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8 *Attorneys for Defendants Vemma Nutrition*
9 *Company and Vemma International Holdings,*
10 *Inc.*

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE DISTRICT OF ARIZONA**

13
14 Federal Trade Commission,
15 Plaintiff,
16 vs.
17 Vemma Nutrition Company, *et al.*,
18 Defendants.

NO. CV-15-01578-PHX-JJT

**STIPULATED MOTION TO
WITHDRAW MOTIONS FILED BY
CORPORATE DEFENDANTS AND
FTC LOCATED AT DOCKET NOS.
128 AND 134, AND SUBMISSION
OF AGREEMENT REGARDING
SAME**

19 Defendants Vemma Nutrition Company and Vemma International Holdings, Inc.
20 (collectively, "**Corporate Defendants**"), hereby submit this Stipulated Motion to
21 withdraw the following motions (collectively, the "**Motions**"): Defendants Vemma
22 Nutrition Company And Vemma International Holdings, Inc.'s Emergency Motion To
23 Approve Affiliate Communications [Docket No. 128] filed by the Corporate Defendants;
24 and Plaintiff Federal Trade Commission's Motion To Prohibit Reclassification Of
25 Affiliates Without Their Affirmative Consent And To Prevent Dissemination Of
26

1 Materials Describing Proposed Compensation Plan Before Approval [Docket No. 134],
2 filed by the Federal Trade Commission (the “FTC”).

3 The Corporate Defendants and the FTC have reached an agreement regarding the
4 matters raised in the Motions, the terms of which are set forth in the letter agreement
5 attached hereto as **Exhibit "1"**. Accordingly, the Corporate Defendants and the FTC
6 stipulate that the Motions should be withdrawn and that the Court should vacate the
7 briefing deadline associated therewith.

8 For these reasons, the Corporate Defendants and the FTC respectfully request that
9 the Court enter an Order in the proposed form attached (a) deeming the Motions
10 withdrawn and (b) vacating the briefing deadline associated with the Motions.

11 RESPECTFULLY SUBMITTED this 7th day of October, 2015.

12 QUARLES & BRADY LLP
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16 By *s/ Kevin D. Quigley*

17 Brian R. Booker
18 John A. Harris
19 Kevin D. Quigley
20 Edward A. Salanga

*Attorneys for Defendants Vemma Nutrition
Company, Vemma International Holdings, Inc.*

21 Agreed to by:

22 */s/ Jason C. Moon*

23 Angeleque P. Linville
24 Jason C. Moon
25 Anne D. Lejeune
26 Emily B. Robinson

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2015, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and a copy was electronically submitted to counsel at the e-mail addresses below:

<p>Counsel for Plaintiff, Federal Trade Commission:</p> <p>Jonathan E. Neuchterlein General Counsel</p> <p>Angeleque P. Linville alinville@ftc.gov</p> <p>Jason C. Moon jmoon@ftc.gov</p> <p>Anne D. Lejeune alejeune@ftc.gov</p> <p>Emily B. Robinson erobinson@ftc.gov</p> <p>Counsel for Defendants Tom and Bethany Alkazin:</p> <p>Coppersmith & Brockelman PLC Keith Beauchamp kbeauchamp@cblawyers.com</p> <p>Marvin Christopher Ruth mruth@cblawyers.com</p>	<p>Counsel for Receiver Robb Evans & Associates, LLC:</p> <p>Dentons US LLP Gary Owen Caris gary.caris@dentons.com</p> <p>Lesley Anne Hawes lesley.hawes@dentons.com</p> <p>Joshua S. Akbar joshua.akbar@dentons.com</p> <p>Counsel for Defendant Benson K. Boreyko:</p> <p>John R. Clemency Gallagher & Kennedy john.clemency@gknet.com</p> <p>Lindsay Michelle Weber lindsay.weber@gknet.com</p>
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s/ Kelly Thwaites



EXHIBIT "1"



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October 7, 2015

VIA EMAIL AND U.S. MAIL

Jason Moon
Federal Trade Commission
1999 Bryan Street, Suite 2150
Dallas, TX 75201
jmoon@ftc.gov

