No. 20-13561

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JARVIS ARRINGTON, ET AL.,

Plaintiffs-Appellants,

v.

BKW, ET AL.,

Defendants-Appellees

On Appeal from the United States District Court for the Southern District of Florida, No. 18-24128-CIV-MARTINEZ-OTAZO-REYES
Hon. Jose E. Martinez

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Circuit Rule 26.1-1, the following parties, not identified in the earlier-filed briefs, have an interest in the outcome of this appeal (as defined under the rule):

- American Antitrust Institute – Amicus Curiae
- Laura M. Alexander – counsel for Amicus Curiae

Pursuant to Appellate Rule 26.1(a), the American Antitrust Institute states that it is a nonprofit, non-stock corporation. It has no parent corporations, and no publicly traded corporations have an ownership interest in it.

s/ Laura M. Alexander
Laura M. Alexander

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The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

A no-poaching agreement between companies that hire from the same pool of workers is a type of market allocation agreement among buyers in a labor market. Employers agree not to compete with one another to hire and retain workers, thereby preventing market forces from setting competitive wages, benefits, and other terms of employment. The U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) treat naked no-poaching agreements as "serious criminal

[1] All parties consent to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person—other than amicus curiae or its counsel—has contributed money that was intended to fund preparing or submitting this brief.

[2] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. Certain members of AAI's Board of Directors or Advisory Board or their law firms represent Plaintiffs-Appellants, but they played no role in AAI's deliberations with respect to the filing of the brief.

conduct" that is "per se illegal under the antitrust laws." DOJ & FTC, Antitrust Guidance for HR Professionals 3, 6 (Oct. 2016), *available at* https://www.justice.gov/atr/file/903511/download. In effect, "[t]hese types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers." *Id*. at 4; *see also* Statement of Interest of the United States of America 23, *Seaman v. Duke University*, No. 15-cv-00462 (M.D.N.C. March 7, 2019) (noting employee no-solicitation and no-hiring agreements cause the same harm as customer- and market-allocation agreements).

This case concerns a no-poaching provision that was inserted in standardized franchise agreements between Burger King Corporation ("BKC"), holder of the Burger King trademark and operator of 50 Burger King restaurants in Miami, and its franchisees. Plaintiffs-Appellants Jarvis Arrington, Geneva Blanchard, and Sandra Munster ("Plaintiffs") are former employees of Burger King franchises who allege that the challenged provision suppressed mobility and wages for Burger King employees.

The no-poaching provision prohibits BKC or any Burger King franchisee from hiring a former employee of BKC or another franchisee for 6 months after his or her termination, without the former employer's prior written consent. The no-poaching provision applies to all employees, regardless of their level of

responsibility, training, or compensation. Plaintiffs allege that these no-poaching provisions amount to an unreasonable restraint of trade under § 1 of the Sherman Act.

Defendants moved to dismiss the complaint, arguing primarily that the rule of reason should apply to Plaintiffs' claims and that Plaintiffs failed to state a claim under the rule of reason. As a secondary argument, Defendants asserted that a franchisee and a franchisor are legally incapable of conspiring for purposes of Section 1 of the Sherman Act.[3]

The district court addressed only the second of these arguments. It dismissed the complaint, finding that "Burger King's No-Hire Agreement constitutes an 'internal agreement to implement a single, unitary firm's policies,' and does not implicate antitrust principles." *Arrington v. Burger King Worldwide, Inc.*, 448 F. Supp. 3d 1322, 1332 (S.D. Fla. 2020) (quoting *Copperweld Corp. v Independence Tube Corp.*, 467 U.S. 752, 769 (1984)). Finding the *Copperweld* issue dispositive, the district court did not consider Defendants' remaining arguments for dismissal.

AAI agrees with Plaintiffs' argument that the district court erred in holding that BKC and its franchisees are incapable of conspiring under the Sherman Act.

[3] Defendants also raised defenses specific to several of the Burger King corporate defendants and argued that some of Plaintiffs' claims are time barred. We do not address those arguments in this brief.

