Brennan H. Moss (10267)
Michael A. Gehret (11890)
Armstrong Teasdale LLP
257 East 200 South, Suite 350
Salt Lake City, UT, 84111
Telephone: 720.613.7088
Facsimile: 720.200.0679
Email: bmoss@atllp.com
mgehret@atllp.com

Attorneys for Defendants
JSS INVESTMENT VENTURES, LLC;
JSS TRUST; and GERALD D. SPANGLER

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FEDERAL TRADE COMMISSION, and UTAH DIVISION OF CONSUMER PROTECTION,, Plaintiffs, vs. ZURIXX, LLC, a Utah limited liability company, BRAND MANAGEMENT HOLDINGS, LLC, a Delaware limited liability company, CAC INVESTMENT VENTURES, LLC, a Puerto Rico limited liability company, CARLSON DEVELOPMENT GROUP, LLC, a Utah limited liability company, CARLSON DEVELOPMENT GROUP, LLC, a Puerto Rico limited liability company, CJ SEMINAR HOLDINGS, LLC, a Utah limited liability company, DORADO MARKETING AND MANAGEMENT, LLC, f/k/a Zurixx, LLC, a Puerto Rico limited liability company, JSS INVESTMENT VENTURES, LLC, a Utah limited liability company, JSS TRUST, individually and as an owner of JSS INVESTMENT VENTURES, LLC, ZURIXX	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS JSS INVESTMENT VENTURES, LLC, JSS TRUST, AND GERALD D. SPANGLER** Civil No. 2:19-cv-00713-DAK-EJF The Honorable Judge Dale A. Kimball

FINANCIAL, LLC, a Utah limited liability company, ZURIXX FINANCIAL, LLC, a Puerto Rico limited liability company, CRISTOPHER A. CANNON, individually and as an officer of ZURIXX, LLC, JAMES M. CARLSON, individually and as an officer of ZURIXX, LLC, JEFFREY D. SPANGLER, individually and as an officer of ZURIXX, LLC, and GERALD D. SPANGLER, as trustee for the JSS TRUST. Defendants.	

Pursuant to Fed. R. Civ. P. 12(b)(6), Defendants JSS Investment Ventures, LLC ("JSS Ventures"), the JSS Trust, and Gerald D. Spangler (collectively, "Defendants"), through undersigned counsel, submit this Reply in support of their Motion to Dismiss (the "Motion") and in response to the Memorandum of Law in Opposition to the Motion ("Opposition") filed by Plaintiffs Federal Trade Commission ("FTC") and Utah Division of Consumer Protection ("UDCP," collectively with FTC, "Plaintiffs") for the claims brought in Plaintiffs' First Amended Complaint for Permanent Injunction and Other Equitable Relief ("FAC"), and state as follows:

I. INTRODUCTION

In an effort to avoid dismissal of their unsupported claims, Plaintiffs rely on allegations that plainly do not exist in the FAC. Indeed, despite the FAC only asserting one paragraph of specific allegations against each of the Defendants, Plaintiffs now argue that the FAC really alleges the detailed role each of the Defendants purportedly played in the common enterprise. The FAC only alleges that defendant Jeffrey Spangler was a manager of JSS Ventures and grantor of JSS Trust, and that JSS Ventures has an ownership interest in two other entities, which

somehow equates to a maze of interrelated companies. As discussed below, common ownership on its own is insufficient to state a claim for common enterprise liability.

Plaintiffs now seek to expand allegations found in the FAC well beyond what the plain wording of what the allegations state. Plaintiffs now claim that the FAC alleges that the Zurixx Defendants transacted business through the JSS Ventures and the JSS Trust, that the business practices conducted by Defendants show a common enterprise, that the role of the Defendants was to make or hide money for the Zurixx Defendants, and that the Defendants likely acted as shell companies for the Zurixx Defendants. No such allegations exist in the FAC. Such attempts to read things into the FAC that do not exist is not only improper and contrary to the standard for determining whether dismissal is appropriate on a motion to dismiss, but only further bolsters Defendants' argument that Plaintiffs have failed to state a claim.

Beyond one allegation of common ownership, Plaintiffs have failed to allege any facts to support any of the common enterprise factors for Defendants. Plaintiffs have therefore failed to state a claim against Defendants, and their claims must be dismissed.

II. ARGUMENT

A. Plaintiffs Incorrectly Argue that the Common Ownership Factor Controls the Common Enterprise Analysis.

While Plaintiffs correctly identify that "courts look to a variety of factors" to determine whether common enterprise liability has been adequately pled and that "no one factor is controlling," Plaintiffs spend most of the Opposition attempting to convince the Court that the "common ownership" factor alone controls the common enterprise analysis. *F.T.C. v. Wyndham Worldwide Corp.*, No. CIV.A. 13-1887 ES, 2014 WL 2812049, at *7 (D.N.J. June 23, 2014); Opposition at 8. However, this approach misapplies the law and ignores the balancing test of all

the factors that the Court must engage in to determine whether common enterprise has been sufficiently pled.

