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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.	Case No. 2:19-cv-00713-DAK-DAO District Judge Dale A. Kimball Magistrate Judge Daphne A. Oberg

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO JSS INVESTMENT VENTURES, JSS TRUST, AND GERALD D. SPANGLER'S MOTION TO DISMISS

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I. INTRODUCTION

The Zurixx enterprise, led by Individual Defendants Cristopher A. Cannon, James M. Carlson, and Jeffrey D. Spangler, has reaped more than $530 million from the deceptive and misleading sale of real estate investment products to at least 70,000 consumers. Cannon, Carlson, and Spangler, who have each received millions of dollars from the enterprise, are officers and owners of Zurixx, LLC, and its Puerto Rico analog, Dorado Marketing and Management, LLC ("Dorado"). But the three do not own Zurixx, LLC, or Dorado directly. Instead, each has held his ownership interest through a chain of limited liability companies and also, in Jeffrey Spangler's case, a Utah trust. Plaintiffs' First Amended Complaint ("FAC") (ECF No. 134) added as defendants four such LLCs through which the Individual Defendants owned the Zurixx enterprise, along with Jeffrey Spangler's trust, and the trustee of the trust.[1] Plaintiffs added these Defendants to increase the likelihood of obtaining complete relief against the Zurixx enterprise and returning funds to its numerous injured customers.

As demonstrated below, the Motion to Dismiss (ECF No. 168) filed by three of the new Defendants associated with Zurixx's president, Jeffrey Spangler—JSS Ventures, the JSS Trust, and the JSS Trust's trustee, Gerald Spangler, Jeffrey Spangler's father (collectively, the

[1] These four added LLCs, which stand between Zurixx, LLC, and its principals are: 1) CAC Investment Ventures, LLC, which is associated with Cannon; 2) Carlson Development Group, LLC (Puerto Rico), which is associated with Carlson; 3) JSS Investment Ventures, LLC ("JSS Ventures"), which is associated with Jeffrey Spangler; and 4) Zurixx Financial, LLC (Puerto Rico), which is associated with Carlson. Plaintiffs' original Complaint (ECF No. 1) had named as Defendants three similar LLCs standing between Zurixx, LLC, and its principals: Carlson Development Group, LLC (Utah), CJ Seminar Holdings, LLC ("CJ Seminar"), and Zurixx Financial, LLC (Utah). The FAC also added Dorado and Brand Management Holdings, LLC ("Brand Management") as defendants.

"Additional Spangler Defendants")—has no merit and should be denied. The Motion rests on a mischaracterization of the FAC and a misapplication of both the Rule 12(b)(6) standard and the flexible, fact-dependent common-enterprise test. The FAC details the overlapping ownership, management structure, and business purpose among the Additional Spangler Defendants and Corporate Defendants Zurixx, LLC, Dorado, CJ Seminar, and Brand Management. These allegations are sufficient to state a claim for relief against the Additional Spangler Defendants under a common-enterprise theory and therefore make dismissal under Rule 12(b)(6) inappropriate.

II. LEGAL STANDARDS

A. Rule 12(b)(6)

"Dismissal under Rule 12(b)(6) is appropriate only if the complaint, viewed in the light most favorable to plaintiff, lacks enough facts to state a claim to relief that is plausible on its face." *United States ex rel. Reed v. KeyPoint Gov't Sols.*, 923 F.3d 729, 764 (10th Cir. 2019) (citations and internal quotations marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "In deciding whether the plaintiff has adequately stated a claim for relief," courts "view the totality of the circumstances as alleged in the complaint in the light most favorable to [the plaintiff], accepting the plaintiff's well-pled facts as true and drawing all reasonable inferences in the non-moving party's favor." *Abdi v. Wray*, 942 F.3d 1019, 1025 (10th Cir. 2019) (citations and internal quotations marks omitted).

B. Common Enterprise Under the FTC Act

As this Court has held, "[w]here the same individuals transact business through a maze of interrelated companies, all of them may be held liable as a joint enterprise." *FTC v. LoanPointe, LLC*, No. 2:10–CV–225DAK, 2011 WL 4348304, at *10 (D. Utah Sept. 16, 2011) (citing *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000)) (internal punctuation omitted). This Court further explained, "[a] common enterprise may exist where companies share common control, office space, employees, interrelated funds, *and other factors*." *Id.* (emphasis added). This Court's reference in *LoanPointe* to "other factors" makes three things clear: (1) that the factors this Court listed are not elements that must be proved in every case; (2) that other non-listed factors may support a finding of a common enterprise; and (3) that courts should look to the totality of the facts to decide whether a common enterprise exists.

