No. 128763

IN THE
SUPREME COURT OF ILLINOIS

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., and MIDWAY STAFFING, INC., Defendants-Appellants.	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0840 There Heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding.

JOINT BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS ELITE STAFFING, INC., METRO STAFF, INC., AND MIDWAY STAFFING, INC.

MCGUIREWOODS LLP
Amy B. Manning
77 West Wacker Drive
Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Firm ID No. 40426
amanning@mcguirewoods.com

Attorneys for Elite Staffing

AMUNDSEN DAVIS, LLC
John R. Hayes
150 N. Michigan Avenue
Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Firm ID No. 42907
jhayes@amundsendavislaw.com

Attorneys for Midway Staffing

FISH POTTER BOLAÑOS P.C.
David J. Fish
200 E. 5th Avenue
Suite 123
Naperville, Illinois 60563
Telephone: (630) 355-7590
Firm ID No. 23522
dfish@fishlawfirm.com

Attorneys for Metro Staff

Additional counsel in signature block

ORAL ARGUMENT REQUESTED

E-FILED
1/11/2023 4:26 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF POINTS AND AUTHORITIES

Page

NATURE OF THE CASE **1**

ISSUE PRESENTED **2**

JURISDICTION **2**

Rules

Ill. S. Ct. R. 315(b)(1) 2

STATUTE INVOLVED **2**

Statutes

740 ILCS 10/4 2

Cases

Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.,
162 Ill. 2d 99 (1994) 2

People ex rel. Scott v. Schwulst Bldg. Ctr., Inc.,
92 Ill. App. 3d 552 (4th Dist. 1981), *rev'd on other grounds*,
89 Ill. 2d 365 (1982) 2

STATEMENT OF FACTS **3**

Statutes

740 ILCS 10/4 4

Cases

Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.,
9 F.4th 1102 (9th Cir. 2021) 3

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018) 4

Deslandes v. McDonald's USA, LLC,
No. 1:17-cv-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) 4

O'Regan v. Arb. Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 4, 6

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

STANDARD OF REVIEW **7**

Cases

People ex rel. Madigan v. Wildermuth,
2017 IL 120763 (2017) 7

People v. Fiveash,
2015 IL 117669 (2015) 7

Schultz v. St. Clair Cnty.,
2022 IL 126856 (2022) 7

SUMMARY OF THE ARGUMENT **7**

ARGUMENT **8**

I. The IAA Does Not Apply To Employer Coordination on Individual Labor **8**

A. The Statute's Plain Text Carves Out Coordination Regarding Individual Labor. **9**

Statutes

110 ILCS 1010/11(c) 11

205 ILCS 305/1.1 11

740 ILCS 10/3(1)(a)–(c) 9

740 ILCS 10/4 .... 9, 10, 11, 13

740 ILCS 10/5(1) 11, 12

Cases

Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.,
9 F.4th 1102 (9th Cir. 2021) 13

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018) 10, 13

Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100,
421 U.S. 616 (1975) 13

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

Cosmopolitan Nat'l Bank v. Cook Cnty.,
103 Ill. 2d 302 (1984) 12, 13

Deslandes v. McDonald's USA, LLC,
No. 1:17-cv-4857, 2018 WL 3105955
(N.D. Ill. June 25, 2018) 10, 12, 13

Estate of Alford v. Shelton,
2017 IL 121199 (2017) 11

Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.,
162 Ill. 2d 99 (1994) 14

People ex rel. Madigan v. Wildermuth,
2017 IL 120763 (2017) 14

O'Regan v. Arb. Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 10, 13

People v. Clark,
2019 IL 122891 (2019) 11, 13

People v. Fiveash,
2015 IL 117669 (2015) 9, 12

People v. Hudson,
228 Ill. 2d 181 (2008) 11

People v. Kastman,
2022 IL 127681 (2022) 12

Schultz v. St. Clair Cnty.,
2022 IL 126856 (2022) 12

B. Other Interpretive Tools Confirm That Plain Text Understanding. ..15

Cases

In re Marriage of Mathis,
2012 IL 113496 (2012) 15

People v. Collins,
214 Ill. 2d 206 (2005) 15

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

Petersen v. Wallach,
198 Ill. 2d 439 (2002) 15

1. The IAA Is Materially Narrower Than Federal Law...............15

Statutes

15 U.S.C. § 17...16

740 ILCS 10/4...17

740 ILCS 10/11...16

740 ILCS 10/5, Bar Comm. Cmts.-1967 17

740 ILCS 10/11, Bar Comm. Cmts.-1967 16

Cases

Cordova v. Bache & Co.,
321 F. Supp. 600 (S.D.N.Y. 1970)...17

Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.,
162 Ill. 2d 99 (1994) 16

People v. Crawford Distrib. Co.,
53 Ill. 2d 332 (1972) 16

Williams v. St. Joseph Hosp.,
629 F.2d 448 (7th Cir. 1980) 16

2. Legislative History Confirms The General Assembly Intended To Retain A Carveout For Labor Coordination.......................18

Statutes

740 ILCS 10/4...18

740 ILCS 10/4, Bar Comm. Cmts.-1967 18

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

Cases

Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.,
9 F.4th 1102 (9th Cir. 2021) 19

In re Mary Ann P.,
202 Ill. 2d 393 (2002) 20

People ex rel. Scott v. Schwulst Bldg. Ctr., Inc.,
92 Ill. App. 3d 552 (4th Dist. 1981), *rev'd on other grounds*,
89 Ill. 2d 365 (1982) 18

Schultz v. St. Clair Cnty.,
2022 IL 126856 (2022) 19

Other Authorities

1891 ILL. LAWS 78 (1891), available at https://archive.org/details/
lawsofstateofill1891illi/page/78/mode/2up...................................18

3. The General Assembly Has Approved Of A Decades-Spanning Line Of Federal Authorities Interpreting The IAA To Carve Out Employer Coordination On Labor. 20

Statutes

740 ILCS 10/4...23

Cases

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018)..21

California v. Infineon Techs. AG,
531 F. Supp. 2d 1124 (N.D. Cal. 2007) 22

Deslandes v. McDonald's USA, LLC,
No. 1:17-cv-4857, 2018 WL 3105955
(N.D. Ill. June 25, 2018) 21

In re Marriage of Mathis,
2012 IL 113496 (2012) 20, 21

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

O'Regan v. Arb. Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 21

People v. Villa,
2011 IL 110777 (2011) 21

People v. Way,
2017 IL 120023 (2017) 20

Other Authorities

2009 Ill. Legis. Serv. P.A. 96-751 (H.B. 2246) 22

S. Tr. 90–91, 96th Gen. Assembly, 53d Legis. Day (Ill. May 20, 2009)...22

II. The Appellate Court's Resolution Of This Appeal Fundamentally Misunderstood The Certified Question. 23

Statutes

740 ILCS 10/4..25

Cases

Deslandes v. McDonald's USA, LLC,
No. 1:17-cv-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018)...25

Donnelly v. Donnelly,
2015 IL App (1st) 142619 (1st Dist. 2015)...................................25

O'Regan v. Arb. Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 24

Rules

Ill. S. Ct. R. 308(c)...24

CONCLUSION 26

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

NATURE OF THE CASE

This case is about whether the Illinois Antitrust Act ("IAA") means what it says. The IAA says that "labor which is performed by natural persons as employees of others" is excluded from the "Services" the IAA covers. This means that the IAA does not provide a claim to challenge conduct that allegedly restrains individual labor performed by employees. Until the trial court here, every court to interpret the IAA has interpreted the language to mean exactly what it says: there is no claim under the IAA for conduct affecting individual labor performed by employees, including claims alleging employer-to-employer wage and hiring coordination. Not only does the IAA expressly state that the individual labor market is beyond its scope, but the General Assembly has not amended the IAA to say otherwise, despite decades of precedent interpreting the IAA just as it was written.

The State's IAA claims assert the very type of conduct the IAA expressly carves out. The State asserts that Defendants—three staffing agencies and their common client—allegedly coordinated with each other about hiring workers and about the wages paid to workers hired for the common client. Recognizing that it was important to resolve whether the IAA reaches the conduct alleged by the State, the trial court certified the question for interlocutory appeal under Rule 308. But the Appellate Court declined to answer that question, choosing instead to *sua sponte* reframe it to one about the staffing industry specifically. The three staffing agency defendants—Appellants here—now appeal.[1]

[1] The trial court also certified a second question, which primarily concerns what antitrust standard applies to alleged agreements involving a vertical component, such as a common client. That question is the subject of a companion appeal, filed by Defendant Colony Display LLC, and docketed as case No. 128767. The instant appeal, however, involves only the trial court's first certified question, which concerns whether wage- and hiring-coordination is beyond the IAA's reach.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

ISSUE PRESENTED

Whether the IAA's exclusion of "labor which is performed by natural persons as employees of others" from the "Services" covered by the IAA forecloses claims alleging employer coordination on wages and hiring.

JURISDICTION

The Appellate Court entered its judgment on the Rule 308 certified question on June 3, 2022, (A1–16), and denied rehearing on June 27, 2022, (A20). Defendants timely petitioned this Court under Rule 315 for leave to appeal on August 1, 2022, which this Court allowed. Ill. S. Ct. R. 315(b)(1); (A183–205, 206). This Court therefore has jurisdiction.

STATUTE INVOLVED

This appeal concerns the construction of Section 4 of the IAA, 740 ILCS 10/4. That section is set forth below. The entire IAA, including the Bar Committee Comments,[2] is set forth in the Appendix. (A207–42.)

740 ILCS 10/4

As used in this Act, unless the context otherwise requires:

> "Trade or commerce" includes all economic activity involving or relating to any commodity or service.
>
> "Commodity" shall mean any kind of real or personal property.
>
> "Service" shall mean any activity, not covered by the definition of "commodity," which is performed in whole or in part for the purpose of financial gain.

[2] The Bar Committee Comments are commentary on the IAA promulgated in 1967 (two years after the IAA was passed) by the Chicago Bar Association's Committee on Antitrust Laws. *People ex rel. Scott v. Schwulst Bldg. Ctr., Inc.*, 92 Ill. App. 3d 552, 554 (4th Dist. 1981), *rev'd on other grounds*, 89 Ill. 2d 365 (1982). This Court has referred to the Comments in construing the statute. *See, e.g.*, *Gilbert's Ethan Allen Gallery v. Ethan Allen, Inc.*, 162 Ill. 2d 99, 106 (1994).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

> "Service" shall not be deemed to include labor which is performed by natural persons as employees of others.
>
> "Person" shall mean any natural person, or any corporation, partnership, or association of persons.

STATEMENT OF FACTS

Defendants Elite Staffing, Inc., Metro Staff, Inc., and Midway Staffing, Inc. provide temporary staffing services to clients across the State of Illinois, helping workers of all skill levels find jobs at businesses looking for quality talent. Staffing agencies sometimes work for the same client at the same location, as they have here with Defendant Colony Display LLC, a manufacturer of customized displays and exhibits. In such settings, all involved—agencies, clients, and workers—can benefit from coordination between the staffing agencies and common client on issues affecting employees such as wages and hiring. As courts have recognized, such coordination can enable more employees to be placed in the jobs they are qualified to perform. *E.g.*, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109–10 (9th Cir. 2021) (recognizing that "procompetitive collaboration" on hiring practices can help "fulfill" staffing needs).

The State alleges that Defendants have violated state antitrust law by allegedly coordinating with each other about the wages they pay their workers and about which workers they hire at Colony's facilities. (*See* A26, 31–32.) In particular, the State alleges that the staffing agencies, facilitated by their common client Colony, agreed to pay temporary workers placed at Colony facilities the same wage and to not solicit or hire temporary workers already placed at Colony by one of the other staffing agencies. (*See*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

id.) Despite the potential procompetitive effects, the State claims that such alleged wage- and hiring-coordination is a *per se* violation of the IAA. (*See* A42–44.)

Defendants moved to dismiss the State's Complaint, arguing, as relevant here, that the IAA does not provide a claim to challenge alleged coordination between businesses about the wages they pay or the workers they employ. (A47–86); *see* 740 ILCS 10/4 (excluding "labor which is performed by natural persons as employees of others" from the "services" the statute regulates). In so moving, Defendants identified that every court to have addressed the subject had reached that conclusion. *O'Regan v. Arb. Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997) ("[T]o the extent [the plaintiff's] claims relate to an alleged market for labor services, they are specifically excluded by § 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.'"); *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-4857, 2018 WL 3105955, at *9 (N.D. Ill. June 25, 2018) ("[T]he plain language of the [IAA] excludes plaintiff's claim, which alleges that the no-hire agreement artificially suppressed her wage, i.e., the price paid for her service."); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) (concluding that a challenge to hiring coordination could be "quickly disposed of" because "the [IAA] expressly states that it does not apply to 'labor which is performed by natural persons as employees of others'").

The trial court denied Defendants' motion to dismiss (A22–25), but certified this case-dispositive question for appeal under Rule 308, (A21). In particular, the trial court sought resolution of whether the IAA's text foreclosed challenges to employer coordination about individual labor (referred to by the trial court, the parties, and other cases as "labor services"):

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

> Whether the definition of "Service" under Section 4 of the Illinois Antitrust Act, 740 ILCS 10/4, which states that Service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the Act as a whole and thus excludes all labor services from the Act's coverage.

(A5.) Resolution of that question, the trial court and Defendants agreed, was important enough to warrant immediate appellate review and would materially advance the proceedings.

The Appellate Court did not answer that question. (A5.) Instead, without input from the parties, it changed the certified question to an industry-specific one about whether the services temporary staffing agencies provide to their clients are beyond IAA scrutiny, even though the State has alleged no restraint of trade in that market. Specifically, the Appellate Court reframed the question to focus on whether the IAA contains an exemption for staffing agencies (even though Defendants have never asserted that such a staffing-agency exemption exists):

> [W]hether the exclusion of individual labor from the definition of "service" in section 4 of the Act also excludes the labor-related services provided by temporary staffing agencies and therefore exempts such agencies from the Act's coverage.

(A5.) The Appellate Court answered that reframed question "No"—"the services provided by staffing agencies are generally not excluded from the Act's coverage." (*Id.*)

Notwithstanding that conclusion, however, the Appellate Court suggested that it agreed with Defendants that the IAA does not apply to coordination about employees' individual labor services. Specifically, the Appellate Court reasoned that, per the IAA's text, "[t]he second definition [of Service] clearly expresses the idea that an individual's labor for their employer is not a service." (A6.) And so, because "individual labor is not a service," "otherwise anticompetitive action restraining individual labor is permissible."

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

(A7–8.) Such a position, the Appellate Court noted, comported with the Seventh Circuit's *O'Regan* holding that "a former employee could not bring an Illinois antitrust claim related to an alleged restraint on her individual labor." (A8.) *O'Regan*, the court said, was "entirely consistent" with its own reading that "the plain language . . . allow[s] such a restraint." (A8–9.) And the court likewise appeared to agree with subsequent interpretations of *O'Regan*, which, in its view, had properly concluded that the IAA "excludes claims related to a market for labor services" and therefore had correctly dismissed management-side wage- and hiring-coordination regarding an "employee's own individual labor." (A9.)

Defendants sought rehearing under Rule 367 to address the inconsistencies in the Appellate Court's opinion. (A163–82.) Specifically, Defendants identified that the Appellate Court apparently misapprehended the "labor services" term in the trial court's certified question. The Appellate Court seemed to think that the term referred to coordination on the "labor-related services provided by temporary staffing agencies" to their clients. (A5.) Defendants explained that the phrase referred to alleged coordination about the individual labor provided by employees, which is the only conduct alleged and is how all parties and the trial court had intended the term, (*see* A172–73), as well as how all prior courts had understood that phrase, *see, e.g.*, *O'Regan*, 121 F.3d at 1066. Defendants further raised that the Appellate Court's reasoning on *O'Regan* and its progeny supported Defendants' view of the IAA: the IAA does not reach alleged employer coordination regarding individual labor performed by employees.

The Appellate Court denied Defendants' petition for rehearing without an opinion. (A20.) This Court allowed Defendants leave to appeal under Rule 315. (A206.)

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

STANDARD OF REVIEW

This Court reviews questions of law—including those certified for appeal under Rule 308—*de novo*. *People ex rel. Madigan v. Wildermuth*, 2017 IL 120763, ¶ 11 (2017). Although the question as articulated by the trial court guides its analysis, this Court is "not limited solely to consideration of the certified question." *Id.* The Court's review instead focuses on the ultimate "propriety" of "the order that gave rise to the appeal," here, the trial court's denial of Defendants' motion to dismiss. *Id.* This Court's primary touchstone in this interlocutory posture is to promote "judicial economy" and "reach an equitable result" that materially advances the efficient resolution of the case on remand. *Id.*

This appeal concerns the proper interpretation of Illinois's antitrust statute. This Court's "primary goal" in that analysis is "to ascertain and give effect to the legislative intent." *Schultz v. St. Clair Cnty.*, 2022 IL 126856, ¶ 19 (2022). To do so, this Court looks first and foremost to "the plain and ordinary language of the statute." *Id.* The statute's "words and phrases should be interpreted in relation to each other and the entire act," including with reference to any relevant statutory definitions. *Id.*; *see People v. Fiveash*, 2015 IL 117669, ¶ 13 (2015). Every part of the statute should be given effect; "no word or provision should be rendered meaningless." *Schultz*, 2022 IL 126856, ¶ 19. And any language that is "clear and unambiguous" "must be applied as written." *Id.* Only if there is some ambiguity on the face of the text itself will this Court look beyond the language used by the General Assembly and "rel[y] upon other aids of construction." *Id.*

SUMMARY OF THE ARGUMENT

The IAA does not apply to alleged employer coordination about individual labor performed by employees. The statute's plain text excludes individual labor from the "Services" it covers. So agreements about individual labor—including alleged employer

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

coordination on wages and hiring—fall outside the IAA. That definitional carveout does much more than address unions (which have their own categorical exemption later in the statute); it covers all entities, including employers, from antitrust scrutiny when working together to meet staffing needs. And, except for the trial court here, every court to have addressed the issue has reached the same conclusion: by its plain text, the IAA does not reach employer wage- and hiring-coordination.

That result is only further confirmed by other interpretive aids. The IAA is designed not to apply to labor coordination—and is pointedly different from federal law in that respect. The General Assembly has purposely kept the labor services carveout even as it removed a broader carveout for professional occupations. And it has declined to modify any relevant part of the statute in the over-twenty-five years that federal courts have held that wage- and hiring-coordination is not actionable under the IAA. Simply put: the General Assembly meant what it said. The IAA does not reach labor coordination.

This Court should decline to reframe the certified question as the Appellate Court did. This case concerns labor coordination generally, not the temporary staffing industry specifically. That is the core of the question the trial court certified. And that question can be easily be answered "Yes"; the IAA does not apply to employer coordination on individual labor. This Court should so hold and remand with instructions to dismiss the State's Complaint, which only alleges such coordination, for failure to state a claim.

ARGUMENT

I. The IAA Does Not Apply To Employer Coordination on Individual Labor.

The IAA does not cover coordination on individual labor. The statute's plain text could not be clearer: individual labor is not a regulated "Service." So alleged agreements about the terms of such labor—like what wages to pay or who to hire—are beyond the

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

scope of the statute. That is equally true for both unions and employers. And, indeed, a steady drumbeat of legislative history confirms as much. However else such coordination might be regulated, it is not subject to the IAA.

A. The Statute's Plain Text Carves Out Coordination Regarding Individual Labor.

The plain text of the IAA states that it does not reach individual labor. The statute carves out "labor which is performed by natural persons as employees of others" from the definition of the "Services" it regulates. 740 ILCS 10/4 ("'Service' shall not be deemed to include labor which is performed by natural persons as employees of others."). That definitional carveout matters to interpreting other provisions in the IAA; "[w]hen a term is defined within a statute, that term must be construed by applying the statutory definition provided by the legislature." *Fiveash*, 2015 IL 117669, ¶ 13.

So, when the IAA prohibits "fixing . . . the fee charged or paid for any service," "limiting . . . the sale or supply of any service," or "dividing . . . markets . . . for any . . . service," 740 ILCS 10/3(1)(a)–(c), it reaches none of those agreements if they are about employee labor. Any IAA claims asserting an agreement on employee wages or hiring—like the State's alleged claims here—therefore fail as a matter of law. Simply put, the IAA does not reach alleged coordination on labor.

Indeed, the IAA's language is so clear that, minus the trial court here, every court to have dealt with it has concluded that it means exactly what it says: the IAA does not apply to any agreements about the terms of employee labor. That includes those made between employers.

Most prominently, the Seventh Circuit has unambiguously concluded that such coordination is not covered because "labor services . . . are specifically excluded by § 10/4

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

of the Act." *O'Regan*, 121 F.3d at 1066. Follow-on federal district courts have likewise identified the carveout's effect in equally plain terms. In their words, "the [IAA] specifically excludes claims 'related to an alleged market for labor services,'" *Butler*, 331 F. Supp. 3d at 797 (quoting *O'Regan*, 121 F.3d at 1066), and "the plain language of the statute excludes" claims premised on things like "no-hire agreement[s]." *Deslandes*, 2018 WL 3105955, at *9. As a consequence, those courts then dismissed IAA claims involving essentially the same alleged employer-to-employer coordination at issue here. *Butler*, 331 F. Supp. 3d at 797 (dismissing challenge to hiring coordination); *Deslandes*, 2018 WL 3105955, at *9 (same). In fact, even the Appellate Court here agreed with that principle: like those courts, it concluded that, because "individual labor is not a service," "otherwise anticompetitive action restraining individual labor is permissible." (A7–8.) These courts' conclusions are simple and straightforward: by its terms, the IAA does not apply to agreements about employee labor. And that naturally includes agreements between competitor businesses. Put simply: there is no claim under the IAA for alleged employer wage- or hiring-coordination.

That same plain text reading confirms that the definitional carveout does something different than merely address unions, the alternative interpretation the State has advanced. The State claims that the carveout solely "clarifies" the existence of a separate exemption for labor unions later in the IAA. (*E.g.*, A115, 129–30.) That unions-only theory of the definitional carveout is wrong for (at least) two distinct textual reasons.

The first problem with the State's reading is that the relevant "Service" carveout does not refer to unions. It refers only to "labor . . . by natural persons"—that is, to individual labor. 740 ILCS 10/4. It uses no touchstone union language like "labor

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

organization[*s*]", "*organized* labor", or "labor *unions*." *Compare* 740 ILCS 10/4, *with* 740 ILCS 10/5(1), 205 ILCS 305/1.1, *and* 110 ILCS 1010/11(c). The "Service" definition thus lacks a hook to collectivized labor; it refers only to individual labor.

That is no oversight, either; the IAA itself deploys such union-specific language later in the statute when it intends to refer to unions. The IAA's entirely separate union exemption uses classic union language—"labor organization"—to exempt unions in their entirety from state antitrust liability. 740 ILCS 10/5(1) (exempting "activities of any labor organization . . . which are directed solely to labor objectives"). Nothing similar appears in the Definitions section's services carveout, which refers solely to individual labor: "labor which is performed by natural persons as employees of others." 740 ILCS 10/4.

Using "different language" imparts "different meanings." *People v. Hudson*, 228 Ill. 2d 181, 193 (2008); *see also, e.g.*, *People v. Clark*, 2019 IL 122891, ¶ 23 (2019) (concluding that when a word from one section is "absent" from another, it is presumed not to apply to the latter section); *Estate of Alford v. Shelton*, 2017 IL 121199, ¶ 45 (2017) (emphasizing that "the legislature must have intended" to give two sections "different application[s]" by using different terms). The natural upshot: the General Assembly used "labor . . . by natural persons" in the carveout to refer to individual employees' labor and then separately used "labor organization" in the exemption to refer to unions. Any agreements about employee labor—whether by unions or not—are therefore not subject to the IAA.

The second (and equally fatal) problem for the State's unions-only interpretation is that the State's theory would also render the definitional carveout superfluous to the union exemption. That separate exemption protects unions top-to-bottom, excluding them from

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

antitrust scrutiny whether they are coordinating about labor, other types of services, or even non-services (like commodities). *See* 740 ILCS 10/5(1); *Deslandes*, 2018 WL 3105955, at *9 ("[T]he statute includes a separate labor exemption."). There would be no purpose for an additional unions-only carveout for services on top of that union exemption—unions are already protected in everything they do; it would be redundant to also protect them for coordinating on services. And the State essentially concedes as much; it has repeatedly stated that, in its view, the definitional labor services carveout merely "clarifies" that the separate union exemption exists. (*E.g.*, A115, 129–30.)

That is a cardinal interpretive error. Statutes are to be interpreted to give independent effect to every one of their provisions. Statutes occasionally have some overlap; the General Assembly sometimes takes a belt-and-suspenders approach with partially duplicative protections. But it is presumed not to use two belts. *See, e.g.*, *People v. Kastman*, 2022 IL 127681, ¶ 30 (2022) ("Each word, clause, and sentence of a statute must be given a reasonable meaning, if possible, and should not be rendered superfluous."); *Schultz*, 2022 IL 126856, ¶ 19 ("[N]o word or provision should be rendered meaningless."); *Cosmopolitan Nat'l Bank v. Cook Cnty.*, 103 Ill. 2d 302, 313 (1984) ("It is a fundamental rule of statutory construction that surplusage will not be presumed[.]"). Every part of a statute presumptively does something distinct. The State's interpretation would violate that rule by effectively writing the carveout out of the statute.

The IAA should be read to avoid the defects inherent in the State's unions-only theory. Take first the General Assembly's choice of language in the Definitions section. By its terms, that definitional labor services carveout—unlike the union exemption—is not exclusively for unions. *See Fiveash*, 2015 IL 117669, ¶ 13. The union-specific

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

terminology is "absent" from that section. *Clark*, 2019 IL 122891, ¶ 23. So that section excludes all coordination about employee labor, no matter who does it, from the statute's coverage. 740 ILCS 10/4 ;*O'Regan*, 121 F.3d at 1066 (concluding that an employer's coordination about its employee's labor fell outside the IAA); *Butler*, 331 F. Supp. 3d at 797 (same); *Deslandes*, 2018 WL 3105955, at *9 (same).

For similar reasons, the statute is also best read to give separate and independent effects to the labor services carveout and the union exemption. Unlike the State's surplusage interpretation, those two sections can (and do) operate differently. *Deslandes*, 2018 WL 3105955, at *9; *see Cosmopolitan Nat'l Bank*, 103 Ill. 2d at 313–14. The carveout and the exemption use different language with "distinct meanings": the carveout applies to labor generally while the exemption applies just to labor unions. *Cosmopolitan Nat'l Bank*, 103 Ill. 2d at 314. It is "logically possible"—indeed, entirely natural—that those sections have different coverage. *Id.* The carveout defines a *what* that is carved out (coordination about employee labor) no matter who engages in it, while the union exemption defines a *who* that is specifically exempt (labor unions) despite the market impacted. The carveout and exemption thereby achieve two distinct legislative goals.[3] The IAA's text is best read to give meaningful effect to both the carveout and the exemption, and therefore to both of those legislative aims.

Naturally, there is some overlap between the services carveout and the union exemption—but not the total overlap the State suggests. Unions often advance their

---

[3] *See, e.g.*, *Aya Healthcare Servs.*, 9 F.4th at 1109–10 (recognizing that "procompetitive collaboration" on hiring practices can help "fulfill" staffing needs); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975) (noting promoting union activity sometimes "requires tolerance for the lessening of business competition").

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

legitimate labor objectives by making agreements about employee labor services, by, for instance, collective bargaining or striking. And when they do so, they can benefit from the fact that all agreements about individual labor are beyond the IAA's reach. But the IAA's union exemption allows more. It also lets unions coordinate on, for instance, the sale of commodities—something they would be unable to do under the labor services carveout alone.[4] And the carveout has its own unique effect separate from the union exemption: it allows non-union entities to coordinate on employee labor. *See Gilbert's*, 162 Ill. 2d at 106 (noting a section of the IAA was not "superfluous" even though "there may be some overlap between" the sections at issue). These provisions thus operate independently, and with different effects.

That plain text reading not only forecloses the State's interpretive theory—it also dooms the State's claims as a matter of law. The State has alleged only wage- and hiring-coordination. (*See* A42–44.) And as discussed, the IAA does not cover such conduct. So the trial court should have dismissed the State's Complaint. (A22–25.) *See Wildermuth*, 2017 IL 120763, ¶ 11 (noting that this Court should consider the propriety of the underlying order that gave rise to the appeal). That error would be rectified by answering "Yes" to the certified question—the IAA does not apply to alleged coordination about employee labor—and remanding with instructions to dismiss the Complaint.

[4] For example, unions could agree to use their membership funds to purchase all available sources of a particular raw material and only sell it at a coordinated price to companies that use union labor. They would be beyond IAA scrutiny in doing so because of the union exemption alone. If a group of non-union entities agreed to do the same thing, they would be subject to the IAA; specifically, the labor services carveout would not apply because such an agreement on commodity prices is not an agreement on employee labor.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

In short, by its plain text, the IAA does not apply to employer coordination on individual labor. The Definitions section removes all types of alleged agreements about employee labor from the statute's ambit. That definitional carveout does more than exclude unions. The IAA also does not reach businesses—like Defendants here—when they allegedly coordinate about labor. Accordingly, the State's Complaint, which takes aim solely at alleged wage- and hiring-coordination, cannot proceed.

B. Other Interpretive Tools Confirm That Plain Text Understanding.

Since the text is clear that alleged wage- and hiring-coordination is not actionable under the IAA, this Court need not go any further.[5] But even if the Court looked to other tools of statutory interpretation, those, too, confirm that the General Assembly intended to carve out coordination about employee labor from the IAA's reach. Any such coordination is, as a matter of state legislative design, better addressed through more specific labor and employment laws.

1. The IAA Is Materially Narrower Than Federal Law.

The IAA is pointedly—and intentionally—narrower than federal law when regulating labor coordination. The General Assembly designed the IAA to exclude more conduct from antitrust scrutiny than the Clayton Act's union exemption. Unlike federal law, the General Assembly also created a definitional carveout that removes all types of labor coordination from the IAA's ambit.

[5] *In re Marriage of Mathis*, 2012 IL 113496, ¶ 20 (2012) ("When the language is clear, our task is simple: we must give it effect as it was written and enacted."); *People v. Collins*, 214 Ill. 2d 206, 214 (2005) ("Where the language is plain and unambiguous we must apply the statute without resort to further aids of statutory construction."); *Petersen v. Wallach*, 198 Ill. 2d 439, 446 (2002) (identifying that, when the language of a statute is "unambiguous," it is "improvident" to "look beyond" that language to considerations like "legislative history").

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Federal antitrust law does not categorically exclude coordination about employee labor from its reach. But the IAA was purposely designed to be narrower than federal antitrust law in various ways. 740 ILCS 10/11, Bar Comm. Cmts.-1967; *accord, e.g.*, *Gilbert's*, 162 Ill. 2d at 108 (refusing to follow federal antitrust law because the IAA is "narrower" than federal law on certain types of unilateral conduct); *People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 340 (1972) (same because the IAA is "narrower" than federal law on witness immunities). So federal antitrust law matters only when it is "identical or similar" to the IAA. 740 ILCS 10/11.

This is one way the IAA is narrower than federal law. The IAA's definitional carveout for alleged labor coordination is unique. There is no "identical or similar" provision in the federal antitrust statutes. *Id.* Federal antitrust law contains only a union exemption—it does not also put alleged agreements about employee labor definitionally beyond its reach like the IAA does. *See* 15 U.S.C. § 17. Federal antitrust law is therefore irrelevant to interpreting the IAA's labor services carveout. *See Gilbert's*, 162 Ill. 2d at 108; *Crawford Distrib. Co.*, 53 Ill. 2d at 340.

The federal union exemption is distinct from the IAA's definitional carveout. The Clayton Act's federal union exemption is prefaced with a line stating that, for the purposes of that exemption, "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17. But placing that prefatory clause in the same section as the exemption itself cabins the language's effect to explaining why unions specifically are beyond federal antitrust scrutiny. *E.g.*, *Williams v. St. Joseph Hosp.*, 629 F.2d 448, 453 n.8 (7th Cir. 1980) (identifying that the prefatory clause is "limit[ed]" by the union-focused nature of the exemption because they appear in the same section). If that language appeared

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

elsewhere, it would not have the same effect. Indeed, as a case the State has frequently cited makes plain, had the Clayton Act "stopped" after its labor-is-not-a-commodity language, it would "lend support" for the proposition that coordination about employee labor is beyond the reach of federal antitrust law. *Cordova v. Bache & Co.*, 321 F. Supp. 600, 605 (S.D.N.Y. 1970).

It therefore matters that the IAA uses different employee-labor-is-not-a-service language in a different section from its union exemption. The IAA's Definitions section provides that "'Service' shall not be deemed to include labor which is performed by natural persons as employees of others"—full stop. 740 ILCS 10/4. The effect of that standalone provision is simple: it changes the definition of "Service" throughout the statute, irrespective of union status. Indeed, Bar Committee Comments to the IAA union exemption confirm as much: when the union exemption and the definitional carveout are "read together", they "make the Act inapplicable to agreements by either labor or nonlabor groups insofar as they relate to restraint of competition concerning labor itself." 740 ILCS 10/5, Bar Comm. Cmts.-1967. That provides more than the union-focused protection afforded by federal law. It narrows the types of conduct the IAA regulates.

The IAA's definitional labor services carveout is therefore a material and intentional departure from federal antitrust law. The IAA puts all coordination about employee labor beyond its reach—even when allegedly done by non-union entities. The IAA's scope is thus narrower than federal law on the subject. That difference from federal law should be given effect.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

2. Legislative History Confirms The General Assembly Intended To Retain A Carveout For Labor Coordination.

The IAA's narrowness on this point is no accident. Even as the General Assembly has broadened the IAA in other respects, it has retained the carveout for alleged coordination on labor services. That legislative history confirms that the General Assembly intentionally crafted the IAA not to reach coordination about individual labor performed by employees.

The IAA's predecessor statute—the earlier Antitrust Act of 1891—did not apply to services at all.[6] That exclusion left essentially all professional occupations (which make their money from providing services) beyond antitrust scrutiny. That dynamic, unsurprisingly, was one of the eccentricities that made the 1891 Act "largely ignored and not enforced." *People ex rel. Scott v. Schwulst Bldg. Ctr., Inc.*, 92 Ill. App. 3d 552, 554 (4th Dist. 1981), *rev'd on other grounds*, 89 Ill. 2d 365 (1982). And so, when it came to enact the IAA in 1965, the General Assembly sensibly sought to fix this "services loophole."

The IAA significantly cut back on—but intentionally did not eliminate wholesale—that "loophole." It put "*almost all* service occupations" within the statute's reach. 740 ILCS 10/4, Bar Comm. Cmts.-1967 (emphasis added). But "almost all" is less than "all." *Id.* And the General Assembly clarified exactly how much less with the statute's text: unlike agreements about professional services, coordination about employees' labor services would not be covered by the IAA. 740 ILCS 10/4.

---

[6] *See* 1891 ILL. LAWS 78 (1891) (regulating only agreements about "any article of merchandise or commodity"), available at https://archive.org/details/lawsofstateofill1891illi/page/78/mode/2up.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

It makes sense why the General Assembly would continue allowing labor services coordination under the IAA. The labor market is notoriously tumultuous—and high stakes. Businesses and workers in many industries struggle to keep skilled workers in the right jobs, especially over long periods of time. (That is why, for instance, unions and employers often implement seniority regimes.) And that tumult can create potentially disastrous consequences for employers and employees alike: unmet staffing needs and under- or unemployment, most obviously. As such, there are potential procompetitive benefits to employer coordination; doing so can ensure employment of well-trained workers with minimal workplace disruption. *E.g.*, *Aya Healthcare Servs.*, 9 F.4th at 1109–10 (emphasizing that "procompetitive collaboration" can be facilitated by employer-to-employer hiring limitations).

Those potential benefits make labor coordination a particularly poor fit for antitrust law's treble damages and potential criminal penalties. Such stiff sanctions risk chilling procompetitive collaboration between employers—potentially keeping qualified and eager workers from the shop floor. The General Assembly could therefore reasonably conclude that targeted labor and employment laws (of which Illinois has many) would better regulate the benefits and risks of such coordination than antitrust law ever could. In other words, keeping the labor services carveout in the IAA was a logical legislative decision.

And the General Assembly's decision to keep the definitional labor services carveout also matters in properly interpretating the statute. If the General Assembly wanted to completely close the services loophole and make the IAA apply to agreements about employee labor services, it could have done that. *Schultz*, 2022 IL 126856, ¶ 27 ("[I]f the legislature wanted to limit the scope of [an immunity], it could have done so

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

expressly."); *In re Mary Ann P.*, 202 Ill. 2d 393, 409 (2002) ("Had the legislature also intended to permit [the State to challenge certain conduct], it could have done so. The legislature has not seen fit to amend the statute in this fashion, and we will not, under the guise of statutory construction, inject this provision into the statute."). But it kept in a (smaller) carveout for only a subset of services: the labor individuals provide as employees. That decision confirms the legislature's intent to carve out coordination about individual labor.

3. The General Assembly Has Approved Of A Decades-Spanning Line Of Federal Authorities Interpreting The IAA To Carve Out Employer Coordination On Labor.

The General Assembly's decision to carve out coordination on labor services is further confirmed by its apparent approval of an unbroken, twenty-five-year line of federal authorities holding that the IAA does not apply to agreements about labor services. Those cases have long put alleged wage- and hiring-coordination beyond the IAA's reach. The General Assembly has not changed the statute in response. It has therefore presumptively acquiesced to those interpretations.

The General Assembly is presumed to be aware of all judicial decisions interpreting its statutes—and to approve of judicial interpretations that it has not acted to address. As this Court has put it, courts must "assume not only that the General Assembly acts with full knowledge of previous judicial decisions but also that its silence on an issue in the face of those decisions indicates its acquiescence to them." *People v. Way*, 2017 IL 120023, ¶ 27 (2017) (citing *In re Marriage of Mathis*, 2012 IL 113496, ¶ 25). "[P]revailing case law" thus becomes "a part of the law" itself unless "a contrary legislative intent"—amendment,

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

ordinarily—"is clearly shown." *People v. Villa*, 2011 IL 110777, ¶ 36 (2011). In short, legislative inaction implies legislative consent.

The case for legislative acquiescence is especially strong here. There is a uniform, decades-spanning series of federal authorities from five federal judges across the State of Illinois. *O'Regan*, 121 F.3d at 1066; *Butler*, 331 F. Supp. 3d at 797; *Deslandes*, 2018 WL 3105955, at *9. Without exception, those cases unequivocally held that the IAA does not apply to wage- and hiring-coordination. In their words, the statute "specifically exclude[s]" "claims relate[d] to an alleged market for labor services," *O'Regan*, 121 F.3d at 1066; *Butler*, 331 F. Supp. 3d at 797; and, as a consequence, "no-hire agreement[s]" fall beyond the "plain language of the statute," *Deslandes*, 2018 WL 3105955, at *9. Indeed, one of those authorities has even specifically rejected the State's unions-only reading of the labor services carveout: per the *Deslandes* court, the carveout is not "merely an exception for collective bargaining" because the IAA "includes a separate labor exemption." *Id.*[7] Beyond the substantial persuasive weight these federal authorities warrant on the underlying interpretive question, the General Assembly can also be presumed to know that they exist. And so the General Assembly's decision not to modify

---

[7] It is no surprise those federal authorities resolved the issue without particularly lengthy analysis. Determining whether the carveout means what it says is a straightforward interpretive question that can be answered from the plain text. *See Butler*, 331 F. Supp. 3d at 797 (noting that arguments that labor services are covered by the IAA "can be quickly disposed of" because the IAA "expressly states that it does not apply to [labor services]"); *Deslandes*, 2018 WL 3105955, at *9 (noting that the labor services carveout is part of "the plain language of the statute"). And the mere existence of these authorities is enough to put the General Assembly on notice that "previous judicial decisions" have interpreted the statute in a certain way—if they came out the wrong way, the General Assembly could have addressed them. *In re Marriage of Mathis*, 2012 IL 113496, ¶ 25.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

the statute in response (even as it has amended it in other ways) further confirms those courts were correct: the IAA does not apply to coordination about labor.

The particular salience of antitrust law sharpens the point further still. The legislature has paid extremely close attention to judicial interpretations of the IAA, and has acted to modify the statute when courts—even far-flung federal trial courts— have strayed from its vision. So, for instance, after a federal district court in California once interpreted the IAA to prevent the Illinois Attorney General from using *parens patriae* authority to bring antitrust lawsuits on behalf of Illinois residents, *California v. Infineon Techs. AG*, 531 F. Supp. 2d 1124, 1166 (N.D. Cal. 2007), the General Assembly promptly amended the statute to specifically authorize the Attorney General to bring such lawsuits, 2009 Ill. Legis. Serv. P.A. 96-751 (H.B. 2246). Indeed, the amendment's sponsor in the Senate left no doubt that the amendment was intended to correct that California court's erroneous reading: it was designed to "merely codify what was always given to be the case" in response to "a California judge" "who got up on the wrong side of the bed" and "decided to question it." S. Tr. 90–91, 96th Gen. Assembly, 53d Legis. Day (Ill. May 20, 2009). The General Assembly, in other words, is attentive to how courts interpret the IAA. And it has modified the statute in response to erroneous non-precedential trial court opinions from thousands of miles away.

If the General Assembly disagreed with the Seventh Circuit's reading of the IAA—which has bound every federal court in Illinois for over a quarter of a century—it could have done the same here. It has not. That decision reflects an agreement with the reasoning of *O'Regan* and its progeny: the IAA does not reach employer coordination about employee labor.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

* * *

In sum, the IAA does not cover wage- and hiring-coordination. Unlike federal antitrust law, the IAA's plain text excludes agreements about employee labor from the conduct it reaches. That much is confirmed by legislative history when the statute was enacted. And it has only been made clearer still by legislative inaction in response to an unbroken line of federal decisions interpreting the IAA to exclude such coordination.

The Court should therefore answer "Yes" to the question as certified by the trial court, "Whether the definition of 'Service' under Section 4 of the Illinois Antitrust Act, 740 ILCS 10/4, which states that Service 'shall not be deemed to include labor which is performed by natural persons as employees of others,' applies to the Act as a whole and thus excludes all labor services from the Act's coverage." And because such wage- and hiring-coordination—the exclusive focus of the State's claims—is not actionable under the IAA, the Court should likewise remand with instructions to dismiss the State's Complaint.

II. The Appellate Court's Resolution Of This Appeal Fundamentally Misunderstood The Certified Question.

This Court should not follow the Appellate Court's lead in reframing the certified question posed by the trial court. As discussed above, this Court can easily resolve this appeal from the plain text of the statute: the IAA does not apply to alleged coordination about employee labor. And so the State's Complaint—which alleges only coordination about individual labor performed by employees—should be dismissed.

The Appellate Court's decision to create a new question about the temporary staffing industry was a fundamental misunderstanding of the parties' arguments, the trial court's decision, and the federal cases interpreting the IAA. Additionally, the Appellate Court diverged from the actually-presented question *sua sponte* and without input from the

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

parties. And it then refused to correct course when Defendants identified the apparent misapprehension. (A163–82.) The net result: rather than "materially advance" the case by resolving the case-dispositive issue at the heart of this matter, the court's treatment left the scope of the IAA murkier than ever. Ill. S. Ct. R. 308(c).

At bottom, the Appellate Court misunderstood the certified question as posed by the trial court. It misconstrued the question's reference to "labor services" as something industry-specific about staffing agencies. It thought that the term referred to the "labor-related services provided by temporary staffing agencies" to their clients. (A5.) That is not how the phrase is related to this case, and not how the parties, the trial court, or any other cases used that phrase. Properly understood, the "labor services" term refers to the services businesses get from their workers—not the temporary staffing services businesses provide to their clients. (*See generally* A172–73 (identifying party and trial court references to "labor services" meaning coordination about employee labor)); *O'Regan*, 121 F.3d at 1066. The Appellate Court's misapprehension was therefore akin to focusing on coordination about the fees law firms charge their clients, rather than about the salaries they pay their associates. It is the latter coordination—coordination about individual labor services—that the IAA does not regulate.

That also makes sense in this case. The State alleges no coordination on staffing services. Its claims are solely about individual labor, specifically, that Defendants allegedly coordinated what they pay their workers and who they hire. (*See* A42–44.) That is why Defendants' argument is (and always has been) that such alleged coordination is beyond the reach of the IAA because employee "labor" is not a covered "service"—not that there is a staffing-agency-specific exemption hidden in the statute. (*See* A172.) And

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

the statute unambiguously supports Defendants' actual argument about labor coordination. Agreements about "labor which is performed by natural persons as employees of others" are not regulated by the IAA. 740 ILCS 10/4. The question as written by the trial court can therefore be easily answered "Yes".

There are substantial risks to following the Appellate Court's approach. Most significantly, retaining the Appellate Court's reframed question would continue—rather than fix—the functional split the Appellate Court's decision created with *O'Regan* and its progeny. As it stands, IAA defendants in federal court can obtain dismissal of any wage- and hiring-coordination claims brought against them. *E.g.*, *Deslandes*, 2018 WL 3105955, at *9. But the Appellate Court let this case go forward, even while repeatedly citing those federal cases with approval. (A8–9.) And so litigants are left with a perplexing tension: on the one hand, the Appellate Court seemed to hold that Defendants here could not have this case dismissed; on the other, it said the IAA does not apply to wage- and hiring-coordination as a matter of law (which is correct, if potentially dicta given the decision to reframe the question). *Cf. Donnelly v. Donnelly*, 2015 IL App (1st) 142619, ¶¶ 19–21 (1st Dist. 2015) (assuming that reasoning "outside the scope of the question certified" could be treated as dicta). That same tension would persist if this Court keeps the Appellate Court's version of the question.

However this Court resolves this matter, it should decline to adopt the Appellate Court's reframed question. That reframed question does not help resolve this case; it addresses a market (temporary staffing services) in which the State has not alleged any coordination. This Court should instead simply answer the question as posed by the trial court. That question concerns whether the IAA excludes coordination on labor from its

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

reach, the exclusive basis for the State's claims. And as discussed, that question can easily be answered "Yes." The State's claims—which only challenge the sort of coordination not actionable under the statute—cannot proceed.

CONCLUSION

For the foregoing reasons, this Court should answer the first certified question as written by the trial court "Yes" and remand with instructions to dismiss the State's Complaint for failure to state a claim.

Dated: January 11, 2023

Respectfully submitted,

ELITE STAFFING, INC.

By: */s/ Amy B. Manning*

MCGUIREWOODS LLP

Amy B. Manning
Angelo M. Russo
Sarah A. Zielinski
77 West Wacker, Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Facsimile: (312) 558-4386
Firm ID No. 40426
amanning@mcguirewoods.com
arusso@mcguirewoods.com
szielinski@mcguirewoods.com

Sean A. McClelland
888 16th Street N.W., Suite 500
Black Lives Matter Plaza
Washington, DC 20006
Telephone: (202) 828-2838
Facsimile: (202) 828-2976
smcclelland@mcguirewoods.com

MIDWAY STAFFING, INC.

By: */s/ John R. Hayes*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

AMUNDSEN DAVIS, LLC

Jeffrey A. Risch
3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@amundsendavislaw.com

John R. Hayes
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210
Firm ID No. 42907
jhayes@amundsendavislaw.com

METRO STAFF, INC.

By: *<u>/s/ David J. Fish</u>*

FISH POTTER BOLAÑOS P.C.

David J. Fish
Kimberly Hilton
John Kunze
200 E 5th Ave Suite 123
Naperville, Illinois 60563
Telephone: (630) 355-7590
Facsimile: (630) 778-0400
Firm ID No. 23522
dfish@fishlawfirm.com
docketing@fishlawfirm.com
admin@fishlawfirm.com

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, notice of filing, the certificate of service, and those matters to be appended to the brief under Rule 342, is 7,018 words.

By: *<u>/s/ Sean A. McClelland</u>*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

No. 128763

IN THE
SUPREME COURT OF ILLINOIS

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., and MIDWAY STAFFING, INC., Defendants-Appellants.	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0840 There Heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding.

NOTICE OF FILING

To: See Attached Service List

PLEASE TAKE NOTICE that on January 11, 2023, the undersigned filed with the Clerk of the Illinois Supreme Court, through the Odyssey efiling system, **JOINT BRIEF AND APPENDIX OF DEFENDANTS-APPELLANTS ELITE STAFFING, INC., METRO STAFF, INC., AND MIDWAY STAFFING, INC.**, a copy of which is attached hereto and hereby served upon you.

Dated: January 11, 2023

ELITE STAFFING, INC.

By: */s/ Amy B. Manning*

MCGUIREWOODS LLP

Amy B. Manning
Angelo M. Russo
Sarah A. Zielinski
77 West Wacker, Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Facsimile: (312) 558-4386

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

amanning@mcguirewoods.com
arusso@mcguirewoods.com
szielinski@mcguirewoods.com

Sean A. McClelland
888 16th Street N.W., Suite 500
Washington, DC 20006
Telephone: (202) 828-2838
smcclelland@mcguirewoods.com

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that on January 11, 2023, a copy of the within instrument was filed via the Court's approved electronic filing service provider. Additionally, a true and correct copy was served on the below parties by email from avlasak@mcguirewoods.com to the email addresses indicated below pursuant to Illinois Supreme Court Rule 11.

By: /s/ Sean A. McClelland

Priyanka Gupta
Assistant Attorney General
Elizabeth L. Maxeiner
Senior Assistant Attorney General,
Antitrust Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-1004
priyanka.gupta@ilag.gov
Elizabeth.Maxeiner@ilag.gov
civilappeals@ilag.gov

Counsel for Plaintiffs

AMUNDSEN DAVIS, LLC

Jeffrey A. Risch
3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@amundsendavislaw.com

John R. Hayes
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210
Firm ID No. 42907
jhayes@amundsendavislaw.com

Counsel for Midway Staffing, Inc.

GREENBERG TRAURIG, LLP

Scott Mendeloff
Gabriel Aizenberg
Brian D. Straw
David S. Repking
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
(312) 456-8400
Firm ID No. 36511
mendeloffs@gtlaw.com
aizenbergg@gtlaw.com
strawb@gtlaw.com
repkingd@gtlaw.com

Counsel for Colony Display, LLC

FISH POTTER BOLONOS P.C.

David Fish
Kimberly Hilton
John Kunze
200 E 5th Ave Suite 123
Naperville, Illinois 60563
Telephone: 630-355-7590
Facsimile: 630-778-0400
Firm ID No. 23522
dfish@fishlawfirm.com
docketing@fishlawfirm.com
admin@fishlawfirm.com

Counsel for Metro Staff, Inc.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

THOMPSON COBURN LLP

John J. Cullerton
Patrick Morales-Doyle
55 East Monroe Street, 37th Floor
Chicago, Illinois 60603
Telephone: (312) 346-7500
Facsimile: (312) 580-2201
jcullerton@thompsoncoburn.com
pmoralesdoyle@thompsoncoburn.com

Counsel for Staffing Services Association of Illinois, Amicus Curiae

Ada Sandoval
Mark H. Birhanu
Legal Department
Raise the Floor Alliance
1 N. LaSalle Street, Suite 1275
Chicago, IL 60201
(312) 795-9115
asandoval@raisetheflooralliance.org
mbirhanu@raisetheflooralliance.org

Counsel for Raise the Floor Alliance et al., Amici Curiae

Eric A. Posner
5611 South Blackstone Avenue
Chicago, Illinois 60637
(773) 633-3834
eposner@uchicago.edu

Amicus Curiae

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

No. 128763

IN THE
SUPREME COURT OF ILLINOIS

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., and MIDWAY STAFFING, INC., Defendants-Appellants.	On Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0840 There Heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding.

