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Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Federal Trade Commission;

Plaintiff,

v.

Vemma Nutrition Company, et al

No. CV-15-01578-PHX-JJT

**PLAINTIFF FEDERAL
TRADE COMMISSION'S
MOTION TO PROHIBIT
RECLASSIFICATION OF
AFFILIATES WITHOUT
THEIR AFFIRMATIVE
CONSENT AND TO PREVENT
DISSEMINATION OF
MATERIALS DESCRIBING
PROPOSED COMPENSATION
PLAN BEFORE APPROVAL**

I. INTRODUCTION

Plaintiff Federal Trade Commission (“FTC”) moves the Court to enter an order prohibiting Defendants Vemma Nutrition Company, Vemma International Holdings, Inc.,

and B.K. Boreyko (hereinafter collectively “Defendants) from re-classifying Affiliates as Customers without their express consent, and requiring that any attempt to reclassify Affiliates as Customers be subject to approval by the FTC and the Court-appointed Monitor. Defendants have proposed a communication to certain Affiliates that places the burden on those Affiliates to affirmatively object to re-classification as Customers. This procedure is likely to misclassify some Affiliates as Customers, resulting in future problems with Defendants’ compliance with the Court’s September 18, 2015 preliminary injunction (the “Order”) (#118). The FTC objects to this procedure and the argumentative language in Defendants’ proposed communication.

The FTC also asks the Court to enter an order: 1) clarifying that communications with participants or prospective participants about Defendants’ compensation plan or proposed compensation plan constitutes “marketing or sales material” for purposes of the Order; or 2) prohibiting Defendants from making such communications until the FTC and the Monitor have had an opportunity to review the proposed compensation plan and to state any objections. On an unknown date before September 29, 2015, Defendant Boreyko circulated a message to Affiliates that described elements of a proposed compensation plan that had not been provided to or reviewed by the FTC or the Monitor. Disclosing proposed compensation plans before they are approved is likely to cause confusion among Affiliates and interfere with an orderly restructuring of Defendants’ operations.¹

¹ While this Motion was being finalized, Defendants Vemma Nutrition Company and Vemma International Holdings, Inc filed an Emergency Motion to Approve Affiliate

II. BACKGROUND

A. Defendants' efforts to re-classify certain Affiliates as Customers

On September 22, 2015, counsel for Defendant Vemma Nutrition Company (“Vemma”), notified the FTC by email that Vemma intended to send a letter to its Affiliates in an effort to re-classify Affiliates who had purchased product since enrollment, but 1) had not purchased an Affiliate Pack; 2) had not enrolled a person into the Vemma marketing plan; and 3) had not “taken any other actions that would allow [the Affiliate] to earn a commission under the Vemma Marketing plan” as Customers.² The letter notified these Affiliates that they would be reclassified as Customers unless they affirmatively notified Vemma by email or by an unspecified customer service number that the reclassification would be incorrect. *See Exhibit A.*

The FTC responded to the proposed communication with a letter detailing the FTC concerns and a redline draft.³ The FTC objected that: 1) Vemma’s proposed letter as written implied that participants’ silence would confirm that they had been incorrectly designated as Affiliates in the past; and 2) given that Affiliates had affirmatively designated themselves as Affiliates when they signed up with Vemma, it was more appropriate to require Affiliates to act affirmatively to be reclassified as Customers. *See Exhibit B.*

Communications covering the same subject matter. Rather than re-casting the present Motion, the FTC requests the Court to consider this Motion in connection with Defendants’ Motion.

² The proposed letter, which was attached to the email, is attached as **Exhibit A**.

³ True and correct copies of the letter and redline draft are attached as **Exhibits B** and **C**, respectively.

Vemma's counsel responded by email and attached a revised proposed communication.⁴ The FTC responded with a letter objecting to the revised communication,⁵ and also alerting Vemma counsel that Defendant Boreyko had issued new sales and marketing material without pre-approval by the FTC, in violation of the Order.

B. Communications by Defendant Boreyko regarding new compensation plan, discounts, and pricing.

The Order included a provision prohibiting the Corporate Defendants and Defendant Boreyko from publishing or disseminating "any new marketing or sales material" without prior delivery to the FTC and a five day period for the FTC to review the materials. **Order, at 22.** Under the Order, if the FTC objects, Defendants must file a motion asking Court approval to use the materials. *Id.*

FTC staff recently located two Facebook postings by self-proclaimed Vemma Affiliates that include a message from Defendant Boreyko outlining details about Vemma's new compensation plan.⁶ **See Exhibits G and H.** The postings assert that Vemma has doubled its Auto-delivery discount from 10% to 20% and will be having a "Customer Thank You Sale," and attaches a revised price list of Vemma products. *Id.* None of the information contained in the messages had been disclosed to the Monitor or the FTC before being disseminated.

III. ARGUMENT

⁴ True and correct copies of the email and revised proposed correspondence are attached as **Exhibits D and E**, respectively.

⁵ A true and correct copy of the September 29, 2015 letter is attached as **Exhibit F**.

⁶ True and correct copies of these Facebook postings are attached as **Exhibits G and H**.

