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FEDERAL TRADE COMMISSION

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

Federal Trade Commission,

Plaintiff,

v.

Vemma Nutrition Company, et al

Defendants.

No. CV-15-01578-PHX-JJT

**JOINT PROPOSED CASE
MANAGEMENT PLAN**

As required by the Court's Order setting a Rule 16 Pretrial Scheduling Conference [#148], the parties conducted a Rule 26(f) Conference by telephone on November 16, 2015. The parties' Joint Proposed Case Management Plan is below.

1. Parties' Statement of the Nature of the Case

A. Plaintiff FTC's Statement

Plaintiff brings this action seeking injunctive relief and equitable monetary relief against Defendants for violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Defendants violated the FTC Act by: (1) engaging in an illegal pyramid scheme; (2) falsely representing that members of the Vemma program (“Affiliates”) were likely to earn substantial income; (3) representing that consumers who became Affiliates had the ability to earn substantial income, while failing to disclose, or disclose adequately, that Vemma’s structure ensured that most Affiliates would not earn substantial income; and (4) providing the means and instrumentalities for the commission of deceptive acts and practices by furnishing Affiliates with promotional materials to be used in recruiting new participants that contained false and misleading representations.

In numerous videos, audio presentations, and written materials, Defendants promoted a program in which Affiliates were encouraged to purchase Vemma products to qualify for commissions and to recruit others to do the same. Defendants’ compensation plan provided little incentive for retail sales of product to ultimate users; instead, the program incentivized Affiliates to recruit other Affiliates who would in turn make commission-qualifying purchases. The result was an illegal pyramid scheme. Defendants’ marketing materials also portrayed Vemma’s program as a lucrative business opportunity in which Affiliates’ potential income was limited only by their own efforts. However, the vast majority of Affiliates made very little money; in fact, the structure of Defendants’ program ensured that most Affiliates would be in a position of financial loss

at any given time. Defendants failed to adequately disclose this aspect of the program.

B. Defendant Vemma Nutrition Company's Statement

For more than a decade, Vemma has sold high quality products to many thousands of loyal customers. Vemma distributes its products through retail locations, distributors (i.e., Affiliates) and directly to consumers. Unlike many multi-level marketing companies, there is no fee to become an Affiliate and no minimum purchase requirement. Although this Court initially concluded, based on the limited evidence available at the preliminary injunction stage, that the FTC was likely to succeed on its claim that Vemma was a pyramid scheme, a more fulsome review of the sales data and other evidence will show that Vemma was not operating as a pyramid scheme. Affiliates were not required to—and did not in practice—pay a fee or buy non-returnable products in order to act as Affiliates. In addition, the rewards paid by Vemma to Affiliates were primarily from the sale of products to ultimate users of the products - both Customers and Affiliates who were purchasing the products primarily for retail sale and/or personal consumption. The data and evidence will show that commissions paid by Vemma came primarily from the sale of products to ultimate users, not from recruiting, which is further confirmed by the Receiver's testimony that virtually all of Vemma's income comes from the sale of products.

Similarly, the videos and other materials principally relied on by the FTC to support its allegations of income misrepresentations are not representative of the overall message delivered to Affiliates. Vemma provided substantial assistance to its Affiliates to assist them in selling product. The sales data and conduct of those purchasing

Vemma's products—Affiliates and customers alike—reflect that statements cited by the FTC were largely ignored (even assuming they were widely disseminated). Vemma also provided accurate income Disclosure Statements, as well as other disclaimers. Evidence at trial will also show that those Affiliates who actually intended to engage in the business opportunity expected to augment their income only on a modest scale, and were not misled.

Notwithstanding the crippling effects of the *ex parte* TRO, Vemma continues to sell a substantial (albeit reduced) volume of products. It would be inappropriate to permanently enjoin Vemma in these circumstances.

