

NOT FOR PUBLICATION

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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Federal Trade Commission,  
10 Plaintiff,  
11 v.  
12 Vemma Nutrition Company, *et al.*,  
13 Defendants.

No. CV-15-01578-PHX-JJT

**ORDER**

14 At issue is the Motion for Approval and Payment of Fees and Expenses of  
15 Temporary Receiver and Its Counsel (Doc. 120, Mot.) filed by former Temporary  
16 Receiver Robb Evans & Associates (“REA”), to which the Receivership Defendants filed  
17 a Response in Opposition (Doc. 136, Resp.) and REA filed a Reply in support (Doc. 149,  
18 Reply). The Court heard oral argument on the Motion on October 21, 2015. (Doc. 159.)  
19 For the reasons that follow, the Court will grant the Motion in part and deny it in part.

20 The operative facts underlying the Motion are as follows. The Court entered a  
21 Temporary Restraining Order (TRO) in this matter appointing REA as Temporary  
22 Receiver as of August 21, 2015. (Doc. 25 at 15.) REA continued to act as Temporary  
23 Receiver until the Court’s Preliminary Injunction Order issued on September 18, 2015,  
24 dissolving the receivership but appointing REA as monitor. (Doc. 118.)

25 The TRO set out the duties of the Temporary Receiver, which constituted 18 broad  
26 categories and can be found on pages 16-19 of the TRO. (Doc. 25.) In abbreviated  
27 fashion, the duties included: 1) assuming full control of Receivership Defendants; 2)  
28 taking possession and control of all assets and documents of Receivership Defendants; 3)

1 continuing to conduct the business of Receivership Defendants in such manner as the  
2 Temporary Receiver “may in good faith deem to be necessary or advisable to operate the  
3 business profitably and lawfully, if at all”; 4) taking all steps necessary to secure the  
4 premises, assets, inventory, information and websites or other communication media of  
5 Receivership Defendants; 5) managing the business of Receivership Defendants,  
6 including making purchases, deal with existing contracts, pay expenses, open and/or  
7 administer bank accounts, and engage in legal action to preserve and protect the assets of  
8 Receivership Defendants; and 6) preparing a report for the benefit of the Court prior to  
9 the Preliminary Injunction hearing detailing the state of the Receivership Defendants’  
10 business, assets, liabilities, actions taken by the Temporary Receiver under the Order, and  
11 contemplated further actions. (Doc. 25 at 16-19, 23-24.) The TRO also provided that  
12 REA

13 and all persons hired by the Temporary Receiver as  
14 authorized by this Order, are entitled to reasonable  
15 compensation for the performance of duties undertaken  
16 pursuant to this Order, and for the cost of actual out-of-pocket  
17 expenses incurred by them solely from the Assets now held  
18 by or in the possession or control of, or which may be  
19 received by, the Receivership Defendants.

20 (Doc. 25 at 25.)

21 On September 21, 2015, three days after the temporary receivership terminated,  
22 REA filed its motion for fees and expenses. The motion and attachments contained a  
23 detailed listing of all persons who performed work on behalf of the Temporary Receiver,  
24 their hourly rates, justifications therefor, and hourly amounts billed by each person, by  
25 date, with a justification by task. REA seeks fees and costs totaling \$294,452.11 in four  
26 categories: Receiver fees in the amount of \$192,987.60; costs expended by the Receiver  
27 in the amount of \$19,466.99; fees for its legal counsel in the amount of \$79,247.55; and  
28 costs expended by counsel in the amount of \$2,749.97.

The Receivership Defendants oppose the amount of the award, arguing it is unreasonable both because it is excessive and because REA’s performance of its duties as

1 Temporary Receiver was deficient and injurious to the Receivership Defendants. They  
2 suggest that a reasonable and appropriate aggregate award would be no greater than  
3 \$100,000.00.

4 The parties' moving papers thoroughly detail the arguments and counter  
5 arguments, and the Court will not recount them here. At a hearing in this matter on  
6 October 21, 2015, the Court partially set forth findings that will govern this award.  
7 Among those findings, the Court concluded that the Receivership Defendants' first basis  
8 for reducing the award – its attack on the way REA carried out its duties under the TRO –  
9 was unavailing. Receivership Defendants contend that REA failed in its duties as  
10 Temporary Receiver by ceasing operations of Receivership Defendants' multilevel  
11 marketing program and resisting entreaties by its executives to continue operating.  
12 According to Receivership Defendants, this action was in error because it did not  
13 maintain the "status quo" of the business.