A. The Court should prohibit Vemma’s proposed reclassification of Affiliates as Customer without their express consent

Vemma’s counsel characterizes Vemma’s proposed communication as an attempt to properly categorize Affiliates and customers *going forward*. **See Exhibit D, subpara. 2.** However, counsel’s email also confirms that the effort to reclassify Affiliates is also intended to show that certain Affiliates should have been characterized as Customers *in the past*.⁷ In response to the FTC’s concerns, Vemma’s counsel specifically reserved the right to make this argument based on the results of the procedure. **See Exhibit D, subparagraph 2. Exhibit E,** the revised version of the letter, includes argumentative language that makes this intent clear. It is addressed to “Vemma Product Fan” and concludes with a sentence thanking the Affiliate for his or her “continued support to help Vemma provide your family with the finest wellness products available anywhere . . . [.]” **Exhibit E.** Likewise, it includes an assertion that Vemma views the recipient of the letter as not being enrolled to participate in the Vemma Marketing Plan, but as participating primarily to order product for the Affiliate’s own consumption. ***Id.***

This assertion—that Affiliates who have not 1) purchased an Affiliate pack; 2) enrolled another participant in the marketing program; or 3) earned commissions are actually Customers who are only interested in purchasing Vemma products for their own consumption—has been a contentious issue in this litigation. Defendants have advocated this argument to address the fact that the overwhelming majority of Vemma’s sales volume consisted of purchases by Affiliates. The Court specifically considered this

⁷ Vemma “retains the right to argue that the result of this procedure is evidence of the true status or intent of participants in the past.” ***Id.***

argument and rejected it, finding that the proposed reclassification “is not based in fact” and serves to “misrepresent how many Affiliates there likely are.” **Order, at 4.**

Defendants seek to use this communication with Affiliates to revisit the argument.

Even more troublesome than the argumentative language in the letter is that the letter seeks to draw an inference of consumers’ intent based on their silence or inaction. Vemma intends to re-classify recipients as Customers unless they reply to the letter or otherwise inform Vemma that they should retain their classification as Affiliates. *Id.* By using this procedure, Defendants no doubt hope that a large number of Affiliates, many of whom may not have had recent activities or purchases with Vemma, will not respond and will be re-classified by default. Defendants intend to argue that these Affiliates should have been properly classified as Customers all along.

The re-classification procedure proposed by Vemma will likely cause Affiliates to be re-classified as Customers regardless of their actual intent. Because the Order allows Vemma to pay compensation only if the majority of such compensation is derived from sales outside the network (*i.e.* Customers) (**Order, at 21**), the distinction between Customer and Affiliate is critical for Vemma’s future compliance with the Order. Vemma’s proposed procedure is likely to misclassify large numbers of Affiliates as Customers and override their expressed intent. If Vemma is permitted to use this procedure to reclassify Affiliates at this time, any attempt to undo it in the future will be difficult and confusing to Affiliates.

Since Vemma Affiliates took affirmative actions to identify themselves as Affiliates when they signed up with Vemma, a procedure likewise requiring Affiliates to

take affirmative steps to re-classify themselves as Customers is more likely to correctly identify Customers for purposes of future compliance with the Order. The FTC's redline draft of the original letter (**Exhibit C**) strips the communication of its argumentative language, clarifies that the purpose of the letter is to correctly identify Affiliate versus Customer status *going forward*, and institutes a procedure whereby the Affiliate must affirmatively indicate a desire to be reclassified as a Customer. The FTC requests a Court order prohibiting Defendants from reclassifying Affiliates as Customers without their express consent, and requiring that any attempt to reclassify Affiliates as Customers be subject to approval by the FTC and the Court-ordered Monitor. Given the potential for confusion and mischaracterization of Affiliates as Customers, and the minimal additional burden placed on Defendants, the equities weigh heavily in favor of entry of such an order.

B. The Court should enter an order prohibiting Defendants from disseminating materials that include the terms of any proposed compensation plan until the Monitor and FTC has had an opportunity to review and state any objections to the materials and plan.

Defendant Boreyko's message to Affiliates violates the Court's Order. By discussing the terms of Vemma's new proposed compensation plan, new pricing, and a new sale, it constitutes "sales or marketing material" and should have been provided to the FTC for pre-approval under Section I.E of the Order. **Order, at 22.**

Of particular concern is the fact that, despite Vemma's counsel's representation on September 28, 2015 that "new marketing and sales material relating to the compensation plan" would be forwarded to the FTC for review in accordance with the Order (**see**

Exhibit D, subparagraph 5), Vemma and Defendant Boreyko appear to have circulated major elements of the new plan to Affiliates before giving the Monitor or FTC the opportunity to review the proposed plan or the communication.⁸ This communication was disseminated on social media and probably cannot effectively be removed or retracted. Should the Court ultimately disapprove the proposed compensation plan, necessitating a revision, the publication of conflicting descriptions of the compensation will likely cause great confusion for Affiliates or prospective Affiliates, and may even constitute new violations of the FTC Act should Affiliates enroll with Vemma based on inaccurate representations of the plan.

While the FTC is troubled that Defendants Vemma Nutrition Company and Boreyko violated the Order a mere eleven days or less after it was entered, the FTC is not seeking sanctions at this time. Instead, the FTC is seeking an order from the Court clarifying that “sales or marketing material” for purposes of Section I.E of the Order includes descriptions of the compensation plan provided to participants or prospective participants, even if the material does not otherwise promote Vemma products or the business opportunity. Alternatively, the FTC seeks an order prohibiting dissemination of any materials describing the terms of Vemma’s compensation plan or proposed compensation plan to participants or prospective participants until the Monitor and FTC have received a copy of the proposed materials and a five day time period to review it and state objections. The equities weigh heavily in favor these provisions, which will

⁸ Vemma’s counsel finally sent a proposed compensation plan to the FTC on September 30, 2015.

help prevent the inevitable confusion caused by publication of unapproved compensation plan terms and promote an orderly and efficient restructuring of Vemma's operations.

