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
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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' REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE THE OPINIONS AND TESTIMONY OF DR. HAL J. SINGER, Ph.D.

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I. Introduction

Plaintiffs' Opposition falls woefully short of rehabilitating Dr. Singer's unreliable testimony. Plaintiffs emphasize that Dr. Singer's opinions have been admitted in other antitrust cases. But in a recent case alleging a franchise-system no-poach conspiracy, his opinions were excluded as unreliable due to an error in how he used data to measure alleged wage suppression. And, as the court took pains to point out, Dr. Singer's additional failure to define the relevant market called into question the baseline premise of his opinion. *Conrad v. Jimmy John's Franchise, LLC*, 2021 WL 718320, at *22 n.9 (S.D. Ill. Feb. 24, 2021), *reconsideration denied*, 2021 WL 173688 (S.D. Ill. May 3, 2021) ("without defining a relevant market, [Dr. Singer's] model's baseline premise hinges on the *ipse dixit* of the expert") (quotation omitted). Dr. Singer's testimony is infected by the same failure here: without defining a relevant market, he does not and cannot offer a reliable opinion that the alleged No-Hire Agreement suppressed all putative class member wages.

Because they cannot dispute Dr. Singer's failure to define any relevant market, Plaintiffs mischaracterize Seventh Circuit precedent and Defendants' expert's testimony to argue that market definition is neither economically nor legally necessary. Contrary to their arguments, the controlling standard is clear: "The failure to allege the existence of a relevant commercial market is fatal . . . regardless of whether per se, quick-look, or rule-of-reason analysis is applied." *Reapers Hockey Ass'n v. Amateur Hockey Ass'n Ill.*, 412 F. Supp. 3d 941, 952 (N.D. Ill. 2019) (citing *Agnew v. NCAA*, 683 F.3d 328, 337 (7th Cir. 2012)). And "[t]he Seventh Circuit has held as a matter of law that direct-effects evidence alone cannot establish market power." *Gumwood HP Shopping Partners v. Simon Prop. Grp.*, 2016 WL 6091244, at *9 (N.D. Ind. Oct. 19, 2016). This is particularly so here, where Dr. Singer claims that wage suppression stems from McDonald's exercise of monopsony power—an inherently *market-based* theory of harm. Grasping at straws, Plaintiffs argue that Dr. Singer "outlined" the rough contours of the relevant market. But Dr. Singer unequivocally admitted that he did no such thing. Higney Ex. 6,[1] Singer Dep. 159:20-

[1] Citations to "Brass Ex." refer to the exhibits attached to the Declaration of Rachel Brass filed in support of Defendants' motions to exclude. *See* Dkt. 302. Citations to "Higney Ex." refer to the

160:21. And the "local" controls that he added to his regression do nothing to absolve this failing.

Even if a regression could stand in place of Dr. Singer's failure to properly consider the markets at play—and it cannot—Dr. Singer's "wage suppression" regression is unreliable for a host of reasons. ***First***, the regression rests on data that are unrepresentative of the putative class, a disqualifying flaw under Supreme Court precedent. *See Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 455 (2016). ***Second***, Dr. Singer's erroneous use of unrepresentative data is compounded by the fact that he averages that data to calculate "generalized" wage suppression figures. When de-averaged, his regressions show that wages in some states went *down* after the alleged conspiracy ended. Moreover, Plaintiffs now admit that there is not a single, nationwide labor market. Dkt. 325 (hereinafter Opp.) 7. This means the impact of the conspiracy must be analyzed on a *local*—not nationwide—basis. Yet Dr. Singer did not do so; he continues to claim common impact based on a *nationwide* average wage suppression figure. This alone necessitates his exclusion. *Owens v. Auxilium Pharm., Inc.*, 895 F.3d 971, 973 (7th Cir. 2018) (testimony must "fit the issue to which the expert is testifying and be tied to the facts of the case") (quotation omitted). ***Third***, Dr. Singer's model is infected by significant false positives. It would find harm to 85% of class members even when the wage suppression figure in his regression is zero. This too necessitates exclusion. *Olean Wholesale Coop. v. Bumble Bee Foods*, 993 F.3d 774, 792-94 (9th Cir. 2021).

Dr. Singer's other opinions fare no better. His wage structure model is infected by an irredeemable statistical flaw—the "reflection problem." And his unsupported conclusions challenging the procompetitive justifications of the No-Hire Agreement fail to address the circumstances and purpose *at the time of adoption*, rendering it both unhelpful and irrelevant. *See Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985).