C. Defendant Vemma International Holdings, Inc.'s Statement

Vemma International Holdings, Inc. ("Vemma International") joins in the above statement by Vemma. In addition, Vemma International is not a "common enterprise" with Vemma. The FTC's contention in paragraph 11 of the Complaint that Vemma International operated through "interrelated companies that comingle funds" with Vemma is simply inaccurate. Thus, it is not jointly and severally liable with Vemma. Moreover, the conduct involving companies located in Asia, Australia, Europe, New Zealand and South Africa (none of whom are parties in this action) which is the subject of the FTC's complaint, did not have a "direct, substantial, and reasonably foreseeable domestic effect." 15 U.S.C. §45(a)(3). Therefore, the FTC lacks authority under the FTC Act to seek redress on behalf of foreign Affiliates in this case.

D. Defendant Benson K. Boreyko's Statement

Mr. Boreyko joins in the statements of Vemma set forth above, and to the extent

applicable, the statements of Defendants Alkazin. In addition, Mr. Boreyko notes that very few direct sales companies can boast over a decade of ongoing and successful business like Vemma can. Few (if any) pyramid schemes in the history of the industry have ever lasted over a decade. Vemma has succeeded for over a decade because of its products, its sales minded associates, and its loyal customers. The very nature of a pyramid scheme is to harm people. Vemma, at its core mission, exists to help people through high quality products focused on three megatrends in the world today: wellness, energy, and weight management. Finally, much of the “evidence” relied upon by the FTC in the preliminary proceedings was taken out of context and/or omitted related disclosures and disclaimers. After 29 successful years in the direct sales industry, there is no basis for a permanent injunction or other relief as requested by the FTC against Mr. Boreyko.

E. Defendant Tom Alkazin’s Statement

In addition to joining in the statement of Vemma, above, Mr. Alkazin notes that he is not responsible for the actions of Vemma and cannot be held jointly and severally liable with other Defendants. Mr. Alkazin was never an officer, director, employee or shareholder of Vemma and did not control Vemma. With respect to the assertion that Mr. Alkazin made false statements regarding income, most of the materials upon which the FTC has relied are outdated. Moreover, when taken in context of the other statements made by Mr. Alkazin, those statements are not misleading. Mr. Alkazin has been in the direct sales business for over four decades without ever being accused by any agency of misconduct, and a permanent injunction should not be entered as to him.

2. Parties' Statement of the Elements of Proof

Count One: Illegal Pyramid

A. Plaintiff FTC's Statement

Plaintiff must show that Defendants promoted a program that includes a compensation plan based primarily on providing payments to participants for the recruitment of new participants, not on the retail sale of products or services, thereby resulting in a substantial percentage of participants losing money. The Ninth Circuit has applied what is known as the “Koscot test” to pyramid analysis. 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 recruiting other participants into the program rewards which are unrelated to the sale of product to ultimate users.” *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014) (citing *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1181 (1975)).

B. Defendants' Additional Statement

The first *Koscot* prong—the payment of money in return for the right to sell product—is ordinarily met by requiring payment of an initial or periodic fee or purchasing non-returnable product. *Id.* at 833; *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 782 (9th Cir. 1996). The second prong requires the Court to look beyond a company’s policies and procedures and examine how the company operates in practice. *BurnLounge*, 753 F.3d at 883 *see also Omnitrition*, 79 F.3d at 783–84.

In assessing whether a company is actually rewarding distributors primarily for recruiting rather than for the sale of product to ultimate users, the mere fact that sales are made to a distributor does not mean that rewards based on such sales are rewards for recruiting. Rather, the Court must consider whether sales to such distributors constitute sales to “ultimate users” (i.e., “internal consumption”). *BurnLounge*, 753 F.3d at 887.

Count Two or Three: Deceptive Income Claims

A. Plaintiff FTC’s Statement

To prove a violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), Plaintiff must show: (1) there is a representation, omission, or practice; (2) that is likely to mislead consumers acting reasonably under the circumstances; and (3) the representation, omission, or practice is material.” *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)). Misrepresentations may be either express or implied. *FTC v. Figgie Int’l, Inc.*, 994 F. 2d 595, 604 (9th Cir. 1993). 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.” *FTC v. Cyberspace.com LLC*, 453 F. 3d 1196, 1201 (9th Cir. 2006) (quoting *In Re Cliffdale Assocs.*, 103 F.T.C. 110, 165 (1984)). The “common-sense net impression” created by the representation controls. *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 LLC*, 453 F. 3d at 1200 (a representation “may be likely to mislead by virtue of the net impression it creates even though [it] contains truthful disclosures”).

