

1 Quarles & Brady LLP  
2 Firm State Bar No. 00443100  
3 Renaissance One  
4 Two North Central Avenue  
5 Phoenix, AZ 85004-2391  
6 TELEPHONE 602.229.5200

7 John A. Harris (#014459)  
8 [john.harris@quarles.com](mailto:john.harris@quarles.com)  
9 Kevin D. Quigley (015972)  
10 [kevin.quigley@quarles.com](mailto:kevin.quigley@quarles.com)  
11 Edward A. Salanga (#20654)  
12 [edward.salanga@quarles.com](mailto:edward.salanga@quarles.com)

13 *Attorneys for Defendants Vemma Nutrition*  
14 *Company and Vemma International Holdings,*  
15 *Inc.*

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

18 Federal Trade Commission,  
19  
20 Plaintiff,  
21  
22 vs.  
23 Vemma Nutrition Company, *et al.*,  
24  
25 Defendants.

NO. CV-15-01578-PHX-JJT

**OBJECTION OF CORPORATE  
DEFENDANTS TO REA'S MOTION  
FOR APPROVAL OF TEMPORARY  
RECEIVER'S WIND UP OF  
RECEIVERSHIP ESTATE AND  
REQUEST FOR SUPPLEMENTAL  
AWARD OF RECEIVER'S  
ATTORNEYS' FEES**

26 This Objection is filed by Vemma Nutrition Company and Vemma International Holdings, Inc. (collectively, "Vemma" or the "Corporate Defendants") in opposition to the "Motion For Approval Of Temporary Receiver's Wind Up Of Receivership Estate, Including Approval Of Final Report And Accounting, Discharge Of Receiver And Release Of Liability, Exoneration Of Bond, And Related Relief, And Request For Supplemental Award Of Receiver's Attorneys' Fees" (Doc. 204) (the "Motion"), filed by Robb Evans and Robb Evans & Associates ("REA").

1 In the Motion, REA asks the Court to approve what REA calls a "wind up" of a  
2 temporary receivership that has already been terminated for more than five months (since  
3 September 18, 2015). In conjunction with this purported "wind up", REA asks the Court  
4 to enter an order that would, among other things:

5 (a) have the Court "approve and confirm" every piece of paper filed and every  
6 action taken by REA;

7 (b) grant and adjudicate a sweeping and involuntary release of REA (and a  
8 litany of related parties) from any claims or liability of any kind (held by anybody)  
9 relating to the temporary receivership; and

10 (c) approve an additional \$23,370 in fees for REA's counsel for the period from  
11 September 21, 2015 through October 31, 2015, even though REA already requested as  
12 part of its previous "final" fee request, and the Court approved, \$16,500 in counsel fees  
13 for the same period.

14 As discussed in detail below, the sweeping relief requested by REA is neither  
15 necessary or appropriate to confirm that the terminated temporary receivership is "wound  
16 up". To the extent the Court is inclined to grant any of the relief requested by REA, it  
17 should be limited to the straightforward matters addressed in the form of order proposed  
18 by the Corporate Defendants (the "Defendants' Proposed Order"), and which is lodged  
19 herewith.<sup>1</sup>

20 **A. REA's Request For The Court To "Approve And Confirm" All Papers**  
21 **Filed And Actions Taken By REA Is Unnecessary And Improper.**

22 Pursuant to the terms of the Court's ex parte Temporary Restraining Order dated  
23 August 21, 2015 (Doc. 25) (the "TRO") and its Order dated September 18, 2015 (Doc.  
24 118) (the "9/18/15 Order"), the Court terminated the temporary receivership and REA's

25 <sup>1</sup> A redline version of the Defendants' Proposed Order showing changes from the  
26 order proposed by REA is attached hereto as Exhibit "1".

1 role as temporary receiver which had been previously ordered by the Court. There is no  
2 need for the Court to now order a "wind up" of a temporary receivership terminated by  
3 orders of the Court more than five months ago. In addition to REA's request being  
4 unnecessary, the sweeping relief it asks for under the guise of confirming a "wind up" of  
5 the temporary receivership is improper and excessive.

