

BEFORE THE  
DEPARTMENT OF CORPORATIONS  
STATE OF CALIFORNIA

In the Matter of the Administrative Orders  
Issued to:

WHY WEIGHT WOMEN'S TOTAL  
FITNESS, INC., IVAN BONDY and MARK  
HAINING,

Respondents.

File No.: 993-5092

OAH No. L2004080086

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Commissioner of Corporations as its Decision in the above-entitled matter.

This Decision shall become effective on JANUARY 4, 2006.

IT IS SO ORDERED this 4<sup>th</sup> day of JANUARY, 2006.

CALIFORNIA CORPORATIONS COMMISSIONER

WAYNE STRUMPFER  
Acting California Corporations Commissioner

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PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on September 21 and 22, November 8, 9 and 10, 2004, and May 31, June 1 and 2, 2005, at Los Angeles, California.

Karen L. Patterson, Senior Corporations Counsel, represented the California Corporations Commissioner.

James M. Mulcahy, Attorney at Law, represented all Respondents through the hearing date of November 10, 2004. Thereafter, Respondent Ivan Bondy (Bondy) represented himself. There were no further appearances by or on behalf of Respondent Mark Haining (Haining) or Why Weight Women's Total Fitness, Inc. (Why Weight).<sup>1</sup>

The record was held open for receipt and review of post-trial briefs, which were timely filed. The Administrative Law Judge completed his review of the briefs on September 30, 2005 and the matter was deemed submitted on that date.

Oral and documentary evidence having been received and the matter submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. On June 17, 2004, William P. Wood, acting in his official capacity as California Corporations Commissioner (Commissioner), issued his Order (Stop Order), under the provisions of Corporations Code section 31115, denying the Franchise Registration

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<sup>1</sup> During Mr. Mulcahy's representation of Why Weight, John Wenger (Wenger), then President of the company, appeared as Why Weight's corporate representative.

Application of Why Weight. On June 18, 2004, the Commissioner caused a Desist and Refrain Order (D&R), under the provisions of Corporations Code section 31402, to be issued against Respondents Bondy, Haining and Why Weight, who timely filed appeals, and against Matthew Craig Rubin (Rubin) who did not contest the order, for alleged violations of Corporations Code Sections 31110 and 31201.

2. The Commissioner based the stop order on his findings (prior to the trial herein) that Why Weight made false and misleading statements in its Uniform Franchise Offering Circular (UFOC) dated October 14, 2003, submitted to the Commissioner as part of the application process to permit Why Weight to sell franchises in California. The Commissioner found that revisions made to the UFOC and filed with the Department on subsequent dates also made false and misleading representations. The Commissioner based the D&R on the basis that Haining and Rubin, with the approval of Bondy, were actively offering franchises on behalf of Why Weight before the UFOC was approved.

3. The purpose of the UFOC is to provide accurate information to prospective franchisees about the franchise investments they are contemplating. The nature of the franchise, financial matters relating its purchase and operation, and the names and backgrounds of those involved with the franchisor must be disclosed, thereby allowing a prospective franchisee to make an informed decision regarding the investment.

4. In its first UFOC,<sup>2</sup> dated September 30, 2003, signed by then Why Weight president Teresa Saucedo-Artino (Artino) on October 1, 2003 and filed with the Commissioner on October 14, 2003 (the first UFOC), Why Weight described itself as a California corporation formed on September 12, 2003 which "offers franchises . . . for the operation of independent private fitness and nutrition centers using the Why Weight Women's Total Fitness procedures, menu and format, and emphasizing a 30-minute circuit exercise program, related fitness activities and a comprehensive nutritional program . . ."<sup>3</sup>

5. The formation of Why Weight was the end result of a series of failed attempts by Rubin and Gerald Foreman (Foreman) to create a business opportunity for themselves. Bondy was, for the most part, a "patsy" who, through a combination of his own ignorance, false belief that he had good business acumen, and a willingness to use all of the equity in his home to finance Rubin's and Foreman's investment schemes, ended up as the major shareholder of a defunct corporation. The road to the formation of Why Weight was exceptionally convoluted; a brief summary of what occurred is as follows:<sup>4</sup>

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<sup>2</sup> It is very common for California franchisors to submit multiple UFOC's to the Commissioner before a final offering circular is approved. After the initial UFOC is submitted, the Department makes a careful review and may request changes, modifications and explanations to be made. The prospective franchisor then must submit a revised UFOC incorporating the changes, modifications or explanations requested. Often, a prospective franchisor may simply submit corrected pages. In this matter, Why Weight submitted no less than four revised UFOCs, as well as numerous separate page changes.

