UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JESSICA ROBINSON, STACEY JENNINGS, and PRISCILLA MCGOWAN, individually and on behalf of others similarly situated,

Plaintiffs,

v.

JACKSON HEWITT, INC. and TAX SERVICES OF AMERICA, INC.,

Defendants.

Case No.: 2:19-cv-09066- MEF-ESK

BRIEF OF *AMICUS CURIAE* THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS, IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). *Amicus curiae* the Committee to Support the Antitrust Laws ("COSAL") is an independent, non-profit corporation that has been devoted to preventing, remediating, and deterring anticompetitive conduct since its founding in 1986. *See* COSAL, https://www.cosal.org/about (last visited Oct. 17, 2023). COSAL accomplishes these ends through its Board of Directors, which elects officers, and its various committees and members, which collectively promote the enactment, preservation, and enforcement of a strong body of antitrust laws. COSAL has advocated for these ends through legislative efforts, public policy debates, and by serving as *amicus curiae* before the circuit courts as well as the Supreme Court of the United States.

Consumers, employees, and businesses large and small benefit from robust public and private enforcement of our nation's antitrust and fair competition laws.

The restraint at issue in this case is a horizontal restraint whereby Jackson Hewitt locations—whether corporate-owned or franchisee-owned—agree not to solicit or hire one another's employees. Each of these locations competes for employees, as well as for customers. Consequently, regardless of any other vertical element that may exist between Jackson Hewitt Corporate and its franchisees, these no-poach agreements constitute a market division among

[1] *Amicus curiae* represents that no party's counsel authored the brief in whole or part, that no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and that no person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief. *Cf.* Fed. R. App. P. 29(a)(2), (a)(4)(E).

horizontal competitors in the employment market. A "horizontal market division is illegal per se even if price fixing is not present." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984) (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 n.9 (1972)). This is so because our historical experience with such restraints has revealed their "predictable and pernicious anticompetitive effect," *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997), and so "the law does not permit an inquiry into [*per se* restraints'] reasonableness" or the "economic justification[s]" defendants might proffer, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) ("They are all banned because of the actual or potential threat to the central nervous system of the economy.").

Black-letter Supreme Court jurisprudence, as well as the express intentions of Congress in enacting the Sherman Antitrust Act, impel the conclusion that horizontal no-poach agreements constitute *per se* violations of § 1 of the Sherman Act. To hold such agreements to a lesser standard risks further erosion of the *per se* rule, which would have deleterious effects on the preservation of economic freedom and American free enterprise, negatively impacting employees, consumers, and businesses alike.

On the pending class certification motion, and ultimately on the merits, this Court should analyze Plaintiffs' claims under the well-established *per se* rule.

SUMMARY OF ARGUMENT

This antitrust case involves an agreement among horizontal competitors not to hire one another's employees, a practice that is commonly referred to in antitrust jurisprudence as a "no-poach" agreement. Defendants had at least partly memorialized this anticompetitive agreement in written franchise agreements that predate the beginning of the class period. Even after a civil investigative demand from the Washington Attorney General prompted Jackson Hewitt Corporate

in 2018 to publicly disclaim enforcing the no-poach agreements contained in its written franchise contracts, and to discontinue including no-poach agreements in new contracts, Jackson Hewitt Corporate and its franchisees continued to adhere to the no-poach agreements in practice as a part of their corporate culture.

At the hearing on Plaintiff's class certification motion, this Court correctly characterized the restraint in question as "[i]narguably horizontal, I would have thought," Tr. at 14:6-8, at least insofar as it restricted franchisees. But as the franchise disclosure documents make clear, the relationship between Jackson Hewitt Corporate and the franchisees is equally horizontal in all relevant respects; franchisees are informed upfront that they "may face competition from other franchisees, from outlets that we own, or from other channels of distribution or competitive brands that we control." *See* ECF No. 211 at 11.[2] Under the plain terms of the franchise agreements, then, Defendants' market allocations operate between and among horizontal competitors for labor.

