

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

NO.

BUFFALO WILD WINGS
INTERNATIONAL, INC.
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 Buffalo Wild Wings International, Inc. (“Buffalo Wild Wings”) relating to certain provisions in its franchise agreement.

1.2 Buffalo Wild Wings is a Minnesota corporation with its principal offices or place of business in Atlanta, Georgia. Buffalo Wild Wings is a franchisor, and its corporate and franchisee operated locations are in the business of offering chicken wings and sandwiches, among other food products, for sale to consumers.

1.3 For purposes of this AOD, Buffalo Wild Wings 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 13 Buffalo Wild Wings stores located in the State of Washington as
3 of the date hereof. Three of these stores are independently owned and operated by franchisees.

4 2.2 For a number of years, the franchise agreements entered into between Buffalo
5 Wild Wings and its franchisees have provided that franchisees subject to such agreements may
6 not solicit for employment the managerial-level employees of Buffalo Wild Wings or of other
7 Buffalo Wild Wings franchisees (the “No-Solicitation Provision”) or hire the managerial-level
8 employees of Buffalo Wild Wings or of other Buffalo Wild Wings franchisees (the “No-Hire
9 Provision”).

10 2.3 The Attorney General asserts that the foregoing conduct of Buffalo Wild Wings
11 and its franchisees constitutes a contract, combination, or conspiracy in restraint of trade in
12 violation of the Consumer Protection Act, RCW 19.86.030.

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

22 **III. ASSURANCE OF DISCONTINUANCE**

23 3.1 Subject to Paragraph 2.4 above, Buffalo Wild Wings agrees:

24 3.1.1. It will no longer include the No-Solicitation Provision or the No-Hire
25 Provision in any of its franchise agreements in the United States signed after the date hereof.

1 3.1.2. It will not enforce the No-Solicitation Provision or the No-Hire
2 Provision in any of its existing franchise agreements in the United States, and will not seek to
3 intervene in any action brought by the Attorney General's Office against a current franchisee in
4 Washington to defend an existing No-Solicitation Provision or No-Hire Provision, provided
5 such action is brought in accordance with, and consistent with, the provisions of this AOD.

6 3.1.3. It will notify all of its current franchisees in the United States of the
7 entry of this AOD and make a copy available to them.

8 3.1.4. If, after the 21 day period set forth in Paragraph 3.2 below, Buffalo Wild
9 Wings becomes aware of a franchisee with a store located in the State of Washington
10 attempting to enforce the No-Solicitation Provision or the No-Hire Provision, and Buffalo
11 Wild Wings is unable to persuade such franchisee to desist from enforcing or attempting to
12 enforce such provision, Buffalo Wild Wings will notify the Attorney General.

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

23 3.3 In addition to sending the letter to its current franchisees in the State of
24 Washington pursuant to Paragraph 3.2 above, Buffalo Wild Wings will respond promptly to
25 any inquiries from such franchisees regarding the request to amend the terms of the franchise
26 agreement and will encourage its current franchisees in the State of Washington to sign the

1 proposed amendment. However, for the avoidance of doubt, Buffalo Wild Wings is under no
2 obligation to offer its franchisees any consideration—monetary or otherwise—in order to
3 induce them to sign the proposed amendment, or take any adverse action against such
4 franchisees if they refuse to do so. Within 120 days of entry of this AOD, Buffalo Wild Wings
5 will provide copies of all executed amendments it has obtained with its current franchisees in
6 the State of Washington to the Attorney General’s Office. A decision by a franchisee not to
7 amend its franchise agreement, or not to do so within 120 days of this AOD, shall not mean
8 that Buffalo Wild Wings has not complied with its obligations under this AOD.

9 3.4 If Buffalo Wild Wings learns that a current franchisee in the State of
10 Washington intends in good faith to sign the proposed amendment but is unable to do so within
11 the time period specified in Paragraph 3.3, Buffalo Wild Wings will notify the Attorney
12 General’s Office to seek a mutually agreeable extension. During any such extension, the
13 Attorney General’s Office will not take further investigative or enforcement action against a
14 franchisee.

15 3.5 As they come up for renewal during the ordinary course of business, Buffalo
16 Wild Wings will remove the No-Solicitation Provision and the No-Hire Provision from all of
17 its existing franchise agreements in the United States with its franchisees on a nationwide
18 basis, unless expressly prohibited by law. In addition, Buffalo Wild Wings will not include the
19 No-Solicitation Provision or the No-Hire Provision in any franchise agreement it signs in the
20 United States after the date of this AOD.

21 3.6 Within 30 days of the conclusion of the time periods referenced in paragraph
22 3.3, Buffalo Wild Wings will submit a declaration to the Attorney General’s Office signed
23 under penalty of perjury stating whether all provisions of this agreement have been satisfied.

24 **IV. ADDITIONAL PROVISIONS**

25 4.1 This AOD is binding on, and applies to Buffalo Wild Wings, including each of
26 its respective directors, officers, managers, agents acting within the scope of their agency, and

1 employees, as well as their respective successors and assigns, controlled subsidiaries,
2 predecessor franchisor entities, or other entities through which Buffalo Wild Wings may now
3 or hereafter act with respect to the conduct alleged in this AOD.

