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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.	**PLAINTIFFS' OPPOSITION TO MOTION TO INTERVENE** Case No. 2:19-cv-00713-DAK-DAO District Judge Dale A. Kimball Magistrate Judge Daphne A. Oberg

The Federal Trade Commission ("FTC") and the Utah Division of Consumer Protection (the "Division," and collectively, "Plaintiffs") oppose the intervention motion because (1) Movants lack standing, (2) they fail to explain why Defendants do not adequately represent Movants' interests, and (3) the intervention is untimely and prejudicial.

RELEVANT BACKGROUND

Plaintiffs allege that Zurixx, LLC and related Defendants perpetrated a real estate investing training fraud that bilked more than $530 million from consumers across the nation.

In October 2019, the Court granted an *ex parte* TRO because Plaintiffs demonstrated a likelihood of success on the merits and appointed a monitor over the corporate defendants. ECF 24. In November 2019, the Court entered the parties' Stipulated Preliminary Injunction ("SPI"), which converted the monitor to a Receiver. ECF 54. The SPI directed the Receiver to determine whether Zurixx could operate "legally and profitably" and, if not, to "[s]uspend business operations." *Id.* at 18, § XV.G. The Receiver suspended Zurixx's operations in November 2019, *see* ECF 80 (Receiver's Mot., at 2), and advised the Court in August 2020 that Zurixx could not operate legally and profitably, ECF 176 (Receiver's Status Report), at 3, § I.B.

Movants' motion to intervene comes 19 months after Plaintiffs filed this action and 18 months after the Receiver suspended Zurixx's operations. They seek to file a putative class action complaint, purportedly on behalf of tens of thousands of Zurixx customers, seeking a declaratory judgment and injunctions against Plaintiffs.[1] Although Plaintiffs brought this action in the public interest, the Intervenors contend that Plaintiffs should be enjoined "from taking any

[1] This is not the first such motion filed by Mr. Mitts, counsel for Movants, in an FTC case. Counsel filed a similar motion to intervene to file a complaint asserting nearly identical legal theories for proposed intervenor customers in *FTC v. OTA Franchise Corp.*, 8:20-CV-00287 JVS (KESx) (C.D. Cal.), ECF 231. That case settled prior to resolution of the issue. *Id.*, ECF 267.

acts which would infringe" their so-called "rights to receive the benefits of their contracts with Zurixx," ECF 242-1 (Proposed Compl.), ¶ 54 (Prayer for Relief), notwithstanding that the Receiver suspended Zurixx's operations, *id.* ¶ 37.

DISCUSSION

Movants' attempted intervention is deficient because (1) they lack standing, (2) they fail to demonstrate why Defendants do not adequately represent Movants' interests in this action, and (3) the attempted intervention is untimely and prejudicial.

I. Movants Lack Article III Standing Because the Relief They Seek Would Not Likely Redress Their Alleged Injury.

Movants concede that they must demonstrate Article III standing. ECF 242, at 7. "'[A]n intervenor of right must demonstrate Article III standing when it seeks additional relief beyond that which the plaintiff requests.'" *FTC v. Nudge, LLC*, No. 2:19-cv-00867-DBB-DAO, 2020 WL 6881846, at *3 (D. Utah Nov. 23, 2020) (quoting *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017), and citing *Safe Sts. Alliance v. Hickenlooper*, 859 F.3d 865, 912 (10th Cir. 2017)).[2]

"'Article III standing requires a litigant to show: (1) an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury can likely be redressed by a favorable decision.'" *Nudge*, 2020 WL 6881846, at *3 (citation omitted).

[2] This district evaluated the *Town of Chester* standing requirement as to Rule 24(b) permissive intervention in *United States Dep't of Justice v. Utah Dep't of Com.* No. 2:16-CV-611, 2017 WL 3189868, at *4 (D. Utah July 27, 2017) ("[I]ntervenors must independently satisfy the test for standing if their interests do not align with those of a party with standing."); *id.* at *5 (respondent intervenors "ha[d] Article III standing"). *See also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania,* 140 S. Ct. 2367, 2379 n.6 (2020) ("Under our precedents, at least one party must demonstrate Article III standing for each claim for relief.").

