

FILED

2018 JUL 12 AM 9:14

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

FILED
KING COUNTY, WASHINGTON

JUL 12 2018

SUPERIOR COURT CLERK

EXPO7

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO POACHING
PROVISIONS

NO.

18-2-17231-4 SEA

AUNTIE ANNE'S FRANCHISOR SPV
LLC 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 Auntie Anne's Franchisor SPV LLC ("Auntie Anne's") relating to certain provisions in its franchise agreement.

1.2 Auntie Anne's is a Delaware limited liability corporation with its principal offices or place of business in Atlanta, Georgia. Auntie Anne's is a franchisor, and its corporate and franchisee operated locations are in the business of offering hand-rolled soft pretzels, among other food products, for sale to consumers.

1.3 For purposes of this AOD, Auntie Anne's 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
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

II. INVESTIGATION

2.1 There are 27 Auntie Anne's stores located in the State of Washington as of the date hereof. All of these stores are independently owned and operated by franchisees.

2.2 For years, the franchise agreements entered into between Auntie Anne's and its franchisees have provided that franchisees subject to such agreements could not solicit for employment the employees of Auntie Anne's and/or of other Auntie Anne's franchisees (the "No-Solicitation Provision"), and in certain years provided that franchisees subject to such agreements could not hire the employees of Auntie Anne's and/or other Auntie Anne's franchisees (the "No-Hire Provision").

2.3 The Attorney General asserts that the foregoing conduct of Auntie Anne's and its franchisees constitutes a contract, combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act, RCW 19.86.030.

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

III. ASSURANCE OF DISCONTINUANCE

3.1 Subject to Paragraph 2.4 above, Auntie Anne's agrees:

3.1.1. It will no longer include the No-Solicitation Provision or the No-Hire 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, Auntie
9 Anne's 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 Auntie
11 Anne's is unable to persuade such franchisee to desist from enforcing or attempting to enforce
12 such provision, Auntie Anne's will notify the Attorney General.

13 3.2 Within 21 days of entry of this AOD, Auntie Anne's will send a letter to all of
14 its current franchisees with stores located in the State of Washington, stating that the Attorney
15 General has requested that the existing No-Solicitation Provision and No-Hire Provision be
16 removed from existing franchise agreements. The letter that Auntie Anne's will send to its
17 current franchisees in the State of Washington will be substantially in the form of the letter
18 attached hereto as Exhibit A. That letter will enclose the proposed amendment that Auntie
19 Anne's is requesting that each of its franchisees in the State of Washington agree to, which
20 amendment will remove the No-Solicitation Provision and the No-Hire Provision. The
21 proposed amendment that will be included with each letter will be substantially in the form of
22 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, Auntie Anne's will respond promptly to any
25 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, Auntie Anne's 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, Auntie Anne's will
5 provide copies of all executed amendments it has obtained with its current franchisees in the
6 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 Auntie Anne's has not complied with its obligations under this AOD.

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

14 3.5 As they come up for renewal during the ordinary course of business, Auntie
15 Anne's will remove the No-Solicitation Provision and the No-Hire Provision from all of its
16 existing franchise agreements in the United States with its franchisees on a nationwide basis,
17 unless expressly prohibited by law. In addition, Auntie Anne's will not include the No-
18 Solicitation Provision or the No-Hire Provision in any franchise agreement it signs in the
19 United States after the date of this AOD.

20 3.6 Within 30 days of the conclusion of the time periods referenced in paragraph
21 3.3, Auntie Anne's will submit a declaration to the Attorney General's Office signed under
22 penalty of perjury stating whether all provisions of this agreement have been satisfied.

23 IV. **ADDITIONAL PROVISIONS**

24 4.1 This AOD is binding on, and applies to Auntie Anne's, including each of its
25 respective directors, officers, managers, agents acting within the scope of their agency, and
26 employees, as well as their respective successors and assigns, controlled subsidiaries,

1 predecessor franchisor entities, or other entities through which Auntie Anne's may now or
2 hereafter act with respect to the conduct alleged in this AOD.

3 4.2 This is a voluntary agreement and it shall not be construed as an admission of
4 law, fact, liability, misconduct, or wrongdoing on the part of Auntie Anne's or any of its
5 current or former franchisees. Auntie Anne's and its current and former franchisees neither
6 agree nor concede that the claims, allegations and/or causes of action which have or could have
7 been asserted by the Attorney General have merit and Auntie Anne's and its current and
8 former franchisees expressly deny any such claims, allegations, and/or causes of action.
9 However, proof of failure to comply with this AOD shall be *prima facie* evidence of a
10 violation of RCW 19.86.020, thereby placing upon the violator the burden of defending against
11 imposition by the Court of injunctions, restitution, costs and reasonable attorney's fees, and
12 civil penalties of up to \$2,000.00 per violation.
13


14 4.3 Auntie Anne's will not, nor will it authorize any of its officers, employees,
15 representatives, or agents to, state or otherwise contend that the State of Washington or the
16 Attorney General has approved of, or has otherwise sanctioned, the conduct described in
17 Paragraph 2.2 with respect to the No-Solicitation Provision and the No-Hire Provision in Auntie
18 Anne's franchise agreement.
19

20 4.4 This AOD shall have a term of twenty-five (25) years.
21

22 4.5 This AOD resolves all issues raised by the State of Washington and the Antitrust
23 Division of the Attorney General's Office under the Consumer Protection Act and any other
24 related statutes pertaining to the acts of Auntie Anne's and its current and former franchisees as
25 set forth in Paragraph 2.1 – 2.3 above that may have occurred before the date of entry of this
26 AOD, or that occur between the date of the entry of this AOD and the conclusion of the 120 day

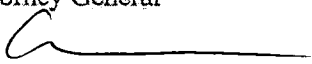
1 period identified in Paragraph 3.3 above, and concludes the investigation thereof. Subject to
2 Paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's
3 Office shall not file suit or take any further investigative or enforcement action with respect to the
4 acts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

15
16 APPROVED ON this 12th day of July, 2018.

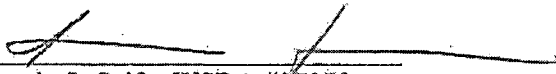
17
18
19 
20 JUDGE/COURT COMMISSIONER
21
22
23
24
25
26


1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

4 
5 ERIC S. NEWMAN, WSBA #31521
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 AUNTIE ANNE'S FRANCHISOR SPV LLC

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

12 
13 Sarah Powell
14 Executive Vice President,
15 General Counsel & Secretary

Auntie Anne's Franchisor SPV LLC

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
25 200 I. K Street, NW
26 Washington, DC 20006

Attorneys for Auntie Anne's Franchisor SPV LLC

EXHIBIT A

Franchisee name and address

Re: Notice Regarding Amendment to Franchise Agreement

Dear Franchisee:

You are receiving this letter because you operate an Auntie Anne's location in the State of Washington. As you may be aware, the Attorney General of the State of Washington recently began an investigation into the inclusion of non-solicitation and no-hire clauses in the franchising industry. Numerous franchise companies, including Auntie Anne's, were included in this investigation.

After significant negotiations, we were able to reach an agreement with the Attorney General that will provide peace of mind not only for Auntie Anne's, but also for our franchisees. While we do not believe that we or our franchisees have acted in any way that is unlawful or improper, we think a settlement is in the best interests of our franchise system, to avoid the uncertainty and potentially significant costs of litigation. Among other things, we have committed to removing the non-solicitation provision currently in our franchise agreements from all new franchise agreements that we sign on a nationwide basis. We have also committed to not enforcing the non-solicitation and no-hire provisions in any of our existing franchise agreements on a nationwide basis. In addition, the Attorney General has required that we ask all franchisees who operate franchises in the State of Washington to execute an amendment to the franchise agreement, which amendment deletes the non-solicitation and no-hire provisions from their franchise agreement (if any such provisions exist).

We have enclosed such an amendment for your Auntie Anne's location. If you enter into this amendment, then pursuant to our agreement with the Attorney General, the State of Washington will not file suit against you, or take any investigative or enforcement action against you, relating to any non-solicitation or no-hire provisions in your franchise agreement, up to and including the date upon which you sign the amendment. By executing the amendment you are not admitting any liability, fault, or wrongdoing. If you decide not to execute this amendment, the Attorney General has indicated it will reserve the right to investigate you for any actions you may have taken under the non-solicitation and no-hire provisions, and to pursue any litigation or enforcement actions it deems appropriate. We strongly encourage you to sign the enclosed amendment.

Please review this amendment with your legal counsel and return the executed amendment to Tim Goodman, Vice President of Franchise Administration, at tgoodman@focusbrands.com or mail it to Tim at the address above. If you have any questions regarding this amendment, please contact Sarah Powell, the Executive Vice President and General Counsel of Focus Brands, at (678) 702-5040.

We appreciate your prompt attention to this matter.

Best regards,

Heather Neary
President

EXHIBIT B

**AMENDMENT
TO
AUNTIE ANNE'S FRANCHISOR SPV LLC FRANCHISE AGREEMENT**

The Auntie Anne's Franchisor SPV LLC ("Auntie Anne's") Franchise Agreement between Auntie Anne's ("We") and the undersigned franchisee ("You") dated _____ (as amended, the "Franchise Agreement") shall be amended in accordance with the following terms.

1. Background. We and you are parties to the Franchise Agreement and you operate one or more franchised outlets in the State of Washington under the Franchise Agreement. We have determined that it is in the best interests of the franchise system to not enforce [Section 15.4.A(v) and Section 15.4.B(c)] [the last sentence of Section 18.4.A (which provides "You further agree that you will not employ or seek to employ an employee of ours or another franchisee, or attempt to induce such employee to cease his/her employment without the prior written consent of such employee's employer.")] [Section XVI.B(ii) and Section XVI.C(ii) (which provides restrictions on your ability to "employ or seek to employ an employee of Franchisee, Franchisor or Franchisor's franchisees or attempt to induce the person to leave his/her employment without the prior written consent of the employer")]. The purpose of this Amendment to your Franchise 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 Franchise Agreement.

2. Modification of Terms. As of the Effective Date (defined below) of this Amendment, you and we agree that [Section 15.4.A(v) and Section 15.4.B(c)] [the last sentence of Section 18.4.A (which provides "You further agree that you will not employ or seek to employ an employee of ours or another franchisee, or attempt to induce such employee to cease his/her employment without the prior written consent of such employee's employer.")] [Section XVI.B(ii) and Section XVI.C(ii) (which provides restrictions on your ability to "employ or seek to employ an employee of Franchisee, Franchisor or Franchisor's franchisees or attempt to induce the person to leave his/her employment without the prior written consent of the employer")] [are/is] hereby deleted from the 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 shall remain in full force and effect. This document is an amendment to, and forms a part of, the Franchise Agreement. If there is an inconsistency between this Amendment and the 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 _____, 2018 (the "Effective Date").

**AUNTIE ANNE'S FRANCHISOR SPV
LLC**

[FRANCHISEE'S NAME]

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____