IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LEINANI DESLANDES, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	Case No. 17-cv-04857
v.	)	Judge Jorge L. Alonso Magistrate Judge Jeffrey Cole
McDONALD'S USA, LLC, a Delaware limited liability company, McDONALD'S CORPORATION, a Delaware corporation; and DOES 1 through 10, inclusive,	)	
Defendants.	)	

DEFENDANTS' RESPONSE TO PLAINTIFF'S SUR-REPLY
IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

In her Sur-Reply In Opposition to Defendants' Motion to Dismiss, Plaintiff suggests that McDonald's posited an argument in a recent brief filed in an unrelated case that somehow contradicts an argument McDonald's makes in this case. Plaintiff is incorrect. There is nothing either new or relevant about the fact that McDonald's is not a joint employer with its franchisees and does not exert control over its franchisees' employment practices. As Plaintiff has pointed out, McDonald's Answer in this case, filed with its Motion to Dismiss, states that its franchisees are independent and make their own employment decisions. (*See* ECF No. 46 at 4 n.4 (hereinafter "Sur-Reply").) But the issue raised by McDonald's Motion to Dismiss is not whether McDonald's jointly employs its franchisee's employees, but whether McDonald's franchisees' vertical agreements in Paragraph 14 of the franchise agreements to limit *intra*brand competition for labor violated the Sherman Act. Plaintiff says they did, but the U.S. Supreme Court, the Seventh Circuit, and other courts have held that such *intra*brand restrictions are not *per se* unlawful

and, in fact, can be pro-competitive because they can strengthen a brand and thereby promote *inter*brand competition. (*See* ECF No. 35 at 7-9 (Memo. in Support of Motion to Dismiss).)

There is absolutely nothing inconsistent between McDonald's position in this case and its position in *Salazar v. McDonald's Corporation et al.*, No. 17-15673 (U.S. Ct. App. 9th Cir.). Here, McDonald's contends that if a franchisee allegedly was restricted from hiring an existing McDonald's restaurant employee based on Paragraph 14 of the franchise agreement, that cannot be a *per se* violation of the antitrust laws because it was a legitimate *intra*brand restriction. The issue in *Salazar* was whether McDonald's "employed" a franchisee's employees under the California Supreme Court's three-part test, which looks to whether the defendant (1) exercises control over "wages, hours, or working conditions," (2) "suffers or permits" the employees' work, or (3) engages in a common-law employment relationship with the employees. (*See* ECF No. 43-3 at 8.) The *Salazar* court concluded definitively that McDonald's was *not* a joint employer with its franchisee because, among other reasons, McDonald's did not control its franchisee's hiring practices. *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS, 2016 WL 4394165, at *1 (N.D. Cal. Aug. 16, 2016). Notably, in reaching that conclusion, the court considered franchise agreements that contained the very same Paragraph 14 that Plaintiff here contends is evidence of an antitrust conspiracy to restrict hiring and suppress wages. *Id.* at *6; *see also* Declaration of Bruce Steinhilper in Support of Motion for Summary Judgment, Exs. A & B ¶ 14, *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS (N.D. Cal. May 6, 2016), ECF Nos. 91-1 & 91-2. The two cases are entirely distinct and involve completely different allegations. There is nothing inconsistent about McDonald's establishing in *Salazar* that it does not control the day-to-day employment decisions of its franchisees and its position here that a provision in its franchise agreements restricting franchisees from hiring or soliciting employees from other McDonald's

branded restaurants is not *per se* unlawful under the antitrust laws.

Finally, it is significant that Plaintiff has long known that McDonald's did not consider itself a joint employer with its franchisees and disclaimed control over its franchisees' hiring practices. As Plaintiff herself admits, these disclaimers are explicitly stated in the standard franchise agreement. (Sur-Reply at 4 n.5.) Moreover, McDonald's position in *Salazar* has been consistent and well-known for years. For example, in its 2016 order granting in part McDonald's motion for summary judgment in *Salazar*, the court stated: "McDonalds asserts it does not employ the Haynes workers because it does not retain or exert direct or indirect control over their hiring, firing, wages, or working conditions." *Salazar v. McDonald's Corp.*, No. 14-CV-02096-RS, 2016 WL 4394165, at *3 (N.D. Cal. Aug. 16, 2016). McDonald's earlier made the same argument in other matters, where courts have again concluded that McDonald's is not its franchisee employees' "joint employer." *See*, *e.g.*, *Ochoa v. McDonald's Corp.*, 133 F. Supp. 3d 1228, 1236 (N.D. Cal. 2015) ("[I]t is clear that McDonald's has the ability to exert considerable pressure on its franchisees. It can try to influence a franchisee in many ways, up to and including termination of the business relationship. But the evidentiary showings about McDonald's strength as a franchisor do nothing to negate or call into question the dispositive fact that the authority to make hiring, firing, wage, and staffing decisions at the Smith restaurants lies in Smith and its managers—and in them alone."). Tellingly, Plaintiff fails to explain why, if the issue of McDonald's disclaiming involvement in employee hiring is relevant to her antitrust case, she failed to raise it in her complaint, her amended complaint, or her opposition to the Motion to Dismiss. This supposed "contradiction" should be seen for what it is: a last-ditch attempt to save a claim that does not state a *per se* or rule of reason violation under the Sherman Act.

For these reasons, and those stated in McDonald's Motion to Dismiss briefs, the Court

should grant McDonald's Motion to Dismiss and deny Plaintiff leave to amend yet again. (*See* ECF No. 41 at 13 n.4 (Reply in Support of Motion to Dismiss).)

Dated: February 16, 2018

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

By: /s/ Rachel S. Brass
Rachel S. Brass

GIBSON DUNN & CRUTCHER LLP

D. Jarrett Arp (admitted pro hac vice)
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
Email: JArp@gibsondunn.com

Rachel S. Brass (admitted pro hac vice)
555 Mission St., Suite 3000
San Francisco, California 94105
Telephone: (415) 393-8200
Facsimile: (415) 374-8458
Email: RBrass@gibsondunn.com

Matthew C. Parrott (admitted pro hac vice)
3161 Michelson Dr.
Irvine, CA 92612
Telephone: (949) 451-3800
Facsimile: (949) 451-4220
Email: MParrott@gibsondunn.com

A&G LAW LLC

Robert M. Andalman (Atty. No. 6209454)
Rachael Blackburn (Atty. No. 6277142)
542 S. Dearborn St.; 10th Floor Chicago, IL 60605
Tel.: (312) 341-3900
Fax: (312) 341-0700

CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the **DEFENDANTS' RESPONSE TO PLAINTIFF'S SUR-REPLY IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was electronically filed on February 16, 2018 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