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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' REPLY IN FURTHER SUPPORT OF THEIR PARTIAL MOTION TO DISMISS** Case No.: 2:19-cv-00713-DAK-CMR Judge Dale Kimball

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I. INTRODUCTION

In their Partial Motion to Dismiss, the Defendants demonstrated that the FTC and the Division were pursuing claims for relief based on powers that they wish they had rather than on those that they properly possess. Nothing in the Oppositions filed by the FTC and the Division changes this.

The FTC continues to ignore the plain language of Section 13(b) of the FTC Act, the Act's overall statutory scheme, and the restrictions that the Supreme Court and the Tenth Circuit have placed on inferring additional remedies into a statutory scheme. Congress provided a detailed mechanism for the FTC to seek monetary relief in court for violations of Section 5 of the FTC Act—namely, Section 19 of the FTC Act. Because Congress provided the FTC with that detailed remedy, including a scienter requirement and a statute of limitations, Tenth Circuit precedent dictates that Section 13(b) not be interpreted to provide another remedial mechanism for monetary relief devoid of a scienter requirement and a statute of limitations.

The Division, recognizing that its Complaint was infirm, tries to bolster its deficient allegations by improperly seeking to introduce material outside the Complaint. The Division's efforts do not rescue its improper attempt to regulate conduct outside of Utah. The Division's effort to regulate Preview Events, Workshops, and fulfillment events occurring outside of Utah is beyond its statutory authority and contrary to due process. The Division tries to save its BODA claims by attempting to rewrite the language of the statute to cover almost anything sold in connection with starting a business.

For the reasons stated herein and previously, the Partial Motion to Dismiss should be granted.

II. THE FTC IS NOT ENTITLED TO THE EQUITABLE MONETARY RELIEF REQUESTED IN COUNTS ONE, TWO, AND THREE OF THE COMPLAINT WHEN IT PROCEEDS UNDER SECTION 13(B) OF THE FTC ACT.

A. The Plain Language of Section 13(b) Does Not Authorize the FTC to Obtain, Or a Court to Award, Equitable Monetary Relief.

In its Opposition, the FTC consciously and consistently ignores the plain language of Section 13(b), instead choosing to rely on non-binding legislative statements and dated judicial interpretations of the statute to support the right to obtain "equitable monetary relief." The FTC ignores the plain language of the statute because the plain language of Section 13(b) does not authorize the FTC to obtain equitable monetary relief.

Nothing the FTC says, however, can magically transform the unambiguous language of Section 13(b), which only authorizes the FTC to obtain prospective injunctive remedies 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) (emphasis added). Specifically, Section 13(b) provides: "the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to *enjoin* any such act or practice . . . . *Provided further* that in proper cases the Commission may seek, and after proper proof, the court may issue, *a permanent injunction*." *Id.* (emphasis added). Accordingly, Section 13(b) is unambiguous in that it explicitly authorizes only prospective injunctive remedies.

Where, as here, "the statutory language is clear, [the] analysis ordinarily ends." *United States v. Manning*, 526 F.3d 611, 614 (10th Cir. 2008) (citations omitted). And the Supreme Court, the Tenth Circuit, and this Court all routinely apply the same analysis to determine whether a statute is plain and unambiguous, namely by examining the language of the statute itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) (citing *Estate of Cowart v. Nicklos Drilling*

Co., 505 U.S. 469, 477 (1992)); *see also Manning*, 526 F.3d at 614 (citation omitted); *Stacy S. v. Boeing Co. Employee Health Benefit Plan (Plan 626),* 344 F. Supp. 3d 1324, 1334 (D. Utah 2018) (quoting *Time Warner Entm't Co., L.P. v. Everest Midwest Licensee, L.L.C.,* 381 F.3d 1039, 1050 (10th Cir. 2004)). Then-Judge Gorsuch put it as simply as possible: "'[w]hen a statute is as clear as a glass slipper and fits without strain,' it is our job merely to put it on the foot where it belongs." *Lexington Ins. Co. v. Precision Drilling Co., L.P.,* 830 F.3d 1219, 1220 (10th Cir. 2016) (Gorsuch, J.) (quoting *Demko v. U.S.*, 216 F.3d 1049, 1053 (Fed. Cir. 2000)). Here, the plain language of Section 13(b) is, as then-Judge Gorsuch put it, "as clear as a glass slipper." It states that the FTC can seek injunctive relief—nothing more. Reading "injunction" to include court orders to pay monetary judgments means that "a statutory limitation to injunctive relief would be meaningless, since any claim for legal relief can, with lawyerly inventiveness, be phrased in terms of an injunction." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 211 n.1 (2002).

In an effort to sidestep the plain language of Section 13(b), the FTC resorts to non-binding legislative history and judicial interpretations of the statute, arguing that these sources should override the statute's plain language. However, where, as here, the language of the statute is unambiguous, these types of secondary sources are irrelevant and should be disregarded. *Osborne v. Babbitt*, 61 F.3d 810, 814 n.4 (10th Cir. 1995) ("Having determined that the meaning of [certain statutory sections] are clear from the words of the statutes themselves, we need not consider the legislative history of the General Allotment Act. Similarly, because Congress's intent is clear and unambiguous, we need not examine the agency's cases interpreting these statutes.") (internal citations omitted); *see also Lexington Ins. Co.,* 830 F.3d at 1221 ("The fact is the task of trying to discern the textually unexpressed intentions of (or really attribute such intentions to) a legislative body composed of scores or often hundreds of individuals is a notoriously doubtful business—and

precisely never enough to trump the unambiguous text a majority of legislators actually adopted.") (citations omitted).

This Court should resist the FTC's urging to look beyond the unambiguous language of Section 13(b), as the statute's plain language is the best evidence of what Congress intended. Accordingly, because Section 13(b) contains no language authorizing the recovery of any other form of relief, including restitution or monetary compensation for past violations, this Court should not imply such a remedy.

B. The Comprehensive Statutory Scheme for Consumer Redress Provided in the FTC Act Reinforces That Section 13(b) Does Not Authorize Equitable Monetary Relief.

In its Opposition, the FTC baldly asserts that it may proceed as it chooses under either Section 13(b) or Section 19 of the FTC Act, as, in the FTC's eyes, either statutory section permits the FTC to obtain monetary relief for a violation of Section 5 of the FTC Act. *See* Plaintiff Federal Trade Commission's Memorandum of Law in Opposition to Defendants' Partial Motion to Dismiss ("FTC's Opposition") (ECF No. 72) at 15–16. The FTC's interpretation, however, entirely disregards the contours of Section 19 and fundamentally misunderstands Section 13(b)'s function within the FTC Act's overall statutory scheme.

When the broader context of the FTC Act is taken into account, Congress's intent is clear. Section 19 of the Act provides a comprehensive scheme for consumer redress for past violations of Section 5. 15 U.S.C. § 57b(a)(2). Section 13(b), to the contrary, was intended to enjoin future violations of Section 5. Read together, Sections 13(b) and 19 give the FTC two complementary—but not overlapping—tools to satisfy its statutory mandate to protect consumers.

Given the statutory scheme Congress created, the Court should not read into Section 13(b) an implied ability of the FTC to seek equitable monetary relief. Specifically, the Tenth Circuit routinely utilizes the canon of construction known as *expressio unius est exclusio alterius*—"the

expression of one thing is the exclusion of another"—to aid in statutory interpretation. *See Mincin v. Vail Holding, Inc.*, 308 F.3d 1105, 1111 (10th Cir. 2002); *see also Elwell v. Oklahoma ex rel. Bd. Of Regents of University of Oklahoma*, 693 F.3d 1303, 1312 (10th Cir. 2012) (Gorsuch, J.) ("After all, '[c]ommon sense, reflected in the canon *expressio unius est exclusio alterius*, suggests that the specification of [one provision] implies' the exclusion of others.") (quoting *Arizona v. U.S.*, 576 U.S. 387, 432 (2012) (Scalia, J., concurring in part and dissenting in part)); *United States v. Cardenas*, 864 F.2d 1528, 1534 (10th Cir. 1989) (applying the "long-honored rule of statutory construction, *expressio unius*[,]" the Court ruled that had the legislature intended a meaning "it would have included [specific language].") (citations and quotations omitted); *Stacy S.*, 344 F. Supp. 3d at 1334 ("[A] negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute." (quoting *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006)).

Notably, the Tenth Circuit has utilized the *expressio unius* canon when assessing a governmental entity's interpretation of its statutory authority, recognizing that where the government is a 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 to infer a public remedy in the Rivers and Harbors Act and dismissing the government's complaint).

Applying the canon of *expressio unius* to Section 13(b) lends further support to the conclusion that Section 13(b) does not authorize the FTC to obtain equitable monetary relief. Here, Congress expressly authorized the FTC to seek monetary relief under Section 19 of the FTC Act:

> The court . . . shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . . Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of

> damages, and public notification respecting the rule violation or the unfair or deceptive act or practice.

15 U.S.C. § 57b(b). In contrast, Section 13(b) explicitly provides for only one type of remedy—injunctions. The absence of other remedies, such as disgorgement or restitution, from Section 13(b), coupled with their express inclusion in Section 19, indicates that Congress did not intend for such remedies to be available when the FTC proceeds under Section 13(b). Thus, it is clear that Congress knew how to grant the FTC authority to obtain consumer redress, and elected not to include such a grant in Section 13(b).

Moreover, adopting the FTC's improperly expansive interpretation of Section 13(b) as allowing awards of monetary relief circumvents Section 19's procedural protections, including an enhanced scienter standard and a statute of limitations. 15 U.S.C. § 57b(a)(2). Although Section 13(b) was added to the FTC Act in 1973, the FTC did not initially utilize the provision to seek monetary relief. That inaction speaks volumes about what the FTC at the time thought the statute authorized it to do. Indeed, at the time of Section 13(b)'s enactment, then-Chairman Eng made a statement confirming the limited nature of Section 13(b), thus further corroborating the plain language of the statute that Section 13(b) serves as a stopgap, preventive measure:

> The major provisions of this section would . . . authorize the commission to go into federal court to seek temporary injunctions to prevent the continuation of particularly aggravated violations of the laws under its jurisdiction, pending the completion of the lengthy administrative proceedings and appeals which lead to a final cease-and-desist order. . . Each of these provisions is essentially a gap-filling measure; none would increase the commission's substantive jurisdiction in any respect . . . .

119 Cong. Rec. 36,610 (1973).

In fact, the FTC did not begin using Section 13(b) to obtain equitable monetary relief until the early 1980s. *See* Exhibit 1 to the Declaration of Elliot A. Kelly, filed herewith ("In the early and mid-1980s, the Commission began to make widespread use of the permanent injunction

proviso of Section 13(b) in its consumer protection program to challenge cases of basic consumer fraud and deception."). Indeed, the FTC's previous understanding that Section 13(b) was not an avenue through which to obtain equitable monetary relief led Congress to adopt Section 19 in 1975, to authorize the FTC—for the first time—to seek monetary relief for consumers.

