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9  
10 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT  
11 OF THE STATE OF CALIFORNIA

12 In the Matter of: ) FIL ORG NO.: 112124  
)  
13 THE COMMISSIONER OF BUSINESS ) CONSENT ORDER  
OVERSIGHT, )  
14 )  
15 Complainant, )  
)  
16 v. )  
)  
17 US CRYOTHERAPY FRANCHISING, )  
)  
18 Respondent. )  
19 )  
20 )

21 Complainant, the Commissioner of Business Oversight (Commissioner) and Respondent, US  
22 Cryotherapy Franchising (USCF) (hereinafter, the parties), enter into this consent order based on the  
23 following facts:

24 **RECITALS**

- 25 A. The Commissioner regulates the offer and sale of franchises under the Franchise Investment  
26 Law (Corp. Code, § 31000 et seq.) (FIL).  
27 B. USCF is a California limited liability company, formed on October 12, 2011. USCF has a  
28 principal place of business at 1490 Drew Avenue, Suite 110, Davis, California 95618.

1 C. USCF has been registered to offer and sell franchises in this state since 2012. USCF has sold  
2 seven franchise locations in California and has sold a total of 22 nationwide. The most recent  
3 registration lapsed, and USCF filed a new franchise registration application with the Department of  
4 Business Oversight on April 26, 2017. The application is currently pending.

5 D. The Commissioner received complaints in November 2016 and June 2017, alleging violations  
6 of the FIL by USCF. The complaints alleged that USCF made financial performance claims that were  
7 not disclosed in USCF’s franchise disclosure document (FDD), as required under the law.

8 E. The Commissioner’s investigation of these complaints verified that USCF made financial  
9 performance claims in violation of the FIL.

10 F. USCF admits to the jurisdiction of the Commissioner and desires to resolve this matter without  
11 the necessity of an enforcement action and/or other litigation.

12 **TERMS**

13 1. Purpose: The purpose of this consent order is to resolve the matter before the Commissioner  
14 in a manner that avoids the expense of a hearing and possible further court proceedings, and is in the  
15 public interest, protects consumers, and is consistent with the purposes, policies, and provisions of the  
16 FIL.

17 2. Financial Disclosures: USCF stipulates that it violated sections 31200 and 31201 of the FIL  
18 by providing financial representations in the form of a business planning tool spreadsheet showing  
19 expenses and averages from the limited number of locations opened, as well as potential retail pricing  
20 modeling manipulatable with total customer check-ins to estimate ramp up and revenues based on the  
21 system metrics, without having disclosed this in its FDD.

22 3. Modifications to Franchises: USCF stipulates that it provided “policy updates” which  
23 modified the terms of some franchise agreements, without those modifications being previously  
24 approved by the Commissioner, in violation of Corporations Code section 31125.

25 4. Citation and Desist and Refrain Orders: Pursuant to Corporations Code section 31406, the  
26 Commissioner hereby issues a citation to USCF and orders USCF to desist and refrain from the offer  
27 and sale of franchises using financial performance information that has not been disclosed in its FDD,  
28 in violation of sections 31200 and 31201 of the FIL. The Commissioner further orders USCF to desist

1 and refrain from making material modifications to existing franchises or franchise agreements without  
2 first receiving approval from the Commissioner, pursuant to Corporations Code section 31125.

3 5. Finality of Desist and Refrain Orders: USCF agrees to the finality of the citation and desist  
4 and refrain orders in Paragraph 4 of this consent order and voluntarily waives all rights to  
5 reconsideration, appeal, or other rights which may be afforded pursuant to Corporations Code section  
6 31406, or any other provision of law in connection with these matters, including but not limited to  
7 Government Code sections 11521 and 11523, and any writ proceeding in accordance with the Code of  
8 Civil Procedure.

9 6. Rescinding Policy Updates: USCF shall rescind the “policy updates” regarding pricing and  
10 any other items material to the operation of a franchise. USCF will allow all franchisees to change  
11 their pricing and any other material items as though the “policy updates” had not been in effect. USCF  
12 shall communicate this to all franchisees in writing within 30 days of the effective date of this consent  
13 order. The substance of this communication to franchisees shall be approved by the Commissioner.

14 7. Compliance Report: Within 45 days of the effective date of this consent order, USCF shall  
15 provide copies of all letters and proof of mailing to all franchisees in compliance with Paragraph 6 of  
16 this consent order to Joanne Ross, Senior Counsel, Department of Business Oversight, 1515 K Street,  
17 Suite 200, Sacramento, California 95814.

18 8. Disclosure Regarding Cryotherapy Machines: USCF agrees to fully and accurately disclose  
19 information relating to capacity and maintenance of the cryotherapy machines in its FDD, in a manner,  
20 form and level of detail approved by the Commissioner. These FDD disclosures will include a risk  
21 factor regarding volume/capacity data for the machines, data regarding cost to maintain and repair the  
22 machines, as well as intellectual property information in Item 14 of the FDD.

