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7  
8 **IN THE UNITED STATES DISTRICT COURT**  
9 **FOR THE DISTRICT OF ARIZONA**

10 Federal Trade Commission,

11 Plaintiff,

12 v.

13 Vemma Nutrition Company, *et al.*

14 Defendants.  
15  
16  
17  
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Case No. CV-15-01578-PHX-JJT

**OBJECTION OF BK BOREYKO  
TO TEMPORARY RESTRAINING  
ORDER AND REQUEST FOR  
PRELIMINARY INJUNCTION  
AND JOINDER IN POSITION OF  
VEMMA CORPORATE  
DEFENDANTS**

**Hearing Date: September 15, 2015**

19 Pursuant to this Court's Order entered on September 1, 2015 at Dkt. #40 (the  
20 "Order"), Defendant Benson K. Boreyko ("Boreyko"), by and through undersigned  
21 counsel, files the following objection to the *Ex Parte Application for Temporary*  
22 *Restraining Order With Asset Freeze, Appointment of a Receiver, and Other Equitable*  
23 *Relief* (Dkt. #9; the "FTC Application") filed by the Federal Trade Commission (the  
24 "FTC") on August 17, 2015 on an *ex parte* basis. BK further joins in the Response and  
25 Objection (the "Vemma Response") filed by corporate Defendants Vemma Nutrition  
26 Company and Vemma International Holdings, Inc. (collectively, "Vemma" or the  
27 "Company Defendants"). Boreyko also joins in the evidentiary objections filed by the  
28 Company Defendants relating to the declarations and alleged evidence submitted in

1 support of the FTC Application.

2 This objection and joinder is supported by the materials submitted by the other  
3 Defendants, and the *Declaration of Benson K. Boreyko* (the “Boreyko Declaration”)  
4 filed concurrently.

## 5 **I. INTRODUCTION.**

6 As established in the Boreyko Declaration and the evidentiary submissions of  
7 Vemma, the devastating effects of the draconian measures invoked by the FTC -  
8 without a stitch of prior notice or any attempt to address or resolve any alleged concerns  
9 - cannot be overstated. The FTC sought and obtained *ex parte* relief based on an  
10 incomplete, misleading, and vastly insufficient presentation of the facts and  
11 circumstances regarding Vemma’s operations (and success).

12 As more fully set forth in the Vemma Response, the FTC has failed to meet its  
13 burden (whether for *ex parte* relief or preliminary injunctive relief) to justify the  
14 extreme and crippling shutdown of a booming international business. Mr. Boreyko will  
15 not repeat the same analysis or argument in this filing, but instead joins and incorporates  
16 the Vemma Response and supporting materials.

## 17 **II. ADDITIONAL ARGUMENTS AND AUTHORITIES.**

18 The FTC has ambushed Vemma and its principal, and improperly stripped Mr.  
19 Boreyko of his income, assets, and ability to earn a living. Rather than cooperate to  
20 reach an agreeable pre-trial resolution, the FTC has prevented Mr. Boreyko from  
21 accessing funds to pay the most basis of expenses – including court-ordered family  
22 support obligations.<sup>1</sup> There is no basis to deny Mr. Boreyko access to his own funds in  
23 order to fulfill obligations to his family and creditors. After seeking a consensual  
24 solution with the FTC and Receiver and being denied, Mr. Boreyko now respectfully  
25 requests the assistance of this Court to provide a set amount of funds, according to an

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26  
27 <sup>1</sup> Counsel for Mr. Boreyko reached out to counsel for the FTC and Receiver for the  
28 release of a limited amount of funds to pay for ordinary and necessary family expenses  
and obligations. The request was denied.

1 approved budget to be submitted under seal, to pay for living expenses and family  
2 support.

3       There is absolutely no evidence that Mr. Boreyko has concealed or attempted to  
4 dissipate assets (the exact opposite is true - Mr. Boreyko promptly provided the  
5 financial disclosures requested by the FTC along with supporting documentation), and  
6 there is no basis for the complete and total freeze of all assets and funds of Mr. Boreyko  
7 implemented unilaterally by the FTC. Indeed, there is no need for any freeze of assets  
8 or funds of Mr. Boreyko. If the Court believes there is a need for reasonable restraints  
9 on the transfer of assets owned by Mr. Boreyko, as stated in the Boreyko Declaration,  
10 Mr. Boreyko voluntarily will agree to reasonable constraints. In point of fact, the only  
11 significant transfer of assets contemplated by Mr. Boreyko involved the infusion of his  
12 personal funds into Vemma to assist the company which short term cash flow needs.

