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FEDERAL TRADE COMMISSION

**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 REPLY TO
VEMMA DEFENDANTS'
OBJECTIONS TO EVIDENCE**

I. INTRODUCTION

Plaintiff Federal Trade Commission (FTC) filed its complaint (Dkt. 3) on August 17, 2015, 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. Based upon Defendants' deceptive conduct and the enormity of consumer injury, Plaintiff moved for entry of a temporary restraining order and preliminary injunction that prohibits Defendants from further law violations, appoints an independent receiver to oversee the business, and preserves certain assets pending adjudication of the case. (Dkt. 4).

Plaintiff's pleadings were accompanied by volumes of declarations and supporting documents from witnesses, which were filed as evidence in support. (*See* Dkts. 10-14, 21, 30; Plaintiff's Exhibits (PE) 1-128). A preliminary injunction hearing is set for September 15, 2015. (Dkt. 40). On September 10, Defendants Vemma Nutrition Company and Vemma International Holdings, Inc. (Vemma Defendants), filed Objections to Inadmissible Evidence (Dkt. 73).¹ In their objections—which do not comply with Local Rules²—Defendants submit incorrect assertions of law.

II. ARGUMENT

Defendants seek to exclude all of the evidence Plaintiff has submitted in this action. Defendant rely upon a host of inapplicable and incorrect legal arguments,

¹ All of the defendants have joined in Vemma Defendants' objections. (*See* Dkts. 70, 76).

² Vemma Defendants' objections (Dkt. 73) is 27 pages in length. The Local Rules state that motions, responses, briefings and memoranda must not exceed 17 pages unless otherwise ordered in advance of filing by assigned judge for good cause shown. LRCiv 7.2(e). Defendants have neither sought leave to exceed page limitations nor shown good cause for doing so.

including assertions that Plaintiff's evidence is inadmissible hearsay, lacks a proper foundation, or is unauthenticated. None of Defendants' arguments has merit.³

Plaintiff's proposed exhibits include sworn declarations from regulators and others, including Federal Trade Commission investigator Matthew Thacker (Plaintiff Exhibits (PE) 1, 125, 127), Michigan Assistant Attorney General Adam Fracassi (PE 71), and Bonnie Patton, Executive Director of Truth in Advertising, a nonprofit organization dedicated to educating the public about deceptive marketing scams (PE 70). These sworn declarations introduce and authenticate pertinent documents related to Defendants' business activities: public records (PE 2-3), including records documenting law enforcement activities (PE 1-68, 71-71c, 72-128); certified records of regularly conducted activities (PE 3-5); materials that contain opposing party statements or circumstantial guarantees of trustworthiness, such as Defendants' advertising, marketing, and business materials and solicitations, recorded videos, conversations, and presentations and captured websites (PE 7-68, 70-71c, 73-77, 81-124). Plaintiff has also submitted the expert declaration Stacie Bosley, Ph.D. (PE 69). All of the submitted evidence is admissible at the preliminary injunction hearing and trial. Fed. R. Civ. P. 65(a)(2).

A. PRELIMINARY INJUNCTIONS ARE ENTERED ON LESS FORMAL PROCEDURES

The U.S. Supreme Court has recognized that "a preliminary injunction is customarily granted on the basis of procedures that are less formal and on evidence that is less complete than in a trial on the merits." *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981); *see also Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir.

³ Concurrent with this reply, Plaintiff files FRE Notices Under Rules 807, 902, and 1006.

2003); *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004); *F.S.L.I.C. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987).

The preliminary injunction hearing, like the trial on the ultimate merits, will be decided by the court without a jury. The Rules of Evidence are not applied with the same stringency when a matter is tried before the court, as opposed to before a jury. *Herb Reed Enters., LLC v. Florida Entm't Mgmt., Inc.*, 736 F.3d 1239, 1250 n.5 (9th Cir. 2013) (“Due to the urgency of obtaining a preliminary injunction at a point when there has been limited factual development, the rules of evidence do not apply strictly to preliminary injunction proceedings.”); *Builders Steel Co. v CIR*, 179 F.2d 377, 379 (8th Cir. 1950) (“In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence . . . [o]n the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to but which, on review, the appellate court believes should have been admitted.”).

