

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

_____)
 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)
)
 JACK G. SCHWARTZ, individually and)
 as an officer or director of one or more or)
 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. 023415

STIPULATED PRELIMINARY
INJUNCTION FOR
DEFENDANT
JACK G. SCHWARTZ

Where as Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), having filed its complaint for a permanent injunction and other relief in this matter, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b; and having moved *ex parte* for a Temporary Restraining Order pursuant to Rule 65 of the Federal Rules of Civil Procedure on June 12, 2002, and this Court ordering Plaintiff to notify Defendants of the pending action, and after oral argument on this motion on June 13, 2002, and this Court entering a Stipulated TRO on July 17, 2002.

Therefore, having considered the pleadings, declarations, exhibits, and memoranda filed in support or and in opposition to the Commission’s application for Preliminary Injunction, and the parties below having stipulated to the following Order, it hereby **ORDERED ADJUDGED AND DECREED** as follows:

FINDINGS OF FACT

1. This Court has jurisdiction of the subject matter of this case, and there is good cause to believe it will have jurisdiction over all parties.
2. Plaintiff asserts that there is good cause to believe that Defendants Essex Marketing Group, Inc., Westbrook Marketing Group, Inc., Westbrook Marketing Associates, LLC, Manhattan Vending, LLC (hereafter collectively “Westbrook”), Richard J. Guadagno, a/k/a Rich Dano, Rich Guadano and Richard Guadago, (“Guadagno”), Jack G. Schwartz (“Schwartz”) and Henry Sanchez (“Sanchez”) have engaged and are likely to engage in acts and practices that violate Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the Federal Trade Commission Trade Regulation Rule entitled “Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures” (the “Franchise Rule”), 16 C.F.R. Part 436, and that the

Commission is therefore likely to prevail on the merits of this action. Defendant denies these assertions.

3. Plaintiff asserts that there is good cause to believe that the evidence set forth in support of Plaintiff's Motion for a Temporary Restraining Order, Preliminary Injunction, and Other Equitable Relief, and in the accompanying declarations and exhibits, shows that the Defendants have engaged in a concerted course of illegal activity in their dealings with consumers nationwide in connection with the advertising, promotion, offering, sale or servicing of vending machine business opportunities to consumers nationwide, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45 and the Franchise Rule, 16 C.F.R. Part 436. Defendant denies these assertions.

4. The Defendant, Jack Schwartz, while denying all allegations of wrongdoing set forth in the Complaint, has stipulated and agreed to entry of this Order without any admission by Defendant of any wrongdoing or violation of law, and without a finding by the Court of any fact or law than as stated above.

5. The entry of this Order, as set forth below, is in the public interest.

6. Plaintiff asserts that no security is required of any agency of the United States for issuance of a preliminary injunction. Fed. R. Civ. P. 65(c).

7. By this stipulation, Defendant Jack Schwartz waives his right to a Preliminary Injunction hearing before this Court.

ORDER

Definitions

For purposes of this temporary restraining order, the following definitions shall apply:

1. "Franchise" and "Franchisee" are defined in Section 436.2(a) of the Federal Trade Commission Trade Regulation Rule entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures" (the "Franchise Rule"), 16 C.F.R. § 436.2(a), a copy of which is attached to this Order as Attachment A.

2. "Business venture" means any written or oral business arrangement, however denominated, whether or not covered by the Franchise Rule, which consists of the payment of any consideration for:

- a. the right or means to offer, sell, or distribute goods or services (whether or not identified by a trademark, service mark, trade name, advertising, or other commercial symbol); and
- b. more than nominal assistance to any person or entity in connection with or incident to the establishment, maintenance, or operation of a new business or the entry by an existing business into a new line or type of business.

3. "Material" means likely to affect a person's choice of, or conduct regarding, goods or services;

4. "Defendant" means Defendant Jack G. Schwartz, any officer, director, employee, or agent, and his successors, assigns, officers, agents, servants, employees, attorneys, and all persons or entities directly or indirectly under their control or under common control with them, and all other persons or entities in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, whether acting directly or through any corporation, subsidiary, division, or other device;

5. "Plaintiff" means the Federal Trade Commission;

6. "Assets" means any legal or equitable interest in, right to, or claim to, any real and personal property, including, but not limited to chattel, goods, instruments, equipment, fixtures, general intangibles, inventory, checks, notes, leaseholds, effects, contracts, mail or other deliveries, shares of stock, lists of consumer names, accounts, credits, premises, receivables, funds, and cash, wherever located, whether in the United States or abroad;

7. "Document" is synonymous in meaning and equal in scope to the usage of the term in Federal Rule of Civil Procedure 34(a) and includes writings, drawings, graphs, charts, photographs, audio, and video recordings, computer records, and other data compilations from which the information can be obtained and translated, if necessary, through detection devices into reasonably usable form. A draft or non-identical copy is a separate document within the meaning of the term; and

8. "Person" means a natural person, an organization or other legal entity, including a corporation, partnership, sole proprietorship, limited liability company, association, cooperative, or any other group or combination acting as an entity.

I. PROHIBITED BUSINESS ACTIVITIES

IT IS THEREFORE ORDERED that, in connection with the advertising, promoting, offering for sale, or sale of any business venture, subject to this Courts' Order sealing these proceedings, Defendant is hereby temporarily restrained and enjoined from:

A. Falsely representing, expressly or by implication, either orally or in writing, any material fact, including but not limited to the following:

1. the income, profits, or sales volume likely to be achieved; and

2. that he will deliver the vending machines within the agreed upon time or allow purchasers to cancel their contracts; and

B. Violating or assisting others to violate any provision of the Franchise Rule, 16 C.F.R. Part 436, including but not limited to:

1. failing to provide any potential franchisee with a complete and accurate disclosure document within the times stated in the Franchise Rule, 16 C.F.R. § 436.1(a);
2. failing to provide any potential franchisee with an earnings claim document when any earnings claim is made, as required by the Franchise Rule, 16 C.F.R. § 436.1(b)-(e); and
3. failing to disclose, in immediate conjunction with any earnings claim, the material basis for the claim (or the lack of such basis) and a warning that the earnings claim is only an estimate, as required by the Franchise Rule, 16 C.F.R. § 436.1(e)(3)-(4).

II. ASSET FREEZE

IT IS FURTHER ORDERED, except as otherwise provided in Subparagraph F, that

Defendant is hereby temporarily restrained and enjoined from:

- A. Transferring, converting, encumbering, selling, concealing, dissipating, disbursing, assigning, spending, withdrawing, or otherwise disposing of any personal assets that are: (1) owned or controlled, directly or indirectly, by Defendant, in whole or in part; (2) titled or held in the name, singly or jointly, of Defendant; or (3) in the actual or constructive possession of the Defendant; or (4) owned, controlled by, or in the actual or constructive

possession of any corporation, partnership, or other entity directly or indirectly owned, managed, or controlled by, or under common control with, any other Defendant, including but not limited to, any assets held by, for, or under the name of the Defendant at any bank or savings and loan institution, or with any broker-dealer, escrow agent, title company, commodity trading company, precious metal dealer, or other financial institution or depository of any kind;

B. Opening or causing to be opened any safe deposit boxes titled in Defendant's name, or subject to access by Defendant;

C. Incurring charges or cash advances on any credit card issued in the name, singly or jointly, of Defendant;

D. Obtaining a personal or secured loan;

E. Incurring liens or other encumbrances on real property, personal property or other assets in the name, singly or jointly, of the Defendant; and

F. Assets affected by this Section shall be limited to all of the assets of the Defendant existing as of 4 p.m., June 13, 2002, including assets that are derived from or traceable to assets existing as of 4 p.m., June 13, 2002.

