IN THE 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, a Delaware limited liability company, McDONALD'S CORPORATION, a Delaware corporation; and DOES 1 through 10, inclusive, Defendants.	)	Case No. 17-cv-04857 Judge Jorge L. Alonso Magistrate Judge Jeffrey Cole

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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INTRODUCTION

Plaintiff contends that she has stated a *per se* Sherman Act claim because the alleged no-hire agreement among McDonald's and its restaurants is like a horizontal price fixing or group boycott conspiracy to raise prices. But that precise analogy has already been rejected by multiple courts that have considered antitrust challenges to no-hire agreements. Tellingly, Plaintiff does not cite *a single case* in which a court actually declared a no-hire agreement *per se* unlawful. Rather, every court to have reached the question has held that no-hire agreements must be judged under the traditional rule of reason analysis. *See*, *e.g.*, *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 337 (7th Cir. 1967). This is so regardless of whether a no-hire agreement is characterized as horizontal or vertical because no-hire agreements have plausible procompetitive justifications.

Nor can Plaintiff sidestep that McDonald's and its restaurants comprise an *intrabrand* franchise system, which by definition fosters coordination and reduces competition within the McDonald's system. Tellingly, again, Plaintiff does not cite *a single case* in which a court declared an agreement among members of an intrabrand system *per se* unlawful, which distinguishes this case from every case she cites. In fact, courts routinely rebuff *per se* treatment in this context. *See, e.g.*, *Ill. Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751, 753 (7th Cir. 1989).

Next, Plaintiff incorrectly contends that she has pleaded a "hub-and-spoke" conspiracy claim. Although the argument is immaterial because even horizontal no-hire agreements are not *per se* unlawful, no hub-and-spoke conspiracy is plausibly alleged. To do so, the complaint would have had to allege a plausible "rim" around the alleged thousands of vertical spokes of the supposed conspiracy. A rim means a meeting of the minds of the horizontal participants to achieve the conspiracy's aim—here, to suppress employee wages. But the complaint includes no factual allegations concerning the who, what, when, where, and how to establish that thousands of

McDonald's restaurants agreed to suppress employee wages using no-hire agreements. *Cf. In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192, 1198 (9th Cir. 2015).

For these reasons, Plaintiff has not stated a *per se* Sherman Act claim. Nor has she stated a rule of reason claim because she has failed to plead a plausible relevant market or that McDonald's has market power. Markets are defined according to cross-elasticities of demand, and cursory allegations of market power based on single brand markets should be dismissed. The allegations that the relevant market for Plaintiff's labor consists only of McDonald's jobs and, therefore, that McDonald's has market power in that so-called market, are clearly deficient and contrary to Seventh Circuit law. *Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 595 (7th Cir. 2008).

Because Plaintiff's complaint fails to state either a *per se* or rule of reason claim, the Sherman Act claim should be dismissed with prejudice. And because Plaintiff misstates the law when attempting to defend her Illinois state law claims, they too should be dismissed with prejudice.

ARGUMENT

I. Plaintiff Has Failed To State A Sherman Act Claim

A. Plaintiff Has Not Pleaded A *Per Se* Sherman Act Violation

Plaintiff's primary argument is that "[h]orizontal agreements between competitors are *per se* unlawful." (Opp. 7-8.) But although horizontal agreements between competitors are, in many circumstances, *per se* unlawful, there are also countless types of horizontal agreements between competitors that must be judged under the rule of reason. *See*, *e.g.*, *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1010-11 (7th Cir. 2012) ("[W]e know from [established precedent] that even price fixing by agreement between competitors—and . . . other agreements that restrict competition, as well—are governed by the rule of reason, rather than being per se illegal, if the challenged practice when adopted could reasonably have been believed to promote 'enterprise and productiv-

ity.'"). Only when "experience has convinced the judiciary that a particular type of business practice has no (or trivial) redeeming benefits ever" can the *per se* rule be applied. *Id.* at 1011-12; *see also Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("Resort to *per se* rules is confined to restraints . . . that would always or almost always tend to restrict competition," and lack "any redeeming virtue."); *Continental T.V. v. Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977) (same). Case in point: the most directly applicable precedent to this case holds that agreements between competitors not to hire each other's employees are ***not*** *per se* unlawful, but instead must be judged according to the rule of reason. *Nichols*, 371 F.2d at 333-34, 337.

