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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT ON McDONALD'S ASSERTED JUSTIFICATIONS

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Rules

Treatises

Other Authorities

TABLE OF AUTHORITIES
(continued)

Page

I. INTRODUCTION

The Court should grant Plaintiffs' Cross-Motion for Summary Judgment because no reasonable jury could conclude that the No-Hire Agreement was justified by competitive benefits. At trial, Plaintiffs will ask the jury to find that McDonald's joined a horizontal market allocation scheme: a *per se* violation of the Sherman Act. "[T]hese hallmarks of anticompetitive behavior place upon [McDonald's] a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 113 (1984). An essential element of this affirmative defense is that the No-Hire Agreement was ancillary to McDonald's franchise system. McDonald's does not and cannot satisfy this requirement.

First, McDonald's ancillarity argument does not address Plaintiffs' theory of liability. McDonald's offers litigation-created speculation and hearsay regarding why Paragraph 14 was part of its original franchise contracts in 1955, when McDonald's did not compete for labor with its franchisees, and when McDonald's wanted to offer (anticompetitive) inducements to convince reluctant franchisees to join the system. But Plaintiffs do not challenge vertical franchise contracts from 1955, which expired long before the damages period beginning in 2013. Plaintiffs challenge the No-Hire Agreement, which was a horizontal understanding entered into decades later by labor competitors to allocate each other's workers, with restraints that went beyond the franchise contracts and were created apart from them. Critically, McDonald's offers no justification for the challenged misconduct because—implausibly—*McDonald's denies that it occurred*. But there is ample record evidence from which a reasonable jury could find it did.

McDonald's denies the existence of a horizontal market allocation scheme; denies that McDonald's preserved Paragraph 14 during the damages period after franchisees objected to narrowing it; denies that it secretly agreed with its franchisee labor competitors to reciprocate Paragraph 14; and denies that McDonald's and its franchisees shared a common method for policing and enforcing the restrictions (requiring "letters of release" from co-conspirator

employers). McDonald's does not dispute that, if proven, these restrictions were naked restraints of trade that are properly subject to *per se* condemnation.

Second, even with respect to Paragraph 14, McDonald's offers no legally cognizable or factually supported justification. In particular, McDonald's fails to even argue that Paragraph 14's unlimited scope had any rational connection to its purported competitive concerns. Instead, McDonald's makes the remarkable and meritless argument that the overbreadth of a restraint is irrelevant to ancillarity. This is wrong, as McDonald's own authorities explain. Pursuant to even the most deferential formulations of ancillarity, there must be some fit between the scope of the restraint and legitimate competitive benefits. If, as McDonald's insists, the relevant scope of labor competition is exclusively local, then there can be no justification for the "egregiously excessive" nationwide prohibition set forth in Paragraph 14. Herbert J. Hovenkamp, *Competition Policy for Labour Markets*, U. of Penn. Inst. for Law & Econ. Research Paper No. 19-29 at 12-13 (May 17, 2019). Thus, Paragraph 14 should be treated as the naked restraint of trade it was, along with other components of the No-Hire Agreement that McDonald's denies occurred.

Third, McDonald's ignores the undisputed evidence that eliminating the No-Hire Agreement did not negatively impact McDonald's franchise system, including with respect to McDonald's litigation-inspired procompetitive defenses. The No-Hire Agreement ended in 2018, and we now have three years of observable market reality that disproves McDonald's self-serving speculation. In fact, franchisees did not train their employees less. In fact, franchisees did not cooperate less in legitimate areas like marketing. In fact, output did not decrease. In fact, new franchisees continued to join the system. Indeed, the *undisputed* facts show that, when McDonald's eliminated the restraint and permitted the market competition required by the Sherman Act, employees, franchisees, and McDonald's all did better than ever.

Finally, McDonald's asserted justifications fail on their own terms, and only serve to admit the market power and anticompetitive effects that McDonald's elsewhere denies.

II. ARGUMENT

A. McDonald's Competitive Justifications Are Affirmative Defenses Properly Subject to Plaintiffs' Cross-Motion for Summary Judgment

McDonald's contends that its competitive justifications are not affirmative defenses. Br. at 20-21.[1] McDonald's is wrong. A procompetitive justification for what would otherwise be *per se* unlawful misconduct is a textbook affirmative defense. As the Supreme Court explained in *Board of Regents*, McDonald's bears the "*heavy burden* of establishing an *affirmative defense* which competitively justifies [its] apparent deviation from the operations of a free market." 468 U.S. at 113 (emphasis added). This was no "stray line" in an opinion, Br. at 20; it was the burden of proof the Supreme Court articulated and applied at length. *Id*. at 113-120 (examining and rejecting asserted competitive justifications). *See also NCAA v. Alston*, 141 S. Ct. 2141, 2157 (2021) (explaining that its analysis is "fully consistent" with *Board of Regents*, including requiring "procompetitive rationales" to avoid condemnation under the *per se* rule, even in industries in which some horizontal restraints are essential). It also reflects black letter antitrust law, repeated many times in this Circuit and elsewhere. *See, e.g., Agnew v. NCAA*, 683 F.3d 328, 335-36 (7th Cir. 2012) (defendant required to "show that the restraint in question actually has a procompetitive effect on balance"); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (defendant bears "burden . . . to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct"). McDonald's asks the Court to ignore this controlling authority, in favor of out-of-circuit cases regarding Title VII and securities claims. Br. at 20-21. Those cases are irrelevant to the task at hand. They are not antitrust cases, and address only pleading requirements, not the evidentiary burden for an antitrust defendant at summary judgment and trial.

Summary judgment with respect to McDonald's affirmative defenses is appropriate because, as explained further below, they present no genuine issues of material fact for the jury

[1] "Br." refers to Defendant McDonald's Combined Reply in Support of Motion for Judgement on The Pleadings or in the Alternative Summary Judgment and Opposition to Plaintiffs' Cross-Motion for Summary Judgment on McDonald's Asserted Justifications (Dkt. 415).

to resolve. *See* Part II.B-D, *infra*. Resolving this now will narrow the issues for trial and facilitate the efficient adjudication of Plaintiffs' claims. *See* Fed. R. Civ. P. 56(a) (party may seek summary judgment on "part" of a "defense"); *Republic Tobacco, L.P. v. N. Atl. Trading Co.*, 254 F. Supp. 2d 985, 997 n.13 (N.D. Ill. 2002) (purpose of partial adjudication is "to streamline the litigation process by narrowing the triable issues").

Finally, McDonald's contends that, "[i]n any event," it should not be precluded from litigating its unpled affirmative defenses because Plaintiffs will not be harmed by the delay. Br. at 21. If that is so, then equity demands that Plaintiffs should not be precluded from proving their antitrust claims pursuant to a rule of reason framework, if the Court finds that to be necessary (which, respectfully, it is not). Unlike McDonald's unpled affirmative defenses, Plaintiffs' factual and legal theories are set forth in their pleadings, and have remained the same throughout this litigation: the No-Hire Agreement was an unreasonable restraint of trade because it allocated employee labor, suppressed worker pay, and was not ancillary to McDonald's franchise agreements. *See* Pls.' Cross-Mot. (Dkt. 400) at 13; *Deslandes* Dkt. 32 ¶¶ 10, 11, 14, 23-38, 59-116; *Turner* Dkt. 1 ¶¶ 2, 7-17, 27-42, 63-115. This is so regardless of whether the mode of analysis is *per se*, quick look, or full rule of reason. McDonald's makes no argument that it has been prejudiced by Plaintiffs seeking to prove their well-pled antitrust claims pursuant to any applicable mode of analysis, and McDonald's makes no request under Rule 56(d) that it needs additional time or discovery to respond. Indeed, the parties completed extensive fact and expert discovery regarding issues relevant to the rule of reason. Plaintiffs' experts explained there is a relevant service market for workers with McDonald's-specific skills, Pls.' SMF (Dkt. 403) ¶¶ 57-67, and Plaintiffs cited cases regarding the cognizability of such a market in class certification and related *Daubert* briefing, s*ee* Class Cert Reply (Dkt. 344) at 4, n.6; Cappelli *Daubert* Opp. (Dkt. 327) at 11, n.12. (McDonald's does not dispute or respond to Plaintiffs' legal authority concerning the validity of this market definition, *see* Pls.' Cross-Mot. (Dkt. 400) at 18-19 & nn.13-14.) Plaintiffs' experts accounted for variations in local geographic markets when measuring anticompetitive effects, and explained why defining strict geographic markets

did not serve any economic purpose, Pls.' SMF (Dkt. 403) ¶¶ 70-72, a point that McDonald's addressed in its opposition to class certification and its expert reports, *see*, *e.g.*, Class Cert. Opp. (Dkt. 303) at 12-15; Pls.' Resp. to Defs.' SUMF (Dkt. 405), Ex. 52 (Murphy Rept.) at 6, 49, 64-65. To quote McDonald's: "There is no reason to preclude the parties from litigating the issue now." Br. at 21.

B. McDonald's Offers No Justification For The No-Hire Agreement During the Damages Period

McDonald's competitive justifications answer an irrelevant question: What *post hoc* justifications can McDonald's legal team conjure to explain why Paragraph 14 appeared in the original franchise contracts from 1955? While there are many reasons to reject McDonald's answer, it is critical to first acknowledge that McDonald's asks the wrong question.

In 1955, McDonald's did not operate its own competing restaurants, and needed to entice potential franchisees to its then novel and untested franchise model. Defs.' SUMF (Dkt. 380) ¶¶ 16, 22. To do so, McDonald's gave each franchisee an exclusive territory in which to sell its products, and allocated worker labor so that franchisees did not compete for each other's workers. *Id.* ¶ 18. Each franchise contract required renewal every 20 years. Defs.' Resp. to Pls.' SAMF (Dkt. 418) ¶ 1. Over the ensuing decades, McDonald's franchise model became fabulously successful, and McDonald's was able to easily attract additional franchisees. Defs.' Resp. to Pls.' SMF (Dkt. 416) ¶¶ 34-35. New franchisees signed their own contracts as they entered the system, and existing franchisees renewed their contracts every 20 years. Defs.' Resp. to Pls.' SAMF (Dkt. 418) ¶¶ 1-2.

By the early 1970s, McDonald's no longer offered exclusive territories to its franchisees. Pls.' SMF (Dkt. 403), Ex. 14 (Kramer Depo) at 135:3-5. By the 1980s, it no longer required anticompetitive inducements to convince franchisees to invest because it was working in a "seller's market." Pls.' SMF (Dkt. 403) ¶¶ 33-35. In fact, all franchise agreements in effect during the damages period expressly stated that franchisees were free to compete for each other's customers. *Id.* ¶ 4. The standard franchise contract also made clear that McDonald's and its

franchisees were not joint employers or joint venturers with respect to employees in any way. Defs.' Resp. to Plfs. SMF (Dkt. 416) ¶ 2. But McDonald's and its franchisees did not remove or narrow Paragraph 14. Why? Because of "objections from the franchisees to the change." Plfs. SMF (Dkt. 403) ¶ 8.[2] At the same time, unlike in 1955, McDonald's by now operated its own restaurants in direct competition with franchisees. Defs.' SUMF (Dkt. 380) ¶ 17. Although Paragraph 14 imposed no restriction on McDonald's, in secret, McDonald's reciprocated the restraint, first with respect to managers, and then with respect to crew. Pls.' SMF (Dkt. 403) ¶¶ 7-18. McDonald's thus fully joined the allocation scheme as a direct, horizontal participant. Finally, while Paragraph 14 provided no mechanism for franchisees to monitor compliance among each other, franchisees and McDonald's adopted the same procedure for doing so: requiring letters of "release" before hiring each other's workers. *Id.* ¶¶ 13-15.

The damages period in this case is June 28, 2013 to July 12, 2018. The oldest franchise contract in effect during this time was created or renewed in 1993 (a time wholly ignored by McDonald's), not 1955. The "No-Hire Agreement" that Plaintiffs challenge is partly set forth in franchise contracts that were in effect during the damages period, and partly set forth in private meetings and communications that had nothing to do with the franchise contracts. All of these restrictions reflected a common horizontal understanding to allocate worker labor.

When government antitrust enforcers began investigating these labor restrictions, McDonald's voluntarily abandoned them (along with many other franchisors). Defs.' Resp. to Pls.' SMF (Dkt. 416) ¶¶ 19, 23.[3] That is why the damages period ends in 2018. According to McDonald's own version of the relevant facts, the labor restrictions were, by then, essentially

[2] McDonald's responds to this testimony only by quibbling with the foundation of Mr. Kramer's knowledge, not by denying the fact asserted. Defs.' Resp. to Pls. SMF (Dkt. 416) ¶ 8.

[3] McDonald's objects to the publications of the Washington Attorney General and his deputy, Rahul Rao, as hearsay, but these fall within the residual exception because they possess sufficient guarantees of trustworthiness: they were prepared by a governmental agency, pursuant to a formal investigation, and Mr. Rao testified to the results of the investigation (and the contents of the statements Plaintiffs introduced) under oath before Congress. Fed. R. Evid. 807; *Brokaw v. Boeing Co.*, 137 F.Supp.3d 1082, 1094 (N.D. Ill. 2015) (emails prepared in response to government investigation and verified under oath were sufficiently reliable).

irrelevant to the legitimate operation of its franchise system: "By 2017, former Paragraph 14 went unenforced in light of other priorities." Defs.' SUMF (Dkt. 380) ¶ 58. That is, McDonald's position in this litigation is that the labor restrictions at issue were so irrelevant to McDonald's asserted competitive concerns that it did not bother to enforce them.

McDonald's fact statements end upon the elimination of the No-Hire Agreement, as though nothing relevant to this case occurred after 2018. But the intervening three years provide an ideal, laboratory-like opportunity to test the competitive effects of the No-Hire Agreement. There is no need to resort to speculation regarding the competitive effects of the No-Hire Agreement during the damages period: the Court may simply observe the undisputed market facts regarding what happened when the challenged conduct was removed. Franchisees did not train their employees less. Defs.' Resp. to Pls.' SMF (Dkt. 416) ¶¶ 37-45. Franchisees continued to cooperate with each other in legitimate ways. *Id.* ¶¶ 46-49. The number of franchise-owned locations *increased*. *Id.* ¶ 50. McDonald's CEO said in July 2021: "Our U.S. franchisees have never been in a better financial position than they are right now. The average franchisee in the U.S. is going to have record cash flow in 2021. *They've had three consecutive years of compounding record cash flow*. So our franchisees absolutely have the firepower to make these investments." *Id.* ¶ 51 (emphasis added).[4] McDonald's does not deny any of this.

In sum, according to McDonald's: (1) the labor restraints at issue either did not exist or were so unimportant to its competitive concerns that McDonald's did not bother to enforce them; and (2) when McDonald's eliminated all labor restraints, none of the competitive concerns fashioned by its legal team materialized—indeed, the contrary occurred: McDonald's franchise system has never been more successful. Is there any wonder why McDonald's attempts to limit the Court's inquiry to 1955?

[4] McDonald's objects that Plaintiffs have not identified Mr. Kempczinski as a witness, but the quote was not published until July 2, 2021, after the close of fact discovery. This was thus "substantially justified," and "harmless" because McDonald's does not require discovery to obtain the testimony of its own CEO. Fed. R. Civ. P. 37(c)(1). In any case, McDonald's does not deny the truth of the matters asserted, only the admissibility of the New York Times article. But his statements therein fall within the hearsay exception of a party admission. Fed. R. Evid. 801(d)(2).

The Supreme Court just rejected a similar sleight of hand in *Alston*, where the NCAA tried to justify its conduct based upon its view of the market in 1984. "Whether an antitrust violation exists *necessarily* depends on a careful analysis of market realities. . . . If those market realities change, so may the legal analysis. When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984." 141 S. Ct. at 2158 (emphasis added) (citations omitted). So too here, where McDonald's admits that the relevant market realities changed significantly between 1955 and the damages period of 2013-2018. It is also important that what matters to antitrust liability are "market *realities*," not speculation, hypotheses, or subjective intentions. The *undisputed* market reality here is that the No-Hire Agreement, in fact, generated no competitive benefits during the relevant time period.[5]

The *relevant* question that McDonald's refuses to answer is: What was the competitive effect of the No-Hire Agreement during the damages period? Plaintiffs answer this question not with irrelevant and inadmissible speculation over McDonald's subjective intent from 1955, but by investigating market realities: running sophisticated econometric analyses, comparing worker pay when the No-Hire Agreement was in place with worker pay when it was removed, and controlling for a variety of independent economic factors (including local factors). These reliable methods yield direct evidence of profound anticompetitive effects: nationwide pay suppression, to the highest degree of statistical confidence. Pls.' SMF (Dkt. 403) ¶¶ 68-76. McDonald's has done nothing like this to test whether removal of the No-Hire Agreement harmed its purported competitive concerns. For instance, McDonald's could have performed econometric analyses to answer: Did training decrease? Did cooperation decrease? Did output decrease? McDonald's did none of these things because McDonald's knows that the No-Hire Agreement, in fact, accomplished none of the competitive benefits it asserts in this litigation.

[5] *Polk Bros, Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985) does focus on the justifications for a restraint at the time it was adopted, but Plaintiffs' argument is not to the contrary. Paragraph 14 was part of operative contracts during the damages period because of franchise agreements that were created or renewed no earlier than 1993, and because of additional franchise agreements that were *continuously* created and renewed thereafter. Other components of the No-Hire Agreement were never made part of the franchise contracts, and were adopted separate and apart from them.

Pls.' SMF (Dkt. 403) ¶¶ 45, 47, 50. Moreover, McDonald's admits that the opposite is true: its franchise system has never operated better, and has never been as large, as when it eliminated the collusion at issue in this case. *Id*. ¶¶ 50-52. This case presents an excellent example of why "Congress tasked courts with enforcing a policy of competition on the belief that market forces 'yield the best allocation' of the Nation's resources." *Alston*, 141 S. Ct. at 2147 (quoting *Bd. of Regents*, 468 U.S. at 104 n.27).

C. McDonald's Admits That The No-Hire Agreement Was Wildly Disproportionate To Its Asserted Justifications

A challenged restraint must be "tailored" to a legitimate objective in order to qualify as ancillary. *Bd. of Regents*, 468 U.S. at 119; *see also* Pls.' Cross-Mot. (Dkt. 400) at 9 & n.6. According to McDonald's, "Localized external competition defines McDonald's and franchisees' hiring and pay practices." Defs.' Resp. to Pls.' SUMF ¶ 4. If that is so, then there can be no justification for the No-Hire Agreement that restrained competition nationwide, with no time limit. McDonald's paints itself into a corner from which there is no logical escape.

Even where local restraints might 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." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1908f (4th ed. 2021) (emphasis in original). *See also Bd. of Regents*, 468 U.S. at 119 (condemning restraint that was "not even arguably tailored to serve such an interest"); *Blackburn v. Sweeney*, 53 F.3d 825, 828 (7th Cir. 1995) (holding market division not ancillary where "[t]here is no time limit"); *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"). McDonald's does not and cannot justify the No-Hire Agreement's limitless scope, in terms of employees restrained (all of them), geography (nationwide), or timeframe (unlimited through six months after

termination). Professor Hovenkamp is correct: McDonald's labor restraint was "egregiously excessive and raises significant competitive concerns." *Competition Policy for Labour Markets*, U. of Penn. Inst. for Law & Econ. Research Paper No. 19-29 at 12-13 (May 17, 2019).

McDonald's misstates the facts and the law to distract from its dispositive failure. McDonald's asserts Plaintiffs do not cite to any evidence on this point. Br. at 7-8. Of course, Plaintiffs cite to the plain language of Paragraph 14, which sets forth the egregiously excessive scope of the restraint. Defs.' Resp. to Pls.' SMF (Dkt. 416) ¶ 6. In addition, McDonald's later expanded the restraint through secret arrangements with its franchisees, in ways that McDonald's denies and makes no attempt to justify. *Id*. ¶¶ 5, 7, 13, 15. McDonald's conflates its initial burden to avoid *per se* condemnation from a plainly anticompetitive restraint, with its burden to disprove less restrictive alternatives under the rule of reason. Br. at 8. But an antitrust defendant cannot escape condemnation under the *per se* or quick look standards without showing that the restraint is reasonably tailored to a claimed competitive benefit.

Instead, McDonald's incorrectly argues that to be ancillary, a restraint need not be *necessary* but must merely *serve the purposes* of the overall enterprise. Br. at 5-8. However, the law is clear that the standard for testing whether a restraint is ancillary is necessity. *See Polk Bros.*, 776 F.2d at 190 (finding that the restraint was ancillary because it was "integral" to the joint venture, which would not have happened without it: "The district court found that Polk 'would not have entered into this arrangement, however, unless it had received assurances that [Forest City] would not compete with it in the sale of products that are the 'foundation of [Polk's] business' . . . . The agreement not to compete was an integral part of the lease and land sale."); *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) (applying rule of reason "[b]ecause the provisions are *reasonably necessary* to achieve MLBP's efficiency-enhancing objectives" (emphasis added)); *Nat'l Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 601 (11th Cir. 1986) ("The question is whether the restraint is *necessary* for the existence of the product." (emphasis added)). Even McDonald's authorities agree. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1110–11 (9th Cir.

2021) (to be ancillary, "the restraint must be (1) subordinate and collateral to a separate, legitimate transaction, and (2) *reasonably necessary* to achieving that transaction's pro-competitive purpose." (emphasis added) (citations omitted)); Gregory J. Werden, *The Ancillary Restraints Doctrine After Dagher*, 8 Sedona Conf. J. 17, 23 (2007) ("[A] collateral restraint is ancillary if, and only if, it was *reasonably necessary* to make the venture operate more efficiently or effectively at the time it was entered into." (emphasis added)).[6]

D. Even On Their Own Terms, McDonald's Competitive Defenses Are Meritless And Admit Market Power and Common Impact

McDonald's has not identified any evidence from which a reasonable jury could conclude that the No-Hire Agreement was reasonably necessary to achieve legitimate competitive benefits. Instead, McDonald's justifications all go to the lower standard of furthering the purposes of the franchise system, which is legally insufficient, *see*, Section II.C, *supra*. But even if it were not, the justifications fail on their own terms.

First, as discussed above, at best, McDonald's attempts to justify Paragraph 14's 1955 predecessor. But it denies the broader No-Hire Agreement and does not attempt to justify Paragraph 14's existence during the damages period; McDonald's reciprocation of Paragraph 14; McDonald's agreement to keep Paragraph 14 in its franchise agreements *after* it started opening competing McOpCo restaurants; McDonald's relenting to franchisees' objections to its attempt in 2002 to narrow Paragraph 14; or McDonald's agreement to impose a hiring moratorium on all franchisee workers in 2015, to placate upset franchisee leaders who knew that McDonald's modest wage-hike would place competitive pressure on them to follow suit or risk losing workers. None of McDonald's competitive defenses apply during the damages period, or to the No-Hire Agreement McDonald's denies occurred.

[6] McDonald's cites only one case that applies a lesser standard for ancillarity: *Medical Center at Elizabeth Place, LLC v. Atrium Health System*, 922 F.3d 713 (6th Cir. 2019). But *Atrium* cites only one case for its lower standard, *Texaco, Inc. v. Dagher*, 126 S.Ct. 1276 (2006), which does not support it. *Dagher* found that the ancillarity doctrine had no application in that case at all. 126 S. Ct. at 1281. Moreover, in asserting that the Second and Seventh Circuits are in accord, *Atrium* cites *Polk* and *MLB Properties* which, as shown above, apply an "integral" and "reasonably necessary" standard, respectively. In short, *Atrium* is an erroneous outlier that misapplies relevant precedent.

Second, to the extent McDonald's attempts to justify Paragraph 14 on the basis that it makes McDonald's restaurants more effective competitors against other food brands in the *food sales market*, *see* Br. at 24-28, that cross-market justification is not cognizable as a matter of law. McDonald's entirely fails to address this argument or the cases cited by Plaintiffs in their cross-motion, such as the Supreme Court's admonition—*quoting the Seventh Circuit*—that "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[.]" *Alston*, 141 S. Ct. at 2157 (quoting *Chi. Pro. Sports Ltd. P'ship v. NBA*, 95 F.3d 593, 600 (7th Cir. 1996)). *See* Pls.' Cross-Mot. (Dkt. 400) at 27-28. And it has not cited a single case in support of the idea that McDonald's and its franchisees may launder their horizontal labor market allocation scheme on the basis that they hoped to sell more hamburgers. To the contrary, the (false) notion that McDonald's cannot profitably produce hamburgers without restraining competition in the labor market does not justify cartel behavior; it would only call into question McDonald's business model. *Cf. Polygram Holding, Inc. v. F.T.C.*, 416 F.3d 29, 38 (D.C. Cir. 2005) ("[I]f the only way a new product can profitably be introduced is to restrain the legitimate competition of older products, then one must seriously wonder whether consumers are genuinely benefitted by the new product."). In any case, the undisputed facts show that product output *increased* after the No-Hire Agreement was eliminated. Pls.' SMF (Dkt. 403) ¶¶ 50-51. Market forces, not collusion, provide the best allocation of the Nation's resources. *Alston*, 141 S. Ct. at 2147.

Second, McDonald's has not identified admissible evidence to support its procompetitive justifications, even assuming that they could be viable, which they are not. With respect to Mr. Kramer's speculative and uninformed testimony about Paragraph 14's purported procompetitive rationale, McDonald's claims Mr. Kramer's views were based on conversations with "colleagues." Br. at 24. In fact, Mr. Kramer could not recall any conversations with this "colleague"—whom he could only identify as "Props"—about Paragraph 14, nor could Mr. Kramer articulate a nexus between vague, decades-old conversations with "Props" and his present-day testimony about Paragraph 14. *See* Pls.' SMF (Dkt. 403) ¶¶ 29-30. Further, Mr.

Kramer confirmed that even "Props" was not employed at McDonald's when Paragraph 14's predecessor was adopted. *Id.* Mr. Kramer cannot establish foundation for his testimony through unspecific references to an ethereal character who lacked foundation for his own views. That's because Mr. Kramer's views are not based on any personal knowledge about why Paragraph 14 existed. Fed. R. Evid. 602. McDonald's does not even dispute that Mr. Kramer merely recycled a defense theory that its lawyers created in connection with the Washington Attorney General investigation. *See* Pls.' Cross-Mot. (Dkt. 400) at 22; Defs.' Resp. Pls.' SMF (Dkt. 416) ¶ 32.[7]

Further, contrary to McDonald's assertion (Br. at 22), Plaintiffs *did* challenge the admissibility of Dr. McCrary's testimony regarding the procompetitive justifications for Paragraph 14, on the same basis they challenged Mr. Kramer's: it is speculative and unfounded. *See* Pls.' Cross-Mot. (Dkt. 400) at 21-23. Dr. McCrary's assertions about Paragraph 14's purpose were based exclusively on Mr. Kramer's inadmissible testimony and a quotation from a PowerPoint presentation that had nothing to do with Paragraph 14's purpose. *Id.* at 22-23. Thus, Dr. McCrary failed to provide admissible testimony as to what Paragraph 14's purpose was *as a matter of historical fact*, because he lacked foundation to opine on that issue.[8] At best, Dr. McCrary offered a theoretical justification (based on McDonald's lawyer-conjured defense theory), but to defeat summary judgment, McDonald's was obligated to introduce "evidence of truly procompetitive benefits," not merely "hypotheses." *Viamedia, Inc. v. Comcast Corp.*, 951

[7] McDonald's objects that Mr. Kramer was not a 30(b)(6) witness and did not testify on behalf of the company. Defs.' Resp. to Pls.' SMF (Dkt. 416) ¶ 5. However, Mr. Kramer verified the interrogatory responses that called for McDonald's to state its procompetitive justifications. Pls.' SMF (Dkt. 403) ¶ 28. Thus he "attest[ed] to the truth of the responses" on McDonald's behalf, and the responses are McDonald's "sworn statement." *Villareal v. El Chile, Inc.*, 266 F.R.D. 207, 211 (N.D. Ill. 2010). Questioning Mr. Kramer on the interrogatory responses is therefore the same as questioning McDonald's. Moreover, McDonald's itself relies on Mr. Kramer's testimony as evidence of Paragraph 14's purpose. Br. at 23. McDonald's cannot have it both ways.

[8] *See Obrycka v. City of Chicago*, 792 F. Supp. 2d 1013, 1023 (N.D. Ill. 2011) ("[T]he Court must ascertain not just whether 'an expert witness is qualified in general, but whether his qualifications provide a foundation for [him] to answer a specific question.'" (citation omitted)) (holding expert was qualified, but lacked foundation to opine on Chicago Police Department's culture where the only evidentiary basis for it was a 3-day visit over a decade earlier in connection with study of a distinct issue); *Mason v. City of Chicago*, 631 F. Supp. 2d 1052, 1058–59 (N.D. Ill. 2009) (excluding expert opinion because it lacked "a proper factual foundation" and thus "amount[ed] to mere speculation").

F.3d 429, 480 (7th Cir. 2020). And McDonald's cannot perform the alchemy of converting a speculative hypothesis into admissible evidence merely by having an expert rehash its legal theory. *Bourke v. Conger*, 639 F.3d 344, 347 (7th Cir. 2011) ("In order for 'an expert report to create a genuine issue of fact, it must provide not merely . . . conclusions, but the basis for the conclusions.'"); *Therasense, Inc. v. Becton, Dickinson & Co.*, No. C 04-02123 WHA, 2008 WL 2323856, at *1 (N.D. Cal. May 22, 2008) (excluding expert testimony: "One of the worst abuses in civil litigation is the attempted spoon-feeding of client-prepared and lawyer-orchestrated 'facts' to a hired expert who then 'relies' on the information to express an opinion.").

Third, McDonald's does nothing to establish the validity of its "free-riding" defense. McDonald's does not dispute that franchisees can prevent other franchisees from hiring their workers by paying competitive wages. *See* Br. at 25. This is fatal to its argument because the fact that market mechanisms exist to price out the problem means bona fide free-riding is not at issue. *See* Pls.' Cross-Mot. (Dkt. 400) at 23-24. Instead, McDonald's argues that the true problem is preventing the "*threat* of free-riding" in order to give franchisees "an incentive to provide training in the first place." Br. at 25-26. But *every* employer faces the threat that others will hire away talented or trained employees, and franchisees have the same natural incentive that *all* employers have to train their employees: workers are useless if they are not trained. This is especially true in McDonald's system, where training is a requirement to meet brand standards. Pls.' SMF (Dkt. 403) ¶¶ 37-45. The fact that workers otherwise would have freedom of movement, and that labor markets would otherwise be competitive, is *not* evidence of a market failure, but rather a functioning market.[9]

Moreover, McDonald's justifications rely on the premise that the No-Hire Agreement increased the market power of McDonald's restaurant owners over their workers. *See* Pls.' Cross-Mot. (Dkt. 400) at 18. Otherwise, the No-Hire Agreement would be wholly ineffective in reducing turnover and stimulating franchisee investment in training. McDonald's itself concedes

[9] Indeed, the No-Hire Agreement—not market competition—is what introduces inefficiencies typically associated with market failure, because it prevents the efficient allocation of labor to workplaces where workers are capable of generating the most value/output. *See* Pls.' Cross-Mot. at 6, n.3.

that these purported goals were accomplished by "limit[ing] . . . competition." Pls.' SMF (Dkt. 403) ¶ 27. To re-cast the reduction of competition as procompetitive, however, requires McDonald's to argue that the competition in question was harmful or undesirable—an argument that is precluded by the antitrust laws. *See, e.g.*, *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 696 (1978) ("[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable."); *see also* Pls.' Cross-Mot. at 27-28.

Fourth, even if McDonald's could assert a cognizable procompetitive benefit and substantiate it with admissible evidence, a reasonable jury still could reach only one conclusion: the No-Hire Agreement was not reasonably necessary to achieve those benefits. The evidence unequivocally demonstrates that the No-Hire Agreement was wildly overbroad, and that McDonald's could accomplish every legitimate competitive desire without it, as the undisputed test of history has proven. Nor is the overbreadth of the No-Hire Agreement "irrelevant," as McDonald's incorrectly asserts. Br. at 8. In fact, its own cases hold the opposite.[10]

III. CONCLUSION

However the Court approaches the question of liability in this case, the outcome is the same. Plaintiffs can satisfy their initial burden to establish a *per se* violation, a presumption of anticompetitive effects under quick-look, or anticompetitive effects under the rule of reason. McDonald's, however, cannot justify a *per se* violation, show that the No-Hire Agreement was ancillary, or that there were no less restrictive alternatives. McDonald's motion should be denied and Plaintiffs' cross-motion should be granted.

[10] *See Atrium Health*, 922 F.3d at 725 (restraint could not be "integral" to a joint venture where "[defendants] continue to operate as a joint venture today even though the [restraint] clauses have been removed from their contracts"); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 267 (7th Cir. 1981) (holding that "the actual phrasing of the covenants is irrelevant" because what matters is how they were enforced, and because defendant "sought to enforce the covenants in this case only as to clearly reasonable time, space, and product limitations," covenants were ancillary). McDonald's cites two inapposite cases, *Snap-On Tools Corp. v. F.T.C.*, 321 F.2d 825, 837 (7th Cir. 1963) and *United States v. Empire Gas Corp.*, 537 F.2d 296, 308 (8th Cir. 1976). Both cases examine the legality of non-compete agreements in employee contracts and find that they are generally legal unless unreasonable as to time or geographic scope. Neither examines ancillarity, and it is undisputed that the No-Hire Agreement was unreasonable as to time or geographic scope.

Dated: December 21, 2021

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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT ON McDONALD'S ASSERTED JUSTIFICATIONS** was electronically filed on December 21, 2021 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

/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*