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HONORABLE STANLEY A. BASTIAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOSEPH STIGAR, individually and on behalf of all others similarly situated,

Plaintiff,

vs.

DOUGH DOUGH, INC., a Washington Corporation, AUNTIE ANNE'S FRANCHISOR SPV LLC, a Delaware Limited Liability Company; and DOES 1 through 10, inclusive,

Defendants.

Case No. 2:18-cv-00244-SAB

DEFENDANT AUNTIE ANNE'S FRANCHISOR SPV LLC'S MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

ORAL ARGUMENT REQUESTED

Hearing date: February 6, 2019
With oral argument: 2:00 P.M.

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INTRODUCTION

The Complaint should be dismissed because Plaintiff's ambitious antitrust legal *theory* is not supported by any of the *facts* required to state an antitrust cause of action.

Plaintiff was employed by Defendant Dough Dough at an Auntie Anne's franchise located in the Wenatchee Valley Mall in East Wenatchee. Auntie Anne's bakeries make and sell pretzels and other baked goods. Plaintiff claims that because he allegedly could not be hired by any other Auntie Anne's franchise in Washington -- although he does *not* allege that he ever tried -- wages for workers like him were "suppressed." For that allegation to state a viable antitrust claim, Plaintiff would need to allege facts showing that competition in the relevant market for his labor by all other potential employers has been so impaired by Defendants' alleged conduct, that wages throughout the market have been depressed.

No such facts are alleged. All Plaintiff alleges is that Auntie Anne's Franchisor SPV LLC ("Auntie Anne's") entered into franchise agreements with franchisees like Dough Dough which allegedly prohibit Auntie Anne's franchisees from soliciting or hiring employees from other Auntie Anne's franchisees. Plaintiff does not allege that he, or any other Auntie Anne's franchise employee, has not been hired or could not be hired by any of the hundreds or thousands of other employers in Washington. Plaintiff has not alleged that Auntie Anne's has entered into any "no solicit/no hire" agreements with any of its rival bakeries, restaurants or food chains, or with any other employers in Washington. Thus, Plaintiff has not alleged that competition to hire him, or any other Auntie Anne's franchise employee, has been harmed in any relevant labor market.

These pleading defects are fatal:

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First, Plaintiff has failed to allege facts that establish an actionable "conspiracy" under Section 1 of the Sherman Act and the Washington state analog, RCW 19.86.030. Merely alleging agreements between a franchisor (Auntie Anne's) and its franchisees (like Dough Dough) will not suffice. On the contrary, federal courts in this state have dismissed antitrust claims where defendants were in a "franchisor-franchisee relationship and therefore cannot conspire within the meaning of the Sherman Act." *Danforth & Assoc., Inc.* v. *Coldwell Banker Real Estate, LCC*, No. C10-1621, 2011 WL 338798, at *2 (W.D. Wash. Feb. 3, 2011). "[T]he Supreme Court and Ninth Circuit have made clear that coordinated activity between a franchisor and a franchisee does not implicate the Sherman Act." *Id.*

Second, even if the franchisor and franchisee were capable of conspiring, Plaintiff has failed to allege facts that would establish that the agreements created an "unreasonable" restraint on trade. Like other types of vertical agreements, franchise agreements that are solely between parties who do not compete should be reviewed under the "rule of reason." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015). There is no allegation that Auntie Anne's made any agreements with any of its competitor franchise businesses or rival companies. Nor is there any allegation that Dough Dough made any agreements with other franchisees.

Thus, the law requires that the complaint allege facts showing (1) a relevant antitrust market in which (2) the defendant's conduct harmed competition. *Tanaka* v. *Univ. of S. Cal.*, 252 F.3d 1059, 1063 (9th Cir. 2001). Plaintiff does not even try to satisfy those pleading requirements. The Complaint does not allege what the relevant labor market might be: it does not allege the relevant geographic area (*e.g.*, East Wenatchee, the entire state, the country) or the relevant employment

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opportunities in that area (*e.g.*, Auntie Anne's bakeries only, other bakeries, pretzel shops, restaurants, all sorts of other businesses). Nor does it allege that the Auntie Anne's franchise agreements have had any adverse impact on competition for labor among all those other employers, or on the wages paid by all those other employers.

Plaintiff attempts to evade his obligation to plead facts showing an unreasonable restraint of trade by asserting that the Auntie Anne's franchise agreements constitute a *per se* antitrust violation -- meaning that the court need not require any factual allegations that the conduct had any actual anti-competitive effect. That is a legal non-starter. "Vertical agreements . . . are analyzed under the rule of reason," not the *per se* rule. *Musical Instruments*, 798 F.3d at 1191.

