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Dept. of Alcoholic Beverage Control
 Southern Division

8 Attorneys for Petitioner
 9 Il Boccaccio Inc.

10 BEFORE THE DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL
 11 OF THE STATE OF CALIFORNIA

12 IN THE MATTER OF THE PETITION BY:

File No. 47-463116

13 IL BOCCACCIO INC.
 14 DbA Il Boccaccio Restaurant
 15 39 Pier Avenue
 16 Hermosa Beach, CA 90254

Reg. No. 09071531

PETITIONER'S CLOSING ARGUMENT

Petitioner

17 INTRODUCTION

18 IL BOCCACCIO IS IN THE CITY'S NIGHTLIFE ZONE

19 Petitioner, Il Boccaccio, Inc., applied for a person-to-person transfer of a Type 47
 20 license for a restaurant called Il Boccaccio on the Pier Plaza of Hermosa Beach. Pier Plaza,
 21 in Downtown Hermosa Beach is a pedestrian mall lined with restaurants, bars, and
 22 miscellaneous businesses that serve visitors to the beach. Pier Avenue forms a "T" with
 23 Hermosa Avenue.

24 The City of Hermosa Beach designed the Downtown intersection of Pier Avenue and
 25 Hermosa Avenue as a focus of the City's nightlife. On Pier Avenue and within a one-block
 26

1 radius on Hermosa Avenue, there were 15 licensed businesses open between Midnight and
2 2:00 a.m. See, Exhibit A¹

3 IL BOCCACCIO'S CONDITIONAL USE PERMIT (CUP) FROM THE CITY PERMITS
4 IT TO SERVE ALCOHOL UNTIL 1:30 A.M.

5 Petitioner, in its application, stated that its hours would be from 5:00 p.m. to 1:30 a.m.
6 Monday through Friday, and Noon to 1:30 a.m. on Saturday and Sunday. See, Exhibit 2.
7 The current ABC license has no restrictions on hours. The Department's witnesses,
8 Investigator Ibarra and Police Chief Savelli, testified that the City's CUP allows Il Boccaccio
9 to remain open and serve alcohol until 1:30 a.m. See, Exhibit B.

10 PETITIONER OBJECTS TO THE IMPOSITION OF TWO NEW CONDITIONS; ONE,
11 THAT IT CLOSE AT MIDNIGHT, AND TWO, THAT 50% OF ITS REVENUE BE FROM THE
12 SALE OF FOOD.

13 The City requested that the ABC, as part of the person-to-person transfer, impose
14 two new conditions. One would require Il Boccaccio to close every night no later than
15 Midnight. The second would require Il Boccaccio to keep quarterly records showing that at
16 least 50% of its revenues came from the sale of food (this is commonly referred to as a "50-
17 50" condition). This request was accepted and processed by the Department under
18 Business & Professions Code Section 23800(e).

19 Petitioner objected to these conditions on the grounds that there was no substantial
20 evidence of a problem in the premises or immediate vicinity that would permit these
21 conditions under Section 23800(e). Petitioner also objected to the 50-50 Condition on the
22 ground that there was no nexus or rational connection between any alleged problem and
23 percentage of food sales.

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25 ¹ Chief Savelli's letter did not count Il Boccaccio as among these, but it was demonstrated at
26 the hearing that it was regularly open until 1:30 a.m.

1 Lastly, Petitioner contended that Section 23800 (e) did not apply to this transfer as a
2 matter of law.

3 THE CITY OFFERED TWO DIFFERENT RATIONALE FOR THE REQUESTED
4 CONDITIONS AND BOTH WERE PROVEN FALSE.

5 The City offered two different rationale for these conditions. Investigator Ibarra and
6 Chief Savelli both testified that initially the City stated that it wanted to impose Midnight
7 closing condition on all transfers on the Pier and neighboring Hermosa Avenue. See, Exhibit
8 D. This first rationale—uniformity of imposing a Midnight closing condition on all license
9 transfers—was negated by Chief Savelli's admission that the City had, in fact, allowed two
10 subsequent transfers without requesting a Midnight closing even though those businesses
11 were open until 1:30 a.m. and 2:00 a.m.