Once the FTC began stretching the contours of Section 13(b), however, the agency abandoned Section 19. Counsel for Defendants have only been able to locate *one* case since the early 1980s in which the FTC brought a proceeding in federal court after completing the FTC Act's administrative procedures pursuant to Section 19. *See FTC v. Telebrands Corp.*, No. 07-3525 (D.N.J. filed July 30, 2007). Thus, from a practical perspective, the FTC's expanded interpretation of Section 13(b) began the obsolescence of Section 19. Statutes should not be so construed. *See D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) ("cardinal rule that, if possible, effect shall be given to every clause and part [of] a statute."); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.") (citing *U.S. v. Menasche*, 348 U.S. 528, 538–39 (1955)).

Where, as here, Section 19 specifically and comprehensively addresses monetary relief, and Section 13(b) simply generally refers to the FTC's right to seek injunctive relief, the application of Section 19 must trump that of Section 13(b). *FDA v. Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (subsequent legislative acts that are specific control over prior general enactments).

C. The FTC's Reliance on Judicial Interpretations of Section 13(b) As Providing Equitable Monetary Relief Are Unavailing.

The FTC asks that this Court go beyond the plain language of Section 13(b) and instead rely on cases contrary to modern Supreme Court precedent, which cautions courts against judicially-implied remedies. The FTC's cases, however, are distinguishable and cannot overcome

the best evidence of congressional intent—the plain and unambiguous language of a statute and the overall statutory scheme. Accordingly, this Court should follow the lead of the Seventh Circuit in *Federal Trade Commission v. Credit Bureau Center, LLC* and assess the plain language of Section 13(b) without regard to court decisions that failed to thoroughly analyze the FTC's authority to seek equitable monetary relief under Section 13(b). 937 F.3d 764, 785 (7th Cir. 2019) *petition for cert. filed* (U.S. Dec. 19, 2019) (applying *Meghrig v. KFC Western, Inc.*, 516 U.S. 479 (1996), and "reading section 13(b) as authorizing only injunctive relief—that is, reading it to mean what it plainly says," while noting that "most circuits adopted their [contrary position] by uncritically accepting" the Seventh Circuit's holding in *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564 (7th Cir. 1989), which the *Credit Bureau* court overruled).

Contrary to the assertions of the FTC, the Tenth Circuit's decisions in *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192 (10th Cir. 2005), and in *FTC v. LoanPointe, LLC*, 525 F. App'x 696 (10th Cir. 2013), do not trump the plain language of the statute. Neither case even attempts to analyze the plain language of Section 13(b), or challenge the FTC's authority under Section 13(b). Further, both cases were decided before the Supreme Court circumscribed what remedies should be deemed equitable.

The issue on appeal in *Freecom* was whether the defendant was entitled to attorneys' fees for the FTC's baseless pursuit of litigation, not the remedies to which the FTC was entitled. Thus, the *Freecom* decision, summarily noting in dicta in a footnote that the FTC is entitled to obtain equitable monetary relief, without conducting any assessment of the statute's plain language, should be given no weight. *See Freecom Commc'ns*, 401 F.3d at 1202 n.6. Rather, the *Freecom* decision merely relies on out-of-circuit precedent that is similarly inapplicable here. *See id.* (citing *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468–69 (11th Cir. 1996) (relying on the inapplicable

Porter v. Warner Holding Co., 328 U.S. 395 (1946) case to hold that the FTC is entitled to seek equitable monetary relief); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (conducting no assessment of the plain language of Section 13(b)). Similarly, the *LoanPointe* decision simply relies on the *Freecom* decision without conducting any assessment of the statute. *See LoanPointe*, 525 F. App'x at 699 (quoting *Freecom Commc'ns*, 401 F.3d at 1202 n.6). In fact, during the district court proceedings before this Court, the defendants in *LoanPointe* "admit[ted] that the court ha[d] broad equitable authority to grant injunctive and ancillary relief, including monetary relief in the form of either restitution or disgorgement[,]" thereby conceding the issue. *FTC v. LoanPointe, LLC*, No. 2:10-CV-225DAK, 2011 WL 4348304, at *11 (D. Utah Sept. 16, 2011), *aff'd*, 525 F. App'x 696 (10th Cir. 2013). On appeal, the petitioners in *LoanPointe* similarly elected not to challenge the FTC's right to obtain equitable monetary relief under Section 13(b). *See* Opening Brief of Appellants LoanPointe, LLC, Easterbrook, LLC, and Joe S. Strom, *FTC v. LoanPointe*, Case No. 12-4006 (Document No. 01018813090) (10th Cir. March 19, 2012); *see also* Appellants' Reply Brief, *FTC v. LoanPointe*, Case No. 12-4006 (Document No. 01018848519) (10th Cir. May 21, 2012).

Moreover, this Court should not defer to the *LoanPointe* decision because it holds that disgorgement is a form of equitable relief, rather than a type of penalty. 525 F. App'x at 699. This holding, however, has been challenged by the Supreme Court in its decision in *Kokesh v. SEC*, 137 S. Ct. 1635, 1643 (2017), in which the Supreme Court held that the SEC's request for disgorgement constituted a penalty for purposes of the application of a statute of limitations. Significantly, the Supreme Court recently accepted certiorari in the *SEC v. Liu* matter to further determine "[w]hether the Securities and Exchange Commission may seek and obtain disgorgement from a court as 'equitable relief' for a securities law violation even though this Court has determined that

such disgorgement is a penalty." *SEC v. Liu*, 754 F. App'x 505 (9th Cir. 2018), *cert. granted*, 205 L. Ed. 2d 265 (U.S. Nov. 1, 2019) (No. 18-1501). The Supreme Court's granting of the *Liu* petition has impending implications regarding the question of whether independent government agencies can extend their statutory authority to obtain injunctions so as to also authorize the agencies to obtain disgorgement. Given that the Supreme Court will hear oral argument on this issue on March 3, 2020, and will issue a decision soon thereafter, the FTC's contention that "*Freecom* and *LoanPointe* are rooted in the principles expressed by the Supreme Court[,]" FTC's Opposition at 7, is highly questionable and indeed may well be curtailed.

In fact, mere days before the FTC filed its Opposition in the present action, the Solicitor General on behalf of the FTC also took the contrary position before the Supreme Court that the legal precedent as to "whether Section 13(b) of the FTC Act authorizes district courts to award equitable monetary relief" is unsettled. *See* Brief for the Respondent, *AMG Capital Management, LLC v. FTC*, No. 19-508, *petition for cert. filed* (U.S. Oct. 18, 2019), at 4. In response to a petition for a writ of certiorari in *AMG Capital Management, LLC*, the FTC responded, "In light of the overlap between this case and *Liu*, the Court should hold this petition pending the disposition of *Liu*." *Id*. at 4; *see also id*. at 7 ("Nevertheless, the question presented in this case and the question presented in *Liu* overlap . . . . The Court therefore should hold this petition pending the disposition of *Liu*."). The FTC's representations to this Court that the law in the Tenth Circuit is clear, juxtaposed against its request to the Supreme Court to stay review of a certiorari petition pending the Court's determination in *Liu*, indicate that the FTC, at the very least, acknowledges that the "principles expressed by the Supreme Court" are not well-settled in the context of Section 13(b). Further indicating the state of flux on this issue, on December 19, 2019, the FTC took the rare step of representing itself in the Supreme Court, filing a petition for writ of certiorari in the *Credit*

Bureau Center case urging the Supreme Court to not wait until *Liu* is resolved to address the interpretation of Section 13(b).[1] Thus, the FTC and Solicitor General appear to disagree on the impact of *Liu* and perhaps the powers provided by Congress to the FTC under Section 13(b).

Here, the law favors the conclusion that, pursuant to Supreme Court precedent, the FTC's request for disgorgement constitutes a penalty, and that penalty is not equitable in nature. *See Tull v. U.S.*, 481 U.S. 412, 424 (1987) (finding that "a court in equity . . . may not enforce civil penalties"). 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*, 137 S. Ct. at 1643–44. Here, the FTC's request for disgorgement plainly qualifies as a "penalty" pursuant to the standard set forth in *Kokesh*. First, the FTC Act is a "public law," and where the FTC seeks disgorgement pursuant to the FTC Act, it "is a distinctly public-regarding remedy . . . ." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 372–73 (2d Cir. 2011). Second, FTC disgorgement is imposed for punitive purposes, as the entire purpose of disgorgement is to "deprive the defendant of his ill-gotten gains." *See, e.g.*, *LoanPointe, LLC*, 525 F. App'x at 698 (the "primary purpose [of disgorgement] 'is to deter violations of the [] laws by depriving violators of their ill-gotten gains.'") (quoting *Bronson Partners*, 654 F.3d at 373). Finally, FTC disgorgement is not compensatory because the

[1] 15 U.S.C. § 56(a)(1)(A) sets forth the procedure pursuant to which the FTC can represent itself in the Supreme Court. If the FTC makes a written request to represent itself to the Attorney General, within 10 days of entry of judgment, it may do so, if (1) "the Attorney General concurs with such request; or" (2) within 60 days from entry of judgment the Attorney General provides written notice of its refusal to appeal or file a petition for writ of certiorari; or "the Attorney General fails to take action with respect to the [FTC]'s request." 15 U.S.C. § 56(a)(1)(A). In its petition for a writ of certiorari in *Credit Bureau Center*, the FTC acknowledged that "[t]he Commission rarely exercises its authority to represent itself before [the Supreme] Court, having done so only four times previously since Congress granted that authority 44 years ago." Petition For a Writ of Certiorari, *Federal Trade Commission v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), *petition for cert. filed* (U.S. Dec. 19, 2019), at 1, n.1.

FTC is not required to "make any particular effort to compensate the victims that [it] *can* identify" when it disgorges funds. *Bronson*, 654 F.3d at 372 (emphasis in original) (noting that FTC disgorgement awards "run[] in favor of the Treasury, not of the victims"); *LoanPointe, LLC*, 525 F. App'x at 698 ("the purpose of disgorgement 'is not to compensate the victims of fraud, but to deprive the wrongdoer of his ill-gotten gain'") (quoting *Gem Merch.*, 87 F.3d at 470).

Accordingly, the FTC's request for disgorgement constitutes a "penalty." Section 13(b) does not authorize the FTC to seek penalties. Rather, actions seeking penalties for rule or statutory violations involving laws enforced by the FTC must be brought by the Department of Justice pursuant to Section 16 of the FTC Act, 15 U.S.C. § 56. Thus, like the *Credit Bureau Center* court, this Court should examine the plain language of Section 13(b) and find that it does not authorize the FTC to obtain monetary relief.

