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7
8 **IN THE UNITED STATES DISTRICT COURT**
9 **FOR THE DISTRICT OF ARIZONA**

10 Federal Trade Commission,

Case No. CV-15-01578-PHX-JJT

11 Plaintiff,

12 v.

**DECLARATION OF BENSON K.
BOREYKO**

13 Vemma Nutrition Company, *et al.*

14 Defendants.
15

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

17 **I. BACKGROUND AND PURPOSE OF DECLARATION**

18 1. I am the CEO and founder of Vemma Nutritional Company (“**Vemma**”)
19 and Vemma International Holdings, Inc. (“**VHI**”).

20 2. I am submitting this Declaration in response to the *Order (Filed Under*
21 *Seal)* entered on August 21, 2015 in the above-captioned matter (the “**TRO**”)[Dkt.25];
22 the *Declaration of FTC Investigator Matthew J. Thacker Pursuant to 28 U.S.C. §1746*
23 dated August 14, 2015 (the “**Thacker Declaration**”) [Dkt. 10], submitted by Matthew
24 Thacker (“Thacker”), an investigator with the Federal Trade Commission (the “**FTC**”);
25 and the *Report of Temporary Receiver’s Activities August 24, 2015 through September*
26 *4, 2015* (the “**Receiver’s Report**”)[Dkt. 50-1]. Unless otherwise indicated, capitalized
27 terms used in this Declaration will correspond to the capitalized terms used in the
28 Thacker Declaration, and citations to the Appendix submitted by the FTC along with the

1 Thacker Declaration will be to “App. ___”

2 **II. PERSONAL BACKGROUND**

3 3. I am 53 years old. I am the father of six (6) children ages 3-8 years old.

4 4. My wife and I divorced in April 2014. As part of the divorce decree, I am
5 obligated to pay child support of \$8,000 per month, along with payments to my wife of
6 approximately \$13,000 per month. Since the entry of the TRO, all of my assets have
7 been frozen, and I have been unable to support my children or my ex-wife, which
8 creates an enormous hardship for them (and for me).

9 5. I was born in Alberta, Canada. My family moved to Scottsdale, Arizona
10 when I was 10. I have been a citizen of the United States since March of 1993.

11 **III. PROFESSIONAL BACKGROUND**

12 6. I have been involved in the direct sales industry for most of my adult life.
13 I am extremely sensitive to the suspicion surrounding the direct sales (or multilevel
14 marketing) industry and I have always endeavored to conduct my businesses in
15 compliance with the commercial and legal rules and regulations that govern the
16 industry.

17 7. As stated in the Thacker Declaration (¶6), I founded Vemma in 2004, and
18 I have served as the CEO of Vemma ever since (for roughly 11 years now). As
19 described in more detail below, Vemma develops and sells nutritional, energy, and
20 weight loss drinks and powders.

21 8. Prior to Vemma, I founded and served as CEO of New Vision, which like
22 Vemma sold nutritional supplements. Prior to New Vision, I was a distributor for Matol
23 Botanical, International (also a direct sales company). I have spent a total of 29 years in
24 the industry.

25 **IV. THE VEMMA STORY**

26 9. I lost both my father (Ben) and mother (Dottie) to heart disease and cancer
27 way before their time. I created Vemma as a way of keeping families healthy through
28 clinically tested, doctor-formulated wellness products. Vemma stands for Vitamins,

1 Essential Minerals, Mangosteen, and Aloe. The nutritional drinks manufactured and
 2 sold by Vemma (including Renew and Verve brands) contain each of the vitamins,
 3 essential minerals, mangosteen, and aloe that make up the Vemma line of products.
 4 [App. 700-710, 722]

5 10. Vemma also manufactures and sells a weight loss and weight management
 6 product (Bod*e) that has been used successfully by TV celebrities and transformation
 7 specialists, Chris and Heidi Powell. [App. 707, 711]

