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.*	Civil Action No.: 2:19-cv-9066-MEF-ESK

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The United States of America submits this brief pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in federal court, and this Court's order of August 11, 2023, inviting briefing by interested parties. Order, Dkt. 272.

As an enforcer of federal antitrust law, the United States has a strong interest in its correct application. The United States enforces Section 1 of the Sherman Act, 15 U.S.C. § 1, against firms that conspire with one another to allocate workers, including by agreeing not to hire, solicit, or compete for each other's workers (so-called "no-poach" agreements). *See, e.g.*, *United States v. Hee*, No. 2:21-cr-00098-RFB-BNW (D. Nev. filed Mar. 30, 2021); Complaint, *United States v. eBay, Inc.*, No. 5:12-cv-05869 (N.D. Cal. Nov. 16, 2012), Dkt. 1.

The Court invited briefs addressing (1) what form of antitrust analysis applies to the alleged no-poach agreement in this case and (2) whether the alleged no-poach agreement was an ancillary restraint. Order, Dkt. 272; *see also* Tr. 104:10-18, Dkt. 270. The United States has filed numerous amicus briefs and statements of interest addressing these issues in cases involving alleged worker-allocation agreements. *See, e.g.*, Corrected Brief for the United States of America as Amicus Curiae in Support of Plaintiffs-Appellants, *Giordano v. Saks & Co. LLC*, No. 23-600 (2d Cir. Aug. 7, 2023), Dkt. 89; Brief for the United States of America and the Federal Trade Commission as Amici Curiae in Support of Neither Party, *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333, 22-2334 (7th Cir. Nov. 18, 2022), Dkt. 51; Brief of Amicus United States of America in Support of Neither Party, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679 (9th Cir. Nov. 19, 2020), Dkt. 14; Statement of Interest of the United States of America, *Seaman v. Duke Univ.*, No. 1:15-cv-00462 (M.D.N.C. Mar. 7, 2019), Dkt. 325;

Statement of Interest of the United States of America, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-mc-00798 (W.D. Pa. Feb. 8, 2019), Dkt. 158.

The United States files this brief to explain how Section 1 applies to no-poach agreements in the franchise context and to point out facts in the non-sealed portion of the record that are relevant to the issues presented. The United States takes no position on the ultimate merits of Plaintiffs' claims. If a hearing is scheduled on the questions being briefed, the United States would welcome the opportunity to participate.

BACKGROUND

In this case, three former Jackson Hewitt employees allege that Jackson Hewitt stores agreed not to compete with each other for certain employees, thereby depressing their wages, benefits, and opportunities. Defendants are Jackson Hewitt, Inc., and its wholly-owned subsidiary, Tax Services of America, Inc. (collectively "Jackson Hewitt"). Fourth Am. Compl. (FAC), Dkt. 161, ¶¶ 23-24. Jackson Hewitt provides tax-preparation services to consumers at roughly 5,700 stores in the United States. *Id.* ¶ 2. Jackson Hewitt operates around 1,800 of the stores itself, and the rest are owned and operated by franchisees. *Id.*; Answer ¶ 2, Dkt. 164. Plaintiffs, three former tax preparers at corporate-owned Jackson Hewitt stores, allege that Jackson Hewitt and its franchisees agreed not to compete for each other's employees. FAC ¶¶ 4, 53. Specifically, Plaintiffs allege that Jackson Hewitt and its franchisees agreed that (1) Jackson Hewitt would not hire franchisee employees who performed certain duties and (2) Jackson Hewitt franchisees would not hire employees who performed these same duties at other franchisees' stores or at Jackson Hewitt-owned stores. *Id.* ¶¶ 11, 56-57, 64.

In support of these allegations, Plaintiffs claimed that, from at least 2000 until 2018, Jackson Hewitt entered into and enforced franchise agreements that barred franchisees from hiring employees who performed certain duties at Jackson Hewitt-owned stores. FAC ¶ 57,

Dkt. 161; *see also* Ex. 4 to Mot. for Class Certification at 21, Dkt. 199-4. Under the agreements, franchisees could not hire any employees from Jackson Hewitt whose duties "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." FAC ¶ 57, Dkt. 161; *see also* Ex. 4 to Mot. for Class Certification at 21, Dkt. 199-4. This clause—the "No-Poach Clause"—applied regardless of the covered employees' locations in the country; how long they had been with Jackson Hewitt; or whether a franchisee solicited them or they approached a franchisee independently. *See* Ex. 4 to Mot. for Class Certification at 21 (§ 17.3), Dkt. 199-4. The prohibition applied for the entirety of a covered employee's tenure with Jackson Hewitt and for one year thereafter. *Id.*

Plaintiffs allege that, in December 2018, to resolve an antitrust investigation by the state of Washington, Jackson Hewitt agreed "to remove the No-Poach Clause from its franchise agreement going forward and to cease enforcement of the No-Poach Clause." FAC ¶ 94, Dkt. 161. They allege, however, that "[d]espite the removal of the No-Poach Clause from Jackson Hewitt's franchise agreements," Jackson Hewitt and its franchisees have "continue[d]" to refrain from competing for employees who perform certain duties and that "the anticompetitive harms are ongoing." *Id.* ¶ 95.

Plaintiffs allege that this agreement harmed them. In particular, Plaintiffs claim that, but for the challenged conduct, Jackson Hewitt franchisees "would have competed with other Jackson Hewitt franchisees and with Jackson Hewitt itself for employees." FAC ¶ 52, Dkt. 161. This competition would have yielded "higher wages, benefits, compensation, and [better] terms of employment" for workers. *Id.* ¶ 70.

Based on these allegations (among others), Plaintiffs allege that the no-poach agreement violates Section 1 of the Sherman Act under any mode of analysis (per se, quick look, or full rule of reason). *Id.* ¶¶ 112-16. After discovery closed, Plaintiffs moved to certify a class of "[a]ll persons who worked in a tax preparer position at any company-owned Jackson Hewitt location in the United States at any time between December 10, 2014 and the present." Proposed Order at 2, Dkt. 196-1.

