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9 UNITED STATES DISTRICT COURT
10 DISTRICT OF ARIZONA

11	Federal Trade Commission,)	No. 2:15-cv-01578-JJT
12)	
12	Plaintiff,)	TOM ALKAZIN’S RESPONSE TO
13	v.)	FTC’S MOTION TO CLARIFY OR
13)	RECONSIDER PRELIMINARY
14	Vemma Nutrition Company, <i>et al.</i> ,)	INJUNCTION AS TO DEFENDANT
14)	TOM ALKAZIN
15	Defendants.)	
15)	

16
17 In accordance with this Court’s Order (Doc. 240), Tom Alkazin hereby responds
18 to the FTC’s Motion to Clarify or Reconsider Preliminary Injunction as to Defendant
19 Tom Alkazin (“Motion”) (Doc. 135). Mr. Alkazin’s Response is supported by the
20 attached exhibits and the separately filed Declaration of Tom Alkazin (Doc. 248) and
21 Declaration of Marvin Ruth (Doc. 249).

22 The FTC’s Motion asks the Court to reconsider its decision not to enjoin Mr.
23 Alkazin with respect to Section I.A and Sections I.B to I.E of the Preliminary Injunction
24 Order entered September 18, 2015 (Doc. 118).

25 For Section I.A, the FTC argues that notwithstanding this Court’s finding that Mr.
26 Alkazin lacked control over Vemma, he should nonetheless be jointly and severally liable
27 with Vemma “for the operation of an illegal pyramid scheme based on his own direct
28 participation in the pyramid scheme marketing.” (Motion at 8). The FTC notes that the

1 Court's Injunction Order accepted the FTC's assertion that Mr. Alkazin "helped create"
2 the Two & Go program and promoted it, and goes on to argue that this amounts to
3 participation sufficient to establish liability for operation of the company-wide pyramid.
4 But the FTC did not prove that Mr. Alkazin helped create the Two & Go program, and
5 there is indisputable evidence that he did not do so. Moreover, the cases cited by the
6 FTC make clear that Mr. Alkazin's conduct (even accepting as true the inaccurate
7 assertions of the FTC) would be insufficient to make him responsible for Vemma's
8 operation of a pyramid.

9 For Sections I.B through I.E, the FTC points to the Court's finding that the FTC was
10 likely to succeed on its claim that Mr. Alkazin made deceptive income claims, then argues
11 that this finding provides a basis to enjoin Mr. Alkazin. But even the findings made by this
12 Court did not (and do not) support entry of an injunction as to Mr. Alkazin because: the
13 evidence relied on by the FTC was dated; Mr. Alkazin was not engaged in ongoing
14 misconduct; and Mr. Alkazin has no history of misconduct. Moreover, if the Court is
15 inclined to revisit its Order regarding Mr. Alkazin, it should instead clarify that he did not
16 make income misrepresentations.

17 The FTC's Motion should be denied.

18 **I. Background**

19 At the preliminary injunction hearing, the FTC elected to focus its presentation on
20 Vemma and Mr. Boreyko. It did not reference either of the two video/audio presentations
21 involving Mr. Alkazin. The FTC did not ask a single question about Mr. Alkazin of any
22 witness. The only witness who uttered Mr. Alkazin's name was Bonnie Patten. She
23 conceded that the July 2014 *Roadmap to Success*, quoted by the FTC as an income
24 misrepresentation (*see* Complaint ¶ 36), was superseded by two more recent versions (neither
25 of which contain the statement quoted by the FTC in its Complaint). (09/15/15 Tr. at 69).

26 Although the Court permitted testimony by declaration at the hearing, the Declaration
27 of FTC investigator Mathew Thacker said little about Mr. Alkazin except to provide
28

1 foundation for the limited materials that related to him.¹

2 Mr. Alkazin was present at the hearing, but the FTC did not call him to testify.
3 Because the FTC adduced no testimony about Mr. Alkazin, and in light of the hearing time
4 constraints, he was not called to testify by his counsel. Had the FTC called him, or asked
5 questions of other witnesses about him, Mr. Alkazin would have testified consistent with the
6 content of his Declaration filed herewith. (*See* Doc. 248). That Declaration confirms and
7 expands on points made in Mr. Alkazin's Opposition to the FTC's Application for
8 Preliminary Injunction, and the Declaration is incorporated here by reference.

9 The FTC made no effort to show it had reason to think Mr. Alkazin would violate the
10 law in the absence of an injunction from this Court directing him not to do so. Had the FTC
11 attempted to do so, Mr. Alkazin would have testified that after more than 40 years in the
12 direct sales industry, he has never been accused of misconduct by any federal or a state
13 regulator, and has never been sued (apart from this case). (Alkazin Decl. ¶ 3). He is unaware
14 of any Vemma affiliate or potential affiliate complaining that he made misrepresentations or
15 omissions regarding the business opportunity. (*Id.*)

16 Mr. Alkazin did not focus on selling the business opportunity to affiliates to the
17 exclusion of selling the product to customers. Many of the presentations he gave in the 2013-
18 2015 period made no income claims at all. (*Id.* ¶ 11). He believed, and taught others, that
19 customers are vital to the success of the company and its affiliates. Consistent with this
20 emphasis, he made substantial retail sales of Vemma products from his home office, selling
21 about \$130,000 in Vemma products (mostly in amounts of \$75 or less) from his home in the
22 2.5 year period prior to August, 2015, when the FTC filed suit. (*Id.* ¶ 10).

23
24 ¹ Along with its Complaint, the FTC filed an excerpt recorded by Mr. Thacker at a "Super
25 Saturday Business Opportunity" in Pleasanton, CA on February 7, 2015. (App. 1030-
26 1046). Mr. Thacker's Declaration inaccurately and without foundation stated that the
27 event was "hosted by Alkazin" (Thacker Decl. at ¶ 36; *compare with* Thacker Depo. at
28 188:3-7 (only basis to say Alkazin hosted was Thacker's recollection that Vemma
website said so). There are no materials indicating Tom hosted that event, and in fact he
did not. (Alkazin Decl, ¶ 12.) Although the FTC complains about statements made by
others at the event, it does not complain about the statements made by Mr. Alkazin.

