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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.*, Defendant.	**MEMORANDUM OPPOSING RECEIVER'S MOTION TO LIFT STAY IN ANCILLARY CASES AND TO ALLOW THE RECEIVER TO FILE ADDITIONAL ANCILLARY CASES** Civil No. 2:19-cv-00713 Judge Dale A. Kimball Magistrate Judge Daphne A. Oberg

Non Party and ancillary case Defendant Christopher Young ("Young") submits this Memorandum Opposing the Receiver's Motion to Lift Stay in Ancillary Cases and to Allow the Receiver to File additional Ancillary Cases.

ARGUMENT

I. Incorporation of arguments of non-party Matt Davis.

Young hereby incorporates by reference the arguments set forth in the Objection to Receiver's Motion to Lift Stay [Dkt. 425] filed by Matt Davis.

II. The parties' settlement bars further proceedings in the Ancillary Cases.

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 case as Dkt. 333 ("Mem. Dec."). The Mem. Dec. details why the Ancillary Cases were stayed and sets forth the conditions that must occur before that stay can be lifted. Specifically, the Court ruled that the Plaintiffs must first prove damages against the Zurixx Defendants[1].

The Court was focused on the potential damages under § 19 of the FTC Act related to telemarketing sales during the three-year relevant time period. The FTC alleged that the gross revenues from those sales was $68.2 million. Mem. Dec. at 11. However, as the Court further explained:

> To obtain the consumer redress allowed under Section 19, the Zurixx Defendants contend that the FTC must show the extent to which each consumer was harmed from the TSR violations, not merely gross revenues. The FTC's reliance on Zurixx'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 reply on specific violations, the justification for imposing an asset freeze and receivership has also changed significantly.
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> The FTC provided some evidence of individual consumer harm in its opposition to this motion, but the evidence consists of some individuals whose claims were outside the statute of limitations and some individuals who already received part of their money back in refunds. Zurixx also countered the FTC evidence with an exhibit containing a sampling of satisfied customers who would not seek consumer redress. The Zurixx Defendants further assert that there are factual questions as to the damages available to each consumer based on disclaimers Zurixx allegedly read prior to each telesale. Before any telesales purchase was completed, Defendants claim that a Zurixx compliance representative read consumers an Enrollment Confirmation and Authorization Agreement, acknowledging that no one had promised them any type of financial success, that no one guaranteed them any results, and that their level of success would depend on a variety of factors.
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> The change in this case from the previous gross revenue damages under Section 13(b) to the individualized consumer redress damages under Section 19 is a significant change in not only the amount of damages but the type of evidence needed to demonstrate those damages.

[1] The "Zurixx Defendants" are the Zurixx entities, the insiders and their various entities. Mem. Dec. at 1.

In summary, the Court noted that "the FTC cannot equate the total amount of telesales in the statutory period with consumer injury…" [Mem. Dec. at 17]. The Court then ruled that the stay could be lifted only if the Zurixx Defendants could not pay the amount of damages awarded:

> The 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. While the enforcement action is against Zurixx's owners and their related entities, the clawback cases are against employees, contractors, and charities who received funds from Zurixx's owners. The clawback cases are far less complicated and reach judgment far more quickly than the underlying enforcement action. Therefore, these other entities will be required to pay their judgments before it is known whether the Defendants in the underlying enforcement action can satisfy the judgment in their case. For example, if the damages in the underlying enforcement action ultimately prove to be only $25 million and the receivership funds and Defendants in the enforcement action can cover those damages, it does not seem equitable to have previously taken three years of an employee's salary to pay for the judgment that the owner can pay for himself. The court realizes that these clawback cases are more nuanced, and involve individuals who were making fraudulent misrepresentations. But 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. [Mem. Dec. at 19.]
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> The court continues to have some belief that Plaintiffs in the enforcement action will uncover more assets available in the Zurixx Defendants web of LLCs and trusts. The court believes that all efforts should presently be put into this effort. If the ultimate damages are $50 million or $150 million, the court believes that when it enters that specific judgment, Plaintiffs and the Receiver should make every effort to have the principal defendants satisfy that judgment first. The specific amount of the judgment will be able to guide the parties and court as to whether the clawback cases are necessary at that time. The court's equitable concerns are heightened in this case because of the court's present uncertainty as to the scope of damages. The court must weigh that uncertainty against Plaintiffs. Because the court does not have clear evidence at this point of the litigation that Defendants cannot satisfy a potential judgment, the court concludes that the ancillary clawback cases are not presently necessary. Accordingly, the court stays and administratively closes all the Receiver's ancillary clawback cases presently pending in this court. If Defendants in this action cannot satisfy the judgment ultimately entered against them, Plaintiffs can renew the ancillary cases at that time.

