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

11 Federal Trade Commission,

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

12 Plaintiff,

**DEFENDANT BENSON K.
BOREYKO'S FIRST AMENDED
ANSWER TO PLAINTIFF
FEDERAL TRADE
COMMISSION'S COMPLAINT
FOR PERMANENT
INJUNCTION AND OTHER
EQUITABLE RELIEF**

13 v.

14 Vemma Nutrition Company, *et al.*

15 Defendants.
16

17
18 Defendant Benson K. Boreyko ("Defendant Boreyko"), by and through
19 undersigned counsel, hereby answers the Plaintiff Federal Trade Commission's
20 Complaint for Injunctive and other Equitable Relief dated August 17, 2015 (the
21 "Complaint");

22 1. Paragraph 1 contains no allegations that require a response. Defendant
23 Boreyko denies any allegation in Paragraph 1 regarding violation of Section 5(a) of the
24 FTC Act, 15 U.S.C. § 45(a), and further denies that the FTC is entitled to the relief it
25 seeks.

26 **JURISDICTION AND VENUE**

27 2. Defendant Boreyko admits the allegations in Paragraph 2.

28 3. Defendant Boreyko admits the allegations in Paragraph 3.

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PLAINTIFF

4. Responding to the allegations in Paragraph 4, Defendant Boreyko admits that the FTC is an independent agency of the United States Government created by statute. Defendant Boreyko further admits that the FTC enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. Defendant Boreyko denies any allegation in Paragraph 4 regarding violation of Section 5(a) of the FTC Act.

5. The allegations in Paragraph 5 set forth conclusions of law as to which no response is required. However, if deemed to contain allegations of fact, Defendant Boreyko denies the allegations.

DEFENDANTS

6. The allegations in Paragraph 6 are not directed at Defendant Boreyko, and therefore require no response in this answer. However, if deemed to contain allegations against Defendant Boreyko, Defendant Boreyko denies the allegations. Defendant Boreyko affirmatively alleges that Vemma Nutrition Company’s advertisement, marketing, distribution, or sale of “business opportunities” do not constitute a violation of Section 5(a) of the FTC Act.

7. The allegations in Paragraph 7 are not directed at Defendant Boreyko, and therefore require no response in this answer. However, if deemed to contain allegations against Defendant Boreyko, Defendant Boreyko denies the allegations. Defendant Boreyko affirmatively alleges that Vemma International Holdings, Inc.’s advertisement, marketing, distribution, or sale of “business opportunities” do not constitute a violation of Section 5(a) of the FTC Act.

8. Defendant Boreyko admits that he is the Chief Executive Officer, Secretary, and a director of Vemma Nutrition Company, that he is the President, Secretary, and a director of Vemma International Holdings, Inc., and that he resides in this District. Defendant Boreyko denies the remaining allegations in Paragraph 8.

9. The allegations in Paragraph 9 are not directed at Defendant Boreyko,

1 and therefore require no response. However, if deemed to contain allegations against
2 Defendant Boreyko, Defendant Boreyko denies the allegations.

3 10. The allegations in Paragraph 10 are not directed at Defendant Boreyko,
4 and therefore require no response. However, if deemed to contain allegations against
5 Defendant Boreyko, Defendant Boreyko denies the allegations.

6 **COMMON ENTERPRISE**

7 11. The allegations in Paragraph 11 are not directed at Defendant Boreyko,
8 and therefore require no response. However, if deemed to contain allegations against
9 Defendant Boreyko, Defendant Boreyko denies the allegations.

10 **COMMERCE**

11 12. The allegations in Paragraph 12 are not directed at Defendant Boreyko,
12 and therefore require no response. However, if deemed to contain allegations against
13 Defendant Boreyko, Defendant Boreyko denies the allegations.

