Angelo J. Calfo
CALFO EAKES &
OSTROVSKY PLLC
1301 Second Avenue, Suite 2800
Seattle, WA 98101
Phone: (206) 407-2210
Fax: (206) 407-2224
Email: angeloc@calfoeakes.com

HONORABLE STANLEY A. BASTIAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiff,

vs.

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

Defendants.

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

DEFENDANT AUNTIE ANNE'S FRANCHISOR SPV LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

ORAL ARGUMENT REQUESTED

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

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LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

TABLE OF AUTHORITIES

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CASES

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

OTHER AUTHORITIES

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

INTRODUCTION

Plaintiff's opposition only highlights that his Complaint fails to allege the facts necessary to avoid dismissal.

First, the Complaint does not allege, and Plaintiff does not identify, "sufficient facts to support a claim that the [defendants] are separate entities pursuing different economic goals, capable of conspiring for Sherman Act purposes." *Jack Russell Terrier Network of N. Cal.* v. *Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005).

Second, the Complaint does not allege any facts that could establish a *per se* antitrust violation. And Plaintiff admits he has not pled a "rule of reason" violation. ECF No. 17 ("Opp.") at 19.

Plaintiff's attempts to get around those pleading deficiencies are not supported by the necessary factual allegations either. He argues that defendants are part of a "hub-and spoke" conspiracy, but he has failed to allege the "rim" required to sustain such a claim: a horizontal agreement between the franchisees.

Plaintiff also argues that he has alleged a "quick look" antitrust claim, based on the decision in another no solicit/no hire case involving a different franchise system, *Yi* v. *SK Bakeries*, No. 3:18-cv-05627 (W.D. Wash. Nov. 13, 2018). That decision, with respect, is not consistent with the applicable law. In fact, the *Yi* court found that there are plausible procompetitive justifications for no solicit and no hire clauses in franchise agreements. That precludes the use of the quick look approach. So too does Plaintiff's failure to plead a horizontal agreement among competitors and failure to allege the contours of a relevant labor market.

Rule 12(b)(6) requires sufficient *facts*, not unsubstantiated arguments and borrowed theories. The Complaint should be dismissed.

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO ALLEGE DEFENDANTS ARE CAPABLE OF CONSPIRING

The law is clear: a plaintiff in a Section 1 case must allege "sufficient facts to support a claim that the [defendants] are separate entities pursuing different economic goals, capable of conspiring for Sherman Act purposes." *Jack Russell*, 407 F.3d at 1035 (9th Cir. 2005) (affirming a motion to dismiss). Plaintiff fails in his opposition to identify any such allegations in his Complaint. *See* Opp. at 5–10 (no citations to Complaint). Plaintiff's reliance on *Yi* v. *SK Bakeries*, No. 3:18-cv-05627 (W.D. Wash. Nov. 13, 2018), is misplaced because he has failed to allege *facts* to show that defendants are capable of conspiring under the antitrust laws.

Instead, he tries to distinguish the controlling cases holding that, under *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), a franchisor and its franchisees are not legally capable of conspiring for antitrust purposes. *Jack Russell*, 407 F.3d at 1035 (9th Cir. 2005) (*citing Williams* v. *I.B. Fischer Nevada*, 999 F.2d 445, 447–48 (9th Cir.1993)); *Danforth & Assoc., Inc.* v. *Coldwell Banker Real Estate, LCC*, No. C10-1621, 2011 WL 338798, at *2 (W.D. Wash. Feb. 3, 2011) (granting motion to dismiss where defendants are "in a franchisor–franchisee relationship and therefore cannot conspire within the meaning of the Sherman Act"). He argues that *Danforth* did not involve "employees or labor." Opp. at 10. There is no exception, however, to *Copperweld* for cases relating to "employees or labor." On the contrary, *Danforth* relied on the *Williams* case, which did deal with employees and labor in the franchise context. *See Williams*, 999 F.2d at 447.

