

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

ROCHE BROS. INC.,

Defendant.

CIVIL ACTION NO. _____

ASSURANCE OF DISCONTINUANCE
PURSUANT TO GENERAL LAWS CHAPTER 93A, SECTION 5

I. INTRODUCTION

The Commonwealth of Massachusetts (“Commonwealth”), through its Attorney General, Andrea Joy Campbell, pursuant to her authority under G.L. c. 93A, investigated Roche Bros. Inc. (“Roche Bros.”) based on allegations of unfair or deceptive practices related to its loss prevention practices, including alleged racial or ethnic profiling, at Roche Bros.’ store location at 8 Summer Street, Boston, Massachusetts (“Roche Bros. Downtown Crossing”).

In lieu of litigation, the Attorney General agrees to accept this Assurance of Discontinuance (“Assurance”) on the terms and conditions herein, pursuant to G.L. c. 93A, § 5. The Commonwealth and Roche Bros. voluntarily enter into this Assurance.

II. ALLEGED VIOLATIONS

Without limiting the scope of the alleged violations, the Commonwealth contends that the Downtown Crossing, Boston location of Roche Bros., a supermarket chain located in Massachusetts, violated G.L. c. 93A, § 2, and G.L. c. 272, § 98, through its engagement of a

security company whose personnel watched, followed, and stopped customers, resulting in perceived racial disparities in the treatment of customers at Roche Bros. Downtown Crossing.

Specifically, the Commonwealth alleges that Black customers in particular were disproportionately subjected to stops by third-party security personnel in the Roche Bros. Downtown Crossing location. The Commonwealth further alleges that some Black customers who were stopped were banned from later entering Roche Bros. Downtown Crossing—through third-party security officers’ use of “No Trespass” orders—at rates that were disproportionate to their percentage of the population, and disproportionate to their share of stops generally. The Commonwealth further alleges that Roche Bros. failed to exercise sufficient oversight over third-party security officers’ loss prevention activities, including by not providing regular anti-discrimination training to the third-party security officers or other employees, not sufficiently documenting incidents in which customers were wrongly stopped for suspected shoplifting, not sufficiently reviewing the incident reports it kept for racial disparities (including for at least some of the relevant time period not recording data that would allow it to conduct such review), and further failing to document and respond adequately to customer complaints of racial profiling.

Roche Bros. has cooperated fully with this investigation. Roche Bros. Downtown Crossing hereby agrees to enter into this Assurance in a spirit of cooperation and to resolve this matter without costly litigation. Roche Bros.’s willingness to enter into this Assurance shall not be construed as evidence of any liability or wrongdoing regarding any of the allegations in this Assurance.

III. ROCHE BROS.’ RESPONSE TO THE ALLEGED VIOLATIONS

Roche Bros. disputes the Attorney General’s claims, including the Attorney General’s interpretation of information supplied in this investigation and the conclusions it reached

concerning racially disparate treatment. Roche Bros. further contends that it contracted with a company that is in the business of providing security services to provide its Downtown Crossing location with security services, and that Roche Bros. properly relied on that company to carry out its work in a non-discriminatory fashion.

Roche Bros. denies that it violated any laws in connection with the security practices at Roche Bros. Downtown Crossing. Roche Bros. is a family-run grocery store that employs more than 3,414 employees across 20 locations in eastern Massachusetts. Roche Bros. is an inclusive, diverse, and community-oriented company that welcomes customers regardless of race or any other characteristic protected by law. Roche Bros. opened the Downtown Crossing store at 8 Summer Street in 2015. Roche Bros.'s primary business is not professional security services and at all relevant times Roche Bros. engaged a third-party company, Northeast Security ("NESI"), to manage security at the Downtown Crossing store. Roche Bros. engaged NESI largely because the Downtown Crossing store has a significant amount of theft. While Roche Bros. exercised general oversight over NESI's performance of its contract, NESI was responsible for every aspect of its service, including the day-to-day work performed by its security guards. Roche Bros. had no role in creating or enforcing NESI policies; conducting performance reviews of NESI personnel; hiring and firing decisions; disciplinary decisions; or promotions or demotions. If Roche Bros. had any reason to believe that NESI was targeting any specific groups based on their skin color or other protected characteristics – instead of based on reasonable suspicion of theft – it would have ended its relationship with the company immediately. Thus, Roche's position is that it should not be held accountable for the alleged acts of a third-party company and its employees.

