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

FEDERAL TRADE COMMISSION and UTAH DIVISION OF CONSUMER PROTECTION, **Plaintiffs,** **v.** **ZURIXX, LLC, *et al.*,** **Defendants.**	**OBJECTION TO RECEIVER'S MOTION TO LIFT STAY** **Case No.: 2:19-cv-00713-DAK-DAO** **Judge Dale A. Kimball** **Magistrate Judge Daphne A. Oberg**

Non-Party and ancillary case defendant Matt Davis ("Davis"), through counsel MCNEILL VON MAACK, hereby submits his Objection to the Motion to Lift Stay in Ancillary Cases and to Allow the Receiver to File Additional Ancillary Cases, filed at the end of the business day on October 27, 2022 (Dkt. 423) ("Motion").

OBJECTION

The Court should deny the Motion without prejudice. The Motion, among other things, seeks an order by this Court that would lift the stay in ancillary cases, including an ancillary case filed against Davis, "to allow those pending cases to move forward." [Dkt. 423 at 1.] The

Motion further "requests that the stay be lifted ***prior to*** November 4, 2022." [Dkt. 423 at 3 (emphasis added).] The relief sought by the Receiver is not warranted, much less warranted on an emergency basis of less than **seven days** – i.e., less than the time afforded parties to respond under DUCivR 7-1(a)(4)(D)(ii).[1]

1. There is no Emergency as to the Ancillary Cases.

The Court should reject the Receiver's request that the stays in the ancillary cases be lifted prior to November 4, 2022. [Dkt. 423 at 3.] The only reason given by the Receiver for expedited treatment of its Motion is that November 4 "is when many of the existing tolling agreements expire." [*Id.*] Such tolling agreements, however, have nothing to do with the already-filed ancillary cases; they relate only to the Receiver's request "to file additional ancillary cases." [*Id.*]

Further, an expedited ruling on the Motion is not warranted because any emergency now as to the ancillary cases has been self-inflicted by the Receiver. That is, the Receiver argues (but does not prove) that proceeding with litigation now follows efforts of "engag[ing] in settlement discussions with multiple parties resolving and attempting to resolve both filed and unfiled (tolled) disputes." [Motion at 2.] However, counsel for Davis who represents the defendants in five ancillary cases advised the Receiver's counsel ***six months ago***: "We have been able to

[1] As a non-party, Davis only received notice of the Receiver's Motion because his counsel previously entered an appearance relative to discovery issues. Currently, it is unclear whether any actual party to this case will respond to the Motion, in light of a settlement reached in late 2021, [*see* 12-15-2021 Stipulation of All Parties to Stay Case for 60 Days to Consider Settlement Agreement (Dkt. 349)], let alone respond within the short time by which the Receiver requests its Motion be granted. Accordingly, Davis submits this Objection for the Court to consider in the spirit of being an *amicus curiae*, and because even unopposed motions should not be granted unless well taken.

speak with each of our clients. Each has decided not to make an offer at this time. Please keep us posted on your upcoming filing." [4-26-2022 Email J. McNeill to D. Byers, attached as Exhibit "1."] If there was any real exigency as to the ancillary cases, the Receiver would undoubtedly have filed its Motion earlier, permitting sufficient time for briefing and due consideration by the Court.

Without any exigency as to the ancillary cases, the Court should not grant the Motion, if at all, as to the ancillary cases within that shortened time frame.

2. The Receiver's Motion is Procedurally Improper and Undermines the Right to Due Process.

The Court should deny the Motion without prejudice as to the ancillary cases because the Motion is inconsistent with the ancillary defendants' right to due process of law. As the Supreme Court has recognized:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

Armstrong v. Manzo, 380 U.S. 545, 550, 85 S. Ct. 1187, 1190, 14 L. Ed. 2d 62 (1965) (citations omitted).

