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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

TABLE OF CONTENTS

INTRODUCTION 1
ARGUMENT 2
I. Plaintiff Has Not Pleaded Article III Standing Or Antitrust Injury 2
II. Plaintiff's Claim Is Time-Barred 14
CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

Aasen v. DRM, Inc.,
No. 09C50228, 2010 WL 2698296 (N.D. Ill. July 8, 2010) 7

AFMS LLC v. UPS,
105 F. Supp. 3d 1061 (C.D. Cal. 2015) 7

Alliant Energy Corp. v. Bie,
277 F.3d 916 (7th Cir. 2002) 3

In re Animation Workers Antitrust Litig.,
87 F. Supp. 3d 1195 (N.D. Cal. 2015) 12, 13, 14, 15

Ashcroft v. Iqbal,
556 U.S. 662 (2009).....1, 2, 3

Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,
459 U.S. 519 (1983).....1, 6

Banks v. Nat'l Collegiate Athletic Ass'n,
977 F.2d 1081 (7th Cir. 1992) 11

Bayer Schera Pharma AG v. Sandoz, Inc.,
No. 08CIV03710, 2010 WL 1222012 (S.D.N.Y. Mar. 29, 2010) 8

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007).....1, 3, 4, 10

Blanton v. Domino's Pizza Franchising LLC,
No. 18-13207, 2019 WL 2247731 (E.D. Mich. May 24, 2019) 12

Butler v. Jimmy John's Franchise, LLC,
331 F. Supp. 3d 786 (S.D. Ill. 2018).....5, 12

Cohen v. Am. Sec. Ins. Co.,
735 F.3d 601 (7th Cir. 2013) 4, 10

Conservation Law Found. v. Pub. Serv. Co. of N.H.,
No. 11-CV-353-JL, 2012 WL 4477669 (D.N.H. Sept. 27, 2012) 3

Deslandes v. McDonald's USA, LLC,
No. 17-cv-4857, 2018 WL 3105955 (N.D. Ill. June 25, 2018)..... *passim*

Eichorn v. AT&T Corp.,
248 F.3d 131 (3d Cir. 2001).....2, 8

Generac Corp. v. Caterpillar Inc.,
172 F.3d 971 (7th Cir. 1999).....8

Hanger v. Berkley Grp., Inc.,
No. 5:13-CV-113, 2015 WL 3439255 (W.D. Va. May 28, 2015).....8

Harrell v. United States,
13 F.3d 232 (7th Cir. 1993).....10

In re High-Tech Employee Antitrust Litig.,
856 F. Supp. 2d 1103 (N.D. Cal. 2012).....12, 13

In re High-Tech Employees Antitrust Litig.,
289 F.R.D. 555 (N.D. Cal. 2013).....13

Kelsey K. v. NFL Enterprises LLC,
254 F. Supp. 3d 1140 (N.D. Cal. 2017).....9

Kelsey K. v. NFL Enterprises LLC,
No. C 17-00496 WHA, 2017 WL 3115169 (N.D. Cal. July 21, 2017).....1, 10, 15

Klor's, Inc. v. Broadway-Hale Stores, Inc.,
359 U.S. 207 (1959).....5

Law v. Nat'l Collegiate Athletic Ass'n,
134 F.3d 1010 (10th Cir. 1998).....1

Loeb Indus., Inc. v. Sumitomo Corp.,
306 F.3d 469 (7th Cir. 2002).....11

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992).....3

McCagg v. Marquis Jet Partners, Inc.,
No. 05 CV 10607 PAC, 2007 WL 2454192 (S.D.N.Y. Mar. 29, 2007).....7, 8

McReynolds v. Merrill Lynch & Co.,
694 F.3d 873 (7th Cir. 2012).....3

Milwaukee Ctr. for Indep., Inc. v. Milwaukee Health Care, LLC,
929 F.3d 489 (7th Cir. 2019).....2

Moore v. Wells Fargo Bank, N.A.,
908 F.3d 1050 (7th Cir. 2018).....3

NHL Players Ass'n v. Plymouth Whalers Hockey Club,
419 F.3d 462 (6th Cir. 2005) 7

Nichols v. Spencer International Press, Inc.,
371 F.2d 332 (7th Cir. 1967) 11, 12

Nitsch v. Dreamwork Animation SKG, Inc.,
315 F.R.D. 270 (N.D. Cal. 2016).....14

O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc.,
36 F.3d 565 (7th Cir. 1994) 11

Ogden v. Little Caesar Enterprises,
393 F. Supp. 3d 622 (E.D. Mich. 2019)..... *passim*