The Court held a hearing on this motion (as well as a motion filed by Defendants to strike Plaintiffs' class allegations) on August 1, 2023. Minute Order, Dkt. 269. At the hearing, the Court expressed its desire to resolve "[t]he threshold question of whether this is a per se case or quick look case or rule of reason case" before deciding whether to certify a class. Tr. 13:20-21, Dkt. 270. The Court acknowledged that "there's an argument that what we're dealing with is as old as the hills"—namely, "a horizontal market division" that "hurts workers" and is per se illegal. *Id.* at 69:12-15. The Court noted, however, that Defendants have argued that the per se rule should not apply because the no-poach agreement had "verticality aspects" and was "intra-brand." *Id.* at 69:16-19. The Court directed both sides and other interested parties to submit briefs addressing (1) whether the case is governed by the per se rule, quick-look analysis, or full rule-of-reason analysis, and (2) whether the alleged agreement was an ancillary restraint, *id.* at 104:13-18—an issue on which Defendants conceded they bear the burden of proof, *id.* at 70:25-71:4.

ARGUMENT

The answers to two questions determine whether a no-poach agreement, including a no-poach agreement in the franchise context, is subject to per se condemnation. First, whether the agreement eliminates horizontal competition for employees. Second, if so, whether defendants

can establish that the no-poach agreement is appropriately related to, and reasonably necessary to achieve the procompetitive goals of, a broader, procompetitive undertaking.

The Sherman Act is "predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy." *Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2160 (2021) (internal quotation marks omitted). This "policy of competition" applies in labor markets just as it does in other markets. *Id.*; *see also Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023) ("*Alston* establishes" that antitrust law protects against "detriments to workers"). Indeed, from its enactment, the Sherman Act has been concerned with the power of business combinations to "depress the price of what they buy"—including workers' labor services. 21 Cong. Rec. 2461 (1890) (remarks of Sen. Sherman); *see also* 21 Cong. Rec. 2457 (1890) (remarks of Sen. Sherman) (observing that a trust can "command[] the price of labor without fear of strikes, for in its field it allows no competitors").

Section 1 of the Sherman Act bars every "contract," "combination," or "conspiracy" that unreasonably restrains competition for workers' labor. 15 U.S.C. § 1; *see also FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 457 (1986). "Restraints can be unreasonable in one of two ways." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). First, the Sherman Act condemns certain restraints as per se unreasonable based on their inherently anticompetitive "nature and character." *Standard Oil Co. v. United States*, 221 U.S. 1, 64-65 (1911); *see also Lifewatch Servs. Inc. v. Highmark Inc.*, 902 F.3d 323, 336 (3d Cir. 2018) ("[S]ome horizontal restraints, including price fixing and market division, are considered anticompetitive by their very nature."). Second, "[r]estraints that are not unreasonable per se are judged under the 'rule of reason,'" a "fact-specific assessment" of "the restraint's actual effect on competition." *Am. Express*, 138 S. Ct. at 2284 (internal quotation marks and brackets omitted). "The quick-look

approach is a subset of analysis under the Rule of Reason," *Deslandes*, 81 F.4th at 702 (citations omitted), and applies when "no elaborate industry analysis is required to demonstrate" a restraint's "anticompetitive character." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999).

The correct mode of analysis to employ often rests on whether the agreement is horizontal. Horizontal agreements are those that "eliminate some degree of rivalry between persons or firms who are actual or potential competitors." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986). Said otherwise, they are agreements "among competitors on the way in which they will compete with one another." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 99 (1984). On the other hand, when "firms at different levels of distribution" agree on matters over which they do not compete, those agreements are referred to as "vertical." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988). Because horizontal agreements are between competitors, they pose a heightened risk of harm to the competitive process and "are generally less defensible" than other types of restraints. *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 348 n.18 (1982); *see also Lifewatch Servs.*, 902 F.3d at 335. For that reason, some horizontal agreements are per se unlawful—i.e., "anticompetitive by their very nature." *Lifewatch Servs.*, 902 F.3d at 336.

When firms that compete to hire workers from the same labor pool enter into an agreement about hiring practices, the agreement is "horizontal" and per se unlawful. *See, e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam) (horizontal market-allocation agreements per se unlawful). There is an exception, however: Defendants can defeat per se liability by successfully showing that the agreement is ancillary to a broader, procompetitive undertaking. *E.g.*, *Deslandes*, 81 F.4th at 703. Specifically, an ancillary agreement is one that is subordinate and collateral to a separate, legitimate business collaboration

among the defendants and reasonably necessary to achieve a procompetitive objective of that collaboration.

Because parts of the record are sealed, the United States takes no position on the ultimate answers to the two questions of horizontality and ancillarity. The United States does, however, explain that no-poach agreements can be subject to per se condemnation—including in the franchise context—and that many of Defendants' arguments for evading per se treatment are unavailing. The United States also notes that certain facts in the non-sealed portion of the record weigh in favor of a finding that the alleged agreement in this case was horizontal and non-ancillary. If this assessment is borne out by the full record, the restraint would be per se unlawful.

I. HORIZONTAL NO-POACH AGREEMENTS ARE PER SE ILLEGAL MARKET ALLOCATIONS, INCLUDING IN THE FRANCHISE CONTEXT.

The first inquiry necessary to determine the proper mode of antitrust analysis is whether the alleged agreement is horizontal. When competing employers enter into the type of agreement alleged in this case—an agreement not to hire or solicit workers—the agreement is known as a market-division or market-allocation agreement. Those agreements involve assigning (i.e., allocating) workers to particular employers and limiting their ability to move to certain alternative employers. *See infra* at 9-10. If the employers would or potentially could compete to hire workers from the same labor pool absent the agreement, the agreement is horizontal. This is just as true in the franchise context as it is elsewhere. In the franchise setting, there can be many different types of horizontal agreements with respect to competition for employees:

- between two separate franchises (e.g., between McDonald's and Burger King);

- between a franchisor and a franchisee, where they compete in the labor market (e.g., because the franchisor owns stores that compete with separately owned franchisee-owned stores to hire from the same labor pool); or
- between two or more franchisees.

Such a horizontal agreement is a per se violation of Section 1 of the Sherman Act unless defendants claim and establish that it is ancillary to a broader, procompetitive undertaking.

A. Horizontal No-Poach Agreements Are Per Se Illegal Worker Allocations.

As the Court has noted, market division is a practice "as old as the hills." Tr. 69:12-15, Dkt. 270. The Supreme Court has "reiterated time and time again" that agreements among competitors to divide markets, such as by allocating customers or territories, are one of the types of agreements that are "*per se* violations of the Sherman Act." *Palmer*, 498 U.S. at 49; *id.* at 49-50 (territorial division); *United States v. Topco Assocs.*, 405 U.S. 596, 608-12 (1972) (territorial division); *see United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (agreement not to compete for existing customers); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1088 (5th Cir. 1978) (agreement not to solicit existing customers).

