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10 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT
11 OF THE STATE OF CALIFORNIA

12 In the Matter of:) FIL ORG ID.: 99992
13)
14 THE COMMISSIONER OF BUSINESS)
OVERSIGHT,) **CONSENT ORDER**
15)
16 Complainant,)
17)
18 v.)
19)
20 TOM N TOMS FRANCHISE, LLC; DO KYUN)
KIM, and YOON JO HONG,)
21 Respondents.)
22)

22 The Commissioner of Business Oversight (“Commissioner”) and Tom N Toms Franchise,
23 LLC (“TNT”); Do Kyun Kim (“Kim”), and Yoon Jo Hong (“Hong”) (hereafter “ Respondents”)¹
24 stipulate and consent to entry of this Consent Order as settlement of the issues contained in this
25 Consent Order, as follows:

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JURISDICTION AND VENUE

1. The Commissioner is the head of the Department of Business Oversight (“Department”), and is responsible for administering and enforcing the California Franchise Investment Law (“FIL”) (Corp. Code § 31000, et seq.), and registering the offer and sale of franchises in California.

2. The Commissioner brings this action pursuant to the provisions of the FIL, sections 31402, 31406, 31408 of the Corporations Code.

3. Respondents admit to the jurisdiction of the Department and the subject matter of these proceedings and consents to entry of this Consent Order

STATEMENT OF FACTS

This Consent Order is made with reference to the following facts:

4. TNT is a California limited liability company incorporated on January 30, 2012, with its principal place of business at 3974 Wilshire Blvd 2nd Fl., Los Angeles, California 90010. TNT offers franchises for the operation of a “Tom N Toms Coffeehouse featuring premium coffee products and complementary food and beverages.”

5. Kim is, and was, the chief executive officer of TNT.

6. Hong represented or held himself out as TNT’s agent, representative, or “Franchise Consultant.”

7. To register a franchise, a franchisor must file a Uniform Franchise Disclosure Document (“UFDD” or “Disclosure Document”) with the Department for review and approval, in accordance with sections 31111 and 31114.

8. The franchisor must provide copies of the registered Disclosure Document and all proposed agreements relating to the sale of the franchise to a prospective franchisee at least 14 days prior to executing any binding franchise or other agreement, or prior to receiving any consideration, whichever occurs first, as required by section 31119.

9. On or about February 17, 2012, TNT filed its initial Uniform Franchise Registration Application (the “Initial Application”) with the Commissioner, pursuant to Corporations Code

¹ The Commissioner and Respondents shall collectively be referred to as the “Parties.”

1 section 31111. TNT also filed, along with its Initial Application, a Franchise Disclosure Document
2 (“FDD”) containing the material information set forth in the application, as required by Corporations
3 Code section 31114. On March 5, 2102, TNT was first registered as a California franchise.

4 10. On September 14, 2015, TNT filed a franchise renewal registration application with
5 the Department (“Renewal Application”), which is pending.

6 11. Beginning in or about October 2013, Respondents offered and sold a TNT franchise
7 to at least one California resident (hereafter “Franchisee”) raising an initial amount of least
8 \$30,000.00.

9 12. On October 3, 2013, TNT and the Franchisee entered into a Franchise Agreement
10 (“Agreement”) for the establishment and operation of a Tom N Toms Coffeehouse, which the Parties
11 agreed would be constructed on a site selected by the Franchisee. TNT provided the Franchisee its
12 FDD before the Parties signed the Agreement.

13 13. Pursuant to the Agreement, the Franchisee paid TNT a non-refundable franchise fee
14 of \$20,000.00, and a refundable security deposit in the amount of \$10,000.00. The deposit fee was
15 intended to be used to, among other things, secure the Franchisee’s future payment obligations for
16 equipment, products, and food ingredients supplied by TNT. In addition, the Franchisee was
17 required to pay TNT a recurring, non-refundable royalty fee of 5 percent of gross sales payable
18 weekly, on the net sales of the preceding week.