1 It is undisputed that Mr. Alkazin was not an employee, officer or owner of Vemma.
2 He did not have access to Vemma’s financial, sales and operational data or to management
3 reports or other company-wide sales and commission data. He was not involved in preparing
4 Vemma’s annual income disclosure statements. He did not author Vemma’s marketing plans.
5 He did not structure or have control over Vemma’s compensation model for affiliates. He
6 had no role in drafting Vemma’s affiliate agreements. (*Id.* ¶ 15); (Boreyko Decl., Ex. 1
7 hereto, at ¶¶ 7-9) Instead, Vemma was operated by its staff of more than 100 employees,
8 including Compliance, Marketing and Information Technology departments. (Boreyko Decl.,
9 Ex. 1 hereto, at ¶ 6); *see generally* Declaration of Brad Wayment (Doc. 131) and Declaration
10 of Allison Tengan (Doc. 78-1).

11 There was no need for Mr. Alkazin to come forward with evidence on these issues at
12 the hearing, because the FTC made no effort to prove he participated in or controlled
13 Vemma’s operations in any of these conventional ways.

14 **II. The FTC’s Request to Expand “Participant” Liability Should Be Denied.**

15 In its Motion, the FTC argues that Mr. Alkazin should be preliminarily enjoined (and
16 ultimately found jointly liable with Vemma for approximately \$456 million in alleged
17 pyramid damages!) because of his “direct participation in the pyramid scheme.” (Motion at
18 8.) Notwithstanding Mr. Alkazin’s lack of involvement in the actual business operations that
19 dictated whether Vemma was or was not a pyramid, the FTC seeks to impose this draconian
20 result because he (i) supposedly “helped create” the Two & Go program, (ii) appeared in a
21 video explaining that program, (iii) and appeared in an interview on a third-party website in
22 2011 where he supposedly “discusses his success in Vemma, never mentions selling a
23 product, and instead, focuses on recruiting others who want to participate in the business
24 opportunity.” (Motion at 8). The FTC is wrong on the facts (which it has not proved in any
25 in any event) and wrong on the law.

26 **A. Mr. Alkazin did not create Two & Go**

27 In May 2015, a few months before the FTC filed this action, Vemma introduced a
28 new program branded Two & Go. The FTC alleges that Mr. Alkazin helped create the

1 Two & Go program. Its allegation is based on the following offhand statement made by
2 Mr. Boreyko when introducing Mr. Alkazin and Ms. Ruth Elliot on a Vemma Live
3 conference call in May 2015 at which the Two & Go program was discussed: “[you] and
4 Ruth [Elliott] and a lot of our ambassadors were intimately involved in the creation of
5 this program.” (See App 1367). The audio transcript containing this statement by Mr.
6 Boreyko was hearsay, at least for purposes of using it against Mr. Alkazin to prove the
7 truth of the matter asserted. It was not contained in a testimonial declaration. The FTC
8 did not ask Mr. Boreyko or Mr. Alkazin about this at the hearing.²

9 If the FTC had asked, Mr. Boreyko and Mr. Alkazin would have explained that Mr.
10 Alkazin was not meaningfully involved in creation of the Two & Go program. (Alkazin
11 Decl. ¶ 16-21); (Boreyko Decl., Ex. 1 hereto, at ¶ 19-20). The Two & Go program was
12 created by Vemma based on a concept was already in use by a competitor. (Boreyko
13 Decl., Ex. 1, at ¶ 19). Beginning in approximately December 2014, Vemma researched the
14 competitor’s concept and retained a consultant to craft a similar program for Vemma.
15 Various Vemma employees further developed the program in-house. (*Id.*)

16 Numerous internal email communications relating to the creation of the Two & Go
17 program in the period December 2014 through May 2015—none of which include Mr.
18 Alkazin—confirm the point. (See Ex. 1 to Declaration of Marvin Ruth filed herewith)
19 (compilation of emails).

20 Eventually, after Vemma had put the program together, Mr. Boreyko sent an email
21 to a dozen Ambassador-level Vemma distributors (including Alkazin) on March 18, 2015,
22 asking for input regarding the Two & Go brochure *that was already in existence*.
23 (Alkazin Decl. ¶ 19 and Ex. A thereto).³ Boreyko also sent an email on April 23, 2015 to
24

25 ² Even if admitted into evidence, the statement merely says that “other” Ambassadors,
26 Ms. Elliott and Mr. Alkazin all were involved, with no explanation of what they did.

27 ³ Mr. Alkazin responded with two emails, suggesting (a) that the bonus structure could be
28 simplified to avoid confusing participants, (b) the program name made more sense as
“Two *and* Go” rather “Two to go,” and (c) correcting a typographical error. (*Id.* ¶ 20).
Vemma did not adopt all of his minor comments. Numerous other individuals on that

1 all Elite-level distributors, *of which there were hundreds*, requesting feedback on
2 Vemma's Two & Go program before it went final. (Alkazin Decl. ¶ 21 and Ex. D thereto).

3 As these documents make clear, Vemma created the Two & Go program with its
4 own management team and the help of a paid consultant based on a similar concept used
5 by a competitor. Vemma had planned the program and drafted the marketing brochure
6 before Mr. Alkazin was even asked to comment, and comments were solicited from
7 hundreds of affiliates in addition to Mr. Alkazin.

8 In sum, the FTC did not try to prove at the hearing that Mr. Alkazin created the
9 Two & Go program, and it would not have succeeded (had it tried) because the evidence
10 proves the opposite.

11 **B. Appearing in a training video does not constitute participation in a**
12 **pyramid scheme.**

13 Mr. Alkazin did participate in a video training presentation of the Two & Go
14 program, using a PowerPoint which Vemma's Marketing department developed and its
15 Compliance Department and lawyers approved. Mr. Alkazin had no reason to think the
16 program was unlawful, and good reason to think it was not, since Vemma's counsel and
17 Compliance Department approved the program and its marketing materials. (Ex. B, Decl.
18 of Michelle Lottner, at ¶¶ 18-20).⁴ As explained in section II.D. below, appearing in
19 good faith in a training video vetted by counsel does not give rise to participant liability
20 for operation of a pyramid scheme.

