

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, )  
 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 LIFESTYLE VENDING, INC., )  
 a New York corporation; )  
 )  
 MICHAEL EISENBERG, individually and )  
 as an officer of the corporation; and )  
 )  
 MARY ANN MCCULLOH, individually )  
 and as an officer of the corporation, )  
 )  
 Defendants. )

CV 06 6421  
 FILED  
 IN CLERK'S OFFICE  
 U.S. DISTRICT COURT E.D.N.Y  
 Civ. No. ★ DEC 04 2006 ★  
 LONG ISLAND OFFICE  
 SPATT, J.  
 BOYLE, M.

(S.F.)

**COMPLAINT FOR CIVIL PENALTIES, CONSUMER REDRESS,  
PERMANENT INJUNCTION, AND OTHER EQUITABLE RELIEF**

Plaintiff, the United States of America, acting upon notification and authorization to the Attorney General by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Section 16(a)(1) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 56(a)(1), for its complaint alleges:

1. Plaintiff brings this action under Sections 5(a), 5(m)(1)(A), 13(b), 16(a), and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), 56(a), and 57b, to secure civil penalties, a permanent injunction, and other equitable relief for defendants' violations of 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. Part 436, and Section 5(a) of the FTC Act, 15 U.S.C. § 45(a).

### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355, and 15 U.S.C. §§ 45(m)(1)(A), 53(b), 56(a), and 57b. This action arises under 15 U.S.C. § 45(a).

3. Venue in the United States District Court for the Eastern District of New York is proper under 28 U.S.C. §§ 1391(b)-(c) and 1395(a), and 15 U.S.C. § 53(b).

### **DEFENDANTS**

4. Defendant Lifestyle Vending, Inc. (“Lifestyle”) is a New York corporation with its principal place of business at 519-2 Acorn Street, Deer Park, NY 11729. Lifestyle promotes and sells vending machine business ventures. Lifestyle transacts or has transacted business in the Eastern District of New York.

5. Defendant Michael Eisenberg is the President of Lifestyle. 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 has transacted business in the Eastern District of New York.

6. Defendant Mary Ann McCulloh is the Vice President and Secretary of Lifestyle. At all times material to this Complaint, acting alone or in concert with others, she 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. She resides or has transacted business in the Eastern District of New York.

### **COMMERCE**

7. 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**

8. The defendants offer and sell vending machine business ventures to prospective purchasers. The defendants sell vending machines which dispense loose candy or soda and snacks. The defendants promote their business ventures through classified advertisements in newspapers. 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. For example, defendants' classified newspaper advertisements have stated:

**ALL CASH BUSINESS! Local candy vending route. \$50K/yr.  
Potential. 30 machines plus candy. \$5,995. Call Now!  
800-704-5414.**

9. In their advertisements, the defendants have failed to disclose additional information to prospective purchasers, including the number and percentage of prior purchasers known by the defendants to have achieved the same or better results.

10. Consumers who call Lifestyle's toll-free number are connected to the defendants or their employees or agents, who make representations about the earnings potential of the business venture. For example, the defendants or their employees or agents have represented that

defendants' business venture may generate revenues of approximately \$4,000, \$7,500, and \$15,000 per month with the purchase of 30, 50, and 100 machines, respectively.

11. The defendants failed to provide prospective business venture purchasers with an earnings claim document containing information substantiating their earnings claims, failed to have a reasonable basis for their earnings claims at the time they were made, and/or failed to disclose that materials, which constitute a reasonable basis for the claims, were available.

12. The defendants do not provide potential purchasers with a basic disclosure document.

### **THE FRANCHISE RULE**

13. 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).

14. 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.

15. The Franchise Rule also 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).

16. 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 I**

#### **Basic Disclosure Violations**

17. 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(a) of the FTC Act.