APPENDIX

MCGUIREWOODS LLP
Amy B. Manning
77 West Wacker Drive
Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Firm ID No. 40426
amanning@mcguirewoods.com

Attorneys for Elite Staffing

AMUNDSEN DAVIS, LLC
John R. Hayes
150 N. Michigan Avenue
Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Firm ID No. 42907
jhayes@amundsendavislaw.com

Attorneys for Midway Staffing

FISH POTTER BOLAÑOS P.C.
David J. Fish
200 E. 5th Avenue
Suite 123
Naperville, Illinois 60563
Telephone: (630) 355-7590
Firm ID No. 23522
dfish@fishlawfirm.com

Attorneys for Metro Staff

ORAL ARGUMENT REQUESTED

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

TABLE OF CONTENTS TO APPENDIX

Date	Title/Description	Page No.
06/03/2022	OPINION OF THE ILLINOIS APPELLATE COURT, FIRST DISTRICT	A1
06/27/2022	ORDER DENYING DEFENDANTS-APPELLANTS' PETITION FOR REHEARING UNDER RULE 367	A20
06/17/2021	RULE 308 ORDER WITH CERTIFIED QUESTIONS	A21
05/26/2021	ORDER ON MOTIONS TO DISMISS	A22
10/27/2020	UNREDACTED COMPLAINT	A26
10/28/2020	COLONY DISPLAY LLC, ELITE STAFFING, INC., AND MIDWAY STAFFING, INC.'S CONSOLIDATED MOTION TO DISMISS	A47
02/08/2022	BRIEF OF PLAINTIFF-APPELLEE STATE OF ILLINOIS	A87
06/24/2022	DEFENDANTS-APPELLANTS' PETITION FOR REHEARING UNDER RULE 367	A163
08/01/2022	DEFENDANTS-APPELLANTS' PETITION FOR LEAVE TO APPEAL UNDER RULE 315	A183
09/28/2022	ORDER ALLOWING PETITION FOR LEAVE TO APPEAL UNDER RULE 315	A206
	ILLINOIS ANTITRUST ACT, 740 ILCS 10/1. SHORT TITLE	A207
	ILLINOIS ANTITRUST ACT, 740 ILCS 10/2. PURPOSE	A208
	ILLINOIS ANTITRUST ACT, 740 ILCS 10/3. VIOLATIONS; ENUMERATION	A209
	ILLINOIS ANTITRUST ACT, 740 ILCS 10/4. DEFINITIONS	A214
	ILLINOIS ANTITRUST ACT, 740 ILCS 10/5. EXCEPTIONS	A215
	ILLINOIS ANTITRUST ACT, 740 ILCS 10/6. VIOLATIONS; PUNISHMENTS; PROSECUTIONS	A220
	ILLINOIS ANTITRUST ACT, 740 ILCS 10/7. CIVIL ACTIONS AND REMEDIES	A224

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.1. PERSONAL SERVICE	A227
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.2. INVESTIGATION BY ATTORNEY GENERAL	A228
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.3. SERVICE OF SUBPOENA	A230
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.4. EXAMINATION OF WITNESSES	A231
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.5. FEES FOR WITNESSES; DOCUMENT PRODUCTION	A232
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.6. FAILURE OF REFUSAL TO OBEY SUBPOENA	A233
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.7. INCRIMINATING TESTIMONY	A234
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.8. ACTION BY STATE, COUNTIES, MUNICIPALITIES, ETC. FOR DAMAGES	A235
ILLINOIS ANTITRUST ACT, 740 ILCS 10/7.9. ACTION NOT BARRED AS AFFECTING OR INVOLVING INTERSTATE OR FOREIGN COMMERCE	A236
ILLINOIS ANTITRUST ACT, 740 ILCS 10/8. JUDGMENT OR ORDER AS PRIMA FACIE EVIDENCE IN ACTION FOR DAMAGES	A237
ILLINOIS ANTITRUST ACT, 740 ILCS 10/9. VIOLATION AS CONSPIRACY AT COMMON LAW	A238
ILLINOIS ANTITRUST ACT, 740 ILCS 10/10. REPEALED BY P.A. 80-233/2, EFFECTIVE OCTOBER 1, 1977	A239
ILLINOIS ANTITRUST ACT, 740 ILCS 10/11. CONSTRUCTION OF FEDERAL ANTITRUST LAW	A240
ILLINOIS ANTITRUST ACT, 740 ILCS 10/12. JURY TRIAL	A242

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

2022 IL App (1st) 210840

FIFTH DIVISION
Order filed: June 3, 2022

No. 1-21-0840

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 2020 CH 5156
ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC,	)	Honorable Raymond W. Mitchell,
Defendants-Appellants.	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Presiding Justice Delort and Justice Cunningham concurred in the judgment and opinion.

OPINION

¶ 1 The Attorney General of Illinois on behalf of the State of Illinois filed the instant action against three staffing agencies, Elite Staffing, Inc., Metro Staff, Inc., and Midway Staffing, Inc. (hereinafter collectively referred to as the "Agency Defendants"), and their mutual client Colony Display, LLC (Colony), alleging that the defendants entered into unlawful conspiracies in violation of the Illinois Antitrust Act (Act) (740 ILCS 10/1 *et seq.* (West 2018)). The defendants filed two

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

motions to dismiss the action pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020). The circuit court denied the defendants' motions and thereafter, in response to the defendants' motions, certified the following two questions for interlocutory appeal pursuant to Illinois Supreme Court Rule 308 (eff. Oct. 1, 2019):

> 1. Whether the definition of "Service" under Section 4 of the Illinois Antitrust Act, 740 ILCS 10/4 [("Act")], which states that Service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the [Act] as a whole and thus excludes all labor services from the [Act]'s coverage.
>
> 2. Whether the *per se* rule under Section 3(1) of the [Act], 740 ILCS 10/3(1), which states that it applies to conspiracies among "competitor[s]," extends to alleged horizontal agreements facilitated by a vertical noncompetitor.

We answer the first question, with a modification for clarity and accuracy, by holding that the services provided by staffing agencies are generally not excluded from the Act's coverage. The second question we answer as written by holding that the *per se* rule can apply to horizontal agreements facilitated by vertical noncompetitors when such agreements evidence naked restraint of competition.

¶ 2 The following facts are drawn from the allegations in the State's complaint, which we accept as true and construe in the State's favor at the motion-to-dismiss stage. See *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 382 (2004).

¶ 3 Colony designs, manufactures, and installs customized fixtures, exhibits, and displays for home improvement, retail, and hospitality businesses. It relies heavily on temporary workers to carry out this work, with such employees generally comprising the majority of its workforce. The

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Agency Defendants are temporary staffing agencies that recruit, select, and hire employees for their clients. Colony hired all three Agency Defendants to perform such services at two of Colony's facilities.

¶ 4 In addition to the initial hiring of temporary employees, Colony also tasked the Agency Defendants with a degree of ongoing management of the temporary employees. This included the Agency Defendants providing dedicated on-site supervisors at Colony's facilities, paying the temporary employees' wages and benefits, and retaining sole authority over the hiring, assigning, and firing of the temporary employees assigned to Colony.

¶ 5 The State alleges in its complaint that during their work for Colony, the Agency Defendants "agreed with each other not to recruit, solicit, hire, or 'poach' temporary employees from one another at Colony's facilities," and that "Colony facilitated the Agency Defendants' agreement by acting as a go-between to communicate about the agreement among the Agency Defendants and by assisting in enforcing the Agency Defendants' no-poach conspiracy." In support of this allegation that Colony facilitated the conspiracy, the State cites numerous communications between various representatives of the Agency Defendants and the CEO of Colony. As further proof of the conspiracy, the State also cites communications among representatives of the Agency Defendants themselves.

¶ 6 The State also alleges in its complaint that, at Colony's request, the Agency Defendants agreed to fix the wages of their temporary employees at a below-market rate determined by Colony. As with the alleged no-poach agreement, the State alleges that Colony facilitated the Agency Defendants' communications regarding this alleged wage-fixing conspiracy. The State's complaint presents the two alleged conspiracies as *per se* violations of the Act that can be deemed

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

illegal without any further consideration of the competitive and economic purposes and consequences of the alleged arrangements.

¶ 7 The defendants together filed two motions to dismiss pursuant to section 2-615 of the Code, arguing, among other things, that their business of "supplying labor," which the Agency Defendants also refer to as "labor services," is exempt from the Act's coverage and that the facilitation of the conspiracies by a vertical non-competitor (Colony) removes the alleged conspiracies from the ambit of subsection 3(1) of the Act (740 ILCS 10/3(1) (West 2018)).

¶ 8 The circuit court rejected the defendants' arguments and denied their motions to dismiss. The defendants then moved for the court to certify two questions for interlocutory appeal under Supreme Court Rule 308. The court granted the request and certified the two questions set forth above. We allowed the interlocutory appeal.[1]

¶ 9 Rule 308 "allows for permissive appeal of an interlocutory order certified by the trial court as involving a question of law as to which there is substantial ground for difference of opinion and where an immediate appeal may materially advance the ultimate termination of the litigation." *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 17. When reviewing a certified question, "we are limited to answering the specific question certified by the trial court[,] to which we apply a *de novo* standard of review." *Id.* (citing *Moore v. City of Chicago Park District*, 2012 IL 112788, ¶ 9). When conducting that review, the "scope of review is generally limited to the certified question." *Id.* at ¶ 25 (citing *Moore*, 2012 IL 112788, ¶ 9). However, when appropriate a court

[1] In addition to the briefs filed by the parties, we have also reviewed briefs filed by *amici curae* Staffing Services Association of Illinois, Raise the Floor Alliance, National Legal Advocacy Network, National Employment Law Project, and Professor Eric A. Posner. The court appreciates their additional perspectives.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

may "modif[y] a certified question or read a certified question in such a way as to bring it within the ambit of a proper question of law." *Id.* at ¶ 28.

¶ 10 We begin with the first certified question: "Whether the definition of 'Service' under Section 4 of the Illinois Antitrust Act, 740 ILCS 10/4, which states that Service 'shall not be deemed to include labor which is performed by natural persons as employees of others,' applies to the Act as a whole and thus excludes all labor services from the Act's coverage."

¶ 11 Although it presents a proper question of law, we must modify the first certified question because, as written, it contains an erroneous premise that application of section 4's definition of "service" to the entire Act necessarily exempts so-called "labor services" from the Act's coverage. As we explain below, that is not the case. However, because the essence of the question is apparent in the parties' briefs and the record, we will still answer the question after rephrasing it to address the core issue: whether the exclusion of individual labor from the definition of "service" in section 4 of the Act also excludes the labor-related services provided by temporary staffing agencies and therefore exempts such agencies from the Act's coverage. See *Fireman's Fund Insurance Co. v. SEC Donohue, Inc.*, 176 Ill. 2d 160, 166 (1997) (modifying a certified question to delete an erroneous statement of law); *Batson v. Township Village Associates, LP*, 2019 IL App (5th) 170403, ¶ 30 (modifying an "inartfully worded and incomplete" certified question to address what it "essentially asks"). For the reasons explained more fully below, we hold that it does not.

¶ 12 Our analysis begins with the statutory provisions governing the defendants' alleged antitrust violations. The State alleges that the defendants' no-poach and wage-fixing conspiracies each violated subsection 3(1) of the Act. In relevant part, that subsection prohibits conspiring to

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

take various specified anticompetitive actions towards a "service." 740 ILCS 10/3(1) (West 2018). It is the definition of the term "service" that is the central issue in the first certified question.

¶ 13 Section 4 of the Act, titled "Definitions," provides two definitions of the term "service." 740 ILCS 10/4 (West 2018). That section first states that, "[a]s used in this act, unless the context requires otherwise: * * * 'Service' shall mean any activity, not covered by the definition of 'commodity,' which is performed in whole or in part for the purpose of financial gain." *Id.* "Commodity," in turn, is defined as "any kind of real or personal property." *Id.* There is no dispute that the alleged conspiracies in this case do not concern commodities. Therefore, we focus on the meaning of "service," and in particular section 4's second definition of the term, which provides that " '[s]ervice' shall not be deemed to include labor which is performed by natural persons as employees of others." *Id.* The Agency Defendants read this second definition, and specifically its use of the term "labor," as excluding from the Act's coverage the "labor services" that they provide to their clients.

¶ 14 Our consideration of this issue of statutory interpretation is governed by the well-established principle that "[o]ur primary objective in construing a statute is to ascertain and give effect to the intent of the legislature." *In re Estate of Luccio*, 2012 IL App (1st) 121153, ¶ 21 (citing *In re Estate of Ellis*, 236 Ill. 2d 45, 50 (2009)). "The best evidence of legislative intent is the language of the statute itself, which must be given its plain and ordinary meaning." *Id.* (citing *Ellis,* 236 Ill. 2d at 50).

¶ 15 We view the plain language of section 4's definitions of "service" to be unambiguous and sufficiently clear to resolve the question presented. The second definition clearly expresses the idea that an individual's labor for their employer is not a service. The obvious intention behind

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

this is to allow individuals to engage in otherwise anticompetitive behavior regarding their own labor by participating in collective bargaining and related conduct. We find support for this conclusion in the labor exception contained in section 5 of the Act (740 ILCS 10/5 (West 2018)).

¶ 16 Section 5, titled "Exceptions," provides, in relevant part, that "[n]o provisions of this Act shall be construed to make illegal: (1) the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States." *Id.* The Bar Committee Comments, which both the supreme court and this court have considered when interpreting the Act (see *Laughlin v. Evanston Hospital*, 133 Ill. 2d 374, 386–87 (1990), and *Blake v. H-F Group Multiple Listing Service*, 36 Ill. App. 3d 730, 741 (1st Dist. 1976)), explain that "[t]he labor exemption in subsection (1), like that of Section 6 of the Clayton Act, prevents the application of the Antitrust Act to legitimate labor objectives and activities of unions or of individual members thereof." *Id.* Bar Comm. Cmts.-1967 (West 2018). The comments further note that "[t]he labor exemption should be read together with the provision of Section 4 which states that labor performed as an employee is not a 'service' within the meaning of Section 3 of the Act," with the effect being that "[t]he Act [is] inapplicable to agreements by either labor or nonlabor groups insofar as they relate to restraint of competition concerning labor itself. The Act thus protects both management and labor in bargaining collectively over terms and conditions of employment." *Id.*

¶ 17 The Agency Defendants attempt to broaden this exception by arguing that it includes conduct "related to labor services." But they provide no specific definition for the term "labor services" or its limits, and their attempt to draw in their alleged conduct as being "related to" labor has no basis in the Act's provisions. The Act merely provides that individual labor is not a service,

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

so that otherwise anticompetitive action restraining individual labor is permissible. It does not provide that the exemption extends to services like those provided by staffing agencies that are "related to" labor, whatever that may mean.

¶ 18 The Agency Defendants point to federal court cases purportedly reaching a different conclusion, but we find those cases unhelpful to the Agency Defendants' position. The primary case upon which they rely is *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060 (7th Cir. 1997). There, an employee was terminated for refusing to sign a noncompetition agreement. *Id.* at 1063. She brought both federal and Illinois antitrust claims against her former employer, arguing that the noncompetition agreement "restrained trade by binding employees." *Id.* at 1065. The Seventh Circuit held that the employee lacked standing to bring her state-law claim, stating, without any further explanation, "to the extent [the employee's] claims relate to an *alleged market for labor services*, they are specifically excluded by § 10/4 of the Act, which states that ' "[s]ervice" shall not be deemed to include labor which is performed by natural persons as employees of others.' " *Id.* at 1066 (emphasis added).

¶ 19 The Agency Defendants appear to latch onto this use of the term "labor services" and attempt to position their work within it. However, the context of *O'Regan* makes clear that the "labor services" at issue in that case was not the type of labor services that the Agency Defendants provide. *O'Regan* concerned an employer's attempt to restrain an employee's individual labor through a noncompetition agreement. Thus, the "alleged market for labor services" that was the target of the alleged anticompetitive conduct in *O'Regan* was the market for the employee's own individual labor. Accordingly, *O'Regan*'s holding that a former employee could not bring an Illinois antitrust claim related to an alleged restraint on her individual labor is entirely consistent

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

with our reading of the plain language of section 4's second definition of "service" as allowing such a restraint, and it does not support the Agency Defendants' position that the labor addressed in section 4 extends to the services they provide.

¶ 20 The Agency Defendants also cite *Deslandes v. McDonald's USA, LLC*, 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018), which concerned an agreement between McDonald's stores not to hire each other's employees. *Id.* at *2–3. An employee who was barred from transferring between franchises brought claims under the Act, asserting that the no-hire agreements artificially suppressed her wage. *Id.* at *8–9. The district court affirmed the denial of her claims, citing *O'Regan* for the proposition that the Act excludes claims related to a market for labor services. *Id.* at *9. However, as in *O'Regan*, the so-called "labor services" that were allegedly restrained in *Deslandes* were the employee's own individual labor, a different type of would-be service than the hiring and managing services provided by temporary staffing agencies.

¶ 21 The *Deslandes* court also seemingly suggested that the labor referenced in section 4 of the Act is different from the labor exception contained in section 5, stating, "[a]lthough plaintiff suggests [that the exclusion of labor from the definition of "service" in section 4] is merely an exception for collective bargaining, the statute includes a separate labor exemption." *Id.* As did the circuit court, we find this limited analysis unpersuasive, and we disagree with the *Deslandes* court's apparent conclusion that the labor exception in section 5 and the exclusion of labor from the definition of "service" in section 4 must have different purposes. To the contrary, they are consistent with each other, and lawmakers are entitled to take a "belt and suspenders" approach to legislative drafting and cover the same issue in more than one place to avoid potential confusion over a possible conflict between the provisions. *Cf. Hively v. Ivy Tech Community College of*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Indiana, 853 F.3d 339, 344 (7th Cir. 2017) (recognizing that "Congress may certainly choose to use both a belt and suspenders to achieve its objectives"). Indeed, the Bar Committee Comments to section 5 expressly observe that the labor provisions of sections 4 and 5 should be read together. See 740 ILCS 10/5 Bar Comm. Cmts.-1967 (West 2018).

¶ 22 Thus, contrary to the Agency Defendants' arguments, the exclusion of labor from the definition of "service" in section 4 is primarily concerned with restraints on the individual labor of natural persons for the purpose of allowing employees and management to engage in collective bargaining and related activities. We do not see any language in the Act extending that protection to the hiring and managing services provided by temporary staffing agencies, which are not natural persons performing labor for an employer.[2]

¶ 23 Therefore, we answer the first certified question by holding that, to the extent that the alleged unlawful conduct concerns restraints that they place on their own services (*i.e.*, recruiting, hiring, and managing temporary employees) and do not concern restraints on a natural person's individual labor, temporary staffing agencies like the Agency Defendants in this case are subject to the Act's provisions, and in particular section 3's prohibitions on anticompetitive restraints on services.

¶ 24 We turn, then, to the second certified question: "Whether the *per se* rule under Section 3(1) of the [Act], 740 ILCS 10/3(1), which states that it applies to conspiracies among 'competitor[s],' extends to alleged horizontal agreements facilitated by a vertical noncompetitor." We believe that

---

[2] We note that our comments on this issue should not be read to express an opinion that collective bargaining and related conduct are the *only* types of activities covered by the exclusion of individual labor from the definition of "service" in section 4 of the Act. That issue is not before us. Rather, our opinion in this case is limited to that provision's inapplicability to the type of services provided by temporary staffing agencies.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

the answer to that question is that it depends not on the presence of a vertically situated party, but rather on the nature of the agreement and the conduct at issue. Even when there is a vertical element to an otherwise horizontal agreement, such an agreement can receive *per se* treatment when it is a naked anticompetitive conspiracy. However, it should be examined under the rule of reason when the conduct at issue is ancillary to a legitimate procompetitive agreement.

¶ 25 Unlike the first certified question, the plain language of the Act does not clearly provide an answer to this question. The provision at issue is subsection 3(1) of the Act, which makes it unlawful to "[m]ake any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person" for delineated anticompetitive purposes or with particular anticompetitive effects. 740 ILCS 10/3(1) (West 2018). Violations of this subsection are commonly referred to as "*per se*" offenses and are "deemed to constitute the most serious restraints upon competition." *Id.* Bar Comm. Cmts.-1967. "The conduct proscribed by Section 3(1) is violative of the Act without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct." *Id.* As a general matter, subsection 3(1) is only applied to horizontal agreements between competitors and "does not reach vertical agreements, such as agreements between buyers and sellers fixing the price at which the buyer shall resell." *Id.*

¶ 26 The State in this case brings both of its claims against the defendants under subsection 3(1), alleging two horizontal agreements constituting *per se* violations of the Act. However, the defendants contend that their alleged no-poaching and wage-fixing agreements are not purely horizontal in nature and instead contain a vertical element, removing them from consideration under subsection 3(1), which only applies to agreements with a "competitor." Instead, they argue

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

that the State's claims must be considered under subsection 3(2) of the Act (740 ILCS 10/3(2) (West 2018)).[3]

¶ 27 Subsection 3(2) more generally prohibits "one or more other persons" from "unreasonably restrain[ing] trade or commerce." 740 ILCS 10/3(2) (West 2018). Rather than applying a *per se* approach, subsection 3(2) uses the "rule of reason" to "examine the competitive and economic purposes and consequences of such arrangements for the purpose of determining whether or not trade or commerce has been unreasonably restrained." *Id.* Bar Comm. Cmts.-1967.

¶ 28 While Illinois courts have not yet weighed in on the question presented, the supreme court has noted that subsection 3(1) of the Act is "patterned after section 1 of the Sherman Act * * * , and in our construction of the Illinois Antitrust Act we are guided by Federal case law construing analogous provisions of Federal legislation." *People ex rel. Scott v. College Hills Corp.*, 91 Ill. 2d 138, 150 (1982) (citations omitted); see also 740 ILCS 10/11 (West 2018) ("When the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act."); *Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 69 (1st Dist. 2005) ("Section 3(1) is patterned after section 1 of the Sherman Act."). We therefore take instruction from federal court decisions to the extent that they are consistent with the Act's provisions.

¶ 29 An analysis of this issue begins with a preliminary determination of the type of restraint at issue as either horizontal or vertical. "A horizontal restraint is 'an agreement among competitors on the way in which they will compete with one another.' " *Aya Healthcare Services, Inc. v. AMN*

[3] In its separate brief, Colony argues that for the same reason it should be dismissed from this case. However, that issue is beyond the scope of the questions presented, so we will not address it.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Healthcare, Inc., 9 F.4th 1102, 1108 (9th Cir. 2021) (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984)). "Vertical restraints are 'restraints imposed by agreement between firms at different levels of distribution.' " *Id.* (quoting *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018)). The Agency Defendants contend that Colony's involvement in and facilitation of the alleged conspiracies renders the agreements vertical in nature, or at least removes the alleged conspiracies from the *per se* category. However, the analysis of this issue is nuanced, and the classification ultimately depends on the conduct at issue.

¶ 30 Federal case law makes clear that a vertical party's coordination of a horizontal restraint among competitors does not necessarily transform the otherwise horizontal restraint into a vertical one. In *Toys "R" Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000), toy retailer Toys "R" Us ("TRU") orchestrated an agreement among its largest manufacturers to restrict the distribution of their products to warehouse clubs that were competing against TRU. *Id.* at 930. The Seventh Circuit held that, even though the conspiracy consisted of a series of individual vertical agreements between each manufacturer and TRU, evidence that the manufacturers only agreed to TRU's desired restrictions on the condition that their competitors would do the same made the conspiracy horizontal in nature and allowed for a finding of a *per se* violation. *Id.* at 935–36. The key consideration was evidence of concerted anticompetitive behavior by competitors, regardless of the presence or participation of a vertical party. *Id.*; accord *United States v. Apple, Inc.*, 791 F.3d 290, 325 (2d Cir. 2015) (holding that a horizontal conspiracy existed despite the coordination and participation of a vertical party); *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1220 (7th Cir. 1993) (holding that the participation of a noncompetitor did not transform a horizontal price-fixing agreement among competitors into a vertical agreement). Thus, the

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

defendants' contention that a vertical party's involvement necessarily precludes application of *per se* review is incorrect.

¶ 31 However, while horizontal restraints are typically analyzed under the *per se* standard (*Aya Healthcare*, 9 F.4th at 1109) that is not always the case. "Under the 'ancillary restraints' doctrine, a horizontal agreement is 'exempt from the *per se* rule,' and analyzed under the rule-of-reason, if it meets two requirements." *Id.* (quoting *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986)).

> "These requirements are that the restraint must be (1) 'subordinate and collateral to a separate, legitimate transaction,' *Rothery Storage*, 792 F.2d at 224, and (2) 'reasonably necessary' to achieving that transaction's pro-competitive purpose, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211, 20 S. Ct. 96, 44 L.Ed. 136 (1899); see also [*L.A. Memorial Coliseum Commission v. National Football League*, 726 F.2d 1381, 1395 (9th Cir. 1984)] ('[T]he doctrine teaches that some agreements which restrain competition may be valid if they are "subordinate and collateral to another legitimate transaction and necessary to make that transaction effective." ' (citation omitted)).
>
> 'Naked restraints' are categorically not 'ancillary restraints.' *Rothery Storage*, 792 F.2d at 224 n.10. Thus, naked horizontal restraints are always analyzed under the *per se* standard. A restraint is naked if it has 'no purpose except stifling of competition.' *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L.Ed.2d 738 (1963). Some examples of these restraints include agreements among actual or potential competitors to fix prices, *e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S. Ct. 1925, 64

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

> L.Ed.2d 580 (1980) (per curiam); rig bids, *e.g.*, [*United States v. Joyc*e, 895 F.3d 673, 677 (9th Cir. 2018)]; or divide markets, *e.g.*, *Palmer v. BRG of Georgia., Inc.*, 498 U.S. 46, 49–50, 111 S. Ct. 401, 112 L.Ed.2d 349 (1990) (per curiam)."

Aya Healthcare, 9 F.4th at 1109.

¶ 32 *Aya Healthcare* provides an example of the type of horizontal restraint that should receive rule-of-reason consideration. There, a temporary staffing company, AMN Healthcare, Inc., was struggling to provide enough labor to meets its clients' needs. *Id.* at 1106. To help satisfy that demand, it contracted with other staffing companies, including Aya Healthcare Services, Inc., to provide additional labor. *Id.* AMN's contract with Aya prohibited Aya from soliciting AMN's employees. *Id.* When Aya broke that covenant and began soliciting AMN's employees, the parties ended their relationship, and Aya then sued AMN for antitrust violations. *Id.*

¶ 33 After first finding that the parties' contract was a horizontal agreement between would-be competitors, the Ninth Circuit explained that "the threshold question on appeal is whether the restraint in this case is naked or ancillary, and in turn, whether it is *per se* unlawful or subject to the rule-of-reason, respectively." *Id.* at 1109. The court concluded that the non-solicitation restraint was ancillary because it was "reasonably necessary to the parties' procompetitive collaboration. The purpose of the parties' contract was to supply hospitals with traveling nurses. The non-solicitation agreement is necessary to achieving that end because it ensures that AMN will not lose its personnel during the collaboration." *Id.* at 1110. The court further explained, "[t]he non-solicitation agreement * * * promotes 'competitiveness in the healthcare staffing industry'—more hospitals receive more traveling nurses because the non-solicitation agreement allows AMN to give spillover assignments to Aya without endangering its 'establish[ed] network[] [of] recruiters,

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

travel nurses, AVs, and of course, hospital customers.' " *Id.* (ellipses added, brackets in original) (quoting *Aya Healthcare Services, Inc. v. AMN Healthcare, Inc.*, --- F. Supp. 3d ----, ----, 2020 WL 2553181, at *1 (S.D. Cal. May 20, 2020)). The court therefore concluded that the restraint was ancillary in nature and reviewed under the rule of reason. *Id.*

¶ 34 With this guidance, we return to the circuit court's second certified question: "Whether the *per se* rule under Section 3(1) of the [Act], 740 ILCS 10/3(1), which states that it applies to conspiracies among 'competitor[s],' extends to alleged horizontal agreements facilitated by a vertical noncompetitor." We answer this question by holding that the classification of a conspiracy as horizontal or vertical is not determined by the presence of a vertically situated party, but rather by the existence or absence of concerted horizontal action, and whether the *per se* rule applies to such a horizontal conspiracy depends on whether the restraint at issue is naked or ancillary, with *per se* consideration given to the former and the rule of reason applied to the latter.

¶ 35 Certified questions answered; cause remanded.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

No. 1-21-0840

Cite as:	The State of Illinois, by the Attorney General, Kwame Raoul, Plaintiff-Appellee v. Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc. and Colony Display, LLC, Defendants-Appellants.
Decision Under Review:	Appeal from the Circuit Court of Cook County, Nos. 20 CH 5156 Honorable Raymond Mitchell, Judge, presiding.

Appellants Attorneys:

MCGUIREWOODS LLP	SMITHAMUNDSEN LLC
Amy B. Manning	John R. Hayes
77 West Wacker	150 N. Michigan Avenue
Suite 4100	Suite 3300
Chicago, Illinois 60601	Chicago, Illinois 60601
Telephone: (312) 849-8100	Telephone: (312) 894-3200 Firm
Attorneys for Elite Staffing	Attorneys for Midway Staffing

The Fish Law Firm
David J. Fish
200 E. 5th Ave
Suite 123
Naperville, Illinois 60563
Telephone: (630) 355-7590
Attorneys for Metro Staff

Scott Mendelhoff, Gabriel Aizenberg, David S. Repking, Brian D. Straw
Greenburg Taurig LLP,
77 W. Wacker Dr., Suite 3100
Chicago, IL 60601
Telephone: (312) 456-8400
Attorneys for Colony Display LLC

John J. Cullerton Patrick Morales-Doyle Thompson Coburn LLP 55 East Monroe Street, 37th Floor Chicago, Illinois 60603 Telephone No.: 312.346.7500 – Amicus Brief for Staffing Services Association of Illinois

Eric A. Posner 5611 S. Blackstone Ave. Chicago, Illinois 60637 Telephone No.: 773-633-3834 – Amicus Brief for Eric A. Posner

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Ada Sandoval Mark H. Birhanu Legal Department Raise the Floor Alliance 1 N. LaSalle Street, Suite 1275 Chicago, IL 60602 (312) 795-9115 – Amicus Brief for Raise the Floor Alliance

Attorneys for Appellee:
KWAME RAOUL Attorney General State of Illinois; Priyanka Gupta PRIYANKA GUPTA Assistant Attorney General 100 West Randolph Street 12th Floor Chicago, Illinois 60601 (312) 814-2109 (

llee Attorney:

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT- FIFTH DIVISION

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL,	)	
Plaintiff-Appellee,	)	
v.	)	No. 1-21-0840
ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC,	)	
Defendants-Appellants.	)	

ORDER

This cause having come on for hearing on the petition of the defendant-appellants, Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc., and Colony Display LLC, for rehearing of this court's opinion filed on June 3, 2022, answering two certified questions and remanding the matter to the circuit court for further proceedings; the court having considered the petition and its June 3, 2022 opinion; and being advised in the premises:

IT IS HEREBY ORDERED THAT the petition of the defendant-appellants, Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc., and Colony Display LLC, for rehearing of this court's opinion filed on June 3, 2022, is DENIED.

ORDER ENTERED
JUN 27 2022
APPELLATE COURT FIRST DISTRICT

ENTER:

Mathias W. Delort
Justice

Thomas E. Hoffman
Justice

J. Cunningham
Justice

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

IN THE CIRCUIT COURT OF COOK COUNTY ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL,	)	
Plaintiff,	)	Case No. 2020 CH 05156
v.	)	Honorable Raymond Mitchell
ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC. and COLONY DISPLAY LLC,	)	
Defendants.	)	

RULE 308 ORDER

This cause, coming to be heard on Defendants' Motion for Appellate Certification Pursuant to Illinois Supreme Court Rule 308, the Court being fully advised, and due notice having been given;

IT IS HEREBY ORDERED:

1. The Court finds that, pursuant to Supreme Court Rule 308, there is substantial ground for difference of opinion and that an immediate appeal from the May 26, 2021 Order denying Defendants' Motions to Dismiss may materially advance the ultimate termination of the litigation.

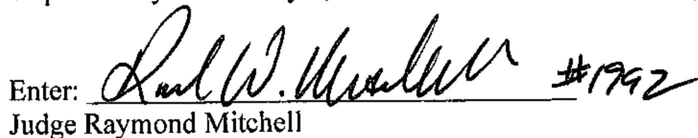
2. The Court therefore certifies the following questions of law for immediate appeal:

   a. Whether the definition of "Service" under Section 4 of the Illinois Antitrust Act ("IAA"), 740 ILCS 10/4, which states that Service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the IAA as a whole and thus excludes all labor services from the IAA's coverage.

   b. Whether the *per se* rule under Section 3(1) of the IAA, 740 ILCS 10/3(1), which states that it applies to conspiracies among "competitor[s]," extends to alleged horizontal agreements facilitated by a vertical noncompetitor.

3. Pending a decision to accept the appeal by the Illinois Appellate Court, discovery is to continue.

4. The Case Management Conference previously set for July 7, 2021 at 10:30 a.m. remains in place.



Enter: #1992
Judge Raymond Mitchell

Atty. No.	42907
Atty. Name:	John R. Hayes
Firm Name:	SmithAmundsen, LLC
Attorney for:	Defendant, Midway Staffing, LLC
Address:	150 North Michigan Ave., suite 3300
City:	Chicago, IL
Telephone:	312-455-3904

Judge Raymond W. Mitchell
JUN 17 2021
IRIS Y. MARTINEZ
Circuit Court-1992

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT, CHANCERY DIVISION

The State of Illinois, Plaintiff, v. Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc., and Colony Display, LLC, Defendants.	Case No. 2020 CH 5156 Calendar 2

ORDER

RAYMOND W. MITCHELL, Circuit Judge.

Defendants Colony Display, LLC, Elite Staffing, Inc., and Midway Staffing, Inc. move to dismiss Plaintiff's complaint pursuant to section 2-615 of the Illinois Code of Civil Procedure. Defendant Metro Staff, Inc. also moves to dismiss Plaintiff's complaint. Defendants have adopted each other's arguments.

I.

The facts alleged in the complaint are taken as true for the purpose of ruling on a motion to dismiss. Defendants Elite Staffing, Midway Staffing, and Metro Staff (the "Agency Defendants") are temporary staffing agencies that compete with one another to recruit and hire employees who will be placed at their client locations on a temporary basis. All three agencies provide temporary workers to Defendant Colony Display, a company that manufactures and installs customized fixtures and displays for businesses. Colony contracted with each agency for the procurement of temporary workers at different times. By February 2018, all three Agency Defendants were providing temporary workers to Colony. As stated in the contracts, the Agency Defendants were responsible for hiring the temporary workers, maintaining their employment records, and paying wages and benefits to the workers.

By 2018, the three Agency Defendants agreed that they would not poach each other's temporary workers at Colony, not allowing temporary workers to switch to a different agency even if they were unhappy with their current agency. The Agency Defendants also agreed to not compete over wages they pay temporary workers at Colony. To enforce these agreements, the Agency Defendants often communicated

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

with each other through Colony. The alleged conspiracies eliminated competition among the Agency Defendants for temporary workers at Colony. As a result, the workers are not able to seek better wages or other benefits by switching to a different agency at Colony. Also, they were paid wages below the market rate for similar work. On July 29, 2020, Plaintiff, the State of Illinois, filed this action against Defendants for violations of the Illinois Antitrust Act.

II.

A motion to dismiss pursuant to section 2-615 challenges the legal sufficiency of a complaint based upon defects apparent on its face. *Beacham v. Walker*, 231 Ill. 2d 51,57 (2008). The critical inquiry is whether the well-pleaded facts of the complaint, taken as true and construed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief may be granted. *Loman v. Freeman*, 229 Ill. 2d 104, 109 (2008). The complaint need only set forth the ultimate facts to be proved—not the evidentiary facts tending to prove such ultimate facts. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 369 (2004).

As an initial matter, Defendants argue that the case should be dismissed because the Illinois Antitrust Act does not apply to labor services. The Act prohibits restraints of trade that "act or tend to act to decrease competition between and among persons engaged in commerce and trade, whether in manufacturing, distribution, financing, and service industries or in related for-profit pursuits." 740 ILCS 10/2. Here, trade or commerce is defined to include "all economic activity involving or relating to any commodity or service. *Id.* § 4. In further defining "service," the Act expressly provides that service "shall not be deemed to include labor which is performed by natural persons as employees of others." *Id.* Because of this exclusionary language, Defendants assert that both "no-poach" and "wage-fixing" conspiracies are excluded from the scope of the Act. In response, Plaintiff argues that the definition of "service" must be read in the context of section 5(1) of the Act which exempts from liability legitimate labor union activities.

Defendants' argument fails for several reasons. First, the Act was passed in 1965 after the U.S. Supreme Court rendered the key decisions determining the scope of the labor organizations exemptions in section 6 of the federal Clayton Act. It is presumed that the legislature acted with knowledge of the prevailing case law. *People v. Espinoza*, 2015 IL 118218, ¶ 34. Indeed, section 5(1) of the Act provides an exemption that closely resembles the Clayton Act labor exemption for the sake of "preserving general overall consistency." 740 ILCS 10/5(1), Bar Comm. Cmts. (1967). The difference in wording and structure from the Clayton Act exemption does not necessarily translate to a conclusion that the Illinois legislature intended to provide a blanket immunization for labor services only in Illinois. If such a blanket exclusion for labor services existed, it would render the labor union exemption in section 5(1) superfluous. Such construction of a statute is to be avoided. *Blum v.*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Koster, 235 Ill. 2d 21, 29 (2009). Furthermore, Defendants rely on three federal cases to support their proposition. However, these cases from federal courts lack meaningful analysis of the question and do not pose any persuasive explanation or reasoning on the purported exclusion in section 4 of the Act. *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060 (7th Cir. 1997); *Butler v. Jimmy John's Franchise, LLC*, 221 F. Supp. 3d 786 (S.D. Ill. 2018); *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 U.S. Dist. LEXIS 105260 (N.D. Ill. June 25, 2018).

Defendant Metro Staff sets forth a separate argument that the labor union exemption in section 5(1) applies here. Section 5(1) exempts "the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States." 740 ILCS 10/5(1). The complaint does not allege facts that brings the claim within the purview of this exemption.

Defendants next argues that even if the Act applied to labor services, the complaint fails to state a *per se* violation under section 3(1). Certain agreements or practices are conclusively presumed to be unreasonable and therefore illegal because of their "pernicious effect on competition and lack of any redeeming virtue." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Agreements among competitors to divide markets or to fix prices are within that *per se* category. *Id.* It has been recognized that no-poaching and wage-fixing agreements are viewed in the same way as the market allocation and price-fixing agreements are viewed. Indeed, several federal courts have denied motions to dismiss and allowed no-poaching and wage-fixing claims, like those here, to proceed under the *per se* category. *See, e.g., In re Ry. Indus. Employee No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 481-85 (W.D. Penn. 2019).

Defendants contend that the *per se* approach is not applicable in this case because the alleged agreements are vertical in nature, involving a non-competitor. However, the fact that Colony, a common client to the Agency Defendants, participated in the agreements does not recharacterize an agreement that is horizontal in nature as a vertical one. While it was alleged that Colony aided in facilitating the alleged agreements, the restraint agreed to by all participants was plainly horizontal, competitors agreeing not to solicit or hire each other's workers and to fix wages, which would be *per se* illegal. *See United States v. Apple, Inc.*, 791 F.3d 290, 325 (2d Cir. 2015). Therefore, having alleged horizontal agreements among competitors to control supplies or sales of a service and to fix the price paid for a service, Plaintiff's claim states a section 3(1) violation. 740 ILCS 10/3(1).

Lastly, Plaintiff has pled sufficient facts to sustain its claim. In pleading a conspiracy under the Act, only the ultimate fact regarding the agreements by the defendants need to be laid out in the complaint, not the evidentiary facts tending to prove those ultimate facts. *People v. Carriage Way W., Inc.*, 88 Ill. 2d 300, 310

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

(1981). Thus, allegations of "agreements among those who would otherwise be competitors for the purpose or with the effect of fixing the price" or other restraints of trade suffice. Here, Plaintiff alleged the requisite facts in the complaint. Most importantly, it alleged that the Agency Defendants "agreed with each other not to recruit, solicit, hire, or 'poach' temporary employees from one another at Colony's facilities" and "not to complete with respect to the wages paid to their temporary employees assigned to Colony." Compl. ¶¶ 2, 4. With the complaint not only setting forth these ultimate facts but also additional details explaining the alleged agreements in depth, Plaintiff has sufficiently stated claims for section 3(1) violation of the Act.

III.

It is hereby ORDERED:

1. Defendants' motion to dismiss Plaintiff's complaint is DENIED.

2. Defendants have until June 30, 2021 to answer.

3. The interim stay of discovery is dissolved. The parties shall meet and confer within 21 days of this Order to formulate an efficient schedule for discovery.

4. The case is set for a case management conference on July 7, 2021 at 10:30 a.m.

Zoom Meeting ID: 940 2104 4687; **Password**: 296476

ENTERED,

Raymond W. Mitchell, Judge No. 1992

MAY 26 2021

IRIS Y. MARTINEZ
Circuit Court-1992

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Return Date: No return date scheduled
Hearing Date: 12/3/2020 10:00 AM - 10:00 AM
Courtroom Number: 2601
Location: District 1 Court
Cook County, IL

FILED
10/27/2020 9:37 AM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020CH05156

10916477

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff, v. ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC, Defendants.	**Case No. 2020 CH 05156** **Hon. Raymond Mitchell** **Jury Trial Demanded**

UNREDACTED COMPLAINT

Plaintiff, the State of Illinois (the "State"), by and through its attorney, Kwame Raoul, Attorney General of the State of Illinois, brings this complaint against Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc., and Colony Display LLC, for violations of the Illinois Antitrust Act, 740 ILCS 10/1 *et seq*. In support of its Complaint, Plaintiff alleges as follows:

Introduction

1. This action challenges unlawful agreements among three temporary staffing agencies, facilitated by a common client, to refuse to solicit or hire each other's employees and to fix the wages paid to their employees. These unlawful agreements have harmed competition in the recruiting and hiring of temporary workers and have harmed temporary workers in Illinois by interfering with their ability to seek better employment opportunities and better wages and other terms of employment.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

2. Defendants Elite Staffing, Inc. ("Elite"), Metro Staff, Inc. ("Metro Staff") and Midway Staffing, Inc. ("Midway") (collectively, the "Agency Defendants") are temporary staffing agencies. All three Agency Defendants place temporary employees at their common client, Defendant Colony Display LLC ("Colony"). The Agency Defendants agreed with each other not to recruit, solicit, hire, or "poach" temporary employees from one another at Colony's facilities. Colony facilitated the Agency Defendants' agreement by acting as a go-between to communicate about the agreement among the Agency Defendants and by assisting in enforcing the Agency Defendants' no-poach conspiracy.

3. The Defendants' no-poach conspiracy was not reasonably necessary to any separate, legitimate business purpose, transaction, or collaboration among the companies.

4. At the request of Colony, the Agency Defendants also agreed with one another not to compete with respect to the wages paid to their temporary employees assigned to Colony. Instead, the Agency Defendants agreed to fix the wages paid to their temporary employees to a below-market wage requested by Colony. At least two of the Agency Defendants explicitly acknowledged that this wage was below market value, and that it could be difficult to solicit, recruit, and hire temporary employees for Colony while offering the agreed-upon wage. Colony also facilitated communications concerning the wage-fixing conspiracy among the Agency Defendants.

5. Defendants' no-poach and wage-fixing conspiracies suppressed the wages of the temporary workers employed by the Agency Defendants and staffed at Colony and prevented workers who were unhappy with their treatment and conditions of employment from switching among the Agency Defendants.

6. These conspiracies among competitors, facilitated by a common client, are *per se*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

violations of the antitrust laws.

Jurisdiction and Venue

7. This Court has jurisdiction under 735 ILCS 5/2-209(a) because the Defendants' unlawful acts performed pursuant to the conspiracy alleged herein occurred in Illinois.

8. This Court also has jurisdiction under 735 ILCS 5/2-209(b) because the Defendants are corporations organized under the laws of Illinois or do business within Illinois.

9. This Court further has jurisdiction over actions alleging violations of the Illinois Antitrust Act under 740 ILCS 10/7.

10. The claim or claims against at least one of the Defendants arose in whole or in part in Cook County. At least one of the Defendants resides in Cook County. Venue as to each defendant is therefore proper in this judicial district pursuant to 735 ILCS 5/2-101.

Parties

11. The Illinois Attorney General, Kwame Raoul ("Attorney General"), brings this Complaint under his statutory and common law authority to represent the Plaintiff, the State of Illinois, and persons residing in Illinois. In the name of and on behalf of the people of the State of Illinois, the Attorney General seeks injunctive relief and such other equitable relief as provided under 740 ILCS 10/7(1) and civil penalties under 740 ILCS 10/7(4). Acting as *parens patriae* for the residents of Illinois, the Attorney General also seeks monetary damages, injunctive relief, and costs of suit, including reasonable attorneys' fees, pursuant to 740 ILCS 10/7(2) and the Attorney General's common law *parens patriae* authority.

12. Agency Defendant Metro Staff, Inc. ("Metro Staff") is an Illinois corporation with its corporate headquarters at 1601 Weld Road, Elgin, Illinois, 60123.

13. Agency Defendant Midway Staffing, Inc. ("Midway") is an Illinois corporation with its corporate headquarters at 2137 Euclid Avenue, Suite 1-2, Berwyn, Illinois.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

14. Agency Defendant Elite Staffing, Inc. ("Elite"), also known as Elite Labor Services, Ltd., is an Illinois corporation with its corporate headquarters at 1400 W. Hubbard St., Chicago, Illinois, 60642.

15. Defendant Colony Display LLC ("Colony"), formerly known as Colony, Inc., is a Delaware limited liability company with its principal place of business located at 2531 Technology Drive, Suite 314, Elgin, Illinois, 60124. Colony has facilities at 2500 Galvin Drive, Elgin, Illinois (the "Elgin Location") and 3950 Stern Ave., St. Charles, Illinois (the "St. Charles Location").

16. Whenever in this Complaint reference is made to any act, deed, or transaction of any corporation or limited liability entity, the allegation means that the corporation or limited liability entity engaged in the act, deed, or transaction by or through its officers, directors or employees while they were actively engaged in the management, direction, control, or transaction of the corporation's or limited liability entity's business or affairs.

Factual Allegations

I. Relationship between Colony and the Agency Defendants

17. Colony is a designer, manufacturer, and installer of highly customized fixtures, exhibits, and displays servicing home improvement, retail, and hospitality businesses. Colony has approximately 75-100 full-time employees and between 200 and 1,000 temporary workers at any given time.

18. The Agency Defendants are temporary staffing agencies that compete with one another to recruit, select, and hire employees that will be staffed at third-party client locations on a temporary basis. The Agency Defendants provide temporary employees to perform light industrial work at Colony's facilities, including at the Elgin and St. Charles Locations.

19. Colony contracted with Elite to provide temporary employees at the Elgin Location

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

as early as May 2006.[1] In or around March 2010, Colony entered into an agreement with Elite's competitor, Metro Staff, to provide temporary employees alongside Elite at that location.[2] In February 2018, Colony entered into an agreement with[3] a third temporary staffing agency, Midway, to provide temporary workers there because Elite and Metro Staff "were having trouble bringing people in." By February 2018, the three competing Agency Defendants—Elite, Metro Staff, and Midway—were all providing temporary workers to Colony at the Elgin Location.

20. Colony contracted with Metro Staff to provide temporary workers at the St. Charles Location beginning in or around March 2010. Colony then hired Elite beginning in or around May 2016 and then Midway in February 2018 to provide the same services at the St. Charles Location.[4]

21. Each Agency Defendant had a dedicated on-site supervisor at both the Elgin and St. Charles locations. The on-site supervisors coordinated and oversaw each staffing agency's temporary employees assigned to that Colony location. The on-site supervisors worked out of office space provided by Colony at each Colony location.[5]

22. The Agency Defendants' contracts with Colony state that in addition to recruiting, interviewing, selecting, and hiring the temporary employees assigned at Colony, the Agency Defendants are responsible for: (i) maintaining all necessary personnel and payroll records for the temporary employees assigned to Colony; (ii) computing their wages and withholding applicable federal, state and local taxes and federal Social Security payments; (iii) remitting employee

---

[1] Before the Complaint was filed, all four Defendants asserted that certain information produced during the State's investigation must remain confidential. The State disagrees with the position and will promptly move the Court to allow it to file an unredacted complaint. Until the court can rule on this confidentiality dispute, however, the State has complied with the Defendant's confidentiality requests in the filing of its Complaint. For the Defendants' ease of reference, the State provides citations to where the information can be found in the Defendants' productions. The information provided in this sentence can be found in Subpoena Respondent Colony, Inc.'s Answers to Office of the Attorney General's Interrogatories to Colony, Inc. ("Colony Interrogatory Resp."), at 5.
[2] *Id.*
[3] COLONY_00003004.
[4] Colony Interrogatory Resp. at 5.
[5] ESI0024259, COLONY_00003004, METRO000326.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

withholdings to the proper governmental authorities and making employer contributions for federal FICA taxes and federal and state unemployment insurance payments; and (iv) paying net wages and fringe benefits, if any, directly to the temporary employees.[6]

23. Colony's contracts with the Agency Defendants also state that the Agency Defendants have the "sole and exclusive authority and control over the hiring, transfer, suspension, lay off, recall, promotion, discharge, assignment, reward, discipline, and adjustment of grievances" of the temporary employees assigned to Colony.[7]

24. The Agency Defendants and Colony are not parties to any joint venture or business collaboration with each other or together with Colony.

II. The Agency Defendants agreed not to solicit, hire, or poach each other's temporary workers at Colony.

25. From at least March 2018 through the present, Agency Defendants Midway, Metro Staff, and Elite, who are supposed to compete in the recruiting and hiring of temporary workers, instead agreed, combined, and conspired not to recruit, hire, solicit, or poach temporary workers from each other at Colony locations. The purpose of this illegal conspiracy was to restrict any competition between the Agency Defendants that would benefit temporary employees assigned to Colony in terms of wages or other conditions or terms of employment.

26. The Agency Defendants agreed that they would not approach temporary workers employed by another Agency Defendant at Colony locations and offer them better wages or other benefits. The Agency Defendants also agreed that if a temporary worker wished to switch employment from one Agency Defendant to another Agency Defendant at Colony locations, they would not be permitted to do so. The Agency Defendants further agreed that if a temporary worker

[6] ESI0024254, COLONY_00003004, METRO000321.
[7] ESI0024259, COLONY_00003004, METRO000326.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

managed to switch Agency Defendants at a Colony location, and the switch was later noticed by another Agency Defendant or Colony, the temporary worker would be returned to the original Agency Defendant.

27. The Agency Defendants enforced their conspiracy by communicating with each other through Colony. If one of the Agency Defendants acted against the conspiracy by hiring the temporary employees of another Agency Defendant, a complaint would be made to Colony. Colony would then communicate the issue to all of the Agency Defendants and ensure that the conspiracy was enforced.