Although the above cases involved agreements among sellers, the Sherman Act "does not confine its protection . . . to sellers," and the same principles apply—and thus the per se rule applies—to agreements among competing buyers of products or services. *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948); *see W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 104 (3d Cir. 2010); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.); *see also United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (agreement between billboard companies not to compete for purchasing leases of certain billboard sites constituted per se unlawful market division). And agreements among competing

employers about the buying of "employment services" are subject to the same analysis as agreements about buying other types of goods and services. *Eichorn v. AT & T Corp.*, 248 F.3d 131, 141 (3d Cir. 2001) (quotation omitted).

Indeed, the Supreme Court and courts of appeals have repeatedly applied the Sherman Act to employer restraints on workers' wages or mobility, including restraints on college athletes' compensation, *Alston*, 141 S. Ct. at 2154-60, and on seamen's ability to seek employment on other ships, *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 360-65 (1926). *See also Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 826, 828-29 (5th Cir. 1976); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 335-37 (7th Cir. 1967); *cf. Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543-45 (10th Cir. 1995) (finding antitrust injury based on no-hire agreement).

Courts have thus recognized that, just as other horizontal market divisions are per se unlawful, so too are agreements among competing employers not to hire or solicit each other's workers. *Deslandes*, 81 F.4th at 703; *Borozny v. Raytheon Techs. Corp.*, 2023 WL 348323, at *6-8 (D. Conn. Jan. 20, 2023); *In re Outpatient Med. Ctr. Emp. Antitrust Litig.*, 630 F. Supp. 3d 968, 987-89 (N.D. Ill. 2022); *cf. Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1110 n.4 (9th Cir. 2021) (without deciding the issue, finding "considerable merit" in argument "that the per se rule applies to naked non-solicitation agreements" between competing employers).[1] That is because worker allocations inherently "stifl[e] . . . competition" by limiting

[1] *See also Markson v. CRST Int'l, Inc.*, 2021 WL 1156863, at *4 (C.D. Cal. Feb. 10, 2021); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 480-85 (W.D. Pa. 2019); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1211-14 (N.D. Cal. 2015); *United States v. eBay, Inc.*, 968 F. Supp. 2d at 1038-39; *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1110-12, 1122 (N.D. Cal. 2012); *In re Geisinger Health & Evangelical Cmty. Hosp. Healthcare Workers Antitrust Litig.*, 2021 WL 5330783, at *2-4 (M.D. Pa. Nov. 16, 2021) (denying motion to dismiss per se claim based on "no-poach agreement").

employers' competition to purchase the allocated workers' labor services. *Palmer*, 498 U.S. at 49 (discussing territorial division) (quoting *Topco*, 405 U.S. at 608). As a result, the allocated workers cannot benefit from employer competition that would improve their working conditions by, for example, ensuring "a higher salary." *See, e.g.*, *Deslandes*, 81 F.4th at 704.

B. No-Poach Agreements in Franchise Settings Can Be Horizontal and Thus Per Se Illegal.

Worker-allocation agreements in the franchise setting can be horizontal. When two rival franchisors that compete for workers' labor services enter into a no-hire agreement (such as an agreement between H&R Block and Jackson Hewitt not to hire each other's tax preparers), the agreement is horizontal, and the parties' status as franchisors does not affect the analysis: They are treated the same as any other firms that compete for workers' labor services.

The same is true when the parties to the horizontal agreement are firms that operate as part of the same franchise system. That is the case in at least two contexts. If a franchisor and franchisee actually or potentially compete for workers' labor services, a no-hire or no-solicitation agreement between them is horizontal. So is a no-hire or no-solicitation agreement among franchisees that actually or potentially compete for workers' labor services, even if the agreement is orchestrated in whole or in part by the franchisor. The United States addresses each circumstance in turn, including Defendants' specific counterarguments, before noting that two general points raised by Defendants—regarding (1) whether the no-poach agreement restricted only franchisees' hiring practices (and not Jackson Hewitt's) and (2) the Supreme Court's decision in *Alston*—do not alter the analysis.

1. If a brand's franchisees hire from the same labor pool, they are "actual or potential competitors" for workers, and a worker-allocation agreement among them is horizontal because it "eliminate[s] some degree of rivalry" among the franchisees. *Rothery Storage*, 792 F.2d at 229.

Franchisors are also horizontal labor-market competitors with their franchisees in regions where they both hire from the same labor pool—for instance, in regions where franchisors hire employees to work at corporate headquarters or in regions where franchisors operate their own branded stores.

The Eleventh Circuit illustrated this principle by recognizing that Burger King—which operated corporate-owned restaurants in addition to granting franchises—"compete[d] . . . for employees" against "its separate and independent franchise restaurants." *Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247, 1250 (11th Cir. 2022); *see id.* at 1253. Similarly, the Seventh Circuit held in *Deslandes* that a no-poach agreement in the McDonald's franchise agreement was horizontal because "McDonald's operate[d] many restaurants itself or through a subsidiary" and therefore competed with franchisees for workers. *Deslandes*, 81 F.4th at 703. Thus, to the extent Jackson Hewitt, including any Jackson Hewitt corporate-owned stores, competed with franchise stores for employees, a worker-allocation agreement among Defendants and their franchisees restricting this competition was horizontal.

Defendants have argued that the No-Poach Clause is a vertical agreement because Jackson Hewitt and its franchisees are at "different levels of [the] production and distribution process." Memo. in Supp. of Mot. to Dismiss at 21, Dkt. 65-1. But even if that were true with respect to *output* markets (e.g., the market for tax-preparation services), it is not true with respect to labor. Jackson Hewitt and its franchisees do not appear to have any sort of producer-distributor relationship when it comes to labor; rather, they are simply competing purchasers of workers' labor services. In an analogous context, the Ninth Circuit held that a no-solicitation agreement between firms in a "subcontractor-subcontractee relationship" was horizontal because

it "restrict[ed]" one firm's "actual or potential employer-rival" from "competing with [it] for its employees by soliciting them." *Aya*, 9 F.4th at 1109.