21 **C. The 2011 "Top Earner" Interview is outdated and lawful**

22 The FTC asserts that Mr. Alkazin is liable as a "participant" because "in a
23 'Vemma Top Earner Interview,' Tom Alkazin supposedly discussed his success in

24 email chain made their own suggestions to Mr. Boreyko. (*See* Ex. 2 to Declaration of
25 Marvin Ruth filed herewith) (compilation of emails).

26 ⁴ The Two & Go video with Mr. Alkazin includes disclaimers and disclosures *when*
27 *Alkazin is discussing* the manner in which affiliates can earn bonuses, and points potential
28 customers to the Vemma website to view "generally expected results," which again,
would include the Disclosure Statement.

1 Vemma, never mentioned selling a product, and instead, focused on recruiting others who
2 want to participate in the business opportunity.” (Motion at 8.)

3 Although the FTC does not mention it, that interview took place more than four
4 years ago, on October 29, 2011, and can hardly support a request for injunctive relief in
5 2015 (or 2016). The interview was available only on an obscure third-party website,
6 www.businessforhome.org, which is not owned by or affiliated with Mr. Alkazin.
7 (Alkazin Decl. ¶¶ 23-24)

8 Contrary to the FTC’s accusations, Mr. Alkazin never specifically discusses his
9 wealth or his Vemma earnings, stating only, in the most generic terms possible, that “we
10 have never been more successful financially than what we have right now with
11 VEMMA.” (App. 0915.) To the extent the FTC is relying on the introductory
12 paragraphs to the interview, Mr. Alkazin did not provide such information during the
13 interview, and he disputes the accuracy of it. (Alkazin Decl. ¶ 25)

14 Finally, the interview does not focus on “recruiting.” Instead, even a cursory
15 review of the interview reveals that it was about Tom’s backstory and general
16 information on the direct sales industry. (App. 914-915.) The FTC’s reliance on this old
17 interview to demonstrate “participation” in the operation of Vemma underscores the
18 weakness of its claims against Mr. Alkazin.

19 **D. Even if the FTC proved Mr. Alkazin did what it claims, his actions**
20 **would not constitute actionable “participation” under the FTC’s cases.**

21 It would break new ground to hold Mr. Alkazin responsible as a “participant” for
22 Vemma’s purported status as a pyramid where he was not officer, director, shareholder,
23 or even employee, and thus did not meaningfully participate in its operation. At most, he
24 offered limited comments on a marketing plan Vemma had already developed and spoke
25 at Vemma events, as did dozens of others.

26 A review of the FTC’s best cases regarding individual liability for “participation” in
27 a company’s Section 5(a) violations illustrates that “participant” liability does not extend
28 to Mr. Alkazin. The FTC’s five best cases are found in its Motion for Reconsideration at

1 page 7. Four of the five cases were really more about control than participation, because
2 the individual defendants were officers/employees. We address each case in turn:

3 In *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985), consumers
4 bought equipment from Kitco to manufacture plastic specialty items for re-sale to third
5 parties. Kitco represented it had contracts with those third parties to provide a ready
6 market for the consumers' finished goods. The two individual defendants found to have
7 "participated" in the illegal scheme were directly associated with the company. One,
8 Snelling, held himself out as the company's president. The other, Farkas, was a principal
9 in the company who directed, controlled, and formulated the company's business practices.

10 Farkas and Snelling placed misleading ads in newspapers to lure customers; they
11 created brochures falsely stating that the business was highly profitable; and they made
12 explicit and false claims regarding profits that could be made. The brochures contained
13 purported references from other businesses that were simply made up. To reinforce the
14 false claim that the company could provide ongoing contract work, Snelling provided
15 phony purchase orders from a sham company, signed by him using a fake name. Snelling
16 and Farkas personally and frequently contacted interested buyers and repeated these false
17 statements.

18 In *FTC v. National Urological Group, Inc.*, 645 F. Supp. 2d 1167 (N.D. Ga. 2008),
19 the FTC brought an action against three dietary supplement companies for making deceptive
20 and unsubstantiated health claims, as well as the companies' officers and shareholders, and
21 an endorsing physician who actively and knowingly peddled false information regarding the
22 products. The directors and officers were all found liable on the basis of control.

23 The doctor, *who did not contest his individual liability for the corporate*
24 *defendants' wrongs and instead simply joined in arguing that no violations occurred*, was
25 found liable for participating in the scheme on the grounds that he (a) "helped develop
26 the products, reviewed the substantiation regarding the ingredients in the products, []
27 reviewed and edited the advertisements before they were disseminated," (b) "allowed
28 himself to be called "Chief of Staff" and "Medical Director" in the advertisements," (c)

1 “knew that no clinical trials had ever been conducted on the products” notwithstanding
2 his representation to the contrary, and (d) was “aware that none of the studies that he
3 reviewed were conducted on any of the products sold by the defendants” notwithstanding
4 his assertions to the contrary. In short, the doctor was paid a fee for developing and
5 advertising the product and blatantly lied about the product’s qualities and testing.

6 In *FTC v. Money Now Funding, LLC*, No. 2:13-1583-ROS (D. Ariz. July 15,
7 2015), the company and its various defendants (who defaulted and mounted no defense)
8 were found to have “lured consumers” to purchase products by which the customers
9 could earn commissions by referring small businesses seeking loans to the company. The
10 individual defendants, who were all employees of the offending corporations, fell into
11 two camps: (1) “reloaders,” who contacted customers and purported to sell them “leads”
12 to small businesses seeking loans, but who in actuality, sold customers a “a random list of
13 names and email addresses” and (2) “factoring” defendants who used fictitious names to
14 set up straw credit card processing merchant accounts in furtherance of the scheme, and
15 who, in addition to being employees, were also each the principal of the shell business.
16 Thus, while many of the defendants were found liable on the basis of their participation
17 in the scheme, the participation consisted of active employees selling fictitious leads to
18 victims or setting up fictitious companies to process victim’s credit card information.

