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7 Attorneys for Complainant

8 BEFORE THE DEPARTMENT OF BUSINESS OVERSIGHT  
9 OF THE STATE OF CALIFORNIA

11 In the Matter of:	)	FIL ORG ID: 124690
	)	
12 THE COMMISSIONER OF BUSINESS	)	CITATION INCLUDING:
13 OVERSIGHT,	)	(1) DESIST AND REFRAIN ORDER;
	)	
14 Complainant,	)	(2) ASSESSMENT OF
	)	ADMINISTRATIVE PENALTIES
15 v.	)	(Corp. Code § 31406)
	)	
16 SLAPFISH FRANCHISE, LLC,	)	
	)	
18 Respondent.	)	
	)	

20  
21  
22 The Complainant, the Commissioner of Business Oversight (Commissioner) of the  
23 Department of Business Oversight (Department), finds the following:

24 **I.**  
25 **Statement of Facts**

26 1. At all relevant times, Slapfish Franchise, LLC (Slapfish) was organized on or around  
27 June 3, 2013 as a Delaware limited liability company with a principal place of business located at  
28 10661 Ellis Avenue, Suite F, Fountain Valley, California 92708.

1 2. At all relevant times, Andrew Gruel is the President, Chief Marketing Officer, and  
2 Chief Executive Officer of Slapfish, with a principal place of business located at 10661 Ellis  
3 Avenue, Suite F, Fountain Valley, California 92708.

4 3. Slapfish is a franchising company that promotes and sells “Slapfish” and “Roll in the  
5 Wall by Slapfish” franchises.

6 The 2014 Initial Registration

7 4. On or around September 17, 2013, Slapfish filed an initial franchise registration  
8 application, which included the franchise disclosure document (FDD), with the Commissioner  
9 pursuant to Corporations Code section 31111 (Application). The FDD stated that “[t]he franchise  
10 offered is for a full service, casual restaurant offering a menu specializing in fresh, healthy seafood  
11 dishes using sustainable resources, side dishes, beverages, beer and wine. The franchise operates  
12 under the name ‘Slapfish’ and offers dine-in, take-out and catering.”

13 5. On February 10, 2014, the Commissioner issued an Order Accelerating  
14 Effectiveness of Registration, which authorized the offer and sale of franchises described in the  
15 Application, from February 10, 2014 until April 21, 2014 (2014 Initial Registration).

16 6. The 2014 Initial Registration contained the following provisions under Item 17 of  
17 the FDD entitled, “Renewal, Termination, Transfer, and Dispute Resolution,” regarding both the  
18 franchise relationship and multi-unit operator relationship:

19 Franchisor’s option to purchase franchisee’s business . . . Other than assets  
20 on termination, non-renewal or right of first refusal, we have no right or  
obligation to purchase your business . . .

21 Franchisor’s option to purchase multi-unit operator’s business . . . Not  
22 applicable . . . .

23 7. The 2014 Initial Registration enumerated 23 Items and 11 Exhibits, A through K,  
24 including the following: in Item 23, two copies of receipts acknowledging the prospective  
25 franchisee’s receipt of the FDD, one of which was to be retained by the prospective franchisee and  
26 the other to be signed and returned to Slapfish (Receipt); in Exhibit A, unaudited financial  
27 statements; in Exhibit B, the Franchise Agreement; in Exhibit C, the Multi-Unit Operator  
28 Agreement; and in Exhibit E, a list of franchisees, multi-unit operators, and development agents.

Violations of Corp. Code §§ 31119(a) and 31200 as to the Newport Franchise Agreement

8. In or around February 2014, Slapfish offered two California residents (Franchisee) a Slapfish franchise to be located in Newport Beach, California. The Receipt acknowledging the Franchisee’s receipt of the FDD and Exhibits A through K was signed and dated February 11, 2014 (February 11, 2014 Receipt).

