

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

ATS TREE SERVICES, LLC,

Plaintiff,

v.

FEDERAL TRADE COMMISSION; LINA M. KHAN, in her official capacity as Chair of the Federal Trade Commission; and REBECCA KELLY SLAUGHTER, ALVARO BEDOYA; ANDREW N. FERGUSON, and MELISSA HOLYOAK, in their official capacities as Commissioners of the FTC,

Defendants.

Case No. 2:24-cv-01743-KBH

SUPPLEMENTAL DECLARATION OF DAVID SERVIN

Pursuant to 28 U.S.C. § 1746, I, David Servin, declare as follows:

1. I am over the age of 18 years. The facts set forth in this declaration are based upon my personal knowledge and, if called as a witness, I could and would competently testify thereto under oath.
2. I am the Chief Financial Officer of ATS Tree Services, LLC (“ATS”) and I also have a 5% ownership share of ATS.
3. I have served as ATS’s Chief Financial Officer or served effectively in that capacity for many years. As Chief Financial Officer, I am responsible for many administrative responsibilities at ATS, including employment agreements, employee onboarding, and finances. As a result of my role as Chief Financial Officer, I am familiar with the non-compete agreements that ATS asks its employees to sign and their importance to ATS’s business. I am also familiar with

the Federal Trade Commission's Non-Compete Clause Rule (the "Final Rule") and its requirements, and I understand the impact the Final Rule will have on ATS if it goes into effect.

ATS BACKGROUND INFORMATION

4. ATS began as a sole proprietorship in 2013, with Adam Thor Servin doing small residential tree jobs with his brother.

5. After one year, Adam committed to the long-range goal of growing and establishing a viable competitive tree service company in our community, providing residential, commercial, industrial, municipal, and special project tree services.

6. In 2015, ATS became a limited liability corporation.

7. It was almost impossible for a small two-man company like ATS to compete in the labor market with established tree companies. Experienced industry workers did not consider joining a small company like ours an upward move.

8. Instead, we decided and committed to staffing ATS by hiring and training tradesmen in-house instead of trying to pull employees from the experienced labor pool at other companies.

9. Many tree companies operate a tree crew using one or two skilled tradesmen and several general laborers. ATS formulated a different approach. Instead of hiring skilled tradesmen or laborers, we developed an in-house apprenticeship-focused program for an ATS Tree Service Professional Trainee. ATS does not hire employees as laborers. Each employee is hired as a trainee for a professional trade in arboriculture. When hired, our typical employee has no experience in the industry and no formal training in any field.

10. Our typical employment listing includes this language:

We are seeking highly motivated employees who are interested in expanding their skills in a professional trade. We will provide expert training for qualified individuals who join our team. The Tree Care Industry is a professional trade that involves education, personal growth,

development, and financial stability. For the right individual, it is a rewarding opportunity for a long-term career.

11. At the time an employee is interviewed during the hiring process, the employee is introduced to our company training program.

12. In ATS's training program, the employee is initially onboarded as an ATS Tree Crew Associate and then offered the following apprenticeships: ATS Bucket Operator Apprentice; ATS Skilled Climber Apprentice; ATS Crew Lead Apprentice; ATS CDL Driver Apprentice; and ATS Arborist Apprentice. The company provides full economic and logistic training support. Each completed apprenticeship includes a pay increase, and employees are encouraged to complete all the apprenticeships.

13. ATS Skilled Climber Apprentice:

- a. Skilled climbing involves technical training and expertise and is dangerous for the climber and the people and property on the ground. Climbers learn to climb safely using rope techniques and specialized ascending equipment as well as operate dangerous chainsaws while suspended high in the air. They use sophisticated rigging and lowering techniques and procedures in various settings. They also train to work with cranes for aerial removals. During aerial removals, heavy cranes are used to reach difficult places, enable the safe removal of dead-standing trees, and perform volume removals. Typically, a climber "rides the crane ball" up to the treetops, sometimes over 100 feet tall, and selectively dissects the tree limb-by-limb to be lowered by the crane to the ground for processing.
- b. These skills cannot be learned by an employee through online training materials, which is no substitute for the hands-on instruction and experience

that ATS provides. I believe it would be irresponsible to allow someone who only accessed online training materials to do ATS's tree trimming work. The fear factor alone takes months to get comfortable with and only abates with developed confidence in the ropes and safety procedures employed.

