UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEINANI DESLANDES, on behalf of herself and all others similarly situated, Plaintiff, v. McDONALD'S USA, LLC, McDONALD'S CORP., and DOES 1 through 10, Defendants.	Civil No. 17-cv-04857 **Hon. Jorge L. Alonso**

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT.)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT.)

Page(s)

TABLE OF AUTHORITIES (CONT.)

Page(s)

TABLE OF AUTHORITIES (CONT.)

Page(s)

Statutes

Rules

Other Authorities

INTRODUCTION

McDonald's USA, LLC and McDonald's Corporation ("McDonald's") organized, orchestrated, and enforced an anti-competitive no-solicitation and no-hiring agreement between and among itself and its franchisees. That agreement was evidenced at least in part by an explicit provision embedded in the standard McDonald's franchise agreement pursuant to which franchisees agreed not to employ, or seek or solicit to employ, any person "who is at the time employed by McDonald's, any of its subsidiaries, or by any person [i.e., a franchisee] who is at the time operating a McDonald's restaurant." Amended Class Action Complaint ("FAC") ¶ 87. In response to this suit, McDonald's removed this provision from its standard franchise agreement.

Plaintiff Leinani Deslandes was an hourly wage earner at a McDonald's branded franchise restaurant in Apopka, Florida. Seeking an exit from a stagnating job opportunity and unfair work conditions, she applied in 2015 for an open position at a nearby "McOpCo" restaurant—a McDonald's restaurant owned and operated by McDonald's or its subsidiary. Although the manager of that restaurant expressed interest in hiring Plaintiff, a McDonald's corporate employee informed Plaintiff that the McOpCo restaurant could neither interview her nor hire her unless her franchisee-employer "released" her, which it refused to do.

McDonald's asks this Court to characterize the no-hiring agreement as "vertical" in nature and to afford it rule of reason antitrust scrutiny, either because it takes place in a franchise setting or because franchisor-franchisee contracts are vertical. But even if aspects of McDonald's relationship with its franchisees and McOpCo's can be described as vertical, the no-hire agreement here played out in a decidedly horizontal fashion, between restaurant outlets operating at the same market structure level and which McDonald's itself labels competitors of one another. Further, even where vertical components also exist, horizontal components of a hub-and-spokes conspiracy

are treated as horizontal and subject to *per se* condemnation. *United States v. Apple, Inc.*, 791 F.3d 290, 323-25 (2d Cir. 2015), *cert. denied*, 133 S.Ct. 1376 (2016); accord *Toys 'R' Us, Inc. v. Federal Trade Commission*, 221 F.3d 928, 935-36, 940 (7th Cir. 2000).

Nor is there anything "implausible" about the existence of this conspiracy. It is evidenced at least in part by a standard form written instrument agreed-to by sophisticated business entities entering into franchise agreements. McDonald's itself characterizes that written no-hire agreement as "widely adopted and undisputed." Mem. at 14. Whatever portion or application of the agreement that was not included in the standard franchise contract was *admitted* to by McDonald's when it told Plaintiff that she could not be hired by the competing McOpCo store. Because Plaintiff adequately pleads a *per se* Section 1 claim and adequately pleads viable state-law claims, McDonald's motion should be denied in its entirety.

FACTUAL ALLEGATIONS

McDonald's Franchise and Company-Owned Restaurants

McDonald's restaurants are operated by a franchisee, an affiliate, or, in the case of company-operated stores, by a McOpCo. FAC ¶ 24. Approximately 90% of McDonald's U.S. restaurants are franchised, while the remainder are McOpCo outlets. *Id.* at ¶ 25. Some 420,000 employees work for McDonald's or these franchise restaurants. *Id.* at ¶ 29. Each McDonald's franchise is an independently owned and managed business, operated as a separate legal entity from McDonald's. *Id.* at ¶ 27. Franchise documents specify that franchisees are responsible for all obligations and liabilities of the business, including day-to-day operations. *Id.* at ¶¶ 35, 74, 82 (franchisees agree that they "shall have no authority, express or implied, to act as agent of McDonald's or any of its affiliates for any purpose. . . . Franchisee and McDonald's are not and do not intend to be partners, associates, or joint employers in any way. . .."). McDonald's admits

that each franchise is its own economic decision-maker on employment issues. Answer [Dkt. No. 30], ¶ 50.

McDonald's also specifies that franchisees and the McOpCo outlets are competitors. The franchise documents dictate repeatedly that franchisees have no exclusive, protected, or territorial rights in the contiguous market area of their restaurant location. McDonald's discloses that franchisees may face competition from other franchisees, new franchisees, and new McDonald's restaurants owned and operated by McDonald's itself. FAC ¶¶ 36, 75, 76, 78 (no "exclusive grant, exclusive territorial rights, protected territory . . . .") McDonald's informs franchisees that they may face competition from other franchisees, from McOpCo's, or from other channels of distribution. *Id.* at ¶ 77. A franchisee also may compete with offerings at other McDonald's stores by allowing customers to use certain credit/ debit cards or gift cards, neither of which is a system-wide requirement. *Id.* at ¶ 80. Franchisees also are permitted to negotiate purchasing terms with approved suppliers and may seek approval of new suppliers. *Id.* at ¶ 79

McDonald's Commitment to Wage Reduction

Since the late 1990s, McDonald's has been committed to reducing labor costs. FAC at ¶¶ 39, 48-49 (replacing employees with electronic kiosks; using devices to "save money on live staffers"; responding to labor strikes). Although wages are not uniform among the competing franchisee and McOpCo stores, low wages are consistent across the McDonald's system of restaurants. *Id.* at ¶ 58.

One way that McDonald's suppresses labor costs is through the no-hire and no-solicitation agreement at issue in this case. In particular, McDonald's and its franchisees have agreed not to recruit or hire each other's employees. *Id.* at ¶¶ 1, 84. This agreement was orchestrated, dispersed, and enforced by McDonald's and among all franchisees, at least in part, through an explicit contractual agreement contained in standard McDonald's franchise agreements. *Id.* at ¶ 1.

