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HONORABLE STANLEY A. BASTIAN

9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON

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

13 Plaintiff,

14 vs.

15 DOUGH DOUGH, INC., a Washington
16 Corporation, AUNTIE ANNE'S
17 FRANCHISOR SPV LLC, a Delaware
18 Limited Liability Company; and DOES
19 1 through 10, inclusive,

20 Defendants.

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

DEFENDANT AUNTIE ANNE'S
FRANCHISOR SPV LLC'S
OPPOSITION TO MOTION FOR
LEAVE TO FILE BRIEF OF
AMICI CURIAE BY
WASHINGTON STATE
ATTORNEY GENERAL

Hearing date: March 8, 2019

1 **INTRODUCTION**

2 Auntie Anne’s Franchisor SPV LLC (“Auntie Anne’s”) opposes the motion
3 of the Attorney General of the State of Washington (the “Washington AG”) for
4 expedited leave to file an amicus curiae brief in connection with Auntie Anne’s
5 pending motion to dismiss Plaintiff’s complaint. The Washington AG’s motion, by
6 which it seeks to weigh in on the merits of this case, is contrary to the terms and
7 purpose of the Assurance of Discontinuance (“AOD”) entered into between Auntie
8 Anne’s and the Washington AG last July. The AOD was intended to bring to an end
9 the Washington AG’s actions relating to Auntie Anne’s so-called “no poaching”
10 agreements. The motion, accordingly, should be denied.

11 **ARGUMENT**

12 In 2018, the Washington AG launched an investigation into the use of no-hire
13 or no-solicit provisions in franchise agreements, which allegedly limited the
14 mobility of franchise employees. Auntie Anne’s promptly and fully cooperated with
15 the Washington AG and agreed to resolve the investigation without any litigation.
16 Auntie Anne’s was among the first businesses to settle with Washington AG.¹

17 Accordingly, Auntie Anne’s entered into an AOD with the Washington AG
18 on July 12, 2018. *In re: Franchise No Poaching Provisions*, Auntie Anne’s
19 Franchisor SPV LLC Assurance of Discontinuance, No. 18-2-17231-4 SEA (Dkt.

20
21 ¹ See Washington AG Press Release, *AG Ferguson Announces Fast-Food Chains*
22 *Will End Restrictions On Low-Wage Workers Nationwide*, (July 12, 2018),
23 [https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-](https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers)
24 [chains-will-end-restrictions-low-wage-workers](https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers) (announcing settlement with Auntie
25 Anne’s and six other franchisors).

1 No. 4) (Wash. Super. Ct. July 12, 2018). A true and correct copy of the AOD is
2 attached as **Exhibit 1**.

3 To memorialize the closure of the investigation and foreclose further action
4 against Auntie Anne’s, Paragraph 4.5 of the AOD states in relevant part:

5 This AOD resolves all issues raised by the State of Washington and the
6 Antitrust Division of the Attorney General’s Office under the Consumer
7 Protection Act and another related statutes pertaining to the acts of Auntie
8 Anne’s and its current and former franchisees Subject to Paragraph 4.2,
9 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 above²

10 The AOD, by its express terms, “resolve[d] all issues” between the parties
11 relating to the “no poaching” clauses. The Washington AG committed to (a) “not
12 file suit,” (b) to not “take any further investigative . . . action,” and (c) to not “take
13 any further . . . enforcement action.”³

14 When Auntie Anne’s entered into the AOD, it accepted the risk that there
15 might be follow-on lawsuits brought by private parties seeking to capitalize on the
16 Washington AG’s investigation, as often happens. It is for that very reason that
17 Auntie Anne’s bargained to be free from any further actions by the Washington AG.

18 Now, the Washington AG seeks permission (over Auntie Anne’s objection)
19 to file a brief in this private antitrust case addressing the merits of the legal arguments
20

21 ² Paragraph 4.2 provides that proof of failure to comply with the AOD shall be prima
22 facie evidence of a violation of RCW 19.86.020.

23 ³ The Washington AG’s commitment in this regard is dependent on Auntie Anne’s
24 compliance with the terms of the AOD. Auntie Anne’s has fully complied with its
25 obligations under the AOD, the Washington AG has never contended that is has not.

1 made by Auntie Anne’s in its pending motion to dismiss. To resolve its differences
2 with the Washington AG, Auntie Anne’s received assurances that the Washington
3 AG would not take any further action to expose Auntie Anne’s to liability. The
4 Washington AG’s proposed brief threatens to do just that by weighing in on the
5 merits of the motion to dismiss. For this reason, the motion should be denied.

6 In addition to the representations made by the Washington AG to induce
7 Auntie Anne’s to enter into the AOD, the Washington AG is not a disinterested party
8 in this litigation. While Auntie Anne’s acknowledges that “there is no rule that amici
9 must be totally disinterested,” *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm’n*, 801
10 F.2d 1120, 1125 (9th Cir.1986), the historical purpose and role of an amicus curiae
11 “is an impartial individual who suggests the interpretation and status of the law,
12 gives information concerning it, and advises the Court in order that justice may be
13 done, ***rather than to advocate a point of view so that a cause may be won by one***
14 ***party or another,***” *Cmty. Ass’n for Restoration of Env’t v. DeRuyter Bros. Dairy*,
15 54 F.Supp.2d 974, 975 (E.D. Wash. 1999) (citation omitted) (emphasis added).
16 Here, the Washington AG is neither impartial nor disinterested, and is advocating
17 for “a point of view so that a cause may be won by one party.” *Id.* at 974. As the
18 Washington AG stated in its motion for expedited leave to file an amicus curiae
19 brief, it currently is litigating a case in the Washington courts against a franchisor
20 named Jersey Mike’s Franchise Systems, Inc., regarding what the Washington AG
21 described as “the very same issues at to the proper interpretation of the antitrust
22 provision in the [Consumer Protection Act].” *See* Declaration of Rahul Rao (“Rao
23 Decl.”), ECF No. 29-1, at ¶¶ 2–3. It is also advocating an interpretation of the
24 Washington Consumer Protection Act in its investigations against “over 100
25 franchise systems,” Rao Decl. ¶ 2, in order to impose its policy preferences on

1 franchisors and franchisees operating in the State of Washington.

2 The Washington AG has many other venues to advance its policies, including
3 its active lawsuit against a franchise business which, unlike Auntie Anne's, did not
4 agree to settle the Washington AG's investigation. Using this venue to influence the
5 outcome of Auntie Anne's motion, to the potential detriment of Auntie Anne's, is
6 contrary to the AOD and deprives Auntie Anne's of the protections it bargained for.

7 **CONCLUSION**

8 For the foregoing reasons, Auntie Anne's respectfully requests that this Court
9 deny the motion for expedited leave to file an amicus curiae brief.

1 Respectfully submitted this 7th day of March, 2019.

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*Attorneys for Defendant Auntie Anne's Franchisor
SPV LLC*

1 **CERTIFICATE OF SERVICE**

2 The undersigned hereby certifies that on March 7th, 2019 I electronically
3 filed the foregoing with the Clerk of the Court using the CM/ECF system, which
4 will send notification of such filing to all CM/ECF participants.

5
6 DATED this 7th day of March, 2019.

7
8 s/ George Barrington

9 George Barrington
10 Legal Assistant