14 This argument fails. As the Court noted at the October 21 hearing, the TRO  
15 required the Temporary Receiver to preserve, to the extent possible, the status quo of the  
16 assets, not to maintain the status quo of the business. Moreover, as quoted above, the  
17 TRO required the Temporary Receiver to make a good faith determination whether it  
18 could operate the business "profitably and lawfully, if at all." (Doc. 25 at 16.) The Court  
19 concludes the Temporary Receiver did just that. It considered the findings the Court had  
20 made in the TRO about the operation of the Receivership Defendants prior to August 21,  
21 2015, and the prohibitions against certain business and communication practices that the  
22 Order imposed. From that Order, the Temporary Receiver quite reasonably concluded  
23 that it could not "lawfully" operate the business as it had been operated before.

24 The Receivership Defendants also urge that the Temporary Receiver's  
25 performance was deficient, and therefore requires a fee reduction, because it did not pay  
26 certain or all of the bills outstanding during the pendency of the temporary receivership.  
27 Receivership Defendants point out specifically REA's failure to make payments on the  
28 lease for Receivership Defendants' Tempe headquarters, on the lease for a Kenworth

1 tractor, and on their line of credit with Wells Fargo Bank. But as REA notes, this picture  
2 is deceiving in that some of these shortfalls or defaults had commenced before the  
3 temporary receivership was instituted.<sup>1</sup> The Kenworth tractor was already one payment in  
4 arrears at commencement of the receivership, and the Wells Fargo debt had been in  
5 default more than once prior thereto. Moreover, REA demonstrated to the Court's  
6 satisfaction that it could not pay many of the bills Receivership Defendants criticize it for  
7 not paying because insufficient funds were available, and it had great difficulty freeing up  
8 funds from certain accounts and receivables; REA therefore had to prioritize payments,  
9 and it focused on paying employees. The Court does not conclude from the evidence or  
10 argument presented that a decrease in fee award is justified on the basis that REA failed  
11 to perform its duties as Temporary Receiver.

12 The thrust of the Receivership Defendants' second broad argument for a reduction  
13 in the award is that the fees and costs REA requests are unreasonable because they are  
14 simply excessive. Here, Receivership Defendants have outlined 11 separate areas in  
15 which they urge REA and its employees either took too much time to perform the  
16 required tasks or unreasonably duplicated work and did not "write down" or otherwise  
17 reduce their bill accordingly.

18 In one such area, the Receivership Defendants note that REA billed for over 70  
19 hours of work to assess Receivership Defendants' business operations after REA had  
20 concluded the business should be closed down. Additionally, per Receivership  
21 Defendants, REA relied on reports prepared by Receivership Defendants yet appeared to  
22 bill for creating original material. And the Receiver's Report, according to Receivership

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24 <sup>1</sup> The Receivership Defendants substantially understate the poor financial condition that  
25 they were in at the time REA was appointed, with which the Temporary Receiver was  
26 required to deal immediately. It is beyond dispute that Receivership Defendants had  
27 incurred a net loss of over \$4 million during the first half of 2015 and were suffering  
28 from cash flow issues. This was the reason Mr. Boreyko and two other shareholders had  
planned, before the Court created the temporary receivership, to effect a \$1.3 million cash  
infusion into Receivership Defendants, which infusion ultimately never took place.

1 Defendants, simply restates reports received from Receivership Defendants on day one,  
2 such as the sales and income statement and balance sheet. Here, the Court finds that  
3 Receivership Defendants oversimplify the tasks assigned to the Temporary Receiver and  
4 the efforts required to perform those tasks. The Temporary Receiver's time charge  
5 associated with gathering and reviewing documents necessary to assess Receivership  
6 Defendants' finances and operations was largely proper and will only be reduced slightly.

7 The Temporary Receiver was tasked with determining whether the business could  
8 be operated profitably and lawfully going forward. That exercise required a  
9 comprehensive review of materials, procedures and practices, and the affiliate and  
10 customer base. While the efforts undertaken in the completion of this task were  
11 substantially justified, the Court is not entirely persuaded that all of the hours claimed for  
12 this task were necessary, and it will reduce the fee for this task set.