In re Papa John's Employee & Franchisee Employee Antitrust Litig.,
No. 3:18-CV-00825-JHM, 2019 WL 5386484 (W.D. Ky. Oct. 21, 2019).....12

Parkell v. Markell,
622 F. App'x 136 (3d Cir. 2015) 10

PSKS, Inc. v. Leegin Creative Leather Prods., Inc.,
615 F.3d 412 (5th Cir. 2010) 8

Robinson v. Jackson Hewitt, Inc.,
No. 2:19-cv-9066, 2019 WL 5617512 (D.N.J. Oct. 31, 2019) 5, 14

In re Ry. Indus. Employee No-Poach Antitrust Litig.,
No. MC 18-798, 2019 WL 2542241 (W.D. Pa. June 20, 2019) 4, 6

Seaman v. Duke Univ.,
No. 1:15-CV-462, 2018 WL 671239 (M.D.N.C. Feb. 1, 2018) 6, 13

Simpson v. Sanderson Farms, Inc.,
744 F.3d 702 (11th Cir. 2014) 4, 8

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016).....14

Tamburo v. Dworkin,
601 F.3d 693 (7th Cir. 2010) 3

In re Text Messaging Antitrust Litig.,
630 F.3d 622 (7th Cir. 2010) 3

Todd v. Exxon Corp.,
275 F.3d 191 (2d Cir. 2001).....7, 8

Twin City Sportservice v. Charles O. Finley & Co.,
676 F. 2d 1291 (9th Cir. 1982) 7

United States v. E. I. du Pont de Nemours & Co.,
351 U.S. 377 (1956).....8

Warth v. Seldin,
422 U.S. 490 (1975).....14

Yi v. SK Bakeries, LLC,
No. 18-5627, 2018 WL 8918587 (W.D. Wash. Nov. 13, 2018).....12

Zenith Radio Corp. v. Hazeltine Research, Inc.,
401 U.S. 321 (1971).....2, 15

Statutes

15 U.S.C. § 15b.....14

Other Authorities

Federal Rule of Civil Procedure 12 8

Federal Rule of Civil Procedure 23 13

INTRODUCTION

Sue now, fill in the details later. That is what Stephanie Turner wants to do. Opp. 10. But the era of notice pleading is over. The "enormous expense" of antitrust cases, even "anemic" ones, requires a plaintiff to allege specific plausible *facts* making out each element of her claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Here, that extends not only to constitutional standing but also antitrust injury—an indispensable element of Turner's claim. *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535-38 & n.31 (1983).

Turner all but admits that she has not pleaded such facts here. She expressly disclaims any antitrust injury based on "the loss of a particular job"—because there was none. Opp. 6. But far from "a straw-man" or "irrelevant," *id.* at 1, this is the exact type of antitrust injury courts look for in cases like this one. Indeed, this Court emphasized such an allegation in *Deslandes v. McDonald's USA, LLC*, No. 17-cv-4857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018). And other courts, in no-poach cases like *Kelsey K.* and *Little Caesar Enterprises*, dismissed claims because no specific lost opportunity was alleged—decisions Turner cannot squarely answer.

In place of any specific lost opportunity, Turner instead relies on her admittedly "general" allegation of wage suppression. Opp. 9. That bare allegation does not suffice where, as here, the *per se* rule does not apply. *See* Deslandes, 2018 WL 3105955, at *7. In either the quick look or rule of reason context, there is no presumption of injury—that must be alleged. *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998). Turner makes no *factual* allegation that *her* wages were lower *because* of *McDonald's* alleged no-poach provision. Nor can that be inferred from her complaint: Turner not only failed to seek higher wages, but also alleges her pay met or exceeded the market rate. Compl. ¶¶ 15 n.6, 50, 59, 63-69. In this context, a generalized allegation of "wage suppression," Opp. 1, is the precise kind of "conclusory statement[]" and "threadbare recital[]" the Supreme Court has proscribed. *Ashcroft v. Iqbal*, 556

U.S. 662, 678 (2009). Dismissal is therefore required. *Id.*

Turner also cannot salvage her time-barred lawsuit through the continuing violation doctrine. To do so, she would have to plausibly allege an injury to her, not just the mere existence of an alleged conspiracy, within the limitations period. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338-40 (1971). But she has not and cannot. For this separate reason, dismissal of Turner's lawsuit in its entirety is also warranted.