<sup>3</sup> Evidence at trial showed this business concept to be virtually identical to the highly successful "Curves" fitness centers for women.

<sup>4</sup> There were many individuals involved in the formation and operation of Why Weight whose connection thereto is not mentioned herein. A full discussion of their involvement is not necessary to this Decision.

a. In early to mid-2003, Rubin and Foreman, using others as fronts, created a scheme to sell franchises known as Solare MedSpa (Solare). The business was to offer "specialized cosmetic services and wellness care in a relaxing spa-like environment." Essentially, Solare was envisioned as a place for women to receive laser hair removal treatment. In May 2003, Bondy, who ran two small businesses, one a computer company where he was the sole employee, and the other a pool cleaning service that he operated with his wife in Mammoth, California, was doing "internet research" for investments. He came across the Solare website, and thought that kind of business would do well in Mammoth.

b. Bondy contacted Solare, and was put in touch with Foreman, who invited him to come to Los Angeles for a presentation regarding the Solare franchise opportunity. Bondy and his wife went to Los Angeles where they met Foreman and Rubin, among others, at a Solare information seminar. Foreman introduced himself as the president of Solare. Rubin identified himself as an "independent consultant who moved from business to business and the person responsible for putting the presentation together."

c. The presentation lasted two days, at the end of which Bondy was convinced Solare was a great investment opportunity. The franchise fee was \$75,000 and the purchase price of all necessary equipment to operate the franchise would exceed \$100,000. Bondy was eager to invest, but did not have sufficient capital to do so. He asked Foreman if he could purchase a franchise for less than the asking price. Foreman refused to give Bondy a discount and suggested Bondy refinance his house, which Bondy did, netting approximately \$220,000.

d. Thereafter, Foreman sent Bondy the Solare investment documents, which Bondy completed and returned to Foreman, along with a certified check for \$75,000. Approximately one week later, Foreman called and told Bondy that he, Foreman, was leaving Solare, and wanted to return Bondy's money. Foreman did not tell Bondy that on June 8, 2003, the Commissioner had issued a desist and refrain order against Solare for selling unregistered franchises. Foreman returned, uncashed, the check Bondy had sent.

e. Several weeks later, Foreman called Bondy and told him he had another great investment opportunity, this one named "Wellington," which would be in the business of purchasing laser hair removal equipment and renting the same to "high end salons." Bondy was offered 5% of this company for \$150,000, and was assured there were other investors. Thereafter, Bondy again traveled to Los Angeles and met Foreman at Foreman's attorney's office. Bondy was "pleasantly surprised" to see that Rubin was also present. Bondy believed Rubin to be a man of good business sense and extensive experience.<sup>5</sup> At the meeting, Bondy was told one of the other "investors" had backed out, and Bondy could buy 7.5% of the company for \$200,000. Bondy agreed, signed the investment documents, and paid his money. Bondy returned to Mammoth (which is approximately 300 miles from Los

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<sup>5</sup>No one told Bondy that in 1994, Rubin was convicted in federal court on five counts of mail fraud and ordered to serve 21 months in prison and three years of supervised release after completing his prison sentence.