The Supreme Court has long treated horizontal market allocations as *per se* violations of the antitrust laws, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990), and Congress has recently confirmed the appropriateness of that judicial treatment: "[c]onspiracies among competitors to fix prices, rig bids, *and allocate markets* are *categorically and irredeemably anticompetitive* and contravene the competition policy of the United States." 15 U.S.C. § 7a note (Findings; Purpose of 2020 Am.) (emphases added).

Given the nature and character of the horizontal market division at issue here, the *per se* rule provides the proper framework in which to adjudicate Plaintiffs' claims, both on the pending class certification motion and ultimately on the merits of Plaintiffs' claims. Properly understood

[2] Pin citations to documents filed on ECF refer to the pagination applied by the Court, not the pagination applied by the filer's word processing software.

in this context, the *per se* rule could potentially play into the Court's class certification determination in at least four principal ways.

First, it is beyond question that the antitrust laws protect employees the same as they protect purchasers. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 352a (5th ed., 2020) ("Areeda & Hovenkamp") ("Employees may challenge antitrust violations that are premised on restraining the employment market."). This Court should not put aside the will of Congress and the Supreme Court's longstanding policy determinations by judicially creating an exception to *per se* liability merely because a market division for employees was implemented by and among a group of franchisees and a franchisor when those actors were admittedly horizontal competitors in the employment market.

Second, based on the publicly available filings in this case, the ancillary restraints doctrine cannot insulate Defendants from *per se* liability. "Determining ancillarity requires courts to consider first, whether any aspect of the defendants' association contains a significant promise of integration or cooperation yielding an increase in output. Second, some determination must be made whether the challenged agreement is an essential part of this arrangement, whether it is important but perhaps not essential, or whether it is completely unnecessary." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345 (3d Cir. 2010) (quoting 11 Hovenkamp, Antitrust Law ¶ 1910b, at 253 (2d ed., 2005) (cleaned up)). Restricting labor mobility does not increase productivity or output, nor does suppressing workforce wages. These practices are not essential or even important to the larger franchise agreement, which itself makes clear the franchisor and its franchisees compete with one another. At any rate, for purposes of the pending class certification motion, any

attempt by Defendants to raise the ancillary restraints doctrine as an affirmative defense in this action raises questions of law and fact common to all class members.

Third, the Court should not be misled into concluding that because the horizontal restraint first appeared in a franchise agreement that otherwise contained vertical elements, the restraint should likewise be treated as vertical. *See* Tr. at 65:12-17 (defense counsel asserting "this is within the franchise context. . . There are vertical components to it. It's a vertical relationship."). The Supreme Court defines a vertical restraint as one dictating the relationship between "firms at different levels of distribution" and concerning matters on which the firms do not compete with one another. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). While the larger franchisor-franchisee *agreements* might be considered by some courts to be vertical in other respects, the challenged *restraint* they contain—the no-poach clauses—involves the suppression of horizontal competition among the franchisees as well as with the franchisor-owned locations, with each agreeing to divide the market for their employees. For purposes of analyzing Plaintiffs' claims, the mere involvement of a vertical player does not transform the nature of this horizontal restraint. *See, e.g.*, *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928, 932 (7th Cir. 2000) (boycott to eliminate competition among horizontal retailers was *per se* unlawful despite being orchestrated through a series of "separate, vertical agreements").

And finally, any allegedly procompetitive justifications Defendants might offer for the horizontal market division (in particular, claimed issues of "free riding" off the training provided by a competing Jackson Hewitt entity) does not justify a departure from *per se* condemnation. "Often instances of claimed free riding are really complaints about competition" itself, rather than legitimate grievances. *Viamedia, Inc. v. Comcast Corp.*, 951 F.3d 429, 480 (7th Cir. 2020). As this Court has already recognized, expending judicial and party resources to entertain justifications for

evading *per se* condemnation eviscerates the policy considerations that led the Supreme Court to establish the *per se* rule for horizontal market division in the first place. Tr. 17:7-12 ("There are many reasons for 100 years of antitrust law why *per se* rules have developed. And one of the standard justifications is, Oh, my gosh, the complexity in any number of ways, including as measured by judicial expenditure of resources to do a serious and rigorous rule of reason analysis, is a cost."). "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." *Gen. Leaseways*, 744 F.2d at 595 (a "division of markets . . . is a per se violation"). Courts have more than enough experience with horizontal market divisions to condemn the practice without ado, and in any event, Defendants' unsubstantiated free rider justifications do not survive a searching analysis of their merit—further illustrating why courts should not entertain such justifications for *per se* antitrust violations.

