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, a Delaware limited liability company, McDONALD'S CORPORATION, a Delaware corporation; and DOES 1 through 10, inclusive, Defendants.	)	Case No. 17-cv-04857 Judge Jorge L. Alonso Magistrate Judge M. David Weisman PUBLIC-REDACTED
STEPHANIE TURNER, on behalf of herself and all others similarly situated, Plaintiff, v. McDONALD'S USA, LLC, a Delaware limited liability company, and McDONALD'S CORPORATION, a Delaware corporation, Defendants.	)	Case No. 19-cv-05524 Judge Jorge L. Alonso Magistrate Judge M. David Weisman PUBLIC-REDACTED

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF PETER CAPPELLI, D. PHIL

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INTRODUCTION

"An opinion has a significance proportioned to the sources that sustain it." *Minasian v. Standard Chartered Bank, PLC*, 109 F.3d 1212, 1216 (7th Cir. 1997) (internal quotation marks and citation omitted). It has thus long been the rule that an expert who "does nothing to substantiate [his] opinion is worthless, and [his opinions] therefore inadmissible." *Id.*

In this case, Prof. Cappelli opines that all putative class members' wages would have been suppressed by the alleged No-Hire Agreement. That is because, he says, McDonald's exercises monopsony power in the relevant market—a single-brand market that includes only "McDonald's and its Franchisees." Dkt. 270-6 ¶ 9.a. And in that market, the alleged conspiracy artificially depressed "trained" McDonald's workers' wages because (1) they could not obtain higher wages *outside* the McDonald's System since their training was unique and not transferrable; (2) the No-Hire Agreement impeded them from moving *within* the System for higher wages; and (3) a common wage structure within and across McDonald's corporate-owned and franchisee restaurants depressed wages nationwide. *Id.* ¶ 9.

These are all points of proof, but Prof. Cappelli provides none. Eschewing empirical analysis, he *assumes* each contrafactual premise—skipping the market definition analysis he admitted was "necessary" and relying on his "imagination," "sense," and "knowledge of how employees behave and have behaved effectively since the period of industrial revolution" to fill in the rest. *See*, *e.g.*, Ex. 3, Cappelli Dep. 108:24-109:23, 145:4-147:9, 150:14-151:4, 186:15-188:4; 195:25-196:20; 200:20-202:12; 222:16-224:8; 230:4-231:12; 236:23-237:8. Conjecture unmoored from the record is neither reliable nor helpful; expert opinions must be based on facts, not assumptions. *Kirk v. Clark Equip. Co.*, 2021 WL 1133199, at *7 (7th Cir. 2021); *Clark v. Takata Corp.*, 192 F.3d 750, 757-58 (7th Cir. 1999).

Played out to their logical conclusions, Prof. Cappelli's opinions even contradict the claim of common impact he stakes out. His theory of harm necessarily implies no harm to untrained (or only briefly trained) workers, and his theory of an internal wage structure recognizes that competitively set wages for new McDonald's workers would place upward pressure on wages of other

employees in the System, thereby negating any alleged suppression. All that remains is Prof. Cappelli's *ipse dixit* that the alleged conduct impacted "all" class members, and it must be excluded as such. *See Wendler & Ezra, P.C. v. Am. Int'l Grp.*, 521 F.3d 790, 791 (7th Cir. 2008) ("We have said over and over that an expert's *ipse dixit* is inadmissible.").

Prof. Cappelli's testimony should be excluded under Federal Rules of Evidence 702 and 703. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

BACKGROUND

In support of their motion for class certification, Plaintiffs submitted a report from an economist, Peter Cappelli, with the following assignment: "to determine (1) whether Class Members receive training and develop skills that are of specific value to McDonald's-branded restaurants, such that Class Members receive training that has greater value within the McDonald's-system restaurants than to employers outside that system; and (2) whether the alleged No-Hire Agreement would have reduced the pay of all or nearly all Class Members." Dkt. 270-6 ¶ 8. To meet his charge, Prof. Cappelli reviewed a smattering of record documents and a selection of deposition transcripts that Plaintiffs' counsel provided him, Ex. 3, Cappelli Dep. 58:10-62:18; 188:6-194:24, and some economic literature, *e.g.*, Dkt. 270-6 ¶ 51. Based on that information, Prof. Cappelli regurgitates Plaintiffs' interpretations of record evidence; *compare id.* ¶¶ 66-76, *with* Dkt. 268 at 12-15; and concludes (1) that "McDonald's workers receive training and develop skills specific to the McDonald's system, which are generally not transferable to non-McDonald's work settings but would be extremely valuable to other McDonald's restaurants," Dkt. 270-6 ¶ 9.a, and (2) that because of the alleged No-Hire Agreement, McDonald's restaurant employees "cannot work for any other employer for whom those brand-specific skills are valuable," resulting in "wages [that] are therefore lower than they otherwise would have been" absent the alleged agreement, *id.* ¶ 9.b. Prof. Cappelli does not purport to measure classwide damages or offer any method for doing so—he merely offers the conclusion that "[t]he No-Hire Agreement would have suppressed the pay of all Class Members." *See id.* ¶ 9.c; *see also* Ex. 3, Cappelli Dep. 50:18-24.

