

STATE OF HAWAII

DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

In the Matter of:	)	Case Number SEU-2011-012
	)	
	)	
DENNIS W. LOVELL and	)	PRELIMINARY ORDER TO CEASE
KRM DISTRIBUTORS, 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 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, through the Securities Enforcement Branch of the Business Registration Division, has conducted a preliminary investigation into the activities of Respondents Dennis W. Lovell ("Respondent Lovell"), and KRM Distributors, LLC ("Respondent KRM" and collectively "Respondents"), to determine if the Respondents have engaged in, or are about to engage in, any act or practice constituting a violation of Chapter 482E, HRS, 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 Chapter 482E, HRS, 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 she finds as follows:

## II. STATEMENT OF JURISDICTION

The Commissioner has jurisdiction under Chapter 482E, HRS, as this case involves the offer and sale of franchises in the State of Hawaii to Hawaii franchisees within the meaning of HRS § 482E-2 and other applicable authority.

## III. RESPONDENTS

1. Respondent Lovell is an individual and the owner of KRM and was, at all relevant times, a resident of Hawaii. At all times relevant to this proceeding, Respondent Lovell was engaged in the offer and sale of “Surfin’ Ass Coffee Company” businesses in the State of Hawaii.

2. Respondent KRM was registered with the State of Hawaii as a domestic limited liability company in September 2007 and is currently active. Respondent Lovell serves as the agent and managing member of Respondent KRM. KRM was set up, at least in part, as a coffee and chocolate distributor for the “Surfin’ Ass Coffee Company” businesses.

3. Respondent Lovell registered the trade name “Surfin’ Ass Coffee” with the State of Hawaii on or about May 28, 2010. In his Application for Registration of Trade Name, Respondent Lovell, as registrant, stated that the nature of the business for which the trade name would be used was for the production and sale of coffee, coffee drinks, clothing, novelty items, and other related products.

#### IV. STATEMENT OF FACTS AND ALLEGATIONS

4. On or about January 30, 2009, Respondents solicited a Hawaii franchisee ("Franchisee") to purchase a "Surfin' Ass Coffee Company" business. Franchisee accepted and entered into a written agreement with Respondents that granted Franchisee the right to use the trade name "Surfin' Ass Coffee Company" for a five year period (the "Agreement"). The Agreement also gave Franchisee the option to purchase four additional licenses owned by Respondents.

5. Although Respondents called the Agreement a "License Agreement," Respondents provided Franchisee with training materials that referred to the "Surfin' Ass Coffee Company" business as a franchise. The training materials also set out Respondents' operational and marketing programs which Franchisee agreed to comply with.

6. Respondents and Franchisee had a continuing community interest in selling coffee and chocolate distributed by KRM to the general public during Franchisee's operation of the franchise from January 30, 2009 until April 2010, including, but not limited, to the following:

- a. Franchisee paid Respondents a share of the advertising costs for the products sold by Franchisee and Respondent KRM;
- b. Franchisee was required to purchase all coffee and related products from Respondents at wholesale prices set by Respondents;
- c. The Agreement specified the geographic locales within which Franchisee could conduct her business, including the hours of store operation;

- d. The Agreement contained a non-compete clause which required Franchisee to obtain permission from Respondents prior to purchasing and selling other products not available through Respondents;
- e. The Agreement provided Respondents with authority over the handling of customer complaints, the use of credit cards, the use of advertising, and the termination and cancellation of the Agreement;
- f. The Agreement required the return of all trade marked products, logos, etc. at the termination of the Agreement; and
- g. Respondents controlled the volume and types of products sold by Franchisee to the extent that it affected Franchisee's possibility of future success.

7. Franchisee paid \$20,000.00 in direct franchise fees to Respondents prior to opening the "Surfin' Ass Coffee Company" business, in addition to her purchase of \$9,000.00 for store inventory, \$10,000.00 for store fixtures, and \$61,000.00 for four additional licenses and the right of first refusal on the development of all locations within the island of Hawaii for stores selling the same products.

#### V. VIOLATIONS OF FRANCHISE LAWS

8. The facts and allegations in paragraphs 1 through 7, inclusive, are realleged and incorporated as if set forth verbatim.

9. The above-described Agreement is a "franchise" within the meaning of HRS § 482E-2 and other applicable authority which emphasizes the presence of a "community interest"

when there is a continuing relationship between the franchisor and franchisee in the operation of the franchise business.

10. 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).

11. 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).

#### VI. PRELIMINARY ORDER TO CEASE AND DESIST

NOW THEREFORE, pursuant to Chapter 482E, HRS, based on the aforementioned findings and conclusions and/or because it appears that Respondents may engage in further acts or practices in violation of Chapter 482E, HRS, 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, jointly and severally, shall REFUND to said 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 (10.0%) 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 Commissioner, pursuant to HRS §§ 482E-10.5, and any future violation of Chapter 482E, HRS; 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 or any other party for violations of Chapter 482E, HRS.

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 Chapter 91, HRS.

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

DATED: Honolulu, Hawaii, OCT 26 2012.

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