

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

**RESPONSE TO PLAINTIFF
FEDERAL TRADE COMMISSION'S
MOTION TO MODIFY ASSET
PRESERVATION SECTION OF
PRELIMINARY INJUNCTION AS TO
DEFENDANT BENSON K. BOREYKO
(Dkt. #200)**

17
18 Defendant Benson K. Boreyko ("Mr. Boreyko"), by and through undersigned
19 counsel, files this response to the *Motion to Modify Asset Preservation Section of*
20 *Preliminary Injunction as to Defendant Benson K. Boreyko* filed by Plaintiff Federal
21 Trade Commission (the "FTC") on February 12, 2016 (Dkt. #200; the "Motion").

22 The FTC has offered no basis to expand the existing injunctive provisions of the
23 Court's Order (Dkt. #118; the "Order") which currently prohibit Mr. Boreyko from
24 transferring or disposing of real estate interests. Instead, the FTC launches unfounded
25 attacks supported only by rampant speculation that various transactions Mr. Boreyko
26 has already disclosed in compliance with (and that are expressly permitted pursuant to)
27 the Court's prior orders may have been "under potentially unreasonable terms." *See*
28 Motion at 3.

1 This Court has already determined that the expansive relief sought by the FTC is
2 unmerited in this Case (*see* Order; *see also* Dkt. #193 at 3), and that the restrictions
3 currently in place relating to Mr. Boreyko’s real property assets are an acceptable
4 compromise to safeguard any alleged future award of damages (which the FTC has still
5 failed to identify or quantify).¹ And while the FTC has made various demands for
6 information and Mr. Boreyko has promptly complied without protest (*see* Motion at
7 Exhibit B), the FTC is now seeking draconian relief from this Court despite the fact that
8 Mr. Boreyko’s conduct has been wholly in compliance with this Court’s Order, and that
9 Mr. Boreyko continues his ongoing efforts to right the Vemma ship and remedy the
10 situation caused by the FTC’s *ex parte* actions in this Case.

11 In fact, the transactions at issue were all patently reasonable, and the use of funds
12 generated by these transactions to pay living expenses and provide debt relief and
13 capital infusion into Vemma’s ongoing operations is in no way “in contravention of the
14 Order’s intent and purpose” as alleged by the FTC. *See* Motion at 4. Accordingly, Mr.
15 Boreyko respectfully requests that the Court deny the relief sought in the Motion.

16 I. INTRODUCTION.

17 Contrary to the FTC’s unfounded assertions, Mr. Boreyko has not “liquidated
18 [assets] at a discount,” “dissipated assets... under potentially unreasonable terms,” or
19 “cashed out the full value of his retirement account.” *See* Motion at 3-4. Rather, Mr.
20 Boreyko has complied with this Court’s prior Order, disclosed his assets and liabilities
21 to the FTC on an ongoing basis, provided supplemental disclosures in response to
22 follow up inquiry by the FTC, and cooperated with the FTC to seek (and in some cases,
23 obtain) approval from this Court for transactions involving real estate. Despite
24 unsupported allegations of various nefarious intent or conduct, the FTC ultimately
25 admits that notice or approval of the identified transactions “is not currently required
26 under the terms of the Order.” Motion at 6.

27 ¹ The FTC and the Court were provided with copies of Mr. Boreyko’s initial financial
28 disclosures, including a listing of his real estate assets and non-real estate assets, prior
to the Court’s issuance of the Order. *See* Dkt. #114, 115, and 117.

1 Mr. Boreyko's disclosures to the FTC (which have been provided quarterly in
2 compliance with the Court's Order, and supplemented on a more frequent interim basis
3 upon request by the FTC) reveal that Mr. Boreyko has not taken a salary from Vemma
4 since at least August of last year, and instead has been forced to generate funds from the
5 sale of non- real estate assets to fund his personal expenses and provide much needed
6 capital infusion to Vemma on an ongoing basis. Far from "wasting significant assets to
7 put them out of reach for any consumer redress" (*see* Motion at 5), Mr. Boreyko has
8 been paying for living expenses for himself and his six children, supporting his former
9 spouse in compliance with prior existing court orders, and, as expressly recognized by
10 the FTC, "infus[ing] most of that money into Vemma" to fund capital needs for Vemma
11 in order to allow operations to continue. Motion at 6. There is no basis (and the FTC
12 has provided none) to overturn the Court's prior determination that a blanket restriction
13 on all assets is unmerited, inappropriate, and unduly burdensome in this Case.

14 **II. ANALYSIS.**

15 At least twice now, this Court has acknowledged the "high burden" that the FTC
16 must satisfy in order to restrict Mr. Boreyko's assets, and rejected requests by the FTC
17 to impose an expansive asset freeze. *See* Dkt. #118, 193. As the Court has previously
18 reasoned,

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

28 Dkt. #193 at 3. Mr. Boreyko has complied with this Court's prior orders, sought FTC
consent for various real estate transactions, and where necessary, sought and obtained
Court approval before proceeding. There is no basis to expand the restrictions
previously put in place by this Court, and the FTC has not met its high burden to justify
any additional restrictions on Mr. Boreyko's assets.

