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

STEPHANIE TURNER, on behalf of herself and all others similarly situated, Plaintiff, v. McDONALD'S USA, LLC, *et al.* Defendants.	Civil No. 19-cv-05524

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE REPORT AND TESTIMONY OF HAL J. SINGER, PH.D.

[PUBLIC REDACTED VERSION]

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I. INTRODUCTION

Dr. Hal Singer is a qualified economist and econometrician with over a decade of experience analyzing impact and damages in antitrust class actions. Courts have relied on his opinions to certify seven antitrust classes, including two worker classes. Here, Dr. Singer performed a rigorous analysis, using multivariate regressions—the *Reference Manual on Scientific Evidence*'s standard econometric tool for such purposes—that determined what change in wages, if any, resulted from the No-Hire Agreement. Controlling for other relevant factors, he compared Class Member wages while the restraint was in effect with wages after McDonald's abandoned it. Dr. Singer found that the No-Hire Agreement had a statistically significant impact on all or nearly all Class Members.

McDonald's primary argument turns on the fiction that while Dr. Singer demonstrated *actual* Class Member wage suppression using common methods and evidence, he did not take the antecedent step of first demonstrating that wage suppression was *theoretically possible* through a market-definition inquiry. That approach is unnecessary and inappropriate here. The Court has ruled that the "quick-look" rule applies, observing 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. 53 at 14. At the *merits* stage of the quick-look analysis, "if the defendant lacks legitimate justifications for facially anticompetitive behavior then the court 'condemns the practice without ado' without resort to analysis of market power." *Id.* at 9 (citation omitted). Dr. Singer has done everything he is required to do to demonstrate McDonald's exercise of monopsony power over Class Members.

McDonald's remaining arguments are meritless. It argues that Dr. Singer's regressions are based on "unrepresentative" data, but its (unsupported) arguments go only to sample size, not representativeness. McDonald's fails to demonstrate any incidence of "false positives" in Dr. Singer's model. It attacks him for using "averages," but Dr. Singer's use of regression analysis (not mere averages) does not mask over any material variations between Class Members. His regression uses local and even individual-specific variables, and confirms class-wide impact based

on unique estimates of injury for every Class Member in the dataset. He rigorously tested his model's sensitivity by estimating separate regressions for crew and managers and for McOpCo and franchisee employees. He then applied a predictive model and a compensation-structure model to confirm that all, or substantially all, Class Members suffered injury. In contrast, McDonald's alternative state-by-state "de-averaging" of Dr. Singer's model is both scientifically unsupported and a fundamental mismatch for Plaintiffs' claim—a single, nationwide conspiracy.

Dr. Singer's treatment of McDonald's Washington AG settlement as the conspiracy end-date for his regressions "fits" the case because substantial record evidence indicates that Class Members and their employers were either unaware of an earlier change in the No-Hire policy or continued to abide by it. Moreover, Dr. Singer's conclusions do not change even if he treats the earlier date as the end of the restraint, as McDonald's suggests.

Finally, although McDonald's will get a merits-stage opportunity to argue that the No-Hire Agreement was procompetitive, at this stage, such arguments are common to the Class and do not affect Dr. Singer's class certification opinions. The Court should deny McDonald's motion.

II. BACKGROUND

Dr. Singer's qualifications and a summary of his methodology and findings are included in Plaintiffs' motion for class certification. *See* Dkt. 268 at 2; *see also* Ex. 5 (Singer Rept.), ¶¶4-9.[1] Dr. Singer used multivariate regressions to isolate the effect of McDonald's No-Hire Agreement on worker wages from all other relevant factors, including local minimum wages and the presence of other Quick-Service Restaurant ("QSR") employers in the local market. He found that the No-Hire Agreement suppressed wages by approximately 2.5% to 6.8%. *Id.*, ¶59. Dr. Singer then proposed two methods to determine whether common impact could be proven class-wide. In one method, he uses the aforementioned wage regression to predict impact on an individual level. In the other, he relies on statistical and record evidence to prove there was a wage structure that linked the relative wage levels of Class Members, such that a generalized suppression of Class

[1] References to "**Ex.**" are to the exhibits attached to the Decl. of Anne Shaver ISO Pltfs' Mtn. for Class Certif. (Dkt. 270). References to "**Shaver *Daubert* Ex.**" are to exhibits (including Dr. Singer's Rebuttal Report) attached to the Decl. of Anne Shaver ISO Pltfs' Opp. to Mtns. To Exclude Drs. Cappelli and Singer.

