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

LEINANI DESLANDES, on Behalf of Herself and All Others Similarly Situated, Plaintiff, v. McDONALD'S USA, LLC, *et al.*, Defendants.	Civil Case No. 17-cv-04857 Judge Jorge L. Alonso Magistrate Judge M. David Weisman
STEPHANIE TURNER, on Behalf of Herself and All Others Similarly Situated, Plaintiff, v. McDONALD'S USA, LLC, *et al.*, Defendants.	Civil No. 19-cv-05524

PLAINTIFFS' OPPOSITION TO DEFENDANTS'
MOTION FOR LEAVE TO FILE SURREPLY

McDonald's has submitted ninety pages of briefing and more than 130 exhibits in its opposition to class certification and its related motions to exclude the opinions of Drs. Singer and Cappelli. *See* Dkts. 299, 300-1, 301-1, 302, 310, 336, 337. Now—seven months after the Court entered the parties' *agreed* class certification briefing schedule—it seeks to file yet another brief so that it can have the last word, both on class certification arguments it already made and about certain witness testimony. That witness testimony, however, was prompted by declarations that McDonald's itself introduced for the first time with its class certification opposition and to which Plaintiffs merely responded on reply. McDonald's motion (Dkt. 348) should be denied.

McDonald's argues that a sur-reply is justified so that it may address certain witnesses' deposition testimony "that did not exist and could not be addressed" in its class certification opposition (*id.*, ¶ 6), but these are *McDonald's* witnesses and it was *McDonald's* choice to rely on their declarations to support its opposition and expert reports that prompted the witnesses' depositions. At issue is the testimony of two franchisee owners and three employees of the (former) franchisee that employed Plaintiff Deslandes. McDonald's could have deposed any or all of these witnesses in preparation for class certification briefing before fact discovery closed,[1] but instead it worked behind the scenes to coordinate declarations of the witnesses and unveiled those declarations for the first time with its opposition to Plaintiffs' motion to certify. *See* Dkts. 310-11 Ex. 120 (L. Lopez Decl.); Ex. 121 (Miller Decl.); Ex. 122 (Watson Decl.); Ex. 123 (Vidler Decl.); Ex. 124 (Groen Decl.).

McDonald's did not identify these declarants in its Rule 26(a)(1) disclosures. Exs. 1, 2.[2] Plaintiffs could have asked the Court to strike the untimely and undisclosed declarations. *See*,

[1] Fact discovery between the parties closed on March 2, 2020, with only specific exceptions for postponed depositions or discovery subject to motion practice. *See* Dkt. 169, 256. Magistrate Judge Weisman allowed additional time for third-party discovery pertaining only to Plaintiffs' payroll provider subpoenas; that discovery was completed by September 2020.

[2] References to "Ex." are to exhibits attached to the Declaration of Derek Y. Brandt, filed herewith. The closest McDonald's Rule 26 disclosures come to identifying any of the declarants is a generic reference to "individuals affiliated with" the plaintiffs' former McDonald's restaurant employers. *See* Exs. 1, 2. It bears noting that declarant Leonardo Lopez was not "affiliated with" Ms. Deslandes' former employer. Rather, he acquired the franchise that formerly employed Ms. Deslandes after she stopped working there; he [redacted]. Ex. 13 (Lopez Tr.) at 7:16-8:8. Indeed, his

e.g., *Paldo Sign and Display Co. v. Unified Mrktg., LLC*, No. 13C1896, 2017 WL 951313, *2 (N.D. Ill. March 10, 2017) (Alonso, J.) (discussing Rule 37(c)(1) "automatic and mandatory" exclusion: when "a party 'fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.'"); *see also* Ex. 3 (Aug. 7, 2020 McDonald's counsel email taking position that "because [a proposed witness] was not included on Plaintiffs' initial disclosures, Rule 37(c)(1) forecloses Plaintiffs from relying on her testimony for any purpose."). Instead, Plaintiffs sought discovery regarding the lawyer-drafted assertions. McDonald's informed Plaintiffs that each declarant was represented by the Ogletree Deakins law firm. Ex. 4. Ogletree agreed to accept subpoenas for the witnesses and agreed to schedule their depositions. Exs. 5, 7. As a part of the subpoenas, Plaintiffs sought production of certain categories of documents, including communications between the witnesses (or anyone acting on their behalf) and McDonald's or its counsel. *E.g.*, Ex. 6 at "Attach. A," Request No. 2. Ogletree engaged in negotiations over document production, but ultimately refused to search for or produce the majority of the requested documents, including communications regarding Paragraph 14 and/or releases; the franchisees' use of McDonald's-generated compensation tools or guides; and communications between the witnesses (or Ogletree) and McDonald's or its counsel. Brandt Decl. ¶ 8 & Exs.7-10. With their class certification reply due on May 28, 2021, Plaintiffs took the depositions anyway, without the benefit of these documents. Exs. 9, 10.

