

STATE OF HAWAII

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

In the Matter of:) Case Number: SEU-2010-011
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)
SHANNON FULLER; and) PRELIMINARY ORDER TO CEASE
E-Z ROADSIDE, LLC,) AND DESIST AND NOTICE OF RIGHT
) TO HEARING
)
Respondents.)
)
_____)

PRELIMINARY ORDER TO CEASE AND DESIST
AND NOTICE OF RIGHT TO HEARING

I. STATEMENT OF APPLICABLE STATUTORY LAW

Pursuant to the authority granted by the Hawaii Franchise Investment Law, Chapter 482E of the Hawaii Revised Statutes (“HRS”), the rules and orders adopted thereunder, the authority delegated by the Director of the Department of Commerce and Consumer Affairs of the State of Hawaii (“Director”) to the Commissioner of Securities (“Commissioner”), and other applicable authority, the Commissioner has conducted a preliminary investigation into the activities of Respondents Shannon Fuller (“Respondent Fuller”) and E-Z Roadside, LLC (“E-Z Roadside” or “Respondent E-Z Roadside”) (collectively, “Respondents”), to determine if the Respondents have engaged in or are about to engage in any act or practice constituting a violation of HRS Chapter 482E or any rule or order adopted thereunder.

From the information revealed pursuant to said investigation, the Commissioner has reasonable cause to believe that the above-named Respondents have violated HRS Chapter 482E

and that such violations justify the entry of an order pursuant to the authority of HRS § 482E-10.7(a) to cease and desist from such violations in that the Commissioner finds as follows:

II. STATEMENT OF JURISDICTION

The Commissioner has jurisdiction under HRS Chapter 482E as this case involves the offer to sell and sale of a franchise in the State of Hawaii to a Hawaii franchisee within the meanings of HRS § 482E-2 and other applicable authority.

III. RESPONDENTS

1. Respondent Fuller is an individual and the owner of a business concept known as E-Z Roadside and was, at all relevant times, believed to be a resident of the State of Colorado. At all times relevant to this proceeding, Respondents were engaged in the offer to sell and sale of a franchise of E-Z Roadside in the State of Hawaii. Respondent E-Z Roadside was, at all relevant times, believed to be a sole proprietorship operated by Respondent Fuller.

2. Respondents never registered E-Z Roadside as a business entity or trade name in the State of Hawaii. Records from Colorado show only that the trade name “EZ Roadside Assistance” was registered by Annette M. Fuller, Respondent Fuller’s wife, but no business entity named “E-Z Roadside, LLC” was ever registered in Colorado.

IV. STATEMENT OF FACTS AND ALLEGATIONS

3. Sometime in December 2007, Respondent Fuller solicited a Hawaii franchisee (“Franchisee”) to purchase a franchise of E-Z Roadside for Honolulu, Hawaii, by posting a “business for sale” ad on Craigslist. On January 28, 2008, the Franchisee accepted and entered into a written agreement with Respondents (the “Buy-Sell Agreement”). The Buy-Sell Agreement provided that Franchisee purchased the rights to operate a roadside assistance

business using the trade name of E-Z Roadside for the service area of Honolulu, Hawaii, which was referred to as "Purchase Unit Area."

4. Franchisee, using the trade name E-Z Roadside, provided various roadside services such as battery jumpstarts, fuel refill, tire changes, and assistance with vehicle lockouts to motorists on the island of Oahu.

5. Respondents and Franchisee had a continuing community interest in providing various roadside assistance services to the general public commencing with Franchisee's operation of the franchise on or about February 11, 2008 until mid-December of 2009, including, but not limited, to the following:

- a. Franchisee was required to use the dispatch and accounting services of Respondents for all service calls in the Purchase Unit Area. Franchisee did not bill customers for its roadside services; rather, Respondents handled all the billing to the respective insurance companies of the motorists served by Franchisee.
- b. After collecting payments from insurance companies, Respondents sent bi-weekly payments to Franchisee with the following deductions:
 - (i) "Purchasing Fee" from the gross dollar amount received from insurance companies. The "Purchasing Fee" was equivalent to 15% of the gross dollar amount collected. Under the Buy-Sell Agreement, the "Purchasing Fee" was to be paid starting at the commencement of the Buy-Sell Agreement and continuing until the "cost" of the Purchase Unit Area was eventually "paid in full."