Plaintiff points to no judicial experience with employee no-hire agreements that could justify *per se* treatment, particularly in the intrabrand context. Instead, Plaintiff tries to distinguish this case from *Nichols* and the body of law holding that no-hire agreements should be evaluated under the rule of reason. And she tries to analogize McDonald's alleged intrabrand conduct to conduct typically considered *per se* unlawful, such as "naked price fixing," boycotts, and interbrand territorial market allocation. (Opp. 7-8.) None of these arguments supports application of the *per se* rule in this case.

1. This Court Should Follow *Nichols* And The Body Of Law Holding That No-Hire Agreements Are Not *Per Se* Unlawful

Plaintiff's assertion that *Nichols* "did not even reach the issue of whether the rule of reason should apply" (Opp. 16) is simply incorrect. In *Nichols*, the Seventh Circuit examined whether summary judgment should have been granted on a Sherman Act claim alleging that two newspaper publisher competitors had agreed not to hire each other's employees. 371 F.2d at 333-34, 337. The Court recognized that potential pro-competitive and anti-competitive effects of such an agreement may exist and remanded for further consideration of those issues—precisely what the rule of reason requires courts to do. *Id.* at 337. The Court also stated explicitly that "[r]easonableness

was explored in" previous no-hire agreement cases and that these "[a]greements not to compete are tested by a standard of reasonableness." *Id.*

This Seventh Circuit precedent controls here, but the Seventh Circuit was not alone in that determination. *Nichols* relied on *Union Circulation Co. v. F.T.C.*, 241 F.2d 652, 656-657 (2d Cir. 1957), in which the Second Circuit *explicitly rejected* application of the *per se* rule to a no-hire agreement because no-hire agreements "are directed at the regulation of hiring practices and the supervision of employee conduct, not at the control of manufacturing or merchandising practices," thus making no-hire agreements unlike "group boycotts or concerted refusals to deal, and certain other restraints such as price-fixing, market-sharing, or production control." Accordingly, the court applied the rule of reason. *Id.*

Since *Nichols and Union Circulation* were decided, no court has applied the *per se* standard to no-hire agreements. Rather, courts have on numerous occasions *rejected* application of the *per se* rule for reasons similar to those articulated in these precedents. *See*, *e.g.*, *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143-44 (3d Cir. 2001); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999); *see also* cases cited in McDonald's Br. 8-11. Plaintiff fails to acknowledge this extensive judicial experience with no-hire agreements, much less the consistent rejection of *per se* treatment.

Instead, Plaintiff attempts to distinguish these cases based on trivial factual differences. (Opp. 15-16.) For example, she contends that several cases "involved agreements entered into ancillary to the sale of a business to a third party." (Opp. 15.) But even in those cases, the pro-competitive justifications for the no-hire agreements—such as allowing parties to "retain the skilled services" of employees—apply with equal force here. *E.g.*, *Eichorn*, 248 F.3d at 146. And, most certainly, *Nichols* did not involve any sale of a business, yet reached the same result. At bottom, Plaintiff misses the fundamental point that *all* of these cases held that the *per se* rule did

not apply to no-hire agreements because they can be procompetitive in various contexts.[1]

2. Plaintiff Inaptly Analogizes To Cases That Did Not Involve No-Hire Agreements

Plaintiff essentially asks this Court to ignore *Nichols* and the body of law holding that *per se* treatment is not appropriate for no-hire agreements. Instead, Plaintiff asks this Court to analogize McDonald's alleged conduct to other types of conduct typically treated as *per se* unlawful, such as naked price fixing and group boycott agreements among competitors. (Opp. 7-8 (citing *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422 (1990); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991); *United States v. Coop. Theaters of Ohio, Inc.*, 845 F.2d 1367, 1373 (6th Cir. 1988)).) Plaintiff's analogies are misguided.

