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ROBERT W. FERGUSON
Eric Newman, WSBA No. 31521
Assistant Attorney General
Office of the Attorney General of Washington
Antitrust Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 442-4498

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON**

<p>JOSEPH STIGAR, individually and on behalf of all others similarly situated,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>DOUGH DOUGH, INC. et al.,</p> <p style="text-align: right;">Defendants.</p>	<p>NO. 2:18-cv-00244-SAB NO. 2:18-cv-00246-SAB NO. 2:18-cv-00247-SAB</p>
<p>MYRRIAH RICHMOND and RAYMOND ROGERS, individually and on behalf of all others similarly situated,</p> <p style="text-align: right;">Plaintiffs,</p> <p style="text-align: center;">v.</p> <p>BERGEY PULLMAN INC. et al.,</p> <p style="text-align: right;">Defendants.</p>	<p>AMICUS CURIAE BRIEF BY THE ATTORNEY GENERAL OF WASHINGTON</p>

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ASHLIE HARRIS, individually and on behalf of all others similarly situated, Plaintiff, v. CJ STAR, LLC, et al., Defendants.	
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TABLE OF CONTENTS

I. INTRODUCTION AND STATEMENT OF INTEREST 1

II. ARGUMENT..... 1

 A. State Antitrust Laws Are Not Mere Mirror Images Of The
 Federal Antitrust Laws..... 1

 B. Franchise Agreements Have Both Vertical And Horizontal
 Components..... 6

 C. Whether A No-Poach Provision Is Reasonably Necessary To A
 Larger Procompetitive Activity Is A Question Of Fact..... 7

III. CONCLUSION 10

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8
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TABLE OF AUTHORITIES

Cases

Am. Motor Inns. v. Holiday Inns,
521 F.2d 1230 (3d Cir. 1975).....7

Am. Needle, Inc. v. Nat’l Football League,
560 U.S. 183 (2010).....8

Blewett v. Abbott Labs.,
86 Wash. App. 782, 938 P.2d 842 (1997).....4

Broadcast Music Inv. v. CBS,
441 U.S. 1 (1979).....7

California v. Arc America Corp.,
490 U.S. 93 (1989).....1, 2

Freeman v. San Diego Ass’n of Realtors,
322 F.3d 1133 (9th Cir. 2003).....7

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007).....6

Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.,
334 U.S. 219 (1948).....6

NCAA v. Board of Regents,
468 U.S. 85 (1984).....7

Panag v. Farmers Ins. Co.,
166 Wash. 2d 27, 204 P.3d 885 (2009).....4

Regents of the Univ. of Cal. v. ABC,
747 F.2d 511 (9th Cir. 1984).....7

State v. LG Elecs., Inc.,
186 Wash. 2d 1 (2016).....4, 5

State v. Reader’s Digest Ass’n, Inc.,
81 Wash. 2d 259, 501 P.2d 290 (1972).....4

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Statutes

15 U.S.C. § 1.....6

15 U.S.C. § 15c.....5

RCW 19.86.0301

RCW 19.86.0805

RCW 19.86.9204

Other Authorities

Alan Krueger & Orley Ashenfelter,
Theory and Evidence on Employer Collusion in the Franchise Sector at 27-28
(July 2018).....9

1 **I. INTRODUCTION AND STATEMENT OF INTEREST**

2 The Attorney General of Washington (State) respectfully submits this
3 amicus brief to aid the Court’s assessment of the state antitrust law claims,
4 RCW 19.86.030, in this matter. As the primary enforcer of the Washington
5 State Consumer Protection Act (CPA)—which contains the State’s antitrust
6 laws—the Attorney General has a pronounced interest in the correct
7 interpretation and development of the CPA. Particularly so in this matter; as
8 noted in the State’s leave to file, in the past year, the State has investigated over
9 100 nationwide franchisors that have included no-poach provisions in their
10 franchise agreements, and has successfully resolved virtually all of those
11 matters. In addition, the State has filed an enforcement action in state court
12 against a national franchisor, and successfully defeated a motion to dismiss.

