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

STEPHANIE TURNER, on behalf of herself and all others similarly situated,

Plaintiff,

v.

McDONALD'S USA, LLC, a Delaware limited liability company, McDONALD'S CORPORATION, a Delaware corporation,

Defendants.

Civil Case No. 19-cv-5524

Judge Jorge L. Alonso
Magistrate Judge M. David Weisman

PLAINTIFF'S SUR-REPLY TO DEFENDANTS' MOTION TO DISMISS

The main issue raised in McDonald's motion to dismiss is whether Ms. Turner adequately pleads antitrust injury, *i.e.*, that she was injured by an anti-competitive effect of the No-Hire Agreement. *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *4 (N.D. Ill. June 25, 2018). In its Reply, McDonald's argues for the first time that Ms. Turner fails because it is impossible to show antitrust injury in the "single brand" market for McDonald's labor. Dkt. 51 at 7-9. McDonald's is wrong for at least two reasons: it ignores that the Court has already held that McDonald's corporate and franchise restaurants constitute *different* brands in the labor market, and it relies on antitrust cases that applied the rule of reason or dealt with inapposite product markets, not labor restraints.

First, the Court has already rejected the notion that McDonald's and its franchisees constitute a "single brand" labor market. To the contrary, the Court specifically observed that McDonald's and its franchisees may operate as one brand in the market for hamburger sales, but "[i]n the employment market, the various McDonald's stores are competing brands." *Deslandes*, 2018 WL 3105955, at *8. The No-Hire Agreement therefore "stifles interbrand competition [for

employees]." *Id.* Indeed, employment markets are nothing like the product markets in the cases cited by McDonald's. For example, McDonald's cites *Generac Corp. v. Caterpillar Inc.* for the proposition that "[n]ot even the most zealous antitrust hawk has ever argued that Amoco gasoline, Mobile gasoline, and Shell gasoline are three separate product markets . . . ." 172 F.3d 971, 977 (7th Cir. 1999) (challenge to vertical trademark licensing restrictions reviewed under rule of reason). Gasoline is a commodity product, however, so it makes little meaningful difference to a consumer what brand gasoline they purchase: gasoline of any brand can be used in the same way as other brands. Further, drivers face de minimis, if any, obstacles in switching between gasoline brands.

Workers, however, are not commodity products, and switching employers is a difficult, costly, and risky process. Further, as Ms. Turner alleges, working for a non-McDonald's restaurant is an imperfect substitute for a McDonald's restaurant, due to the McDonald's-specific value of her training and experience.[1] Even the economists McDonald's cited in its motion acknowledge this. *See* Dkt. 48 at 11. Accordingly, Ms. Turner alleges, and will seek to prove, that the No-Hire Agreement suppressed employee pay.

[1] *See* Compl. ¶ 15 (McDonald's employees' "marketable skills acquired through their work at McDonald's primarily have value only to other McDonald's restaurants and do not transfer to other fast food restaurants or similar businesses"); ¶ 109 (noting that "the education, training and experience within the McDonald's enterprise are unique to McDonald's and not transferable to other restaurants"); ¶ 110 ("Training, education, and experience within the McDonald's system are not transferrable to other restaurants for a number of reasons. McDonald's franchises utilize McDonald's own proprietary computer systems and platforms, including proprietary applications and data systems, which new franchises must purchase through McDonald's approved suppliers. [….] Experience with these systems is of little value to other restaurants."); ¶ 111 ("McDonald's franchises also utilize proprietary store operating procedures, McDonald's methods of inventory control and bookkeeping/accounting procedures, and McDonald's-prescribed equipment. Training is also accomplished through proprietary curricula and systems. According to McDonald's Franchise Disclosure Document, training is designed to provide the 'specific skill sets in the various facets of the conduct of a McDonald's restaurant, including such areas as equipment, standards, controls, and leading people.'").

Second, although McDonald's has not moved to dismiss Ms. Turner's case for failure to state a claim under the rule of reason (an argument this Court rejected in *Deslandes*), it attempts on Reply to resurrect that argument indirectly by relying on cases about proving "market power" and defining the "relevant market." As the Court already held, however, such an analysis is only relevant under the rule of reason. *Deslandes*, 2018 WL 3105955, at *5. The Court held that Ms. Deslandes plausibly alleged the No-Hire Agreement was unlawful under the "quick-look" test, which does not require a market power analysis to prove unreasonableness. *Id.* ("Under quick-look analysis, if the defendant lacks legitimate justifications for facially anticompetitive behavior then the court 'condemns the practice without ado' without resort to analysis of market power."). Given the resemblance between the No-Hire Agreement and a traditionally *per se* unlawful market division, the Court concluded that Ms. Deslandes stated a claim under the quick-look test because "[d]ividing the market does not promote intrabrand competition for employees, it stifles interbrand competition." *Id.* at *8. *Cf. In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007-08 (7th Cir. 2012) (Canadian mining company's agreement with U.S. sulfuric acid producers to restrict output would be reviewed under quick-look application of rule of reason, and plaintiff did not need to show market power or define a relevant market due to restraint's resemblance to price-fixing arrangement); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010 (10th Cir. 1998) (sports league's rule to cap coach salaries was reviewed under quick-look application of rule of reason, restraint's resemblance to traditionally unlawful price-fixing agreement did not require plaintiff to present an elaborate market analysis).