This Court should therefore exclude Dr. Singer's testimony. Fed. R. Evid. 702, 703.

II. Argument

A. Plaintiffs Do Not Dispute That Dr. Singer Failed to Define The Relevant Market

Plaintiffs argue that because Dr. Singer claims to show direct evidence of wage suppression

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exhibits attached to the Declaration of Caeli Higney, filed herewith.

and they assert a claim under the quick-look framework, his analysis required no market definition. Opp. 3-4. Plaintiffs are mistaken; under the quick-look framework, the Seventh Circuit requires that they define the contours of the relevant market regardless of whether they have "direct evidence." Moreover, as an economic matter, Dr. Singer's theory of harm rests on the precept that McDonald's restaurants exercised *monopsony power* to suppress wages, which necessarily requires assessing the markets in which such power could potentially exist or be exercised.

1. Dr. Singer Must Define the Contours of the Relevant Market

First, as a legal matter, neither the quick-look standard nor Plaintiffs' purported "direct evidence" of anticompetitive effects relieves Dr. Singer of his burden to identify a relevant market in which the alleged No-Hire Agreement had an anticompetitive effect. Plaintiffs attempt to do what the plaintiff in *Agnew* did: "argue that the quick-look framework absolves them of the burden of describing a relevant market on which the [conspiracy] . . . had an anticompetitive effect." 683 F.3d at 337. The Seventh Circuit rejected that argument; the Court here should as well. *Id.* (the need to define a relevant market is not "dispensed with" under quick-look; rather plaintiffs "must prove" that "there is a cognizable market"); *see also Reapers Hockey Ass'n*, 412 F. Supp. 3d at 952; *Acuity Optical Labs., LLC v. Davis Vision, Inc.*, 2016 WL 4467883, at *12 (C.D. Ill. Aug. 23, 2016) ("For a Section 1 claim analyzed under either the quick-look approach or the Rule of Reason, a petitioner is required to identify a relevant product market that is affected by the allegedly anticompetitive practice.").

Nor does Dr. Singer's purported "direct evidence" of anticompetitive effects absolve him of this burden. Indeed, "[t]he Seventh Circuit has held as a matter of law that direct-effects evidence alone cannot establish market power." *Gumwood*, 2016 WL 6091244, at *9. "To ensure that the direct effects analysis is meaningful, a plaintiff needs to make a minimum initial showing that the defendant possesses a substantial market share in a roughly-defined relevant market." *Hannah's Boutique, Inc. v. Surdej*, 2015 WL 4055466, at *4 (N.D. Ill. July 2, 2015). This remains equally true for cases proceeding under a quick-look framework. *See Agnew*, 683 F.3d at 337 (even under the quick-look doctrine there must be "a relevant market on which actions have an

anticompetitive effect"); *Reapers Hockey Ass'n*, 412 F. Supp. 3d at 952; *Acuity Optical Labs.*, 2016 WL 4467883, at *12. Plaintiffs' citation to *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018), does not support their argument that Dr. Singer need not define the relevant market because a horizontal agreement is at issue. Opp. 4. As the Supreme Court explained: "The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees . . . . We disagree." *Am. Express Co.*, 138 S. Ct. at 2285 n.7. The cases that the Court distinguished involved naked horizontal agreements. *See id.* That is not the case here. Dkt. 53 at 13-14.

Second, as an economic matter, Dr. Singer must define the relevant market in order to reliably opine that the alleged removal of the No-Hire Agreement (which he delineates as the signing of the AOD), as opposed to broader market forces, caused McDonald's restaurant employee wages to rise. As Dr. Murphy explains, "[w]hile it may not be necessary to define the outer bounds of [] a relevant market, it is essential to start by considering the broad fundamental characteristics of employees and employment at issue in order to evaluate whether the relevant market is likely to be so narrow that a single brand's labor-market activity potentially could harm competition." Brass Ex. 2 ¶ 17. In other words, assuming the alleged No-Hire Agreement did limit competition for a McDonald's employee's labor, the degree to which that will ultimately harm the employee depends on whether McDonald's possesses the requisite monopsony power to suppress wages—i.e., whether the individual employee has other non-McDonald's opportunities that are equally (or more) attractive. Higney Ex. 5, Murphy Dep. 93:10-94:12 ("[T]he ability to suppress prices for an input will depend on . . . the alternatives that those inputs have."); Brass Ex. 2 ¶¶ 98-102.