Even assuming Movants could satisfy the first two requirements, they fail to demonstrate that their alleged injury "can likely be redressed by a favorable decision." Movants' brief contains one conclusory sentence asserting that they meet this requirement. ECF No. 242, at 8. "[S]aying it does not make it so." *Shepherd v. Ocwen Loan Servicing, LLC*, No. 1:19-CV-953, 2020 WL 1000078, at *3 (D.N.M. Mar. 2, 2020). The theory of injury and redressability they have pleaded does not withstand scrutiny and defies basic logic.

Movants' alleged injury is "the FTC and [the Division] bringing an action against Zurixx in this Court and seeking relief from this Court which has interfered with Intervenors' receipt of the benefits of their contractual relationships with Zurixx." ECF 242-1 (Proposed Compl.), ¶ 10; *id.* ¶¶ 31-32, 34, 45. They allege they want to access "ongoing training and support" and "online courses and training materials," that were available before Plaintiffs sued Zurixx and the Receiver suspended Zurixx's operations. *Id.* ¶¶ 28-29. Their requested remedy is (1) "seek[ing] from the Court a declaration that Zurixx's students are entitled to continue receiving the benefits of their contracts and relations with Zurixx free from interference by the FTC and [the Division]," *id.* ¶ 41; *id.* ¶ 54 (Prayer for Relief), and (2) an injunction against Plaintiffs prohibiting them from "taking any acts which would infringe upon Intervenors' rights, including, *inter alia*, their rights to receive the benefits of their contracts with Zurixx," *id.* ¶ 54.

The requested declaration and injunction against Plaintiffs, however, will not change Movants' situation one bit because Zurixx's operations ceased 19 months ago, after the Receiver concluded that Zurixx could not operate legally and profitably. *See* ECF 80, at 2; ECF 176, at 3. Movants' ostensible complaints about Plaintiffs are misdirected complaints about the Receiver's actions pursuant to the SPI. What they appear to want is specific performance of their contracts by Zurixx, yet they do not plead a claim against Zurixx or the Receiver (who controls Zurixx

pursuant to the SPI), and they cannot obtain that remedy from Plaintiffs.[3] *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570-71 (1992) ("The short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action."); *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1074-75 (9th Cir. 2010) ("A favorable decision would not redress the injury complained of . . . . Even if the Park Service were to rescind its approval of the landfill project, the [Bureau of Land Management], as the lead agency, would be free to move forward.").

This Court held there was not redressability in a similar case where a claimant sought relief from a federal agency that the agency could not provide as a non-party to the relevant contract. *Fed. Nat'l Mortg. Ass'n v. Takas*, No. 2:17-CV-204-DAK, 2017 WL 3016785, at *4 (D. Utah July 14, 2017). There, the plaintiff company sued Takas for unlawful detainer of real property. *Id.* at *1-2. Takas filed a third-party complaint against the Secretary of the U.S. Department of Housing and Urban Development ("HUD") seeking, in relevant part, "injunctive relief to protect Ms. Takas from foreclosure." *Id.* at *2. The Court held that "Takas's alleged injury [was] not redressable by the present action against HUD" because the foreclosure was pursuant to a mortgage contract HUD "ha[d] no authority to alter." *Id.* at *4; *id.* ("Because HUD has no authority to require the lender to pursue an option that protects [Takas], the court concludes that Ms. Takas has not shown redressability sufficient to demonstrate Article III

[3] Movants' brief, at 8, presupposes that the Court could "set[] aside the injunction or requir[e] the [R]eceiver to provide access," but their Proposed Complaint does not request this relief.

standing in her claims against HUD."). Similarly, here, Plaintiffs are not parties to the Zurixx contracts and cannot require them to be performed or perform them.