For these reasons, as further explained below, this Court should review Plaintiffs' claims as *per se* violations.

ARGUMENT

A. The *Per Se* Rule Applies To Market Divisions Among Horizontal Competitors In Labor Markets.

The Supreme Court, Congress, and this Circuit have harmoniously declared that horizontal market divisions are among those horizontal restraints that "are considered anticompetitive by their very nature," *Lifewatch Servs. Inc. v. Highmark Inc.*, 902 F.3d 323, 336 (3d Cir. 2018), because of the "predictable and pernicious anticompetitive effect" of such restraints of trade, *Khan*, 522 U.S. at 10; *Palmer*, 498 U.S. at 49; 15 U.S.C. § 7a note (market divisions "are categorically and irredeemably anticompetitive"). The "*per se* approach permits categorical judgments with respect to certain business practices," *Northwest Wholesale Stationers, Inc. v. Pac. Stationery and Printing*

Co., 472 U.S. 284, 289 (1985), and is subject to "only a few, narrow exceptions," *United States v. Aiyer*, 33 F.4th 97, 118 (2d Cir. 2022), such as the ancillary restraints doctrine which, for the reasons discussed in Section B, *infra*, does not apply.

This categorical *per se* rule of condemnation applies even where the market division does "not foreclose all possible avenues of competition," *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995), where the colluding firms are small enough that they "were in no position to control the market," *Socony*, 310 U.S. at 221, and where the colluding firms are buyers of inputs or labor rather than sellers of goods or services, *Omnicare, Inc. v. UnitedHealth Grp., Inc.,* 629 F.3d 697, 705 (7th Cir. 2011) (a "buyers' cartel" is *per se* unlawful). The *per se* rule also applies where there is little judicial familiarity with the context within which a categorically *per se* violation arises. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771 (2d Cir. 2016) (the "unfamiliar context of" a claim "provides no basis to disturb application of the *per se* rule").[3]

And even if relevant (and it is not, *Gelboim*, 823 F.3d at 771), the proposition that our courts lack sufficient experience with divisions of employment markets cannot be countenanced. The Supreme Court first invalidated a no-hire agreement nearly one hundred years ago, *Anderson v. Shipowners' Ass'n*, 272 U.S. 359, 361-62 (1926), and the circuit courts have considered employment market divisions as *per se* unlawful for at least forty years, *e.g.*, *Quinonez v. Nat'l Ass'n Secs. Dealers, Inc.*, 540 F.2d 824, 826, 828-29 & n.9 (5th Cir. 1976) (agreement "not [to] hire" among horizontal firms unlawful *per se*).

[3] *See also, e.g.*, *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 348-51 (1982) (the per se rule need not be "rejustified for every industry that has not been subject to significant antitrust litigation"); *United States v. DaVita, Inc.*, No. 1:21-cr- 00229, 2022 WL 266759, *3, 6-8 (D. Col. Jan. 28, 2022) (it "makes no difference" that there is "less precedent on per se treatment of horizontal market allocation agreements allocating employment"—they "are treated the same" as "anticompetitive practices in markets for goods and services").

