

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.

18-2-22878-6 SEA

DFO, LLC DBA DENNY'S
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 DFO, LLC, dba Denny's, relating to certain provisions utilized in its franchise agreements.

1.2 DFO, LLC, is a Delaware limited liability company with its principal offices in South Carolina. DFO, LLC developed a unique and particular plan of food service operation for Denny's restaurants that are operated throughout the United States by DFO, LLC, and by franchisees who have entered into franchise-agreements with DFO, LLC that allow the franchisees to operate restaurants under the "Denny's" name.

1.3 For purposes of this AOD, DFO, LLC, shall include its directors, officers, managers, and agents acting within the scope of their agency, and employees as well as its

1 successor and assigns, controlled subsidiaries, divisions, groups, affiliates, partnerships, and
2 joint ventures. Franchisees of DFO, LLC are not parties to this AOD.

3 II. INVESTIGATION

4 2.1 There are approximately 46 Denny's franchised restaurants in Washington, all
5 of which are owned and operated by at least 11 franchisees. None of the Denny's restaurants in
6 Washington are owned and operated by DFO, LLC.

7 2.2 For years, DFO, LLC has included language in its franchise agreements that the
8 Attorney General of Washington State regards as a restriction on a franchisee's ability to solicit
9 or hire workers from DFO, LLC or another franchisee of DFO, LLC. Specifically, the
10 standard DFO, LLC franchise agreement included the following language:

11 The parties agree that they will not, directly or indirectly, solicit for employment or
12 induce to leave his or her employment any person who is, at the time of such
13 solicitation or inducement, employed by the other party (or by affiliates of Company)
14 without first delivering written notice of the intention to so solicit or induce any such
15 person to the other party in accordance with Paragraph 21.3 of this Agreement. In
addition, Franchisee shall not solicit employees of another franchisee without prior
notice.

16 For purposes of this Assurance of Discontinuance, the above quoted language may be referred
17 to as "Paragraph 20.6." The Washington State Attorney General has maintained that this
18 provision restricted franchisees from hiring both employees from a competing franchisee and
19 from any DFO, LLC corporate-owned restaurants.

20 2.3 The Attorney General asserts that the foregoing conduct constitutes a contract,
21 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,
22 RCW 19.86.030.

23 2.4 DFO, LLC denies that Paragraph 20.6 restricted franchisees from hiring
24 employees from a competing franchisee or from any DFO, LLC corporate-owned restaurants.
25 DFO, LLC expressly denies the conduct described above constitutes a contract, combination,
26 or conspiracy in restraint of trade in violation of the Consumer Protection Act, RCW

1 19.86.030, or any other law, and expressly denies it has engaged in conduct that constitutes a
2 contract, combination, or conspiracy in restraint of trade. DFO, LLC asserts paragraph 20.6
3 facilitated communications among members associated in a franchise relationship, was
4 Constitutionally-protected activity, and was reasonable in relation to the development and
5 preservation of business and not injurious to the public interest. DFO, LLC enters into this
6 AOD to avoid protracted and expensive litigation and because DFO, LLC has determined
7 paragraph 20.6 is no longer beneficial to the franchise relationship or to DFO, LLC. Pursuant
8 to RCW 19.86.100, neither this AOD nor its terms shall be construed as an admission of law,
9 fact, liability, misconduct, or wrongdoing on the part of DFO, LLC.