19 14. In connection with the offer or sale of its franchise to the Franchisee, Respondents
20 failed to provide full and complete information regarding the franchise or the franchisor-franchisee
21 relationship that would allow a franchisee to make an informed decision whether to invest, in
22 violation of Corporations Code section 31201. Further, Respondents willfully omitted to state
23 material fact in TNT’s Initial and Renewal Applications filed with the Commissioner in violation of
24 Corporations Code section 31200.

25 15. The “Receipt” page of TNT’s FDD states that the sellers of the franchise are TNT and
26 its chief executive officer, Kim. However, Hong offered or sold the franchise to the Franchisee.
27 The Franchisee never met, nor had any contact with Kim prior to signing the Agreement or
28 thereafter.

1 16. Applicants are required to file a “Franchise Disclosure Form” identifying each person
2 that will solicit, offer, or sell franchises in California unless the person is named in Item 2, “Business
3 Experience” section of the FDD. (Guidelines for Franchise Registration, title 10, California Code of
4 Regulations, section 310.111) The Department’s records do not show that a Franchise Disclosure
5 Form was filed for Hong. Additionally, Hong is not listed in Item 2 of the FDD.

6 17. Pursuant to Corporations Code section 31210, a person may not sell a franchise that is
7 non-exempt unless the seller is licensed by the Bureau of Real Estate as a real estate broker or real
8 estate salesman, or licensed by the Commissioner as a broker-dealer or agent pursuant to the
9 Corporate Securities Law of 1968. Hong is neither licensed by the Bureau of Real Estate nor by the
10 Commissioner as a broker-dealer or agent.

11 18. Exhibit D of TNT’s FDD provides, among other things, that within one year after the
12 execution of the Agreement, the Franchisee shall select and acquire a location for the franchised
13 business subject to the Franchisor’s approval. Notwithstanding, the Franchisee was not given the
14 opportunity to choose a location for the franchise. Instead, TNT, Kim and Hong induced the
15 Franchisee to enter into a lease agreement for TNT’s proposed location within two weeks after the
16 Franchisee signed the Agreement by threatening to not sell the franchise to Franchisee if the
17 Franchisee declined TNT’s proposed site.

18 19. Hong told the Franchisee that TNT will assign personnel or an “Area Representative”
19 based in the U.S. who would oversee the operations of TNT’s franchises in the U.S. including,
20 providing support and assistance to its franchisees. The Franchisee was not aware of any TNT
21 personnel or “Area Representative” appointed to oversee TNT’s operations in the U.S., leaving the
22 Franchisee with little, if any, support with operating the franchise.

23 20. Respondents failed to inform the Franchisee that all decisions and approvals
24 concerning the design, construction or furnishing of the site would be made by Kim. Respondents
25 failed to provide accurate information concerning the design plan and construction to the contractor
26 in a timely fashion, causing further delay in the completion of the site; and resulting in the
27 Franchisee incurring approximately \$28,000.00 in rental charges; \$7,000.00 in design fees; and
28 \$8,000.00 in architectural fees.

1 21. Respondents failed to disclose the architect's fee in Item 7 under the "Estimated
2 Initial Fee" section of the FDD filed with the Commissioner.

3 22. Item 8, "Restrictions on Sources of Products and Services" of the FDD restricts the
4 source and types of products a franchisee may use in operating the franchise by requiring that
5 franchisees operate the franchise according to TNT's "...System Standards, which regulates among
6 other things, the types, models and brands of fixtures, furniture, equipment..." Notwithstanding this
7 restriction, the FDD did not disclose that the furniture for the franchised business would be shipped
8 from Korea, which caused substantial delay in opening the franchise.

9 23. Item 11 of the FDD under "Training," states that the Franchisor will provide a total of
10 80 hours of training over 12 days at a Franchisor's training facility. The FDD also promised that
11 TNT's representative will advise and assist the Franchisee in opening the Coffeehouse by
12 coordinating the Franchisee's pre-opening activities and assisting the Franchisee with TNT's
13 operations for up to seven days for the opening of the Franchise. Respondents did not fulfil their
14 promise. Rather, Respondents gave the Franchisor six days of training at 3-7 hours per day at the
15 Franchisee's premises after the franchise opened. The training the Franchisor provided was
16 inadequate in that it failed to train the Franchisee on how to find, and hire employees despite listing
17 "Human Resources Management" as a topic in the training program.

