

EXP07

FILED  
KING COUNTY, WASHINGTON

AUG 20 2018

SUPERIOR COURT OF WASHINGTON . . . SUPERIOR COURT CLERK,  
KING COUNTY SUPERIOR COURT

No.

**18-2-20763-1SEA**

IN RE: FRANCHISE NO POACHING  
PROVISIONS

PANERA, LLC  
ASSURANCE OF DISCONTINUANCE

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

### I. PARTIES

1.1 In January 2018, the Attorney General initiated an investigation into Panera, LLC ("Panera") relating to certain provisions in its franchise agreement.

1.2 Panera is a Delaware limited liability company with its principal place of business in St. Louis, Missouri. Panera owns, operates and franchises Panera Bread® bakery-cafes, which offer to the general public a variety of food products based primarily on its artisan baked bread.

1.3 For purposes of this AOD, Panera shall include its directors, officers, managers, agents acting within the scope of their authority, and employees as well as its successors and assigns, controlled subsidiaries, affiliates and predecessor franchisor entities.

### II. INVESTIGATION

2.1 There are thirty-two (32) Panera Bread bakery cafes located in the State of Washington as of the date hereof. All of these bakery-cafes, except four (4) owned by Panera, are independently owned and operated by franchisees.

2.2 Since 2013, the franchise agreements entered into between Panera and its franchisees have provided, in part, that franchisees subject to such agreements may not solicit employees of Panera or employees of other Panera franchisees to terminate or reduce their

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DISCONTINUANCE - 1

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1 employment with Panera or the other franchisees. Specifically, the franchise agreement stated  
2 that a franchisee "may not recruit or hire any person who is an employee of [Panera] or of  
3 Panera Bread bakery café operated by [Panera, Paner's Affiliates] or another franchisee of  
4 [Panera] without obtaining the employer's consent..." of similar language. (the "No-  
5 Solicitation Provision").

6         2.3 The Attorney General asserts that the foregoing conduct of Panera constitutes a  
7 contract, combination, or conspiracy in restraint of trade in violation of the Consumer  
8 Protection Act, RCW 19.86.030.

9         2.4 Panera expressly denies that the conduct described above constitutes a contract,  
10 combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act,  
11 RCW 19.86.030, or any other law or regulation, and expressly deny they have engaged in  
12 conduct that constitutes a contract, combination, or conspiracy in restraint of trade, or violates  
13 any other law or regulation. Panera enters into this AOD to avoid protracted and expensive  
14 litigation. Pursuant to RCW 19.86.100, neither this AOD nor its terms shall be construed as an  
15 admission of law, fact, liability, misconduct, or wrongdoing on the part of Panera or any of its  
16 current or former franchisees.

### 17                                 III. ASSURANCE OF DISCONTINUANCE

18         3.1 Subject to Paragraph 2.4 above, Panera agrees:

19                 3.1.1 It will not include the No-Solicitation Provision in any of its franchise  
20 agreements executed after the date hereof for Panera Bread bakery-cafes located in the United  
21 States.

22                 3.1.2 Panera will not enforce the No-Solicitation Provision in any of its  
23 existing franchise agreements for Panera Bread bakery-cafes located in the United States, and  
24 will not seek to intervene in any action brought by the Attorney General's Office against a  
25 current franchisee in the State of Washington to defend an existing No-Solicitation Provision,  
26

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ASSURANCE OF  
DISCONTINUANCE - 2

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1 provided such action is brought in accordance with, and consistent with, the provisions of this  
2 AOD.

3 3.1.3 Panera will notify all of its current franchisees for bakery-cafes located  
4 in the United States of the entry of this AOD and make a copy available to them.

5 3.1.4 If, after the 21-day period set forth in Paragraph 3.2 below, Panera  
6 becomes aware of a franchisee with a bakery-cafe located in the State of Washington  
7 attempting to enforce the No-Solicitation Provision, and Panera is unable to persuade such  
8 franchisee to desist from enforcing or attempting to enforce such provision, Panera will notify  
9 the Attorney General.

