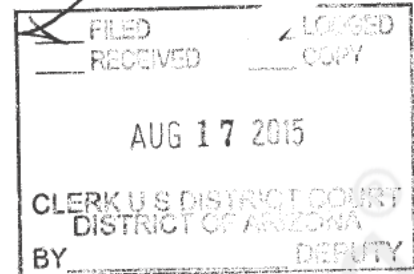


JONATHAN E. NUECHTERLEIN
General Counsel

ANGELEQUE P. LINVILLE, Tex. Bar No. 24058793
JASON C. MOON, Tex. Bar No. 24001188
ANNE D. LEJEUNE, Tex. Bar No. 24054286
EMILY B. ROBINSON, Tex. Bar No. 24046737
Federal Trade Commission
1999 Bryan Street, Suite 2150
Dallas, Texas 75201
(214) 979-9381; alinville@ftc.gov (Linville)
(214) 979-9378; jmoon@ftc.gov (Moon)
(214) 979-9371; alejeune@ftc.gov (LeJeune)
(214) 979-9386; erobinson@ftc.gov (Robinson)



Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

SEALED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CV-15-01578-PHX-JJT

Federal Trade Commission;

Plaintiff,

v.

Vemma Nutrition Company, a corporation;
Vemma International Holdings, Inc., a
corporation;
Benson K. Boreyko a/k/a B.K. Boreyko, an
individual; and
Tom Alkazin, an individual;

Defendants, and

Bethany Alkazin, an individual;

Relief Defendant.

No. _____

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFF'S *EX
PARTE* APPLICATION FOR
TEMPORARY RESTRAINING
ORDER WITH ASSET
FREEZE, APPOINTMENT OF
A RECEIVER, AND OTHER
EQUITABLE RELIEF, AND AN
ORDER TO SHOW CAUSE
WHY A PRELIMINARY
INJUNCTION SHOULD NOT
ISSUE**

UNDER SEAL

TABLE OF CONTENTS

I. Introduction.....	1
II. Defendants’ Business Practices Are Permeated with Deception	2
A. Defendants.....	2
1. Vemma Nutrition Company.....	2
2. Vemma International Holdings, Inc.....	3
3. Benson K. Boreyko.....	4
4. Tom Alkazin	4
5. Bethany Alkazin (Relief Defendant)	5
B. Defendants’ Business Model.....	6
1. Recruitment Methods.....	7
2. The Young People Revolution.....	9
3. Vemma Teaches and Rewards Recruitment Over Product Sales	11
4. Misrepresentations Regarding Income	17
5. Inadequate Disclaimers.....	22
6. Vemma’s Compensation Plan.....	24
III. Defendants’ Pyramid Scheme and False Income Claims Violate Section 5 of the FTC Act	34
A. Defendants Are Operating an Illegal Pyramid Scheme	34
1. The Pyramid Explained: The Legal Standard.....	34
2. Vemma Affiliates Pay Money to Receive the Right to Sell a Product.....	37
3. Vemma Affiliates Receive Rewards for Recruitment Unrelated to Product Sales to Ultimate Users	38
4. Vemma Pays Lip Service to Anti-Pyramid Scheme Rules.....	40

B. Defendants Make Income Misrepresentations	43
C. Defendants Fail to Disclose Material Information.....	46
D. Defendants Provide the Means and Instrumentalities for Section 5 Violations	47
E. Bethany Alkazin Is an Appropriate Relief Defendant	48
IV. The Court Should Enter a TRO to Stop Defendants' Scheme.....	48
A. The Court Has the Authority to Grant the Requested Relief	48
B. A TRO Should Be Entered Because the FTC Is Likely to Succeed on the Merits, and Balancing of the Equities Serves the Public Interest	49
C. Defendants Are Each Liable for the Law Violations	50
D. An <i>Ex Parte</i> TRO With an Asset Freeze, Immediate Access, Temporary Receivership, and Other Ancillary Relief Is Essential	54
V. Conclusion	61

TABLE OF AUTHORITIES

Cases

<i>Am. Standard Credit Sys., Inc.</i> , 874 F. Supp. 1080 (C.D. Cal. 1994)	52, 53
<i>Amy Travel Serv., Inc.</i> , 875 F.2d 564 (7th Cir. 1989)	52, 53, 58
<i>Bailey Emp't Sys. v. Hahn</i> , 545 F. Supp. 62 (D. Conn. 1982)	43
<i>CFTC v. British Am. Commodity Options Corp.</i> , 560 F.2d 135 (2d Cir. 1977)	50
<i>CFTC v. Kimberlynn Creek Ranch, Inc.</i> , 276 F.3d 187 (4th Cir. 2002)	48
<i>FSLIC v. Sahni</i> , 868 F.2d 1096 (9th Cir. 1989)	56
<i>FTC v. Affordable Media, LLC</i> , 179 F.3d 1228 (9th Cir. 1999)	49, 50, 56
<i>FTC v. Am. Nat'l Cellular, Inc.</i> , 810 F.2d 1511 (9th Cir. 1987)	49
<i>FTC v. Ambrosia Web Design LLC</i> , No. 2:12-cv-02248-FJM (D. Ariz. Oct. 22, 2012)	2, 56, 59
<i>FTC v. Ameridebt, Inc.</i> , 343 F. Supp. 2d 451 (D. Md. 2004)	48
<i>FTC v. Arlington Press, Inc.</i> , No. CV-98-9260-MMM (CWx), 1999 U.S. Dist. LEXIS 2055 (C.D. Cal. 1999)	44
<i>FTC v. BurnLounge, Inc.</i> , 753 F.3d 878 (9th Cir. 2014)	passim
<i>FTC v. Cyberspace.com LLC</i> , 453 F.3d 1196 (9th Cir. 2006)	43, 44, 52, 53
<i>FTC v. Equinox Int'l Corp.</i> , No. CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866 (Sept. 14, 1999)	passim
<i>FTC v. Evans Prod. Co.</i> , 775 F.2d 1084 (9th Cir. 1985)	48
<i>FTC v. Figgie Int'l, Inc.</i> , 994 F.2d 595 (9th Cir. 1993)	43
<i>FTC v. Five-Star Auto Club, Inc.</i> , 97 F. Supp. 2d 502 (S.D.N.Y. 2000)	34, 43, 46
<i>FTC v. Fortuna Alliance, LLC</i> , No. C96-799M (W.D. Wash. May 24, 1996)	55
<i>FTC v. Fortune Hi-Tech Mktg., Inc.</i> , No. 13-CV-578 (N.D. Ill. Jan. 24, 2013)	2, 55

<i>FTC v. Gill</i> , 265 F.3d 944 (9th Cir. 2001).....	43
<i>FTC v. Gov't Careers, Inc.</i> , No. CV-09-721-TUC-DCB (D. Ariz. Jan. 5, 2010)	56, 59
<i>FTC v. H. N. Singer, Inc.</i> , 668 F.2d 1107 (9th Cir. 1982).....	48
<i>FTC v. Handicapped & Disabled Workshops, Inc.</i> , No. CV-08-0908-PHX-DGC (D. Ariz. May 13, 2008)	59
<i>FTC v. Helping Hands of Hope, Inc.</i> , No. CV-08-0909-PHX-JAT (D. Ariz. May 13, 2008)	56, 59
<i>FTC v. J.K. Publ'ns, Inc.</i> , 99 F. Supp. 2d 1176 (C.D. Cal. 2000).....	50, 53
<i>FTC v. John Beck Amazing Profits, LLC</i> , 865 F. Supp. 2d 1052 (C.D. Cal. 2012).....	44
<i>FTC v. Kennedy</i> , 574 F. Supp. 2d 714 (S.D. Tex. 2008)	50, 51
<i>FTC v. Magui Publishers, Inc.</i> , No. 91-55474, 1993 U.S. App. LEXIS 28684 (9th Cir. Oct. 6, 1993)	47
<i>FTC v. Medicor, LLC</i> , 217 F. Supp. 2d 1048 (C.D. Cal. 2002).....	44, 52, 53
<i>FTC v. Minuteman Press</i> , 53 F. Supp. 2d 248 (E.D.N.Y. 1998)	44
<i>FTC v. Nat'l Urological Group, Inc.</i> , 645 F. Supp. 2d 1167 (N.D. Ga. 2008)	50, 51
<i>FTC v. Network Servs. Depot, Inc.</i> , 617 F.3d 1137 (9th Cir. 2010).....	51
<i>FTC v. North America Mktg. and Assoc., LLC</i> , No. 2:12-cv-00914-DGC (D. Ariz. May 2, 2012)	2, 56, 59
<i>FTC v. Pantron I Corp.</i> , 33 F.3d 1088 (9th Cir. 1994)	43, 46
<i>FTC v. Premier Nationwide Corp.</i> , No. CV-12-09-PHX-GMS (D. Ariz. Jan. 4, 2012)	56
<i>FTC v. Publ'g Clearing House, Inc.</i> , 104 F.3d 1168 (9th Cir. 1997)	52, 53
<i>FTC v. SkyBiz Int'l, Ltd.</i> , 4:01-CV-00396-CVE-FHM (N.D. Okla. June 6, 2001).....	55

<i>FTC v. SkyBiz.com, Inc.</i> , No. 01-CV-396-K(E), 2001 U.S. Dist. LEXIS 26314 (N.D. Okla. Aug. 2, 2001)	52
<i>FTC v. The Results Group, LLC</i> , No. CV-06-02843-PHX-JAT (D. Ariz. Nov. 28, 2006).....	56, 59
<i>FTC v. Think Achievement Corp.</i> , 144 F. Supp. 2d 993 (N.D. Ind. 2000).....	50, 52, 53
<i>FTC v. Transnet Wireless Corp.</i> , 506 F. Supp. 2d 1247 (S.D. Fla. 2007)	53
<i>FTC v. Trek Alliance Inc.</i> , No. CV-02-9270 DSF (AJWx) (C.D. Cal. Dec. 16, 2002)	55
<i>FTC v. U.S. Oil & Gas</i> , 1987 U.S. Dist. LEXIS 16137 (S.D. Fla. 1987), <i>aff'd</i> , 748 F.2d 1431 (11th Cir. 1984).....	34, 43, 60
<i>FTC v. Wall Street Underground, Inc.</i> , 281 F. Supp. 2d 1260 (D. Kan. 2003)	50
<i>FTC v. Warner Commc'ns, Inc.</i> , 742 F.2d 1156 (9th Cir. 1984)	49
<i>FTC v. World Media Brokers, Inc.</i> , 415 F.3d 758 (7th Cir. 2005).....	52
<i>FTC v. World Travel Vacation Brokers, Inc.</i> , 861 F.2d 1020 (7th Cir. 1988).....	43, 50, 56
<i>FTC v. World Wide Factors, Ltd.</i> , 882 F.2d 344 (9th Cir. 1989).....	49, 50
<i>In re Amway Corp.</i> , 93 F.T.C. 618, 716, 1979 FTC LEXIS 390 (1979).....	36
<i>In re Cliffdale Assocs.</i> , 103 F.T.C. 110, 164-65 (1984)	43
<i>In re Koscot Interplanetary, Inc.</i> , 86 F.T.C. 1106, 1178 (1975).....	34, 35
<i>In re Nat'l Credit Mgmt. Grp.</i> , 21 F. Supp. 2d 424 (D. N.J. 1998).....	57, 58
<i>In re New Vision Int'l, Inc.</i> , 127 F.T.C. 278 (1999).....	4
<i>In re Vuitton et Fils</i> , 606 F.2d 1 (2d Cir. 1979)	55
<i>Janvey v. Adams</i> , 588 F.3d 831, 834 (5th Cir. 2009).....	48
<i>Johnson v. Couturier</i> , 572 F.3d 1067, 1085 (9th Cir. 2009).....	56
<i>Nat'l Dynamics Corp. v. FTC</i> , 492 F.2d 1333, 1335 (2d Cir. 1974)	43
<i>SEC v. Bankers Alliance Corp.</i> , 881 F. Supp. 673, 676-77 (D.D.C. 1995)	59

<i>SEC v. Cavanagh</i> , 155 F. 3d 129, 136 (2d Cir. 1998).....	48
<i>SEC v. First Fin. Group</i> , 645 F.2d 429, 438 (5th Cir. 1981)	60
<i>SEC v. Keller Corp.</i> , 323 F.2d 397, 403 (7th Cir. 1963).....	60
<i>SEC v. Manor Nursing Cntrs., Inc.</i> , 458 F.2d 1082 (2d Cir. 1972)	57, 60
<i>SEC v. Parkersburg Wireless Ltd. Liability Co.</i> , 156 F.R.D. 529 (D.D.C. 1994)	59
<i>Sunshine Art Studios, Inc. v. FTC</i> , 481 F.2d 1171 (1st Cir. 1973).....	50
<i>United States v. Diapulse Corp. of America</i> , 457 F.2d 25 (2d Cir. 1972)	50
<i>United States v. Gold Unlimited, Inc.</i> , 177 F.3d 472 (6th Cir. 1999)	36
<i>Waffenschmidt v. Mackay</i> , 763 F.2d 711 (5th Cir. 1985).....	58
<i>Waltham Watch Co. v. FTC</i> , 318 F.2d 28 (7th Cir. 1963), <i>cert. denied</i> , 375 U.S. 944 (1963).....	47
<i>Webster v. Omnitrition Int’l, Inc.</i> , 79 F.3d 776 (9th Cir. 1996).....	passim
<i>Winter v. Nat’l Res. Defense Council</i> , 555 U.S. 7 (2008).....	56
Statutes	
15 U.S.C. § 45(a) (2006)	34

I. Introduction

The Federal Trade Commission (“FTC”) requests that this Court put an immediate end to a nationwide pyramid scheme. Vemma Nutrition Company (“Vemma”) claims that consumers can obtain financial freedom through its network-marketing program but instead ensnares consumers in an illicit scheme that dooms the vast majority of consumers to financial loss. Defendants target consumers with an entrepreneurial spirit and claim that Vemma enables anyone to build a lucrative business without the hundreds of thousands of dollars needed to buy a franchise. According to Defendants, consumers need only follow a simple process: (1) initially invest in the company by purchasing a pack of health drinks and business-related tools; (2) continue to purchase those health drinks each month in order to qualify for bonuses; (3) find at least two other entrepreneurs; and (4) help those new recruits duplicate that process.

Virtually all of Defendants’ training and marketing materials focus on recruiting others into the scheme. The products are only mentioned in attempts to give credibility to the business opportunity, and there is little discussion, either during the recruiting process or after a consumer joins Vemma, of how to actually sell Vemma products. Vemma’s compensation plan and training, marketing, and other materials provide little incentive for retail sales and in fact make them difficult. As a result, consumers find themselves in an endless chain of recruitment in attempts to recoup their product costs.

As in most schemes of this nature, Defendants make misleading claims that consumers are likely to earn substantial incomes through participation in Vemma. However, Vemma’s structure ensures that most participants will not earn substantial

incomes —a fact Defendants fail to adequately disclose.

To stop Defendants' illegal conduct and preserve assets for consumer restitution, the FTC seeks an *ex parte* TRO with an asset freeze, immediate access, appointment of a receiver, and other ancillary relief. This type of *ex parte* relief has been granted in this Circuit, including this District, as well as in federal district courts across the country in similar FTC cases.¹

II. Defendants' Business Practices Are Permeated with Deception

A. Defendants

1. Vemma Nutrition Company

Vemma is an Arizona corporation headquartered in Tempe that was founded in 2004.² Since 2011, Vemma's largest shareholder has been Vemma International Holdings, Inc. ("Vemma Holdings").³

In its decade of operation, Vemma has described itself as a multilevel, network, or affiliate marketing company. Vemma is an acronym for vitamins – essential minerals – mangosteen – aloe, and Vemma's three main product lines include: (1) the Vemma flagship nutritional drink; (2) Bod•ē, a liquid weight loss system; and (3) Verve, an

¹ See, e.g., *FTC v. Ambrosia Web Design LLC*, No. 2:12-cv-02248-FJM (D. Ariz. Oct. 22, 2012) (granting *ex parte* TRO including asset freeze, immediate access, and appointment of a temporary receiver); *FTC v. North America Mktg. and Assoc., LLC*, No. 2:12-cv-00914-DGC (D. Ariz. May 2, 2012) (same); *FTC v. Fortune Hi-Tech Mktg., Inc.*, No. 13-CV-578 (N.D. Ill. Jan. 24, 2013) (pyramid scheme with same). For additional cases, see *infra* n. 259, 263, 274 and Linville Declaration at ¶19.

² App. 31, 74.