B. Defendants' Additional Statement

“When determining whether statements amount[] only to puffery, the court must analyze the context in which the statements were made.” *In re Bridgepoint Educ., Inc. Sec. Litig.*, 2013 WL 5206216, at *17 (S.D. Cal. Sept. 13, 2013) (citing *FTC v. Trudeau*, 579 F.3d 754, 766 (7th Cir. 2009) (“In determining whether a statement is puffery, the context matters”) (emphasis added))

Count Four: Means and Instrumentalities

Plaintiff must show that Defendants placed “into the hands of another” a means for violating the FTC Act. *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963), *cert. denied*, 375 U.S. 944 (1963).

Count Five: Relief Defendant

In order to recover funds from Relief Defendant Bethany Alkazin, Plaintiff must show that she: (1) received ill-gotten funds; and (2) has no legitimate claim to those funds. *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).

Common Enterprise

Corporate defendants may be held jointly and severally liable if they operate as a common enterprise. *FTC v. J.K. Publ’ns, Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000). “[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.” *FTC v. Nat'l Urological Group*, 645 F. Supp. 2d 1167, 1182 (N.D. Ga. 2008) (citing *FTC v. Delaware Watch Co., Inc.*, 332 F.2d 745, 746-747, *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)).

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

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

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

Liability of Individuals

A. Plaintiff FTC's Statement

In order to establish individual liability for injunctive relief, Plaintiff must show that the individual either directly participated in the deceptive acts or practices or had authority to control the deceptive acts or practices. *FTC v. Publ'g Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). To establish liability for equitable monetary relief, Plaintiff must show that the individual had knowledge or should have had knowledge of the practices at issue. *Id.* at 1171. The FTC need not show that the individual had an intent to deceive or had actual knowledge of the deception. *Id.* 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. *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 573-574 (7th Cir. 1989).

B. Defendants' Additional Statement

With respect to monetary relief, good faith belief is a defense. "Because of the knowledge requirement for individual liability, a defendant's good-faith belief in the truth of a representation, while not relevant to the question of whether the representation violates the FTC Act, may be relevant to whether that defendant can be held individually liable for these misrepresentations." *FTC v. Medical Billers Network, Inc.*, 543 F.Supp.2d 283 (S.D.N.Y. 2008) (citation omitted).

The FTC must also show reliance by consumers on the misrepresentations. *FTC v. Affordable Media*, 179 F.3d 1228, 1234 (9th Cir. 1999) (individuals are personally liable for restitution for corporate misconduct if they “had knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct, that the misrepresentations were the type upon which a reasonable and prudent person would rely, and that consumer injury resulted.”) (emphasis added); *F.T.C. v. Solomon Trading Co.*, 1994 WL 421478, at *3 (D. Ariz. June 28, 1994) (for an individual to be personally liable under the Act, the FTC must show “(1) that the corporate misrepresentations or omissions were of a kind usually relied upon by reasonably prudent persons; (2) that consumer injury resulted from such reliance; and (3) that the individual directly participated in the practices or acts complained of or that the individual had authority to control the practices or acts complained of and had some knowledge of the practices or acts.”) (emphasis added).

Appropriate Final Relief

A. Plaintiff FTC’s Statement

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.” *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1111–13 (9th Cir. 1982). Such relief may include equitable monetary relief, such as restitution, disgorgement, and rescission of contracts. *See Pantron I Corp.*, 33 F.3d at 1102 (Section 13(b) authorizes ancillary relief, including restitution, citing *Amy Travel Serv.*, 875 F. 2d at 571); *FTC v. Febre*,

128 F. 3d 530, 537 (7th Cir. 1997) (Section 13(b) permits courts to order disgorgement of illegally obtained funds); *H.N. Singer, Inc.*, 668 F. 2d at 1113 (Section 13(b) gives courts the power to order rescission).