Given this almost universally held view, it is no surprise that antitrust scholars categorize no poach agreements as market divisions—a *per se* violation. Areeda & Hovenkamp ¶ 2013a ("Anti-poaching agreements . . . not to hire one another's employees of a certain type, in fact operate as market-division agreements."). Or that the majority of district courts within or outside this Circuit to consider the issue have "accepted that a non-solicitation or no-poach agreement could be a form of market allocation agreement," thus demonstrating "that the agreements fit within an established category of per se unlawful restraints." *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 630 F. Supp. 3d 968, 988-89 (N.D. Ill. 2022) ("It makes no difference that Defendants were dividing employees as opposed to territories, customers, or products.").[4] Or that less than two months ago, the Seventh Circuit adopted this view, holding that in granting dismissal under Rule 12 to a Section One claim challenging McDonald's use of no-poach clauses in its franchise agreements, the district court had "jettisoned the *per se* rule too early," and urging the district court to "reconsider" its denial of class certification on related state-law issues in light of

[4] *See also, e.g.*, *United States v. Manahe*, No. 2:22-cr-00013, 2022 WL 3161781, at *7-9 (D. Me. Aug. 8, 2022) (no poach agreement "falls within the category of restraints long condemned as inherently anticompetitive"); *United States v. Jindal*, No. 4:20-CR-00358, 2021 WL 5578687, at *4-6 (E.D. Tex. Nov. 29, 2021) (the "scope of conduct found to constitute horizontal price-fixing agreements warranting application of the per se rule is broad" and encompasses employment market divisions); *Markson v. CRST Int'l, Inc.*, No. 5:17-cv-01261, 2021 WL 1156863, at *4 (C.D. Cal. Feb. 10, 2021) (plaintiffs "alleged a per se violation" where employers agreed "not to poach drivers that are under contract with another competitor"); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019) (no poach agreements are "horizontal service division agreements . . . per se unlawful under the antitrust laws"); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1214 (N.D. Cal. 2015) (agreement "not to solicit each other's employees" is per se unlawful); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1038-39 (N.D. Cal. 2013) (holding that no-poach agreement presents a "classic horizontal market allocation"); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1110-22 (N.D. Cal. 2012) (agreements "whereby each company . . . instructed recruiters not to cold call the employees of the other company" stated a "*per se* violation of the Sherman Act").

the appellate court's ruling on the applicability of the *per se* rule. *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703-05 (7th Cir. 2023).

All these precedents reflect the basic fact that, in categorizing horizonal restraints as *per se* violations, "[a]ntitrust law does not treat employment markets differently from other markets." *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013). The nature of the harm is the same, whether in markets for employment or for anything else. "Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services." Areeda & Hovenkamp ¶ 352c.

Recent academic research on no-poach agreements in the franchise context suggests that this practice suppresses workers' wages by statistically significant amounts. *See generally* Brian Callaci et al., *The Effect of Franchise No-Poaching Restrictions on Worker Earnings* (IZA Institute of Labor Economics, Discussion Paper No. 16330, July 2023), available at https://docs.iza.org/dp16330.pdf (estimating increase of 4% to 6.6% in annual earnings by employees of franchise chains that entered assurances of discontinuation with Washington State Attorney General); Francine Lafontaine et al., *No-Poaching Clauses in Franchise Contracts: Anticompetitive of Efficiency Enhancing?* (March 24, 2023), available at https://ssrn.com/abstract=4404155 (finding that when U.S. chain restaurants dropped no-poach clauses from their contracts, wages rose by 5-6% relative to chains that never imposed no-poach restraints). For hourly workers already on the low end of the wage scale, wage suppression of this magnitude imposes a particularly egregious harm.

B. The Ancillary Restraints Doctrine Does Not Move a Restraint From *Per Se* To Rule of Reason Analysis Where, As Here, The Restraint Is Not Subordinate And Necessary To An Output-Enhancing Endeavor.