6 First, REA asks the Court to "approve and confirm" essentially every pleading,  
7 report, or other paper filed by REA, as well as every action taken by REA (and many  
8 other parties) in conjunction with the temporary receivership. Such an adjudication is  
9 totally unnecessary to confirming that the already terminated temporary receivership is  
10 now "wound up".<sup>2</sup> There also is no substantive basis under the TRO or applicable law for  
11 such a request.<sup>3</sup> Reports and pleadings that are filed and actions taken by REA as  
12 temporary receiver are no more entitled to "approval and confirmation" by the Court than  
13 reports and pleadings filed or actions taken by any other party in this case.

14 Granting REA's request would also be highly prejudicial to the Corporate

15 \_\_\_\_\_  
16 <sup>2</sup> REA asks the Court to adjudicate the following:

17 The Receiver's Report of Temporary Receiver's Activities filed on  
18 September 4, 2015 (Doc. No. 50) and the Receiver's final reports of  
19 activities as reflected in the Receiver's fee motion filed September 21, 2015  
20 and related pleadings filed by the Receiver (Doc. No. 120 et seq.)  
21 ("Receiver's fee motion") and the Receiver's opposition to the defendants'  
22 emergency motion to compel turnover of funds (Doc. No. 138) filed  
October 2, 2015 ("emergency funds turnover motion") and other pleadings  
and files of the Court are hereby approved, and all actions and activities  
taken by or on behalf of the Receiver are hereby approved and confirmed.

23 See REA Proposed Order, p. 2 at Paragraph B.

24 <sup>3</sup> REA's claim that it believes such relief is "customary" is not a legal basis for its  
25 request. The authority cited by REA in the Motion stands for the proposition that the  
26 Court has discretion to provide for the administration of a receivership and to supervise a  
receiver, and not the relief requested by REA.

1 Defendants. As an example, among the things REA asks the Court to "approve and  
2 confirm" is the "Report of Temporary Receiver's Activities from August 24, 2015  
3 Through September 4, 2015" filed by REA (Doc. 50) and presumably REA's testimony at  
4 the preliminary injunction hearing regarding the report. These materials are opinion  
5 testimony by REA and are contested by the Corporate Defendants. It would be highly  
6 prejudicial to the Corporate Defendants for the Court to somehow "confirm and approve"  
7 such contested testimony before completion of discovery and a trial on the merits.

8 **B. REA's Request That It Be Granted A Sweeping "Release" Is**  
9 **Unnecessary And Improper.**

10 REA also requests that the Court order a sweeping release of REA from all claims  
11 and liabilities that anyone may hold against it related to the temporary receivership.  
12 REA's proposed "wind up" order contains the following proposed adjudication by the  
13 Court:

14 The Receiver, its agents, employees, members, officers,  
15 independent contractors, attorneys and representatives are  
16 hereby: . . . (b) released from all claims and liabilities arising  
17 out of and/or pertaining to the receivership herein . . .

18 See REA's Proposed Order, p. 2-3 at Paragraph 4 (emphasis added). Like its request for  
19 "approval and confirmation" of its acts, REA's request for a release is totally unnecessary  
20 to confirming that the terminated temporary receivership is now "wound up".

21 REA asks for a release of any conceivable claim, no matter how egregious, that  
22 anyone might assert against it. However, none of the Corporate Defendants nor anyone  
23 else has agreed to release claims they may be able to assert against REA. There has been  
24 no directive by the Court that the Corporate Defendants or anyone else that may have  
25 been affected by REA must investigate and assert claims against REA now or be forever  
26 barred from doing so (and irrespective of otherwise applicable statutes of limitation). The  
Motion was not even noticed to thousands of potentially affected persons and entities.

1 REA cites no authority, and there is none, for the proposition that the Court can order an  
2 involuntary release of potentially valuable claims that may be owned by the Corporate  
3 Defendants and others (including persons and entities that are not even parties to this case)  
4 simply because REA asks for one.