Finally, denominating this case as a purported class action on behalf of other Auntie Anne's franchise employees does nothing to obviate Plaintiff's pleading requirements. To the contrary, Plaintiff's reference to other franchise employees only highlights the legal deficiencies in his Complaint: there is not a single fact alleged showing that competition for any putative class member's talents and skills in any labor market has been impacted, much less injured, by the Auntie Anne's franchise agreements. The Complaint should be dismissed.

THE COMPLAINT

Defendant Auntie Anne's issues franchise licenses to other companies through the use of a franchise agreement. The franchise agreement provides the other companies with the ability to own and operate Auntie Anne's bakeries as franchisees. ECF No. 1 at 4, ¶ 7 ("Compl."). One of those franchisees is Defendant Dough Dough, Inc. ("Dough Dough"). *Id.* at 4, ¶ 6. There are allegedly 27 Auntie Anne's locations in the State of Washington owned and operated by Auntie Anne's franchisees. *Id*. at 6, ¶ 13. Auntie Anne's franchisees serve pretzels and other similar

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bakery goods.

The Auntie Anne's franchise agreements provide the franchisees with, among other things, the right to use the Auntie Anne's trademarks, and the right to access Auntie Anne's signage and proprietary Auntie Anne's ingredients and products. In addition, Plaintiff alleges that, "[f]or years, the franchise agreements entered into between Auntie Anne's and its franchisees have provided that franchisees subject to such agreements could not solicit for employment the employees of Auntie Anne's . . . and in certain years provided that franchisees subject to such agreements could not hire the employees of Auntie Anne's and/or other Auntie Anne's franchisees." *Id.* at 6, ¶ 14.

Plaintiff Joseph Stigar asserts he was a "crewmember" at an Auntie Anne's in the Wenatchee Valley Mall in East Wenatchee owned by Dough Dough. *Id.* at 4, ¶¶ 5-6. He claims that his wages were artificially low because employees at one Auntie Anne's location cannot be hired at other Auntie Anne's locations under the alleged no solicit/no hire provisions of the franchise agreements. *Id.* at 13, ¶ 40.

The Complaint does not allege, however, that Plaintiff or any other employee sought to switch to another Auntie Anne's location and was in fact prohibited from switching. Nor does the Complaint allege that the employment opportunities of Plaintiff, or the employees he seeks to represent, are limited to the alleged 27 Auntie Anne's bakeries in Washington. Nor does the Complaint allege that Auntie Anne's had no solicit/no hire agreements with any other employer in Washington. There is no allegation, therefore, that Auntie Anne's or Dough Dough engaged in any conduct that prevented Plaintiff from moving to any other job in East Wenatchee, or anywhere else in Washington.[2]

[2] After filing this Complaint, Plaintiff left his employment with Dough Dough.

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Plaintiff seeks to represent a class of every person who has worked at Auntie Anne's, Dough Dough or any of the "DOE" defendants in Washington from July 12, 2014 to the present. *Id*. at 10, ¶ 28. The allegations relating to the purported class members contain no more factual detail about the relevant labor markets. *Id*. at 10-12, ¶¶ 28-35. In fact, the Complaint does not even specify the relevant labor market in which Plaintiff, or any purported class member, is employed or could be employed.

Nonetheless, the Complaint alleges that the no solicit/no hire provisions in the Auntie Anne's franchise agreements violate Section 1 of the Sherman Act and the Washington state law analog, RCW 19.86.030. *Id*. at 14-15, ¶¶ 43, 52. Plaintiff's antitrust theory is that by prohibiting him and other Auntie Anne's franchise employees from working at other Auntie Anne's locations, their wages were depressed. *Id*. at 13-15, ¶¶ 40, 48. For that to be economically plausible and, thus, state an antitrust claim, Plaintiff would have to allege facts to show that the Auntie Anne's franchise agreements somehow significantly reduced competition for his labor from all *other* potential employers, and that the resulting lack of competition for hiring in the relevant labor market depressed wages. Defendants move to dismiss because, as established below, the facts necessary to state such an antitrust claim have not been pled.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 570 (2007). To satisfy the *Twombly* plausibility standard, a complaint must contain sufficient factual allegations for the Court to draw the reasonable inference that the defendant engaged in anticompetitive conduct

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prohibited by the antitrust laws. *Id.* at 556-7; *Kendall* v. *Visa U.S.A., Inc.*, 518 F.3d 1042, 1047 (9th Cir. 2008). Conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss. *Ove* v. *Gwinn*, 264 F.3d 817, 821 (9th Cir. 2001). For example, a "formulaic recitation of the elements" of a claim are not entitled to the presumption of truth. *Ashcroft* v. *Iqbal,* 556 U.S. 662, 681 (2009). In light of the enormous expense and burden associated with discovery in antitrust actions, courts "insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Twombly*, 550 U.S. at 558 (citations omitted); *see also Kendall*, 518 F.3d at 1047 ("discovery in antitrust cases frequently causes substantial expenditures and gives the plaintiff the opportunity to extort large settlements even where he does not have much of a case").

