

ATTORNEY GENERAL OF THE STATE OF NEW YORK

In the Matter of

M & T Pretzel Inc. and George Makkos

ASSURANCE OF  
DISCONTINUANCE  
PURSUANT TO EXECUTIVE  
LAW SECTION 63,  
SUBDIVISION 15

WHEREAS, M & T Pretzel Inc. ("M & T"), a corporation located at 349 West 37<sup>th</sup> St., New York, NY 10018, employing vendors to sell pretzels, refreshments, and other food products in and around New York City's Central Park, is subject to the: (i) New York State Labor Law, as amended, ("New York Labor Law"), Article 6 (Payment of Wages), §§190 et seq. and Article 19 (Minimum Wage Act), §§650 et. seq., including, but not limited to, §652 thereof; (ii) New York Codes, Rules and Regulations, as amended, ("NYCRR") Title 12, Chapter II, et seq., including, but not limited to, §142 thereof; and (iii) Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§201 et. seq. ("FLSA"); and

WHEREAS, the: (i) New York Labor Law, Article 6 (Payment of Wages) §§190 et seq and Article 19 (Minimum Wage Act) §§650 et seq.; (ii) NYCRR, Title 12, Chapter II, Subchapter B, Part 142; (iii) FLSA; (iv) New York General Business Law, as amended; §630; (iv) and New York Executive Law ("Executive Law"), as amended (collectively "Wage Hour Laws") require, inter alia, payment of minimum wages and overtime compensation and provide other rights to eligible employees and remedies for failure to comply therewith; and

WHEREAS, George Makkos ("Makkos"), vice president, majority shareholder, and manager of M & T who hired employees, determined their salaries and schedules, and was otherwise intimately

involved in the store's daily operations, is and was an "employer" under the FLSA and the New York State Labor Law; and

WHEREAS, complaints have been made to the Attorney General of the State of New York (the "Attorney General") that M & T and Makkos have violated the Wage Hour Laws; and

WHEREAS, the Attorney General has jurisdiction over this matter pursuant to Executive Law § 63(12); and

WHEREAS, the Attorney General and M & T and Makkos have had settlement negotiations and wish to resolve the Attorney General's investigation without resort to further investigation or litigation;

IT IS HEREBY AGREED:

(1) M & T and Makkos shall pay \$450,000.00 (four hundred fifty thousand dollars) ("Settlement Amount") in restitution and liquidated damages to current and former employees. All payments shall be paid by check payable to the New York State Attorney General's Office. If any check provided by M & T to the New York State Attorney General's Office is found to have insufficient funds ("dishonored check"), then all checks subsequent to the dishonored check must be in the form of a certified check, bank check, money order, or attorney's check.

(2) The \$450,000.00 sum shall be paid according to the following schedule:

Initial Payment: The first payment of seventy five thousand dollars (\$75,000.00) shall be paid by October 29, 2004.

November, 2004 through May, 2005: A payment of ten thousand dollars (\$10,000.00) shall be

paid on or before the first of each month from November 1, 2004 through May 1, 2005, for a total of seventy thousand dollars (\$70,000.00) paid between November 1, 2004 and May 1, 2005.

June, 2005: A payment of one hundred thousand dollars (\$100,000.00) shall be paid on or before June 1, 2005.

July, 2005 through September, 2005: A payment of twenty five thousand dollars (\$25,000.00) shall be paid on or before the first of each month from July 1, 2005 through September 1, 2005, for a total of seventy five thousand dollars (\$75,000) paid between July 1, 2005 and September 1, 2005.

October, 2005 through August, 2006: A payment of ten thousand eight hundred thirty three dollars (\$10,833.00) shall be paid on or before the first of each month from October 1, 2005 through August 1, 2006, for a total of one hundred nineteen thousand one hundred and sixty three dollars (\$119,163.00).

Final payment: A final payment of ten thousand eight hundred thirty seven dollars (\$10,837.00) shall be paid on or before September 1, 2006.

- (3) Each payment check must be made payable to “The New York State Attorney General’s Office”, and forwarded to the New York State Attorney General’s Office, attention Terri Gerstein, Labor Bureau, 120 Broadway, 26<sup>th</sup> Floor, New York, New York, 10271.
- (4) After the signing of this Assurance, the Attorney General will commence a claims process to determine the distribution of the \$450,000.00 Settlement Amount among current and former employees of M & T and Makkos. The Attorney General will have sole discretion to determine the share of the Settlement Amount payable to each eligible person who files a claim and to determine the distribution schedule of such funds. All of the Settlement Amount will be

distributed to the claimants in amounts as solely determined by the Attorney General.