12 Chief Savelli attempted to explain away that inconsistency and shift to the City's
13 second rationale by testifying that those businesses were different than Il Boccaccio
14 because they were already staying open to the later hours, so allowing them to continue was
15 not adding to the number of late night establishments. Il Boccaccio, on the other hand, and
16 only according to the Chief Savelli's testimony, regularly closed before Midnight. Thus, if the
17 new owners stayed open until 1:30 a.m., that would add to the number of late night
18 establishments. Chief Savelli acknowledged that he did not have personal knowledge that Il
19 Boccaccio regularly closed by Midnight, and the Department offered no other evidence of
20 that fact beyond his statements.

21 Contrary to Chief Savelli's testimony, Petitioner proved that Il Boccaccio regularly
22 stayed open until 1:30 a.m. Chief Savelli admitted that he was aware that the City had
23 issued numerous notices to Il Boccaccio, between October 2006 and August 2007, for
24 staying open past 1:30 a.m. in violation of its CUP. See Exhibit C. Petitioner's President,
25 Greg Newman, also testified that he observed Il Boccaccio regularly open until 1:30 a.m. in
26 the year preceding this application, which was filed in January 2008. Mr. Newman also

1 testified that the fact that Il Boccaccio could stay open until 1:30 a.m. was a material factor in
2 his decision to buy the building and the business of Il Boccaccio.

3 Therefore, the City's shifting rationale for requesting these new conditions was based
4 on the false assertion that Il Boccaccio regularly closed before Midnight.

5 No explanation or evidence of any kind was offered by the Department's witnesses in
6 support of the 50-50 condition.

7
8 THE DEPARTMENT FAILED TO PROVE WITH SUBSTANTIAL EVIDENCE THAT
9 (1) A PROBLEM EXISTED IN THE VICINITY OF IL BOCCACCIO AND (2) THAT THE
10 REQUESTED CONDITIONS WOULD MITIGATE THE PROBLEM.

11 Investigator Ibarra testified that the Department sought to impose this Midnight
12 Closing Condition and 50-50 Condition under Business and Professions Code¹ Section
13 23800(e), which provides, in relevant part:

14 (e)(1) At the time of transfer of a license pursuant to Section 24071.1, 24072.1, or
15 24072 and upon written notice to the licensee, the department may adopt conditions
16 that the department determines are reasonable pursuant to its investigation or that
17 are requested by the local governing body, or its designated subordinate officer or
18 agency, in whose jurisdiction the license is located. **The request for conditions**
19 **shall be supported by substantial evidence that the problems either on the**
20 **premises or in the immediate vicinity identified by the local governing body or**
21 **its designated subordinate officer or agency will be mitigated by the**
22 **conditions. [Emphasis added.]**

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26 ¹ All references are to provisions of the Business & Professions Code.

1 This statute requires that the City and the Department provide substantial evidence of
2 two things. One, that a problem exists at the premises or immediate vicinity; and two, that
3 the requested conditions will mitigate that problem. The City and the Department failed to
4 provide substantial evidence to support either point.

5 THE CITY'S "CALLS FOR SERVICE" PRINTOUT IS NOT SUBSTANTIAL
6 EVIDENCE OF A PROBLEM.

7 In explaining why it sought to prohibit Il Boccaccio's alcohol service after Midnight,
8 Chief Savelli testified that late night drinking was a problem on the Pier. He testified that the
9 City did annual evaluations of police calls for service in the Downtown. He agreed that of all
10 of the licensed businesses in the Downtown, Il Boccaccio had the fewest calls for service.
11 See, Exhibit A.

12 Chief Savelli did not testify that his assertion was based on his personal knowledge.
13 Instead, the only supporting evidence he provided was a computer print out of the Calls for
14 Service to Pier Plaza. See Exhibit 7. For each call on that printout, there is no evidence that
15 alcohol was involved and there is no evidence indicating the time of day of each call. Thus
16 the City's printout is not **substantial evidence** of late night alcohol causing problems on Pier
17 Avenue.