ARGUMENT

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO ALLEGE A CONSPIRACY ACTIONABLE UNDER THE ANTITRUST LAWS

The elements of a claim under Section 1 of the Sherman Act are: "(1) an agreement, conspiracy, or combination between two or more entities; (2) an unreasonable restraint of trade under either a *per se* or rule of reason analysis; and (3) the restraint affected interstate commerce." *Am. Ad Mgmt., Inc.* v. *GTE Corp*., 92 F.3d 781, 788 (9th Cir. 1996).

Alleging a conspiracy in restraint of trade under Section 1 of the Sherman Act requires far more than an agreement between two parties, especially when that agreement (as in this case) is not between competitors. *See, e.g., Kendall* v. *Visa U.S.A., Inc*., 518 F.3d 1042, 1047 (9th Cir. 2008) (Section 1 "claimants must plead not just ultimate facts (such as a conspiracy), but evidentiary facts which, if true, will prove" the elements of the claim); *Disney Enterprises, Inc.* v. *VidAngel, Inc*.,

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No. 2:16 CV 04109, 2017 WL 6883685, at *7 (C.D. Cal. Aug. 10, 2017) (where agreement is not between competitors "the plaintiff must allege both that a 'relevant market' exists and that the defendant has power within that market.") (*quoting Newcal Indus.* v. *Ikon Office Sol.*, 513 F.3d 1038, 1044 (9th Cir. 2008)). As a threshold matter, the businesses accused of making an unlawful agreement must be capable of conspiring in a way that violates Section 1 of the Sherman Act. "[T]he existence of more than one entity sufficient to conspire is part of the first element required to allege a [Sherman Act] § 1 violation." *Jack Russell Terrier Network of N. Cal.* v. *Am. Kennel Club, Inc.,* 407 F.3d 1027, 1034 n.14 (9th Cir. 2005).

Following Ninth Circuit precedent, a federal court in this state granted the motion to dismiss the Section 1 claim in *Danforth & Assoc., Inc.* v. *Coldwell Banker Real Estate, LCC*, No. C10-1621, 2011 WL 338798, at *2 (W.D. Wash. Feb. 3, 2011) because the defendants were "in a franchisor-franchisee relationship and therefore ***cannot conspire within the meaning of the Sherman Act***.". *See also Williams* v. *I.B. Fischer Nevada*, 999 F.2d 445, 447-48 (9th Cir. 1993) (restaurant franchisor cannot conspire with its franchisees in violation of Section 1). Plaintiff here has alleged no facts to warrant a different result on this motion to dismiss. As the Supreme Court held in *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 769 (1984), an alleged conspiracy requires scrutiny under Section 1 only if it "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." If the alleged conspirators are *not* competitors or *not* otherwise pursuing competing economic interests, then the policies and purposes of the antitrust law are not implicated. *Am. Needle, Inc.* v. *Nat'l Football League*, 560 U.S. 183, 195 (2010). The Sherman Act prohibits only those agreements that undermine "actual or potential competition." *Id.* (citations omitted).

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Thus, "the Supreme Court and Ninth Circuit have made clear that coordinated activity between a franchisor and a franchisee does not implicate the Sherman Act." *Danforth*, 2011 WL 3387898, at *2. *Copperweld* held that a corporation and its subsidiary were not legally capable of conspiring in violation of Section 1, but as *Williams* and *Danforth* demonstrate, common ownership or control among the alleged conspirators is not required for dismissal. *See Williams* v. *Nevada*, 794 F. Supp. 1026, 1032 (D. Nev. 1992), *aff'd* 999 F.2d 445 (9th Cir. 1993) ("For two separate corporations to act as a single entity" for purposes of the antitrust laws it "is not necessary that one be owned, wholly or in part, by the other corporation"). The Ninth Circuit summarized the law:

> We have held that the single entity rule applies to principal-agent relationships, *Calculators Hawaii, Inc.* v. *Brandt, Inc*., 724 F.2d 1332, 1336 (9th Cir. 1983), ***as well as to an agreement between a franchiser and franchisee***, *Williams* v. *I.B. Fischer Nevada*, 999 F.2d 445, 447-48 (9th Cir. 1993) (per curiam).

