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

Judge Jorge L. Alonso
Magistrate Judge M. David Weisman

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF PETER CAPPELLI, D. PHIL

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INTRODUCTION

Dr. Peter Cappelli is a Professor of Management at Wharton and among the world's leading scholars of labor economics; employer hiring, compensation, and training practices; employment relations; and business management. Dkt. 270-6 ¶¶ 1-2 ("Cappelli Rept."). He applies well-accepted economic principles to his review of the record evidence to offer the following opinions.

First, Dr. Cappelli opines that McDonald's workers receive "specific" training for skills of value to McDonald's establishments but not directly transferable to, or useful for, non-McDonald's employers. Second, Dr. Cappelli opines that the No-Hire Agreement restrained McDonald's restaurants' ability to hire one another's employees, limiting the most natural source of competition for the employees' labor, thereby reducing competitive pressure on wages. Third, Dr. Cappelli opines McDonald's restaurants wield monopsony power, which was enhanced by the No-Hire Agreement. Finally, he opines that the No-Hire Agreement would have suppressed the pay of all or nearly all Class Members, including entry-level workers and lateral managers. His opinions are based on his expertise, economic literature, and his analysis of the record evidence.

McDonald's does not challenge Dr. Cappelli's qualifications or the relevance of his opinions. Instead, it challenges the reliability of his opinions. Its challenges are based on misstatements of Dr. Cappelli's report and deposition testimony. For example, McDonald's repeatedly asserts that Dr. Cappelli simply "speculates" or "assumes" certain facts, but this is belied by the report itself. McDonald's also applies the wrong legal standard. Applying the correct standard, McDonald's attacks go, at best, to the weight of Dr. Cappelli's testimony, not its admissibility. Dr. Cappelli's opinions are based on well-established economic principles and a rigorous review of the record evidence.[1] The Court should deny McDonald's motion.

[1] McDonald's faults Dr. Cappelli for not performing empirical statistical analyses in his report, but its own expert Dr. McCrary also based his opinions on [redacted] undertook no empirical analyses, and disavowed their feasibility or usefulness. Declaration of Anne Shaver In Support Of Plaintiffs' Opposition to Defendants' Motions to Exclude ("Shaver Daubert Decl."), Ex. 5 (McCrary Dep.) at 223:15-224:2; 213:6-21; 204:20-205:7; 146:15-25.

LEGAL STANDARD

Under Federal Rule of Evidence 702, expert testimony must be both "relevant" and "reliable." *Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) (quoting *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993)). At the class certification stage, the court need only resolve a *Daubert* challenge to the extent the "expert's report or testimony is critical to class certification," such as "establishing any of the Rule 23 requirements." *Am. Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). A qualified expert's testimony is admissible if it is "based on sufficient facts or data," is the "product of reliable principles and methods," and the expert "has reliably applied the principles and methods to the facts of the case." *Lees v. Carthage Coll.*, 714 F.3d 516, 521 (7th Cir. 2013) (quoting Fed. R. Evid. 702). The test of reliability is "flexible" and based on "the criteria relevant to a particular kind of expertise in a specific case . . . ." *Smith v. Ford Motor Co.*, 215 F.3d 713, 719 (7th Cir. 2000) (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999)). "The rejection of expert testimony is the exception rather than the rule, and 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'" *Spearman Indus. v. St. Paul Fire & Marine Ins. Co.*, 128 F. Supp. 2d 1148, 1150 (N.D. Ill. 2001) (quoting Fed. R. Evid. 702 advisory committee's note to 2000 amendment). Although the court is the gatekeeper, "the key to the gate is not the ultimate correctness of the expert's conclusions," but rather the "soundness and care with which the expert arrived at her opinion." *Schultz v. Akzo Nobel Paints, LLC*, 721 F.3d 426, 431 (7th Cir. 2013). *See also Manpower*, 732 F.3d at 806 (court "usurps the role of the jury" and "abuses its discretion, if it unduly scrutinizes the quality of the expert's data and conclusions rather than the [methodology's] reliability"); *Toney v. Quality Resources, Inc.*, 323 F.R.D. 567, 579 (N.D. Ill. 2018) (same, regarding *Daubert* challenge at class certification).

