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Mr. Jeff Marsh
President, HealthyYOU Vending
1366 S. Legend Hills Drive
Clearfield, UT 84015

Re: Potential Business Opportunity Law Violations by Competitors

Dear Mr. Marsh:

You have brought certain sales practices you have indicated one or more of your competitors are using to my attention and asked whether these practices are lawful under federal and state business opportunity sales laws. For your information I not only have been practicing in the area of Franchise and Distribution Law for decades, but my first position as an attorney was with the Georgia State Law Department (Office of the Attorney General of Georgia) and while there, I spent considerable time enforcing Georgia's Business Opportunity Act.

Your inquiry indicated that one or more competitors are using practices which concern you, including:

1. Providing data showing a graph or chart indicating that 10 Machines, at \$10,000 per machine, could generate Yearly Revenue equal to \$100,000, and showing profit margins at 50%, yielding profit of \$50,000, and then showing resulting levels for 20, 30, 40 and 50 machines.
2. Providing an "ROI Estimating Form" and then providing the Average Daily Sales/Vends to plug into the chart.
3. Additionally, you indicated that their materials promise a "Lifetime Locating Program" which states or implies that machines will be relocated for free if the customer does not get 100 vends per week. "Minimum of 100 vends per week or we will find a new location FOR LIFE!"

The sale of vending machines for the purpose of starting a business on the part of a buyer, coupled with the offer to provide locations or locating services normally triggers the application of Business Opportunity laws if the purchase price of the equipment is over \$500 (the threshold amount varies by state and under federal law). In addition, it is my understanding that for one of more of your competitors, federal and/or state franchise laws may apply as well. The Federal Trade Commission's Business Opportunity Rule (the "Rule") can be found at 42 United States Code Section 437. It applies everywhere in the United States.

The Rule provides detailed requirements for sellers of business opportunities, at 42 U.S.C. Section 437.4(a), specifically stating that it is a Rule violation and also an unfair or deceptive act or practice in violation of Section 5 of the FTC Act in connection with the offer for sale, sale or promotion of a business opportunity to make any earnings claim to a prospective purchaser, unless the seller:

1. Has a reasonable basis for its claim at the time it was made;
2. Has in its possession written materials that substantiate its claim at the time made;
3. *Makes the substantiation available upon request of prospective purchasers and the FTC;*
4. Furnishes to the prospective purchaser an earnings claim statement entitled EARNINGS CLAIM STATEMENT REQUIRED BY LAW, and which complies with detailed and specific requirements for same.

For example, it would be unlawful for a company to provide an ROI Estimating Form and then state that the average daily sales or vends of their customers is 22 and this number should be entered on the form to find the average revenue – unless they provide an Earnings Claim. This Earnings Claim would need to state the number of vends achieved by all machines during the reporting period and the percentage of those machines that achieved the daily sales or vends of 22. They must also make this substantiation data available to any prospective purchaser who requests it.

The Rule, at Section 437.6(a), makes it a violation and an unfair or deceptive practice in violation of Section 5 of the FTC Act, for any seller to “disclaim, or require a prospective purchaser to waive reliance on, any statement made in any document or attachment that is required or permitted to be disclosed under this Rule” – in other words, a seller cannot ignore the Rule’s requirements outlined above and then attempt to avoid responsibility by using words which disclaim, such as “*This does not constitute an earnings claim” or “We cannot guarantee you will make the average number of vends”.

Analyzing the practices you described above, I believe that the FTC and a substantial number of state agencies empowered to enforce similar laws in their states would conclude that these practices are unlawful, both as a violation of the Rule, and as an unfair or deceptive practice in violation of Section 5 of the FTC Act, along with many state “Little FTC Acts.” Often, actions by state agencies precede action by the FTC. These state actions are typically a matter of public record and can sometimes be found on the Better Business Bureau report for a company. I do see that one of or more of your competitors has multiple consent orders and cease and desist orders for violation of business opportunity or franchise laws. Over my career I have seen many vending companies cease operations due to the consequences of violating business opportunity or franchise law. You are probably familiar with the case of the vending company, Antares Corporation, who agreed to pay \$1 Million in consumer redress to settle Federal Trade Commission charges of misrepresenting, among other things, the potential earnings of prospective distributors and the substance and success of their location assistance program.

I hope that the above is helpful in understanding the likely legality of your competitors' practices. Please feel free to call me with any questions that the above raises.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael S. Rosenthal".

Michael S. Rosenthal
For TAYLOR ENGLISH DUMA LLP