For similar reasons, Defendants are wrong to argue that the alleged no-poach agreement here was vertical because "Jackson Hewitt's business is a dual-distribution model." Reply in Supp. of Mot. to Dismiss at 15, Dkt. 69. A dual-distribution system is one in which a manufacturer both "distributes its products through a distributor" and also distributes the same products itself, competing with its distributors at the distribution level of the supply chain. *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prod., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997). In the dual-distribution context, courts have treated agreements that restrict a distributor's sales of the manufacturer's products as vertical even though the manufacturer is operating at the distribution level. But even assuming that Jackson Hewitt is comparable to a dual distributor in the market for tax-preparation services, where it both grants franchises to third parties and provides tax services at its own stores, it does not engage in "distribution" at all (let alone dual distribution) in the *labor* market. Jackson Hewitt is a purchaser, not a manufacturer or distributor, of employees' labor services and therefore (as explained *infra*) appears to be its franchisees' horizontal competitor in the labor market, not a participant in a dual-distributor relationship.[2]

At oral argument on the class-certification motion, the Court questioned whether the challenged agreement restricted "inter-brand" or "intra-brand" competition and whether this characterization affects the application of the per se rule. Tr. 67:19-22, 69:9-19, 103:11-15,

[2] For the same reasons, the Third Circuit's decision in *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 433, 442-43 (3d Cir. 1997)—which related to an agreement among a pizza franchisor and its franchisees over the ingredients, beverages, and packaging that franchisees could use to serve customers rather than over their competition for employees' labor services—is inapposite.

Dkt. 270. That dichotomy is inapplicable in the franchise no-poach context because employees are not branded commodities.

The Supreme Court has defined interbrand competition as "competition among . . . manufacturers of the same generic product." *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977). Intrabrand competition, on the other hand, "is the competition between the distributors wholesale or retail of the product of a particular manufacturer," *id.*, or "competition among retailers selling the same brand," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007). Neither workers nor employment opportunities are branded products of a particular firm, and competition among franchisees (or among a franchisor and franchisees) to purchase workers' labor services thus is not competition over distribution of a manufacturer's branded product. Instead, much like different manufacturers competing with each other for sales, franchisors and franchisees compete in the labor market as distinct purchasers of distinct employees' services. Stores operating under the Jackson Hewitt name may engage in intrabrand competition when they compete to provide tax-preparation services to customers, but that characterization is inapposite when they compete with each other for employees' labor services.

Even if the interbrand/intrabrand dichotomy had a role to play in analyzing franchise no-poach restraints, when franchisors and franchisees operate as independent employers, the competition that a horizontal worker-allocation agreement between them restricts is most analogous to interbrand, not intrabrand, competition. Applying the per se rule to such an agreement is thus consistent with the Supreme Court's statements that the antitrust laws are especially skeptical of restraints on interbrand competition. *See Leegin*, 551 U.S. at 890; *GTE Sylvania*, 433 U.S. at 52 n.19. In any event, even *intrabrand* restraints can be per se unlawful

when imposed by horizontal competitors. *See United States v. Gen. Motors Corp.*, 384 U.S. 127, 145-46 (1966).

2. Even if a franchisor does not compete with its franchisees for workers, it may still *organize* or *participate in* a no-poach agreement among franchisees. In that case, the no-poach agreement would still be horizontal in nature, and the per se rule would still apply unless defendants raise and establish the ancillary-restraints defense.

For example, a franchisor could enforce a no-poach clause in the franchise agreement at franchisees' behest or empower franchisees to enforce the clause against each other. In *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 795-96 (S.D. Ill. 2018), for instance, the court concluded at the motion-to-dismiss stage that a corporate headquarters and its franchisees were participants in a "horizontal agreement," in a "hub-and-spoke" structure, because the "franchisees tacitly agree[d] amongst each other to enforce the no-hire provision" and "the franchise agreements g[a]ve the franchisees a contractual right to enforce the no-hire agreements directly against each other." Moreover, if an entity at one level of the distribution chain "induc[es]" entities that compete at another level of the distribution chain to conspire with each other, the agreement is horizontal. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934-36 (7th Cir. 2000). Likewise, if a franchisor induces franchisees to enter into a no-hire agreement by providing "assurance" that all other franchisees will "abid[e] by the agreement and behav[e] in the same way," the agreement is horizontal. *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 842 (7th Cir. 2020) (applying this principle in medical-devices market).

These types of agreements are properly characterized as horizontal, even though the franchisors and franchisees have a "vertical" relationship, *see supra* at 11-12, because a vertically-related firm's participation in a per se illegal horizontal agreement does not alter the

agreement's horizontal character. Where a "vertical organizer has not only committed to vertical agreements, but has also agreed to participate in [a] horizontal conspiracy . . . the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint." *United States v. Apple*, 791 F.3d 290, 325 (2d Cir. 2015). For example, in *Apple*, the Second Circuit affirmed a judgment finding Apple per se liable for organizing a price-fixing conspiracy among publishers of ebooks on its iBookstore. Although Apple's contracts with publishers were vertical, it had also joined and organized the publishers' *horizontal* agreement, which was the "relevant agreement in restraint of trade." *Id.* (internal quotation marks omitted). Similarly, in *In re Insurance Brokerage Antitrust Litigation*, the Third Circuit held that the plaintiffs had stated a per se claim under Section 1 by alleging a conspiracy among competing insurers, orchestrated by a vertically-related broker, not to compete for each other's incumbent business. 618 F.3d 300, 337 (3d Cir. 2010); *see also, e.g., Gen. Motors Corp.*, 384 U.S. at 132-38, 140-41, 144-46 (vertically-related manufacturer enforced horizontal restraint agreed upon by distributors); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-13 (1959) (conspiracy "of manufacturers, distributors and a retailer"); *Interstate Circuit v. United States*, 306 U.S. 208, 225-27 (1939) (conspiracy among competing film distributors and certain exhibitors); *United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990) ("[A] noncompetitor can join a Sherman Act bid-rigging conspiracy among competitors. If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors.").