For starters, numerous courts have concluded that employee no-hire agreements—even those between horizontal interbrand competitors—are fundamentally unlike that very conduct that traditionally deserves *per se* treatment. *See*, *e.g.*, *Union Circulation*, 241 F.2d at 656-57 (finding *Socony-Vacuum* and group boycott cases inapplicable "[b]ecause a harmful effect upon competition is not clearly apparent from the terms of [no-hire] agreements"); *Eichorn*, 248 F.3d at 139 ("[T]he facts here are substantially different from the classic per se horizontal price fixing and group boycott conspiracies the Court has generally found to be per se antitrust violations."). And there is no allegation at all that McDonald's ever dictated what salaries restaurants should pay or

[1] Plaintiff refers to the *Antitrust Guidance for Human Resource Professionals* published by the Department of Justice Antitrust Division and Federal Trade Commission (the "Guidelines"), and she contends they declare "no-poaching agreements" as *per se* illegal. (Opp. 8-9.) But every example the DOJ relies on in the Guidelines involved *interbrand* agreements, not an alleged intrabrand restraint, as here. That is a material distinction, especially where the U.S. Supreme Court has recognized that intrabrand restraints, including in franchise agreements, serve legitimate, procompetitive ends. *See Sylvania, Inc.*, 433 U.S. at 54-55. The Guidelines do not, and could not as a matter of law, supplant or overrule that law and the additional controlling court authorities McDonalds cites here and in its opening brief. (Br. 6-10.)

otherwise facilitated communications among the restaurants about salary levels. That differentiates this case from the nursing cases upon which Plaintiff relies, where interbrand competitors exchanged employee salary information. (Opp. 8 (citing *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 160 (N.D.N.Y. 2010); *Doe v. Ariz. Hosp. & Healthcare Ass'n*, No. CV-07-1292-PHX-SRB, 2009 WL 1423378, *3 (D. Ariz. Mar. 19, 2009).)

Moreover, unlike the claims at issue in *Socony-Vacuum* and the other price fixing cases cited by Plaintiff (Opp. 7-8), there is no allegation here that McDonald's ever fixed—or even discussed—employee wages with anyone, making the alleged no-hire restraint—at most—ancillary to the broader McDonald's venture. *Cf. Sylvania, Inc.*, 433 U.S. at 54-55 & n.26 ("[P]er se rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees."). That is underscored by the fact that Plaintiff alleges that McDonald's (the franchisor) used Paragraph 14 of the traditional franchise agreement to "orchestrate" a horizontal no-hire agreement among thousands of franchisees, which somehow indirectly depressed salaries. (Opp. 10.) These are novel allegations, to be sure.[2]

Further distancing this case from traditional price-fixing and group boycott cases is the fact that the complaint establishes that salary competition did, in fact, occur. Plaintiff failed to address this issue entirely in her opposition brief, which speaks volumes. Plaintiff cannot avoid that she pleaded a 15% wage differential between just two restaurants. *See* FAC ¶ 67. By contrast, she

[2] *See also F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986) ("[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor—a situation obviously not present here. Moreover, we have been slow . . . in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." (citing *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979))).

pleads no facts about specific salary levels at any other restaurants, and instead only makes generalized allegations about McDonald's desire to reduce labor costs. *Id.* ¶¶ 39-58.

Finally, Plaintiff places significant weight on an alleged statement made by an unnamed McDonald's corporate employee that Plaintiff could not be hired by the McOpCo store absent a "release" from Bam-B. (Opp. 1, 5, 10, 18, 19.) But that statement is not even remotely comparable to the evidence adduced in *Socony-Vacuum* or any of the other cases Plaintiff relies on. At most, it confirms the vertical and intrabrand nature of the alleged no-hire restraint insofar as it demonstrates the franchisor's interest in facilitating an orderly transfer of Plaintiff's employment from one restaurant to another. The statement, which acknowledges employee mobility, cannot plausibly infer an absolute boycott on hiring or any sort of facilitation of salary communications. These allegations make this case unlike any of the cases in which any court applied *per se* analysis.

3. *In re High-Tech Employee* Is Not An Appropriate Precedent For This Case

Plaintiff also urges this Court to emulate the approach taken in *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103 (N.D. Cal. 2012), in which a district court denied a motion to dismiss Sherman Act claims challenging no-hire agreements between technology companies. (Opp. 9-10.) In so doing, the district court ruled that it need not decide at the motion to dismiss stage whether to apply the *per se* or the rule of reason standard. For numerous reasons, the present case is markedly different, and no such ruling would be appropriate here.