RE: FTC v. VEMMA NUTRITION, CO., et al, United States District Court For the District of Arizona, NO. CV-15-01578-PHX-JJT

Dear Mr. Moon:

We are responding to your letter dated October 5, 2015 (the "Letter"). We appreciate your response to our proposal from Monday to resolve the matters at issue in our respective motions regarding Affiliate re-classification and related matters in light of the Court's September 18, 2015 Order (Dkt#118) (the "Order"). Some of the points raised in your Letter and its attachment are not acceptable. However, Vemma is willing to proceed in accordance with the following points, which we believe address the matters raised in your letter, comply in all respects with the Order, and resolve the current issues in a simple and straightforward manner:

1. Affiliate Re-Classification.

(a) Vemma will communicate and implement Affiliate re-classification using the specific terms of the Affiliate re-classification message which you proposed in the mark-up attached to your letter to Ed Salanga, dated September 25, 2015. We have attached another copy of that communication. This should resolve the specific content of the communication, as it adopts the language you proposed previously.¹ The communication will be delivered to those affiliates who meet the re-classification criteria either through a message on the Vemma website when the individual visits the website to order product, an email directed to that individual, or, as discussed below, through a phone call to those individuals who are currently registered on auto-ship.

¹ This will not include additional language proposed by the Monitor that is inconsistent with the Order, as you acknowledged in your September 25 email to Mr. Salanga. See Exhibit D to your motion (Dkt#134).

(b) As we discussed, Vemma intends to contact all participants on auto-ship to confirm they want to continue auto-ship deliveries. If that contact is by phone, Vemma will state the same message (i.e., the message in subsection (a) above) to those Affiliates that meet the criteria and request that they state affirmatively whether they want to continue to be classified as an Affiliate or whether they want to be classified as a Customer.

(c) Vemma will provide the FTC a copy of the email notification, the web notification (screenshots are sufficient), and the telephone script in final form before they go live. Only those existing Affiliates that indicate affirmatively that they wish to be classified as Customers in response to the web-site communication or during the calls discussed above will be re-classified as Customers going forward. Vemma will maintain records of this process and the results. If Vemma proposes any re-classification program other than as described above, Vemma will send the FTC the details of any such program and provide the FTC an opportunity to review and object to that program. If the FTC objects, Vemma will not implement the program absent prior approval from the Court.

2. Sales And Marketing Materials.

(a) Vemma and the FTC will agree that the following are not "new marketing or sales materials", in any media form (website, brochures, emails, etc.) that require review by the FTC under Section I.E. of the Order prior to publication or dissemination by Vemma:

(i) Product descriptions that are unchanged from previous product descriptions other than appearance or formatting changes such as font, color, or background.

(ii) Price lists, to the extent the prices advertised are available to all prospective purchasers and do not include any special incentives or promotions.

(This is the language that you proposed on these points.)

(b) Vemma and the FTC will agree that the following are "new marketing or sales materials", in any media form (website, brochures, emails, etc.) that do require review by the FTC in accordance with the procedure stated in Section I.E. of the Order prior to publication or dissemination by Vemma:

(i) Materials that contain descriptions of Vemma's compensation plan or proposed compensation plan and that are intended to be disseminated to participants or prospective participants in Vemma's marketing program.

(This is the language that is proposed in the draft order attached to your letter.)

(c) Except for the categories of materials described in subsections (a) and (b) above, Vemma and the FTC reserve their respective rights in regard to what newly produced materials may constitute "new marketing or sales materials" for purposes of Section I.E. of the Order.

3. Implementation And Other Matters.

(a) The above points adopt the language proposals you have made in either your letter of October 5 or in your prior correspondence. Accordingly, we believe that agreement to these points resolves fully the matters at issue in the respective Vemma and FTC motions.