Angeles) believing that within the next year, he would start receiving income from his investment in Wellington.

f. Approximately one month after having made the Wellington investment, Bondy received a call from Foreman who advised him that offices had been leased, and the company needed help setting up its computers. Bondy again traveled to Los Angeles and spent several days at the Wellington offices and set up the computer system. He then returned to Mammoth.

g. Several weeks later, Bondy received a call from Foreman who told him that Wellington was "having problems placing [laser hair removal] machines." Again Bondy traveled to Los Angeles and met with Foreman and Rubin. Foreman told him that Wellington "was a loser" and that other investors had backed out, so the only money available was Bondy's, and that \$150,000 remained, the rest having been spent on furniture, rent and the like.<sup>6</sup> According to Bondy, he was able to recover the unspent \$150,000.

h. Foreman and Rubin informed Bondy they had yet another great investment plan, and the formation of Why Weight was discussed. Bondy wanted to back out, but Rubin and Foreman convinced him to stay with them and Bondy acquiesced, rolling over his investment from Wellington to Why Weight. Bondy received 10% of the Why Weight shares in exchange for allowing Why Weight to use the furniture and fixtures Wellington had purchased with Bondy's investment money. A few days later (on or about September 16, 2003), when Foreman needed to pay Don Drysdale (Drysdale), the attorney who was working on the Why Weight UFOC, Foreman called Bondy and offered him another 5% in Why Weight for an additional \$10,000, with \$8,200 to be sent directly to Drysdale, and the remainder to be sent to a graphic design company. Bondy agreed, and sent his money as directed.<sup>7</sup> Up to this point, other than dealing with the computers, Bondy had taken no part in the operation of Why Weight.

i. In early October 2003, Bondy met with Rubin and Artino. They wanted Bondy to invest additional money in Why Weight, as other investors had not been forthcoming. They offered Bondy an additional 60% of the shares of Why Weight in exchange for \$100,000. Ultimately Bondy agreed to make the investment and he and his wife became 75% shareholders. The evidence was not clear as to whether Bondy actually paid the full \$100,000; he did make several capital contributions of the course of the next two months. Up until the time Bondy became the majority shareholder, Rubin, Foreman and Artino had been running the company. At this early October meeting, Rubin and Artino told Bondy that Foreman was a liability to the company, and he should be let go.

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<sup>6</sup> Bondy was not informed that his money was being used to pay Rubin's living expenses at a hotel near the Wellington offices. Apparently tired of living in a hotel, Rubin rented later an apartment in Marina del Rey, as well as a car, also paid for out of Bondy's investment funds. Bondy did not learn of this until much later.

<sup>7</sup> It was for this reason Bondy ended up signing Drysdale's fee agreement with Why Weight; it should have been signed by Artino as president of Why Weight. On September 17, 2003, Drysdale sent a new fee letter (same terms) for Artino's signature.

j. Artino had been hired during the last stages of the Wellington saga, and became the president of Why Weight upon its formation in mid-September 2003. Although she did have some business background, and “presented well” as the head of a women’s fitness company, Artino had little business acumen, and was dominated in her position by Rubin and Foreman. Artino spent a considerable amount of time going over the UFOC with Drysdale, but never talked to him about Rubin’s role. She told Drysdale that Foreman was going to be a salesperson. Artino did not understand, until just before she resigned (discussed below) a few weeks later, that Rubin, as the actual manager of Why Weight,<sup>8</sup> had to be named in the UFOC. Drysdale had known Rubin from prior business activities, but was not formally advised of Rubin’s activities until just before Artino resigned.

k. In mid-October 2003, Rubin and Foreman finally had a complete falling out. The day after Drysdale and Artino filed the first UFOC on October 14, 2003, Foreman attempted to have everyone at Why Weight evicted from the offices on the basis that he had signed the original lease and the others had no right to be on the premises. Police were called. Ultimately, Foreman left the company and immediately contacted counsel for the Commissioner to disclose the “illegal activities” of Why Weight and Rubin’s undisclosed role with it. Foreman notified, or attempted to notify, authorities in each state Why Weight was trying to sell, or register to sell, franchises, of Rubin’s problems with the FTC (noted below) as well as Rubin’s criminal history. Foreman had several communications with counsel for the Commissioner in which he detailed, at length, the inner operations of Why Weight. Meanwhile, Rubin continued to run Why Weight, while Artino dealt with Drysdale and the UFOC.

