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9 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT  
10 OF THE STATE OF CALIFORNIA

11 In the Matter of ) FILE NO.: 993-6326  
12 )  
13 THE COMMISSIONER ) FIRST AMENDED STATEMENT OF ISSUES  
14 OF BUSINESS OVERSIGHT OF ) IN SUPPORT OF STOP ORDER AND STOP  
THE STATE OF CALIFORNIA, ) ORDER DENYING EFFECTIVENESS OF  
15 Complainant, ) FRANCHISE REGISTRATION APPLICATION  
16 v. ) (CORPORATIONS CODE SECTION 31115)  
17 )  
18 FRESH HEALTHY VENDING, LLC, )  
Respondent. )  
19 )

20  
21 Jan Lynn Owen, the Commissioner of Business Oversight of the State of California  
22 (“Commissioner”), finds the following:

23 I.  
24 STATEMENT OF FACTS

25 1. Fresh Healthy Vending, LLC (“FHV”) is a California limited liability company formed  
26 February 8, 2010, with a principal place of business at 9605 Scranton Road, Suite 350, San Diego,  
27 California 92121. FHV engages in the business of offering and selling franchises under the brand  
28 name of “Fresh Healthy Vending.”

1 2. On March 18, 2013, The Department of Business Oversight (“Department”) and FHV entered  
2 into a settlement agreement whereby FHV agreed to terms and conditions of the following: a  
3 Statement in Support of Order and Order Revoking Effectiveness of Franchise Registration; a  
4 Statement in Support of Order and Order Denying Effectiveness of Franchise Registration  
5 Application; a Desist and Refrain Order; and Ancillary Relief including Rescission and Restitution.  
6 This enforcement action by the Department was based on violations of Corporations Code sections  
7 31200 and 31123. This action revoked the registration of FHV filed on April 26, 2010 and effective  
8 through April 20, 2011; revoked the registration of FHV filed on March 25, 2011 and effective  
9 through April 20, 2012; and denied the franchise renewal application of FHV filed on April 20, 2012,  
10 as amended on June 27, 2012.

11 3. On September 16, 2013, the Department discovered FHV offered and sold at least three  
12 franchises during 2012 at a time when FHV was not registered in California to offer and sell  
13 franchises. Specifically, FHV offered and sold an unregistered franchise to the following individuals:

14 ND

15 FHV provided a Uniform Franchise Disclosure Document to ND on or about September 18,  
16 2012. ND executed the franchise agreement with FHV on or about October 24, 2012, and paid  
17 franchise fees on or about October 24, 2012.

18 JG

19 FHV provided a Uniform Franchise Disclosure Document to JG on or about August 6, 2012.  
20 JG executed the franchise agreement with FHV on or about August 29, 2012, and paid franchise fees  
21 on or about August 29, 2012.

22 TR

23 FHV provided a Uniform Franchise Disclosure Document to TR on or about August 10, 2012.  
24 TR executed the franchise agreement with FHV on or about August 30, 2012, and paid franchise fees  
25 on or about August 30, 2012.

26 FHV offered rescission and restitution to all three individuals on or about the following dates:  
27 to ND on July 15, 2013, to JG on July 10, 2013, and to TR on May 17, 2013. JG and TR accepted the  
28 rescission and restitution offer of FHV, but ND did not.

1 4. In addition to these three unregistered offers and sales during 2012, the current Chief  
2 Executive Officer of FHV, Alex Kennedy, also published an advertisement soliciting offers to buy,  
3 and otherwise offering franchises in Fresno, California on or about September 17, 2013. This offer  
4 was sent by electronic mail and received by various individuals including one individual who  
5 complained to the Department about this unregistered offer.

6 5. On October 3, 2013, FHV filed another registration application which has not yet become  
7 effective, and is pending with the Department. The application contains a Uniform Franchise  
8 Disclosure Document. The Uniform Disclosure Document describes Nicholas Yates as the Vice  
9 President of Corporate Operations for FHV International, and sole owner of FHV Holdings (the  
10 controlling shareholder of FHV International), having practical control over all the activities of FHV  
11 Holdings, FHV International, FHV Acquisitions, and FHV. In that role, he serves as an advisor to  
12 FHV's Chief Executive Officer, providing advice on marketing, and general and industry knowledge,  
13 as well as administrative back-up and guidance to company staff, among other things.

