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 DR. HAL J. SINGER, Ph.D.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

RULES

I. Introduction

Plaintiffs' economist Dr. Hal Singer opines that "McDonald's exercised monopsony power over Class Members" resulting in "generalized" wage suppression that impacted a putative class of millions of employees. Dkt. 270-5 ¶¶ 60, 83. But Dr. Singer skipped the first, foundational step in assessing monopsony power—defining the contours of the relevant market—claiming that because his statistical models demonstrate "direct evidence" of anticompetitive effects, market definition is "irrelevant." This is backward; without a defined relevant market, Dr. Singer cannot reliably assess anticompetitive effects. *See Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004). Dr. Singer's opinion that the alleged No-Hire Agreement is proof alone that McDonald's had monopsony power is similarly circular, because it assumes what he is supposed to test—whether there is, in fact, a market limited to McDonald's workers and employers. His *ipse dixit* conclusions about the relevant market do not substitute for a reliable expert analysis that withstands scrutiny under *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993).

Those economic analyses that Dr. Singer performs are unsound and cannot support his opinions of common impact. *First*, Dr. Singer's wage suppression regression is based on unrepresentative data—covering a less than 1% sliver of the putative class—rendering his results both unreliable and unhelpful for the class certification task. His use of averages in that model compounds the problem, because it both masks a significant number of uninjured putative class members and tends to produce false positives. Moreover, Dr. Singer's model does not reliably show that any purported wage suppression was *caused* by the alleged No-Hire Agreement.

Second, Dr. Singer's alternative regression, which purports to show a "wage structure" common to all 14,000 McDonald's restaurants, suffers from a common statistical fallacy known as the "reflection problem," and can only demonstrate that an individual employee's wages are correlated (to some undefined degree) with the wages of other employees in a similar position. This is a far stretch from evidencing a "formulaic" wage structure as Dr. Singer claims.

Third, Dr. Singer's damages model rests on an alleged conspiracy end-date of July 2018, which is entirely divorced from McDonald's public, official abandonment of Paragraph 14 in

March 2017. *Finally*, Dr. Singer's dismissal of the procompetitive justifications for Paragraph 14 ignores the legally relevant question—whether it was procompetitive *at the time of adoption*.

The Court should exclude Dr. Singer's testimony in its entirety under Federal Rules of Evidence 702 and 703. *See Daubert*, 509 U.S. 579.

II. Background

Plaintiffs' claim under Section 1 of the Sherman Act is based on the theory that corporate-owned stores ("McOpCos") and McDonald's franchisees collectively had monopsony power over a nationwide labor market comprised only of McDonald's, and that the alleged No-Hire Agreement enabled them to allocate that market, Dkt. 53 at 11-12, which "harmed employees by lowering salaries and benefits [they] otherwise would have commanded in an open marketplace." Turner Compl. ¶ 16. In support of their motion for class certification, Plaintiffs submitted an expert report from Dr. Singer for the purpose of showing that impact and damages from the alleged No-Hire Agreement can be litigated on a classwide basis using common evidence. *See* Dkt. 268 at 2-3. Dr. Singer's opinions are based largely on statistical models he developed using McOpCo wage data, and data that Plaintiffs obtained from Paychex, an independent payroll provider, containing compensation information for 59 franchisees. Dr. Singer presents three types of models:

1. Wage-Suppression Regressions. Dr. Singer's wage suppression regressions seek to measure "generalized" wage suppression by comparing wages for employees at franchised and McOpCo restaurants during the alleged conduct period (June 28, 2013 through July 12, 2018) against a so-called "benchmark period" (July 2018 through June 2019). That benchmark was tied to McDonald's signing an Assurance of Discontinuance ("AOD") with the Washington Attorney General ("AG"), after which Dr. Singer asserts "the alleged conspiracy or restraint was absent." Dkt. 270-5 ¶ 41. He uses that date because it is when the AOD was "publicized in a press release posted on the internet," *id.* ¶ 45, despite acknowledging that McDonald's explicitly renounced Paragraph 14 in March 2017, and stopped including it in franchise agreements shortly thereafter, *id.* ¶ 3. Dr. Singer calculates wage suppression for a class comprised of at least several million people using wages for only 13,606 McOpCo employees and [redacted]. Ex. 2

¶ 170.[1]