13 To be clear, the State is not taking a position on the merits of these suits.
14 Rather, the State seeks to provide the Court with relevant legal principles and
15 cases that may inform the Court’s analysis of the extent to which Washington
16 State’s antitrust laws can and do differ from their federal counterparts.

17 **II. ARGUMENT**

18 **A. State Antitrust Laws Are Not Mere Mirror Images Of The Federal**
19 **Antitrust Laws**

20 It is well settled that state antitrust laws can and do follow different paths
21 than their federal counterparts. This principle was firmly enshrined by the U.S.
22 Supreme Court in *California v. Arc America Corp.*, 490 U.S. 93 (1989). In *Arc*

1 *America*, four states sought to recover treble damages as a result of a
2 nationwide conspiracy to fix the prices of cement. The district court denied the
3 states’ claims on a settlement fund in the matter because the federal antitrust
4 laws do not permit recovery of monetary damages for indirect purchasers—*i.e.*,
5 entities that did not directly purchase the product at issue from the price-fixing
6 defendants, and who instead acquired it through a third-party, such as a
7 reseller.¹ The four states—all indirect purchasers of the price-fixed cement—
8 argued that they were entitled to monetary relief under their respective state
9 antitrust laws, which did permit indirect purchasers to recover damages. Both
10 the district court and the Ninth Circuit held that the states were not entitled to
11 any recovery, reasoning that “[s]uch statutes are clear attempts to frustrate the
12 purposes and objective of Congress,” that the state antitrust laws at issue
13 conflicted directly with federal law as construed in *Illinois Brick*, and were pre-
14 empted by federal law. *Arc America*, 490 U.S. at 99.

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17 ¹ Section 4 of the Clayton Act provides that “any person ... injured in his
18 business or property by reason of [an antitrust violation] may sue . . . in any
19 district court in the United States.” 15 U.S.C. § 15. In *Illinois Brick Co. v.*
20 *Illinois*, the U.S. Supreme Court held that only direct purchasers of a price-fixed
21 product were “injured in [their] business or property” within the meaning of
22 Section 4. 431 U.S. 720, 729 (1977).

1 The Supreme Court disagreed and reversed. The Court acknowledged the
2 “long history of state common-law and statutory remedies against monopolies
3 and unfair business practices” and that “plain[ly], this is an area traditionally
4 regulated by the States.” *Id.* at 101. The Court concluded that that while
5 congressional policies rightly inform the contours of relief under the federal
6 antitrust laws, it is inappropriate to view those policies as “defining what
7 federal laws allows States to do under their own antitrust law.” *Id.* at 103. The
8 Court also dismissed concerns that permitting indirect purchaser recovery under
9 state antitrust laws could impose multiple liability on defendants, noting that
10 “state causes of action are not pre-empted solely because they impose liability
11 over and above that authorized by federal law.” *Id.* (citation omitted).²

12 As *Arc America* demonstrates, state antitrust laws are not beholden to
13 their federal counterparts. Consistent with that principle, the CPA and the cases

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15 ² One area in which state antitrust laws and federal antitrust laws have
16 diverged is the treatment of resale price maintenance—the practice by which
17 manufacturers and resellers agree to set a price floor for the manufacturer’s
18 goods. While federal antitrust laws analyze these agreements under the rule of
19 reason, *See Leegin Creative Leather Prods v. PSKS, Inc.*, 551 U.S. 877 (2007),
20 several states continue to regard these agreements as *per se* illegal. *See, e.g.*,
21 *People v. Dermaquest, Inc.*, Case No. RG 10497526 (Cal. Super. Ct. Alameda
22 County Feb. 23, 2010) (permanent injunction on minimum RPM agreements).

