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 ~~[PROPOSED]~~ SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In a brief filed in the United States Court of Appeals for the Ninth Circuit on January 19, 2018, McDonald's USA, LLC and McDonald's Corporation (together, "McDonald's")—the same entities who are defendants in this lawsuit—made factual and legal arguments that directly undercut one of the principal arguments they have advanced in *this* Court in support of their motion to dismiss.[1]

McDonald's has argued that this Court should not employ *per se* scrutiny of the no-solicitation and no-hire agreement that Plaintiff alleges McDonald's orchestrated between and

[1] A copy of the Brief for Defendants-Appellees McDonald's Corp. et al., filed on January 19, 2018 in the matter *Salazar, et al. v. McDonald's Corporation, et al.*, No. 17-15673 (U.S. Court of Appeals for the Ninth Circuit) (hereafter, "*Salazar* Brief" or "*Salazar* Br.") is attached as Exhibit 1 to the Declaration of Derek Y. Brandt in Support of Plaintiff's Motion for Leave to File Sur-Reply in Opposition to Defendants' Motion to Dismiss. *Salazar* addresses various wage-and-hour claims asserted by Oakland-area McDonald's crew members against the franchise operator that employed them. The *Salazar* plaintiffs also sought to hold McDonald's itself responsible, as a "joint employer," for the alleged violations. *See Salazar* Br. at 1, 4-5, 7. McDonald's prevailed at the district court, either on summary judgment or on class certification (after the plaintiffs settled with the franchisee-employer). *See id.* at 1, 7.

among franchisees and McOpCo restaurants because that agreement exists within a franchise context. *E.g.*, Reply in Support of Motion to Dismiss [Dkt. No. 41] ("Reply") at 1 ("McDonald's and its restaurants comprise an *intrabrand* franchise system, which by definition fosters coordination and reduces competition within the McDonald's system.") (Emphasis in original). Whether or not McDonald's-branded franchisee-owned restaurants and McOpCo stores operate within a franchise "system," Plaintiff has alleged and argued—based on McDonald's and franchisees' own admissions—that they are, and consider themselves to be, horizontal competitors of each other. Amended Class Action Complaint [Dkt. No. 32] ("FAC") at ¶¶ 36, 75-80; Opposition to Motion to Dismiss [Dkt. No. 40] ("Opp'n") at 10-14. In response, McDonald's asserts that within the franchise system it lawfully "can limit intrabrand competition in manners … such as by setting minimum prices … and dictating what products its retailers sell." Reply at 9.[2] It must follow, the argument goes, that McDonald's also is permitted to coordinate a no-hiring pact among franchisees as to the employees who provide labor in McDonald's-branded restaurants, thereby restraining competition for labor. But as its *Salazar* Brief makes plain, restaurant-level hiring is an area of operations as to which McDonald's emphatically *denies* the existence of coordination, system-wide or otherwise. In fact, this is the very foundation of McDonald's appellate position in *Salazar*. As McDonald's argues there,

> the franchise operator, *not McDonald's*, **exclusively controls all aspects** of [restaurant employees'] employment—from **hiring** and firing, to setting and paying wages, to scheduling, supervision, and discipline.

Salazar Br., at 1 (italics in original, bold supplied).

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[2] Setting minimum retail prices or dictating what products its franchisees sell are vertical restraints. As argued in her Opposition to the motion to dismiss, Plaintiff here asserts an unlawful horizontal conspiracy which, as orchestrated by McDonald's, may be described as a hub-and-spokes conspiracy. Opp'n at 1-2, 10-14.

Urging the Ninth Circuit to affirm, McDonald's categorically rejects the notion that the McDonald's franchise system coordinates labor or employment issues of any type, *but particularly employee hiring*, at the franchise level. For instance, McDonald's argues that franchisees "exclusively control" all aspects of hiring, and that based on the record McDonald's presented, the district court there was correct to so-conclude. *Salazar* Br. at 2 ("district court observed" that McDonald's "is not involved in hiring [franchisee] employees" (quoting district court)[3]); at 6 (McDonald's business manuals "vest authority over hiring and firing workers … exclusively in the franchisee"); and at 9-10 ("McDonald's undisputedly had no power to hire, fire, or direct [franchisee] employees" and district court "concluded that undisputed facts … demonstrate that McDonald's did not retain" "general right of control over factors such as hiring, direction, supervision, discipline, discharge, and relevant day-to-day aspects of the workplace behavior of the franchisee's employees").[4]