One narrow exception to the *per se* rule for horizontal market divisions is the ancillary restraints doctrine, which applies only where the restraint is reasonably related and "reasonably necessary" to achieve "legitimate and competitive purposes." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) ("a restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits"). As Defendants have conceded, where the ancillary restraints doctrine applies, it functions as an affirmative defense against liability for what otherwise would be a *per se* violation. Tr. at 71:1-4 (defense counsel agreeing with the Court's statement that "if it is a per se case, then it's a per se case and it switches over to the defendants to show ancillarity"). Thus, establishing ancillarity is a defendant's burden. *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 705 (7th Cir. 2023) ("the classification of a restraint as ancillary is a defense" which plaintiffs need not plead around in their complaint); *see also Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003) (defendants' ancillarity argument "fail[ed] to state a valid defense"); *Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1154 n.9 (10th Cir. 1983) (burden of "proving the effectiveness and necessity" of allegedly ancillary restraints rightly placed on defendant), *aff'd*, 468 U.S. 85 (1984).

In addition to being necessary to achieve procompetitive ends, for a restraint of trade to be ancillary to a competitive purpose, the procompetitive ends must not be achievable by reasonable and less restrictive alternatives to the restraint of trade. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) ("If [the restraint] is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary."); *Nat'l Bancard Corp. v. Visa USA Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) (a restraint

is ancillary only if it is "no broader than necessary to accomplish its procompetitive goals"). A restraint that satisfies these tests is removed from the *per se* rule and evaluated under either the quick look or rule of reason mode of analysis.[5]

The fact that an anticompetitive restraint is contained within some broader agreement that might have procompetitive benefits untethered to the restraint is not enough to invoke the doctrine and remove the restraint from *per se* condemnation. Restraints are "not automatically deemed ancillary simply because [they] facilitate[] a procompetitive arrangement"; rather, "some determination must be made whether the challenged agreement is an essential part of this arrangement." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345-46 (3d Cir. 2010) (internal quotation marks omitted). "Clearly, a restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful."[6] Areeda & Hovenkamp ¶ 1908b; *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2157 (2021) ("the ability of McDonald's

[5] Because the underlying motion is one for class certification, the Court might reasonably limit its inquiry at this stage to whether common questions predominate the questions of law or fact that ultimately will need to be resolved to adjudicate the case—including any factual or legal questions relating to the affirmative defense of ancillarity. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 454 (2016) (articulating commonality requirement); *In re Constar Int'l Inc. Sec. Litig.*, 585 F.3d 774, 785 (3d Cir. 2009) (upholding class certification because, among other things, defendants' claimed affirmative defense "would present a common issue—not an individual one" and so could not defeat a showing of predominance). It is difficult to imagine, though, how Defendants' attempts to prove the affirmative defense that their company-wide no-poach agreements were ancillary to a legitimate, procompetitive purpose could turn in any way on considerations specific to individual class-member employees, or even specific Jackson Hewitt locations. The policy applied to all employees, and at all Jackson Hewitt locations. Indeed, the ancillarity argument Defendants advanced at the class certification hearing—a dubious argument about the supposedly legitimate, competitive benefits of preventing trained employees from leveraging that training to obtain higher wages at another Jackson Hewitt location, *see* Tr. at 73:3-75:11—presents entirely common questions of both law and fact that can be more conclusively resolved after the employee class is certified.

[6] And even if the restraint was shown to be necessary to an output-enhancing endeavor, it would still flunk the less restrictive means test. *See* Section D, *infra*).

franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers").

The Seventh Circuit's recent *McDonald's* decision is instructive here. There, the court of appeals flatly rejected the district court's determination that the no-poach agreement was ancillary simply "because it appeared in franchise agreements—and each agreement expands the output of burgers and fries." *McDonald's*, 81 F.4th at 703 That flawed approach "treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing). That's not right; it is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, when [*National Collegiate Athletic Association v.*] *Alston* establishes otherwise." *Id.* (referencing 141 S. Ct. 2141 (2021)). Furthermore, it ignores the very real possibility that even if the larger contract increases output, the challenged restraint contained in that contract might "just take[] advantage of workers' sunk costs and help[] each business's bottom line, without adding to output." *Id.* at 704.