ARGUMENT

I. Dr. Cappelli's Opinion That Class Members Receive Considerable "Specific" Training Is Reliable

Dr. Cappelli concludes that McDonald's workers received a significant amount of brand-specific training that had the most value within the proprietary McDonald's system. That is not a remarkable point: as McDonald's expert agrees, McDonald's business is premised on standardizing the customer experience across thousands of locations that sell proprietary products prepared using proprietary methods. *See* Cappelli Rept. ¶¶ 17-43; Dkt. 302-1 ¶¶ 78-90 ("McCrary Rept."). To ensure consistency of customer experience, consistent training is required. *See* Cappelli Rept. ¶¶ 24, 29, 44-55; *see also* Declaration of Anne Shaver ISO Class Certification (Dkt. 271) ("Shaver Decl."), Ex. 14 (King Dep. 30:14-16) [redacted]. Dr. Cappelli's insight is that, due to the proprietary nature of McDonald's standardized systems, this training is more "specific" than "general," which means that McDonald's-branded employers are most likely to value (and pay for) that training. Cappelli Rept. ¶¶ 52-55, 59-62.

McDonald's attacks Dr. Cappelli's opinion on two meritless grounds. First, McDonald's falsely claims that Dr. Cappelli "opines that *all* McDonald's training is specific to McDonald's and not transferable to other types of jobs." Mot. at 6 (emphasis in original). Dr. Cappelli emphasized that McDonald's employees receive training and skills "of value *primarily* to McDonald's employers." Cappelli Rept. ¶ 48 (emphasis added).[2] He acknowledged that some training has general applicability. *Id.* ¶ 60. Dr. McCrary likewise acknowledged that [redacted] Shaver Daubert Decl., Ex. 5 (McCrary Dep.) at 179:24-9.

[2] *See also* Cappelli Rept. ¶ 48 ("*Many* skills are not valuable to non-McDonald's work settings."); *id.* ¶ 60 ("*Much* of the training for managers is quite specific to McDonald's."); *id.* ¶ 9(a) ("McDonald's workers receive training and develop skills specific to the McDonald's system, which are *generally* not transferable . . . but would be extremely valuable to other McDonald's restaurants."); *id.* ¶ 9(e) ("[T]he training and skill development at McDonald's is not *as* valuable in jobs outside the McDonald's system."); Brass Decl., Ex. 3 (Cappelli Dep. 175:14-17) ("*[M]ost* of the—the training that I saw is about compliance with the McDonald's system, the McDonald's rules, the McDonald's approaches to things.") (all emphasis added).

Second, McDonald's falsely asserts Dr. Cappelli "performed no rigorous study of this question" and offered assumptions in lieu of facts. Mot. at 7. To the contrary, informed by his background in labor economics and human resources, his research on franchising systems, employee training practices, and labor economics' distinction between specific and general training, and academic studies *of McDonald's* itself, Dr. Cappelli performed a qualitative analysis of myriad record materials before reaching his opinion. He studied the type of work performed at McDonald's and the training necessary to perform it. Dr. Cappelli reviewed McDonald's detailed U.S. Operations and Training Manual, *see* Cappelli Rept. ¶¶ 49-50, which McDonald's own personnel described as "McDonald's Bible on how to do things in a restaurant," *id.* ¶ 45 (quoting Shaver Decl., Ex. 13 (Langhorn Dep. 69:5-15)). He reviewed copious training materials. *See* Cappelli Rept. ¶ 27 (quoting training materials specifying McDonald's method for [redacted]); *id.* ¶ 55(e) (describing McDonald's "foundational" courses for Crew Trainers"); *id.* ¶ 60 (describing McDonald's-specific manager training on proprietary systems); *id.* ¶ 24 n.11 (citing detailed documents about McDonald's Crew Development Program, Crew Trainer Training, Shift Manager Training, and Department Manager Training).[3] Dr. Cappelli also reviewed corporate policy statements about the benefits of hiring workers trained by McDonald's, *id.* ¶ 50, deposition testimony corroborating the highly specific nature of McDonald's training, *id.* ¶ 49, materials provided to McOpCo managers to help them assess whether new hires are adjusting to the McDonald's system, *id.* ¶ 55(g), and evaluations of how employees performed based on their training, *id.* ¶ 56.

