
IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ROBERT BROWN, JANET DIAZ, and JOHN WELLING,)	Appeal from the United
)	States District Court for
)	the Northern District of
Plaintiffs-Appellants,)	Illinois, Eastern Division
)	
v.)	
)	
SEARS, ROEBUCK AND CO.,)	
)	No. 02 C 3939
Defendant-Appellee,)	
)	
and)	
)	
DIAMOND EXTERIORS, INC. and)	Hon. Robert W. Gettleman,
DIAMOND HOME SERVICES, INC.,)	<i>Judge, Presiding</i>
)	
Defendants.)	

**BRIEF OF DEFENDANT-APPELLEE
SEARS, ROEBUCK AND CO.**

May 3, 2004

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ORAL ARGUMENT REQUESTED

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 03-4289

Short Caption: Brown v. Sears, Roebuck and Co.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with [Circuit Rule 26.1](#) and [Fed. R. App. P. 26.1](#).

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):

Sears, Roebuck and Co.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Mayer, Brown, Rowe & Maw, LLP

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

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None

Attorney's Signature: _____ Date: May 3, 2004

Attorney's Printed Name: Howard J. Roin, Kim A. Leffert, Lauren Frank Noll

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TABLE OF CONTENTS

JURISDICTION	1
ISSUES	4
STATEMENT OF THE CASE	4
A. Nature of the Case and the Course of Proceedings.	4
B. Disposition Below.	6
STATEMENT OF FACTS	8
A. The License Agreement.	8
B. The Three Named Plaintiffs.	11
C. The Working Relationship Between Sears And Diamond	12
1. Diamond’s role in hiring, disciplining, and firing Diamond’s employees.	12
2. Directing the details of Diamond’s employees’ daily work. . .	16
3. Audits and customer complaints.	18
4. Diamond’s major corporate decisions.	20
SUMMARY OF ARGUMENT	21
STANDARD OF REVIEW	23
ARGUMENT	24
I. To Withstand Summary Judgment, Plaintiffs Must Demonstrate That Sears Exercised Day-To-Day Control Over The Activities Of Diamond’s Employees	24

A.	The Remaining Claims Against Sears Require Proof That Sears Was Plaintiffs' Employer.	24
B.	To Be An Employer Under Illinois Law, One Must Exercise Day-To-Day Control Over The Plaintiffs' Work Activities.	27
II.	There Is No Evidence That Sears Directed The Daily Work Of Any Of The Three Named Plaintiffs	33
III.	As A Matter Of Law, Sears Was Not The Employer Of Diamond's Employees.	35
A.	Diamond Had Exclusive Authority To Hire, Pay, Transfer, Discipline, And Fire Diamond's Employees.	35
B.	Diamond Controlled The Day-To-Day Activities Of Diamond's Employees	39
C.	The Quality Control Standards Set By Sears Did Not Make Sears The Employer Of Diamond's Employees	45
D.	Plaintiffs' Other Arguments Are Meritless.	48
	CONCLUSION	51

TABLE OF AUTHORITIES

	Page
Cases	
<i>Abbott v. Village of Westmont</i> , 2003 WL 22071492 (N.D. Ill. Sept. 5, 2003)	34, 37
<i>Adcock v. Chrysler Corp.</i> , 166 F.3d 1290 (9th Cir. 1999)	41
<i>Alexander v. Rush N. Shore Med. Ctr.</i> , 101 F.3d 487 (7th Cir. 1996)	28
<i>American Patriot Ins. Agency v. Mutual Risk Management</i> , No. 03-1684, 2004 WL 816836 (7th Cir. Apr. 16, 2004)	8
<i>Anderson v. Humana, Inc.</i> , 24 F.3d 889 (7th Cir. 1994)	3, 33
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986)	23
<i>Bob Neal Pontiac-Toyota v. Industrial Commission</i> , 433 N.E.2d 678 (Ill. 1982)	27, 28, 35, 44
<i>Castro v. Brown’s Chicken & Pasta, Inc.</i> , 732 N.E.2d 37 (Ill. App. Ct. 2000)	32, 37, 40, 45, 49
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	23, 24, 34
<i>Chemsource, Inc. v. Hub Group, Inc.</i> , 106 F.3d 1358 (7th Cir. 1997)	24, 34
<i>Collins v. Associated Pathologists, Ltd.</i> , 844 F.2d 473 (7th Cir. 1988)	23
<i>Commercial Nat’l Bank v. Demos</i> , 18 F.3d 485 (7th Cir. 1994)	2
<i>Coty v. U.S. Slicing Machine Co.</i> , 373 N.E.2d 1371 (Ill. App. Ct. 1978)	31, 37, 38, 45
<i>DeBruyne v. Equitable Life Assurance Society</i> , 920 F.2d 457 (7th Cir. 1990)	2, 33
<i>Decatur Production Credit Ass’n v. Murphy</i> , 456 N.E.2d 267 (Ill. App. Ct. 1983)	26

	Page
<i>Doe v. Allied-Signal, Inc.</i> , 925 F.2d 1007 (7th Cir. 1991)	44
<i>Doe v. R.R. Donnelley & Sons</i> , 42 F.3d 439 (7th Cir. 1994)	24
<i>EEOC v. North Knox School Corp.</i> , 154 F.3d 744 (7th Cir. 1998)	29, 38
<i>G. Heileman Brewing v. NLRB</i> , 879 F.2d 1526 (7th Cir. 1989)	36
<i>Gallagher Corp. v. Russ</i> , 721 N.E.2d 605 (Ill. App. Ct. 1999)	25
<i>Gill Custom House v. Gaslight Club</i> , 330 N.E.2d 559 (Ill. App. Ct. 1975)	26
<i>Graves v. Women’s Professional Rodeo Ass’n</i> , 907 F.2d 71 (8th Cir. 1990)	41
<i>Harold Washington Party v. Cook County Democratic Party</i> , 984 F.2d 875 (7th Cir. 1993)	3, 33, 34
<i>Hedberg v. Indiana Bell Tel. Co.</i> , 47 F.3d 928 (7th Cir. 1995)	23
<i>Hojnacki v. Klein-Acosta</i> , 285 F.3d 544 (7th Cir. 2002)	28-29, 35, 37, 40, 43, 46
<i>Hopgood v. Anheuser-Busch, Inc.</i> , 458 N.E.2d 525 (Ill. App. Ct. 1983)	29, 48
<i>Kelley v. Southern Pacific Co.</i> , 419 U.S. 318 (1974)	27-28
<i>Kerr v. WGN Continental Broadcasting Co.</i> , 2002 WL 1477629 (N.D. Ill. July 9, 2002), <i>motion to amend denied</i> , 229 F. Supp. 2d 880 (N.D. Ill. 2002)	30, 46, 48
<i>Lavazzi v. McDonald’s Corp.</i> , 606 N.E.2d 845 (Ill. App. Ct. 1992)	32, 37, 38, 40, 41, 45, 47, 48
<i>Matsushita Electric Industrial Co. v. Zenith Radio Corp.</i> , 475 U.S. 574 (1986)	23
<i>Murphy v. Holiday Inns, Inc.</i> , 219 S.E.2d 874 (Va. 1975)	31

	Page
<i>People ex rel. Hartigan v. E&E Hauling</i> , 607 N.E.2d 165 (Ill. 1989)	25
<i>Richardson v. Bulk Petroleum Corp.</i> , 297 N.E.2d 405 (Ill. App. Ct. 1973)	32, 39, 42, 47
<i>Rohter v. Passarella</i> , 617 N.E.2d 46 (Ill. App. Ct. 1993)	26
<i>Rutan v. Republican Party of Illinois</i> , 868 F.2d 943 (7th Cir. 1989) (en banc), <i>aff'd in part and rev'd in part on other grounds</i> , 497 U.S. 62 (1990)	3, 33
<i>Schroeder v. Pennsylvania R.R.</i> , 397 F.2d 452 (7th Cir. 1968)	44
<i>Slates v. International House of Pancakes</i> , 413 N.E.2d 457 (Ill. App. Ct. 1980)	32, 39, 48, 49-50
<i>Smith v. Sheahan</i> , 189 F.3d 529 (7th Cir. 1999)	23
<i>Tierney v. Burlington Northern R.R.</i> , 608 N.E.2d 479 (Ill. App. Ct. 1992)	29-30
<i>Vanderlaan v. Berry Constr. Co.</i> , 255 N.E.2d 615 (Ill. App. Ct. 1970)	26
<i>Walker v. Brown</i> , 28 Ill. 378 (1862)	26
<i>Walker v. Pritzker</i> , 705 F.2d 942 (7th Cir. 1983)	2
<i>Yassin v. Certified Grocers</i> , 502 N.E.2d 315 (Ill. App. Ct. 1986)	31, 39, 40

Statutes and Rules

28 U.S.C. § 1291 2

28 U.S.C. § 1331 1

28 U.S.C. § 1335 1, 2

28 U.S.C. § 1367(a) 1

29 U.S.C. § 1132(e)(1) 1

Fed. R. Civ. P. 22 1

Fed. R. Civ. P. 56 23

Other Authorities

RESTATEMENT (SECOND) OF AGENCY § 220 27, 28

JURISDICTION

Plaintiffs' Jurisdictional Statement is not complete and correct. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1367(a), and 29 U.S.C. § 1132(e)(1). The complaint, originally filed in St. Clair County, Illinois, sought the payment of benefits provided for under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, et seq., and also alleged related state law claims. R2.¹ Among other things, the plaintiffs alleged in count V that after their employer, Diamond Exteriors (collectively, with Diamond Home Services, "Diamond"), went out of business in January 2000, defendants Sears, Roebuck and Co. ("Sears") and Professional Benefit Administrators ("PBA") breached a contract that provided plaintiffs with a self-funded health insurance program, which is an "employee welfare benefit plan" under ERISA, 29 U.S.C. § 1002(1). R2 ¶¶ 46-50. Because of the ERISA claim, the case was removed to the Southern District of Illinois in March 2002. R1, at 2-3. PBA, a health insurance administrator, then filed an interpleader claim, pursuant to 28 U.S.C. § 1335 and Fed. R. Civ. P. 22, with respect to approximately \$81,000 it held, which belonged to Diamond's health insurance plan. R6, at 4-9.

¹ Record materials that are not included in one of the appendices are cited by the district court's docket number ("R__"). Items in appendix A attached to plaintiffs' opening brief ("A__") or plaintiffs' separately bound appendix B ("B__") are referred to by appendix page number. The depositions included in the supplemental appendix filed by Sears ("SA__") are cited by tab number, followed by the original deposition transcript page numbers.