13       Perhaps worst of all, the FTC absolutely should have known that what they  
14 submitted to this Court in support of their request for an *ex parte* asset freeze was  
15 insufficient as a matter of Ninth Circuit law. The allegations made by the FTC do not  
16 satisfy either the burden for *ex parte* relief, or the burden for preliminary injunctive  
17 relief in the form of an asset freeze.

18       **A.     The FTC failed to satisfy the applicable standards for the relief**  
19       **sought.**

20       The standard employed to determine whether injunctive relief is appropriate  
21 depends upon whether the defendant has notice of the request for injunctive relief. The  
22 FTC has not met its burden under either standard in this Case.

23       Section 13(b) of the Federal Trade Commission Act (“FTCA”), codified at 15  
24 U.S.C. § 53(b), permits the FTC to seek a TRO or injunction against a person or entity  
25 that it has reason to believe is violating or about to violate a provision of law enforced  
26 by the FTC. Section 13(b) provides that “[u]pon a proper showing that, weighing the  
27 equities and considering the Commission’s likelihood of ultimate success, such action  
28 would be in the public interest, and after notice to the defendant, a temporary restraining

1 order or preliminary injunction may be granted without bond . . . .” 15 U.S.C. § 53(b).  
 2 This standard is less rigorous than the typical standard for a preliminary injunction  
 3 because no showing of irreparable harm is required. However, section 13(b) requires  
 4 notice to the defendant. Thus, to take advantage of this more lenient standard, the FTC  
 5 must give notice. Here, the FTC utterly failed to do so, not even a single phone call was  
 6 made before freezing assets and shutting down a company.

7 In contrast, when the FTC seeks *ex parte* relief, it must satisfy Rule 65(b).  
 8 *F.T.C. v. Onlineyellowpages.com, Inc.*, No. C14-838 RAJ, 2014 WL 2694243, at  
 9 \*2 (W.D. Wash. June 10, 2014) (“the court has not found precedential authority  
 10 relieving the FTC of its obligation to satisfy Rule 65(b) when seeking *ex parte* relief”);  
 11 *see also F.T.C. v. Loewen*, No. C12-1207MJP, 2012 WL 4045207, at \*1 (W.D. Wash.  
 12 Sept. 13, 2012) (FTC initially sought an *ex parte* TRO but the court denied it because  
 13 the FTC “did not meet the irreparable injury requirement of Federal Rule 65(b), which  
 14 allows an *ex parte* TRO”). Under Fed. R. Civ. P. 65(b) (1), “[t]he court may issue a  
 15 temporary restraining order without written or oral notice to the adverse party or its  
 16 attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show  
 17 that immediate and irreparable injury, loss, or damage will result to the movant before  
 18 the adverse party can be heard in opposition; and (B) the movant’s attorney certifies in  
 19 writing any efforts made to give notice and reasons why it should not be required.”  
 20 Accordingly, when the FTC seeks *ex parte* relief, the FTC must prove irreparable  
 21 injury. Here, they have failed to do so.

### 22 1. Ex Parte TRO

23 Generally, courts have been extremely hesitant to grant an *ex parte* TRO  
 24 pursuant to Rule 65. *Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th  
 25 Cir. 2006) (“courts have recognized very few circumstances justifying the issuance of  
 26 an *ex parte* TRO”). An *ex parte* TRO may be granted where “notice to the defendant  
 27 would render fruitless the further prosecution of the action.” *Id.* Accordingly, in order  
 28 for a party seeking an asset freeze to show likelihood of irreparable harm, the party

1 “must show a likelihood of dissipation of the claimed assets, or other inability to  
2 recover monetary damages, if relief is not granted.” *Johnson v. Couturier*, 572 F.3d  
3 1067, 1085 (9th Cir. 2009). In those cases, the plaintiff must show that “defendants  
4 would have disregarded a direct court order and disposed of the goods within the time it  
5 would take for a hearing and must support such assertions by showing that the adverse  
6 party has a history of disposing of evidence or violating court orders or that persons  
7 similar to the adverse party have such a history.” *Onlineyellowpagestoday.com, Inc.*,  
8 2014 WL 2694243, at \*2.

