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*.	No. 2:19-cv-9066 Hon. Michael E. Farbiarz, U.S.D.J. Hon. Edward S. Kiel, U.S.M.J.

BRIEF FOR STATES OF NEW JERSEY, ARIZONA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE*

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INTERESTS AND IDENTITIES OF *AMICI CURIAE*[1]

The *Amici* States of New Jersey, Arizona, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New York, North Carolina, Oregon, Pennsylvania, Rhode Island, and the District of Columbia respectfully submit this brief to aid this Court's review of the no-poach agreement at issue in this putative class action under Sections 1 and 3 of the Sherman Act, 15 U.S.C. §§ 1, 3. For the reasons below, the no-poach agreement, as alleged, is a horizontal restraint that should be analyzed under the *per se* standard of analysis. Jackson Hewitt is unlikely to prove the no-poach agreement is an ancillary restraint because such a broad restriction is seldom reasonably necessary to effectuate an otherwise legitimate and pro-competitive purpose or transaction.

The *Amici* States have a strong interest in maintaining a competitive labor market and ensuring fairness for all workers in their respective jurisdictions by preserving and promoting worker mobility as well as competitive wages and working conditions. Several State Attorneys General have significant enforcement experience in practice areas related to no-poach agreements, including in the spheres of labor, antitrust, and consumer protection, and have thus seen how such restraints limit worker mobility, depress wages, and create inefficiencies. By contrast, when companies compete to attract workers, wages rise, working conditions improve, and productivity increases—all results consistent with the goals of antitrust law, and all undermined by anticompetitive arrangements like no-poach agreements.

In recent years, many States have enforced antitrust laws against the unlawful use of no-poach and other agreements that limit worker mobility and economic opportunity. A coalition of Attorneys General from several States, including New Jersey and Pennsylvania, opened an

[1] The parties consent to the *Amici* States' appearance as *amici curiae* in this matter.

investigation in 2018 into the use of no-poach agreements by many national fast-food franchises. *See* Press Release, New Jersey Attorney General, AG Grewal Seeks Records from Eight Fast Food Companies About Use of Employee Non-Compete Agreements (Jul. 9, 2018), https://www.njoag.gov/ag-grewal-seeks-records-from-eight-fast-food-companies-about-use-of-employee-non-compete-agreements/. As a result of this investigation, several fast-food chains that operate thousands of locations across the United States and employ tens of thousands of workers - including Dunkin' Donuts, Arby's, Five Guys, and Little Caesars - agreed to stop using no-poach agreements. *See* Nat'l Ass'n of Attys Gen., Settlement Agreement Between States and Dunkin' Brands, Inc. (2019), https://www.naag.org/multistate-case/settlement-agreement-between-states-and-dunkin-brands-inc/. Among other things, the national food franchisors agreed to stop including no-poach provisions in any of their franchise agreements, to stop enforcing any no-poach agreements already in place, and to amend their existing franchise agreements to remove no-poach provisions. *Id.* Elimination of these no-poach agreements has resulted in measurable wage increases for workers. *See* Brian Callaci et al., The Effect of No-poaching Restrictions on Worker Earnings (July 20, 2023), *available at* SSRN: https://ssrn.com/abstract=4155577.

Legal developments in recent years have underscored the importance of States' participation in antitrust enforcement of labor issues. The recent passage of the State Antitrust Enforcement Venue Act, 28 U.S.C. § 1407, removed procedural inefficiencies and barriers to State antitrust enforcement, allowing States to more easily serve as enforcement partners to the Federal Government. And federal precedent has a direct effect on States' enforcement efforts, as most States' antitrust laws are analogous to the corresponding federal antitrust laws and are construed in harmony with those laws. *E.g.*, N.J.S.A. 56:9-18; *see also* Herbert Hovenkamp, *State Antitrust*

in the Federal Scheme, 58 Ind. L.J. 375, 377 n.10 (1983). In short, the *Amici* States have a particularly strong interest in the development of federal antitrust law.

In recognition of the importance of federal precedent, many States have sought to solidify the legal standards governing labor markets. For instance, a multistate coalition of 20 States, including New Jersey, Delaware, and Pennsylvania, filed an *amicus* brief in *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023), successfully challenging no-poach clauses in McDonald's franchise agreements. Another multistate coalition of 20 States, including New Jersey, Delaware, and Pennsylvania, filed an *amicus* brief in *Giordano v. Saks & Company LLC*, No. 23-600, 2023 WL 5096031 (2d Cir. filed Apr. 14, 2023), challenging no-poach clauses in agreements between Saks Fifth Avenue and the manufacturers of certain luxury retail products such as Gucci, Louis Vuitton, and Prada. And a third coalition, featuring 17 States, including New Jersey, Delaware, and Pennsylvania, filed a comment letter in support of the Federal Trade Commission's proposed rulemaking, which would ban the use of non-compete employment agreements. *See* Multistate Comment Letter on Proposed Non-Compete Rule to the Federal Trade Commission (Apr. 19, 2023), https://www.naag.org/wp-content/uploads/2023/06/04-19-23-AGs_Comment_FTC_NonCompeteRule.pdf.

