

HYPOTHETICAL

Analysis Guide for FTC Rule Franchise Elements: Trademark Element; Substantial Control or Assistance Element; Fee Element

Company (“Gekko Medical Co”) has come for legal consultation relating to the distribution and sale of a new medical device. They have developed a non-invasive medical device that recognizes blood issues, disorders and diseases relating to the use of drugs or alcohol, sugar, and can measure types and percentages of certain blood cells and other similar blood analysis. The device has received a patent and approval from the FDA as a medical device for over-the-counter sales. No prescription is necessary. The Company claims the device to be 99.9% accurate. The Company also has a federally registered trademark and logo. The name of the device is the “**Magic Miracle®**.” The Company will provide a warranty on the device.

The Company's market penetration and distribution alternatives include: the creation of a sales force of either employees or independent contractors, on-line sales, distributions through major pharmaceutical distribution networks, and/or small independent distributors that may have a number of products or only a few products. After an analysis of the various distribution methods and available markets, and the capital resources required to penetrate these markets, the Company has determined that it does not have sufficient capital to launch its Magic Miracle® using traditional wholesale distribution networks. They have opted instead to go through smaller independent wholesale distributors (“Distributors”).

The Company proposes the following distribution program and has asked for your advice. The Distributors will have the right to sell the devices to the pharmaceutical industry. There will be no upfront fee payable to the Company, nor will there be an on-going royalty. The entity name of the Distributor must be unique and may not include the Magic Miracle® name. Furthermore, the entity must do business under its own name. The Distributor cannot use the trademark or logo to identify the Distributor company. However, the Distributor will be allowed to use the trademark and logo in its marketing and advertising campaigns, and on its letterhead and signs so long as it identifies the Distributor as a "a licensed Distributor of the Magic Miracle®." Further, the Company offers only limited operating assistance to the Distributor.

The location of the Distributor does not need to be approved and there are no décor, uniforms, or other requirements. However, the Company would like the Distributor's salesman to display its logo on their shirt sleeve for brand recognition purposes. Strict policies set by the Company must be followed by all salesmen and the Distributors to assure their adherence to Federal laws protecting such things as gay rights and sexual harassment. There are no other sales protocols established by the Company. The hours of operation are determined by the Distributor. The Company will assist with joint system wide advertising and marketing campaigns. The Company will provide sales training for all sales people at the request of the Distributor and will provide a sales training manual.

The Company will also provide management and marketing advice upon the request of Distributor for a set fee. To maintain its distributorship, the Distributor must purchase a minimum number of Magic Miracle® devices each year. Distributor may sell other products and Distributors can

advertise on their own without Company approval. The Company will purchase the Magic Miracle® devices for distribution to pharmaceutical and retail stores with pharmacies. There will be suggested retail prices. The Distributor may set its own prices but may not advertise the non-conforming price of the device outside of its premises and its current customers of record. Distributors are also required to use the Company's logo in all social media platforms related to the device.

The Distributor will be required to make and pay for an initial order of the device for \$10,000 with minimum purchase requirements throughout the year. The mark-up on the device is more than 100%, but there are no higher or lower mark-ups to the Distributor. The Company will provide a three-day mandatory training program at a cost of \$2,500 with suggestions on how to market the product, how the product works, and a few other operational concepts and suggestions.

There are no territorial restrictions, but the Distributor is restricted from selling the device to businesses that do not have a dedicated pharmacy, such as grocery stores and standalone pharmacies. The Company reserves the right to market the device to medical doctors and medical clinics and on-line, but not to the pharmaceutical industry. The Distributors may not independently sell the Magic Miracle® device on-line outside of the pharmaceutical industry and must participate with the Company in all on-line marketing and other marketing programs. The Distributor must share in the cost of these on-line marketing programs and will also share in the revenues from sales to their existing customers.

Is the foregoing a franchise under the FTC Rule? Is it a franchise under various state laws?

Is the foregoing a business opportunity under various state laws?