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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, et al. Defendants.	**DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO RELIEF UNDER SECTION 13(b) AND BODA** Case No.: 2:19-cv-00713-DAK-DAO Judge Dale Kimball Magistrate Judge Daphne A. Oberg

Defendants Zurixx, LLC, Brand Management Holdings, LLC, CAC Investment Ventures, LLC, CAC Investment Ventures, LLC (Puerto Rico), Carlson Development Group, LLC, Carlson Development Group, LLC (Puerto Rico), CJ Seminar Holdings, LLC, Dorado Marketing and Management, LLC, Zurixx Financial, LLC, Zurixx Financial, LLC (Puerto Rico), Christopher A. Cannon, James M. Carlson, and Jeffrey D. Spangler (collectively, "Defendants"), by and through undersigned counsel, hereby submit this reply memorandum in support of their motion for partial summary judgment as to relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53, and the Utah Business Opportunity Disclosure Act ("BODA").[1]

INTRODUCTION

In its opposition (ECF No. 269), the Utah Division of Consumer Protection (the "Division") first contends that because Judge Shelby previously held in *Fed. Trade Comm'n v. Nudge, LLC*, 430 F. Supp. 3d 1230, 1245 (D. Utah 2019) that the Division is entitled to institute an action under BODA, the Division is therefore entitled to obtain civil penalties. However, this is not what the *Nudge* court ruled, and the Division cannot meet the statutory requirement that provides that civil penalties are permitted only when a person violates a "cease and desist order issued under [BODA]" as a matter of law. Utah Code § 13-15-7.

Second, the Division argues that the subsection of BODA providing for "any other relief" under Utah Code § 13-15-6(3) inherently includes civil fines and penalties. As Justice Breyer stated in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021)

[1] While the FTC offers a number of arguments about claims (other than the Section 13(b) claims) that are not at issue in this Motion, the FTC does not oppose Defendants' Motion. *See* Plaintiff FTC's Non-Opposition to Defendants' Motions for Partial Summary Judgment (ECF No. 270). Accordingly, in light of the Supreme Court's decision in *AMG Capital Management, LLC, v. Federal Trade Commission*, 141 S. Ct. 1341 (2021), this Court should enter summary judgment in Defendants' favor with respect to the FTC's claims for monetary relief under Section 13(b) of the FTC Act under Counts I, II, III, and IV.

such a "reading would allow a small statutory tail to wag a very large dog." *Id.* at 1348. BODA provides for several types of monetary relief in its sections and subsections, including providing specific instances in which fines or civil penalties are allowable. To interpret the "any other relief" portion of Section 13-15-6(3) to encompass fines and civil penalties as argued by the Division runs contrary to basic notions of statutory construction.

The Division is not entitled to any monetary relief in this case for alleged violations of BODA as a matter of law, and Defendants' Motion for Partial Summary Judgment should be granted on this issue.

UNDISPUTED MATERIAL FACTS

The Division does not dispute the material facts at issue, but asserts that Fact 3 is irrelevant, which provides that "[t]he Division did not issue a cease and desist order to any of the Defendants for purported violations of the BODA prior to commencing this action." Fact 3 is not irrelevant and is not disputed. As shown below and in Defendants' motion, the Division cannot meet the statutory requirement that provides that civil penalties are permitted only when a person violates a "cease and desist order issued under [BODA]." Thus, the undisputed fact that the Division did not issue a cease and desist order to Defendants prior to bringing this action is highly relevant to the relief Defendants seek by this Motion. Whether the Division is entitled to seek fines and penalties under BODA is a matter of law ripe for summary judgment.

DISCUSSION

I. The Division Fails to Meet the Statutory Requirement to Obtain Civil Penalties under BODA.

In an effort to avoid the requisite showing under BODA for obtaining civil penalties, the Division conflates subsections of the statute it is tasked with enforcing. Under the plain

language of Utah Code § 13-15-6(1) the Division can "*begin adjudicative proceedings*" before a cease and desist order is issued, but it can only *obtain civil penalties* under Utah Code § 13-15-7 when it demonstrates that a person violated a cease and desist order. Such penalties are unavailable here as it is undisputed that no cease and desist order was issued or violated.

To obtain civil penalties under BODA, the Division must meet the express statutory requirements of Utah Code § 13-15-7. That is, it must prove that Defendants violated a "cease and desist order issued under [BODA]" in order to obtain "a civil penalty not to exceed $5,000 for each violation." *Id.* The Court's ruling in *Nudge* cited by the Division did not address nor change this express statutory requirement.

