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 Magistrate Judge M. David Weisman
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' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO McDONALD'S MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON McDONALD'S ASSERTED JUSTIFICATIONS

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INTRODUCTION

McDonald's motion is based upon a misunderstanding of the challenged conduct. According to McDonald's, the No-Hire Agreement is limited to one paragraph of a purely vertical franchise contract, designed by Ray Kroc in 1955. This factual premise is necessary to McDonald's extraordinary argument that the real-world economic effects of the No-Hire Agreement are irrelevant to assessing the restraint's reasonableness. Instead, McDonald's seeks to limit the liability inquiry to hearsay and speculation about Ray Kroc's subjective intentions.

But this is not a breach of contract case regarding a written agreement made in 1955. This is an antitrust conspiracy case, seeking damages for suppressed wages from June 28, 2013 to July 12, 2018. At trial, Plaintiffs will prove that, by 2013, McDonald's joined a horizontal market allocation scheme, whereby competing McDonald's restaurant owners—franchisor-owned and franchisee-owned alike—reached a common understanding not to compete for each other's workers. If the jury so finds, McDonald's liability will be conclusively determined under the *per se* rule. McDonald's contends this fact question cannot be put to the jury because there is "*no* evidence" to support it. Mot. at 6 (emphasis in original). McDonald's is mistaken.

Between 1955 and 2013, McDonald's and its franchisees signed *thousands* of franchise contracts, with both new and existing franchisees, since McDonald's franchise contracts required renewal at least every 20 years. SAMF[1] ¶ 1. Thus, even under McDonald's distorted view of this case, the oldest operative franchise contract in place during the class period was created in 1993, not 1955. By that time, McDonald's competed with its franchisees for restaurant labor throughout the country. SMF[2] ¶ 4. The continued and universal use of Paragraph 14 in McDonald's franchise contracts was not a competitively benign attempt to honor the memory of Ray Kroc (who passed away in 1984). It was an effective tool to allocate labor markets, remaining unchanged for [redacted] which former McDonald's Vice President James

[1] "SAMF" refers to Plaintiffs' Statement of Additional Material Facts, contained in Plaintiffs' Responses to McDonald's Statement of Undisputed Material Facts, filed herewith.
[2] "SMF" refers to Plaintiffs' Statement of Material Facts, filed herewith.

Kramer confirmed were [redacted]. SMF ¶ 8.

In addition, the common understanding Plaintiffs challenge went beyond the four corners of McDonald's franchise contracts. While the *public* contracts imposed no restriction on McDonald's ability to hire workers from its franchisees, in *private*, McDonald's assured its franchisees it would reciprocate the restraint. SMF ¶ 7. Throughout, McDonald's refused to hire franchisees' managers without those franchisees' consent. *Id*. In addition, in 2015, [redacted]. *Id*. ¶¶ 9-10. [redacted] *Id*. McDonald's agreed to extend its covert reciprocation of the restraint to cover franchisee crew workers, so that franchisees would not need to increase their worker pay to match McOpCo's increase. *Id*. ¶ 11. This secret arrangement was not mentioned in the "talking points" from McDonald's legal, but was confirmed in a private memo from McOpCo President Charles Robeson to McDonald's USA President Michael Andres. *Id*. The jury may reasonably infer from this and other evidence that McDonald's joined a horizontal market allocation scheme—a *per se* violation of the Sherman Act.

By defending only long-defunct contracts from 1955, McDonald's confirms what observable market facts already make clear: the No-Hire Agreement was unnecessary to any legitimate competitive benefit during the relevant time period. *See, e.g.*, SMF ¶¶ 37-52. Regardless of the mode of analysis, Plaintiffs satisfy their initial burden to show anticompetitive effects, while McDonald's cannot satisfy its burden to justify the restraint.

Under the *per se* rule, liability is conclusively determined upon proof of the No-Hire Agreement, so that evidence of purported competitive benefits is irrelevant and inadmissible. Under an appropriately tailored version of the rule of reason, the No-Hire Agreement is presumptively unreasonable. The burden would then shift to McDonald's to prove that the No-Hire Agreement was reasonably necessary to legitimate competitive benefits. McDonald's

cannot satisfy this burden, and admits that the No-Hire Agreement was unnecessary to the invalid and unsupported justifications it asserts. Under more searching versions of the rule of reason, Plaintiffs satisfy their initial burden by providing direct evidence of anticompetitive effects: nationwide pay suppression. *See, e.g.*, SMF ¶¶ 68-76. The burden on McDonald's would then increase, also requiring proof that there was no reasonably available alternative to the No-Hire Agreement. This is impossible for McDonald's to satisfy, since it voluntarily eliminated all restraints on labor competition in 2017, to avoid "scrutiny by various antitrust authorities." Defs.' Statement of Facts ¶ 59. The admitted result from McDonald's own CEO has been "record cash flow" to franchisees, who "have never been in a better financial position than they are right now. So our franchisees absolutely have the firepower to make these investments." SMF ¶ 51. There is no evidence that eliminating the No-Hire Agreement worked against the *post hoc* justifications conjured by McDonald's legal team.

The Court should deny McDonald's motion and grant Plaintiffs' cross motion for summary judgment regarding McDonald's asserted defenses.

LEGAL STANDARDS

A party may move for summary judgment on a claim or defense, or "part" of a claim or defense. Fed. R. Civ. P. 56(a). A summary judgment motion "shall" be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* A factual dispute is not material if it involves "irrelevant or unnecessary" facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). It is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Once the moving party puts forth evidence showing the absence of a genuine dispute of material fact, the burden shifts to the non-moving party to provide evidence of specific facts creating a genuine dispute." *Carroll v. Lynch*, 698 F.3d 561, 564 (7th Cir. 2012). On issues where the nonmovant bears the burden, the moving party discharges its initial burden simply by "point[ing] out to the district court" "that there is an absence of evidence to support the nonmoving party's case." *Modrowski v. Pigatto*, 712 F.3d 1166, 1168 (7th Cir. 2013). All

evidence must be construed in favor of the nonmoving party. *Kvapil v. Chippewa Cty.*, 752 F.3d 708, 712 (7th Cir. 2014).

In antitrust cases, Defendants bear the burden of "show[ing] a procompetitive rationale for [a] restraint." *Nat'l Collegiate Athletic Assoc. v. Alston*, 141 S. Ct. 2141, 2160 (2021). Defendants may only advance such justifications under the rule of reason and quick-look test. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). A defendant must "come forward with evidence of the procompetitive virtues of the alleged wrongful conduct," not mere speculation or assertions. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *see also* ABA Section of Antitrust Law, Model Jury Instructions, Instruction 3C, Notes (2016 ed.) ("Defendant has the burden of producing evidence regarding the existence of competitive benefits"). Further, the proffered justifications may be considered only to the extent that they tend to show that "the challenged restraint enhances competition." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984).

Valid procompetitive justifications may include enabling the existence of a product that would otherwise be unavailable, *see, e.g.*, *Bd. of Regents*, 468 U.S. at 102, and preventing market failures and efficiency-reducing externalities such as free-riding, *see, e.g.*, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890-91 (2007). However, free-riding is not a viable defense if the entity supposedly benefiting from a free ride in fact must pay for it. *See, e.g.*, *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) ("What gives this the name *free*-riding is the lack of charge.").

On the other hand, a defendant may not justify a restraint on the grounds that it promotes an interest unrelated to economic competition. *See, e.g.*, *Law*, 134 F.3d at 1021-22 (the "social value" of a restraint's effects are irrelevant if unconnected to competition); *F.T.C. v. Sup. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990) (desire of public defenders to improve quality of representation by boycotting court-appointed work not valid justification); *F.T.C v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-64 (1986) (professional goal of ensuring quality dental care not valid procompetitive end). Nor may a defendant justify a restraint on the grounds that it

helps reduce costs or boost profits. *Law*, 134 F.3d at 1022 ("cost-cutting by itself is not a valid procompetitive justification"). Finally, in a monopsony case, a defendant may not point to lower prices or similar benefits in the downstream consumer market to justify an agreement "among buyers with power over their suppliers." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1504c (4th ed. 2021) (hereinafter "*Areeda*"). Such defenses "impl[y] power over price," and thus are "tantamount to an acknowledgement that the restraint at issue is naked—and thus that the objective is illegitimate." *Id.*

ARGUMENT

I. The No-Hire Agreement Is Unlawful *Per Se*

If the jury finds that McDonald's joined the No-Hire Agreement, liability should be conclusively established under the *per se* rule. "[B]ecause a no-hire agreement is, in essence, an agreement to divide a market, the Court has no trouble concluding that a naked horizontal no-hire agreement would be a *per se* violation of the antitrust laws." Order Denying Motion to Dismiss, *Deslandes*, Dkt. 53 at 12 (collecting authority). McDonald's does not dispute that a no-hire agreement between horizontal competitors in the labor market would be a *per se* violation. Instead, it contends that it is entitled to summary judgment because there is "*no* evidence" that the alleged No-Hire Agreement existed. Mot. at 6 (emphasis in original). McDonald's is wrong.

A. The No-Hire Agreement Extended Beyond Paragraph 14

According to McDonald's, the No-Hire Agreement was fully set forth in Paragraph 14 of McDonald's franchise agreement, purportedly designed by Ray Kroc himself in 1955. Mot. at 7. McDonald's contends the restraint can only be understood as discrete vertical agreements between McDonald's and each of its individual franchisees. "But this is not a contracts case in which the scope of the alleged anticompetitive agreement is cabined by the four corners of the written document. Not confined by the parol evidence rule, [Plaintiffs] could use all manner of extrinsic evidence to persuade a jury that what the [restaurant owners] actually agreed to was a naked [market division]." *In re Wholesale Grocery Prod. Antitrust Litig.*, 752 F.3d 728, 733–34

(8th Cir. 2014). Such extrinsic evidence is particularly probative if the alleged co-conspirators agreed to eliminate competition otherwise permitted by the terms of the written contract. *Id*.

No-Hire Reciprocation. Paragraph 14 prohibited franchisees from competing for employees of the franchisor (McDonald's) or the employees of other franchisees, but did not prohibit McDonald's from competing for franchisee employees. SMF ¶¶ 6-7. However, the No-Hire Agreement was a horizontal understanding that went beyond the four corners of the franchise contracts, "extend[ing] both ways mutually between the owner/operators and the company owned restaurants." SMF ¶ 7. This covert reciprocation was never included in franchise contracts, despite the fact that new franchise contracts were being created continuously and renewed every 20 years. SAMF ¶ 1. Moreover, the horizontal character of the agreement is confirmed by the fact that, [redacted] SMF ¶ 8. Thus, during the relevant time period, Paragraph 14 was not a unilateral policy of a franchisor seeking to maximize efficiency within its system, but rather, the product of a common understanding between horizontal competitors to reduce competition among them. Indeed, antitrust scholar Herbert Hovenkamp has explained that such no-hire policies run contrary to a franchisor's unilateral economic interest, because they reduce the allocative efficiency of labor resources and thus overall output of a franchise system.[3]

McDonald's covert reciprocation was also clearly linked to suppressing worker pay. For instance, in 2015, McDonald's announced it would raise the pay of its McOpCo restaurant workers. SMF ¶ 9. If McDonald's litigation-driven arguments about relevant markets were correct, franchisees would have reacted with indifferent shrugs, since, according to McDonald's,

[3] *See* Herbert J. Hovenkamp, *Competition Policy for Labour Markets*, U. of Penn. Inst. for Law & Econ. Research Paper No. 19-29 at 12 (May 17, 2019) (explaining that "it is in a firm's best interests to use its employees in the most profitable way, and if an employee is valued more at a different location the firm will agree to the move," so franchisors would not be expected to forbid such movement, in contrast to "individual franchisees [who] maximize the value of their individual locations," which "inclines them to be more resistant to inter-firm movement that might deprive them of valued workers"), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3421036.

worker pay was determined entirely by market forces outside the McDonald's system. In reality, however, the franchisees were "upset beyond words" with McDonald's, and scrambled to determine what it would cost to increase pay to their own workers to match. SAMF ¶ 3. Indeed, McDonald's itself knew [redacted]. SMF ¶¶ 9-10. But rather than allow market forces to determine worker pay, McDonald's [redacted]. *Id.* They discussed [redacted] *Id.* In order to alleviate wage pressure on franchisees, McDonald's agreed to expand the No-Hire Agreement so that McDonald's would not compete for franchisee crew workers located within 25 miles of a McDonald's-owned restaurant. *Id.* ¶ 11. The franchisees did not need to worry about pay pressure on their managers, since McDonald's had long-since reciprocated the restraint with respect to managers, without any geographic limitation. *Id.* ¶¶ 7, 18.

Horizontal Restraint Amongst Franchisees. Similarly, the express terms of Paragraph 14 did not provide franchisees with a mechanism to enforce the restraint against each other, nor was it clear from the face of the franchise contract that the same restraint applied to all franchisees. However, since the No-Hire Agreement was a common understanding among McDonald's restaurant, they worked out a common mechanism to enforce the restraint: by requiring a "letter of release" from any current McDonald's employer.[4] SMF ¶¶ 7, 13-15. The

[4] Allowing mobility only upon permission of the current employer is itself a *per se* violation of the antitrust laws. A market allocation agreement "need not foreclose all possible avenues of competition" to fit under the *per se* rule. *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (applying *per se* rule to attorneys' agreement to divide market by limiting advertising by geography). *See also United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1371-73 (6th Cir. 1988) (rejecting argument that the "limited nature" or less "extensive" restraint on only active solicitation of competitor accounts, which did not involve "explicit price fixing agreements or allocation of specific [employees] according to geographic location or enforcement of agreements through coercion," was any less a *per se* violation than other market allocation agreements). *See also* ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases 31 (2016 ed.) ("Model Instructions"): "Evidence of Competition: . . . it is no defense that defendants actually competed in some respects with each other or failed to eliminate all competition between them." (collecting authority).

record contains ample evidence demonstrating release decisions were made directly between horizontal franchisees, and also that McDonald's corporate human resources directed employees to raise these issues with their franchisee employers. *Id.*

The facts that McDonald's directly competed with its franchisees for labor, and that the No-Hire Agreement relieved them of that competition, render irrelevant McDonald's arguments that the No-Hire Agreement can only be understood as a hub-and-spoke conspiracy without a "rim."[5] At trial, Plaintiffs will prove the No-Hire Agreement is a horizontal market allocation scheme, in which *every* participant—including McDonald's—employed the same categories of workers subject to the challenged restraint. Further, the No-Hire Agreement's horizontal character does not vary by geographic area, depending upon whether McDonald's operated a restaurant in any particular region or not. Market allocation agreements are *per se* unlawful "regardless of whether the parties split a market within which both do business or [not]." *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990). The No-Hire Agreement applied *nationwide*, exempting not a square inch of geography from its anticompetitive reach. SMF ¶ 18.

There is thus ample evidence for the jury to conclude that McDonald's joined a horizontal market allocation agreement. This is a genuine dispute of material fact for the jury to resolve at trial. "The crucial factual question here: What are the terms of the allegedly anticompetitive agreement? Perhaps there are aspiring [wage-fixers] foolish enough to reduce their entire anticompetitive agreement to writing, which would make the answer easy. But most would-be [wage-fixers] probably can be expected to display a bit more guile, jotting down only a few seemingly common terms while sealing their true anticompetitive agreement with a knowing nod and wink. If [Plaintiffs'] evidence is accepted, that is what happened here." *Wholesale Grocery*, 752 F.3d at 733-35.

[5] McDonald's authority confirms Plaintiffs need only show that "[McDonald's] and those of its franchisees alleged to be part of the combination or conspiracy agreed among themselves as to the [restraint]." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 711 (11th Cir. 1984). Unlike here, *Midwestern Waffles* and McDonald's remaining authorities on this topic involved *only* vertical restraints.

B. The No-Hire Agreement Was Not Ancillary To McDonald's Franchise Contracts

The No-Hire Agreement was not ancillary to McDonald's franchise contracts because the common understanding in restraint of trade went beyond the express terms of Paragraph 14, and included anticompetitive terms adopted long after the franchise relationships were established. *See Blackburn*, 53 F.3d at 827-29 (holding that restraint post-dating transaction is "naked" not "ancillary" because it cannot be necessary to it). Moreover, even with respect to Paragraph 14, "a restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful." *Areeda* ¶ 1908b. *Accord Blackburn*, 53 F.3d at 827-29; *Bd. of Regents*, 468 U.S. at 110 (describing restraint as "naked" even though it was part of larger contract and collaborative activity); *Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 37 (D.C. Cir. 2005) (restraint in joint venture "naked" when it concerned a product outside the collaboration). Otherwise, any savvy businessperson could shield an anticompetitive restraint by placing it within a broader contract.

Rather, to be ancillary, a restraint must be both essential to the overall arrangement, and commensurate with it, meaning that it is no broader than reasonably necessary to accomplish a procompetitive integration. *See Areeda* ¶¶ 1908b, 1908c, 1912c2; *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) (applying rule of reason when the restraint was *necessary* to the economic collaboration); *Law*, 134 F.3d at 1021 ("the only legitimate rationales that we will recognize . . . are those necessary to produce competitive intercollegiate sports").[6]

The No-Hire Agreement flunks both tests. It could not have been essential to establishing new franchise relationships, or McDonald's would not have been able to continue

[6] *See also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987) (to be ancillary, "an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. . . . If [the restraint] is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary"); *Nat'l Bancard Corp. v. Visa USA Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) (restraint is ancillary only "if it is no greater than reasonably necessary to achieve a legitimate commercial objective (i.e., has a procompetitive purpose), has no substantial anticompetitive impact, and is no broader than necessary to accomplish its procompetitive goals"); *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) ("a restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits").

growing its franchise system after announcing it would stop enforcing the No-Hire Agreement. SMF ¶ 50. And it can hardly be "essential" to McDonald's franchise system—that is, "an inherent feature of the joint venture," *Areeda* ¶ 1908b—given that McDonald's and each franchisee emphasize that franchisees' employment relationships are outside the scope of their collaboration, and that McDonald's has no right to control the terms and conditions of employment for franchisees' workers. SMF ¶ 3. *Accord Polygram*, 416 F.3d at 37 (agreement to stop marketing albums that were not part of joint collaboration was "naked," not ancillary). Indeed, the Washington Attorney General confirmed that one-third of the franchise systems it investigated never had such restraints at all—and *over 200 other franchisors*, like McDonald's, voluntarily removed them after the investigation. SMF ¶¶ 24-25. Suppressing worker mobility was unnecessary to McDonald's franchise system.

Further, the No-Hire Agreement was wildly overbroad. It was not bound by time or geography. It applied for the entire duration of every employee's tenure, plus six months thereafter. *Blackburn*, 53 F.3d at 828 (holding market division not ancillary where "[t]here is no time limit"); *Areeda* ¶ 1908f ("No further inquiry into power or effects is necessary once the excessiveness of the restraint in relation to the underlying transaction is clear."). It was not limited to some reasonable time sufficient to recoup up-front training costs, and was not limited to the most highly-trained employees. It restrained those recently hired and those who worked for the same franchisee for over ten years. It applied regardless of whether a worker wanted to move to a franchisee five blocks away, or to one five states away, and regardless of whether the franchisee itself was new or old, along the side of the highway or in the heart of Chicago. This is precisely why Professor Hovenkamp, upon reviewing McDonald's No-Hire Agreement, observed that "a blanket prohibition on inter-franchisee hiring seems egregiously excessive and raises significant competitive concerns," including that "the real initiative for these franchise

wide agreements" is "cartel suppression of wages."[7] This overbreadth alone precludes a holding that the No-Hire Agreement qualifies as ancillary.[8]

McDonald's contends that the Court should ignore all of this, and instead assess ancillarity by divining the subjective intent of Ray Kroc in 1955. Mot. at 7. But Plaintiffs do not challenge an agreement made in 1955, because no franchisee in business during the damages period (beginning June 2013) was bound by the terms of a 1955 agreement—the franchise agreements have terms of twenty years. The oldest relevant franchise contract would have been created or renewed no earlier than 1993. McDonald's makes no effort to support a finding of ancillarity as to that date or later. *See* Section II.D, *infra*. Indeed, nearly all of McDonald's franchisees employing workers during the class period did not even exist in 1955. McDonald's provides zero contemporaneous evidence of the purpose or effects of Paragraph 14, irrespective of the time period at issue. As to its purported justifications, McDonald's *required* that franchisees invest in training their employees, and cooperate with each other and with McDonald's in advertising and other efforts to promote the overall brand. SMF ¶¶ 37-49. Indeed, failure to do so can result in being ineligible for renewal of the franchise. *Id*. ¶¶ 43-44. None of McDonald's training and cooperation requirements have changed since the No-Hire Agreement ended. *Id*. ¶¶ 37-49, 52. In any case, no version of Paragraph 14 ever disclosed other terms of the No-Hire Agreement, like McDonald's reciprocation in its market role as a horizontal competitor for franchisee workers, or the methods by which franchisees enforced and monitored compliance. SMF ¶¶ 6-7.

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[7] Hovenkamp, *supra* n.3, at 12-13.

[8] *See, e.g.*, *Bd. of Regents*, 468 U.S. at 119 (condemning restraint that was "not even arguably tailored to serve such an interest"); *Eli Lilly & Co. v. Zenith Goldline Pharm., Inc.*, 172 F. Supp. 2d 1060, 1072 n.14 (S.D. Ind. 2001) (denying defendant's summary judgment argument that restraint was ancillary, holding, "[b]y limiting all cefaclor sales by Dobfar, the Lilly–Dobfar contract goes one step too far, thereby defeating Lilly's argument that the agreement was ancillary"); *Areeda* ¶ 1908f (Even when local restraints may be justified, "nothing would justify a *nationwide* restriction on competition. . . . That agreement should be treated as a naked restraint. No further inquiry into power or effects is necessary once the excessiveness of the restraint in relation to the underlying transaction is clear.") (emphasis in original).

The No-Hire Agreement was not ancillary to McDonald's franchise system, and thus should be assessed as the naked restraint of trade it was.[9]

C. Subjective Intentions Are Irrelevant and Inadmissible

McDonald's contends that Plaintiffs must have evidence that the conspirators subjectively intended for the No-Hire Agreement to suppress worker pay. Mot. at 6. This misstates the law. The express language of Paragraph 14 (to say nothing of other aspects of the No-Hire Agreement) sets forth a market allocation agreement, and agreements to divide markets are just as unlawful as agreements to directly fix wages. *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Assn.*, 744 F.2d 588 592 (7th Cir. 1984) ("horizontal market division is illegal per se even if price fixing is not present") (citing *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609 at n.9 (1972)). The "objectively measured and likely consequence of the restraint is more important than the defendants' actual states of mind. The purpose of the rule identifying naked restraints is to enable relatively expeditious assessments of restraints. As a general matter this is best accomplished by avoiding inquiries into the defendants' actual state of mind. Indeed, the defendants' state of mind is not even the determinative factor: a restraint might still be naked even though it is well intended." *Areeda* ¶ 1906c at 285 (citing *Bd. of Regents*, 468 U.S. 85, and *Nat'l Soc. of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978)).

At trial, liability should be conclusively established upon a jury finding that McDonald's joined a market allocation agreement. There will be no additional requirement that, in doing so, McDonald's (or anyone else) subjectively intended for the market allocation agreement to suppress worker pay. *See, e.g.*, Model Instructions, at 36-40 (instructions for various kinds of market allocation agreements). Indeed, the jury should be instructed that subjective intent is irrelevant, and the Court should exclude such evidence at trial. *Id.* at 29 ("Good Intent Not a Defense: . . . it is not a defense that defendant acted with good motives, thought its conduct was

[9] Contrary to McDonald's suggestion, *Pearse v. McDonald's Sys. of Ohio, Inc.*, 47 Ohio App. 2d 20 (1975), did not evaluate whether Paragraph 14 violated the antitrust laws, and did not consider other aspects of the No-Hire Agreement, like McDonald's reciprocation. *Pearse* does not establish Paragraph 14's lawfulness.

legal, or that the conduct may have had some good results.") (collecting authority). This has long been black letter antitrust law, and McDonald's cites no case to the contrary.[10]

II. Plaintiffs Satisfy Their Burden Under Any Appropriate Version of the Rule of Reason, While McDonald's Cannot

A. Plaintiffs Are Not Precluded From Proving Their Sherman Act Claim

McDonald's contends that Plaintiffs have "waived" their Sherman Act claim if the Court selects the rule of reason mode of analysis. Mot. at 5. To the contrary, while Plaintiffs properly pled their Sherman Act claim, it is McDonald's that never pled the (illegitimate and meritless) defenses it now asserts.

In their pleadings, Plaintiffs were obligated to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Plaintiffs stated a claim for violations of Section 1 of the Sherman Act, and supported that claim with detailed factual allegations, explaining that they sought to recover suppressed pay caused by an unreasonable restraint of trade among owners of McDonald' restaurants to suppress competition for each other's employees. *Deslandes*, Dkt. 32; *Turner*, Dkt. 1. Plaintiffs explained how the No-Hire Agreement suppressed Class pay by providing McDonald's restaurant owners with illegitimate market power over their workers (*Deslandes*, Dkt. 32 ¶¶ 10, 11, 14, 23-38, 59-116; *Turner*, Dkt. 1 ¶¶ 7-17, 27-42, 63-115), and explained that it was unlawful because it "was not reasonably necessary to, and did not add to the success of, any legitimate procompetitive benefit or joint venture, nor did it promote enterprise or productivity when it was adopted or any time since." *Turner*, Dkt. 1 ¶ 2. *See also Deslandes*, Dkt. 32 ¶¶ 23-38, 72-109; *Turner*, Dkt. 1 ¶¶ 7-17, 27-42, 72-113.

The *per se* and rule of reason tests are not different legal claims, but rather different methods of evaluating the same legal claim under Section 1 of the Sherman Act. *See Always Towing & Recovery, Inc. v. City of Milwaukee*, 2 F.4th 695, 704 (7th Cir. 2021) (explaining "the

[10] Here, again, McDonald's authorities are inapposite because they concern not horizontal market divisions—where intent is irrelevant—but strictly vertical restraints. *See Miles Distributors, Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442 (7th Cir. 2007) (plaintiff failed to support vertical conspiracy claim); *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987) (same).

per se, rule of reason, and quick look analyses" "are meant to answer the same question: whether or not the challenged restraint enhances competition") (quotations and citations omitted). "A plaintiff need not plead legal theories," and "when a plaintiff does plead legal theories, it can later alter those theories, and there is no burden on the plaintiff to justify altering its original theory" so long as the factual basis is consistent with the original complaint. *BRC Rubber & Plastics, Inc. v. Cont'l Carbon Co.*, 900 F.3d 529, 540-41 (7th Cir. 2018).

That is the case here, where the factual basis for Plaintiffs' Sherman Act claim is entirely consistent with their complaints, and simply reflects the evidentiary record already developed. There is no requirement that Plaintiffs amend their complaints to include the voluminous record,[11] and doing so would serve no purpose, as the underlying Sherman Act claim has remained the same throughout. *See, e.g., In re Processed Egg Prod. Antitrust Litig.*, 206 F. Supp. 3d 1033, 1051-53 (E.D. Pa. 2016) (permitting plaintiffs to pursue antitrust claims under the rule of reason though not alleged in complaint), *aff'd*, 962 F.3d 719 (3d Cir. 2020). Plaintiffs' antitrust claims should be considered on the merits.

If the pleadings have any preclusive effect relevant to the disposition of these motions, it should be to preclude McDonald's from asserting defenses that are wholly unpled in its answers. McDonald's was obligated to "state its defenses to each claim asserted against it," and to "affirmatively state any . . . affirmative defense." Fed. R. Civ. P. 8(b)(1)(A), 8(c)(1). McDonald's failed to do so. *Deslandes* Dkt. 69, *Turner* Dkt. 67. Unlike Plaintiffs, who provided detailed factual allegations in support of their antitrust claim that the No-Hire Agreement was an unreasonable restraint of trade, McDonald's pled *nothing* to support or even identify its defense that the No-Hire Agreement was ancillary to its franchise system or that it benefited competition. *Williams v. Lampe*, 399 F.3d 867, 870-71 (7th Cir. 2005) (failure to plead

[11] Indeed, this was not even possible, because the Court's 30-day deadline for Plaintiff Deslandes to amend her complaint passed before discovery had even begun. No such deadline was imposed upon Plaintiff Turner. The Court never set a deadline in either case for Plaintiffs to otherwise amend their complaints. If the Court finds that the complaints should be amended to reflect the evidence already obtained in discovery, it should provide Plaintiffs an opportunity to do so before granting a motion for judgment on the pleadings. *See* Fed. R. Civ. 15(b); *Edwards v. City of Goldsboro*, 178 F.3d 231, 241-43 (4th Cir. 1999); *Ideal Steel Supply Corp. v. Anza*, 652 F.3d 310, 325 (2d Cir. 2011).

affirmative defense in answer waives the defense unless leave to amend is granted); *Bd. of Regents*, 468 U.S. at 113 (procompetitive justifications are "an affirmative defense").

B. The No-Hire Agreement Is Presumptively Unreasonable

As explained above, the No-Hire Agreement should be conclusively condemned under the *per se* rule. In the alternative, the No-Hire Agreement should be presumptively unreasonable pursuant to an appropriately truncated version of the rule of reason.

As the Court previously observed, the manifestly anticompetitive character of the No-Hire Agreement should, at the very least, give rise to a rebuttable presumption of unreasonableness. Dkt. 53 at 8-16. As the lead author of the nation's primary antitrust treatise has explained, "broad limitations on inter-franchise transfer of employees [should] be regarded with suspicion," and purported justifications "should not be accepted without clear proof that they apply in a particular case," because even cursory examination of the restraint suggests that "the real initiative for . . . franchise wide agreements covering all types of employees is . . . cartel suppression of wages." Hovenkamp, *supra* n.3, at 12-13. Plaintiffs satisfy their initial burden by showing that a horizontal market allocation agreement existed, and that McDonald's joined it. These are genuine disputes of material fact for the jury to resolve.

The burden then shifts to McDonald's to justify the restraint. To avoid condemnation under quick-look, McDonald's must show that the No-Hire Agreement was reasonably necessary (in other words, ancillary) to its franchise system. *See Areeda* ¶ 1908b. When the Supreme Court applied quick-look in *Board of Regents*, the challenged restraint was condemned as "naked" once the NCAA failed to show that the broadcasting restraint was reasonably necessary to the joint delivery of college football. 468 U.S. 85, 113-115. This requires a "plausible connection between the specific restriction and the essential character of the [main transaction]." *Gen. Leaseways*, 744 F.2d at 595 (condemning horizontal market allocation where "no reason has been suggested" why reciprocal truck *servicing* agreement required participants not to compete with each other in truck *leasing*: "The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a

horizontal agreement not to compete from the per se to the Rule of Reason category."). *See also* Section I.B, *supra*.

McDonald's burden, moreover, is to show "empirical evidence of procompetitive effects." *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 775 n.12 (1999). McDonald's must do more than merely assert procompetitive justifications, it must prove they are sound and legitimate before any additional burden is placed on the Plaintiffs. *Chicago Pro.*, 961 F.2d at 672-76 (scrutinizing and rejecting claimed benefits such as controlling free-riding); *Law*, 134 F.3d at 1021 (applying quick-look, examining and rejecting procompetitive justifications, because none proved that the restraint was "necessary to produce competitive intercollegiate sports").

As explained herein, the No-Hire Agreement was unnecessary to McDonald's franchise system (and certainly so during the time period that matters, *i.e.*, decades after 1955), and McDonald's purported competitive benefits are meritless. At worst, whether the No-Hire Agreement was reasonably necessary to legitimate competitive benefits is a jury question.

C. Plaintiffs Also Satisfy Their Burden Under More Demanding Versions of the Rule of Reason

Even if the Court applies a more expansive version of the rule of reason, McDonald's motion should still be denied and Plaintiffs' cross-motion should still be granted.

Under the full rule of reason, the initial burden on Plaintiffs would include persuading the jury that the No-Hire Agreement substantially harmed competition. The rule of reason is not a "rote checklist," nor is it "an inflexible substitute for careful analysis." *Alston*, 141 S. Ct. at 2160. The "whole point" of the rule of reason "is to furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint[.]'" *Id.* (quoting *California Dental*, 526 U.S. at 781). "Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for inquiry into market power, which is but a surrogate for detrimental effects." *Indiana Dentists*, 476 U.S. at 460-61 (quotation omitted). When "adverse effects are directly observable . . . [s]urrogates for those

effects are not needed." *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 754 F. Supp. 1336, 1363 (N.D. Ill. 1991), *aff'd*, 961 F.2d 667 (7th Cir. 1992) ("Under the circumstances, market power is not a prerequisite to condemnation under the Rule of Reason.").[12]

Here, Plaintiffs provide significant evidence of detrimental effects, by directly observing that the No-Hire Agreement suppressed worker pay nationwide. SMF ¶¶ 68-76. This is not only sufficient to satisfy Plaintiffs' burden under the rule of reason, it is *preferable* to indirect forms of proof that are only a "surrogate" for the direct evidence Plaintiffs provide. *Indiana Dentists*, 476 U.S. at 460–461. McDonald's cites to no case that requires indirect proof of market power despite direct proof of anticompetitive effects. To the contrary, the primary cases it relies on agree there is no such requirement. *See Minn. Ass'n of Nurse Anesthetists v. Unity Hosp.*, 208 F.3d 655, 662 (8th Cir. 2000) (agreeing that "actual adverse effects on competition" are an adequate substitute for market definition); *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004) (evidence of the ability to affect prices would substantiate market power, but the plaintiffs, unlike here, "introduced no econometric evidence of any kind").

Further, Plaintiffs buttress their direct proof of detrimental effects with substantial economic scholarship showing that low-wage employers, including those in the fast food sector, possess market power over their employees. SMF ¶¶ 55-56. Plaintiffs' direct proof conforms with the expectations of leading labor economists, who predict that restraints like the No-Hire Agreement here would result in suppressed pay. *Id*. Plaintiffs also rely upon substantial record evidence, including contemporaneous business documents and witness testimony, all showing that the No-Hire Agreement allowed co-conspirators to set worker pay without having to worry

[12] *See also In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (rejecting the proposition that the rule of reason always requires proof of market power through market definition because "even if a challenged practice doesn't quite rise to the level of *per se* illegality, it may be close enough to shift [the burden] to the defendant"); *Law*, 134 F.3d at 1019 ("A plaintiff may establish anticompetitive effect . . . directly by showing actual anticompetitive effects, such as control over output or price"); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996) (same); *Levine v. Cent. Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996) (same); *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 546 (2d Cir. 1993) (same).

that other McDonald's employers (the only alternative employers who also value McDonald's-specific skills, *see* SMF ¶¶ 57-67) might offer more for them. SMF ¶¶ 5-18.

Indeed, the evidence establishes that McDonald's had market power—its own purported justifications presume it. For instance, according to McDonald's Dr. Murphy, the No-Hire Agreement: [redacted] SAMF ¶ 5. It is simply impossible for a restraint to have the market power to [redacted], but not have the power to suppress those employees' pay. This is particularly true since Dr. Murphy also admitted the common sense notion that McDonald's [redacted] *Id.* ¶ 6. If, as McDonald's argues, potential employers outside of the McDonald's system provide sufficient competitive pressure to eliminate any anticompetitive effects of the No-Hire Agreement on worker pay, then the No-Hire Agreement could not have had a significant impact on employee retention either. The two are necessarily linked: McDonald's cannot assert the latter without admitting the former. Moreover, the No-Hire Agreement itself is an admission of market power. *See* Ioana Marinescu & Herbert J. Hovenkamp, *Anticompetitive Mergers in Labor Markets*, 94 Ind. L. J. 1031, 1035 (2019) ("The fact that the two firms found it profitable to enter into this agreement is a strong indicator that (1) the firms were competitors in this particular portion of the labor market and (2) that between the two of them they had enough market power to make the agreement profitable.").

Moreover, the jury could find that the No-Hire Agreement created market power in a cognizable market for McDonald's workers. McDonald's assumes that the relevant market must include non-McDonald's employers, but the possible existence of "a broader [employment] market . . . does not necessarily negative the existence of submarkets[.]" *U.S. v. Continental Can*

Co., 378 U.S. 441, 457-58 (1964).[13] Here, a plethora of "practical indicia," *Photovest*, 606 F.2d at 712, would support a jury finding of a cognizable service market consisting of a discrete group of buyers (McDonald's franchisees and McOpCos) for the services of a discrete group of sellers (workers who have received McDonald's training), including: (1) proof that the No-Hire Agreement actually enabled McDonald's employers to hold down wages, *cf. Photovest*, 606 F.2d at 713 (ability to charge distinct prices supported finding of submarket); (2) record and economic evidence that workers with McDonald's-specific training have unique value to McDonald's employers, *see* SMF ¶¶ 57-67; *Photovest*, 606 F.2d at 712 (relevant factors include "the [service's] peculiar characteristics and uses" and "distinct customers"); and (3) the limited interchangeability of workers in the broader labor market given the high switching costs for both employers (*e.g.*, costs related to recruitment and job-specific training) and employees (*e.g.*, the costs associated with job search, loss of seniority, etc.), SMF ¶¶ 55-56.

To the extent McDonald's argues that McOpCo restaurants and franchisees also compete with employers outside of its franchise system, that does not preclude a finding of a cognizable market limited to independent employers operating McDonald's restaurants.[14] Even if the existence of other employers can set a *floor* on what McDonald's must pay workers, the No-Hire Agreement prevented wages from increasing further to prevent trained employees from leaving to join other McDonald's employers who value those specific skills and experiences. SMF ¶¶ 55-67. McDonald's also seeks to impose upon Plaintiffs a burden to define relevant geographic markets, while its own restraint made no such effort. If, as McDonald's contends, "relevant competition" occurred only within a "reasonable commuting distance," Mot. at 12,

[13] *See also Photovest Corp. v. Fotomat Corp.*, 606 F.2d 704, 713-16 (7th Cir. 1979) (recognizing that drive-thru kiosk photo processing services, as opposed to in-store photo services, were cognizable submarket even though customers sometimes switched between them); *Beatrice Foods v. F.T.C.*, 540 F.2d 303, 308 (7th Cir. 1976) (holding that "the question is not whether [paint] brushers, rollers, aerosols, and sprayers constitute a market, but whether the [fact-finder] could properly find that brushers and rollers alone constitute a line of commerce").

[14] *See Photovest*, 606 F.2d at 714 ("The law does not require an exclusive class of customers for each relevant submarket."); *Beatrice Foods*, 540 F.2d at 309 ("[T]he fact that [paint] aerosols and other spray equipment are interchangeable with brushes and rollers for some limited end uses does not negative the existence of a separate brush-and-roller market.").

then the No-Hire Agreement's nationwide scope must be condemned as a naked restraint without further analysis. *See Bd. of Regents*, 468 U.S. at 119 (condemning restraint that was "not even arguably tailored to serve such an interest"). Plaintiffs do not assume or in any way depend upon a single nationwide geographic market. That is a benefit of the direct proof of anticompetitive effects Plaintiffs provide. SMF ¶¶ 18, 55-56. At most, the parties' disagreement on this issue is a genuine dispute of fact regarding the proper market definition, which would go to the jury if deemed necessary to Plaintiffs' burden. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 531 (7th Cir. 1986) ("[c]laims analyzed under the Rule of Reason require the trier of fact to delineate the 'relevant market'"); *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 725 (7th Cir. 2004). The cases cited by McDonald's are inapposite and do not hold to the contrary.[15]

D. McDonald's Cannot Satisfy Its Burden to Justify the No-Hire Agreement

McDonald's purported justifications cannot satisfy its burden, regardless of the level of scrutiny applied to them. The Court need go no further than observe that the No-Hire Agreement was not ancillary to the purported competitive benefits McDonald's asserts. *See* Section I.B, *supra*. No reasonable jury could conclude that the No-Hire Agreement was "reasonably necessary" to achieve McDonald's asserted justifications, much less that these "benefits" could

[15] *See, e.g., Menasha Corp.*, 354 F.3d at 664 (nothing could "lead a reasonable person to think that the leading supplier of one form of coupon has the power to drive up price, given the plethora of substitutes" for promotional prices, including "signs and placards, end caps . . . ,sales, coupons distributed at the checkout counter [and] by mail or newspaper"); *Valley Liquor*, 822 F.2d at 667 (agreeing that "special market conditions or other compelling evidence of market power" can substitute for market share; in any case, distilled spirits and wines are economically interchangeable in a way that trained workers are not); *Sheridan v. Marathon Petroleum Co. LLC*, 530 F.3d 590, 595 (7th Cir. 2008) (holding gasoline cannot be divided into submarkets by brand because it is a commodity, but here, human beings are not commodities, workers with McDonald's-specific skills are not perfect substitutes for workers without, and independently-owned restaurants are different "brands" in the labor market); *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1409 (7th Cir. 1995) (acknowledging that a jury's finding regarding a market definition must be accepted "if there is a reasonable basis . . . in the evidence," such as a "distinctive . . . assemblage of skills"); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1403 (7th Cir. 1989) (involved a commodity product, eggs, but workers are not commodities); *Madison 92nd St. Assocs., LLC v. Courtyard Mgmt. Corp.*, 624 Fed. App'x 23, 28 (2d Cir. 2015) (challenge to purely vertical agreements, and no allegation of significant firm-specific skills or training); *DSM Desotech, Inc. v. 3D Sys. Corp.*, 2013 WL 389003, at *11 (N.D. Ill. Jan. 31, 2013) (finding "there is no genuine dispute that other technologies are alternatives to stereolithography"); *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elec. Corp.*, 518 F.2d 913, 933-34 (9th Cir. 1975) (submarket cannot be based on nothing more than different customer identities when the product is otherwise identical).

not have been "readily achieved by other, reasonably available means that create substantially less harm to competition[.]" Model Instructions, at 8 (collecting cases). Further, the "benefits" McDonald's asserts should be rejected as invalid and unsupported.

1. Any Claimed Competitive Benefits Must Be Supported by Admissible Evidence, Not Speculation About Subjective Beliefs

McDonald's cannot introduce admissible evidence to support its argument that the No-Hire Agreement enhanced competition. *Law*, 134 F.3d at 1019. In its interrogatory responses, McDonald's marshaled four justifications for the No-Hire Agreement, arguing that it: (1) encouraged franchisees [redacted]; (2) prevented franchisees from [redacted] (3) "[redacted] and (4) [redacted] SMF ¶ 27. The interrogatories were verified by James Kramer, its former VP of Franchising. *Id.* ¶ 28.

However, Mr. Kramer's testimony is not admissible. He began working for McDonald's in 1973, decades after the first no-hire provisions appeared in McDonald's franchise agreements, and he testified that [redacted]t. SMF ¶ 29. He testified that his understanding of why Paragraph 14 existed [redacted]. *Id.* ¶¶ 29-30. Not only did Mr. Kramer [redacted] *Id.* He did not [redacted]. *Id.*

Thus, Mr. Kramer's testimony about the purpose of the No-Hire Agreement is entirely speculative and lacks foundation, and should be stricken. *See Payne v. Pauley*, 337 F.3d 767, 772 (7th Cir. 2003) (testimony "must be grounded in observation or other first-hand personal experience," not "flights of fancy, speculations, hunches, intuitions, or rumors").[16] Mr. Kramer's vague and unspecific references to his "experience" do not constitute a sound foundation either. *See United States v. Scott*, 901 F.3d 842, 844-45 (7th Cir. 2018) (emphasizing that "a detail-free assertion of 'training and experience'" does not provide adequate foundation).

[redacted]. SMF ¶¶ 31-32. McDonald's has not identified *any* contemporaneous evidence in support of these *post hoc*, litigation-driven defenses.

McDonald's expert testimony on this matter is similarly based on *hypothetical* reasons for why McDonald's adopted Paragraph 14 in connection with the No-Hire Agreement. For example, although Dr. McCrary claims that a version of Paragraph 14 was included in the very first McDonald's franchise agreement, he cites no contemporaneous evidence concerning its purpose. Instead, Dr. McCrary focuses on the procompetitive benefits of "intrabrand restraints that focused on quality and standardization," such as "the look of the store, the neon sign, and the parking lot; employee appearance, product appearance . . . ; advertising and marketing . . . , product and service quality, operations," and so on. SMF Ex. 31, ¶ 67. The No-Hire Agreement, however, does not concern any of these issues—or even an "intrabrand" restraint. Dkt. 53 at 15 ("In the employment market, the various McDonald's stores are competing brands."). Dr. McCrary cites zero evidence about its purpose, relying instead on Mr. Kramer's testimony, which is speculative at best or the product of coaching at worst. He also cites testimony from

[16] *See also Luster v. Ill. Dept. of Corrections*, 652 F.3d 726, 731 (7th Cir. 2011) (interrogatory response insufficient to defeat summary judgment where there was no "admissible foundation from which to conclude that" testifying party "possessed personal knowledge about the [matter]"); Fed. R. Evid. 602; *cf.* Fed. R. Civ. P. 56(e) ("affidavits shall be made on personal knowledge").

McDonald's Franchise Relations Officer and Ombudsman, Robert Valdez, claiming that franchisees were concerned about protecting their investments, *see* SMF Ex. 31 at 65 ¶ 130c, however, Mr. Valdez's testimony is about [redacted] SMF ¶ 17.

McDonald's cites no contemporaneous evidence of the reasons for Paragraph 14's adoption, relying exclusively on *post hoc* and speculative hypotheses. And McDonald's does not even attempt to justify other aspects of the No-Hire Agreement, like McDonald's covert reciprocation.

2. The Free-Riding Justification Is Invalid

McDonald's asserts that the No-Hire Agreement helped prevent "free-riding" in the form of Franchisee A benefiting from the training efforts of Franchisee B by hiring a trained employee away from the latter. However, this is not a valid invocation of the free-riding defense.

First, a ride is not "free" if Franchisee A has to pay for it. *Chicago Pro*, 961 F.2d at 675 ("What gives this the name *free*-riding is the lack of charge."); *Gen. Leaseways*, 744 F.2d at 593-94 (free-riding defense rejected in market division scheme between truck leasing companies party to reciprocal repair agreements, where they reimbursed one another for repairs); *see also Toys R Us, Inc. v. F.T.C.*, 221 F.3d 928, 933 (7th Cir. 2000). Here, Franchisee A hires Franchisee B's worker by *paying a higher wage*. It is only economical for Franchisee A to do so if the value of the worker's labor (*i.e.*, value of the worker's output) exceeds or is equal to the cost (*i.e.*, the wage). Importantly, Franchisee B can prevent the threat of free-riding by *paying the worker the competitive wage*. Thus, market competition itself limits the threat of what McDonald's calls free-riding, just as it does for every employer who invests in training their employees. *See* Herbert J. Hovenkamp, The Rule of Reason, 70 Fla. L. Rev. 81, 111 (2018) ("[I]n order for anticompetitive free riding to occur, the free rider must be able to take advantage of someone else's investment in such a way that the other firm is not capable of pricing it out of

the market."). This contrasts with situations where a restraint is necessary because there are no other effective ways to counter-act free-riding.[17]

Second, "[t]he 'free-riding' to be eliminated by the [No-Hire Agreement is] nothing more than the competition of [employers] that [was] not part of the joint undertaking" between franchisees and McDonald's. *Polygram*, 416 F.3d at 38. It is undisputed that McDonald's and its franchisees disavow *any* joint undertaking in the employment market. SMF ¶ 3. Franchisees are responsible for making their own employment decisions, and McDonald's disavows any right to control the terms of its franchisees' employment relationships. *Id*. This places employment issues outside of the scope of their economic collaboration, and therefore invalidates any free-riding justification to restrain the labor market. *Alston*, 141 S. Ct. at 2157 ("the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers") (quoting *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996)).

3. A Desire to Retain Employees by Depriving Them of Competitive Wages Is Not a Legitimate Defense

McDonald's admits that the No-Hire Agreement [redacted] but contends it was justified because it [redacted] and purportedly [redacted] SMF ¶ 27 & Ex. 61.

There is no record evidence to support this assertion. As Mr. Kramer testified, [redacted] SMF ¶ 36. Even if they were true, "a proffered efficiency cannot arise from anticompetitive effects." *United States v. Anthem, Inc.*, 855 F3d 345, 369 (D.C. Cir. 2017) (Miller, J., concurring) (citing *id.*, at 377-78 (Kavanaugh, J., dissenting)); *see also* C. Scott Hemphill & Nancy L. Rose,

[17] *See Leegin*, 551 U.S. at 890-91 (explaining that retailers who invest in showrooms cannot recover those costs if a customer learns about the product there, but then purchases from a discounting retailer who does not invest in such services; and a manufacturer-imposed restraint on retail price competition can mitigate such free-riding); *Chicago Pro.*, 961 F.2d at 675 (explaining same); *Gen. Leaseways*, 744 F.2d at 593 (free-riding only exists where services are "'given away' by a seller who could recover his cost only by selling the product to the consumer who used the information").

Mergers that Harm Sellers, 127 Yale L.J. 2078, 2082 (2018) ("[S]avings achieved through the exercise of increased classical monopsony power . . . are premised on a reduction in competition" and "are not cognizable efficiencies."). Moreover, there is no requirement that such cost savings be used for any efficiency-enhancing ends, as opposed to simply raising profits.

To the extent McDonald's claims the No-Hire Agreement reduced labor costs, that is an acknowledgment that it was anticompetitive and suppressed wages. "[C]ost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises." *Law*, 134 F.3d at 1022; *see also Socony-Vacuum*, 310 U.S. at 220-21 (pointing to the "evils of price [competition]" is "no legal justification" for a restraint); Areeda ¶ 1504. Indeed, this objective is actually counter-productive: by suppressing labor costs and mobility within the McDonald's system, McDonald's reduced the incentive for workers to perform well.[18]

4. The No-Hire Agreement Was Completely Unnecessary

Even if theoretically viable in some circumstances, McDonald's procompetitive justifications fail here because they could be vindicated without the No-Hire Agreement.

First, McDonald's has not identified any material effect on its business from abandoning the No-Hire Agreement, even though more than four years have passed since. McDonald's announced it would no longer enforce the No-Hire Agreement in 2017 in response to Department of Justice and FTC guidance condemning no-poach agreements, and then agreed with the Washington Attorney General to remove Paragraph 14 from its franchise agreements going forward. SMF ¶¶ 19, 23. Yet there is no evidence this hurt its ability to attract new franchisees, maintain franchisee relationships, induce franchisee investment in training or other initiatives, or

[18] *See Sup. Ct. Trial Lawyers*, 493 U.S. at 423 ("[T]he Sherman Act reflects a legislative judgment that ultimately competition will produce . . . better goods and services."); *cf. Law*, 134 F.3d at 1022 (noting "coaches have less incentive to improve their performance if their salaries are capped").

train workers. To the contrary, McDonald's reports that its franchisees are having record success, *id*. ¶¶ 50-51, and no McDonald's witness identified a detrimental effect on its operations.[19] McDonald's admission that, after eliminating the No-Hire Agreement, franchisees "have never been in a better financial position," SMF ¶¶ 50-51, vindicates the fundamental premise of the Sherman Act: "the belief that market forces yield the best allocation of the Nation's resources." *Alston*, 141 S. Ct. at 2147 (quoting *Board of Regents*, 468 U.S. at 104, n.27). Indeed, the Washington Attorney General concluded its efforts resulted in *hundreds* of franchise chains abandoning similar restraints without adverse effect on their franchise models. SMF ¶¶ 24-25.

Second, separate and apart from the No-Hire Agreement, franchisees are required by McDonald's to train their employees. SMF ¶¶ 37-44. This makes sense: it is impossible to perform a McDonald's job without McDonald's-specific training. None of McDonald's training requirements have changed since McDonald's removed Paragraph 14 and stopped enforcing the No-Hire Agreement. *Id*. ¶ 45. This is consistent with franchisees' strong economic incentive to train their employees, even without the No-Hire Agreement. Why would a franchisee invest its capital to join the McDonald's system, but then fail to undertake the employee training necessary to turn a sustainable profit on that investment? Employers do not need labor market allocation schemes to have a sufficient "incentive" to train their employees.

Third, to the extent McDonald's asserts that the lack of a No-Hire Agreement would frustrate efforts to promote on-the-job training and collaboration between franchisees, the record shows the contrary. For example, McDonald's National Franchising Standards [redacted] SMF ¶ 46. And the franchise agreements required franchisees to expend a fixed percentage of sales on

[19] *See, e.g.*, SMF ¶ 52 (Lowery Dep.) ("[redacted]").

advertising of the overall brand. *Id.* ¶ 48. Finally, McDonald's acknowledges that franchisees compete for customers without undermining cooperation for joint marketing efforts. *Id.* ¶ 4. In any case, that franchisees may have good reason to collaborate on marketing initiatives and food sales, does not mean they may collude to the detriment of their workers. *Alston*, 141 S. Ct. at 2157 ("the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers") (quoting *Chicago Pro.*, 95 F. 3d at 600).

5. McDonald's May Not Offset Admitted Harm in the Labor Market with Speculative Benefits in the Consumer Market

McDonald's argues that suppressing worker mobility and thereby wages somehow results in better experiences for McDonald's customers. As an initial matter, it points to no evidence other than the *ipse dixit* of its own expert, Dr. McCrary, who also cites no record evidence for his speculation. But even assuming McDonald's could point to competent evidence to support this *non sequitur*, "[p]rocompetitive justifications for [a restraint] must apply to the same market in which the restraint is found, not to some other market." *Law v. Nat'l Collegiate Athletic Ass'n*, 902 F. Supp. 1394, 1406 (D. Kan. 1995), *aff'd*, 134 F.3d 1010 (10th Cir. 1998).[20]

To hold otherwise would put courts and juries in the untenable position of resolving non-justiciable questions that are political, not legal, in nature, about which group of buyers or sellers should be entitled to the benefits of competition. Here, that means to choose between allocating the fruits of competitive freedoms to McDonald's workers, McDonald's franchise owners, or potentially McDonald's customers. *See Maryland v. United States*, 460 U.S. 1001, 1106 (1983) ("Questions of policy are not submitted to judicial determination."); *U.S. v. Addyston Pipe &*

[20] *See also United States v. Topco Assoc., Inc.*, 405 U.S. 596, 611 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this . . . is a decision that must be made by Congress and not by private forces or by the courts."); *U.S. v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370 (1963) (rejecting proposition that "anticompetitive effects in one market could be justified by procompetitive consequences in another"); *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (holding that it is "improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market"), *cert. denied*, 115 S.Ct. 1252 (1995).

Steel Co., 85 F. 271, 284 (6th Cir. 1898) (Taft, J.) (warning courts should not "set sail on a sea of doubt" by asking "how much restraint of competition is in the public interest, and how much is not"). It would also contradict over a century of case law recognizing that antitrust laws protect persons on all sides of a market,[21] and refusing to justify restraints in one market with supposed benefits in another.[22]

III. Plaintiffs' Claims Are Not Time Barred

The Sherman Act's four-year statute of limitations "runs from the most recent injury caused by the defendants' activities rather than from the violation's inception." *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)); *Turner* Dkt. 64 at 7 ("'each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those damages the statute of limitations runs from the commission of the act.'" (quoting *Zenith Radio*, 401 U.S. at 338)). As the Court has noted, "in this case, each time plaintiff was paid a depressed wage for her labor, she was injured and the four-year statute of limitations for that injury began." *Id.* at 8.[23] Contrary to McDonald's arguments, the evidentiary record does nothing to change this analysis. It is undisputed that Ms. Turner worked at a McDonald's restaurant until September 2018, SAMF ¶ 9, well within the 4-

[21] *See, e.g., Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 363 (1926) (holding agreement among different shipowners to regulate employment of seamen, including by fixing wages, unlawful, and that it "cannot be justified by the fact that the object . . . was to benefit [shipowners] in a way which might have been unobjectionable, in the absence of such restraint").

[22] *See, e.g.*, *Bd. of Regents*, 468 U.S. at 115 (rejecting attempt to limit competition for televised football games to shore up market for live games).

[23] McDonald's cases applying the continuing violation doctrine in the irrelevant Title VII context provide no basis for the court to reverse this ruling. Though McDonald's characterized these cases as establishing a rule when plaintiffs "had actual knowledge of the challenged restraint," Mot. at 15, the cases did not involve restraints at all. *See Tinner v. United Ins. Co. of Am.*, 308 F.3d 697, 707-08 (7th Cir. 2002) (considering whether discrete acts of discrimination constituted an ongoing pattern); *Filipovic v. K & R Exp. Sys., Inc.*, 176 F.3d 390 (7th Cir. 1999) (same). The doctrine of laches likewise does not apply in this context. *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 679 (2014) ("[W]e adhere to the position that, in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief[.]"). McDonald's cites two cases to argue otherwise—*Tinner* and *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813 (7th Cir. 1999); neither involved the Sherman Act—with the former concerning false advertising and the latter negligence—and both pre-dated *Petrella*.

years before she sued in August 2019 (even disregarding any tolling of her claim, *see* Deslandes Dkt. 372 at 27).[24] It is likewise undisputed that Ms. Deslandes worked at a McDonald's restaurant through at least December 2015, well within the 4 years before she sued in 2017. SAMF ¶ 8.

Even aside from Plaintiffs' suppressed wages, McDonald's and franchisees engaged in countless other overt acts in furtherance of the No-Hire Agreement within the four years before Plaintiffs sued. McDonald's incorporated Paragraph 14 into each new (and renewing) franchise agreement until at least April 4, 2017. SMF ¶ 6. Employee "release" letters also represent overt acts in furtherance of the conspiracy. Although McDonald's coaxed franchisees dubiously to assert that they were "not aware of Paragraph 14" (McDonald's Facts ¶ 34 (Grant Groen), or that Paragraph 14 was not "relevant" to their hiring (McDonald's Facts ¶ 32 (Leonardo Lopez)), managers at the very restaurants that employed Plaintiffs requested and provided releases within four years before filing and as recently as January 2018. SAMF ¶ 11. Far from vindicating the No-Hire Agreement, these demonstrate adherence to, compliance with, and enforcement of it. All of this is on top of Plaintiffs' own well-recounted experiences within four years prior to filing. SAMF ¶ 12 (Deslandes 2015 release request denied[25] and Turner 2017 discussion about release request). Each of the above overt acts "start[ed] the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 189 (1997); *Turner* Dkt. 64 at 7 (quoting same).

Restraining employees through the overt act of requiring a release for mobility, moreover, was consistent with McDonald's policy, as evidenced by call logs generated in its Human Resource Consulting ("HRC") team call center. Those 2013-2018 call logs (relating to

[24] Ms. Turner's claim was timely even if her pay was no longer depressed at any time after the July 2018 AOD with the Washington AG, SMF ¶ 23, or even after McDonald's March 2017 internal announcement, *id*. ¶ 19. This, however, is counter-factual, as Plaintiffs demonstrate that wages did not immediately reach equilibrium or return to competitive levels before (at least) December 2019. SMF ¶ 68 & SMF, Ex. 88 ¶ 56.

[25] McDonald's argues (Mot. at 15) that Ms. Deslandes's release request was denied in 2013, but bases this on Ms. Deslandes's superseded EEOC charge letter. The corrected charge (ignored by McDonald's) asserts that the denial was in 2015, consistent with Ms. Deslandes's testimony. Plfs.' Resp. to McD's Statement of Facts, ¶ 62.

both McOpCo and non-McOpCo restaurant employees) offer numerous examples of enforcement of the release requirement—both between franchisees and McOpCo restaurants, and franchisee-to-franchisee. SAMF ¶ 4 (540 call notes spanning 44 states, including from both Plaintiffs' states of work, referencing release requirement; 100 call notes evidencing instances where releases denied).

Because McDonald's and franchisees repeatedly "abided by, attempted to enforce, or otherwise reaffirmed the" No-Hire Agreement during the limitations period, and these "independent actions . . . caused Plaintiffs[] . . . new or accumulating injury," *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1212 (N.D. Cal. 2015), McDonald's statute of limitations arguments fail.

CONCLUSION

For the aforementioned reasons, McDonald's motion should be denied and Plaintiffs' cross-motion should be granted.

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Respectfully submitted,

s/ Dean M. Harvey

Dean M. Harvey*
Anne B. Shaver*
Lin Y. Chan*
Yaman Salahi*
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, California 94111-3339
Tel: (415) 956-1000
dharvey@lchb.com
ashaver@lchb.com
lchan@lchb.com
ysalahi@lchb.com

Jessica A. Moldovan*
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
250 Hudson St., 8th Floor
New York, NY 10013-1413
Tel: (212) 355-9500
jmoldovan@lchb.com

Derek Y. Brandt (#6228895)
Leigh M. Perica (#6316856)
Connor P. Lemire*
MCCUNE WRIGHT AREVALO, LLP
231 North Main Street, Suite 20
Edwardsville, Illinois 62025
Tel: (618) 307-6116
Fax: (618) 307-6161
dyb@mccunewright.com
lmp@mccunewright.com

Richard D. McCune*
Michele M. Vercoski*
MCCUNE WRIGHT AREVALO, LLP
3281 East Guasti Road, Suite 100
Ontario, California 91761
Tel: (909) 557-1250
rdm@mccunewright.com
mmv@mccunewright.com

Attorneys for Individual and Representative Plaintiffs Leinani Deslandes and Stephanie Turner

* Admitted *pro hac vice*

CERTIFICATE OF SERVICE

I, Dean M. Harvey, an attorney, hereby certify that the **PLAINTIFFS' COMBINED MEMORANDUM OF LAW IN OPPOSITION TO McDONALD'S MOTION FOR SUMMARY JUDGMENT, AND IN SUPPORT OF PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON McDONALD'S ASSERTED JUSTIFICATIONS** was electronically filed on November 16, 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 email.

s/Dean M. Harvey

Dean M. Harvey*
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, California 94111-3339
Tel: (415) 956-1000
dharvey@lchb.com

*Admitted *pro hac vice*