AAI submits this amicus brief to aid the court should it reach Defendants' alternative argument that Plaintiffs failed to allege an unreasonable restraint of trade. AAI seeks to clarify several discrete points courts should consider in selecting the appropriate liability standard to apply to no-poaching claims:

1. The *per se* and quick look approaches are a substantive part of antitrust law. Beyond administrative convenience and efficiency, these frameworks help ensure correct analysis of complex competition issues in the highly imperfect context of litigation.
2. The existence of a vertical relationship between two parties to an agreement in one market does not dictate the proper liability standard applicable to agreements between the parties in all markets. A franchisor and a franchisee can have a vertical relationship in one market and compete horizontally in another market. Moreover, agreements between vertically related entities can merit *per se*, quick look, or rule of reason treatment. The court's ability (or inability) to draw confident conclusions about the effect of the restraint, not a characterization of the relationship between the parties as vertical or horizontal, should drive the analysis of which standard to apply.
3. Under the ancillary restraints test, a restraint is not ancillary merely because it is included within the four corners of a broader, efficiency

enhancing agreement or because the parties have an existing business relationship; one seeking to invoke the defense must first demonstrate that the restraint at issue is connected to the procompetitive purpose of the broader agreement.

4. To actually qualify as ancillary once the defense is properly invoked, a restraint must further be shown to be reasonably necessary to effectuate the procompetitive purpose of the broader venture and no more restrictive than necessary to accomplish that goal. Only if both conditions are satisfied does the ancillary nature of a restraint justify converting a *per se* or quick look inquiry into a full-blown rule of reason analysis.

5. At every step of the ancillary restraints analysis, the focus must remain on whether the restraint generates *cognizable* efficiencies in the *relevant* market. Cost savings generated by the suppression of competition, including savings in the cost of producing hamburgers generated by suppressing wage competition, are not cognizable efficiencies. Nor can courts weigh efficiencies outside of the relevant labor market, such as the market for hamburgers, as a potential justification for a labor-market restraint. The choice whether to allow an anticompetitive "tax" on sellers of labor to subsidize buyers of fast food is political,

not legal. It therefore belongs to Congress, which can enact exemptions and immunities from antitrust law when it believes diminished competition in a given market would serve the greater good.

ARGUMENT

The Court can and should reverse and remand this case to the district court to consider Defendants' unaddressed arguments for dismissal in the first instance. The proper liability standard for no-poaching agreements in the franchise sector is a complicated question that would benefit from the careful treatment of a district court with intimate knowledge of the factual record in the first instance. Should the court elect to address those arguments, however, it should keep in mind the points that follow.

I. *The* Per Se *and Quick Look Standards Serve a Vital Role in Antitrust Enforcement*

The *per se* rule and other simplifying assumptions in antitrust law are not merely administrative conveniences; they are substantive rules that serve a vital role in effective enforcement of the antitrust laws. *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 433 (1990) ("The *per se* rules also reflect a longstanding judgment that the prohibited practices by their nature have 'a substantial potential for impact on competition.'") (*citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)); *see also*, Phillip E. Areeda & Herbert

Hovenkamp, Antitrust Law ¶ 305a (3d ed. 2010) (hereinafter "Areeda & Hovenkamp"); *id.* at ¶ 305f ("[S]uch presumptions are the means by which we reach intelligible and consistent conclusions in the uncertain world of antitrust law."). "[T]he litigation process is costly and its ability to analyze complex contested issues and produce accurate results is limited. As a result, simplifying assumptions are necessary." Areeda & Hovenkamp ¶ 1908; *see also Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005) ("When everything is relevant, nothing is dispositive…. Litigation costs are the product of vague rules combined with high stakes, and nowhere is that combination more deadly than in antitrust litigation under the Rule of Reason.") (*quoting* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12–13 (1984)).

Per se rules also serve a significant role in effective deterrence. A full-blown rule of reason inquiry is long and complicated, which undermines deterrence. Areeda & Hovenkamp ¶ 1509 ("Moreover, complicating and perhaps forestalling the condemnation of [naked restraints of trade] weakens deterrence of such unredeemed behavior."). An understanding that certain conduct will be condemned swiftly and straightforwardly provides clear guidance to businesspeople that they will not be able to explain away their conduct or use relentless litigation to escape consequences. *Id*. ("Businesspersons are more likely to obey its clear guidance. By denying the escape that litigation about power or justification might allow, that

prohibition weakens the businessperson's temptation to believe that price fixing could be lawful.").