18 The Department's internal guidelines for applying Section 23800(e) defines
19 "substantial evidence" as follows:

20 "The leading California court case on what constitutes "substantial evidence" is the
21 Toyota Motor Sales decision (Toyota Motor Sales USA, Inc. v Superior Court (1990),
22 220 Cal. App.3d 864, 871, 269 Cal. Rptr 647). The Court defined it as: "... evidence
23 which is of ponderable legal significance. It must be reasonable in nature, credible,
24 and of solid value; *it must actually be 'substantial' proof of the essentials which*
25 *the law requires in a particular case.* Thus, the focus is on the quality, not the
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1 quantity of the evidence. Very little solid evidence may be 'substantial' while a lot of
2 extremely weak evidence might be 'insubstantial.'" [Emphasis added.]¹

3 Applying this definition, the calls for service lacking any indication of alcohol
4 involvement or time, are not proof of the essentials which the law requires in this case;
5 namely that late night alcohol violations are a problem on Pier Avenue that justify forcing II
6 Boccaccio to close at Midnight.

7 The Department's L Manual states:

8 "Applying the guidance provided by this [Toyota] decision to Section 23800(e),
9 the following will constitute "substantial evidence:"

- 10
- 11 • Police reports reflecting personal observations by police officers during arrests
12 at or in the immediate vicinity of the premises,
 - 13 • Recent accusations (within three years) and resultant decision of the
14 Department relating to the premises.
 - 15 • Photographs or video recordings of nuisance activities or disturbances at the
16 premises.
 - 17 • Sound recordings of noise emanating from the premises.
 - 18 • Records of complaints by citizens concerning the premises."

19 In other words, in the Department's own view, substantial evidence requires a greater
20 level of reliable, detailed evidence of the problem, than shown by the City's calls for service
21 printout. That is neither detailed nor reliable. Chief Savelli admitted he could not provide
22 any detail beyond what was shown on the printout. The Department did not offer any police
23 reports in evidence. The Chief also stated that many businesses complained about the

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25 ¹ See attached Declaration of Richard D. Warren and the excerpt of the Department's L
26 Manual.

1 inaccuracies in these printouts, and it was the City's practice now, to first provide a draft of
2 them to the listed businesses so errors could be corrected before the list was published.

3
4 THE CITY AND DEPARTMENT FAILED TO PROVIDE SUBSTANTIAL EVIDENCE
5 THAT THE REQUESTED CONDITIONS WILL MITIGATE ANY PROBLEM ON PIER
6 PLAZA.

7 Chief Savelli testified that Il Boccaccio had the lowest number of calls for service
8 among all of the licensed businesses on Pier Avenue. Initially, he sought to explain this by
9 reiterating his view that Il Boccaccio closed before Midnight, and, thus was not a problem.

10 Petitioner proved, however, that Il Boccaccio was regularly open until 1:30 a.m. and
11 the only problem it had was twice failing to close at 1:30 a.m. as required under its CUP.
12 Therefore, where the evidence is clear that Il Boccaccio regularly operated until 1:30 a.m.
13 and still had the fewest calls for service, it is illogical that a Midnight closing condition is
14 warranted to mitigate any problem. The evidence proves just the contrary; Il Boccaccio did
15 operate until 1:30 a.m. without being a problem.

16 Chief Savelli also testified that in 2008, the City itself took action against two
17 establishments that were identified as particular problems and modified their CUP's to
18 require them to close at Midnight or 12:30 a.m. Since that action, Chief Savelli confirmed
19 that calls for service were down 30% on Pier Avenue by the end of 2008. If any concern
20 lingers, the City has it has its own tools mitigate the problem by targeting the businesses
21 that, in fact, are the cause of problems.

22 With respect to the 50-50 Condition, the Department and Chief Savelli proffered no
23 evidence of any problem that condition would mitigate. They offered no explanation at all
24 why Petitioner's license should be conditioned to require that it earn at least 50% of its
25 revenue from food. The ABC Appeals Board has repeatedly said that there must be some
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1 nexus or rational connection between the problem and the condition. Here, none was shown
2 by the Department or the City.

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4 SECTION 23800(e) DOES NOT APPLY TO THIS TRANSFER UNDER SECTION
5 24070.1 BECAUSE THIS TRANSFER IS NOT ONE OF THOSE LISTED IN SECTION
6 23800(e).

7 As noted above, Section 23800(e) applies only to the "transfer[s] pursuant to Section
8 24071.1, 24071.2, or 24072..." This transfer is under Section 24070.1, and not one of the
9 statutes listed in Section 23800(e).

