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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.	**DEFENDANTS' POSITION WITH RESPECT TO SUPREME COURT DECISION IN *AMG CAPITAL MANAGEMENT, LLC*** Case No.: 2:19-cv-00713-DAK-DAO Judge Dale Kimball Magistrate Judge Daphne A. Oberg

Pursuant to the Court's May 6, 2021 Order directing the parties to submit briefing discussing how the *AMG Capital Management, LLC, et al. v. Federal Trade Commission*, 141 S.Ct. 1341 (2021) ruling impacts and applies to this case (Dkt. 241), Defendants Zurixx, LLC, Brand Management Holdings, LLC, CAC Investment Ventures, LLC, CAC Investment Ventures, LLC (Puerto Rico), 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), Christopher A. Cannon, James M. Carlson, and Jeffrey D. Spangler (collectively, "Defendants"), by and through undersigned counsel, hereby submit this brief.

DISCUSSION

I. *AMG* Has Drastically Changed the Landscape of FTC Act Cases and the Basis for the Court's Previous Orders in this Case.

As discussed in Defendants' Motion to Modify Preliminary Injunction Order (Dkt. 244) and Motion for Partial Summary Judgment as to Relief under Section 13(b) and BODA (Dkt. 245), the United States Supreme Court's recent, unanimous decision in *AMG* has substantially impacted this case.

The FTC filed this action pursuant to powers it had alleged to have under Section 13(b) of the FTC Act.[1] On April 22, 2021, however, the Supreme Court rejected the FTC's longstanding position that it is entitled to seek monetary relief under Section 13(b) of the FTC

[1] (*See* Plaintiffs' Motion for Ex Parte Temporary Restraining Order with Limited Asset Freeze and Other Equitable Relief and Order to Show Cause Why a Preliminary Injunction Should Not Issue and Supporting Memorandum, Dkt. 4, at p. 41 ("Section 13(b) of the FTC Act, 15 U.S.C. §53(b), gives the Court authority to issue permanent injunctive relief to enjoin practices that violate any law enforced by the FTC and to grant 'any ancillary relief necessary to accomplish complete justice.' This ancillary relief may encompass 'the full range of equitable remedies,' including a TRO, a preliminary injunction, an asset freeze, and any other measures that the Court deems necessary to protect consumers and preserve the possibility for complete and permanent relief." (internal citations omitted)).)

Act. *AMG*, 141 S.Ct. at 1347. The Supreme Court stated 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. *Id.* at 1344, 1347 (citing 87 Stat. 592, 15 U. S. C. § 53(b)). The Court noted that the previous interpretation of the FTC's Section 13(b) powers had allowed the FTC to improperly circumvent the administrative process and notice requirements of Sections 5 and 19 of the FTC Act.[2] Because the FTC did not follow the required administrative processes in this case, it is not authorized to seek to recover monetary relief from Defendants for alleged violations of the FTC Act.[3]

Accordingly, Defendants have moved this Court to modify the Preliminary Injunction

[2] *See AMG* at 1348-49 ("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…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." (emphasis in original)).

[3] Had the FTC followed the process of issuing cease and desist orders and holding administrative proceedings as mandated in §5(*l*) and §19, it is highly unlikely that there would have been damages of any nature. The alleged damages in this case, if any, were of Plaintiffs' making. Defendants belonged to a self-regulatory program affiliated with the Better Business Bureau which, for over five years, met annually (and often semi-annually) with the FTC to urge it to provide rules, guidance, and/or notice of any potential business practice issues. Instead of following statutorily-mandated processes, the FTC chose to ignore its duties to Defendants, similarly-situated companies, and the public. Had Defendants received notice from the FTC that their business practices required modification, Defendants would have modified such practices. The UDCP similarly failed to follow the notice, guidance, and due process provisions set out by the Utah Legislature in the statutes relevant to this case. The UDCP had the opportunity to provide notice and guidance to Defendants each year when Defendants submitted annual telesales registrations. The UDCP also had the opportunity to provide notice and guidance to Defendants when they responded, in written detail, to occasional complaints filed with the UDCP, particularly as Defendants regularly requested that the UDCP apprise them if there were any further actions Defendants should be taking to comply with Utah statutes. The UDCP failed to provide such notice or guidance.

Order in this case by striking the provisions related to the freezing and preservation of Defendants' assets and the appointment or further use of a receiver – both portions of the Preliminary Injunction that exist in furtherance of Plaintiffs' efforts to preserve their ability to obtain monetary relief under Section 13(b) at the outset of this case. Defendants also simultaneously moved for partial summary judgment regarding the FTC's inability to obtain monetary relief from Defendants under Section 13(b).

