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3 ELLIOTT SUBSTITUTE FOR SB129
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8 SYNOPSIS: This bill creates the Protect Alabama Small
9 Businesses Act.

10 This bill would regulate the conduct of
11 franchisors and their representatives in an effort
12 to prevent fraud, unfair business practices, unfair
13 methods of competition, impositions, and other
14 abuses upon franchisees in the state.

15 This bill would address requirements for the
16 sale, transfer, or assignment of franchises, and
17 for the mandatory repurchase by a franchisor of a
18 franchise or an interest in a franchise, and for
19 the repurchase of certain assets, including
20 inventory, supplies, equipment, goodwill, and
21 furnishings, upon termination, nonrenewal, or
22 expiration of a franchise, except where the
23 termination or nonrenewal is for good cause.

24 This bill would also require the
25 compensation of a franchisee for the fair market
26 value of the business upon termination or

1 nonrenewal without good cause by the franchisor of
2 the franchise.

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4 A BILL
5 TO BE ENTITLED
6 AN ACT

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8 To create the Protect Alabama Small Businesses Act;
9 to provide legislative intent; to regulate the conduct of
10 franchisors and their representatives to prevent fraud, unfair
11 business practices, unfair methods of competition,
12 impositions, and other abuses upon franchisees in the state;
13 to address requirements for the sale, transfer, or assignment
14 of franchises, and for the mandatory repurchase by a
15 franchisor of a franchise or an interest in a franchise, and
16 for the repurchase of certain assets, including inventory,
17 supplies, equipment, goodwill, and furnishings, upon
18 termination, nonrenewal, or expiration of a franchise; and to
19 require the compensation of a franchisee for the fair market
20 value of the business upon termination or nonrenewal without
21 good cause by the franchisor of the franchise.

22 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

23 Section 1. This act shall be known and may be cited
24 as the Protect Alabama Small Businesses Act.

25 Section 2. The Legislature finds and declares that
26 the welfare of franchisees, including the success and failure
27 of their franchise businesses, greatly affects the general

1 economy of this state, the public interest, and the public
2 welfare. The intent of the Legislature is to promote fair
3 business relations between franchisees and franchisors and to
4 protect franchisees against unfair treatment by franchisors.

5 Section 3. For the purposes of this act, the
6 following terms shall have the following meanings:

7 (1) AFFILIATE. A person controlling, controlled by,
8 or under common control with another person or, in the case of
9 a business entity, the officer, director, or other person in
10 control of the activities of the business entity.

11 (2) AREA FRANCHISE. A contract or agreement, in
12 writing, through which a person is granted the right, for
13 consideration in whole or in part, to do any of the following:

14 a. Sell or negotiate the sale of a franchise in the
15 name or on behalf of the franchisor.

16 b. Become an area developer and develop a franchise
17 for the benefit of that person or affiliates of that person.

18 (3) AREA FRANCHISEE. The owner of an area franchise.

19 (4) FAIR MARKET VALUE. The price at which the
20 property will change hands between a willing buyer and a
21 willing seller, neither being under any compulsion to buy or
22 sell, and both having a reasonable knowledge of relevant
23 facts.

24 (5) FRANCHISE or FRANCHISE AGREEMENT.

25 a. A contract or agreement, in writing, between two
26 or more persons for which all of the following are provided:

1 1. A franchisee is granted the right to engage in
2 the business of offering, selling, or distributing goods or
3 services under a marketing plan or system prescribed in
4 substantial part by a franchisor.

5 2. The operation of the franchise business pursuant
6 to that marketing plan or system is substantially associated
7 with the trademark, service mark, trade name, logotype,
8 advertising, or other commercial symbol of the franchisor
9 designating the franchisor or its affiliate.

10 3. The franchisee is required to provide, directly
11 or indirectly, a franchise fee.

12 b. The term franchise or franchise agreement
13 includes an area franchise.

14 (6) FRANCHISE BUSINESS. A business unit that is
15 owned or operated by a franchisee and that is subject to a
16 marketing plan or system prescribed by the franchise.

17 (7) FRANCHISE FEE. A fee, charge, or the provision
18 of a service, which a franchisee agrees to pay or provide,
19 directly or indirectly, to or for the benefit of the
20 franchisor for the right to enter into or continue a
21 franchise.