14 **DEFENDANTS' BUSINESS PRACTICES**

15 13. Responding to the allegations in Paragraph 13, Defendant Boreyko
16 admits that Vemma Nutrition Company was founded in 2004, that Vemma Nutrition
17 Company is a multilevel marketing company that promotes health and wellness drinks
18 through independent distributors called "Affiliates," that the products promoted
19 include health, energy and weight loss products, and that Vemma International is the
20 sole or partial owner of certain entities operating in various international markets.
21 Defendant Boreyko denies the remaining allegations in Paragraph 13.

22 14. Responding to the allegations in Paragraph 14, Defendant Boreyko
23 admits that Affiliates can earn financial and other rewards for building two "teams" or
24 "downlines" of individuals who also enroll with the company, either as an Affiliate, if
25 the individual is interested in the business opportunity, or as a customer, if the
26 individual is primarily interested in purchasing Vemma products for his or her own
27 consumption. Defendant Boreyko denies the remaining allegations in Paragraph 14.

28 15. Defendant Boreyko denies the allegations in Paragraph 15.

1 16. Responding to the allegations in Paragraph 16, Defendant Boreyko
2 admits only that Vemma Nutrition Company earned more than \$200 million in annual
3 revenues in 2013 and 2014. Defendant Boreyko denies the allegation that Vemma
4 Nutrition Company earned this money using a business model that “depends upon
5 recruiting individuals to participate in Vemma as Affiliates and encouraging them to
6 purchase Vemma Products in connection with such participation, rather than selling
7 products to ultimate-user consumers.” Defendant Boreyko affirmatively alleges that
8 virtually all revenues came from the sale of Vemma products to “ultimate users” –
9 both Customers and Affiliates who purchased product for their personal consumption
10 or resale.

11 **Defendants’ Sales and Marketing Activities**

12 17. Responding to the allegations in Paragraph 17, Defendant Boreyko
13 admits only that the companies promote the Vemma program through a variety of
14 channels and that Defendant Boreyko has spoken at events promoting Vemma’s
15 products and opportunities. Defendant Boreyko denies the allegation that
16 “[o]pportunity events are meetings designed to motivate and train Affiliates and to
17 recruit new Affiliates,” and affirmatively alleges that opportunity events are also
18 designed to promote the sale of Vemma’s products. The allegations regarding
19 Defendant Alkazin are not directed at Defendant Boreyko, and therefore require no
20 response. However, if deemed to contain allegations against Defendant Boreyko,
21 Defendant Boreyko denies the remaining allegations.

22 18. Defendant Boreyko denies the allegations in Paragraph 18.

23 19. Responding to the allegations in Paragraph 19, Defendant Boreyko
24 admits only that there was a campaign known as “YPR.” Defendant Boreyko denies
25 the remaining allegations in Paragraph 19.

26 20. Defendant Boreyko denies the allegations in Paragraph 20.

27 21. Defendant Boreyko denies the allegations in Paragraph 21.

28 22. Defendant Boreyko denies the allegations in Paragraph 22.

1 23. Defendant Boreyko denies the allegations in Paragraph 23.

2 24. Defendant Boreyko denies the allegations in Paragraph 24, and
3 affirmatively alleges that the quote in Paragraph 24 is taken out of context.

4 25. Defendant Boreyko denies the allegations in Paragraph 25, and
5 affirmatively alleges that the quote in Paragraph 25 is incomplete and is taken out of
6 context.

7 26. Defendant Boreyko denies the allegations in Paragraph 26.

8 27. Defendant Boreyko denies the allegations in Paragraph 27.

9 28. Defendant Boreyko denies the allegations in Paragraph 28, and
10 affirmatively alleges that the quote in Paragraph 28 is incomplete and is taken out of
11 context.

12 29. Defendant Boreyko denies the allegations in Paragraph 29.

13 30. Defendant Boreyko admits that there are training materials on the
14 Vemma web site. Defendant Boreyko denies the rest of the allegations in Paragraph
15 30.

16 31. Defendant Boreyko admits that Vemma provides web site support for its
17 Affiliates. Defendant Boryeko denies the rest of the allegations in Paragraph 31.