28. Numerous internal emails and emails exchanged between Colony and the Agency Defendants evidence the conspiracy.

29. For example, on or around March 2018, shortly after Midway began hiring employees to be placed at Colony, the President of Midway sent an email to several Midway employees, including Midway's on-site supervisor at Colony, with the subject line "Poaching". In the email, Midway's President explained that at one of Midway's clients where two other staffing agencies in addition to Midway provides temporary workers, Midway was accused of "approaching temps from their agencies and offering them work at other locations for more pay." Midway's President told his employees not to poach temporary workers from other agencies, stating "[w]e do not want to be known as [a]n agency that poaches. If we are at an account with other agencies we should not approach their employees for work at that site through us or any other site." He further explained that "it makes it much easier when you are friendly with the other on sites at the facility."[8]

30. Midway's President made clear that this no-poaching policy was not merely a

[8] MID000910.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

unilateral policy of Midway, but instead was a mutual understanding shared with the Agency Defendants. Midway's President stated: "Also on a side note, [Agency Defendant] Metro Staff (MSI)'s owner is a very close friend of mine and [another Midway employee's] Dad. If there ever is a situation regarding them in any scenario, please call [Midway's Head of Sales] or myself and we will handle it. Good bad or indifferent please let us know. It is in our best interest we remain friendly competitors with them." [9]

31. A few weeks later, in April 2018, Midway accused Elite of poaching temporary workers from Midway and asked Colony to intervene and clarify the Agency Defendants' mutual understanding that they do not poach. The Agency Defendants communicated their agreement not to poach or hire temporary workers from one another at Colony through Colony's CEO.

32. In particular, on April 20, 2018, the Head of Sales at Midway emailed Colony's CEO concerning Elite cheating on the Agency Defendants' agreement not to poach. He told Colony's CEO: "We want to briefly discuss how we can eliminate the transferring of employees between other agencies in the facility."[10] He then said, "I think we can squash it by implementing a couple rules." Colony's CEO replied, "I can talk to Elite directly to stop it if you can give me evidence. Not that I don't believe you but I need something to go to them with."[11]

33. On April 23, 2018, the Elgin Branch Manager at Midway met with Colony's CEO to discuss the issue in person. The next day, the Branch Manager emailed Colony's CEO the names of employees who had switched from Midway to Elite.

34. After receiving this email, Colony's CEO emailed a Senior Vice President at Elite with the subject line "Employees changing companies." Colony's CEO made clear that there is a

---

[9] *Id.*
[10] MID000917.
[11] MID000916.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

shared understanding amongst the Agency Defendants that they are not to poach employees from one another. Specifically, Colony's CEO stated the following:

> It's come to my attention that employees have been poached from Midway to work for Elite. Since they haven't had an onsite (which changes Thursday) they've been going to Elite and MSI on sites for help, and being told to move to your agency. I don't have your employees['] side of the story but I do have proof of employees who worked for Midway, who are now working for Elite. Please look into this as this is bad practice, we don't allow for any of the agencies and I want to make sure everyone understand [sic] that.

35. Colony's CEO also provided to the Senior Vice President at Elite the names of the four employees that Midway's Branch Manager told him were poached.

36. Right after Colony's CEO sent the email to the Senior Vice President at Elite, he sent another email to the Elgin Branch Manager at Midway, stating that he sent the list of employees to Elite and "enforced the policy that we do not allow this. I'll let you know the follow up on their end."[12]

37. Elite's Senior Vice President responded to Colony's CEO confirming that "[o]ur policy is not to allow this to occur. It is bad business for temp employees to be allowed to change agencies at the same company. I will speak to both onsites right now." After speaking with the Elite on-sites at Colony, Elite's Senior Vice President informed Colony's CEO that:

> There have been many Midway employees who have requested to come through Elite. The onsites are telling them it is not possible or allowed. According to my onsites, many employees are not happy working for Midway. They are saying Midway does not help them, answer their calls/return messages, and have many pay issues. At times, new applicants for Midway sit in the break room for hours waiting for Midway rep to show up. No idea if the complaints are valid or not . . . . I'm certainly not going to rip on another agency. Just passing along information I'm told.

[12] MID000918.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

38. In an apparent effort to stop employees from switching staffing companies, the Senior Vice President at Elite said he had "asked the onsites to ask applicants if he/she has worked for another agency at Colony before hiring." He went on, "We'll do everything we can to not hire Midway employees . . . just understand we don't know who's with Midway at Colony and who's just stopping by Colony to apply with us. I'll be happy to have the onsites inform the 4 employees they must go back to Midway if they want to stay at Colony. Let me know how to handle."

39. Just minutes after receiving it, Colony's CEO forwarded Elite's response directly to the Head of Sales at Midway, stating "Here is Elite's response, just for you. We can discuss."[13]

40. Subsequently, on April 24, 2018, the on-site supervisor at Colony with Metro Staff emailed Colony's CEO about two temporary workers who had previously worked for Midway Staffing at Colony and had switched to Metro Staff. Their reason for switching was "not getting paid on time, and not being able to communicate with anyone when they needed help." Metro Staff's on-site supervisor asked, "Is there a certain way I should go about this or is this not permitted to do?"

41. Colony's CEO then forwarded the email to the Head of Sales at Midway, stating: "More feedback, this time from the other agency [Metro Staff]."[14] The Head of Sales at Midway responded and apologized to Colony's CEO for having to deal with this situation. He said that although Midway competes with the other agencies, "we work together whenever necessary for the client. It makes it easier for everyone."[15]

42. Colony's CEO responded, "No problem . . . Going forward I've put a process in place where I need to approve if an employee wants to switch so I at least can communicate with

---

[13] MID000920.
[14] MID000924.
[15] MID000923.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

the agency and find out why."[16]

43. The next day, the Vice President of Operations at Metro Staff emailed both the on-site supervisor for Metro Staff and Colony's CEO about the situation and said:

> As long as you did not solicit them which I know you did not because we just do not do that at MSI, we are ok with it as long as the client is ok with it too. In the future, I would prefer if you inform [Colony's CEO] and [a certain Colony employee] prior to it happening rather than after the fact. Transparency is very important to us. We [don't] ever want to be perceived as one of those shady services that try to solicit or poach temps under the table and back door us and the client.

44. Colony's CEO replied and said, "for the record, it was more of an Elite issue . . ." Then Metro Staff's Vice President of Operations replied, "You know how I feel about soliciting, so I want to make perfectly clear that you know we didn't . . . in the future, I would like for [Metro Staff's on-site supervisor] and/or the office to let you know and discuss with you even before it takes place. I like for us to get your ok first."

45. Colony's CEO responded: "Yes you are correct, I sent the feedback to Midway as well and they are addressing on their end too. It seems like Elite was the one soliciting but they responded well so we are all on the same page." This response reflects the agreement among the Agency Defendants that they would not solicit, recruit, hire, or poach temporary workers and the understanding among the Agency Defendants that Colony would facilitate the agreement through communicating about its enforcement.

46. In May 2018, several Midway employees sought to switch to Metro Staff at this time but were not permitted to do so because of the no-poach conspiracy. Metro Staff's on-site supervisor notified Colony's CEO that "four Midway employees have come to me asking if they are able to start with [Metro Staff] on Monday . . . I asked them what the reason for them wanting

---

[16] *Id.*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

to switch and they said Midway has owed them hours since they first started working for them. They say they are simply unsatisfied with their service." She asked whether they will be permitted to work for Metro Staff.

47. Before responding, Colony's CEO forwarded the email to the Head of Sales at Midway and said, "More feedback of employees wanting to switch. Let me know how you want to handle."[17]

48. Midway's Head of Sales replied, saying "[y]es we are fully aware of this and are fixing it ASAP." When Colony's CEO asked Midway's Head of Sales if he was going to contact the employees who wanted to switch, he said that he would. Midway's Head of Sales said "[t]hey will not be transferring to Metro as we had a whole team meeting to discuss that even if Metro employees come to us tell them it is not allowed."[18]

49. Colony's CEO then replied to the Metro Staff on-site supervisor and told her that the employees would be prohibited from transferring from Midway to Metro Staff. Colony's CEO said: "Midway is contacting those employees and resolving the issue. They will not transfer."

50. Midway's Head of Sales then followed up with Colony's CEO to confirm that Midway has "a zero tolerance policy per our meeting last month regarding transferring employees in the first 90 days between agencies."[19]

51. At least two of the Agency Defendants communicated directly about this agreement not to solicit, recruit, hire, or poach temporary workers at Colony. On May 4, 2018, the President of Midway texted a screen shot of the May 4 email Metro Staff's on-site supervisor had sent to Colony's CEO about workers wanting to switch agencies to the President of Metro Staff, his

---

[17] MID000930.
[18] MID000929.
[19] MID000932.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

competitor. Along with the screen shot, Midway's President texted Metro Staff's President acknowledging and seeking to enforce their no-poach agreement: "Thought we were on the same page with this. This is the second time they've sent something like this to [Colony's CEO]. I told my on site and team if anyone from MSI goes to them they need to go to their on site."[20]

52. Metro Staff's President responded directly to Midway's President via text message: "I have informed them no transfers. I'm calling [the on-site supervisor for Metro Staff]."[21]

53. Because of the Agency Defendants' no-poach agreement facilitated by Colony, the Agency Defendants did not compete with one another for temporary workers, including by offering better wages or terms and conditions of employment to attract those workers to their respective agencies.

54. As these communications show, the Agency Defendants agreed not to solicit or hire each other's temporary workers and enforced that agreement with Colony's help. The Defendants' no-poach conspiracy eliminated any competition among the Agency Defendants for temporary employees, which lowered the quality of the terms of employment for temporary employees staffed at Colony and suppressed their wages. Temporary employees could not seek better wages, on-time payment, better communication from on-site supervisors, or any other benefits by switching to another Agency Defendant at Colony.

III. The Defendants agreed to fix the wages paid to temporary workers assigned to Colony locations.

55. Colony's contracts with the Agency Defendants state that the temporary employees provided by the Agency Defendants are employees of the Agency Defendants for which they work, not of Colony. As employees of the Agency Defendants, and as stated in Colony's contracts with

---

[20] MID000912-14.
[21] MID000914.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

the Agency Defendants, the Agency Defendants are responsible for paying wages and benefits (if any) directly to their temporary workers.[22]

56. Although the temporary workers assigned to Colony are employees of the Agency Defendants for which they work, the Agency Defendants agreed among themselves and with Colony to pay these workers a fixed wage set by Colony. Each Agency Defendant agreed to the wage set by Colony with the understanding that all other Agency Defendants also agreed to pay the same wage.

57. The contracts between Colony and each of the Agency Defendants themselves[23] contain an incentive for the Agency Defendants to offer temporary workers higher wages. For example, the provision in the contract with Elite concerning the compensation that Colony pays Elite for temporary staffing services states:[24]

> **Hourly Rate and Mark up**
>
> For all employee/work categories listed on Exhibit A hereto, the multiplier will be [XXX][25] times the base pay rate per hour, ([XXX][26] per overtime hours).

58. Colony's contracts with Metro Staff and Midway contain similar provisions that establish compensation based on a multiplier times the "base pay rate per hour."[27]

59. The Agency Defendants and Colony agreed that the "base pay rate per hour"[28] will be set by Colony, and the Agency Defendants all agreed to pay their temporary employees placed at Colony that agreed rate.

---

[22] ESI0024254, COLONY_00003004, METRO000321.
[23] ESI0024255, COLONY_00003004, METRO000322.
[24] *Id.*
[25] The multiplier is not stated in the unredacted Complaint.
[26] The multiplier is not stated in the unredacted Complaint.
[27] COLONY_00003004 & METRO000322.
[28] ESI0024255, COLONY_00003004 & METRO000322.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

60. The Agency Defendants should be in direct competition with one another over the wages they offer potential hires in order to attract more workers. An internal survey done by Elite in 2017 established that 86% of surveyed temporary workers—including those who are currently working and those who are not—are motivated to work for a temporary staffing agency by the hourly pay rate offered. Moreover, in that survey the most popular reason given for why a respondent chooses one temporary agency over another—after availability of work—is the hourly pay rate.[29]

61. However, the Agency Defendants have illegally agreed with each other and with Colony not to compete over wages for temporary workers assigned to Colony. This conspiracy suppresses the wages of temporary employees assigned to Colony below a competitive rate.

62. Given how important the hourly rate is to the Agency Defendants' ability to compete with each other and successfully solicit, recruit, and hire temporary workers, the Agency Defendants would not have agreed to pay a fixed wage set by Colony unless there was a mutual understanding among all of the Agency Defendants that they would pay the same wage to their temporary employees assigned to Colony.

63. That mutual understanding again is evidenced by communications among the Agency Defendants and Colony. For example, in March 2018, after Elite raised concerns with Colony about offering forklift drivers only $10 per hour when "general labor sits at around $10.50" and "FL drivers [sic] is $12-13 per hour," Colony's CEO informed his staff: "I've gone over and spoke with all 3 agencies and they are saying $10 is the sweet spot . . . . They are all saying a seasonal increase or bonus usually backfires in their experience when you stop it or take it away . . . ."[30]

---

[29] ESI0043518 & ESI0043526.
[30] COLONY_00036492.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

64. At different times, the Agency Defendants complained to Colony about each other's cheating on their wage-fixing agreement. For example, in April 2018, the on-site supervisor for Elite at Colony emailed both a supervisor at Colony and the on-site supervisor for Metro Staff at Colony, complaining that Metro Staff temporary employees were being paid at a higher wage than Elite temporary employees. In the email, the Elite on-site supervisor wrote: "there is a rumor going around from [Metro Staff] employees at the other location that they are getting $13.00 per hour. Does that only apply to [Metro Staff] or Elite employees as well[?]" Colony resolved the issue after Colony's CEO spoke to the Metro Staff on-site supervisor. Colony's CEO then directed the on-site supervisor at Elite to speak directly with Metro Staff to get the "info".

65. In another example, in June 2018, Metro Staff complained to Colony that Elite was not complying with how the Agency Defendants and Colony had agreed that temporary workers assigned to Colony would be paid for overtime. A supervisor at Colony emailed the on-site supervisors from both Metro Staff and Elite and said: "Let's go over this tomorrow so everyone is on the same page."

66. But for an agreement among the Agency Defendants and Colony to pay a suppressed, fixed wage, the Agency Defendants would have a strong incentive to offer higher wages to prospective temporary workers to fulfill Colony's requests. But because the Agency Defendants were not free to offer higher wages to temporary employees assigned to Colony due to the Defendants' conspiracy, the Agency Defendants at times struggled to hire workers to meet Colony's needs.

67. For example, on or about April 6, 2016, approximately ten Elite and Metro Staff temporary employees assigned to Colony did not show up for work. Colony requested replacements from both Elite and Metro Staff as soon as possible. Colony also requested an

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

additional 12-14 employees for the second shift the following week. Metro Staff could not satisfy Colony's request. Metro Staff's Vice President of Operations told Colony and Elite: "I hate to sound like a broken record, but as long as we continue paying minimum wage, we will continue having these problems . . . Not that paying a little more would cure all, but it would definitely draw more people and at least it would put Colony on an equal playing field with most other companies. Right now, we are at a disadvantage. There is too much work out there offering better pay." If Colony and the Agency Defendants had not entered into a wage-fixing agreement, Metro Staff could have offered a higher hourly rate to potential temporary workers to fulfill Colony's staffing needs.

68. The Agency Defendants' and Colony's conspiracy to fix wages for temporary workers assigned to Colony resulted in suppressing wages for those temporary workers. According to an internal survey done by Elite in late 2017, the "fair wage" for light industrial work with no training is $13.00 per hour.[31] However, according to an advertisement put out by Elite for warehouse workers for Colony at the Elgin Location, Colony set the wage at only $10.00 per hour. The numerous complaints made by the Agency Defendants concerning the low wage set by Colony further confirms that the Agency Defendants' and Colony's conspiracy to fix the wages paid to temporary employees assigned to Colony have suppressed wages.

Count I
No-Poach Conspiracy in Violation of the Illinois Antitrust Act, 740 ILCS 10/1 *et seq.*

69. Plaintiff restates and re-alleges Paragraphs 1 through 68 of this Complaint as though fully set forth herein.

70. Beginning at a time known only to Defendants, Defendant Colony and Agency

[31] ESI0043520.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

Defendants Metro Staff and Elite entered into and engaged in an unlawful conspiracy for the purpose and with the effect of allocating or dividing the market or supply for the recruiting and hiring of temporary employees assigned to Colony in violation of 740 ILCS 10/3(1). In particular, the Agency Defendants agreed not to recruit, solicit, hire, or poach temporary employees to be assigned to Colony from other Agency Defendants. Agency Defendant Midway joined this unlawful no-poach conspiracy no later than February 2018.

71. During all relevant times, the Agency Defendants were competitors in the temporary staffing services industry and competed for temporary workers, including workers at Colony. Defendant Colony is a common customer of the three Agency Defendants who facilitated the Agency Defendants' illegal no-poach conspiracy.

72. These agreements are *per se* unlawful under 740 ILCS 10/3(1). Defendants' no-poach conspiracy was not reasonably necessary to any separate, legitimate business purpose, transaction or collaboration among the Defendants.

73. The effect of this unlawful no-poach conspiracy was to suppress the wages paid to temporary employees assigned to Colony. The conspiracy also substantially reduced competition among the Agency Defendants in the soliciting, recruiting, and hiring of temporary workers, therefore reducing the quality of the terms and conditions of employment available to the temporary workers.

Count II
Wage-Fixing Conspiracy in Violation of
the Illinois Antitrust Act, 740 ILCS 10/1 *et seq.*

74. Plaintiff restates and re-alleges Paragraphs 1 through 73 of this Complaint as though fully set forth herein.

75. Beginning at a time known only to Defendants, Defendant Colony and Agency Defendants Metro Staff and Elite entered into and engaged in an unlawful conspiracy for the

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/27/2020 9:37 AM 2020CH05156

purpose and with the effect of fixing, controlling, or maintaining the wage paid to the Agency Defendants' temporary employees assigned to Colony in violation of 740 ILCS 10/3(1). Agency Defendant Midway joined this unlawful conspiracy no later than February 2018.

76. During all relevant times, the Agency Defendants were competitors in the temporary staffing services industry and competed for temporary workers, including workers at Colony. Defendant Colony is a common customer of the three Agency Defendants who facilitated the Agency Defendants' illegal wage-fixing conspiracy.

77. These agreements are *per se* unlawful under 740 ILCS 10/3(1) because the Defendants agreed to fix the hourly rates paid to the Agency Defendants' temporary employees assigned to Colony. Defendants' wage-fixing conspiracy was not reasonably necessary to any separate, legitimate business purpose, transaction, or collaboration among the Defendants.

78. The effect of the Defendants' unlawful wage-fixing conspiracy was to suppress the wages paid to temporary employees assigned to Colony.

Prayer for Relief

79. WHEREFORE, Plaintiff, the State of Illinois, prays for judgment as follows:

a. Finding Defendants liable, jointly and severally, for the no-poach conspiracy alleged herein as a violation of 740 ILCS 10/3(1);

b. Finding Defendants liable, jointly and severally, for the wage-fixing conspiracy alleged herein as a violation of 740 ILCS 10/3(1);

c. Awarding treble damages in favor of the State of Illinois as *parens patriae* for all damages caused by the Defendants' violations of 740 ILCS 10/7(3)(1);

d. Awarding civil penalties pursuant to 740 ILCS 10/7(4);

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 7/29/2020 9:30 AM 2020CH05156

e. Awarding injunctive relief to undo the effects of the Defendants' illegal conduct and to prevent further recurrences of such conduct pursuant to 740 ILCS 10/7(1) & (2);

f. Awarding costs, disbursements and reasonable attorneys' fees; and

g. For such other, further, and different relief as the Court may deem just, necessary, or appropriate.

Jury Trial Demanded

The State of Illinois demands a trial by jury of all issues so triable in this case.

Dated: July 29, 2020

THE STATE OF ILLINOIS,
by KWAME RAOUL,
ATTORNEY GENERAL OF ILLINOIS

By:________________________

Blake L. Harrop (#99000)
Chief, Antitrust Bureau
Elizabeth L. Maxeiner
Senior Assistant Attorney General,
Antitrust Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-1004
bharrop@atg.state.il.us
emaxeiner@atg.state.il.us

Alvar Ayala
Chief, Workplace Rights Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 793-3895
AAyala@atg.state.il.us

FILED DATE: 7/29/2020 9:40 AM 2020CH05156

STATE OF ILLINOIS)
)
COUNTY OF COOK)

AFFIDAVIT OF BLAKE L. HARROP

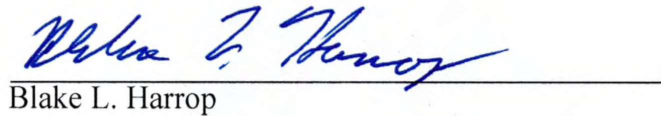
Blake L. Harrop, being duly sworn, on oath deposes and states:

1. I am Chief of the Antitrust Bureau in the Office of the Attorney General for the State of Illinois.

2. I am personally familiar with the facts underlying the complaint filed in *State of Illinois v. Elite Staffing, Inc., et al.*

3. Based on my knowledge of those facts, I believe the amount of money damages and civil penalties to be recovered by the State of Illinois exceeds $50,000.

Further affiant sayeth not.



Blake L. Harrop

Subscribed and sworn to before me this 29th day of July, 2020.

Notary Public

My commission expires: 05-04-2021

Return Date: No return date scheduled
Hearing Date: 11/5/2020 10:30 AM - 10:30 AM
Courtroom Number: 2601
Location: District 1 Court
Cook County, IL

FILED
10/28/2020 8:35 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020CH05156

10947692

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff, v. ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY, LLC, Defendants.	Hon. Raymond W. Mitchell No. 2020 CH 05156

COLONY DISPLAY LLC, ELITE STAFFING, INC.,
<u>AND MIDWAY STAFFING, INC.'S CONSOLIDATED MOTION TO DISMISS</u>

Defendants Colony Display LLC ("Colony"), by and through its attorneys Greenberg Traurig, LLP, Elite Staffing, Inc. ("Elite"), by and through its attorneys McGuireWoods LLP, and Midway Staffing, Inc. ("Midway"), by and through its attorneys SmithAmundsen LLC (collectively "Defendants") move to dismiss the State of Illinois' Complaint under Section 2-615 of the Illinois Code of Civil Procedure.

<u>INTRODUCTION</u>

The State has brought this case even though Illinois law plainly block the claims, the allegations it advances fail to state a claim, and the Complaint itself reveals that the harm it alleges does not exist. That the State has chosen to use its considerable resources to bring the charges it has against a single small company (Colony) and its vendors under these circumstances is troubling, especially because the U.S. Supreme Court has warned against just such use of the antitrust laws.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

The State has seen fit to lodge antitrust claims against Colony and three vendors ("Agency Defendants") that contract to provide Colony with temporary workers, which the Complaint alleges amount to 50-90% of Colony's total permanent and temporary labor force that varies between roughly 300 and 1,100 people.

In its zeal to advance this case, the State has brought its claims notwithstanding the fact that the Illinois Antitrust Act ("IAA") expressly bars such an action in cases involving labor services. Moreover, the State has chosen to bring this case as a *per se* action under Section 3(1), 740 ILCS 10/3(1), but Section 3(1) is wholly inapplicable because it applies only to claims against competitors, and the Complaint acknowledges that Colony does not compete with the other vendor defendants. Section 3(2) of the IAA is not limited to competitors, but that section utilizes the more expansive rule of reason.

It is clear that the State is pressing to apply *per se* principles to avoid inconvenient facts evident in the Complaint itself, which would doom its case under the rule of reason. The Complaint alleges that the Colony-Agency agreements are unlawful because they "have harmed competition in the recruiting and hiring of temporary workers and have harmed temporary workers by interfering with their ability to seek better employment opportunities," (Complaint ("Compl.") ¶ 1), but its own allegations reflect that (i) the arrangements in no way constrain the ability of the temporary workers that the vendor defendants have placed at Colony to obtain employment at *any* company other than Colony, and (ii) there is a robust demand for such workers from other companies. In addition to cabining its claims under Section 3(1), the Complaint also attempts to artificially focus only upon Colony's workforce even while it repeatedly references (and in fact relies upon) the existence of substantial demand for the same type of temporary workers from other employers just outside Colony's doors.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

In a vain attempt to avoid Section 3(1)'s limitations as well as the existence of a broad reservoir of employment opportunities from other companies, the Complaint asserts that Colony "facilitated" the conspiracy of the Agency Defendants. Nothing within the language of Section 3(1) permits this approach. The Complaint telegraphs that the State will attempt to advance this theory in reliance upon certain federal cases applying Section 1 of the Sherman Antitrust Act ("Sherman 1"). This too fails. Though Section 3(1) is crafted after Sherman 1, the IAA specifically states that federal authority should not be considered if it is based upon language that deviates from the IAA. 740 ILCS 10/11. The IAA uses a different approach than the federal courts in determining when the *per se* rule will apply.

These issues to one side, the allegations of the Complaint also fail to state a claim because they do not sufficiently allege the antitrust claims charged. A close look at the Complaint's allegations reveals that they grounded upon conclusory statements and quotes from emails that the law establishes are insufficient to state a claim under the IAA. For example, the Complaint contains no allegations establishing by direct or circumstantial references that there was any agreement between the three Agency Defendants, let alone an agreement to fix wages. Indeed, the wage limits came exclusively from Colony through its series of unilateral contracts with the Agency Defendants. This does not state a claim under 3(1) (or under the federal antitrust laws.) Accordingly, for numerous mutually independent reasons, the Complaint should be dismissed in its entirety.

<u>STATEMENT OF FACTS</u>

With 75-100 full-time employees and 200-1,000 temporary workers, Colony designs, manufactures, and installs customized fixtures, exhibits, and displays for commercial use. (Compl. ¶ 17.) Elite, Midway, and Metro Staff, Inc. ("Metro") are Illinois-based professional staffing

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

agencies that "recruit, select, and hire" employees for temporary staffing at third-party client locations.[1] (*Id.* ¶¶ 12-14, 18.) Each Agency Defendant has its own vertical contract with Colony. (*Id.* ¶¶ 18-20.) Since 2006 Colony has contracted with Elite for the procurement of temporary workers to perform light industrial work at Colony's facilities. (*Id.* ¶¶ 18-19.) In March 2010, Colony contracted with Metro for similar temporary staffing services. (*Id.* ¶¶ 19-20.) In February 2018, Colony contracted with Midway for temporary staffing services. (*Id.* ¶ 19.) The Agency Defendants each maintained an on-site supervisor at Colony's facilities, who "coordinated and oversaw" their agency's temporary workers. (*Id.* ¶ 21.)

Before filing the Complaint, the State issued investigatory subpoenas to Defendants, and Defendants responded by producing documents and answering interrogatories. (*Id.* ¶ 19 n.1.) On July 29, 2020, the State filed the Complaint against Colony and the Agency Defendants alleging *per se* violations of the IAA. The State asserts two conspiracies: (1) Defendants agreed not to recruit, solicit, hire, or poach temporary workers assigned to Colony from other Agency Defendants for work at Colony ("no-poach" conspiracy); and (2) Defendants agreed to fix the hourly rate paid to temporary workers assigned to Colony ("wage-fixing" conspiracy). (*Id.* ¶¶ 69-78.)

Count One: The Alleged No-Poach Conspiracy

The Complaint does not allege a direct agreement among the Agency Defendants not to poach each other's temporary workers placed at Colony. Instead, the Complaint attempts to infer an agreement among the Agency Defendants by referencing a few email communications between an Agency Defendant and Colony about the performance of their vendor-client contract. Some

[1] This Motion recites the facts alleged in the Complaint, which are assumed true solely for purposes of this Motion. *See Better Gov't Ass'n v. Illinois High Sch. Ass'n*, 2017 IL 121124, ¶ 57.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

communications show Colony reserving its ability to sign off on transfers at its facilities or a reasonable time limit before a transfer at the same location can occur. (*Id.* ¶42 (Colony CEO stating, "I need to approve if an employee wants to switch so I at least can communicate with the agency and find out why"); *Id.* ¶ 44 (Metro executive to Colony CEO about a transfer: "I would like us to get your ok first."); *Id.* ¶ 50 (Midway's no movement policy only covers "the first 90 days").) The remaining communications cited in the Complaint reference an internal unilateral company policy of a defendant or statements of deference to a common client's desires. (*See generally id.* ¶¶ 25-54.)

Agency Defendants communicated one-to-one with their client, Colony, about temporary workers transferring from one staffing agency to another at Colony's facilities. As an example, in April 2018, Midway's Head of Sales informed Colony's CEO that temporary workers placed by Midway at the Elgin Facility "transferred" to Elite and asked for Colony's assistance in "eliminat[ing] the transferring of employees between other agencies" in Colony's facilities. (*Id.* ¶¶ 32-33.) In response, Colony notified Elite that hiring temporary workers placed by other agencies at Colony's location is "bad practice," and that Colony does not "allow for any of the agencies [to do that]." (*Id.* ¶ 34.)

The communications cited show Colony's approach toward inter-facility agency transfers. For example, on April 24, 2018, an on-site supervisor for Metro contacted Colony about two temporary workers who had recently transferred from Midway for reasons unrelated to wage rates. (*Id.* ¶ 40.) Metro's on-site supervisor sought Colony's guidance on how to handle the situation, including whether Colony even permitted transfers. (*Id.*) In response, Colony's CEO stated that he "put a process in place where I need to approve if [a temporary] employee wants to switch [agencies] so I at least can communicate with the agency and find out why." (*Id.* ¶ 42.) Importantly,

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

the Complaint alleges Colony communicated its policy about inter-agency transfers to each Agency Defendant separately. (*Id.* ¶¶ 42-45.)

Several weeks later, Metro informed Colony that four temporary workers originally placed by Midway sought to switch to Metro again due to issues unrelated to wage rates. (*Id.* ¶ 46.) Colony's CEO contacted Midway about the temporary workers' concerns and Midway assured Colony it would fix the issues promptly. (*Id.* ¶ 48.) Colony's CEO informed Metro the temporary workers would not transfer because Midway would be "contacting those employees and resolving the[ir] issues."[2] (*Id.* ¶ 49.) The Complaint contains no factual allegation showing direct communications between Elite and the two other Agency Defendants.

Count Two: The Alleged Wage-Fixing Agreement

The Complaint alleges all temporary workers provided to Colony were employees of the respective Agency Defendants and the Agency Defendants paid wages and benefits directly to the temporary workers. (Compl. ¶ 55.) The Complaint then offers a conclusory allegation that the Agency Defendants, "agreed among themselves and with Colony to pay these workers a fixed wage set by Colony." (*Id.* ¶ 56.) In support of this conclusion, the Complaint alleges Elite and Metro separately questioned the wages offered by Colony and explained those low wages put them at a disadvantage when recruiting temporary workers on Colony's behalf. (*Id.* ¶¶ 63, 67.) The Complaint also includes two communications the State incorrectly characterizes as complaints from the Agency Defendants to Colony about "cheating on their wage-fixing agreement." (*Id.* ¶ 64.) The communications, however, do not reflect complaints about a wage-fixing agreement. One inquiry refers to a "rumor" about workers receiving $13 per hour at a different Colony location

[2] The State's only factual allegation demonstrating direct communication between the Agency Defendants about the alleged "no poach" agreement is a text message conversation between the respective Presidents of Midway and Metro. (Compl. ¶¶ 51-52.)

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

followed by the question, "Does that apply to [Metro Staff] or Elite as well[?]" (*Id.*) The second communication concerns Colony's required approach to paying overtime to temporary workers. (*Id.*)

LEGAL STANDARD

A motion to dismiss under section 2-615 of the Illinois Code of Civil Procedure challenges the legal sufficiency of a complaint. 735 ILCS 5/2-615; *City of Chicago v. Beretta USA Corp.*, 213 Ill. 2d 351, 364 (2004). "In opposing a section 2-615 motion to dismiss, a plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations." *Pooh-Bah Enters. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). "A complaint fails to state a cause of action if it does not contain factual allegations in support of *each element* of the claim that the plaintiff must prove in order to sustain a judgment." *Grund v. Donegan*, 298 Ill. App. 3d 1034, 1037 (1st Dist. 1998) (emphasis in original).

ARGUMENT

The Complaint fails to state a claim for a no-poach conspiracy or a wage-fixing conspiracy under the IAA for two reasons. First, the IAA does not apply to the market for labor services, which is the subject of the alleged conspiracies. Second, even if the IAA applied to the market for labor services, the Complaint lacks sufficient factual allegations to state a *per se* claim under Section 3(1) of the IAA.

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE THE ILLINOIS ANTITRUST ACT DOES NOT APPLY TO LABOR SERVICES

The Complaint asserts two conspiracies in violation of the IAA. Count I alleges Defendants conspired to allocate the market for temporary workers assigned to Colony. (Compl. ¶ 70.) Count II alleges Defendants conspired to fix the wages paid to temporary workers assigned to Colony.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

(*Id.* ¶ 75.) Both alleged conspiracies involve the market for labor services, which the IAA specifically excludes from its reach.

The IAA prohibits restraints of trade that "decrease competition between and among persons engaged in commerce and trade whether in manufacturing, distribution, financing, and service industries or in related for-profit pursuits." 740 ILCS 10/2. Section 10/4 of the IAA defines commerce and trade as "all economic activity involving or relating to any commodity or service." *Id.* at 10/4. Section 10/4 then clarifies that "a '[s]ervice' *shall not be deemed to include labor* which is performed by natural persons as employees of others." *Id.* (emphasis added). This statutory language unambiguously conveys the Legislature's intent to exclude labor services from the IAA. *See generally People v. Whitney*, 188 Ill. 2d 91, 97 (1999) ("The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature . . . [and when] statutory language is clear and not ambiguous, its plain meaning will be given effect.").

Indeed, each court that has considered the exclusionary language of Section 10/4 has held that the IAA does not apply to labor services. *See O'Regan v. Arb. Forums, Inc.,* 121 F.3d 1060, 1066 (7th Cir. 1997) (affirming dismissal of state antitrust claims because Section 10/4 of the IAA specifically excluded labor services); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) (same); *Deslandes v. McDonald's USA, LLC*, 17-C-4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018) (same).

For example, in *Deslandes*, the district court determined whether a "no poach" provision in a franchise agreement—which precluded McDonald's franchisees from hiring any person employed by another McDonald's restaurant—violated the IAA. 2018 WL 3105955, at *3. The defendant argued that the IAA explicitly excluded coverage of the plaintiffs' alleged labor-based "no poach" agreement. *Id.* at *9. After analyzing Section 10/4, the court dismissed the state

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

antitrust claim because "the plain language of the statute excludes plaintiff's [labor-based] claim." *Id.* at *8 (citing *O'Regan*, 121 F.3d at 1066).

Here, just as in *Deslandes*, the State's "no poach" and "wage-fixing" claims both relate to labor services (*i.e.*, labor provided by temporary workers), and they should likewise be dismissed. And, because the State has no cognizable claim against Defendants under the IAA, the Complaint should be dismissed with prejudice. *See Deasey v. Chicago*, 412 Ill. 151, 157 (1952) (a court may consider the ultimate efficacy of a claim in denying leave to amend the complaint).

II. THE COMPLAINT FAILS TO STATE A *PER SE* CLAIM UNDER SECTION 3(1) OF THE ILLINOIS ANTITRUST ACT

Even if the IAA applied to labor services (which it does not), the Complaint fails to allege sufficient facts to state a claim under Section 3(1) of the IAA. The Illinois Legislature patterned Section 3(1) of the IAA after Section 1 of the Sherman Act ("Sherman 1"). *See Laughlin v. Evanston Hosp.*, 133 Ill. 2d 374, 381 (1990). The IAA provides, "when the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this act." 740 ILCS 10/11.

Under the IAA and federal antitrust law, courts evaluate alleged restraints using either the rule of reason or the *per se* rule. *See Blake v. H-F Group Multiple Listing Serv.*, 36 Ill. App. 3d 730, 738-41 (1st Dist. 1976) (articulating that federal antitrust law and the IAA each apply rule of reason and *per se* analyses). The rule of reason requires the court to "consider the actor's purpose in entering into the arrangement, the nature of the conduct, the effect on the industry and the competitive climate in the industry." *Health Prof'ls, Ltd. v. Johnson*, 339 Ill. App. 3d 1021, 1038 (3d Dist. 2003). On the other hand, the *per se* rule does not require the court to fully analyze the alleged restraint. Instead, the courts reserve the *per se* rule for only those restraints "whose nature

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *Nat'l Soc. Of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

The two bodies of law differ in how they determine whether the rule of reason or *per se* rule will apply to a restraint. Under federal antitrust law, the courts determine which restraints are subject to the *per se* rule. *See, e.g.*, *Blake*, 36 Ill. App. 3d at 740 ("The distinction between Per se violations and rule of reason violations at the federal level is therefore a distinction created by the courts…."). On the other hand, the IAA specifically "codifies what restraints are illegal 'per se,' 740 ILCS 10/3(1) (a)-(c), versus restraints that should be analyzed under the 'Rule of Reason,' 740 ILCS 10/3(2)." *Intercontinental Test & Balance, Inc. v. Assoc. Air & Balance Council ("Intercontinental Test")*, 14 F. Supp. 2d 1033, 1040 (N.D. Ill. 1998).

The IAA and federal antitrust law both distinguish between horizontal and vertical relationships among firms when analyzing an alleged restraint. *See, e.g.*, *Leegin Creative Leather Products v. PSKS, Inc. ("Leegin")*, 551 U.S. 877, 888 (2007) (rejecting "the approach of reliance upon rules governing horizontal restraints when defining rules applicable to vertical ones"); *Nichols Motorcycle Supply v. Dunlop Tire Co. ("Nichols")*, 913 F. Supp. 1088, 1129 (N.D. Ill. 1995) (analyzing reach of IAA subsection 3(1) based on whether the alleged restraint is vertical or horizontal). A ***horizontal relationship*** involves firms operating at the same level of distribution, such as retail outlets that draw from the same customer base. These entities are direct *competitors* under the IAA and federal antitrust laws. A ***vertical relationship*** exists among firms operating at different levels of distribution, such as a manufacturer and distributor. The *per se* rule under Section 3(1) of the IAA applies ***only*** to select categories of horizontal restraints involving direct ***competitors***. *See Blake*, 36 Ill. App. 3d at 740-41 (Section 3(1) defines "those violations which

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

were deemed Per se violations, leaving all other possible violations to be judged by the rule of reason").

The Complaint fails to establish a *per se* claim under Section 3(1) of the IAA for three reasons. First, Illinois law states conclusively that the *per se* test of Section 3(1) applies only to exclusively horizontal arrangements, and the Complaint alleges conspiracies that contain a core vertical component between a client and its vendors. Such arrangements are only cognizable under Section 3(2) and are evaluated under the rule of reason. Second, the Complaint includes no factual allegations to show a horizontal agreement among Defendants under either the wage fixing or no-poach theories. Third, even if a horizontal relationship existed, the Complaint would be subject to rule of reason analysis anyway. Each reason is enough to dismiss the entire Complaint with prejudice.

A. The Complaint is Brought Exclusively under Section 3(1) of the Illinois Antitrust Act and Fails to Assert A Claim Because the Complaint's Conspiracy Allegations Necessarily Involve Vertical Relationships.

The Complaint seeks only to advance *per se* claims under Section 3(1) of the IAA. (*See* Compl. ¶¶ 72, 77 (alleging that the "agreements are *per se* unlawful under 740 ILCS 10/3(1)".)[3] The Complaint, however, does not and cannot state a claim under Section 3(1) of the IAA because its core allegations involve vertical relationships between a client and its vendors. (*See, e.g.*, Compl. ¶ 6 ("These conspiracies among competitors, facilitated by a common client, are *per se* violations of the antitrust laws.").)

Subsection 3(1) leaves no question that it *only* reaches contracts, combinations or conspiracy among *competitors* (horizontal):

[3] The Prayer for Relief also seeks judgments of liability for "violation[s] of 740 ILCS 10/3(1)." (Compl. ¶¶ 72, 77, 79 (a)-(b).)

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

> …any contract with, or engage in any combination or conspiracy with any other person who is, or but for a prior agreement would be, a competitor of such person ….

740 ILCS 10/3(1). The Bar Committee Comments about Section 3(1) specifically confirm it does not reach vertical arrangements, *i.e.*, between non-competitors:

> Section 3(1) ***does not reach vertical agreements***, such as agreements between buyers and sellers fixing the price at which the buyer shall resell. Although not unlawful under Section 3(1), such vertical price fixing, if not exempt under the Illinois Fair Trade Act, may be proscribed by Section 3(2), the general restraint of trade section.

740 ILCS 10/3. Bar Committee Comments-1967 (1963) (emphasis added)[4]; *see Nichols*, 913 F. Supp. at 1129 ("[t]he Bar Committee Comments could not be any more explicit that a vertical agreement may not constitute a *per se* violation of Section 3 of the IAA"). The Illinois Supreme Court has relied on the committee comments in construing Section 3 of the IAA. *Laughlin*, 133 Ill. 2d at 386.

The Complaint leaves no question that Colony is a client (and not a competitor) of each of the Agency Defendants. The Complaint excludes Colony from its list of "competitors." (Compl. ¶¶ 1, 3-4, 6.) Moreover, the Complaint's non-conclusory allegations show that the relationships between Colony and the Agency Defendants are ***vertical*** as are Colony's instructions and policies regarding the services of the Agencies, which amount to a significant amount of the allegations. (*Id.* ¶¶ 1-2, 17-20.)[5] The vertical client-vendor relationship between Colony and the Agency Defendants is thus inextricably intertwined with the Complaint's alleged "no-poach" and wage-

---

[4] Section 3(2) of the IAA addresses contracts, combinations, or conspiracies between all other parties, including vertical arrangements between actors at different levels: "contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce."

[5] For example, the Complaint alleges that (i) the "Agency Defendants provide temporary employees to perform light industrial work at Colony's facilities…,"; and (ii) each of the Agency Defendants entered into a separate contract with Colony for this service, making Colony the "common client" of the agencies. (*Id.* ¶¶ 18-20, 55-57.)

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

fixing conspiracies, excluding them from the ambit of Section 3(1). Due to these vertical relationships, the *per se* rule under Section 3(1) of the IAA does not apply to the alleged the no-poach and wage-fixing conspiracy claims. Any such conspiracy claims must be analyzed under Section 3(2) of the IAA, which employs the rule of reason test.

1. The "no poach" claims are vertical in nature.

The allegations concerning the no-poach conspiracy relate to vertical relationships between a client and its vendors.[6] The Complaint repeatedly alleges that Colony – at the top of the vertical relationship – determined policy and communicated it to the downstream Agency Defendants. Its remaining allegations repeatedly aver that the vertical player, Colony, directed things. The Complaint quotes Colony's vertical pronouncement to one of its vendors that hiring between agencies at the same location "is a bad practice, we don't allow for any of the agencies and I want to make sure everyone understand [sic] that. . . ." (Compl. ¶ 34.) The Complaint also quotes Colony as having, "enforced the policy that we do not allow this." (*Id.* ¶ 36.) These statements show Colony's own internal policy and its instructions to its vendors, and in no way reflects an agreement between and among the Agency Defendants themselves.

The Complaint also asserts that Colony, the vertical player, directed the movement of temporary workers between staffing agencies at its own locations. For example, when four Midway employees shifted to Elite, Elite did not consult with the other Agency Defendant, but looked to its client, Colony, for direction: "Let me know how to handle."[7] (*Id.* ¶ 38.) The Complaint

[6] In fact, the Complaint contains several allegations that in fact undermine the notion that employee movement between agencies was actually prohibited at all. (Compl. ¶ 42 (quoting Colony CEO stating, "I need to approve if an employee wants to switch so I at least can communicate with the agency and find out why"); Compl. ¶ 44 (Metro executive statement to Colony CEO regarding poaching: "I would like us to get your ok first."); Compl. ¶ 50 (Midway's no movement policy only covers "the first 90 days").)

[7] The Complaint is silent as to what happened.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

also claims that when two temporary workers placed by Midway at Colony moved to Metro, the Metro supervisor asked its customer, Colony, how to handle the situation. (*See id.* ¶ 40 ("Is there a certain way I should go about this or is this not permitted to do?").) Metro's Vice President later wrote to Colony stating that while he does not like soliciting, in the future he wanted his people to talk with Colony first: "we are OK with [interagency movement] as long as the client is ok with it too…in the future, I would like... to let you know and discuss with you even before it takes place. I would like for us to get your OK first." (*Id.* ¶¶ 43-44.) Similarly, when four temporary workers placed by Midway asked to switch to Metro, a Metro supervisor sought Colony's permission for the move. (*Id.* ¶ 46.) Ultimately, the temporary workers did not transfer because Midway addressed their concerns and not because they were barred from transferring agencies. (*Id.* ¶¶ 48-49.) Thus, the Complaint describes Colony's vertical policy, and not a horizontal agreement among the Agency Defendants.

2. The wage-fixing claims are vertical in nature.

The alleged wage-fixing conspiracy is specifically grounded upon a series of vertical contracts between Colony and each of the Agency Defendants. (Compl. ¶¶ 55, 57-58.) Each vertical agreement established that ***the upstream customer***, Colony, drove the vertical relationship with its vendor. The Complaint shows that Colony set the wages for the temporary workers and paid the Agency Defendants for the temporary workers. For example, the Complaint alleges that Colony: (i) "request[ed]" the Agency Defendants to "agree[] with one another not to compete with respect to wages paid to their temporary employees assigned to Colony"; (ii) set the wage rates it would pay for temporary workers provided by the agencies; and (iii) paid each staffing agency for the temporary workers provided. (*Id.* ¶¶ 4, 56, 57, 59, 64, 68.) Several other allegations reinforce that the arrangement was vertical. For example, the Agency Defendants required approval from

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

Colony for wage increases and complained when Colony would not agree to pay more for labor. (*Id.* ¶¶ 63, 67-68.) The Complaint does not allege the Agency Defendants ever had the power to set wages or agree with one another about such wages. These assertions preclude any allegations of an agreement on wages among the Agency Defendants.

3. The Complaint's Facilitation/Hub-and-Spoke Allegations do not trigger the *per se* rule under Section 3(1) of the Illinois Antitrust Act.

Defendants anticipate the State will argue the *per se* rule under Section 3(1) of the IAA applies here because the Complaint alleges that Colony "facilitated" horizontal conspiracies among the Agency Defendants. (*See, e.g.*, Compl. ¶¶ 1, 6.) That argument does nothing to resolve the fact that the alleged "facilitation" is vertical, which is outside the scope of Section 3(1) of the IAA. *See* 740 ILCS 10/3(1) (addressing only contracts, combinations, or conspiracies among competitors). Section 3(1) covers any contract, combination or conspiracy "with any person who is…a competitor of such person," while Section 3(2) covers the rest:

> By contract, combination, or conspiracy ***with one or more other persons*** unreasonably restrain trade or commerce

740 ILCS 10/3(2). If there is a vertical player involved, the contract, conspiracy or combination must be pursued under Section 3(2) of the IAA. The State has chosen not to do so.

Even though the State has not adequately alleged any horizontal agreements, case law analyzing situations involving both horizontal and vertical relationships confirm that they are not subject to Section 3(1). For example, in *Intercontinental Parts v. Caterpillar, Inc.*, the court refused to apply the *per se* rule under Section 3(1) of the IAA to an alleged restraint in a dual distribution system. 260 Ill. App. 3d 1085, 1091-92 (1st Dist. 1994). Dual distribution describes those situations where manufacturers themselves also operate as distributors in direct competition with their independent distributors. Caterpillar manufactured heavy equipment parts and sold them through authorized domestic dealers, authorized overseas dealers, and its own internal distribution

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

arm. *Id.* at 1088-89. The plaintiff bought and exported replacement parts for heavy equipment, including Caterpillar parts bought from Caterpillar's authorized domestic dealers. *Id.* at 1088. Due to price competition from resellers like the plaintiff, Caterpillar instituted an export policy that prohibited its authorized domestic dealers from selling to resellers/exporters that were not Caterpillar-authorized overseas dealers. *Id.* Caterpillar designed the export policy to inhibit the ability of resellers like the plaintiff to compete against Caterpillar and its authorized dealers. *Id.* at 1088-89.

Although Caterpillar directly competed against its authorized dealers and the plaintiff, the court held the rule of reason under Section 3(2) applied to the plaintiff's conspiracy claim because of the vertical components of the relationship. *Id.* at 1094-95. The *Intercontinental* court held that it would be error to characterize the arrangement as horizontal and subject to the *per se* test even though Caterpillar was also an overseas distributor like Intercontinental. *Id.* at 1091-92. Plainly, the instant case is well within the holding in *Intercontinental*, for as noted all of the Complaint's allegations cast Colony in a wholly vertical position to the Agency Defendants, whereas Caterpillar was upstream as well as a horizontal competitor to Intercontinental. If the *Intercontinental* court applied the rule of reason where the vertical actor also competed on a horizontal level with the other defendants, then the rule of reason should apply to allegations that only show Colony in a vertical vendor-client relationship.

Another example of a court refusing to apply the *per se* rule of Section 3(1) to an alleged restraint involving both horizontal and vertical elements is *Nichols Motorcycle Supply v. Dunlop Tire Co.*, 913 F. Supp. 1088 (N.D. Ill. 1995). In *Nichols*, the defendant was a motorcycle tire manufacturer that sold its tires to distributors like the plaintiff. *Id.* at 1097-98. After the defendant terminated its distributor relationship with the plaintiff, the plaintiff sued the defendant and its

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

other distributors claiming a *per se* violation under Section 3(1). *Id.* at 1128. The plaintiff alleged that its termination resulted from a price-fixing arrangement between the defendant and its other distributors. The court dismissed the plaintiff's *per se* claim because including the upstream manufacturer in the alleged conspiracy rendered the claim vertical and subjected it only to Section 3(2):

> Because Nichols levies its allegation against "all defendants," that is, Dunlop (a seller), Tucker/Rocky (a buyer) and Parts Unlimited (a buyer), it alleges a *vertical* price-fixing agreement. Nichols' claim fails as a matter of law.

Id. at 1128 (emphasis in original). The court held that Section 3(1) did not reach the case due to its vertical element. *Id.* at 1128-29.

Thus, the Complaint's allegations of vertical relationships render its Section 3(1) claims fatally deficient. The rule of reason under Section 3(2) of the IAA applies to the conspiracy claims in the Complaint because the State's allegations unquestionably establish a vertical relationship between Colony and each of the Agency Defendants. Seeking another way to the *per se* rule, the State appears to try to allege a hub-and-spoke conspiracy. By definition, the hub-and-spoke theory has a vertical element, *i.e.*, the hub, which would eliminate it from the scope of Section 3(1). Moreover, the Supreme Court's ruling in *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007), includes language specifically rejecting the sort of approach the State seeks to advance.[8] Addressing the appropriate treatment of arrangements having vertical and horizontal

---

[8] Holding that "[v]ertical price restraints are to be judged according to the rule of reason," *id.* at 907, overturning a doctrine based upon a theory similar to that which the State advances here. The Court overruled *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), which "treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors." *Id.* at 888 (describing the effect of *Dr. Miles*). The Complaint in this case also attempts to construct a horizontal cartel from a series of vertical price agreements and alleged nonprice arrangements between Colony and each of the Agency Defendants.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

elements, *Leegin* ***specifically dispenses with the "facilitation" argument***. Recognizing that vertical restraints also "might be used to organize cartels at the retailer level,'" the Court specifically rejects the application of the *per se* rule to a circumstance in which it is alleged that an improper horizontal agreement is "facilitated by a common client":

> To the extent a vertical agreement setting minimum resale prices is entered upon ***to facilitate either type of cartel*** [i.e., a horizontal cartel among competitors that "decreases output or reduces competition"], it too would need to be held unlawful under the rule of reason.

Leegin, 551 U.S. at 893 (emphasis added). Therefore, even if this case had arisen under federal law and not the IAA, no valid basis would exist to pursue it under a *per se* rule.

The State chose not to allege its claims under Section 3(2) of the IAA, which applies the rule of reason to restraints involving non-competitors. For this reason, the Court should dismiss the Complaint. *See AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006) (dismissing claim where plaintiff "could have argued that" it "ought to be analyzed under the traditional rule of reason rather than attempt to squeeze [it] into the *per se* realm," but did not).