Other courts agree. As one district court has stated, in denying a Rule 12(b)(6) motion challenging the pleading of a common enterprise, "no one factor is controlling. In fact, federal courts routinely consider a variety of factors." *FTC v. Wyndham Worldwide Corp.*, Civil Action No. 13–1887 (ES), 2014 WL 2812049, at *7 (D.N.J. June 23, 2014) (internal citations omitted). That court also observed, in line with the view of other courts, that "[w]hen determining whether a common enterprise exists, the pattern and frame-work of the whole enterprise must be taken into consideration." *Id.* at *5 (quoting *FTC v. Nat'l Urological Grp.*, 645 F. Supp. 2d 1167, 1182 (N.D. Ga. 2008) (internal punctuation omitted)); *see also FTC v. Pointbreak Media, LLC*, 376 F. Supp. 3d 1257, 1269 (S.D. Fla. 2019) (same) (citation omitted); *FTC v. Life Mgmt. Servs.*, 350 F. Supp. 3d 1246, 2157 (M.D. Fla. 2018) (same) (citation omitted)); *FTC v. Consumer Health Benefits Ass'n*, No. 10–CV–3551 (ILG), 2011 WL 3652248, at *5 (E.D.N.Y. Aug. 18,

2011) (quoting *Delaware Watch Co. v. FTC*, 332 F.2d 745, 746 (2d Cir.1964)) (same).

As another district court has stated, while granting summary judgment to the FTC, including on the existence of a common enterprise, "Plaintiff need not prove any particular number of entity connections or any specific connection." *Pointbreak Media*, 376 F. Supp. 3d at 1270 (quoting *FTC v. Kennedy*, 574 F. Supp. 2d 714, 722 (S.D. Tex. 2008)) (internal punctuation omitted). Instead, the court continued, the question is whether the defendants "maintained an unholy alliance." *Id.* (internal quotation marks and citation omitted).

Finally, the Ninth Circuit has explained that "entities constitute a common enterprise when they exhibit *either vertical or horizontal commonality*—qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues." *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1142-43 (9th Cir. 2010) (emphasis added) (internal punctuation and citations omitted).

III. ARGUMENT

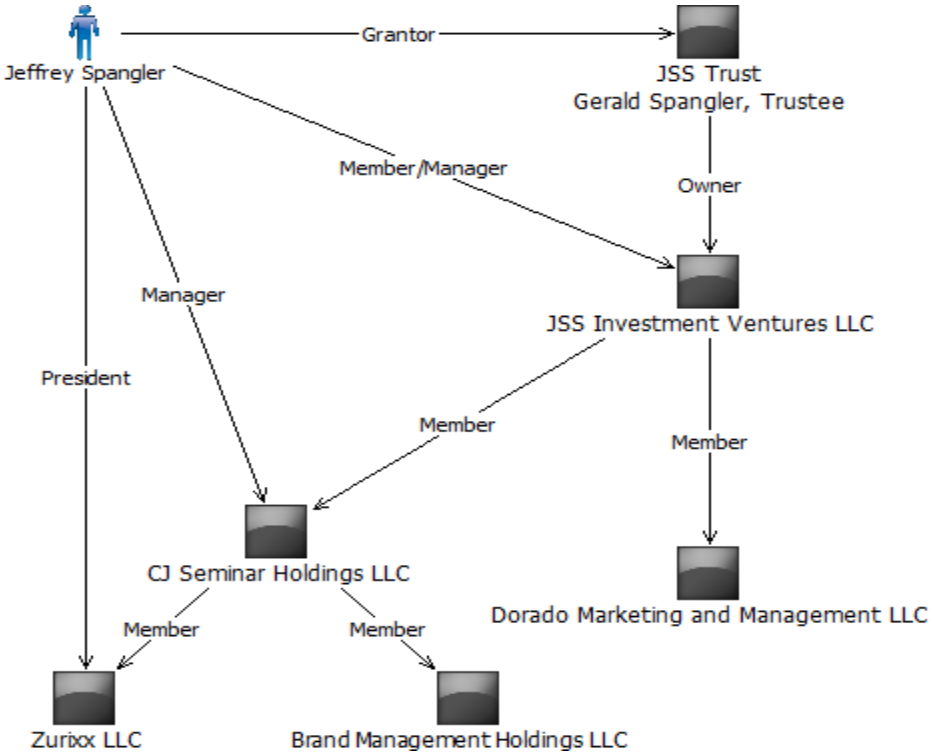
Plaintiffs allege that in operating the Zurixx enterprise, the three Individual Defendants, including Jeffrey Spangler, have "transact[ed] business through a maze of interrelated companies," *LoanPointe, LLC*, 2011 WL 4348304, at *10, which constituted a common enterprise exhibiting both vertical and horizontal commonality, *Network Servs. Depot, Inc.*, 617 F.3d at 1142-43. ECF No. 134 ¶¶ 30-41. Faced with these legally sufficient allegations, the Additional Spangler Defendants mischaracterize the FAC and misapply the law. They improperly ask this Court to treat certain non-dispositive common-enterprise factors as dispositive, and ignore the overlapping ownership, control, and business purpose that Plaintiffs do allege. ECF No. 168 at 7-12.

