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STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE FRANCHISE NO POACHING
PROVISIONS INVESTIGATION

(EDIBLE ARRANGEMENTS, LLC)

NO. **18-2-56305-4 SEA**

EDIBLE ARRANGEMENTS, LLC
ASSURANCE OF
DISCONTINUANCE

The State of Washington (State), by and through its attorneys, Robert W. Ferguson, Attorney General, and Rahul Rao, 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 Edible Arrangements, LLC ("EA") relating to its hiring practices.

1.2 EA is a Delaware limited liability company with its principal office or place of business in Atlanta, Georgia. EA is a franchise company specializing in gifting fresh fruit arrangements.

1.3 EA includes its directors, officers, managers, agents acting within the scope of their agency, and employees acting in the scope of their employment, as well as its affiliate, Edibles 392, LLC.

1 II. INVESTIGATION

2 2.1 EA has eight stores in Washington. Seven of these stores are owned and
3 operated by franchisees and one is owned and operated by EA affiliate Edibles 392, LLC.

4 2.2 EA previously included language in its form franchise agreements that restricted
5 a franchisee's ability to solicit or hire workers from another EA franchise ("no-poaching
6 provision"). Specifically, the standard EA franchise agreement stated (typically, at Section
7 17(A)(4)) that a franchisee will not "recruit or hire any person then employed, or who was
8 employed in the immediately preceding twelve (12) months, as a manager or assistant manager
9 at an EDIBLE ARRANGEMENTS® Business operated by EA, or any of its affiliates, or a
10 franchisee without obtaining the employer's prior written permission." The no-poaching
11 provision restricted franchisees from hiring certain employees from a competing franchisee
12 and from EA's corporate-owned or affiliate-owned stores as well, absent the receipt of prior
13 written permission. EA had removed the no-poaching provision from its form franchise
14 agreement in August, 2018, prior to the receipt of notice of an investigation from the Attorney
15 General.

16 2.3 The Attorney General asserts that the foregoing conduct constitutes a contract,
17 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,
18 RCW 19.86.030.

19 2.4 EA expressly denies the conduct described in above constitutes a contract,
20 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,
21 RCW 19.86.030, or any other law, and expressly deny they have engaged in conduct that
22 constitutes a contract, combination, or conspiracy in restraint of trade, and EA notes that it had
23 already discontinued use of the no-poaching provision prior to the receipt of the Attorney
24 General's Civil Investigative Demand in this matter. EA enters into this AOD to avoid
25 protracted and expensive litigation. Pursuant to RCW 19.86.100, neither this AOD nor its
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1 terms shall be construed as an admission of law, fact, liability, misconduct, or wrongdoing on
2 the part of EA.

3 **III. ASSURANCE OF DISCONTINUANCE**

4 3.1 Subject to paragraph 2.4 above, EA agrees:

5 3.1.1. It will no longer include the purported no-poaching provision or any
6 similar no-poaching provisions in any of its future franchise agreements;

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

12 3.1.3. It will notify all of its franchisees of the entry of this AOD and provide
13 them a copy by way of its online internal systems.

14 3.1.4. It will notify the Attorney General's Office if a member of management
15 receives actual notice of any effort by a franchisee to enforce any existing no-poaching
16 provision.

17 3.2 Within 60 days of entry of this AOD, EA will have endeavored to amend all
18 existing franchise agreements with entities in Washington to remove any no-poaching
19 provisions in its existing franchise agreements. If any franchise owner is unwilling to consent
20 to amendment or otherwise fails to respond to EA's efforts to change its franchise agreement
21 prior to the 60-day deadline, EA shall provide the name and address of such franchisee and the
22 name and address of the franchisee's registered agent to the Office of the Attorney General.

23 3.3 As they come up for renewal, during the ordinary course of business, EA will
24 enter into a new conforming form of franchise agreement on a nationwide basis to remove any
25 no-poach provision.
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1 3.4 Within 30 days of the conclusion of the time periods referenced in this section
2 III, EA will submit a declaration to the Attorney General's Office signed under penalty of
3 perjury stating that the provisions of Section 3.2 to this agreement have been satisfied.

4 IV. ADDITIONAL PROVISIONS

5 4.1 This AOD shall be binding on and applies to EA.

6 4.2 This is a voluntary agreement and it shall not be construed as an admission of
7 law, fact, liability, misconduct, or wrongdoing on the part of EA. By entering into this AOD,
8 EA neither agrees nor concedes that the claims, allegations and/or causes of action which have
9 or could have been asserted by the Attorney General have merit and EA expressly deny any
10 such claims, allegations, and/or causes of action. However, proof of failure to comply with
11 this AOD shall be *prima facie* evidence of a violation of RCW 19.86.030, thereby placing upon
12 the violator the burden of defending against imposition by the Court of injunctions, restitution,
13 costs and reasonable attorney's fees, and civil penalties of up to \$2,000.00 per violation.

14 4.3 EA will not, nor will it authorize any of its officers, employees, representatives, or
15 agents to state or otherwise contend that the State of Washington or the Attorney General has
16 approved of, or has otherwise sanctioned, the conduct described in Paragraph 2.2 with respect to
17 the no-poaching provision in certain of EA's prior franchise agreements.

18 4.4 This AOD resolves all issues raised by the State of Washington and the Antitrust
19 Division of the Attorney General's Office under the Consumer Protection Act and any other
20 related statutes pertaining to the acts set forth in paragraph 2.1 – 2.3 above that may have occurred
21 before the date of entry of this AOD and concludes the investigation thereof. Subject to
22 paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's
23 Office shall not file suit or take any further investigative or enforcement action with respect to the
24 acts set forth above that occurred before the date of entry of this AOD.

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APPROVED ON this ____ day of _____, 2018.

JUDGE/COURT COMMISSIONER

Presented by:

ROBERT W. FERGUSON
Attorney General

RAHUL RAO, WSBA No. 53375
Assistant Attorney General
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Agreed to and approved for entry by:

DLA PIPER LLP (US)

Anthony Todaro, WSBA No. 30391
Attorney for Edible Arrangements, LLC

EDIBLE ARRANGEMENTS, LLC

Michael Rotondo
CEO Edible Arrangements, LLC