Plaintiffs claim that the market definition exercise is a theoretical one, and therefore unnecessary in light of the fact that Dr. Singer's model purportedly demonstrates that "McDonald's and its franchisees are *actual* monopsonists, who have *actually* exerted market power, resulting in suppression of wages." Opp. 3. But Dr. Singer's model does not—and cannot—demonstrate anything of the sort. It shows only that, among the small sample of McDonald's store employees for whom he had data, wages rose after July 2018 (when the AOD was signed) on average as compared

to their wages during the class period before July 2018—in other words, that over time, wages rose. Dr. Singer attributes that rise in average wages to the No-Hire Agreement based on *his theory* that the alleged Agreement gave McDonald's incremental monopsony power to suppress wages. Dkt. 270-5 ¶¶ 21-25; Brass Ex. 2 ¶¶ 98-102. But Dr. Singer did not examine the change in McDonald's workers' wages relative to the broader market, as would be necessary to support this theory. Brass Ex. 2 ¶¶ 100-02. Dr. Murphy did and found two things: (1) McDonald's wages were rising well before the AOD—a trend Dr. Singer ignores—and (2) McDonald's workers' wages did *not* increase more than their counterparts in other QSR or service industries once the AOD was signed, as one would expect if their wages were in fact "suppressed" by the No-Hire Agreement. Brass Ex. 2 ¶¶ 147-50; Higney Ex. 5, Murphy Dep. 136:2-137:23. Thus, Dr. Singer's reliance on the regression to prove monopsony power is circular, because his finding of anticompetitive effects from the regression rests on the *assumption* that McDonald's had monopsony power in a McDonald's-only market. This is precisely the type of assumption-based analysis that the Seventh Circuit has held to be an unreliable "[g]arbage in, garbage out" expert opinion not admissible under *Daubert*. *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 665-66 (7th Cir. 2004).

Plaintiffs' attempt to circumvent the market definition requirement by arguing that it is not required at the class certification stage of litigation, Opp. 1, 4, 6, is unavailing. In every context examining anticompetitive effects under the quick-look or Rule of Reason frameworks, including *Daubert* motions, the Seventh Circuit demands that the contours of a relevant market be defined. *Agnew*, 683 F.3d at 337; *Menasha*, 354 F.3d at 664-66 (excluding expert opinion for failing to define the relevant market). And at class certification, Plaintiffs must prove they can *try* their claim on a classwide basis. *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 818 (7th Cir. 2012) (plaintiffs' burden at class certification state is to "demonstrate that the element of antitrust impact *is capable of proof at trial* through evidence that is common to the class") (emphasis in original). Defendants do propound "potential procompetitive justifications" in this case, *see* Brass Ex. 1 ¶¶ 61-75, placing the burden on Plaintiffs to demonstrate market power in a relevant markets, *see Agnew*, 683 F.3d at 335-37. Now is the time for Plaintiffs to show they can do so

with common proof, and they have not done so.

Because Dr. Singer's opinion that he need not engage in any market definition analysis is contrary to controlling law and his alleged finding of anticompetitive effects is divorced from any analysis of the relevant market, it is unhelpful and unreliable and should be excluded.

2. Dr. Singer Did Not Define Even the Rough Contours of a Market

Perhaps recognizing the futility of attempting to avoid the market definition analysis altogether, Plaintiffs argue that Dr. Singer "outlined the 'rough contours of the relevant commercial market.'" Opp. 5. But he explicitly admitted that he did not engage in such an analysis. Higney Ex. 6, Singer Dep. 159:20-160:21 ("I'll make it easier for you. I don't think I ever get – I don't think I ever commit to what the relevant geographic market is."). At most, Dr. Singer offered a "preview" of how to define the geographic markets here, but that is not enough, particularly where Plaintiffs do not and cannot explain how such a "preview" meets the market definition requirement. *Messner*, 669 F.3d at 818 (requiring actual evidence, not speculation).