19 *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168 (9th Cir. 1997) was
20 another case that turned on control, not participation. This was a telemarketing operation
21 in which the defendants, working from a script, contacted potential consumers and told
22 them that they were guaranteed a prize worth at least \$3,500, but potentially as high as
23 \$50,000, if the customer made a donation to a particular charity. The scheme was
24 identical to one run by National Clearing House, the entity’s predecessor, which the FTC
25 had already shut down due its fraudulent conduct. One of the individual defendants,
26 Lorin Martin, argued that she could not be held liable because she lacked knowledge of
27 the misrepresentations made by the company solicitors. The Court disagreed, finding that
28 Martin was the president of the company and thus had the requisite control over the

1 company. It also found that she was recklessly indifferent to the truth or falsity of the
2 misrepresentations, where, among other things, she had worked as a solicitor for the
3 predecessor entity and had filed the company's business license at the direction of
4 someone she knew was facing criminal charges.

5 In *FTC v. J.K. Publications, Inc.*, 99 F. Supp.2d 1176 (C.D. Cal. 2000), the
6 individual defendants were both officers of a corporation that had no legitimate business
7 operations, but instead operated "a fraudulent scheme by which they debited and charged
8 credit card numbers with the cardholders' authorization. *Id.* at 1203. One, the President,
9 "actively participated in the unlawful practices, controlled the day-to-day operations of
10 the corporate defendants, and had actual knowledge of the unlawful practices." *Id.* at
11 1204. The other defendant was an officer who signed documents on behalf of the
12 corporation and "actively participated in acts crucial to the success of the [the] billing
13 scheme," including using her credit to obtain merchant accounts and signing the purchase
14 agreement for the database from which the card numbers were obtained.

15 In sum, the FTC's best cases for individual liability on the basis of "participation"
16 involve: (a) a non-employee doctor who personally developed and marketed false health
17 claims and lied about studies that did not even exist; (b) employees who sold fake leads
18 and set up fake companies in a scheme to defraud customers; (c) company owners who
19 created misleading brochures, personally verified misleading information, and forged
20 purchase orders and lied about non-existent references, (d) company owners who
21 solicited "charitable" contributions based on promises of false prizes and (e) officers
22 whose company had no legitimate business purpose and who submitted millions of
23 dollars in fraudulent credit card charges.⁵

24
25
26 ⁵ See also *FTC v. Five-Star Auto Club, Inc.*, 97 F.Supp.2d 502 (S.D.N.Y. 2000) (where
27 the court found individual defendant had the "requisite level of participation and/or
28 control" based specifically on the finding that defendant "was the founder, president
and sole owner of Five Star... [and] was the moving force behind the wrongful acts and
practices of the corporation").

1 Tom Alkazin’s conduct is nothing like the “participation” of the defendants in the
2 FTC’s cases. The facts of this case do not support a conclusion that Tom “participated”
3 in Vemma’s purported pyramid scheme. The FTC’s effort to impose liability would be
4 an unwarranted and substantial expansion of existing law (not to mention unfair and
5 personally devastating to Mr. Alkazin).

6 **III. The FTC’s Request to Enjoin Mr. Alkazin based on alleged income**
7 **misrepresentation claims should be rejected**

8 **A. Even assuming the FTC’s allegations were true, injunctive relief is not**
9 **warranted.**

10 The FTC’s Motion for Reconsideration ignores that it was required to prove that
11 violations by Mr. Alkazin were imminent to obtain an injunction, and it failed to do so.
12 Because there was no imminent threat that Mr. Alkazin would violate the statute, the
13 Court properly omitted him from Sections I.B – I.E of the Preliminary Injunction Order.
14 There is no sound basis for the Court to reconsider that decision.

15 “In deciding whether the FTC has made a ‘proper showing’ of entitlement to
16 injunctive relief, a court must independently assess *whether violations are imminent.*”
17 *F.T.C. v. Merch. Servs. Direct, LLC*, 2013 WL 4094394, at *1 (E.D. Wash. Aug. 13,
18 2013) (emphasis added); *see also F.T.C. v. Evans Products Co.*, 775 F.2d 1084, 1087
19 (9th Cir. 1985) (“The FTC may only seek a temporary restraining order or a preliminary
20 injunction when it believes a person ‘*is violating, or is about to violate*’ any law enforced
21 by the FTC; *the statute does not mention past violations*”) (emphasis added).

22 As a general rule, “[p]ast wrongs are not enough for the grant of an injunction.”
23 *F.T.C. v. Evans Products*, at 1087; *accord FTC v. Amazon.com, Inc.*, Trade Reg. Rep. ¶
24 79,600 (W.D. Wash April 26, 2016) (permanent injunctive relief not warranted, even
25 though liability under FTC Act was found, because there was no cognizable danger of a
26 recurring violation). “The determination that such danger” of a recurring violation
27 “exists must be based on appropriate findings supported by the record.” *United States v.*
28 *Laerdal Mfg. Corp.*, 73 F.3d 852, 854 (9th Cir. 1995) (internal citation omitted). With all
due respect, the record does not support such a finding as to Mr. Alkazin.

1 **1. FTC largely cites past conduct**

2 As to Mr. Alkazin, the FTC relied on dated materials that did not suggest any
3 ongoing or imminent threat, with the sole exception being the FTC's claim that Mr.
4 Alkazin created the Two & Go program. That assertion was not proved and is in fact is
5 baseless, as described above.

6 For example, while the FTC makes much of Mr. Alkazin's *Roadmap to Success*,
7 the FTC's sole citation to the *Roadmap* brochure is outdated and misleading.

8 The FTC asserted that the *Roadmap to Success* included this purported script by
9 which Mr. Alkazin purportedly advised others to misrepresent expected income earnings:

10 John, if I could show you how to invest \$120 per month in your family's
11 health and turn that into \$1000 to \$3000 per month, part time, what would
you say?

12 (Complaint at ¶ 36; also quoted in the FTC's Memorandum in Support of TRO, at 18.)

13 That language was actually changed *in July 2014* to read:

14 Zac, if I could show you how to invest a small amount of money in your
15 family's health and that could turn that into part-time or full-time income,
what would you say?

16 (Doc. 75-1, pp. 31 of 45) (June 2015 Roadmap); (Alkazin Decl. ¶ 6 and Ex. E thereto).

