

EX-101

FILED
KING COUNTY, WASHINGTON

SEP 13 2018

SUPERIOR COURT CLERK

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO POACHING
PROVISIONS

18-2-22877-8SEA

BURGER KING CORPORATION
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 Burger King Corporation (“BKC”) relating to certain provisions in its franchise agreements.

1.2 BKC is a Florida corporation with its principal offices or place of business in Miami, Florida. BKC is a franchisor, and its corporate and franchisee operated locations are in the business of offering hamburgers, among other food products, for sale to consumers.

1.3 For purposes of this AOD, BKC shall include 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 brought by the Attorney General's Office against a current franchisee in Washington to defend
2 an existing No-Solicitation Provision, provided such action is brought in accordance with, and
3 consistent with, the provisions of this AOD;

4 3.1.3. It will notify all of its current franchisees in the United States of the
5 entry of this AOD and make a copy available to them;

6 3.1.4. If, after the 30 day period set forth in Paragraph 3.2 below, BKC
7 becomes aware of a franchisee with a store located in the State of Washington attempting to
8 enforce the No-Solicitation Provision, and BKC is unable to persuade such franchisee to desist
9 from enforcing or attempting to enforce such provision, BKC will notify the Attorney General.

10 3.2 Within 30 days of entry of this AOD, BKC will send a letter to all of its current
11 franchisees with stores located in the State of Washington, stating that the Attorney General
12 has requested that the existing No-Solicitation Provision be removed from existing franchise
13 agreements. The letter that BKC will send to its current franchisees in the State of Washington
14 will be substantially in the form of the letter attached hereto as Exhibit A. That letter will
15 enclose the proposed amendment that BKC is requesting that each of its franchisees in the
16 State of Washington agree to, which amendment will remove the No-Solicitation Provision.
17 The proposed amendment that will be included with each letter will be substantially in the
18 form of the amendment attached hereto as Exhibit B.

19 3.3 In addition to sending the letter to its current franchisees in the State of
20 Washington pursuant to Paragraph 3.2 above, BKC will respond promptly to any inquiries
21 from such franchisees regarding the request to amend the terms of the franchise agreement and
22 will encourage its current franchisees in the State of Washington to sign the proposed
23 amendment. However, for the avoidance of doubt, BKC is under no obligation to offer its
24 franchisees any consideration—monetary or otherwise—in order to induce them to sign the
25 proposed amendment, or take any adverse action against such franchisees if they refuse to do
26 so. Within 120 days of entry of this AOD, BKC will provide copies of all executed

1 amendments it has obtained with its current franchisees in the State of Washington to the
2 Attorney General's Office. A decision by a franchisee not to amend its franchise agreement, or
3 not to do so within 120 days of this AOD, shall not constitute a breach by BKC of its
4 obligations under this AOD or a failure by BKC to comply with this AOD.

5 3.4 If BKC learns that a current franchisee in the State of Washington intends in
6 good faith to sign the proposed amendment but is unable to do so within the time period
7 specified in Paragraph 3.3, BKC will notify the Attorney General's Office to seek a mutually
8 agreeable extension. During any such extension, the Attorney General's Office will not take
9 further investigative or enforcement action against a franchisee.

10 3.5 In addition, as they come up for renewal during the ordinary course of business,
11 BKC will remove the No-Solicitation Provision from all of its existing franchise agreements in
12 the United States with its franchisees on a nationwide basis, unless expressly prohibited by
13 law.

14 3.6 Within 30 days of the conclusion of the time period referenced in Paragraph 3.3,
15 BKC will submit a declaration to the Attorney General's Office signed under penalty of perjury
16 stating whether all provisions of this agreement have been satisfied.

17 IV. ADDITIONAL PROVISIONS

18 4.1 This AOD is binding on, and applies to BKC, including each of its respective
19 directors, officers, managers, agents acting within the scope of their agency, and employees, as
20 well as their respective successors and assigns, controlled subsidiaries, predecessor franchisor
21 entities, or other entities through which BKC may now or hereafter act with respect to the
22 conduct alleged in this AOD.

24 4.2 This is a voluntary agreement and it shall not be construed as an admission of
25 law, fact, liability, misconduct, or wrongdoing on the part of BKC or any of its current or
26 former franchisees. BKC and its current and former franchisees neither agree nor concede that

1 the claims, allegations and/or causes of action which have or could have been asserted by the
2 Attorney General have merit, and BKC and its current and former franchisees expressly deny
3 any such claims, allegations, and/or causes of action. However, proof of failure to comply with
4 this AOD shall be *prima facie* evidence of a violation of RCW 19.86.030, thereby placing upon
5 the violator the burden of defending against imposition by the Court of injunctions, restitution,
6 costs and reasonable attorney's fees, and civil penalties of up to \$2,000.00 per violation.