In sum, the States are working to aid the development of federal antitrust law in the labor context and, in turn, to spur competition in the labor markets, leading to greater worker mobility, higher compensation, and better terms and conditions of employment. In keeping with this work, *Amici* States have an interest in halting unlawful no-poach agreements in their jurisdictions and take a particular interest in this matter. For the reasons below, *Amici* States urge the Court to hold that the no-poach agreements, as alleged, are horizontal restraints between competitors that amount to *per se* violations of Section 1 of the Sherman Act. Based on the current record, Defendants'

only apparent justification for claiming an ancillary restraints defense would fail as a matter of law.

INTRODUCTION

Antitrust law seeks to promote competition and prevent collusion in both input markets (including labor) and output markets (including goods and services). The Sherman Act serves that purpose by prohibiting unreasonable restraints on trade. When a restraint is so manifestly anticompetitive that longstanding practice has shown there is no need for case-specific analysis, courts apply a rigorous standard of review known as the *per se* rule. For instance, if competing widget sellers (or widget buyers) agreed to divide up the market for selling (or buying) widgets, such a restraint would need no in-depth study—it would qualify for *per se* analysis.

The same is true where, as alleged here, buyers of labor (here, tax preparer services) agree to divide up the labor market through what are known as "no-poach agreements," or agreements not to hire each other's workers. While the answer would perhaps be different if the competitors operated at different levels of the market structure—for instance, if one was a manufacturer and the other was a distributor—this case does not implicate such "vertical" arrangements. Rather, it involves corporate tax-preparation locations and franchisee tax-preparation locations, who are plainly competitors for tax-preparation labor under the facts as alleged, and thus have created a classically "horizontal" restraint on trade. Horizontal agreements are considered presumptively unreasonable because, among other things, there are not many benign reasons for cooperation between direct competitors. *See* Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1776) (warning that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public or in some contrivance to raise prices.").

Nor does the fact that the corporate offices and franchisee offices share a common "brand" in selling tax-preparation services alter this conclusion; the critical distinction is that they do not operate as a unified brand in *hiring* tax preparers. Instead, as Judge Easterbrook recently explained for a unanimous Seventh Circuit panel in a carefully reasoned published decision involving analogous no-poach agreements, restraints on the market for labor between corporate locations and franchise locations cannot escape *per se* analysis simply by virtue of being agreed to by labor-market competitors who share a common consumer-facing brand. *Deslandes v. McDonald's USA LLC*, 81 F.4th 699, 704 (7th Cir. 2023).

Nor is there any apparent basis to deem the no-poach restraints alleged here as being "ancillary" to some broader, procompetitive agreement and reasonably necessary to that agreement. While ancillarity is an affirmative defense that Defendants may attempt to prove through discovery and later stages of litigation, the only apparent justifications that these Defendants have identified at this stage—that their no-poach restraints on labor-market competition may generate benefits for *consumers* by reducing business expenses or maintaining staffing levels—fails as a matter of law. That is so for two independent reasons. First, it is implausible on the facts as alleged, given that the no-poach agreements at issue do not appear to improve any consumer's access to tax-preparation services, and given that the length and severity of the restraint appear vastly disproportionate to any conceivable consumer benefit. And second, even if the explanation were not facially implausible, the premise would still fail as a matter of both precedent and first principles, since it amounts to suggesting that "antitrust law is unconcerned with competition in the market for inputs"—an argument the U.S. Supreme Court has already precluded, *see id.* at 704 (*citing NCAA v. Alston*, 141 S. Ct. 2141 (2021)), and rightly so, given that it would imply that any labor-side collusion could be justified simply by citing

consumer-side benefits. *See also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609–10 (1972) (cautioning in the context of Section 1 of the Sherman Act that courts are ill-equipped "to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector[.]").

In short, the no-poach agreements alleged here are horizontal restraints on trade that should be analyzed under the *per se* rule. Any attempt by Defendants to invoke the exception for restraints that are ancillary (and reasonably necessary) to a larger, procompetitive agreement would likely fail due to the length and scope of the restraint.

