

1 PRESTON DuFAUCHARD  
California Corporations Commissioner  
2 ALAN S. WEINGER  
Deputy Commissioner  
3 MIRANDA LEKANDER (CA BAR NO. 210082)  
4 Senior Corporations Counsel  
Department of Corporations  
5 1515 K Street, Suite 200  
6 Sacramento, California 95814  
Telephone: (916) 322-8730  
7 Facsimile: (916) 445-6985

8 Attorneys for Complainant

10 BEFORE THE DEPARTMENT OF CORPORATIONS  
OF THE STATE OF CALIFORNIA

12 In the Matter of THE CALIFORNIA )  
CORPORATIONS COMMISSIONER, )

) Agency Case No.: 993-6250  
) OAH Case Number: 2010070378

14 Complainant, )

15 vs. )

16 BEVMAX FRANCHISING, LLC, )

17 Respondent. )

) AGREEMENT OF BEVMAX FRANCHISING,  
) LLC TO STIPULATE TO FINALITY OF  
) ORDER DENYING EFFECTIVENESS OF  
) FRANCHISE REGISTRATION  
) APPLICATION AND PAY ATTORNEYS'  
) FEES AND COSTS TO COMMISSIONER

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1 IT IS HEREBY STIPULATED BY AND AGREED BETWEEN RESPONDENT BEVMAX  
2 FRANCHISING, LLC (“BEVMAX”) AND PRESTON DUFAUCHARD, COMMISSIONER OF  
3 CORPORATIONS OF THE STATE OF CALIFORNIA (“COMMISSIONER”), AS FOLLOWS:  
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5 **RECITALS**

6 A. At all relevant times, BevMax Franchising, LLC (“BevMax”) was a Connecticut limited  
7 liability company operating its principle business at 17 Cedar Street, Stamford, Connecticut, 06902;

8 B. At all relevant times, John J. Todd (“Todd”) served as President of BevMax.

9 C. BevMax engaged in business activities relating to the franchising of a common plan or system  
10 for use by retail store operators, who sell an assortment of alcoholic and non-alcoholic beverages,  
11 tobacco products, lottery tickets, gourmet foods, and party goods, to promote sales by organizing and  
12 marketing their stores under the “BevMax” trademark;

13 D. On or about November 24, 2009, BevMax filed its initial Uniform Franchise Registration  
14 Application (“franchise registration application”) with the Commissioner, seeking to register its  
15 franchise enterprise in this State in compliance with the California Franchise Investment Law  
16 (California Corporations Code sections 31000 *et seq.*) (hereafter referred to as the “FIL”);

17 E. On or about May 11, 2010, the Commissioner issued against BevMax a Statement in Support  
18 of Stop Order Denying Effectiveness of Franchise Registration Application and Order Denying  
19 Effectiveness of Registration Application. A true and correct copy of the Statement in Support of  
20 Stop Order Denying Effectiveness of Franchise Registration Application and Order Denying  
21 Effectiveness of Registration Application is attached and hereby incorporated by reference as  
22 “Exhibit A” or the “Enforcement Action;”

24 F. On or about June 14, 2010, BevMax submitted to the Commissioner a Notice of Defense,  
25 requesting an administrative hearing; and, on June 16, 2010, BevMax informed the Commissioner in  
26 writing that it waived the provisions of Corporations Code section 31117 and consented to commence  
27 the hearing at a date later than the 15 business days contemplated thereunder;  
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1 G. On June 23, 2011, the United States Court of Appeals issued its decision in *Securities and*  
2 *Exchange Commission v. John J. Todd et al.*, No. 07-5098, (9th Cir. June 23, 2011), reversing the  
3 district court ruling setting aside a jury verdict finding that Todd violated federal antifraud provisions  
4 with respect to certain financial transactions and misrepresentations made to auditors in 2000 while  
5 serving as an executive officer for Gateway, Inc.

6 H. Without admitting or denying the charges alleged in the Commissioner’s Enforcement Action,  
7 BevMax seeks to resolve the concerns of the Commissioner and charges alleged in the Enforcement  
8 Action by entering into this Agreement;

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10 NOW WHEREFORE, in consideration of the foregoing, and the terms and conditions set  
11 forth herein, the Commissioner and BevMax (“the Parties”) agree as follows:

12 **TERMS AND CONDITIONS**

13 1. Purpose. The purpose of this Agreement is to resolve the concerns of the Commissioner and the  
14 charges alleged in the Enforcement Action in a manner that avoids the expense of a hearing and  
15 possible further court proceedings, is in the public interest, protects investors, and is consistent with  
16 the purposes, policies and provisions of the FIL.