After the case was transferred to the Northern District of Illinois in May 2002 (R37), the plaintiffs filed an amended complaint. R41, Ex. A; R46 (order granting motion to amend). The new count V alleged that Diamond and/or PBA breached a contract to provide plaintiffs with health insurance benefits. R41, Ex. A, ¶¶ 46-50. In November 2002, the district court granted two agreed motions concerning that claim. First, the court granted the parties' motion for consent to interpleader and PBA's request to deposit the \$81,000 with the court. R58. Second, the court ordered that (a) the interpleader claim would continue without further involvement by PBA, (b) the plaintiffs' claims against PBA would continue against the \$81,000 fund, and (c) PBA would be dismissed as a defendant. R59. The district court continues to have jurisdiction over the interpleader claim under 28 U.S.C. § 1335(a). *Commercial Nat'l Bank v. Demos*, 18 F.3d 485, 488 (7th Cir. 1994); *Walker v. Pritzker*, 705 F.2d 942, 944 (7th Cir. 1983).

On September 24, 2003, the district court granted summary judgment in favor of Sears. A1-9. Pursuant to Fed. R. Civ. P. 54(b), the court directed entry of final judgment in favor of Sears on all claims asserted against it in an order dated November 12, 2003 and entered on the docket on November 19, 2003. A10-12. Plaintiffs filed a timely notice of appeal on December 19, 2003. R91. This Court has jurisdiction under 28 U.S.C. § 1291.

Before entering final judgment in favor of Sears, the district court never ruled on (and was not asked to rule on) class certification—indeed, the plaintiffs never filed a class certification motion. On the claims alleged against Sears, the district court thus “has

done everything it plans to do.” *DeBruyne v. Equitable Life Assurance Society*, 920 F.2d 457, 463 (7th Cir. 1990). Accordingly, the absence of a ruling on class certification does not affect the finality of the judgment being appealed, although it means that this Court on appeal will consider only the claims alleged by the three named plaintiffs. See *Rutan v. Republican Party of Illinois*, 868 F.2d 943, 947 (7th Cir. 1989) (en banc), *aff’d in part and rev’d in part on other grounds*, 497 U.S. 62 (1990); *Anderson v. Humana, Inc.*, 24 F.3d 889, 891 (7th Cir. 1994); *Harold Washington Party v. Cook County Democratic Party*, 984 F.2d 875, 878 (7th Cir. 1993); *DeBruyne*, 920 F.2d at 463 & n.9.

The claims remaining in the district court—the claims involving the interpleaded ERISA funds and the claims against Diamond—are factually and legally distinct from the claims against Sears. The issue on appeal is whether Sears was plaintiffs’ employer (along with Diamond). In contrast, the claims against Diamond—which is no longer in business and has never responded to any of the complaints—turn on whether Diamond breached its contract with, and violated duties that Diamond owed to, the plaintiffs. The interpleader claim concerns the plaintiffs’ claims to health insurance benefits, which the plaintiffs were, but are no longer, seeking to recover from Sears. See R2 ¶¶ 46-50; B191-92 ¶¶ 46-50.

ISSUES

Whether the district court properly granted summary judgment on the three named plaintiffs' claims that Sears was their employer when

- (1) there was no evidence that any of the named plaintiffs had any contact with Sears, and
- (2) in any event, the undisputed evidence is that
 - (a) Diamond paid the compensation of all Diamond employees,
 - (b) Diamond made all decisions on hiring, disciplining, transferring, and firing Diamond's employees, and
 - (c) Diamond directed the day-to-day activities of Diamond's 1,500 employees in dozens of Diamond offices nationwide.

STATEMENT OF THE CASE

A. Nature of the Case and the Course of Proceedings.

Plaintiffs are three former Diamond employees. B23. Before Diamond went out of business on January 31, 2000, it sold and installed certain Sears home improvement items under a License Agreement with Sears. B24-28. Plaintiffs allege that when Diamond went out of business it defaulted on its obligation to pay wages, commissions, and health benefits to plaintiffs and other Diamond employees. B185-91 ¶¶ 21-44.

In an effort to impose liability on Sears as a result of Diamond's failure to pay Diamond's employees, the plaintiffs pursued a series of theories below as to why Sears was supposedly their employer. In their initial complaint, plaintiffs alleged that they were employed by "Sears/Diamond." *E.g.*, R2 ¶¶ 1-3, 15, 18. Sears moved to dismiss, noting among other things that there is no entity called "Sears/Diamond," and that,

although the complaint was premised on the assumption that Sears was plaintiffs' employer, plaintiffs never actually made that allegation. R29. Plaintiffs responded by filing an amended complaint, which eliminated the term "Sears/Diamond" and replaced it with conclusory allegations that "Plaintiffs were employed by Sears, or Sears and Diamond," *e.g.*, R41, Ex. A ¶¶ 1-3, 15, 26, and were subservants of Sears, *id.* ¶¶ 11, 13. The district court dismissed that complaint, ruling that (a) "[p]laintiffs have not adequately alleged either dual-employment or borrowed employment," and (b) plaintiffs did not allege sufficient facts to support the theory that they were subservants of Sears, because, *inter alia*, the complaint "conspicuously fails to allege that Sears had day-to-day control over Diamond or Diamond's employees," and the Sears-Diamond License Agreement—which provides that Diamond was "an independent contractor" solely responsible for compensating Diamond's employees—does not provide for "day-to-day control sufficient to change Diamond's legal status from an independent contractor into a servant of Sears." B16, 18.

The plaintiffs amended yet again, this time alleging that that they were "dual employees of both Sears and Diamond," although conceding that "Diamond wrote paychecks to each of the Plaintiffs," drawn on "Diamond's bank account." B182, 187 ¶¶ 10, 28, 30. In support of their assertion of "dual employment with Sears," plaintiffs alleged that they "wore 'Sears' uniforms" and "appeared to be Sears' employees"; "both Diamond and Se[ar]s benefitted from the Plaintiffs' work"; Sears retained the contractual right to "control quality standards" on installation work; Sears considered the customers

to be “Sears customers”; Sears “reserved the right to adjust the sales price”; Sears required Diamond to provide monthly financial information and “weekly tracking reports”; and Sears could “request” that the plaintiffs be “transferred” from selling or installing Sears-approved products in certain circumstances. B183-84 ¶¶ 14-15.

The second amended complaint dropped the previous allegation (R41, Ex. A ¶ 42) that Sears was a party to a contract with the plaintiffs. Instead, it alleged that “Plaintiffs and Diamond were parties to a valid contract” under which “Diamond was to pay the Plaintiffs * * * from monies paid to Diamond by Sears.” B190 ¶ 41. Although Sears admittedly was not a party to the agreement, plaintiffs alleged that “Diamond and Sears breached this contract” by not paying the plaintiffs. B190-91 ¶ 43.

The plaintiffs asserted claims against Sears for unjust enrichment, conversion, violation of the Illinois Wage Payment and Collection Act, and breach of contract. B185-91 ¶¶ 21-44. Sears answered and moved for summary judgment. R62, 66.

B. Disposition Below.

The district court granted summary judgment for Sears on each claim. On appeal, plaintiffs do not challenge the ruling on the conversion claim. Pl. Br. 4 n.1.

The court stated that the License Agreement “was very specific about the intended relationship between Sears and Diamond”: the Agreement provided that Diamond was “‘an independent contractor’”; Diamond had “‘no authority’” to employ anyone on behalf of Sears; “‘no employee’” of Diamond would be deemed to be a Sears employee; Diamond had the “‘sole and exclusive right’” to hire, fire, transfer, promote or discipline

its employees; and, “perhaps most importantly for the instant case,” Diamond was “solely responsible for all salaries and other compensation of all licensee’s employees.” A2 (quoting the License Agreement). Thus, the License Agreement “specifically indicated an intent to create an independent contractor relationship with Diamond maintaining day-to-day control of its operations and employees.” A5. The court noted that the plaintiffs agreed that they could not withstand summary judgment on any of their claims except conversion unless there were “sufficient facts in the record to demonstrate that Sears actually exercised substantial daily control over plaintiffs’ work.” A6.

The court held that the evidence was legally insufficient to meet this test. Even though Sears placed certain quality-control requirements on Diamond telephone operators, salespersons, and installers, it was “undisputed” that “[t]he actual authority to fire remained at all times with Diamond, and Diamond did not always comply with Sears’ requests.” A6-7. In addition, “plaintiffs’ own witnesses * * * testified that all of Diamond’s employees across the country reported to, were evaluated by, and had their compensation determined and paid by Diamond.” A7. The evidence also “demonstrates that Sears had no authority to direct the details of plaintiffs’ daily work, outside of the general requirements set forth in the Licensing Agreement.” *Id.* In short, although “Sears demanded compliance with the Licensing Agreement,” there was “no evidence * * * that Sears exercised the type of discretionary control over individual Diamond employees, particularly the instant plaintiffs, with the same specification and rigor necessary to establish the employer/employee relationship.” A8. As a result, the court

concluded, “plaintiffs cannot prevail on their unjust enrichment, Illinois Wage Payment Act, and breach of contract claims.” *Id.*

STATEMENT OF FACTS

The material facts are undisputed. In the district court, the plaintiffs agreed with the defendant’s statement of undisputed facts except for two paragraphs on venue and jurisdiction. See B23; R78, at 1. The factual statement below is derived largely from the parties’ License Agreement and the depositions of the two former Diamond employees whose affidavits plaintiffs submitted in response to Sears’s summary judgment motion.²

A. The License Agreement.

Diamond Exteriors was started in 1993 by several former Sears employees to provide home improvement services. SA Tab 1, at 28-29, 31. In 1996, Sears and Diamond executed a License Agreement to govern the entire relationship between the two companies. B227, 242. Pursuant to that Agreement, which applied only to “non-commercial residential customers,” Diamond agreed to sell and install certain Sears-approved home improvement products, including roofs, gutters, fences, and garage doors,

² The district court incorrectly stated that Sears had admitted the facts in plaintiffs’ statement of additional facts because Sears did not respond to that statement. A3 n.2. The pertinent Northern District rule, LR 56.1(b)(3)(B), provides that facts in the “statement required of the moving party” are deemed admitted if not controverted, but there is no such provision with respect to the additional facts submitted by the non-moving party. See *American Patriot Ins. Agency v. Mutual Risk Management*, No. 03-1684, 2004 WL 816836, at *2 (7th Cir. Apr. 16, 2004) (criticizing courts’ tendency to “drift away from the language of a statute or a rule”). In any event, as explained in the Argument section below, the facts relied on by plaintiffs on appeal do not preclude summary judgment.

using the Sears name. B227-28 ¶¶ 1(A), 1(B), 3. Diamond was free to sell the same or similar products under Diamond's own name to commercial customers (or to any customers in markets not covered by the License Agreement), and Diamond had the "sole discretion" to decide whether to "engage in any other business or business activities." B231 ¶ 9.