Geographic market. Plaintiffs pivot on the question of market definition, at last conceding that the geographic market here is not a nationwide one. Opp. 5. But neither they, nor Dr. Singer, ever specify how the concededly local labor markets should be defined. Doing so would require Dr. Singer to determine the market area "to which the [employee] can practicably turn for [employment]." *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 738 (7th Cir. 2004) (internal quotation omitted). In place of analysis, Dr. Singer's "preview" consists of observations that (1) McDonald's used 25-mile radii around its McOpCo stores when considering the potential impacts of its 2015 $1-above-minimum-wage increase and (2) "approximately 91% of McDonald's employees live within 25 miles of a separately-owned (thus, ostensibly competing) McDonald's location." Opp. 5. This back-of-the-envelope approach says nothing about how one would actually define labor markets for the purposes of conducting a competitive effects analysis. Would the markets be defined entirely as the 25-mile radius around each McOpCo store? What about the many markets in which there are no McOpCo stores? Or several within a few miles? What about the fact that 90% of McDonald's restaurant employees in Dr. Singer's data commuted *10 miles* or

less to their jobs? Is each employee's labor market unique, based on where they live in relation to McDonald's locations? Are those that commute more than 25 miles uninjured? Dr. Singer offers no non-speculative answers to these or other critical questions of market definition. Higney Ex. 6, Singer Dep. 154:3-157:7 ("[H]owever it gets done, it's going to get done with common methods and common evidence.").

Product market. Instead of affirmatively defining the market as one limited to McDonald's employers, Dr. Singer passively relies on the mere existence of the alleged No-Hire Agreement. Dr. Singer's opinion that McDonald's exercised labor monopsony power hinges on his precept that the No-Hire Agreement "reveal[s] the contours of the relevant labor market—[which] excludes competition from non-McDonald's employers." Dkt. 270-5 ¶ 25; Higney Ex. 6, Singer Dep. 144:9-19. This is well short of what is required. As Dr. Murphy explains, the No-Hire Agreement "is alleged to have affected the opportunities available to employees. And in order to understand that, you have to think about and examine the alternatives that exist in the marketplace." Higney Ex. 5, Murphy Dep. 19:11-20:2.

Dr. Singer undertook no such analysis of the availability of other equally attractive opportunities, which suggests a broader market (unmarked by monopsony power). Brass Ex. 4, Singer Dep. 161:25-163:7; Brass Ex. 2 ¶¶ 105-08. He did not consider evidence indicating that McDonald's employees view their McDonald's training as transferable to other employers, which also supports a broader labor market definition. Brass Ex. 2 ¶¶ 130-32. He did not consider the named Plaintiffs' own experiences, which indicates that they leveraged their McDonald's training to move to non-McDonald's jobs. *See*, *e.g.*, Brass Ex. 118, Turner Dep. 179:6-181:19, 241:3-242:16, 298:2-14; Brass Ex. 109, Deslandes Dep. 114:25-115:16, 165:19-167:21, 174:16-177:4. In short, he did not consider the relevant facts at all.

Because Dr. Singer fails to define the relevant markets at play—or even their "rough contours"—he cannot reliably opine on monopsony power or anticompetitive effects, and those opinions should be excluded. *See 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).

3. Dr. Singer's Regressions' "Local" Controls Do Not Solve the Problem

Plaintiffs argue in the alternative that Dr. Singer's models adequately controlled for local market conditions and therefore there was no need to define markets, because "McDonald's wage data could be analyzed in a single ***model*** covering the United States." Opp. 7 (emphasis in original). But the fact that Dr. Singer's regressions incorporated some "local" control variables does not relieve him of the obligation to determine whether the alleged *impact* of the No-Hire Agreement accrued in local labor markets.

As an initial matter, the "local" controls used by Dr. Singer are not actually tied to local labor markets, much less the 25-mile radius he proposes *post hoc*. For example, most of the "local" controls Dr. Singer used—unemployment rates, per-capita income, and other QSR wages—are measured at the *county* level, when no one, including Dr. Singer, uses a county-based market definition. Simply applying his approach to Ms. Turner underscores this problem: her "local labor market" would cross state lines, encompassing both Ohio and Kentucky in the greater Cincinnati area, but Dr. Singer did not account for that possibility at all. Brass Ex. 118, Turner Dep. 9:14-10:6, 203:5-13. And his model severely misspecifies some of these variables—e.g., using the wrong minimum wage for over *25%* of his observations. Brass Ex. 2, Fig. E-11. More fundamentally, this is yet another example of Dr. Singer assuming what he should be testing. The fact that Dr. Singer's data, when averaged together and put into a regression along with control variables, show "impact" on average, *nationwide*, does not answer the question of whether there was impact in properly defined *local* labor markets. Dr. Murphy evaluated the question of whether a "single model" using all available McOpCo and Paychex data in the United States "proves" there was no need to define local labor markets by looking at that model's results on a state-by-state basis. Brass Ex. 2 ¶¶ 185-88, Figs. 20-24D. He found that not only did the estimated impact differ across geographies, but there were some states with no estimated "impact" at all. *Id.* ¶ 188. This cannot be reconciled with Plaintiffs' claim that a local labor market analysis is unnecessary.