IV. RELIEF REQUESTED

For the foregoing reasons, the FTC respectfully requests that the Court enter an order: 1) prohibiting the Corporate Defendants and Defendant Boreyko from reclassifying Affiliates as Customers without their express consent; and 2) requiring that any attempt to reclassify Affiliates as customers be subject to approval by the FTC and the Court-appointed Monitor. The FTC further requests that the Court enter an order clarifying that materials containing descriptions of compensation plans or proposed compensation plans that are intended to be conveyed to participants or prospective participants constitute "marketing or sales material" for purposes of the Court's preliminary injunction (#118). Alternatively, the FTC requests the Court to enter an order enjoining Defendants from disseminating any materials containing descriptions of compensation plans until the materials been provided to the Monitor and FTC with a five (5) day period in which to review the materials and state their objections.

Dated: October 2, 2015.

Respectfully submitted,

JONATHAN E. NUECHTERLEIN
General Counsel

/s/ Jason C. Moon

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Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I certify that on October 2, 2015, Plaintiff Federal Trade Commission electronically transmitted the attached Document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Filing to all CM/ECF registrants including:

Counsel for Defendants Vemma Nutrition Co. and Vemma Int'l Holdings Inc.:

Quarles & Brady LLP
Brian Ronald Booker -
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Edward Alipio Salanga -
esalanga@quarles.com

John Anthony Harris -
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/s/ Jason C. Moon

Jason C. Moon

EXHIBIT A



We are reviewing our membership base to confirm that our status designations are appropriate. In our company, an Affiliate is someone who intends to participate in and earn rewards under Vemma's Marketing Plan, and a Customer is someone who is primarily interested in purchasing and using our products. Our system allows participants when they enroll to self select to be categorized as an "Affiliate" or as a "Customer".

Our records indicate that you selected the "Affiliate" designation when you enrolled with Vemma, and that you have ordered Vemma product since your enrollment. However, our records further indicate that since you enrolled with Vemma, you have not taken any of the following actions:

1. Purchased an Affiliate Pack;
2. Enrolled a person into the Vemma Marketing Plan; or
3. Taken any other actions that would allow you to earn a commission under the Vemma Marketing Plan.

Based on this information, it does not appear that you are enrolled with Vemma to participate in the Vemma Marketing Plan; rather it appears that you are ordering Vemma product for your own consumption. Accordingly, and so that our records accurately reflect who is participating with Vemma with the intent to participate in the Marketing Plan and who is participating primarily to buy Vemma product for their own consumption, we are reclassifying you as a Customer in our system.

Remember that, as a Customer, you will still be able to buy our products at the same prices offered to Affiliates and, if you change your mind and later decide that you want to participate in Vemma's Marketing Plan, you can always ask us to re-classify you as an Affiliate.

If you believe our reclassification of your status as a Customer is incorrect, and that you are primarily interested in participating in Vemma's Marketing Plan, please let us know by October 5, 2015. All you have to do is reply to this email and tell us that you should remain an Affiliate in our system, and we will maintain that status in our records. You may also call our customer service department.

Thank you for your cooperation.

BK

EXHIBIT B





United States of America
FEDERAL TRADE COMMISSION
Southwest Region

Jason C. Moon
Attorney
1999 Bryan Street, Suite 2150
Dallas, TX 75201
(214) 979-9378
jmoon@ftc.gov

September 25, 2015

Mr. Edward Salanga
Quarles & Brady LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004

Re: *FTC v. Vemma Nutrition Company, et al.*
Proposed communication to affiliates

Dear Mr. Salanga:

We received the proposed communication to Affiliates that you sent us on September 22, 2015. Please be advised that any proposed re-classification on Vemma's system must be done in a way that does not destroy or modify data regarding past classifications, or otherwise interfere with the FTC's or the Monitor's ability to review or query Vemma's sales data (including classification data) as it existed before entry of the Preliminary Injunction. Any destruction or modification of past sales data will constitute spoliation and a violation of the Preliminary Injunction.

Although the proposed communication may not violate the Preliminary Injunction or require pre-approval by the FTC, the language raises concerns that may need to be brought to the Court's attention if not resolved. While it is appropriate for Vemma to contact participants to determine their appropriate classification as Customers versus Affiliates *going forward*, the proposed communication could be read as asking participants to confirm by their silence that they were incorrectly designated as Affiliates *in the past*. As you are aware, this has been a contentious issue in litigation, and the Court has rejected Vemma's attempt to redefine certain of its Affiliates as Customers. The FTC will dispute any inference that any reclassification generated by this procedure is evidence of the true status or intent of participants in the past. Also, given that Affiliates affirmatively chose their status in the past, it is more appropriate to require Affiliates to make an affirmative choice to be reclassified, to avoid the danger of misclassification through inaction. Accordingly, I am attaching a proposed redline draft that makes it more clear that Vemma is focusing on future classifications, and converts the "opt out" into an "opt in" procedure. We also believe that it would be appropriate to mention upcoming changes to the Affiliate program, as Mr. Johnson suggested in his September 24 email.

If Vemma does not agree to our proposed changes, please contact me next week at the number listed above to discuss the issue. I will be out of the office on Monday, but will return on Tuesday.

Sincerely,

/s/ Jason C. Moon

Jason C. Moon

Enclosure (as stated)

Cc: Kenton Johnson

truthinadvertising.org®

EXHIBIT C



We are reviewing our membership base to confirm that our status designations are appropriate **going forward**. In our company, an Affiliate is someone who intends to participate in and earn rewards under Vemma's Marketing Plan, and a Customer is someone who is primarily interested in purchasing and using our products. Our system allows participants when they enroll to self select to be categorized as an "Affiliate" or as a "Customer".

