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8 *Company and Vemma International Holdings,*
9 *Inc.*

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

12
13 Federal Trade Commission,
14 Plaintiff,
15 vs.
16 Vemma Nutrition Company, *et al.*,
17 Defendants.

NO. CV-15-01578-PHX-JJT

**CORPORATE DEFENDANTS'
RESPONSE TO THE FTC'S
MOTION TO MODIFY THE
COURT'S SEPTEMBER 18, 2015
ORDER**

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19 This Response is filed by Vemma Nutrition Company and Vemma International
20 Holdings, Inc. (collectively, "Vemma" or the "Corporate Defendants") in opposition to the
21 "Plaintiff Federal Trade Commission's Motion To Modify Asset Preservation Section Of
22 Preliminary Injunction As To Defendant Benson K. Boreyko" (Doc. 200) (the "FTC
23 Motion") filed by the Plaintiff Federal Trade Commission (the "FTC").

24 **A. Introduction.**

25 The FTC asks the Court to modify its September 18, 2015 "Order" (Doc. 118) (the
26

1 "9/18/15 Order") and impose additional and more onerous restrictions on the ability of
2 defendant Benson Boreyko to manage his personal assets. As discussed in detail below,
3 the FTC's request should be denied for at least two basic and threshold reasons.

4 First, the FTC's request is based entirely on certain transactions or proposed
5 transactions by Defendant Boreyko regarding his personal property, each of which
6 complies exactly with the letter and spirit of the terms and procedures stated in the
7 9/18/15 Order. It is nonsensical to ask for restrictions to be increased under the 9/18/15
8 Order based on Defendant Boreyko's compliance with the Order.

9 Second, the FTC alleges that Defendant Boreyko (and presumably anyone else) is
10 wrongly "dissipating" assets when he invests in or loans to the Corporate Defendants
11 proceeds from the disposition of his personal property. This allegation is based solely on
12 an unsubstantiated assertion that Vemma is "losing money", and completely ignores that
13 the Court has allowed Vemma to restart and continue business operations under the terms
14 of the 9/18/15 Order. Not only are investments in Vemma fully consistent with the terms
15 of the 9/18/15 Order, investments in the Corporate Defendants should be encouraged. It is
16 both wrong, and grossly prejudicial to the Corporate Defendants, to allege that
17 investments made in Vemma are some kind of improper "dissipation" of assets.¹

18 **B. Both The Corporate Defendants And Defendant Boreyko**
19 **Have Complied (And Continue To Comply) In All**
20 **Respects With The 9/18/15 Order.**

21 In the 9/18/15 Order, the Court terminated an ex parte freeze that had been placed
22 on Defendant Boreyko's personal assets, and the Court ruled that Defendant Boreyko was
23 free to deal with his non-real estate personal assets as he sees fit. Defendant Boreyko is

24 ¹ If the FTC was really concerned with preserving and maximizing assets for
25 potential recovery if the FTC ever prevails in this action, it would want Vemma to
26 succeed and increase in value. The fact that the FTC instead wants to choke off funding
to Vemma is telling.

1 prohibited from disposing of personal real estate assets unless he obtains approval by the
2 Court for a proposed disposition. See, e.g., 9/18/15 Order at 17, 24 (Section IV.B).

3 The FTC says "circumstances have changed," and it asks for additional restrictions
4 to be placed on Defendant Boreyko solely because: (a) Defendant Boreyko disposed of
5 certain of his personal non-real estate assets; and (b) Defendant Boreyko has previously
6 asked this Court to approve proposed dispositions of certain real estate assets. See FTC
7 Motion at 3-4.²

8 However, as even the FTC admits, Defendant Boreyko's disposition of his personal
9 non-real estate assets complies fully with the terms of the 9/18/15 Order, and his requests
10 to the Court to approve proposed dispositions of personal real estate assets (which allows
11 the Court to review and approve/disapprove of any proposed real estate transaction) is
12 exactly the procedure contemplated under the Order.

13 The FTC's complaints about Defendant Boreyko's management of his personal
14 assets are also refuted by the Court's statements that under the 9/18/15 Order it intended
15 for Defendant Boreyko to have full discretion in regard to his personal non-real estate
16 assets. The Court has stated:

17 In its Preliminary Injunctive Order [the 9/18/15 Order], the
18 Court removed all restrictions on the disposal of many of
19 Mr. Boreyko' assets previously frozen, including all liquid
20 assets and any pure equity assets not made of real estate, such
21 as his AP&P interest. In reaching that decision, the Court
22 balanced the high burden the FTC had to meet to secure a
23 freeze and the hardship as asset freeze would work on Mr.
24 Boreyko, on the one hand, against the need to preserve assets
to satisfy any judgment that might result from final orders
after trial. That balancing yielded an Order that allowed the
alienation, dissipation and use of all assets but real estate.

25 ² The Court has actually approved two of the real-estate sale transactions proposed
26 by Defendant Boreyko. See Order dated January 20, 2016 (Doc. 196); Order dated
February 17, 2016 (Doc. 208).