B. Dr. Singer's Regressions Are Unreliable

Dr. Singer's regressions also fail to reliably measure the impact of the alleged No-Hire

Agreement on a classwide basis, providing an alternative basis to exclude his opinions.

1. Plaintiffs Do Not Refute That Dr. Singer's Data Are Unrepresentative

Plaintiffs do not and cannot dispute that Dr. Singer failed to use geographically representative data in his primary regressions. The Supreme Court's standard for the use of representative evidence—which Plaintiffs ignore—is whether "each class member could have relied on [it] . . . to establish liability if he or she had brought an individual action." *Tyson*, 577 U.S. at 442, 455. Dr. Singer's sample does not meet this standard.

Out of the millions of putative class members who worked at over 12,000 franchisee restaurants operating in all 50 states, Dr. Singer's calculation of "wage suppression" rests on Paychex data from only [redacted] franchisee employees working at no more than [redacted] franchisees in [redacted] states.[2] Brass Ex. 2 Figs. E-8, E-9, E-10. The data are skewed heavily towards certain states. For example, over [redacted] of the franchisee observations that Dr. Singer uses to calculate his "wage suppression" figure come from New Hampshire. Brass Ex. 2 Fig. E-8. Plaintiffs do not claim that the labor markets in New Hampshire are representative of those in Florida. Dr. Singer conducted no test to assess the representativeness of this data either. Brass Ex. 2 ¶¶ 171-72; *see also* Higney Ex. 5, Murphy Dep. 150:15-151:5 (describing the tests Dr. Singer could have done). And, as Dr. Murphy explained, "[w]e know from [Dr. Singer's] data that the effects and what happened in the labor market differs by location." Brass Ex. 2 ¶¶ 171-72, Higney Ex. 5, Murphy Dep. 151:8-152:3. It is therefore *undisputed* that an employee working at a franchisee store in Florida like Ms. Deslandes could not rely on Dr. Singer's sample as required by *Tyson*. 577 U.S. at 455; *see also Spokeo, Inc. v. Robbins*, 136 S. Ct. 1540, 1549, n.6 (2016). The same is true for franchisee class members in the [redacted] other states in which Dr. Singer lacks any useable data.

Plaintiffs cannot cure this failure by twisting Defendants' argument into one about sample size or data quality. *See* Opp. 8-9. While the (small) size of Dr. Singer's franchisee sample from

[2] This includes only those states for which there is a more than de minimis amount (>100) of observations. An observation is defined a single pay period for a single employee.

Paychex bears on the sample's representativeness, Defendants do not seek to exclude the regression based on sample size alone. Dkt. 301-1 ("Mot.") at 10 n.6. It is the lack of geographic representativeness in a case alleging impact in indisputably local labor markets that renders his analysis unreliable. Similarly, this critique stems not from the quality of the Paychex data; the issue is one of scope.[3] Plaintiffs try to remedy the issue by pointing to Dr. Singer's *other* analyses. But Dr. Singer opined that "the best available estimates of impact to Class Members" derive from his Paychex-based regression, and these are the data he used to measure impact. Dkt. 270-5 ¶ 57. The fact that the Profit & Loss data Dr. Singer analyzed "included every McDonald's store in the United States" is irrelevant and misleading. Opp. 9. Data in a *separate regression* cannot cure his failure to use representative data in his Paychex-based regression. Dkt. 270-5 ¶ 44 (admitting other payroll data not "suitable"). Moreover, neither the P&L data nor any of the other non-Paychex data that Dr. Singer uses contain the type of individual, payroll-level information necessary to reliably assess common impact. Brass Ex. 2 ¶¶ 199-208. The representativeness of this other data is, therefore, beside the point.