ARGUMENT

I. Plaintiff Has Not Pleaded Article III Standing Or Antitrust Injury

The archetypical injury in a no-poach case is a lost job opportunity. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 141-42 & n.1 (3d Cir. 2001) (collecting cases). Turner all but admits she alleges nothing of the sort here. Instead, the best she musters is that a supervisor twice "reminded" her about an alleged "need [for] a release." Opp. 3. But while on page three of her brief she suggests this allegation "would suffice," *id.*, by page four she gives up the ghost, conceding that her "alleged injury is not . . . that she was denied a job," *id.* at 4; *see also Milwaukee Ctr. for Indep., Inc. v. Milwaukee Health Care, LLC*, 929 F.3d 489, 493 (7th Cir. 2019) (parties are bound by concessions in briefs). Nor would that thin allegation be enough to sustain antitrust injury, as she has no response to the fact that this reminder was equally likely to facilitate a transfer, not preclude one. *See* Mot. 7-8. Turner's complaint is devoid of any cognizable injury.

Turner nevertheless argues that her generalized allegation of wage suppression is enough, pointing to two statements that she says "explicitly alleg[e] that her wages were suppressed on account of McDonald's No-Hire Agreement." Opp. 10 (citing Compl. ¶¶ 16, 130). But the first merely states that former Paragraph 14 "harmed employees by lowering salaries and benefits employees otherwise would have commanded in an open marketplace, and deprived such employees of better job growth opportunities." Compl. ¶ 16. The second is more of the same: "Plaintiff and

Class Members have received lower compensation from Defendants and independent franchise businesses than they otherwise would have received in the absence of Defendants' unlawful conduct." *Id.* at ¶ 130. In other words, two sweeping conclusions bereft of specific, alleged facts supporting a particular injury to Turner. *See McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873, 877 (7th Cir. 2012) (affirming dismissal "under the pleadings standards announced in *Twombly*, and amplified in *Iqbal*" because the complaint alleged an element "in a wholly conclusory fashion") (reporter information omitted).

Turner's suggestion that these "general factual allegations" suffice, Opp. 9 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)), because "'[d]etails . . . can come later'" implicitly concedes that her Complaint is deficient. *Id.* at 10 (quoting *Alliant Energy Corp. v. Bie*, 277 F.3d 916, 920 (7th Cir. 2002)). That is underscored by her reliance on the defunct *Conley* regime. *See Alliant Energy*, 277 F.3d at 920 (citing *Conley* in accepting general allegations); *Lujan*, 504 U.S. at 561 (relying upon *Conley*-regime case law). The Supreme Court has instructed in blackletter law that a plaintiff must allege *facts* sufficient "to raise a right to relief above the speculative level," not sweeping conclusions or "formulaic recitation[s] of the elements of a cause of action." *Twombly* 550 U.S. at 555; *see also Conservation Law Found. v. Pub. Serv. Co. of N.H.*, No. 11-CV-353-JL, 2012 WL 4477669, at *2-3 (D.N.H. Sept. 27, 2012) (recognizing *Twombly* superseded *Alliant Energy*). That is true for both Article III standing and antitrust injury. *See Tamburo v. Dworkin*, 601 F.3d 693, 699-700 (7th Cir. 2010) (dismissing antitrust claim under *Twombly* because the plaintiff pled only conclusory allegations of injury); *Moore v. Wells Fargo Bank, N.A.*, 908 F.3d 1050, 1057 (7th Cir. 2018) (similar for constitutional standing); *see also In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625-26 (7th Cir. 2010) ("[M]isapplying the *Twombly* standard . . . bids fair to immerse the parties in the discovery swamp—'that Serbonian

bog . . . where armies whole have sunk'—and by doing so create irrevocable as well as unjustifiable harm to the defendant.") (internal citation omitted)).

Turner's allegations fall far short of that standard. Consider *Twombly* itself. That case teaches that allegations of parallel conduct cannot elevate a "conclusory allegation of agreement" because there are also lawful reasons for that behavior. 550 U.S. at 556-57. There are similarly lawful reasons wages stagnate. Prevailing wages paid by interbrand competitors, technological innovation, minimum wage laws, population, unemployment rates, and socio-economic demographics are some—none of which Turner disputes. *See* Mot. 13. That is why a "more sedulous" economic analysis is required. DOJ Statement of Interest at 17; *see also Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601, 612 (7th Cir. 2013) (holding that "it's not enough" to plead "facts that are 'merely consistent with' a defendant's liability" as a "complaint fails to state a plausible claim for relief" when "the allegations are 'not only compatible with, but indeed [are] more likely explained by, lawful' conduct"). Turner does not even pretend to offer one. *See* Opp. 13; *see also*, *e.g.*, *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) (refusing to presume general wage suppression absent allegations of interlocking compensation structures). That places here claims squarely within the holding of *Ogden v. Little Caesar Enterprises*, where the Court held a parallel failure to "offer[] any facts to show that the agreement precipitated any *specific* wage or opportunity loss *to [the plaintiff]*" was fatal. 393 F. Supp. 3d 622, 638 (E.D. Mich. 2019) (emphasis added); *see also Simpson v. Sanderson Farms, Inc.*, 744 F.3d 702, 709 (11th Cir. 2014) (rejecting as "not a close case" a RICO wage suppression claim in which injury was pled "only the highest order of abstraction" as the plaintiffs "offered no market data . . . to infer a gap between the wages they *actually* received at [their employer] and the wages they *would have* received but for" the alleged misconduct).