9 This exacting standard is not met by conclusory statements regarding FTC  
10 defendants generally – which is precisely what the FTC relied upon in this Case. For  
11 example, in *Onlineyellowpagestoday.com, Inc.*, the court denied the FTC request for an  
12 *ex parte* TRO because the FTC had not provided evidence that the defendants “have a  
13 history of disregarding court orders, disposing of evidence, or transferring or hiding  
14 assets” or that individuals similar to the defendants have such a history. *Id.* A  
15 declaration from an attorney at the FTC stating that in the FTC’s experience other  
16 defendants who engaged in fraudulent schemes will often withdraw funds was found to  
17 be a legal conclusion unsupported by any facts. *Id.* at \*3. Because the overbroad TRO  
18 would have essentially shut down the defendants’ business without requiring the FTC to  
19 “meet any standard of proof,” the request for the TRO was denied. *Id.* at \*4. This Case  
20 calls for the same result.

21 Rather, courts tend to find a likelihood of dissipation of assets only where the  
22 defendant has been directly involved in fraudulent behavior. “By way of example,  
23 some courts have found it appropriate to impose an asset freeze in the following types  
24 of situations: (1) where defendant had convinced his fellow directors and trustees to  
25 consent to diverting nearly \$35 million from the company’s account into his personal  
26 bank account, and (2) where defendant had a history of making intra-family transfers  
27 and had refused to disclose asset information in defiance of court order.” *F.T.C. v.*  
28 *Millennium Telecard, Inc.*, No. CIV.A. 11-2479 JLL, 2011 WL 2745963, at \*11 (D.N.J.

July 12, 2011); *see also F.T.C. v. Patriot Alcohol Testers, Inc.*, No. CIV. A. 91-11812-C, 1992 WL 27334, at \*7 (D. Mass. Feb. 13, 1992) (the fact that at least one substantial physical asset was unaccounted for, and the individual's conduct in withdrawing funds prior to the freeze was sufficient to grant a preliminary injunction and asset freeze). Short of this type of egregious behavior, courts are hesitant to find a likelihood of dissipation of assets. The court in *Millennium Telecard* noted that even though there was evidence that the company's owner had disregarded the corporate form, these were isolated acts that by themselves did not "demonstrate a history or pattern of deceptive or fraudulent conduct" by the owner. *Id.* at \*13. Accordingly, the court modified the asset freeze to allow the defendant some access to his personal assets. *Id.*

## 2. Preliminary Injunction

Even in circumstances where the FTC is not required to show a likelihood of irreparable harm, the FTC must show that there is at least a possibility that the defendant may dissipate assets. *F.T.C. v. Debt Solutions, Inc.*, No. C06-298JLR, 2006 WL 1041996, at \*7 (W.D. Wash. Apr. 3, 2006). "Because Congress did not provide for an automatic asset freeze for violations of the FTCA, the court holds that to show a 'possibility' that a Defendant will dissipate assets, the FTC cannot rely on conjecture." *Id.* Here, the FTC has not shown even a possibility that Mr. Boreyko will dissipate assets, and has relied instead on pure conjecture.

It is not enough to rely on the fact that the individual defendant is the subject of allegations of violations of the FTCA or even that a company has dissipated assets. In *Debt Solutions*, 2006 WL 1041996, at \*7, the court found sufficient evidence to support an inference that the company would dissipate financial assets absent an asset freeze - but this did not automatically subject the owner to the same asset freeze. Rather, the FTC "must offer evidence specific to the Defendant that reveals a possibility that the Defendant will dissipate assets." *Id.* There, the court found no evidence that the individual defendants would dissipate assets:



1 At best, the FTC surmises that because the individual Defendants are  
2 accused of violations that could subject them to substantial liability, they  
3 will dissipate assets. If this were sufficient to establish a “possibility” of  
4 dissipation, then every defendant subject to an injunction under the  
FTCA would automatically be subject to an asset freeze.