Members' pay would suppress wages for all or almost all Class Members. *Id.*, ¶¶66-68, 71-82. Both models demonstrate that all or nearly all of Class Members were injured by the No-Hire Agreement. Finally, Dr. Singer estimates aggregate class-wide damages. *Id.*, ¶85.

III. ARGUMENT[2]

A. Dr. Singer Offers Direct Evidence Demonstrating the Restraint's Anticompetitive Effects.

Dr. Singer's Report shows direct evidence of *actual* wage suppression to all or substantially all Class Members. McDonald's incorrectly claims that before the Court accepts this common impact evidence, Dr. Singer must first go through the *theoretical* exercise of defining a relevant market to test whether a *hypothetical* monopsonist controlling all McDonald's restaurants would have sufficient wage-setting power over the employees of those restaurants to profitably impose a wage cut. Mot. at 4. But Dr. Singer's model demonstrates that McDonald's and its franchisees are *actual* monopsonists, who have *actually* exerted monopsony power, resulting in suppression of wages. Ex. 5, ¶60. Nothing further is required or appropriate.

1. Dr. Singer's Models Adequately Demonstrate McDonald's Exercise of Monopsony Power Over Class Members.

The parties' experts agree that there is no *economic* need to "define a relevant market" in the way that McDonald's lawyers propose. Ex. 5, ¶60; Murphy Report, ¶17. *See also* Shaver *Daubert* Decl. Ex. 1 ("Singer Rebuttal"), ¶¶50-53. Unlike a merger challenge where market definition helps *predict* the impact of a merger that *has not yet occurred*, the restraint here has *already occurred* and ended; Dr. Singer is able to directly measure its impact by comparing wages during the restraint with wages after it was lifted. As Dr. Murphy admitted, Dr. Singer's regression analysis does not depend upon market definition being broad or narrow: [redacted] Shaver *Daubert* Decl. Ex. 6 ("Murphy Dep.") at 45:18-23. As Dr. Murphy explained in another matter: "Since my analysis placed no prior restrictions on the extent to which firms could compete with one another, my results and conclusions regarding the price and non-price

[2] For the applicable legal standard, Plaintiffs respectfully refer to the legal standard section of Plaintiffs' brief in opposition to McDonald's motion to exclude the testimony of Dr. Peter Cappelli, filed herewith.

effects of the acquisition would stand even if a broader or narrower market definition were used." Shaver *Daubert* Decl. Ex. 12, July 9, 2007 Expert Rpt. of Dr. Murphy in *FTC v. Whole Foods Mrkt, et al.*, 1:07-cv-01021 (D.D.C.), at p. 111. Further, Dr. Murphy explained that [redacted] Murphy Dep. at 19:6-9, which is exactly what Dr. Singer did. Ex. 5, ¶¶10-38.

There also is no *legal* requirement to follow McDonald's theory-only approach. The Court has recognized from the outset of this case: "market power is only one test of [a restraint's] 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." Dkt. 53 at 9-10 (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 109-10 n.42 (1984)). The Court has characterized McDonald's hiring restraint as horizontal, Dkt. 53 at 11, and the evidence bears this out, as individual and separately owned McDonald's stores compete against each other for workers. Ex. 5, ¶¶1, 21. The Supreme Court recently noted, because "horizontal restraints involve agreements between competitors not to compete in some way," there is no need to precisely define a relevant market to conclude that such agreements are anticompetitive. *Ohio v. Am. Exp. Co.*, -- U.S. --, 138 S.Ct. 2274, 2285 n.7 (2018). Within this framework, class-wide evidence of anticompetitive effects suffices. *See also* Ex. 5, ¶61 (regression model comparing actual prices against but-for prices is "[t]he standard economic approach to evaluating the effects of an alleged horizontal conspiracy").

McDonald's cites *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717 (7th Cir. 2004) and *Agnew v. NCAA*, 683 F.3d 328 (7th Cir. 2012), but neither of those cases addresses a *Daubert* challenge (or even class certification). *Republic Tobacco* is a merits decision at summary judgment involving vertical, not horizontal, restraints. 381 F.3d at 736. *Agnew* reviews a Rule 12 decision, holding that when a restraint affects a "not obviously commercial" area "it is incumbent on the plaintiff to describe the rough contours of the relevant commercial market in which anticompetitive effects may be felt…." 683 F.3d at 345. The labor of McDonald's restaurant employees is an "obviously commercial" area.