³ App. 63, 67, 71, 75.

energy drink (collectively, the “Vemma Products”).⁴ Vemma claims to use its members (called “Affiliates”) to promote these products.⁵

In addition to its home office, Vemma maintains a manufacturing plant in Tempe, where it manufactures most of its own health and wellness beverages.⁶ Vemma also has a small office in Virginia Beach, Virginia.⁷ Vemma has publicly stated that it earned more than \$200 million in annual revenues in each of the last two years.⁸ Vemma has also claimed to have approximately 30,000 people joining each month, with more than half of those characterized by Vemma as “young people.”⁹

2. Vemma International Holdings, Inc.

Vemma Holdings was incorporated in Arizona in 1994 as New Vision International, Inc. (“New Vision”).¹⁰ New Vision marketed health and wellness drinks until at least 1999, when the company, Defendant Boreyko, and others entered into an FTC administrative order to resolve claims that they misrepresented nutritional supplements (termed “God’s Recipe”) as a cure for Attention Deficit Disorder and

⁴ See App. 559-64; 737; 1098:5-9, 1099:1-3, 1099:12-15, 1800. Other Vemma product lines include a kids’ health drink called Vemma Next. App. 800; 1637.

⁵ Vemma previously called its distributors “Brand Partners,” but the company began calling them Affiliates in early 2014. App. 960-61.

⁶ See App. 565.

⁷ App. 786.

⁸ App. 901; 1348:21-23, 1824; 1078:13-14, 1798; 1097:14-15, 1800; 1130:24-1131:1, 1803.

⁹ App. 1393:16-19, 1829. Many of Defendants’ recruitment efforts target young adults. See 1158:22-23, 1807; 1167:17-24, 1808; 1207:15-24, 1210:15-21, 1812; 1219:4-10, 1813.

¹⁰ App. 88-89, 101.

Attention Deficit/Hyperactivity Disorder.¹¹ The New Vision Order is effective until March 3, 2019 and prohibits various health claims.¹² In 2011, the company changed its name from New Vision to Vemma Holdings and took over as Vemma's largest shareholder.¹³

3. Benson K. Boreyko

Defendant Benson K. Boreyko, also known as B.K. Boreyko, is the founder, President, Chief Executive Officer, Secretary, and a director of Vemma.¹⁴ He is also the President, Secretary, a director, and a shareholder of Vemma Holdings.¹⁵ Boreyko controls and is actively involved in the management and operations of both companies.¹⁶

Boreyko resides in Scottsdale, Arizona and promotes Vemma through live presentations across the nation and world.¹⁷ He is also the spokesperson in numerous Vemma videos and print materials.¹⁸

4. Tom Alkazin

Defendant Tom Alkazin is Vemma's top income earner,¹⁹ and Vemma and Boreyko frequently point to Tom Alkazin and his wife, Relief Defendant Bethany

¹¹ See *In re New Vision Int'l, Inc.*, 127 F.T.C. 278 (1999) (available at App. 1781-88).

¹² See App. 1782-83 ¶¶ I-III. Given the exponential growth associated with pyramid schemes and the need to halt ongoing consumer injury, the claims alleged in this action focus on the pyramid aspect of Defendants' business. The FTC may amend its complaint should it discover health claims attributable to Vemma in violation of the FTC Act or the New Vision Order.

¹³ App. 63, 67, 71, 75, 101.

¹⁴ App. 34, 39, 43, 51, 55, 59, 63, 67, 71, 75, 86-87.

¹⁵ App. 90-91, 95, 98, 102, 105-06, 112-13.

¹⁶ See *id.*; see also App. 597-98; 649-50, 666; 722-23; 790, 808, 820-21.

¹⁷ See generally App. 35; 650; 927-31; 1357:10-22, 1825; 1668:20-24.

¹⁸ See e.g., 930; 964-65, 967-68; 1000; 1108; 1392; 1399; 1435; 1448; 1455; 1462.

¹⁹ App. 1399:19-21, 1400:21-22, 1830; see also App. 898; 913.

Alkazin, as models for success.²⁰ In 2011, the Alkazins claimed to have over 200,000 people in their downlines.²¹ In 2014, Vemma reported that the couple has made over \$17 million in “their rise to rankdom in Vemma.”²²

Tom Alkazin resides in California.²³ He has developed numerous training materials related to Vemma, which he sells or disseminates to Affiliates and makes available on his website, www.myroadmaptosuccess.com.²⁴ Vemma has even adopted some of those training materials as its own.²⁵ According to Boreyko, Tom Alkazin has also been “intimately involved in the creation” of certain Vemma training programs.²⁶ In addition, Tom Alkazin has given several live Vemma presentations across the county, including presentations at company-sponsored events and conventions.²⁷ He has directly participated in the deception described herein.

5. Bethany Alkazin (Relief Defendant)

Tom Alkazin’s wife, Relief Defendant Bethany Alkazin, has profited handsomely

²⁰ See e.g., App. 569, 573; 913-15; 993-95. While Vemma states that Tom Alkazin is the number one Vemma earner, he and his wife are considered a single Affiliate. *Id.*; see also App. 841 ¶ 11 (stating that spouses may join either as a single Affiliate or as separate Affiliates if they meet certain conditions).

²¹ App. 913.

²² App. 993.

²³ App. 913.

²⁴ See e.g., App. 908; 932; 961; 1095:4-12, 1800; 1366:22-1367:4, 1825.

²⁵ For instance, since 2009, Tom Alkazin has published an audio CD and written workbook titled “Roadmap to Success – A Working Plan for Creating Wealth Through the Vemma Opportunity” (the “Roadmap”), which describes his eight step system for building a Vemma business. See App. 1568-1609. In 2014, Vemma incorporated the Roadmap into an official training program called “Affiliate Action Plan: 8 Steps To Your Success” (the “Affiliate Action Plan”). App. 720-63.

²⁶ App. 1366:24-1367:4, 1825.

²⁷ See generally App. 932; 956-57; 1095:5-12, 1800; 1797; 1839; 1366:21-1367:16, 1825; 1318:3-25, 1822; 1400:21-25, 1830.

from Defendants' deceptive activities. At company events and on its websites, Vemma publicizes the millions of dollars she and her husband have reaped through the scheme.²⁸ Bethany Alkazin possesses ill-gotten gains that should be made available for consumer restitution.

B. Defendants' Business Model

Defendants tout that Vemma can provide anyone an easy path to financial freedom and independence²⁹ and claim to reward their Affiliates for word-of-mouth advertising by paying them the millions of dollars that traditional companies spend on advertising.³⁰ However, Defendants promote the business opportunity rather than the products themselves and encourage their Affiliates to do the same.

Vemma Affiliates can earn financial and other rewards for building two "downlines" – a "left team" and a "right team" – of individuals who also enroll with Vemma. Individuals may enroll as Affiliates, if they are interested in the purported moneymaking opportunities presented by enrolling others, or as "Customers," if they are

²⁸ App. 1499:4-7, 1839; 993-94.

²⁹ App. 782; 884; 1000:8-12, 1790; 1102:14-19, 1800.

³⁰ App. 1109:25-1110:13 ("I pay people just like you about \$2 million every week for talking about these products. And, so, what I decided as a business owner is instead of Madison Avenue and putting that money into traditional advertising, I want to put it into the hands of the people that fall in love with this product and -- and tell their friends about it and -- and, so, I want to reward word-of-mouth advertising. And for that, some people call me a scam. You know, some people say that we're not legit."), 782; *see also* App. 1002:8-18, 1790; 1016:11-18, 1792; 1657:21-1658:11, 1658:22-23; *see also* App. 722.

only interested in purchasing Vemma Products.³¹ Of course, Defendants view Customers as Affiliates-in-the-making, which is consistent with their overall focus on recruitment.³²

The FTC's expert, Dr. Stacie Bosley,³³ has reviewed Vemma's compensation plan, marketing materials, and available empirical data and determined that Vemma's program and business model incentivizes and rewards recruitment over sales to ultimate users.³⁴ At any moment the scheme is analyzed, the overwhelming majority of participants are in a position of financial loss.³⁵

1. Recruitment Methods

Defendants promote the Vemma program in several ways. Their websites contain numerous videos and print materials used for training and promotional purposes.³⁶

Defendants also host monthly live training calls³⁷ and present the Vemma business opportunity at various live events, including conventions and recruitment meetings such as "opportunity" meetings and "home events."

At their annual convention, which thousands of Affiliates and their prospective

³¹ Vemma has stated that all participants begin as Customers and considers the term "Customer" to include any non-Affiliate who purchases Vemma Products. *See* 722; 1386:5-9, 1828; 1377:2-7, 1826.

³² App. 1387:1-9, 1387:16-23 ("You know, we can't pay [Customers] money because of some legal mumbo-jumbo, but customers will have the opportunity to accumulate product credits . . . And they can earn as many product credits as they want, but if they find this fun and easy, we think they'll see an opportunity with Vemma and want to become an [A]ffiliate down the line."), 1828; 1262:21-1263:1, 1817.

³³ Dr. Bosley has prepared an extensive declaration that is being filed concurrently at App. 1522-65. Dr. Bosley's *curriculum vitae* is attached to her declaration. App. 1551-53.

³⁴ *See infra* Section III(A)(1); *see generally* App. 1548-49 ¶¶ 63-68.

³⁵ App. 1542 ¶ 47, 1543 ¶ 50 (Dr. Bosley); *see also infra* n. 92.

³⁶ *See, e.g.*, App. 807; 867, 870; 927-32.

³⁷ *See generally* App. 1824; 1825; 1830; *see also* App. 867.

recruits attend,³⁸ Defendants make training and other program-related presentations that contain misrepresentations regarding income and focus on recruitment.³⁹ At “opportunity” meetings, which Affiliates are encouraged to attend with their prospective recruits, Defendants present the Vemma opportunity to hundreds in hotel ballrooms or other locations.⁴⁰ At “home events,” which Defendants urge their Affiliates to host in their home, dorm room, park, or other location, Affiliates and their “upline” team members tell their financial success stories and play videos (decided by Vemma) to entice potential recruits to join.⁴¹ Overall, Defendants tell consumers that the more seats they fill at these types of events, the more money they will make.⁴²

Vemma additionally provides Affiliates with their own website to market Vemma’s products and program.⁴³ Affiliates may log on to their “Back Office,” where Vemma provides the website template with specific videos the Affiliate may choose to display (the “Back Office Videos”).⁴⁴ Many of those videos focus on recruitment and contain misrepresentations regarding the income potential of Vemma.⁴⁵

Affiliates have also created training and promotional materials related to

³⁸ See App. 1463:13-15 (10,000 people attended the 2014 convention), 1836.

³⁹ See App. 1499:4-7, 1839; 1511:17-1512:18, 1514:9-1515:5, 1516:17-1517:7, 1840.

⁴⁰ See App. 871-72, 874-76; 1766; 1829.

⁴¹ See App. 751-56; 1201:9-1202:23; 1235:16-17 (proclaiming that “[i]t’s not uncommon for people to begin earning from their Vemma opportunity in the first seven to thirty days.”), 1815; *see also* App. 596; 881.

⁴² App. 1520:1-3, 1840; 1673:2-8, 1673:17-23, 1674:10-23 (“Every person you get [to convention], you will make around \$1,000 that year . . . So, if you guys want to go out there and make \$100,000 this year, what do you do? You bring 100 people to the convention.”), 1688:2-20; *see also* App. 1177:16-25.

⁴³ App. 783.

⁴⁴ App. 927-31.

⁴⁵ *See infra* Sections II(B)(3) and (4).

Vemma.⁴⁶ Vemma requires company approval prior to the distribution of materials by Affiliates.⁴⁷

2. The Young People Revolution

Many of Defendants' promotional and training videos and events target college students and other young adults. Defendants have termed this campaign the "Young People Revolution" or "YPR," which Defendant Boreyko cites as the number one reason to join the organization:

And the number one reason you should consider joining this Vemma team is this youth revolution . . . I am all about young people, because they can think differently than us . . . They've got a clean slate.

And, so, when you take a look at this young people revolution that's going on here at Vemma and [] you see that of the 28-, 30,000 people joining a month, more than half of those people are young people. And [] what I love about this is these young people have such a tremendous work ethic, but they are stuck in this dilemma of over 50 percent unemployment; student loan debt higher than credit card debt.

And, so, they have this dilemma that they're faced with, and you [] take a look at our concept, this whole Verve movement where who do you know that drinks energy drinks, who do you know that likes to send out texts, who do you know that wants to make a lot of money, and who do you know that wants to drive a free BMW? That is the marketplace for this young people revolution, YPR, and . . . when . . . we're paying out in bonuses almost a million and a half dollars a week to people for promoting these Vemma brands. They look at this and say I want to get me some of that.⁴⁸

Defendants present the Vemma program as a better avenue than "going to school

⁴⁶ For example, Defendant Alkazin's website, www.myroadmaptosuccess.com, provides access to multiple training presentations, including the Roadmap. *See supra* n. 24-25; *see also infra* n. 86.

⁴⁷ App. 843 ¶ 59, 845 endnote ¶ 12. Vemma may formally integrate Affiliate materials into its own resources as it did with the Alkazin Roadmap. *See infra* n. 25.

⁴⁸ App. 1393:6-1394:14, 1829.

and getting a good job,” which Defendant Boreyko says “may not be the best path for financial security and time freedom.”⁴⁹ In making such claims, Boreyko often references the potential for high student loan debt and unemployment following graduation.⁵⁰ YPR videos and marketing materials frequently reference the lavish lifestyles, luxury cars, exotic travel, and financial and time freedom young Affiliates were able to achieve through Vemma.⁵¹ Defendants’ live events reiterate these allusions,⁵² as do their YPR Radio interviews.⁵³

⁴⁹ App. 1000:17-19. High-level Affiliates echo these sentiments. *See* App. 1415:9-17, 1831.

⁵⁰ *See* App. 1473:23-1474:1, 1474:5-22 (“It could turn into a full-time career or income for you. It could turn into an opportunity that pays you more than you’ve ever dreamt or more than that job that you were getting trained for in school would ever pay you. It could. But if it doesn’t, you know what, what you’re going to be able to do is . . . have a nice secondary income coming in and [] help ease that -- paying off the student loan.”), 1836.

⁵¹ *See, e.g.*, App. 1158:9-12, 1807; 1435:16-25, 1436:17-23, 1437:5-7, 1440:3-1441:12, 1833; 1207:20-24, 1208:23-1209:2, 1211:8-10, 1212:24-25, 1812; 1168:1-14, 1808; *see also generally* App. 574, 578, 584, 585, 588, 614-22, 643-48, 652-62, 672-76, 689-92.

⁵² *See, e.g.*, App. 1035:3-6, 1038:11-15 (“[I]n the last two years, I’ve been able to, you know, produce a phenomenal income and travel, you know, all across different states out here in the United States with all my best friends, no boss, no job, no hours.”); 1040:4-9: (“I had no idea it would turn into, you know, this large income traveling all around the world. So, if it could happen for me, if it could happen for Stu . . . it could happen for you guys here today.”), 1766; 1041:16-17, 1053:23-1054:11, 1056:13-22, 1060:3-1061:16, 1063:18-25, 1066:10-21, 1069:12-16, 1808; 1077:2-14, 1798.

⁵³ In connection with the YPR campaign, Vemma hosts a radio show called YPR Radio where young Vemma Affiliates discuss their alleged success. *See, e.g.*, App. 1207:20-24, 1208:23-1209:2, 1211:8-10, 1212:24-25, 1214:15-19, 1812; 1300:21-1301:16, 1301:19-1303:9, 1304:23-1305:2, 1306:21-1307:16, 1308:8-24, 1309:13-16, 1310:23-1311:20, 1312:24-1313:9, 1313:13-21, 1821. Many of these interviews appear in Vemma’s Back Office Videos. *See* App. 929-30. By creating videos that emphasize Vemma’s income potential rather the products themselves and encouraging Affiliates to use these materials to recruit others, Vemma has created an endless chain of recruitment.

3. Vemma Teaches and Rewards Recruitment Over Product Sales

Overall, Vemma videos and presentations focus on the purported affluent lifestyles of high-ranking Vemma Affiliates to entice people to join the program and lack focus on selling Vemma Products to ultimate users. Indeed, nearly every time Defendants talk about the qualities of Vemma Products, it relates to recruiting consumers to join the business as Affiliates—the product discussions are simply aimed at lending credibility to the business opportunity.⁵⁴ One of Vemma's Back Office Videos states:

I realized if I want to have a multi-million-dollar business, if I want to have . . . a multi-billion-dollar business that expands globally, I had to go out there and recruit.

And, so, it starts with recruiting and it starts with you . . . I want everybody to write this down real quick. Seven/30. This is the key . . . to the vault right here, 7/30. What has happened in the last seven days in your business? How many people have joined your business in the last seven days? And that is the most important thing as a leader in this business.