6. Pursuant to its authority under California Code of Regulations, title 10, section 310.111, the Department has adopted guidelines to follow in connection with completing a UFOC. These guidelines were promulgated by the North American Securities Administrators Association (NASAA) in 1993.<sup>9</sup> Item 2 of the UFOC requires the applicant to list by name and position its directors, trustees and/or partners, principal officers and other executives who have management responsibility. It does not require disclosure of the names of any shareholders of a corporate franchisor, such as Why Weight. Neither Bondy nor Rubin were mentioned in the first UFOC.

7. On October 28, 2003, the Department sent its comment letter regarding the first UFOC, asking for numerous technical corrections and explanations, and also requesting that Rubin’s role with the company be disclosed. Drysdale advised Artino that if Rubin had any role in the operation of the company, full disclosure must be made. A copy of the comment

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<sup>8</sup> Respondents variously portrayed Artino as skillful, incompetent or manipulative. Whatever her qualifications or conduct, it was clear she was not the “person in charge.” Rubin was in charge—he had the authority, on his own if he so chose, to fire Artino; the converse was not true.

<sup>9</sup> Official notice is taken that on August 25, 2004 Federal Trade Commission released its staff report on proposed amendments to the Franchise Rules, originally prepared by NASAA and adopted by the FTC and the Commissioner. Official notice is further taken that on November, 10, 2004, the Commissioner urged the FTC to change some of the proposed amendments to conform to current guidelines used by the Department under the NASAA’s UFOC guidelines.

letter was sent to Bondy. Shortly after receiving the comment letter, Artino called Bondy and told him she wanted to be given 25% of the stock of Why Weight because of her "value" to the company. Bondy became enraged at this demand and on November 3, 2003, returned to Los Angeles. Acting in his capacity as 75% shareholder, Bondy fired Artino. He sent an email to Drysdale advising him that he was taking this action and told Drysdale, apparently in reference to the Department's comment letter and statements made by Foreman, "I made [a] large investment of money in this venture and I will make sure that this business will succeed and will be 100% legal and correctly and truthfully set up."

8. Bondy spent most of the next two months actively involved in the management of Why Weight. Relying on Drysdale's advice, he agreed that Rubin's background with respect to the FTC should be disclosed. Why Weight filed an amendment to the first UFOC. The amendment was dated November 10, 2003 (the second UFOC), however it was not clear from the evidence when this document was actually filed with the Commissioner.<sup>10</sup> In this document, Bondy was listed as "President, Secretary and Director." He was described as having "founded [Why Weight] in September 2003 and became its President, Secretary and Director in November 2003." Bondy's 1997 bankruptcy was disclosed.<sup>11</sup> C.B. Brennan (Brennan) was identified as the "Chief Executive Officer."<sup>12</sup> Haining was listed as the Vice President of Franchise Development. Rubin was identified as having joined Why Weight in November 2003, and was referred to as the "Advertising and Operations Administrator." In addition, the following information about Rubin was disclosed in the "Litigation" section of the second UFOC:

In March 2001, the Federal Trade Commission filed suit under sections 5(a) and 13(b) of the Federal Trade Commission Act in the United States District Court for the Central District of California to obtain injunctive relief, rescission of contracts, restitution, disgorgement and other equitable relief against Medicor LLC and other named defendants (including Matthew Rubin.) The FTC alleged the defendants were engaging in a variety of fraudulent practices in soliciting at-home workers to perform medical billing work for doctors. On April 12, 2001, the judge granted a preliminary injunction. The FTC then moved for a Summary Judgment against Medicor LLC, Andrew Rubin [Rubin's brother] and Matthew Rubin. Medicor LLC did not file an opposition, but Andrew Rubin and Matthew Rubin did file oppositions. On July 18, 2002, the Court granted the FTC's motion for summary judgment and issued an Order for Permanent Injunction and Other Relief as to Defendants Medicor LLC, Andrew Rubin and Matthew Rubin, including a judgment for the full amount of consumer redress (\$16,562,364.51) to be paid by the defendants. In addition to ordering

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<sup>10</sup> Although subsequent changes to the UFOC are technically "amendments," each time a change is made, the entire UFOC is re-filed with the Commissioner.