B. Even if Section 3(1) Did Apply, The Complaint Still Does Not State a Claim.

To allege a conspiracy under Illinois law, "the complaint must set forth with particularity the facts and circumstances constituting the alleged conspiracy." *See Heying v. Simonaitis*, 126 Ill. App. 3d 157, 163 (1984) (citing *Owens v. Green*, 400 Ill. 380, 393 (1948)). In evaluating conspiracies under the IAA, Illinois courts have adopted the Supreme Court's definition of concerted action in the antitrust context: a "conscious commitment to a common scheme" demonstrated by "evidence that tends to exclude the possibility of independent action by the [parties]." *See, e.g.*, *Intercontinental Parts*, 260 Ill. App. 3d at 1094-95 (citing the standards under *Monsanto* and *Matsushita*); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 768 (1984);

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) (applying *Monsanto* standard in horizontal context).

At best, the Complaint makes conclusory and unsupported allegations that the Defendants conspired with one another, *e.g.*, "At the request of Colony, the Agency Defendants also agreed with one another not to compete with respect to the wages paid to their temporary employees assigned to Colony." (Compl. ¶ 4.)[9] But, merely repeating that the Agency Defendants "agreed" without supporting facts does not make it so. *See Integrated Sys. & Power, Inc. v. Honeywell Inter.*, Inc. ("Integrated Systems"), 713 F. Supp. 2d 286, 297 (S.D.N.Y. 2010) (dismissing Section 1 claim and stating that "[r]epeating the assertion that the distributors 'agreed' and characterizing the conduct as a horizontal conspiracy . . . does not, without more, pass muster. . .."); *Illinois Non-Profit Risk Mgmt. Ass'n v. Human Serv. Ctr. of S. Metro-E.*, 378 Ill. App. 3d 713, 724 (4th Dist. 2008) (dismissing plaintiff's civil conspiracy claims based on nothing more than conclusory allegations that the conspiracy existed) (citing *Fritz v. Johnston*, 209 Ill. 2d 302, 318 (2004)). Instead, "[a] court considering a motion to dismiss for failure to state a claim will disregard the conclusions that are pleaded and look only to well-pleaded facts to determine whether they are sufficient to state a cause of action against the defendant." *Galvan v. Nw. Mem'l Hosp.*, 382 Ill. App. 3d 259, 263 (1st Dist. 2008) (quotations omitted). A motion must be granted "regardless of how many conclusions the count may contain and regardless of whether or not they inform the

[9] *See, e.g.*, Compl. ¶¶ 2, 25 ("The Agency Defendants agreed with each other not to recruit, solicit, hire, or 'poach' temporary employees from one another at Colony's facilities."); Compl. ¶ 26. ("The Agency Defendants also agreed that if a temporary worker wished to switch employment from one Agency Defendant to another Agency Defendant at Colony locations, they would not be permitted to do so."); Compl. ¶ 56 ("[T]he Agency Defendants agreed among themselves and with Colony to pay these workers a fixed wage set by Colony."); Compl. ¶ 61 ("[T]he Agency Defendants have illegally agreed with each other and with Colony not to compete over wages for temporary workers assigned to Colony.").

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

defendant in a general way of the nature of the claim against him." *Knox Coll. v. Celotex Corp.,* 88 Ill. 2d 407, 426 (1981).[10]

1. The Complaint fails to allege sufficient facts to establish a horizontal no-poach conspiracy.

As set forth below, the Complaint is devoid of facts showing, for both the alleged no poach agreement and the alleged wage fixing agreement, either (a) any direct evidence of a horizontal agreement between the Agency Defendants, or (b) any circumstantial evidence that would allow this court to infer that horizontal agreement — *i.e.*, the "rim" connecting the Agency Defendants to each other under the State's hub-and-spoke theory.

a. The Complaint's allegations do not reference a direct agreement to a "no poach" conspiracy between the agency defendants.

The Complaint does not and cannot rely upon any written agreement containing no poach terms because there is none. The Complaint also does not allege any communications between the Agency Defendants that directly affirms the existence of a "no poach" conspiracy. The Complaint merely attempts to draw conclusions about the existence of a conspiracy between the Agency Defendants from business communications almost entirely between Colony and the several agencies.

b. Nor does the complaint make adequate circumstantial allegations to support an inference of a "no poach" conspiracy.

The Complaint fails to set forth sufficient allegations tending to show the existence of a horizontal no poach arrangement. The Complaint appears to be founded upon a "hub-and-spoke" conspiracy, alleging that a vertical hub (Colony) facilitated the alleged no-poach agreement

[10] Evaluations in the context of a motion to dismiss under Illinois law must of course apply Illinois pleading standards. Illinois's fact-pleading standard "imposes a heavier burden on the plaintiff so that a complaint that would survive a motion to dismiss in a notice-pleading jurisdiction might not do so in a fact-pleading jurisdiction." *Beretta USA Corp.*, 213 Ill. 2d at 368.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

between the various spokes (Agency Defendants). A hub-and-spoke conspiracy has three elements: "(1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192 (9th Cir. 2015). Among other things, to establish a violation using a hub-and-spoke conspiracy a Complaint must allege adequately the existence of a horizontal agreement among the individual competitors, *i.e.*, the rim.

The Complaint fails to do so here. To plead conspiracy in Illinois based on circumstantial evidence, that circumstantial evidence must be shown through "clear and convincing" allegations. *Redelmann v. Claire Sprayway, Inc.*, 375 Ill. App. 3d 912, 924 (1st Dist. 2007) (citing *McClure v. Owens Corning Fiberglas Corp.* 188 Ill. 2d 102, 134 (1999)). In the context of a 2-615 motion to dismiss, "[w]hen a civil conspiracy is shown by circumstantial evidence, the evidence must be both clear and convincing." *Redelmann*, 375 Ill. App. 3d at 924; *Merrilees v. Merillees*, 2013 IL App (1st) 121897, ¶ 50 (same, citing *Redelmann*); *accord Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 70 (1st Dist. 2005) (clear and convincing standard applied in the antitrust conspiracy context). "Clear and convincing evidence is 'the quantum of proof that leaves no reasonable doubt in the mind of the finder of fact as to the truth of the proposition in question,' *i.e.*, more than a preponderance while not quite approaching the degree of proof necessary for a criminal conviction." *Baker*, 355 Ill. App. 3d at 69-70 (quoting *Bazydlo v. Volant*, 164 Ill. 2d 207, 213 (1995)). Applied in the pleading context, the "clear and convincing" standard means that the allegations of conspiracy must meet that standard. Tenuous allegations of a conspiracy that are subject to alternative innocent explanations would not be sufficient. This is consistent with the

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

elevated federal pleading standard in the antitrust context. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Further, an antitrust conspiracy requires "evidence that tends to exclude the possibility of independent action by the [parties]." *See, e.g.*, *Intercontinental Parts*, 260 Ill. App. 3d at 1094-95 (1st Dist. 1994) (citing the standards under *Monsanto* and *Matsushita*). Conduct that stems from independent decisions is permissible under Sherman 1. *Starr v. Sony BMG Music Entm't.*, 592 F.3d 314, 321 (2d Cir. 2010). Moreover, "independent responses to common stimuli" do not form the basis for a conspiracy or violation of Sherman 1. *Twombly*, 550 U.S. at 556 n.4. Indeed, the same can be said as to "interdependence unaided by an advance understanding among the parties." *Id.* Illinois courts also hold that a plaintiff cannot establish a horizontal agreement under an antitrust conspiracy by proof of parallel conduct alone. *See Baker, Inc.*, 355 Ill. App. 3d at 72 (evidence insufficient to establish a conspiracy).

Here, to try to show a no-poach agreement, the Complaint relies upon two types of communications: (1) unilateral directives of, or agency deferral to, the ***vertical*** client (Colony); and (2) a series of unilateral policy statements by the various Defendants. Under the law cited hereafter, neither provides an adequate basis for an antitrust conspiracy in the abstract, much less under the far more rigorous clear and convincing standard in Illinois.

Unilateral Directives of Colony or Agency Deference to their Client. The Complaint contains many allegations regarding nothing more than client-vendor directives and deference. Although they do reinforce the point that the vertical element is at the core of this Complaint, the assertions do not establish the existence of a horizontal agreement among the Agency Defendants.

The Complaint advances no more than unilateral directives from a client to its vendors and those vendors' confirmations that they will act as instructed by the client. (Compl. ¶ 34 (quoting

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

Colony CEO: poaching "is a bad practice, we [Colony] don't allow for any of the agencies and I want to make sure everyone understand [sic] that"); Compl. ¶ 36 (Colony executive stating that it "enforced the policy that we [Colony] do not allow this"); Compl. ¶ 38 (in relation to employees that transferred from Midway to Elite, Elite asks Colony, "Let me know how to handle"); Compl. ¶ 40 (in relation to employees that had transferred from Midway to Metro, Metro asks Colony CEO, "Is there a certain way I should go about this or is this not permitted to do?"); Compl. ¶ 41 (Midway executive: "although Midway competes with the other agencies, 'we work together whenever necessary for the client.'"); Compl. ¶ 43 (email from Metro to Colony CEO regarding poaching, "…we are ok with is as long as the client is ok with it too…"); Compl. ¶ 44 (Metro executive statement to Colony's preferred approach to poaching, "…in the future, I would like…to let you know and discuss with you even before it takes place. I for like us to get your ok first.").)

Beyond the fact that these all provide powerful bases to conclude that the arrangement is entirely vertical, compliance with an independent directive of an upstream client does not establish a horizontal agreement sufficient to form the basis for an antitrust violation. "[P]laintiff cannot overcome this burden merely by alleging that the manufacturer announced the restrictive policy to its dealers and then implemented enforcement of that policy." *Intercontinental Parts*, 260 Ill. App. 3d at 1095 (citing *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). A downstream player's mere compliance with the policy of an upstream actor also does not establish a conspiracy. *Id.* at 1096 (a distributor may acquiesce in a manufacturer's demand).

<u>No Poach Based Upon Independent Policy Positions of the Defendants</u>. The Complaint's remaining allegations are nothing more than statements of longstanding corporate policies of each of the Agency Defendants. This does not establish that the agencies formed any sort of conspiracy. (Compl. ¶ 29 (quoting Midway, "we do not want to be known as an agency that poaches."); Compl.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

¶ 37 (Elite statement regarding its personnel hiring temporary workers of other agencies already at Colony: "[o]ur policy is not to allow this to occur. It is bad business for temp employees to be allowed to change agencies at the same company."); Compl. ¶ 43 (Metro statement to Colony CEO re solicitation of other agencies' workers employed at a common client: "…we just do not do that at MSI…We [don't] ever want to be perceived as one of those shady services that try to solicit or poach temps under the table…"); Compl. ¶ 50 ("Midway has 'a zero-tolerance policy per our meeting last month regarding transferring employees in the first 90 days between agencies.'").)

Paragraphs 51-52 relate to a series of emails between a vendor (Metro) and to its client (Colony) about Midway workers wanting to switch to Metro. Midway's President emails Metro's stating "Thought we were on the same page with this" to which Metro's President replies with a statement of corporate policy: "I have informed them no transfers." Contrary to the inference the State seeks to draw, the "same page" reference could easily have been a reference to the communication from Colony on April 23 that poaching "is a bad practice, we don't allow for any of the agencies…" (Compl. ¶¶ 33-39.) This chain is thus equally compatible with an innocent explanation and in any event far from clear and convincing allegations of a horizontal arrangement rather than a reference to a vertical directive. *Intercontinental Parts*, 260 Ill. App. 3d at 1095.

That the State fully recognizes the vulnerability of its case on this score is evident from the inclusion in the Complaint of Paragraph 30, which effectively states that it is expressly designed to respond to the defense that the alleged no-poaching policy was "a unilateral policy." The sole basis of their response, however, is limited only to Midway and even then does nothing to undermine the point that the various Defendants might properly have common views of an issue common to each of their businesses. Paragraph 30 notes only that Midway's President is a close friend of Metro's owner and that Midway employees should contact Midway's President or its

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

Head of Sales if there "is a situation with regarding them in any scenario …good bad or indifferent." Nothing about this provides any basis at all to conclude that there was a "mutual understanding shared with the Agency Defendants." (Compl. ¶ 30.)

2. The Complaint fails to allege sufficient facts to support an inference of a horizontal wage-fixing conspiracy.

The Complaint's wage-fixing allegations are also grounded upon plainly conclusory, circumstantial allegations unsupported by facts. As with the no poach claim, the Complaint contains absolutely no allegations demonstrating a direct horizontal agreement between or among the Agency Defendants as to wage fixing. The only agreements alleged are a series of mutually independent and vertical bi-lateral contracts between Colony and "each of the Agency Defendants" for the provision of temporary workers, containing similar provisions setting wages at a "base rate per hour" to be set by Colony. (Compl. ¶¶ 58-59.) **There is no reference in any of these contracts to any agency other than the signee entity.** The existence of a series of similar contracts between a single vertical actor (Colony) and several different horizontal actors (Agency Defendants) does not establish that any of the vendors had any horizontal agreement between themselves. *See, e.g.*, *McClure*, 188 Ill. 2d at 140 (parallel activity is insufficient to show concerted action); *In re McCormick & Co.*, 217 F. Supp. 3d 124, 135-36 (D.D.C. 2016) (in an alleged hub-and-spoke conspiracy, plaintiff must allege facts to support any allegation of agreement.) Thus, no horizontal agreement can be gleaned from the fact that Colony had a series of independent vertical agreements with the several Agency Defendants, each of which empowered Colony to set the wage rate it would agree to pay for temporary workers the Agency Defendant provided to work at Colony's facilities. Nothing precluded Colony from independently choosing to set the same rate in each contract if it wished. If this occurred, it does not mean that the various agencies needed to agree to the rate with any party except Colony.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

The Complaint thus attempts to establish a wage fixing conspiracy through circumstantial allegations, that is, by reference to "communications among the Agency Defendants and Colony." (Compl. ¶ 63.) None of the communications referenced even suggests that there was any agreement between the horizontal Agency Defendants on wage rates. Paragraph 63 references conversations Colony's CEO allegedly had with each of the three Agency Defendants about the market rate for labor: "they are saying $10 is the sweet spot…They are all saying a seasonal increase or bonus usually backfires in their experience when you stop it or take it away." That all of the agencies each had the same view about a given issue does not mean that they were asked or that they expressed their views jointly. Moreover, there is nothing whatsoever anticompetitive about Colony checking with its agencies to determine the market rate for labor. If the "facts are as consistent with innocent conduct as they are with guilty conduct, then the evidence is neither clear nor convincing." *McClure*, 188 Ill. 2d at 140-41. In fact, the act of checking on the market rate for labor is a reflection that such information is important to Colony's pricing decision. This bespeaks a pro-competitive arrangement.

Without any proof of the existence of an agreement, Paragraphs 64-65 and 67 make a series of claims seeking to show a conspiracy based purely upon "Agency Defendants complain[ts] to Colony about each other's cheating on their wage-fixing agreement…" Evidence of complaints (and even action on the complaints) is insufficient to establish an antitrust conspiracy. *See, e.g.*, *Monsanto Co.*, 465 U.S. at 764; *Integrated Systems*, 713 F. Supp. 2d at 296 (complaints to defendant manufacturer by competitors of plaintiff distributor followed by manufacturer defendant's actions in response to those complaints insufficient to establish a conspiracy rather than mere parallel action.) Moreover, the specific communications do not reflect any wage fixing arrangement much less cheating on one.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

Paragraph 64 is a contrary indication of the existence of any alleged conspiracy. The paragraph relates to a question from a supervisor at Elite to Colony referencing a "rumor" that Metro employees receiving $13 per hour at another Colony location and asking whether that would apply to Elite as well as Metro. That Elite was responding to a rumor by asking Colony (its client) if the alleged rate would apply to it shows that there was no organized agreement on wages. The reference to a "rumor" regarding wage rates suggests that Colony did not tell the agencies collectively about rates. If there was a clear arrangement to fix wages horizontally, there would have been no need to rely upon rumors nor would there been a reason for Elite to ask Colony if it could use the rate. Furthermore, while the Complaint then alleges that Colony "resolved the issue," there is no indication as to any agreement on the wage. "[W]hen companies have legitimate business reasons for their contacts, plaintiffs must offer some evidence that moves beyond speculation about the content of what was conveyed." *Kleen Prods. LLC v. Georgia-Pacific LLC*, 910 F. 3d 927, 938 (7th Cir. 2018). Finally, even if one concludes from the "rumor" reference that Colony told the collective agencies the rate it would pay for workers, this changes nothing. As discussed above, the *per se* rule does not apply if Colony tells those in a vertical relationship with Colony what rate was available for the temporary workers at Colony. The rule of reason would apply even if a party in Colony's position did tell its various horizonal agents that the rate was the same.

Paragraph 65's allegations regarding Metro's complaint to Colony about Elite's noncompliance with an agreement between Colony and the Agency Defendants as to the payment of overtime is irrelevant to any wage fixing claim. Rather, as noted in Metro's motion to dismiss, *Metro Motion to Dismiss*, at 5-9, this is merely a reference to regulations *requiring* coordination between the agencies and Colony as to overtime payment. *McClure*, 188 Ill. 2d at 140-41 (when

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

"facts are as consistent with innocent conduct as they are with guilty conduct," then the evidence is neither clear nor convincing.).

Paragraph 67 references a warning from Metro that the wage rates Colony was willing to pay was causing Colony to lose workers to "other companies" and "there is too much work out there offering better pay." This is nothing more than a reference to the fact that Colony is subject to the proper operation of the market.

Finally, in Paragraphs 62 and 66-67, the Complaint asserts without any support at all that the Agency Defendants "would not have agreed to pay a fixed wage set by Colony unless there was a mutual understanding among all the Agency Defendants that they would pay the same wage" and but for the agreements between Colony and the Agency Defendants, the Agency Defendants "would have a strong incentive to offer higher wages" and "could have offered a higher hourly wage." (Compl. ¶¶ 62, 66-67.) These conclusory allegations are meritless and should be rejected. First, the IAA does not apply to labor services. Second, the IAA does not disallow Colony's right to set the rate it is willing to pay for labor at its own facilities. Again, this is a case involving the workforce at one small company. Thus, Colony is permitted to tell sources of temporary labor that it is only willing to pay for labor at a given rate and to refuse to deal with any vendor that will not comply. A vertical actor "has the right to deal, or refuse to deal, with whomever it likes as long as it does so independently." *Gilbert's Ethan Allan Gallery v. Ethan Allan, Inc.*, 251 Ill. App. 3d 17, 24 (5th Dist. 1993) (citing *Monsanto*, 465 U.S. at 761). Similarly, the Agency Defendants (and the workers that they contacted) were free to accept or reject the agreements or the rates. The Agency Defendants accepted the agreements because they wanted the business. It does not follow that the situation required "mutual understanding among all the Agency Defendants that they would pay the same wage." Such allegations should be disregarded as patently unreasonable.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

Third, the allegation that the Agency Defendants "would not have agreed to pay a fixed wage set by Colony" because they had the financial incentive to "offer a higher hourly wage" is false. While the Agency Defendants received more when Colony agreed to pay higher rates, Colony had no obligation to pay more than it wished.[11] Thus, the only way that the Agency Defendants could pay workers more would be if the contracts entitled them to do so.[12] But the Complaint errs in suggesting that the Agency Defendants would have an economic incentive for this, for they would have to eat into their own margins to do so. This is flatly contrary to their economic interests, and there is no indication that the Agency Defendants ever offered to do this. "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case…[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588.

In addition to the fact that the Complaint's specific factual allegations are not sufficient to state a claim, it is notable that the allegations here are analogous to those rejected as insufficient in *Integrated Systems*, 713 F. Supp. 2d at 289. There, the district court dismissed the plaintiff's complaint for insufficient allegations establishing a rim. *Id.* at 297-98. While operating as an authorized distributor, the plaintiff frequently submitted low bids on service contracts for the defendant's fire alarm system. *Id.* at 289. The plaintiff alleged that competing distributors forced the defendant to terminate its distributorship. The district court found that the complaint sufficiently alleged other authorized distributors tended not to bid on service contracts for customers with a pre-existing relationship with another distributor (incumbent distributor). *Id.* at

[11] The Complaint's allegations (Compl. ¶¶ 66-67) make clear that it was the pressure of an inadequate supply of workers at the lower wage rates that put pressure on Colony to raise rates (working precisely as the market should).

[12] Colony has strong reasons to avoid this, for it could easily lead to great disruption if temporary workers that perform the very same job are paid at a different wage rates.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

296. The district court also found sufficient allegations to show the incumbent distributors complained to the defendant about the plaintiff's low bids, and the defendant relayed those complaints to the plaintiff. *Id.* The court, however, held that the plaintiff's allegations of the distributors' complaints followed by the defendant's conduct were "insufficient to suggest plausibly that the distributors *agreed with each other*" to rig bids as opposed to mere parallel action. *Id.* (emphasis supplied).

C. The Complaint Fails to Allege Conduct of the Type that Warrants *Per Se* Treatment.

Even if the State could clear the above hurdles, it fails to allege a claim that is subject to *per se* scrutiny. The rule of reason is the default analysis under the antitrust laws. *See People ex rel. Scott v. Coll. Hills Corp.*, 91 Ill. 2d 138, 150 (1982); *see also Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) (noting a general presumption against applying the *per se* rule). Only some restraints "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). *Per se* illegality is reserved for only those agreements so plainly anticompetitive that they have no purpose other than to limit competition. *See, e.g.*, *United States v. Am. Express Co.*, 838 F.3d 179, 193-94 (2d Cir. 2016). Thus, "[*p*]*er se* treatment is appropriate 'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" *State Oil Co.*, 522 U.S. at 10 (quoting *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982)).

The Supreme Court has expressed reluctance to adopt *per se* rules with regard to "'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" *Bus. Elecs. Corp.*, 485 U.S. at 726 (quoting *FTC v. Indiana Fed. of Dentists*, 476 U.S. 447, 458-59 (1986)); *see also NCAA v. Bd. of Regents of the Univ. of*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

Okla., 468 U.S. 85, 100 n.21 (1984) ("judicial inexperience with a particular arrangement counsels against extending the reach of per se rules"). Unless there is already "considerable knowledge of the business practice in question and the impact of those practices on competition," *per se* treatment is not appropriate. *Quality Auto Body, Inc. v. Allstate Ins. Co*., 660 F.2d 1195, 1203 (7th Cir. 1981).

Per se treatment is also improper for both the no-poach and wage-fixing allegations based on (a) federal case law interpreting similar allegations, (b) applying the ancillary restraints doctrine, and (c) the pro-competitive benefits of vertical restraints promoting interbrand competition. For all these reasons, the Complaint fails to allege a *per se* claim.

1. *Per Se* Treatment Is Inappropriate for the No-Poach Claims.

a. Analogous federal cases demonstrate that the Complaint fails to allege a no-poach claim subject to *per se* scrutiny.

Federal appellate authority construing no-poach agreements analogous to the alleged activities here demonstrates that the Complaint has failed to allege a *per se* claim. Guidance from the Antitrust Division of the United States Department of Justice establishes the same.

In *Bogan v. Hodgkins*, 166 F.3d 509 (2d. Cir. 1998), the court refused to apply *per se* scrutiny to an alleged no poach conspiracy. In that case, a single vertical player (Northwestern Mutual Life Ins. ("NML")) entered into a series of bilateral contracts with its independent, contractor insurance agencies in which those agencies agreed not to hire each other's employees. *Id.* at 510-12. Unlike here, the NML contracts each contained an express no poach provision. Thus, a possible case for *per se* treatment was, if anything, stronger in *Bogan* than here, with no express agreement. Nevertheless, in a thorough analysis, the Second Circuit held that the rule of reason and not the *per se* rule should govern the analysis of the no poach arrangement, which the court held did "not fit into any of the established *per se* categories." *Id.* at 514-15. Indeed, the *Bogan*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

court explained that even if the no poach arrangement were also interfirm—rather than only affecting NML agencies—it would still fail to present a *per se* case because the arrangement's anticompetitive effect on the market was not obvious. *Id.* at 515.

In *Eichorn v. AT&T*, 248 F.3d 131 (3d. Cir. 2001), the Third Circuit came to the same conclusion about an arrangement closely analogous to the one here. There, the plaintiff employees brought a claim based on no-hire provisions in a corporate reorganization plan that barred employees in AT&T's Paradyne division from being hired by any other division of AT&T. *Id.* at 136. The limitation remained in place when AT&T sold Paradyne to a third party. *Id.* As here, the plaintiffs asserted that the provision locked them out of the labor market and constituted a horizontal antitrust conspiracy subject to the *per se* rule. *Id.* 139. The Third Circuit rejected this argument, holding there was no basis for including such agreements in the established *per se* categories. *Id.* at 141. The *Eichorn* court acknowledged that the no-hire provisions were ancillary to the corporate reorganization. *Id.* at 146.

b. The no-poach policies alleged in the complaint are ancillary to a procompetitive agreement to provide temporary workers to Colony.

Numerous federal courts agree that the rule of reason rather than *per se* treatment should apply to no poach arrangements that are (a) ancillary (b) to a procompetitive agreement with a legitimate business purpose. For example, in *Phillips v. Vandygriff*, 711 F.2d 1217, 1228 (5th Cir. 1983), the Fifth Circuit held that the rule of reason applied to an alleged horizontal no hire arrangement. Arising from the principle that the *per se* rule should be limited to *agreements* that have no purpose other than to limit competition, the Fifth Circuit in *Phillips* held that the arrangement was not subject to a *per se* test but rather should be evaluated under the rule of reason because it was "at least potentially reasonably ancillary" to an agreement with a valid business purpose. *Id.* at 1228. Other cases have applied this same principle. *See Aya Healthcare Servs., Inc.*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

v. AMN Healthcare, Inc., No. 17-CV-205, 2018 WL 3032552, at *13 (S.D. Cal. June 19, 2018) (explaining that even where a horizontal no poach agreement is shown, that does not "in and of itself indicate that *per se* treatment is imminent" because the Court should first determine whether the agreement is "ancillary to a procompetitive business purpose"); *Deslandes* 2018 WL 3105955, at *7 (no poach provision not evaluated under *per se* rule because restraint ancillary to a legitimate business purpose). Indeed, even the Department of Justice's Antitrust Division has explained that *per se* treatment should not apply when a "no-poach" agreement is ancillary to a separate venture with a legitimate business purpose. *See* United States' Corrected Statement of Interest, *Ashlie Harris v. CJ Star, LLC*, Case No. 2:18-cv-00247, Dkt. No. 38 (E.D. Wash.).

"To be ancillary," an "agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction," and reasonably necessary to "make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *accord Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335-38 (2d Cir. 2008) (Sotomayor, J., concurring). The alleged no poach policies are plainly ancillary to the primary contract between Colony and the agencies. Unlike the foregoing cases, the Complaint makes clear that the contracts do not contain any no poach provisions at all. Rather, the no-poach elements alleged are merely corporate policies of the various actors,[13] which by definition are ancillary to the primary contractual purpose, *i.e.*, the provision of temporary workers to Colony.

Additionally, the agreements to supply temporary workers are plainly procompetitive. The agreements lead to jobs for temporary workers and the efficient supply of labor to Colony, which is dependent upon temporary workers. The contracts are not "naked agreements" purely designed

[13] *See supra* at 23-25.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

to squelch competition. Further, nothing in the Complaint establishes that the alleged no-poach agreements are anti-competitive. The Complaint acknowledges high demand for temporary workers. (Compl. ¶¶ 66-67.) The Complaint repeatedly acknowledges that Colony does in fact face stiff competition for temporary workers from other companies, including those, like Colony, have also retained agencies to provide that labor. Put differently, a world of alternative job options are available to the temporary workers at Colony.[14] Colony's hesitance to increase wages caused an expected reduction in supply of workers. (Compl. ¶ 67.) Colony considered the market price for workers in determining the amount it was willing to pay (Compl. ¶ 63), which is the essence of the proper operation of a competitive arrangement. Furthermore, the existence of substantial demand for temporary labor outside of Colony means that temporary workers have many other options if they do not want to work at Colony. In fact, the Complaint suggests that the Agency Defendants themselves provide temporary labor to these other businesses.

The Complaint also does not allege that the limitations apply to the movement of workers to jobs with *other companies outside Colony*, including jobs offered by the several agencies themselves. If a Colony temporary worker wishes, she may move to any job with *any* other company irrespective of whether another agency provided the job. Especially given Colony's small size — employing less than 100 permanent employees and between 200 and 1,000 temporary workers (Compl. ¶ 17) — the alleged agreement could not meaningfully impair the job

[14] The alleged no-poach agreement here does not affect the ability of temporary workers to seek these alternative employment opportunities. The Complaint effectively admits this, repeatedly acknowledges that Colony does in fact face stiff competition for temporary workers from other companies. Colony's hesitation to increase wages caused an expected reduction in supply of workers. (Compl. ¶ 67 (Colony would get more supply of workers if it would agree to pay more).) Colony also considered the market price for workers in determining the amount it was willing to pay, (Compl. ¶ 63), which again is the essence of the proper operation of a competitive arrangement.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

opportunities of temporary workers, for they constitute a minuscule fraction of laborers in the market. *See Eichorn*, 248 F.3d at 148 (no antitrust violation where the "market realities reflect that the no-hire agreement did not have a significant anti-competitive effect on the plaintiffs' ability to seek employment" in the interbrand market).

The alleged no-poach agreement is also procompetitive because it creates efficiencies. As noted in the Complaint, Colony hired multiple staffing agencies, bringing in Midway because Elite and Metro were having trouble bringing in enough temporary workers to meet Colony's needs. (Compl. ¶ 19.) If each agency could hire each other's workers, however, the purpose of having multiple agencies on hand would be undermined. Rather than *supplementing* each other's efforts, the agencies would instead cannibalize each other's sources of labor. Policies that inhibit the agencies from hiring each other's temporary workers that are already working at Colony prevents free riding and ensures that each agency is meeting the client's demand by recruiting *new* workers. *See, e.g.*, *Leegin*, 551 U.S. at 913 (recognizing the benefit to consumers of eliminating "free ride").

Additionally, as discussed in *Metro's Motion to Dismiss*, at 5-6, such restrictions help Defendants stay in compliance with the law. As explained at length in Metro's motion, incorporated here, Illinois law places upon Colony the burden of ensuring that overtime rules are followed for given temporary employees if they move from company-to-company while at Colony (*Metro's Motion to Dismiss*, at 5-9), giving Colony a valid business reason for limiting this risk. Accordingly, the Complaint does not allege *per se* claims based upon no poach agreements.

2. Per Se Treatment Is Inappropriate for the Allegations about Wages.

Per se review of the wage fixing allegations is also not warranted. Again, analogous federal cases have refused to apply *per se* scrutiny. Furthermore, the wage fixing allegations here do not present the sort of competitive disruption to which *per se* liability is aimed.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

In *Brillhart v. Mut. Med. Ins., Inc.*, 768 F.2d 196 (7th Cir. 1985), the Seventh Circuit took up allegations that Blue Shield and its affiliated doctors engaged in illegal price fixing under Blue Shield's "Voluntary Incentive Program." Under that program, doctors would provide medical services to Blue Shield subscribers at a price determined by Blue Shield, but otherwise still compete for patients. In exchange, the doctors would be reimbursed directly by Blue Shield, rather than billing the patient. Plaintiff alleged this arrangement constituted a *per se* horizontal price-fixing agreement among the participating doctors. But, the district court disagreed, applied the rule of reason standard, and dismissed the complaint. The Seventh Circuit affirmed. *Id.* at 199-201. The Seventh Circuit explained that the arrangement was subject to the rule of reason because "Blue Shield is merely purchasing medical services from the doctors who choose to participate." *Id.* at 199; *see also Am. Floral Servs., Inc. v. Florists' Transworld Delivery Ass'n*, 633 F. Supp. 201, 217-19 (N.D. Ill. 1986) (affirming summary judgment against horizontal claims that florists agreed to restrictions on phone-order referrals where those restrictions were unilaterally imposed by phone-order broker and the evidence suggested that "most members would … prefer not to have [those restrictions].")

The same situation is present here. Colony, like Blue Shield, has unilaterally decided the rate at which it will pay temporary employees. Each Agency Defendant is then free to either accept that rate or reject it. That unilateral, vertical decision by Colony on who it will contract with does not give rise a *per se* horizontal conspiracy claim against everyone who accepts Colony's offer.

Like the no poach allegations, it bears noting that the arrangements here do not adversely impact competition making the alleged agreements so "plainly anticompetitive" that *per se* treatment is warranted. *See, e.g.*, *Am. Express Co.*, 838 F.3d at 193-94. A conspiracy to restrict competition for one brand in an industry in which the plaintiff has not alleged a lack of substitutes

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

is not the type of restraint that is so manifestly anticompetitive that the *per se* rule would be appropriate. *See Integrated Systems*, 713 F. Supp. 2d at 297-98. There are two main vertical restrictions — intraband restrictions and interbrand restrictions. Intrabrand restrictions restrain the downstream firm's freedom to sell the product or service. Interbrand restrictions restrain the downstream firm's freedom to deal with competitors of the firm imposing the restraint. Interbrand competition is "the primary concern of antitrust law." *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977). "It is inappropriate to consider intrabrand restraints as 'agreements to conspire,' and manufacturers are permitted to independently impose appropriate vertical restraints where the manufacturers exercise the unilateral power over their own products." *Intercontinental Parts, Inc.*, 260 Ill. App. 3d at 1095.

Here, the Agency Defendants all contract to provide workers for the same brand, i.e., Colony, to assist Colony to compete with other sellers of customized displays. The Complaint focuses only upon their competition *at the same brand* – Colony. The Complaint also refers to multiple communications evidencing the ongoing impact of healthy competition for the larger market for the workers the Agency Defendants provide. (*Id.* ¶¶ 63-68.) If Colony was not willing to pay the going rate for a forklift driver, then the staffing agencies will struggle to find temporary workers to fill its orders because temporary workers are working at companies offering more money. The only inference is that the market is functioning properly because of *interbrand* competition. The wages set by Colony are subject to the competitive forces of other companies in the market seeking temporary workers—temporary workers pursuing opportunities at other clients for higher wages. *See Intercontinental Parts*, 260 Ill. App. 3d at 1092.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

CONCLUSION

The State fails to allege a *per se* claim under Section 3(1) the IAA. The State does not allege a *horizontal* agreement between or among the staffing agencies not to hire each other's temporary workers or to fix wages. Nor does it plausibly suggest a hub-and-spoke conspiracy among Defendants to refuse to solicit or hire each other's temporary workers and to fix the wages paid to temporary workers. The Complaint pleaded random communications between certain Defendants at isolated times that show interdependent behavior related to a vertical relationship. Elite Staffing, Inc., Colony Display LLC, and Midway Staffing, Inc. request this Court enter an order: (a) dismissing the State of Illinois' entire Complaint, with prejudice, (b) deny the State of Illinois the opportunity to replead a rule of reason claim, and (c) grant such other and further relief as this Court deems proper.

Respectfully submitted,

Dated: October 28, 2020

COLONY DISPLAY LLC
By: */s/ Scott Mendeloff*

GREENBERG TRAURIG, LLP
Scott Mendeloff
Gabriel Aizenberg
Brian D. Straw
David S. Repking
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
(312) 456-8400
Firm ID No. 36511
mendeloffs@gtlaw.com
aizenbergg@gtlaw.com
strawb@gtlaw.com
repkingd@gtlaw.com

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

ELITE STAFFING, INC.

By: /s/ *Angelo M. Russo*

MCGUIREWOODS LLP
Amy B. Manning
Angelo M. Russo
Jason L. Chrestionson
77 West Wacker, Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Firm ID No. 40426
amanning@mcguirewoods.com
arusso@mcguirewoods.com
jchrestionson@mcguirewoods.com

Dated: October 28, 2020

MIDWAY STAFFING, INC.
By: /s/ *John R. Hayes*

SMITHAMUNDSEN LLC
Jeffrey A. Risch (ARDC No.: 6271407)
3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@salawus.com
sjados@salawus.com
John R. Hayes (ARDC No.: 6286365)
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210
Firm ID No. 42907
jhayes@salawus.com

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FILED DATE: 10/28/2020 8:35 PM 2020CH05156

CERTIFICATE OF SERVICE

I certify that on October 28, 2020, a copy of the within instrument was filed via the Court's approved electronic filing service provider, which will automatically serve and send notification of such filing to all parties who have appeared and have not until this point been found by the Court to be in default for failure to plead. Additionally, a true and correct copy was served on those parties by email pursuant to Illinois Supreme Court Rule 11.

/s/ David S. Repking
Attorney for Defendant Colony Display LLC

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

E-FILED
Transaction ID: 1-21-0840
File Date: 2/8/2022 3:04 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-21-0840

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL,	)	On Appeal from the Circuit Court of Cook County, Illinois, County Department, Chancery Division
Plaintiff-Appellee,	)	
v.	)	No. 2020 CH 05156
ELITE STAFFING, INC.; METRO STAFF, INC.; MIDWAY STAFFING, INC.; and COLONY DISPLAY, LLC,	)	The Honorable RAYMOND MITCHELL,
Defendants-Appellants.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE STATE OF ILLINOIS

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellee

PRIYANKA GUPTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2109 (office)
(872) 272-0799 (cell)
CivilAppeals@ilag.gov (primary)
priyanka.gupta@ilag.gov (secondary)

ORAL ARGUMENT REQUESTED

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

TABLE OF CONTENTS

NATURE OF THE ACTION 1

ISSUES PRESENTED FOR REVIEW 2

JURISDICTIONAL STATEMENT 3

STATUTES INVOLVED 4

STATEMENT OF FACTS 6

The Illinois Antitrust Act 6

The State's Antitrust Action 7

ARGUMENT 15

POINTS AND AUTHORITIES

I. This court's review is *de novo*. 15

Morrissey v. City of Chi.,
334 Ill. App. 3d 251 (1st Dist. 2002) 15

Ill. Sup. Ct. R. 308(a) 15

In re Est. of Luccio,
2012 IL App (1st) 121153 15

II. The Act should be construed in harmony with similar antitrust federal law. 15

People ex rel. Hartigan v. Moore,
143 Ill. App. 3d 410 (1st Dist. 1986) 15

People v. Crawford Distrib. Co.,
53 Ill. 2d 332 (1972) 16

People ex rel. Scott v. Coll. Hills Corp.,
91 Ill. 2d 138 (1982) 16

740 ILCS 10/11 (2020) 16

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Weinberg v. Chi. Blackhawk Hockey Team, Inc.,
274 Ill. App. 3d 637 (1st Dist. 1995) 16

740 ILCS 10/11, Bar Comm. Cmts.-1967.......... 16

In re Est. of Crawford,
2019 IL App (1st) 182703 .... 16, 17

In re Cty. Treasurer & ex officio Cty. Collector of Cook Cty.,
2020 IL App (1st) 190722 17

Arlington Park Racecourse LLC v. Ill. Racing Bd.,
2012 IL App (1st) 103743 17

III. The Act does not exempt the entire market for labor services from its prohibitions. 18

740 ILCS 10/5 (2020) 18

740 ILCS 10/5, Bar Comm. Cmts.-1967 18

740 ILCS 10/4 (2020) 18

740 ILCS 10/11 (2020) 19

A. As analogous federal law establishes, the Act does not exempt the entire market for labor services. 20

740 ILCS 10/5, Bar Comm. Cmts.-1967 20

1. The Act's provisions on labor were modelled on federal antitrust law. 20

15 U.S.C. §§ 12-27 20

Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers,
325 U.S. 797 (1945) 20, 21

Loewe v. Lawlor,
208 U.S. 274 (1908) 21

15 U.S.C. § 17 .... 21, 22

740 ILCS 10/4 (2020) 21, 22, 23

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

740 ILCS 10/5 (2020) 21, 23

15 U.S.C. § 1 22

Atl. Cleaners & Dyers, Inc. v. United States,
286 U.S. 427 (1932) 22

In re Est. of Crawford,
2019 IL App (1st) 182703 23

740 ILCS 10/4, Bar Comm. Cmts.-1967 23

740 ILCS 10/5, Bar Comm. Cmts.-1967 23

740 ILCS 10/11 (2020) 23

People ex rel. Scott v. Coll. Hills Corp.,
91 Ill. 2d 138 (1982) 24

People v. Crawford Distrib. Co.,
53 Ill. 2d 332 (1972) 24

2. Neither federal law nor the Act exempts the market for labor services from antitrust liability. .. 24

Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers,
325 U.S. 797 (1945) 24, 25, 28

Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers,
145 F.2d 215 (2nd Cir. 1944) 24

15 U.S.C. § 17 .... 25, 27

Apex Hosiery Co. v. Leader,
310 U.S. 469 (1940) 25

Cordova v. Bache & Co.,
321 F. Supp. 600 (S.D.N.Y. 1970) 26, 27, 28

United States v. Hanigan,
681 F.2d 1127 (9th Cir. 1982) 26

Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.,
540 F.2d 824 (5th Cir. 1976) 26

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

United States v. eBay, Inc.,
968 F. Supp. 2d 1030 (N.D. Cal. 2013) 26

740 ILCS 10/11 (2020) 27

Laughlin v. Evanston Hosp.,
133 Ill. 2d 374 (1990) 27

People v. N. Ave. Furniture & Appliance, Inc.,
645 P.2d 1291 (Co. 1982) 27

Rhodes v. Rains,
195 Wash. App. 235 (Wash. App. 2016) 27

Robertsson v. Misetic,
2018 IL App (1st) 171674 28

3. Defendants incorrectly cast aside federal law as inapplicable. 28

740 ILCS 10/11 (2020) 28

740 ILCS 10/4 (2020) 29

740 ILCS 10/5, Bar Comm. Cmts.-1967 .... 29, 30

In re Est. of Crawford,
2019 IL App (1st) 182703 .... 29, 31, 32

Apex Hosiery Co. v. Leader,
310 U.S. 469 (1940) 30

Cordova v. Bache & Co.,
321 F. Supp. 600 (S.D.N.Y. 1970) 31

740 ILCS 10/4, Bar Comm. Cmts.-1967 31

B. The Act's plain text does not exempt the entire market for labor services. 32

Van Dyke v. White,
2019 IL 121452 32

740 ILCS 10/1 *et seq.* 32

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

740 ILCS 10/5, Bar Comm. Cmts.-1967 .... 32, 39

740 ILCS 10/5 (2020) 32, 34, 37

740 ILCS 10/4 (2020) 33, 34

Facebook, Inc. v. Duguid,
141 S. Ct. 1163 (2021) 33

Atl. Richfield Co. v. Christian,
140 S. Ct. 1335 (2020) 33, 34

In re Est. of Crawford,
2019 IL App (1st) 182703 34

Banco Popular N. Am. v. Gizynski,
2015 IL App (1st) 142871 34

In re Cty. Treasurer & ex officio Cty. Collector of Cook Cty.,
2020 IL App (1st) 190722 35

740 ILCS 10/4, Bar Comm. Cmts.-1967 35

Arlington Park Racecourse LLC v. Ill. Racing Bd.,
2012 IL App (1st) 103743 35

740 ILCS 10/7 (2020) 36

740 ILCS 10/11 (2020) 36

People v. Wiggins,
2016 IL App (1st) 153163 36

O'Regan v. Arbitration Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 36, 37

P.W. by Woodson v. United States,
990 F.3d 515 (7th Cir. 2021) 37

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018) 37

DeSlandes v. McDonald's USA, LLC,
No. 17-cv-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) 37

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

People v. Johnson,
2019 IL 123318 38

People v. Perry,
224 Ill. 2d 312 (2007) 38, 39

Charles v. Seigfreid,
165 Ill. 2d 482 (1995) 38

Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers,
325 U.S. 797 (1945) 39

Solon v. Mid. Records Ass'n, Inc.,
236 Ill. 2d 433 (2010) 39

C. Applying the Act to the market for labor services would not conflict with other Illinois laws. 40

820 ILCS 175/85(b) (2020) 40

820 ILCS 175/2 (2020) 41

29 C.F.R. § 825.500 41

820 ILCS 175/12 (2020) 41

New York v. Saint Francis Hosp.,
94 F. Supp. 2d 399 (S.D.N.Y. 2000) 41

Mass. Furniture & Piano Movers Ass'n, Inc. v. FTC,
773 F.2d 391 (1st Cir. 1985) 41-42

United States v. Phila. Nat'l Bank,
374 U.S. 321 (1963) 42

IV. The Act's *per se* liability applies to horizontal conspiracies facilitated by a vertical noncompetitor. 42

740 ILCS 10/3(1) (2020) 42

A. Like federal law, the Act deems no-poach and wage-fixing agreements among competitors *per se* unlawful. 43

740 ILCS 10/11 (2020) 43

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

740 ILCS 10/3 (2020) ... 44, 45

740 ILCS 10/3(1), Bar Comm. Cmts.-1967 ... 44, 46

740 ILCS 10/3(2), Bar Comm. Cmts.-1967 ... 44

People ex rel. Scott v. Coll. Hills Corp.,
91 Ill. 2d 138 (1982) ... 44, 45

People ex rel. Fahner v. Carriage Way W., Inc.,
88 Ill. 2d 300 (1981) ... 45

Baker v. Jewel Food Stores, Inc.,
355 Ill. App. 3d 62 (1st Dist. 2005) ... 45

Palmer v. BRG of Georgia, Inc.,
498 U.S. 46 (1990) ... 45

United States v. Container Corp. of Am.,
393 U.S. 333 (1969) ... 45-46

United States v. Socony-Vacuum Oil Co.,
310 U.S. 150 (1940) ... 46

N. Pac. Ry. Co. v. United States,
356 U.S. 1 (1958) ... 46

In re Railway Industry Employee No-Poach Antitrust Litig.
395 F. Supp. 3d 464 (W.D. Pa. 2019) ... 46

United States v. eBay, Inc.,
968 F. Supp. 2d 1030 (N.D. Cal. 2013) ... 46

Fleischman v. Albany Med. Ctr.,
728 F. Supp. 2d 130 (N.D.N.Y. 2010) ... 46

Doe v. Arizona Hosp. & Healthcare Ass'n,
No. CV07-1292-PHX-SRB, 2009 WL 1423378
(D. Ariz. Mar. 19, 2009) ... 46

U.S. Dep't of Justice & Fed. Trade Comm'n,
Antitrust Guidance for Human Resource Professionals
(Oct. 2016) ... 46-47

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

DeSlandes v. McDonald's USA, LLC,
No. 17-cv-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) 47

Roman v. Cessna Aircraft Co.,
55 F.3d 542 (10th Cir. 1995) 47

Phillip Areeda & Herbert Hovenkamp,
Antitrust Law (1995) 47

United States v. Hee,
No. 2:21-cr-00098 (D. Nev.) 47

740 ILCS 10/11, Bar Comm. Cmts.-1967 47

B. Federal authority establishes that horizontal agreements among competitors are *per se* unlawful even when a noncompetitor participates. 47

United States v. Topco Assocs., Inc.,
405 U.S. 596 (1972) 47-48

Toys "R" Us v. Federal Trade Commission,
221 F.3d 928 (7th Cir. 2000) 48

Denny's Marina, Inc. v. Renfro Prods., Inc.,
8 F.3d 1217 (7th Cir. 1993) 48

United States v. Apple,
791 F.3d 290 (2d Cir. 2015) 49

In re Ins. Brokerage Antitrust Litig.,
618 F.3d 300 (3d Cir. 2010) 49, 50

United States v. MMR Corp. (LA),
907 F.2d 489 (5th Cir. 1990) 49, 50

In re Loc. TV Advert. Antitrust Litig.,
No. 18 C 6785, 2020 WL 6557665 (N.D. Ill. Nov. 6, 2020) 49

740 ILCS 10/11 (2020) 49

740 ILCS 10/3(1) (2020) 50

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

C. Federal law is neither inapplicable nor unsettled. 50

National Collegiate Athletic Association v. Alston,
141 S. Ct. 2141 (2021) 51

United States v. Jindal,
No. CV 4:20-CR-00358, 2021 WL 5578687
(E.D. Tex. Nov. 29, 2021) 52

United States v. Penn,
No. 20-CR-00152-PAB, 2021 WL 4521904 (D. Colo. Oct. 4, 2021) 52

DeSlandes v. McDonald's USA, LLC,
No. 17 C 4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) 52, 53

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018) 52, 53

Conrad v. Jimmy John's Franchise, LLC,
No. 18-cv-00133-NJR, 2021 WL 3268339 (S.D. Ill. July 30, 2021) ... 52, 53

Intercontinental Parts, Inc. v. Caterpillar, Inc.,
260 Ill. App. 3d 1085 (1st Dist. 1994) 53

Clear Connection Corp. v. Comcast Cable Commc'ns Mgmt., LLC,
No. 2:12-CV-02910-TLN-DB, 2020 WL 6742889
(E.D. Cal. Nov. 17, 2020) 53

Aya Healthcare Servs., Inc., v. AMN Healthcare, Inc.,
9 F.4th 1102 (9th Cir. 2021) 54, 55, 56

General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n,
744 F.2d 588 (7th Cir. 1984) 55

In re Est. of Luccio,
2012 IL App (1st) 121153 55

N. Pac. Ry. Co. v. United States,
356 U.S. 1 (1958) 56

Arizona v. Maricopa Cty. Med. Soc.,
457 U.S. 332 (1982) 56

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 56, 57

Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.,
530 F.3d 204 (3d Cir. 2008) 57, 58

In re Ins. Brokerage Antitrust Litig.,
618 F.3d 300 (3d Cir. 2010) 58

D. Defendants' remaining arguments are unpersuasive. 59

740 ILCS 10/3(1) (2021) 59

In re Est. of Crawford,
2019 IL App (1st) 182703 59

740 ILCS 10/3(1), Bar Comm. Cmts.-1967 .... 60, 61

Intercontinental Parts, Inc. v. Caterpillar, Inc.,
260 Ill. App. 3d 1085 (1st Dist. 1994) 60, 61

In re Est. of Luccio,
2012 IL App (1st) 121153 61

N. Pac. Ry. Co. v. United States,
356 U.S. 1 (1958) 61

Anderson v. Shipowners' Ass'n,
272 U.S. 359 (1926) 61

740 ILCS 10/2 (2020) 62

CONCLUSION 63

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF FILING AND SERVICE

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

NATURE OF THE ACTION

The State of Illinois brought an action against three temporary staffing agencies and their common client, alleging violations of the Illinois Antitrust Act, 740 ILCS 10/1 *et seq*. (2020) ("Act"). Defendants moved to dismiss the complaint, arguing among other things that the Act does not apply to the market for labor services and that their alleged conspiracies were not subject to *per se* liability under the Act. Following a hearing, the circuit court denied the motions to dismiss. Upon defendants' request, the circuit court then certified for interlocutory appeal under Illinois Supreme Court Rule 308 two questions of law concerning the Act's applicability to labor services and the availability of *per se* liability for the type of conspiracies alleged here. This court granted leave to appeal both certified questions. This appeal is on the pleadings.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

ISSUES PRESENTED FOR REVIEW

1. Whether the definition of "Service" under Section 4 of the Act, 740 ILCS 10/4 (2020), which states that Service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the Act as a whole and thus excludes all labor services from the Act's coverage.

2. Whether the *per se* rule under Section 3(1) of the Act, which states that it applies to conspiracies among "competitor[s]," 740 ILCS 10/3(1) (2020), extends to alleged horizontal agreements facilitated by a vertical noncompetitor.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

JURISDICTIONAL STATEMENT

This court has jurisdiction over this interlocutory appeal under Illinois Supreme Court Rule 308. On June 17, 2021, the circuit court certified that its order denying defendants' motions to dismiss involved two questions of law for which there was a "substantial ground for difference of opinion," the resolution of which could "materially advance the ultimate termination of the litigation." C633.[1] On July 19, 2021, defendants filed with this court an application for leave to appeal both certified questions, C881, which was timely because it was filed within 30 days of the certification order, Ill. Sup. Ct. R. 308(b).[2] This court granted leave to appeal the certified questions.

