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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.	**RELIEF DEFENDANT STEPHENIE J. SPANGLER'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** Case No.: 2:19-cv-00713-DAK-DAO Judge Dale Kimball Magistrate Judge Daphne A. Oberg

Relief Defendant Stephenie Spangler, by and through undersigned counsel, hereby submits this reply memorandum in support of her Motion for Summary Judgment ("Motion") (ECF No. 259).

In what has become a repeat play for Plaintiffs following the Supreme Court's decision in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021), Plaintiffs pivot from the language of disgorgement in their Second Amended Complaint and

describe the relief as the return of funds to redress consumer injury. (*See* Opp'n at 3, 10-11.) Plaintiffs' pivot from its pleading is clearly outlined in its Opposition to Relief Defendant Stephenie Spangler's Motion for Summary Judgment ("Opposition) (ECF No. 298) where it attempts to rebrand the relief it seeks from Ms. Spangler in this action. It does not matter how Plaintiffs try to spin this relief, however, they cannot seek it from a relief defendant like Ms. Spangler.

Instead of engaging with Ms. Spangler's legal arguments in the Motion, Plaintiffs spend much of their Opposition providing irrelevant background and reciting unproven allegations of wrongdoing against Defendants. (*See id.* at 1-7.) When they finally get to their purported legal basis for seeking monetary relief against Ms. Spangler, their arguments fall flat. *First*, Plaintiffs argue that the Court has the "inherent equitable authority" to order Ms. Spangler to turn over allegedly "ill-gotten funds." (*See* Opp'n at 9-10.) But the Court's "inherent equitable authority" is restricted by the text of Section 19 (which is Plaintiffs' only basis for seeking monetary relief from Ms. Spangler following *AMG Management*). *See Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946) ("Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.") Specifically, Section 19 allows the Commission to seek relief only against those who violated a rule "respecting unfair or deceptive acts or practices." *See* 15 U.S.C. § 57b(a)(1). And Plaintiffs admit that Ms. Spangler is not accused of any wrongdoing. (*See* Opp'n at 7, 11 n.7.)

Second, Plaintiffs argue that Section 19 itself gives the Court authority to grant relief "as the court finds necessary to redress injury to consumers . . . resulting from the rule violation."

(*See* Opp'n at 10-11.) But again, Plaintiffs ignore that the statute explicitly provides that such relief may only be sought against those who violated the rule. *See* 15 U.S.C. § 57b(a)(1). Thus, neither the Court's "inherent equitable authority" nor Section 19 allows Plaintiffs to seek or the Court to order relief against a nominal defendant like Ms. Spangler. Ms. Spangler respectfully requests that this Court grant her Motion and dismiss her as a relief defendant from this case.

UNDISPUTED MATERIAL FACTS

Plaintiffs do not dispute the material facts in Ms. Spangler's Motion, which are all allegations from Plaintiffs' Second Amended Complaint. (*See* Mot. at 2.) Instead, Plaintiffs argue without explanation that Ms. Spangler failed to "cite with particularity the alleged evidence that supports her factual assertions" and selectively quoted portions of the Second Amended Complaint, "while omitting key allegations . . . against her." (*See* Opp'n at 5.)

Ms. Spangler's Motion is not a typical motion for summary judgment that relies on evidence from the record to show no genuine dispute of material fact. Rather, it relies on a pure legal argument that arose after the Supreme Court's decision in *AMG Capital Management* regarding the relief Plaintiffs seek in this action from Ms. Spangler (as demonstrated by their own allegations). Plaintiffs do not (and cannot) dispute allegations taken from their own complaint, and their critiques of Ms. Spangler's undisputed material facts ring hollow.

RESPONSE TO STATEMENT OF ADDITIONAL MATERIAL FACTS

Although they do not dispute the material facts from Ms. Spangler's Motion, Plaintiffs list several additional "facts" that they claim are material to this dispute. Not so. Rather, most of these additional "facts" consist of allegations and other evidence related to Defendants' alleged wrongdoing and Ms. Spangler's alleged receipt of property from Defendants. Even though Ms.

Spangler disputes some of these facts, it ultimately doesn't matter because the "facts" are irrelevant to the legal question presented by Ms. Spangler's motion: whether Plaintiffs have a legal basis to seek monetary relief from a nominal defendant like Ms. Spangler.