Plaintiff also tries to distinguish *Copperweld* itself, arguing that the franchisees are not "wholly-owned" subsidiaries of Auntie Anne's. Opp. at 5–6. He is wrong as a matter of law: the "single entity rule" is not limited to parents and subsidiaries, but applies to other business relationships -- specifically including franchisors and franchisees. *Jack Russell*, 407 F.3d at 1034.

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CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

Plaintiff next argues that the *Copperweld* inquiry is "wholly improper at the pleading stage." Opp. at 6. That is not true. The Ninth Circuit rejected this argument in *Jack Russell*. 407 F.3d at 1034, n.14 (affirming pleading stage dismissal). Multiple courts have dismissed claims against franchisees/franchisors at the pleading stage on this basis. *Danforth*, 2011 WL 338798 (granting motion to dismiss); *Search Int'l, Inc.* v. *Snelling and Snelling, Inc.*, 168 F. Supp. 2d 621 (N.D. Tex. 2001) (same); *see also Manufacturer Direct, LLC* v. *Directbuy, Inc.*, 2007 WL 2114285 (N.D. Ind. July 19, 2007) (denying motion to amend).

Lastly, Plaintiff's argument that a franchise relationship is "not enough" to find defendants "necessarily cannot conspire," Opp. at 10, misses the point. The Court need not determine whether defendants "necessarily cannot conspire" in all circumstances. Rather, the Court need only determine whether Plaintiff has alleged "sufficient facts to support a claim that the [defendants] are separate entities pursuing different economic goals, capable of conspiring for Sherman Act purposes." *Jack Russell*, 407 F.3d at 1035. He has not.

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT FAILS TO ALLEGE A *PER SE* ANTITRUST CLAIM

Plaintiff concedes that he has not alleged the facts necessary to satisfy the "rule of reason," the antitrust standard for challenging vertical agreements like the franchise agreements alleged here. *See In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015).

Unable to allege that those agreements have any anticompetitive effect in any relevant market, Plaintiff argues that the franchise agreements are a *per se* violation of the antitrust laws. That is a legal non-starter: similar restrictions in franchise agreements have been found to be *not* anticompetitive. *See Williams* v. *Nevada*, 794 F. Supp. 1026, 1034 (D. Nev. 1992), *aff'd* 999 F.2d 445 (9th Cir. 1993) ("no-

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CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

switching" agreement between franchisor and franchisee was "not anti-competitive"). Moreover, there are no factual allegations of a horizontal agreement that would be essential to even consider applying the *per se* standard. Nor is there a judicial record of findings that no solicit or no hire clauses in franchise agreements are anticompetitive, which is required for the *per se* standard to apply. ECF No. 16 ("Mot.") at 19–20.

Plaintiff responds that he has alleged a so-called "hub-and-spoke" conspiracy. But he has failed to allege an essential part of such a theory: the "rim" -- *i.e.*, a horizontal agreement connecting the franchisees (the "spokes").

As the Ninth Circuit explained: "A traditional hub-and-spoke conspiracy has three elements: (1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) ***the rim of the wheel, which consists of horizontal agreements among the spokes***." *Musical Instruments*, 798 F.3d at 1192 (emphasis added) (affirming 12(b)(6) dismissal where plaintiffs failed to allege sufficient facts to support a plausible inference that the "spokes" agreed with each other). A "rimless hub-and-spoke conspiracy is not a hub-and-spoke conspiracy at all (for what is a wheel without a rim?); it is a collection of purely vertical agreements." *Id.* at 1192 n.3.

A collection of vertical agreements, such as Auntie Anne's agreements with its independent franchisees, has no rim because there is no horizontal agreement among the franchisees. *Musical Instruments*, 798 F.3d at 1193. Parallel conduct is insufficient to show a horizontal conspiracy because it can represent merely "independent responses to common stimuli," such as the demands of the franchisor. *See*, *e.g.*, *Orchard Supply Hardware LLC* v. *Home Depot USA, Inc.*, 967 F. Supp. 2d 1347, 1356 (N.D. Cal. 2013) (dismissing "hub-and-spoke" claim where plaintiff

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1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

"gives no sufficient explanation for why" conduct was anything more than a response to the "common stimuli" of a retailer's demand).