Accordingly, Dr. Singer's opinions regarding "generalized" wage suppression and common impact, all of which are based on his primary "wage suppression" regression model, should be excluded because the model lacks representative data. *See Tyson*, 577 U.S. at 455; *Bowman for J.B. v. Int'l Bus. Machines Corp.*, 2013 WL 12290828 *8-9 (S.D. Ind. Aug. 16, 2013) (excluding expert who used unrepresentative data, "ignor[ing] the actual make-up of the purported class").

2. Dr. Singer's Use of Averages Masks Uninjured Class Members

Plaintiffs' suggestion that Dr. Singer's regression "shows classwide impact with individual predictions," Opp. 10, is misleading, if not outright false. His model applies *a single* "average" (aka "generalized") wage suppression figure to calculate impact for *all* franchisee class members, and does the same for McOpCo class members. As Dr. Murphy explains, "he assumes that all McOpCo and franchisee employees are affected by the *average* wage suppression (6.7 percent for

[3] It is not Dr. Murphy's role to identify alternative sources of pay data. Opp. 9. It was Plaintiffs' burden to obtain sufficient data to support their expert's opinion; they did not do so.

all franchisee employees (both managers and crew) or 3.5 percent for all McOpCo employees (both manager and crew)),” using that to calculate “individual” impact. Brass Ex. 2 ¶ 226. Other courts exclude this exact type of averaging because it masks “substantial variation across individual cases.” *Reed v. Advocate Health Care*, 268 F.R.D 573, 591, 594 (N.D. Ill. 2009).[4]

Plaintiffs defend Dr. Singer’s approach by arguing it was used in other cases, but those cases involved far different labor markets. The markets for McDonald’s employees are exponentially more varied and geographically diverse than highly specialized markets for high-tech employees (as in *In re High-Tech Employee Antitrust Litig.*, 985 F. Supp. 2d 1167 (N.D. Cal. 2013)) or doctors and nurses (as in *Seaman v. Duke Univ.*, 2018 WL 671239 (M.D.N.C. Feb. 1, 2018)).

Moreover, Plaintiffs do not dispute that the “de-averaged” regression reveals substantial swaths of putative class members—such as those McOpCo employees in Florida—that suffered *no* impact. The method by which Dr. Murphy “de-averages” the regressions is the same as that applied by Dr. Singer in unpooling his regressions for different types of employees. Dkt. 270-5 ¶ 59, 71-73, Tables 4, 6. Plaintiffs argue that Dr. Murphy’s de-averaging of Dr. Singer’s regression is inconsistent with the alleged “single, nationwide conspiracy,” Opp. 2, 11, but having admitted that there is no single nationwide labor market, that answer underscores the disconnect between Dr. Singer’s model and the claims here. Plaintiffs’ protestations regarding a Florida-only market are similarly misplaced, as Ms. Deslandes alleges an alternative Florida-only class. Dkt. 32 ¶ 118.

3. Plaintiffs Cannot Wave Away Dr. Singer’s False Positives

Plaintiffs do not and cannot dispute that false positives indict the reliability of a statistical model. *See In re Rail Freight Fuel Surcharge Antitrust Litig.*, 725 F.3d 244, 254-55 (D.C. Cir. 2013); *Olean*, 993 F.3d at 792-94. A false positive is a finding of impact where there logically could be none. Fed. Judicial Center, *Reference Manual on Scientific Evidence* 300-301 (3d ed. 2011). Dr. Singer’s model finds impact on employees who had recently been hired, and employees

[4] Plaintiffs attempt to distinguish *Reed* insofar as the model there left up to “half the causes of the differences in real-world wages unexplained,” (i.e., had a low “R-squared” statistic) but Dr. Singer’s model’s purportedly “high” R-squared is a manufactured one, much of it is attributable to his double-counting of observations. Brass Ex. 2 ¶¶ 177-78.

hired after March 2017—an impossibility. Brass Ex. 2 ¶¶ 162, 227.

Plaintiffs' and Dr. Singer's argument that the No-Hire Agreement suppressed wages for entry-level employees, Opp. 11, is nonsensical. They admit McDonald's stores competed against other quick service restaurants, retail, and other major local employers for such employees. Dkt. 330-2 ¶ 124. And the evidence shows that in many markets, McDonald's stores paid wages above other QSRs. *See*, *e.g.*, Brass Ex. 123, Vidler Decl. ¶¶ 16-17; Higney Ex. 4, Lopez Dep. 158:14-159:10; *see also* Dkt. 299 at Section II.B. Still, Plaintiffs claim that McDonald's would have paid *even more* to entry-level workers absent the alleged No-Hire Agreement. But they offer no explanation for why that would happen in a competitive marketplace for entry-level workers.

