

the Respondents received adequate notice of hearing, the hearing went forward.¹ The Department has jurisdiction over this matter pursuant to R.I. Gen. Laws § 19-28.1-1 *et seq.*

Section I

Based on the foregoing, the undersigned makes the following findings of fact:

1. Pursuant to Section 21 of the *Central Management Regulation 2 – Rules of Procedure in Administrative Hearings* (“CMR2”), the Respondent is declared to be in default for failing to appear at the status conference.

2. Pursuant to Section 21 of CMR2, the allegations in the Notice are found to be true including but not limited to the following:

A. Respondent TriState Enterprises is the fictitious name of a subsidiary of DECI, Inc., a domestic corporation with principal offices at 1270 Mineral Spring Avenue, Suite 12, North Providence, Rhode Island.²

B. Respondent Anthony E. DeSimone, Jr. is president of TriState.

C. Respondent David A. Civetti is vice-president of TriState.

D. On July 22, 2008, the Department received information that TriState was offering or selling franchises in the State of Rhode Island without benefit of registration in violation of R.I. Gen. Laws § 19-28.1-5.

E. TriState is not registered as a franchise or franchisor pursuant to R.I. Gen. Laws § 19-28.1-1 *et seq.*, nor has it registered as such in the past.

¹ See for example, *Castro v. Employees' Retirement System of Rhode Island*, C.A. No. PC 08-7573 (4/5/12).

² At the time of the Notice that was Respondents' address. Administrative notice is taken of the Respondents' 2010 filing with the Secretary of State's office changing the address to 3 Alvina Drive, Johnston, RI 02919.

F. On August 26, 2007, the Department received a complaint that the complainant was a TrisState franchisee and TriState breached the franchise agreement that he had entered into with TriState. On October 10, 2007, TriState provided information to the Department that led the Department to conclude on April 23, 2008 that Tristate had not been involved in the sale of an unregistered franchise in the State. TriState's October 10, 2007 response was a fraudulent, prohibited, and deceptive practice by making an untrue statement in a report filed with the Department by unequivocally stating that TriState never acted as a franchisor and was never engaged in the offer of the sale of a franchise in violation of R.I. Gen. Laws § 19-28.1-1 *et seq.*, Rhode Island Franchise Investment Act.

Section II

Furthermore, R.I. Gen. Laws § 19-28-1 *et seq.* contains the following provisions:

1. R.I. Gen. Laws § 19-28.1-3(7) defines "franchise" as an oral or written agreement, either express or implied, that:

- (i) Grants the right to provide services under a marketing plan prescribed or suggested in substantial part by the franchisor;
- (ii) Requires payment of a franchise fee in excess of five hundred dollars (\$500) to a franchisor or its affiliate; and
- (iii) Allows the franchise business to be substantially associated with a trademark, service mark, trade name, logotype, advertising, or other commercial symbol of or designating the franchisor or its affiliate.

2. R.I. Gen. Laws § 19-28.1-3(9) defines "franchise fee" as a direct or indirect payment to purchase or operate a franchise.

3. R.I. Gen. Laws § 19-28.1-3(12) defines "marketing plan" as a plan or system concerning a material aspect of conducting business. This section further describes the indicia of a marketing plan to include:

- (i) Price specifications, special pricing systems or discount plans;
- (ii) Sales or display equipment or merchandising devices;
- (iii) Sales techniques;
- (iv) Promotional or advertising materials or cooperative advertising;
- (v) Training regarding the promotion, operation or management of the business; or
- (vi) Operational, managerial, technical or financial guidelines or assistance.

4. R.I. Gen. Laws § 19-28.1-5 provides that it is unlawful for any person to offer or sell a franchise unless the offer is registered or is exempt from registration under § 19-28.1-6.

5. R.I. Gen. Laws § 19-28.1-24 provides that in an administrative, civil, or criminal proceeding arising under this Act, the burden of proving an exemption, or an exclusion from a definition, is on the person claiming it.