Plaintiff also argues that Auntie Anne's and its franchisees have "a common motive to reduce labor costs." Opp. at 18. It is black-letter antitrust law, however, that "common motive does not suggest an agreement." *Musical Instruments*, 798 F.3d at 1194–95. Likewise, Plaintiff also asserts that all the Auntie Anne's franchisees "knew that all the other franchisees also agreed to abide by the same agreement," Opp. at 3, but mere knowledge is not sufficient to plead a conspiracy. *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007) ("[P]arallel conduct, *even conduct consciously undertaken* . . . stays in neutral territory.") (emphasis added).

Courts routinely dismiss such "rimless" conspiracies at the pleading stage. *See*, *e.g.*, *Musical Instruments*, 798 F.3d at 1198 (affirming dismissal of "hub-and-spoke" claim at the pleading stage); *Howard Hess Dental Labs. Inc.* v. *Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010) (same); *PSKS, Inc.* v. *Leegin Creative Leather Prod., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010) (same); *Total Benefits Planning Agency, Inc.* v. *Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435–36 (6th Cir. 2008) (same). The cases Plaintiff cites involved interbrand conspiracies among ***direct competitors with horizontal agreements***. In *United States* v. *Apple, Inc.*, the court found "ample . . . evidence" of "express collusion" between the publishers (*i.e.*, the "spokes"), as well as numerous communications between the publishers on the subject of the conspiracy. 791 F.3d 290, 300–16 (2d Cir. 2015). Likewise, in *Toys 'R' Us* v. *Federal Trade Commission*, the facts showed the toy manufacturers (*i.e.*, the alleged "spokes") accepted limitations on sales to club stores only "on the condition that their competitors would do the same." 221 F.3d 928, 932 (7th Cir. 2000).

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CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

Plaintiff also points to the recent *Deslandes* decision, but that actually supports dismissal because it held that the *per se* rule did not apply. *Deslandes* v. *McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018). Just like here, "the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per se*" because it is ancillary to the franchise agreement. *Id.*

There is one final flaw in Plaintiff's "hub-and-spoke" theory: the claim against Auntie Anne's as a franchisor still must be dismissed because its alleged conduct (the vertical agreements with its franchisees) is not subject to *per se* condemnation. *Musical Instruments*, 798 F.3d at 1192 (a hub-and-spoke claim is to be "broken into its constituent parts" and "the respective vertical and horizontal agreements can be analyzed either under the rule of reason or as violations per se"). As the Supreme Court stated, "[t]o the extent a vertical agreement . . . is entered upon to facilitate [a horizontal] cartel, it . . . would need to be held unlawful under the rule of reason." *Leegin Creative Leather Prods. Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 893 (2007); *see also Toledo Mack Sales & Serv., Inc.* v. *Mack Trucks, Inc.*, 530 F.3d 204, 224–25 (3d Cir. 2008) (same).

III. PLAINTIFF HAS NOT ALLEGED A "QUICK LOOK" CLAIM

Plaintiff argues that he has alleged an antitrust claim under the "quick look" standard, again citing the *Yi* v. *SK Bakeries* case. Opp. at 19; ECF No. 18 at 2. But Plaintiff has not, in fact, pled such a claim. The Complaint alleges only a *per se* claim. It should be dismissed. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 317 (3d Cir. 2010) ("While pleading exclusively *per se* violations can lighten a plaintiff's litigation burdens, it is not a riskless strategy. If the court determines that the restraint at issue . . . require[s] application of the rule of reason, the plaintiff's claims will be dismissed.").

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1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

Even if the Complaint did plead the "quick look" test, it would have to be dismissed. This less demanding version of the rule of reason is a rarely applied "exception" to the rule of reason, *Am. Ad Mgmt., Inc.* v. *GTE Corp.*, 92 F.3d 781, 789–90 (9th Cir. 1996), and is available only when (1) there is no plausible procompetitive explanation for the conduct, and (2) a rudimentary understanding of economics demonstrates that the conduct "would have an anticompetitive effect on customers and markets." *California ex rel. Harris* v. *Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011) (internal quotation omitted). For example, "the quick-look approach is used when a restraint would normally be considered illegal *per se*, but 'a certain degree of cooperation is necessary if the [product at issue] is to be preserved.'" *Agnew* v. *NCAA*, 683 F.3d 328, 336 (7th Cir. 2012).

