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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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FEDERAL TRADE COMMISSION and  
UTAH DIVISION OF CONSUMER  
PROTECTION,

Plaintiffs,

v.

ZURIXX, LLC, *et al.*

Defendants.

**ATTORNEY PLANNING  
MEETING REPORT**

Case No. 2:19-cv-00713-DAK-EJF

District Judge Dale A. Kimball  
Magistrate Judge Evelyn J. Furse

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**1. PRELIMINARY MATTERS:**

a. Describe the nature of the claims and affirmative defenses:

The Plaintiffs Federal Trade Commission (“FTC”) and Utah Division of  
Consumer Protection (“Division”) claim that Defendants violated Section 5(a) of the

Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §45(a), the Consumer Review Fairness Act (“CRFA”), 15 U.S.C. §45(b), the Utah Consumer Sales Practices Act (“UCSPA”), Utah Code § 13-11-1 *et seq.* and the Business Opportunity Disclosure Act (“BODA”), Utah Code § 13-15-1 *et seq.* in the marketing and sale of real estate investment products.

Plaintiff FTC claims that Defendants made false and unsubstantiated earnings and other claims regarding their real estate investment products (Counts I, II), and failed to disclose material aspects of their refund policy (Count III) in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The FTC also claims that Defendants violated the CRFA by using form contracts that contain provisions that prohibit or restrict the ability of consumers purchasing Defendants’ products to review, assess, or otherwise analyze Zurixx’s products online or otherwise (Count IV) in violation of 15 U.S.C. § 45b.

Plaintiff Division claims that Defendants made false and unsubstantiated earnings and other claims regarding their real estate investment products (Counts V, VI), and failed to disclose material aspects of their refund policy (Count VII) in violation of the UCSPA §13-11-4(1). The Division also claims that Defendants marketed and sold assisted marketing plans in violation of BODA by failing to file required information with the Division (Count VIII) and failing to provide the required disclosures to prospective purchasers (Count IX).

Plaintiffs note that Defendants state below that Zurixx executives and executives of Zurixx’s competitors participated in a meeting with FTC officials regarding the Electronic Retailer Self-Regulatory Program (“ERSP”) in 2018. In that meeting, and in several previous meetings, FTC staff have repeatedly stressed to ERSP participants, and counsel from Venable, that the use of false and unsubstantiated marketing claims – including false and unsubstantiated earnings claims, non-representative testimonials, and “success stories” – violates the FTC Act. In those meetings, ERSP members repeatedly represented to FTC staff that they do not use earnings claims in marketing their products and services because, among other reasons, they do not track the results of their customers.

The Defendants deny that they have violated any laws and further deny that Plaintiffs are entitled to any relief against any of them. In sum, this lawsuit was filed based on 24 declarations from former Zurixx students and 239 unspecified complaints the FTC allegedly received about Zurixx. Prior to this lawsuit being filed, however, Zurixx provided real estate education to over 100,000 students since the company's founding in 2012. The complaints cited by the Plaintiffs amount to approximately one-quarter of one percent of all students who received real estate education and training from Zurixx. Put simply, contrary to the Plaintiffs' assertions, there is no evidence of any widespread consumer fraud or deception.

In fact, the record evidence in this case demonstrates widespread *satisfaction*. Specifically, over 99% of all prior Zurixx student customers rated their educational experience as insightful, valuable, worthwhile, understandable and helpful. This customer satisfaction data, yielded from detailed surveys of Zurixx's students, was audited and verified by an independent accounting firm (Squire & Company, PC).

Zurixx's commitment to providing high-quality educational experiences to its customers is also exemplified by the training and certification of its customer service and instructional teams. All members of Zurixx's customer service department not only underwent a detailed internal on-boarding and training process, but all members also completed an external training and certification program administered by an independent third-party company. After completion of the program, each employee was tested and all received certification.

Zurixx's instructors, trainers, and coaches were also vetted to ensure that they had several years of experience in their field of instruction. Zurixx then required each of them to complete an internal training, after which, the individual was required to pass an examination. As with customer service, Zurixx supplemented its internal training with third-party training and certification as a quality assurance measure. Further, all of Zurixx's coaches attended a two-day training and certification course where they were trained in best practices for helping students, diagnosing problems, and creating success. The course was offered and administered through the Association for Talent Development, which is the world's largest association dedicated to talent development

and training effectiveness. Instructors and presenters who violated Zurixx's compliance policies were subject to discipline including, but not limited to, suspension without pay and termination.

