

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff,

v.

Case No. 5:24-cv-000316-TJC-PRL

FEDERAL TRADE COMMISSION,

Defendant.

AMICUS CURIAE BRIEF OF FLORIDA NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION IN OPPOSITION TO PLAINTIFF'S
MOTION FOR STAY OF EFFECTIVE DATE
AND PRELIMINARY INJUNCTION

INTRODUCTION

The Florida Chapter of the National Employment Lawyers Association ("Florida NELA") submits this amicus curiae brief in opposition to Plaintiff Properties of the Villages, Inc. ("POV")'s motion for stay of effective date and preliminary injunction against the Federal Trade Commission (FTC)'s Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024) (the "Rule" or "Final Rule"). Florida NELA is a non-profit organization dedicated to the advocacy and protection of employees' rights throughout Florida.

I.
INTEREST OF AMICUS CURIAE

As set forth in the Motion for Leave to file this brief, Florida NELA's members, who are attorneys specializing in employment law, regularly encounter

the effects of non-compete agreements on workers in this District. Florida NELA submitted a comment to the FTC in support of the Non-Compete Clause Rule (<https://www.regulations.gov/comment/FTC-2023-0007-18082>) and has also reviewed some of the comments submitted by others.

The relief sought by the POV would impact the public generally and workers in this District very specifically. Florida NELA offers its comments to help the court evaluating the issues of the harm claimed by POV, the public interest and how the balance of equities favor denying the injunction.

II. ARGUMENT

A. The Plaintiff Will Not Suffer Irreparable Harm

1. Non-Compete Agreements Are Not Essential to Business Operations

POV's contention that the FTC's Rule will precipitate irreparable harm to its business model is unfounded. Non-compete agreements are not a *sine qua non* for the successful operation of a business. Numerous thriving enterprises eschew such restrictive covenants, instead relying on alternative mechanisms to safeguard their legitimate business interests. Tools such as non-disclosure agreements can provide adequate protection for proprietary information and customer relationships without unduly restricting employee mobility. The FTC's Rule, by permitting these less restrictive alternatives, ensures that businesses can continue to thrive while also promoting fair labor practices.

The members of Florida NELA regularly advise employees who have signed less restrictive agreements, which protect legitimate business interests

while also allowing employees to change workplaces if they so desire. The necessity of non-compete agreements is greatly exaggerated by the Plaintiff. In practice, it is the experience of Florida NELA members and their clients that these agreements suppress healthy competition, instead of protecting legitimate business interests. There are numerous other ways for companies to safeguard proprietary information and customer relationships.

2. Compensation and Training Investments Are Recoverable

Plaintiff's argument that it has made substantial investments in training and compensating its Sales Associates, which would be rendered futile by the enforcement of the FTC's Rule, does not withstand scrutiny. Investments in training and compensation are intrinsic to the employer-employee relationship and are designed to enhance the skills and productivity of the workforce. These investments yield reciprocal benefits, as employees apply their enhanced skills to further the business's objectives. Moreover, the claim that these investments necessitate the imposition of restrictive non-compete agreements is unsubstantiated, as businesses can protect their interests through other mechanisms that do not inhibit employee mobility.

Training and compensatory investments made by the employer are recoverable through various means. The primary return on investment comes from the enhanced productivity and performance of the trained employees during their tenure with the company. These benefits accrue over time and are not nullified simply because an employee departs.

The members of Florida NELA regularly advise employees who have received training from their employers. It should be noted that paying employees to complete mandatory training is not some extraordinary investment; rather, it is legally required of all companies. Similarly, the suggestion that a recoverable stipend for training is something that substantially benefits the individual is ludicrous. The business is the clear beneficiary because the employer is actually recovering the claimed costs from the employees' commissions.