7 4.3 BKC will not, nor will it authorize any of its officers, employees, representatives,
8 or agents to, state or otherwise contend that the State of Washington or the Office of the Attorney
9 General has approved of, or has otherwise sanctioned, the conduct described in Paragraph 2.2
10 with respect to the No-Solicitation Provision in BKC's franchise agreement.

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 of BKC and its current and former franchisees as set forth in
14 Paragraphs 2.1 – 2.3 above that may have occurred before the date of entry of this AOD, or that
15 occur between the date of the entry of this AOD and the conclusion of the 120-day period
16 identified in Paragraph 3.3 above, and concludes the investigation thereof. Subject to Paragraph
17 4.2, the State of Washington and the Antitrust Division of the Attorney General's Office shall not
18 file suit or take any further investigative or enforcement action with respect to the acts set forth
19 above that occurred before the date of entry of this AOD, or that occurs between the date of the
20 entry of this AOD and the conclusion of the 120-day period identified in Paragraph 3.3 above,
21 against BKC or any of its current franchisees in the State of Washington that sign the proposed
22 amendment described in Section III, any of its former franchisees in the State of Washington, or
23 any of its current or former franchisees located outside the State of Washington. The Attorney
24 General reserves the right to take further investigative or enforcement action against any current
25 franchisee in the State of Washington identified pursuant to Paragraph 3.1.4 or any current
26

1 franchisee in the State of Washington that does not sign the proposed amendment described in
2 Section III.

3
4 APPROVED ON this _____ day of 9/13, 2018.

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7 **HENRY H. JUDSON**



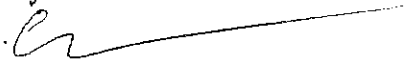
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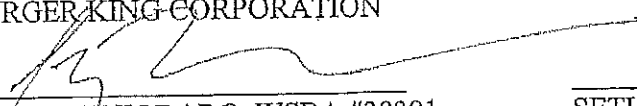
1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General



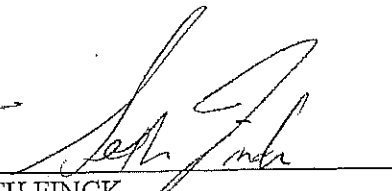
4 ERIC S. NEWMAN, WSBA #31521
5 Assistant Attorney General
6 Chief Litigation Counsel
7 Antitrust Division
8 Attorneys for State of Washington
9 Office of the Attorney General
10 800 Fifth Avenue, Suite 2000
11 Seattle, WA 98104

12 Agreed to and approved for entry by:
13 BURGER KING CORPORATION



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19 *Attorneys for Burger King Corporation*



20 SETH FINCK
21 Counsel, Franchising, and Real Estate US
22 *Popeyes, Burger King, & Tim Hortons Brands*

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EXHIBIT A

Dear Burger King Franchisee,

In February 2018, Burger King Corporation ("BKC") 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 BKC 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 BKC 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. The agreement also provides that BKC will not enforce any such provisions in any of our existing franchise 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 BKC to satisfy that requirement. To the extent that you agree to this amendment to your franchise agreement, 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. Please sign and return the amendment to me as soon as possible. If you decide not to sign the enclosed amendment, 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

Sincerely,

Burger King Corporation

EXHIBIT B

AMENDMENT TO FRANCHISE AGREEMENTS

The franchise agreement(s) between Burger King Corporation (“We”) and the undersigned franchisee (“You”) listed in Exhibit A hereto (as at any time amended, the “Franchise Agreement(s)”) shall be amended in accordance with the following terms.

1. Background. We and You are parties to the Franchise Agreement(s), 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 5.K. of the Franchise Agreement(s) as described below. For your reference only, the language of Section 5.K. as set forth in our franchise disclosure document as of September 1, 2018, is set forth on Appendix A attached hereto. The purpose of this Amendment is to document this change.

2. Amendment of Franchise Agreements. As of the Effective Date (defined below) of this Amendment, We and You hereby agree that Section 5.K. is hereby deemed deleted from each Franchise Agreement and is 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 two or more counterparts, each of which shall be an original, with the same effect as if the signatures thereto and hereto were upon the same instrument, and shall become effective when one or more counterparts have been signed by each of the parties and delivered (by telecopy, electronic delivery or otherwise) to the other parties. Signatures to this Amendment transmitted by facsimile transmission, by electronic mail in “portable document format” (“.pdf”) form, or by any other electronic means intended to preserve the original graphic and pictorial appearance of a document, will have the same effect as physical delivery of the paper document bearing the original signature.

[Signatures appear on following page.]

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Amendment, effective as of _____, 2018 (the "Effective Date").

BURGER KING CORPORATION _____

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

APPENDIX A

K. Interference with Employment Relations of Others

Neither BKC nor Franchisee will attempt, directly or indirectly, to entice or induce, or attempt to entice or induce any employee of the other or of another Franchisee of BKC to leave such employment, or employ such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.