

NO. BV 403734

IN THE MATTER OF:

STATE OF TEXAS

AND

LADY OF AMERICA FRANCHISE CORP.

§  
§  
§  
§

IN THE DISTRICT COURT OF

TRAVIS COUNTY, TEXAS

200<sup>th</sup> JUDICIAL DISTRICT

FILED #6

2004 NOV -4 AM 9: 13

*Amelia Rodriguez, Secretary*  
DISTRICT CLERK  
TRAVIS COUNTY, TEXAS

ASSURANCE OF VOLUNTARY COMPLIANCE

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, THE STATE OF TEXAS ("State"), acting by and through Attorney General GREG ABBOTT, and LADY OF AMERICA FRANCHISE CORP. ("Respondent"), and respectfully submit for the Court's approval and filing in accordance with, TEX. BUS. & COM. CODE ANN. § 17.58 (Vernon 2002 and Supp. 2004), this Assurance of Voluntary Compliance for purposes of settlement of the cause of action.

**STIPULATIONS**

The parties, through their respective attorneys, make the following stipulations:

1. The Office of the Attorney General has asserted certain claims and causes of action under the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§ 17.41 *et seq.* (Vernon 2002 and Supp. 2004) ("DTPA") alleging that Respondent has:

- A. Misrepresented to prospective franchisees that the franchisee was not required to register its business as a health spa under the Texas Health Spa Act, TEX. OCC. CODE ANN. §§ 702.001 *et seq.* (Vernon 2004) ("Health Spa Act");

- B. Misrepresented to prospective franchisees that the franchisee was not required to post a bond or other security with the Texas Secretary of State, pursuant to the Health Spa Act; and
- C. Failed to clearly and conspicuously disclose all fees or potential costs a franchisee might incur.

2. Respondent denies the allegations of the Office of the Attorney General, and the parties agree and stipulate that this Assurance is being entered into for the sole purpose of compromising disputed claims without the necessity for protracted and expensive litigation and that neither this Assurance nor the payment of money by Respondent constitutes an admission by Respondent of any violation of the DTPA or otherwise.

3. The Office of the Attorney General and Respondent agree to and do not contest the entry of the Assurance.

4. The corporate signatory hereto is an officer of the Respondent; he is authorized to enter into this Assurance; and, he has read the Assurance and agrees to entry of same.

5. The Office of the Attorney General has jurisdiction in this matter under § 17.47 of the DTPA.

6. The venue of this cause is proper in Travis County.

7. This Assurance in no way affects any individual's (including any franchisee's) right of action under the DTPA.

#### **DEFINITIONS**

It is further stipulated that for purposes of this Assurance, the following definitions will apply:

8. "Respondent" means Lady of America Franchise Corporation, and includes its officers, agents, servants, employees, successors and assigns as well as any other persons acting on behalf of Respondent, who receives actual notice of this Assurance by personal service or otherwise.

9. "Clearly and conspicuously" means that the required disclosures, when made in writing, or via television or the Internet are presented in such a manner, given their size, color, contrast and proximity to adjoining information, as to be readily noticed and understood by the recipient. A disclosure is not clear and conspicuous if, among other things, it is ambiguous, it is obscured by the background against which it appears, or it is obscured by its location within a lengthy disclosure of non-material information. Clearly and conspicuously also means, in an oral presentation, that the information is presented in a manner that a consumer will hear and understand at a normal speed in the same tone and volume as the sales offer.

#### **TERMS OF COMPLIANCE**

10. Respondent hereby agrees and voluntarily assures the State that from the date of the signing of this AVC that Respondent shall not engage in the following conduct:

- A. Representing, directly or indirectly, to any franchisee or potential franchisee that Respondent's franchises in Texas are not "health spas" as defined by Health Spa Act;
- B. Representing, directly or indirectly, to any franchisee or potential franchisee that Respondent's franchises in Texas do not have to register as a health spa with the Texas Secretary of State;

- C. Representing, directly or indirectly, to any franchisee or potential franchisee that Respondent's franchises in Texas do not have to post a surety or other security with the Texas Secretary of State; and
- D. Representing, directly or indirectly, to any franchisee or potential franchisee that Respondent's franchises in Texas are "weight loss centers" exempt from the Texas Health Spa Act.

11. Further, Respondent hereby agrees and voluntarily assures the State that from the date of the signing of this AVC that Respondent shall, prior to a Texas franchise opening, clearly and conspicuously disclose to such franchisee the need to register as a health spa and post a surety or other security with the Texas Secretary of State; provided, however, that if the disclosures required by this paragraph are not made until after the franchisee has become legally bound by a franchise agreement, such franchisee shall have the right to cancel the franchise agreement (and receive a full refund under Section 12) once the disclosures are made.