Because of the value that Zurixx's educational training provided to its students, Zurixx received numerous awards from local and national business review organizations, including, by way of example, being inducted into the Salt Lake City Business Hall of Fame, being awarded the Best of Salt Lake City for Education award, as well as achieving a rank of forty-three (43) on Inc. 500's list of Fastest Growing Companies in 2016, and a rank of two (2) in the Top Education Company category. Zurixx has also donated millions of dollars and a significant amount of its officer's and staff's time to charitable organizations in Utah, the U.S., and around the world.

Defendants also participated in ERSP, an independent advertising review program administered by the Better Business Bureau. A little less than a year ago, Defendants through ERSP affirmatively reached out to the FTC to meet with staff within the FTC's Bureau of Consumer Protection – the Bureau that brought this lawsuit – to discuss advertising and business practices affecting ERSP's members. Indeed, Defendants Jeffrey Spangler and James Carlson, two of the owners of Defendant Zurixx and individual Defendants in this enforcement action, along with their counsel from Venable LLP who are defending them herein, met in person at the FTC's headquarters in Washington, D.C. with Andrew Smith, the Director of the FTC's Bureau of Consumer Protection, several other high-ranking FTC staff members, as well as other industry participants to discuss advertising and marketing practices in the real estate education industry and to solicit the FTC's views on ERSP's efforts in industry self-regulation. During that meeting, ERSP participants asked the FTC if the FTC had concerns with any advertising or marketing practices or educational training, and the participants also reaffirmed their continued commitment to make any changes the FTC requested as they had in the past. Despite the fact that the FTC's investigation that led to the filing of this case was already well underway, albeit in secret, the FTC did not disclose the investigation to Zurixx. Nor did the FTC, at that meeting or subsequently, identify any

specific concerns with respect to Zurixx, nor ask Zurixx to change any of its advertising practices or educational training.

Further, the Plaintiffs' claims in this case that Defendants' educational training provided little to no value to its students is unsupported and unsupportable. Specifically, the expert on which Plaintiffs rely is not only unqualified to give opinions on Defendants' training, his opinions are also based on the wrong data and belied by the enormous evidence of success experienced by Zurixx's students and others who use the same flipping formula taught by Zurixx. Indeed, the educational training taught by Zurixx is widely accepted and used throughout the real estate investing industry by real estate investors.

Even though the real estate education taught by Defendant Zurixx is widely-accepted and used by real estate investors and, more importantly, can work to generate profit, Zurixx's policy was always to make it clear to students before they paid for the initial level of training that their individual success was not guaranteed, that they may not succeed, and that their results would vary. The disclaimers used by Zurixx were reviewed and approved by ERSP through the industry self-regulatory process. When the cherry-picked statements upon which the Plaintiffs rely are viewed in context, the evidence shows that, while specific results of past students, real deals, or hypothetical deals were used by instructors to teach the real estate education, Zurixx did not represent that those results and numbers were what the student would achieve or should expect to achieve.

Moreover, as explained in Defendants' Motion to Dismiss (ECF No. 62): (1) the FTC is not entitled to seek any monetary relief in this case as a matter of law; (2) Defendants' educational training is not subject to Utah's BODA; and (3) the Division may not apply Utah law extraterritorially to Defendants' conduct occurring outside of Utah.

Defendants reserve the right to assert any and all other defenses each of them may have.

b. This case is referred to Magistrate Judge Evelyn Furse under 28 U.S.C. § 636(b)(1)(A).

c. Pursuant to Fed. R. Civ. P. 26(f), the parties held telephone meetings on Wednesday November 20 and December 4, 2019.

The following attended the attorney meeting on November 20, 2019:  
Collot Guerard, Josh Doan, Amanda Grier, and Robert Wing counsel for Plaintiffs FTC and Division, and Benson L. Hathaway, Jr., Leonard L. Gordon, Stephen R. Freeland, and Michael A. Munoz for the Defendants.

