BEFORE THE
DEPARTMENT OF CORPORATIONS
STATE OF CALIFORNIA

In the Matter of the Request of: THE SENIOR'S CHOICE, INC. and STEVEN EVERHART, Respondents, vs THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, for a hearing pursuant to section 31402 of the Franchise Investment Law.	OAH No. L2007020013

DECISION

The attached Proposed Decision of the Administrative Law Judge is hereby adopted by the Commissioner of Corporations as his Decision in the above-entitled matter.

This Decision shall become effective on MAY 1, 2007.

IT IS SO ORDERED this 30th day of APRIL 2007.

CALIFORNIA CORPORATIONS COMMISSIONER

Preston DuFauchard

BEFORE THE DEPARTMENT OF CORPORATIONS

OF THE STATE OF CALIFORNIA

In the Matter of the Request of: THE SENIOR'S CHOICE, INC. and STEVEN EVERHART, Respondents, vs THE CALIFORNIA CORPORATIONS COMMISSIONER, Complainant, for a hearing pursuant to section 31402 of the Franchise Investment Law.	OAH No. L2007020013

PROPOSED DECISION

Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, heard this matter on February 16, 2007, at Los Angeles, California.

Linda A. Stella, Senior Corporations Counsel, represented Complainant.

Steven E. Paganetti, Attorney at Law, represented The Senior's Choice, Inc. (Senior's Choice) and Steven Everhart (Everhart) (collectively Respondents).

The record was left open for the receipt of closing and reply briefs. Both parties timely submitted their respective briefs, and the matter was submitted for decision on March 19, 2007.

Oral and documentary evidence having been received and the matter having been submitted, the Administrative Law Judge makes the following Proposed Decision.

FINDINGS OF FACT

1. On November 30, 2006, Complainant, the Commissioner of the Department of Corporations (Commissioner) issued a Desist and Refrain (D&O) Order to Respondents. The Commissioner had determined that Respondents' sale of "memberships," more fully discussed below, constituted the sale of franchises in this state in violation of the Franchise

Investment Law. The D&O ordered Respondents to halt the further offer or sale of said franchises unless and until the same had been duly registered. Respondents timely filed a Notice of Request for Hearing challenging the issuance of the D&O, and this hearing ensued.

2. Senior's Choice is a Nevada corporation and Everhart is its president. They offer memberships in "The Senior's Choice Network," providers of "in-home assisted living and care" for the elderly.[1] The written Membership Agreement (Agreement) provides for a five year term and requires payment of a non-refundable "initial Membership fee" of $12,900 and a "monthly Membership fee" of $500 per month for the first year and $250 per month for the remainder of the term.[2]

3. According to the Agreement, Senior's Choice had developed a "System" "for the development and operation of service businesses offering companion care to elderly citizens." The System would permit a business to "operate using uniform service regimens, formats, procedures, business methods, forms, information, knowledge, policies and practices."[3] Under the Agreement, Senior's Choice would "grant to persons who meet our qualifications, and who are willing to undertake the investment and effort, a membership interest entitling [them] to operate, under [their] own name, a 'The Senior's Choice' business offering the services we promote under the System."

4. Those who purchase memberships are granted the right to use the System, copyrighted materials and "certain other confidential information."[4] Members receive a training and operations manual which contains "suggested standards and operating procedures and marketing systems."[5] Members also receive a DVD set containing over 40 hours of instruction and training, a copy of a "Caregiver Training Manual," a copy of a "Certified Companion Aide Manual" and a DVD set containing over 12 hours of instruction and training for the member and the member's caregivers.[6]

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[1] On its website, Senior's Choice describes itself as "a network of independent businesses that strive to ensure a better quality of life for elderly clients and their families, by providing dependable and affordable in-home assisted living and care."

[2] Membership is renewable for a second five year term at no additional charge.

[3] The actual content of the System was not disclosed by the evidence.

[4] Although these materials were never described, either in the Agreement or by the evidence, with any specificity, members would be granted the right to use the registered service mark "The Senior's Choice" and logo, which consists of a stylized heart encompassing a sketch of a person standing with her arm around someone who is seated. Members would also be entitled to identify themselves as members of "The Senior's Choice Network." That "Network" would then typically be described as "a national leader in senior care." Under the terms of the Agreement, membership could be terminated if a member "uses or displays any Mark for any purpose whatsoever, without our consent."

[5] This manual was not offered in evidence.

[6] None of these items was offered in evidence.