18 24. Item 11 of the FDD states that the Franchisor will provide its grand opening
19 promotion, advertising, and local marketing programs to the Franchisee. However, Respondents did
20 not provide any promotional advertisement programs as promised and instead, forced the Franchisee
21 to pay for "free" samples at their grand opening, and thereon charged royalties on the "free" samples.

22 25. Respondents provided a defective Point of Sale system (POS) to the Franchisee and
23 charged \$70.00 per month for a new POS system without the Franchisee's consent. All charges with
24 respect to obtaining, maintaining, and upgrading any computer system must be disclosed in Item 11
25 of the FDD. Respondents failed to disclose the \$70.00 per month charge in its FDD.

26 26. In light of Respondents' failure to fulfil their promises under the FDD, the Franchisee
27 decided to sell the franchise. Under Business and Professions Code section 20028 and TNT's FDD,
28 a franchisor may not prevent a franchisee from selling or transferring a franchise to a person

1 qualified under the franchisor's standards, and the standards are to be made available to the
2 franchisee. Also, while a franchisor's written consent is required before a franchisee may sell or
3 transfer a franchise, such consent shall not be withheld unless the buyer does not meet the
4 franchisee's standards for new or renewing franchisees. Respondents prevented the Franchisee from
5 listing the franchise for sale by instructing the Franchisee not to list the franchise for sale in order to
6 preserve TNT's reputation, and in return, promising to find a buyer for the franchise. Further,
7 Respondents did not provide the standards for selling or transferring the franchise to a prospective
8 buyer to the Franchisee.

9 27. TNT and Kim willfully made untrue statement of a material fact in TNT's
10 application, notice or report filed with the commissioner, or willfully omitted to state in TNT's
11 application, material fact, including but not limited to;

12 a. failing to identify Hong as a seller of the TNT's franchise in TNT's Initial and
13 Renewal Applications filed with the Department;

14 b. failing to disclose in TNT's Application filed on June 20, 2013, the \$7,000.00
15 architectural fees the Franchisee was mandated to pay;

16 c. failing to disclose in TNT's Application filed on June 20, 2013 that
17 the Franchisee had to pay for free samples; and

18 d. failing to disclose in TNT's Application filed on June 20, 2013,
19 that the Franchisee had to pay \$70.00 per month for a Point of Sale system.

20 28. Respondents, offered to sell or sold the TNT franchise by means which include an
21 untrue statement of a material fact or omitted to state a material fact necessary in order to make the
22 statements made, in the light of the circumstances under which they were made, not misleading,
23 including but not limited to;

24 a. representing that the Franchisee would be the one to select a site for the
25 franchise when Respondents selected the franchise site;

26 b. representing that TNT would designate personnel or an "Area Representative
27 based in the U.S to oversee TNT's franchises and provide support to the Franchisee, and failing to
28 designate such personnel or "Area Representative";

- 1 c. failing to inform the Franchisee that furniture for the franchise would be
- 2 shipped from Korea;
- 3 d. failing to inform the Franchisee that all decisions concerning the franchise
- 4 would have to be made by Kim;
- 5 e. representing that the Franchisee would receive 80 hours of training prior to
- 6 opening the franchise and instead, providing six days of training after the opening of the franchise,
- 7 lasting approximately 3-7 hours per day.

8 29. On May 12, 2016, the Commissioner served Respondents, by personal delivery, the
9 following documents: Statement in Support of Stop Order Denying Effectiveness of Franchise
10 Registration Application and Stop Order Denying Effectiveness of Franchise Registration
11 Application Pursuant to Corporations Code section 31115 (“Stop Order”); Citation including: (1)
12 Desist and Refrain Order (2) Assessment of Administrative Penalties (3) Claim for Ancillary Relief
13 and Costs issued pursuant to California Corporations Code Section 31406 (“Citation”); Government
14 Code sections 11507.5, 11507.6 and 11507.7 relating to discovery; and Notice of Defense. All of
15 the above documents were dated May 12, 2016, and the accompanying documents are collectively
16 referred to as the “Administrative Action.”

