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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,

vs.

ZURIXX, LLC, et al.

Defendants.

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO AMEND
SCHEDULING ORDER TO EXTEND
CLOSE OF FACT DISCOVERY**

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

Judge Dale Kimball

Magistrate Judge Daphne A. Oberg

All Defendants hereby jointly submit this Opposition to Plaintiffs' Motion to Amend Scheduling Order to Extend Close of Fact Discovery, (ECF No. 276).

Defendants oppose a blanket extension of the fact discovery deadline, including any extension allowing document production to occur after July 22, 2021. Defendants are also opposed to Plaintiffs' request to schedule fact and expert discovery to take place simultaneously. Defendants are, however, amenable to allowing the depositions of Matt Davis, Robert Shemin, Tarek El Moussa, Christina El Moussa, and Mike Grow to occur within a reasonable time after the July 22, 2021 deadline because of constraints on these third parties' schedules.

RELEVANT BACKGROUND

I. Plaintiffs File their Original Complaint and Motion for TRO

Plaintiffs initiated this action on September 30, 2019 when they filed their original Complaint (ECF No. 1) and 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 ("TRO Motion") (ECF No. 4). Three attorneys were listed as attorneys for Plaintiff Federal Trade Commission (the "Commission"). (ECF No. 1 at 37.) Four attorneys were listed as attorneys for the Plaintiff Utah Division of Consumer Protection (the "Division"). (ECF No. 1 at 37.)

In support of their TRO Motion, Plaintiffs submitted 95 exhibits—including the declarations of at least seven Commission investigators, a declaration of Utah Commerce Analyst Leigh Veillette, and a declaration of Division investigator Nate Kanbe. (*See* ECF No. 4 at 9–10.) The declarations reveal that as early as of June 12, 2018, Commission investigators began attending and recording events in connection with their investigation of Defendants. (*See*

ECF No. 12-54 at 2.) But according to the Division’s recent discovery responses, Plaintiffs’ investigation of Defendants began as early as 2016. (*See* Ex. 1, the Division’s June 15, 2021 Second Supplemental Responses to the JSS Defendants’ First Set of Interrogatories, at 2 (“Mike Pitts . . . investigator; investigated consumer complaints regarding the Defendants from approximately February 2016 to approximately September 2016.”).)

II. Plaintiffs Submit Initial Disclosures

On December 17, 2019, Plaintiffs submitted their initial disclosures, representing that they were in possession of five categories of documents that may be used “to support their claims against Defendants:” (1) “documents obtained through the October 2019 immediate access,” (2) “documents produced by defendants pursuant to the TRO or stipulated preliminary injunction,” (3) “documents produced by non-parties,” (4) “documents provided by the Receiver,” and (5) “documents in the possession of the division.”

III. Defendants File First Motion to Stay

On December 19, 2019, Defendants filed their first Motion to Stay. (ECF No. 70.) Four days later, Plaintiffs filed their Opposition to this Motion (ECF No. 84), arguing that “a stay would prejudice Plaintiffs by imposing further delay, increasing costs and placing unnecessary constraint on agency resources, and impeding Plaintiffs’ ability to recover redress and other relief for consumers.” (ECF No. 84 at 2.)

After a hearing before Magistrate Judge Furse, Plaintiffs filed supplemental briefing in support of their Opposition to Defendants’ Motion to Stay Discovery. (ECF No. 97.) Plaintiffs argued that “the longer discovery is postponed, the longer this case will drag on, and thus the

greater the costs to the receivership, diminishing the Court’s ability to issue [a] permanent injunction to protect consumer[s] and redress . . . victims.” (ECF No. 97 at 7.)

On February 12, 2020, Magistrate Judge Furse entered an order granting, in part, Defendants’ Motion to Stay Discovery. (ECF No. 108 at 2.) On February 26, 2020, the Commission filed a Rule 72(a) Objection, arguing that a stay “unnecessarily delays the efficient and just resolution of this consumer protection matter.” (ECF No. 110 at 7.) The Division filed a Rule 72(a) Objection that same day. (ECF No. 111.) The Court ultimately granted Plaintiffs’ Rule 72(a) objections, vacating an Order entered by Magistrate Judge Furse. (ECF No. 127.)