[Mem. Dec., 19-20 (emphasis added).]

Here, Plaintiffs did not prove damages. There was not a trial on the merits nor any summary judgment order awarding damages. Instead, these parties settled their disputes. Shortly after the entry of the Mem. Dec. the Court stayed this case to permit the Federal Trade Commission to consider and vote on a proposed settlement agreement:

> ORDER granting the 349 Stipulation of all parties to stay the case for 60 days to permit the Commissioners of the Federal Trade Commission to consider and vote on the terms of the proposed final settlement agreement in this matter. This case and all applicable deadlines set forth in the 305 Amended Scheduling Order are hereby STAYED for a period of 60 days. Furthermore, the Parties are hereby ORDERED to notify this Court when the Federal Trade Commission has voted on the proposed final settlement agreement for this matter or to provide a status report by February 14, 2022 if the vote has not been completed by that date. Signed by Judge Dale A. Kimball on 12/16/2021. (eat) (Entered: 12/16/2021)

[Dkt. 350.] Then, the Plaintiffs reported to the Court on February 13, 2022 that they had "approved the proposed settlement." [Unopposed Motion to Enter Stipulated Order for Permanent Injunction and Monetary Judgment, Dkt. 363.] On February 15, 2022, the Court entered the Stipulated Order for Permanent Injunction and Monetary Judgment [Dkt. 365] (the "Stipulated Order").

The Stipulated Order is not a judgment based on damages. *See In re New Mexico Properties, Inc.*, 18 B.R. 936, 941 (Bankr. D.N.M. 1982) ("A stipulated judgment is not a judicial determination, but is a contract between the parties entering into said stipulation."). The Stipulated Order says nothing about damages. Rather it enters judgment against the Defendants based on a stipulated *settlement*. The Stipulated Order contains no findings of fact and no citations to evidence regarding any specific representations made to any particular Zurixx customer. Likewise, the Stipulate Order contains no findings of any damages suffered by such individual customers, or Zurixx's customers generally for that matter.

Nevertheless, the Receiver argues it has satisfied the condition that Plaintiffs first establish the amount of damages simply because the Stipulated Order contains the word "judgment" in the caption. The incredible settlement amount contained in the Stipulated Order of $104,700,000 is not based on evidence of "specific violations" and "individual consumer redress." Rather, it is a fiction, an exorbitant settlement figure Plaintiffs knew Zurixx Defendants could never pay. But more importantly, it certainly does not represent the actual damages, if any, the FTC could be arguably entitled to following *AMG Capital* and described in the Mem. Dec.

Moreover, no longer can the FTC and Receiver rely on Zurixx's total revenues to estimate actual damages. Rather, to obtain a damages award, the FTC was required to show the extent to which each individual consumer was harmed. But, Young is unaware of the FTC or the Receiver disclosing any evidence of consumer complaints,[2] any evidence of whether those complaints are valid, and importantly, whether each consumer suffered some sort of monetary harm as a result of allegedly unlawful conduct. In other words, the FTC and Receiver have yet to prove even $1 in actual damages, let alone $104,700,000. Before the Court gives the Receiver carte blanch to continue existing lawsuits and initiate new ones, it should require that the Receiver present his evidence of actual damages. Indeed, unless that proof is submitted to the Court, it appears the Receivership assets will not be efficiently spent, but rather substantially diminished litigating possibly moot third-party clawback actions.

The Court stated that it was "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

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[2] Mem. Dec., at 13 ("The FTC provided some evidence of individual consumer harm in its opposition to this motion, but the evidence consists of some individuals whose claims were outside the statute of limitations and some individuals who already received part of their money back in refunds. Zurixx also countered the FTC evidence with an exhibit containing a sampling of satisfied customers who would not seek consumer redress.")

state claims." [Mem. Dec., 19.] The mere entry of the Stipulated Order has not eliminated the uncertainty of damages. Indeed, that uncertainty will always exist now that the Plaintiffs have given up ever proving damages in light of the parties' settlement. The settlement bars the reopening of the Ancillary Cases under the equitable, rational, and plain language of the Court's Mem. Dec.