Rather than place her claims outside this plain standard, the cases Turner cites highlight the deficiency of her allegations. In *Robinson v. Jackson Hewitt, Inc.*, for example, the plaintiff alleged the employer's wages were as much as 70% below the industry rate, citing specific national average wages for each job position at issue. No. 19-9066 (SDW) (LDW), 2019 WL 5617512, at *3 (D.N.J. Oct. 31, 2019); *see also* Second Am. Compl. ¶ 90 fig. 1, *Robinson v. Jackson Hewitt, Inc.*, No. 2:19-cv-9066, Dkt. 61 (D.N.J. May 13, 2019). Turner does not. Instead, she alleges that she made as much *or more* than the average pay for both fast food employees and McDonald's restaurant workers. *See* Compl. ¶¶ 15, 50, 59, 63-69 & n.6. The decision in *Butler v. Jimmy John's Franchise* is similarly distinguishable; there, the court held that the plaintiff had alleged that "his store reduced his hours to about four per week" and that he "could not transfer to another Jimmy John's store or even another sandwich shop in his area . . . because of the no-hire provision." 331 F. Supp. 3d 786, 793 (S.D. Ill. 2018). But Turner has not alleged economic harm in the form of reduced hours or preclusion from working at another quick-serve restaurant. And far from being unable to transfer to another McDonald's restaurant, Turner says she knew about releases—a mechanism by which she could do just that. Compl. ¶¶ 66, 68-69.

Nor can a presumption of injury save Turner's Complaint. This Court has already held the alleged agreement challenged here was not unlawful *per se*. *Deslandes*, 2018 WL 3105955, at *7. No harm to competition is therefore presumed, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959), and no assumption of anticompetitive effects on wages can be drawn. DOJ Statement of Interest at 17 (citing *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 781 (1999)); *accord Little Caesar Enterprises*, 393 F. Supp. 3d at 636.

In the face of this long-established precedent, Turner tries to contrive a quick-look presumption by repeatedly quoting this Court's statement in *Deslandes* that "if competitors agree not

to hire each other's employees, wages for employees will stagnate." 2018 WL 3105955, at *7. But that did not establish Deslandes's standing. Instead, as the Court said in the following sentence, Deslandes alleged that she "herself experienced the stagnation of her wages." *Id.* That includes the specific allegation that her "stagnated [at] $12.00 per hour" compared to the "23 percent increase" at another McDonald's for a position she was denied. Am. Compl. ¶ 67, *Deslandes v. McDonald's USA, LLC*, No. 1:17-cv-04857, Dkt. 32 (N.D. Ill. Sept. 18, 2017). Turner makes no comparable allegations, and it is not "proper to assume that the [plaintiff] can prove facts that [she] has not alleged." *Associated Gen. Contractors of Cal.*, 459 U.S. at 526.

Absent a presumption, nothing in Turner's complaint indicates that former Paragraph 14 suppressed wages generally, much less Turner's wages in particular. She points to her allegation that former Paragraph 14 enabled McDonald's-brand restaurants "to retain their best employees without having to pay market wages to these employees or compete in the market place relative to working conditions and promotion opportunities." Compl. ¶ 104 (cited in Opp. 13). Yet there is no allegation that Turner was one of those "best employees." *Id.*; *see also id.* at ¶¶ 63-71. And even if she were, inferring depressed wages for a particular employee based on a general no-poach clause requires some kind of causal mechanism such as "compensation structures for all defendants [that] were so rigid that the compensation of all [employees] . . . were tethered together." *In re Ry. Indus. Employee No-Poach Antitrust Litig.*, 2019 WL 2542241, at *30-37; *see also Seaman v. Duke Univ.*, No. 1:15-CV-462, 2018 WL 671239, at *4 (M.D.N.C. Feb. 1, 2018) (relying upon "internal equity structures" designed "to have ensured relatively constant compensation relationships"). Turner makes no such allegation. Nor could she add it through amendment as she has already alleged the very opposite—that compensation decisions were made independently throughout the McDonald's system, with pay varying significantly as a result. *See* Compl. ¶¶ 59-

62 (alleging "[w]ages and salaries for employees of franchised stores are not dictated in any way by McDonald's" and pay for managers varied); *Aasen v. DRM, Inc.*, No. 09C50228, 2010 WL 2698296, at *2 (N.D. Ill. July 8, 2010) (amended complaint cannot contradict prior allegations).