STATEMENT OF THE CASE

As alleged, Plaintiffs are former tax preparers who were injured by an illegal conspiracy between Defendants ("Jackson Hewitt") and their franchisees not to hire workers from other corporate-owned or franchise locations in order to suppress wages. Fourth Am. Compl. ¶¶ 20-24, ECF 161. Plaintiffs seek redress for themselves and a class of Jackson Hewitt employees injured by the conspiracy, asserting violations of the Sherman Act, 15 U.S.C. §§ 1, 3. *Id.* at ¶¶ 117-124.

As alleged, Jackson Hewitt's tax-preparation offices and franchise locations are independently owned and operated and thus compete directly with each other for tax-preparers in the relevant labor market. *Id.* at ¶¶ 43-44, 112. Jackson Hewitt's franchise locations are owned and operated by independent owners who have ultimate responsibility for their daily operations, *id.*, and the company's standardized franchise agreement provides that each franchisee is "an independent contractor and that no principal-agent, partnership, employment, joint venture, or fiduciary relation exists between" Jackson Hewitt and the franchisee. *Id.* at ¶ 46. The franchise disclosure documents further advise franchisees of the competitive nature of this market by informing them that "you may face competition from other franchisees, from outlets that we own,

or from other channels of distribution or competitive brands that we control." *Id.* at ¶ 48. In addition, franchisees have sole and complete discretion with respect to "all decisions regarding hiring, firing, training, supervision, discipline, scheduling … and compensation" regarding their employees. *Id.* at ¶ 50.

From 2014 through 2018, Jackson Hewitt's written form franchise agreement contained a no-poach agreement that expressly prohibited franchisees from hiring employees of company-owned locations. The version of the standard franchise agreement that was in effect during the putative class period was styled as a "Covenant Against Recruiting or Hiring Our Employees" clause, which stated:

> During the Term and for a period of two (2) years [afterward] … neither you nor any of your Owners may, without our prior written permission … solicit, recruit, or hire …any of our or our Affiliates' employees whose duties with us or our Affiliates include(d) management of or over company-owned or franchised stores, franchisee training, tax preparation software writing or debugging, tax return processing, software writing or debugging, electronic filing of tax returns, tax return processing, processing support, tax return preparation or tax return preparation advice or support.

Id. at ¶ 57. Following termination of an employee, this prohibition would remain in effect for one year. *Id.* at ¶ 58. The cost of breach was a "Recruiting Fee" equal to "300% of the annual salary of person recruited or hired." *Id.* at ¶ 59.

Washington State's Attorney General initiated enforcement proceedings against Jackson Hewitt several years ago in light of this no-poach agreement. As part of an Assurance of Discontinuance ("AOD") entered into in December 2018, Jackson Hewitt agreed to, and did in fact, remove the no-poach agreement from its franchise documents. Jackson Hewitt Inc. Assurance of Discontinuance at 3, *In re Franchise No Poaching Provisions*, No. 18-2-57808-OSEA (King Cty., Super. Ct., Wash. 2018). Plaintiffs allege, however, that despite having removed the written no-poach agreement from its franchise documents, Jackson Hewitt

nonetheless continued to operate under a "corporate culture" that prohibited franchisees from soliciting and hiring employees of company-owned locations. *Id.* at ¶ 95.

On August 1, 2023, this Court heard oral argument on (i) Plaintiffs' motion to certify a class of current and former tax preparers of Jackson Hewitt company-owned stores from December 10, 2014 through the present, pursuant to Fed. R. Civ. P. 23; and (ii) Defendants' motion to strike all class allegations in the complaint pursuant to Fed. R. Civ. P. 23(d)(1)(D). At the conclusion of the parties' presentations, the Court requested further briefing from the parties and invited *amicus* briefing on which analytical antitrust framework should apply. The Court further requested, in the event the no-poach agreements are governed by a *per se* analysis, a discussion of the ancillary-restraints defense. Tr. at 104:13-18, ECF 270. On August 11, 2023, the Court entered an Order [ECF 272] requiring the parties and any *amici* to file briefs by October 20, 2023.

ARGUMENT

No-poach agreements, like those alleged here, qualify as classic horizontal restraints on trade and should therefore be analyzed under the *per se* rule. Any ancillary-restraints defense would likely fail as a matter of law.

I. NO-POACH AGREEMENTS LIKE THOSE ALLEGED HERE ARE HORIZONTAL RESTRAINTS SUBJECT TO THE *PER SE* RULE, AND DEFENDANTS ARE UNLIKELY TO DEMONSTRATE AN ANCILLARY RESTRAINTS DEFENSE.