A defendant invoking the ancillary restraints doctrine must establish through evidence—not the mere suggestions or conclusory statements Defendants have made here thus far—that the restraint increased output, that the restraint is reasonably necessary to achieve that increased output, and that the increased output could not have been achievable through reasonable, less restrictive alternatives to the restraint. *E.g.*, *Blackburn*, 53 F.3d at 828 (non-solicitation agreement not ancillary because it "was not a necessary condition for the increased competition"); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970 (10th Cir. 1994) (restraint must be "no broader than necessary to effectuate the" procompetitive effects); *Sullivan v. Nat'l Football League*, 34 F.3d 1091, 1102 (1st Cir. 1994) ("a 'restraint' that is ancillary to the functioning of such a joint activity" is "one that is *required* to make the joint activity more efficient) (emphasis in original).

Again, because the reasonable necessity inquiry relates to the affirmative defense provided by the ancillary restraints doctrine, it is Defendants' burden to prove. Courts do not treat restraints as ancillary "simply because [a defendant] posits that it is." *eBay*, 968 F. Supp. 2d at 1039. Defendants here have made only conclusory statements, which do not suffice to carry their burden of establishing the defense.

C. This Case Involves Horizontal Restraints Subject to *Per Se* Condemnation, Not Vertical Restraints.

Purely vertical restraints of trade—that is, those imposed only between firms at varying levels of a chain of distribution and concerning issues upon which those vertical firms do not compete—are judged under the rule of reason. *Am. Express*, 138 S. Ct. at 2284. But this case does not involve a vertical restraint.

In *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, the district court, and, in turn, the Seventh Circuit, were faced with two restraints. No.85-cv-7079, 1985 WL 2548, at *5 (N.D. Ill. Sep. 16, 1985), *aff'd*, 806 F.2d 722 (7th Cir. 1986). The first restraint involved a vertical resale price maintenance claim involving a single airline and its travel agents. *Id.* The district court dismissed that claim and the Seventh Circuit affirmed. *Id.* The second restraint involved a claim that "American conspired with [the downstream] travel agents to cut off competition" among horizontal competitors at the travel agent level. 806 F.2d at 726 ("Collaboration among dealers orchestrated through American therefore might establish a *per se* violation."). The district court upheld that claim and the Seventh Circuit affirmed. *Id.* The involvement of a vertical actor (American) did not destroy the nature of the restraint, which was to eliminate horizontal competition at the agent level—"a firm footing for *per se* analysis." *Id.*[7] So too here, where a

[7] The district court and Seventh Circuit's references in *Illinois Corporate Travel* that the *per se* rule "usually" and "might" apply were references to the possibility that the claim might fail for want of proof. 806 F.2d at 726 (the "record d[id]not contain an explicit agreement" and the

franchisor (that itself owns and operates tax-preparation offices) has orchestrated a horizontal market division for employees between and among itself and its competitor Jackson Hewitt franchisees, restraining horizontal competition at the restaurant level.

This conclusion is far from novel. The Supreme Court explicitly recognizes the *per se* unlawfulness of vertical actors orchestrating horizontal cartels. In *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, the Supreme Court recognized that "[v]ertical price restraints also 'might be used to organize cartels at the retailer level.'" 551 U.S. 877, 893 (2007). Such a retailer cartel "is, and ought to be, *per se* unlawful." *Id.* (the vertical "agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel"). Applying identical principles, in *Toys "R" Us*, the Seventh Circuit upheld the *per se* unlawfulness of a restraint where a downstream vertical actor (a retailer) orchestrated a restraint wherein upstream actors (toy manufacturers) boycotted discounting toy retailers (through separate vertical agreements), but with the aim of suppressing horizontal competition at the retailer level. 221 F.3d at 936. The Seventh Circuit held that the presence of vertical aspects did not control: "That is a *horizontal* agreement." *Id.*; *accord Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993) (the presence of a vertical actor in a scheme designed to suppress horizontal competition "does not transform [the restraint] into a vertical agreement").