1 See Order dated January 15, 2016 (Doc. 193) at 3 (emphasis added).

2 It is spurious for the FTC to ask the Court to find that Defendant Boreyko has acted
3 wrongfully based on conduct that demonstrably complies with the terms of the 9/18/15
4 Order. There is no basis for the FTC Motion and it should be denied.³

5 **C. It Is Wrong And Prejudicial For The FTC To Suggest That**
6 **Loans To Or Investments In Vemma Constitute Some Kind Of**
7 **Improper "Dissipation" Of Assets.**

8 The FTC acknowledges that most of the proceeds from the disposition of
9 Defendant Boreyko's assets were invested in or loaned to Vemma to support its business
10 operations. In fact, Defendant Boreyko has used the proceeds of his asset dispositions to
11 loan approximately \$1,231,500 to Vemma since October 2015 to support Vemma's
12 business operations. See FTC Motion at 5-6.

13 However, the FTC suggests that Defendant Boreyko's loans to or investments in
14 Vemma are some kind of improper "dissipation" of assets because Vemma "continues to
15 operate at a loss." See FTC Motion at 6. This statement presents no basis to suggest that
16 investments in Vemma are improper, and such a suggestion by the FTC is highly
17 prejudicial to Vemma.

18 Pursuant to the 9/18/15 Order, the Court found that there was no basis to continue a
19 receivership over Vemma and that Vemma should be allowed to restart business
20 operations under the terms of the Order. The Court terminated an existing temporary
21 receivership of the Corporate Defendants and returned all assets to the control of the
22 Corporate Defendants; it removed all freezes on any of the Corporate Defendant's assets;
23 and it specifically provided that the Corporate Defendants could restart their business

24 ³ Defendant Boreyko is separately responding to the FTC Motion in his own right.
25 However, improper requests by the FTC to impose new and additional restrictions on any
26 Defendant based on conduct that complies with the 9/18/15 Order is of obvious concern to
all of the Defendants.

1 operations (which had been summarily terminated by the temporary receiver) in
2 accordance with the terms and conditions stated in the Order. See 9/18/15 Order.

3 Despite the substantial economic and other harm to the business created by the
4 temporary receiver's summary termination of all of Vemma's operations, the Corporate
5 Defendants have successfully restarted their business; the business operations are stable;
6 sales trends have been consistently improving; and Vemma's operations are cash flow
7 positive.⁴

8 In addition to its improving business performance, Vemma has been operating for
9 more than five months in full compliance with all terms and conditions of the 9/18/15
10 Order. The Monitor has authority to review and inspect Vemma's operations, and it has
11 raised no objection or concerns about Vemma's operations. Vemma has worked
12 cooperatively with the FTC, including in regard to Vemma's new marketing materials and
13 compensation plan.

14 Moreover, and pursuant to the 9/18/15 Order, funds invested in or loaned to
15 Vemma can be used only for ordinary business expenses; Vemma reports to the Court
16 regarding its business operations; and the Court-appointed Monitor is allowed to review
17 all of Vemma's business operations. See 9/18/15 Order at 24-26. These provisions ensure
18 that funds made available to Vemma are used for proper purposes and to enhance the
19 value of the Corporate Defendants.

20 In light of the foregoing, it is demonstrably wrong for the FTC to assert or suggest
21 that investing in Vemma amounts to a "dissipation" of assets or is otherwise improper.
22 The FTC's position is directly contrary to the terms of the 9/18/15 Order, which

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24 ⁴ As will be set forth more fully in the next operating report to be filed by the
25 Corporate Defendants, monthly sales from November 2015 through February 2016 show
26 an approximately 39% increase in monthly revenue (U.S. sales in November 2015 were
\$701,927.06 compared to \$1,146,748.39 for February 2016).

1 contemplate and provide for Vemma to operate and attempt to succeed, and is highly
2 prejudicial to Vemma's ability to attract capital and funding for its business from
3 Defendant Boreyko or anyone else. Indeed, even if the FTC succeeds at trial, the most
4 significant source of any consumer redress recovery will likely be from the Corporate
5 Defendants' assets. The Corporate Defendants are interested in saving their business
6 operations; the FTC has stated that its interest is preserving assets for consumers.
7 Allowing and encouraging investments in Vemma fulfills both of these objectives.

8 The Court found that Vemma Should be allowed to restart its business and work to
9 succeed. Vemma has done so and it has operated in full accordance with the terms of the
10 9/18/15 Order. Despite many challenges, Vemma's business has steadily improved, and
11 investments from Defendant Boreyko have been important to that success. The FTC may
12 not like that Vemma was allowed to restart, or that Vemma may ultimately succeed, but it
13 should not be allowed to thwart the Court's ruling by choking off (or trying to choke off)
14 funding that supports Vemma's business.

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D. Conclusion.

For all of the foregoing reasons, the Corporate Defendants request that the Court:

A. Deny the FTC Motion in its entirety; and

B. Grant the Corporate Defendants such other and further relief as is proper under the facts of this case.

RESPECTFULLY SUBMITTED this 7th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2016, 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:

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/s/ Angelina Chavez _____