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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  
**ORDER**

On August 17, 2015, Plaintiff Federal Trade Commission (“FTC”) filed its Complaint for Permanent Injunction and Other Equitable Relief against Vemma Nutrition Company, Vemma International Holdings, Inc., Benson K. Boyle, et al. Federal Trade Commission v. Vemma Nutrition Company, et al., No. CV-15-01578-PHX-JJT, 2015 WL 4714714 (D. Ariz. Aug. 17, 2015).

Twn

1 held on September 15, 2015, (*see* Docs. 102, 100), the Court will grant in part the FTC’s  
2 request for a preliminary injunction against Defendants.

3 **I. ENTITLEMENT TO PRELIMINARY INJUNCTIVE RELIEF**

4 Section 13(b) of the FTC Act allows the Court to grant the FTC a preliminary  
5 injunction upon a showing that, considering the FTC’s ultimate likelihood of success on  
6 the merits and weighing the equities, a preliminary injunction is in the public interest.  
7 15 U.S.C. § 53(b). The FTC “need not show irreparable harm to obtain a preliminary  
8 injunction.” *FTC v. Affordable Media, LLC*

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1 members it calls Affiliates. Affiliates are those participants who seek to avail themselves  
2 of the business opportunity of promoting Vemma and/or selling Vemma products and  
3 thereby earn bonuses, as opposed to customers, who are solely or primarily interested in  
4 purchasing Vemma products for their own consumption. While no purchase, payment or  
5 fee is required to become an Affiliate under Vemma's policies and the Affiliate  
6 Agreement, in practice, Vemma strongly encourages any person wanting to become an  
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1 Likewise, the “Two & Go” program, which Mr. Alkazin helped create and which went  
2 into effect in June 2015, teaches new Affiliates to purchase an Affiliate Pack, get on  
3 monthly auto-delivery to ensure eligibility for bonuses, recruit two new Affiliates the first  
4 week, teach those Affiliates to do the same, and so on.

5 A representative of the Receiver testified at the Preliminary Injunction hearing that  
6 Vemma’s own accounting records show that, in 2013, approximately 86% of its U.S.  
7 product sales were to participants classified as Affiliates, and 14% of U.S. sales were to  
8 participants classified as customers; in 2014, approximately 71% of U.S. product sales  
9 were to Affiliates and 29% were to customers.<sup>1</sup> Much of Vemma’s contention that it is  
10 not a pyramid scheme is based on its proposal to reclassify many of its Affiliates, as  
11 currently shown in its own records, to customers, which would have the effect of  
12 decreasing the amount of sales to Affiliates and increasing the amount of sales to  
13 customers. However, Defendants’ proposed reclassification of Affiliates to customers—  
14 as urged by Defendants’ expert, Dr. Carr—is not based in fact. Defendants have offered  
15 no evidence to support a finding

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1 current bonus system there is no way to unbundle the Affiliates' intent to consume  
2 Vemma products as ultimate us

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1 the former programs. Defendants have not produced evidence that the critical defects in  
2 their programs have been remedied since 2014, and the Court thus has no reason to  
3 believe at this stage that Vemma's violations of the FTC Act are not continuing or likely  
4 to recur in the absence of injunctive relief. In sum, the Court finds the FTC has again met  
5 its burden to show a likelihood of success on the merits in demonstrating Vemma and  
6 Mr. Boreyko are operating a pyramid scheme, even in light of the argument and evidence  
7 provided by these Defendants.

8 Separately, Tom Alkazin argues that the FTC has not met its burden to show he is  
9 liable under the FTC Act for Vemma's operation of a pyramid scheme, and the Court  
10 agrees. While the FTC has provided evidence of Mr. Alkazin's participation in the  
11 promotion of Vemma's business opportunities, there is no evidence that, even as a top  
12 Affiliate, he had control over Vemma's structure, operations, or bonus and compensation  
13 structure. *See FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1203-04 (C.D. Cal. 2000).  
14 Accordingly, the Court denies the FTC's request for a preliminary injunction against  
15 Mr. Alkazin with regard to the operation of an illegal pyramid scheme.

## 16 **2. False and Misleading Representations**

17 The FTC raises three claims that Defendants made or provided false or misleading  
18 statements, namely, (1) that, in advertising, marketing, promoting, offering for sale, or  
19 sale of the right to participate in the Vemma program, Defendants misrepresented that  
20 Vemma Affiliates are likely to earn substantial income, (2) that, in the same contexts,  
21 Defendants failed to disclose that Vemma's structure ensures that most Affiliates will not  
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1 of determining if preliminary injunctive relief is appropriate, the Court considers these  
2 claims together.

