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8
9 BEFORE THE DEPARTMENT OF CORPORATIONS
10 OF THE STATE OF CALIFORNIA

11 THE CALIFORNIA CORPORATIONS)
12 COMMISSIONER,)
13 Complainant,)
14 vs.)
15 IHP, INC. DBA CHERRY ON TOP; DAVID D.)
16 KIM AND KURT CHOU)
17 Respondents.)

1) CITATIONS AND DESIST AND
REFRAIN ORDER
2) CLAIMS FOR ANCILLARY
RELIEF

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19 Complainant, the California Corporations Commissioner, (“Commissioner”) is informed and
20 believes, and based upon such information and belief, alleges and charges Respondents as follows:

21 I.
22 STATEMENT OF FACTS

23 During all relevant times, IHP, Inc. dba Cherry On Top (“Cherry”) is, and was, a California
24 Corporation with its principal office located at 6281 Beach Boulevard, Suite # 203, Buena Park,
25 California 90621.

26 During all relevant times, David D. Kim (“Kim”) was the President and control person of
27 Cherry who executed franchise agreements on behalf of Cherry.
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CITATIONS AND DESIST AND REFRAIN ORDER
AND CLAIMS FOR ANCILLARY RELIEF

1 During all relevant times, Kurt Chou (“Chou”) was an employee of Cherry and handled
2 negotiations with prospective franchisees for Cherry franchises.

3 In 2009, Cherry registered with the Commissioner to offer and sell franchises in California as
4 required under Corporations Code section 31110 of the Franchise Investment Law (“FIL”),
5 Corporations Code section 30000 et seq. The franchises were for the right to operate a frozen yogurt
6 restaurant under the “Cherry On Top” brand. Cherry’s franchise registration allowed it to legally
7 offer and sell franchises until April 20, 2010. Cherry did not renew its franchise registration after
8 April 20, 2010.

9 After the April 20, 2010 expiration date, Cherry, through Chou and Kim, continued to offer
10 and sell “Cherry On Top” franchises to at least two California residents. Kim was the signatory to all
11 the franchise contracts. Chou was the individual who directly negotiated and interacted with the
12 prospective franchisees. Chou would represent the terms of the franchise to prospective franchisees
13 and also answered any inquiries that the franchisees had about purchasing a “Cherry On Top”
14 franchise.

15 In connection with the offer and sale of these franchises, Cherry, Kim, and Chou, made, or
16 caused to be made, misrepresentations of material fact or omitted to state material facts necessary in
17 order to make the statements made, in the light of the circumstances under which they were made,
18 not misleading. These misrepresentations and omissions were the following:

19 a. Cherry provided an expired Franchise Disclosure Document to investors to induce
20 them into investing with Cherry and misrepresented to the investors that they would be provided
21 with new Franchise Disclosure Documents, when in fact Cherry never did;

22 b. Cherry omitted to inform investors that Wang Globalnet filed a lawsuit against
23 Cherry and Kim on November 25, 2009;

24 c. Cherry omitted to inform investors that their franchise registration had already
25 expired.

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II.
CITATIONS
AND

DESIST AND REFRAIN ORDER

(For violations of Corporations Code sections 31110 and 31201)

Corporations Code section 31406 provides that:

(a) If, upon inspection or investigation, based upon a complaint or otherwise, the commissioner has cause to believe that a person is violating any provision of this division or any rule or order promulgated pursuant to this division, the commissioner may issue a citation to that person in writing describing with particularity the basis of the citation. Each citation may contain an order to desist and refrain and an assessment of an administrative penalty not to exceed two thousand five hundred dollars (\$2,500) per violation and shall contain reference to this section, including the provisions of subdivision (c). All penalties collected under this section shall be deposited in the State Corporations Fund.

(b) The sanctions authorized under this section shall be separate from, and in addition to, all other administrative, civil, or criminal remedies.

(c) If within 60 days from the receipt of the citation, the person cited fails to notify the commissioner that the person intends to request a hearing as described in subdivision (d), the citation shall be deemed final.