5 REA's suggestion that it should be essentially immune from any potential liability  
6 because it was a temporary receiver is also wrong as a matter of law. A receiver  
7 appointed by a federal court should act in accordance with the laws of the state in which  
8 the receivership property is situated, it should act in the same manner that the owner  
9 would be required to act, and it may be held liable for improper acts or other misconduct  
10 that occurred during the course of the receivership. Court-appointed officials, like a  
11 receiver, do not have total immunity for their acts. See, e.g., 28 U.S.C.A. § 959 (2012);  
12 see also 65 Am. Jur. 2d Receivers § 290 (“A receiver operating a business generally is  
13 liable officially, but not personally, for his or her torts or negligence in such operation . . .  
14 , [with] such liability on his or her part existing under the same circumstances and to the  
15 same extent that it would exist if he or she were the corporation or person whose business  
16 is in receivership.”).

17 The quasi-judicial immunity to which a federal court-appointed official may be  
18 entitled does not eliminate potential liability for the official's acts; this is evident in the  
19 similar situation of bankruptcy trustees where the Ninth Circuit has found that a trustee  
20 may be liable for intentional and negligent violations of duties. See, e.g., Bennett v.  
21 Williams, 892 F.2d 822, 824 (9th Cir. 1989) (Ninth Circuit noted that bankruptcy trustee  
22 may be held liable for acts taken in excess of the trustee's authority); In re Cochise Coll.  
23 Park, Inc., 703 F.2d 1339, 1357 (9th Cir. 1983) (reversing a bankruptcy court's grant of  
24 summary judgment in favor of a bankruptcy trustee and finding that such trustee may be  
25 held liable for misconduct during the bankruptcy). Indeed, “[a]lthough a trustee is not  
26 liable for mistakes in judgment where discretion is allowed, he or she is liable for not only

1 intentional but also negligent violations of duties imposed upon him by law.” In re  
2 Rigden, 795 F.2d 727, 730 (9th Cir. 1986) (citing Cochise Coll. Park, 703 F.2d at 1357,  
3 and reversing and remanding grant of summary judgment in favor of bankruptcy trustee).

4 Finally, REA's request is improper because it would require the Court to adjudicate  
5 that no valid claim exists against REA when there is no actual claim before the Court.  
6 This would be an improper advisory opinion rendered in the absence of a case or  
7 controversy. A fundamental limit to federal jurisdiction is that courts can entertain only  
8 actual "cases and controversies", and may not issue advisory opinions that would declare  
9 rights in hypothetical cases under hypothetical facts. See, e.g., Stormans, Inc. v. Selecky,  
10 586 F.3d 1109, 1122 (9th Cir. 2009); J.N.S., Inc. v. State of Ind., 712 F.2d 303, 305 (7th  
11 Cir. 1983). Rather, a justiciable case or controversy exists only when "the facts alleged,  
12 under all the circumstances, show that there is a substantial controversy, between parties  
13 having adverse legal interests, of sufficient immediacy and reality to warrant the issuance  
14 of a declaratory judgment.” MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127, 127  
15 S. Ct. 764, 771, 166 L. Ed. 2d 604 (2007) (internal quotation marks omitted).

16 **C. The Court Should Deny REA's Request For Supplemental Attorneys'**  
17 **Fees.**

18 REA asks the Court to approve \$23,370 in "supplemental" fees for its attorneys for  
19 the period after REA filed its Final Fee Motion on September 21, 2015 through October  
20 31, 2015.<sup>4</sup> This request is in addition to \$16,500 in estimated attorneys' fees for the same  
21 period requested by REA in its Final Fee Motion and already awarded by the Court and  
22 paid to REA. REA and its lawyers say they should get these additional fees because  
23 REA's counsel ran up substantial "unanticipated" fees related to: (a) objecting to the  
24 Defendants' motion to compel REA to turnover funds of the Defendants that REA retained

25 <sup>4</sup> See "Notice of Motion and First and Final Motion for Approval and Payment of  
26 Fees and Expenses of Temporary Receiver and its Counsel" (Doc. 120) (the "Final Fee  
Motion") filed by REA on September 21, 2015.



1 after termination of the receivership; and (b) responding to the Defendants' objection to  
2 REA's Final Fee Motion. See Motion at 4, 8.

3 The supplemental fee request is excessive and should be denied. As an initial  
4 matter, the Court has already considered REA's final fee request (including REA's fee  
5 estimates for attorneys' fees) and ordered that the requested fees would be reduced from  
6 the aggregate of what was requested. See Order dated November 24, 2015 (Doc. 169) at  
7 7. REA should not be allowed a second bite at the apple and ask for more fees after the  
8 Court has considered and reduced its prior fee requests.