B. DEFENDANTS’ HEARSAY OBJECTIONS ARE FRIVOLOUS

Defendants challenge Plaintiff’s exhibits under FRE 801(c), which generally excludes hearsay. Defendants’ arguments are unavailing for three reasons. First, hearsay is admissible at a preliminary injunction hearing. Second, many of Plaintiff’s exhibits are not hearsay. And, third, Plaintiff’s exhibits are admissible under hearsay exceptions.

1. Hearsay is Admissible at a Preliminary Injunction Hearing

It is beyond refute that hearsay evidence is admissible at a hearing on a preliminary injunction request under Fed. Rule Civ. P. 65. *Houdini Inc. v. Goody Baskets*

LLC, 166 F. App'x 946, 947 (9th Cir. 2006) (“[T]he district court did not abuse its discretion in considering hearsay and biased evidence of actual confusion because the rules of evidence do not strictly apply to preliminary injunction proceedings.”); *Johnson v. Couturier*, 572 F.3d 1067, 1083 (9th Cir. 2009) (internal citations omitted); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988) (*en banc*).

The Ninth Circuit recognizes that “[t]he urgency of obtaining a preliminary injunction necessitates a prompt determination and makes it difficult to obtain affidavits from persons who would be competent to testify at trial. The trial court may give even inadmissible evidence some weight, when to do so serves the purpose of preventing irreparable harm before trial.” *Flynt Distrib. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984). Hearsay is allowed, and all of Plaintiff’s exhibits (PE 1-128) should be admitted.

2. Plaintiff’s Evidence is Not Hearsay

Rule 801 generally bars a statement that: (a) the declarant does not make while testifying in court that is (b) offered to prove the truth of the matter asserted. FRE 801(c). However, many of Plaintiff’s exhibits do not meet the definition of hearsay.

a. Statements offered to show falsity are not hearsay.

Statements that are offered to show falsity, not truth, are not hearsay. *United States v. Abrams*, 947 F.2d 1241, 1249 (5th Cir. 1991) *cert. denied*, 505 U.S. 1204 (1992); *United States v. Gibson*, 690 F.2d 697, 700 (9th Cir. 1982) (“in a mail fraud prosecution, the admission of conversations between alleged victims and participants in the scheme did not raise an ‘actual hearsay question,’ because the testimony was not offered for its veracity.”). Plaintiff’s complaint arises from Defendants’ deceptive practices, including

the false and misleading earnings claims that Defendants widely disseminated in their advertising, marketing, and promotional materials—brochures (PE 7-11, 13-14, 17, 22, 70a, 71a, 126), websites (PE 6, 12, 15-16, 18, 20, 73, 78), recorded videos (PE 19a-h, 21, 73, 74-77, 83-123), and conversations and presentations (PE 26-27, 71b-c, 79-82). These materials, offered to prove Defendants' deception, are not hearsay.

b. Statements by a party opponent are not hearsay.

Similarly, statements made by (i) a party in an individual or representative capacity, (ii) by a person whom a party authorized to make the statement, or (iii) by a party's agent or employee on a matter within the scope of that relationship is not hearsay. FRE 801(d)(2); *see United States v. Evans*, 572 F.2d 455, 487 (5th Cir. 1978) cert. denied, *Tade v. U.S.*, 439 U.S. 870 (1978). Statements made by Defendants or their agents as contained in written materials or recorded videos, conversations, and presentations are therefore not hearsay. (PE 6-22, 26-27, 70-71c, 73-123, 126).