3. The parties disagree about whether the alleged no-poach agreement restricted only franchisees' hiring practices (and not Jackson Hewitt's), Memo. in Supp. of Mot. to Dismiss at 24, Dkt. 65-1 (Defendants' view), or instead restricted both Jackson Hewitt's and franchisees'

hiring, Tr. 28:1-5, Dkt. 270; FAC ¶¶ 53, 64, Dkt. 161. This issue makes no difference to the application of the per se rule. Even if the alleged agreement were only "one way" (i.e., limiting franchisees' hiring from corporate-owned stores but not vice versa), Plaintiffs are required to show only that Defendants entered into a worker-allocation conspiracy—not that the conspiracy involved reciprocal promises. In other words, Plaintiffs need only show "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946); *see also Havens v. Mobex Network Servs., Inc.*, 820 F.3d 80, 91 (3d Cir. 2016) (same).

In an analogous context, courts have upheld the per se illegality of one-sided bid-rigging conspiracies where one party promised to submit high bids so that its co-conspirator would win a contract, because such conspiracies "subvert the competition" between bidders. *United States v. Reicher*, 983 F.2d 168, 169-70, 172 (10th Cir. 1992); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1159-60 (4th Cir. 1986); *United States v. Bensinger Co.*, 430 F.2d 584, 586-87, 589 (8th Cir. 1970). The same logic applies in one-sided worker-allocation cases: A horizontal agreement in which franchisees agree not to hire or solicit the franchisor's workers is subject to the per se rule because it inherently subverts competition for the franchisor's workers, irrespective of whether the franchisor made a reciprocal commitment.

4. Defendants are mistaken to argue that the Supreme Court's decision in *NCAA v. Alston* precludes applying the per se rule to franchise no-poach agreements even if such agreements are horizontal. Opp. to Mot. for Class Certification at 8-9, Dkt. 233. *Alston* affirmed a district court's judgment—following a full rule-of-reason trial—that several NCAA rules limiting student-athlete compensation had severe anticompetitive effects and thus violated Section 1. 141 S. Ct. at 2141; *see In re NCAA Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058, 1070

(N.D. Cal. 2019). The Supreme Court rejected the NCAA's argument that the lower courts should have *upheld* these rules after "a quick look." *Alston*, 141 S. Ct. at 2155-57 (internal quotation marks omitted).

Alston stated in dicta that "we take special care not to deploy [the per se rule and quick-look condemnation] until we have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'" 141 S. Ct. at 2156 (quoting *Leegin*, 551 U.S. at 886-87). But as this Court observed at the class-certification hearing, this statement in *Alston* did not "chang[e] the law" regarding when per se rules apply; rather, it "say[s] something . . . we've always known," Tr. 68:24-69:8, Dkt. 270, which is that judicial "experience" is necessary before courts will decide to create "a *new per se* rule." *Maricopa Cnty.*, 457 U.S. at 349 & n.19; *see Palmer*, 498 U.S. at 46. In a case involving an *existing* per se rule (such as the rule against horizontal market-division agreements), judicial experience with the restraint at issue is irrelevant: Existing per se rules need not "be rejustified for every industry that has not been subject to significant antitrust litigation." *Maricopa Cnty.*, 457 U.S. at 351. Nor did *Alston* change the standard regarding when quick-look analysis applies; that standard, as *Alston* indicated, 141 S. Ct. at 2156, is still governed by the Supreme Court's decision in *California Dental Ass'n.*

Alston had no occasion to change these principles because neither per se illegality nor quick-look condemnation (as opposed to quick-look approval) was at issue in the case as it came before the Court, and the Court focused "only on the objections" the NCAA raised on appeal.[3]

[3] The student-athletes in *Alston* never sought abbreviated examination of the challenged restraints. Consistent with controlling circuit precedent, the district court applied the full rule of reason. *NCAA Athletic Grant-in-Aid Cap*, 375 F. Supp. 3d at 1066 (citing *O'Bannon v. NCAA*, 802 F.3d 1049, 1069 (9th Cir. 2015)). Because the district court's finding of "severe

141 S. Ct. at 2154-55. Indeed, if anything, *Alston*'s affirmance of an injunction against labor-market restraints simply confirms what was already evident: The Sherman Act protects workers to the same extent that it protects other economic actors. *See id.* at 2167-68 (Kavanaugh, J., concurring) ("[P]rice-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work.").

For this reason—as the Seventh Circuit made clear in *Deslandes*, correcting the district court—when a challenged franchise no-poach agreement is horizontal, it is per se unlawful unless defendants raise and establish ancillarity. 81 F.4th at 703-04. The now-vacated opinion in *Deslandes v. McDonald's USA, LLC,* 2022 WL 2316187, at *4 (N.D. Ill. June 28, 2022), *vacated and remanded*, 81 F.4th 699 (7th Cir. 2023), and the decision in *Conrad v. Jimmy John's Franchise, LLC*, 2021 WL 3268339, at *10 (S.D. Ill. July 30, 2021), were simply incorrect to hold that *Alston* required full rule-of-reason analysis of franchise no-poach agreements. Horizontal no-poach agreements fall under an existing per se rule against market-division agreements, making judicial "experience" with no-poach agreements irrelevant. *Maricopa Cnty.*, 457 U.S. at 349 n.19 (only in deciding whether to apply "a *new per se* rule" must the judiciary assess its "experience with the particular type of restraint challenged").[4]

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anticompetitive effects," *id.* at 1070, was never challenged on appeal, *see Alston*, 141 S. Ct. at 2154, the student-athletes—having won under full rule-of-reason analysis—had no need to seek examination under the per se rule or quick-look analysis in either the Ninth Circuit or the Supreme Court.

[4] The district court in *Deslandes* also plainly erred by focusing on its own lack of "experience with no-hire provisions of franchise agreements." 2022 WL 2316187, at *4. Even in cases involving a potential new per se rule, the relevant reference point is the experience of "the judiciary," *Maricopa Cnty.*, 457 U.S. at 349 n.19, not judges' individual experience.

Defendants also err in describing why the Court applied the rule of reason in *Alston*. It was not because, as they suggest, the restraint was "complex." Opp. to Mot. for Class Certification at 8-9, Dkt. 233. Rather, the Court applied the rule of reason because the restraint arose in the unique context of "an industry [collegiate sports] in which some 'horizontal restraints on competition are essential if the product is to be available at all.'" *Alston*, 141 S. Ct. at 2157 (quoting *Bd. of Regents*, 468 U.S. at 101-02). That rationale does not apply to franchise no-poach cases because "horizontal restraints on competition" are not "essential" for businesses to employ workers or for labor markets to function. *See Alston*, 141 S. Ct. at 2157; *see also United States v. Manahe*, 2022 WL 3161781, at *7 (D. Me. Aug. 8, 2022) ("The Court interprets *Alston* . . . in the context of the unique line of athletic league-related antitrust caselaw.").