D. The Decision in *Rx Depot* Does Not Support the FTC's Position.

The FTC maintains that the Tenth Circuit's finding in *United States v. Rx Depot, Inc.*, 438 F.3d 1052 (10th Cir. 2006)—that a court could infer the availability of equitable monetary relief from an injunctive grant in the Food Drug and Cosmetics Act ("FDCA")—requires a similar finding regarding Section 13(b) of the FTC Act. That argument is misplaced for several reasons.

First, the Tenth Circuit in *Rx Depot* treats disgorgement as an equitable remedy. As explained above, that finding is no longer correct based on the Supreme Court's subsequent opinion in *Kokesh*. *See supra* Section II.C.

Second, the statutory schemes of the FTC Act and the FDCA are materially different. Section 19 of the FTC Act sets forth a specific mechanism by which the FTC can go to court to obtain monetary relief for violations of Section 5 of the FTC Act. 15 U.S.C. § 57b(b) ("Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation

or the unfair or deceptive act or practice."). That statutory mechanism is the type that prohibits a judicial conclusion that additional implied equitable remedies are available. *Meghrig*, 516 U.S. at 487–88 (finding that "where Congress has provided elaborate enforcement provisions for remedying [a] violation . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies") (internal quotations omitted).

In contrast, in *Rx Depot*, the government sought to obtain equitable monetary relief under the FDCA for alleged violations of sections 381(d) and 355(a) of the FDCA. While the FDCA has various enforcement mechanisms—including for injunctive relief, criminal and civil penalties, and seizure—it has no express provision for the government to go to court to obtain funds for monetary redress or disgorgement. The *Rx Depot* court found that the closest provision in the FDCA was Section 360h, which authorized the Secretary of the FDA to order refunds to consumers for certain medical devices. 438 F.3d at 1060. The court in *Rx Depot* rejected the argument that this remedy indicated congressional intent to displace the availability of implied equitable remedies: "Section 360h describes only the Secretary's powers in administering the Act. The section says nothing about remedies that may be ordered by courts." *Id.* at 1060. Accordingly, the *Rx Depot* decision speaks to a court's ability to infer equitable remedies from a statute where those remedies are not otherwise available within the confines of the statutory scheme. Therefore, the *Rx Depot* court's statutory analysis does not apply to the FTC Act.

Third, the more recent Tenth Circuit decision in *United States v. Jantran, Inc.*, 782 F.3d 1177 (10th Cir. 2015), compels a finding that implied equitable remedies are not available under Section 13(b). In *Jantran,* the Tenth Circuit rejected the government's contention that an implied judicial remedy should be read into a provision of the Rivers and Harbors Act. Relying on the

plain language and structure of the statute, the court refused to infer a remedy that was broader than that provided elsewhere in specific provisions of the Act. *Id.* at 1182–83.

The *Jantran* court so concluded based upon the Supreme Court's repeated holding 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. In such cases, in the absence of strong indicia of contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate.

Id. at 1183 (quoting *Karahalios v. Nat'l Federation of Fed. Emp's, Local 1263,* 489 U.S. 527, 532–33 (1989)). Further, the Tenth Circuit rejected the argument, made by the FTC here, that it should find an implied remedy because that remedy would be in favor of the government rather than a private party and that the negative implication canon only applies where private remedies are at issue. *Id.*

The plain language and statutory scheme demonstrate that Section 13(b) does not provide for equitable monetary relief, and the FTC's claims for equitable monetary relief set forth in Counts One, Two, and Three of the Complaint should be dismissed.

III. THE DIVISION'S RELIANCE ON DOCUMENTS OUTSIDE OF THE FOUR CORNERS OF THE COMPLAINT SHOULD BE STRICKEN.

In an effort to avoid dismissal of its clearly deficient Complaint, the Division attempts to improperly rely on documents outside of the four corners of the Complaint, requesting that the Court take judicial notice of statements relating to the Defendants' purported Utah activities contained in those documents. Specifically, the Division seeks to rely on the deposition of Jeffrey D. Spangler and exhibits to Plaintiffs' *ex parte* temporary restraining order to attempt to establish "that Zurixx's Utah employees, using Utah resources, sold products and services nationwide", even though these documents were not referenced in any manner in the Complaint. These materials, however, are not properly subject to judicial notice. Thus, they cannot be considered in

a Rule 12(b)(6) motion to dismiss. *Waller v. City & Cty. of Denver*, 932 F.3d 1277, 1286 n.1 (10th Cir. 2019) ("[W]e will not consider evidence or allegations outside the four corners of the complaint in reviewing the district court's Rule 12(b)(6) dismissal . . . .").

In its Opposition, the Division erroneously contends that the mere fact that the documents are public records makes them the appropriate subject of judicial notice. That is not so. Instead, it is well settled that where a party seeks judicial notice of public records, that judicial notice is limited to establishing the existence of the document, not the truth of the facts stated therein. *Hansen v. Harper Excavating, Inc.*, 641 F.3d 1216, 1219 n.2, 1226–28 (10th Cir. 2011).

Here, the Division does not appropriately request judicial notice of the existence of unrelated case filings, that Mr. Spangler was deposed, or that Plaintiffs' filed an *ex parte* temporary restraining order in this action. Instead, the Division seeks to impermissibly rely on the statements *contained within these documents* to supplement its plainly deficient allegations that the Division is entitled to relief for conduct that occurred outside of Utah. Indeed, in its Opposition, the Division concedes precisely this fact, acknowledging, "Even if the Complaint were insufficiently pled, however, the deposition of Mr. Spangler establishes that Zurixx's Utah employees, using Utah resources, sold products and services nationwide." Plaintiff Utah Division of Consumer Protection's Response to Defendants' Partial Motion to Dismiss ("Division's Opposition") (ECF No. 76) at 29.

Similarly, the Division concedes that it must rely on the statements contained within its improper sources to support its failure to plead *any* allegations that Defendants' telesales took place in Utah because, as acknowledged in its Opposition, the Division neglected to allege the location of Defendants' telesales. *Id*. at 5 ("The Complaint alleges that Zurixx pitches its services, in part, through its telemarketers." (citing Compl. ¶ 83)).

These are plainly improper uses of materials outside the four corners of the Complaint. The Division failed to adequately allege its right to relief for extraterritorial conduct. It cannot repair this deficiency by relying on statements and arguments contained in documents not referenced or mentioned in the Complaint as these documents are not properly subject to judicial notice. Consequently, any extrinsic materials discussed in the Division's Opposition must be disregarded, and the Court must decide the Partial Motion to Dismiss based solely on the allegations in the Complaint. *Waller*, 932 F.3d at 1286 n.1.

IV. THE DIVISION HAS FAILED TO PLEAD A COGNIZABLE BUSINESS OPPORTUNITY OFFERED BY DEFENDANTS AND, THUS, COUNTS NINE AND TEN OF THE COMPLAINT MUST BE DISMISSED.

In its Opposition, the Division elects to ignore the plain language of BODA, essentially attempting to shoehorn Defendants' education business into the definition of an assisted marketing plan under BODA. In so attempting, the Division twists or ignores the plain language of the statute.

The Division's argument at bottom is that:

> BODA does not require that Zurixx enable students to start a new sales or marketing program. It requires Zurixx to sell an assisted marketing plan to enable the consumer to start a business of any kind and to derive income from that business.

Division's Opposition at 12.

This argument, in addition to being nonsensical, is directly contrary to the language of the statute and Judge Shelby's reading of BODA in *Roberts v. C.R. England. Inc.*, 318 F.R.D. 457 (D. Utah 2017). Indeed, the Division's argument reads the words "assisted marketing plan" out of the statute. Under the Division's view, a company can sell anything and if, in the Division's view, that thing enables a consumer to start a business of any kind and to derive income from that business, that company is subject to the requirements of BODA. Under this strained interpretation,

office space, electricity, telephony, internet connectivity, software, advertising, and countless other goods or services might be deemed a business opportunity because they enable the customer to start a business and derive income therefrom. That is not what the statute says.

Rather, as Judge Shelby noted in *Roberts*, an "assisted marketing plan" means "a program or plan relating to selling, leasing, or licensing goods or services." *Id.* at 497. The Complaint does not allege that Defendants offer a plan relating to selling, leasing, or licensing goods or services. Rather, the Complaint consistently characterizes Zurixx's business as providing education. *See* 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"). That consumers can make money from using this education does not transform that education into an assisted marketing plan or business opportunity any more than a student using electricity to start a business and make money would do so.

The Complaint alleges that Defendants sell real estate investment training, not a business opportunity. Counts Nine and Ten should be dismissed with prejudice.

V. THE UNITED STATES AND UTAH CONSTITUTIONS PROHIBIT UTAH'S ATTEMPT TO REGULATE THE ACTIVITIES OF OTHER STATES.

The Division has no authority to regulate the business activities of Utah entities in other states. No statute confers this power, and no court decision has recognized it. Indeed, both the United States and Utah constitutions prohibit the Division's attempt at extraterritorial regulation. The Division is also wrong on the facts: the Complaint does not allege that Defendants' conduct took place in an intertwined manner between Utah and other states. Indeed, how could it? After all, the Complaint fails to allege *any* violative conduct occurring in Utah. Consequently, the Division entirely predicates its claims of BODA and UCSPA violations on activities taking place

in other states. This violates due process. Similarly, the Division is wrong in contending that the constitutional prohibition against extraterritorial application of one state's statutes to conduct taking place solely within another state is limited to price-fixing or price-affirmation statutes. Rather, as explained below, the U.S. and Utah Constitutions prohibit states from applying *any* of their laws extraterritorially to conduct occurring in other states.

A. The Division is Not Authorized to Pursue Alleged Wrongful Conduct Occurring Outside of Utah.

The entirety of the conduct challenged by the Division occurs completely outside of Utah:

- Free Preview Event held in California. *See* Compl. ¶¶ 42, 45, 48, 51, 55;
- Free Preview Event held in Florida. *Id.* ¶¶ 42, 45, 48, 51, 55;
- Free Preview Event held in Georgia. *Id.* ¶¶ 42, 45, 51, 55;
- Free Preview Event held in Virginia. *Id.* ¶¶ 42, 45, 51, 55;
- Three-Day Workshop Event held in Florida. *Id.* ¶¶ 68, 71, 80;
- Three-Day Workshop Event held in Texas. *Id.* ¶¶ 68, 71, 76; and
- Three-Day Workshop Event held in Virginia. *Id.* ¶¶ 68, 71, 76, 80.

Accordingly, the Complaint does not allege any facts indicating that the jurisdictional prerequisites for the Division to act under § 13-2-6(4) have been met, and the Division concedes as much by resorting to information beyond the Complaint and, in the alternative, seeking leave to amend.