Section 1 of the Sherman Act ("Section 1") "provides that '[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states ... is declared to be illegal.'" *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (*quoting* 15 U.S.C. § 1).[2] But because courts "long ago realized that literal application of section

[2] Section 3 of the Sherman Act extends those same prohibitions to U.S. Territories and the District of Columbia. 15 U.S.C. § 3.

one would render virtually every business arrangement unlawful," *id.*, courts interpret Section 1 as prohibiting unlawful "contracts, combinations, or conspiracies that *unreasonably* restrain trade." *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004).

"An 'unreasonable' restraint is one that inhibits competition in the relevant market," and different types of restraints are subjected to varying types of scrutiny. *See LifeWatch Servs. v. Highmark Inc.*, 902 F.3d 323, 335 (3d Cir. 2018) (citation omitted). More specifically, three "standards have emerged for determining whether a business combination unreasonably restrains trade under" Section 1—rule of reason, *per se*, and quick look. *Brown Univ.*, 5 F.3d at 668. No-poach agreements, like other horizontal market allocation agreements, qualify for the strictest standard: they should be "treated as *per se* Sherman Act Section 1 violations." *See LifeWatch Servs.*, 902 F.3d at 336.

A. The Three Frameworks For Analyzing Section 1 Challenges.

As noted, courts assess whether a restraint is unreasonable for purposes of Section 1 in three different ways. Those three frameworks are (1) the "rule of reason," (2) *per se* condemnation, and (3) "quick look analysis." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 315-18 (3d Cir. 2010). Which framework applies typically turns on how well understood the restraint is and the likelihood that the restraint has redeeming, procompetitive benefits.

"Rule of reason" analysis is typically applied when courts confront an unfamiliar form of restraint, or a type that courts have found to yield procompetitive benefits. *See Ins. Brokerage*, 618 F.3d at 315-16; *see also Flat Glass*, 385 F.3d at 356. This fact-intensive, totality-of-the-circumstances inquiry requires weighing a challenged restraint's anticompetitive effects against any procompetitive justifications. *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343 (1982). To start, the plaintiff bears the initial burden of demonstrating that the restraint has produced "actual detrimental effects" or that the defendant wields troubling power in the relevant

market. *Ins. Brokerage*, 618 F.3d at 315-16. "If the plaintiff carries this burden," then the defendant may come forward with "countervailing pro-competitive benefits." *Id.* at 316. The court is then tasked with weighing burdens against benefits and ultimately discerning whether the restraint is reasonable. *Id.* This analysis requires an "incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607 (1972).

This onerous inquiry is unnecessary, however, when the *per se* rule applies. That rule applies where a defendant has utilized a type of restraint that "judicial experience has shown" has "redeeming competitive benefits so rarely that [its] condemnation does not require application of the full-fledged rule of reason." *Ins. Brokerage*, 618 F.3d at 316. Examples of such "manifestly anticompetitive" restraints, *Flat Glass*, 385 F.3d at 356, include horizontal agreements between competitors, such as agreements to fix prices or to divide up a market. *See LifeWatch Servs.*, 902 F.3d at 336; *see also Ins. Brokerage*, 618 F.3d at 316. In those situations, there is no need for a plaintiff to demonstrate detrimental effects or market power, or for the court "to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Instead, the fact of the restraint is sufficient for a court to conclude that it unreasonably restrains trade in violation of Section 1 "without elaborate inquiry as to the precise harm it has caused or the business excuse for its use." *Flat Glass*, 385 F.3d at 356 (quotation omitted).

Between these two standards of review lies the "quick look analysis." *Ins. Brokerage*, 618 F.3d at 317. It applies where a restraint appears "highly suspicious yet sufficiently idiosyncratic that judicial experience with [it] is limited" such that "[p]er se condemnation [would be] inappropriate." *Id.* (quotation omitted). Under the quick look analysis, as under the *per se*

approach, the plaintiff need only point to the fact of the restraint to raise an inference of unreasonableness within the meaning of Section 1. *Id.* at 317-18. In other words, "competitive harm is presumed." *Id.* at 317 (quotation omitted). However, the defendant has the opportunity to "set forth some competitive justification for the restraints," and if it does so, then "the court must proceed to weigh the overall reasonableness of the restraint." *Id.* at 317-18.

At this stage of litigation—where there has been no factfinding on the merits and the court simply seeks clarification on which analysis applies so as to understand what legal questions are at play for the purpose of analyzing Plaintiffs' motion for class certification—the salient difference between these frameworks is that under a rule of reason analysis, but not under either a *per se* or quick look approach, Plaintiffs must establish the defendant's market power and the anticompetitive effects of the challenged restraints. *See Ins. Brokerage*, 618 F.3d at 315-18. By contrast, if a *per se* or quick look approach applies, competitive harm is presumed. *Id.* at 316-18. And if a rule of reason or quick look analysis applies, but not if a *per se* analysis applies, Defendants have an opportunity to demonstrate procompetitive benefits of the specific restriction.