Provided however, Plaintiff agrees not to serve this Order on any bank or financial institution. Plaintiff's agreement is based upon the accuracy and truthfulness of the financial statement provided to the FTC on June 19, 2002 pursuant to Paragraph VII herein, and Defendant's willingness to provide copies of bank and financial records; should Defendant fail to comply with the provisions set forth in this Order or the financial statement provided to the FTC on June 19, 2002 contained any material omission, Plaintiff reserves the right to serve any bank and financial institution with copies of this Order.

III. RETENTION OF ASSETS AND RECORDS HELD BY THIRD PARTIES

IT IS FURTHER ORDERED that, pending determination of the Commission's request for a Permanent Injunction, any financial or brokerage institution, business entity, or person served with a copy of this Order, that holds, controls or maintains custody of any asset of the Defendant, or has held, controlled or maintained custody of any such asset of Defendant, which is the subject of this Order, at any time since January 1, 2000 shall:

A. Prohibit Defendant from withdrawing, removing, assigning, transferring, pledging, encumbering, disbursing, dissipating, converting, selling, or otherwise disposing of any such assets, which are the subject of this Order, except as directed by further order of the Court;

B. Deny the Defendant access to any safe deposit box that is:

1. Titled in the name of the Defendant, either individually or jointly; or
2. Otherwise subject to access by the Defendant, either individually or jointly;

C. Provide counsel for the Commission, within five (5) business days of receiving a copy of this Order, a sworn statement setting forth:

1. The identification number and description of each such account or asset titled in the name, individually or jointly, of the Defendant, or held on behalf of, or for the benefit of Defendant;
2. The balance of each such account, or a description of the nature and value of such asset as of the close of business on the day on which this Order is served, and, if the account or other asset has been closed or removed, the date closed or removed, the total funds removed in order to close the

account, and the name of the person or entity to whom such account or other asset was remitted; and

3. The identification of any safe deposit box that is either titled in the name, individually or jointly, of the Defendant, or otherwise subject to access by Defendant; and

D. Upon the request of the Commission, promptly provide the Commission with copies of all records or other documentation pertaining to such account or asset, including but not limited to originals or copies of account applications, account statements, signature cards, checks, drafts, deposit tickets, transfers to and from the accounts, all other debit and credit instruments or slips, currency transaction reports, 1099 forms, and safe deposit box logs. Any such financial institution, account custodian, or other aforementioned entity shall arrange for Plaintiff to obtain copies of any such records which Plaintiff seeks, *provided* that such institution or custodian may charge a reasonable fee not to exceed ten cents (10¢) per page copied; and

IV. REPATRIATION OF ASSETS AND DOCUMENTS LOCATED IN FOREIGN COUNTRIES

IT IS FURTHER ORDERED that, unless Defendant has already done so pursuant to the TRO, the Defendant shall:

A. Within forty-eight (48) hours following the date of this Order, take such steps as are necessary to transfer to the territory of the United States of America all documents and assets that are located outside of such territory and are held by or for the Defendant or are under his direct or indirect control, jointly, severally, or individually;

B. Within forty-eight (48) hours following the service of this Order, provide counsel for the Commission with a full accounting of all documents and assets that are located outside of

such territory and are held by or for the benefit of Defendant or are under his direct or indirect control, whether jointly, severally, or individually;

C. Hold and retain all transferred documents and assets and prevent any transfer, disposition, or dissipation whatsoever of any such assets or funds; and

D. Provide counsel for the Commission with access to records and documents of the Defendant held by financial institutions outside the territorial United States of America, by signing and delivering to Plaintiff a "Consent of Release of Financial Records" in a form to be provided by Plaintiff within forty-eight (48) hours of a request by Plaintiff.

V. INTERFERENCE WITH REPATRIATION

IT IS FURTHER ORDERED that the Defendant is hereby preliminarily restrained and enjoined from taking any action, directly or indirectly, which may result in the encumbrance or dissipation of foreign assets, or in the hindrance of the repatriation required by the preceding Section this Order, including but not limited to:

A. Sending any statement, letter, fax, e-mail or wire transmission, telephoning or engaging in any other act, directly or indirectly, that results in a determination by a foreign trustee or other entity that a "duress" event has occurred under the terms of a foreign trust agreement until such time that all assets have been fully repatriated pursuant to the preceding Section of this Order;

B. Notifying any trustee, protector or other agent of any foreign trust or other related entities of either the existence of this Order, or of the fact that repatriation is required pursuant to a Court Order, until such time that all assets have been fully repatriated pursuant to the preceding Section of this Order.

VI. DISCOVERY

IT IS FURTHER ORDERED that the Commission and the Defendant shall conduct any further discovery in this action pursuant to the Federal Rules of Civil Procedure and this Court's Local Rules; provided, however, the requests for production of documents pursuant to the expedited discovery provision of the TRO shall not in any way waive Plaintiff's rights to seek the production of additional documents.

VII. FINANCIAL REPORTS

IT IS FURTHER ORDERED that unless the Defendants have already done so pursuant to the TRO, the Defendants, within forty-eight (48) hours of entry of this Order, shall prepare and deliver to this Court, and to counsel for the Commission:

A. Completed financial statements on the forms attached the TRO. The financial statements shall be accurate as of the date of entry of this Order; and

B. Upon request by Plaintiff, all current accountants' reports; all federal tax returns filed since January 1, 1999; documents indicating title to real or personal property; other indicia of ownership that are now in the Defendant's actual or constructive possession; and other of Defendant's financial and bank records requested by Plaintiff.

VIII. IDENTIFYING INFORMATION RELATING TO ACCOUNTANTS, FINANCIAL PLANNERS, INVESTMENT ADVISORS, STOCK BROKERS AND OTHERS

IT IS FURTHER ORDERED that unless the Defendant has already done so pursuant to the TRO, the Defendant, within forty-eight (48) hours after the date of this Order, shall provide counsel for the Commission: (1) the name, address and telephone number for each accountant, financial planner, investment advisor, stock broker or other individual, corporation or partnership whom they hire for personal advice or services, including but not limited to preparation of tax

returns and investment advice, since January 1, 2000, and (2) the name, address and telephone number for each accountant, financial planner, investment advisor, stockbroker or other individual, corporation or partnership who was hired on behalf of Defendant since January 1, 2000.