Our records indicate that you selected the "Affiliate" designation when you enrolled with Vemma, and that you have ordered Vemma product since your enrollment. However, our records further indicate that since you enrolled with Vemma, you have not taken any of the following actions:

1. Purchased an Affiliate Pack;
2. Enrolled a person into the Vemma Marketing Plan; or
3. Taken any other actions that would allow you to earn a commission under the Vemma Marketing Plan.

If you intend in the future only to purchase products for your own consumption (rather than participate in and earn rewards under Vemma's Marketing Plan), please reply to this email with the word "Customer" by October 5, 2015 and we will reclassify you as a Customer. You may also contact our customer service department to discuss your classification. Based on this information, it does not appear that you are enrolled with Vemma to participate in the Vemma Marketing Plan; rather it appears that you are ordering Vemma product for your own consumption. Accordingly, and so that our records accurately reflect who is participating with Vemma with the intent to participate in the Marketing Plan and who is participating primarily to buy Vemma product for their own consumption, we are reclassifying you as a Customer in our system. If you take no action, you will continue to be designated as an Affiliate.

[insert information regarding changes to affiliate plan]

Remember that, as a Customer, you will still be able to buy our products at the same prices offered to Affiliates and, if you change your mind and later decide that you want to participate in Vemma's Marketing Plan, you can always ask us to re-classify you as an Affiliate.

~~If you believe our reclassification of your status as a Customer is incorrect, and that you are primarily interested in participating in Vemma's Marketing Plan, please let us know by October 5, 2015. All you have to do is reply to this email and tell us that you should remain an Affiliate in our system, and we will maintain that status in our records. You may also call our customer service department.~~

Thank you for your cooperation.

BK



EXHIBIT D



Moon, Jason C

From: Salanga, Edward A. (PHX x3422) <Edward.Salanga@quarles.com>
Sent: Monday, September 28, 2015 3:14 PM
To: Moon, Jason C
Cc: 'kentonjohnson@robbevans.com'; Linville, Angeleque P.
Subject: RE: Affiliate Communication [QBLLP-ACTIVE.FID38201419]
Attachments: FTC v. Vemma_ Communication to Affiliates.DOCX

Dear Mr. Moon,

I am in receipt of your September 25, 2015 letter. I am writing to confirm the following:

- (1) Vemma has no intention of spoliating any evidence. As we discussed during our phone call on September 25, Vemma intends to take all necessary actions to ensure that a copy of the Vemma's sales data (including classification data) will be retained for litigation purposes.
- (2) Vemma acknowledges that the FTC has concerns regarding the evidentiary value of any response to the communication Vemma will be sending. However, as we discussed (and you recognize in your letter), this communication is concerned with properly classifying Customers and Affiliates *going forward*. We agree that the "FTC will retain the right to dispute any inference that any reclassification generated by this procedure is evidence of the true status or intent of participants in the past." Likewise, Vemma retains the right to argue that the result of this procedure is evidence of the true status or intent of participants in the past. But, as we discussed during our call, those are arguments for the litigation, not arguments that relate in any way to Vemma's compliance with the Court's Preliminary Injunction Order.
- (3) To make it clearer that this procedure is focused on the appropriate classification of Vemma Affiliates and Customers *going forward*, Vemma will add the "going forward" language to the first paragraph of the draft communication that you proposed in your September 25 letter.
- (4) In addition to this notice to Affiliates, Vemma will also be asking purchasers who have been reclassified as Customers to electronically confirm that the reclassification is accurate when they purchase products from the Vemma website on a going forward basis. Vemma will also be including a statement with their shipments reminding purchasers that if they believe the reclassification is inappropriate, and that they should remain Affiliates in Vemma's system, that they can contact Vemma's customer service department and have their classification changed to Affiliate.
- (5) As to the changes to the Affiliate Plan, we intend on communicating those changes separately. But, as we discussed during our call, the new marketing plan will comply in all respects with the Court's Order. When the new marketing and sales materials relating to the new compensation plan are ready, we will forward them to the FTC for review, in accordance with the Order. I expect to be sharing those documents with you early this week.

In light of both (a) the fact that your September 25 letter does not state any specific objection to proceeding with the communication as previously submitted, and (b) the additional changes Vemma has decided to make which are reflected on the attached copy of the communication, the only potential dispute relates to the evidentiary value of the communication for purposes of the litigation. In that regard, as we discussed and confirmed above, all parties' rights have been fully reserved. Accordingly, and because communication is clearly important to going forward operations under the Order, Vemma intends to proceed with delivery of the communication. If you would like to further discuss, please contact me.

Edward A. Salanga

Attorney, Partner
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One Renaissance Square
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Phoenix, Arizona 85004-2391
edward.salanga@quarles.com
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From: Moon, Jason C [<mailto:jmoon@ftc.gov>]
Sent: Friday, September 25, 2015 2:40 PM
To: Salanga, Edward A. (PHX x3422)
Cc: 'kentonjohnson@robbevans.com'; Linville, Angeleque P.
Subject: RE: Affiliate Communication [QBLLP-ACTIVE.FID38201419]

Ed,

Please see attached correspondence regarding Vemma's proposed communication with affiliates. I left you a voice message also.

Jason C. Moon
Attorney
Federal Trade Commission—Southwest Region
(214) 979-9378

From: Salanga, Edward A. (PHX x3422) [<mailto:Edward.Salanga@quarles.com>]
Sent: Friday, September 25, 2015 11:23 AM
To: Moon, Jason C
Cc: Linville, Angeleque P.
Subject: RE: Affiliate Communication [QBLLP-ACTIVE.FID38201419]

Jason,

I should have time to talk around 11:30 Pacific/AZ time today. If that works for you, please call me on my direct line: 602.229.5422.