2. Predictive Model of Antitrust Impact. Using his wage-suppression regressions, Dr. Singer predicts the "but-for" wages for people in his sample "in the absence of" the conspiracy by comparing the wages "actually received" (as drawn from the McOpCo or Paychex data) to "the compensation they would have received," calculated using his "generalized" wage suppression figures. Dkt. 270-5 ¶ 67. He regards an employee as injured if her "actual compensation" was below the "compensation she would have received per the regression" in any one pay period. *Id.*

3. Wage-Structure Regressions. Dr. Singer also purports to create a regression model to test for "a compensation structure that would transmit" the alleged wage suppression to all putative class members. Dkt. 270-5 ¶ 69. He does so by comparing whether an increase in the wages of an individual McDonald's manager or crew member is correlated with an increase in the wages of other crew members or managers (either in that year or the prior year). *Id.* ¶ 71.

Based on these three models, as well as isolated documents and testimony, Dr. Singer concludes that "common methods and evidence demonstrate Anticompetitive Effects and Common Impact to the Class," and that "common methods and evidence demonstrate Aggregate Damages attributable to the No-Hire Agreement." Dkt. 270-5 ¶ 93. Dr. Singer also opines that, based on his interpretation of a few pieces of testimony and documents, there is no evidence that Paragraph 14 was motivated by efficiency concerns. *Id.* ¶¶ 89-91.

III. Legal Standard

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). When the admissibility of expert testimony is contested, "the trial judge must determine at the outset" "whether the reasoning or methodology underlying the [expert] testimony is . . . valid and . . . whether that reasoning or methodology . . . can be applied to the facts in issue." *Daubert*, 509

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

U.S. at 593-94; *see Gopalratnam v. Hewlett-Packard Co.*, 877 F.3d 771, 780 (7th Cir. 2017). And it must "fit" the issues—that is, be "sufficiently tied to the facts of the case that it will aid the jury [or the court] in resolving a factual dispute." *Daubert*, 509 U.S. at 591 (internal citation omitted); *see Chapman v. Maytag Corp.*, 297 F.3d 682, 687 (7th Cir. 2002). Where, "an expert's report or testimony is critical to class certification," the Seventh Circuit requires the "district court [to] make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification." *Messner*, 669 F.3d at 812 (internal quotation omitted).

IV. Argument

Dr. Singer fails to define a relevant market in this case, instead relying on circular reasoning and unfounded assumptions to escape the Seventh Circuit's requirement that he do so. Compounding this error, he uses unrepresentative data and engages in inappropriate averaging to analyze the impact of the alleged No-Hire Agreement with regression models. Putting Dr. Singer's regression models to the test reveals their tendency to find false positives and their inability to demonstrate that the alleged conspiracy caused any harm—both disqualifying flaws. Similarly, Dr. Singer's wage structure regression cannot be used to demonstrate common impact because it is afflicted with a basic statistical fallacy. Finally, Dr. Singer's opinions regarding procompetitive effects should be excluded due to his failure to undertake *any* economic analysis of the issue.

A. Dr. Singer Fails To Define A Relevant Market

Dr. Singer's opinions are unreliable because he fails to define a market in which to assess the effects of the alleged conspiracy. Specifically, an analysis of the relevant market is required in any case proceeding under the quick look or rule of reason framework. *Agnew v. NCAA*, 683 F.3d 328, 337-38 (7th Cir. 2012) (requiring plaintiffs to prove a "cognizable market on which [defendant's] actions could have had anti-competitive effects"). That is because "economic analysis" of anticompetitive effects is "virtually meaningless" if not grounded in at least "a rough definition of a product and geographic market." *Republic Tobacco*, 381 F.3d at 737; *see also* Ex. 3, Cappelli Dep. 236:23-237:8 ("an understanding of the labor market [is] necessary to begin to answer" the question of whether the alleged No-Hire Agreement had any impact). But Dr. Singer

provides no market definition at all, a fundamental failure. *See Hannah's Boutique, Inc. v. Surdej*, 2015 WL 4055466, at *4 (N.D. Ill. July 2, 2015) (excluding expert for failing to define a market and instead arguing that direct evidence was sufficient) (citing *Republic Tobacco*, 381 F.3d at 736-37); *McLaughlin Equip. Co. v. Servaas*, 2004 WL 1629603, at *9 (S.D. Ind. Feb. 18, 2004) (same).

