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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

★ JUN 12 2002 ★

ENTERED

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FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ESSEX MARKETING GROUP, INC.,
a New York corporation;

WESTBROOK MARKETING GROUP, INC.,
a New York corporation;

WESTBROOK MARKETING ASSOCIATES, LLC,
a Delaware limited liability company;

MANHATTAN VENDING, LLC,
a New York limited liability company;

RICHARD J. GUADAGNO, a/k/a Rich Dano,
Rich Guadano and Richard Guadago,
individually and as an officer or director
of one or more of the above corporations
and/or as a member of one or more of the
above limited liability companies;

JACK G. SCHWARTZ, individually and
as an officer or director of one or more of
the above corporations and/or as a member
of one or more of the above the limited
liability companies; and

HENRY SANCHEZ, individually and
as an officer or director of one
or more of the above corporations
and/or as a member of one or more of the
above limited liability companies;

Defendants.

CIV. NO.

02-3415

COMPLAINT FOR
INJUNCTIVE AND
OTHER EQUITABLE
RELIEF

PLATT, J.

WALL, M.J.

Plaintiff, the Federal Trade Commission ("FTC" or "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, appointment of a receiver, and other equitable relief for the 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" ("Franchise Rule" or "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 Eastern 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 Essex Marketing Group, Inc., a New York corporation with its principal place of business at 12 Gates Street, Greenlawn New York 11740, promotes and sells vending machine business ventures. Essex Marketing Group, Inc. has transacted business in the Eastern District of New York.

6. Defendant Westbrook Marketing Group, Inc., a New York corporation with its principal place of business at 12 Gates Street, Greenlawn New York 11740, promotes and sells vending machine business ventures. Westbrook Marketing Group, Inc. has transacted business in the Eastern District of New York.

7. Defendant Westbrook Marketing Associates, LLC, a Delaware limited liability company with its principal place of business at 12 Gates Street, Greenlawn New York 11740, promotes and sells vending machine business ventures. Westbrook Marketing Associates, LLC has transacted business in the Eastern District of New York.

8. Defendant Manhattan Vending, LLC, a New York limited liability company with its principal place of business at 12 Gates Street, Greenlawn New York 11740, promotes and sells vending machine business ventures. Manhattan Vending, LLC has transacted business in the Eastern District of New York.

9. Defendant Richard J. Guadagno a/k/a Richard Dano, Richard Guadano, and Richard Guadago (“Guadagno”), is an officer, director or principal owner of one or more of the corporate defendants and/or one or more of the limited liability company defendants. 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 defendants and limited liability company defendants, including the acts and practices set forth in this Complaint. He resides or has transacted business in the Eastern District of New York.

10. Defendant Jack G. Schwartz ("Schwartz"), is an officer, director or principal owner of one or more of the corporate defendants and/or one or more of the limited liability defendants. 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 defendants and limited liability defendants, including the acts and practices set forth in this Complaint. He resides or has transacted business in the Eastern District of New York.

11. Defendant Henry Sanchez ("Sanchez"), is an officer, director or principal owner of one or more of the corporate defendants and/or one or more of the limited liability defendants. 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 defendants and limited liability defendants, including the acts and practices set forth in this Complaint. He resides or has transacted business in the Eastern District of New York.

12. Defendants Essex Marketing Group, Inc., Westbrook Marketing Group, Inc., Westbrook Marketing Associates, LLC, and Manhattan Vending, LLC sell vending machine business ventures, share or have shared the same office space and telephone numbers, send out virtually identical materials in the promotional packages sent to prospective purchasers, and cooperate and act in concert to carry out the defendants' business practices as alleged herein. They constitute a common enterprise for the purpose of this proceeding.

COMMERCE

13. 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.

THE DEFENDANTS' BUSINESS PRACTICES

14. Since at least January 2000, Defendants have been engaged in a series of schemes to promote, offer to sell, and sell vending machine business ventures. For a period of time, defendants sold these ventures under the name of Essex Marketing Group, Inc. and then under the names Westbrook Marketing Group, Inc. and Westbrook Marketing Associates, LLC. Most recently, defendants started selling these ventures under the name Manhattan Vending, LLC, in addition to the two Westbrook companies. Although the company names changed, defendants' business practices, Greenlawn, New York location and telephone number remain the same. Moreover, defendants' sales pitch and promotional material remain strikingly similar.

15. Defendants advertise their venture in the business opportunity section of the classifieds in newspapers across the country. The advertisements typically offer an established vending machine route with big money potential. For example, one of defendants' states: "AAA EST. 25 MACH VEND RTE. TREMENDOUS RETURN! BIG \$ (LOCAL) MUST SELL BY 4/10. INV REQ. FIN AVAIL. WAC 1-866-211-8300, 24HRS." Defendants also have a web-site which advertises many different vending machines, including medical supply vending machines, soda and snack vending machines, M&M® vending machines, and Pringles® vending machines.

