No. 19-cv-09066

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JESSICA ROBINSON, ET AL.,

Plaintiffs,

v.

JACKSON HEWITT, INC., ET AL.,

Defendants

[PROPOSED] BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS

Counsel of Record
ANDREW R. WOLF
DANNLAW
1520 US Highway 130
Suite 101
North Brunswick, NJ 08902
(201) 355-3440
awolf@dannlaw.com

KATHLEEN W. BRADISH
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 304-0195
kbradish@antitrustinstitute.org

Counsel for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

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-poach agreement between companies that hire from the same pool of workers is nothing more than a market allocation agreement among buyers in a labor market. Employers agree not to compete with one another to hire and retain workers, thereby suppressing competitive wages, benefits, and other terms of employment. The U.S. Department of Justice (DOJ) and Federal Trade

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[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 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.

Commission (FTC) treat naked no-poach agreements as "serious criminal conduct" that is "per se illegal under the antitrust laws." DOJ & FTC, Antitrust Guidance for HR Professionals 3, 6 (Oct. 2016) ("DOJ & FTC Guidance"), *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-poach provision that was inserted in franchise agreements between Jackson Hewitt, operator of its own tax preparation locations, and its franchisees. Plaintiffs are former employees who allege that the challenged provision suppressed worker mobility and wages for Jackson Hewitt employees. The no-poach provision prohibits franchisees from hiring tax preparation employees from Jackson Hewitt's corporate locations. Plaintiffs allege that these no-poach provisions amount to an unreasonable restraint of trade under § 1 of the Sherman Act.

In a hearing on August 1, 2023, this Court asked the parties to submit briefs explaining what standard, *per se*, quick look or rule of reason, should be used to analyze the claims here. Tr. at 103-4. This Court further invited other amici to

submit their own briefs on the issue. *Id.* AAI responds to this Court's invitation in this brief by outlining several criteria, which taken together, require a *per se* illegal standard in cases like this:

1. The *per se* approach to liability is an essential aspect of effective antitrust enforcement. The *per se* standard is important to administrative convenience and efficiency, but at a more fundamental level, it is necessary to balance analysis of complex competition issues in the highly imperfect context of litigation. Without appropriate use of the *per se* rule, baldly anticompetitive conduct like market allocation will be insufficiently deterred.
2. A vertical relationship between two parties to an agreement in one market does not dictate the analysis in other markets where the parties compete. Despite vertical aspects of the franchisor-franchisee relationship, the parties here compete head-to-head for tax preparation employees. 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. The ancillary restraints test is a defense, and it requires something more than simply inserting the restraint into an otherwise legal agreement. Defendants must first demonstrate that the restraint at issue is

connected to the procompetitive purpose of the broader agreement before any further analysis is merited.

4. Any defense based on ancillarity must show that the restraint is (1) reasonably necessary to the procompetitive purpose of the broader venture and (2) 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* inquiry into a full-blown rule of reason analysis.

5. Any claim of ancillarity must be backed up by evidence that the restraint generates *cognizable* efficiencies in the *relevant* market. This is a particularly important consideration in labor markets. Cost savings generated by the suppression of competition, including savings 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 tax preparation services, as a potential justification for a labor-market restraint.

ARGUMENT

A no-poach agreement between franchisor and franchisees is nothing more than a market allocation agreement. Such agreements, when not reasonably

necessary to a procompetitive agreement, are *per se* illegal under Sherman Act Section 1. That the markets at issue are labor markets rather than markets for goods or services does not change the analysis, nor does the franchise relationship. This Court should follow the example of Judge Easterbrook and the Seventh Circuit in the recent *Deslandes v. McDonald's* case and assess the restraints alleged here under the *per se* standard. *Deslandes v. McDonald's United States, LLC*, 2023 U.S. App. LEXIS 22509, 81 F.4th 699 (7th Cir. 2023).