9 Moreover, REA's counsel is asking to be awarded an aggregate of \$39,870<sup>5</sup> in fees  
10 essentially for responding to a turnover motion and an objection to the Final Fee Motion,  
11 both of which they could fully anticipate when making their initial \$16,500 fee estimate.  
12 Both matters were resolved without an evidentiary hearing. The Court granted substantial  
13 parts of the relief requested by the Defendants in both matters (the Court ordered REA to  
14 turnover approximately \$235,677 in funds of the Corporate Defendants, and the Court  
15 reduced REA's aggregate final fee request by approximately 20%). See Minute Entry  
16 dated October 2, 2015 (Doc. 139); Order dated November 24, 2015 (Doc. 169) at 7.  
17 REA's counsel has already been awarded a substantial amount of fees for its work in this  
18 case (\$70,450 in the aggregate); and for responding to the two matters discussed above  
19 (\$16,500 already awarded for the subject period). REA's counsel's request to tack on  
20 another \$23,370 in fees should be denied, especially considering the fact that the  
21 Corporate Defendants prevailed on material parts of the relief requested in the turnover  
22 motion and objection to the Final Fee Motion.

23 **D. Conclusion.**

24 For all of the foregoing reasons, the Corporate Defendants request that the Court:

25 \_\_\_\_\_  
26 <sup>5</sup> That is, \$23,370 supplemental request *plus* \$16,500 awarded from the Final Fee Motion.

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A. Deny the Motion; or

B. If the Court grants any of the relief requested in the Motion, such relief should be limited to the relief set forth in the Corporate Defendants' Proposed Order, lodged herewith; and

C. Grant the Corporate Defendants such other and further relief as is proper under the facts of this case.

DATED this 7th day of March, 2016.

QUARLES & BRADY LLP  
Renaissance One  
Two North Central Avenue  
Phoenix, AZ 85004-2391

By /s/ Edward A. Salanga

John A. Harris  
Kevin D. Quigley  
Edward A. Salanga

*Attorneys for Defendants Vemma Nutrition  
Company, Vemma International Holdings, Inc.*



**CERTIFICATE OF SERVICE**

I hereby certify that on March 7, 2016, I electronically transmitted the attached document to the Clerk’s Office using the CM/ECF System for filing and a copy was electronically submitted to counsel at the e-mail addresses below:

<p><b>Counsel for Plaintiff, Federal Trade Commission:</b></p> <p>Jonathan E. Neuchterlein General Counsel</p> <p>Angeleque P. Linville <a href="mailto:alinville@ftc.gov">alinville@ftc.gov</a></p> <p>Jason C. Moon <a href="mailto:jmoon@ftc.gov">jmoon@ftc.gov</a></p> <p>Anne D. Lejeune <a href="mailto:alejeune@ftc.gov">alejeune@ftc.gov</a></p> <p>Emily B. Robinson <a href="mailto:erobinson@ftc.gov">erobinson@ftc.gov</a></p> <p>Zachary Alexander Keller <a href="mailto:zkeller@ftc.gov">zkeller@ftc.gov</a></p> <p><b>Counsel for Defendants Tom and Bethany Alkazin:</b></p> <p>Coppersmith &amp; Brockelman PLC Keith Beauchamp <a href="mailto:kbeauchamp@cblawyers.com">kbeauchamp@cblawyers.com</a></p> <p>Marvin Christopher Ruth <a href="mailto:mruth@cblawyers.com">mruth@cblawyers.com</a></p>	<p><b>Counsel for Receiver Robb Evans &amp; Associates, LLC:</b></p> <p>Dentons US LLP Gary Owen Caris <a href="mailto:gary.caris@dentons.com">gary.caris@dentons.com</a></p> <p>Lesley Anne Hawes <a href="mailto:lesley.hawes@dentons.com">lesley.hawes@dentons.com</a></p> <p>Joshua S. Akbar <a href="mailto:joshua.akbar@dentons.com">joshua.akbar@dentons.com</a></p> <p><b>Counsel for Defendant Benson K. Boreyko:</b></p> <p>John R. Clemency Gallagher &amp; Kennedy <a href="mailto:john.clemency@gknet.com">john.clemency@gknet.com</a></p> <p>Lindsī Michelle Weber <a href="mailto:lindsi.weber@gknet.com">lindsi.weber@gknet.com</a></p>
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/s/ Angelina Chavez

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

Federal Trade Commission,  
  
Plaintiff,  
  
vs.  
  