Despite this extensive review, McDonald's claims Dr. Cappelli should have analyzed non-existent survey data of other employers. It does not cite a single academic article suggesting that this is the only acceptable methodology for classifying training as "specific." To the contrary, "[a]n expert's testimony is not unreliable simply because it is founded on his experience rather

[3] *See also* Appendix B to his report, citing: Shaver Daubert Decl., Ex. 8 at -515 (McDonald's method of making French fries); *id.*, Ex. 9 (forty-one page training manual for department managers); *id.*, Ex. 10 at -503 (McDonald's "Crew Orientation [I]nstruction [M]anual"); *id.*, Ex. 11 (McDonald's "Training SOC (Station Observation Checklist)"); Brass Decl., Ex. 11 (McDonald's "Crew Development Program (CDP) on Frequently Asked Questions").

than on data," so long as the expert explains their reasoning. *Metavante Corp. v. Emigrant Sav. Bank*, 619 F.3d 748, 761-62 (7th Cir. 2010); *see also Prayitno v. Nextep Funding LLC*, No. 17 C 4310, 2019 WL 6497374, at *6-7 (N.D. Ill. Dec. 3, 2019) (Alonso, J.) (holding expert's "qualitative," non-statistical analysis informed by experience was admissible).[4] McDonald's criticism of Dr. Cappelli for not conducting a survey goes to weight, not admissibility. *See Tilstra v. Bou-Matic, LLC*, No. 12-CV-827-SLC, 2014 WL 4662483, at *7 (W.D. Wis. Sept. 19, 2014), *aff'd sub nom. Tilstra v. BouMatic LLC*, 791 F.3d 749 (7th Cir. 2015) ("Although [the defendant] proffers a laundry list of factors that it contends [the expert] should have considered, these factors all affect the weight to be given to [the expert's] testimony, not its admissibility."). Notably, McDonald's expert Dr. McCrary agrees that McDonald's provides specific training and that "returns from specific training that are not shared with the worker can be characterized as harm," McCrary Rept. ¶¶ 317, 323, but opines that the training has some general value, without conducting any such survey, *id*. ¶¶ 317-323. McDonald's other expert, Dr. Murphy, also agrees. Shaver Daubert Decl., Ex. 6 (Murphy Dep. 115:18-25) [redacted]

Likewise, McDonald's claims Dr. Cappelli did not review all McDonald's training materials, but "[n]either *Daubert* nor the Federal Rules of Evidence requires an expert to review all the facts, only a 'sufficient' amount is required." *See Hoskins v. Trucking*, No. 4:07-CV-72 JD, 2010 WL 4000123, at *12 (N.D. Ind. Oct. 12, 2010) (citation omitted). To the extent McDonald's claims there is evidence that Dr. Cappelli "should have considered but did not," it may "uncover[]

[4] *See also Woods v. Amazon.com, LLC*, No. 17 C 4339, 2019 WL 2323874, at *16 (N.D. Ill. May 30, 2019) (finding experts' opinions based on "work-rehabilitation and economic analyses" admissible where they were "supported by the experts' experience, industry research, and academic research"); *Ill. Liberty PAC v. Madigan*, No. 12 C 56811, 2015 WL 5589630, at *3-5 (N.D. Ill. Sept. 21, 2015) (admitting political scientist's "qualitative analysis" of campaign finance system); *Aloe Vera of Am. Inc. v. United States*, No. No. CV-99-01794-PHX-JAT, 2014 WL 3072981, at *4 (D. Ariz. July 7, 2014) (admitting expert testimony that "involve[d] qualitative assessments such as examining business models, market characteristics, and the like").

those flaws through cross-examination and through the presentation of contrary evidence." *Walker v. Soo Line R. Co.*, 208 F.3d 581, 591 (7th Cir. 2000) (affirming admissibility of expert opinion). This argument is not a basis for exclusion. *See, e.g., Gecker as Tr. for Collins v. Menard, Inc.*, No. 16 C 50153, 2019 WL 4166859, at *6 (N.D. Ill. Sept. 3, 2019) (expert should not be excluded on basis he "did not have all the fact he should have"). In any event, Dr. Cappelli considered the new materials identified by McDonald's and has not changed his opinion. Shaver Daubert Decl., Ex. 2 (Rebuttal Expert Report of Dr. Peter Cappelli) ¶ 8.

McDonald's cases are clearly distinguishable and actually support the admissibility of Dr. Cappelli's opinion. In *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, the court excluded the expert's testimony not because he "failed to conduct any economic study," Mot. at 7, but because his report consisted of a "one-page affidavit," which did not "draw on the skills of an economist" and "gave a legal rather than an economic opinion," 877 F.2d 1333, 1340 (7th Cir. 1989). Similarly, in *Minasian v. Standard Chartered Bank, PLC*, the expert's affidavit was "devoid of analysis," "must have" been written by an attorney, and put forth an "economically ludicrous" conclusion. 109 F.3d 1212, 1216 (7th Cir. 1997). That is clearly not the case here.

