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7 **STATE OF WASHINGTON**  
8 **KING COUNTY SUPERIOR COURT**

9 IN RE: FRANCHISE NO POACHING  
10 PROVISIONS

11 (AIRE SERV LLC)

NO. 19-2-26203-6

AIRE SERV LLC ASSURANCE OF  
DISCONTINUANCE

12 The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney  
13 General, and Justin Wade, Assistant Attorney General, files this Assurance of Discontinuance  
14 (AOD) under RCW 19.86.100.

15 **I. PARTIES**

16 1.1. In August 2019, the Attorney General initiated an investigation into Aire Serv  
17 LLC ("Aire Serv") relating to the hiring practices of Aire Serv's franchisees.

18 1.2. Aire Serv is a Texas limited liability company with its principal office or place  
19 of business in Waco, Texas. Aire Serv is in the business of licensing independent franchisees to  
20 operate a business identified by the AIRE SERV® trademarks that installs, maintains, and  
21 repairs residential and commercial heating, ventilating, air conditioning and indoor air quality  
22 equipment, performs related services and sells related products within a defined territory.

23 1.3. For the purposes of this AOD, "The Aire Serv Parties" means Aire Serv, its  
24 directors, officers, managers, agents, and employees (all of the foregoing, as acting within the  
25 scope of their duties to Aire Serv) as well as its successor and assigns, and controlled  
26 subsidiaries.

## II. INVESTIGATION

2.1. Aire Serv has granted one franchisee the right and license to operate an AIRE SERV® franchised business in two territories in Washington, which that franchisee independently owns and operates. Aire Serv does not own or operate any locations in Washington.

2.2. During a portion of the period of the State of Washington's investigation, Aire Serv included language in its franchise agreements in Washington that restricted a franchisee's ability to solicit or hire workers from another franchisee for a limited time-period. ("No-Poaching Provision"). Specifically, from April 1, 2016, until April 1, 2018, the standard Aire Serv franchise agreement registered in Washington contained a provision stating that, "you agree that during the term of this Agreement and for one year thereafter, you will not, without our prior written consent, directly or indirectly, for yourself or on behalf of any other person . . . employ or seek to employ any person who is at that time employed by us, our affiliate or another AIRE SERV franchisee or otherwise directly or indirectly induce or seek to induce the person to leave his or her employment." In addition, from the beginning of the relevant time period until April 1, 2016, the standard Aire Serv franchise agreement in Washington contained a provision stating that the franchisee shall not, directly or indirectly, during the term of the franchise agreement and for a period of two (2) years immediately following the later of expiration, termination, or non-renewal of the franchise agreement "employ, seek to employ or otherwise induce any person to leave his employment who is then employed by any other franchisee or by Franchisor, unless, in the case of any employee of Franchisor, Franchisee has obtained Franchisor's prior written consent and paid the then current Franchisor Employee Training Fee set forth in Exhibit 'IB' hereto, which Franchisee acknowledges and agrees is reasonable and necessary to compensate Franchisor for a portion of the costs of training such employee." Aire Serv entered its two currently effective franchise agreements in Washington in 2012 with this latter provision. In

1 summary, the No-Poaching Provisions restricted franchisees from hiring employees of Aire  
2 Serv, an affiliate of Aire Serv, or another franchisee.

3 2.3. Prior to the initiation of the State of Washington's investigation in 2019, in Aire  
4 Serv's April 2018 renewal of its franchise disclosure documents ("FDD"), Aire Serv removed  
5 the No-Poaching Provision from its U.S. form franchise agreement. Aire Serv's form franchise  
6 agreement registered in Washington has not included the No-Poaching Provision since  
7 April 1, 2018.

8 2.4. The Attorney General asserts that the No-Poaching Provision in franchise  
9 agreements that Aire Serv entered with Washington franchisees, prior to the issuance of the April  
10 2018 renewal FDD, constitutes a contract, combination, or conspiracy in restraint of trade in  
11 violation of the Consumer Protection Act, RCW 19.86.030.

