

COMMONWEALTH OF VIRGINIA
STATE CORPORATION COMMISSION

AT RICHMOND, OCTOBER 29, 2013

COMMONWEALTH OF VIRGINIA, *ex rel.*

2013 OCT 29 P 3:04

STATE CORPORATION COMMISSION

v.

CASE NO. SEC-2013-00017

ANY TEST FRANCHISING, INC.

and

JOSEPH NEELY,

Defendants

SETTLEMENT ORDER

The State Corporation Commission's ("Commission") Division of Securities and Retail Franchising ("Division") conducted an investigation of Any Test Franchising, Inc. ("Any Test"), and Joseph Neely ("Neely") (collectively, "Defendants") pursuant to § 13.1-567 of the Virginia Retail Franchising Act ("Act"), § 13.1-557 *et seq.* of the Code of Virginia ("Code").

Based upon its investigation, the Division alleges the following:

- (1) Any Test is a franchisor formed under the laws of Georgia that offers franchising opportunities in labs that specialize in the collection of blood, urine, and DNA for testing and analysis. Any Test locations also offer immunizations and therapeutic injections. Any Test's franchise was first registered to be offered and sold in the Commonwealth of Virginia ("Virginia") in 2007.
- (2) Neely is a resident of Georgia. At all relevant times Neely was the CEO of Any Test.
- (3) For the first several years the franchise was registered, Any Test included optional Financial Performance Representations in Item 19 of its disclosure document. Item 19 allows, but does not require, franchisors to include actual or projected financial performance of franchisee or franchisor-owned locations. Pursuant to 21 VAC 5-110-95 of the Commission's

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Retail Franchising Act Rules, 21 VAC 5-110-10 *et seq.*, a franchisor is required to have a reasonable basis for the financial representation at the time the representation was made as well as written substantiation. In addition, Any Test was required to disclose any unique characteristics of the locations included in the financial representations that differed materially from those outlets that were offered to the prospective franchisees.

(4) Despite these requirements, Any Test and Neely failed to disclose the fact that every outlet listed in Item 19 was owned by a medical doctor. The Division alleges that a medical doctor who owns the location is able to refer patients to the locations as well as read the results of tests without charging the locations a fee for doing so. The Division alleges that by failing to disclose all of the outlets listed in Item 19 were owned by a medical doctor, the Defendants violated § 13.1-563 (2) of the Act.

(5) Prior to entering into a franchise relationship, prospective Virginia franchisees were invited to a "Discovery Day" at Any Test, hosted by Neely.

(a) At Discovery Day, Neely showed prospective franchisees a presentation and provided them with an electronic copy of a Financial Model Worksheet which is offered as a template that includes formulas to be used by a prospective franchisee.

(b) In the presentation, Any Test listed nine tests its franchisees offered. It then broke down the tests by retail cost, cost of each test, gross margin, gross margin percentage, and mark-up percentage.

(c) The electronic Financial Model Worksheet contained formulas created by Any Test. Upon a prospective franchisee entering data, these formulas would calculate expenses and revenues for the prospective franchisees as well as gross margins.

(d) A franchisor may only make financial performance representations through Item 19 in its disclosure document. Therefore, a franchisor cannot make any financial performance representations to prospective franchisees outside its disclosure document. The Financial Model Worksheet, which contained formulas for a prospective franchisee, and the presentation at Discovery Day were not the disclosures made by Any Test in Item 19 of its disclosure document. According to the Division, both the Discovery Day presentation that listed gross margins and mark-ups for nine tests offered by the franchise locations as well as the Financial Model Worksheet that provided formulas for the calculation of expenses and revenues represent prohibited financial representations and violated § 13.1-563 (2) of the Act.

(6) The disclosure document cleared by the Division contains exhibits, including an Area Developer Agreement. According to the Division, the Area Developer Agreement provided to the Division was materially different than the one the franchisees signed in that certain fees, the fee structure, and the training requirements differed between the disclosure document provided to the Division and the one the Virginia franchisees signed violating § 13.1-563 (4) (ii) of the Act.

(7) After concluding its investigation, the Division alleges the Defendants violated: (i) § 13.1-563 (2) of the Act by making untrue statements of a material fact or omitting to state a material fact necessary in order to avoid misleading the offeree in connection with the sale or offer to sell a franchise; and (ii) § 13.1-563 (4) (ii) of the Act by failing to, directly or indirectly, provide franchisees with such disclosure documents as may be required by rule or order of the Commission.