Ed

From: Moon, Jason C [<mailto:jmoon@ftc.gov>]
Sent: Friday, September 25, 2015 6:59 AM
To: Salanga, Edward A. (PHX x3422)
Cc: Linville, Angeleque P.
Subject: RE: Affiliate Communication [QBLLP-ACTIVE.FID38201419]

Ed,
I think you are probably correct about the order.

Do you have time to talk this through today? I want to make sure I understand the intent behind this communication and its effect, if any, on existing records.

JCM

From: Salanga, Edward A. (PHX x3422) [<mailto:Edward.Salanga@quarles.com>]
Sent: Thursday, September 24, 2015 7:43 PM
To: Moon, Jason C; 'kenton.johnson@robbevans.com'; 'Brad Wayment'; brick_kane@robbevans.com; Linville, Angeleque P.
Cc: 'Peter Reilly'; Quigley, Kevin D. (PHX x3433); Harris, John A. (PHX x3406)
Subject: RE: Affiliate Communication [QBLLP-ACTIVE.FID38201419]

Jason,

We look forward to your comments. After reading Kent's email, I wanted to point out a misstatement in case you did not already see it. In his email, Kent recommends the following language: "The new and revised plan will generate commissions for sales made to customers, but will not generate any commissions for sales made to other Affiliates enrolled in the company's Marketing Plan."

This description of the Court's order is not accurate. The Order precludes qualification for bonuses based on purchases by that affiliate, and it precludes the payment of commissions to an Affiliate "unless the majority of such compensation is derived from sales to or purchases by" customers. But it clearly does not preclude the generation of commissions based on any sales made to other Affiliates. The new Marketing Plan that Vemma is preparing will comply with the Court's Order and not Kent's mischaracterization of that Order.

Ed

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Two North Central Avenue
Phoenix, Arizona 85004-2391
edward.salanga@quarles.com
Direct Line: (602) 229-5422
Facsimile: (602) 420-5112

From: Moon, Jason C [<mailto:jmoon@ftc.gov>]
Sent: Thursday, September 24, 2015 1:36 PM
To: 'kenton.johnson@robbevans.com'; 'Brad Wayment'; brick_kane@robbevans.com; Linville, Angeleque P.
Cc: 'Peter Reilly'; Salanga, Edward A. (PHX x3422)
Subject: RE: Affiliate Communication [QBLLP-ACTIVE.FID38201419]

We did receive Mr. Salanga's email on Tuesday and were working on response. We'll take this language into consideration and have a response to you tomorrow.

Thx,

JCM

From: Kenton Johnson [<mailto:kenton.johnson@robbevans.com>]
Sent: Thursday, September 24, 2015 3:23 PM

To: 'Brad Wayment'; brick_kane@robbevans.com; Linville, Angeleque P.; Moon, Jason C
Cc: 'Peter Reilly'; edward.salanga@quarles.com
Subject: RE: Affiliate Communication [QBLLP-ACTIVE.FID38201419]

Thursday, September 24, 2015

Brad,

Thank you for forwarding the draft communication that Veema intends on distributing next week to some Affiliates. After reviewing it, Brick Kane and I are proposing some suggested additional language after the last sentence in the fourth paragraph. We are forwarding this because the draft message to some Affiliates introduces the topic of Veema's Marketing Plan. Considering the changes required by the Court's issued Order, we believe the following language should continue after the sentence ending "...you can always ask us to reclassify you as an affiliate."

However, you should know the company is changing the compensation plan substantially for its Affiliates. The new and revised plan will generate commissions for sales made to customers, but will not generate any commissions for sales made to other Affiliates enrolled in the company's Marketing Plan. The company will also be requiring Affiliates to complete new and increased procedures and requirements about disclosing potential earnings and the earning results of other Affiliates enrolled in the Marketing Plan.

As you shared your draft communication with the FTC, we have included the FTC on this reply.
Kent

Kenton Johnson, Deputy to the Reciver
EVP, Robb Evans & Associates LLC
(D) 818-683-1051 (O) 818-768-8100 (M) 626-831-6649
kenton.johnson@robbevans.com

From: Brad Wayment [<mailto:Brad.Wayment@vemma.com>]
Sent: Tuesday, September 22, 2015 4:18 PM
To: 'brick_kane@robbevans.com' <brick_kane@robbevans.com>; 'kenton.johnson@robbevans.com' <kenton.johnson@robbevans.com>
Cc: Peter Reilly <Peter.Reilly@vemma.com>; edward.salanga@quarles.com
Subject: Affiliate Communication [QBLLP-ACTIVE.FID38201419]

Dear Mr. Kane and Mr. Johnson,

We are attaching a copy of a draft communication that Vemma intends on distributing next week to the Affiliates in its database who never purchased an affiliate pack, enrolled anyone or earned a commission. While we don't believe this communication is "new marketing or sales material" which requires prior notice to the FTC, we are sharing this with the FTC and the Monitor in the spirit of cooperation. If you have any questions, please let us know.

