

ADMINISTRATIVE PROCEEDING
BEFORE THE
SECURITIES COMMISSIONER OF MARYLAND

IN THE MATTER OF:

*

*

GNC FRANCHISING, LLC,

*

Case No. 2005-0537

Respondents.

*

*

* * * * *

CONSENT ORDER

WHEREAS, the Securities Division of the Office of the Attorney General of Maryland (the "Division") initiated an investigation into the franchise-related activities of GNC Franchising, LLC ("GNC") under the authority granted under the Maryland Franchise Registration and Disclosure Law, MD. BUS. REG. CODE ANN. §14-210 et seq. (2004 Repl. Vol. and Supp. 2005) (the "Maryland Franchise Law"); and

WHEREAS, based on information presented by the Division, the Maryland Securities Commissioner (the "Commissioner") concluded that grounds exist to allege that GNC violated the provisions of the Maryland Franchise Law, in relation to the offer and sale of GNC franchises in Maryland; and

WHEREAS, the Commissioner and GNC have reached an agreement in this action whereby GNC, without admitting or denying any of the Commissioner's statement of facts or conclusions of law, except as to the Commissioner's jurisdiction in this proceeding, consents to the terms of this Consent Order; and

WHEREAS, Respondents may deny any statement of facts or conclusions of law of the Consent Order in any proceeding, litigation, or arbitration against the Respondents in which the

Commissioner is not a party; and

WHEREAS, the Commissioner has determined that it is in the public interest to issue this Consent Order;

NOW, THEREFORE, before the holding of a hearing in this matter, without trial or final adjudication of any issue of fact or law, and upon consent of the parties hereto;

IT IS HEREBY AGREED AND ORDERED:

I. JURISDICTION

1. The Commissioner has jurisdiction in this proceeding and over GNC pursuant to section 14-210 (a) of the Maryland Franchise Law.

2. In the event that judicial intervention in this matter is sought by any party, GNC consents to the jurisdiction of the Circuit Court for Baltimore City over any such proceeding and as to GNC.

II. PARTIES

3. Melanie Senter Lubin is the Securities Commissioner for the State of Maryland.

4. GNC is a Pennsylvania limited liability company with a principal office at 300 Sixth Avenue, Pittsburgh, PA 15222.

5. GNC offers franchises for the establishment and operation of a retail store that specializes in the sale of vitamins, minerals and other food supplements, natural cosmetics and other health management items.

III. STATEMENT OF FACTS

Background

6. At various times since 1998, GNC has been registered by the Division to offer and sell franchises in Maryland, or has been deemed exempt from registration.

7. Prior to 2000, GNC filed several applications with the Division to register the GNC franchise offering in Maryland.

8. Since 2000, GNC filed several notices with the Division for an exemption from registration as a “seasoned franchisor” under COMAR 02.02.08.10D.

9. GNC’s most recent filing with the Division was made on May 9, 2005, when GNC filed a notice for an exemption from registration.

10. On July 28, 2005, the Division sent GNC a letter stating that GNC’s exemption notice was deemed filed by the Division as of July 28, 2005 and was effective for a one year period.

UFOC Requirements to Disclose Litigation

11. Under Item 3 of the Uniform Franchise Offering Circular Guidelines (the “UFOC Guidelines”), adopted in the regulations promulgated under the Maryland Franchise Law at COMAR 02.02.08.04, a franchisor must disclose in its franchise disclosure document (“UFOC”), among other things, a description of all material civil actions filed against it alleging a violation of a franchise law, unfair or deceptive practice, or comparable allegations.

12. Item 3 requires that the franchisor disclose the names of the parties to the action, the forum, and the terms of settlement. Item 3 also requires that, if a franchisor resolves an otherwise discloseable civil action by settlement, all material terms of the settlement must be disclosed in its UFOC, whether or not the settlement agreement is confidential.

The Savin Litigation Disclosure

13. Since at least 1997 through 2005, in multiple filings with the Division, GNC included in its UFOC a description of a civil action (“the Savin Litigation”) filed in New Jersey state court against GNC by former franchisees Barbara E. Savin and Arnold Savin (the “Savin Plaintiffs”).

14. According to GNC’s UFOC, the Savin Litigation involved allegations by the Savin

Plaintiffs that GNC violated New York and New Jersey franchise laws, and made income misrepresentations and improper product shipments.

15. In GNC's UFOC Item 3, GNC described the resolution of the Savin Litigation as follows:

"In October 1996, we agreed with Plaintiffs that this matter would be mutually dismissed without payment to either party, and an appropriate dismissal with prejudice by stipulation was filed in the court on December 6, 1996."

