Benson L. Hathaway, Jr. (Bar No. 4219)
Ryan R. Beckstrom (Bar No. 14593)
KIRTON McCONKIE
KIRTON McCONKIE BUILDING
50 East South Temple, 4th Floor
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Fax: (801) 321-4893
BHathaway@kmclaw.com
RBeckstrom@kmclaw.com

Stephen R. Freeland (*pro hac vice*)
Mary M. Gardner (*pro hac vice*)
Michael A. Munoz (*pro hac vice*)
VENABLE LLP
600 Massachusetts Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 344-4000
Fax: (202) 344-8300
SRFreeland@venable.com
MMGardner@venable.com
MAMunoz@venable.com

Leonard L. Gordon (*pro hac vice*)
Elliot Kelly (*pro hac vice*)
VENABLE LLP
1270 Avenue of the Americas
24th Floor
New York, NY 10020
Telephone: (212) 370-6277
Fax: (212) 307-5598
LLGordon@venable.com
EKelly@venable.com

Attorneys for Defendants

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

FEDERAL TRADE COMMISSION, and UTAH DIVISION OF CONSUMER PROTECTION, Plaintiffs, vs. ZURIXX, LLC; CARLSON DEVELOPMENT GROUP, LLC; CJ SEMINAR HOLDINGS, LLC; ZURIXX FINANCIAL, LLC; CRISTOPHER A. CANNON; JAMES M. CARLSON; and JEFFREY D. SPANGLER, Defendants.	**DEFENDANTS' PARTIAL MOTION TO DISMISS** Case No.: 2:19-cv-00713-DAK-CMR Judge Dale Kimball

TABLE OF CONTENTS

Page

AUTHORITIES

Page

Cases

Page

Page

Page

Statutes

Page

Page

Miscellaneous

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and DUCivR 7-1, Defendants Zurixx, LLC; Carlson Development Group, LLC; CJ Seminar Holdings, LLC; Zurixx Financial, LLC; Cristopher A. Cannon; James M. Carlson; and Jeffrey D. Spangler (collectively "Defendants"), by and through undersigned counsel, respectfully submit their Partial Motion to Dismiss for the below stated reasons.

I. INTRODUCTION

In four crucial respects, the action filed by the Federal Trade Commission ("FTC") and the Utah Division of Consumer Protection ("Division") (collectively, the "Plaintiffs") exceeds those agencies' lawful authority. Although Defendants vigorously deny all allegations in the Complaint, Defendants move to dismiss the Complaint only as to these four issues at this time.

First, the FTC seeks an unfounded award of equitable monetary relief against Defendants under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). But that provision only authorizes the FTC to obtain injunctive relief, not monetary relief. Recent Supreme Court precedent and a Seventh Circuit decision applying that precedent to Section 13(b) make clear that the FTC may not seek equitable monetary relief under Section 13(b). *See FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). The FTC's attempt to disgorge hundreds of millions of dollars and freeze Defendants' assets is nothing more than massive agency overreach.

Second, the Division wrongly claims that educational services to teach real estate investment constitutes a "business opportunity" subject to the Utah Business Opportunity Disclosure Act ("BODA"), which regulates sales of business opportunities. The Complaint wholly fails to allege sufficient facts that explain how educational programs constitute sales of business opportunities under the plain language of the statute.

Third, the Complaint violates core constitutional limits against extraterritorial assertions of state regulatory power. Most of the conduct that allegedly violated Utah law occurred *outside* Utah. The Division's attempt to regulate activity in other states under the Utah Consumer Sales Practices Act ("UCSPA") and BODA, especially in states that have no comparable statutes, plainly violates both the Division's limiting grant of authority as well as the United States and Utah Constitutions.

Finally, the Division's request for disgorgement, civil penalties, and fines from Defendants constitutes a "penalty" under Utah law, and, as a result, the Division is barred from seeking any such relief from Defendants for challenged conduct that occurred outside the one-year limitations period set forth in Utah Code Ann. § 78B-2-302(3), *i.e.*, before May 8, 2017.

In short, the FTC and the Division seek relief based on powers they want, rather than the limited powers that the law gives them. The FTC's claims for monetary relief under Section 13(b) should be dismissed, as should the Division's BODA claims, all aspects of the Division's claims premised on activity occurring outside of Utah, and the Division's request for disgorgement for alleged wrongful conduct that is time-barred by the applicable statute of limitations.

In considering whether Plaintiffs have crossed the limits of permissible regulatory activity, the Court should bear in mind the Supreme Court's warning that courts must carefully scrutinize an agency's efforts to expand its authority beyond statutory bounds: "The fox-in-the-henhouse syndrome is to be avoided . . . by taking seriously, and applying rigorously, in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it . . . ." *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013); *see also FTC v. Nat'l Lead Co.*, 352 U.S. 419, 428 (1957) ("As the Court has said many times before, the Commission may exercise only the powers granted to it by the [FTC] Act." (citation omitted)).

II. FACTS

Zurixx began providing educational content on real estate investments to students as early as July 2013. Compl. ¶¶ 6, 28. According to Plaintiffs, Zurixx marketed their education offerings at free live events across the country, during which Zurixx discussed the content offered at the first level of paid training: the 3-day workshop. *Id.* ¶¶ 8–9. Zurixx then held 3-day workshop events a week or two after the free event in the same geographic area. *Id.* ¶ 62. During the 3-day workshop events, Zurixx offered students the ability to purchase additional training after the 3-day workshop concluded, which also was offered in that same geographic area. *Id.* ¶¶ 64–65.

Prior to this lawsuit and the Court's *ex parte* temporary restraining order, Zurixx's business extended across the United States and Canada. *Id.* ¶¶ 28, 36. The Plaintiffs identify no allegedly unlawful conduct committed by any of the Defendants in the State of Utah. In fact, all of the unlawful conduct alleged in the Complaint—the free preview events, the 3-day seminars, the advanced training, and the coaching—occurred outside of Utah or in an unspecified location. *See Id.* ¶ 10 ("a Zurixx presenter made the following representations during a December 2018 free event in **Georgia**"); *id.* ¶ 11 ("A Zurixx presenter at a June 2018 free event in **California** told attendees . . . ."); *id.* ¶ 42 ("Zurixx presenters made the following representations between March 2019 and July 2019 in **California**, **Florida**, **Georgia**, and **Virginia** . . . ."); *id.* ¶ 45 ("Zurixx presenters made the following representations between March 2018 and July 2019 in **California**, **Florida**, **Georgia**, and **Virginia** . . . ."); *id.* at ¶ 48 ("Zurixx presenters made the following representations between March 2018 and December 2018 in **California** and **Florida** . . . ."); *id.* ¶ 51 ("Zurixx made the following representations between March 2018 and July 2019 in **California**, **Florida**, **Georgia**, and **Virginia** . . . ."); *id.* ¶ 55 ("Zurixx presenters made the following representations between March 2018 and July 2019 in **California**, **Florida**, **Georgia**, and **Virginia** . . . ."); *id.* ¶ 68 ("Zurixx presenters made the following representations between April 2018 and July 2019 in **Florida**, **Texas**, and **Virginia** . . . ."); *id.* ¶ 71 ("Zurixx presenters made the following representations between April 2018 and July 2019 in **Florida**, **Texas**, and **Virginia** . . . ."); *id.* ¶ 76 ("Zurixx presenters made the following statements in April 2018 and September 2018 in **Texas** and **Virginia** . . . ."); *id.* ¶ 80 ("Zurixx presenters made the following representations between February 2019 and July 2019 in **Florida** and **Virginia** . . . .") (all emphasis added). Notably missing from the Complaint is any reference to events taking place in Utah.