IX. RECORD KEEPING/BUSINESS OPERATIONS

IT IS FURTHER ORDERED that the Defendant is hereby temporarily restrained and enjoined from:

A. Failing to document and maintain documents that, in reasonable detail, accurately, fairly, and completely reflect their incomes, disbursements, transactions, and use of money;

B. Destroying, erasing, mutilating, concealing, altering, transferring, or otherwise disposing of, in any manner, directly or indirectly, any contracts, accounting data, correspondence, advertisements, computer tapes, discs, or other computerized records, books, written or printed records, handwritten notes, telephone logs, telephone scripts, receipt books, ledgers, personal and business canceled checks and check registers, bank statements, appointment books, copies of federal, state or local business or personal income or property tax returns, and other documents or records of any kind that relate to the business practices or business or personal finances of the Defendant; and

C. Creating, operating, or exercising any control over any business entity, including any partnership, limited partnership, joint venture, sole proprietorship or corporation, without first providing counsel for the Commission with a written statement disclosing: (1) the name of the business entity; (2) the address and telephone number of the business entity; (3) the names of

the business entity's officers, directors, principals, managers and employees; and (4) a detailed description of the business entity's intended activities.

X. DISTRIBUTION OF ORDER BY DEFENDANT

IT IS FURTHER ORDERED that Defendant shall immediately provide a copy of this Order to each affiliate, subsidiary, division, sales entity, successor, assign, officer, director, agent, sales manager, attorney, and representative of the Defendant, and shall, within ten (10) days from the date of entry of this Order, provide counsel for the Commission with a sworn statement that Defendant has complied with this provision of the Order, which statement shall include the names and addresses of each such person or entity who received a copy of the Order. For any employee or independent contractor who solicits business opportunity sales or speaks to prospective business opportunity purchasers, Defendant shall give a statement in the form attached hereto as Attachment B.

XI. BANKRUPTCY PETITIONS

IT IS FURTHER ORDERED that Defendant is hereby prohibited from filing, or causing to be filed, a petition for relief under the United States Bankruptcy Code, 11 U.S.C. § 101 et seq., without five (5) days prior written notice to the Commission.

XII. CONSUMER CREDIT REPORTS

IT IS FURTHER ORDERED that the Commission may obtain and keep confidential credit reports concerning Defendant pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(1), and that upon written request, any credit reporting agency from which such reports are requested shall provide them to the Commission.

XXVII. RETENTION OF JURISDICTION

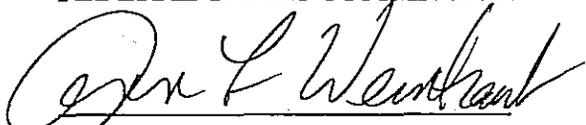
IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes.

STIPULATED AND AGREED TO BY:

PLAINTIFF:

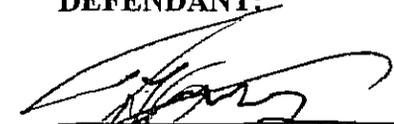
WILLIAM E. KOVACIC
GENERAL COUNSEL

BARBARA ANTHONY
REGIONAL DIRECTOR
NORTHEAST REGION
FEDERAL TRADE COMMISSION:

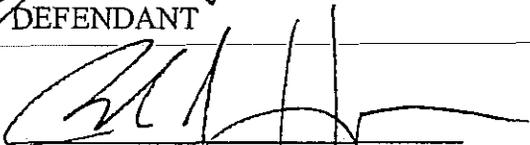

ANN F. WEINTRAUB (AW 3080)
RONALD L. WALDMAN (RW 2003)

DATED: 9/26/02

DEFENDANT:

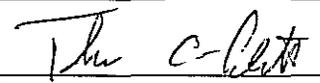

JACK G. SCHWARTZ
DEFENDANT

DATED: 9/23/02


MICHAEL JANUZZI
COUNSEL FOR DEFENDANT
JACK SCHWARTZ

DATED: 9/23/02

SO ORDERED, this 4 day of October, 2002, at 3:35 p.m.


UNITED STATES DISTRICT COURT JUDGE

THIS ORDER IS TO BE MAILED BY ~~MAIL~~
TO ALL COUNSEL IMMEDIATELY UPON RECEIPT.
Ronald Waldman, Esq.

Title 16--Commercial Practices; Revised as of January 1, 1986

CHAPTER I--FEDERAL TRADE COMMISSION
SUBCHAPTER D--TRADE REGULATION RULESPART 436--DISCLOSURE REQUIREMENTS AND PROHIBITIONS CONCERNING FRANCHISING AND
BUSINESS OPPORTUNITY VENTURES

16 CFR 436.1

In connection with the advertising, offering, licensing, contracting, sale, or other promotion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any franchise, or any relationship which is represented either orally or in writing to be a franchise, it is an unfair or deceptive act or practice within the meaning of section 5 of that Act for any franchisor or franchise broker:

(a) To fail to furnish any prospective franchisee with the following information accurately, clearly, and concisely stated, in a legible, written document at the earlier of the "time for making of disclosures" or the first "personal meeting":

(1) (i) The official name and address and principal place of business of the franchisor, and of the parent firm or holding company of the franchisor, if any;

(ii) The name under which the franchisor is doing or intends to do business; and

(iii) The trademarks, trade names, service marks, advertising or other commercial symbols (hereinafter collectively referred to as "marks") which identify the goods, commodities, or services to be offered, sold, or distributed by the prospective franchisee, or under which the prospective franchisee will be operating.

(2) The business experience during the past 5 years, stated individually, of each of the franchisor's current directors and executive officers (including, and hereinafter to include, the chief executive and chief operating officer, financial, franchise marketing, training and service officers). With regard to each person listed, those persons' principal occupations and employers must be included.

(3) The business experience of the franchisor and the franchisor's parent firm (if any), including the length of time each:

(i) Has conducted a business of the type to be operated by the franchisee;

(ii) has offered or sold a franchise for such business;

(iii) has conducted a business or offered or sold a franchise for a business:

(A) operating under a name using any mark set forth under paragraph (a)(1)(iii) of this section, or

(B) involving the sale, offering, or distribution of goods, commodities, or services which are identified by any mark set forth under paragraph (a)(1)(iii) of this section; and

(iv) has offered for sale or sold franchises in other lines of business, together with a description of such other lines of business.

(4) A statement disclosing who, if any, of the persons listed in paragraphs (a) (2) and (3) of this section:

(i) Has, at any time during the previous seven fiscal years, been convicted of a felony or pleaded nolo contendere to a felony charge if the felony involved fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade;

(ii) Has, at any time during the previous seven fiscal years, been held liable in a civil action resulting in a final judgment or has settled out of court any civil action or is a party to any civil action:

(A) involving allegations of fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade, or

(B) which was brought by a present or former franchisee or franchisees and which involves or involved the franchise relationship; Provided, however, That only material individual civil actions need be so listed pursuant to this paragraph (4)(ii), including any group of civil actions which, irrespective of the materiality of any single such action, in the aggregate is material;

(iii) Is subject to any currently effective State or Federal agency or court injunctive or restrictive order, or is a party to a proceeding currently pending in which such order is sought, relating to or affecting franchise activities or the franchisor-franchisee relationship, or involving fraud (including violation of any franchise law, or unfair or deceptive practices law), embezzlement, fraudulent conversion, misappropriation of property, or restraint of trade.