A. The Additional Spangler Defendants Mischaracterize the FAC

The FAC sufficiently details the roles Jeffrey Spangler and the Additional Spangler Defendants played in the Zurixx enterprise. Plaintiffs allege that Jeffrey Spangler "is an officer of Zurixx, LLC, a manager of CJ Seminar, a member and manager of JSS Ventures, and the grantor of the JSS Trust." ECF No. 134 ¶ 32; *see also id.* ¶ 38 (alleging that Jeffrey Spangler is president of Zurixx). Plaintiffs further allege that the JSS Trust, like Jeffrey Spangler, owns JSS Ventures. *Id.* ¶ 27. JSS Ventures, in turn, is alleged to be a member of both CJ Seminar (of which Jeffrey Spangler is a manager) and Dorado, which is Zurixx, LLC's Puerto Rico counterpart. *Id.* ¶ 26. CJ Seminar is alleged to be a member of Zurixx, LLC (of which Jeffrey Spangler is president), and Brand Management. *Id.* ¶ 24, 38. The diagram below depicts the relationships alleged in the FAC:[2]

[Continued on next page.]

[2] For ease of reference, the diagram shows only those entities connected to Jeffrey Spangler and the Additional Spangler Defendants. The entities through which Cristopher Cannon and James Carlson have held their ownership interests in the Zurixx enterprise are not depicted.



The Additional Spangler Defendants mischaracterize the FAC when they claim that they are "tenuously and nebulously associated with one of the individual defendants—Jeffrey Spangler." ECF No. 168 at 3. First, the connection to Jeffrey Spangler is not "tenuous or nebulous." Jeffrey Spangler is a member and manager of one of the Additional Spangler Defendants (JSS Ventures) and is the grantor of another (the JSS Trust), with which he owns JSS Ventures.[3] *See* ECF No. 134 ¶ 32. Second, those Additional Spangler Defendants are associated

[3] Plaintiffs sued Gerald D. Spangler, the JSS Trust's trustee, along with the JSS Trust itself. Gerald Spangler is named as a defendant solely in his capacity as trustee, and Plaintiffs have not otherwise sought to hold him liable for the Zurixx enterprise. Under Utah law, "[i]t is well settled that a trust is a form of ownership in which the legal title to property is vested in a trustee, who has equitable duties to hold and manage it for the benefit of the beneficiaries." *In re Hoopiiaina Tr.*, 144 P.3d 1129, 1138 (Utah 2006) (internal punctuation and brackets omitted). Thus, Plaintiffs' claims against the JSS Trust and its trustee are identical.

with Defendants other than Jeffrey Spangler, namely with Corporate Defendants Zurixx, LLC, Dorado, CJ Seminar, and Brand Management, because they hold direct or indirect ownership interests in those four LLCs, as explained in the preceding paragraph.[4] Put another way, JSS Ventures and the JSS Trust are associated with each Corporate Defendant other than the LLCs through which Cannon and Carlson hold their ownership interests in the Zurixx enterprise.