And in the same vein as *Toys "R" Us* and *Denny's* is the Second Circuit's decision in *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015). There, Apple orchestrated a cartel involving five publishers of electronic books, via five separate arm's-length vertical contracts

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circumstantial evidence of agreement was "weak"). On that basis, both tribunals declined to issue injunctive relief, which is the context in which the terms "usually" and "might" are employed. *Id.* Neither the lower court's nor the Seventh Circuit's opinions in *Illinois Corporate Travel* so much as hint that anything less than *per se* condemnation would occur if the plaintiff met its burden of proof.

between Apple and the five publishers. *Id.* at 322. The Second Circuit (and the district court below it) rejected application of the rule of reason: "It is the type of restraint Apple agreed to impose that determines whether the *per se* rule or the rule of reason is appropriate." *Id.* The "relevant 'agreement in restraint of trade' [] is not Apple's vertical Contracts with the Publisher Defendants . . it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices." *Id.* at 323. As such, on the question of "whether the vertical organizer of a horizontal conspiracy" can "escape *per se* liability," the Second Circuit forcefully concluded: "We think not." *Id.* at 325.

These precedents explain why it would be incorrect to rely on the presence of vertical agreements to avoid application of the *per se* rule. Indeed, the *per se* rule controls, notwithstanding the existence of some arguably vertical elements.

D. The *Per Se* Rule Does Not Permit Weighing Of Claimed Business Justifications For Violations, And Analysis of Defendants' Purported Free Rider Justification Demonstrates the Soundness of the *Per Se* Rule.

As the Supreme Court explained in *Leegin*, the *per se* rule conclusively "treat[s] categories of restraints as necessarily illegal." 551 U.S. at 886. As such, arguments—such as those offered by Defendants here—that "the *per se* rule is inapplicable because [Defendants'] agreements are alleged to have procompetitive justifications. . . indicate[] a misunderstanding of the *per se* concept." *Maricopa Cty.*, 457 U.S. at 351 (such restraints are unlawful *per se* "even if procompetitive justifications are offered for some").

The policy justifications behind the *per se* rule are obvious. "The conceivable social benefits [for *per se* violations] are few in principle, small in magnitude, speculative in occurrence, and always premised on the existence of price-fixing power that is likely to be exercised adversely

to the public." Areeda & Hovenkamp ¶ 1509a.[8] The Supreme Court has explained that the law precludes such arguments because otherwise they "would necessarily become an issue in every price-fixing case," in which event "the Sherman Act would soon by emasculated [and] its philosophy would be supplanted by one which is wholly alien to a system of free competition[.]" *Socony-Vacuum*, 310 U.S. at 221.

Defendants have no more than gestured toward some allegedly procompetitive justifications for their restraint. But even if some such justification could conceivably exist, that is not the relevant inquiry here. Because the no-poach agreements constitute a horizontal restraint, any argument relating to some supposed procompetitive justification must occur in the context of the ancillary restraints defense, not the rule of reason balancing test. Accordingly, it is Defendants' burden to show that no reasonable, less restrictive alternatives existed for achieving the procompetitive ends. *E.g.*, *Rothery*, 792 F.2d at 224 (no less restrictive means); *Deslandes*, 81 F.4th at 705 (the existence of an ancillary restraint is an affirmative defense on which defendants have the burden). Significantly, it is *not* the plaintiff's burden to establish that a less restrictive, equally effective alternative exists, as it would be under the rule of reason. *Am. Express*, 138 S.Ct. at 2284. But under either the correct ancillarity analysis or the erroneous rule of reason analysis, the no-poach agreements appear to fail legal scrutiny.

Defendants' purported procompetitive justification seems to be a variation on the free rider issue: that individual Jackson Hewitt offices have invested in training their employees and do not want to lose that investment by allowing their employees to be hired away by a competing location willing to pay higher wages for workers who already know how to do the job. It bears repeating

[8] "Further, the defendants have little moral standing to demand proof of power or effect when the most they can say for themselves is that they tried to harm the public but were mistaken in their ability to do so." Areeda & Hovenkamp ¶ 1509a.

the Seventh Circuit's recent caution that "[o]ften instances of claimed free riding are really complaints about competition" itself, rather than legitimate grievances. *Viamedia*, 951 F.3d at 480. Defendants' true complaint appears to be a concern with cutting their own labor costs, but antitrust laws do not recognize cost-cutting as a procompetitive justification. *Law v. NCAA*, 134 F.3d 1010, 1022 (10th Cir. 1998) ("[C]ost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices."). Every job in every industry, from working in a quick service restaurant to practicing law, involves on-the-job training, and often substantially costly on-the-job training. If the provision of training justified a horizontal market division, surely market divisions would become appropriate and tolerated in myriad industries. That is not the law.

