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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.	**PLAINTIFF FTC'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, FOR RECONSIDERATION** Case No. 2:19-cv-00713-DAK-DAO District Judge Dale A. Kimball Magistrate Judge Daphne A. Oberg

Plaintiff Federal Trade Commission ("FTC") respectfully seeks clarification of two aspects of the Court's Memorandum Decision and Order on the preliminary injunction ("Order") [ECF No. 333].[1] First, whether the Order has resolved contested fundamental issues relating to how consumer redress under Section 19 of the FTC Act will be measured in this case, including FTC's burden of proof as to consumer reliance and injury. In the alternative, if the Order decided these issues against FTC, FTC respectfully seeks reconsideration given the significance

[1] FTC met and conferred with counsel for the Zurixx Defendants regarding the issues addressed by this motion.

of these issues, and the fact that the Court has yet to have the benefit of merits briefing from FTC on them. Second, FTC seeks to clarify whether the release of $50,000 from the asset freeze for legal expenses applies only to the three Individual Defendants (totaling $150,000), or also to four Corporate Defendants, which would bring the total release to $350,000.

I. PRESUMPTIONS REGARDING CONSUMER RELIANCE AND REDRESS

FTC seeks clarification of whether the Order decided or left open fundamental issues of law regarding FTC's burden of proof as to consumer reliance and calculation of consumer redress under Section 19.[2] Well-established rebuttable presumptions, long applied in both 13(b) and Section 19 cases, would not require FTC to prove reliance and injury specifically as to each of the more than 3,600 consumers who purchased Zurixx's coaching products sold over the phone within the statute of limitations period. Instead, FTC would be required to show that Defendants made material misrepresentations that were widely disseminated, and that consumers purchased Defendants' products. *See, e.g.*, *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1206 (10th Cir. 2005). If successful, FTC would be allowed to reasonably approximate the injury caused by Defendants. The reasonable approximation would be the total amount consumers paid minus refunds and chargebacks they received (sometimes called gross revenue) for Defendants' coaching products during the limitations period because Defendants violated the Telemarketing Sales Rule ("TSR") in selling those products. Thereafter, the burden would shift to Defendants to show why their monetary liability should be lowered. *See, e.g.*, *FTC v.*

[2] If the Court clarifies that it has not decided these issues, FTC intends to address them on summary judgment to preserve judicial economy. *See* DUCivR 56-1(b)(1) ("The parties should endeavor to address all summary judgment issues in a single motion.").

Kuykendall, 371 F.3d 745, 764-66 (10th Cir. 2004) (en banc).

A. The Briefing

The legal issues addressed here were not squarely presented by Defendants' moving brief to modify the preliminary injunction, and their resolution was not necessary to the results reached by the Order. The sole allusion to these issues in Defendants' opening brief was two statements within a lengthy footnote addressing several distinct matters. *See* [ECF No. 244, at 4 n.1]. FTC's within-length Opposition focused on the core, disputed issues of law and fact—whether Section 19 allows for an asset freeze and receivership and the effects of the Supreme Court's *AMG* decision. Thereafter, Defendants' 20-page Reply spent several pages on the legal issues addressed here, and added arguments about purportedly satisfied customers. [ECF No. 283, at 11-15]. FTC did not request leave to file a surresponse—not because the issues or factual disputes are undisputed or unimportant, but because they were not core to Defendants' motion and are more appropriately addressed on summary judgment with a developed factual record.

B. The Order

The Order contains language appearing to credit Defendants' Reply arguments regarding the issues addressed here. For example, it states there has been a "change in this case from the previous gross revenue damages under Section 13(b) to the individualized consumer redress damages under Section 19" affecting "not only the amount of damages but the type of evidence needed to demonstrate those damages." [ECF No. 333, at 13-14].

The Court did not have to (and perhaps did not) reach these legal questions to resolve Defendants' motion. It was well-within the Court's discretion to release funds for legal expenses and to stay the Court-appointed receiver's clawback actions. And the Court observed that the

"the likelihood of success element," established by FTC, "more properly relates to the FTC's ability to prove liability for its claims," rather than a calculation of the redress amount at this stage. *Id.* at 8. Indeed, the Court observed the "present uncertainty" about the redress calculation. *Id.* at 20. It noted that Plaintiffs "provided evidence that the Zurixx Defendants' business model injured consumers . . . through telesales by the use of false and misleading representations," *id.* at 8, and Defendants presented "an exhibit containing a sampling of satisfied customers who would not seek consumer redress," *id.* at 13.

