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HONORABLE STANLEY A. BASTIAN

IN THE UNITED STATED DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

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

Plaintiff,

v.

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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

02/06/2019
With Oral Argument: 2:00 p.m.

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INTRODUCTION

In its Motion to Dismiss, Defendants Dough Dough, Inc. and Auntie Anne's Franchisor SPV LLC ("Defendant Auntie Anne's") (together with DOES 1-10, "Defendants") assert that Plaintiff Joseph Stigar's ("Plaintiff") Antitrust Class Action Complaint (ECF No. 1) fails to state a claim upon which relief can be granted. However, Plaintiff has adequately plead a *per se* antitrust claim that there was a conspiracy among and between Defendants in the form of a horizontal restraint on labor competition.

Defendants formulated and coordinated long-standing, mutual non-solicitation and no-hire agreements ("no hire/no solicit" agreements) that were entered into and enforced by all of the Auntie Anne's franchises throughout Washington State. Defendants' standard franchise agreements each contained an identical provision precluding each franchisee from soliciting for employment or hiring the employees of Auntie Anne's and/or any other Auntie Anne's franchisee. ECF No. 1, ¶ 1. This illegal conspiracy between and among Defendants was only discovered by Plaintiff after being revealed by the Washington State Attorney General (AG) as part of its investigation into illegal behavior by large fast food franchises in Washington State, including Auntie Anne's. *Id.* ¶ 2; *see also In Re: Franchise No Poaching Provisions,* Auntie Anne's Franchisor SPV LLC Assurance of Discontinuance, Case No. 18-2-17231-4 SEA (Dkt. No. 1) (July 12, 2018) ("Auntie Anne's AOD"). A true and correct copy is attached hereto as **Exhibit 1**.

Defendants assert that because franchisor—franchisee contracts are generally vertical in nature, and/or because this case involves franchises with intrabrand interests, the Court must find the no hire/no solicit agreements to be vertical—rather than horizontal—and therefore must scrutinize Plaintiff's claims under the rule of reason rather than the *per se* rule. Defendants are mistaken. While it is appropriate to characterize features of Defendant Auntie Anne's and its franchisees' relationships as vertical in

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nature, the no hire/no solicit agreements are horizontal restraints on competition by and between restaurants that operate and compete on the same market level. Despite Defendants' assertion that "The Ninth Circuit has held that vertical agreements . . . 'are analyzed under the rule of reason' and not under the *per se* rule," (ECF No. 16, at 16), horizontal restraints of a hub-and-spokes conspiracy to restrain competition are horizontal in nature, even when vertical aspects exist, and such horizontal restraints are properly subject to being analyzed under the *per se* rule. *United States v. Apple, Inc.*, 791 F.3d 290, 323-25 (2d Cir. 2015), *cert denied*, 133 S.Ct. 1376 (2016). Plaintiff adequately pled a *per se* antitrust claim, and Defendants' Motion to Dismiss should be denied.

FACTS

Plaintiff, a Washington resident, worked as a crewmember for Defendant Dough Dough at its Wenatchee store in 2017-2018. ECF No. 1, ¶ 5. Defendant Auntie Anne's operates and franchises soft pretzel stores throughout Washington and the United States. *Id.* ¶ 7. Defendant Auntie Anne's issues franchise licenses to independent companies via franchise agreements. ECF No. 16, at 8. Each Defendant entered into the no hire/no solicit agreement and carried out a joint scheme that was intended to and had the effect of suppressing employee wages through a market division, by prohibiting each Defendant from hiring or soliciting the other Defendants' employees. ECF No. 1, ¶ 2, 9, 11.

Defendants conspired to not solicit or hire each other's employees as part of a hub-and-spokes conspiracy to suppress employee compensation, which restricts worker mobility and prevents low-wage workers from seeking and obtaining higher pay at a competing Auntie Anne's. ECF No. 1, ¶ 9, 18, 20. Plaintiff was subjected to and victimized by the no hire/no solicit agreement entered into between Defendants: he was not actively solicited for employment by any other Auntie Anne's restaurants, could not

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have been hired at another restaurant pursuant to the plain language of the franchise agreement's no hire/no solicit provisions, and as a result, lost wages. *Id.* ¶¶ 5-6, 21-22.

For years, Defendants suppressed labor costs through the no hire/no solicit agreements, which explicitly prohibit franchisees from employing or seeking to employ any employee of Defendant Auntie Anne's or another Auntie Anne's franchisee. Auntie Anne's AOD, ¶ 2.2. The Washington AG asserted that Defendants' no hire/no solicit provision constitutes a contract, combination, or conspiracy in restraint of trade in violation of RCW 19.86.030 (*Id.* ¶ 2.3), and Defendants agreed to no longer include or enforce the no hire/no solicit agreement subsequent to the date of the AOD. *Id.* ¶ 3.1. The no hire/no solicit provisions from the standard Auntie Anne's franchise agreement are Sections 15.4.A(v), 15.4.B(c), and 18.4.A, and state, in part:

> You further agree that you will not employ or seek to employ an employee of ours or another franchisee, or attempt to induce such employee to cease his/her employment without the prior written consent of such employee's employer.

Id., Exhibit B. Each of the 27 Washington Auntie Anne's stores are independently owned and operated by franchisees (*Id.* ¶ 2.1) and the standard no hire/no solicit provision was included in franchise agreements "for years," so each franchisee in Washington State entered into the same no hire/no solicit agreement with Defendant Auntie Anne's, and knew that all the other franchisees also agreed to abide by the same agreement. *Id.* ¶ 2.2.

Plaintiff has never seen Auntie Anne's standard franchise agreement, nor has he been able to review the relevant provisions relating to the no hire/no solicit agreement and/or other pertinent provisions. Furthermore, Plaintiff has no access to Defendants' records and has not yet conducted any discovery to determine if Defendants have in fact prohibited employees from employment at Auntie Anne's locations after working at another franchise location. Plaintiff alleges, based on the plain terms of the standard no hire/no solicit agreement entered into by each Auntie Anne's franchisee, that he and the

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putative class were prohibited from being employed or even sought out for employment opportunities by Defendants other than their immediate employer, and that this labor market division was conducted and enforced by Defendant Auntie Anne's and its franchisees at least until the date of the Auntie Anne's AOD. ECF No. 1, ¶¶ 9, 15, 18, 21.