Such statement shall set forth the identity and location of the court or agency; the date of conviction, judgment, or decision; the penalty imposed; the damages assessed; the terms of settlement or the terms of the order; and the date, nature, and issuer of each such order or ruling. A franchisor may include a summary opinion of counsel as to any pending litigation, but only if counsel's consent to the use of such opinion is included in the disclosure statement.

(5) A statement disclosing who, if any, of the persons listed in paragraphs (a) (2) and (3) of this section at any time during the previous 7fiscal years has:

(i) Filed in bankruptcy;

(ii) Been adjudged bankrupt;

(iii) Been reorganized due to insolvency; or

(iv) Been a principal, director, executive officer, or partner of any other person that has so filed or was so adjudged or reorganized, during or within 1 year after the period that such person held such position in such other person. If so, the name and location of the person having so filed, or having been so adjudged or reorganized, the date thereof, and any other material facts relating thereto, shall be set forth.

(6) A factual description of the franchise offered to be sold by the franchisor.

(7) A statement of the total funds which must be paid by the franchisee to the franchisor or to a person affiliated with the franchisor, or which the franchisor or such affiliated person imposes or collects in whole or in part on behalf of a third party, in order to obtain or commence the franchise operation, such as initial franchise fees, deposits, down payments, prepaid rent, and equipment and inventory purchases. If all or part of these fees or deposits are returnable under certain conditions, these conditions shall be set forth; and if not returnable, such fact shall be disclosed.

(8) A statement describing any recurring funds required to be paid, in connection with carrying on the franchise business, by the franchisee to the franchisor or to a person affiliated with the franchisor, or which the franchisor or such affiliated person imposes or collects in whole or in part on behalf of a third party, including, but not limited to, royalty, lease, advertising, training, and sign rental fees, and equipment or inventory purchases.

(9) A statement setting forth the name of each person (including the franchisor) the franchisee is directly or indirectly required or advised to do business with by the franchisor, where such persons are affiliated with the franchisor.

(10) A statement describing any real estate, services, supplies, products, inventories, signs, fixtures, or equipment relating to the establishment or the operation of the franchise business which the franchisee is directly or indirectly required by the franchisor to purchase, lease or rent; and if such

purchases, leases or rentals must be made from specific persons (including the franchisor), a list of the names and addresses of each such person. Such list may be made in a separate document delivered to the prospective franchisee with the prospectus if the existence of such separate document is disclosed in the prospectus.

(11) A description of the basis for calculating, and, if such information is readily available, the actual amount of, any revenue or other consideration to be received by the franchisor or persons affiliated with the franchisor from suppliers to the prospective franchisee in consideration for goods or services which the franchisor requires or advises the franchisee to obtain from such suppliers.

(12) (i) A statement of all the material terms and conditions of any financing arrangement offered directly or indirectly by the franchisor, or any person affiliated with the franchisor, to the prospective franchisee; and

(ii) A description of the terms by which any payment is to be received by the franchisor from (A) any person offering financing to a prospective franchisee; and (B) any person arranging for financing for a prospective franchisee.

(13) A statement describing the material facts of whether, by the terms of the franchise agreement or other device or practice, the franchisee is:

(i) Limited in the goods or services he or she may offer for sale;

(ii) Limited in the customers to whom he or she may sell such goods or services;

(iii) Limited in the geographic area in which he or she may offer for sale or sell goods or services; or

(iv) Granted territorial protection by the franchisor, by which, with respect to a territory or area,

(A) the franchisor will not establish another, or more than any fixed number of, franchises or company-owned outlets, either operating under, or selling, offering or distributing goods, commodities or services, identified by any mark set forth under paragraph (a)(1)(iii) of this section; or

(B) the franchisor or its parent will not establish other franchises or company-owned outlets selling or leasing the same or similar products or services under a different trade name, trademark, service mark, advertising or other commercial symbol.

(14) A statement of the extent to which the franchisor requires the franchisee (or, if the franchisee is a corporation, any person affiliated with the franchisee) to participate personally in the direct operation of the franchise.

(15) A statement disclosing, with respect to the franchise agreement and any related agreements:

(i) The term (i.e., duration of arrangement), if any, of such agreement, and whether such term is or may be affected by any agreement (including leases or subleases) other than the one from which such term arises;

(ii) The conditions under which the franchisee may renew or extend;

(iii) The conditions under which the franchisor may refuse to renew or extend;

(iv) The conditions under which the franchisee may terminate;

(v) The conditions under which the franchisor may terminate;

(vi) The obligations (including lease or sublease obligations) of the franchisee after termination of the franchise by the franchisor, and the obligations of the franchisee (including lease or sublease obligations) after termination of the franchise by the franchisee

and after the expiration of the franchise;

(vii) The franchisee's interest upon termination of the franchise, or upon refusal to renew or extend the franchise, whether by the franchisor or by the franchisee;

(viii) The conditions under which the franchisor may repurchase, whether by right of first refusal or at the option of the franchisor (and if the franchisor has the option to repurchase the franchise, whether there will be an independent appraisal of the franchise, whether the repurchase price will be determined by a predetermined formula and whether there will be a recognition of goodwill or other intangibles associated therewith in their purchase price to be given the franchisee);

(ix) The conditions under which the franchisee may sell or assign all or any interest in the ownership of the franchise, or of the assets of the franchise business;

(x) The conditions under which the franchisor may sell or assign, in whole or in part, its interest under such agreements;

(xi) The conditions under which the franchisee may modify;

(xii) The conditions under which the franchisor may modify;

(xiii) The rights of the franchisee's heirs or personal representative upon the death or incapacity of the franchisee; and

(xiv) The provisions of any covenant not to compete.

(16) A statement disclosing, with respect to the franchisor and as to the particular named business being offered:

(i) The total number of franchises operating at the end of the preceding fiscal year;

(ii) The total number of company-owned outlets operating at the end of the preceding fiscal year;

(iii) The names, addresses, and telephone numbers of:

(A) The 10 franchised outlets of the named franchise business nearest the prospective franchisee's intended location; or

(B) all franchisees of the franchisor; or

(C) all franchisees of the franchisor in the State in which the prospective franchisee lives or where the proposed franchise is to be located, Provided, however, That there are more than 10 such franchisees. If the number of franchisees to be disclosed pursuant to paragraph (a)(16)(iii)(B) or (C) of this section exceeds 50, such listing may be made in a separate document delivered to the prospective franchisee with the prospectus if the existence of such separate document is disclosed in the prospectus;

(iv) The number of franchises voluntarily terminated or not renewed by franchisees within, or at the conclusion of, the term of the franchise agreement, during the preceding fiscal year;

(v) The number of franchises reacquired by purchase by the franchisor during the term of the franchise agreement, and upon the conclusion of the term of the franchise agreement, during the preceding fiscal year;

(vi) The number of franchises otherwise reacquired by the franchisor during the term of the franchise agreement, and upon the conclusion of the term of the franchise agreement, during the preceding fiscal year;

(vii) The number of franchises for which the franchisor refused renewal of the franchise agreement or other agreements relating to the franchise during the preceding fiscal year; and

(viii) The number of franchises that were canceled or terminated by the franchisor during the term of the franchise agreement, and upon conclusion of the term of the franchise agreement, during the preceding fiscal year.