22 (8) FRANCHISEE. A person to whom a franchise is
23 offered or granted.

24 (9) FRANCHISOR. A person who grants a franchise to a
25 franchisee.

26 (10) FRAUD. Actual fraud or constructive fraud as
27 normally defined, in addition to the following:

- 1 a. A misrepresentation of a material fact.
- 2 b. A promise or representation not made honestly and
3 in good faith.
- 4 c. An intentional failure to disclose a material
5 fact.
- 6 (11) GOOD CAUSE. Includes any of the following:
- 7 a. The current use of illegal drugs.
- 8 b. Indictment for any crime involving moral
9 turpitude, fraud, or misrepresentation.
- 10 c. Commission of any act that would constitute a
11 felony and that would adversely impact the business or
12 reputation of a franchisor.
- 13 d. Fraud.
- 14 e. Misappropriation or embezzlement of franchisor
15 funds or property.
- 16 f. Willful conduct that is materially injurious to
17 the reputation, business, or business relationships of the
18 franchisor.
- 19 g. Material violation of any provision of the
20 franchise agreement.

21 (12) PERSON. A natural person, corporation, limited
22 liability company, association, partnership, trust, or other
23 business entity and, in the case of a business entity, any
24 other affiliate of that business entity.

25 (13) SALE. The issuance, transfer, agreement for
26 transfer, exchange, pledge, hypothecation, or mortgage in any
27 manner or form, whether by transfer in trust or otherwise, of

1 any goods or interest therein, or of any franchise related
2 thereto, for a consideration, and any option, subscription or
3 other contract, or solicitation, looking to a sale, or offer
4 or attempt to sell in any form, whether in written or oral
5 form, for a consideration.

6 Section 4. (a) Except as otherwise provided in this
7 act, a franchisor may not terminate or refuse to renew a
8 franchise except for good cause. The termination or nonrenewal
9 of a franchise without good cause constitutes an unfair
10 termination. Except as otherwise provided in subsection (b), a
11 franchisor may not terminate a franchise except for good
12 cause. A written notice specifying the reasons for termination
13 must be given to the franchisee. A franchisee shall have not
14 less than 90 days after receipt of a notice of noncompliance
15 to cure the failure. If the franchisee cures the failure
16 within the time given to cure, the termination notice is void
17 and unenforceable.

18 (b) A franchisor may give to a franchisee an
19 immediate notice of termination without an opportunity to cure
20 if, during the period in which the franchise is in effect, any
21 one of the following events relevant to the franchise occurs:

22 (1) The franchisee has been judicially determined to
23 be insolvent, has had all or a substantial part of its assets
24 assigned to or for the benefit of any creditor, or has
25 admitted its inability to pay its debts as they come due,
26 which materially affects the ability of the franchisee to
27 remain in business.

1 (2) The franchisee abandons, by failing to operate,
2 the franchise business for 60 consecutive days during which,
3 under the terms of the franchise, the franchisee is required
4 to operate the franchise business unless such failure to
5 operate is due to an act of God; a work stoppage; a strike or
6 labor difficulty; a fire, flood, hurricane, or sinkhole; or
7 other causes beyond the control of the franchisee.

8 (3) The franchisor and franchisee agree in writing
9 to terminate the franchise.

10 (4) The franchisee fails, for a period of 60 days
11 after a notice of noncompliance, to comply with any federal,
12 state, or local law or rule including, but not limited to, any
13 health, safety, building, and labor law or rule applicable to
14 the operation of the franchise.

15 (5) Insolvency of the franchisee, the filing of any
16 petition by or against the franchisee under any bankruptcy or
17 receivership law, or the assignment for the benefit of
18 creditors or dissolution or liquidation of the franchisee
19 which materially affects the ability of the franchisee to
20 remain in business.

21 (6) The franchisee is convicted of a felony that
22 significantly, directly, and adversely affects the operation
23 of the franchise business.

24 (7) The franchisor makes a reasonable determination
25 that continued operation of the franchise business by the
26 franchisee will result in imminent and substantial danger to
27 public health or safety.

1 Section 5. A franchise agreement, regardless of its
2 stated term of years, is deemed to be continuing unless either
3 of the following occur:

4 (1) Termination of the franchise agreement is
5 authorized under Section 4.

