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EXPO7

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO POACHING
PROVISIONS

NO. **18-2-17225-0 SEA**

ARBY'S FRANCHISOR, LLC
ASSURANCE OF
DISCONTINUANCE

The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General (the "Attorney General"), and Eric S. Newman, Assistant Attorney General, files this Assurance of Discontinuance ("AOD") pursuant to RCW 19.86.100.

I. PARTIES

1.1 In January 2018, the Attorney General initiated an investigation into Arby's Franchisor, LLC ("Arby's") relating to certain provisions in its franchise agreement.

1.2 Arby's is a Delaware limited liability corporation with its principal offices or place of business in Atlanta, Georgia. Arby's is a franchisor, and its corporate and franchisee operated locations are in the business of offering roast beef sandwiches, among other food products, for sale to consumers.

1.3 For purposes of this AOD, Arby's shall include its directors, officers, managers, agents acting within the scope of their agency, and employees as well as its successors and assigns, controlled subsidiaries, and predecessor franchisor entities.

1 **II. INVESTIGATION**

2 2.1 There are 57 Arby's stores located in the State of Washington as of the date
3 hereof. All of these stores are independently owned and operated by franchisees.

4 2.2 Since 2013, the franchise agreements entered into between Arby's and its
5 franchisees have provided that franchisees subject to such agreements may not solicit
6 employees of Arby's or of other Arby's franchisees to terminate or reduce their employment
7 with Arby's or the other franchisees (the "No-Solicitation Provision").

8 2.3 The Attorney General asserts that the foregoing conduct of Arby's and its
9 franchisees constitutes a contract, combination, or conspiracy in restraint of trade in violation
10 of the Consumer Protection Act, RCW 19.86.030.

11 2.4 Arby's and its current and former franchisees expressly deny that the conduct
12 described above constitutes a contract, combination, or conspiracy in restraint of trade in
13 violation of the Consumer Protection Act, RCW 19.86.030, or any other law or regulation, and
14 expressly deny they have engaged in conduct that constitutes a contract, combination, or
15 conspiracy in restraint of trade, or violates any other law or regulation. Arby's enters into this
16 AOD to avoid protracted and expensive litigation. Pursuant to RCW 19.86.100, neither this
17 AOD nor its terms shall be construed as an admission of law, fact, liability, misconduct, or
18 wrongdoing on the part of Arby's or any of its current or former franchisees.

19 **III. ASSURANCE OF DISCONTINUANCE**

20 3.1 Subject to Paragraph 2.4 above, Arby's agrees:

21 3.1.1. It will no longer include the No-Solicitation Provision in any of its
22 franchise agreements in the United States signed after the date hereof.

23 3.1.2. It will not enforce the No-Solicitation Provision in any of its existing
24 franchise agreements in the United States, and will not seek to intervene in any action brought
25 by the Attorney General's Office against a current franchisee in Washington to defend an
26

1 existing No-Solicitation Provision, provided such action is brought in accordance with, and
2 consistent with, the provisions of this AOD.

3 3.1.3. It will notify all of its current franchisees in the United States of the
4 entry of this AOD and make a copy available to them.

5 3.1.4. If, after the 21 day period set forth in Paragraph 3.2 below, Arby's
6 becomes aware of a franchisee with a store located in the State of Washington attempting to
7 enforce the No-Solicitation Provision, and Arby's is unable to persuade such franchisee to
8 desist from enforcing or attempting to enforce such provision, Arby's will notify the Attorney
9 General.

10 3.2 Within 21 days of entry of this AOD, Arby's will send a letter to all of its
11 current franchisees with stores located in the State of Washington, stating that the Attorney
12 General has requested that the existing No-Solicitation Provision be removed from existing
13 franchise agreements. The letter that Arby's will send to its current franchisees in the State of
14 Washington will be substantially in the form of the letter attached hereto as Exhibit A. That
15 letter will enclose the proposed amendment that Arby's is requesting that each of its
16 franchisees in the State of Washington agree to, which amendment will remove the No-
17 Solicitation Provision. The proposed amendment that will be included with each letter will be
18 substantially in the form of the amendment attached hereto as Exhibit B.