As explained below, the no-poach agreements alleged here fall cleanly into a category of anticompetitive conduct that has long been recognized as *per se* violations of Section 1: agreements between competitors ("horizontal" agreements) to divide a market (here, the labor market). And Defendants' anticipated ancillary-restraints defense is likely to fail as a matter of law.

B. No-Poach Agreements Like Those Alleged Here Are Essentially Market-Division Agreements That Are *Per Se* Unreasonable.

The U.S. Supreme Court has long recognized "horizontal agreements among competitors to fix prices or to divide markets" as "[p]aradigmatic examples" of *per se* unreasonable restraints on trade. *Ins. Brokerage*, 618 F.3d at 316 (*quoting Leegin Creative Leather Prods.*, 551 U.S. at

886). The no-poach agreements alleged here are such "manifestly anti-competitive" agreements: would-be competitor companies have agreed to divide the labor market rather than compete for workers. *See Flat Glass*, 385 F.3d at 356 (quotation omitted). Further, Defendants are unlikely to be able to prove that those restraints are ancillary, and cannot do so simply by suggesting that the restraints may benefit the market for *outputs* (and thus consumers), when they clearly harm the market for *inputs* (and thus workers). *See Deslandes*, 81 F.4th at 703-04.

More specifically, courts around the country, and within the Third Circuit, determine an alleged antitrust violation is *per se* unreasonable if it is a "naked" horizontal restraint on trade involving concerted action "between actual or potential competitors … restricting competition between them." *See, e.g.*, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 480-81 (W.D. Pa. 2019) (*quoting* William C. Homes & Melissa Mangiaracina, *Antitrust Law Hornbook* § 2:13 (2018-2019 ed.)). If this showing is made, a defendant may assert the affirmative defense that it is an "ancillary" restraint or, in other words, "necessary to some larger, procompetitive integrative activity." *See id.* Here, the challenged practice involves a horizontal restraint, and no plausible ancillary-restraints defense is apparent.

1. Horizontal restraints are "more rigorously scrutinized for an antitrust violation" because they "more easily facilitate competitive harms, such as the exclusion of rivals, price-fixing, or the consolidation of market power." *Ry. Indus. Emp. No-Poach*, 395 F. Supp. 3d at 480-81 (*quoting LifeWatch Servs.*, *supra*, 902 F.3d at 335-36). An agreement is "horizontal" when it is "between competitors at the same market level." *Ins. Brokerage*, 618 F.3d at 318 (quotation and quotation marks omitted). For example, if Company A and Company B both sell bar-review courses, then they are horizontal competitors for purchasers of bar-review courses. If, rather than competing for such purchasers, these two companies agreed that Company A would sell only in Georgia and

Company B would sell everywhere but Georgia, they would have entered into a horizontal market-allocation agreement subject to *per se* scrutiny under Section 1. *See Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (*per curiam*).

Vertical restraints, by contrast, operate between parties "at different levels of the market structure, e.g., manufacturers and distributors." *Bascom Food Prods. Corp. v. Reese Finer Foods, Inc.*, 715 F. Supp. 616, 631 (D.N.J. 1989) (*quoting United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972)). Such restraints are less "rigorously scrutinized" because they "less easily facilitate competitive harms." *See LifeWatch Servs.*, 902 F.3d at 335; *see also, e.g.*, *Brown Univ.*, 5 F.3d at 674-79. For example, courts have held that an agreement between a manufacturer of a product and a retailer of that product setting a minimum resale price is a vertical restraint subject to rule-of-reason analysis. *See Leegin Creative Leather Prods.,* 551 U.S. at 899. While a minimum price agreement between two manufacturers or two distributors (horizontal competitors), would amount to illegal price fixing subject to the *per se* rule, *id.* at 886, the same agreement between companies at different levels of the market is not categorically unlawful, *id.* at 899.