8 11. In short, Vemma has focused its products and business plan on the three
 9 megatrends in the world today: wellness, energy, and weight management. Like most
 10 start-ups, Vemma began in 2004 selling relatively modest amounts of its products to
 11 customers in the United States. Just prior to the entry of the TRO, Vemma was selling
 12 its products in 50 countries around the world. Contrary to the allegations of the
 13 Commission and the claims made in the Thacker Declaration, Vemma always had been
 14 about the products it manufactures and sells. As I have said time and again:

15 “The foundation of Vemma's success lies firmly in the results achieved
 16 from our clinically studied; single-formula product line....Vemma has a
 17 two part formula for success that resonates with people in more than 50
 18 countries around the world. The first is enhanced health through
 19 supplementation and Vemma delivers the results people are looking for
 20 guaranteed. The second part is the sharing of Vemma products. I devote
 21 my advertising dollars; literally millions of dollars every month, to the
 22 people who choose to champion our mission and promote the Vemma
 23 brand....Vemma is transforming lives through ultra-premium products.”
 24 [App 790]

22 **V. RESPONSE TO SELECTED STATEMENTS MADE IN THE THACKER** 23 **DECLARATION**

24 12. The Thacker Declaration is 24 pages long, and it purports to incorporate
 25 over 1,840 pages of materials in its Appendix. Based on statements made in the
 26 Thacker Declaration, the Commission has been investigating since at least December 4,
 27 2014 [see Thacker Declaration ¶20] (for roughly 10 months) and very likely much
 28 longer. In contrast, Vemma and I have had a matter of days to respond to the pyramid

1 claims made by the Commission. As a result, it is impossible in the short time provided
2 for Vemma and me to respond in detail to all of the things contained in the Thacker
3 Declaration and Appendix. Consequently, my focus will be primarily on responding to
4 “qualitative” claims by Thacker that Vemma and I were deceitful and promoted a
5 pyramid scheme rather than the sale of nutritional products.¹

6 **A. Wage and other payment claims**

7 13. Thacker misrepresents that my wages in 2014 from Vemma were
8 \$4,027,335.85. [Thacker Declaration ¶11] In point of fact, and as reflected on the 2014
9 tax return that I furnished the Commission as part of the financial disclosures required
10 under the TRO, my wages from Vemma in 2014 were at least \$1.35 million less than
11 what Thacker represents.

12 14. I cannot respond to the non-salary payment claims raised in ¶16 of the
13 Thacker Declaration because no documentation is provided.

14 **B. Thacker’s undercover purchase and return of Vemma Products**

15 15. Thacker’s undercover purchase and return of Vemma products is
16 described in the Thacker Declaration ¶¶20-32. Other than the fact that Thacker
17 apparently spent nearly two times the shipping and handling costs incurred by Vemma
18 when he returned the Vemma product, Thacker’s description of his purchase and return
19 of Vemma products and the Affiliate Pack is pretty unremarkable.

20 16. Among other things, Thacker acknowledges receipt of the Vemma
21 Flipbook [Thacker ¶26iv)], which is the primary tool used by Vemma in presenting its
22 product and business opportunity to prospective customers and Affiliates. In the portion

23
24 ¹ The Thacker Declaration is loaded with sound bites from Vemma marketing
25 materials and events, and is devoid of quantitative facts or figures to support the
26 pyramid claim that the Commission asserts against Vemma and me. Other
27 representatives of Vemma and outside professionals hired by Vemma will provide the
28 quantitative proof that Vemma’s focus was on product sales rather than recruitment of
Affiliates. I will focus on correcting misstatements or incomplete statements attributed
to me and other leaders of Vemma.