10 Department's Counsel argued that section 23800(e) applies here because Petitioner
11 was required to pay a fee under Section 24072. But it is generally true that a transfer fee is
12 paid in nearly all license transfer situations. Therefore, interpreting this reference to Section
13 24072 to trigger the applicability of Section 23800(e) to all transfers in which a fee is paid,
14 has the effect of allowing conditions to be imposed on all transfers. This would include
15 transfers by an individual licensee to a corporation in which he owns all of the shares. Such
16 a transfer is treated as a person-to-person transfer under Section 24070.1. As shown in the
17 attached Declaration of Richard D. Warren, in at least one other matter, the Department has
18 previously agreed that Section 23800(e) did not allow conditions to be imposed on a person-
19 to-person transfer. In that matter, as here, a fee was required by Section 24072.

20 This reference to Section 24072 creates ambiguity and requires that Section
21 23800(e) be interpreted according to well settled rules.

22 The Supreme Court has provided the following rules to apply when construing a
23 statute or Constitutional provision:
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1 "Words used in a statute or constitutional provision should be given the meaning they
2 bear in ordinary use. If the language is clear and unambiguous there is no need for
3 construction, nor is it necessary to resort to indicia of the intent of the Legislature (in
4 the case of a statute) or of the voters (in the case of a provision adopted by the
5 voters).

6 But the "plain meaning" rule does not prohibit a court from determining whether the
7 literal meaning of a statute comports with its purpose or whether such a construction
8 of one provision is consistent with other provisions of the statute. The meaning of a
9 statute may not be determined from a single word or sentence; the words must be
10 construed in context, and provisions relating to the same subject matter must be
11 harmonized to the extent possible. Literal construction should not prevail if it is
12 contrary to the legislative intent apparent in the statute. The intent prevails over the
13 letter, and the letter will, if possible, be so read as to conform to the spirit of the act.
14 An interpretation that renders related provisions nugatory must be avoided [E]ach
15 sentence must be read not in isolation but in the light of the statutory scheme ; and if
16 a statute is amenable to two alternative interpretations, the one that leads to the
17 more reasonable result will be followed. These rules apply as well to the
18 interpretation of constitutional provisions." [Citations omitted.] *Lungren v.*
19 *Deukmejian*, 45 Cal 3d 727, 735 (1988).

20 As already noted, allowing subparagraph (e) to apply whenever a fee is paid under
21 Section 24072, makes the limiting references to Section 24071.1 and 24071.2 meaningless
22 and that interpretation is not permitted.

23 Furthermore, the legislative intent here was to allow conditions only in certain
24 circumstances. These references to Section 24017.1, 24071.2 and 24072 were added by
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1 Assembly Bill 2759, and effective 2001. See, Stats. 2000, c. 979 (A. B. 2759), §3.
2 Subparagraph (e), first added in 1999, had no such limitation.

3 The Legislative Counsel's Digest explained the purpose of this amendment as
4 follows:

5 "This bill would permit the department in that situation to place reasonable restrictions
6 on these licensees at the time of transfer of a license **under specified**
7 **circumstances.**"

8 Therefore, Assembly Bill 2759 was intended to limit a previously unlimited opportunity
9 to impose conditions to mitigate a problem. Counsel's interpretation would frustrate that
10 intent by interpreting the reference to Section 24072 to allow conditions in any transfer where
11 a fee was paid. In other words, to virtually every transfer, not just the limited circumstances
12 intended by the Legislature.

13 In at least one recent situation, the Department agreed that Section 23800(e) did not
14 allow conditions on a person-to-person transfer even though a fee was required and paid
15 under Section 24072. See attached Declaration of Richard D. Warren.

16 In that matter, Petitioner's attorney, Rick Warren, represented an individual licensee
17 who was transferring his license to a personal corporation. The applicant paid a fee under
18 Section 24072, and the transfer was treated as a person-to-person transfer. The City of
19 Oakland and the Department requested conditions under Section 23800(e). That applicant
20 objected on the grounds that that transfer was not a transfer under 24071.1 or 24071.2 and
21 therefore, Section 23800 (e) did not apply. Upon review by the Department, the Oakland
22 Supervising Investigator confirmed that Section 23800 (e) did not apply to that person-to-
23 person transfer. See Declaration of Richard D. Warren and attached exchange of e-mails
24 with Stephen Hogate.