Here, the alleged no-poach agreement between Jackson Hewitt corporate and its franchisees is a horizontal restraint because Jackson Hewitt corporate and Jackson Hewitt franchisees compete in the employment of tax preparers. *See United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) ("Antitrust law does not treat employment markets differently from other markets."). In this sense, they are both buyers in the labor market for the same thing: employees to work as tax preparers. *Ry. Indus. Emp. No-Poach*, 395 F. Supp. 3d at 481 ("An agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement analogous to a product division agreement." (citation omitted)). Absent the no-poach agreement,

they would freely compete with one another to attract and hire the best workers for this job. They would do so by offering competitive wages and terms and conditions of employment—none of which are standardized by Jackson Hewitt as franchisor. *See, e.g.*, *Deslandes*, 81 F.4th at 704. Instead, they have divided the labor market by agreeing not to hire one another's workers. This is a purely horizontal agreement that is manifestly anticompetitive. *See also Ry. Indus. Emp. No-Poach*, 395 F. Supp. 3d at 481 (agreement among railroad industry suppliers "to not hire each other's employees," that is, "to allocate their employees to minimize competition for the employees" constituted a horizontal restraint amounting to *per se* Section 1 violation); *eBay*, 968 F. Supp. 2d at 1038 (no-hire agreement between eBay and Intuit, who otherwise compete to employ "skilled engineers and scientists," constitutes "horizontal market allocation").

Nor does the fact that the agreement here is within the Jackson Hewitt "brand" counsel a different result. While an "intrabrand" market-division agreement between an owner of a branded product and that product's retailers might qualify as a vertical restraint subject to rule-of-reason analysis, *see Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977), dividing a market between competing retailers of the same brand is still a classic unlawful horizontal restraint, *see, e.g.*, *Leegin Creative Leather Prods.,* 551 U.S. at 886-87, 893, because those retailers still "compete with one another in the relevant market." *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). So too here, where the agreement is within the Jackson Hewitt brand, nonetheless the no-poach agreement is a horizontal restraint subject to the *per se* rule because Jackson Hewitt corporate and Jackson Hewitt franchisees are still competitors with respect to hiring workers. After all, "[j]ob opportunities are not a branded 'product of a particular manufacturer,' and competition among franchisees to purchase employees' labor is not competition over distribution of a manufacturer's branded product." Brief for the U.S. and FTC as Amici Curiae In Support of

Neither Party at 29, *Deslandes v. McDonald's*, 81 F.4th 699, Nos. (22-2333 & 22-2334) (*distinguishing Cont'l T.V.*). Accordingly, this Court (like others) has recognized that franchisors and franchisees often operate in the employment context as "separate economic actors pursuing separate economic interests." *Robinson v. Jackson Hewitt, Inc.*, No. 19-9066, 2019 WL 5617512, *14-16 (D.N.J. Oct. 31, 2019) (*quoting Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186, 195 (2010)); *cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984); *Am. Needle*, 560 U.S. at 186, 191, 201 (holding that the National Football League Properties, a separate entity formed by the 32 NFL teams, had engaged in "concerted action" for purposes of a Section 1 claim in making licensing decisions regarding the teams' trademarks and other "separately owned intellectual property"). That is similarly the case under the facts alleged here, given that Jackson Hewitt's own franchise documents make clear that it competes with its franchisees to retain employees. Jackson Hewitt therefore cannot be operating as a unified "brand" with respect to *hiring* tax preparers.

The highly analogous, published decision from the Seventh Circuit in *Deslandes* similarly confirms that, when a corporation acts as both a franchisor and an operator of the same business as its franchisees, no-poach agreements it makes with those franchisees qualify as horizontal restraints. *See Deslandes,* 81 F.4th at 703. *Deslandes* itself involved McDonald's restaurants, some of which were operated by McDonald's corporate, and others of which were operated by franchisees. *See id.* As Judge Easterbrook explained in his opinion for the unanimous panel, that "made the [no-poach] arrangement horizontal: workers at franchised outlets could not move to corporate outlets, or the reverse." *Id.* Similarly, here, Jackson Hewitt and its franchisees, although operating within the same brand, are competitors in the market for hiring tax preparers, and under the facts alleged, they simply agreed to divide up that market to the detriment of workers in that

market. Such a market division is, as explained above, a classically *per se* unreasonable restraint on trade.

While Jackson Hewitt suggested during the class-certification hearing that the franchise relationship nonetheless imbues the no-poach agreement here with "vertical components," Tr. at 65:14-16, ECF 270, it does not. In the labor market, Jackson Hewitt acts in its capacity as an employer of tax preparers. And in that market, it therefore has a horizontal relationship to its franchisees, which likewise are employers of tax preparers. When Jackson Hewitt franchisees agree not to hire Jackson Hewitt corporate workers, or *vice versa*, the parties to those agreements are acting in their capacities as competing employers of tax preparers, not as entities "at different levels of the market structure." *See, e.g.*, *Bascom Food*, 715 F. Supp. at 631.