First, perhaps because "***the parties [had] agree[d]*** . . . the Court need not decide [at the motion to dismiss phase] whether *per se* or rule of reason analysis applies," *In re High Tech Employee*, 856 F. Supp. 2d at 1122 n.9 (emphasis added), that court merely assumed that the *per se* rule could be applied and did not engage with directly applicable authority applying the rule of reason, *e.g.*, *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 899-900 (9th Cir. 1983), much less the on-

point authorities from the Seventh, Second, and Third Circuits holding that the rule of reason should be applied to no-hire agreements, *Nichols*, 371 F.2d at 337; *Eichorn*, 248 F.3d at 145-47; *Bogan*, 166 F.3d at 515. There is plainly no such concession here.

Second, there are established procompetitive explanations for no-hire agreements in intrabrand franchise restaurant contexts, *see, e.g.*, *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026, 1033 (D. Nev. 1992), *aff'd*, 999 F.2d 445 (9th Cir. 1993), whereas there were fewer well-established procompetitive explanations for the no-hire agreements between the technology company competitors in *In re High Tech Employee*. Without such obvious procompetitive justifications, at the motion to dismiss phase, the district court evidently believed that discovery could help determine which standard applied. That is also not the case here.

Third, Plaintiff contends that she has pleaded relevant market "allegations that are consistent with those found sufficient" in *In re High Tech Employee*. (Opp. 20-21.) But that is incorrect because the market definition allegations here are utterly implausible. *In re High Tech Employee* involved an alleged labor market consisting of at least seven distinct technology companies—Adobe Systems Inc., Apple Inc., Google Inc., Intel Corp., Intuit Inc., Lucasfilm, Ltd., and Pixar—as well as up to *50* additional co-conspirator companies throughout the United States. (Opp. Ex. A, ¶¶ 21-28, 41-54.) By contrast, Plaintiff alleges a single-brand labor market, and ignores every private and public sector employer that McDonald's competes with for labor. There is simply no reason to supplant controlling Circuit precedent with *In re High Tech Employee* here.

B. Plaintiff Offers No Justification For Applying A *Per Se* Standard To Restraints Within An Intrabrand Franchise Context

Plaintiff's *per se* claim fails for a separate and distinct reason: The *per se* rule simply does not apply to intrabrand restraints in a franchise context. *Sylvania, Inc.*, 433 U.S. at 57. Plaintiff does not cite a single case that applied the *per se* rule to restraints in that context.

Courts have consistently refused to apply the *per se* rule to intrabrand restrictions where vertical relationships between franchisors and franchisees (or manufacturers and retailers) are accompanied by elements of horizontal intrabrand competition, such as in dual-distribution systems like McDonald's. *See*, *e.g.*, *Ill. Corp. Travel*, 889 F.2d at 753 ("Dual distribution . . . does not subject to the per se ban a practice that would be lawful if the manufacturer were not selling direct to customers; antitrust laws encourage rather than forbid this extra competition."); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 721 (11th Cir. 1984) (applying rule of reason where territorial restraints imposed by franchisor did not reduce *interbrand* competition); *see also PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 421 n.8 (5th Cir. 2010) (noting that nine circuits have applied the rule of reason to dual-distribution systems as of 2010).

Plaintiff appears to argue that McDonald's disclosure in franchise agreements that it does not guarantee its franchisees an exclusive territory means that McDonald's declares franchisees and McOpCo stores to be competitors in all respects. (Opp. 3.) But that is clearly incorrect because McDonald's can limit intrabrand competition in manners other than geographic exclusivity, such as by setting minimum prices at which its retailers sell its products and dictating what products its retailers sell. *See*, *e.g.*, *Leegin*, 551 U.S. at 889-892, 907 (recognizing that resale price maintenance has numerous procompetitive benefits and is not *per se* unlawful); *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 598 (7th Cir. 1996) ("[N]o one expects a McDonald's outlet to compete with other members of the system by offering pizza."). Regardless of whether the no-hire agreements alleged here are characterized as horizontal or vertical, the rule of reason applies to them because they arose in an intrabrand franchise context.[3]

[3] Plaintiff suggests, without authority, that Paragraph 14 of the franchise agreement was removed in response to this lawsuit and thereby could not have been procompetitive. (Opp. 1, 16.) In fact, Paragraph 14 was removed before this lawsuit was filed. Regardless, that fact has no bearing on the present motion.