The Division is not authorized to pursue alleged wrongful conduct outside of Utah because nothing in the Utah statutes it seeks to enforce provides for extraterritorial application. Utah adheres to "a deeply rooted and longstanding canon of construction" providing that "statutes are presumed not to have extraterritorial effect." *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)); *Vivint, Inc. v. Alarm Prot., LLC*, No. 2:14-CV-441-CW, 2016 WL 146454, at *3 (D. Utah Jan. 12,

2016) (finding that presumption against extraterritoriality "mandates that the court reject [plaintiff's extraterritorial] interpretation and hold that the [Truth in Advertising] Act only applies when the alleged wrongful conduct occurs in Utah").

Because there is no language in the statutes at issue which provides any indication, let alone a clear indication, of the Utah Legislature's intent to apply them extraterritorially, the Court must conclude that the statutes do not apply to alleged wrongful conduct occurring outside of Utah.

B. The Division's Claims That Are Focused on Defendants' Conduct in Other States Violate Due Process.

At base, the Division brings its BODA and UCSPA claims to punish Defendants, its citizens, for engaging in conduct occurring in other states. The Division's assertion that it has adequately alleged an intimate nexus between its allegations regarding Defendants' acts in Utah, and Defendants' acts in other states, is belied by (1) the very language of the Complaint, which fails to allege that *any* challenged conduct occurred in Utah; (2) the fact that the Division felt compelled to go beyond the Complaint's allegations; and (3) the fact that the Division, in the alternative, requested leave to file an amended complaint.

The alleged violative conduct is entirely outside of Utah. For example, after briefly describing Defendants' alleged marketing program, the Complaint immediately points to marketing events purportedly held by Defendants in California, Florida, Georgia, Texas, and Virginia. *See* Compl. ¶¶ 42, 45, 48, 51, 55, 68, 71, 76, 80. The Complaint alleges that violative conduct occurred at marketing events in these other jurisdictions. *Id.* ¶¶ 36–61. The Complaint also details extensively Defendants' "Preview Events," *id.* ¶¶ 36–61, and specifically cites "Preview Events" held in California, Florida, Georgia, and Virginia. *Id.* ¶¶ 42, 45, 48, 51, 55. The Complaint concedes that the Workshops generally occur in the same geographic area as the Preview Events. *Id.* ¶ 62. The Complaint, again, cites to no Workshop Event taking place in Utah,

and specifically cites to events held in Florida, Texas, and Virginia. *Id.* ¶¶ 68, 71, 76, 80. Evidently, despite the Division's assertion, the nexus between the challenged conduct and Utah is nonexistent. Thus, although the Division asserts that it is "not . . . attempting to impose the CSPA and BODA on conduct that occurred exclusively in states other than Utah" and that "[t]he Division seeks to impose liability based on conduct that was attempted or occurred, at least in part, in Utah," Division's Opposition at 25, that is not what the Division actually pled. The Complaint fails to allege any violative conduct that occurred in Utah. Conduct occurring wholly outside of Utah is outside the Division's reach.

In reality, the Division seeks to impose its own statutory scheme to hold corporations registered and headquartered in Utah liable for their conduct in California, Florida, Georgia, Texas, and Virginia. As Defendants explained in their Partial Motion to Dismiss, such extraterritorial regulation violates substantive due process under the Fourteenth Amendment to the U.S. Constitution and under the Utah Declaration of Rights. The Opposition fails to respond meaningfully to the due process violation and instead mischaracterizes Defendants' constitutional argument as only a "Commerce Clause challenge" that functions as an affirmative defense. This is wrong. Defendants have, in fact, asserted a due process challenge to the Division's claims, *see* Defendants' Partial Motion to Dismiss (ECF No. 62) at 21-25, and the Division has not made any argument to the contrary.

Moreover, Defendants' constitutional argument is not a fact-intensive "affirmative defense." At its core and in its entirety, Defendants' constitutional argument raises a legal question: has the Division stated a legally plausible claim to support its right to seek relief for alleged violations of BODA and USCPA that occur entirely outside of Utah? The answer is, of course, "no," because, as Defendants have demonstrated, the Division bases its claims on Utah

statutes to prosecute conduct in other states; the Division's claims are therefore inconsistent with constitutional principles. Thus, here, Defendants and the Division are engaged in a purely legal dispute as to whether the Division's BODA and UCSPA claims violate the Due Process Clause of the Constitution. Pure questions of law, such as this one, are ripe for resolution on a motion to dismiss. *See Huntsinger v. Bd. of Dirs. of the E-470 Pub. Highway Auth.*, 35 Fed. App'x 749, 756 (10th Cir. 2002) (constitutional question of law could be resolved without evidence, on a motion to dismiss, where plaintiff could prove no facts to establish her claim). The Division's request for relief for extraterritorial conduct fails because the Division's attempt to impute Utah-based liability to the Defendants for conduct that occurred in other states is inconsistent with Defendants' constitutional rights, and this Court is appropriately positioned to decide this issue now.

The Due Process Clause does not permit the Division, by the language of its own Complaint, to apply laws that prohibit conduct *in Utah* to conduct that is legal in the states where the conduct occurred. *See Stover v. O'Connell Assocs., Inc.*, 84 F.3d 132, 136 (4th Cir. 1996) ("[A] state's assertion of power beyond its borders violates the Due Process Clause of the Fourteenth Amendment.").

The U.S. Supreme Court made clear in *Bigelow v. Virginia*, 421 U.S. 809 (1975) the basic principle of extraterritorial limits that a state may not sanction the conduct of its own citizens in another state where that conduct violates the state's own laws, but is lawful in the state where the conduct occurred. The Division argues that *Bigelow* is inapplicable because "the Division is not regulating [another state's] company that offers real estate coaching services in [that state]" and is instead "regulating a Utah company which is offering services partly in Utah and partly in other states." Division's Opposition at 26. This argument misses the mark.

The plain language of the Division's Complaint seeks, *inter alia*, the sanctioning of the conduct of a Utah-based company occurring *exclusively* in other states. *Compare* Compl. ¶¶ 42, 45, 48, 51, 55, 68, 71, 76, 80, *with* Division's Opposition at 24.[2] Contrary to Utah's description of the case, *Bigelow* did not only address Virginia's attempt to regulate the conduct of New York providers, it also expressly addressed Virginia's attempt to prohibit the travel by its own citizens to New York to engage in legal conduct in that state. *See* 421 U.S. at 823–24 ("Nor could Virginia prevent its residents from traveling to New York to obtain those services or, as the State conceded . . . prosecute them from going there. Virginia possessed no authority to regulate the services provided in New York."). In addressing only one portion of the Court's finding, the Division clearly misapprehends *Bigelow*. Other courts have recognized that the principle that Virginia could not use its own laws to prohibit the conduct of its citizens when in New York is central to *Bigelow*'s holding. *See, e.g.*, *State of Fla., Dep't of Health & Rehab. Servs. v. Friends of Children, Inc.*, 653 F. Supp. 1221, 1227–28 (N.D. Fla. 1986) ("The *Bigelow* decision was based, in part, on the court's observation that Virginia had no authority to prevent its residents from travelling to New York to obtain the abortion services that were lawfully available there . . . . In this case, Florida argues it may prevent its citizens from travelling to Georgia to place a child for adoption because of the state's interest in the welfare of the child. But in *Bigelow,* the Supreme Court made it clear that, 'A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State.'").

[2] In its Opposition, the Division improperly relies on the fact that Zurixx has, in the past, brought lawsuits "in Utah courts, using Utah lawyers." Division's Opposition at 6. The mere fact that Zurixx filed lawsuits in Utah and have made Utah-law-based arguments does not support the Division's right to seek relief for Defendants' conduct occurring wholly outside the state that was legal where it occurred. *See Bigelow*, 421 U.S. at 823–24.

The Division's arguments regarding the (purported lack of) applicability of the other cases cited by Defendants fare no better. *Rahmani v. Resorts Intern. Hotel, Inc.*, 20 F. Supp. 2d 932 (E.D. Va. 1998) is directly on point. There, the plaintiff sought relief under a Virginia statute for gambling losses she suffered at a casino in New Jersey. As the federal court found, however, the Virginia statute on which the plaintiff based her claim for relief "cannot be applied to gambling losses that occur lawfully outside Virginia." *Id.* at 936. "Put another way, the Virginia General Assembly has no power to invalidate lawful gambling taking place wholly outside of Virginia." *Id.* Similarly, in *State v. Cardwell*, 246 Conn. 721 (1998), the Supreme Court of Connecticut upheld a trial court's determination that a Connecticut criminal statute could not apply to acts occurring outside of Connecticut, which were legal where they occurred. The trial court explained:

> This court cannot discern how, constitutionally, one state can superimpose its internal laws upon another state, directly or indirectly, so as to deprive its own Connecticut citizens of the right to engage in activities which occur solely and exclusively outside its own borders.
>
> . . .
>
> It should be further obvious that the practical benefit of constitutional sovereignty allows, for example, citizens of other states where casino gambling is prohibited, to come to this state for casino gambling. ***The implications of allowing one state to directly or indirectly dictate to another what shall be the internal doings of another state is fundamentally constitutionally repugnant, and cannot be accomplished by internal legislation or judicial decree seeking to regulate the conduct of activity engaged in solely within another state.***

State v. Cardwell, No. CV 950556135S, 1997 WL 466499, at *13 (Conn. Super. Ct. July 31, 1997), *aff'd in part, remanded in part*, 246 Conn. 721, 718 A.2d 954 (1998) (emphasis added). Notably, the Division has not cited, nor have Defendants found, any cases in support of the Division's (implied) argument that the Constitution and UDR permit, rather than proscribe, the imposition of one state's laws on conduct in another state.

The Division's BODA and UCSPA claims suffer from the same fatal flaws as did the claims that were rejected in the *Rahmani* and *Cardwell* cases: they are predicated on conduct taking place wholly and exclusively in other states. *See* Compl. ¶¶ 42, 45, 48, 51, 55, 68, 71, 76, 80. As in *Rahmani* and *Cardwell*, the Division cannot use the BODA and UCSPA to prosecute Utah residents for actions that occurred in other states.

This rule applies universally to protect each person's substantive due process right to travel to another state and engage in conduct that is lawful in that state. The Division's overly aggressive interpretation of BODA creates just such a problem. For example, because licensed gaming is a "matter reserved to the states within the meaning of the Tenth Amendment," *Thomas v. Bible*, 694 F. Supp. 750, 760 (D. Nev. 1988), *aff'd* 896 F.2d 555 (9th Cir. 1990), Utah has outlawed gambling in Utah. Yet, despite the variance in state laws on this issue, no one could reasonably argue that Utah's prohibition on gambling would permit that state to punish a Utah resident under Utah's gambling prohibition statute for traveling to Nevada, where licensed gaming is legal (and, indeed, vitally important), and engaging in gambling. *See Rahmani*, 20 F. Supp. 2d at 936–37 ("A state cannot invalidate the lawful statutes of another state or penalize activity that lawfully occurs in another state.").