<sup>11</sup> The bankruptcy was the result of a failed trucking business which Bondy owned.

<sup>12</sup> It appears that Brennan was retained in November 2003, but took no active role in the management of Why Weight until January 2004. At that time, he agreed to work part time at an hourly rate.

the defendants to pay restitution to the affected consumers, the Court permanently barred the defendants from the promotion, advertising, marketing, sale, or offering for sale of any medical billing work-at-home opportunity. The Court's order also enjoined the defendants from (i) engaging in, or assisting others in engaging in, deceptive acts or practices in the business of telemarketing and (ii) making, or assisting others in making, false or misleading oral or written statements or representations in connection with the promotion, advertising, marketing, sale, or offering for sale of an work-at-home opportunity, product, service, or investment.

9. From January until mid-April 2004, Bondy had no active involvement in Why Weight. He left Brennan in charge.<sup>13</sup> On February 23, 2004, Why Weight filed an amended UFOC with the Commissioner. The evidence was unclear whether this was the second or third filing, but based on its content, it appears to be the latter and will be referred to as such. The third UFOC shows highlighted changes. Bondy's name was removed, and Brennan was described as "President, Secretary, Chief Executive Officer, Director." Rubin and Haining were referenced as before. Drysdale had been replaced as counsel by attorney Lori Lofstrom (Lofstrom) who was named as the person to whom communications regarding the UFOC should be directed.

10. On March 24, 2004, Why Weight filed a fourth UFOC, incorporating additional changes requested in another comment letter from the Commissioner. In early April 2004, the Supervising Counsel for the Commissioner informed Lofstrom of Rubin's federal mail fraud conviction. He also informed her that Rubin and his brother Andrew had apparently been operating another company since January 2004, a company referred to as Cosmetica, which required disclosure in Why Weight's UFOC. Apparently, Rubin had been operating Cosmetica out of Why Weight's offices, using Why Weight personnel and supplies. Lofstrom conveyed this information to Bondy, who returned to Los Angeles and demanded Rubin's resignation. Rubin resigned. Brennan resigned on April 16, 2004, and Bondy assumed active control of Why Weight.

11. On April 21, 2004, Why Weight filed another amended UFOC with the Commissioner. All references to Rubin were dropped. Bondy was identified as "Administrative Coordinator" in charge of technology. Brennan was identified as the Chief Executive Officer, even though he had resigned a week earlier. On May 20, 2004, Why Weight filed yet another amended UFOC; Brennan was still listed as Chief Executive Officer.

12. Based on all of the evidence presented at hearing, it became clear that from its inception through the time he was discharged by Bondy, Rubin was in control of Why

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<sup>13</sup> The evidence was unclear as to what, if anything, Brennan actually did at Why Weight, as Rubin was in charge of the operation during Brennan's tenure. As Bondy was not present during the period when Brennan was supposed to be in charge, he could not testify accurately as to Brennan's role.



Weight. Brennan was nothing more than a part time figurehead who had no operational authority. Although Bondy "ran" Why Weight for approximately two months at the end of 2003, he had no prior experience in any form of franchise operation and relied totally on Rubin for business advice. Rubin's true role with Why Weight was never disclosed in any draft of the UFOC.

13. During the week of April 19, 2004, Why Weight conducted a "training seminar" for the purpose of teaching new franchisees (from outside California since it could not yet sell franchises in this state), how to run a Why Weight fitness and nutrition center. The seminar included instruction on use of the equipment and products, as well as the general operation of the business. Annette Boatswain (Boatswain) attended the April 2004 training seminar. She is the California resident to whom, the Commissioner alleges, Why Weight sold a franchise before the UFOC had been approved. Her involvement as a prospective franchisee is as follows:

a. In October 2003, Boatswain was searching for a "business opportunity" on the entrepreneur.com website when she saw a Why Weight ad. She filled out some sort of online "application," then called a toll free number which accompanied the ad. She reached the Why Weight offices and was connected with Haining. Boatswain told Haining that she was not only interested, but "anxious" to become a franchisee. Haining spoke with Boatswain for approximately 20 minutes, explained the franchise fee of \$28,500<sup>14</sup> and the Why Weight "concept," then asked about her background. Boatswain had no knowledge of the franchise laws. Haining told her that Why Weight was not yet approved to sell franchises in California and could not accept her application. He told her to "call back in a month."