IV. The Court Enters Governing Scheduling Order and Plaintiffs Submit Supplemental Initial Disclosures

On June 22, 2020, the Court entered the governing Scheduling Order, setting March 18, 2021 as the last day to serve written discovery, July 22, 2021 as the close of fact discovery, and August 15, 2022 for the commencement of a ten day trial. (ECF No. 151 at 2, 4.) The next day, Plaintiffs submitted Supplemental Initial Disclosures. In addition to the five categories of documents identified in their December 2019 initial disclosures, Plaintiffs represented that they would also rely on “consumer declarations and complaints” to support their claims.

V. Defendants File Second Motion to Stay

On August 18, 2020, the Zurixx Defendants filed a Motion to Stay pending the Supreme Court’s decision in *AMG Capital Management*. (ECF No. 169 at 2.) On September 1, 2020, Plaintiffs filed their Opposition to this Motion, arguing that “the stage of litigation and prejudice to Plaintiffs militate against a stay.” (ECF No. 182 at 9.) On November 24, 2020, the Court entered a Memorandum Decision and Order denying the Zurixx Defendants’ Motion to Stay. (ECF No. 205 at 12–13.)

VI. Defendants Submit Requests for Production to the Division

On March 18, 2021, all Defendants timely submitted their first set of requests for production of documents to the Division and to the Commission under the scheduling order, over 4 months before the close of fact discovery. For the most part, these requests for production sought documents supporting Plaintiffs’ contentions against Defendants in the operative complaint.

ARGUMENT

“Federal Rule of Civil Procedure 16(b)(4) provides that scheduling orders ‘may be modified only for good cause and with the judge’s consent.’” *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 988 (10th Cir. 2019). “In practice, this standard requires the movant to show the scheduling deadlines cannot be met despite the movant’s diligent efforts.” *Id.* “‘Good cause’ also ‘obligates the moving party to provide an adequate explanation for any delay.’” *Id.* (quoting *Husky Ventures, Inc. v. B55 Invs., Ltd.*, 911 F.3d 1000, 1020 (10th Cir. 2018)).

Despite Plaintiffs’ suggestion otherwise (*see* ECF No. 276 at 2), “prejudice to the party opposing the modification” is a “relevant consideration” for the Court. *Tesone*, 942 F.3d at 988. Indeed, district courts throughout the Tenth Circuit—including the District of Utah—regularly consider prejudice to the non-moving party when considering a motion to modify a scheduling order to extend discovery. *See e.g., Johnson v. Peay*, No. 1:14-CV-147-TC-BCW, 2015 WL 7112942, at *2 (D. Utah Nov. 13, 2015). When a party seeks to extend the discovery deadline, courts within this District consider six factors:

[A] whether trial is imminent, [B] whether the request is opposed, [C] whether the non-moving party would be prejudiced, [D] whether the moving party was diligent in obtaining discovery within the guidelines established by the court, [E] the foreseeability of the need for additional discovery in light of the time allowed

for discovery by the district court, and [F] the likelihood that the discovery will lead to relevant evidence.

See Visser v. Miller Dev. Co., No. 2:07CV319, 2008 WL 2620105, at *1 (D. Utah July 2, 2008) (quoting *Smith v. United States*, 834 F.2d 166, 169 (10th Cir. 1987)).

Plaintiffs provide four reasons in support of their requested extension. First, they argue that it would be “impossible” for the Division to complete its document review and production by the current July 22, 2021 fact cutoff date. (ECF No. 276 at 3.) Second, they argue that “the Division’s Rule 30(b)(6) deponent cannot feasibly be ready to testify on the Division’s behalf before the current fact discovery cutoff date” because the Division’s “primary investigator for the investigation . . . left the Division’s employ in early March 2021.” (ECF No. 276 at 3.) Third, they argue that the Commission’s lead counsel will retire shortly, “to be replaced by a new lead counsel for the FTC.” (ECF No. 276 at 4.) And fourth, they argue that third parties have requested postponement of their depositions. (ECF No. 276 at 5.) These arguments are unpersuasive.

I. The *Smith* Factors Weigh in Defendants’ Favor

Although Plaintiffs fail to discuss the *Smith* factors in their Motion, on balance, the factors weigh against Plaintiffs’ requested extension.