Further, the individuals in this case are selling real estate. While POV might try to claim some "secret sauce," the reality is that due to Florida's existing licensing regimen, Florida real estate agents are all required to receive extensive training. For example, as a condition of licensure all Florida real estate sales associates must successfully complete a 63-Hour Pre-Licensure Course based on the FREC I syllabus and pass the required end-of-course exam. *See Fla. Stat. §475.17(4)(a) and F.A.C. 61J2-3.008.*¹

¹ The 1 Florida Real Estate Commission Sales Associate Course Syllabus (FREC Course I) is a 59 page, single spaced document, which outlines the requirements of the 63-Hour Pre-Licensure Course. <https://www2.myfloridalicense.com/re/documents/FREC1SyllabusCleanFinal01012023.pdf> Post-licensure real estate agents must complete 45-hours of approved courses and required exams within their first renewal period. In addition, as continuing education, in each subsequent renewal period requires 8-hours of specialty continuing education, 3-hours of Florida Law Core and 3-hours of Ethics and Business Practices. Additional information about the licensure requirements for real estate agents are available at the Florida Real Estate Commission's website: <https://www2.myfloridalicense.com/real-estate-commission/>

3. The Alleged Harm Is Speculative

The harm alleged by POV is speculative and lacks concrete substantiation. The assertion that employees will immediately defect to competitors, thereby causing significant business losses, is conjectural. Existing legal frameworks provide robust remedies for addressing genuine cases of trade secret misappropriation. The speculative nature of the alleged harm fails to meet the high threshold required for establishing irreparable harm in the context of a preliminary injunction.

POV's argument hinges on hypothetical scenarios rather than documented instances of harm. The risk of employees joining competitors and causing business loss exists in every industry, yet businesses continue to thrive without resorting to overly restrictive non-compete agreements. The legal landscape provides ample protection against unfair competition and trade secret theft through well-established laws and regulations, making the alleged harm both speculative and preventable through less restrictive means.

B. The Public Interest and Balance of Equities Favor Denying the Injunction

1. Promoting Employee Mobility and Economic Opportunity

The FTC's Rule significantly promotes employee mobility and economic opportunity by dismantling unjust barriers that inhibit workers from seeking better employment opportunities. Enhanced mobility benefits the broader economy by allowing workers to transition to roles where their skills are most effectively utilized, thereby driving innovation and economic growth. The FTC

Rule ensures that employees are not unduly restricted by non-compete agreements that serve primarily to protect employer interests at the expense of worker freedom. The FTC's Rule is particularly important in Florida's rapidly evolving job market, where technological advancements and changing economic conditions require a highly adaptable and mobile workforce.

By removing the constraints of non-compete agreements, the Rule empowers employees to seek out opportunities that best align with their skills and career aspirations, leading to higher job satisfaction and productivity. Furthermore, increased mobility fosters a more competitive labor market, encouraging employers to offer better wages and benefits to attract and retain talent.

A number of commenters to the FTC spoke about how they were forced to signed non-compete agreements and the impact upon their lives. *See e.g.*, www.regulations.gov/document/FTC-2023-0007-0755 (employee signed non-compete with three different companies, each time it was presented after he accepted the job but before starting); www.regulations.gov/document/FTC-2023-0007-2950 (employee was never able to negotiate non-compete); www.regulations.gov/document/FTC-2023-0007-19718 (Florida employee had no choice but to endure the difficult miserable work environment because going to look for a healthier work environment with benefits is not possible with non-compete). These experiences are consistent with the discussions Florida NELA members have with their clients on a daily basis.

2. Reducing Wage Suppression

Non-compete agreements contribute to wage suppression by diminishing employees' bargaining power. By invalidating these agreements, the FTC's rule plays a crucial role in ensuring that workers receive fair compensation commensurate with their skills and contributions.

Non-compete agreements often disproportionately affect lower-wage workers who have the least bargaining power and resources to challenge such agreements. The FTC's rule addresses this imbalance by removing a significant barrier to wage growth and career advancement. By fostering a more equitable labor market, the rule helps to ensure that all workers, regardless of their position or industry, have the opportunity to negotiate for better pay and working conditions.

A number of commenters to the FTC about the Rule were low wage workers who spoke about the impact of non-compete on their wages. For example, a Florida bartender, who claimed to be the victim of sexual harassment, was being sued to prevent her from serving drinks. See www.regulations.gov/document/FTC-2023-0007-8852 A Florida journalist detailed how her wages and those of her co-workers are suppressed due to non-competes. See www.regulations.gov/document/FTC-2023-0007-20378; see also www.regulations.gov/document/FTC-2023-0007-3156 (Florida hairstylist). These comments are consistent with the experiences of Florida NELA members who consult with low wage earners who are forced to sign non-compete agreements and then cannot afford to challenge them in court.

