“WELCOME TO MCDONALD’S…MAY I TAKE YOUR CASHIER?” — A REVIEW OF RECENT FRANCHISE NO-POACH CLASS ACTION LAWSUITS

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For years, franchise businesses in various industries have included "no-poach" provisions in franchise agreements that restrict employees from moving among locations within the same franchise system. While these provisions had gone largely unnoticed, more recently they have garnered much attention, with economists pointing to them as a possible source of wage stagnation and antitrust practitioners challenging them as illegal restraints of trade. Around the same time state attorneys general successfully put a stop to the practice of franchise no-poach agreements at thousands of franchise establishments nationwide, several private class actions were also filed seeking compensation for workers subject to these provisions. To date, these lawsuits have hit a number of roadblocks, including class certification difficulties and arbitration clauses, and have not resulted in any meaningful victories for plaintiffs. Nevertheless, private enforcement efforts are ongoing in a number of cases, and if successful, may provide victims with compensation for their losses.

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I. INTRODUCTION

For years, cashiers, fry-cooks, managers, and other employees working for the biggest restaurant chains across the country have been blocked from seeking higher wages and better positions at competing restaurants in the same chain due to restrictions placed in franchise agreements. These "no poach" clauses could prevent a cashier at a McDonald's in Brooklyn, for example, from accepting a higher paying manager position at a McDonald's in Manhattan. That same cashier would not be barred from taking a job at a Burger King or Carl's Jr., however. In recent years these clauses have garnered much attention, with economists pointing to them as a possible source of wage stagnation and antitrust practitioners challenging them as illegal restraints of trade.

Antitrust enforcement in this area exploded in 2018 when state attorneys general across the country announced that they were investigating franchise agreements of several fast-food restaurants which they claimed contained no-poach clauses.[2] While the investigation began with a handful of restaurant chains, the number of companies under scrutiny grew quickly and went beyond fast-food to include other industries that use a franchise model, such as automotive services and tax preparation.[3] Enforcement initiatives by the state of Washington were particularly strong. As a result of Washington's investigation, by 2020, 237 corporate franchisors agreed to end no-poach practices *nationwide*, covering nearly 200,000 locations around the country.[4] Companies included major chains like Arby's, Burger King, Domino's, Jiffy Lube, and La Quinta, to name a few.[5]

The enforcement efforts by the various state attorneys general kicked off a slew of private class action lawsuits based on these same no-poach clauses. While the states' efforts have stopped no-poach practices at hundreds of franchise businesses going forward, the victims of these no-poach practices did not receive compensation for past wrongs. Victims have still not received meaningful compensation, as these private lawsuits have faced a variety of challenges.

Below we provide a survey of the recent litigation. First, we will give an overview of why these clauses may present an antitrust issue. Then, we will describe the various cases that have been filed and will discuss the unique issues these cases present, including the type of scrutiny (i.e. *per se* or rule of reason) that courts have applied and issues that have arisen related to class certification.

II. NO POACH CLAUSES IN FRANCHISE AGREEMENTS MAY RAISE AN ANTITRUST PROBLEM

Employers may be violating the antitrust laws if the employer agrees with another firm to set wages at a specific level or within a range ("wage fixing agreements"), or if the employer agrees with another firm to refuse to recruit or hire the other firm's employees ("no-poach agreements").[6] "From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace[,] . . . . [and] [i]t is unlawful for competitors to expressly or implicitly agree not to compete with one another" for employees.[7]

The no-poach agreements discussed here are provisions in franchise agreements— "agreements between a franchisor and a legally distinct and independent franchisee"—that restrict employees moving among locations within the same franchise system.[8] Because these no-poach agreements typically exist in contracts between franchisor and franchisee rather than in employment contracts, workers are often unaware

2 Jeff Stein, "States launch investigation targeting fast-food hiring practices," Washington Post (July 9, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/07/09/11-states-launch-investigation-targeting-fast-food-hiring-practices/; Press Release, "AG Ferguson announces fast-food chains will end restrictions on low-wage workers nationwide," Washington State Office of the Attorney General (July 12, 2018), https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-food-chains-will-end-restrictions-low-wage-workers.

3 Report, Washington State Attorney General's Office No Poach Initiate (June 2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf.