Finally, McDonald's seizes isolated and out-of-context comments provided in response to McDonald's deposition questions—not part of his expert report or an opinion that Plaintiffs intend to submit to a jury.[5] Taken together, these inconsequential deposition "gotchas" demonstrate only that Dr. Cappelli may not have a photographic memory and is unaware of certain irrelevant facts. *See Elorac, Inc. v. Sanofi-Aventis Can., Inc.*, No. 14 C 1859, 2017 WL 3592775, at *5 (N.D. Ill. Aug. 21, 2017) (Alonso, J.) ("To the extent that [the expert] might have struggled to find support in the record for some of his factual assumptions, they are not so central to [the] analysis that any fuzziness on these factual details makes his opinion professionally unreliable.").

[5] Dr. Cappelli cited "respectful workplace" training as an example of a uniform training requirement, not "specific" training. He merely testified that such trainings generally have company-specific elements. Brass Decl., Ex. 3 (Cappelli Dep. 175:8-13). Similarly, Dr. Cappelli cited Ms. Turner's experience regarding cash-counting as an illustrative example; he did not assert that the same training was provided to all workers. Cappelli Rept. ¶ 60. Finally, Defendants seize upon Dr. Cappelli's mistaken deposition statement that ServSafe was a McDonald's-specific protocol; but McDonald's quizzed him about ServSafe even though he offered no opinion about it in his report, and without showing him an exhibit to study.

Dr. Cappelli applied labor economics' well-accepted distinction between "general" and "specific" training to ample record evidence of McDonald's-specific training to opine that the training imparts "specific" skills to workers that is primarily useful to McDonald's employers. Unlike the experts in the cases Defendants cite, Dr. Cappelli did not rely on assumptions or speculation.[6] Instead, he did precisely what an expert is supposed to do: "bring[] to [the record]. . . specialized knowledge that the lay person cannot be expected to possess." *United States v. Conn*, 297 F.3d 548, 554 (7th Cir. 2002).

II. Dr. Cappelli's Opinion That the No-Hire Agreement Reduced Worker Mobility Is Reliable

The Court previously recognized that "[e]ven a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate." Dkt. No. 53 at 14. Dr. Cappelli's opinion provides a labor economics explanation why no-hire agreements generally, and McDonald's No-Hire Agreement specifically, limit employee mobility and, in turn, suppress wages. Cappelli Rept. ¶¶ 86-103.

McDonald's main attack on Dr. Cappelli's opinion is that he somehow "assumes" the agreement was "enforced" and prohibited employee mobility. This is false. Dr. Cappelli's report cites, summarizes, and relies upon considerable evidence that McDonald's and its franchisees followed their agreement. *See* Cappelli Rept. ¶¶ 65(c), 66(a), 103; *see also* Shaver Daubert Decl. Ex. 2 ¶ 63 (discussing McDonald's human resource call logs, which include more than [redacted] instances of releases being denied). Indeed, Dr. Cappelli cites evidence that McDonald's threatened franchisees with various sanctions if they violated the No-Hire Agreement. Cappelli Rept. ¶¶ 40-42, 66(a). He cites examples of McDonald's reacting to apparent disputes between franchisees. *Id.* ¶ 65(b)-(d).[7] McDonald's uses the term "enforced" narrowly to mean punishment

[6] *See Clark v. Takata Corp.*, 192 F.3d 750, 757 (7th Cir. 1999) (expert opinion that seatbelt unlatched during accident inadmissible where he assumed it did); *Kirk v. Clark Equip. Co.*, 991 F.3d 865, 874 (7th Cir. 2021) (expert assumed load weight could be calculated through dimensions of bucket, even though record showed material was irregular in form and weight).

[7] McDonald's complains that some examples pre-date the class period, but it is undisputed that Paragraph 14 continued into the class-period, as did McOpCo's reciprocation and the April 2015 hiring moratorium.

for violations, even though that is not the only way to effectuate compliance. As Dr. Cappelli explained, a business can effectuate its goals through deterrence without engaging in punishment.[8]

McDonald's next argues that Dr. Cappelli did not consider record evidence contrary to his conclusion. That is untrue. For example, Dr. Cappelli was aware that Karen King claimed she had never received complaints from franchisees about [redacted] *see* Cappelli Rept., Appendix B (listing King depo), but she also testified that [redacted]. Shaver Daubert Decl., Ex. 2, ¶ 44. Regardless, an expert is not required to review every page of the record for his opinion to be admissible. *See Hoskins*, 2010 WL 4000123, at *12; *see also Gomez v. Palmer*, No. 11 C 1793, 2016 WL 212952, at *4 (N.D. Ill. Jan. 19, 2016). In the case Defendants cite, an expert relied primarily on the allegations in the complaint, rather than record evidence. *See Chen v. Mnuchin*, No. 14 C 50164, 2020 WL 5819869, at *3 (N.D. Ill. Sept. 30, 2020).