* * *

Tom says it the best. Every time we meet with Tom Alkazin or Brad, they always tell me how many people joined your business in the last seven days. And 30, in the last 30 days, how many people in your business have rank advanced?⁵⁵

These statements are consistent with the system for success that Defendants teach new and prospective Affiliates, which generally includes some variation of the following four-

⁵⁴ See generally App. 1393:6-1394:14, 1829; 1124:11-1125:9, 1802; 1258:22-1259:3, 1264:19-22, 1817; 1351:15-19, 1824; 1088:12-1090:25, 1798; see also App. 1112:4-13 (“if I was a scam, I wouldn’t take a million bucks and spend it on clinical science. I wouldn’t take tens of millions of dollars and create my own manufacturing plant.”), 1801; see also App. 1095:20-1096:11, 1800.

⁵⁵ App. 1175:11-1178:8, 1809; see also App. 1179:7-11 (“See, we have to understand, people are positive when recruiting is at an all-time high. People are positive when people are rank advancing. People are positive when people are having massive success stories in this business.”).

step plan.

First, the person should become an Affiliate by purchasing an Affiliate Pack,⁵⁶ which currently costs approximately \$600⁵⁷ and consists of a mixture of various Vemma Products, audio and video recordings, print materials, and branded items.⁵⁸ While Defendants tell consumers that it is free to sign up, they strongly suggest that the only way to become profitable in the business is to make this initial purchase.⁵⁹ Indeed, Defendants describe the Affiliate Pack as the Affiliate's initial investment and often contrast this "low start-up cost" with the hundreds of thousands of dollars needed to buy a franchise.⁶⁰ According to Boreyko, "you don't have to buy an Affiliate Pack, but you *have* to buy an Affiliate Pack."⁶¹

Second, the Affiliate should sign up for a \$150 monthly "auto-delivery" to maintain eligibility for bonuses.⁶² Auto-delivery automatically charges the Affiliate on a set periodic basis for a standing product purchase-order, and the Affiliate may receive up

⁵⁶ There are numerous videos that direct the purchase of an Affiliate Pack. *See, e.g.*, App. 1465:23-1467:3, 1477:22-1478:6, 1479:21-23, 1836; 1242:22-1243:1, 1243:14-1244:13, 1816; 1424:5-22, 1428:8-14, 1428:17-20, 1430:1-3, 1832; *see also* App. 1379:22-23, 1380:12-16, 1826; 1076:4-25, 1798. Training materials also direct this purchase. App. 937, 942.

⁵⁷ Beginning in June 2015, the price of an Affiliate Pack increased from approximately \$500 to \$600. *See* App. 1360:25-1361:1, 1361:6-8, 1825.

⁵⁸ App. 6-12 ¶ 26; 804, 811.

⁵⁹ App. 1242:22-1243:1, 1243:14-1244:13, 1816; 1466:10-17, 1466:25-1467:3, 1836; 1324:13-21, 1822; 1282:9-11, 1819; 807; *see also* App. 1508:17-1509:16, 1840. Eligibility for certain bonuses is also explicitly contingent upon the Affiliate's initial purchase of an Affiliate Pack. *See infra* Section II(B)(6)(a).

⁶⁰ App. 1471:9-1472:4, 1836; 718; 1363:20-1367:10, 1364:15-20, 1825; *see also* App. 1042:20-1043:6, 1797; 1666:7-1667:20, 1668:7-1669:8; 1282:20-23, 1283:24-1284:1, 1819; 1243:5-1244:2, 1816; 783, 785, 807-08; *see also* App. 1082:4-1083:5, 1798.

⁶¹ App. 1466:10-12, 1836; 1243:24-1244:2, 1816.

⁶² App. 1477:22-1478:6, 1478:21-24, 1836; 956; 1379:10-13, 1826.

to a 10% discount for signing up.⁶³ Defendants refer to auto-delivery as an expense to participate in the business.⁶⁴ In Boreyko's words, a monthly auto-delivery order is the Affiliate's "trump card" that makes sure the Affiliate stays qualified to earn bonuses:

[A]fter you've done your affiliate pack, you need to get on an auto-delivery order. Do the two -- what I would do is I would get four of those variety packs, two cases, 120 points. That is like your trump card. That makes sure that you're qualified. And here's the thing, yes, you can qualify with customers, but you know what, sometimes customers don't order and they don't tell you they don't order, and all of a sudden you're like, hey, I didn't get -- I wasn't qualified.⁶⁵

Boreyko also tells Affiliates that signing up for auto-delivery will prove to the IRS that the Affiliate is in the business to make a profit, which will allow them to receive unspecified tax advantages.⁶⁶

Third, the Affiliate should recruit like-minded people or find others who "see what they see" and enroll them in their downlines.⁶⁷ According to Boreyko, the Affiliate

⁶³ See App. 1340:1-13, 1823; 1379:10-13, 1826; 1326:18-22, 1822.

⁶⁴ Vemma Affiliates also recognize the \$150 per month auto-delivery as the cost of doing business. See App. 1493:10-1494:7, 1838; 1198:23-1199:24, 1811; 1186:8-12, 1810; 1679:23-1680:11.

⁶⁵ App. 1468:5-13, 1836; see also App. 956; 1246:13-1247:5, 1247:8-10, 1816; 937, 942. Interestingly, when the FTC investigator attempted to cancel his auto-delivery order, a box pops up stating "Are you sure[?] . . . Removing your monthly order may affect your qualification levels and ability to earn weekly commission." App. 13 ¶ 29 (Thacker). Vemma then sent a confirmation email stating, "Please note that if you are currently working the Vemma business, you will need to maintain a minimum monthly auto-delivery order in order to remain eligible . . . to earn any type of compensation and maintain your marketing website." *Id.* at ¶ 30 (Thacker).

⁶⁶ App. 1001:13-19, 1790.

⁶⁷ See, e.g., App. 1479:21-1480:19, 1836; 1449:22-24 ("get a builder pack today and find 3 people this week that see what you see and you're gonna earn yourself about \$700"), 1834; 1226:23-1227:10 ("And when you find someone who sees what you and I see, who are excited about what this can do for their life, those are the people you got to focus on."), 1814; 595 ("When you believe in this opportunity and help others do the same, you

should focus on enrolling other Affiliates, because they are like “gold,” while Customers are “silver nuggets” that are simply a “byproduct” of the business:

[I]t’s an amazing opportunity that we offer people, and, you know, I talked about this earlier . . . this business is about conversations, it’s a sorting process. You’re just sorting through people . . . There’s people that are into health, and they’d be great customers. And I know with this move to [] affiliate marketing and a lot of people have been talking about, hey, customers, that’s great.

I mean, *but we’re mining for gold, and we’re looking for those [] entrepreneurs*. But when you find a silver nugget, you don’t throw it away. You say, hey, that’s great, that’s a byproduct of our business. And [] so, those customers are like silver[] . . . *but the affiliates, man, they are like gold and you got to treat them like gold.*

And, so, you’re going to find people that are into health make great customers. *You’re going to find these nuggets of gold, these people that are entrepreneurial, they’re people that have this desire to [] get out of their job, pay off their debt, have [] leverage in their life, time freedom, money freedom. And [] that is the people that we’re looking for.*⁶⁸

Fourth, the Affiliate should teach recruits to “duplicate,” or repeat this process themselves (*i.e.*, purchase an Affiliate Pack, get on a qualifying monthly auto-delivery order, recruit others, and teach them to repeat).⁶⁹ Indeed, Defendants tell new and

can turn this business into career income, and you should know that it’s happening for people just like you.”); *see also* App. 1137:17-8:2, 1804; 1270:15-1271:6, 1818.

⁶⁸ App. 1476:8-1477:6 (emphasis added), 1836; *see also* App. 1110:21-1111:16, 1801; 1351:25-1352:23, 1824; 1404:14-1405:4 (“you’re going to find people falling into three categories. You’re going to find those entrepreneurs that we’re looking for. We’re going to find customers, people that say, hey, I buy into this concept . . . And then the third group is people that the timing just isn’t right for them. [M]aybe their idea of health food is light beer and Sweet’N Low, okay? . . . We can’t help those people, all right?”), 1830; 1285:18-20, 1819; *see also* App. 1066:10-21, 1798. Defendant Alkazin likewise instructs Affiliates to focus on enrolling other Affiliates. *See* App. 1320:11-22, 1321:21-1322:13, 1323:15-1324:12, 1325:17-23, 1328:13-19, 1331:21-1332:3, 1822.

⁶⁹ *See* App. 1014:24-1015:3, 1792; *see also* App. 1008:6-14, 1008:19-1009:2 (“It’s not what you can do; it’s what you can model and replicate so hundreds, thousands, or even

potential recruits that they should follow Vemma's proven system of "duplication" to "send [their] financial potential into the stratosphere."⁷⁰ While slight variations of this recommended system exist, the focus is consistently on recruitment.⁷¹

Vemma's most recent "Two & Go" training program clearly illustrates that Vemma is promoting an illegal pyramid scheme. The program, which went into effect in mid-June 2015, follows Vemma's basic model and is wholly focused on recruitment.⁷² It explicitly teaches new Affiliates to purchase an Affiliate Pack and get on a monthly auto-delivery order to ensure eligibility for financial rewards, get two others to become Affiliates in the first week, teach those two to do the same, and so on.⁷³ Defendant Tom Alkazin helped create this program, which is summarized in a one-page handout that contains a pyramid structure on the left displaying the levels Affiliates and those below them should reach and, on the right, the dollar figures Affiliates will earn if they meet those criteria.⁷⁴ According to Alkazin, this "one-page methodology . . . explain[s] the

tens of thousands of people can do. . . To go from you to a few, to hundreds, to tens of thousands, you need a simple, duplicatable system that anyone with little to no skills can use anywhere at any time. The leadership in Vemma has that system, just don't get in the way of it."), 1791; 1439:11-14, 1442:23-1443:1, 1833; 1450:8-11, 1834.

⁷⁰ App. 1014:24-1015:3, 1015:13-19, 1792.

⁷¹ See, e.g., App. 1479:21-1480:19, 1836; 1102:14-1103:11, 1800; see also App. 1242:10-1243:4, 1816; 1675:2-1676:8, 1679:6-1680:11, 1681:13-18, 1685:8-12, 1685:15-1686:1, 1686:16-1687:10.

⁷² App. 936-51; 1364:21-1367:16, 1371:5-6, 1825; 1378:2-1379:13, 1826. While Vemma and Boreyko attempt to explain that the new program focuses on getting new Affiliates because that is how the company will "attract more Customers," the program itself explicitly encourages and incentivizes Affiliates to solely focus on the recruitment side of the business. *Id.*

⁷³ App. 936-51; see also App. 1378:2-1379:13, 1826; 1364:21-1367:16, 1371:5-6, 1825; 1319:3-16, 1321:21-1322:13, 1326:9-17, 1328:13-19, 1331:21-1332:3, 1333:12-24, 1822.

⁷⁴ App. 949; 1368:15-24, 1825.

compensation side of [Vemma's] opportunity.”⁷⁵

Statements during Vemma's 2015 annual convention further demonstrate Defendants' focus on recruitment. In a training session about prospecting, the instructor, a high-ranking Vemma Affiliate, told the Affiliates and prospective Affiliates in the crowd that they should not be “vitamin salesmen” or “vitamin pushers”—instead, they should “introduce [people] to the opportunity.”⁷⁶

Defendants' emphasis on recruitment was also confirmed through an FTC investigator's undercover enrollment as a Vemma Affiliate. When the FTC investigator made an undercover phone call to his upline “enroller” or “coach” (determined by Vemma), the individual stated: “the thing to really get your head around is . . . you're not selling the product.”⁷⁷ Instead, this upline Affiliate encouraged the FTC investigator to: identify two to five people willing to “make a simple shift of existing behavior”⁷⁸ and “help those people find two more.”⁷⁹ He explained how this process, which is consistent with what is encouraged in various Vemma presentations, multiplies the effects of the

⁷⁵ App. 1367:12-16, 1369:13-16, 1369:20-21, 1825.

⁷⁶ App. 1514:9-1515:5, 1840. This individual also asked the crowd if they were willing to enroll 417 people to get 30 good ones who will bring the Affiliate thousands just by drinking the product “and ask[ing] people to just take a look at the opportunity.” *Id.* at 1511:17-1512:18, 1840.

⁷⁷ App. 1023:7-9, 1795.

⁷⁸ For example, switch from Red Bull to Verve. App. 1024:14-1025:4, 1795; *see also* App. 1219:11-16 (“[A]ll our friends already spend money on Red Bull, Rockstar, Monster, Five Hour Energy, Gatorade, Powerade, and Starbucks. Those brands are never going to pay you and I to drink those drinks, but here, we get paid to drink Verve and simply tell our friends about it.”), 1813; 1199:9-1200:4, 1811. While products may be mentioned, the focus is consistently on promoting the program and its income opportunities rather than the products themselves.

⁷⁹ App. 1024:14-1028:1, 1795.

Affiliate's efforts and generates income.⁸⁰

4. Misrepresentations Regarding Income

Defendants assert that consumers can earn significant income and rewards through participation in Vemma and that Affiliates' income potential is limited only by their own efforts. Defendant Boreyko has repeatedly made income claims during Vemma presentations and in Vemma videos:

And whether you tell three or four [friends] and enjoy free product or a lightbulb comes on and you get how powerful this concept is, when you meet some of the people that have partnered up with us and have begun generating an extra \$500, \$5,000, even \$50,000 or more per month part-time . . . [I]n fact, we've got people making \$1,000, \$1,500, \$2,000 in their very first month . . . just help five people on your two teams get a car and you're earning about \$50,000 a year residual income part-time, and it just keeps growing from there.⁸¹

* * *

You know, we have young people doing enough just to enjoy some free product and we have some making an extra \$500 a month, we have some making an extra \$500 a week, and some young people really get serious about this business model and they've developed a residual income of \$5,000 a month or even \$5,000 a week. In fact, I've got a 26-year-old, get a load of this, that will earn \$1 million this year.⁸²

* * *

I don't care if you want to make [\$]500 [] a month or \$5,000 a month. I don't care what you want to make. You get to decide that. And that is the opportunity here . . . Think of the fact that two to four years invested into this business, you have a great chance of setting yourself up financially for potentially the rest of your life.⁸³

⁸⁰ *See id.*

⁸¹ App. 1449:5-12, 1450:5-15, 1834.

⁸² App. 1457:14-21, 1835.

⁸³ App. 1103:2-5, 1111:13-16, 1801; *see also* App. 1137:17-1138:2 ("if you can find just three people that want to get started and promote these products like you're promoting them, then you're going to make over \$500 in a week. Could you imagine not having to pay gas for a whole month? Could you imagine being able to pay off some of those nagging bills and get some of that pressure off you? Well, every week that you do that, you could earn \$500 and then maybe \$1,000, and maybe that could go to \$2,000. But it

Defendant Boreyko also interviews Vemma Affiliates about their alleged success, and many of those interviews feature discussions regarding how much money young Affiliates have earned through the Vemma program.⁸⁴

Defendant Tom Alkazin has likewise made income claims when presenting the Vemma opportunity:

It's not uncommon for us to see people earning anywhere from \$500, \$1,000, \$2,000, even \$3,000 in their first four to eight weeks in the business . . . [H]ow well does this work? We have people earning \$100 to \$200 per week cycle bonus income. We have some earning \$300 to \$500 per week. We have some earning \$1,000 to \$3,000 a week. We have some earning, five, ten, fifteen. Imagine this, some even more than \$20,000 on a weekly basis. Now, if we're doing this well after this short amount of time, can you imagine what the next three to five years holds in store?⁸⁵

Defendant Alkazin has directed Affiliates to make income claims as well.⁸⁶

Other claims regarding the high income potential purportedly associated with

all starts with you making a decision to get on this product.”), 1804; 1131:12-18, 1803; 1499:3-8 (“I had the privilege to pay [the Alkazin family] in one month, not too many months ago, 900 – \$963,000, in one month”), 1839; 785 (“We have a game plan to get you earning \$500, \$5,000, or even \$50,000 per month!”); 1084:25-1085:9 (“if you want to make a million bucks, you could make a million bucks with me”), 1798.

⁸⁴ See, e.g., App. 1436:11-25, 1438:6-13, 1440:3-1441:12 (Boreyko: “We got, you know, hundreds and hundreds of the young kids at this – at this meeting here in North Carolina, and all they’re talking about is becoming millionaires . . . And for some kids, it’s like the first time -- I think everybody always dreamt they’d want to become a millionaire, but really for a lot of these kids, it’s the first time they’ve actually had a shot at becoming a millionaire in a business like this”), 1833; 1187:18-1189:4, 1810. In some of these videos, Boreyko asks Affiliates how they respond to objections regarding Vemma being a “pyramid” or a “scam,” and interestingly, some Affiliates respond to those concerns with income claims. See App. 1191:3-1192:22, 1810.

⁸⁵ App. 1427:24-1427:1, 1428:25-1429:7, 1832; see also App. 1100:14-16, 1800; 1499:4-8, 1500:17-20 (“What’s happened for us can happen for you.”), 1839.

⁸⁶ App. 1592 (directing Affiliates to ask prospects: “[I]f I could show you how to invest a small amount of money in your family’s health that could turn into \$1000 to \$3000 per month, part time, what would you say?”).