---

[1] The common law record is cited as "C__," defendants' opening brief is cited as "AT Br. __," and the brief of *amicus curiae* Staffing Services Association of Illinois is cited as "Amicus Br. __."

[2] Because 30 days from June 17, 2021, was Saturday, July 17, 2021, defendants' application was due on the next business day, Monday, July 19, 2021. *See* Ill. Sup. Ct. R. 9(d).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

STATUTES INVOLVED

§ 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);

c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce . . .

* * *

740 ILCS 10/3 (2020).

§ 4. As used in this Act, unless the context otherwise requires:

* * *

“Service” shall mean any activity, not covered by the definition of “commodity,” which is performed in whole or in part for the purpose of financial gain.

“Service” shall not be deemed to include labor which is performed by natural persons as employees of others.

* * *

740 ILCS 10/4 (2020).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

§ 5. No provisions of this Act shall be construed to make illegal:

(1) the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States;

* * *

740 ILCS 10/5 (2020).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

STATEMENT OF FACTS

The Illinois Antitrust Act

The Act "promote[s] the unhampered growth of commerce and industry throughout the State by prohibiting restraints of trade which . . . act or tend to act to decrease competition between and among persons engaged in commerce and trade." 740 ILCS 10/2 (2020). "'[T]rade or commerce'" includes "all economic activity involving or relating to any commodity or service." 740 ILCS 10/4 (2020). The Act applies to trade and commerce across a broad span of industries, including "service industries." 740 ILCS 10/2 (2020).

Among other things, the Act prohibits "engag[ing] in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person" for certain purposes, including allocating markets and fixing prices for commodities and services. 740 ILCS 10/3(1) (2020). Such conduct is *per se* unlawful, meaning that it is illegal regardless of its "competitive and economic purposes and consequences." 740 ILCS 10/3(1), Bar Comm. Cmts.-1967; *see Gilbert's Ethan Alley Gallery v. Ethan Allen, Inc.*, 162 Ill. 2d 99, 105-06 (1994) (relying on Bar Committee comments when interpreting Act); AT Br. 4 n.3 (same). Certain commodities and services, however, are exempt from liability under the Act, including "the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States." 740 ILCS 10/5(1) (2020).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

The State's Antitrust Action

In July 2020, the State brought an action against temporary staffing agencies Elite Staffing, Inc., Metro Staffing, Inc., and Midway Staffing, Inc. ("Agency Defendants"), and Colony Display, LLC, alleging violations of the Act. C14 (redacted complaint); *see* C319 (unredacted complaint). Agency Defendants are staffing agencies that hire employees for temporary placement at third-party client locations. C322 ¶ 18.[3] They are not party to any joint venture or business collaboration with each other or together with Colony. *Id.* ¶ 24. Instead, each agency has a separate contract to provide temporary workers to Colony, which designs, manufactures, and installs customized fixtures and displays for various businesses. *Id.* ¶ 17. The majority of Colony's workers are temporary: at any given time, it employs approximately 75-100 fulltime employees and utilizes between 200 to 1,000 temporary workers. *Id.*

Under the terms of each agency's contract with Colony, the temporary workers are employees of, and paid by, the respective agency. C323-24 ¶¶ 18, 22. The contracts provide Agency Defendants with "sole and exclusive authority and control" over hiring, transferring, promoting, and disciplining their temporary workers. C324 ¶ 23 (internal quotations omitted). The contracts do not specify base wages or prohibit the agencies from hiring each other's workers. *See* C323-24 ¶¶ 22-23; C331-32 ¶¶ 55, 57-58.

---

[3] This brief describes the facts as alleged by the State, which are accepted as true at the motion to dismiss stage. *Masters v. Murphy*, 2020 IL App (1st) 190908, ¶ 11.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

The State alleged that defendants committed two *per se* violations of Section 3(1) of the Act: a no-poach conspiracy and a wage-fixing conspiracy. C335-37 ¶¶ 69-78. The State claimed that both conspiracies were unrelated to any separate, legitimate business transaction. C336 ¶ 72; C337 ¶ 77. As to the no-poach conspiracy, the State alleged that Agency Defendants agreed not to recruit, solicit, or hire—or "poach"—temporary employees from one another at Colony's facilities. C324 ¶ 25. That is, they agreed not to approach each other's temporary workers at Colony and offer them better wages or other benefits as incentives to switch employers. C324-25 ¶ 26. They would also prohibit their temporary workers from voluntarily switching from one employer to another, regardless of the workers' reasons for doing so, and transfer back any workers who managed to switch. *Id.*

Agency Defendants enforced their no-poach conspiracy by communicating with each other through Colony. C325 ¶ 27. For example, many Midway employees wanted to switch to Elite because they were "not happy working for Midway;" they cited "pay issues" and a lack of communication and support from their employer. C327 ¶ 37 (internal quotations omitted). Midway told Colony that it wanted to stop the employees from transferring. C326-27 ¶¶ 32-33. Colony then communicated via e-mail with Elite, which confirmed its policy not to hire other Agency Defendants' employees, and Colony forwarded the response to Midway. C326-28 ¶¶ 34-39. As this incident shows, the no-poach conspiracy eliminated competition among

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Agency Defendants for temporary employees, which resulted in a lower quality of employment for the workers; the workers could not seek better wages, on-time payment, improved communication from supervisors, or other benefits by switching to another Agency Defendant at Colony. C331 ¶ 54.

Regarding the wage-fixing conspiracy, Agency Defendants agreed not to compete on the wages paid to their workers assigned to Colony and instead to pay the same wage requested by Colony. C332 ¶¶ 56, 59. As with the no-poach conspiracy, Agency Defendants enforced their wage-fixing agreement through Colony. C334 ¶¶ 64-65. For example, Elite accused Metro of paying its temporary workers at Colony above the agreed wage. C334 ¶ 64. Colony resolved the issue by speaking with Metro and then directing Elite to contact Metro. *Id.*

By setting a fixed wage, rather than competing as to the amount, defendants suppressed the temporary workers' wages below a competitive rate. C333 ¶ 61. The agreed-upon wage was below the market rate. C320 ¶ 4; C333 ¶ 63. In fact, at one point, the fixed wage was $10 per hour but, according to a survey done by Elite, the "fair wage" was $13 per hour. C335 ¶ 68. Absent the agreement, however, Agency Defendants would have had a strong incentive to offer higher wages to attract prospective workers to fulfill Colony's staffing requests. C334 ¶ 66; *see* C333 ¶ 60 (study showing many temporary workers choose staffing agency based on hourly pay rate); C334 ¶ 67 (Metro pointing out that increasing wages "would definitely draw more people").

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Based on these allegations, the State sought a declaration that defendants had violated the Act and an injunction to undo the effects of defendants' illegal conduct and prevent recurrence of that conduct. C337-38 ¶ 79. The State also requested treble damages, civil penalties, and costs, disbursements, and attorneys' fees. *Id.*

Defendants moved to dismiss this action under Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615 (2020). C274-89 (Metro's motion); C342-80 (Colony, Elite, and Midway's motion). To begin, they argued that the entire market for labor services—including the temporary staffing industry—is exempt from the Act. C276, 348-50.[4] That is, according to defendants, the Act exempts any agreements between employers about their employees, including conspiracies to fix wages or prevent the employees from switching jobs. C348-49. Defendants noted that the Act regulates restraints on services but states that "'a service shall not be deemed to include labor which is performed by natural persons as employees of others.'" C349 (quoting 740 ILCS 10/4 (2020)) (cleaned up). They read this statutory provision to mean that the Act allows restraints on all economic activity

[4] The market for labor services refers to the market in which individuals sell their labor and employers buy that labor, i.e., the hiring of employees for wages. Fed. Reserve Bank of St. Louis, *The Labor Market—The Economic Lowdown Podcast Series*, https://bit.ly/3B6ilCw (last visited Feb. 8, 2022); *see Leach v. Dep't of Emp. Sec.*, 2020 IL App (1st) 190299, ¶ 44 (judicial notice of information on government website is appropriate).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

involving labor, even no-poach or wage-fixing agreements. *Id.* In support, they relied on three federal decisions interpreting Section 4. C277-78, 349-50.

Alternately, defendants contended that the State failed to state a *per se* claim under Section 3(1). C350. They characterized the State's complaint as alleging that Colony and each Agency Defendant had a vertical agreement, and pointed out that Section 3(1) does not reach vertical agreements. C352-56. Defendants further argued that even if the State had pled horizontal agreements between the Agency Defendants, Colony's "facilitation" of those agreements constituted vertical involvement, which they asserted necessarily took the alleged conduct outside the scope of Section 3(1). C356-59.

In response, the State explained that the Act does not immunize all conduct involving the market for labor services. C401-09. It pointed out that the Act directs that it be construed in harmony with similar federal antitrust law, and the Act was passed after the United States Supreme Court established that the Clayton Act's similarly-worded labor provision exempts only legitimate union activities. C402-06. It added that defendants' reading of the Act would violate basic tenets of statutory construction by rendering Section 5(1) (the exemption for legitimate union activities) superfluous and producing the absurd result that Illinois workers would be unprotected from no-poach and wage-fixing conspiracies within their state. C407. The three federal decisions reaching the contrary conclusion were incorrect and contained no detailed analysis of the Act. C408-09.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

The State also responded that Section 3(1)'s *per se* liability governed its claims. C419-33. Although defendants characterized the State's allegations as portraying vertical restraints between Colony and each Agency Defendant, the State had alleged that defendants agreed to a horizontal restraint on trade that would eliminate competition among the Agency Defendants. C425-28. And instructive federal authority construing similar federal antitrust law established that Colony's participation in this agreement did not transform the horizontal restraint into a vertical one. C428-33.

After holding a hearing, the circuit court denied the motions to dismiss. C615. Relevant here, the court rejected defendants' contention that the Act exempts the entire market for labor services. C613. It explained that the Act "closely resembles" the labor union exception in the Clayton Act, which the United States Supreme Court has held does not provide blanket immunization for labor services. *Id.* Further, the court noted, reading Section 4 as exempting all labor services from the Act "would render the labor union exemption in [S]ection 5(1) superfluous," contrary to basic principles of statutory construction. *Id.* The court added that the three federal decisions reaching a contrary conclusion did not alter its conclusion because those decisions "lack[ed] meaningful analysis" and "any persuasive explanation or reasoning" as to why Section 4 should be read as exempting all labor services. C614.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Additionally, the court concluded that the State had stated claims for *per se* violations of the Act. *Id.* Among other things, it rejected defendants' argument that the alleged agreements were vertical, rather than horizontal, in nature. *Id.* The court explained that "[w]hile it was alleged that Colony aided in facilitating the alleged agreements, the restraint agreed to by all participants was plainly horizontal, competitors agreeing not to solicit or hire each other's workers and to fix wages, which would be *per se* illegal." *Id.* As such, "the fact that Colony, a common client to the Agency Defendants, participated in the agreements [did] not recharacterize an agreement that [was] horizontal in nature as a vertical one." *Id.*

Defendants then moved under Rule 308(a) for the circuit court to certify two questions for interlocutory appeal:

> 1. Whether the definition of "Service" under Section 4 of the Illinois Antitrust Act ("IAA"), 740 ILCS 10/4, which states that Service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the IAA as a whole and thus excludes all labor services from the IAA's coverage.
>
> 2. Whether the *per se* rule under Section 3(1) of the IAA, 740 ILCS 10/3(1), which states that it applies to conspiracies among "competitor[s]," extends to alleged horizontal agreements facilitated by a vertical noncompetitor.

C618 (alteration in original). On June 17, 2021, the circuit court certified both questions as phrased by defendants, concluding that "there is substantial ground for difference of opinion" on these questions and that "an immediate

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

appeal . . . may materially advance the ultimate termination of the litigation." C633.

Defendants filed a Rule 308 application in this court for leave to appeal both certified questions, C881, which this court granted.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

ARGUMENT

I. This court's review is *de novo*.

Rule 308 provides a limited exception to the general rule that only final orders may be appealed. *Morrissey v. City of Chi.*, 334 Ill. App. 3d 251, 257 (1st Dist. 2002). It permits an appeal where the circuit court certifies that an interlocutory order has "a question of law as to which there is substantial ground for difference of opinion" and on which "an immediate appeal . . . may materially advance the ultimate termination of the litigation." Ill. Sup. Ct. R. 308(a). Because questions certified under Rule 308 must present issues of law, this court's review of such questions is *de novo*. *In re Est. of Luccio*, 2012 IL App (1st) 121153, ¶ 17. In conducting this review, the court is "limited to answering the specific question certified by the [circuit] court," and cannot "review the propriety of the [underlying] order entered by the lower court." *Id.* If a certified question's "disposition depends on the resolution of . . . factual predicates," any answer provided by the court would be "an advisory opinion" and thus the question should not be reached. *Id.* ¶ 32 (internal quotations omitted).

II. The Act should be construed in harmony with similar federal antitrust law.

The General Assembly passed the Act in 1965 "to provide a strong tool for antitrust enforcement" at "the State level." *People ex rel. Hartigan v. Moore*, 143 Ill. App. 3d 410, 415 (1st Dist. 1986). Before then, Illinois had a different antitrust statute that was rarely enforced by the State or interpreted

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

by courts. *People v. Crawford Distrib. Co.*, 53 Ill. 2d 332, 337 (1972). There was, however, a robust body of federal antitrust law at the time of the Act's passage, and the General Assembly modelled the Act in large part on the existing federal laws. *People ex rel. Scott v. Coll. Hills Corp.*, 91 Ill. 2d 138, 150-51 (1982).

Given this history, the Act instructs that "[w]hen the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act." 740 ILCS 10/11 (2020). Indeed, Illinois courts—including the Supreme Court and this court—have repeatedly looked to federal courts' interpretation of analogous federal antitrust statutes when construing the Act. *See, e.g.*, *Coll. Hills Corp.*, 91 Ill. 2d at 150; *Crawford Distrib.*, 53 Ill. 2d at 338-39; *Weinberg v. Chi. Blackhawk Hockey Team, Inc.*, 274 Ill. App. 3d 637, 640 n.2 (1st Dist. 1995). This approach ensures harmony between federal and state antitrust law, resulting in greater consistency for the businesses subjected to and the people protected by such laws. *See* 740 ILCS 10/11, Bar Comm. Cmts.-1967 (explaining that Section 11 intended to address businesses' "fear that there might develop a conflict between state and federal law").

Beyond this specific directive, the basic principles of statutory interpretation apply to the court's construction of the Act. The court's primary goal is to give effect to the legislature's intent. *In re Est. of Crawford*, 2019 IL App (1st) 182703, ¶ 29. To do so, the court examines the plain and

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

ordinary meaning of the statutory text. *Id.* The text's plain meaning "cannot be determined in isolation, but must be drawn from the context in which it is used." *Id.* ¶ 30 (internal quotations omitted). The court, therefore, should construe the relevant statutory text "in light of the statute as a whole." *Id.* In doing so, it should give each statutory provision meaning, such that none is rendered superfluous, and refrain from "reading into [the statute] exceptions, limitations, or conditions not expressed by the legislature." *Id.* ¶ 29. The court should also reject interpretations of a statute's text that would produce an absurd result. *Id.* And if the statutory language is unclear, the court "can consider the purpose behind the law and the evils the law was designed to remedy." *In re Cty. Treasurer & ex officio Cty. Collector of Cook Cty.*, 2020 IL App (1st) 190722, ¶ 23. In such situations, the court should also afford "substantial deference" to the agency responsible for enforcing the statute. *Arlington Park Racecourse LLC v. Ill. Racing Bd.*, 2012 IL App (1st) 103743, ¶ 37.

Under these principles, this court should effectuate the General Assembly's intent by construing the Act in accordance with federal authority on analogous federal antitrust law, and it should conclude that the Act does not exempt the entire market for labor services and that it does apply *per se* liability to horizontal wage-fixing and no-poach agreements among competitors that are facilitated by a vertical noncompetitor.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

III. The Act does not exempt the entire market for labor services from its prohibitions.

Question 1 concerns whether a definitional provision in the Act exempts the entire market for labor services from state antitrust liability, including the temporary employment industry in which Agency Defendants compete. Two provisions of the Act are relevant: Sections 4 and 5. Section 5, entitled "Exceptions," provides that "[n]o provisions of this Act shall be construed to make illegal" certain enumerated activities. 740 ILCS 10/5 (2020). These exceptions are to be "strictly construed and narrowly applied." 740 ILCS 10/5, Bar Comm. Cmts.-1967. Relevant here, the Act exempts "the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States." 740 ILCS 10/5(1) (2020). Section 5 provides no other exception concerning labor, let alone one exempting the entire market for labor services.

Defendants rely instead on Section 4 as support for their view that the Act is "inapplicable to *any* restraint of competition concerning labor services." AT Br. 10-11, 16 (emphasis in original). Section 4 provides definitions of terms used in the Act. 740 ILCS 10/4 (2020) ("Definitions"). It defines "[s]ervice" as "any activity, not covered by the definition of 'commodity,' which is performed in whole or in part for the purpose of financial gain." *Id.* It then clarifies that "'[s]ervice' shall not be deemed to include labor which is performed by natural persons as employees of others." *Id.*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

The question here is whether this latter definitional provision should be read as a blanket exemption from the Act for any conduct involving the market for labor services. Again, the market for labor services refers to the supply of and demand for labor, in which individuals sell their services and employers purchase those services, i.e., employees hire employees. *See supra* p. 10 n.4. As defendants recognize, this question is one of first impression in Illinois courts. *See* C888 (application for interlocutory appeal). Federal courts, however, have resolved this question when analyzing analogous federal statutory language, and they have determined that this language does not create the blanket exemption that defendants seek. Given the lack of Illinois precedent on point, and the Act's unique directive to consult federal authority on similar federal antitrust law, 740 ILCS 10/11 (2020), these federal decisions are a crucial aid in resolving the question before this court. And, as the circuit court correctly determined, C613-14, these decisions establish that the Act does not contain a blanket exemption for the labor services market, and thus does not exempt employers who conspire to fix their workers' wages and prevent those workers from switching employers. Defendants' arguments to the contrary ignore the Act's directive to look to federal law and contravene basic principles of statutory construction.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

A. As analogous federal law establishes, the Act does not exempt the entire market for labor services.

The statutory provisions at issue here were modelled on, and thus should be interpreted consistently with, federal antitrust law. As the Bar Committee noted, and as defendants concede, *see* AT Br. 18, in crafting the labor union exemption, the General Assembly "adopt[ed] an approach similar to that used for the federal exemption . . ., thereby preserving general overall consistency," 740 ILCS 10/5, Bar Comm. Cmts.-1967. Indeed, the phrasing of the Act's provisions on labor—including the service definition—is similar to the labor union exception found in federal law. And because it is well-settled that the analogous federal law does not provide a blanket exemption for the labor services market, that same interpretation should be applied to the Act.

1. The Act's provisions on labor were modelled on federal antitrust law.

The Clayton Act, 15 U.S.C. §§ 12-27, contains the federal counterpart to the Act's provisions on labor. The Clayton Act was enacted, in part, to address concerns that another federal antitrust statute—the Sherman Act—was being used to penalize efforts by labor unions to improve employment conditions. *Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 802-04 (1945). Specifically, federal courts had applied the Sherman Act's prohibition on restraints on trade or commerce to union activities, such as strikes and boycotts. *See Loewe v. Lawlor*, 208 U.S. 274, 293 (1908). Unions and

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

their supporters contended that "labor was not a commodity," and pushed Congress to exempt union activities from antitrust liability. *Allen*, 325 U.S. at 801-02.

In response, Congress passed the Clayton Act in 1914, providing:

> *The labor of a human being is not a commodity or article of commerce*. Nothing contained in the antitrust laws shall be construed *to forbid the existence and operation of labor . . . organizations, . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof*; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

15 U.S.C. § 17 (emphasis added).

Illinois's Act was passed decades after the Clayton Act, and its provisions mirror the federal statute's labor union exemption. For starters, the Clayton Act clarifies that "[t]he labor of a human being is not a commodity or article of commerce." *Id.* Similarly, the Act provides that "[s]ervice" does not include "labor which is performed by natural persons as employees of others." 740 ILCS 10/4 (2020). Then, just like the Clayton Act exempts "the legitimate objects" of "labor . . . organizations," 15 U.S.C. § 17, the Act exempts "the activities of any labor organizations or of individual members thereof which are directed solely to labor objectives which are legitimate," 740 ILCS 10/5(1) (2020). Thus, the Act mirrors the Clayton Act by first clarifying that a person's labor is not the type of economic activity regulated by the statute and then providing that legitimate union activities are exempt from antitrust liability.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

To be sure, the statutes have two minor distinctions, but neither is substantively meaningful. First, the Clayton Act specifies that a person's labor is not a "commodity" or "article of commerce," 15 U.S.C. § 17, whereas the Act makes the same clarification as to "service," 740 ILCS 10/4 (2020). That difference in terminology exists because the Sherman Act (to which the Clayton Act responded) explicitly refers only to restraints on "trade or commerce." 15 U.S.C. § 1. The Sherman Act, however, has long been interpreted to apply to restraints on services, *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 435-36 (1932), and the General Assembly intended to match this interpretation of the Sherman Act, 740 ILCS 10/4, Bar Comm. Cmts-1967. Accordingly, the General Assembly phrased the Act more specifically than the Sherman Act to refer explicitly to services. 740 ILCS 10/4 (2020). Because—unlike federal law—the Act refers to "service" in its text, it uses this same terminology when referring to "labor which is performed by natural persons as employees of others." *Id.*

Second, the two statutes structure their labor exemptions differently. The Clayton Act contains both statements (a person's labor is not a commodity, and legitimate union activities are exempt) in a single section. *See* 15 U.S.C. § 17. By contrast, the General Assembly split the Act's labor provisions into two sections: the statement clarifying that a person's labor is not a service is in the "Definitions" section, 740 ILCS 10/4 (2020), while the

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

statement providing that legitimate union activities are exempt is contained in the "Exceptions" section, 740 ILCS 10/5 (2020).

That the General Assembly put the equivalent to the first sentence of the Clayton Act's labor provision in a separate "Definitions" section makes no substantive difference. Statutes are to be read as a whole. *Est. of Crawford*, 2019 IL App (1st) 182703, ¶ 30. Indeed, the Bar Committee's comments to each section emphasize that these statements should be read together. The committee explained that Section 4 was "expressly designed to make services . . . subject to the prohibitions of the law," and thus "exemptions should be strictly limited." 740 ILCS 10/4, Bar Comm. Cmts.-1967. The committee then directed the reader to its discussion regarding Section 5, *id*., in which it stated that Section 5's "labor exemption should be read together with the provision of Section 4 which states that labor performed as an employee is not a 'service' within the meaning of Section 3 of the Act," 740 ILCS 10/5, Bar Comm. Cmts.-1967. The General Assembly's structural choice thus does not create a meaningful difference between the Clayton Act's and the Act's labor provisions.

In sum, the Act's labor provisions are similarly phrased to—and in fact based on—those in the Clayton Act. This court should thus "use the construction of the federal law by the federal courts as a guide in construing this Act," 740 ILCS 10/11 (2020), especially given the absence of Illinois

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

precedent on the question here, *see Coll. Hills Corp.*, 91 Ill. 2d at 150; *Crawford Distrib.*, 53 Ill. 2d at 339.

2. Neither federal law nor the Act exempts the market for labor services from antitrust liability.

Federal courts have concluded that the Clayton Act does not create a blanket exemption for the entire labor services market, notwithstanding its clarification that a person's labor is not a commodity or article of commerce. That same interpretation should govern here.

To begin, the United States Supreme Court has long held that the Clayton Act's labor union exception applies only to legitimate labor union activities and thus does not exempt all economic activity involving labor. In *Allen*, a union conspired with its members' employers—manufacturers of electrical equipment and contractors who installed that equipment—so that the employers would only exchange goods with each other. 325 U.S. at 799-800. As part of the conspiracy, the employers agreed to fix their workers' wages and hours at amounts demanded by the union. *Allen Bradley Co. v. Loc. Union No. 3, Int'l Bhd. of Elec. Workers*, 145 F.2d 215, 218 (2nd Cir. 1944). The Court concluded that the Clayton Act's labor union exception, including its "declar[ation] that labor was neither a commodity nor an article of commerce," did not shield the actors from antitrust liability. *Allen*, 325 U.S. at 804. That exception, the Court explained, protected only "the rights of labor to organize to better its conditions through the agency of collective bargaining"—it did not protect agreements involving labor outside of that

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

context. *Id.* at 806-08. The Court cautioned against reading the labor union exception as "wholly exempting labor from any possible inclusion in the Anti-trust legislation." *Id.* at 804-05; *see id.* at 809 (provision was "special exemption[ ]" from "general legislative plan" to "preserve business competition and to proscribe business monopoly").

The United States Supreme Court has also clarified the meaning of the phrase that "[t]he labor of a human being is not a commodity or article of commerce." 15 U.S.C. § 17. When an individual agrees to work for an employer, she engages in "the sale of [her] services to the employer." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502-03 (1940). Accordingly, when individuals combine together for collective bargaining, they "restrain[ ] competition among themselves in the sale of their services to the employer." *Id.* But such agreements are not illegal under federal law because "'the labor of a human being is not a commodity or article of commerce'"—that is, the services that an individual sells to her employer are not commodities or articles of commerce. *Id.* Thus, when an individual restrains her own labor by entering a collective bargaining agreement, she is not engaging in a "restraint of trade or commerce under the Sherman Act." *Id.*

Other federal courts addressing the Clayton Act's labor union exception have reaffirmed that it, including the provision that "'the labor of a human being is not a commodity or article of commerce,'" does not provide a blanket exemption for all agreements related to the labor services market. *Cordova v.*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Bache & Co., 321 F. Supp. 600, 605-07 (S.D.N.Y. 1970) (quoting 15 U.S.C. § 17) (holding that Clayton Act did not exempt employer conspiracies to fix wages); *see, e.g.*, *United States v. Hanigan*, 681 F.2d 1127, 1130 (9th Cir. 1982) (The Clayton Act's labor provision "serves merely to exempt the activities of organized labor from the antitrust laws."); *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 829 n.9 (5th Cir. 1976) (determining that Clayton Act did not exempt brokerage firms' agreements to restrict movement of labor force from Sherman Act); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1039 (N.D. Cal. 2013) (Sherman Act reaches, and prohibits, no-poach agreements between employers).

The federal court's analysis in *Cordova* is particularly instructive. There, several brokerage firms contended that the Clayton Act's statement that "'[t]he labor of a human being is not a commodity or article of commerce'" exempted any agreements by "employers with respect to the labor of their employees," including their agreement to reduce their employees' commissions. 321 F. Supp. at 605 (quoting 15 U.S.C. § 17). The court rejected this argument, explaining that the "labor of a human being . . . can be restrained only by the employees or unions controlling the labor itself," and it was only such labor that is not an article of commerce or commodity. *Id.* at 605-06. As such, the exception only protects the rights of unions and their members to control the "furnishing of [their] labor or services," and does not protect all activity involving labor, including "the right of employers to ban[d]

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

together for joint action in fixing the wages to be paid by each employer." *Id.* The court added that there was "no evidence of the existence of any necessity to protect [such] activity" by employers, and, in any case, if Congress had wanted to do so, it "would also have provided that compensation offered or paid by employers to employees is not a commodity or article of commerce" but it did not. *Id.* at 606.

This long-settled interpretation of the Clayton Act controls here, given the analogous phrasing of the Clayton Act's and the Act's labor union exception. *See* 740 ILCS 10/11 (2020). This is particularly true because the Act was enacted in 1965, decades after *Allen* clarified that the Clayton Act does not exempt the entire labor services market. *See Laughlin v. Evanston Hosp.*, 133 Ill. 2d 374, 383-84 (1990) (When "a [s]tate legislature enacts a statute modeled upon a [f]ederal statute, it can be presumed that the legislature did so with the knowledge of the statute's construction by the [f]ederal courts."). Indeed, other state courts have consulted federal authority when interpreting state antitrust statutes modelled on the Clayton Act. *See e.g.*, *People v. N. Ave. Furniture & Appliance, Inc.*, 645 P.2d 1291, 1299 (Co. 1982) (en banc) (construing Colorado's labor exception consistently with Clayton Act even though statement that labor is not commodity or article of commerce *was placed in separate subsection*); *Rhodes v. Rains*, 195 Wash. App. 235, 244 (Wash. App. 2016) (Washington's labor exception, including statement that labor is not commodity or article of commerce, follows federal antitrust law

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

and is limited to legitimate union activity); *see also Robertsson v. Misetic*, 2018 IL App (1st) 171674, ¶ 16 ("comparable decisions of other jurisdictions are entitled to respect").

Under the interpretation well established by analogous federal law, the Act exempts only agreements by natural persons (or the unions to which they belong) to restrain their own labor in order to better their working conditions. *See Allen*, 325 U.S. at 804-09; *Cordova*, 321 F. Supp. at 605-06. It does not exempt any agreement simply because it concerns labor services, such as conspiracies between employers to suppress their employees' wages and to prevent them from switching employers. The Act, therefore, governs conspiracies such as those allegedly committed by defendants.

3. Defendants incorrectly cast aside federal authority as inapplicable.

Defendants acknowledge the General Assembly's directive that federal authority be used as a guide when the Act is "'identical or similar to that of a federal antitrust law.'" AT Br. 13 (quoting 740 ILCS 10/11 (2020)). And they do not dispute that the Act and the Clayton Act contain similar language in their labor provisions. Nor do they dispute that federal courts have held that the Clayton Act exempts only legitimate labor union activities. Nevertheless, they contend that this court should ignore the Act's instruction to consult federal law merely because the General Assembly put one sentence—that a person's labor is not a service regulated under the Act—in a separate section

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

from the rest of the labor exemption. *Id.* at 14. Defendants place too much weight on this structural choice, and their argument should be rejected.

Initially, defendants ignore obvious reasons for placing this sentence in a separate section of the Act. It is, as they recognize, a sentence "defining the word 'Service,'" *id.* at 15, and thus it was placed in the "Definitions" section of the Act, *see* 740 ILCS 10/4 (2020). There is no evidence that the General Assembly intended to carve a substantial gap with federal antitrust law simply by grouping together definitional sentences. To the contrary, as the Bar Committee noted, "as to the labor . . . exemption[,] it was believed necessary to adopt an approach similar to that used for the federal exemption[ ] . . ., thereby preserving general overall consistency." 740 ILCS 10/5, Bar Comm. Cmts.-1967. The committee acknowledged that the sentence defining service as not including a person's labor was in a different section from the labor union exception, but it explained that this sentence should nevertheless be "read together" with the labor union exception. *Id.*; *see Est. of Crawford*, 2019 IL App (1st) 182703, ¶ 30 (statutes should be read as a whole). Thus, while the Act does deviate from federal law in some other respects, *see* AT Br. 13-14, the Bar Committee's comments make clear that the Act's provisions on labor are to be read consistently with federal law.

Defendants' contrary argument rests on a misreading of the committee's comments. They selectively quote the comment that Section 4 "'make[s] the Act inapplicable to agreements by either labor or nonlabor

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

groups insofar as they relate to restraint of competition concerning labor itself,'" *id.* at 16 (quoting 740 ILCS 10/5, Bar Comm. Cmts.-1967) (emphasis omitted), to contend that the Act is "inapplicable to *any* restraint of competition concerning labor services," *id.* (emphasis in original), such as employers' conspiracies to fix wages or prevent employees from switching jobs.

But, when read in full, the committee's comments clarify that it was referring specifically to collective bargaining agreements between labor and nonlabor groups:

> The labor exemption should be read together with the provision of Section 4 which states that labor performed as an employee is not a "service" within the meaning of Section 3 of the Act. The effect of this provision is to make the Act inapplicable to agreements by either labor or nonlabor groups insofar as they relate to restraint of competition concerning labor itself. *The Act thus protects both management and labor in bargaining collectively over terms and conditions of employment*.

740 ILCS 10/5, Bar Comm. Cmts.-1967 (emphasis added). The committee thus used "restraint[s] of competition concerning labor itself" to describe collective bargaining agreements regarding an individual's sale of their services, *id.*, and never stated that the exception applies more broadly to any restraint that employers place on their employees' labor, *see also Apex Hosiery*, 310 U.S. at 502-03 (explaining that "the labor of a human being" refers to "the sale of [individuals'] services to the employer").

Defendants also overread a comment in *Cordova*: the Clayton Act's statement that the "'labor of a human being is not a commodity or article of commerce' . . . would "'lend support'" for the view that all agreements

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

concerning labor were exempt from antitrust liability if the statute stopped there and did not "'immediately'" include "'additional language'" about labor unions. AT Br. 15 (quoting *Cordova*, 321 F. Supp. at 605). Defendants note that, here, the relevant additional language does not "immediately follow[ ]" the definitional sentence but rather appears separately in Section 5. *Id.* But *Cordova* did not condition its analysis on the fact that the additional language of the labor union exception "immediately" followed the definitional sentence. Instead, it viewed the provision as a whole, and noted that if Congress wanted to exempt employers who fixed their employees' wages, then it would have used different language about exempting the "compensation offered or paid by employer to employees." *Cordova*, 321 F. Supp. at 606. That analysis applies with equal force here, especially because statutory provisions must be read together rather than in isolation. *See Est. of Crawford*, 2019 IL App (1st) 182703, ¶ 30; 740 ILCS 10/5, Bar Comm. Cmts.-1967; 740 ILCS 10/4, Bar Comm. Cmts.-1967.

All told, defendants have not shown that the General Assembly's decision to place one sentence about labor in the "Definitions" section of the Act amounts to a meaningful difference between the Act and Clayton Act. And they do not dispute the statutes' similar phrasing on this issue, or that federal courts have concluded that the Clayton Act does not exempt the entire labor services market. This court, therefore, should follow federal law interpreting the Clayton Act—just as the General Assembly instructed—and decline to read

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

into the Act an exemption for all employers' conspiracies to fix their employees' wages or conditions. *See Est. of Crawford*, 2019 IL App (1st) 182703, ¶ 29 (courts may not add exemptions or conditions into statutes).

B. The Act's plain text does not exempt the entire market for labor services.

Federal courts' conclusion that the Clayton Act's labor union exception does not exempt the entire labor services market is consistent with the Act's plain text and basic principles of statutory construction. Defendants' arguments to the contrary are unpersuasive.

As an initial matter, the Act's plain text, when properly read as whole, does not exempt the entire market for labor services. As explained, statutory provisions "should not be construed in isolation but must be interpreted in light of other relevant provisions of the statute." *Van Dyke v. White*, 2019 IL 121452, ¶ 46. Here, Sections 4 and 5 are the only sections of the Act that reference labor, *see generally* 740 ILCS 10/1 *et seq*. (2020), and they should be read in tandem, 740 ILCS 10/5, Bar Comm. Cmts.-1967. Taken together, they direct that only legitimate labor union activities are exempt from the Act. Section 5 specifically exempts legitimate labor activities from the Act. 740 ILCS 10/5(1) (2020). Given that Section 5(1) does not use the word "services," Section 4 then clarifies that this exception is incorporated in the definition of "services": "labor which is performed by natural persons as employees of others" does not count as a service regulated by the Act, 740 ILCS 10/4 (2020), so any of the Act's prohibitions of restraints on "service[s]" do not, by

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

definition, apply to an individual's restraints on the sale of her labor to employers.[5] As such, read together, Sections 5(1) and 4 immunize human beings as laborers, not all participants in the market for labor services.

Because Section 4 clarifies that the definition of "service[s]" is consistent with the labor union exception in Section 5(1), it potentially creates some redundancy between those sections. But, as defendants point out, this overlap is permissible because legislatures may take a "'belt and suspenders approach' when writing statutes." AT Br. 18 (quoting *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1172 n.7 (2021)). That is, sometimes legislatures are "redundant" when writing a statute to "make sure" the provisions are clear. *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020). To the extent the relevant provisions of Section 4 and 5 overlap, Section 4 merely clarifies that, although "services" broadly means "any activity . . . performed in whole or in part for the purposes of financial gain," 740 ILCS 10/4 (2020), it still does not apply to restraints that an individual places on the provision of her labor to employers, such as strikes, boycotts, or collective bargaining.[6]

Defendants, however, misapply the "belt and suspenders" principle to obtain the opposite result. They contend that Section 5's entire labor union

---

[5] That Section 4 includes this clarification makes sense, given that, as defendants note, *see* AT Br. 16-17, the definition of services applies throughout the Act.

[6] Similarly, Section 5(6) exempts the "charitable activities" of not-for-profit organizations, 740 ILCS 10/5(6) (2020), and Section 4 clarifies that "[s]ervice[s]" applies only to activities "performed in whole or in part for the purpose of financial gain," 740 ILCS 10/4 (2020).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

exception is a mere redundancy of the broader labor services market exemption in Section 4. AT Br. 18-19. This contention makes little sense, because "if such a blanket exclusion for labor services existed, it would render the labor union exemption in [S]ection 5(1) superfluous." C613; *see Est. of Crawford*, 2019 IL App (1st) 182703, ¶ 29 (courts should avoid statutory interpretations that render text superfluous). Defendants argue that Section 5 is not superfluous because it and Section 4 of the Act "have different meanings and accomplish different objectives." AT Br. 18. But these sections' different objectives undermine defendants' construction. Section 4—into which they attempt to read an exemption—is entitled "Definitions," whereas Section 5 is entitled "Exemptions." *Compare* 740 ILCS 10/4 (2020) *with* 740 ILCS 10/5 (2020); *see Banco Popular N. Am. v. Gizynski*, 2015 IL App (1st) 142871, ¶ 57 (declining to interpret section entitled "Homeowner protection" in a manner that would not benefit homeowners). Given the stated objectives of the two sections, it is "much more likely" that the General Assembly was reflecting Section 5's exemption in the definitions provided in Section 4, rather than carving out a new, broad exemption in Section 4—a section designed to define terms. *Atl. Richfield Co.*, 140 S. Ct. at 1350 n.5.

To the extent, however, that Section 4's plain meaning is unclear, the legislative purpose confirms that Section 4 does not carve out a broad, unprecedented exemption for the entire market for labor services. *See Cty. Treasurer*, 2020 IL App (1st) 190722, ¶ 23 (courts may consider legislative

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

purpose where statutory language is unclear). As the Bar Committee explained, a "primary purpose" of the Act was to "eliminate 'loopholes'" in Illinois's prior antitrust statute, the "most conspicuous" of which included "the omission . . . of penalties designed to curb restraints with respect to services." 740 ILCS 10/4, Bar Comm. Cmts.-1967. To this end, "the definitions of Section 4 were expressly designed to make services . . . subject to the prohibitions of the law," and "[i]t was the feeling of the draftsmen that exemptions should be strictly limited and that almost all service occupations should be within the reach of the statute." *Id.* Adopting defendants' reading of the Act would undermine the legislature's intent to subject restraints on services to antitrust liability because it would exempt the market for labor services as a whole, including the entire temporary staffing industry.

Should any uncertainty remain, this court should defer to the Attorney General's interpretation of the Act. When a statute is ambiguous, this court "give[s] substantial deference and weight to the interpretation of the statute by the agency charged with administration and enforcement of that statute." *Arlington Park*, 2012 IL App (1st) 103743, ¶ 37. The Act tasks the Attorney General with its enforcement, 740 ILCS 10/7 (2020), so his interpretation—that the Act does not exempt all labor services—should be afforded significant deference.

As such, reading the Act in accordance with federal antitrust law—to exempt only legitimate labor union activities—is consistent not only with the

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Act's directive to do so, but also with the Act's plain text, its purpose, and other principles of statutory interpretation. Defendants, in contrast, improperly attempt to discern the plain meaning of Section 4 in isolation. *See* AT Br. 10-11. In support, they cite three federal decisions holding that the Act exempts all conspiracies regarding the market for labor services. *Id.* at 11-12. These decisions, however, provide no justification to ignore the Act as a whole. While the Act directs Illinois courts to consult federal decisions analyzing analogous federal statutes, 740 ILCS 10/11 (2020), Illinois courts need not defer to decisions by lower federal courts analyzing Illinois statutes, *People v. Wiggins*, 2016 IL App (1st) 153163, ¶ 37 (rejecting federal court's interpretation of Illinois statute).

The circuit court correctly determined that such deference was unwarranted here, where the cited federal decisions "lack[ed] meaningful analysis" or "persuasive explanation" as to why the Act exempts the entire market for labor services. C614. In *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060 (7th Cir. 1997), the United States Court of Appeals for the Seventh Circuit's discussion of the labor exception was dictum, as it held that the plaintiff lacked standing to bring her state antitrust claims against her employer. *Id.* at 1066; *see P.W. by Woodson v. United States*, 990 F.3d 515, 526 n.3 (7th Cir. 2021) (dicta is reasoning unnecessary to a decision). The court then added that to the extent those "claims relate to an alleged market for labor services, they are specifically excluded by § 10/4 of the Act, which states

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

that 'service shall not be deemed to include labor which is performed by natural persons as employees of others.'" *O'Regan*, 121 F.3d at 1066 (cleaned up). The court included no further analysis.

The other two decisions primarily relied on *O'Regan*'s dictum. *See* AT Br. 11-12 (citing *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018); *DeSlandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2018 WL 3105955, *9 (N.D. Ill. June 25, 2018) ("*DeSlandes I*")). Defendants note that both courts were presented with the argument that the Act should be interpreted consistently with federal law. *Id.* at 12. But *Butler* did not address this argument, and instead merely stated that "[t]he Seventh Circuit has already said that the Illinois Antitrust Act specifically excludes claims 'relate[d] to an alleged market for labor services.'" 331 F. Supp. 3d at 797 (quoting *O'Regan*, 121 F.3d at 1066) (alteration in original). And although *DeSlandes I* rejected the argument because "the statute includes a separate labor exemption," 2018 WL 3105955, *9 (citing 740 ILCS 10/5(1) (2018)), that was the extent of the court's analysis. It did not acknowledge, for instance, the parallel phrasing of Section 4's definition and the first sentence of the Clayton Act, or the Bar Committee's instruction that the language in Sections 4 and 5(1) be read together.

Defendants respond that clear statutory language requires no "extensive analysis." AT Br. 12. But these decisions did not even address why the General Assembly would choose to depart from federal antitrust law, why

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

it would broadly exempt all employers from antitrust liability for anticompetitive agreements restricting wages or other employment conditions (especially in the Act's definitions section, rather than the exemptions section), or why Section 4 should not be read together with Section 5(1) despite the Bar Committee's guidance.

Additionally, contrary to defendants' assertion, *id.* at 12-13, the General Assembly did not acquiesce to these federal courts' interpretation of Section 4 when it subsequently amended Section 5 without clarifying the labor union exception. The presumption of legislative acquiescence "is merely a jurisprudential principle," "not a rule of law." *People v. Perry*, 224 Ill. 2d 312, 331-32 (2007). And defendants have supplied no case where an Illinois court applied this presumption based on federal courts' interpretation of state law. *See* AT Br. 12 (citing only *Charles v. Seigfreid*, 165 Ill. 2d 482, 492 (1995) (discussing legislature's acquiescence to Illinois Supreme Court's interpretation of statute that had been applied for more than a century)). Here, the General Assembly modelled the Act's relevant provisions on federal antitrust law and decades after the Supreme Court clarified that the Clayton Act's analogous provision exempted only legitimate labor union activities. *See Allen*, 325 U.S. 804-09. Because the meaning of the Act is clear, especially given this history, that the General Assembly has not amended the Act in response to *O'Regan* and its progeny "is of little weight." *Perry*, 224 Ill. 2d at 331-32.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

At minimum, this court should reject defendants' interpretation of the Act because it would produce an absurd result. *See Solon v. Midwest Med. Records Ass'n, Inc.*, 236 Ill. 2d 433, 441 (2010) (when construing statutes, courts presume that legislature did not intend absurd results). If all restraints on the labor services market were exempt from the Act, then Illinois workers would be protected from no-poach and wage-fixing agreements by their employers only when such conduct occurs in interstate commerce (under federal antitrust law), and not when this conduct occurs solely within Illinois (under state antitrust law). And while defendants contend that this was a "balance" struck by the General Assembly, AT Br. 19, they have pointed to nothing in the Act's legislative history or in the Bar Committee comments that "it was ever suggested, considered, or legislatively determined" that the entire market for labor services should be exempt from the Act, *Allen*, 325 U.S. at 808. To the contrary, as defendants note, the General Assembly added exceptions to the Act beyond those listed in the original bill. AT Br. 19. But aside from the labor union exception, none of those exceptions—which, again, are to be strictly construed and narrowly applied, 740 ILCS 10/5, Bar Comm. Cmts.-1967—pertain to the market for labor services. While defendants may prefer that the General Assembly make this policy choice, which would shield from the Act any employer conspiracies regarding their employees' working conditions and wages, defendants' "concerns should be taken up with the Illinois legislature and not the judiciary." AT Br. 19.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

C. Applying the Act to the market for labor services would not conflict with other Illinois laws.

Amicus curiae Staffing Services Association of Illinois claims that this court should not read the Act as applying to labor services because doing so would conflict with the staffing agencies' obligations under other Illinois laws. Amicus Br. 17-24. This contention lacks merit.

For one, the Association asserts that applying the Act to the market for labor services, and thus to wage-fixing agreements by employers, would conflict with the Illinois Day and Labor Services Act's requirement that third-party clients "'share all legal responsibility and liability for the payment of wages'" with the temporary staffing agencies with which they contract. *Id.* at 18-19 (quoting 820 ILCS 175/85(b) (2020)) (alteration omitted). But this provision merely ensures that temporary employees will get paid for their work by putting clients on the hook for the wages. It says nothing about allowing employers to collude to fix wages. Indeed, it would make little sense if the Day and Temporary Labor Services Act conflicted with a prohibition on fixing workers' wages, as that statute aims to protect temporary laborers because "they are particularly vulnerable to abuse of their labor rights, including unpaid wages, failure to pay for all hours worked, minimum wage and overtime violations, and unlawful deduction from pay." 820 ILCS 175/2 (2020).

The Association also claims that reading the Act to prevent no-poach agreements among employers would impede the staffing agencies' ability to

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

comply with various other laws. Amicus Br. 19-24. It submits that if employees at a single workplace were permitted to switch between employers, then it would be difficult for the employers to track the employees for purposes of liability and payment. *Id.* But that is why federal and state law impose robust record-keeping requirements on employers and their clients. *See* 29 C.F.R. § 825.500; 820 ILCS 175/12 (2020). Additionally, the Association's concerns are overblown; staffing agencies whose activities impact interstate commerce and thus trigger federal antitrust law must already navigate the practical obstacles feared by the Association, given that federal law prohibits no-poach and wage-fixing agreements. *See infra* pp. 46-47. At any rate, any additional paperwork or financial costs for the staffing agencies caused by employees switching employers in search of better pay and working conditions would not justify restraints on competition. *See New York ex rel. Spitzer v. Saint Francis Hosp.*, 94 F. Supp. 2d 399, 418 (S.D.N.Y. 2000) (that "competition would result in financial hardship" does not justify restraints on trade).

The Association is thus incorrect that applying the Act to the labor services market—thereby applying its protections to temporary workers—would conflict with other Illinois laws. Even if it did, "'[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.'" *Mass. Furniture & Piano Movers Ass'n, Inc. v.*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

FTC, 773 F.2d 391, 393 (1st Cir. 1985) (quoting *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 350-51 (1963)) (finding "no irreconcilable conflict" between antitrust law and state regulatory scheme).

IV. The Act's *per se* liability applies to horizontal conspiracies facilitated by a vertical noncompetitor.

Under Section 3(1) of the Act, it is *per se* illegal to "[m]ake any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person" for certain purposes, including allocating markets and fixing prices. 740 ILCS 10/3(1) (2020). In Question 2, defendants ask this court to determine whether Section 3(1)'s *per se* liability applies to "alleged horizontal agreements facilitated by a vertical noncompetitor." C618. In their view, even if Agency Defendants—who are competitors with each other and thus horizontally situated—engaged in a conspiracy to fix wages and prevent poaching, they are shielded from liability under Section 3(1) simply because Colony—who is their client and thus vertically situated—participated in the conspiracy. *See* AT Br. 20.

The circuit court correctly determined that Section 3(1) applies to such conspiracies because defendants agreed to a horizontal restraint on competition, even if a vertical noncompetitor participated in that restraint. C614. Until the circuit court, no Illinois court had addressed whether such arrangements are subject to *per se* liability. But federal authority interpreting analogous federal antitrust law establishes that such agreements are subject to

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

per se treatment because the aspect of agreements that makes them particularly harmful to competition—agreements among competitors not to compete—exists regardless of whether a vertical noncompetitor participates. Defendants' contrary arguments do not justify shielding conspiracies among competitors from *per se* liability merely because a customer of the competitors joins. This court should thus conclude that Section 3(1) governs horizontal agreements facilitated by a vertical noncompetitor, like the one alleged here.

A. Like federal law, the Act deems no-poach and wage-fixing agreements among competitors *per se* unlawful.

As explained, the Act directs state courts to rely on federal authority interpreting similar federal statutes when construing its terms. 740 ILCS 10/11 (2020); *see supra* Section II. Section 3(1) of the Act is similar to federal antitrust statutes in that both proscribe *per se* offenses, including market allocation and price-fixing agreements. In fact, as Illinois courts have recognized, Section 3(1) was modelled after federal law. Because no Illinois court (before the circuit court below) has determined whether Section 3(1) applies to horizontal agreements facilitated by a vertical competitor, *see* C618, this court should look to federal authority to resolve this question.

To start, the Act prohibits *per se* and rule of reason offenses. 740 ILCS 10/3(1), (2) (2020); *see* 740 ILCS 10/3(1), 10/3(2), Bar Comm. Cmts.-1967; *Coll. Hills Corp.*, 91 Ill. 2d at 150, 154. *Per se* offenses are "commonly deemed . . . the most serious restraints upon competition" and are thus unlawful regardless of their "competitive and economic purposes and consequences."

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

740 ILCS 10/3(1), Bar Comm. Cmts.-1967. By contrast, offenses assessed under the "rule of reason" are not presumed unlawful; instead, courts "examine the competitive and economic purposes and consequences" of the alleged conduct to determine whether the conduct has "unreasonably restrained" trade or commerce. 740 ILCS 10/3(2), Bar Comm. Cmts.-1967.

The Act lists *per se* violations in Section 3(1) and rule of reason violations in Section 3(2). 740 ILCS 10/3(1), 10/3(2), Bar Comm. Cmts.-1967. Section 3(1) prohibits "engag[ing] in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person" for certain enumerated activities. 740 ILCS 10/3(1) (2020). These activities include "fixing" or "controlling" "the sale or supply of any service," and "fixing" the "fee charged or paid for any service performed or received by the parties." *Id.* Section 3(2) does not list specific offenses but instead prohibits conduct "[b]y contract, combination, or conspiracy with one or more other persons [that] unreasonably restrain[s] trade or commerce." 740 ILCS 10/3(2) (2020). The State brought its claims under Section 3(1), claiming that defendants' no-poach and wage-fixing conspiracies were *per se* unlawful. C335-37 ¶¶ 69-78.

Illinois courts, including this court, have recognized that Section 3(1) was "patterned after" the Sherman Act. *Coll. Hills Corp.*, 91 Ill. 2d at 150 (referencing Section 1 of the Sherman Act, 15 U.S.C. § 1); *see People ex rel. Fahner v. Carriage Way W., Inc.*, 88 Ill. 2d 300, 309 (1981); *Baker v. Jewel*

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Food Stores, Inc., 355 Ill. App. 3d 62, 69 (1st Dist. 2005). Illinois courts have thus been "guided by [f]ederal case law construing analogous provisions of [f]ederal legislation" when interpreting Section 3(1). *Coll. Hills Corp.*, 91 Ill. 2d at 150; *see Carriage Way W., Inc.*, 88 Ill. 2d at 309 (relying on federal authority interpreting Sherman Act to analyze price-fixing claim under Section 3(1)).