The following attended the attorney meeting on December 4, 2019:  
Collot Guerard, Josh Doan, Amanda Grier, and Robert Wing counsel for Plaintiffs FTC and Division, and Benson L. Hathaway, Jr., Leonard L. Gordon, and Stephen R. Freeland for the Defendants.

d. As set forth in Section XXV of the Stipulated Preliminary Injunction (ECF 54), the parties will exchange by December 17, 2019, the Initial Disclosures required by Rule 26(a)(1).

e. Pursuant to Fed. R. Civ. P. 5(b)(2)(D), the parties agree to receive all items required to be served under Fed. R. Civ. P. 5(a) by either (i) notice of electronic filing, or (ii) email transmission. Such electronic service will constitute service and notice of entry as required by those rules. Any right to service by USPS mail is waived.

**2. DISCOVERY PLAN:** The parties jointly propose to the court the following discovery plan:

a. Discovery is necessary on the following subjects:

*(1) By the Plaintiffs:* At this early stage of the litigation, Plaintiffs have not yet determined all the subjects on which discovery is or may be necessary. At present the subjects on which Plaintiffs will seek discovery include, but are not limited to:

- a. the role of the individual and corporate Defendants in the Zurixx business;
- b. the role of potential corporate and individual Defendants;
- c. the extent of unreimbursed consumer injury;
- d. the nature and extent of compliance efforts;
- e. the extent and nature of Defendants' business operations and activities in Utah;

- f. the extent to which Defendants collected or otherwise obtained information about consumer financial success;
- g. any efforts by Defendants to make any disclosures to prospective or actual purchasers.

(2) *By the Defendants:* Defendants have also not yet determined all the subjects on which discovery is or may be necessary. At present, the subjects on which Defendants will seek discovery include, but are not limited to:

- a. the Plaintiffs' evidence of customer complaints;
- b. the Plaintiffs' evidence regarding Defendants' educational training; and
- b. the Plaintiffs' expert's limited experience and knowledge.

b. Discovery Phases

The parties agree that discovery will be conducted in phases: there will be a fact discovery phase followed by an expert discovery phase. At this point, the parties do not know whether discovery will be limited to or focused on particular issues.

c. The discovery methods to be used and the limitations to be imposed.

(1) Oral Exam Depositions

The parties agree that the Plaintiffs collectively may take 25 oral exam depositions and that the Defendants collectively may take 25 oral exam depositions.

Maximum number of hours per deposition. The parties agree that the depositions of individuals will last seven hours, net of all breaks, including those taken off-the-record. The parties agree that each individual testifying in a Rule 30(b)(6) deposition will be examined for up to seven hours, on the topics for which she is designated, net of all breaks, including those taken off-the-record. Where a Rule 30(b)(6) witness is also a personal knowledge witness, that witness may be examined for up to seven hours as the Rule 30(b)(6) witness and up to seven hours as a personal knowledge witness.

(2) Interrogatories:

The parties agree that the Plaintiffs collectively may serve a maximum of 60 Interrogatories on the Defendants and the Defendants collectively may serve a maximum of 60 Interrogatories on Plaintiffs.

Admissions

The parties agree that Plaintiffs and Defendants may serve an unlimited number of Requests for Admission, subject, however, to Fed. R. Civ. P. 26(b)'s proportionality and undue burden restrictions.

Requests for production of documents

The parties agree that Plaintiffs and Defendants may serve an unlimited number of Requests for Production of Documents, subject, however, to Fed. R. Civ. P. 26(b)'s proportionality and undue burden restrictions.

(3) Other discovery methods:

At this early stage of the litigation, the parties do not know whether they will seek to use other discovery methods.

d. Discovery of electronically-stored information should be handled as follows:

The parties agree to exchange electronically-stored data ("ESI"), including the metadata. The parties also agree that each party will alert the other in writing if it appears that privileged ESI may have been produced.

The parties agree that, to the extent feasible, the production of electronically-stored information shall comply with the attached Bureau of Consumer Protection Production Guide.

e. Protective Order. The parties agree to explore the implementation of an agreement or a stipulated protective order to handle the production and use of personal identifying information and sensitive health information as well as attorney-client and work product material. The Plaintiffs will propose that the parties agree to the entry of the FTC model protective order.