III. CERTAIN OF PLAINTIFFS' CLAIMS MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Iqbal*, 556 U.S. at 678; *see also Ordonez v. Canyons School Dist.*, No. 2:13CV245DAK, 2014 WL 4092900, at *2 (D. Utah Aug. 18, 2014) (Kimball, J.) ("While a court must accept as true all of the allegations contained in a complaint, this rule does not apply to legal conclusions.") (internal quotations omitted). "A complaint survives only if it 'states a plausible claim for relief.'" *Ordonez*, 2014 WL 4092900, at *2. Moreover, a plaintiff's claim for relief is ripe for dismissal where it is apparent from the face of the complaint that "relief is barred by the applicable statute of limitations . . . ." *Chance v. Zinke*, 898 F.3d 1025, 1034 (10th Cir. 2018) (quoting *Jones v. Bock*, 549 U.S. 199, 215 (2007)).

Here, the FTC's request for equitable monetary relief for the alleged violations in Counts I through III of the Complaint must be dismissed with prejudice because the FTC is entitled only to injunctive relief for these alleged violations. Similarly, the Division's request for relief for alleged violations of Utah law as set forth in Counts V through IX of the Complaint should be dismissed with prejudice where the requested relief is improperly directed at conduct that occurred outside of Utah. Moreover, the Division's BODA Counts must separately be dismissed because the Division has failed to allege that Zurixx offers a "business opportunity" subject to BODA. Finally, the Division's request for disgorgement, civil penalties, and fines from Defendants constitutes a "penalty" under Utah law, and, therefore, the Division is barred from seeking any such relief from Defendants for challenged conduct that occurred outside the one-year limitations period set forth in Utah Code Ann. § 78B-2-302(3), *i.e.*, before May 8, 2017.

A. The FTC's Request for Equitable Monetary Relief in Counts I, II, and III of the Complaint Must Be Dismissed With Prejudice.

The FTC bases its claim for equitable monetary relief in Counts I through III of the Complaint on Section 13(b) of the FTC Act. *See* Compl. at 35; 15 U.S.C. § 53(b). The plain language of that statute, however, does not provide the FTC with the authority to seek or obtain monetary relief—only preliminary or permanent injunctive relief. While certain courts have previously accepted the FTC's effort to rewrite Section 13(b), recent Supreme Court precedent and a decision from the Seventh Circuit applying that precedent demonstrate that the FTC's effort to seek equitable monetary relief through Section 13(b) is improper. More specifically, in *Federal Trade Commission v. Credit Bureau Center, LLC*, the Seventh Circuit held, relying on recent Supreme Court precedent, that courts may not read additional remedies into statutes that have complex remedial statutory schemes, such as the FTC Act. 937 F.3d 764, 767 (7th Cir. 2019). Based on recent Supreme Court and Tenth Circuit precedent, this Court should follow *Credit Bureau* and reject the FTC's attempt to obtain equitable monetary relief under Section 13(b).

1. The Plain Language of Section 13(b) Does Not Provide for Equitable Monetary Relief.

Nothing in the text of Section 13(b) supports the FTC's authority to recover equitable monetary relief for violations of Section 5 of the FTC Act. Section 13(b) explicitly authorizes only prospective injunctive remedies—temporary restraining orders, preliminary injunctions, and permanent injunctions—to enjoin "any person, partnership, or corporation [that] is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission[.]" 15 U.S.C. § 53(b)(1). Section 13(b) contains no language authorizing the recovery of any other form of equitable relief, including restitution or monetary compensation for past violations.

By contrast, Section 19 of the FTC Act authorizes "such relief as the court finds necessary . . . , [including] *the refund of money or return of property*." 15 U.S.C. § 57b(b) (emphasis added). For violations of Section 5 of the FTC Act, Section 19 expressly allows the FTC to seek consumer redress, but only by following a two-step process for challenging conduct. Under this two-step process, the FTC first must prevail in an administrative proceeding brought before an Administrative Law Judge. 15 U.S.C. § 57b(a)(2). Section 13 can be used in conjunction with Section 19 by providing the FTC with the authority to seek a preliminary injunction pending resolution of the Section 19 administrative proceeding. Then, after the conclusion of the administrative proceeding, the FTC may file a district court action for monetary relief, but to so recover, it must demonstrate that the conduct at issue was such that "a reasonable man would have known under the circumstances [it] was dishonest or fraudulent." *Id*. Section 19 also provides that "[n]o action may be brought by the Commission under this section more than 3 years after the rule violation . . . , or the unfair or deceptive act or practice[.]" 15 U.S.C. § 57b(d). In the instant action, the FTC seeks to avoid this 3-year statute of limitations, as well as these extensive administrative procedures and standards, by invoking Section 13(b).[1]

This explicit distinction in relief authorized by Congress could not be clearer. Nevertheless, the FTC has read into Section 13(b) an implied monetary remedy for Section 5 violations in a transparent attempt to circumvent the administrative proceeding, heightened evidentiary standard, and time-bar of Section 19. In effect, the FTC's reading of the statute renders Section 19 superfluous as applied to Section 5 violations—contrary to bedrock canons of statutory construction. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *Elwell v. Okla. ex rel. Bd. of Regents of Univ. of Okla.*, 693 F.3d 1303, 1309–10 (10th Cir. 2012) (Gorsuch, J.) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)). By including the remedy of monetary relief in Section 19 of the FTC Act while simultaneously omitting that same remedy from Section 13(b) of the FTC Act, Congress acted intentionally and purposefully to permit the FTC to seek monetary relief for Section 5 violations through Section 19 following an administrative proceeding, not a Section 13 federal court injunction action.

2. The Seventh Circuit Has Recently Confirmed that the FTC is Not Entitled to Equitable Monetary Relief Under Section 13(b).

In *Credit Bureau*, the Seventh Circuit expressly held that "section 13(b) does not authorize restitutionary relief." 937 F.3d at 767. In so holding, the court overturned its own precedent,

[1] Further, Section 19 provides that for certain other statutes and rules enforced by the FTC other than Section 5, such as the Consumer Review Fairness Act ("CRFA") violation alleged in Count IV of the Complaint, the FTC can seek redress. Given that the allegations in Count IV relate to conditions placed upon refunds that were given, consumer redress for alleged violations of the CRFA seems impossible.

which it determined was predicated on since-abrogated Supreme Court precedent favoring judicially-implied remedies. *See id*. at 776–77.

The Seventh Circuit first determined that now-binding Supreme Court precedent prohibits the judicial implication of equitable monetary relief under Section 13(b) given the FTC Act's provision elsewhere of express remedies. *Id*. at 782 ("Rather than presuming that Congress authorizes the judiciary to supplement express statutory remedies, the Court now recognizes that 'the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.'" (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1385 (2015))). In so holding, the Seventh Circuit first analyzed the distinction Congress drew in the FTC Act between Section 13(b) (authorizing injunctions) and Section 19 (authorizing consumer redress). *Credit Bureau*, 937 F.3d at 771–73. The court "start[ed] with the obvious: Restitution isn't an injunction." *Id.* at 771. Simply put, "nothing in the text or structure of the [FTC Act] supports an implied right to restitution in section 13(b), which by its terms authorizes only injunctions." *Id*. at 775.

Next, the court explained why the basis upon which prior courts had implied the ability to obtain monetary relief under Section 13(b) is faulty. For example, the (now-overruled) Seventh Circuit case finding that Section 13(b) contains implied equitable remedies, *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989), was anchored upon two Supreme Court cases that allowed implied remedies despite a statute's silence: *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960). *Credit Bureau*, 937 F.3d at 776. *Porter* had held that, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of [its equitable] jurisdiction." 328 U.S. at 398. *Mitchell* applied *Porter* to hold that implied remedies are permissible when they fit within a statute's purpose. 361 U.S. at 291–92. The Supreme Court, however, reversed course on the propriety of finding implied restitutionary remedies in *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996). In *Meghrig*, the Supreme Court refused to find an implied restitutionary remedy, reasoning that Congress's express inclusion of forward-facing remedies in the Resource Conservation and Recovery Act of 1976 ("RCRA") precluded any further implied remedies. *Id.* at 484–85. It explained:

> [W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, as Congress has done with [the] RCRA and CERCLA, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute. *It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.*

Meghrig, 516 U.S. at 487–88 (emphasis added).

