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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.**	**OPPOSITION 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-Parties and ancillary case defendants (collectively, "Ancillary Defendants"), through counsel MCNEILL VON MAACK, hereby submit this memorandum in opposition to the Motion to Lift Stay in Ancillary Cases and to Allow the Receiver to File Additional Ancillary Cases, filed on October 27, 2022 (Dkt. 423) ("Motion"). This opposition is being made in connection with a Motion to Intervene to Oppose Receiver's Motion to Lift Stay, filed herewith, and is filed based upon the Court's October 31, 2022 docket text order (Dkt 426).[1]

[1] The Ancillary Defendants consist of all defendants in the following five ancillary cases brought by the Receiver: *Broadbent v. Davis, et al.*, 2:20-CV-545; *Broadbent v. Freier, et al.*,
(continued...)

ARGUMENT

The Court should deny the Receiver's Motion because the Receiver has not satisfied the conditions to lifting the stay imposed by the Court's Memorandum Decision and Order, entered November 8, 2021, in this underlying Receivership Case as Dkt. 333 ("Mem. Dec.") – whether as to existing Ancillary Cases or as to new potential ancillary cases.

1. Incorporation of Arguments by Christopher Young.

On November 4, 2022, Non Party and ancillary case Defendant Christopher Young ("Young") filed his Memorandum Opposing Receiver's Motion to Lift Stay in Ancillary Cases and to Allow the Receiver to File Additional Ancillary Cases (Dkt. 429) ("Young Opp."). The facts, law, and arguments described in the Young Opp. fully support the instant Opposition submitted by these Ancillary Defendants. Rather than repeat the same, the Young Opp. is hereby incorporated by reference.

2. The Court Should Deny the Receiver's Motion Because There Has Been no Proof of Any Individualized Consumer Redress Damages, Which is Required by the Court's Memorandum Decision.

The Receiver's Motion should be denied because this Court imposed the stay in the Ancillary Cases pending proof in the underlying action of individualized consumer redress damages, such proof has never been made, and the "Judgment" the Court actually contemplated as warranting continuation of the Ancillary Cases does not exist.

2:20-CV-546; *Broadbent v. Hrisko, et al.*, 2:20-CV-550; *Broadbent v. Swails*, 2:20-CV-551; and *Broadbent v. Shemin, et al.*, 2:20-CV-763 (collectively, the "Ancillary Cases"). This includes the individuals Matt Davis, David Freier, Marc Hrisko, Claude Alan Swails, and Robert Dale Shemin.

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 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 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."

Further, pursuant to the terms of the Stipulated Order, it is to have no effect as the Ancillary Defendants and outside the context of a nondischargeability complaint in bankruptcy. The Receiver's motion presumes the validity of the fabricated judgment in the amount of $104,700,00 but the Stipulated Judgment also provides:

> L. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation <u>by or on behalf of the Plaintiffs</u>, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case. The facts alleged in the Complaint <u>will not be considered true or established for any purpose or for any party other than Plaintiffs</u> as set forth in this Subsection and Subsection M below.
>
> M. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Plaintiffs pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C.

[2-15-2022 Stipulated Order (Dkt. 365) at 11 (emphasis added).] The "Plaintiffs" are the FTC and State of Utah – not the Receiver. Further, the Ancillary Cases are not nondischargeability

actions in bankruptcy. Accordingly, the Receiver is not able to rely upon the Stipulated Judgment at all to request the stay be lifted in the Ancillary Cases.

3. Lifting the Stay is Not Necessary to Prevent the Running of Statutes of Limitations as to New Ancillary Cases.

The Court should deny the Receiver's Motion notwithstanding the Receiver's statement that potential ancillary claims could be lost due to expiration of tolling agreements. The Receiver has already demonstrated, and the Court has accepted, a different method to preserve such claims.

On January 4, 2022, the Receiver filed a Motion for Leave to File Ancillary Actions to Preserve Claims (Dkt. 353), which the Court approved the same day (Dkt. 354). As a result, the Receiver was permitted to file new ancillary cases "for preservation purposes," although such newly filed cases were stayed immediately. In the event potential claims are at risk of being barred by statutes of limitation, the Court should only allow a placeholder filing by the Receiver, but continue to impose the stay on such newly filed actions.

CONCLUSION

Based on the foregoing, the Ancillary Defendants respectfully request that the Court deny the Receiver's Motion.

DATED this 4th day of November, 2022.

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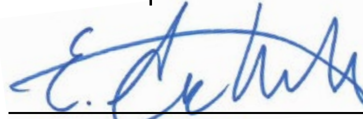

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CERTIFICATE OF SERVICE

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 **OPPOSITION TO RECEIVER'S MOTION TO LIFT STAY** was delivered to counsel of record this 4th day of November 2022, by filing of the same through the Court's CM/ECF System.

/s/ Camille Coley