Jack Russell Terrier, 407 F.3d at 1034 (affirming Rule 12(b)(6) dismissal on *Copperweld* grounds).[3]

The Ninth Circuit explained in *Williams* that the franchisor-franchisee relationship in the fast-food business is *not* depriving the market of the benefits of

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[3] The focus on the substance of competition in *Copperweld* makes it a different analysis than piercing the corporate veil (which looks to whether formalities have been observed, assets co-mingled, etc.) or joint employer liability (which can focus on whether one entity controlled the schedules of another's employees, etc.). *See, e.g., Houston Orthopedic Surgical Hosp.* v. *Steadfast Ins. Co*., No. CV H-11-3916, 2013 WL 12141371, at *4 (S.D. Tex. Oct. 8, 2013) (*Copperweld* not "instructive in" a case on piercing the corporate veil).

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competition since they are not competitors and are not pursuing competing economic interests:

> In a fast-food franchise the franchisor does everything to promote a uniform, non-competitive environment between the franchises: Each franchise serves substantially the same products; the products are served to the public in the same manner; the franchisor develops products and services for all franchises; the employees dress alike; the decor of each franchise is similar; the franchises are advertised as a single enterprise with a single logo. . . .

Williams, 794 F. Supp. at 1031, *aff'd* 999 F.2d 445. In a franchise system like Auntie Anne's, the franchisor and the franchisee share a common interest in providing the best Auntie Anne's-branded products and services. *Id.* at 1032 ("As [franchise] restaurants prosper because of the uniformity of quality food and service, each franchise benefits from an enhanced reputation which results in an increase in business, as does the franchisor who is able to sell more franchises at … higher prices."). For antitrust purposes, the competition to be promoted and protected is the interbrand competition between rival businesses, with Auntie Anne's and its franchisees working together to compete against other companies for customer sales and loyalty. *Leegin Creative Leather Prods.* v. *PSKS, Inc.*, 551 U.S. 877, 890 (2007) ("The promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'") (*citing State Oil Co.* v. *Khan*, 522 U.S. 3, 15 (1997)). With robust interbrand competition -- which is *not* alleged to be lacking here -- consumers can choose between Auntie Anne's and other options (Dunkin' Donuts and Krispy Kreme, to name just two), and franchise employees can choose to work for myriad other businesses and employers.

The Complaint here does not allege any facts to the contrary. Nor does the

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Complaint allege any facts that distinguish this pleading from *Williams* and *Danforth*. Rather, as in *Jack Russell Terrier,* the Plaintiff has alleged no facts to show that "co-defendants had divergent economic interests, or what goals the affiliates pursued other than those of" the Auntie Anne's franchise system. 407 F.3d at 1035. As the Ninth Circuit noted, "Although [courts] assume the truth of the facts alleged in the complaint, [courts] cannot assume any facts necessary to the appellants' claim that they have not alleged." *Id.*

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO ALLEGE THE FACTS REQUIRED TO PLEAD AN UNREASONABLE RESTRAINT OF TRADE UNDER SECTION 1 OF THE SHERMAN ACT

Even if Plaintiff had alleged facts showing that Auntie Anne's and its franchisees were capable of conspiring under the antitrust laws, the Complaint should still be dismissed because it fails to allege the facts necessary to state a claim that the alleged no solicit/no hire provision is an "unreasonable restraint of trade." The pleading requirements for a Section 1 claim depend largely on the type of agreement at issue. *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191-92 (9th Cir. 2015). In analyzing the reasonableness of an agreement, "the Supreme Court has distinguished between agreements made up and down a supply chain, such as between a manufacturer and a retailer ('vertical agreements'), and agreements made among competitors ('horizontal agreements')." *Id.* at 1191 (*citing N. Pac. Ry.* v. *United States,* 356 U.S. 1, 5 (1958)).

