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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.

**UTAH DIVISION OF CONSUMER
PROTECTION'S OPPOSITION TO
DEFENDANTS' MOTION TO MODIFY
PRELIMINARY INJUNCTION ORDER**

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

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

INTRODUCTION

The Utah Division of Consumer Protection (“the Division”) opposes the Motion to Modify Preliminary Injunction Order ([ECF No. 244](#), “Mot. Mod.”) filed by Defendants (collectively referred to as “Zurixx”). Zurixx argues that, because the Supreme Court recently held in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1342 (2021) that the FTC cannot seek equitable monetary relief under Section 13(b) of the FTC Act, there is no basis for the asset freeze and receivership contained in the Stipulated Preliminary Injunction. Zurixx is wrong. The Division’s state law claims, which have been part of this litigation from the beginning, are sufficient to support the preliminary injunction, asset freeze, and receivership even absent any claims by the FTC. Zurixx’s motion should be denied.

ARGUMENT

I. UTAH’S CONSUMER PROTECTION STATUTES SUPPORT THE APPOINTMENT OF A RECEIVER AND AN ASSET FREEZE.

The Division sued Zurixx under three Utah statutes: the Utah Consumer Sales Practices Act (the “CSPA”) ([Utah Code Ann. § 13-11-1 et seq.](#)), the Business Opportunity Disclosure Act (“BODA”) ([Utah Code Ann. § 13-15-1 et seq.](#)), and the Telephone Fraud Prevention Act (the “TFPA”) ([Utah Code Ann. § 13-26-1 et seq.](#)). See [ECF No. 219](#) at 43-51. The Division’s CSPA and BODA claims have been part of this litigation from its inception (see [ECF No. 1](#) at 30-36), and the TFPA claims relate back to the filing of the original complaint because they arise under the same course of conduct set out in the original complaint. See, e.g., *Sylvia v. Trevino*, 842 F. App’x 175, 178-179 (10th Cir. 2020).¹

¹ Regardless of whether the TFPA claim relates back, it is part of the case now, and therefore supports continuation of the asset freeze and receivership as discussed herein.

As Zurixx acknowledges, the Stipulated Preliminary Injunction expressly states that it is based in part on the Division's state claims. *See* [ECF 54](#) (Stipulated Preliminary Injunction) at 2; Mot. Mod. at 3 n.1.

Zurixx now argues that the Stipulated Preliminary Injunction was really only based on the FTC's Section 13(b) claim, and that none of the Utah statutes or claims provide the Court authority to freeze assets. Mot. Mod. at 3 n.1. That is factually and legally wrong. The Stipulated Preliminary Injunction was always based on the Division's state law claims. *See* [ECF 4](#) at 2, 30, 34-36 (Motion for P.I.) [ECF 54](#) at 3 (Stip. P.I.). The Division's state law claims are sufficient to support a preliminary injunction and asset freeze even absent any claims by the FTC.

Claims for equitable relief justify a preliminary injunction preventing a party from disposing of its assets pending the adjudication of a legal claim. *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 61 S.Ct. 229 (1940). The CSPA specifically grants the Division the authority to seek equitable relief in the form of an injunction. "The enforcing authority may bring an action in a court of competent jurisdiction to . . . enjoin, in accordance with the principles of equity, a supplier who has violated, is violating, or is otherwise likely to violate this chapter." [Utah Code Ann. §13-11-17\(1\)\(b\)](#). The Division sought this relief in its Motion for Temporary Restraining Order and Preliminary Injunction ([ECF No. 4](#) at 2), and in the Complaint which asks for a permanent injunction ([ECF No. 219](#) at 54). A civil injunction is an equitable remedy. *U.S. v. RaPower-3, LLC*, 294 F.Supp.3d 1238, 1241 (D. Utah 2018); *Pugh v. Dozzo-Hughes*, 112 P.3d 1247, 1250 (Utah Ct. App. 2005).

Further, as Zurixx acknowledges, the CSPA gives the Division the authority to recover damages on behalf of those consumers who timely file a complaint with the Division. [Utah Code Ann. § 13-11-17\(1\)\(c\)](#). Some consumers have already filed complaints and the Division expects others to do so. These damage claims sound in equity as any recovery would be used to compensate consumers for their losses.

In addition to equitable relief, the Division's Complaint seeks statutory fines and penalties. *See* [ECF No. 219](#) at 54. Zurixx and the Division disagree about whether this Court can impose fines under BODA or whether those fines must be imposed by the Division Director. But there is no dispute that the CSPA and the TFPA provide for any court of competent jurisdiction to impose fines. *See* [Utah Code Ann. § 13-11-17\(1\)\(d\)](#), [§ 13-26-8\(2\)](#). A Court may impose an asset freeze in cases that seek both legal and equitable relief. *AAAG-California, LLC v. Kisana*, [Civil No. 2:20-cv-00026-HCN](#), 2020 WL 377043, *2 (D. Utah 01/23/2020). This is such a case.

