

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF AGRICULTURE AND)
CONSUMER SERVICES,)
)
Petitioner,)
)
vs.) Case No. 07-4120
)
AMERICAN CASH MACHINE, LLC,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On December 3, 2007, a formal administrative hearing in this case was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Eric H. Miller, Esquire
Department of Agriculture and
Consumer Services
2005 Apalachee Parkway
Tallahassee, Florida 32301

For Respondent: Gilbert B. Swarts, pro se
American Cash Machine, LLC
535 Twenty-Second Street South
St. Petersburg, Florida 33712

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty, if any, should be imposed.

PRELIMINARY STATEMENT

By letter dated July 16, 2007, the Department of Agriculture and Consumer Services (Petitioner) filed an Administrative Complaint against American Cash Machine, LLC (Respondent), alleging that Respondent failed to comply with requirements set forth in Subsections 559.803(11)(a) and (b) and 559.809(11), Florida Statutes (2005), related to the sale of "business opportunities." The Respondent disputed the allegations and filed a request for formal hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits 1 through 14 admitted into evidence. Gilbert B. Swarts, president/owner of the Respondent testified on behalf of the Respondent.

The Transcript of the hearing was filed on December 13, 2007. The Petitioner filed a Proposed Recommended Order on January 10, 2008. On January 14, 2008, the Petitioner forwarded to the Division of Administrative Hearings, a letter received by the Petitioner from Mr. Swarts on January 11. The letter has been treated as a Proposed Recommended Order.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a seller of business opportunities registered with the Petitioner, holding registration number 2000-054, and located at 3101 Twenty-Second Avenue South, St. Petersburg, Florida 33712.

2. The Respondent was the successor in interest to American Cash Machine, Inc., and is responsible for fulfilling the obligations of the previous company.

3. At all times material to this case, Gilbert B. Swarts was the president and chairman of the board of the Respondent.

4. On July 8, 2005, the Respondent entered into a contract with Bonnie Campbell as trustee of the Campbell Family Trust (purchaser) under which the purchaser agreed to purchase 36 "CardPayment" machines from the Respondent, and the Respondent agreed to place the machines in appropriate business locations on behalf of the purchaser. As required by the contract, the purchaser paid a total of \$135,000 by check to the Respondent.

5. At the time of the sale, the Respondent provided a disclosure form to the purchaser which stated that 200 "CardPayment Business Opportunities" had been sold by the Respondent to other purchasers by the end of 2005 and that 25 "Internet Kiosk Business Opportunity [sic]" had been sold by the Respondent to other purchasers by the end of 2002.

6. The disclosure form also stated that the Respondent would provide to the purchaser, the names, addresses, and telephone numbers of the ten purchasers located closest to the purchaser; however, the disclosure form did not include the information, and the Respondent did not otherwise provide the information to the purchaser.

7. The Respondent stocked the 36 CardPayment machines, but failed to acquire business locations for all of the machines.

8. The Respondent has asserted that after discussions with the purchaser, the parties agreed to "upgrade" the 36 CardPayment machines identified in the contract to 18 Internet Kiosk machines. The Respondent was subsequently unable to acquire business locations for all of the Internet Kiosk machines.

9. The Respondent has asserted that after discussions with the purchaser, the parties agreed to "upgrade" the 18 Internet Kiosk machines to 18 "Smart Terminal" machines.

10. The CardPayment machines, Internet Kiosk machines, and Smart Terminal machines are different types of machines, and each type has a usage different from the others.

11. The terms of the contract executed between the parties did not provide for the substitution of various machines upon failure by the Respondent to place the machines into operation. The contract required the Respondent to rebate a portion of the

sales price for each month during which each CardPayment machine was not placed for operation.

12. No contract for the purchase of either the Internet Kiosk or the Smart Terminal machines was executed by the parties.

13. The disclosure information provided by the Respondent to the purchaser related to the Internet Kiosk machines was insufficient to comply with the statutory requirements addressed herein.

14. No disclosure information related to the Smart Terminal machines was provided by the Respondent to the purchaser.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2007).

16. The Petitioner has the burden of establishing the allegations of the Administrative Complaint by clear and convincing evidence. Coke v. Department of Children & Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998); Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met.