The Complaint here alleges vertical intra-brand agreements: franchise agreements between Auntie Anne's and its Auntie Anne's-branded franchisees. *See, e.g.,* Compl. at 4, ¶ 7 ("Auntie Anne's entered into agreements with its franchisees . . . that contained no-hire and non-solicitation provisions"). Auntie Anne's is not

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alleged to have made any horizontal inter-brand agreements with any of its competitors or with other potential employers. The Ninth Circuit has held that vertical agreements like those alleged here **"are analyzed under the rule of reason" and not under the *per se* rule**. *Musical Instruments*, 798 F.3d at 1191 (emphasis added); *cf. Williams v. I.B. Fischer Nevada*, 999 F.2d 445, 448 (9th Cir. 1993) (intrabrand vertical "no switching" agreements between a franchisor and franchisee were not subject to the *per se* rule because "only group boycotts engaged in by [horizontal] competitors are per se illegal") (*citing Calculators Hawaii, Inc.* v. *Brandt, Inc*., 724 F.2d 1332, 1337 n.2 (9th Cir. 1983)).

Vertical agreements generally are subject to the rule of reason because "vertical restraints may have procompetitive justifications that benefit consumers." *Musical Instruments*, 798 F.3d at 1191 (*citing Leegin,* 551 U.S. at 889–92). Unlike horizontal agreements between rival businesses, some of which have no purpose other than to harm competition and consumers -- *e.g.*, price fixing agreements between competing manufacturers -- vertical contractual restrictions "can stimulate interbrand competition," like competition between different brands of fast-food and/or bakery products. *Leegin*, 551 U.S. at 887. "The promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.'" *Id.* (*citing Khan*, 522 U.S. at 15 (emphasis added); *cf. Williams v. Nevada*, 794 F. Supp. 1026, 1034 (D. Nev. 1992), *aff'd* 999 F.2d 445 (9th Cir. 1993) ("no switching" agreement between franchisor and franchisee was "not anticompetitive" where it "only effects [Plaintiffs'] ability to move within [the Jack-in-the-Box fast-food] enterprise and has no impact upon other businesses that may be interested in [Plaintiffs'] skills as a manager").

At the pleading stage, the rule of reason requires alleged facts showing that

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the restraint produces "significant anticompetitive effects" within a "relevant market." *Tanaka*, 252 F.3d at 1063 (internal citations omitted); *see also Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018) ("[C]ourts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.").

At a minimum, Plaintiff needs to plead facts showing that the alleged inability of employees at one Auntie Anne's location to be employed at another Auntie Anne's location has so significantly suppressed competition for their skills among all other potential employers, that wages have been suppressed by that lack of competition. *Tanaka* 252 F.3d at 1063; *see also Mooney* v. *AXA Advisors, L.L.C.*, 19 F. Supp. 3d 486, 502 (S.D.N.Y. 2014) ("Without alleging all reasonably interchangeable substitutes for AXA-affiliated employees or alleging a plausible explanation for why the Court should regard competition for AXA-affiliated employees as a market unto itself, [plaintiff] has failed to adequately allege a relevant market."). If, on the other hand, other businesses in the market are unrestrained in competing for the labor of Auntie Anne's franchise employees, then the no solicit/no hire clause cannot plausibly be an unreasonable restraint on trade.

That wages for certain job categories might be perceived as low or unfair is, if true, the result of numerous and complex economic forces and phenomena affecting the relevant geographic and product labor markets. Accordingly, to attribute that to the franchise agreements for 27 pretzel bakeries, and to plead that the agreements are an antitrust violation, requires specific and plausible factual allegations regarding the relevant market and anticompetitive effects in that market. Since Plaintiff has not even tried to plead facts to establish (a) a relevant labor market or (b) the required anticompetitive effects in any such market, the Complaint fails to state a viable Section 1 claim and should be dismissed.

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A. The Complaint Does Not Allege a "Relevant Market"

Plaintiff must allege that competition for labor, and thus competition over wages for that labor, were suppressed in a relevant "hiring market." *See* Marinescu, Ioana and Hovenkamp, Herbert J., "Anticompetitive Mergers in Labor Markets" at 15 (2018). *Faculty Scholarship*. 1965, *available at* http://scholarship.law.upenn.edu/faculty_scholarship/1965 ("Hovenkamp"). Under general antitrust principles, the "relevant market" encompasses both a "geographic market" and a "product market." *Id.* at 21. "The geographic market extends to the 'area of effective competition . . . where buyers can turn for alternative sources of supply.' The product market includes the pool of goods or services that enjoy reasonable interchangeability of use and cross-elasticity of demand." *Oltz* v. *St. Peter's Cmty. Hosp.,* 861 F.2d 1440, 1446, (9th Cir. 1988) (citations omitted).

