

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

**STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT**

IN RE: FRANCHISE NO POACHING
PROVISIONS

(TCBY SYSTEMS, LLC)

NO. 19-2-24797-5

TCBY SYSTEMS, LLC
ASSURANCE OF
DISCONTINUANCE

The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General, and Rahul Rao, Assistant Attorney General, files this Assurance of Discontinuance (AOD) under RCW 19.86.100.

I. PARTIES

1.1. In July 2019, the Attorney General initiated an investigation into TCBY Systems, LLC (TCBY) relating to its hiring practices.

1.2. TCBY is a Delaware limited liability company with its principal office or place of business at 8001 Arista Place, Suite 600, Broomfield, Colorado 80021. TCBY is in the business of granting franchises and supporting franchisees that operate TCBY®-branded retail outlets that sell TCBY-branded frozen yogurt and related products.

1.3. For the purposes of this AOD, TCBY includes its directors, officers, managers, agents acting within the scope of their agency, and employees as well as its successor and assigns, controlled subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures.

1 **II. INVESTIGATION**

2 2.1. TCBY has three (3) stores in Washington, all of which are owned and
3 operated by third-party, unaffiliated franchisees.

4 2.2. For years, TCBY has included language in its franchise agreements that
5 restricted a franchisee’s ability to solicit or hire workers from TCBY and other franchisees
6 without the prior consent of the workers’ employer (no-poaching provision). Specifically,
7 the standard TCBY franchise agreement stated that a franchisee will not “recruit or hire any
8 employee who, within the immediately preceding six (6) month period, was employed by us
9 or any Stores operated by us, our Affiliates or another franchisee or licensee of us, without
10 obtaining the prior written permission of us or the franchisee or licensee.” A no-poaching
11 provision restricted franchisees from hiring both employees from a competing franchisee and
12 from TCBY’s corporate-owned stores without the prior written consent of the employee’s
13 employer.

14 2.3. The Attorney General asserts that the foregoing conduct constitutes a
15 contract, combination, or conspiracy in restraint of trade in violation of the Consumer
16 Protection Act, RCW 19.86.030.

17 2.4. TCBY expressly denies the conduct described above constitutes a contract,
18 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,
19 RCW 19.86.030, or any other law, and expressly denies it has engaged in conduct that
20 constitutes a contract, combination, or conspiracy in restraint of trade. TCBY enters into this
21 AOD to avoid protracted and expensive litigation. Pursuant to RCW 19.86.100, neither this
22 AOD nor its terms shall be construed as an admission of law, fact, liability, misconduct, or
23 wrongdoing on the part of TCBY.

24 **III. ASSURANCE OF DISCONTINUANCE**

25 3.1. Subject to paragraph 2.4 above, TCBY agrees:
26

1 3.1.1 It will no longer include no-poach provisions in any of its future
2 franchise agreements;

3 3.1.2 It will no longer enforce no-poaching provisions in any of its existing
4 franchise agreements, and will not seek to intervene or defend in any way the legality of any
5 no-poach provision in any litigation in which a franchisee may claim third-party beneficiary
6 status rights to enforce an existing no-poach provision;

7 3.1.3 It will notify all of its franchisees of the entry of this agreement with
8 the State, and provide them a copy of the AOD upon request;

9 3.1.4 It will notify the Attorney General's Office if it learns of any effort by
10 a franchisee in Washington to enforce any existing no-poach provision.

11 3.2. Within 60 days of entry of this AOD, TCBY will exercise all reasonable
12 commercial efforts to amend all existing franchise agreements with entities in Washington
13 to remove any no-poaching provisions in its existing franchise agreements. TCBY is under
14 no obligation to offer any franchisee any monetary or non-monetary consideration to induce
15 them to accept the proposed amendment of the franchise, and it shall be under no obligation
16 to take any coercive action against a franchisee that may refuse or decline to agree to any
17 amendment of its franchise agreement. If any franchise owner is unwilling to consent to the
18 change to its franchise agreement, prior to the 60-day deadline, TCBY shall provide the name
19 and address of the resisting franchisee and the name and address of the franchisee's registered
20 agent to the Office of the Attorney General.