As the Seventh Circuit further explained, "[s]ince *Meghrig*, the [Supreme] Court has adhered to this more limited understanding of judicially implied remedies." *Credit Bureau*, 937 F.3d at 781 (citation omitted). It has applied this principle to reject implied remedies in ERISA, the Prison Reform Litigation Act of 1985, and Title IX. *See id.* (quoting *Great-West Life & Ann. Ins. Co. v. Knudson*, 534 U.S. 204, 209 (2002) ("We have therefore been especially reluctant to tamper with the enforcement scheme embodied in [ERISA] by extending remedies not specifically authorized by its text.") (quotation marks and alteration omitted); *Miller v. French*, 530 U.S. 327, 340 (2000) (concluding that the plain meaning of a provision expressed the congressional intent to displace equitable authority); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (holding that courts cannot enlarge the "scope of available remedies" under an implied right of action "in a manner at odds with the statutory structure and purpose")). Most recently, in *Armstrong*, the Supreme Court reversed a Ninth Circuit decision that had found an implied equitable remedy (a private right of action) to enforce a Medicaid requirement against states, ruling that, *inter alia,* the express inclusion of an administrative remedy precluded the implied availability of a traditional equitable remedy. *See Armstrong*, 135 S. Ct. at 1385.

Based upon *Meghrig* and progeny, the Seventh Circuit concluded that modern Supreme Court jurisprudence counsels against implied remedies under a "statute that expressly enumerate[s] the remedies available to plaintiffs," and explained that "[i]t is . . . an elemental canon of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies." *Credit Bureau,* 937 F.3d at 780 (quoting *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 69 n.6 (1992); *Karahalios v. Nat'l Fed'n of Fed. Emps.*, 489 U.S. 527 (1989)). Thus, "[i]t is now well settled that Congress, not the judiciary, controls the scope of remedial relief when a statute provides a cause of action." *Id.* at 782.

Applying these principles to the FTC Act, the Seventh Circuit conducted a thorough analysis of the statute and concluded that Section 13(b) does not contain an implied restitutionary remedy. The FTC Act's structure—which affords the FTC multiple other avenues and provisions to seek and obtain restitution with distinct statutory and administrative requirements—demonstrates that "[r]eading an implied restitution remedy into section 13(b) makes the other provisions largely pointless." *Id.* at 774. Conversely, the "tensions [] just discussed dissipate if we read section 13(b) to mean what it says: The remedy is limited to injunctive relief." *Id*. The court concluded that "[t]he meaning of Section 13(b) is plain – it was designed to provide a remedy that ameliorates present or obviates the risk of future 'imminent' harms, not a remedy that compensates for past violations." *Id*. at 783 (quoting *Meghrig*, 516 U.S. at 486).

3. This Court Should Adopt the Seventh Circuit's Analysis and Apply Traditional Tools of Statutory Interpretation to Determine that the FTC is Not Entitled to Equitable Monetary Relief.

Previous cases in the Tenth Circuit allowing for equitable monetary relief under Section 13(b) are based on the same outdated understanding of equitable relief that the Seventh Circuit concluded was contrary to modern Supreme Court precedent. The Tenth Circuit, relying on *Porter*, has held that "a district court's authority to award disgorgement under § 13(b) falls within its general equitable jurisdiction to 'decide all relevant matters in dispute and to award complete relief.'" *FTC v. LoanPointe, LLC*, 525 F. App'x 696, 699 (10th Cir. 2013) (unpublished) (quoting *Porter*, 328 U.S. at 399); *see also FTC v. Freecomm Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005)). But, as the Seventh Circuit held, continued reliance on *Porter* is erroneous. *See Credit Bureau*, 937 F.3d at 782 ("Whatever strength *Porter* and *Mitchell* retain, *Meghrig* clarifies that they cannot be used as . . . a license to categorically recognize all ancillary forms of equitable relief without a close analysis of statutory text and structure.").

Further, in determining that Section 13(b) allows for equitable monetary relief, the Tenth Circuit relied upon the very Seventh Circuit decision, *Amy Travel*, that the Seventh Circuit overturned in *Credit Bureau*. *Compare Freecomm Commc'ns*, 401 F.3d at 1202 (allowing the FTC to pursue ancillary relief in the form of consumer redress pursuant to Section 13(b) (citing *Amy Travel, Inc.*, 875 F.2d at 573)), *with Credit Bureau*, 937 F.3d at 785 ("In light of the Court's commands in *Meghrig*, our holding in *Amy Travel* is no longer viable."). Accordingly, this Court should conduct the same analysis and turn to a plain reading of the FTC Act that Section 13(b) does not allow for equitable monetary relief. In this situation, where the law has materially changed, ordinary principles of stare decisis should not apply.[2]

The Court's role is to "interpret[] statutes to determine congressional intent, using traditional tools of statutory construction." *United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008). When reviewing a statute, the court must "begin by examining the statute's plain language." *Id.* at 614. "If the statutory language is clear, [the] analysis ordinarily ends." *Id.*

This Court reads the plain language of a statute in "context and with a view to [its] place in the overall statutory scheme and *must resist reading words or elements into a statute that do not appear on its face*." *United States v. Fronk*, No. 13-CR-484-DAK, 2014 WL 3513164, at *4 (D. Utah July 11, 2014) (quoting *United States v. Sturm*, 673 F.3d 1274, 1279 (10th Cir. 2012)) (internal quotations omitted) (emphasis added). Throughout, the Court must apply common sense in its construction. *Fronk*, 2014 WL 3513164, at *4.

By seeking equitable monetary relief under Section 13(b), the FTC seeks to circumvent the express restrictions imposed by Section 19 for such monetary relief. This is plainly improper. Not only did Congress elect not to provide a consumer-redress remedy in Section 13(b), it mandated that remedies for consumer redress would be subject to specific restrictions as set forth in Section 19. This structure makes it clear that Congress intentionally declined to extend such relief under Section 13(b). *See United States v. Livesay*, 600 F.3d 1248, 1251 (10th Cir. 2010) (Gorsuch, J.). Indeed, the Tenth Circuit has recognized that where the government is plaintiff, "courts ought to be reluctant to find implied remedies where an act expressly provides other remedies . . . ." *United States v. Jantran, Inc.*, 782 F.3d 1177, 1183 (10th Cir. 2015) (denying the government's request

[2] If the Court concludes that it is constrained by stare decisis and Tenth Circuit precedent, it should certify this issue for immediate appeal to the Tenth Circuit under 28 U.S.C. § 1292(b). This is an important issue, and it would be decisive in considering the FTC's request for preliminary relief.

to infer a public remedy in the Rivers and Harbors Act and dismissing the government's complaint). This is "in essence, a variation of the negative implication, or *expression unius*, canon, which holds that 'the expression of one thing implies the exclusion of others.'" *Id*. (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012)).

Reading the text of Section 13(b) in conjunction with Section 19, Congress did not intend Section 13(b) to allow for implied equitable monetary relief as a means for the FTC to circumvent the requirements of Section 19. Because Section 13(b) does not entitle the FTC to obtain equitable monetary relief, the FTC's request for equitable monetary relief for alleged violations of the FTC Act as set forth in Counts I, II, and III of the Complaint must be dismissed with prejudice.

B. Counts VIII and IX Must Be Dismissed Because the Utah Division Fails to Plead a Cognizable Business Opportunity Offered by Defendants.