In the absence of relevant discovery, Plaintiff cannot reasonably be expected to know what other terms or conditions are within the standard franchise agreements, including: whether and to what extent Defendant Auntie Anne's maintains control or a unity of ownership with its franchisees, especially as it relates to employment issues and decision-making; whether the franchisees are responsible for all day-to-day operations; whether franchisees have authority to act as an agent of Defendant Auntie Anne's (i.e., partnership, joint employers, etc.); and whether franchisees have protected territorial rights or exclusivity in any contiguous market areas, or if they may face competition from another Auntie Anne's franchisee. Despite these unknowns, Plaintiff's factual allegations rise well above mere speculation or a legal theory. Indeed, the existence of the no hire/no solicit agreements among Defendants is confirmed by the Auntie Anne's AOD.

LEGAL STANDARD

A party may bring a motion to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Generally, the Federal Rules require only that a plaintiff provide "'a short and plain statement of the claim that [will] . . . give the defendant fair notice of what . . . the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). "[S]tating a [Section 1] claim requires a complaint with enough factual matter to suggest an agreement. Asking for probable grounds does not impose a probability requirement . . . it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 556. In determining whether there is a sufficient basis for a complaint,

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"[t]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation—***for example, identifying a written agreement*** or even a basis for inferring a tacit agreement . . . ." *Id.* at 557 (emphasis added). When evaluating a Rule 12(b)(6) motion, a court must accept all material allegations in the complaint—as well as any reasonable inferences to be drawn from them—as true and construe them in the light most favorable to the non-moving party. *Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005). There is no heightened fact pleading standard for antitrust cases. *Twombly*, 550 U.S. at 570.

ARGUMENT

I. PLAINTIFF ADEQUATELY STATES A SHERMAN ACT CLAIM

To establish a Sherman Act § 1 claim, a plaintiff must demonstrate "(1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce." *Tanaka v. Univ. of S. California*, 252 F.3d 1059, 1062 (9th Cir. 2001) (citation omitted).

A. PLAINTIFF'S COMPLAINT ADEQUATELY ALLEGES A CONSPIRACY

Defendants argue that because there is a franchisor—franchisee relationship between them, they cannot conspire under the Sherman Act and Plaintiff's complaint therefore fails to allege a conspiracy. ECF No. 16, at 11-15. In essence, Defendants urge this Court to accept that Defendant Auntie Anne's and all of its franchisees are a single-entity. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) (holding that a corporation and its wholly-owned subsidiaries are not legally able to conspire under the Sherman Act because they have "a complete unity of interest.").

Defendants' contention that *Copperweld* bars Plaintiff's Section 1 claim is wrong; *Copperweld* stands for the general proposition that a *wholly* owned subsidiary of another corporate entity cannot conspire with its parent for purposes of violating Section

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1. *Id.* at 777. The doctrine is inapplicable here because Plaintiff has alleged that Defendants—*separate entities*—entered into a series of agreements to effectuate their anticompetitive scheme. Defendants argue that, as a franchisor and franchisees, the Court should decide, as a matter of law, that Defendants should be viewed as a "single enterprise" incapable of conspiring in this case. ECF No. 16, at 11-14. Defendants' request is wholly improper at the pleading stage. Indeed, the leading Supreme Court cases post-*Copperweld* addressing the issue were decided on summary judgment, and the Court in both instances rejected similar arguments in the context of a joint venture; in each instance the Supreme Court held that the individual members of the joint enterprise at issue were subject to Section 1 liability. *See American Needle v. National Football League*, 130 S. Ct. 2201 (2010) (decided on summary judgment and finding individual NFL teams are subject to Section 1 liability); *Texaco v. Dagher*, 547 U.S. 1, 7 & n.2 (2006) (presuming that a joint venture made up of two or more entities is subject to Section 1 scrutiny); *see also Ariz. v. Maricopa County Medical Soc.*, 457 U.S. 332, 336-37, 356-57 (1982) (decided on summary judgment and holding that physicians were individually liable, notwithstanding membership in medical societies).

While Defendants do not assert that they have a complete unity of interest (or a *Copperweld* wholly-owned-subsidiary relationship), they argue that the decisions in *Danforth & Assoc., Inc. v. Coldwell Banker Real Estate, LLC*, No. C10-1621, 2011 U.S. Dist. LEXIS 10882 (W.D. Wash. Feb. 3, 2011) and *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) require this Court to dismiss the case at hand because "franchisor-franchisee['s] cannot conspire within the meaning of the Sherman Act." *Danforth*, 2011 U.S. Dist. LEXIS 10882, at *7. But this is not so; the single-entity inquiry is "unique to the facts of each case." *Jack Russell Terrier Network of N. Cal. v. Kennel Club, Inc.*, 407 F.3d 1027, 1034 (9th Cir. 2005) (citing *Williams*, 999 F.2d at

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447). Further, the crucial question is not the title of the relationship between entities, but rather, "whether [they] maintain an 'economic unity,' and whether the entities were either actual ***or potential*** competitors." *Id.* at 1034 (citation omitted) (emphasis added). Defendants' motion to dismiss does not set forth single-entity inquiry guidelines or why they meet them, nor do Defendants assert that there is a unity of interest between them beyond a shared "common interests in providing the best Auntie Anne's-branded products and services." ECF No. 16, at 14. The single-entity inquiry demands more.

As set forth by the 9th Circuit, there is economic unity between individual entities, such that they function as a single-entity, when they have "substantial common ownership, a fiduciary obligation to act for another entity's economic benefit, or an agreement to divide profits and losses. . . ." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003). Examples of the single-entity rule, where there is economic unity, provided by the 9th Circuit are: a company and its officers, subsidiaries, and/or employees; subsidiaries controlled by a common parent company; agency relationships; and partnerships or joint ventures that pool capital and share risks of loss. *Id.* at 1147-48. Defendants do not argue, nor could they, that any of these types of single-entity relationships (i.e., relationships with a unity of interest among the entities) exist as a result of their franchisor—franchisee relationship. While it is clear the franchisees here are independent corporate entities, Plaintiff is unaware of the degree of control Defendant Auntie Anne's exercises over its franchisees (i.e., whether separate entities act as a single-entity). Further, the requisite level of control raises fundamental questions of fact that cannot be decided at the pleading stage. The 9th Circuit, in *Freeman*, provided three general guidelines or principles that are relevant to consider when making a single-entity inquiry determination, which is fact specific:

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> First, in the absence of economic unity, the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity. "[A] commonality of interest exists in every cartel." . . . . Second, in the absence of economic unity, the fact that firms are not actual competitors is also usually not enough, by itself, to render them a single entity. Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself, as where firms conspire to divide the market. . . . Cases have instead required that the constituent entities be neither actual nor *potential* competitors . . . or that the nature of the relationship be inherently noncompetitive. . . Finally, where firms are not an economic unit and are at least potential competitors, they are usually not a single entity for antitrust purposes.