Equally problematic is Turner's reliance on a counterfactual "market place" that includes only McDonald's-brand restaurants subject to former Paragraph 14. Opp. 13 (quoting Compl. ¶ 104); *see also id.* at 7 (acknowledging a "restraint in and affecting" only the "market" for "McDonald's labor"). She does so because—causal mechanism or not—it is implausible that a provision only in McDonald's franchise agreements could depress wages for employees across brands. Yet markets must be defined by "commercial reality," *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F. 2d 1291, 1299 (9th Cir. 1982), and "[a]ntitrust plaintiffs are required to define the market according to the rules of 'interchangeability' and 'cross-elasticity.'" *McCagg v. Marquis Jet Partners, Inc.*, No. 05 CV 10607 PAC, 2007 WL 2454192, at *5 (S.D.N.Y. Mar. 29, 2007). In the employment context, the "market is comprised of buyers who are seen by sellers as being reasonably good substitutes." *Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001); *accord NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 472 (6th Cir. 2005). And while Turner alleges reasons why McDonald's might prefer those with experience in its system—like training in McDonald's proprietary document management system or word-processing software, Compl. ¶¶ 110-11—she alleges no economic basis explaining why employees would not sell their labor to competing buyers like Burger King, Subway, Little Caesar's, Amazon, Kroger, or Target. *See AFMS LLC v. UPS*, 105 F. Supp. 3d 1061, 1077-78 (C.D. Cal. 2015) (rejecting definition containing only an "arbitrary subset" of products). That they would do so is evident in Turner's own voluntary transitions away from McDonald's restaurants. Compl. ¶¶ 64, 70.

For all of these reasons, skepticism of single-firm markets is at the heart of the Seventh

Circuit's market definition jurisprudence. As Judge Wood explained in *Generac Corp. v. Caterpillar Inc.*, "[n]ot even the most zealous antitrust hawk has ever argued that Amoco gasoline, Mobil gasoline, and Shell gasoline are three separate product markets." 172 F.3d 971, 977 (7th Cir. 1999). The same is true in labor-side cases like this one. *See Hanger v. Berkley Grp., Inc.*, No. 5:13-CV-113, 2015 WL 3439255, at *9 (W.D. Va. May 28, 2015) (dismissing challenge to non-solicitation provisions because "artificially and arbitrarily" limiting the market to the two defendants was implausible as employees could "look elsewhere for employment"); *Eichorn*, 248 F.3d at 147 (rejecting definition "only include[ing] the defendants" because "[t]he market for the plaintiffs' labor is much broader"). So for this reason too, Turner cannot presume for purposes of alleging standing that former Paragraph 14 depressed wages for all employees, much less suppressed *her* wages in particular. *See Todd*, 275 F.3d at 200 ("dismissal on the pleadings is appropriate" for antitrust complaints "attempt[ing] to limit a product market to a single brand, franchise, institution, or comparable entity"); *Simpson*, 744 F.3d at 709-10 (dismissing wage suppression theory premised on "vague market theory"); *Bayer Schera Pharma AG v. Sandoz, Inc.*, No. 08CIV03710, 2010 WL 1222012, at *6 n.10 (S.D.N.Y. Mar. 29, 2010) ("[A]ntitrust claims based on single-brand or unique product markets often do not survive motions to dismiss").*

In sum, conclusory allegations that all employees suffered depressed wages because of an

* Turner cannot escape basic economics by declaring that her "claims are entitled to a presumption of truth." Opp. 11. Rule 12 "does not require the Court to ignore its common sense." *McCagg*, 2007 WL 2454192, at *6 (dismissing antitrust claim for failing "to allege a plausible product market"). Thus, courts recognize single-brand markets as plausible only in unusual circumstances, like locked-in markets. *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 418 (5th Cir. 2010). They otherwise reject implausibly narrow markets like the one alleged here. *See, e.g.*, *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (individual soft drinks not in separate markets).