16. In fact, GNC did pay the Savin Plaintiffs a sum of money as a condition of the dismissal of the Savin Litigation.

17. An October 30, 1996 Release and Confidentiality Agreement the Savin Plaintiffs entered into with GNC (the "Savin Release") states that the Savin Litigation was settled after GNC paid the Savin Plaintiffs the sum of \$325,000. Specifically, the Savin Release states in pertinent part as follows:

WHEREAS, the Savin Plaintiffs filed an action against [GNC] ... in several counts (the "Action") and [GNC] filed a counterclaim against some of the Savin Plaintiffs. The Savin Plaintiffs subsequently amended the complaint to include a count for defamation (the "Defamation Action.")

....

NOW THEREFORE, in consideration of the foregoing, intending to be legally bound hereby, the parties hereto agree as follows:

1. By agreement and stipulation of the parties, except for the Defamation Action, the parties to this Action shall stipulate to the Court that the Action to [sic] be dismissed with prejudice.

2. Upon dismissal of the Action with prejudice, [GNC] shall pay the sum on Three Hundred Twenty-Five Thousand Dollars (\$325,000) by corporate check made payable to the Savin Plaintiffs and their Attorney, Gerald A. Marks (the "Payment").

3. Upon receipt of the Payment, Plaintiffs shall dismiss with prejudice the Defamation Action.

18. Since 1997, GNC has offered and sold approximately 75 franchises in Maryland or

to Maryland franchisees using a UFOC that represented that GNC and the Savin Plaintiffs resolved the Savin Litigation without payment to either party.

Other Litigation Disclosure Issues

19. In UFOCs that GNC filed with the Division, GNC made additional errors involving its Item 3 litigation disclosure.

20. One such error involved GNC's disclosure of a civil action filed in Pennsylvania state court in 1999 by Frederick H. Miller, Rodger W. Miller and Bayhill Trading Corp. v. GNC Franchising, Inc. (the "Miller Litigation"), in which those plaintiffs alleged a number of claims, including violations of the Florida Franchise Law, and false statements involving the franchise.

21. In Item 3 of its UFOC filed with the Division, GNC stated in pertinent part that, as part of the settlement of the Miller Litigation, GNC "agreed to purchase the Millers' four stores for \$112,818, which represented fair market value of the stores less \$46,670.82, which is the amounts owed to GNC by franchisee and to rescind all outstanding development agreements."

22. In fact, contrary to what GNC represented in Item 3 of its UFOC regarding the Miller Litigation, as part of a confidential Settlement Agreement and Full and Final Release, GNC agreed to pay the plaintiffs in the Miller Litigation the sum of One Million One Hundred Fifty Thousand Dollars (\$1,150,000.00), not the \$112,818 described in GNC's UFOC.

23. In addition, GNC also failed to disclose in its UFOCs filed with the Division the amount of money it agreed to pay to resolve a civil action filed in 2000 in Texas state court against GNC and other defendants by Tom Levitz and Alco Nutrition, Inc. (the "Levitz Litigation").

24. In Item 3 of its UFOC, GNC left blank the amount of money it agreed to pay a plaintiff in the Levitz Litigation as part of the resolution of that action. In fact, as part of the

settlement of the Levitz Litigation, GNC agreed to purchase that plaintiff's GNC store for the sum of \$197,815.26.

III. CONCLUSIONS OF LAW

GNC acknowledges that the Commissioner makes the following conclusions of law:

25. GNC violated §§ 14-216(a) and 14-223 of the Maryland Franchise Law by offering and selling franchises in Maryland and to Maryland residents using a prospectus that failed to set forth material information in the application for registration, as required by regulation of the Commissioner.

IV. REMEDIAL MEASURES

26. GNC shall immediately and permanently cease and desist from the offer and sale of franchises in violation of the Maryland Franchise Law.

27. GNC shall pay the Division an administrative penalty in the amount of One Hundred Thousand Dollars (\$100,000).

28. GNC represents that it has developed and implemented new franchise law compliance procedures to ensure that it complies in the future with the disclosure provisions of the Maryland Franchise Law.

29. GNC acknowledges that this Consent Order is a discloseable order as described under §14-216(c)(9)(I)(4) of the Maryland Franchise Law.

V. CONSEQUENCES OF VIOLATING THIS CONSENT ORDER

30. If GNC fails to comply with any term of this Consent Order, the Division may bring administrative or judicial proceedings against it to enforce this Consent Order or to sanction it for violating an order of the Commissioner, and may take any other action authorized under the

Maryland Franchise Law or any other applicable law. In any such proceeding in which, after an opportunity for a hearing, the Commissioner or a court finds that GNC has violated this Consent Order, the Statement of Facts and the violations of the Maryland Franchise Law alleged in the Consent Order shall be deemed admitted and may be introduced into evidence against it.

VII. MODIFICATION OF CONSENT ORDER

31. The terms of this Consent Order may be modified only by a subsequent order issued by the Commissioner.

BY CONSENT:

GNC FRANCHISING, LLC

BY: Joseph M. Fortunato,
Chief Executive Officer

SO ORDERED:

MELANIE SENTER LUBIN
SECURITIES COMMISSIONER

DATE OF THIS ORDER:
