

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO
POACHING PROVISIONS

Massage Envy Franchising, LLC

NO. **18-2-55222-2 SEA**

MESSAGE ENVY FRANCHISING,
LLC ASSURANCE OF
DISCONTINUANCE

The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General (the "Attorney General"), and Rahul Rao, Assistant Attorney General, files this Assurance of Discontinuance ("AOD") pursuant to RCW 19.86.100.

I. PARTIES

1.1 In September 2018, the Attorney General initiated an investigation into Massage Envy Franchising, LLC ("MEF") relating to certain provisions in its franchise agreement.

1.2 MEF is a Delaware limited liability corporation with its principal offices or place of business in Scottsdale, Arizona. MEF is a franchisor, and its franchisee operated locations are in the business of providing massage and skin care services.

1.3 For purposes of this AOD, MEF 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 **II. INVESTIGATION**

2 2.1 There are 29 MEF clinics located in the State of Washington as of the date
3 hereof. All of these MEF clinics are independently owned and operated by franchisees.

4 2.2 The franchise agreements entered into between MEF and its franchisees provide
5 that franchisees subject to such agreements, as well as their shareholders, partners, and
6 immediate family members, will not “employ or seek to employ any person who is, or within
7 six (6) months of such employment or solicitation was, our employee, an employee of, our
8 affiliates or our or their franchisees or licensees, or otherwise directly or indirectly induce that
9 person to leave such employment, without obtaining our or the employer's prior written
10 permission.” (The “No-Hire/No-Solicitation Provision”).

11 2.3 The Attorney General asserts that the foregoing conduct of MEF and its
12 franchisees constitutes a contract, combination, or conspiracy in restraint of trade in violation
13 of the Consumer Protection Act, RCW 19.86.030.

14 2.4 MEF and its current and former franchisees expressly deny that the conduct
15 described above constitutes a contract, combination, or conspiracy in restraint of trade in
16 violation of the Consumer Protection Act, RCW 19.86.030, or any other law or regulation, and
17 expressly deny they have engaged in conduct that constitutes a contract, combination, or
18 conspiracy in restraint of trade, or violates any other law or regulation. MEF enters into this
19 AOD to avoid protracted and expensive litigation. Pursuant to RCW 19.86.100, neither this
20 AOD nor its terms shall be construed as an admission of law, fact, liability, misconduct, or
21 wrongdoing on the part of MEF or any of its current or former franchisees.

22 **III. ASSURANCE OF DISCONTINUANCE**

23 3.1 Subject to Paragraph 2.4 above, MEF agrees:

24 3.1.1. It will no longer include the No-Hire/No-Solicitation Provision in any of
25 its franchise agreements in the United States signed after the date hereof.
26

1 3.1.2. It will not enforce the No-Hire/No-Solicitation Provision in any of its
2 existing franchise agreements in the United States, and will not seek to intervene in any action
3 brought by the Attorney General's Office against a current franchisee in Washington to defend
4 an existing No-Hire/No-Solicitation Provision, provided such action is brought in accordance
5 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, MEF
9 becomes aware of a franchisee with a center located in the State of Washington attempting to
10 enforce the No-Hire/No-Solicitation Provision, and MEF is unable to persuade such franchisee
11 to desist from enforcing or attempting to enforce such provision, MEF will notify the Attorney
12 General.

13 3.2 Within 21 days of entry of this AOD, MEF will send a letter to all of its current
14 franchisees with a center located in the State of Washington, stating that the Attorney General
15 has requested that the existing No-Hire/No-Solicitation Provision be removed from existing
16 franchise agreements. The letter that MEF will send to its current franchisees in the State of
17 Washington, to the extent the franchisee has a No-Hire/No-Solicitation Provision in its
18 franchise agreement, will be substantially in the form of the letter attached hereto as Exhibit A.
19 That letter will enclose the proposed amendment that MEF is requesting that each of its
20 franchisees in the State of Washington agree to, which amendment will remove the No-
21 Hire/No-Solicitation Provision. The proposed amendment that will be included with each
22 letter will be substantially in the form of 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, MEF will respond promptly to any inquiries
25 from such franchisees regarding the request to amend the terms of the franchise agreement and
26 will encourage its current franchisees in the State of Washington to sign the proposed

1 entities, or other entities through which MEF may now or hereafter act with respect to the
2 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 MEF or any of its current or
5 former franchisees. MEF and its current and former franchisees neither agree nor concede that
6 the claims, allegations and/or causes of action which have or could have been asserted by the
7 Attorney General have merit and MEF and its current and former franchisees expressly deny
8 any such claims, allegations, and/or causes of action. However, proof of failure to comply
9 with this AOD shall be *prima facie* evidence of a violation of RCW 19.86.030, thereby placing
10 upon the violator the burden of defending against imposition by the Court of injunctions,
11 restitution, costs and reasonable attorney's fees, and civil penalties of up to \$2,000.00 per
12 violation.
13
14