C. The Law

It is well-established that a rebuttable presumption of consumer reliance will arise if FTC proves that (1) Defendants made material misrepresentations or omissions, (2) the misrepresentations or omissions were widely disseminated, and (3) consumers purchased Defendants' products. If FTC shows that the reliance presumption applies, it may reasonably approximate consumer injury based on the total amount consumers paid (minus refunds or chargebacks they received) for coaching products Defendants sold in violation of the TSR within the limitations period. The burden will then shift to Defendants to prove that a lesser amount may be justified. For example, Defendants might try to show that the calculations used by FTC are incorrect or present consumers who do not wish to receive redress.

In *FTC v. Security Rare Coin & Bullion Corp.*, the appellant deceived consumers with false representations about the value of its coins and buy-back policy. 931 F.2d 1312, 1314 (8th

Cir. 1991).[3] Appellant challenged the district court's rescission award to injured consumers under Section 13(b). It argued the mirror image of Defendants' argument here: "actual reliance on false and misleading statements was not proved for each consumer who is to be reimbursed." *Id.* at 1316. The Eighth Circuit "reject[ed] Security Coin's argument," holding that "FTC need merely show that the misrepresentations or omissions were of a kind usually relied upon by reasonable and prudent persons, that they were widely disseminated, and that the injured consumers actually purchased the defendants' products." *Id.* Requiring FTC to prove subjective reliance, consumer-by-consumer, would be "virtually impossible" and "would thwart and frustrate the public purposes of FTC action. This is not a private fraud action, but a government action brought to deter unfair and deceptive trade practices and obtain restitution on behalf of a large class of defrauded investors. It would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer." *Id.*

The Ninth Circuit confirmed application of the consumer reliance presumption in the Section 19 case *FTC v. Figgie International, Inc.*, 994 F.2d 595 (9th Cir. 1993). Appellant made the same argument Defendants make here: "Figgie argues that because its liability is premised on certain misrepresentations or misleading statements, only those consumers that can prove that they purchased [its product] in reliance on those statements should be entitled to redress." *Id.* at 605. The court found this contention "incorrect as a matter of law. It is well established with regard to Section 13 . . . that proof of individual reliance by each purchasing customer is not

[3] Cases involving Section 13(b) cited herein have been abrogated in part, on other grounds, by the Supreme Court's *AMG* decision to the extent they held that Section 13(b) permitted FTC to obtain equitable monetary relief. *AMG* did not otherwise take issue with the consumer redress frameworks applied in these cases or the policy reasons underlying them.

needed." *Id.* (citing *Security Rare Coin* and quoting *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 2d 1282, 1293 (D. Minn. 1985)). The court held that **"[t]he same reasoning is applicable to Section 19**." *Id.* at 606 (emphasis added).

Relying on *Figgie* and *Security Rare Coin*, the Tenth Circuit adopted this presumption in the civil contempt case *FTC v. Kuykendall*, 371 F.3d at 764-66, and Section 13(b) case *FTC v. Freecom Communications*, 401 F.3d at 1205-07. The district court in *Freecom*, after a bench trial, found that FTC "failed to introduce sufficient probative evidence in support of its allegations" and "consumer injury." 401 F.3d at 1200 (internal quotation marks omitted). Reversing the district court, the *Freecom* panel followed *Figgie* in holding that "FTC is not required, however, to show any particular purchaser actually relied on or was injured by the unlawful misrepresentations." *Id.* at 1205; *id.* at 1205-06 (quoting *Figgie* and *Kitco*, and citing *Security Rare Coin*); *id.* at 1206 (in *Kuykendall*, Tenth Circuit "rejected the argument that § 5 [of the FTC Act] required the FTC to prove individual consumer reliance"). Furthermore, the panel stated that "[t]he district court erroneously believed the FTC had to present a 'parade' of consumer witnesses to establish its case against Haroldsen." *Id.* at 1206. Here, it would be similarly impractical and illogical to require Plaintiffs to parade more than 3,600 consumers who purchased Defendants' products sold over the phone during the limitations period to testify at trial or for the Court to review 3,600 individual declarations for summary judgment.

In addition to the consumer reliance presumption, there is the related presumption that a reasonable approximation of consumer injury in this case is the total amount consumers paid (minus refunds and chargebacks received) for the coaching products Defendants sold in violation of the TSR within the limitations period. *See, e.g.*, *Kuykendall*, 371 F.3d at 766 ("[U]sing the

defendant's gross receipts is a proper baseline in calculating the amount . . . necessary to compensate injured consumers."); *Freecom*, 401 F.3d at 1207 ("Accordingly, the FTC's view that consumer injury in this case could amount to nearly $150 million was justified notwithstanding limited consumer testimony of particularized injury."). That is not the end of the story—the burden then shifts to Defendants, and they may try to reduce the amount. *Kuykendall*, 371 F.3d at 766. Defendants may proffer evidence about, among other things, additional refunds or "wholly satisfied" customers.[4] *Id.* Or they may be able to prove that "*individual* transactions were atypical," warranting reductions in the calculation. *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 369 (2d Cir. 2011) (explaining that such individualized proof is "properly considered at stage two of the analysis, where the burden of proof rests with the defendant").