Further, Dr. Singer has outlined the "rough contours of the relevant commercial market" at issue. In his Report, Dr. Singer discussed the construction of "relevant labor market(s)" that could be defined using common evidence. Ex. 5, ¶63. In the product dimension, he analyzed record evidence showing that McDonald's employees have brand-specific skills and training aimed at promoting a uniform brand quality and experience. *Id.*, ¶¶24, 60-62. *See also id.* at ¶¶25-27 (No-Hire Agreement "directly informs the dual inquiries of Defendants' monopsony power and the relevant market"; existence of No-Hire Agreement "revealed the contours of the relevant labor market—namely, that it excludes competition from non-McDonald's employers—and confirmed the existence of McDonald's brand-specific monopsony power"; wage suppression "would not have been economically possible if a McDonald's-only relevant labor market did not exist."). He also explained that any further tests aimed at gauging McDonald's buying power over its workers, such as estimating supply elasticities, would be entirely common to the Class. *Id.*, ¶65 & n. 161.

In the geographic dimension, Dr. Singer considered McDonald's own view based on its [redacted]. Ex. 5, ¶¶28, 62-63. Studying McDonald's [redacted]-mile radius, Dr. Singer determined that approximately 91% of McDonald's employees live within [redacted] miles of a separately-owned (thus, ostensibly competing) McDonald's location. *Id.* ¶¶64, 65. And, Dr. Singer's regressions specifically controlled for local market factors, including county-specific minimum wage, local unemployment rates, McDonald's share of the local QSR offerings, and distance to the nearest separately-owned McDonald's restaurant. *Id.* at ¶¶62, 53, 58, 59. All of this is layered on top of Dr. Singer's consideration of decades of peer-reviewed literature demonstrating the monopsony power of employers over their employees, including in low-wage occupations generally and in fast-food markets specifically. Ex. 5, ¶¶11-20.

Ignoring all of this, McDonald's argues that Dr. Singer merely assumes what he set out to prove. But, in fact, Dr. Singer did not assume that McDonald's restaurants operate in a market "unto themselves." Mot. at 5. His model is agnostic to this. Rather, he controls for all relevant factors affecting employee wages—including localized and employee-specific factors—and then

measures the *actual* change in wages (in percentage terms) from the conduct period to the after period. Ex. 5, ¶¶45-50 (describing controls for minimum wages, local unemployment rates, local per-capita income, and job titles). Had wages not increased (subject to the model's controls) after elimination of the restraint, Dr. Singer's model would not have shown statistically and economically significant wage suppression from the No-Hire Agreement. Ex. 5, ¶¶52, 56; Singer Rebuttal, Tables A1-A4.

McDonald's cites cases about market definition, but they are inapposite. In *Hannah's Boutique v. Surdej*, which was decided at summary judgment, the court rejected the *per se* and quick-look standards and applied the full rule of reason analysis. 2015 WL 4055466, *5 (N.D. Ill. July 2, 2015). In *McLaughlin Equip Co. v. Servaas*, also decided at the merits, the expert was excluded for both mis-defining and failing to show market power (a prerequisite to tying claim). 2004 WL 1629603, *7-9 (S.D. Ind. Feb. 18, 2004)). McDonald's cases critiquing experts' *ipse dixit* are likewise dissimilar. In contrast to Dr. Singer's regression models that control for all relevant variables and are based on decades of academic study, the expert in *Menasha Corp. v. News Am. Mktg., In-Store, Inc.* failed to study whether increases in output for one product related to output of others during the period in interest. 354 F.3d 661, 664-65 (7th Cir. 2004) ("Instead of econometric analysis, [expert] offered a potpourri of survey research and armchair economics."). Like *Menasha*, *Wendler & Ezra, P.C., v. American Intern. Group, Inc.*, was decided at the merits. 521 F.3d 790, 791 (7th Cir. 2008) (likening unexplained opinion about source of electronic bulletin board posting to "nothing but a bottom line"). Lastly, McDonald's quotes *dicta* from *Conrad v. Jimmy John's Franchise*, LLC, 2021 WL 718320, at *22 n.9 (S.D. Ill. Feb. 24, 2021). Unlike here, there was no decision in *Conrad* what liability standard would apply; the court excluded Dr. Singer's analysis not for an *ipse dixit* treatment of market definition or market power, but based on what it thought was an unaccounted-for infirmity in the dataset. *Id.* at *19.