17 Thus, the 2015 Roadmap (and the July 2014 version that preceded it) *did not include any*
18 *income misrepresentations*.

19 The FTC reached even further into the past for other evidence of income
20 misrepresentations. For example, the FTC cited an interview of Mr. Alkazin conducted
21 by Businessforhome.org in 2011. *See* App. 913. Similarly, while the FTC incorrectly
22 asserts that Mr. Alkazin made misleading income claims in a Vemma video titled The
23 Vemma Business Presentation with Tom Alkazin (Compl. at ¶ 35, citing App. 1420-30
24 (tr) & 1832 (recording)), that video was recorded *in 2011*.

25 Once the "substantially outdated" and "stale" evidence is "excised from the
26 [FTC's] materials, there is little to suggest that the violations alleged in the FTC's
27 Complaint are likely to recur." *FTC v. Merchant Services Direct, LLC*, 2013 WL
28 4094394 at *3 (E.D. Wash. Aug. 13, 2013). Instead, as in *Merchant Services*, the FTC

1 here “appears to have taken the position that future violations are simply a foregone
2 conclusion.” *Id.* That will not suffice.

3 **2. There is no ongoing misconduct to enjoin**

4 Mr. Alkazin voluntarily took down his *Roadmap to Success* website even before
5 the preliminary injunction hearing, removing all materials (including the “Tom Alkazin’s
6 24-Hour Call” audio recording cited by the FTC). Further, Vemma’s operations are now
7 curtailed and observed by a monitor and the FTC. Finally, neither the five-year-old
8 Vemma Business Presentation with Tom Alkazin nor the Two & Go video remain
9 available through the Vemma back office, which has been enjoined and shut down.

10 **3. Mr. Alkazin has no history of misconduct**

11 In assessing whether Mr. Alkazin should be enjoined, the Court may consider his
12 past conduct in determining the likelihood of a future, recurring violation. *FTC v. Sharp*,
13 782 F. Supp. 1445, 1454 (D. Nev. 1991).

14 As described above, Mr. Alkazin has no history of misconduct to suggest he will
15 violate the FTC Act going forward. He has never been accused of misconduct by any federal
16 or a state regulator. He submitted materials to Vemma’s Compliance Department for review
17 and approval, relied on their guidance, and accepted their revisions without question.

18 Here, the FTC did not show a likelihood of recurring violations by Mr. Alkazin, so
19 the Court was correct not to include him in Sections I.B – I.E of the Order (even assuming
20 the accuracy of the FTC’s claim that Mr. Alkazin made income misrepresentations).

21 **B. The FTC’s evidence of income misrepresentations was inadequate**

22 Alternatively, or in addition, if the Court is inclined to revisit its Order with
23 respect to Mr. Alkazin, it should reconsider its finding that Mr. Alkazin made income
24 misrepresentations.

25 The FTC’s Complaint (at ¶¶ 35 & 36) and accompanying motion for TRO cite three
26 instances in which Tom allegedly made false income claims. As noted above, the third
27 quotation, in paragraph 36 of the Complaint, is outdated and misleading. The other two
28 statements attributed to Mr. Alkazin do not constitute actionable misstatements.

1 **1. Alkazin made no express income claims in his 24-Hour Call or**
2 **the Vemma Business Presentation**

3 Neither of the two remaining income statements attributed to Mr. Alkazin are
4 misleading. One is the statement in a five-year-old Vemma Business Presentation video
5 available only to affiliates in Vemma’s back office. There, in the context of describing the
6 cycle bonus structure, Tom stated: “we have people earning \$100 to \$200 per week cycle
7 bonus income. We have some earning \$300 to \$500 per week. We have some earning
8 \$1,000 to \$3,000 a week. We have some earning five, ten, fifteen. Imagine this some even
9 more than \$20,000 on a weekly basis. Now, if we’re doing this well after this short amount
10 of time, can you image what the next three to five years hold in store?” (App. 1427-1428.)

11 The second express income claim attributed to Mr. Alkazin is a similar statement
12 in an undated 24-Hour Business Overview call that “[t]here’s a way to come into Vemma
13 and create immediate cash flow within your first few weeks, even within your first few
14 days. Some people are creating cash flow that amounts to \$500, \$1,000, \$2,000, even
15 \$3,000 in their first few weeks and months in the business.” (App. 1100).⁶

16 Alkazin’s statements are true – there are affiliates who make these amounts in their
17 first four to eight weeks. He made those statements based on his own discussions with
18 affiliates he was working with. Mr. Alkazin does not state that those amounts are
19 minimum amounts, or expected amounts, or average amounts – merely that “some” people
20 have reached those goals. Any reasonable person viewing the statement that “some”
21 people make these amounts would understand Mr. Alkazin is not warranting or promising
22 that they will make those amounts or even that most people make these amounts.

23 _____
24 ⁶ The FTC’s mischaracterization of Tom’s 24-Hour Business Overview call
25 demonstrates the FTC’s use of selective quotations taken out-of-context. While Mr.
26 Alkazin does address the potential income that can be earned with Vemma during his
27 overview of the company (App. 1110 – Transcript; App. 1800 – Video), he does so only
28 after discussing the history of the company (App. 1097) and the product and its
nutritional value (App. 1098-99). He also “suggests” that customers who are not
interested in the business venture, “at the very least . . . make a great decision for your
health” and purchase the product for *personal* use. (App. 1101:5-14).

1 These statements are not concrete promises or representations as to what
2 consumers could expect to earn with Vemma. Under existing case law, liability for
3 income misrepresentations typically involves express income claims that are direct,
4 specific, and false. For example, in *Burnlounge*, defendants were liable for income
5 misrepresentations because “the misleading items *were not vague or merely suggestive*
6 *pronouncements*, but rather specific references to actual (or purportedly actual) income
7 amounts earned by individuals or groups.” *FTC v. Burnlounge*, No. CV 07-3654
8 Statement of Decision at Dkt. No. 431, p. 24 (C.D. Cal. July 1, 2011) (emphasis added).