Application of a *per se* or quick look rule does not change the fundamental nature of the antitrust inquiry—which remains the impact of the conduct upon competition; rather, such rules are rooted in an understanding that anticompetitive effects can sometimes be presumed without elaborate analysis based on judicial experience or are obvious based on a rudimentary understanding of economics. *See NCAA v. Bd. of Regents of U. of Oklahoma*, 468 U.S. 85, 103–104 (1984) ("Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct. But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition."). When a practice "facially appears to be one that would always or almost always tend to restrict competition and decrease output," there is no need to conduct an elaborate analysis to arrive at the same conclusion. *Cf. Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979) [hereinafter *BMI*].

Although more nuanced than the *per se* rule, the quick look and other truncated rule of reason standards serve similar purposes: allowing for the presumption of anticompetitive effects without the need for elaborate analysis when there is a

"close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare." *Polygram*, 416 F.3d at 37; *see also* Brief of the Federal Trade Commission 21, *1-800 Contacts, Inc. v. FTC*, No. 18-3848 (2d Cir. filed Oct. 7, 2019)[4] (describing "quick look approach" as one of three ways for plaintiffs to meet initial burden under the rule of reason to show anticompetitive effects). Unlike the *per se* rule, the quick look approach allows defendants to counter the presumption of anticompetitive effects by demonstrating procompetitive effects. But both rules are rooted in the fact that antitrust law recognizes that sometimes, regardless of what analytical framework is nominally applied, "no elaborate industry analysis is required to demonstrate the anticompetitive character of … an agreement." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (quoting *Nat'l Soc'y of Prof'l Eng'rs v. U.S.*, 435 U.S. 679, 692 (1978)).

Accordingly, courts have consistently and emphatically rejected the idea that plaintiffs must provide detailed proof of anticompetitive effects for any restraint not condemned as *per se* illegal. *See Polygram*, 416 F.3d at 36 (rejecting argument that "proof of actual anticompetitive effect (or market power as its surrogate) is required in *any* Rule of Reason case"); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779

[4] Brief available at https://www.ftc.gov/system/files/documents/cases/1-800_contacts_ca2_ftc_answering_brief_10-7-19.pdf

(1999) (not "every case attacking a less obviously anticompetitive restraint . . . is a candidate for plenary market examination"). Instead, as the Supreme Court has explained, courts should engage in an "enquiry meet for the case," *Cal. Dental Ass'n*, 526 U.S. at 781, and allow "'the quality of the proof required [to] vary with the circumstances,'" *id.* at 780 (quoting P. Areeda, Antitrust Law ¶ 1507, p. 402 (1986)); *id.* at 779 ("our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look, and 'rule of reason' tend to make them appear.").

Accordingly, the Court has invited trial courts to "structure antitrust litigation so as to avoid, on the one hand, the use of antitrust theories too abbreviated to permit proper analysis, and, on the other, consideration of every possible fact or theory irrespective of the minimal light it may shed on the basic question—that of the presence of significant unjustified anticompetitive consequences." *FTC v. Actavis, Inc.*, 570 U.S. 136, 159–60 (2013). Even in *Leegin*, where the Court applied the full-blown rule of reason to a resale price maintenance policy, the Court simultaneously reaffirmed the important role for more truncated analyses in other resale price-maintenance cases where warranted. It invited lower courts to "devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones." *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 898–99 (2007).

II. *The Likely Effect of the Restraint, Not the Existence of Some Vertical Relationship between a Franchisor and a Franchisee, Determines the Proper Liability Standard that Applies to Franchise No-Poach Agreements*

The gravamen of the inquiry into the level of proof required in a rule of reason case is whether "a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *Cal. Dental Ass'n*, 526 U.S. at 781. It is a functional inquiry into "the circumstances, details, and logic of a restraint," *Polygram*, 416 F.3d at 35 (quoting *Cal. Dental Ass'n*, 526 U.S. at 781), which turns "upon demonstrable economic *effect* rather than upon formalistic line drawing," *Leegin*, 551 U.S. at 887 (citations omitted and emphasis added). *Cf. BMI*, 441 U.S. at 19 ("More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten [competition].").

