

Exhibit A

**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' SUR-SUR-REPLY MEMORANDUM OF LAW
IN SUPPORT OF CLASS CERTIFICATION**

McDonald's is fundamentally wrong that "the critical questions of agreement, injury, causation, and damages in this case depend on the circumstances of each restaurant and each employee[.]" Sur-Reply at 1. As many courts have recognized, antitrust claims challenging no-hire agreements are by their nature well-suited for class certification "because proof of an alleged conspiracy will focus on defendants' conduct and not on the conduct of individual class members." *Nitsch v. Dreamworks Animation SKG Inc.*, 315 F.R.D. 270, 283 (N.D. Cal. 2016) (citation omitted). See also *Merenda v. VHS of Mich., Inc.*, 296 F.R.D. 528, 548 (E.D. Mich. 2013) (same); *In re High-Tech Emp. Antitrust Litig.*, 985 F. Supp. 2d 1167, 1180 (N.D. Cal. 2013) (same); *Seaman v. Duke Univ.*, 1:15-CV-462, 2018 WL 671239, at *4 (M.D.N.C. Feb. 1, 2018) (same); *id.* at *8 (rejecting argument that evidence of individual instances in which the agreement was not enforced would require individualized inquiry because that "presumes that each class member is seeking damages based on the impact of enforcing the agreement against the individual class member in particular, [when] Dr. Seaman chose to assert theories of class-wide impact, not individual impact"). Indeed, each of these courts certified classes based on the same categories of evidence Plaintiffs present here: company documents indicating an agreement, a regression analysis showing impact, the use of compensation structures as a vehicle to spread wage suppression, and a classwide damages model. All of this evidence is common.

McDonald's falsely accuses Plaintiffs of "cherry-picking." But it was McDonald's who selected individuals from just two franchisees out of thousands to create litigation declarations that contradict McDonald's contemporaneous business records and employee testimony. This was perhaps the only way McDonald's could gin up "evidence" to contradict rudimentary economics. These lawyer-drafted declarations are, unsurprisingly, unreliable. But to the extent they are credited, they are merely conflicting common evidence from which the trier of fact may decide whether Plaintiffs have shown agreement, impact, and damages. For example, the jury will decide whether employees acquire training and skills that are primarily of value to other McDonald's restaurants, such that the No-Hire Agreement would cause harm, notwithstanding the existence of alternative employers. That is the very essence of a common question, the

answer to which will “drive the resolution of the litigation.” *Wal-Mart v. Dukes*, 564 U.S. 338, 350 (2011). Plaintiffs have met their burden “to demonstrate that the element of impact is capable of class-wide proof at trial, through evidence common to all class members.” *Kleen Prods. LLC v. Int’l Paper Co.*, 831 F.3d 919, 925 (7th Cir. 2016).

I. The Declarations Are Unreliable and Unrepresentative

As an initial matter, the Court should afford these declarations little, if any, weight. Franchisee owners (declarants Groen and Lopez) depend on the goodwill of their franchisor for continued operation and success; they are also, in this case, alleged co-conspirators. Franchisee employees (declarants Miller, Vidler, and Watson) are also in the inherently coercive position of being asked to support their employer in litigation. For this reason, courts regularly recognize that such testimony has little or no probative value.¹ This is even truer when the declarations are inconsistent with contemporaneous business records or the witnesses’ own testimony. *See High-Tech Emp.*, 985 F. Supp. 2d at 1216 (“[T]he Court is more persuaded by the internal documents Defendants created before and during the anti-solicitation agreements . . . than the declarations Defendants created to oppose class certification . . .”). That is true for *all five* declarants here:

- *Compare* Vidler Decl. ¶21 (“In other cases, managers have simply left to work for another McDonald’s organization without a ‘release.’”) *with* Vidler Tr. 175:8-17 [REDACTED].²
- *Compare* Miller Decl. ¶30 (“Although the Allegroe Organization did not have a formal policy on the matter, whenever an employee asked for a letter of recommendation or a letter of release to work for another McDonald’s operator, we would provide it.”) *with* Miller Tr.

¹ *See Sapperstein v. Hager*, 188 F.3d 852, 856 (7th Cir. 1999) (trial court erred in relying on an employee affidavit because “[a]n employee of the defendants is not a disinterested witness,” but “subject to their influence, in a sense in their power”); *In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 527 F. Supp. 2d 1053, 1060-61 (N.D. Cal. 2007) (finding “glaring reliability concerns” with defendants’ employee declarations); *Bilskey v. Bluff City Ice, Inc.*, No. 1:13-cv-62, 2014 WL 320568, at *3 (E.D. Mo. Jan. 29, 2014) (finding little use for defendant’s “fill-in-the-blank” affidavits); *Creely v. HCR ManorCare, Inc.*, 789 F. Supp. 2d 819, 840 (N.D. Ohio 2011) (finding 35 “happy camper” affidavits using “substantially the same language” had no weight, as employer could simply “round up a small sample of favorable statements from employees”).

² Unless otherwise noted, the quoted deposition testimony was previously filed as an exhibit to the May 28, 2021 declaration of Walter W. Noss.

153:4-8 [REDACTED]
[REDACTED].

- *Compare* Groen Decl. ¶12 (“Before this lawsuit was filed, I was not aware of Paragraph 14 in my Franchise Agreements. As such, I did not take Paragraph 14 in account when hiring employees or following an employee’s resignation.”) *with* Groen Tr. 44:8-10 [REDACTED]
[REDACTED].
- *Compare* Watson Decl. ¶ 10 (“While I worked for the Allegroe Organization, employees frequently left to work at other McDonald’s-brand restaurants owned and operated by operators other than the Allegroe Organization.”) *with* Watson Tr. 86:20-87:5 [REDACTED]
[REDACTED]
[REDACTED].
- *Compare* Lopez Decl. ¶ 8 (“I would not consider other McDonald’s-brand restaurants . . . to be competitors for customers or employees[.]”) *with* Lopez Tr. 18:19-19:3 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

II. Competition Within Local Labor Markets Does Not Defeat Predominance

The declarants’ testimony that wages differed by area is in line with, and does not undermine, Plaintiffs’ theory. First, Plaintiffs do not dispute that local factors partly determine Class pay. That is why Dr. Singer’s regression model includes control variables for relevant local factors, allowing his model to explain over 99% of all individual variation in Class pay. Singer Rpt., ¶49 & Table 2. Indeed, courts regularly certify nationwide antitrust classes, notwithstanding regional market variations.³

Second, Plaintiffs do not dispute that Class members can seek employment with employers outside the McDonald’s system. The point is that *only* McDonald’s restaurants value

³ See, e.g., *In re Korean Ramen Antitrust Litig.*, No. 13-cv-04115-WHO, 2017 WL 235052, at *3, *19 (N.D. Cal. Jan. 19, 2017) (certifying class despite geographic price variations); *In re Polyurethane Foam Antitrust Litig.*, 314 F.R.D. 226, 253 (N.D. Ohio 2014) (same); *In re Sulfuric Acid Antitrust Litig.*, No. 03 C 4576, 2007 WL 898600, at *7 (N.D. Ill. Mar. 21, 2007) (same); *In re Linerboard Antitrust Litig.*, 203 F.R.D. 197, 209 (E.D. Pa. 2001) (same).

McDonald's-specific skills. McDonald's declarants agree. *See Vidler Tr.* 59:2-11, 103:6-15, 100:13-24; *Groen Tr.* 76:24-77:3; *Miller Tr.* 83:16-19, 64:18-23, 89:5-14, 91:9-4, 132:1-7. From a Class member's perspective, outside employment does not permit them to command a wage based on their McDonald's-specific skills. For that reason, courts have rejected the argument that the existence of non-conspirator competitors defeats impact in no-poach cases. *See High-Tech Emp.*, 985 F. Supp. 2d at 1202 (citing evidence that defendants viewed each other as *among* their competitors, and noting that defendants set pay based on common external surveys that included many companies); *Seaman*, 2018 WL 671239, at *9 (rejecting argument that competition from other employers meant no-hire agreement could not have impacted the class).

III. McDonald's Misunderstands What a Common Pay Structure Is

Plaintiffs in other no-poach cases have satisfactorily demonstrated impact with evidence that defendants maintained a compensation structure that accounts for internal equity (or compression, as McDonalds calls it).⁴ *Mot.* at 28-29 (citing cases). The same evidence is present here: McDonald's shared its own pay structure (and data) with franchisees, and also shared data on what other franchisees within their region were paying. *Id.* at 7. McDonald's also provided external market pay data to its franchisees, so all restaurants were benchmarking off a common source. *Id.* at 8. McDonald's managed its pay structures to avoid pay compression and provided tools to the franchisees to do the same. *Id.* The declarants confirmed that their organizations used pay structures with salary ranges for each job, and took compression into account when setting pay. *See Brandt Decl., Ex. 11 (Groen Tr. 69:9-14)* [REDACTED]

[REDACTED]; *id.*, Ex. 14 (*Miller Tr.* at 95:16-19) (same); *id.*, Ex. 13 (*Lopez Tr.* 118:24-119:14) (same); *id.*, Ex. 12 (*Watson Tr.* 83:20-84:1) (same). This is the essence of a common pay structure. There is no requirement that pay be identical. *See High-Tech Emp.*, 985

⁴Here, Plaintiffs also demonstrate impact empirically with Dr. Singer's predictive model.

F. Supp. 2d at 1220 (rejecting argument that pay structure required wages to be “lockstep” across firms).

IV. The Declarants Confirmed Participation in the Conspiracy

McDonald’s relies on testimony that the declarants were unaware of “Paragraph 14” to argue that individualized evidence is needed to determine whether any given employer joined the conspiracy. But every franchisee agreed to abide by the franchise agreements, including

Paragraph 14. *See* Lopez Tr. 154:14-155:4 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Groen Tr. 42:1-25,

44:1-10 (same). And Mr. Watson testified [REDACTED]

[REDACTED] *See, e.g.*, Watson Tr. 90:13-91:11 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

McDonald’s cites testimony that releases were granted as evidence that employees could move freely. It is quite the opposite: releases show that employees needed permission to move. That some franchisees sometimes granted releases only proves that the employees could not be hired by others without them. This amounts to considerable additional friction in the labor market, as Dr. Cappelli explains. Cappelli Rpt., ¶¶46-52. Additionally, the focus on releases ignores those who were deterred from asking for one (like Plaintiff Turner, who was “reminded” about the release requirement several times). Finally, there is vast common evidence of the agreement: the franchise contracts themselves, the corporate memos reminding franchisees to comply, McOpCo lead recruiter testimony, records of enforcement of the release requirement, and the HRC call logs. Mot. at 9-15. McDonald’s litigation declarations cannot eliminate common evidence of the No-Hire Agreement.

Dated: June 18, 2021

Respectfully submitted,

s/ Derek Y. Brandt

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CERTIFICATE OF SERVICE

I, Derek Y. Brandt, an attorney, hereby certify that the **Plaintiffs' Sur-Sur-Reply Memorandum of Law in Support of Class Certification** was electronically filed on June 18, 2021 and will be served electronically via the Court's ECF Notice system upon the registered parties of record. Additionally, consistent with Local Rule 26.2(e), unredacted copies of the documents provisionally filed under seal will be served electronically on all parties of record via email.

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