b. Boatswain called Haining towards the end of November 2003 and was again informed that Why Weight had still not been approved to sell franchises in California. Boatswain was still "really anxious" to become a franchisee. Thereafter, Boatswain would call Haining every two weeks. Haining told her that Why Weight expected approval of its UFOC "any day now." Boatswain also regularly checked the website. She saw a Why Weight ad for "Discovery Day" set in April 2004. Discovery day, according to the ad, was for anyone interested in Why Weight to come to corporate headquarters to learn more about the company. Boatswain also saw there was to be "Training Day" (actually a week long program) for current franchisees--those who had purchased a Why Weight franchise in another state.

c. Boatswain felt she had no need to attend Discovery Day, but was very interested in attending the training. She contacted Why Weight (the evidence was not clear with whom she spoke) and was "given the okay" to attend training. A few days before the training was to commence, Haining called Boatswain and told her she could not attend training, but

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<sup>14</sup> The first UFOC had been filed shortly before this conversation took place. The franchise fee set forth in that document was \$24,950. The evidence did not show whether Haining informed Boatswain that, in the first UFOC, Why Weight had estimated the initial investment required, including the franchise fee as well as items a franchisee would need to purchase in order to operate, was then estimated to be between \$41,150 and \$57,450. Subsequent UFOCs showed an increase of several thousand dollars for the estimated initial investment.

another session was being scheduled for June and she would probably be permitted to attend at that time. Boatswain had already made up her mind to become a franchisee and insisted on being permitted to attend the April training. Haining told her she "would talk to Ivan [eg. Bondy]" about it. The next day Haining called Boatswain and told her Bondy had approved her attendance at the April training session. Haining told Boatswain that she would be the "the only one from California" and they had made "special provision" for her. Haining told her that if anyone were to ask her capacity at the training, she was to say she was the "manager of a Why Weight (i.e. company owned) store" as Why Weight was still not approved to sell franchises in California. Boatswain agreed to do this and attended the five day Why Weight training session which was given beginning April 19, 2004 at a hotel across the street from Why Weight's offices.

d. After completing the training, Boatswain was more eager than ever to become a franchisee. She had been given a "Non-Registration State UFOC,"<sup>15</sup> but was still informed that Why Weight could not sell her a franchise in California. She and Haining talked more about her becoming a "corporate store owner" because Why Weight was still having problems becoming registered to sell franchises in California. Boatswain spoke with both Haining and Wenger, the new president of Why Weight, about her potential investment.<sup>16</sup> Ultimately, they decided that Boatswain would operate a company owned store, then be permitted to buy the store and operate it as a franchise once the UFOC was approved. In June 2004, Boatswain paid Why Weight \$28,500, the then asking price for a franchise. Why Weight formed another California corporation known as Why Weight of Riverside (Riverside) and became the holder of all of the stock of that new company. On June 9, 2004, as part of Boatswain's investment, Why Weight granted Boatswain an option to purchase all of Riverside's shares for \$1. Boatswain became president of Riverside.<sup>17</sup> She was told by Haining that she was to run Riverside, without compensation from Why Weight, because she would eventually be the owner of the store as a franchisee.

e. Haining and Wenger told Boatswain they would help her get Riverside up and running. Wenger did in fact provide assistance. Over the course of the next several months, Wenger helped Boatswain find a location for Riverside to operate, negotiated a lease for the store under Why Weight's name, and even personally guaranteed Why Weight's performance under the lease, which was dated September 16, 2004. Boatswain was required to pay \$7500 as and for the first month's rent and security deposit. She was also required to pay for a city business license as well as \$1900 to an interior designer who planned the build-out of the store site. In sum, even though Riverside was owned by Why Weight, all of its

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<sup>15</sup> Why Weight had been selling, or attempting to sell, franchises in several other states that did not require prior state approval of a UFOC.