Fundamentally, despite what the Division asserts, Utah does not have the power to regulate conduct occurring elsewhere when all of the allegations of the Complaint *as pled* solely discuss conduct occurring outside of Utah. Under principles of due process, it does not. *See Stover*, 84 F.3d at 136.[3]

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[3] In addition to the fact that the Division's attempted application of the BODA and UCSPA to out-of-state conduct is unconstitutional, it would also create significant conflicts of law between Utah and other jurisdictions. *See* Mot. to Dismiss at 25–28. For example, certain states' "business opportunity disclosure statutes require that disclosures be provided two days in advance of a contract, others three days, and others five." Division's Opposition at 30. The Division argues in

C. Constitutional Prohibitions on The Extraterritorial Application of State Statutes to Conduct Lawfully Occurring in Another State Are Not Limited to Only Price-Fixing or Price-Affirmation Statutes Under the Tenth Circuit's Interpretation of The Dormant Commerce Clause.

The Division's attempt to limit the constitutional proscriptions against extraterritoriality to price fixing or price affirmation is erroneous. Here, the Division contends that, under *Energy & Env. Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015), the "Tenth Circuit concluded" that the Supreme Court's extraterritoriality jurisprudence, and the rule against extraterritorial applications of state statutes to out-of-state conduct, are limited to those "price control or price affirmation statutes that involve tying the price of in-state products to out-of-state prices." Division's Opposition at 23. The Division also contends that a later Tenth Circuit case, *Johnson & Johnson Vision Care, Inc. v. Reyes*, 665 F. App'x 736 (10th Cir. 2016), similarly limited the application of the Supreme Court's extraterritoriality jurisprudence to "legislation that has the practical effect of establishing a 'scale of prices for use in other states.'" Division's Opposition at 23.

The Division misapprehends the holdings in *Energy & Environment* and *Johnson & Johnson* and further errs as to their application to the facts of this case. In both cases, the statutes themselves were being challenged as unconstitutionally regulating extraterritorial commerce. In both cases, the Tenth Circuit explained that, to strike down a statute based on its extraterritorial application in violation of the Dormant Commerce Clause, the statute must be of a price-fixing or price-control nature. In other words, the Tenth Circuit elucidated the requirements for a facial attack on a statute that a plaintiff believes is unconstitutional under the Dormant Commerce

its Opposition that Defendants can overcome these conflicts, and comply with each of these laws, "by simply providing the greatest notice." *Id.* at 31. That approach would project Utah's public policy onto other states, something that the U.S. Supreme Court expressly forbids. *See BMW of N.A., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (holding that altering nationwide policy to adhere to one state's policy requiring greater disclosures "would be infringing on the policy choices of other states" in an impermissible manner).

Clause. But the Defendants' challenge here is not that BODA or USCPA are facially unconstitutional and discriminatory, but, instead, that the Division may not apply and rely on these statutes to punish conduct outside of Utah that was legal where it occurred. This difference alone precludes the applicability of these cases.

The facts of the cases also are inapposite. Neither *Energy & Environment* nor *Johnson & Johnson* involved an attempt by Utah or Colorado to apply the statutes in question to conduct by a Utah or Colorado company that occurred in other states and was lawful in those other states. The concern in *Energy & Environment* centered on the application of a Colorado statute to out-of-state suppliers doing business with out-of-state utilities, and the concern in *Johnson & Johnson* centered on the application of a Utah statute to out-of-state contact lens manufacturer doing business in Utah. Neither case supports the extraterritorial overreach that the Division seeks in this case.

The Division's citation to *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), is equally inapplicable. There, South Dakota enacted a statute requiring out-of-state retailers to collect and remit sales tax "as if the seller had a physical presence" in South Dakota. *Id.* at 2089. Respondents, merchants with no employees or real estate in South Dakota, argued that the statute unconstitutionally discriminated against other states in interstate commerce in violation of the Commerce Clause. The Supreme Court agreed, setting out, as the Division explained, that there must be a "substantial nexus" with the taxing state to tax an out-of-state company in a constitutionally sound manner.[4] Here, the Division incorrectly applies *Wayfair* to argue that its

[4] The Division also argues that it has a "legitimate public interest in enforcing its consumer protection laws against companies with their base of operations here," and that "state laws that regulate even-handedly to effectuate a legitimate public local public interest will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Division's Opposition at 22. This argument is unavailing. Utah's public policy interests do not justify an otherwise unconstitutional extraterritorial overreach. *See Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 920 (Cal. 2006) (distinguishing a situation in which a California

attempted extraterritorial overreach is constitutional because "the Division does not purport to regulate business activity by out-of-state companies in this suit, it only regulates Utah companies." Division's Opposition at 28. Again, the Division confuses the issues. Defendants' argument with respect to the BODA and UCSPA claims brought in this suit is not that the Division is attempting to apply Utah statutes to a Utah company, but that the Division is attempting to apply Utah statutes to *conduct occurring elsewhere, involving non-Utah consumers*. As established above, this the Division may not do.

Put simply, it is a long-held rule that states may not use their own statutes to regulate conduct occurring outside of their own borders, except as allowed by those states or by comity. *See Bonaparte v. Tax Ct.*, 104 U.S. 592, 594 (1881) ("No State can legislate except with reference to its own jurisdiction."); *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) ("[A state] may not abrogate the rights of parties beyond its borders having no relation to anything done or to be done within them."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("by attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other states"); *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) ("A State cannot punish a defendant for conduct that may have been lawful where it occurred.").

The Division has not cited any applicable cases to the contrary. The constitutional principles underpinning the prohibition of extraterritorial application of state statutes do not limit that prohibition to state statutes involving price-fixing or price affirmation, in the Tenth Circuit or

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law is applied to out-of-state businesses to protect California residents while they are in California, from an impermissible situation in which California "would be applying its law in order to defeat a defendant's conduct in another state vis-à-vis another state's residents" or to "alter [a company's] nationwide policy").

otherwise. Rather, the U.S. and Utah constitutions prohibit states from applying *any* of their laws extraterritorially to conduct occurring in other states.

VI. 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.

Consistent with Defendants' argument, the Division concedes that a one-year statute of limitations applies to its demand for penalties or forfeitures based on allegedly wrongful conduct that occurred on or before May 8, 2017. Division's Opposition at 32. It follows then that the Division necessarily concedes that it may not seek to impose penalties or forfeitures on Defendants for any conduct that occurred on or before that date as well.

The Division asserts just two substantive responses to the applicability of a one-year statute-of-limitations to certain of its claims. First, the Division mischaracterizes the impact of *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), on the Division's request for disgorgement, arguing that *Kokesh* "did [not] modify the nature of disgorgement as an equitable remedy." Division's Opposition at 33. Second, it argues that certain of its requests for relief do not constitute a penalty or a forfeiture. Both assertions are incorrect.

First, the Division's attempt to mischaracterize and obfuscate the impact of the Supreme Court's decision in *Kokesh* is unavailing. The fact remains that, as demonstrated in Defendants' Partial Motion to Dismiss, the Division's request for disgorgement constitutes a penalty, and, thus, the one-year statute of limitations set forth in Section 78B-2-302 of the Utah Code applies to limit the requested relief accordingly. Mot. to Dismiss at 28–30. This conclusion directly aligns with the District of Utah's interpretation of *Kokesh*. Namely, in *United States v. RaPower-3, LLC*, 294 F. Supp. 3d 1238, 1241–42 (D. Utah 2018), the court acknowledged, "*Kokesh v. SEC* decided whether disgorgement is a penalty for the purpose of applying a statute of limitation." *Id.* That is

precisely the determination that Defendants ask this Court to make here. Moreover, contrary to the Division's contention, whether the one-year statute of limitations applies to the Division's request for disgorgement is, in fact, a legal question appropriate for determination on a motion to dismiss. *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1041, 1041 n.4 (10th Cir. 1980) ("Statute of limitations questions may, therefore, be appropriately resolved on a Fed. R. Civ. P. 12(b) motion.") (citations omitted). Thus, the *Kokesh* Court's penalty test undoubtedly demonstrates that the Division's request for disgorgement is a penalty, and, accordingly, the Division's purported entitlement to disgorgement should be limited accordingly.

The Division also argues that reimbursement of consumers "found to have been damaged" under the UCSPA, along with "injunctive relief" under BODA, are not subject to a one-year statute of limitations because they do not qualify as punishment. The Division is wrong. As an initial matter, "injunctive relief" is a penalty under the circumstances of this case because the Division has not made a plausible showing of future harm in the form of ongoing BODA violations. The problem is that "show[ing] risk of harm is . . . a traditional equitable requirement that applies to enforcement agencies pursuing statutory injunctions." *SEC v. Gentile*, 939 F.3d 549, 556 (3d Cir. 2019). Without "a real threat of future harm," injunctive relief under BODA cannot "fairly be said *solely* to serve a remedial purpose." *Kokesh*, 137 S. Ct. at 1645. To the contrary, that relief's only purpose is "to punish the defendant," making it a penalty subject to a one-year statute of limitations. *Gentile*, 939 F.3d at 556.

By and large, the remedies available to the Division under the UCSPA are also penalties for purposes of the one-year statute of limitations. For any relief the Division seeks that is not

directly tied to consumer losses and returned to consumers in full[5]—*i.e.*, non-compensatory relief—the one-year statute of limitations applies. First, this relief is a penalty because it is "imposed" by the Division—on behalf of the State—as "a consequence for violating . . . public laws." *Kokesh*, 137 S. Ct. at 1643; *see 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." (emphasis added)); *Fuller v. Sight 'N Sound Appliance Ctrs.*, 982 P.2d 528, 532 (Okla. Ct. App. 1999) (similar). Second, this relief by its nature is designed to punish and deter, not restore or reimburse. *Kokesh*, 137 S. Ct. at 1643; *see In re Castletons, Inc.*, 990 F.2d 551, 557–58 (10th Cir. 1993) (applying Utah law). Third, and finally, such relief, by definition, is "not compensatory." *Kokesh*, 137 S. Ct. at 1644.

Under these circumstances, the Division may not seek to impose any penalties or forfeitures, including disgorgement, injunctive relief and non-compensatory restitution, for any conduct that occurred before May 8, 2017.