Prof. Cappelli admitted that the threshold step for his analysis would be to define the relevant market. Ex. 3, Cappelli Dep. 236:23-237:8. Prof. Cappelli acknowledged this was "an extremely difficult undertaking." *Id.* 235:15-236:21. But he did not "try[] to address that particular question" and made no analysis of the relevant markets in this case. *Id.* 237:10-239:11.

Prof. Cappelli also declined to conduct other analyses related to the transferability of training, mobility of employees, or imposition of systemwide pay structures. He did not analyze any payroll or training data. Ex. 3, Cappelli Dep. 27:5-23; 116:14-17. He did not analyze how all "14,000 McDonald's restaurants in the U.S." set their wages or the extent to which they provide raises for their employees. Ex. 3, Cappelli Dep. 216:20-217:21. He did not "study whether [workers] with prior McDonald's experience were paid more than those without prior McDonald's experience." *Id.* 115:24-118:9. He did not speak with either Ms. Turner or Ms. Deslandes, much less any putative class members, about their training or wages. *Id.* 27:24-28:2; 184:9-185:15. He did not analyze how many employees were prevented from moving jobs because of the alleged No-Hire Agreement or whether employee mobility increased when the alleged No-Hire Agreement supposedly ended. *Id.* 90:10-91:5. He did not read or consider any testimony from any of McDonald's franchising executives about their experience with Paragraph 14. *Id.* 114:17-115:23. He did not conduct any surveys or independent research to gauge whether other companies compensate more based on the skills that McDonald's-sponsored training provides or whether other companies use the same equipment and processes as McDonald's restaurants. *Id.* 207:22-209:4. He did not study whether employees departing McDonald's jobs obtained better wages or better titles. *Id.* 204:22-205:17. As Prof. Cappelli repeatedly admitted, he did not perform any empirical analyses at all. *Id.* 56:12-21; 101:25-102:11; 201:18-202:12; 204:22-205:11; 209:21-210-19.

LEGAL STANDARD

Federal Rule of Evidence 702 imposes a "special obligation" on the district court to serve as a "gatekeep[er]" to ensure that expert testimony is both reliable and relevant. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141, 147 (1999); *see also Daubert*, 509 U.S. at 589 ("[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant,

but reliable."). The proponent of expert testimony bears the burden of establishing its admissibility in support of class certification. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 706 (7th Cir. 2009); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811-13 (7th Cir. 2012). The testimony must be "based on a correct application of a reliable *methodology* and . . . sufficient data to employ the methodology." *Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 780 (7th Cir. 2017) (internal quotation omitted). "Since the *Daubert* standard is fluid and analyzed on a case-by-case basis, *[a]ny* step that renders the analysis unreliable under the *Daubert* factors renders the expert's testimony inadmissible." *Marion Healthcare, LLC v. S. Ill. Healthcare*, 2020 WL 1527771, at *5 (S.D. Ill. Mar. 31, 2020) (emphasis in original; internal quotation omitted).

ARGUMENT

Prof. Cappelli opines that the alleged No-Hire Agreement suppressed wages of *all* putative class members. Dkt. 270-6 ¶ 9.c. By his own admission, a threshold step to reaching that conclusion is the definition of the relevant markets. But Prof. Cappelli does no such analysis; instead, he simply assumes that the alleged existence of the No-Hire Agreement proves the existence of a single-brand market—circular reasoning rejected by courts, including the Seventh Circuit. This alone requires exclusion.