The Complaint here, however, does not allege the facts necessary to take this short-cut for proving an antitrust violation:

First, the quick look test does not apply here because the challenged "arrangement might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Safeway*, 651 F.3d at 1134 (internal quotation omitted). As a matter of law, the quick look approach cannot be used where the conduct at issue "might plausibly" have no effect or a net procompetitive effect. Since courts have found similar restrictions in franchise agreements were "not anticompetitive," this Court cannot make the threshold determination necessary to apply the quick look approach. *Williams*, 794 F. Supp. at 1034 ("no-switching" agreement between franchisor and franchisee was "not anticompetitive"). No Court has ever found that no solicit or no hire clauses in franchise agreements are without procompetitive benefits; indeed no court has ever found that such clauses have any demonstrable anticompetitive effects. In fact, in the *Yi* v. *SK Bakeries* case, the court found that there are "plausible arguments" that such provisions enhance "overall

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

efficiency and makes markets more competitive." No. 3:18-cv-05627, slip op. at 9 (W.D. Wash. Nov. 13, 2018). Despite finding plausible procompetitive justifications, the *Yi* court nonetheless concluded that the quick look test could still apply. *Id.* at 10–11. With respect, that is contrary to the very premise of the test, and therefore, contrary to the case law. *See, e.g.*, *Safeway*, 651 F.3d at 1134 (quick look not appropriate where "agreement might plausibly be" procompetitive); *see also In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1137 (N.D. Cal. 2014) (quick look inappropriate "[b]ecause courts have found that the [restrictions] could conceivably enhance competition").

As discussed above, the vertical agreement at issue here is not the type of naked, horizontal agreement between competitors that is likely to harm competition; rather, it is a series of vertical, intra-brand agreements that are ancillary to a procompetitive franchise agreement. *Williams*, 794 F. Supp. at 1032 ("As [franchise] restaurants prosper because of the uniformity of quality food and service, each franchise benefits from an enhanced reputation which results in an increase in business, as does the franchisor who is able to sell more franchises at . . . higher prices."). The Complaint fails as a matter of law to allege the type of agreements that could be subject to a quick look analysis and, therefore, should be dismissed. *See, e.g.*, *Surf City Steel, Inc.* v. *Int'l Longshore & Warehouse Union*, No. CV 14-05604, 2017 WL 5973279, at *6 (C.D. Cal. Mar. 7, 2017) (granting motion to dismiss quick look claim where "not clear from a cursory glance" that conduct "has an anticompetitive effect on customers or markets").

Second, the "quick look" analysis "applies only when the agreement contains ***at least one horizontal element.***" Areeda & Hovencamp, *Antitrust Law*, ¶ 1508 at 456 (4th Ed. 2014) (emphasis added). As the Supreme Court recently confirmed, plaintiffs challenging vertical agreements -- like the Auntie Anne's franchise

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

agreements -- must allege the facts required to establish a rule of reason violation: anticompetitive effects in a relevant market. *Ohio* v. *Am. Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018). Plaintiff admittedly has not done so, and since he has not alleged any horizontal agreement, the quick look approach cannot apply. *See Acton* v. *Merle Norman Cosmetics, Inc.*, No. CV 88-7462, 1995 WL 441852, at *9 (C.D. Cal. May 16, 1995) ("Because the 'quick look' approach is only used in cases involving horizontal agreements which come close to warranting *per se* treatment, the 'quick look' approach has no applicability to the facts of this case.").

