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
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STEPHANIE TURNER, on behalf of herself and all others similarly situated, Plaintiff, v. McDONALD'S USA, LLC, a Delaware limited liability company, 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 COMBINED REPLY IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS OR IN THE ALTERNATIVE SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT ON McDONALD'S ASSERTED JUSTIFICATIONS

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McDonald's Statement of Additional Material Facts	"McD SAMF"	Filed herewith

*All docket cites are to the docket in *Deslandes v. McDonald's USA, LLC*, Case No. 17-cv-04857, unless otherwise noted with "*Turner*," in which case it refers to the docket in *Turner v. McDonald's USA, LLC*, Case No. 19-cv-05524.

I. Introduction

The Court has issued three detailed orders in this litigation. Based on both the pleadings and proof, the Court found the alleged No-Hire agreement (1) was ancillary to a procompetitive franchise agreement and so cannot be deemed unlawful *per se*; (2) was supported by procompetitive justifications; and (3) that Plaintiffs waived any attempt to prove their claim under a rule of reason theory. Plaintiffs ignore these rulings entirely. They instead tie themselves in knots cobbling together a theory that is not only unsupported by the record but also devoid of any facts relating to either Ms. Deslandes or Ms. Turner—the only claimants left in this case. These machinations do not forge a path forward. Plaintiffs cannot ignore that the Court ruled they had not stated a *per se* claim or that they "waived" a rule of reason claim. Dkt. 372 at 26. And even if they could, there remains no evidence of an unlawful agreement *relevant to Ms. Deslandes or Ms. Turner* nor any proof of market power in the localities in which *they worked*. Equally meritless is Plaintiffs' Cross-Motion: Plaintiffs do not say what issues they are moving on, or even identify the legal theory that entitles them to judgment as a matter of law, much less grapple with this Court's prior finding that McDonald's has "offered enough evidence of procompetitive effects." *Id.* at 16. Ample evidence supports that finding—none of which Plaintiffs have objected to or moved to exclude. The Court should therefore grant McDonald's Motion, deny Plaintiffs' Cross-Motion, and enter judgment in favor of Defendants.

II. Argument

Plaintiffs each made an affirmative choice in this case to allege violations of the Sherman Act only under a *per se* or quick look framework. The Court has already ruled, however, that "the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per se*," Dkt. 53 at 13–14, and the "rule of reason analysis [applies] to this case," Dkt. 372 at 11. A rule of reason claim requires "an accurate definition of the relevant market" as well as facts establishing the defendant's power in that market. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284–85 (2018). But even when given the express opportunity to amend and attempt to allege either a plausible market definition or facts establishing market power, Plaintiffs did not do so. *See* Dkt. 372 at 10 n.3. Plaintiffs therefore

"waived" any claim under the rule of reason. *Id.* at 26.

A. Plaintiffs Cannot Argue Away Their Waiver Of The Rule Of Reason Framework

Plaintiffs cannot dispute that they filed suits asserting liability under only a *per se* or quick look theory nor that they declined this Court's explicit invitation to add a rule of reason claim. *See* Mot. at 5–6. They offer one excuse: that they did not need to "plead legal theories" or "amend their complaints to include the voluminous record" of this case. Opp. at 14. That misses the point. Plaintiffs did not plead facts that stated a rule of reason claim at all—including a "cognizable market on which [McDonald's] actions could have had anticompetitive effects (thus implicating the Sherman Act)"—and then *deliberately forwent* any such claim. *Agnew v. NCAA*, 683 F.3d 328, 337–38, 347 (7th Cir. 2012) (affirming dismissal of Section 1 claim for failure to plead a "specific relevant market" under rule of reason and quick look theories).

Plaintiffs cannot ignore their litigation decisions. They brought suit under a *per se* or quick look theory; the words "rule of reason" appear nowhere with reference to their Sherman Act claim in either of their complaints. Dkt. 32 ¶¶ 133–34; Dkt. 180-1 ¶¶ 131–32. The Court rejected a *per se* theory but allowed each case to proceed under the quick look framework—with the admonition that "the evidence at a later stage may not support" such a claim. Dkt. 53 at 13–16; *see also Turner* Dkt. 48 at 3–4 (Plaintiffs conceding that the Court would not apply the *per se* theory). In so ruling, the Court noted that Ms. Deslandes "ha[d] not attempted to plead a claim under the rule of reason." Dkt. 53 at 16. Observing that doing so would require her to "allege market power in a relevant market," the Court gave Ms. Deslandes leave to add a rule of reason claim within 28 days of its order on the motion dismiss. *Id.*

This was the chance to do so. As Plaintiffs' counsel acknowledged, "[t]here was a deadline to amend to file a rule of reason claim" that came and went in 2018. Dkt. 166 at 4:4–19. Ms. Deslandes declined the Court's invitation to amend, and Ms. Turner similarly chose not to plead a rule of reason claim when she (represented by the same attorneys) filed suit a year later. Dkt. 180-2 ¶¶ 131–32. In other words, as this Court later observed, Plaintiffs made a strategic choice "early in this case not to amend the complaint to add a claim under the rule of reason." Dkt. 372 at 26;

see also id. at 10 n.3 (Plaintiff Turner "failed to state a claim under the rule of reason").

Extensive discovery ensued under the framework Plaintiffs had chosen. *See* Dkt. 143 at 13:16–24 (magistrate judge noting that "the focus in this case is going to be the plaintiffs are going to try and prove under the quick-look analysis that there is a restraint of trade here" to which Plaintiffs did not object); *id.* at 32:19–35:8 (Plaintiffs' counsel arguing that "Judge Alonso has already ruled on the standard that applies to this case"); *id.* at 48:8–49:19 (Plaintiffs' counsel requesting "discovery nationwide" that would allow them to file a class certification motion under a quick look theory); Dkt. 171 at 26:14–29:2 (Magistrate Judge Weisman framing the boundaries of discovery according to Plaintiffs' quick look theory). And at no point did Plaintiffs ever suggest they could or would proceed under the rule of reason—not in any discovery motion, response, request, meet and confer, or hearing. To the contrary, Plaintiffs moved for class certification by doubling down on their commitment to a quick look theory and forgoing any "analysis of market power." Dkt. 268 at 21 (quoting Dkt. 53 at 9).

That "gamble" was Plaintiffs' to make, but they must live with the ramifications. Dkt. 372 at 26. Based on an extensive factual record and recent guidance from the Supreme Court, the Court ruled it "must apply rule of reason analysis to this case." *Id.* at 11. And as the Court found, Plaintiffs' deliberate relinquishment of the opportunity to plead or pursue a rule of reason theory "waived" any such claim. Dkt. 372 at 26; *see also Chessie Logistics Co. v. Krinos Holdings, Inc.*, 867 F.3d 852, 860 (7th Cir. 2017) (affirming summary judgment because plaintiff forfeited "new theory of negligence" by failing to raise it until summary judgment).

Moreover, Plaintiffs cannot escape the consequence of their pleading choices by arguing that "the factual basis" for asserting a claim under the rule of reason is "consistent with their complaints" and "reflects the evidentiary record." Opp. at 13–14. *Per se*, quick look, and rule of reason are different analytical frameworks with well-established, distinct factual burdens. *See Agnew*, 683 F.3d at 336–37 (distinguishing the different threshold burdens under the different modes of analysis). Chief among these is the requirement of proving market power and anticompetitive effects in a relevant market. *See Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354

F.3d 661, 663 (7th Cir. 2004). Having eschewed the need to plead or prove a relevant market, Plaintiffs' "offer [of] post hoc arguments attempting to illuminate a buried market allegation" is too little, too late. *Agnew*, 683 F.3d at 347.

Plaintiffs almost acknowledge as much through their half-formed request to amend their complaints. Opp. at 14 n.11. But yet again, they ignore the Court's explicit admonition that if Plaintiffs at this late stage of litigation tried "to amend the claim to add a claim under the rule of reason, it will be denied outright or stricken." Dkt. 387 at 5:14–6:15. Any intimation that they are nonetheless entitled to do so *sub silentio* is baseless. *See Ames v. Shaw*, 2018 WL 6435656, at *8 (N.D. Ill. Dec. 7, 2018) ("Plaintiff cannot amend his theory of the case by way of his summary judgment briefs; accordingly, this new theory of the case cannot defeat summary judgment.").

None of the cases Plaintiffs cite supports their gamesmanship. In *BRC Rubber & Plastics, Inc. v. Continental Carbon Co.*, the court allowed the plaintiff to pivot where the supposed change was actually "not new to this case at all" because it conformed to the "construction of the contract" advanced by the defendant and "d[id] not depend on any essential allegations that are missing from the complaint." 900 F.3d 529, 536–44 (7th Cir. 2018). That has no bearing here, where Plaintiffs have "explicitly or implicitly disclaim[ed] certain legal characterizations of the claim." *Vidimos, Inc. v. Laser Lab Ltd.*, 99 F.3d 217, 222 (7th Cir. 1996); *see also Menasha*, 238 F. Supp. 2d at 1033 (finding rule of reason and *per se* allegations are not interchangeable because the "relevant market analysis" differs). This is the very rule of another case Plaintiffs advance, *In re Processed Egg Products Antitrust Litigation*, Opp. at 14, in which the court explained that litigants *are* "prevented from pursuing a claim under a rule of reason theory" after other theories fail where, as here, they "expressly disavowed reliance on the rule of reason." 206 F. Supp. 3d 1033, 1051–53 (E.D. Pa. 2016); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006) (similar); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 318 (3d Cir. 2010) (similar).

Judgment for McDonald's is therefore the only appropriate result here.

B. Plaintiffs Cannot Evade The Court's Conclusion That The Rule Of Reason Applies By Relitigating Whether The Alleged Restraint Was Ancillary

In a similar attempt to restructure the case, Plaintiffs resurrect their argument that the alleged No-Hire Agreement was not ancillary to the franchise relationship and thus is subject to *per se* liability. Opp. at 9–12; *see* Dkt. 40 at 10–13. But the Court already found that Plaintiffs alleged a "restraint that is ancillary to franchise agreements," Dkt. 53 at 13. Plaintiffs did not seek reconsideration of this ruling, which the undisputed evidence confirms is correct.

"A restraint is ancillary if it 'promoted enterprise and productivity when it was adopted.'" Dkt. 53 at 12 (quoting *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985)). Competent, undisputed evidence shows that former Paragraph 14 promoted the legitimate goals of an efficient output-enhancing franchise system. McD SAMF ¶¶ 17–21; *see also, infra*, at 24–28. As McDonald's expert Dr. McCrary explained, "the challenged conduct, like McDonald's other intrabrand restraints, . . . help[ed] McDonald's ensure standardization, consistency, and quality across its stores." McCrary ¶ 115; *see also id.* ¶¶ 135–44 (explaining employee-facing benefits of restraint). This Court has already recognized this too—yet another finding Plaintiffs ignore. Dkt. 372 at 14.[1]

Plaintiffs cite no contrary evidence. *See* Opp. at 10–12. Nor can they create a triable issue by elsewhere pointing to incomplete excerpts of testimony from Bill Lowery, one of McDonald's ombudsman, that he was unaware of Paragraph 14's economic purpose and had not noticed any difference since its removal. Opp. at 26 & n.19. Mr. Lowery did not testify as a corporate representative on behalf of McDonald's, did not handle any employment issues, was never trained on the franchise agreement, and did not provide guidance about its terms as part of his job. McD SAMF ¶ 13. Because he "did not ever" encounter Paragraph 14, he had no reason to know why it

[1] Although Plaintiffs criticize Dr. McCrary's analysis, they cannot "get to a jury simply by casting doubt on the defendant's evidence." *Fletcher v. Hoeppner Wagner & Evans, LLP*, 775 F. App'x 240, 241 (7th Cir. 2019); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (plaintiff cannot survive summary judgment "by merely asserting that the jury might, and legally could, disbelieve the defendant's denial of a conspiracy"); *Scherer v. Rockwell Int'l Corp.*, 975 F.2d 356, 361 (7th Cir. 1992) (similar).

would have been included. *Id.* And he observed no change after its removal "because it never really impacted [his day-to-day work] in the first place." *Id.* None of this detracts from the unrebutted evidence establishing the alleged restraint's value to the McDonald's System—it just highlights the dearth of evidence Plaintiffs have adduced.

Lacking any evidence that would support their argument under the controlling legal standard, Plaintiffs fall back on trying to convince this Court to create a new standard for assessing whether a restraint is ancillary: that it must be "essential to the overall arrangement." Opp. at 9. But a principle of strict necessity finds no support in relevant precedent. As this Court observed and Plaintiffs ignore, that is not the rule the Seventh Circuit adopted in *Polk Brothers*. 776 F.2d at 189 ("A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output."); *see* Dkt. 53 at 12. Nor is it the one used in any other case Plaintiffs cite. *See, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) ("To be ancillary, and hence exempt from the *per se* rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction . . . in the sense that it serves to make the main transaction more effective in accomplishing its purpose."); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339–41 & n.11 (2d Cir. 2008) (Sotomayor, J., concurring) (restraint "need not be essential" but only "reasonably ancillary to the legitimate cooperative aspects of the venture"); *Nat'l Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 599 (11th Cir. 1986) ("[C]ourts should look to whether the restraint at issue potentially could create an efficiency enhancing integration to which the restraint is ancillary."); *Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 36 (D.C. Cir. 2005) (defendant must "come[] forward with some plausible (and legally cognizable) competitive justification for the restraint").[2]

[2] Although some cases speak to *reasonable* necessity, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281, 290–91 (6th Cir. 1898), this language is no different in substance. *See Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 727 (6th Cir. 2019) ("follow[ing] the majority of Circuits," including the Seventh, by holding a "restraint is ancillary and therefore inappropriate for *per se* categorization when, viewed at the time it was adopted, the restraint may contribute to the success of a cooperative venture"); *see also* Gregory J. Werden, *The Ancillary*

Plaintiffs are therefore wrong to suggest that the removal of Paragraph 14 precludes the alleged restraint from being deemed ancillary. *See* Opp. at 9–10. First, this argument only works if a restraint must be "essential"—a premise Plaintiffs have tried to spin from straw. *Id.* Second, it cannot be reconciled with the actual rule, which links the analysis to "the time [the restraint] was adopted." *Polk Bros.*, 776 F.2d at 189; *accord Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1111 (9th Cir. 2021). Plaintiffs' reliance on *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), is therefore misplaced. In that case, the parties entered into a permanent market allocation agreement *after* their partnership dissolved—making it naked and unrelated to any venture. *Id.* at 828–29. That reasoning does not apply to cases like this one "involv[ing] a restraint that was entered into at the same time the parties agreed to collaborate" and which "promoted enterprise and productivity *at the time it was adopted*." *Aya*, 9 F.4th at 1110–11 (citing *Polk Bros.* to reject similar analogy to *Blackburn*) (emphasis added). And Plaintiffs' attempt to parse whether or not Paragraph 14 was indispensable to forming a franchise system, rather than reasonably aimed to promote its success and growth, runs contrary to the well-established principle that "lower courts should [not] calibrate degrees of reasonable necessity" such that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage*, 792 F.2d at 227; *see also NCAA v. Alston*, 141 S. Ct. 2141, 2161 (2021) ("[A]ttempts to meter small deviations [from perfect efficiency] is not an appropriate antitrust function.") (cleaned up).[3]

Nor can Plaintiffs revisit the Court's determination on the ancillary nature of the alleged restraint by arguing that it "was wildly overbroad." Opp. at 10. Absent from this argument is any

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Restraints Doctrine After Dagher, 8 Sedona Conf. J. 17, 24 (2007) (The "burden . . . of demonstrating ancillarity . . . is not a heavy one. The more important of the two words in 'reasonably necessary' is the first.").

[3] The Courts of Appeal have uniformly analyzed no-hire agreements associated with the sale of a business under the rule of reason. *Eichorn v. AT & T Corp.*, 248 F.3d 131, 145 (3d Cir. 2001); *Aya*, 9 F.4th at 1111; *Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1336 (Fed. Cir. 2010); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999); *Consultants & Designers, Inc. v. Butler Serv. Grp., Inc.*, 720 F.2d 1553, 1561 (11th Cir. 1983); *Lektro-Vend Corp. v. Vendo Corp.*, 660 F.2d 255, 265 (7th Cir. 1981).

citation to evidence. *See, e.g.*, *Robinson v. The Univ. of S.C.*, No. C.A.3:04 0640 MBS, 2006 WL 2521452, at *4 (D.S.C. Aug. 29, 2006) (argument in a brief is not evidence for summary judgment). And it is also contrary to law: a defendant "need not satisfy a less-restrictive-means test to demonstrate that [a] non-solicitation agreement is an ancillary restraint." *Aya*, 9 F.4th at 1111. Because that question is instead part of the rule of reason itself, *Am. Express Co.*, 138 S. Ct. at 2284, Plaintiffs' argument merely highlights the need for the searching inquiry they eschewed. *See Aya*, 9 F.4th at 1111 ("[T]he less restrictive alternative analysis falls within the rule-of-reason analysis, not the ancillary restraint consideration."); *see also Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 267 (7th Cir. 1981) (rejecting as "irrelevant" ancillary covenant's alleged overbreadth); *Snap-on Tools, Corp. v. F.T.C.*, 321 F.2d 825, 837 (7th Cir. 1963) ("[E]ven if this restriction is unreasonable as to geographic scope, we are not prepared to say that it is a *per se* violation."); *United States v. Empire Gas Corp.*, 537 F.2d 296, 307–08 (8th Cir. 1976) (rule of reason applied to contracts with allegedly overbroad covenants not to compete).

Here, undisputed evidence shows that the alleged restraint was not the product of "two people meet[ing] one day and decid[ing] not to compete" but rather entered "[a]t the time A and B strike their bargain" to establish an "enterprise (viewed as a whole) [that] expands output and competition by putting B to work." *Polk Bros.*, 776 F.2d at 189. The Court should therefore confirm what it has recognized from the start: the alleged agreement was an ancillary restraint that cannot be subject to *per se* liability. Dkt. 53 at 13–14; *see also* Dkt. 372 at 16.

C. Plaintiffs Have No Evidence Of A Nationwide Agreement To Allocate Markets Or Suppress Wages, Dooming Their Claims Under Any Standard

Plaintiffs do not dispute that the touchstone of this case is former Paragraph 14. *See* Mot. at 6; Dkt. 268 at 21–26. But in tacit recognition that no claim premised on this provision can carry the day in light of this Court's prior orders, Plaintiffs now pivot to emphasizing an alleged agreement that "went beyond the four corners of the franchise contracts." Opp. at 6. But no matter how Plaintiffs characterize their theory of liability, there is no evidence of any common scheme designed to achieve an unlawful objective among McDonald's and its franchisees—much less any

evidence connecting such a conspiracy to the restaurants where either Plaintiff worked.

1. There Is No Evidence Of The Alleged Market Allocation Conspiracy

Plaintiffs suggest there is "extrinsic evidence" of (1) a nationwide "reciprocated" agreement whereby McOpCos would not hire franchisees' managers and, starting in 2015, franchisees' crew and (2) an agreement among each and every franchisee not to hire one another's employees, evidenced by "releases" granted by certain franchisees. Opp. at 6–8. But Plaintiffs point to no facts demonstrating when these supposed agreements arose, who joined them, or how they were maintained among thousands of operators of McDonald's restaurants. And there remains no evidence that *all* franchisees or McOpCos joined these alleged agreements, including, critically, the restaurants in Ms. Deslandes's and Ms. Turner's local labor markets.

No Evidence of a Single, Nationwide, Reciprocal Agreement. Plaintiffs cite evidence from Arizona (Pl. Ex. 32), Las Vegas (Pl. Ex. 33), and Houston (Pl. Ex. 34) to suggest that McDonald's franchisees and McOpCos nationwide "adhered to, complied with, and enforced the No-Hire Agreement." Pl. SMF ¶ 13. But there is no corresponding evidence with respect to the restaurants where Ms. Deslandes or Ms. Turner lived and worked. McD SAMF ¶ 7–8; McD Resp. Pl. SMF ¶ 5. Instead, franchisees in those localities denied any such agreement—among themselves or with McOpCos. McD SUF ¶¶ 26, 31–36. That unrebutted and unequivocal testimony shows that Ms. Deslandes and Ms. Turner were not subject to any "conspiracy or other agreement to suppress or otherwise reduce wages of McDonald's brand restaurant employees." McD SUF ¶ 26; *see also id.* ¶¶ 23, 34–36; McD SAMF ¶ 1. Ms. Turner indisputably admitted the same. McD SUF ¶ 27.

Unable to defang this devastating evidence, Plaintiffs object to the declarations from their former employers by arguing "employee declarations" are hearsay and "insufficient under Federal Rule of Civil Procedure 56(e)." Pl. Resp. McD SUF ¶ 23. This effort is in vain, for a moving party need not "support its motion with affidavits or other similar materials *negating* the opponent's claims." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (emphasis in original). Plaintiffs are also wrong as affidavits and declarations are the precise kind of support Rule 56 contemplates. Fed. R. Civ. P. 56(c); *see also Igasaki v. Ill. Dep't of Fin. & Pro. Regul.*, 988 F.3d 948,

955 (7th Cir. 2021) (because "the form [of evidence] produced at summary judgment need not be admissible," a "moving party can support its assertions of undisputed facts by citing to record materials, 'including . . . affidavits or declarations'"). No doubt Plaintiffs resort to this baseless line of attack because, despite a full opportunity to examine them under oath, they did not ferret out any testimony or other evidence undermining the sworn statements of any declarant—none of whom is in fact an employee of either defendant. McD SAMF ¶¶ 1–2.[4]

Critically, there is no evidence that McDonald's *agreed* with the franchisees for whom Plaintiffs worked—or franchisees anywhere, for that matter—to not hire managers from their restaurants for McOpCos. *See* Opp. at 6–7. And Plaintiffs have not attempted to parse where such an agreement even could have existed. *See* Dkt. 372 at 16–17 (recognizing that "in many parts" of the country any agreement between franchisees and McDonald's would be vertical due to absence of McOpCos). Nor have they identified when this supposed agreement arose, who was involved, or how it was maintained among thousands of franchisees over decades—nor a single document between McDonald's and a franchisee reflecting it. *See* Opp. at 6–7; McD Resp. Pl. SMF ¶¶ 7, 8. Although Plaintiffs place great weight on Ms. King's comments about *her* understanding, Opp. at 6, she was not deposed as a corporate representative and testified her knowledge was not based on her former role as Chief People Officer, but instead limited to one region more than a decade before the relevant time period. McD Resp. Pl. SMF ¶ 5. During the relevant time period, McDonald's stated position was that "[e]mployment releases [were] not required [for McOpCo employees] to leave an[d] go to a franchise restaurant." *Id.*

Although some McOpCo recruiters sought releases before hiring managers from franchisees, that practice did not extend without exception as Plaintiffs contend. McD Resp. Pl. SMF ¶ 7. It is instead proof positive that McOpCo practices could vary by region. *Id.* The former head

[4] For these reasons, the declarations submitted by McDonald's bear no resemblance to the materials in the cases Plaintiffs cite. *See Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999) (error to credit declaration from defendant's manager on a motion to dismiss because the plaintiff "had no opportunity to conduct discovery to challenge the credibility of the affidavit"); *Gunville v. Walker*, 583 F.3d 979, 985 (7th Cir. 2009) (excluding classic hearsay from a deposition transcript).

of all McOpCo restaurants in California, for example, testified that company stores did not generally require a letter of release before hiring employees from franchisees. McD SAMF ¶ 6. And even among the McOpCo recruiters who did seek release letters, they testified that doing so was a "courtesy"; no phantom agreement imposed a "requirement" to do so. McD Resp. Pl. SMF ¶¶ 5, 7, 14. That includes for Ms. Deslandes herself—as shown by unrebutted testimony from the McOpCo recruiter with whom she spoke. *See id.* ¶ 7; *see also id.* ¶ 5; McD SUF ¶¶ 26, 31–33; Mot. at 9.[5]

No Evidence of a Horizontal Restraint Among Franchisees. Similarly, Plaintiffs have failed to adduce evidence of a horizontal agreement among the restaurants where each of the Plaintiffs worked. Plaintiffs focus on the fact that, on occasion, these restaurants "requested and provided releases." *See* Opp. at 29. But "parallel conduct by alleged co-conspirators is not sufficient to show an agreement." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d at 321; *accord Kleen Prod. LLC v. Georgia-Pac. LLC*, 910 F.3d 927, 942 (7th Cir. 2018); *Rsrv. Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 51 (7th Cir. 1992).

And there is not even evidence of parallelism here. Ms. Deslandes worked within 25 miles of 28 McDonald's run by multiple franchisees. Murphy Fig. 7. Yet there is no evidence that Ms. Deslandes's organization reached any agreement about releases with any—much less all—of them. McD SAMF ¶ 7. So too as to Ms. Turner, who also lived and worked near dozens of McDonald's restaurants. Murphy Figs. E-2C, E-4C–E. Rather, the franchisees in Ms. Deslandes's and Ms. Turner's locales sought and granted releases from time to time when they thought it would promote intrabrand trust and cooperation. McD SAMF ¶ 8. The unsupported assertion that McDonald's "coaxed" this testimony, Opp. at 29, cannot create a material issue of fact. *Fletcher*, 775 F. App'x at 241; *see also Anderson*, 477 U.S. at 256; *Scherer*, 975 F.2d at 361.

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[5] To the extent Plaintiffs suggest an agreement is proven by McDonald's supposed refusal in 2002 to remove part of Paragraph 14 "because of 'objections from the franchisees to the change,'" Opp. at 6, that argument simply misrepresents the cited testimony. Mr. Kramer testified that he did not know which proposed changes had been proposed or might have been found objectionable. McD Resp. Pl. SMF ¶ 8.

Moving away from actual local labor markets in which Plaintiffs worked to the alleged nationwide conspiracy simply exacerbates Plaintiffs' lack of evidence. Rather than showing that *thousands* of franchisees nationwide "worked out a common mechanism" of "requiring a 'letter of release,'" Opp. at 7, the evidence shows widespread divergence in practice and policy. *See* McD SUF ¶¶ 28–38. There is no evidence that all franchise restaurants across the country demanded or agreed to releases under the same circumstances. *See* SUF ¶¶ 31, 35–36; McD SAMF ¶ 9. For every instance in which a franchisee suggested that a release was required before hiring another franchisee's employee, *see* Pl. SMF ¶ 15, there is a countervailing example involving a different franchisee simply hiring whomever they wanted whenever they wanted. McD Resp. Pl. SMF ¶ 15. None of this bridges Plaintiffs' failure to adduce any evidence about an agreement *in their markets* to suppress wages or reduce mobility by requiring letters of release.

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At bottom, the record does not support the existence of any "single, general" horizontal agreement, much less a multifaceted conspiracy that evolved at indeterminate points over decades. *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 (4th Cir. 2002). Nor is there even evidence of parallel behavior—a prerequisite to inferring such an agreement. *See, e.g., Rsrv. Supply Corp.*, 971 F.2d at 51. As a result, this case is nothing like *In re Wholesale Grocery Products Antitrust Litigation*, on which Plaintiffs principally rely. 752 F.3d 728, 730 (8th Cir. 2014) (express evidence of an agreement between two interbrand competitors to divide geographic territories supported by emails from executives explicitly confirming an agreement "not to 'compete'"). The Court should therefore enter summary judgment for McDonald's.

2. There Is No Evidence Of A Shared, Unlawful Objective

Plaintiffs do not dispute their burden to prove that, as part of any alleged horizontal agreement, McDonald's and the franchisees for whom they worked intended and agreed to "achieve [the] unlawful objective" of suppressing employee wages. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). But challenged to come forth with such evidence, Plaintiffs have failed to do so. They do not argue that there is any direct evidence of a commitment to suppress

worker pay. *See* Opp. at 6–7. And despite the apparent allegation that multiple agreements arose over multiple years involving thousands of conspirators, they can cite to no document or testimony substantiating such a design. *Id.*

Rather, all Plaintiffs muster as a "clear[] link[] to suppressing worker pay" is McDonald's 2015 announcement that it would *increase pay* and *improve* benefits for all McOpCo restaurant workers. Opp. at 6; *see also* McD SUF ¶¶ 44, 47 (evidence that McDonald's consistently encouraged franchisees to evaluate their compensation to ensure it was "competitive"). That is remarkable in and of itself. Plaintiffs' principal evidence of an agreement intended to suppress wages was *a unilateral decision by McDonald's to increase McOpCo pay*—with no evidence of any connection to the franchisees who employed Plaintiffs. But aside from this self-evident contradiction, the actual testimony from Ms. King (McDonald's then-Chief People Officer) about McOpCo's 2015 benefits increase does not tell the story Plaintiffs string together in their brief. *See* Opp. at 7 (relying on Ms. King).

Ms. King testified that in fall 2014 McDonald's senior leadership decided to increase the minimum wage for workers in McOpCo restaurants. McD SAMF ¶ 3. This was a unilateral decision designed to "enhance the competitiveness of [McOpCo's] entire compensation and benefits package." McD SAMF ¶ 3 ("[W]e are choosing to differentiate ourselves from our competitors."). Before making a systemwide announcement in April 2015, however, McDonald's executives met with a group of franchisees' elected leadership in Las Vegas—part of a larger, regular gathering among franchisees. *Id.* Contrary to Plaintiffs' suggestion, this meeting was not "about alignment" or reinforcing a preexisting decision to suppress wages. *Id.* It was to "communicate [the] policy" that McDonald's had already adopted—just as the company would do when "roll[ing] out fresh meat patties in Texas" or "any other major decision that . . . will impact the system." *Id.*

Ms. King did not "clearly link[]" McDonald's practices to "suppressing worker pay." Opp. at 6. Rather, she recalled that "[w]e didn't talk about well, you're going to also experience pressure to raise your wages" because every franchisee has "a different point of view in their philosophy around compensation. And so it's just not something you can't talk about it. We're not going to

talk about it. We made a decision for McOpCo, these operators have to make the best decisions for their marketplaces." McD SAMF ¶ 4 (reiterating this point throughout her deposition). Moreover, McDonald's hoped its announcement would spur franchisees to "evaluate whether [their] business is competitive, including the wage and benefits packages offered to [their] employees" because doing so will "help . . . attract and retain the best people for [their] restaurant[s], provide superior customer service, develop more guest counts and ultimately maximize the profitability of your McDonald's restaurant business." Pl. Resp. McD SUF ¶ 47; McD SUF ¶ 47. By arguing otherwise, Plaintiffs merely seek to "put[] words in [Ms. King's] mouth"—just as they did during her deposition. McD SAMF ¶ 4; *see also id.* ¶ 1 (testimony from the operator of one of Ms. Deslandes's former restaurants that McOpCo made its decision to increase benefits in 2015 "irrespective" of franchisees, and he made his personnel decisions "irrespective of their decisions").

Likewise, there is no evidence that the subsequent, temporary crew hiring moratorium was anything but a unilateral decision by McDonald's—not an expansion of a nebulous, preexisting commitment to reciprocate a no-hire policy. *See* Opp. at 6. This is proven by the very records Plaintiffs cite—both of which describe the moratorium as a "unilateral decision"—as well as undisputed testimony. McD SAMF ¶ 5. McDonald's did not even discuss the "idea of a hiring moratorium" with franchisee leadership, *id.*, nor was it adhered to by all McOpCos after it was announced. *Id.*[6]

Nor do Plaintiffs offer any evidence that it even made sense for McDonald's to attempt to suppress wages. *See* Mot. at 8. They reference a (hearsay) research paper, Opp. at 6 n.3, but the undisputed *evidence* in this case shows that any savings from supposedly suppressed wages at

[6] The other evidence Plaintiffs cite in their Statement of Facts adds nothing to the calculus. For example, they point to an anecdote by one of McDonald's ombudsmen in which a franchisee complained about potential poaching, Pl. Resp. McD SUF ¶ 23 (citing Pl. Ex. 13 at 55:4–10), but omit the ombudsman's response: "after listening entirely to their concerns, I would explain to them that employees are free to work wherever and whoever they want to work with, and we really don't control what employees -- their employees, where they want to work, what they want to do." Pl. Ex. 47 at 55:14–18. This echoes the testimony of McDonald's other ombudsman. McD SAMF ¶ 13. Nothing about this bespeaks a "conscious commitment to a common scheme" to suppress wages among McDonald's and its franchisees. *Monsanto*, 465 U.S. at 764.

McOpCo restaurants would be far outstripped by the reduced output at franchisee restaurants (i.e., sales that determine the amount of royalties paid to McDonald's). McCrary ¶¶ 206–12; *see also* Dkt. 372 at 16. Given that suppressing wages would have been contrary to "McDonald's clear financial incentive," McCrary ¶ 212, it is no surprise Plaintiffs cannot cite a single instance in which McDonald's discouraged franchisees from increasing pay. That stands in stark contrast to the evidence showing McDonald's challenged franchisees to "commit to offering even more competitive wages and benefits." McD SAMF ¶ 20; *see also* Mot. at 7–8; McD SUF ¶¶ 44–47. The undisputed record thus confirms what economic theory predicts: McDonald's did not join a scheme to suppress wages to its own detriment. *See Gulf States Reorganization Group v. Nucor Corp.*, 822 F. Supp. 2d 1201, 1223–27 (N.D. Ala. 2011) (granting summary judgment where the purpose of contract was benign and no testimony established a mutual objective to restrain trade).

D. Plaintiffs Lack Any Evidence Of A Nationwide Single-Brand Market

As this Court previously observed, Plaintiffs "can establish that the [alleged] restraint is anticompetitive only by showing anticompetitive effects in the *relevant market* where she sells her labor." Dkt. 372 at 23 (emphasis added). To proceed, therefore, Plaintiffs must make some showing regarding those relevant markets. This is true regardless of whether the alleged restraint is a horizontal or vertical one, and whether Plaintiffs' claim is litigated under the rule of reason or the quick look. *See Reapers Hockey Ass'n v. Amateur Hockey Ass'n Ill.*, 412 F. Supp. 3d 941, 952 (N.D. Ill. 2019) ("The failure to allege the existence of a relevant commercial market is fatal . . . regardless of whether *per se*, quick-look, or rule-of-reason analysis is applied.") (citing *Agnew*, 683 F.3d at 337). Plaintiffs' failure to identify the relevant markets in which they sell their respective labor—much less put forward evidence of McDonald's market power in such markets—dooms their claims.

1. To Prevail Under Either The Rule Of Reason Or Quick Look Standards, Plaintiffs Must Define A Relevant Market

Plaintiffs continue to eschew the necessity of a market definition in direct contravention of Seventh Circuit precedent and this Court's rulings. Instead, they argue that the restraint should be

condemned under the *per se* rule or quick look, without regard to market definition. Opp. at 15–16. That entirely ignores two lengthy decisions by this Court, both at the motion to dismiss and class certification phases, explaining why the alleged restraint is not suitable for *per se* treatment or quick-look review. Dkt. 53 at 8–14; Dkt. 372 at 6–11. Plaintiffs offer no new evidence or law in advancing their position, nor provide any basis for revisiting the prior rulings. For the reasons already fully enumerated by the Court, the rule of reason applies. Dkt. 372 at 6–11. And, as explained in McDonald's opening motion, under the rule of reason, Plaintiffs bear the threshold burden of proving "the defendant has market power"—which itself requires the definition of a relevant market. *Agnew*, 683 F.3d at 335; *see also Menasha*, 354 F.3d at 663.

Plaintiffs would fare no better under even a "truncated version of the rule of reason," Opp. at 15—a "quick look" analysis in all but name. Under that standard, Plaintiffs must prove that "the practice at issue facially appears to be one that would always or almost always tend to [1] restrict competition and [2] decrease output, and [3] in what portion of the market." *Illinois Corp. Travel v. Am. Airlines., Inc.*, 806 F.2d 722, 727 (7th Cir. 1986) (internal marks and citations omitted). Restricted competition and reduced output can only be assessed in relation to a relevant market. *Agnew*, 683 F.3d at 337; *see also Am. Express Co.*, 138 S. Ct. at 2285 ("Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition."). Thus, the need to define a relevant market is not "dispensed with" under quick look; rather plaintiffs "must prove" that "there is a cognizable market." *Agnew*, 683 F.3d at 337.

Accordingly, under either framework, Plaintiffs must define a market in which the alleged restraint could have affected them. Plaintiffs have not done so.

2. Plaintiffs Offer No Proof Of Any Relevant Market

Despite arguing that they "do not assume or in any way depend upon a single nationwide geographic market," Opp. at 20, Plaintiffs fail to identify *any* geographic market—other than a nationwide one—in which they were harmed, *see id.* at 17 ("Plaintiffs provide significant evidence of detrimental effects, by directly observing that the No-Hire Agreement suppressed worker pay *nationwide*.") (emphasis added). McDonald's experts, on the other hand, examined employment

opportunities within a reasonable commuting distance of Ms. Deslandes and Ms. Turner's residences and demonstrated that, given the incredibly large number of alternative employers in those locales, McDonald's could not possibly have the market power necessary to suppress wages. *See* Mot. at 12–14, McD SUF ¶¶ 47–49, 54–57. There is no evidence to the contrary: Plaintiffs' expert's wage suppression regression included *no* data from Ms. Deslandes and only limited data from Ms. Turner. Murphy ¶ 174. In fact, de-averaging that regression on a state-by-state basis showed no statistically significant wage suppression in either of their home states—and even that McOpCo wages were *higher* in Florida during the alleged conspiracy than after it. *Id.* ¶¶ 184–88 & Figs. 19–23. Those facts stand unrebutted and the time to offer such evidence has passed.

Further, far from "assum[ing] that the relevant market must include non-McDonald's employers," Opp. at 18, McDonald's put forward undisputed factual evidence that McDonald's restaurants compete with non-McDonald's employers for all levels of employees (crew up through managers)—including testimony from McDonald's and franchisee witnesses responsible for recruiting and hiring and contemporaneous business documents demonstrating as much. *See* McD SUF ¶¶ 39, 40, 44–46, 48, 49; *see also* Dkt. 372 at 21–22 (describing evidence that McOpCos and franchisees competed with other quick service restaurants and other local employers to hire employees). Plaintiffs admitted their own McDonald's experience was transferable to other employers. McD SAMF ¶ 12 (admitting that performing cash audits and guest service skills were transferrable). Ms. Deslandes recognized she could leverage her ServSafe training into a better paying job elsewhere, and she even lied to potential employers about attending Hamburger University because of its recognized value. *Id.*

On the other hand, Plaintiffs rest on mere speculation in arguing there is "a cognizable market limited to independent employers operating McDonald's restaurants." Opp. at 19. The only actual evidence they offer—the existence of the alleged restraint and expert testimony—falls woefully short of establishing a material issue of fact. Plaintiffs' experts did not examine their individual claims at all and their opinions therefore do not advance them. Even as to the putative

class members (who are no longer at issue), Plaintiffs' experts did not examine potential employment alternatives or analyze the dynamics of employee choice, as would be necessary to support a market limited to McDonald's. *Compare* McD SAMF ¶ 10 with *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004) ("the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice").

Plaintiffs' argument that "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," Opp. at 19, rests on the *assumption* that non-McDonald's employers would not value McDonald's training where the actual evidence is to the contrary, McD SAMF ¶¶ 11–12. That is not surprising, as Plaintiffs' expert Dr. Cappelli did not actually study that question, and they offer no actual evidence in support of it, only *ipse dixit*. *See* Dkt. 300-1 at 6–9. Moreover, the evidence illustrates Ms. Deslandes's and Ms. Turner's ability to leverage their McDonald's training to move to non-McDonald's jobs—directly contradicting their experts' assumption. McD SUF ¶¶ 63–66. The only actual evidence in the record shows that McDonald's "does not have sufficient market share to have the market power necessary to affect [Plaintiffs' wages] and therefore harm competition," rendering summary judgment on their claims appropriate. *Valley Liquor Inc.v. Renfield Importers*, 822 F.2d 656, 667 (7th Cir. 1987).

3. Plaintiffs' So-Called "Direct Proof" Of Anticompetitive Effects Does Not Relieve Them Of Their Burden To Define The Market

Plaintiffs argue that "direct proof of detrimental effects"—namely, their expert's alleged finding "that the No-Hire agreement suppressed worker pay nationwide"—relieves them of their burden to offer even a rough market definition with regard to their individual claims. Opp. at 17. Not so. "[T]he Seventh Circuit has held as a matter of law that direct-effects evidence alone cannot establish market power." *Gumwood HP Shopping Partners v. Simon Prop. Grp.*, 2016 WL 6091244, at *9 (N.D. Ind. Oct. 19, 2016); *see also Repub. Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 737 (7th Cir. 2004) (a plaintiff relying on "direct evidence of anticompetitive effects" still must establish the "rough contours of a relevant market" and the defendant's "substantial share

of the market"). That is because "[e]conomic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market." *Repub. Tobacco Co.*, 381 F.3d at 737; *see also Hannah's Boutique, Inc. v. Surdej*, 2015 WL 4055466, at *4 (N.D. Ill. July 2, 2015) ("To ensure that the direct effects analysis is meaningful, a plaintiff needs to make a minimum initial showing that the defendant possesses a substantial market share in a roughly-defined relevant market.").

Moreover, Plaintiffs do not point to any evidence of actual anticompetitive effects—wage suppression—that *they* suffered. The only evidence they point to is Dr. Singer's wage suppression regressions that he claims demonstrated average *nationwide* wage suppression. Opp. at 3; Pl. SMF ¶¶ 68–76; Dkt. 270-5 ¶¶ 4, 60, 62, 63–65, 83. Notwithstanding the fundamentally unreliable nature of that evidence, *see* Dkt. 301-1 at 8–12, it cannot substitute for Plaintiffs' burden to define the market because "it *assumes* that plaintiffs sell their labor in one national market." Dkt. 372 at 20 (emphasis in original); *see also* Dkt. 301-1 at 7–8. Plaintiffs now seemingly recognize the fallacy of a nationwide labor market, Opp. at 20, but ignore that their "direct proof" depends on it.

Try as they might to avoid it, Plaintiffs' case cannot proceed absent a defined market(s) in which the alleged restraints could have had anticompetitive effects for them. Their failure to offer one means that summary judgment is appropriate. *Menasha*, 238 F. Supp. 2d at 1034 (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).

E. Plaintiffs' Motion For Judgment On McDonald's Procompetitive Justifications Must Be Denied

Plaintiffs' cross-motion for summary judgment on McDonald's asserted procompetitive justifications is unsupported as either a legal or factual matter—it rests on mischaracterization (or ignorance) of the law and ignores the factual record. And McDonald's has otherwise offered substantial evidence to show that the alleged restraint had the procompetitive justifications of deterring free-riding, facilitating intrabrand cooperation, and enhancing output. As Plaintiffs offer no valid evidence or law to the contrary, their cross-motion should be denied.

1. McDonald's Was Not Required To Plead Its Procompetitive Justifications

Plaintiffs' argument that McDonald's should be "preclude[d] . . . from asserting defenses that are wholly unpled in its answers," Opp. at 14, is wrong as a matter of law, and any relief they seek should be denied. As a preliminary—and dispositive—matter, this argument is nonsensical given that Plaintiffs *did not plead* a rule of reason claim. *See*, *supra*, at 2–4. But in any event, Plaintiffs conflate McDonald's burden of *proving* procompetitive effects under the rule of reason with a requirement for *pleading* affirmative defenses.

Unlike duress, fraud, estoppel, laches, waiver, and other enumerated defenses that a party "must affirmatively state" in an answer, Fed. R. Civ. P. 8(c)(1), the assessment of procompetitive effects is an inherent component of the quick look or rule of reason analysis. *See Agnew*, 683 F.3d at 335–36. After all, this inquiry requires "weigh[ing] all of the circumstances," *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007), to assess "the total economic effects of a restrictive practice that is plausibly argued to increase competition or other economic values on balance," *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1011 (7th Cir. 2012). Thus, the defendant's burden here is akin to an employer's ability to offer a "legitimate, non-discriminatory reason" in a Title VII case—similarly part of a "burden shifting" framework that need not be pled as an affirmative defense. *Peterson v. Nat'l Sec. Techs., LLC*, No. 12-CV-5025-TOR, 2013 WL 1758857, at *8 (E.D. Wash. Apr. 24, 2013); *see also Thomas v. Exxon Mobil Corp.*, No. 07 C 7131, 2009 WL 377334, at *2 (N.D. Ill. Feb. 11, 2009) (striking "affirmative defense" that "legitimate, non-discriminatory reasons" supported termination as that "is nothing more than a mere denial of the allegations in the complaint").

Plaintiffs rely on *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), but nothing in that case requires otherwise. *See* Opp. at 15. The stray line referring to the defendant's procompetitive justifications as "an affirmative defense," did not purport to impose any particular pleading burden on a defendant. *NCAA*, 468 U.S. at 113. To the contrary, it recognized that the assessment of such justifications lies at the heart of the rule of reason itself, *see id.*—

a point the Supreme Court has recently reaffirmed. *Alston*, 141 S. Ct. at 2160. Because the existence of procompetitive effects is therefore an inherent dispute in cases like this one, pleading as much is not "necessary 'to avoid surprise and undue prejudice'"—the "critical question . . . in determining whether an issue should be treated as an affirmative defense for purposes of pleading." *In re ZAGG Inc. S'holder Derivative Action*, 826 F.3d 1222, 1231 (10th Cir. 2016).

In any event, a defendant only waives an affirmative defense if "the plaintiff was harmed as a result" of the delay. *Williams v. Lampe*, 399 F.3d 867, 870–71 (7th Cir. 2005); *see also Curtis v. Timberlake*, 436 F.3d 709, 711 (7th Cir. 2005) (affirmative defense not waived when plaintiff was aware of it from the case's inception). Defendants surfaced the existence of procompetitive effects in their motion to dismiss, Dkt. 35 at 1–2, 9–11, and denied the allegation that "[t]he agreement . . . did not contribute to the success of[] any legitimate procompetitive benefit," *Turner* Dkt. 67 ¶ 2. Plaintiffs also served an interrogatory asking McDonald's to identify former Paragraph 14's procompetitive effects—clear evidence that they were aware this was a live issue. Pl. SMF ¶ 26. McDonald's provided a detailed answer to that request, Plaintiffs deposed at length the witness who verified that response, and McDonald's has consistently argued former Paragraph 14's procompetitive effects throughout this litigation. McD SAMF ¶ 14; McD Resp. Pl. SMF ¶ 27; Dkt. 27 at 8–10. There is no reason to preclude the parties from litigating the issue now. *See Curtis*, 436 F.3d at 711; *Lock Realty Corp. IX v. U.S. Health, LP*, 707 F.3d 764, 772 (7th Cir. 2013); *Schmidt v. Eagle Waste & Recycling, Inc.*, 599 F.3d 626, 632 (7th Cir. 2010).

2. McDonald's Has Put Forward Evidence Of Valid Procompetitive Justifications For The Alleged Agreement, As This Court Already Found

Courts have long recognized a "wide range of justification for restraints." ABA Antitrust Section, Antitrust Law Developments 74 (8th ed. 2017). These include limiting free-riding, *Leegin*, 551 U.S. at 903, promoting interbrand competition, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51–52, 54 (1977), creating operating efficiencies, *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1023 (10th Cir. 1998), and increasing output, *Polk Bros.*, 776 F.2d at 189. This Court has already concluded that McDonald's has "put forth sufficient evidence of pro-

competitive effects of the hiring restriction to warrant full rule of reason analysis." Dkt. 372 at 12. Plaintiffs ignore this holding and, on the exact same record as was before this Court at class certification, now argue that somehow *they* are entitled to summary judgment on McDonald's asserted justifications. Regardless, McDonald's procompetitive effects are well supported by legal and economic theory, and borne out by the evidence in this case such that they create—at the very least—a material issue of fact on this issue, rendering summary judgment in appropriate.[7]

McDonald's franchising system, which revolutionized the franchising business model, was built on a franchise agreement with provisions designed to promote brand consistency and investment by franchisees. McD SUF ¶¶ 8, 18; McCrary ¶¶ 67–69. The genius of Ray Kroc's system was that as these restraints within the franchise agreement limited free-riding, incentivized investments, and promoted cooperation among McDonald's franchisees, and in turn enhanced McDonald's competitiveness vis-a-vis other brands, resulting in exponential growth and output expansion over the decades that followed its original 1955 adoption. McD SUF ¶¶ 14, 15, 18, 25. Among these restraints was a restriction on poaching employees within the System. *Id.* ¶18. The procompetitive nature of that alleged restraint is addressed extensively in the expert report of Dr. Justin McCrary. McCrary ¶¶ 25–198.[8]

Plaintiffs do not challenge the admissibility of Dr. McCrary's testimony (*see* Dkt. 372 at 12) and offer no evidence that disputes it; they simply complain it is "based on *hypothetical* reasons," Opp. at 22 (emphasis in original), for why McDonald's adopted the alleged restraint. Not so. Dr. McCrary's analysis is based on the context of the development of McDonald's franchise agreement, monographs chronicling the founding of the McDonald's franchise system (one of

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[7] Plaintiffs have not met their burden of proving anticompetitive effects, which means that the Court need not reach the question of whether any alleged procompetitive benefits outweigh the anticompetitive effects under the rule of reason. *Agnew*, 683 F.3d at 345 (affirming dismissal for failure to identify a relevant market, prior to considering procompetitive justifications).

[8] Dr. McCrary submitted a sworn declaration attesting to the veracity of his report. Dkt. 379-1.

which was written by Mr. Kroc himself), percipient witness testimony, economic theory, franchising literature, and an evaluation of McDonald's revenue streams and economic incentives. *E.g.*, McCrary ¶¶ 65–69, 138, 140, 151. Dr. McCrary also analyzed McDonald's training and franchising materials, crew development programs, management training courses and manuals, and business reports to assess how it builds intrabrand cooperation and maintains brand standards. *Id.* ¶¶ 91–95, 137, 142, 153. None of this is "hypothetical"; it is record evidence, which Dr. McCrary explains in the context of franchise economics generally, and scholarship on the McDonald's system specifically. *Id.* Figs. 1, 2; ¶¶ 74, 76, 78–99. That testimony is admissible and reliable.

Plaintiffs' arguments regarding the testimony offered by James Kramer, former Vice President of International Franchising at McDonald's, are similarly misplaced. As one of the last-living original franchising executives, Mr. Kramer testified that former Paragraph 14 "was there to convince franchisees, who were going to invest in McDonald's, that they were not going to lose their investment in people to other franchisees." McD SAMF ¶¶ 16–17. Former Paragraph 14 thus promoted "trust between [McDonald's] franchisees and the company," which "is really important to the success of McDonald's as a company." McD SAMF ¶ 18. Plaintiffs criticize Mr. Kramer's testimony as being based on "common sense," Opp. at 21, but Mr. Kramer's testimony was based on his personal knowledge, derived from not only decades of work at the frontline of McDonald's franchising operations but conversations with people who were present and part of the early building of the McDonald's franchise system. McD SAMF ¶¶ 15–16 (explaining his understanding of Paragraph 14 based "on the years that [he] worked within the franchising department" and spent time "discussing relationships with our owner-operators").

And if that type of learned expertise is "common sense," that is admissible too, as Plaintiffs' cited authorities support reliance on it. In *U.S. v. Scott*, the Seventh Circuit disapproved of conclusions drawn from "detail-free" assertions of "training and experience" as supporting probable cause for a search warrant. 901 F.3d 842, 844–45 (7th Cir. 2018). However, where conclusions drawn on training and experience can "be cross-examined to unearth [their] foundation," *id.*, as Mr. Kramer's were during his almost six-hour deposition—much of which was focused on the

testimony Plaintiffs now challenge—they are admissible. McD SAMF ¶ 14. *Payne v. Pauley* also allows that "personal knowledge may include reasonable inferences," 337 F.3d 767, 772 (7th Cir. 2003), and Plaintiffs' contention that Mr. Kramer "had no personal knowledge of why Paragraph 14 was in the standardized franchise agreement," Opp. at 21, is divorced from its context, where Mr. Kramer testified (immediately after Plaintiffs' cited portion) that "[o]ver time, [he] learned why [Paragraph 14] was in [the franchise agreement]," noting that he "would have discussions about . . . this document and these issues, whatever they might be, within the franchising department, with my colleagues," Pl. SMF ¶ 29 (Ex. 14 at 58:3–61:12). One of these colleagues had been with McDonald's since the 1960s. *Id.* Moreover, Plaintiffs' claim that Mr. Kramer's testimony is inadmissible because he was not present at the McDonald's franchise system's founding is facially inconsistent with their insistence that procompetitive rationales originating from that founding are not relevant. Opp. at 21–23, 25–27. Neither of these positions is correct. *See, infra*, at 24–28.

In short, McDonald's evidence supporting its procompetitive rationales is reliable and admissible, and Plaintiffs have not offered any evidence to show otherwise.

3. The Alleged No-Hire Agreement Contributed To The Success Of The McDonald's System And Led To Greater Investment In Training, Intrabrand Competition, and Output

As this Court has already found, to evaluate a proffered procompetitive justification for an agreement containing an ancillary restraint, the Court "must ask whether [the] agreement promoted enterprise and productivity *at the time it was adopted*." *Polk Bros.*, 776 F.2d at 189 (emphasis added); *see also* Dkt. 53 at 12–13, Dkt. 372 at 9–11.

When the predecessor to Paragraph 14 was added as an ancillary restraint to the 1955 franchise agreement, franchise operations were still a "significant innovation" only "lately com[ing] into prominence." Frank Covey, *Franchising and the Antitrust Laws: Panacea or Problem*, 42 Notre Dame L. Rev. 605, 605 (1967); *see also FTC v. Qualcomm Inc.*, 969 F.3d 974, 990–91 (9th Cir. 2020) (courts should not presume "novel business practices" are unreasonable, particularly

where they "can have long-lasting effects" that foster "economic growth and social welfare"); *Alston*, 141 S. Ct. at 2163 ("Firms deserve substantial latitude to fashion agreements that serve legitimate business interests."); McCrary ¶¶ 25–50 (describing franchise systems and their economic motivations for limiting intrabrand competition). McDonald's reasonably concluded that its restraint on intrabrand hiring would increase interbrand competition and output in at least three ways.

First, former Paragraph 14 deterred *intra*brand free-riding, whereby franchisees would forgo investing in their own employees and instead hire well-trained employees from other franchisees. *See* McD SUF ¶ 22; McD SAMF ¶¶ 17–19; *see also Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674–75 (7th Cir. 1992) ("Firms that take advantage of costly efforts without paying for them, that reap where they have not sown, reduce the payoff that the firms making the investment receive. This makes investments in design and distribution of products less attractive, to the ultimate detriment of consumers. Control of free-riding is accordingly an accepted justification for cooperation."); *Leegin*, 551 U.S. at 886. Here, limiting free-riding incentivized each franchisee to invest in its own operations, which helped establish and then grow the McDonald's brand. McCrary ¶¶ 71–75; *Williams v. I.B. Fischer Nevada*, 794 F. Supp. 1026, 1029 (D. Nev. 1992) (same rationale for different brand). Consistent with this purpose, in 1975, the Ohio Court of Appeals concluded that former Paragraph 14 served a "legitimate business objective" because "there was a valid relationship between McDonald's desire to avoid the enticement and hiring of its franchisees' managers within the system, and the profit factors as experienced by the franchisor McDonald's in the overall unified operation of its system." *Pearse v. McDonald's Sys. of Ohio, Inc.*, 47 Ohio App. 2d 20, 26–27 (1975). Deterrence of free-riding would also benefit consumers; as this Court pointed out, "the benefit of the brand to the consumer is the consistency the consumer can expect each time he makes a purchase from that brand and the reduced search costs inherent in sticking with what is known." Dkt. 372 at 12.

Plaintiffs misconstrue the concept of free-riding altogether by claiming that Franchise A could prevent the threat of free-riding by Franchise B by paying a competitive wage. But Plaintiffs ignore the need to give Franchise A an incentive to provide training in the first place. Without

assurances that it will have the benefit of its investments in such training, Franchise A will have less incentive to do so, which is bad for both the workers and the brand. McCrary ¶¶ 34–39. In short, it is the *threat* of free-riding that matters.

Plaintiffs' further attacks on the free-riding justification are also not to the point. In *General Leaseways Inc. v. National Truck Leasing Association*, the Seventh Circuit found the defendant's free-rider argument insufficient because there were no intangible investments on which to free-ride. 744 F.2d 588, 593–94 (7th Cir. 1984). This is not the case here; free-riding on the training investments of other business is a well-documented public good problem. McCrary ¶¶ 34–39. The decision in *Toys R Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000), is also inapt because there was no free-rider problem there. Franchisees can and do hire trained workers away from one another while saving on their own training costs, thus the need to protect a franchisee's investment in training is an entirely real free-riding concern. The very documents cited by Plaintiffs demonstrate as much. Pl. Resp. McD SUF ¶ 23 (citing Pl. Resp. Ex. 13 at 55:4–10 (McDonald's executive Robert Valdez testifying that he would get calls from operators "concerned that employees were being pirated . . . by another franchisee," and that they had "invested a lot of time, effort, and development" on an employee) and Pl. Resp. Ex. 14 (email from franchisee to McDonald's corporate regarding concern that "[o]perators relied on [Paragraph 14]'s protection when choosing McDonald's as the franchise to dedicate our lives to," and without it, they would "incur training costs and could lose an employee for as little as ten cents an hour more offered by another operator")).

Second, former Paragraph 14 facilitated *intra*brand cooperation—a key ingredient to a franchise system's success. McD SAMF ¶¶ 17–19. Mr. Kroc emphasized intrabrand cooperation, consistency across operations, and—in particular—investment in employee training, believing that doing so would promote *inter*brand competition between all McDonald's restaurants and other restaurants. McCrary ¶¶ 68, 72–74. Former Paragraph 14 was originally coupled with a territorial exclusivity restraint, which assured franchisees that no other competing McDonald's restaurants would be established in their geographic areas. McD SUF ¶ 18. Courts routinely have found that

such vertical territorial restraints can be procompetitive because they incentivize *intra*brand cooperation while simultaneously promoting *inter*brand competition. *See, e.g.*, *Cont'l T.V.*, 433 U.S. at 55–56. The same rationale applied to Paragraph 14.

Plaintiffs' rebuttal of this justification is a patchwork of irrelevant cases. First, Plaintiffs cite to a cherry-picked sentence on merger efficiencies under the Clayton Act. Opp. at 24 (citing *U.S. v. Anthem, Inc.*, 955 F.3d 345, 369 (D.C. Cir. 2017)). Next, Plaintiffs cite to an out-of-circuit case, *Law v. NCAA*, 134 F. 3d 1010 (10th Cir. 1998), arguing that "cost-cutting by itself is not a valid procompetitive justification" because then "any group of competing buyers could agree on maximum prices." *Id.* at 1022. But this misses the point: McDonald's does not justify the restraint as a cost-cutting measure. To the contrary, McDonald's consistently encouraged its franchisees to train their employees and pay *more* in wages to enhance the competitiveness of the brand. McD SUF ¶¶ 39–40. Indeed, Plaintiffs have not identified a single piece of evidence that links the alleged restraint to reducing or suppressing wages. *See*, *supra*, at 13–15; Mot. at 6–10. McDonald's relied on the restraint to promote intrabrand cooperation and reduce infighting, such that franchisees would work for the good of the brand to enhance service by investing in their employees and rely on one another for equipment and material shortages. McD SAMF ¶¶ 16–19. Only when cost savings are the *mere* justification can they fail as a defense under the antitrust laws, *Law*, 134 F.3d at 1023, and that is not the case here.[9]

Third, former Paragraph 14 contributed to expanding McDonald's output. The success of this "franchise system of operation" has been, of course, "good for the economy." *Susser v. Carvel Corp.*, 206 F. Supp. 636, 640 (S.D.N.Y. 1962); *see also United States v. Arnold, Schwinn & Co.*, 237 F. Supp. 323, 334–35 (N.D. Ill. 1965) (extolling the virtues of franchise systems—the "effects" of which "by and large are wholesome"—as "a fact of business life"). McDonald's has provided thousands of opportunities for "individuals with small capital to become entrepreneurs,"

[9] Plaintiffs' final citation to a *per se* price-fixing case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), is irrelevant to this analysis.

creating "a class of independent businessmen" who in turn have created millions of jobs. *Susser*, 206 F. Supp. at 640; McD SAMF ¶¶ 22–22. Plaintiffs even acknowledge that employees in McDonald's restaurants have received first-rate training. *See, e.g.*, Dkt. 270-6 ¶¶ 48–58. As just one example, over 275,000 individuals have graduated from Hamburger University since it first opened in 1961 and countless other employees received college credit for their on-the-job training. *See* McD SAMF ¶ 24. McDonald's growth and success also has "provide[d] the public with an opportunity to get a uniform product at numerous points of sale." *Susser*, 206 F. Supp. at 640; *see also* McD SAMF ¶¶ 21–22. And the number of jobs created is staggering—as of 2015, an estimated one out of every 12 working Americans had worked at a McDonald's. McD SAMF ¶ 23. That included Plaintiffs, who leveraged their experiences and training at McDonald's into new employment opportunities. McD SUF ¶¶ 63–65.

Taken together, there is ample evidence for a jury to consider in assessing procompetitive virtues of the alleged restraint. Plaintiffs have not carried their initial burden to demonstrate anticompetitive effects suffered by Plaintiffs in a relevant market, but if they had, the burden would now shift back to them to "demonstrate that the[se] procompetitive efficiencies could be reasonably achieved through less anticompetitive means" according to the traditional rule of reason framework. *Alston*, 141 S. Ct. at 2160. This is a burden they cannot meet, as they have adduced no evidence to support a claim that McDonald's franchising system could have achieved the same deterrence of free-riding, facilitation of intrabrand cooperation, and increased output through "substantially less restrictive means." *Id.* at 2162. And even if they could proffer another means, *Alston* specifically discourages courts from second-guessing the relative efficiencies of procompetitive justifications, noting that a "skilled lawyer" could always find a more efficient way to achieve a benefit. *See id.* at 2161. Plaintiffs' Cross-Motion for Summary Judgment on McDonald's procompetitive justifications is thus meritless and should be denied.

F. Ms. Deslandes's and Ms. Turner's Claims Are Time-Barred

Plaintiffs' evidence confirms that they learned of their alleged injuries more than four years before bringing suit. *See In re Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006).

Ms. Turner admits she knew about Paragraph 14 two decades ago. McD SUF ¶ 61. And although Ms. Deslandes attempts to backtrack her sworn statement to the EEOC, Opp. at 29 n.25, she does not deny learning about letters of release in March 2013—a fact confirmed by the records she submits, McD SAMF ¶ 25. That Plaintiffs "didn't know it was illegal" until later, Pl. Resp. McD SUF ¶ 61, is irrelevant: "it is the discovery of the injury, not the elements of a particular claim, that gets the clock ticking." *Cancer Found., Inc. v. Cerberus Cap. Mgmt., LP*, 559 F.3d 671, 675 (7th Cir. 2009).

Plaintiffs cannot toll the accrual of their claims by pointing to supposedly "depressed wage[s]." Opp. at 28. Their actual knowledge of the challenged practice forecloses a continuing violation theory. Mot. at 15. This is not a rule unique to Title VII cases as Plaintiffs imply, *see* Opp. at 28 n.23; it extends wherever the doctrine is invoked. *See, e.g., Pitts v. City of Kankakee, Ill.*, 267 F.3d 592, 596 (7th Cir. 2001) (First Amendment claim); *Macklin v. United States*, 300 F.3d 814, 824 (7th Cir. 2002) (tax claim); *Overton v. Health Commc'ns, Inc.*, No. 10-CV-701-WMC, 2012 WL 13069986, at *7 (W.D. Wis. Feb. 6, 2012) (copyright claim). Moreover, neither Ms. Deslandes nor Ms. Turner attempted to prove "[t]he amount each [of their] wages were suppressed multiplied by the hours worked." Dkt. 372 at 24 n.6; *see also* Murphy Rpt. ¶¶ 174, 184. Plaintiffs therefore prove nothing by noting that they worked at McDonald's restaurants until 2015 and 2019, respectively. Opp. at 28–29; *see also In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1213 (N.D. Cal. 2015) (claim untimely where plaintiffs "failed to allege any facts showing that their compensation was at all impacted" after the relevant date).

Nor are there other "overt acts" to restart the limitations period. Opp. at 29. Ms. Turner's "well-recounted experience[]," *id.*, is that she "never verbally asked if [she] could have a release" and then decided not to pursue a job elsewhere for personal reasons, McD SAMF ¶ 26. And Ms. Deslandes cannot rely on discussions with a McOpCo recruiter in 2014 or 2016, Pl. Resp. McD SUF ¶ 62, because there is no evidence that those discussions resulted in any request for a release letter pursuant to or in furtherance of any agreement, *see, supra*, at 11. All other documents Plaintiffs cite are about the experiences of others; none evidences a "discrete act with fresh adverse

consequences" for Ms. Deslandes or Ms. Turner. *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 902 (7th Cir. 2004).

Finally, Plaintiffs argue that laches "does not apply" under *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663 (2014). Opp. 28 n.23. That ruling extends only to "a claim for damages" governed by Section 507(b) of the Copyright Act. 572 U.S. at 668. This is an antitrust case seeking not only damages but also "equitable relief," including multiple "permanent injunction[s]," "restitution," "disgorgement," and "a constructive trust." Dkt. 32 at 38–40; Dkt. 180-1 at 34–35. Before and since *Petrella*, "many courts" have recognized laches may "bar claims for equitable relief based on antitrust claims" even when "brought within the statute of limitations period." *Corizon, LLC v. Wainwright*, No. 3:20-CV-00892, 2020 WL 6323134, at *7 (M.D. Tenn. Oct. 28, 2020) (collecting cases). Because Plaintiffs offer nothing beyond this threshold argument, they otherwise "concede[] through silence" that their claims are foreclosed. *Maxum Indem. Co. v. Oxford Interior Corp.*, 443 F. Supp. 3d 348, 351 n.2 (E.D.N.Y. Mar. 9, 2020).

III. 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, and deny Plaintiffs' cross-motion.

Dated: December 7, 2021

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

By: */s/ Rachel S. Brass*
Rachel S. Brass
GIBSON DUNN & CRUTCHER LLP

GIBSON, DUNN & CRUTCHER LLP
Rachel S. Brass (admitted pro hac vice)
Caeli A. Higney (admitted pro hac vice)
Julian W. Kleinbrodt (admitted pro hac vice)
555 Mission St., Suite 3000
San Francisco, California 94105
Telephone: (415) 393-8200

Facsimile: (415) 374-8458
Email: RBrass@gibsondunn.com

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

A&G LAW LLC

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

CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the foregoing document was electronically filed on December 7, 2021 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

/s/ *Rachel S. Brass*
Rachel S. Brass