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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FEDERAL TRADE COMMISSION and
UTAH DIVISION OF CONSUMER
PROTECTION,

Plaintiffs,

v.

ZURIXX, LLC, *et al.*

Defendants.

**ATTORNEY PLANNING
MEETING REPORT**

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

District Judge Dale A. Kimball
Magistrate Judge Daphne A. Oberg

I. PRELIMINARY MATTERS:

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

The Plaintiffs Federal Trade Commission (“FTC”) and Utah Division of Consumer Protection (“Division”) claim that Defendants violated Section 5(a) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §45(a), the Consumer Review Fairness Act (“CRFA”), 15 U.S.C. §45(b), the FTC’s Telemarketing Sales Rule (“TSR”),

16 C.F.R. Part 310, the Utah Consumer Sales Practices Act (“UCSPA”), Utah Code § 13-11-1 *et seq.*, the Business Opportunity Disclosure Act (“BODA”), Utah Code § 13-15-1 *et seq.*, and the Telephone Fraud Prevention Act (“TFPA”), Utah Code § 13-26-1 *et seq.* in the marketing and sale of real estate investment products.

Plaintiff FTC claims that Defendants made false and unsubstantiated earnings and other claims regarding their real estate investment products (Counts I, II), and their coaching packages (Count IV), and also failed to disclose material aspects of their refund policy (Count III) in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). The FTC further claims that Defendants violated the CRFA by using form contracts that contain provisions that prohibit or restrict the ability of consumers purchasing Defendants’ products to review, assess, or analyze Zurixx’s products online or otherwise (Count V), in violation of 15 U.S.C. § 45b. The FTC and the Division claim that Defendants, in connection with telemarketing offers to sell coaching packages, have misrepresented material aspects of the performance, efficacy, nature, or central characteristics of the coaching packages by stating to consumers that the coaching packages are necessary for consumers to generate a profit of thousands of dollars in real estate investing—substantially more than they could earn after taking the 3-day workshop or purchasing the advanced packages; purchasing the coaching packages will help consumers generate profit more quickly than if the consumers had purchased the 3-day workshop and the advanced packages; the coaching packages are only offered to a select group of investors who have been vetted to ensure that they will be successful; or that the coaching packages will pay for themselves, in violation of the TSR, 16 C.F.R. § 310.3(a)(2)(iii) and (a)(4) (Count VI).

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

Defendants violated the Utah Telephone Protection Act by making false or unsubstantiated statements, in connection with telemarketing coaching packages, that the coaching packages are necessary for consumer to generate a profit of thousands of dollars in real estate investing—substantially more than the consumers could earn after taking the 3-day workshop or purchasing the advanced packages; purchasing the coaching packages will help consumer generate profit more quickly than if the consumers had purchased only the 3-day workshop and the advanced packages; the coaching packages are only offered to a select group of investors who have been vetted to ensure that they will be successful, and/or the coaching packages will pay for themselves, in violation of the TFPA, Utah Code §§ 13-26-11(1)(c) and 13-26-11(2)(a) (Count XIII).

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

The Defendants deny that they have violated any laws and further deny that Plaintiffs are entitled to any relief against any of them. Prior to this lawsuit, Zurixx provided real estate education to over 100,000 students since the company’s founding in 2012. Plaintiffs’ allegations against Defendants are based on 24 declarations from former Zurixx students and 239 unspecified complaints the FTC allegedly received about Zurixx. The complaints cited by the Plaintiffs amount to approximately one-quarter of one percent of all students who received real estate education and training from Zurixx. Put simply, contrary to the Plaintiffs’ assertions, there is no evidence of any widespread consumer fraud or deception to justify the extraordinary relief already obtained by Plaintiffs in this action on an *ex parte* basis. To the contrary, the evidence in this case

will demonstrate widespread satisfaction among Zurixx students. Specifically, over 99% of all prior Zurixx students rated their educational experience as insightful, valuable, worthwhile, understandable and helpful. This customer satisfaction data, yielded from detailed surveys of Zurixx's students, was audited and verified by an independent accounting firm (Squire & Company, PC).