19 3.3 In addition to sending the letter to its current franchisees in the State of
20 Washington pursuant to Paragraph 3.2 above, Arby's will respond promptly to any inquiries
21 from such franchisees regarding the request to amend the terms of the franchise agreement and
22 will encourage its current franchisees in the State of Washington to sign the proposed
23 amendment. However, for the avoidance of doubt, Arby's is under no obligation to offer its
24 franchisees any consideration—monetary or otherwise—in order to induce them to sign the
25 proposed amendment, or take any adverse action against such franchisees if they refuse to do
26 so. Within 120 days of entry of this AOD, Arby's will provide copies of all executed

1 amendments it has obtained with its current franchisees in the State of Washington to the
2 Attorney General's Office. A decision by a franchisee not to amend its franchise agreement, or
3 not to do so within 120 days of this AOD, shall not mean that Arby's has not complied with its
4 obligations under this AOD.

5 3.4 If Arby's learns that a current franchisee in the State of Washington intends in
6 good faith to sign the proposed amendment but is unable to do so within the time period
7 specified in Paragraph 3.3, Arby's will notify the Attorney General's Office to seek a mutually
8 agreeable extension. During any such extension, the Attorney General's Office will not take
9 further investigative or enforcement action against a franchisee.

10 3.5 As they come up for renewal during the ordinary course of business, Arby's will
11 remove the No-Solicitation Provision from all of its existing franchise agreements in the
12 United States with its franchisees on a nationwide basis, unless expressly prohibited by law. In
13 addition, Arby's will not include the No-Solicitation Provision in any franchise agreement it
14 signs in the United States after the date of this AOD.

15 3.6 Within 30 days of the conclusion of the time periods referenced in paragraph
16 3.3, Arby's will submit a declaration to the Attorney General's Office signed under penalty of
17 perjury stating whether all provisions of this agreement have been satisfied.

18 IV. ADDITIONAL PROVISIONS

19 4.1 This AOD is binding on, and applies to Arby's, including each of its respective
20 directors, officers, managers, agents acting within the scope of their agency, and employees, as
21 well as their respective successors and assigns, controlled subsidiaries, predecessor franchisor
22 entities, or other entities through which Arby's may now or hereafter act with respect to the
23 conduct alleged in this AOD.
24

25 4.2 This is a voluntary agreement and it shall not be construed as an admission of
26 law, fact, liability, misconduct, or wrongdoing on the part of Arby's or any of its current or

1 former franchisees. Arby's and its current and former franchisees neither agree nor concede
2 that the claims, allegations and/or causes of action which have or could have been asserted by
3 the Attorney General have merit and Arby's and its current and former franchisees expressly
4 deny any such claims, allegations, and/or causes of action. However, proof of failure to comply
5 with this AOD shall be *prima facie* evidence of a violation of RCW 19.86.020, thereby placing
6 upon the violator the burden of defending against imposition by the Court of injunctions,
7 restitution, costs and reasonable attorney's fees, and civil penalties of up to \$2,000.00 per
8 violation.

9 4.3 Arby's will not, nor will it authorize any of its officers, employees,
10 representatives, or agents to, state or otherwise contend that the State of Washington or the
11 Attorney General has approved of, or has otherwise sanctioned, the conduct described in
12 Paragraph 2.2 with respect to the No-Solicitation Provision in Arby's franchise agreement.

13 4.4 This AOD shall have a term of twenty-five (25) years.

14 4.5 This AOD resolves all issues raised by the State of Washington and the Antitrust
15 Division of the Attorney General's Office under the Consumer Protection Act and any other
16 related statutes pertaining to the acts of Arby's and its current and former franchisees as set forth
17 in Paragraph 2.1 – 2.3 above that may have occurred before the date of entry of this AOD, or that
18 occur between the date of the entry of this AOD and the conclusion of the 120 day period
19 identified in Paragraph 3.3 above, and concludes the investigation thereof. Subject to Paragraph
20 4.2, the State of Washington and the Antitrust Division of the Attorney General's Office shall not
21 file suit or take any further investigative or enforcement action with respect to the acts set forth
22 above that occurred before the date of entry of this AOD, or that occurs between the date of the
23 entry of this AOD and the conclusion of the 120 day period identified in Paragraph 3.3 above,
24 against Arby's or any of its current franchisees in the State of Washington that sign the proposed
25 amendment described in Section III, any of its former franchisees in the State of Washington, or
26 any of its current or former franchisees located outside the State of Washington. The Attorney

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General reserves the right to take further investigative or enforcement action against any current franchisee in the State of Washington identified pursuant to Paragraph 3.1.4 or any current franchisee in the State of Washington that does not sign the proposed amendment described in Section III.

