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9 *Attorneys for Defendant Jason A. Kotzker*

10 **UNITED STATES DISTRICT COURT**
11 **DISTRICT OF NEVADA**

12 **FEDERAL TRADE COMMISSION,**

13 **Plaintiff,**

14 **vs.**

15 **SEQUOIA ONE, LLC, a Wyoming limited**
16 **liability company, GEN X MARKETING**
17 **GROUP, LLC, a Florida limited liability**
18 **company, JASON A. KOTZKER,**
19 **THERESA D. BARTHOLOMEW, JOHN**
20 **E. BARTHOLOMEW, JR., AND PAUL T.**
21 **MCDONNELL,**

22 **Defendants.**

23 **CASE NO. 2:15-cv-01512-JCM-CWH**

24 **KOTZKER’S REPLY TO “FEDERAL**
25 **TRADE COMMISSION’S OPPOSITION**
26 **TO DEFENDANT JASON KOTZKER’S**
27 **MOTION TO STAY PROCEEDINGS**
28 **PENDING RESOLUTION OF CRIMINAL**
PROCEEDINGS”

COMES NOW Defendant JASON A. KOTZKER by and through his counsel, Jeffrey B. Setness of the law firm of Fabian VanCott and files the following Reply to “Federal Trade Commission’s Opposition to Defendant Jason Kotzker’s Motion to Stay Proceedings Pending Resolution of Criminal Proceedings” filed on October 15, 2015 (Docket Number 25). This Reply will respond to the arguments made by the FTC in the same order as set forth in their Opposition.

I. The Existence of a Criminal Investigation is Beyond Dispute

On Page 2, Lines 10-11, the FTC states, “Kotzker’s activities have apparently caught the eye of criminal law enforcement authorities and *he believes* he is the *subject* of a criminal investigation.” (Emphasis added.) Based upon the foregoing, it appears that the FTC is questioning whether or not there is an actual criminal investigation under way and that Kotzker is a target of said investigation.

1 First, as set forth in the Declaration of Jeffrey B. Setness in Support of Motion to Stay
2 (Docket Number 22-2), on January 30, 2015, via e-mail, the Department of Justice submitted a
3 plea offer to the former counsel for Kotzker which would require Kotzker to plead guilty to a
4 federal felony. Apparently, this representation in the Declaration was insufficient to convince the
5 FTC that a criminal investigation is under way and that Kotzker is a target; therefore, the
6 undersigned has prepared a Supplemental Declaration of Jeffrey B. Setness in Support of Motion
7 to Stay which attached as an exhibit the actual redacted e-mail from the Department of Justice.

8 Second, the undersigned is providing the FTC with the contact information for the
9 Department of Justice attorney who is heading up this criminal investigation, which is as follows:

10 Josh Burke
11 Trial Attorney
12 Consumer Protection Branch
13 U.S. Department of Justice – Civil Division
14 950 Pennsylvania Avenue, N.W.
15 Washington, DC 20530-0001
16 Phone: (202) 353-2001
17 E-mail: Josh.Burke@usdoj.gov

18 If the FTC should have any doubt that a criminal investigation is currently under way, I would
19 recommend that they contact Trial Attorney Josh Burke either by telephone or by e-mail to
20 confirm this fact.

21 Third, as set forth in the Supplemental Declaration of Jeffrey B. Setness in Support of
22 Motion to Stay, earlier this week, the undersigned contacted Trial Attorney Josh Burke and
23 confirmed that the criminal investigation is continuing.

24 **II. Whether or Not an Indictment is Imminent is Irrelevant**

25 On Page 3, Lines 21-26, the FTC states as follows:

26 As noted, Kotzker has not been indicted, nor does Kotzker point to anything
27 in his motion that suggests his indictment is imminent. To the contrary, the last
28 interaction with criminal law enforcement authorities mentioned in his motion was
in January 2015, approximately nine months ago. (Def. Memo at 3.) Without an
indictment pending against him, the extent to which his Fifth Amendment rights
may be implicated in this civil proceeding is speculative and unclear.

First, whether or not an indictment “is imminent” is irrelevant to the valid exercise of an
individual’s Fifth Amendment right against self-incrimination.

1 Second, anyone who has any knowledge about or experience with federal criminal
2 investigations is well aware that many federal criminal investigations are ongoing for months, if
3 not years.