I. The Per Se Standard is Necessary to Prevent Substantial Underenforcement of the Antitrust Laws

The *per se* rules are not merely an administrative convenience; they are key to how courts strike the appropriate balance in the enforcement of the antitrust laws. Courts have long made the judgement that certain "prohibited practices by their nature have 'a substantial potential for impact on competition.'" *FTC v. Superior Court Trial Lawyers Assn.*, 493 U.S. 411, 433 (1990) (*citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984)). In cases involving such practices, the presumption of illegality is "the means by which we reach intelligible and consistent conclusions in the uncertain world of antitrust law." Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 305a (3d ed. 2010) (hereinafter "Areeda & Hovenkamp"). Without it, courts have warned, "[l]itigation 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." *Polygram Holding, Inc. v.* FTC, 416 F.3d 29, 34 (D.C. Cir. 2005) (*quoting* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 12-13 (1984)). Litigation can be messy, costly, and imperfect; the appropriate use of the *per se* standard helps correct for that.

Moreover, the antitrust laws aim to deter others who may be lured by the potential financial gains of acting anticompetitively. Without the *per se* rules, that goal is unachievable. A full-blown rule of reason inquiry can be long, expensive, and complicated. The courts' adoption of the *per se* analysis recognizes that optimal deterrence of naked restraints of trade like price-fixing, market allocation, and bid rigging requires a more certain path. An effective response to blatantly anticompetitive conduct necessitates "clear guidance" that counteracts "the businessperson's temptation to believe that [their anticompetitive behavior] could be lawful." Areeda & Hovenkamp ¶ 1509. The *per se* standard offers these guideposts; the uncertainty of rule of reason does not.

The *per se* rule does not change the fundamental question, which remains the impact of the conduct at issue on competition. It only changes the relative focus of the analysis. The rule set out by the Supreme Court, as Judge Easterbrook explained in *Deslandes v. McDonald's*, is simple: "market power is not essential" when analyzing "antitrust claims involving naked agreements among competitors."

Deslandes, 2023 U.S. App. LEXIS 22509 at *7 (citing *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46 (1990)). Anticompetitive effects are instead presumed in *per se* inquiries because the "likelihood of anticompetitive conduct is so great as to render unjustified further examination" of the nature of the conduct. *NCAA v. Bd. of Regents of U. of Oklahoma*, 468 U.S. 85, 103-104 (1984). But with or without the presumption, "the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *Id.* 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 back at a foregone conclusion. *Cf. Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979). Instead, the defendants in a *per se* case have an opportunity to rebut the presumption by showing that the restraint is reasonably ancillary to a procompetitive agreement.

II. The Likely Effect of the Restraint, Not the Type of Market or the Existence of a Vertical Relationship, Determines the Proper Liability Standard

In *Deslandes v. McDonalds,* a case factually similar to this one, the Seventh Circuit reversed the district court for failure to assess the no-poach agreement between McDonald's and its franchisees under the *per se* rule. *See Deslandes*, 2023 U.S. App. LEXIS 22509 at *7. Judge Easterbrook's opinion was unambiguous—under the Supreme Court's *NCAA v. Alston* decision, no basis

exists to treat liability standards in labor or franchise context differently than in any other markets. *Id.* at *5 ("[T]he antitrust laws prohibit monopsonies, just as they prohibit monopolies"). A naked no-poach agreement is *per se* illegal just as surely as an unjustified territorial allocation. The effect of the restraint is what matters, and the parties' franchise relationship does not save it. If the no-poach "prevents workers from reaping the gains from skills they learned by agreeing to work at lower wages at the outset of their employment—then it does not promote output" and cannot be redeemed as an ancillary restraint. *Id.* at *10.

In short, the only appellate court that has spoken on such a factually similar issue has reached a clear conclusion. A franchise relationship does not justify launching a full rule of reason analysis of an otherwise *per se* illegal no-poach agreement.