14 6. The Uniform Franchise Disclosure Document (filed on October 3, 2013) also discloses the  
15 following litigation as "currently-effective injunctive orders" involving Nicholas Yates:  
16 *In Re: California Corporations Commissioner vs. Fresh Healthy Vending, LLC, California*  
17 *Department of Corporations, File No. 993-6326, Order entered March 18, 2013* (applicant failed to  
18 disclose its parent, predecessor or affiliates, failed to disclose that Nicholas Yates was a principal  
19 with management responsibility, and failed to disclose that Nicholas Yates has a litigation history  
20 involving fraud and deceptive practices as well as bankruptcy history); *In Re: Violation of the*  
21 *Washington Investment Protection Act, Washington Department of Financial Institutions, Order S-*  
22 *11-0712-12-CO01 as of May 24, 2012* (applicant made inaccurate and incomplete statements in  
23 franchise disclosure documents, failed to disclose that Nicholas Yates was a principal with  
24 management responsibility, and failed to disclose the litigation history of Nicholas Yates); *In Re:*  
25 *Violation of the Washington Business Opportunity Fraud Act, Washington Department of Financial*  
26 *Institutions, Order S-12-0911-12-CO01 as of May 30, 2012* (Nicholas Yates offered and sold business  
27 opportunities in the State of Washington without a registered disclosure document and without  
28 providing a disclosure document to purchasers); and *Australian Competition and Consumer*

1 *Commission vs. Global Prepaid Communications Pty Ltd., In Touch Networks Pty Ltd., et al.*, Case  
2 No. NSD 328 of 2003, Federal Court of Australia, New South Wales District Registry filed June 30,  
3 2003 (Nicholas Yates engaged in misleading and deceptive conduct in the operation of business that  
4 sold pre-paid telephone cards).

5 7. Nicholas Yates continues to employ a management team at FHV that has failed to exercise  
6 due diligence to determine whether FHV is in compliance with the franchise registration requirements  
7 of California law. With respect to the three unregistered offers and sales during 2012, the following  
8 managers did not follow-up with then-Chief Executive Officer Daniel Negroni, to determine whether  
9 FHV was in compliance with the registration requirements of California law: Nicholas Yates, Alex  
10 Kennedy, and Maria Truong. Moreover, the current Chief Executive Officer, Alex Kennedy, failed to  
11 exercise due diligence when she authorized the unregistered offering by FHV in September 2013.

## 12 II.

### 13 **GROUNDS FOR ISSUING STOP ORDER**

#### 14 **A. Corporations Code Section 31115(a) – Unregistered Offers and Sales**

15 8. Corporations Code section 31115 authorizes the Commissioner to issue a stop order denying  
16 the effectiveness of any registration if the Commissioner finds that there has been a failure to comply  
17 with any of the provisions of this law or the rules of the Commissioner pertaining thereto.

18 Corporations Code section 31110 makes it unlawful for any person to offer or sell any franchise in  
19 this state unless the offer of the franchise has been registered, or is exempt. As described above, FHV  
20 offered and sold three franchises during 2012 to ND, JG and TR, and offered a franchise during  
21 September 2013. These offers or sales were not registered with the Commissioner as required by  
22 section 31110. By reason of the foregoing, FHV has engaged in the offer and sale of a franchise in  
23 this state that was subject to registration under the Franchise Investment Law without the offer first  
24 being registered, in violation of California Corporations Code section 31110. Therefore, grounds  
25 exist under section 31115 for a stop order.

#### 26 **B. Corporations Code section 31115(d)(4) – Management Risk**

27 9. Corporations Code section 31115(d)(4) authorizes the Commissioner to issue a stop order  
28 denying the effectiveness of any registration if the Commissioner finds the following: 1) that any

1 person identified in the application is subject to any currently effective injunctive or restrictive order  
2 relating to business activity as a result of an action brought by any public agency or department, and  
3 2) the involvement of that person in the sale or management of the franchise creates an unreasonable  
4 risk to prospective franchisees. As part of the FHV application, the Uniform Franchise Disclosure  
5 Document identifies Nicholas Yates as subject to four separate actions by public agencies or  
6 departments. Furthermore, Nicholas Yates, in having practical control over all of FHV's activities,  
7 has continued to employ a management team that has failed to exercise due diligence in determining  
8 whether FHV meets the franchise registration requirements. Accordingly, the involvement of  
9 Nicholas Yates in the management and control of FHV exposes prospective franchisees to  
10 unreasonable risk. For these reasons, grounds exist for a stop order.

11 **III.**

12 **STOP ORDER DENYING EFFECTIVENESS OF FRANCHISE REGISTRATION**

13 10. Pursuant to Corporations Code section 31115, and based on the foregoing facts, the franchise  
14 registration application of Fresh Healthy Vending, LLC, filed on October 3, 2013, is hereby denied.  
15 This order is necessary, in the public interest, for the protection of investors, and consistent with the  
16 purposes, policies, and provisions of the California Franchise Investment Law. This order shall  
17 remain in full force and effect until February 28, 2016, or until further order of the Commissioner.  
18

19 Dated: April 2, 2014

20 Sacramento, CA

JAN LYNN OWEN  
Commissioner of Business Oversight

21  
22  
23 By \_\_\_\_\_  
24 MARY ANN SMITH  
25 Deputy Commissioner  
26 Enforcement Division  
27  
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