In the case of competition for labor, the "boundaries of labor product markets are driven mainly by employee skills and training" -- *i.e.*, in what other businesses and for what other employers can Plaintiff and other Auntie Anne's franchise employees work. *Hovenkamp* at 21. "Geographic markets are driven mainly by location and mobility of current or prospective employees" -- *i.e.*, is the relevant labor market restricted to East Wenatchee, or does it encompass a broader geographic region. *Id.* In sum, a relevant labor market defines where and what are the other job opportunities. Alleging such a relevant labor market is essential to stating a Section 1 claim because if employees have "sufficient mobility" and range of job opportunities in that market, "the result will be ***higher*** wages and salaries," not lower wages. *Id.* at 18 (emphasis added).

The Complaint does not even purport to allege any relevant labor markets for the named Plaintiff or the purported class, by type of employment or geography.

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Plaintiff variously refers to the "industry" (Compl. at 7, 9, ¶¶ 15, 26), "low-wage" workers (*Id.* at 7, 9, ¶¶ 18, 25), "fast-food" workers (*Id.* at 7, 9, ¶¶ 18, 25), crew members at "fast food pretzel stores" (*Id.* at 7, ¶ 17), and Defendant's employees (*Id.* at 7, ¶ 15). Sometimes the Complaint refers vaguely to multiple "labor markets" (*Id.* at 8, ¶ 20) and other times to a singular "market" (*Id.* at 15, ¶ 50), but it never alleges with specificity -- or the necessary supporting facts -- the identity and boundaries of any relevant labor market.

If Plaintiff intends to imply that the entire relevant market for the purported class's labor is confined to 27 Auntie Anne's locations in Washington, he has not alleged facts to support such a miniscule labor market. As other courts have recognized, there is no coherent antitrust market limited only to one brand of fast-food stores. *See, e.g., Midwestern Waffles, Inc.* v. *Waffle House, Inc.*, 734 F.2d 705, 720 (1984) ("whatever the relevant market is here, it is a great deal broader than the Waffle House system and encompasses much, if not all, of the fast food industry"). And Plaintiff has not alleged that he has such highly specialized skills, or that Auntie Anne's offers such unique products or services, that employees of Auntie Anne's bakeries cannot find employment elsewhere. Compl. at 7, ¶¶ 15, 18.

The "[f]ailure to identify a relevant market is a proper ground for dismissing a Sherman Act claim" under the rule of reason. *Tanaka*, 252 F.3d at 1063; *see also Newcal Indus., Inc.* v. *Ikon Office Sols., Inc.*, No. C04-2776 FMS, 2004 WL 3017002, at *3 (N.D. Cal. Dec. 23, 2004) ("[c]ircuit courts that have addressed the issue, including the Ninth Circuit, have held that the plaintiff's failure to identify a relevant market is a proper ground for dismissal in a Rule 12(b)(6) motion"). Accordingly, courts in the Ninth Circuit regularly dismiss rule of reason cases that fail to allege the relevant markets. *See, e.g., Golden Gate Pharmacy Servs., Inc.* v.

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Pfizer, Inc., 433 F. App'x 598, 599 (9th Cir. 2011) (affirming dismissal because of "[t]he failure to allege a product market consisting of reasonably interchangeable goods"); *Stubhub, Inc.* v. *Golden State Warriors, LLC*, No. C 15-1436 MMC, 2015 WL 6755594, at *4 (N.D. Cal. Nov. 5, 2015) (dismissing "for failure to allege a cognizable product market"). The Complaint here should be dismissed too.

B. The Complaint Fails to Allege Significant Anticompetitive Effects

The Complaint does not allege any facts that would (if true) establish that competition for hiring workers like Plaintiff by all the other potential employers in the labor market has been adversely impacted by the Auntie Anne's franchise agreements. All it alleges is that Auntie Anne's franchise employees cannot work at other Auntie Anne's locations. It does *not* allege that the no solicit/no hire clause has had any impact on other employment opportunities or -- as is dispositive in an antitrust case -- any impact on the competition for labor between those potential employers. Thus, Plaintiff has failed to allege facts showing that the no solicit/no hire provisions produced "significant anticompetitive effects" within any relevant market. *See Tanaka*, 252 F.3d at 1064 (internal citations omitted) (affirming grant of motion to dismiss where plaintiff "failed to allege that the [restriction] has had significant anticompetitive effects within a relevant market, however defined"); *Aydin Corp* v. *Loral Corp.*, 718 F.2d 897, 902 (9th Cir. 1983) (a plaintiff "has the burden to plead and prove that the actions of [defendant] harmed competition").

Anticompetitive effects under Section 1 can generally be shown through either (1) "direct evidence," such as "reduced output, increased prices, or decreased quality in the relevant market"; or (2) "indirect evidence . . . of market power plus some evidence that the challenged restraint harms competition." *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). For vertical agreements, even where

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Plaintiffs pursue the "direct evidence" route, Plaintiffs must also establish the defendant has "market power." *Id.* at 2285 n.7 ("Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market.").