With respect to the disclosures required by paragraphs (a)(16)(v), (vi), (vii), and (viii) of this section, the disclosure statement shall also include a general categorization of the reasons for such reacquisitions, refusals to renew or terminations, and the number falling within each such category, including but not limited to the following: failure to comply with quality control standards, failure to make sufficient sales, and other breaches of contract.

(17) (i) If site selection or approval thereof by the franchisor is involved in the franchise relationship, a statement disclosing the range of time that has elapsed between signing of franchise agreements or other agreements relating to the franchise and site selection, for agreements entered into during the preceding fiscal year; and

(ii) If operating franchise outlets are to be provided by the franchisor, a statement disclosing the range of time that has elapsed between the signing of franchise agreements or other agreements relating to the franchise and the commencement of the franchisee's business, for agreements entered into during the preceding fiscal year.

With respect to the disclosures required by paragraphs (a)(17)(i) and (ii) of this section, a franchisor may at its option also provide a distribution chart using meaningful classifications with respect to such ranges of time.

(18) If the franchisor offers an initial training program or informs the prospective franchisee that it intends to provide such person with initial training, a statement disclosing:

(i) The type and nature of such training;

(ii) The minimum amount, if any, of training that will be provided to a franchisee; and

(iii) The cost, if any, to be borne by the franchisee for the training to be provided, or for obtaining such training.

(19) If the name of a public figure is used in connection with a recommendation to purchase a franchise, or as a part of the name of the franchise operation, or if the public figure is stated to be involved with the management of the franchisor, a statement disclosing:

(i) The nature and extent of the public figure's involvement and obligations to the franchisor, including but not limited to the promotional assistance the public figure will provide to the franchisor and to the franchisee;

(ii) The total investment of the public figure in the franchise operation; and

(iii) The amount of any fee or fees the franchisee will be obligated to pay for such involvement or assistance provided by the public figure.

(20) (i) A balance sheet (statement of financial position) for the franchisor for the most recent fiscal year, and an income statement (statement of results of operations) and statement of changes in financial position for the franchisor for the most recent 3 fiscal years. Such statements are required to have been examined in accordance with generally accepted auditing standards by an independent certified or licensed public accountant.

Provided, however, That where a franchisor is a subsidiary of another corporation which is permitted under generally accepted accounting principles to prepare financial statements on a consolidated or combined statement basis, the above information may be submitted for the parent if: (A) the corresponding unaudited financial statements of the franchisor are also provided, and (B) the parent absolutely and irrevocably has agreed to guarantee all obligations of the subsidiary;

(ii) Unaudited statements shall be used only to the extent that audited statements have not been made, and provided that such statements are accompanied by a clear and conspicuous disclosure that they are unaudited. Statements shall be prepared on an audited basis as soon as practicable, but, at a minimum, financial statements for the first full fiscal year following the date on which the franchisor must first comply with this part shall contain a balance sheet opinion prepared by an independent certified or licensed public accountant, and financial statements for the following fiscal year shall be fully audited.

(21) All of the foregoing information in paragraphs (a) (1) through (20) of this section shall be contained in a single disclosure statement or prospectus, which shall not contain any materials or information other than that required by this part or by State law not preempted by this part. This does not preclude franchisors or franchise brokers from giving other nondeceptive information orally, visually, or in separate literature so long as such information is not contradictory to the information in the disclosure statement required by paragraph (a) of this section. The disclosure statement shall carry a cover sheet distinctively and conspicuously showing the name of the franchisor, the date of issuance of the disclosure statement, and the following notice imprinted thereon in upper and lower case bold-face type of not less than 12 point size:

**Information for Prospective Franchisees
Required by Federal Trade Commission**

* * *

To protect you, we've required your franchisor to give you this information. We haven't checked it, and don't know if it's correct. It should help you make up your mind. Study it carefully. While it includes some information about your contract, don't rely on it alone to understand your contract. Read all of your contract carefully. Buying a franchise is a complicated investment. Take your time to decide. If possible, show your contract and this information to an advisor, like a lawyer or an accountant. If you find anything important that's been left out, you should let us know about it. It may be against the law. There may also be laws on franchising in your state. Ask your state agencies about them.

FEDERAL TRADE COMMISSION, Washington, D.C.

Provided, That the obligation to furnish such disclosure statement shall be deemed to have been met for both the franchisor and the franchise broker if either such party furnishes the prospective franchisee with such disclosure statement.

(22) All information contained in the disclosure statement shall be current as of the close of the franchisor's most recent fiscal year. After the close of each fiscal year, the franchisor shall be given a period not exceeding 90 days to prepare a revised disclosure statement and, following such 90 days, may distribute only the revised prospectus and no other. The franchisor shall, within a reasonable time after the close of each quarter of the fiscal year, prepare revisions to be attached to the disclosure statement to reflect any material change in the franchisor or relating to the franchise business of the franchisor, about which the franchisor or franchise broker, or any agent, representative, or employee thereof, knows or should know. Each prospective franchisee shall have in his or her possession, at the "time for making of disclosures," the disclosure statement and quarterly revision for the period most recent to the "time for making of disclosures" and available at that time. Information which is required to be audited pursuant to paragraph (a)(20) of this section is not required to be audited for quarterly revisions, Provided, however, That the unaudited information be accompanied by a statement in immediate conjunction therewith that clearly and conspicuously discloses that such information has not been audited.

(23) A table of contents shall be included within the disclosure statement.

(24) The disclosure statement shall include a comment which either positively or negatively responds to each disclosure item required to be in the disclosure statement, by use of a statement which fully incorporates the information required by the item. Each disclosure item therein must be preceded by the appropriate heading, as set forth in Note 3 of this part.

(b) To make any oral, written, or visual representation to a prospective franchisee which states a specific level of potential sales, income, gross or net profit for that prospective franchisee, or which states other facts which suggest such a specific level, unless:

(1) At the time such representation is made, such representation is relevant to the geographic market in which the franchise is to be located;

(2) At the time such representation is made, a reasonable basis exists for such representation and the franchisor has in its possession material which constitutes a reasonable basis for such representation, and such material is made available to any prospective franchisee and to the Commission or its staff upon reasonable demand.