23 9. Affidavits Regarding Financial Performance Information: All USCF officers agree to sign  
24 affidavits, in a form approved by the Commissioner and within 30 days of the effective date of this  
25 consent order, that USCF will not give any financial performance information to prospective  
26 franchisees unless that information is previously disclosed in the registered FDD. All such affidavits  
27 shall be sent by USCF so that they are received within 45 days of the effective date of this consent  
28 order by Joanne Ross, Senior Counsel, Department of Business Oversight, 1515 K Street, Suite 200,

1 Sacramento, California 95814.

2 10. Franchisees' Rights of Association: USCF specifically acknowledges Corporations Code  
3 section 31220, and agrees to not impede or threaten to impede any franchisee's rights of association  
4 under the FIL.

5 11. Penalties: The Commissioner hereby orders USCF to pay an administrative penalty of  
6 \$5,000.00 within 30 days of executing this consent order. The penalties shall be paid by check made  
7 payable to "Department of Business Oversight," and mailed to the attention of Accounting-Litigation,  
8 Department of Business Oversight, 1515 K Street, Suite 200, Sacramento, California 95814. Notice of  
9 payment shall be concurrently made via email to Joanne Ross, Senior Counsel at Department of  
10 Business Oversight, at joanne.ross@dbo.ca.gov.

11 12. Training for Officers and Salespeople: USCF officers and salespeople agree to complete  
12 training, given by an experienced franchise attorney, which shall include in-person training on  
13 compliance with the FIL. The trainer and general format of this training must be approved by the  
14 Commissioner.

15 13. Disclosure of Consent Order in FDD: USCF will disclose this consent order in each of their  
16 FDDs submitted after this consent order is effective.

17 14. Registration Application: In consideration for USCF's consenting to these terms, the  
18 Commissioner will agree to the withdrawal of USCF's pending franchise registration and will approve  
19 a newly filed registration application as soon as all standard registration requirements are met, with no  
20 delay relating to the violations forming the basis of this consent order. Notwithstanding the foregoing,  
21 the newly filed registration application and any subsequent applications must be in compliance with  
22 this consent order prior to their approval.

23 15. Opportunity to Cure: In the event USCF or any of its officers or salespeople fail to comply  
24 with the terms of this consent order with regard to any non-monetary term in this consent order, it is  
25 hereby agreed by the parties that for non-monetary breaches only, USCF will have 20 days from the  
26 date of USCF's initial knowledge of the breach or USCF's receipt of written notice of the breach from  
27 the Commissioner to cure the breach (initial knowledge or receipt of notice hereinafter known as  
28 Notice). Such cure will be in a manner and will contain the information approved by the

1 Commissioner. Proof of such cure shall be sent by USCF so that it is received within 45 days of the  
2 date of Notice to Joanne Ross, Senior Counsel, Department of Business Oversight, 1515 K Street,  
3 Suite 200, Sacramento, California 95814.

4 16. Remedy for Breach: In the event USCF or any of its officers or salespeople fail to comply  
5 with the terms of this consent order with regard to any term in this consent order, and fail to cure any  
6 non-monetary term in accordance with Paragraph 16 above, it is hereby agreed by USCF that a penalty  
7 of \$10,000.00 will be ordered and shall be deemed a final and enforceable order (Penalty). The  
8 Penalty payment in full shall be received within 10 days of knowledge or notice of a monetary breach,  
9 whichever occurs first, and within 30 days of Notice of any non-monetary breach that remains  
10 uncured. The Penalty shall be paid by check made payable to “Department of Business Oversight,”  
11 and mailed to the attention of Accounting-Litigation, Department of Business Oversight, 1515 K  
12 Street, Suite 200, Sacramento, California 95814. Notice of payment shall be concurrently made via  
13 email to Joanne Ross, Senior Counsel at Department of Business Oversight, joanne.ross@dbo.ca.gov.

14 17. Waiver of Hearing Rights: USCF acknowledges that the Commissioner is ready, willing and  
15 able to proceed with the filing of an enforcement action on the charges contained in this consent order,  
16 and USCF hereby waives the right to a hearing, and to any reconsideration, appeal, or other right to  
17 review which may be afforded pursuant to the FIL. USCF further expressly waives any requirement  
18 for the filing of an Accusation or other action that may be afforded by Government Code section  
19 11415.60, subdivision (b), the California Administrative Procedure Act, the California Code of Civil  
20 Procedure, or any other provision of law, and by waiving such rights, USCF effectively consents to  
21 this consent order becoming final.

22 18. Binding: This consent order is binding on all heirs, assigns, and/or successors in interest.