The Agreement explicitly provided that Diamond was "an independent contractor" and stated that "[n]othing contained in or done pursuant to this License Agreement shall be construed as creating a partnership, agency * * * or joint venture." B231 ¶ 8. Diamond had "no authority to employ persons on behalf of Sears and no employees of [Diamond] shall be deemed to be employees or agents of Sears, said employees at all times remaining [Diamond's] employees." B230 ¶ 6(A). Thus, Diamond had "sole and exclusive control" over the "wages, hours, working conditions, or conditions of its employees." *Id.* Diamond also had "the sole and exclusive right to hire, transfer, suspend, layoff, recall, promote, assign, discipline, adjust grievances and discharge said employees." *Id.* Diamond agreed to "give consideration" to a "request[]" by Sears to the "transfer, from the sale or installation of Sears approved products, of any employee who is objectionable to Sears for reasons of health, safety and/or security of Sears customers, employees or Sears merchandise and/or whose manner impairs Sears customer relations." *Id.*

The Agreement also stated that Diamond was "solely responsible for all salaries and other compensation of all [Diamond's] employees." B230 ¶ 6(C). Therefore,

Diamond would “make all necessary salary deductions and withholdings from its employees’ salaries and other compensation,” and Diamond was “solely responsible for the payment of any and all contributions, taxes and assessments,” including income taxes, Social Security, and unemployment compensation. *Id.* Diamond also agreed to “comply with any other Federal, State or local law or regulation regarding but not limited to compensation, hours of work, or other conditions of employment.” B230 ¶ 6(D). The Agreement further provided that Diamond would “not make any purchases and/or incur any obligation or expense of any kind in the name of Sears,” and Diamond would “promptly pay all the obligations of [Diamond] including those for labor and material.” B233 ¶ 16.

Sears did not have “any right or power to effect or control the prices at which services or products shall be offered” under the License Agreement; that power belonged exclusively to Diamond. B240 ¶ 32. However, if customers complained about specific work and Diamond’s “adjustment is unsatisfactory to the customer,” Sears had the right to “make such further adjustment as Sears may deem necessary under the circumstances.” B231 ¶ 10(B).

When Diamond referred to its work under the License Agreement, it was required to represent itself as a “‘Sears Authorized Contractor.’” B232 ¶ 11(B). Sears had the right to “disapprove” of the forms, materials, and plans used by Diamond in connection with performing its responsibilities under the Agreement. *Id.* The prior approval of

Sears was required for advertising used by Diamond for products and services offered as a Sears authorized contractor under the License Agreement. B232 ¶ 11(A).

The customer information that Diamond developed or acquired in operating as a Sears licensee was owned by Sears. B232 ¶ 14(A). Diamond agreed to “maintain a minimum level of service * * * acceptable to Sears,” as measured by quality control surveys filled out by customers. B227 ¶ 1(C). Diamond promised that its work would be “of high quality” and that it would “maintain the general policy of satisfaction of customers.” B231 ¶ 10(B).

Depending on the product, Diamond retained 87% or 89% of the sales proceeds from the products covered by the License Agreement; Diamond paid 11% or 13% to Sears as compensation for being permitted to act as a Sears licensee. B233 ¶ 19(A). In addition, Diamond agreed to pay Sears at least 1% of the gross sales for each lead supplied by a Sears employee that resulted in a sale. B234 ¶ 19(C). Diamond reported sales information to Sears on a weekly basis, and Sears “reserve[d]” the right to “review and audit” Diamond’s books. B234 ¶ 20(A), B236 ¶ 23.

B. The Three Named Plaintiffs.

The three named plaintiffs—Robert Brown, Janet Diaz, and John Welling—are “former employees of Diamond Exteriors.” B23 ¶ 1. In opposing summary judgment, plaintiffs did not offer any evidence concerning which Diamond office Brown, Diaz, and Welling worked in; how and by whom they were supervised; and whether any of them

ever had any contact with Sears employees in performing their daily responsibilities for Diamond. R75-78. Brown, Diaz, and Welling did not submit affidavits.

The plaintiffs did submit affidavits from R.Q. Whitmire, the Vice President of Installations for Diamond, starting in 1998, and Michael Burchfield, Diamond's Vice President of Marketing, beginning in 1998, both of whom were later deposed. B29-30, 281. The affidavits did not mention Brown, Diaz, and Welling. Whitmire testified in his deposition that he did not know any of the named plaintiffs. SA Tab 1, at 157-59. Burchfield said he did not know Diaz or Brown, and although he thought Welling's name "rings a bell, a sales associate in some office," he admitted, "I don't recall which office." SA Tab 2, at 282. Burchfield did not provide any testimony about Welling's daily activities or the supervision of Welling's day-to-day work.

C. The Working Relationship Between Sears And Diamond.

1. Diamond's role in hiring, disciplining, and firing Diamond's employees.

Burchfield and Whitmire testified that all of Diamond's employees—approximately 1,500 in dozens of offices around the country—reported to, were evaluated by, and had their compensation determined by Diamond officials. SA Tab 1, at 43-47, 155; SA Tab 2, at 269-71; B61.³ Diamond's employees all received Diamond paychecks and Diamond benefits, and they told customers they worked for Diamond. SA Tab 2, at 81-83; SA

³ The cited exhibit states that Diamond has "a work force of more than 1,500 people" in "72 offices nationwide." B61. In their depositions, Burchfield and Whitmire disagreed on the number of Diamond sales offices. SA Tab 1, at 147 (Whitmire: 72 or 73 offices); SA Tab 2, at 64 (Burchfield: 55 offices).

Tab 1, at 55-56. As Whitmire put it, “I never told anyone I was an employee of Sears.” SA Tab 1, at 56. Burchfield and Whitmire themselves reported to, were evaluated by, and had their compensation determined by Diamond executives. *Id.* at 34, 39-40; SA Tab 2, at 50, 52, 264-65. Both testified that they were not employed by Sears after Diamond began in 1993. SA Tab 2, at 15 (Burchfield: “That’s when Sears terminated my relationship as an employee”); SA Tab 1, at 16 (Whitmire: in 1993, he “stopped being a Sears employee”). Neither received paychecks or benefits from Sears after 1993. SA Tab 1, at 16; SA Tab 2, at 15.

Whitmire and Burchfield both testified that Sears never instructed Diamond to fire anyone. SA Tab 1, at 162; SA Tab 2, at 296. Sears occasionally recommended or suggested that a particular employee be terminated, but Whitmire and Burchfield agreed that Diamond did not always go along. SA Tab 1, at 162-63; SA Tab 2, at 228, 295-96. Whitmire and Burchfield—who were asked to identify every such incident they recalled—remembered only five specific Diamond employees whom Sears ever recommended or suggested be terminated from 1993 to 2000. With respect to three of those employees—Gene McCord, Ed Bruner, and Mary Heavlyn—Diamond refused to terminate them, and Diamond later promoted McCord. SA Tab 1, at 104-06, 113-14, 163. All three remained employed by Diamond until Diamond went out of business on January 31, 2000. *Id.* at 105-06; R84, Tab 3, at 11, 14, 15. Whitmire and Burchfield did identify two employees who were fired due to Sears’s purported “influence,” but they admitted that Sears did not instruct Diamond to fire either one: Steve Crawford (a sales

manager in Dallas) and a sales manager in Chicago. SA Tab 1, at 107-09; SA Tab 2, at 213-17.⁴

In addition, Diamond could—and did—terminate employees “without having any [of] Sears’s input.” SA Tab 1, at 163 (Whitmire: he “[a]bsolutely” had the authority to terminate Diamond employees). For example, a manager of a Diamond branch office could terminate someone with the approval of Diamond’s Human Resources (“HR”) department. This “happened all the time,” Burchfield testified. SA Tab 2, at 259. And Whitmire had “the authority to fire a sales manager or installation manager.” SA Tab 1, at 44-45, 163.

Diamond, not Sears, also decided whether to discipline, suspend, transfer, or promote Diamond employees. *Id.* at 164-65. That was “done by Diamond on its own.” *Id.* at 165. Branch managers simply needed the approval of Diamond’s HR department to discipline an employee. SA Tab 2, at 259-60. This occurred on a “[r]egular basis.” *Id.* If Diamond employees in management positions were promoted or transferred, Diamond would “let Sears know as a courtesy,” but “if it wasn’t a management position, we probably wouldn’t notify Sears.” SA Tab 1, at 164. Sears once “encouraged”

⁴ Whitmire and Burchfield also mentioned two other Diamond employees. Sears was “not happy” with Rod Orey, the manager in New Orleans, who “left after ’95,” but there was no testimony that he was fired. SA Tab 1, at 109-10. And Burchfield decided to fire a Milwaukee manager following an unspecified incident that Diamond “could not substantiate” after an investigation, but which made a customer “incredibly upset.” SA Tab 2, at 218, 219-20. Sears, however, did not request that the person be terminated; it asked Diamond only to “commit that nothing like this will ever happen again.” *Id.* at 219.

Diamond to transfer a sales manager to Chicago, but the “ultimate decision” to do so was made by Diamond. SA Tab 2, at 75-77.

Similarly, Diamond, not Sears, decided which employees to hire for Diamond. “The management at Diamond did the hiring.” *Id.* at 72. Whitmire hired the managers for Diamond’s branch offices. SA Tab 1, at 33-34. When branch offices got approval from Diamond’s corporate office to hire more sales consultants, “they’d go out [and] find their own individuals to hire.” SA Tab 2, at 257. And when Sears began requiring inspections of every roof installation, it told Diamond generally to hire quality control inspectors, but Sears did not “have any involvement at all in choosing specific quality control managers”—Diamond “interviewed them and hired them.” SA Tab 1, at 184-85; SA Tab 2, at 246. Sears occasionally recommended someone for a position with Diamond: Burchfield and Whitmire identified a total of four such people over a seven-year span. SA Tab 1, at 145-46; SA Tab 2, at 247-48. ⁵ A Sears employee also occasionally sat in on interviews of prospective employees and sometimes gave his or her views on the candidates, but Sears never took the lead in interviewing anyone. SA Tab 2, at 73, 258. Sears also approved the classified ads soliciting applications and the application forms. *Id.* at 72, 250, 258. But all hiring decisions were made by Diamond.

⁵ Burchfield stated in his affidavit that Sears “directed” Diamond to hire Joseph Sieger as Diamond’s Chief Operating Officer in late 1999 (B37 ¶ 33), but he admitted in his subsequent deposition that he was not personally involved in hiring Sieger. SA Tab 2, at 251. Nor was Whitmire. SA Tab 1, at 146-47. Steve Burnett of Sears told Burchfield vaguely only that Sears was “involved” in Sieger’s move to Diamond. SA Tab 2, at 254. Whitmire heard only “rumors” related by Burchfield about the “involve[ment]” of Sears. SA Tab 1, at 146-47.