10 **III. ASSURANCE OF DISCONTINUANCE**

11 3.1 Subject to paragraph 2.4 above, DFO, LLC agrees:

12 3.1.1. It will not include the language of Paragraph 20.6 (quoted above in
13 paragraph 2.2) in any of its future franchise agreements, and it will not include in its franchise
14 agreements a provision that forbids franchisees from soliciting or hiring employees of DFO,
15 LLC or of another franchisee;

16 3.1.2. It will not enforce the provisions of Paragraph 20.6 (quoted above in
17 paragraph 2.2) in any of its existing franchise agreements, and will not seek to intervene or
18 defend in any way the legality of that provision in any litigation brought by the Attorney
19 General's Office against a current franchisee in Washington to defend the provisions of
20 Paragraph 20.6, provided such action is consistent with the provisions of this AOD;

21 3.1.3. It will notify all of its current franchisees of the entry of this AOD and
22 make a copy of the AOD available to them. This provision does not restrain DFO, LLC from
23 any additional communications with franchisees regarding the AOD;

24 3.1.4. It will notify the Attorney General's Office if it learns of any effort by a
25 franchisee in the State of Washington to enforce the provisions of Paragraph 20.6 (quoted
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1 above in paragraph 2.2) after the 60-day period discussed in paragraph 3.2 below, unless the
2 franchisee agrees to cease enforcement or attempted enforcement of Paragraph 20.6.

3 3.2 Within 10 days of entry of this AOD, DFO, LLC will initiate communications
4 with franchisees who operate Denny's restaurants in Washington, stating that the Attorney
5 General requested that Paragraph 20.6 of the franchise agreements be removed, and request
6 their agreements to remove Paragraph 20.6 from the franchise agreements, effective within 60
7 days of the entry of this AOD. Exhibit A is a form of letter that DFO, LLC may use to request
8 that the franchisees agree to the change in the franchise agreement. DFO, LLC will respond
9 promptly to any inquiries from such franchisees regarding the request to amend the terms of
10 the franchise agreement and will request that its current franchisees in the State of Washington
11 sign the proposed amendment. If any franchisee is unwilling to consent to the change to its
12 franchise agreement, prior to the 60-day deadline, DFO, LLC shall provide the name and
13 address of such franchisee and the name and address of the franchisee's registered agent to the
14 Office of the Attorney General, along with the franchisee's stated reason for the failure to
15 amend.

16 3.3 At the expiration of the current terms of existing franchise agreements and the
17 issuance of new franchise agreements, the franchise agreements DFO, LLC will use on a
18 nationwide basis will not include the provisions of Paragraph 20.6 (quoted above in paragraph
19 2.2), and shall not include in its franchise agreements a provision that forbids a franchisee from
20 soliciting or hiring an employee of DFO, LLC or an employee of another franchisee of DFO,
21 LLC.

22 3.4 Within 30 days of the conclusion of the time periods referenced in this section
23 III, DFO, LLC will submit a declaration to the Attorney General's Office signed under penalty
24 of perjury stating that all provisions of this agreement have been satisfied.
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1 **IV. ADDITIONAL PROVISIONS**

2 4.1 This AOD is binding on, and applies to DFO, LLC, including each of its
3 respective directors, officers, managers, agents acting within the scope of their agency, and
4 employees, as well as their respective successors and assigns, controlled subsidiaries,
5 divisions, groups, affiliates, partnerships, and joint ventures, or other entities through which
6 DFO, LLC may now or hereafter act with respect to the conduct alleged in this AOD.

7 4.2 This is a negotiated agreement and it shall not be construed as an admission of
8 law, fact, liability, misconduct, or wrongdoing on the part of DFO, LLC. By entering into this
9 AOD, DFO, LLC does not agree nor concede that the claims, allegations and/or causes of
10 action which have or could have been asserted by the Attorney General have merit, and DFO,
11 LLC expressly denies any such claims, allegations, and/or causes of action. However, proof of
12 failure to comply with this AOD shall be *prima facie* evidence of a violation of RCW
13 19.86.030, thereby placing upon the violator the burden of defending against imposition by the
14 Court of injunctions, restitution, costs and reasonable attorney's fees, and civil penalties of up
15 to \$2,000.00 per violation.

16 4.3 DFO, LLC will not assert that the State of Washington or the Attorney General
17 has approved of or sanctioned the conduct described in paragraph 2.2 above. DFO, LLC, will not
18 authorize any of its officers, employees, representatives, or agents to make such an assertion.