McDonald's further argues that the "undisputed record" and the "undisputed facts" it presented support those findings. *E.g.*, *Salazar* Br. at 8 (McDonald's had no control over working conditions as "[f]ranchisees are independent employers and are solely responsible for hiring…"); at 9 ("undisputed record" established that franchisee "exercised exclusive control over hiring, firing, training, scheduling rest and meal breaks, and imposing discipline"); at 15 ("the Franchise Agreements and summary judgment record establish that the franchisee alone controls hiring, firing, wages, hours, and day-to-day aspects of the workplace environment."); *see also id.* at 22-

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[3] All internal quotations and citations from the *Salazar* Brief are omitted unless otherwise indicated.

[4] Plaintiff similarly alleges here that franchisees are independent entities, responsible for all day-to-day restaurant operations, including employment matters. FAC at, *e.g.*, ¶¶ 35, 58, 74, 82. McDonald's has admitted that each franchise is its own economic decision-maker on employment issues. Answer [Dkt. No. 30] at ¶ 50.

23 (franchisees have "complete discretion over the selection, hiring, firing, supervision, assignment, direction, setting of wages, hours, and working conditions of [its] employees" and "McDonald's business manuals, referenced by the Agreements, make explicit the franchisee's exclusive authority over employment related matters."); and at 25 ("undisputed evidence" shows that franchisee representatives are "solely responsible" for hiring, firing, training, and supervising employees: "they alone hire and fire employees, conduct performance evaluations, and supervise them day to day, including by imposing discipline when warranted.").[5]

So while McDonald's posits to this Court that it is permitted to restrain competition for labor within its own franchise "system," it argues to another federal court—at the same time—that franchisee labor is an area in which it plays absolutely no role. These arguments belie McDonald's contention in this Court that McDonald's-branded restaurants may lawfully restrain competition for employee labor.[6]

And while it may be true that McDonald's may "limit intrabrand competition" by, for example, dictating what products its retailers may sell, Reply at 9, such a (vertical) limitation is merely consistent with an aspect of the franchise system which McDonald's *has chosen* to manage and as to which it *does* exercise system-wide control. The "McDonald's System" incorporates "the

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[5] McDonald's also explicitly disclaims any "joint employer" relationship with its franchisees. It argues that the franchise agreements specify that franchisees and it "are not and do not intend to be partners, associates, or joint employers in any way and McDonald's shall not be construed to be jointly liable for any acts or omissions of [franchisees] under any circumstances" and that the franchisees "shall have no authority, express or implied, to act as agent of McDonald's or any of its affiliates for any purpose." *Salazar* Br. at 6 (quoting franchise agreement); *see also id.* at 22 ("Uncontroverted record evidence" showing same).

[6] The *Salazar* Brief similarly guts McDonald's contention in this Court that the no-hire pact has so-called "pro-competitive" benefits—to the extent that claim survived McDonald's own removal, in 2017, of the no-hire and no-solicitation language from the standard franchise agreement on a going-forward basis.

retailing of a limited menu of uniform and quality food products," and operation of the restaurant includes "a designated menu of food and beverage products [with] uniformity of food specifications." *See* 2013 Franchise Agreement [Dkt. 27-1] at ¶ 1(a) ("***Nature and Scope of Franchise***") and at ¶12. Franchisees agree to serve "only those food and beverage products now or hereafter designated by McDonald's." *Id.* at ¶ 12(a) ("***Compliance with Entire System***"). But even though McDonald's may—and does—establish restrictions about what menu offerings must be made available in franchisee restaurants, it specifically *disclaims* this type of control as to franchisee-level hiring: "McDonald's, with thousands of franchises nationally (and with countless individuals employed by franchise operators), has neither the capacity nor the inclination to micromanage the employment practices of individual franchise operators." *Salazar* Br. at 2.[7]

As McDonald's itself rejects the proposition that franchise-level hiring is one of the areas where its "intrabrand franchise system … fosters coordination," Reply at 1, it negates its own argument that *per se* scrutiny is avoided simply because the anti-competitive restraint here exists in a franchise context.

For all the foregoing reasons and for the reasons set forth in Plaintiff's Opposition, the Court should deny Defendants' Motion to Dismiss.

[7] Unlike its hands-off approach to franchisee hiring, McDonald's strict operational control over food and beverage offerings precludes franchisees from competing with each other by offering, for instance, pizza. *Cf.* Reply at 9.

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Respectfully Submitted,

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