Freeman, 322 F.3d at 1148-49.

The Supreme Court expanded on the single-entity test in *American Needle*, the case where the Court rejected single-entity treatment between NFL teams and their licensing affiliates. The *American Needle* Court noted that concerted action turns on "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate . . . [and] we have repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served . . . as a vehicle for ongoing concerted activity." *Id.* at 2209. The Court explained the "key" to the single-entity inquiry, which is:

> [w]hether the alleged 'contract, combination . . . or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a 'contract, combination . . . , or conspiracy' amongst 'separate economic actors pursuing separate economic interests' . . . such that the agreement 'deprives the marketplace of independent centers of decisionmaking."

Id. at 2212 (citations omitted). *See also* Block and Ridings, *Antitrust Conspiracies in Franchise Systems After American Needle*, 30 FRANCHISE L.J. 216 (2011) ("The *American Needle* Court said the . . . NFL and NFLP have some common interests in promoting professional football, but, on other matters, their interests are separate. . . . Much of the same thing can be said about many franchise systems. The franchisors and the franchisees have a common interest in promoting the franchise system; but, like

NFLP, the franchise outlets are separately owned and often, at least to some extent, compete for customers."). While Defendants assert that *Williams* requires the single-entity rule to apply to a franchisor—franchisee relationship (ECF No. 16, at 13-14), Defendants fail to acknowledge that *Williams* was decided on summary judgment after a fact-specific inquiry, not on a Rule 12(b)(6) motion. *Williams*, 999 F.2d at 446-47. *Williams* held that a Jack-in-the-Box franchise "no-switching" provision did not violate the Sherman Act due to the franchisor—franchisee relationship, which the District Court said was a "single enterprise, incapable of competing for purposes of Section 1." *Williams*, 794 F. Supp. 1026, 1032 (D. Nev. 1992). However, the *Williams* court made a factual determination that competition between the Jack-in-the-Box entities, which is "the cornerstone of the Ninth Circuit analysis for a § 1 violation[,] . . . does not exist in this case." *Id.* at 1031 (emphasis added). Significantly, the *Williams* court noted that Jack-in-the-Box franchise agreements contain terms for "exclusivity within a certain geographic area to minimize competition between franchises." *Id.* Plaintiff here alleges the no hire/no solicit agreements are between horizontal entities, and has not had the benefit of conducting discovery to further prosecute his claim. Further, there is no indication or assertion by Defendants that they contract for exclusive territory as was the case in *Williams*, and which is an important component in determining if competition exists between Defendants, as Plaintiff asserts, or whether they are all a single-entity.

Defendants also assert that *Danforth* should control here because it held that a franchisor and franchisee "cannot conspire within the meaning of the Sherman Act." *Danforth*, 2011 U.S. Dist. LEXIS 10882, at *7. However, *Danforth* is easily distinguishable from the case at hand. Most importantly, *Danforth* involved a Sherman Act allegation made by a plaintiff franchisee against the franchisor (Coldwell Banker) and another Coldwell Banker franchisee after the franchisor denied plaintiff's request to

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open a fourth Coldwell Banker franchise. *Id.* at *2-3. The *Danforth* plaintiff alleged that the franchisor and another franchisee unlawfully conspired "to unreasonably restrain Plaintiff's expansion in violation of the Sherman Act." *Id.* at *5. *Danforth* is not a case that involved a Sherman Act allegation relating to a no hire/no solicit agreement, it did not allege that employees' wages were suppressed through a horizontal restraint among a franchisor and franchisees, and it did not involve employees whatsoever. Further, the *Danforth* court accepted the *Williams* court's decision regarding franchisors and franchisees with no analysis—and without a citation to or mention of *American Needle*—after noting that the plaintiff "alleges no facts to support the existence of a conspiracy [or] unlawful behavior." *Id.* at *5. At a bare minimum, Plaintiff's allegations here that Defendants conspired to suppress employee wages through a no hire/no solicit agreement, evidenced by the Auntie Anne's AOD, distinguishes this case from *Danforth*, which has no relation to employees or labor generally.

The mere fact that the Defendants in this case are all members of a franchisor—franchisee relationship does not preclude them from being able to conspire within the meaning of the Sherman Act. Defendants do not have complete unity of interest, so the Court should determine if they have economic unity and whether they are actual or potential competitors through a fact-specific single-entity inquiry. It is not enough to simply assert that because Defendants are each part of a franchisor—franchisee relationship and have common interests, they necessarily cannot conspire. "A commonality of interest exists in every cartel." *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1389 (9th Cir. 1984).

B. PLAINTIFF'S COMPLAINT ADEQUATELY ALLEGES A *PER SE* VIOLATION

Section 1 prohibits "unreasonable restraints" of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Some restraints "have such predictable and pernicious

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anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se." *Id. Per se* illegal restraints include "horizontal agreements among competitors to fix prices . . . or to divide markets . . . 'that would always or almost always tend to restrict competition and decrease output.'" *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). There is no requirement to plead or prove a relevant market or market power for *per se* illegal restraints on competition. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n.59 (1940).

1) Horizontal Agreements between Competitors are *Per Se* Illegal

The Supreme Court has consistently held that price fixing among competitors through horizontal agreements is a *per se* Sherman Act violation. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 309 (1956) ("It has been held too often to require elaboration . . . that price fixing is contrary to the policy of competition underlying the Sherman Act. . . ."). The *per se* rule also applies to price fixing regardless of whether a specific price is actually agreed to. *Socony-Vacuum*, 310 U.S. at 222 ("An agreement to pay or charge rigid, uniform prices would be an illegal agreement. . . . But so would agreements to raise or lower prices whatever [the] machinery for price-fixing. . . . They are fixed because they are agreed upon."); *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990) (a boycott among competing lawyers to raise pay rates was illegal *per se* as a price and output restraint).