Id. at 71-72. Diamond also decided which independent contractors to hire to do the actual installation work. SA Tab 1, at 42-43.

After Diamond hired the employees, it also trained them. The sales managers, installation managers, and project coordinators in Diamond's field offices were trained by Whitmire and Burchfield, not by Sears. SA Tab 1, at 48, 54-55. By 1998, newly hired Diamond salespersons participated in a two-week training session, 8 hours per day, which was run by a Diamond employee. SA Tab 2, at 98, 100-01, 103-04. Out of that two weeks, Sears representatives would participate in about 7 hours of training. SA Tab 2, at 100-02. They "typically stayed for their own session and left." *Id.* at 114-15. At the end of the training session, Diamond "made the ultimate decision whether an individual graduated." *Id.* at 115-16.

2. Directing the details of Diamond's employees' daily work.

The individual Diamond employees scattered in offices around the country received day-to-day direction from other Diamond employees or made decisions themselves. As Burchfield summarized, "Sears didn't—often they didn't want to get into the details. They just wanted the results. And that's all they were after was the results." SA Tab 2, at 216.

For example, Diamond's national call center in Kansas would initially "schemul[e] appointments, and assign[] the appointment to a specific salesman." *Id.* at 62. Thus, a Diamond employee determined when a specific person could be at the customer's house. *Id.* at 144-45. And Diamond's branch managers would "tell[] the sales

consultants and the quality inspection people where to go and when to do their jobs.” *Id.* at 269. In addition, Diamond salespeople could decide on their own when to visit a job site to check on the status of the work, or when to take off for, say, a dentist appointment. *Id.* at 93. Decisions on vacation time were determined in accordance with a policy and procedures manual prepared by Diamond’s HR department. SA Tab 1, at 39-40. If a customer was not ready to sign a certificate of completion for a job, Diamond decided what steps to take to resolve it. R83, at 7.

Some Diamond employees used materials that had been approved by Sears: scripts for the telephone operators in the call center; training materials for new salespeople; sales material for customers; and quality control check sheets. Those written materials (all of which used the Sears name) were all prepared by the same process: Diamond would do the initial drafts and then submit them to Sears for approval. SA Tab 1, at 83-84, 160; SA Tab 2, at 94-96, 151-52, 156-57, 160, 164-65, 173-81, 193. And Diamond employees often did not use scripts; Diamond trained them to make presentations “seem more natural than that.” SA Tab 2, at 97-98; SA Tab 1, at 88. Diamond would also have its own ad agency—one not used by Sears—create new ads, which were presented to and approved by Sears (because the ads used the Sears name). SA Tab 2, at 119, 120-22. Sears credit forms were used when a customer financed the purchase through Sears, but by 1997 Visa, MasterCard, and American Express could also be used, in which case those companies’ forms were used. *Id.* at 87, 195.

Besides the categories of Diamond employees already discussed, Diamond employed a wide variety of people not directly involved in selling, installing, or inspecting home improvements: clerical staff, administrative assistants, information services, the HR department, payroll, accounting, purchasing, and the legal department. SA Tab 2, at 59-63. There was no evidence that the Diamond employees performing these tasks had any contact with Sears.

With respect to Whitmire himself, he testified only that beyond 5 to 10 discussions per week with Sears about customer complaints, he had daily discussions with Sears about “fencing issues” and the average time frame to install roofing. SA Tab 1, at 96-97, 99, 178-79. As for Burchfield, by 1999, he was spending his work week at Diamond’s Woodstock, Illinois headquarters and had daily contact with Steve Burnett, who worked at Sears’s office at Hoffman Estates, Illinois. SA Tab 2, at 57-58, 261. Burnett, however, had no authority to terminate Burchfield. *Id.* at 265. Burchfield still reported to Diamond’s CEO, Steve Clegg; Burchfield spoke with Clegg every day, Clegg gave him assignments, and Clegg determined his compensation. *Id.* at 52-53, 90, 261, 264-65.

3. Audits and customer complaints.

Sears periodically audited Diamond’s many field offices in order to “review the office performance, paperwork, policies, and procedures.” SA Tab 2, at 277. Each office would be audited two or three times per year, and a typical audit lasted two days. SA Tab 1, at 121-25. Sears also had some of its employees visit job sites every once in a while; the frequency depended on the area. In St. Louis, where a number of Sears

home improvement executives lived, it was “quite often.” *Id.* at 68. In other cities, it would be only a “couple of times a year.” *Id.* at 69. In Chicago, it “might be as high as 15” visits a year—out of 2,500 total jobs. *Id.* at 69-70. Typically, the Sears representative “would visit with the customer,” see “if they had any concerns or if they were pleased with the salesperson and the contractor,” “[v]isit with the contractor,” and “[l]ook at the work that was being done.” *Id.* at 71. The Sears representative might tell Diamond that an employee “needs to be more involved in A, B or C,” or tell Diamond what an employee did right or wrong, but Diamond’s witnesses did not recall any specific instances of this. *Id.* at 103, 112-13.

In addition, Sears would call Whitmire 5 to 10 times per week about customer complaints concerning the 300 or so jobs that Diamond was doing every day. *Id.* at 96-97, 99. This was “primarily to inform me to get it fixed,” although sometimes Sears would tell Whitmire more specifically what it wanted done. *Id.* at 97, 102. Sears might discuss with Diamond how long it was taking to install roofs generally, but Sears “did not tell you you should do this to the roof or do that to the roof.” R83, at 11⁶; SA Tab 1, at 178-79. Whitmire also participated in weekly conference calls with Diamond’s eight operations centers to discuss customer complaints; Sears joined in those calls about once a month. SA Tab 1, at 115-16. The number of open complaints was a factor that Sears

⁶ The quotation, from Burchfield’s deposition, was included in Sears’s reply brief below (R83), but due to a photocopying error the transcript page on which it appears and another manuscript page were inadvertently omitted from the copy of the complete transcript that was filed below (R84, Tab 2). For completeness, Sears is moving to supplement the record with the missing pages.

used to determine if Diamond was meeting its obligations under the License Agreement. *Id.* at 142. In the fall of 1999, Diamond had 6,000 open customer complaints according to Sears's records. SA Tab 2, at 245. Diamond also had weekly conference calls with Sears to discuss open service orders; those calls did not discuss the performance of particular Diamond employees. *Id.* at 199-200, 201-02. There were also monthly and quarterly quality control reviews; Burchfield recalled only one discussion of a specific employee, whose name he could not recall. *Id.* at 223-28. Starting in the fall of 1999, Burchfield had weekly conference calls with Sears regarding Diamond employees; "[s]ometimes" the call would be dropped and Steven Burnett of Sears would "spend the day" with Burchfield looking at "all our reports, the open service orders." *Id.* at 206-07. (Before fall 1999, those conference calls or meetings occurred once a month. *Id.* at 208.)

4. Diamond's major corporate decisions.

Diamond's founders decided to open Diamond in 1993 and to locate its headquarters in Woodstock, Illinois because it was personally convenient for them; seven years later, Diamond's CEO, Steve Clegg, made the decision to close Diamond. SA Tab 1, at 31, 151; SA Tab 2, at 293-94.

In 1998 or 1999, Diamond "went through a major reorganization," to consolidate its dozens of branch installation offices "down to eight very large ones." SA Tab 2, at 65-66. (The restructuring did not affect Diamond's many sales offices. SA Tab 1, at 147.) This was a "radical structure change in the company," and it was implemented by Jeff Foreman (Diamond's President) and Whitmire—Sears was not involved. *Id.* at 40-

42; SA Tab 2, at 207, 255. In addition, Burchfield, supervised by Diamond's Steve Clegg, performed the "enormous project" of consolidating and streamlining all of the paperwork provided to customers. SA Tab 2, at 183-84.

SUMMARY OF ARGUMENT

In order for plaintiffs to prevail on any of the claims left against Sears, they are required to prove that Sears was their employer. To do so, plaintiffs must establish that Sears, not Diamond, directed the plaintiffs in their daily work for Diamond. They cannot do that; undisputed evidence refutes their theory.

Most fundamentally, there is absolutely no evidence that Sears even had any contact with the three named plaintiffs—Robert Brown, Janet Diaz, and John Welling—let alone supervised their day-to-day work. Because the district court was not asked to, and did not, rule on class certification before granting summary judgment, the only claims before this Court on appeal are those of the three named plaintiffs. But the plaintiffs offered *no* evidence concerning Brown, Diaz, and Welling in their summary judgment papers—those three did not even submit affidavits. The record indicates only that they are former Diamond employees and that Welling was a salesperson. The positions held by Brown and Diaz are a mystery. The offices in which the three worked are unknown. And there is utterly no evidence that Sears directed—or was even aware of—their day-to-day work. As a result, the judgment in favor of Sears must be affirmed.

The plaintiffs' total failure to offer any material evidence concerning Brown, Diaz, and Welling is all that this Court need consider. But even if the Court considers the other

evidence in the record—none of which shows that Sears had day-to-day control over the work of the three named plaintiffs—it is legally insufficient to establish that Sears was the employer of any Diamond employees. Most significantly, it is undisputed that Diamond, not Sears, had exclusive authority to hire, discipline, transfer, and fire Diamond employees. In a handful of instances, Sears suggested that an employee be terminated, but Diamond made the ultimate decision: sometimes Diamond fired the person, but more frequently Diamond retained the employee. It is also uncontested that Diamond, not Sears, evaluated Diamond’s employees, paid Diamond’s employees, and made all decisions regarding their compensation.

What is more, there is no evidence that Sears controlled the daily work activities of Diamond’s 1,500 employees, working in dozens of Diamond offices around the country. For starters, there is no evidence that many of Diamond’s office workers, such as clerical staff and information services personnel, had any contact with Sears whatever. As for other Diamond employees, plaintiffs’ own witnesses admitted that Sears did not direct the details of what they did on a day-to-day basis. (Indeed, given the breadth of Diamond’s operations—dozens of offices spread throughout the country, working on some 300 home improvement jobs every day—Sears could not have directed the daily work of Diamond’s employees without a vast administrative apparatus.) Diamond employees made the everyday decisions involved in running a business: in addition to making all decisions concerning hiring, compensation and termination of individual employees, Diamond employees scheduled appointments, decided when to visit job sites, and

determined how each particular home improvement job would be performed. Sears took steps to insure that Diamond met certain quality standards and it approved Diamond-prepared materials using the Sears name, but that is no more than what a franchisor routinely does with respect to its franchisees—and a long line of Illinois cases holds that a franchisor is not the employer of the people working for its franchisees.

