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**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.

No. 2:18-cv-00244-SAB

**MOTION FOR
EXPEDITED LEAVE TO
FILE AMICUS CURIAE
BRIEF BY THE
ATTORNEY GENERAL
OF WASHINGTON**

CLASS ACTION

DATE: 3/8/19
Without Oral Argument

INTRODUCTION

Pursuant to Local Rules 7.1(a) and 7.1(h)(2)(C), the Attorney General of the state of Washington respectfully requests expedited leave to file a brief as amicus curiae in the above-captioned actions. The Attorney General is the legal adviser to the state of Washington. *See* RCW 43.10.030. The Attorney General's

1 constitutional and statutory powers include the submission of amicus briefs on
2 matters that affect the public interest. *See Young Ams. for Freedom v. Gorton*,
3 588 P.2d 195, 200 (Wash. 1978). While no rule specifically addresses amicus
4 participation, district courts have broad discretion to grant leave to participate as
5 amicus curiae. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), *abrogated*
6 *on other grounds by Sandin v. Conner*, 515 U.S. 472 (1995).

7 Counsel for the State has conferred with the parties' counsel regarding the
8 Attorney General's intent to file an amicus brief. Plaintiffs have no objections.
9 Declaration of Rahul Rao In Support of The Attorney General of Washington's
10 Motion for Expedited Leave to File Amicus Brief ("Rao Decl."), ¶ 13. Franchisor
11 Defendants do not consent to the Attorney General filing an expedited request for
12 leave to file an amicus brief. *Id.* ¶ 14. Franchisee Defendants Dough Dough,
13 Marlu Sea-Tac, and CJ Starr, have been notified of the Attorney General's intent
14 to file an amicus brief. *Id.* ¶¶ 15-17. As of the time of this filing, those
15 Franchisee Defendants have not provided a response or stated any particular
16 objections to the Attorney General filing an expedited request for leave to file an
17 amicus brief. *Id.*

18 ARGUMENT

19 In the motions to dismiss, Defendants contend that, under both federal and
20 state antitrust laws, the rule of reason applies to analyzing claims based on "no
21 poaching" provisions contained in franchise agreements. Defendants are
22 mistaken. The Washington Attorney General respectfully seeks leave to file an

1 amicus curiae brief to provide additional information to this Court on (1) the
2 purpose, function and interpretation of the relevant antitrust provisions of
3 Washington’s Consumer Protection Act (CPA), RCW 19.86.030, and (2) the
4 State’s unique perspective on these agreements borne from having investigated
5 over 100 franchisors, having entered into settlements—through assurances of
6 discontinuance—with 57 franchisors who used no-poach provisions in their
7 franchise agreements, and having successfully defeated a motion to dismiss on
8 this very issue before a state trial court, which left in place *per se* claims against
9 the defendants. Rao Decl. ¶¶ 2-3.

10 District courts have broad discretion to grant leave to participate as amicus
11 curiae. *Hoptowit, supra*, 682 F.2d at 1260. An amicus curiae brief should
12 “normally be allowed” in certain circumstances, including “when the amicus has
13 unique information or perspective that can help the court beyond the help that the
14 lawyers for the parties are able to provide.” *Community. Ass’n for Restoration of*
15 *the Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash.
16 1999). Amicus curiae fulfill the role by submitting briefing designed to
17 supplement and assist in cases of general public interest, supplement the efforts
18 of counsel, and draw the court’s attention to law that might otherwise escape
19 consideration. *Id.* “An amicus brief should normally be allowed . . . when the
20 amicus has unique information or perspective that can help the court beyond the
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1 help that the lawyers for the parties are able to provide.” *Id.* (internal citations
2 omitted).