The *Deslandes* decision is not an outlier but rather flows logically from the relevant precedent. The Supreme Court recognized that companies can have a vertical relationship in one market and compete horizontally in another. In *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), for example, the Court affirmed that a territorial allocation is *per se* illegal, even if the companies never competed in the same territory and notwithstanding a vertical licensor-licensee relationship. The fact that a company supplies another with inputs or a license to IP does not alter

the horizontal competition between them in the downstream product market or the upstream labor market.

Labor markets make this dynamic particularly important to recognize. As the *Deslandes* case showed, 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). No poach agreements can be horizontal restraints regardless of how the ultimate product markets relate. The DOJ, for example, has prosecuted no-poach agreements between tech companies even though they operated in different product markets. *See United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013). And antitrust scholars have reached the same conclusion in the context of merger law. *See* Ioana Mirinescu & Herbert Hovernkamp, *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.").

For this reason, no-poach restraints should not be confused with two scenarios in which courts have sometimes hesitated to apply *per se* standards: dual distributorships and exclusive dealing arrangements. Unlike these cases, no-poach restraints operate on a wholly separate market—the labor market—from that in which the vertical relationship between franchisors and franchisees exists—here, tax preparation franchises.

In a traditional dual distributor scenario, a manufacturer sells its own products while also authorizing others to sell them. In these cases, courts have given some leeway for vertically-imposed restraints on pricing of the manufacturer's products because the manufacturer supplies the products in the first place. *See, e.g., 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). Here, in contrast, the franchisee and the franchisor that also operates its own locations 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-poach agreement, they would compete directly and horizontally to hire from the same pool of workers. Their vertical relationship in the separate tax preparation franchise market is irrelevant to the labor market at issue. The reasons courts have hesitated to condemn pricing restrictions outright in dual distribution case do not apply here.

No-poach agreements are also categorically different than exclusive dealing arrangements in which a manufacturer limits the number of its distributors or suppliers. Courts have often allowed such arrangements, as the Supreme Court did in *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Manufacturer's restraints on 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.*

That rationale has no place in a no-poach scenario. GTE did not supply salespeople to its distributors and had no vertical relationship with its distributors in the labor market for salespeople. Had GTE sought to restrain its distributors' ability to contract with sales labor instead of TVs, there would have been no reason to believe that restraint was promoting interbrand competition. 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.

III. The Ancillary Restraints Test Is a Defense that Requires Showings Not Met Here

As Judge Easterbrook emphasized in *Deslandes,* ancillarity is a defense. *Deslandes,* 2023 U.S. App. LEXIS 22509 at *12. Without more, merely invoking the words "ancillary restraint" does not convert a *per se* inquiry into a searching rule of reason analysis. Moreover, defendants' burden is to show that the restraint generates *cognizable* efficiencies in the *relevant* market.

A. Ancillarity Requires Both a Plausible Connection and a Reasonable Necessity to a Legitimate Collaboration Not Present Here

Ancillarity requires 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 because "no reason has been suggested" why legitimate agreement to provide reciprocal truck-leasing services required a non-compete in actual leasing of trucks. 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," *id.*, ancillarity cannot be a defense, and the broader agreement plays no part in the analysis.

Mere inclusion of the no-poach provision within the four corners of a broader franchise agreement is not enough. Indeed, the leading antitrust treatise dismisses such an argument as "foolish" as it would enable a hard-core price-fixing

cartel to escape heightened scrutiny simply by attaching the agreement to some "other independently lawful transaction" Areeda & Hovenkamp ¶1908b, at 228-29. The "per se rule would collapse" if every such claim, "however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category. *Gen. Leaseways*, 744 F.2d at 595.

The connection between the restraint and the legitimate agreement must not only be plausible but also "reasonably necessary." Not every plausible connection meets that test. "[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 v. Bd. of Regents*, 468 U.S. 85 (1984).