17. Subsection 559.801(1)(a), Florida Statutes (2005), provides the following relevant definition:

"Business opportunity" means the sale or lease of any products, equipment, supplies, or services which are sold or leased to a purchaser to enable the purchaser to start a business for which the purchaser is required to pay an initial fee or sum of money which exceeds \$500 to the seller, and in which the seller represents:

1. That the seller or person or entity affiliated with or referred by the seller will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases, currency or card operated equipment, or other similar devices or currency-operated amusement machines or devices on premises neither owned nor leased by the purchaser or seller;

2. That the seller will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using in whole or in part the supplies, services, or chattels sold to the purchaser;

3. That the seller guarantees that the purchaser will derive income from the business opportunity which exceeds the price paid or rent charged for the business opportunity or that the seller will refund all or part of the price paid or rent charged for the business opportunity, or will repurchase any of the products, equipment, supplies, or chattels supplied by the seller, if the purchaser is unsatisfied with the business opportunity; or

4. That the seller will provide a sales program or marketing program that will enable the purchaser to derive income from the business opportunity, except that this paragraph does not apply to the sale of a

sales program or marketing program made in conjunction with the licensing of a trademark or service mark that is registered under the laws of any state or of the United States if the seller requires use of the trademark or service mark in the sales agreement.

For the purpose of subparagraph 1., the term "assist the purchaser in finding locations" means, but is not limited to, supplying the purchaser with names of locator companies, contracting with the purchaser to provide assistance or supply names, or collecting a fee on behalf of or for a locator company.

18. Section 559.803, Florida Statutes (2005), sets forth the requirement that a business opportunity seller provide a written disclosure form to the purchaser at least three days prior to execution of a contract or the seller's receipt of consideration by the purchaser, whichever occurs first, and identifies the information that must be included within the disclosure statement. Subsection 559.803(11), Florida Statutes (2005), requires that such information include the following:

(11)(a) The total number of persons who purchased the business opportunity being offered by the seller within the past 3 years.

(b) The names, addresses, and telephone numbers of the 10 persons who previously purchased the business opportunity from the seller and who are geographically closest to the potential purchaser.

19. The disclosure statement provided by the Respondent to the purchaser failed to disclose the total number of persons who

purchased within the preceding three years and stated only that 200 CardPayment "Business Opportunities" had been sold by the end of 2005 and that 25 "Internet Kiosk Business Opportunity [sic]" had been sold by the end of 2002. There was no disclosure statement provided in relation to the Smart Terminal substitution.

20. The disclosure statement provided by the Respondent to the purchaser failed to disclose information related to the ten previous purchasers geographically located closest to the potential purchaser, for any of the machines sold to the purchaser by the Respondent, and the information was not otherwise provided to the purchaser.

21. Subsection 559.809(11), Florida Statutes (2005), prohibits a seller of business opportunities from failing to provide a written contract to a purchaser. The Respondent failed to provide a written contract related to the "upgrade" from the CardPayment to the Internet Kiosk machines. The Respondent failed to provide a written contract related to the "upgrade" from the Internet Kiosk to the Smart Terminal machines.

22. The Respondent appears to have treated the sale of the CardPayment machines as one under which the equipment being sold was interchangeable with other "Business Opportunities" offered by the Respondent. Nothing in the Act provides for the

substitution of equipment sold as part of a Business Opportunity, and nothing in the sales contract provided for such an exchange.

23. Subsection 559.813(2)(a), Florida Statutes (2005), sets forth the remedies for violations of the Act and provides in relevant part as follows:

(2)(a) The department may enter an order imposing one or more of the penalties set forth in paragraph (b) if the department finds that a seller or any of the seller's principal officers or agents:

1. Violated or is operating in violation of any of the provisions of this part or of the rules adopted or orders issued thereunder;
2. Made a material false statement in any application, document, or record required to be submitted or retained under this part;
3. Refused or failed, after notice, to produce any document or record or disclose any information required to be produced or disclosed under this part or the rules of the department;
4. Made a material false statement in response to any request or investigation by the department, the Department of Legal Affairs, or the state attorney; or
5. Has intentionally defrauded the public through dishonest or deceptive means.

(b) Upon a finding as set forth in paragraph (a), the department may enter an order doing one or more of the following:

1. Issuing a notice of noncompliance pursuant to s. 120.695.

2. Imposing an administrative fine not to exceed \$5,000 per violation for each act which constitutes a violation of this part or a rule or order.

3. Directing that the seller or its principal officers or agents cease and desist specified activities.

4. Refusing to issue or revoking or suspending an advertisement identification number.

5. Placing the registrant on probation for a period of time, subject to such conditions as the department may specify.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Agriculture and Consumer Services enter a final order finding that the Respondent has violated Subsections 559.803(11)(a) and (b) and 559.809(11), Florida Statutes (2005); imposing an administrative fine of \$10,000; and placing the Respondent on probation for a period of three years subject to such conditions as the Department deems appropriate.

DONE AND ENTERED this 8th day of February, 2008, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of February, 2008.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.