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FILED
KING COUNTY, WASHINGTON

SEP 13 2018

EXP07

SUPERIOR COURT CLERK

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO POACHING
PROVISIONS

NO. **18-2-22876-0SEA**

A&W RESTAURANTS, INC.
ASSURANCE OF
DISCONTINUANCE

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

I. PARTIES

1.1 In January 2018, the Attorney General initiated an investigation into A&W Restaurants, Inc. ("A&W") relating to its hiring practices.

1.2 A&W is a Michigan corporation with its principal office or place of business in Lexington, Kentucky. A&W enters into franchise agreements with franchisees who operate independently owned and managed restaurants under the A&W brand name.

1.3 A&W 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, predecessors, successors, owners, and joint ventures. A&W does not include independent franchisees.

II. INVESTIGATION

1
2 2.1 A&W has 29 stores in Washington, all of which are owned and operated by
3 independent franchisees.

4 2.2 From approximately 2001 until March 2018, A&W has included language in its
5 franchise agreements that restricted a franchisee's ability to solicit or hire workers from
6 another A&W franchisee ("no-recruiting provision"). Specifically, the A&W franchise
7 agreements in effect in Washington state: "It shall constitute a material breach of this
8 Agreement if Franchisee recruits, or attempts to recruit, any employee of the Company or of
9 any other A&W Franchisee during the term of this Agreement."

10 2.3 The Attorney General asserts that the no-recruiting provision constitutes a
11 contract, combination, or conspiracy in restraint of trade in violation of the Consumer
12 Protection Act, RCW 19.86.030.

13 2.4 A&W expressly denies the no-recruiting provision constitutes a contract,
14 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,
15 RCW 19.86.030, or any other law or regulation, and expressly denies it has engaged in conduct
16 that constitutes a contract, combination, or conspiracy in restraint of trade. A&W enters into
17 this AOD to avoid protracted and expensive litigation. Pursuant to RCW 19.86.100, neither
18 this AOD nor its terms shall be construed as an admission of law, fact, liability, misconduct, or
19 wrongdoing on the part of A&W. That is because, in A&W's view, the no-recruiting provision
20 was adopted to encourage franchisees to make the investments necessary to develop well-
21 trained, high-quality, and stable workforces in their restaurants, which in turn strengthened
22 A&W's brand and individual A&W-branded restaurants' ability to compete against other
23 branded companies, among other reasons.
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1 III. ASSURANCE OF DISCONTINUANCE

2 3.1 Subject to paragraph 2.4 above, A&W agrees:

3 3.1.1. It will no longer include the no-recruiting provision in any of its future
4 franchise agreements nationwide;

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

9 3.1.3. Within 30 days of the entry of this AOD, A&W will notify all of its
10 franchisees in Washington of the entry of this AOD and provide them a copy;

11 3.1.4. Within 30 days of the entry of this AOD, A&W will make its best
12 efforts to notify all franchisees nationwide who have the no-recruiting provision in their
13 franchise agreements of the entry of this AOD and provide them a copy;

14 3.1.5. It will notify the Attorney General’s Office if it learns of any effort by a
15 franchisee to enforce any existing no-recruiting provision.

16 3.2 Within 120 days of entry of this AOD (“Amendment Period”), A&W will
17 endeavor to amend all existing franchise agreements with franchisees in the State of
18 Washington to remove any no-recruiting provision in their existing franchise agreements.
19 Within 21 days of the entry of this AOD, A&W will send a letter in substantially the same
20 form as the letter attached hereto as Exhibit A to all of its franchisees in the State of
21 Washington. That letter will enclose a proposed amendment in substantially the same form as
22 the amendment attached hereto as Exhibit B. A&W will respond promptly to any inquiries
23 from such franchisees regarding the request to amend the terms of the franchise agreement and
24 will encourage its current franchisees in the State of Washington to sign the proposed
25 amendment. However, for the avoidance of doubt, A&W is under no obligation to offer its
26 franchisees any consideration—monetary or otherwise—in order to induce them to sign the

1 proposed amendment, or take any adverse action against such franchisees if they refuse to do
2 so. If any franchisee is unwilling to consent to the amendment to its franchise agreement by the
3 end of the Amendment Period, A&W shall provide the name and address of the resisting
4 franchisee and the name and address of the franchisee's registered agent to the Office of the
5 Attorney General. Once A&W complies with this paragraph, it shall have no further obligation
6 to seek to amend any existing franchise agreement with franchisees in the State of Washington
7 to remove any no-recruiting provisions.

8 3.3 As they come up for either renewal or renegotiation during the ordinary course
9 of business, A&W will, on a nationwide basis, not include any no-recruiting provision.

10 3.4 Within 30 days of the conclusion of the end of the Amendment Period, A&W
11 will submit a declaration to the Attorney General's Office signed under penalty of perjury
12 stating that Sections 3.1-3.2 of this AOD have been satisfied.

13 IV. ADDITIONAL PROVISIONS

14 4.1 This AOD is binding on, and applies to A&W, including each of its respective
15 directors, officers, managers, agents acting within the scope of their agency, and employees, as
16 well as their respective successors and assigns, controlled subsidiaries, divisions, groups,
17 affiliates, partnerships, and joint ventures, or other entities through which A&W may now or
18 hereafter act with respect to the conduct alleged in this AOD.

19 4.2 This is a voluntary agreement and it shall not be construed as an admission of
20 law, fact, liability, misconduct, or wrongdoing on the part of A&W, and may not be used for
21 any of those purposes. By entering into this AOD, A&W neither agrees nor concedes that the
22 claims, allegations and/or causes of action which have or could have been asserted by the
23 Attorney General have merit and A&W expressly denies any such claims, allegations, and/or
24 causes of action. This AOD is not and may not be considered an admission or evidence of
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1 violation for any purpose. However, proof of failure to comply with this AOD presented by the
2 Attorney General shall be *prima facie* evidence of a violation of RCW 19.86.030, thereby
3 placing upon the violator the burden of defending against imposition by the Court of
4 injunctions, restitution, costs and reasonable attorney's fees, and civil penalties of up to
5 \$2,000.00 per violation.
6

7 4.3 Under no circumstances shall this AOD or the name of the State of Washington or
8 the Office of the Attorney General or any of its employees or representatives be used by either
9 A&W, nor by their officers, employees, representatives, or agents in conjunction with any
10 business activity of A&W.


11 4.4 This AOD resolves all issues raised by the State of Washington and the Antitrust
12 Division of the Attorney General's Office under the Consumer Protection Act and any other
13 related statutes pertaining to the acts set forth in paragraph 2.1 – 2.3 above that may have occurred
14 before the date of entry of this AOD and concludes the investigation thereof. Subject to
15 paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's
16 Office shall not file suit or take any further investigative or enforcement action with respect to the
17 acts set forth above that occurred before the end of the Amendment Period, against A&W or any
18 of its franchisees in Washington who agree to the amendment described in paragraph 3.2 above
19 with respect to acts that occurred before the date of such amendment. The Attorney General
20 reserves the right to take further investigative or enforcement action against any current franchisee
21 in the State of Washington that does not sign the proposed amendment described in Section III.
22

23 APPROVED ON this _____ day of 9/13, 2018.

24 **HENRY H. JUDSON**

25 SEP 13 2018

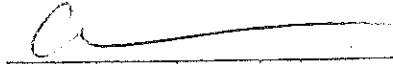
26 COURT COMMISSIONER



JUDGE/COURT COMMISSIONER

1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

4 

5 ERIC S. NEWMAN, WSBA #31521
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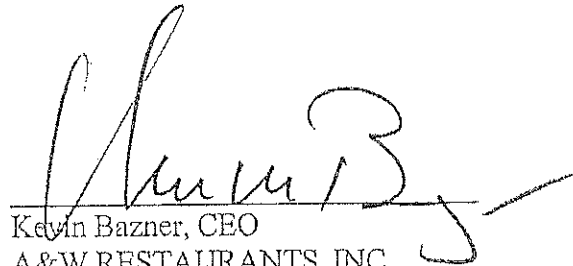
15 Agreed to and approved for entry by:
16 A&W RESTAURANTS INC.

17 

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Form Letter to A&W Franchisees in the State of Washington

Dear [Franchisee Name]

In February 2018, A&W 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 from A&W or from another A&W franchisee (sometimes referred to as "no poaching" or "no solicitation" clauses). We understand that this is part of a broader investigation into the use of such clauses in the restaurant industry and other franchised industries. We have cooperated fully with the investigation.

Without admitting that A&W 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 A&W 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 from A&W or another A&W franchisee. The agreement also provides that A&W 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 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 A&W 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 but certainly by no later than _____, 2018. If you decide not to sign the enclosed amendment(s) by that date, 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 [email address].

SIGNATURE BLOCK

**AMENDMENT
TO A&W RESTAURANTS, INC.
[FRANCHISE/LICENSE] AGREEMENT**

The A&W Restaurants, Inc. ("A&W") [Franchise/License] Agreement(s) between A&W ("We") and the undersigned franchisee ("You") listed in Exhibit A hereto (as amended, the "Agreement(s)") shall be amended in accordance with the following terms.

1. Background. We and you are parties to each Agreement and you operate one or more franchised outlets in the State of Washington under the Agreement(s). We have determined that it is in the best interests of the franchise system to not enforce Section _____. The purpose of this Amendment to your 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 Agreement(s).

2. Modification of Terms. As of the Effective Date (defined below) of this Amendment, you and we agree that Section _____ is hereby deleted from each Agreement and is replaced by the following:

Franchisee is solely responsible for its employees, all acts of its employees and all employment related decisions, including but not limited to, those decisions concerning wages, benefits, hours of work, scheduling, hiring, firing, discipline, training, supervision, recordkeeping and all other terms and conditions of employment.

3. Miscellaneous. Except as specifically modified by this Amendment, the provisions of the Agreement(s) shall remain in full force and effect. This document is an amendment to, and forms a part of, each Agreement. If there is an inconsistency between this Amendment and any 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 Amendment effective as of _____, 2018 (the "Effective Date").

A&W RESTAURANTS, INC.

By: _____
Name: _____
Title: _____

[FRANCHISEE'S NAME]

By: _____
Name: _____
Title: _____