The parties also agree that any party asserting a claim of privilege or other protection in response to a discovery request shall provide a log that includes a description of each withheld or partially withheld communication or document that is consistent with Rule 26(b)(5)(A). Notwithstanding this requirement, the parties agree that there shall be no need to provide a privilege log for the following categories of communications and documents: (1) communications and documents, or drafts thereof, circulated between and among the parties and their outside counsel that relate to matters at issue in this case and that were created on or after October 2, 2019; (2) communications and documents, or drafts thereof, circulated between or among FTC staff, between or among FTC staff and staff from the offices of the Utah Attorney General or the Utah Division of Consumer Protection, and between and among the offices of the Utah Attorney General and



the Utah Division of Consumer Protection; and (3) drafts of pleadings, motions, responses or replies, or discovery requests.

The parties further agree, consistent with Federal Rule of Evidence 502(b), that the inadvertent production of privileged and protected information shall not operate as a waiver of the privilege or protection provided that: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following the procedures provided by Rule 26(b)(5)(B).

- f. Discovery Deadlines: Although the Parties agree as to the timing of discovery, they disagree as to when discovery should commence.<sup>1</sup>

It is Defendants' position that all discovery should be stayed until the Court rules on Defendants' pending Motion to Dismiss the Complaint ("MTD") (ECF No. 62). Indeed, as more fully explained in the concurrently-filed Stipulated Motion for Initial Scheduling Conference, Zurixx has been shut down, and is being wound down, by the Court-appointed receiver, the individual defendants are subject to significant conduct restrictions imposed by the Court's November 1, 2019 Stipulated Preliminary Injunction, the Plaintiffs in this case have already obtained, or have access to, all documents and data in Zurixx's care, custody and control pursuant to the immediate access the Court granted in the October 1, 2019 Temporary Restraining Order, and a decision granting Defendants' MTD could very well limit the scope of, or eliminate entirely the need for any, discovery in this case. Additionally, Defendants have made an offer to settle, and while the FTC indicated it would submit a counteroffer nine (9) days ago, none has been received by Defendants. Defendants' MTD goes to the issue the parties' will likely debate during settlement, which is whether the FTC is entitled to any monetary relief at all, and whether the relief available to the Division is limited. Thus, in light of the above, there is no ongoing conduct that necessitates discovery before a ruling on Defendants' MTD, the Plaintiffs have access to Zurixx's documents and data, and a favorable ruling on Defendants' MTD could result in the quick resolution of this case without any discovery. There is simply no need for the parties to expend substantial resources engaging in discovery unless and until the Court rules on the pending motion to dismiss.

It is the Plaintiffs' position that discovery between the parties should commence without delay. First, Defendants' MTD does not attack the FTC's authority to obtain injunctive relief under Section 5(a) of the FTC Act or under the Consumer Review Fairness Act. The FTC's authority to seek injunctive relief is not at issue in the MTD. Yet Defendants seek to postpone all discovery

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<sup>1</sup> The positions discussed below relate to discovery between the parties. The Court's November 1, 2019 Stipulated Preliminary Injunction provides that "the parties may engage in any third party discovery authorized by the Federal Rules of Civil Procedure and the Local Rules of this District immediately . . . ." ECF No. 54 at 28.

between the parties until the Court rules upon the MTD. As the authority of the FTC to seek injunctive relief is not at issue and discovery would be substantially the same whether or not Defendants' MTD is granted, there is no basis for postponing discovery with respect to counts I-IV (the FTC counts). Second, the partial MTD argues, contrary to Tenth Circuit precedent, that the FTC lacks authority to obtain equitable monetary relief under Section 13(b) of the FTC Act. The Tenth Circuit has rejected this argument<sup>2</sup> and District Courts are bound to follow Tenth Circuit precedent.<sup>3</sup> As the Tenth Circuit has already held that the FTC has authority to seek equitable monetary relief, Defendants' argument on this point is without any merit and certainly is no basis for a blanket stay on all discovery between the parties. Third, there is no reason to postpone discovery under the BODA and USCPA counts (Counts V-IX) as Defendants' recognize that the Division may seek injunctive and monetary relief for Utah consumers. Fourth, while the Plaintiffs' did download some of Defendants' servers and copied some of Defendants' paper documents, as authorized by the Court's Temporary Restraining Order (ECF 24), that is not a basis for postponing all written and deposition discovery of Defendants and their employees. Fifth, even if the Court granted all the relief sought in Defendants' MTD, discovery would then commence on the injunctive issues and issues related to Utah consumers. There is no reason to delay that discovery.

The Defendants agree that in the event that the Court declines to stay discovery between the parties pending the resolution of the MTD, the deadlines proposed by the Plaintiffs are acceptable.