3 The Attorney General enforces the CPA and has a strong interest in both
4 the enforcement of those laws as well as their correct application. The Attorney
5 General has a particular interest in this case because of its more-than-year-long
6 investigation into the use of no-poaching provisions in franchise agreements.
7 RCW 19.86.030 sets forth the state of Washington’s prohibition on contracts,
8 combinations, or conspiracies in restraint of trade or commerce. While this
9 provision of Washington law is intended to complement the federal analogue—
10 section 1 of the Sherman Act—it is not beholden to mirror federal antitrust law.
11 *See Blewett v. Abbott Labs*, 86 Wn. App. 782, 787, 938 P.2d 842 (1997) (the
12 statutory “directive to be ‘guided by’ federal law does not mean that [Washington
13 state courts] are bound to follow it”). State law—including the antitrust
14 provisions in the Consumer Protection Act—can and do part ways from federal
15 law for reasons rooted in the state’s “own statutes or case law.” *Id.*

16 In all three class actions, Plaintiffs have asserted a violation of
17 Washington’s Consumer Protection Act, RCW 19.86.030, as one of their causes
18 of action. Yet, in their motions to dismiss, Defendants devote only *three*
19 *sentences* in a 20 page brief to address the state law cause of action. And those
20 three sentences merely, and incompletely, state that the courts interpreting RCW
21 19.86.030 are guided by federal court decisions interpreting the Sherman Act. In
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1 responding to the motion to dismiss, Plaintiffs also devote a mere three sentences
2 to addressing their state antitrust claim. And in their response, Plaintiffs actually
3 agree with Defendants' characterization of how federal law guides RCW
4 19.86.030. As the State will show in its amicus, the parties understanding of how
5 federal court decisions guide the interpretation of RCW 19.86.030, while not
6 necessarily incorrect, is incomplete.

7 The Attorney General has a strong interest in upholding the continued and
8 consistent application of the CPA. Because the question of how to interpret the
9 state Consumer Protection Act was raised by the both parties—through the
10 complaint and motion to dismiss—but has not been sufficiently briefed by the
11 parties themselves, the Attorney General respectfully submits that its amicus brief
12 will assist the Court in providing this additional perspective, and requests that the
13 Court grant its motion for leave to file an amicus brief.

14 **GOOD CAUSE FOR EXPEDITED HEARING**

15 While the Attorney General has been generally aware of the existence of
16 purported class actions over no-poach provisions in franchise agreements filed in
17 the Eastern District of Washington, and elsewhere, the Attorney General did not
18 feel it necessary to insert itself into private parties' litigation. However, on
19 January 28, 2019, the Attorney General learned of the Department of Justice's
20 Notice of Intent to File a Statement of Interest in the instant actions. Rao Decl., ¶
21 5. In light of the Department of Justice's forthcoming views regarding the
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1 interpretation of the parties' claim under the federal antitrust laws, as well as the
2 parties limited briefing on the proper interpretation of state law as it relates to
3 federal law, the Attorney General respectfully requests an opportunity to more
4 fully brief the court on the application of state law to the conduct at issue.

5 Accordingly, the Attorney General respectfully requests expedited
6 determination by the Court on whether to grant leave to the Attorney General to
7 file an amicus curiae brief no later than three (3) court days after an order
8 granting leave, or March 13, 2019, whichever is earlier.

9 Good cause exists because Defendants' motions to dismiss are set for a
10 hearing on March 20, 2019. An expedited hearing will allow the parties to the
11 above actions to know whether the Court has granted the State leave to file the
12 amicus brief, such that they may have the opportunity to reply to the Attorney
13 General's position.

14 CONCLUSION

15 For the foregoing reasons, the Attorney General respectfully moves the
16 Court for expedited leave to file an amicus curiae brief.

17 RESPECTFULLY SUBMITTED this 1st day of March 2019.

18 ROBERT W. FERGUSON
19 Attorney General

20 s/ Eric Newman
ERIC NEWMAN, WSBA No. 31521
21 Assistant Attorney General
Office of the Attorney General of Washington
22 Antitrust Division

CERTIFICATE OF SERVICE

I hereby certify that on March 1st, 2019, I caused to be delivered via the method listed below the document to which this Certificate of Service is attached (plus any exhibits and/or attachments) to the following:

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s/ Eric Newman

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