- c. The ATS apprenticeship program for skilled climbers includes technical training in climbing, rigging/lowering skills, safely attaching climbing lines, ascending and descending, safely lowering limbs to the ground without damaging property or endangering staff, aerial chainsaw use, crane removals, and dealing with inherently dangerous climber situations and dangers to property and staff in the drop zone.
- d. ATS provides skilled climbing apprentices with almost \$4,000 worth of technical climbing equipment, including ropes, carabiners, specialized mechanical devices, climber chainsaws, personal safety gear, and a specialized helmet with a built-in noise-canceling intercom system for communication with staff on the ground. For safety reasons, each apprentice is responsible for maintaining their personal climbing gear and equipment.
- e. During the apprenticeship, the training climber will climb alongside Adam Servin, ATS's owner, or another experienced climber and discuss and evaluate each action before it is undertaken.
- f. The apprentice must log each climb, noting the type of climbing situation performed. The apprenticeship program involves documenting numerous working climbs alongside another skilled climber.

- g. During each of those climbs, ATS sacrifices productivity and income on jobs to provide the apprentice with the opportunity to learn to climb because such jobs will proceed more slowly than with a fully trained team. During that additional time, the company provides half a million dollars worth of trucks and equipment and a crew of four men to support the apprentice climber. The company's lost productivity cost for a crew throughout a climbing apprenticeship is likely tens of thousands of dollars over the six months to over a year that an apprenticeship lasts.
- h. When the apprentice has gone through all the potential climbing scenarios, ATS internally certifies him as a climber.

14. ATS Crew Lead Apprentice:

- a. ATS employees who apprentice to become crew leads are trained to oversee the completion and direction of work orders assigned to the crew. Working alongside a Crew Lead, a Crew Lead Apprentice learns to plan and oversee a job and lead and mentor other employees through coaching, training, planning, setting expectations, monitoring job performance, oversight, correction, and evaluation of ATS Crew Members. Responsibility for supervising an ATS job includes implementing work orders, organizing the crew in their proper places, positioning the equipment, ensuring that the tree care tasks are completed efficiently, and communicating and reinforcing standard operating procedures (“SOP”) and best practices to achieve expected productivity. The Crew Lead develops full knowledge of ATS Skilled Climber job descriptions and an intermediate understanding of climber processes and protocols. The ATS Crew

Lead is a dynamic position focused on meeting team productivity, efficiency, and safety standards. The Crew Lead is directly responsible for safe and efficient operations, recognizing potential job site hazards and obstacles and formulating solutions to complete jobs safely and efficiently.

- b. This position is layered over another crew position, such as an ATS Tree Crew Associate or Climber. The ATS Crew Lead is still responsible for the duties of his underlying position but receives a higher compensation for his additional leadership.
- c. The Crew Lead partners with management to identify process improvement opportunities and collaborates daily with management to review operational issues, challenges, and completion of work orders to client satisfaction expectations and ATS productivity expectations.
- d. This apprenticeship is internal to ATS. Typically, it takes two to three years of training and job experience to encounter all the situations a crew might encounter in the field.

15. ATS Bucket Operator Apprentice:

- a. In this apprenticeship, another operator mentors a trainee in this role to learn the technical aspects of operating front and rear-mounted bucket trucks, spider lifts, and the safety procedures for safely trimming and removing trees using an aerial platform. There is some overlap between this training and climber training. Aerial equipment can reach heights of up to 85 feet without climbing a tree and can be used for specific applications depending on accessibility. A trained operator is assigned his own truck or spider lift, for which he is

responsible for operating and providing routine maintenance. The specific aerial equipment assigned is typically costly, ranging from \$110,000 to over \$200,000.

b. This apprenticeship is internal to ATS.