- (ii) Fees for “Services or other costs” incurred by Respondents on behalf of Franchisee.
 - (iii) “Fees for services” to cover the cost of dispatching (\$5.50) and billing (\$1.00) per call dispatched to Franchisee’s area of coverage. Franchisee was required to pay for the dispatching and billing costs even in instances when Franchisee chose not to accept or perform the services requested.
- c. Franchisee was required to pay for the costs of Respondent Fuller’s attendance in various “Tow Shows” to promote the business on behalf of Franchisee.
- d. Franchisee was required to purchase annual telephone book advertisements which needed Respondents’ approval prior to publication.
- e. Any signs displayed on Franchisee’s service vehicles had to be purchased from Respondents or approved by them prior to use.
- f. Franchisee was required to purchase and to use invoices from Respondents, or to use invoices approved by Respondents prior to use.
- g. The Buy-Sell Agreement contained a non-compete clause which proscribed Franchisee from competing, or assisting anyone to compete, with Respondents and the roadside assistance business in Honolulu, Hawaii, or other potential Purchase Units Area for an indefinite period of time.

- h. The Buy-Sell Agreement required that Franchisee maintain a “Roadclub Score” of 95%. In the event that Franchisee’s Roadclub Score dropped below 95% and Franchisee failed to bring it back up to 95% within one week of verbal or written notification from Respondents, Franchisee would forfeit all monies paid or earned to date and would be charged a \$20,000.00 fee to cover Respondents’ costs to “re-establish the Purchase Unit Area.”
- i. Under the Buy-Sell Agreement, Respondents were responsible for maintaining contact and coordinating sales efforts with the roadclubs in the Purchase Unit Area as well as notifying Franchisee of any potential contract rate changes in the Purchase Unit Area prior to making such changes.

6. Franchisee paid franchise fees in the form of a down payment of \$20,000.00 to Respondents prior to commencing the business, in addition to Franchisee’s payments of “Purchasing Fees,” dispatch and billing fees, and other costs as noted above.

7. Respondents omitted to state material facts in their oral and written communications with Franchisee including, but not limited to, the following:

- a. Respondents failed to disclose that they were required to present to Franchisee an “offering circular” with material information regarding the franchise prior to the sale pursuant to HRS § 482E-3 (a). Respondents did not present such circular.

- b. Respondents failed to disclose that they were required to file an “offering circular” with the Director prior to the sale of the franchise pursuant to 482E-3 (c) and did not.
- c. Prior to the execution of the Buy-Sell Agreement, Respondents knew that E-Z Roadside’s then-existing Roadclub Score was 64%, way below the 95% target that would trigger Franchisee forfeiture under the Buy-Sell Agreement. As the seller of the E-Z Roadside franchise, Respondents knew that under the Buy-Sell Agreement, should Franchisee fail to attain and to maintain a Roadclub Score of 95%, Franchisee risked forfeiture of all monies it would pay or earn and would be charged a \$20,000.00 fee to cover Respondents’ costs to “re-establish the Purchase Unit Area” as noted above. Respondents nevertheless failed to disclose to Franchisee that the Roadclub Score was 64%, and only informed Franchisee of this after the parties had already executed the Buy-Sell Agreement.

8. Franchisee did not attain and maintain a Roadside Score of 95% during the time it ran the business. The Buy-Sell Agreement was eventually terminated.

V. VIOLATIONS OF FRANCHISE LAWS

9. The facts and allegations in paragraphs 1 through 8, inclusive, are realleged and incorporated in their entirety.

10. The above-described Buy-Sell Agreement is a “franchise” within the meaning of HRS § 482E-2 and other applicable authority.

11. In connection with the sale of this franchise, Respondents were required to, but did not, present an "offering circular" to Franchisee prior to the sale of the franchise, in violation of HRS § 482E-3(a).

12. Respondents were also required to, but did not, file a copy of the offering circular with the Director prior to the sale of the franchise, in violation of HRS § 482E-3(c).

13. Respondents also violated HRS § 482E-5(b)(4), by selling or offering to sell a franchise by means of oral communication which omitted to state material facts necessary in order to make the statements made in light of the circumstances under which they were made not misleading.

