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8 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
9

10 MYRRIAH RICHMOND and
RAYMOND ROGERS, individually and
on behalf of all others similarly situated,

No. 2:18-cv-00246-SAB

11 Plaintiffs,

NOTICE OF INTENT TO FILE A
STATEMENT OF INTEREST OF
THE UNITED STATES OF
AMERICA

12 vs.

13 BERGEY PULLMAN INC. et al.,

14 Defendants.

15 NOTICE OF INTENT TO FILE A STATEMENT OF INTEREST OF THE UNITED
16 STATES OF AMERICA

17 The United States respectfully submits this notice pursuant to 28 U.S.C. § 517,
18 which permits the Attorney General to direct any officer of the Department of Justice
19 to attend to the interests of the United States in any case pending in a federal court.
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21 The United States enforces the federal antitrust laws and has a strong interest in
22 their correct application. The United States has a particular interest in this case
23 because of its focus on naked wage-fixing or no-poaching agreements among
24 employers. See Department of Justice and Federal Trade Commission Guidance for
25 Human Resource Professionals (Oct. 2016). This case raises the issue of whether
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1 courts should analyze claims based on “no-poaching” agreements contained in
2 franchise agreements under the *per se* rule, the rule of reason, or the rarely-applicable
3 version of rule of reason analysis known as “quick look.” *Compare* Motion to
4 Dismiss, Doc. 23, at 10-12 (advocating for rule of reason analysis), *with* Response to
5 Motion to Dismiss, Doc. 27, at 10-16, 19-20 (advocating for *per se* or quick-look
6 analysis).
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9 The Antitrust Division of the Department of Justice intends to file a Statement
10 of Interest of the United States in this case on this issue. Vertical restraints, as a
11 category, are typically assessed under the rule of reason. Moreover, certain horizontal
12 restraints, such as customer- and market-allocation agreements among competitors,
13 including no-poaching agreements, that are reasonably necessary to a separate,
14 legitimate business transaction or collaboration between the companies, also are
15 assessed properly under the rule of reason. A no-poaching agreement between a
16 franchisor and a franchisee, within the same franchise system, likely falls within one
17 of these two categories and thus merits rule of reason analysis at the proper procedural
18 stage. The so-called “quick-look” analysis, moreover, is merely a version of rule of
19 reason analysis that is appropriate only when “an observer with even a rudimentary
20 understanding of economics could conclude that the arrangements in question would
21 have an anticompetitive effect,” *California Dental Ass’n v. FTC*, 526 U.S. 756, 770
22 (1999), which is unlikely to apply for the typical vertical franchisor-franchisee
23 agreements. In addition, the franchise model by itself, absent other facts, cannot
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1 constitute a “hub and spoke” conspiracy that would trigger *per se* or quick-look
2 treatment.

3 The Antitrust Division believes that the Court would benefit from receiving a
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5 Statement of Interest of the United States prior to the hearing on the motion to dismiss
6 scheduled for February 6, 2019. The United States would ordinarily seek to file its
7 Statement of Interest well in advance of that hearing to provide the Court and the
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9 parties ample time to review the Statement of Interest and, if necessary, respond. Due
10 to a lapse in funding that took effect at the Antitrust Division at midnight on January
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12 4, 2019, however, the Division is prohibited by the Anti-Deficiency Act, 31 U.S.C. §
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14 1341, from working at this time on such a Statement of Interest. If the motion hearing
15 cannot reasonably be delayed until after Department of Justice appropriations have
16 been restored, then the United States would be unable to submit its views in advance
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18 of the hearing, unless the Court issues an order requesting the United States do so.

19 Dated: January 25, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 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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Adam Bernstein Daniel Howley Robert Atkins Paul Weiss, et al. 1285 Avenue of the Americas New York, NY 10019-6064 abernstein@paulweiss.com dhowley@paulweiss.com 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: _____
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3 4 5 6 7	Bensy Benjamin Delian Deltchev Lewis Brisbois, et al. 1111 Third Avenue, Suite 2700 Seattle, WA 98101 Bensy.benjamin@lewisbrisbois.com Delian.deltchev@lewisbrisbois.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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