Non-compete agreements between horizontal competitors are classic *per se* violations of the Sherman Act. *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (holding it is unnecessary to analyze whether a restraint is unreasonable when it is an agreement that is *per se* illegal); *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607-08 (1972) (A "classic example[] of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in

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order to minimize competition. Such concerted action is usually termed a 'horizontal' restraint, in contradistinction to combinations of persons at different levels of the market structure. . . ."). The *per se* rule also applies to agreements between sellers to not solicit each other's customers. *United States v. Coop. Theaters of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (holding an agreement between movie theater booking agents to allocate and not solicit the other's customers is a *per se* violation of the Sherman Act).

Moreover, the *per se* rule applies to agreements between employers that restrain competition for employees, as is alleged in this case by Plaintiff. Significantly, the DOJ Antitrust Division and FTC have recently weighed in on no hire/no solicit agreements among employers through a Human Resource Guidance document which makes clear that these federal agencies view the conduct as not only *per se* unlawful, but also a behavior that can expose defendants to criminal liability. *See* Department of Justice Antitrust Division and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* (October, 2016), ("firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether [they] make the same products or compete to provide the same services. It is unlawful for competitors to expressly or implicitly agree not to compete with one another. . . . Naked wage-fixing or no-poaching agreements among employers . . . are per se illegal. . . ."). *See also In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (holding that the plaintiff employees properly "pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion," and denying the defendant employers' motion to dismiss that asserted the court must engage in a market analysis: "the Court need not decide now whether *per se* or rule of reason analysis applies . . . that decision is more appropriate on a motion for summary judgment."); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (allegations of a no-hire

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agreement between eBay and Intuit sufficiently state a claim of a horizontal market allocation agreement); *Fleischman v. Albany Med. Ctr.*, 728. F. Supp. 2d 130, 157-58 (N.D.N.Y. 2010) (holding that circumstantial proof of a *per se* Sherman Act claim—even in the absence of direct evidence of a conspiracy—was sufficient to constitute a conspiracy that is illegal *per se*); *Doe v. Arizona Hosp. and Healthcare Ass'n*, No. CV 07-1292-PHX-SRB, 2009 WL 1423378 (D. Ariz. Mar. 19, 2009) (travel nurses sufficiently alleged facts supporting a *per se* Sherman Act claim). Plaintiff adequately pled that Defendants' no hire/no solicit agreement is a *per se* unlawful, horizontal market division agreement between competitors. Defendant's motion should be denied.

2) Defendants' No Hire/No Solicit Agreement is a Horizontal Restraint

Defendants argue that Plaintiff's complaint should be dismissed as a matter of law because the no hire/no solicit agreement is contained within a franchise agreement, which Defendants assert is a vertical agreement "solely between parties who do not compete," and which should be analyzed by the court under the rule of reason. ECF No. 16, at 7, 16. However, Defendants are mistaken: the restraint on competition here is horizontal, and between employers operating and competing at the same market level.

Plaintiff's complaint alleges that Defendants entered into, adhered to, enforced, and reaffirmed the anticompetitive no hire/no solicit agreements. ECF No. 1, ¶¶ 1, 2, 9, 10, 36. Plaintiff alleges that all of the Defendants successfully "entered into the mutual [no hire/no solicit agreements] with the common interest and intention to keep their employees' wage costs down," (*Id.* ¶¶ 15, 20). Defendants' conclusory assertion that because the restraint on competition was contained within a franchise agreement, it is a vertical agreement, is wrong. Rather, the nature of the restraint—not the identity of the parties who enter and enforce it—must be examined for a court to determine whether an agreement is horizontal or vertical. *See Apple, Inc.*, 791 F.3d at 319-20 ("It is well

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established that vertical agreements, lawful in the abstract, can in context 'be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel,' . . . particularly where multiple competitors sign vertical agreements that would be against their own interests were they acting independently. . . .") (citation omitted).

In *Apple*, Apple, Inc., a consumer-facing retailer, entered into separate vertical agreements with five competing publishing companies to raise ebook prices across the market. *Id.* at 312. While the court acknowledged Apple and the publishing companies operate at different levels of the market structure, it nonetheless held the anticompetitive restraint was horizontal, not vertical, and therefore subject to the *per se* rule.

> But the relevant "agreement in restraint of trade" in this case is not Apple's vertical Contracts with the Publisher Defendants . . . it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices. . . . [H]orizontal agreements with the purpose and effect of raising prices are *per se* unreasonable because they pose a "threat to the central nervous system of the economy," [*Socony-Vacuum Oil Co.*, 310. U.S. at 224 n.59]; that threat is just as significant when a vertical market participant organizes the conspiracy. . . . The competitive effects of that *same restraint* are no different merely because a different conspirator is the defendant.

Apple, 791 F.3d at 323. The premise that "one who organizes a horizontal price-fixing conspiracy . . . among those competing at a different level of the market has somehow done less damage to competition than its co-conspirators" is erroneous. *Id.* at 297.

The *Apple* court also acknowledged that there is a long history of court's recognizing "hub-and-spoke" conspiracies—where the "hub" (an actor on one level of the market structure) coordinates an agreement with the "spokes" (competitors on a different level of the market structure)—that "consist of both vertical agreements between the hub and each spoke and a horizontal agreement among the spokes 'to adhere to the [hub's] terms,". . . ." *Id.* at 314 (citations omitted). Thus, in determining whether it is appropriate to apply the rule of reason or the *per se* rule, the decision-maker should evaluate the type of restraint that was imposed, i.e., "'whether [a]

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restraint is unreasonable,' not the reasonableness of a particular defendant's role in the scheme." *Id.* at 322 (citations omitted). *See also Toys 'R' Us, Inc. v. Fed. Trade Comm'n*, 221 F.3d 928 (7th Cir. 2000) (Toys 'R' Us's use and enforcement of multiple vertical agreements with toy manufacturers to restrain price competition from warehouse club stores via an effective boycott constituted an illegal horizontal agreement, and that "[p]roof that this is what TRU was doing is sufficient proof of actual anticompetitive effects that no more elaborate market analysis was necessary.").