5 *Id.* A fair reading of the FTC Application and papers reveals that the FTC had and has  
6 no basis to support an asset freeze against Mr. Boreyko (or Vemma, for that matter).

7 **B. The FTC Application and related submissions do not allege any basis**  
8 **for the drastic relief sought.**

9 What makes the FTC’s conduct in this Case even more egregious is the fact that  
10 the FTC previously investigated Mr. Boreyko in connection with New Vision, and there  
11 was absolutely no evidence or indication that Mr. Boreyko or New Vision attempted to  
12 dissipate assets, conceal funds, or made any other attempt to be anything other than up  
13 front and transparent. Likewise, a Vemma affiliate in Italy was subjected to a similar  
14 process by the Italian authorities (but there, the Italian authorities did not unilaterally  
15 crater the business, did not take drastic and unwarranted measures, and instead engaged  
16 in a process that resulted in continued operation and success for the company and its  
17 members and employees). The Italian authorities similarly did not find any evidence  
18 that anyone associated with Vemma (Mr. Boreyko or otherwise) did anything other than  
19 cooperate fully with the investigation process.

20 Based on the applicable authorities, and the utter dearth of any evidence or even  
21 any allegation (other than pure conjecture and irrelevant speculation) to support the  
22 relief sought by the FTC, this particular asset freeze obtained by the FTC may be the  
23 most reckless asset freeze possible when considering the facts and circumstances of this  
24 Case and the applicable law.

25 The FTC’s actions have ruined a company, destroyed reputations (including Mr.  
26 Boreyko’s), and left multitudes of employees jobless – all without any basis or evidence  
27 to support these drastic and unsubstantiated actions, and certainly without meeting the  
28 applicable standards and burden that the FTC must bear.

1 **III. CONCLUSION.**

2 As Mr. Boreyko stated in his own words:

3 After my 21 years of successfully operating as a CEO of two Direct  
4 Selling Association (“DSA”) member network marketing companies,  
5 generating hundreds of local jobs, creating part time incomes for tens of  
6 thousands of families around the world - to not even be warned by the  
7 FTC of potential problems is unthinkable in this country. To shut down  
8 my company worldwide, freeze all my assets and accounts, to label me  
9 a flight risk without any basis whatsoever, to destroy my company, my  
10 brands and my reputation around the world in the media should never be  
11 allowed to happen before a simple phone call. The damage to families,  
12 the damage to my family, and the damage to my reputation cannot be  
13 undone. 21 years of very hard work, massive risk taking, and a  
14 tremendous amount of commitment deserves better. The very nature of  
15 a pyramid scheme is to harm people. Vemma, at its core mission, exists  
16 to help people. I know the difference, and I would never engage in the  
17 latter.

18 *See* Boreyko Declaration at ¶30.

19 The FTC has failed miserably to establish a likelihood of success on its claims  
20 that: (i) Vemma is a pyramid scheme; (ii) Vemma and Mr. Boreyko made misleading  
21 representations concerning income potential for Vemma Affiliates; (iii) Vemma or Mr.  
22 Boreyko would have dissipated assets had they received basic notice of the FTC Action;  
23 and (iv) the FTC has any right to pretrial relief in this case. As a result, Mr. Boreyko  
24 respectfully requests that the Court:

- 25 A. Dissolve the TRO immediately;
- 26 B. Deny any further injunctive relief requested by the FTC in this action; and
- 27 C. Grant Mr. Boreyko such other and further relief as is just and proper under  
28 the circumstances of this case.



1 Respectfully submitted this 10th day of September 2015.

2 GALLAGHER & KENNEDY, P.A.

3 By /s/ John R. Clemency  
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8 *Attorneys for Benson K. Boreyko a/k/a*  
9 *B.K. Boreyko*

10 **CERTIFICATE OF SERVICE**

11 I hereby certify that on this 10<sup>th</sup> day of September, 2015, I electronically  
12 transmitted a PDF version of this document to the Clerk of the Court, using the  
13 CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all  
14 CM/ECF registrants and non-registered parties.

15 /s/ Gloria Kannberg  
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