1 **A. Mr. Boreyko obtained fair value for the sale of his ownership interests**
2 **in AP&P and AZLabs, and the terms of sale were reasonable and**
3 **beneficial to both Mr. Boreyko and Vemma.**

4 Contrary to the FTC's assertions that the sale of Mr. Boreyko's ownership
5 interests in Arizona Production and Packaging, LLC ("AP&P") and AZ Laboratories,
6 LLC ("AZLabs") were "of questionable reasonableness" (Motion at 6), the sale of the
7 these interests provided much needed financial accommodations and generated income
8 that has assisted Mr. Boreyko and Vemma to continue despite the crippling effects of
9 the earlier *ex parte* actions by the FTC in this Case.

10 The FTC has already provided this Court with the background summary and
11 explanation of the disposition of the proceeds generated by the AP&P and AZLabs
12 transactions (*see* Motion at Sealed Exhibit A), and Mr. Boreyko will not repeat that
13 confidential commercial and financial information in this public filing. Suffice it to say
14 that the transactions at issue generated substantial benefit to Vemma in the form of debt
15 relief and direct capital infusion of funds, which were critical to continue and stabilize
16 operations of the company. The remaining funds from those transactions were utilized
17 by Mr. Boreyko (again, as explained in Sealed Exhibit A) to pay his living expenses and
18 those of his family in light of the current lack of salary or income to Mr. Boreyko from
19 his employer.

20 Accordingly, the FTC's after-the-fact complaints about transactions that are
21 wholly allowable under the Court's Order,² and that were undertaken to benefit Vemma
22 and provide critical income for Mr. Boreyko, do not provide any basis to impose the
23 unworkable restrictions sought by the FTC in the Motion (and previously rejected by
24 this Court when it determined that a narrowly tailored restriction on real estate assets
25 was the only restriction justified in this Case).

26 _____
27 ² The Court's subsequent order at Dkt. #193 expressly recognized that the AP&P
28 transaction was allowed under the Preliminary Injunction Order, and that the Court's
 prior balancing of burdens and circumstances permitted disposition of assets other than
 real estate, "such as his AP&P interest." *See* Dkt. #193 at 3.

1 **B. There is no “waste” of assets that would justify the additional**
2 **restrictions sought by the FTC.**

3 The FTC’s entire argument regarding alleged “waste” of Mr. Boreyko’s real
4 estate assets stems from the discrepancy between Mr. Boreyko’s estimated value of the
5 Happy Valley Residence (which was expressly disclosed as being obtained from the
6 website Zillow in Mr. Boreyko’s quarterly disclosures to the FTC) and the appraisal
7 commissioned and obtained by a national banking institution in connection with a
8 proposed short sale. There is no requirement that Mr. Boreyko commission, pay for, or
9 otherwise obtain formal appraisals or expert valuations in order to comply with the
10 Court’s Order and disclosure requests from the FTC. Rather, Mr. Boreyko disclosed the
11 values that were available to him and included the source for those values. *See*
12 Disclosures provided to the FTC dated September 1, 2015, December 16, 2015, and
13 supplemental disclosures provided on January 28, 2016 (listing “Zillow” as the “Basis
14 of Valuation” for various real property assets).

15 The fact that a formal appraisal performed by a licensed appraiser and obtained
16 by a regulated banking institution differs from an informal value obtained by Mr.
17 Boreyko from Zillow does not demonstrate that the “assets have purportedly declined in
18 value” or that any party has “engaged in waste, *i.e.*, the neglecting, injuring, damaging,
19 or destroying of the value of the property” as alleged by the FTC as a basis for the
20 Motion. *See* Motion at 8.

21 **C. Mr. Boreyko’s retirement funds were promptly redeposited into an**
22 **acceptable replacement qualified retirement account.**

23 While the FTC is correct that Mr. Boreyko received cash proceeds from his
24 retirement account in late January, 2016, the FTC fails to provide the rest of the story.
25 In fact, Mr. Boreyko received notice from his prior retirement account holder, Charles
26 Schwab, indicating that he was no longer an eligible client for the institution.
27 Ostensibly, this change of heart by Charles Schwab was the result of the FTC’s
28 allegations, contacts, and ex parte actions in this Case. *See* Dkt. #115 (noting the
Schwab account in the category of “FTC-Confirmed Assets Held by Third Parties”).

1 Regardless, Mr. Boreyko was not provided any option to retain the funds in the
2 current account, and instead was issued a check from Charles Schwab in late January.
3 Pursuant to advice of his financial advisor, Mr. Boreyko had sixty days to redeposit the
4 retirement funds into a qualified retirement account. Accordingly, on March 3, 2016
5 Mr. Boreyko redeposited 100% of the prior Schwab funds in a qualified retirement
6 account.