ARGUMENT

In their Second Amended Complaint, Plaintiffs seek an order requiring Ms. Spangler "to *disgorge* all funds and assets . . . which are traceable to Defendants' deceptive and unlawful acts or practices." (Second Am. Compl. ("SAC"), ECF No. 219, at 54 (emphasis added).) But in their Opposition, Plaintiffs veer away from the language of "disgorgement," likely recognizing that the purpose of disgorgement is not to redress consumer injuries (Plaintiffs' only remaining source of monetary relief) but rather "to deprive *wrongdoers* of ill-gotten gains." *See Fed. Trade Comm'n v. AMG Servs., Inc.*, No. 12-00536, 2017 WL 1704411, at *11 (D. Nev. May 1, 2017) (unpublished) (emphasis added). Instead, the Opposition rebrands the relief Plaintiffs seek from Ms. Spangler as the "refund of money or return of property" to "redress injury to consumers pursuant to Section 19 of the FTC Act." (*See* Opp'n at 3, 10-11.)

Plaintiffs make two arguments as to why they can seek (and the Court can order) this monetary relief against Ms. Spangler. First, they argue that the Court may order Ms. Spangler to turn over allegedly "ill-gotten funds" pursuant to the Court's "inherent equitable powers." (*See* Opp'n at 9-10.) And second, they argue that even if statutory authority were necessary "to award equitable relief against Ms. Spangler, Section 19 of the FTC Act would provide it here." (*See id.* at 10-11.) Plaintiffs are wrong.

I. Plaintiffs Concede that They Cannot Seek Monetary Relief Against Ms. Spangler Under Section 13(b) of the FTC Act

As an initial matter, Plaintiffs fail to address Ms. Spangler's argument that Section 13(b) of the FTC Act does not authorize the Commission to seek (or the Court to award) an order of disgorgement against her. (*See* Mot. at 3-4.) Instead, in a footnote, they criticize Ms. Spangler for devoting "more than a page of her argument" to *AMG Capital Management* and state that the decision is "inapposite here." It is not.

In *AMG Capital Management*, the Supreme Court held that Section 13(b) of the FTC Act "does not authorize the Commission directly to obtain court-ordered monetary relief," including disgorgement. 141 S. Ct. 1341, 1347-48 (2021). And regardless of what Plaintiffs say now, in their Second Amended Complaint, they explicitly sought an order of disgorgement against Ms. Spangler based, in part, on Section 13(b). (*See* SAC ¶ 207.) Thus, *AMG Capital Management* is not "inapposite" to Ms. Spangler's Motion.

In any event, by not addressing Ms. Spangler's argument regarding Section 13(b) in their Opposition, Plaintiffs have conceded that Section 13(b) does not authorize the Commission to seek monetary relief against Ms. Spangler. *See Phrasavang v. Deutsche Bank*, 656 F. Supp. 2d 196, 201 (D.D.C. 2009) ("Because the Plaintiff fails to respond to any of these arguments in his oppositions, the court treats them as conceded." (internal citation omitted)).

II. Plaintiffs Cannot Seek Relief Against Ms. Spangler Based on the Court's Inherent Equitable Authority

Plaintiffs' principal argument is that the Court has the "inherent equitable authority" to grant relief against a nominal defendant like Ms. Spangler. (*See* Opp'n at 9-10.) To set up this argument, Plaintiffs cite a string of cases purportedly showing that federal courts have long

allowed government agencies to seek relief from nominal defendants. (*See* Opp'n at 7-8.) Many of these cases involve actions brought by the Securities and Exchange Commission, and their rulings can arguably be cabined to the securities context. *See, e.g.*, *SEC v. George*, 426 F.3d 786, 798 (6th Cir. 2005) ("Federal courts may order equitable relief against [such] a person who is not accused of wrongdoing in a *securities enforcement action* . . . (emphasis added)); *SEC. v. Cavanaugh*, 155 F.3d 129, 136 (9th Cir. 1998) (same); *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) ("[T]here is law to support the use of nominal defendants in *securities' actions* . . . (emphasis added)). Others involve actions where the Commission was seeking monetary relief under Section 13(b)–rather than Section 19–prior to the Supreme Court's ruling in *AMG Capital Management*. *See, e.g.*, *FTC v. Inc21.com, Corp.*, 745 F. Supp. 2d 975, 1009 (N.D. Cal. 2010) (noting that the Commission's claims against defendants were "expressly brought" under Section 13(b) and not Section 19); *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 464 (D. Md. 2004) ("*Section 13(b)* of the FTC Act invests the Court with equitable powers over 'innocent persons'. . . ." (emphasis added)). Plaintiffs do not (and cannot) cite any case where a court has allowed the Commission to seek monetary relief from a nominal defendant based on Section 19 alone.

Nevertheless, Plaintiffs rely on these cases to argue that this Court's authority to order a relief defendant, like Ms. Spangler, to "turn over ill-gotten funds comes from the [C]ourt's inherent equitable powers, not a statute." (*See* Opp'n at 9 (citing *Colello*, 139 F.3d at 677).) But Plaintiffs fail to recognize that a court's "inherent equitable authority" is not unlimited. Rather, a statute, by words or implication, can restrict a court's "jurisdiction in equity." *See Porter*, 328 U.S. at 398.