McDonald's disagrees that the No-Hire Agreement was actually enforced, but Dr. Cappelli "is entitled to base his opinion on assumptions about the truth of disputed facts," which are left to a jury to resolve. *Elorac*, 2017 WL 3592775, at *5 (Alonso, J.); *see also Richman v. Sheahan*, 415 F. Supp. 2d 929, 942 (N.D. Ill. 2006) ("Experts routinely base their opinions on assumptions that are necessarily at odds with their adversary's view of the evidence."); *In re Ready–Mixed Concrete Antitrust Litig.*, 261 F.R.D. 154, 165 (S.D. Ind. 2009) (denying request to strike expert's opinion based on disputed facts). That McDonald's expert came to a different conclusion does not make Dr. Cappelli's methodology and opinions unreliable. *See Baugh v. Cuprum S.A. de C.V.*, 845 F.3d

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Moreover, earlier evidence is relevant because an antitrust conspiracy is presumed to continue absent affirmative proof of withdrawal. *See United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952); *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus, Inc.*, 648 F.3d 452, 457 (6th Cir. 2011); *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823 (11th Cir. 1999), *amended in part*, 211 F.3d 1224 (11th Cir. 2000); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, No. C-07-5944 JST, 2016 WL 8669891, at *2-3 (N.D. Cal. Aug. 22, 2016).

[8] *See* Brass Decl., Ex. 3 (Cappelli Dep. 197:10-198:10) ("So in a typical business organization, supervisors get things done every day without threatening people and without disciplining them even though it is still possible to discipline them and to threaten them. One of the things we know about effective management is the less you do that, the more effective your management is."); Shaver Daubert Decl., Ex. 2, ¶¶ 4, 39.

838, 847 (7th Cir. 2017) ("[I]t is often the case that experts reach conflicting conclusions based on applying different but nevertheless reliable methodologies to a set of partially known facts.").

III. Dr. Cappelli Does Not "Assume" Monopsony Power

Dr. Cappelli reviews the economic literature on the nature of monopsony power in labor markets and explains how no-poach agreements enhance that power. Cappelli Rept. at ¶¶ 43-56. He analyzes monopsony power in the context of the McDonald's system where employees develop McDonald's-specific skills, for which McDonald's restaurants are the buyers. *Id.* at ¶¶ 23-43. Indeed, as McDonald's former Chief People Officer Ms. King confirmed, [redacted].[9] Contrary to McDonald's suggestion, this reasoned analysis "cannot be characterized as mere *ipse dixit*," because Dr. Cappelli "did not simply testify that [the No-Hire Agreement enhanced McDonald's monopsony power] because he said so," but rather explained why it did based on his experience, academic theory, and the record. *Metavante*, 619 F.3d at 761-62.

McDonald's also argues Dr. Cappelli's opinion is unreliable because he supposedly "admit[ted] that defining a market is a 'necessary' first step to determine whether the alleged No-Hire Agreement could have suppressed class members' wages." Mot. at 4. This is a gross misrepresentation of his testimony, which says nothing of the sort. What he said is: "an *understanding* of the labor market is necessary to begin to answer the first and second questions which were my charge, and my conclusion is that *definitions of the labor market were not going to alter my conclusions in this case*." Brass Decl., Ex. 3 (Cappelli Dep. at 237:3-8) (emphasis added). In other words, Dr. Cappelli's opinions about the specificity of training and a wage structure are agnostic to the market definition exercise McDonald's proposes. Consistent with his testimony, Dr. Cappelli discussed his understanding of the labor market at length in his report: that

[9] Jan. 15, 2021 Shaver Decl., Ex. 14 (King Dep. 224:22-225:16) [redacted].

McDonald's proprietary systems and specific training impart workers with skills that are primarily of value to other McDonald's employers. Dr. McCrary appears to agree that firm-specific skills give rise to an "internal labor market": "However, once specific investments [trainings] play a role, a relationship arises between the worker and the firm. Both have some incentive to invest in and maintain the relationship. The term that is often used for this is that such firms emphasize *internal labor markets*." McCrary Rept. ¶ 124 (quoting Edward Lazear & Michael Gibbs, *Personal Economics in Practice* 62 (3d ed. 2015)) (emphasis in original) & ¶ 136.