<sup>16</sup> The evidence was not clear as to when Wenger became president. In the UFOC filed with the Commissioner on May 20, 2004, Brennan was still listed as the Chief Executive Officer, even though he had left Why Weight one month previously; Wenger was not mentioned in that document.

<sup>17</sup> Part of the transaction, never explained to or understood by Boatswain, required her to sign, as president of Riverside, two promissory notes, one for \$28,500 and one for \$21,500, both of which were to be payable to herself and secured by shares of stock of an entity known as Why Weight of Corona, Inc.

operating expenses were paid by Boatswain, and Boatswain paid Why Weight \$28,500 for this privilege.

f. The store never opened. Why Weight went out of business. Wenger tried to help Boatswain have the lease placed in her name, but the landlord would not agree to the transfer. Wenger advised Boatswain to exercise her option to purchase the Riverside shares, and on February 18, 2005, Boatswain sent a letter to Bondy, enclosing a check for \$1.00. In the letter, Boatswain stated that she was exercising her option to purchase all of the Riverside shares. She requested that Bondy forward to her a "deed" conveying the shares, as well as Riverside's corporate books. She received the corporate books but no share certificates.

14. Boatswain was never really certain whether she had purchased a franchise outright or merely the right to run a company store with an agreement to allow her to become a franchisee at a later time. Her testimony on this issue was confused and confusing. However, under the facts as outlined above, it is clear that Why Weight's formation of Riverside and acceptance of Boatswain's \$28,500, and requiring her to pay all operating expenses, in exchange for granting Boatswain the option to purchase Riverside for \$1.00, was a disguised sale of a franchise. This disguised sale was made to avoid the fact that Why Weight's UFOC had never been approved.

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#### CONCLUSIONS OF LAW

1. The law governing this case is found in the following sections of the Corporations Code and California Code of Regulations, title 10:

Code section 31110. Necessity for registration

On and after April 15, 1971, it shall be unlawful for any person to offer or sell any franchise in this state unless the offer of the franchise has been registered under this part or exempted under Chapter 1 (commencing with Section 31100) of this part.

Code section 31114. Offering circular

The application for registration shall be accompanied by a proposed offering circular, which shall contain the material information set forth in the application for registration, as specified by rule of the commissioner, and such additional disclosures as the commissioner may require. The offering circular shall recite in bold type of not less

than 10-point type that registration does not constitute approval, recommendation, or endorsement by the commissioner.

#### Regulation 310.111. Form of Application

(a) All applications for registration under this Law shall be filed upon the Uniform Franchise Registration Application as defined in subsection (b).

(b) Until December 31, 1994, the term "Uniform Franchise Registration Application" means information required from the applicant in accordance with either (1) the Uniform Franchise Offering Circular ("UFOC") Guidelines, as amended by the North American Securities Administrators Association, Inc. on November 21, 1986; or (2) the Uniform Franchise Offering Circular ("UFOC") Guidelines, as amended by the North American Securities Administrators Association, Inc. on April 25, 1993. On or after January 1, 1995, the term "Uniform Franchise Registration Application" means information required from the applicant in accordance with the Uniform Franchise Offering Circular ("UFOC") Guidelines, as amended by the North American Securities Administrators Association, Inc. on April 25, 1993.

#### Code section 31200. Misrepresentation of material fact in document filed with commissioner

It is unlawful for any person willfully to make any untrue statement of a material fact in any application, notice or report filed with the commissioner under this law, or willfully to omit to state in any such application, notice, or report any material fact which is required to be stated therein, or fail to notify the commissioner of any material change as required by Section 31123.