Plaintiff seeks permanent injunctive relief against all Defendants. Plaintiff contends that all Defendants, including the individual Defendants, should be placed under a permanent injunction that, at a minimum, enjoins marketing activity that is likely to result in a pyramid scheme and deceptive income claims. The permanent injunctive relief requested may exceed the scope of the Preliminary Injunction currently in place and may prohibit Defendants' current marketing activities, as Defendants' current marketing program is based on a binary compensation plan that incentivizes recruiting, creates little incentives for retail sales, and is likely to lead to pyramid activity.

Voluntary cessation of illegal conduct does not deprive the Court of the power to grant injunctive relief. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). However, to be entitled to a permanent injunction, Plaintiff must show that there is a "cognizable danger of recurrent violation." *Id.*; see also *FTC v. Evans Products Co.*, 775 F. 2d 1084, 1087 (FTC must show that violations are likely to recur to be entitled to injunction).

Plaintiff will also seek joint and several liability against all Defendants for equitable monetary relief. When seeking an equitable monetary remedy based on consumers' net losses, the Commission must show that its calculations "reasonably approximated" those losses. *Febre*, 128 F. 3d at 535. Once it does so, the burden shifts

to the defendant to show that the calculations were inaccurate, because “the risk of uncertainty should fall on the wrongdoer whose illegal conduct created the uncertainty.” *Id.* (quoting *SEC v. First City Financial Corp., Ltd.*, 890 F.2d 1215, 1232 (D.C.Cir.1989)).

B. Defendants’ Additional Statement

The FTC's claim for injunctive relief under Section 13(b) of the FTCA requires proof of ongoing violations. “As a general rule, '[p]ast wrongs are not enough for the grant of an injunction'; an injunction will issue only if the wrongs are ongoing or likely to recur.” *F.T.C. v. Evans Products Co.*, 775 F.2d 1084, 1087 (9th Cir. 1985) (quoting *Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253 (9th Cir.1984)).

In determining the likelihood of recurring violations, “the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations” are proper considerations. *FTC v. RCA Credit Servs., LLC*, 2010 WL 2990068, at *5 (M.D. Fla. July 29, 2010) (citing *SEC v. CarribaAir, Inc.*, 681 F.2d 1318, 1322 (11th Cir. 1982)). As previously noted by this Court, “the FTC has shown no evidence Defendants have ever previously attempted to intentionally dissipate or hide either corporate or personal assets from an effort to collect a debt or judgment against them.” Furthermore, there is no evidence or indication that any dissipation or interference with assets will be undertaken by Defendants in the future. Accordingly, under applicable authority, there

is no basis for an asset freeze against Mr. Boreyko, or any of the Defendants in this Case. *See, e.g., Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009); *FTC v. John Beck Amazing Profits, LLC*, No. 2:09-cv-4719-FMC-FFMx, 2009 WL 7844076, at *15 (C.D. Cal. Nov. 17, 2009); *F.T.C. v. Debt Solutions, Inc.*, No. C06-298JLR, 2006 WL 1041996, at *7 (W.D. Wash. Apr. 3, 2006).

C. Defendants' Additional Statement Regarding Good Faith Defense

The Defendants' intent is relevant to several issues, including the Court's determination of appropriate relief. *See F.T.C. v. Direct Benefits Grp., LLC*, No. 6:11-CV-1186-ORL-28, 2013 WL 3771322, at *20 (M.D. Fla. July 18, 2013) (non-exhaustive list of factors relevant to the propriety of injunctive relief includes the degree of scienter involved) (citations omitted); *F.T.C. v. CEO Grp., Inc.*, No. 06-60602 CIV, 2007 WL 521933, at *1-2 (S.D. Fla. Feb. 15, 2007) ("Defendants should be entitled to at least raise these defenses at the remedies stage of this case"); *F.T.C. v. Bronson Partners, LLC*, No. 3:04CV1866(SRU), 2006 WL 197357, at *1 (D. Conn. Jan. 25, 2006); *FTC v. Medicor LLC*, 2001 WL 765628, *2 (C.D.Cal. June 26, 2001) (good faith is relevant for determining whether to issue a permanent injunction and whether to hold defendants individually liable).