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Finally, when construing subparagraph (e), it must be considered in the context of all of the other provisions of Section 23800. The general purpose of Section 23800 is to restrict the authority of the Department to impose conditions only in limited circumstances.

Therefore, it must be concluded that Section 23800(e) by its express terms does not apply to Petitioner's transfer application under Section 24070.1

SECTION 23800(a) DOES NOT AUTHORIZE THE DEPARTMENT TO IMPOSE CONDITIONS ON THIS PERSON TO PERSON TRANSFER.

In spite of Investigator Ibarra's testimony that the Department sought to impose these conditions under Section 23800(e), at the hearing the Department amended the Statement of Issues to also assert that these conditions could be imposed under Section 23800(a).

That statutes provides as follows:

"The department may place reasonable conditions upon retail licensees or upon any licensee in the exercise of retail privileges in the following situations:

- (a) If grounds exist for the denial of an application for a license or where a protest against the issuance of a license is filed and if the department finds that those grounds may be removed by the imposition of those conditions."

Department counsel argued that because the Department "issues" a new license when it transfers a license from one owner to another, subparagraph (a) applies here.

That interpretation ignores the plain language requiring a "protest against the issuance of a license." That is commonly understood to apply only to those situations where a protest is filed to an application to place a license at a location not previously licensed. Here, Il Boccaccio is already licensed and this application seeks to continue that license at the same location only under a new owner.

1 Furthermore, if every person-to-person transfer may be subjected to new conditions
2 under Counsel's interpretation of subparagraph (a) that would render meaningless the
3 provisions of subparagraph (e), which first require substantial evidence of a problem before
4 conditions may be imposed that will mitigate that problem. It is well settled that statutes are
5 not to be construed in a manner that renders a portion meaningless.

6 Reading all of Section 23800 together, it is apparent that the Department may apply
7 conditions on a license in only limited situations described in the various subparagraphs.

8 Before subparagraph (e) was added in 1999, it was always understood that the
9 Department had no authority to impose any conditions on a person-to-person transfer.

10 Subparagraph (e) was added in 1999 to correct that situation but only where the City first
11 presented substantial evidence of a problem, and requested conditions tailored to mitigate
12 the problem. These limitations on the Department's authority to impose conditions would be
13 negated by allowing, as Department's counsel request, any conditions to be imposed merely
14 because there is a license "issued" as part of a transfer. Such an interpretation of Section
15 23800(a) violates the rules laid out in *Lungren v. Deukmejian*.

16 Furthermore, subparagraph (e) is itself limited to apply only to transfers under
17 Section 24071.1, 24071.2 and 24072. It was conceded that Petitioner's application here in
18 under Section 24070.1. Accepting Counsel's argument that subparagraph (a) allows the
19 conditions to be imposed here, would nullify the limitations expressly stated in subparagraph
20 (e). Again, such an interpretation is not allowed.

21 Therefore, it should be determined that subparagraph (a) has no application here,
22 and that provision does not authorize the Department to impose the requested Midnight
23 closing and 50-50 Conditions.
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1 LIKewise, SUBPARAGRAPH (f) DOES NOT AUTHORIZE THE DEPARTMENT TO
2 IMPOSE THE CONDITIONS ON THIS PERSON-TO-PERSON TRANSFER.

3 At the hearing, Department's Counsel amended the Statement of Issues to allege
4 that the conditions may be imposed by the Department under Section 23800(f), which reads
5 as follows:

6 "The department may place reasonable conditions upon retail licensees or upon any
7 licensee in the exercise of retail privileges in the following situations:

8 ... (f) At the time of a transfer of a license pursuant to Article 5 (commencing with
9 Section 24070 of Chapter 6."

10 Petitioner's transfer application is a transfer under Article 5, beginning with Section
11 24070. Therefore, the plain words appear to apply to this transfer. However, such a reading
12 is contrary to the legislative intent, other provisions relating to the same subject (i.e. when
13 the Department may impose conditions on a license) and if applied literally would render
14 other provisions such as subparagraph (e) meaningless. Thus, a literal reading does not
15 govern the interpretation of subparagraph (f).