The relevant provision from the McDonald's franchise agreement states:

> *Interference With Employment Relations of Others.* During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph [] shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

Id. at ¶ 87.

That standard agreement was executed by McDonald's and by franchisees alike—at least up until the time that this lawsuit was commenced. *Id.* at ¶¶ 1, 86, 93. McDonald's 2013 Franchise Disclosure Document ("FDD")[1] and 2014 FDD both included the provision. *Id.* at ¶¶ 90, 91. Sometime in 2017, McDonald's removed the provision from its franchise agreement. The current 2017 FDD, most recently amended August 1, 2017—i.e., after the filing of this suit—does not include the provision. *See* FAC ¶ 92. Either way, franchises are offered on standardized terms, so a franchisee who enters into a franchise agreement with McDonald's knows that all franchisees have agreed to abide by the same terms. *Id.* at ¶ 85. At the beginning of 2017, more than 13,000 restaurants operated under existing McDonald's franchise agreements, none of which would have executed the new 2017 form FDD. *Id.* at ¶ 93.

Although the explicit provision technically restricts only franchisee hiring, it evidences a broader agreement. In fact, *McDonald's itself* adheres to the restriction in its operation of McOpCo stores. FAC at ¶¶ 6, 68, 88 (provision interpreted and enforced by McDonald's as applying to hiring in McOpCo store where Plaintiff applied). McDonald's employment applications allow restaurants to flag applicants currently employed by competing McDonald's franchisees or

[1] Exhibit 1 to McDonald's Memorandum ("Mem.") reflects excerpts from the *2013* FDD, not, as McDonald's identifies it, *see* Mem. at vii., the 2003 FDD.

McOpCo stores, thus allowing potential employers to avoid violations. *Id.* at ¶ 98. McDonald's standard franchise agreement includes enforcement mechanisms which could be applied to any breach of this no-hire and no-solicitation provision. *Id.* at ¶ 89.

Plaintiff Deslandes

In 2009, Plaintiff began working for Bam-B Enterprises of Central Florida, Inc., at its franchised McDonald's-brand restaurant in Apopka, Florida, where she tolerated a difficult work environment and overtime wage violations. FAC at ¶¶ 59, 63. Plaintiff took on McDonald's proprietary training programs in order to advance through the McDonald's system, ultimately becoming a Department Manager. *Id.* at ¶ 63. By 2015, she was scheduled for a final weeklong course at McDonald's "Hamburger University," which was necessary to advance to a General Manager position. *Id.* at ¶¶ 63, 64. When Bam-B learned that Plaintiff was pregnant, it canceled Plaintiff's training. *Id.* at ¶ 64.

Shortly thereafter, Plaintiff applied for a departmental manager opening at a nearby McDonald's company-owned McOpCo restaurant, a position that would have included increased pay and, Plaintiff believed, better treatment. *Id.* at ¶¶ 66, 67. The manager of the McOpCo restaurant expressed a desire to hire Plaintiff. *Id.* at ¶ 68. Plaintiff informed the manager that she was currently employed at Bam-B's McDonald's restaurant. *Id.* The next day, a McDonald's corporate employee called Plaintiff and explained that unless Bam-B "released" Plaintiff, the McOpCo restaurant could not even interview (much less hire) her because she was currently employed by a McDonald's franchisee. *Id.* Plaintiff asked Bam-B to "release" her so that she could pursue the opportunity, but it refused. *Id.* at ¶ 69. Unable to pursue an opportunity within the McDonald's system, in January 2016 Plaintiff took employment at Hobby Lobby at a significantly lower pay rate of $10.25 per hour. *Id.* at ¶ 71.

As Plaintiff alleges, training in McDonald's management is only valuable and transferrable within the McDonald's system. FAC ¶ 71. This is because the education, training and experience are unique to McDonald's. *Id.* at ¶ 110. Training is provided through proprietary curricula and systems which, according to McDonald's, are designed to provide "specific skill sets in the various facets of the conduct of a McDonald's restaurant." *Id.* at ¶ 112. McDonald's franchises also utilize proprietary store operating procedures, inventory control and bookkeeping/accounting procedures, and McDonald's-prescribed equipment. *Id.* McDonald's franchises also utilize McDonald's own proprietary computer systems, platforms, applications, and data systems. *Id.* at ¶ 111. Franchises electronically submit store financial information to McDonald's via a separate proprietary web-based system. Experience with these systems is of little value to other restaurants. *Id.*

LEGAL STANDARD

There is no heightened pleading standard for antitrust cases. *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991, 999 (N.D. Ill. 2011). A complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). That statement must "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While "detailed factual allegations" are not required, a complaint must include sufficient facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Twombly*, 550 U.S at 570. The complaint "must establish a nonnegligible probability that the claim is valid[.]" *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010). Even circumstantial evidence can suffice in a case asserting an antitrust conspiracy; the plaintiff need not plead direct, or "smoking gun" evidence of agreement. *See id.* at 628-29. Finally, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in the plaintiff's favor. *Hecker v. Deere & Co.*, 556 F.3d 575, 580 (7th Cir. 2009).