6 (2) The franchisor completely withdraws from
7 directly or indirectly distributing its products or services
8 in the geographic market then being served by the franchisee,
9 provided that in any such instance in which the franchisor
10 subsequently reintroduces its products or services into the
11 same geographic market the franchisee may resume the franchise
12 and the terms and conditions of the agreement between the
13 franchisee and franchisor shall continue in full force and
14 effect.

15 Section 6. (a) A franchisor may not deny the
16 surviving spouse, heir, or estate of a deceased franchisee or
17 of the person controlling a majority interest in the
18 franchisee the opportunity to participate in the ownership of
19 the franchise or franchise business under a valid franchise
20 agreement.

21 (b) A franchisor may not deny the assignment of the
22 franchise agreement, upon the death of the franchisee or
23 person controlling a majority interest in the franchisee, to
24 any other person who meets all of the existing
25 nondiscriminatory, material, and reasonable qualifications for
26 a purchaser of a franchise.

1 (c) (1) A franchisee may sell, transfer, or assign a
2 franchise, all or substantially all of the assets of the
3 franchise business, or an interest in the franchisee with the
4 prior written consent of the franchisor. The consent of the
5 franchisor may not be withheld unless the purchaser,
6 transferee, or assignee does not meet the qualifications for
7 new or renewing franchisees described in subdivision (2) or
8 the franchisee and the purchaser, transferee, or assignee fail
9 to comply with other reasonable and material transfer
10 conditions specified in the franchise agreement.

11 (2) A franchisor may not prevent a franchisee from
12 selling, transferring, or assigning a franchise, all or
13 substantially all of the assets of the franchise business,
14 including the assignment of the rights of the franchisee under
15 the agreement, or an interest in the franchisee to another
16 person or entity if the purchaser meets the nondiscriminatory,
17 material, and reasonable qualifications of the franchisor for
18 the approval of new or renewing franchises in effect at the
19 time the franchisor receives notice of the proposed sale,
20 transfer, or assignment.

21 (d) (1) To invoke the protections under this section,
22 a franchisee shall provide the franchisor with prior written
23 notice of its intent to sell, transfer, or assign the
24 franchise, all or substantially all of the assets of the
25 franchise business, or an interest in the franchisee.

26 (2) The franchisor, within 60 days after receipt of
27 all of the written notice or any shorter period required by

1 the franchise agreement, shall notify the franchisee of the
2 approval or disapproval of the proposed sale, transfer, or
3 assignment. If the proposed sale, transfer, or assignment is
4 disapproved, the franchisor shall include in the notice of
5 disapproval a statement specifying the reasons for the
6 disapproval. A proposed sale, transfer, or assignment is
7 deemed approved unless disapproved by the franchisor in the
8 manner provided in this subdivision. The reasonableness of the
9 decision of the franchisor shall be a question of fact
10 requiring consideration of all existing circumstances.

11 (e) Nothing in this section shall prohibit a
12 franchisor from exercising its contractual right of first
13 refusal to purchase a franchise, all or substantially all of
14 the assets of a franchise business, or an interest in a
15 franchisee.

16 Section 7. (a) A franchisee shall have the
17 opportunity to monetize any equity that the franchisee may
18 have developed in the franchise business before the effective
19 date of any termination or nonrenewal without good cause, or
20 expiration of the franchise agreement pursuant to this act.
21 Therefore, upon termination or nonrenewal without good cause,
22 or expiration of a franchise agreement, a franchisor shall
23 repurchase at fair market value the inventory, supplies,
24 goods, fixtures, equipment, and furnishings of the franchise
25 business. The franchisor shall also either purchase the
26 goodwill of the franchise business or waive any and all

1 noncompete obligations of the franchisee so that the
2 franchisee, at its option, may continue in business.

3 (b) This section does not apply if the franchisee
4 declines a bona fide offer of renewal from the franchisor
5 which is consistent with the franchise agreement between the
6 franchisor and franchisee, provided the terms of the renewal
7 are not in violation of this act.

8 (c) This section does not apply if the franchisor
9 and franchisee agree in writing within 30 days before the
10 termination, nonrenewal, or expiration of the franchise to
11 terminate or not renew the franchise, or to allow the
12 franchise to expire.

13 (d) This section does not apply to inventory,
14 supplies, goods, fixtures, equipment, or furnishings sold by
15 the franchisee between the date of the notice of termination,
16 nonrenewal, or expiration and the date the franchisee ceases
17 to operate the franchise business pursuant to a termination,
18 nonrenewal, or expiration.

