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**UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

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FEDERAL TRADE COMMISSION *et al.*,

Plaintiffs,

vs.

ZURIXX, LLC *et al.*,

Defendants.

**OBJECTION TO MAGISTRATE  
MEMORANDUM DECISION  
AND ORDER  
DENYING MOTION TO INTERVENE  
(DKT. 314)**

Case No: 2:19-CV-00713-DAK-DAO

District Judge Dale A. Kimball  
Magistrate Judge Daphne A. Oberg

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Proposed Intervenors, through counsel, and pursuant to Federal Rule of Civil Procedure 72(a) and 28 U.S.C. §636(b)(1)(A), object to the Memorandum Decision and Order Denying Motion to Intervene dated August 10, 2021 (Dkt. 314) (Order) as follows:

**INTRODUCTION**

The Order found Proposed Intervenors have standing to assert claims in this case, yet denied their motion to intervene. Notably, of the four factors to grant intervention as of right, the

Magistrate Judge found in favor of movants on two. The Magistrate Judge, however, found against Proposed Intervenor on the first and fourth factors: the Magistrate Judge found the motion was untimely and determined the existing defendant, Zurixx, LLC, adequately represents Intervenor interests.

Because Proposed Intervenor's motion is timely and because Zurixx, LLC, does not adequately represent their interests, the court should reverse and allow intervention.

## **OBJECTIONS**

### **I. The Motion is Timely**

"The timeliness of a motion to intervene is assessed in light of all the circumstances, including the length of time the applicant knew his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances."<sup>1</sup> Within this broad sweep, the Tenth Circuit has explained that prejudice is the most important factor. "The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by the failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained."<sup>2</sup> In this case there is no real prejudice to the existing parties by allowing intervention.

The Magistrate Judge's Order did not sufficiently consider the lack of prejudice to the existing parties, and specifically Plaintiffs, that would result from intervention. The Order noted that fact discovery closes on October 22, 2021, and trial is set for September 12, 2022. In fact, the Magistrate Judge recently extended the discovery deadline from July 22 to October 22, 2021. (*See*

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<sup>1</sup> *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001) (cleaned up)

<sup>2</sup> *Id.*, citing Wright, Miller & Kane, Federal Practice and Procedure §1916 (2d. ed. 1986)

Dkt. 304.) Just as in *Utah Ass'n of Counties*, where the motion was found timely, this case is “far from ready for final disposition.” Proposed Intervenors have stated they do not intend to take additional discovery from Plaintiffs, and given the trial date in more than one year from now in September 2022, there is ample time for Plaintiffs to seek discovery on an expedited basis. To the extent that Plaintiffs wish to take discovery from Proposed Intervenors, Proposed Intervenors shall cooperate with Plaintiffs to provide such discovery in an expedited and timely fashion so as not to delay any other existing case management deadlines. The Order noted the parties recently participated in a settlement conference, which failed, but the fact existing parties did not settle does not show any prejudice to Plaintiffs. Finally, the Order noted the motion was filed more than eighteen months after the receiver suspended Zurixx’s operations, but the Tenth Circuit has held the timeliness “analysis is contextual; absolute measures of timeliness should be ignored.”<sup>3</sup>

In finding that Proposed Intervenors’ Motion was untimely, the Magistrate Judge did not consider that, as a real and practical matter, Plaintiffs here will suffer no prejudice from Proposed Intervenors’ participation in this case. Proposed Intervenors seek intervention to assert an important but narrow claim for relief: a declaration that they are entitled to receive the benefits of their contracts with Zurixx. This claim can be adjudicated based on the discovery already exchanged, or to be exchanged, between the existing parties within the current case management deadlines, and any expedited discovery Plaintiffs may wish to take from Proposed Intervenors, which can also be accomplished within the current case management deadlines.<sup>4</sup>

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<sup>3</sup> *Utah Ass'n of Counties*, 255 F.3d at 1250.

<sup>4</sup> Proposed Intervenors note that Plaintiffs sought to extend discovery until December 22, 2021. Given that Plaintiffs themselves sought that additional time, they cannot claim to be prejudiced by Proposed Intervenors’ participation in discovery within the existing case management deadlines, or even if discovery were briefly extended to December 22, as Plaintiffs themselves had requested.

The Magistrate Judge's Order also did not consider the very real effect that the COVID-19 pandemic has had on Proposed Intervenor's ability to organize, retain counsel, and assert their rights in this case. While Proposed Intervenor certainly had, and continue to have, an interest in asserting their claim to receive the benefits of their contracts with Zurixx, paramount consideration and effort over the past 18 months has, quite reasonably, been focused on Proposed Intervenor's health and safety, and that of their family members, friends, and colleagues.