ARGUMENT

I. PLAINTIFF STATES A CLAIM UNDER THE SHERMAN ACT

To state a claim under Section 1 of the Sherman Act a plaintiff must allege (1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in the relevant market; and (3) and accompanying injury. *See Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993). There is no requirement to plead or prove a relevant market or market power with respect to restraints of competition that are illegal *per se*. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940)

A. Plaintiff Adequately Alleges a *Per Se* Violation of the Antitrust Laws

1. Horizontal agreements between competitors are per se *unlawful.*

It has long been the case that a horizontal agreement among competitors to fix price is a *per se* violation of the antitrust laws. *Socony-Vacuum*, 310 U.S. at 223 ("Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se."); *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422 (1990) (boycott among competing lawyers in order to increase pay rates "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act" and "was unquestionably a 'naked restraint' on price and output."). It matters not whether any specific price was literally "fixed" or agreed-to; the *per se* rule extends well beyond that simplest form of cartel. *Socony-Vacuum*, 310 U.S. at 222 (Sherman Act proscribes price-fixing even where prices paid by the combination "were not fixed in the sense that they were uniform and inflexible" and prohibits "agreements to raise or lower prices whatever machinery for price-fixing was used."); *Superior Court Trial Lawyers*, 493 U.S. at 422 (constriction of supply "the essence of 'price-fixing,'").

Agreements not to compete among horizontal competitors are the quintessential *per se* violation of the antitrust laws. *See United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (affirming conviction of defendants who conspired to refrain from bidding on each other's former billboard leases). The *per se* rule also applies to agreements to restrict the geographic territories where competitors advertise. *See Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (market allocation agreement *per se* unlawful, even if not a perfect allocation). It applies where sellers agree not to solicit each other's customers. *United States v. Cooperative Theaters of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988) (*per se* standard applied to agreement between movie theater booking agents to refrain from soliciting each other's customers, even though agents remained free to accept unsolicited business from these customers). And, as applicable here, the *per se* rule applies to agreements among employers that reduce competition for employees. *See Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 157-58 (N.D.N.Y. 2010) (denying defendants' motion for summary judgment on *per se* claim, holding that information exchange between defendants in an effort to fix nurse wages constituted a conspiracy that was illegal *per se* and tantamount to a conspiracy to fix prices); *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012) (plaintiffs "successfully pled a *per se* violation of the Sherman Act for purposes of surviving a 12(b)(6) motion"); *Doe v. Arizona Hosp. and Healthcare Ass'n*, No. CV 07-1292-PHX-SRB, 2009 WL 1423378 (D. Ariz. Mar. 19, 2009) (temporary employee nurse plaintiffs alleged facts sufficient to support claim of *per se* illegality against hospitals where they alleged that defendants conspired to keep temporary nursing wages below free market levels). *See also* Department of Justice Antitrust Division and Federal Trade Commission *Antitrust Guidance for Human Resource Professionals* (October 2016) ("no-poaching agreements among employers . . . per se illegal under the antitrust laws"; "firms that compete to hire or retain employees are

competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services. It is unlawful for competitors to expressly or implicitly agree not to compete with one another. . . .").[2]

In *In re High Tech*, the plaintiffs alleged that certain high tech companies engaged in a nationwide "conspiracy to eliminate competition between them for skilled labor, with the intent and effect of suppressing the compensation and mobility of [their] employees." 856 F. Supp. 2d at 1110. The "overarching conspiracy" alleged by the plaintiffs included "an interconnected web of express bilateral agreements" between certain defendants, each involving a company under the control of the late Steven P. Jobs and/or a company whose board shared at least one member of Apple's board of directors. *Id.* at 1110-12. As here, the defendants moved to dismiss, arguing that the complaint was deficient for "failure to allege a relevant market" or that defendants had power in that market. The court rejected that argument noting that the plaintiffs had alleged a nationwide labor market which, in light of the allegation that the defendants succeeded in distorting the market, was not facially unsustainable. *Id.* at 1122. Specifically, the court noted that it *need not engage in a market analysis at all* unless and until it decided that a rule of reason analysis would govern. *Id.*, citing *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 462 (1986); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978). That decision, it concluded, was more appropriately addressed on a motion for summary judgment. Because the plaintiffs had successfully pleaded a

[2] Available at https://www.justice.gov/atr/file/903511/download (last visited Sept. 17, 2017). While the DOJ/FTC Guidelines are not binding, similar antitrust guidelines promulgated by the DOJ and the FTC are often relied upon and cited as persuasive authority in the Seventh Circuit. *See, e.g., County Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 736 (7th Cir. 2007) (citing DOJ/FTC Antitrust Guidelines for the Licensing of Intellectual Property); *Abbott Labs. v. Baxter Internat'l, Inc.*, Nos. 01 C 4809, 01 C 4839, 2002 WL 467147, at *11 (N.D. Ill. Mar. 27, 2002) (same); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 949 (7th Cir. 2003) (citing DOJ/FTC Antitrust, Unfairness, Deception Policies and Guidelines).

per se violation of the Sherman Act, "no market analysis is required at this time." *Id.* citing *Socony-Vacuum* , 310 U.S. at 224 n.59.

2. McDonald's no-hire agreement is a horizontal agreement between competitors.

McDonald's argues that the restraint on competition at issue in this case cannot be judged under the *per se* standard because it takes place within a "franchise context" and vertical restraints in that context are governed by the rule of reason. Mem. at 7, 11. This argument fails.

The restraint on competition in this case—as evidenced by Plaintiff's experience—was a restraint between McDonald's restaurant outlets operating at the *same* level of distribution. Plaintiff was an employee of a McDonald's franchisee (Bam-B). FAC ¶ 59. McDonald's discloses to and requires franchisees to acknowledge that they may compete against other franchisees and against company-owned stores. *Id.* at ¶¶ 36, 75-78. Plaintiff applied for an opening at a McOpCo (i.e., company-owned) store. *Id.* at ¶¶ 66, 67. The manager of that McOpCo restaurant expressed an interest in hiring Plaintiff but after Plaintiff disclosed that she was a Bam-B employee, a McDonald's corporate employee intervened to inform Plaintiff that she could not be hired by the McOpCo absent a "release" from Bam-B. *Id.* at ¶ 68. Because Bam-B and the McOpCo were situated as horizontal competitors, Plaintiff was the victim of a *horizontal* restraint.

