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**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DISTRICT**

**FEDERAL TRADE COMMISSION, and
UTAH DIVISION OF CONSUMER
PROTECTION,**

Plaintiffs,

v.

ZURIXX, LLC, et al.,

Defendants.

**MOTION TO QUASH SUBPOENA AND
FOR PROTECTIVE ORDER**

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

Judge Dale Kimball

Magistrate Judge Daphne A. Oberg

The subpoenaed non-party Matt Davis submits this Motion to Quash Subpoena and for Protective Order.

Davis certifies the parties met and conferred via email exchange beginning 06-16-2021 and via telephone conference between Joni Ostler (for state plaintiff) and Eric Schnibbe (for Davis) on 06-17-2021. No resolution occurred.

Three days ago, the FTC subpoenaed Davis to appear for a deposition. (Exhibit 1.) If required to appear, Davis will be unduly burdened by having to incur the expense and burden in preparing for and appearing at duplicative and potentially unnecessary depositions.

ARGUMENT

A court may grant a protective order upon the mere showing of “good cause.” *S.E.C. v. Art Intellect, Inc.*, No. 2:11-CV-00357-TC-DN, 2012 WL 776244, at *2 (D. Utah, 2012). Good cause exists to quash the FTC’s subpoena.

Davis is a non-party to this action, but is a named defendant in the related Receivership Action, Case No.: 2:20-cv-00545. The Receiver’s complaint against Davis incorporates much of the FTC’s complaint against Zurixx. [Receiver’s Complaint, ¶¶2, 8-30.] Indeed, Davis was sued by the Receiver on the premise that Davis “made the deceptive representations” alleged in this action, was “involved in much of the alleged deception” complained of by the FTC, and was “aware of Zurixx’s...scheme and were active participants in such scheme.” [Receiver’s Complaint, ¶¶33-35.] Hence, Davis will necessarily have to prepare for and testify twice concerning the same allegations and issues: once when deposed by the Receiver and once when deposed by the FTC. Incurring the time, expense, and efforts of duplicative depositions covering the same subject matter is unduly burdensome and should not be required. Fed.R.Civ.P 26(b)(2)(C), 45(d).

Further, the Court is preparing rulings on Davis’s Motion to Dismiss the Receiver’s complaint, and briefing concerning the impact of *AMG Capital* in this action and the Receivership Action. Such rulings will substantially reshape the scope of this matter and the Receivership Action, which will directly impact the proportionality of Davis’s deposition. For instance, if the Court were to deny Davis’s Motion to Dismiss, and find that *AMG* has no limiting effect on the Receivership Action, Davis will be deposed by the Receiver on the same allegations the FTC will explore in its deposition, justifying that both the FTC and Receiver

depose Davis at the same time. But, if the Court grants Davis' motion, or finds that the FTC's case is narrowed due to *AMG*, such result impacts the scope of Davis's deposition and the proportionality considerations dictating what discovery is allowed. Fed.R.Civ. 26(b)(1).

A less-burdensome, less-expensive, and non-duplicative means of discovery on Davis requires the FTC to wait for the Court's rulings; and if the Receivership Action is not dismissed, to require the FTC to depose Davis in conjunction with Receiver's deposition.

Lastly, because the FTC is essentially the same party-in-interest as the Receiver, and the FTC's deposition of Davis constitutes an end-run of Rule 26's requirement that depositions occur only after disclosures have been provided in the Receiver's Action. Therefore, good cause exists to enter a protective order consistent with the above.

DATED this 17th day of June, 2021.

MCNEILL | VON MAACK



Jason A. McNeill

Eric K. Schnibbe

Attorneys for Subpoenaed Non-Party Matt Davis

CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of McNEILL VON MAACK, 175 South Main Street, Suite 1050, Salt Lake City, Utah 84111, and that, pursuant to Rule 5(b) of the Federal Rules of Civil Procedure, a true and correct copy of the foregoing **MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER** was delivered to the following this 17th day of June, 2021, by:

- Hand Delivery
- Depositing the same in the U.S. Mail, postage prepaid
- Electronic Mail
- Submission to the CM/ECF System

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/s/ Camille Coley

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of Utah



Federal Trade Commission, et al.

Plaintiff

v.

Zurixx, LLC, et al.

Defendant

Civil Action No. 2:19-CV-00713-DAK-DAO

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Matt Davis

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (Utah Attorney General's Office, 160 E. 300 South, Fifth Floor, Salt Lake City, Utah 84114) and Date and Time (06/30/2021 9:00 am)

The deposition will be recorded by this method: Stenographic, audiovisual

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 06/11/2021

CLERK OF COURT

OR

/s/ Thomas L. Harris

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) Federal Trade Commission

Thomas Harris, 600 Pennsylvania Ave., NW, CC-8528, Washington, D.C. 20580, (202) 326-3620, tharris1@ftc.gov

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 2:19-CV-00713-DAK-DAO

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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**FEDERAL TRADE COMMISSION and
UTAH DIVISION OF CONSUMER
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Plaintiffs,

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ZURIXX, LLC, *et al.*,

Defendants.

**ORDER ON MOTION TO QUASH
SUBPOENA AND FOR PROTECTIVE
ORDER**

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

Judge Dale A. Kimball

Magistrate Judge Daphne A. Oberg

Before the Court is Subpoenaed Non-Party Matt Davis's Short Form Motion to Quash Subpoena and for Protective Order ("Motion") regarding a deposition Subpoena served by Plaintiffs. Having considered the Motion and attachment thereto, any opposition, and any arguments of counsel, the Court hereby GRANTS, the Motion and ORDERS as follows.

1. The Subpoena served on Mr. Davis is hereby quashed.
2. The Deposition of Mr. Davis shall not be taken in this matter until fourteen (14) calendar days after the latter of (a) issuance of a decision on Davis's Motion to

Dismiss in *Broadbent v. Davis, et al.*, Case No.: 2:20-cv-00545 (“Receiver Case”) that is currently under advisement or (b) issuance of a ruling by Court in the above-captioned action or *Broadbent v. Davis, et al.* regarding the impact of *AMG Capital Management, LLC, et al. v. Federal Trade Commission*, 593 U.S. ___, 141 S. Ct. 1341 (2021).

3. The Deposition of Mr. Davis may be rescheduled following the time described in Paragraph 2 above, but one single deposition shall be taken of Mr. Davis for the above-captioned action and the Receiver Case.

SO ORDERED

SIGNED this ____ day of _____, 2021.

BY THE COURT

Daphne A. Oberg
United States Magistrate Judge