A. The First Factor Should be Afforded Little Weight

Under the governing Scheduling Order, trial is set for August 15, 2022. Defendants concede that trial is not imminent. But as explained below, consideration of all factors weigh in favor of denying Plaintiffs’ Motion.

B. Plaintiffs’ Request Is Opposed

Defendants oppose Plaintiffs' Motion to extend the close of fact discovery to December 3, 2021 and to require the parties to engage in fact and expert discovery simultaneously. The second *Smith* factor therefore weighs in Defendants' favor.

C. Defendants Will be Prejudiced by an Extension

The third *Smith* factor weighs heavily in Defendants' favor because further delay prejudices Defendants. As previously noted, "Defendants dispute the substantive allegations in this case" (ECF No. 283 at 19.) As the Court is aware, under the terms of the Preliminary Injunction now in place, Defendants' assets are frozen. As Defendants have previously argued, they are entitled to have full access to their assets to enable them to pay counsel to mount an adequate defense and to pay their basic living expenses. Thus, each day that the case is delayed further prejudices Defendants. And even if the Court grants Defendants' Motion to Modify the Preliminary Injunction (ECF No. 244), further delay prejudices not only Defendants but those customers who seek Defendants' products and services.

D. Plaintiffs Were Not Diligent in Preparing Discovery

The fourth *Smith* factor relates to the moving parties' diligence. Plaintiffs have not been diligent in prosecuting their case. Plaintiffs began their investigation of Defendants as early as 2016—more than three years before they filed the original Complaint. (*See* Ex. 1 at 2.) Despite years of investigation, the Division claims it needs an additional six months to produce written discovery that is plainly relevant to the case—discovery that should be easily retrievable given the length of the Division's investigation.

Plaintiffs' request for a six-month extension is even more egregious considering Plaintiffs *twice* opposed Defendants' request for a stay. Defendants are left to wonder why the Division is

not able to produce discovery that is plainly relevant when it previously argued against a stay and in favor of a quick resolution of the case.

E. The Fifth and Sixth *Smith* Factors Do Not Weigh in Plaintiffs' Favor

The documents that Defendants requested in their Requests for Production are plainly relevant to Plaintiffs' claims and Defendants' defense of those claims. Given the length of Plaintiffs' investigation, there is no reason why the Division could not have completed discovery within the time allotted in the current scheduling order.

II. The Division's Arguments in Support of an Extension Are Unpersuasive

As noted above, Plaintiffs provide four reasons in support of their requested extension—offering only one reason why document production cannot be completed by the fact discovery deadline.

First, the Division argued that it would be “impossible for the Division to complete its document review and production by the current July 22, 2021, fact cutoff date.” (ECF No. 276 at 3.) This is so, the Division argues, because of the number of requests that Defendants made. (*See* ECF No. 276 at 2.) The Division's excuse is not satisfactory. The Division offers no explanation as to why it delayed 91 days after receiving the Defendants' Requests for production to file its Motion to Amend. Through counsel, the Division represents that it “intends to marshal additional resources and hire more attorneys to expedite the document review” (ECF No. 276-1 at 3.) But conspicuously absent from the Division's Motion and supporting Declaration is any explanation as to why this “marshalling” of additional resources could not have been done earlier.

Moreover, many of the documents that Defendants sought from Plaintiffs in their March 18, 2021 requests for production fall within the five categories of documents that Plaintiffs represented were already in their possession almost 18 months ago. And Plaintiffs have had even longer to gather documents in support of their contentions against Defendants in the operative complaint, given that Plaintiffs' investigation of Defendants began as early as five years ago.

The governing good cause standard requires the FTC and the Division "to show the scheduling deadlines cannot be met despite [their] diligent efforts." *Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 988 (10th Cir. 2019). It also obligates the FTC and the Division to provide an adequate explanation for the delay. *Id.* Plaintiffs have not met this standard because they have offered no explanation as to why they have not already "marshalled" additional resources to meet *their* discovery obligations. Plaintiffs' Motion demonstrates their lack of diligence. Defendants should be further prejudiced because of Plaintiffs' tardiness.