To be sure, Plaintiff alleges that McDonald's orchestrated and enforced an agreement between and among franchisees and itself (including in its operation of McOpCo stores). FAC at, *e.g.*, ¶¶ 1, 5, 68, 87. (The fact that it was a McDonald's corporate employee who intervened to squelch Plaintiff's opportunity supports this allegation.) Because it did so "in part," *id.* at ¶¶ 1, 5, through the use of the no-hire provision contained in franchise agreements, McDonald's argues that this makes the overall agreement vertical. Not so. To determine whether an agreement is horizontal or vertical, it is the *nature of the restraint* that the Court must evaluate, not the identity

of the party who joins in to impose it. *United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2015), *cert. denied*, 133 S. Ct. 1376 (Mar. 7, 2016). In *Apple*, the defendant entered into separate agreements with major publishing companies in connection with its launch of the iBookstore for its iPad tablet. The government alleged that Apple and the publishers had conspired to raise prices across the nascent ebook market. Even though Apple, a consumer-facing retailer, operated at a different level of the market structure than the publishers, the Second Circuit had no difficulty concluding that the relevant restraint in the case was a *horizontal* restraint subject to *per se* condemnation:

> But the relevant "agreement in restraint of trade" in this case is not Apple's vertical Contracts with the Publisher Defendants . . . it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices. As explained below, horizontal agreements with the purpose and effect of raising prices are *per se* unreasonable because they pose a "threat to the central nervous system of the economy," [*Socony-Vacuum Oil Co.*, 310 U.S. at 224 n.59]; that threat is just as significant when a vertical market participant organizes the conspiracy. . . . The competitive effects of that *same restraint* are no different merely because a different conspirator is the defendant.

Apple, 791 F.3d at 323. The Second Circuit forcefully rejected the proposition that "one who organizes a horizontal price-fixing conspiracy . . . among those competing at a different level of the market has somehow done less damage to competition than its co-conspirators." *Id.* at 297. There is thus no safe harbor for the orchestrator of a horizontal conspiracy merely because the organizer operates at a different level of the market structure. *See id.* at 322 ("the Supreme Court and our Sister Circuits have held all participants in 'hub-and-spoke' conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade." (citations omitted)). *See also In re Musical Instruments and Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 & n.3 (9th Cir. 2015) (horizontal aspects of hub-and-spoke conspiracy analyzed under *per se* rule). "It is the type of restraint Apple agreed to impose that determines whether the *per se* rule or the rule of reason is appropriate. These rules are means of evaluating 'whether [a] *restraint* is unreasonable,' not the

reasonableness of a particular defendant's role in the scheme." *Apple*, 791 F.3d at 322, quoting and citing *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990); *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984) ("*NCAA*").

This Circuit is in accord. In *Toys 'R' Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000), the retailer Toys 'R' Us ("TRU") entered into and used a network of vertical agreements with toy manufacturers to restrain price competition from warehouse clubs like Costco. The FTC found that TRU "orchestrated a horizontal agreement among its key suppliers to boycott the [warehouse] clubs." 221 F.3d at 932. Evidence showed that the manufacturers agreed to boycott the warehouse clubs on the condition that their competitors would do the same, that TRU policed the boycott, and that the boycott was effective. *Id.* at 932-33. Notwithstanding TRU's argument that its dealings with the manufacturers were separate, vertical agreements, the Seventh Circuit easily concluded, "That is a horizontal agreement." *Id.* at 936. As the court noted, "[t]aking steps to prevent a price collapse through coordination of action among competitors has been illegal at least since [*Socony-Vacuum*]. Proof that this is what TRU was doing is sufficient proof of actual anticompetitive effects that no more elaborate market analysis was necessary." *Id.* at 937.

Likewise, in *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993), the fact that a conspiracy among the plaintiff's boat-selling competitors to preclude plaintiff's participation in certain boat shows was joined by the operator of the boat shows (who was not a horizontal competitor) "does not transform [the restraint] into a vertical agreement." 8 F.3d at 1220-21. The district court in *Denny's Marina* had entered summary judgment against the plaintiff for the absence of "a sufficient showing of a potential market-wide impact." *Id.* at 1219. The Seventh Circuit reversed, as where the restraint alleged "constitutes a horizontal price-fixing conspiracy, it is *per se* an unreasonable restraint of trade." *Id.* at 1220, citing *Arizona v. Maricopa*

County Medical Society, 457 U.S. 332, 348 (1982); *Socony-Vacuum*; *Superior Court Trial Lawyers*. It noted:

> As far back as 1940, it has been clear that horizontal price-fixing is illegal *per se* without requiring a showing of actual or likely impact on a market. . . . This is because joint action by competitors to suppress price-cutting has the requisite substantial potential for impact on competition . . . to warrant *per se* treatment. The district court would require plaintiff to demonstrate a particular potential for impact on the market, when one of the purposes of the *per se* rule is that in cases like this such a potential is so well-established as not to require individualized showings. . . . The pernicious effects are conclusively presumed.

Id. at 1221-22 (citations and quotations omitted).

It is no answer to argue, as McDonald's does, that vertical non-price restraints imposed by a franchisor and vertical price restraints are governed by the rule of reason under, respectively, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). *See* Mem. at 7. Those rules refer to *vertical* restraints. The restraint here—although organized and policed by McDonald's—is a *horizontal* restraint between and among ostensible competitors. As the Second Circuit said in *Apple*, this is in no way inconsistent with *Leegin*. In *Leegin*, the Court specifically cautioned that "vertical price restraints can also be used to organize horizontal cartels to increase prices, which are, 'and ought to be, per se unlawful.' . . . When used for such a purpose, the vertical agreement may be 'useful evidence . . . to prove the existence of a horizontal cartel.'" *Apple*, 791 F.3d at 324, quoting *Leegin*, 551 U.S. at 893 (citations omitted). It is also the case, as noted in *Apple*, 791 F.3d at 324, that *Leegin* addressed only the lawfulness of the manufacturer's vertical agreements and not the plaintiff's claim that the manufacturer also "participated in an unlawful horizontal cartel with competing retailers." *See Leegin*, 551 U.S. at 907-08. Nor did *Leegin* reject *per se* liability for hub-and-spokes conspiracies generally. Even if vertical agreements would need to be evaluated under the rule of reason, a hub-and-spokes conspiracy's vertical organizer "has not only committed to

vertical agreements, but has also agreed to participate in the horizontal conspiracy. In that situation, the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is 'and ought to be, *per se* unlawful.'" *Leegin*, 551 U.S. at 893; *see also Apple*, 791 F.3d at 324-25.