13 Similarly, the Court finds that the preparation of the Receiver's Report was  
14 substantially more involved than Receivership Defendants argue—and necessarily so—  
15 and a cut of the magnitude Receivership Defendants seek is unwarranted. But that does  
16 not mean the Court will not apply its own judgment to the determination of what are and  
17 are not reasonable fees. The Court concludes upon consideration of all facts and  
18 argument presented that the time charged to produce the product involved, even under the  
19 difficult the circumstances the Temporary Receiver faced, was somewhat excessive.  
20 Accordingly, the Court will also reduce the Temporary Receiver's fee for this component  
21 of work performed.

22 Receivership Defendants also note that REA flew at least ten people from Los  
23 Angeles to Phoenix—some multiple times—and argue that it was improper to charge the  
24 full hourly rate for the travel time. The travel time billed was over \$22,500.00 and  
25 comprises nearly 10% of the total request. Here again, the Court sees things differently  
26 than either party.

27 The Court selected REA to serve as Temporary Receiver in part based on REA's  
28 experience in similar matters, and with knowledge that REA personnel were located in

1 other cities, necessitating travel to Phoenix to complete their assignments. For that  
2 reason, travel expenses, and even repeated travel expenses, that are reasonable and  
3 necessary to complete the performance of duties will be allowable. The Court does not  
4 endorse the Temporary Receiver's position that it should be paid its employees' full "on  
5 the clock" consulting rate in receivership fees while traveling and not working. While  
6 other courts, as REA asserts, may "commonly" order compensation for all employees of  
7 the receiver at their "on the clock" billable rate during all travel time, this Court will not  
8 do so absent a demonstration that the employees were actively performing services and  
9 working on receivership issues during travel. Without such proof, it is this Court's  
10 practice to partially reduce billable rates for travel time, and the Court will do so here.

11 The Receivership Defendants also take issue with REA's billing for different  
12 employees to perform what it says are the same or similar tasks. (*See* Doc. 136 at 10-11.)  
13 The Court is unpersuaded by this argument. It is understandable that different staff may  
14 be assigned to complete different facets of the same task, and the Court finds that REA  
15 has substantiated this work and the need for it.

16 The Receivership Defendants also urge it was inappropriate for REA to charge for  
17 "purely secretarial tasks" comprising nearly 50 hours, as well as charging over  
18 \$21,000.00 for "independent contractor services" without explanation for what those  
19 services are. The Court concludes that REA identified and substantiated these charges in  
20 its Reply and at oral argument in this matter. It will not reduce the fees or costs for same.  
21 Nor does the Court agree with Receivership Defendants or their counsel that REA's  
22 expenses accrued in litigating with Receivership Defendants over discovery in  
23 preparation for the Preliminary Injunction Hearing are improper. Once appointed by this  
24 Court to perform the duties of Temporary Receiver, REA was required to do all that  
25 assignment reasonably entailed, including defending its position as Temporary Receiver  
26 and engage in related litigation. The Court will not reduce REA's fees or costs for this  
27 reason.

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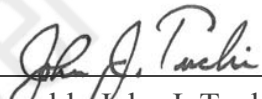
1 Finally, the Court will not reduce REA's fees for tasks performed after its filing of  
2 the Receiver's Report, as it concludes those tasks were necessary and reasonable.

3 **IT IS THEREFORE ORDERED** granting in part and denying in part the Motion  
4 for Approval and Payment of Fees and Expenses of Temporary Receiver and Its Counsel  
5 (Doc. 120), and awarding REA the following amounts in fees and costs for its service as  
6 Temporary Receiver in this matter:

7 Receiver fees in the amount of \$144,300.00; Receiver costs in the amount of  
8 \$19,466.99; Receiver's attorney fees in the amount of \$70,450.00; and attorney costs in  
9 the amount of \$2,749.97, for a total award of \$236,966.96.

10 **IT IS FURTHER ORDERED** offsetting this award amount by the \$170,000.00  
11 in funds of Receivership Defendants that this Court previously ordered REA could  
12 maintain in its Order of October 2, 2015 (Doc. 139). Receivership Defendants shall pay  
13 the outstanding balance—\$66,966.96—within 30 days of issuance of this Order.

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15 Dated this 24th day of November, 2015.

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20 Honorable John J. Tuchi  
21 United States District Judge  
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