Consider for a moment a corollary argument. Assume a seller of widgets plans to implement an advertising campaign aimed at new customers that have never before purchased widgets. That advertising itself is output enhancing, since it creates new demand that did not previously exist for widgets. Fearful that the benefits of its output-enhancing investment in advertising might be usurped by a rival seller of widgets offering lower prices, the seller agrees with its competing sellers of widgets to allocate customers, such that the advertiser is immune from competition for those newly generated customers. A defense to that unlawful market division premised on the notion that it was merely preventing free riding on an output-enhancing investment in advertising would be laughed out of court. *But that is precisely the argument advanced by Defendants here*, simply substitute widgets for tax-preparer employees' labor and an investment in advertising with an investment in training on Jackson Hewitt's proprietary tax prep software.

Defendants' argument also fails because "in order for anticompetitive free riding to occur, the free rider must be able to take advantage of someone else's investment in such a way that the other firm is not capable of pricing it out of the market." Herbert J. Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 111 (2018). Put another way, free-riding is not anticompetitive if the claimed free-rider is paying for the benefits *or* if the generator of the benefits can price the free ride out of the market through a competitive response. *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) ("What gives this the name *free*-riding is the lack of charge."); *Viamedia*, 951 F.3d at 480 ("[w]hen payment is possible, free-riding is not a problem because the 'ride' is not free"). Here, there is no "free ride," since a franchisee recruiting away a trained employee must pay for that employee's services, and a franchise whose employee is being recruited away can retain the employee by paying a competitive wage.

Further underscoring the fruitlessness of evaluating of procompetitive justifications in *per se* cases is the ease with which the restraint at hand flunks the less restrictive alternatives test. "Since the Sherman Act is meant to protect the benefits of competition, the determination of whether a restraint is unreasonable must focus on the competitive effects of challenged behavior relative to such alternatives as its abandonment or a less restrictive substitute." *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012) (internal quotation marks omitted); *Alston*, 141 S. Ct. at 2162 (the third step in a rule of reason analysis is "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the" restraint). If the "excessiveness of the restraint in relation to the underlying transaction is clear," then "[n]o further inquiry into power or effects is necessary." Areeda & Hovenkamp ¶ 1908f.

The Seventh Circuit pointed toward this conclusion in *McDonalds*. It reviewed the theoretical possibility that training might justify some limited degree of restraint on worker mobility. 81 F.4th at 704. "But eventually the cost of training will have been amortized, and a ban on transfer to another restaurant after that threshold could be understood as an antitrust problem." *Id*. Accordingly, even the theoretically possible justification will fail depending on whether the no-poach agreements were actually "protecting franchises' investments in training, or [whether the agreements were] allowing [franchises] to appropriate the value of the workers' own investments." *Id*. The cost of the training provided to employees, and the duration and geographic scope of the restriction on employee mobility, are all relevant to this determination. Here, every indication points to a conclusion that the no-poach agreements were about suppressing wages, untethered to any claimed interest in recouping an employer's training costs.

All of this demonstrates the soundness of the *per se* rule's application here. Entertaining procompetitive justifications for categorically *per se* restraints wastes judicial and party resources while threatening to undermine the Sherman Act and our system of free competition. *Socony-Vacuum*, 310 U.S. at 222.

CONCLUSION

For these reasons, this Court should apply the per se rule in analyzing Plaintiffs' claims, both on the pending class certification motion and ultimately on the merits.

Dated: October 20, 2023

Respectfully submitted,

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