McDonald's also ignores that the Court has held that the quick-look test applies to Plaintiffs' claim. Dkt. 53 at 13-14. Under the quick-look test, a plaintiff need only articulate the "rough contours" of a commercial market, a task which is satisfied by Plaintiffs' identification of a service market for employees with McDonald's-specific training. *See Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 346 (7th Cir. 2012) (agreeing "a labor market for student-athletes . . . would meet plaintiffs' burden of describing a cognizable market"); *see also In re Sulfiric Acid Antitrust Litig.*, 703 F.3d 1004, 1007-08 (7th Cir. 2012) (observing that "even if a challenged practice doesn't quite rise to the level of per se illegality, it may be close enough to shift to the defendant the burden of showing that appearances are deceptive" without proof of market power through market definition). In contrast, McDonald's cites rule of reason cases.[10]

[10] *See Hannah's Boutique, Inc. v. Surdej*, No. 13-CV-2564, 2015 WL 4055466, at *5 (N.D. Ill. July 2, 2015) (rule of reason case re: monopolization of prom and homecoming dress market); *McLaughlin Equip. Co., Inc. v. Servaas*, No. IP98-0127-C-T/K, 2004 WL 1629603, at *16 (S.D. Ind. Feb. 18. 2004) (rule of reason case re: school bus distributorship tying claim); *see also Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979) (monopolization case applying rule of reason, no *Daubert* analysis). McDonald's also cites *CDW LLC v. NETech Corp.*, 906 F. Supp. 2d 815, 824, 827 (S.D. Ind. 2012), but that was not an antitrust case and sheds no light on this dispute. *Chapman v. Maytag Corp.* is not an antitrust case either and involved irrelevant facts. *See* 297 F.3d 682, 687-88 (7th Cir. 2002) (expert with no training or experience in field of electrical engineering not qualified to offer opinion re: fatal electric leak). Finally, McDonald's cites as a "cf." an opinion in *Conrad v. Jimmy John's Franchise, LLC*, No. No. 18-CV-00133-NJR, 2021 WL 718320, at *22 n.9 (S.D. Ill. Feb. 24, 2021), but the quoted language is unreasoned dicta in a footnote. The *Conrad* decision was based on grounds inapplicable here.

Moreover, McDonald's is wrong that a cross-price elasticity analysis is the only admissible method to demonstrate a market for McDonald's-skills.[11] The record and expert evidence show that system-specific training creates a set of skills that command the most value within the McDonald's system.[12] McOpCo and franchisees spend considerable time and money to provide those skills to their employees. *See* Cappelli Rept. ¶ 55; Shaver Daubert Decl., Ex. 2 ¶ 72-82. The cost of such training and the value of those skills is precisely why turnover is costly and undesirable. McDonald's own expert agrees. *See* McCrary Rept. ¶¶ 91-99.

McDonald's also faults Dr. Cappelli for "assuming" that Paragraph 14 was intended to suppress wages, citing former executive Jim Kramer's testimony as support. Of course, Dr. Cappelli did not make an "assumption," but rather an inference about the evidence in light of his expertise in labor economics. Dr. Cappelli views the senior executives' testimony as confirming that wage suppression was the point. Saying that Paragraph 14 [redacted] Shaver Daubert Decl., Ex. 3 (Kramer Dep. 63:9-13), is a euphemism for saying that it was there to prevent bidding wars for employees. *See* Shaver Daubert Decl., Ex. 2, ¶ 35-37.

IV. Dr. Cappelli's Opinion That Class Members' Wages Are Tied Together Through a Wage Structure Is Reliable

Dr. Cappelli applies his expertise in compensation systems and labor economics to the record evidence to opine that Class Members' wages were connected by a wage structure. *First*, he explains that McOpCo uses a highly structured compensation plan that groups employees into

[11] Even McDonald's expert, Dr. Kevin Murphy, agrees that elasticity analysis is not always needed. *ABS Glob., Inc. v. Inguran, LLC*, No. 14-CV-503-WMC, 2016 WL 3963246, at *15 (W.D. Wis. July 21, 2016) (in case concerning whether the "sexed bovine semen processing market" was separate from the one for conventional bovine semen processing, Dr. Murphy argued, and the court agreed, that "a meaningful analysis as to the cross demand or price elasticity is unnecessary" when other evidence provided substantial support for the existence of the market).