23 19. Future Actions by the Commissioner: The Commissioner reserves the right to bring any future  
24 action(s) against USCF for any and all unknown or future violations of the FIL. This consent order  
25 shall not serve to exculpate USCF from liability for any and all unknown or future violations of FIL.  
26 This consent order may be revoked and the Commissioner may pursue any and all remedies available  
27 under law against USCF if the Commissioner later discovers that USCF knowingly or willfully  
28 withheld information used for and relied upon in this consent order. Further, USCF agrees that this

1 consent order does not resolve any penalties that may be assessed by the Commissioner upon  
2 discovery of new and further violations of the FIL.

3 20. Independent Legal Advice: Each of the parties represents, warrants, and agrees that it has  
4 received or been advised to seek independent legal advice from its attorneys with respect to the  
5 advisability of executing this consent order.

6 21. No Other Representation: Each of the parties represents, warrants, and agrees that in executing  
7 this consent order, it has relied solely on the statements set forth herein and the advice of its own  
8 counsel. Each of the parties further represents, warrants, and agrees that in executing this consent  
9 order, it has placed no reliance on any statement, representation, or promise of any other party, or any  
10 other person or entity not expressly set forth herein, or upon the failure of any party or any other  
11 person or entity to make any statement, representation or disclosure of anything whatsoever. The  
12 parties have included this clause: (1) to preclude any claim that any party was in any way fraudulently  
13 induced to execute this consent order; and (2) to preclude the introduction of parol evidence to vary,  
14 interpret, supplement, or contradict the terms of this consent order.

15 22. Waiver and Modifications: The failure of any party to require the performance of any term or  
16 obligation of this Agreement, or the waiver by any party of any breach of this Agreement, shall not  
17 prevent any subsequent enforcement of such term or obligation or be deemed a waiver of any  
18 subsequent breach. No waiver, amendment, or modification of this consent order shall be valid or  
19 binding to any extent unless it is in writing and signed by all parties affected by it.

20 23. Full Integration: This consent order is the final written expression and the complete and  
21 exclusive statement of all the agreements, conditions, promises, representations, and covenants  
22 between the parties with respect to the subject matter hereof, and supersedes all discussions between  
23 and among the parties, their respective representatives, and any other person or entity, with respect to  
24 the subject matter covered hereby.

25 24. No Presumption From Drafting: In that the parties have had the opportunity to draft, review  
26 and edit the language of this consent order, no presumption for or against any party arising out of  
27 drafting all or any part of this consent order will be applied in any action relating to, connected to, or  
28 involving this consent order. Accordingly, the parties waive the benefit of Civil Code section 1654

1 and any successor or amended statute, providing that in cases of uncertainty, language of a contract  
2 should be interpreted most strongly against the party who caused the uncertainty to exist.

3 25. Counterparts: This consent order may be executed in any number of counter-parts by the  
4 parties, and when each party has signed and delivered at least one such counterpart to the other party,  
5 each counterpart shall be deemed an original and taken together shall constitute one and the same  
6 consent order. A fax signature shall be deemed the same as an original signature.

7 26. Terms, Headings and Governing Law: All terms used, but not defined herein, shall have the  
8 meaning assigned to them by the FIL. The headings to the paragraphs of this consent order are  
9 inserted for convenience only and will not be deemed a part hereof or affect the construction or  
10 interpretation of the provisions hereof. This consent order shall be construed and enforced in  
11 accordance with, and governed by, the laws of the State of California.

12 27. Authority for Consent Order: Each signatory hereto covenants that he/she possesses all  
13 necessary capacity and authority to sign and enter into this consent order. Each party warrants and  
14 represents that such party is fully entitled and duly authorized to enter into and deliver this consent  
15 order. In particular, and without limiting the generality of the foregoing, each party warrants and  
16 represents that it is fully entitled to enter into the covenants, and undertake the obligations set forth  
17 herein.

18 28. Public Record: USCF hereby acknowledges that this consent order will be a matter of public  
19 record. USCF further understands and agrees to not make any statement or representation that is  
20 inconsistent with this consent order.

21 29. Voluntary Agreement: The parties each represent and acknowledge that he, she or it is  
22 executing this consent order completely voluntarily and without any duress or undue influence of any  
23 kind from any source.

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1 30. Effective Date: This consent order shall become effective when executed by all parties and  
2 served by the Commissioner's agent via email to USCF counsel, Dawn Newton, at  
3 dnewton@donahue.com.

4 Dated: April 26, 2018

JAN LYNN OWEN  
Commissioner of Business Oversight

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By \_\_\_\_\_  
MARY ANN SMITH  
Deputy Commissioner  
Enforcement Division

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Dated: April 17, 2018

By \_\_\_\_\_  
Kevin Kramer, Chief Executive Officer  
on behalf of  
US CRYOTHERAPY FRANCHISING

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APPROVED AS TO FORM AND CONTENT:

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Dated: April 25, 2018

By \_\_\_\_\_  
DAWN NEWTON  
Attorney for  
US CRYOTHERAPY FRANCHISING

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