1 interpreting it overwhelmingly demonstrate that federal judicial interpretations
2 are guiding, but not binding, on state courts determining what conduct violates
3 the CPA. RCW 19.86.920 (“[I]n construing this act, the courts be guided by
4 final decisions on the federal courts . . . interpreting the various federal statutes
5 dealing with the same or similar matters . . .”). The Washington State Supreme
6 Court has reaffirmed this relationship, noting time and again that “RCW
7 19.86.920 does not adopt any federal judicial precedents . . . [and] [i]n the final
8 analysis, the interpretation of [the CPA] is left to the state courts.” *State v.*
9 *Reader’s Digest Ass’n, Inc.*, 81 Wash. 2d 259, 275, 501 P.2d 290, 301 (1972);
10 *see also Panag v. Farmers Ins. Co.*, 166 Wash. 2d 27, 47, 204 P.3d 885, 894
11 (2009). As one court put it, “[t]he directive to be guided by federal law does not
12 mean that we are bound to follow it.” *Blewett v. Abbott Labs.*, 86 Wash. App.
13 782, 787, 938 P.2d 842 (1997).

14 Thus, while Washington’s antitrust laws do track their federal
15 counterparts in a variety of respects, Washington courts have departed from
16 federal law “for [] reason[s] rooted in our own statutes or case law”
17 *Blewett*, 86 Wash. App. at 788; *see also State v. LG Elecs., Inc.*, 186 Wash. 2d
18 1, 10-11 (2016) (“[W]e have declined to follow federal law where the language
19 and structure of the CPA departs from otherwise analogous federal
20 provisions.”). For example, the Attorney General is authorized to bring antitrust
21 actions on behalf of indirect purchasers to recover restitution on their behalf.
22

1 RCW 19.86.080; *id.* at 790 (bar on indirect purchaser recovery by private
2 parties does not apply to the Attorney General). In addition, in contrast to the
3 federal *parens patriae* statute, there is no statute of limitations on the State's
4 authority to bring *parens* actions under RCW 19.86.080 to recovery monetary
5 relief. *LG Elecs., Inc.*, 186 Wash. 2d at 17; *compare* 15 U.S.C. § 15c (4-year
6 limitations period) *with* RCW 19.86.080 (no limitations period provided).

7 Here, a state court has already rendered a decision relevant to the present
8 matter. As the State noted in its Motion for Leave, it is currently in litigation
9 with Jersey Mike's Franchise Systems, Inc. (Jersey Mike's) in King County
10 Superior Court regarding its use of no-poach provisions. Jersey Mike's filed a
11 motion to dismiss the State's lawsuit where it argued, among other things, that
12 its franchise agreements "are undeniably vertical agreements that are subject to
13 the rule of reason analysis." *State of Washington v. Jersey Mike's Franchise*
14 *Systems, Inc., et al.*, No. 18-2-25822-7-SEA, Mot. to Dismiss (King Cty. Sup.
15 Ct. Nov. 11, 2018). On January 28, 2019, shortly after it held a hearing, the
16 court denied Jersey Mike's motion to dismiss, preserving in full both the State's
17 *per se* and quick look claims under the CPA. *Id.*, Order Den. Def.'s Mot. to
18 Dismiss (Jan. 25, 2019). In short, a state court judge has already ruled that these
19 claims can be subject to *per se* liability under the CPA.

20 While there is certainly no dispute that federal case law is persuasive,
21 perhaps often highly so, the Washington State Legislature had expressed its
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1 preference that courts interpreting the CPA should be free to depart from
 2 federal antitrust law in appropriate circumstances. That circumstance is met
 3 here to the extent that federal law supports an argument that no-poach
 4 agreements in franchise agreements should be analyzed under the rule of
 5 reason, though the state of Washington disagrees that it does.

6 **B. Franchise Agreements Have Both Vertical And Horizontal**
 7 **Components**

8 Section 1 of the Sherman Act prohibits “[e]very contract, combination in
 9 the form of trust or otherwise, or conspiracy, in restraint of trade or commerce
 10 among the several States.” 15 U.S.C. § 1. Restraints that are deemed unlawful
 11 *per se* include agreements among horizontal competitors to fix prices or to
 12 divide markets. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S.
 13 877, 886 (2007). Sellers, like buyers, can be liable for horizontal agreements in
 14 restraint of trade. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334
 15 U.S. 219, 235 (1948) (finding antitrust liability “even though the price-fixing
 16 was by purchasers, and the persons specially injured . . . are sellers, not
 17 customers or consumers”) (footnotes omitted). In contrast, agreements that are
 18 deemed purely vertical are governed by the far more deferential rule of reason.

19 It would be a mistake to view a franchise agreement as vertical in all
 20 instances. In addition to their network of franchise locations, franchisors
 21 commonly own and operate their own corporate-owned stores in locations
 22 throughout the country. Accordingly, to the extent a franchise agreement

1 restricts solicitation and hiring among franchisees and a corporate-owned
 2 store—which is indisputably a horizontal competitor of a franchisee for labor—
 3 the agreement must properly be analyzed as a *per se* restraint. *See, e.g., Am.*
 4 *Motor Inns. v. ¶*, 521 F.2d 1230, 1253-54 (3d Cir. 1975) (holding that
 5 “otherwise unreasonable restraints of trade are not insulated from the antitrust
 6 laws by the fact that such company functions as a franchisor as well as”
 7 operating motels on the same horizontal market level as its franchisees).

8 **C. Whether A No-Poach Provision Is Reasonably Necessary To A Larger**
 9 **Procompetitive Activity Is A Question Of Fact**

10 Even in matters involving a restraint that is otherwise subject to *per se*
 11 scrutiny, the Supreme Court has carved out exceptions to summary
 12 condemnation, which merit discussion here only to dismiss their applicability.
 13 In *NCAA v. Board of Regents*, 468 U.S. 85 (1984) and *Broadcast Music Inv. v.*
 14 *CBS*, 441 U.S. 1 (1979), the Supreme Court applied the rule of reason to
 15 conduct that resembled price fixing. The Court justified applying the rule of
 16 reason in these context because (1) the blanket licenses at issue in *BMI* were
 17 novel, and (2) horizontal restraints on competition may be essential if a product
 18 is to be available at all. Over time, case law is now generally settled that even in
 19 an instance where a restraint might otherwise be viewed as *per se* illegal, it may
 20 nevertheless be “reasonably ancillary to the legitimate cooperative aspects of
 21 [a] venture” such that summary condemnation under the *per se* rule is
 22 inappropriate. *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1151

1 (9th Cir. 2003) (citing *Regents of the Univ. of Cal. v. ABC*, 747 F.2d 511, 517
2 (9th Cir. 1984). Specifically, “when restraints on competition are essential if the
3 product is to be available at all,’ *per se* rules of illegality are inapplicable, and
4 instead the restraint must be judged according to the flexible Rule of Reason.”
5 *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 (2010). That is
6 not the case here.

7 As mentioned, for over a year, the state of Washington has investigated
8 the use of no-poach provisions in franchise agreements. All told, the State has
9 issued investigative process to over 100 targets both within and without the
10 fast-food industry. To date, more than 50 franchisors have entered into an
11 Assurance of Discontinuance (AOD), a binding agreement in which they have
12 promised to (1) stop enforcing no poach provisions in their franchise
13 agreements; (2) stop including no-poach provisions in any new franchise
14 agreements after the AOD’s date of entry; and (3) amend franchise agreements
15 with entities in Washington immediately, and as they come up for renewal
16 nationwide, to remove no poach language. *See* Decl. of Assistant Attorney
17 General Rahul Rao ¶ 2 (18-cv-244 ECF No. 29-1 at 2; 18-cv-246 ECF No. 38-1
18 at 2; 18-cv-247 ECF No. 32-1 at 2). Through this process, the State has gained a
19 unique perspective on the use and purported justification of these no-poach
20 provisions and offers the following observations, from this vantage point.
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1 Franchise agreements among different systems contain many common or
2 uniform provisions (e.g., use of trademarks, licensing, etc.). No-poach
3 provisions are not among them. See Alan Krueger & Orley Ashenfelter, *Theory*
4 *and Evidence on Employer Collusion in the Franchise Sector* at 27-28 (July
5 2018)³ Indeed, nearly 1/3 of the franchisors the State issued process to did not
6 include and have never included any form of a no-poach provision in their
7 franchise agreements. In addition, in an almost every instance the State
8 investigated, there was paucity of evidence on the extent to which franchisors
9 have enforced no-poach provisions, raising significant question as to their
10 utility and importance to the franchisor's system. Notably, as a result of the
11 State's ongoing investigation, many franchisors began voluntarily ceasing
12 enforcement of no-poach provisions and affirmatively removing them from
13 future contracts.