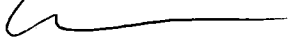
APPROVED ON this 12th day of July, 2018.



JUDGE/COURT COMMISSIONER

1 Presented by:

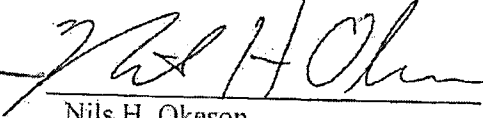
2 ROBERT W. FERGUSON
3 Attorney General



4
5 ERIC S. NEWMAN, WSBA #31521
6 Assistant Attorney General
7 Chief Litigation Counsel
8 Antitrust Division
9 Attorneys for State of Washington
10 Office of the Attorney General
11 800 Fifth Avenue, Suite 2000
12 Seattle, WA 98104

10 Agreed to and approved for entry by:
11 ARBY'S FRANCHISOR, LLC

12
13 Angelo J. Calfo, WSBA #27079
14 Damon C. Elder, WSBA #46754
15 CALFO EAKES & OSTROVSKY, PLLC
16 1301 Second Avenue, Suite 2800
17 Seattle, WA 98101



Nils H. Okeson
Chief Administrative Officer,
General Counsel & Secretary

Arby's Franchisor, LLC

16 —and—

17 Robert A. Atkins
18 Adam J. Bernstein
19 PAUL, WEISS, RIFKIND, WHARTON
20 & GARRISON, LLP
21 1285 Avenue of the Americas
22 New York, NY 10019

21 —and—

22 Kenneth A. Gallo
23 PAUL, WEISS, RIFKIND, WHARTON
24 & GARRISON, LLP
25 2001 K Street, NW
26 Washington, DC 20006

Attorneys for Arby's Franchisor, LLC

EXHIBIT A

Form Letter to Arby's Franchisees in the State of Washington

Dear [Franchisee Name]

In February 2018, Arby's received a Civil Investigative Demand from the Attorney General's Office of the State of Washington seeking information regarding whether there are any provisions in our franchise agreements that restrict the hiring or solicitation of employees (sometimes referred to as "no poaching" clauses). We understand that this is part of a broader investigation into the use of such clauses in the restaurant industry and perhaps other franchised industries. We have cooperated fully with the investigation.

Without admitting that Arby's or its franchisees violated any law or regulation, or acted improperly in any respect, we have reached an agreement with the Attorney General's Office. This agreement provides that Arby's will, among other things, no longer include in any U.S. franchise agreement or renewal signed after the date of our agreement with the Attorney General's Office any provisions that restrict the hiring or solicitation of employees. The agreement also provides that Arby's will not enforce any such provisions in any of our existing franchise agreements in the U.S.

We believe the system's interests are best served by resolving the investigation quickly and cooperatively on these terms, and avoiding the uncertainty and cost of protracted litigation.

Our agreement with the Attorney General's Office also includes a requirement that we request, from franchisees with locations in the State of Washington, that they agree to amend their existing franchise agreements to remove the provisions, if any, that restrict the hiring or solicitation of employees. Enclosed for your signature is an amendment to your franchise agreement(s) with Arby's to satisfy that requirement. To the extent that you agree to this amendment to your franchise agreement, the Attorney General has committed to not pursue any suit, or take any investigative or enforcement action against you, for conduct relating to the relevant provisions of your franchise agreement, up to and including the date you sign the amendment. Please sign and return the amendment to me as soon as possible. If you decide not to sign the enclosed amendment, the Attorney General's Office has indicated that it will reserve the right to investigate you and/or pursue enforcement actions against you relating to the contractual provisions described above.

Should you have any questions regarding this matter, please contact me at NOkeson@InspireBrands.com.

If you receive any media inquiries regarding this matter, please refer them to Press@InspireBrands.com.

Sincerely,

Nils H. Okeson
General Counsel
Arby's Restaurant Group, Inc.