18 32. The allegations in Paragraph 32 are not directed at Defendant Boreyko,
19 and therefore require no response. However, if deemed to contain allegations against
20 Defendant Boreyko, Defendant Boreyko denies the allegations.

21 **Defendants' Income Claims**

22 33. Defendant Boreyko denies the prefatory allegations in Paragraph 33, and
23 affirmatively alleges that the quotes in Paragraph 33 are incomplete and are taken out
24 of context.

25 34. Defendant Boreyko denies the prefatory allegations in Paragraph 34, and
26 affirmatively alleges that the quotes in Paragraph 34 are incomplete and are taken out
27 of context.

28 35. The allegations in Paragraph 35 are not directed at Defendant Boreyko,

1 and therefore require no response. However, if deemed to contain allegations against
2 Defendant Boreyko, Defendant Boreyko denies the allegations.

3 36. The allegations in Paragraph 36 are not directed at Defendant Boreyko,
4 and therefore require no response. However, if deemed to contain allegations against
5 Defendant Boreyko, Defendant Boreyko denies the allegations.

6 37. Defendant Boreyko denies the prefatory allegations in Paragraph 37, and
7 affirmatively alleges that the quotes in Paragraph 37 are incomplete and are taken out
8 of context.

9 38. Defendant Boreyko denies the allegations in Paragraph 38.

10 39. Defendant Boreyko denies the allegations in Paragraph 39.

11 40. Defendant Boreyko denies the prefatory allegations in Paragraph 40, and
12 affirmatively alleges that the quotes in Paragraph 40 are incomplete and are taken out
13 of context.

14 41. Defendant Boreyko denies the prefatory allegations in Paragraph 41, and
15 affirmatively alleges that the quotes in Paragraph 41 are incomplete and are taken out
16 of context.

17 42. The allegations in Paragraph 42 are not directed at Defendant Boreyko,
18 and therefore require no response. However, if deemed to contain allegations against
19 Defendant Boreyko, Defendant Boreyko admits that Vemma publishes income
20 disclosures, and Defendant Boreyko denies the rest of the allegations in Paragraph 42.

21 43. The allegations in Paragraph 43 are not directed at Defendant Boreyko,
22 and therefore require no response. However, if deemed to contain allegations against
23 Defendant Boreyko, Defendant Boreyko denies the allegations.

24 44. The allegations in Paragraph 44 are not directed at Defendant Boreyko,
25 and therefore require no response. However, if deemed to contain allegations against
26 Defendant Boreyko, Defendant Boreyko denies the allegations.

27 **Vemma's Compensation Plan**

28 45. Defendant Boreyko admits the allegations in Paragraph 45.

1 46. Defendant Boreyko admits the allegations in Paragraph 46.

2 47. Defendant Boreyko denies the allegations in Paragraph 47.

3 48. Responding to the allegations in Paragraph 48, Defendant Boreyko
4 admits that in order to be eligible for financial compensation under the compensation
5 plan an Affiliate must be “qualified.” Defendant Boreyko further admits that under the
6 compensation plan in effect prior to the filing of the Complaint, to be qualified an
7 Affiliate must have (1) a minimum of 120 points in “personal volume” each month,
8 and (2) at least one “active” customer or affiliate on each of the Affiliate’s left and
9 right teams. Defendant Boreyko denies the remaining allegations contained in
10 Paragraph 48.

11 49. Responding to the allegations in Paragraph 49, Defendant Boreyko
12 admits that under the compensation plan in effect prior to the filing of the Complaint,
13 Affiliates could achieve 120 personal volume points in a month by personally
14 purchasing products worth that same number in “qualifying volume” points or “QV”
15 for personal consumption or resale, or by having double that amount (i.e., 240 QV)
16 purchased by their personally enrolled customers, or some combination of both.
17 Defendant Boreyko denies the remaining allegations contained in Paragraph 49.

