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7 Attorneys for Complainant

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) STOP ORDER AND CITATION INCLUDING
14 OF BUSINESS OVERSIGHT OF) THE FOLLOWING:
THE STATE OF CALIFORNIA,)
15 Complainant,) DESIST AND REFRAIN ORDER;
16 v.) ADMINISTRATIVE PENALTIES; AND
17 FRESH HEALTHY VENDING, LLC,) ANCILLARY RELIEF AND COSTS
18 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 Chief Executive
2 Officer of FHV, Alex Kennedy, on behalf of FHV, also published an advertisement soliciting offers
3 to buy, and otherwise offering franchises in Fresno, California on or about September 17, 2013. This
4 offer 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. On June 9, 2014, the Chief Executive Officer, Alex Kennedy, on behalf of FHV, entered into
6 a Consent Order with the State of Washington, Department of Financial Institutions, *Order No. S-13-*
7 *1304-14-C00*, based on unregistered offers and sales of franchises and misrepresentations in the offer
8 and sale of franchises. This consent order was executed after the Washington Department of Financial
9 Institutions issued a Statement of Charges and Notice of Intent to Enter Order to Cease and Desist,
10 *Order S-13-1304-14-SC01*, on February 11, 2014.

11 8. Nicholas Yates employed a management team at FHV that failed to exercise due diligence to
12 determine whether FHV is in compliance with the franchise registration requirements of state law.
13 With respect to the three unregistered offers and sales during 2012, the following managers did not
14 follow-up with then-Chief Executive Officer Daniel Negroni, to determine whether FHV was in
15 compliance with the registration requirements of California law: Nicholas Yates, Alex Kennedy, and
16 Maria Truong. Moreover, the Chief Executive Officer, Alex Kennedy, failed to exercise due
17 diligence when she authorized the unregistered offering by FHV in September 2013, and the offers
18 and sales of franchises in violation of Washington state law, as described above.

19 9. On February 27, 2014, the Department issued a stop order to deny the effectiveness of
20 franchise registration in California. Despite that order, FHV continued to offer and sell franchises to
21 franchisees in other states without fully disclosing material facts. Specifically, FHV provided to
22 franchisees its 2013 Uniform Franchise Disclosure Document that did not disclose the following: the
23 February 27, 2014 (as amended April 2, 2014) stop order of the Department; and the February 11,
24 2014 Statement of Charges and Notice of Intent to Enter Order to Cease and Desist as issued by the
25 Washington Department of Financial Institutions. That deficient disclosure document was provided
26 to the following persons in the offer and sale of franchises on or about the following dates:

27 The H's

28 FHV made an offer on February 18, 2014, and a sale on March 7, 2014.

1 The P's
2 FHV made an offer on March 4, 2014, and a sale on March 20, 2014.

3 L and O
4 FHV made an offer on March 3, 2014, and a sale on March 24, 2014.

5 JB
6 FHV made an offer on March 6, 2014, and a sale on April 1, 2014

7 MR
8 FHV made an offer on March 11, 2014, and a sale on March 26, 2014.

9 HD
10 FHV made an offer on March 17, 2014, and a sale on March 28, 2014.

11 The H's
12 FHV made an offer on March 18, 2014, and a sale on April 29, 2014.

13 RR
14 FHV made an offer on March 19, 2014, and a sale on April 29, 2014.

15 The B's and L's
16 FHV made an offer on March 21, 2014, and a sale on May 28, 2014.

17 JS
18 FHV made an offer on March 26, 2014, and a sale on April 18, 2014.

19 SN
20 FHV made an offer on April 7, 2014, and a sale on May 22, 2014.

21 R and L
22 FHV made an offer on April 9, 2014, and a sale on May 30, 2014.

23 MF
24 FHV made an offer on April 24, 2014, and a sale on May 14, 2014.

25 AM
26 FHV made an offer on April 25, 2014, and a sale on May 15, 2014.

27 The F's
28 FHV made an offer on May 7, 2014 and a sale on May 23, 2014

II.**STOP ORDER**

10. Corporations Code section 31115, subdivision (a), authorizes the Commissioner to issue a stop order denying the effectiveness of any registration if the Commissioner finds that there has been a failure to comply with any of the provisions of this law or the rules of the Commissioner pertaining thereto. Corporations Code section 31110 makes it unlawful for any person to offer or sell any franchise in this state unless the offer of the franchise has been registered, or is exempt. As described above, FHV offered and sold three franchises during 2012 to ND, JG and TR, and offered a franchise during September 2013. These offers or sales were not registered with the Commissioner as required by section 31110. By reason of the foregoing, FHV has engaged in the offer and sale of a franchise in this state that was subject to registration under the California Franchise Investment Law without the offer first being registered, in violation of California Corporations Code section 31110. Thus, grounds exist for a stop order.

11. In addition, Corporations Code section 31201 provides that it is unlawful for any person to offer or sell a franchise in this state by means of any written or oral communication which includes an untrue statement of material fact or omits to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading. As described above, FHV omitted material facts in its Uniform Franchise Disclosure Document thereby rendering misleading this disclosure document by not describing and explaining the stop order issued by the Department, or the Statement of Charges and Notice of Intent to Enter Order to Cease and Desist as issued by the Washington Department of Financial Institutions. This deficient disclosure document was used in the offer and sale of franchises in fifteen transactions, following the initial issuance of a stop order by the Department. Accordingly, grounds exist for a stop order.