C. Facts in the Non-Sealed Portion of the Record Suggest the Alleged Agreement Was Horizontal.

Because part of the record is sealed, the United States does not take a position on whether the alleged no-poach agreement in this case was horizontal. But it does note that certain facts in the non-sealed portion of the record weigh in favor of a finding that the alleged agreement was horizontal. For one, Defendants appear to have competed with their franchisees for employees. Second, the record indicates that Defendants may have organized and enforced the alleged no-poach agreement. Defendants could thus be liable for participating in a horizontal conspiracy among franchisees even if Defendants were not franchisees' competitors for employees.

1. First, facts in the record indicate that Defendants and their franchisees compete for employees. The record shows that corporate-owned Jackson Hewitt stores and franchisees' stores, which "are separate entities from Jackson Hewitt corporate," Ex. 2 to Mot. for Class Certification at 29:15-20, Dkt. 199-2, hire to fill the same types of positions. Jackson Hewitt's Rule 30(b)(6) corporate witness (its senior vice president of franchise operations) acknowledged

that "[b]oth corporate and franchise locations need tax preparers" and that a tax preparer trained on Jackson Hewitt's software can "work for either a corporate or franchise location." Ex. 1 to Mot. for Class Certification at 31:9-19, Dkt. 211-1. She also explained that tax preparers at corporate and franchise stores receive the same training. *Id.* at 143:24-144:4; *see also* Ex. 12 to Mot. for Class Certification at 38:7-13, Dkt. 211-3 (corporate and franchise tax preparers must take and pass the same test).

The record also indicates that corporate-owned stores and franchise stores "sometimes operate in geographic proximity" to one another, meaning that some employees could choose to work at either a corporate or franchise location. Ex. 2 to Mot. for Class Certification at 29:12-14, Dkt. 199-2; *accord* Ex. 1 to Mot. for Class Certification at 31:23-24, Dkt. 211-1 ("[W]e have corporate locations and franchise locations in the same region."). These facts—along with the fact that Jackson Hewitt felt the need to include the No-Poach Clause in its franchise agreements—support the conclusion that Jackson Hewitt and its franchisees were "actual or potential competitors" for employees. *Rothery Storage*, 792 F.2d at 229; *see* Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 IND. L.J. 1031, 1035 (2019) ("The fact that" two firms entered into a no-poach agreement "is a strong indicator that . . . the firms were competitors in [a] particular portion of the labor market."). Accordingly, the alleged no-poach agreement, which allegedly prevented any Jackson Hewitt-branded store from hiring or soliciting certain employees from other stores (including corporate-owned stores), restricted Jackson Hewitt and its franchisees' horizontal competition for those workers. *See, e.g.*, *Deslandes*, 81 F.4th at 703 (complaint alleging a no-poach agreement between franchisees and a franchisor that operated its own restaurants "allege[d] a horizontal restraint").

2. In addition, facts in the record indicate that Jackson Hewitt may have organized the alleged no-poach agreement. Jackson Hewitt's Rule 30(b)(6) witness testified that the company has a "culture of not recruiting each other's employees," which extends to both corporate and franchisee hiring. Ex. 1 to Mot. for Class Certification at 193:23-194:11. She testified that Jackson Hewitt communicates this "culture" in its new franchisee training, where "we remind people to work together to hire and train and to respect each other." *Id.* at 111:23-24.

The record also suggests that Jackson Hewitt enforced the no-poach agreement. For example, in one email, a franchisee responded to Jackson Hewitt corporate personnel about an "accusation" that the franchisee's general manager had been "soliciting another franchisee[']s employees." Ex. 43 to Mot. for Class Certification at 2, Dkt. 199-43. Another franchisee testified that he and others associated with his franchise contacted Jackson Hewitt corporate personnel to find out if Jackson Hewitt could help them in a dispute over an employee hired by another franchisee.[5] And Jackson Hewitt's 30(b)(6) witness testified that she had received a "complaint from a franchisee about efforts of another franchisee in the same city to recruit tax preparers." Ex. 1 to Mot. for Class Certification at 111:2-4, Dkt. 211-1. If Defendants organized or enforced a no-poach conspiracy among their franchisees, they could be liable for "agree[ing] to participate" in a horizontal agreement among the franchisees, even if Defendants did not themselves compete with franchisees in the labor market. *Apple*, 791 F.3d at 325; *see Ins. Brokerage*, 618 F.3d at 337.

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[5] *See* Ex. 51 to Mot. for Class Certification at 93:11-94:5 (franchise personnel complained to Jackson Hewitt about a former employee being hired by another franchisee), Dkt. 246-1; *id.* at 99:18-24 (franchisee's wife emailed Jackson Hewitt corporate to ask if something could be done); *id.* at 109:10-25 (franchisee emailed Jackson Hewitt corporate to ask if there was a no-poach provision in the franchise agreement).

II. DEFENDANTS CAN AVOID THE PER SE RULE'S APPLICATION TO A HORIZONTAL FRANCHISE NO-POACH AGREEMENT ONLY BY RAISING AND ESTABLISHING THE ANCILLARY-RESTRAINTS DEFENSE.

Once a plaintiff proves the existence of a horizontal no-poach agreement, defendants can avoid per se condemnation only by raising the ancillary-restraints defense and establishing the defense's two elements: (1) that the agreement is subordinate and collateral to a separate, legitimate business collaboration among the defendants and (2) that the agreement is reasonably necessary to achieve a procompetitive objective of the collaboration. The United States takes no ultimate position on whether the worker-allocation agreement alleged here was naked or ancillary. But facts in the non-sealed portion of the record point towards the conclusion that the restraint was naked.

A. An Ancillary Restraint Is One Subordinate and Collateral to a Separate, Legitimate Collaboration Among Defendants and Reasonably Necessary to Achieve a Procompetitive Objective of the Collaboration.

