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
STEPHANIE TURNER, 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; Defendants.	)	Case No. 19-cv-05524 Judge Jorge L. Alonso

DEFENDANTS McDONALD'S USA, LLC AND McDONALD'S CORPORATION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE SUMMARY JUDGMENT

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I. Introduction

Plaintiffs challenge an intra-brand hiring limitation found in McDonald's franchise agreement until 2017, contending the provision constituted a wage-suppressing conspiracy. In rejecting Plaintiffs' class certification bid, the Court concluded this case "require[s] rule-of-reason analysis." Dkt. 372 at 11. Plaintiffs, however, did not plead a rule of reason claim. Indeed, despite this Court's explicit invitation to amend their complaint to pursue their theory under the rule of reason, Plaintiffs "declined" and thus "waived" any rule of reason claim. Dkt. 372 at 10, 26. Rather, they litigated their claims as either per se unlawful or capable of resolution under a "quick-look" analysis. Their bid to make out a claim under the per se or "quick-look" standard fails as a matter of law, as the Court has already determined. As such, judgment should be entered against Plaintiffs' individual claims as a matter of law.

Moreover, even had Plaintiffs not waived a rule of reason claim (and they have, as the Court has said), undisputed evidence forecloses any such claim in any event. At the threshold, Plaintiffs proffer no evidence of an illegal agreement among McDonald's, its corporate-owned restaurants ("McOpCos"), and thousands of franchisees—the "essence of any violation of § 1." *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 330 (1991). Nor can they establish the "first requirement in every suit based on the Rule of Reason": market power. *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). Far from exercising market power in a properly defined labor market, the undisputed evidence shows that the McDonald's restaurants near Plaintiffs were just a few of innumerable potential employers, and that McDonald's restaurants paid their employees based on competitive forces. Finally, Plaintiffs' claim is time-barred. Under any standard, judgment should be entered for McDonald's and against Plaintiffs.

II. Background

In 1955, Ray Kroc revolutionized franchising with the advent of the modern McDonald's franchise system. SUF ¶¶ 12-14. The system was built on a franchise agreement filled with a host of provisions meant to promote brand consistency and investment, including a version of former Paragraph 14. *Id.* ¶¶ 18, 22. The earliest franchise agreements also granted exclusive territories

to franchisees and defined the types of products they could offer and the other types of businesses they could operate. *Id.* ¶ 18. At that time, franchising was an entirely new and unproven business model, and McDonald's was not yet an established brand. *Id.* ¶¶ 13, 15. But the genius of Mr. Kroc's system was that, with these restraints, the franchise agreement limited free-riding, incentivized investments, and promoted cooperation among McDonald's franchisees, enhancing in turn McDonald's competitiveness vis-à-vis other brands. *Id.* ¶¶ 21-23. The result was exponential growth and output expansion over the decades that followed. *Id.* ¶ 25.

There is no evidence that McDonald's adoption of the challenged provision, former Paragraph 14, had anything to do with suppressing wages or coordinating a conspiracy between franchised and company-owned restaurants. How could it? *McOpCos did not even exist when former Paragraph 14 was first adopted*. SUF ¶¶ 16-17. Rather, Mr. Kroc believed that former Paragraph 14 would promote cooperation *among franchisees* and thereby empower franchisees to focus on *inter*brand competition. *Id.* ¶ 22.

As one of the last-living early franchising executives explained, former Paragraph 14 promoted "trust between [McDonald's] franchisees and the company," which "is really important to the success of McDonald's as a company." SUF ¶ 22. As McDonald's explained in a 1972 litigation that unsuccessfully challenged the legality of former Paragraph 14:

> McDonald's has established a highly sophisticated continuous [ ] system to insure quality, cleanliness, service, managerial experience [ ], and cost efficiency. . . . The key person in maintaining the integrity of the entire business system, and its profitability, is the retail store manager. . . . McDonald's has established a staff training and job experience standards for store managers. . . . [T]he minimum necessary training period for a store manager is one year, and may require up to three years. . . . The training of the manager is therefore a substantial investment for both McDonald's and the franchise operator. . . . McDonald's predominant purpose is unmistakable: It's concern was entirely directed at the economic well-being of the overall system . . . .

SUF ¶ 21. The Ohio Court of Appeals agreed, ruling that former Paragraph 14 was both lawful and enforceable. *Pearse v. McDonald's Sys. of Ohio, Inc.*, 47 Ohio App. 2d 20, 26-27 (1975).

"[B]alanc[ing] all of the interests, social, economic and private, of the objectives as advanced in defense of the interference as against the importance of the [employment] interest interfered with, considering all of the facts and circumstances of the matter, including the method and means used and the relationship of the parties," the court concluded that McDonald's had a "legally protected interest" in enforcing former Paragraph 14. *Id.* at 25.

Mr. Kroc's system worked. Between 1955 (when former Paragraph 14's predecessor was introduced) and 1960 alone, the brand grew from fewer than a dozen to 224 restaurants. SUF ¶ 25. Knowing not to fix what isn't broken, the company thereafter made only modest changes to its founder's groundbreaking franchise agreement, including virtually no changes to what eventually became Paragraph 14. *Id.* ¶ 19. Starting in the 1970s, McDonald's filed its franchise agreement annually with state regulators. *Id.* ¶ 20.

By 2017, the landscape in which McDonald's and its franchisees conducted their businesses had changed in various ways. Although all the original procompetitive justifications for former Paragraph 14's adoption remained, it went unenforced in light of other priorities. SUF ¶ 58. First, McDonald's and its franchisees were facing challenges on many fronts to the legal distinction between McDonald's and its franchisees for employment law purposes. *See*, *e.g.*, *Fast Food Workers Comm. & Serv. Emps. Int'l Union, CTW, CLC, et al.*, 02-CA-093893; 04-CA-125567 (U.S. NLRB). Second, the company was aware of increasing scrutiny by various antitrust authorities as well as a new political focus on restrictions in the employment context. *See* SUF ¶ 59. For these reasons, in March 2017, McDonald's announced to all franchisees that former Paragraph 14 had become "a dated policy," that McDonald's "w[ould] not enforce" it, that it "would not be included in future franchise agreements," and that franchisees were "free to make their own employment decisions." *Id.* ¶ 60.

Plaintiff Leinani Deslandes filed her complaint on June 28, 2017, alleging that former Paragraph 14 of McDonald's franchise agreement violated Section 1 of the Sherman Act under the per se or quick-look standard; she did not purport to state a rule of reason claim. *See* Dkt. 1 ¶¶ 131, 132. Ms. Deslandes amended her complaint and moved to amend a second time but declined to

add a rule of reason theory to either amended complaint—even after the Court gave her explicit leave to do so. Dkt. 53 at 15-16; *see also* Dkt. 32 ¶¶ 133-34; Dkt. 147-1 ¶¶ 147-48. Plaintiff Stephanie Turner likewise declined to allege a claim under the rule of reason when she sued in August 2019. Dkt. 180-1 ¶¶ 131, 132; *see also* Dkt. 166 at 4:4-19 (Plaintiffs' counsel acknowledging that the "deadline to amend to file a rule of reason claim or to attempt to state a rule of reason claim" lapsed years ago). At enormous cost, the parties undertook multiple years of discovery focused on Plaintiffs' quick-look theory of the case. *See*, *e.g.*, Dkt. 199 (discussing Defendants' voluminous document and data productions); Dkt. 171 at 26:14-29:2 (Magistrate Judge Weisman framing the boundaries of discovery at an early hearing according to Plaintiffs' quick-look theory, including ruling that allowing nationwide discovery would be a "substantial" "burden to defendants"). Earlier this year, the Court denied Plaintiffs' motion for class certification—still premised on a quick-look claim—concluding that it "must apply rule of reason analysis to this case" and that Plaintiffs' "strategic decision early in this case not to amend the complaint to add a claim under the rule of reason . . . waived" such a claim. Dkt. 372 at 11, 26.

III. Legal Standard

To prevail under Federal Rule of Civil Procedure 12(c), "the moving party must demonstrate that there are no material issues of fact to be resolved" and that it is entitled to judgment as a matter of law on the face of the pleadings. *Federated Mut. Ins. Co. v. Coyle Mech. Supply Inc.*, 983 F.3d 307, 313 (7th Cir. 2020). Summary judgment, which "is not only permitted but encouraged in certain circumstances, including antitrust cases," *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 475 (7th Cir. 1988), is appropriate where there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 252 (1986).

IV. Argument

To prevail on their sole claim, Plaintiffs must prove "(1) a contract, combination, or conspiracy; (2) a resultant unreasonable restraint of trade in [a] relevant market; and (3) an accompanying injury." *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012). They cannot. First, they have

waived the rule of reason theory. Moreover, Plaintiffs cannot establish a singular "meeting of minds in an unlawful arrangement" among McDonald's and its thousands of franchisees to suppress employees' wages, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946), nor prove market power in a properly defined relevant market. Their claim is also time-barred.

A. Plaintiffs Have Not Pleaded a Rule of Reason Claim and Therefore Judgment on the Pleadings Should Be Granted

"The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). The Supreme Court confirmed in *NCAA v. Alston* that an ancillary labor market restraint that generates cross-market procompetitive benefits can only be tested by the rule of reason. 141 S. Ct. 2141, 2155-56 (2021). Accordingly, this Court rightly held that it "must apply rule of reason analysis to this case." Dkt. 372 at 11.

Plaintiffs deliberately forwent such a claim. From the start, they made a "strategic decision" to pursue liability under only the per se or quick-look theories. Dkt. 372 at 26. That remained so even after the Court *invited* them to "include a claim under the rule of reason." Dkt. 53 at 16; *see also* Dkt. 32 ¶¶ 133-34. And that continued up to and through Plaintiffs' reply in support of class certification, which continued to focus exclusively on "the quick-look test." Dkt. 344 at 2. As a result, the parties spent years—expending extraordinary resources in discovery—litigating the case Plaintiffs chose to present. Now, by Plaintiffs' own concession, the deadline to add a rule of reason claim has long since passed. Dkt. 166 at 4:4-19. In short, Plaintiffs "took a gamble, choosing not to pursue a rule-of-reason claim" for the potential "payoff of a nationwide class under quick-look analysis." Dkt. 372 at 26.

That gambit failed. As the Court has determined, Plaintiffs have no claim under a per se or "quick-look" theory and have waived a rule of reason claim. Dkt. 372 at 26. Thus, their complaints do not "set[] forth facts sufficient to support a cognizable legal theory" at all. *Laborers Loc. 236, AFL-CIO v. Walker*, 749 F.3d 628, 632 (7th Cir. 2014). For example, Plaintiffs studiously avoided pleading a relevant market—an exercise they continued to eschew throughout the

entire case. *See* Dkt. 32 ¶¶ 133-34; Dkt 180-1 ¶¶ 131-32; Dkt. 268 at 21; Dkt. 344 at 2. As the Seventh Circuit has held, a complaint that forgoes a rule of reason claim "to hedge [plaintiffs'] bets by keeping their market allegations vague" cannot proceed when a court applies "full-fledged Rule of Reason analysis." *Agnew*, 683 F.3d at 345-46. As such, judgment on the pleadings is appropriate and should be entered against Plaintiffs.

B. Summary Judgment Should Be Granted Because Plaintiffs Cannot Prove an Unlawful Agreement or a Relevant Market Under the Rule of Reason

Plaintiffs cannot prove a conspiracy between McDonald's and its franchisees to suppress wages, nor that McDonald's exercised market power in a properly defined market—essential elements of a rule of reason claim. Summary judgment should therefore be granted.

1. Plaintiffs Cannot Prove a Conspiracy to Suppress Employees' Wages

The centerpiece of this case has always been former Paragraph 14, which Plaintiffs allege reflected a nationwide agreement among McDonald's and thousands of franchisees over a period of fifty years to suppress wages. *See* Dkt. 32 ¶ 5; Dkt. 268 at 10, 14, 21. But there is *no evidence* suggesting that McDonald's and its franchisees intended and agreed to the "unlawful objective" of suppressing employee wages. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). Nor can Plaintiffs establish that the vertical franchise agreement was in fact a horizontal conspiracy among competitors because their hub-and-spoke theory has no rim. *See U.S. v. Bustamante*, 493 F.3d 879, 885 (7th Cir. 2007); *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1192, 1198 (9th Cir. 2015). In short, Plaintiffs have *no* evidence of a "conscious commitment to a common scheme designed to achieve an unlawful objective" among competitors. *Monsanto*, 465 U.S. at 764.

First, there is zero evidence connecting the adoption or retention of former Paragraph 14 to a shared "unlawful objective" of suppressing employee wages paid by McDonald's restaurants. *Monsanto*, 465 U.S. at 764. Witnesses uniformly denied that former Paragraph 14 had anything to do with suppressing wages. SUF ¶¶ 23, 26, 34. And those with living memory testified that the original purpose of former Paragraph 14, like other franchise agreement provisions, was to create

a novel business enterprise—the McDonald's franchise system. *Id.* ¶¶ 22-23. Decades ago, the court in *Pearse* agreed, and held that Paragraph 14 served a legitimate, lawful purpose. *Pearse*, 47 Ohio App. 2d at 26-27. Despite the opportunity to relitigate that case with a "voluminous record," Plaintiffs could find no "smoking gun buried" within. *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 706 (7th Cir. 2011).

Neither does former Paragraph 14's mere existence prove a conscious commitment to an unlawful objective as it is a classic ancillary restraint to a legitimate business arrangement that promoted greater productivity and output. *See* Dkt. 372 at 16; *see also Alston*, 141 S. Ct. at 2163 ("Firms deserve substantial latitude to fashion agreements that serve legitimate business interests."). Mr. Kroc designed former Paragraph 14 to convince potential franchisees to invest in the McDonald's system, encourage franchisees to train their employees, and to lay the foundation of trust necessary for a successful franchise enterprise. SUF ¶ 21-22; *see also* Dkt. 372 at 12-16; Dkt. 302-1, Ex. 1 ¶¶ 45-50. There is no evidence of any attempt to quell wage competition among the then handful of McDonald's-branded franchised restaurants. Rather, McDonald's was trying to build a system of well-staffed restaurants with well-trained employees who could deliver consistent products and services. *See Polk Bros. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (courts examine procompetitive justifications "at the time [the restraint] was adopted"); *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1111 (9th Cir. 2021) (same).

The core of Plaintiffs' case—the idea that McDonald's was trying to protect corporate-owned restaurants from franchisee wage competition—is an invention of litigation. When Paragraph 14's predecessor was first implemented, McDonald's did not operate any corporate-owned restaurants. SUF ¶ 16. Those restaurants were only developed later as a "testing ground" for new products and systems. *Id.* ¶¶ 17. Since then, McOpCo restaurants have led the way on wage increases and competitive pay ranges across all of their markets. *Id.* ¶¶ 39-40, 43-44. And McDonald's has consistently "encourage[d] [franchisees] to periodically evaluate whether [their] business is competitive, including the wage and benefits packages offered to [their] employees." *Id.* ¶ 47.

This undisputed evidence leaves Plaintiffs to ask the Court to *infer* anticompetitive intent, but there is no basis to do so. "[A]n inference of conspiracy is [not] appropriate" where, as here, "the evidence is consistent with the hypothesis that the firm at the top of the vertical chain designed the restrictions for its own purposes." *Ill. Corp. Travel, Inc. v. Am. Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986). At the time former Paragraph 14 was adopted, McDonald's was a nascent enterprise without market power. *See Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 595 (7th Cir. 2008) (single-brand franchise systems do not confer market power); SUF ¶ 15. And without market power, there was no economically feasible way that a restraint on *intra*brand hiring could suppress wages. *Fishman v. Est. of Wirtz*, 807 F.2d 520, 568 (7th Cir. 1986); *see also Davis-Watkins Co. v. Serv. Merch.*, 686 F.2d 1190, 1202 (6th Cir. 1982) ("Without market power, a firm cannot have an adverse effect on competition."); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("Without market power to increase prices above competitive levels, and sustain them for an extended period, a predator's actions do not threaten consumer welfare.").

Plaintiffs' theory also fails as a matter of both common sense and business sense because the conspiracy would not have provided any economic advantage to McDonald's. While franchisees may wish to cut costs (including wages) to maximize profits, McDonald's must ensure they do not do so to the detriment of the brand. SUF ¶ 25. Moreover, under the franchise agreement McDonald's earns royalties calculated from franchisees' gross revenue—not their profits. *Id.* ¶ 24. This is why McDonald's encourages franchisees to *maximize* competitive wages—to improve service and customer satisfaction, and thus, maximize sales and gross revenues. *Id.* ¶¶ 44-47; *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655-56 (7th Cir. 2002) (the "structure of the market" can be "inimical" to agreement to achieve an alleged unlawful objective). No inference of anticompetitive intent can be taken on this record.

With no evidence of a shared unlawful purpose and unrebutted evidence of procompetitive justifications for former Paragraph 14, summary judgment is appropriate. *See*, *e.g.*, *Miles Distributors, Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 449, 452 (7th Cir. 2007) (affirming summary judgment because plaintiffs failed to offer evidence that defendants "had a conscious

commitment to a common scheme designed to achieve an unlawful objective"); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656, 665 (7th Cir. 1987) (similar).

Second, there is no evidence of a horizontal agreement between each and every franchisee and McOpCo restaurant to refrain from hiring and poaching each other's employees in order to suppress employee wages. To begin, there is no direct evidence of an agreement among franchisees. Each franchise agreement determined the rights and obligations only between McDonald's and the counterparty franchisee. SUF ¶ 10. And as the Department of Justice has explained, parallel signing of franchise agreements, even with "knowledge of others' agreement," does not establish a hub-and-spoke conspiracy. Statement of Interest in *Stigar v. Dough Dough, Inc. et al*, 2:18-cv-00244 (E.D. Wash. 2019), at 14-15 (citing cases); *accord* P. Areeda & H. Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and Their Application ¶ 2013b (4th ed. 2020 supp.). There is no evidence here that proves each of the thousands of McDonald's "franchisees alleged to be part of the combination or conspiracy" in fact "agreed among themselves." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711 (11th Cir. 1984).

To the contrary, voluminous, undisputed evidence shows that no such singular agreement existed among franchisees, including the McDonald's restaurants at which each Plaintiff worked. Start with Ms. Deslandes. SUF ¶¶ 26-38. Her former colleagues and supervisors—including those who made employment decisions—uniformly testified that they were "aware of no conspiracy or other agreement to suppress or otherwise reduce wages of McDonald's brand restaurant employees involving the [Bam-B] Organization or any other entity within the McDonald's system." SUF ¶ 26. Nor did they carry out anything akin to the conspiracy Plaintiffs allege. As one supervisor testified, Ms. Deslandes's former organization never "prevented an employee from leaving to work for another McDonald's restaurant," "hired employees of other McDonald's restaurants in numerous cases," and in many cases "freely re-hired" those who "left to work for another McDonald's restaurant." *Id.* ¶ 32; *see also id.* ¶ 31. Indeed, the owner-operator of that organization often *helped* managers move to other owner-operators. *Id.* ¶ 33. These sentiments were echoed by other local franchisees. *See id.* ¶ 36.

Similarly, Plaintiffs provide no evidence that there was an agreement among McOpCo and franchisee restaurants in the Cincinnati metropolitan region, where Ms. Turner worked, to suppress employee wages through former Paragraph 14. Rather, an owner-operator in that region testified that before this lawsuit was filed, he "was not aware of Paragraph 14" and that the provision "did not matter as to how [he] . . . set wages." SUF ¶¶ 34. And Ms. Turner herself denied the existence of such a conspiracy. *Id.* ¶ 27.

On top of all this, the undisputed evidence shows that the thousands of alleged co-conspirators—other McDonald's restaurants across the country—did not "engage[ ] in parallel conduct" as required to prove a hub-and-spoke conspiracy. *Marion Healthcare, LLC v. Becton Dickinson & Co.*, 952 F.3d 832, 842 (7th Cir. 2020). Instead, franchisee knowledge, understanding, and practices regarding former Paragraph 14 varied wildly. *See* SUF ¶¶ 28-38. Some franchisees freely hired from other McDonald's restaurants without "[taking] paragraph 14 in the franchise agreement into account," or "did not view [Paragraph 14] as relevant when hiring employees or following an employee's resignation." *Id.* ¶¶ 32, 35. One franchisee witness testified that he hired current employees of other McDonald's restaurants. *Id.* ¶ 36. And a vast number of restaurants facilitated employee mobility with release letters, including the restaurant at which Ms. Deslandes was employed. *Id.* ¶¶ 31, 38. There is no evidence that can square these different practices into a single "rim" agreement.

Thus, there is undisputed evidence that many franchisees did not agree to the conspiracy alleged, as well as many places "where no McOpCos compete with franchisees [and therefore] the hiring provision cannot be said to be horizontal" at all, Dkt. 372 at 16-17. Plaintiffs can at most establish "a rimless wheel," not "a single, general conspiracy" as required for their claim. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 (4th Cir. 2002); *see also Kotteakos v. United States*, 328 U.S. 750, 755 (1946) ("[W]ithout the rim of the wheel to enclose the spokes," there is no single conspiracy). The Court should therefore enter summary judgment for McDonald's. *Monsanto*, 465 U.S. at 764; *Impro Prods., Inc. v. Herrick*, 715 F.2d 1267, 1279-80 (8th Cir. 1983) (affirming summary judgment given no evidence of an "*overall*-unlawful plan or 'common design'").

2. Plaintiffs Cannot Prove McDonald's Exercised Market Power in a Properly Defined Relevant Market

Plaintiffs also cannot carry their "threshold" burden of proving "the defendant has market power." *Agnew*, 683 F.3d at 335; *see also Menasha*, 354 F.3d at 663 ("The first requirement in every suit based on the Rule of Reason is market power."). To do so, they must define the relevant local markets and prove that the alleged conspirators could pay workers in those markets artificially suppressed wages significantly below the competitive rate. *Agnew*, 683 F.3d at 335. Because there is no evidence that McDonald's exercises market power in any relevant labor market, judgment should be entered against Plaintiffs. *See*, *e.g.*, *Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655, 661 (8th Cir. 2000) (affirming summary judgment because the "plaintiffs ha[d] made no showing that defendants have market power in the *local* labor market").

To start, Plaintiffs have not even alleged a valid relevant market, having staked their case on *not* needing to prove one. Dkt. 268 at 21; *see also* Dkt. 372 at 20 ("Plaintiffs have made no attempt to identify a relevant market, beyond . . . assum[ing] that plaintiffs sell their labor in one national market."). As a result, "there is no way to measure [McDonald's] ability to lessen or destroy competition," much less for Plaintiffs to prove that McDonald's and its franchisees possessed such power in any particular place. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 (2018); *accord Alston*, 141 S. Ct. at 2151. This alone is fatal. *Agnew*, 683 F.3d at 337; *see also Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 238 F. Supp. 2d 1024, 1034 (N.D. Ill. 2003) (summary judgment entered because plaintiff failed to prove the relevant market); *DSM Desotech, Inc. v. 3D Sys. Corp.*, 2013 WL 389003, at *12 (N.D. Ill. Jan. 31, 2013) (same).

In fact, the relevant markets are nothing like those to which Plaintiffs have alluded. No evidence supports a single-brand labor market limited to McDonald's restaurants. *See* Dkt. 372 at 20-22. To the contrary, the undisputed evidence illustrates that McDonald's restaurants are constantly recruiting from and losing employees to *non*-McDonald's employers. SUF ¶¶ 39, 47-49. And this competition is localized. *Id.* ¶¶ 50-57. The notion that Plaintiffs "sell their labor in a national market . . . defies logic." Dkt. 372 at 20. Thus, there are "hundreds or thousands of local

relevant [labor] markets" across the country in which McDonald's restaurants compete for labor against any number of other employers. Dkt. 372 at 21; *see also Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp.*, 518 F.2d 913, 934 (9th Cir. 1975) (plaintiff cannot expand scope of relevant product market beyond complaint).

Although Plaintiffs have made no attempt to define the local markets in which they sold their labor, undisputed evidence forecloses any argument that McDonald's exercised market power in the Cincinnati and Orlando areas in which Plaintiffs lived and worked. Undisputed evidence shows McDonald's "does not have sufficient market share to have the market power necessary to affect [wages] and therefore harm competition." *Valley Liquor*, 822 F.2d 656, 667.

Relevant competition for the type of labor performed by Plaintiffs generally occurs within a reasonable commuting distance. SUF ¶ 51; *see also* Dkt. 372 at 21. Yet within just three miles of Ms. Deslandes's residence, for example, there were anywhere between *forty-two and fifty* non-McDonald's QSR employers—compared to just one to two McDonald's restaurants. SUF ¶ 52. Within ten miles, there were as many as *517* distinct non-McDonald's QSR employers. *Id.* So too for Ms. Turner, who could work for *253* independent QSR chains (other than McDonald's) and *1,970* retail trade businesses within ten miles of her residence. *Id.* ¶ 53. Nor were these small shops: In Central Florida, for example, McDonald's restaurants squared off against not only other established QSR chains but also behemoths like Amazon, SeaWorld and Disney. *Id.* ¶ 54. McDonald's miniscule market share was thus far below what is needed to unilaterally reduce marketwide wages. *Rebel Oil Co.*, 51 F.3d at 1434; *see also Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1411 (7th Cir. 1995) (33% market share insufficient to infer market power); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403 (7th Cir. 1989) (no market power where there were "ample potential sources of supply" to which customers could turn).

Undisputed evidence corroborates what basic economics predicts: Cincinnati and Orlando were "fiercely competitive marketplace[s]" in which McDonald's restaurants had no ability to

charge artificially suppressed wages. SUF ¶¶ 55-57. McDonald's operators in both areas explained how they determined wages based on competition in the marketplace. *See id.* ¶ 47. And specific examples abound: As one manager testified, "[w]e sometimes offer raises to retain employees sought by other local employers, including quick serve restaurants like Wendy's and retail stores like Wal-Mart." *Id.* ¶ 48. Just as for a seller who cuts prices in response to competitors' price drops, increasing wages to respond to hiring competition is "entirely inconsistent with the exercise of market power." *Com. Data Servers, Inc. v. Int'l Bus. Machines Corp.*, 262 F. Supp. 2d 50, 74 (S.D.N.Y. 2003); *see also Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 827 (6th Cir. 1982) (firm that "followed price changes initiated by other firms . . . lacked the power to control prices" and, therefore, did not possess market power).

Underscoring their inability to create a material question of fact, Plaintiffs have adduced *no* evidence that any particular McDonald's restaurant, much less those in Cincinnati and Orlando, could set wages without reference to prevailing market conditions. Rather, McDonald's "encourage[d] [franchisees] to periodically evaluate whether [their] business is competitive, including the wage and benefits packages offered to [their] employees," and provided them with external wage surveys and analytical tools (such as the "O/O toolkit") to better understand and compete within their local markets. SUF ¶¶ 44, 47. That is because McDonald's understood competitive wages would "help . . . attract and retain the best people for [their] restaurant[s]." *Id.* ¶ 47. This was as true in Cincinnati and Orlando as it was across the country. *Id.* ¶¶ 47-49. This focus on and investment in analyzing competitive marketwide wages belies any ability to depress wages significantly below the competitive rate. *See Agnew*, 683 F.3d at 335.

Moreover, there is no evidence that McDonald's restaurants near Ms. Deslandes and Ms. Turner in fact paid artificially low wages. *See Valley Liquors*, 822 F.2d at 668 (affirming finding of no market power in part because the plaintiff did not establish prices were above the "competitive range"). Plaintiffs' own econometric model shows that wages among Florida McOpCo restaurants were *above* the supposedly competitive rate. SUF ¶ 41. And Ms. Deslandes's own testimony establishes that, between 2007 and 2016, she earned anywhere from $10 to $11 per hour at

Wal-Mart and Hobby Lobby while nearby McDonald's restaurants paid crew, shift managers, and department managers wages from $7 to $14.75. *Id.* ¶ 42. Although Plaintiffs did not adduce in discovery evidence for a similar comparison for Ms. Turner, the median wages for McOpCo crew and swing managers in Louisville, Kentucky (the closest major city to Cincinnati) were $8.40 and $10.81—each *above* the local medians for other quick serve restaurants. *See id.* ¶ 43 (wages paid by the McDonald's restaurants employing Ms. Turner were in line with these medians).

Nor can Plaintiffs exclude from consideration this robust evidence of competition by fashioning local single-brand markets. Their single-brand theory hinged on the allegation that McDonald's training conferred "brand-specific skills," Dkt. 268 at 6, but both Ms. Deslandes and Ms. Turner admitted that their McDonald's experience *was* transferable. SUF ¶ 63. Ms. Deslandes even lied to potential employers about attending Hamburger University because of its externally recognized value, *id.* ¶ 64, and Ms. Turner demonstrated the transferability of her training by weaving in and out of the McDonald's system between stints at hotels and other restaurants, *id.* ¶ 65; *see also* Dkt. 302-1, Ex. 2, Fig. 9. Ms. Deslandes's undisputed employment history also demonstrates that she took advantage of the diverse employment options in Apopka, Florida, by working for Walmart and Hobby Lobby in addition to McDonald's. SUF ¶ 66. Considering this evidence, "it cannot plausibly be said" that an alleged market "limited to labor at [one franchise system] . . . 'encompass[es] all interchangeable substitute products.'" *Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp.*, 624 F. App'x 23, 29 (2d Cir. 2015). In sum, there is no evidence that in either Cincinnati or Orlando McDonald's restaurants had the necessary market power to suppress wages. There is instead robust undisputed evidence of interbrand competition that influenced the wages paid by McDonald's restaurants. "It follows that any restraint on competition was reasonable and that summary judgment [is] therefore appropriate." *Bi-Rite Oil Co. v. Indiana Farm Bureau Coop. Ass'n*, 908 F.2d 200, 204 (7th Cir. 1990).

C. Ms. Deslandes's and Ms. Turner's Claim Is Time-Barred

Finally, Plaintiffs' claim is barred by the Sherman Act's four-year statute of limitations. 15 U.S.C. § 15b. Under the discovery rule, the clock started running on "the date when [they]

discover[ed] [they] ha[d] been injured." *In re Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006) (internal quotation marks omitted). Ms. Turner admitted she knew about former Paragraph 14 more than twenty years ago. SUF ¶ 61. And according to Ms. Deslandes's sworn complaint to the EEOC, the alleged violation that made her a "direct victim of the 'no-solicit' and 'no-hire' agreement," Dkt. 32 ¶ 101—a franchisee's refusal to grant her a release—transpired in 2013 (not 2015 as she alleges in this case). SUF ¶ 62. It is therefore undisputed that both Plaintiffs learned of "the injury" more than four years before they sued. *Cancer Found., Inc. v. Cerberus Capital Mgmt., LP*, 559 F.3d 671, 675 (7th Cir. 2009).

Plaintiffs cannot invoke the continuing violation doctrine to resuscitate their time-barred claim. To be sure, the Court found Ms. Turner had not *pleaded* herself into a time-bar under that doctrine. *Turner v. McDonald's USA, LLC*, No. 1:19-cv-05524, Dkt. 64 at 8 (N.D. Ill. Apr. 24, 2020). But contrary to the allegations in her complaint and Ms. Deslandes's complaint, the actual *evidence* shows that Ms. Turner and Ms. Deslandes learned about former Paragraph 14 outside the limitations period. SUF ¶¶ 61-62. As a matter of law, the continuing violation doctrine is inapplicable where, as here, Plaintiffs had actual knowledge of the challenged restraint. *Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 707-08 (7th Cir. 2002); *see also Filipovic v. K & R Exp. Sys., Inc.*, 176 F.3d 390, 396 (7th Cir. 1999) ("The continuing violation doctrine is applicable only if 'it would have been unreasonable to expect the plaintiff to sue before the statute ran.'").

The doctrine of laches also forecloses Plaintiffs' claim in any event. Laches ensures "[t]he notion of a 'continuing wrong'" cannot "reward . . . dilatory conduct." *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 821 (7th Cir. 1999). So where, as here, "the [alleged] injury is immediate and manifest and is close in time with the allegedly [illegal] conduct, the claim accrues instantly and is untimely" unless promptly filed. *Steele v. United States*, 599 F.2d 823, 829 (7th Cir. 1979).

V. Conclusion

For the foregoing reasons, McDonald's requests that the Court grant McDonald's motion and enter judgment against each of the Plaintiffs, whether on the pleadings or summary judgment.

Dated: October 26, 2021

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

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CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE SUMMARY JUDGMENT** was electronically filed on October 26, 2021 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

/s/ *Rachel S. Brass*
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