Counts VIII and IX of the Complaint—the Division's claims that the Defendants violated BODA—must be dismissed because the Division has failed to allege any facts that demonstrate that Defendants offer Utah consumers a "business opportunity."

Under Utah law, a business is subject to BODA where the business offers consumers an "assisted marketing plan." *See* Utah Code Ann. § 13-15-4. An "assisted marketing plan" is defined as the "sale or lease of any products, equipment, supplies, or services that are sold to the purchaser upon payment of an initial required consideration of $500 or more for the purpose of enabling the purchaser to start a business, and in which the seller" makes one or more of the four representations listed in the BODA. *See* Utah Code Ann. § 13-15-2(1)(a). The Division relies on only one of the four listed representations. It states: "that upon payment by the purchaser of a fee or sum of money, which exceeds $500 to the seller, the seller will provide a sales program or marketing program that will enable the purchaser to derive income from the assisted marketing plan that exceeds the price paid for the marketing plan." Utah Code Ann. § 13-15-2(1)(a)(iv). Put simply, the Division's

BODA claims must demonstrate an "assisted marketing plan" whereby Defendants offer Utah consumers a "sales program or marketing program," essentially a "business-in-a-box," so that the consumer then has the ability to walk out the door and start a business selling or marketing goods or services.

As Judge Shelby noted:

> Because the terms "sales program" and marketing program" are not defined in the statute, Utah courts would attempt to give the terms their "usual and accepted meaning" by relying on dictionary definitions.
>
> Marketing is often defined as the "act or process of promoting and selling, leasing, or licensing products or services," or alternatively, as the part of a business concerned with meeting customer needs." The noun "sales" is used to refer to operations and activities involved in promoting and selling goods or services," or as an adjective to connote "of, relating to, or used in selling."

Roberts v. C.R. England, Inc. 318 F.R.D. 457, 498 (D. Utah 2017) (citations omitted) (denying summary judgment because a question of fact existed as to whether allegations that school owner promised to hire students as drivers created business opportunity).

As alleged in the Complaint, Zurixx's educational content does not qualify as an "assisted marketing plan." Indeed, the Complaint describes what Zurixx sells as "investment" training products, not marketing or sales programs. *See* Compl. ¶¶ 6, 19–22. The Complaint consistently characterizes Zurixx's business as providing education, not products, equipment, supplies or services to start a "sales program or marketing program." *See id*. ¶ 8 ("team of 'experts' will *teach* consumers how to"); *id.* ¶ 39 ("Zurixx invites consumers to attend the free event to *learn* how to"); *id.* ¶ 40 ("indicate that their team of 'experts' will *teach* consumers how to"); *id.* ¶ 50 ("consumers will learn all they need to know").

Moreover, at no point does the Complaint allege facts explaining how the investment education Zurixx provided its clients enables students to immediately start a new sales or marketing program. In fact, the Complaint is entirely devoid of factual allegations demonstrating that the training and education Zurixx provided is not training or education and instead constitutes a "marketing plan" or a business-in-a-box of the type that was designed to be subject to BODA.

The Complaint baldly attempts to redefine Zurixx's educational training programs as "Zurixx's products" in a conclusory attempt at shoehorning Zurixx's business into the definition of a business opportunity. Compl. ¶ 32 ("Zurixx's products are 'assisted marketing plans' as defined by the BODA"). Such conclusory allegations, devoid of factual support, are not entitled to deference by this Court when considering the merits of Defendants' partial motion to dismiss. *See Med. Diagnostic Labs, LLC v. Health Care Serv. Corp.*, 772 F. App'x 637, 641 (10th Cir. 2019) (only well-pleaded facts, and not conclusory allegations, are entitled to deference). Apart from these conclusory allegations, the Complaint repeatedly refers to the investment education and training Zurixx provides to its clients. *See, e.g.*, Compl. ¶ 8 ("team of 'experts' will *teach* consumers how to"); *id.* ¶ 39 ("Zurixx invites consumers to attend the free event to *learn* how to"); *id.* ¶ 40 ("indicate that their team of 'experts' will *teach* consumers how to"); *id.* ¶ 50 ("consumers will learn all they need to know") (all emphasis added). These statements regarding education and training fall far short of the statutory standard.

The Division's overly broad interpretation of BODA is demonstrated by its conflict with the FTC's Business Opportunity Rule. Companies that comply with the FTC's Business Opportunity Rule are exempt from filing under Utah's BODA. Utah Code Ann. § 13-15-4.5(1)(a), § 13-15-2(b)(iii). Thus, compliance with the FTC's Business Opportunity Rule constitutes compliance with Utah's BODA. The FTC's Business Opportunity Rule, however, defines business opportunity narrowly: "*Business opportunity* means a commercial arrangement in which:

(1) A seller solicits a prospective purchaser to enter into a new business; and
(2) The prospective purchaser makes a required payment; and

> (3) The seller, expressly or by implication, orally or in writing, represents that the seller or one or more designated persons will:
> (i) Provide locations for the use or operation of equipment, displays, vending machines, or similar devices, owned, leased, controlled, or paid for by the purchaser; or
> (ii) Provide outlets, accounts, or customers, including, but not limited to, Internet outlets, accounts, or customers, for the purchaser's goods or services; or
> (iii) Buy back any or all of the goods or services that the purchaser makes, produces, fabricates, grows, breeds, modifies, or provides, including but not limited to providing payment for such services as, for example, stuffing envelopes from the purchaser's home."

16 C.F.R § 437.1(c). Tellingly, the FTC has not challenged Zurixx's conduct under the FTC's Business Opportunity Rule, nor could it as the FTC's definition of business opportunity requires that a company provide locations, outlets or buy back goods or services—none of which Zurixx provides to consumers. This lack of action by the FTC vividly demonstrates that Utah's expansive interpretation of its BODA to apply to educational programs unrelated to sales and marketing programs is improper.

Consequently, because the Complaint fails to allege facts demonstrating that Zurixx does anything other than offer investment training and education, the BODA counts of the Complaint—Counts VIII and IX—should be dismissed with prejudice.

C. Counts V through IX of the Complaint Must Be Limited to Alleged Harm to Utah Consumers Because the Utah Division of Consumer Protection Does Not Have the Authority to Seek Injunctive Relief, Monetary Relief, and Financial Penalties for Activities That Occurred Outside of Utah.

In all of its Counts, the Utah Division impermissibly seeks to enjoin and obtain redress and penalties from Zurixx for activities that occurred outside of Utah. Much of the conduct challenged in the Complaint involves free one-day events, three-day workshops, and subsequent training events, all of which occur outside of Utah. Indeed, the Complaint contains no allegations that any of the challenged conduct occurred in Utah and instead alleges wrongful conduct in other states, including California, Florida, Georgia, Texas, and Virginia. As the alleged wrongful conduct is nationwide, the Division seeks extraterritorial relief based upon statutes that apply only to conduct occurring in Utah, including the UCSPA and BODA. Compl. ¶ 45 (representations made in "California, Florida, Georgia and Virginia . . ."), *id*. ¶ 68 (representations made in "Florida, Texas, and Virginia . . . ."). The Division's expansive interpretation of its enforcement authority to encompass potentially limitless remedial power violates the clear statutory mandate of the Division, the plain language of the UCSPA and BODA, the Tenth and Fourteenth Amendments to the United States Constitution, and Article 1 of the Utah Declaration of Rights.

1. Based on the Plain Language of the Utah Statutes Invoked, the Division's Authority to Seek Financial Penalties, Monetary Relief, and Injunctive Relief is Limited to Alleged Harm Caused Within Utah.