As discussed in Defendants' Motion to Modify Preliminary Injunction Order, Plaintiffs in this case pressured Defendants into stipulating to certain terms of the Preliminary Injunction through reliance on a longstanding interpretation of Section 13(b) by the FTC and the courts, including the Tenth Circuit, that the Supreme Court has now ruled to be improper and unsupported by the text of the FTC Act. The Supreme Court's decision in *AMG* represents not only a clear declaration of what Section 13(b) of the FTC Act does—and does not—permit, but a repudiation of a decades-long strategy by the FTC to obtain extreme monetary and injunctive relief without due process. As Justice Breyer (who authored the *AMG* decision on behalf of the unanimous Court) stated during oral argument in the *AMG* case:

> History matters. I think Justice Brandeis, when he started [working on the FTC Act], was faced with a business community that was very suspicious of the FTC's power and thought it would be abused and a progressive community that thought it's absolutely necessary to bring bad business practices under control. So they compromised.
>
> The compromise was you've got to do what the FTC says, but before it tells you to do something, it will find that what you're doing now is wrong. It will find that. It will be a cease-and-desist order, later expanded under Moss-Magnuson, I think, to include violation of a rule.
>
> So Section 5, cease-and-desist order or violation of a rule, ha, damage of some kind. Nineteen, the same thing. And now we have right in the middle 13, no protection like that whatsoever. Do not worry, says the FTC, we will only use it in

> exceptional cases.
>
> Ha! In 2012, they repeal that. And now, 10 years later, after this has been in effect for a few years, I read that 100 cases under this provision are in the courts, compared with 10 or 12 under the regular cases.
>
> * * *
>
> … if we interpret it your way, … we say your fears, business community, were absolutely right. It is now up to the FTC. Before you know the thing is wrong, they hit you with bad damages.

Tr. of Oral Argument at 37-39, *AMG*, 141 S.Ct. 1341 (No. 19-508). As Justice Breyer rightly stated, the FTC's interpretation of Section 13(b), when enforced by the courts, allowed the FTC to act as judge and jury in numerous cases, without affording the statutory prior notice and due process protections to defendants.

In fact, the FTC Bureau of Consumer Protection's former Assistant Director for Litigation publicly admitted that the text of Section 13(b) does not authorize the tactics employed by the FTC: "Neither the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief." David M. FitzGerald, "The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act," FTC 90th Anniversary Symposium (Sept. 23, 2004), *available at* https://bit.ly/3bUyoYU (link shortened from original). At oral argument in *AMG*, Justice Alito noted:

> Mr. FitzGerald says that when 13(b) was enacted, nobody on the Commission imagined that it would become an important part of its --the Commission's consumer protection program.
>
> But the Commission decided that Section 19 was too time-consuming, so it wanted -- it looked for a workaround ….

Tr. of Oral Argument at 41-42, *AMG*, 141 S.Ct. 1341 (No. 19-508). This is not merely an instance of the FTC misinterpreting the law, but implementing a deliberate strategy to ignore the

law's text, limitations, and protections for defendants.

That same strategy has been employed in this case—until the Supreme Court recently handed down the *AMG* decision. Had the FTC and courts applied a correct interpretation of Section 13(b) as enunciated by the Supreme Court in *AMG*, Defendants never would have stipulated to numerous terms of the Preliminary Injunction, which must now be modified accordingly. (*See generally* Dkt. 244.)

II. Plaintiffs' Remaining Available Monetary Relief under the Telemarketing Sales Rule and Other Statutory Provisions is Limited and Does Not Justify the Prior Section 13(b) Asset and Receivership Provisions of the Preliminary Injunction.

Because the FTC is not authorized to obtain monetary relief under Section 13(b), its potential monetary damages in this case will be limited to damages they can illustrate were suffered because of specific violations of the Telemarketing Sales Rule ("TSR")—*if* they can prove any violations from which damages arose. Importantly, the TSR was not referenced as a basis for the Preliminary Injunction, nor had it even been pled by the FTC at the time the FTC sought, the parties stipulated to, and the Court entered the Preliminary Injunction. Further, the potential damages under the TSR are 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. *See F.T.C. v. Washington Data Res.*, 856 F. Supp. 2d 1247, 1279-81 (M.D. Fla. 2012), *aff'd sub nom. F.T.C. v. Washington Data Res., Inc.*, 704 F.3d 1323 (11th Cir. 2013) (comparing damages under Section 13(b) and 19 and noting that under (the prior reading of) 13(b), "[r]estitution is an equitable remedy designed to cure unjust enrichment of the defendant… Specifically, restitution and disgorgement deprive the defendant of his ill-gotten gains; these equitable remedies do not take into consideration the plaintiff's losses" whereas