21 3.3. As they come up for either renewal or renegotiation during the ordinary
22 course of business, TCBY will amend all of its existing franchise agreements on a nationwide
23 basis to remove any no-poach provision.

24 3.4. Within 30 days of the conclusion of the time periods referenced in this section
25 III, TCBY will submit a declaration to the Attorney General's Office signed under penalty
26 of perjury stating that all provisions of this agreement have been satisfied.

1 **IV. ADDITIONAL PROVISIONS**

2 4.1. This AOD is binding on, and applies to TCBY, including each of its
3 respective directors, officers, managers, agents acting within the scope of their agency, and
4 employees, as well as their respective successors and assigns, controlled subsidiaries,
5 divisions, groups, affiliates, partnerships, and joint ventures, or other entities through which
6 TCBY may now or hereafter act with respect to the conduct alleged in this AOD.

7 4.2. This is a voluntary agreement and it shall not be construed as an admission of
8 law, fact, liability, misconduct, or wrongdoing on the part of TCBY. By entering into this
9 AOD, TCBY neither agrees nor concedes that the claims, allegations and/or causes of action
10 which have or could have been asserted by the Attorney General have merit and TCBY
11 expressly denies any such claims, allegations, and/or causes of action. However, proof of
12 failure to comply with this AOD shall be *prima facie* evidence of a violation of RCW
13 19.86.030, thereby placing upon the violator the burden of defending against imposition by
14 the Court of injunctions, restitution, costs and reasonable attorney’s fees, and appropriate
15 civil penalties under the Consumer Protection Act.

16 4.3. TCBY will not, nor will it authorize any of its officers, employees,
17 representatives, or agents to state or otherwise contend that the State of Washington or the
18 Attorney General has approved of, or has otherwise sanctioned, the conduct described in
19 Paragraph 2.2 with respect to the No-Poach Provision in TCBY’s franchise agreement.

20 4.4. This AOD resolves all issues raised by the State of Washington and the
21 Antitrust Division of the Attorney General’s Office under the Consumer Protection Act and
22 any other related statutes pertaining to the acts set forth in paragraph 2.1 – 2.3 above that
23 may have occurred before the date of entry of this AOD and concludes the investigation
24 thereof. Subject to paragraph 4.2, the State of Washington and the Antitrust Division of the
25 Attorney General’s Office shall not file suit or take any further investigative or enforcement
26

1 action with respect to the acts set forth above that occurred before the date of entry of this
2 AOD.

3 APPROVED ON this _____ day of _____, 2019.

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

JUDGE/COURT COMMISSIONER

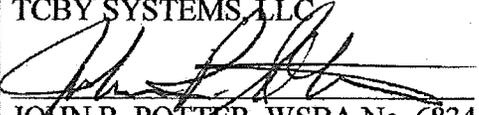
1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

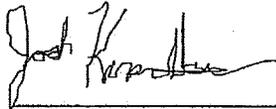
4 
RAHUL RAO, WSBA No. 53375
5 Assistant Attorney General
6 Antitrust Division
7 Office of the Attorney General
8 800 Fifth Avenue, Suite 2000
9 Seattle, WA 98104
10 (206) 442-4499
11 rahul.rao@atg.wa.gov

12 *Attorneys for State of Washington*

13 Agreed to and approved for entry by:
14 TCBY SYSTEMS, LLC

15 
16 JOHN R. POTTER, WSBA No. 6834
17 Weurlin, Potter, Jahn, Leatham, Holtman &
18 Stoker, P.S.
19 211 E. McLoughlin Boulevard, Suite 100
20 Vancouver, WA 98663
21 (360) 750-7547
22 jrp@hpl-law.com

23 *Attorneys for TCBY Systems LLC*

24 

25 JOSH KIRSCHBAUM
26 Interim Acting Chief Executive Officer
TCBY Systems LLC