Under the ancillary-restraints defense, the Third Circuit (like others) distinguishes between "naked" restraints, which are "not an integral part of an arrangement with redeeming competitive virtues," and "ancillary" restraints, which are. *See Ins. Brokerage*, 618 F.3d at 345. As Defendants concede, Tr. 70:25-71:4, Dkt. 270, they bear the burden of establishing ancillarity. *Ins. Brokerage*, 618 F.3d at 346 (rejecting ancillarity argument where "Defendants [we]re unable to identify" allegations supporting it or "explain why a non-competition agreement . . . is an essential or reasonably necessary component" of a "procompetitive venture"); *see also Deslandes*, 81 F.4th at 705 ("[T]he classification of a restraint as ancillary is a defense . . . ."); *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). If defendants establish that a restraint is ancillary, then some version of the rule of reason applies. *Ins. Brokerage*, 618 F.3d at 346.

The Third Circuit has adopted a two-part test to establish that a restraint is ancillary. *See Ins. Brokerage*, 618 F.3d at 345. First, the defendants must demonstrate that the challenged restraint is "subordinate and collateral" to a separate, "legitimate business collaboration" among them. *Aya*, 9 F.4th at 1109-10; *see Ins. Brokerage*, 618 F.3d at 345 (court must "consider *first*, whether any aspect of the defendants' association contains a significant promise of integration or cooperation" (citation omitted)). In other words, the restraint must be "secondary," *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1073 (11th Cir. 2005), to "a larger endeavor"—paradigmatically, "a joint venture"—that achieves "efficiency-enhancing purposes." *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338-39 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) (internal quotation marks and citation omitted); *see Ins. Brokerage*, 618 F.3d at 345 (relying on *Salvino* concurrence's discussion of ancillary-restraints doctrine).

Second, the defendants must demonstrate that the challenged restraint is "reasonably necessary" to achieve a procompetitive objective of the defendants' collaboration. *Ins. Brokerage*, 618 F.3d at 345-46 (internal quotation marks omitted); *see Aya*, 9 F.4th at 1109; *Salvino*, 542 F.3d at 338 (Sotomayor, J., concurring in the judgment); *see also United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (adopting "reasonably necessary" standard), *aff'd in relevant part & modified in part*, 175 U.S. 211 (1899). Thus, even if a restraint "'facilitates' a procompetitive arrangement," the "restraint is not automatically deemed ancillary." *Ins. Brokerage*, 618 F.3d at 346. The reasonable-necessity requirement "distinguish[es] between those restraints that are intended to promote the efficiencies" of a

collaboration, *Salvino*, 542 F.3d at 338-39 (Sotomayor, J., concurring in the judgment), and those that are "unnecessary," anticompetitive "appendage[s]." *Ins. Brokerage*, 618 F.3d at 346 (internal quotation marks omitted).

In applying the second prong of the ancillary-restraints defense, a court must assess whether the restraint at issue is "commensurate" with the "main" collaboration's procompetitive objectives. *Addyston Pipe*, 85 F. at 290; *see Salvino*, 542 F.3d at 339 n.6 (Sotomayor, J., concurring in the judgment). As *Addyston Pipe* explained, if the restraint's scope "exceeds the necessity presented by the main purpose of the" collaboration, "it is void." *Addyston Pipe*, 85 F. at 282; *see also, e.g.*, *Hudson's Bay Co. Fur Sales Inc. v. Am. Legend Co-op.*, 651 F. Supp. 819, 839 (D.N.J. 1986) (to be ancillary, restraint "must be appropriately circumscribed to achieve the efficiency sought"). For example, the Seventh Circuit rejected an ancillarity defense partly on the ground that the challenged restraint had an "infinite duration," which was not reasonably "necessary" for a partnership's dissolution. *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995). Similarly, in *Deslandes*, the court doubted that a no-poach agreement could be commensurate with the goal of protecting investments in employee training if the agreement was not "linked to any estimate of the time a franchise would need to recover its investment[.]" *Deslandes*, 81 F.4th at 704.

B. Facts in the Non-Sealed Portion of the Record Suggest that the Alleged Agreement Was Not An Ancillary Restraint.

In the franchise context, this doctrine means that to qualify as ancillary, a no-poach agreement must "be subordinate and collateral to a legitimate" franchise agreement "*and* be reasonably necessary to achieve a procompetitive objective of the franchise agreement." *Deslandes*, 81 F.4th at 706 (Ripple, J., concurring) (citations and quotation marks omitted). It is up to the defendants to show that a franchise no-poach agreement meets both requirements.

Neither requirement is automatically satisfied just because a franchise is involved. *See Deslandes*, 81 F.4th at 703. Courts need to engage in a fine-grained, fact-specific analysis in each case to assess the connection between the restraint and the procompetitive purpose asserted by the defendant. As the Seventh Circuit explained, "A 'restraint does not qualify as "ancillary" merely because it accompanies some other agreement that is itself lawful.'" *Id.* at 704 (citation omitted).

In particular, at the first step, not every agreement among franchisees (or among franchisees and the franchisor) is "subordinate and collateral" to the franchise arrangement. *See supra* at 23 (describing "subordinate and collateral" prong). For example, two firms that compete in the labor market may have entered into a no-hire agreement long before becoming franchisees or entering into a franchisor-franchisee relationship; this suggests that the no-hire agreement is an independent restraint that is not part of the franchise relationship itself. Alternatively, franchisees may reach an agreement among themselves without the franchisor's knowledge, again calling into doubt whether the agreement has any connection to the franchise relationship.[6] Similarly, at the second step, not every agreement among franchisees (or among franchisees and the franchisor) is "reasonably necessary" to achieve a procompetitive purpose of the franchise relationship. *See supra* at 23-24 (describing "reasonably necessary" prong).

The United States takes no conclusive position on whether the alleged no-poach agreement here was ancillary. But facts available in the non-sealed portion of the record suggest that the agreement may not be ancillary. At minimum, these facts suggest that the agreement may not meet the second prong's requirement that it be reasonably necessary to a procompetitive

[6] By the same token, if two separate franchisees (e.g., H&R Block and Jackson Hewitt) form a joint venture, not every agreement between the two franchisees is necessarily subordinate and collateral to the joint venture.

objective of the Jackson Hewitt franchise agreement. Based on Defendants' public filings, it appears Defendants will argue that the no-poach agreement furthered two procompetitive objectives: (1) encouraging investments in employee training and (2) strengthening the quality of the Jackson Hewitt brand, thereby encouraging more franchisees to open Jackson Hewitt stores and increasing the output of tax-preparation services. *See, e.g.*, Opp. to Mot. for Class Certification at 29-30, Dkt. 233. But facts in the record suggest that the alleged no-poach agreement was not reasonably necessary to achieving either objective.