Provided, further, That in immediate conjunction with such representation, the franchisor shall disclose in a clear and conspicuous manner that such material is available to the prospective franchisee; and Provided, however, That no provision within paragraph (b) of this section shall be construed as requiring the disclosure to any prospective franchisee of the identity of any specific franchisee or of information reasonably likely to lead to the disclosure of such person's identity; and Provided, further, That no additional representation as to a prospective franchisee's potential sales, income, or profits may be made later than the "time for making of disclosures";

(3) Such representation is set forth in detail along with the material bases and assumptions therefor in a single legible written document whose text accurately, clearly and concisely discloses such information, and none other than that provided for by this part or by State law not preempted by this part. Each prospective franchisee to whom the representation is made shall be furnished with such document no later than the "time for making of disclosures"; Provided, however, That if the representation is made at or prior to a "personal meeting" and such meeting occurs before the "time for making of disclosures", the document shall be furnished to the prospective franchisee to whom the representation is made at that "personal meeting";

(4) The following statement is clearly and conspicuously disclosed in the document described by paragraph (b)(3) of this section in immediate conjunction with such representation and in not less than twelve point upper and lower-case boldface type;

CAUTION

These figures are only estimates of what we think you may earn. There is no assurance you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

(5) The following information is clearly and conspicuously disclose in the document described by paragraph (b)(3) of this section in immediate conjunction with such representation:

(i) The number and percentage of outlets of the named franchise business which are located in the geographic markets that form the basis for any such representation and which are known to the franchisor or franchise broker to have earned or made at least the same sales, income, or profits during a period of corresponding length in the immediate past as those potential sales, income, or profits represented; and

(ii) The beginning and ending dates for the corresponding time period referred to by paragraph (b)(5)(i) of this section, Provided, however, That any franchisor without prior franchising experience as to the named franchise business so indicate such lack of experience in the document described in paragraph (b)(3) of this section. Except, That representations of the sales, income or profits of existing franchise outlets need not comply with this paragraph (b).

(c) To make any oral, written or visual representation to a prospective franchisee which states a specific level of sales, income, gross or net profits of existing outlets (whether franchised or company-owned) of the named franchise business, or which states other facts which suggest such a specific level, unless:

(1) At the time such representation is made, such representation is relevant to the geographic market in which the franchise is to be located;

(2) At the time such representation is made, a reasonable basis exists for such representation and the franchisor has in its possession material which constitutes a reasonable basis for such representation, and such material is made available to any prospective franchisee and to the

Commission or its staff upon reasonable demand;

Provided, however, That in immediate conjunction with such representation, the franchisor discloses in a clear and conspicuous manner that such material is available to the prospective franchisee; and Provided, further, That no provision within paragraph (c) of this section shall be construed as requiring the disclosure to any prospective franchisee of the identity of any specific franchisee or of information reasonably likely to lead to the disclosure of such person's identity; and Provided, further, That no additional representation as to the sales, income, or gross or net profits of existing outlets (whether franchised or company-owned) of the named franchise business may be made later than the "time for making of disclosures";

(3) Such representation is set forth in detail along with the material bases and assumptions therefor in a single legible written document which accurately, clearly and concisely discloses such information, and none other than that provided for by this part or by State law not preempted by this part. Each prospective franchisee to whom the representation is made shall be furnished with such document no later than the "time for making of disclosures",

Provided, however, That if the representation is made at or prior to a "personal meeting" and such meeting occurs before the "time for making of disclosures," the document shall be furnished to the prospective franchisee to whom the representation is made at that "personal meeting";

(4) The underlying data on which the representation is based have been prepared in accordance with generally accepted accounting principles;

(5) The following statement is clearly and conspicuously disclosed in the document described by paragraph (c)(3) of this section in immediate conjunction with such representation, and in not less than twelve point upper and lower case boldface type:

CAUTION

Some outlets have [sold] [earned] this amount. There is no assurance you'll do as well. If you rely upon our figures; you must accept the risk of not doing as well.

(6) The following information is clearly and conspicuously disclosed in the document described by paragraph (c)(3) of this section in immediate conjunction with such representation:

(i) The number and percentage of outlets of the named franchise business which are located in the geographic markets that form the basis for any such representation and which are known to the franchisor or franchise broker to have earned or made at least the same sales, income, or profits during a period of corresponding length in the immediate past as those sales, income, or profits represented; and

(ii) The beginning and ending dates for the corresponding time period referred to by paragraph (c)(6)(i) of this section,

Provided, however, That any franchisor without prior franchising experience as to the named franchise business so indicate such lack of experience in the document described in paragraph (c) (3) of this section.

(d) To fail to provide the following information within the document(s) required by paragraphs (b)(3) and (c)(3) of this section whenever any representation is made to a prospective franchisee regarding its potential sales, income, or profits, or the sales, income, gross or net profits of existing outlets (whether franchised or company-owned) of the named franchise business:

(1) A cover sheet distinctively and conspicuously showing the name of the franchisor, the date of issuance of the document and the following notice imprinted thereon in upper and lower case

boldface type of not less than twelve point size:

**INFORMATION FOR PROSPECTIVE FRANCHISEES ABOUT FRANCHISE [SALES]
[INCOME] [PROFIT] REQUIRED BY THE FEDERAL TRADE COMMISSION.**

To protect you, we've required the franchisor to give you this information. We haven't checked it and don't know if it's correct. Study these facts and figures carefully. If possible, show them to someone who can advise you, like a lawyer or an accountant. Then take your time and think it over.

If you find anything you think may be wrong or anything important that's been left out, let us know about it. It may be against the law.

There may also be laws on franchising in your State. Ask your State agencies about them.

FEDERAL TRADE COMMISSION, Washington, D.C.

(2) A table of contents.

Provided, however, That each prospective franchisee to whom the representation is made shall be notified at the "time for making of disclosures" of any material change (about which the franchisor, franchise broker, or any of the agents, representatives, or employees thereof, knows or should know) in the information contained in the document(s) described by paragraphs (b)(3) and (c)(3) of this section.

(e) To make any oral, written, or visual representation for general dissemination (not otherwise covered by paragraph (b) or (c) of this section) which states a specific level of sales, income, gross or net profits, either actual or potential, of existing or prospective outlets (whether franchised or company-owned) of the named franchise business or which states other facts which suggest such a specific level, unless:

(1) At the time such representation is made, a reasonable basis exists for such representation and the franchisor has in its possession material which constitutes a reasonable basis for such representation and which is made available to the Commission or its staff upon reasonable demand;

(2) The underlying data on which each representation of sales, income or profit for existing outlets is based have been prepared in accordance with generally accepted accounting principles;

(3) In immediate conjunction with such representation, there shall be clearly and conspicuously disclosed the number and percentage of outlets of the named franchise business which the franchisor or the franchise broker knows to have earned or made at least the same sales, income, or profits during a period of corresponding length in the immediate past as those sales, income, or profits represented, and the beginning and ending dates for said time period;

(4) In immediate conjunction with each such representation of potential sales, income or profits, the following statement shall be clearly and conspicuously disclosed:

CAUTION

These figures are only estimates; there is no assurance you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

Provided, however, That if such representation is not based on actual experience of existing outlets of the named franchise business, that fact also should be disclosed;