The Commission should be aware of this concept given its recent loss in *AMG Capital Management*. There, the Commission made a similar argument to the one Plaintiffs make here. Namely, the Commission pointed to the Supreme Court's ruling in *Porter* and argued that a court's "traditional equitable authority to grant an injunction includes the power to grant restorative monetary remedies." *AMG Capital Mgmt.*, 141 S. Ct. at 1349-50 (internal quotation marks omitted). The Supreme Court disagreed, stating that "the text and structure of the statutory scheme at issue can, 'in so many words, or by a necessary and inescapable inference,' restric[t] the court's jurisdiction in equity." *Id.* (citing *Porter*, 328 U.S. at 403). And in the case of Section 13(b), the inference against the section's "authorization of monetary relief is strong." *Id.* Accordingly, regardless of a court's traditional equitable authority to grant an injunction, the Supreme Court held that the Commission could not seek equitable monetary relief under Section 13(b). *See id.* at 1350, 1352.

Likewise, the inference against a court's ability to order monetary relief from a nominal defendant under Section 19 "is strong." Section 19 states that if "any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices . . . the Commission may commence a civil action *against such person, partnership, or corporation*, for relief under subsection (b) . . . ." 15 U.S.C. § 57b(a)(1) (emphasis added).[1] Subsection (b), in turn, gives the court jurisdiction to grant "such relief as the court finds necessary to redress injury to consumers." *Id.* § 57b(b). In other words, Section 19 explicitly limits those from whom the Commission can seek relief to defendants who have committed a

[1] Subsection (a)(2) also allows the Commission to commence a civil action against "any person, partnership, or corporation" that engages in an unfair or deceptive practice "with respect to which the Commission has issued a final cease and desist order." 15 U.S.C. § 57b(a)(2). Since the Commission has not issued a final cease and desist order regarding the conduct alleged in the Second Amended Complaint, this subsection is inapplicable.

rules violation. *See id.* § 57(a)(1). And the Commission admits that relief defendants, "[b]y definition," are not accused of any wrongdoing. (*See* Opp'n at 7, 11 n.7.) Thus, the text of the statute restricts the Court's "inherent equitable authority" to grant relief against relief defendants, like Ms. Spangler, under Section 19.

III. Plaintiffs Cannot Seek Relief Against Ms. Spangler Under Section 19 of the FTC Act

Plaintiffs' secondary argument is that Section 19 itself provides the Court a "statutory grant of equitable jurisdiction . . . to award equitable relief against Ms. Spangler." (*See* Opp'n at 10.) Again, Plaintiffs are wrong.

First, it bears repeating that Plaintiffs originally sought an order requiring Ms. Spangler "to disgorge all funds and assets . . . which are traceable to Defendants' deceptive acts or practices . . . ." (SAC at 54.) As Ms. Spangler argued in her Motion, however, the purpose of disgorgement is to deter wrongful conduct, not redress consumer injuries. (*See* Mot. at 5-6.) Plaintiffs did not directly address this argument in their Opposition, choosing instead to rebrand the relief they seek against Ms. Spangler as "the return of ill-gotten funds . . . to provide victim redress." (*See* Opp'n at 11 n.7.)

But as shown above, Section 19 does not allow the Commission to seek (or the Court to order) relief from Ms. Spangler, regardless of how Plaintiffs characterize that relief. Even though Section 19 gives the Court the ability to order "such relief as the court finds necessary to redress injury to consumers," it explicitly limits from whom that relief may be sought. Specifically, the section allows the Commission to seek (and the Court to order) relief for consumer redress against those who violated a rule "respecting unfair or deceptive acts or practices"; not relief

defendants who are not accused of any wrongdoing. *See* 15 U.S.C. § 57b(a)(1). Thus, Plaintiffs cannot seek monetary relief from Ms. Spangler under Section 19.

CONCLUSION

Plaintiffs continue to downplay *AMG Capital Management* and the impact that it has on this case. Besides curtailing the Commission's historic overreach under Section 13(b), *AMG Capital Management* serves as an important reminder that statutory text matters. And here, the text and implication of Section 19 demonstrates that neither the Court's "inherent equitable authority" nor Section 19 itself allows Plaintiffs to seek monetary relief from a nominal defendant like Ms. Spangler. Thus, Ms. Spangler respectfully requests that this Court grant her Motion and dismiss her as a relief defendant from this case.

DATED: July 9, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 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/ Shelby Irvin