9 Likewise, in *Patriot Alcohol Testers*, defendants circulated advertisements that
10 “explicitly” stated that the “reported national average” revenue per device was \$130 per
11 week, when in reality, the device generated less than half that on average. *Federal Trade*
12 *Commission v. Patriot Alcohol Testers*, 798 F. Supp. 851 (D. Mass. 1992). In *Transnet*
13 *Wireless*, the court found defendants liable where they falsely told consumers that each
14 purchased internet kiosk would each generate, at the very minimum, \$1,000 to \$2,000
15 income per month. *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247 (S.D. Fla. 2007);
16 *see also FTC v. Freecom Commc’ns, Inc.*, 401 F.3d 1192, 1203-04 (10th Cir. 2005)
17 (defendants represented that “average monthly income” from vending machine would be
18 \$80, yet average income was at best in the “low thirties”); *FTC v. Holiday Enters., Inc.*,
19 2008 WL 953358, at *3 (N.D. Ga. Feb. 5, 2008) (illegal income misrepresentations where
20 ads falsely promised that “average display will sell between 3 and 5 cartridges per day” and
21 that “entry-level investment of \$16,000 dollars offers you the ability to recoup your
22 investment in approximately six months”). Unlike the offending income claims in these
23 cases, Mr. Alkazin’s income statements are neither definitive nor untruthful.

24 **2. The disclaimers in Mr. Alkazin’s materials are effective and fair**

25 The Court noted that in some instances, the disclaimers for Vemma videos are
26 limited and arguably difficult to see. But that is not true with respect to the videos and
27 written materials relating to Mr. Alkazin. For example, although the FTC points to the
28 presentation of the Two & Go program as evidence of misrepresentations regarding

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CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2016, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to all CM/ECF registrants.

s/ Sheri McAlister

Exhibit 1



Exhibit 1

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Marvin C. Ruth (024220)
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6 *Attorneys for Defendant Tom Alkazin and*
7 *Relief Defendant Bethany Alkazin*

8 UNITED STATES DISTRICT COURT
9 DISTRICT OF ARIZONA

10 Federal Trade Commission,) No. 2:15-cv-01578-JJT
11)
Plaintiff,)
12) **DECLARATION OF B.K. BOREYKO**
v.)
13)
Vemma Nutrition Company, *et al.*,)
14)
Defendants.)

15
16 I, Benson K. Boreyko, state under penalty of perjury, as follows:

17 1. I am the Chief Executive Officer and a director of Vemma International
18 Holdings, Inc. (“VIH”) and Vemma Nutrition Company (“Vemma Nutrition”)
19 (collectively, “Vemma”). I am familiar with records maintained by Vemma in the
20 ordinary course of its business. I have personal knowledge of the facts set forth in this
21 Declaration, and if called upon, could competently testify to these facts under oath.

22 2. I submit this declaration in response to express and implied statements by
23 the Federal Trade Commission that Tom Alkazin controlled, or participated in, Vemma’s
24 business operations.

25 3. Vemma Nutrition is wholly-owned subsidiary of Vemma International,
26 which is also an Arizona corporation. Vemma International (formerly known as New
27 Vision International Holdings, Inc.) shares its headquarters with Vemma Nutrition. Mr.
28

1 Alkazin had no role or input with respect to the formation of Vemma or the drafting of
2 Vemma's corporate documents.

3 4. Vemma's business is the marketing and sale of the following four lines of
4 health, energy, lifestyle, and fitness products (the "Vemma Products"). Vemma Nutrition
5 sells the Vemma Products through a network of distributors that are independent
6 contractors, which Vemma calls "Affiliates", and to end users that consume the product.
7 Tom Alkazin was an Affiliate with Vemma from its inception in 2004. Mr. Alkazin was
8 previously a distributor with New Vision International Holdings, where I was also the
9 CEO and a director.

10 5. A person becomes an Affiliate by signing the Vemma Affiliate Agreement
11 and Terms and Conditions (the "Affiliate Agreement. Among other things, the Affiliate
12 Agreements include limitations on health and income claims that an Affiliate may make,
13 require Affiliates to use preapproved advertising and promotional materials created by
14 Vemma, and require Affiliates to obtain approval from Vemma's Compliance
15 Department for use of promotional materials. Mr. Alkazin had no role or input with
16 respect to the content of any version or iteration of the Vemma Affiliate Agreement.

17 6. At the time the FTC initiated the FTC Action on August 21, 2015, Vemma
18 employed 104 full-time employees and one part-time employee, in various departments,
19 including a Marketing, Compliance, and Information Technology. These employees were
20 based in the Tempe, Arizona headquarters. In prior years, Vemma had employed even
21 more people.

22 7. Mr. Alkazin was never an employee, manager, officer, director, or owner at
23 Vemma.

24 8. Mr. Alkazin never had authority or control over any employee, manager,
25 officer, director, or owner at Vemma. Mr. Alkazin never had the ability to direct or
26 control any of Vemma's more than 100 employees.

27 9. Mr. Alkazin never had a physical or virtual office at Vemma.
28

1 10. Vemma did not compensate Mr. Alkazin for the marketing materials he
2 produced or created for Alkazin & Associates, including the Roadmap to Success website
3 and brochure.

4 11. Each Vemma Affiliate is provided with a unique ID number and a free
5 company website referred to as the Vemma Back Office. The Vemma Back Office
6 provided (a) links to manage the Affiliate's own purchases and account, (b) news and
7 resources, (c) events and training, and (d) various business tools that allow an Affiliate to
8 track certain aspects of their own downline activity, such as the number of downline
9 members and the number of current and past cycles attained by the Affiliate. Through
10 the Vemma Back Office, Mr. Alkazin had access to his own VID-specific sales and
11 commission information, as did all Affiliates.

12 12. Mr. Alkazin was limited to accessing this personal sales information. Mr.
13 Alkazin was not have a log-in or other access to Vemma management reports or
14 company-wide sales or commission data. Likewise, Mr. Alkazin was not provided log-in
15 or other access to Vemma's finance system or financial reporting.

16 13. Vemma did not include Mr. Alkazin in Vemma's attorney-client
17 communications. Thus, Mr. Alkazin was not privy to the discussions Vemma
18 management had with its internal and outside counsel regarding compliance, regulatory
19 and other matters.