### **COUNT II**

#### **Earnings Disclosure Violations**

18. In connection with the offering of franchises, as “franchise” is defined in Section 436.2(a) of the Franchise Rule, the defendants violate Sections 436.1(b) - (c) of the Rule and Section 5(a), of the FTC Act by making earnings claims to prospective franchisees while, *inter alia*: (1) lacking a reasonable basis for each claim at the time it is made; (2) failing to disclose, in immediate conjunction with each earnings claim, and in a clear and conspicuous manner, that material which constitutes a reasonable basis for the claim is available to prospective franchisees;

and/or (3) failing to provide prospective franchisees with an earnings claim document, as prescribed by the Rule.

### **COUNT III**

#### **Advertising Disclosure Violations**

19. In connection with the offering of franchises, as “franchise” is defined in Section 436.2(a) of the Franchise Rule, the defendants violate Section 436.1(e) of the Rule and Section 5(a) of the FTC Act by making generally disseminated earnings claims without, *inter alia*, disclosing, in immediate conjunction with the claims, information required by the Franchise Rule, including the number and percentage of prior purchasers known by the defendants to have achieved the same or better results.

### **CONSUMER INJURY**

20. Consumers in the United States have suffered or will suffer substantial monetary loss as a result of the defendants’ violation of the Franchise Rule and FTC Act. Absent injunctive relief by this Court, defendants are likely to continue to injure consumers and harm the public interest in the offer and sale of franchises.

### **THIS COURT’S POWER TO GRANT RELIEF**

21. 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.

22. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), as modified by Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended, and as implemented by 16 C.F.R. § 1.98(d)(1997), authorizes this Court to award civil

penalties of not more than \$11,000 for each violation of the Franchise Rule occurring after November 20, 1996.

23. Section 19 of the FTC Act, 15 U.S.C. § 57b, authorizes this Court to grant such relief as this 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.

24. This Court, in the exercise of its equitable jurisdiction, may award ancillary relief to remedy injury caused by the defendants' violations of the Franchise Rule and the FTC Act.

#### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff requests that this Court, as authorized by Sections 5(a), 5(m)(1)(A), 13b, and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 45(m)(1)(A), 53(b), and 57b, and pursuant to its own equitable powers:

1. Enter judgment against the defendants and in favor of the plaintiff for the violation alleged in this complaint;
2. Enter a permanent injunction to prevent future violations of the FTC Act and the Franchise Rule by defendants;
3. Award plaintiff monetary civil penalties for every violation of the Franchise Rule;
4. Award such relief as this Court finds necessary to redress injury to consumers resulting from the defendants' violations of the Franchise Rule and the FTC Act, including, but not limited to, rescission of contracts, the refund of monies paid, and the disgorgement of ill-gotten gains; and

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

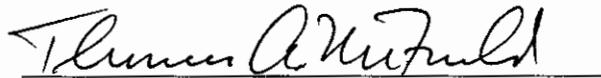
Dated: December 4, 2006 Respectfully submitted,

OF COUNSEL:  
BARBARA ANTHONY  
Director  
Northeast Region  
FEDERAL TRADE COMMISSION

FOR THE UNITED STATES OF AMERICA  
PETER D. KEISLER  
Assistant Attorney General  
Civil Division  
U.S. DEPARTMENT OF JUSTICE

Ann F. Weintraub  
Attorney  
Northeast Region  
Federal Trade Commission  
One Bowling Green, Suite 318  
New York, NY 10004  
PHONE: (212) 607-2815  
FAX: (212) 607-2822

Roslynn R. Mauskopf  
United States Attorney



Thomas A. McFarland  
Assistant U.S. Attorney for the  
Eastern District of New York  
610 Federal Plaza, 5<sup>th</sup> Floor  
Central Islip, NY 11722-4454  
PHONE: (631) 715-7863  
FAX:(631) 715-7920  
E-MAIL: thomas.mcfarland@usdoj.gov

EUGENE M. THIROLF  
Director  
Office of Consumer Litigation

*f*  AUSA  
J.P. Ellison  
Trial Attorney

Office of Consumer Litigation  
U.S. Department of Justice  
P.O. Box 386  
Washington, D.C. 20044  
PHONE: (202)353-2001  
FAX: (202) 514-8742  
E-MAIL: j.p.ellison@usdoj.gov