19 Section 8. The following rights and prohibitions
20 govern the relations between a franchisor or subfranchisor and
21 its franchisee:

22 (1) The parties shall deal with each other in good
23 faith and in a commercially reasonable manner.

24 (2) A person, during the selling or establishing of
25 a franchise, may not intentionally misrepresent or fail to
26 disclose any of the following:

1 a. The prospects or chances for success of the
2 proposed or existing franchise.

3 b. The known required total investment for such
4 franchise.

5 c. Any effort to sell or establish more franchises
6 than is reasonable to expect the market or market area for the
7 particular franchise to sustain.

8 (3) It is prohibited and deemed an unfair and
9 deceptive act or practice, or an unfair method of competition,
10 and a violation of this section for a franchisor or
11 subfranchisor, or an officer, agent, employee, or other
12 representative thereof, to directly or indirectly do any of
13 the following:

14 a. Terminate or fail to renew a franchise agreement
15 in violation of this act.

16 b. Allow a franchise agreement to expire without
17 complying with this act.

18 c. Prevent a sale, transfer, or assignment of a
19 franchise in violation of Section 6.

20 d. Fail to repurchase inventory, supplies, goods,
21 fixtures, equipment, goodwill, and furnishings in violation of
22 Section 7.

23 e. Violate the Deceptive Trade Practices Act in
24 connection with its business as a franchisor, or an officer,
25 agent, or other representative thereof.

26 f. Without prior written disclosure to a franchisee,
27 obtain vendor rebates, kickbacks, or other similar payments

1 from another person with whom the franchisee does business or
2 employs on account of or in relation to the transactions
3 between the franchisee, the franchisor, and the other person.

4 g. Require a franchisee to assent to a release,
5 assignment, novation, waiver, or estoppel that would relieve
6 any person from liability imposed under this act including,
7 but not limited to, through the use of a disclaimer or
8 checklist designed to avoid a protection or to limit damages
9 under this act.

10 h. Require a franchisee to assent to the use of a
11 choice of law provision by selecting the law of a different
12 state to govern the relationship of the parties.

13 i. Restrict or inhibit, directly or indirectly, the
14 right of a franchisee to join a franchisee association or the
15 free association for any lawful purpose among franchisees.

16 j. Impose upon a franchisee, by contract or rule,
17 written or oral, any unreasonable standard of conduct.

18 k. Require a franchisee to waive its rights to a
19 jury trial or waive any procedure or remedy otherwise
20 available in this state; however, a binding arbitration clause
21 is enforceable if it complies with Section 11.

22 l. Impose upon a franchisee, by contract or rule,
23 written or oral, any unreasonable or overbroad noncompetition
24 agreement. If a judge or jury finds that a noncompetititon
25 agreement is in violation of state law, the entire
26 noncompetition agreement is void and unenforceable.

1 (4) A person who shows in a civil court of law a
2 violation of this section is entitled to the remedies in
3 Section 12.

4 Section 9. A franchise agreement or other contract,
5 a part thereof, or practice thereunder which is in violation
6 of this act is deemed against public policy and is void and
7 unenforceable. An aggrieved party may choose to seek to void
8 only the portion of the agreement that is unenforceable and
9 continue to enforce the remainder of the agreement.

10 Section 10. A provision in a franchise agreement
11 restricting the venue to a forum outside of this state or
12 selecting the law of any other state or jurisdiction other
13 than Alabama is void with respect to any claim arising under
14 or relating to a franchise agreement involving a franchisee
15 that, at the time of signing, was a resident of this state or
16 a business entity established in this state or involving a
17 franchise business either operating or planning to be operated
18 in this state.

19 Section 11. This act does not limit the right of a
20 franchisor and franchisee to agree, before or after a dispute
21 arises, to binding arbitration to settle a claim under this
22 act if the standards applied and the remedies available in the
23 arbitration are not less than the requirements specified in
24 this act.