10 3.2 Within 21 days of entry of this AOD, Panera will send a letter to all of its  
11 current franchisees with bakery-cafes located in the State of Washington, stating that the  
12 Attorney General has requested that the existing No-Solicitation Provision be removed from  
13 existing franchise agreements. The letter that Panera will send to its current franchisees with  
14 bakery-cafes located in the State of Washington will be substantially in the form of the letter  
15 attached hereto as Exhibit A. That letter will enclose the proposed amendment that Panera is  
16 requesting that each of its franchisees with bakery-cafes located in the State of Washington  
17 agree to, which amendment will remove the No-Solicitation Provision. The proposed  
18 amendment that will be included with each letter will be substantially in the form of the  
19 amendment attached hereto as Exhibit B.

20 3.3 In addition to sending the letter to its current franchisees with bakery-cafes  
21 located in the State of Washington pursuant to Paragraph 3.2 above, Panera will respond  
22 promptly to any inquiries from such franchisees regarding the request to amend the terms of the  
23 franchise agreement and will encourage its current franchisees with bakery-cafes located in the  
24 State of Washington to sign the proposed amendment. However, for the avoidance of doubt,  
25 Panera is under no obligation to offer its franchisees any consideration—monetary or  
26 otherwise—in order to induce them to sign the proposed amendment, or take any adverse

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ASSURANCE OF  
DISCONTINUANCE - 3

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1 action against such franchisees if they refuse to do so. Within 120 days of entry of this AOD,  
2 Panera will provide copies of all executed amendments it has obtained with its current  
3 franchisees with bakery-cafes located in the State of Washington to the Attorney General's  
4 Office. A decision by a franchisee not to amend its franchise agreement, or not to do so within  
5 120 days of this AOD, shall not mean that Panera has not complied with its obligations under  
6 this AOD.

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

13 3.5 As they come up for renewal during the ordinary course of business, Panera will  
14 remove the No-Solicitation Provision from its existing franchise agreements for bakery-cafes  
15 located in the United States with its franchisees on a nationwide basis, unless expressly  
16 prohibited by law. In addition, Panera will not include the No-Solicitation Provision in any  
17 franchise agreement it signs for Panera Bread bakery-cafes located in the United States after  
18 the date of this AOD.

19 3.6 Within 30 days of the conclusion of the time periods referenced in paragraph  
20 3.3, Panera will submit a declaration to the Attorney General's Office signed under penalty of  
21 perjury stating whether all provisions of this agreement have been satisfied.

#### 22 IV. ADDITIONAL PROVISIONS

23 4.1 This AOD is binding on, and applies to Panera, including each of its respective  
24 directors, officers, managers, agents acting within the scope of their agency, and employees, as  
25 well as their respective successors and assigns, controlled subsidiaries, predecessor franchisor  
26

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1 entities, or other entities through which Panera 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 Panera. Panera neither agrees nor  
5 concedes that the claims, allegations and/or causes of action which have or could have been  
6 asserted by the Attorney General have merit and Panera expressly denies any such claims,  
7 allegations, and/or causes of action. However, proof of failure to comply with this AOD shall  
8 be *prima facie* evidence of a violation of RCW 19.86.030, thereby placing upon the violator the  
9 burden of defending against imposition by the Court of injunctions, restitution, costs and  
10 reasonable attorney's fees, and civil penalties of up to \$2,000.00 per violation.

11 4.3 Panera will not, nor will it authorize any of its officers, employees,  
12 representatives, or agents to, state or otherwise contend that the State of Washington or the  
13 Attorney General has approved of, or has otherwise sanctioned, the conduct described in  
14 Paragraph 2.2 with respect to the No-Solicitation Provision in Panera franchise agreement.

15 4.4 This AOD resolves all issues raised by the State of Washington and the Antitrust  
16 Division of the Attorney General's Office under the Consumer Protection Act and any other  
17 related statutes pertaining to the acts of Panera and its current and former franchisees as set  
18 forth in Paragraph 2.1 — 2.3 above that may have occurred before the date of entry of this  
19 AOD, or that occur between the date of the entry of this AOD and the conclusion of the 120  
20 day period identified in Paragraph 3.3 above, and concludes the investigation thereof. Subject  
21 to Paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's  
22 Office shall not file suit or take any enforcement action or further investigative action with  
23 respect to the acts set forth above that occurred before the date of entry of this AOD, or that  
24 occurs between the date of the entry of this AOD and the conclusion of the 120 day period  
25 identified in Paragraph 3.3 above, against Panera or any of its current franchisees in the State of  
26 Washington that sign the proposed amendment described in Section III, any of its former