That no-poach provisions are not reasonably necessary for Jackson Hewitt's and other franchise systems' business model is obvious from the fact that, since enforcement authorities began examining these provisions, more than 150 franchise companies, including Jackson Hewitt itself, have voluntarily abandoned them. *See* Washington State Off. of the Att'y Gen., *AG Ferguson's initiative to end no-poach clauses nationwide continues with seven additional chains* (Dec. 20, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-s-initiative-end-no-poach-clauses-nationwide-continues-seven. Indeed, Jackson Hewitt has gone further than many of the others investigated by the state attorneys general in

claiming that it never enforced the no poach provisions in the first place. Tr. at 22. Evidence that the no-poach can be so easily abandoned obviates the need for an elaborate inquiry into reasonable necessity.

C. Franchise No-Poach Agreements Are Not Ancillary to the Franchise System Because Less Restrictive Means Are Readily Available

Moreover, even if, contrary to the facts here, there were a legitimate connection between the no-poach and the franchise agreement, the restriction would not be ancillary because 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.")

Attempts to justify labor restraints, such as non-compete clauses and no-poach provisions are generally of two types: encouraging investments in training and protecting 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). Neither seems to apply here. The trade secret justification does not work 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. Hovenkamp, *Competition Policy for Labour Markets* 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 less restrictive alternatives into account in evaluating alleged ancillary restraint). When options like these are readily available, a no-poach agreement cannot qualify as an ancillary restraint.

Finally, in determining ancillarity, only *cognizable* efficiencies in the *relevant* market should be considered. Plaintiffs in this case allege harm to buyer competition for workers' services in labor markets. Accordingly, the harmful effects of the no-poach agreements may not be excused by "out-of-market benefits" in the *product* market, such as enhanced competition in selling tax preparation services. In other words, the argument in other types of franchise or distributorships cases that a reduction in intrabrand competition can be offset by an increase in interbrand competition does not apply here. As Judge Easterbrook noted in *Deslandes v. McDonald's,* to "treat benefits to consumers (increased output) as justifying detriments workers (monopsony pricing)" is simply "not

right" and fundamentally misapprehends the focus of antitrust laws. *Deslandes*, 2023 U.S. App. LEXIS 22509 at *8-9.

Such "benefits" are not cognizable because courts are not tasked with determining "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). This is based "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]."). It is for Congress and political decision-making to trade off benefits in one market against harms in another. *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"); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986) (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. Considering the effects of the no-

poach provisions in *Deslandes,* Judge Easterbrook pointed out as much. He observed that one effect of the no-poach agreement is to "promote profits, to be sure, as franchises capitalize on workers' sunk costs," but this is not output-increasing and therefore not cognizable under the antitrust laws. *Deslandes*, 2023 U.S. App. LEXIS 22509 at *11 (cleaned up). To treat increased profitability from decreased competition as an "efficiency" is 'nothing less than a frontal assault on the basic policy of the Sherman Act.' *Nat'l Soc'y of Prof'l. Eng'rs. v. US,* 435 U.S. 679, 695 (1978).

Absent required showings of plausible connection, reasonable necessity, and no less restrictive alternative to establish ancillarity—none of which appear on the public record thus far—the no-poach restrictions Jackson Hewitt has used to suppress wages should be condemned under the *per se* standard as violations of Section 1 of the Sherman Act.

CONCLUSION

The no-poach restraints alleged here are naked market allocations unjustified by the franchise relationship between the parties. As a matter of law and policy, they are the kind of unredeemed anticompetitive conduct for which the *per se* standard was designed. For this reason, Plaintiffs' allegations should be assessed as *per se* illegal.

Respectfully submitted,

/s/ *Andrew R.Wolf*
ANDREW R.WOLF
DANNLAW
1520 US Highway 130
Suite 101
North Brunswick, NJ 08902
(201) 355-3440
awolf@dannlaw.com

KATHLEEN W. BRADISH
AMERICAN ANTITRUST INSTITUTE
1025 Connecticut Avenue, NW
Suite 1000
Washington, DC 20036
(202) 304-0195
kbradish@antitrustinstitute.org

October 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 2023, I electronically filed the foregoing Motion For Leave To File Amicus Brief with the Clerk of the Court for the District of New Jersey on the 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/*Andrew R.Wolf*

Dated: October 20, 2023