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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO POACHING
PROVISIONS

(EINSTEIN BROS. BAGELS)

NO. **19-2-04315-6 SEA**

EINSTEIN BROS. BAGELS
FRANCHISE CORPORATION
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 November 2018, the Attorney General initiated an investigation into Einstein Bros. Bagels Franchise Corporation (EBBFC) relating to its hiring practices.

1.2 EBBFC is a Colorado corporation with its principal office or place of business in Lakewood, Colorado. EBBFC is in the business of offering and selling franchises for (and operating) restaurants that principally feature bagel and coffee products and that operate under the name and mark "Einstein Bros. Bagels".

1.3 For the purposes of this AOD, EBBFC includes its directors, officers, managers, agents acting within the scope of their agency, and employees, as well as its successor and assigns, controlled subsidiaries, and predecessor franchisor entities.

II. INVESTIGATION

1
2 2.1 EBBFC currently has eighteen (18) stores in Washington, of which seven (7)
3 are owned and operated by EBBFC, nine (9) are owned and operated by licensees, and two (2)
4 are now-closed stores formerly operated by franchisees.

5 2.2 For years until April 2018, EBBFC has included language in its franchise
6 agreements that restricted a franchisee's ability to solicit or hire workers from another
7 "Einstein Bros. Bagel" store ("no-poaching provision"). In pertinent part, the 2017 standard
8 EBBFC franchise agreement included language that stated that a franchisee would not
9 "[e]mploy or seek to employ any person who is then employed by us or any other Einstein
10 Bros. Bagel Restaurant franchisee or developer, or otherwise directly or indirectly induce such
11 person to leave his or her employment." A no-poaching provision restricted franchisees from
12 hiring both employees from a competing franchisee and from EBBFC's corporate-owned
13 stores. EBBFC removed the no-poaching provision from its new franchise agreements in April
14 2018. EBBFC did not generally have a no-poaching provision in its license agreements except
15 for those entered into with the Army & Air Force Exchange Service for units located on U.S.
16 military bases.

17 2.3 The Attorney General asserts that the foregoing conduct constitutes a contract,
18 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,
19 RCW 19.86.030.

20 2.4 EBBFC expressly denies the conduct described above constitutes a contract,
21 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,
22 RCW 19.86.030, or any other law, and expressly denies that it has engaged in conduct that
23 constitutes a contract, combination, or conspiracy in restraint of trade, or in violation of any
24 other law or regulation. EBBFC also expressly denies that the Consumer Protection Act, RCW
25 19.86.030, applies to contracts that EBBFC has entered into with parties outside of
26 Washington. EBBFC enters into this AOD to avoid protracted and expensive litigation.

1 Pursuant to RCW 19.86.100, neither this AOD nor its terms shall be construed as an admission
2 of law, fact, liability, misconduct, or wrongdoing on the part of EBBFC.

3 III. ASSURANCE OF DISCONTINUANCE

4 3.1 Subject to paragraph 2.4 above, EBBFC agrees that:

5 3.1.1. It will continue its current practice of not including no-poaching
6 provisions in its future franchise agreements in the U.S. after the date of this AOD;

7 3.1.2. It will not enforce no-poaching provisions in any of its existing franchise
8 agreements in the U.S., and will not seek to intervene or defend in any way the legality of any
9 no-poaching provision in any litigation in which a franchisee may claim third-party beneficiary
10 status rights to enforce an existing no-poaching provision;

11 3.1.3. It will notify all of its current franchisees in the U.S. of the entry of this
12 AOD and advise them that this AOD was entered into with the Attorney General; and

13 3.1.4. If EBBFC becomes aware of a franchisee or licensee with a store located
14 in the state of Washington attempting to enforce the no-poaching provision, and EBBFC is
15 unable to persuade such franchisee or licensee to desist from enforcing or attempting to enforce
16 such provision, EBBFC will notify the Attorney General.

17 3.2 Within 60 days of entry of this AOD, EBBFC will send a letter to all of its
18 current franchisees and licensees in the state of Washington with agreements that contain a
19 no-poaching provision, exercising EBBFC's unilateral contractual right under its franchise
20 agreements to reduce the scope of the covenant against competition, specifically by deleting
21 the no-poaching provisions in those franchise agreements, and citing the relevant provisions of
22 the underlying franchise or license agreement (including the no third-party beneficiary clause).

23 3.3 As they come up for either renewal or renegotiation during the ordinary course
24 of business, EBBFC will amend all of its existing franchise and license agreements on a
25 nationwide basis to remove the no-poaching provisions (if any) that are included in the current
26 versions of those agreements.

1 related statutes pertaining to the acts set forth in paragraphs 2.1 – 2.3 above that may have
2 occurred before the date of entry of this AOD 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.

6 APPROVED ON this ____ day of _____, 201__.

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10 JUDGE/COURT COMMISSIONER

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1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

4 
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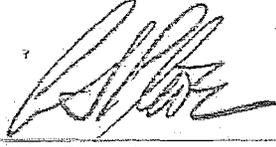
14 Agreed to and approved for entry by:

15 EINSTEIN BROS. BAGELS FRANCHISE CORPORATION

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18 General Counsel
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24 Approved as to form:

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