court’s authority to order disgorgement of allegedly ill-gotten monies from Ms. Spangler—Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 19 of the FTC Act, 15 U.S.C. § 57b. As laid out below, neither section permits Plaintiffs to seek (or the Court to award) an order of disgorgement against a relief defendant like Ms. Spangler. Ms. Spangler therefore respectfully asks the Court to grant this motion and enter summary judgment in her favor.

I. Plaintiffs Cannot Seek an Order of Disgorgement Against Ms. Spangler Under Section 13(b) of the FTC Act.

In the recent decision of *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021), the Supreme Court gave a historical overview of the FTC’s abuse of its authority under Section 13(b). The Supreme Court noted that “[b]eginning in the late 1970s, the [FTC] began to use § 13(b), and in particular the words ‘permanent injunction,’ to obtain court orders for redress of various kinds in consumer protection cases,” including orders of “restitution and other forms of equitable monetary relief . . .” *Id.* at 1346. “Similarly, in the late 1990s the

[FTC] began to use § 13(b)'s 'permanent injunction' authority in antitrust cases to seek monetary awards, such as restitution and disgorgement" *Id.* at 1346–47. Thus, for decades prior to the Supreme Court's decision in *AMG Capital*, the FTC used "§ 13(b) to win equitable monetary relief directly in court with great frequency." *Id.* at 1347.

The Supreme Court granted certiorari in *AMG Capital* to "answer" a "purely legal question: Did Congress, by enacting § 13(b)'s words, 'permanent injunction,' grant the Commission authority to obtain monetary relief directly from courts" *Id.* The text of Section 13 convinced the Supreme Court that the answer is "no." Namely, the Supreme Court found that the language of Section 13 "refers only to injunctions," and that "[a]n 'injunction' is not the same as an award of equitable monetary relief." *Id.* at 1347.

In addition to the text of Section 13(b), the Supreme Court also considered the structure of the FTC Act as a whole. For example, Section 19 of the FTC Act, which was passed after Section 13, authorizes "*conditioned and limited* monetary relief." *See id.* at 1349. The Court found that it was "highly unlikely" that Congress would have enacted Section 19 had Section 13(b) "already implicitly allowed the Commission to obtain that same monetary relief and more without satisfying those conditions and limitations." *See id.* at 1349. Thus, the Supreme Court stressed that Section 13 should be "read . . . to mean what it says"—that Section 13 authorizes injunctive but not monetary relief. *Id.*

AMG Management makes clear that Section 13(b) of the Act does not authorize "the Commission to seek," nor "a court to award, equitable monetary relief such as . . . disgorgement." *Id.* at 1344. Thus, here, Plaintiffs cannot seek an order of disgorgement against Ms. Spangler on the basis of Section 13(b).

II. Plaintiffs Cannot Seek an Order of Disgorgement Against Ms. Spangler Under Section 19 of the FTC Act

Plaintiffs’ efforts to seek disgorgement against Ms. Spangler under Section 19 of the Act are similarly unavailing. In contrast to Section 13(b), Section 19 allows for monetary relief in certain situations. Namely, it authorizes a court to “grant such relief as the court finds necessary to *redress* injury to consumers” 15 U.S.C. § 57b(b) (emphasis added). It does not, however, allow for monetary relief designed to punish or deter wrongful behavior. *See id.* (“[N]othing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.”).

a. The Purpose of Disgorgement Is to Deter Wrongful Conduct, Not Redress Injury to Consumers

In contrast to restitution, which aims to compensate victims of wrongful acts, disgorgement aims to wrest “ill-gotten gains from the hands of a wrongdoer.” *Osborn v. Griffin*, 865 F.3d 417, 461 (6th Cir. 2017) (citation omitted); *S.E.C. v. Huffman*, 996 F.2d 800, 802 (5th Cir. 1993). “It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs.” *Id.* (citation omitted). “Disgorgement does *not seek to compensate the victims* of the wrongful acts, as restitution does.” *Id.* (emphasis added) (citation omitted); *see also Fed. Trade Comm’n v. AMG Servs., Inc.*, 2017 WL 1704411, at *11 (D. Nev. May 1, 2017) (“The purpose of disgorgement is *not to redress consumer injuries* but to deprive wrongdoers of ill-gotten gains.”) (emphasis added)). Rather, the purpose of disgorgement is to deter wrongful conduct. *C.f. S.E.C. v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1096 (9th Cir. 2010) (“Disgorgement is designed to deprive a wrongdoer of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable.”); *F.T.C. v. Bronson Partners, LLC*, 654 F.3d

359, 373 (2d Cir. 2011) (“[T]he primary purpose of disgorgement orders is to deter violations of the laws by depriving violators of their ill-gotten gains.” (internal quotation marks omitted)).