Although Roche Bros. does not dispute the enforceability of this Assurance of Discontinuance, Roche Bros. also believes that the proper statutory framework for the AGO's allegations of discriminatory security practices is found in Chapter 272, Section 98 – the public accommodations statute – instead of Chapter 93A. Because Section 98 specifically governs the allegations made by the Attorney General's Office, Roche Bros. asserts it cannot be held liable for the alleged conduct under Chapter 93A.

Notwithstanding Roche Bros.' position with respect to the AGO's allegations, Roche Bros. has agreed to this Assurance of Discontinuance in the interests of strengthening its commitment to a fair, inclusive, and nondiscriminatory environment for customers and improving its practices with respect to the security practices at the Downtown Crossing store.

IV. PROHIBITIVE ASSURANCES

Roche Bros., together with its principals, agents, and employees, shall be prohibited and enjoined from engaging in conduct that violates G.L. c. 93A, § 2, and G.L. c. 272, § 98.

V. AFFIRMATIVE ASSURANCES

A. Outside Consultant

Within ninety (90) days from the date this Assurance is filed (hereinafter, the "Effective Date"), Roche Bros. shall engage an AGO-approved outside consultant (the "Consultant") who will be responsible for assisting Roche Bros. with a review of its security policies and practices as set forth below.

B. Anti-Discrimination Policy

Within ninety (90) days from the Effective Date, Roche Bros. shall adopt and distribute to all Roche Bros. Downtown Crossing employees and third-party security personnel a specific

policy explaining and prohibiting racial profiling, including a policy stating that discrimination against customers or other members of the public based on race or other protected characteristics is strictly prohibited, including in connection with security practices. Roche Bros. will work with the Consultant to create this policy. This policy will be subject to review and approval by the Commonwealth before it is published to Downtown Crossing employees and third-party security personnel. Roche Bros. will provide a copy of this policy to the Commonwealth within fourteen (14) days before it is published to employees and third-party security personnel. If the Commonwealth proposes any changes to the policy, the deadline to adopt and distribute the policy will be extended to seven (7) days after Roche Bros. and the Commonwealth agree on a final version.

C. Anti-Discrimination Training

1. Within ninety (90) days from the Effective Date, Roche Bros., with the assistance of the Consultant, shall develop and implement training for all Roche Bros. Downtown Crossing employees explaining the foregoing policy. Roche Bros. will implement the training for all new employees and require employees to undergo the training once every three years. Roche Bros. shall provide the relevant training materials for such training for review and recommendations by the Commonwealth.

2. Within ninety (90) days from the Effective Date, Roche Bros. will also implement anti-discrimination training to all current and future third-party security personnel who are staffed at Roche Bros. Downtown Crossing. Roche Bros. shall provide the relevant training materials for such training for review and recommendations by the Commonwealth.

D. Enhanced Investigation of and Resolution of Customer Complaints

Within ninety (90) days from the Effective Date, Roche Bros. will implement and enforce a policy for investigating complaints of discrimination or biased security practices. Roche Bros. shall (i) post a notice at Roche Bros. Downtown Crossing in a conspicuous place visible to customers explaining the legal prohibitions against racial profiling, including a summary of G.L. c. 272, § 98, and informing customers how to lodge a complaint; (ii) give any member of the public who makes a complaint of discrimination a copy of the notice; (iii) create a single point of contact for complaints (via email and phone) that will be monitored and reviewed by an employee or group of employees designated by Roche Bros. and/or Roche Bros.'s security contractor to investigate the matter; (iv) create a detailed internal protocol for investigating complaints that will conclude with a report with conclusions (and consultation with counsel where appropriate); and (v) take appropriate steps to address any problems as they arise, including if a finding is made that a stop was not justified or was otherwise discriminatory.