5. In addition to the foregoing, a member and "one other person" would be allowed to attend a five day seminar on the operation of a "The Senior's Choice Business." "Supplemental training courses or programs" were also to be offered at no additional charge. Members were also to be provided with telephonic "continuing guidance and advice in operating [their] Members Business, including areas of accounting, marketing, operations, basic management and elder care matters." In addition, members were to be provided with "samples of legal and other forms, letterhead, business cards, newspaper inserts, direct mail letters, advertising slicks, graphic designs, layouts, written copy and other print media marketing materials which [were] developed for use by 'The Senior's Choice' Businesses." Client and caregiver scheduling software is made available to members as part of their monthly membership dues.

6. Respondents limit the number of memberships granted in any geographic area "based on feasibility studies" that take into account demographics and perceived demand for services. By mutual agreement, Respondents may grant the member a "protected territory." In that event, Respondents agree they "will not, directly or through any affiliates, operate or grant [to anyone else] the membership right to operate a 'The Senior's Choice' Business to be physically located within [the] Protected Territory."

7. Under the terms of the Agreement, Respondents have no say in how a member's business is to be advertised, operated or marketed. The means were left to each member, although Respondents are provided "advice." Members are free to use some, all or none of the materials they receive. They are not required to operate their businesses in a uniform manner nor at any set hours. In essence, members have absolute and total control over the manner in which their business is run. The only restrictions placed on a member are contained in paragraph 8.1 of the Agreement, which reads as follows:

> We will have the right to terminate this Agreement and your Membership, effective upon delivery of a notice of termination to you, if:
>
> (a) You or anyone associated withy your Member Business uses or displays any Mark for any purpose whatsoever, without our consent;
>
> (b) You are convicted of or plead no contest to a felony, perform any act that might put our System into disrepute or are declared insane by a civil or criminal court;
>
> (c) You willfully violate any regulation, ordinance, statute or administrative ruling related to The Senior's Choice Business;
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> (d) You fail to comply with any other provision of this Agreement and do not cure such failure within thirty (30) days after we deliver written notice of such failure to you; or

(e) You fail to pay timely the Initial Membership Fee or Monthly Membership Fee when due and do not cure such failure within fifteen (15) days after we deliver written notice of such failure to you.

8. Little evidence was presented as to how Respondents actually marketed their memberships. Marketing materials were offered in evidence, materials such as a 22 page "overview" of the "business opportunity" being offered, together with 42 pages of testimonials. The means by which these materials were made known to prospective members was not specified. Respondents did maintain a website whereby some or all of these materials could be obtained. The marketing materials include a section entitled "Here's How It Works." It states, in part:

> You will follow the system we've created for recruiting, screening, and interviewing these caregivers. Background checks will be performed, as well as reference checks. You will then hire these people and have them go through, and pass, a caregiver training course and certification program that we have developed that leads to a Certified Companion Aide (CCA®) designation. The caregiver is then assigned to a client and your job becomes one of managing the relationship. You will keep track of your employees' schedules, you'll check in to see that they are doing their job well, you'll perform employee evaluations, you'll "coach" your employees to improve their abilities, and you'll plan and carry out additional employee training with continuing educational programs we provide you with.
>
> The second thing your business will do is acquire clients. This involves following the marketing and sales plan that we've laid out in our business model. That includes identifying potential clients in your area, generating qualified leads through a variety of marketing methods, setting appointments with each potential client and his/her family, conducting thorough client assessments using the assessment tools we will provide you, proposing a "care plan" for clients, and then implementing that care plan by matching up the right caregiver (your employee) with the client. We will teach you how to carry out each one of these activities in a way that is easy and successful. The only thing left is to collect the money.

9. While each member's business is independently operated, several members have posted websites with a link to Senior Choice.[7] Printouts of the first page of these websites were offered in evidence. Several of these printouts show a "links" tab. Respondents argued that no member had a link from his or her website to the Senior Choice website. In his reply brief, counsel for Complainant argued that under the links tab of the websites of three members, there was a direct link to the Senior Choice website. To resolve this conflict between the evidence and the conflicting arguments of the parties, the Administrative Law

[7] As these websites are remarkably similar in appearance and content, it is presumed the same were modeled after Senior Choice's own website, a right that, according to the marketing materials, is given to members.

Judge treated the printouts as "writings" under Evidence Code section 250.[8] The printouts were also deemed to be genuine under the presumption established in Evidence Code section 1552, subdivision (a).[9] Accordingly, pursuant to the provisions of Evidence Code section 356,[10] the Administrative Law Judge reviewed each of the three member's websites in their entirety and found that counsel for Complainant was correct in his assertion that each website had a direct link to the Senior Choice website.