Plaintiff has alleged neither "direct evidence" nor "indirect evidence," and has not alleged that Auntie Anne's has market power. The Complaint has no allegations of any relevant market, let alone reduced output, increased prices or decreased quality across any relevant market. Moreover, there are no allegations of Defendants' market power or even their market shares in any relevant market. *Cf. Aydin Corp.*, 718 F.2d at 902 (the "employee labor market allegations" did not support a finding that the defendants' actions "harmed competition" where "[w]e are at a loss to identify with any specificity the 'field[s] of competition [with which] we are concerned and the dimensions of [those] field[s]'").

In *Tanaka*, the plaintiff challenged the PAC-10 conference rule restricting immediate transfers of student-athletes between PAC-10 universities. After concluding that the plaintiff did not adequately allege a relevant market for her soccer services, the Ninth Circuit found that the plaintiff failed to allege significant anticompetitive effects:

> If the relevant market is national in scope, as Tanaka's own complaint suggests, the transfer rule most certainly does not have a significant anticompetitive effect. By its own terms, the Pac-10 transfer rule applies only to intraconference transfers; it has no application to student-athletes who transfer to nonmember institutions.

252 F.3d at 1064. Just as the PAC-10 transfer rule in *Tanaka* was not anticompetitive because it had "no application" to soccer players willing to perform outside the PAC-10, here, the alleged Auntie Anne's no solicit/no hire provision is not anticompetitive

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because it has "no application" to employees willing to work outside the Auntie Anne's system. *See also PSKS, Inv.* v. *Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 419 (5th Cir. 2010) (affirming dismissal where "[e]ven accepting PSKS's factual allegations as true, nothing in its complaint plausibly alleges a harm to interbrand competition"); *Williams*, 794 F. Supp. 1034 ("no switching" clause in franchise agreement was "not anticompetitive" where it only impacts Plaintiffs' "ability to move within [the Jack-in-the-Box fast-food] enterprise and has no impact upon other businesses that may be interested in [Plaintiffs'] skills as a manager").[4]

Thus, the very essence of an antitrust claim -- an *anticompetitive* effect from the challenged conduct -- is missing from the Complaint. No facts are alleged indicating that the Auntie Anne's franchise agreements so stymied all other prospective employers from competing against each other to hire people like Plaintiff, that they stopped competing on wages and benefits.

C. Plaintiff Cannot Avoid Dismissal by Wrongly Asserting a *Per Se* Violation

Plaintiff apparently seeks to avoid alleging the required elements of a Section 1 claim by asserting that the vertical agreements between Auntie Anne's and its franchisees are *per se* violations. Compl. at 2-4, 6, ¶¶ 2, 7, 12 (asserting "Defendants engaged in *per se* violations" because "Auntie Anne's entered into agreements with

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[4] Even if Auntie Anne's-branded bakeries were a cognizable labor market (they are not), the Complaint still would have not alleged a significant anticompetitive effect in that "market," because there is no allegation that Plaintiff attempted to move to another Auntie Anne's bakery or that another franchise would have solicited him in the absence of the provisions. *See Tanaka*, 52 F.3d at 1064 (no allegation of anticompetitive effect because the restriction at issue was only enforced once).

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its franchisees . . . that contained no-hire and non-solicitation provisions").

However, Plaintiff's conclusory *per se* assertion is wrong as a matter of law: the Ninth Circuit applies the rule of reason to vertical agreements. *Musical Instruments*, 798 F.3d at 1191 (9th Circ. 2015). "While pleading exclusively *per se* violations can lighten a plaintiff's litigation burdens, it is not a riskless strategy. If the court determines that the restraint at issue . . . require[s] application of the rule of reason, ***the plaintiff's claims will be dismissed***." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 317 (3d Cir. 2010) (emphasis added); *see also Texaco Inc.* v. *Dagher*, 547 U.S. 1, 7 n.2 (2006) (refusing to analyze a claim under the rule of reason when plaintiffs put forth solely a *per se* claim).

The *per se* rule was developed for conduct that plainly has no purpose but to harm competition and for which "courts have had considerable experience" such that the court "can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886-87. Examples include horizontal agreements between competitors to fix prices, rig bids, and divide product or geographic markets. *In re Musical Instruments*, 798 F.3d at 1191. In such instances, "[o]nce the agreement's existence is established, no further inquiry into the practice's actual effect on the market or the parties' intentions is necessary to establish a § 1 violation." *Id.* But resort to *per se* rules is confined to restraints "'that would always or almost always tend to restrict competition and decrease output'" and lack "any redeeming virtue." *Leegin*, 551 U.S. at 886-87.