Even if the Court granted everything Movants' Proposed Complaint asks for (the declaration and injunction against Plaintiffs), it would not redress their claimed injury. *See Concerned Citizens for Nuclear Safety, Inc. v. EPA*, No. 18-9542, 2020 WL 8674182, at *4 (10th Cir. Apr. 23, 2020) (no redressability where petitioner asked court to require allegedly polluting facility to comply with environmental laws because petitioner "present[ed] no evidence that any [facility] activity would be prohibited under either" law), *cert. denied*, 141 S. Ct. 1464 (2021); *Remick v. Utah*, No. 2:16-CV-00789-DN-DBP, 2018 WL 1472484, at *20 (D. Utah Mar. 23, 2018) ("Simply put, the declaratory relief will not terminate a controversy by remedying Plaintiffs' alleged injury.").

II. Movants Fail to Demonstrate Inadequate Representation.

Movants "bear[] the burden of showing inadequate representation." *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001). While this burden has been characterized as "minimal," *id.*, "a presumption of adequate representation arises when an applicant for intervention and an existing party have the same ultimate objective in the litigation." *Id.* at 1255; *Bottoms v. Dresser Indus.*, 797 F.2d 869, 872 (10th Cir. 1986). In *Bottoms*, the Tenth Circuit explained that "[t]he most common situation in which courts find representation adequate arises when the objective of the applicant for intervention is identical to that of one of the parties." 797 F.2d at 872. The court cited cases denying intervention because of identical or overlapping interests for (1) shareholders whose "interests were represented by other shareholders or the corporation," (2) insurance agents "in actions between the insurer and insured," and (3) "remaindermen under a trust and heirs of an estate . . . in actions brought by fiduciaries." *Id.*

The presumption applies here because Defendants share the same ultimate objective pleaded by Movants—*i.e.*, defeating Plaintiffs' claims and establishing that Zurixx's customer contracts are lawful and enforceable (thus ending Plaintiffs' so-called "interference" with those contracts).[4] *See* ECF 242-1, ¶¶ 53-54.

Indeed, Movants effectively concede adequate representation because of shared litigation objective: "While Zurixx and [Movants] may be *aligned as to the outcome of this litigation that they seek—the continuation of Zurixx's educational programs*—they have independent interests and reasons for doing so." ECF 242, at 13 (emphasis added). Their asserted distinguishing factor—"independent interests and reasons for" seeking the same "outcome of this litigation"—is legally irrelevant because motivation is immaterial. The Tenth Circuit "distinguish[es] between the objective of the suit and larger or collateral motives the party and nonparty may have: the presumption applies if they have a common objective with respect to the suit; *their motivations for pursuing that common objective are immaterial*." *Statewide Masonry v. Anderson*, 511 F. App'x 801, 806-07 (10th Cir. 2013) (emphasis added) (citing *City of Stilwell,*

[4] *See, e.g.*, *Gaedeke Holdings VII, Ltd. v. Mills*, No. CIV-11-649-M, 2013 WL 2532501, at *3 (W.D. Okla. June 10, 2013) (adequate representation where proposed intervenors' "only interest in this lawsuit [was] based upon plaintiffs prevailing"); *In re Samsung Top-Load Washing Mach. Mktg., Sales Pracs. & Prod. Liab. Litig.*, No. 17-ml-2792-D, 2018 WL 3676971, at *4 (W.D. Okla. Aug. 2, 2018) (denying intervention where plaintiffs, "their counsel, and the MDL Liaison Counsel ha[d] the same interest as Proposed Intervenors in prosecuting the claims relating to allegedly defective drain pumps"); *Hale v. Marques*, No. 19-CV-00752, 2020 WL 2309619, at *16 (D. Colo. Feb. 3, 2020) ("Hale and the movants have the same ultimate objective with respect to their interests: the removal of any restrictions on Hale's correspondence whatsoever."), *R. & R. adopted as modified by* 2020 WL 1593339; *XTO Energy, Inc. v. ATD, LLC*, No. CV 14-1021, 2016 WL 3148399, at *19 (D.N.M. Apr. 18, 2016) (denying intervention where proposed intervenors "share[d] an interest [with plaintiff] . . . in having the Master Contract indemnification clauses declared valid" and "enforc[ing] the relevant provisions"); *Am. Ass'n of People With Disabilities v. Herrera*, 257 F.R.D. 236, 255 (D.N.M. 2008) ("Defendant has adopted the same legal position . . . and is defending vigorously the constitutionality of the statute.").