C. Plaintiff Has Not Pleaded A Hub-And-Spoke Conspiracy

Apparently Plaintiff now contends that her complaint pleads a so-called "hub-and-spoke" conspiracy which dictates *per se* treatment. (Opp. 10-14.) As explained, that is incorrect because regardless whether the no-hire agreements were horizontal or vertical, they are not *per se* unlawful under controlling authority. In any event, she has not pleaded a plausible hub-and-spoke conspiracy.

Hub-and-spoke conspiracies require that a horizontal agreement actually existed—*i.e.*, a rim to connect the spokes. *See United States v. Bustamante*, 493 F.3d 879, 885 (7th Cir. 2007); *see also In re Musical Instruments*, 798 F.3d at 1192, 1198 (plaintiffs failed to allege sufficient facts to support a plausible inference that "spoke" manufacturers agreed to fix prices); *PSKS, Inc.*, 615 F.3d at 420 (dismissing hub-and-spoke claims where plaintiff failed to allege an agreement among retailers to implement the alleged horizontal conspiracy through vertical restraints). Plaintiff's argument that vertical agreements between McDonald's and its franchisees and McOpCo stores "played out" in "a horizontal fashion" (Opp. 1, 17) misstates the law: "[A] restraint is horizontal not because it has horizontal effects, but because it is the product of a horizontal agreement." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988); *see also Leegin*, 551 U.S. at 890 (rejecting *per se* treatment of resale price maintenance despite fact it plays out in a horizontal fashion). Even the hub-and-spoke cases Plaintiff cites turned on allegations or evidence of *actual* coordination between interbrand competitors. *United States v. Apple*, 791 F.3d 290, 300-01, 307 (2d Cir. 2015) (describing evidence that competing booksellers regularly communicated with each other in furtherance of conspiracies); *Toys 'R' Us v. F.T.C.*, 221 F.3d 928, 932 (7th Cir. 2000) (describing evidence that competing toymakers joined vertical contracts "on the condition that their competitors would do the same"); *Denny's Marina, Inc. v. Renfro Prods.,*

Inc., 8 F.3d 1217, 1220 (7th Cir. 1993) (describing evidence that competing marine dealers attended a meeting and urged each other to boycott plaintiff).

Plaintiff offers no such allegations here. Plaintiff's bald assertion that McDonald's "orchestrated and enforced an agreement between and among franchisees and itself," (Opp. 10), is insufficient because Plaintiff nowhere alleges that any restaurants communicated (or had an opportunity to communicate) about employee hiring or salaries. Nor does Plaintiff allege that any franchisees joined the no-hire agreement *only if* other franchisees did so, or that McDonald's adopted Paragraph 14 of the franchise agreement (the supposed vertical manifestation of the horizontal agreement) at the urging of its franchisees. There are no allegations that any restaurant sought or received enforcement of Paragraph 14. And Plaintiff's assertion that McDonald's "admitted" the existence of a horizontal agreement, (Opp. 2), is wholly implausible.

Plaintiff's last-ditch argument that this Court should infer the existence of conspiracy from a supposed system-wide desire to reduce labor costs, (Opp. 3), fails. All economically rational actors want to minimize costs. *See Leegin*, 551 U.S. at 896 (discussing impact of resale price maintenance on cost of distribution, "which, like any other cost, the manufacturer usually desires to minimize"); *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 622-23 (1953) (adoption of cost-reducing practices "do[es] not bespeak a purposive quest for monopoly or restraint of trade"); *see also In re Musical Instruments*, 798 F.3d at 1189 (affirming dismissal of Sherman Act claim where inferences from alleged facts were "no more consistent with an illegal agreement than with rational and competitive business strategies"). And, notably, Plaintiff cites no case involving an *intrabrand* hub-and-spoke conspiracy. That should come as no surprise, because Plaintiff's theory would potentially transform all franchise and dual-distribution systems into hub-and-spoke conspiracies, contrary to long-standing precedent. *E.g.*, *Ill. Corp. Travel,* 889 F.2d at 753.