4 Third, as set forth in the Supplemental Declaration of Jeffrey B. Setness in Support of
5 Motion to Stay, yesterday, the undersigned contacted Trial Attorney Josh Burke and confirmed
6 that the criminal investigation is ongoing.

7 Fourth, when an individual is under federal criminal investigation, it is not “speculative
8 and unclear” how an individual’s Fifth Amendment rights may be implicated. When the
9 Department of Justice proposes that an individual plead guilty to a felony, there is nothing
10 “speculative and unclear” about that.

11 **III. The FTC Will Not be Prejudiced by a Stay**

12 On Page 5, Lines 14-15, the FTC states, “A stay of this proceeding will negatively impact
13 the FTC in several different ways and this factor therefore weighs against a stay.”

14 First, an examination of the FTC’s “Complaint for Permanent Injunction and Other
15 Equitable Relief” filed on August 7, 2015 (Docket Number 1) does not support the FTC’s claim
16 that they will be negatively impacted. Specifically, the Complaint contains no allegations that the
17 alleged activity is ongoing. In fact, a review of Paragraphs 14, 20, 22, and 25 of the Complaint
18 make it clear that the alleged activity apparently ended in early 2013.

19 Second, a review of the Docket Report and pleadings filed in this matter indicates that the
20 FTC has resolved this litigation with Defendants Theresa D. Bartholomew, John E. Bartholomew,
21 Jr., and Paul T. McDonnell.

22 Third, the FTC is apparently conceding that there is absolutely no evidence that Kotzker is
23 currently engaged in the same type of conduct that is alleged in the Complaint when the FTC
24 argues on Page 5, Lines 23-24, “However, there is nothing to stop him from starting up the same
25 or similar practices, and enforcement of the FTC Act is therefore still vital.”

26 Fourth, it is undeniable that this litigation is at its earliest stages, and this Motion to Stay
27 was brought by Kotzker at the earliest possible time.

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1 **IV. The FTC’s Opposition Ignores the Reality that this Situation was Caused by Two**
2 **Government Agencies and Does Not Involve Private Litigants**

3 It is asserted that we are confronted with an unusual situation in this case – one agency of
4 the United States Government is pursuing a civil action when another agency of the United States
5 Government is pursuing a criminal investigation. In other words, we are talking about a situation
6 of the Government’s making that does not involve any private litigants.

7 **V. In Other Proceedings, the Government has Taken the Opposite Position – Should**
8 **the Government be Permitted to “Blow Hot and Cold”?**

9 A review of other cases in the District of Nevada reveals that the Government does not
10 always take the position that the civil proceedings should be allowed to proceed. On June 20,
11 2013 in the case of *Securities and Exchange Commission v. ARVCO Capital Research, LLC*, Case
12 No. 3:12-cv-00221-MMD-WGC, the Government filed “United States’ Motion to Intervene and to
13 Stay Discovery; Memorandum of Points and Authorities in Support of Same; [Proposed] Order”
(Docket Number 41). In that pleading, the United States argued the following:

14 **The Court should stay any further civil discovery** to prevent the
15 defendants from gaining unfair access to discovery. . . **Recognizing the likelihood**
16 **of harm to the United States’ and the public’s interest in law enforcement,**
17 courts have issued stays to prevent criminal defendants from using civil discovery
18 to circumvent narrow criminal discovery rules. **Issuing a stay is particularly**
19 **important where, as here, the subject matters of the civil and criminal cases**
20 **are the same** – and where both defendants stand accused of obstructing the
21 underlying criminal and civil investigation. (Emphasis added.)

22 A copy of the “United States’ Motion to Intervene and to Stay Discovery; Memorandum of Points
23 and Authorities in Support of Same; [Proposed] Order” is attached as Exhibit 2 to the
24 Supplemental Declaration of Jeffrey B. Setness in Support of Motion to Stay. The fact that the
25 Government takes inconsistent positions on different cases should be considered by the Court
26 when analyzing the claim that the FTC will be prejudiced by a stay.

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VI. Conclusion

Based upon the foregoing, Kotzker respectfully request that the Motion be granted and this action be stayed as to Kotzker pending the conclusion of the criminal investigation and any other later proceedings.

Oct 22 2015
DATE

Fabian VanCott

By: 
JEFFREY B. SETNESS
Attorneys for Defendant Jason A. Kotzker