"To the extent the large number of consumers affected by the defendants' deceptive trade practices creates a risk of uncertainty" in the calculation of redressable injury, "the defendants must bear that risk." *Kuykendall*, 371 F.3d at 765; *id.* ("'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'") (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 372 U.S. 251, 265 (1946)); *Freecom*, 401 F.3d at 1206-07 (quoting *Kuykendall*, 371 F.3d at 765). "The seller bears this risk because '[t]he fraud in the selling, not the value of the thing sold,' is what entitles consumers to redress." *Freecom*, 401 F.3d at 1207 (quoting *Figgie*, 994 F.2d at 606).

This Court correctly applied the consumer reliance presumption in an FTC case

[4] But "the existence of some satisfied customers" is not a defense to liability. *Freecom*, 401 F.3d at 1206 n.8.

involving, as here, claims under Section 13(b) and Section 19 (there, for violation of FTC's Credit Practices Rule). *See FTC v. LoanPointe, LLC*, No. 2:10-CV-225-DAK, 2011 WL 4348304, at *4 (D. Utah Sept. 16, 2011) (Kimball, J.), *aff'd*, 525 F. App'x 696 (10th Cir. 2013). In so doing, this Court relied on *Figgie* and *FTC v. SlimAmerica, LLC*, 77 F. Supp. 2d 1272, 1275 (S.D. Fla. 1999) (and *SlimAmerica*, in turn, relied on *Secure Rare Coin*). *Id. at* *4 ("The FTC is not required to prove that each consumer relied on Defendants' deceptive claims to establish a violation of Section 5 of the FTC Act. Instead, a presumption of actual reliance arises once the FTC has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product, or were induced to some other action, such as garnishment of wages by an employer." (citations and quotation marks omitted)). The Court rejected defendants' arguments that the representations at issue were not material nor misleading. *Id.* at *4-5.[5]

There is no reason that the Supreme Court's *AMG* decision, holding that FTC cannot obtain equitable monetary relief pursuant to Section 13(b) because of the statutory meaning of "injunction," should cause the Court to depart from this well-established authority, including *Loanpointe*. Indeed, the Central District of California recently upheld application of the presumptions of consumer reliance and that amounts paid by consumers reasonably approximated consumer injury in a post-*AMG* Section 19 case also involving misrepresentations

[5] Unlike this case where the Section 19 redress remedy will turn on the amount of injury to consumers, *see* Order at 17, *LoanPointe* was a disgorgement case turning on the amount of defendants' ill-gotten gains. There, the ill-gotten gains from defendants' violations of the FTC Act were "interest amounts received through the inappropriate garnishments" of consumers' wages, "minus any amount" that was "repayment of principal on the loans in question." *See* 2011 WL 4348304, at *12-13.

that violated the TSR. *United States v. MyLife.com, Inc.*, ___ F. Supp. 3d ____, No. CV 20-6692, 2021 WL 4891776, at *13 (C.D. Cal. Oct. 19, 2021) (applying presumption of consumer reliance on widely disseminated misrepresentations, granting summary judgment as to consumer redress, and holding that amounts paid by consumers minus refunds and chargebacks reasonably approximated the consumer redress amount); *id.* ("The appropriate method to redress these consumers under Section 57b [Section 19] is to refund the amounts consumers paid.").

Accordingly, FTC respectfully requests that the Court clarify that the Order did not decide the fundamental legal issues addressed here. Alternatively, if the Order has decided these issues against FTC, FTC respectfully requests that the Court reconsider that decision.

II. CLARIFICATION REGARDING RELEASE OF LEGAL EXPENSES

The Order "lift[s] the asset freeze in a limited fashion to grant each of the Zurixx Defendants an additional $50,000 to assist in their defense of the case." [ECF No. 333, at 17]. The Order further notes that Defendants had not "submit[ted] evidence that they are struggling to meet their own living expenses" and that, presumably, Defendants "are capable of working to meet their own living expenses." *Id.* Based on these statements, FTC reads the Order to allow the release of $50,000 to each of the three Individual Defendants. Earlier in the Order, however, "Zurixx Defendants" is defined to include the Individual Defendants plus four entities: Zurixx, LLC, Carlson Development Group, LLC, CJ Seminar Holdings, LLC, and Zurixx Financial, LLC. *Id.* at 1. If each entity is also receiving $50,000 in funds, the release totals $350,000 instead of $150,000. FTC did not understand this to be the Court's intent, but it respectfully requests clarification on this point.

November 19, 2021

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on November 19, 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/Thomas Harris
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