3. Plaintiff's Evidence Is Admissible Under Hearsay Exceptions

Irrespective of the admissibility of hearsay evidence at a preliminary injunction hearing, the Federal Rules of Evidence provide a number of hearsay exceptions under which Plaintiff's exhibits are admissible. These exceptions include: (a) public records, (b) certified records of regularly conducted activity, and (c) documents with circumstantial guarantees of trustworthiness.

a. Public Records are admissible.

Plaintiff's exhibits include public records from Arizona state agencies (PE 2-3). It

also includes records documenting law enforcement activities (PE 1, 71, 78-82, 125, 127) and describing information observed by law enforcement (PE 1, 6-68, 71-71c, 73-128). These exhibits are admissible under FRE 803(8), which allows records, reports, statements, or data compilations of public offices or agencies, setting forth factual findings resulting from an investigation.

b. Certified Records of Regularly Conducted Activity are admissible.

Plaintiff's exhibits include records of regularly conducted activity from an Arizona state agency and financial institutions. (PE 3-5). These exhibits include certifications from appropriate records custodians and are properly excepted from the hearsay rule by FRE 803(6).⁴ Records of regularly conducted business activities are admissible, regardless of whether the declarant is available as a witness.

c. Documents with Circumstantial Guarantees of Trustworthiness.

FRE 807 permits the court to admit an out-of-court statement that: (i) has equivalent circumstantial guarantees of trustworthiness; (ii) is offered as evidence of a material fact; (iii) is more probative on the point for which it is offered than any other evidence that can be procured through reasonable efforts; and (iv) best serves the general purposes of the Rules of Evidence and interests of justice.

⁴ The admissibility of evidence under Federal Rule 803(6) is "chiefly a matter of trustworthiness," and courts have "great latitude" in making a decision. *Miss. River Grain Elevator, Inc. v. Bartlett & Co., Grain*, 659 F.2d 1314, 1319 (5th Cir. 1981). "The rationale behind this exception is that business records 'have a high degree of reliability because businesses have incentives to keep accurate records.'" *United States v. Ary*, 518 F.3d 775, 786 (10th Cir. 2008)(internal citations omitted). FRE 902(11) is a corollary to Rule 803(6) that serves to self-authenticate certified domestic records of regularly conducted activity that are accompanied by a written declaration of the custodian of records.

Plaintiff's proposed exhibits, including materials relating to law enforcement's undercover purchases (PE 1, 6, 26, 78-80), recording of conversations and live presentations (PE 27-28, 81-82, 70, 71b-c), captures of websites, screen shots, and videos (PE 12-21, 73-124), business records (PE 125-128), Defendants' advertising, marketing, and solicitation materials (PE 7-18, 22, 70a, 71a), have ample guarantees of trustworthiness. These materials, all of which evidence Defendants' deceptive promotion of an unlawful pyramid scheme, are more probative of the issues than other evidence than Plaintiff can reasonably procure. The documents, which depict or feature Defendants and their representatives, show the court precisely how Defendants have marketed their business opportunity to consumers and includes their many deceptive earnings claims.

C. AUTHENTICITY

Because Defendants' presentations (PE 27-28, 70, 71b-c, 81-82), websites and videos (PE 12-21, 73-124), business records (PE 125-128), and advertising, marketing, and solicitation materials (PE 7-18, 22, 70a, 71a) are damaging, Defendants seek to prevent the court from receiving and examining them. Defendants claim that Plaintiff's proposed exhibits are not properly authenticated. In fact, authenticity of a document can be demonstrated by circumstantial evidence, including the document's appearance, contents, substance, and other distinctive content. Fed. R. Evid. 901(b)(4). Under this standard, the exhibits referred to in Plaintiff's declarations are easily authenticated.

1. Business records and Advertising, Marketing, and Solicitation Materials

The trial judge has wide latitude in the admission of evidence. *United States v.*

Saballa, 1989 U.S. App. LEXIS 23762 at *6 (9th Cir. Nov. 3, 1989) (relying on *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 773 (9th Cir. 1981)).