Okla. v. Ozarks Rural Elec. Coop. Corp., 79 F.3d 1038, 1042 (10th Cir. 1996)). Nor does it matter that Movants might have made, or might make, different strategic decisions, including their criticism of the SPI. *See Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) ("Of course, representation is not inadequate simply because the applicant and the representative disagree regarding the facts or law of the case." (citation omitted)); *Herrera*, 257 F.R.D. at 256 ("Competent counsel, such as those representing the potential intervenors, can usually think up something the[y] would do different from another attorney.").

Because the presumption of adequate representation applies, Movants must make a "concrete showing" of circumstances that make Defendants' representation inadequate, namely, that "there is collusion between the representative and an opposing party, that the representative has an interest adverse to the applicant, or that the representative failed to represent the applicant's interest." *Bottoms*, 797 F.2d at 872-73; *id.* at 873 (showing "must be more than 'speculation'" (citation omitted)); *Anderson*, 511 F. App'x at 807 (applicant "made no showing to rebut the presumption" of adequate representation). As in *Bottoms* and *Anderson*, Movants have made no such showing. Defendants are represented by capable and zealous counsel from three law firms. *See XTO Energy*, 2016 WL 3148399, at *20.

Movants' one argument on this point falls flat and is not a "concrete showing." They contend that Defendants' strategic decision to stipulate to the SPI diverged from their interests. ECF 242, at 13. As an initial matter, this contention is belied by the fact that Movants did not seek to intervene during the first 18 months of suspended Zurixx operations. Last October, Defendants filed their first motion for relief from the SPI, attacking the injunction, receivership, and asset freeze provisions. ECF 198. After Movants filed this intervention motion, Defendants filed and are litigating their second motion to modify the SPI and dissolve the receivership. ECF

244. These motions further evidence that Defendants already represent Movants' interests and are zealously pursuing their professed shared litigation objectives.

III. Movants' Motion is Untimely and Prejudicial.

"The timeliness of a motion to intervene is determined in light of all of the circumstances." *Oklahoma ex rel. Edmondson v. Tyson Foods, Inc.*, 619 F.3d 1223, 1232 (10th Cir. 2010) (internal quotation marks and citation omitted). Three factors are "particularly important: (1) the length of time since the movant knew of its interests in the case; (2) prejudice to the existing parties; and (3) prejudice to the movant." *Id.* (cleaned up). Delay is measured "from when the movant was on notice that its interests may not be protected by a party." *Id.* "'When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow intervention.'" *Id.* (quoting 7C Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1916, at 539–40 (3d ed. 2007)). These factors favor denying intervention here.

As to the first factor, by Movants' own admission, they were on notice of their "interests in the case" as of the October 2019 TRO and November 2019 SPI because each (allegedly) "negatively affected the rights of Zurixx students,"[5] as have "numerous [other] motions and applications brought before the Court, and decisions by the Court." ECF 242, at 9. In light of these admissions, their assertions that they "have not delayed" and "acted expeditiously after their rights were adversely affected," *id.*, ring hollow.

As to the second factor, intervention will prejudice the existing parties. In addition to admitting that "there have already been numerous motions and applications brought before the

[5] The Receiver suspended Zurixx's operations around November 1, 2019. *See* ECF 80, at 2. Movants complain the suspension deprived them of access to ongoing training, support, and online materials. ECF 242-1, ¶ 28.

Court, and decisions by the Court," Movants acknowledge "[c]ritical events . . . are scheduled to occur in the near future." *Id.* at 10. They neglect to mention that several critical deadlines from the June 2020 Scheduling Order, ECF 151, have passed, including the January 21, 2021 deadline to add parties or amend pleadings; the March 18, 2021 deadline to serve written discovery on a party; and the March 18, 2021 and May 20, 2021 deadlines to disclose experts and rebuttal experts. Movants do not explain why their intervention will not disturb these deadlines or significantly disrupt this litigation. They seek to file a putative class action against Plaintiffs, which, if allowed to proceed, will require significant additional discovery and motion practice regarding class issues such as certification, adequacy, typicality, and predominance.

