

1 MARY ANN SMITH
Deputy Commissioner
2 SEAN M. ROONEY
Assistant Chief Counsel
3 UCHE L. ENENWALI (State Bar No. 235832)
4 Senior Counsel
5 Department of Business Oversight
320 West 4th Street, Suite 750
6 Los Angeles, California 90013
Telephone: (213) 576-7591
7 Facsimile: (213) 576-7181

8 Attorneys for Complainant

9 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT

10 OF THE STATE OF CALIFORNIA

11
12 In the Matter of:) FIL ORG ID.: 99992
13)
14 THE COMMISSIONER OF BUSINESS) STATEMENT IN SUPPORT OF STOP
OVERSIGHT,) ORDER DENYING EFFECTIVENESS OF
15) FRANCHISE REGISTRATION
Complainant,) APPLICATION
16)
17 v.)
18 TOM N TOMS FRANCHISE, LLC; DO KYUN)
KIM, and YOON JO HONG,)
19)
Respondents.)
20)
21)

22 Jan Lynn Owen, the California Commissioner (“Commissioner”) of the Department of
23 Business Oversight (“Department”), finds the following:

24 **I. PARTIES**

25 1. At all relevant times, Tom N Toms Franchise, LLC (“TNT” or “Franchisor”), is a
26 California limited liability company incorporated on January 30, 2012, with its principal place of
27 business at 3974 Wilshire Blvd 2nd Fl., Los Angeles, California 90010. TNT purportedly offers
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1 franchises for the operation of a “Tom N Toms Coffeehouse featuring premium coffee products and
2 complementary food and beverages.”

3 2. At all relevant times, Do Kyun Kim (“Kim”) is, and was, the chief executive officer
4 of TNT. Kim is also a “control” person of TNT as that term is defined by Corporations Code section
5 160.¹

6 3. At all relevant times, Yoon Jo Hong (“Hong”) represented or held himself out as
7 TNT’s agent, representative, or “Franchise Consultant.”

8 4. The Commissioner is responsible for administering and enforcing the California
9 Franchise Investment Law, and registering the offer and sale of franchises in California pursuant to
10 section 31000 et seq.

11 5. Corporations Code section 31001 recognizes that “California franchisees have
12 suffered substantial losses where the franchisor or his or her representative has not provided full and
13 complete information regarding the franchisor-franchisee relationship, the details of the contract
14 between franchisor and franchisee, and the prior business experience of the franchisor.”

15 6. Accordingly, the FIL serves to, among other things, “... provide each prospective
16 franchisee with the information necessary to make an intelligent decision regarding franchises being
17 offered,” and “...to prohibit the sale of franchises where the sale would lead to fraud or a likelihood
18 that the franchisor's promises would not be fulfilled, and to protect the franchisor and franchisee by
19 providing a better understanding of the relationship between the franchisor and franchisee with
20 regard to their business relationship.” (Corporations Code section 31001)

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

24 8. The franchisor must provide copies of the registered Disclosure Document and all
25 proposed agreements relating to the sale of the franchise to a prospective franchisee at least 14 days
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¹ All further statutory references are to the Corporations Code unless otherwise indicated.

1 prior to executing any binding franchise or other agreement, or prior to receiving any consideration,
2 whichever occurs first, as required by section 31119.

3 **II. STATEMENT OF FACTS**

4 9. On or about February 17, 2012, TNT filed its initial Uniform Franchise Registration
5 Application (the "Initial Application") with the Commissioner, pursuant to Corporations Code
6 section 31111. TNT also filed, along with its Initial Application, a Franchise Disclosure Document
7 ("FDD") containing the material information set forth in the application, as required by Corporations
8 Code section 31114. On March 5, 2012, TNT was first registered as a California franchise.

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

11 11. Beginning in or about October 2013, TNT, Kim and Hong offered and sold a TNT
12 franchise to at least one California resident (hereafter "Franchisee") raising an initial amount of least
13 \$30,000.00.