Although the Act does not prohibit all the *per se* offenses proscribed by federal law, *see* AT Br. 20-23, that difference is immaterial because the conduct at issue here is prohibited by both. The Sherman Act and the Act both prohibit as *per se* unlawful horizontal agreements among competitors to divide markets or to fix prices. *See, e.g.*, *Coll. Hills Corp.*, 91 Ill. 2d at 151 (price fixing and division of markets *per se* illegal under Act); *Carriage Way W., Inc.*, 88 Ill. 2d at 309 (same for price fixing under Act); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (same for division of markets under Sherman Act); *United States v. Container Corp. of Am.*, 393 U.S. 333, 337 (1969) (same for price fixing under Sherman Act). In such agreements, competitors agree to charge the same price or limit the companies from which customers can buy, and as a result they do not compete for business by offering lower prices or better quality products and services. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219 (1940). These agreements have a "pernicious effect on competition" and are thus presumptively illegal. *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). Courts, therefore, need not engage in an

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

"elaborate inquiry" to know that these agreements harm competition or address the "business excuse for their use," and can also avoid "an incredibly complicated and prolonged economic investigation into the entire history of the industry involved." *Id.*; *see* 740 ILCS 10/3(1); Bar Comm. Cmts-1967.

Federal courts have explained that no-poach and wage-fixing agreements are types of market allocation and price-fixing agreements subject to *per se* liability. *In re Railway Industry Employee No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019).[7] No-poach and wage-fixing agreements are *per se* illegal because they "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals*, at 4 (Oct. 2016); *see DeSlandes I*, 2018 WL 3105955, at *6 (citing this guidance). Specifically, they deprive workers of free-market competition for their labor and result in lower wages and poorer benefits and employment conditions. *See Antitrust Guidance* at 2; *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995) ("'employer conspiracies controlling employment terms . . . tamper with the employment market and

[7] *See, e.g.*, *eBay, Inc.*, 968 F. Supp. 2d at 1039; *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 157 (N.D.N.Y. 2010); *Doe v. Arizona Hosp. & Healthcare Ass'n*, No. CV07-1292-PHX-SRB, 2009 WL 1423378, at *2 (D. Ariz. Mar. 19, 2009).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

thereby impair the opportunities of those who sell their services there'") (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 377c (1995)).[8]

In short, Section 3(1) was based on federal antitrust law. Like federal law, it prohibits as *per se* unlawful price-fixing and market allocation agreements, which include wage-fixing and no-poach conspiracies. Federal precedent is especially useful here, because no Illinois court before the circuit court in this action has addressed whether Section 3(1) reaches horizontal agreements to commit *per se* offenses in which a noncompetitor participates. Accordingly, just like courts before it, this court should give Section 3(1) "a construction which keeps it consistent with the Sherman Act." 740 ILCS 10/11, Bar Comm. Cmts.-1967.

B. Federal authority establishes that horizontal agreements among competitors are *per se* unlawful even when a noncompetitor participates.

Federal authority establishes that the conspiracies alleged by the State are horizontal and are thus subject to *per se* liability under Section 3(1), notwithstanding Colony's participation. A "horizontal" agreement is one "between competitors at the same level of the market structure . . . to minimize competition." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972). By contrast, a "vertical" agreement is one between entities "at

---

[8] Such agreements are so harmful to workers and competition that employers who enter no-poach and price-fixing agreements face criminal liability under federal law. *Antitrust Guidance* at 2; *United States v. Hee*, No. 2:21-cr-00098 (D. Nev.) (criminal prosecution of agreement to fix nurses' wages).

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

different levels of the market structure." *Id.* Horizontal agreements to fix wages or prevent poaching are "naked restraints of trade with no purpose except stifling of competition," and are thus *per se* unlawful under federal law. *Id.* Federal courts have concluded that such agreements are horizontal even when, as here, a company that is vertically situated to the competitors (such as a customer or supplier) joins. This court should interpret Section 3(1) of the Act consistently with this guidance. Otherwise, employers who enter horizontal agreements to fix wages or prevent poaching that would otherwise be *per se* unlawful could escape antitrust liability simply by involving a noncompetitor in their scheme.

Federal courts have consistently concluded that restraints among competitors are horizontal (and thus *per se* unlawful) even when a noncompetitor joins the conspiracy. For example, in *Toys "R" Us, Inc. v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000), a retailer convinced its suppliers to boycott the retailer's competitors. *Id.* at 932. The retailer argued that *per se* liability did not apply because its policy comprised vertical agreements between itself and each supplier. *Id.* at 935. The Seventh Circuit disagreed, explaining that although the retailer had set the "demands," it had facilitated a "horizontal agreement" among the suppliers to collude and suppress competition between them that was subject to *per se* liability. *Id.* at 935-36; *see Denny's Marina, Inc. v. Renfro Prod., Inc.*, 8 F.3d 1217, 1219-22 (7th Cir. 1993) (holding agreement by marine dealers and non-competing boat

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

show hosts to exclude marine dealer competitor from shows was horizontal because non-competitors' participation did "not transform [the restraint] into a vertical agreement").

Likewise, in *United States v. Apple*, 791 F.3d 290 (2d Cir. 2015), the federal court determined that an agreement between Apple, which sells eBooks, and several competitor eBook publishers to fix eBook prices was horizontal. *Id.* at 325. The court reasoned that although Apple had vertical contracts with the publishers, Apple could not "escape *per se* liability" simply because it was a "vertical organizer of a horizontal conspiracy" that suppressed competition among the publishers. *Id.*; *see also In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 337 (3d Cir. 2010) (agreement among competitor insurers was horizontal even though insurance broker, "an entity vertically oriented to the insurers," organized it); *United States v. MMR Corp. (LA)*, 907 F.2d 489, 498 (5th Cir. 1990) (agreement among competitors was horizontal even if joined by noncompetitor); *In re Loc. TV Advert. Antitrust Litig.*, No. 18 C 6785, 2020 WL 6557665, at *14 (N.D. Ill. Nov. 6, 2020) (describing as horizontal a price-fixing agreement among competing broadcasters that was facilitated by sale representation firms that served, but did not compete with, the broadcasters).

The same analysis applies to the Act. *See* 740 ILCS 10/11 (2020). The Act prohibits a person from entering into price-fixing or market allocation conspiracies with "any other person who is, or but for a prior agreement would

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

be, a competitor of such person." 740 ILCS 10/3(1) (2020). When there is such an agreement "between A and B," who are competitors, "there is no reason why others joining that conspiracy must be competitors." *MMR Corp. (LA)*, 907 F.2d at 498. Otherwise, competitors could escape *per se* liability for horizontal restraints on competition "simply because their conspiracy depended upon the participation of a middle-man." *Ins. Brokerage Antitrust Litig.*, 618 F.3d at 337 (internal quotations omitted). Thus, it is immaterial here that Colony allegedly requested the specific wage used by Agency Defendants and facilitated communications between them, because the resulting agreement was horizontal: it restrained competition among Agency Defendants as to recruitment and wages.

C. Federal law is neither inapplicable nor unsettled.

Defendants again seek to evade the Act's instruction to consult federal precedent by claiming that the Act is materially different from federal antitrust law. AT Br. 25. They further contend that, even if federal law were relevant, it does not establish that *per se* liability governs horizontal agreements joined by noncompetitors. *Id.* at 25-29. Neither argument has merit.

At the threshold, defendants contend that federal precedent is inapplicable because, unlike the Sherman Act, the Act specifically lists the conduct to which *per se* liability attaches and excludes from this list some offenses that are *per se* illegal under federal law. *Id.* at 20-23, 25. As

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

defendants acknowledge, however, no-poach and wage-fixing agreements are *per se* illegal under both statutes. *See* C902 (in application for interlocutory appeal, conceding that Section 3(1) reaches price-fixing and market allocation); *supra* pp. 46-47 (cases concluding that no-poach and wage-fixing agreements are types of market allocation and price-fixing agreements). And they have not explained why federal precedent analyzing those *per se* offenses is inapplicable simply because Section 3(1) specifically enumerates offenses, but the Sherman Act does not.

Alternately, defendants argue that even if federal authority is useful, "it does not support that the *per se* rule applies." AT Br. 25. But the decisions upon which they rely are inapposite. To start, several of defendants' cited decisions involve different types of business arrangements than the one at issue here. In *National Collegiate Athletic Association v. Alston*, 141 S. Ct. 2141 (2021), the Court assessed the NCAA's horizontal scheme to fix student athletes' wages under the rule of reason because it assumed that the NCAA was a joint venture, in which "some collaboration" rather than competition among members is "necessary," *id*. at 2155, and emphasized that the NCAA operated in "an industry in which some horizontal restraints on competition are essential if the product is to be available at all," *id.* at 2157 (internal quotations omitted). The Court was thus hesitant to "condemn[ ] [the NCAA's] arrangements too reflexively," such as by applying *per se* liability. *Id.* at 2155.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

This analysis is inapplicable here, as defendants are not parties to a joint venture or operating in a unique industry where some restraints on trade are necessary for the product to exist at all. *See* C324 ¶ 24. Indeed, federal decisions since *Alston*—including one cited by defendants—have explained that "outside the extraordinary context at issue in *Alston*, naked horizontal agreements to fix the price of labor . . . are ordinarily *per se* illegal." *United States v. Jindal*, No. CV 4:20-CR-00358, 2021 WL 5578687, at *6 n.2 (E.D. Tex. Nov. 29, 2021) (slip op.); *see United States v. Penn*, No. 20-CR-00152-PAB, 2021 WL 4521904, at *3 n.1 (D. Colo. Oct. 4, 2021) (slip op.) (*Alston* involved a "particular situation" and "did not overrule *per se* analysis," including for price fixing); *DeSlandes v. McDonald's USA, LLC*, No. 17 C 4857, 2021 WL 3187668, at *6 (N.D. Ill. July 28, 2021) (slip op.) ("*DeSlandes II*") (cited at AT Br. 27) (describing *Alston* as applying "where the horizontal restraint is necessary in order the product to exist at all").

Defendants also cite several cases that addressed franchises. *See* AT Br. 26-27 (citing *Butler*, 331 F. Supp. 3d at 796-97; *Conrad v. Jimmy John's Franchise, LLC*, No. 18-cv-00133-NJR, 2021 WL 3268339, at *10 (S.D. Ill. July 30, 2021); *DeSlandes II*, 2021 WL 3187668, at *5-*7.[9] But defendants are not

[9] In *DeSlandes II*, the court determined that an agreement constituted "a horizontal restraint," notwithstanding that it had "vertical elements," because it "restrain[ed] competition for employees among horizontal competitors." 2021 WL 3187668, at *5. *DeSlandes II* thus contradicts defendants' argument that their agreement is not horizontal because it involved some vertical participation.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

franchises, C324 ¶ 24, which some courts have found involve a different analysis because antitrust law is less concerned about restraints between entities in the same brand (i.e., multiple Jimmy John's stores) than among different brands in the same industry (i.e., Jimmy John's and Subway), *Butler*, 331 F. Supp. 3d at 796-97 (distinguishing *Toys "R" Us* because that case involved restraints between competitor brands); *see Conrad*, 2021 WL 3268339, at *10 (case involved "a nationwide franchise's use of intrabrand restraints that were arguably designed to help the company more effectively compete with other brands") (cleaned up).

Similarly, defendants' reliance on cases involving dual distribution arrangements are inapposite, *see* AT Br. 27, because this case does not involve a dual distribution arrangement, in which manufacturers sell their products through distributors but also compete with those distributors by "sell[ing] directly to consumers," *Intercont'l Parts, Inc. v. Caterpillar, Inc.*, 260 Ill. App. 3d 1085, 1091 (1st Dist. 1994). In such situations, the common client or supplier has both a vertical and horizontal relationship with the competitors, so the court must determine whether the client or supplier was acting in a vertical or horizontal capacity for the relevant agreement. *See Clear Connection Corp. v. Comcast Cable Commc'ns Mgmt., LLC*, No. 2:12-CV-02910-TLN-DB, 2020 WL 6742889, at *4-*5 (E.D. Cal. Nov. 17, 2020) (explaining horizontal restraints are subject to *per se* liability but applying rule

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

of reason because defendant set vertical agreements with its customers) (cited at AT Br. 27).

Defendants' remaining case, *Aya Healthcare Servs., Inc.*, *v. AMN Healthcare, Inc.*, 9 F.4th 1102 (9th Cir. 2021), applied the rule of reason under an antitrust doctrine that is inapplicable here. *See* AT Br. 26-27, 30-31. In that case, staffing agency AMN Healthcare, Inc. could not satisfy hospitals' needs for travel nurses and thus contracted with another staffing agency, Aya Healthcare Services, Inc., to supply additional nurses. *Aya*, 9 F.4th at 1106. In exchange for the business, Aya agreed not to solicit AMN's employees. *Id.* The parties' business relationship ended after Aya tried to solicit AMN's employees, and Aya sued AMN, claiming that its non-solicitation covenant violated federal antitrust law. *Id.* at 1106-07. The court noted that this covenant was a horizontal restraint among competitors but concluded that it was an "ancillary" restraint rather than a "naked" restraint and thus subject to the rule of reason. *Id.* at 1110. "Under the ancillary restraints doctrine, a horizontal agreement is exempt from the *per se* rule" if the restraint is (1) "subordinate and collateral to a separate, legitimate transaction," and (2) "reasonably necessary to achieving that transaction's pro-competitive purpose." *Id.* at 1109 (internal quotations omitted). The court explained that these two requirements were met because (1) the parties had a legitimate, procompetitive contract with each other to supply nurses; and (2) as Aya

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

admitted, the non-solicitation agreement was "necessary to achieving that end." *Id.* at 1110.

Defendants' agreement, however, satisfied neither prong of the ancillary restraints doctrine. That doctrine must be strictly applied; otherwise, "[t]he per se rule would collapse if every claim of economies from restricting competition . . . could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category." *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984). Here, unlike the agencies in *Aya*, the Agency Defendants are not part of a legitimate, business arrangement with each other. *See* C320 ¶ 3. Indeed, defendants concede that they are not party to any joint business arrangement. C374, 377. Instead, they all had separate contracts with Colony. C322-23 ¶¶ 19-20. Nor can defendants show that their agreements were "reasonably necessary" to any such arrangement, even if one existed. *Aya*, 9 F.4th at 1110. They claim that they needed to implement no-poach and wage-fixing agreements so that they could supply Colony with sufficient workers, AT Br. 31, but, as Metro recognized, they could have attracted more workers if they offered better conditions and wages, C334 ¶ 67; *see* C331 ¶ 53; C334 ¶ 66—that is, if they had competed to attract workers. Given that the ancillary restraints doctrine does not apply here—and at the very least, the certified questions do not concern that doctrine, *see Luccio*, 2012 IL App (1st) 121153, ¶ 17—*Aya* is inapposite.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

Finally, defendants contend that the circuit court improperly relied on *Apple* because that decision arose outside the employment industry. AT Br. 28; *see* C614 (relying on *Apple* in concluding that restraint was horizontal, notwithstanding Colony's participation). Even though defendants themselves rely on cases "beyond the employment context," AT Br. 27, they insist that courts lack sufficient experience with restraints in the employment context to apply decisions from other contexts, *id.* at 28. Courts, however, have sufficient experience with the restrictions on competition created by market allocation and price-fixing agreements to conclude that they lack "redeeming virtue," including in the employment context. *N. Pac. Ry.*, 356 U.S. at 5; *see supra* pp. 46-47 & n.7. Defendants' "argument that the *per se* rule must be rejustified" for the employment industry because it "has not been subject to significant antitrust litigation" in Illinois "ignores the rationale for *per se* rules, which in part is to avoid the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved." *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 351 (1982) (internal quotations omitted); *see id.* at 349 (noting that, as to price-fixing agreements, Sherman Act "establishes one uniform rule applicable to all industries alike").

Defendants are also wrong that *Leegin* and *Toledo Mack* cast doubt on *Apple*'s reasoning. *See* AT Br. 28-29. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), addressed a standard vertical price-fixing agreement under which a leather goods manufacturer would only sell its

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

products to retailers if they agreed to resell those products at a certain price. *Id.* at 883. The Court, therefore, was not presented with a factual situation, like here, where a customer joined a horizontal restraint among competitors (i.e., if *Leegin* instead involved an agreement between the retailers of leather goods that was organized by the manufacturer). And although the Court discussed the relationship between vertical and horizontal agreements, defendants selectively quote that discussion, *see* AT Br. 28, in which the Court stated:

> *A horizontal cartel* among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price *is, and ought to be, per se unlawful*. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. *This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.*

Leegin, 551 U.S. at 893 (emphasis added and citations omitted). The Court, therefore, confirmed that horizontal price-fixing restraints are *per se* unlawful, and that a vertical agreement used to facilitate such a restraint can be useful evidence of a horizontal scheme. *Id.* But it did not, as defendants contend, conclude that a horizontal agreement is subject to the rule of reason merely because there was a separate vertical agreement.

Likewise, *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008), involved a situation factually distinct from both this case and *Apple*. There, a dealer of Mack trucks alleged two separate agreements: (1) a "horizontal agreement" among Mack dealers to fix prices

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

and (2) a separate "vertical agreement" between the manufacturer and distributer, Mack Trucks, Inc., and Mack dealers to deny sales to dealers that sought to compete on price. *Id.* at 209, 219. The court held that the first alleged agreement was horizontal and would be "*per se* unlawful." *Id.* at 221. Then, noting that there was insufficient evidence for a jury to conclude that "Mack itself was a party" to that agreement, *id.*, the court held that Mack's separate vertical agreement to support the horizontal restraint would be analyzed under the rule of reason, *id.* at 225. The court did not suggest that the parties would escape *per se* liability for the horizontal restraint merely because an entity, like Apple or Colony, with a vertical relationship to the competitors participated in the horizontal conspiracy. *Cf. Ins. Brokerage Antitrust Litig.*, 618 F.3d at 338 (noting that alleged conduct between insurers "plausibly implies a horizontal conspiracy" and broker's participation "does not alter that conclusion").

In short, defendants have not established that federal antitrust law is meaningfully distinct from the Act in its treatment of no-poach and wage-fixing agreements as *per se* offenses, and they cannot circumvent *per se* liability under federal law. As such, consistent with Section 11 of the Act, this court should follow federal law and conclude that Section 3(1) applies to an agreement among competitors to prevent poaching and fix wages, even if a noncompetitor joins the conspiracy.

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

D. Defendants' remaining arguments are unpersuasive.

None of defendants' other arguments to avoid liability under Section 3(1) have merit.

First, defendants argue that the Section 3(1)'s plain language only reaches agreements between competitors, and note that the Bar Committee's comments confirm that this section does not reach vertical agreements. AT Br. 23. Section 3(1), however, states that it applies to agreements among entities who are, or "would be," competitors, 740 ILCS 10/3(1) (2020), as Agency Defendants undisputedly are. It does not say that it no longer applies to these agreements if a noncompetitor facilitates the agreement, and the court should not read such limitations into the Act. *See Est. of Crawford*, 2019 IL App (1st) 182703, ¶ 30. And the Bar Committee's comments, which provide that Section 3(1) is "limited to agreements between . . . competitors" and thus "does not reach vertical agreements," 740 ILCS 10/3(1), Bar Comm. Cmts.-1967, are beside the point. The State did not allege a vertical agreement between non-competitors, but rather that defendants violated Section 3(1) through a horizontal restraint to restrict wages and competition among competitor staffing agencies. C324-35 ¶¶ 25-68.

Second, defendants ask this court to look to the Act's treatment of boycotts, *see* AT Br. 23-24, but that is irrelevant to the certified question here. As defendants note, the Act treats boycotts as rule of reason offenses, whereas some federal decisions treat them as *per se* offenses. *See id.* Here, by contrast,

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

both the Act and federal law treat market allocation and price-fixing agreements—the conduct at issue here—as *per se* unlawful, and that is why federal law is relevant.

Third, despite admitting that no Illinois court has addressed the question before this court, defendants claim that this court has already spoken on the subject by analyzing "blended horizontal and vertical conduct" under the rule of reason in *Caterpillar*. AT Br. 24-25. But *Caterpillar* was a dual distribution case, and, in any case, its reasoning is inapposite. Caterpillar, Inc., sold replacement parts for its construction equipment to distributors *and* also directly sold the replacement parts to consumers in competition with its distributors. 260 Ill. App. 3d at 1088. One of the distributors challenged Caterpillar's policy that limited to whom a distributor could sell the parts. *Id.* at 1088-89. This court held that this policy was a vertical restraint imposed by Caterpillar on entities at a different level of the distribution chain, and "the mere fact" that Caterpillar also sold replacement parts did not transform its policy into a restraint among competitors." *Id.* at 1092. The court added that the "[p]laintiff ha[d] not alleged any facts which would support a horizontal restraint of trade claim." *Id.* at 1093. Thus, that case did not involve a horizontal restraint among competitors facilitated by a noncompetitor, as alleged here. Moreover, this decision belies defendants' contention that federal authority is inapplicable, as this court was "guided by precedent

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

interpreting [f]ederal antitrust laws" when analyzing whether Section 3(1)'s *per se* liability applied to the alleged conduct. *Id.* at 1091.

Finally, although Rule 308 appeals are limited to "the specific question certified by the [circuit] court," *Luccio*, 2012 IL App (1st) 121153, ¶ 17, defendants stray from the certified question and ask this court to assess whether no-poaching and wage-fixing agreements have procompetitive effects and so should be considered *per se* offenses at all, *see* AT Br. 29-33. But the certified question asks whether Section 3(1) applies to horizontal restraints facilitated by vertical noncompetitors, C618, not whether no-poach and wage-fixing agreements should be considered *per se* illegal or instead subject to the rule of reason.

At any rate, defendants are wrong about the procompetitive effects of their conduct. They do not dispute (nor could they) that price-fixing and market allocation are *per se* illegal because they stifle competition. 740 ILCS 10/3(1), Bar Comm. Cmts.-1967 (listing such conduct as "'hard core' conspiratorial offenses" subject to *per se* liability). The same principles apply to the market for labor services because employees are entitled to the same antitrust protections as consumers. Indeed, the Supreme Court has long held that market allocation and price-fixing are without "redeeming virtue," *N. Pac. Ry.*, 356 U.S. at 5, and federal courts have long applied the same analysis to no-poach and wage-fixing agreements, *see Anderson v. Shipowners' Ass'n*, 272 U.S. 359, 362-63 (1926) (shipowners' agreement assigning seamen to

SUBMITTED - 21004258 - Antoinette (Toni) Vlasak - 1/11/2023 4:26 PM

particular ships was "precisely what [Sherman Act] condemns"); *see supra* pp. 46-47. Although defendants would like to avoid competing as to the wages offered to prospective workers, or as to working conditions that will motivate workers to stay in their jobs, *see* AT Br. 31-32, the General Assembly has chosen to "promote the unhampered growth of commerce and industry throughout the State by prohibiting restraints of trade" that "decrease competition," 740 ILCS 10/2 (2020).

CONCLUSION

For these reasons, the State of Illinois requests that this court answer the first certified question "No" and the second certified question "Yes."

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Plaintiff-Appellant

PRIYANKA GUPTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2109 (office)
(872) 272-0799 (cell)
CivilAppeals@ilag.gov (primary)
Priyanka.Gupta@ilag.gov (secondary)

February 8, 2022

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Ill. Sup. Ct. R. 341(a) and (b). The length of this brief, excluding the pages contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 14,631 words.

/s/ Priyanka Gupta
PRIYANKA GUPTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2109 (office)
(872) 272-0799 (cell)
CivilAppeals@ilag.gov (primary)
Priyanka.Gupta@ilag.gov (secondary)

CERTIFICATE OF FILING AND SERVICE

I certify that on February 8, 2022, I electronically filed the foregoing **Brief of Plaintiff-Appellee State of Illinois** with the Clerk of the Illinois Appellate Court, First Judicial District, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL System.

Amy B. Manning
amanning@mcguirewoods.com

Jeffrey A. Risch
jrich@salawus.com

David J. Fish
dfish@fishlawfirm.com

Angelo M. Russo
arusso@mcguirewoods.com

Sean A. McClelland
smcclelland@mcguirewoods.com

Patrick Morales-Doyle
pmoralesdoyle@thompsoncoburn.com

John R. Hayes
jhayes@salawus.com

Gabriel Aizenberg
aizenbergg@gtlaw.com

Sarah Zielinski
szielinski@mcguirewoods.com

Antoinette Vlasak
avlasak@mcguirewoods.com

Brian D. Straw
strawb@gtlaw.com

Scott Mendeloff
mendeloffs@gtlaw.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

By: /s/ Priyanka Gupta
PRIYANKA GUPTA
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2109 (office)
(872) 272-0799 (cell)
CivilAppeals@ilag.gov (primary)
Priyanka.Gupta@ilag.gov (secondary)

E-FILED
Transaction ID: 1-21-0840
File Date: 6/24/2022 1:31 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

No. 1-21-0840

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC, Defendants-Appellants.	Appeal from the Circuit Court of Cook County, Illinois Chancery Division Case Number 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding.

DEFENDANTS-APPELLANTS ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., AND COLONY DISPLAY LLC'S PETITION FOR REHEARING UNDER RULE 367

McGuireWoods LLP
Amy B. Manning
77 West Wacker
Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Firm ID No. 40426
amanning@mcguirewoods.com

Attorneys for Elite Staffing

SmithAmundsen LLC
John R. Hayes
150 N. Michigan Avenue
Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Firm ID No. 42907
jhayes@smithamundsen.com

Attorneys for Midway Staffing

Fish Potter Bolaños P.C.
David J. Fish
200 E. 5th Ave
Suite 123
Naperville, Illinois 60563
Telephone: (630) 355-7590
Firm ID No. 23522
dfish@fishlawfirm.com

Attorneys for Metro Staff

Additional counsel in signature block

TABLE OF POINTS AND AUTHORITIES

Page

INTRODUCTION 1

Statutes

740 ILCS 10/4 ....1, 2

Cases

O'Regan v. Arbitration Forums,
121 F.3d 1060, 1066 (7th Cir. 1997)..1, 2

ARGUMENT 2

I. Rehearing Is Warranted On The First Certified Question. 2

Rules

Ill. S. Ct. R. 367(b)...2

Cases

Amalgamated Transit Union v. Ill. Labor Relations Bd.,
2017 IL App (1st) 160999 (Ill. App. Ct. 1st Dist. 2017)................2

O'Regan v. Arbitration Forums,
121 F.3d 1060, 1066 (7th Cir. 1997)..3

A. Rehearing Is Necessary To Address The Court's Apparent Misapprehension Of "Labor Services."....................4

1. The "Labor Services" Question Concerns Labor Services Provided By Employees, Not The Services Staffing Agencies Provide To Clients..............4

Rules

Ill. S. Ct. R. 308 6

Cases

O'Regan v. Arbitration Forums,
121 F.3d 1060, 1066 (7th Cir. 1997)..4, 6

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

Walker v. Carnival Cruise Lines, Inc.,
383 Ill. App. 3d 129 (1st Dist. 2008) 6

2. Properly Understood, Labor Services Are Definitionally Excluded From IAA Scrutiny..................7

Statutes

740 ILCS 10/4 8

Rules

Ill. S. Ct. R. 308 10

Ill. S. Ct. R. 308(a) 9

Cases

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) 8

Donnelly v. Donnelly,
2015 IL App (1st) 142619 (Ill. App. Ct. 1st Dist. 2015) 9

Deslandes v. McDonald's USA, LLC,
No. 17 C 4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018).........8

In re Tirso,
No. 11-01873 (RJF),
2022 WL 567704 (Bankr. D. Haw. Feb. 23, 2022) 9

O'Regan v. Arbitration Forums,
121 F.3d 1060, 1066 (7th Cir. 1997)..8, 9

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

Other Authorities

Press Release, Illinois Attorney General,
Attorney General Raoul Files Lawsuit Against Staffing Agencies For Use Of No-Poach Agreements (June 6, 2022), https://illinoisattorneygeneral.gov/pressroom/2022_06/20220606.html.....9

B. Rehearing Would Also Help Clarify Other Aspects Of The Court's Reasoning. 10

CONCLUSION..........11

Defendants–Appellants Elite Staffing, Inc., Metro Staff, Inc., Midway Staffing, Inc., and Colony Display LLC, pursuant to Rule 367, file this petition for rehearing, and for reasons state:

INTRODUCTION

Defendants seek rehearing on the first certified question, which relates to the Illinois Antitrust Act's ("IAA") carveout of "labor which is performed by natural persons as employees of others" from the definition of "Service." 740 ILCS 10/4. Defendants respectfully submit that Court's June 3 opinion misunderstood the first certified question and the nature of this case. This case involves the same market at issue in *O'Regan v. Arbitration Forums*, 121 F.3d 1060, 1066 (7th Cir. 1997): the market for individual labor. Coordination in that market is the only conduct challenged in this case. Accordingly, when the first certified question used the term "labor services," it was intended to address whether the IAA reaches conduct that allegedly restrains the market for individual labor.

However, the Court appears to have thought the question's "labor services" term referred to "labor-related services provided *by* temporary staffing agencies" to their clients. (Current Op. ¶ 11 (emphasis added).) And it likewise apparently thought that Defendants were attempting to broaden the IAA's exception beyond individual labor by arguing that the services they provide are "conduct related to" labor services. (*Id.* ¶ 17.) The Court therefore reframed the question to address whether the temporary staffing industry is exempt from the IAA. (*Id.* ¶ 11.)

But the reframed question does not capture what Defendants and the trial court were asking or intending to ask. This case does not involve a restraint of trade for the services staffing agencies provide to their clients; it involves alleged coordination in the market for

employee labor. That same market is likewise the subject of the first certified question-as-asked. The parties and trial court were using "labor services" to refer to the services provided by individual employees. Similarly, the "conduct related to" phrase was used to refer to coordination about those employee-provided services. As a result, all involved were describing the same conduct at issue in the Seventh Circuit's *O'Regan* decision: coordination on the wages and hiring of employees. 121 F.3d at 1066.

With the intended framing of "labor services" as employee-provided labor, Defendants submit that the answer to the first certified question is "Yes." 740 ILCS 10/4. In fact, the Court's current opinion already reaches that conclusion. Per the Court, "otherwise anticompetitive action restraining individual labor is permissible" because "individual labor is not a service." (Current Op. ¶ 17.) Thus, alleged agency coordination as to employees' labor would appear to be beyond the IAA's reach.

Accordingly, Defendants respectfully request that this Court grant rehearing, answer the first certified question as initially posed "Yes," and embrace as its direct holding its already-written conclusion that the IAA does not reach coordination "restraining individual labor."

ARGUMENT

I. Rehearing Is Warranted On The First Certified Question.

Rehearing is the proper mechanism to address points that "have been overlooked or misapprehended by the court." Ill. S. Ct. R. 367(b); *see, e.g.*, *Amalgamated Transit Union v. Ill. Labor Relations Bd.*, 2017 IL App (1st) 160999, ¶ 60 (Ill. App. Ct. 1st Dist. 2017) (granting rehearing based on a misinterpretation of a legally relevant fact).

As posed in the first certified question, Defendants and the trial court requested that the Court address the following question concerning whether the IAA applies to coordination with respect to employee labor:

> Whether the definition of "Service" under Section 4 of the Illinois Antitrust Act, 740 ILCS 10/4, which states that Service "shall not be deemed to include labor which is performed by natural persons as employees of others," applies to the Act as a whole and thus excludes all labor services from the Act's coverage.

(Current Op. ¶ 10.)

Defendants respectfully submit that rehearing is proper because the Court misapprehended the "labor services" term in that question. That term, as used by the parties, the trial court, and the Seventh Circuit's *O'Regan* decision, is industry-agnostic. It refers to employee-provided labor—not to agency-provided staffing services. As the text, federal cases, and even this Court's own conclusions make clear, coordination on employee labor falls outside the statute. Properly understood, then, Defendants believe the as-posed certified question easily can be answered "Yes."

Additionally, if the Court grants Defendants' rehearing petition, other disputed aspects of the Court's current opinion—most significantly, its discussion about the relationship of the IAA to the federal union exemption—may become superfluous. Defendants respectfully suggest those sections could be omitted or revised in any opinion upon rehearing, as appropriate.

A. Rehearing Is Necessary To Address The Court's Apparent Misapprehension Of "Labor Services."

1. The "Labor Services" Question Concerns Labor Services Provided By Employees, Not The Services Staffing Agencies Provide To Clients.

It appears that the Court thought that Defendants were trying to "extend[]" *O'Regan*'s "labor services" holding to a new and distinct setting: the staffing services they provide to clients. (Current Op. ¶¶ 17, 19.) But Defendants were invoking *O'Regan*'s "labor services" term for exactly what *O'Regan* used it: to refer, in this Court's words, to "the market for the employee's own individual labor." (*Id.* ¶ 19.) So when Defendants and the trial court asked in the certified question whether the definitional carveout operated to "exclude[] all labor services from the Act's coverage," they meant precisely that. Defendants and the trial court are interested in determination by this Court as to whether all markets involving an employee's individual labor fall outside the IAA's prohibitions. Defendants and the trial court are not seeking a determination by this Court as to whether services provided by staffing agencies to their clients are excluded because they are conceptually similar to labor services. By the same token, Defendants occasionally used the phrase "conduct related to labor services" to refer to coordination affecting the market for an employee's individual labor—not, as the Court appears to have thought, to expand the labor services carveout to non-employee-provided services conceptually like labor. (*Cf. id.* ¶ 17; *see* Defs.' Opening Br. 11.) The legal question, in other words, is whether the labor services carveout excludes coordination on the terms of employment from the IAA's reach.

That misapprehension resulted in the Court's decision to reframe the first certified question. Based on its view that Defendants and the trial court intended "labor services"

to mean the staffing services the agencies provide (rather than the labor services from employees), the Court changed the first certified question to an industry-specific one about temporary staffing agencies:

> [W]hether the exclusion of individual labor from the definition of "service" in section 4 of the Act also excludes the labor-related services provided by temporary staffing agencies and therefore exempts such agencies from the Act's coverage.

(Current Op. ¶ 11.)

Unfortunately, by reframing the question, the Court materially altered it in a way that makes its answer largely inapplicable to this case. The question is not whether staffing agencies are categorically exempt from the IAA because they provide "labor-related services." (*Id.*) Defendants do not dispute that the staffing services they provide to their clients are not affected by the labor-services carveout. Rather, the question is whether conduct allegedly restraining *employees'* "labor services" is subject to the IAA. (*Id.* ¶ 10.)

That all makes sense given that alleged coordination on employee labor is the only charged conduct in this case. Per the State, Defendants' alleged "agreements . . . to refuse to solicit or hire each other's employees and to fix the wages paid to their employees" violates the IAA. (Compl. ¶ 1, A1; *see also id.* ¶¶ 69–78, A17–19.) Nothing in the Complaint contends that Defendants imposed any restraints in the market for staffing services. There are no allegations, in other words, that Defendants engaged in any misconduct in "the hiring and managing services provided by temporary staffing agencies." (Current Op. ¶ 22.) Accordingly, the State's Complaint likewise reveals that the "labor services" question deals with coordination on employee labor generally, rather than the client-facing conduct of the staffing services industry particularly.

The parties' (and the trial court's) filings here further confirm that the question's focus is whether coordination on employees' terms of employment falls outside the IAA.[1] Defendants' briefing before this Court was devoted to that employee-focused wage- and hiring-coordination point, contending that such collaboration was not subject to the IAA.[2] Defendants similarly asserted as much during oral argument,[3] in their Rule 308 petition,[4] and in their filings before the trial court.[5] For their part, the State and the trial court also

---

[1] Defendants acknowledge that the Court is limited to the questions before it. But where the Court is uncertain as to the scope of the question as posed (as was apparently the case here), the parties' articulations of the relevant issues in the case can be helpful guides to what the question is asking. *See, e.g.*, *Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133–34 (1st Dist. 2008). And, as discussed below, from the briefing and underlying pleadings, there appears to be no dispute between the parties (or the trial court) that the first certified question concerns employee labor services, not temporary staffing services.

[2] (*See* Defs.' Opening Br. at 11 (identifying federal case law interpreting the IAA as holding that "claims relate[d] to an alleged market for labor services . . . are specifically excluded by § 10/4 of the Act" (quoting *O'Regan*, 121 F.3d at 1066)); Defs.' Reply at 5 ("The carveout recognizes that wage- and hiring-coordination can be beneficial across all industries"), 8 (noting that, under the IAA, "unlike professional services, employees' labor services would not be covered", thereby leaving "a (smaller) carveout for only a subset of services—those in the employer–employee context"), 11 (identifying that federal cases have "unequivocally held that the IAA specifically excludes claims related to an alleged market for labor services and that no-hire agreements therefore fall beyond the plain language of the statute" (internal quotations, citations, and alterations omitted).)

[3] (*E.g.*, OA Recording at 4:10–16 ("On its face, that language applies to the employer–employee relationship."), 4:25–29 ("The Act does not apply to antitrust conspiracies affecting employment.").)

[4] (*See* A257 (asserting that Rule 308 certification was appropriate "because no Illinois appellate court has addressed whether the IAA reaches labor services, and particularly whether the IAA reaches conduct such as the no-poaching and wage-fixing agreements alleged by the State").)

[5] (*E.g.*, A28–30 (moving to dismiss the Complaint because the alleged conduct only involved "the market for temporary workers assigned to Colony"); A146 (reply arguing that "every court to address the issue has barred IAA claims in the labor/employment context"); A233 (trial court Rule 308 motion asserting that the question is important in part because "[n]o Illinois appellate court has addressed the specific issue of whether the IAA's plain language excluding 'labor' from its definition of services therefore prohibits claims

view the question through that lens: both focused on whether coordination regarding employee labor was subject to the IAA (they both contend it is).[6] Indeed, the State led off its oral argument with a pointed (but accurate) statement that the first certified question concerned *all* employment relationships: "[T]he exemption that the Defendants are seeking is broad. It would not just apply to them or the entire staffing industry but for all employers in Illinois . . . ." (OA Recording at 28:00–12.)

In short, both the parties and the trial court (correctly) understood the "labor services" question as relating to the services provided by employees—*not* the staffing services Defendants in turn provide to their clients. Conduct in the employee labor market is, after all, the only thing the State charged here. Defendants respectfully submit that, in exclusively focusing on whether the temporary staffing services Defendants provide to clients are subject to the IAA, the Court misapprehended the question.

2. Properly Understood, Labor Services Are Definitionally Excluded From IAA Scrutiny.

Properly understood as a question about whether the IAA reaches conduct involving an employee's individual labor, the Court's decision already answers that question in the Defendants' favor. As the Court acknowledges, the statute's text is crystal clear. (Current Op. ¶ 15.) The statute says that coordination about labor services—that is, agreements concerning "labor which is performed by natural persons as employees of

---

under the IAA dealing with all employment, such as the alleged no poaching and wage-fixing agreements here").)

[6] (*See* State Br. 19 ("[T]he market for labor services refers to the supply of and demand for labor, in which individuals sell their services and employers purchase those services, i.e., employe[r]s hire employees"); A226–27 (trial court order denying motion to dismiss because the labor services carveout merely replicated the union exemption—not because it did not extend to staffing agencies).)

others"—is not subject to the IAA. 740 ILCS 10/4. The import is obvious. According to the Court, the labor-services carveout "clearly expresses the idea that an individual's labor for their employer is not a service." (Current Op. ¶ 15.) Thus, per the Court, "individual labor is not a service, so that otherwise anticompetitive action restraining individual labor is permissible." (*Id.* ¶ 17.) Accordingly, the Court's holding adopts the position Defendants are advancing in this matter—that the State's claims are outside the scope of the IAA because they involve allegations that Defendants engaged in anticompetitive conduct restraining individual labor.

Cases like *O'Regan* (which the Court apparently agreed with), *Deslandes* (which the Court partially distinguished on other grounds), and *Butler* (which the Court did not address) confirm the Court's plain text reading of the IAA: it does not apply to labor services, nor, therefore, to coordination on employee labor.[7] As such, Defendants do not think that these federal cases "reach[] a different conclusion" on that point—and it appears that the Court agrees. (*Id.* ¶ 18.) By the Court's reading (which Defendants agree with), *O'Regan* held that the IAA does not permit a "claim related to an alleged restraint on [an employee's] individual labor." (*Id.* ¶ 19.) That holding, the Court said, is "entirely consistent" with its own reading that the statute "allow[s] such a restraint." (*Id.*.) In short, it appears that this Court has concluded that the IAA does *not* apply to labor services, as

[7] *O'Regan*, 121 F.3d at 1066 ("[L]abor services . . . are specifically excluded by § 10/4 of the Act."); *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *9 (N.D. Ill. June 25, 2018) ("[T]he plain language of the statute excludes plaintiff's claim, which alleges that the no-hire agreement artificially suppressed her wage."); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) ("[T]he [IAA] specifically excludes claims 'relate[d] to an alleged market for labor services.'" (quoting *O'Regan*, 121 F.3d at 1066)).

the parties and trial court understood the term. That conclusion would seem to answer the as-posed first certified question "Yes."

But because the Court answered a different question than Defendants and the trial court intended, it is likely that the trial court and other future courts will treat as dicta this Court's apparent conclusion that wage- and hiring-coordination is not within the scope of the IAA. *Cf. Donnelly v. Donnelly*, 2015 IL App (1st) 142619, ¶¶ 19–21 (Ill. App. Ct. 1st Dist. 2015) (assuming without directly resolving that reasoning "outside the scope of the question certified" could be treated as dicta); *see also, e.g.*, *In re Tirso*, No. 11-01873 (RJF), 2022 WL 567704, at *3 n.26 (Bankr. D. Haw. Feb. 23, 2022) ("[T]hat language is dicta as it was not necessary to answer the certified question."). To actually bind the trial court and "materially advance the ultimate termination of the litigation," Ill. S. Ct. R. 308(a), that conclusion likely needs to be a direct answer on the as-posed certified question, or at least a more direct holding that the trial court will treat as such on remand.

Simply put, unless the Court's opinion is clarified, it will create even greater confusion regarding the scope of the IAA and risk unduly prejudicing Defendants here. Indeed, the State has already claimed to have "won" the issue in a way that allows "greater potential for antitrust enforcement under Illinois law"—when in fact the Court's ruling narrowly interpreted the IAA just as the Seventh Circuit did in *O'Regan*.[8] Defendants respectfully submit that the Court's reasoning on the subject should therefore become its direct holding on the as-posed first certified question: "otherwise anticompetitive action

---

[8] *See* Press Release, Illinois Attorney General, *Attorney General Raoul Files Lawsuit Against Staffing Agencies For Use Of No-Poach Agreements* (June 6, 2022) ("On June 3, the Attorney General won an initial victory in that case when the Illinois Appellate Court agreed that the temporary staffing industry can't use a loophole to avoid state antitrust protections."), https://illinoisattorneygeneral.gov/pressroom/2022_06/20220606.html

restraining individual labor" is "permissible" because "labor is not a service." (Current Op. ¶ 17.) Directly holding as much and answering "Yes" to the original question would definitively resolve the Rule 308 question at the core of this case.

B. Rehearing Would Also Help Clarify Other Aspects Of The Court's Reasoning.

Should the Court grant rehearing, it may wish to clarify one additional element of its analysis on the first certified question: its discussion of the relationship between the IAA's labor services carveout and the Clayton Act's union exemption. As written, the Court's opinion could be read to suggest that the Section 4 definitional carveout tracks the union-specific protections in the Clayton Act in some way. (*Id.* ¶ 16 (referencing that the IAA's Section 5 union exemption is modeled off the Clayton Act and then referencing that Section 5 should be read together with Section 4).) But the Court's subsequent reasoning clarifies that Section 4 does something different than just protect unions: by "provid[ing] that individual labor is not a service," the carveout makes "permissible" "otherwise anticompetitive action restraining individual labor." (*Id.* ¶ 17.) That is at once broader and narrower than the Clayton Act union exemption—the carveout applies no matter who is doing the "restraining," but does not apply to the sort of non-labor restraints that unions sometimes employ. Because the two have different effects, it is essentially unnecessary to reach any conclusion about the Clayton Act's union exemption to hold one way or the other on the scope of the Section 4 definitional carveout. This Court may therefore wish to take the opportunity of rehearing to reframe its discussion of the subject to avoid any tension with its conclusion as to the effect of carveout at the core of the certified question.

CONCLUSION

WHEREFORE, Defendants-Appellants ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC pray that this Honorable Court grant rehearing on the first certified question and answer it "Yes" by holding that "otherwise anticompetitive action restraining individual labor" is "permissible" because "labor is not a service."

Dated: June 24, 2022

Respectfully submitted,

ELITE STAFFING, INC.

By: */s/ Angelo M. Russo*

MCGUIREWOODS LLP

Amy B. Manning
Angelo M. Russo
Sarah A. Zielinski
77 West Wacker, Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Facsimile: (312) 558-4386
Firm ID No. 40426
amanning@mcguirewoods.com
arusso@mcguirewoods.com
szielinski@mcguirewoods.com

Sean A. McClelland
888 16th Street N.W., Suite 500
Black Lives Matter Plaza
Washington, DC 20006
Telephone: (202) 828-2838
smcclelland@mcguirewoods.com

MIDWAY STAFFING, INC.

By: */s/ John R. Hayes*

SMITHAMUNDSEN LLC

Jeffrey A. Risch

3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@smithamundsen.com

John R. Hayes
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210
Firm ID No. 42907
jhayes@smithamundsen.com

METRO STAFF, INC.

By: _/s/ David J. Fish_

FISH POTTER BOLAÑOS P.C.

David J. Fish
Kimberly Hilton
John Kunze
200 E 5th Ave Suite 123
Naperville, Illinois 60563
Telephone: 630-355-7590
Facsimile: 630-778-0400
Firm ID No. 23522
dfish@fishlawfirm.com
docketing@fishlawfirm.com
admin@fishlawfirm.com

COLONY DISPLAY LLC

By: _/s/ Scott Mendeloff_

GREENBERG TRAURIG, LLP

Scott Mendeloff
Gabriel Aizenberg
Brian D. Straw
David S. Repking
77 West Wacker Drive, Suite 3100

Chicago, Illinois 60601
(312) 456-8400
Firm ID No. 36511
mendeloffs@gtlaw.com
aizenbergg@gtlaw.com
strawb@gtlaw.com
repkingd@gtlaw.com

No. 1-21-0840

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiffs-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Illinois Chancery Division Case Number 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a), (b), and 367. The length of this petition for rehearing, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 11 pages.

By: */s/ Sean A. McClelland*

CERTIFICATE OF SERVICE

I certify that on June 24, 2022, a copy of the within instrument was filed via the Court's approved electronic filing service provider, which will automatically serve and send notification of such filing to all parties who have appeared and have not until this point been found by the Court to be in default for failure to plead. Additionally, a true and correct copy was served on the below parties by email pursuant to Illinois Supreme Court Rule 11.

By: */s/ Sean A. McClelland*

Priyanka Gupta
Assistant Attorney General
Elizabeth L. Maxeiner
Senior Assistant Attorney General,
Antitrust Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-1004
priyanka.gupta@ilag.gov
Elizabeth.Maxeiner@ilag.gov
civilappeals@ilag.gov

Counsel for Plaintiffs

SMITHAMUNDSEN LLC

Jeffrey A. Risch
3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@smithamundsen.com

John R. Hayes
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210
Firm ID No. 42907
jhayes@smithamundsen.com

Counsel for Midway Staffing, Inc.

GREENBERG TRAURIG, LLP

Scott Mendeloff
Gabriel Aizenberg
Brian D. Straw
David S. Repking
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
(312) 456-8400
Firm ID No. 36511
mendeloffs@gtlaw.com
aizenbergg@gtlaw.com
strawb@gtlaw.com
repkingd@gtlaw.com

Attorneys for Colony Display, LLC

FISH POTTER BOLONOS P.C.

David Fish
Kimberly Hilton
John Kunze
200 E 5th Ave Suite 123
Naperville, Illinois 60563
Telephone: 630-355-7590
Facsimile: 630-778-0400
Firm ID No. 23522
dfish@fishlawfirm.com
docketing@fishlawfirm.com
admin@fishlawfirm.com

Counsel for Metro Staff, Inc.

THOMPSON COBURN LLP
John J. Cullerton
Patrick Morales-Doyle
55 East Monroe Street, 37th Floor
Chicago, Illinois 60603
Telephone: (312) 346-7500
Facsimile: (312) 580-2201
jcullerton@thompsoncoburn.com
pmoralesdoyle@thompsoncoburn.com

Counsel for Staffing Services Association of Illinois, Amicus Curiae

Ada Sandoval
Mark H. Birhanu
Legal Department
Raise the Floor Alliance
1 N. LaSalle Street, Suite 1275
Chicago, IL 60201
(312) 795-9115
asandoval@raisethefflooralliance.org
mbirhanu@raisethefflooralliance.org

Counsel for Raise the Floor Alliance et al., Amici Curiae

Eric A. Posner
5611 South Blackstone Avenue
Chicago, Illinois 60637
(773) 633-3834
eposner@uchicago.edu

Amicus Curiae

No. ________

IN THE
SUPREME COURT OF ILLINOIS

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiff-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC, Defendants-Appellants.	Petition for Leave to Appeal from the Appellate Court of Illinois, First Judicial District, No. 1-21-0840 There Heard on Appeal from the Circuit Court of Cook County, Illinois Chancery Division, No. 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding.