Equally problematic, Prof. Cappelli relies on three critical but unproven assumptions: (1) McDonald's training is brand-specific and not transferable to other employers; (2) the No-Hire Agreement in fact limited employee mobility during the class period; and (3) all 14,000 McDonald's restaurants across the United States share a common pay structure. None of these assumptions is "based on sufficient facts," "the product of reliable principles and methods," or represents the "reliab[le] appli[cation] [of those] principles and methods to the facts of the case." Fed. R. Evid. 702. To the contrary, they are belied by overwhelming evidence—ignored by Prof. Cappelli. For that reason too, his opinions should be excluded.

I. Prof. Cappelli Assumes That The Alleged Conspirators Had Monopsony Power

Prof. Cappelli admits that defining a market is a "***necessary***" first step to determine whether the alleged No-Hire Agreement could have suppressed class members' wages. Ex. 3, Cappelli

Dep. 236:23-237:8 (emphasis added). He also admits he did not conduct any type of analysis of the relevant markets in this case. *Id.* 237:10-238:13. This is inadequate as a matter of law, as the Seventh Circuit has held that in an antitrust case "[e]conomic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market" that has "evidentiary support." *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004). As such, without defining the relevant markets in this case, Prof. Cappelli's opinions regarding the impact of the alleged No-Hire Agreement are meaningless. *See Hannah's Boutique, Inc. v. Surdej*, 2015 WL 4055466, at *4 (N.D. Ill. July 2, 2015) (excluding expert testimony for failure to define a relevant market); *McLaughlin Equip. Co. v. Servaas*, 2004 WL 1629603, at *9 (S.D. Ind. Feb. 18, 2004) (same); *see also Conrad v. Jimmy John's Franchise, LLC*, 2021 WL 718320, at *22 n.9 (S.D. Ill. Feb. 24, 2021) ("without defining a relevant market" an expert's analysis "hinges on the *ipse dixit* of the expert") (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

There are established methods for determining whether a market exists. *See* Mot. Exclude Ops. and Test. Dr. Hal J. Singer ("Mot. Excl. Singer"), Section IV.A.3. Prof. Cappelli does not use any of them. Instead, he *assumes* that the only relevant "buyers" for labor in this case "are McDonald's and its Franchisees," Dkt. 270-6 ¶ 9.a, and he *assumes* that McDonald's training makes McDonald's workers so specialized that the only competition for their labor that could realistically bid up their wages is from other McDonald's restaurants, *id.* ¶ 9.b. Prof. Cappelli does not support these assumptions with record evidence or any type of rigorous analysis. *See infra* Part II. Instead, like Plaintiffs' other expert Dr. Singer, Prof. Cappelli opines that the fact the alleged No-Hire Agreement existed is itself evidence of McDonald's monopsony power. Ex. 3, Cappelli Dep. 211:7-212:3; Dkt. 270-6 ¶¶ 79-81. He bases this on his "obvious" assumption that the only purpose of Paragraph 14 was to suppress wages. Ex. 3, Cappelli Dep. 155:15-156:10; *see also* Dkt. 270-6 ¶ 9.g ("The purpose was clear: to protect franchisees from competitive wage pressure."). But Prof. Cappelli did not review any of the record evidence surrounding the adoption of

former Paragraph 14. He did not review long-time McDonald's executive Jim Kramer's deposition testimony about why the company added Paragraph 14 to the franchise agreement in the first place. Ex. 3, Cappelli Dep. 26:17-19. He did not even know that a version of former Paragraph 14 was part of the very first Ray Kroc franchise agreement in 1955 when there were eleven franchisees and no McDonald's-owned restaurants. *Id.* 155:15-157:8.

By assuming that the alleged No-Hire Agreement is proof of monopsony power, Prof. Cappelli is just assuming what he set out to prove—a fact underscored by his testimony that he "didn't think it was important to test" "supply and demand" since "they're pretty well established" in monopsony cases. Ex. 3, Cappelli Dep. 211:18-212:3. That is exactly backwards. Testing supply and demand elasticity is precisely how one determines the boundaries of a relevant market in which monopsony power could exist. *McLaughlin*, 2004 WL 1629603, at *6 ("It is insufficient for an expert to merely mention cross-elasticity of demand or supply; an analysis is required."); *Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 712 (7th Cir. 1979) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *see also* Mot. Excl. Singer Section IV.A. (explaining invalidity of same assumption by Dr. Singer).