The Division's authority to seek injunctive relief, consumer redress, and penalties is properly limited to conduct undertaken in Utah that impacts Utah consumers. *See Utah Division of Consumer Protection v. uSightcom, LLC*, Case No. 030907202, Order at 2 (entered Jan. 7, 2004) (granting defendant summary judgment because the Division "has no jurisdiction to regulate transactions that occur in other states other than Utah"), attached hereto as Exhibit 1. Tellingly, the statutory authority of the Utah Department of Commerce (the "Department"), of which the Division of Consumer Protection is an authorized subpart, specifies that its purpose is to protect Utah citizens:

> The Legislature finds that many businesses and occupations in the state have a pronounced physical and economic impact on the health, safety, and welfare *of the citizens of the state*. The Legislature further finds that while the overall impact is generally beneficial to the public, the potential for harm and injury frequently warrants intervention by state government.
>
> The Legislature declares that it is appropriate and necessary for *state government to protect its citizens* from harmful and injurious acts by persons offering or providing essential or necessary goods and services to the general public. The Legislature further declares that business regulation should not be unfairly discriminatory. However, the general public interest shall be recognized and regarded as the primary purpose of all regulation by state government.

Utah Code Ann. § 13-1-1 *et. seq*. (emphasis added). The mandate is clear: the Division was created to protect the citizens of Utah, not the citizens of New York, Virginia, or some other state. Consequently, to allow the Division to regulate and obtain monetary and injunctive relief for activities that did not occur in the State of Utah and which involved consumers from other states exceeds that mandate.

In addition, the plain language of the Utah BODA illustrates that the statute's provisions do not apply to activities conducted outside of Utah. Indeed, certain disclosure terms required by BODA would be peculiar were they provided to consumers at out-of-state events. *See, e.g.*, Utah Code Ann. § 13-15-5(2) ("To protect you, the State Division of Consumer Protection has required your seller to give you this information. The State Division of Consumer Protection has not verified this information as to its accuracy."). BODA specifically references activities taking place within Utah. For example, an exemption for entities that comply with FTC franchising rules states that the entities "shall, prior to offering for sale or selling a franchise *to be located in this state or to a resident of this state,* file with the division a notice that the franchisor is in substantial compliance with the requirements of [the FTC's franchise rules]." Utah Code Ann. § 13-15-4.5(1)(a) (emphasis added). Consequently, BODA's plain language demonstrates that it was intended to apply only to activities within the State of Utah.

Similarly, the UCSPA's plain language expressly limits its application to conduct that occurs in Utah. Its statutory purpose is to "promote the following policies . . . to make uniform the law, including the administrative rules, with respect to the subject of this act among those states which enact similar laws." Utah Code Ann. § 13-11-2(5). That purpose of creating uniform law that does not conflict with the laws imposed by other states' regulatory authorities makes little sense if the UCSPA could sanction conduct that is legal in other states. In addition, the plain language of the Division's enforcement authority under the UCSPA solidifies that the statute is limited to Utah:

> (1) The enforcing authority shall:
>
> (a) enforce this chapter *throughout the state* . . . .

Utah Code Ann. § 13-11-7 (emphasis added). This language clearly demonstrates that the Division's powers to enforce the UCSPA is limited to conduct and alleged harm occurring in Utah.

In *Goshen v. Mutual Life Insurance Co. of N.Y.*, 98 N.Y.2d 314 (N.Y. 2002), the New York Court of Appeals similarly found that, based on its plain language, New York's consumer protection statute applied only to conduct occurring in New York. *Id.* (analyzing N.Y. Gen. Bus. L. § 349 (2014)). There, Goshen, a Florida resident, purchased one of Defendant's insurance policies in Florida. *Id.* at 322–23. Despite the fact that the transaction occurred wholly in Florida, Goshen sued the defendant in New York because it was incorporated in New York. *Id.* at 322. The court ultimately concluded that that statute only applies where the deceptive act in question occurs within New York. *Id.* at 325 ("[New York General Business Law § 349] was not intended to police the out-of-state transactions of New York companies, nor was it intended to function as a per se bar to out-of-state plaintiffs' claims of deceptive acts leading to transactions within the state."). In so holding, the court relied on the plain language of statute, which—like the UCSPA—specifically references business in the home state. *Compare* N.Y. Gen. Bus. L. § 349(a) (2014) ("the conduct of any business, trade or commerce or in the furnishing of any service *in this state*" (emphasis added)), *with* Utah Code Ann. § 13-11-7(a) ("The enforcing authority shall enforce this chapter *throughout the state*" (emphasis added)). This Court should similarly find that the plain language of the UCSPA and BODA only apply to conduct occurring in Utah.

Moreover, neither BODA nor UCSPA contains express language allowing the Division to seek injunctive relief, monetary relief, or financial penalties for conduct occurring out-of-state. As the Utah Supreme Court has made clear, Utah statutes may not be applied extraterritorially absent clear legislative intent. *Nevares v. M.L.S.*, 345 P.3d 719, 727 (Utah 2015) (citing *U.S. Bond & Fin. Corp. v. Nat'l Bldg. & Loan Ass'n of Am.*, 17 P.2d 238, 239 (Utah 1932)). As no such legislative intent exists here, neither statute authorizes the Division to impose financial penalties and seek injunctive relief for conduct occurring outside of Utah.

In at least one other action, the Division has erroneously pointed to its grant of jurisdiction to pursue legal action as the basis for its efforts to expand its authority to seek monetary and injunctive relief to a nationwide scope. *Utah Division of Consumer Protection v. Stevens, et al.*, Case No. 190907053 (3d Dist. Ct. for Salt Lake County filed Sept. 10, 2019). The Division's grant of jurisdiction, however, should not be confused with the Division's ability to regulate conduct and seek monetary relief on behalf of consumers. The statute at issue refers to circumstances when only part of the activities occurs within the state of Utah:

> A person who has violated, is violating, or has attempted to violate a chapter identified in Section 13-2-1 is subject to the division's *jurisdiction* if:
>
> (i) the violation or attempted violation is committed wholly or partly within the state;
>
> (ii) conduct committed outside the state constitutes an attempt to commit a violation within the state; or
>
> (iii) transactional resources located within the state are used by the offender to directly or indirectly facilitate a violation or attempted violation.

Utah Code Ann. § 13-2-6(4)(a) (emphasis added). This provision does not grant the Division the ability to regulate conduct or seek a remedy for out-of-state activities or alleged harm to consumers in other states, and, as a matter of Utah law, cannot be read to imply rights not expressly set forth in the statute. *See Nevares*, 345 P.3d at 727.

Because the plain language of the Division's statutory authority limits the Division's right to seek relief for conduct and alleged harm that occurred within Utah, the relief requested by the Division in Counts V through IX of the Complaint must be limited to allegedly illegal conduct and alleged harm that occurred within Utah.

2. The Division's Attempt to Enjoin Conduct or Impose Monetary Relief or Financial Penalties for Out-of-State Conduct Violates the United States and Utah Constitutions.

The Division's attempt to enjoin, recover monetary relief for, or impose penalties regarding alleged violations of Utah's BODA and UCSPA that allegedly occurred entirely in other states also violates principles of state sovereignty enshrined in the Tenth Amendment's guarantee that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. It also violates the liberty rights guaranteed by the Fourteenth Amendment to the U.S. Constitution and Article 1 of the Utah Declaration of Rights.

This constitutional protection of state sovereignty against the extraterritorial regulation that the Division seeks to impose here has been recognized by the U.S. Supreme Court. Specifically, *BMW, Inc. v. Gore*, 517 U.S. 559, 572 (1996), establishes that constitutional "principles of comity and state sovereignty" prohibit a state from imposing its own state laws and policies onto other states. In *Gore*, BMW was found liable for failing to advise dealers and customers of pre-delivery damage to new cars when the cost of repair amounted to less than three percent of the car's value. *Id.* at 562. The jury awarded punitive damages of $4,000,000 in part to punish conduct occurring in other states, to deter BMW's conduct nationwide, and to incentivize BMW to change its policy in each state in which it operates and sells cars. The Supreme Court held that principles of state sovereignty precluded Alabama from "enact[ing] such a policy for the entire Nation, . . . or even impose its own policy choice on neighboring States." *Id.* at 571. "Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents." *Id.* at 572–73.