- (5) Default: A failure to comply with the Assurance, or a default, will be defined as the failure to ensure that the Attorney General's Office receives a required payment under Paragraph 2 within ten (10) days of the due date. In the event of a default, the Attorney General's Office will send a letter via certified mail, return receipt requested, to Makkos at the M & T corporate address of 349 West 37<sup>th</sup> St., New York, NY 10018, informing them of the default. ("Default Letter"). The Attorney General's office will also send a copy of the Default Letter via certified mail, return receipt requested and facsimile to the attorney for M & T, James H. Tully, Jr. at DeGraff, Foy, Holt-Harris, Kunz & Devine, LLP, 90 State Street, Albany, NY 12207 (fax number 518-436-0210). If payment is not made within twenty days of the date on which the Default Letter is sent, then M & T and Makkos hereby agree that the Attorney General's Office may file a judgment, in a court of competent jurisdiction, against M & T and Makkos in the amount of six hundred thousand dollars (\$600,000.00) minus a credit for any payments received prior to such default. If such event occurs, the Attorney General's Office will commence judgment collection efforts initially solely against M & T, and the Attorney General's Office will commence judgment collection efforts against Makkos only after ninety (90) days of unsuccessful efforts to collect from M & T.
- (6) Makkos hereby expressly and unequivocally agrees to assume personal and individual liability for all monies owed to the New York State Attorney General's Office pursuant to this Assurance. Personal and individual liability shall mean Makkos accepts and is subject to all

collection efforts against an individual as prescribed under the Civil Practice Law and Rules of the State of New York. By signing this Assurance, Makkos hereby admits his understanding of the term “personal and individual liability” and agrees to be subject to any and all means of collection remedies available against an individual under the Civil Practice Law and Rules of the State of New York, including but not limited to, seizure of his personal assets, garnishment of his wages, and seizure of the assets of M & T.

- (7) M & T and Makkos agree to become jointly and severally liable for the \$450,000.00 payment described in paragraphs 1 and 2 above.
- (8) Payments are to be postmarked on, or before, the due dates set forth in paragraph 2 above. Payments not received within five business days of the due dates set forth in paragraph 2, above, will be assessed a late-charge/liquidated damages provision of one hundred (\$100) dollars per day. A payment will be considered late, and late-charge fees/liquidated damages will continue to accrue, until the payment and any late-charge fees/liquidated damages are paid in full.
- (9) M & T will provide the Attorney General’s office with a complete set of time records and payroll records for the first week of each calendar quarter for all employees employed by M & T and Makkos for the time period from October, 2004 through December, 2006 (a total of nine quarters). Such records shall be provided quarterly, not more than thirty one

days after the end of the quarter; specifically, on or before the following dates:

January 31, 2005  
April 30, 2005  
July 31, 2005  
October 31, 2005

January 31, 2006  
April 30, 2006  
July 31, 2006  
October 31, 2006  
January 31, 2007

- (10) By signing this Assurance, M & T and Makkos acknowledge that they have read and will comply with the FLSA, New York Labor Law § 652, New York Labor Law § 215, 12 NYCRR § 142-2.2, and 12 NYCRR § 142-2.4; that they will pay all persons employed by M & T and Makkos the proper minimum wage and overtime wage required by law; and that they will maintain all time and payroll records as required by law. In addition, M & T and Makkos will comply with Labor Law § 162 (2), which requires a thirty-minute meal break, and Labor Law § 193 regarding unlawful deductions from wages.
- (11) M & T and Makkos each agree to sign an affidavit of confession of judgment in the amount of six hundred thousand dollars (\$600,000.00) which will be signed on the date of the signing of this Assurance. A copy of the signed affidavit of confession of judgment will be attached to this Assurance as Exhibit "A". The affidavit of confession of judgment will be held in escrow by the Attorney General's office and not filed unless M & T and Makkos default on the terms of this Assurance and fail to cure within twenty days of the date on which a Default Letter is sent, as specified in Paragraph 5 of this Assurance. In the event of a default, the Attorney General's office will send a default letter, as specified in Paragraph 5 of this Assurance. If M & T and Makkos fail to cure the default within twenty days of the date on which the Default Letter is sent, the Attorney General's Office will file judgment in New York County Supreme Court for the amount of the affidavit of confession of judgment, minus any payments made by M & T and

Makkos up to the date of the default.

- (12) No costs are to be paid by M & T or Makkos to the Attorney General as a part of this Assurance.
- (13) This Assurance of Discontinuance is made solely to expeditiously resolve this matter without the time and expense of litigation and does not constitute an admission by M & T or Makkos of any: (i) liability; (ii) violation of any federal, state or local law, regulation, order or other requirement of law; (iii) breach of contract, actual or implied; (iv) commission of any tort; or (v) other wrong of any type whatsoever.
- (14) This Assurance, consisting of eight (8) pages and Exhibit A, constitutes the entire agreement between the New York State Attorney General's Office and M & T and Makkos. Any modifications of this agreement must be in writing.