Because he undertook no analysis of the relevant markets here, Prof. Cappelli's opinions regarding the impact of the alleged conspiracy are unreliable *ipse dixit* and should be excluded. *See CDW LLC v. NETech Corp.*, 906 F. Supp. 2d 815, 824, 827 (S.D. Ind. 2012) (excluding expert who conducted no "economic analysis" of "market forces" as "too unreliable for admissibility under Rule 702"); *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002) (excluding "unverified statements unsupported by scientific methodology"); *Conrad*, 2021 WL 718320, at *22 n.9 ("without defining a relevant market," the baseline premise of a statistical analysis purporting to find common impact "hinges on the *ipse dixit* of the expert") (internal quotation omitted).

II. Prof. Cappelli Assumes That All McDonald's Training Is Specific To McDonald's

Prof. Cappelli opines that *all* McDonald's training is specific to McDonald's and not transferable to other types of jobs. Dkt. 270-6 ¶ 48. This opinion is the foundation for his theory of

harm, because if McDonald's workers could take their training outside the McDonald's System, there would be no ability for McDonald's restaurants to suppress wages through the alleged No-Hire Agreement. *See* Ex. 1 ¶¶ 258-59.[1] But notwithstanding the fact that this is the basis for his entire theory, Prof. Cappelli performed no rigorous study of this question, making the notion that *all* McDonald's training is specific to McDonald's pure "ukase in the guise of expertise." *Mid-State Fertilizer Co. v. Exch. Nat. Bank of Chicago*, 877 F.2d 1333, 1340 (7th Cir. 1989) (excluding expert's opinion who failed to conduct any economic study and instead "examined materials produced in discovery and drew inferences from the record"); *see also Minasian*, 109 F.3d at 1216 (excluding opinion of expert that "did not gather any data on the subject, survey the published literature, or do any of the other things that a genuine expert does before forming an opinion").

Prof. Cappelli freely admits that he did not review actual McDonald's training courses or materials. Ex. 3, Cappelli Dep. 152:7-18, 173:23-174:3. While he looked at the McDonald's Operations and Training Manual, he did not review any of the actual training course materials that consist of thousands of pages of course handouts, slides, and online modules. Dkt. 270-6 ¶¶ 49-50. For example, the General Manager training curriculum consists of over 25 courses and takes on average 41 weeks to complete. *See* Ex. 83; Ex. 10 at -460. Prof. Cappelli has no idea what skills that training actually imparted because he did not review the training materials available to him—let alone do so in a methodical and disciplined manner. *Cf. Stokes v. John Deere Seeding Grp.*, 2014 WL 675820, at *4 (C.D. Ill. Feb. 21, 2014) ("Eyeballing may have the advantage of ease, but it surely lacks scientific reliability in the sense of producing consistent results"); *Brown v. Burlington N. Santa Fe Ry. Co*., 765 F.3d 765, 776 (7th Cir. 2014) (opining "without reliable, testable methodology is not sufficient").

To be clear, because Prof. Cappelli did not review any of the actual training offered by McDonald's, his opinions are based on assumptions, as he admits. For example, Prof. Cappelli just *assumes* that the training course on "respectful workplace" is specific to McDonald's. Ex. 3,

[1] Ex." refers to Exhibits attached to the "Declaration of Rachel S. Brass."

Cappelli Dep. 174:11-175:17 ("If this was like the training done in other organizations on this topic of respect, it outlines what the company's rules are and what their norms are and what their policies and procedures are . . ."). Prof. Cappelli *assumes* that the training on "ServSafe" is a McDonald's-specific protocol (*id.* 175:18-176:1), even though Ms. Deslandes testified otherwise, Ex. 109, Deslandes Dep. 176:11-17; *see also* https://www.servsafe.com. He *assumes* that all McDonald's workers learn a unique way of counting cash based solely on Ms. Turner's experience, Dkt. 270-6 ¶ 60, even though he does not know whether any McDonald's restaurants other than Ms. Turner's actually count cash using that method, Ex. 3, Cappelli Dep. 179:24-184:8. In making these assumptions, rather than actually studying the training materials themselves, Prof. Cappelli fails to "substantiate his opinion" that ***all*** McDonald's training is specific to McDonald's and non-transferable to other jobs—he is simply "assum[ing]" the facts that would support his opinion "to be true." *Kirk*, 2021 WL 1133199, at *7 (quoting *Takata Corp*., 192 F.3d at 757).

Prof. Cappelli also baldly assumes that part of McDonald's training included education about Paragraph 14, such that McDonald's General Managers knew not to hire applicants working in other McDonald's restaurants. Ex. 3, Cappelli Dep. 149:4-150:12. When pressed to explain the basis for that assumption, Prof. Cappelli admitted that he had none. *Id.* 150:14-152:18. And yet he claims that "it would be remarkable to [him] if in this McDonald's franchise management operation [employees] did not learn something about that." *Id*. This too is textbook *ipse dixit*.