At bottom, Jackson Hewitt's anticipated argument appears to be that the blackletter antitrust rules that protect consumers in the market for goods and services do not likewise protect workers in the market for labor, but that is wrong as a matter of both precedent and first principles. With respect to precedent, as Judge Easterbrook observed for the unanimous Seventh Circuit in *Deslandes*, the U.S. Supreme Court has already made clear that the same rules ensure fair trade in labor. *Deslandes*, 81 F.4th at 702 (*citing NCAA v. Alston*, 141 S. Ct. 2141 (2021)). With respect to first principles, this Court has recognized that the Sherman Act is "intended and designed to be a charter of economic liberty directed at preserving free and unfettered competition as the rule of trade." *Hudson's Bay Co. Fur Sales, Inc. v. Am. Legend Coop.*, 651 F. Supp. 819, 834 (D.N.J. 1986). It is premised on the idea that "the free interaction of competitive forces will result in the 'best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.'" *Id.* (citation omitted). No-poach agreements

such as the one alleged here—which enable should-be-competitor companies to agree to avoid competing over workers, with the result of suppressing wages, benefits, and terms of employment—thwart those laudable goals. *See generally* Sampsa Samila & Olav Sorenson, *Noncompete Covenants: Incentives to Innovate or Impediments to Growth*, 57 Mgmt. Sci. 452 (2011) (determining that high enforcement of restrictive covenants in employment contracts stifles entrepreneurship and innovation, to the detriment of the economy at large). No-poach agreements, such as those alleged here, are therefore just as *per se* unreasonable a restraint on trade as they would be if these same competitors had agreed to divide up a market for consumer goods.

2. Nor has Jackson Hewitt yet come forward with a plausible reason that these horizontal restraints would be exempted from the *per se* rule as "ancillary to the success of a cooperative venture" rather than "naked." *See, e.g.*, *Deslandes*, 81 F.4th 699 at 703. A restraint is not "ancillary" in this sense unless it is (1) part of a separate, legitimate (that is, non-collusive) transaction and (2) reasonably necessary to effectuate that transaction. *Ry. Indus. Emp. No-Poach*, 395 F. Supp. 3d at 480-81; *Ins. Brokerage*, 618 F.3d at 345-46; *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *see also Deslandes*, 81 F.4th at 703 (noting law-firm agreement as a classic example of an agreement that is ancillary to a legitimate, procompetitive business enterprise; a law firm partnership requires an agreement among competitors that, all else equal, may be acceptable because it is likely to create procompetitive efficiencies, for instance, promoting the pooling of resources and complementation of different areas of legal expertise among partners); *id.* at *14 (Ripple, J., concurring) (emphasizing that agreement must "be reasonably necessary to achieve a *procompetitive objective* of the franchise agreement" (emphasis added)). The burden is on the antitrust defendant to prove an "ancillary restraints" defense. *E.g.*, *Rothery Storage & Van Co.*, 792 F.2d at 224. As a matter of law, Jackson

Hewitt's only apparent basis for invoking the ancillary-restraints defense thus far—that these agreements allegedly help *consumers*—cannot save its no-poach agreements from the *per se* rule.

To begin with, the only basis Jackson Hewitt has so far proposed to conclude that the no-poach agreements are part of a larger, procompetitive "endeavor whose success they promote," *Ins. Brokerage*, 618 F.3d at 345 (*quoting Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir.1985)), fails as a matter of law. *See Deslandes*, 81 F.4th at 703-04; *Rothery Storage & Van Co.*, 792 F.2d at 224; *Ry. Indus. Emp. No-Poach*, 395 F. Supp. 3d at 480-81. This is because increased product market outputs (i.e., more tax filings) are inappropriate out-of-market benefits that cannot be considered in the ancillary restraint analysis because the no-poach agreements are restraints on the labor market. *See* Michael Iadevaia, *Poach-No-More: Antitrust Considerations of Intra-Franchise No-Poach Agreements*, 35 ABA J. LAB. & EMP. L. 151, 179 (2020) (citations omitted).

Jackson Hewitt seems to suggests that stifling competition for employees among Jackson Hewitt and its franchisees allows it to pass along benefits to consumers by reducing training costs and ensuring sufficient staffing during the tax season. But that line of argument can be rejected at the pleading stage for two reasons. First, it is not clear why no-poach agreements would promote that purpose at all, given that the hypothetical employee would be seeking to move from a Jackson Hewitt corporate location to a Jackson Hewitt franchise location—in which case, some Jackson Hewitt location would still have the benefit of that worker's training and be able to help a consumer get their taxes prepared by Jackson Hewitt. And second, even if these provisions did provide some potential benefit to consumers (and it is hard to see how they would), the premise that an anticompetitive arrangement in the input (labor) market can be justified by purported benefits in the output (goods and services) market fails as a matter of law. Rather, these arguments

erroneously "treat[] benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing)," which is "equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs"—a point that the Supreme Court has already roundly rejected. *Deslandes*, 81 F.4th at 703 (*citing Alston*, 141 S. Ct. 2141). In other words, because Plaintiffs allege anticompetitive harm in the input market, it is no answer to say that those harms might produce benefits in the output market (even if true). Otherwise, any labor-sided anticompetitive practice, no matter how detrimental to an employee, could be justified by arguments that it benefited the consumer at the expense of the employee. As previously noted, that result would be contrary not only to antitrust precedent, but also to antitrust first principles.