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DISCONTINUANCE - 5

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

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DISCONTINUANCE - 6

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APPROVED ON this \_\_\_ day of 8/20/18

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

HENRY H. JUDSON

AUG 20 2018

COURT COMMISSIONER

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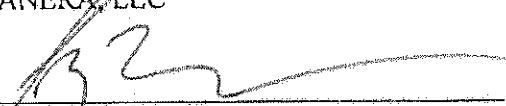
1 Presented by:

2 ROBERT W. FERGUSON  
Attorney General

3  WSBA: 38051  
FOR

4 ERIC S. NEWMAN, WSBA  
Assistant Attorney General  
5 Chief Litigation Counsel  
Antitrust Division  
6 Attorneys for State of Washington  
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8 Agreed to and approved for entry by:  
9 PANERA, LLC

10 

11 Anthony Todaro  
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# EXHIBIT A

Form Letter to Panera, LLC Franchisees in the State of Washington

Dear [Franchisee Name]

In February 2018, Panera received a Civil Investigative Demand from the Attorney General's Office of the State of Washington seeking information regarding whether any provisions in our franchise agreements 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.

Following significant negotiations and without admitting that Panera 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. We believe that both Panera's interests and the interests of our franchisees are best served by resolving the investigation quickly and cooperatively on the terms outlined in the agreement and by avoiding the uncertainty and cost of litigation. The agreement with the Attorney General's Office provides that Panera will, among other things, no longer include in any U.S. franchise agreement or renewal any provision that restrict the hiring or solicitation of employees. The agreement also provides that Panera will not enforce any such provisions in any of our existing franchise agreements for Panera Bread® bakery-cafes located in the U.S.

Our agreement with the Attorney General's Office also includes a requirement that we request all franchisees that operate franchises in the State of Washington to execute an amendment of their existing franchise agreements to remove the "no poaching" provisions. Enclosed for your signature is an amendment to your franchise agreement(s) with Panera to satisfy that requirement. To the extent that you agree to this amendment to your franchise agreement, the Attorney General has committed not to 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. By executing the amendment, you are not admitting any liability, fault or wrongdoing. Please review this amendment with your legal counsel. If acceptable, 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 me at [e-mail of appropriate person]

If you receive any media inquiries regarding this matter, please refer them to [e-mail of appropriate person]

We appreciate your prompt attention to this matter.

[SIGNATURE BLOCK FOR APPROPRIATE PERSON]

# EXHIBIT B

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**AMENDMENT**  
**PANERA, LLC FRANCHISE AGREEMENT**

The Panera, LLC ("Panera") Franchise Agreement(s) between Panera ("We") and the undersigned franchisee ("You") listed in Exhibit A hereto (as amended, the "Franchise Agreement(s)") shall be amended in accordance with the following terms.

1. Background. We and you are parties to each Franchise Agreement and you operate one or more franchised outlets in the State of Washington under the License Agreement(s). We have determined that it is in the best interests of the franchise system to not enforce certain portions of Section 9.07 described below and in Appendix A attached hereto. The purpose of this Amendment to your 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, You and We agree that certain portions of Section 9.07 are hereby deleted from each Franchise Agreement, as shown in Appendix A attached hereto, and are 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 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 of \_\_\_\_\_, 2018 (the "Effective Date").

PANERA, LLC

[FRANCHISEE'S NAME]

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## Appendix A

### Portions of Section 9.07 being deleted:

#### Pre-March 2018 Version

You may not recruit or hire any person who is an employee of ours or of any Panera Bread Baker-Cafe operated by us, our Affiliates or another franchisee of ours without obtaining the employer's consent, which consent may be withheld for any reason. Likewise, we may not recruit or hire any person who is an employee of yours or your Affiliates without obtaining the employer's consent, which consent may be withheld for any reason.

#### Post-March 2018 Version

You may not recruit or hire any person who is a General Manager level or above, or similarly situated support center executive, of ours or of any Panera Bread Bakery-Cafe operated by us, our Affiliates or another franchisee of ours without obtaining the employer's consent, which consent may be withheld for any reason. Likewise, we may not recruit or hire any person who is a General Manager level or above, or similarly situated support center executive, of yours or your Affiliates without obtaining the employer's consent, which consent may be withheld for any reason.