

1 John R. Clemency (Bar No. 009646)
john.clemency@gknet.com
2 Lindsy M. Weber (Bar No. 025820)
3 lindsy.weber@gknet.com
4 GALLAGHER & KENNEDY, P.A.
2575 East Camelback Road
5 Phoenix, Arizona 85016-9225
Telephone: (602) 530-8000
6 Facsimile: (602) 530-8500
7 *Attorneys for Benson K. Boreyko a/k/a B.K. Boreyko*

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

11 Federal Trade Commission,

12 Plaintiff,

13 v.

14 Vemma Nutrition Company, *et al.*

15 Defendants.
16

Case No. CV-15-01578-PHX-JJT

**REPLY IN SUPPORT OF
MOTION BY BENSON K.
BOREYKO TO APPROVE SALE
OF 25% INTEREST IN LIMITED
LIABILITY COMPANY**

17 Defendant Benson K. Boreyko (“Mr. Boreyko”), by and through undersigned
18 counsel, hereby files this reply in support of the pending request that the Court approve
19 the sale of his 25% interest in AZPACK Properties, LLC (“AZ Pack”), as further set
20 forth in the *Motion by Benson K. Boreyko to Approve Sale of 25% Interest in Limited*
21 *Liability Company* (Dkt. #167; the “Motion”).

22 The speculation and conjecture set forth in the *Plaintiff Federal Trade*
23 *Commission’s Response to Motion by Benson K. Boreyko to Approve Sale of 25%*
24 *Interest in Limited Liability Company* (Dkt. #173; the “Response”) does not alter the
25 two critical premises underlying the Motion; namely, that the Vemma entities are in
26 real and dire need of additional capital to cover ongoing operations, and that the
27 proposed sale transaction has been fully disclosed and is reasonable and fair to all
28 parties.

1 To address the unsubstantiated concerns¹ conjured up by the FTC (none of
2 which were raised by the FTC when counsel for Mr. Boreyko reached out to attempt to
3 obtain a stipulation regarding the proposed sale) and set forth in the Response, Mr.
4 Boreyko provides as follows:

5 1. Mr. Boreyko originally purchased his interest in AZ Pack just over two years
6 ago when the LLC was formed (as reflected in the documentation attached by the FTC
7 to the Response) for a price of \$400,000. *See* Exhibit “A” – Declaration of Benson K.
8 Boreyko.

9 2. With shifting real estate prices and various market factors, the proposed
10 purchase price of \$500,000 is eminently fair and reasonable. *Id.*

11 3. The proceeds from the sale of Mr. Boreyko’s 25% interest in AZ Pack will go
12 to fund ongoing Vemma operations, which will benefit all interested parties in the long
13 run. *Id.*

14 4. Vemma is in need of additional capital to continue its ongoing efforts to
15 “right the ship” after the tumultuous stint by the Receiver and the interruption of
16 business operations (both domestic and international) caused by the FTC’s *ex parte*
17 actions. *See* Dkt. #180.

18 5. Without additional capital infusion, Vemma’s chances for future success will
19 be significantly impaired. *Id.*

20
21
22
23
24
25 ¹ Similar to the unsubstantiated allegations made by the FTC that resulted in an *ex parte*
26 asset freeze of the Vemma entities as well as Mr. Boreyko, which asset freeze was
27 ultimately lifted by this Court after being presented with evidence that neither the
28 corporate nor individual defendants had engaged in any conduct meriting the draconian
asset freeze demanded by the FTC.

1 As noted in prior filings in this Case, the standard to restrict assets is high, and
2 the burden is on the FTC to demonstrate that there is a significant need for an asset
3 freeze. *See, e.g., Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009); *FTC v.*
4 *John Beck Amazing Profits, LLC*, No. 2:09-cv-4719-FMC-FFMx, 2009 WL 7844076,
5 at *15 (C.D. Cal. Nov. 17, 2009); *F.T.C. v. Debt Solutions, Inc.*, No. C06-298JLR,
6 2006 WL 1041996, at *7 (W.D. Wash. Apr. 3, 2006). The FTC has failed to meet its
7 burden, just as it did at the start of this Case.

8 In addition, despite the FTC's unsupported parade of horrors (*see* pages 4-7 of
9 the Response), and despite the fact that the FTC was provided complete access to all of
10 Vemma's books and records (and excluded Vemma and Mr. Boreyko from accessing
11 those records for a period of time), the FTC has utterly failed to quantify the alleged
12 "damages" or "equitable monetary relief" it is seeking in this Case. The FTC has not
13 attempted to provide a figure, or even a range (other than speculating, without support,
14 that "equitable monetary relief is likely to reach into the tens of millions or even
15 hundreds of millions" – *see* Response at 6), instead continuing its sensationalist
16 arguments and predictions regarding what may ultimately come to pass with respect to
17 Vemma's operations and future profitability.

18 The FTC cannot continue to hold Vemma hostage by restricting much-needed
19 capital, on the basis that some unknown, unsubstantiated, and unverified future
20 "equitably monetary" award may go unsatisfied. The immediate concern is accessing
21 capital to assist Vemma in its continued operations, and the FTC's nebulous someday
22 arguments regarding "if and when the Court enters a judgment granting equitable
23 monetary relief" should not preclude the proposed sale of Mr. Boreyko's 25% interest
24 in a limited liability company. *See* Response at 8.

25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

As noted previously and further supported by the attached Declaration of Benson K. Boreyko, the proceeds from this sale will be utilized to make a much-needed capital infusion to fund ongoing company operations and expenses. The terms of the proposed sale of Mr. Boreyko's 25% interest in AZ Pack are fair and reasonable, and the transaction is not prohibited by this Court's prior order. Accordingly, Mr. Boreyko respectfully requests that this Court enter an order approving the sale of his interest in AZ Pack on the terms set forth in the Motion and related attachments.

Respectfully submitted this 21st day of December, 2015.

GALLAGHER & KENNEDY, P.A.

By /s/ Lindsi M. Weber
John R. Clemency
Lindsi M. Weber
2575 East Camelback Road
Phoenix, Arizona 85016-9225
*Attorneys for Benson K. Boreyko a/k/a
B.K. Boreyko*

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December, 2015, I electronically transmitted a PDF version of this document to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants and non-registered parties.

/s/ Angela Renteria

EXHIBIT “A”



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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

Federal Trade Commission,

Plaintiff,
v.
Vemma Nutrition Company, *et al.*

Defendants.

Case No. CV-15-01578-PHX-JJT

**DECLARATION OF BENSON K.
BOREYKO IN SUPPORT OF
REQUEST TO APPROVE SALE
OF 25% INTEREST IN LIMITED
LIABILITY COMPANY**

I, Benson K. Boreyko, declare under penalty of perjury as follows:

1. I originally purchased my interest in AZ Pack just over two years ago when the LLC was formed, for a price of \$400,000.
2. With shifting real estate prices and various market factors, I believe that the proposed purchase price of \$500,000 is eminently fair and reasonable.
3. The proceeds from the sale of my 25% interest in AZ Pack will go to fund ongoing Vemma operations, which will benefit all interested parties in the long run.

DATED this 21st day of December, 2015.

By: /s/ B.K. Boreyko
Benson K Boreyko