D. Plaintiff Has Not Pleaded A Plausible Rule Of Reason Claim

Nor can Plaintiff's invocation of the rule of reason save her case. (Opp. 20-21.) No such claim is plausibly alleged because the Complaint lacks any allegation of an anticompetitive effect "on a given market within a given geographic area." *Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012). Single-brand markets are disfavored; were that not so, each manufacturer would be guilty of monopolization with regard to its own products. *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956); *see also Sheridan*, 530 F.3d at 595.

Nonetheless, Plaintiff now doubles down on her single-brand market allegations. (Opp. 20-21.) Although she argues that her allegations are consistent with those in the *High Tech Employee* complaint, there is no serious suggestion that the seven technology giant defendants (and 50 unnamed company co-conspirators) were a single brand. Plaintiff also argues that McDonald's training systems transformed her at-will employment into an inescapable contract comparable to "lock-in" theories of antitrust liability found in tying cases. (Opp. 21; *see also* FAC ¶ 114.) "[A] tying arrangement exists when a seller exploits power over one product (the tying product) to force the buyer to accept a second product (the tied product)." *Batson v. Live Nation Entm't, Inc.*, 746 F.3d 827, 832 (7th Cir. 2014). Plaintiff fails to explain how tying cases are relevant to this case (they are not, *see Sheridan*, 530 F.3d at 592-93) or how the "lock-in" theory could apply where there are no allegations of tying or tied products, market power in a tying product, or impact on the market for the tied product, *see Eastman Kodak Co. v. Image Tech. Servs. Inc.*, 504 U.S. 451, 461-62 (1992).

Moreover, the allegation that McDonald's training is *so* unique that it cannot be used in any capacity outside of McDonald's (FAC ¶¶ 111-12), defies common sense, especially in light of Plaintiff's subsequent employment at Hobby Lobby (FAC ¶ 71). *See Ashcroft v. Iqbal*, 556 U.S.

662, 679 (2009) ("Determining whether a complaint states a plausible claim for relief . . . requires the reviewing court to draw on its judicial experience and common sense."). Under Plaintiff's logic, any employer with specialized training or a proprietary operational system is its own labor market. For these reasons, Plaintiff's Sherman Act claim should be dismissed with prejudice.[4]

II. Plaintiff Has Failed To State Claims Under Illinois State Law

Plaintiff's Illinois Antitrust Act ("IAA") claim also should be dismissed. At the threshold, this claim falls with Plaintiff's Sherman Act claim. *See Appraisers Coal. v. Appraisal Inst.*, 845 F. Supp. 592, 608 (N.D. Ill. 1994). Moreover, the plain text of the statute excludes claims based on labor services. 740 ILCS § 10/4; *see also O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997) ("[T]o the extent [Plaintiff's] claims relate to an alleged market for labor services, they are specifically excluded by § 10/4 of the [Illinois Antitrust] Act . . . ."). Plaintiff cites legislative history—not case law—in an attempt to narrow this exclusion to the activities of labor unions (Opp. 22-23), but that interpretation contradicts the straightforward statutory language and *O'Regan*. Plaintiff's effort to distinguish *O'Regan* on the facts is similarly unavailing, as nothing about the court's holding that antitrust claims based on an alleged market for labor services are excluded by the IAA was limited to the facts of that case. 121 F.3d at 1066.

For similar reasons, Plaintiff's Illinois Consumer Fraud Act ("ICFA") claim should be dismissed. *First*, Illinois Supreme Court precedent prohibits using ICFA as an enforcement mechanism for antitrust claims not cognizable under the IAA. *Laughlin v. Evanston Hosp.*, 133 Ill. 2d

[4] Plaintiff requests leave to amend so that she might address her failure to state a rule of reason claim. (Opp. 22.) But given that McDonald's initial motion to dismiss put her on notice of this defect (ECF No. 27 at 15-18), she failed to cure it, and she does not explain how amendment would resolve her complaint's deficiencies, amendment is futile. *See Jafree v. Barber*, 689 F.2d 640, 644 (7th Cir. 1982) (affirming denial of request for leave to amend where plaintiff failed to explain how he would cure defective allegations).