1. Dr. Singer Offers Only His *Ipse Dixit* To Define A Relevant Market

Dr. Singer asserts that "direct evidence" of anticompetitive effects—i.e., his regression models' alleged finding of wage suppression—means it is "not economically necessary to demonstrate market power indirectly by defining relevant labor market(s)." Dkt. 270-5 ¶ 60. But this is circular: Dr. Singer's *assumption* that McDonald's stores operate in a market unto themselves drives his models' results, on which he then relies to argue that the market is appropriately limited to McDonald's restaurants. Thus, it is his "assumption, and not the events under study, that ends up 'defining' the market"—an approach the Seventh Circuit has explicitly deemed "[g]arbage in, garbage out." *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 665-66 (7th Cir. 2004) (rejecting expert opinion that assumed a market definition).

As another court in this Circuit noted in excluding Dr. Singer's opinions regarding a different no-poach provision, "without defining a relevant market, [Dr. Singer's] model's baseline premise hinges on 'the *ipse dixit* of the expert.'" *Conrad v. Jimmy John's Franchise, LLC*, 2021 WL 718320, at *22 n.9 (S.D. Ill. Feb. 24, 2021) (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). Such *ipse dixit* is inadmissible. *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").

2. Paragraph 14 Alone Does Not Demonstrate Monopsony Power

Dr. Singer also asserts that the mere existence of Paragraph 14 "reveal[s] the contours of the relevant labor market—[which] excludes competition from non-McDonald's employers—and confirmed" McDonald's monopsony power. Dkt. 270-5 ¶ 25. This opinion is based on the unfounded *assumption* that Paragraph 14's only "economic purpose" was to suppress employee wages. Dkt. 270-5 ¶ 25; Ex. 4, Singer Dep. 121:13–18. In reality, the suppression of employee wages and resulting reduction of output, *id.* 142:6-16, would have been *contrary* to McDonald's

economic incentives. Ex. 1 ¶¶ 206-22. Moreover, in 1955, when a version of Paragraph 14 first appeared in the franchise agreement, Ex. 7, there were a mere 11 McDonald's-branded restaurants with no plausible market power, and no McOpCos to benefit from any wage suppression. *See* Ex. 112, Kramer Dep. 56:1-57:12 (before 1960, McDonald's "had an interest in real estate" but was not "running the restaurant"). Dr. Singer's opinion fails to "discuss the import of, or even mention, these material facts." *LeClercq v. The Lockformer Co.*, 2005 WL 1162979, at *4 (N.D. Ill. April 28, 2005) (excluding as unreliable opinion that cherry-picked facts and disregarded relevant data).

Dr. Singer's assumption also fails to consider record evidence regarding multiple procompetitive economic purposes for Paragraph 14. *First*, Paragraph 14 was put in place to deter intrabrand free-riding, whereby franchisees would forgo investing in their own employees and instead hire well-trained employees from other franchisees. *See* Ex. 112, Kramer Dep. 61:14-63:14; Ex. 1 ¶¶ 126-33, 330-33. Limiting free-riding in turn incentivized franchisees to invest in their operations, which helped to grow the brand. *Id.* ¶¶ 145-47. As McDonald's explained when Paragraph 14 was challenged in a 1972 lawsuit, "[t]he training of [a McDonald's] manager is . . . a substantial investment for both McDonald's and the franchise operator," thus the "predominant purpose" of Paragraph 14 "was entirely directed at the economic well-being of the overall system." Ex. 16. The Ohio Court of Appeals agreed, ruling that former Paragraph 14 was not only lawful, but also enforceable. *Pearse v. McDonald's Sys. of Ohio, Inc.*, 351 N.E.2d 788, 792-93 (1975).