The stay that the Receiver now requests be lifted was imposed through the Court's Memorandum Decision and Order, entered November 8, 2021, in this underlying Receivership Case as Dkt. 333 ("Mem. Dec."). The Mem. Dec. provided that "the following ancillary receivership actions are STAYED and ADMINISTRATIVELY CLOSED and all pending

motions in those cases are denied without prejudice," describing thirteen case numbers. In addition to the above captioned case, however, the Mem. Dec. was also filed by the Court in those individual ancillary cases, including five cases in which counsel for Davis is also counsel for the ancillary defendants: *Broadbent v. Davis, et al.*, 2:20-CV-545 (Dkt. 35); *Broadbent v. Freier, et al.*, 2:20-CV-546 (Dkt. 40); *Broadbent v. Hrisko, et al.*, 2:20-CV-550 (Dkt. 39); *Broadbent v. Swails*, 2:20-CV-551 (Dkt. 38); and *Broadbent v. Shemin, et al.*, 2:20-CV-763 (Dkt. 18).

The Receiver only filed the Motion in the underlying Receivership Case and not in the separate ancillary cases. In so doing, because none of the ancillary defendants are parties to or able to file responses in the underlying Receivership Case, the Receiver's Motion circumvents the ancillary defendants' right to due process of law. That is, the Motion seeks to impose the burden to recommence defending against the Receiver's ancillary cases and using the ancillary defendants' property to pay their attorneys to do so, without giving them the opportunity to be heard in a meaningful manner.[2]

Accordingly, the Court should deny the Motion as to the ancillary cases without prejudice. If the Receiver seeks to lift the stay that was imposed by entering the Mem. Dec. in each of the ancillary cases, the Receiver should instead file motions in the ancillary cases so that the ancillary defendants can be heard on the issue in a meaningful manner.

[2] The ancillary defendants should each have the option to evaluate the Receiver's Motion and decide whether they oppose having the stay lifted. Some may not oppose lifting of the stay and would prefer obtaining a final decision on their respective motions to dismiss that were previously filed, briefed, argued, and taken under advisement. This Objection is without waiving Davis's or any other ancillary defendant's right to make that determination.

3. The Receiver's Motion Raises Substantial Questions on Whether the Stay Should be Lifted at all, Including as to the Ancillary Cases.

The Receiver's Motion should be the subject of adversarial briefing because it raises various questions the Court should consider on whether the stay should be lifted. Just one example is that the Receiver has not complied with the Court's Mem. Dec. and disregards the Court's reasoning for imposing the stay in the first instance.

That is, the Mem. Dec. followed extensive briefing in the Receivership Case and ancillary cases as to the impact of "the Supreme Court['s] … decision in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), determining that Section 13(b) of the FTC Act does not grant the FTC authority to obtain equitable monetary relief. *Id.* at 1352." [Mem. Dec. at 3.] This Court ruled:

> The FTC's reliance on Zurif's gross telemarketing sales in the three years leading up to the Complaint does not demonstrate the individual consumer redress damages that are at issue under Section 19. Because *Plaintiffs must now rely on specific violations*, the justification for imposing an asset freeze and receivership has also changed significantly.

[Mem. Dec. at 12-13 (emphasis added).] The Court further recognized "the individualized nature of the consumer redress available under Section 19 that was not at issue when the FTC brought its Complaint" [*id.* at 13]; the change from gross revenue damages to individualized consumer redress damages "is a significant change in not only the amount of damages but the type of evidence needed to demonstrate those damages" [*id.* at 13-14]; "[t]he court is also concerned with the equities involved in having the Receiver pursue these clawback cases despite the uncertainty of damages at issue under Section 19 and the state claims" [*id.* at 19]; and "the equities of having such individuals and entities pay on a judgment before the owners of the

actual business, who profited much more from the scheme, concern the court when it is uncertain whether it is actually necessary to get every potential dollar back in the receivership estate." [*Id.* at 19.] Accordingly, the Court ruled it does not have clear evidence that Defendants in the Receivership Case cannot satisfy a potential judgment and, therefore, "the ancillary clawback cases are not presently necessary." [*Id.* at 20.] It was on that basis that the Court "stay[ed] and administratively close[d] all the Receiver's ancillary clawback cases presently pending in this court."

The Receiver's Motion disregards this Court's Mem. Dec. and reasoning for staying the ancillary cases, stating:

> Now, the Receiver requests that the Court lift the stay so that the Receiver may proceed with litigation and liquidating claims. The Court's concern has now been resolved because the Court entered the Stipulated Order for Permanent Injunction and Monetary Judgment (CM/ECF No. 365, the "Judgment") that, among other things, imposed a monetary judgment of $104,700,000 against the receivership entities, jointly and severally.