Perhaps the most critical gap is between Prof. Cappelli's conclusion that other employers would not value McDonald's training, and his failure to analyze what skills non-McDonald's employers actually value and look for, or otherwise study the question in the real world. Ex. 3, Cappelli Dep. 172:11-188:4. For example, Prof. Cappelli claims that McDonald's restaurant equipment is not used in any other restaurants, so training in how to use McDonald's equipment would not be useful to other employers. Dkt. 270-6 ¶ 61. But Prof. Cappelli cites nothing to support this conclusion, *id.*, and conducted no study or personal observation supporting it. Ex. 3, Cappelli Dep. 207:9-209:4. Rather, Prof. Cappelli *assumes* that other companies do not use the same equipment as McDonald's restaurants based on his vague recollection of having "read something about how

Subway works." *Id.* 208:16-209:4. Nor does Prof. Cappelli analyze competing employer job postings, surveys of competing employers, or what jobs McDonald's workers are typically hired into upon leaving McDonald's jobs—examples of actual evidence that could have indicated whether employers value McDonald's training (or not). *Id.* 204:22-206:20. Rather, he testified that he "can certainly *imagine* many employers who would think [McDonald's training] was not relevant." Ex. 3, Cappelli Dep. 186:20-187:2 (emphasis added). This imagined opinion would extend to crew training on matters such as mopping floors, counting change, and providing positive customer service. Speculation is not evidence, much less the foundation for reliable expert opinion. *Takata Corp*., 192 F.3d at 757 ("a district court is required to rule out subjective belief or unsupported speculation") (internal quotation omitted).

Prof. Cappelli has not used a reliable methodology—or any methodology—to arrive at his conclusions regarding the alleged specificity of McDonald's training and its lack of value to other employers. Instead, his opinions rest on unfounded assumptions and speculation and therefore should be excluded. *Takata Corp*., 192 F.3d at 757; *Chen v. Mnuchin*, 2020 WL 5819869, at *4-5 (N.D. Ill. Sept. 30, 2020) (excluding expert who did not rely "upon 'sufficient facts or data' to support his testimony") (quoting Fed. R. Evid. 702(b)).

III. Prof. Cappelli Assumes A Lack of Mobility By McDonald's Workers

In order for employees to be harmed under Prof. Cappelli's theory, it must be the case that the alleged No-Hire Agreement actually restricted employee mobility. *See* Dkt. 270-6 ¶¶ 9.a, 81. But Prof. Cappelli did not study whether the alleged No Hire-Agreement had *any* effect on worker mobility. Ex. 3, Cappelli Dep. 209:21-210:25. Rather, he reads a handful of documents and cherry-picked deposition testimony to mean that McDonald's "enforced" the No-Hire Agreement such that mobility was prevented for all class members. Dkt. 270-6 ¶¶ 65-66. Scratching beneath the surface reveals that his opinions here are based on assumption, not study, as well.

First, Prof. Cappelli assumes that the alleged No-Hire Agreement was enforced because there were various ways that McDonald's *could* have enforced it. Dkt. 270-6 ¶¶ 40-43. But he does not cite a single instance in which McDonald's *actually did so*, and he admits that he located

no such evidence. Ex. 3, Cappelli Dep. 138:6-145:3. For example, while he cites evidence that in one year (2016), McDonald's did not renew the franchise agreements of [redacted] of operators whose agreements were up for renewal, Dkt. 270-6 ¶ 41, he admits he does not know what the actual reasons were for McDonald's decisions not to renew those franchise agreements, and that those non-renewals could have been unrelated to violations of the alleged No-Hire Agreement. Ex. 3, Cappelli Dep. 139:22-141:1. In fact, there is no evidence that McDonald's ever refused to renew a franchisee agreement, or took other action against a franchisee, as a result of a violation of Paragraph 14 during the class period. Ex. 116, Poroda Dep. 108:1-23. Prof. Cappelli cites no such example. And while Prof. Cappelli cites two McDonald's documents about regional practices surrounding Paragraph 14, those documents date to 1995 and 2011—and they provide no evidentiary basis for a conclusion about McDonald's conduct during the class period. Even worse, Prof. Cappelli admitted in deposition testimony that one did not support his conclusion, disavowing the evidentiary value of the 1995 document because it states "[i]f an employee is terminated or simply quits . . . this employee is free to immediately seek employment from any McDonald's restaurant," which flies in the face of his assumption that the alleged No-Hire Agreement prevented such movement. Ex. 78; Ex. 3, Cappelli Dep. 79:7-81:16 (stating the 1995 memo "could have simply been an error" and that it was "superseded by other documents later on"); *see also id.* 89:23-90:9 (claiming the 2011 memo was "in conflict" with the language of former Paragraph 14).