Second, Paragraph 14 facilitated intrabrand cooperation—a key ingredient in the success of McDonald's System. Ex. 104 ("Our slogan for McDonald's Operators is 'In business for yourself, but not by yourself,' and it is one of the secrets of our success"); Ex. 111, King Dep. 86:25-87:22 (describing operating philosophy as "a system of respect and interdependence"); Ex. 112, Kramer Dep. 66:14-67:18 (relationships are "critical to the success of [the] company"). And inherent in McDonald's encouragement of cooperative, trusting relationships within the System is its recognition that such *intra*brand cooperation would promote *inter*brand competition. *Id.* 135:19-140:7; Ex. 1 ¶¶ 148-56, 160-68. Failure to account for obvious alternative explanations is

a classic characteristic of an *in*admissible expert opinion. *See* Fed. R. Civ. P. 702 advisory committee's note to 2000 amendment; *Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 773-76 (7th Cir. 2014) (excluding expert opinion for failure to consider alternative explanations).

Dr. Singer's assertion regarding the purpose for Paragraph 14 relies not on evidence, sound economics or even the record, but rests instead on nothing but his *ipse dixit*; it is no basis for his opinion that McDonald's had monopsony power. *Joiner*, 522 U.S. at 146.

3. Dr. Singer Employs No Reliable Methods To Assess Monopsony Power

There are accepted methodologies for defining a relevant product and geographic market and assessing market or monopsony power, but Dr. Singer did not employ those methods here. "'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.'" *Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*, 950 F.3d 911, 918 (7th Cir. 2020) (citation omitted). Identifying a geographic market requires examining the market area "to which the purchaser can practicably turn for supplies." *Republic Tobacco*, 381 F.3d at 738 (internal quotation omitted).

Relevant product market. Dr. Singer did not examine employees' potential employment alternatives or analyze the dynamics of employee choice, as would be necessary to support a market definition limited to McDonald's employers. Ex. 4, Singer Dep. 161:25-163:7; *Menasha*, 354 F.3d at 664-65 (affirming summary judgment where plaintiffs failed to present any analysis of substitutability, instead relying on "armchair economics"); *McLaughlin*, 2004 WL 1629603, at *7. Nor did he conduct any analysis of the cross-elasticity of supply to examine the substitutability of non-McDonald's jobs for McDonald's ones. Ex. 4, Singer Dep. 293:9-295:12 (admitting that "there could be some . . . cross-price elasticity," and confirming that his only reasoning for dismissing competition from non-McDonald's employers is the "the No-Poach Agreement itself"); Dkt. 270-5 ¶ 65 (noting that "market definition may also be informed by estimates of elasticity of supply" but not conducting such estimates). His opinions should be excluded for that reason alone. *McLaughlin*, 2004 WL 1629603, at *6-7 (collecting cases).

Relevant geographic market. Dr. Singer's model assumes a market comprised of "*all*

McDonald's restaurants" nationwide, based on the "existence and use of the No-Hire Agreement." Dkt. 270-5 ¶ 62. But he recognized that monopsony power in labor markets is typically assessed at "the commuting zone" or the "county" level. Ex. 4, Singer Dep. 152:19-153:13. In fact, over 90% of the McDonald's workers in Dr. Singer's data commuted 10 miles or fewer to their McDonald's jobs. Dkt. 270-5 ¶ 64; *see also* Dkt. 53 at 16 ("The relevant market for employees to do the type of work alleged in this case is likely to cover a relatively-small geographic area."); Ex. 2 ¶¶ 109-10 (same). Record evidence supports this common sense conclusion—that McDonald's restaurants compete for employees against a diverse array of other employers and in local labor markets that, according to Plaintiffs' other economist, "var[y] quite a bit." Ex. 3, Cappelli Dep. 237:10-17; *see* Opp. Class Cert. II.B. But Dr. Singer does not consider these facts; instead, as Judge Easterbrook put it in rejecting a similarly unsubstantiated (and therefore unreliable) opinion, Dr. Singer's "approach assumes what is to be established." *Menasha*, 354 F.3d at 665.

The problem is not limited to Dr. Singer's failure to define a market, but extends to his failure to analyze each of the multitude of actual markets to determine whether McDonald's had monopsony power such that the alleged No-Hire Agreement could have had anticompetitive effects in any given market. Ex. 4, Singer Dep. 159:2-160:17 ("I don't think I ever commit to what the relevant geographic market is."). At most, he offers a "preview as to how [he would go] about doing it," *id.*, but that *preview*, which he could not even coherently articulate, *see id.* 157:20-163:24, cannot reliably support his opinion "that McDonald's exercised monopsony power over Class Members" in local labor markets around the country. Dkt. 270-5 ¶ 60.