The Additional Spangler Defendants likewise are wrong when they state that "[t]he only paragraph in the [FAC] that alleges any specifics relating to JSS Ventures is paragraph 26." ECF No. 168 at 4. First, paragraph 32 expressly refers to Jeffrey Spangler's role in JSS Ventures—it states that he is a manager and member of the company. Second, as a matter of law, paragraph 26 must not be read in isolation, and should instead be read in conjunction with the paragraphs pertaining to entities JSS Ventures directly or indirectly owns, including paragraph 19 (Zurixx, LLC), paragraph 20 (Brand Management), paragraph 24 (CJ Seminar), and paragraph 25 (Dorado). *See Abdi*, 942 F.3d at 1025. The FAC amply specifies the role JSS Ventures and its subsidiaries played in the Zurixx enterprise.

The Additional Spangler Defendants further mischaracterize the FAC by contending that "Plaintiffs have also failed to allege facts identifying who the officers and managers of JSS Ventures are" and that "Plaintiffs cannot tie the control or management structure of JSS Ventures

[4] As to Cannon, the FAC alleges that he "is an officer of Zurixx, LLC, a manager of CJ Seminar, and a member of CAC Ventures." ECF No. 134 ¶ 30. CJ Seminar, in turn, is a member of Zurixx, LLC, and Brand Management, while CAC Ventures is a member of Dorado. *Id.* ¶¶ 21, 24. As to Carlson, Plaintiffs allege that he is Zurixx's CEO, and a member and manager of Carlson Development Group (Utah) and Carlson Development Group (Puerto Rico). *Id.* ¶ 31. Carlson Development Group (Utah) is a member and manager of Zurixx Financial (Utah), which in turn is a member and manager of Zurixx, LLC. *Id.* ¶¶ 22, 28. Carlson Development Group (Puerto Rico) is a member and manager of Zurixx Financial (Puerto Rico), which is a member of both Dorado and Brand Management. *Id.* ¶¶ 23, 29.

to that of any other defendant." ECF No. 168 at 9. Paragraph 32 alleges that Jeffrey Spangler is a manager of JSS Ventures, just as he an officer of Zurixx, LLC, and a manager of CJ Seminar.

And the Additional Spangler Defendants are wrong in contending that "Plaintiffs fail to allege that [Jeffrey Spangler] has any control over the trust assets." ECF No. 168 at 10. As the FAC pleads, the JSS Trust has ownership interests in JSS Ventures, CJ Seminar, and Zurixx, LLC, because the JSS Trust owns JSS Ventures, JSS Ventures is a member of CJ Seminar, and CJ Seminar is a member of Zurixx, LLC. ECF No. 134 ¶¶ 24, 26, 27.[5] Jeffrey Spangler controls these trust assets as a member and manager of JSS Ventures, a manager of CJ Seminar, and president of Zurixx, LLC. ECF No. 134 ¶¶ 32, 38.

B. The Additional Spangler Defendants Misapply the Law of Common Enterprise

The law instructs that the Court's common-enterprise inquiry should focus on whether "the same individuals transact business through a maze of interrelated companies," *LoanPointe*, 2011 WL 4348304, at *10, and should consider the "pattern and frame-work of the whole enterprise," *Wyndham Worldwide Corp.*, 2014 WL 2812049, at *5. This Court may examine a variety of factors to determine whether a common enterprise exists, *LoanPointe*, 2011 WL 4348304, at *10, but "no one factor is controlling," *Wyndham Worldwide Corp.*, 2014 WL 2812049, at *7, and Plaintiffs "need not prove any particular number of entity connections or any specific connection," *Pointbreak Media*, 376 F. Supp. 3d at 1270. Because Defendants have moved to dismiss under Rule 12(b)(6), "it is premature at this stage to determine whether Defendants *actually* operated a common enterprise sufficient for joint and several liability. This

[5] The Additional Spangler Defendants err for the same reason when they argue that "the JSS Trust is not alleged to share assets . . . with any Zurixx Defendant." ECF No. 168 at 11.

determination will, of course, depend on what the evidence ultimately shows." *Wyndham Worldwide Corp.*, 2014 WL 2812049, at *6.[6]

Here, the FAC alleges that the Additional Spangler Defendants and the other Corporate Defendants operated as a common enterprise because they "conducted the business practices described [in the FAC] through an interrelated and interdependent network of companies" with "a common business purpose, ownership, officers, managers, members, business functions, and office locations." ECF No. 134 ¶ 34. In Section III.A above, Plaintiffs demonstrate how the FAC described the Additional Spangler Defendants' roles in the interrelated and interdependent network of entities that are tied to Jeffrey Spangler and that exhibit common ownership, officers, managers, and members. The Additional Spangler Defendants also are alleged to have played a role in the Zurixx enterprise's common business purpose, which was to make money for the