Recently, the United States District Court for the Northern District of Illinois denied McDonald's restaurant's Rule 12(b)(6) motion to dismiss the plaintiff employee's Sherman Act claim, which contained very similar facts and claims to the case at hand. *See Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 U.S. Dist. LEXIS 105260 (N.D. Ill. June 25, 2018). The plaintiff in *Deslandes* alleged that McDonalds' nationally uniform no-hire agreement restricted competition among the franchisor and franchisees for their employees' labor, thereby inhibiting employees' ability to increase compensation, amounting to an unlawful horizontal agreement. *Id.* at *5, 8-9, 15. While McDonald's argued that its franchise agreement's no-hire provision "is merely a vertical restraint, because it was spearheaded by the entity at the top of the chain[,]" the court held that "the restraint has vertical elements, but the agreement is also a horizontal restraint. It restrains competition for employees among horizontal competitors: the franchisees and the McOpCos." *Id.* at *15-16. The *Deslandes* court denied McDoanld's motion to dismiss plaintiff's Sherman Act claim, stating "The Court finds the plaintiff has alleged a horizontal restraint of trade. . . . A horizontal agreement not to hire competitors' employees is, in essence, a market division. . . ." *Id.* at *16-17.

Defendants' argument that vertical restraints are subject to analysis under the rule of reason, citing *Leegin*, *inter alia*, misses the mark. The rule of reason applies to

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vertical restraints, but the no hire/no solicit restraint at issue here is a *horizontal* restraint among and between competitors. This concept is not inconsistent with the Supreme Court's decision in *Leegin*, as recognized in *Apple*. "[The Supreme Court's *Leegin*] analysis was careful to distinguish between vertical restraints and horizontal ones. . . . [V]ertical price restraints can also be used to organize horizontal cartels to increase prices, which are, 'and ought to be, *per se* unlawful.' When used for such purpose, the vertical agreement may be 'useful evidence . . . to prove the existence of a horizontal cartel." *Apple*, 791 F.3d at 324 (quoting *Leegin*, 551 U.S. at 893). So while purely vertical agreements are generally analyzed under the rule of reason, that is not the case for a hub-and-spoke conspiracy, which is the situation at hand. *See Apple*, 791 F.3d at 325 ("[W]here the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal conspiracy . . . the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is 'and ought to be, *per se* unlawful.'") (citation omitted). *See also Coca-Cola Co. v. Omni Pac. Co.*, No. C 98-0784 SI, 2000 U.S. LEXIS 17089, at *16-17 (N.D. Cal. 2000) (denying Coca-Cola's motion for summary judgment where Omni, a transnational distributor of Coca-Cola products, alleged a *per se* illegal horizontal agreement between Coca-Cola and its other distributors to eliminate price competition, i.e., transshippers; the court rejected the argument that such restraints must be analyzed under the rule of reason because the actions are ancillary to its vertical territorial bottling and distribution agreements, and held that Coca-Cola's summary judgment motion is denied because Omni alleged the vertical agreements took on a horizontal character, which "is akin to the horizontal conspiracies which have been held *per se* illegal."); *Guild Wineries & Distilleries v. J. Sosnick & Son*, 102 Cal. App. 3d

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627 (Cal. Ct. App. 1980) (holding that a wine manufacturer that also distributed its own products could commit a *per se* violation of the California antitrust act).

Defendants entered into unlawful hub-and-spoke conspiracies via horizontal no hire/no solicit agreements uniformly included in their franchise agreements. These horizontal restraints on competition for labor, which are plainly evidenced via the franchise agreements' no hire / no solicit provisions, are illegal *per se*, and Plaintiff therefore need not prove a relevant market or market power to state such a claim for relief.

C. THE ALLEGED RESTRAINT IS PLAUSIBLE

To survive a 12(b)(6) motion, a complaint must plead "enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement" or "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 556, 570. Defendants assert that "[t]he Complaint here alleges vertical intrabrand agreements" (ECF No. 16, at 15) and "Plaintiff has not . . . alleged any horizontal agreement between competitors . . . . [T]here is no allegation that the . . . franchisees made any agreement with each other." *Id.* at 24. However, the relevant agreement here is the *horizontal restraint* between and among the franchisor and franchisees, regardless of whether certain aspects of Auntie Anne's relationship with its franchisees can be described as vertical. Defendant Auntie Anne's is the coordinator, but the standard franchise agreements—containing the no hire/no solicit provision—*evidence* a conspiracy among and between the franchisees, which operate horizontally at the same level. *See Apple*, 791 F.3d at 325 ("How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the horizontal restraint is irrelevant. Instead, the question is whether the vertical organizer of a horizontal conspiracy designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape *per se* liability. We think not.").

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Plaintiff alleged that Defendant Auntie Anne's entered into franchise agreements with all of its Washington franchisees that include the no hire/no solicit agreement, that each Defendant acted as an agent of the other Defendants in carrying out this joint scheme, and that it had the intended and actual effect of significantly reducing or suppressing employees' wages. ECF No. 1, ¶¶ 1-2, 7, 9-10. The Court must accept Plaintiff's allegations as true, and this satisfies the *Twombly* standard that Plaintiff alleged a claim—a broad horizontal agreement among Defendants—that is plausible on its face. While Defendants argue that Plaintiff did not plead evidentiary facts such as "who, did what, to whom (or with whom), where, and when[,]" (ECF No. 16, at 25), Plaintiff has pled parallel conduct between the franchisees, plus asserted compelling evidence that the standard no hire/no solicit agreement was entered into by Defendant Auntie Anne's and all of its Washington franchisees via the Auntie Anne's AOD. Clearly, the no hire/no solicit agreement exists here, as evidenced by standard contracts.

Each Defendant also shares a common motive to reduce labor costs. ECF No. 1, at ¶¶ 2, 15, 18, 20-21. There is nothing inherently implausible about Plaintiff's allegation of a broad hub-and-spoke horizontal agreement. "A horizontal conspiracy can use vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goals." *Apple*, 791 F.3d at 324. *See also In re High-Tech*, 856 F. Supp. 2d at 1118 ("A co-conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy.") (citation omitted). Further, district courts within this Circuit have held that sufficient factual pleadings require allegations "*such as* 'a specific time, place or person involved in the alleged conspiracies.'" *Darush v. Revision LP*, 2013 U.S. Dist. LEXIS 186906, at *14-15 (C.D. Cal. July 16, 2013). *See also In re Fresh & Process Potatoes Antitrust Litig.*, 834 F. Supp. 2d 1141, 1163 & n.13 (D. Idaho

2011) (*Twombly* "did not impose the elaborate 'who-what-where-when' pleading requirement defendants insisted upon"). Where antitrust plaintiffs allege specific details of the conspiracy, a motion to dismiss will be denied. *See In re High-Tech*, 856 F. Supp. 2d at 1115-18. Plaintiff's pleadings go beyond allegations of parallel conduct equally consistent with independent action or a "conclusory allegation of an agreement" (*Twombly*, 550 U.S. at 557); accepting Plaintiff's pleaded facts as true, he plausibly pleads the existence of a horizontal no hire/no solicit agreement among competitors.