17 30. On or about May 24, 2016, Respondents timely submitted a Notice of Defense to the
18 Commissioner requesting a hearing regarding the Administrative Action.

19 31. In their defense, Respondents claimed that Hong was not a seller of TNT Franchise,
20 nor did he have any authority to solicit or offer to sell TNT franchises to Franchisee or anyone else
21 on behalf of TNT. Respondents further claimed that they disclosed all material facts to the
22 Franchisee and complied with the terms of their franchise agreement with the Franchisee.

23 32. The Commissioner notes that Respondents and the Franchisee referenced in this
24 proceeding entered into a termination agreement and mutual release under which the Franchisee paid
25 TNT \$20,000.00 in return for the Parties’ mutual release of any obligations, rights, or liabilities
26 arising from the franchise agreement. The Commissioner further notes that the Franchisee sold the
27 franchised location referenced in this action to a third party in the amount of approximately
28 \$119,000.00.

1 33. It is the intention and desire of the Parties to resolve this matter without the necessity
2 of a hearing and/or other litigation.

3 34. The Commissioner finds that this Consent Order is appropriate, in the public interest,
4 and consistent with the purposes fairly intended by the policy and provisions of the FIL.

5 NOW, THEREFORE, in consideration of the foregoing, and the terms and conditions set
6 forth herein, the Parties agree as follows:

7 **TERMS AND CONDITION**

8 Purpose

9 35. The purpose of this Consent Order is to resolve the Department’s Administrative
10 Action in a manner that avoids the expense of court proceedings and a hearing, is in the public
11 interest, protects consumers, and is consistent with the purposes, policies, and provisions of the FIL.

12 Compliance with the Commissioner’s Stop Order and Citation

13 36. Respondents hereby agree to comply with the Stop Order and Citation issued against
14 Respondents in this action. Respondents further stipulate that the Commissioner’s Stop Order and
15 Citation are hereby deemed final.

16 Waiver of Hearing Rights

17 37. Respondents acknowledge their right to a hearing under the FIL in connection with
18 the Final Stop Order, Citation, and Desist and Refrain Order and hereby waive that right to a
19 hearing, and to any reconsideration, appeal, or other right to review which may be afforded pursuant
20 to the FIL, the California Administrative Procedure Act, the Code of Civil Procedure, or any other
21 provision of law, and by waiving such rights, Respondents effectively consents to this Consent Order
22 becoming final.

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Restitution to Franchisee

38. Respondents agree to pay restitution to the Franchisee referenced in the accusation in the amount of \$15,000.00, representing architectural fees and TNT’s concept drawing fees paid by the Franchisee (“Restitution”). The Restitution in the amount of \$15,000.00 shall be paid by Respondents to the franchisee within 10 days of the execution of this Consent Order. Respondents shall provide satisfactory documentation to the Commissioner evidencing such payment to the Franchisee within 30 days of the execution of this Consent Order.

Administrative Penalties

39. Respondents agree to pay to the Commissioner penalties totaling \$7,500.00 (“Penalties”). Such Penalties shall be paid by Respondents and received by the Commissioner within 10 days of the execution of this Agreement. The check shall be made payable to “The Department of Business Oversight,” and shall be sent to the following address:

Uche L. Enenwali, Esq.
Senior Counsel
Department of Business Oversight
320 W. 4th Street, Suite 750
Los Angeles, CA 90013

In the event the payment due date falls on a weekend or holiday, the payment shall be due the next business day. Respondents acknowledge that failure to timely pay the Penalties or attorney’s fees and costs in this Agreement shall be a breach of this Consent Order and shall be cause for the Commissioner to immediately revoke any registrations held by, and/or deny any pending application(s) of Respondents, its successors and assigns, by whatever names they might be known. Respondents hereby waive any notice and hearing rights to contest such revocations and/or denial(s) which may be afforded under the FIL, the California Administrative Procedure Act, the California Code of Civil Procedure, or any other provision of law in connection therewith.