[Motion at 2.] This "pie-in-the-sky" Judgment is not the same judgment the Court contemplated in the Mem. Dec., which would represent "specific violations" and "individualized consumer redress damages." To the contrary, the Judgment relied upon by the Receiver was a stipulated judgment under a settlement agreement – one resulting from negotiations in which the ancillary defendants were not involved – that approximates the equitable monetary relief the Supreme Court held in *AMG Capital* was <u>not available</u> to the FTC under Section 13(b) of the FTC Act. And, importantly, the Plaintiffs in the Receivership Case never submitted evidence to support such damages. Hence, regardless of how large of an arbitrary pie-in-the-sky number was produced through those settlement negotiations, it does not represent the actual proven and recoverable consumer redress to which the FTC could be entitled following *AMG Capital*. That

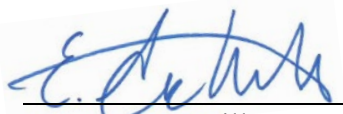
number, therefore, does not demonstrate whether the ancillary cases are necessary to satisfy individualized consumer redress damages, which was the precondition this Court set for allowing the Receiver to pursue the ancillary cases.

The Motion's failure to squarely deal with the substance of this Court's memorandum decision is underscored by not mentioning the ordered relief against the primary defendants. That is, Plaintiffs assigned the arbitrary and fictitious pie-in-the-sky number of $104,700,000 only to certain entities that Plaintiffs likely knew would not pay anything further. [2-15-2022 Stipulated Order for Permanent Injunction and Monetary Judgment ("Stipulated Order"), Part VI.A., at 8 (Dkt. 365).] At the same time, Plaintiffs agreed that the primary owner defendants possessing actual assets to pay for consumer redress and who primarily benefitted from the Zurixx business need only pay a *fraction* of that fictitious amount – a combined total of only $7,000,000. [*See* Stipulated Order, Parts VI.B-D. & VI.F-H, at 8-10.] The receiver does not show the $7,000,000 was not actually received, nor does it show the $7,000,000 did not approximate the real "individualized consumer redress damages" caused by "specific violations."

Accordingly, there are substantial questions raised by the Receiver's Motion that should preclude it from being summarily granted without being filed in the ancillary cases in which the ancillary defendants may be heard in a meaningful manner. As such, the Court should deny the Motion without prejudice.

DATED this 31st day of October, 2022.

MCNEILL | VON MAACK



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CERTIFICATE OF SERVICE

I hereby certify that I am employed by the law firm of MCNEILL VON MAACK, 175 South Main Street, Suite 1050, Salt Lake City, Utah 84111, and that pursuant to Rule 5(b), Federal Rules of Civil Procedure, a true and correct copy of the foregoing **OBJECTION TO RECEIVER'S MOTION TO LIFT STAY** was delivered to counsel of record this 31st day of October 2022, by filing of the same through the Court's CM/ECF System.

/s/ Camille Coley

Eric Schnibbe

From: Jason McNeill
Sent: Tuesday, April 26, 2022 12:56 PM
To: Doyle Byers
Cc: Eric Schnibbe
Subject: RE: Broadbent v. Freier et al. - RE: Nuffer Decision

Thanks Doyle. You actually beat me to the punch, as I was preparing to send you an email yesterday, but got pulled off track. Sorry about that.

We have been able to speak with each of our clients. Each has decided not to make an offer at this time. Please keep us posted on your upcoming filing.

Thanks,

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From: Doyle Byers <DSByers@hollandhart.com>
Sent: Tuesday, April 26, 2022 12:53 PM
To: Jason McNeill <mcneill@mvmlegal.com>
Cc: Eric Schnibbe <Schnibbe@mvmlegal.com>
Subject: RE: Broadbent v. Freier et al. - RE: Nuffer Decision

Jason, would you let me know as soon as possible whether your clients are interested in discussing settlement? If not, we intend to move forward with the litigation. Let me know if you wish to discuss.

Best regards,

Doyle S. Byers
Partner
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