

**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

**STIPULATED ORDER FOR
PERMANENT INJUNCTION AND
MONETARY JUDGMENT
AGAINST VEMMA NUTRITION
COMPANY, VEMMA
INTERNATIONAL HOLDINGS,
INC., AND BENSON K. BOREYKO**

Plaintiff, the Federal Trade Commission (“Commission” or “FTC”), filed its Complaint for Permanent Injunction and Other Equitable Relief pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b). The Commission and Corporate Defendants and Individual Defendant Benson K. Boreyko (collectively, “Defendants”) stipulate to the entry of this Stipulated Order for Permanent Injunction and Monetary Judgment against Vemma Nutrition Company, Vemma International Holdings, Inc., and Benson K. Boreyko (“Order”) to resolve all matters in dispute in this action between them.

or other commercial symbol). The definition of Business Venture includes Multi-level Marketing Programs.

B. “

6. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

7. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

8. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

9.

1. Any product labeled as a dietary supplement or otherwise represented as a dietary supplement; or
2. Any pill, tablet, capsule, powder, softgel, gelcap, liquid, or other similar form containing one or more ingredients that is a vitamin, mineral, herb or other botanical, amino acid, probiotic, or other dietary substance for use by humans to supplement the diet by increasing the total dietary intake, or a concentrate, metabolite, constituent, extract, or combination of any ingredient

which the participants obtain the right to: (1) recruit additional participants, or have additional participants placed by the promoter or any other person into the program

B. Links or ties a participant's compensation, or eligibility to receive compensation, to that participant's purchase of goods or services; or

C. Pays a participant any compensation related to the sale of goods or services in a fixed pay period unless the majority of the total revenue generated during such period by the participant and others within the participant's downline is derived from sales to persons who are not participants in the Business Venture.

III. PROHIBITION AGAINST MISREPRESENTATIONS OR UNSUBSTANTIATED CLAIMS

IT IS FURTHER ORDERED that Defendants and their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly:

A. In connection with the advertising, marketing, promoting, or offering of any Business Venture, are permanently restrained and enjoined from:

1. Misrepresenting or assisting others in misrepresenting, including by providing others with the means and instrumentalities with which to misrepresent, expressly or by implication:

a. That participants will or are likely to earn substantial income from selling any good or service or by participating in the Business Venture;

b. The amount of sales, income, or profit a participant earned by selling any good or service or by participating in the Business Venture;

2. Any material restriction, limitation, or condition to purchase, receive, or use the goods or services;
3. Any material aspect of the performance, efficacy, nature, or central characteristics of the goods or services;
4. Any material aspect of the nature or terms of the seller's refund, cancellation, exchange, or repurchase policies; or
5. Any other material fact;

C. In connection with the advertising, marketing, promoting, or offering of any Covered Product, are permanently restrained and enjoined from making, or assisting others in making, expressly or by implication, including through the use of a product or program name, endorsement, depiction, or illustration, any representation that such product cures, mitigates, or treats any disease; unless the representation is non-misleading and, at the time of making such representation, Defendants possess and rely upon competent and reliable scientific evidence to substantiate that the representation is true. For purposes of this Section, competent and reliable scientific evidence shall consist of human clinical testing of the Covered Product, or of an Essentially Equivalent Product, that is sufficient in quality and quantity based on standards generally accepted by experts in the relevant disease, condition, or function to which the representation relates, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that the representation is true. Such testing shall be: (1) randomized, double-blind, and placebo-controlled; and (2) conducted by researchers qualified by training and experience to conduct such testing. In addition, all underlying or supporting data and

- A. All protocols and protocol amendments, reports, articles, write-ups, or other accounts of the results of the test, and drafts of such documents reviewed by the test sponsor or any other person not employed by the research entity;
- B. All documents referring or relating to recruitment; randomization; instructions, including oral instructions, to participants; and participant compliance;
- C. Documents sufficient to identify all test participants, including any participants who did not complete the test, and all communications with any participants relating to the test; all raw data collected from participants enrolled in the test, including any participants who did not complete the test; source documents for such data; any data dictionaries; and any case report forms;
- D. All documents referring or relating to any statistical analysis of any test data, including, but not limited to, any pretest analysis,

B. Failing to disclose, clearly and conspicuously, before any potential participant pays any money to the Defendants, all information material to the decision of whether to participate in the Business Venture, including, but not limited to, whether the Defendants have a refund or buyback policy and if so, all material terms and conditions of the refund or buyback policy, including the specific steps consumers must follow to obtain a refund or buyback.