10. More importantly than some member websites having links to the Senior Choice website, the websites of each member, save one, make reference to either "The Senior's Choice" or "The Senior's Choice Network" as a mark of distinction that ensures customers they would receive quality care. The websites, on their respective homepages, make the following statements:

(a) From the website of member Foothill HomeCare Partners, Inc., "As a member of The Senior's Choice, a leading companion care service provider for over 18 years, our mission is to ensure a better quality of life for our elderly clients and their families, by providing dependable and affordable care." The website carries the Senior Choice logo.

(b) The website of member Seniors at Home contains the same sentence as in sub-paragraph (a) and also includes the following: "Our affiliation with The Senior's Choice, a national leader in senior care, allows us to share resources and continually improve our services." The website carries the Senior Choice logo.

(c) The website of member Sequoia Senior Solutions essentially has the same information as in sub-paragraph (b), including the logo, but without reference being made to the Senior Choice Network.

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[8] Evidence Code section 250 provides: "'Writing'" means handwriting, typewriting, printing, photostating, photographing, photocopying, transmitting by electronic mail or facsimile, and every other means of recording upon any tangible thing, any form of communication or representation, including letters, words, pictures, sounds, or symbols, or combinations thereof, and any record thereby created, regardless of the manner in which the record has been stored."

[9] Evidence Code section 1552, subdivision (a) provides: "A printed representation of computer information or a computer program is presumed to be an accurate representation of the computer information or computer program that it purports to represent. This presumption is a presumption affecting the burden of producing evidence. If a party to an action introduces evidence that a printed representation of computer information or computer program is inaccurate or unreliable, the party introducing the printed representation into evidence has the burden of proving, by a preponderance of evidence, that the printed representation is an accurate representation of the existence and content of the computer information or computer program that it purports to represent."

[10] Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence."

(d) The website of member Desert Valley Eldercare, Inc. contains the same information as in subparagraph (b), as well as the logo.

(e) The website of member Sheridan Care has no logo nor any of the information referenced in the preceding sub-paragraphs.

(f) The website of member ChoiceCare carries no logo, but does have the following: "ChoiceCare is a member of The Senior's Choice Network, specializing in providing in-home companion care and assistance to Seniors for over 18 years."

* * * * *

CONCLUSIONS OF LAW

1. Under the California Franchise Investment Law,[11] it is unlawful for any person to offer or sell any franchise in California unless the offer of the franchise has been registered or exempted from registration. (Corp. Code, § 31110.) The Legislature's intent in enacting the Franchise Investment Law more than thirty years ago[12] was threefold: (1) to provide franchisees with the full and complete information so that they can make an intelligent decision regarding the offered franchise; (2) to prohibit the sale of a franchise if it would lead to fraud or the likelihood that the franchisor's promises would not be fulfilled; and (3) to protect the franchisor by providing a better understanding of the relationship between the franchisor and the franchisee regarding their business relationship. (Corp. Code, § 31001.)

2. Because the Franchise Investment Law is remedial and protective, it is to be liberally construed to effectuate its intent. Thus, when considering each of the four elements of a franchise, "each element should be construed liberally to broaden the group of investors protected by the law and to carry out the legislative intent." (*Kim* v. *Servosnax, Inc.* (1992) 10 Cal.App.4th 1346, 1356.)

3. Corporations Code section 31005, subdivision (a) defines "franchise" as follows:

> (a) "Franchise" means a contract or agreement, either expressed or implied, whether oral or written, between two or more persons by which:
>
> (1) A franchisee is granted the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor; and
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> (2) The operation of the franchisee's business pursuant to such plan or system

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[11] Corporations Code section 31000, et seq.

[12] See Stats. 1970, ch.1400, section 3, p. 2645.

is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising or other commercial symbol designating the franchisor or its affiliate; and

(3) The franchisee is required to pay, directly or indirectly, a franchise fee.

4. Making the determination of whether an agreement, business opportunity or some other arrangement is actually a franchise subject to registration is often difficult. Accordingly, the Commissioner issued Release 3-F, entitled "When Does an Agreement Constitute a Franchise? (revised June 22, 1994) (Release 3-F), to help make that determination. Release 3-F offers a detailed analysis of how the Commissioner determines whether an agreement is a franchise under the Franchise Investment Law.[13] Release 3-F begins by noting the four elements which must be found in order to determine that an agreement is a franchise, and further notes that the failure to find any one of these four elements means that the agreement is not a franchise. The four elements, all of which can be found in Corporations Code section 31005, subdivision (a), are as follows:

1. A right must be granted to the franchisee to engage in the business of offering, selling or distributing goods or services;

2. The right must be granted to engage in the business under a marketing plan or system prescribed in substantial part by the franchisor;

3. The operation of the franchisee's business must be substantially associated with an advertising or other commercial symbol designating the franchisor or an affiliate of the franchisor, such as a trademark, service mark, trade name or logotype; and

4. The franchisee must be required to pay, directly or indirectly, a fee or charge, known as a "franchise fee," for the right to enter into the business. However, the percentage of gross revenues of a business that is attributable to the "franchise" agreement may not be a factor in determining whether the agreement in question is a "franchise." (Comm. Op. No. 74/9F.)