That pleading defect is what distinguishes this case from *Deslandes* v. *McDonald's*. There, the court found that in addition to the vertical franchise agreement, there were allegations of horizontal agreements between owners of different McDonald's locations. *Deslandes*, 2018 WL 3105955, at *6. The court in the *Yi* case relied on *Deslandes*, but with little analysis of the factual allegations in *Deslandes*. *Yi*, slip op. at 10–11. It thus found that the quick look test applied even in the absence of any alleged agreement between horizontal competitors. That is not consistent with the case law. *See, e.g.*, Areeda & Hovencamp, *Antitrust Law*, ¶ 1508 at 456 (4th Ed. 2014) (controlling cases "compel the conclusion" that quick look "applies only when the agreement contains at least one horizontal element"); *California Dental Ass'n* v. *FTC*, 526 U.S. 756, 769–70 (1999) (Supreme Court cases involving "horizontal agreements" provide the "basis for" the "quick look" analysis); *Acton*, 1995 WL 441852, at *9 ("the 'quick look' approach is only used in cases involving horizontal agreements").

Third, while the quick look test allows a plaintiff to forego showing that the defendants have "market power" -- a key requirement of the rule of reason -- it does not "dispense" with the burden to show ***"the existence of a relevant market."*** *Agnew*, 683 F.3d at 337 (affirming dismissal at pleading stage); *see also Lifewatch*

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

Servs. Inc. v. *Highmark Inc.*, 902 F.3d 323, 336 n.8 (3d Cir. 2018) (quick look is inappropriate if "the contours of the market . . . are not 'sufficiently well-known or defined'"); *Buccaneer Energy (USA) Inc.* v. *Gunnison Energy Corp.*, 846 F.3d 1297, 1312 n.17 (10th Cir. 2017) (same); *Worldwide Basketball and Sport Tours, Inc.* v. *NCAA*, 388 F.3d 955, 961 (6th Cir. 2004) (same); *Safeway*, 651 F.3d at 1134 (quick look analysis only appropriate where agreement "would have an anticompetitive effect *on customers and markets*") (emphasis added).

Thus, to establish a quick look claim, Plaintiff "has the burden to identify the 'rough contours' of the market . . . so that a court can determine whether the respondent's actions have anticompetitive effects on that market." *Acuity Optical Labs., LLC* v. *Davis Vision, Inc.*, No. 14-CV-03231, 2016 WL 4467883, at *12 (C.D. Ill. Aug. 23, 2016). The court in *Yi* v. *SK Bakeries* incorrectly concluded that the "quick look" applied even in the absence of any market definition. No. 3:18-cv-05627, slip op. at 10–11. Here, the Complaint does not even try to allege any relevant labor market -- *i.e.*, the types and geographic location of other employment opportunities available to Auntie Anne's employees.[1]

CONCLUSION

For the above reasons, the Complaint should be dismissed.

Respectfully submitted this 26th day of November, 2018.

CALFO EAKES & OSTROVSKY PLLC

By *s/ Angelo J. Calfo*
Angelo J. Calfo, WSBA# 27079
1301 Second Avenue, Suite 2800

[1] Plaintiff seemingly agrees with Auntie Anne's that the Washington state law claim should be treated the same as the federal antitrust claim. Opp. at 20.

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224

Seattle, WA 98101
Phone: (206) 407-2210
Fax: (206) 407-2224
Email: angeloc@calfoeakes.com

PAUL WEISS RIFKIND WHARTON & GARRISON LLP

Robert A. Atkins *(Pro Hac Vice)*
Adam J. Bernstein *(Pro Hac Vice)*
1285 Avenue of the Americas
New York, NY 10019-6064
Phone: (212) 373-3000
Fax: (212) 757-3990
Email: ratkins@paulweiss.com
abernstein@paulweiss.com

Daniel J. Howley *(Pro Hac Vice)*
2001 K Street, NW
Washington, DC 20006-1047
Phone: (202) 223-7372
Fax: (202) 204-7372
Email: dhowley@paulweiss.com

Attorneys for Defendant Auntie Anne's Restaurants, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on November 26, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all CM/ECF participants.

DATED this 26th day of November, 2018.

s/ George Barrington
George Barrington

LAW OFFICES
CALFO EAKES & OSTROVSKY PLLC
1301 SECOND AVENUE, SUITE 2800
SEATTLE, WASHINGTON 98101
TEL (206) 407-2200 FAX (206) 407-2224