STANDARD OF REVIEW

Summary judgment rulings are reviewed *de novo*, following the same standards that apply in the district court. *Smith v. Sheahan*, 189 F.3d 529, 532 (7th Cir. 1999). Rule 56 permits “weak factual claims” to be “weeded out through summary judgment motions. The existence of a triable issue is no longer sufficient to survive a motion for summary judgment.” *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 476 (7th Cir. 1988). Rather, there must be “sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986) (citations omitted). And although “‘the inferences to be drawn from the underlying facts * * * must be viewed in the light most favorable to the party opposing the motion,’” *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986), those inferences must be “reasonable”—speculation and conjecture do “not create a *genuine* issue of fact,” *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 932 (7th Cir. 1995). Moreover, once the moving party has made a “‘showing’—that is, point[ed] out to the district court—that there is an absence of

evidence to support the nonmoving party's case," *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986), "the burden shifts to the nonmoving party to show through specific evidence that a triable issue of fact remains on issues on which the nonmovant bears the burden of proof at trial," *Chemsource, Inc. v. Hub Group, Inc.*, 106 F.3d 1358, 1361 (7th Cir. 1997). Thus, as one of the cases cited by plaintiffs states, "the nonmoving party cannot rest on its pleadings, but must demonstrate that there is admissible evidence that will support its position." *Doe v. R.R. Donnelley & Sons*, 42 F.3d 439, 443 (7th Cir. 1994) (affirming summary judgment for the defendant). "[S]ummary judgment must be entered 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Id.* (quoting *Celotex*, 477 U.S. at 322).

ARGUMENT

- I. To Withstand Summary Judgment, Plaintiffs Must Demonstrate That Sears Exercised Day-To-Day Control Over The Activities Of Diamond's Employees.**
 - A. The Remaining Claims Against Sears Require Proof That Sears Was Plaintiffs' Employer.**

Plaintiffs are still pursuing three claims against Sears: unjust enrichment, the Illinois Wage Payment Act, and breach of contract. (As noted earlier, plaintiffs have dropped their conversion claim. Pl. Br. 4 n.1.) Plaintiffs cannot recover on any of the three remaining claims without establishing that Sears was their employer. The Second Amended Complaint is premised on the theory that the plaintiffs "were dual employees of both Sears and Diamond," B182 ¶ 10; see also B183-84 ¶¶ 14-15, and the three claims

left against Sears all contain allegations that Sears and Diamond were the plaintiffs' dual employers, B185 ¶ 21, B189 ¶ 37, B191 ¶ 43.

Illinois law, which the district court and the parties agreed provides the law of decision here, confirms that proof that Sears acted as plaintiffs' dual employer is an essential element of each claim still being asserted against Sears. The Illinois Wage Payment and Collection Act, by its terms, applies to "employers." 820 ILCS 115/1. Likewise, in order to be held liable for breach of an employment contract, it is axiomatic that the defendant must have been an employer. See *Gallagher Corp. v. Russ*, 721 N.E.2d 605, 612 (Ill. App. Ct. 1999) (breach of contract claim properly dismissed where plaintiffs and defendant "did *not* have a contractual relationship"—the complaint alleged that a third party, "and not the plaintiffs," had hired the defendant); B21 ("Absent any allegation that [plaintiffs] thought they had contracted with Sears, or that Sears had held Diamond out to make employment contracts on their behalf, plaintiffs cannot allege a breach of contract action against Sears").

In the context of this case, the unjust enrichment claim also requires proof by the plaintiffs that Sears was their employer. Plaintiffs allege that Sears was "unjustly enriched by reaping the benefits of the Plaintiffs' labor without paying the Plaintiffs the compensation due them." B186 ¶ 25. But Sears could have been unjustly enriched by the benefits of plaintiffs' labor only if it had been plaintiffs' employer. That is because unjust enrichment is based on an implied contract in law, *People ex rel. Hartigan v. E&E Hauling*, 607 N.E.2d 165, 177 (Ill. 1992), and under long-established Illinois law, a third

party cannot be sued for unjust enrichment when it receives the benefits of the plaintiff's labor and the plaintiff is under contract to be paid by someone else. *E.g.*, *Walker v. Brown*, 28 Ill. 378, 386 (1862) (“when work is done under a contract, the suit must be between the parties to it; and third persons, though benefited by the work, cannot be sued on an implied assumpsit to pay for that benefit”); *Decatur Production Credit Ass’n v. Murphy*, 456 N.E.2d 267, 274 (Ill. App. Ct. 1983) (“A third party cannot be held liable under an implied contract for work done under an explicit contract between two different parties merely because the third party benefited from the work”); *Gill Custom House v. Gaslight Club*, 330 N.E.2d 559, 564-65 (Ill. App. Ct. 1975) (plaintiff could not sue defendant for unjust enrichment where defendant paid Acoustron for a sound system that plaintiff installed, but Acoustron failed to pay plaintiff); *Vanderlaan v. Berry Constr. Co.*, 255 N.E.2d 615, 617 (Ill. App. Ct. 1970) (subcontractor who has not been paid by contractor and has no express contract with the property’s owners cannot sue the owners even though the owners received the benefits of the subcontractor’s work).⁷

An employment relationship between the plaintiff and the defendant is not required for all unjust enrichment claims. But it is required when, as here, the plaintiff is seeking payment for labor that someone else is contractually obligated to pay. As a result,

⁷ *Rohter v. Passarella*, 617 N.E.2d 46 (Ill. App. Ct. 1993), a quantum meruit case that plaintiffs cited below, is not to the contrary. The plaintiff there did not have “an enforceable agreement” with anyone to pay him for his services. *Id.* at 50. Here, of course, plaintiffs were admittedly employed by Diamond, and it is undisputed that Diamond was legally obligated to pay them for their work.

plaintiffs cannot recover on any of their claims against Sears unless they prove that Sears was their employer.

B. To Be An Employer Under Illinois Law, One Must Exercise Day-To-Day Control Over The Plaintiffs' Work Activities.

In the district court, “Plaintiffs admit[ted] that the ability to withstand Sears’ motion for summary judgment on their claims for unjust enrichment, violation of the Illinois Wage Payment Act, and breach of contract, depends on whether there are sufficient facts in the record to demonstrate that Sears actually exercised substantial daily control over plaintiffs’ work.” A6. Although the plaintiffs do not dispute this test on appeal, a summary of the pertinent case law will be helpful in setting the stage for the argument that follows.

The district court held that “Illinois has adopted the 10-factor test set forth in Restatement (Second) of Agency § 220 to determine whether an employer-employee relationship exists.” A6 (citing *Bob Neal Pontiac-Toyota v. Industrial Commission*, 433 N.E.2d 678, 680-81 (Ill. 1982)). The RESTATEMENT test requires that the defendant must “actually exercise[] substantial daily control” over the employees’ work in order to be an “employer.” A6.

For example, in the seminal case of *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), which applied the RESTATEMENT standard, the Court held as a matter of law that Southern Pacific was not the plaintiff’s employer, because it did not “play[] a significant supervisory role in the unloading operation,” was not “supervis[ing]” plaintiff “at the time of his injury,” and did not have “any general right to control the activities of

[plaintiff] and the other * * * workers.” *Id.* at 327. The Court concluded that the plaintiff was not “sufficiently under the control of [Southern Pacific] to be * * * a dual servant of the railroad and [plaintiff’s employer].” *Id.* at 325.

This Court’s decisions follow the same basic test. In *Hojnacki v. Klein-Acosta*, 285 F.3d 544 (7th Cir. 2002), the medical director of a state prison argued that she was either an employee of the Illinois Department of Corrections or that she had been loaned from a private company that contracted to provide medical services at a prison. *Id.* at 549. This Court affirmed summary judgment for the defendants, ruling that the plaintiff was only employed by the private company, which paid her wages and provided her medical supplies. Applying “a common-law test that involves ‘general principles of agency,’” the court held that “[f]or an employer-employee relationship to exist * * * *the employer must have ‘the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved.’*”⁸ *Id.* at 549, 551 (emphasis added) (quoting *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 492-93 (7th Cir. 1996)). See also *id.* at 552 (“[a] dual employment relationship may exist if more than one individual or company has the right to control or

⁸ *Hojnacki* applied a five-factor test that substantively is essentially the same as the ten-factor RESTATEMENT test. Compare 285 F.3d at 550 with A6 (quoting RESTATEMENT § 220). Under both tests, the purported employer’s ability to control the employees’ daily activities is critical. See *Hojnacki*, 285 F.3d at 550 (“the extent of control and supervision over the worker is the most significant in determining the employment status”); *Bob Neal Pontiac-Toyota*, 433 N.E.2d at 681 (“the right to control the manner in which the work is done is the most important”). Control over employees’ daily work activities is also the touchstone under other Illinois cases discussed at pp. 29-32 below.

direct an employee in the performance of the work’”). Moreover, the Court held that an entity will not be deemed to be an employer simply because it is a party to a contract that “‘set[s] out in detail’” the other contracting party’s “‘obligations; this is nothing more than the freedom of contract. This sort of one-time “control” is significantly different than the *discretionary control an employer daily exercises over its employees’ conduct.*” *Id.* at 551 (emphasis added) (quoting *EEOC v. North Knox School Corp.*, 154 F.3d 744, 748 (7th Cir. 1998)). Nor is control established by “setting [the plaintiff’s] working hours”—that does “not amount to control of the details of her performance.” *Id.* at 552.

Cases involving dual-employer theories in Illinois state courts likewise hold that the defendant is not a dual employer unless it exercises day-to-day control over the plaintiff’s work. In *Hopgood v. Anheuser-Busch, Inc.*, 458 N.E.2d 525 (Ill. App. Ct. 1983), the question was whether the plaintiff, an employee of a company called SLRC, was also the employee of a separate company, MRC. The plaintiff “was paid by SLRC,” was “not subject to discharge” by MRC, was “not using the tools” of MRC to perform his work, and “[s]upervisory employees of MRC d[id] not issue instructions to or attempt to control the work of employees of SLRC.” *Id.* at 527, 528. As a result, the court held that the defendants were entitled to summary judgment: “nothing in the record suggests that at the time of his injury plaintiff * * * was serving MRC and SLRC simultaneously,” *id.* at 528, even though the two companies were both subsidiaries of Anheuser-Busch, shared some of the same officers and directors, and filed a consolidated tax return, *id.* at 526, 527. Another Illinois court rejected a dual-employer theory in *Tierney v.*

Burlington Northern R.R., 608 N.E.2d 479 (Ill. App. Ct. 1992) (affirming summary judgment on this ground). The plaintiff there, an employee of BN Transport, was “often supervised by railroad personnel” at certain job locations, but he did not proffer any such evidence “as to the 36th Street location, where the accident at issue occurred.” *Id.* at 482. The Appellate Court therefore affirmed the trial court’s ruling “that [plaintiff] failed to present enough evidence of serving two masters simultaneously, BN Transport and Burlington Northern Railroad, at the time of his injury.” *Id.* See also *Kerr v. WGN Continental Broadcasting Co.*, 2002 WL 1477629, at *4-6 (N.D. Ill. July 9, 2002) (plaintiff, an employee of Trio Video, which supplied WGN with production personnel for Cubs games, was not employed by WGN; although “during game broadcasts, Kerr took direction from WGN personnel concerning duties and deadlines,” the “control that WGN exercised over Kerr stems from the contract between WGN and Trio Video, and not from any employment relationship between Kerr and WGN”; in addition, Trio Video paid Kerr and was required to provide the equipment necessary for Kerr to do her job), *motion to amend denied*, 229 F. Supp. 2d 880 (N.D. Ill. 2002).