7 It is particularly curious that the FTC raises questions about retirement funds, as
8 these types of funds are exempt from process in almost all circumstances. Regardless of
9 whether Mr. Boreyko had utilized the retirement funds for living expenses, infused
10 additional capital into Vemma, or otherwise (which he did not, as explained above),
11 there is no basis to punish Mr. Boreyko further and expand the current restrictions based
12 on his forthright disclosures regarding his assets.

13 **D. Mr. Boreyko's has fully complied with this Court's orders, worked**
14 **with the FTC to obtain consent for various real estate transactions,**
15 **and sought Court approval for transactions restricted under the**
16 **Court's Order.**

17 The FTC attempts to use Mr. Boreyko's good faith efforts to reach stipulated
18 agreements with the FTC on certain pending real estate transactions as a basis to justify
19 further restrictions. However, Mr. Boreyko has provided significant background
20 information, documentation, and follow-up materials in an effort to reach agreements
21 wherever possible with the FTC prior to bringing these real estate transactions before
22 the Court for final approval. After reviewing the information provided by Mr. Boreyko,
23 the FTC has agreed to various real estate transactions on the condition that the proceeds
24 due to Mr. Boreyko be held in escrow pending final determination of this Case or
25 further Court Order. This type of compromise and agreement demonstrates Mr.
26 Boreyko's good faith efforts to work with the FTC within the parameters of the Court's
27 Order.

28 While he may not necessarily agree with the prior restrictions put in place, Mr.
Boreyko has respected this Court's determination to restrict alienation of his real estate

1 holdings. Mr. Boreyko has sought FTC permission and agreement to maximize the
2 benefits of certain pending real estate transactions, and avoid potential liability that
3 could arise from breach of existing agreements. *See* Dkt. #203, 208. And, while not
4 required under any Order or request by the FTC, Mr. Boreyko has even gone so far as to
5 provide the FTC with notice of his proposed payment of certain real estate taxes relating
6 to existing real estate assets.³ Mr. Boreyko's conduct with respect to his real estate
7 assets, as well as his other assets, has been in compliance with both the spirit and letter
8 of this Court's Order, and there is no basis to expand the restrictions currently in place.

9 **III. CONCLUSION.**

10 The FTC's real complaint appears to be that Mr. Boreyko has assisted Vemma,
11 through debt relief and capital infusion, in continuing operations and attempting to
12 recover from the cataclysmic effects of the FTC's early actions in this Case. Far from
13 "wasting significant assets to put them out of reach for any consumer redress" as alleged
14 by the FTC, any assets or funds that are provided to Vemma are expressly prohibited
15 from being transferred or otherwise utilized for any purposes outside of ordinary
16 business. Accordingly, the FTC's assertion that, by infusing capital into Vemma, Mr.
17 Boreyko is somehow engaged in an improper dissipation of assets, could not be further
18 from the truth. Coupled with the fact that Mr. Boreyko has not taken a salary from
19 Vemma for more than six months, there is no conceivable "dissipation" that could be
20 occurring.

21
22 _____
23 ³ And, inexplicably, the FTC has recently refused its consent to allow Mr. Boreyko to
24 pay currently due property taxes for the second half of the tax year using the proceeds
25 from the property. In one breath (*i.e.*, the Motion) the FTC demands that all obligations
26 relating to real estate assets must be kept current, but in the next breath refuses to allow
27 Mr. Boreyko's reasonable request to pay property taxes on these real estate assets. The
28 FTC is once again asserting outlandish, unreasonable, and unworkable restrictions
without basis. The FTC has further demanded that Mr. Boreyko engage a licensed
appraisal expert (and the FTC declined to accept a broker's opinion of value for a
proposed real estate transaction despite prior discussions regarding the same), but again
has provided no proposed source of acceptable payment for such an exorbitant and
unnecessary expense.

1 For all of the reasons set forth above, and as evidenced by the record in this Case,
2 the FTC has failed to satisfy the high burden necessary to impose further restrictions on
3 Mr. Boreyko, and the Motion should be denied.

4 Respectfully submitted this 7th day of March, 2016.

5 GALLAGHER & KENNEDY, P.A.

6 By /s/ Lindsy M. Weber
7 John R. Clemency
8 Lindsy M. Weber
9 2575 East Camelback Road
10 Phoenix, Arizona 85016-9225
11 *Attorneys for Benson K. Boreyko a/k/a*
12 *B.K. Boreyko*

11 **CERTIFICATE OF SERVICE**

12 I hereby certify that on this 7th day of March, 2016, I electronically transmitted
13 a PDF version of this document to the Clerk of the Court, using the CM/ECF System
14 for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants
15 and non-registered parties.

16 /s/ Gloria Kannberg