Merely labeling conduct a *per se* violation, as Plaintiff does, is not sufficient to survive a 12(b)(6) motion. *See Twombly*, 550 U.S. at 557 ("a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality"); *In re Musical Instruments*, 798 F.3d at 1198 (affirming dismissal

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of *per se* claims where complaint "failed to allege enough nonconclusory facts to support a plausible inference" of a horizontal agreement). Plaintiff has failed to plead any facts about the operation or effect of the Auntie Anne's franchise agreements that would bring it within the *per se* rule -- *i.e.*, that would justify condemning the alleged no solicit/no hire clause without a factual basis from which to conclude that it actually harmed competition. *Am. Express*, 138 S. Ct. at 2283-84 ("Typically only 'horizontal' restraints—restraints 'imposed by agreement between competitors'—qualify as unreasonable *per se*."). No court has ever declared such franchisor-franchisee provisions to be *per se* unlawful.[5]

And no Court has had "considerable experience" with the conduct alleged here to "predict with confidence" that it would be invalidated under the rule of reason. *Leegin*, 551 U.S. at 886-87. In fact, no such intrabrand provision has ever been invalidated under the rule of reason. To the contrary, the Ninth Circuit has concluded similar restrictions in franchise agreements were not anticompetitive. *See Williams*, 794 F. Supp. 1034 ("no switching" agreement was "not anticompetitive").

Plaintiff has not, for example, alleged any horizontal agreement between competitors. There is no allegation that Auntie Anne's made any agreements with its competitors, and there is no allegation that the individual franchisees made any agreement with each other. Alleging parallel vertical agreements is not sufficient to allege a horizontal conspiracy. *Musical Instruments*, 798 F.3d at 1193. "Plaintiffs must plead something more, some further factual enhancement, a further

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[5] Multiple courts have concluded that even horizontal "no hire" agreements are evaluated under the rule of reason. *Union Circulation Co.* v. *Federal Trade Comm'n*, 241 F.2d 652, 657 (2d Cir. 1957); *UARCO Inc.* v. *Lam*, 18 F. Supp. 2d 1116, 1124 (D. Haw. 1998).

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circumstance pointing toward a meeting of the minds of the alleged conspirators." *Id.* (quotation marks omitted). If Plaintiff means to allege some kind of unwritten horizontal agreement among the franchisees, he has failed to allege any of the necessary facts: "plaintiffs must plead evidentiary facts," such as "who, did what, to whom (or with whom), where, and when." *Id*. at 1194 n.6 (quotation marks omitted).

III. THE STATE LAW CLAIM ALSO SHOULD BE DISMISSED

In considering the Washington analog to Section 1 of the Sherman Act, RCW 19.86.030, "courts are to be guided by federal decisions interpreting comparable federal provisions." *Murray Pub. Co.* v. *Malmquist*, 832 P.2d 493, 497 (Wash. Ct. Appeals 1992). This is because "RCW 19.86.030 is essentially identical to Section 1 of the Sherman Act." *Id.* As a result, the state law claim under RCW 19.86.030 should be dismissed for the same reasons as the Sherman Act claim. *See, e.g., Husky Int'l Trucks* v. *Navistar*, No. C10–5409BHS, 2010 WL 4053082 at *17-19 (W.D. Wash. 2010) (dismissal on the basis of *Copperweld*); *Ceiling & Interior Sys. Supply, Inc.* v. *USG Interiors, Inc*., 878 F. Supp. 1389, 1395 (W.D. Wash. 1993) (dismissal for failure to allege a relevant market).[6]

CONCLUSION

For the above reasons, the Complaint should be dismissed.

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[6] Plaintiff points to an AOD that Auntie Anne's agreed to with the State AG (Compl. at 5-6, ¶¶ 11 n.1, 14), but fails to disclose that the AOD does not claim a "*per se*" violation. The AOD does not reference any finding by the AG, and states that Auntie Anne's "expressly den[ies]" that the conduct violates any law and that "[p]ursuant to RCW 19.86.100, neither this AOD nor its terms shall be construed as an admission of law, fact, liability, misconduct, or wrongdoing." AOD ¶ 2.4.

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Respectfully submitted this 22nd day of October, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 22nd, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants.

DATED this 22nd day of October, 2018.

s/ George Barrington
George Barrington

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