

DEBRA A. VALENTINE
General Counsel

BARBARA ANTHONY
Director, Northeast Region

CAROLE A. PAYNTER (CP 4091)
MICHAEL J. BLOOM (MB 7732)
One Bowling Green, Suite 318
New York, New York 10004
(212) 607-2813; 2801

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 CIV. 1131

FEB 15 2000

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

MARKETING AND VENDING CONCEPTS, L.L.C.,
a New York corporation,
MICHAEL CAVALLO,
individually and as an officer of
MARKETING AND VENDING CONCEPTS, L.L.C.,
and MITCHELL JACOBY,
individually and as an officer of
MARKETING AND VENDING CONCEPTS, L.L.C.,
Defendants.

CIVIL ACTION NO.

COMPLAINT FOR INJUNCTIVE AND OTHER EQUITABLE RELIEF

Plaintiff, the Federal Trade Commission ("FTC" or "the Commission"), for its complaint alleges:

1. The FTC brings this action under Sections 5(a), 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b) and 57b, to obtain temporary, preliminary, and permanent injunctive relief, rescission of contracts, restitution, disgorgement, and other equitable relief for defendants' violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "Franchise Rule" or the "Rule"), 16 C.F.R. § 436.

JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 53(b) and 57b. This action arises under 15 U.S.C. § 45(a)(1).

3. Venue in the United States District Court for the Southern District of New York is proper under 28 U.S.C. §§ 1391(b) and (c), and 15 U.S.C. § 53(b).

THE PARTIES

4. Plaintiff, the Federal Trade Commission, is an independent agency of the United States Government created by statute. 15 U.S.C. § 41 *et seq.* The Commission is charged, *inter alia* with enforcement of 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, as well as enforcement of the Franchise Rule, 16 C.F.R. § 436. The Commission is authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act in order to secure such equitable relief as may be appropriate in each case, and to obtain consumer redress. 15 U.S.C. §§ 53(b) and 57b.

5. Defendant Marketing and Vending Concepts, L.L.C., a New York corporation with its principal place of business at 132 Nassau Street, Suite 401, New York, NY 10038, promotes and sells vending machine business ventures. Marketing and Vending Concepts transacts or has transacted business in the Southern District of New York.

6. Defendant Michael Cavallo is an a member and the President of Marketing and Vending Concepts. At all times material to this complaint, acting alone or in concert with others, he has formulated, directed, controlled or participated in the acts and practices of the corporate defendant, including the acts and practices set forth in this complaint. He resides or transacts or has transacted business in the Southern District of New York.

7. Defendant Mitchell Jacoby is a member and manager of Marketing and Vending Concepts. At all times material to this complaint, acting alone or in concert with others, he has formulated, directed, controlled or participated in the acts and practices of the corporate defendant, including the acts and practices set forth in this complaint. He resides or transacts or has transacted business in the Southern District of New York.

COMMERCE

8. At all times relevant to this complaint, the defendants have maintained a substantial course of trade in the offering for sale and sale of vending machine business ventures, in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS ACTIVITIES

9. Since at least February 1998, and continuing thereafter, defendants have offered and sold vending machine business ventures to consumers. The defendants have promoted their business

ventures to prospective purchasers in a variety of media, including classified advertisements in newspapers.

10. In their advertisements, defendants make representations about the earnings potential of their business venture, and urge consumers to call defendants' toll-free telephone number to learn more about the opportunity. For example, defendants' classified newspaper advertisements typically state:

**HERSHEY AND NABISCO
VENDING — High weekly in-
come potential. Work 6-8
hrs./wk. Secured and guaran-
teed locations. \$7,000 invest-
ment required. 1-800-821-1140**

11. Consumers who call the defendants' toll-free telephone number are ultimately connected to defendants, or their employees or agents, who represent to consumers that in exchange for a payment, often in excess of \$7,000, consumers will receive what they need to get started in the business venture, including: (1) vending machines; (2) "take one" displays to go atop the vending machines, promoting goods and services which if purchased would generate commissions for the consumer; and (3) assistance in placing the machines and displays in profitable locations.

12. The defendants or their employees or agents also make representations about the earnings potential of the business venture, and the actual earnings of prior purchasers, without giving consumers access to the information they need to evaluate the claims. For example, the defendants or their employees or agents typically represent that each of their vending machines average 16 sales a day, and generate a net profit of \$0.17 per sale, which for a typical purchase of a 19-machine package generates income of \$1,550.40 per month and \$18,604.80 per year. The defendants or their

employees or agents have also represented that prior purchasers had made almost \$20,000 in a six or nine month period from the combined vending and take-one businesses.

13. The defendants or their employees or agents additionally represent that profitable vending machine locations are available in the consumer's local area, and that profitable locations will be obtained for the purchasers' vending machines.

14. When consumers receive the vending machines and place them on location, they discover that the vending machines do not generate the number of sales or the amount of profit that the defendants represented. As a result, few, if any, consumers who purchase the defendants' business venture earn, or will earn, the income represented.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

15. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), provides that "unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful."