II. UTAH'S LAW GOVERNING RECEIVERS GIVES INDEPENDENT AUTHORITY FOR AN ASSET FREEZE.

An independent basis for the asset freeze is found in [Rule 66 of the Utah Rules of Civil Procedure](#) which governs the appointment of receivers. [Rule 66\(a\)](#) provides: "A court may appoint a receiver . . . in any action in which property is in danger of being lost, removed, damaged or is insufficient to satisfy a judgment, order, or claim." The receiver, acting under the direction of the court, has the power "to seize property." [Utah R. Civ. P. 66\(e\)](#). A court order to freeze assets is an element of a receiver's authority to seize property. *Interlake Co. v. Von Hake*, [697 P.2d 238, 239 \(Utah 1985\)](#) ("A receiver has, under the direction of the court, the power to take and keep possession of property and generally do such acts respecting the property as the

court may authorize.) The language of [Rule 66](#) is clear: it applies to any action. It is not limited to claims for equitable relief.

The remedy provided in [Rule 66](#) is applicable here because [Rule 64 of the Federal Rules of Civil Procedure](#) mandates it. Subsection (a) of [Fed. R. Civ. P. 64](#) is captioned “Remedies Under State Law—In General.” It reads:

At the commencement of and throughout an action, every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment. But a federal statute governs to the extent it applies.

The leading case analyzing [Rule 64](#) is *United States ex rel. Rahman, M.D. v. Oncology Associates, P.C.*, 198 F.3d 489 (4th Cir. 1999). It holds that [Rule 64](#) applies to an asset freeze order under state law. Like Utah, Maryland has a rule allowing asset freeze injunctions. 198 F.3d at 500. Defendants sought to lift the freeze on their assets, arguing the Federal court lacked authority to impose a freeze. The Fourth Circuit disagreed, concluding that [Rule 64](#) “incorporates state procedures authorizing any meaningful interference with property to secure satisfaction, of a judgment, including any state-authorized injunctive relief for freezing assets to aid in satisfying the ultimate judgment in a case.” *Id.* at 501.

Because Utah law provides the receivership remedy in [Rule 66](#), it is available here pursuant to [Fed. R. Civ. P. 64](#). This Court properly froze assets and appointed a receiver, and those provisions should remain in place.

III. THE POTENTIAL FINES UNDER THE DIVISION’S STATE CLAIMS ARE SUFFICIENTLY LARGE TO JUSTIFY THE ASSET FREEZE

The amounts at issue under the Division’s state law claims are sufficiently large to justify the asset freeze and receivership here.

Zurixx argues that the amount the Division seeks in consumer restitution is minuscule by comparison with the amount previously sought under the FTC's Section 13(b) claim. Mot. Mod. at 3 n.1. Zurixx is wrong. The amount of restitution will depend on the number of consumers who lodge complaints.

Furthermore, even if the amount of restitution were small, the available fines and penalties are not. They may total hundreds of millions of dollars. Court ordered fines under the CSPA are set at judicial discretion after weighing several factors. [Utah Code Ann. §13-11-17\(1\) and \(6\)](#). Every misrepresentation is a separate violation of the CSPA. *See Utah Code Ann. § 13-11-4* (a supplier violates CSPA if supplier commits deceptive act or practice in connection with consumer transaction). Zurixx admitted it sold its products to more than 70,000 individuals. *See Answer to Second Amended Complaint*, ¶ 51. Even if the Court were to impose only one fine for each of those purchases, and if it were to limit the amount of each fine to \$2,500 (which is the amount allowed for an administrative fine), Zurixx's total fine exposure under the CSPA would be approximately \$175,000,000.

The Division also has claims under the TFPA, [Utah Code Ann. § 13-26-1](#), et seq. The TFPA authorizes a court of competent jurisdiction to issue a civil penalty of up \$2,500 for each unlawful transaction. Zurixx sold its products by telephone to more than 9,500 consumers. Assuming a fine of \$2,500 per violation, fines under the TFPA could exceed \$15,000,000.

As with restitution claims, the fine amount cannot be known until after the Court hears the case and exercises its discretion. Even if the amount of the fines is a fraction of the statutory amount, it exceeds the value of the frozen assets. Thus, under [Kisana, 2020 WL 377043 *2](#), an

asset freeze is appropriate and necessary here for the Division's claims alone, regardless of the FTC's claims.

CONCLUSION

For the foregoing reasons, the asset freeze and receivership should remain in place pending resolution of this matter.

Respectfully submitted this 4th day of June 2021.

/s/ Robert G. Wing

Signed by filing attorney with permission from

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 4, 2021, a true and correct copy of the foregoing UTAH DIVISION OF CONSUMER PROTECTION'S OPPOSITION TO DEFENDANTS' MOTION TO MODIFY PRELIMINARY INJUNCTION ORDER was served on counsel for all parties via electronic filing with the Court's ECF service.

/s/ Joni Ostler
Joni Ostler