12 2.5. The Aire Serv Parties expressly deny that the conduct described above constitutes  
13 a contract, combination, or conspiracy in restraint of trade in violation of the Consumer  
14 Protection Act, RCW 19.86.030, or any other law, and expressly denies it has engaged in conduct  
15 that constitutes a contract, combination, or conspiracy in restraint of trade. Aire Serv viewed the  
16 No-Poaching Provision in Aire Serv's form franchise agreement as a way to reduce potential  
17 conflicts among its franchisees that could disrupt the franchise system and the franchisor-  
18 franchisee relationship that Aire Serv has with each of its franchisees. However, the No-  
19 Poaching Provision has not been the subject of any dispute in any legal proceeding in  
20 Washington. Aire Serv has never attempted to enforce a No-Poaching Provision with any of its  
21 franchisees and is not aware of any of its franchisees in Washington enforcing or attempting to  
22 enforce any No-Poaching Provision in their franchise agreements. Aire Serv nevertheless enters  
23 into this AOD to avoid protracted and expensive litigation. Pursuant to RCW 19.86.100, neither  
24 this AOD nor its terms shall be construed as an admission of law, fact, liability, misconduct, or  
25 wrongdoing on the part of The Aire Serv Parties.  
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### III. ASSURANCE OF DISCONTINUANCE

3.1. Subject to paragraph 2.5 above, The Aire Serv Parties agree:

3.1.1 Aire Serv will no longer include no-poaching provisions in any of its future U.S. franchise agreements.

3.1.2 Aire Serv will continue not enforcing no-poaching provisions in any of its existing franchise agreements, and will not seek to intervene or defend in any way the legality of any no-poaching provision in any litigation in which a franchisee may claim third-party beneficiary status rights to enforce an existing no-poaching provision;

3.1.3 Aire Serv will make all of its U.S. franchisees aware of the entry of this agreement with the State, and provide them a copy of the AOD upon request;

3.1.4 Aire Serv will notify the Attorney General's Office if it learns of any effort by a franchisee in Washington to enforce any existing no-poaching provision.

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

3.3. Aire Serv has modified its form franchise agreement it uses on a nationwide basis to remove any no-poaching provision. Any existing franchisee that renews a franchise agreement will be party to a new or amended franchise agreement that will not include a no-poaching provision.

3.4. Within 30 days of the conclusion of the time period referenced in Section 3.2, Aire Serv will submit a declaration to the Attorney General's Office signed under penalty of perjury stating that Section 3.1.3 and 3.2 of this agreement have been satisfied.

#### IV. ADDITIONAL PROVISIONS

4.1. This AOD is binding on, and applies to Aire Serv, including each of its respective directors, officers, managers, agents, and employees (all of the foregoing, acting within the scope of their duties to Aire Serv), as well as their respective successors and assigns, and controlled subsidiaries through which Aire Serv may now or hereafter act with respect to the conduct alleged in this AOD.

4.2. This is a voluntary agreement and it shall not be construed as an admission of law, fact, liability, misconduct, or wrongdoing on the part of The Aire Serv Parties, and it is not an order, injunction, or decree. By entering into this AOD, The Aire Serv Parties neither agree nor concede that the claims, allegations and/or causes of action which have or could have been asserted by the Attorney General have merit and The Aire Serv Parties expressly deny any such claims, allegations, and/or causes of action. However, proof of failure to comply with this AOD shall be *prima facie* evidence of a violation of RCW 19.86.030, thereby placing upon the violator the burden of defending against imposition by the Court of injunctions, restitution, costs and reasonable attorney's fees, and appropriate civil penalties under the Consumer Protection Act.

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

4.4. This AOD resolves all issues raised by the State of Washington and the Antitrust Division of the Attorney General's Office under the Consumer Protection Act and any other related statutes pertaining to the acts set forth in paragraph 2.1 – 2.4 above that may have

1 occurred before the date of entry of this AOD and concludes the investigation thereof. Subject  
2 to paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's  
3 Office shall not file suit or take any further investigative or enforcement action with respect to  
4 the acts set forth above that occurred before the date of entry of this AOD.

5 APPROVED ON this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

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JUDGE/COURT COMMISSIONER

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