Attorney’s Fees and Costs

Respondents agree to pay the Commissioner attorney’s fees totaling \$13,000.00, and costs totaling \$1,700.00. The attorney’s fees and costs, totaling \$14,700.00 shall be paid by Respondents and received by the Commissioner within 10 days of the execution of this Agreement. The check shall be made payable to the “Department of Business Oversight,” and shall be sent to:

Uche L. Enenwali, Esq.
Senior Counsel
Department of Business Oversight
320 W. 4th Street, Suite 750
Los Angeles, CA 90013

Desist and Refrain Order

41. Respondents stipulate to undertake all appropriate steps to assure full compliance with California law in the conduct of its business. Respondents shall desist and refrain from the further offer or sale of franchise agreements unless and until the offers have been registered under the FIL, or are exempt.

42. Education

Respondents represent that Kim and Hong are no longer acting as franchise sellers of TNT franchise. Within sixty (60) days of the execution of this Agreement, all persons employed by Respondents who assist in preparing franchise registrations or who assist in franchise selling are hereby required to attend eight (8) hours of remedial education, in the form of franchise law training courses offered by a franchise law specialist certified with the State Bar of California or courses offered by the International Franchise Association. Within ninety (90) days of execution of this Agreement, Respondents shall file proof of compliance to Uche Enenwali at the address above.

Failure to Comply With Agreement

43. If Respondents fail to comply with any of the terms of this Consent Order, the Commissioner may institute proceedings for any and all violations otherwise resolved under this Consent Order, Final Stop Order, Citation, and Desist and Refrain Order. Respondents acknowledge that failure to comply with this Consent Order shall be a breach of this Consent Order and shall be cause for the Commissioner to immediately revoke any registrations held by, and/or deny any pending application(s) of Respondents, their successors and assigns, by whatever names they might be known. Respondents hereby waive any notice and hearing rights to contest such revocations and/or denial(s) which may be afforded under the FIL, the California Administrative Procedure Act, the Code of Civil Procedure, or any other provision of law in connection therewith.

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1 Effect of Consent Order on TNT

2 44. In consideration of Respondents’ agreement to the entry of this Consent Order, and to
3 pay penalties required by Paragraph 39 hereof, the Commissioner hereby agrees that except as set
4 forth in this Consent Order, she shall not take any further action based on violation of the code
5 provisions cited in this order.

6 Full and Final Settlement

7 45. The Parties hereby acknowledge and agree that this Consent Order is intended to
8 constitute a full, final, and complete resolution of the Administrative Action and the Department’s
9 investigation of Respondents and for violations in the Administrative Action and that no further
10 proceedings or actions will be brought by the Commissioner in connection with these matters either
11 under the FIL, or any other provision of law, excepting therefrom any proceeding to enforce
12 compliance with the terms of this Consent Order, or action if such proceeding or action is based
13 upon discovery of new and further violations of the FIL which do not form the basis for this Consent
14 Order or which were knowingly concealed from the Commissioner by Respondents.

15 Binding

16 46. This Consent Order is binding on all heirs, assigns, and/or successors in interest.

17 Commissioner’s Duties

18 47. The Parties further acknowledge and agree that nothing contained in this Consent
19 Order shall operate to limit the Commissioner’s ability to assist any other agency (city, county, state
20 or federal) with any prosecution, administrative, civil or criminal, brought by any such agency
21 against Respondents or any other person based upon any of the activities alleged in these matters or
22 otherwise.

23 Third Party Actions

24 48. It is the intent and understanding between the parties that this Consent Order does not
25 create any private rights or remedies against Respondents, create any liability for Respondents, or
26 limit defenses of Respondents for any person or entity not a party to this Consent Order.