Similar issues have arisen in franchise cases, when injured employees working for franchisees, or customers injured in a franchised store, have attempted to sue franchisors. Illinois courts have held consistently that the franchisor is entitled to judgment as a matter of law when there is no agency or master-servant relationship because the franchisor does not have day-to-day control over either the franchisee’s operations or the franchisee’s employees.

For example, in *Yassin v. Certified Grocers*, 502 N.E.2d 315, 328 (Ill. App. Ct. 1986), the court ruled as a matter of law that a customer injured by a meat tenderizer machine could not recover against the franchisor because “[t]here was no agent-principal relationship” between the franchisor and the franchisee in whose store the customer was injured. The court explained that the franchisee “exercised day-to-day control over the grocery store” and had sole “power to hire and fire employees.” *Id.* There was “no evidence that [the franchisor] had the authority to compel or to prevent [the franchisee] or its employees from operating the tenderizer in a manner that resulted in plaintiff’s injury.” *Id.*

Similarly, in *Coty v. U.S. Slicing Machine Co.*, 373 N.E.2d 1371, 1376 (Ill. App. Ct. 1978), the court held as a matter of law that the injured employee of a franchisee could not “subject the franchisor to liability under either agency or employer-independent contractor theories.” Although the franchise agreement imposed “numerous restrictions” on the franchisee—including setting “minimum hours and days of service” and various provisions “geared towards protecting the [franchisor’s] trademark and the good will associated with it”—the court followed a Virginia case holding that “‘no principal-agent or master-servant relationship was created’” between the franchisor and franchisee. *Id.* at 1374-75 (quoting *Murphy v. Holiday Inns, Inc.*, 219 S.E.2d 874, 877 (Va. 1975)). The franchisor “did not retain any day-to-day supervisory control, could not hire or fire anyone, could not stop work in the restaurant immediately nor could it give any orders to any of the franchisee’s employees.” *Id.* at 1374. In particular, “the franchisor did not

retain the right to directly order children-employees away from the meat slicing machine[]” that injured the plaintiff, “nor could it have ‘stopped the work’ because the franchisee refused to order such employees away from the hazard.” *Id.* at 1375-76.

Other cases involving franchisors are to the same effect. See *Lavazzi v. McDonald’s Corp.*, 606 N.E.2d 845, 852 (Ill. App. Ct. 1992) (franchisor not liable for death of employee of third party with which franchisor had contract, because franchisor did not have “control over Otto’s day-to-day operations such as hiring and firing employees, payroll, worker’s compensation, or taxes”) (summary judgment affirmed); *Slates v. International House of Pancakes*, 413 N.E.2d 457, 463 (Ill. App. Ct. 1980) (franchisee’s employee was not an agent of the franchisor, because the employee “was not paid, supervised, controlled or directed by the defendant corporation” and the defendant “did not have the authority to hire or fire” employee); *Richardson v. Bulk Petroleum Corp.*, 297 N.E.2d 405, 407, 408 (Ill. App. Ct. 1973) (rejecting argument that the lessee of a gas station was the “agent or employee” of an oil company—the lessee “had complete discretion in the hiring and firing of his employees” and “was responsible for his employees’ payroll, including withholding, workmen’s compensation and social security taxes”) (summary judgment affirmed); *Castro v. Brown’s Chicken & Pasta, Inc.*, 732 N.E.2d 37, 46 (Ill. App. Ct. 2000) (defendant entitled to summary judgment because “nothing in the record supports the conclusion that Brown’s controlled the franchisee’s day-to-day operations in any way”).

It is clear from the case law that the plaintiffs must show “that Sears had day-to-day control over Diamond or Diamond’s employees” in order to recover. B18. As explained next, plaintiffs did not do that here.

II. There Is No Evidence That Sears Directed The Daily Work Of Any Of The Three Named Plaintiffs.

Because the district court never ruled on class certification, on appeal “the claims must be treated as being brought solely by the named Plaintiffs against the named Defendants.” *Harold Washington Party*, 984 F.2d at 878. Accord, *e.g.*, *Rutan*, 868 F.2d at 947; *Anderson*, 24 F.3d at 891; *DeBruyne*, 920 F.2d at 463 n.9. Thus, on appeal this case concerns only the claims alleged by the three named plaintiffs: Robert Brown, Janet Diaz, and John Welling. The specific issue on appeal is whether there is any evidence that Sears directed Brown, Diaz, and Welling in performing their day-to-day responsibilities for Diamond.

There is not. Although plaintiffs’ opening brief on appeal is filled with references to “Plaintiffs,” the summary judgment record does not contain *any* material evidence concerning Brown, Diaz, or Welling—there is no evidence on how they were supervised (if at all), by whom they were supervised, which Diamond office they worked in, or whether they had any contact at all with Sears in performing their duties for Diamond. Not one of the record citations in plaintiffs’ brief refers to Brown, Diaz, or Welling. The record indicates only that the three plaintiffs are “former employees of Diamond Exteriors” and that Welling was a sales associate somewhere. B23 ¶ 1; SA Tab 2, at

282. For Brown and Diaz, the record does not provide even a clue as to their job titles, much less the nature of their responsibilities.

The named plaintiffs could have filled in these gaping holes in the district court, but they did not even bother to submit their own affidavits in response to Sears's summary judgment motion. Instead, plaintiffs offered the affidavits of Whitmire and Burchfield, who knew nothing relevant about any of the three named plaintiffs. Whitmire and Burchfield didn't even know Brown and Diaz; Whitmire also didn't know Welling; and Burchfield could identify Welling only as "a sales associate in some office"—"I don't recall which office." SA Tab 2, at 282; SA Tab 1, at 157-59.

Because on appeal this case "must be treated as being brought solely by the named Plaintiffs," *Harold Washington Party*, 984 F.2d at 878, the named plaintiffs' complete failure to offer any pertinent evidence in response to Sears's summary judgment motion is fatal. See *Abbott v. Village of Westmont*, 2003 WL 22071492, at *4 (N.D. Ill. Sept. 5, 2003) (granting summary judgment for defendant where plaintiff "has not submitted detailed factual evidence showing the degree of control and supervision Westmont maintained over her work"). When, as here, the moving party's papers "point[] out * * * that there is an absence of evidence to support the nonmoving party's case," *Celotex*, 477 U.S. at 325, the nonmovant has the "burden" of demonstrating with "specific evidence" that there is a "triable issue of fact," *Chemsource*, 106 F.3d at 1361. The plaintiffs did not even attempt to do that with respect to Brown, Diaz, and Welling—the only plaintiffs whose claims are at issue on appeal. There is absolutely nothing in the

record indicating that these “former employees of Diamond Exteriors” (B23 ¶ 1) were also employed by Sears or, indeed, that they ever had any contact with Sears in performing their duties for Diamond. The total absence of pertinent evidence concerning the three named plaintiffs by itself compels affirmance of the district court’s judgment.

III. As A Matter Of Law, Sears Was Not The Employer Of Diamond’s Employees.

Even if the evidence that plaintiffs cite on appeal pertained to Brown, Diaz, and Welling—and it does not—it does not create a material issue of fact on whether Sears was the employer of Diamond’s employees.

A. Diamond Had Exclusive Authority To Hire, Pay, Transfer, Discipline, And Fire Diamond’s Employees.

The most important factor in determining whether a defendant is an employer is the extent to which the defendant supervised the would-be employees and “control[led] the manner in which the work is done.” *Bob-Neal Pontiac-Toyota*, 433 N.E.2d at 681; accord *Hojnacki*, 285 F.3d at 550. An important aspect of an employer’s control of its employees’ daily work is the ability to hire, discipline, and fire employees. Here, the undisputed evidence demonstrates that Diamond, not Sears, had the exclusive authority to make all decisions on hiring, transferring, disciplining, and firing Diamond’s employees. That is what the License Agreements provided, and that is what the testimony of plaintiffs’ own witnesses confirmed. B230 ¶ 6(A); pp. 9, 12-16, *supra*.

Plaintiffs assert that “[o]ne of the strongest indicators of employer-type control is having sufficient influence to fire a worker.” Pl. Br. 15. It *is* a strong indicator, but “influence” is the wrong test—the case they cite requires the “*authority* to hire or fire

employees.’” *G. Heileman Brewing v. NLRB*, 879 F.2d 1526, 1531 (7th Cir. 1989) (emphasis added). It is undisputed that the License Agreement did not give Sears any such authority over Diamond employees (B230 ¶ 6(A)), and the testimony of Whitmire and Burchfield confirmed that Sears had no such authority in practice either: both testified that Sears *never* instructed Diamond to fire anyone. SA Tab 1, at 162; SA Tab 2, at 296. Rather, they testified, *Diamond decided* whether to fire its employees; Diamond was free to—and did—terminate employees “without having any Sears[] input.” SA Tab 1, at 163; SA Tab 2, at 259.

Moreover, while Whitmire and Burchfield testified that Sears, on rare occasions, suggested that a particular employee be terminated, they also testified that Diamond did not always go along. SA Tab 1, at 162-63; SA Tab 2, at 228, 295-96. Between the two of them, they were able to identify only five Diamond employees whom Sears ever recommended be terminated over a seven-year period (1993 to 2000)—and they testified that Diamond *refused* to terminate three of them (McCord, Bruner, and Heavlyn), and Diamond even *promoted* one of them (McCord). See p. 13, *supra*. Thus, the contention that “many Diamond employees were fired pursuant to Sears’ instructions” (Pl. Br. 16) is simply false—refuted by the undisputed testimony of plaintiffs’ own witnesses. And although Burchfield said that Sears would “pull the market” if its suggestions were not followed (Pl. Br. 16), he did not identify a single instance when that ever happened. Diamond’s continued employment of McCord, Bruner, and Heavlyn—in markets where Diamond continued to operate until the day it went out of business—shows that Diamond

made its own decisions on whether to fire or retain Diamond employees. Anyway, “Illinois courts have consistently * * * refused to impose liability on the defendant in franchisor-franchisee cases where the franchisee has retained total control over its own day-to-day operations,” even when the contract “gives the franchisor a right to rescind the contract.” *Castro*, 732 N.E.2d at 45. Accord *Lavazzi*, 606 N.E.2d at 852; *Coty*, 373 N.E.2d at 1375.