3. Factual and Legal Issues in Dispute

A. Plaintiff FTC's Statement of the Disputed Factual and Legal Issues

Plaintiff contends that Defendants violated the FTC Act as stated in the Complaint, and that the Court should grant permanent injunctive relief and equitable monetary relief to consumers. Further, it is Plaintiff's position that there are no factual

and legal issues genuinely in dispute as to Defendants' liability for violations of the FTC Act; Plaintiff produced voluminous exhibits from Defendants' own marketing materials showing the violations, including dozens of videos and hundreds of pages of printed or Web material. Plaintiff contends that the only remaining issue is the amount of equitable monetary relief.

B. Defendants' Statement of the Disputed Factual and Legal Issues

1. Did Vemma Nutrition Company and Vemma Nutritional Holdings, Inc. operate as a "common enterprise" such that each is responsible for the alleged statutory violations of the other?
2. What was the process for designating purchasers of Vemma products as "Affiliates" or "customers" within Vemma's recordkeeping system? Did that system accurately reflect the intent of those purchasers?
3. Were many (or even most) of the purchasers designated as "Affiliates" within Vemma's recordkeeping system actually purchasing product for personal consumption in light of what the actual data show (*i.e.*, that approximately half of the "Affiliates" never purchased affiliate packs and that the average auto-delivery size was less than the amount necessary to be considered eligible for commissions)?
4. Did Vemma have adequate policies against inventory loading? Can the FTC demonstrate that Vemma Affiliates actually engaged in inventory loading during the relevant period? If so, how many and to what extent?
5. Were Vemma Affiliates required to purchase non-returnable inventory in order to receive the full benefits of the program?

6. Do the actual sales data reflect that the commissions paid by Vemma came primarily from the sale of product to end users, rather than recruiting?

7. Did Vemma's structure "ensure" that those who sought to act as Affiliates would not earn substantial income, as the FTC alleges?

8. Were Vemma's income Disclosure Statements accurate?

9. Can the FTC prove that the misrepresentations it complains of were widely disseminated and caused actual injury?

10. Can the FTC establish that Vemma was operating as a pyramid and/or making actionable misrepresentations in violation of the FTC Act when Vemma provides its Affiliates a 100% refund policy on returns that are made within one year?

11. Does the fact that Vemma had numerous repeat customers rebut any presumption the FTC may establish as to the reliance of those customers on the alleged misrepresentations?

12. Can the FTC seek monetary and/or injunctive relief for products purchased and consumed outside of the United States?

13. Can the FTC prove that permanent injunctive relief is warranted given Vemma's current practices and operation and the substantial corrective actions it took on its own prior to the FTC filing its complaint?

14. Is permanent injunctive relief against the public interest in light of the well-established, public demand for Vemma's products?

15. Is Mr. Alkazin liable for Vemma's alleged misconduct given that he had no authority to control the company and did not participate directly in its operation or management?

16. Can the FTC show reliance by consumers on the alleged misrepresentations for which it seeks monetary relief from the Individual Defendants?

17. Were the relatively few income representations made by the Alkazin material and likely to mislead consumers, particularly in light of the accompanying income disclosures? If so, can the FTC prove they were widely disseminated and caused actual injury?

18. Were the relatively few income representations made by the Mr. Boreyko material and likely to mislead consumers, particularly in light of the accompanying income disclosures? If so, can the FTC prove they were widely disseminated and caused actual injury?

19. Did the Individual Defendants have a good faith belief that the misrepresentations for which the FTC seeks monetary relief were true?

20. Is permanent injunctive relief warranted as to Mr. Alkazin in light of his 40-plus years in the industry without any prior regulatory or other adverse action?

21. Is permanent injunctive relief warranted as to Mr. Boryeko in light of his 30 plus years in the direct sales industry with only a single regulatory action, and without any regulatory action for nearly 20 years?