2. McDonald's Additional Monopsony Power Arguments Fail.

McDonald's other monopsony power arguments fare no better. It first argues that Paragraph 14 "alone" does not demonstrate monopsony power, but this mischaracterizes Dr.

Singer's opinion. *See* Ex. 5, ¶¶25, 39 (Paragraph 14 is corroborative of buying power, alongside direct evidence and decades of peer-reviewed literature). It argues that the suppression of employee wages would be "contrary to McDonald's economic incentives," Mot. at 5-6, but this is plainly wrong. Ex. 5, ¶¶86-88 (explaining McDonald's and franchisees' interest in reducing labor costs); *see also* Singer Rebuttal at ¶106 (no basis to believe No-Hire Agreement reduced output).

McDonald's then argues that Dr. Singer fails to "account for" its story about Paragraph 14's genesis and supposed "procompetitive economic purposes." Mot. at 6. Dr. Singer in fact expressly acknowledged McDonald's claimed output market "efficiencies." Ex. 5, ¶¶4, 86-92 (also addressing impropriety of balancing output market benefits against input labor market injury); *see also* Dkt. 53 at 14 ("This case … is not about competition for the sale of hamburgers to consumers. It is about competition for employees[.]"). Dr. Singer can hardly be faulted for not *crediting* McDonald's "alternative explanations" (discussed *infra* Part IV.E.), but even so this is unlike the cases McDonald's cites where experts were excluded. *See LeClercq v. The Lockformer Co.*, 2005 WL 1162979, *4 (N.D. Ill. Apr. 28, 2005) (expert omitted from his hydrogeological analysis data for "17 annual effluent samples reflecting non-detect" for contaminants of interest); *Brown v. Burlington N. Santa Fe Ry. Co.*, 765 F.3d 765, 773-76 (7th Cir. 2014) (excluding medical causation opinion where expert did not adhere to differential etiology method which required him to rule out alternative explanations). In any event, McDonald's (disputed) narrative has no bearing on Dr. Singer's wage-suppression model or his common impact analysis, and any procompetitive benefits argument would be the subject of common proof. Dr. Murphy agrees. Murphy Dep. 185 6-8 ("the issue, I think, would be true in most places if not all.").

Finally, McDonald's criticizes Dr. Singer for not addressing product market cross-elasticities and rehashes its arguments about relevant product and geographic markets. These arguments are no more compelling the second time through. Dr. Singer never asserts the existence of a single nationwide geographic market; rather, he concluded that McDonald's wage data could be analyzed in a single ***model*** covering the United States, by accounting for local characteristics. Ex. 5, ¶¶49, 58 (describing control variables). In particular, Dr. Singer did study commuting

patterns of McDonald's employees, McDonald's share of the local employees among QSRs, and even controlled for distance to the closest McDonald's in his impact regression. Ex. 5, ¶58. He also controlled for factors that would affect local wages, including the local relevant minimum wage and local unemployment rates. *Id.*, ¶49. While he acknowledged that market definition "may" be informed by supply elasticity estimates, this again is only one way of establishing market power and would be common to the Class anyway. Ex. 5, ¶65.[3] Dr. Singer's model accounts (i.e., *controls*) for every localized condition McDonald's can point to, rendering it much more accurate as a tool to measure impact than alternatives. *Compare* Ex. 5, ¶58 & Singer Rebuttal ¶¶3, 65-71 (accounting for county-level localized variables and controlling for distance to closest McDonald's) *with* Murphy Rept., ¶186 (assuming separate labor markets at the state level).

Dr. Singer's opinions are based not on his *ipse dixit*, but on a solid foundation of economic literature, coupled with direct evidence of anticompetitive effects in an obviously commercial market, and record evidence. His opinions are relevant and reliable.

B. McDonald's Claimed "Flaws" in Dr. Singer's Regression Model are Baseless.

McDonald's offers a hodgepodge of arguments why Dr. Singer's regression models do not establish common impact, but these arguments do not support exclusion.