Further, Proposed Intervenor filed the Motion shortly after the Supreme Court's ruling in *AMG Capital*, which markedly changed the landscape for FTC enforcement actions by establishing that the FTC has, for decades, engaged in an unlawful practice of obtaining asset freezes and receiverships to preserve assets for consumer redress under Section 13(b) of the FTC Act, when such monetary damages are not available under Section 13(b). In fact, this Court itself recognized the monumental effect of *AMG Capital* on FTC enforcement cases, as the Court *sua sponte* ordered briefing on the effect of *AMG* on the asset freeze and receivership in this case. (Dkt. 241.) To be clear, here, the asset freeze and receivership were obtained under pretenses and precedent that was overruled by *AMG Capital*. Where Proposed Intervenor may not have had any recourse due to precedent upholding the FTC's enforcement strategy prior to *AMG Capital*, when the Supreme Court decision establishing their right to relief from the FTC's unlawful acts came down, Proposed Intervenor acted promptly.

Under these circumstances, there is no genuine prejudice to Plaintiffs, and Proposed Intervenor's Motion was timely.

## II. Zurixx, LLC Does Not Adequately Represent Movants' Interests

The “language of the [Rule 24(a)(2)] clearly suggests...the intervenor is to be allowed in, if the other conditions of the rule are satisfied, unless the court is persuaded that the representation is in fact adequate.”<sup>5</sup> The party seeking intervention bears only a “minimal” burden of showing inadequate representation. This minimal burden is satisfied by showing there is a mere “possibility that the interests of the applicant and the parties may diverge.”<sup>6</sup> The possibility of diverging interests “need not be great” to find the minimal burden is satisfied.<sup>7</sup> The motion easily satisfies this minimal standard.

Proposed Intervenors showed the court their interests in continuing Zurixx’s educational programs may differ substantially from Zurixx’s interests, which may include “avoiding monetary liability, even if Zurixx programs do not resume.”<sup>8</sup> Proposed 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. Zurixx itself does not necessarily represent these interests.

The Magistrate Judge incorrectly states that “[t]here is no doubt Zurixx seeks the same outcome [as Proposed Intervenors],” that being the “continuation of Zurixx’s educational programs, and resumption of services.” (Dkt. 314, at 9.) The presumption is not necessarily true. While the resumption of Zurixx’s services is one *possible* outcome if Zurixx prevails in this case, it is not the *only* possible outcome, such that Zurixx and Proposed Intervenors must be aligned.

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<sup>5</sup> 7C Fed. Prac. & Proc. Civ. §1909 (3d ed. 2021)

<sup>6</sup> *Utah Ass’n of Counties*, 255 F.3d at 1254.

<sup>7</sup> *Utah Ass’n of Counties*, 255 F.3d at 1254.

<sup>8</sup> Reply memorandum, at p. 5.

For example, while Zurixx and its codefendants have sought to set aside the receivership after the Supreme Court's ruling in the *AMG Capital* case (*see* dkt. 244), the defendants may simply be seeking to recover their assets that are controlled by the receiver. Zurixx may not reestablish the online resource center or provide ongoing support and instruction to Proposed Intervenor. Further, even if the defendants were to prevail in its defense of this action, they may elect simply to keep the company shuttered, liquidate its assets, and move on to other ventures without honoring their contracts with Proposed Intervenor. What Proposed Intervenor seek in their proposed Complaint is a declaration of the validity of, and their rights under, their contracts with Zurixx. The relief sought means that not only are Proposed Intervenor entitled to receive their contractual benefits without interference from Plaintiffs and the receiver, but also that Zurixx is obligated to *provide* those benefits. To the extent that the defendants' business or personal interests are best served by shuttering their business, even if they prevail in this action, Zurixx does not represent Proposed Intervenor's interests.

Nor, of course, do Plaintiffs represent Proposed Intervenor's interests. Plaintiffs' actions in bringing this case and shutting down Zurixx's operations, including the online resource center, run *contrary* to Proposed Intervenor's interests. If Plaintiffs and the receiver had been representing Proposed Intervenor's interests, Proposed Intervenor would not have brought this Motion in the first place.

To the extent that Zurixx and the other defendants have aims other than that very specific goal, they do not adequately represent Intervenor's interests.

**CONCLUSION**

For the foregoing reasons, the court should overrule the Order and grant the Motion to Intervene.

DATED: August 31, 2021.

GOEBEL ANDERSON PC

/s/ Sam Meziani  
Sam Meziani  
-and-  
MITTS LAW, LLC  
Maurice R. Mitts, Esq.  
(*pro hac vice forthcoming*)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 31st day of August, 2021, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

*/s/ Sam Meziani* \_\_\_\_\_