14 12. On October 3, 2013, TNT and the Franchisee entered into a Franchise Agreement
15 ("Agreement") for the establishment and operation of a Tom N Toms Coffeehouse, which the parties
16 agreed would be constructed on a site that would be selected by the Franchisee. TNT provided the
17 Franchisee its FDD before the parties signed the Agreement.

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

24 14. In connection with the offer or sale of its franchise to the Franchisee, TNT, Kim and
25 Hong failed to provide full and complete information regarding the franchise or the franchisor-
26 franchisee relationship that would allow a franchisee make an informed decision whether to invest in
27 violation of Corporations Code section 31201. Further, TNT, Kim and Hong willfully omitted to
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1 state material fact in its Initial and Renewal Applications filed with the Commissioner which is
2 required to be stated therein in violation of Corporations Code section 31200.

3 15. The "Receipt" page of TNT's FDD states that the sellers of the franchise are TNT and
4 its chief executive officer, Kim. However, Hong offered and sold the franchise to the Franchisee.
5 The Franchisee never met, nor had any contact with Kim prior to signing the Agreement or
6 thereafter.

7 16. Applicants are required to file a "Franchise Disclosure Form" identifying each person
8 that will solicit, offer, or sell franchises in California unless the person is named in Item 2, "Business
9 Experience" section of the FDD. (Guidelines for Franchise Registration, rule 310.111) The
10 Department's records do not show that a Franchise Disclosure Form was filed for Hong.
11 Additionally, Hong is not listed in Item 2 of the FDD.

12 17. Pursuant to Corporations Code section 31210, a person may not sell a franchise that is
13 non-exempt unless the seller licensed by the Bureau of Real Estate as a real estate broker or real
14 estate salesman, or licensed by the Commissioner as a broker-dealer or agent pursuant to the
15 Corporate Securities Law of 1968. Hong is neither licensed by the Bureau of Real Estate nor by the
16 Commissioner as a broker-dealer or agent. Accordingly, the Commissioner finds that TNT and Kim
17 willfully made an untrue statement of a material fact in its Initial and Renewal Applications filed
18 with the commissioner, or willfully omitted to state in the applications, material fact which is
19 required to be stated therein.

20 18. Exhibit D of TNT's FDD provides, among other things, that within one year after the
21 execution of the Agreement, the Franchisee shall select and acquire a location for the franchised
22 business subject to the Franchisor's approval. Notwithstanding, the Franchisee was not given the
23 opportunity to choose a location for the franchise. Instead, TNT, Kim and Hong induced the
24 Franchisee to enter into a lease agreement for TNT's proposed location within two weeks after the
25 Franchisee signed the Agreement by threatening to not sell the franchise to Franchisee if the
26 Franchisee declined TNT's proposed site.

27 19. Hong told the Franchisee that TNT will assign personnel or an "Area Representative"
28 based in the U.S. who would oversee the operations of TNT's franchises in the U.S. including,

1 providing support and assistance to its franchisees. The Franchisee was not aware of any TNT
2 personnel or “Area Representative” appointed to oversee TNT’s operations in the U.S., leaving the
3 Franchise with little, if any, support with operating the franchise.

4 20. TNT, Kim and Hong failed to inform the Franchisee that all decisions and approvals
5 concerning the design, construction or furnishing of the site would be made by Kim. TNT, Kim and
6 Hong failed to provide accurate information concerning the design plan and construction to the
7 contractor in a timely fashion, causing further delay in the completion of the site; and resulting in the
8 Franchisee incurring approximately \$28,000.00 in rental charges; \$7,000.00 in design fees; and
9 \$8,000.00 in architectural fees.

10 21. TNT, Kim and Hong failed to disclose the architect’s fee in Item 7 under the
11 “Estimated Initial Fee” section of the FDD filed with the Commissioner.