VI. MONITORING COMPLIANCE WITH ORDER

IT IS FURTHER ORDERED that Defendants, in connection with the advertising, marketing, promoting, or offering of any Business Venture, are hereby permanently restrained and enjoined from:

A. Failing to take reasonable steps sufficient to monitor and ensure that the Defendants' agents, representatives, employees, independent contractors, affiliates and participants comply with Sections I-V of this Order. Reasonable steps shall include obtaining initial and biennial assessments and reports ("Assessments") from a qualified, objective, independent third-party auditor, who uses procedures and standards generally accepted in the profession. The auditor selected to conduct such Assessments and prepare such reports shall be Kotzin Valuation Partners, LLC, or any other auditor approved by the Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, in his or her sole discretion. The reporting period for the Assessments shall cover: (i) the first one hundred and eighty (180) calendar days after entry of the Order for the initial Assessment, and (ii) each two

(2) year period thereafter for twenty (20) years after entry of the Order. Each Assessment shall:

- 1.

B.

2. Individual Defendant is ordered to cooperate fully and take all

related to the assets and shall timely make all payments due.

c. Individual Defendant represents that no encumbrances to any of the assets listed on Attachment A have been added since the execution of his sworn financial statement dated July 11, 2016, and that he will not add

f. The Liquidating Receiver shall have 60 calendar days from entry of this Order to determine the value or marketability and to demand the transfer of possession and title of any asset listed on Attachment A.

3. Individual Defendant is ordered to sell to a third party in an arms-length transaction for fair market value, or to surrender to lienholder, the real property located at 3083 Ocean Street, Carlsbad, California 92008, bearing the legal description U.S. 1 PER DOC 86-609892, undivided interest in Parcel 1 Tr 14585, in the County of San Diego (“Carlsbad Property”) and to pay to the Commission all net proceeds (as described in Subsection g. below), if any, relating to such transfer or surrender.

a. The sale or surrender of the Carlsbad Property shall be completed within 120 calendar days of entry of this Order or, for good cause shown, within such time as the Court shall otherwise order.

b. Individual Defendant represents that no encumbrances to the Carlsbad Property have been added since the execution of his sworn financial statement dated July 11, 2016, and that he will not add any encumbrances after signing this Order. Individual Defendant further represents that he shall maintain and take no action to diminish the value of the Carlsbad Property, including any structures, fixtures, or appurtenances thereto.

c. Until Individual Defendant transfers or surrenders title and possession of the Carlsbad Property, he shall remain current on all amounts

payment of ad valorem taxes, transfer fees, recording fees, other fees, and
liens recorded prior to July 11, 2016, shall be

Commission. The Commission may request any information, including amended tax returns and any other filings related to compliance with this provision, that Individual Defendant has the authority to release.

5. Corporate Defendants are ordered to cooperate fully and take all necessary steps to transfer to the Liquidating Receiver appointed by the Court pursuant to Section IX of this Order (or to such person designated in writing by the Liquidating Receiver), possession and legal and equitable title to the assets listed on Attachment B to this Order that the Liquidating Receiver, in its sole discretion, shall determine to have a fair market value in excess of the asset's existing liabilities. Such transfer shall occur within 30 calendar days of Corporate Defendants' receipt of a written demand from the Liquidating Receiver directing the transfer of an asset listed on Attachment B, or at such other later date as the Liquidating Receiver shall direct, subject to Subsection e., below.

