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

FEDERAL TRADE COMMISSION *et al.*, Plaintiffs, vs. ZURIXX, LLC *et al*., Defendants.	**INTERVENORS' REPLY IN SUPPORT OF THEIR RULE 24 MOTION TO INTERVENE** Case No: 2:19-CV-00713-DAK-DAO District Judge Dale A. Kimball Magistrate Judge Daphne A. Oberg

Proposed Intervenors Students of Zurixx ("Intervenors") have moved for leave to intervene in the above captioned action pursuant to Federal Rule of Civil Procedure 24 (the "Motion," doc. no. 242). Intervenors offer this brief Reply in further support of the Motion and in response to the opposition to the Motion (doc. no. 267) filed by Plaintiffs Federal Trade Commission (the "FTC") and the Utah Division of Consumer Protection (the "UDCP," and together with the FTC,

"Plaintiffs"). Plaintiffs contend that the Motion should be denied because, according to Plaintiffs, Intervenors lack Article III standing, they are adequately represented by the existing parties, and intervention would be prejudicial. Plaintiffs also assert that permissive intervention should be denied. Intervenors offer the following points in rebuttal to Plaintiffs' assertions.

I. Intervenors Have Article III Standing.

Intervenors have Article III standing for the reasons set forth in the Motion. Plaintiffs do not contend that Intervenors lack the elements of an injury that is concrete and particularized and actual or imminent. Nor do Plaintiffs contend that Intervenors' lack an injury—namely, the deprivation of their property interest in their contracts with Zurixx, LLC, and the services and benefits they are entitled to thereunder. Instead, according to Plaintiffs, Intervenors' injury cannot be redressed by a favorable decision. (Doc. No. 267, at 3.) According to Plaintiffs, "[t]he requested declaration and injunction against Plaintiffs, however, will not change [Intervenors'] situation one bit because Zurixx's operations ceased 19 months ago, after the Receiver concluded that Zurixx could not operate legally and profitably." (*Id.*) What Plaintiffs ignore, however, is that the very implementation of the receivership pursuant to the Stipulated Preliminary Injunction ("SPI," doc. no. 54) was obtained unlawfully and coercively based on a deliberate misrepresentation of the scope of the FTC's authority under Section 13(b) of the FTC Act, as recently rebuked by a unanimous Supreme Court in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021).

In *AMG*, the Supreme Court excoriated the FTC for its unlawful contortion of Section 13(b) of the FTC Act. For decades, the FTC had liberally and improperly interpreted Section 13(b) as authorizing the agency to seek monetary awards without prior use of traditional administrative

proceedings. By claiming to operate under Section 13(b), the FTC avoided the administrative procedures and due process protections of Section 5 and 19 of the FTC Act, which were implemented as safeguards against agency overreach.

The Supreme Court stated that "Section 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 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. *Id.* 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.").

The Supreme Court's decision in *AMG* represents not only a faithful 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.
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> 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.
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> * * *
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> … 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 noted, and subsequently wrote for the Court, 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. It did not afford the statutory prior notice protections and due process to defendants—or to third parties who may be collaterally damaged by the FTC's enforcement strategy, such as Intervenors.

Against the backdrop of *AMG*, the harm to Intervenors done by Plaintiffs' unlawful shut-down of Zurixx through the Receiver in the SPI—which was coercively and wrongly obtained through the FTC's misrepresentation of its rights and powers under Section 13(b)—can of course be redressed by a favorable decision declaring Intervenors' contracts to be valid and lawful, and setting aside the receivership and shut-down of Zurixx so that Zurixx can resume operations and provide Intervenors with their rightful benefits. Accordingly, Intervenors have standing.

II. Intervenors Are Not Adequately Represented.

Plaintiffs also contend that the defendants in this case adequately represent Intervenors' interests. To reiterate what Intervenors set forth in the Motion, "[a]lthough an applicant for intervention as of right bears the burden of showing inadequate representation, that burden is the minimal one of showing that representation may be inadequate.'" *Utah Ass'n of Ctys. v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) (quoting *Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984)) (secondary quotation omitted). Plaintiffs assert that Intervenors fall short of meeting the minimal burden because both Zurixx and Intervenors seek the continuation of Zurixx's educational programs. (Doc. No. 267, at 6.) At the risk of inaccurately summarizing Zurixx and the other defendants' goals in this litigation, which Intervenors are not privy to beyond the obvious desire to prevail, the interests of Intervenors and the defendants are not precisely squared. As set forth in the Motion, Intervenors seek the continuation of Zurixx's educational programs, and resumption of offering services to which Intervenors are entitled. The Zurixx defendants, however, may have broader—or narrower goals—such as avoiding monetary liability, even if Zurixx programs do not resume. Put differently, it is possible that Plaintiffs could prevail in this action in part by, for instance, obtaining damages from the Zurixx defendants—which would not in and of itself harm Intervenors. Intervenors have a very specific goal and right they seek to enforce: resuming and continuing to receive the ongoing benefits they are entitled to as customers of Zurixx. To the extent that Zurixx and the other defendants have aims other than that very specific goal, they do not adequately represent Intervenors' interests.

III. Intervention Would Not Be Prejudicial.

Plaintiffs next argue that intervention should be denied because Intervenors' Motion is untimely, and intervention would prejudice the parties. In the first instance, Plaintiffs ignore the landmark shift in this case occasioned by the Supreme Court's decision in *AMG*, which was decided just weeks before Intervenors filed the Motion. "'The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'" *Elliott Indus. v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005) (quoting *Utah Ass'n of Ctys.*, 255 F.3d at 1250). The Supreme Court's *AMG* decision, which undercuts the entire basis for this action, and specifically for the SPI and receivership that have stripped Intervenors of their rights without due process to Intervenors, represents an unusual circumstance justifying allowing intervention notwithstanding the passage of time since Plaintiffs wrongly commenced this action. The *AMG* decision, taken together with the circumstances discussed in the Motion, such as Plaintiffs' filing of the Second Amended Complaint in this action just a few months ago, justifies Intervenors' participation in this action at this crucial juncture. The Court should therefore find the Motion to be timely.

IV. Permissive Intervention Should Be Granted.

Finally, to the extent that the Court finds that Intervenors do not satisfy the criteria for mandatory intervention, it should nonetheless allow permissive intervention under Federal Rule of Civil Procedure 24(b). Plaintiffs' opposition to permissive intervention amounts to reiteration of their arguments regarding mandatory intervention. (*See* Doc. No. 267, at 10 ("The arguments regarding (1) standing; (2) adequacy of representation, … and (3) untimeliness and prejudice …

apply with equal or greater force to defeat permissive intervention.").) Plaintiffs also assert that "[p]ermitting 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 …." (*Id.*) To the extent that the Court is concerned about discovery delays, Intervenors note that their proposed Complaint in Intervention for Declaratory Judgment raises a pure legal issue: Intervenors' rights to receive the fruits of their contracts. Intervenors do not intend to pursue discovery apart from obtaining copies of the discovery already exchanged between the current parties. To the extent that the parties wish to take discovery from Intervenors, Intervenors are amenable to an expedited schedule for doing so in order to keep this action on or close to its current trial schedule.

Accordingly, permissive intervention should be allowed in the event that the Court does not grant intervention as of right.

RESPECTFULLY SUBMITTED this 28th day of June, 2021.

GOEBEL ANDERSON PC

/s/ Sam Meziani
Sam Meziani

and

Maurice R. Mitts
MITTS LAW, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 28, 2021, a true and correct copy of the foregoing document was served on counsel for all parties *via* electronic filing with the Court's ECF service.

/s/ Karen Harwood