3. McDonald's no-hire agreement cannot be justified as having "pro-competitive" benefits.

Without accounting for any of the authority to the contrary cited above, McDonald's argues that its no-hire agreement cannot be *per se* unlawful because it has (McDonald's says) pro-competitive benefits or because it is comparable to a common law covenant not to compete. None of the authority that McDonald's cites, however, controls.

McDonald's argues that its no-hire agreement is "eminently reasonable" because it prevents franchises from "raiding" one another's employees. Mem. at 1, 8. McDonald's cites a similar "no-switching" provision addressed in *Williams v. I.B. Fischer Nev.*, 794 F. Supp. 1026 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993), which pertained to the Jack-in-the-Box franchise system. *Williams*, however, was decided (on summary judgment) on the basis that the defendants, the franchisor and the plaintiff's former employer-franchisee, were "a single enterprise, incapable of competing for purposes of Section 1 of the Sherman Act." 794 F. Supp. at 1032. According to the court, competition between the entities—the "cornerstone" of a Section 1 claim—simply did not exist and so there could be no conspiracy between them. *Id.* at 1031 (noting, among other things, that Jack-in-the-Box franchisees contract for geographic exclusivity "to minimize competition between" them). Plaintiff here complains of a no-hire agreement between

horizontal actors who have no such exclusive territory and who actually compete with each other. *See* FAC ¶¶ 36, 75-78.[3]

Eichorn v. AT&T Corp., 248 F.3d 131 (3d Cir. 2001), upon which McDonald's relies heavily, involved a challenge to AT&T's agreement not to hire for a period of time certain of its own former employees (those who earned more than $50,000 per year) from the company to which it was selling a portion of its business. The Third Circuit applied a rule of reason analysis but did so explicitly with reference to no-hire agreements "entered upon the legitimate sale of a business to a third party." 248 F.3d at 144; *see also id.* at 144 n.2 ("we find no cases in which a no-hire agreement *entered into upon the sale of a business to a third party* . . . was found to be a horizontal price fixing conspiracy") (emphasis supplied). With this limitation, it is no surprise that the *Eichorn* court found no cases applying the *per se* rule "in similar factual circumstances." Mem. at 1. The McDonald's no-hire agreement is untethered to the sale of a business to a third party and cannot fairly be described as a limited covenant not to compete.

Coleman v. Gen. Elec. Co., 643 F. Supp. 1229 (E.D. Tenn. 1986), *Cesnik v. Chrysler Corp.*, 490 F. Supp. 859 (M.D. Tenn. 1980), and *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 225 (7th Cir. 1981) also involved agreements entered into ancillary to the sale of a business to a third party. *Aydin Corp. v. Loral Corp.*, 718 F.2d 897 (9th Cir. 1983) involved a single departing executive's non-horizontal agreement not to "raid" his former employer and *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) did not even involve a no-hire covenant. Unlike Plaintiff's action, *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) involved what the court

[3] McDonald's has not argued in this motion that its franchisees, McOpCo stores, and it comprise a "single economic enterprise" incapable of conspiring. Plaintiff, accordingly, does not address that issue.

referred to as an intrafirm agreement rather than a classic interfirm horizontal restraint. In any event, neither *Eichorn* nor *any* of these other cases was decided on a motion to dismiss.

Finally, the cursory decision in *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332 (7th Cir. 1967), cannot bear the weight McDonald's attempts to put on it. In *Nichols*, the Seventh Circuit did not even reach the issue of whether the rule of reason should apply; it simply reversed summary judgment in favor of the defense, which it criticized as being "tantamount to holding that the complaint failed to state a claim." 371 F.2d at 337. With the recent removal of the explicit no-hire provision long-contained in its franchise agreements, McDonald's cannot plausibly assert that the no-hire agreement was necessary to its operations or that it offers or offered pro-competitive benefits. In any event, pro-competitive benefits are no defense to a *per se* violation.

B. There Is Nothing Implausible About the Restraint Alleged

McDonald's argues that franchise contracts are "unquestionably" vertical and that no factual allegations describe "how the McDonald's franchise contracts possibly could have morphed into a horizontal agreement." Mem. at 11. As discussed above, while any given franchisee's contract with McDonald's may be vertical in nature, this is not the relevant agreement for purposes of this case.[4] McDonald's is the orchestrator, but the standard franchise agreements *evidence* a conspiracy between and among franchisees and McOpCo outlets, all of which operate horizontally at the same level. *See Apple*, 791 F.3d at 325 ("How the law might treat Apple's vertical agreements in the absence of a finding that Apple agreed to create the horizontal restraint is irrelevant. Instead, the question is whether the vertical organizer of a horizontal conspiracy

[4] It is unsurprising that rule of reason analysis governs challenges *by franchisees* to restrictions imposed by franchisors, *see* Mem. at 11 n.4 and cases cited therein, as that is a vertical context.

designed to raise prices has agreed to a restraint that is any less anticompetitive than its co-conspirators, and can therefore escape *per se* liability. We think not.").