[6] The Additional Spangler Defendants cite six cases discussing the law of common enterprise. *See* ECF No. 168 at 6-7. None of those cases involves a court's granting a Rule 12(b)(6) motion against the FTC, the Utah DCP, or any other law-enforcement agency. In *LoanPointe*, this Court granted summary judgment in the FTC's favor. *See* 2011 WL 4348304, at *15. In *Network Services Depot*, the Ninth Circuit affirmed a grant of summary judgment in the FTC's favor. *See* 617 F.3d at 1130-31. In *FTC v. Vacation Property Services*, No. 8:11–cv–00595–JDW–MAP, 2012 WL 1854251, at *5 (M.D. Fla. May 1, 2012), the court denied the FTC's request for summary judgment because it found that genuine issues of material fact existed. In *FTC v. Tax Club, Inc.*, 994 F. Supp. 2d 461, 465 (S.D.N.Y. 2014), the court denied the defendants' motions to dismiss. *Stoltz v. Fage Dairy Processing Industries, S.A.*, No. 14–CV–3826 (MKB), 2015 WL 5579872 (E.D.N.Y. Sept. 22, 2015), was a lawsuit filed by private companies, not the FTC. Although the court granted the defendants' Rule 12(b)(6) motion, it did so because the plaintiffs had "alleged only that [the defendants] 'operate as a single integrated and common enterprise' without setting forth any specific facts to support this allegation." *Id.* at *30. And in *FTC v. Nudge, LLC*, 430 F. Supp. 3d 1230, 1240 (D. Utah 2019), the court addressed common enterprise as a subsidiary issue in denying a Rule 12(b)(6) motion. The court held that the FTC and the Utah DCP had adequately pleaded that a defendant that ceased operating in 2016 could still be violating or about to violate the FTC Act in November 2019, by virtue of its participation in a common enterprise.

enterprise's principals, namely Jeffrey Spangler and his fellow Individual Defendants. And they did. Jeffrey Spangler received millions of dollars in salary, distributions, and other funds. ECF No. 134 ¶ 41. Therefore, Jeffrey Spangler, the Additional Zurixx Defendants, and the other Corporate Defendants are alleged to have exhibited the "strongly interdependent economic interests," *Network Servs. Depot, Inc.*, 617 F.3d at 1143, characteristic of a common enterprise.

The Additional Spangler Defendants improperly ask this Court to ignore the allegations discussed above and focus instead on common-enterprise factors that Plaintiffs have not alleged against them, such as common employees and common office locations. *See* ECF No. 168 at 8-9, 11. This Court should reject their request for two reasons. First, as noted above, the common enterprise inquiry includes no required element the absence of which is dispositive.[7]

Second, shell companies can participate in a common enterprise. *See, e.g.*, *Life Mgmt. Servs.*, 350 F. Supp. 3d at 1259-60. The evidence at trial may end up showing that JSS Ventures and the JSS Trust are shell entities set up to hold Jeffrey Spangler's assets. If so, they would not be able to avoid common-enterprise liability on the ground that, as shells, they had no employees at all, and thus no employees in common with other Corporate Defendants. Nor can they escape liability by having no true "business" location, and instead listing residential addresses in their corporate filings. *See Life Mgmt. Servs.*, 350 F. Supp. 3d at 1259 n.10 (noting that shell companies that participated in common enterprise listed residences as principal place of business in corporate filings). The evidence at trial may well show, for example, that the Bloomfield, New Mexico address to which JSS Ventures refers this Court, *see* ECF No. 168 at 8, is a

[7] This Court should ignore the Additional Spangler Defendants' comparisons of the common-enterprise allegations in this case with those in *Nudge* for the same reason.

residential address associated with an individual involved in this case, and that JSS Ventures previously listed an Individual Defendant's residence as its principal place of business in corporate filings. Such evidence would militate in favor of finding the interconnectedness characteristic of a common enterprise, not against it.

In summary, the FAC sufficiently alleges facts showing that the Additional Spangler Defendants participated in the common enterprise at issue in this matter.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Additional Spangler Defendants' Motion to Dismiss.

September 14, 2020

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that on the 14th day of September 2020, a true and correct copy of the foregoing, Plaintiffs' Memorandum of Law in Opposition to JSS Investment Ventures, JSS Trust, and Gerald D. Spangler's Motion to Dismiss, was served electronically by the Court's ECF System upon:

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