3 **a. Factual Findings**

4 As is common in pyramid schemes, the evidence shows that most Vemma  
5 Affiliates have very low earnings—in both 2013 and 2014, more than 93% of Affiliates  
6 earned less than \$6,200, and that amount does not account for their expenses in  
7 purchasing Vemma product to remain qualified for bonuses. However, the FTC provided  
8 the Court with numerous examples of Defendants’ representations in print, web, audio,  
9 video, and live presentation of exorbitant Affan

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1 already working. There's nothing you can say to contest this. You're either  
2 in or you're out. You're either in and you want to make a lot of money and  
3 live the life you want, or you're going to go out and do what everybody else  
4 does, oh, go to high school and get good grades, go to college, get good  
5 grades, make a resume, go beg someone to hire you, and you're told when  
6 to show up, when to eat lunch, when to pee, and when to go home. . . . Why  
7 does the day of the week even matter? The sun comes up, goes down, we  
8 make money while we're asleep. That's how Vemma works. You're paid  
9 24 hours a day, seven days a week no matter what you are doing . . . That's  
10 what we're all about. And, yeah, you can make a million a year or a million  
11 a month.

12 (Doc. 12, App. 1415-18; *see also* Doc. 9 at 7-29; Docs. 10-14.)

13 While the Court recognizes that referring to a small portion of a presentation does  
14 not allow for a net impression, the Court has reviewed the myriad videos and other media  
15 provided by the FTC in their entirety, and they are replete with deceptive income  
16 statements such as those cited above. Some Vemma material also contains  
17 representations the Court would characterize as ridiculous—bordering on absurd—such  
18 that a listener could not reasonably be expected to believe them. But numerous Vemma  
19 content contains income representations that are likely to mislead consumers acting  
20 reasonably under the circumstances, and that content is thus deceptive under the FTC  
21 Act. *See Nat'l Dynamics Corp.*, 492 F.2d at 1335; *Five-Star Auto Club*, 97 F. Supp. 2d at  
22 528-29. Likewise, the Vemma content on income potential cited by the FTC rarely  
23 informs its audience that the structure of the Vemma program ensures that the vast  
24 majority of Affiliates cannot achieve substantial income, which is a material omission.  
25 *See Five-Star Auto Club*, 97 F. Supp. 2d at 532-33.

26 Defendants argue that their content contains disclaimers such as “results not  
27 typical,” and that newer content contains more disclaimers.<sup>2</sup> But numerous advertising,

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28 <sup>2</sup> As an extension of this last point, Defendants argue that much of the material the  
FTC put forward to prove violations of the FTC Act does not reflect its more current  
materials, and therefore the FTC can show, at best, prior violations of the FTC Act, but  
has failed to prove ongoing violations. This argument fails. Although the abandonment of  
practices alleged to be unlawful does bear on whether a court should enjoin defendants,  
“voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to  
hear and determine the case.” *FTC v. Crescent Publishing Group, Inc.*, 129 F. Supp. 2d  
311, 320 (S.D.N.Y. 2001) (internal citations omitted). Put another way, such voluntary



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The Court finds that, even in light of

1 appointment of a receiver, an asset freeze and repatriation of assets. *Lamb-Weston, Inc. v.*  
2 *McCain Foods, Ltd.*

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1 disclaimers and references to income statements are inadequate, and Defendants must  
2 remedy the inadequacies not only in their processes but also in their actual practices. The  
3 Court will require Defendants to remove all non-compliant material from its “Back  
4 Office” websites, all other web-based and other repositories for training and promotional  
5 material, and to undertake diligent efforts to require all Affiliates to do the same. The  
6 injunctive relief will also include, as Defendants offered in their proposal to avoid  
7 appointment of a receiver, a prohibition against the use or distribution of any  
8 promotional, sales or advertisement material that has not be

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*Am. Nat'l Cellular*, 810 F.2d 1511, 1512-14 (9th Cir. 1987). But it is “an extraordinary remedy, to be employed cautiously and usually when no lesser relief would be effective.”





1 its expiration, and the FTC shall serve a copy of this Order on all subject financial  
2 institutions and third parties affected by it.

3 The Court is mindful that allowing the Corporate Defendants to resume operation  
4 of their business and unfreezing associated accounts and assets presents a possibility that  
5 the business will not succeed and, in that event, if the FTC ultimately is successful on the  
6 merits of this case, there would be less money available to satisfy victims.<sup>4</sup> But Vemma's  
7 testimony and argument in their briefing that they are capable of, and intend to, operate  
8 the business even under the provisions this Court found necessary to safeguard against  
9 violations of the FTC Act, supported by evidence that there is some demand for the  
10 product when unbundled from the business opportunity, leads the Court to conclude it is  
11 appropriate to allow the business to move forward in that fashion. The injunction will not  
12 contain a freeze on any of Defendants' financial accounts.