[12] In contrast, McDonald's cases involved more contestable propositions. *See, e.g.*, *McLaughlin*, 2004 WL 1629603, at *7 (expert opined that there was a market for just one brand of school busses without any supporting evidence or analysis that "school bus dealers did not change brands or manufacturers"). *Photovest Corp* supports Plaintiffs' case. The court found "[t]he law does not require an exclusive class of customers for each relevant submarket." 606 F.2d at 714. Similarly, here, the fact that class members could sell different skillsets to different employers (*e.g.*, McDonald's-skills to McDonald's restaurants, general skills to other employers) does not preclude the existence of a service market for McDonald's labor.

pay bands based on job title, and that when it makes adjustments to that system, they percolate system-wide. Cappelli Rept. ¶¶ 105-134. This occurs because of principles of internal equity and the desire to avoid wage compression, which results when new employees' wages are too similar to that of experienced employees, causing dissatisfaction. *Id.* ¶¶ 105-08. Substantial record evidence demonstrates that McOpCo was conscientious of this concern, and educated franchisees about planning for it as well. *Id.* ¶¶ 112, 128-29, 134. For example, Lori Duggan, McDonald's in-house compensation specialist, succinctly described the structured relationship between different employees' wages, and explained that when wages for some employees were adjusted upward, the entire structure was lifted to ensure fairness.[13]

Second, Dr. Cappelli establishes that wages at McOpCo restaurants and franchisee restaurants share a wage structure by virtue of market forces, in addition to pressure from McOpCo to conform. Given the identical nature of the work at McOpCo and franchisee restaurants, employees are sensitive to whether some restaurants pay more for the same work. Cappelli Rept. ¶ 77. The record confirms that McDonald's and McOpCo understood this. [redacted] *Id.* ¶¶ 68-71. [redacted] *Id.* ¶¶ 73-78.

McDonald's asserts that not all restaurants used the same job titles, but, as support, it relies solely on Dr. Murphy, who merely demonstrates that there were very minor variations in how job titles were coded in data, not that the actual jobs differed. Dkt. 302-1 (Murphy Rept. ¶ 33, Fig. 3).

[13] Shaver Daubert Decl., Ex. 4 (Duggan Dep. 31:15-32:3) [redacted]

In fact, titles were overwhelmingly common. *See* Shaver Daubert Decl., Ex. 2 ¶ 161-166; Ex. 1 ¶ 104. That does not disprove a structured relationship between employee wages.

McDonald's also suggests that somehow a wage structure would defeat any harm to the class, because competition over entry-level wages would "trickle[] up." Mot. at 14. No doubt, to the extent wage increases happen at the entry level, they *would* trickle up—that's exactly what Dr. Cappelli argues, Cappelli Rept. ¶¶ 135-38, and what Lori Duggan testified to, *supra* n. 13, and why Plaintiffs assert that harm from the No-Hire Agreement would hurt all employees. But it is a non sequitur to claim that the existence of *some* competition makes irrelevant the removal of other forms of competition. *Cf. Seaman v. Duke Univ.*, No. 1:15-cv-462, 2018 WL 671239, at *4-5 (M.D.N.C. Feb. 1, 2018) (recognizing anti-competitive harm from no-poach agreement at Duke and UNC, notwithstanding competition from other universities). Indeed, courts instruct juries to ignore exactly this specious argument. *See* ABA Model Jury Instructions in Civil Antitrust Cases, at 31 (2016 Ed.) ("ABA Model Jury Instructions") ("[I]t is no defense that defendants actually competed in some respects with each other or failed to eliminate all competition between them.") (collecting cases). Absent the No-Hire Agreement, there would have been *more* competition, which would lead to higher wages. *See Turner*, *supra*, Dkt. 64 at 3 (acknowledging "basic principles of economics: if fewer employers compete for the same number of employees, wages will be lower than if a greater number of employers are competing for those employees").

Finally, McDonald's contends that Dr. Singer's finding that franchisee crew wages were suppressed more than franchisee managers (while the opposite is true for McOpCo) somehow contradicts the standard labor economics fact that a Class Member's value to their McOpCo or franchisee employer increases with their McDonald's-specific training. McDonald's, however, assumes that (1) the gap between the value of managers to McDonald's versus alternative employers is greater for managers than crew and (2) McDonald's would grab a larger share of managers' labor value than it does for crew. Dr. Cappelli's theory does not make or depend upon such assumptions, and accepts that McDonald's could have extracted greater value from one group of employees than another. Shaver Daubert Decl., Ex. 2 ¶¶ 175-179.

