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7 **STATE OF WASHINGTON**  
8 **KING COUNTY SUPERIOR COURT**

9 IN RE: FRANCHISE NO POACHING  
10 PROVISIONS

11 (MATTRESS DEPOT USA, INC.)

NO. 19-2-24809-2

MATTRESS DEPOT USA, INC.  
ASSURANCE OF  
DISCONTINUANCE

12  
13 The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney  
14 General, and Rahul Rao, Assistant Attorney General, files this Assurance of Discontinuance (AOD)  
15 under RCW 19.86.100.

16 **1.1. PARTIES**

17 1.2. In August 2019, the Attorney General initiated an investigation into Mattress  
18 Depot USA, Inc. relating to its hiring practices.

19 1.3. Mattress Depot USA, Inc. is a Washington State corporation with its principal  
20 office or place of business in Bellevue, WA. Mattress Depot USA, Inc. is in the business of  
21 selling a large selection of mattresses and bedding products.

22 1.4. For the purposes of this AOD, Mattress Depot USA, Inc. includes its directors,  
23 officers, managers, agents acting within the scope of their agency, and employees as well as its  
24 successor and assigns, controlled subsidiaries, divisions, groups, affiliates, partnerships, and  
25 joint ventures.

1 II. INVESTIGATION

2 2.1. Mattress Depot USA, Inc. has 31 stores in Washington. 4 of these stores are  
3 owned and operated by franchisees and 27 are owned and operated by Mattress Depot Inc., an  
4 affiliate of Mattress Depot USA, Inc.

5 2.2. For years, Mattress Depot USA, Inc. has included language in its franchise  
6 agreements that restricted a franchisee's ability to solicit or hire workers from another Mattress  
7 Depot USA, Inc. (no-poaching provision). Specifically, the standard Mattress Depot USA, Inc.  
8 franchise agreement contained a "No Pirating of Personnel" clause stating:

9 During the term of this Agreement and for a period of two (2) years following  
10 Termination or Nonrenewal of this Agreement for any reason whatsoever,  
11 Franchisee shall not (a) induce, or attempt to induce any employee of Franchisor,  
12 an Affiliate or of any other franchisee to leave their current employer; (b) without  
13 the prior written approval of Franchisor (which may be conditioned upon the prior  
14 written approval of another franchisee and other proper conditions) hire or associate  
15 or offer to hire or associate any employee of Franchisor, an Affiliate, or of any other  
16 franchisee; or (c) without the prior approval of Franchisor (which may be  
17 conditioned upon the prior written approval of another franchisee and other proper  
18 conditions) hire or associate or offer to hire or associate any former employee of  
19 Franchisor, an Affiliate, or of any other franchisee, who has, voluntarily or  
20 otherwise terminated his or her relationship with Franchisor, an Affiliate, or any  
21 other franchisee during the prior eighteen (18) calendar months. The terms of this  
22 paragraph shall survive termination or nonrenewal of this Agreement for any  
23 reason. Any waivers of this paragraph must be in writing and signed by the  
24 Franchisor.

25 The No Pirating of Personnel clause is a no-poaching provision <sup>that</sup> restricted franchisees from hiring  
26 both employees from a competing franchisee and from Mattress Depot USA, Inc.'s corporate-  
owned stores.

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. Mattress Depot USA, Inc. expressly denies the conduct described above  
24 constitutes a contract, combination, or conspiracy in restraint of trade in violation of the  
25 Consumer Protection Act, RCW 19.86.030, or any other law, and expressly denies it has engaged  
26 in conduct that constitutes a contract, combination, or conspiracy in restraint of trade. Mattress

1 Depot USA, Inc. enters into this AOD to avoid protracted and expensive litigation. Pursuant to  
2 RCW 19.86.100, neither this AOD nor its terms shall be construed as an admission of law, fact,  
3 liability, misconduct, or wrongdoing on the part of Mattress Depot USA, Inc.

### 4 III. ASSURANCE OF DISCONTINUANCE

5 3.1. Subject to paragraph 2.4 above, Mattress Depot USA, Inc. agrees:

6 3.1.1 It will no longer include no-poach provisions in any of its future franchise  
7 agreements;

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

12 3.1.3 It will notify all of its franchisees of the entry of this agreement with the  
13 State, and provide them a copy of the AOD upon request;

14 3.1.4 It will notify the Attorney General's Office if it learns of any effort by a  
15 franchisee in Washington to enforce any existing no-poach provision.