Nor did Dr. Cappelli consider the record evidence contrary to his conclusion. He did not read—let alone rely on—the depositions of McDonald's witnesses who explained that former Paragraph 14 was not enforced during the class period. *Compare* Ex. 3, Cappelli Dep. 112:19-115:23 *with* Ex. 114, Lopez Dep. 63:5-14, 66:12-15, 169:9-172:7, 172:23-173:9, 184:22-185:19; Ex. 115, Lowery Dep. 16:10-17:6, 27:1-28:12, 62:14-63:1, 71:1-5; Ex. 108, Brethauer Dep. 108:3-14, 109:19-110:3, 129:23-130:2; *see also* Ex. 1 ¶¶ 261-70. Nor does he account for McDonald's March 2017 announcement that it was removing Paragraph 14 and that it would not enforce the "dated" policy. Ex. 17; Ex. 82. This failure to "consider[] potentially contrary evidence" makes his opinions particularly unreliable. *See Chen*, 2020 WL 5819869, at *4.

Second, Prof. Cappelli assumes that, pursuant to Paragraph 14, franchisees in fact prohibited their employees from moving to other franchisee organizations or to McOpCos. But he identifies no documents or other data—other than Ms. Deslandes's supposed experience—that speak to any franchisee preventing employees from moving. He admits as much, testifying that he "didn't think it was necessary to document" evidence of enforcement because "it seemed obvious." Ex. 3, Cappelli Dep. 108:24-109:11; *see also id.* 112:5-114:11 ("[I]t didn't strike me as particularly useful to document that something that was fundamentally – fundamental and in the contract with franchisees was something that the franchisor took seriously"). The actual evidence demonstrates that it was far from "obvious" that franchisees all restricted their employees from moving to other McDonald's organizations. Dr. McCrary did what Prof. Cappelli failed to do—he studied the evidence to determine if it supported Prof. Cappelli's *theory* of enforcement, and found that "during the class period McDonald's and franchisees did not have a consistent policy of enforcing the challenged clause, or otherwise limiting employee mobility between McDonald's restaurants." Ex. 1 ¶ 283; *see id.* ¶¶ 273-81 (compiling "numerous examples of mobility during the class period"); *see also* Ex. 118 ¶¶ 17-19; Ex. 120 ¶¶ 9, 18, 19; Ex. 124 ¶¶ 13-14.

Third, Prof. Cappelli makes numerous unsubstantiated assumptions about methods of enforcement. He assumes that the alleged No-Hire Agreement was enforced via job applications, Dkt. 270-6 ¶ 66.a, but did not investigate franchisees' application processes or whether they even attempted to verify previous McDonald's employment. Ex. 3, Cappelli Dep. 102:22-105:16. He assumes that releases were "extremely difficult to get," but he admits that he made no attempt to study whether or not that was actually true. *Id.* 163:17-164:24. Prof. Cappelli has "a reasonably good . . . sense" that restaurant managers would have "report[ed]" other franchisees who violated the No-Hire Agreement, *id*. 145:4-146:1, yet admits he saw "no direct evidence" of that, simply claiming "that practice seems to be one rooted in human behavior, and so it should apply at McDonald's as well." *Id.* 146:4-17. And Prof. Cappelli cited his "knowledge of how employees behave and have behaved effectively since the period of industrial revolution." *Id.* 146:4-147:9. However, "courts must ensure that purportedly scientific testimony employs scientific methods to

reach reliable conclusions." *Huey v. United Parcel Serv., Inc.*, 165 F.3d 1084, 1087 (7th Cir. 1999). While Prof. Cappelli may have "specialized knowledge or skills," "he did not apply them to the analysis of" the issue in this case—classwide wage suppression. *Id.*

Having failed to conduct any actual study of employee mobility, all Prof. Cappelli is left with are his "subjective belief[s] [and] unsupported speculation" that the alleged No-Hire Agreement restricted employees from moving between McDonald's restaurants—neither of which can support a reliable opinion. *Takata Corp.*, 192 F.3d at 757; *see also Wendler*, 521 F.3d at 791 ("We have said over and over that an expert's *ipse dixit* is inadmissible"); *Marion Healthcare*, 2020 WL 1527771, at *4 (excluding economist opinion that was "not predicated on the facts in the record").

