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

Federal Trade Commission;

Plaintiff,

v.

Vemma Nutrition Company, et al.;

Defendants.

No. CV-15-01578-PHX-JJT

**PLAINTIFF FEDERAL
TRADE COMMISSION'S
OMNIBUS REPLY
REGARDING ITS MOTION
TO MODIFY ASSET
PRESERVATION SECTION
OF PRELIMINARY
INJUNCTION AS TO
DEFENDANT BENSON K.
BOREYKO**

I. INTRODUCTION

Plaintiff Federal Trade Commission's ("FTC") Motion to Modify the Asset Preservation Section of the Preliminary Injunction as to Defendant Benson K. Boreyko (Doc. 200, "Motion") seeks limited modifications to the Asset Preservation section of the preliminary injunction (Doc. 118, "Order") as to Defendant Boreyko. The requested relief does not involve a general asset freeze or a blanket restriction on any one type of transfer—rather, it is narrowly tailored to certain issues that will assist in providing transparency and ensuring prudent actions by Defendant Boreyko, especially with regard to large transfers of assets. The Motion should be granted.

II. ARGUMENT

A. Defendants' Factual Mischaracterizations

In response to the Motion, Defendants Boreyko and Vemma¹ distort the record with mischaracterizations, misstatements, and completely new (and unverified) information.

Defendant Boreyko suggests that since entry of the Order, his actions have been not only compliant but virtuous, implying that he has gone above and beyond his obligations in providing information to the FTC. While Defendant Boreyko has provided the FTC with the Court-ordered financial disclosure forms, it should be noted that much of the information relevant to the Motion was provided after the fact, at the eleventh

¹ Defendants Vemma Nutrition Company and Vemma International Holdings (together, "Vemma") filed a separate Response (Doc. 220) from Defendant Boreyko's Response (Doc. 218). Both are addressed herein.

hour, or after being specifically requested by the FTC.² For example, Defendant Boreyko “inadvertently left off” various transactions from his Court-ordered disclosure forms at the time they were required to be made, including: the prior sale of his interest in Arizona Production & Packaging (“AP&P”), the more recent sale of his remaining AP&P interest, the sale of his AZLAB (AZ Laboratories, LLC) interest, and his various loans to Vemma. (See Ex. A to Motion (filed under seal)). Defendant Boreyko only supplemented his disclosures with the details of those transactions following questioning by the FTC. (See *id.* and Ex. B to Motion). This approach is consistent with Defendant Boreyko’s practice of belatedly presenting proposed sales of real estate assets (which violate the Order absent its modification or leave of Court)³ to the FTC for consideration, providing little time for the FTC to review. (See Ex. B to Motion and Doc. 190, p. 2-3).

In addition, Defendant Boreyko’s statements about obtaining “fair value” for the sale of his interests in AP&P and AZLAB are unsupported and unexplained. (See Doc. 218, p. 4). While the transactions may have been beneficial to Vemma in light of Defendant Boreyko’s resulting substantial loans to the company, there remain

² While the FTC is not relying on Defendant Boreyko’s non-compliance with the Order in seeking the requested modification, Defendants’ misleading Responses require that the FTC clarify the record.

³ Vemma misquotes language of the Order in its Response. There is no “procedure” or process set forth in the Order for proposed dispositions of Defendant Boreyko’s real estate assets. (See Doc. 220, p. 3, adding “unless he obtains approval by the Court for a proposed disposition” to the end of the relevant section, and further stating that Boreyko’s requests are “exactly the procedure contemplated under the Order”). Instead, such dispositions are strictly prohibited. (Doc. 118, p. 24).

unanswered questions regarding the reasonableness of those transactions. (*See* Motion, p. 6).

Defendant Boreyko also appears to discount the importance of his required disclosures. For example, with regard to the half a million dollar drop in valuation of Defendant Boreyko's residence currently involved in a short sale, Boreyko suggests that his initial valuation was unreliable and meant little to nothing. (*See* Doc. 218, p. 5). However, Defendant Boreyko should have a reasonable basis for the valuations he sets forth in his disclosures. (*See* Order, p. 24, requiring that Defendant Boreyko prepare and provide "complete and accurate" updated disclosure forms). Otherwise, they serve no purpose.