The *Nudge* court found in a previous order that, for the purposes of BODA, "adjudicative proceedings" are not limited to administrative proceedings, and the Division can, but is not limited to, "initiat[e] a judicial action." (*See Nudge* Order Denying Defendants' Partial Motion to Dismiss (ECF No. 93) at p. 22 (quoting Utah Code § 13-15-6(1)). The *Nudge* defendants did not raise, and the Court did not address, whether civil penalties were available under the BODA statute.

Indeed, Magistrate Judge Oberg acknowledged this distinction in denying the Division's Motion for Protective Order as to the *Nudge* defendants' Topic 5 in the Notice for 30(b)(6) Deposition of the Division:

> [T]he prior order merely determined a cease-and-desist order was not required before initiating a judicial action. (Id. at 22.) It did not address the availability of civil penalties in a judicial action where no cease-and-desist order has been entered. Accordingly, the prior order is not determinative of the issue on which Defendants seek discovery here.

(*Nudge* ECF No. 214 at p. 2.)

The Division admitted that it never issued a cease and desist letter to Defendants for purported violations of BODA. (*See* Division's Responses to Zurixx Defendants' First Set of Requests for Admission (April 19, 2021), at p. 24, Ex. B to ECF 245.) Because the Division cannot meet the requisite showing under Utah Code § 13-15-7, the Court should grant partial summary judgment and dismiss the Division's claim for civil penalties under BODA.

II. The Division Is Not Authorized to Seek Fines or Penalties under BODA.

The Division concedes that BODA § 13-15-6(3) does not expressly authorize the Division to seek civil penalties or fines in this civil action. (*See* Division Opposition at p. 4.) The Division instead argues that it is nonetheless entitled to seek these monetary remedies on two grounds: (1) the statute's passing reference to "other relief" empowers the Division to seek and be awarded financial remedies, including civil penalties; and (2) statutory causes of action necessarily bring with them the same unwritten remedies. (*Id.* at 4-5). The Division is wrong on both grounds.

The Division's argument about the scope of "other relief" under BODA violates at least two fundamental principles of statutory construction. The first is known as *ejusdem generis*, which restricts the meaning of a "general term" to "things of the same kind, class, character, or nature as those specifically enumerated, unless there is something to show a contrary intent." *GeoMetWatch Corp. v. Utah State Univ. Rsch. Found.*, 428 P.3d 1064, 1073 (Utah 2018). As applied here, this means that the general phrase "other relief" is limited by the specific types of relief mentioned in the same subsection—in this case, "judgment or injunctive relief." Utah Code § 13-15-6(3). Because fines, civil penalties, and other forms of financial remedies are not of "the same kind, class, character, or nature" as declaratory judgments and injunctive relief, the

general term "other relief" does not encompass them. *See AMG*, 141 S. Ct. at 1347 ("An 'injunction' is not the same as an award of equitable monetary relief.").

The second obstacle to the Division's reading of the statute is the principle that when the Legislature "includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the Legislature] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983); *see also Bountiful City v. Baize*, 2021 WL 1307973, at *9 (Utah Apr. 8, 2021). In Utah Code § 13-15-6(3), the Legislature authorizes the Division to recover, "in addition to any other relief," "reasonable attorney's fees, costs of court, and investigative fees" in cases where the division is granted "judgment or injunctive relief." But in the immediately preceding subsection, the Legislature authorizes "[a]ny purchaser of a business opportunity" from a noncompliant seller to recover "reasonable attorney's fee[s] and costs of court," *as well as* "actual damages or $2,000, whichever is greater." Utah Code § 13-15-6(2). And in the immediately subsequent subsection, the Legislature authorizes the "*division director*" to "impose an administrative fine of up to $2,500 for each violation of this chapter." Utah Code § 13-15-6(4)(a) (emphasis added). Further, as previously explained *supra*, Utah Code § 13-15-7 dictates when the Division may seek civil penalties. The Division's interpretation of § 13-15-6(3) would render the other sections of BODA meaningless.

That the Legislature specifically spelled out these forms of monetary relief in neighboring subsections and a subsequent section of BODA demonstrates that it did not impliedly authorize such relief in subsection (3). *Cf. Washington v. CSC Credit Servs. Inc.*, 199 F.3d 263, 268 (5th Cir. 2000) ("We hold that the affirmative grant of power to the FTC to pursue injunctive relief,

coupled with the absence of a similar grant to private litigants when they are expressly granted the right to obtain damages and other relief, persuasively demonstrates that Congress vested the power to obtain injunctive relief solely with the FTC.").