Without question, the no-hire agreement was applied to Plaintiff in this very case in a horizontal fashion: Plaintiff was employed by a franchisee restaurant and she sought employment at a McOpCo restaurant. Those two restaurants are horizontal competitors. McDonald's points out that the franchise contracts do not include the McOpCo companies as parties, Mem. at 11 n.4, apparently arguing that McOpCo restaurants would thus not be bound by the no-hire provision contained in the franchise agreement. This argument can only backfire though. Plaintiff specifically alleges that McDonald's informed her that the McOpCo could not hire her while she was employed by the Bam-B franchise. The Court must accept this as true. McDonald's seems to suggest that the absence of McOpCo's from the franchise contracts undercuts Plaintiff's claims. The only reasonable inference that may be drawn from these facts is that the no-hire agreement did apply to the McOpCo. *See also* FAC ¶ 5 ("McDonald's effects this plan, *in part*, through an explicit contractual 'no hire' and 'no solicitation' clause in its franchise agreements").[5]

The same is true of McDonald's argument that "nothing in [¶] 14 of the franchise contract speaks to or suggests" that a "release" by Bam-B could have obviated the problem. Mem. at 13. McDonald's asks the Court to infer from this that the existence of an agreement is somehow implausible. But accepting, as it must, that this actually occurred, there are no reasonable inferences that the Court could draw other than that there *was* a no-hire agreement, it *was* used

[5] The Court may reasonably infer that the McOpCo restaurants also are subject to a franchise agreement. According to McDonald's Exhibit 1, "*All McDonald's restaurant businesses in the U.S. are operated under franchise agreements* and are owned by franchisees who are independent third parties, by affiliates . . . , or by our [McOpCo companies]. Currently . . . about 11% [of all U.S. restaurants] are *franchised* to McOpCo companies." Dkt. No. 35-1 at p.1 (emphasis supplied). While it is unknown whether that agreement includes an explicit no-hire provision, given Plaintiff's allegations, the no-hire agreement here did apply to McOpCo hiring.

against Plaintiff, and, if anything, it was again *broader* than what the technical language of Paragraph 14 dictated. The fact that it was a McDonald's corporate employee who intervened to prevent the hiring of Plaintiff by the McOpCo can reasonably lead only to the inference that there was in fact a broad horizontal agreement among restaurant outlets and that McDonald's orchestrated and policed this agreement.

McDonald's argues that Plaintiff has not established the "who, what, when, where, and how" of the agreement. Plaintiff has not here merely mustered parallel conduct and plus factors, and does not ask the Court to guess about an agreement. Part of the agreement is reduced to writing and was executed by more than 13,000 franchisees. McDonald's itself characterizes that written no-hire provision as a "widely adopted and undisputed" "restraint." Mem. at 14. Franchises are offered on standardized terms and each of those 13,000 franchisees knew that other franchisees had agreed to the same terms. An agreement not to hire Plaintiff was specifically cited to Plaintiff by a McDonald's corporate employee when Plaintiff was told that the McOpCo could not hire her. Franchisees share with McDonald's in a common motive to reduce labor costs, *see* FAC ¶¶ 39, 48-49, 81, and Plaintiff also alleges that the no-hire agreement was against the independent economic self-interest of franchisees. FAC ¶¶ 102-104. In light of Plaintiff's allegations, what would actually be implausible is if the Court inferred that there was *no* agreement.[6]

[6] Nor is there anything inherently implausible about a broad-based horizontal agreement. "A horizontal conspiracy can use vertical agreements to facilitate coordination without the other parties to those agreements knowing about, or agreeing to, the horizontal conspiracy's goals." *Apple*, 791 F.3d at 324. *See also In re High-Tech*, 856 F. Supp. 2d at 1118, citing *Beltz Travel Serv. Inc. v. Int'l Air Transp. Ass'n*, 620 F.2d 1360, 1366-67 (9th Cir. 1980) ("A co-conspirator need not know of the existence or identity of the other members of the conspiracy or the full extent of the conspiracy.")

All of this also makes this case very unlike *Kelsey K. v. NFL Enters. LLC*, No. C 17-00496 WHA, 2017 WL 3115169 (N.D. Cal. July 21, 2017), cited by McDonald's. Among other glaring deficiencies, it is clear from *Kelsey K.* that the purported no-hire clause allegedly included in the NFL bylaws was wholly inconsistent with the plaintiff's arguments and claims. *See* 2017 WL 3115169 at *2 (plaintiff's "own appended documents show that the NFL does not categorically prohibit competition among its member clubs to recruit cheerleaders."). This case is also unlike *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 238 F. Supp. 2d 1024 (N.D. Ill. 2003), *aff'd* 354 F.3d 661 (7th Cir. 2004), which McDonald's also cites. *Menasha* is a summary judgment opinion, 238 F. Supp. 2d at 1027, where the plaintiff presented "no evidence" from which an inference of horizontal agreement could be drawn. *Id.* at 1032-33. Further, Plaintiff does not ask this Court to infer the existence of a horizontal agreement based on the "mere fact that a large number of retailers agreed to . . . exclusive contracts" with McDonald's. *Id.* at 1033. Rather, the Court may here infer the existence of a horizontal agreement because one was described to Plaintiff by McDonald's corporate employee, exercised against Plaintiff, *and* evidenced by standardized contracts.

This goes significantly beyond allegations of parallel conduct equally consistent with independent action, as in *In re Insurance Brokerage Antitrust Litig.*, 618 F.3d 300, 348-49 (3d Cir. 2010) (brokers were alleged to have independent motive to avoid disclosure of contingent commission agreements and so there was no need to agree not to disclose). *See Twombly*, 550 U.S. at 554-55. Accepting Plaintiff's well-pleaded facts as true Plaintiff plausibly pleads the existence of a horizontal no-hire agreement which also encompasses the McOpCo's.