9. On February 24, 2014, a Slapfish representative sent an email to the Franchisee stating, “Attached is the updated FDD. I have also attached the updated Addendum to Franchise Agreement addressing the ‘Minimum Gross Sales’ clause. Please let me know if you have any questions . . . .” The referenced document entitled, “Addendum to Franchise Agreement,” stated, in relevant part:

Franchisee has requested, and Franchisor is willing, to amend the provisions of the Franchise Agreement . . . as follows:

1. Section 2.6 – Opening Date; Time is of the Essence. This Section is hereby modified to state that Franchisee has twelve (12) months from the Effective Date in which to open the Restaurant and commence business.
2. Section 4.1 – Initial Franchise Fee. The initial franchise fee has been paid under the Multi-Unit Operator Agreement executed simultaneously with this Agreement.
3. Section 1.6 – Minimum Gross Sales. This Section is hereby deleted in its entirety. Any references to Minimum Gross Sales or minimum required Gross Sales in the Disclosure Document are hereby null and void . . . .

10. On February 28, 2014, Slapfish executed a franchise agreement with the Franchisee for a Slapfish franchise located in Newport Beach, California (Newport Franchise Agreement), including the “Addendum to Franchise Agreement,” which was also signed and dated by the Franchisee on February 28, 2014 (Newport Addendum).

11. Slapfish failed to notify the Commissioner of the material changes to the 2014 Initial Registration pursuant to Corporations Code section 31123, in violation of section 31200.

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1           12. Slapfish did not file a Notice of Negotiated Sale of Franchise in the form set forth in  
2 California Code of Regulations, title 10, section 310.100.2, subsection (b) with the Commissioner  
3 within 15 business days after the negotiated sale between Slapfish and the Franchisee.

4           13. The February 11, 2014 Receipt did not include any acknowledgment of the receipt of  
5 the Newport Addendum or any of its negotiated provisions prior to February 24, 2014, which was  
6 only four days prior to the execution of the Newport Franchise Agreement on February 28, 2014.

7           14. Slapfish failed to give the Franchisee a copy of all proposed agreements relating to  
8 the sale of the franchise, including an updated FDD that included the Newport Addendum, at least  
9 14 days prior to the execution of the Newport Franchise Agreement, in violation of Corporations  
10 Code section 31119, subdivision (a).

11                           The 2014 Renewal and Post-Effective Material Amendment

12           15. On April 21, 2014, Slapfish filed a Registration Renewal Statement and FDD with  
13 the Commissioner pursuant to Corporations Code section 31121, which became effective on May  
14 23, 2014 (2014 Renewal). The 2014 Renewal authorized the offer and sale of franchises from May  
15 23, 2014 until April 20, 2015.

16           16. The 2014 Renewal did not include any appendix in which Slapfish certified or  
17 declared that it had complied with Corporations Code section 31109.1 regarding the offer and sale  
18 of a franchise with terms different from the terms of the offer registered pursuant to the 2014 Initial  
19 Registration.

20           17. The FDD in the 2014 Renewal included Item 17 entitled, “Renewal, Termination,  
21 Transfer, and Dispute Resolution,” regarding both the franchise relationship and multi-unit operator  
22 relationship, that were identical to those in the 2014 Initial Registration as referenced above in  
23 Paragraph 6.

24           18. On December 19, 2014, Slapfish filed a Post-Effective Material Amendment to the  
25 2014 Renewal pursuant to Corporations Code section 31125 (Post-Effective Amendment). The  
26 Post-Effective Amendment changed the 2014 Renewal by purporting to give Slapfish the right to  
27 buy back the franchised restaurant from a franchisee, as well as buy back the development rights,  
28 including any existing franchised restaurants, from a multi-unit operator, after providing 90 days of

1 written notice of intent to exercise the right. Exhibit B of the Post-Effective Amendment contained  
2 a modified franchise agreement reflecting the “Buy Back Option” in Section 14.8.