In contrast, all the antitrust cases cited for the first time by McDonald's on Reply applied the full rule of reason, and involved factual scenarios and economic configurations that are very different from the No-Hire Agreement at issue here. *See Generac*, 172 F.3d at 977 (rule of

reason applied to review of vertical trademark licensing restrictions); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412 (5th Cir. 2010) (vertical price restraints reviewed under rule of reason); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F. 2d 1291, 1303-04 (9th Cir. 1982) (challenge to concessionaire's exclusive dealing arrangements reviewed under rule of reason); *Todd v. Exxon Corp.*, 275 F.3d 191, 198-99 (2d Cir. 2001) (challenge to employers' practice of sharing wage information absent a price-fixing agreement reviewed under rule of reason); *NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 466-67, 469 (6th Cir. 2005) (horizontal restraints in professional sports necessary for product to exist, so rule of reason applied to Ontario Hockey League rule that effectively barred teams from signing twenty-year-old NCAA players); *AFMS LLC v. UPS*, 105 F. Supp. 3d 1061, 1076 (C.D. Cal. 2015) (third-party consultant who advised shippers re: delivery needs challenged transportation carriers' practice of prohibiting consultants' participation in negotiations with customers, and claim evaluated under rule of reason); *Hangar v. Berkley Grp., Inc.*, No. 5:13-cv-113, 2015 WL 3439255, at *7 (W.D. Va. May 28, 2015) (applying rule of reason to terms of settlement agreement restricting tortious interference with contract); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 393 (1956) (explaining how to define relevant markets in monopolization cases); *McCagg v. Marquis Jet Partners, Inc.*, No. 05 CV 10607 PAC, 2007 WL 2454192, at *5 (S.D.N.Y. Mar. 29, 2007) (alleged monopoly in "25-hour jet card" market); *Bayer Schera Pharma AG v. Sandoz, Inc.*, No. 08CIV03710, 2010 WL 1222012, at *6 n.10 (S.D.N.Y. Mar. 29, 2010) (admonishing plaintiff to "be mindful that 'the natural monopoly every manufacturer has in the production and sale of its own product cannot be the basis for antitrust liability'") (citation omitted).

Further, all but one of these antitrust cases dealt with product markets. The only exception, *Hangar*, is distinguishable, as the court itself explained that the agreement before it was "little more than a covenant not to violate the law by intentionally interfering with each other's employment contracts," *i.e.*, an agreement not to tortiously interfere with employer-employee restrictive covenants. 2015 WL 3439255, at *7. The court expressly distinguished that "narrowly drawn" agreement from blanket no-poach agreements like the one at issue here. *Id.* The final new case cited by McDonald's did not involve an antitrust claim. *See Simpson v. Sanderson Farms*, 744 F.3d 702, 709-10 (11th Cir. 2014) (plaintiffs brought RICO claim alleging that defendants' practice of hiring undocumented workers suppressed wages without any indication of number of undocumented versus documented workers). For these reasons, and those argued in her Opposition to the Motion, Ms. Turner respectfully requests that the Court deny the Motion.

Dated: January 8, 2020

Respectfully submitted,

/s/ Anne B. Shaver

Dean Harvey (*pro hac vice*)
Anne B. Shaver (*pro hac vice*)
Lin Y. Chan (*pro hac vice*)
Yaman Salahi (*pro hac vice*)
Jeremy J. Pilaar (*pro hac vice*)
LIEFF CABRASER HEIMANN & BERNSTEIN, LLP
275 Battery Street, 29th Floor
San Francisco, CA 94111-3339
Tel: 415.956.1000
dharvey@lchb.com
ashaver@lchb.com
lchan@lchb.com
ysalahi@lchb.com
jpilaar@lchb.com

Derek Y. Brandt
Leigh M. Perica
McCune Wright Arevalo, LLP
231 North Main Street, Suite 20
Edwardsville, IL 62025
Telephone: 618-307-6116
dyb@mccunewright.com
lmp@mccunewright.com

Richard D. McCune
Michele M. Vercoski
McCune Wright Arevalo, LLP
3281 East Guasti Road, Suite 100
Ontario, CA 91761
Telephone: 909-557-1250
rdm@mccunewright.com
mmv@mccunewright.com

Walter W. Noss
Stephanie A. Hackett
Sean C. Russell
Scott+Scott Attorneys at Law LLP
600 West Broadway, Suite 3300
San Diego, CA 92101
Telephone: 619-233-4565
wnoss@scott-scott.com
shackett@scott-scott.com
sean.russell@scott-scott.com

Michelle E. Conston
Scott+Scott Attorneys at Law LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10169
Telephone: 212-223-6444
mconston@scott-scott.com

CERTIFICATE OF SERVICE

I, Anne B. Shaver, an attorney, hereby certify that **PLAINTIFF'S SUR-REPLY TO DEFENDANTS' MOTION TO DISMISS** was electronically filed on January 8, 2020 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

/s/ Anne B. Shaver
Anne B. Shaver