14 For these reasons, franchisors should have a heavy burden to show that a no-
15 poach provision in a franchise agreement can be justified as a restraint that is
16 "reasonably necessary" to a separate, legitimate business transaction or
17 collaboration. See DOJ Statement of Interest at 3, 8 and 16 (18-cv-244 ECF No.
18 30; 18-cv-246 ECF No. 39; 18-cv-247 ECF No. 34).

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³ Available at <http://ftp.iza.org/dp11672.pdf> (last visited Mar. 8, 2019).

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III. CONCLUSION

As the foregoing demonstrates, state antitrust laws are not mere mirror images of their federal counterparts; they can and do depart in certain instances, and a Washington state court has done precisely that in a matter substantially related to the present litigation.

RESPECTFULLY SUBMITTED this 11th day of March 2019.

ROBERT W. FERGUSON
Attorney General

/s/ Eric Newman
ERIC NEWMAN, WSBA No. 31521
Assistant Attorney General
Office of the Attorney General of Washington
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:

NAME & ADDRESS	Method of Delivery
Adam J Bernstein Paul Weiss Rifkind Wharton & Garrison LLP - NY 1285 Avenue of the Americas New York, NY 10019-6064 212-373-3397 Fax: 212-757-3990 abernstein@paulweiss.com	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:
Angelo J Calfo Calfo Eakes & Ostrovsky PLLC 1301 Second Avenue Ste 2800 Seattle, WA 98101 206-294-7440 Fax: 206-407-2224 angeloc@calfoeakes.com	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:
Daniel J Howley Paul Weiss Rifkind Wharton & Garrison LLP - DC 2001 K Street, NW Washington, DC 20006-1047 202-223-7372 dhowley@paulweiss.com	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:

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<p>Craig J Ackermann Ackermann & Tilajef PC 1180 South Beverly Drive Suite 610 Los Angeles, CA 90035 310-277-0614 Fax: 310-277-0635 cja@ackermanntilajef.com</p>	<p><input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:</p>
<p>Brian Denlinger Ackermann & Tilajef PC Attorney at Law 2602 N Proctor Street Suite 205 Tacoma, WA 98406 253-507-4619 bd@ackermanntilajef.com</p>	<p><input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:</p>
<p>David W Kesselman Kesselman Brantly Stockinger LLP 1230 Rosecrans Ave Ste 690, Manhattan Beach, CA 90266 310-307-4555 dkesselman@kbslaw.com</p>	<p><input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:</p>
<p>India Lin Bodien Attorney at Law 2522 N Proctor St #387 Tacoma, WA 98407 253-212-7913 india@indialinbodienlaw.com</p>	<p><input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other</p>
<p>Mary Helen Wimberly Kristen Ceara Limarzi US Department of Justice Antitrust Division - DC 950 Pennsylvania Avenue Room 3224 Washington, DC 20530 202-514-4510 maryhelen.wimberly@usdoj.gov 202-353-8629 Kristen.limarzi@usdoj.gov 202-353-8629</p>	<p><input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:</p>

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Rudolf J Verschoor United States Attorney's Office 920 W Riverside Avenue Room 340 Spokane, WA 99201 509-353-2767 usawae.rverschoorecf@usdoj.gov	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:
Michael James Hines Kelly E Konkright Rein Johnson Lukins & Annis PS - SPO 717 W Sprague Avenue Suite 1600 Spokane, WA 99201-0466 509-455-9555 Fax: 15093632490 mhines@lukins.com kkonkright@lukins.com rjohnson@lukins.com	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:
Robert A Atkins Paul Weiss Rifkind Wharton & Garrison LLP – NY 1285 Avenue of the Americas New York, NY 10019-6064 212-373-3000 Fax: 212-757-3990 ratkins@paulweiss.com	<input checked="" type="checkbox"/> CM/ECF System <input type="checkbox"/> Electronic Mail <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Other:

s/ Eric Newman
 ERIC NEWMAN, WSBA No. 31521
 Assistant Attorney General