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Attorneys for Subpoenaed Non-Party

Matt Davis

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

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**FEDERAL TRADE COMMISSION and  
UTAH DIVISION OF CONSUMER  
PROTECTION,**

**Plaintiffs,**

v.

**ZURIXX, LLC, *et al.*,**

**Defendants.**

**OPPOSITION TO FTC’S SHORT FORM  
MOTION TO COMPEL**

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

**Judge Dale A. Kimball**

**Magistrate Judge Daphne A. Oberg**

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Matt Davis opposes FTC’s Motion to Compel [[Dkt. 218](#)].

First, the Court should direct that FTC bear the expense of Subpoena compliance. Davis, an individual residing in Puerto Rico, is not a party to this action. Yet FTC issued the immensely broad Subpoena and compliance therewith imposes an undue burden. Rule 45 provides: A party...must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court...must enforce this duty....” FRCP 45(d)(1) (emphasis added). Any order compelling compliance “must protect a person who is neither a party nor a

party's officer from significant expense resulting from compliance." [FRCP 45\(d\)\(2\)\(B\)\(ii\)](#).  
[Rhea v. Apache Corp.](#), 833 F.App'x 186, 190 (10th Cir.2020) (“[T]he rule is mandatory.”); [In re Antitrust Litig.](#), 669 F.2d 620, 622-23 (10th Cir.1982) (affirming order shifting expense).

The Subpoena requires document production under various complex electronic formatting instructions, dating to February 2016. It mandates compliance with three pages of ESI instructions and 40 document categories. Responding necessitates lawyers and an ESI firm to identify and apply search protocols to Davis's Gmail, which commingles Zurrix with non-Zurrix and personal with business emails. The documents must be reviewed for responsiveness, confidentiality, and privilege, numbered, then produced in ESI format. The Subpoena also seeks four years of text messages, requiring a backup of Davis's cellular phone and application of search protocols. The “zipped” size of electronic documents to be searched is estimated at 81.5 GB – not including emails. Costs to comply will be approximately \$11,000 (\$5,500—fees; \$5,500—ESI costs).

This expense is significant. [Rhea](#), 833 F.App'x at 190 n.2 (“[A]mounts in...range of \$9,000 to \$20,000 qualify as ‘significant’ under the rule”). Davis's income has essentially dropped to zero following Zurixx ceasing business and COVID-19's industry impact. Imposing this expense is a significant burden. This is not *Management Compensation*, cited by FTC, where the subpoenaed non-party was a large university with in-house counsel, substantial financial interest in the litigation, and close relationship with a party.

FTC refused to pay any portion of expenses, yet is more easily able to bear the burden.

Second, regarding Request 2, FTC agreed in the meet-and-confer call it was limited to contracts with “corporate” defendants [[Dkt. 218-10 at 1](#)]; which is necessary because Davis had

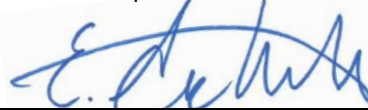
contracts with individual defendants unrelated to Zurixx. FTC does not address Davis’s objection or its agreement, yet its proposed order improperly applies to “corporate and individual defendants.”

Third, FTC does not meaningfully address Davis’s objections to Requests 24-26 (vague, ambiguous, unduly burdensome, and disproportional) despite no reference to whether, when, where, or who is alleged to have made the claims described, or the claims’ context.

Fourth, Davis’s objection to Request 29 is unripe. FTC states “Davis...declined our offer,” which is untrue. At the meet-and-confer, Davis agreed to provide information as limited, after which FTC would respond regarding sufficiency. [[Dkt. 218-9 at 3.](#)] Due to the costs objection addressed above, FTC has not reviewed Davis’s compliance for sufficiency. A dispute should be adjudicated only after it arises.

DATED this 18<sup>th</sup> day of February, 2021.