Here, the Division is attempting to impose Utah's UCSPA and BODA on Zurixx's conduct in other states, many of which do not prohibit Zurixx's alleged conduct and in thirty states do not even have a business opportunity act. *See* Compl. ¶¶ 42, 45, 48, 51, 55, 68, 71, 76, 80.

The Division's attempt to apply Utah statutes to Defendants' extraterritorial conduct is plainly impermissible under *Gore*'s clear directive that Utah, like all other states, cannot "impose its own policy choice on neighboring States." *See Gore*, 517 U.S. at 571 ("by attempting to alter [Zurixx's] nationwide policy, [Utah] would be infringing on the policy choices of other States."); *id.* (citing *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction. . . . Each State is independent of all others in this particular")). The right to state sovereignty means that each state is tasked with the power to enact policies for the conduct occurring within its borders. Where a majority of states do not even have BODA statutes on their books, the Division's claims constitute a clear extraterritorial regulatory grab.

Extraterritorial regulation, such as what Utah hopes to achieve here, is unconstitutional under multiple constitutional principles. It violates state sovereignty and comity, as recognized in *BMW v. Gore*, and substantive due process under the Fourteenth Amendment and the Utah Declaration of Rights. These principles were applied by the U.S. Supreme Court in *Bigelow v. Virginia*, 421 U.S. 809 (1975), wherein an agency that provided abortion referral services in New York ran an ad in a Virginia newspaper informing readers that "abortions are now legal in New York. There are no residency requirements . . . ." At the time, abortions were legal in New York but illegal in Virginia, and, further, a Virginia statute prohibited the publication of any communication encouraging the procuring of an abortion. The publisher of the Virginia newspaper that ran the advertisement was convicted of violating the Virginia advertising law.

The Supreme Court reversed the conviction, finding that, in addition to the clear violation of the First Amendment right to free speech, Virginia had no authority to prevent its residents from traveling to New York to obtain the abortion services that were lawfully available there and explaining:

> Moreover, the placement services advertised in appellant's newspaper were legally provided in New York at that time. ***The Virginia Legislature could not have regulated the advertiser's activity in New York, and obviously could not have proscribed the activity in that State.*** Neither could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded . . . prosecute them for going there. Virginia possessed no authority to regulate the services provided in New York . . . .

Id. at 823–24 (emphasis added) (citations and footnotes omitted). Further, in *Bigelow*, the Court noted that a State "does not acquire power or supervision over the internal affairs of another state ***merely because the welfare and health of its citizens may be affected when they travel to that State***." *Id.* at 824 (emphasis added); *see also Huntington v. Attrill*, 146 U.S. 657, 669 (1892) ("Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of the other States"); *DJR Assocs., LLC v. Hammonds*, 241 F. Supp. 3d 1208, 1232 n.11 (N.D. Ala. 2017) ("Thus, an operating principle the court must respect is that each state is entitled to determine its own policies, and no state may insist that its laws be applied within other states to the exclusion of the power of such other states to decide for themselves what is good policy for regulating economic relationships within their own borders."). More recently, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, the Supreme Court, applying *Gore*, expressly reiterated that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred." 538 U.S. 408, 421 (2003). It is axiomatic, then, that a state (such as Utah) may not punish its own residents for acts committed in another state "under the guise" of exercising internal police powers. *Bigelow*, 421 U.S. at 825.

This rule applies universally to protect each state's sovereignty over its own affairs, and each person's substantive due process right to travel to another state to engage in conduct that is lawful in that state. *Rahmani v. Resorts Int'l Hotel, Inc.*, 20 F. Supp. 2d 932, 936–37 (E.D. Va. 1998) (stating that Virginia law mandating the return of gambling losses due to the state's ban on gambling "cannot be applied to gambling losses that occur lawfully outside Virginia" because one "state cannot invalidate the lawful statutes of another state or penalize activity that lawfully occurs in another state"), *aff'd*, 182 F.3d 909 (4th Cir. 1999); *see also Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 177 (S.D.N.Y. 1997) (holding that statute criminalizing use of a computer to distribute obscene material to minors impermissibly encroached upon state sovereignty since "conduct that may be legal in the state in which the user acts can subject the user to prosecution in New York and thus subordinate the user's home state's policy—perhaps favoring freedom of expression over a more protective stance—to New York's local concerns" (citation omitted)).

Indeed, as the Seventh Circuit has noted,

> It is quite common for persons to travel to other jurisdictions in order to avoid restrictive laws in their home state or to take advantage of more lenient laws in another state, and it is perfectly lawful for one to advise another to do so. People travel to Nevada to gamble or to gain a quick marriage or divorce; they travel across state lines in order to purchase liquor cheaper or at a younger age.

Robak v. United States, 658 F.2d 471, 476–77 (7th Cir. 1981). The substantive due process right to engage in conduct that has been deemed lawful in another state, even when that conduct is unlawful in one's own home state, may not be circumscribed by home state laws. *See State v. Cardwell*, 246 Conn. 721, 728–29 (1998) (reversing conviction of a Connecticut citizen for violating Connecticut's ticket scalping statute because "out-of-state activities are not proscribed by [the scalping statute].").

Only twenty-six states have BODA statutes. *See* Alaska Stat. § 45.66.010; Ariz. Rev. Stat. Ann. § 44-1272; Cal. Civ. Code § 1812.203; Conn. Gen. Stat. Ann. tit. 36(b), ch. 672(c), § 36b-62; Fla. Stat. Ann. § 559.803; Ga. Code Ann. § 10-1-411; 815 Ill. Comp. Stat. § 602; Ind. Code § 24-5-8-2; Iowa Code Ann. § 551A.3; Ky. Rev. Stat. § 367.805; La. Rev. Stat. § 51:1822; Md. Code Ann. § 14-113; Me. Rev. Stat. tit. 32, ch. 69-B, § 4692; Mich. Comp. L. Ann. § 445.903b; Minn. Stat. Ann. § 80C.01; N.C. Gen. Stat. § 66-95; Neb. Rev. Stat. § 59-1724; N.H. Rev. Stat. Ann. § 358-E; Ohio Rev. Code § 1334.02; Okla. Stat. Ann. Tit. 71 § 801; S.C. Code § 39-57-30; S.D. Codified L. § 37-25A-8; Tex. Bus. & Com. Code Ann. § 51.001; Utah Code Ann. § 13-15-4; Va. Code Ann. § 59.1-264; Wash. Rev. Code Ann. § 19.110.020. Thus, Zurixx's actions that allegedly violated Utah's BODA are entirely lawful in approximately half of states nationwide, yet the Division seeks to apply its BODA nationwide. As the law is clear that one state cannot regulate or proscribe activities in another state, the Division cannot extend the BODA or the UCSPA to punish Zurixx for acts and alleged harm that occurred outside of Utah.

3. Allowing the Utah Division Unfettered Authority to Regulate Out-of-State Conduct Involving Non-Utah Residents Creates Impermissible Compliance Conflicts.

The Division's position should also be rejected because of the absurd results that it would produce. Specifically, the Division contends that, because Zurixx is a Utah LLC, Zurixx is required to comply with Utah law in every state in which it transacts business, irrespective of the regulatory standards of those other states. This necessarily creates unlawful friction with sister state laws. For example, the Division's pursuit of monetary relief and other remedies for Zurixx's conduct that occurred in California and which allegedly harmed California consumers would violate California law, which grants the California Attorney General exclusive jurisdiction to enforce its consumer protection statutes. *See* Cal. Bus. & Prof. Code §§ 17200, 17204 (unfair competition, which includes any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising," is to "be prosecuted *exclusively* in a court of competent jurisdiction by the Attorney General or a district attorney . . . ." (emphasis added)).