4 Press Release, "AG Report: Ferguson's initiative ends no-poach practices nationally at 237 corporate franchise chains," Washington State Office of the Attorney General (June 16, 2020), https://www.atg.wa.gov/news/news-releases/ag-report-ferguson-s-initiative-ends-no-poach-practices-nationally-237-corporate.

5 For the full list, see Report, Washington State Attorney General's Office No Poach Initiate (June 2020), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/NoPoachReport_June2020.pdf.

6 Department of Justice Antitrust Division & Federal Trade Commission, Antitrust Guidance for Human Resource Professionals (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

7 *Id.*

8 Written Testimony of Assistant Attorney General Rahul Rao Office of the Attorney General of the State of Washington Antitrust Division (October 29, 2019), https://agportal-s3bucket.s3.amazonaws.com/uploadedfiles/Another/News/Press_Releases/WA%20AAG%20Rahul%20Rao%20-%20Written%20Testimony_0.pdf.

of their existence.[9] Moreover, no-poach provisions in franchise agreements are not uniform in what they prohibit. For instance, one franchisor's provision may flat out prohibit the hiring of another franchisee's employee, but another company's provision may only prohibit *recruitment* from another store in the same system. Other no-poach provisions "only prevent the poaching of a franchisor's employees. Some protect only company owned locations. Some only restrict franchisees from hiring or recruiting other franchisee employees."[10]

Regardless of the specific prohibition, commentators say that the effects are the same: "all no-poach provisions . . . artificially restrict competition for labor."[11] "This decrease in competition for labor has the potential to lead to reduced opportunities and stagnant wages."[12] Studying such clauses, economists have found that such provisions were "ubiquitous" among franchises and "appeared to exist mainly to limit both competition and turnover, which can keep labor costs low."[13]

III. OVERVIEW OF RELEVANT CLASS ACTIONS

Many class action lawsuits have been filed on behalf of workers subject to no-poach clauses at franchises. Below we provide an overview of the various challenges these cases have faced.

A. Courts Have Found That Plaintiffs Alleged Plausible Antitrust Claims

As we will discuss in the next section, while there is uncertainty about which standard of antitrust analysis — *per se*, quick look, or rule of reason — to apply, most courts agree with plaintiffs that a no-poach provision in a franchise agreement may constitute an anticompetitive restraint under the Sherman Act. In 2018 and 2019, "six district courts . . . faced motions to dismiss raising . . . whether a 'no-poach' provision in a franchise agreement (that prevents one franchisee from hiring another's employees for a set period) can constitute an anticompetitive restraint under the Sherman Act. Five of the six denied those motions to dismiss." [14]

The one case from this period where the motion to dismiss was granted was *Ogden v. Little Caesar Enterprises, Inc*, a class case filed on behalf of employees of the pizza chain Little Caesar.[15] Here, the court found that under any standard of analysis, the plaintiff failed to plead an antitrust claim. The court made a noteworthy observation that potentially "for a tactical reason" the plaintiff did not even "advance allegations or arguments supporting any claim under the rule-of-reason standard."[16] That "tactical reason" put forward by the court: defining a nationwide relevant market for fast-food employees could be difficult, as "[m]ost employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move."[17]

Putting aside the finding that the plaintiff alleged no illegal restraint, the court also found that the complaint failed to allege an antitrust injury. The court found that the plaintiff had not "offered any facts to show that the agreement precipitated any specific wage or opportunity loss to him" nor was he ever "subjected to any invocation of the clause by either his former or any prospective employer."[18] Regarding the latter, the court compared the allegations to other cases where plaintiffs alleged the no poach agreements were "explicitly . . . invoked to bar the plaintiffs from transferring to other stores."[19] While the plaintiff did appeal the district court's decision, the parties ultimately stipulated a dismissal.[20]

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 Rachel Abrams, "Why Aren't Paychecks Growing? A Burger-Joint Clause Offers a Clue," The New York Times (Sept. 27, 2017), https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html.

14 See *Fuentes v. Royal Dutch Shell PLC*, No. CV 18-5174, 2019 WL 7584654, at *1 (E.D. Pa. Nov. 25, 2019).

15 *Ogden v. Little Caesar Enterprises, Inc.*, 393 F. Supp. 3d 622 (E.D. Mich. 2019)

16 *Id.* at 631.

17 *Id.* at 631-32 (quoting *Deslandes v. McDonald's USA, LLC*, No. 17-4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018))

18 *Id.* at 638.