VII. 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. Defendants' motion to dismiss should be granted in full.

[5] This includes relief that the State claims to be recovering on behalf of consumers but that ultimately ends up in the State's own pockets. *See* Utah Code Ann. § 13-11-17(2)(c); *see also Kokesh*, 137 S. Ct. at 1644 (holding disgorgement award subject to five-year statute of limitations because some of the "disgorged funds . . . are dispersed to the United States Treasury.").

DATED this 31st day of December, 2019.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of December, 2019, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY IN FURTHER SUPPORT OF THEIR PARTIAL MOTION TO DISMISS** to be served on the following by email:

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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' REPLY IN FURTHER SUPPORT OF THEIR PARTIAL MOTION TO DISMISS** Case No.: 2:19-cv-00713-DAK-CMR Judge Dale Kimball

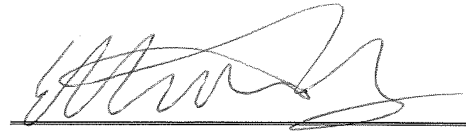
I, ELLIOT A. KELLY, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that:

1. I am an attorney with the law firm of Venable LLP, with offices at 1270 Avenue of the Americas, New York, NY 10020. I am over the age of eighteen and understand the nature and obligations of a declaration made under the penalty of perjury. I have personal knowledge of the facts contained in this Declaration, and if called as a witness, I could and would testify competently under oath as to such facts. I submit this declaration in support of Defendants' Reply in Further Support of Their Partial Motion to Dismiss.

2. I searched the "Wayback Machine" (https://archive.org/web/) for https:/www.ftc.gov/about-ftc/what-we-do/enforcement-authority. I viewed the archived webpage for July 29, 2017. Attached as "Exhibit A" is a true and correct copy of the July 29, 2017 archived webpage that I located using the "Wayback Machine."

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: December 19, 2019



Elliot A. Kelly

Exhibit A to Declaration of Elliot A. Kelly

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority

Revised, July 2008(1)

I. INVESTIGATIVE AUTHORITY

A. In General

The Commission may" prosecute any inquiry necessary to its duties in any part of the United States" (FTC Act Sec. 3, 15 U.S.C. Sec. 43) and may"gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions * * * Federal credit unions * * * and common carriers * * *." (FTC Act Sec. 6(a), 15 U.S.C. Sec. 46(a)).(2) Pre-complaint investigations are generally non-public and, thus, are not identified on this site. On occasion the existence of an investigation may be identified in a press release.(3)

B. Specific Investigative Powers

The Commission's specific investigative powers are defined in Sections 6, 9, and 20 of the FTC Act, 15 U.S.C. Secs. 46, 49, and 57b-1, which authorize investigations and various forms of compulsory process. In addition, the premerger notification provisions in Section 7A of the Clayton Act, 15 U.S.C. Sec. 18a, prohibit consummation of covered acquisitions until the requested information is provided, thus effectively enabling the Commission to obtain information regarding such acquisitions.

1. Sections 9 and 20 of the FTC Act

Section 9 of the FTC Act authorizes the Commission to "require by **subpoena** the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation" (15 U.S.C. Sec. 49). Any member of the Commission may sign a subpoena, and both members and "examiners" (employees) of the agency may administer oaths, examine witnesses, and receive evidence (Id., 16 C.F.R. Sec. 2.5).

Under Commission Rule 2.7 (16 C.F.R. Sec. 2.7), a party may raise objections to a subpoena by filing a **petition to limit or quash**. Such petitions may be resolved by a designated Commissioner, and the designated Commissioner's ruling may thereafter be appealed to the full Commission.

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subpoena, and following receipt of any response from the subpoena recipient, the court may enter an order requiring compliance. Refusal to comply with a court enforcement order is subject to penalties for contempt of court.

The subpoena provisions of Section 9 are used routinely by the Bureau of Competition to investigate alleged unfair methods of competition and other antitrust violations. Prior to 1980, the Bureau of Consumer Protection also used subpoenas for investigations. However, as the result of the FTC Improvements Act of 1980, which added a new Section 20 of the FTC Act, 15 U.S.C. Sec. 57b-1, the Bureau of Consumer Protection may now use only "civil investigative demands" ("**CIDs**") to investigate possible"unfair or deceptive acts or practices." By virtue of the FTC Act Amendments of 1994, the Bureau of Competition also may use CIDs (in addition to subpoenas) for investigations of possible antitrust violations.

The scope of a civil investigative demand is different from that of a subpoena. Both subpoenas and CIDs may be used to obtain existing documents or oral testimony. But a CID may also require that the recipient "file written reports or answers to questions" (15 U.S.C. Sec. 57b-1(c)(1)). In addition, Section 20 expressly authorizes the issuance of CIDs requiring the production of tangible things and provides for service of CIDs upon entities not found within the territorial jurisdiction of any court of the United States (15 U.S.C. Sec. 57b-1(c)(7)(B)).

As with subpoenas, the recipient of a civil investigative demand may file a petition to limit or quash. Likewise, the Commission may petition a federal district court to enforce the CID in the event of noncompliance, although permissible venue is narrower in a CID enforcement action than in a subpoena enforcement case.

2. Section 6 of the FTC Act

Another investigative tool, this one available in both competition and consumer protection matters, appears in Section 6 of the FTC Act, 15 U.S.C. Sec. 46. Section 6(b) empowers the Commission to require the filing of "annual or special * * * reports or answers in writing to specific questions" for the purpose of obtaining information about "the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals" of the entities to whom the inquiry is addressed. As with subpoenas and CIDs, the recipient of a **6(b) order** may file a petition to limit or quash, and the Commission may seek a court order requiring compliance. In addition, the Commission may commence suit in Federal court under Section 10 of the FTC Act, 15 U.S.C. Sec. 50, against any party who fails to comply with a 6(b) order after receiving a notice of default from the Commission. After expiration of a thirty-day grace period, the defaulting party is liable for a penalty(4) for each day of noncompliance.

The Commission's 6(b) authority enables it to conduct wide-ranging economic studies that do not have a specific law enforcement purpose. (An example is the "Line-of-Business" study conducted in the 1970's, which required corporations to report line of business profitability and other data on a yearly basis.) Section 6(b) enables the Commission to obtain answers to specific questions as part of an antitrust law enforcement investigation, where such information would not be available through subpoena because there is no document that contains the desired answers. Section 6 also authorizes the Commission to "make public from time to time" portions of the information that it obtains, where disclosure would serve the public interest (15 U.S.C. Sec. 46(f)) (An example here is the Commission's July 2002 report on "Generic Drug Entry prior to Patent Expiration.").

The "Undertaking Spam, Spyware, And Fraud Enforcement With Enforcers beyond Borders Act of 2006" (or the "U.S. SAFE WEB Act of 2006" or "Safe Web") (Pub. L. No. 109-455, codified to the FTC Act, 15 U.S.C. §§ 41 et seq.) amended Section 6(f) to allow the Commission to share confidential information in consumer protection matters with foreign law enforcement agencies subject to appropriate confidentiality assurances. Safe Web also added a new section (j) to Section 6 allowing the Commission to conduct investigations and discovery to help foreign law enforcement agencies in appropriate cases. Amended Section 6(j)(4) authorizes the Commission, with the approval of the Secretary of State, to negotiate and conclude international agreements in the name of the United States or the Commission if foreign law requires an agreement as a condition for reciprocal assistance or information sharing.

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fashion as Section 6(f) to allow the Commission to share confidential information in its files in consumer protection matters with foreign law enforcement agencies subject to appropriate confidentiality assurances.

4. Section 21b of the FTC Act

Safe Web amended Section 21b (15 U.S.C. Sec. 57b-2b) to protect certain entities (for example, internet service providers and consumer reporting agencies) from liability for voluntary disclosures to the Commission about suspected fraud or deception, or about recovery of assets for consumer redress.

5. Premerger Notification

In merger investigations, the Commission also relies on Section 7A of the Clayton Act, 15 U.S.C. Sec. 18a, which was added by the **Hart-Scott-Rodino** Act of 1976. Under Section 7A, if either of the parties is a certain size or if the proposed transaction is of requisite size, the parties must report the transaction to the government and wait a specified number of days before consummation. Should the Commission or the Department of Justice decide that further examination is warranted, they may seek additional information by issuing a "second request" to the parties. When such a request is issued, the waiting period is extended and the subject acquisition may not be consummated until the conclusion of a specified period following the parties' compliance with the request. Although parties are not technically obligated to comply with a second request, as they are with a subpoena, the price of noncompliance is that consummation of the transaction would be illegal. Thus, the premerger notification provisions of the Clayton Act are a powerful incentive for companies to submit information that the government needs to evaluate corporate acquisitions. Should the parties merge without observing the requirements of the Clayton Act, the Commission may seek both injunctive relief and civil penalties, as appropriate, under Section 7A(g) of the Clayton Act. The Commission may also grant an early termination of a waiting period. Notices of early termination are available on this site.

6. Pharmaceutical Agreement Filings

The Medicare Prescription Drug, Improvement, and Modernization Act of 2003 requires that brand name drug manufacturers and generic drug applicants file certain agreements with the Federal Trade Commission and the Assistant Attorney General of the Antitrust Division of the Department of Justice within 10 business days of execution of the agreement. Information about what types of agreements must be filed, filing deadlines, and where to file, is set forth at https://www.ftc.gov/enforcement/premerger-notification-program/medicare-.... Unlike the merger review process under the Hart-Scott-Rodino Act, there is no prescribed timetable for the FTC's review. The FTC neither approves nor denies approval to the filed agreements.

7. International Antitrust Enforcement

Under the International Antitrust Enforcement Assistance Act ("IAEAA"), 15 U.S.C. § 6201 *et seq.*,the FTC may invoke all of its investigative tools to obtain materials or information from domestic sources for the use of foreign antitrust authorities, and may seek investigative assistance from those authorities, pursuant to mutual or bilateral assistance agreements established under the IAEAA. FTC Act Sections 6(l) and 20(a)(8)(c) incorporate the IAEAA investigative authority into the FTC Act.

II. ENFORCEMENT AUTHORITY

Following an investigation, the Commission may initiate an enforcement action if it has "**reason to believe**" that the law is being or has been violated. The Commission uses certain of its statutory powers to enforce both consumer protection and antitrust laws, but there are also important differences that merit separate discussion of the two missions.

A. Consumer Protection

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commerce that cause or are likely to cause reasonably foreseeable injury within the United States or involve material conduct occurring within the United States.

"Unfair" practices are defined as those that "cause[] or [are] likely to cause **substantial injury** to consumers which is **not reasonably avoidable** by consumers themselves and **not outweighed by countervailing benefits** to consumers or to competition" (15 U.S.C. Sec. 45(n)). In addition, the Commission enforces a variety of specific consumer protection statutes (e.g., the Equal Credit Opportunity Act, Truth-in-Lending Act, Fair Credit Reporting Act, the Cigarette Labeling Act, the Do-Not-Call Implementation Act of 2003, the Children's Online Privacy Protection Act, Fair and Accurate Credit Transactions Act of 2003, the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 and others)) that prohibit specifically-defined trade practices and generally specify that violations are to be treated as if they were "unfair or deceptive" acts or practices under Section 5(a).&Summaries of the statutes giving the Commission enforcement powers are available on this site.