Broadening the analysis to the exhaustive remedial regimes authorized under other chapters of Title 13 only confirms the point. *See* Utah Code §§ 13-11a-4 (authorizing the Division, under the Truth in Advertising Act, to seek injunctive relief "and, if injured by the act…the recovery of damages," while also making clear that the statutory remedies "are in addition to remedies otherwise available for the same conduct under local or state law"); 13-5-14 (authorizing the Division to pursue injunctive relief and damages under the Unfair Practices Act); 13-23-7 (authorizing the Division, under the Health Spa Services Protection Act, to "file an action for injunctive relief, damages, or both"); 13-45-401 (authorizing the "attorney general" to seek a "civil fine" under the Consumer Credit Protection Act against a "person who violates" the Act, as well as "injunctive relief" and "attorney fees and costs").

The court's decision in *Department of Environmental Quality v. Golden Gardens*, 27 P.3d 579 (Utah Ct. App. 2001), is illustrative. There, the Safe Drinking Water Board, a division of the Department of Environmental Quality, held an adjudicative hearing regarding Golden Gardens Water Company's alleged violations of the Safe Drinking Water Act. The court held that the Board was not authorized to hold a hearing. *Id.* at 582. In reaching that conclusion, the court explained that "Title 19 does not specifically authorize the Board to hold hearings," and that the "omission shows that it was not the Legislature's intent to authorize the Board to hold adjudicative hearings." *Id.* at 581. That conclusion garnered additional support, as the court explained, from "the fact that the Legislature specifically authorized every other board created

under Title 19, each within their respective chapters, to hold hearings." *Id.* The statute's tangential reference to the Utah Administrative Procedures Act, which calls for agencies to hold adjudicative hearings, did not affect the analysis because it did not "specifically authorize the Board to hold hearings." *Id.* at 581-82. As another court explained in a similar context:

> The question is whether the plaintiffs, as administrative agents of the state, have statutory authority to sue for those remedies [rescission and restitution] on behalf of purchasers of securities. We hold that they do not. It would be unreasonable to infer such authority from the general language of RC 1707.26 ["such other relief"], when, in other sections of the code, the General Assembly has taken pains to create similar causes of action in purchasers of securities explicitly, rather than by implication.

State, Dep't of Com., Div. of Sec. v. Buckeye Fin. Corp., 377 N.E.2d 502, 504 (Ohio 1978).

The Division's argument that a remedy should be made available by necessity based on the "cause of action" created under BODA is also not persuasive. That doctrine applies only in the context of "private right[s] of action." *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 65 (1992). The Division is not a private actor but is instead a member of the executive branch. *See Muddy Boys, Inc. v. Dep't of Com., Div. of Occupational and Prof'l Licensing*, 440 P.3d 741, 747 (Utah Ct. App. 2019) ("Important to this analysis is the fact that administrative agencies are part of the executive (and not the judicial) branch."). As a result, the Division's authority is limited by BODA's plain language. *See Ramsay v. Kane Cnty. Hum. Res. Special Serv. Dist.*, 322 P.3d 1163, 1167 (Utah 2014) ("In order to determine whether adjudicative authority has been delegated, we look to the plain language of the applicable statute…"). Because the plain language of BODA does not provide for the relief the Division seeks in the present case, this Court should grant Defendants' motion.

Contrary to the Division's assertion, Defendants' reading of BODA does not render it

inert. The Legislature provided means for the Division to recover civil penalties and fines. The Division, however, chose not to pursue those administrative remedies in this case, but rather to proceed in court. As with any litigant, tactical decisions about where and how to press claims have tradeoffs and consequences. The Division cannot avoid the consequences and tradeoffs of their choice. Summary judgment is appropriate on the claims for fines and penalties under BODA because the Division is not authorized to seek fines or civil penalties against Defendants under the relevant BODA provisions.

CONCLUSION

Based on the foregoing, the Court should grant the relief requested in Defendants' Motion for Partial Summary Judgment. Specifically, the Court should enter an order stating that the FTC is not entitled to any equitable monetary relief under Section 13(b) and that the Division is not entitled to any monetary relief under BODA.

DATED this 23rd day of June, 2021.

/s/ Z. Ryan Pahnke

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of June, 2021, I caused a true and correct copy of the foregoing **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO RELIEF UNDER SECTION 13(b) AND BODA** to be filed electronically with the Court, which provides notice of the electronic filing to counsel of record in this matter.

/s/ Z. Ryan Pahnke

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