16 3.2. Within 60 days of entry of this AOD, Mattress Depot USA, Inc. will exercise all  
17 reasonable commercial efforts to amend all existing franchise agreements with entities in  
18 Washington to remove any no-poaching provisions in its existing franchise agreements. Mattress  
19 Depot USA, Inc. is under no obligation to offer any franchisee any monetary or non-monetary  
20 consideration to induce them to accept the proposed amendment of the franchise, and it shall be  
21 under no obligation to take any coercive action against a franchisee that may refuse or decline  
22 to agree to any amendment of its franchise agreement. If any franchise owner is unwilling to  
23 consent to the change to its franchise agreement, prior to the 60-day deadline, Mattress Depot  
24 USA, Inc. shall provide the name and address of the resisting franchisee and the name and  
25 address of the franchisee's registered agent to the Office of the Attorney General.

1 3.3. As they come up for either renewal or renegotiation during the ordinary course  
2 of business, Mattress Depot USA, Inc. will amend all of its existing franchise agreements on a  
3 nationwide basis to remove any no-poach provision.

4 3.4. Within 30 days of the conclusion of the time periods referenced in this section  
5 III, Mattress Depot USA, Inc. will submit a declaration to the Attorney General's Office signed  
6 under penalty of perjury stating that all provisions of this agreement have been satisfied.

#### 7 IV. ADDITIONAL PROVISIONS

8 4.1. This AOD is binding on, and applies to Mattress Depot USA, Inc., including each  
9 of its respective directors, officers, managers, agents acting within the scope of their agency, and  
10 employees, as well as their respective successors and assigns, controlled subsidiaries, divisions,  
11 groups, affiliates, partnerships, and joint ventures, or other entities through which Mattress  
12 Depot USA, Inc. may now or hereafter act with respect to the conduct alleged in this AOD.

13 4.2. This is a voluntary agreement and it shall not be construed as an admission of  
14 law, fact, liability, misconduct, or wrongdoing on the part of Mattress Depot USA, Inc.. By  
15 entering into this AOD, Mattress Depot USA, Inc. neither agrees nor concedes that the claims,  
16 allegations and/or causes of action which have or could have been asserted by the Attorney  
17 General have merit and Mattress Depot USA, Inc. expressly denies any such claims, allegations,  
18 and/or causes of action. However, proof of failure to comply with this AOD shall be *prima facie*  
19 evidence of a violation of RCW 19.86.030, thereby placing upon the violator the burden of  
20 defending against imposition by the Court of injunctions, restitution, costs and reasonable  
21 attorney's fees, and appropriate civil penalties under the Consumer Protection Act.

22 4.3. Mattress Depot USA, Inc. will not, nor will it authorize any of its officers,  
23 employees, representatives, or agents to state or otherwise contend that the State of Washington  
24 or the Attorney General has approved of, or has otherwise sanctioned, the conduct described in  
25 Paragraph 2.2 with respect to the No-Poach Provision in Mattress Depot USA, Inc.'s franchise  
26 agreement.

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

APPROVED ON this \_\_\_\_\_ day of \_\_\_\_\_, 2019.

\_\_\_\_\_  
JUDGE/COURT COMMISSIONER

1 Presented by:

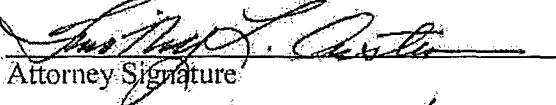
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12 eric.newman@atg.wa.gov

13 *Attorneys for State of Washington*

14 Agreed to and approved for entry by:  
15 Mattress Depot USA, Inc.

16   
17 Attorney Signature

18 Print Name: Timothy L. Austin

19 WSBA No.: 2939

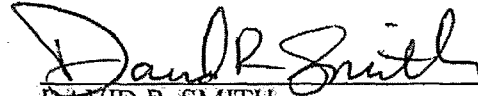
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25 

26 DAVID R. SMITH  
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