(b) A separate order approving the agreement outlined above between Vemma and the FTC is neither required nor contemplated under the Order. The Order provides that court approval is required only if there is a continuing objection by the FTC to materials that are subject to Section I.E. of the Order. See Order at Section I.E. Because agreement by Vemma and the FTC to the above terms resolves the current FTC objection, Vemma and the FTC can simply inform the Court that they have consensually resolved the matters at issue in their respective Emergency Motion to Approve Affiliate Communications (Dkt #128) and Motion to Prohibit Reclassification of Affiliates (Dkt #134), and the motions are withdrawn and require no further consideration or ruling by the Court (based on the Court's comments at the October 2 hearing, we believe this is also the course of action the Court would prefer). Obviously, if either party were to violate the agreed terms, the violation could be brought to the Court's attention. Alternatively, the parties can mutually submit a stipulated order stating that the matters at issue in the two motions have been resolved by the parties and that the motions have been withdrawn.

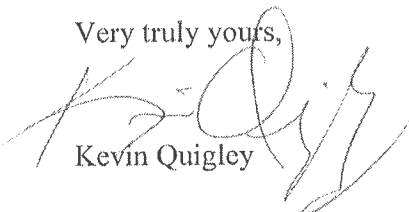
(c) Section I.E. of the Court's Order provides that Vemma is required to vet proposed new marketing or sales materials only with the FTC, and only the FTC has an objection right regarding such materials. See Order at Section I.E. Accordingly, it is not required or contemplated that the Monitor approve of such materials (and it would add another layer of cost and complexity to an already cumbersome process). Vemma will continue to keep the Monitor apprised of such materials and of communications and any agreements between Vemma and the FTC regarding same that are required by the Order.

4. Conclusion.

The foregoing proposal resolves the matters in dispute under the competing motions, and it does so in accordance with language proposed by the FTC.

Please send us a response confirming the FTC's agreement to these terms and we can jointly notify the Court that Vemma and the FTC have consensually resolved matters and that the respective motions are withdrawn. We will then prepare a short stipulated order to which the letter can be attached and we can lodge with the Court.

Very truly yours,



Kevin Quigley

Jason Moon
October 7, 2015
Page 4

AGREED AND ACCEPTED:

FEDERAL TRADE COMMISSION

By:



Jason C. Moon
(Printed Name)

Staff Attorney - SWRO
(Title)

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United States of America
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Southwest Region

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September 25, 2015

Mr. Edward Salanga
Quarles & Brady LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004

Re: *FTC v. Vemma Nutrition Company, et al.*
Proposed communication to affiliates

Dear Mr. Salanga:

We received the proposed communication to Affiliates that you sent us on September 22, 2015. Please be advised that any proposed re-classification on Vemma's system must be done in a way that does not destroy or modify data regarding past classifications, or otherwise interfere with the FTC's or the Monitor's ability to review or query Vemma's sales data (including classification data) as it existed before entry of the Preliminary Injunction. Any destruction or modification of past sales data will constitute spoliation and a violation of the Preliminary Injunction.

Although the proposed communication may not violate the Preliminary Injunction or require pre-approval by the FTC, the language raises concerns that may need to be brought to the Court's attention if not resolved. While it is appropriate for Vemma to contact participants to determine their appropriate classification as Customers versus Affiliates *going forward*, the proposed communication could be read as asking participants to confirm by their silence that they were incorrectly designated as Affiliates *in the past*. As you are aware, this has been a contentious issue in litigation, and the Court has rejected Vemma's attempt to redefine certain of its Affiliates as Customers. The FTC will dispute any inference that any reclassification generated by this procedure is evidence of the true status or intent of participants in the past. Also, given that Affiliates affirmatively chose their status in the past, it is more appropriate to require Affiliates to make an affirmative choice to be reclassified, to avoid the danger of misclassification through inaction. Accordingly, I am attaching a proposed redline draft that makes it more clear that Vemma is focusing on future classifications, and converts the "opt out" into an "opt in" procedure. We also believe that it would be appropriate to mention upcoming changes to the Affiliate program, as Mr. Johnson suggested in his September 24 email.