C. If the *Per Se* (or "Quick Look") Claim is Dismissed, Plaintiff Should Be Permitted to Pursue a Rule of Reason Claim

McDonald's argues that because Plaintiff has not pleaded a relevant product and geographic market her claim is "properly dismissed with prejudice." Mem. at 15-16. Plaintiff makes a robust showing that the conspiracy alleged is *per se* unlawful. It is undisputed that a plaintiff need not plead or prove a relevant market or market power with respect to restraints of competition that are illegal *per se*:

> [such] agreements may or may not be aimed at complete elimination of price competition. The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination.

Socony-Vacuum, 310 U.S. at 224 n.59. The Court should decide that Plaintiff has adequately pleaded a *per se* case and deny McDonald's motion to dismiss on that basis. *E.g.*, *In re High-Tech*, 856 F. Supp. 2d at 1122 (court need not engage in market analysis until it decides whether to apply *per se* or rule of reason, a decision "more appropriate on a motion for summary judgment"). Alternatively, Plaintiff has alleged anticompetitive effects sufficient that the Court may use the "quick look" standard. *See NCAA*, 468 U.S. at 109 (relieving plaintiff of burden to provide robust market analysis under "quick look" approach when there is likelihood of anticompetitive effects).

To the extent Plaintiff is required to plead a relevant product and geographic markets, her complaint makes allegations that are consistent with those found sufficient in *In re High Tech*. *See* 856 F. Supp. 2d at 1122 ("Plaintiffs allege that Defendants are high-tech companies in the market for skilled labor, where cold calling plays an important role in determining salaries and labor mobility…. Plaintiffs further allege that the labor market for skilled high-tech labor is national. [Internal citations omitted.]"). The complaint in *In re High Tech* did not include separate "relevant market" paragraphs or a section denominated as such. Just as here, the plaintiffs pleaded a

nationwide class and pleaded that the defendants employed class members throughout the United States. *Compare In re High Tech* Cons. Am. Compl. ¶¶ 30, 39 *with* FAC ¶¶ 117, 118, 15.[7]

And while Plaintiff acknowledges that single product markets are rare, McDonald's and its franchisees are significant employers in the United States, FAC ¶¶ 29, 93 (420,000 employees, more than 13,000 franchisee restaurants), and Plaintiff has alleged facts concerning the unique training and education in the McDonald's system that liken employment there to "lock-in" cases. *See Eastman Kodak Co. v. Image Tech. Serv's, Inc.*, 504 U.S. 451 (1992). *See also Burda v. Wendy's Intern., Inc.*, 659 F. Supp. 2d 928 (S.D. Ohio 2009) (denying franchisor's motion to dismiss franchisee Section 1 lock-in tying claim and rejecting argument that Wendy's franchise could not be relevant tying product market). McDonald's argues that Plaintiff asserts no facts to support her allegations, but Plaintiff's allegations are *purely* factual. The McDonald's franchise agreement permits a franchisee to use the McDonald's "system." FAC ¶ 78. Plaintiff alleges that system incorporates proprietary McDonald's store operating procedures, inventory control and bookkeeping procedures, along with proprietary computer systems, platforms, applications, and data systems; that store financial information is transmitted via proprietary McDonald's systems; and that training is provided through proprietary curricula and systems designed to assist in the conduct of a *McDonald's* restaurant. FAC ¶¶ 111, 112. As a result, experience and training within the McDonald's systems is of little or no use outside the McDonald's system. FAC ¶¶ 65, 71. Nor does the fact that Plaintiff ultimately took a different job at Hobby Lobby contradict any lock-in theory. Mem. at 18. As Plaintiff alleges, after six years at McDonald's, she took a job at a significant pay cut, for a store that does not operate the McDonald's system. FAC ¶ 71.

[7] A copy of the Consolidated Amended Complaint at issue in *In re High Tech*, No. 5:11-cv-02509-LHK (N.D. Cal.) [Dkt. No. 65] is attached hereto as Exhibit A.

The *per se* rule is designed to avoid an "incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable. . . ." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). For this very reason, Plaintiff should not be required to plead a rule of reason case unless the Court concludes that Plaintiff has not adequately pleaded a *per se* or Quick Look case, or that Plaintiff must proceed under the rule of reason. To the extent the Court makes such a ruling, Plaintiff respectfully requests leave to amend to do so.

II. PLAINTIFF STATES VIABLE STATE LAW CLAIMS

A. Plaintiff Sufficiently Alleges a Violation of the Illinois Antitrust Act

In Count II, Plaintiff alleges that McDonald's "engaged in predatory and anticompetitive behavior to not solicit restaurant-based employees and/or managers from other McDonald's restaurants." FAC ¶ 140. Plaintiff alleges that such actions are unreasonable restraints of trade and violations of the Illinois Antitrust Act, 740 ILCS 10/1 *et seq.*, as competition was substantially lessened in the market for employee and/or manager positions at McDonald's restaurants. *Id.* at ¶¶ 140-144. The gravamen of Plaintiff's complaint is that McDonald's entered into agreements not with employees, but with and among other employers the result of which was to restrict competition in the labor market. Plaintiff does not bring claims for labor law violations.

McDonald's argues that Plaintiff's claims are labor claims excluded by section 10/4 of the IAA which states that "'[s]ervice' shall not be deemed to include labor which is performed by natural persons as employees of others." 740 ILCS 10/4. This misreads the very purpose of that exemption, which was to protect the right of employees and labor unions to bargain collectively over terms and conditions of employment. *See* 740 ILCS 10/4, Bar Committee Comments 1967 ("[D]efinitions of Section 4 were expressly designed to make services and real estate subject to the prohibitions of the law. . ..feeling of the draftsmen that exemptions should be strictly limited

and that almost all service occupations should be within the reach of the statute."). Section 10/4 dictates that the definition of "service" is to be read with relation to Section 5 on exemptions generally. *Id.* The Comments on Section 5 explain it was "always understood by the draftsmen that exemptions would be accorded to labor unions," and the labor exemption in subsection (1) of 10/5 thus "prevents the application of the Antitrust Act to legitimate labor activities of unions or of individual members thereof." 740 ILCS 10/5, Bar Committee Comments 1967. Therefore, while the IAA exempts legitimate collective bargaining among management and labor, it does not exclude from its sweep an unlawful employer no-hiring conspiracy. *See* 740 ILCS 10/5; FAC ¶ 7.