D. IF THE *PER SE* OR "QUICK LOOK" CLAIM IS DISMISSED, THE COURT SHOULD ALLOW PLAINTIFF TO PURSUE A RULE OF REASON CLAIM

Defendants argue that Plaintiff's Complaint fails to allege a relevant market and facts showing the restraint produces "significant anticompetitive effects" under the rule of reason. ECF No. 16, at 17, 23. As stated herein, Plaintiff does sufficiently plead a *per se* unlawful conspiracy, and a plaintiff does not need to prove, or even plead, market power or a relevant market when alleging horizontal restraints that are illegal *per se*. *See Socony-Vacuum*, 310 U.S. at 224 n.59 ("[such] agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination."). For that reason, the Court should deny Defendants' motion to dismiss. *See In re High-Tech*, 856 F. Supp. 2d at 1122 ("the Court need not engage in a market analysis until the Court decides whether to apply a *per se* or rule of reason analysis . . . . [T]he Court need not decide now whether *per se* or rule of reason analysis applies . . . that decision is more appropriate on . . . summary judgment.").

Even if the Court determines the *per se* rule does not apply, Plaintiff alleged sufficient anticompetitive effects to allow the Court to use the "quick look" standard. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109

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(1984) (where there is a likelihood of anticompetitive effects, there is no need for the plaintiff to prove or analyze market power under a quick look approach). The *per se* rule is designed to avoid an "incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable. . . ." *N. Pac. Ry. Co.*, 356 U.S. 1, 5 (1958). Unless the Court concludes that Plaintiff has not adequately plead a *per se* or "quick look" case, or that Plaintiff may only proceed under the rule of reason, Plaintiff should not be required to plead a rule of reason case. Should the Court make such a ruling, Plaintiff respectfully requests leave to amend to do so.

II. THE WASHINGTON STATE ANTITRUST CLAIM

Plaintiff agrees with Defendants that Sherman Act § 1 and its Washington State counterpart, RCW 19.86.030, are "essentially identical[,]" and that "[i]n construing RCW 19.86.030, courts are to be guided by federal decisions interpreting comparable federal provisions." *Murray Pub. Co. v. Malmquist*, 66 Wn. App. 318, 325 (Wash. Ct. App. 1992). There are no on-point Washington court decisions to guide the Court in construing the germane issues associated with this motion (i.e., franchisor—franchisee ability to conspire, antitrust allegations based on competition restraints on employees' labor, etc.). The Court should deny Defendants' motion to dismiss, because Plaintiff has adequately alleged a *per se* violation of RCW 19.86.030. *See id.* at n.4.

III. CONCLUSION

For the above reasons, the Court should deny Defendants' Motion to Dismiss.

Respectfully submitted,
ACKERMANN & TILAJEF, P.C.
INDIA LIN BODIEN, ATTORNEY AT LAW

Date: November 12, 2018

/s/Craig J. Ackermann
Craig J. Ackermann
Attorneys for Plaintiff and the Putative Class

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DECLARATION OF SERVICE

I, Amanda Lutsock, declare under penalty of perjury under the laws of Washington State, that on November 12, 2018, I caused to be delivered to Defendants the following a copy of the foregoing document and the Proposed Order Denying Defendants' Motion to Dismiss in the manner indicated below:

Adam J. Bernstein, Esq. PAUL WEISS RIFKIND WHARTON & GARRISON 1285 Ave of the Americas New York, NY 10019-6064 abernstein@paulweiss.com *Attorney for Defendants*	[ ] By Overnight Mail [ ] By Legal Messenger [ ] By Facsimile [X] By Email [X] By E-Filing
Angelo J. Calfo, Esq. CALFO EAKES & OSTROVSKY PLLC 1301 Second Avenue Seattle, WA 98101-3808 angeloc@calfoeakes.com *Attorney for Defendants*	[ ] By Overnight Mail [ ] By Legal Messenger [ ] By Facsimile [X] By Email [X] By E-Filing
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John Ray Nelson, Esq. FOSTER PERPPER, PLLC 618 West Riverside Ave., Ste. 300 Spokane, WA 99201-5102 John.nelson@foster.com *Attorney for Defendants*	[ ] By Overnight Mail [ ] By Legal Messenger [ ] By Facsimile [X] By Email [X] By E-Filing
Adam J. Chambers, Esq. FOSTER PERPPER, PLLC 618 West Riverside Ave., Ste. 300 Spokane, WA 99201-5102 John.nelson@foster.com *Attorney for Defendants*	[ ] By Overnight Mail [ ] By Legal Messenger [ ] By Facsimile [X] By Email [X] By E-Filing

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of November, 2018, at Tacoma, Washington.

Amanda Lutsock
Legal Assistant

EXHIBIT 1

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

IN RE: FRANCHISE NO POACHING PROVISIONS	NO. AUNTIE ANNE'S FRANCHISOR SPV LLC ASSURANCE OF DISCONTINUANCE

The State of Washington, by and through its attorneys, Robert W. Ferguson, Attorney General (the "Attorney General"), and Eric S. Newman, Assistant Attorney General, files this Assurance of Discontinuance ("AOD") pursuant to RCW 19.86.100.

I. PARTIES

1.1 In January 2018, the Attorney General initiated an investigation into Auntie Anne's Franchisor SPV LLC ("Auntie Anne's") relating to certain provisions in its franchise agreement.

1.2 Auntie Anne's is a Delaware limited liability corporation with its principal offices or place of business in Atlanta, Georgia. Auntie Anne's is a franchisor, and its corporate and franchisee operated locations are in the business of offering hand-rolled soft pretzels, among other food products, for sale to consumers.

1.3 For purposes of this AOD, Auntie Anne's shall include its directors, officers, managers, agents acting within the scope of their agency, and employees as well as its successors and assigns, controlled subsidiaries, and predecessor franchisor entities.