Plaintiffs defend Dr. Singer's finding that employees hired after March 2017 suffered harm because "there is no evidence that McDonald's informed restaurant employees of a policy change at that time." Opp. 12. As Defendants explained, this assertion contradicts reality, including the named Plaintiffs' *own* testimony and other evidence that the policy change was public knowledge. Dkt. 299 at 5, 28. Moreover, 20% of employees for whom Dr. Singer finds harm were hired *after* March 2017—and thus never subject to the alleged Agreement. Brass Ex. 2 ¶ 162.

A final check highlights this problem: Dr. Singer's model would find that ***85%*** of class members incurred "harm" even if the estimated wage suppression was ***zero***. Brass Ex. 2 ¶ 224. The model finds injury where none lies, indicting its reliability. *See Rail Freight*, 725 F.3d at 254.

4. Dr. Singer Fails to Account for "Pre-Trends"

Plaintiffs claim that Defendants must point to an "omitted variable" to "upset the results of Dr. Singer's wage regressions." Opp. 12. But Dr. Murphy explains that what Dr. Singer failed to account for in using his "during and after" regression is "pre-trends." Higney Ex. 5, Murphy Dep. 134:5-135:24. In short, if "wages for [McDonald's] workers were rising before the AOD, [Dr. Singer]'s [regression] is going to attribute some of that to the AOD." *Id.* 136:2-137:2. Dr. Murphy did examine such trends and found clear evidence that McOpCo and franchisee pay rates began increasing in ***2014***, well before the end of the alleged conspiracy, and consistent with broader wage

trends in the economy.[5] Brass Ex. 2 ¶ 147, Figs. 15A, 15B. Dr. Singer's failure to account for this pre-trend, and his conflation of correlation and causation, are "failure[s] to exercise the degree of care that a statistician would use in his scientific work, outside of the context of litigation," necessitating exclusion. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

C. Dr. Singer's Compensation Structure Opinions Are Indisputably Unreliable

Plaintiffs cannot dispute that Dr. Singer's wage structure regression suffers from a fundamental statistical fallacy—the "reflection problem." Mot. 14. Plaintiffs instead argue it was used only to "test the implications of the qualitative evidence of wage structure." Opp. 13.[6] But the qualitative evidence fares no better. Rather, substantial qualitative evidence—confirmed by recent franchisee testimony—shows there was *no* common McOpCo framework adopted uniformly by franchisees. Dkt. 299 at Section II.B.2; Higney Ex. 1, Groen Dep. 71:7-22; Higney Ex. 4, Lopez Dep. 146:23-149:24. Dr. Murphy demonstrated that even Dr. Singer's model shows no evidence of a wage structure when McOpCo and franchisee manager pay is separated. Brass Ex. 2 ¶ 239, Fig. 28. And Dr. Singer's data illustrate that wages vary greatly between McOpCo and franchisee restaurants. *Id.* ¶¶ 257-63, Fig. 33C. This is inconsistent with a wage structure.

Because his statistical model suffers from a fundamental statistical fallacy, and because his interpretation of the "qualitative" evidence is directly contradicted by the record, Dr. Singer has no reliable basis to opine that a common compensation structure would have spread alleged wage suppression throughout the class. *Clark v. Takata Corp.*, 192 F.3d 750, 757, 759 (7th Cir. 1999) (affirming exclusion of expert's "unsupported speculation"). These opinions should be excluded.

D. Dr. Singer's Damages Model Does Not Fit This Case

Dr. Singer's impact and damages models pivot around a July 2018 conspiracy end date

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[5] Plaintiffs also point to Dr. Singer's new analyses, which purport to control for QSR wages. Opp. 12. But this "fix" is infected by a more serious error—the introduction of endogeneity bias—because wages at McDonald's stores and other QSR locations are similarly affected by the controls included in his regression, such as the minimum wage. Brass Ex. 2 ¶¶ 139, 196.