Zurixx's commitment to providing high-quality educational experiences to its customers is also exemplified by the training and certification of its customer service and instructional teams. All members of Zurixx's customer service department not only underwent a detailed internal on-boarding and training process, but all members also completed an external training and certification program administered by an independent third-party company. After completion of the program, each employee was tested and all received certification. Zurixx's instructors, trainers, and coaches were also vetted to ensure that they had several years of experience in their field of instruction. Zurixx then required each of them to complete an internal training, after which, the individual was required to pass an examination. As with customer service, Zurixx supplemented its internal training with third-party training and certification as a quality assurance measure. Further, all of Zurixx's coaches attended a two-day training and certification course where they were trained in best practices for helping students, diagnosing problems, and creating success. The course was offered and administered through the Association for Talent Development, which is the world's largest association dedicated to talent development and training effectiveness. Instructors and presenters who violated Zurixx's compliance policies were subject to discipline including, but not limited to, suspension without pay and termination.

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

donated millions of dollars and a significant amount of its officer's and staff's time to charitable organizations in Utah, the U.S., and around the world.

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

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

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

Moreover, the FTC is not entitled to seek any monetary relief in this case, Defendants' educational training is not subject to Utah's BODA, Defendants did not violate any telemarketing rules through their legitimate business activities, and the Division may not apply Utah law extraterritorially to Defendants' conduct occurring outside of Utah.

The JSS Trust, JSS Investments Ventures, and Gerald Spangler deny any connection to the case between the Plaintiffs and the Zurixx defendants. The allegations do not assert that JSS Trust, JSS Investment Ventures, and Gerald Spangler have taken any action to satisfy the elements of Counts I through XIII. Any allegations that may connect JSS Trust, JSS Investment Ventures, and Gerald Spangler to are disputed under the same grounds as the Zurixx defendants above.

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

c. Pursuant to Fed. R. Civ. P. 26(f), the parties held telephone meetings on Tuesday June 16, 2020.

The following attended the attorney meeting on June 16, 2020:
Collot Guerard, Josh Doan, Amanda Grier, and Robert Wing

counsel for Plaintiffs FTC and Division, Ryan Pahnke for Defendants ZURIXX, LLC, CARLSON DEVELOPMENT GROUP, LLC, CJ SEMINAR HOLDINGS, LLC, ZURIXX FINANCIAL, LLC, CRISTOPHER A. CANNON, JAMES M. CARLSON, JEFFREY D. SPANGLER, BRAND MANAGEMENT HOLDINGS, LLC, CAC INVESTMENT VENTURES, LLC, CARLSON DEVELOPMENT GROUP, LLC (Puerto Rico), DORADO MARKETING AND MANAGEMENT, LLC, and ZURIXX FINANCIAL, LLC (Puerto Rico); and Brennan Moss for GERALD D. SPANGLER, JSS INVESTMENT VENTURES, LLC, and JSS TRUST.

- d. The parties named on the Complaint [ECF No. 1] exchanged Initial Disclosures on December 17, 2019. The parties agree to exchange updated Initial Disclosures by Thursday, July 23, 2020.
- e. Pursuant to Fed. R. Civ. P. 5(b)(2)(D), the parties agree to receive all items required to be served under Fed. R. Civ. P. 5(a) by either (i) notice of electronic filing, or (ii) email transmission. Such electronic service will constitute service and notice of entry as required by those rules. Any right to service by USPS mail is waived.

II. DISCOVERY PLAN: The parties jointly propose to the Court the following discovery plan:

- a. Discovery is necessary on the following subjects:

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

- a. the role of the individual and corporate Defendants in the Zurixx business;
- b. the extent of unreimbursed consumer injury;
- c. the nature and extent of compliance efforts;
- d. the extent and nature of Defendants' business operations and activities in Utah;
- e. the extent to which Defendants collected or otherwise obtained information about consumers' financial success;
- f. any efforts by Defendants to make any disclosures to prospective or actual purchasers;
- g. the factual basis for defendants' earnings and other claims
- h. whether the testimonials were representative of the experience of Zurixx's customers;
- i. the knowledge of the individual defendants Cannon, Carlson, and Spangler that Zurixx representatives were making false or unsubstantiated earnings and other claims during the live events and telemarketing calls;

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

- a. the Plaintiffs' evidence of customer complaints;
- b. the Plaintiffs' evidence regarding Defendants' educational training;
- c. the Plaintiffs' evidence regarding Defendants connection to the allegations in support of Causes I through XIII; and
- d. the Plaintiffs' expert's limited experience and knowledge.

b. Discovery Phases

The parties agree that discovery will be conducted in phases: there will be a fact discovery phase followed by an expert discovery phase. At this point, the parties do not know whether discovery will be limited to or focused on particular issues. Some limited expedited discovery has been done pursuant to the Court's October 1, 2019, *Ex Parte* Temporary Restraining Order. Pursuant to Section XIX.F. of that Order, the parties acknowledge that this limited expedited discovery is in addition to, and is not subject to, the limits on discovery set forth in the Federal Rules of Civil Procedure and the Local Rules of the Court and further agree that this limited expedited discovery is in addition to, and is not subject to, the limits in this Discovery Plan.