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II. INVESTIGATION

2.1 There are 27 Auntie Anne's stores located in the State of Washington as of the date hereof. All of these stores are independently owned and operated by franchisees.

2.2 For 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/or of other Auntie Anne's franchisees (the "No-Solicitation Provision"), 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 (the "No-Hire Provision").

2.3 The Attorney General asserts that the foregoing conduct of Auntie Anne's and its franchisees constitutes a contract, combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act, RCW 19.86.030.

2.4 Auntie Anne's and its current and former franchisees expressly deny that the conduct described above constitutes a contract, combination, or conspiracy in restraint of trade in violation of the Consumer Protection Act, RCW 19.86.030, or any other law or regulation, and expressly deny they have engaged in conduct that constitutes a contract, combination, or conspiracy in restraint of trade, or violates any other law or regulation. Auntie Anne's enters into this AOD to avoid protracted and expensive litigation. Pursuant to RCW 19.86.100, neither this AOD nor its terms shall be construed as an admission of law, fact, liability, misconduct, or wrongdoing on the part of Auntie Anne's or any of its current or former franchisees.

III. ASSURANCE OF DISCONTINUANCE

3.1 Subject to Paragraph 2.4 above, Auntie Anne's agrees:

3.1.1. It will no longer include the No-Solicitation Provision or the No-Hire Provision in any of its franchise agreements in the United States signed after the date hereof.

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3.1.2. It will not enforce the No-Solicitation Provision or the No-Hire Provision in any of its existing franchise agreements in the United States, and will not seek to intervene in any action brought by the Attorney General's Office against a current franchisee in Washington to defend an existing No-Solicitation Provision or No-Hire Provision, provided such action is brought in accordance with, and consistent with, the provisions of this AOD.

3.1.3. It will notify all of its current franchisees in the United States of the entry of this AOD and make a copy available to them.

3.1.4. If, after the 21 day period set forth in Paragraph 3.2 below, Auntie Anne's becomes aware of a franchisee with a store located in the State of Washington attempting to enforce the No-Solicitation Provision or the No-Hire Provision, and Auntie Anne's is unable to persuade such franchisee to desist from enforcing or attempting to enforce such provision, Auntie Anne's will notify the Attorney General.

3.2 Within 21 days of entry of this AOD, Auntie Anne's will send a letter to all of its current franchisees with stores located in the State of Washington, stating that the Attorney General has requested that the existing No-Solicitation Provision and No-Hire Provision be removed from existing franchise agreements. The letter that Auntie Anne's will send to its current franchisees in the State of Washington will be substantially in the form of the letter attached hereto as Exhibit A. That letter will enclose the proposed amendment that Auntie Anne's is requesting that each of its franchisees in the State of Washington agree to, which amendment will remove the No-Solicitation Provision and the No-Hire Provision. The proposed amendment that will be included with each letter will be substantially in the form of the amendment attached hereto as Exhibit B.

3.3 In addition to sending the letter to its current franchisees in the State of Washington pursuant to Paragraph 3.2 above, Auntie Anne's will respond promptly to any inquiries from such franchisees regarding the request to amend the terms of the franchise agreement and will encourage its current franchisees in the State of Washington to sign the

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proposed amendment. However, for the avoidance of doubt, Auntie Anne's is under no obligation to offer its franchisees any consideration—monetary or otherwise—in order to induce them to sign the proposed amendment, or take any adverse action against such franchisees if they refuse to do so. Within 120 days of entry of this AOD, Auntie Anne's will provide copies of all executed amendments it has obtained with its current franchisees in the State of Washington to the Attorney General's Office. A decision by a franchisee not to amend its franchise agreement, or not to do so within 120 days of this AOD, shall not mean that Auntie Anne's has not complied with its obligations under this AOD.

3.4 If Auntie Anne's learns that a current franchisee in the State of Washington intends in good faith to sign the proposed amendment but is unable to do so within the time period specified in Paragraph 3.3, Auntie Anne's will notify the Attorney General's Office to seek a mutually agreeable extension. During any such extension, the Attorney General's Office will not take further investigative or enforcement action against a franchisee.

3.5 As they come up for renewal during the ordinary course of business, Auntie Anne's will remove the No-Solicitation Provision and the No-Hire Provision from all of its existing franchise agreements in the United States with its franchisees on a nationwide basis, unless expressly prohibited by law. In addition, Auntie Anne's will not include the No-Solicitation Provision or the No-Hire Provision in any franchise agreement it signs in the United States after the date of this AOD.

3.6 Within 30 days of the conclusion of the time periods referenced in paragraph 3.3, Auntie Anne's will submit a declaration to the Attorney General's Office signed under penalty of perjury stating whether all provisions of this agreement have been satisfied.

IV. ADDITIONAL PROVISIONS

4.1 This AOD is binding on, and applies to Auntie Anne's, including each of its respective directors, officers, managers, agents acting within the scope of their agency, and employees, as well as their respective successors and assigns, controlled subsidiaries,

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predecessor franchisor entities, or other entities through which Auntie Anne's may now or hereafter act with respect to the conduct alleged in this AOD.

4.2 This is a voluntary agreement and it shall not be construed as an admission of law, fact, liability, misconduct, or wrongdoing on the part of Auntie Anne's or any of its current or former franchisees. Auntie Anne's and its current and former franchisees neither agree nor concede that the claims, allegations and/or causes of action which have or could have been asserted by the Attorney General have merit and Auntie Anne's and its current and former franchisees expressly deny any such claims, allegations, and/or causes of action. However, proof of failure to comply with this AOD shall be *prima facie* evidence of a violation of RCW 19.86.020, thereby placing upon the violator the burden of defending against imposition by the Court of injunctions, restitution, costs and reasonable attorney's fees, and civil penalties of up to $2,000.00 per violation.

4.3 Auntie Anne's will not, nor will it authorize any of its officers, employees, representatives, or agents to, state or otherwise contend that the State of Washington or the Attorney General has approved of, or has otherwise sanctioned, the conduct described in Paragraph 2.2 with respect to the No-Solicitation Provision and the No-Hire Provision in Auntie Anne's franchise agreement.

