

**North American Securities Administrators Association, Inc. (NASAA)**  
**Corporation Finance Section/ Franchise and Business Opportunities Project Group**  
**750 First Street, N.E., Suite 1140**  
**Washington, D.C. 20002**  
**Attn. Dale Cantone CC: Andrea Seidt**

**December 21, 2021**

**Re: Request for Public Comment on NASAA's Proposed SOP on Questionnaires & Acknowledgements in FDDs**

Dear Security Administrators of NASAA:

I greatly appreciate the invitation to comment on NASAA's proposed statement of policy ("SOP") regarding franchisors' use of questionnaires and acknowledgements. I hope that this is the first of many such inquiries and debates regarding the growing power imbalance and circumvention of federal and state laws and policies intended to protect vulnerable, trusting investors in franchise opportunities.

My name is Sean Kelly. I am an investigative journalist, fair franchising advocate and publisher of franchise industry watchdog discussion site UnhappyFranchisee.Com for 15 years. I have 35 years of experience in the franchise industry as a consultant, franchisor executive, franchise marketer, columnist, expert witness.... Nearly every role except franchise salesman or franchisee.

My reporting and franchise advocacy efforts have resulted in numerous state investigations and enforcement orders, federal investigations, a Grand Jury indictment and Department of Justice charges for fraud, wire fraud, conspiracy, and tax evasion scheduled to be tried in federal court next month.

While there are many good reasons to support the excellent S.O.P. under consideration, I will offer one specific to my franchise marketing experience and expertise:

**Prospective franchisees, especially at the time of signing as franchise agreement, do not have the requisite skill, experience, perspective, information or ability to answer these questions accurately and factually.**

**Prospective franchisees signing documents declaring that they were not misled or deceived speaks more to the skill of their deceivers, accomplices, service providers & apologists than it does toward the absence of fraud or misconduct.**

In past decades, it has become increasingly apparent to franchise marketers and sellers that the federal marshall (FTC) has left the territory indefinitely, and there's no sheriff in the town

of Franchiseville to enforce the “requirements” of The Franchise Rule nor its original intent. I have found that regulators in only a handful of states (such as Maryland, Virginia, California & Washington) are empowered to act on franchise matters... and their power is woefully limited. That clever franchisor attorneys have devised loopholes like these to prevent legitimate instances of fraud from reaching a judge or jury and anti-waiver prohibitions from being enforced earns these attorneys high fees and awards, undermine our system of justice and encourage fraudsters to *keep on frauding*.

## **How We Clever Marketers Use the “Trojan Earnings Claim”**

The FTC Franchise Rule allows franchisors to make earnings claims or Financial Performance Representations (*FPRs*) as long as they 1) can provide a reasonable basis for these claims, and 2) disclose these claims in the Item 19 section of their Franchise Disclosure Document (FDD).

These restrictions are fine for franchisors with solid, consistent sales, profitability and/or unit economics, but *are hugely and unfairly inconvenient for the many franchise sellers peddling broken, flawed, outdated, unviable, unprofitable and overly fee-burdened but otherwise saleable brands & concepts*. Franchise brokers have to eat, too. *Those leased BMWs and Mercedes don't pay for themselves!*

Fortunately for them, there is a cottage industry of IFA-member service providers who gladly help disadvantaged franchise sellers gain the appearance of credibility they haven't earned and sidestep those pesky franchise protections. Using the documented example of PIRTEK USA and 1851 Magazine, it works like this:

- 1) PIRTEK USA pays PR firm & propagandist No Limit PR to interview & promote the success & sales of their franchisee Jim Lager
- 2) No Limit PR propagandist Nick Powills writes the success story of Jim Lager, including his 1<sup>st</sup> & 2<sup>nd</sup> year sales of \$1M and \$2M respectfully. Powills publishes the story in his own publication, 1851 Magazine, which looks just like part of the legitimate business press of days gone by. There is no identification of the story as a paid advertorial or that the FDD states PIRTEK USA does not furnish FPRs.
- 3) The article & its illegal earnings claim is promoted, linked to, reprinted & included in PIRTEK USA's press and franchise sales packages as if it's a 3<sup>rd</sup> party news story. The page is optimized in Google for search terms used by prospective franchisees performing their due diligence. For 7 years, franchise prospects are fed the impression that new franchisees can achieve sales of #1M - 2M in their first years.

The truth, according to company disclosures disclosed later, is that the average PIRTEK USA franchisee generates sale roughly half that amount. Those that closed aren't included in that average.

## **If Prospective Franchisees Were Asked If They Had Been Given Sales Numbers by PIRTEK USA During that Period\*, They Would Incorrectly Answer “No.”**

Isn't it a bit ludicrous for opponents of the proposed S.O.P. to argue that fraud victims have the ability to assess whether they have been defrauded while they are still being defrauded?

In the case of PIRTEK USA, it's likely that franchisees would simply remember reading the sales numbers from a 3<sup>rd</sup> party publication, never suspecting it was planted by a franchisor in contradiction of the representations in their FDD.