Plaintiffs argue that the allegations of common ownership in the FAC tie the Defendants to the corporate structure of the Zurixx Defendants, but such arguments are circular and based on a flawed premise of business ownership. The only allegations of common ownership between Defendants and the Zurixx Defendants in the FAC are that that Jeffrey Spangler is a member and manager of JSS Ventures and that JSS Ventures is a member of CJ Seminar and Dorado. FAC ¶¶ 26, 32. Plaintiffs argue that because JSS Ventures is a member of CJ Seminar Holdings, that also gives JSS Ventures "indirect" control or ownership over every entity associated with CJ Seminar Holdings. (Opposition at p. 7) This is simply false. The fact that LLC A is a member of LLC B, that does not mean that LLC A is an owner or manager of every entity in which LLC B has an interest. This argument ignores the corporate form without any basis for doing so. *F.T.C. v. Wyndham Worldwide Corp.*, No. CIV.A. 13-1887 ES, 2014 WL 2812049, at *4 (D.N.J. June 23, 2014) ("absent highly unusual circumstances, the corporate entity will not be disregarded.") Plaintiffs' logic is circular: Plaintiffs cannot disregard the corporate form, and then use that as evidence that the corporate form should be disregarded to find common enterprise liability.

Plaintiffs also make this false equivalency of ownership as to the JSS Trust. The only allegation in the FAC related to assets owned by the JSS Trust is that it owns JSS Ventures. FAC ¶27. Plaintiffs use this fact to argue that the Trust's ownership of JSS Ventures gives it an ownership interest in every other entity related to JSS Ventures, including CJ Seminar Holdings and Zurixx, LLC. (Opposition at 8). This is likewise an improper inference that cannot serve as

an allegation of common ownership. By Plaintiff's own allegations in the FAC, the JSS Trust does not manage or own, nor is it controlled by, any of the Zurixx Defendants.

However, even taking the FAC's allegations relating to the common ownership of JSS Ventures alone, allegations relating to this solitary factor are legally insufficient to find common enterprise liability because "no one factor is controlling." *Wyndham Worldwide Corp.*, 2014 WL 2812049, at *7; *F.T.C. v. Consumer Health Benefits Ass'n*, No. 10 CIV. 3551 ILG RLM, 2012 WL 1890242, at *8 (E.D.N.Y. May 23, 2012) (identifying "the various factors that courts balance in determining whether a common enterprise existed — ***none of which is dispositive***")(emphasis added). In fact, it is clear that the common ownership factor cannot be controlling or dispositive because ownership does not necessarily equal a joint scheme. As an example, an entity may have ownership interest in a fish market and a local newspaper – it is absurd to assume that the common ownership means the fish market and local newspaper are part of a common enterprise. This is why the courts always require more than mere ownership; there must be evidence of multiple factors to demonstrate the "unholy alliance" required for common enterprise liability.

Significantly, Plaintiffs fail to cite to a single case in which common enterprise liability was found based on common ownership alone. *See, e.g. F.T.C. v. LoanPointe, LLC*, No. 2:10-CV-225DAK, 2011 WL 4348304, at *10 (D. Utah Sept. 16, 2011), *aff'd*, 525 F. App'x 696 (10th Cir. 2013) (common enterprise liability existed based on "shared ownership and control, office space and addresses, and employees"); *F.T.C. v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1143 (9th Cir. 2010) (finding common enterprise liability where "companies pooled resources, staff, and funds; they were all owned and managed by Castro and his wife; and they all

participated to some extent in a common venture to sell internet kiosks"); *Wyndham Worldwide Corp.*, 2014 WL 2812049, at *5 (FTC stated a claim for common enterprise where the FTC alleged "specific facts relating to common control" and common "business functions, employees, and office locations").

Plaintiffs have not alleged a single fact relating to any other of the common enterprise liability factors as to Defendants. As discussed extensively in the Motion, the FAC is devoid of any specific facts that Defendants had common control, office space, officers, employees, comingled funds, customer referral system, or any other common enterprise factor with the Zurixx Defendants. Because Plaintiffs have failed to plead any facts to support the common enterprise factors, other than common ownership, Plaintiffs have failed to state a claim for common enterprise liability.

B. Plaintiffs Improperly Read Facts into the FAC That Do Not Exist.

In an apparent attempt to cure their deficient pleadings with regard to the other common enterprise factors, Plaintiffs make unsupported inferences and allude to facts that plainly do not exist in the FAC.

When courts determine the "legal sufficiency of the complaint, the burden remains with the plaintiff to assert facts sufficient to support the claim," and courts "are not bound by conclusory allegations [and] unwarranted inferences." *Hackford v. Babbitt*, 14 F.3d 1457, 1465 (10th Cir. 1994). The Opposition makes numerous "unwarranted inferences" in an attempt to bolster Plaintiffs' assertion of common enterprise liability.