19 *Id.*

20 *Ogden v. Little Caesar Enterprises, Inc.*, No. 19-1986, 2020 WL 948507, at *1 (6th Cir. Jan. 28, 2020)

B. Rule of Reason, Quick Look, or Per Se?

Although courts are mostly in agreement that these clauses may violate the antitrust laws, there is a great deal of uncertainty about what level of scrutiny to use when analyzing the restraints. Recognizing that this issue is complex and deeply factual, several courts at the motion to dismiss stage have decided to defer a decision until after a factual record is developed.[21] There are two factual issues that make it difficult for courts to decide the level of scrutiny without a developed factual record. Specifically, (1) whether the agreements are between horizontal or vertical competitors; and (2) whether the franchisees are truly independent from their franchisors.

Regarding the first issue, defendants typically argue that the agreements are purely vertical restraints between corporate franchisors and their franchisees. Plaintiffs, on the other hand, contend that the agreements are horizontal agreements between the various franchisees not to hire each other's employees with the franchisor at the center orchestrating the entire scheme — in antitrust parlance, a "hub-and-spoke" conspiracy.[22] In the *Jimmy John's Franchise* case, the court found that plaintiffs plausibly pled a horizontal hub-and-spoke conspiracy which could give rise to *per se* liability.

Specifically, the court found that the franchisees "tacitly agree amongst each other to enforce the no-hire provision through austere enforcement of the employee non-compete contracts. And most damningly, the franchise agreements give the franchisees a contractual right to enforce the no-hire agreements directly against each other through the third-party beneficiary provision. That is a horizontal agreement."[23] Unfortunately for the plaintiffs in that case, the court could not determine on the pleadings the level of independence that franchisees had and, therefore, could not rule on the appropriate level of antitrust scrutiny. According to the court, if the evidence showed that the franchisees were truly independent, then *per se* or quick look analysis would apply, but, if the evidence of independence was weak, rule of reason would be applicable.[24]

Two decisions have rejected per se treatment on the pleadings but determined that quick look analysis may apply.[25] In both cases — one brought against McDonald's, the other against Cinnabon — the respective courts found that the plaintiffs plausibly alleged horizontal or partly-horizontal restraints.[26] The courts found *per se* treatment was still improper, however, because the agreements were not "naked" agreements not to hire. Instead, the agreements were ancillary to legitimate franchise agreements,[27] and it was not clear that the agreements lacked "any redeeming virtue."[28] Nevertheless, both courts found that quick look analysis might be appropriate given that "[e]ven a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate."[29] Both courts recognized, however, that the evidence in the case might not actually support quick look analysis.

In the *McDonald's* case, the court was able to conclude after the close of discovery that quick look analysis would actually be improper and that it must apply the rule of reason.[30] Citing the recent Supreme Court case, *NCAA v. Alston*, 141 S. Ct. 2141 (2021), the court acknowledged that "quick-look condemnations should be rare."[31] The court continued: "This Court cannot say that it has enough experience with no-hire provisions of franchise agreements to predict with confidence that they must always be condemned, which means, under *Alston*, that the Court

21 See e.g. *Fuentes*, 2019 WL 7584654, at *1; *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018); *In re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *9 (W.D. Ky. Oct. 21, 2019); *Robinson v. Jackson Hewitt, Inc.*, No. 19-9066 (SDW) (LDW), 2019 WL 5617512, at *7 (D.N.J. Oct. 31, 2019)

22 For an illustration of both sides of the argument, see *Butler v. Jimmy John's Franchise*, LLC, 331 F. Supp. 3d 786, 795 (S.D. Ill. 2018).

23 *Id.* at 796.

24 *Id.* at 797.

25 *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018); *Yi v. SK Bakeries, LLC*, No. 18-5627 RJB, 2018 WL 8918587, at *4 (W.D. Wash. Nov. 13, 2018).

26 *Deslandes*, 2018 WL 3105955 at *6 ("McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., **itself**) from horizontal competition for employees."); *Yi*, 2018 WL 8918587 at *4 ("While a part of the restraint at issue in the agreements is a vertical one (the franchisee agrees not to solicit or hire a Cinnabon employee), a part of the restraint is also a horizontal one (the franchisee agrees not to solicit or hire another franchisee's employee without permission).").

27 *Deslandes*, 2018 WL 3105955 at *7.