VI. PRELIMINARY ORDER TO CEASE AND DESIST

NOW THEREFORE, pursuant to HRS Chapter 482E, based on the aforementioned findings and conclusions and/or because it appears that Respondents may engage in further acts or practices in violation of HRS Chapter 482E, and/or because it is found that this action is necessary and in the public interest for the protection of Franchisee and prospective franchisees, **IT IS HEREBY ORDERED** that:

(1) Respondents shall **CEASE AND DESIST** from making any offer to sell, solicitation to purchase, sale of and/or transfer of the above-described franchise, or any other franchise, within the State of Hawaii;

(2) All contracts regarding the purchase or sale of the aforesaid franchise by Respondents to Franchisee, or any similarly situated franchisees, are hereby **RESCINDED** effective immediately. Respondents shall **REFUND** to said Franchisee and any similarly situated franchisees, all monies or other franchise fees paid, plus interest on the amounts of

monies or other compensation calculated at the same rate of ten percent (10%) per annum from the date of the sale of the franchise to the date of the refund payment until fully paid, minus amounts or remuneration already paid to said franchisees. This payment shall be made within thirty (30) days of the date of the Commissioner's Final Order ("Final Order"). Proof of said payments to franchisees shall be provided to the Securities Enforcement Branch within thirty (30) days of the date of the Final Order. If a franchisee elects not to rescind the purchase or sale of a franchise, then the franchisee must so indicate in writing that the franchisee has elected not to exercise such right;

(3) Respondents shall be liable to pay the State of Hawaii, Department of Commerce and Consumer Affairs, Business Registration Division, a CIVIL PENALTY in the sum of TEN THOUSAND AND NO/100 DOLLARS (\$10,000.00), plus interest on the unpaid balance thereof at the rate of ten percent (10%) per annum from the date of the Final Order until finally paid, pursuant to HRS § 482E-10.5. Payment of this civil penalty shall be made by cashier's check or certified check made payable to the "Department of Commerce and Consumer Affairs Compliance Resolution Fund" and received by the Commissioner within thirty (30) days of the date of the Final Order;

(4) Respondents shall be subject to a civil penalty of not more than One Hundred Thousand and No/100 Dollars (\$100,000.00) per violation for each and every violation of this Preliminary Order to Cease and Desist ("Preliminary Order") or any other order of the Director or the delegated authority, pursuant to HRS § 482E-10.5, and any future violation of HRS Chapter 482E; and

(5) The imposition of this Preliminary Order shall not preclude or prevent in any way the imposition of further sanctions or other actions against Respondents for violations of HRS Chapter 482E.

YOU ARE HEREBY NOTIFIED that pursuant to HRS § 482E-10.7, you may request a hearing on this matter within thirty (30) days of the date of this Preliminary Order. Said request must be in writing and addressed to: Office of Administrative Hearings, Department of Commerce and Consumer Affairs, State of Hawaii, P.O. Box 541, Honolulu, Hawaii, 96809.

You must simultaneously serve a copy of your written request for a hearing upon the Securities Enforcement Branch, Department of Commerce and Consumer Affairs, State of Hawaii, P.O. Box 40, Honolulu, Hawaii, 96810. If a hearing is requested, it shall be scheduled within fifteen (15) business days after your written request has been received by the Office of Administrative Hearings unless extended by the Commissioner for good cause.

If no written request for a hearing is received by the Office of Administrative Hearings, and none is ordered by the Commissioner, this Preliminary Order shall remain in effect unless and until modified or vacated by the Commissioner or until a Final Order becomes effective.

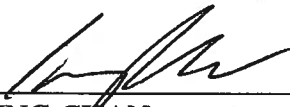
You are hereby further notified that pursuant to § 16-201-23 of the Hawaii Administrative Rules for Administrative Practice and Procedure, you may, within ten (10) days after receiving a Final Order, move the Commissioner to reconsider the Final Order. Your motion shall be filed with the Commissioner and shall state specifically what points of law or

facts the Commissioner has overlooked or misunderstood, together with brief arguments on the points raised.

Additionally, pursuant to HRS § 16-201-24, as applicable, you may file an appeal with the Circuit Court of the First Circuit of the State of Hawaii in the manner provided in HRS Chapter 91.

You have the right to retain legal counsel, at your own expense, for all stages of these proceedings.

DATED: Honolulu, Hawaii, ~~MAY 13~~ 2013.



TUNG CHAN
Commissioner of Securities
Department of Commerce & Consumer Affairs
STATE OF HAWAII