20 14. Mr. Alkazin never had authority or control over any aspect of Vemma's
21 business operations, including its marketing, promotional, or sales efforts.

22 15. Mr. Alkazin never drafted or originated any of Vemma's compensation
23 plans. However, I periodically ran compensation ideas by many of Vemma's high-
24 ranking distributors, including Mr. Alkazin. I also sought input from time to time from
25 various others who were not Vemma employees, such as consultants and other colleagues
26 of mine. I was not obligated to accept suggestions from Mr. Alkazin and the many others
27 from whom I sought input.

28

1 16. I held regular telephonic meetings with what I called the “Elite Council,” a
2 group of high-ranking Vemma Affiliates, where I would discuss, among other things,
3 Vemma’s proposed changes to its compensation plans. I held these meetings with senior
4 Affiliates because those Affiliates understood how their downlines were operating, how
5 prior changes had affected the recruitment of customers and affiliates, and how new
6 changes might be perceived or accepted by their downline. Further, I felt it was
7 important to educate the upline Affiliates on developments that were likely to result in
8 questions or comments from their downline. Mr. Alkazin, along with approximately 12
9 to 15 others, was part of this Elite Council.

10 17. I also generally gave Vemma’s field leadership a 30-day advance notice of
11 changes to the compensation structure. I invited comments and suggestions, and myself
12 and other Vemma managers were free to accept or disregard whatever suggestions we
13 received.

14 18. I do not recall any specific input or ideas Mr. Alkazin may have contributed
15 to any compensation models or programs. Mr. Alkazin had no authority to demand or
16 implement any changes of any kind with respect to any Vemma compensation program
17 or promotional materials. Moreover, there was a significant in-house group at Vemma,
18 with representatives from marketing, compliance, legal and other departments, that was
19 involved in developing and revising Vemma’s compensation structure and related
20 materials.

21 19. For example, beginning in approximately December 2014, Vemma, with
22 the help of an outside consultant, developed what it referred to as the “Two & Go”
23 program based on a concept that had already been implemented by a competitor, Isagenix
24 International, LLC. Several months later, after Vemma created the program and drafted
25 the marketing brochure, my email dated March 18, 2015 I circulated the program details
26 and brochure to more than a dozen high ranking Vemma affiliates, including Mr.
27 Alkazin, for comment.
28

1 20. I do not recall what specific input or ideas Mr. Alkazin may have
2 contributed to the Two & Go program or any other promotional materials. Irrespective of
3 the nature of any suggestions, ideas, or criticism from Mr. Alkazin (or any other
4 Affiliate), Mr. Alkazin had no authority to implement changes of any kind with respect
5 to any Vemma's promotional materials.

6 21. Vemma produced marketing materials that included profiles of Mr. Alkazin
7 and his family (as it did with other successful Affiliates). Vemma did not ask Mr.
8 Alkazin to review the content of the profiles included in the *This is Vemma Success*
9 magazine, the AchieveVemma.com website, or the Vemma Training Bible. In general,
10 Vemma did not seek or request Mr. Alkazin's approval, authorization, or review of
11 profiles regarding Mr. Alkazin in Vemma's marketing materials.

12 22. Vemma has a Compliance Department dedicated to the development and
13 monitoring of Vemma's internal and external compliance policies, and the enforcement
14 thereof. This includes reviewing promotional and marketing materials to ensure that the
15 health and income representations included therein comply with the law. Up until the
16 time they were terminated by the court-appointed receiver, Vemma employed no fewer
17 than five full-time employees in its Compliance Department.

18 23. The Compliance Department reports directly to Vemma's General Counsel.
19 Until August 14, 2015, Vemma's General Counsel during the time relevant to the FTC
20 lawsuit was Chris Reid.

21 24. It is my understanding that in the spring of 2014, Mr. Alkazin began
22 submitting his Roadmap to Success brochure and website to Vemma's Compliance
23 Department for review. To my knowledge, Mr. Alkazin accepted all of Vemma's
24 revisions and fully cooperated in submitting his materials for review. Mr. Alkazin never
25 complained to me regarding the review process or the changes Vemma required to his
26 marketing materials.

27
28

1 25. Beginning in 2014, Vemma required that Mr. Alkazin include Vemma's
2 Income Disclosure Statement in his Roadmap to Success materials and website. The
3 Income Disclosure Statement reflect Affiliates' actual results.

4 26. Mr. Alkazin was not involved in preparing or formatting the Vemma
5 Income Disclosure Statement. To my knowledge, he was not consulted at all about the
6 development of that document, or the revisions made to it over time.

7 27. Vemma's program and marketing materials were also submitted to the
8 Compliance Department for review.

9 28. For example, the Two & Go program and marketing materials were
10 submitted to Vemma's Compliance Department and general counsel Chris Reid for
11 review and approval prior to their dissemination by, or to, any Vemma Affiliates,
12 including Mr. Alkazin.

13 29. Specifically, the Two & Go Training Video featuring Mr. Alkazin was
14 reviewed and approved by Vemma's Compliance Department, as was the Two & Go
15 brochure that Mr. Alkazin presented at the June 2015 Vemma Convention.

16
17 I declare under the penalty of perjury that the foregoing is true and correct.

18
19 Respectfully submitted this 11 day of July, 2016.

20
21 
22 _____
23 Benson K. Boreyko
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Exhibit 2



Exhibit 2

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 2 Marvin C. Ruth (024220)
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 6 *Attorneys for Defendant Tom Alkazin and*
 7 *Relief Defendant Bethany Alkazin*

8 UNITED STATES DISTRICT COURT
 9 DISTRICT OF ARIZONA

10	Federal Trade Commission,)	No. 2:15-cv-01578-JJT
11)	
	Plaintiff,)	
12)	DECLARATION OF MICHELLE
	v.)	LOTTNER
13	Vemma Nutrition Company, <i>et al.</i> ,)	
14)	
	Defendants.)	