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

18 23. Item 11 of the FDD under “Training,” states that the Franchisor will provide a total of
19 80 hours of training over 12 days at a Franchisor’s training facility. The FDD also promised that
20 TNT’s representative will advise and assist the Franchisee in opening the Coffeehouse by
21 coordinating the Franchisee’s pre-opening activities and assisting the Franchisee with TNT’s
22 operations for up to seven days for the opening of the Franchise. TNT, Kim and Hong did not fulfil
23 their promise. Rather, TNT, Kim and Hong gave the Franchisor six days of training at 3-7 hours per
24 day at the Franchisee’s premises after the franchise opened. The training the Franchisor provided
25 was inadequate in in that it failed to train the Franchisee on how to find, and hire employees despite
26 listing “Human Resources Management” as a topic in the training program.

27 24. Item 11 of the FDD states that the Franchisor will provide its grand opening
28 promotion, advertising, and local marketing programs to the Franchisee. However, TNT, Kim and

1 Hong did not provide any promotional advertisement programs as promised and instead, forced the
2 Franchisee to pay for “free” samples at their grand opening, and thereon charged royalties on the
3 "free" samples.

4 25. Item 19 of the FDD under “Financial Performance Representations,” prohibits TNT
5 or any of its employees or representatives from making either orally or in writing, “any
6 representations about a franchisee’s future financial performance or the past financial performance
7 of company – owned, affiliate - owned or franchised Tom N Toms Coffeeshouses...” Despite this
8 prohibition, TNT and Kim, through Hong, made illegal earnings claims to the Franchisee, stating
9 that the original corporate TNT franchise was making over \$1,000,000.00 per year and that the
10 Franchisee should expect to earn at least \$450,000.00 per year. In addition, TNT, Kim and Hong
11 failed to disclose their earning claim in Item 19 of the FDD filed with the Commissioner.

12 26. TNT, Kim and Hong provided a defective Point of Sale system (POS) to the
13 Franchisee and charged \$70.00 per month for a new POS system without the Franchisee’s consent.
14 All charges with respect to obtaining, maintaining, and upgrading any computer system must be
15 disclosed in Item 11 of the FDD. TNT, Kim and Hong failed to disclose the \$70.00 per month
16 charge in its FDD.

17 27. In light of TNT, Kim and Hong’s failure to fulfil their promises under the FDD, the
18 Franchisee decided to sell the franchise. Under Business and Professions Code section 20028 and
19 TNT’s FDD, a franchisor may not prevent a franchisee from selling or transferring a franchise to a
20 person qualified under the franchisor's standards, and the standards are to be made available to the
21 franchisee. Also, while a franchisor’s written consent is required before a franchisee may sell or
22 transfer a franchise, such consent shall not be withheld unless the buyer does not meet the
23 franchisee’s standards for new or renewing franchisees. TNT, Kim and Hong prevented the
24 Franchisee from listing the franchise for sale by instructing the Franchisee not to list the franchise
25 for sale in order to preserve TNT’s reputation, and in return, promising to find a buyer for the
26 franchise. Further, TNT, Kim and Hong did not provide the standards for selling or transferring the
27 franchise to a prospective buyer to the Franchisee.

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III. VIOLATION OF CORPORATIONS CODE SECTION 31200

(Willfully making an untrue statement in an application filed with the Commissioner)

28. Corporations Code section 31200 provides:

It is unlawful for any person willfully to make any untrue statement of a material fact in any application, notice or report filed with the commissioner under this law, or willfully to omit to state in any such application, notice, or report any material fact which is required to be stated therein, or fail to notify the commissioner of any material change as required by Section 31123.

29. The Commissioner finds that TNT and Kim violated Corporations Code section 31200 by willfully making untrue statement of a material fact in TNT’s application, notice or report filed with the commissioner, or willfully omitting to state in TNT’s application, material fact, including but not limited to;

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

b. failing to disclose in TNT’s Application filed on June20, 2013, the \$7,000.00 architectural fees the Franchisee was mandated to pay;

c. failing to disclose in TNT’s Application filed on June20, 2013, the earnings claims that the original corporate TNT franchise was making over \$1,000,000.00 per year and that the Franchisee should expect to earn at least \$450,000.00 per year;

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

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

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1 **IV. VIOLATION OF CORPORATIONS CODE SECTION 31201**

2 (Misrepresentation or Omission of Material Facts)

3 30. Corporations Code section 31201 provides:

4 It is unlawful for any person to offer or sell a franchise in this state by
5 means of any written or oral communication not enumerated in Section
6 31200 which includes an untrue statement of a material fact or omits to
7 state a material fact necessary in order to make the statements made, in the
8 light of the circumstances under which they were made, not misleading.