DEFENDANTS-APPELLANTS ELITE STAFFING, INC., METRO STAFF, INC., AND MIDWAY STAFFING, INC.'S PETITION FOR LEAVE TO APPEAL UNDER RULE 315

MCGUIREWOODS LLP
Amy B. Manning
77 West Wacker
Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Firm ID No. 40426
amanning@mcguirewoods.com

Attorneys for Elite Staffing

SMITHAMUNDSEN LLC
John R. Hayes
150 N. Michigan Avenue
Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Firm ID No. 42907
jhayes@smithamundsen.com

Attorneys for Midway Staffing

FISH POTTER BOLAÑOS P.C.
David J. Fish
200 E. 5th Ave
Suite 123
Naperville, Illinois 60563
Telephone: (630) 355-7590
Firm ID No. 23522
dfish@fishlawfirm.com

Attorneys for Metro Staff

Additional counsel in signature block

ORAL ARGUMENT REQUESTED IF PETITION IS GRANTED

E-FILED
8/1/2022 6:04 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

TABLE OF POINTS AND AUTHORITIES

Page

PRAYER FOR LEAVE TO APPEAL 1

Statutes

740 ILCS 10/4 1

Rules

Ill. S. Ct. R. 318(a) 1

JUDGMENT OF THE APPELLATE COURT..2

Rules

Ill. S. Ct. R. 315(b)(1) 2

POINTS RELIED UPON IN SEEKING REVIEW 2

Statutes

740 ILCS 10/4 3

Cases

O'Regan v. Arbitration Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 2

STATEMENT OF FACTS 3

Statutes

740 ILCS 10/4 4

Cases

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018) 4

Deslandes v. McDonald's USA, LLC,
No. 17-C-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) 4, 6

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

O'Regan v. Arbitration Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 4, 6

Rules

Ill. S. Ct. R. 308 4

Ill. S. Ct. R. 367 6

ARGUMENT 7

I. The Appellate Court's Decision Conflicts With The Seventh Circuit's Interpretation Of The IAA In *O'Regan*. 7

Cases

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018) 9

Deslandes v. McDonald's USA, LLC,
No. 17-C-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018) 8, 9

Donnelly v. Donnelly,
2015 IL App (1st) 142619 (Ill. App. Ct. 1st Dist. 2015) 8

Duldulao v. St. Mary of Nazareth Hosp. Ctr.,
115 Ill. 2d 482 (Ill. 1987) 7, 9-10

In re Tirso,
No. 11-01873 (RJF),
2022 WL 567704 (Bankr. D. Haw. Feb. 23, 2022) 8

Moon v. Rhode,
2016 IL 119572 (Ill. 2016) 7, 9

O'Regan v. Arbitration Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 7, 8, 9, 10

People v. Kokoraleis,
132 Ill. 2d 235 (Ill. 1989) 10

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

Sproull v. State Farm Fire & Cas. Co.,
2021 IL 126446 (Ill. 2021) 7, 9

Reddington v. Staten Island Univ. Hosp.,
511 F.3d 126 (2d Cir. 2007) 7, 10

Reiser v. Residential Funding Corp.,
380 F.3d 1027 (7th Cir. 2004) 10

Rules

Ill. S. Ct. R. 315(a) 7

II. Whether The IAA Reaches Wage And Hiring Coordination Is Critical To Businesses Throughout The State. 11

Rules

Ill. S. Ct. R. 315(a) 11

Other Authorities

Press Release, Illinois Attorney General, *Attorney General Raoul Files Lawsuit Against Staffing Agencies For Use Of No-Poach Agreements* (June 6, 2022), https://illinoisattorneygeneral.gov/pressroom/2022_06/20220606.html ... 11

III. Other Factors Likewise Support Granting Leave To Appeal. 12

Cases

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 13

Kelsey v. Comm'r of Corr.,
274 A.3d 85 (Conn. 2022) 13

O'Regan v. Arbitration Forums, Inc.,
121 F.3d 1060 (7th Cir. 1997) 13

TABLE OF POINTS AND AUTHORITIES
(continued)

Page

Rules

Ill. S. Ct. R. 308 12

Ill. S. Ct. R. 315(a) 12, 13

CONCLUSION 13

Defendants–Appellants Elite Staffing, Inc., Metro Staff, Inc., and Midway Staffing, Inc., pursuant to Rule 315, file this petition for leave to appeal the Appellate Court's resolution of the first certified question below, and for reasons state:[1]

PRAYER FOR LEAVE TO APPEAL

This case addresses a question of critical importance to businesses across Illinois: whether the Illinois Antitrust Act ("IAA") reaches alleged wage and hiring coordination among employers. The IAA directly answers this question. It says that the "services" encompassed by the IAA "shall not be deemed to include labor which is performed by natural persons as employees of others." 740 ILCS 10/4. Thus, by its plain language, the IAA does not reach employer coordination about the services provided by individual employees. Not surprisingly then, every case before this one to address the issue has held that wage or hiring coordination is not actionable under the IAA.

Defendants pray for leave to appeal from the Appellate Court's decision allowing the State to pursue claims for alleged wage and hiring coordination under the IAA. The Appellate Court's decision creates a new state–federal split and confuses, rather than clarifies, this important issue. Instead of addressing whether the IAA reaches the market for services provided by individual employees, the Appellate Court inaccurately rewrote the certified question. The reformed question addressed a market not relevant to the State's allegations: the market for the services staffing agencies provide to their clients. But in holding that the IAA *does* reach the services staffing agencies provide to their clients, the

[1] Defendants Elite, Metro, and Midway understand that Defendant Colony Display LLC intends to file its own petition for leave to appeal with respect to the second certified question. Should Colony's separate petition be granted, Elite, Metro, and Midway respectfully request the opportunity to brief the issues raised in that petition as they relate to Elite, Metro, and Midway. *See* Ill. S. Ct. R. 318(a).

Appellate Court also reasoned that the IAA *does not* reach restraints on employees' individual labor. If that is true, the State's wage and hiring coordination claims cannot proceed, but the Appellate Court contradictorily seemed to conclude that they can. The Appellate Court's decision thus directly conflicts with prior federal precedent, which has repeatedly interpreted the IAA not to reach claims like the ones at issue in this case.

This Court's review is necessary to address the conflict the Appellate Court created with federal court interpretations of the IAA and to provide the parties and other employers with clarity regarding the statute's scope, which is now more confused than ever. Defendants accordingly seek leave to appeal the Appellate Court's decision.

JUDGMENT OF THE APPELLATE COURT

The Appellate Court entered its judgment on June 3, 2022. Defendants timely petitioned for rehearing on June 24, 2022, which the Appellate Court denied on June 27, 2022. This petition for leave to appeal under Rule 315 is therefore timely. Ill. S. Ct. R. 315(b)(1).

POINTS RELIED UPON IN SEEKING REVIEW

The Appellate Court's decision that this case can proceed conflicts with every other case to have addressed the issue, each of which foreclosed IAA claims like the alleged wage and hiring coordination asserted by the State. Most prominently, the Appellate Court's decision conflicts with the Seventh Circuit's holding that the IAA does not apply to employer coordination in markets for employee-provided labor—that is, markets for "labor services." *O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997). The Appellate Court's conflicting decision creates substantial confusion on that point. Significantly, the Appellate Court changed the question certified by the trial court

to one about the services temporary staffing agencies provide to their clients, which is not at issue in this case. This change deprives the litigants and other employers of a definitive answer on the alleged wage and hiring coordination at the heart of this matter.

The actual certified question—whether the IAA means what it says when it excludes "labor . . . performed by natural persons as employees" from its coverage—is a question that impacts businesses across Illinois. 740 ILCS 10/4. The State is pursuing multiple cases like this one on the theory that the statute's language merely protects union activity. Whether the State is correct in its atextual reading that alleged wage and hiring coordination is proscribed by the IAA is of critical importance. This Court's involvement is necessary to resolve the issue.

STATEMENT OF FACTS

In July 2020, the State filed a Complaint against Defendants alleging violations of Section 3(1) of the IAA. According to the Complaint, Defendant Colony Display LLC ("Colony") (which manufactures customized displays and exhibits) coordinated with its staffing agencies, Defendants Elite, Metro, and Midway, about pay rates and hiring for certain employees working at Colony's facilities. In particular, the State alleges that the staffing agencies, facilitated by their common client Colony, agreed to pay temporary workers placed at Colony facilities the same wage and to refrain from soliciting or hiring temporary workers placed at Colony by one of the other staffing agencies. (*See* Pet. App. 20 ¶¶ 1, 25–27.) Such coordination, the State claims, violates the IAA.

Defendants moved to dismiss, arguing, as relevant here, that the IAA does not apply to alleged wage and hiring coordination. (Pet. App. 47–49.) Defendants argued that the IAA excludes "labor which is performed by natural persons as employees of others" from

the "services" it regulates. 740 ILCS 10/4. That clear statutory text, Defendants asserted, means that the IAA does not reach wage and hiring coordination—a conclusion that every prior court to address the issue had likewise reached. *O'Regan*, 121 F.3d at 1066 ("[T]o the extent [the plaintiff's] claims relate to an alleged market for labor services, they are specifically excluded by § 10/4 of the Act, which states that '"[s]ervice" shall not be deemed to include labor which is performed by natural persons as employees of others.'"); *Deslandes v. McDonald's USA, LLC*, No. 17-C-4857, 2018 WL 3105955, at *9 (N.D. Ill. June 25, 2018) ("[T]he plain language of the [IAA] excludes plaintiff's claim, which alleges that the no-hire agreement artificially suppressed her wage, i.e., the price paid for her service."); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) (concluding that a challenge to hiring coordination could be "quickly disposed of" because "the [IAA] expressly states that it does not apply to 'labor which is performed by natural persons as employees of others'").

The trial court denied Defendants' motion. (Pet. App. 81–84.) In the process, it specifically declined to follow *O'Regan*'s, *Deslandes*'s, and *Butler*'s conclusions that such wage and hiring coordination was beyond the IAA's reach. (*Id.* at 82–83.) Even so, the trial court recognized that there was substantial ground for disagreement on the subject and that resolution of the question would facilitate the ultimate termination of the litigation, and so certified the case-dispositive question for appeal under Rule 308. (*Id.* at 85.) In particular, it sought a determination from the Appellate Court as to whether the IAA's text excluded coordination with respect to employee-provided labor (referred to by the trial court, the parties, and *O'Regan* as "labor services"):

> Whether the definition of "Service" under Section 4 of the Illinois Antitrust Act, 740 ILCS 10/4, which states that Service "shall not be deemed to

> include labor which is performed by natural persons as employees of others," applies to the Act as a whole and thus excludes all labor services from the Act's coverage.

(*Id.* at 5 ¶ 10.) Resolution of that question, the trial court and Defendants agreed, was important enough to warrant immediate appellate review and would materially advance the proceedings.

The Appellate Court declined to answer that question. (*Id.* ¶ 11.) Instead, without input from the parties, it changed the certified question to an industry-specific question about whether the IAA reaches the services temporary staffing agencies provide to their *clients*, even though the State alleged no restraint of trade in that market.[2] Rather, all of the State's allegations and claims focus on restraints in the market for the labor services provided to the staffing agencies *by employees*. Accordingly, the reframed certified question focused on the wrong market:

> [W]hether the exclusion of individual labor from the definition of "service" in section 4 of the Act also excludes the labor-related services provided by temporary staffing agencies and therefore exempts such agencies from the Act's coverage.

(*Id.*) The Appellate Court answered that reframed question "No"—"the services provided by staffing agencies are generally not excluded from the Act's coverage." (*Id.* at 1–2 ¶ 1.)

Notwithstanding that conclusion, the Appellate Court suggested that the IAA does not apply to restraints on employees' individual labor services, which was the question posed by the trial court and the parties. Specifically, the Appellate Court concluded that,

---

[2] A hypothetical restraint of trade in the market for the services staffing agencies provide to *clients* could be an agreement among staffing agencies to charge their clients higher prices (i.e., price fixing). In that case, the staffing agencies' clients would be the victims of the hypothetical conduct. Here, there are no allegations that the staffing agencies' clients are victims; indeed, one of the staffing agencies' clients is a co-defendant. The Complaint thus makes plain that the relevant market is *not* the market for temporary staffing services.

per the IAA's text, "[t]he second definition [of Service] clearly expresses the idea that an individual's labor for their employer is not a service." (*Id.* at 6–7 ¶ 15.) The Appellate Court further explained that because "individual labor is not a service, . . . otherwise anticompetitive action restraining individual labor is permissible." (*Id.* at 7–8 ¶ 17.) It then appeared to embrace *O'Regan*'s holding that "a former employee could not bring an Illinois antitrust claim related to an alleged restraint on her individual labor," which the Appellate Court viewed as "entirely consistent" with its own reading that "the plain language . . . allow[s] such a restraint." (*Id.* at 8–9 ¶ 19.) The Appellate Court likewise appeared to agree with much of *Deslandes*'s reading of *O'Regan*, suggesting that *Deslandes* had properly concluded that the IAA "excludes claims related to a market for labor services" and therefore had properly dismissed management-side wage and hiring coordination regarding "the employee's own labor." (*Id.* at 9 ¶ 20.)

Defendants sought rehearing under Rule 367 to address the inconsistencies in the Appellate Court's ruling. (*Id.* at 86–105.) Defendants identified that the Appellate Court apparently misapprehended the "labor services" term in the trial court's certified question. The Appellate Court seemed to think that the term meant "labor-related services provided *by* temporary staffing agencies" to their clients. (*Id.* at 5 ¶ 11 (emphasis added).) Defendants contended that the phrase actually referred to employee-provided labor, which is the only sort of conduct alleged in the Complaint and is how all parties and the trial court had intended the term. (*See id.* at 95–96 & nn.1–6.) It is also how all prior courts had understood that phrase. *See, e.g.*, *O'Regan*, 121 F.3d at 1066. Defendants also raised that the Appellate Court's reasoning on *O'Regan* supported Defendants' view of the IAA: that the IAA does not reach restraints on an employee's individual labor.

The Appellate Court denied Defendants' petition for rehearing without an opinion. (*Id.* at 106.) Given the substantial confusion the Appellate Court's decision will cause, as well as the importance of the issue for employers in the state, Defendants now seek leave to appeal to this Court.

ARGUMENT

I. The Appellate Court's Decision Conflicts With The Seventh Circuit's Interpretation Of The IAA In *O'Regan*.

This Court's review is necessary to address the conflict the Appellate Court's decision creates with the Seventh Circuit's *O'Regan* decision. *See* Ill. S. Ct. R. 315(a) (identifying that "the existence of a conflict" between courts can justify Illinois Supreme Court review). The divergence between the cases constitutes a split of authority needing immediate attention by this Court.

This Court commonly takes up cases to resolve splits with federal authorities on questions of state law. *E.g.*, *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446, ¶¶ 20–46 (Ill. 2021) (granting appeal, noting a division between state cases and federal cases on matter of state law); *Moon v. Rhode*, 2016 IL 119572, ¶ 12 (Ill. 2016) (same); *Duldulao v. St. Mary of Nazareth Hosp. Ctr.*, 115 Ill. 2d 482, 488–89 (Ill. 1987) (same). There is a good reason for that: like splits within Illinois's state courts, splits between state and federal courts can encourage forum shopping and hinder the orderly application of important doctrinal questions. *See, e.g.*, *Reddington v. Staten Island Univ. Hosp.*, 511 F.3d 126, 136 (2d Cir. 2007) (identifying that a "split of authority l[ying] along federal/state lines" "would lead to precisely the kind of forum shopping that *Erie R.R. Co. v. Tompkins* was intended to prevent" (quotation omitted)). As such, this Court sensibly treats such state–federal splits with careful attention.

Here, the state–federal split is outcome-determinative. If the rule in *O'Regan* and its federal progeny applies, then the State's claims—which exclusively take aim at alleged wage and hiring coordination—cannot proceed. But the Appellate Court let the case move forward, all but affirming the trial court's decision to disregard that uniform series of authorities coming out the other way. (*See* Pet. App. 82–83.) So, as it stands, IAA defendants in federal court can get pre-discovery dismissal of any wage and hiring coordination claims brought against them. *E.g.*, *Deslandes*, 2018 WL 3105955, at *9. But in state court, defendants are denied such an outcome.

The Appellate Court's decision creates a state–federal split notwithstanding its favorable citations to *O'Regan*. When the Appellate Court changed the certified question, it rendered its treatment of *O'Regan* essentially unnecessary to resolving the new (reframed) question concerning temporary staffing firms the Appellate Court purported to address. That made its discussion of *O'Regan* potentially dicta. *Cf. Donnelly v. Donnelly*, 2015 IL App (1st) 142619, ¶¶ 19–21 (Ill. App. Ct. 1st Dist. 2015) (assuming without directly resolving that reasoning "outside the scope of the question certified" could be treated as dicta); *see also, e.g.*, *In re Tirso*, No. 11-01873 (RJF), 2022 WL 567704, at *3 n.26 (Bankr. D. Haw. Feb. 23, 2022) ("[T]hat language is dicta as it was not necessary to answer the certified question."). As such, it will be up to future courts to decide whether they must follow the Appellate Court's *O'Regan* discussion—a matter only further complicated by the two decisions' apparently divergent outcomes.

That the conflict persists is confirmed by the Appellate Court's discussion of subsequent federal district courts' interpretations of *O'Regan*. The Appellate Court appeared to think those courts erred by treating the employee labor carveout as having a

distinct effect from separate union-promoting provisions elsewhere in the IAA. Specifically, the Appellate Court directly rejected *Deslandes*'s reasoning on that issue, emphasizing that it "disagree[d]" with *Deslandes*'s conclusion that the labor services carveout had "different purposes" from the labor union exemption later in the statute. (Pet. App. 9–10 ¶ 21.) According to the Appellate Court, those two sections are instead "consistent with each other" and should be "read together." (*Id.*)[3]

That suggestion—that the carveout and the exemption are both intended to promote unions—conflicts with *O'Regan*, *Deslandes*, and *Butler*. None of those cases involved unions or collective bargaining. They all involved alleged management-side wage and hiring coordination, as is likewise alleged here. *O'Regan*, 121 F.3d at 1062–63, 1066 (employer-imposed non-competition agreement); *Deslandes*, 2018 WL 3105955, at *1–3, *9 (no-hire agreements between employers); *Butler*, 331 F. Supp. 3d at 789–90, 797 (same). The Appellate Court's implication that the carveout might protect solely union-side efforts is therefore in significant conflict with the federal cases on the subject. That tension leaves the state of the law in considerable disarray.

The conflict requires intervention by this Court. Naturally, the conflict between the Appellate Court's decision and the uniform series of federal authorities on the IAA poses self-explanatory confusion and inconsistency concerns. Those would warrant review on their own. *See Sproull*, 2021 IL 126446, ¶¶ 20–46; *Moon*, 2016 IL 119572, ¶ 12; *Duldulao*,

[3] Adding even more confusion, the Appellate Court later disclaimed any intent to hold that the carveout and the union exemption had the same scope. (Pet. App. 10 ¶ 22 n.2 ("We note that our comments on this issue should not be read to express an opinion that collective bargaining and related conduct are the *only* types of activities covered by the exclusion of individual labor from the definition of 'service' in section 4 of the Act.") (emphasis in original).) Even so, its suggestion that the two sections share the same "purposes" tends to suggest that the court viewed both sections as designed to promote union activity.

115 Ill. 2d at 488–89. But the unique state–federal conflict creates additional problems. The possibility that a claim might be viable in state court but nonviable if removed to federal court can spur on litigation gamesmanship and costly piecemeal litigation. *See Reddington*, 511 F.3d at 136. The result is an uneven liability landscape for defendants and wasted judicial resources.

This split will not resolve on its own. Critically, no matter how one reads the Appellate Court's decision here, Illinois's federal courts remain bound by *O'Regan*. That is because, as the Seventh Circuit explained in *Reiser v. Residential Funding Corp.*, "decisions of intermediate state courts" cannot override prior federal circuit precedent on an issue of state law. 380 F.3d 1027, 1029 (7th Cir. 2004). Only "a decision by a state's supreme court" can. *Id.* And even if the Seventh Circuit were to otherwise change its own take on the IAA (such as through some hypothetical future en banc proceedings), doing so would not clean up the state-court-side confusion caused by the Appellate Court's reasoning. *E.g.*, *People v. Kokoraleis*, 132 Ill. 2d 235, 261 (Ill. 1989) ("[D]ecisions of lower Federal courts [which includes federal courts of appeals] are not conclusive on State courts."). Quite simply, then, the apparent divergence between the Appellate Court's decision and *O'Regan* is almost certain to remain unless the Court grants this petition.

This Court—the final arbiter on the IAA—is uniquely positioned to resolve this conflict. Only this Court is capable of ensuring that the outcome of cases like this one does not turn solely on whether the defendant is in a state courthouse or a federal one. This Court should resolve the split between the Appellate Court's decision and federal authority and definitively address the scope of the IAA.

II. Whether The IAA Reaches Wage And Hiring Coordination Is Critical To Businesses Throughout The State.

Whether the IAA excludes alleged coordination about employee-provided labor services is profoundly important to businesses across the state. Ill. S. Ct. R. 315(a) (identifying that "the general importance of the question presented" can justify further appeal). Businesses need to know what conduct is subject to the IAA. It is no surprise, then, that both the trial court and the appellate court thought the question was sufficiently important to warrant immediate review.

The question is not idle musing. Less than two months ago, the State initiated a new lawsuit against seven companies (including one of the agency Defendants here) on a materially similar theory to the one it advances in this case.[4] In fact, the State appears to have taken the Appellate Court's ruling as a green light to move forward with IAA enforcement on this same theory, claiming that the State has "won" this case in a way that allows "greater potential for antitrust enforcement under Illinois law."[5] Plainly, this case is not a one-off.

Meanwhile, the law remains disturbingly unsettled in Illinois's state courts given the Appellate Court's decision to reframe the question. Of course, this Court has not itself addressed whether the IAA reaches alleged coordination on labor services. And its other discussions of the IAA shed little light on the proper answer; notably, neither the trial court nor the Appellate Court cited any of this Court's opinions in their discussions of the issue.

---

[4] *See* Press Release, Illinois Attorney General, *Attorney General Raoul Files Lawsuit Against Staffing Agencies For Use Of No-Poach Agreements* (June 6, 2022), https://illinoisattorneygeneral.gov/pressroom/2022_06/20220606.html.

[5] *See id.* ("On June 3, the Attorney General won an initial victory in that case when the Illinois Appellate Court agreed that the temporary staffing industry can't use a loophole to avoid state antitrust protections.").

(*See generally* Pet. App. 82–83; *id.* at 8–10 ¶¶ 18–23.) Nor are there any other state cases touching on the subject. And while there is a uniform series of federal cases holding that the IAA does not apply to such coordination, those cases are cold comfort to defendants. As the trial court here illustrated by disregarding them, they only directly bind federal courts addressing IAA claims. Put simply, the law is in a state of serious uncertainty, at least in Illinois's state courts.

Facing significant threat of enforcement activity, litigants lack a clear answer on whether the IAA's labor services carveout puts coordination on employee-provided labor services beyond the statute's reach (as Defendants contend it does). This lack of clarity may chill businesses considering procompetitive coordination, as exists in this case. Some might forego such efficient coordination altogether out of concern that their conduct would be subject to enforcement—notwithstanding the statute's clear language otherwise. Put simply, employers would benefit from knowing whether such coordination is in fact a problem under the IAA. This Court should address the question.

III. Other Factors Likewise Support Granting Leave To Appeal.

For similar reasons, this Court's supervisory authority is necessary to rectify the particular confusion created by the Appellate Court's opinion below. Ill. S. Ct. R. 315(a) (identifying that "the need for the exercise of the Supreme Court's supervisory authority" can justify review). Save hypothetical en banc proceedings in the Seventh Circuit, only a decision by this Court can rectify the tension between the Appellate Court's opinion and the federal IAA cases. Moreover, there are other potential benefits that supervision could bring to the Appellate Court's *sua sponte* decision to change the Rule 308 certified question

submitted by the trial court.[6] On both fronts, the exercise of this Court's supervisory authority would help clear up considerable ambiguities created by the Appellate Court's novel treatment of this case.

And because of this case's "interlocutory character," a final resolution of this case-dispositive legal question would save considerable litigation expense in this and other matters. Ill. S. Ct. R. 315(a) (identifying that the "final or interlocutory character of the judgment" is relevant to the decision to grant leave to appeal); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–59 (2007) (emphasizing that "proceeding to antitrust discovery can be expensive" and that such a "threat of discovery expense" "will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"). The State has ramped up its enforcement activity on this question. It is worth knowing sooner rather than later whether this Court agrees with *O'Regan* that these wage- and hiring-coordination cases are not actionable under the IAA as drafted by the General Assembly.

CONCLUSION

WHEREFORE, Defendants-Appellants ELITE STAFFING, INC., METRO STAFF, INC., and MIDWAY STAFFING, INC. pray that this Honorable Court grant their petition for leave to appeal.

---

[6] In addition to the substantive IAA question at the center of this case, this matter would also provide an opportunity to clarify how the Appellate Court should approach reframing certified questions more generally. The Appellate Court here changed the certified question with no notice or opportunity for the parties to be heard on the subject. *But see, e.g.*, *Kelsey v. Comm'r of Corr.*, 274 A.3d 85, 89 n.2 (Conn. 2022) (noting that the court had earlier modified the certified question on appeal only upon motion and that the opposing party had another briefing opportunity post-modification). Should this petition be granted, Defendants would be happy to brief those issues as well if the Court desires.

Dated: August 1, 2022

Respectfully submitted,

ELITE STAFFING, INC.

By: */s/ Angelo M. Russo*

McGUIREWOODS LLP

Amy B. Manning
Angelo M. Russo
Sarah A. Zielinski
77 West Wacker, Suite 4100
Chicago, Illinois 60601
Telephone: (312) 849-8100
Facsimile: (312) 558-4386
Firm ID No. 40426
amanning@mcguirewoods.com
arusso@mcguirewoods.com
szielinski@mcguirewoods.com

Sean A. McClelland
888 16th Street N.W., Suite 500
Black Lives Matter Plaza
Washington, DC 20006
Telephone: (202) 828-2838
smcclelland@mcguirewoods.com

MIDWAY STAFFING, INC.

By: */s/ John R. Hayes*

SMITHAMUNDSEN LLC

Jeffrey A. Risch
3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@smithamundsen.com

John R. Hayes
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210

Firm ID No. 42907
jhayes@smithamundsen.com

METRO STAFF, INC.

By: *<u>/s/ David J. Fish</u>*

FISH POTTER BOLAÑOS P.C.

David J. Fish
Kimberly Hilton
John Kunze
200 E 5th Ave Suite 123
Naperville, Illinois 60563
Telephone: 630-355-7590
Facsimile: 630-778-0400
Firm ID No. 23522
dfish@fishlawfirm.com
docketing@fishlawfirm.com
admin@fishlawfirm.com

No. 1-21-0840

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE STATE OF ILLINOIS, by its Attorney General, KWAME RAOUL, Plaintiffs-Appellee, v. ELITE STAFFING, INC., METRO STAFF, INC., MIDWAY STAFFING, INC., and COLONY DISPLAY LLC, Defendant-Appellant.	Appeal from the Circuit Court of Cook County, Illinois Chancery Division Case Number 2020 CH 05156 The Honorable Raymond Mitchell, Judge Presiding.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a), (b), and 315. The length of this petition for leave to appeal, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 15 pages.

By: */s/ Sean A. McClelland*

CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. I certify that on August 1, 2022, a copy of the within instrument was filed via the Court's approved electronic filing service provider. Additionally, a true and correct copy was served on the below parties by email from avlasak@mcguirewoods.com to the email addresses indicated below pursuant to Illinois Supreme Court Rule 11.

By: /s/ Sean A. McClelland

Priyanka Gupta
Assistant Attorney General
Elizabeth L. Maxeiner
Senior Assistant Attorney General,
Antitrust Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-1004
priyanka.gupta@ilag.gov
Elizabeth.Maxeiner@ilag.gov
civilappeals@ilag.gov

Counsel for Plaintiffs

SMITHAMUNDSEN LLC

Jeffrey A. Risch
3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@smithamundsen.com

John R. Hayes
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210
Firm ID No. 42907
jhayes@smithamundsen.com

Counsel for Midway Staffing, Inc.

GREENBERG TRAURIG, LLP

Scott Mendeloff
Gabriel Aizenberg
Brian D. Straw
David S. Repking
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
(312) 456-8400
Firm ID No. 36511
mendeloffs@gtlaw.com
aizenbergg@gtlaw.com
strawb@gtlaw.com
repkingd@gtlaw.com

Attorneys for Colony Display, LLC

FISH POTTER BOLONOS P.C.

David Fish
Kimberly Hilton
John Kunze
200 E 5th Ave Suite 123
Naperville, Illinois 60563
Telephone: 630-355-7590
Facsimile: 630-778-0400
Firm ID No. 23522
dfish@fishlawfirm.com
docketing@fishlawfirm.com
admin@fishlawfirm.com

Counsel for Metro Staff, Inc.

THOMPSON COBURN LLP

John J. Cullerton
Patrick Morales-Doyle
55 East Monroe Street, 37th Floor
Chicago, Illinois 60603
Telephone: (312) 346-7500
Facsimile: (312) 580-2201
jcullerton@thompsoncoburn.com
pmoralesdoyle@thompsoncoburn.com

Counsel for Staffing Services Association of Illinois, Amicus Curiae

Ada Sandoval
Mark H. Birhanu
Legal Department
Raise the Floor Alliance
1 N. LaSalle Street, Suite 1275
Chicago, IL 60201
(312) 795-9115
asandoval@raisetheflooralliance.org
mbirhanu@raisetheflooralliance.org

Counsel for Raise the Floor Alliance et al., Amici Curiae

Eric A. Posner
5611 South Blackstone Avenue
Chicago, Illinois 60637
(773) 633-3834
eposner@uchicago.edu

Amicus Curiae

161922727_13

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

September 28, 2022

In re: The State of Illinois, etc., Appellee, v. Elite Staffing, Inc., et al., Appellants. Appeal, Appellate Court, First District.
128763

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause. We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed with the Clerk's office.

With respect to oral argument, a case is made ready upon the filing of the appellant's reply brief or, if cross-relief is requested, upon the filing of the appellee's cross-reply brief. Any motion to reschedule oral argument shall be filed within five days after the case has been set for oral argument. Motions to reschedule oral argument are not favored and will be allowed only in compelling circumstances. The Supreme Court hears arguments beginning the second Monday in September, November, January, March, and May. Please see Supreme Court Rule 352 regarding oral argument.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/1
Formerly cited as IL ST CH 38 ¶ 60-1

10/1. Short title

Currentness

§ 1. This Act shall be known and may be cited as the Illinois Antitrust Act.

Credits
Laws 1965, p. 1943, § 1, eff. July 21, 1965.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-1.

BAR COMMITTEE COMMENTS--1967

Section 1 provides that the Act shall be called "the Illinois Antitrust Act."

Notes of Decisions (6)

740 I.L.C.S. 10/1, IL ST CH 740 § 10/1
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/2
Formerly cited as IL ST CH 38 ¶ 60-2

10/2. Purpose

Currentness

§ 2. The purpose of this Act is to promote the unhampered growth of commerce and industry throughout the State by prohibiting restraints of trade which are secured through monopolistic or oligarchic practices and which act or tend to act to decrease competition between and among persons engaged in commerce and trade, whether in manufacturing, distribution, financing, and service industries or in related for-profit pursuits.

Credits
Laws 1965, p. 1943, § 2, eff. July 21, 1965.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-2.

BAR COMMITTEE COMMENTS--1967

Section 2 was inserted into S.B. 116 by the legislative proponents of the measure. It should be noted that Section 2 as enacted, while not drafted by the Bar Association, does reflect in large measure the Committee's motivations. It indicates that the intent of the draftsmen was to remedy the defects found in existing legislation and basically to prohibit conduct amounting to a restraint of trade or a monopolistic practice. Section 2, of course, is merely hortatory, and is not itself definitive of prohibited misconduct.

Notes of Decisions (4)

740 I.L.C.S. 10/2, IL ST CH 740 § 10/2
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/3
Formerly cited as IL ST CH 38 ¶ 60-3

10/3. Violations; enumeration

Currentness

§ 3. Every person shall be deemed to have committed a violation of this Act who shall:

(1) Make any contract with, or engage in any combination or conspiracy with, any other person who is, or but for a prior agreement would be, a competitor of such person:

a. for the purpose or with the effect of fixing, controlling, or maintaining the price or rate charged for any commodity sold or bought by the parties thereto, or the fee charged or paid for any service performed or received by the parties thereto;

b. fixing, controlling, maintaining, limiting, or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect stated in paragraph a. of subsection (1);

c. allocating or dividing customers, territories, supplies, sales, or markets, functional or geographical, for any commodity or service; or

(2) By contract, combination, or conspiracy with one or more other persons unreasonably restrain trade or commerce; or

(3) Establish, maintain, use, or attempt to acquire monopoly power over any substantial part of trade or commerce of this State for the purpose of excluding competition or of controlling, fixing, or maintaining prices in such trade or commerce; or

(4) Lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, or services (including master antenna television service), whether patented or unpatented, for use, consumption, enjoyment, or resale, or fix a price charged thereof, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodity or service (including cable television service or cable television relay service), of a competitor or competitors of the lessor or seller, where the effect of such lease, sale or contract for such sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce; or

(5) Being an employee, officer or agent of any foreign government, or an employee, officer or agent of a corporation or other entity which does business with or seeks to do business with any foreign government or instrumentality thereof; enforce, attempt to enforce, agree to or take action to forward the aims of, any discriminatory practice by the foreign government which is based

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

on race, color, creed, national ancestry or sex or on ethnic or religious grounds, where such conduct, course of conduct, or agreement takes place in whole or in part within the United States and affects business in this State.

Credits

Laws 1965, p. 1943, § 3, eff. July 21, 1965. Amended by P.A. 76-208, § 1, eff. July 1, 1969; P.A. 79-965, § 1, eff. Oct. 1, 1975; P.A. 82-219, § 1, eff. Jan. 1, 1982.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-3.

BAR COMMITTEE COMMENTS--1967

Section 3(1).

"Per Se" Offenses

The basic prohibitions of the statute are found in Section 3. Section 3(1) proscribes certain of the offenses which under federal law are termed "*per se*" offenses and are commonly deemed to constitute the most serious restraints upon competition. To them, criminal as well as civil penalties are attached. The conduct proscribed by Section 3(1) is violative of the Act without regard to, and the courts need not examine, the competitive and economic purposes and consequences of such conduct.

Section 3(1) is expressly limited to agreements between two classes of persons: (a) those who are competitors and (b) those persons who, but for a prior agreement, would be competitors. This latter class includes agreements between persons who are not currently competitors, but were at some time in the past and subsequently agreed to cease competing. It also includes agreements not to compete between persons who have never been competitors, but who would have become competitors but for such an agreement.

In general, Section 3(1) is designed to reach the "hard core" conspiratorial offenses of price fixing, limitations on production, and allocation of markets or customers. To violate this subsection it is not necessary that there be a binding contract or agreement between competitors. Informal agreements or understanding or loose combinations or conspiracies to accomplish the forbidden purposes would also violate this subsection.

Section 3(1)(a) proscribes agreements between competitors, the purpose or effect of which is to fix, control, or maintain the prices which they will charge for the commodities or services which they sell or the prices which they will pay for the commodities or services which they buy.

Section 3(1)(b) proscribes agreements between competitors to limit or control the supply of a commodity or service which will be made available to the buyers thereof for the purpose or with the effect of allowing such competitors to fix or control the prices at which they will deal in such commodities or services. If competitors are found to have entered into such an agreement, the courts may, absent special circumstances, infer that they did so for the required purpose or effect on the ground that it is unlikely that such an agreement would be made for any other purpose or without such effect. Even if such purpose or effect were not found to exist, however, such an agreement could still be tested under the Section 3(2) provisions governing unreasonable restraints of trade, and found violative of the Act thereunder if trade were deemed to be unreasonably restrained by such agreement.

Section 3(1)(c) proscribes agreements between competitors wherein they agree to allocate or divide between them, with respect to any commodity or service:

(a) The particular commodities or services which they will respectively make, furnish, or distribute;

(b) The geographical areas within which they will respectively sell;

(c) The levels of distribution, in which they will respectively engage or to which they will respectively sell;

(d) The customers or classes or types of customers to whom they will respectively sell;

(e) Supplies, sales, or markets in which they will deal.

The result of any of the foregoing is that some competition between such competitors is eliminated and it is that evil against which Section 3(1)(c) is directed.

It is important to note that the criminal penalties set forth in Section 6 apply to violations of the "*per se*" provisions of Section 3(1) only when such offenses are "wilfully" committed. As to the meaning and effect of "wilful," see commentary as to Section 6, *infra*.

Section 3(1) does not reach vertical agreements, such as agreements between buyers and sellers fixing the price at which the buyer shall resell. Although not unlawful under Section 3(1), such vertical price fixing, if not exempt under the Illinois Fair Trade Act, may be proscribed by Section 3(2), the general restraint of trade section. Since the draftsmen carefully constructed Section 3 to require it, the Illinois courts should conclude that they *must* examine the competitive and economic purposes and consequences of such agreements before reaching a conclusion that Section 3(2) has been violated. While it is perhaps possible, as under Federal law, that the courts may hold such agreements violative of Section 3(2) without such an examination, they should not, since to do so would defeat the clear intention of the draftsmen. See discussion under Section 11, *infra*.

Boycotts are not proscribed by this "*per se*" subsection. Here again in view of federal precedents and of Section 11, horizontal boycotts may be found unlawful under the general restraint of trade Section 3(2). Vertical agreements to refuse to deal or boycotts, that is, agreements between persons at different levels of production and distribution which have as their immediate purpose the depriving of a third person of a supply of a commodity or service, may also be found violative of Section 3(2). Boycotts which involve persons who are not related horizontally or vertically in the production and distribution of commodities or services will not be as likely to endanger competition as would boycotts by businessmen and, hence, the courts should be more reluctant to find that such boycotts violate Section 3(2). This will be true even if that type of boycott has serious economic effects, especially if the ultimate objective of such a boycott is social, political, or otherwise nonbusiness in nature.

See discussion above on vertical price fixing agreements as to the necessity of examining the competitive and economic purposes and consequences of boycott agreements.

Prior to the enactment of the Act fears were expressed that Section 3(1) might be deemed applicable to and hence invalidate any business mergers. Bar Association representatives then expressed the view that such fears were without foundation. In generally accepted terminology corporate mergers are not considered agreements to fix prices, allocate markets, and the like. Nothing comparable to Section 7 of the Clayton Act is include in the Illinois statute and hence, the legality of a merger will be tested under the unreasonable restraint of trade provisions of Section 3(2) or under the monopolization provisions of Section 3(3) after an examination of the competitive and economic consequences of the merger.

Similarly, fears were expressed that Section 3(1)(a) might be construed to prohibit "joint ventures." It would seem, however, that a determination by a joint venture company as to the price at which it sells its products would not

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

constitute a price fixing agreement between the parents of the joint venture company merely because of their stock ownership in the joint venture subsidiary and where the joint venture company is not merely a sham or subterfuge to accomplish an otherwise forbidden purpose. Bar Association representatives stated with respect to such fears that joint ventures who are not otherwise competitive would not violate Section 3(1). As under federal law, however, competitors who enter into a joint venture would not thereby be removed from the operation of the statute.

Concern was likewise expressed that Section 3(1) might prevent competitors from making sales to each other on the theory that it might be unlawful for them to agree on the prices at which they would respectively sell and buy in such transactions. This construction was deemed by the draftsmen to lead to an absurd result which the courts would not reach and would also conflict with the express language "charged . . . by the parties" to the contract. This language makes clear that the section applies only to situations where the competitors are agreeing on the price at which they would *both* sell or *both* buy a commodity or service and not to a situation wherein they are merely agreeing to the price at which one of them will sell and at which the other one will buy from that seller.

Section 3(2).

Rule of Reason

Section 3(2) prohibits unreasonable restraints of trade under the "rule of reason" approach. Note that the word "unreasonably" is explicit in Section 3(2). Only civil remedies are available for violations of this subsection. It seems probable that, except where the language and structure of the Illinois Act indicate that a different result was intended, Sherman Act Section 1 cases will be followed by the Illinois courts when construing Section 3(2), particularly in light of the provisions of Section 11 of the Illinois Act.

Various arrangements which, as above noted, do not fall under the purview of Section 3(1), such as vertical price fixing agreements not exempt under the Illinois Fair Trade Act, and boycotts, must meet the test of the "rule of reason" established in Section 3(2). As pointed out in the discussion with reference to Section 3(1), *supra*, the courts should examine the competitive and economic purposes and consequences of such arrangements for the purpose of determining whether or not trade or commerce has been unreasonably restrained before finding a violation of Section 3(2).

An early draft of the Bar Association bill provided that a conspiracy to limit bidding on governmental business would be a separate offense. The Attorney General's bill would have made any combination restraining competition in bidding on public contracts a "*per se*" offense. The authors of the Bar Association measure, however, concluded it would be unnecessary to create a separate offense relating to bids on government contracts on the ground that Sections 3(1) and 3(2) are entirely adequate to reach such activities.

It will be noted that the Illinois Act contains no counterpart to Sections 2, 3, 7, and 8 of the Clayton Act or to Section 5 of the Federal Trade Commission Act. Hence, practices which would be violative of those federal provisions would be violative of the Illinois Act only if they were deemed unreasonably to restrain trade under the provisions of Section 3(2). There is no "incipiency" standard under the Illinois Act, i.e., a present actual violation must be shown as distinguished from a showing only of a reasonable probability of a violation in the future.

An early draft of the Bar Association bill contained an exemption for "ancillary" restraints of trade. Because of the extreme difficulties in constructing appropriate language for such an exemption and since existing decisions under the common law and federal statutes would probably exempt reasonable ancillary restraints without specific language in the statute itself, it was decided not to provide specifically for such an exemption. In view of Section 11 of the Act, it seems clear that any ancillary restraint which is lawful under federal law would likewise be found to be lawful under the Illinois Act, except possibly those types of ancillary restraints which the Illinois courts have previously

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

held to be unlawful. Reasonably limited ancillary restraints have been held lawful on the basis that any adverse effect on competition is limited both in scope and duration and other valid business purposes or desirable competitive consequences are secured or enhanced. It seems clear, therefore, that truly ancillary covenants, such as a seller's reasonably limited agreement not to compete in connection with the sale of a business, would not be proscribed by the "*per se*" provisions of Section 3(1) relating to allocation of customers or territories. All covenants or restrictions which are truly ancillary to an otherwise proper business purpose may have their legality tested under the unreasonable restraint of trade provisions in Section 3(2) and if found to be truly ancillary and reasonably limited, should be held lawful under that section.

Section 3(3).

Monopolization

Section 3(3) prohibits monopolization only when it exists or is attempted with reference to any "substantial" part of trade or commerce of this State. The draftsmen recognized that elements of indivisibility must give rise to monopoly. Many towns are only large enough to support a single hotel, movie theater, or bank, etc., for example. The draftsmen did not intend to reach a situation of that type. The word "substantial" indicates that the area in which a monopoly is unlawfully exercised must be large enough to make the existence of one or more competitors a practical possibility. The legality of mergers may be tested under this section as well as under Section 3(2).

This section would penalize the monopolist only when he acted for the forbidden purposes of excluding competition or of fixing prices. It is, therefore, directed only to abuses and attempted abuses of monopoly power rather than to its mere existence. To that extent the prohibition is somewhat narrower than that applied to Section 2 of the Sherman Act and is also somewhat more specific.

In view of the difficulty experienced in construing Section 2 of the Sherman Act, it was felt undesirable to enforce the prohibitions of Section 3(3) with criminal sanctions. On the other hand, it was not deemed necessary to require that the plaintiff show the defendant had created a "dangerous probability" of complete monopoly. Language requiring such a showing on the part of the plaintiff was removed from the Bar Association draft at an early stage.

Notes of Decisions (306)

740 I.L.C.S. 10/3, IL ST CH 740 § 10/3
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/4
Formerly cited as IL ST CH 38 ¶ 60-4

10/4. Definitions

Currentness

§ 4. As used in this Act, unless the context otherwise requires:

“Trade or commerce” includes all economic activity involving or relating to any commodity or service.

“Commodity” shall mean any kind of real or personal property.

“Service” shall mean any activity, not covered by the definition of “commodity,” which is performed in whole or in part for the purpose of financial gain.

“Service” shall not be deemed to include labor which is performed by natural persons as employees of others.

“Person” shall mean any natural person, or any corporation, partnership, or association of persons.

Credits
Laws 1965, p. 1943, § 4, eff. July 21, 1965. Amended by P.A. 83-516, § 1, eff. Jan. 1, 1984.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-4.

BAR COMMITTEE COMMENTS--1967

A prime purpose of the Bar Association bill was to eliminate “loopholes” in existing Illinois legislation. Among the most conspicuous of those “loopholes” was the omission from the 1891 statute of penalties designed to curb restraints with respect to services and dealing with real estate. Accordingly, the definitions of Section 4 were expressly designed to make services and real estate subject to the prohibitions of the law. It was the feeling of the draftsmen that exemptions should be strictly limited and that almost all service occupations should be within the reach of the statute. In this connection see the discussion, *infra*, with relation to Section 5 on exemptions generally.

Notes of Decisions (1)

740 I.L.C.S. 10/4, IL ST CH 740 § 10/4
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/5
Formerly cited as IL ST CH 38 ¶ 60-5

10/5. Exceptions

Effective: July 12, 2019
Currentness

§ 5. No provisions of this Act shall be construed to make illegal:

(1) the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States;

(2) the activities of any agricultural or horticultural cooperative organization, whether incorporated or unincorporated, or of individual members thereof, which are directed solely to objectives of such cooperative organizations which are legitimate under the laws of either the State of Illinois or the United States;

(3) the activities of any public utility, as defined in Section 3-105 of the Public Utilities Act [1] to the extent that such activities are subject to a clearly articulated and affirmatively expressed State policy to replace competition with regulation, where the conduct to be exempted is actively supervised by the State itself;

(4) the activities of a telecommunications carrier, as defined in Section 13-202 of the Public Utilities Act, [2] to the extent those activities relate to the provision of noncompetitive telecommunications services under the Public Utilities Act [3] and are subject to the jurisdiction of the Illinois Commerce Commission or to the activities of telephone mutual concerns referred to in Section 13-202 of the Public Utilities Act to the extent those activities relate to the provision and maintenance of telephone service to owners and customers;

(5) the activities (including, but not limited to, the making of or participating in joint underwriting or joint reinsurance arrangement) of any insurer, insurance agent, insurance broker, independent insurance adjuster or rating organization to the extent that such activities are subject to regulation by the Director of Insurance of this State under, or are permitted or are authorized by, the Illinois Insurance Code or any other law of this State;

(6) the religious and charitable activities of any not-for-profit corporation, trust or organization established exclusively for religious or charitable purposes, or for both purposes;

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(7) the activities of any not-for-profit corporation organized to provide telephone service on a mutual or cooperative basis or electrification on a cooperative basis, to the extent such activities relate to the marketing and distribution of telephone or electrical service to owners and customers;

(8) the activities engaged in by securities dealers who are (i) licensed by the State of Illinois or (ii) members of the National Association of Securities Dealers or (iii) members of any National Securities Exchange registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934, as amended, [4] in the course of their business of offering, selling, buying and selling, or otherwise trading in or underwriting securities, as agent, broker, or principal, and activities of any National Securities Exchange so registered, including the establishment of commission rates and schedules of charges;

(9) the activities of any board of trade designated as a "contract market" by the Secretary of Agriculture of the United States pursuant to Section 5 of the Commodity Exchange Act, as amended; [5]

(10) the activities of any motor carrier, rail carrier, or common carrier by pipeline, as defined in the Common Carrier by Pipeline Law of the Public Utilities Act, [6] to the extent that such activities are permitted or authorized by the Act or are subject to regulation by the Illinois Commerce Commission;

(11) the activities of any state or national bank to the extent that such activities are regulated or supervised by officers of the state or federal government under the banking laws of this State or the United States;

(12) the activities of any state or federal savings and loan association to the extent that such activities are regulated or supervised by officers of the state or federal government under the savings and loan laws of this State or the United States;

(13) the activities of any bona fide not-for-profit association, society or board, of attorneys, practitioners of medicine, architects, engineers, land surveyors or real estate brokers licensed and regulated by an agency of the State of Illinois, in recommending schedules of suggested fees, rates or commissions for use solely as guidelines in determining charges for professional and technical services;

(14) conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless:

(a) such conduct has a direct, substantial, and reasonably foreseeable effect:

(i) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(ii) on export trade or export commerce with foreign nations of a person engaged in such trade or commerce in the United States; and

(b) such effect gives rise to a claim under the provisions of this Act, other than this subsection (14).

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

If this Act applies to conduct referred to in this subsection (14) only because of the provisions of paragraph (a)(ii), then this Act shall apply to such conduct only for injury to export business in the United States which affects this State;

(15) the activities of a unit of local government or school district and the activities of the employees, agents and officers of a unit of local government or school district; or

(16) the activities of a manufacturer, manufacturer clearinghouse, or any entity developing, implementing, operating, participating in, or performing any other activities related to a manufacturer e-waste program approved pursuant to the Consumer Electronics Recycling Act, to the extent that such activities are permitted or authorized by this Act or are subject to regulation by the Consumer Electronics Recycling Act and are subject to the jurisdiction of and regulation by the Illinois Pollution Control Board or the Illinois Environmental Protection Agency; this paragraph does not limit, preempt, or exclude the jurisdiction of any other commission, agency, or court system to adjudicate personal injury or workers' compensation claims.

Credits

Laws 1965, p. 1943, § 5, eff. July 21, 1965. Amended by P.A. 80-995, § 1, eff. Oct. 1, 1977; P.A. 83-516, § 1, eff. Jan. 1, 1984; P.A. 84-1050, § 3, eff. July 1, 1986; P.A. 84-1118, § 2, eff. April 14, 1986; P.A. 85-553, § 1, eff. Sept. 18, 1987; P.A. 90-185, § 15, eff. July 23, 1997; P.A. 90-561, Art. 7, § 95, eff. Dec. 16, 1997; P.A. 100-592, § 15, eff. June 22, 2018; P.A. 100-863, § 600, eff. Aug. 14, 2018; P.A. 101-81, § 720, eff. July 12, 2019.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-5.

BAR COMMITTEE COMMENTS--1967

Section 5 of the Act contains twelve provisions which give a limited exemption, or prescribe a particular lawful interpretation, for certain described facts.

As originally drafted, the bill contained exemptions for labor unions, agriculture cooperatives, and public utilities. A limited insurance exemption was added by the Chicago Bar Association Board of Managers and accepted by the Illinois State Bar Association Board of Governors. In the legislature, the insurance exemption was extended to its present form and the other provisions found in Section 5 were added. The Bar Association representatives opposed all of these changes and additions, except subsection (9) on motor carriers.

It was always understood by the draftsmen that exemptions would be accorded to labor unions, agricultural cooperatives, and public utilities. Much effort was devoted to the defining of those exemptions. Because of difficulties encountered with attempts to employ new expressions as to the labor and agricultural exemptions it was believed necessary to adopt an approach similar to that used for the federal exemptions on those subjects, thereby preserving general overall consistency.

The labor exemption in subsection (1), like that of Section 6 of the Clayton Act, prevents the application of the Antitrust Act to legitimate labor objectives and activities of unions or of individual members thereof. The Illinois Act is more explicit than the Clayton Act, however, in limiting the exemption to activities which “are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States.” The word “solely” requires denial of the exemption if the activity is partly or wholly directed toward some objective other than a legitimate labor objective. The test of legitimacy is whether, under state or federal statutory or case law, the objective of the labor activity in question is lawful.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

The labor exemption should be read together with the provision of Section 4 which states that labor performed as an employee is not a "service" within the meaning of Section 3 of the Act. The effect of this provision is to make the Act inapplicable to agreements by either labor or nonlabor groups insofar as they relate to restraint of competition concerning labor itself. The Act thus protects both management and labor in bargaining collectively over terms and conditions of employment.

The exemption for agricultural and horticultural cooperatives in subsection (2) is limited in the same way as the labor exemption, i.e., to activities which are directed "solely" to objectives which are "legitimate" under state or federal law. By exempting incorporated as well as unincorporated cooperatives, the Act reflects both Section 6 of the Clayton Act and the Capper-Volstead Act.

The exemption in the first half of subsection (3) in favor of public utilities was designed expressly to exempt all activities which are within the regulatory power of the Illinois Commerce Commission. This exemption was not patterned after any specific federal analogy, and a narrower exemption limited to activities actually regulated by the Commission was rejected as being too uncertain in its application.

The exemption for motor carriers found in subsection (9) was accepted by Bar Association representatives at the legislative stage as being within their intent to exempt regulated public utilities. Although the qualifying language differs somewhat from that of subsection (3), it appears to have the same meaning.

The second clause of subsection (3), exempting certain activities of telephone mutual concerns, and all of subsection (6) on not-for-profit mutual or cooperative corporations in the telephone and electrification fields, were opposed by Bar Association representatives. Also opposed were the exemptions relating to religious and charitable organizations in subsection (5), securities dealers in subsection (7), boards of trade in subsection (8), banks in subsection (10), and savings and loan associations in subsection (11). All of these provisions were opposed on the ground that need for them had not been demonstrated.