15
 16 I, Michelle Lottner, declare under penalty of perjury as follows:

17 1. I am the Compliance Manager at Vemma Nutrition Company (“Vemma”),
 18 and Vemma International Holdings, Inc. (“Vemma International”) (collectively,
 19 “Vemma”), and have held that position since March 31, 2014. Prior to being the
 20 Compliance Manager, I was an analyst in the department for eight years. I am familiar
 21 with the records maintained by Vemma in the ordinary course of its business. I have
 22 personal knowledge of the facts set forth in this Declaration, and if called upon, could
 23 competently testify to these facts under oath.

24 2. I submit this declaration in response to express and implied statements by
 25 the Plaintiff Federal Trade Commission that Tom Alkazin controlled, or participated in,
 26 Vemma’s business operations.

27 3. My responsibilities with respect to Vemma include, among other things,
 28 ensuring that (a) Vemma’s marketing and advertising materials, including written

1 materials, video recordings, audio recordings, and presentations are in compliance with
2 the rules and regulations of regulatory agencies, including the FTC, and (b) Vemma's
3 affiliates are abiding by Vemma's policies and procedures, as well as the terms and
4 conditions of the affiliate's agreements with Vemma.

5 4. Up until the time the receiver appointed by the Court terminated them in
6 September 2015, Vemma employed no fewer than five full-time employees dedicated to
7 the development and monitoring of Vemma's internal and external compliance policies,
8 and the enforcement thereof. In addition to myself, the Compliance Department was
9 composed of Allison Tengan, who was the head of the Compliance Department until
10 October 2015 as well as the Vice President of Legal Affairs at Vemma, Debra Nevarez,
11 Fernando Venegas, and James Wang.

12 5. At various points during the 2014 through 2015 time period, Vemma
13 employed one or more part-time employees in the Compliance Department, and other
14 Vemma employees would assist the Compliance Department.

15 6. The Compliance Department reports directly to Vemma's General Counsel.
16 Until August 2015, Vemma's General Counsel was Chris Reid.

17 7. Starting in approximately the Spring 2014, Mr. Alkazin (or his assistant,
18 Lisa Schuster) started sending me drafts of his training workbook, "Roadmap to
19 Success," for the Compliance Department to review for compliance with the law.

20 8. The Compliance Department edited and revised the Roadmap to Success
21 training workbook in 2014 and 2015 specifically to comply with laws regarding health
22 and income claims. Mr. Alkazin always accepted the required revisions, which included
23 the addition of Vemma's Income Disclosure Statement to the Roadmap to Success
24 training workbook.

25 9. Starting in June 2014, Mr. Alkazin submitted all portions of his
26 www.myroadmaptosuccess.com website to the Compliance Department for review,
27 comment, and approval.

28

1 10. When Tom first submitted the myroadmaptosuccess.com website to the
2 Compliance Department, it included links to telephonic training workshops conducted by
3 Mr. Alkazin dating back to 2009, such as, for example, his Quick Start Training Calls. I
4 instructed Mr. Alkazin to remove all training calls from his website until the Compliance
5 Department was able to review them to insure that they did not include any misleading
6 health or income claims. Mr. Alkazin promptly removed all of the training calls from his
7 website.

8 11. Due to the volume of prior workshops and training calls, the Compliance
9 Department was unable to review the prior calls, and consequently, told Mr. Alkazin that
10 he could not re-post those calls to his website. Mr. Alkazin complied with that directive.

11 12. Going forward, Mr. Alkazin would conduct his training calls, then submit
12 the audio for review by the Compliance Department before posting the audio to his
13 website. The Compliance Department reviewed dozens of those calls and approved their
14 posting, until ultimately advising Mr. Alkazin that it was no longer necessary for those
15 calls to be approved.

16 13. I do not specifically recall that the Compliance Department ever found fault
17 with the content of Mr. Alkazin's training calls, which often featured Mr. Alkazin as well
18 as a guest speaker. I do recall that the Compliance Department found no fault in Mr.
19 Alkazin's portions of the calls; if there were issues, they would have been with
20 statements made by guest speakers.

21 14. The Compliance Department edited and revised the verbiage in the
22 remaining portions of Mr. Alkazin's myroadmaptosuccess.com website specifically to
23 comply with laws regarding health and income claims. These included, but were not
24 limited to, sections of the website devoted to product information, compensation
25 information, success stories and profiles. Mr. Alkazin accepted all of the required
26 revisions.

27 15. The Compliance Department also edited and revised the scripts Mr.
28 Alkazin used to record his Roadmap to Success Videos, which walked listeners through

1 the eight steps in his Roadmap to Success training workbook, before he posted the videos
2 to his website. Mr. Alkazin complied with all the revisions the Compliance Department
3 requested.

4 16. In addition to revising the language in the Roadmap to Success website and
5 training book, the Compliance Department also required the addition of disclaimers in the
6 material. Mr. Alkazin complied with that requirement. As a result, the Roadmap to
7 Success training materials thereafter (a) contained numerous disclosures as well as
8 disclaimers inviting potential customers to view the Vemma Income Disclosure
9 Statement and (b) included a copy of the Vemma Income Disclosure Statement.
10 Likewise, the Roadmap to Success website included numerous pages alerting customers
11 that success is not guaranteed and that “generally expected results can be obtained” by
12 visiting the Vemma website.

13 17. Vemma drafted the language for the disclaimers utilized in the Roadmap to
14 Success materials, and determined their frequency and placement.

15 18. The Compliance Department also reviewed Vemma’s materials for
16 compliance with laws regarding health and income claims. Thus, for example, the Two
17 & Go program and marketing materials were submitted to Vemma’s Compliance
18 Department and general counsel Chris Reid for review and approval prior to their
19 dissemination by any Vemma employees or affiliates, including Mr. Alkazin.

20 19. The Two & Go brochure that Mr. Alkazin presented at the June 12 & 13,
21 2015 Vemma Focus Convention (App. 0936-51) was reviewed and approved by
22 Vemma’s Compliance Department and General Counsel.

23 20. The Two & Go Training Video featuring Mr. Alkazin includes multiple
24 disclaimers and disclosures inviting potential customers to view Vemma’s “generally
25 expected results” and includes a copy of those generally expected results via Vemma’s
26 2014 Disclosure Statement. Vemma, its Compliance Department, and General Counsel
27 drafted the language for the disclaimers utilized in the Two & Go Training Video, and
28 determined their frequency and placement.