Plaintiffs point to the fact that Diamond had to “*consider* transferring any Diamond employee whom Sears deemed objectionable.” Pl. Br. 20 (emphasis added). But it is well settled that the right “to make suggestions or recommendations which need not necessarily be followed * * * does not mean that the contractor is controlled as to his methods of work, or as to operative detail.” *Castro*, 732 N.E.2d at 45 (quoting *Coty*, 373 N.E.2d at 1375). See also *Hojnacki*, 285 F.3d at 546-47 (plaintiff not employed by the Illinois Department of Corrections even though the IDOC recommended disciplinary action against her and plaintiff’s employer followed that recommendation); *Abbott*, 2003 WL 22071492, at *4 (plaintiff was employed by PSSI, not the Village of Westmont, where Westmont could “recommend” her termination, but under the contract between PSSI and Westmont, the “ultimate decision to terminate and/or transfer an employee stayed with PSSI”). Under the License Agreement (and in practice), Diamond retained the exclusive decision-making authority on whether to transfer, suspend, discipline, or promote Diamond employees. B230 ¶ 6(A); pp. 9, 14-15, *supra*.

It is also undisputed that Diamond made all decisions on which individuals to hire as Diamond employees, Diamond evaluated their performance, Diamond decided their compensation, and Diamond paid all of their wages and benefits. See pp. 9-10, 12-13, 15, *supra*. In rare instances, Sears recommended someone for a position with Diamond: Burchfield and Whitmire identified a total of only four such people over a seven-year span. SA Tab 1, at 145-46; SA Tab 2, at 247-48. But four people is a drop in the bucket; Diamond had 1,500 employees at any one time and “massive turnover”—200% to 300%—so thousands of people worked for Diamond during its existence. SA Tab 2, at 71.

When the defendant tells the employer “whom to hire and fire and how much to pay them,” the defendant may become “the de facto employer.” *EEOC v. Illinois*, 69 F.3d 167, 171 (7th Cir. 1995). But “[t]hat point was not reached here.” *Id.* at 172. Diamond retained—and exercised—full authority in making hiring and firing decisions. This means that Sears was not the employer of Diamond’s employees. See *id.* at 171-72 (Illinois was not the de facto employer of public school teachers where the “key powers” of “hiring and firing” were “in the hands of the local school district”); *Lavazzi*, 606 N.E.2d at 852 (“when a franchisee which uses a franchisor’s logo or an independent contractor which uses an employer’s logo retains day-to-day control of operations such as hiring and firing employees, payroll, worker’s compensation insurance, and taxes, then the franchisee or independent contractor is deemed to control itself and * * * the franchisor or employer of the independent contractor is not liable”). See also *Coty*, 373

N.E.2d at 1374 (franchisor not subject to liability where, under the franchise agreement, it “could not hire or fire anyone”); *Yassin*, 502 N.E.2d at 328 (same); *Slates*, 413 N.E.2d at 461 (same); *Richardson*, 297 N.E.2d at 408 (same). An employer has the power to hire, fire, promote, transfer, and compensate employees. Here, that power rested with—and was exercised entirely by—Diamond.

B. Diamond Controlled The Day-To-Day Activities Of Diamond’s Employees.

Beyond the undisputed evidence on hiring, firing and compensation, there is simply no evidence that Sears controlled the day-to-day tasks performed by each of Diamond’s 1,500 employees, located in dozens of offices scattered around the country and working on approximately 300 home improvement jobs every day. In his affidavit, Burchfield made the conclusory assertion that “Sears representatives routinely provided instruction and direction as to the details of how Diamond employees should be doing their jobs.” Pl. Br. 15 (quoting B36 ¶ 28); see also Pl. Br. 17-18 (citing similar conclusory statements by Burchfield and Whitmire). But in his subsequent deposition, Burchfield conceded that “Sears didn’t—often they didn’t want to get into the details. They just wanted the results. And that’s all they were after was the results.”⁹ SA Tab 2, at 216. Sears might discuss with Diamond how long it was taking to install roofs generally, but Sears “did not tell

⁹ Indeed, Burchfield admitted that except for the office managers, he typically did not even know the employees in Diamond’s many offices. SA Tab 2, at 70. Whitmire, who spent much more time in the field, knew about 1/3 of the sales office employees and about 1/2 of the operations office employees. SA Tab 1, at 152-54. Burchfield and Whitmire obviously could not provide any evidence about the daily supervision of employees they did not know.

you you should do this to the roof or do that to the roof.” R83, at 11; SA Tab 1, at 178-79. Or Sears might request Diamond to hire more quality control inspectors—but Diamond did all of the interviewing and decided which people to hire. See p. 15, *supra*.

As this Court has explained, “[f]or an employer-employee relationship to exist * * * the employer must have ‘the right to control and direct the work of an individual, not only as to the result to be achieved, but also as to the details by which that result is achieved.’” *Hojnacki*, 285 F.3d at 551. Accord *Castro*, 732 N.E.2d at 45; *Lavazzi*, 606 N.E.2d at 851-52; *Yassin*, 502 N.E.2d at 328. Sears exercised no such control here. Diamond’s employees scheduled the appointments for Diamond’s salespeople and quality inspection personnel; Diamond’s employees decided when they would visit specific job sites; and Diamond’s employees determined what needed to be done to complete a particular job—to “do this to the roof or do that to the roof.” R83, at 11; pp. 16-17, *supra*. In addition, there was not a shred of evidence that Sears ever had *any* contact with a host of other Diamond employees—clerical staff, administrative assistants, information services, the HR department, payroll, accounting, purchasing, and the legal department (SA Tab 2, at 59-63)—much less supervised their daily activities. In short, Diamond, not Sears, provided the detailed direction to Diamond’s employees on a daily basis.

To be sure, some Diamond salespeople used “tools,” such as sales materials and advertising, that had been approved by Sears, and Sears owned the customer information and telephone numbers that Diamond used in acting under the License Agreement. See

Pl. Br. 23-24. Diamond employees also used another Sears “tool,” Sears credit materials (Pl. Br. 23), when customers charged purchases on a Sears credit card—just as they used Visa materials for a Visa charge, and MasterCard materials for a Master Card charge. SA Tab 2, at 87, 195. The written materials using the Sears name were all prepared by the same process: Diamond would do the initial drafts and then submit them to Sears for approval. See p. 17, *supra*. A licensor does not create an employment relationship by approving materials with its name on them or supplying some tools used by the licensee. Otherwise, a fast-food franchisor would be the employer of every person working in franchised outlets, and that is not the case. *Slates*, 413 N.E.2d at 465; see *Lavazzi*, 606 N.E.2d at 852. See also *Graves v. Women’s Professional Rodeo Ass’n*, 907 F.2d 71, 73 (8th Cir. 1990) (“American Express sets rules for its cardmembers as well as for participating vendors, but neither of these are its employees”); *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1293 (9th Cir. 1999) (Chrysler was not the employer of a car dealer even though Chrysler “determines which products the dealer may purchase,” sets “minimum sales requirements,” has “the right to approve the appearance of the dealership,” may “specify the dealership location,” and requires dealers to “meet certain financial standards” and “engage in advertising and sales promotion programs”).

As for Whitmire and Burchfield themselves, their testimony does not demonstrate the type of daily, detailed supervision of their work that is required to show that Sears had the legal status of being their employer (and besides, neither of them is one of the three plaintiffs whose claims are the sole focus of this appeal). Beyond the 5 to 10

discussions per week Whitmire had with Sears about customer complaints, he testified only that he had daily discussions with Sears about “fencing issues” and the average time frame to install roofing. SA Tab 1, at 96-97, 99, 178-79. Whitmire admitted that he reported to, was evaluated by, and had his compensation determined by Diamond officials. *Id.* at 34, 39-40. And although as of 1999, Burchfield had daily contact with Steve Burnett of Sears, Burchfield admitted that he still reported to Diamond’s Steve Clegg, who gave assignments to Burchfield and determined Burchfield’s compensation. SA Tab 2, at 52-53, 57-58, 90, 261, 264-65. Burchfield also acknowledged that Burnett had no authority to terminate him. *Id.* at 265. Burchfield’s daily conversations with Burnett did not make Sears Burchfield’s employer any more than a outside lawyer who talks every day with a client becomes that client’s employee. Burchfield did testify that on one day, December 23, 1999, Sears “dictated my schedule completely” when it summoned him to Hoffman Estates for a key meeting. *Id.* at 54-55. That is clearly not enough either; business people, lawyers, and accountants are told every day by customers or clients to be somewhere for a meeting, but that does not create an employer-employee relationship. Plaintiffs cite no case holding that talking to a client or licensor every day transforms one into an employee. See *Richardson*, 297 N.E.2d at 406-08 (gas station lessee was not the employee of the lessor oil company even though the lessee was required to submit daily sales report to the oil company).

Plaintiffs contend that Sears “reserved the right to adjust the sales price for its customers at Diamond’s expense” (Pl. Br. 21), but this assertion, which does not

establish day-to-day control in any event, is seriously misleading. Sears did not have any broad authority to set prices. The License Agreement explicitly provided that Sears did not have “any right or power to effect or control the prices at which services or products shall be offered hereunder, *said right and power being retained by [Diamond].*” B240 ¶ 32 (emphasis added). It was only when a customer complained about particular work, Diamond adjusted the price, and the adjustment was still “unsatisfactory to the customer,” that Sears had the limited right to make a “further adjustment” in the price. B231 ¶ 10(B).

In *Hojnacki*, this Court affirmed a summary judgment ruling that the Department of Corrections was not the employer of the plaintiff—a doctor working at a state prison—even though the DOC (a) “required her to comply” with certain policies and procedures, complete certain training, sit on a quality improvement committee, and perform a monthly review of mortality cases; (b) “specified what information should be included” on certain forms, “how often” to examine prisoners, and “what kind of questions” to ask the inmates; and (c) “set[] her working hours.” 285 F.3d at 551, 552. The same result is warranted here. Diamond officials around the country made the countless everyday decisions about operating the business in the trenches: hiring, firing, promoting, and disciplining employees; deciding on the employees’ compensation; paying wages and benefits to those employees; assigning specific tasks to particular employees; and directing Diamond’s 1,500 employees in what each would be doing on any given day.