Dr. Singer's opinions regarding anticompetitive effects (and resulting common impact and damages) must, therefore, be excluded. *Menasha*, 354 F.3d at 664-66 (excluding expert opinion for failing to define the relevant market); *Hannah's Boutique*, 2015 WL 4055466, at *4 (same).

B. Dr. Singer's Regression Models Cannot Reliably Establish Common Impact

Dr. Singer's models cannot reliably measure the impact of the alleged No-Hire Agreement on a classwide basis, as they must in order to support class certification or to be used at trial because they (1) rest on an unrepresentative sample, (2) employ an unreliable averaging-based impact

methodology; (3) generate excessive false positives, finding impact where none should exist; and (4) establish no reliable causal connection between the alleged conspiracy and wage suppression.

1. Dr. Singer's Statistical Models Are Based On Unrepresentative Data

Dr. Singer purports to find classwide harm to millions of putative class members based on a sample of franchisee and McOpCo payroll data. *See supra*, Section II.1. But the use of a sample is not methodologically sound and fails the test of fit where, as here, that sample fails to represent material characteristics of putative class members. *See Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1048-49 (2016) (finding representative sampling permissible for plaintiffs who "worked in the same facility, did similar work, and w[ere] paid under the same policy); *cf. In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 578 (N.D. Cal. 2013) (denying class certification where expert examined relevant data for a "small fraction of the total class" that was not representative).

The standard for use of representative evidence is whether "each class member could have relied on [it] . . . to establish liability if he or she had brought an individual action." *Tyson Foods*, 136 S. Ct. at 1046. Ms. Deslandes serves as an illustrative example of why that standard is not met here. She worked for a franchisee restaurant in Florida (Bam-B), Dkt. 32 ¶ 13, but Dr. Singer's sample has *no* data from Florida franchisees. Ex. 2 ¶ 184-85, Fig. 19. Dr. Singer has data from Florida McOpCos—it comprises almost 50% of his total sample—but according to his model, employees at Florida McOpCos suffered wage *elevation* (not suppression) as a result of the alleged conspiracy. *Id.* ¶ 184-85; Appendix Fig. E-8. Indeed, Dr. Singer's sample of franchisee wage data that he uses to determine impact covers just [redacted] of the over 2,000 franchisee owners operating in the putative class period in [redacted], and he calculates "generalized" wage suppression for *several million* franchisee employees based on a [redacted]. *Id.*¶ 169-70, Fig. 17. Dr. Singer does not even purport to evaluate whether those [redacted] can serve as reliable "representative[s]" for the thousands of other franchisees and millions of other putative class members working at more than 12,000 McDonald's franchise restaurants in localized labor markets throughout the country, such that they could rely on the sample in an individual action. *Id.* ¶¶ 171-73; *see Bowman for J.B. v. Int'l Bus. Machines Corp.*, 2013 WL 12290828, at *8 (S.D.

Ind. Aug. 16, 2013) (excluding expert whose calculations were based on data not "representative and proportional" to the proposed class).[2]

All Dr. Singer offers in support of his sample is the fact that large payroll providers (only *one* of whose data he uses in his primary model[3]) were targeted to "maximize representativeness." Dkt. 270-5 ¶ 42. That is plainly insufficient, as even Plaintiffs' own counsel recognized.[4] Ex. 107, 19:4-20:9 (Plaintiffs arguing that for a sample to be "reliable" it has "got to be geographically representative" and "representative of labor markets nationwide"); *Pierson v. Orlando Health*, 2010 WL 3447496, at *4 (M.D. Fla. Aug. 30, 2010) (excluding expert statistical analysis that "was devoid of any consideration or comparison of the geographic markets involved"). Even a "careful randomized controlled experiment"—which Dr. Singer's is not—"on a large but unrepresentative group of subjects will have . . . low external validity," meaning it cannot be used to "reach more general conclusions." Fed. Judicial Center, *Reference Manual on Scientific Evidence* 222 (3d ed. 2011). "[T]here is simply too great an analytical gap between the data"—comprising less than 1% of putative class members without even a veneer of representativeness—"and the opinion proffered" by Dr. Singer—classwide impact to millions of employees. *C.W. ex rel. Wood v. Textron, Inc.*, 807 F.3d 827, 837 (7th Cir. 2015). This error alone justifies excluding Dr. Singer's opinions.