374, 390-91 (1990). Plaintiff tries to distinguish this authority on its facts because the IAA "specifically excluded price discrimination from its scope." (Opp. 23-24.) But because the IAA also specifically excludes labor-based claims from its scope, 740 ILCS § 10/4, that "distinction" only confirms that dismissal is appropriate.

Second, apparently conceding that her complaint fails to allege conduct that defrauds or deceives consumers, Plaintiff argues that "McDonald's conduct was unfair" under ICFA. (Opp. 24.) But that requires allegations that a defendant's conduct "offends public policy" and was "so oppressive as to leave the consumer with little alternative but to submit." *Batson*, 746 F.3d at 830, 833. Because Plaintiff fails to allege a cognizable antitrust claim, she fails to plead facts or theories that satisfy that standard. *Id.* at 831-33. Moreover, the oppressive conduct element "is not satisfied if a consumer can avoid the defendant's practice by seeking an alternative elsewhere." *Id.* at 833. Here, Plaintiff admits that she found employment elsewhere. FAC ¶ 71.

Third, ICFA protects *consumers*, not employees. Plaintiff misrepresents ICFA's language by claiming that the statute "define[s] a consumer as any 'person' and a 'person' to include 'employee.'" (Opp. 24.) Actually, the statute defines a consumer as "any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household." 815 ILCS § 505/1(e). An employee does not fall within that definition. Moreover, Plaintiff's argument that McDonald's alleged conduct had a "consumer nexus" because it was "addressed to the market generally and implicate[s] consumer protection concerns vis-à-vis restaurant employees" (Opp. 25), offers no explanation for *how* that could be so. McDonald's alleged conduct was "addressed to" only franchisees, McOpCo's, and their employees. Most certainly, there are no "consumer protection concerns" in this case because no consumers are alleged to have been harmed. *Cf. Bank One Milwaukee v.*

Sanchez, 336 Ill. App. 3d 319, 324 (2003) (consumer nexus test implicated by consumer's car purchase); *Downers Grove Volkswagen, Inc. v. Wigglesworth Imports, Inc*., 190 Ill. App. 3d 524, 534 (1989) (consumer nexus test applied where defendant published false prices).

Finally, to establish an Illinois nexus, Plaintiff claims (for the first time) that the alleged conspiracy was "policed from Illinois." (Opp. 25 (citing FAC ¶ 68).) But that assertion is not pleaded at all. The complaint states that "Plaintiff received a call from a McDonald's corporate employee," but never alleges who this employee was or from where the call was placed. (FAC ¶ 68.) Moreover, Plaintiff's complaint establishes that the "disputed transaction"—Bam-B's alleged refusal to terminate her employment—"occurred outside of Illinois," even if the relevant company policy was created in Illinois. Plaintiff's argument in this regard is precisely that rejected by the Illinois Supreme Court in *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill. 2d 100, 186-87 (2005). That court has specifically rejected attempts, like Plaintiff's, to resurrect its pre-*Avery* decision in *Martin v. Heinold Commodities, Inc.*, 117 Ill. 2d 67 (1987), limiting any vitality *Martin* has to the very specific facts of that case. *Barbara's Sales, Inc. v. Intel Corp.,* 227 Ill. 2d 45, 70 (2007).

CONCLUSION

For these and the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiff's Amended Complaint with prejudice.[5]

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[5] To the extent that any claims remain, Plaintiff's request for injunctive and declaratory relief should be dismissed. The Supreme Court's determination that former employees lack standing to seek such relief was in no way limited to questions of class certification. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364 (2011); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 103 (1983); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). Each plaintiff must have standing to secure any requested relief throughout the lawsuit. *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988). Plaintiff cannot save her claims for prospective relief by relying on hypothetical putative class members. "That a suit may be a class action . . . adds nothing to the question of standing." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 n.6 (2016) (citations and quotations omitted).

Dated: December 11, 2017

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

By: /s/ Rachel S. Brass
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CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** was electronically filed on December 11, 2017 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

/s/ Rachel S. Brass
Rachel S. Brass