3 19. Notwithstanding the modified Exhibit B with a new Section 14.8, the Post-Effective  
4 Amendment did not reflect corresponding changes to Item 17 of the FDD entitled, “Renewal,  
5 Termination, Transfer, and Dispute Resolution,” regarding the franchise relationship and the multi-  
6 unit operator relationship. Like the 2014 Initial Registration and 2014 Renewal it purported to  
7 change, the Post-Effective Amendment still reflected the same Item 17, “Renewal, Termination,  
8 Transfer, and Dispute Resolution,” referenced above in Paragraph 6 expressly disavowing any buy-  
9 back option. Also, Exhibit C of the Post-Effective Amendment contained a modified Multi-Unit  
10 Operator Agreement that failed to include any “Buy-Back Option.”

11 Violations of Corp. Code §§ 31119(a), 31200, and 31201 as to the Irvine Franchise Agreement

12 20. Before receiving the Commissioner’s approval for the changes requested in the Post-  
13 Effective Amendment, on or around December 26, 2014, Slapfish entered into a franchise  
14 agreement with a California limited liability company (Irvine Franchisee) for the operation of a  
15 franchise in Irvine under the terms of the Post-Effective Amendment, which included the “Buy-  
16 Back” Option in Section 14.8 (Irvine Franchise Agreement).

17 21. The Irvine Franchise Agreement contained an “Addendum to Franchise Agreement,”  
18 which was dated December 26, 2014 (Irvine Addendum). The Irvine Addendum stated, in relevant  
19 part:

20 The parties hereby amend the Franchise Agreement in accordance with the  
21 following . . . In the event of any conflict or ambiguity between the terms  
22 of this Addendum and the Franchise Agreement, the terms of this  
Addendum shall control.

23 1. Section 4.1 – Initial Franchise Fee. The parties agree that the  
24 Franchisor shall apply the Fifteen Thousand Dollars (\$15,000) pro-rata  
25 portion of the Development Fee, which was previously paid by the  
26 Franchisee under a Multi-Unit Operator Agreement dated February 28,  
27 2014 and credited towards the Thirty Thousand Dollar (\$30,000) Initial  
28 Franchise Fee due under this Franchise Agreement. The Franchisee shall  
pay the balance due of Fifteen Thousand Dollars (\$15,000) upon  
execution of the Franchise Agreement . . . .

1           22.     On December 29, 2014, the Commissioner issued an Order Declaring Effectiveness  
2 of Amendment to Registration, thereby making the Post-Effective Amendment effective for the  
3 period of December 29, 2014 until April 20, 2015.

4           23.     Slapfish failed to disclose to the Commissioner the material facts contained in the  
5 Irvine Addendum, omitted mentioning any “Addendum to Franchise Agreement” in its 2014  
6 Renewal and Post-Effective Amendment, which was effective from December 29, 2014 until April  
7 20, 2015, and also failed to notify the Commissioner of the material changes to the 2014 Renewal  
8 pursuant to Corporations Code section 31123, in violation of section 31200.

9           24.     Slapfish did not file a Notice of Negotiated Sale of Franchise in the form set forth in  
10 California Code of Regulations, title 10, section 310.100.2, subsection (b) with the Commissioner  
11 within 15 business days after the negotiated sale between Slapfish and the Irvine Franchisee.

12           25.     Slapfish did not retain any Receipt acknowledging the date that the Irvine Franchisee  
13 received the 2014 Renewal, Post-Effective Amendment, or the Irvine Addendum and any of its  
14 negotiated provisions, to show compliance with Corporations Code section 31119, subdivision (a),  
15 which requires the franchisor to provide a prospective franchisee, at least 14 days prior to the  
16 execution of any binding franchise or other agreement, or at least 14 days prior to the receipt of any  
17 consideration, whichever occurs first, a copy of the FDD, together with a copy of all proposed  
18 agreements relating to the sale of the franchise.

19           26.     On or around December 26, 2014, when Slapfish and the Irvine Franchisee executed  
20 the Irvine Franchise Agreement, Slapfish failed to disclose to the Irvine Franchisee that the Buy  
21 Back Option at Section 14.8 of the Post-Effective Amendment was not yet approved by the  
22 Commissioner, in violation of Corporations Code section 31201.