2. Dr. Singer's Use Of Averages Renders His Regressions Unreliable

With his very limited data set, Dr. Singer simply combines all levels of crew and manager employees from diverse geographic areas to generate average wage suppression figures for the entire putative class—broken out by franchisee and McOpCo employees. Dkt. 270-5 ¶ 56, Table

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[2] Plaintiffs obtained a 10% sample of McOpCo payroll data and McDonald's agreed not to dispute the size of that dataset, but reserved the right to argue whether those data were representative of the putative class. Dkt. 174; Ex. 107, 23:5–24:20; *see also* Ex. 125 (correspondence among counsel). That agreement had no bearing on franchisee data.

[3] The other payroll data were not granular enough for use in his primary regression, and none of these datasets can reliably identify impact from the alleged conspiracy. Ex. 2 ¶¶ 199-208.

[4] Not only would any opinion on representativeness be untimely, *Brennan v. AT & T Corp.*, 2006 WL 306755, at *8 (S.D. Ill. 2006), Dr. Singer cannot investigate the issue because he does not even know where the franchise restaurants he includes are located. Dkt. 270-5 ¶ 96.

3.[5] This is a routinely criticized error: "Using such averages can lead to serious analytical problems. For example, averages can hide substantial variation across individual cases, which may be key to determining whether there is common impact." *Reed v. Advocate Health Care*, 268 F.R.D. 573, 591, 594 (N.D. Ill. 2009) (quoting ABA Section of Antitrust Law, Econometrics: Legal, Practical, and Technical Issues 220 (2005)); *see also In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 194 (3d Cir. 2020) ("the District Court abused its discretion when it assumed, absent a rigorous analysis, that averages are acceptable" for analyzing predominance of common issues).

Analyzing Dr. Singer's model by state reveals that his averages are nothing more than a "mask" covering an unknown number of individuals who suffered no injury as a result of the alleged No-Hire Agreement. *See Lamictal*, 957 F.3d at 192. Dr. Murphy de-averages Dr. Singer's regression and examines whether the model finds wage suppression at the state (rather than national) level. In Florida, which accounts for *almost half* of Dr. Singer's entire dataset, Dr. Singer's regression finds that wages were *higher* in the class period than after the No-Hire Agreement was abandoned (according to Dr. Singer) in July 2018. Ex. 2 ¶ 185.

That Dr. Singer's unpooled model predicts wage inflation—not suppression—in the state accounting for almost 50% of his data reveals its unreliability. Dr. Singer's "use of averages . . . unacceptably masks [] significant variation"—particularly between the local markets at issue in this case—and is therefore a "critical" flaw justifying exclusion. *Reed*, 268 F.R.D. at 592.

3. Dr. Singer's Model Is Prone To False Positives

A statistical model's "propensity toward false positives"—i.e., findings of impact where none could exist—also demonstrates its unreliability. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254-55 (D.C. Cir. 2013) (vacating class certification and remanding for reconsideration in light of expert model's "propensity toward false positives," which could "indict the viability of [the] class"); *Olean Wholesale Coop. v. Bumble Bee Foods*, 2021 WL

[5] Dr. Singer also runs separate regressions for crew and managers (*see* Dkt. 270-5 Table 4), but claims that the "best available estimates of impact to Class Members" is the regression combining crew and managers as one, which appears at Table 3. *Id.* ¶ 57; Ex. 4, Singer Dep. 206:5–209:3.

1257845, at *12 (9th Cir. Apr. 6, 2021) (same). Dr. Singer's wage suppression regressions reveal a strong propensity towards false positives, finding impact in instances where there could be none.