Vemma appear in Defendants' and their Affiliates' videos, print materials, and training presentations:

[T]his is about a three-to-five-year plan, to where you never have to worry about money ever again.

* * *

You don't want to live life with no money. You want to have so much money it doesn't even matter. That's why people do Vemma, to have enough money to where it doesn't even matter anymore, guys.

* * *

[T]he days of the week shouldn't even matter to you, guys. Why does the day of the week even matter? The sun comes up, goes down, we make money while we're asleep. That's how Vemma works. You're paid 24 hours a day, seven days a week no matter what you are doing.

* * *

[Y]ou can make a million a year or a million a month.⁸⁷

Vemma's Back Office Videos also contain misrepresentations regarding the income potential of Vemma:

I'm going to share with you exactly what to do to take your business from zero to a thousand a month, zero to a quarter million dollars, very, very fast . . . Here's the thing, guys. When I first got in this business, my own roommate . . . who's now earning over \$12,000 a month in Vemma, told me no. So, when your friends don't want to do it, don't get discouraged, guys. They will come around. When they start seeing you make money, when they see you getting free BMWs, guys, they will eventually come around.

* * *

⁸⁷ App. 1411:15-16, 1415:5-8, 1415:2-1416:4, 1418:10-11, 1831; *see also* App. 880 ("Do you want a few hundred dollars a month on the side? Do you want to make a six-figure income? A million? All of this is possible but you have to know where you want to go to determine what, and how much you have to do."); 884 ("Do you want to make an extra \$500-\$1000 in order to quit your part time job, or do you want to make six figures to gain the time and financial freedom that you have always dreamed of? Both are achievable, and both have been done before, you just need to ask yourself . . . how big do you want to dream?"); 1493:10-11, 1838 ("Here's the thing: in the last two weeks, I have earned \$59,500."); 1293:17-21 ("If you treat Vemma like a hobby, it's going to pay you like a hobby. If you treat it like a multi-million-dollar business, it can pay you a million bucks."), 1820; 1250:11-1251:6, 1816.

I'm a normal average 23 year old kid. If this business can pay me \$25,000 a month, it can for you too. And guess what, we even have a 26 year old guy . . . earning over \$1M a year. It's worked for us and it can work for you. Follow our proven system, follow our proven method, guys. If you say what we say and do what we do, you get what we have every single time.⁸⁸

Many of these videos, including the recordings from Vemma's YPR Radio show, are specifically geared towards young people:

[HOST:] I know that in the next 30 minutes you are about to change some young people's lives. I mean, I know you're doing great things, and we're going to talk about that, but more importantly, I want to talk to young people who are out there because . . . in my day, it's not possible. You're not 17, 18-year-old, 19-year-olds, they don't -- they can't be millionaires, you know? But with this company, opportunities have been opened that are like unbelievable.

So . . . I want to ask you, for real, because you know a lot of people are, like, they got to see it to believe it. Talk to me about one of your biggest weeks.

BRAD ALKAZIN: Biggest weeks? . . . In the business? . . . Last week . . . Last week, it was about [\$]54 grand.

[HOST:] Wow. Hold on. You're watching -- because you just thought your speakers were messed up, something was wrong with the audio in your computer . . . I didn't say 60 days, I didn't say 30 days.⁸⁹

In addition, top earners often display mock-ups of checks for millions of dollars (representing their lifetime or yearly earnings with Vemma) at company events and

⁸⁸ App. 1225:16-18, 1227:10-17, 1228:22-1229:5, 1814; *see also* App. 1111:11-16, 1113:1-5, 1801; 1124:11-1125:9, 1802; 1158:9-12 ("And they're getting to a point where they can retire mom and dad, pay off student loan debt, travel the world with their best friends, guys, and live the life they want to live."), 1807; 1131:12-18, 1803; 1137:17-1138:2, 1804; *see also* App. 1219:4-10, 1219:19-1220:4, 1813; 1143:17-1144:7, 1805.

⁸⁹ App. 1207:15-24, 1208:2-20, 1812; *see also* App. 1164:23-1166:24; 1167:17-1168:22, 1808.

conventions.⁹⁰

Defendants consistently lead consumers to believe that if they work hard, they can and will earn these substantial sums. For example, one high-ranking Vemma Affiliate tells potential recruits:

The only way you fail in this is by quitting or doing nothing. That's it. If you do something and don't quit, you succeed every time, no matter where you come from, no matter what your educational level is. No matter what, guys, you can make this work.⁹¹

Despite the numerous representations regarding substantial income potential, the vast majority of Vemma Affiliates will be in a position of financial loss at any given moment in time.⁹² As Dr. Bosley explains, the promised rewards may be realized only if successful recruitment continues indefinitely; thus, positive earnings suggestions are inherently deceptive and cannot be fulfilled for the overwhelming majority of participants.⁹³ These losses are inherent in the very design of Vemma's compensation

⁹⁰ App. 918, 914-15.

⁹¹ App. 1417:4-8, 1831; *see also* App. 1187:21-1188:9, 1810; 1450:16-25, 1834; 1662:21-1663:7, 1667:10-20.

⁹² App. 1542-43 ¶¶ 47, 49, 50 (Dr. Bosley). The poor results for most participants are predictable given Vemma's recruitment incentives and the binary nature of the compensation plan. Dr. Bosley's illustrations of hypothetical scenarios of how the Vemma program operates in practice suggest that at any time in the life of the organization, nearly 94% of participants will need additional recruitment to cover their personal investments, given the expenses associated with the recommended system of purchasing an Affiliate Pack and signing up for a qualifying monthly auto-delivery order. *Id.*

⁹³ App. 1542 ¶ 49 (Dr. Bosley). The compensation plan depends on continuous recruitment, which results in the vast majority of participants not having sufficient "downline" activity to make any significant amount of money. *Id.*

plan.⁹⁴

5. Inadequate Disclaimers

Although Defendants typically attempt to provide one of three purported disclaimers when making income claims, those attempts are inadequate. First, in recorded presentations, while the speaker makes income claims, there may be small white print at the bottom of the video that states some variation of the following:

Results not typical, your results may vary. The success or failure of each individual is dependent on their own efforts. The Company has generally expected results which can be obtained by visiting www.vemma.com.⁹⁵

When this print does appear, which is not always the case, it is not always legible—it sometimes blends in with the backdrop.⁹⁶ In addition, where the video is a recording of a live presentation, there is no indication of a similar disclaimer being provided to the live audience.⁹⁷

Second, Boreyko and certain high-ranking Vemma Affiliates may orally state some variation of “results not typical” in the midst of making an income claim, and then quickly follow the purported disclaimer with a statement that dilutes it.⁹⁸ For example,

⁹⁴ *Id.*

⁹⁵ See App. 18 ¶ 47 (Thacker); 918-26 (screenshots from 1834, 1836, 1801, 1812, 1802, 1814, 1807, 1803).

⁹⁶ See App. 18 ¶ 47 (Thacker); 918, 924-26 (screenshots from 1834, 1814, 1807, 1803).

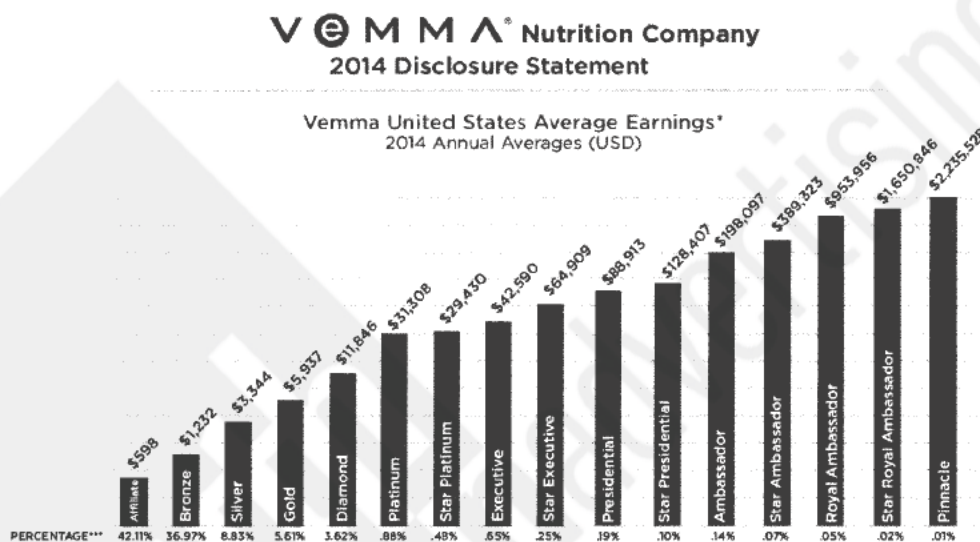
⁹⁷ See App. 18 ¶ 47 (Thacker); 919-22 (screenshots from 1801, 1812, 1836).

⁹⁸ App. 1401:22-1402:3, 1830; 1036:12-25 (Affiliate states: “This gentleman has reached a rank in the company called presidential, which by Vemma’s compensation plan, that’s \$100,000 a year. He did it, I believe, at the age of 20 years old, 19 or 20. So, he’s doing a lot of big things. In the next couple months, he’s on track to hit a rank called ambassador . . . Which by title is a quarter million dollars a year, \$5,000 a week. Understand, [] results not typical. But then also ask yourself, are you typical? And if you are, this may

Boreyko made the following statement during a presentation:

[T]his is a product that you could earn seven figures. And I'm not making any kind of income claims, because your results may vary. It's happened to other people. So why shouldn't it happen to you? I mean, you know, results aren't typical. I hope you're not typical.⁹⁹

Third, Vemma may point consumers to one of its annual disclosure statements (the "Income Disclosure Statements")¹⁰⁰ or have it quickly scroll through the end of a video.¹⁰¹ Portions of the 2014 Income Disclosure Statements are depicted below.



Of course, the Income Disclosure Statements only take Affiliates who met certain minimum purchase thresholds into account, thereby omitting Affiliates who fared worse—those, for example, who purchased an Affiliate Pack but were unsuccessful in

not be for you, you know.”), 1797; 1672:2-22 (Affiliate states: “this business took me from being a dead-broke college student . . . where in the last three years I’ve . . . made over \$450,000 . . . I’m not up here to brag, the results aren’t typical, right, they’re not probable, but do you know what these results are? They’re 150 percent possible”); 1150:18-21, 1152:2-17, 1152:24-1153:10, 1806.

⁹⁹ App. 1401:23-1402:3, 1830.

¹⁰⁰ App. 950 (2014); 788 (2013).

¹⁰¹ See App. 18 ¶ 47 (Thacker).

recruiting others.¹⁰² Moreover, Vemma likely redefines unsuccessful Affiliates as Customers.¹⁰³ In addition, the Income Disclosure Statements do not factor in expenses, such as any initial Affiliate Pack purchase or other purchases that Affiliates make to maintain bonus eligibility.¹⁰⁴ Further, Defendant Boreyko often attempts to minimize these figures by representing that most Affiliates are part time—in other words, they are not devoting their full attention to trying to make the business work.¹⁰⁵

Each of these purported disclaimers is inadequate for the reasons described in Section III(B) herein. None is sufficient to correct the false impression that consumers are likely to earn substantial income as a Vemma Affiliate.

6. Vemma's Compensation Plan¹⁰⁶

a. The terms of the plan.

Vemma's compensation plan is based on a binary system where each Affiliate

¹⁰² While the 2014 Income Disclosure Statement does not specifically state that the U.S. figures are limited to Affiliates who met these purchase thresholds, that is most likely the case given that the previous statement was limited as such and that the percentages of Affiliates and average dollar amounts earned are so similar.

¹⁰³ App. 1545 ¶ 60 (Dr. Bosley). The 2013 Income Disclosure Statement claims that Vemma is made up of 30% Affiliates (105,251 people) and 70% Customers (246,388 people). However, the company does not explain how it determined the make-up of those categories. Dr. Bosley notes that while Vemma apparently assumes Customers were never interested in the business opportunity, it seems far more likely – given Vemma's marketing activities and incentive structure – that many, if not most, of these individuals were interested in the business opportunity but chose not to purchase an Affiliate Pack and were unable to recruit. *Id.*

¹⁰⁴ See *id.* at ¶ 59 (Dr. Bosley).

¹⁰⁵ See, e.g., App. 1352:12-17, 1824; 1340:24-1341:3, 1823; 1118:11-15, 1801.

¹⁰⁶ Vemma's compensation plan is complex and continuously changes. However, the general characteristics of the plan have remained the same. App. 1530 ¶ 27 (Dr. Bosley). Incentives remain aligned with recruitment and purchases rather than retail sales based on market demand. *Id.* As such, for consistency, the FTC has focused its analysis on the compensation plan that went into effect in January 2015, unless otherwise noted.

builds two downlines of individuals who enroll with Vemma as Affiliates or Customers.¹⁰⁷ The number of “points” an Affiliate earns during a specified period generally determines the Affiliate’s eligibility to earn financial compensation and other rewards.¹⁰⁸ Points are earned through product purchases by the Affiliates themselves and their downlines.¹⁰⁹

To become an Affiliate, a consumer must either purchase a \$500 (now \$600) Affiliate Pack or personally enroll a Customer or Affiliate. In practice, as set forth above, Defendants advise consumers to purchase the Affiliate Pack, which they characterize as the Affiliate’s initial investment.¹¹⁰

After becoming an Affiliate, the individual must maintain a “qualified” status to be eligible for financial compensation from Vemma. This means the Affiliate must have: (1) a minimum of 120 points in “personal volume” each month, and (2) at least one “active” Customer or Affiliate on each of the Affiliate’s left and right teams.¹¹¹

To achieve 120 “personal volume” points each month, the Affiliate can personally purchase products worth 120 qualifying volume points or “QV” (e.g., a 2-pack of Vemma Health for \$171 or 2-pack of Verve for \$160), have double that purchased by his or her

¹⁰⁷ See generally App. 822-39; 1523 ¶ 5 (Dr. Bosley).

¹⁰⁸ See App. 1523 ¶ 5, 1530 ¶ 26, 1531 ¶ 30 (Dr. Bosley).

¹⁰⁹ See *id.* Most Vemma Products are sold in packs, and each pack is worth a certain number of “qualifying volume” points. For example, a 2-pack of Verve, which consists of 48 8.3-ounce cans and costs approximately \$160 (roughly \$3.33 per can), is worth 120 qualifying volume points. App. 793. Qualifying volume points are converted to “personal volume” points for purposes of determining an Affiliate’s qualification for compensation. App. 1530 ¶ 26 (Dr. Bosley).

¹¹⁰ See *supra* Section II(B)(3).

¹¹¹ See App. 823; 1530 ¶ 26 (Dr. Bosley).

personally enrolled Customers (*i.e.*, purchases worth 240 QV), or some combination of both.¹¹² Participants are “active” if they maintain a minimum level of 60 personal volume points each month, which is achieved by personally purchasing products worth 60 QV that month (*e.g.*, a 1-pack of Vemma Health for \$74), having double that purchased by his or her personally enrolled Customers, or some combination of both.¹¹³

Vemma’s compensation plan generally offers two types of financial compensation to qualified Affiliates: (1) immediate income and (2) long-term or “residual” income.¹¹⁴

Immediate Income

Sources of immediate income under the compensation plan include the **New Customer Bonus**, **Frenzy Bonus**, and **Double Frenzy Bonus**. Affiliates may receive a **New Customer Bonus** ranging from \$5 to \$100 on the first purchase made by a new Customer or Affiliate, so long as the Affiliate personally enrolled them.¹¹⁵ Affiliates who purchased an Affiliate Pack may also earn **Frenzy** or **Double Frenzy Bonuses**. **Frenzy Bonuses** are paid to qualified Affiliates who recruit three people who purchase at least 120 QV of Vemma Products within the same week they enroll in Vemma.¹¹⁶ **Double Frenzy Bonuses** pay higher rewards if each of those three recruits purchases an Affiliate Pack (which signifies enrollment as an Affiliate) and signs up for a monthly auto-delivery

¹¹² *See id.*; App. 792, 793.

¹¹³ App. 781; 823; 1530 ¶ 26 (Dr. Bosley). Some bonuses or rewards impose additional requirements or restrictions. For example, the requirements for active status are doubled and match those for qualified status (*i.e.*, 120 personal volume points) once the Affiliate reaches a certain “rank.” *See infra* text at n. 122-123.

¹¹⁴ *See* App. 1100:8-24, 1800; 1425:23-1426:4, 1427:2-6, 1832.

¹¹⁵ App. 1530-31 ¶ 28 (Dr. Bosley).

