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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) SETTLEMENT AGREEMENT
14 OF BUSINESS OVERSIGHT OF)
THE STATE OF CALIFORNIA,)
15)
Complainant,)
16 v.)
17 FRESH HEALTHY VENDING, LLC,)
18)
Respondent.)
19)

20
21 This Settlement Agreement (“Agreement”) is entered into between the California
22 Commissioner of Business Oversight (“Commissioner”) and Fresh Healthy Vending, LLC (“FHV”)
23 with respect to the following facts:

24 **RECITALS**

25 A. 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 B. On March 18, 2013, the Department of Business Oversight (“Department”) and FHV entered
2 into a settlement agreement to: revoke and deny the franchise registrations of FHV, issue a desist and
3 refrain order, and request ancillary relief for franchisees.

4 C. On September 16, 2013, the Department discovered FHV offered and sold at least three
5 franchises during 2012 at a time when FHV was not registered in California to offer and sell
6 franchises.

7 D. The Department also discovered that the Chief Executive Officer of FHV, Alex Kennedy,
8 offered a franchise in Fresno, California on or about September 17, 2013. This offer was also made
9 at a time when FHV was not registered to offer or sell franchises.

10 E. On October 3, 2013, FHV filed a franchise registration application with the Department. A
11 review of the Uniform Franchise Disclosure Document showed multiple regulatory actions taken
12 against the controlling person of FHV, Nicholas Yates.

13 F. On February 27, 2014, and April 2, 2014, the Department issued a two-year stop order
14 denying the effectiveness of FHV’s franchise registration application due to unregistered offers and
15 sales of franchises, and based on an unreasonable risk to prospective franchisees.

16 G. After the stop order was issued by the Department, FHV continued to offer and sell franchises
17 to fifteen franchisees in other states by means of misrepresentations. These franchise sales occurred
18 during March, April and May of 2014.

19 H. On June 9, 2014, FHV’s Chief Executive Officer, Alex Kennedy, entered into a Consent
20 Order with the State of Washington, Department of Financial Institutions, based on unregistered
21 offers and sales of franchises and misrepresentations in the offer and sale of franchises.

22 I. For these reasons, the Commissioner proposes to issue a Stop Order under Corporations Code
23 section 31115(a) based on violations of Corporations Code section 31110 (unregistered offers and
24 sales of franchises) and violations of Corporations Code section 31201 (misrepresentations in
25 connection with the offer and sale of franchises); and under Section 31115(d)(4) based on the
26 regulatory actions involving Nicholas Yates, and the management team of FHV which pose an
27 unreasonable risk to prospective franchisees.

28 J. Furthermore, the Commissioner proposes to issue a Citation under Corporations Code section

1 31406 and request ancillary relief under section 31408 including the following: a desist and refrain
2 order based on violations of Corporations Code section 31201 (misrepresentations in connection with
3 the offers and sales in fifteen franchise transactions); an assessment of administrative penalties of
4 thirty-seven thousand five hundred dollars (\$37,500) based on these fifteen separate violations;
5 ancillary relief involving rescission offers and restitution to these fifteen franchisees; ancillary relief
6 requiring FHV to develop and implement a compliance program; ancillary relief requiring FHV to
7 contract with an independent monitor to review compliance activities of FHV and assess FHV's
8 performance in complying with the Order and Citation and the California Franchise Investment Law;
9 and ancillary relief of requiring FHV to pay attorney's fees of eighteen thousand two hundred dollars
10 (\$18,200).

11 It is the intention and desire of the parties to resolve the foregoing, and the terms and
12 conditions set forth herein, the parties agree as follows:

13 **TERMS AND CONDITIONS**

- 14 1. This Agreement is entered into for the purpose of judicial economy and expediency, and to
15 avoid the time and expense of a hearing and possible further court proceedings.
- 16 2. FHV admits the allegations contained in the Stop Order and Citation Including Desist and
17 Refrain Order, Administrative Penalties, and Ancillary Relief and Costs ("Order and Citation"), and
18 FHV hereby stipulates to issuance of the Order and Citation, a true and correct copy of which is
19 attached hereto as Exhibit A. In the event that any future proceedings are initiated by or brought
20 before the Commissioner against FHV, FHV shall not dispute the allegations contained in the Order
21 and Citation or this Agreement, including the Recitals.
- 22 3. FHV waives any right to a hearing on the allegations set forth in the Order and Citation.
23 Respondent acknowledges its right to an administrative hearing under sections 31117 and 31406 in
24 connection with this Order and Citation, and hereby waives that right to a hearing, and to any
25 reconsideration, appeal, or other right which may be afforded pursuant to the California Franchise
26 Investment Law, the California Administrative Procedure Act, the California Code of Civil Procedure
27 or any other provision or law in connection with this matter.
- 28 4. FHV agrees to comply with the terms of the Order and Citation. If FHV fails to comply with

1 any of the terms of this Order and Citation, the Commissioner may institute proceedings for any and
2 all violations otherwise resolved pursuant to this Agreement and the Order and Citation.

3 5. FHV agrees that Nicholas Yates shall not be a director, officer, or manager of FHV for a
4 period of two years following the effective date of this Agreement.

5 6. FHV agrees that this enforcement action and Agreement will be a matter of public record.
6 FHV also agrees that written reports submitted by the monitor to the Department shall be public
7 records subject to the California Public Records Act, and shall be subject to an exemption from
8 disclosure pursuant to Government Code section 6254(d)(2).

9 7. The parties hereby acknowledge and agree that this Agreement is intended to and shall
10 constitute a final and complete resolution of the Order and Citation, and constitutes the entire
11 Agreement between the parties with respect thereto. This Agreement supersedes any and all prior or
12 contemporaneous agreements between the parties hereto.

13 8. Notwithstanding any other provision contained herein, nothing in this Agreement shall
14 operate to limit the Commissioner's ability to investigate and prosecute violations of the California
15 Franchise Investment Law not addressed herein, or to assist any other agency (county, state or
16 federal) with any prosecution, administrative, civil or criminal, brought by such agency against FHV
17 concerning violations alleged herein or otherwise.

18 9. Each party hereto represents and warrants that it has received independent advice from its
19 attorney(s) and/or other representatives prior to entering into this Agreement, and in executing this
20 Agreement relied solely on the statements set forth herein and the advice of its own counsel and/or
21 representative.

22 10. In that the parties have had the opportunity to draft, review and edit the language of this
23 Agreement, no presumption for or against any party arising out of drafting all or any part of this
24 Agreement will be applied in any action relating to or arising out of this Agreement. Accordingly,
25 the parties hereby waive the benefit of California Civil Code section 1654 and any successor statute.

26 11. The waiver of any provision of this Agreement shall not operate to waive any other provisions
27 set forth herein, and any waiver, amendment and/or change to the terms of this Agreement must be in
28 writing, signed by the parties hereto.

1 12. The parties agree that any all claims and disputes arising out of or related to the allegations set
2 forth in the Order and Citation and/or this Agreement shall be governed by and interpreted in
3 accordance with California law, and shall be resolved in the Superior Court of California, County of
4 Sacramento ("Court"). Each of the parties hereto consents to the jurisdiction of the Court, and hereby
5 irrevocably waives, to the fullest extent permitted by law, the defense of an inconvenient forum to the
6 maintenance of such action or proceeding in Court.

7 13. Each signatory hereto represents and warrants that he/she possesses the necessary capacity
8 and authority to execute this Agreement and bind the parties hereto.

9 14. This Agreement may be executed in one or more counterparts, each of which shall be an
10 original but all of which, together, shall be deemed to constitute a single document. A facsimile
11 signature shall be deemed the same as an original signature.

12 15. This Agreement shall not become effective until signed and dated by each of the parties.

13 Dated: November 7, 2014 JAN LYNN OWEN
14 Commissioner of Business Oversight

15
16 By: _____
17 MARY ANN SMITH
18 Deputy Commissioner

19 Dated: November 4, 2014 FRESH HEALTHY VENDING, LLC

20
21 By: _____
22 ART BUDMAN
23 Chief Executive Officer

24 APPROVED AS TO FORM:

25 Dated: November 4, 2014

26 By: _____
27 JAMES MULCAHY
28 Counsel for Fresh Healthy Vending, LLC