First, according to Dr. Singer, employees' *entry-level wages* were suppressed (Ex. 4, Singer Dep. 180:25–181:3; Ex. 2 ¶¶ 190-92); but common sense and economics dictate that local competition would have prevented suppression for employees entering from indisputably competitive labor markets. Ex. 2 ¶¶ 126-27; Dkt. 268 at 14 (recognizing need to "stay competitive with the external market"). Of the newly-hired employees in his model, Dr. Singer finds almost all of them injured, including the almost 12% of his sample who worked less than one month and 40% who left within six months. Ex. 2 ¶ 124, Fig. 13. Indeed, Dr. Singer finds injury to 84% of employees in his data *within their first week* of work. That finding is a "false positive," inimical to Plaintiffs' own theory. They claim that McDonald's training imparts "brand-specific skills" and gives employees value to other McDonald's such that the alleged conspiracy suppressed their wages. Dkt. 268 at 3-6. But newly-hired employees without McDonald's experience have not attained such "brand-specific skills." *See Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 145 (D.N.J. 2002) (rejecting claim that employees who "entered the market from another field, or out of school, suffered [] antitrust injury" in a no-poach case). Finding injury where it should not, Dr. Singer's model is "sweep[ing] in uninjured class members," indicting its reliability. *Olean Wholesale*, 2021 WL 1257845, at *10.

***Second*,** Dr. Singer finds that employees were injured *after* McDonald's announced that it would not enforce Paragraph 14 with respect to *all* franchisee employees and abandoned any then-existing release practices with respect to McOpCo employees, as well as removed Paragraph 14 from its franchise agreements. Ex. 17; Ex. 82. Indeed, about 20% of employees for which Singer finds harm were hired *after* March 2017. *Id.* ¶ 162.

If the model cannot exclude false positives such as these, then it cannot provide a reliable basis to determine impact as to *any* putative class member. *See Rail Freight*, 725 F.3d at 254.

4. Dr. Singer Cannot Reliably Opine Regarding Causation

Dr. Singer claims that his regression models "indicate that, holding other factors constant,

Class Member compensation increased in a statistically significant way after July 2018," Dkt. 270-5 ¶ 45, but his regressions are misspecified, Ex. 2 ¶¶ 137-44, 179-81, and he misinterprets their findings as demonstrating *causation* (attributing the increase in wages to McDonald's signing the AOD) when they demonstrate nothing more than *correlation*, *id.* ¶¶ 147-50, 189-98. There are tests that Dr. Singer could have performed to validate his theory of causation. For example, if the upward trend in his sample of McDonald's workers' wages post-July 2018 was in fact attributable to the AOD, one would not expect to see a similar increase in the wages of non-McDonald's workers. Dr. Murphy ran Dr. Singer's regression using wages for workers at limited-service restaurants, full-service restaurants, and drinking establishments, and found that wages were "suppressed" across all of these groups as a result of the alleged conspiracy, under Dr. Singer's logic, despite the fact they were not subject to it. *Id.* ¶¶ 190-95. His regression, therefore, is capturing some other effect that is causing wages to rise industry-wide, unrelated to the alleged conspiracy, *id.* ¶146, but Dr. Singer fails to consider such alternative explanations. *Brown*, 765 F.3d at 773-76.

Moreover, Dr. Singer did not test the central question of whether, after the end of the conspiracy, compensation of McDonald's workers increased *more* than that of workers at similar employers. Dr. Murphy did and found McDonald's wages did *not* increase relative to the average wages of limited service restaurant employees, further demonstrating that other unaccounted-for market forces are infecting Dr. Singer's analysis of common impact. Ex. 2 ¶¶ 198-200. Dr. Singer is "equating . . . correlation" between the signing of the AOD and increased wages "to a causal relation[ship]." *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940, 942 (7th Cir. 1997) (excluding such expert testimony); Fed. Judicial Center at 309 ("in making causal inferences, it is important to avoid spurious correlation"). This, along with his failure to account for alternative explanations for the rise in wages, renders his opinions unreliable.

C. Dr. Singer's Compensation-Structure Regression Is Inherently Flawed

Dr. Singer theorizes that the wages of each individual McDonald's worker move with the wages of other McDonald's workers as result of a "formulaic compensation structure" shared by all McOpCos and franchisees, where suppression of one worker's wages would impact others'

wages as well. Dkt. 270-5 ¶¶ 69, 74. He does not define this alleged "compensation structure" or explain how it would have spread alleged wage suppression across the McDonald's System, other than to assume that all franchisees adopted a McOpCo wage framework (Ex. 4, Singer Dep. 254:7-256:25)—a claim contradicted by substantial evidence (*see* Opp. Class Cert. at II.B.2). Instead, to test his hypothesis, Dr. Singer created a wage-structure regression model. *See* Dkt. 270-5 ¶¶ 71-73 & Table 6. This model suffers from serious conceptual problems, and its results cannot demonstrate common impact, as Dr. Singer claims. *See* Ex. 2 ¶¶ 228-63.