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

(1) Oral Exam Depositions

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

Maximum number of hours per deposition. The parties agree that the depositions of individuals are limited to one day of seven hours, net of all breaks, including those taken off-the-record.

(2) Interrogatories:

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

(3) Admissions

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

(4) Requests for production of documents

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

(5) Other discovery methods:

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

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

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

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

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

The parties also agree that any party asserting a claim of privilege or other protection in response to a discovery request shall provide a log that includes a description of each withheld or partially withheld communication or document that is consistent with Rule 26(b)(5)(A). Notwithstanding this requirement, the parties agree that there shall be no need to provide a privilege log for the following categories of communications and documents: (1) communications and documents, or drafts thereof, circulated between and among the parties and their outside counsel that relate to matters at issue in this case and that were created on or after October 2, 2019 and (2) drafts of pleadings, motions, responses or replies, or discovery requests. Defendants further agree to meet and confer in good faith about proposed modifications to any discovery request that could create an undue burden for Plaintiffs to log communications and documents, or drafts thereof, circulated between or among FTC staff, between or among FTC staff and staff from the offices of the Utah Attorney General or the Utah Division of Consumer Protection, and between and among the offices of the Utah Attorney General and the Utah Division of Consumer Protection. Defendants do not waive any rights to

a privilege log by the agreement to meet and confer about specific discovery requests set forth herein.

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

f. ADR/Settlement

- i. The parties to the original complaint have been negotiating in good faith but thus far have been unable to reach a stipulated permanent injunction. The parties are willing to and anticipate that they will engage in further settlement negotiations as discovery progresses.
- ii. Depending on the progress of the parties' negotiations to resolve the case, the parties, or one or more of them, may file a motion to participate in the Court's alternative dispute resolution program for settlement conference (with a magistrate judge).
- iii. The parties do not intend to engage in private alternative dispute resolution.

III. THE AGREED UPON LITIGATION-RELATED DEADLINES

The parties have agreed to the following deadlines for the balance of this litigation:

- | | |
|---|------------------|
| a) Deadline to serve written discovery: | March 18, 2021 |
| b) Close of fact discovery: | July 22, 2021 |
| c) Deadline to file a motion to amend pleadings: | January 21, 2021 |
| d) Deadline to file a motion to join additional parties: | January 21, 2021 |
| e) Deadline for part(ies) bearing the burden of proof to disclose the subject matter and identity of their experts: | March 18, 2021 |
| f) Deadline for counter disclosures of experts: | May 20, 2021 |
| g) Deadline to serve reports from experts under Rule 26(a)(2): | |
| Party(ies) bearing burden of proof: | October 7, 2021 |
| Counter Reports: | December 9, 2021 |

- h) Close of expert discovery: January 20, 2022
- i) Deadline for filing dispositive or potentially dispositive motions including motions to exclude experts where expert testimony is required to prove the case: May 5, 2022
- j) Deadline for filing partial or complete motions to exclude expert testimony: May 5, 2022
- k) The parties agree that they should have 14 days after service of final lists of witnesses and exhibits to list objections under Rule 26(a)(3) (if different than the 14 days provided by Rule).

IV. TRIAL-RELATED MATTERS

This case should be ready for trial by: 60 days after ruling on dispositive motions.

Plaintiffs' position is that this case should be tried to the Court and estimate it will last 5 days.

Defendants' position is that they are entitled to a jury trial, and estimate it will last 10 trial days.

Collot Guerard
Collot Guerard
Attorney for the Plaintiff
Federal Trade Commission

Date: June 19, 2020

Robert Wing
(with permission)
Attorney for the Plaintiff
Utah Division of Consumer Protection

Date: June 19, 2020

/s/ Z. Ryan Pahnke
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FTC v. Zurixx, LLC, 2:19-cv-00713

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JSS INVESTMENT VENTURES, LLC, and

JSS TRUST

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2020 I electronically filed the foregoing **ATTORNEY PLANNING MEETING REPORT** with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ Collot Guerard
Collot Guerard