16. ATS CDL Driver Apprentice:

a. To obtain a commercial driver's license (CDL) from the state, the company apprenticeship program offers in-house training by our staff CDL drivers and appropriate commercial trucks to prepare employees to pass the CDL test, including mastery of truck pre-trip inspection, truck maintenance, emergency procedures, and over-the-road driving. There are paid CDL driving schools available. Instead, we provide staff, company trucks, personal over-the-road driver training, and pay for the CDL state testing, medical card, and licensing. A CDL driver is vital to the company because they can legally drive any truck in the ATS fleet and are trained and prepared to properly maintain commercial vehicles for on-the-road inspections by the Pennsylvania Department of Transportation.

17. ATS Arborist Apprentice:

a. To become a certified arborist, the ATS employee takes an external training class. A certified arborist is an industry certification requiring extensive study, passing a comprehensive examination, and working for at least three years in the tree care industry. ATS will pay for and augment arborist training for its employees and recognize employees who have completed the arborist course with a pay increase before the official certification in three years.

- b. It is valuable for a company to have at least one certified arborist to assess specific tree diseases and ascertain whether a tree can be saved or should be removed.

18. ATS recently added the Equipment Operator apprenticeship as a sixth apprenticeship. Because ATS has grown in the level, scope, and sophistication of technical tree care and removals performed, our tree crews now rely on an increasing array of ground machinery and specialized vehicles to process and transport wood debris and heavy logs, ranging in weight from hundreds to thousands of pounds. Machinery enables heavy lifting to be transferred from employees to equipment.

19. We consider the designation of ATS Equipment Operator to be a first requirement and a gateway apprenticeship to all future ATS employment and training opportunities. Employees are provided with instruction and practical training to master the use of chainsaws, mini-skid steers, grapples and attachments, articulated loaders, chippers, stump grinders, log splitters, and hook lift trucks with bins. Training involves the effective, efficient, and safe use of equipment in the full variety of work environments encountered by ATS.

20. The operator also learns and performs standard equipment maintenance procedures and follows safety protocols. Employees are expected to demonstrate intermediate-level mastery as an equipment operator within three months of employment training.

21. ATS recognized with a pay increase that its non-administrative employees had completed the requirements to satisfy the new Equipment Operator apprenticeship in April 2024. ATS currently has its first employee proceeding through the apprenticeship.

22. ATS also takes all its employees on a company-paid and payroll-included trip to attend the annual Tree Care Industry Association (TCIA) Expo in a different city each year. The

typical cost to ATS is over \$10,000 for employees' travel, lodging, and attendance at the three-day convention. There, they participate in a program with mostly tree company owners. ATS is one of the few companies that takes their entire staff to these events because we do not classify our employees as laborers but as professional tradesmen. In addition to participating in TCIA Expo training seminars and breakout sessions on tree care skills, they can explore the latest state-of-the-art equipment and techniques and further develop their professional stature.

23. The company also takes its employees to several annual industry training events, such as crane school.

24. As of July 1, 2024, ATS has thirteen employees:

- a. Nine employees are qualified as Equipment Operators.
- b. Three employees are qualified as Bucket Truck and Aerial Operators.
- c. Four employees are qualified as Skilled Climbers.
- d. Four employees are Licensed CDL Drivers.
- e. One employee is a Certified Arborist.
- f. Three employees are Qualified Crew Leaders.
- g. One employee is the Company Estimator.
- h. Three employees serve in administrative roles as CEO, part-time CFO, and part-time Media Director.

25. All ATS's current employees are categorized as full-time "EPIC employees" (Employee Plan for Incentives and Compensation) subject to a non-compete agreement, except the administrators.

26. The EPIC Employee is given various benefits, including health, dental, prescription, short-term disability, long-term disability, life, and accidental death and dismemberment insurance, as well as 15 paid personal days annually.

27. ATS employees receive on-the-job training that is equivalent or superior to training provided in some trade schools while being paid for the work they do as they learn and master each skill.

28. Because most of the training is performed “on the clock,” the employees are paid according to wage and hour laws, and as such, the training provided by ATS is not reimbursable.

ATS’S NON-COMPETE AGREEMENT

29. As part of the ATS staffing strategy as described above, we include an employee non-compete clause in our employment agreement that reasonably limits an employee from competing directly with ATS for one year after departure in work of the same type engaged in while an employee at ATS, and within a geographical area that includes the areas worked in while an employee of ATS.