In the class certification reply, Plaintiffs responded to the evidence McDonald's had introduced, citing relevant portions of the witnesses' deposition testimony to demonstrate that McDonald's declarations were unreliable or that cross-examination revealed evidence actually supporting class certification. While courts often afford little weight to declarations like these, *see, e.g., In re High-Tech Employee Antitrust Litig.*, 985 F.Supp.2d 1167, 1216 (N.D. Cal. 2013)

declaration purports to introduce evidence of his own franchisee labor practices untethered to Ms. Deslandes' employment. *See* Dkt. 310-11 Ex. 120.

(finding "diminished probative value" in declarations "drafted for the specific purpose of opposing Plaintiffs' class certification motion"), there is even greater reason for skepticism about McDonald's declarations. The declarants were "represented" by Ogletree, but—to the extent they even knew how Ogletree became involved or who was paying Ogletree—the witnesses acknowledged that this effectively was all the doing of McDonald's. *E.g.*, Ex. 12 (Watson Tr.) 14:21-15:7 ([redacted]); Ex. 14 (Miller Tr.) 13:2-20 ([redacted]); Ex. 15 (Vidler Tr.) 31:3-32:12 ([redacted]); Ex. 13 (Lopez Tr.) 40:3-41:2 ([redacted]). McDonald's further apparently entered into "common interest" agreements with some declarants, Ex. 13 (Lopez Tr.) at pp. 42-44 ([redacted]); Ex. 11 (Groen Tr.) at 133:23-135:14 ([redacted]), suggesting obvious bias, and the declarants communicated directly only with Ogletree (the content of which was privileged), such that the details of McDonald's role in obtaining these declarations—specifically suited to its needs for this particular case—remain undiscovered. *E.g.*, Ex. 13 (Lopez Tr.) at 41:25-42:5 ([redacted]), 77:19-78:1 ([redacted]); Ex. 12 (Watson Tr.) 33:3-6 ([redacted]); Ex. 15 (Vidler Tr.) 20:4-12 ([redacted]).

In any event, the fact that Plaintiffs deposed McDonald's new declarants provides no basis to upset the agreed briefing schedule entered by the Court or to allow McDonald's the final word on Plaintiffs' motion. McDonald's had all the time and access it needed with these witnesses—indeed, outside of Plaintiffs' knowledge. Much of the deposition testimony McDonald's proposes to cite is merely its own questioning of the witnesses at the depositions Plaintiffs subpoenaed, underscoring that it could have obtained this evidence long ago. This is not a situation where Plaintiffs held back evidence for use on reply. Rather, McDonald's

introduced new evidence (improperly, after the close of fact discovery) and Plaintiffs fairly responded to it. As McDonald's own authority acknowledges, "there simply is no need for a surreply when '[e]ach brief in the sequence on the motion fairly responded to the arguments in the brief that preceded it.'" *Univ. Healthsystem Consortium v. UnitedHealth Grp., Inc.*, 68 F.Supp.3d 917, 922 (N.D. Ill. 2014) (quoting *Franek v. Walmart Stores, Inc.*, 2009 WL 674269, at *19 n.14 (N.D. Ill. Mar. 13, 2009)). The fact that the witnesses' testimony did not hold up to the propositions included in their declarations is no reason to permit McDonald's relief from its chosen strategy.

For all these reasons, the Court should deny McDonald's motion (Dkt. 348), strike the proposed sur-reply (Dkt. 348-1), and strike exhibits 3-7 (Dkts. 349-3 through 349-7) and Table 1 (Dkt. 349 ECF pages 6-16) to the Declaration of Caeli A. Higney from the docket.[3] In the alternative, if the Court grants McDonald's motion, then the Court should also consider Plaintiffs' 5-page sur-sur-reply, attached hereto.

Dated: June 18, 2021

Respectfully submitted,

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[3] The Higney declaration purports to submit additional untimely evidence in opposition to Plaintiffs' class certification motion, both in its exhibits 3-7, and in the ten-page attached "Table 1."

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CERTIFICATE OF SERVICE

I, Derek Y. Brandt, an attorney, hereby certify that the **Plaintiffs' Opposition to Defendants' Motion for Leave to File Surreply** was electronically filed on June 18, 2021 and will be served electronically via the Court's ECF Notice system upon the registered parties of record. Additionally, consistent with Local Rule 26.2(e), unredacted copies of the documents provisionally filed under seal will be served electronically on all parties of record via email.

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