The Commission enforces the substantive requirements of consumer protection law through both administrative and judicial processes, as described below.

1. Administrative Enforcement

In the administrative process, the Commission makes the initial determination that a practice violates the law in either an adjudicative or rulemaking proceeding.

(a) Adjudication

Under Section 5(b) of the FTC Act, the Commission may challenge "unfair or deceptive act[s] or practice[s]" (or violations of other consumer protection statutes) through maintenance of an administrative adjudication. When there is "**reason to believe**" that a law violation has occurred, the Commission may issue a complaint setting forth its charges. If the respondent elects to settle the charges, it may sign a consent agreement (without admitting liability), consent to entry of a final order, and waive all right to judicial review. If the Commission accepts such a proposed consent agreement, it places the order on the record for thirty days of public comment (or for such other period as the Commission may specify) before determining whether to make the order final.

- Administrative Trials

If the respondent elects to contest the charges, the complaint is adjudicated before an administrative law judge ("ALJ") in a trial-type proceeding conducted under the Commission's Rules of Practice. The prosecution of a consumer protection matter is conducted by FTC "complaint counsel," who are staff from the Bureau of Consumer Protection or a regional office. Upon conclusion of the hearing, the ALJ issues an "initial decision" setting forth his findings of fact and conclusions of law, and recommending either entry of an order to cease and desist or dismissal of the complaint. Either complaint counsel or respondent, or both, may appeal the initial decision to the full Commission.

Upon appeal of an initial decision, the Commission receives briefs, holds oral argument, and thereafter issues its own final decision and order. The Commission's final decision is appealable by any respondent against which an order is issued. The respondent may file a petition for review with any court of appeals within whose jurisdiction the respondent resides or carries on business or where the challenged practice was employed (FTC Act, Section 5(c), 15 U.S.C. Sec. 45(c). If the court of appeals affirms the Commission's order, the court enters its own order of enforcement. The party losing in the court of appeals may seek review by the Supreme Court. Commission decisions and orders since July 1949 are available.

- Enforcing Final Commission Orders

A Commission order (except an order to divest assets) becomes final (i.e., binding on the respondent) 60 days after it is served, unless the order is stayed by the Commission or by a reviewing court. If a respondent violates a final order, it is liable for a civil penalty for each violation, as set forth in Commission Rule 1.98(c). The penalty is assessed by a district court in a suit brought to enforce the Commission's order. The court may also issue "mandatory injunctions" and "such

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In addition (after all judicial review of its order is complete), the Commission may seek consumer redress from the respondent in district court for consumer injury caused by the conduct that was at issue in the administrative proceeding. In such a suit, which lies under Section 19 of the FTC Act, 15 U.S.C. Sec. 57b, the Commission must demonstrate that the conduct was such as "a reasonable man would have known under the circumstances was dishonest or fraudulent."

- Civil Penalty Enforcement against Non-Respondents

Where the Commission has determined in a litigated administrative adjudicatory proceeding that a practice is unfair or deceptive and has issued a final cease and desist order, the Commission may obtain civil penalties from non-respondents who thereafter violate the standards articulated by the Commission. To accomplish this, the Commission must show that the violator had "actual knowledge that such act or practice is unfair or deceptive and is unlawful" under Section 5(a)(1) of the FTC Act. (FTC Act, Section 5(m)(1)(B); 15 U.S.C. Sec. 45(m)(1)(B)). To prove "actual knowledge," the Commission typically shows that it had provided the violator with a copy of the Commission determination in question, or a "synopsis" of that determination. Section 5(m)(1)(B) limits wrongdoers to only a "single bite of the apple" before they are subject to monetary penalties.

(b) Rulemaking

In lieu of administrative adjudications against individual respondents, the Commission may use trade regulation rules to remedy unfair or deceptive practices that occur on an industry-wide basis. Under Section 18 of the FTC Act, 15 U.S.C. Sec. 57a, the Commission is authorized to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" within the meaning of Section 5(a)(1) of the Act. The statute requires that Commission rulemaking proceedings provide an opportunity for informal hearings at which interested parties are accorded limited rights of cross examination. Before commencing a rulemaking proceeding the Commission must have reason to believe that the practices to be addressed by the rulemaking are "prevalent" (15 U.S.C. Sec. 57a(b)(3)). Commission rules are published in Title 16 of the Code of Federal Regulations.

Once the Commission has promulgated a trade regulation rule, anyone who violates the rule "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule" is liable for civil penalties for each violation.(5)) The Commission obtains such penalties by filing a suit in district court under Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. Sec. 45(m)(1)(A). In addition, any person who violates a rule (irrespective of the state of knowledge) is liable for injury caused to consumers by the rule violation. The Commission may pursue such recovery in a suit for consumer redress under Section 19 of the FTC Act, 15 U.S.C. Sec. 57b.

Various special statutes that authorize Commission rulemaking provide for promulgation in accordance with section 553 of title 5, United States Code. Examples include the Do-Not-Call Implementation Act of 2003 (15 U.S.C. § 6101 note), the Children's Online Privacy Protection Act (15 U.S.C. §§ 6501-6506), Fair and Accurate Credit Transactions Act of 2003 (15 U.S.C. §§ 1681 et seq.), and the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 (15 U.S.C §§ 7701-7713).

2. Judicial Enforcement

As the preceding section illustrates, even where the Commission determines through adjudication or rulemaking that a practice is unfair or deceptive, the Commission must still seek the aid of a court to obtain civil penalties or consumer redress for violations of its orders to cease and desist or trade regulation rules. In this section, we discuss the Commission's ability to challenge a practice directly in court, without first making a final agency determination that the challenged conduct is unlawful.

Section 13(b) of the FTC Act, 15 U.S.C. Sec. 53(b), authorizes the Commission to seek preliminary and permanent injunctions to remedy "any provision of law enforced by the Federal Trade Commission." Under the first proviso of Section 13(b), whenever the Commission has "reason to believe" that any party "is violating, or is about to violate" a provision of law enforced by the Commission, the Commission may ask the district court to enjoin the allegedly unlawful conduct,

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Section 13(b) was added to the FTC Act as part of amendments to the Trans-Alaska Pipeline Act of 1973. At the time, the provision was expected to be used principally for obtaining preliminary injunctions against corporate acquisitions, pending completion of FTC administrative hearings. During the 1970s, Section 13(b) was used by the Commission mainly in this way, and the Commission continues to make frequent use of the provision in its merger enforcement program. However, on occasion in the 1970s, the Commission also used the "preliminary injunction" provision of Section 13(b) to obtain injunctions against ongoing campaigns of deceptive advertising, pending a final FTC adjudication (Section 13(a) of the Act (15 U.S.C. Sec. 53), passed in 1938, had previously authorized the Commission to seek injunctive relief in cases of false advertisements for "food, drugs, devices, services or cosmetics."). See Sec. 15 U.S.C. Sec. 52(a) as referenced in 15 U.S.C. Sec. 53(a)(1).

In the early and mid-1980s, the Commission began to make widespread use of the permanent injunction proviso of Section 13(b) in its consumer protection program to challenge cases of basic consumer fraud and deception. Further, the Commission argued that the statutory reference to "permanent injunction" entitled the Commission to obtain an order not only permanently barring deceptive practices, but also imposing various kinds of monetary equitable relief (*i.e.*, restitution and rescission of contracts) to remedy past violations. The Commission also argued that, to preserve the possibility of ultimate monetary equitable relief, it should be able to obtain a freeze of assets and imposition of temporary receivers in appropriate cases.

The courts have uniformly accepted the Commission's construction of Section 13(b), with the result that most consumer protection enforcement is now conducted directly in court under Section 13(b) rather than by means of administrative adjudication. See, e.g., *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1024-28 (7th Cir. 1988); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432-35 (11th Cir. 1984) (per curiam); *FTC v. H.N. Singer*, 668 F.2d at 1110-13. A suit under Section 13(b) is preferable to the adjudicatory process because, in such a suit, the court may award both prohibitory and monetary equitable relief in one step. Moreover, a judicial injunction becomes effective immediately, while a Commission cease and desist order takes effect only 60 days after service. Pending Section 13(b) cases are identified on the Federal Court Litigation Status Report.

Of course, administrative adjudication offers certain advantages over direct judicial enforcement. In particular, in an adjudicatory proceeding, the Commission has the first opportunity to make factual findings and articulate the relevant legal standard. On review, the court is obliged to affirm the Commission's findings of fact if supported by substantial evidence. A reviewing court must also accord substantial deference to Commission interpretation of the FTC Act and other applicable federal laws. In a 13(b) suit, by contrast, the Commission receives no greater deference than would any government plaintiff. Thus, where a case involves novel legal issues or fact patterns, the Commission has tended to prefer administrative adjudication.

B. Antitrust

The Commission enforces various antitrust laws through its Bureau of Competition. The two most significant statutory provisions are Section 5(a) of the FTC Act and the Clayton Act. Section 5(a) of the FTC Act, 15 U.S.C. Sec. 45(a), prohibits, *inter alia*, "unfair methods of competition." **Unfair methods of competition** include any conduct that would violate the Sherman Antitrust Act. The Clayton Act prohibits corporate **acquisitions that may tend substantially to lessen competition** (Section 7, 15 U.S.C. Sec. 18) and also bars certain forms of price discrimination (Section 2 of the Robinson Patman Act, 15 U.S.C. Secs. 13-13b). As with its consumer protection responsibilities, the Commission uses both administrative and judicial remedies to enforce the law.

1. Administrative Enforcement

(a) Adjudication

The Commission may challenge alleged "unfair methods of competition," as it does "unfair or deceptive acts or practices,'" by commencing an administrative adjudicatory proceeding under Section 5(b) of the FTC Act. Where a

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final after all judicial review has been completed (or, if no review is sought, after the time for seeking review has expired). Violations of antitrust orders are subject to suits for civil penalties under FTC Act Section 5(1) or Clayton Act Section 11(1), as appropriate.

(b) Rulemaking

Section 18 of the FTC Act, which authorizes the promulgation of trade regulation rules, applies to "unfair or deceptive acts or practices." Prior to enactment of Section 18, the Commission issued substantive trade regulation rules under Section 6(g), which authorizes the Commission "to make rules and regulations for the purpose of carrying out the provisions of this subchapter." *National Petroleum Refiners Assoc. v. FTC*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied* 415 U.S. 951 (1974)(Commission has authority to require octane labels on gasoline pumps). Nearly all of the rules that the Commission actually promulgated under Section 6(g) were consumer protection rules. While Section 6(g) authority still exists, in 1975, Section 18 became the exclusive statutory provision invoked for issuing rules that specify unfair or deceptive acts or practices (15 U.S.C. Sec. 57(a)(2)).