2. Recorded Videos, Conversations, and Presentations

In the Ninth Circuit, the admissibility of taped conversations is within the discretion of the court. *United States v. Espinoza-Godinez*, 1997 U.S. App. LEXIS 885, *4-5 (9th Cir. Jan. 17, 1997) (citing *United States v. Lane*, 514 F.2d 22, 27 (9th Cir. 1975), *Cape v. United States*, 283 F.2d 430, 435 (9th Cir. 1960)).⁵ The court need not adhere to “rigid foundation requirements which purport to cover the varied and particularized circumstances of different cases.” *U.S. v. King*, 587 F.2d at 960. Instead, “[a]uthenticity and general trustworthiness are the keystones for a proper foundation.” *United States v. Mouton*, 617 F.2d 1379, 1383 (9th Cir. 1980). The court may admit a recording when “[t]he party introducing it carries its burden of going forward with foundation evidence demonstrating that the recording as played is an accurate reproduction of relevant sounds previously audited by a witness.” *King*, 587 F.2d at 960.

“The foundation which must be laid for the introduction of recordings of conversations . . . is a matter largely within the good discretion, judicially exercised, of the trial judge.” *Id.* at 961 (citing *Brandow v. United States*, 268 F.2d 559, 567 (9th Cir. 1959)). A proper foundation is made when a law enforcement agent, subject to cross-

⁵ Factors that a court may consider when admitting recorded conversations include whether: (1) the recording device was capable of taking the conversation offered in evidence; (2) the operator of the recording device was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions or deletions have been made in the recording; (5) the recording has been preserved; (6) the speakers are identified; (7) the conversation was made voluntarily and in good faith, without any kind of inducement. *United States v. King*, 587 F.2d 95, 960 (9th Cir. 1978) (relying on *United States v. McKeever*, 169 F. Supp. 426, 430 (D.N.Y. 1958) (rev'd on other grounds, 271 F.2d 669 (2d Cir. 1959))).

examination, describes how the recordings were made, identifies relevant voices on the tapes, and testifies that the tapes are accurate, complete, and authentic. *See United States v. Ridgill*, 1999 U.S. App. LEXIS 16284, 4-5 (9th Cir. July 15, 1999); *United States v. McIntosh*, 1989 U.S. App. LEXIS 22919, 2-3 (9th Cir. June 19, 1989). The FTC has provided sufficient indicia of the authenticity and trustworthiness of the recordings presented to the court, many of which in fact feature the Individual Defendants.⁶

3. TRANSCRIPT EXCERPTS ARE AN AID TO THE COURT

It is within the discretion of the trial court to allow the use of transcripts of recordings to assist the trier of fact. *See United States v. McMillan*, 508 F.2d 101, 105 (8th Cir.), *cert. denied*, 421 U.S. 916 (1974). Partial transcripts are similarly admissible as an aid. *Saballa*, 1989 U.S. App. LEXIS 23762, at *8 (citing *United States v. Tornabene*, 687 F.2d 312, 317 (9th Cir. 1982)). Plaintiff has submitted full recordings of videos, conversations, and presentations, and transcript excerpts are provided as an aid to the Court. (PE 23-68).

D. PLAINTIFF PROVIDED RECORDS SUMMARIZED PURSUANT TO FRE 1006

Defendants claim Plaintiff filed FRE 1006 summaries without providing copies of the original documents. In fact, Plaintiff provided Defendants copies of the materials (along with records custodian certificates) prior to the filing of Defendants' motion.

IV. CONCLUSION

Based upon the foregoing, Plaintiff respectfully asks the court to admit Plaintiff's exhibits for both the preliminary injunction hearing and trial, as authorized by Fed. R. Civ. P. 65 (a)(2).

⁶ *See generally* PE 1, 5-22, 70-128.

Dated: September 11, 2015

Respectfully submitted,

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FEDERAL TRADE COMMISSION

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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