30. ATS’s non-compete agreement does not extend to circumstances in which a tree care member works for a competitor in a different capacity, such as in a mechanic position rather than a tree care role.

31. The outer range of the geographical area where an employee has worked for us is generally less than 20 miles from the company depot in Perkasio, Pennsylvania, and is dictated by the distance that we are able to profitably transport our heavy trucks and equipment to complete a job and haul downed trees away. We do not construe this to be a strict radius.

32. ATS previously used a non-compete agreement that had a broader scope, but ATS's current non-compete agreement reflects the extent to which ATS would seek to enforce its non-compete agreement against any employee.

33. Prospective employees are advised of ATS's non-compete agreement through ATS's employment application, which contains a section advising applicants that by applying, they "understand and agree that as a condition of employment and to the extent permitted by federal, state, and local law, I will be required to sign a confidentiality, restrictive covenant, and/or conflict of interest statement."

34. The entire employment agreement is reviewed with the employee during a three-hour orientation program that I generally conduct.

35. During the employment agreement review, I specifically read, discuss, and fully explain the non-compete clause and its purpose and importance to ATS.

36. In my experience, the new employees appreciate the explanation that is provided for why they are asked to sign the non-compete agreement.

37. ATS also currently employs a full-time estimator. The estimator works closely with the owner, is privy to all proprietary information, and has administrator access to the company software platform containing all current and historical client, job, and billing data. He is a trusted key employee who is also the primary face of the company to many of our current clients.

38. The estimator is covered under the same non-compete as the EPIC employees based on his intimate knowledge of the company's internal workings and his relationship with our clients. When hired, he was offered a full salary and benefits package in consideration for signing the noncompete agreement.

39. The departure of an estimator immediately to a direct competitor with this information could cause significant damage to ATS's business by allowing direct competitors to identify ATS's customers, the terms of its pricing and services for those customers, the essence of the company's secret sauce, and to use that proprietary information to take those customers from ATS and to provide a competitor with a competitive advantage that would otherwise take the competitor years to achieve.

HARM TO ATS

40. ATS has centered its strategic staffing process on providing exceptional and unparalleled apprenticeship training for years.

41. It was through our careful integration of reasonable non-compete agreements into our business strategy that our small company, which started as a sole proprietorship, could effectively compete with numerous more developed, long-established, and well-financed competitors.

42. This developed system is fundamental to and defines our company culture.

43. By strategically using reasonable noncompete agreements, we establish a solid relational foundation that allows us to offer comprehensive training and a long-term commitment to our employees' professional development.

44. This approach protects us from the free-riding problem, where competitor firms poach our skilled tradesmen to avoid their own training costs without repercussions.

45. Unlike other tree care companies, ATS does not hire general laborers; our tree care employees are company-trained, technically skilled apprenticeship graduates or progressing well in their current apprenticeships. This makes them prime targets for poaching by competitors.

46. However, eliminating noncompete agreements would significantly alter our current situation.

47. We are presently comfortable with long-term commitments, allowing us to strategically focus our administrative efforts on ensuring year-round employment for our staff.

48. Other tree care companies have busy and slow periods throughout the year. These companies have approached our employees with attractive offers during their busy periods when they are short-handed.

49. Our employees typically do not entertain these offers, knowing they are committed to us under a one-year noncompete agreement, and we are equally committed to our employees.

50. If non-compete agreements are eliminated, we expect other companies to attempt to poach our employees and that some of those employees would leave, as we know that employees are sometimes tempted by short-term gain in work or slight increases in pay. And if the Final Rule goes into effect, ATS, too, could presumably attempt to poach other companies' employees. But ATS is far stronger and more productive if we are able to focus on building a workforce that is committed to working for us and to whom we are committed than constantly attempting to poach employees from other companies.

51. We currently employ four trained ATS Skilled Climbers and operate three tree crews daily. Each crew requires a Skilled Climber, with one extra as a backup. We plan to start a fourth crew as more employees progress through their apprenticeships.