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18 2. Waiver of Hearing Rights. Solely as set forth in the Enforcement Action, and as otherwise set  
19 forth in this Agreement, BevMax hereby waives the right to a hearing, and to any reconsideration,  
20 appeal, or other right to review which may be afforded pursuant to the FIL, the California  
21 Administrative Procedure Act, the California Code of Civil Procedure, or any other provision of law,  
22 and by waiving such rights, BevMax consents to the Agreement becoming final.

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24 3. Withdrawal with Prejudice of Request for Administrative Hearing. Effective immediately  
25 BevMax withdraws with prejudice any request previously submitted to the Commissioner for an  
26 administrative hearing on all pending actions referenced herein.  
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1 4. Consent to Finality of Order Denying Franchise Registration Application. The Parties agree that  
2 this Agreement shall have the effect of finalizing the Order Denying Effectiveness of Franchise  
3 Registration Application (“Order”). The Order shall become final upon the signing by all parties to  
4 this Agreement. The Order is a public record and shall remain posted on the Department of  
5 Corporation’s website together with a copy of this Agreement.

6 5. Future Franchise Applications. The Parties agree that BevMax shall not be eligible to file an  
7 application with the Commissioner for the registration of a franchise until one (1) year from the  
8 effective date of this Agreement, as defined in Paragraph 11. BevMax agrees that any application  
9 filed before one (1) year of the effective date of this Agreement on behalf of BevMax or any business  
10 entity, affiliate, subsidiary or successor controlled by BevMax shall be summarily denied pursuant to  
11 this Agreement. In the event that BevMax wishes to apply for franchise registration or pursue any  
12 other filing with the California Department of Corporations after one (1) year from the effective date  
13 of this Agreement, the current Enforcement Action may be considered as a factor in determining the  
14 approval of such registration or application in accordance with the provisions of the FIL, or any other  
15 applicable law.

16 6. Effect of Breach. The Commissioner hereby consents to this Agreement provided that all the  
17 conditions stipulated or expressed herein are met.

18 7. Future Actions by the Commissioner. No future enforcement action shall be brought by the  
19 Commissioner solely for any act(s) or omission(s) which are based upon the allegations set forth in  
20 the present Enforcement Action. BevMax acknowledges and agrees that the Agreement shall not be  
21 the exclusive remedy available to the Commissioner in pursuing future violations against BevMax or  
22 any business entity, affiliate, subsidiary or successor controlled by BevMax but may be sought and  
23 employed in addition to any other remedy available pursuant to the FIL.  
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1 8. Commissioner's Duties. BevMax acknowledges and agrees that nothing contained in this  
2 Agreement shall operate to limit the Commissioner's ability to assist any other agencies with any  
3 administrative, civil or criminal prosecution brought by any such agency against BevMax based upon  
4 any of the activities alleged in this matter or otherwise. BevMax further agrees that this Agreement  
5 shall not bind or otherwise prevent any other federal, state or county agency from the performance of  
6 its duties.  
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8 9. Settlement Agreement Coverage. The Parties hereby acknowledge and agree that this Agreement  
9 is intended to constitute a full, final and complete resolution of the Enforcement Action referenced  
10 above. BevMax understands and agrees that this Agreement pertains only to BevMax and is not  
11 intended by the Parties to address or resolve any of the enforcement actions taken by the  
12 Commissioner against any other party.  
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14 10. Commissioner's Attorneys' Fees and Expenses. BevMax agrees that this Agreement shall not go  
15 into effect unless and until the Commissioner receives a cashier's check from BevMax in the sum of  
16 FOUR THOUSAND DOLLARS (\$4,000) for reasonable attorneys' fees and investigative expenses  
17 incurred in the Department's investigation and litigation of the Enforcement Action. The check shall  
18 be made payable to the "California Department of Corporations" and must be sent via certified mail  
19 to: Miranda LeKander, Senior Corporations Counsel, Department of Corporations, Enforcement  
20 Division, 1515 K Street, Suite 200, Sacramento, California, 95814.  
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23 11. Effective Date. This Agreement shall not become effective until BevMax has tendered full  
24 payment of the Commissioner's attorney's fees and expenses pursuant to Paragraph 10 above, and the  
25 Agreement has been signed and delivered by all parties.  
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27 12. Full Integration. This Agreement, including the attached exhibits, is the final written expression  
28 and the complete and exclusive statement of all the agreements, conditions, promises,