First, Plaintiffs allege that Defendants and the Zurixx Defendants "conducted the business practices described [in the FAC] through an interrelated and interdependent network of

companies." Opposition at p. 9, FAC ¶34. The FAC goes to great lengths to detail the "business practices" of the Zurixx Defendants, but does not mention a single detail about what the alleged "business practices" of the Defendants are. The Opposition fails to identify a single business practice of the Defendants, but once again lumps them in with the Zurixx Defendants. Opposition at p. 9. The FAC has only one paragraph specific to each Defendant, and those paragraphs do not even identify what the business of JSS Ventures and the JSS Trust actually are. FAC ¶26-27. In fact, the business of JSS Ventures very well could be running a fish market, as far as the FAC is concerned. And there is nothing in the FAC to show that the JSS Trust is anything more than a standard trust – a vehicle for holding and maintaining assets.

While the FAC does state CJ Seminar, Zurixx, LLC, and Dorado "advertised, marketed, distributed, or sold the real estate investment products at issue in this Complaint," it does not state that JSS Ventures or the JSS Trust ever did so. FAC ¶26-27. Rather, the FAC alleges that JSS Ventures undertook these actions "by way of," or by virtue of, its ownership interest in CJ Seminar and Dorado. FAC ¶26. Also, the FAC alleges that the JSS Trust undertook these actions by "by way of" its ownership interest in JSS Ventures. FAC ¶27. There is a crucial distinction between JSS Ventures and the JSS Trust actually engaging in these business practices and attributing the business practices of other entities to JSS Ventures and the JSS Trust. Once again, Plaintiffs ignore the corporate form without justification. The whole point of common enterprise liability is that a corporate entity may be liable for the deceptive acts and practices of other corporate entities, but only **after** common enterprise liability has been found. *LoanPointe, LLC*, 2011 WL 4348304, at *10. Plaintiffs cannot attribute the actions of CJ Seminar, Zurixx, LLC, and Dorado to Defendants as evidence of common enterprise liability – Defendants' own

actions and characteristics (such as common location, shared employees, comingled funds, etc.) must prove that they are part of the common enterprise **before** the actions of other entities can be attributed to them.

Second, Plaintiffs claim there are allegations in the FAC that Defendants had a "common business purpose" with the Zurixx Defendants to make money for Jeffrey Spangler and the other individual defendants. Opposition at p. 10. This allegation is nowhere in the FAC. The FAC fails to state how Defendants made money at all – it does not identify any products or services sold by Defendants, any contracts between Defendants and any other Zurixx Defendant, or any business practices of the Defendants whatsoever. Rather, the FAC alleges that JSS Ventures has an asset – it owns part of CJ Seminar and Dorado. FAC ¶26. The JSS Trust's only asset is alleged to be ownership of JSS Ventures. FAC ¶27. As discussed above, mere ownership cannot be equated with business activities and is not sufficient on its own to establish common enterprise liability. Further, the FAC fails to allege that Jeffrey Spangler or any of the other Zurixx Defendants ever received money or distributions from JSS Ventures or the JSS Trust. As Jeffrey Spangler is not a beneficiary of the JSS Trust, it is impossible for him to receive any money from the JSS Trust. Thus, Plaintiffs' own allegations, or lack thereof, undercut the Opposition's unsupported claim that Defendants' business purpose was to make money for Jeffrey Spangler.

Third, Plaintiffs now argue that Defendants could be shell companies, and that the Bloomfield, New Mexico business address listed for JSS Ventures may possibly be connected with one of the individual Zurixx Defendants, such as a prior residence. Opposition at p. 10-11. These statements are nothing more than speculation that should be disregarded by the court. *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level.") Moreover, Plaintiffs are once again reading allegations into the FAC that simply are not there. The FAC is barren of any reference to Defendants holding or hiding assets for Jeffrey Spangler. Further the FAC does not discuss the Bloomfield, New Mexico address beyond stating that it is the principal place of business for JSS Ventures. FAC ¶26. The FAC does not tie the Bloomfield, New Mexico address to any other Zurixx Defendant whatsoever.

As Plaintiffs have failed, once again, to identify any allegations in the FAC beyond mere ownership to tie business activities of the Defendants to the alleged Zurixx enterprise, Plaintiffs have not met their burden of pleading common enterprise liability. Thus, the claims against Defendants must be dismissed.

III. CONCLUSION

For the reasons above, and for the reasons listed in the Motion, all claims against Defendants JSS Ventures, the JSS Trust, and Gerald Spangler should be dismissed for failure to state a claim.

Dated: September 28, 2020

Respectfully submitted,

ARMSTRONG TEASDALE LLP

/s/ Michael A. Gehret

Brennan H. Moss
Michael A. Gehret
Attorneys for Defendants
JSS INVESTMENT VENTURES, LLC;
JSS TRUST; GERALD D. SPANGLER

CERTIFICATE OF SERVICE

I certify that on September 28, 2020, I caused a true and correct copy of **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS JSS INVESTMENT VENTURES, LLC, JSS TRUST, AND GERALD D. SPANGLER** to be sent via the Court's electronic notification system to all counsel of record.

/s/ Michael A. Gehret