intrabrand no-poach provision are insufficient to plead antitrust injury. Turner tries to argue otherwise by repeatedly invoking this Court's observation in *Deslandes* that "[e]ven a person with a rudimentary understanding of economics would understand that if, say, law firms in Chicago got together and decided not to hire each other's associates, the market price for mid-level associates would stagnate." 2018 WL 3105955, at *6. But the Court was describing a model *interbrand* restraint of the type that might give rise to a *per se* claim. A person with the same understanding of economics would conclude the opposite if two firms in Chicago jointly representing a client agreed not to hire each other's associates without a release—so long as other law firms in the area offered better wages, benefits, or an otherwise more attractive workplace. In those circumstances, an associate would and could move to those firms—or be hired by the client, go in-house, or join a university—and the market wage would not stagnate. That is the very fact scenario here, where Ms. Turner elected to leave and return to the McDonald's system and there are no allegations of any interband restraint. Compl. ¶¶ 64, 70.

It is therefore unsurprising that the most recent and rigorous analyses in analogous cases—*Kelsey K. v. NFL Enterprises LLC*, 254 F. Supp. 3d 1140 (N.D. Cal. 2017), and *Little Caesar Enterprises*, 393 F. Supp. 3d 622—have dismissed claims like Turner's for lack of standing. *See* Mot. at 7, 9-10. Turner tries to distinguish the first by framing the plaintiff's "failure to allege she was denied any particular job" as "just an additional reason why the court could not infer a no-poach agreement." Opp. 7. But that ignores the entire section of the decision captioned, "No Allegations of Injury to Plaintiff." *Kelsey K.*, 254 F. Supp. 3d at 1148. There, the court found no "facts supporting a plausible inference that . . . plaintiff herself suffered any harm as a result of defendants' anticompetitive conduct" as the plaintiff never applied for another position or lost out on a higher wage. *Id.* What is more, the same court went on to deny leave to file an amended

complaint, holding yet *again* that the plaintiff "fail[ed] to allege how she personally suffered any antitrust injury as a result of the purported no-poaching agreement" because it was her "own decision to not tryout for another club," which Turner simply ignores. *Kelsey K. v. NFL Enterprises LLC*, No. C 17-00496 WHA, 2017 WL 3115169, at *5 (N.D. Cal. July 21, 2017).

Turner's attempts to avoid the logic of *Little Caesar Enterprises* fare no better. First, she argues Little Caesar's never "enforced" the alleged no-hire agreement against the plaintiff. Opp. 8. Yet the same is true here. Turner's supervisors only allegedly "reminded" her about releases, *id.* at 3, and she did no more than *contemplate* applying to another McDonald's, Compl. ¶¶ 66, 68-69. She never did so, so there was no occasion for former Paragraph 14 to be "enforced." Opp. 8. And while Turner now argues this reminder "dissuaded her from pursuing an opportunity," *id.* at 2, this dissuasion is not alleged in the complaint. *See Harrell v. United States*, 13 F.3d 232, 236 (7th Cir. 1993) ("If a complaint fails to state a claim . . . , the plaintiff cannot cure the deficiency by inserting the missing allegations in a document that is not either a complaint or an amendment to a complaint."). Just as thinking about but deciding against buying a price-fixed product does not confer standing, thinking about but deciding against applying for another job does not create injury. *See Kelsey K.*, 2017 WL 3115169, at *5 (refusing to infer plaintiff involuntarily chose not to apply to another job because such "information [is] exclusively within plaintiff's own control" and "[t]here is no reason to leave such details to insinuation"); *Twombly*, 550 U.S. at 555 (allegations must rise "above the speculative level"). That is particularly important where, as here, the alleged reference to the release is "equally consistent with" Turner's supervisor simply reminding her to ask for one. *Parkell v. Markell*, 622 F. App'x 136, 141 (3d Cir. 2015) (affirming dismissal because alleged conduct was consistent with lawful and unlawful behavior and "therefore insufficient to state a plausible claim"); *see also Cohen*, 735 F.3d at 612 (dismissing complaint that pled

facts "'not only compatible with, but indeed [were] more likely explained by, lawful' conduct").