One cannot conclude from the fact that some aspects of a relationship between a franchisor and a franchisee are vertical that employee no-poaching agreements merit a full rule of reason analysis. Companies can have a vertical relationship in one market and compete horizontally in another. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (overturning Eleventh Circuit decision approving territorial allocation between licensee and licensor and affirming that such allocations are *per se* illegal, even if the companies never competed in the same

territory and notwithstanding the vertical licensing relationship). The fact that a company supplies another with inputs or a license to IP does not diminish the horizontal nature of any competition between them in the downstream product market or the upstream labor market. Moreover, even agreements between companies with purely vertical relationships can be subject to heightened scrutiny. While the vertical aspects of the relationship between a franchisor and a franchisee can be relevant to the antitrust analysis, it is the beginning, not the end, of the inquiry.

Companies can, and regularly do, engage in horizontal competition with companies in one market, even though they also have a vertical relationship in another market. In particular, companies that operate at different levels of a product market or in completely different product markets, often compete horizontally in labor markets. *See Deslandes v. McDonald's USA, LLC*, 2018 WL 3105955, at 6 (N.D. Ill. June 25, 2018) (finding that McDonald's competes horizontally in labor market with its own franchisees); United States Corrected Statement of Interest, *Stigar v. Dough Dough, Inc.* 10 (D. Wash. filed March 8, 2019) [hereinafter Statement of Interest] (citing to *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013)—a prosecution of a no-poach agreement between two tech companies in different product markets—as an example of a "classic horizontal market division"); Jason Hartley & Fatima Brizuela, *The Complexities of Litigating a No-Poach Class Claim in the Franchise Context*, 29 No. 2 COMPETITION 1 (Fall 2019)

("When competing in the same labor markets, no-poach agreements between any two or more employers are considered horizontal restraints, regardless of whether the employers are competitors in the downstream product markets for the sale of goods or services."); *cf.* Ioana Marinescu & Herbert Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1053 (2019) ("A fundamental principle of market definition for merger analysis is that if two firms can profit by agreeing with one another to fix prices or divide markets, then they are in the same collusive group, which means that they should be treated as competitors for the purpose of merger analysis. This can occur in the labor market whether or not it also occurs in the product markets of the firms who employ those workers.").

Critically, unlike in the classic dual distributor scenario, no-poaching restraints operate on a wholly separate market—the labor market—from that in which the vertical relationship between franchisors and franchisees exists—the restaurant format licensing market. Whereas, a company that both sells its own mattresses and authorizes other retailers to sell those same mattresses has both vertical and horizontal relationships with its fellow mattress retailers in the market for mattresses, *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 127, 1342-43 (11th Cir. 2010) (upholding retail mattress price maintenance by mattress manufacturer/retailer), the franchisee and the franchisor that also operates its own restaurants have no vertical relationship regarding labor. The franchisor does not supply the franchisee with

labor; both the franchisor and the franchisee are purchasers of labor, and, absent a no-poaching agreement, they would compete directly and horizontally to hire from the same pool of workers. Because the restraint operates on a market where the franchisee and franchisor are purely horizontal competitors, their vertical relationship in that separate restaurant format licensing market is irrelevant, absent a showing that the restraint is ancillary to the procompetitive franchising agreement.

Similarly, no-poach agreements are categorically different than exclusive dealing arrangements where a manufacturer limits the number of its distributors or suppliers. A TV manufacturer is generally allowed to limit how many outlets it will allow to distribute its TVs, as in *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), because the manufacturer supplies those TVs to its distributors. Accordingly, one assumes that it does so efficiently. Thus, the manufacturer's restraints on TV distribution are thought to "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id*. at 54. "These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason." *Id.*

But GTE did not supply salespeople to its distributors. Put differently, GTE had no vertical relationship with its distributors in the labor market for salespeople. Had GTE sought to restrain its distributors' purchases of sales labor instead of TVs, there would have been no inherent reason to believe that restraint was

efficient or that it promoted interbrand competition, notwithstanding the vertical relationship between GTE and its suppliers regarding TVs. Instead, like any other restraint between collaborators "with respect to products not part of the [collaboration]," it would "look[] suspiciously like a naked price fixing agreement between competitors, which would ordinarily be condemned as *per se* unlawful." *Polygram*, 416 F.3d at 37.