#### 31201. Other written or oral statement

It is unlawful for any person to offer or sell a franchise in this state by means of any written or oral communication not enumerated in Section 31200 which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

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Code section 31115. Summary order denying, suspending or revoking registration

The commissioner may summarily issue a stop order denying the effectiveness of or suspending or revoking effectiveness of any registration if the commissioner finds:

(a) That there has been a failure to comply with any of the provisions of this law or the rules of the commissioner pertaining thereto.

(b) That the offer or sale of the franchise would constitute misrepresentation to, or deceit or fraud of the purchasers, or that, in the case of a franchise other than a subfranchise, a major inducement to prospective franchisees is fees or other compensation from participation in the sale of additional franchises.

(c) That the applicant has failed to comply with any rule or order of the commissioner issued pursuant to Section 31113.

(d) That any person identified in the application or any officer or director of the franchisor, whether or not identified in the application, meets one or more of the following conditions, and the involvement of this person in the sale or management of the franchise creates an unreasonable risk to prospective franchisees:

(1) Has been convicted of a felony, or pleaded nolo contendere to a felony charge, or held liable in a civil action by final judgment if the felony or civil action involved fraud, embezzlement, fraudulent conversion, or misappropriation of property.

(2) Is subject to any currently effective order of the Securities and Exchange Commission or the securities administrator of any state denying registration to or revoking or suspending the registration of the person as a securities broker or dealer or investment adviser or is subject to any currently effective order of any national securities association or national securities exchange (as defined in the Securities and Exchange Act of 1934) suspending or expelling the person from membership in the association or exchange.

(3) Is subject to any currently effective order or ruling of the Federal Trade Commission.

(4) 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, including, without limitation, actions affecting a license as a real estate broker or sales person.

#### Code section 31119. Delivery of offering circular to franchisee

(a) It is unlawful to sell any franchise in this state which is subject to registration under this law without first providing to the prospective franchisee, at least 10 business days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or at least 10 business days prior to the receipt of any consideration, whichever occurs first, a copy of the offering circular, together with a copy of all proposed agreements relating to the sale of the franchise.

#### 31402. Unregistered offer; Cease and desist order; Hearing

If, in the opinion of the commissioner, the offer of any franchise is subject to registration under this law and it is being, or it has been, offered for sale without the offer first being registered, the commissioner may order the franchisor or offeror of that franchise to desist and refrain from the further offer or sale of that franchise unless and until the offer has been duly registered under this law. If, after that order has been made, a request for a hearing is filed in writing within 60 days from the date of service of the order by the person to whom the order was directed, a hearing shall be held in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code, and the commissioner shall have all of the powers granted under that chapter. Unless that hearing is commenced within 15 business days after the request is made (or the person affected consents to a later date), the order shall be deemed rescinded.

2. The Commissioner's Stop Order was properly issued under Corporations Code section 31115. Rubin's involvement with Why Weight created an unreasonable risk to prospective franchisees. At all times prior to and up to at least April 9, 2004, Rubin's true role at Why Weight was never disclosed. He was the ultimate decision maker with respect to all aspects of the operation of Why Weight and the disclosures/non-disclosures with respect to the UFOC. Although his status with the FTC was disclosed after the first UFOC was filed, no reference was ever made to his criminal conviction in any subsequent UFOC filing. The failures to disclose Rubin's true status with Why Weight, and his criminal conviction, constituted a clear violation of Corporations Code section 31115, subdivision (d), as well as Corporations Code section 31114 and the regulations promulgated thereunder. See Findings 5, 8, 9, 10, 11 and 12.

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3. The transaction between Why Weight and Boatswain, as described in Findings 12 and 13, constituted the offer of a franchise for sale in California, without the offer having been registered under the Franchise Investment Law, a violation of Corporations Code section 31110. Thus, the D&R issued pursuant to Corporations Code section 31402 was proper.

\* \* \* \* \*

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

Respondents' appeal of the issuance of the Commissioner's stop order is denied; the desist and refrain order is affirmed. Respondents are prohibited from offering for sale any Why Weight franchise in California.

Date: 10-21-05

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RALPH B. DASH  
Administrative Law Judge  
Office of Administrative Hearings