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

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 of MEF and its current and former franchisees as set forth in
22 Paragraph 2.1 – 2.3 above that may have occurred before the date of entry of this AOD, or that
23 occur between the date of the entry of this AOD and the conclusion of the 120 day period
24 identified in Paragraph 3.3 above, and concludes the investigation thereof. Subject to Paragraph
25 4.2, the State of Washington and the Antitrust Division of the Attorney General's Office shall not
26

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

14 APPROVED ON this _____ day of _____, 2018.
15
16

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

1 Presented by:

2 ROBERT W. FERGUSON
3 Attorney General

4 
5 RAHUL RAO, WSBA #53375
6 Assistant Attorney General
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 MASSAGE ENVY FRANCHISING, LLC

14 
15 Angelo J. Calfo, WSBA #27079
16 Damon C. Elder, WSBA #46754
17 CALFO EAKES & OSTROVSKY, PLLC
18 1301 Second Avenue, Suite 2800
19 Seattle, WA 98101

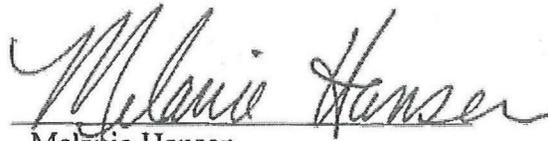
20 —and—

21 Robert A. Atkins
22 Adam J. Bernstein
23 PAUL, WEISS, RIFKIND, WHARTON
24 & GARRISON, LLP
25 1285 Avenue of the Americas
26 New York, NY 10019

—and—

Kenneth A. Gallo
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, LLP
2001 K Street, NW
Washington, DC 20006

Attorneys for Massage Envy Franchising, LLC



Melanie Hansen
General Counsel

Massage Envy Franchising, LLC

EXHIBIT A

Form Letter to Massage Envy Franchisees in the State of Washington

Subject: A message from Melanie Hansen regarding “no poaching” clauses

Dear [Franchisee Name]

In September 2018, Massage Envy Franchising, LLC (“Massage Envy”) 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 its 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 several industries. We have cooperated fully with the investigation.

Without admitting that Massage Envy 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 Massage Envy 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 Massage Envy will not enforce any such provisions in any of its existing franchise agreements or area development agreements in the United States.

We believe the Massage Envy franchise system’s interests are best served by resolving the investigation quickly and cooperatively on these terms, and by avoiding the uncertainty and cost of protracted litigation.

Massage Envy’s agreement with the Attorney General’s Office also includes a requirement that it request, from franchisees with locations in the State of Washington containing “no poaching” clauses, that they agree to amend their existing franchise agreements to remove the “no poaching” clauses. Enclosed for your signature is an amendment to your franchise agreement(s) with Massage Envy 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(s), up to and including the date you sign the amendment(s). Please sign and return the amendment(s) to me as soon as possible. If you decide not to sign the enclosed amendment(s), 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 mhansen@massageenvy.com. If you receive any media inquiries regarding this matter, please refer them to me.

Sincerely,

Melanie Hansen
General Counsel
Massage Envy Franchising, LLC

EXHIBIT B

**AMENDMENT
TO
MESSAGE ENVY FRANCHISE AGREEMENT(S)**

The Franchise Agreement(s) for the Massage Envy franchised locations in the State of Washington listed on Exhibit A hereto between Massage Envy Franchising, LLC ("Franchisor") and the undersigned franchisee ("Franchisee") are hereby amended in accordance with the following terms.

1. Background. Franchisor and Franchisee are parties to the Franchise Agreement(s) listed on Exhibit A hereto and incorporated herein by reference (as hereby amended, the "Franchise Agreement(s)"), and Franchisee operates a franchised outlet in the State of Washington, under each listed Franchise Agreement. Franchisor has determined that it is in the best interests of the franchise system to not enforce Section 7(4) of the Franchise Agreement(s). The purpose of this Amendment to the Franchise 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 Franchise Agreement(s).

2. Modification of Terms. As of the Effective Date (defined below) of this Amendment, Franchisee and Franchisor agree that Section 7(4) is hereby deleted from the Franchise Agreement(s) 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, the Franchise Agreement(s). If there is an inconsistency between this Amendment and the Franchise Agreement(s), 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").

MESSAGE ENVY FRANCHISING, LLC

[FRANCHISEE'S NAME]

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____