4.4 This AOD shall have a term of twenty-five (25) years.

4.5 This AOD resolves all issues raised by the State of Washington and the Antitrust Division of the Attorney General's Office under the Consumer Protection Act and any other related statutes pertaining to the acts of Auntie Anne's and its current and former franchisees as set forth in Paragraph 2.1 – 2.3 above that may have occurred before the date of entry of this AOD, or that occur between the date of the entry of this AOD and the conclusion of the 120 day

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period identified in Paragraph 3.3 above, and concludes the investigation thereof. Subject to Paragraph 4.2, the State of Washington and the Antitrust Division of the Attorney General's Office shall not file suit or take any further investigative or enforcement action with respect to the acts set forth above that occurred before the date of entry of this AOD, or that occurs between the date of the entry of this AOD and the conclusion of the 120 day period identified in Paragraph 3.3 above, against Auntie Anne's or any of its current franchisees in the State of Washington that sign the proposed amendment described in Section III, any of its former franchisees in the State of Washington, or any of its current or former franchisees located outside the State of Washington. The Attorney General reserves the right to take further investigative or enforcement action against any current franchisee in the State of Washington identified pursuant to Paragraph 3.1.4 or any current franchisee in the State of Washington that does not sign the proposed amendment described in Section III.

APPROVED ON this _____ day of_____, 2018.

_____
JUDGE/COURT COMISSIONER

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Presented by:

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Agreed to and approved for entry by:
AUNTIE ANNE'S FRANCHISOR SPV LLC

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—and—

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EXHIBIT A

Franchisee name and address

Re: Notice Regarding Amendment to Franchise Agreement

Dear Franchisee:

You are receiving this letter because you operate an Auntie Anne's location in the State of Washington. As you may be aware, the Attorney General of the State of Washington recently began an investigation into the inclusion of non-solicitation and no-hire clauses in the franchising industry. Numerous franchise companies, including Auntie Anne's, were included in this investigation.

After significant negotiations, we were able to reach an agreement with the Attorney General that will provide peace of mind not only for Auntie Anne's, but also for our franchisees. While we do not believe that we or our franchisees have acted in any way that is unlawful or improper, we think a settlement is in the best interests of our franchise system, to avoid the uncertainty and potentially significant costs of litigation. Among other things, we have committed to removing the non-solicitation provision currently in our franchise agreements from all new franchise agreements that we sign on a nationwide basis. We have also committed to not enforcing the non-solicitation and no-hire provisions in any of our existing franchise agreements on a nationwide basis. In addition, the Attorney General has required that we ask all franchisees who operate franchises in the State of Washington to execute an amendment to the franchise agreement, which amendment deletes the non-solicitation and no-hire provisions from their franchise agreement (if any such provisions exist).

We have enclosed such an amendment for your Auntie Anne's location. If you enter into this amendment, then pursuant to our agreement with the Attorney General, the State of Washington will not file suit against you, or take any investigative or enforcement action against you, relating to any non-solicitation or no-hire provisions in your franchise agreement, up to and including the date upon which you sign the amendment. By executing the amendment you are not admitting any liability, fault, or wrongdoing. If you decide not to execute this amendment, the Attorney General has indicated it will reserve the right to investigate you for any actions you may have taken under the non-solicitation and no-hire provisions, and to pursue any litigation or enforcement actions it deems appropriate. We strongly encourage you to sign the enclosed amendment.

Please review this amendment with your legal counsel and return the executed amendment to Tim Goodman, Vice President of Franchise Administration, at tgoodman@focusbrands.com or mail it to Tim at the address above. If you have any questions regarding this amendment, please contact Sarah Powell, the Executive Vice President and General Counsel of Focus Brands, at (678) 702-5040.

We appreciate your prompt attention to this matter.

Best regards,

Heather Neary
President

EXHIBIT B

AMENDMENT
TO
AUNTIE ANNE'S FRANCHISOR SPV LLC FRANCHISE AGREEMENT

The Auntie Anne's Franchisor SPV LLC ("Auntie Anne's") Franchise Agreement between Auntie Anne's ("We") and the undersigned franchisee ("You") dated _____ (as amended, the "Franchise Agreement") shall be amended in accordance with the following terms.

1. Background. We and you are parties to the Franchise Agreement and you operate one or more franchised outlets in the State of Washington under the Franchise Agreement. We have determined that it is in the best interests of the franchise system to not enforce [Section 15.4.A(v) and Section 15.4.B(c)] [the last sentence of Section 18.4.A (which provides "You further agree that you will not employ or seek to employ an employee of ours or another franchisee, or attempt to induce such employee to cease his/her employment without the prior written consent of such employee's employer.")] [Section XVI.B(ii) and Section XVI.C(ii) (which provides restrictions on your ability to "employ or seek to employ an employee of Franchisee, Franchisor or Franchisor's franchisees or attempt to induce the person to leave his/her employment without the prior written consent of the employer")]. The purpose of this Amendment to your Franchise Agreement is to document this change. All initial capitalized terms used but not defined in this Amendment shall have the meanings set forth in the Franchise Agreement.

2. Modification of Terms. As of the Effective Date (defined below) of this Amendment, you and we agree that [Section 15.4.A(v) and Section 15.4.B(c)] [the last sentence of Section 18.4.A (which provides "You further agree that you will not employ or seek to employ an employee of ours or another franchisee, or attempt to induce such employee to cease his/her employment without the prior written consent of such employee's employer.")] [Section XVI.B(ii) and Section XVI.C(ii) (which provides restrictions on your ability to "employ or seek to employ an employee of Franchisee, Franchisor or Franchisor's franchisees or attempt to induce the person to leave his/her employment without the prior written consent of the employer")] [are/is] hereby deleted from the Franchise Agreement and are of no further force or effect.

3. Miscellaneous. Except as specifically modified by this Amendment, the provisions of the Franchise Agreement shall remain in full force and effect. This document is an amendment to, and forms a part of, the Franchise Agreement. If there is an inconsistency between this Amendment and the Franchise Agreement, the terms of this Amendment shall control. This Amendment constitutes the entire agreement between the parties hereto, and there are no other oral or written representations, understandings or agreements between them, relating to the subject matter of this Amendment. This Amendment inures to the benefit of the parties hereto and their respective successors and assigns and will be binding upon the parties hereto and each of their respective successors and assigns. This Amendment may be executed in

multiple counterparts, but all such counterparts together shall be considered one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed and delivered this Agreement effective as _____, 2018 (the "Effective Date").

AUNTIE ANNE'S FRANCHISOR SPV LLC

By:_____
Name:_____
Title:_____

[**FRANCHISEE'S NAME**]

By:_____
Name:_____
Title:_____