Similarly, Zurixx could not comply with Utah's BODA and, at the same time, comply with BODA statutes of certain other states. The Utah BODA requires that "a single disclosure statement or prospectus . . . be provided to any prospective purchaser at least 10 business days prior to the earlier of" the execution of the agreement or payment by the purchaser. Utah Code Ann. § 13-15-5. California's version of BODA, however, requires that the information be provided "at least 48 hours prior to the execution." Cal. Civ. Code § 1812.206. Stated differently, California has made the policy decision that, as it relates to California consumers, 48 hours is sufficient notice. If Zurixx exercised its rights in accordance with California's law, and provided the disclosure 48 hours prior to the execution (rather than the Utah-mandated 10 business days), Zurixx would violate Utah's BODA.

This conflict is not unique to California. *See* Ariz. Rev. Stat. Ann. § 44-1276.01 ("The seller shall deliver the written disclosure document to the consumer at least *five business days* before the earlier of the consumer's execution of a contract imposing a binding legal obligation on the consumer or the payment of any monies, receipt of anything of value or authorization to charge a credit or debit card."); Fla. Stat. Ann. § 559.803 ("At least *3 working days* before the time the purchaser signs a business opportunity contract, or at least 3 working days before the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document . . . ."); Ga. Code Ann. § 10-1-411(b) ("*At least 48 hours* prior to the time the purchaser signs a business opportunity contract or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document . . . ."); Ind. Code § 24-5-8-2 ("*At least seventy-two (72) hours* before the time the investor signs a contract, or at least seventy-two (72) hours before receipt of any consideration by the seller, whichever occurs first, the seller shall provide the investor a written disclosure document . . . ."); Me. Rev. Stat. tit. 32, ch. 69-B, § 4692 ("Seller shall provide all purchasers with a disclosure statement meeting the requirements of this chapter at the earliest of: *at least 72 hours* before the purchaser signs a business opportunity agreement; at least 72 hours before the purchaser makes payment of any consideration in connection with the sales or proposed sale of the business opportunity; or the first face-to-face meeting between the seller and the purchaser that is held for the purpose of discussing the sale or proposed sale of a business opportunity."); N.C. Gen. Stat. § 66-95 ("At least *48 hours prior* to the time the purchaser signs a business opportunity contract, or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document . . . ."); S.C. Code § 39-57-30 ("At least *forty-eight hours* prior to the time the purchaser signs a business opportunity contract, or at least forty-eight hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller shall provide the prospective purchaser a written document . . . ."); Va. Code Ann. § 59.1-264 ("At least *forty-eight hours* prior to the time the purchaser signs a business opportunity contract, or at least forty-eight hours prior to the receipt of any consideration therefor by the seller, whichever occurs first, the seller shall provide the prospective purchaser with a written document . . . .") (all emphasis added). Abiding by any of these state laws would result in Zurixx violating Utah law.

If the Division's position were accepted, companies would inevitably face these and other statutory conflicts across the country, creating chaos and competition among state enforcement regimes. Because the Division's improper expansive interpretation of its enforcement authority violates the clear mandate of the Division, the plain language of the UCSPA and BODA, and the United States and Utah Constitutions, the Division's request for injunctive relief and financial penalties for conduct and alleged harm occurring outside the state of Utah in Counts V through IX of the Complaint should be dismissed with prejudice.

D. The Division is Barred From Seeking Disgorgement, Civil Penalties, and Fines For All Alleged Wrongful Conduct that First Occurred Outside The Applicable Statute of Limitations Period.

Not only has the Division improperly sought relief for Defendants' activities that occurred outside the State of Utah, the Division also improperly seeks certain types of relief that are time-barred by the applicable one-year statute of limitations. Specifically, the Division alleges that the Defendants violated the UCSPA and BODA through their alleged wrongful conduct that occurred, in part, prior to May 8, 2017. Compl., ¶¶ 6, 28, 129, 132. For these alleged violations of Utah law, the Division seeks "disgorgement of ill-gotten monies, civil penalties, and fines" from Defendants. *Id.* ¶ 2. However, to the extent that the Division seeks such relief for conduct that occurred on or before May 8, 2017, a one-year statute of limitations applies and the Division's request for relief should be limited accordingly.

Section 78B-2-302(3) of the Utah Code establishes a one-year statute of limitations for actions "upon a statute . . . for a forfeiture or penalty to the state." Utah Code Ann. § 78B-2-302(3). On May 8, 2018, Utah Code § 13-2-6 was amended to include a statute of limitations for actions brought under UCSPA and BODA, expressly displacing the one-year statute of limitations in Utah Code § 78B-2-302(3). *See* Utah Code Ann. § 13-2-6(6)(b)–(c). Before that amendment took effect, however, none of the relevant statutes contained a separate statute of limitations. Thus, before May 8, 2018, the Division had only one year to bring claims for penalties, including disgorgement, under the UCSPA and BODA. Utah Code Ann., § 78B-2-302(3).[3] As a result, the Division's requested relief based on Defendants' alleged wrongful conduct that occurred prior to May 8, 2017 is time-barred by this one-year statute of limitations.

The one-year statute of limitations applies to the Division's request for disgorgement because that relief constitutes a penalty under Section 78B-2-302(3). Indeed, under Utah law, "[a] penalty is a sum of money which the law exacts the payment of by way of punishment for doing some act which is prohibited, or omitting to do some act which is required to be done." *In re Castletons, Inc.*, 990 F.2d 551, 557–58 (10th Cir. 1993) (quoting *State v. Franklin*, 226 P. 674, 676 (Utah 1924)); *see also Sinclair Oil Corp. v. Atl. Richfield Co.*, 720 F. Supp. 894, 900 (D. Utah 1989) ("As seen above, to whom the cause of action is given is fundamental to the federal 'penalty' characterization."). This is precisely the motivation behind seeking disgorgement for "ill-gotten gains" as the Division seeks to do in this action.

Moreover, the Supreme Court's decision in *Kokesh v. SEC* further supports that disgorgement constitutes a penalty. In *Kokesh*, the Court found that a form of equitable or monetary relief is a penalty when it is (1) "imposed by the courts as a consequence for violating [a] public law[;]" (2) "imposed for punitive purposes[;]" and (3) "not compensatory." *Kokesh v. SEC*, 137 S. Ct. 1635, 1643–44 (2017). Here, the Division's request for disgorgement plainly qualifies as a "penalty" pursuant to the standard set forth in *Kokesh*. First, BODA and UCSPA are

[3] Moreover, that the Utah Legislature extended the statute of limitations for penalties awarded under the UCSPA and BODA on May 8, 2018, does not revive causes of actions that were already dead under the prior statute of limitations. *See State v. Lusk*, 37 P.3d 1103, 1110 (Utah 2001) ("[I]t should be observed that if the statute has run on a cause of action, so that it is dead, it cannot be revived by any such statutory extension." (citation omitted)). Thus, the Division's request for penalties for alleged wrongful conduct that occurred on or before May 8, 2017, had already died before the Utah Legislature codified a five-year statute of limitations for UCSPA and BODA claims on May 8, 2018.

both "public laws," as they are intended to protect the Utah public. Utah Code Ann. § 13-15-3 (authorizing the Division to address consumer complaints of BODA violations); Utah Code Ann., § 13-11-2 (the expressed policy of the UCSPA is "to protect consumers"). In the Complaint, the Division concedes that it seeks to impose disgorgement for expressly punitive purposes, as the entire purpose of disgorgement is to deprive the defendant of his "ill-gotten" gains." Compl. ¶ 2 ("disgorgement of *ill-gotten monies*" (emphasis added)). Finally, disgorgement is not compensatory because the Division is not expressly required to return disgorged money to consumers. Utah Code Ann. § 13-2-6 (providing for the enforcement powers of the Division, which does not include return of funds to consumers).

