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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission; Plaintiff, v. **Vemma Nutrition Company**, a corporation; **Vemma International Holdings, Inc.**, a corporation; **Benson K. Boreyko** a/k/a **B.K. Boreyko**, individually and as an officer of Vemma Nutrition Company and Vemma International Holdings, Inc.; and **Tom Alkazin**, an individual; Defendants, and **Bethany Alkazin**, an individual; Relief Defendant.	**No. CV-15-01578-PHX-JJT** **PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION TO EXCLUDE IRRELEVANT EVIDENCE AT THE PRELIMINARY INJUNCTION HEARING AND MEMORANDUM IN SUPPORT**

I. Introduction

Plaintiff Federal Trade Commission moves to preclude Defendants from introducing certain irrelevant evidence, specifically evidence of whether the Defendants' products had some value to consumers, and evidence of the existence of some satisfied consumers.

II. Product Value Is Irrelevant to Determine the Issues before the Court

Plaintiff Federal Trade Commission (FTC) filed its complaint (Dkt. 3) alleging that Defendants violated the FTC Act, 15 U.S.C. § 45(a), by using deceptive earnings claims to promote an illegal pyramid operation, and by providing others the means and instrumentalities to do the same. Defendants contend that they are a multilevel marketing company that markets nutritional drinks. *See* Dkt. 71 pp. 2-3. Defendants suggest that their drinks have actual value. However, product value is clearly irrelevant to determine whether Defendants are making deceptive earnings claims, promoting an illegal pyramid operation, or providing others the means and instrumentalities to do the same. Accordingly, Plaintiff seeks to preclude any testimony or evidence relating to product value.

More than a quarter of a century of jurisprudence makes clear that the alleged value of a product is not relevant to pyramid analysis. The seminal case on pyramid analysis is *In re Koscot Interplanetary, Inc*., 86 F.T.C. 1106 (1975), a multilevel marketing company that purportedly sold cosmetics and toiletries. In *Koscot*, the administrative court held that a pyramid scheme is "characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell

a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to the sale of product to ultimate users." *Koscot*, 86 F.T.C. at 1180-81. Notably, *Koscot* recognized that sales of product had taken place and that, therefore, the product must have some market value. Nonetheless, the *Koscot* court pointedly ignored product value in its analysis. Instead, it focused on whether the scheme promised "rewards unrelated to the sale of the product" to ultimate users. The opinion explains why:

> [E]ven where rewards are based upon sales to consumers, a scheme which represents indiscriminately to all consumers that they can recoup their investments by virtue of the product sales of their recruits must end up disappointing those who can find no recruits capable of making retail sales.

Koscot, 86 F.T.C. at 1180.

The opinion in that case concludes that Koscot's scheme was an illegal pyramid because "recruitment with rewards unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed." *Koscot*, 86 F.T.C. at 1180. In *Webster v. Omnitrition International, Inc.*, the Ninth Circuit approved the two-prong *Koscot* test for defining an illegal pyramid scheme, again without considering product value. *Omnitrition*, 79 F.3d 776, 781 (9th Cir. 1996).

It is Defendants' compensation structure and marketing practices that are relevant to the Court's analysis here, not the purported value of its products. Defendants charged with Section 5 violations often argue that their products have value, but courts have not found those argument compelling. *See, e.g.*, *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604-

606 (9th Cir. 1993) (Rejecting claims by a merchant who deceptively sold rhinestones as diamonds and stating, "there is nothing dishonest about selling rhinestone jewelry; it has some value. However, it is dishonest to represent that rhinestone jewelry is actually diamond, and to charge diamond prices for it.")

Because product value is irrelevant to a liability determination of whether Defendants made deceptive earnings claims or deceptively promoted an illegal pyramid, evidence of product value is irrelevant, has no probative value, and is inadmissible under Fed. R. Evid. 402. The presentation of any value-related evidence at a preliminary injunction hearing will serve only to confuse the issues and waste time on the presentation of irrelevant evidence under Fed. R. Evid. 403, without countervailing benefit. For those reasons, Plaintiff opposes the introduction of any evidence of product value.

III. Evidence of Satisfied Consumers is Likewise Irrelevant and Should Be Excluded

Defendants similarly suggest that because they have some satisfied consumers, they cannot be found to have violated Section 5 of the FTC Act, 15 U.S.C. § 45(a). However, several federal cases have held that the existence of "satisfied" customers is not a defense under the FTC Act. *See, e.g., FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 530 (S.D.N.Y. 2000); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1273 (S.D. Fla. 1999) (existence of some satisfied customers is not a defense to FTC Act liability); FTC v. *Amy Travel Serv., Inc.*, 875 F. 2d 564, 572 (7th Cir. 1989) ("[T]he FTC need not prove that every consumer was injured. The existence of some satisfied customers does not constitute a defense under the FTCA."); *Basic Books, Inc. v. FTC*, 276 F.2d 718, 721

(7th Cir. 1960) ("[B]asic Books could have called . . . twenty trustworthy witnesses to testify that such representations had not been made to them. Such evidence, however, would not refute the testimony which was previously given by . . . witnesses that such misrepresentations had in fact been made to them. That a person or corporation, through its agents, may have made correct statements in one instance has no bearing on the fact that they made misrepresentations in other instances."); *Erickson v. FTC*, 272 F.2d 318, 322 (7th Cir. 1959) (stating the fact "that petitioner had satisfied customers is not a defense to Commission action for deceptive practices"); *Indep. Directory Corp. v. FTC*, 188 F.2d 468, 471 (2d Cir. 1951) (affirming exclusion of proof of satisfied customers stating petitioners cannot be excused for deceptive practices by showing that consumers, "even in large numbers, were satisfied with the treatment petitioners accorded them").

As stated in *FTC v. Gill*:

> At oral argument, defendants argue that it would be "unfair" for the Court to order such damages against defendants, as "thousands" of their customers are satisfied with their services, and as such have not been injured. Even assuming that defendants do have thousands of satisfied consumers, it does not excuse their violation of the law.

Gill, 71 F. Supp. 2d. at 1049 n.21.

Thus, testimony or evidence concerning satisfied consumers is irrelevant and should be precluded.

IV. CONCLUSION

Based upon the foregoing, Plaintiff respectfully asks the Court preclude Defendants from introducing the type of testimony, documents, or other evidence described above.

Dated: September 11, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on September 11, 2015, Plaintiff Federal Trade Commission electronically transmitted the attached Document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Filing to all CM/ECF registrants including:

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