1 of the Flipbook that summarizes the Vemma compensation plan for Affiliates, the focus
 2 of Vemma on the sale of products could not be more clearly stated: “**COMMISSIONS**
 3 **ARE PAID WHEN YOU INTRODUCE CUSTOMERS WHO PURCHASE**
 4 **PRODUCTS.**” (Bold and capital letters used in the Flipbook.) [App. 705]

5 **C. Thacker’s undercover calls**

6 17. Paragraphs 33-35 of the Thacker Declaration chronicles undercover calls
 7 that Thacker apparently made to Vemma representatives.

8 18. The highlighted excerpts from the January 26, 2015 call from Thacker to
 9 Vemma representative David Treat (“**Treat**”) exemplify the use of out of context
 10 “sound bites” by the FTC to try to prove its claim that Vemma’s business is not
 11 primarily devoted to the sale of products. In this regard, Thacker highlights only an
 12 isolated statement by Treat that Vemma is “not selling the product.” What is
 13 conspicuously absent from the highlighted portion of Thacker’s undercover call is the
 14 so-called “rest of the story” where Treat explains how Vemma is devoted to shifting
 15 consumer energy and sport drink habits from more well-known brands like Red Bull to
 16 the Vemma brand of products like Verve:

17 The product is going to sell itself. You're simply selling them, Here's a
 18 really cool product, and I'm going to show them that there's a simple
 19 way of--if they make--or they make that substitution or one simple shift,
 20 if you will, from, you know, you use the Verve example, from Red Bull
 21 to Verve, that--and-- we show a few other people to do the same, the
 numbers work. [App. 1023:9-16]²

22 19. A more complete review of the undercover discussion between Thacker
 23 and Treat also confirms that Vemma did not make sweeping “get rich quick” pitches to
 24 prospective Affiliates as the FTC is attempting to argue. Quite the contrary, Vemma

25 _____
 26 ² The emphasis of Vemma on product sales actually is reinforced as well in some of
 27 the highlighted portions of the Thacker under cover call excerpts: “But the cool part of
 28 our business is that our products are good enough and people like them so much that
 they keep reordering them.” [App. 1027:3-5]

1 was open about the long term and limited nature of significant income opportunity for
2 Affiliates:

3 ...eventually you'll become, you know, successful enough to where you
4 would be making a presentation, if you will, you'd be explaining the
5 opportunity to people on your team. But that's not going to happen for a
6 long time. [App. 1028:22-25]

6 **D. Thacker's attendance at undercover Vemma events**

7 **1. The 2/7/15 Super Saturday Business Opportunity Event**

8 20. Missing from the highlighted portion of the transcript of the 2/7/15
9 Vemma event referenced in the Thacker Declaration were (among other things) the
10 following Vemma product endorsements:

11 "Who drinks iced tea, iced coffee, energy drinks, pre-workout
12 protein....so kind of just think about adding something healthy..... and
13 how it can also put a couple hundred dollars a month in your
14 pocket...."[App 1038:18-1039:20]

15 "The worst that can happen is you guys get some phenomenal products,
16 right, that's going to benefit their health. Who thinks health here today
17 is worth \$3 a day?" [App 1040:14-17]

17 **2. The 4/8/15 Opportunity and Fast Start Event**

18 21. Missing from the highlighted portions of the transcript of the 4/8/15
19 Vemma event referenced in the Thacker Declaration were (among others) the following
20 examples of how the sale of Vemma products is emphasized:

21 "And it was so simple and so easy, a little two ounce shot like this,
22 helped so many people, and started putting it in products that are
23 products you use every day...We'll go through those products today. But
24 that's what Vemma is all about, right?" [App 1058:5-11]

25 "[W]e actually have a couple people that have been using the products,
26 and I want to kind of get their testimony." [App. 1058:12-14]

27 "The products were amazing from the get-go. I didn't have to think
28 about that." [App. 1060:14-15]

Kelly McAney (phonetic), a \$100K/year earner after 2.5 years: "So, I
love Vemma, I love the products, and--" [App 1061]