IV. Prof. Cappelli's Opinion That All Workers Were Harmed Does Not Fit The Facts Of How Wages Are Set For Entry-Level Workers And Lateral Managers

A core component of Prof. Cappelli's wage suppression theory is his assumption that McDonald's workers have McDonald's-specific skills that they cannot capitalize on by moving to other McDonald's restaurants. Dkt. 270-6 ¶ 61. But he ignores that a large category of employees are new hires—entry-level crew and externally hired managers—who indisputably do *not* possess such skills and thus could not have been harmed until some undefined and unstudied point in time when they have done enough training to be uniquely valuable at a McDonald's restaurant.

First, Prof. Cappelli admits that there *was* "competition for workers" "at the entry level" such that their wages were market-driven. Dkt. 270-6 ¶ 136; *see also* Class Cert. Opp. at II.B (discussing record evidence). Further, evidence demonstrates an extremely high rate of turnover in many McDonald's restaurants, especially for entry-level crew. *See* Ex. 3, Cappelli Dep. 93:8-94:17 ([redacted]); Ex. 1 ¶¶ 52-56, 234-38; Ex. 2 ¶¶ 105-108, 129. Thus, even Prof. Cappelli admits that the putative class contains some class members who would not have been harmed according to his theory of wage suppression, because they never accumulated enough training to be harmed. Prof. Cappelli has not, however, accounted for this and has no method for excluding these individuals from the putative class. Ex. 3, Cappelli Dep. 62:5-14. An expert who merely *assumes* that a putative class is composed of similarly situated

people is not providing helpful testimony for the jury, particularly where purporting to offer testimony "critical to class certification." *See Bowman for J.B. v. Int'l Bus. Machines Corp.*, 2013 WL 12290828, at *2, *8 (S.D. Ind. Aug. 16, 2013) (internal quotation omitted).

Second, Prof. Cappelli assumes without evidence that McDonald's restaurants do not hire employees above the entry-level crew positions (i.e., managers) from outside the McDonald's System, such that "all positions above entry-level Crew Member must be filled by someone already employed in the McDonald's System." Dkt. 270-6 ¶¶ 54, 57. That is demonstrably incorrect. There is an entire department within the McOpCo organization that "focus[es] on strategic recruitment for *external talent* for McOpCo Shift Manager, Department Manager and General Manager" positions. *See* Ex. 85 (emphasis added). Deb Leon, one of its primary recruiters, testified about it at length, in a deposition Prof. Cappelli claims to have relied upon. *Compare* Leon Dep. 21:25-23:6 *with* Dkt. 270-6 Appx. B (Materials Relied Upon listing Deposition Testimony of Deb Leon); Ex. 3, Cappelli Dep. 109:24-110:23; 127:12-128:7. And franchisees similarly hire managers from outside their own restaurants and compete with countless other companies for labor. *See* Ex. 120 ¶ 7; Ex. 121 ¶ 10. Indeed, as of 2014, McDonald's estimated that over 50 percent of General Managers at McDonald's-owned restaurants began their careers at positions above entry-level crew. Ex. 84; *see also* Ex. 1 ¶¶ 293-96 (collecting evidence of external hiring for managers).

Prof. Cappelli did *nothing* to test or verify his assumption that McDonald's restaurants do not compete with other companies for non-entry level employees, and that assumption is verifiably wrong, so his opinions based on it should be excluded as unreliable. *See Smith v. Ill. Dep't of Transp.*, 936 F.3d 554, 558–59 (7th Cir. 2019) (affirming exclusion of expert who "omitted a substantial set of facts from her analysis, and instead relied only on what appears to be plaintiff-curated records") (internal quotation omitted); *Stokes*, 2014 WL 675820, at *6 (excluding as unreliable economist whose method relied on "unsubstantiated inferences").

