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No-Poach Case Against HP Dismissed for Failure to Allege a Plausible Conspiracy

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Many recent no-poach agreement antitrust claims have risen within the franchise context, where the alleged agreement was plainly described in the operative franchise agreements. In those cases, the parties fought over what standard of review should apply to the undisputed agreement. However, franchise cases are the exception not the norm. Many, if not most, Sherman Act Section 1 claims rise or fall on the plausibility of the allegations of an agreement, often oral, between the accused firms. Recently, the Ninth Circuit affirmed a district court's dismissal of a factually threadbare no-poach antitrust claim. In *Fonseca v. Hewlett-Packard Co.*,[1] a former employee of Hewlett-Packard Co. (HP), who was fired by HP and not hired by one of HP's competitors, alleged HP had entered into an illegal no-poach agreement with the competitor. Highlighting that no-poach antitrust cases require more than simply allegations of agreements and parallel conduct, the Ninth Circuit upheld the district court's dismissal because the allegations of a conspiracy did not make sense and were not plausible. The decision serves as a poignant reminder that despite the class action bar's and various government enforcement agencies' (FTC, DOJ, and states attorneys general) stated desire to use the antitrust laws to protect employees' wages and mobility, the law requires sufficient proof of a conspiracy to get beyond the pleadings stage of litigation.

Background

Plaintiff Fonseca, a 55-year-old, long-term HP employee, left HP's employ in 2017 pursuant to HP's Workforce Reduction Plan (WFR). Under the WFR, terminated employees could apply for other positions at HP with preferential treatment for a certain period of time (the Redeployment Period), and if not re-hired, they were eligible for a severance payment. Employees forfeited their severance payments if they accepted a job with a competitor during the Redeployment Period or, outside the Redeployment Period, if they accepted a job with a competitor but failed to notify their manager. Fonseca applied for employment with 3D Systems, an HP competitor, but did not receive an offer.

Thereafter, the plaintiff filed suit against HP on his behalf and on behalf of persons aged 40 years or older, who were also terminated via the WFR after January 1, 2016.[2] The plaintiff brought a number of claims, including age discrimination and antitrust claims under California's Cartwright Act and Sherman Act.[3] The crux of the plaintiff's state and federal antitrust claims was that HP and competitor 3D Systems entered into a no-poach agreement after 3D Systems hired a number of HP executives. The plaintiff alleged that HP executives and 3D Systems' CEO, a former HP executive, agreed to a "cease-fire," under which the companies agreed not to solicit each other's employees, dissuaded their current employees from applying for work at the other company, and to publicly share salary scales.[4] This agreement allegedly began after 3D Systems' CEO poached several top-level HP executives. After an HP executive told 3D's CEO to "stop hiring away HP's employees," the plaintiff alleges

that in that call “and [in] subsequent communications,” 3D’s CEO agreed to the “cease fire” “so long as the arrangement was mutual.” The court noted that the plaintiff made all of these allegations “on information and belief,” failing to otherwise explain how this information about the call was obtained that purportedly “memorializ[ed] the cease-fire arrangement.” Nonetheless, the plaintiff alleged that the cease-fire resulted in (1) an agreement to stop cold calling the other’s employees and stop using third-party recruiters to hire the other’s employees; (2) a policy that “required [employees] to notify HP if they were offered a position at 3D Systems and provided that any HP employee offered a position with 3D Systems would be deprived the severance check provided under the [WRF]”; and (3) the sharing of each other’s wage information “to avoid entering a bidding war.”

The plaintiff maintained that his third amended complaint pled the plausible existence of a no-poach agreement between HP and competitor 3D Systems based primarily on the foregoing allegations regarding a phone call between the two company’s executives in 2016. As a result of this agreement, the plaintiff claimed he and others were injured when they were fired from HP and failed to find work with 3D Systems. The district court, however, found these conclusory allegations unavailing — noting a distinct lack of factual content regarding the “who, what, when, and where” of the alleged no-poach deal. Without more, the court dismissed the plaintiff’s antitrust claims asserted under both federal and California law. The Ninth Circuit issued a one-page opinion, affirming the district court’s decision, which it concluded was “thorough” and “carefully reasoned.” As a result, the substance of the ruling lies within the district court’s decision.