Accordingly, the Division's request for disgorgement, civil penalties, and fines from Defendants constitutes a "penalty" under Utah law. Therefore, the Division is barred from seeking any relief, including disgorgement, civil penalties, and fines, for the challenged conduct that occurred outside the one-year limitation period, *i.e.*, before May 8, 2017.

IV. CONCLUSION

The FTC and the Division seek relief based on powers that those agencies wish they had, not those that Congress and the Utah Legislature gave them. The rhetorical excesses of the Complaint do not justify allowing these agencies to obtain relief not authorized by statute. The FTC's claims for equitable monetary relief should be dismissed. The Division's BODA claims should be dismissed. The Division's remaining claims should be limited to activity occurring after May 8, 2017, and within the State of Utah. The motion should be granted.

DATED this 19th day of November, 2019.

Respectfully Submitted,

KIRTON McCONKIE

By: /s/ Benson L. Hathaway, Jr.

Benson L. Hathaway, Jr. (Bar No. 4219)
Ryan R. Beckstrom (Bar No. 14593)
KIRTON McCONKIE
KIRTON McCONKIE BUILDING
50 East South Temple, 4th Floor
P.O. Box 45120
Salt Lake City, Utah 84145-0120
Telephone: (801) 328-3600
Fax: (801) 321-4893
BHathaway@kmclaw.com
RBeckstrom@kmclaw.com

Leonard L. Gordon (*pro hac vice*)
Elliot Kelly (*pro hac vice*)
VENABLE LLP
1270 Avenue of the Americas
24th Floor
New York, NY 10020
Telephone: (212) 370-6277
Fax: (212) 307-5598
LLGordon@venable.com
EKelly@venable.com

Stephen R. Freeland (*pro hac vice*)
Mary M. Gardner (*pro hac vice*)
Michael A. Munoz (*pro hac vice*)
VENABLE LLP
600 Massachusetts Ave., N.W.
Washington, D.C. 20001
Telephone: (202) 344-4000
Fax: (202) 344-8300
SRFreeland@venable.com
MMGardner@venable.com
MAMunoz@venable.com

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2019, I caused a true and correct copy of the foregoing **DEFENDANTS' PARTIAL MOTION TO DISMISS** to be served on the following by email:

Attorneys for Plaintiff Federal Trade Commission
FEDERAL TRADE COMMISSION
Amanda R. Grier (agrier@ftc.gov)
Collot Guerard (cguerard@ftc.gov)
Joshua A. Doan (jdoan@ftc.gov)
Miry Kim (mkim@ftc.gov)

Attorneys for Plaintiff Utah Division of Consumer Protection
UTAH DIVISION OF CONSUMER PROTECTION
Assistant Attorney General's Office
Thomas M. Melton (tmelton@agutah.gov)
Douglas E. DeVore, II (dedevore@agutah.gov)
Kevin M. McLean (kmclean@agutah.gov)
Robert G. Wing (rwing@agutah.gov)

Receiver & Attorneys for Receiver
HOLLAND & HART LLP
David K. Broadbent (dbroadbent@hollandhart.com)
Chelsea J. Davis (cjdavis@hollandhart.com)
Cory A. Talbot (catalbot@hollandhart.com)
Doyle S. Byers (dsbyers@hollandhart.com)
Engels Tejeda (ejtejeda@hollandhart.com)

/s/ Kelsey Murry

EXHIBIT 1

RAY, QUINNEY & NEBEKER

JAN 12 2003

PROVO

Craig Carlile (0571)
Gregory S. Roberts (9092)
RAY QUINNEY & NEBEKER
101 North University Avenue, #200
Provo, Utah 84601-2833
Telephone: (801) 342-2400

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

UTAH DIVISION OF CONSUMER PROTECTION, Plaintiff, v. USIGHTCOM, LLC, a Utah limited liability company, Defendant.	**ORDER GRANTING DEFENDANT'S MOTION TO VACATE ADMINISTRATIVE ORDER AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, GRANTING EX PARTE MOTION FOR LEAVE TO FILE OVERLENGTH REPLY MEMORANDUM, DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S REPLY MEMORANDUM, MOTION TO STRIKE DEFENDANT'S STATEMENT OF UNDISPUTED FACTS, AND MOTION IN LIMINE** Case No. 030907202 Judge Henriod

1-5-04

This matter came before the court for hearing on November 17, 2003 on Defendant's Motion to Vacate Administrative Order and Motion to Dismiss for Lack of Subject Matter Jurisdiction, Defendant's Ex Parte Motion to File an Overlength Reply Memorandum, Plaintiff's Motions to Strike Defendant's Reply Memorandum, to Strike Defendant's Statement of Undisputed Facts, and Motion in Limine, and Plaintiff's Motion to Strike References to Payment of Administrative Fine. Defendant uSightcom, LLC was represented by Craig Carlile and Gregory S. Roberts of Ray Quinney & Nebeker. Plaintiff the Utah Division of Consumer Protection was represented by Jeffrey S. Buckner of the Utah Attorney General's office. The court having considered the memoranda filed in this matter and the oral arguments of the parties, the court being fully advised in the premises, and good cause appearing, the Court denied Plaintiff's motions and granted Defendant's motion for summary judgment. The Court granted Defendant's motion for summary judgment on the basis that the Utah Division of Consumer Protection (the "Division") has no jurisdiction to regulate transactions that occur in states other than Utah. Furthermore, as to the two cases on which the Division's Order of Adjudication was based, the Division agreed to a complete settlement of its administrative citation as to Carol Llantro and a partial settlement of the issues as to Tamara McCoy.[1] Having resolved and settled the claims in the Administrative Citation, there were no such claims over which the Division could exercise further jurisdiction. Accordingly,

[1] The Administrative Citation included claims as to Emanuel Udo, but the presiding officer determined in his Conclusions of Law that there was no violation as to Mr. Udo. Therefore, the Emanuel Udo claims were not part of the Order of Adjudication. Nevertheless, even if the Emanuel Udo claims had been part of the jurisdictional basis asserted in this case; those claims also were fully resolved and settled with the Division.

IT IS HEREBY ORDERED as follows:

1. The Administrative Order of Adjudication entered against uSightcom, LLC on December 27, 2002 is hereby vacated and Plaintiff's First Amended Complaint filed in the above-entitled action is hereby dismissed with prejudice;

2. Defendant's Ex Parte Motion for Leave to File an Overlength Reply Memorandum is granted;

3. Plaintiff's Motion to Strike Defendant's Reply Memorandum in denied;

4. Plaintiff's Motion to Strike Statement of Undisputed Facts is denied;

5. Plaintiff's Motion in Limine is denied; and

6. Defendant's Motion to Strike Any Reference to Payment of Administrative Fine is now moot given the above rulings.

DATED this 7 day of January, 2004.

BY THE COURT

Stephen L. Henriod
Third District Judge
By
STAMP USED AT DIRECTION OF JUDGE

CERTIFICATE OF SERVICE

I do hereby certify that on the 5th day of January, 2004, a true and correct copy of the foregoing **ORDER GRANTING DEFENDANT'S MOTION TO VACATE ADMINISTRATIVE ORDER AND MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION, GRANTING EX PARTE MOTION FOR LEAVE TO FILE OVERLENGTH REPLY MEMORANDUM, DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S REPLY MEMORANDUM, MOTION TO STRIKE DEFENDANT'S STATEMENT OF UNDISPUTED FACTS, AND MOTION IN LIMINE** was hand-delivered to the following:

Jeffrey S. Buckner
Attorney General's Office
P.O. Box 140872
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114

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