McDonald's is thus simply wrong that Dr. Cappelli's opinion is based on "speculation" or "intuition." Mot. at 14. His opinion is based on labor economics and the record evidence.

V. Dr. Cappelli Establishes That Entry-Level and Lateral Employees Would Also Have Been Harmed

Although the non-transferability of McDonald's-specific skills is a key feature that enabled McDonald's to exercise monopsony power over employees through the No-Hire Agreement, it does not follow that *only* trained employees could have been harmed. As Dr. Cappelli explained, harm would have spread to all employees through the wage structure, which tied different employees' wage levels together, including entry-level and lateral managers.

Entry-Level Employees: Dr. Cappelli did not "admit" that entry-level employees could not have been harmed by the No-Hire Agreement. Mot. at 12. As explained above and confirmed by Ms. Duggan, a key feature of McDonald's compensation practice is ensuring a gap between entry-level wages and those of people at higher levels, to avoid wage compression and vindicate internal equity concerns. Because the No-Hire Agreement enabled McDonald's to hold down wages for trained employees, McDonald's had more leeway to hold down entry-level wages, too. Shaver Daubert Decl., Ex. 2 ¶ 167-171. The fact that McDonald's ability to suppress entry-level wages was in part tempered by the existence of other low-wage employers does not negate that, particularly where McDonald's admits that it paid below market even for entry-level wages. *Id.* ¶ 139. This is confirmed by the high turnover of entry-level positions, which suggests that McDonald's entry-level wages were not competitive. *Id.* ¶ 25. However, McDonald's could tolerate the high cost of turnover in part by holding down wages for the experienced employees tasked with training new workers (such as crew trainers or shift managers). *Id.* ¶ 173-174. Harm for entry-level employees is consistent with Dr. Cappelli's opinions. McDonald's disagreement with Dr. Cappelli's conclusion is a dispute for the jury, not a basis for exclusion. *Schultz*, 721 F.3d at 431; *Greene v. Sears Protection Co.*, No. 15-cv-2546, 2018 WL 3104300, at *2 (N.D. Ill. June 25, 2018) (Alonso, J.).

Lateral Managers: McDonald's obfuscates the record regarding external hiring above entry-level crew positions. Dr. Cappelli acknowledged that McOpCo could hire people who had worked for franchisees for management positions if they provided a "release." Cappelli Rept. ¶ 66(a). To the extent McDonald's implies that it also hired managers who *never* worked for McDonald's, it has not offered any evidence. All but one example cited by Dr. McCrary of such "external" hiring actually involved people with prior McDonald's management experience. Shaver Daubert Decl., Ex. 2 ¶ 100. (The last individual's job history is not in the record, so it is possible she had prior McDonald's experience too, *id.*) Neither of the hand-picked franchisee declarants claim they hired managers with no McDonald's experience, nor that they would not value such experience. Brass Decl., Ex. 120 ¶ 7, Ex. 121 ¶ 10. In fact, at deposition, Groen said the opposite. Shaver Daubert Decl., Ex. 2 ¶ 101. Even if such hiring could happen on occasion, that would not change Dr. Cappelli's opinion, because those employees would *still* have to be trained on McDonald's systems—a task that is considerably more expensive and time-consuming for people who have never worked in a McDonald's. Cappelli Rept. ¶ 54; Shaver Daubert Decl., Ex. 2 ¶ 95-104.[14] In any case, these employees are part of the same suppressed wage structure.

Dr. Cappelli's testimony is nothing like those in the cases cited by McDonald's. *See Smith v. Ill. Dep't of Transp.*, 936 F.3d 554, 558-59 (7th Cir. 2019) (expert deviated from her usual practice in opining plaintiff experienced hostile work environment); *Stokes v. John Deere Grp.*, No. 4:12-cv-04054-SLD-JAG, 2014 WL 675820, at *4-6 (C.D. Ill. Feb. 21, 2014) (excluding as unreliable opinion on hedonic damages based on widely repudiated methodology).

CONCLUSION

Plaintiffs respectfully request that the Court deny McDonald's motion.

[14] *See also* Shaver Daubert Decl., Ex. 7 at -149) [redacted]; *id.* at -150 [redacted] *id.* at -156-60 (summarizing the multi-week training programs for external management hires).

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CERTIFICATE OF SERVICE

I, Anne B. Shaver, an attorney, hereby certify that this **Plaintiffs' Opposition to Defendants' Motion to Exclude the Opinions and Testimony of Peter Cappelli, D. Phil** was electronically filed on May 14, 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 e-mail.

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