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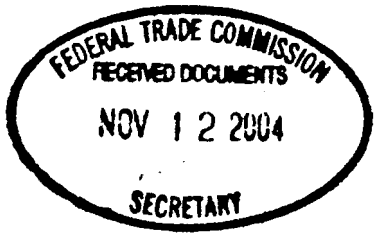

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IN RE FILE NO:

November 11, 2004

VIA FEDERAL EXPRESS

Office of the Secretary
Federal Trade Commission
Room H-159, Annex W
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

RE: Franchise Rule Staff Report (Proposed Amendments to Federal Trade Commission Franchise Trade Regulation Rule, 16 C.F.R. Part 436)

Dear Sir/Madam:

Due to time limitations, I write regarding one selected proposed revision to the Franchise Trade Regulation Rule, on behalf of my clients, including numerous franchisees, and franchisee association clients.

1. Proposed Section 436.9(B)(2)

The use of these clauses is of importance because prospective franchisees receive required Uniform Franchise Offering Circulars under the Rule with an appended proposed franchise agreement. Invariably, however, the prospective franchisee will subsequently sign a final franchise agreement containing an integration clause often including no representation and no reliance provisions. The Commission staff was accordingly asked to examine whether these contract provisions should be proscribed under the revised Rule.[1]

Regarding integration clauses, and related no representation and no reliance clauses, the proposed prohibitions are not sufficient. Integration clauses are provisions found in franchise agreements which typically state that the written agreement is the entire agreement of the parties with no other additional terms. Often an integration clause will also contain two additional

[1] The Staff Report contains comments on the limits of the notice of proposed rulemaking, which I will not address.

provisions which may be labeled no representation and no reliance clauses. These two latter contract provisions often state that no other representations were made to the prospect other than the written terms in the franchise agreement and that the prospect is relying on nothing other than the written provisions of the franchise agreement itself in entering the franchise agreement.

In studying these issues, the Commission Staff states that the Commission itself has long recognized that having truthful and accurate disclosures is "critical" to prospective franchisees. In addition the Commission has long disfavored waivers of its trade regulation rules. Thus contract integration clauses may not be used disclaim the statements made in the Uniform Franchise Offering Circular itself, as such conduct "would undermine the Rule's very purpose by signaling to prospective franchisees that they cannot trust or rely upon the disclosure document." We concur with this result. On the other hand, the Commission Staff expressed concern that integration clauses are commonly used in contracts and therefore noted that the proposed limits on the use of integration clauses are limited.

In the report to the Commission, staff specifically state that "a franchisor reasonably may seek to disclaim responsibility for unauthorized claims made by rogue sales persons. . ." Although this staff comment is part of a section entitled "third party statements" the provision is worrisome. The purpose of the FTC Franchise Rule is to provide material information in a truthful manner upon which a prospective franchisee may rely. This provision would, however, authorize franchisors to obtain the fruits of misconduct by its own salespersons. In other words, a franchisor who enters a franchise agreement due to a "rogue" salespersons earnings claims violations (whether outside of the Item 19 disclosure or simply false earnings claims), should not be able to profit from its salespersons' misconduct as against the franchisee.

Carefully crafted integration, no representation and no reliance clause might be used to insulate deception by "rogue" salespersons and others. A typical integration clause might also include the following:

> No employee or salesperson is authorized to make earnings claims or representations, and any such representations are unauthorized. Franchisee agrees to immediately report any such representations to franchisor and agrees not to rely upon any such representations.

The purpose of such clauses is to insulate the franchisor from liability for the acts of its own salespersons. To the contrary, however, a franchisor should remain liable for misconduct in the sales process, particularly by its own employees and agents.

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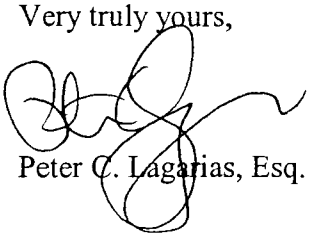
In conclusion, please consider the franchisor which includes the above contract clause that no employee is authorized to make earnings claims, but whose employees nonetheless make earnings claims sub rosa. (I have litigated and established such sub rosa earnings claims on multiple occasions). Such conduct clearly violates the letter and spirit of the Rule. See, FTC v. Minuteman Press, Bus. Fran. Guide (CCH) Para. 11,516 (E.D.N.Y. 1998), yet these types of no representation and no reliance clauses will be used by franchisors to argue that such conduct is lawful. Such use of no representation and no reliance in integration clauses is both deceptive and unfair and should be prohibited.

Very truly yours,



Peter C. Lagarias, Esq.

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