Second, Plaintiffs argue that "the Division's Rule 30(b)(6) deponent cannot feasibly be ready to testify on the Division's behalf before the current fact discovery cutoff date" because the Division's "primary investigator for the investigation . . . left the Division's employ in early March 2021." (ECF No. 276 at 3.) Defendants note that this argument does not relate to Plaintiffs' document production and is therefore irrelevant to the question of whether Plaintiffs have offered an adequate explanation for their failure to meet their obligations to timely produce documents. Regardless, the argument fails on its own terms. The Division has at least four attorneys assigned to this case. The Division has had at least eight investigators work on this case. (*See Ex. 1 at 2–3.*) The Division offers no adequate explanation as to why one of the many investigators who have already worked on this investigation could not easily replace the

“primary investigator.” The Division’s argument that its Rule 30(b)(6) designee needs “the benefit of the relevant documents to prepare for the deposition” is similarly unavailing. The essence of the Division’s argument is that it needs more time to prepare its designee because of a delay of its *own creation*. The Division’s argument is nonsensical. The Court should not allow the Division to rely on its own failure to justify an extension.

Third, Plaintiffs argue that an extension of the discovery deadline is warranted because the Commission’s lead counsel will retire shortly, “to be replaced by a new lead counsel for the FTC.” (ECF No. 276 at 4.) Plaintiffs argue that “[t]he FTC’s new counsel requires time to get up to speed on the case and cannot reasonably be expected to learn the case and meaningfully participate in the upcoming depositions in the five weeks remaining in the fact discovery period.” (ECF No. 276 at 4.) In support of their argument, Plaintiffs cite *Kee v. Fifth Third Bank*, No. 2:06-CV-00602DAKPMW, 2008 WL 183384, at *1 (D. Utah Jan. 17, 2008) for the proposition that the departure of the Commissions’ lead counsel amounts to good cause to extend the fact discovery deadline. But in *Kee*, all of Plaintiff’s attorneys withdrew, leaving him without counsel. *See Kee*, 2008 WL 183384 at *1 (“Plaintiff shall, within twenty (20) days of the date of this order, file a notice with the court naming his new counsel” “If Plaintiff chooses to retain counsel, rather than appear pro se, said counsel shall promptly file a formal notice in this case.”). Plaintiffs’ reliance on *Kee* is perplexing considering the Commission has three other attorneys who have actively been involved in this case who could very easily participate in the upcoming depositions. Furthermore, lead counsel’s retirement is not until the end of August, well after the close of fact discovery on July 22, 2021. This is not a reason for further delay.

Fourth, Plaintiffs argue that third parties have requested postponement of their depositions.¹ (ECF No. 276 at 5.) But as noted above, Defendants are amenable to allowing the depositions of Matt Davis, Robert Shemin, Tarek El Moussa, Christina El Moussa, and Mike Grow to occur within a reasonable time after the July 22, 2021 deadline because of constraints on these third parties' schedules. Thus, good cause does not exist for a blanket extension of the discovery deadline.

III. Defendants Are Amenable to Allow Some Depositions to Occur After July 22, 2021

Although Defendants oppose a universal extension of the fact discovery deadline (for the reasons stated above), they agree that certain depositions may occur after July 22, 2021. Specifically, Defendants recognize that third parties Matt Davis, Robert Shemin, Tarek El Moussa, Christina El Moussa, and Mike Grow have raised conflicts and reasons as to why their depositions cannot or should not occur until after July 22, 2021. Thus, although Defendants oppose Plaintiffs' efforts to extend fact discovery by five months, they agree that the depositions of these third parties can occur within a reasonable time after the current fact discovery deadline.

CONCLUSION

Based on the foregoing, Defendants respectfully request that the Court DENY Plaintiffs' Motion insofar as it seeks to extend the existing deadline for document production. Defendants are amenable to allowing certain depositions to occur after the July 22, 2021 deadline if good cause is shown.

¹ Plaintiffs' issues with scheduling the depositions is a direct result of Plaintiffs' lack of diligently pursuing discovery in this case. On June 10, 2021, just 6 weeks prior the close of fact discovery, Plaintiffs noticed 23 depositions without consulting with Defendants or the witnesses about the dates for the depositions beforehand.

DATED this 24th day of June, 2021.