¹¹⁶ *Id.*; App. 834.

order worth at least 120 QV.¹¹⁷

Long-term or Residual Income

The primary bonus based on Defendants' incentive structure and representations is the **Cycle Commission**.¹¹⁸ Vemma describes this bonus as the "most powerful" and as the pathway to residual income.¹¹⁹ Vemma defines residual income as "the art of earning income after the initial work has been done" and compares the concept to Michael Jackson earning more money after his death than while he was still alive and making music.¹²⁰

At the end of each week, Affiliates may earn approximately \$20 each time they "cycle," or accumulate 360 QV on one team and 180 QV on the other.¹²¹ For example, Affiliates cycle one time, and earn roughly \$20, where they have three 2-pack Vemma Health purchases on the left team (totaling \$444) and three 1-pack Vemma Health purchases on the right team (totaling \$222, for a combined total of \$666 in purchases).

Other Rewards

Rank Advancement Awards are one-time bonuses paid when an Affiliate

¹¹⁷ App. 834; 1531 ¶ 28 (Dr. Bosley).

¹¹⁸ See App. 1427:2-6, 1832; 1531 ¶ 29 (Dr. Bosley).

¹¹⁹ App. 1235:18-1236:14 ("There are nine different ways to earn income. Let's show an example of the most powerful of the nine, the cycle bonus. It's the concept of creating residual or continuing income, and it has changed lives. Let's take a look at a three-month example . . . Month one income plus the new business in month two, for a total of \$400 in cycle bonus income. Now, in month three, let's say you create 10 new cycles. The volume from month one, two, and three equals \$600 in cycle bonus income. Simple math, right? I think you get the idea."), 1815; 1799.

¹²⁰ App. 985; 1072:4-20, 1073:4-11, 1798.

¹²¹ App. 826.

achieves a new “rank.”¹²² There are at least eighteen ranks within the compensation plan ranging from Bronze to Legend, based upon the number of cycles the Affiliate accrues during a four-week rank advancement period or “RAP.”¹²³ For example, if the Affiliate reaches the rank of Silver (five cycles per RAP) and maintains that rank for at least two consecutive RAPs, the Affiliate receives \$100.¹²⁴ Five cycles is equivalent to approximately \$3,330 in Vemma Health 2-pack purchases per RAP.¹²⁵ Affiliates may receive up to \$1 million if they reach the highest rank of Legend (20,000 cycles per RAP) and maintain that rank for at least four consecutive RAPs.¹²⁶ Twenty-thousand cycles is equivalent to approximately \$13.32 million in Vemma Health 2-pack purchases per RAP.

The Affiliate enters the “Premier Club” and may be eligible for the **Premier Club Bonus** once he or she reaches the rank of Diamond (twenty cycles per RAP),¹²⁷ so long as the Affiliate personally purchased an Affiliate Pack, has at least one Gold member in each downline, and has at least 500 QV on both teams in a four-week RAP.¹²⁸ This bonus ranges from \$400 to \$4,000, depending on the ranks achieved.¹²⁹

Other bonuses, which are also directly connected to the Affiliate’s number of cycles, include the: **Balanced Team Bonus, Affiliate Pack Flag, Matching**

¹²² App. 835-37; 1532 ¶ 33 (Dr. Bosley).

¹²³ App. 835-37.

¹²⁴ App. 835.

¹²⁵ App. 1531 ¶ 30 (Dr. Bosley).

¹²⁶ App. 1532-33 ¶ 33 (Dr. Bosley).

¹²⁷ App. 833. Twenty cycles is equivalent to approximately \$13,320 in Vemma Health 2-pack purchases per RAP.

¹²⁸ App. 833; 1532 ¶ 34 (Dr. Bosley).

¹²⁹ The Premier Club Bonus previously paid out half these amounts in cash, or the full amounts if the money was applied towards a car lease or college loan payment and various other requirements were met. *See* App. 1532 ¶ 34 (Dr. Bosley).

Commission, Second Tier Matching Commission, and Global Bonus Pool. These bonuses are described in Dr. Bosley's Declaration in paragraphs 34 through 36.

Lastly, under the **Vemma Loyalty Program**, Affiliates can earn a free case of product (in a maximum amount of 120 QV or the lowest order placed) if they purchase a minimum of 60 QV per month for six consecutive months.¹³⁰ The free product does not constitute points for purposes of bonus determination.¹³¹

b. The plan favors recruitment.

The key determinate of an Affiliate's income, and thus the activity incentivized by the compensation plan, is the recruitment of Affiliates, who then recruit other Affiliates, and so on.¹³²

The very terms of Vemma's compensation plan demonstrate its favoring of recruitment. For example, Affiliates who initially purchased an Affiliate Pack may earn up to \$700 through the New Customer and Double Frenzy Bonuses combined when they quickly recruit three other Affiliates after becoming involved in the program.¹³³

Defendants tout this as the Affiliates' way to recoup their initial cost.¹³⁴ In contrast,

¹³⁰ App. 834.

¹³¹ *Id.*

¹³² See App. 1543 ¶ 50 (Dr. Bosley). Vemma's discontinuation of its Customer Referral Program further evidences Vemma's limited focus on retail sales based on market demand. See App. 1539 ¶ 43 (Dr. Bosley). The Customer Referral Program required purchases by Customers (rather than the Affiliate) for qualification—however, Defendant Boreyko stated that fewer than 1,700 people qualified. App. 1349:23-1350:5, 1824. Its replacement program (the Vemma Loyalty Program) can be satisfied solely with personal purchases by the Affiliate. App. 1539 ¶ 43 (Dr. Bosley).

¹³³ App. 1449:19-1450:4, 1834; 1102:17-22, 1800; 1286:14-1287:18, 1819; 1675:2-1676:8.

¹³⁴ *Id.*; see *supra* text at n. 60.

Affiliates who sell from personal inventory – even if they take advantage of the 10% auto-delivery discount and then resell for full retail price – would need to sell \$7,000 worth of personal inventory to earn this same amount (\$700) through retail sales from inventory.¹³⁵ Affiliates who direct Customers to buy products through the Affiliate's Vemma website would need to achieve an even higher level of sales to achieve this amount.¹³⁶ This differential effort demonstrates that the Compensation Plan drives recruitment over retailing.¹³⁷ Vemma's new Two & Go training program also shows how Vemma's compensation plan drives recruitment.¹³⁸

In addition, the likelihood of Affiliates earning profits on retail sales from their own inventories is minimal. Vemma restricts Affiliates from selling Vemma Products at retail by prohibiting sales at business or retail outlets or offices, flea markets, swap meets,

¹³⁵ App. 1537-38 ¶ 40 (Dr. Bosley).

¹³⁶ By way of example, retail customers who purchase a 1-pack of Vemma Health for \$74 (or \$67 with auto-delivery) contribute 1/9 of a cycle, or \$2.22 in potential cycle earnings, which means Affiliates would need to sell 315 Vemma Health 1-packs (for a total value of over \$21,000 after incorporating the 10% auto-delivery discount the Customer may receive) to earn \$700. App. 1537-38 ¶ 40 (Dr. Bosley).

¹³⁷ Affiliate training also discourages retail sales and directs Affiliates to concentrate their efforts on recruitment rather than retail sales. *See* App. 1538 ¶ 41 (discussing 1487:12-1488:2).

¹³⁸ As discussed above, this training program directs Affiliates to purchase an Affiliate Pack, set up monthly auto-delivery, and recruit two new Affiliates who do the same within seven days—this allows the Affiliate to “go Bronze” and earn \$320 in their first week. App. 943, 949. The Affiliate is then directed to help the two new recruits duplicate those actions (recruit two more who purchase an Affiliate Pack and set up auto-delivery within seven days) in order to “go Silver” and earn an additional \$330. App. 0944, 0949. Then, the Affiliate should teach the new enrollees to duplicate with their own recruits in order to “go Gold” and earn at least \$1650. App. 945-46, 949. These bonuses are effectively payments for recruitment, as each is contingent upon getting others to join the business by purchasing an Affiliate Pack. *See* App. 1533-37 ¶¶ 38-39 (Dr. Bosley); *see also* App. 1319:3-16, 1321:21-1322:13, 1328:13-19, 1331:21-1332:3, 1333:12-24, 1822.

garage sales, home shopping networks, and online stores or auction sites, including eBay and Craigslist.¹³⁹ Moreover, Vemma provides no discounts to Affiliates that are not already available to Customers.¹⁴⁰ The only consistent discounts Vemma offers – up to a 10% discount for enrolling in auto-delivery, and any pro rata discount that would apply if the Affiliate meets the terms of the Vemma Loyalty Program – are equally available to Customers.¹⁴¹ This lack of differential wholesale/retail pricing means that Affiliates would have to re-sell Vemma Products at a higher price than that already available to Customers in order to earn a profit. It also means that the obvious incentive to become an Affiliate is the opportunity to earn cash rewards.¹⁴² Clearly, the activities incentivized by Vemma’s compensation plan and corresponding marketing activities are recruitment and eligibility-generating product purchases—not product sales.¹⁴³

Dr. Bosley’s hypothetical scenarios further demonstrate that earnings under the compensation plan are rewards for recruitment rather than sales to ultimate users, as the ability for the most recent Affiliates to reach a positive cumulative net profit relies upon an ongoing and consistent ability to recruit new Vemma Affiliates.¹⁴⁴ Data uncovered by the Italian Competition and Markets Authority (“Italian Authority”) during an investigation into a similar Vemma program in Italy supports Dr. Bosley’s

¹³⁹ App. 843 ¶ 48.

¹⁴⁰ App. 1544 ¶ 57 (Dr. Bosley). As discussed above, Vemma’s compensation plan provides little incentive to make such sales in any event.

¹⁴¹ *See id.*

¹⁴² Affiliates recognize that the products are simply incidental to the business opportunity. *See* App. 1044:9-1045:3, 1797; 1760:3-1761:16; 1272:23-1273:8, 1818.

¹⁴³ *See* App. 1533-39 ¶¶ 38-43, 1544 ¶ 55 (Dr. Bosley).

¹⁴⁴ App. 1543 ¶ 50 (Dr. Bosley).

conclusions.¹⁴⁵ The Italian Authority found that approximately 20% of Vemma's revenue was from Affiliate Pack purchases, over 60% was from auto-delivery, and only 16% was attributable to external sales.¹⁴⁶ These findings also reveal that Vemma's compensation plan and marketing materials strongly incentivize recruitment.¹⁴⁷

c. Vemma's purported anti-pyramid safeguards.

Vemma's Affiliate Agreement Terms and Conditions (the "Affiliate Agreement")¹⁴⁸ states: "[p]lacing a new order is [the Affiliate's] certification that 70% of the products previously purchased have been sold to or consumed by end users."¹⁴⁹ The

¹⁴⁵ App. 1548-49 ¶¶ 63-66 (Dr. Bosley); 1611-28. The compensation plan evaluated by the Italian Authority is comparable to the pre-2014 versions of the U.S. compensation plan, and any modifications to the U.S. compensation plan since then do not change the fundamental incentives or the suggested approach to Vemma's purported business opportunity. App. 1548 ¶ 63 (Dr. Bosley). As a result, the current U.S. compensation plan would likely result in outcomes similar to the Italian market. *Id.*

¹⁴⁶ App. 1624 ¶ 59. Affiliate Pack and auto-delivery purchases are really expenses to participate in the purported business opportunity. *See infra* Section II(B)(3); App. 1544 ¶ 57 (Dr. Bosley). The Italian Authority further discovered that only 27% of Italian Affiliates were active. *See infra* text at n. 113 for a detailed discussion of "active" status. If this percentage is applied to the U.S. Income Disclosure Statements, the percentage of total U.S. participants experiencing a loss would be much higher than what Dr. Bosley conservatively predicts. App. 1549 ¶ 65 (Dr. Bosley).

¹⁴⁷ App. 1548 ¶¶ 63-64 (Dr. Bosley). In ultimately concluding that Vemma Italia operated a pyramid scheme, the Italian Authority found that "personal" orders (Affiliate Packs and auto-delivery orders) played "an absolute predominate role" in the program, as opposed to sales to third parties, and Affiliates' promotional efforts focused on constantly enrolling new associates, rather than product sales. App. 1624 ¶ 59. The Italian Authority fined Vemma Italia €100,000 and ordered it to cease its operations in Italy. App. 1626 ¶ 74.

¹⁴⁸ When Affiliates make their initial Affiliate Pack purchase online, they are required to check a box stating that they read the Affiliate Agreement. App. 9 ¶ 21 (Thacker). The Affiliate Agreement itself does not display unless the consumer clicks the link and opens it, so it is unclear whether consumers actually read it. *See generally id.*

¹⁴⁹ App. 842 ¶ 29; 1544 ¶ 53 (Dr. Bosley).

policy depends on self-verification, and there are no explicit sanctions for violation.¹⁵⁰ In addition, when Affiliates sign-up for auto-delivery, they are not required to affirmatively verify with regard to past purchases.¹⁵¹

Vemma's return policies state that (a) consumers may return unused¹⁵² products within 30 days, but they must pay the shipping costs incurred on both the order and the return, and (b) Affiliates may return marketable product within one year of purchase, again, less all shipping and handling costs in both receiving and returning the products. Shipping costs are typically significant given the weight of the products (*e.g.*, approximately \$35 for one Affiliate Pack purchase).¹⁵³ For the products to be marketable, they must be usable (unexpired and undamaged) and not seasonal, discontinued, or special promotion items.¹⁵⁴ With regard to usability, some products have only a four or five month shelf life.¹⁵⁵ In addition, Vemma states that it "will not issue a refund for products certified as consumed by end consumers."¹⁵⁶ As discussed in Section III(A)(4) below, both of these purported anti-pyramiding safeguards are inadequate.

¹⁵⁰ *See id.*

¹⁵¹ App. 9 ¶ 22 (Thacker). Affiliates simply receive their monthly orders without further action. *See generally id.*

¹⁵² Consumers may return up to three empty cans or one empty bottle along with the rest of the unused case. App. 842 ¶ 34.

¹⁵³ App. 12 ¶ 27 (Thacker); 0772-76. The FTC investigator spent nearly \$300 in shipping costs on his undercover orders and his membership cancellation. App. 13-14 ¶¶ 31-32 (Thacker).

¹⁵⁴ App. 842 ¶ 38.

¹⁵⁵ App. 10 ¶ 26 (Thacker). The expiration dates of the liquid products the FTC investigator received with his undercover purchase ranged from four to ten months.

¹⁵⁶ App. 842 ¶ 29.

III. Defendants' Pyramid Scheme and False Income Claims Violate Section 5 of the FTC Act

Section 5(a) of the FTC Act empowers the FTC to prevent “unfair or deceptive acts or practices in or affecting commerce.”¹⁵⁷ The operation of a pyramid scheme constitutes an unfair or deceptive act or practice in or affecting commerce for the purposes of Section 5(a).¹⁵⁸ Pyramid schemes are inherently fraudulent—by their very design, most participants will lose money.¹⁵⁹ False income claims are also deceptive under Section 5(a).¹⁶⁰

A. Defendants Are Operating an Illegal Pyramid Scheme

1. The Pyramid Explained: The Legal Standard

While pyramids may take the form of simple “chain letters” in which participants pay a fee for the right to receive rewards for recruiting others who pay the same fee, most modern pyramid schemes involve the supposed marketing of products. With respect to pyramid schemes involving product purchases, the Ninth Circuit and other courts have applied what is known as the “Koscot test.” Under this test, pyramid schemes are “characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product *and* (2) the right to receive in return for

¹⁵⁷ 15 U.S.C. § 45(a) (2006).

¹⁵⁸ *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014) (citing *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1178, 1181 (1975), *aff'd mem. sub nom, Turner v. FTC*, 580 F.2d 701 (D.C. Cir. 1978) (“Koscot”)).

¹⁵⁹ *See Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1996); *see also Koscot Interplanetary*, 86 F.T.C. at 1181.

¹⁶⁰ *See FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528-29 (S.D.N.Y. 2000); *FTC v. U.S. Oil & Gas*, 1987 U.S. Dist. LEXIS 16137, at *44-45 (S.D. Fla. 1987), *aff'd*, 748 F.2d 1431 (11th Cir. 1984).

recruiting other participants into the program rewards which are unrelated to the sale of product to ultimate users.”¹⁶¹

The requirement that participants pay money for the right to sell products need not be in the form of mandatory join or renewal fees.¹⁶² Instead, it can be met where participants are required to purchase inventory in order to receive the full benefits of the program.¹⁶³

The satisfaction of the second prong, recruitment with rewards unrelated to product sales, “is the *sine qua non* of a pyramid scheme.”¹⁶⁴ The “promise of lucrative rewards for recruiting others tends to induce participants to focus on the recruitment side of the business at the expense of their retail marketing efforts, making it unlikely that meaningful opportunities for retail sales will occur.”¹⁶⁵ A system that compensates participants based on product purchases and incentivizes recruitment over retail sales can

¹⁶¹ See *BurnLounge*, 753 F.3d at 883 (quoting *Omnitrition*, 79 F.3d at 781 and *Koscot*, 86 FTC at 1181) (emphasis in original).