(5) No later than the earlier of the first "personal meeting" or the "time for making of disclosures," each prospective franchisee shall be given a single, legible written document which accurately, clearly and concisely sets forth the following information and materials (and none other than that

provided for by this part or by State law not preempted by this part):

(i) The representation, set forth in detail along with the material bases and assumptions therefor;

(ii) The number and percentage of outlets of the named franchise business which the franchisor or the franchise broker knows to have earned or made at least the same sales, income or profits during a period of corresponding length in the immediate past as those sales, income, or profits represented, and the beginning and ending dates for said time period;

(iii) With respect to each such representation of sales, income, or profits of existing outlets, the following statement shall be clearly and conspicuously disclosed in immediate conjunction therewith, printed in not less than 12 point upper and lower case boldface type:

CAUTION

Some outlets have [sold] [earned] this amount. There is no assurance you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

(iv) With respect to each such representation of potential sales, income, or profits, the following statement shall be clearly and conspicuously disclosed in immediate conjunction therewith, printed in not less than 12 point upper and lower case boldface type:

CAUTION

These figures are only estimates. There is no assurance that you'll do as well. If you rely upon our figures, you must accept the risk of not doing as well.

(v) If applicable, a statement clearly and conspicuously disclosing that the franchisor lacks prior franchising experience as to the named franchise business;

(vi) If applicable, a statement clearly and conspicuously disclosing that the franchisor has not been in business long enough to have actual business data;

(vii) A cover sheet, distinctively and conspicuously showing the name of the franchisor, the date of issuance of the document, and the following notice printed thereon in not less than 12 point upper and lower case boldface type:

INFORMATION FOR PROSPECTIVE FRANCHISEES ABOUT FRANCHISE [SALES] [INCOME] [PROFIT] REQUIRED BY THE FEDERAL TRADE COMMISSION

To protect you, we've required the franchisor to give you this information. We haven't checked it and don't know if it's correct. Study these facts and figures carefully. If possible, show them to someone who can advise you, like a lawyer or an accountant. If you find anything you think may be wrong or anything important that's been left out, let us know about it. It may be against the law. There may also be laws about franchising in your State.

Ask your State agencies about them.

FEDERAL TRADE COMMISSION, Washington, D.C.

(viii) A table of contents;

(6) Each prospective franchisee shall be notified at the "time for making of disclosures" of any

material changes that have occurred in the information contained in this document.

(f) To make any claim or representation which is contradictory to the information required to be disclosed by this part.

(g) To fail to furnish the prospective franchisee with a copy of the franchisor's franchise agreement and related agreements with the document, and a copy of the completed franchise and related agreements intended to be executed by the parties at least 5 business days prior to the date the agreements are to be executed.

Provided, however, That the obligations defined in paragraphs (b) through (g) of this section shall be deemed to have been met for both the franchisor and the franchise broker if either such person furnishes the prospective franchisee with the written disclosures required thereby.

(h) To fail to return any funds or deposits in accordance with any conditions disclosed pursuant to paragraph (a)(7) of this section.

16 CFR 436.2

As used in this part, the following definitions shall apply:

(a) The term "franchise" means any continuing commercial relationship created by any arrangement or arrangements whereby:

(1)(i)(A) a person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(1) Identified by a trademark, service mark, trade name, advertising or other commercial symbol designating another person (hereinafter "franchisor"); or

(2) Indirectly or directly required or advised to meet the quality standards prescribed by another person (hereinafter "franchisor") where the franchisee operates under a name using the trademark, service mark, tradename, advertising or other commercial symbol designating the franchisor; and

(B) (1) The franchisor exerts or has authority to exert a significant degree of control over the franchisee's method of operation, including but not limited to, the franchisee's business organization, promotional activities, management, marketing plan or business affairs; or

(2) The franchisor gives significant assistance to the franchisee in the latter's method of operation, including, but not limited to, the franchisee's business organization, management, marketing plan, promotional activities, or business affairs; Provided, however, That assistance in the franchisee's promotional activities shall not, in the absence of assistance in other areas of the franchisee's method of operation, constitute significant assistance; or

(ii)(A) A person (hereinafter "franchisee") offers, sells, or distributes to any person other than a "franchisor" (as hereinafter defined), goods, commodities, or services which are:

(1) Supplied by another person (hereinafter "franchisor"), or

(2) Supplied by a third person (e.g., a supplier) with whom the franchisee is directly or indirectly required to do business by another person (hereinafter "franchisor"); or

(3) Supplied by a third person (e.g., a supplier) with whom the franchisee is directly or indirectly advised to do business by another person (hereinafter "franchisor") where such third person is affiliated with the franchisor; and

(B) The franchisor:

(1) Secures for the franchisee retail outlets or accounts for said goods, commodities, or services; or

(2) Secures for the franchisee locations or sites for vending machines, rack displays, or any other product sales display used by the franchisee in the offering, sale, or distribution of said goods, commodities, or services; or

(3) Provides to the franchisee the services of a person able to secure the retail outlets, accounts, sites or locations referred to in paragraph (a)(1)(ii)(B) (1) and (2) above; and

(2) The franchisee is required as a condition of obtaining or commencing the franchise operation to make a payment or a commitment to pay to the franchisor, or to a person affiliated with the franchisor.

(3) Exemptions. The provisions of this part shall not apply to a franchise:

(i) Which is a "fractional franchise"; or

(ii) Where pursuant to a lease, license, or similar agreement, a person offers, sells, or distributes goods, commodities, or services on or about premises occupied by a retailer-grantor primarily for the retailer-grantor's own merchandising activities, which goods, commodities, or services are not purchased from the retailer-grantor or persons whom the lessee is directly or indirectly: (A) required to do business with by the retailer-grantor, or (B) advised to do business with by the retailer-grantor where such person is affiliated with the retailer-grantor; or

(iii) Where the total of the payments referred to in paragraph (a)(2) of this section made during a period from any time before to within 6 months after commencing operation of the franchisee's business, is less than \$500; or

(iv) Where there is no writing which evidences any material term or aspect of the relationship or arrangement.

(4) Exclusions. The term "franchise" shall not be deemed to include any continuing commercial relationship created solely by:

(i) The relationship between an employer and an employee, or among general business partners; or

(ii) Membership in a bona fide "cooperative association"; or

(iii) An agreement for the use of a trademark, service mark, trade name, seal, advertising, or other commercial symbol designating a person who offers on a general basis, for a fee or otherwise, a bona fide service for the evaluation, testing, or certification of goods, commodities, or services;

(iv) An agreement between a licensor and a single licensee to license a trademark, trade name, service mark, advertising or other commercial symbol where such license is the only one of its general nature and type to be granted by the licensor with respect to that trademark, tradename, service mark, advertising, or other commercial symbol.

(5) Any relationship which is represented either orally or in writing to be a franchise (as defined in this paragraphs (a) (1) and (2) of this section) is subject to the requirements of this part.

(b) The term "person" means any individual, group, association, limited or general partnership, corporation, or any other business entity.