18 50. Responding to the allegations in Paragraph 50, Defendant Boreyko
19 admits that under the compensation plan in effect prior to the filing of the Complaint,
20 to be “active” customers or affiliates must have 60 personal volume points in a month
21 by personally purchasing products worth 60 QV that month for personal consumption
22 or resale, having double that purchased by their personally enrolled customers, or some
23 combination of both. Defendant Boreyko denies the remaining allegations contained
24 in Paragraph 50.

25 51. Defendant Boreyko denies the allegations in Paragraph 51.

26 52. Defendant Boreyko denies the allegations in Paragraph 52.

27 53. Responding to the allegations in Paragraph 53, Defendant Boreyko
28 alleges that Plaintiff has not accurately and completely summarized the compensation

1 plan. Defendant Boreyko denies all remaining allegations in Paragraph 53.

2 54. Defendant Boreyko denies the allegations in Paragraph 54.

3 55. Defendant Boreyko denies the allegations in Paragraph 55.

4 56. Defendant Boreyko denies the allegations in Paragraph 56.

5 57. Defendant Boreyko denies the allegations in Paragraph 57.

6 58. Responding to the allegations in Paragraph 58, Defendant Boreyko
7 admits only that Rank Advancement Awards exist. Defendant Boreyko denies the
8 remaining allegations in Paragraph 58.

9 59. Responding to the allegations in Paragraph 59, Defendant Boreyko refers
10 to Vemma's compensation plan for its true and complete contents and denies that
11 Plaintiff has accurately and completely summarized them. Defendant Boreyko denies
12 all remaining allegations in Paragraph 59.

13 60. Responding to the allegations in Paragraph 60, Defendant Boreyko refers
14 to Vemma's compensation plan for its true and complete contents and denies that
15 Plaintiff has accurately and completely summarized them. Defendant Boreyko denies
16 all remaining allegations in Paragraph 60.

17 61. Defendant Boreyko denies the allegations in Paragraph 61.

18 62. Defendant Boreyko admits that Vemma restricts the sale of Vemma
19 Products on eBay and Craigslist, but Defendant Boreyko denies the remaining
20 allegations in Paragraph 62.

21 63. Defendant Boreyko denies the allegations in Paragraph 63.

22 **VIOLATIONS OF SECTION 5 OF THE FTC ACT**

23 64. The allegations in Paragraph 64 set forth conclusions of law as to which
24 no response is required. However, if deemed to contain allegations of fact, Defendant
25 Boreyko denies the allegations.

26 65. The allegations in Paragraph 65 set forth conclusions of law as to which
27 no response is required. However, if deemed to contain allegations of fact, Defendant
28 Boreyko denies the allegations.

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COUNT I

Illegal Pyramid

66. Defendant Boreyko denies the allegations in Paragraph 66.

67. The allegations in Paragraph 67 set forth conclusions of law as to which no response is required. However, if deemed to contain allegations of fact, Defendant Boreyko denies the allegations.

COUNT II

Income Claims

68. Defendant Boreyko denies the allegations in Paragraph 68.

69. Defendant Boreyko denies the allegations in Paragraph 69.

70. The allegations in Paragraph 70 set forth conclusions of law as to which no response is required. However, if deemed to contain allegations of fact, Defendant Boreyko denies the allegations.

COUNT III

Failure to Disclose

71. Defendant Boreyko denies the allegations in Paragraph 71.

72. Defendant Boreyko denies the allegations in Paragraph 72.

73. The allegations in Paragraph 73 set forth conclusions of law as to which no response is required. However, if deemed to contain allegations of fact, Defendant Boreyko denies the allegations.

74. The allegations in Paragraph 74 set forth conclusions of law as to which no response is required. However, if deemed to contain allegations of fact, Defendant Boreyko denies the allegations.