Section 19(b), "[c]oncerned solely with the plaintiff's injury…confers no authority to award monetary relief that exceeds redress to consumers" and "explicitly prohibit[s] exemplary and punitive damages."); *see also F.T.C. v. Figgie Int'l, Inc.*, 994 F.2d 595, 607 (9th Cir. 1993) (finding that appropriate measure of redress under Section 19 was to refund "those buyers 'who can make a valid claim for such redress,'" but to allow customers who were happy with their purchase to instead keep the product, and finding that district court order providing that any unrefunded money be distributed to nonprofits exceeded court's authority to award redress as Section 19 expressly prohibits exemplary or punitive damages). In addition to individual proof of harm, damages under Section 19 are statutorily limited to three years prior to the FTC's assertion of its TSR claims in May 2020. *See* 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…"). Importantly, Defendants are not aware of any case in which the FTC has obtained an asset freeze and appointment of a receiver in a case proceeding solely under Section 19—as this case must now proceed.

To date, the FTC has provided no evidence whatsoever—to the Court or to the Defendants in discovery—of injury to specific consumers under the TSR that could form the basis for freezing assets before a finding of liability and consumer loss, even assuming such remedy is available for a Section 19 violation. While the FTC claimed in its Memorandum of Law in Opposition to Defendants' Motion to Stay Proceedings Pending Supreme Court Review that "Zurixx sold more than $136 million in coaching sessions and other real estate products via telemarketing," this number represents all telemarketing sales "between October 2012 and October 2019." (*See* Dkt. 182 at p. 6; Dkt. 182-1 at ¶ 3). Accordingly, even if this number was

accurate, it grossly inflates the amount of potential damages that the FTC could recover in this case, as it encompasses the entirety of Defendants' telemarketing sales over a 7-year period, *and* includes all sales regardless of whether there was a rule violation or whether a consumer was damaged by such rule violation. Given the 3-year lookback limitation under Section 19 and the lack of evidence of individual damage to specific consumers, the FTC's inflated—and unfounded—damages claim cannot be the basis for continuing to justify the asset freeze and preservation provisions of the Preliminary Injunction and appointment of an expensive and burdensome receivership.

In fact, based on Defendants' investigation, the vast majority of tele-sales clients that were harmed in the three years prior to May 2020 were actually damaged by Plaintiffs when, through the Receiver, Plaintiffs interrupted the delivery of the services consumers had purchased from Zurixx. The Court need look no further than the recent Motion to Intervene filed by Zurixx customers asking the Court to consider their *support* for Zurixx and the harm inflicted on them, not through any allegedly deceptive or misleading marketing practices by Defendants, but by Plaintiffs and the Receiver curtailing their access to the Zurixx services that they paid for, value, and are entitled to receive. (*See* Dkt. 242.)

To the extent that Plaintiffs can establish any specific instances of individual harm to any consumers, the correct measure of potential damages under the TSR is limited to the losses of those specific, individual consumers from May 2017 through October 2019, when the company was shut down. Since the FTC has not provided the Court or Defendants with evidence of how many TSR violations allegedly occurred, when the alleged violations occurred, and an accounting of the amount of damage for each violation, the Court has no factual basis in the

record before it to conclude that there will be any damages from the alleged TSR violations. Further, given the substantial factual disputes inherent in allegations of TSR violations and proving individualized damages therefrom, any attempt by the FTC to move for a new asset freeze based on alleged violations of the TSR would be futile.[4]

The remaining claims alleged in the Second Amended Complaint allow for similarly limited damages. *See*, *e.g.*, 15 U.S.C. § 45b(d)(2)(B) (similar to TSR violations, violations of the Consumer Review Fairness Act must be pursued through either Section 13(b) or Section 19 and their attendant damage provisions); 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. § 13-14-6(4)(a) (allowing only for *administrative* fines of up to $2,500 per violation of Utah's Business Opportunity Disclosure Act ("BODA"), plus reasonable costs and fees); Utah Code Ann. § 13-26-8(1) (providing that the director of the Division of Consumer Protection "may issue a cease and desist order and impose an *administrative* fine of up to $2,500 for each violation of this chapter," and that violators are subject to "a civil penalty in a court of competent jurisdiction not exceeding $2,500 for each unlawful transaction" in violation of the Utah Telephone Fraud Prevention Act (emphasis added)). None of the allegations leveled at Defendants would allow Plaintiffs to