McDonald's argues that *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997) supports dismissal of Plaintiff's IAA claim as an exempt labor claim. But *O'Regan* involved alleged antitrust violations relating to an employee's refusal to sign an employer's non-competition agreement, rather than horizontal employers' agreements to restrict competitive conditions in the labor market (unknown to employees).

B. Plaintiff Alleges a Cognizable Claim Under the Illinois Consumer Fraud Act

In Count III, Plaintiff alleges that McDonald's practices were addressed to the market generally and implicate consumer protection issues including "lack of a competitive workforce in the franchise industry" which "prevents better goods and services, restricts wages and mobility of the workforce, and creates a strain on public assistance, and thereby affects all consumers generally." FAC ¶ 149.

McDonald's argues that Plaintiff cannot bring a ICFA claim in light of *Laughlin v. Evanston Hosp.*, 133 Ill.2d 374, 390-91 (Ill. 1990), because doing so would be a "backdoor enforcement mechanism for antitrust." In *Laughlin*, however, the Illinois Supreme Court ruled only that plaintiffs could not bring an action under the ICFA for a hospital's "price discrimination" where the IAA (unlike its federal counterpart) specifically excluded price discrimination from its

scope. *Id*. at 381 (noting that the IAA adopts the Sherman Act, but contains no counterpart to the Clayton Act or its Robinson–Patman amendments). That has no bearing on this situation, where the IAA does not exclude a right of relief for a horizontal no-hire conspiracy.

McDonald's also argues that Plaintiff fails to allege "conduct that defrauds or deceives consumers." Mem. at 20. However, Plaintiff alleges that McDonald's conduct was unfair because it "illegally participated in an agreement among competitors" to restrict trade and lower costs (FAC ¶ 153) and that Plaintiff was "unaware of the 'no-hire' clause and had no choice but to submit, thereby preventing Plaintiff . . . from negotiating better wages and conditions." FAC ¶ 154. These allegations suffice at the pleading stage because a plaintiff may allege that conduct is "unfair" under the ICFA without alleging that it was deceptive. *See Demitro v. Gen. Motors Acceptance Corp.*, 388 Ill.App.3d 15, 19, 902 N.E.2d 1163, 1168 (2009).

McDonald's next argues that employees are not consumers for purposes of the ICFA, citing *Hess v. Kanoski & Assocs*., 668 F.3d 446, 454 (7th Cir. 2012). *Hess* involved what was effectively a contract suit between a lawyer and his former employer. Plaintiff's claim is different; she does not even sue her employer but instead asserts a claim against McDonald's for restraining her mobility in the workforce. FAC ¶¶ 149-54. 815 ILCS § 505/10a, moreover, authorizes suit by any "person" who suffers damage as a result of a violation, and §§ 505/1(e) and (c) define a consumer as any "person" and a "person" to include "employee." Even if Plaintiff is not a "consumer" within the meaning of the ICFA, a non-consumer can, as McDonald's acknowledges, acquire standing under the ICFA through the consumer nexus test. *Thrasher–Lyon v. Illinois Farmers Ins. Co.*, 861 F. Supp. 2d 898, 911 (N.D. Ill. 2012). Under the test, "if a natural person . . . alleges conduct [that] involves trade practices addressed to the market generally or otherwise implicates consumer protection concerns, that person has standing to sue under the [ICFA]." *Id*. at 912. Plaintiff meets

this test: McDonald's actions and practices were addressed to the market generally and implicate consumer protection concerns vis-à-vis restaurant employees. *See* FAC ¶¶ 147-62.

Nor, finally, does *Avery v. State Farm Mut. Auto. Ins. Co.*¸ 216 Ill. 2d 100, 186-87 (2005) require dismissal. As McDonald's acknowledges, an ICFA action may lie where "the circumstances that relate to the disputed transaction occur primarily and substantially in Illinois." 216 Ill.2d at 187. Where the no-hire conspiracy was organized and orchestrated from Illinois, FAC ¶ 19, and policed from Illinois, FAC ¶ 68, and where the explicitly written portion of the no-hire agreement was entered into in Illinois and contains choice of law and forum provisions selecting Illinois, FAC ¶ 19, the Court cannot conclude at this stage that the circumstances do not occur primarily and substantially in Illinois. *See Martin v. Heinold Commodities, Inc.*, 117 Ill.2d 67, 109 Ill.Dec. 772 (1987) (distinguished, but not overruled, by *Avery*, 216 Ill.2d at 188-89).

III. PLAINTIFF HAS STANDING TO PURSUE INJUNCTIVE RELIEF

Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2559-60 (2011) addresses standing at class certification, and not at the motion to dismiss stage. Even to the extent Plaintiff's status as a former employee precludes her request for injunctive relief, any dismissal should be without prejudice to the rights of current employee class members if a class is ultimately certified.

CONCLUSION

For all the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

Dated: November 10, 2017

Respectfully Submitted,

s/ Derek Y. Brandt
Derek Y. Brandt (#6228895)
McCune Wright Arevalo, LLP
P.O. Box 487
Edwardsville, Illinois 62025
Tel: (618) 307-611

Fax: (618) 307-6161
dyb@mccunewright.com

Richard D. McCune (*pro hac vice*)
Michele M. Vercoski (*pro hac vice*)
McCune Wright Arevalo, LLP
3281 East Guasti Road, Suite 100
Ontario, California 91761
Tel: (909) 557-1250
rdm@mccunewright.com
mmv@mccunewright.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the accompanying ***PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT*** was filed on this date electronically through the Court's CM/ECF system, which will send an electronic notice to counsel of record for all parties.

s/ Derek Y. Brandt