Second, Turner asserts that *Little Caesar's* is irreconcilable with Seventh Circuit precedent. Opp. 8. To start, Turner's first "clear Seventh Circuit authority," *id.*, is a dissenting opinion from a case in which the majority *dismissed* an antitrust claim because the plaintiff had "fail[ed] to explain how" the alleged restraint in fact "diminish[ed] competition in or among the markets." *Banks v. Nat'l Collegiate Athletic Ass'n*, 977 F.2d 1081, 1093-94 (7th Cir. 1992); *see also* Opp. 8 (citing *Banks*, 977 F.2d at 1095 (Flaum, J., concurring in part and dissenting in part)). The other case, *Nichols v. Spencer International Press, Inc.*, held only that the "loss of opportunity for employment" from an *interbrand* no-poach agreement may establish "a restraint of trade" if it *unreasonably* "impair[ed] competition in the supply of [the products sold by the two employers]." 371 F.2d 332, 334, 337 (7th Cir. 1967) (applying rule of reason). Neither decision speaks to the standing issue here, much less is irreconcilable with *Little Caesar's*.

In any event, contrary to Turner's rhetoric, Judge Lawson did not rule out antitrust injury in every case "absent a particular job loss." Opp. 8. He simply required the plaintiff to "offer[] any facts to show that the agreement precipitated any specific wage or opportunity loss to him." 393 F. Supp. 3d at 638. That need not be loss of a particular job opportunity, but it must include a plausible claim of a specific harm to the plaintiff—such as a plausible allegation that she was paid less than the market rate for his labor. *See supra* p. 5. Far from "contradict[ing] the black-letter rule," Opp. 8, that holding aligns with well-established precedent. *See*, *e.g.*, *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 485 (7th Cir. 2002) (finding no antitrust injury where plaintiffs "may have suffered no true economic loss at all"); *O.K. Sand & Gravel, Inc. v. Martin Marietta Techs., Inc.*, 36 F.3d 565, 573 (7th Cir. 1994) (similar).

Nor are the decisions requiring factual allegations establishing specific injury "outlier[s]."

Opp. 7. The no-poach cases Turner cites differ in key ways. For example, many of those decisions left open the possibility of *per se* condemnation and its attendant presumption of competitive injury. *See In re Papa John's Employee & Franchisee Employee Antitrust Litig.*, No. 3:18-CV-00825-JHM, 2019 WL 5386484, at *8 (W.D. Ky. Oct. 21, 2019) (declining to rule out *per se* treatment); *Blanton v. Domino's Pizza Franchising LLC*, No. 18-13207, 2019 WL 2247731, at *5 (E.D. Mich. May 24, 2019) (similar); *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. 2018) (similar); *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (similar). But this Court rightly rejected that standard, *Deslandes*, 2018 WL 3105955, at *7, under "clear Seventh Circuit authority," Opp. 8, holding that the "standard of reasonableness," not *per se* treatment, is the appropriate framework in this Circuit. *Nichols*, 371 F.2d at 337; *see also Little Caesar Enterprises*, 393 F. Supp. 3d at 634 (agreeing with the Court's rejection of the *per se* rule); *Yi v. SK Bakeries, LLC*, No. 18-5627, 2018 WL 8918587, at *4 (W.D. Wash. Nov. 13, 2018) (similar); DOJ Statement of Interest at 11-13 (similar).

The decisions involving animation and high-tech employees are even farther afield because of the different conduct and markets alleged in those cases. Opp. 8-9. In those cases, there were "collusive discussions" about "competitively sensitive compensation information and agreed upon compensation ranges" along with extensive interbrand agreements not to "cold call" one another's employees. *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d 1195, 1200-04 (N.D. Cal. 2015); *accord In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d at 1109-12. The plaintiffs alleged that this had an outsized effect on compensation because "cold calling play[ed] an important role in determining salaries and labor mobility" in that particular "market for skilled labor." *Id.* at 1122. And all this was accompanied by allegations of specific enforcement, including examples in which one studio told another not to offer particular group of employees a specific

salary. *E.g.*, *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d at 1214. In other words, the plaintiffs there alleged *facts* supporting their allegations that the studios had "fix[ed] salaries at artificially low levels" and "suggested how this injury should be quantified." *In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d at 1123.

None of that is alleged here. To the contrary, in a case Turner's counsel described as "alleg[ing] an identical claim," the plaintiff expressly alleged that different McDonald's organizations offered *different pay for the same position*. Dkt. 12-1 at 7; *see also Deslandes*, 2018 WL 3105955, at *3, 7. Turner likewise acknowledges that pay varies and *is set independently* by different organizations. Compl. ¶¶ 59-62. And there are no allegations regarding exchange of wage information—instead, the complaint makes clear that different McDonald's organizations competed on wages. *See id.* at ¶¶ 59-70.