23   2015 Renewal

24           27.     On or around April 17, 2015, Slapfish filed a Registration Renewal Statement and  
25 FDD with the Commissioner pursuant to Corporations Code section 31121 which became effective  
26 on or around May 19, 2015 (2015 Renewal). The 2015 Renewal authorized the offer and sale of  
27 franchises from May 19, 2015 until April 20, 2016.

28     ///

1           28.     The 2015 Renewal did not include any appendix in which Slapfish certified or  
2 declared that it had complied with Corporations Code section 31109.1 regarding the offer and sale  
3 of a franchise with terms different from the terms of the offer registered pursuant to the 2014  
4 Renewal or the Post-Effective Amendment.

5   **II.**  
6   **Citations and Desist and Refrain Orders**

7           29.     Corporations Code section 31119, subdivision (a) states:

8                         (a) It is unlawful to sell any franchise in this state that is subject to  
9 registration under this law without first providing to the prospective  
10 franchisee, *at least 14 days prior to the execution* by the prospective  
11 franchisee of any binding franchise or other agreement, or at least 14 days  
12 prior to the receipt of any consideration, whichever occurs first, a copy of  
the franchise disclosure document, together with a copy of *all proposed*  
*agreements relating to the sale of the franchise.* (Emphasis added.)

13          30.     Corporations Code section 31200 states:

14                         It is unlawful for any person willfully to make any untrue statement of a  
15 material fact in any application, notice or report filed with the  
16 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  
17 stated therein, or *fail to notify the commissioner of any material change*  
*as required by Section 31123.* (Emphasis added.)

18          31.     Corporations Code section 31123 states:

19                         A franchisor *shall promptly notify* the commissioner in writing, by an  
20 application to amend the registration, of *any material change in the*  
*information contained in the application as originally submitted,*  
21 *amended or renewed.* The commissioner may by rule further define what  
22 shall be considered a material change for such purposes, and the  
23 circumstances under which a revised offering prospectus must accompany  
such application. (Emphasis added.)

24          32.     Corporations Code section 31201 states:

25                         It is unlawful for any person to offer or sell a franchise in this state by  
26 means of any written or oral communication not enumerated in Section  
27 31200 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  
28 light of the circumstances under which they were made, not misleading.

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33. Corporations Code section 31109.1 states:
- (a) There shall be exempted from the provisions of Chapter 2 (commencing with Section 31110) the offer and sale of a franchise registered under Section 31111, 31121, or 31123 on terms different from the terms of the offer registered thereunder if ***all of the following requirements are met:***
    - (1) The initial offer is the offer registered under Section 31111, 31121, or 31123.
    - (2) The prospective franchisee receives all of the following in a separate written appendix to the franchise disclosure document:
      - (A) A summary description of each material negotiated term that was negotiated by the franchisor for a California franchise during the 12-month period ending in the calendar month immediately preceding the month in which the negotiated offer or sale is made under this section.
      - (B) A statement indicating that copies of the negotiated terms are available upon written request.
      - (C) The name, telephone number, and address of the representative of the franchisor to whom requests for a copy of the negotiated terms may be obtained.
    - (3) ***The franchisor certifies or declares in an appendix to its application for renewal that it has complied with all of the requirements of this section, in the event this exemption is claimed.***
    - (4) The negotiated terms, on the whole, confer additional benefits on the franchisee.
  - (b) The franchisor shall provide a copy of the negotiated terms described in subdivision (a) to the prospective franchisee within five business days following the request of the franchisee.
  - (c) The franchisor shall maintain copies of all material negotiated terms for which this exemption is claimed for a period of five years from the effective date of the first agreement containing the relevant negotiated term. Upon the request of the commissioner, the franchisor shall make the copies available to the commissioner for review. For purposes of this section, the commissioner may prescribe by rule or order the format and content of the summary description of the negotiated terms required by subparagraph (A) of paragraph (2) of subdivision (a).



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(d) For purposes of this section, “material” means that a reasonable franchisee would view the terms as important in negotiating the franchise. (Emphasis added.)