MCNEILL | VON MAACK



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Jason A. McNeill

Eric K. Schnibbe

*Attorneys for Subpoenaed Non-Party Matt Davis*

**CERTIFICATE OF SERVICE**

I hereby certify that I am employed by the law firm of McNEILL VON MAACK, 175 South Main Street, Suite 1050, Salt Lake City, Utah 84111, and that pursuant to Rule 5(b), Federal Rules of Civil Procedure, a true and correct copy of the foregoing **OPPOSITION TO FTC'S SHORT FORM MOTION TO COMPEL** was delivered to counsel of record this 18<sup>th</sup> day of February 2021, by filing of the same through the Court's CM/ECF System, and by electronic mail to the following:

COLLOT GUERARD  
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DIVISION OF CONSUMER PROTECTION

/s/ Camille Coley\_\_\_\_\_

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**FEDERAL TRADE COMMISSION and  
UTAH DIVISION OF CONSUMER  
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**ORDER ON FTC'S SHORT FORM  
MOTION TO COMPEL**

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**Judge Dale A. Kimball**

**Magistrate Judge Daphne A. Oberg**

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Before the Court is Plaintiffs' Short Form Motion to Compel Nonparty Matt Davis to Produce Documents in Compliance with Rule 45 Subpoena [Dkt. 218] ("Motion"). Having considered the Motion and attachments thereto, the Opposition to FTC's Short Form Motion to Compel filed on behalf of subpoenaed non-party Matt Davis, and any arguments of counsel, the Court hereby GRANTS, in part, and DENIES, in part, the Motion and ORDERS as follows.

1. Mr. Davis is neither a party nor an officer of a party in the above-captioned action.

The estimated expense of \$11,000 that will be required for Mr. Davis to comply with

the Subpoena [Dkt. 218-3] is a “significant expense” to Mr. Davis under Federal Rule of Civil Procedure 45(d)(2)(B)(ii). Accordingly, the Court hereby compels Mr. Davis to comply with the Subpoena in accordance with this Order and further directs that the FTC shall reimburse Mr. Davis for the expense Mr. Davis incurs for such compliance, within fourteen (14) calendar days of being notified of such expenses by Mr. Davis’s counsel.

2. The FTC and Mr. Davis are directed to agree on a staggered return to produce responsive documents, not to exceed 30 days after entry of this Order.
3. For any responsive document withheld on privilege grounds, Mr. Davis must produce a privilege log. However, Mr. Davis does not need to produce a privilege log for documents created after July 30, 2020, the date the document Subpoena was served on Mr. Davis.
4. The Subpoena is hereby modified to reflect the limitations agreed to between the FTC and Mr. Davis during the meet-and-confer process, as memorialized in their written correspondence filed as Dkt. 218-8, Dkt. 218-9, and Dkt. 218-10. This includes, but is not limited to, the following:
  - a. The Subpoena requires production of documents created only from February 1, 2016 until the present.
  - b. Request No. 1 is modified as follows: “Documents Referring To or Relating to the products or services You provided to each of the Defendants, which shall include only the Defendants’ wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names,

dbas (doing business as), and other related entities, and all directors, members, employees, agents, contractors, consultants, and other persons working for or on behalf of the defendants that are known to You.”

- c. Request No. 2 is modified as follows: “All contracts and agreements You entered into with each of the corporate defendants and only those entities that You know to be the corporate defendants’ subsidiaries, successors, or assigns.”
- d. Request No. 4 is modified as follows: “Documents that show all Communications between You and any companies, including Seed Capital and Foundation Funding, that You know offered financing to consumers, whether to purchase any of Defendants’ products or services or to invest in real estate.”

- 5. The Court does not compel Mr. Davis to comply with Request Nos. 24-26.
- 6. The Court defers ruling upon Mr. Davis’s compliance with Request No. 29 as unripe. In the event there is a dispute over Mr. Davis’s future compliance with Request No. 29, as limited by the agreement between the FTC and Mr. Davis, the FTC or Mr. Davis may follow the provisions of DUCivR 37-1 to bring such a dispute to the Court’s attention.

SO ORDERED

SIGNED this \_\_\_\_ day of \_\_\_\_\_, 2021.

BY THE COURT

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Daphne A. Oberg  
United States Magistrate Judge