4 4.2 This is a voluntary agreement and it shall not be construed as an admission of
5 law, fact, liability, misconduct, or wrongdoing on the part of Buffalo Wild Wings or any of its
6 current or former franchisees. Buffalo Wild Wings and its current and former franchisees
7 neither agree nor concede that the claims, allegations and/or causes of action which have or
8 could have been asserted by the Attorney General have merit and Buffalo Wild Wings and its
9 current and former franchisees expressly deny any such claims, allegations, and/or causes of
10 action. However, proof of failure to comply with this AOD shall be *prima facie* evidence of a
11 violation of RCW 19.86.020, thereby placing upon the violator the burden of defending against
12 imposition by the Court of injunctions, restitution, costs and reasonable attorney's fees, and
13 civil penalties of up to \$2,000.00 per violation.
14

15 4.3 Buffalo Wild Wings will not, nor will it authorize any of its officers, employees,
16 representatives, or agents to, state or otherwise contend that the State of Washington or the
17 Attorney General has approved of, or has otherwise sanctioned, the conduct described in
18 Paragraph 2.2 with respect to the No-Solicitation Provision and the No-Hire Provision in
19 Buffalo Wild Wings' franchise agreement.
20

21 4.4 This AOD shall have a term of twenty-five (25) years.
22

23 4.5 This AOD resolves all issues raised by the State of Washington and the Antitrust
24 Division of the Attorney General's Office under the Consumer Protection Act and any other
25 related statutes pertaining to the acts of Buffalo Wild Wings and its current and former franchisees
26 as set forth in Paragraph 2.1 – 2.3 above that may have occurred before the date of entry of this

1 AOD, or that occur between the date of the entry of this AOD and the conclusion of the 120 day
2 period identified in Paragraph 3.3 above, and concludes the investigation thereof. Subject to
3 Paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's
4 Office shall not file suit or take any further investigative or enforcement action with respect to the
5 acts set forth above that occurred before the date of entry of this AOD, or that occurs between the
6 date of the entry of this AOD and the conclusion of the 120 day period identified in Paragraph 3.3
7 above, against Buffalo Wild Wings or any of its current franchisees in the State of Washington
8 that sign the proposed amendment described in Section III, any of its former franchisees in the
9 State of Washington, or any of its current or former franchisees located outside the State of
10 Washington. The Attorney General reserves the right to take further investigative or enforcement
11 action against any current franchisee in the State of Washington identified pursuant to Paragraph
12 3.1.4 or any current franchisee in the State of Washington that does not sign the proposed
13 amendment described in Section III.
14
15

16
17 APPROVED ON this ____ day of _____, 2018.
18
19

20 _____
JUDGE/COURT COMMISSIONER
21
22
23
24
25
26

1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

4 _____
5 ERIC S. NEWMAN, WSBA #
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 BUFFALO WILD WINGS INTERNATIONAL, INC.

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

18 _____
19 Brad Orschel
20 Vice President, Associate General
21 Counsel

22 Buffalo Wild Wings International, Inc.

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

26 *Attorneys for Buffalo Wild Wings International, Inc.*

EXHIBIT A

Form Letter to BWW Franchisees in the State of Washington

Dear [Franchisee Name]

In February 2018, Buffalo Wild Wings 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 Buffalo Wild Wings 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 Buffalo Wild Wings will, among other things, no longer include in any U.S. franchise agreement, renewal, or area development agreement 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 Buffalo Wild Wings will not enforce any such provisions in any of our existing franchise agreements or area development 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, and, if applicable, their area development agreement, 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), and, if applicable, your area development agreement, with Buffalo Wild Wings to satisfy that requirement. To the extent that you agree to [this/these] amendment(s), 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(s). Please sign and return the amendment(s) to me as soon as possible. If you decide not to sign the enclosed amendment(s), 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
Buffalo Wild Wings, Inc.

EXHIBIT B

**AMENDMENT
TO BUFFALO WILD WINGS INTERNATIONAL, INC.
FRANCHISE AGREEMENT**

The Buffalo Wild Wings International, Inc. ("BWW") Franchise Agreement(s) between BWW ("We") and the undersigned franchisee ("You") listed in Exhibit A hereto (as amended, the "Franchise 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 Section 15.P. 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 Section 15.P is hereby deleted from each Franchise Agreement and are 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").

**BUFFALO WILD WINGS
INTERNATIONAL, INC.**

[FRANCHISEE'S NAME]

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

**AMENDMENT
TO BUFFALO WILD WINGS INTERNATIONAL, INC.
AREA DEVELOPMENT AGREEMENT**

The Buffalo Wild Wings International, Inc. ("BWW") Area Development Agreement between BWW ("We") and the undersigned developer of BWW's franchised restaurants ("You") dated _____ (as hereby amended, the "Development Agreement") shall be amended in accordance with the following terms.

1. Background. BWW and you are parties to the Development Agreement. BWW has determined that it is in the best interests of the franchise system to not enforce Section 10.N. The purpose of this Amendment to your Development Agreement is to document this change. All initial capitalized terms used but not defined in this Amendment shall have the meanings set forth in the Development Agreement.

2. Modification of Terms. As of the Effective Date (defined below) of this Amendment, you and we agree that Section 10.N is hereby deleted from the Development Agreement and is of no further force or effect.

3. Miscellaneous. Except as specifically modified by this Amendment, the provisions of the Development Agreement shall remain in full force and effect. This document is an amendment to, and forms a part of, the Development Agreement. If there is an inconsistency between this Amendment and the Development 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").

**BUFFALO WILD WINGS
INTERNATIONAL, INC.**

[DEVELOPER'S NAME]

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____