5. Analysis of each of the foregoing elements, as applied to the facts of this case, shows that the Agreement between Senior Choice and its members constitutes a franchise within the meaning of Corporations Code section 31005 and is thus subject to registration under the Franchise Investment Law.

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[13] The Commissioner's written opinions are entitled to great weight. (*People* v. *Kline* (1980) 110 Cal.App.3d 587, 593.)

Right to Engage in a Business:

Anyone who otherwise meets state and local criteria may operate a business offering eldercare services. However, only those who have signed the Agreement and paid the membership fee have the right to engage in that business as an associate of the Senior Care Network and use the System designed by Respondents. As noted in Finding 3, the Agreement itself specifically acknowledges this when it provides that under the Agreement, Senior's Choice would "grant to persons who meet our qualifications, and who are willing to undertake the investment and effort, a membership interest entitling [them] to operate, under [their] own name, a 'The Senior's Choice' business offering the services we promote under the System." This is a valuable right, a right that costs $12,900 to obtain, and $500 per month for 12 months and $250 per month for the next 48 months to retain.

Marketing Plan or System:

As set forth in Release 3-F, "For the agreement to constitute a 'franchise,' the business in which the franchisee is granted the right to engage in must be operated under a marketing plan or system prescribed in substantial part by the franchisor." Release 3-F also contains the following rebuttable presumption: "If the franchisor in his advertising to prospective franchisees claims to have available a successful marketing plan, the element of a marketing plan presumably will be present." Without question, Respondents touted the marketing plan it had developed as a strong selling point for the benefits of membership in the network. (See Finding 8.) Release 3-F also identifies a number of factors indicative of a marketing plan or system. These factors are as follows:

> The Commissioner of Corporations' opinions have considered the presence of a marketing plan in light of the following provisions in an agreement:
>
> Prescribing or limiting resale prices (Comm. Op. Nos. 72/11F, 73/5F, 73/47F; PL/27F);
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> Restrictions on use of advertising or mail order business (Comm. Op. No. 73/47F);
>
> Requiring display racks (Comm. Op. No. 73/9F);
>
> Giving detailed directions and advice concerning operating techniques (Comm. Op. Nos. 72/11F, 72/20F, 73/17F);
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> Assigning exclusive territory (Comm. Op. Nos. 72/45F, 73/20F, 73/25F, 73/30F);
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> Providing for uniformity or distinctiveness of appearance (Comm. Op. Nos. 72/10F, 72/21F, 73/26F, 73/27F, 73/29F);

Limiting sale of competitive products (Comm. Op. Nos. 72/3F, 72/25F, 73/30F);

Limiting use of products (Comm. Op. No. 74/6F);

Requiring approval of advertising and signs (Comm. Op. Nos. 72/4F, 72/45F);

Prohibiting engaging in other activities (Comm. Op. No. 75/6F);
Providing training sessions (Comm. Op. Nos. 72/25F, 72/34F, 72/42F);

Assigning contract (Comm. Op. No. 74/7F);

Use of manual (Comm. Op. No. 72/42F);

Providing "trade secrets" (Comm. Op. No. 74/8F).

Release 3-F goes on to state: "While any one of the examples of restrictions may not amount to "a marketing plan or system prescribed in substantial part by a franchisor," several such restrictions taken together may be sufficient to amount to such a plan or system."

Applying the foregoing to the facts of this case, it is readily apparent that several of the enumerated factors are present. These include: giving detailed directions and advice concerning operating techniques (Finding 8); assigning exclusive territory (Finding 6); providing for uniformity or distinctiveness of appearance (Findings 5, 8 and 10);[14] providing training sessions (Findings 5 and 8); and, use of a manual (Finding 4).

Respondents contend that even if these elements are present, they are not "prescribed" because, under the terms of the Agreement, the use of any or all of these items is strictly voluntary. However, Release 3-F disposes of that argument as well. It provides:

> A marketing plan or system may be "prescribed" within the meaning of Section 31005(a), although there may be no obligation on the part of the franchisee to observe it, where a specific sales program is outlined, suggested, recommended, or otherwise originated by the franchisor. Thus, a sales program may be "prescribed" by the franchisor where the franchisor supplies the franchisee with sales aids or props, such as demonstration kits, films, or detailed instructions for personal introduction and presentation of the product, possibly including the text of a sales pitch and especially where such a program is supported by training material, courses, or seminars. (Comm. Op. No. 71/61F.)