1 “Give you a nice, cool, state-of-the-art app, award winning, track your
2 whole business worldwide and simply tell people about Vemma, drink
3 the product, and when you get customers or you get other people to
4 want to become an affiliate or a member, you’re going to get paid and
the commissions come to you.” [App 1064:1-7]

5 “There are three megatrends that we’ve focused on, you know, one
6 being wellness, two being energy, three being weight management. I
7 think everybody, you know, in America, Canada, Mexico, Europe, Asia,
8 Australia, everywhere we go, people are into at least one of those three
things. And as you can see, they’re doing over \$200 million in sales
annually, right, in the world.” [App. 1069:18-25]

9 “Vemma is different....People come up to me....they tell me how their
10 life has been changed--and how thankful they are for these products and
11 this opportunity.” [App. 1090:21-25]

12 **E. Thacker’s review of selected web sites and videos**

13 22. The balance of the Thacker Declaration (¶¶38-49) consists mostly of a
14 chronicling of web sites apparently viewed by Thacker (including the Vemma web site)
15 and videos (including selected videos where I appeared). Very little substantively is
16 discussed in ¶¶38-49 of the Thacker Declaration, but the point of the web site and video
17 portion apparently is aimed at trying to show that Vemma is a pyramid scheme that
18 makes false statements about income potential for Affiliates. In point of fact, the web
19 sites and videos reviewed by Thacker and excerpted in the Appendix show the emphasis
20 on product sales at Vemma, and the efforts by Vemma to create in the minds of
21 Affiliates realistic income goals from the sale of Vemma products. For example:

22 a. The FTC acknowledges that the Vemma web site and
23 Vemma videos include income disclaimers. *See, e.g.*, Thacker Declaration ¶47.

24 b. The Vemma web site focuses on the product sold by the
25 company:

26 The Vemma web site starts with products. [App. 781]

27 “What’s possible? When you share product...” [App. 782]

28 “The difference with Vemma is a tremendous product line that people

1 fall in love with and would buy anyway..." Anyone can join--IT'S
2 FREE to sign up!A lucrative income from products..."[App. 783]

3 "Vemma prides itself on quality, innovative products that provide
4 customers with real health results. In 2013, 246,388 active customers
5 enjoyed the brands that make up the Vemma products...These customers
6 are the reason we exist. Their family's wellness needs are what drives us
7 to develop and manufacture the finest, most complete nutritional
8 solutions available anywhere...The Vemma flagship brand, along with
9 Verve and Bod-e brand are promoted through a positive, very social
10 network of Affiliates that have fallen in love with these products and
11 want to share them with the people they care about." [App. 788]

12 Our story: "The foundation of Vemma's success lies firmly in the results
13 achieved from our clinically studied, single-formula product
14 line....Vemma has a two part formula for success that resonates with
15 people in more than 50 countries around the world. The first is
16 enhanced health through supplementation and Vemma delivers the
17 results people are looking for guaranteed. The second part is the sharing
18 of Vemma products. I devote my advertising dollars, literally millions
19 of dollars every month, to the people who choose to champion our
20 mission and promote the Vemma brand....Vemma is transforming lives
21 through ultra-premium products" [App. 790]

22 Product descriptions are covered on the next 14 slides from the web site.
23 [App. 792-804]

24 How to get paid with Vemma: "All you have to do is share our
25 innovative, premium Vemma products with customers and help others
26 create their own Vemma businesses. Those product purchases result in a
27 commission. ...start telling others about Vemma products." [App. 808]

28 "Our business model is designed to reward those people that promote
the Vemma brand products." [App. 824]

"You don't make money on people; you make money on product sales."
[App. 910]

"Understanding each product and becoming a 'product of the product'
will increase your success." Immediately after is a list of Vemma
products. [App. 911]

1 c. Likewise, the videos chronicled in the Thacker Declaration
2 confirm that the business of Vemma is selling product:

3 70% of last year people just are customers. And we love our customers.
4 This year it's trending closer to 80% in 2014...Our best affiliates come
5 from people that fall in love with this product." "I pay people just like
6 you about \$2 million every week for talking about these products." [App
7 1109-10]

8 "Imagine you taking this--the products, taking it, putting it on your
9 Facebook, talking about it and talking about your experience and it goes
10 viral, and all of a sudden you've got lots of people wanting to try this
11 product." [App. 1124]

12 "[W]e have been telling the same story for the last eighteen years, and
13 that story revolves around antioxidants. There's so much science
14 behind the benefits of antioxidants that I tasked my chief science
15 officer, Dr. Yibing Wang, some eight years ago to come up with the
16 world's most powerful liquid antioxidant, and this is what he created,
17 this Vemma formula." [App. 1392:7-14]

18 "You see, Vemma manufactures and markets some incredibly
19 innovative, massively consumer brands to people wanting to lose
20 weight, add some healthy energy to their life or slow down the aging
21 process with the world's most powerful liquid antioxidant. Our secret
22 to generate over \$100 million in sales lies in our business model. You
23 see, rather than competing head to head with the mega companies in our
24 space and traditional advertising, we take a more social approach...If
25 you like our products, let your friends know." [App. 1448:17-1449:5]

26 "But, you know, some of the things that we accomplished so far this
27 year [2014] is we, at that event, had our most successful product launch.
28 Your heard Mark talking about it, ReMix, a half a million cans in what,
six weeks, it's been." [App. 1464:5-9]

"The whole foundation of this company is based upon product. We are a
product driven opportunity. Here's the great thing. People love our
product." [App. 1467:9-13]

23. Missing from the Thacker Declaration is a discussion of retail sales of
Vemma products. Vemma has bulk pricing options for Affiliates that wish to sell
products through more traditional retail outlets. For example, Vemma has 20 case

pricing, 40 case pricing, and pallet pricing that involve progressive bulk discounts for sellers of Vemma products. Consequently, Vemma has retail outlets in Virginia Beach, Virginia; in Tempe, Arizona; at concession stands in the U.S. Airways Arena in Phoenix, Arizona (where there also was a Verve Lounge); and at various hybrid marketing sites around the country (like convenience stores, salons, and other outlets). Examples of retail sales of Vemma products are reflected in the pictures below.



Dam Neck, Virginia Beach



Malbon BBQ





Sedona, AZ

VI. RESPONSE TO SELECTED STATEMENTS MADE IN THE RECEIVER'S REPORT.

24. In many respects, the Receiver's Report mimics the statements made in the Thacker Declaration. Perhaps the most disturbing part of the Receiver's Report (and the receivership overall) is the conclusion that Vemma should be shut down. Contrary to the statements in the Receiver's Report about the Receiver spending "a significant amount of time discussing restarting certain aspects of sales operations with company management" [Receiver's Report at 1], the Receiver did not spend a minute with me discussing operations and preservation of the Vemma business.

25. Had the Receiver discussed with me continued operation of the Vemma business, he would have learned that: (i) the company had just finished its annual convention (June 2015) at a cost of approximately \$1 million; (ii) the new Bod*e Build product was launched in January 2015 at a cost of approximately \$700,000; (iii) in the second half of 2014 operations in Thailand, Viet Nam, and Colombia were opened at a significant cost to the company; and (iv) I and the other shareholders of Vemma were about to inject over \$1.3 million dollars into the company to cover recently experienced

1 short falls and to cover expansion of the business. Like any business, Vemma from
2 time to time experienced ups and downs in its business. But, as the financial statement
3 attached to the Receiver's Report [Exhibit 6] reveals, Vemma had receivables, product,
4 and other assets available to cover the relatively modest cash flow issues facing the
5 company when the Receiver took over. Also reflected in the Receiver's Report is the
6 fact that Vemma had net income of over \$13.8 million from world-wide operations over
7 the course of the last five (5) years. [Receiver's Report at 9-10]