AND FURTHER, the Attorney General accepts this Assurance pursuant to Section 63, Subdivision 15 of the Executive Law in lieu of commencing a judicial proceeding pursuant to Executive Law 63(12). In the event that M & T or Makkos fails to comply with the terms of this Assurance, the Attorney General reserves the right to bring enforcement proceedings regarding the above matter. In any such proceeding, M & T and Makkos hereby agree to waive the right to raise any jurisdictional challenges. Evidence of a violation of the terms of this Assurance constitute prima facie proof of violation of the FLSA, New York Labor Law § 652(2), New York Labor Law § 215, 12 NYCRR § 142-2.2, and 12 NYCRR § 142-2.4.

Signed: M & T Pretzel Inc.  
349 W. 37<sup>th</sup> St.  
New York, N.Y. 10018  
By: \_\_\_\_\_  
George Makkos  
Vice President and  
Majority Shareholder

George Makkos (individually)  
c/o 349 W. 37<sup>th</sup> St.  
New York, N.Y. 10018  
By: \_\_\_\_\_  
George Makkos

Sworn to before me this  
\_\_\_\_\_ day of November, 2004

Sworn to before me this \_\_\_\_\_ day  
of November, 2004

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Notary Public

ELIOT SPITZER  
Attorney General of the State of New York

M. PATRICIA SMITH  
Assistant Attorney General in Charge, Labor Bureau  
120 Broadway, 26<sup>th</sup> Floor  
New York, New York 10271  
(212) 416-8442; fax (212) 416-8694

By: \_\_\_\_\_  
Terri Gerstein  
Assistant Attorney General  
Labor Bureau

Exhibit A

PEOPLE OF THE STATE OF NEW YORK  
OFFICE OF THE ATTORNEY GENERAL  
LABOR BUREAU

In the Matter of the Investigation by the Attorney General,  
Eliot Spitzer, of:

M & T Pretzel Inc. and George Makkos

**AFFIDAVIT OF CONFESSION  
OF JUDGMENT**

GEORGE MAKKOS, being duly sworn, deposes and says the following:

1. I am the Vice President and majority shareholder of M & T Pretzel, Inc. and I am a resident of New York County, New York, residing at 117 East 57<sup>th</sup> Street, New York, New York 10022.

2. I hereby confess judgment against M & T Pretzel Inc. and myself pursuant to CPLR 3218 in favor of, The People of the State of New York, in the sum of six hundred thousand dollars (\$600,000.00), and upon default of the Assurance of Discontinuance pursuant to Executive Law § 63(15) entered between the People of the State of New York, M & T Pretzel Inc. and myself, which was signed on November \_\_\_\_, 2004, I hereby authorize The People of the State of New York to enter judgment against M & T Pretzel Inc. and myself, jointly and severally, in the sum of six hundred thousand dollars (\$600,000.00), less any payments and/or credits made prior thereto.

3. I hereby authorize entry of said judgment in the County of New York, State of New York.

4. This Confession of Judgment is for a debt to become due and owing to The People of the State of New York under an Assurance of Discontinuance pursuant to Executive Law § 63(15) entered between The People of the State of New York, M & T Pretzel Inc. and myself, which was signed on November \_\_\_\_, 2004, the terms of which are expressly incorporated herein.

\_\_\_\_\_  
**GEORGE MAKKOS**

Sworn to before me this  
\_\_\_\_ day of November, 2004

\_\_\_\_\_  
NOTARY PUBLIC

\_\_\_\_\_  
**GEORGE MAKKOS**  
As Vice President and majority  
shareholder of M & T Pretzel Inc.

Sworn to before me this  
\_\_\_\_ day of November, 2004

\_\_\_\_\_  
NOTARY PUBLIC

**PERSONAL ACKNOWLEDGMENT OF GEORGE MAKKOS**

STATE OF NEW YORK        )  
  ) SS:  
COUNTY OF NEW YORK    )

On the \_\_\_ day of November, 2004 before me personally came GEORGE MAKKOS to me known who, being by me duly sworn, did depose and say that he resides at 117 East 57<sup>th</sup> Street, New York, NY 10022, that he is the individual described in and who executed the foregoing Affidavit of Confession of Judgement, and duly acknowledged to me that he executed the same.

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NOTARY PUBLIC

**CORPORATE ACKNOWLEDGMENT OF M & T PRETZEL INC.**

STATE OF NEW YORK )  
  ) SS:  
COUNTY OF QUEENS  )

On the \_\_\_ day of November, 2004, before me personally came GEORGE MAKKOS, as the Vice President and majority shareholder of M & T PRETZEL INC., to me known who, being by me duly sworn, did depose and say that he resides at 117 East 57<sup>th</sup> Street, New York, NY 10022, that he is the Vice President and majority shareholder of M & T PRETZEL INC., and that he is the individual described in and who executed the foregoing Affidavit of Confession of Judgement, and duly acknowledged to me that he executed the same.

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NOTARY PUBLIC