Representativeness. McDonald's asserts that Dr. Singer's models are based on "unrepresentative" data, but it fails to show that any data used by Dr. Singer are qualitatively unrepresentative of McDonald's employees generally. Murphy Rept., ¶170 (making no claims as to why employees are unrepresentative). The McOpCo data were obtained from a *randomly* generated list of 10% of stores nationwide, leaving "no room for selection bias." Ex. 5, ¶ 43; Singer Rebuttal, ¶55; Murphy Dep. at 146:11-14 (agreeing). The franchisee data were obtained from several of the largest payroll vendors in the United States, an effort McDonald's counsel commended to another court as an approach to obtain "reliable data that reflects the hours, wages,

[3] *Sharif Pharmacy, Inc. v. Prime Therapeutics, LLC*, did not involve a horizontal agreement to fix prices or divide markets, and thus "require[d plaintiff] to identify a relevant product and geographic market in which [the defendants] have or were dangerously likely to obtain monopoly power." 950 F.3d 911, 916 (7th Cir. 2020).

and … compensation" paid to restaurant workers. Shaver *Daubert* Decl. Ex. 13 (1/5/21 *Conrad* Hrg. Tr.) at 44:5-13. *See also* Ex. 5, ¶44; Singer Rebuttal, ¶56 and at 54-63 generally.

Although invoking "representativeness," McDonald's real argument is about sample size—an issue it agreed not to dispute as to the McOpCo data. Mot. at 10 n. 2. It focuses on the franchisee data, but wholly ignores three of the four franchisee datasets, one of which—the Profit & Loss data—was not a sample at all but instead included *every McDonald's store in the United States*. Ex. 5, ¶103; Singer Rebuttal, ¶59. Even as to the Paychex data alone, the simple fact that a sample constitutes a small fraction of a population does not mean that it lacks representativeness or that statistics calculated from the sample cannot be used as estimates of the population parameters in question. Singer Rebuttal, ¶¶62-63 (discussing standard sampling techniques).

The quality of an expert's data goes to the weight of the evidence, not its admissibility. *See Manpower, Inc. v. Ins. Co. of Pa.*, 732 F.3d 796, 806 (7th Cir. 2013) ("Assuming a rational connection between the data and the opinion—as there was here—an expert's reliance on faulty information is a matter to be explored on cross-examination; it does not go to admissibility."). This is particularly so as to the criticisms McDonald's levels here. *See United States Sec. & Exch. Comm'n v. Ustian*, No. 16 C 3885, 2020 WL 416289, *7-8 (N.D. Ill. Jan. 26, 2020) (citing *Manpower* and rejecting *Daubert* challenge based on small sample size and representativeness); *PECO Pallet, Inc. v. Nw. Pallet Supply Co.*, No. 15 CV 50182, 2018 WL 10602201, *5-6 (N.D. Ill. Oct. 25, 2018) (same, expert opinion including an "indisputably small sample size that resulted in a wide range of data"). Dr. Murphy knows of no other available pay data, and agreed that labor economists would use such pay data "in many labor market analyses, including this one." Murphy Dep. 122:7-124:9. The datasets Dr. Singer used are sufficiently large and sufficiently representative to inform his models. Ex. 5, ¶42; Singer Rebuttal, ¶¶8 & n.25, 54-63. Lending support to this conclusion, each of the four datasets confirmed wage suppression. Ex. 5, ¶44; Singer Rebuttal, ¶59. *Ustian*, 2020 WL 416289, *7 (sample results "appeared consistent with other observations" outside of sample).

McDonald's cites *C.W. ex rel. Wood v. Textron, Inc.*, but the "analytical gap" requiring exclusion in that case turned not on the percentage of the whole that the sample represented, but on the expert's reliance on external studies (with significantly higher toxic exposures) to draw conclusions about exposure injuries in that case. 807 F.3d 827, 836-37 (7th Cir. 2015). By contrast, Dr. Singer relied not on an external study, but on a random sample of employees drawn from the very population to which he extrapolated his results. Comparing Dr. Singer's model to a "randomized controlled experiment," Mot. at 10, misses the mark for the very same reason. Dr. Singer used a random sample of actual pay data; he did not conduct an experiment where he randomly assigned study subjects to either a treatment or a control group. Singer Rebuttal, ¶55. Nor do McDonald's other cases support exclusion. *See Bowman for J.B. v. Int'l Bus. Machines Corp.*, 2013 WL 12290828, *4, 7-8 (S.D. Ind. Aug. 16, 2013) (model included data relating to "individuals not in the purported class"; expert conceded she did not follow scientific method, failed to use "well-accepted" actual vs. but-for damages calculation, and could point to no one in economic community who had used her method). Unlike in *Pierson v. Orlando Health*, Dr. Singer's model explicitly controls for localized conditions and Class Member job titles. 2010 WL 3447496, *4, 6 (M.D. Fla. Aug. 30, 2010) (expert's earnings analysis did not account for varying geographic markets or differing employment circumstances).