8 26. While the Receiver's Report pays lip service to the compliance efforts of
9 Vemma [*see* Receiver's Report at 15-16], the Receiver neglects to mention Vemma's
10 record with the Better Business Bureau (the "**BBB**"). Vemma maintained an A+ rating
11 with the BBB, and on balance had very few complaints with the BBB (or the FTC for
12 that matter). Also, the "complaints" about Vemma that the Receiver includes in his
13 report range from between 18 months to 24 months ago. Complaints received by
14 Vemma from Affiliates or customers are processed promptly, and as of the issuance of
15 the TRO, there were very few unresolved complaints against the company.

16 **VII. HARM CAUSED BY THE EX PARTE TRO**

17 27. I cannot begin to calculate the harm caused by the TRO on the Vemma
18 business, but it is already profound. Among other things, Vemma's 7 year relationship
19 with the Phoenix Suns as the team's official energy drink was abruptly cancelled as a
20 result of the TRO. On a personal level, the TRO prevents me from providing for basic
21 needs of my family and myself. I have requested release of funds from the FTC and
22 from the Receiver to cover basic living expenses for my family and myself, but the
23 request has been denied.

24 28. I am particularly disappointed and aggrieved by the fact that the FTC
25 managed to obtain extraordinary relief against me personally and against the Company
26 without allowing us an opportunity to be heard in response to the pyramid claims and in
27 response to the allegations that we would have dissipated or concealed assets had we
28 known about the FTC claims. As a consequence of the ex parte relief obtained by the

1 FTC, Vemma and I have effectively been found guilty of the FTC charges in the media,
2 which has damaged the company's and my reputation in the industry. Had I been
3 informed about the FTC claims in advance of the issuance of the TRO, I voluntarily
4 would have: (i) disclosed my assets to the FTC (as I have done in compliance with the
5 TRO); (ii) agreed to restrict transfer of my assets; (iii) limited my spending to ordinary
6 and necessary living expenses for my family and myself; (iv) allowed the FTC access to
7 the books and records of Vemma; (v) continued to maintain the books and records of
8 Vemma as they have been maintained for the past 11 years; and (vi) met with and
9 discussed with the FTC concerns over the operation of Vemma, and implemented
10 constructive recommendations to ensure continued compliance by Vemma of the
11 commercial and legal rules and regulations governing direct sales companies.

12 29. Very few direct sales companies can boast over a decade of ongoing and
13 successful business like Vemma can. Few (if any) pyramid schemes in the history of
14 the industry have ever lasted over a decade. Vemma has succeeded for over a decade
15 because of its products, its sales minded associates, and its loyal customers. If Vemma
16 can come back from the harm caused by the abrupt shut down of its business by the
17 Receiver and the negative publicity of the ex parte claims of the FTC, it will be because
18 of the Vemma products and their support by customers around the world.

19 30. After my 21 years of successfully operating as a CEO of two Direct
20 Selling Association ("DSA") member network marketing companies, generating
21 hundreds of local jobs, creating part time incomes for tens of thousands of families
22 around the world - to not even be warned by the FTC of potential problems is
23 unthinkable in this country. To shut down my company worldwide, freeze all my assets
24 and accounts, to label me a flight risk without any basis whatsoever, to destroy my
25 company, my brands and my reputation around the world in the media, should never be
26 allowed to happen before a simple phone call. The damage to families, the damage to
27 my family, and the damage to my reputation cannot be undone. 21 years of very hard
28 work, massive risk taking, and a tremendous amount of commitment deserves better.

1 The very nature of a pyramid scheme is to harm people. Vemma, at its core mission,
2 exists to help people. I know the difference, and I would never engage in the latter.

3 DATED this 10th day of September 2015.
4

5 By: B.K. Boreyko
6 Name: Benson K Boreyko
7 Title: CEO, Vemma Nutrition Company
8 and
9 Vemma International Holdings, Inc.
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