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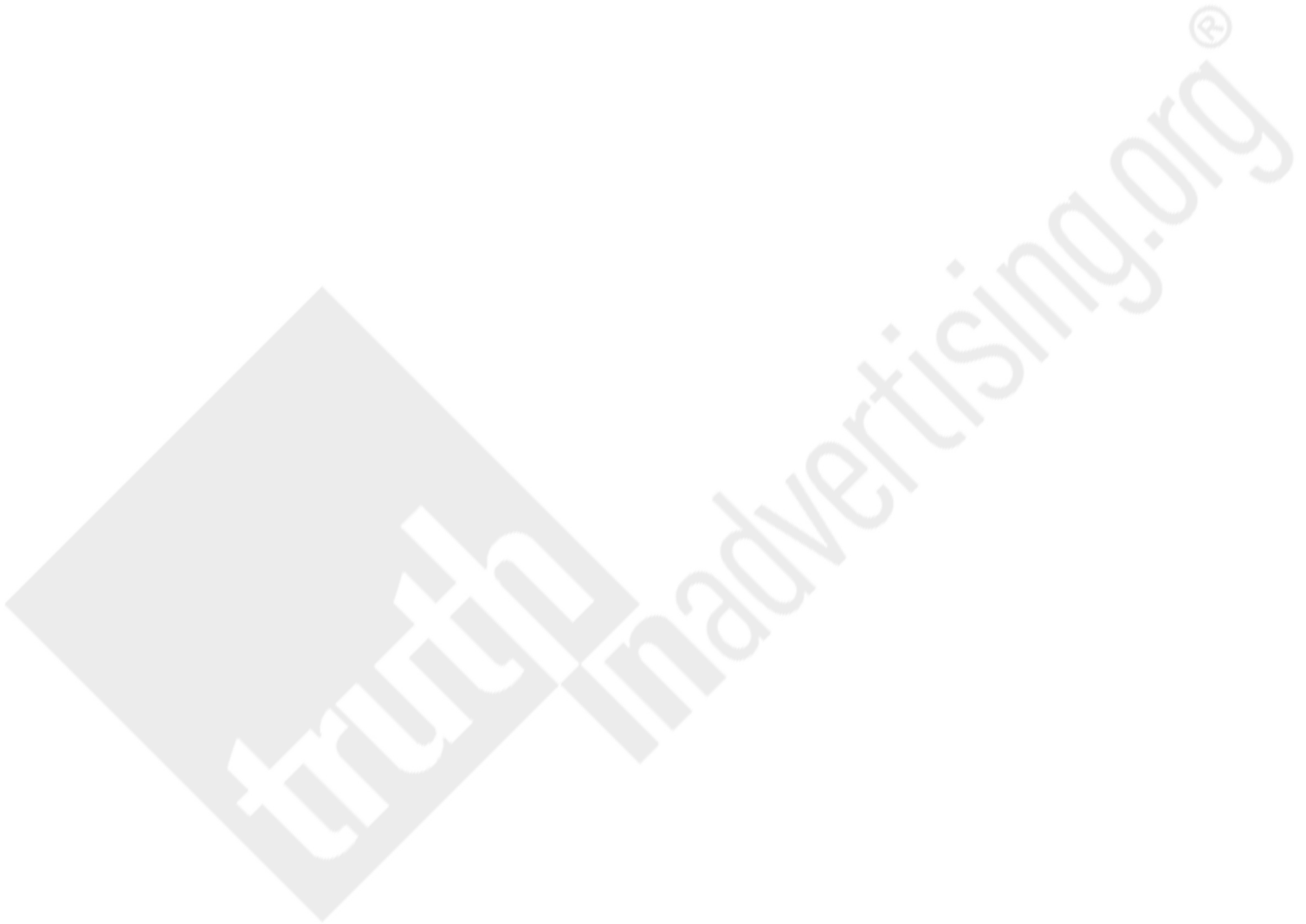


EXHIBIT E



Dear Vemma Product Fan -

We are reviewing our membership base to confirm that our status designations are appropriate going forward. In our company, an Affiliate is someone who intends to participate in and earn rewards under Vemma's Marketing Plan, and a Customer is someone who is primarily interested in purchasing and using our products. Our system allows participants when they enroll to self select to be categorized as an "Affiliate" or as a "Customer".

Our records indicate that you selected the "Affiliate" designation when you enrolled with Vemma, and that you have ordered Vemma product since your enrollment. However, our records further indicate that since you enrolled with Vemma, you have not taken any of the following actions:

1. Purchased an Affiliate Pack;
2. Enrolled a person into the Vemma Marketing Plan; or
3. Taken any other actions that would allow you to earn a commission under the Vemma Marketing Plan.

Based on this information, it does not appear that you are enrolled with Vemma to participate in the Vemma Marketing Plan; rather it appears that you are ordering Vemma product for your own consumption. Accordingly, and so that our records accurately reflect who is participating with Vemma with the intent to participate in the Marketing Plan and who is participating primarily to buy Vemma product for their own consumption, we are reclassifying you as a Customer in our system.

We once again apologize for the past month delay in product shipments. We want to do something to make it up to you since you've been such a loyal customer. We felt the best way is to have a Customer Thank You Sale! This is the first sale in our 11 year history and we hope you visit vemma.com to check out how you can save up to 40% on your favorite Vemma brands!

Remember that, as a Customer, you will still be able to buy our products at the same prices offered to Affiliates and, if you change your mind and later decide that you want to participate in Vemma's Marketing Plan, you can always ask us to re-classify you as an Affiliate.

If you believe our reclassification of your status as a Customer is incorrect, and that you are primarily interested in participating in Vemma's Marketing Plan, please let us know by October 5, 2015. All you have to do is reply to this email and tell us that you should remain an Affiliate in our system, and we will maintain that status in our records. You may also call our customer service department. You will also be asked to confirm that our reclassification of your status as a Customer is correct when you place an order, and you will be reminded of your ability to call our customer service department if your classification should be changed to Affiliate with every shipment.