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[14] The uniformity of appearance is found in the provision by Senior Choice to its members of website templates, letterheads, business cards, graphic designs and the like. There is no requirement by Senior Choice that any of these items must be used by members, but all that Release 3-F requires is that they be provided for.

Substantial Association with Franchisor's Commercial Symbol:

The operation of the franchisee's business must be substantially associated with an advertising or other commercial symbol designating the franchisor or an affiliate of the franchisor, such as a trademark, service mark, trade name or logotype. (Corp. Code, § 31005, subd. (a).) In this matter, there is no question that the member businesses are "substantially associated" with Senior Choice's name, logo and network. While it is true that a member is not required to use the name or logo, that is of no moment. Release 3-F provides, in pertinent part:

> [T]he objective of the Law is to deal with a multiplicity of business arrangements presented to the public as a unit or marketing concept operated pursuant to a uniform marketing plan and under a common symbol. Therefore, if the franchisee is granted the right to use the franchisor's symbol, that part of the franchise definition is satisfied even if the franchisee is not obligated to display the symbol. (Comm. Op. No. 73/20F.)
>
> Moreover, in line with the objective of the Law, for the operation of the franchisee's business to be substantially associated with the symbol, it must be communicated to the customers of the franchisee. A commercial symbol which a supplier of goods or services only uses on its invoices or in its advertising to distributors, but which the supplier does not permit the distributors to show in dealing with their customers, is not in the eyes of the public substantially associated with the operation of the supplier. (Comm. Op. Nos. 71/16F, 73/18F.)
>
> However, where the trademark is communicated to the customers of the supplier, the appearance of a unified operation is established and it is immaterial whether the advertising containing the trademark is originated, distributed, or paid for by the supplier or by the distributor. In resolving the question whether there is a substantial association between the licensee's business and the licensor's commercial symbol, it is necessary to consider whether that commercial symbol is brought to the attention of the licensee's customers to such an extent that the customers regard the licensee's establishment as one in a chain identified with the licensor. (Comm. Op. Nos. 73/5F, 78/1F.)

As noted in Finding 4, footnote 4, members are granted the right to use the name "The Senior's Choice" and the logo. As set forth in Finding 10, many of the members did choose to use the mark, and except for one member, Sheridan Care (Finding 10 (f)), all members made use of their association with Senior Choice in a "pitch" to potential customers that the member's association with Senior Choice was to be taken as assurance that the customer could trust and rely on the member to provide quality services. The members' websites carried one or both of the following statements: "As a member of The Senior's Choice, a leading companion care service provider for over 18 years, our mission is to ensure a better

quality of life for our elderly clients and their families, by providing dependable and affordable care." "Our affiliation with The Senior's Choice, a national leader in senior care, allows us to share resources and continually improve our services." This clearly would lead a consumer to believe that the member's business establishment was "one in a chain identified with the licensor."

Franchise Fee:

Corporations Code section 31001 defines as franchise fees as "any fee or charge that the franchisee or subfranchisor is required to pay or agrees to pay for the right to enter into a business under a franchise agreement, including but not limited to, any payment for goods and services." This definition includes any fee or charge that a franchisee is required to pay or agrees to pay for the right to enter into a business. As Release 3-F notes, "Any fee or charge which the franchisee is required to pay to the franchisor or an affiliate of the franchisor for the right to engage in business is a franchise fee regardless of the designation given to, or the form of, such payment."

As set forth in Finding 2, members were required to pay an initial, nonrefundable "membership fee" of $12,900. In exchange for this sum, Respondents would "grant to persons who meet our qualifications, and who are willing to undertake the investment and effort, a membership interest entitling [them] to operate, under [their] own name, a 'The Senior's Choice' business offering the services we promote under the System." (Finding 3). This "membership fee" is nothing more than another name for "franchise fee."[15]

6. Because each of the elements of a franchise is present, and Respondents have neither registered as a franchise, nor obtained an exemption, cause exists for the Commissioner to have issued the Desist and Refrain Order.

* * * * *

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The Desist and Refrain Order issued by the Commissioner of Corporations on November 30, 2006, against Respondents The Senior's Choice, Inc and Steven Everhart, is sustained.

Date: 4-6-07

RALPH B. DASH
Administrative Law Judge
Office of Administrative Hearings

[15] In light of this determination, there is no need to characterize or discuss the monthly payments, described in Finding 2.