Finally, the Court should be aware of the Receiver's ultimate strategy in the Ancillary Cases. In those cases, the Receiver has alleged claims under the Utah Uniform Voidable Transfer Act, Utah Code Ann. § 25-6-101, *et seq.* ("UVTA"). It is the Receiver's position that he has no obligation to prove that any individual defendant in the Ancillary Cases actually engaged in deceptive or fraudulent conduct. [*See Broadbent v. Olson*, Case No. 2:20-cv-00549, pp. 7-11.] Specifically, the Receiver relies on Ponzi-scheme cases for his argument that "the defendant's conduct is simply not an element of the Receiver's [voidable transfer] claim." *Id*. at 8. Thus, the Receiver intends to rely on the Stipulated Order to argue that he can be relieved of ever proving that Zurixx, or the defendants in the Ancillary Cases, made any deceptive statements to customers *and* be relieved of the obligation to prove that such alleged deceptive statements resulted in specific damages to individuals. Relieving the Receiver in the Ancillary Cases of the obligation to prove violations and resulting individual damages deeply offends notions of justice and due process. In fact the Stipulated Order explicitly provides that "[t]he facts in the Complaint will not be considered true or established for any purpose or for any party other than Plaintiffs. . . ." [Stipulated Order, 11.] Therefore, the Receiver may not rely on the Stipulated Order to prove its claims against the defendants in the Ancillary cases.

For these reasons, the Court should deny the Receiver's motion to lift the stay.

III. Under the Circumstances, any recovery from the defendants in the Ancillary Cases would be inequitable and may result in a double recovery.

It is well-settled that a plaintiff is only entitled to one recovery and that a double recovery of damages is prohibited. *U.S. Industries, Inc. v. Touche Ross & Co.*, 854 F.2d 1223, 1259 (10th Cir. 1988) ("While a plaintiff is entitled to proceed on various theories of recovery, the theories must be pursued with caution [to avoid duplication.]" *United States v. RaPower-3, LLC*, No. 2:15-CV-00828-DN, 2020 WL 5531563, at *14 (D. Utah Sept. 15, 2020) ("the Receiver will not be allowed to obtain a double recovery.")

The amount of the Plaintiffs' actual damages is unknown and, at this point, likely unknowable. The Court has also noted that such damages are speculative. [Mem. Dec., 17 ("As discussed above, the FTC cannot equate the total amount of telesales in the statutory period with consumer injury, and the Division's assertions regarding the state law claims are also speculative.").]

Further, it appears from the Stipulated Order that at least $7,000,000 was paid by the Zurixx Defendants to Plaintiffs within 90 days of February 15, 2022. [Stipulated Order, p. 10, ¶¶ F-H.] Therefore, unless the actual telesales damages exceed $7,000,000, recovery of any amounts from the defendants in the Ancillary Cases will result in a prohibited double recovery. Again, the Court stated that it was "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." [Mem. Dec., 19.] The Court also reasoned that "if the damages in the underlying enforcement action ultimately prove to be only $25 million and the receivership funds and Defendants in the enforcement action can cover those damages, it does not seem equitable to have previously taken three years of an employee's salary to pay for the judgment that the owner can pay for himself." *Id*.

Without a prior determination of actual damages, there is a substantial risk that any recovery from the defendants in the Ancillary Cases will result in a double recovery. Further, it is now a procedural impossibility to prove actual damages given the parties' settlement and the existence of the Stipulated Order. And it is clear from the Receiver's Complaint in his case against Young that the damages allegedly suffered by Plaintiffs in this matter are duplicative of those alleged in the Complaint against Young. [*See Broadbent v. Young*, Case 2:20-cv-00552, Dkt. 29.] Accordingly, permitting the Receiver to reopen the Ancillary Cases (and new ones) will simply give him license to waste a substantial amount of attorney's fees pursuing futile and prohibited double recoveries.

For these reasons, the Receiver's motion should be denied.

IV. In the event the Court is inclined to lift the stay, it should be limited.

The Receiver has intimated that he intends to file multiple new Ancillary Cases, perhaps numbering in the hundreds, if the Court lifts the stay. If the Court is inclined to lift the stay at all (and for the reasons set forth above, Young asserts the stay should not be lifted) the stay should be limited to a single "bellwether" case, preferably one with a Motion to Dismiss pending. This approach would require the Receiver to establish the viability of the theories he has asserted in the Ancillary Cases (which theories are common to all such cases) before opening the floodgates to potentially hundreds of new lawsuits, with potentially hundreds of new parties. If the Receiver were given *carte blanche* to file and prosecute all the new Ancillary Cases he has suggested he will file, it would substantially increase the cost of the litigation for all parties, including rapid depletion of the funds currently available to the Receiver, and would significantly increase the burden on this Court, all before the Receiver has even established the viability of even one

Ancillary Case. For these reasons, if the Court is inclined to lift the stay, it should be limited to single bellwether case.

CONCLUSION

Based on the foregoing, the Court should deny the Receiver's Motion to Lift the Stay.

DATED this 4th day of November, 2022.

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