(c) The term "franchisor" means any person who participates in a franchise relationship as a franchisor, as denoted in paragraph (a) of this section.

(d) The term "franchisee" means any person: (1) who participates in a franchise relationship as a franchisee, as denoted in paragraph (a) of this section, or (2) to whom an interest in a franchise is sold.

(e) The term "prospective franchisee" includes any person, including any representative, agent, or employee of that person, who approaches or is approached by a franchisor or franchise broker, or any representative, agent, or employee thereof, for the purpose of discussing the establishment, or possible

establishment, of a franchise relationship involving such a person.

(f) The term "business day" means any day other than Saturday, Sunday, or the following national holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving, and Christmas.

(g) The term "time for making of disclosures" means ten (10) business days prior to the earlier of: (1) the execution by a prospective franchisee of any franchise agreement or any other agreement imposing a binding legal obligation on such prospective franchisee, about which the franchisor, franchise broker, or any agent, representative, or employee thereof, knows or should know, in connection with the sale or proposed sale of a franchise, or (2) the payment by a prospective franchisee, about which the franchisor, franchise broker, or any agent, representative, or employee thereof, knows or should know, of any consideration in connection with the sale or proposed sale of a franchise.

(h) The term "fractional franchise" means any relationship, as denoted by paragraph (a) of this section, in which the person described therein as a franchisee, or any of the current directors or executive officers thereof, has been in the type of business represented by the franchise relationship for more than 2 years and the parties anticipated, or should have anticipated, at the time the agreement establishing the franchise relationship was reached, that the sales arising from the relationship would represent no more than 20 percent of the sales in dollar volume of the franchisee.

(i) The term "affiliated person" means a person (as defined in paragraph (b) of this section):

- (1) Which directly or indirectly controls, is controlled by, or is under common control with, a franchisor; or
- (2) Which directly or indirectly owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of a franchisor; or
- (3) Which has, in common with a franchisor, one or more partners, officers, directors, trustees, branch managers, or other persons occupying similar status or performing similar functions.

(j) The term "franchise broker" means any person other than a franchisor or a franchisee who sells, offers for sale, or arranges for the sale of a franchise.

(k) The term "sale of a franchise" includes a contract or agreement whereby a person obtains a franchise or interest in a franchise for value by purchase, license, or otherwise. This term shall not be deemed to include the renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business by the franchisee, unless the new contracts or agreements contain material changes from those in effect between the franchisor and franchisee prior thereto.

(l) A "cooperative association" is either (1) an association of producers of agricultural products authorized by section 1 of the Capper-Volstead Act, 7 U.S.C. 291; or (2) an organization operated on a cooperative basis by and for independent retailers which wholesales goods or furnishes services primarily to its member-retailers.

(m) The term "fiscal year" means the franchisor's fiscal year.

(n) The terms "material," "material fact," and "material change" shall include any fact, circumstance, or set of conditions which has a substantial likelihood of influencing a reasonable franchisee or a reasonable prospective franchisee in the making of a significant decision relating to a named franchise business or which has any significant financial impact on a franchisee or prospective franchisee.

(o) The term "personal meeting" means a face-to-face meeting between a franchisor or franchise broker (or any agent, representative, or employee thereof) and a prospective franchisee which is held for the purpose of discussing the sale or possible sale of a franchise.

16 CFR 436.3

If any provision of this part or its application to any person, act, or practice is held invalid, the remainder of the part or the application of its provisions to any person, act, or practice shall not be affected thereby.

NOTE 1: The Commission expresses no opinion as to the legality of any practice mentioned in this part. A provision for disclosure should not be construed as condonation or approval with respect to the matter required to be disclosed, nor as an indication of the Commission's intention not to enforce any applicable statute.

NOTE 2: By taking action in this area, the Federal Trade Commission does not intend to annul, alter, or affect, or exempt any person subject to the provisions of this part from complying with the laws or regulations of any State, municipality, or other local government with respect to franchising practices, except to the extent that those laws or regulations are inconsistent with any provision of this part, and then only to the extent of the inconsistency. For the purposes of this part, a law or regulation of any State, municipality, or other local government is not inconsistent with this part if the protection such law or regulation affords any prospective franchisee is equal to or greater than that provided by this part. Examples of provisions which provide protection equal to or greater than that provided by this part include laws or regulations which require more complete record keeping by the franchisor or the disclosure of more complete information to the franchisee.

NOTE 3: [As per § 436.1(a)(24) of this part]:

DISCLOSURE STATEMENT

Pursuant to 16 CFR 436.1 et seq., a Trade Regulation Rule of the Federal Trade Commission regarding Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, the following information is set forth on [name of franchisor] for your examination:

1. Identifying information as to franchisor.
2. Business experience of franchisor's directors and executive officers.
3. Business experience of the franchisor.
4. Litigation history.
5. Bankruptcy history.
6. Description of franchise.
7. Initial funds required to be paid by a franchisee.
8. Recurring funds required to be paid by a franchisee.
9. Affiliated persons the franchisee is required or advised to do business with by the franchisor.
10. Obligations to purchase.
11. Revenues received by the franchisor in consideration of purchases by a franchisee.
12. Financing arrangements.
13. Restriction of sales.
14. Personal participation required of the franchisee in the operation of the franchise.
15. Termination, cancellation, and renewal of the franchise.
16. Statistical information concerning the number of franchises (and company-owned outlets).
17. Site selection.
18. Training programs.
19. Public figure involvement in the franchise.
20. Financial information concerning the franchisor

SOURCE: 43 FR 59614, Dec. 21, 1978

AUTHORITY: 38 Stat. 717, as amended, 15 U.S.C. 41-58.

As required by a Federal District Court Order in the matter of Federal Trade Commission v. Manhattan Vending, LLC *et al.* (Civil Action # 023415), any Manhattan Vending employee or independent contractor who solicits business opportunity sales or speaks to prospective business opportunity purchasers is hereby advised of the following:

The Federal District Court has issued an Order in the above matter that prohibits Jack G. Schwartz and his employees and independent contractors, in connection with the advertising, promoting, offering for sale, or sale of any business venture from:

A. Falsely representing, expressly or by implication, either orally or in writing, any material fact, including but not limited to the following:

1. the income, profits, or sales volume likely to be achieved; and
2. that he will deliver the vending machines within the agreed upon time or allow purchasers to cancel their contracts; and

B. Violating or assisting others to violate any provision of the Franchise Rule,

16 C.F.R. Part 436, including but not limited to:

1. failing to provide any potential franchisee with a complete and accurate disclosure document within the times stated in the Franchise Rule, 16 C.F.R. § 436.1(a);
2. failing to provide any potential franchisee with an earnings claim document when any earnings claim is made, as required by the Franchise Rule, 16 C.F.R. § 436.1(b)-(e); and

3. failing to disclose, in immediate conjunction with any earnings claim, the material basis for the claim (or the lack of such basis) and a warning that the earnings claim is only an estimate, as required by the Franchise Rule, 16 C.F.R. § 436.1(e)(3)-(4).