If the provisions of the Act are violated, the Commission is authorized by § 13.1-562 of the Act to revoke a defendant's registration, by § 13.1-568 of the Act to issue temporary or

permanent injunctions, by § 13.1-570 of the Act to impose certain monetary penalties and to request a defendant make rescission and restitution, and by § 12.1-15 of the Code to settle matters within its jurisdiction.

For the purposes of this Settlement Order ("Order"), the Defendants neither admit nor deny the foregoing allegations, but admit to the Commission's jurisdiction and authority to enter this Order.

As a proposal to settle all matters arising from these allegations, the Defendants have made an offer of settlement to the Commission wherein the Defendants will abide by and comply with the following terms and undertakings:

(1) The Defendants will pay to the Treasurer of the Commonwealth of Virginia ("Treasurer"), contemporaneously with the entry of this Order, the amount of Thirty Thousand Dollars (\$30,000) in monetary penalties.

(2) The Defendants will pay to the Treasurer, contemporaneously with the entry of this Order, the amount of Five Thousand Dollars (\$5,000) to defray the costs of investigation.

(3) Within 30 days of the date of entry of this Order, the Defendants will provide all current and former franchisees who had a franchise location in Virginia with a copy of this Order.

(4) The Defendants will not violate the Act in the future.

The Division has recommended that the Commission accept the offer of settlement of the Defendants.

NOW THE COMMISSION, having considered the record herein, the offer of settlement of the Defendants, and the recommendation of the Division, is of the opinion that the Defendants' offer should be accepted.

Accordingly, IT IS ORDERED THAT:

(1) The offer of the Defendants in settlement of the matter set forth herein is hereby accepted.

(2) The Defendants shall fully comply with the aforesaid terms and undertakings of this settlement.

(3) This case is dismissed, and the papers herein shall be placed in the file for ended causes.

Dismissal of this case does not relieve the Defendants from their reporting obligations to any regulatory authority.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to:

Any Test Franchising, Inc., 10945 St. Bridge Road, Suite 401, Room 299, Alpharetta, Georgia 30022; Joseph Neely, 310 Fall Ridge Cove, Alpharetta, Georgia 30022; Richard J. Simeone, Esquire, Richard J. Simeone, P.A., 4411 Cleveland Avenue, Ft. Myers, Florida 33901; and a copy shall be delivered to the Commission's Office of General Counsel and Division of Securities and Retail Franchising.

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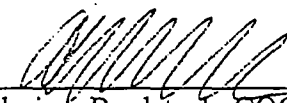
ADMISSION AND CONSENT

Any Test Franchising, Inc. and Joseph Neely (collectively, "Defendants"), admit to the jurisdiction of the State Corporation Commission ("Commission") as to the party and subject matter hereof and, neither admitting nor denying the allegations made herein by the Division of Securities and Retail Franchising, hereby consent to the form, substance and entry of the foregoing Settlement Order ("Order").

The Defendants further state that no offer, tender, threat or promise of any kind whatsoever has been made by the Commission or any member, subordinate, employee, agent or representative thereof in consideration of the foregoing Order.

Any Test Franchising, Inc.

Date: 10/8/13

By: 
Clarissa Bradstock, COO

Date: _____

By: _____
Joseph Neely, individually

Seen and Approved By:

Richard Simeone, Esquire

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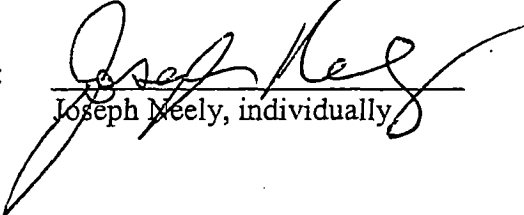
The Defendants further state that no offer, tender, threat or promise of any kind whatsoever has been made by the Commission or any member, subordinate, employee, agent or representative thereof in consideration of the foregoing Order.

Any Test Franchising, Inc.

Date: _____

By: _____
Clarissa Bradstock, COO

Date: 10/7/2013

By: 
Joseph Neely, individually

Seen and Approved By:

Richard Simeone, Esquire

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