4. Jurisdictional Basis

This Court has subject matter jurisdiction because this action is brought by an

agency of the United States to enforce the FTC Act, an act of Congress regulating commerce. *See* 28 U.S.C. §§ 1331, 1337(a) and 1345, and 15 U.S.C. §§ 45(a) and 53(b). The Court has *in personam* jurisdiction over all Defendants because all Defendants transact or have transacted business in this District and throughout the United States, and all Defendants have been properly served and have answered.

5. Parties Who Have Not Been Served or Who Have Not Answered or Appeared

All parties have been served and have answered or otherwise appeared.

6. Names of Parties Who Are Not Subject to the Court's Jurisdiction

All parties are subject to the Court's jurisdiction.

7. Dispositive Motions

Because Plaintiff contends there are no factual or legal issues genuinely in dispute, Plaintiff anticipates filing a motion for summary judgment asking the Court to find all Defendants liable for injunctive and equitable monetary relief on all counts alleged in the Complaint.

Depending on developments in discovery, Defendants may file dispositive or partially dispositive motions.

8. Reference to a Magistrate Judge or Special Master

The parties do not believe the case is suitable for referral to a Magistrate Judge or Special Master.

9. Related Cases

None.

10. Rule 26(a) Initial Disclosures

The parties will make their Federal Rule of Civil Procedure 26(a) initial disclosures on or before December 7, 2015.

11. Proposed Case Deadlines¹

Proposed Case Deadlines	FTC	Vemma
Filing motions to amend and join additional parties	03/04/16	01/01/16
Completion of all fact discovery	06/03/16	10/15/16
Disclosure of expert testimony by Plaintiff under Rule 26(a)(2)	04/08/16	11/01/16
Disclosure of expert testimony by Defendants under Rule 26(a)(2)	04/22/16	11/30/16
Disclosure of rebuttal expert testimony	05/06/16	12/17/16
Disclosure of all witnesses, exhibits and other matters under Rule 26(a)(3)(i.e., depo designations and final exhibit lists)	07/22/16	01/31/17
Closure of expert discovery	06/03/16	01/31/17
Completing good faith discussion of settlement	06/03/16	03/15/16
Filing dispositive motions, including <i>Daubert</i> motions	06/17/16	02/15/17

¹ Defendants object to the FTC's proposed highly accelerated track. The FTC had been conducting its investigation and working on this case for well over a year. Already at a year disadvantage to the FTC, Defendants respectfully request adequate time to "catch up" to the FTC's lengthy advance start. The FTC disputes that the proposed track is "highly accelerated," and notes that Defendants already have substantial information about the FTC's theories, arguments, and evidence. Further, Defendants are already familiar with and have access to their own business records.

12. Scope of Discovery

The parties agree that discovery should be as broad as permitted by the Federal Rules of Civil Procedure, Fed. R. Civ. Pro. 26(b)(1).

13. Limitations on Discovery

The parties do not suggest any changes to the limitations on discovery at this time, though it is likely that the parties will seek to take more than 10 depositions each. The parties will confer on that issue at a later date, and make reasonable efforts to reach a stipulation should more than 10 depositions per side be necessary.

14. Estimated Length of Trial and Suggestions for Shortening the Trial

The parties estimate that the trial will take 10 court days. Plaintiff suggests that the Court shorten the trial by accepting consumer testimony by declaration. The parties expect to stipulate to the admission of certified business records and Defendants' business records.

15. Trial by Jury

Trial by jury is not requested.

16. Settlement

The FTC needs additional information about Defendants' sales and commission records before it can propose an amount for equitable monetary relief, but will attempt to work with Defendants to obtain this information in an expeditious manner. The parties request a settlement conference before another US District Judge or Magistrate Judge. Defendants request that the parties be directed to appear for such a settlement conference no later than March 15, 2016. The FTC does not oppose an early settlement conference

date as long as it has an opportunity to obtain and analyze the necessary sales and commissions records before the settlement conference.

17. Class Action Procedures

Not applicable.

18. Complex Track

There are no unusual, difficult, or complex problems or issues that would require this case to be placed on the complex track.

19. Other matters

There are no other matters that counsel believe will aid the Court in resolving this dispute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 7, 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:

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