Sears did not do any of this, and as a result, it was not the employer of Diamond's employees.¹⁰

In short, the uncontested evidence squarely refutes the contention that Sears “possessed authority to control virtually every aspect of Diamond’s operation and personnel.” Pl. Br. 21. There is no evidence that Sears controlled the daily “‘details’” of the work of 1,500 Diamond employees (Pl. Br. 22)—and, in particular, there is

¹⁰ Plaintiffs rely on inapposite cases. The facts in *Schroeder v. Pennsylvania R.R.*, 397 F.2d 452 (7th Cir. 1968) (cited at Pl. Br. 19-20), and this case are completely different. In *Schroeder*, the court stressed that the plaintiffs alleged that the “railroad would issue directions through its clerk to Willett drivers”; the railroad even “determined the specific trailers” that the drivers would use to pick up goods as well as “the time and manner of making the pickup.” *Id.* at 455. Moreover, the accident that spawned the lawsuit occurred immediately after Schroeder “was directed by a railroad employee to hook up an empty trailer to his tractor”; Schroeder was fatally injured while standing behind the trailer. *Id.* at 454. The type of daily supervision and control that the railroad had in *Schroeder*—including directing the very conduct that resulted in the accident at issue—do not exist here.

The same is true of the other cases on which plaintiffs rely. See *Doe v. Allied-Signal, Inc.*, 925 F.2d 1007, 1009-10 (7th Cir. 1991) (applying Indiana law) (Allied was plaintiff’s employer where she worked on Allied’s premises, Allied required that plaintiff be retained, Allied assured her that she had a job and would not be transferred or fired, Allied paid part of plaintiff’s wages and benefits, Allied reprimanded plaintiff on one occasion, plaintiff took work-related complaints to Allied, and Allied assigned plaintiff additional tasks and changed her hours without notifying Acme); *Hills v. Bridgeview Little League Ass’n*, 745 N.E.2d 1166, 1183 (Ill. 2000) (defendant did not dispute that the evidence was sufficient to find agency); *Bob Neal Pontiac-Toyota*, 433 N.E.2d at 680, 681 (car dealer employed claimant where dealer told him where “to paint each day, exactly which portions of what building and what colors,” the dealer could fire him “at any time,” and claimant punched the same time clock as the dealer’s other employees); *Hamilton v. Family Record Plan, Inc.*, 217 N.E.2d 113, 117 (Ill. App. Ct. 1966) (each week, the defendant company directed the salesman to call—only once—on a list of specified prospective customers and the salesman never solicited someone not on the list, except for his mother).

absolutely no such evidence with respect to the three named plaintiffs, Brown, Diaz, and Welling: plaintiffs never offered *any* evidence of even where those three worked, let alone who supervised them and how.

C. The Quality Control Standards Set By Sears Did Not Make Sears The Employer Of Diamond's Employees.

Plaintiffs rely heavily on the quality control standards set by Sears. See Pl. Br. 5-6, 12-14, 20. The requirements that plaintiffs cite—including such items as answering the phones promptly, dressing neatly, taking accurate measurements, and keeping customers informed—amount essentially to instructions to treat customers honestly and courteously. This is no different from the “requirements” that franchisors place on franchisees every day, but it is clear under Illinois law that franchisors are not the employer of franchisees’ employees absent much more intrusive and direct control over the employees’ jobs on a daily basis. Contractual restrictions “geared towards protecting the * * * trademark and the good will associated with it” are not grounds for imposing liability, particularly where, as here, the licensor “did not retain any day-to-day supervisory control, could not hire or fire anyone, could not stop work * * * immediately nor could it give any orders to any of the [licensee’s] employees.” *Coty*, 373 N.E.2d at 1374. Accord *Castro*, 732 N.E.2d at 41 (summary judgment for franchisor affirmed where franchisor conducted monthly “quality inspections” of the restaurant “to monitor compliance with [the franchisor’s] guidelines and to answer questions” from employees); *Lavazzi*, 606 N.E.2d at 852 (no liability where defendant’s audits of a supplier’s plant were done “to insure that the quality of the product met defendant’s standards”).

Moreover, the quality standards set by Sears all stemmed from the License Agreement, as did the ability of Sears to disapprove forms and sales materials that were prepared by Diamond and used the Sears name. These contractual provisions indicate nothing about whether Sears “‘control[led] and direct[ed]’” the “‘details’” of “the manner in which” plaintiffs “perform[ed] th[eir] duties.” *Hojnacki*, 285 F.3d at 551-52 (distinguishing contractual requirements from “‘the discretionary control an employer daily exercises over its employees’ conduct’”). See also *Kerr*, 2002 WL 1477629, at *4 (WGN was not Kerr’s employer where any control it exercised “stems from the contract between WGN and [Kerr’s employer], and not from any employment relationship between Kerr and WGN”).

Plaintiffs also note that Sears followed up on the cited quality “requirements” with surveys that customers were asked to complete. Pl. Br. 13-14. There was no evidence on how often customers filled out the surveys, but in any event the surveys do not show that Sears controlled the everyday work of Diamond’s employees. Although Sears asked customers to complete surveys about certain Diamond employees and the work that Diamond performed for them, it is undisputed that the key decisions concerning all of Diamond’s employees—termination, promotion, transfer, discipline, compensation—were made by Diamond, not Sears. Moreover, the surveys, like much of the other evidence that plaintiffs cite, were designed to insure that Diamond’s work as a Sears licensee met Sears’s quality standards—and as already explained, that does not transform one into an employer under Illinois law. Plaintiffs cite no Illinois cases holding otherwise.

There were also monthly and quarterly quality control review meetings involving Diamond and Sears executives. But in all of those reviews, Burchfield recalled only one discussion of a specific Diamond employee (whose name he could not recall). SA Tab 2, at 223-28. Starting in the fall of 1999, Burchfield had weekly conference calls with Sears regarding Diamond employees, although “[s]ometimes” the call would be cancelled. *Id.* at 206-07. Given the large number of Diamond employees nationwide and the rapid turnover, even an eight-hour session devoted entirely to employee performance could not have covered more than a small percentage of Diamond’s 1,500 employees across the country. And Sears’s audits of Diamond’s field offices—which occurred only two or three times annually—were much too sporadic to be a means of exercising daily control over each office’s employees. SA Tab 1, at 121-25.

Under Illinois law, it is settled that the occasional audits, discussions about customer complaints, and Diamond’s periodic transmission of sales data to Sears are legally insufficient to show day-to-day control by Sears over Diamond’s employees. See *Lavazzi*, 606 N.E.2d at 847, 852 (defendant did not have “control over [a supplier’s] day-to-day operations” even though it monitored the supplier “through periodic quality assurance reviews, sanitation audits, and supplier status reports”); *Richardson*, 297 N.E.2d at 406-08 (the lessee of a single gas station was not controlled by the lessor oil company and was not the employee of the oil company, even though the lessee had to “furnish a daily sales report,” the oil company had the right to audit the lessee’s books, and the oil company’s representative visited the station every week or 10 days, regularly

counseled the lessee on violations of the lease, and could terminate the lease without notice).

D. Plaintiffs' Other Arguments Are Meritless.

Plaintiffs' remaining arguments are all without merit. Plaintiffs note that home improvement services are within the scope of Sears's regular business (Pl. Br. 22-23), but that does not matter. Restaurants are the regular business of the International House of Pancakes, and Cubs television broadcasts are part of the regular business of WGN, yet courts have held, as a matter of law, that IHOP is not the employer of its franchisees' employees and WGN is not the employer of the assistant director of Cubs broadcasts. See *Slates*, 413 N.E.2d at 463; *Kerr*, 2002 WL 1477629, at *4-6. The key is the authority to hire and fire the purported employees and direct them in their daily work. Sears did not do any of that here.

It is also irrelevant that Diamond elected to work exclusively for Sears. Whitmire testified that "when Sears is your only customer * * * you're very careful to do exactly what they tell you to do." SA Tab 1, at 172. But there is no "authority for [the] contention that if a customer has economic control of a supplier," then the customer is the employer of the supplier's employees, even if the customer was the supplier's "only customer" and "therefore had the power to determine [the supplier's] very survival." *Lavazzi*, 606 N.E.2d at 851. See also *Hopgood*, 458 N.E.2d at 526, 528 (the plaintiff, an employee of SLRC, was not also an employee of MRC, even though SLRC worked exclusively for MRC and its parent company). Moreover, as we have seen, Whitmire

obviously did not do exactly what Sears told him to do—he retained or promoted employees Sears was unhappy with. In any event, the License Agreement did not restrict Diamond to working only for Sears; it just applied to “non-commercial residential customers,” and it explicitly *permitted* Diamond to “sell, install or apply” products “for commercial customers,” as long as sales were made in Diamond’s “own name and without reference to any relationship with, or responsibility of, Sears with respect to such sales.” B227, 231 ¶¶ 1(B), 9.

Finally, the plaintiffs complain that the district court relied on “selected terms” of the License Agreement in reaching its decision. Pl. Br. 19. The court relied on central provisions of the Agreement bearing on the most important factors considered in deciding whether one is an employer. Those provisions “carefully delineated the status of Diamond’s employees with respect to Sears,” and made clear that Diamond, an independent contractor, was fully responsible for the working conditions, hiring, firing, promotion, assignments, and compensation of its employees. A2.

The License Agreement plainly indicates that the parties intended to and did make Diamond—which had day-to-day control over Diamond’s business and the work that Diamond’s employees performed—solely responsible for compensating its own employees. This contractually expressed intent must be followed. See *Castro*, 732 N.E.2d at 46 (affirming summary judgment in favor of franchisor, stating “the purchase agreement also makes it clear that the franchisee was in control of the restaurant”); *Slates*, 413 N.E.2d at 465-66 (where the franchise agreement “indicates beyond any doubt

that the parties * * * were trying to exclude the possibility of an agency relationship,” even the franchisor’s retention of “a high degree of supervision over the methods and operations of [franchisee] * * * was not so all encompassing as to negate the express intention of the parties in the franchise agreement that no agency relationship was created”).

* * *

Considering the undisputed evidence discussed above, it is preposterous to think that Sears controlled “virtually every aspect” of Diamond’s daily business operations. Pl. Br. 21. Diamond’s 1,500 employees—who were all hired and paid by Diamond—were directed by Diamond in performing specific tasks every day; Sears manifestly did not do that. And most importantly for purposes of this appeal, there is not one iota of evidence that Sears ever had any contact with Brown, Diaz, and Welling, the only three plaintiffs whose claims are involved in this appeal. Given all this, Sears is entitled to judgment on every claim remaining against it.

CONCLUSION

The district court's judgment should be affirmed.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to the word processing program used to prepare this brief (Word Perfect 9), this brief contains 13,665 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

James C. Schroeder

CIR. R. 31(e)(1) CERTIFICATE

I hereby certify that the items contained in the Supplemental Appendix are not available electronically and therefore are not part of the Digital Version of this brief.

James C. Schroeder

CERTIFICATE OF SERVICE

I hereby certify that I served two copies of the foregoing Brief of Defendant-Appellee Sears, Roebuck and Co. upon:

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by causing the same to be deposited in the U.S. mail on May 3, 2004.

James C. Schroeder