Vemma Nutrition Company, *et al.*,  
  
Defendants.

NO. CV-15-01578-PHX-JJT

**[DEFENDANTS' PROPOSED] ORDER GRANTING IN PART AND DENYING IN PART MOTION FOR APPROVAL OF TEMPORARY RECEIVER'S WIND UP OF RECEIVERSHIP ESTATE, INCLUDING APPROVAL OF FINAL REPORT AND ACCOUNTING, DISCHARGE OF RECEIVER AND RELEASE OF LIABILITY, EXONERATION OF BOND, AND RELATED RELIEF, AND REQUEST FOR SUPPLEMENTAL AWARD OF RECEIVER'S ATTORNEYS' FEES**

The matter of the Motion for Approval of Temporary Receiver's Wind Up of Receivership Estate, Including Approval of Final Report and Accounting, Discharge of Receiver and Release of Liability, Exoneration of Bond, and Related Relief and Request for Supplemental Award of Receiver's Attorneys' Fees ("Wind Up Motion") filed by Robb Evans and Robb Evans & Associates LLC in its capacity as the former Temporary Receiver ~~in the above-captioned matter~~ ("Receiver") pursuant to the Order Filed under Seal entered August 21, 2015 (Doc. 25) ("Temporary Receivership Order"), came on regularly for

1 determination by the Court, the Honorable John J. Tuchi, United States District Judge  
2 presiding.

3  
4 The temporary receivership which is the subject of the Wind Up Motion terminated  
5 and expired by order of the Court on September 18, 2015.

6 The Court having reviewed and considered the Wind Up Motion, the Objection to  
7 the Wind Up Motion filed by the Defendants Vemma (Doc. \_\_\_\_) and all pleadings and  
8 papers in support thereof, ~~and response or opposition, if any, to the Wind Up Motion,~~ and  
9 good cause appearing therefor,

10 IT IS ORDERED THAT:

11 1. The Wind Up Motion and the relief sought therein is hereby granted; in part  
12 and denied in part as set forth in this Order.

13 ~~2. Without limiting the generality of the foregoing:~~

14 ~~A. The Court hereby authorizes and approves the Receiver's wind up of the~~  
15 ~~temporary receivership created by the appointment of the Receiver as temporary receiver~~  
16 ~~pursuant to the Order Filed under Seal entered August 21, 2015 (Doc. No. 25) ("Temporary~~  
17 ~~Receivership Order");~~

18 ~~B. The Receiver's Report of Temporary Receiver's Activities filed on September~~  
19 ~~4, 2015 (Doc. No. 50) and the Receiver's final reports of activities as reflected in the~~  
20 ~~Receiver's fee motion filed September 21, 2015 and related pleadings filed by the Receiver~~  
21 ~~(Doc. No. 120 *et seq.*) ("Receiver's fee motion") and the Receiver's opposition to the~~  
22 ~~defendants' emergency motion to compel turnover of funds (Doc. No. 138) filed October 2,~~  
23 ~~2015 ("emergency funds turnover motion") and other pleadings and files of the Court are~~  
24 ~~hereby approved, and all actions and activities taken by or on behalf of the Receiver are~~  
25 ~~hereby approved and confirmed;~~

1           2.     ~~3. The~~ No objection has been filed in regard to the Receiver's final accounting  
2 through September 18, 2015 attached as Exhibit 1 to the Declaration of Kenton Johnson  
3 filed in support of the Receiver's fee motion (Doc. ~~No. 120-5~~) ~~is hereby approved, and all~~  
4 ~~payments made by, and the final accounting is accepted as the final accounting of~~ the  
5 Receiver ~~in connection with the administration~~ through the termination of the temporary  
6 receivership ~~estate are hereby approved and confirmed;~~ on September 18, 2015.