/s/ D. Loren Washburn

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 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/ Sarah Nielsen

EXHIBIT 1

**(Division's June 15, 2021 Second Supplemental Responses to the JSS
Defendants' First Set of Interrogatories)**

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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

<p>FEDERAL TRADE COMMISSION, and</p> <p>UTAH DIVISION OF CONSUMER PROTECTION,</p> <p style="text-align: center;">Plaintiffs,</p> <p style="text-align: center;">vs.</p> <p>ZURIXX, LLC, et al.</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">PLAINTIFF UTAH DIVISION OF CONSUMER PROTECTION'S SECOND SUPPLEMENTAL RESPONSES TO JSS INVESTMENT VENTURES, LLC; JSS TRUST; GERALD D. SPANGLER; AND STEPHENIE SPANGLER'S FIRST SET OF INTERROGATORIES</p> <p style="text-align: center;">Case Number: 2:19-cv-00713-DAK-DAO</p> <p style="text-align: center;">Judge Dale Kimball</p> <p style="text-align: center;">Magistrate Judge Daphne A. Oberg</p>
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Pursuant to Federal Rules of Civil Procedure 26 and 33, Plaintiff Utah Division of Consumer Protection, submits the following Second Supplemental Objections and Responses to the JSS Investment Ventures, LLC; JSS Trust; Gerald D. Spangler; and Stephenie Spangler's

First Interrogatories to the Utah Division of Consumer Protection.

Interrogatory No. 2: Identify each and every employee, agent, investigator or independent contractor of the UDCP who participated in or assisted in the UDCP's investigation of the JSS Defendants, and describe his or her: (a) position, title, and/or relationship to the UDCP, (b) duties and responsibilities concerning the investigation, (c) dates, or ranges of dates, spent working on, participating in and/or assisting in the investigation; and (d) identify all documents or other tangible items prepared by such employee, agent, investigator or independent contractor concerning the investigation of each of the JSS Defendants.

RESPONSE: The Division incorporates by reference its prior objections to Interrogatory No. 2. The Division supplements its prior response as follows:

Mike Pitts – investigator; investigated consumer complaints regarding the Defendants from approximately February 2016 to approximately September 2016. Performed investigative work and legal analysis.

Leigh Veillette - investigator; investigated consumer complaints regarding the Defendants beginning in approximately February 2018 through approximately March 5, 2021. Performed investigative work and legal analysis.

Daniel Larsen – analyst; investigated consumer complaints regarding the Defendants from approximately September 2016 to approximately May 2018. Performed investigative work and legal analysis.

Adam Watson – managed and oversaw investigators' work since February 2016 but did not perform direct investigative work himself. After the current lawsuit was filed, he attended a Zurixx event in San Mateo, California at the request of the Court monitor (who was later appointed as Receiver).

Investigators Nate Kanbe and Holt Terburg visited Zurixx's offices in late March 2019 and took pictures.

Investigator Nate Kanbe and Investigative Technician / Office Specialist Nathan Jones attended a Zurixx seminar in June 2019.

Investigator Blake Young interviewed a couple of consumers.

The following investigators from the Division attended Zurixx events after the lawsuit was filed at the request of the Court monitor: Investigators Blake Young and Glen Minson attended event in Las Vegas, Nevada, and Investigator Robert Porter attended event in San Mateo California with Adam Watson.

The following investigators were present at the immediate access: Adam Watson, Glen Minson, Holt Terburg, Blake Young, and Dan Larsen. Division Director Daniel O'Bannon was also present. At the immediate access, these persons observed, helped get employees into a conference room so the Court monitor could explain what was happening, made sure employees did not return to their desks to destroy or delete documents, and took some photos (which will be produced in the Division's responses to the Defendants' document requests).

DATED June 15, 2021

/s/ Joni Ostler
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DECLARATION OF DANIEL LARSEN

I am a Commerce Analyst for the Utah Division of Consumer Protection (the “Division”), one of the Plaintiffs in this action. I am authorized to make this declaration for and behalf of the Division.

I have read the foregoing Plaintiff Utah Division of Consumer Protection’s Second Supplemental Responses to JSS Investment Ventures, LLC; JSS Trust, Gerald D. Spangler, and Stephenie Spangler’s First Set of Interrogatories, am familiar with the contents thereof. The answers to these Interrogatories are true and correct to the best of my knowledge, information, and belief.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the statements made in this declaration are true and correct.

Executed on June 15, 2021.

/s/ Daniel Larsen
Daniel Larsen

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 15, 2021, a true and correct copy of the foregoing document was served by electronic mail upon:

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