The “Trojan Earnings Claim,” is not new, and the PIRTEK example is neither an isolated nor extreme example. It is tolerated by the International Franchise Association (IFA) and practiced by some of its most prominent franchisor and vendor members.

*\* Hypothetically. I don't know whether PIRTEK USA uses such questionnaires or not*

## **For \$5,000, Franchisors Could (Can?) Publish Trojan Earnings Claims in a Book Published by an “Expert” Author**

If they were *questionnaired*, prospective franchisees who had read any of the two editions or multiple offshoot editions of “12 Amazing Franchise Opportunities” would believe they had read factual information, praise and earnings information provided by 3<sup>rd</sup> party, impartial franchise expert and “Bestselling Author” Dr. John Hayes.

In fact, our research indicates that franchisors featured in the heavily promoted books secretly paid \$5,000 to Hayes and BizCom publishing, and were allowed to write & provide their own chapters under Hayes' name. A quick review indicates these Trojan Earnings claims readers would not suspect came from the franchisors:

### **Dental Fix RX:**

*Dental Fix's Scott Mortier estimates a franchisee can charge between \$150 and \$200 an hour and see up to 5 dental offices a day....*

*According to Dental Fix's CEO David Lopez, the sky is the limit. The potential for Dental Fix is endless...*

Dental Fix RX – which has since ceased franchising – also planted that earnings information in multiple publications – but not in its FDD.

### **LIME PAINTING:**

John Hayes facilitated earnings claims in his book and on video before Lime Painting had even completed its FDD.

**“First year in Denver we did about \$600,000 in sales. Second year we did over a mil. 3rd year we did upwards of \$1.8 Mil or so. And this year we'll be well over a couple mil.”**

## Franchise Business Review (FBR) Provides Trojan Earnings Claims, Questionable Awards & Suspect Surveys

Our reporting of *You Move Me's* Trojan Earnings claims and deceptive case study prompted investigations and enforcement order by the state regulators in California and Washington.

Franchise Business Review, and several other 3rd party publications, promoted the company's story that Marine veteran Andrew Wilson achieved sales of \$1.3M and nearly 3K moves in his first year as a franchisee. Not only was this an illegal Trojan earnings claim planted by the franchisor, Wilson was an experienced mover whose established company was the prototype for the franchise chain.

For More Examples and Documentation, See [The "Trojan Earnings Claim" Deceives Franchisees & Courts at https://www.unhappyfranchisee.com/trojan-earnings-claim/](https://www.unhappyfranchisee.com/trojan-earnings-claim/)

## Thanks NASAA For Protecting Franchisee Investors & Giving Them a Voice

Thank you, NASAA members, for your efforts to protect franchisees and other investors from fraud.

I hope legitimate franchisors come to realize that they, too, are victimized by the bad actors who compete unfairly and rob them of franchise prospects that could have succeeded with a legitimate franchise company.

I also hope taxpayers come to realize that your efforts protect their tax dollars, which currently are used to repay defaulted SBA loans to banks and untrustworthy franchisors.

### A Reluctant Farewell to Retired Public Servant Dale Cantone

Finally, I reluctantly must say thank you to Dale Cantone, and wish him a happy and well-deserved retirement. The franchise industry may be losing one of the most honest and dedicated advocates of fair franchising and ethical business practices.

With Mr. Cantone retiring, the rest of us who truly love franchising and still believe in what it can be ***will have to really step up our games in 2022 and beyond!***

Sean Kelly

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## **Documentation, Further Reading**

Franchise Discussion, Documents, Links: NASAA Proposed S.O.P.

<https://www.unhappyfranchisee.com/nasaa-townhall/>

The “Trojan Earnings Claim” Deceives Franchisees & Courts

<https://www.unhappyfranchisee.com/trojan-earnings-claim/>

Dr. John Hayes’ Franchise Fraud School

<https://www.unhappyfranchisee.com/john-hayes-franchise-fraud/>

Does U.S. Army Veteran Jim Lager Recommend the PIRTEK Franchise?

<https://www.unhappyfranchisee.com/jim-lager-pirtek-franchise/>

DENTAL FIX RX Franchise Complaints [UPDATED]

<https://www.unhappyfranchisee.com/dental-fix-rx-franchise-complaints/>

FRANCHISE BUSINESS REVIEW Promotes Illegal Earnings Claims Disavowed by Client

<https://www.unhappyfranchisee.com/franchise-business-review-promotes-illegal-earnings-claims-disavowed-client/>

YOU MOVE ME Franchise Brian Scudamore Making Illegal Earnings Claims?

[unhappyfranchisee.com/you-move-me-franchise-illegal-earnings-claims/](https://www.unhappyfranchisee.com/you-move-me-franchise-illegal-earnings-claims/)

**WE STOPPED A SCAM:**

NY Bagel Scam Joe Smith Federal Fraud Trial to Begin

<https://www.unhappyfranchisee.com/ny-bagel-scam-joe-smith-trial/>

NY Bagel Franchise Scam Links & Complaint Timeline

<https://www.unhappyfranchisee.com/ny-bagel-franchise-scam-links-timeline/>