As an initial matter, Dr. Singer's regression model suffers from a common statistical fallacy called the "reflection problem." Ex. 2 ¶¶ 234-37. The model shows that an individual's wages, on average, are positively correlated with the average wages of the group to which the individual belongs. But this says nothing about whether changes in individual wages are *caused* by changes in the group's wage; it could simply reflect the fact that both the individual's and the group's wages are influenced by common factors. *Id.* ¶¶ 233, 237. His is a textbook example of a model that cannot distinguish correlation from causation, *id.* ¶¶ 240-42, again violating this basic statistical principle. Setting aside that fundamental problem, controlling for common labor market influences on wages demonstrates that there is a *weak* relationship between McDonald's workers' wages—not the strong relationship that would be associated with a common wage structure. Ex. 2 ¶¶ 243-50. Indeed, average wages can vary greatly both at McOpCos and across franchisee stores in a given geographic region, as Dr. Murphy's analysis of Chicago illustrates. *Id.* ¶¶ 257-63, Fig. 33C. Further, when Dr. Singer's regression is disaggregated and evaluated separately for managers at McOpCo and franchisee restaurants, it demonstrates *no* evidence of a wage structure. *Id.* ¶ 239, Fig. 28.

Dr. Singer's wage structure regression is therefore unreliable and does not "assist the trier of fact to understand the evidence or to determine a fact in issue." *Owens v. Auxilium Pharm., Inc.*, 895 F.3d 971, 973 (7th Cir. 2018) (quotation omitted).

D. Dr. Singer's Damages Model Does Not Fit The Facts Of The Alleged Conspiracy

Dr. Singer's damages model is built on the assumption that the alleged conspiracy ended

in July 2018, when McDonald's signed the AOD with the Washington AG. Dkt. 270-5 ¶¶ 83-84. Dr. Singer picked that date because he assumed that the AOD communicated the change in policy to employees, Dkt. 270-5 ¶ 3, a question he did not study and that was contrary to the named Plaintiffs' experiences, Dkt. 32 ¶ 1; Turner Compl. ¶ 92 (acknowledging removal before AOD).[6] But over sixteen months earlier, in March 2017, McDonald's announced internally *and* to franchisees that it would "not enforce" Paragraph 14 and was removing it from franchise agreements going forward. Exs. 17, 82. Dr. Singer's damages model, therefore, fails to "fit" a key fact of the case—when the alleged conduct ended—instead resting on a later date that appears to have been picked only to drive up damages, and should therefore be excluded. *Owens*, 895 F.3d at 974.

E. Dr. Singer's Procompetitive Effects Opinions Are Unreliable

To evaluate whether an ancillary restraint, such as Paragraph 14, has procompetitive justifications, the Seventh Circuit requires that Plaintiffs analyze "whether an agreement promoted enterprise and productivity *at the time it was adopted*." *Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (emphasis added); *Impax Labs., Inc. v. FTC*, 2021 WL 1376984, at *8 (5th Cir. Apr. 13, 2021). Dr. Singer entirely ignores the evidence regarding the origination of Paragraph 14. *Compare* Dkt. 270-5 ¶¶ 86–92 *with supra*, Section IV.A.2. Instead, he focuses on the after-effects of the signing of the AOD. Dkt. 270-5 ¶ 89. These analyses address the "aftermath[,] [which] is the wrong focus." *Polk Bros.*, 776 F.2d at 189. And he provides no theoretical support for his opinions outside of his own *ipse dixit*, "suppl[ying] nothing of value to the judicial process." *Wendler*, 521 F.3d at 791. Because Dr. Singer never addresses the critical question of the restraint's purpose when it was first introduced, his opinion regarding the procompetitive effects does not "fit" the issues to be decided and should be excluded. *See Daubert*, 509 U.S. at 591.

V. Conclusion

For the foregoing reasons, Dr. Singer's opinions should be excluded in their entirety.

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[6] While Dr. Singer points to McDonald's human resource call logs to suggest that the alleged conspiracy continued past this date, Dkt. 270-5 ¶ 38, the logs actually show that the majority of callers were advised they could switch McDonald's jobs without restriction. Ex. 2 ¶ 162.

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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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