28 *Yi*, 2018 WL 8918587 at *4.

29 *Deslandes*, 2018 WL 3105955 at *7; Yi, 2018 WL 8918587 at *5.

30 *DeSlandes v. McDonald's USA, LLC*, No. 17 C 4857, 2021 WL 3187668, at *11 (N.D. Ill. July 28, 2021).

31 *Id.* at *7.

must apply rule of reason analysis to this case."[32] The court cited two additional reasons as support for the rule of reason. First, it found that defendants provided sufficient evidence of pro-competitive effects of the hiring restriction to warrant full rule of reason analysis.[33]

More specifically, "the hiring restraint increases output in the hamburger market, because it encourages the very training that enhances the brand (by ensuring uniform food quality, customer service and building cleanliness) . . . . The hiring provision makes the training related to the brand specific to the franchisee (rather than just to the brand), because it prevents other outlets from free riding on that training. All that training leads to greater brand consistency, better food quality and customer satisfaction, which is to say a strong brand."[34] Second, the court concluded that the evidence did "not show that all of the plaintiffs faced horizontal restraints ancillary to output-enhancing agreements."[35] The court found that the plaintiff did not "put forth evidence that McOpCos [McDonald's locations owned by the McDonald's-brand franchisor] compete with franchisees in every part of the United States" and concluded that "[i]n locations where no McOpCos compete with franchisees, the hiring provision cannot be said to be horizontal . . . . the hiring provision is merely vertical."[36] Finding the restrictions were vertical, the court determined that it must apply the rule of reason.

C. DOJ's View on the Appropriate Level of Scrutiny

In 2019, the United States Department of Justice Antitrust Division ("DOJ") under the Trump administration filed a statement of interest in three cases pending in the Western District of Washington to present its view that the rule of reason should be applied.[37] Each of the complaints in these cases—one against Auntie Anne's, another against Arby's, and the third against Carl's Jr.— alleged that the franchise agreements for these brands contained no poach clauses. In its statement of interest, DOJ stated that "[t]he franchise relationship is in many respects a vertical one because the franchisor and the franchisee normally conduct business at different levels of the market structure. Restraints imposed by agreement between the two are usually vertical and thus assessed under the rule of reason."[38]

While articulating that the rule of reason would apply in most cases, DOJ stated that the per se rule could apply in limited situations where a franchisor and one of its franchisees actually compete in the same geographic market for labor. Additionally, DOJ stated that full rule of reason analysis would be necessary, *not quick look*. Stating that quick look only applies in the "rare cases" when "the great likelihood of anticompetitive effects can easily be ascertained," DOJ argued that franchise no-poach agreements fell outside of this category of cases because "they may indeed provide procompetitive benefits and promote interbrand competition."[39] Not long after DOJ filed its statement of interest, both cases were dismissed by stipulation of the parties.

In the same case against McDonald's discussed above, DOJ, now under the Biden administration, moved for leave to file another statement of interest following the court's decision to apply the rule of reason and after defendants' moved for summary judgment.[40] In its motion for leave, DOJ stated that its previous statement of interest "does not fully and accurately reflect the United States' current views."[41] DOJ said it wished to file its statement of interest to aid the court's disposition of defendants' summary judgment motion and to "set[] forth the government's position on the antitrust issues in this case, including the implications of the Supreme Court's decision in *NCAA v. Alston*, 141 S. Ct. 2141 (2021)." DOJ's motion, which was opposed by the defendants, was ultimately rejected by the court for reasons that have not yet been made public.[42] Given the timing and procedural history of the case, it is reasonable to speculate that DOJ's statement of interest would have been beneficial to the plaintiff's view of the case.

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32 *Id.*

33 *Id.* at *8.

34 *Id.* at *9.

35 *Id.* at *10.

36 *Id.*

37 Statement of Interest at 11, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244, ECF No. 34 (E.D. Wash. Mar. 8, 2019).

38 *Id.* at 12-13.

39 *Id.* at 17.

40 Motion for Leave to File Statement of Interest, *Deslandes v. McDonald's USA, LLC et al*, No. 17-cv-4857, ECF No. 446 (N.D. Ill. Feb. 17, 2022).

41 *Id.* at 1.