Section III

At hearing, the Department presented factual allegations³ forwarded to Respondent. As the facts contained in the Department's exhibit are uncontested, the following facts are also found:

1. On or about October 1, 2006, TriState entered into a written agreement ("Agreement") with Albino da Viegua Fernandes ("Fernandes") that constitutes a franchise pursuant to R.I. Gen. Laws § 19-28.1-3(7) as evidenced by the following provisions of the Agreement:

- (i) Para. 1 of the Agreement grants Fernandes the right to provide services to customer accounts located in "TriState's Metropolitan Statistical Area amounting to \$27,141.72 gross volume per year."

³ These facts were contained in a proposed consent order drafted by the Department. Said document is hereby marked and admitted as Department's Exhibit One (1).

(ii) Para. 3B of the Agreement sets forth TriState's system for assisting Fernandes with material aspects of conducting his business, including providing training, assistance with customer relations, and cash flow management and advances.

(iii) Para. 3B also provides that TriState will deduct royalties, management fees, insurance fees, and monies owed on any promissory notes from each monthly payment for services rendered for the accounts assigned to Fernandes.

(iv) Para. 4A of the Agreement grants Fernandes a license "to use the name TriState Enterprises or any other name, design, or mark TriState may authorize in the future" to substantially associate with TriState "in connection with the rendering of [Fernandes]'s services in the janitorial service business..."

(v) Para. 5A of the Agreement mandates that Fernandes must attend a training course and operate his business "in a manner consistent with the procedures; [sic] methods and standards established in such training programs, manuals and directives and also agree to permit TriState to observe the performance and methods of services provided by [Fernandes] and [his] employees."

(vi) Para. 5B of the Agreement sets forth certain guidelines that Fernandes must adhere to regarding operating his business "by keeping with the standards established by the [sic] TriState through its training and periodic directives."

(vii) Para. 7A of the Agreement requires Fernandes to pay TriState a "business fee" in the amount of \$2,810.17, to be paid in equal monthly installments of \$103.27, including interest on the unpaid principal amount at the rate of ten percent (10%) per annum.

(viii) Para. 7B of the Agreement requires Fernandes to pay TriState a "sales and marketing fee" for additional janitorial customer accounts purchased from TriState in the amount of four (4) times one month's gross billings for additional accounts under \$20,000 or three (3) times one month's gross billings for additional accounts over \$20,000.

(ix) Para. 7C of the Agreement requires Fernandes to pay TriState a monthly "royalty fee" equal to eight percent (8%) of Fernandes's monthly gross revenues.

(x) Para. 7D of the Agreement requires Fernandes to pay TriState a monthly "management fee" equal to five percent (5%) of the monthly gross revenues for each month.

(xi) Para. 7E of the Agreement requires Fernandes to pay TriState an "administrative fee" of twenty percent (20%) of any payment received for one time, non-recurring contracts such as for carpet cleaning, floor stripping or initial cleanings.

(xii) Para. 7F of the Agreement requires Fernandes to pay TriState "monthly liability insurance" equal to 3.7% of the monthly gross revenues for each month.

(xiii) Para. 9 of the Agreement provides that “TriState shall have no obligation to refund any portion of any payment made under this Agreement, unless and to the extent that within one hundred twenty (120) business days following the date of completion of training, the [sic] TriState fails to supply initial customer accounts...”

(xiv) Para. 12 of the Agreement provides that “[s]uccess, whether financial or otherwise, is not guaranteed by TriState, even though you [Fernandes] may follow or rely on our advice, recommendations, programs, and policies.”

(xv) Para. 14F of the Agreement allows TriState to terminate the Agreement if Fernandes is convicted of “a felony or of any other crime that substantially impairs the goodwill associated with the marks of TriState.”

(xvi) Para. 17 of the Agreement provides that the Agreement shall remain in full force and effect for a period of ten (10) years and also allows TriState and Fernandes to “execute a written renewal agreement for a period of ten (10) years (the “Extended Term”), which agreement shall be on the same terms and conditions TriState is then granting renewal of new franchises in the Standard Metropolitan Statistical Area in which this Agreement in executed...” [Emphasis added.]

(xvii) Para. 17D of the Agreement provides, *inter alia*, that the Agreement shall be renewed if TriState does not provide Fernandes with written notice of TriState’s intent not to renew and shall waive the non-competition provisions of the Agreement “upon expiration of the Initial Term of payment of the then fair market value of the franchise.”