If Vemma does not agree to our proposed changes, please contact me next week at the number listed above to discuss the issue. I will be out of the office on Monday, but will return on Tuesday.

Sincerely,

/s/ Jason C. Moon

Jason C. Moon

Enclosure (as stated)

Cc: Kenton Johnson

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We are reviewing our membership base to confirm that our status designations are appropriate going forward. In our company, an Affiliate is someone who intends to participate in and earn rewards under Vemma's Marketing Plan, and a Customer is someone who is primarily interested in purchasing and using our products. Our system allows participants when they enroll to self select to be categorized as an "Affiliate" or as a "Customer".

Our records indicate that you selected the "Affiliate" designation when you enrolled with Vemma, and that you have ordered Vemma product since your enrollment. However, our records further indicate that since you enrolled with Vemma, you have not taken any of the following actions:

1. Purchased an Affiliate Pack;
2. Enrolled a person into the Vemma Marketing Plan; or
3. Taken any other actions that would allow you to earn a commission under the Vemma Marketing Plan.

If you intend in the future only to purchase products for your own consumption (rather than participate in and earn rewards under Vemma's Marketing Plan), please reply to this email with the word "Customer" by October 5, 2015 and we will reclassify you as a Customer. You may also contact our customer service department to discuss your classification. ~~Based on this information, it does not appear that you are enrolled with Vemma to participate in the Vemma Marketing Plan; rather it appears that you are ordering Vemma product for your own consumption. Accordingly, and so that our records accurately reflect who is participating with Vemma with the intent to participate in the Marketing Plan and who is participating primarily to buy Vemma product for their own consumption, we are reclassifying you as a Customer in our system.~~ If you take no action, you will continue to be designated as an Affiliate.

[insert information regarding changes to affiliate plan]

Remember that, as a Customer, you will still be able to buy our products at the same prices offered to Affiliates and, if you change your mind and later decide that you want to participate in Vemma's Marketing Plan, you can always ask us to re-classify you as an Affiliate.

~~If you believe our reclassification of your status as a Customer is incorrect, and that you are primarily interested in participating in Vemma's Marketing Plan, please let us know by October 5, 2015. All you have to do is reply to this email and tell us that you should remain an Affiliate in our system, and we will maintain that status in our records. You may also call our customer service department.~~

Thank you for your cooperation.

BK



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission,

Plaintiff,

vs.

Vemma Nutrition Company, *et al.*,

Defendants.

NO. CV-15-01578-PHX-JJT

**[PROPOSED] ORDER GRANTING
STIPULATED MOTION TO
WITHDRAW MOTIONS FILED BY
CORPORATE DEFENDANTS AND
FTC LOCATED AT DOCKET NOS.
128 AND 134, AND SUBMISSION
OF AGREEMENT REGARDING
SAME**

The Court having reviewed the Stipulated Motion To Withdraw Motions Filed By Corporate Defendants And FTC Located At Docket Nos. 128 and 134, And Submission Of Agreement Regarding Same (the "**Stipulated Motion**"),¹ based on the entire record before the Court, the agreement among the Corporate Defendants and the FTC attached to the Stipulated Motion as Exhibit "1", and good cause appearing,

IT IS HEREBY ORDERED that the Stipulated Motion is GRANTED.

IT IS FURTHER ORDERED that the Defendants Vemma Nutrition Company

¹ Capitalized terms not defined in this Order have the meaning ascribed to them in the Stipulated Motion.

1 And Vemma International Holdings, Inc.'s Emergency Motion To Approve Affiliate
2 Communications [Docket No. 128] filed by the Corporate Defendants, and the Plaintiff
3 Federal Trade Commission's Motion To Prohibit Reclassification Of Affiliates Without
4 Their Affirmative Consent And To Prevent Dissemination Of Materials Describing
5 Proposed Compensation Plan Before Approval [Docket No. 134] filed by the FTC
6 (collectively, the "**Motions**"), are both deemed withdrawn.

7 **IT IS FURTHER ORDERED** that the briefing deadline associated with the
8 Motions is vacated.

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