To begin with, Jackson Hewitt's Rule 30(b)(6) witness conceded that the No-Poach Clause "wasn't really necessary to the greater franchise agreement" and that "[w]ithout the express no-poach agreement, the franchise relationship can still continue." Ex. 1 to Mot. for Class Certification at 98:6-11, Dkt. 211-1. The company's actions confirm the point: Jackson Hewitt abandoned the clause "fairly quickly" after the Washington Attorney General began investigating, suggesting that the firm did not see the clause as important to the success of its franchise system. *Id.* at 98:3-11. These facts alone cut powerfully against the notion that the no-poach agreement was ancillary.

Jackson Hewitt's 30(b)(6) witness also testified that she did not know the No-Poach Clause's purpose and that she did not even know it was in the franchise agreement until Plaintiffs brought this action. Ex. 1 to Mot. for Class Certification at 38:20-39:2, Dkt. 211-1. Six franchisee declarants likewise stated that they did not know the clause existed prior to this case and that it had never come up in their business operations. Ex. 13 to Opp. to Mot. for Class Certification ¶ 24, Dkt. 230-6; Ex. 14 to Opp. to Mot. for Class Certification ¶ 21, Dkt. 230-8; Ex. 15 to Opp. to Mot. for Class Certification ¶ 21, Dkt. 230-10; Ex. 16 to Opp. to Mot. for Class Certification ¶ 20, Dkt. 230-12; Ex. 17 to Opp. to Mot. for Class Certification ¶ 19, Dkt. 230-14;

Dkt. 230-16 ¶ 28. If key Jackson Hewitt employees and numerous franchisees did not even know the No-Poach Clause existed, it is doubtful that the clause was reasonably necessary to encourage employee training or to encourage investors to open Jackson Hewitt franchises.

With respect to training, several Jackson Hewitt franchisees testified that despite the amount of training Jackson Hewitt employees receive, hiring employees who already have Jackson Hewitt experience does not necessarily reduce training costs. One franchisee testified that the onboarding and training process "should be a little faster" for a former Jackson Hewitt employee "but that's not always the case because some of our [franchise's] procedures might be different." Ex. 50 to Mot. for Class Certification at 68:7-12, Dkt. 246-1. Another franchisee explained that former Jackson Hewitt employees might still need training on Jackson Hewitt's tax-preparation software to work at his franchises because "different people have different levels of competency." Ex. 54 to Mot. for Class Certification at 88:5-12, Dkt. 246-1. This testimony suggests that the no-poach agreement was not reasonably necessary to protect stores' investments in training because "poaching" already-trained employees is not an effective way for a store to reduce its training costs.[7]

[7] A sealed exhibit apparently indicates that retaining tax preparers allows Jackson Hewitt to achieve cost savings. Memo. in Supp. of Mot. for Class Certification at 9, Dkt. 211 (citing Dkt. 199-29, which is sealed). If these savings are related to the cost of training tax preparers, this evidence may support the argument that the no-poach agreement protects stores' investments in training. But the franchisees' testimony that employees may need more training if they switch Jackson Hewitt stores still weighs against Defendants' training-based justification. Moreover, as explained *infra* (at 28), the fact that the no-poach agreement saves *some* costs does not mean that the agreement is commensurate with the cost savings it achieves: If the agreement applies to employees long after their employers have recouped the costs of training, the agreement will not satisfy the reasonably-necessary prong of the ancillary-restraints defense. As the Seventh Circuit explained, "eventually the cost of training will have been" recovered by the employer, "and a ban on transfer to another [employer] after that threshold could be understood as an antitrust problem." *Deslandes*, 81 F.4th at 704.

Finally, although Defendants acknowledge that the express No-Poach Clause in the franchise agreement prohibited franchisees from hiring employees of corporate-owned stores, Opp. to Mot. for Class Certification at 4, Dkt. 233, they deny Plaintiffs' allegations of a broader "No-Poach Culture" that prevented corporate stores from hiring franchise employees and franchisees from hiring other franchisees' employees, Answer ¶¶ 62, 95, Dkt. 164. This denial that a broader agreement existed in the first place seems inconsistent with the notion that that broader agreement (if proved) was reasonably necessary to achieve the procompetitive objectives of the franchise agreement.

Even if the alleged no-poach agreement furthered a procompetitive objective of Jackson Hewitt's franchise agreement, it is unclear whether the agreement's broad scope was "commensurate" with that objective. *Addyston Pipe*, 85 F. at 290. For example, whether the no-poach agreement was reasonably necessary to protect investments in employee training depends on whether the nationwide scope of the no-poach agreement and its potentially-yearslong duration were "linked to any estimate" of the costs of that training. *See Deslandes*, 81 F.4th at 704. The non-sealed portion of the record does not reveal a clear answer to that question. *See, e.g.*, Ex. 55 to Mot. for Class Certification at 83:15-84:9, Dkt. 246-1 (Jackson Hewitt's then-CFO testifying that it would be possible to quantify Jackson Hewitt's investment in training personnel but that he had not done so). The Court should consider whether the alleged agreement was overbroad in assessing whether Defendants satisfied the second prong of the ancillarity test.

CONCLUSION

If the Court concludes that the alleged agreement here was horizontal, it should hold that the agreement is subject to the per se rule unless Defendants show that it was an ancillary restraint. In determining whether the alleged agreement was horizontal and, if so, whether

Defendants satisfied the ancillary-restraints defense, the Court should consider the facts identified in this brief.

October 20, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2023, I electronically filed the foregoing brief by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Matthew A. Waring

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.*	Civil Action No.: 2:19-cv-9066-MEF-ESK **DESIGNATION OF AGENT FOR SERVICE UNDER LOCAL CIVIL RULE 101.1(f)**

Pursuant to Local Rule 101.1(f), because the United States Department of Justice, Antitrust Division, does not have an office in this district, the United States Attorney for the District of New Jersey is hereby designated as eligible as an alternative to the Antitrust Division to receive service of all notices or papers in the captioned action. Therefore, service upon the United States or its authorized designee, Kristin L. Vassallo, Deputy Chief, Civil Division, United States Attorney's Office for the District of New Jersey, 970 Broad Street, Room 700, Newark, NJ 07102, shall constitute service upon the United States for purposes of this action.

October 20, 2023

Respectfully submitted,

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