2. The Agreement between TriState and Fernandes constitutes a “franchise” as defined in R.I. Gen. Laws § 19-28.1-3(7) for the following reasons:

(i) The Agreement grants Fernandes the right to provide janitorial services for certain accounts provided by Respondent TriState along with training regarding the promotion, operation or management of the business, and operational guidelines and assistance;

(ii) The Agreement requires Fernandes to pay Respondent TriState fees in excess of five hundred dollars (\$500); and

(iii) The Agreement allows Fernandes to be substantially associated with “the name TriState Enterprises or any other name, design, or mark TriState may authorize in the future.”

3. TriState did not qualify for nor seek an exemption under R.I. Gen. Laws § 19-28.1-6.

Section IV

Based on the forgoing, the undersigned makes the following conclusions of law:

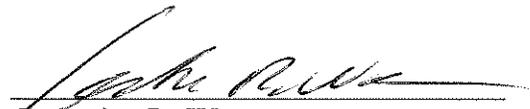
1. As set forth in Section I, the Respondent violated R.I. Gen. Laws § 19-28.1-1 *et seq.*
2. As set forth in Section III, the Respondent violated R.I. Gen. Laws § 19-28.1-1 *et seq.*

Section V

On the basis of the forgoing, the undersigned makes the following recommendation:

Pursuant to R.I. Gen. Laws § 19-28.1-18(c), the Respondents are ordered to cease and desist from continuing any act or practice in violation of R.I. Gen. Laws § 19-28.1-1 *et seq.* and from engaging in any acts or practices in violation of R.I. Gen. Laws § 19-28.1-1 *et seq.*

Date: April 20, 2012


Catherine R. Warren
Hearing Officer

I have read the Hearing Officer's recommendation in this matter and I hereby ADOPT/REJECT the findings of facts, the conclusions of law, and the recommendation of the hearing officer in the above-entitled Order of Revocation.

Date: 27 April 2012


Paul McGreevy
Director

Entered as Administrative Order No. 12-025 on the 25th day of April, 2012.

NOTICE OF APPELLATE RIGHTS

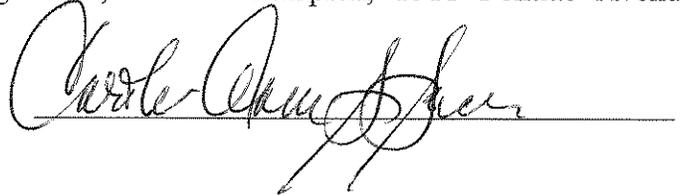
THIS ORDER CONSTITUTES A FINAL ORDER OF THE DEPARTMENT OF BUSINESS REGULATION PURSUANT TO R.I. GEN. LAWS § 42-35-12. PURSUANT TO R.I. GEN. LAWS § 42-35-15, THIS ORDER MAY BE APPEALED TO THE SUPERIOR COURT SITTING IN AND FOR THE COUNTY OF PROVIDENCE WITHIN THIRTY (30) DAYS OF THE MAILING DATE OF THIS DECISION. SUCH APPEAL, IF TAKEN, MUST BE COMPLETED BY FILING A PETITION FOR REVIEW IN SUPERIOR COURT. THE FILING OF THE COMPLAINT DOES NOT ITSELF STAY ENFORCEMENT OF THIS ORDER. THE AGENCY MAY GRANT, OR THE REVIEWING COURT MAY ORDER, A STAY UPON THE APPROPRIATE TERMS.

CERTIFICATION

I hereby certify on this 25th day of April, 2012, that a copy of the within Order was sent by first class mail, postage prepaid and certified mail, receipt requested to -

Mr. David A. Civetti
TriState Enterprises
3 Alvina Drive
Johnston, RI 02919

and by electronic delivery to Ellen R. Balasco, Esquire and Maria D'Alessandro, Deputy Director, Department of Business Regulation, Pastore Complex, 1511 Pontiac Avenue, Cranston, RI



A handwritten signature in cursive script, appearing to read "Charles A. Spina", is written over a horizontal line.