IN THE UNITED STATES DISTRICT COURT
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
**********	)	
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

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO EXCLUDE THE REPORT AND TESTIMONY OF PETER CAPPELLI, D. PHIL.

McDonald's hereby incorporates its previously filed Reply in Support of its original Motion to Exclude the Opinions and Testimony of Peter Cappelli, D. Phil., *see* Dkt. 337. Rather than offer a fresh defense now, Plaintiffs' December 21, 2021 Opposition retreats from Prof. Cappelli's reports, suggesting that his opinions are immaterial to most arguments for which they are cited and that the remaining propositions are immaterial to their arguments. *See* Dkt. 426 at 1–2. This is a remarkable departure from a witness Plaintiffs tapped to show "the effects of the

No-Hire Agreement flowed across workers." Dkt. 344 at 10; *see also* Dkt. 403 ¶¶ 56–58, 60, 61, 64 & Dkt. 405 ¶¶ 25, 31, 39, 47, 57 (reflecting about a dozen citations by Plaintiffs to Prof. Cappelli's reports in connection with summary judgment); Dkt. 268 at 2–9, 22, 27–28 (further relying on Prof. Cappelli's opinions in prior proceedings); Dkt. 344 at 2–8, 10–14 (same); Dkt. 363-1 at 5 (same); Dkt. 371 at 9 (same). And this attempt to walk away from Prof. Cappelli is particularly problematic for Plaintiffs because his assumptions about the transferability of McDonald's training and supposed wage structures across McDonald's restaurants undergird the opinions from Dr. Singer that Plaintiffs continue to embrace. Without Prof. Cappelli's single-brand national labor market, for example, Dr. Singer cannot extend the alleged wage suppression to workers—like the two individual Plaintiffs—whose pay data was not analyzed. *See* Dkt. 329, Ex. 1, ¶¶ 35, 43–52. Regardless, even if Plaintiffs no longer wish to tout Prof. Cappelli, they chose to sponsor his opinions and therefore must shoulder the burden of establishing their admissibility. *Lewis v. CITGO Petroleum Corp.*, 561 F.3d 698, 706 (7th Cir. 2009). They have failed to do so.

First, it is demonstrably untrue that the "rough contours" of the relevant market Prof. Cappelli assumes, and any supposed power McDonald's holds, are based on his study of "empirical research relied on in labor economics, his expertise, and analysis of record evidence in the case." Dkt. 328 at 10; Dkt. 426 at 2. As McDonald's explained in its prior briefs, Prof. Cappelli eschewed established methods for determining whether a market exists in favor of ostensible observations contrary to the record evidence. Dkt. 300-1 at 5–9; Dkt. 337 at 2–11. That failure is even starker in the context of this two-plaintiff case, as Prof. Cappelli made no attempt to define geographic parameters for his market, Dkt. 337 at 5, and his key assumptions about the lack of transferability of McDonald's training are belied by the two individual Plaintiffs' lived experiences in their respective metropolitan areas, Dkt. 380 ¶¶ 63–65; Dkt. 418 ¶ 12.

Likewise, Prof. Cappelli's assumption that wage suppression was the "point" of the alleged No-Hire Agreement, Dkt. 328 at 11, is not grounded in any "study of empirical research" or "analysis of record evidence in the case." Dkt. 426 at 2. To the contrary, the record is bereft of any evidence supporting his assumption. Indeed, Prof. Cappelli admitted (as McDonald's previously pointed out) that he formed that opinion without reference to any actual evidence about Paragraph 14's adoption. Dkt. 337 at 4. Had he in fact obtained and reviewed the relevant materials, he would have seen that undisputed evidence shows wage suppression had nothing to do with the establishment of Paragraph 14. *See*, *e.g.*, Dkt. 380 ¶¶ 12–25; Dkt. 419 ¶¶ 7–8. And, to the extent Plaintiffs suggest the No-Hire Agreement is somehow broader than Paragraph 14, Prof. Cappelli did not consider *any evidence* regarding its purported formation because there is none—not one document, or one piece of testimony, that supports the supposition that there is anything else at work in this case besides Paragraph 14 of the franchise agreement, which is precisely what Plaintiffs' complaints alleged.

Prof. Cappelli's other arguments are similarly unmoored from any "empirical research" or "analysis of record evidence." Dkt. 426 at 2. As but one more example, his opinions about purported wage structures are not only contrafactual, Dkt. 300-1 at 13–15, but also untethered to any evidence in the relevant geographic markets. And as to each of the Plaintiff's local geographic markets, his opinions are contrary to the undisputed sworn testimony of local franchisees. *See*, *e.g.*, Dkt. 382-3 ¶ 13; Dkt. 382-5 ¶¶ 14–17; Dkt. 382-20 ¶¶ 9–10; *see also* Dkt. 299 at 8–9; Dkt. 300-1 at 14–15. That leaves Plaintiffs with only Prof. Cappelli's *ipse dixit*, which is neither reliable nor helpful. *See Wendler & Ezra, P.C. v. Am. Int'l Grp.*, 521 F.3d 790, 791 (7th Cir. 2008) ("We have said over and over that an expert's *ipse dixit* is inadmissible.").

For each and all of these reasons, and as set forth in the prior briefing concerning Prof.

Cappelli, incorporated herein, this Court properly exercises its gatekeeping function under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), by excluding Prof. Cappelli's unreliable and irrelevant testimony.

Dated: January 4, 2022

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

By: */s/ Rachel S. Brass*
Rachel S. Brass

GIBSON DUNN & CRUTCHER LLP

Rachel S. Brass (admitted pro hac vice)
Caeli A. Higney (admitted pro hac vice)
Julian W. Kleinbrodt (admitted pro hac vice)
555 Mission St., Suite 3000
San Francisco, California 94105
Telephone: (415) 393-8200
Facsimile: (415) 374-8458
Email: RBrass@gibsondunn.com
CHigney@gibsondunn.com

Matthew C. Parrott (admitted pro hac vice)
3161 Michelson Dr.
Irvine, CA 92612
Telephone: (949) 451-3800
Facsimile: (949) 451-4220
Email: MParrott@gibsondunn.com

A&G LAW LLC

Robert M. Andalman (Atty. No. 6209454)
Rachael Blackburn (Atty. No. 6277142)
542 S. Dearborn St.; 10th Floor
Chicago, IL 60605
Tel.: (312) 341-3900
Fax: (312) 341-0700

CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the foregoing document was electronically filed on January 4, 2022 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

/s/ Rachel S. Brass
Rachel S. Brass