E. Enhanced Recordkeeping and Oversight by Roche Bros.

1. Within ninety (90) days from the Effective Date, Roche Bros. will implement and enforce a policy requiring detailed recordkeeping documenting every incident in which a customer or member of the public was apprehended for suspected theft activity. For the purposes of this Agreement, to “apprehend” refers to any situation in which a security official actually suspects a customer or member of the public of theft and actively surveils or makes contact with the person for the purpose of determining whether theft occurred. Documentation of these practices will be in the form of standardized incident reports and will include the apparent race or ethnicity of the person apprehended, if possible.

2. Within ninety (90) days from the Effective Date, Roche Bros. will create a Security Review Committee (“SRC”) consisting of Roche Bros. managerial employees who will monitor

and oversee security practices at the Roche Bros. Downtown Crossing store. The SRC will be trained by the Consultant on the requirements of the Public Accommodations statute, G.L. c. 272, § 98, and will exercise general oversight over the security procedures at the Roche Bros. Downtown Crossing store regardless of the security contractor engaged by Roche Bros. The SRC will conduct annual evaluations of any security contractor's performance of its duties under the contract between the two companies, including by (i) reviewing demographic data for all incident reports within the last calendar year, and (ii) investigating any unjustified security stops and any complaints of discrimination by customers or members of the public.

F. Revisions to No-Trespass Policy

Roche Bros. confirms and acknowledges that it has eliminated the use of pre-printed no-trespass letters at the Downtown Crossing store. As of the date of this Agreement, any no-trespass letters issued at the Downtown Crossing store shall be reviewed and signed by Roche Bros.' loss prevention manager and will state the basis for the notice being issued. In addition, within ninety (90) days of the Effective Date, Roche Bros. will develop and distribute to security personnel a written policy containing the criteria for issuing such no-trespass letters, which will be subject to review and approval by the Attorney General's Office.

G. Auditing and Reporting to the Commonwealth

For a period of three (3) years following the Effective Date, the Consultant will perform a biannual (*i.e.*, every six months) audit of Roche Bros. security practices and protocol, including

- (i) reviewing the demographic data for all incident reports within the last calendar year to evaluate whether security officers at Roche Bros. Downtown Crossing are subjecting customers of different races and/or ethnicities to different treatment as it relates to surveillance or apprehension for suspected shoplifting;

- (ii) examining whether Roche Bros. employees and security staff are being trained as described above; and
- (iii) reviewing all customer complaints alleging racial profiling or discrimination at Roche Bros. Downtown Crossing;

The Consultant will prepare a report (the "Consultant Report") that documents all of the Consultant's findings on the above for submission and review by the Commonwealth. The Consultant Report for each biannual period will be due to the Commonwealth by July 31 of the same year for the period January 1 to June 30, and January 31 of the following year for the period July 1 to December 31. If the deadline for the Consultant Report falls on a weekend or holiday, the report will be due on the following business day.

VI. PAYMENT

Roche Bros. agrees to make payments to the Commonwealth of Massachusetts as follows:

A. Within thirty (30) days of the date this Assurance is filed, Roche Bros. shall make a payment in the amount of FORTY THOUSAND dollars (\$40,000.00) to the Commonwealth. At her sole discretion, the Attorney General may use or distribute the payment in any amount, allocation or apportionment and for any purpose permitted by law, including but not limited to: (i) payments to or for consumers and for the facilitation of this Assurance, (ii) payments to the General Fund of the Commonwealth of Massachusetts, (iii) payments to the Local Consumer Aid Fund established pursuant to G. L. c. 12, § 11G, or (iv) for programs or initiatives in furtherance of the protection of the people of the Commonwealth.

Roche Bros. shall make the payment by certified bank check, or Attorney's IOLTA check, and deliver it to the Office of the Attorney General, One Ashburton Place, Boston,

Massachusetts 02108, Attention: Adam Cambier or by wire transfer. The Attorney General will provide wire instructions concurrent with the execution of this Assurance.