2. Judicial Enforcement

As discussed above, **Section 13(b)** of the FTC Act empowers the Commission to obtain preliminary and permanent injunctive relief for violations of any provision of law that the Commission enforces. In the competition context, the Commission has used Section 13(b) primarily for the purpose of obtaining preliminary injunctive relief against corporate mergers or acquisitions pending completion of an FTC administrative proceeding. The Commission may also obtain permanent injunctive relief against an antitrust violation in an appropriate case, as well as disgorgement of unjust enrichment, restitution for injury suffered by consumers (e.g., the refund of overcharges attributable to price-fixing) or other appropriate equitable remedies. The Commission has filed several such actions, and the courts have repeatedly upheld our authority to do so. *FTC v. Abbott Labs.*, 1992-2 Trade Cas. (CCH) ¶ 69,996 (D.D.C. filed Oct. 13, 1992), dismissed on other grounds, 853 F. Supp. 526 (D.D.C. 1994); *FTC v. Mylan Laboratories, Inc. Cv. 98-3114 (TFH)*(D.D.C. filed July 7, 1999).

III. LITIGATING AUTHORITY

The preceding sections have described a variety of actions that may be pursued in federal court against violators of the laws enforced by the Commission. The Commission has independent authority to litigate some of these cases in its own name, by its own attorneys. The scope of this authority is described below. Except as otherwise provided by law, the Attorney General is responsible for the conduct of all litigation in which the United States, or one of its agencies, is a party (28 U.S.C. Sec. 516). Section 16 of the FTC Act, 15 U.S.C. Sec. 56, specifically authorizes the Commission to represent itself by its own attorneys in five categories of cases: (1) suits for injunctive relief under Section 13 of the FTC Act, 15 U.S.C. Sec. 53; (2) suits for consumer redress under Section 19 of the FTC Act, 15 U.S.C. Sec. 57b; (3) petitions for judicial review of FTC rules or orders or a cease and desist order issued under Section 5 of the FTC Act, 15 U.S.C. Sec. 45; (4) suits to enforce compulsory process under Sections 6 and 9 of the FTC Act, 15 U.S.C. Secs. 46 and 49.3,(5) and (6)and suits to prohibit recipients of compulsory process from disclosing the existence of the process in certain situations, section 21a of the FTC Act, 15 U.S.C. Sec. 57b-2a.

In addition to defining five classes of cases where the Commission may automatically represent itself, Section 16 also provides that with respect to "any civil action involving this subchapter (including an action to collect a civil penalty)," the Commission may represent itself if the Attorney General does not agree to do so after 45-days notice. See 15 U.S.C. Sec. 56(a)1. This provision enables the Commission to prosecute and defend by its own attorneys a wide variety of cases that the Department of Justice declines to litigate (particularly civil penalty actions under Sections 5(1) and 5(m) of the FTC Act).

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may represent itself if it requests authority to do so from the Solicitor General within 10 days of the lower court judgment, and the Solicitor General, within 60 days after entry of the judgment, either authorizes the Commission's appearance, declines to represent the Commission, or fails to respond to the request. (7)

In addition to these specific grants of representational authority, there are several situations in which the Department of Justice may appoint Commission attorneys as special United States Attorneys to represent the United States in litigation conducted by the Department of Justice. See Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6107, (appointment of Commission attorneys to prosecute criminal contempt); Memorandum of Agreement Between the Department of Justice and the Federal Trade Commission - Premerger Penalties, 4 Trade Reg. Rep. 1 9853 at p. 17,356 (appointment of Commission attorneys to prosecute civil penalty actions under 15 U.S.C. Sec. 18a(g)(1) for violation of premerger reporting requirements); see also 28 U.S.C. Secs. 515, 543 appointment of special United States attorneys).

APPENDIX A

SYNOPSIS OF ANTITRUST ENFORCEMENT AUTHORITY

STATUTE	FEDERAL TRADE COMMISSION	DEPARTMENT OF JUSTICE	STATE ENFORCEMENT AUTHORITIES	PRIVATE PARTIES
Federal Trade Commission Act (15 U.S.C. §41 *et seq.*)	administrative cease and desist authority [§5(b) FTCA]	prosecution [§§ 1 & 2 Sherman Act]		
Injunctive Relief	judicially ordered injunctive relief [§13(b) FTCA; also § 5(l) FTCA (for violations of cease and orders)]			
Redress	judicially ordered redress [§13(b) FTCA]			
Rulemaking	[§6(g) FTCA]			

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Civil Penalties	judicially ordered civil penalties for violating cease and desist orders [§5(l) FTCA; Commission Rule 1.98(c)]			
Criminal Penalties	referral to U.S. Department of Justice [§16(b) FTCA]			
Clayton Act (15 U.S.C. § 12 *et seq.*)	administrative cease and desist authority [§11(b) Clayton Act]			
Injunctive Relief	judicially ordered injunctive relief [§13(b) FTCA; also §7A(g)(2) Clayton Act (for HSR reporting violations) and §11(l) Clayton Act (for violations of cease and desist orders)]	judicially ordered injunctive relief [§15 Clayton Act; also§7A(g)(2) Clayton Act (for HSR reporting violations)]	may apply to the courts as *parens patriae* for injunctive relief [§16 Clayton Act]	may apply to the courts for injunctive relief [§16 Clayton Act]
Damages		may recover for injuries sustained by the United States Government (treble damages) [§4A Clayton Act]	may apply fortreble damages as *parens patriae* [§4C Clayton Act]	may apply for treble damages [§4 Clayton Act]
Civil Penalties	judicially ordered civil penalties for violating cease and desist orders [§11(l) Clayton Act; Commission Rule 1.98(b)]	judicially ordered civil penalties [§7A(g)(1) Clayton Act; Commission Rule 1.98(a)]		

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Criminal Fines		officer liability for corporate violation of penal provisions [§14Clayton Act]		
Sherman Antitrust Act (15 U.S.C. §1 *et seq.*)				
Injunctive Relief		judicially ordered injunctive relief [§4 Sherman Act]	may apply to the courts as *parens patriae* for injunctive relief [§16 Clayton Act]	may apply to the courts for injunctive relief [§16 Clayton Act]
Damages		may recover for injuries sustained by the United States Government (treble damages) [§4A Clayton Act]	may apply for treble damages as *parens patriae* [§4C Clayton Act]	may apply for treble damages [§4 Clayton Act]
Criminal Penalties		combinations [§1 Sherman Act] monopolization [§2 Sherman Act]		
Miscellaneous		forfeiture [§6 Sherman Act]		

APPENDIX B

SYNOPSIS OF CONSUMER PROTECTION ENFORCEMENT AUTHORITY UNDER THE FEDERAL TRADE COMMISSION ACT

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Federal Trade Commission Act (15 U.S.C. §41 *et seq.*)	administrative cease and desist authority [§5(b) FTCA]	prosecution for violations of §12(a) FTCA [§14 FTCA]	
Injunctive Relief	judicially ordered injunctive relief [§13(b) FTCA; also §13(a) FTCA (for violations of §12(a) FTCA) and §5(l) FTCA (for violations of cease and desist orders)]		
Rulemaking	[§18 FTCA]		
Redress	judicially ordered redress [§13(b) FTCA; also §19(a)(1) FTCA (for rule violations) and§19(a)(2) FTCA (for "fraudulent or dishonest" conduct)]		

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Civil Penalties	judicially ordered civil penalties for violating cease and desist orders [§5(l) FTCA; also §5(m)(1)(A) FTCA (for violations of trade regulation rules) and §5(m)(1)(B) FTCA (for violations of adjudicatory holdings by non-parties)] [For current civil penalty maximums, see Commission Rules 1.98(c)-(e).]	
Criminal Penalties	referral to U.S. Department of Justice [§16(b) FTCA]	

APPENDIX C

Special Statutes that mandate or authorize Commission rulemakings either antitrust and/or consumer protection related:

Recent examples include the Graham-Leach-Bliley Act (15 U.S.C. §§ 6801-6809 and §§ 6821-6827), the DNC Implementation Act (15 U.S.C. § 6101 note), COPPA (15 U.S.C. §§ 6501-6506), FACTA (15 U.S.C. §§ 1681 et seq.), CAN-SPAM Act (15 U.S.C §§ 7701-7713) the Fairness to Contact Lens Consumers Act (15 U.S.C. § 7601 et seq.), the Energy Policy Act 02 2005 (Pub. L. No. 109-58) and the Energy Independence and Security Act of 2007 (Pub. L. No. 110-140)

Endnotes

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covers only the Federal Trade Commission Act. Summaries of Commission enforcement authority under other statutes are available on this site.

2. "Corporation" is defined to include any company, trust or association, incorporated or unincorporated, "which is organized to carry on business for its own profit or that of its members (FTC Act Sec. 4, 15 U.S.C. Sec. 44).

3. Commission policies contemplate the disclosure of certain industry-wide investigations. The Commission will also publicly acknowledge that a particular merger or other transaction is being investigated under Sections 7 and 11 of the Clayton Act in situations where a party to the transaction has disclosed its existence in a press release or other public filing. In addition, the Commission permits limited disclosures about nonmerger investigations where: (1) a target has publicly disclosed the relevant information in either a press release or a filing with a government agency; or (2) the investigation or the practice has received substantial publicity and the disclosure does not identify a target that has not already disclosed its own identity.

4. For the current applicable civil penalty maximum, see Commission Rule 1.98(f).

5. Id. For the current applicable civil penalty maximum, see Commission Rule 1.98(d).

6. Section 16, added to the FTC Act in 1975, does not specifically mention suits to enforce Civil Investigative Demands, as CID authority was not added to the Commission's investigatory repertoire until 1980. However, Section 20 of the FTC Act, which governs issuance of CIDs, provides that a suit to enforce a CID may be prosecuted by the Commission "through such officers or attorneys as it may designate" (15 U.S.C. Sec. 57b-2(e)). The only other statute that expressly vests the Commission with representational authority is the Clayton Act, which provides that injunctive relief for violations of the premerger notification requirements may be granted by a district court "upon application of the Federal Trade Commission or the Attorney General" (15 U.S.C. Sec. 18a(g)(2)).

7. On three occasions, the Commission has exercised its statutory authority to file a petition for certiorari after the Solicitor General has declined to file a petition on the Commission's behalf. In two of those three cases, the Commission was successful in obtaining a grant of certiorari and in obtaining a reversal of an adverse court of appeals ruling.

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