Section 19 of the FTC Act, however, does not allow for monetary relief for deterrence. The plain language of Section 19 states that this Court has jurisdiction to grant relief for rules violations necessary “to redress injury to consumers,” not to deter future violations of the law. *See* 15 U.S.C. § 57b. Indeed, Section 19 expressly prohibits exemplary or punitive damages which, like disgorgement, have the express purpose of deterring “the wrongdoer and others from the commission of similar wrongs.” *See Bridges v. Phillips Petroleum Co.*, 733 F.2d 1153, 1156 (5th Cir. 1984). Because Section 19 only allows for relief to redress consumer injury, an award of disgorgement, the purpose of which is to “deter violations of the laws by depriving violators of their ill-gotten gains,” is not available under the section. *See* 15 U.S.C. § 57b; *Osborn*, 865 F.3d at 417; *Bronson Partners, LLC*, 654 F.3d at 373. Thus, the FTC cannot seek and the Court cannot enter an order of disgorgement from Ms. Spangler under Section 19.

b. Historically, Courts Have Relied on Section 13(b), Rather Than 19, to Order Disgorgement from Relief Defendants

Both courts and the FTC have historically relied on Section 13(b)—rather than Section 19—as providing the authority to order disgorgement from relief defendants. “The legal principle of a Relief Defendant has its genesis in common law and has been fully developed in the SEC context.” *F.T.C. v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1273 (S.D. Fla. 2007).

“In *SEC v. Cavanagh* . . . the Second Circuit held that federal courts may order equitable relief against a ‘nominal’ or ‘relief’ defendant, an individual who is not accused of wrongdoing, where that person has ‘(1) received ill-gotten funds; and (2) does not have a legitimate claim to those

funds.” *Id.* (quoting *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir.1998) (in turn citing *SEC v. Colello*, 139 F.3d 674, 6747 (9th Cir. 1988)). “This rationale [was] transplanted into the FTC arena by the Fourth Circuit in *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191 (4th Cir.2002).” *Id.*

Prior to *AMG Capital*, “district courts” “extended the reasoning of *Cavanagh* and *Kimberlynn Creek Ranch*, permitting the naming of relief defendants in actions under the FTC Act even though the relief defendants were not alleged to have violated the FTC Act.” *F.T.C. v. Bronson Partners, LLC*, 2005 WL 1366459, at *1 (D. Conn. June 8, 2005). When courts did identify the statutory basis of this authority, they most commonly relied on Section 13(b). *See F.T.C. v. Direct Mktg. Concepts, Inc.*, 569 F. Supp. 2d 285, 311 (D. Mass. 2008) (“Based on § 13(b)’s grant of equitable powers over ‘innocent persons,’ courts have extended and applied the practice of disgorgement from relief defendants to the FTC context.”); *see also F.T.C. v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 137 (D. Conn. 2008) (“Under section 13(b) of the Act, I have equitable powers over ‘innocent persons’ in order to accomplish such relief as repayment, restitution, rescission or disgorgement of any unjust enrichment.”); *see also F.T.C. v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 464 (D. Md. 2004) (“Beyond this, the Court agrees with the FTC that there is ample authority for naming Ms. Pukke as a Relief Defendant. Section 13(b) of the Act invests the Court with equitable powers over “innocent persons” in order to accomplish such relief as repayment, restitution, rescission or disgorgement of any unjust enrichment.”)

The FTC has also previously relied on Section 13(b) to justify seeking disgorgement from relief defendants. For example, in an October 23, 2013 reply in support of a motion to

strike a relief defendant's jury demand, the FTC argued: "To the extent that the FTC is seeking disgorgement of unjust enrichment, it does so in reliance on the Court's equitable powers."

FEDERAL TRADE COMMISSION, Plaintiff, v. IAB MARKETING ASSOCIATES, LP et al., Defendants, Tressa K. Wood and Avis S. Wood, Relief Defendants., 2013 WL 11081751 (S.D. Fla.) (quoting *Ameridebt*, 343 F. Supp. 2d at 464).

Similarly, in a May 19, 2005 reply in support of its motion to amend, the FTC argued "Defendants do not challenge the legal premise of *Ameridebt*, that *Section 13(b)* of the FTC Act invests the Court with equitable powers over 'innocent persons,' who nevertheless may be named as relief defendants, in order to accomplish such relief as repayment, restitution, rescission or disgorgement of any unjust enrichment." FEDERAL TRADE COMMISSION, Plaintiff, v. BRONSON PARTNERS, LLC, d/b/a New England Diet Center, and Bronson Day Spa, and Martin Howard, Defendants., 2005 WL 4113378 (D. Conn.) (emphasis added).

These authorities demonstrate that the FTC has historically relied on Section 13(b) to argue that courts have the authority to order disgorgement from relief defendants, not Section 19. This further supports that the FTC cannot seek disgorgement under Section 19.

III. Ms. Spangler Should Be Dismissed from this Case

As demonstrated above, Plaintiffs cannot seek (and this Court cannot enter) "an order requiring Relief Defendant to disgorge all funds and assets" under either Section 13(b) or Section 19. And since disgorgement is the only form of relief Plaintiffs seek from Ms. Spangler, this Court should dismiss her from this case.

CONCLUSION

For too long courts allowed the FTC to overstep the bounds of the authority granted to it by Congress. The Supreme Court in *AMG Capital* finally put a stop to that by looking to the text of the FTC Act and holding that the FTC could not seek monetary relief under Section 13(b). Similarly, here, the text of Section 19 reveals that an award for disgorgement “is not the same” as one for consumer redress. *C.f. AMG Capital*, 141 S. Ct. 1347. Thus, Ms. Spangler respectfully requests this Court to enter an order (1) holding that Plaintiffs are not entitled to an order from this Court requiring her to disgorge (allegedly) ill-gotten funds, and (2) dismissing her as a relief defendant from this case.

DATED: May 28, 2021.

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/s/ Brennan H. Moss
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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2021, a true and correct copy of the foregoing was served via the Court's electronic notification system to all parties registered to receive notice in this action.

/s/ Shelby Irvin
Shelby Irvin