COUNT IV

Means and Instrumentalities

75. Defendant Boreyko denies the allegations in Paragraph 75.

76. The allegations in Paragraph 76 set forth conclusions of law as to which no response is required. However, if deemed to contain allegations of fact, Defendant

1 Boreyko denies the allegations.

2 **COUNT V**

3 **Relief Defendant**

4 77. The allegations in Paragraph 77 are not directed at Defendant Boreyko,
5 and therefore require no response. However, if deemed to contain allegations against
6 Defendant Boreyko, Defendant Boreyko denies the allegations.

7 78. The allegations in Paragraph 78 are not directed at Defendant Boreyko,
8 and therefore require no response. However, if deemed to contain allegations against
9 Defendant Boreyko, Defendant Boreyko denies the allegations.

10 79. The allegations in Paragraph 79 are not directed at Defendant Boreyko,
11 and therefore require no response. However, if deemed to contain allegations against
12 Defendant Boreyko, Defendant Boreyko denies the allegations.

13 **CONSUMER INJURY**

14 80. Defendant Boreyko denies the allegations in Paragraph 80.

15 **THIS COURT'S POWER TO GRANT RELIEF**

16 81. The allegations in Paragraph 81 set forth conclusions of law as to which
17 no response is required. However, if deemed to contain allegations of fact, Defendant
18 Boreyko denies the allegations.

19 82. Defendant Boreyko denies all allegations of the Complaint, either
20 express or implied, not specifically admitted to or otherwise pled to herein.

21 **AFFIRMATIVE DEFENSES**

22 A. The FTC's Claims for injunctive relief, as sought here, may be
23 unconstitutional. The FTC seeks a "permanent injunction to prevent future violations
24 of the FTC Act." Complaint at 26. It is unclear what the sought-for restriction might
25 entail, what harms it seeks to remedy, or whom it might encompass. Consequently, the
26 FTC's requested relief, including potential restrictions on the content, or manner and
27 method, of the Defendant's advertising or communications with third parties, may
28 violate the First Amendment to the United States Constitution as a prior restraint on

1 protected speech and may impermissibly chill protected speech. The FTC's requested
2 relief may be more restrictive than is necessary to accomplish the remedial objective of
3 preventing any purported violations of the FTC Act, and therefore, violate the First
4 Amendment and exceed the scope of the FTC's authority under the law. Further, the
5 FTC's attempt to hold the Defendant responsible for unspecified conduct, actions, or
6 statements of other Defendants and third parties may violate the First Amendment, and
7 exceed the scope of the FTC's authority. Further, the FTC's attempt to hold the
8 Defendants responsible for purported harm suffered by residents of countries other
9 than the United States unconstitutionally and improperly exceeds the scope of the
10 FTC's authority under the law. Defendant Boreyko reserves the right to further amend
11 this affirmative defense as discovery progresses, and as the FTC's allegations, and the
12 nature and form of the requested remedies, become more concrete.

13 B. The FTC's claims for injunctive relief are not authorized or available at
14 law or equity. In support of this defense, Defendant Boreyko incorporates the
15 statements set forth in Affirmative Defense "A" above. Defendant Boreyko reserves
16 the right to further amend this affirmative defense as discovery progresses, and as the
17 FTC's allegations, and the nature and form of the requested remedies, become more
18 concrete.

19 C. Defendant Boreyko acted reasonably, in good faith, and in accordance
20 with any applicable standards and duties.

21 **PRAYER FOR RELIEF**

22 WHEREFORE, having fully responded to the Complaint, Defendant Boreyko
23 respectfully requests that the FTC's requests for a permanent injunction and other
24 equitable relief be denied in their entirety, and that the Court award Defendant
25 Boreyko any further relief the Court deems appropriate.

26 Respectfully submitted this 15th day of July, 2016.

27 GALLAGHER & KENNEDY, P.A.

28 By /s/ Lindsay M. Weber

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2016, I electronically transmitted a PDF version of this document to the Clerk of the Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing to all CM/ECF registrants and non-registered parties.

/s/ Gloria Kannberg