Indeed, even agreements between companies that have only a vertical relationship can be *per se* illegal or condemned on only a quick look. *See, e.g., United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2015) (holding that the effects of the agreement, not the relationship between the parties, controls); *In re Blue Cross Blue Shield Antitrust Litig.*, 308 F. Supp. 3d 1241, 1259–60 (N.D. Ala. 2018) (assertion that only purely horizontal agreements are *per se* illegal "does not square with Eleventh Circuit precedent"). The Antitrust Division explained this in its Second Circuit brief in the *Amex* case: "'horizontal and vertical restraints do not always threaten competition in different ways, or call for different analysis.'" Redacted Final Form Brief of Plaintiffs-Appellees 50, *United States v. American Express Co.*, No. 15-1672 (2d Cir. filed Oct. 21, 2015) (quoting Areeda & Hovenkamp ¶ 1503). Rather, "the 'horizontal-vertical distinction' is 'relevant only insofar as it helps identify competitive effects.'" *Id.* (quoting same). To the extent

Defendants argue that agreements between vertically related entities always merit a full rule of reason analysis irrespective of their likely effects, they are wrong.

III. *The Ancillary Restraints Test Is a Screening Mechanism that Must Be Applied Stepwise to Serve Its Purpose*

If the court determines that the *per se* or quick look test otherwise applies to this no-poaching provision, any appeals to the ancillary restraints doctrine to justify the provision should be carefully scrutinized keeping in mind its purpose as a screening mechanism. Mere invocation of the words "ancillary restraint" does not convert a *per se* or quick look inquiry into a searching rule of reason analysis. Rather, the inquiry must proceed in a series of ordered and prescribed steps. At each step, the focus must remain on whether the restraint generates *cognizable* efficiencies in the *relevant* market.

"Determining whether a restraint is ancillary is simply a way of deciding whether it can be condemned as illegal 'per se,' or upon a relatively quick look; or whether a more complete analysis of the market and likely competitive effects is essential." Areeda & Hovenkamp ¶ 1908a; *see also Texaco, Inc. v. Dagher*, 547 U.S. 1, 7 (2006) ("Under the doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purpose of the business association."). As such, the ancillary restraints test must necessarily be a less searching inquiry than the rule of reason itself.

A. The Ancillary Restraints Test Has No Application Unless a Plausible Connection to a Legitimate Collaboration Is Established

Before a claim of ancillarity may even be invoked, there must be a "plausible connection between the specific restriction and the essential character of the [main transaction.]" *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Assoc.*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.) (condemning a horizontal market division as *per se* illegal after taking a quick look, because "no reason has been suggested" why otherwise procompetitive agreement to provide reciprocal truck-leasing services required participants not to compete with each other in actual leasing of trucks); *see also Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1073 (11th Cir. 2005) ("In order for a condition to be ancillary, an agreement limiting competition must be secondary and collateral to an independent and legitimate transaction."). If "the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing," *Gen. Leaseways*, 744 F.2d at 595, the ancillary restraints defense must be rejected without further inquiry. *See id*. Instead, the restraint must be evaluated under the quick look or *per se* test, and the broader agreement is no longer part of the analysis. FTC & U.S. Dep't of Justice, Antitrust Guidelines for Collaboration Among Competitors § 2.3, at 7 (2000) [hereinafter Competitor Collaboration Guidelines] ("Two or more agreements are assessed together [only] if their

procompetitive benefits or anticompetitive harms are so intertwined that they cannot meaningfully be isolated and attributed to any individual agreement").