a. Corporate Defendants shall execute documents, provide information, and produce any title, deed, registration, appraisal, inspection, certificate of insurance, records pertaining to mortgages or liens, or other items reasonably requested by the Liquidating Receiver to determine the value or marketability of any asset or to effectuate the transfer of possession and title of any asset listed on Attachment B. Corporate Defendants shall comply with such reasonable requests of the Liquidating Receiver within 3 business days of receiving such a request.

b. Following transfer of title and possession, the Liquidating

Receiver, or the person designated to receive title and possession, shall be responsible for all maintenance, utilities, taxes, insurance, mortgage

payments, and all other expenses related to the assets and shall timely make all payments due.

c. Corporate Defendants represent that no encumbrances to any of the assets listed on Attachment B have been added since the execution of their sworn financial statements dated on June 20, 2016, and that they will not add any encumbrances after signing this Order. Corporate Defendants further represent that they shall maintain and take no action to diminish the value of any asset listed on Attachment B.

d. Until Corporate Defendants transfer title and possession of the assets listed on Attachment B, th

the transfer of possession and title of any asset listed on Attachment B.

6. Time is of the essence for Defendants' partial satisfaction of the judgment. In the event that the Individual Defendant or Corporate Defendants fail to timely satisfy any of their respective obligations under Subsection VII.B.1 – VII.B.5, above, and such default continues for 30 calendar days beyond the due date, the entire judgment shall become immediately due and payable by the defaulting Defendant(s), less the amount of any payments made to the Commission in accordance with those provisions.

C. Upon receipt by the Commission of all payments and by the Liquidating Receiver of all transfers of assets required in Subsection VII.B, above, the remainder of the judgment against Individual Defendant and Corporate Defendants shall be suspended, subject to the Subsections below.

D. The Commission's agreement to the suspension of part of the judgment against the Individual Defendant and Corporate Defendants is expressly premised upon the truthfulness, accuracy, and completeness of their sworn financial statements and related documents (collectively, "financial representations") submitted to the Commission, namely:

1. The Financial Statement of Corporate Defendant Vemma International Holdings, Inc. signed by Benson K. Boreyko, CEO, on June 20, 2016 including the attachments;
2. Additional documentation submitted by secure portal and described in an email from Corporate Defendants' counsel Edward A. Salanga to

Commission counsel Thomas B. Carter dated July 11, 2016, consisting of
Corporate Defendants' Consolidating Balance Sheets and Consolidating Income
Statements for the months of

8. Additional documentation submitted by email from Defendants' counsel Edward A. Salanga to Commission counsel Thomas B. Carter dated August 11, 2016, attaching an Appraisal Of Real Property for the Carlsbad Property and a Residential Appraisal Summary Report for Individual Defendant's home at ***** E Gold Dust Ave, Scottsdale, Arizona.

E. The suspension of the judgment will be lifted as to Defendants if, upon motion by the Commission, the Court finds that any Defendant failed to disclose any material asset, materially misstated the value of any asset, or made any other material misstatement or omission in the financial representations identified above, or that a Defendant is in default on any obligation under this Section.

F. If the suspension of the judgment is lifted, the judgment becomes immediately due as to Defendants in the amount specified in Subsection VII.A above (which the parties stipulate only for purposes of this Section represents the consumer injury alleged in the Complaint), less any payment previously made pursuant to this Section, plus interest computed from the date of entry of this Order.

VIII. ADDITIONAL MONETARY PROVISIONS

IT IS FURTHER ORDERED that:

A. Defendants relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a

proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order, such as a nondischargeability complaint in any bankruptcy case.

C. The facts alleged in the Complaint establish all elements necessary to sustain an action by the Commission pursuant to Section 523(a)(2)(A) of the Bankruptcy Code, 11 U.S.C. § 523(a)(2)(A), and this Order will have collateral estoppel effect for such purposes.

D. Defendants acknowledge that their Taxpayer Identification Numbers (Social Security Numbers or Employer Identification Numbers), which Defendants previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. §7701.

E. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

F.

IX. LIQUIDATING RECEIVER

C. Except as otherwise provided, the Liquidating Receiver shall have all necessary powers to manage and maintain the assets of the receivership estate including without limitation, the following powers and responsibilities:

1. To take possession of the assets of the receivership estate.
2. To employ such counsel, real estate agents, auctioneers, appraisers, accountants, contractors, other professionals, and other such persons, including maintenance and repair persons, as may be necessary in order to carry out its duties as Liquidating Receiver and to preserve, maintain, and protect the assets of the receivership estate.
3. To bring and defend lawsuits affecting assets of the receivership estate.
4. To determine or abrogate, in the Liquidating Receiver's sole sound business discretion, to the extent permitted by law, any and all agreements, contracts, understandings, or commitments entered into by Defendants with respect to the assets of the receivership estate.
5. To open new accounts with, or negotiate, compromise or otherwise modify Defendants' existing obligations to third parties, including utility companies, secured creditors, other service providers or suppliers of goods and services related to the assets of the receivership estate, and to otherwise enter into such agreements, contracts, or understandings with such third parties as are necessary to maintain, preserve, and protect the assets of the receivership estate.

6. To open new bank accounts with respect to the Liquidating Receiver's management and operation of the assets of the receivership estate.

D. The Liquidating Receiver shall keep a true and accurate account of any and all receipts and expenditures and periodically file with the Court a Liquidating Receivership Report under oath, accurately identifying all such revenues received and expenditures made, including adequately detailed information concerning income, expenses, payables, and receivables. These periodic filings shall be served by the Liquidating Receiver on the Commission and Corporate Defendants' and Individual Defendant's counsel of record.

E. The Liquidating Receiver shall take all necessary steps to enable the assets of the receivership estate to obtain and maintain the status of a taxable "Settlement Fund," within the meaning of Section 468B of the Internal Revenue Code and of the regulations, whether proposed, temporary or final, or pronouncements thereunder, including the filing of the elections and statements contemplated by those provisions. The Liquidating Receiver shall be designated the administrator of the Settlement Fund, pursuant to Treas. Reg. § 1.468B-2(k)(3)(i), and shall satisfy the administrative requirements imposed by Treas. Reg. § 1.468B-2, including but not limited to (a) obtaining a taxpayer identification number, (b) timely filing applicable federal, state, and local tax returns and paying taxes reported thereon, and (c) satisfying any information, reporting or withholding requirements imposed on distributions from the Settlement Fund. The Liquidating Receiver shall cause the Settlement Fund to pay taxes in a manner consistent with treatment of the Settlement Fund as a "Qualified Settlement Fund."

Defendants shall cooperate with the Liquidating Receiver in fulfilling the Settlement Fund's obligations under Treas. Reg. § 1.468B-2.

F. The Liquidating Receiver shall liquida

access to and show real or personal property to prospective purchasers or brokers, or to evaluate or cause its agents, representatives, or contractors to maintain, repair, restore, and evaluate the condition of the assets.

5. All ad valorem taxes, any transfer fees, recording fees, other fees, advertising, and any commissions associated with or resulting from the sale of the assets of the receivership estate shall be paid from the proceeds of the sale(s) at the time the assets of the receivership estate are sold.

6. Defendants shall in no way profit from the sale of any assets of the receivership estate, including by sharing in any sales commission or fee, or by receiving anything of value in kind, except that nothing herein shall be deemed a waiver or otherwise limit Defendants' right to assert applicable state or federal exemptions. Provided, further, that no provision of this stipulation shall be deemed to enlarge or diminish Defendants' right (or lack thereof) to assert exemptions, under state or federal law, in assets of the receivership estate or to enlarge or diminish the Commission's right (or lack thereof) to challenge such exemptions.

H. Any and all sums collected by the Liquidating Receiver over and above those necessary to manage and maintain the assets of the receivership estate or those necessary to make payments authorized by this Order shall be paid to the FTC.