EXHIBIT B

**AMENDMENT
TO
ARBY'S FRANCHISOR, LLC LICENSE AGREEMENT**

The Arby's Franchisor, LLC ("Arby's") License Agreement(s) between Arby's ("We") and the undersigned franchisee ("You") listed in Exhibit A hereto (as amended, the "License Agreement(s)") shall be amended in accordance with the following terms.

1. Background. We and you are parties to each Franchise Agreement and you operate one or more franchised outlets in the State of Washington under the Franchise Agreement(s). We have determined that it is in the best interests of the franchise system to not enforce the portions of Section 13.1 described below and in Appendix A attached hereto. The purpose of this Amendment to your Franchise Agreement(s) is to document this change. All initial capitalized terms used but not defined in this Amendment shall have the meanings set forth in the Franchise Agreement(s).

2. Modification of Terms. As of the Effective Date (defined below) of this Amendment, you and we agree that Sub-section (ii) of Section 13.1 and the sentence immediately thereafter are hereby deleted from each Franchise Agreement, as shown in Appendix A attached hereto, and is of no further force or effect.

3. Miscellaneous. Except as specifically modified by this Amendment, the provisions of the Franchise Agreement(s) shall remain in full force and effect. This document is an amendment to, and forms a part of, each Franchise Agreement. If there is an inconsistency between this Amendment and any Franchise Agreement, the terms of this Amendment shall control. This Amendment constitutes the entire agreement between the parties hereto, and there are no other oral or written representations, understandings or agreements between them, relating to the subject matter of this Amendment. This Amendment inures to the benefit of the parties hereto and their respective successors and assigns and will be binding upon the parties hereto and each of their respective successors and assigns. This Amendment may be executed in multiple counterparts, but all such counterparts together shall be considered one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement effective as of _____, 2018 (the "Effective Date").

ARBY'S FRANCHISOR, LLC

[FRANCHISEE'S NAME]

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

Appendix A

Modifications:

Section 13:1 Covenant Not to Compete: Licensee covenants that, during the term of this License Agreement, and also for a period of twelve (12) months after termination of this License Agreement for any reason, and in addition to and not as a limitation of any other restriction upon Licensee contained herein, neither Licensee, nor any Guarantor, nor any general partner of Licensee if Licensee is a partnership, nor any shareholder, limited partner, member or other equity owner holding at least a fifteen percent (15.0%) interest in Licensee, shall, without prior written permission of Arby's, either directly or indirectly, for himself or on behalf of or in conjunction with any other person or entity:—~~(i) engage or be engaged in any capacity in, operate, manage or have a fifteen percent (15.0%) or greater interest in any business offering roast beef sandwiches for sale to consumers and located within the Protected Area for Licensee's Restaurant as specified in Exhibit B.; or (ii) solicit or attempt to solicit any officer, employee or independent contractor of Arby's or its affiliates or of any Arby's licensee in the Arby's System to terminate or reduce his or her employment or business relationship with Arby's or its affiliates or with such Arby's licensee and shall not assist any other person or entity in such a solicitation. In addition, Arby's covenants that, during the term of this License Agreement, neither Arby's nor any affiliates controlled by Arby's will solicit or attempt to solicit any officer, employee or independent contractor of Licensee or its affiliates to terminate or reduce his or her employment or business relationship with Licensee or its affiliates and shall not assist any other person or entity in such a solicitation.~~

Provision as Amended:

Section 13:1 Covenant Not to Compete: Licensee covenants that, during the term of this License Agreement, and also for a period of twelve (12) months after termination of this License Agreement for any reason, and in addition to and not as a limitation of any other restriction upon Licensee contained herein, neither Licensee, nor any Guarantor, nor any general partner of Licensee if Licensee is a partnership, nor any shareholder, limited partner, member or other equity owner holding at least a fifteen percent (15.0%) interest in Licensee, shall, without prior written permission of Arby's, either directly or indirectly, for himself or on behalf of or in conjunction with any other person or entity—engage or be engaged in any capacity in, operate, manage or have a fifteen percent (15.0%) or greater interest in any business offering roast beef sandwiches for sale to consumers and located within the Protected Area for Licensee's Restaurant as specified in Exhibit B.