19 4.4 This AOD resolves all issues raised by the State of Washington and the Antitrust
20 Division of the Attorney General's Office under the Consumer Protection Act and any other
21 related statutes pertaining to the acts set forth in paragraph 2.1 – 2.3 above that may have occurred
22 before the date of entry of this AOD and concludes the investigation thereof. Subject to
23 paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's
24 Office shall not file suit or take any further investigative or enforcement action with respect to the
25 acts set forth above that occurred before the date of entry of this AOD, against DFO, LLC or any
26 of its current franchisees in the State of Washington that sign the proposed amendment described

1 in Section III. The Attorney General reserves the right to take further investigative or
2 enforcement action against any current franchisee in the State of Washington identified pursuant
3 to Paragraph 3.1.4 or any current franchisee in the State of Washington that does not sign the
4 proposed amendment described in Section III.

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

6
7 **HENRY H. JUDSON**

8 SEP 13 2018

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10 _____
11 JUDGE/COURT COMMISSIONER

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Denny's, Inc., Managing Member of DFO,
LLC

EXHIBIT A: Form of letter to Denny's Franchisees in Washington State

Date: _____, 2018

Dear [Franchisee]:

You may recall that the Denny's franchise agreement includes a provision (section 20.6) calling for you to notify another franchisee before considering one of their employees. Other systems have much stricter rules, which have come under scrutiny. The Attorney General of Washington has investigated whether franchise agreements used in Washington State by various franchise systems restricted the hiring or solicitation of employees. The Attorney General of Washington requested that Denny's no longer use that provision, in Washington and nationwide.

The objective of section 20.6 is to encourage responsible communications among franchisees. Employees should be free to work wherever they want, and we encourage all operators to train their new hires rather than seek out people trained at others' expense. However, to avoid concerns that regulators have interpreted the provision differently, Denny's has decided to remove this element from all franchise agreements.

The Attorney General of Washington asked that Denny's request your consent to remove section 20.6 from all your franchise agreements. The proposed Amendment to the franchise agreement as well as our agreement with the Attorney General of Washington are enclosed. The Denny's Franchisee Association has reviewed this effort and franchise amendment. To accept this amendment:

1. Click on the link below which will take you to the amendment on mydennys.com where you will log in.
2. Once logged in, click on the box that says "I agree to this amendment."
3. To print a copy of the amendment, click "Print" which will open a new page with a printer friendly version of the amendment. Click "Print" on the top right.

If you prefer, you may print the attached amendment, sign, scan, and return to Laura Shock via email: lshock@dennys.com.

Thank you for your cooperation.

If you have problems or questions about logging in to mydennys.com, please contact the help desk at 800-801-6156.

If you have questions about this amendment, please feel free to call me at _____ to discuss any questions or concerns you have about the proposed amendment.

Sincerely,

DFO, LLC, franchisor of Denny's restaurants

By: _____ (NAME)
_____ (TITLE)

Enclosure: Amendment to Franchise Agreement

UNIT # _____

AMENDMENT TO FRANCHISE AGREEMENT

THIS AMENDMENT to Franchise Agreement is made and entered into this ___ day of _____ 20__ by and between **DFO, LLC (DFO)**, a **Delaware** limited liability company, and _____ (franchisee) _____, a _____ Corporation (**Franchisee**).

RECITALS

Whereas, Franchisee and Denny's, entered into a Franchise Agreement dated _____, pursuant to which Franchisee operates a Denny's restaurant located _____;

Whereas, DFO and Franchisee have agreed to amend the Franchise Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and agreement set forth within the Franchise Agreement, and for the purpose of complying with the intention above expressed, DFO and Franchisee agree as follows:

1. Article 20.6 shall be deleted in its entirety.

IN WITNESS WHEREOF, the parties have duly executed this Amendment.

DFO, LLC
a Delaware limited liability company

(franchisee)

By: Denny's, Inc.

By: _____

By: _____

Name: _____

Its: _____

Its: _____