12. Corporations Code section 31115(d)(4) also authorizes the Commissioner to issue a stop order denying the effectiveness of any registration if the Commissioner finds the following: 1) that any person identified in the application is subject to any currently effective injunctive or restrictive order relating to business activity as a result of an action brought by any public agency or department, and 2) the involvement of that person in the sale or management of the franchise creates an unreasonable

1 risk to prospective franchisees. As part of the FHV application, the Uniform Franchise Disclosure
2 Document identifies Nicholas Yates as subject to four separate actions by public agencies or
3 departments. Furthermore, Nicholas Yates, in having practical control over all of FHV's activities,
4 employed a management team that failed to exercise due diligence in determining whether FHV
5 meets the franchise registration and disclosure requirements. Accordingly, the involvement of
6 Nicholas Yates in the management and control of FHV exposes prospective franchisees to
7 unreasonable risk. For these reasons, grounds exist for a stop order.

8 13. Pursuant to Corporations Code section 31115, and based on the foregoing facts, the franchise
9 registration application of Fresh Healthy Vending, LLC, filed on October 3, 2013, is hereby denied.
10 This order is necessary, in the public interest, for the protection of investors and franchisees, and
11 consistent with the purposes, policies, and provisions of the California Franchise Investment Law.
12 This order shall remain in full force and effect for two years from the date of this order.

13 III.

14 CITATION

15 Corporations Code Section 31406 provides in relevant part:

16 “(a) If, upon inspection or investigation, based upon a complaint or otherwise, the
17 commissioner has cause to believe that a person is violating any provision of this
18 division or any rule or order promulgated pursuant to this division, the
19 commissioner may issue a citation to that person in writing describing with
20 particularity the basis of the citation. Each citation may contain an order to desist
21 and refrain and an assessment of an administrative penalty not to exceed two
thousand five hundred dollars (\$2,500) per violation and shall contain reference to
this section, including the provisions of subdivision (c). All penalties collected
under this section shall be deposited in the State Corporation Fund.

22 (b) The sanctions authorized by this code section shall be separate and apart from,
23 and in addition to, all other administrative, civil, and criminal remedies.

24 (c) If within 60 days from the receipt of the citation the person cited fails to notify
25 the commissioner that the person intends to request a hearing as described in
subdivision (d), the citation shall be deemed final.

26 (d) Any hearing under this section shall be conducted in accordance with Chapter
27 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the
28 Government Code.

1 (e) After the exhaustion of the review procedures provided in this section, the
2 commissioner may apply to the appropriate superior court for a judgment in
3 the amount of the administrative penalty and order compelling the cited
4 person to comply with the order of the commissioner. The application shall
5 include a certified copy of the final order of the commissioner and shall
6 constitute a sufficient showing to warrant the issuance of the judgment and
7 order.

8 **A. Desist and Refrain Order**

9 Based on the foregoing, the Commissioner has cause to believe that FHV offered and sold
10 franchises in California by means of written or oral communications containing omissions of material
11 fact in fifteen different transactions, in violation of Corporations Code section 31201. Pursuant to
12 Corporations Code section 31406, FHV is hereby ordered to desist and refrain from the further offer
13 and sale of all franchises in California by means of oral or written statements containing
14 misrepresentations or omissions of material fact within the meaning of Corporations Code section
15 31201. This order is necessary, in the public interest, for the protection of investors and franchisees
16 and consistent with the purposes, policies and provisions of the California Franchise Investment Law.

17 **B. Administrative Penalties**

18 Pursuant to Corporations Code section 31406, FHV is hereby assessed and ordered to pay an
19 administrative penalty of thirty-seven thousand five hundred dollars (\$37,500.00) based on the fifteen
20 violations involving Corporations Code section 31201, as described above. The administrative
21 penalty shall be made payable by check to the Department of Business Oversight and submitted no
22 later than sixty (60) days from the date of this order to: Timothy L. Le Bas, Senior Corporations
23 Counsel, Enforcement Division, 1515 K Street, Suite 200, Sacramento, CA 95814.

24 **IV.**

25 **ANCILLARY RELIEF**

26 Corporations Code Section 31408 provides in relevant part:

27 “(a) If the commissioner determines it is in the public interest, the commissioner
28 may include in any administrative action brought under this division, including a
stop order, a claim for ancillary relief, including, but not limited to, a claim for
rescission, restitution, or disgorgement or damages on behalf of the person injured
by the act or practice constituting the subject matter of the action, and the
administrative law judge shall have jurisdiction to award additional relief.

1 (b) In an administrative action brought under this part, the commissioner is
2 entitled to recover costs, which in the discretion of the administrative law judge
3 may include any amount representing reasonable attorney's' fees and
investigative expenses for the services rendered,..."