Thank you for your past business and continued support to help Vemma provide your family with the finest wellness products available anywhere – and now at up to 40% off!~~cooperation.~~

BK



EXHIBIT F





United States of America
FEDERAL TRADE COMMISSION
Southwest Region

Jason C. Moon
Attorney
1999 Bryan Street, Suite 2150
Dallas, TX 75201
(214) 979-9378
jmoon@ftc.gov

September 29, 2015

Mr. Edward Salanga
Quarles & Brady LLP
One Renaissance Square
Two North Central Avenue
Phoenix, Arizona 85004
By email: esalanga@quarles.com

Mr. John R. Clemency
Gallagher & Kennedy PA
2575 E. Camelback Road, Suite 1100
Phoenix, Arizona 85016
By email: john.clemency@gknet.com

Re: *FTC v. Vemma Nutrition Company, et al.*
Proposed communication to affiliates and violation of PI

Dear Mr. Salanga and Mr. Clemency:

We received Mr. Salanga's email of September 28, 2015, attaching Vemma's and Mr. Boreyko's revised proposed communication to Affiliates. The revisions do not alleviate our concerns and in fact heighten them. Vemma and Mr. Boreyko now propose additional argumentative language ("Product Fan," etc.) implying that the Affiliates' true intent in the past was simply to purchase products for personal consumption. This language serves no purpose if Vemma's intent is purely to identify Customers for future sales. Also, the reference to a sale for Customers could be read as an inducement to Affiliates to allow their status to be changed to Customers. While it is unclear whether the sale would be offered also to Affiliates (the terms of the sale have not been discussed with the FTC or with the Monitor, to our knowledge), Affiliates could interpret it as being directed only at Customers.

The proposed communication now constitutes "new marketing or sales material" under Section I.E of the Order and requires FTC approval. We object to the communication under that provision. We also object to the previous draft or any similar communication that places the burden of opting out of the reclassification on the Affiliate. As Vemma is prohibited from paying compensation for sales unless the majority of compensation is derived from sales outside the network, the Customer versus Affiliate distinction is critical for Vemma's compliance with

the Order. Vemma's proposed method of reclassification is likely to misidentify Customers and cause compliance issues in the future. Because it will be very difficult to unwind this misleading reclassification in the future, the FTC intends to bring this issue to the Court immediately unless Vemma and Mr. Boreyko confirm that no such communications will be sent.

We also bring to your attention that Vemma and Mr. Boreyko appear to have violated the Preliminary Injunction by providing sales or marketing materials to Affiliates without the prior FTC approval required by Section I.E. The Facebook postings at the following links purportedly quote a new statement by Mr. Boreyko, in which Mr. Boreyko describes new compensation terms, discounts, sales, and prices:

<https://www.facebook.com/kenstewartmlmexpert/posts/10206517842077780>

<https://m.facebook.com/notes/vemma-und-der-staatsanwalt/eroffnung-von-vemma-usa-legal/1647593968859834>

The purported statement was not provided to the FTC, or, to the FTC's knowledge, the Monitor. The statement has been disseminated on social media and will be difficult to remove or retract effectively. The FTC intends to bring this violation to the Court's attention immediately.

Please feel free to contact me at the number listed above if you wish to discuss this matter.

Sincerely,

/s/ Jason C. Moon

Jason C. Moon

Cc: Kenton Johnson

EXHIBIT G



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Sign Up

Email or Phone

Password

Keep me logged in

Forgot your password?

Eröffnung von Vemma USA legal

September 29, 2015 at 5:31am

MEMMA Re-Launch Announcement! Wow! I think we're about to make a major comeback! MEMMA has significantly reduced the price of its products, has doubled the auto-ship discount from 10% to 20%, and reduced the QV needed to qualify from 120 QV down to just 50 QV! (See price list below!) Getting a lot of new customers as well as old customers re-ordering was just made extremely easy, as is qualifying for commissions and bonuses! The price reductions and lowering of the QV for all commissions and bonuses from 120 QV to 50 QV is going to be HUGE for affiliates in Africa! In fact, you can either offer your customers the new, lower price, OR you can sell them the product at the original price and put the difference between the original price and the new price in your pocket as a retail profit! (I suggest opening up a customer account for all your customers and ordering in their name!) Note: The prices for Africa will be a little higher than the new prices shown here due to shipping, import duties, etc. A price list for various African markets will be made available as soon as possible.

IMPORTANT! Please read Bk's message below as it contains important information for affiliates, including new guidelines that affiliates MUST follow! Be sure to forward this information on to those on your team and make sure they follow the guidelines contained in the message below!

Hello Vemma Faithful:

I want to give you a quick update on the FTC case. I am pleased that in a September 18, 2015 Order, the Federal District Court Judge in the case ruled that Vemma could re-start business operations in accordance with the terms of the Court's Order. As part of the ruling, the Judge also terminated the asset freeze on both Vemma and myself personally and removed the Temporary Receiver.

There are a number of requirements in the Order regarding Vemma's business operations, and we will be implementing several interim changes in the way the business is conducted to ensure our operations comply with the Order.

First, we will be modifying the way an Affiliate can qualify for commissions. Under the Order, Affiliates can no longer qualify for commissions through their own purchases. Your personal purchases still qualify for the Vemma Loyalty Program for free product along with your discount for those of you on our super convenient Auto-delivery program.

In fact, we just doubled your discount for this program from 10% to 20%, and you'll be hearing the details on Vemma's first-ever Customer Thank You Sale (see attached price lists)!

So, just to recap, starting today, an Affiliate can only qualify for commissions and obtain their 50 QV (we've lowered this as part of our "thank you" sale) based on the following:

Existing personally enrolled Customer or Affiliate volume.