Finally, what Turner calls her "most compelling[]" cases—all Rule 23 orders—do not address the named plaintiff's standing whatsoever. Opp. 8. Many of the named plaintiffs in those cases *did allege* specific lost job opportunities resulting from the alleged no-poaching agreements. *See*, *e.g.*, *Seaman*, 2018 WL 671239, at *1 (plaintiff alleged that she applied to position at another university but was rejected because "the deans [of the two schools] had agreed not to permit lateral moves of faculty"). Moreover, those cases merely considered whether common proof of injury existed, not whether plaintiffs would succeed in establishing injury itself. *See In re High-Tech Employees Antitrust Litig.*, 289 F.R.D. 555, 576 (N.D. Cal. 2013) (acknowledging "individual questions about whether any particular employee was injured" but finding there was sufficient evidence to "find[] that common issues predominate[d] over individual ones for the purpose of *being able to prove* antitrust impact) (emphasis added); *Seaman*, 2018 WL 671239, at *8 n.10

(similar); *Nitsch v. Dreamwork Animation SKG, Inc.*, 315 F.R.D. 270, 284 (N.D. Cal. 2016) (similar). None endorsed the notion that a plaintiff may pursue a claim past the pleading stage and to class certification without alleging standing, an essential element of her claim. *See Warth v. Seldin*, 422 U.S. 490, 502 (1975) (plaintiffs cannot rely on injuries "suffered by other, unidentified members of [a] class to which [the plaintiffs] . . . purport to represent"); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547-48 (2016) (named plaintiff must suffer individualized, distinct injury).

The Complaint is clear. Turner does not allege that former Paragraph 14 prevented her from being hired at another restaurant or caused her any discernable, particular injury. *Deslandes*, 2018 WL 3105955, at *7. She does not allege that any specific higher paying job existed, that she was denied the ability to seek it, or that she was qualified for it. *Id.* She does not allege her pay fell below the market rate—and instead alleges the opposite. *Robinson*, 2019 WL 5617512, at *3. And she offers no specific allegations of a particular, concrete injury as a result of former Paragraph 14. She simply has no standing to pursue an antitrust claim.

II. Plaintiff's Claim Is Time-Barred

The statute of limitations provides an alternative basis to dismiss this case. Without disputing the Sherman Act's four-year limitations period, 15 U.S.C. § 15b, Turner says she is entitled to damages for five to six years after she learned that she would need to request a release and elected not to do so. Opp. 13-15. That is so, she argues, because she "sold her labor to McDonald's at depressed rates" within the limitations period. Opp. 14. As explained above, there is no competent allegation of any "depressed rates." In any event, courts have rejected this (once) "novel theory" that a plaintiff's claim is timely merely because she allegedly "suffered antitrust injury each time [she] received 'price-fixed' compensation." *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d at 1212-13.

The continuing violation doctrine is not a panacea, as Turner suggests. Opp. 14-15. Every

"overt act[]" does not restart the limitations period, *id.* at 14; instead, a continuing violation restarts the clock "each time a plaintiff *is injured* by an act of the defendants." *Zenith Radio Corp.*, 401 U.S. at 338 (emphasis added). Any other rule would "destroy the function of the statute, since parties may continue indefinitely to receive some benefit as a result of an illegal act performed in the distant past." *In re Animation Workers Antitrust Litig.*, 87 F. Supp. 3d at 1214 (internal quotation omitted). Turner's argument that "McDonald's incorporated the no-poach agreement into new (and renewing) franchise agreements" until March 2017 is therefore irrelevant. Opp. 14. She alleges no injury she suffered as a result, nor even that McDonald's incorporated the provision into a new agreement with the organization for which she worked during the limitations period.

Equally unavailing is Turner's attempt to restart the limitations period by arguing a new cause of action accrued when her franchisee's supervisors allegedly reminded her about releases. Opp. 14. Comments by her *franchisee's* supervisors are not "overt acts in support of the conspiracy" by *Defendants* to "enforce[]" former Paragraph 14. *Id.* And even if they were, Turner made the decision not to seek work elsewhere. *See Kelsey K.*, 2017 WL 3115169, at *5 (attributing to plaintiff her failure to seek employment with another firm because she did not explain why she did not apply elsewhere). Her lawsuit is therefore untimely.

CONCLUSION

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

Dated: December 2, 2019

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

By: /s/ Rachel S. Brass
Rachel S. Brass

GIBSON DUNN & CRUTCHER LLP

D. Jarrett Arp (admitted pro hac vice)
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 955-8500
Facsimile: (202) 467-0539
Email: JArp@gibsondunn.com

Rachel S. Brass (admitted pro hac vice)
Caeli A. Higney (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 **DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS** was electronically filed on December 2, 2019 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