So-Called "Averages." Dr. Singer's presentation of wage suppression coefficients from regression models does not mask uninjured Class Members. Contrary to McDonald's assertions, Dr. Singer's regression uses individual-specific variables, and shows classwide impact with individual predictions. As a check, Dr. Singer allowed all the control variables to map separately onto Crew and Managers. Ex. 5, ¶59. The result was both types of workers suffered injury. *Id.* Thus, unlike in *In re Lamictal Direct Purchaser Antitrust Litig.*, 957 F.3d 184, 193 (3d Cir. 2020), Dr. Singer did not use an "average" as a stand-in for actual data, but instead studied actual wage data for over [redacted] real-life Class Members. Ex. 5, ¶42. He then predicted individual Class Members' but-for wages and compared those to their actual, individual wages to find that 99 percent sustained antitrust injury. *Id.*, ¶68. He did not mask differences between Class Members,

but rather controlled for variations like job title, geography, time period, individual worker "fixed effects," and numerous other factors on his regressions, *id.*, ¶¶49-50, explaining 99 percent of the variation in a worker's wages using common factors. *Id.*, ¶ 52. Courts, including in other no-poach cases, have rejected that wage effects generated by a regression are somehow inherently problematic. *In re High-Tech Employee Antitrust Litig.*, 985 F.Supp.2d 1167, 1212, 1217-21 (N.D. Cal. 2013); *Seaman v. Duke Univ.*, 1:15-cv-462, 2018 WL 671239, *6 (M.D.N.C. Feb. 1, 2018) (accepting expert regression as common proof of impact and damages over defense argument that averaging masked individual variation).[4] By contrast, in *Reed v. Advocate Health Care*, which pre-dates *Manpower*, the Court found that the "regression model leaves up to half of the causes of the differences in real-world wages unexplained." 268 F.R.D. 573, 593 (N.D. Ill. 2009).

McDonald's claims that Dr. Murphy "de-averages" the regression, Mot. at 11, but this is incorrect. Instead, he re-ran the exact regression separately for each state—despite having no *a priori* reason for doing so and despite this being inconsistent with Plaintiffs' claims relating to a single, nationwide conspiracy. This is a blatant violation of well-accepted statistical standards and produces unreliable results. Singer Rebuttal, ¶¶65-71.

"**False Positives.**" McOpCos adhered to principles of internal equity in employee pay and McDonald's counseled franchisees to likewise build in pay gaps between rungs of the job-scale ladder, across job titles and tenure. Ex. 5, ¶¶74-82. It follows that any wage suppression at the second rung of the job-scale ladder necessarily suppresses wages for those at the first rung. *Id.*, ¶70; Singer Rebuttal, ¶43. Further, all workers must be trained in the McDonald's system, so it is unsurprising that employees suffer injury early in their tenure. Singer Rebuttal, ¶45. Dr. Singer's tests also confirm underpayments in workers' early pay periods. *Id.*, ¶43. Nothing in the cases McDonald's cites invites the finding that these are "false positives." *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 253-54 (D.C. Cir. 2013) (remanding consideration of

[4] *See also In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 585-86 (N.D. Cal. 2013) (relying on wage structure regression to demonstrate transmission of impact across employees); *Cason-Merenda v. Detroit Med. Ctr.*, No. 06-15601, 2013 WL 1721651, *14 (E.D. Mich. Apr. 22, 2013) (same); *Nitsch v. Dreamworks Animation SKG, Inc.*, 315 F.R.D. 270, 304 (N.D. Cal. 2016) (same).

predominance where model predicted injury to class members who negotiated fuel rates ***before*** price-fixing conspiracy allegedly began); *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 782-83 (9th Cir. 2021) (same, where model was alleged to show overcharges even during "clean" benchmark period).[5] Nor is there any infirmity in the finding that employees were injured after March 2017, when there is no evidence that McDonald's informed restaurant employees of a policy change at that time and there is ample evidence of ongoing restrained labor mobility. *See infra* Part IV.D. Moreover, as Dr. Singer explains, it took time for wages to move to competitive levels even after the more widely publicized Washington AG settlement. Ex. 5, ¶¶54-57.