3. Encouraging Fair Competition

The FTC's Rule is instrumental in fostering a competitive business environment by preventing the use of non-compete agreements as tools to stifle competition. In a free market economy, businesses should compete based on the quality of their products and services rather than through restrictive contractual arrangements that inhibit employee movement. By promoting fair competition, the rule encourages innovation and improves market efficiency, ultimately benefiting consumers and the economy as a whole.

Fair competition is a cornerstone of a healthy economy, driving businesses to innovate and improve their offerings to gain a competitive edge. Non-compete agreements undermine this dynamic by artificially limiting the pool of talent available to competitors, reducing the incentive to innovate. The FTC's Rule helps to level the playing field, ensuring that businesses compete on their merits rather than relying on restrictive practices that limit employee mobility and stifle competition.

In this case, even though the non-compete agreement covers a specific geographic area, this area is highly significant to the employees who have built their careers there. The restriction of working within The Villages community, which is a substantial and growing area, can severely limit the employment opportunities for former Sales Associates. Businesses in this area are not able to compete on their merits, rather, the entrenched incumbent business is preventing new entrants into the industry.

An FTC commenter, who identifies as “an aspiring entrepreneur in the real estate space ... in a relatively small market where one company dominates,” commented on how the company use “non-competes to restrict competition and trap employees.” See www.regulations.gov/comment/FTC-2023-0007-10710 This comment seems especially appropriate in a town like the Villages, where one business/family has had such a large impact upon the real estate business. Another commenter, who identified as a Florida military veteran financial adviser, discussed the problems with non-compete agreements preventing individuals from working downtown in a small town and how employers often take advantage of employees and especially veterans as they are not aware of the impact of non-compete agreements. See www.regulations.gov/document/FTC-2023-0007-3121

4. Recent Conduct By Participants in the Real Estate Industry

The anti-competitive practices of the real estate industry have been subject to extensive litigation and should be considered by the Court. One example is *Burnett, et al., v. National Assoc. of Realtors, et al.*, Case No. 4:19-CV-00332-SRB, Order Doc. 1487 (Mo. W.D. May 9, 2024) where a recent settlement with the National Association of Realtors resulted in substantial settlement and significant changes in the commissions charged to consumers. See also Debra Kamin, *Judge Approves \$418 Million Settlement That Will Change Real Estate Commissions*, NY Times, April 23, 2024 available at <https://www.nytimes.com/2024/04/23/realestate/nar-settlement-realtors-commission.html>

As these cases illustrate, the real estate industry frequently uses practices that stifle competition, limit consumer choice, and maintain artificially high prices, benefiting a few large entities at the expense of smaller players and consumers. Non-compete agreements exacerbate this problem by restricting the mobility of skilled professionals, preventing them from leveraging their expertise to foster innovation and competition. By prohibiting non-compete agreements, there will be a more dynamic and competitive marketplace, where talent and fair practices drive growth.

A number of commenters to the FTC spoke about the impact of non-compete agreements on those in the real estate industry. For example, an anonymous commenter who is “a real estate professional affected by a Non-Compete Agreement,” details that the agreements “compromise one’s desire to grow and succeed in the business [and] it creates a stagnant work environment and culture where the company makes no effort in improvements.” www.regulations.gov/comment/FTC-2023-0007-5306

Another comment is from an employee in the real estate industry who identified that following issues with non-compete agreements, a) Employees must relocate out of state to find new employment if they quit or are fired, as geographic restrictions limit local employment opportunities; b) Leaving a job often results in financial penalties, including losing future commissions and being billed for client cancellations from years ago; and c) Non-compete agreements damage the industry’s reputation by preventing good, honest salespeople from leaving bad companies or corrupt management, trapping competent workers in unfavorable

situations and restricting local hiring. See www.regulations.gov/comment/FTC-2023-0007-12278

These comments, and many others like them, highlight the need for the FTC's Rule, especially in the real estate industry.

III. CONCLUSION

The Florida Chapter of the National Employment Lawyers Association respectfully urges this Court to deny Plaintiff's motion for a stay of the effective date and preliminary injunction. The Plaintiff will not suffer irreparable harm, and the public interest and balance of equities overwhelmingly support the implementation of the FTC's Non-Compete Clause Rule. This rule is a critical measure for promoting fair competition, safeguarding employee rights, and fostering a dynamic and equitable labor market.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via the Court's CM/ECF system on July 29, 2024 to all counsel of record.

/s/Ryan D. Barack
Attorney