52. This slow and meticulous process has fostered predictable and steady growth for our company.

53. However, it would be a significant setback if the Final Rule goes into effect and we lose even one climber to a competitor. The impact is double; while losing our climber weakens us, our competitor is strengthened by gaining him.

54. The non-compete agreement allows ATS to have a reasonable amount of time—one year—to replace a valuable employee and train a new employee before the value of the training provided by ATS to the former employee can be used to compete directly with ATS. Otherwise, ATS will train a competitor's employees for free.

55. In that scenario, it would be infeasible to invest substantial effort and resources into developing our employees.

56. Additionally, tree care is inherently dangerous, with high worker's compensation insurance rates and numerous injury and death hazards.

57. ATS has established comprehensive safety standards, protocols, training, and SOPs to mitigate workplace injuries.

58. Our employees are trained to operate costly machines that transfer heavy work and risk from humans to equipment.

59. Each employee is outfitted with hard-toe boots and chainsaw pants to prevent leg injuries. They also wear certified safety helmets with integrated face screens and noise-canceling intercom systems, allowing for clear communication among crewmembers despite the loud equipment. These helmets cost \$700 per employee.

60. Because we apprentice our workers, they know how to perform their duties following our stringent safety protocols. Common examples of unsafe practices that we ensure our employees do not use include neglecting to use two tie-in points in a tree or using a chainsaw one-handed from a bucket truck.

61. Beyond increased worker's compensation insurance expenses, the additional risk to life and limb is incalculable.

62. ATS SOPs have been developed over ten years through in-depth research and analysis focusing on efficiency optimization and procedural safety.

63. ATS considers the sum of its operating procedures and methodologies to be proprietary and advanced in the tree care industry.

64. Consistent implementation has resulted in five-star customer reviews and community recognition of our company as dependable, quality-driven, prompt, professional, and prepared.

65. A non-compete ban would erode our current program, leading to a more mobile and transient workforce lacking in formative training and habitual commitment to our SOPs, reducing overall performance to the lowest common denominator in the industry and arguably resulting in higher prices to our clients with a diminished level of service. A more transient workforce would negatively affect our company operations and effectiveness.

66. The Final Rule will also disrupt our long-standing contractual relationships with our employees.

67. We have operated for years under the expectation of mutual benefit from the non-compete agreements.

68. It is impossible for ATS to recoup past company expenditures for employee training under our employment agreement.

69. Without a non-compete, employees may leave for a direct competitor, and ATS has no other mechanism to prevent the training we provide from leaving our company and being immediately utilized by direct competitors, free-riding on the work we have done.

70. The uncertainty introduced by the ban would disrupt our efficient and predictable operations. This increased uncertainty and unpredictability would immediately decrease the value of our company. ATS relies on reasonable non-compete agreements to establish an effective economic business model that benefits our company, employees, clients, and community.

71. Additionally, the immediacy of the Final Rule's implementation in the absence of a preliminary injunction would force ATS to confront the necessity of reassessing our company's operations immediately.

72. Our entire apprenticeship program, pay scale, employee benefits package, and company commitment to long-term professional development would need to be reconsidered without the simple assurance and stability afforded by reasonable non-compete agreements from employees.

73. The company's current employee program and operating system were developed over years of practice, hundreds of hours of legal research, and extensive administrative contemplation and analysis.

74. ATS would suffer additional damage if the Final Rule goes into effect, but is later determined to be unlawful and unenforceable. ATS would seek to reinstate its non-compete agreements. ATS would need to seek legal counsel to determine how to approach the reinstatement of non-compete agreements.

75. ATS would also need to negotiate with its employees and provide new consideration for them to re-enter into non-compete agreements with ATS, if they are even willing to reenter a non-compete agreement.

76. The negotiations over re-entry into a non-compete agreement would also occur in the context of a new status quo in which our employees would have been working for ATS for a

period of time without a non-compete. The use of non-compete agreements would likely be more politically contentious under these circumstances as well. Together, these circumstances would likely erode ATS's culture of mutual commitment with its employees that we believe is critical to ATS's success.

77. Executed on July 17, 2024, at Perkasie, Pennsylvania.



David Servin