Causation. McDonald's urges that Dr. Singer's regressions do not demonstrate causation, but only because it (wrongly) labels his opinion "unreliable." Mot. at 13. Unable to identify any omitted variable that would upset the results of Dr. Singer's wage regressions, McDonald's argues, indirectly, that the regressions are "capturing some other effect" unrelated to the No-Hire that caused wages to rise after July 2018. Dr. Murphy purports to analyze the wages of workers at limited-service restaurants, full-service restaurants, and drinking establishments, but he fails to acknowledge that in 2018-19, dozens of other restaurant chains agreed to terminate no-poaching pacts within their restaurants. Singer Rebuttal, ¶75. When Dr. Singer controlled for the wages of other quick service workers in his regression, he eliminated the possibility that McDonald's wages were merely reacting to the wages of other establishments. Ex. 5, ¶58; *see also* Singer Rebuttal, ¶¶5, 76 (explaining that when properly analyzed, McDonald's wages rose ***more than*** the wages of workers at the establishments Dr. Murphy identifies). Economists routinely analyze correlations that, when supported by economic theory and complementary evidence as they are here, allow them to infer causation. Singer Rebuttal, ¶12.

Dr. Singer did not "fail[] to account for alternative explanations," Mot. at 13, and McDonald's has not identified a *single* variable which, when included in his regression, upsets his

[5] *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 144-45 (D.N.J. 2002), does not announce a categorical rule that nascent employees cannot suffer antitrust injury due to a no-poaching agreement.

results. His regression model is thus unlike the inadmissible evidence in *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997) (expert's failed, in age discrimination case, to make "any adjustment for variables bearing on the decision whether to discharge … other than age").

C. Dr. Singer's Compensation Structure Model is Sound.

Contrary to McDonald's assertion (Mot. at 14), Dr. Singer does not simply "assume" that franchisees adopted the McOpCo wage framework. Instead, he relied on record evidence consistent with a wage structure. Ex. 5, ¶¶74-82. It is the combination of this qualitative evidence and his empirical analyses on the interconnected nature of McDonald's wages that allowed him to reach his conclusion. *Id.*, ¶11. McDonald's argues that the wage regression cannot show causation, but the regression tests the implications of the qualitative record evidence of wage structure; the import is not the direction of causality, but the fact that it demonstrates that gains (or losses) are broadly shared across the class. Singer Rebuttal, ¶12.

Dr. Murphy's insistence on "disaggregate[ing]" the regression has no more basis than the data mining exercise he performs with Dr. Singer's main regression. Singer Rebuttal, ¶¶65-71, 98-99. His conclusion that wages can "vary greatly" misunderstands the purpose of the wage structure regression (and does not upset Dr. Singer's conclusion): Dr. Singer is testing whether changes in wages in a worker's cohort are predictive of changes in said worker's wages, such that an external shock to wages (here, caused by a market allocation scheme) would be shared broadly. Ex. 5, ¶75. The wage structure regression demonstrates that they are. *Id.*; *see also* Singer Rebuttal, ¶95.

D. Dr. Singer's Model Fits the Conspiracy.

McDonald's incorrectly argues that Dr. Singer's damages regression does not "fit" because he used July 2018 instead of March 2017 as the conspiracy end date. Expert testimony "fits" if it assists the trier of fact in understanding the evidence or in determining a fact in issue. *Deimer v. Cincinnati Sub-Zero Prod., Inc.*, 58 F.3d 341, 344 (7th Cir. 1995). Dr. Singer's model fits because, as he explained and McDonald's does not dispute, Class Members' newfound labor mobility is the mechanism that—eventually—lifts employee wages. Ex. 5, ¶45. This mobility arises in part on employees' awareness of the lifting of the restraint and, although discovery revealed that