[6] Plaintiffs attempt to shoo away "causality" as unimportant. Opp. 13. But without causality, all Dr. Singer's regressions show is that McDonald's workers' wages are influenced by common factors—an unsurprising finding. *See* Mot. 14; Brass Ex. 2 ¶¶ 236-37.

despite undisputed evidence that McDonald's confirmed it would not enforce Paragraph 14 fifteen months earlier, in March 2017. *See* Mot. 15. Plaintiffs now argue that in order for class members to be aware of McDonald's approach, McDonald's had to announce it to them directly. Opp. 13-14. But McDonald's did not announce anything directly to class members in July 2018, either. Dr. Singer's reasoning that class members would be more aware of McDonald's non-enforcement of Paragraph 14 in July 2018 than March 2017 relies on a Washington Attorney General Press Release and an article published in the *New York Business Journal*. Dkt. 270-5 ¶ 3 n.13. He offers no explanation of why an economist would deem a *New York Times* article published in 2017 (and republished in other outlets around the country) insufficient, while a press release published on a state government website and a *New York Business Journal* article from 2018 would be sufficient.

Nor can Plaintiffs dispute evidence that the removal of Paragraph 14 *was* in fact communicated to employees before July 2018. The sole email from a single franchisee to which Plaintiffs point does not prove otherwise. *See* Opp. 14 (citing Dkt. 330-1 ¶ 2 n.6). McDonald's HRC call logs similarly show that McDonald's directly told putative class members that Paragraph 14 was not being enforced, Brass Ex. 2 ¶ 162, consistent with the named Plaintiffs' experiences. Dkt. 32 ¶ 1; Turner Compl. ¶ 92. Defendants need not prove that "*all* understood that Paragraph 14 was no longer being enforced," Opp. 14; rather Plaintiffs must prove sufficient mobility was restricted post-March 2017, resulting in wage suppression. They have not met this burden.

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

Plaintiffs' argument that any dispute over procompetitive justifications for the alleged No-Hire Agreement must wait until the merits stage cannot be reconciled with the fact that *Dr. Singer* offered an opinion on them in his initial report.[7] That Plaintiffs apparently regret that he did so

[7] In *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984), the Court found that the alleged restraint was "a horizontal market division that does not appear to be ancillary to the reciprocal provision of service or any other lawful activity," and therefore *per se* unlawful. Plaintiffs torture this holding into requiring that in order to invoke ancillarity, McDonald's must demonstrate "a plausible connection between the [No-Hire Agreement] and the essential character of the [main transaction]." Opp. 15. This Court has already noted that the No-Hire Agreement was "ancillary to franchise agreements for McDonald's restaurants." Dkt. 53 at 13.

does not immunize the offered opinions from the *Daubert* standards. Rather, those opinions should be excluded if they fall short of establishing "whether an agreement promoted enterprise and productivity *at the time it was adopted*." *Polk Bros.*, 776 F.2d at 189 (emphasis added). They do.

Plaintiffs try to turn the tables by suggesting that Defendants have not offered "credible" evidence of procompetitive justifications, attacking the deposition testimony of longtime franchising executive James Kramer. Opp. 15. To be clear, Mr. Kramer was not offered as a Rule 30(b)(6) corporate witness on the topic, as Plaintiffs suggest, *id.*, but as one of the last-living senior executives in McDonald's Franchising Department, he did "learn why [former Paragraph 14] was in" the franchise agreement based on discussions with his colleagues about it. Higney Ex. 3, Kramer Dep. 58:14-24; *see also id.* 186:13-187:5 (describing his experiences working for McDonald's for 39 years), 259:10-261:12 (explaining his understanding of Paragraph 14 based "on the years that [he] worked within the franchising department and discussing relationships with our owner-operators"). Defendants also offer substantial other evidence of potential procompetitive justifications for Paragraph 14. *See* Brass Ex. 1 ¶¶ 57-75. And Plaintiffs' attempt to twist Dr. Murphy's testimony by subbing in "[the procompetitive benefits]" and "[the No-Hire Agreement]" where Dr. Murphy was talking about neither, Opp. 15, does them no credit. An unaltered review of that testimony makes clear Dr. Murphy was discussing firms, and whether McDonald's could exist without Paragraph 14, which he agreed it could. Higney Ex. 5, Murphy Dep. 185:9-186:6. That is of no moment, as procompetitive justifications need not be the *sine qua non* of a firm's existence. *Deppe v. Nat'l Collegiate Athletic Ass'n*, 893 F.3d 498, 503 (7th Cir. 2018) ("[T]he test under *Agnew* is not whether college athletics could ***survive*** without this bylaw, but rather whether the rule is clearly meant to help preserve the amateurism of college sports.").

III. Conclusion

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

Dated: May 21, 2021

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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 May 21, 2021.

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