## 13 PRELIMINARY INJUNCTION

### 14 DEFINITIONS

15 For the purposes of this Order, the following definitions apply:

16 A. **“Clear(ly) and conspicuous(ly)”** means that a required disclosure is  
17 difficult to miss (*i.e.*, easily noticeable) and easily understandable by ordinary consumers,  
18 including in all of the following ways:  
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22 <sup>4</sup> Such a failure may occur for any or all of the following reasons. First, Vemma's  
23 financial statements indicated they were already losing money during the past 18 months.  
24 The companies' 2014 Consolidated Financial Report showed a loss before depreciation  
25 of approximately \$2.2 million, and the income statement for the first six months of 2015  
26 showed an additional loss of about \$1.4 million. (Doc. 50, Temporary Receiver's Report  
27 at 1.) During this period, the companies also lost substantial numbers of Affiliates.  
28 Second, going forward, the injunction's prohibition against incentives for recruiting over  
product sales and misleading promotional statements may result in a critical decrease in  
persons interested in the business opportunity without its pyramidal aspects. This of  
course would present some proof of the FTC's allegations that persons participated in the  
Affiliate venture only to obtain bonuses tied primarily to recruitment. Third, the  
provisions of the expiring TRO may have caused the loss of substantial income and  
numbers of Affiliates. While all parties will have their narratives in the event of a failure,  
the precise contribution of these factors to any failure would be unknowable.

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1. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

2. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

3. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

4. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

5. On a product label, the disclosure must be presented on the principal display panel.

6. The disclosure must use diction and syntax understandable to

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B. **“Defendants”** means all of the Individual Defendants and the Corporate Defendants, individually, collectively, or in any combination.

1. **“Individual Defendants”** means Benson K. Boryeko a/k/a B.K. Boryeko and Tom Alkazin, and by whatever other names each may be known.

2. **“Corporate Defendants”** means Vemma Nutrition Company and Vemma International Holdings, Inc., and their successors and assigns, as well as any subsidiaries, fictitious business entities, or business names created or used by these entities, or by entities owned or controlled by the Individual Defendants, that are related to, or receive funds from, the sale of health and wellness products or business opportunities related to health and wellness products.





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Documents indicating title to real or personal property, general journals, general ledgers, records, and any other data which, in reasonable detail, accurately and fairly reflect the disbursements, dispositions, incomes, transactions, and uses of Defendants' Assets;

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B. Benefitting from the address, bank account number, birth date, credit card number, e-mail address, name, Social Security number, telephone number, or other financial or identifying personal information of any person from whom or about whom any Defendant obtained such information in connection with the advertising, marketing, promoting, offering for sale,



1           B.     Corporate Defendants shall file regular quarterly reports, commencing three  
2 (3) months after service of this Order, with the Court and the FTC describing in detail the  
3 business operations, including all sales and cash inflows and outflows.

4 **VI.   APPOINTMENT OF MONITOR**

5           Robb Evans, together with his firm Robb Evans & Associates LLC, is appointed  
6 Monitor for the Corporate Defendants, with the authority and duty to observe the  
7 Corporate Defendants' business practices to ensure that they are complying with the  
8 Preliminary Injunction, and is to have access to all operations and records of the  
9 Corporate Defendants. The Monitor also shall observe whether the Corporate  
10 Defendants' assets are properly spent on ordinary and necessary business expenses. The  
11 Monitor shall be the agent of this Court when so serving under this Order, and shall  
12 comply with the Federal Rules of Civil Procedure and Local Rules of this Court.

13 **VII.   ACCESS TO BUSINESS PREMISES AND RECORDS**

14           A.     Defendants and their officers, agents, servants, employees, and attorneys,  
15 and all other persons in active concert or participation with any of them, who receive  
16 actual notice of this Order, whether acting directly or indirectly, shall allow the FTC and  
17 Monitor, and their respective representatives, agents, attorneys, investigators, paralegals,  
18 contractors, or assistants immediate access to:

19                 1.     The business premises and storage facilities owned, controlled, or  
20 used by any Corporate Defendant, including, but not limited, to the offices and  
21 facilities at or in the vicinity of 1621 W. Rio Salado Parkway, Tempe, Arizona;

22                 2.     Any premises where the Corporate Defendants conduct business,  
23 manufacturing, sales operations, or customer service operations; and

24                 3.     Any premises where Assets or Documents related to the Corporate  
25 Defendants' businesses are stored or maintained;

26           B.     The purpose of the immediate access shall be to inspect and copy the  
27 business and financial Documents of the Corporate Defendants, including, but not limited  
28 to, forensic imaging of electronically stored information. Such business Documents