4 **A. Rescission**

5 Due to the Commissioner's finding that FHV has committed violations of Corporations Code
6 section 31201, FHV shall afford the FHV franchisees (referenced in paragraph 9 above) the right to
7 rescind any contract for the purchase of a franchise. FHV is hereby ordered to comply with the
8 provisions of Corporations Code section 31304 and California Code of Regulations, section 310.304,
9 within sixty (60) days of this order, by delivering a notice of violation and rescission offer to these
10 franchisees. FHV shall submit the proposed notice of violation and rescission offer to the
11 Department for review and approval within thirty (30) days of this order by sending them to: Timothy
12 L. Le Bas, Senior Corporations Counsel, Enforcement Division, 1515 K Street, Suite 200,
13 Sacramento, CA 95814.

14 **B. Restitution**

15 FHV is hereby ordered to pay restitution to every franchisee that accepts its offer of rescission
16 for the actual cost of the initial franchise fee and the actual cost of any vending machine, paid to FHV
17 by each franchisee according to proof. Each franchisee shall be given ninety (90) days from receipt
18 of the offer of rescission to elect to rescind. FHV shall pay restitution to each franchisee electing
19 rescission within sixty (60) days of receiving any vending machines from the franchisee or, if no
20 vending machines were provided by FHV, then within sixty (60) days of receipt of the election to
21 rescind.

22 **C. Compliance Program**

23 In addition, FHV is hereby ordered to develop and implement a compliance program on or
24 before December 31, 2014. This compliance program of FHV shall include, at a minimum, the
25 following:

- 26 (1) a compliance officer to review and approve franchise registration and disclosure documents,
27 and to administer the compliance program;
28 (2) policies and procedures, approved by FHV's Chief Executive Officer, designed to ensure

- 1 compliance with the California Franchise Investment Law;
- 2 (3) guidelines for immediately reporting to the Department any written complaint or violation
- 3 involving the California Franchise Investment Law; and
- 4 (4) ongoing training of FHV's directors, officers, managers, sales and marketing employees, with
- 5 training in the areas of franchise registration and disclosure and other franchise compliance
- 6 matters, including training received from the International Franchise Association.

7 **D. Independent Monitor**

8 On or before December 31, 2014, FHV is hereby ordered to contract with an independent

9 monitor who shall have no familial, financial, or professional affiliation with FHV or any of its

10 employees or agents; and FHV shall provide the name and contact information of the monitor to the

11 Department. The monitor shall be a California-licensed attorney with experience in franchise

12 transactions. The monitor shall be responsible for reviewing the compliance activities of FHV under

13 the compliance program, and assessing FHV's performance in complying with this action and the

14 California Franchise Investment Law. FHV shall submit a copy of its compliance policies and

15 procedures to the monitor by December 31, 2014, and thereafter provide copies of any updated

16 policies and procedures to the monitor. In addition, FHV shall provide copies of the following to the

17 monitor: (1) ongoing training materials provided to FHV's directors, officers, managers, sales and

18 marketing employees, and certificates of completion of training received from the International

19 Franchise Association; (2) franchise registration and disclosure documents reviewed and approved by

20 the compliance officer; (3) guidelines for reporting written complaints and violations of the California

21 Franchise Investment Law; (4) notices of violation and rescission offers provided to franchisees

22 (described in paragraph 9 above) together with FHV's proof of payment of any restitution; and (5)

23 any other information requested by the monitor to assess FHV's compliance with this action and the

24 California Franchise Investment Law. FHV shall update the monitor on an ongoing basis (and meet

25 with the monitor in-person on at least a quarterly basis) to provide a detailed report of its compliance

26 activities under the compliance program, and to provide a detailed report of its performance in

27 complying with this action and the California Franchise Investment Law. The monitor shall submit

28 quarterly written reports to the Department describing, in detail, the compliance activities of FHV

1 under the compliance program and FHV’s performance in complying with this action and the
2 California Franchise Investment Law, during the preceding quarterly period. These written reports
3 shall be submitted to Timothy L. Le Bas, Senior Corporations Counsel, Enforcement Division, 1515
4 K Street, Suite 200, Sacramento, CA 95814; and shall be submitted on the following dates: March
5 31, 2015, June 30, 2015, September 30, 2015, December 31, 2015, March 31, 2016, June 30, 2016,
6 September 30, 2016, with the last report due two years from the date of this order. The monitor’s
7 responsibilities shall cease two years from the date of this order.

8 **E. Attorney’s Fees**

9 Pursuant to Corporations Code section 31408, FHV is hereby ordered to pay attorney’s fees to
10 the Department in the amount of eighteen thousand two hundred dollars (\$18,200.00). The attorney’s
11 fees shall be made payable by check to the Department of Business Oversight and submitted no later
12 than sixty (60) days from the date of this order to: Timothy L. Le Bas, Senior Corporations Counsel,
13 Enforcement Division, 1515 K Street, Suite 200, Sacramento, CA 95814.

14
15 Dated: November 7, 2014
16 Sacramento, CA

JAN LYNN OWEN
Commissioner of Business Oversight

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18
19 By _____
20 MARY ANN SMITH
21 Deputy Commissioner
22 Enforcement Division
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