Mere inclusion of the no-poach provision within the four corners of a broader, efficiency enhancing franchise agreement is insufficient to provide the requisite connection. To conclude otherwise would be "foolish." Areeda & Hovenkamp ¶ 1908b ("Clearly, it would be foolish to describe agreements … as ancillary *merely* because they are part of the same document creating the [broader agreement], which we presume to be efficient. Such a rule could protect cartels from the heightened scrutiny attending naked restraints through the simple device of attaching the cartel agreement to some other, independently lawful transaction."); *see also Gen. Leaseways*, 744 F.2d at 595 ("The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category."); *Cf.* Statement of Interest at 13 (well pleaded "horizontal hub-and-spoke conspiracies among each franchisor and its franchisees" are subject to *per se* rule).

B. Franchise No-Poaching Agreements Are Not Ancillary Because They Are Not Reasonably Necessary to Achieve the Procompetitive Purpose of the Franchise System

If, and only if, this plausible connection is established, does the inquiry proceed to the next step: a more searching inquiry into whether the restraint is

"reasonably necessary" to the efficiency-enhancing collaboration. Competitor Collaboration Guidelines at 23 (distinguishing between restraints that are "reasonably necessary to achieve 'cognizable efficiencies'" and those that are mere "appendages"). "[C]learly some restraints are 'part' of efficiency-creating joint ventures and yet not sufficiently integral to the venture so as to be classified as ancillary." Areeda & Hovenkamp ¶ 1908b (citing *NCAA*, 468 U.S. 85).

That no-poaching provisions are not reasonably necessary for Burger King's and other franchise systems' business model is patently obvious from the fact that, since enforcement authorities began shining light upon these provisions, more than 150 franchise companies, including Burger King itself, have voluntarily abandoned them. *See* Wash. State Office of the Att'y Gen., *AAG to Testify to Congress as AG Ferguson's Anti-No-Poach Initiative Reaches 155 Corporate Chains* (Oct. 28, 2019)[5]. Burger King's demonstration that the no-poaching provision can be easily abandoned, obviates the need to delve deeply into the precise metes and bounds of the legal test for reasonable necessity in this context. That the no-poach provisions were easily excised from franchise agreements without any apparent harm to the

[5] Press release available at https://www.atg.wa.gov/news/news-releases/aag-testify-congress-ag-ferguson-s-anti-no-poach-initiative-reaches-155-corporate.

business model conclusively establishes they are not necessary to the franchise system under any reasonable understanding of that term.[6]

C. Franchise No-Poach Agreements Are Not Ancillary to the Franchise System Because Less Restrictive Means for Achieving Any Procompetitive Goals Are Readily Available

Because the no-poach provisions are not reasonably necessary to the otherwise procompetitive franchise agreements, there is no need to proceed to the final step of the ancillary restraints test to determine whether less restrictive means could achieve the same objective. *See, e.g.*, *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1396 (9th Cir. 1984) [hereinafter *LA Coliseum*] ("a factor in determining the reasonableness of an ancillary restraint is the 'possibility of less restrictive alternatives' which could serve the same purpose"); *see also* Competitor Collaboration Guidelines at 24 ("However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement.").

Nevertheless, even if one were to get to this step, the no-poaching provision would falter here, as well. The two justifications sometimes put forth to justify labor restraints, such as non-compete clauses and no-poaching provisions, are

[6] It also conclusively establishes that the no-poach provisions are not "so intertwined" with the broader franchise agreement that they cannot meaningfully be evaluated in isolation. Competitor Collaboration Guidelines at 7.

investments in training and the protection of trade secrets. *See* Herbert Hovenkamp, *Competition Policy for Labour Markets* 12 (U. of Penn. Law Sch. Inst. for Law & Econ. Research Paper No. 19-29, May 17, 2019) ("One rationale for employee noncompetes is of course that the employee has received significant training or perhaps possess [sic] trade secrets or other valuable information."). The latter justification is particularly inapt in the franchise context, because any trade secrets belong to the franchisor, not the franchisees, and thus are not protected by intra-franchise labor restraints. *Id.* at 12.

As for training, a franchisor concerned that franchisees will underinvest in training if trained employees can be poached by other franchisees of the same brand can simply pay for the optimal level of training itself. The franchisor can then pass the cost on to franchisees, if it desires, via franchise fees or other financial arrangements. This would readily ensure a proper level of investment in training without constraining the movement of laborers. *LA Coliseum*, 726 F.2d at 1396 (district court correctly instructed jury to take existence of less restrictive alternatives into account in evaluating alleged ancillary restraint). Because this less restrictive alternative is readily available, the no-poaching agreement does not qualify as an ancillary restraint.