16 Subparagraph (f) was added effective 2009¹ by A. B. 2893. See, Stats. 2008, c. 254
17 (A.B. 2893) § 1. Assembly Bill 2893 added subparagraph (f) to Section 23800 and
18 subparagraph (g) to Section 23801, that now provides

19 "(g) In cases under subdivision (f) of Section 23800, restrictions on the presence of
20 the license transferor on the licensed premises without lawful business if that license
21 transferor has multiple violations of this division when in possession of the license.
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25 ¹ Petitioner's application was filed in January 2008. The law in effect at that time should
26 apply in this matter. The fact that the Department delayed its investigation for more than

1 For purposes of this section, "lawful business" specifically excludes, without
2 limitation, working or volunteering at the premises, consulting with the licensee
3 regarding the operation of the premises, and loitering."

4 The Legislative Counsel's Digest explains the purpose of A.B. 2893 as follows:

5 "This bill would authorize the department to also impose conditions that it determines
6 reasonable on license transfers regarding the presence of the license transferor on
7 the licensed premises without lawful business, as defined, if that license transferor
8 was cited with multiple violations of the Alcoholic Beverage Control Act when in
9 possession of the license."

10 The legislative intent of subparagraph (f) to Section 23800 is narrow; to permit
11 conditions on a transferee's license that prohibit a problematic transferor to be present at the
12 licensed premises. Section 23800 (f) should be interpreted to apply only in such
13 circumstances. This is consistent with all of the other provisions in Section 23800 that define
14 limited circumstances when the Department is authorized to impose conditions on a license.

15 Furthermore, all of the same reasons stated above that preclude interpreting
16 subparagraph (a) to authorize the Department to impose conditions on all person-to-person
17 transfers, apply here and dictate that subparagraph (f) likewise does not apply Petitioner's
18 transfer application.

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25 one year should not mean that this subparagraph (f), first effective nearly a year after the
26 application was filed, is applicable here.

CONCLUSION

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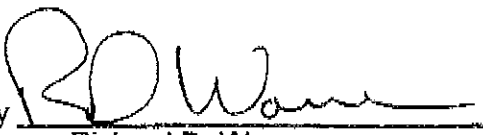
For all of the foregoing reasons, the Department should allow the transfer of the license to Petitioner without imposing the Midnight Closing or 50-50 Conditions.

The Department has failed to provide the requisite substantial evidence of a problem. The Department has failed to provide any substantial evidence that the requested conditions will mitigate the unproven problem.

Finally, none of the statutes at issue—namely, Section 23800 (a), (e) or (f)—may be interpreted to apply here and authorize the Department to impose conditions.

Dated: March 3, 2010

Respectfully submitted,

By 
Richard D. Warren

Attorney for Petitioner
Il Boccaccio Inc.

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**PROOF OF SERVICE BY E-MAIL AND MAIL
(CCP §§ 1013(a), 2015.5)**

I, the undersigned, hereby certify as follows:

I am a citizen of the United States and employed in the County of Alameda, California. I am over the age of eighteen years and I am not a party to the above-captioned action. My business address is 929 Fresno Avenue, Berkeley, CA 94707-2304.

On the date stated below, I served:

PETITIONER'S CLOSING ARGUMENT AND SUPPORTING DECLARATION OF RICHARD D. WARREN WITH ATTACHMENTS

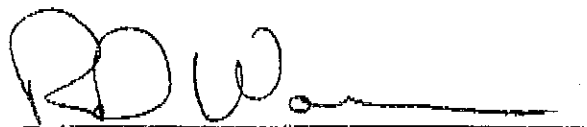
by e-mail to the e-mail addresses shown below and by mail by depositing true copies thereof with the United States Postal Service at Berkeley, California, enclosed in sealed envelopes with first class postage thereon fully prepaid, addressed as follows:

Hon. Jonathon Logan, Administrative Law Judge
C/O: Judy Cain and Ashley Van de Pol
Administrative Hearing Office
Department of Alcoholic Beverage Control
2277 Fair Oaks Blvd. Ste 415
Sacramento, CA 95825
E-mail: Judy.Cain@abc.ca.gov
and ashley.vandepol@abc.ca.gov

David Sakamoto, Staff Counsel
Department of Alcoholic Beverage Control
12750 Center Court Drive S, Ste 700
Cerritos, CA 90703
E-mail: David.Sakamoto@abc.ca.gov

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: March 3, 2010



Richard D. Warren