B. If Roche Bros. fails to comply with any of the terms in this Assurance, Roche Bros. shall make a second payment of SIXTY THOUSAND dollars (\$60,000.00) to the Commonwealth (the "Contingent Payment"). The Commonwealth will provide Roche Bros. with advance notice of any intention to trigger the Contingent Payment, after which Roche Bros. will have thirty (30) calendar days to either (a) provide the Commonwealth with a written statement either disputing its alleged failure to comply or showing substantial efforts to comply with the terms of this Assurance; or (b) cure its alleged failure to comply. If Roche Bros. cures its failure to comply within ten days, Roche Bros. will not be required to pay the Contingent Payment. If Roche Bros. disputes its alleged failure to comply or shows substantial efforts to comply, the Commonwealth will consider the written statement provided by Roche Bros. and notify Roche Bros. in writing whether it will continue seeking the Contingent Payment. If Roche Bros. agrees with the Commonwealth that the Contingent Payment is due, Roche Bros. shall make payment no later than thirty (30) days from the date the Commonwealth notifies Roche Bros. in writing that, notwithstanding Roche Bros' objections, the Contingent Payment must be paid (unless the parties agree in writing to extend the deadline). If Roche Bros. continues to dispute the Commonwealth's position that the Contingent Payment is due, the Commonwealth will have fifteen (15) business days to file a petition in Massachusetts Superior Court seeking injunctive and other relief.

VII. OTHER PROVISIONS

A. This Assurance contains the complete agreement between the parties. Neither of the parties has made any promises, representations, or warranties other than those set forth in this Assurance.

B. Defendants shall maintain, and shall not destroy or dispose of, any documents or electronically stored information (defined and used in Rule 31(a)(1) of the Massachusetts Rules of Civil Procedure) that relates to their compliance, or non-compliance, with this Assurance and shall produce the same to the Commonwealth upon request, unless such documents or information contains material protected by the attorney-client privilege.

C. This Assurance can be modified or supplemented only by a written document signed by all parties.

D. This Assurance shall be binding on Roche Bros., its agents, and anyone acting on their behalf.

E. Roche Bros. is entering into this Assurance without trial or adjudication of any issue of fact or law, and without any admission with respect to the Commonwealth's allegations set forth herein. Except for the purpose of enforcement of its terms by the Attorney General, no part of this Assurance shall constitute evidence against Roche Bros. with respect to any issue of law or fact. Except for the obligations of Roche Bros. that are expressly set forth in this Assurance, the Commonwealth releases Roche Bros. and its agents, owners, employees, subsidiaries and affiliated companies, the successors or assigns of any of the foregoing, and all persons in active concert or participation with Roche Bros., from any and all civil liability to the Commonwealth arising out of or relating to the AGO's investigation into Roche Bros.'s security practices up to and including the date this Assurance is filed. This Assurance represents the compromise of a disputed claim, and the Attorney General expressly acknowledges and agrees

that no part of this Assurance constitutes or may be offered, received, used, treated, or construed as an admission or evidence of any liability or wrongdoing by Roche Bros. in any proceeding.

F. This Assurance does not constitute an approval by the Attorney General of any of Roche Bros.'s business practices, and Roche Bros. shall make no representation or claim to the contrary.

G. This Assurance is not intended to impair any right of action that any person or entity might have against Roche Bros.

H. This Assurance shall be filed in the Superior Court of Suffolk County. By virtue of the provisions of G. L. c. 93A, § 5, any violation of the terms of this Assurance by Roche Bros. shall constitute *prima facie* evidence of a violation of G. L. c. 93A, § 2, in any civil action or proceeding commenced by the Attorney General.

I. Roche Bros. hereby accepts the terms and conditions of this Assurance and waives any right to challenge its specific terms and provisions in any action or proceeding, except to the extent that the Parties disagree about the interpretation of any term or provision of this Assurance. Roche Bros. may, however, challenge in any action or proceeding allegations that they have failed to adhere to the terms and provisions of this Assurance.

J. All deadlines set forth in this Assurance may be extended for good cause, and both Roche Bros. and the Commonwealth agree to cooperate in good faith regarding any extensions.

K. This Assurance shall become effective upon filing with the Superior Court.

L. The provisions of this Assurance are severable, and if any part of it is found to be unenforceable, the other paragraphs shall be fully enforceable.

ROCHE BROS., INC.

By: Kevin F. Barner

Dated: 9/29/2023

COMMONWEALTH OF MASSACHUSETTS

By: 

Dated: 9/22/2023