34. California Code of Regulations, title 10, section 310.100.2 states, in relevant part:

a) General. The offer or sale of a franchise on terms different from the terms of the offer registered under Section 31111, 31121 or 31123 of the Law is exempt from the requirements of Section 31110 of the Law, if ***all of the following conditions are met***: . . .

(3) ***Before selling another franchise***, the franchisor amends its registered offer to disclose: “The terms of Item(s) ..... of this Offering Circular have been negotiated with other franchisees. A copy of all Negotiated Sales Notices filed in California in the last twelve months is attached as Exhibit .....” This disclosure should be made in the UFOC Item that was negotiated or in an appendix to the UFOC. This disclosure must be made if the negotiated sale occurred within twelve months of the offering being made. An amendment making only this disclosure is effective when filed.

(4) The Notice of Negotiated Sale of Franchise in the form set forth in subsection (b) is filed with the Commissioner within ***15 business days after the negotiated sale is consummated***.

(5) The franchisor certifies or declares in an appendix to its application for renewal that all notices have been filed with the Commissioner as required by paragraph (a)(4) . . . (Emphasis added.)

35. Corporations Code section 31406 states:

(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.

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(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.

36. Based upon the foregoing findings, the Commissioner is of the opinion that Slapfish Franchise, LLC sold at least one franchise in this state that is subject to registration under the FIL without first providing to the prospective franchisee, at least 14 days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or at least 14 days prior to the receipt of any consideration, whichever occurs first, a copy of the franchise disclosure document, together with a copy of all proposed agreements relating to the sale of the franchise, in violation of Corporations Code section 31119, subdivision (a). Pursuant to Corporations Code section 31406, Slapfish Franchise, LLC is hereby cited and ordered to desist and refrain from the further sale of franchises in this state that are subject to registration under this law without first providing to the prospective franchisee, at least 14 days prior to the execution by the prospective franchisee of any binding franchise or other agreement, or at least 14 days prior to the receipt of any consideration, whichever occurs first, a copy of the franchise disclosure document, together with a copy of all proposed agreements relating to the sale of the franchise.

37. Furthermore, based upon the foregoing findings, the Commissioner is of the opinion that Slapfish Franchise, LLC willfully made at least one untrue statement of a material fact in an application, notice or report filed with the Commissioner under the FIL, or willfully omitted to state in any such application, notice, or report at least one material fact which is required to be stated therein, or failed to notify the Commissioner of any material change as required by Section 31123,

1 in violation of Corporations Code section 31200. Pursuant to Corporations Code section 31406,  
2 Slapfish Franchise, LLC is hereby cited and ordered to desist and refrain from willfully making any  
3 untrue statement of a material fact in an application, notice or report filed with the Commissioner  
4 under the FIL, or willfully omitting to state in any such application, notice, or report any material  
5 fact which is required to be stated therein, or failing to notify the Commissioner of any material  
6 change as required by Section 31123, in violation of Corporations Code section 31200.

7 38. Also, based upon the foregoing findings, the Commissioner is of the opinion that  
8 Slapfish Franchise, LLC offered or sold a franchise in this state by means of a written or oral  
9 communication not enumerated in Section 31200 which included an untrue statement of a material  
10 fact or omitted to state a material fact necessary in order to make the statements made, in the light  
11 of the circumstances under which they were made, not misleading, in violation of Corporations  
12 Code section 31201. Pursuant to Corporations Code section 31406, Slapfish Franchise, LLC is  
13 hereby cited and ordered to desist and refrain from offering or selling a franchise in this state by  
14 means of a written or oral communication not enumerated in Section 31200 which includes an  
15 untrue statement of a material fact or omits to state a material fact necessary in order to make the  
16 statements made, in the light of the circumstances under which they were made, not misleading, in  
17 violation of Corporations Code section 31201.

18 39. This Order is necessary, in the public interest, for the protection of investors and  
19 franchisees and consistent with the purposes, policies and provisions of the Franchise Investment  
20 Law.