Third, Movants have failed to show they will be prejudiced by not intervening at this advanced stage of the litigation, particularly in light of Defendants' adequate representation.

Under these circumstances, the attempted intervention is untimely and prejudicial.[6]

IV. Permissive Intervention Is Not Justified Here.

Under Rule 24(b), "[t]he Court may permit anyone to intervene who has a claim or defense that shares a common question of law or fact with the main action." *Hale*, 2020 WL 2309619, at *16. "When this threshold requirement is met, the decision to allow or deny

[6] *See, e.g.*, *Edmondson*, 619 F.3d at 1236-37 (affirming district court's finding of prejudice based on, among other things, intervention "trigger[ing] the necessity of a new round of discovery pertaining to at least the statute of limitations issues, a new round of motions for summary judgment and likely a new round of motions in limine"); *Bottoms*, 797 F.2d at 874 ("motion to intervene came after extensive discovery and just before a scheduled trial" and would "cause delay and inject [irrelevant] elements"); *Viesti Assocs. v. McGraw-Hill Glob. Educ. Holdings*, No. 12-CV-00668, 2014 WL 3766185, at *5-6 (D. Colo. July 30, 2014) (finding prejudicial delay and citing cases); *Gaedeke Holdings*, 2013 WL 2532501, at *2-3 (undue delay because of knowledge of payments and lawsuit); *see also FTC v. Cardiff*, No. 18-cv-2104, 2020 WL 766336, at *4 (C.D. Cal. Jan. 14, 2020) (under Ninth Circuit standard, reason for and length of delay "weigh[ed] heavily in favor of a finding of untimeliness"), *aff'd*, 830 F. App'x 844 (9th Cir. 2020).

permissive intervention lies within the discretion of the district court." *Id.* (citing *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990)). "In exercising this discretion, the Court must consider whether intervention will unduly delay or prejudice the adjudication of the original parties' rights." *Id.* The Court may also consider: (1) "whether the would-be intervenor's input adds value to the existing litigation;" (2) "whether the petitioner's interests are adequately represented by the existing parties;" and (3) "the availability of an adequate remedy in another action."[7] *Id.* (internal quotation marks and citation omitted).

The arguments regarding (1) standing; (2) adequacy of representation, *see City of Stilwell*, 79 F.3d at 1043; *XTO Energy*, 2016 WL 3148399, at *20; and (3) untimeliness and prejudice, *see Viesti Assocs.*, 2014 WL 3766185, at *7; *XTO Energy*, 2016 WL 3148399, at *21, apply with equal or greater force to defeat permissive intervention.

An additional consideration weighs heavily against permissive intervention. Courts properly deny permissive intervention where, as here, it would "clutter the action unnecessarily" and delay adjudication of existing claims. *Arney v.* Finney, 967 F.2d 418, 421 (10th Cir. 1992); *XTO Energy*, 2016 WL 3148399, at *20-21; *Huff v. CoreCivic, Inc.*, No. 217CV02320, 2020 WL 430212, at *2-3 & n.6 (D. Kan. Jan. 28, 2020). Permitting intervention will result in the filing of a putative class action involving substantial class-related discovery and motion practice that is unrelated to adjudicating existing claims, in a case that has been in litigation for 20 months.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request denial of the intervention

[7] Denying intervention will not bar Movants from adding their input to assist Defendants' efforts or the Court's decisions. They can, among other things, submit declarations supporting Defendants' summary judgment motion or other filings.

motion.

June 7, 2021

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Certificate of Service

I HEREBY CERTIFY that on June 7, 2021, a true and correct copy of the foregoing, Plaintiffs' Opposition to Motion to Intervene was served electronically by the Court's ECF System upon:

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