42 Minute entry, *Deslandes v. McDonald's USA, LLC et al,* No. 17-cv-4857, ECF No. 451 (N.D. Ill. Mar. 2, 2022)

D. Issues at Class Certification

To date there have only been a few class certification rulings in the actions discussed here, and the rulings that have been issued have been unfavorable to the plaintiffs. In the *McDonald's* case, the court found that it could not certify the proposed class because the class did not meet the predominance requirement of Rule 23(b).[43] The major issue that led the court to find there was predominance problem was that there was no national labor market for McDonald's employees. Instead, the evidence pointed to the existence of "hundreds or thousands of local relevant markets" where employees work near where they live.[44] Plaintiffs' own expert calculated that "only 8% of McDonald's employees commute ten or more miles to work."[45] Because "[a]ny given plaintiff can establish that the restraint is anticompetitive only by showing anticompetitive effects in the relevant market where she sells her labor," anticompetitive effects cannot be show in other markets where they do no work.[46] Thus, no predominance.

Class certification was also denied in the case brought against Jimmy John's. Like in *McDonald's*, the *Jimmy John's* court found that the predominance requirement was not met.[47] Relevant market was again an issue. The court was persuaded by defendants' experts that Jimmy John's workers compete in a labor market that is broader than just Jimmy John's—the market also includes other quick-service restaurants of which "99 percent of Jimmy John's branded stores have at least ten other [quick-service restaurant] brands within ten miles."[48] With such "varied and dynamic labor markets across the country," the court found that "individualized inquiries would still be needed to determine whether a given Jimmy John's employee could have been injured."[49]

Predominance was not the only issue that precluded class certification. The court also found that the sole class representative's claims were atypical. The class representative left Jimmy John's not because he was looking for higher wages or opportunities at a different location but because he was fired for calling his boss's niece an expletive.[50] Moreover, the court found that the class representative, a non-manager, was an inadequate representative of a class defined to include Jimmy John's managers and non-managers alike.[51]

E. Arbitration Clauses may Present Another Roadblock

Finally, another significant barrier for plaintiffs bringing franchise no-poach class actions has emerged: arbitration clauses. In the *Papa John's* case, defendants moved to compel arbitration against one of the named plaintiffs.[52] The arbitration agreement at issue stated that the plaintiff waived "all rights to a trial in court before a judge or jury on any 'claims, disputes or controversies arising out of or relating to her employment with Papa John's.'"[53] While the plaintiff argued that violations of the Sherman Act fell outside of the scope of the arbitration agreement, the court disagreed, citing "the policy of rigorous enforcement of arbitration agreements."[54] Notwithstanding, the other named plaintiffs were not subject to an arbitration clause, and the case was able to move forward.

Plaintiffs in the *Domino's* case were less fortunate. There, the district court granted defendants' motion to dismiss and compel arbitration and ordered the parties to go to arbitration.[55] The plaintiff appealed that decision to the Sixth Circuit, arguing that he did not agree to arbitrate "arbitrability." In other words, he argued that "*a court* must first determine whether the [arbitration] agreement covers a particular claim before

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43 *Deslandes*, 2018 WL 3105955 at *14.

44 *Id.* at *12.

45 *Id.* at *13.

46 *Id.*

47 *Conrad v. Jimmy John's Franchise, LLC*, No. 18-CV-00133-NJR, 2021 WL 3268339, at *11 (S.D. Ill. July 30, 2021).

48 *Id.*

49 *Id.*

50 *Id.* at *5.

51 *Id.* at *7.

52 *In re Papa John's Emp. & Franchisee Emp. Antitrust Litig.*, No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *3 (W.D. Ky. Oct. 21, 2019).

53 *Id.* at *4.

54 *Id.*

55 *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842(6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza Franchising LLC*, 141 S. Ct. 1268, 209 L. Ed. 2d 8 (2021).

the arbitrator has any authority to address its jurisdiction."[56] The Sixth Circuit disagreed and ordered plaintiff into arbitration for a determination of whether his claim is arbitrable.[57]

IV. CONCLUSION

Thankfully for workers today, state enforcers have made substantial progress towards ending the practice of franchise no-poach agreements nationwide at thousands of franchise establishments. Still, this injunctive relief has done nothing to rectify the low, stagnant wages millions of workers received for years when the practices were in effect. Private enforcement efforts are ongoing in a number of cases where the law continues to develop, and if successful, may provide victims with compensation for their losses.

56 *Id*. at 847 (emphasis added).

57 *Id*. at 852.

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