In addition, Defendant Boreyko claims that "the FTC fails to provide the rest of the story" with regard to the funds taken out of his retirement account (Doc. 218, p. 5) but then proceeds to provide new information not previously disclosed to the FTC. Defendant Boreyko's most recent disclosure form explicitly states that his retirement account was "cashed out" and indicates that he deposited those funds into a new checking account in January 2016. (Ex. A to Motion (filed under seal)). Defendant Boreyko's Response is the first time the FTC learned that the withdrawal was seemingly involuntary and that Boreyko redeposited those funds into a replacement qualified retirement account. In fact, that redeposit did not occur until March 3, 2016 (Doc. 218, p. 6)—*after* Defendant Boreyko provided supplemental information and even *after* the FTC filed the Motion at issue.

Defendant Boreyko further claims that the FTC “has agreed to various real estate transactions” on the condition that the proceeds be held in escrow pending a final determination of this case. (Doc. 218, p. 6). To clarify, the FTC has agreed to one transaction pending the maintenance of proceeds in escrow. (*See* Doc. 203). The FTC is prepared to agree to another real estate transaction pending this escrow condition, so long as Defendant Boreyko and his partner (Defendant Alkazin) submit an independent appraisal to support the sales price rather than the opinion of a broker who stands to make a profit from the sale. To further clarify the record, the FTC only expressed concerns regarding Defendant Boreyko’s proposed payment of taxes on this property (*see* Doc. 218, p. 7, allegations in n. 3) because he proposed paying 100% of the taxes even though he only owns 50% of the venture, and because he proposed doing so out of the escrowed funds.

B. Defendants Misunderstand the Nature of the Relief Sought

Defendants Boreyko and Vemma’s numerous comments regarding general asset freezes and the initial relief sought through the preliminary injunction suggest that they misunderstand the nature of the relief sought through the Motion. The FTC is not seeking to impose a general asset freeze—it seeks specific modifications that are reasonably and narrowly tailored to address the FTC’s concerns and the intentions behind the Asset Preservation section of the Order.⁴ And while Defendants complain that the modified language is unworkable and draconian, they do not explain or present any indication of

⁴ This is the first time the FTC is seeking the relief set forth in the Motion and proposed order, so Defendant Boreyko’s statement that such relief was “previously rejected by this Court” (Doc. 218, p. 4) is inaccurate.

how that would be the case. In reality, the nature of the relief sought by the FTC is very limited.

First, Defendant Boreyko would be explicitly required to preserve the value of his real estate assets and not engage in activities that would decrease their value. This would simply strengthen the existing prohibition on transfers of real estate assets.

Second, the FTC requests transparency and an opportunity to be heard with regard to large transfers of assets by Defendant Boreyko. This would deter Defendant Boreyko from unreasonably dissipating his non-real estate assets or selling such assets for drastically reduced amounts. Notably, a blanket restriction on loaning or transferring money to Vemma is not included in the proposed modified language. However, Defendant Boreyko's past transfers to Vemma are concerning given how large they are (*see, e.g.*, Ex. A to Motion (filed under seal)) in the face of Vemma's deteriorating financial condition (*see, e.g.*, Doc. 180, p. 4). If this continues, there will be little left for any potential consumer redress. And while Vemma contends that it is currently cash flow positive, its most recent quarterly report states otherwise. (*See id.*). The requested transparency would simply allow the FTC and, if necessary, the Court, to consider the state of the company, including its financial condition, at the time Defendant Boreyko proposes making another large transfer. This would allow an informed determination of whether the requested disposition is a prudent course of action.

Third and finally, requiring Defendant Boreyko to promptly notify the FTC of a material difference in disclosed asset values would simply require Boreyko to disclose this pertinent information sooner rather than later.⁵

In sum, the requested modifications are limited, reasonable, and will aid in the preservation of the value of Defendant Boreyko's assets.

III. CONCLUSION

The FTC requests that the Court modify the Order as set forth in the Motion and proposed order. Doing so will assist in preserving the FTC's ability to obtain meaningful final relief and fulfill the Court's intentions behind the Asset Preservation section.

Dated: March 17, 2016.

⁵ This is important given Defendant Boreyko's propensity to wait until the last minute or until he is prodded by the FTC to provide information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 17, 2016, 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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