- g. Last day to serve written discovery:
  - Plaintiffs: Monday July 27, 2020.
  - Defendants: 7 months after the Court's decision on the MTD.
  
- h. Close of fact discovery:
  - Plaintiffs: Tuesday September 15, 2020.
  - Defendants: 9 months after the Court's decision on the MTD.

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<sup>2</sup> *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 n. 6 (10<sup>th</sup> Cir. 2005) ("Although § 13(b) does not expressly authorize a court to grant consumer redress (i.e. refund, restitution, rescission, or other equitable monetary relief), § 13(b)'s grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant consumer redress."); *FTC v. Loanpoint, LLC*, 525 F. App'x 696, 699 (10<sup>th</sup> Cir. 2013) (unpublished) ("... 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.'").

<sup>3</sup> *United States v. Spedalieri*, 910 F.2d 707, 709 & n.2 (10<sup>th</sup> Cir. 1990) ("A district court must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits.").

**3. AMENDMENT OF PLEADINGS AND ADDITION OF PARTIES:**

- a. The cutoff dates for filing a motion to amend pleadings are:
  - Plaintiffs: Monday June 29, 2020
  - Defendants: 6 months after the Court's decision on the MTD.
  
- b. The cutoff dates for filing a motion to join additional parties are:
  - Plaintiffs: Monday June 29, 2020
  - Defendants: 6 months after the Court's decision on the MTD.

**4. EXPERT REPORTS:**

- a. The parties will disclose the subject matter and identity of their experts on Party(ies) bearing burden of proof:
  - Plaintiffs: Monday July 27, 2020
  - Defendants: 7 months after the Court's decision on the MTD.Counter Disclosures:
  - Plaintiffs: Monday August 24, 2020
  - Defendants: 8 months after the Court's decision on the MTD.
  
- b. Reports from experts under Rule 26(a)(2) will be submitted on:
  - Party(ies) bearing burden of proof:
    - Plaintiffs: Monday November 2, 2020
    - Defendants: 10 months after the Court's decision on the MTD.
  - Counter Reports:
    - Plaintiffs: Monday November 30, 2020.
    - Defendants: 11 months after the Court's decision on the MTD.

**5. OTHER DEADLINES:**

- a. Expert Discovery cutoff:
  - Plaintiffs: Monday December 28, 2020.

Defendants: 12 months after the Court's decision on the MTD.

- b. Deadline for filing dispositive or potentially dispositive motions including motions to exclude experts where expert testimony is required to prove the case.

Plaintiffs: Monday February 15, 2021.

Defendants: 14 months after the Court's decision on the MTD.

- c. Deadline for filing partial or complete motions to exclude expert testimony:

Plaintiffs: Monday February 15, 2021.

Defendants: 14 months after the Court's decision on the MTD.

**6. ADR/SETTLEMENT:**

- a. The potential for resolution before trial is: good
- b. Depending on the progress of the parties' negotiations to resolve the case, the parties, or one or more of them, may file a motion to participate in the Court's alternative dispute resolution program for settlement conference (with magistrate judge).
- c. The parties do not intend to engage in private alternative dispute resolution.
- d. The parties are negotiating in good faith to reach a stipulated permanent injunction.

**7. TRIAL AND PREPARATION FOR TRIAL:**

- a. The parties agree that they should have 14 days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3) (if different than the 14 days provided by Rule).
- b. This case should be ready for trial by: 60 days after ruling on dispositive motions. Plaintiffs' position is that this case should be tried to the Court and last 5 days. Defendants' position is that they are entitled to a jury trial, and estimate it will last 8 trial days.

Collot Guerard

Collot Guerard

Attorney for the Plaintiff

Federal Trade Commission

Date: December 5, 2019

Robert Wing

*(with permission)*

Attorney for the Plaintiff

Utah Division of Consumer Protection

Date: December 5, 2019

Leonard L. Gordon

*(with permission)*

Leonard Gordon

Attorney for the Defendants

Zurixx, LLC et al.

Date: December 5, 2019

Benjamin Hathaway

*(with permission)*

Benjamin Hathaway

Attorney for the Defendants

Zurixx, LLC et al.

Date: December 5, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on December 5, 2019, I electronically filed the foregoing **ATTORNEY PLANNING MEETING REPORT** with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ Collot Guerard  
Collot Guerard