7           3.     ~~4. The~~ Receiver, its agents, employees, members, officers, independent  
8 contractors, attorneys and representatives are hereby: ~~(a) discharged; (b) released from all~~  
9 ~~claims and liabilities arising out of and/or pertaining to the receivership herein; and (c)~~  
10 ~~relieved of all~~ relieved of any further duties and responsibilities pertaining to the temporary  
11 receivership previously established ~~in this action;~~ under the Temporary Receivership Order.

12           4.     ~~5. The~~ Receiver's bond is hereby exonerated;

13           ~~6. Dentons US LLP is awarded supplemental attorneys' fees of \$23,370.00 as~~  
14 ~~counsel for the Receiver, and defendants Vemma Nutrition Company ("Vemma") and~~  
15 ~~Vemma International Holdings, Inc. are directed to pay such supplemental attorneys' fees~~  
16 ~~award within fifteen days of entry of this Order; and~~

17           5.     ~~7. Notice~~ of the Wind Up Motion is deemed to be sufficient based on (a)  
18 service of the notice of the filing of the Wind Up Motion, the Wind Up Motion and all  
19 supporting pleadings and papers on all parties, and (b) service of the notice of the filing of  
20 the Wind Up Motion on all known taxing authorities with claims and non-consumer  
21 creditors of the estate concurrent with the filing of the Wind Up Motion with the Court.

22           6.     Except to the extent ordered in paragraphs 2 through 5 above, the relief  
23 requested by the Receiver in the Wind Up Motion is denied.

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**IN THE UNITED STATES DISTRICT COURT  
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Federal Trade Commission,  
  
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Defendants.

NO. CV-15-01578-PHX-JJT

**[DEFENDANTS' PROPOSED]  
ORDER GRANTING IN PART AND  
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APPROVAL OF TEMPORARY  
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The matter of the Motion for Approval of Temporary Receiver's Wind Up of Receivership Estate, Including Approval of Final Report and Accounting, Discharge of Receiver and Release of Liability, Exoneration of Bond, and Related Relief and Request for Supplemental Award of Receiver's Attorneys' Fees ("Wind Up Motion") filed by Robb Evans and Robb Evans & Associates LLC in its capacity as the former Temporary Receiver ("Receiver") pursuant to the Order Filed under Seal entered August 21, 2015 (Doc. 25) ("Temporary Receivership Order"), came on regularly for determination by the



1 Court, the Honorable John J. Tuchi, United States District Judge presiding.

2 The temporary receivership which is the subject of the Wind Up Motion terminated  
3 and expired by order of the Court on September 18, 2015.

4 The Court having reviewed and considered the Wind Up Motion, the Objection to  
5 the Wind Up Motion filed by the Defendants Vemma (Doc. \_\_\_ ) and all pleadings and  
6 papers in support thereof, and good cause appearing therefor,

7 IT IS ORDERED THAT:

8 1. The Wind Up Motion and the relief sought therein is hereby granted in part  
9 and denied in part as set forth in this Order.

10 2. No objection has been filed in regard to the Receiver's final accounting  
11 through September 18, 2015 attached as Exhibit 1 to the Declaration of Kenton Johnson  
12 filed in support of the Receiver's fee motion (Doc. 120-5), and the final accounting is  
13 accepted as the final accounting of the Receiver through the termination of the temporary  
14 receivership on September 18, 2015.

15 3. The Receiver, its agents, employees, members, officers, independent  
16 contractors, attorneys and representatives are hereby relieved of any further duties and  
17 responsibilities pertaining to the temporary receivership previously established under the  
18 Temporary Receivership Order.

19 4. The Receiver's bond is hereby exonerated.

20 5. Notice of the Wind Up Motion is deemed to be sufficient based on (a)  
21 service of the notice of the filing of the Wind Up Motion, the Wind Up Motion and all  
22 supporting pleadings and papers on all parties, and (b) service of the notice of the filing of  
23 the Wind Up Motion on all known taxing authorities with claims and non-consumer  
24 creditors of the estate concurrent with the filing of the Wind Up Motion with the Court.

25 6. Except to the extent ordered in paragraphs 2 through 5 above, the relief  
26 requested by the Receiver in the Wind Up Motion is denied.