COUNT I

16. In numerous instances in the course of offering for sale and selling their business ventures, defendants or their employees or agents have represented, expressly or by implication, that consumers who purchase the business venture will earn in excess of \$18,604.80 per year.

17. In truth and in fact, few, if any, consumers who purchase the defendants' business ventures earn, or will earn, in excess of \$18,604.80 per year .

18. Therefore, defendants' representations as set forth in Paragraph 16 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

19. In numerous instances in the course of offering for sale and selling their business ventures, defendants or their employees or agents have represented, expressly or by implication, that consumers will be provided with profitable locations for their vending machines.

20. In truth and in fact, few, if any, consumers who purchase the defendants' business venture are provided with profitable locations.

21. Therefore, defendants' representations as set forth in Paragraph 19 are false and misleading and constitute deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE FRANCHISE RULE

22. The business ventures sold by the defendants are franchises, as "franchise" is defined in Sections 436.2(a)(1)(ii) and (a)(2) of the Franchise Rule, 16 C.F.R. §§ 436.2(a)(1)(ii) and (a)(2).

23. The Franchise Rule requires a franchisor to provide prospective franchisees with a complete and accurate basic disclosure document containing twenty categories of information, including information about the litigation and bankruptcy history of the franchisor and its principals, the terms and conditions under which the franchise operates, and information identifying existing franchisees. 16 C.F.R. § 436.1(a)(1) - (a)(20). The pre-sale disclosure of this information required by the Rule enables a prospective franchisee to contact prior purchasers and take other steps to assess the potential risks involved in the purchase of the franchise.

24. The Franchise Rule additionally requires: (1) that the franchisor have a reasonable basis for any oral, written, or visual earnings or profit representations ("earnings claims") it makes to a

prospective franchisee, 16 C.F.R. § 436.1(b)(2), (c)(2) and (e)(1); and (2) that the franchisor provide to prospective franchisees an earnings claim document containing information substantiating any earnings claims it makes, 16 C.F.R. § 436.1(b)-(e).

25. Pursuant to Section 18(d)(3) of the FTC Act, 15 U.S.C. 57a(d)(3), and 16 C.F.R. § 436.1, violations of the Franchise Rule constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

VIOLATIONS OF THE FRANCHISE RULE

COUNT III

26. In connection with the offering of franchises, as "franchise" is defined in the Rule, 16 C.F.R. § 436.2(a), defendants have failed to provide prospective franchisees with accurate and complete basic disclosure documents within the time period required by the Franchise Rule, thereby violating Section 436.1(a) of the Rule, 16 C.F.R. § 436.1(a), and Section 5 of the FTC Act, 15 U.S.C. § 45.

COUNT IV

27. In connection with the offering of franchises, as "franchise" is defined in the Rule, 16 C.F.R. § 436.2(a), defendants or their employees or agents have made earnings claims within the meaning of the Rule, 16 C.F.R. § 436.1(b)-(c), but have failed to provide prospective franchisees with earnings claim documents within the time period required by the Franchise Rule, have failed to have a reasonable basis for such claims at the times they were made, or have failed to disclose the information required by the Rule in immediate conjunction with such claims, thereby violating Sections 436.1(b)-(d) of the Rule, 16 C.F.R. § 436.1(b)-(d), and Section 5 of the FTC Act, 15 U.S.C. § 45.

CONSUMER INJURY

28. Consumers nationwide have suffered or will suffer substantial monetary loss as a result of defendants' violations of Section 5(a) of the FTC Act and the Franchise Rule. Absent injunctive relief by this Court, defendants are likely to continue to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

29. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other ancillary relief, including consumer redress, disgorgement and restitution, to prevent and remedy any violations of any provision of law enforced by the Federal Trade Commission.

30. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to grant such relief as the Court finds necessary to redress injury to consumers or other persons resulting from defendants' violations of the Franchise Rule, including the rescission and reformation of contracts, and the refund of money.

31. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by the defendants' law violations.

PRAYER FOR RELIEF

WHEREFORE, plaintiff requests that this Court, as authorized by Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, and pursuant to its own equitable powers:

1. Award plaintiff such preliminary injunctive and ancillary relief, including a temporary restraining order, as may be necessary to avert the likelihood of consumer injury during the pendency of this action and to preserve the possibility of effective final relief;

2. Permanently enjoin the defendants from violating the FTC Act and the Franchise Rule, as alleged herein;

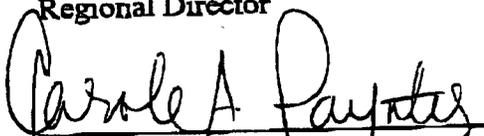
3. Award such relief as the Court finds necessary to redress injury to consumers resulting from the defendants' violations of the FTC Act and the Franchise Rule, including but not limited to, rescission of contracts, the refund of monies paid, and the disgorgement of ill-gotten gains; and

4. Award plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Respectfully submitted,

DEBRA A. VALENTINE
General Counsel

BARBARA ANTHONY
Regional Director


CAROLE A. PAYNTER (CP 4091)
Attorneys for Plaintiff
Federal Trade Commission
Northeast Region
One Bowling Green, Suite 318
New York, NY 10004
(212) 607-2813
(212) 607-2822 (facsimile)