1 representations, and covenants between the parties with respect to the subject matter hereof, and  
2 supersedes all prior or contemporaneous agreements, negotiations, representations, understandings,  
3 and discussions between and among the parties, their respective representatives, and any other person  
4 or entity. Each of the parties represents, warrants, and agrees that in executing this Agreement it has  
5 relied solely on the statements set forth herein and has placed no reliance on any statement,  
6 representation, or promise of any other party, or any other person or entity not expressly set forth  
7 herein, or upon the failure of any party or any other person or entity to make any statement,  
8 representation or disclosure of anything whatsoever. The parties have included this clause: (1) to  
9 preclude any claim that any party was in any way fraudulently induced to execute this Agreement;  
10 and (2) to preclude the introduction of parol evidence to vary, interpret, supplement, or contradict the  
11 terms of this Agreement.  
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14 13. No Presumption From Drafting. In that the parties have had the opportunity to draft, review and  
15 edit the language of this Agreement, no presumption for or against any party arising out of drafting  
16 all or any part of this Agreement, or the request or denial of any particular proposed provision in  
17 negotiations, will be applied in any action relating to, connected, to, or involving this Agreement.  
18 Accordingly, the parties waive the benefit of California Civil Code section 1654 and any successor or  
19 amended statute, providing that in cases of uncertainty, language of a contract should be interpreted  
20 most strongly against the party who caused the uncertainty to exist.  
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23 14. Counterparts. This Agreement may be executed in any number of counterparts by the parties and  
24 when each party has signed and delivered at least one such counterpart to the other party, each  
25 counterpart shall be deemed an original and taken together shall constitute one and the same  
26 Agreement.  
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28 15. Modifications and Qualified Integration. No amendment, change or modification of this

1 Agreement shall be valid or binding to any extent unless it is in writing and signed by all of the  
2 parties affected by it.

3 16. Headings and Governing Law. The headings to the paragraphs of this Agreement are inserted for  
4 convenience only and will not be deemed a part hereof or affect the construction or interpretation of the  
5 provisions hereof. This Agreement shall be construed and enforced in accordance with and governed  
6 by California law.

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8 17. Independent Legal Advice. Each of the parties represents, warrants, and agrees that it has  
9 received independent legal advice from an attorney with respect to the advisability of executing this  
10 Agreement.

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12 18. Authority for Settlement. Each party covenants that they possess all necessary capacity and  
13 authority to sign and enter into this Agreement. Each party warrants and represents that such party is  
14 fully entitled and duly authorized to enter into and deliver this Agreement. In particular, and without  
15 limiting the generality of the foregoing, each party warrants and represents that it is fully entitled to enter  
16 into the covenants, and undertake the obligations set forth herein.

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18 19. Public Record. BevMax acknowledges that this Agreement, and the attachments thereto, is a  
19 public record.

20 20. Voluntary Agreement. The parties each represent and acknowledge that he, she or it is executing  
21 this Agreement completely voluntarily and without any duress or undue influence of any kind from  
22 any source.

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24 21. Notices. Notice shall be provided to each party at the following addresses:

25 If to Respondent: Michael Berkhoff, Chief Executive Officer  
26 BevMax Franchising, LLC  
27 17 Cedar Street  
28 Stamford, Connecticut 06902

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If to the Commissioner: Miranda LeKander, Senior Corporations Counsel  
California Department of Corporations  
1515 K Street, Suite 200  
Sacramento, California 95814

IN WITNESS WHEREOF, the parties hereto have approved and executed this Agreement on  
the dates set forth opposite their respective signatures.

Dated: 7/14/11 PRESTON DuFAUCHARD  
California Corporations Commissioner

By: \_\_\_\_\_  
ALAN S. WEINGER  
Deputy Commissioner  
Enforcement Division

BEVMAX FRANCHISING, LLC

Dated: 7/1/2011 By: \_\_\_\_\_  
MICHAEL BERKHOFF  
Chief Executive Officer

Dated: 7/13/11 Approved as to form by: \_\_\_\_\_  
Jonathan Solish, Esq.  
Bryan Cave LLP  
Attorneys for Respondent BevMax Franchising, LLC