12. Further, Respondent hereby agrees and voluntarily assures the State that from the date of the signing of this AVC that Respondent shall take all reasonable steps to help its current franchisees obtain a bond or other security, or to qualify for an exemption from the security requirements, as required by the Health Spa Act. If within sixty (60) days after receiving the notice from Respondent which is described in Section 13 below, a current franchisee, after a good faith effort and despite the efforts of Respondent, is unable to obtain the required security or exemption, such franchisee may require Respondent to cancel its franchise agreement and obtain a refund of its initial franchise fee paid, minus any net profit such franchisee has made over the life of the franchise; provided, however, that such franchisee has given Respondent written notice of its decision to cancel the franchise agreement during such sixty (60) day period.

Net profit shall mean all income earned by franchisee over the term of the franchise to date minus all reasonable expenses incurred in the operation of the business for which the franchisee can provide reasonable documentation. A franchisee's obligations to comply with the post termination provisions of the franchise agreement are not in any way affected by this AVC; provided, however, that a franchisee exercising the right to cancel their agreement created by this paragraph shall not be obligated to pay future royalties and advertising contributions to Respondent. If a franchisee requests a refund, Respondent can, at Respondent's sole discretion, choose to provide the required security or arrange for the required security to be provided rather than making the refund.

13. Further, Respondent hereby agrees and voluntarily assures the State that Respondent shall, within thirty (30) days of the day this Assurance is signed by the District Court, send a notice letter to all current Texas franchises, informing them of the registration and security requirements of the Health Spa Act, as well as Respondent's willingness to take all reasonable steps to assist franchises in obtaining a security.

#### **ATTORNEYS' FEES**

14. Respondent further agrees that it will pay to the State the sum of TEN THOUSAND DOLLARS AND NO CENTS (\$10,000.00) which shall be paid to the State of Texas as reimbursement of the State's reasonable attorneys' fees and investigative costs. Respondent shall make such payment by cashier's check or certified money order which shall bear the Attorney General case number 041911405 on its face, and shall be delivered to the Office of the Attorney General, Consumer Protection Division, 300 West 15<sup>th</sup> Street, William P. Clements Building, 9<sup>th</sup> Floor, Austin, Texas 78701. Receipt of this amount at the time this AVC is signed by the Court is hereby acknowledged by the State of Texas.

## MISCELLANEOUS

15. Respondent agrees that it shall not represent, directly or by implication, that either this Court or the Attorney General, has approved any of Respondent's business practices.

16. This Assurance shall be governed by § 17.58 of the DTPA, and shall remain in effect until rescinded by agreement of the parties or voided by a Court.

17. This Assurance shall be binding upon Respondent and its successors and assigns. If Respondent merges with any other business entities or sells, assigns, or otherwise transfers substantially all of its assets, Respondent shall provide reasonable prior notice to the surviving corporation or the purchaser, assignee, or transferee of this Assurance and its binding effect upon the surviving corporation, purchaser, assignee, or transferee.

18. It is further understood that, pursuant to § 17.58 of the DTPA, unless this Assurance is rescinded by agreement of the parties or voided by a Court for good cause, subsequent failure to comply with the terms of this Assurance is *prima facie* evidence of a violation of the DTPA.

19. This Assurance shall be deemed in effect from the day it is approved by the District Court. To the extent that the provisions of this Assurance conflict with any Texas, local, or federal law which now exists, or is later enacted or amended, such law and not this Assurance shall apply only to the extent such conflict exists. For the purposes of this Assurance, a conflict exists if conduct prohibited by this Assurance is required by such Texas, local, or federal law, or if conduct required by this Assurance is prohibited by such Texas, local, or federal law.

20. This Assurance constitutes the full and final resolution between the Attorney General and Lady of America Franchise Corp., its agents, employees, and directors relating to

any of Respondent's representations to Texas franchises regarding requirements of the Health Spa Act, up to and including the date this Assurance is signed by the Court.

21. All relief not granted herein is hereby denied.

AGREED this 12 day of October, 2004.

GREG ABBOTT  
Attorney General of Texas

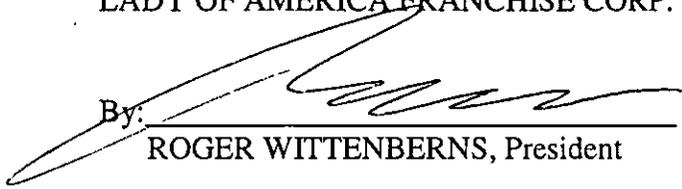
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LADY OF AMERICA FRANCHISE CORP.

By:   
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ROGER WITTENBERNS, President

  
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