District Court’s Decision on Antitrust Claims

The district court focused on whether the plaintiff’s third amended complaint contained sufficient factual allegations to plausibly indicate that the two companies had entered into an illicit conspiracy in restraint of trade. The court noted that “[a] bare allegation of conspiracy is almost impossible to defend against,” therefore, “the complaint must allege facts such as a ‘specific time, place, or person involved in the alleged conspiracies’ to give a defendant seeking to respond … an idea of where to begin.”[5] The court found that the plaintiff’s conclusory allegations failed to meet this threshold. The plaintiff merely alleged that HP and 3D Systems formed an agreement sometime in 2016. While Fonseca named the allegedly implicated persons and what was said (namely, stop “hiring away HP’s employees”), the court found that the plaintiff failed to include sufficient information on the “who, what, when and where.”[6] According to the court, finding a conspiracy present would “ask[] the Court to take ‘too big a leap.’”[7]

The district court also found that there were a number of facts that rendered the plaintiff’s allegations implausible. For example, there were no allegations that HP ever poached 3D Systems employees, providing little incentive for 3D Systems to have entered into the conspiracy. The WRF’s punitive measures — that HP employees would forfeit severance if they accepted a job with a competitor during a “Redeployment Period” — tended to belie the alleged existence of a cease-fire between the companies. Assuming a conspiracy existed, HP would have had no need to punish its employees for accepting employment with 3D Systems or to direct the employees to report employment offers made by 3D Systems. Moreover, the age discrimination claims cut against a finding of an illegal conspiracy. On the one hand, the plaintiff claimed HP was trying to rid itself of older workers; yet, on the other hand, it was trying to prevent its older workers from working for competitors. Further, the plaintiff’s allegations were not found to be related or similar to HP’s 2014 no-poach settlement with the DOJ, “given that [it] occurred three years before the alleged HP/3D Systems conspiracy and involved Intuit rather than 3D Systems.” [8]

For similar reasons, the district court further found the plaintiff's allegations of parallel conduct unavailing. To make out a claim under Section 1 of the Sherman Act, "allegations of parallel conduct … must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[9] Under Ninth Circuit precedent, impermissible parallel conduct is separated from permissible conduct upon consideration of certain "plus factors" that involve "economic action and outcomes that are largely inconsistent with unilateral conduct."[10] The court found that none of the plaintiff's allegations rose to the level of a "plus factor" indicating illicit parallel conduct. For example, there were no facts that HP poached 3D Systems employees, and the disparity between the two company's public salary scales (with HP employees making on average $50,000 and 3D Systems employees making on average $73,007 and $130,265) failed to plausibly suggest that HP and 3D Systems engaged in illegal parallel conduct.[11] In addition, allegations that under its Workforce Reduction Plan, HP would rescind an employee's severance and punish employees who sought employment with 3D Systems diminished the notion that the two companies had a separate no-poach agreement in place.[12] As the plaintiff was on its third bite of the apple, the antitrust claims were dismissed with prejudice.[13]

Takeaways

This case serves as a helpful reminder that conspiracy claims involving alleged no-poach agreements are no different than other antitrust conspiracy claims in that they cannot survive without the "who, what, when, and where" alleged. Therefore, plaintiffs must allege sufficient facts, showing activity prohibited by the antitrust laws for their no-poach claims to survive a motion to dismiss.

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[1] No. 20-56161, 2021 WL 4796540, at *1 (9th Cir. Oct. 14, 2021).

[2] *Fonseca v. Hewlett-Packard Co.*, No. 19CV1748-GPC-MSB, 2020 WL 4596758, at *2-3 (S.D. Cal. Aug. 11, 2020), judgment entered, No. 19CV1748-GPC-MSB, 2020 WL 6158940 (S.D. Cal. Oct. 21, 2020), aff'd, No. 20-56161, 2021 WL 4796540 (9th Cir. Oct. 14, 2021).

[3] *Id.* at *1. This decision involved the dismissal of Fonseca's Cartwright Act, Sherman Act, and Section 16600 claims. Fonseca's disparate treatment, disparate impact, wrongful termination, failure to prevent discrimination, and ancillary unfair competition claims are still proceeding. Additionally, Fonseca also filed suit in California Superior Court, which was stayed except with regard to the antitrust claims.

[4] *Id.* at *3, 5-6.

[5] *Id.* at *6 (citations omitted).

[6] *Id.* at *3, 6.

[7] *Id.* at *6.

[8] *Id.*

[9] *Id.* at *8 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007)).

[10] *Id.* (citing *Twombly*, 550 U.S. at 557 n. 4).

[11] *Id.*

[12] *Id.* at *9.

[13] *Id.*

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