[4] It should also be noted that the Receiver, according to Receiver's reports to this Court, currently holds over $7 million in cash from Defendant Zurixx LLC's bank accounts. Given the TSR's 3-year statute of limitations and the lack of evidence of individual TSR claims, this $7 million is far in excess of any damages Plaintiffs may hope to recover at trial. The unlikelihood of Plaintiffs proving individual TSR claims is underscored by the fact that Plaintiffs' prevention of consumers from accessing their purchased services by shutting down Defendants' fulfillment in this case has already caused those consumers to file over $17 million in chargebacks, which have been honored by Defendants' merchant banks. Many potential TSR claimants, therefore, have been offset as they have already been paid back through these chargebacks and refunds.

recover anywhere near the amount of monetary damages originally sought in this case under Section 13(b). Further, there is no history of any court imposing the broad pre-trial equitable remedies of an asset freeze and a receivership for the remaining violations alleged in this Complaint, now that the Supreme Court has clarified that the remedies allowed under Section 13 exclude monetary relief. Therefore, because the legal basis for the Preliminary Injunction's provisions related to the freezing and preservation of assets and use of a receiver as preliminary remedies to preserve funds for equitable relief under Section 13(b) has been eliminated by the Supreme Court, and because Plaintiffs have not provided a basis for such extreme pre-trial relief based on their remaining claims, the Court should modify the Preliminary Injunction.

III. Defendants Need Access to their Assets and Documents to Adequately Defend Themselves in this Case.

Defendants vigorously dispute the substantive allegations in this case, especially where Plaintiffs are now required to prove individual harm to consumers under the TSR and various other statutes—something they have yet to disclose, let alone prove—before they can obtain a civil judgment. Only after obtaining a judgment would it be appropriate to obtain control over any of Defendants' assets to satisfy that judgment. Until then, Defendants are entitled to have access to funds to, among other things, enable them to pay counsel to mount their defense. As the funds in this case have not been proven to be proceeds from prohibited activity, and the Supreme Court has made clear in *AMG* that the FTC does not have the power under 13(b) to obtain the monetary relief that was hanging over Defendants' heads and induced them to stipulate to the Preliminary Injunction,[5] it is premature for a government entity to freeze their

[5] Plaintiffs and the Receiver also led Defendants to believe at the beginning of this case that the Receiver would continue to carry on customer service, coaching, online resources, and fulfillment services after the

"innocent" property and prevent them from paying reasonable fees for the assistance of counsel. *See*, *e.g.*, *Luis v. United States*, 136 S.Ct. 1083, 1096 (2016) (recognizing the impropriety of freezing a criminal defendant's assets that have not been tied to criminal activity and highlighting the importance of a defendant's access to the assistance of counsel).

Further, since the Receiver has seized and relocated all of Defendants' documents and electronic data, Defendants have been hindered in their ability to locate important evidence. At this point in the case the immediate access and evidence preservation provisions of the Preliminary Injunction have served their purpose. Plaintiffs, with the assistance of the Receiver, have obtained all of Defendants data. (*See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Stay Proceedings Pending Supreme Court Review, Dkt No. 182 at p. 7 ("the FTC has downloaded 19.3 TB of defendants' data from their servers, imaged six laptops, and copied documents during the Immediate Access and in a subsequent trip to Utah").) There is no ongoing reason to employ the services of a receiver to control and filter access to Defendants' own information—it has already been preserved.

CONCLUSION

The impact of the Supreme Court's recent unanimous decision in *AMG* on this case cannot be overstated. The FTC can no longer tout the unfettered power that courts once bestowed upon it under Section 13(b) which led to the TRO and Preliminary Injunction in this case. Accordingly, Plaintiffs should be required to prove their case before the Court orders any

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Preliminary Injunction as such could be done at a nominal cost. This was crucially important to Defendants as it would have protected their consumers against the harm which they ultimately felt when Plaintiffs and the Receiver discontinued these services, thus depriving consumers of the value they had paid for, and essentially creating upset customers who were otherwise satisfied with the Defendants' products. (*See*, *e.g.*, Proposed Intervenors' Rule 24 Motion to Intervene, Dkt. 242.)

form of monetary relief or restraint, preliminary or otherwise. This Court should strike the provisions of the Preliminary Injunction freezing and preserving Defendants' assets and imposing a receiver. The Court should also enter partial summary judgment as requested by Defendants holding that the FTC is not entitled to monetary relief under Section 13(b).

DATED this 28th day of May, 2021.

/s/ Z. Ryan Pahnke

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CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of May, 2021, I caused a true and correct copy of the foregoing **DEFENDANTS' POSITION WITH RESPECT TO SUPREME COURT DECISION IN *AMG CAPITAL MANAGEMENT, LLC*** 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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