¹⁶² See generally *Omnitrition*, 79 F.3d at 782.

¹⁶³ *Id.* (finding that the payment of money element was satisfied where participants had to make large monthly orders to become “supervisors,” and in exchange for those purchases, received the right to sell products and earn compensation based on product orders made by their recruits); see also *FTC v. Equinox Int’l Corp.*, No. CV-S-99-0969-JBR (RLH), 1999 U.S. Dist. LEXIS 19866, at *16 (Sept. 14, 1999) (finding that a monthly order requirement satisfied the first prong of the *Koscot* test).

¹⁶⁴ *Omnitrition*, 79 F.3d at 781.

¹⁶⁵ *Id.* at 782 (citing *Koscot*, 86 F.T.C. at 1181). Paying bonuses for recruitment encourages “both a company and its distributors to pursue that side of the business, to the neglect or exclusion of retail selling. The short-term result may be high recruiting profits for the company and select distributors, but the ultimate outcome will be the neglect of market development, earnings misrepresentations, and insufficient sales for the insupportably large number of distributors whose recruitment the system encourages.” *Koscot*, 86 FTC at 1181.

lead to “inventory loading”—*i.e.*, making purchases to remain eligible for bonuses.¹⁶⁶ Of course, a company may not redeem itself by pointing to the fact that it makes some retail sales.¹⁶⁷ The determination of whether an enterprise is a pyramid scheme focuses on whether the primary purpose of the enterprise is to reward recruitment over sales.¹⁶⁸

Enterprises that enforce safeguard policies preventing distributors from inventory loading and encouraging retail sales may differ from pyramid schemes.¹⁶⁹ In *In re Amway Corp.*, the following anti-pyramiding policies were deemed effective:

- (a) a requirement that distributors sell at wholesale or retail at least 70% of the products bought in a given month in order to receive a bonus for that month (the “70% rule”);
- (b) a requirement that sponsoring distributors buy back from any person they recruited any unused, marketable products if their recruits left the business (the “buy-back rule”); and
- (c) a requirement that distributors submit proof of retail sales made to at least ten different consumers in order to receive a bonus that month (the “10 customer rule”) (together, the “*Amway* safeguards”).¹⁷⁰

However, these *Amway* safeguards are not one size fits all—they were found to be effective in *Amway* as a matter of fact, not as a matter of law.¹⁷¹ To rebut pyramid

¹⁶⁶ *Omnitrition*, 79 F.3d at 782, n. 3 (defining inventory loading and discussing how defendants’ program led to exorbitant amounts of product purchases regardless of market demand). Vemma similarly defines inventory loading in its Affiliate Agreement. *See* App. 0842 ¶ 29. While the Affiliate Agreement states that inventory loading is prohibited, Defendants’ training materials explicitly encourage and incentivize such activity. *See infra* Section II(B)(3).

¹⁶⁷ *Omnitrition*, 79 F.3d at 782; *see also BurnLounge*, 753 F.3d at 886.

¹⁶⁸ *See generally United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 483 (6th Cir. 1999).

¹⁶⁹ *In re Amway Corp.*, 93 F.T.C. 618, 716, 1979 FTC LEXIS 390, at *205-07 (1979).

¹⁷⁰ *Id.*

¹⁷¹ *Omnitrition*, 79 F.3d at 783.

allegations, “there must be evidence that the program’s safeguards are *enforced* and *actually serve to deter inventory loading and encourage retail sales.*”¹⁷² Indeed, “[t]he key to any anti-pyramiding rule . . . is that the rule must serve to tie recruitment bonuses to actual retail sales in some way. Only in this way can the second *Koscot* factor be defeated.”¹⁷³

2. Vemma Affiliates Pay Money to Receive the Right to Sell a Product

While Vemma states that it has no sign-up or membership fees,¹⁷⁴ in practice, Affiliates must purchase an Affiliate Pack to earn full rewards under the compensation plan, and Affiliates are strongly encouraged to purchase Vemma Products each month to maintain eligibility for bonuses.¹⁷⁵ These instructions come directly from the founder and CEO of Vemma. As discussed above, Defendant Boreyko tells new and potential participants “you don’t have to buy an Affiliate Pack, but you *have* to buy an Affiliate Pack,”¹⁷⁶ and “after you’ve done your Affiliate Pack, you need to get on an auto-delivery order [of] 120 points. That is like your trump card. That makes sure that you’re qualified.”¹⁷⁷ Clearly, Affiliates pay money to receive the right to sell Vemma Products.

¹⁷² *Id.* (emphasis added).

¹⁷³ *Id.*

¹⁷⁴ See App. 1376:3-9, 1826; see also App. 1666:7-1667:20; 1099:18-24, 1800. Before 2014, a personal auto-delivery order was explicitly required for Affiliates to receive compensation from Vemma. See App. 1560 (Dr. Bosley).

¹⁷⁵ See, e.g., 1243:24-1244:13, 1816; 1446:10-17, 1834; 1467:1-3, 1836.

¹⁷⁶ App. 1466:9-11, 1836; 1243:24-1244:2, 1816.

¹⁷⁷ App. 1468:5-9, 1836; see also App. 956-57.

3. Vemma Affiliates Receive Rewards for Recruitment Unrelated to Product Sales to Ultimate Users

Recruiting and rewarding recruitment is integral to Vemma's business structure, and there is strong evidence that Affiliates "[a]re meant to be, and [a]re, primarily motivated by the opportunity to earn cash rewards for recruitment."¹⁷⁸

Nearly all of Defendants' promotional efforts emphasize Vemma's purported business opportunity. While there are videos and written materials concerning Vemma Products, the clear emphasis is on the program and the opportunity to achieve financial freedom through the recruitment and enrollment of others. Defendants' own statements evidence that Affiliate Pack and subsequent monthly purchases are motivated by the opportunity to earn financial rewards. Training and presentations focus on the system of duplication, including purchasing an Affiliate Pack; signing up for a personal monthly auto-delivery order to ensure bonus eligibility; recruiting new Affiliates; and teaching them to do the same.¹⁷⁹ This is most clearly illustrated by the recent Two & Go training program.¹⁸⁰

As discussed above, Affiliate Pack purchases are synonymous with being recruited into the business.¹⁸¹ When Affiliates earn compensation from Affiliate Pack purchases of their downlines, they are receiving compensation for recruitment by default. Recruiting is built into Vemma's compensation structure because more recruitment leads to higher

¹⁷⁸ *BurnLounge*, 753 F.3d at 885; see *supra* Sections II(B)(3) and (6)(b).

¹⁷⁹ See *supra* Section II(B)(3).

¹⁸⁰ See *supra* text at n. 72-75; see also *supra* n. 138.

¹⁸¹ See *id.* Along the same lines, there is no other reason to purchase an Affiliate Pack given its contents (*e.g.*, the business-related tools).

rewards.¹⁸² As such, Vemma “primarily reward[s] recruiting new participants.”¹⁸³ The data obtained by the Italian Authority solidifies this point.¹⁸⁴

Not only does Vemma encourage and incentivize Affiliates to seek rewards by recruiting downline Affiliates, it provides little incentive to seek retail sales, whether by reselling products from inventory or directing Customers to purchase online through the Affiliate’s Vemma website. Vemma makes virtually no effort to teach Affiliates how to develop a retail business and even imposes restrictions that discourage retail sales.¹⁸⁵ Moreover, there are no meaningful discounts provided to Affiliates that would enable them to make any real profit on retail sales, thereby making it more likely that Affiliates focus on recruitment.¹⁸⁶ Indeed, Vemma and top Affiliates recognize that cultivating Customers will not provide the amount of rewards recruiting other Affiliates will provide, thereby indicating that Affiliates will focus on recruitment rather than retail sales.¹⁸⁷

While it is possible that some Affiliates purchase Vemma Products for personal consumption rather than for bonus eligibility, Vemma’s own statements, presentations, training, and other materials show that to be highly unlikely.¹⁸⁸ As discussed above, the

¹⁸² See *BurnLounge*, 753 F.3d at 884; see also *Equinox Int’l*, 1999 U.S. Dist. LEXIS 19866, at *18 (“In short, distributors rewards are received by purchasing product and recruiting others to do the same.”).

¹⁸³ *BurnLounge*, 753 F.3d at 884.

¹⁸⁴ See *supra* text at n. 145-147.

¹⁸⁵ See *supra* Sections II(B)(3) and (6)(b).

¹⁸⁶ *Id.*

¹⁸⁷ See *id.*

¹⁸⁸ App. 1544-45 ¶¶ 56-57 (Dr. Bosley). The Ninth Circuit recently addressed the issue of whether internal consumption, or sales of products to participants in the business opportunity, may be considered sales to “ultimate users” for purposes of the *Koscot* test. See *BurnLounge*, 753 F.3d at 887. While the court acknowledged this possibility, it

evidence demonstrates that these purchases are driven by a desire to earn rewards, not by consumer demand for the products themselves.¹⁸⁹ Clearly, the opportunity to earn cash rewards is the primary purpose of Affiliate purchases—the drinks contained in the product packs are merely incidental.

The Vemma program is a perpetual recruitment chain that dooms the vast majority of participants to financial loss.¹⁹⁰ Taken together, Vemma’s structure, compensation plan, and recruitment practices demonstrate that the focus of Vemma is “in promoting *the program* rather than selling *the products*.”¹⁹¹

4. Vemma Pays Lip Service to Anti-Pyramid Scheme Rules

Although Vemma has written policies purportedly addressing two of the *Amway* safeguards, there is no evidence that they are enforced or that they actually serve to deter inventory loading or encourage retail sales.

a. Inadequate 70% rule.

Vemma’s 70% rule is insufficient to deter inventory loading or to encourage retail sales. Buried in its lengthy Affiliate Agreement, Vemma simply states that the placement of a new order is the Affiliate’s “certification that 70% of the products previously

further acknowledged that where the products are simply incidental to the right to participate in the money-making venture, the analysis remains the same. *See id.* at 887-88. In other words, where a company incentivizes recruitment and the rewards paid for package sales are “not tied to the consumer demand for the merchandise in the package” but are effectively paid for recruitment, the rewards are nevertheless “unrelated” to sales to ultimate users. *See id.*

¹⁸⁹ *See supra* Sections II(B)(3) and (6)(b). In addition, Vemma provides no incentive for consumers to join simply to obtain Vemma Products. *Id.* at Section II(B)(6)(b).

¹⁹⁰ App. 1543 ¶ 50 (Dr. Bosley); *see also supra* text at n. 92-93.

¹⁹¹ *See Omnitrition*, 79 F.3d at 782.

purchased have been sold to or consumed by end consumers.”¹⁹² Thus, it is subject to self-certification, and there is no evidence that it is monitored or enforced. This self-certification is particularly problematic given that Affiliates are strongly encouraged to sign-up for monthly auto-delivery, in which case, there is a standing product order and Affiliates do not expressly certify anything with regard to past purchases.¹⁹³ It is also unclear what the sanction or penalty would be if an Affiliate did not actually meet the stated requirement. In addition, the requirement can seemingly be met by the Affiliate’s personal use of the products, regardless of whether they purchased the products for participation in the business opportunity.¹⁹⁴

b. Ineffective buy-back rule.

Vemma’s buy-back rule is likewise insufficient. The high cost of shipping in receiving and returning Vemma Products makes returns difficult, even assuming the products are still marketable. For example, the FTC investigator spent nearly \$300 in shipping costs alone on his Affiliate Pack purchase, five months of auto-delivery orders, and product return.¹⁹⁵ In addition, if Affiliates follow Vemma’s stated pathway to success and incur several months of auto-delivery orders, they may not even attempt a return for previous orders given Vemma’s corresponding 70% rule, which states that Vemma “will

¹⁹² App. 842 ¶ 29.

¹⁹³ See *Equinox Int’l*, 1999 U.S. Dist. LEXIS 19866, at *11-12, 19-20, 22 (finding a similar 70% rule ineffective and noting that the company relied on “the implication that if a distributor place[d] a new order for product, the distributor [] tacitly certifi[ed] that 70% of the previous product ha[d] been sold”).

¹⁹⁴ While Vemma’s Affiliate Agreement states that inventory loading is prohibited, as described at length herein, Defendants expressly encourage it. See *supra* II(B)(3).

¹⁹⁵ App. 14 ¶ 32 (Thacker).

not issue a refund for products certified as consumed by end consumers.”¹⁹⁶ By crafting its 70% rule this way, Vemma appears to reserve the right to refund only 30%¹⁹⁷ of previous orders.¹⁹⁸ Therefore, as written, Vemma’s “70% rule becomes a sword for [it] to deny refunds, instead of a shield to protect distributors from inventory loading.”^{199, 200}

c. No 10 customer rule.

Vemma does not have a 10 customer rule, and there is no minimum retail sales requirement for Vemma Affiliates, whether by re-sale from inventory or development of Customers. Vemma Affiliates can obtain rewards purely from recruitment without selling a single product.

In sum, Defendants are offering a pyramid scheme in which participants pay Vemma for the right to earn compensation from recruitment that is unrelated to sales to ultimate users. Vemma encourages and incentivizes participants to seek and receive rewards for recruitment, Defendants heavily emphasize recruitment over product sales,

¹⁹⁶ App. 842 ¶ 29.

¹⁹⁷ In comparison, the court in *Omnitrition* found that the company’s 90% refund for consumable products less than three months old was likely insufficient to deter inventory loading. *See Omnitrition*, 79 F.3d at 783-84.

¹⁹⁸ While the FTC investigator was able to return his auto-delivery orders less shipping, this may not be the result in every case.

¹⁹⁹ *Equinox Int’l*, 1999 U.S. Dist. LEXIS 19866, at *22 (discussing a similar 70% rule and its effect on the refund policy, and inferring that a majority of product purchased by distributors was non-refundable).

²⁰⁰ Vemma’s buy-back rule is also inferior to *Amway*’s in that it provides no effective check to prevent Affiliates from pushing unnecessary products on their downlines. *See Equinox Int’l*, 1999 U.S. Dist. LEXIS 19866, at *23-24 (discussing how, in *Amway*, the upline or sponsoring distributor was responsible for the refund, so they were deterred from pushing their recruits to purchase large quantities of products). Here, Vemma not only generally encourages inventory loading, it encourages Affiliates to enroll others who will also inventory load. *See supra* text at n. 72-75; *see also* App. 942, 944-46; 1328:13-19, 1822.

and Vemma does not employ sufficient *Amway*-type safeguards.

B. Defendants Make Income Misrepresentations

An act or practice is deceptive under Section 5(a) if “first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material.”²⁰¹ Misrepresentations may be either express or implied.²⁰² A representation, omission, or practice is material if it “involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.”²⁰³

The law is clear that misrepresentations regarding profit potential are material and violate Section 5(a) of the FTC Act.²⁰⁴ Simply stated, an entity may not “make deceptive use of unusual earnings realized only by a few.”²⁰⁵ These claims are misleading despite

²⁰¹ *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001) (quoting *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994)); *In re Cliffdale Assocs.*, 103 F.T.C. 110, 164-65 (1984)). Under Section 5, the FTC is not required to prove that a defendant intended to deceive consumers, nor is a defendant’s good faith a defense to liability. *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1029 (7th Cir. 1988).

²⁰² *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993) (“[N]othing in statute or case law . . . protects from liability those who merely imply their deceptive claims”).

²⁰³ *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006) (quoting *Cliffdale Assocs.*, 103 F.T.C. at 165). The FTC need not prove actual reliance by each individual consumer. *Figgie Int’l*, 994 F.2d at 605. Requiring such proof would defeat the intent of the FTC Act and would frustrate prosecutions of large consumer redress actions. *Id.* Instead, a presumption of actual reliance arises once the FTC has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant’s product. *Id.* at 605-06.

²⁰⁴ See *Five-Star Auto Club*, 97 F. Supp. 2d at 528-29; *U.S. Oil & Gas*, 1987 U.S. Dist. LEXIS 16137, at *44-45.

²⁰⁵ *Nat’l Dynamics Corp. v. FTC*, 492 F.2d 1333, 1335 (2d Cir. 1974); *Five-Star Auto Club*, 97 F. Supp. 2d at 528-30 (finding that consumers could reasonably assume that the promised rewards of a free car and substantial earnings were achieved by typical participants); *Bailey Emp’t Sys. v. Hahn*, 545 F. Supp. 62, 68 (D. Conn. 1982)

“results may vary” or similar language, because consumers may reasonably believe that the statements of earnings potential represent typical or average earnings.²⁰⁶ The “common-sense net impression” controls.²⁰⁷

Defendants have made income misrepresentations in numerous contexts. Whether in person, in recorded presentations or other videos, on Vemma’s websites, or elsewhere, Defendants repeatedly claim, both explicitly and implicitly, that Affiliates have made and can make substantial earnings.²⁰⁸ These claims are clearly made for the purpose of convincing consumers to participate in Vemma. The claims are misleading, however, as the vast majority of consumers will be unable to achieve these earnings and will never even recoup their initial investment.²⁰⁹ In fact, Vemma’s structure ensures that the large

(companies may not publicize the unusual earnings of a few without indicating that they are not representative).

