U.S. Department of Justice

Antitrust Division

RFK Main Justice Building

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Washington, D.C. 20530-0001

June 12, 2023

BY ELECTRONIC FILING

Hon. Anita B. Brody
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 7613
Philadelphia, PA 19106

Re: *Fuentes v. Jiffy Lube International, Inc.*, No. 2:18-cv-05174-AB

Dear Judge Brody:

The United States submits this letter under 28 U.S.C. § 517. The United States enforces the federal antitrust laws and has a strong interest in their correct interpretation. The United States also has a particularly significant interest in ensuring that workers receive the full protections of the antitrust laws.

In the briefing on the pending motion to dismiss (Dkt. 139 at 9, 13, 21 n.6; Dkt. 140-1; Dkt. 142 at 3), both the plaintiff and the defendant have cited an amicus brief submitted by the United States and the Federal Trade Commission in *Deslandes v. McDonald's USA, LLC*, Nos. 22-2333, 22-2334 (7th Cir.). In particular, the defendant claims that "the Department of Justice (DOJ) has said that neither the *per se* nor the quick look test would apply to [a] no-hire agreement" of the type at issue in this case. Reply Brief in Support of Motion to Dismiss, Dkt. 142 at 3.

While the *Deslandes* amicus brief stated that vertical employee-allocation agreements are evaluated under the rule of reason, the brief also identified various ways in which no-hire and no-solicitation agreements, including agreements involving franchise contracts between a franchisor and franchisees, can be horizontal agreements subject to per se condemnation.

Deslandes Am. Br., Dkt. 140-1 at 14-20. For example, if franchisees agree among themselves not to hire each other's employees and the franchisor, at the franchisees' behest, inserts and enforces no-hire clauses in franchise agreements, the franchisor and the franchisees are participants in a horizontal agreement. *Id.* at 17-18. Alternatively, if a franchisor induces franchisees that compete for employees to enter into a no-hire agreement by providing assurance that all other franchisees will abide by the agreement and behave in the same way, the franchisor and the franchisees are, again, participants in a horizontal agreement. *Id.* at 18 (citing *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 842 (7th Cir. 2020); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 934-36 (7th Cir. 2000)). Ultimately, "[e]ven if defendant-franchisors do not actually or potentially compete with franchisees for employees, an employee-allocation agreement among defendant-franchisors and franchisees (including one that is contained in a franchise agreement) may still be horizontal." *Id.* at 16. If such an agreement is horizontal, it is per se unlawful unless the defendant proves that it is ancillary to a broader procompetitive collaboration by satisfying both elements of the ancillary-restraints defense, *id.* at 21-23—a defense that the defendant here did not raise in the motion to dismiss. As in *Deslandes*, however, the United States takes no position on whether the alleged no-hire and no-solicitation agreement in this case is per se unlawful.

If the Court holds oral argument on the motion to dismiss, the United States would be willing to appear and answer any questions about its position on no-hire and no-solicitation agreements in the franchise setting to the extent the Court would find the United States' appearance helpful.

Respectfully submitted,

/s/ Peter M. Bozzo

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cc: All Counsel of Record (by ECF notice)