(d) Any hearing under this section shall be conducted in accordance with Chapter 5 (commencing with Section 11500) of Part 1 of Division 3 of Title 2 of the Government Code.

(e) After the exhaustion of the review procedures provided for in this section, the commissioner may apply to the appropriate superior court for a judgment in the amount of the administrative penalty and order compelling the cited person to comply with the order of the commissioner. The application shall include a certified copy of the final order of the commissioner and shall constitute a sufficient showing to warrant the issuance of the judgment and order.

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A.

CITATIONS

As set forth in greater detail in Section I, the Commissioner finds that IHP, Inc. dba Cherry on Top, David D. Kim and Kurt Chou violated Corporations Code sections 31110 and 31201 by offering and selling unregistered non-exempt franchises through the use of fraud to at least two California residents.

Pursuant to Corporations Code section 31406, IHP, Inc. dba Cherry on Top, David D. Kim and Kurt Chou are hereby ordered, jointly and severally, to pay to the Commissioner administrative penalties of \$2,500 for each violation of the FIL, for a total sum of ten-thousand dollars (\$10,000), for at least two violations of Corporations Code section 31110 and at least two violations of 31201, or according to proof. All citation payments are due and payable 30 days after this order becomes final.

B.

DESIST AND REFRAIN ORDER

As set forth in greater detail in Section I, the Commissioner finds that IHP, Inc. dba Cherry on Top, David D. Kim and Kurt Chou offered and sold unregistered non-exempt franchises through the use of fraud in violation of the FIL.

Pursuant to Corporations Code section 31406, IHP, Inc. dba Cherry on Top, Daniel D. Kim, and Kurt Chou are hereby ordered to desist and refrain from:

(1) Offering and/or selling franchises, including but not limited to, Cherry On Top franchises, unless and until the offers have been duly registered under the Franchise Investment Law, or exempt; and

(2) Offering and/or selling franchises by means of written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.

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III.

CLAIMS FOR ANCILLARY RELIEF

Corporations Code section 31408 provides, in pertinent part:

(a) If the commissioner determines it is in the public interest, the commissioner may include in any administrative action brought under this division, including a stop order, a claim for ancillary relief, including, but not limited to, a claim for rescission, restitution or disgorgement or damages on behalf of the persons injured by the act or practice constituting the subject matter of the action, and the administrative law judge shall have jurisdiction to award additional relief. The person affected may be required to attend remedial education, as directed by the commissioner.

A.

ORDER FOR RESCISSION

Based upon the Commissioner’s finding that IHP, Inc. dba Cherry On Top, David D. Kim, and Kurt Chou have violated the FIL, all Cherry on Top franchisees who were offered and sold Cherry On Top franchises in violation of the FIL shall be afforded the right to rescind any contract for the purchase of a Cherry On Top franchise.

B.

ORDER FOR RESTITUTION

Based upon the Commissioner’s finding that IHP, Inc. dba Cherry On Top, David D. Kim, and Kurt Chou have violated the FIL, IHP, Inc. dba Cherry On Top, David D. Kim, and Kurt Chou are hereby ordered, jointly and severally, to pay restitution to each franchisee who was offered and sold a Cherry On Top franchise in violation of the FIL, in the amount of the full franchise fee collected from each franchisee.

IV.

CONCLUSION

Based on the foregoing facts establishing that IHP, Inc. dba Cherry On Top, David D. Kim, and Kurt Chou have committed multiple violations of the FIL in the offer and sale of Cherry On Top franchises, the issuance of the Citations and Desist and Refrain Order and Claims for

1 Ancillary Relief is necessary, in the public interest, and consistent with the purposes, policies, and
2 provisions of the Franchise Investment Law.

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Dated: September 19, 2012
Los Angeles, California

JAN LYNN OWEN
California Corporations Commissioner

By _____

Mary Ann Smith
Deputy Commissioner
Enforcement Division