16. Defendants' newspaper advertisements and web-site direct consumers to call a toll-free number. When consumers call the toll-free number, they receive defendants' sales presentation for vending machines. Defendants' sales representatives tell consumers that they offer an array of vending machines and that they can make a significant return on their investment with a vending route. Following the initial telephone conversation, defendants typically send consumers a packet with their promotional material. Defendants' promotional material reiterates the representations made over the telephone by defendants' sales representatives. For example, defendants' sales representatives often describe their hot new product, the Pringles® vending machine. Defendants tell prospective purchasers that each vending machine costs \$1,500 and will generate approximately \$5,300 per year profit. Defendants promotional material reiterates that earnings claim. This earnings claim is false.

17. Prospective purchasers are often told that they will have delivery of their vending machines by a particular date. The contract that purchasers must sign reiterates defendants' delivery claims by stating that the purchaser can cancel the contract if the machines are not delivered within thirty (30) business days of payment in full. On numerous occasions, defendants failed to deliver the machines within the agreed upon time, and in some instances defendants failed to deliver the machines at all. In most instances where purchasers did not receive their machines or did not receive their machines in a timely manner, they were not able to cancel.

18. In numerous instances, defendants fail to provide purchasers with basic franchise disclosure documents to business venture purchasers as required by 16 C.F.R. 436.1(a)(1)-(a)(20).

19. Defendants represent that business venture purchasers are likely to make substantial earnings per machine per year, but the defendants have no reasonable basis for these earnings representations, and do not provide prospective business venture purchasers with an earnings claim document containing information substantiating these earnings claims. For example, defendants claim, both orally and in writing that purchasers of the Pringles® vending machine will make approximately \$5,300 per machine per year and do not provide prospective purchasers with an earnings claim document substantiating this claim.

20. As a further inducement, defendants refer prospective purchasers to locator companies--companies that will, for a fee, find supposedly high traffic locations for the purchaser to put the vending machines.

VIOLATIONS OF SECTION 5 OF THE FTC ACT

21. Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits “unfair or deceptive acts or practices in or affecting commerce.”

COUNT I

Misrepresentations Regarding Income

22. Paragraphs 1 through 21 are incorporated herein by reference.

23. In numerous instances in the course of offering for sale and selling their business ventures, the defendants, directly or indirectly, represent, expressly or by implication, that consumers who purchase defendants’ business ventures are likely to earn substantial income.

24. In truth and in fact, consumers who purchase the defendants’ business ventures are not likely to earn substantial income.

25. Therefore, the defendants' representations as set forth in Paragraph 23 are false and misleading and constitute a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

COUNT II

Misrepresentations Regarding Delivery of Vending Machines

26. Paragraphs 1 through 25 are incorporated herein by reference.

27. In numerous instances in the course of offering for sale and selling their vending machine business ventures, the defendants, directly or indirectly, represent, expressly or by implication, that the defendants will deliver the vending machines within the agreed upon time or the purchaser has the right to cancel.

28. In truth and in fact, in numerous instances, the defendants do not deliver the vending machines to purchasers within the agreed upon time, or in some instances at all, and defendants do not allow purchasers to cancel their contracts.

29. Therefore, the defendants' representations as set forth in Paragraph 27 are false and misleading and constitute a deceptive act or practice in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

THE FRANCHISE RULE

30. The business ventures sold by the defendants are franchises, as "franchise" is defined in Sections 436.2(a)(1)(ii), (a)(2), and (a)(5) of the Franchise Rule, 16 C.F.R. §§ 436.2(a)(1)(ii), (a)(2), and (a)(5).

31. 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.

32. 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); (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); and (3) that the franchisor, in immediate conjunction with any generally disseminated earnings claim, disclose additional information including the number and percentage of prior purchasers known by the franchisor to have achieved the same or better results. 16 C.F.R. § 436.1(e)(3)-(4).

33. 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

Basic Disclosure Violations

34. Paragraphs 1 through 33 are incorporated herein by reference.

35. In connection with the offering of franchises, as "franchise" is defined in the Rule, 16 C.F.R. § 436.2(a), the defendants fail to provide prospective franchisees with accurate

and complete basic disclosure documents as prescribed 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

Earnings Disclosure Violations

36. Paragraphs 1 through 35 are incorporated herein by reference.

37. In connection with the offering of franchises, as “franchise” is defined in the Rule, 16 C.F.R. § 436.2(a), the defendants make earnings claims within the meaning of the Rule, 16 C.F.R. § 436.1(b)-(c), but fail to provide prospective franchisees with earnings claim documents as prescribed required by the Franchise Rule, fail to have a reasonable basis for such claims at the times they are made, or fail 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

38. Consumers nationwide have suffered or will suffer substantial monetary loss as a result of the defendants' violations of Section 5(a) of the FTC Act and the Franchise Rule.

Absent injunctive relief by this Court, the defendants are likely to continue to injure consumers and harm the public interest.

THIS COURT'S POWER TO GRANT RELIEF

39. 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.

40. 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 the defendants' violations of the Franchise Rule, including the rescission and reformation of contracts, and the refund of money.

41. 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 and appointment of a receiver, 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 by the defendants; 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,

WILLIAM E. KOVACIC
General Counsel

BARBARA ANTHONY
Regional Director
Northeast Region



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