D. A No-Poaching Agreement in the Labor Market Cannot Be Justified by Efficiencies in the Product Market or by Cost Savings or Profitability Not Cognizable as Efficiencies

In any event, at every step of the ancillary restraints framework, only *cognizable* efficiencies in the *relevant* market should be considered. The complaint in this case alleges harm to buyer competition for workers' services in labor markets. Accordingly, the harmful effects of the no-poaching agreements may not be excused or offset by "out-of-market benefits" in the *product* market, such as enhanced competition in selling hamburgers. As explained above in Section II, a no-poaching agreement is different than a resale price maintenance or exclusive dealing arrangement because the former operates on a separate market where the parties have no vertical relationship. And as the DOJ rightly explained in its *Anthem* brief, "Allowing an otherwise anticompetitive [agreement] because it makes some better off at the expense of others makes little sense…." Brief of Appellees the United States of America and Plaintiff States 60, *United States v. Anthem, Inc.*, Nos. 17-5024, 5028 (D.C. Cir. filed Mar. 13, 2017) [hereinafter Anthem Br.].

More fundamentally, courts are not permitted to "set sail on a sea of doubt" by attempting to determine "how much competition is in the public interest, and how much is not." *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 284 (6th Cir. 1898) (Taft, J.), *aff'd as modified*, 175 U.S. 211 (1899). The problem with cross-market balancing of benefits and harms is "juridical rather than economic";

the judge has to know "how much each of two groups 'deserves' at the expense of the other" and "can relate the decision to nothing more objective than his own sympathies or political views." Robert Bork, The Antitrust Paradox 27, 80 (1978). It is therefore disallowed "on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy." *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 354–55 (1982) (defendants' arguments asking the Court to allow competitive harm in input market for the benefit of end-consumer patients were "better directed to the Legislature" because "Congress may consider the exception that [courts] are not free to read into the [Sherman Act]."); *cf. United States v. Topco Assocs*., 405 U.S. 596, 610–11 (1972) (private firm had "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy"); *Ind. Fed'n of Dentists*, 476 U.S. at 463 (impermissible for courts to tolerate harm to competition in service of a supposedly greater good).

Moreover, certain effects, such as lower input costs due to reduced wages, are both out-of-market *and* non-cognizable. These lower input costs are not "efficiencies." Rather, this kind of cost savings is just a pecuniary gain to the franchisees at the expense of workers. As the government explained it its *Anthem* brief:

> *Economics distinguishes between a 'real' savings and a 'pecuniary' savings. The former enlarges the pie shared by all members of society. The latter enlarges one slice by shrinking one or more other slices. A savings is real when the same output is produced using fewer resources or more output is produced using the same resources.*

Anthem Br. at 59–60 (citing F.M. Scherer & David Ross, Industrial Market Structure and Economic Performance 130 (3d ed. 1990)). By lowering wages, the no-poaching agreements here do not reduce the resources brought to bear in making fast food; they simply allow the franchise to capture a proportionally larger share of the surplus created by such resources than the worker. *See Polygram*, 416 F.3d at 38 (claiming increased profitability resulting from decreased competition as an "efficiency" is 'nothing less than a frontal assault on the basic policy of the Sherman Act.'") (quoting *Nat'l Soc'y of Prof'l. Eng'rs.*, 435 U.S. at 695); *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 696 ("the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable"); *see also* Competitor Collaboration Guidelines at 24 ("[C]ost savings that arise from anticompetitive output or service reductions are not treated as cognizable efficiencies."); *id*. at 9 ("Some claims—such as those premised on the notion that competition itself is unreasonable—are insufficient as a matter of law, and others may be implausible on their face.").

CONCLUSION

The decision below should be reversed. If the Court reaches Defendants' alternative argument that Plaintiffs failed to allege an unreasonable restraint of trade, it should consider the foregoing points in selecting the appropriate liability standard to apply to no-poaching claims.

Respectfully submitted,

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December 7, 2020

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of December, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

s/ Laura M. Alexander

Dated: December 7, 2020

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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