I. The Liquidating Receiver is entitled to reasonable compensation for the performance of duties pursuant to this Order and for the cost of actual out-of-pocket expenses incurred by it. The Liquidating Receiver's compensation and the compensation

of any persons hired by it are to be paid solely from the income generated by the assets of the receivership estate or the proceeds of the sale of the assets of the receivership estate and other sums collected by the Liquidating Receiver, and such payments shall have priority over all other distributions except for any transfer fees, recording fees, or other payments owed through the transfer of the assets of the receivership estate at the time of their sale. The Liquidating Receiver shall file with the Court and serve on the FTC and Corporate Defendants' and Individual Defendant's counsel of record periodic requests for the payment of such reasonable compensation. The Liquidating Receiver shall not increase the fees or rates used as the bases for such fee applications without prior approval of the Court.

J. The Liquidating Receiver shall complete liquidation, transfer all funds to the Commission pursuant to this Section, file its final application for fees, and terminate its service within 180 calendar days of the date of this Order, unless good cause is shown to extend the estate beyond such time.

information related to redress, Defendants must provide it, in the form prescribed by the Commission, within 14 calendar days.

this Order, that Defendant must obtain, within 30 calendar days, a signed and dated acknowledgment of receipt of this Order.

such Defendant performs services whether as an employee or otherwise and any entity in which such Defendant has any ownership interest; and (c) describe in detail such Defendant's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 20 years after entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 calendar days of any change in the following:

1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of any Corporate Defendant or any entity that Defendant has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

position; dates of service; and (if applicable) the reason for termination;

C. Records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

E. A copy of each unique advertisement or other marketing material;

F. A copy of each unique training material; and

G. Copies of all contracts, agreements, and payment records between Defendants and any participant in Defendants' Business Venture.

XV. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order, including any failure to transfer any assets as required by this Order:

A. Within 14 calendar days of receipt of a written request from a representative of the Commission, each De

the Commission to interview any employee or other person affiliated with any Defendant who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Defendants, or any individual or entity affiliated with Defendants, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning the Individual Defendant, pursuant to Section 604(1) of the Fair Cred

IT IS STIPULATED:

FEDERAL

Joseph

Dallas, Tex

FOR DE

[Handwritten signatures and notes]

by Derengani, Emma Nuru
and Kemung International Holdings, Inc.

DEFENDANT

VIRGINIA INTERNATIONAL HOLDINGS, INC.

[Handwritten signatures and notes]

FOR DEFENDANT BENSON K. BOREYKO:

GALLAGHER & KENNEDY, P.A.

By: *[Signature]*

Date: *9/11/11*

Lindsi M. Weber

2575 E Camelback Road, Suite 100
Phoenix, Arizona 85016-9225

[Signature]
BENSON K. BOREYKO

Date: *9/11/11*

[Signature]

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ATTACHMENT B

**PROPERTY SCHEDULE OF
CORPORATE DEFENDANTS'
ASSETS**

The following are descriptions of Corporate Defendants' personal property referenced in the Section titled "Monetary Judgment and Partial Suspension" of the Order:

1. Verve Bold Chopper – Motorcycle (black), Vin No. CE12S8936, acquired from East Texas Choppers on 10/31/2013 for \$20,000.
2. East Texas Choppers – Motorcycle (orange), Vin No. CE09J3607, acquired from East Texas Choppers on 10/25/2010 for \$22,000.
3. Massage chair acquired on 8/1/2014 for \$4,317.
4. 6 acrylic on wood box Abstract Framed Pictures by the graphic design firm of "art2uinc," that were acquired in 2014 for \$32,708, with the following dimensions: 60 x 30 inches; 60 x 30 inches; 84 x 30 inches; 72 x 30 inches; 48 x 96 inches; and 30 x 48 inches.
5. 25 canvas wrapped on a hollow wood frame Abstract Framed Pictures by the graphic design firm of "art2uinc," that were acquired in 2014 for \$74,329, each with the dimensions 48 x 48 inches.