²⁰⁶ See *FTC v. Medicor, LLC*, 217 F. Supp. 2d 1048, 1054 (C.D. Cal. 2002); see also *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1072 (C.D. Cal. 2012) (“small print disclaimers . . . do not preclude liability . . . consumers are unlikely to read them while watching and listening to the testimonials of the endorsers”); see also *Equinox Int’l*, 1999 U.S. Dist. LEXIS 19866, at *17 (“Distributors are given unrealistic hypothetical examples that their profits will increase geometrically if distributors focus on recruitment . . . [While] video presentations and [company] materials . . . contain disclaimers as to the amount of profits obtainable . . . [they] are difficult to read, do not accurately indicate the actual amount of earnings that can be expected and do not immunize Equinox’s exaggerated claims of income.”)

²⁰⁷ See *FTC v. Minuteman Press*, 53 F. Supp. 2d 248, 262 (E.D.N.Y. 1998) (citing *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1497 (1st Cir. 1989)); see also *Cyberspace.com*, 453 F.3d at 1200 (a representation “may be likely to mislead by virtue of the net impression it creates even though [it] also contains truthful disclosures.”); *FTC v. Arlington Press, Inc.*, No. CV-98-9260-MMM (CWx), 1999 U.S. Dist. LEXIS 2055, at *27 (C.D. Cal. 1999) (“Even if . . . literally true, a representation will be found to be deceptive and in violation of Section 5 of the FTC Act if its net impression is likely to mislead consumers.”).

²⁰⁸ See *supra* Section II(B)(4).

²⁰⁹ App. 1540-43 ¶¶ 44-47, 49-50 (Dr. Bosley).

majority of participants will *lose* money.²¹⁰

Although Defendants attempt to qualify their statements through small print during video presentations, by orally stating “results may vary,” or through the Income Disclosure Statements, such attempts are inadequate. None of Defendants’ purported disclaimers is sufficiently prominent and unambiguous to change the apparent meanings of the misrepresentations that Affiliates are likely to earn substantial incomes.²¹¹ With regard to the oral disclaimers in particular (*e.g.*, “Results aren’t typical. I hope you’re not typical.”), consumers would likely nevertheless be left with the inaccurate impression that Affiliates who work hard are likely to earn substantial incomes through Vemma. The same is true with regard to the purported written disclaimers (*e.g.*, “Results not typical, your results may vary. The success or failure of each individual is dependent on their own efforts.”), which lead consumers to believe that if they put forth the right effort, they can and will earn substantial sums.²¹² Indeed, Vemma’s overall message is that anyone can succeed through participation in Vemma if they are willing to work hard, which, as set forth above, is deceptive.

Finally, while the Income Disclosure Statements reveal that many Affiliates have not earned substantial sums (*e.g.*, in 2013, less than 0.62% earned \$92,181 or more), the

²¹⁰ App. 1543 ¶ 50 (Dr. Bosley).

²¹¹ See *supra* Section II(B)(5).

²¹² See *id.* This is assuming consumers are even able to see the printed disclaimer. As noted above, the print sometimes blends in with the backdrop, and if the video is a recording of a live presentation, the live audience would not see it. See *supra* text at n. 96 and 97.

Statements themselves are deceptive and misleading by design.²¹³ Among other things, they inflate the earnings averages by reflecting only the income of Affiliates who meet certain minimum purchase thresholds, do not factor in any costs of participation or other expenses, and likely misidentify unsuccessful Affiliates as Customers.²¹⁴ As such, the results contained in the Income Disclosure Statements, which are already inconsistent with the numerous representations regarding high income potentials, are actually skewed and distorted. Instead, Vemma's income results are likely much worse than what the Income Disclosure Statements depict.²¹⁵

C. Defendants Fail to Disclose Material Information

A material omission that is likely to mislead consumers acting reasonably under the circumstances is also a deceptive act or practice in violation of Section 5(a).²¹⁶ Failing, as Defendants have done, to adequately disclose that Vemma's structure ensures that most consumers who become Vemma Affiliates will not earn substantial income is a material omission similar to the failure to disclose the true nature of a service or product.²¹⁷

Defendants' represent that individuals have earned substantial income from participation in Vemma and that any consumer who becomes a Vemma Affiliate has the

²¹³ In addition, when an Income Disclosure Statement appears at the end of a video, which is not always the case, it scrolls so quickly that consumers cannot possibly read or comprehend it. *See generally* App. 18 ¶ 47.

²¹⁴ *See supra* Section II(B)(5).

²¹⁵ App. 1546 ¶ 62 (Dr. Bosley).

²¹⁶ *FTC v. Pantron I Corp.*, 33 F. 3d at 1095.

²¹⁷ *See Five-Star Auto Club*, 97 F. Supp. 2d at 532-33 (finding that defendants violated Section 5 by, among other things, failing to disclose that due to the structure of the scheme, the vast majority of consumers would not achieve substantial income).

ability to earn substantial income.²¹⁸ Although the lure of achieving wealth is a central element of the Vemma pitch, very few participants can or will ever achieve the stated financial gain.²¹⁹ This is clearly a material fact that should be disclosed to potential participants.

D. Defendants Provide the Means and Instrumentalities for Section 5 Violations

Defendants have further violated Section 5 by providing the means and instrumentalities for participants to make income misrepresentations. “Those who put into the hands of others the means by which they may mislead the public, are themselves guilty of a violation of Section 5 of the Federal Trade Commission Act.”²²⁰

Defendants place false and misleading marketing materials in the hands of their Affiliates, who use them to recruit more participants.²²¹ Presenters at live presentations rely on Vemma videos, recordings, and print materials that contain misrepresentations regarding the income potential of Vemma.²²² Additionally, links to videos are placed on Vemma’s websites with the express intent that Affiliates use them for their recruitment meetings (*e.g.*, video titles include language such as “Home Event—Show this Last”).²²³ Vemma also provides the Back Office Videos for Affiliates to display on their websites,

²¹⁸ See *supra* Section II(B)(4).

²¹⁹ See App. 1542 ¶ 49 (Dr. Bosley).

²²⁰ *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963); *FTC v. Magui Publishers, Inc.*, No. 91-55474, 1993 U.S. App. LEXIS 28684, at * 10-11 (9th Cir. Oct. 6, 1993).

²²¹ See *supra* Sections II(B)(1) and (3).

²²² See *supra* Sections II(B)(1) and (4).

²²³ See *supra* Section II(B)(1).

and many of those videos contain income misrepresentations.²²⁴

E. Bethany Alkazin Is an Appropriate Relief Defendant

An individual may be named as a relief defendant if the person: (1) received ill-gotten funds, and (2) has no legitimate claim to those funds.²²⁵ Vemma has stated that Relief Defendant Bethany Alkazin has received funds through Vemma.²²⁶ At company events and on its websites, Vemma publicizes the millions of dollars she and her husband have earned through the scheme.²²⁷ Because such earnings were the result of the deceptive acts and practices described herein, Bethany Alkazin has no legitimate claim to them and would be unjustly enriched if she were not required to disgorge them.

IV. The Court Should Enter a TRO to Stop Defendants' Scheme

A. The Court Has the Authority to Grant the Requested Relief

Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the FTC to seek, and the Court to grant, both a permanent injunction against violations of any provisions of law enforced by the FTC and “any ancillary relief necessary to accomplish complete justice.”²²⁸ This ancillary relief can include, among other remedies, an *ex parte* temporary

²²⁴ See *supra* Sections II(B)(1) and (4).

²²⁵ *Janvey v. Adams*, 588 F.3d 831, 834 (5th Cir. 2009); *CFTC v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 192 (4th Cir. 2002); *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998); see also *FTC v. Ameridebt, Inc.*, 343 F. Supp. 2d 451, 464 (D. Md. 2004) (Section 13(b) invests the court with equitable powers over “innocent persons” in order to accomplish such relief as disgorgement of unjust enrichment).

²²⁶ App. 993-94.

²²⁷ See *supra* Section II(A)(5).

²²⁸ *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111–13 (9th Cir. 1982). The Ninth Circuit has recognized that any case alleging violations of a law enforced by the FTC constitutes a proper case for which injunctive relief may be sought. *Id.* at 1110-13; *FTC v. Evans Prod. Co.*, 775 F.2d 1084, 1086-87 (9th Cir. 1985).

restraining order, a preliminary injunction, an asset freeze, and the appointment of a receiver.²²⁹

B. A TRO Should Be Entered Because the FTC Is Likely to Succeed on the Merits, and Balancing of the Equities Serves the Public Interest

The FTC has submitted strong evidence that establishes Defendants' widespread and systematic deception. Section 13(b) of the FTC Act was designed to combat such abuses. A court in a Section 13(b) action must only: (1) determine the FTC's likelihood of ultimate success, and (2) weigh the public interest in preventing further law violations against the defendants' private interest in continuing to operate their business unabated.²³⁰ Unlike private litigants, the FTC need not prove irreparable injury,²³¹ which is presumed in a statutory enforcement action.²³²

With regard to the first requirement, the Court need only find "some chance of probable success on the merits."²³³ As discussed in Section III above, the evidence amply demonstrates that the FTC is likely to prevail on each of the five counts alleged in the Complaint.

With regard to the second requirement—weighing the equities—the public interest

²²⁹ See e.g., *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1232 & n.2 (9th Cir. 1999) (*ex parte* TRO and preliminary injunction including asset freeze); *FTC v. Am. Nat'l Cellular, Inc.*, 810 F.2d 1511, 1512 (9th Cir. 1987) (TRO and preliminary injunction including asset freeze and appointment of a receiver).

²³⁰ *FTC v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984) (citing *FTC v. Simeon Mgmt. Corp.*, 532 F.2d 708, 713-714 (9th Cir. 1976)).

²³¹ *Warner Commc'ns*, 742 F.2d at 1159.

²³² *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (citing *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 176 (9th Cir. 1987)).

²³³ *World Wide Factors*, 882 F.2d at 347 (citing *Odessa*, 833 F.2d at 176).

generally receives far greater weight.²³⁴ The public interest in halting Defendants' violations of Section 5 and in preserving assets for a meaningful monetary remedy far outweighs any interest Defendants may have in continuing to engage in deceptive practices.²³⁵ Because Defendants' business is rooted in deception and permeated by fraud, the equities weigh heavily in favor of granting preliminary relief.

C. Defendants Are Each Liable for the Law Violations

1. The Corporate Defendants Operate as a Common Enterprise

Corporate defendants may be held jointly and severally liable if they operate as a common enterprise,²³⁶ and each may be held liable for the deceptive acts and practices of the other.²³⁷ "[I]n situations where corporations are so entwined that a judgment absolving one of them of liability would provide the other defendants with a 'clear mechanism for avoiding the terms of the order,' courts have been willing to find the existence of a common enterprise."²³⁸

²³⁴ *World Wide Factors*, 882 F.2d at 347; *World Travel Vacation Brokers*, 861 F.2d at 1031; see also *Affordable Media*, 179 F.3d at 1236 ("Obviously, the public interest in preserving the illicit proceeds . . . for restitution to the victims is great.").

²³⁵ In contrast, "[t]here is no oppressive hardship to defendants in requiring them to comply with the FTC Act, refrain from fraudulent representation or preserve their assets from dissipation or concealment." *World Wide Factors*, 882 F.2d at 347. The Court has no obligation to protect ill-gotten gains or illegal business interests. *CFTC v. British Am. Commodity Options Corp.*, 560 F.2d 135, 143 (2d Cir. 1977); *United States v. Diapulse Corp. of America*, 457 F.2d 25, 29 (2d Cir. 1972).

²³⁶ *FTC v. J.K. Publ'ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000); see also *Sunshine Art Studios, Inc. v. FTC*, 481 F.2d 1171, 1175 (1st Cir. 1973); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 722 (S.D. Tex. 2008); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 993, 1011 (N.D. Ind. 2000).

²³⁷ *FTC v. Nat'l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1182 (N.D. Ga. 2008); *FTC v. Wall Street Underground, Inc.*, 281 F. Supp. 2d 1260, 1271 (D. Kan. 2003).

²³⁸ *Nat'l Urological Group*, 645 F. Supp. 2d at 1182 (citing *Delaware Watch Co., Inc.*,

Entities are treated as a common enterprise “when they exhibit either vertical or horizontal commonality – qualities that may be demonstrated by a showing of strongly interdependent economic interests or the pooling of assets and revenues.”²³⁹ To determine whether a common enterprise exists, the court considers factors such as:

common control; the sharing of office space and officers; whether business is transacted through a maze of interrelated companies; the commingling of corporate funds and failure to maintain separation of companies; unified advertising; and evidence that reveals that no real distinction exists between the corporate defendants.²⁴⁰

No one factor is dispositive, and all factors need not be present to justify a finding of common enterprise.²⁴¹

As discussed herein, Vemma and Vemma Holdings operate as a common enterprise, and Boreyko controls the activities of both companies. Both companies have common control, with overlapping officers and directors.²⁴² They share office space and

332 F.2d at 746-746), *aff'd* 356 Fed. Appx. 358 2009 WL 4810345 (11th Cir.), *reh'g and reh'g en banc denied*, 401 Fed. Appx. 522, 2010 WL 2787701 (11th Cir), *cert. denied*, 131 S. Ct. 505 (2010)).

²³⁹ *FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1137, 1142-43 (9th Cir. 2010).

²⁴⁰ *Nat'l Urological*, 645 F. Supp. 2d at 1182.

²⁴¹ *FTC v. Kennedy*, 574 F. Supp. 2d 714, 722 (S.D. Tex. 2008) (“It is not necessary that the FTC prove any particular number of entity connections and any specific connection.”). For example, the Ninth Circuit found a common enterprise existed where companies were commonly owned; pooled resources, staff, and funds; and participated to some extent in a common venture to sell the same products. *Network Servs. Depot, Inc.*, 617 F.3d at 1143. Because the defendants participated in and benefitted from a “shared business scheme,” the “common revenue generated in the course of that scheme was the proper subject of the court’s equitable powers under the FTC Act.” *Id.*

²⁴² Boreyko is the President of both companies, and both companies have the same board of directors, comprised of Boreyko and his two sisters. *See supra* II(A)(1)-(3); App. 61-76; 96-99; 103-06.

there is no real distinction between the two companies.²⁴³ In addition, they commingle funds, with one depositing the checks of the other, including state tax refund checks, and paying the other's credit card statements.²⁴⁴ They also frequently transfer funds between one another.²⁴⁵ The common enterprise is used to perpetuate deceit, and unjust loss or injury would result from treating the corporate Defendants separately, because both companies are beneficiaries of and participants in the shared business scheme.

2. The Individual Defendants Are Liable for Injunctive and Monetary Relief

Individuals can be held liable for corporate violations of Section 5.²⁴⁶ Individual liability for injunctive relief is appropriate where the individual either directly participated in the unfair or deceptive acts or practices *or* had authority to control those acts or practices.²⁴⁷ Authority to control the corporation can arise from active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer.²⁴⁸

Individuals are further subject to monetary relief if they had knowledge or should have had knowledge of the practices at issue.²⁴⁹ However, an individual need not have

²⁴³ *See id.*

²⁴⁴ App. 8 ¶¶ 15, 19 (Thacker); 433-39; 522-23.

²⁴⁵ *See id.*

²⁴⁶ *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006).

²⁴⁷ *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997) (quoting *Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1087); *FTC v. SkyBiz.com, Inc.*, No. 01-CV-396-K(E), 2001 U.S. Dist. LEXIS 26314, at *13, ¶ 12 (N.D. Okla. Aug. 2, 2001).

²⁴⁸ *Medicor*, 217 F. Supp. 2d at 1055; *FTC v. World Media Brokers, Inc.*, 415 F.3d 758, 764 (7th Cir. 2005); *Publ'g Clearing House*, 104 F.3d at 1170; *Amy Travel Serv., Inc.*, 875 F.2d 564, 573 (7th Cir. 1989).

²⁴⁹ *Publ'g Clearing House*, 104 F.3d at 1171; *Think Achievement*, 144 F. Supp. 2d at 1011; *Amy Travel Serv., Inc.*, 875 F.2d at 574.

had subjective intent to deceive or actual knowledge of the deception.²⁵⁰ Reckless indifference to the truth or falsity of a misrepresentation or an awareness of a high probability of fraud coupled with intentional avoidance of the truth will suffice.²⁵¹ The degree of participation in the business is probative of knowledge.²⁵² The individual defendants' awareness of a high volume of consumer complaints further demonstrates knowledge of deceptive practices.²⁵³

Defendants Boreyko and Tom Alkazin are liable for both injunctive and monetary relief. As the President, CEO, and founder of Vemma and the President of Vemma Holdings, Defendant Boreyko has possessed the authority to control the operations of Vemma and has been intimately involved in its day-to-day operations throughout the deceptive scheme. He has also directly participated in the conduct at issue by personally giving deceptive income claims at several presentations and in Vemma materials.²⁵⁴ As the individual at the head of the fraudulent enterprise, Boreyko knew of the wrongful acts or practices at issue and certainly knew of the falsity of the income claims he made.²⁵⁵

²⁵⁰ *Amy Travel Serv., Inc.*, 875 F.2d at 573-74; *Think Achievement Corp.*, 144 F. Supp. 2d at 1011; *J.K. Publ'ns, Inc.*, 99 F. Supp. 2d at 1204. The FTC need not show intent to defraud. *Publ'g Clearing House*, 104 F.3d at 1171.