21 **III.**  
22 **Administrative Penalties**

23 40. Pursuant to Corporations Code section 31406, Slapfish Franchise, LLC is hereby  
24 assessed and ordered to pay an administrative penalty of \$2,500.00 for each of six citations under the  
25 Franchise Investment Law, totaling \$15,000.00, as follows:

26 41. **CITATION A:** On or around February 28, 2014, Slapfish Franchise, LLC sold the  
27 Newport Franchise Agreement in this state without first providing to the Franchisee, at least 14  
28 days prior to the execution by Franchisee a copy of the franchise disclosure document, together

1 with a copy of *all proposed agreements relating to the sale of the franchise*, in violation of  
2 Corporations Code section 31119, subdivision (a).

3 42. **CITATION B:** In or around February 2014, Slapfish Franchise, LLC failed to notify  
4 the Commissioner of a material change in its 2014 Initial Registration, namely the “Addendum to  
5 Franchise Agreement” included in the Newport Franchise Agreement, as required by Section  
6 31123, in violation of Corporations Code section 31200.

7 43. **CITATION C:** On or around December 19, 2014, Slapfish Franchise, LLC filed a  
8 Post-Effective Material Amendment to its 2014 Renewal that became effective on December 29,  
9 2014. On December 26, 2014, Slapfish Franchise, LLC sold the Irvine Franchise Agreement in this  
10 state without first providing to the Irvine Franchisee, at least 14 days prior to the execution by the  
11 Irvine Franchisee a copy of the franchise disclosure document, together with a copy of all proposed  
12 agreements relating to the sale of the franchise, in violation of Corporations Code section 31119,  
13 subdivision (a).

14 44. **CITATION D:** In or around December 2014, Slapfish Franchise, LLC failed to  
15 notify the Commissioner of a material change in its 2014 Renewal and Post-Effective Material  
16 Amendment, namely the “Addendum to Franchise Agreement” included in the Irvine Franchise  
17 Agreement, as required by Section 31123, in violation of Corporations Code section 31200.

18 45. **CITATION E:** In or around December 2014, Slapfish Franchise, LLC failed to  
19 notify the Commissioner of a material change in the franchise disclosure document at Item 17  
20 entitled, “Renewal, Termination, Transfer, and Dispute Resolution,” which stated that there was no  
21 buy-back option, in contradiction to Exhibit B, the Franchise Agreement, which contained a “Buy-  
22 Back Option” at Section 14.8, as required by Section 31123, in violation of Corporations Code  
23 section 31200.

24 46. **CITATION F:** In or around December 2014, Slapfish Franchise, LLC offered and  
25 sold the Irvine Franchise Agreement in this state by means of a written or oral communication not  
26 enumerated in Section 31200 which included an untrue statement of a material fact or omitted to  
27 state a material fact necessary in order to make the statements made, in the light of the circumstances  
28 under which they were made, not misleading, namely that the Post-Effective Material Amendment to

1 the 2014 Renewal was not yet approved by the Commissioner and hence not yet effective at the time  
2 of the offer and sale of the Irvine Franchise Agreement, in violation of Corporations Code section  
3 31201.

4 47. Pursuant to Corporations Code section 31406, the total administrative penalty of  
5 \$15,000.00 shall be due within 60 days of receipt of Citations A-F and shall be made payable to the  
6 Commissioner in the form of a cashier’s check or Automated Clearing House deposit to the  
7 “Department of Business Oversight,” and transmitted to the attention of: Accounting – Enforcement  
8 Division, California Department of Business Oversight, 1515 K Street, Suite 200, Sacramento,  
9 California 95814, contemporaneously with notice of transmittal to Sophia C. Kim at  
10 Sophia.Kim@dbo.ca.gov.

11  
12 Dated: January 7, 2019  
13 Los Angeles, California

JAN LYNN OWEN  
Commissioner of Business Oversight

16 By \_\_\_\_\_  
17 MARY ANN SMITH  
18 Deputy Commissioner  
19 Enforcement Division  
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