An insurance exemption was drafted by the Bar Association representatives at the request of the Chicago Bar Association Board of Managers, acting upon a recommendation from the Association's Insurance Law Committee. As originally drafted, the exemption was limited to activities actually regulated by the Director of Insurance. At the legislative stage, however, the language was broadened, over Bar Association opposition to its present form in subsection (4). No provision for professional persons, such as that found in subsection (12) of the Act, was proposed by the Bar Association sponsors. One of the primary purposes of the bill was to extend coverage of the law to services, and it was believed that the public should receive the same protection as to professional services that it receives with respect to other types of services.

At the legislative stage, however, various professional groups sought exemptions. H.B. 143, the bill sponsored by the Attorney General, was amended to provide an exemption for certain named associations of professional persons, "in establishing schedules of suggested minimum fees, rates and commissions to be charged by [the association's] members for certain standard services."

Addition of the same language to S.B. 116 was opposed by the Bar Association representatives, and ultimately the General Assembly adopted the narrower provision found in subsection (12).

This provision authorizes only recommended fee schedules "for use solely as guidelines." This language does not permit associations to go beyond recommending such schedules to their members, and clearly does not permit efforts to enforce them or to effectuate adherence to them. Since the recommendations are to be limited to use as "guidelines," complete freedom of individual members to determine their fees is to be preserved.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

In other words, subparagraph (12) does not lift from the named associations the responsibility to comply with the general prohibitions of the Act, including those against fee-fixing agreements. All that it appears to do is to prevent a finding of conspiracy to fix fees in violation of the Act solely on the basis of association activities which do not go beyond the narrowly limited actions described in the subsection. If in addition to the activities described in the subsection, associations or their members engage in other activities, which taken together with the activities described in the subsection amount to an agreement to fix fees, then the associations of their members may be found guilty of a violation.

It is assumed that all of the provisions of Section 5 will be strictly construed and narrowly applied.

Notes of Decisions (18)

Footnotes

1 220 ILCS 5/3-105.

2 220 ILCS 5/13-202.

3 220 ILCS 5/1-101 et seq.

4 15 U.S.C.A. § 78a et seq.

5 7 U.S.C.A. § 5.

6 220 ILCS 5/15-100 et seq.

740 I.L.C.S. 10/5, IL ST CH 740 § 10/5
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/6
Formerly cited as IL ST CH 38 ¶ 60-6

10/6. Violations; punishments; prosecutions

Currentness

§ 6. Every person who shall knowingly do any of the acts prohibited by subsections (1) and (4) of Section 3 of this Act, commits a Class 4 felony and shall be punished by a fine not to exceed $1,000,000 if a corporation, or, if any other person, $100,000.

(1) The Attorney General, with such assistance as he may from time to time require of the State's Attorneys in the several counties shall investigate suspected criminal violations of this Act and shall commence and try all prosecutions under this Act. Prosecutions under this Act may be commenced by complaint, information, or indictment. With respect to the commencement and trial of such prosecutions, the Attorney General shall have all of the powers and duties vested by law in State's Attorneys with respect to criminal prosecutions generally.

(2) A prosecution for any offense in violation of Section 6 of this Act must be commenced within 4 years after the commission thereof.

(3) The Attorney General shall not commence prosecutions under this Act against any defendant who, at the time, is a defendant with regard to any current pending complaint, information or indictment filed by the United States for violation, or alleged violation, of the Federal Anti-Trust Statutes (including but not being limited, Act of July 2, 1890, Ch. 647, 26 U.S.Stat. 209, 15 U.S.C.A. Secs. 1-7; Act of Oct. 15, 1914, Ch. 323, 38 U.S.Stat. 730, 15 U.S.C.A. Secs. 12-27, 44; Act of August 17, 1937, Ch. 690, Title VIII, 50 U.S.Stat. 693, 15 U.S.C.A. Sec. 1; Act of July 7, 1955, Ch. 281, 69 U.S.Stat. 282, 15 U.S.C.A. Secs. 1-3; Act of May 26, 1938, Ch. 283, 52 U.S.Stat. 446, 15 U.S.C.A. Sec. 13-C; and any similar Acts passed in the future) involving substantially the same subject matter.

Credits

Laws 1965, p. 1943, § 6, eff. July 21, 1965. Amended by P.A. 76-208, § 1, eff. July 1, 1969; P.A. 77-2639, § 1, eff. Jan. 1, 1973; P.A. 78-863, § 1, eff. Sept. 15, 1973; P.A. 81-1051, § 1, eff. Jan. 1, 1980; P.A. 83-238, § 1, eff. Jan. 1, 1984.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-6.

BAR COMMITTEE COMMENTS--1967

The statute provides in Sections 6 and 7 for public enforcement by criminal and civil proceedings with centralization of enforcement authority in the Attorney General. Section 7 also provides for suits by injured persons for damages or injunction, or both. See discussion under Section 7, *infra*. To facilitate criminal enforcement, Section 6(1) gives the Attorney General all the powers and duties vested by law in State's Attorneys with respect to criminal prosecutions generally. This would include the power to convene grand juries, to make all necessary investigations, and to handle

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

prosecutions. To the extent he desires, the Attorney General may call upon the State's Attorneys for assistance. Prosecution under section 6 may be commenced by complaint, information, or indictment.

The bill introduced by the Attorney General (see Introduction, *supra*) would not have provided for criminal prosecutions, but would have authorized a civil penalty procedure. Civil penalties of up to $100,000 as to corporations and up to $25,000 as to individuals would have been authorized for all kinds of violations. Such proceedings would have been in the nature of administrative proceedings and in such an action the burden of proof of the State is less than in a criminal prosecution. Bar Association representatives supported the view that it is desirable in criminal proceedings or in any proceeding that is penal in nature against hard core or *per se* violations of the antitrust laws that the State be held to the heavier burden and that, as to all violations, state enforcement should be confined to court actions.

In aid to the civil penalty proceedings the Attorney General's bill would have provided for a civil investigative demand patterned after but much broader in scope than that recently added to the federal legislation. The proposed civil investigative demand would not only have provided for the production of documents upon demand by the Attorney General but would also have authorized him to require individuals to appear and testify under oath before representatives of the Attorney General's office. Unlike the federal procedure, the Attorney General's bill would have authorized the Attorney General to demand the production of documents from persons *not* under investigation. This far-reaching procedure was determined to be unnecessary under the framework of court procedure incorporated in the statute.

Section 6 makes it a misdemeanor for any person "wilfully" to do any of the acts prohibited by Section 3(1). See commentary as to Section 3, *supra*. The statute puts deliberate emphasis on "wilful" commission of an act to warrant the criminal sanctions of a fine of up to $50,000, or a jail sentence of up to six months, or both, provided for in Section 6. The purpose for this is to avoid punishing as criminals those businessmen who innocently stumble into violation of the statute.

Under the statute criminal actions lie only against those who willfully enter into a conspiracy to do the prohibited acts. This does not require proof that a person intentionally joined in activity he knew to be a violation of Section 3(1). It does require a showing that the person had knowledge that he was engaging in the challenged conduct, e.g., price fixing.

The statute, in Section 6(2), creates a four year statute of limitations on criminal prosecutions. The Bar Association bill provided for the usual eighteen month statute applicable to misdemeanors but Bar Association representatives agreed to the four year provision as part of the compromise with the sponsors of the Attorney General's bill.

Section 6(3) provides that the Attorney General shall not commence "prosecutions" under the statute against a defendant who, at the time, is a defendant in a federal action, civil or criminal, involving substantially the same subject matter. In view of the fact that Section 6 deals only with criminal enforcement of the Act and since only criminal proceedings are denominated in the Act as "prosecutions," it is clear that the limitation on the Attorney General prescribed in Section 6(3) is confined to criminal actions by the State. The Attorney General, therefore, is free to institute civil proceedings, either for injunction or damages. This provision did not appear in either the bill sponsored by the Bar Association or that favored by the Attorney General. Concern was expressed before the General Assembly of the possibility of duplication of proceedings against the same defendants and this provision was added in an effort to prevent this. As originally proposed, the provision would have prohibited not only the commencement of an action by the Attorney General but also the trial of one he had already instituted. The latter prohibition was deleted before enactment. Consequently, the statute does not affect a state action already pending when a federal action is filed.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Since the pendency of an action by the federal government would preclude the bringing of a state criminal action against the same defendant or defendants "involving substantially the same subject matter," the question may be raised as to whether the running of the state statute of limitations as to "prosecutions" by the State may be held to be suspended during the pendency of the prior instituted federal action. There appears to be no light shed on this question from the deliberations before the legislature. Moreover, since this provision did not appear in the bills as introduced, there is no background discussion among the proponents of the litigation.

It is clear from the way Section 6(3) is worded that the intention is to prevent a defendant from having to defend against a federal action and a state criminal charge at the same time. There is no expression of an intention to completely relieve a violator from liability to the State. Section 6(3) prevents, under the conditions prescribed, the Attorney General from "commencing" a criminal action. Thus, he could not obtain an indictment, so as to suspend the statute of limitations, even though the criminal action was not pressed for trial. However, the section would not preclude the institution by the Attorney General of a civil action under Section 7 for the same offense covered by the federal action.

Section 6(3) is not without limitation in its scope and the mere fact that a person is a defendant in an antitrust action brought by the federal government does not give complete immunity during the pendency thereof from state criminal action. In addition to the requirement that the federal action be currently pending, the action must allege a violation under certain enumerated federal statutes or "any similar Acts passed in the future." The federal statutes identified in Section 6(3) are the Sherman Act, the Clayton Act as enacted in 1914, the 1937 Miller-Tydings Amendment (so-called "fair trade" exemption) to Section 1 of the Sherman Act, the 1955 Amendment to the Sherman Act increasing the maximum amount of the fine for violation of Sections 1, 2, and 3 from $5,000 to $50,000, and a 1938 amendment to the Clayton Act exempting purchases by certain nonprofit institutions from the price discrimination statutes. No reference is made, for example to the Robinson-Patman Act (price discrimination) amendments or the Cellar-Kefauver Act (mergers and acquisitions) amendments to the Clayton Act. Numerous federal antitrust statutory provisions are not mentioned and, therefore, are outside the application of Section 6(3). Moreover, the proscription of the section applies only to those state criminal prosecutions "involving substantially the same subject matter" as the federal action. The word "involving" is open to numerous interpretations and this is likewise true of the word "substantially." The determination of whether two actions involve substantially the same subject matter may concern factual, substantive, and relief issues and they would have to be evaluated in reaching a conclusion as to whether the Attorney General could proceed against a defendant in a federal action.

A provision in the Bar Association bill limiting tolling of the statutory period in which state criminal actions could be brought to the conditions set forth in the Criminal Code was deleted at the legislative level as part of the compromise with sponsors of the Attorney General's bill. Nevertheless, it is assumed, because of their general applicability, that the tolling provisions of Sections 3-7 of the Illinois Criminal Code of 1961 are applicable to this Act. It does not seem to be the intention of Section 6(3) to give the Attorney General any longer period than four years after commission of the offense in which to act. The Attorney General, even though he may be precluded from bringing a criminal action, still has available a civil action in which he may seek injunctive relief against conduct being attacked in the federal action. If the federal action is a criminal prosecution, the defendant will not escape having to defend a criminal charge even though the statute of limitations may run against a state criminal action. Irrespective of the nature of the federal action, the State may institute an action to prevent the continuance of the alleged violation and may seek other relief than is sought in the federal action which in the State's view may more effectively eliminate the trade restraining effects of the illegal conduct. It would appear, therefore, that there is no persuasive need to extend the prescribed four year statute of limitations on state criminal actions for reasons other than is provided in the tolling provisions of the Illinois Criminal Code.

The significance of the possibility of both federal and state actions is not as great as might appear at first glance. As a matter of comity, it is unlikely to occur. Moreover, as a practical matter, budgetary limitations on both government agencies will dictate the avoidance of duplicitous proceedings. While not related to the prohibition in Section 6(3), it

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

would also seem that in accordance with the general law of damages an injured plaintiff will not be able to establish any right to recover damages twice for the same injury, once in the state court and once in the federal court.

Notes of Decisions (5)

740 I.L.C.S. 10/6, IL ST CH 740 § 10/6
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7
Formerly cited as IL ST CH 38 ¶ 60-7

10/7. Civil actions and remedies

Effective: January 1, 2010
Currentness

§ 7. The following civil actions and remedies are authorized under this Act:

(1) The Attorney General, with such assistance as he may from time to time require of the State's Attorneys in the several counties, shall bring suit in the Circuit Court to prevent and restrain violations of Section 3 of this Act. In such a proceeding, the court shall determine whether a violation has been committed, and shall enter such judgment as it considers necessary to remove the effects of any violation which it finds, and to prevent such violation from continuing or from being renewed in the future. The court, in its discretion, may exercise all powers necessary for this purpose, including, but not limited to, injunction, divestiture of property, divorcement of business units, dissolution of domestic corporations or associations, and suspension or termination of the right of foreign corporations or associations to do business in the State of Illinois.

(2) Any person who has been injured in his business or property, or is threatened with such injury, by a violation of Section 3 of this Act may maintain an action in the Circuit Court for damages, or for an injunction, or both, against any person who has committed such violation. If, in an action for an injunction, the court issues an injunction, the plaintiff shall be awarded costs and reasonable attorney's fees. In an action for damages, if injury is found to be due to a violation of subsections (1) or (4) of Section 3 of this Act, the person injured shall be awarded 3 times the amount of actual damages resulting from that violation, together with costs and reasonable attorney's fees. If injury is found to be due to a violation of subsections (2) or (3) of Section 3 of this Act, the person injured shall recover the actual damages caused by the violation, together with costs and reasonable attorney's fees, and if it is shown that such violation was willful, the court may, in its discretion, increase the amount recovered as damages up to a total of 3 times the amount of actual damages. This State, counties, municipalities, townships and any political subdivision organized under the authority of this State, and the United States, are considered a person having standing to bring an action under this subsection. The Attorney General may bring an action on behalf of this State, counties, municipalities, townships and other political subdivisions organized under the authority of this State to recover the damages under this subsection or by any comparable Federal law.

The Attorney General may also bring an action in the name of this State, as parens patriae on behalf of persons residing in this State, to recover the damages under this subsection or any comparable federal law. The powers granted in this Section are in addition to and not in derogation of the common law powers of the Attorney General to act as parens patriae.

No provision of this Act shall deny any person who is an indirect purchaser the right to sue for damages. Provided, however, that in any case in which claims are asserted against a defendant by both direct and indirect purchasers, the court shall take all steps necessary to avoid duplicate liability for the same injury including transfer and consolidation of all actions. Provided further that no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae as provided in this subsection.

WESTLAW © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Beginning January 1, 1970, a file setting out the names of all special assistant attorneys general retained to prosecute antitrust matters and containing all terms and conditions of any arrangement or agreement regarding fees or compensation made between any such special assistant attorney general and the office of the Attorney General shall be maintained in the office of the Attorney General, open during all business hours to public inspection.

Any action for damages under this subsection is forever barred unless commenced within 4 years after the cause of action accrued, except that, whenever any action is brought by the Attorney General for a violation of this Act, the running of the foregoing statute of limitations, with respect to every private right of action for damages under the subsection which is based in whole or in part on any matter complained of in the action by the Attorney General, shall be suspended during the pendency thereof, and for one year thereafter. No cause of action barred under existing law on July 21, 1965 shall be revived by this Act. In any action for damages under this subsection the court may, in its discretion, award reasonable fees to the prevailing defendant upon a finding that the plaintiff acted in bad faith, vexatiously, wantonly or for oppressive reasons.

(3) Upon a finding that any domestic or foreign corporation organized or operating under the laws of this State has been engaged in conduct prohibited by Section 3 of this Act, or the terms of any injunction issued under this Act, a circuit court may, upon petition of the Attorney General, order the revocation, forfeiture or suspension of the charter, franchise, certificate of authority or privileges of any corporation operating under the laws of this State, or the dissolution of any such corporation.

(4) In lieu of any criminal penalty otherwise prescribed for a violation of this Act, and in addition to any action under this Act or any Federal antitrust law, the Attorney General may bring an action in the name and on behalf of the people of the State against any person, trustee, director, manager or other officer or agent of a corporation, or against a corporation, domestic or foreign, to recover a penalty not to exceed $1,000,000 from every corporation or $100,000 from every other person for any act herein declared illegal. The action must be brought within 4 years after the commission of the act upon which it is based. Nothing in this subsection shall impair the right of any person to bring an action under subsection (2) of this Section.

Credits

Laws 1965, p. 1943, § 7, eff. July 21, 1965. Amended by P.A. 76-208, § 1, eff. July 1, 1969; P.A. 77-1675, § 1, eff. July 1, 1972; P.A. 79-1360, § 25, eff. Oct. 1, 1976; P.A. 79-1365, § 17, eff. Oct. 1, 1976; P.A. 80-701, § 1, eff. Oct. 1, 1977; P.A. 80-1031, § 10, eff. Sept. 22, 1977, P.A. 81-1051, § 1, eff. Jan. 1, 1980; P.A. 83-236, § 1, eff. Jan. 1, 1984; P.A. 83-238, § 1, eff. Jan. 1, 1984; P.A. 83-1362, Art. II, § 43, eff. Sept. 11, 1984; P.A. 93-351, § 5, eff. Jan. 1, 2004; P.A. 96-751, § 5, eff. Jan. 1, 2010.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.

BAR COMMITTEE COMMENTS--1967

See, also, discussion under Section 6, *supra*.

Section 7 provides for civil actions and remedies. In Section 7(1), the Attorney General, again with such assistance as he may require from any State's Attorneys, is authorized to institute civil proceedings in the Circuit Court to prevent and restrain violations of any of the subsections of Section 3. Thus, as to the acts prohibited by Section 3(1) both criminal (see Section 6(1)) and civil suits by the Attorney General are authorized. Upon proof being made of a violation, the court is empowered to utilize all equitable powers necessary to remove the effects of the violation and to prevent it from continuing or being renewed. This would include but not be limited to, injunction, divestiture of property, divorcement or dissolution of business entities, and suspension or termination of the right of foreign entities to do business in Illinois.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

Section 7(2) authorizes civil actions by any person injured in his business or property by a violation of any of the subsections of Section 3. For this purpose, the State of Illinois, any public organization organized under the authority of the State of Illinois, and the United States, are persons and have standing to sue. Such actions may be for damages, or for an injunction, or both. Unlike the procedure under the federal antitrust laws, a person who is successful in an injunction action is entitled to costs and reasonable attorney's fees. A successful damage action claimant is also entitled to costs and reasonable attorney's fees, but he is entitled to treble damages as of right only if his injury is found to be due to a violation of Section 3(1). If the injury is due to a violation of Section 3(2) or 3(3), he shall recover only actual damages. However, should he be able to show that the violation was “wilful,” the court has the discretion to increase the recovery up to a total of three times the actual damages.

Civil actions under Section 7(2) are barred unless commenced within four years after the cause of action accrued. It is significant to note that in the bill sponsored by the Bar Associations it was provided that fraudulent concealment of an alleged violation would not suspend the running of the statute of limitations. Considerable controversy has surrounded this question under the federal antitrust statutes. Since it is generally accepted that the question of whether fraudulent concealment does suspend a statute of limitations is to be determined by reference to general law, insistence on this provision was withdrawn. Thus, the question is unresolved by the statute. Assuming a proper allegation of fraudulent concealment and evidence to support the allegation, it may well be that Illinois courts will conclude that fraudulent concealment does suspend the running of the state statute of limitations. This would accord with current federal court interpretation and, in view of Section 11 of the Act, it may be that the Illinois courts will be constrained to follow the federal courts.

Notes of Decisions (66)

740 I.L.C.S. 10/7, IL ST CH 740 § 10/7
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.1
Formerly cited as IL ST CH 38 ¶ 60-7.1

10/7.1. Personal service

Currentness

§ 7.1. Personal service of any process in an action under this Act may be made upon any person outside the state if such person has engaged in conduct in violation of this Act in this State. Such persons shall be deemed to have thereby submitted themselves to the jurisdiction of the courts of this state within the meaning of this section.

Credits
Laws 1965, p. 1943, § 7.1, added by P.A. 76-208, § 1, eff. July 1, 1969.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.1.

740 I.L.C.S. 10/7.1, IL ST CH 740 § 10/7.1
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.2
Formerly cited as IL ST CH 38 ¶ 60-7.2

10/7.2. Investigation by Attorney General

Effective: July 2, 2010
Currentness

§ 7.2. (1) Whenever it appears to the Attorney General that any person has engaged in, is engaging in, or is about to engage in any act or practice prohibited by this Act, or that any person has assisted or participated in any agreement or combination of the nature described herein, he may, in his discretion, conduct an investigation as he deems necessary in connection with the matter and has the authority prior to the commencement of any civil or criminal action as provided for in the Act to subpoena witnesses, and pursuant to a subpoena (i) compel their attendance for the purpose of examining them under oath, (ii) require the production of any books, documents, records, writings or tangible things hereafter referred to as "documentary material" which the Attorney General deems relevant or material to his investigation, for inspection, reproducing or copying under such terms and conditions as hereafter set forth, (iii) require written answers under oath to written interrogatories, or (iv) require compliance with a combination of the foregoing. Any subpoena issued by the Attorney General shall contain the following information:

(a) The statute and section thereof, the alleged violation of which is under investigation and the general subject matter of the investigation.

(b) The date and place at which time the person is required to appear or produce documentary material in his possession, custody or control or submit answers to interrogatories in the office of the Attorney General located in Springfield or Chicago. Said date shall not be less than 10 days from date of service of the subpoena.

(c) Where documentary material is required to be produced, the same shall be described by class so as to clearly indicate the material demanded.

The Attorney General is hereby authorized, and may so elect, to require the production, pursuant to this section, of documentary material or interrogatory answers prior to the taking of any testimony of the person subpoenaed. Said documentary material shall be made available for inspection and copying during normal business hours at the principal place of business of the person served, or at such other time and place, as may be agreed upon by the person served and the Attorney General. When documentary material is demanded by subpoena, said subpoena shall not:

(i) contain any requirement which would be unreasonable or improper if contained in a subpoena duces tecum issued by a court of this State; or

(ii) require the disclosure of any documentary material which would be privileged, or which for any other reason would not be required by a subpoena duces tecum issued by a court of this State.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

(2) The production of documentary material in response to a subpoena served pursuant to this Section shall be made under a sworn certificate, in such form as the subpoena designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by a person or persons having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian. Answers to interrogatories shall be accompanied by a statement under oath attesting to the accuracy of the answers.

While in the possession of the Attorney General and under such reasonable terms and conditions as the Attorney General shall prescribe: (A) documentary material shall be available for examination by the person who produced such material or by any duly authorized representative of such person, (B) transcript of oral testimony shall be available for examination by the person who produced such testimony, or his or her counsel and (C) answers to interrogatories shall be available for examination by the person who swore to their accuracy.

Except as otherwise provided in this Section, no documentary material, transcripts of oral testimony, or answers to interrogatories, or copies thereof, in the possession of the Attorney General shall be available for examination by any individual other than an authorized employee of the Attorney General or other law enforcement officials, federal, State, or local, without the consent of the person who produced such material, transcripts, or interrogatory answers.

For purposes of this Section, all documentary materials, transcripts of oral testimony, or answers to interrogatories obtained by the Attorney General from other law enforcement officials shall be treated as if produced pursuant to a subpoena served pursuant to this Section for purposes of maintaining the confidentiality of such information.

(3) No person shall, with intent to avoid, evade, prevent, or obstruct compliance in whole or in part by any person with any duly served subpoena of the Attorney General under this Act, knowingly remove from any place, conceal, withhold, destroy, mutilate, alter, or by any other means falsify any documentary material that is the subject of such subpoena. A violation of this subsection is a Class A misdemeanor. The Attorney General, with such assistance as he may from time to time require of the State's Attorneys in the several counties, shall investigate suspected violations of this subsection and shall commence and try all prosecutions under this subsection.

Credits

Laws 1965, p. 1943, § 7.2, added by P.A. 76-208, § 1, eff. July 1, 1969. Amended by P.A. 81-1051, § 1, eff. Jan. 1, 1980; P.A. 93-351, § 5, eff. Jan. 1, 2004; P.A. 96-751, § 5, eff. Jan. 1, 2010; P.A. 96-1000, § 635, eff. July 2, 2010.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.2.

Notes of Decisions (3)

740 I.L.C.S. 10/7.2, IL ST CH 740 § 10/7.2
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.3
Formerly cited as IL ST CH 38 ¶ 60-7.3

10/7.3. Service of subpoena

Currentness

§ 7.3. Service of a subpoena of the Attorney General as provided herein may be made by (a) Delivery of a duly executed copy thereof to the person served, or if a person is not a natural person, to the principal place of business of the person to be served, or (b) Mailing by certified mail, return receipt requested, a duly executed copy thereof addressed to the person to be served at his principal place of business in this State, or, if said person has no place of business in the State, to his principal office.

Credits
Laws 1965, p. 1943, § 7.3, added by P.A. 76-208, § 1, eff. July 1, 1969.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.3.

740 I.L.C.S. 10/7.3, IL ST CH 740 § 10/7.3
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.4
Formerly cited as IL ST CH 38 ¶ 60-7.4

10/7.4. Examination of witnesses

Currentness

§ 7.4. The examination of all witnesses under this section shall be conducted by the Attorney General or by an assistant attorney general designated by him before an officer authorized to administer oaths in this State. The testimony shall be taken stenographically or by a sound recording device and shall be transcribed.

The Attorney General or his designated assistant conducting the examination shall exclude from the place where the examination is held all persons except the person being examined, his counsel, the officer before whom the testimony is to be taken, and any stenographer taking such testimony. Any person compelled to appear under a demand for oral testimony pursuant to this Act may be accompanied, represented, and advised by counsel. The examination shall be conducted in a manner consistent with the Illinois Civil Practice Law [1] and Illinois Supreme Court Rules. If such person refuses to answer any question, the Attorney General or his designated assistant conducting the examination may petition the Circuit Court pursuant to Section 7.6 of this Act for an order compelling such person to answer such question.

Credits
Laws 1965, p. 1943, § 7.4, added by P.A. 76-208, § 1, eff. July 1, 1969. Amended by P.A. 81-1051, § 1, eff. Jan. 1, 1980; P.A. 83-1539, Art. III, § 3, eff. Feb. 4, 1985.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.4.

Footnotes

1 735 ILCS 5/2-101 et seq.

740 I.L.C.S. 10/7.4, IL ST CH 740 § 10/7.4
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.5
Formerly cited as IL ST CH 38 ¶ 60-7.5

10/7.5. Fees for witnesses; document production

Effective: January 1, 2004
Currentness

§ 7.5. Fees for witnesses; document production.

(1) All persons served with a subpoena by the Attorney General under this Act shall be paid the same fees and mileage as paid witnesses in the courts of this State.

(2) Where a subpoena requires the production of documentary material, the respondent shall produce the original of such documentary material, provided, however, that the Attorney General may agree that copies may be substituted, in which case the respondent shall have copies made and produced at the respondent's expense.

Credits
Laws 1965, p. 1943, § 7.5, added by P.A. 76-208, § 1, eff. July 1, 1969. Amended by P.A. 93-351, § 5, eff. Jan. 1, 2004.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.5.

740 I.L.C.S. 10/7.5, IL ST CH 740 § 10/7.5
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.6
Formerly cited as IL ST CH 38 ¶ 60-7.6

10/7.6. Failure or refusal to obey subpoena

Effective: January 1, 2004
Currentness

§ 7.6. In the event a witness served with a subpoena by the Attorney General under this Act fails or refuses to obey same or produce documentary material or interrogatory answers as provided herein, or to give testimony, relevant or material, to the investigation being conducted, the Attorney General may petition the Circuit Court of Sangamon or Cook County, or the county wherein the witness resides for an order requiring said witness to attend and testify or produce the documentary material or interrogatory answers demanded. The court's order shall require the witness to attend and testify or produce the documentary material or interrogatory answers, or a combination thereof, by a specified date, and shall further provide a date thereafter on which the witness shall show cause in court why he or she should not be held in contempt of court if he or she fails to comply. The Attorney General shall cause the order to be served upon the witness in the manner provided for service of subpoenas in Section 7.3 of this Act. Service of the order shall constitute service of process, and no other form of process is necessary to submit the witness to the jurisdiction of the court and to require compliance with the court order.

Credits

Laws 1965, p. 1943, § 7.6, added by P.A. 76-208, § 1, eff. July 1, 1969. Amended by P.A. 93-351, § 5, eff. Jan. 1, 2004.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.6.

740 I.L.C.S. 10/7.6, IL ST CH 740 § 10/7.6
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.7
Formerly cited as IL ST CH 38 ¶ 60-7.7

10/7.7. Incriminating testimony

Effective: January 1, 2004
Currentness

§ 7.7. In any investigation brought by the Attorney General pursuant to this Act, no individual shall be excused from attending, testifying or producing documentary material, objects or tangible things in obedience to a subpoena or under order of the court on the ground that the testimony or evidence required of him or her may tend to incriminate him or subject him to any penalty. No individual shall be criminally prosecuted or subjected to any criminal penalty for or on account of (a) any testimony or interrogatory answers given by him or her, or (b) any documentary material produced by him or her, as to which he or she would otherwise have a right not to give or produce by virtue of his or her right against self-incrimination, in any investigation brought by the Attorney General pursuant to this Act; provided no individual so giving testimony or answers or so producing documentary material shall be exempt from prosecution or punishment for perjury committed in so testifying, answering, or producing.

Credits

Laws 1965, p. 1943, § 7.7, added by P.A. 76-208, § 1, eff. July 1, 1969. Amended by P.A. 81-1051, § 1, eff. Jan. 1, 1980; P.A. 93-351, § 5, eff. Jan. 1, 2004.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.7.

Notes of Decisions (10)

740 I.L.C.S. 10/7.7, IL ST CH 740 § 10/7.7
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.8
Formerly cited as IL ST CH 38 ¶ 60-7.8

10/7.8. Action by state, counties, municipalities, etc. for damages

Currentness

§ 7.8. The Attorney General may bring an action on behalf of this State, counties, municipalities, townships and other political subdivisions organized under the authority of this State in Federal Court to recover damages provided for under any comparable provision of Federal law; provided, however, this shall not impair the authority of any such county, municipality, township or political subdivision to bring such action on its own behalf nor impair its authority to engage its own counsel in connection therewith.

Credits

Laws 1965, p. 1943, § 7.8, added by P.A. 76-208, § 1, eff. July 1, 1969.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.8.

Notes of Decisions (4)

740 I.L.C.S. 10/7.8, IL ST CH 740 § 10/7.8
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/7.9
Formerly cited as IL ST CH 38 ¶ 60-7.9

10/7.9. Action not barred as affecting or involving interstate or foreign commerce

Currentness

§ 7.9. No action under this Act shall be barred on the grounds that the activities or conduct complained of in any way affects or involves interstate or foreign commerce.

Credits
Laws 1965, p. 1943, § 7.9, added by P.A. 76-208, § 1, eff. July 1, 1969.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-7.9.

740 I.L.C.S. 10/7.9, IL ST CH 740 § 10/7.9
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/8
Formerly cited as IL ST CH 38 ¶ 60-8

10/8. Judgment or order as prima facie evidence in action for damages

Currentness

§ 8. A final judgment or order rendered in any civil or criminal proceeding brought by the Attorney General under this Act to the effect that a defendant has violated this Act shall be prima facie evidence against such defendant in any action for damages brought by any other party against such defendant under subsection (2) of Section 7 of this Act, as to all matters respecting which said judgment or order would be an estoppel as between the parties thereto: Provided, that this Section shall not apply to civil consent judgments or orders entered before any testimony has been taken.

Credits

Laws 1965, p. 1943, § 8, eff. July 21, 1965. Amended by P.A. 79-1365, § 18, eff. Oct. 1, 1976.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-8.

BAR COMMITTEE COMMENTS--1967

Section 8 parallels the federal statute and provides that a final judgment rendered in an action brought by the Attorney General under the statute which is to the effect that a defendant has violated the statute shall be *prima facie* evidence against a defendant in any damage action brought against the defendant by any other party. Such *prima facie* effect is limited to such matters respecting which the judgment would be an estoppel as between the parties thereto. Also as in the federal laws, the section is not applicable to civil consent judgments entered before any testimony has been taken.

Under the present case law the federal laws exempt *nolo contendere* pleas entered before any testimony in criminal actions but, since the Illinois Criminal Code no longer contemplates the reception of such a plea, no such provision appears in the statute. The Bar Association bill provided that Section 8 would not be applicable to a criminal judgment based on a guilty plea, but this provision was eliminated by agreement with sponsors of the Attorney General's bill.

Unlike the federal statute which does not extend to damage actions brought by the federal government, Section 8 is not so limited and the same *prima facie* effect will flow from damage actions brought by the Attorney General. However, since the section applies only to “any civil or criminal proceeding brought by the Attorney General,” damage actions brought by any other state body or agency would not come within the section.

740 I.L.C.S. 10/8, IL ST CH 740 § 10/8
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/9
Formerly cited as IL ST CH 38 ¶ 60-9

10/9. Violation as conspiracy at common law

Currentness

§ 9. No contract, combination, conspiracy, or other act which violates this Act shall constitute or be deemed a conspiracy at common law.

Credits
Laws 1965, p. 1943, § 9, eff. July 21, 1965.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-9.

BAR COMMITTEE COMMENTS--1967

Section 9 provides that no conspiracy which violates the 1965 Illinois Antitrust Act shall constitute or be deemed a conspiracy at common law. The purpose of this provision was to confine remedies for what were formerly common law conspiracies to proceedings under the new Act, if violative of the new Act, and thus prevent another form of "double jeopardy." However, an injured party might still recover under the doctrine of a common law conspiracy where the conduct in question did not violate the new Act.

Notes of Decisions (1)

740 I.L.C.S. 10/9, IL ST CH 740 § 10/9
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

KeyCite Red Flag - Severe Negative Treatment
KeyCite Red Flag Negative Treatment 10/10. § 10. Repealed by P.A. 80-233, § 2, eff. Oct. 1, 1977

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/10
Formerly cited as IL ST CH 38 ¶ 60-10

10/10. § 10. Repealed by P.A. 80-233, § 2, eff. Oct. 1, 1977

Currentness

740 I.L.C.S. 10/10, IL ST CH 740 § 10/10
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/11
Formerly cited as IL ST CH 38 ¶ 60-11

10/11. Construction of federal anti-trust law

Currentness

§ 11. When the wording of this Act is identical or similar to that of a federal antitrust law, the courts of this State shall use the construction of the federal law by the federal courts as a guide in construing this Act. However, this Act shall not be construed to restrict the exercise by units of local government or school districts of powers granted, either expressly or by necessary implication, by Illinois statute or the Illinois Constitution.

Credits

Laws 1965, p. 1943, § 11, eff. July 21, 1965. Amended by P.A. 83-929, § 5, eff. Nov. 3, 1983.

Formerly Ill.Rev.Stat.1991, ch. 38, ¶ 60-11.

BAR COMMITTEE COMMENTS--1967

Difficult problems of interpretation arise under Section 11. No such provision appeared in the original draft sponsored by the Bar Association. Its omission was intentional because the draftsmen had omitted large portions of the federal legislation, including all of the Clayton Act and the Federal Trade Commission Act. In addition, the offenses specified by the basic federal statute, the Sherman Act, and been made more specific and split into several categories in Section 3. In such circumstances it appeared inappropriate to insert a clause specifically providing that the court should be guided by federal precedents.

During the period in which the matter was under consideration in the General Assembly, however, business interests expressed the fear that there might develop a conflict between state and federal law. Such a conflict, they feared, might lead to a situation where interstate companies engaging in a course of action which is lawful under federal law might find that same conduct held violative of the Illinois Act. It is clear that the proponents of Section 11 did not intend to make it easier to establish a violation of the Act than would be the case absent Section 11. Therefore, Section 11 should not be relied upon by the courts to find conduct which is clearly not violative of Section 3(1) to be violative of Section 3(2) of the Act, without having examined the competitive and economic purposes and consequences thereof, even though such conduct is a *per se* offense under federal law. The drafters of the Act in constituting Section 3 carefully excluded such conduct from Section 3(1) and clearly intended it to be tested under the rule of reason under Section 3(2). Conduct may be found violative of Section 3(2) only after an examination of the competitive and economic purposes and effects of such conduct. In this connection see the discussion, *supra*, under Section 3(1) with respect to vertical price fixing and boycotts which are *per se* offenses under the federal law but clearly are not under Section 3(1) of the Illinois Act.

Section 11 provides that when language of the Illinois Act is the same or similar to a federal antitrust law, the Illinois courts must follow the construction given to the federal law by federal courts. In some cases it will be difficult

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

to determine when language in the Illinois Act, which is different from comparable language in the federal act, is "similar" to language in the federal act. While we now have in Illinois a basically Sherman Act type of statute, it was very carefully made different from the federal act in certain important respects with the deliberate intention in certain situations of achieving a different result.

While admittedly this section may be very difficult of application, it would seem that what it really intended is that the Illinois Act will be given a construction which keeps it consistent with the Sherman Act and the comparable procedural (but not substantive) provisions of the Clayton Act. Therefore, whenever the language and structure of the Illinois Act do not indicate that a different result was intended, and where the activity in question is clearly within the scope of both laws, then the Illinois Act should be given a construction which is the same as that reached by the federal courts. The proponents of Section 11 clearly intended that the new Illinois Act would not make conduct unlawful which is lawful under federal law.

Notes of Decisions (17)

740 I.L.C.S. 10/11, IL ST CH 740 § 10/11
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document

© 2023 Thomson Reuters. No claim to original U.S. Government Works.

 © 2023 Thomson Reuters. No claim to original U.S. Government Works.

West s Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 740. Civil Liabilities
Act 10. Illinois Antitrust Act (Refs & Annos)

740 ILCS 10/12

10/12. Jury Trial

Effective: January 1, 2004
Currentness

§ 12. Jury Trial. In the trial of all actions brought under this Act for the imposition of criminal sanctions or the recovery of civil penalties or damages, any party, upon timely demand, shall be entitled to a trial by jury.

Credits
Laws 1965, p. 1943, § 12, added by P.A. 93-351, § 5, eff. Jan. 1, 2004.

740 I.L.C.S. 10/12, IL ST CH 740 § 10/12
Current through P.A. 102-1114 of the 2022 Reg. Sess. Some statute sections may be more current, see credits for details.

End of Document © 2023 Thomson Reuters. No claim to original U.S. Government Works.

TABLE OF CONTENTS TO RECORD ON APPEAL

Date	Title/Description	Page No.
07/29/2020	DOCKET LIST	C 6-C 13 (Volume 1)
07/29/2020	COMPLAINT	C 14-C 34 (Volume 1)
07/29/2020	CIVIL ACTION COVER SHEET	C 35 (Volume 1)
07/29/2020	FEE EXEMPT COVER SHEET	C 36-C 37 (Volume 1)
07/29/2020	COLONY DISPLAY LLC SUMMONS	C 38-C 40 (Volume 1)
07/29/2020	METRO STAFF, INC., SUMMONS	C 41-C 43 (Volume 1)
07/29/2020	MIDWAY STAFFING, INC., SUMMONS	C 44-C 46 (Volume 1)
07/29/2020	ELITE STAFFING, INC., SUMMONS	C 47-C 49 (Volume 1)
08/03/2020	RECEIPT OF SUMMONS AND COMPLAINT	C 50-C 54 (Volume 1)
08/03/2020	ELITE STAFFING, INC., NOTICE	C 55-C 59 (Volume 1)
08/06/2020	COLONY DISPLAY LLC SUMMONS	C 60-C 64 (Volume 1)
08/10/2020	NOTICE OF FILING	C 65-C 69 (Volume 1)
08/10/2020	AGREED MOTION FOR CONFIDENTIALITY ORDER	C 70-C 76 (Volume 1)
08/10/2020	AGREED MOTION TO FILE UNDER SEAL	C 77-C 82 (Volume 1)
08/11/2020	AGREED CONFIDENTIALITY ORDER	C 83-C 84 (Volume 1)
08/11/2020	ORDER GRANTING LEAVE TO FILE UNDER SEAL	C 85 (Volume 1)
08/12/2020	MOTION FOR LEAVE TO SUBSTITUTE COMPLAINT	C 86-C 113 (Volume 1)
08/13/2020	NOTICE OF MOTION	C 114-C 116 (Volume 1)
08/21/2020	NOTICE OF FILING	C 117-C 121 (Volume 1)
08/24/2020	JOINT MOTION TO SET BRIEFING SCHEDULE	C 122-C 129 (Volume 1)
08/25/2020	ORDER TO SEAL FILE	C 130-C 132 (Volume 1)

Date	Title/Description	Page No.
08/27/2020	ELITE STAFFING, INC., APPEARANCE	C 133 (Volume 1)
08/27/2020	COLONY DISPLAY LLC, APPEARANCE	C 134-C 135 (Volume 1)
09/01/2020	NOTICE OF FILING	C 136-C 137 (Volume 1)
09/01/2020	METRO STAFF, INC., APPEARANCE	C 138 (Volume 1)
09/10/2020	RESPONE TO MOTION	C 139-C 145 (Volume 1)
09/10/2020	RESPONSE TO MOTION FOR UNREADACTED COMPLAINT	C 146-C 149 (Volume 1)
09/10/2020	OPPOSITION TO MOTION FOR LEAVE	C 150-C 163 (Volume 1)
09/10/2020	APPEARANCE	C 164-C 165 (Volume 1)
09/10/2020	EXHIBIT	C 166-C 210 (Volume 1)
09/18/2020	MOTION FOR EXTENSION OF TIME	C 211-C 216 (Volume 1)
09/22/2020	RESONSE TO MOTION FOR EXTENION OF TIME	C 217-C 220 (Volume 1)
09/22/2020	ORDER	C 221 (Volume 1)
09/24/2020	AGREED ORDER SETTING BRIEFING SCHEDULE	C 222-C 223 (Volume 1)
09/24/2020	REPLY IN SUPPORT OF ITS MOTION	C 224-C 273 (Volume 1)
10/05/2020	MOTION TO DISMISS	C 274-C 289 (Volume 1)
10/05/2020	NOTICE OF MOTION	C 290-C 291 (Volume 1)
10/13/2020	AGREED ORDER	C 292 (Volume 1)
10/14/2020	METRO STAFF, INC. MOTION FOR CONSOLIDATION OF CASES	C 293-C 296 (Volume 1)
10/14/2020	NOTICE OF MOTION	C 297-C 298 (Volume 1)
10/16/2020	JOINT MOTION FOR LEAVE TO FILE BRIEF	C 299-C 304 (Volume 1)
10/16/2020	NOTICE OF MOTION	C 305 (Volume 1)
10/19/2020	JOINT MOTION FOR LEAVE TO FILE BRIEF	C 306-C 309 (Volume 1)

Date	Title/Description	Page No.
10/20/2020	OPPOSITION TO MOTION FOR CONSOLIDATION OF CASES	C 310-C 316 (Volume 1)
10/26/2020	ORDER	C 317 (Volume 1)
10/26/2020	ORDER FOR MOTION FOR LEAVE	C 318 (Volume 1)
10/27/2020	UNREDACTED COMPLAINT	C 319-C 339 (Volume 1)
10/28/2020	NOTICE OF MOTION	C 340-C 341 (Volume 1)
10/28/2020	CONSOLIDATED MOTION TO DISMISS	C 342-C 381 (Volume 1)
12/16/2020	CONSOLIDATED OPPOSITION TO MOTION TO DISMISS	C 382-C 445 (Volume 1)
01/26/2021	NOTICE OF FILING	C 446-C 447 (Volume 1)
01/26/2021	METRO STAFF, INC., REPLY IN SUPPORT OF IT'S MOTION	C 448-C 454 (Volume 1)
01/26/2021	COLONY DISPLAY LLC AND ELITE STAFFING, INC.'S REPLY IN SUPPORT OF IT'S MOTION	C 455-C 479 (Volume 1)
02/08/2021	ORDER	C 480 (Volume 1)
02/19/2021	ORDER	C 481 (Volume 1)
03/05/2021	CERTIFICATE OF SERVICE	C 482-C 483 (Volume 1)
03/25/2021	NOTICE OF MOTION	C 484-C 485 (Volume 1)
03/25/2021	COLONY DISPLAY LLC, MOTION FOR PROTECTIVE ORDER	C 486-C 517 (Volume 1)
03/25/2021	METRO STAFF, INC.'S MOTION FOR PROTECTIVE ORDER	C 518-C 519 (Volume 1)
03/25/2021	METRO STAFF, INC, NOTICE OF FILING	C 520 (Volume 1)
03/25/2021	COLONY DISPLAY LLC, NOTICE OF MOTION	C 521-C 522 (Volume 1)
03/25/2021	MIDWAY STAFFING, INC., NOTICE OF MOTION	C 523-C 524 (Volume 1)
03/25/2021	MOTION FOR PROTECTIVE ORDER	C 525-C 559 (Volume 1)

Date	Title/Description	Page No.
03/25/2021	MOTION TO STAY DISCOVERY	C 560-C 595 (Volume 1)
03/30/2021	RESPONSE TO MOTIONS FOR PROTECTIVE ORDER	C 596-C 604 (Volume 1)
03/30/2021	COLONY DISPLAY LLC'S REPLY IN SUPPORT OF MOTION	C 605-C 608 (Volume 1)
04/01/2021	ORDER	C 609 (Volume 1)
04/16/2021	HEARING ORDER	C 610 (Volume 1)
05/11/2021	ORDER	C 611 (Volume 1)
05/26/2021	ORDER	C 612-C 615 (Volume 1)
06/11/2021	NOTICE OF MOTION	C 616-C 617 (Volume 1)
06/11/2021	MOTION FOR APPELLATE CERTIFICATION	C 618-C 632 (Volume 1)
06/17/2021	RULE 308 ORDER	C 633 (Volume 1)
06/28/2021	AGREED CASE MANAGEMENT ORDER	C 634 (Volume 1)
06/30/2021	MIDWAY STAFFING, INC., ANSWER TO COMPLAINT	C 635-C 662 (Volume 1)
06/30/2021	METRO STAFFING, INC., ANSWER TO COMPLAINT	C 663-C 691 (Volume 1)
06/30/2021	COLONY DISPLAY LLC, ANSWER TO COMPLAINT	C 692-C 718 (Volume 1)
06/30/2021	ELITE STAFFING, INC., ANSWER TO COMPLAINT	C 719-C 766 (Volume 1)
06/30/2021	METRO STAFF, INC., NOTICE OF FILING	C 767-C 768 (Volume 1)
06/30/2021	MIDWEST STAFFING, INC., NOTICE OF FILING	C 769-C 770 (Volume 1)
06/30/2021	ELITE STAFFING, INC., NOTICE OF FILING	C 771-C 772 (Volume 1)
07/15/2021	ELITE STAFFING, INC., CERTIFICATE OF SERVICE	C 773-C 774 (Volume 1)
07/15/2021	METRO STAFF, INC., CERTIFICATE OF SERVICE	C 775-C 776 (Volume 1)
07/16/2021	COLONY DISPLAY LLC, CERTIFICATE OF SERVICE	C 777-C 778 (Volume 1)

Date	Title/Description	Page No.
07/16/2021	MIDWAY STAFFING, INC., CERTIFICATE OF SERVICE	C 779-C 780 (Volume 1)
07/21/2021	NOTICE OF MOTION	C 781-C 783 (Volume 1)
07/21/2021	REPLY TO ELITE STAFFING, INC., CERTIFICATE OF SERVICE	C 784-C 798 (Volume 1)
07/21/2021	REPLY TO COLONY DISPLAY LLC’S AFFIRMATIVE DEFENSES	C 799-C 809 (Volume 1)
07/21/2021	07/21/2021 REPLY TO METRO STAFF, INC.’S, AFFIRMATIVE DEFENSES	C 810-C 815 (Volume 1)
07/21/2021	REPLY TO MIDWAY STAFFING, INC.’S, AFFIRMATIVE DEFENSES	C 816-C 820 (Volume 1)
07/21/2021	MOTION TO STRIKE AFFIRMATIVE DEFENSES	C 821-C 829 (Volume 1)
07/21/2021	CERTIFICATE OF SERVICE	C 830-C 831 (Volume 1)
08/04/2021	MOTION TO STRIKE AFFIRMATIVE DEFENSES	C 832 (Volume 1)
08/18/2021	REVIEWING COURT ORDER	C 833-C 865 (Volume 1)
08/27/2021	NOTICE OF MOTION	C 866-C 867 (Volume 1)
08/27/2021	MOTION FOR STAY OF DISCOVERY	C 868-C 879 (Volume 1)
09/01/2021	AGREED ORDER	C 880 (Volume 1)
08/18/2021	NOTICE OF INTERLOCUTORY APPEAL	C 881-C 913 (Volume 1)
08/26/2021	REQUEST FOR PREPARATION OF THE RECORD	C 914 (Volume 1)

CERTIFICATE OF SERVICE

I certify that on January 11, 2023, a copy of the within instrument was filed via the Court's approved electronic filing service provider, which will automatically serve and send notification of such filing to all parties who have appeared and have not until this point been found by the Court to be in default for failure to plead. Additionally, a true and correct copy was served on the below parties by email pursuant to Illinois Supreme Court Rule 11.

By: */s/ Sean A. McClelland*

Priyanka Gupta
Assistant Attorney General
Elizabeth L. Maxeiner
Senior Assistant Attorney General, Antitrust Bureau
Office of the Illinois Attorney General
100 West Randolph Street
Chicago, Illinois 60601
(312) 814-1004
priyanka.gupta@ilag.gov
Elizabeth.Maxeiner@ilag.gov
civilappeals@ilag.gov

Counsel for Plaintiffs

AMUNDSEN DAVIS, LLC

Jeffrey A. Risch
3815 E. Main Street, Suite A-1
St. Charles, Illinois 60174
Telephone: (630) 587-7910
Facsimile: (630) 587-7960
Firm ID No. 42913
jrisch@amundsendavislaw.com

John R. Hayes
150 N. Michigan Avenue, Suite 3300
Chicago, Illinois 60601
Telephone: (312) 894-3200
Facsimile: (312) 894-3210
Firm ID No. 42907
jhayes@amundsendavislaw.com

Counsel for Midway Staffing, Inc.

GREENBERG TRAURIG, LLP

Scott Mendeloff
Gabriel Aizenberg
Brian D. Straw
David S. Repking
77 West Wacker Drive, Suite 3100
Chicago, Illinois 60601
(312) 456-8400
Firm ID No. 36511
mendeloffs@gtlaw.com
aizenbergg@gtlaw.com
strawb@gtlaw.com
repkingd@gtlaw.com

Counsel for Colony Display, LLC

FISH POTTER BOLONOS P.C.

David Fish
Kimberly Hilton
John Kunze
200 E 5th Ave Suite 123
Naperville, Illinois 60563
Telephone: 630-355-7590
Facsimile: 630-778-0400
Firm ID No. 23522
dfish@fishlawfirm.com
docketing@fishlawfirm.com
admin@fishlawfirm.com

Counsel for Metro Staff, Inc.

THOMPSON COBURN LLP

John J. Cullerton
Patrick Morales-Doyle
55 East Monroe Street, 37th Floor
Chicago, Illinois 60603
Telephone: (312) 346-7500
Facsimile: (312) 580-2201
jcullerton@thompsoncoburn.com
pmoralesdoyle@thompsoncoburn.com

Counsel for Staffing Services Association of Illinois, Amicus Curiae

Ada Sandoval
Mark H. Birhanu
Legal Department
Raise the Floor Alliance
1 N. LaSalle Street, Suite 1275
Chicago, IL 60201
(312) 795-9115
asandoval@raisetheflooralliance.org
mbirhanu@raisetheflooralliance.org

Counsel for Raise the Floor Alliance et al., Amici Curiae

Eric A. Posner
5611 South Blackstone Avenue
Chicago, Illinois 60637
(773) 633-3834
eposner@uchicago.edu

Amicus Curiae