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1 Future Actions by Commissioner

2 49. This Consent Order may be revoked and the Commissioner may pursue any and all
3 remedies available under law against Respondents if the Commissioner later discovers that
4 Respondents knowingly or willfully withheld information used for and relied upon in this Consent
5 Order. Further, Respondents agree that this Consent Order does not resolve any penalties that may
6 be assessed by the Commissioner upon discovery of new and further violations of the FIL.

7 Independent Legal Advice

8 50. Each of the Parties represents, warrants, and agrees that it has received independent
9 advice from its attorney(s) and/or representatives with respect to the advisability of executing this
10 Consent Order.

11 Counterparts

12 51. The Parties agree that this Consent Order may be executed in one or more separate
13 counterparts, each of which when so executed, shall be deemed an original. Such counterparts shall
14 together constitute and be one and the same instrument.

15 Waiver, Modification, and Qualified Integration

16 52. The waiver of any provision of this Consent Order shall not operate to waive any
17 other provision set forth herein. No waiver, amendment, or modification of this Consent Order shall
18 be valid or binding to any extent unless it is in writing and signed by all of the Parties affected by it.

19 Headings and Governing Law

20 53. The headings to the paragraphs of this Consent Order are inserted for convenience
21 only and will not be deemed a part hereof or affect the construction or interpretation of the
22 provisions hereof. This Consent Order shall be construed and enforced in accordance with and
23 governed by California law.

24 Full Integration.

25 54. Each of the Parties represents, warrants, and agrees that in executing this Consent
26 Order it has relied solely on the statements set forth herein and the advice of its own counsel. Each
27 of the Parties further represents, warrants, and agrees that in executing this Consent Order it has
28 placed no reliance on any statement, representation, or promise of any other party, or any other

1 person or entity not expressly set forth herein, or upon the failure of any party or any other person or
2 entity to make any statement, representation or disclosure of anything whatsoever. The Parties have
3 included this clause: (1) to preclude any claim that any party was in any way fraudulently induced to
4 execute this Consent Order; and (2) to preclude the introduction of parol evidence to vary, interpret,
5 supplement, or contradict the terms of this Consent Order.

6 Presumption from Drafting

7 55. In that the Parties have had the opportunity to draft, review and edit the language of
8 this Consent Order, no presumption for or against any party arising out of drafting all or any part of
9 this Consent Order will be applied in any action relating to, connected to, or involving this Consent
10 Order. Accordingly, the Parties waive the benefit of Civil Code section 1654 and any successor or
11 amended statute, providing that in cases of uncertainty, language of a contract should be interpreted
12 most strongly against the party who caused the uncertainty to exist.

13 Voluntary Agreement

14 56. Respondents enter into this Consent Order voluntarily and without coercion and
15 acknowledge that no promises, threats or assurances have been made by the Commissioner or any
16 officer, or agent thereof, about this Consent Order.

17 Effective Date

18 57. The effective date of this Consent Order shall be the last date of execution of this
19 Consent Order by the Parties. Further, this Consent Order shall not become effective until signed by
20 all Parties and delivered by the Commissioner’s counsel by email to Respondents’ counsel, Andrew
21 S. Kim, Kim Shapiro Park & Lee, akim@kspllaw.com.

22 Public Record

23 58. Respondents acknowledge that this Consent Order is a public record.

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Authority to Execute

59. Each signator hereto covenants that he/she possesses all necessary capacity and authority to sign and enter into this Consent Order.

Dated: November 21, 2016

JAN LYNN OWEN
Commissioner of Business Oversight

By _____
MARY ANN SMITH
Deputy Commissioner
Enforcement Division

Dated: November 21, 2016

TOM N TOMS FRANCHISE LLC.

By _____
DO KYUN KIM, President and CEO

APPROVED AS TO FORM AND CONTENT:

Dated: November 21, 2016

ANDREW S. KIM, ESQ.
KIM SHAPIRO PARK & LEE
Attorneys for Respondents

Dated November 21, 2016

UCHE L. ENENWALI, ESQ.
Senior Counsel
Enforcement Division