25 Section 12. (a) If a franchisor terminates a
26 franchise agreement without good cause or otherwise in
27 violation of this act, or fails to consent to a proper

1 assignment of the franchise, or fails to renew a franchise, or
2 allows a franchise to expire in violation of this act, the
3 franchisee is entitled to receive from the franchisor the fair
4 market value of the franchise business and franchise assets in
5 addition to any other damages caused by the violation. The
6 franchisor and franchisee, in order to determine fair market
7 value, shall mutually select an appraiser. If the franchisor
8 and franchisee are unable to mutually agree on an appraiser,
9 either of them may petition the court to appoint an appraiser.
10 If the franchisor and franchisee do not agree on the fair
11 market value determined by the appraiser, the determination is
12 nonbinding and remains a question of fact.

13 (b) In addition to any relief specified in this act,
14 any person aggrieved or injured in his or her business or
15 property by any violation of this act may bring an action in
16 the appropriate state or federal court of this state and shall
17 recover the damages sustained. The costs of such action,
18 including reasonable attorney fees, shall be awarded to the
19 party who prevails in the litigation, if required by the
20 franchise agreement. Every cause of action under this act
21 shall survive the death of the franchisee.

22 (c) Without regard and in addition to any other
23 remedy or relief to which a person is entitled, any person,
24 franchisor, or franchisee aggrieved by a violation of this act
25 may bring an action to obtain a declaratory judgment to
26 determine the issue in dispute.

1 (d) In an action for monetary damages, if a judge or
2 jury finds that the franchisor acted maliciously, or in a
3 manner not otherwise authorized by state law, the judge or
4 jury may award punitive damages as authorized by state law.

5 (e) The remedies provided in this section are in
6 addition to any other remedies provided by law or in equity
7 including, but not limited to, the Deceptive Trade Practices
8 Act.

9 Section 13. (a) Any person or franchisor who engages
10 directly or indirectly in an agreement or contract within this
11 state in connection with a franchise, or any franchise whose
12 franchisee is a resident of this state or is domiciled in this
13 state or whose franchise business is, has been, or is intended
14 to be operated in this state, is subject to this act and to
15 the jurisdiction of the courts of this state, in accordance
16 with the laws of this state, for violations of this act.

17 (b) This act applies to all of the following:

18 (1) Any written or oral agreement between a
19 franchisor and a franchisee including, but not limited to, a
20 franchise offering; a franchise agreement; a sale of goods,
21 services, and advertising; a lease or mortgage of real or
22 personal property; a promise to pay; a security interest; a
23 pledge; an insurance contract; an advertising contract; a
24 construction or installation contract; a servicing contract;
25 and any other agreement in which the franchisor has a direct
26 or indirect interest.

1 (2) Any franchise entered into, renewed, amended, or
2 revised prior to and after the effective date of this act,
3 including any existing franchise of an indefinite duration
4 which may be terminated by the franchisee or franchisor
5 without cause.

6 (3) A successor to a franchisor that continues in
7 business as a franchisor shall be bound by all terms and
8 conditions of each franchise agreement of the franchisor in
9 effect on the date of succession.

10 (c) This act is supplemental to, and does not
11 preempt, local ordinances dealing with prohibited or unlawful
12 conduct in the manufacturing, distribution, wholesaling,
13 advertising, or sale of goods if such ordinances are not
14 inconsistent with this act.

15 Section 14. This act may not be construed as
16 amending or affecting any provision of any of the following:

17 (1) The Alabama Motion Picture Competition Act,
18 Chapter 18, Title 8, Code of Alabama 1975.

19 (2) The Motor Vehicle Franchise Act, Chapter 20,
20 Title 8, Code of Alabama 1975, and the relationship between a
21 motor vehicle dealer and a manufacturer or distributor, as
22 defined in that act, shall be exclusively governed by that
23 act.

24 (3) The Tractor, Lawn, and Garden and Light
25 Industrial Equipment Franchise Act, Chapter 21A, Title 8, Code
26 of Alabama 1975.

1 (4) The Alabama Heavy Equipment Dealer Act, Chapter
2 21B, Title 8, Code of Alabama 1975.

3 (5) Chapter 21C, Title 8, Code of Alabama 1975,
4 providing for the sale of recreational vehicles.

5 (6) Chapter 9, Title 28, Code of Alabama 1975, and
6 the relationship between wholesalers and suppliers of beer, as
7 defined in that chapter, shall be governed by that chapter.

8 Section 15. This act shall become effective
9 immediately following its passage and approval by the
10 Governor, or its otherwise becoming law.