Newly personally enrolled Customer or Affiliate volume.

100% of the Affiliate's combined personally enrolled Customer and Affiliate volume will count toward the Affiliate's new 50 QV requirement for commission eligibility.

Affiliates will only be paid on the volume in their organization that is at least 51% Customer volume. You will be paid on all volume that meets this requirement. In other words, if 49% of your volume is Affiliate volume, and 51% of your volume is Customer volume, you will receive commissions on the entire 100% of your organization's total volume.

For example, if you had \$100 in organizational volume of which \$51 came from Customers and \$49 came from Affiliates, you would be paid on the entire \$100. However, assume that you had \$100 in organizational volume of which \$60 came from Affiliates, and \$40 came from Customers. In this example, you would be paid on the entire \$40 of Customer volume. But applying the Order's requirement that a majority of the commissionable volume (i.e. 51%) come from Customers, you would only be paid on \$39 of the \$60 dollars of Affiliate volume. Accordingly, you would be paid commissions on a total of \$79 of organizational



Notes by Vemma und der Staatsanwalt

All Notes

Get Notes via RSS

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volume in this example. The remaining \$21 of Affiliate volumewill not be banked. Our computer systems will track this information for you shortly. Any questions regarding qualification under the terms of the new Ordershould be directed to Vemma's Compliance Department, Compliance@Vemma.com.

There are several other modifications that I want to bring to your attention.

We will no longer be selling Affiliate Starter Packs.

The Two & Go Program, along with the Frenzy Bonus, has been and will remain discontinued.

No person can make any income claim or representation of any kind.

No person can use any marketing materials (including Vemma or third-party produced materials) that relate to the business opportunity, income claims or representations. You must also stop using or referring to Vemma's

Earnings Disclosure Statements. We will be developing new marketing materials going forward, including new earnings disclosure statements, and will disseminate them once they are completed and vetted through the procedure provided under the Court Order.

No person may induce another to purchase goods or services to maintain eligibility for bonuses, rewards or commissions rather than for resale or personal use.

All social media channels (including YouTube, Twitter, Facebook, Pinterest, Periscope, Instagram, etc) can be used ONLY for meeting notifications, product promotion, and customer acquisition. They CANNOT be used for posting any marketing or lifestyle content or income claims. No marketing materials may be used except those that will be developed by the company as provided under item 4 above.

Absolutely no videos can be made and posted by Affiliates.

During this interim period, we wanted to say thank you for all your support and prayers. We thought one way to express that would be to reduce the prices of our products, doubling the Auto-delivery discount as well as the CV. I have attached a new price sheet for your review. Please note that under this interim plan, qualifying volume will be reduced to 50 QV.

Commissions will be paid out two weeks in arrears. Accordingly, the first commission payout will be Thursday, October 15, 2015. In accordance with the Court Order, past commissions will not be paid out and "banked volume" will be frozen and not paid on at this time. This could change in the future.

We hope to be taking orders any day now as our system returns online. Your Back Office will be live as soon as the systems go live, but you will need to access it through Vemma.com. Your personal websites will be under maintenance for a few more weeks as we ensure they comply with the Court Order. Please check Vemma.com for updates.

It is important for every person to understand that Vemma will comply 100% with the Court Order and that we will not tolerate any person who does not comply with the Order. Thank you for your assistance with this.

Stay humble, stay positive,

BK Boreyko

Quelle:

<https://www.facebook.com/kenstewartmlmexpert/posts/10206517842077780>



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EXHIBIT H



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Sign Up

Email or Phone

Password

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News Feed



Ken Stewart

13 hrs · Edited ·

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Stay humble, stay positive,
BK Boreyko



**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Federal Trade Commission,

v.

Vemma Nutrition Company, et al.

No. CV-15-01578-PHX-JJT

**[proposed] ORDER ON
PLAINTIFF FEDERAL
TRADE COMMISSION'S
MOTION TO PROHIBIT
RECLASSIFICATION OF
AFFILIATES WITHOUT
THEIR AFFIRMATIVE
CONSENT AND TO
PREVENT
DISSEMINATION OF
MATERIALS DESCRIBING
PROPOSED
COMPENSATION PLAN
BEFORE APPROVAL**

Plaintiff Federal Trade Commission (“FTC”) has filed a Motion to Prohibit Reclassification of Affiliates Without Their Affirmative Consent and to Prevent Dissemination of Proposed Compensation Plans Before Approval (#___). After considering the Motion along with the parties’ submissions and arguments, the Court finds that good cause exists to grant the Motion.

Accordingly,

IT IS ORDERED that Defendants are enjoined from re-classifying participants currently identified as “Affiliates” in Defendants’ business records as “Customers” without the participants’ express written consent.

IT IS FURTHER ORDERED that, should Defendants seek to re-classify “Affiliates” as “Customers” in their business records for the purpose of future sales or for any other purpose, the procedure used for the re-classification and the language used in any communications to participants concerning the proposed re-classification shall be subject to the approval of the Court-ordered Monitor, Robb Evans and Associates, and the FTC. Should either the Monitor or the FTC object to the proposed re-classification procedure, or to the language used in communications concerning the proposed re-classification, Defendants shall seek approval from the Court before proceeding with the re-classification or using the proposed language.

IT IS FURTHER ORDERED that, for purposes of Section I.E of the Court’s preliminary injunction (#118), the term “marketing or sales materials” shall include materials containing descriptions of compensation plans or proposed compensation plans that are intended to be disseminated to participants or prospective participants in Defendants’ marketing program or prospective participants.