McDonald's announced *internally and to franchisees* in March 2017 that *it* would no longer enforce Paragraph 14 and would remove it from *future* franchise agreements, it made no similar announcement about these policy changes to Class Members.[6]

As Dr. Singer notes, there is substantial evidence that Class Members were not aware of McDonald's internal March 2017 policy change, and even evidence showing confusion among corporate employees and franchisees, along with ongoing exercise of the restraint. Ex. 5, ¶45. McDonald's argues that the HRC call center advised a "majority" of identified callers inquiring about this that they could switch "without restriction," Mot. at 15 n.6, but this is inaccurate, Singer Rebuttal ¶2 n.6, and also misses the point: The mere fact of these recurring inquiries—irrespective of McDonald's response—is evidence that not all understood that Paragraph 14 was no longer being enforced. *See also* Shaver *Daubert* Decl. ¶3 (identifying callers informed of release requirement or reporting that employer was requiring a release after March 2017). Finally, even if the trier of fact were to conclude at the merits stage that the restraint ended in March 2017, Dr. Singer's methodology still would demonstrate, with common evidence, statistically and economically significant wage suppression. Singer Rebuttal, ¶2 n.6.

E. McDonald's Supposed Procompetitive Justifications Are Common, Though Not Pertinent at Class Certification.

McDonald's criticizes Dr. Singer for not assessing Paragraph 14's "purpose when it was first introduced," Mot. at 15, but this is premature. Any procompetitive justification for McDonald's labor-market allocation will be an affirmative matter for *McDonald's* to prove at the merits stage. *FTC v. Actavis*, 570 U.S. 136, 159 (2013) (quick look "shifts to a defendant the burden to show empirical evidence of procompetitive effects") (quotation omitted). Even at the merits, to invoke ancillarity, McDonald's will have to demonstrate a "plausible connection

[6] Plaintiffs requested any documents reflecting as much in discovery. Shaver *Daubert* Decl. Exs. 15 & 16, at RFP No. 75. McDonald's argues the July 2018 date is "contrary to the named Plaintiffs' experiences," Mot. at 15, but this is misleading. Ms. Deslandes left McDonald's in 2016 and initially alleged that Paragraph 14 remained in place (Dkt. 1, ¶61). It was not until she filed her Amended Complaint on Sept. 18, 2017 that she alleged that Paragraph 14 had later been removed on a going-forward basis. *Deslandes* Am. Complt. Dkt. 32 at ¶ 1 (alleging then-belief that Paragraph 14 removed "in response to this lawsuit"). Ms. Turner's complaint was filed on Aug. 15, 2019, and so had the benefit of discovery already undertaken. *See Turner* Compl. Dkt. 1.

between [Paragraph 14] and the essential character of the [main transaction]." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Assoc.*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.) (condemning on quick look horizontal market division as per se illegal despite its inclusion in otherwise procompetitive agreement).

McDonald's has presented no credible evidence of procompetitive benefits in the restrained labor market—whether in 1955, during the class period, or any time in between. McDonald's chose retired attorney James Kramer to testify about Paragraph 14's supposed procompetitive justifications, but Mr. Kramer had no [redacted] why Paragraph 14 existed. Shaver *Daubert* Decl. Ex. 3 Kramer Dep. at 58:6-12 [redacted]. He [redacted] *id.* at 58:14-60:6, 60:24-61:1, [redacted] *See id.* at 61:5-12. [redacted], *id.* at 152:9-21 & 186:7-186:11, [redacted] *Id.* at 64:3-65:10, 143:5-22; but see 64:24-65:10 (no foundation for same). Indeed, McDonald's own expert Dr. Murphy admitted that [redacted] Murphy Dep. 185:25-126:3 [redacted] It is unsurprising that Dr. Singer characterized McDonald's "evidence" as unavailing. Most of it is surmise and speculation, or even attorney argument. *E.g.*, Brass Decl. Ex. 16 (1972 legal brief from non-antitrust lawsuit). Either way, it has no bearing on the reliability of Dr. Singer's regressions and, at the merits, it will be the subject of common evidence.

IV. CONCLUSION

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

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CERTIFICATE OF SERVICE

I, Derek Y. Brandt, an attorney, hereby certify that this **Plaintiffs' Opposition to Defendants' Motion to Exclude the Opinions and Testimony of Hal J. Singer, Ph.D.** 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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