²⁵¹ *Amy Travel Serv., Inc.*, 875 F.2d at 573-74; *Think Achievement Corp.*, 144 F. Supp. 2d at 1011; *J.K. Publ'ns, Inc.*, 99 F. Supp. 2d at 1204; *Medicor*, 217 F. Supp. 2d at 1055; *Cyberspace.com LLC*, 453 F.3d at 1202; *Am. Standard Credit Sys., Inc.*, 874 F. Supp. at 1089.

²⁵² *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007); *Amy Travel*, 875 F.2d at 574 (citing *Int'l Diamond Corp.*, 1983-2 Trade Cas. (CCH) at 69,707-8).

²⁵³ *Amy Travel*, 875 F.2d at 574-75.

²⁵⁴ See *supra* Section II(B)(4)

²⁵⁵ Defendant Boreyko certainly had knowledge of the findings by the Italian Authority, and he also repeatedly admits knowledge that many consumers call his company a

Defendant Tom Alkazin has participated in the conduct at issue by personally giving deceptive income claims in his training materials and presentations and by directing his downlines to make deceptive income claims.²⁵⁶ He has even been actively involved in Vemma's business affairs.²⁵⁷ As Vemma's top-earning Affiliate, Tom Alkazin also knew of or recklessly disregarded knowledge of the fraudulent acts of Vemma.

D. An *Ex Parte* TRO With an Asset Freeze, Immediate Access, Temporary Receivership, and Other Ancillary Relief Is Essential

As part of the permanent relief in this case, the FTC seeks restitution for the victims of Vemma. To preserve this possibility, the FTC seeks an *ex parte* TRO with an immediate freeze of Defendants Vemma, Vemma Holdings, and Boreyko's assets, access to their business premises and records, and the appointment of a temporary receiver. Absent such relief, there is a substantial risk that Defendants will continue to operate their deceptive scheme, dissipate their ill-gotten assets, and destroy documents to preclude satisfaction of any final order requiring monetary relief. Defendants have generated hundreds of millions of dollars in income from their deceptive activities at the expense of consumers, and Defendants' ongoing deception demonstrates their willingness to engage in wrongdoing. The Court cannot rely on Defendants to preserve assets and evidence absent a court order.

pyramid scheme or a "scam." See, e.g., App. 1109:25-1110:13, 1112:4-13, 1115:5-1116:6, 1801; 1191:3-1192:22, 1810; 1657:21-1658:9.

²⁵⁶ See *supra* Sections II(B)(4).

²⁵⁷ For example, he was "intimately involved in the creation" of Vemma's Two & Go training program, which focuses solely on recruitment. See *supra* Sections II(A)(4) and B(3).

1. The TRO should be entered *Ex Parte*

Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that “immediate and irreparable injury, loss, or damage will result” if notice is given. Proper situations for *ex parte* relief include situations where notice would “render fruitless further prosecution of the action.”²⁵⁸ Consumer fraud actions such as this fall within the category of situations where *ex parte* relief is not only appropriate but necessary to preserve the possibility of full and effective final relief. The FTC has sought and obtained *ex parte* TROs in other pyramid actions.²⁵⁹

Defendants’ scheme exposes them to substantial liability. If they are provided notice and succeed in concealing or dissipating assets, any monetary judgment for the FTC will be rendered unenforceable. The FTC’s experience shows that defendants engaged in deceptive schemes will withdraw funds from bank accounts and move or shred documents upon learning of impending legal action.²⁶⁰

2. The Court should freeze the assets of Defendants Vemma, Vemma Holdings, and Boreyko

When a district court determines that the FTC is likely to prevail in a final determination on the merits, it has “a duty to ensure that . . . assets . . . [are] available to

²⁵⁸ *In re Vuitton et Fils*, 606 F.2d 1, 5 (2d Cir. 1979).

²⁵⁹ See, e.g., *FTC v. Fortune Hi-Tech Mktg., Inc.*, No. 13-CV-00578 (N.D. Ill. Jan. 24, 2013); *FTC v. Trek Alliance Inc.*, No. CV-02-9270 DSF (AJWx) (C.D. Cal. Dec. 16, 2002); *FTC v. SkyBiz Int’l, Ltd.*, 4:01-CV-00396-CVE-FHM (N.D. Okla. June 6, 2001); and *FTC v. Fortuna Alliance, LLC*, No. C96-799M (W.D. Wash. May 24, 1996).

²⁶⁰ For a discussion of cases in which other defendants have dissipated or concealed assets or evidence in actions brought by the FTC, see Linville Declaration at ¶¶ 15-17.

make restitution” to the injured consumers.²⁶¹ To help ensure this availability, preserve the status quo, and guard against the dissipation and diversion of assets, the Court may issue an asset freeze. The FTC requests that the Court freeze the assets of Defendants Vemma, Vemma Holdings, and Boreyko to preserve the possibility of restitution.²⁶² Courts within the District of Arizona have entered *ex parte* TROs with similar asset freezes in other FTC actions.²⁶³

The Ninth Circuit has stated that a party seeking an asset freeze must show a likelihood of dissipation of the claimed assets or other inability to recover monetary damages if the relief is not granted.²⁶⁴ It is debatable whether “likelihood” of dissipation or “possibility” of dissipation is the proper standard when the FTC, as opposed to a private litigant, seeks an asset freeze.²⁶⁵ However, the difference between the standards is

²⁶¹ *World Travel Vacation Brokers*, 861 F.2d at 1031.

²⁶² The FTC is not seeking an asset freeze as to Defendant Tom Alkazin and Relief Defendant Bethany Alkazin at this time.

²⁶³ See, e.g., *Ambrosia Web Design*, No. CV-12-2248-PHX-JAT (D. Ariz. Oct. 22, 2012); *FTC v. N. Am. Mktg. and Assocs., LLC*, No. CV-12-914-PHX-DGC (D. Ariz. May 2, 2012); *FTC v. Premier Nationwide Corp.*, No. CV-12-09-PHX-GMS (D. Ariz. Jan. 4, 2012); *FTC v. Gov’t Careers, Inc.*, No. CV-09-721-TUC-DCB (D. Ariz. Jan. 5, 2010); *FTC v. Helping Hands of Hope, Inc.*, No. CV-08-0909-PHX-JAT (D. Ariz. May 13, 2008); *FTC v. The Results Group, LLC*, No. CV-06-02843-PHX-JAT (D. Ariz. Nov. 28, 2006).

²⁶⁴ *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009).

²⁶⁵ Before *Couturier*, the Ninth Circuit only required a showing of “possibility” of dissipation. See *FSLIC v. Sahni*, 868 F.2d 1096, 1097 (9th Cir. 1989). *Couturier*’s change to the asset freeze standard to “likelihood” was based on the Supreme Court’s discussion of the “irreparable injury” element of the standard for preliminary relief in *Winter v. Nat’l Res. Defense Council*, 555 U.S. 7 (2008). In *Winter*, the Supreme Court rejected the Ninth Circuit’s requirement that litigants show a “possibility” of irreparable injury in favor of a more stringent standard of “likelihood.” *Id.* at 22. However, since the FTC, unlike private litigants, need not show irreparable injury to be entitled to a preliminary injunction (see *Affordable Media*, 179 F.3d at 1233), a proper reading of *Couturier* may

immaterial because the evidence shows that Defendants Vemma, Vemma Holdings, and Boreyko are likely to dissipate assets.

Defendants are running a global pyramid scheme that has likely victimized hundreds of thousands or millions of consumers. The possibility of a large monetary judgment provides Defendants with ample incentive to conceal or dissipate otherwise recoverable assets. Courts have acknowledged that, where business operations are permeated by deception, there is a strong possibility that assets may be dissipated.²⁶⁶

Additionally, Vemma and Vemma Holdings have connections to associated companies and bank accounts in foreign jurisdictions, including Kenya, China, Canada, Australia, Mexico, Taiwan, Singapore, and Vietnam. These Defendants can easily transfer assets to these foreign bank accounts and have done so repeatedly.²⁶⁷ Through his control over Defendants Vemma and Vemma Holdings, Defendant Boreyko can take advantage of these connections and accounts to dissipate assets.

Vemma and Vemma Holdings commingle funds, with one depositing the checks of the other, including state tax refund checks, and paying the other's credit card statements.²⁶⁸ They also transferred nearly \$790,000 in what appear to be non-salary

limit its holding to private litigants, leaving the *Sahni* standard of "possibility" intact for the FTC.

²⁶⁶ See, e.g., *SEC v. Manor Nursing Cntrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972) ("Because of the fraudulent nature of [the] violations, the court could not be assured that [defendants] would not waste their assets"); *In re Nat'l Credit Mgmt. Grp.*, 21 F. Supp. 2d 424, 426 (D. N.J. 1998) ("When . . . business operations are permeated by misrepresentations and fraud, the likelihood that assets may be dissipated during the pendency of the legal proceedings is strong.").

²⁶⁷ App. 7 ¶ 14 (Thacker).

²⁶⁸ App. 8 ¶¶ 15, 19 (Thacker); 433-39; 522-23.

payments to Defendant Boreyko from 2013 to 2014.²⁶⁹ Considering the free flow of funds to foreign accounts and between the corporate Defendants and Defendant Boreyko, combined with Defendants' history of deception and the motivation of a large monetary judgment, these Defendants are likely to dissipate assets unless under Court order. Courts have frozen company assets and individual defendants' assets where the individual defendants controlled the deceptive activity and had actual or constructive knowledge of the deceptive nature of the practices in which they were engaged.²⁷⁰ Accordingly, the Court should freeze the assets of Defendants Vemma, Vemma Holdings, and Boreyko.²⁷¹

In addition to a provision directing Vemma, Vemma Holdings, and Boreyko not to dissipate or conceal assets, the FTC seeks a provision in the TRO directing banks and other financial institutions to freeze such assets as are in their custody or control. This Court has the authority to direct its order to such third parties to freeze assets.²⁷² The FTC also seeks provisions requiring these Defendants to account for and repatriate any funds that have been transferred outside of the United States.

Finally, the FTC seeks an immediate accounting of all Defendants' assets, and seeks an order requiring that all Defendants complete and return to the FTC financial

²⁶⁹ App. 8 ¶ 16 (Thacker).

²⁷⁰ See, e.g., *Amy Travel*, 875 F.2d at 574-76; *Nat'l Credit Mgmt.*, 21 F. Supp. 2d at 462.

²⁷¹ Defendant Tom Alkazin and Relief Defendant Bethany Alkazin have similar incentives to dissipate assets. However, since the FTC has not developed the same evidence of international connections and accounts or comingling of funds as to the Alkazins, it is not seeking an asset freeze as to their assets at this stage. The FTC may request an asset freeze as to the Alkazins should the agency or a court-appointed receiver uncover additional supporting evidence supporting an asset freeze.

²⁷² See *Waffenschmidt v. Mackay*, 763 F.2d 711, 714 (5th Cir. 1985) (court had authority to enforce asset freeze against nonparties who acted in concert to dissipate funds).

statements on the forms attached to the proposed TRO. Requiring accountings and financial statements in combination with an asset freeze will increase the likelihood of preserving existing assets pending the final determination of this matter.²⁷³

3. The Court Should Grant Immediate Access to Defendants' Tempe Premises

The FTC also seeks immediate access to Defendants' Tempe premises for itself and the temporary receiver to ensure the integrity and production of Vemma's business documents. The proposed TRO requires Defendants to provide both the FTC and the temporary receiver immediate access to Defendants' Tempe premises so that critical evidence can be preserved and swiftly produced. This relief will ensure that corporate records, including electronic databases and records, are not destroyed and can be available for the Court's review. This District has previously granted similar requests by the FTC.²⁷⁴

4. The Court Should Appoint a Temporary Receiver

The Court should also appoint a temporary receiver over Vemma and Vemma Holdings. In cases in which a corporate defendant, through its management, has defrauded members of the public, "it is likely that, in the absence of the appointment of a

²⁷³ See, e.g., *SEC v. Parkersburg Wireless Ltd. Liability Co.*, 156 F.R.D. 529, 532 n.3 (D.D.C. 1994); *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 676-77 (D.D.C. 1995).

²⁷⁴ See, e.g., *Ambrosia Web Design*, No. CV-12-2248-PHX-JAT (D. Ariz. Oct. 22, 2012); *FTC v. N. Am. Mkt'g and Assocs., LLC*, No. CV-12-914-PHX-DGC (D. Ariz. May 2, 2012); *FTC v. Gov't Careers, Inc.*, No. CV-09-721-TUC-DCB (D. Ariz. Jan. 5, 2010); *FTC v. Helping Hands of Hope, Inc.*, No. CV-08-0909-PHX-JAT (D. Ariz. May 13, 2008); *FTC v. Handicapped & Disabled Workshops, Inc.*, No. CV-08-0908-PHX-DGC (D. Ariz. May 13, 2008); *FTC v. The Results Group, LLC*, No. CV-06-02843-PHX-JAT (D. Ariz. Nov. 28, 2006).

receiver to maintain the status quo, the corporate assets will be subject to diversion and waste” to the detriment of the victims.²⁷⁵ A receiver can monitor the use of the corporate Defendants’ assets, marshal and preserve records and evidence, identify assets, determine the size and extent of the fraud, and identify additional consumers who were injured.

Federal district courts have the inherent power to appoint a temporary receiver incident to their statutory authority to issue a permanent injunction under Section 13(b).²⁷⁶ A receiver is appropriate where a business may continue to operate in an unlawful manner without a receiver’s oversight.²⁷⁷

Defendants have persisted in their unlawful business practices despite being on notice of their deceptive practices through, among other things, the findings of the Italian Authority.²⁷⁸ The risk that Defendants’ business will continue to operate unlawfully is extremely high, and it is inconceivable that they can be relied upon to immediately develop a legal business model. The individual Defendants who have overseen the creation and operation of Vemma’s unlawful program cannot be left in control of the corporate Defendants pending resolution of this case. Instead, a neutral Court-appointed temporary receiver should be entrusted to take over the corporate Defendants’ operations, preserve evidence, and marshal assets. By timely reporting the status of Defendants’

²⁷⁵ *SEC v. First Fin. Group*, 645 F.2d 429, 438 (5th Cir. 1981).

²⁷⁶ *See U.S. Oil & Gas Corp.*, 748 F.2d at 1432-34 (all the inherent equitable powers of the District Court are available in an action filed pursuant to the final proviso in FTC Act 13(b)); *see also Manor Nursing Ctrs.*, 458 F.2d at 1105.

²⁷⁷ *See SEC v. Keller Corp.*, 323 F.2d 397, 403 (7th Cir. 1963).

²⁷⁸ *See supra* Section II(B)(6)(b). In addition, Defendants constantly recognize that many consider them to be a pyramid scheme or a “scam.” *See, e.g.*, App. 1109:25-1110:13, 1112:4-13, 1115:5-1116:6, 1801; 1191:3-1192:22, 1810.

operations, the receiver can assess the nature of their business and, if instructed, wind-down the unlawful operations.

V. Conclusion

Defendants are marketing an illegal pyramid scheme using misleading income representations. The very essence of Vemma is recruitment over product sales, and the company is growing prolifically. For the reasons described herein, we ask that the Court enter an *ex parte* TRO with conduct prohibitions and an asset freeze, appoint a receiver, and order Defendants to preserve records, provide business and financial information, and show cause why a preliminary injunction should not issue.

DATED this 17th day of August, 2015.

Respectfully submitted,

JONATHAN E. NUECHTERLEIN
General Counsel



ANGELEQUE P. LINVILLE, Tex. Bar No. 24058793
JASON C. MOON, Tex. Bar No. 24001188
ANNE D. LEJEUNE, Tex. Bar No. 24054286
EMILY B. ROBINSON, Tex. Bar No. 24046737
Federal Trade Commission
1999 Bryan Street, Suite 2150
Dallas, Texas 75201
(214) 979-9381; alinville@ftc.gov (Linville)
(214) 979-9378; jmoon@ftc.gov (Moon)
(214) 979-9371; alejeune@ftc.gov (LeJeune)
(214) 979-9386; erobinson@ftc.gov (Robinson)
(214) 953-3079 (Fax)

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION