IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHANIE TURNER, on behalf of herself and all others similarly situated,	)	
Plaintiff,	)	Case No. 19-cv-5524
v.	)	Judge Jorge L. Alonso Magistrate Judge M. Davis Weisman
McDONALD'S USA, LLC, a Delaware limited liability company, McDONALD'S CORPORATION, a Delaware corporation,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

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Exhibit 1: DOJ Statements of Interest filed in *Stigar v. Dough Dough Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 7, 2019) (Dkt. 30); *Richmond v. Bergey Pullman Inc.*, No. 2:18-cv-00246-SAB (E.D. Wash. Mar. 7, 2019) (Dkt. 39); and *Harris v. CJ Star, LLC*, No. 2:18-cv-00247-SAB (E.D. Wash. Mar. 7, 2019) (Dkt. 34).

INTRODUCTION

Is a person injured if they thought about, but decided against, buying a price-fixed product? How about a person who considered, but did not take, a wage-fixed job? Both common sense and decades of precedent say no. Nor can a former employee like Stephanie Turner attribute the consequences of her own failure to seek employment to an alleged no-poach conspiracy.

Ignoring these fundamental constitutional and statutory precepts, Turner claims that a former provision of McDonald's USA, LLC and McDonald's Corporation's (collectively, "Defendants") franchise agreement is to blame for her "artificially limited" job mobility and "depressed" wages. Yet she identifies no instance in which the provision was actually applied to her. She does not allege that she was prevented from applying for any open job position or accepting any job offer. She was never asked to obtain a release, nor did she ever seek one. Nor did the provision deprive her of any particular raise, promotion, or other job benefit. She merely *considered* applying to another McDonald's restaurant but *assumed* that her supervisor would not aid in her doing so.

These critical facts distinguish Turner's case from this Court's earlier ruling in *Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018). As Judge Lawson of the Eastern District of Michigan recently held, former employees like Turner—who fail to allege that they "tried to obtain employment at another . . . franchise, let alone that [they were] offered a job for more pay that [they] had to refuse, or that another employer would hire [them] but for the no-poaching clause"—cannot blame their own inaction on an alleged no-poach agreement. *Ogden v. Little Caesar Enterprises, Inc.*, 393 F. Supp. 3d 622, 636 (E.D. Mich. 2019). This critical difference in allegations has both constitutional and statutory dimensions. The absence of a concrete injury that is fairly *traceable* to Defendants' conduct robs this dispute of Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). And Turner's

attendant failure to show "actual injury *attributable* to something the antitrust laws were designed to prevent" precludes her from clearing the higher bar of antitrust standing. *J. Truett Payne Co. v. Chrysler Motors Corp*., 451 U.S. 557, 562 (1981). Dismissal on either basis is appropriate here.

To be sure, Turner surmises that the untested limits on her mobility had an indirect effect of depressing her wages. These same arguments were made to and rejected by Judge Lawson in *Little Caesar Enterprises*, 393 F. Supp. 3d at 638, and for good reason. The Department of Justice has urged courts against assuming that franchise no-poach provisions have anticompetitive effects because "they do not fall into the narrow category of restraints for which 'the experience of the market has been . . . clear,'" as required by the Supreme Court. *See* DOJ Statement at 17 (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999)). Turner's allegations illustrate why: Her own wages almost tripled during her 15 years at various McDonald's restaurants, and she does not identify a single job opportunity that would have offered her higher compensation. With many market factors affecting pay—individualized job performance, technological innovation, legislation and regulation, and prevailing wages in local labor markets to name a few—conclusory assertions of depressed wages are too tenuous a link to establish Article III or antitrust standing.

Turner's claim is also time-barred under the four-year statute of limitations. 15 U.S.C. § 15b. That began running at the time she discovered her alleged injury—no later than 2009 or 2010, which was the only time Turner even *considered* applying to work for another McDonald's-brand restaurant and was told about releases. Turner therefore fails to state a claim, much less one falling within the limitations period, and her complaint must be dismissed.

ALLEGATIONS IN THE COMPLAINT

Defendant McDonald's Corporation is the "parent [of] and predecessor [to]" Defendant McDonald's USA, LLC. Compl. ¶ 20. Together, they operate a system of McDonald's restaurants, whereby thousands of private companies sign franchise agreements with McDonald's

USA, LLC and operate McDonald's restaurants throughout the United States. *Id.* ¶¶ 20, 62. The complaint also alleges that approximately 10% of McDonald's U.S. restaurants are McDonald's "company-operated stores" ("McOpCo" restaurants). *See id.* ¶¶ 5, 25, 28-29.[1]

Former Paragraph 14 of the "standard franchise agreement" between McDonald's USA, LLC and each franchisee ("Paragraph 14") stated:

> ***Interference With Employment Relations of Others***. During the term of this Franchise, Franchisee shall not employ or seek to employ any person who is at the time employed by McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant or otherwise induce, directly or indirectly, such person to leave such employment. This paragraph 14 shall not be violated if such person has left the employ of any of the foregoing parties for a period in excess of six (6) months.

Compl. ¶¶ 87, 89. Turner claims McDonald's "treated" Paragraph 14 as a "bilateral prohibition" applying to McOpCo restaurants as well as franchisee restaurants. *Id.* ¶¶ 21, 42, 88.

According to Turner, she first worked in a McOpCo restaurant in Latonia, Kentucky in 2000 or 2001. Compl. ¶ 63. Within a year, she was promoted to swing manager. *Id.* Her pay rose too, nearly doubling from $5.35 to about $10 per hour in less than five years. *Id.* She quit in 2005 after she was not selected for an assistant manager position. *Id.* ¶ 64.

She returned to her swing manager position with McOpCo in November 2006. Compl. ¶ 65. This time she started at a higher pay rate: $10-11.25 per hour. *Id.* Turner says she considered applying to a franchisee-owned McDonald's-brand restaurant a few years later. *Id.* ¶ 66. She alleges that "her supervisor at the McOpCo restaurant told her she could not be hired at a franchisee-owned McDonald's without a release unless she first stopped working at the McOpCo for six months" and that "the franchisee would not be permitted to speak with her without a

[1] The McOpCo companies are wholly-owned subsidiaries of McDonald's USA, LLC. *See* Compl. ¶¶ 21, 25; McDonald's Franchise Disclosure Document at Item 1, page 1, *Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857 (N.D. Ill. Oct. 2, 2017), ECF No. 35-1.

release." *Id.* Turner did not, however, apply for a position with any franchisee. Nor did she ask for a release. She instead chose to do nothing, presuming that, "if she asked for a release, her supervisor would not give it to her." *Id.* None of this affected Turner's compensation. Although she asserts that this "contributed to downward pressure on her own wages at the McOpCo, as she could not use a competing offer to negotiate better wages or benefits," she neither alleges that the franchisee-owned restaurant to which she "considered" applying offered higher wages or better benefits nor that she tried but failed to negotiate her wages at the McOpCo restaurant. *Id.*

Turner left her position at the Latonia McOpCo restaurant in 2012. Compl. ¶ 67. Although she does not say where she worked next, or what pay she received in that job, she returned later that year as a kitchen department manager to a McDonald's restaurant in Florence, Kentucky operated by a franchisee, Copeland Investments Corporation ("Copeland"). *Id.* Copeland paid her the same wage she received from her last McOpCo restaurant: $11.25 per hour. *Id.* at ¶¶ 65, 67. Turner does not allege that other McDonald's restaurants in Florence, Latonia, or anywhere else nearby, offered higher pay to similar candidates. Nor does she allege that wages were higher in the marketplace generally than at the McDonald's where she elected to work, depart and return.

While at Copeland, Turner twice considered moving away from Kentucky "for personal reasons." Compl. ¶¶ 68-69. "She mentioned the idea" of moving to Florida to her supervisor in 2016, "who told her that she would need a release if she intended to work for another McDonald's restaurant in Florida." *Id.* ¶ 68. She once again presumed—this time "because of her supervisor's tone"—that "the supervisor would not grant her a release if she asked," and she "ultimately decided not to move to Florida." *Id.* The same thing occurred a year later when Turner thought about "the possibility" of moving to Louisiana. *Id.* ¶ 69. In neither instance did Turner apply for a job at another McDonald's restaurant or request a release, much less lose out on a specific opportunity

as a result of former Paragraph 14. There is no suggestion she had any information regarding the wages in Florida or Louisiana, or that they were higher than the wages she was being paid in Kentucky. Turner elected to continue to work for Copeland until September 2018, when she moved to Monroe, Ohio. *Id.* ¶ 70. During her tenure at Copeland, Turner's wage increased from $11.25 per hour to $14.00 per hour. *Id.* ¶¶ 67, 70.

ARGUMENT

I. Plaintiff Lacks Article III And Antitrust Standing.

Article III of the Constitution restricts federal jurisdiction to cases "brought by litigants who demonstrate standing." *Groshek v. Time Warner Cable, Inc.*, 865 F.3d 884, 886 (7th Cir. 2017). Plaintiffs must allege they (1) have suffered an injury in fact that is "concrete and particularized . . . and 'actual or imminent, not conjectural or hypothetical'"; (2) "a *causal connection* between the injury and the conduct complained of"; and (3) that it is likely, rather than speculative, that the injury will be redressed by a favorable court decision. *Lujan*, 504 U.S. at 560-61 (emphasis added). To state an antitrust claim, "the court must make a further determination" beyond "the constitutional standing requirement of injury in fact" that the plaintiff suffered an injury the antitrust laws seek to redress. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535-38 & n.31 (1983). The Court must dismiss an action that fails to allege any of these jurisdictional prerequisites or elements of the claim. Fed. R. Civ. P. 12(b)(1) & (6).

First, Turner alleges no injury-in-fact. She alleges no instance in which she was denied a particular job, wage, or benefit as a result of former Paragraph 14. She never applied for a job with another McDonald's-brand restaurant, let alone was denied one because her former, current, or prospective employer enforced the no-hire provision. *See* Compl. ¶¶ 64-70. Indeed, the complaint fails to identify a single available position at another McDonald's-brand restaurant. Turner

mentions in passing only that she contemplated applying to another restaurant with a shorter commute around 2009 or 2010 and considered moving out-of-state in 2016 and 2017. *Id.* ¶¶ 66, 68-69. She failed to apply anywhere, however, and does not claim that any McDonald's-brand restaurant was hiring at these times, much less for a position that would have paid her more than she was then earning. If, as the Supreme Court has held, statements of future intent "without any description of concrete plans" are insufficient to establish imminent future injury, then hypothetical past injury cannot suffice, either. *Lujan*, 504 U.S. at 564; *see also Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016) ("[Plaintiff] could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III."); *Groshek*, 865 F.3d at 889 (dismissing claim for lack of Article III standing where plaintiff "has not alleged facts demonstrating a real, concrete appreciable risk of harm").

What is more, Turner fails to allege that she ever requested a "release" to work for another McDonald's-brand restaurant. To the contrary, she alleges that *she* decided not to apply for other jobs or to move out-of-state "for personal reasons" (Compl. ¶¶ 66, 68-69), identifying no instance in which former Paragraph 14 was actually applied to her. *See Sanner v. Bd. of Trade of Chi.*, 62 F.3d 918, 923-24 (7th Cir. 1995) (no Article III standing absent "links in the chain of causation between the complained of injury and the challenged conduct"). She now blames Defendants for that choice—presuming that she would have been denied a release had she asked for one. *Id.* ¶¶ 66, 68-69. Such counterfactual hypotheses do not suffice. Having never been told that she could not apply elsewhere or that she would be denied a release, Turner does not cross the line "between the factually neutral and the factually suggestive . . . to enter the realm of plausible liability." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 n.5 (2007).

Nor can Turner show she has suffered antitrust injury required to sue under the Clayton Act. *Sanner*, 62 F.3d at 926. This inquiry is even "more onerous than the conventional Article III inquiry," *Static Control Components, Inc. v. Lexmark Int'l, Inc.*, 697 F.3d 387, 402 (6th Cir. 2012), *aff'd*, 572 U.S. 118 (2014), requiring "some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co.*, 451 U.S. at 562; *accord Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 716 (7th Cir. 2006). In cases challenging no-hire agreements, the plaintiff must show the provision "*preclude[d]* [her] from seeking employment from a third party employer." *Eichorn v. AT&T Corp.*, 248 F.3d 131, 142 (3d Cir. 2001) (emphasis added) (collecting cases).

Take *Kelsey K. v. NFL Enterprises LLC*, for example. No. C 17-496, 2017 WL 3115169 (N.D. Cal. July 21, 2017), *aff'd*, 757 F. App'x 524 (9th Cir. 2018). There, a cheerleader alleged a no-poach agreement among NFL teams. *Id.* at *2. She claimed that one team's director "caused to be communicated" that she could not tryout for another team if her contract was not renewed with her current team. *Id.* at *5. When her contract was not renewed, she therefore did not try out for another team—"despite wanting to do so." *Id.* This choice was fatal. Without alleging an application to another position, the complaint "simply [could not] support any plausible inference that plaintiff missed out on any employment opportunity *as a result of* any purported no-poaching agreement between NFL clubs." *Id*. (emphasis in original).

Turner likewise fails to allege any injury caused by the enforcement of former Paragraph 14. She neither asked for a release nor applied for a job at another McDonald's restaurant, much less lost an offer to work elsewhere. What she does allege is a series of raises and promotions earned at various McOpCo and franchisee restaurants (where she was hired without a release).

Compl. ¶¶ 63-70. Her only attempt to plead otherwise—the conclusory suggestion that she "understood" or "felt" her supervisor would deny a release if Turner asked for one (*id.* ¶¶ 66, 68-69)—is the same kind of "peculiar phrasing" that "makes it impossible to infer any reason why it was not wholly plaintiff's own decision" to not apply elsewhere. *Kelsey K.*, 2017 WL 3115169, at *5; *see also Encana Oil & Gas (USA) Inc. v. Zaremba Family Farms, Inc.*, 736 F. App'x 557, 564 (6th Cir. 2018) ("[A]ntitrust plaintiffs are required to show 'that the conspiracy caused *them* an injury for which the antitrust laws provide relief,' not just that the defendant was up to no good.") (quoting *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990)).

At bottom, former Paragraph 14 was never invoked to "preclude[]" Turner from seeking employment anywhere. *Eichorn*, 248 F.3d at 142. There is no allegation that it had any impact on interbrand employment opportunities at local Burger Kings, Chick-Fil-As, Subways, Five Guys, WingStops, White Castles, Wendy's, Pizza Huts, Little Caesar's, Applebee's, Red Robins, Qdobas, Arby's, Texas Roadhouses, Amazon, Targets, Krogers, or any number of other employers. *See Deslandes*, 2018 WL 3105955, at *4 (quoting *Leegin* for the proposition that "the antitrust laws are designed primarily to protect interbrand competition"). Nor is there a well-pled allegation that it *precluded* an actual intrabrand opportunity: To the contrary, Turner alleges she was told about releases—a specific mechanism by which she *could* work at other McDonald's-brand restaurants. Compl. ¶¶ 66, 68-69. Turner's case, like *Kelsey K*, "stops short of actually stating that [a manager] told plaintiff she could not tryout for [or apply to] another club [or restaurant] because of any purported no-poaching agreement." 2017 WL 3115169, at *5 (emphasis omitted).

All this stands in stark contrast to *Deslandes*. Unlike Turner, Deslandes alleges that she applied for a higher-paying position at another McDonald's restaurant. 2018 WL 3105955, at *3. That restaurant purportedly expressed interest in hiring her, but her supervisor prevented her from

moving by denying her request for a release. *Id.* Nothing of the kind is alleged here. Turner has not identified an actual, available position at another McDonald's restaurant—let alone one for which she was qualified and that paid a higher wage, for which she applied, and from which she was precluded from obtaining because of former Paragraph 14. *See* Compl. ¶¶ 63-70.

These distinctions make a difference. Drawing this precise contrast from *Deslandes*, Judge Lawson recently rejected allegations indistinguishable from Turner's—brought by the same lawyers using the same template—against Little Caesar's. *See Little Caesar Enterprises*, 393 F. Supp. 3d at 637-39. There, like here, a former manager challenged a no-poach provision within a franchise agreement. *Id.* at 627. He, too, had decided against applying to other stores, claiming to be "unable to transfer to a competing Little Caesar franchise restaurant" as a result of the no-poach provision. *Id.* at 629. This stood "sharply against the [alleged] facts in . . . *Deslandes*" and similar cases in which no-poach clauses had allegedly been invoked to deny tangible offers. *Id.* at 637-39. It therefore required a different result: Without applying to another position, much less securing one, the plaintiff had failed to "offer[] any facts to show that the agreement precipitated any specific wage or opportunity loss to him"—leaving him bereft of antitrust injury. *Id.* at 638. For the same reasons, Turner's allegations "suggest nothing more sinister than that the plaintiff, unsatisfied with the conditions of [her] employment, simply decided to seek, and found, work elsewhere." *Id.* at 637-38.

Turner cannot patch this fundamental deficiency with artful pleading. Perhaps because Judge Lawson emphasized in *Little Caesar Enterprises* that the plaintiff had not "even considered" transferring to another franchise, 393 F. Supp. 3d at 639, Turner alleges that she "consider[ed]" applying to another McDonald's restaurant in 2009 or 2010. Compl. ¶ 66. That conclusory insertion adds nothing: Both in *Little Caesar Enterprises* and here, the plaintiff felt dissatisfied but

decided not to explore potential opportunities. *Little Caesar Enterprises*, 393 F. Supp. 3d at 628-29; *see also Kochert*, 463 F.3d at 716-18 (rejecting former employee's "chain reaction theory" of antitrust injury because her own conduct in fact precipitated alleged harm). It is not enough to merely *consider* a choice that *might* have resulted in injury. After all, purchasers cannot sue because they thought about, but decided against, buying a price-fixed product. *See*, *e.g.*, *In re Digital Music Antitrust Litig.*, 812 F. Supp. 2d 390, 402 (S.D.N.Y. 2011) (purchasers of CDs, a substitute product, lacked standing to sue over price-fixing of music sold online). The same is true for plaintiffs who try to sue because they bought goods that only might have been harmful. *See*, *e.g.*, *Arcure v. Kellogg Co.*, No. 2:10-cv-192, 2011 WL 13294631, at *2-4 (M.D. Fla. Mar. 29, 2011) (plaintiff who purchased potentially contaminated products but was not sickened lacked standing). Turner's speculation tells us nothing about what would, in fact, have happened.

Nor can Turner salvage her case by alleging generalized wage suppression, another argument made and rejected in *Little Caesar Enterprises*. 393 F. Supp. 3d at 638. This Court already rebuffed a presumption of anticompetitive effect by holding that former Paragraph 14 "cannot be deemed unlawful *per se*." *Deslandes*, 2018 WL 3105955, at *7. Since then, the Department of Justice has recognized that ancillary no-poach provisions in franchise agreements—including former Paragraph 14—"fall outside. . . the narrow category of restraints for which 'the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look.'" DOJ Statement of Interest at 17 (quoting *Cal. Dental Ass'n*, 526 U.S. at 781); *accord Little Caesar Enterprises*, 393 F. Supp. 3d at 636. Emerging scholarship is in accord, suggesting that no-poaching provisions likely do not affect wages at all. Daniel S. Levy & Timothy J. Tardiff, *Measurement of Market Concentration Faced by Labor Pools: Theory and Evidence from Fast Food Chains in Rhode*

Island with No-Poaching Clauses, Advanced Analytical Consulting Group, Inc., Working Paper Series 1, 19-22 (Sept. 14, 2018). Even in quick-look cases, showing anticompetitive effect requires proof that the restraint was effective and established prices (or wages) at a point "more favorable to the defendant than otherwise would have resulted from the operation of market forces." *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998); *see also Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977) (the rule of reason's comprehensive market analysis is appropriate for agreements where courts and scholars are divided regarding the balance of potential procompetitive and anticompetitive effects); *Polk Bros. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (ancillary restraints are evaluated under the rule of reason).[2]

Indeed, courts have rejected that even naked no-poaching agreements necessarily result in generalized wage suppression absent allegations that "compensation structures for all defendants were so rigid that the compensation of all class members . . . were tethered together." *In re Ry. Indus. Employee No-Poach Antitrust Litig.*, No. MC 18-798, 2019 WL 2542241, at *30-37 (W.D. Pa. June 20, 2019) (collecting cases) (granting Rule 12 motion). Nothing of the kind is alleged here. Instead, Turner emphasizes that McDonald's restaurants make employment decisions independently. Compl. ¶ 62. And she acknowledges that "wages are not uniform" among McDonald's restaurants, *id.*, with compensation varying significantly for the same positions, *id.* ¶¶ 59-61.

Turner's own alleged experience—again diverging from the allegations in *Deslandes*—further belies her conclusory assertion of wage suppression and worsened working conditions. Compl. ¶ 19. She says former Paragraph 14 "depressed her wages" (*id.*), but her pay nearly tripled within the McDonald's System as she earned multiple promotions, *id.* ¶¶ 63-70. She also says

[2] Turner invokes the *per se* rule (Compl. ¶ 131), which this Court has already rejected as applied to the McDonald's franchise agreement. *Deslandes*, 2018 WL 3105955, at *7.

former Paragraph 14 "reduced her mobility" (*id.* ¶ 19), but no one told her she could not apply elsewhere as she worked for multiple McOpCo and franchisee restaurants. *Id.* ¶ 67. And whereas Deslandes alleged that she was poised to accept a higher-paying job at another McDonald's-brand restaurant, 2018 WL 3105955, at *3, Turner does not identify any such position, much less one she lost out on as a result of former Paragraph 14. Compl. ¶¶ 63-70. She instead alleges that the franchisee that hired her in 2012 paid her *the same wage* that the McOpCo restaurant had before she left a little more than 6 months before. *Id.* ¶¶ 65, 67. *See Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 485 (7th Cir. 2002) (finding no antitrust standing where plaintiffs "may have suffered no true economic loss at all"). This is critical: The Court's observation that Deslandes had allegedly "experienced the stagnation of her wages" rested on her specific allegations of securing a higher-paying position at another McDonald's-brand restaurant—none of which is present here. *Deslandes*, 2018 WL 3105955, at *7. Turner provides no basis to infer that there were better job opportunities at other McDonald's-brand restaurants.

Nor has Turner alleged that she was forced to accept lower pay outside the McDonald's system—again in contrast to Deslandes's claims. *See* 2018 WL 3105955, at *7. The absence of similar allegations concerning compensation from interbrand employers is particularly conspicuous given Turner's frequent stints outside the McDonald's system. *See* Compl. ¶¶ 63-70. There are thus no allegations that connect former Paragraph 14 to any wage that Turner earned, and no alleged facts could plausibly support the notion that the wages Turner did earn were depressed.[3]

[3] One court has permitted a plaintiff to allege standing by attributing depressed wages to a franchise no-poaching agreement. *Blanton v. Domino's Pizza Franchising LLC*, No. 18-13207, 2019 WL 2247731, at *3 (E.D. Mich. May 24, 2019). The provision there, however, had been plausibly alleged as unreasonable *per se*, *id.* at *5, leaving open the possibility of presuming anticompetitive effect. Moreover, the court also conflated the plaintiff's total deprivation of wages from his termination with unspecified "depressed wages," *id.* at *4, and conducted a two-sentence causation analysis (without citation) that ignored the panoply of market factors that corrode any alleged link between the plaintiff's wages and the no-poaching agreement. *See infra* pp. 13-14. Notably, Judge Lawson considered the *Domino's* decision in *Little Caesar*

The need for specific allegations of actual harm directly linked to the challenged agreement is especially acute in this case, as wages are affected by endless market forces. Turner acknowledges several, mentioning prevailing wages paid by interbrand competitors and technological innovation. *See* Compl. ¶¶ 12, 43-44. Basic economics acknowledges many more: Minimum wage laws, population, unemployment rates, and socio-economic demographics to name a few. *See Agnew v. Nat'l Collegiate Athletic Ass'n*, 683 F.3d 328, 335-41 (7th Cir. 2012) (courts may consult fundamental economic principles in evaluating motions to dismiss). Thus, no injury can be presumed without a "more sedulous" economic analysis and at least some pleaded facts in support of the conclusion of depressed wages—all of which is notably absent from Turner's complaint. DOJ Statement of Interest at 17; *see also Warth v. Seldin*, 422 U.S. 490, 506 (1975) (no Article III standing where plaintiffs' alleged injury was "the consequence of the economics of the area housing market, rather than of [defendants'] assertedly illegal acts"); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 404 (7th Cir. 1993) (plaintiffs failed to satisfy causation requirement of antitrust injury where "many alternative explanations" existed for alleged injuries).

For all these reasons, any causal connection between the supposed "downward pressure" on Turner's wages (Compl. ¶ 66)—even if she could identify it—and former Paragraph 14 would be at best "highly speculative." *AGC*, 459 U.S. at 542; *see also O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc.*, 36 F.3d 565, 573 (7th Cir. 1994) (plaintiff must allege causation "with a fair degree of certainty" to establish antitrust injury); *Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level."). Turner's Complaint contains *no allegation* identifying a better, non-hypothetical job opportunity or a higher wage that she

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Enterprises, Notice of Supplemental Authority, No. 2:18-cv-12792 (E.D. Mich. May 30, 2019), ECF No. 53, and evidently did not find it persuasive in a case, like this one, in which *per se* analysis is inapplicable and there is no allegation that the plaintiff sought a job with another operator. 393 F. Supp. 3d at 632-33.

plausibly did not earn *because of* former Paragraph 14. *See* Compl. ¶¶ 63-70. Her wages remained the same when she moved from a McOpCo restaurant to a franchisee-owned restaurant. *Id.* ¶ 67. And she acknowledges that broader market forces exerted pressure on her wages. *See*, *e.g.*, *id.* ¶ 43 (crediting electronic kiosks with reducing labor costs); *id.* ¶ 45 (citing "low wages" for "fast food workers" generally); *id.* ¶ 15 n.6 (alleging "the average hourly wage of fast food employees is $9.09"). While Turner cites economic research to suggest that the "*prevalence* of such [no-poaching] agreements" within many brands' franchise contracts "*may* help to explain why wage growth has been sluggish" in the broader labor market, she cannot and does not draw any nexus between these generic conclusions and the facts of her own circumstances. *Id.* ¶ 12 (emphases added). More likely is that her dissatisfaction stemmed from her own inaction. *See Little Caesar Enterprises*, 393 F. Supp. 3d at 638 *Kelsey K.*, 2017 WL 3115169, at *5. Whatever the cause, there is no allegation that *McDonald's* suppressed her wages by enforcing a no-poach provision to block her from a better-paying job or to deny her a raise. Without that, Turner's "allegations are not of the quality or specificity . . . to sustain the pleading of a cognizable anti-trust injury." *Little Caesar Enterprises*, 393 F. Supp. 3d at 638; *see also Kochert*, 463 F.3d at 716-18.

II. Plaintiff's Claim Is Time-Barred.

The statute of limitations for Turner's claim is four years. 15 U.S.C. § 15b; *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971). Under the discovery rule, the clock runs from "the date when [the plaintiff] discovers [she] ha[d] been injured." *In re Copper Antitrust Litig.*, 436 F.3d 782, 789 (7th Cir. 2006) (internal quotation marks omitted). This occurred no later than 2009 or 2010 when Turner alleges she was first informed that she would need a release to work for another McDonald's-brand restaurant if she applied—well outside the applicable limitations period. Compl. ¶ 66.

Turner presumably seeks to bring her claim within the limitations period by alleging that

her supervisor reminded her about releases when she considered moving "for personal reasons" to Florida in 2016 and Louisiana in 2017. Compl. ¶¶ 68-69. But each time, Turner did not actually request a release and "ultimately decided not to move" out-of-state. Her vague allegations even make it impossible to determine whether the 2017 conversation occurred after Defendants removed former Paragraph 14 from their franchise agreements and reiterated their intent not to enforce it. *See id.* ¶ 86. In any event, her personal choices about whether to move (or not) do not plausibly establish new injuries attributable to Defendants.[4]

Even if Turner's allegations of wage suppression were cognizable, they are not timely. Her complaint purports to link "downward pressure on her wages" to "[t]he fact that she could not even apply." Compl. ¶ 66. But her own allegations state that her supervisors' comments about releases spoke to steps she would need to take to gain work at other McDonald's-brand restaurants, not whether she could apply in the first place. *Id.* ¶¶ 66, 68-69. And her claim is time-barred absent any allegation that Defendants actually prevented her from obtaining some higher-paying job opportunity—or took some other overt act—within the limitations period. *See In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1213 (N.D. Cal. 2015). Turner offers no facts to excuse or toll the statute of limitations. Her Sherman Act claim therefore must be dismissed.

CONCLUSION

For these reasons, Defendants respectfully request that the Court dismiss Plaintiff's Complaint and schedule an oral argument on Defendants' motion.

[4] Indeed, former Paragraph 14 has been in the public domain for *decades* as it was litigated and upheld in the 1970's—with the franchise agreement filed publically. *See Pearse v. McDonald's Sys. of Ohio, Inc.*, 47 Ohio App. 2d 20, 27 (1975). Combined with the annual submission of franchise disclosure documents to state governments, *e.g.*, Cal. Corp. Code § 31110, this means the alleged conspiratorial restraint challenged by Turner has been in plain sight for well over forty years.

Dated: October 15, 2019

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

By: /s/ Rachel S. Brass
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CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the **DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS** was electronically filed on October 15, 2019 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

/s/ Rachel S. Brass
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