V. Prof. Cappelli's Opinion That All Workers Were Harmed As A Result Of A Common "Wage Structure" Is Based On Untested Assumption

Prof. Cappelli claims that a "pay structure" existed *across* all McDonald's restaurants—

franchisees and McOpCo's—as well as *within* them, such that wage suppression of one employee's wages would "spread" to other employees' wages, thus "caus[ing] system-wide depression of wages, affecting all Class Members." Dkt. 270-6 ¶ 135. But again, Prof. Cappelli's opinion that the 14,000 McOpCo and franchisee restaurants shared a common wage structure is not based on any analysis utilizing reliable methodologies, but on his intuition and speculation. He simply states that "[a]n obvious point is that the franchisees have little choice but to adopt McDonald's job titles and job requirements of the people working in their restaurants," without citation to any evidence. Dkt. 270-6 ¶ 116. He then doubles down on his speculation, opining that because franchisees "do not have a great deal of discretion on many of the other factors that affect their business" they do not have room to exercise much discretion in how they pay their employees. Dkt. 270-6 ¶ 117. Prof. Cappelli could have examined record evidence—such as the produced wage data or franchisees' documents describing their organizational and pay structures—and performed empirical analysis to confirm whether his musings matched reality, but he did not. Dr. Murphy did, and found that job titles in fact vary between both McOpCos and franchisee restaurants, Ex. 2 ¶¶ 31-34, and that McOpCo and franchisee wages did *not* move similarly, *id.* ¶ 238-39. Again, an expert opinion that is based on "unsupported speculation" and "subjective belief[s]" untethered to the actual evidence is not reliable. *Takata Corp.*, 192 F.3d at 757 (internal quotation omitted).

Prof. Cappelli's opinion that wage structures within McDonald's restaurants would have spread the alleged suppression fares no better. In fact, played out to its logical conclusion, his theory of "linkage" of wages among positions in a given restaurant actually contradicts his opinion that all employees' wages would have been suppressed as a result of the alleged conspiracy. If all wages were linked such that skilled-employees' wages rose when unskilled-employees' wages rose as Prof. Cappelli asserts, Dkt. 270-6 ¶ 112, and if entry-level workers with no McDonald's experience received competitive wages based on local competitive conditions as he recognizes, *id.* ¶ 136, by definition, the bottom rung of competitive wages would have "trickled up" to all other employees. *See* Ex. 1 ¶ 297. Similarly, when new managers were hired from external sources,

their starting wages would have been competitively set based on competition with other employers unaffected by the alleged No-Hire Agreement. *Id.* ¶ 300. Those competitive starting wages would have "ripple[d] through" to other more senior managers as well. *Id.* That competition-driven wage effect would be further enhanced by the pay-equity concerns that Prof. Cappelli opines are central to wage-setting decisions. *Id.* ¶ 299. Indeed, Prof. Cappelli himself recognizes this dynamic, in describing how McDonald's decision to raise wages for McOpCo entry-level jobs by $1 "led to pressures to raise wages throughout the hierarchy of jobs in each restaurant." Dkt. 270-6 ¶ 138; *see also id.* ¶ 131. In other words, the internal "linkage" of employee wages would *increase* wages based on external competition, not suppress them. Ex. 1 ¶¶ 297-300.

Worse, Prof. Cappelli's theories do not survive testing by Plaintiffs' own expert's regressions, much less by properly conducted economic analysis. Prof. Cappelli contends that the more specific training a worker receives, the more valuable she should be to McDonald's employers and, hence, the more her wages should have been suppressed by the No-Hire Agreement. Ex. 3, Cappelli Dep. 176:2-177:18; *see also* Dkt. 270-6 ¶ 58 (emphasizing that "employee value" "rise[s] considerably" with more training and tenure). Yet Dr. Singer purports to find precisely the opposite—that crew wages (among franchisees, who comprise the vast majority of the putative class) were affected by the alleged No Hire Agreement *more* than manager wages, Dkt. 270-5 Table 4, and that the percentage of employees "harmed" *declines* as employees gain experience at a restaurant. Ex. 2 ¶ 265-66. Thus, in addition to being independently unsupported by "a process of reasoning beginning with a firm foundation," *Mid-State Fertilizer*, 877 F.2d at 1339, Prof. Cappelli's theoretical opinion is antithetical to Dr. Singer's empirical findings (reliability notwithstanding). Because Prof. Cappelli has "presented nothing but conclusions—no facts, no hint of an inferential process, no discussion of hypotheses considered and rejected," his opinion "supplies nothing of value to the judicial process" and should be excluded. *Id.*

CONCLUSION

For the reasons stated herein, Defendants request that the Court grant this motion to exclude Prof. Cappelli's testimony in its entirety.

Dated: April 15, 2021

McDONALD'S USA, LLC and McDONALD'S CORPORATION

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CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the foregoing was filed via ECF and served on registered parties of record on April 15, 2021.

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