9 31. The Commissioner finds that TNT, Kim, and Hong, violated Corporations Code
10 section 31201 by unlawfully offering to sell or selling the TNT franchise by means which include an
11 untrue statement of a material fact or omitted to state a material fact necessary in order to make the
12 statements made, in the light of the circumstances under which they were made, not misleading,
13 including but not limited to;

14 a. representing that TNT and Kim were the sellers of the franchise when in fact,
15 Hong sold the franchise;

16 b. representing that the Franchisee would be the one to select a site for the
17 franchise when TNT, Kim and Hong selected the franchise site;

18 c. representing that TNT would designate personnel or an “Area Representative
19 based in the U.S to oversee TNT’s franchises and provide support to the Franchisee, and failing to
20 designate such personnel or “Area Representative”;

21 d. failing to inform the Franchisee that furniture for the franchise would be
22 shipped from Korea;

23 e. failing to inform the Franchisee that all decisions concerning the franchise
24 would have to be made by Kim;

25 f. representing that the Franchisee would receive 80 hours of training prior to
26 opening the franchise and instead, providing six days of training after the opening of the franchise,
27 lasting approximately 3-7 hours per day;

28 g. representing that the Franchisee would earn up to \$450,000.00 per year.

V. VIOLATION OF CORPORATIONS CODE SECTION 31210

(Offering or Selling a Franchise Without a License or Being Exempt)

32. Corporations Code section 31210 provides:

It is unlawful for any person to effect or attempt to effect a sale of a franchise in this state, except in transactions exempted under Chapter 1 (commencing with Section 31100) of Part 2 of this division, unless such person is: (1) identified in an application or amended application filed with the commissioner pursuant to Part 2 (commencing with Section 31100) of this division, (2) licensed by the Bureau of Real Estate as a real estate broker or real estate salesman, or (3) licensed by the commissioner as a broker-dealer or agent pursuant to the Corporate Securities Law of 1968.

33. The Commissioner finds that Hong, effected or attempted to effect a sale of a franchise in this state, without being: (1) identified in an application or amended application filed with the commissioner pursuant, (2) licensed by the Bureau of Real Estate as a real estate broker or real estate salesman, or (3) licensed by the commissioner as a broker-dealer or agent.

VI. AUTHORITY TO ISSUE STOP ORDER

34. Corporations Code section 31115 provides in pertinent part:

The commissioner may summarily issue a stop order denying the effectiveness of or suspending or revoking effectiveness of any registration if the commissioner finds:

(a) That there has been a failure to comply with any of the provisions of this law or rules of the commissioner pertaining thereto. . .

(b) That the offer or sale of the franchise would constitute misrepresentation to, or deceit or fraud of the purchasers, or that, in the case of a franchise other than a subfranchise, a major inducement to prospective franchisees is fees or other compensation from participation in the sale of additional franchises.

35. Based on the foregoing, the Commissioner is of the opinion that TNT, Kim and Hong failed to comply with the provisions of the California Franchise Investment Law, including but not limited to, Corporations Code sections 31200, 31201, and 31210; and the offer or sale of the franchise would constitute misrepresentation to, or deceit or fraud of purchases.

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For these reasons, the Commissioner of Business Oversight has determined that pursuant to Corporations Code section 31115(a), an order should be issued denying the effectiveness of Tom N Toms Franchise, LLC and Do Kyun Kim’s franchise renewal registration application filed with the Commissioner on September 14, 2015.

Dated: May 12, 2016
Sacramento, California

JANN LYNN OWEN
Commissioner of Business Oversight

By _____
UCHE L. ENENWALI
Senior Counsel
Enforcement Division