In any event, there is also no plausible basis to conclude that no-poach agreements like those alleged here are reasonably necessary to any such broader, procompetitive endeavor (if any such labor-side endeavor could be shown to exist, which appears implausible). "[A] restraint is not automatically deemed ancillary simply because it 'facilitates' a procompetitive arrangement." *Ins. Brokerage*, 618 F.3d at 346. Nor does a restraint "qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful." *Deslandes*, 81 F.4th at 704 (*quoting* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1908b (4th ed. 2022)) (rejecting the argument that the no-poach agreement was "ancillary" to franchise agreement merely because it was contained within franchise agreement). Rather, the restraint must be "reasonably necessary" to the success of the joint venture. *Ins. Brokerage*, 618 F.3d at 345 (*quoting MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring)).

No-poach agreements are not critical to the success of a franchise agreement, as evidenced by the fact that many franchisors have abandoned or never used them to begin with. Indeed, scholars have noted that after State antitrust enforcers confronted franchisors about their

anticompetitive no-poach agreements, many franchisors abandoned them, tending to show that they "have no legitimate justification" and are not ancillary to (i.e., necessary to) the franchise agreements. Fatima Brizuela and Jason Hartley, *The Complexities of Litigating A No-Poach Class Claim in the Franchise Context*, Vol. 29 No. 2 Competition: J. Antitrust, UCL & Privacy Section Cal. Law. Ass'n 1, 11 (2019) (citations omitted). And when Washington State Attorney General's Office issued process to franchisors as part of its no-poach initiative, nearly a third of the respondents stated that they had never included no-poach provisions in their franchise agreements. Amicus Curiae Brief by the Attorney General of Washington at 9, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 11, 2019).

Here, even if a venture that improves services for consumers could somehow support an ancillary-restraints defense to a horizontal restraint in the labor market, it remains implausible that the no-poach agreements alleged here could be reasonably necessary to the success of the Jackson-Hewitt franchise agreements. After all, in considering a similar argument in *Deslandes*, Judge Easterbrook noted for the unanimous Seventh Circuit panel that such a justification could perhaps be contemplated "in principle" where an employer hired workers and subsidized their training—rather than passing that cost on to the workers through lower wages or to consumers through higher prices—so long as the no-poach agreements were tailored to allow that employer to "recoup the 'excess' wage during training time" and prevent other employers from "free riding" on the employer's "investment" in its workers. *Deslandes*, 81 F.4th at 704. "[E]ventually the cost of training will have been amortized, and a ban on transfer to another restaurant after that threshold" would appear to raise significant antitrust problems. *Id.* Even if in some hypothetical fact pattern, no-poach provisions could be reasonably necessary to recoup training costs, that is implausible here, because the no-poach agreements alleged continue long after Jackson Hewitt could have

recovered any plausible costs of training and, moreover, contain punitive financial provisions that appear to exceed any plausibly unrecovered training costs. *See* Fourth Am. Compl. at ¶¶ 57, 59.

In short, the no-poach agreements alleged here appear not to benefit consumers at all, so much as they benefit Jackson Hewitt's profit margins. "And if this is what the no-poach agreement does—if it 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. It promotes profits, to be sure, as franchises capitalize on workers' sunk costs. But it does not promote output and so cannot be called 'ancillary' in the sense antitrust law uses that term." *Deslandes*, 81 F.4th at 704. Consequently, while ancillarity is an affirmative defense that Jackson Hewitt may seek to establish on some other ground at a later stage in this proceeding, any argument thus far apparent fails as a matter of law. *See id.* at 704-705 ("Plaintiffs sought class certification, and the district court said no. The court may think it wise to reconsider in light of the need for a remand and the analysis in this opinion.").

CONCLUSION

While Defendants may seek to rehabilitate their ancillary-restraints defense at a later stage of litigation, under the facts alleged and the only ancillary-restraints response thus far raised, these no-poach agreements are naked horizontal restraints properly subject to *per se* analysis.

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