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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 22-2333 & 22-2334

LEINANI DESLANDES and STEPHANIE TURNER,

Plaintiffs-Appellants,

v.

MCDONALD'S USA, LLC, and
MCDONALD'S CORPORATION,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 17 C 4857 & 19 C 5524—
Jorge L. Alonso, *Judge.*

ARGUED MARCH 31, 2023—
DECIDED AUGUST 25, 2023

Before EASTERBROOK, RIPPLE, and WOOD, *Circuit Judges.*

EASTERBROOK, *Circuit Judge.* Until recently, every McDonald's franchise agreement contained an anti-poach clause. Each franchise operator promised not to hire any person employed by a different franchise, or by McDonald's itself, until six months after the last date that person had worked for McDonald's or another franchise. A related clause barred one franchise from soliciting another's employee. We use "anti-poach clause" or "no-poach clause" to refer to these collectively.

Plaintiffs in this suit under §1 of the Sherman Act, 15 U.S.C. §1, worked for McDonald's franchises while these clauses were in force and were unable to take higher-paying offers at other franchises. They contend that the no-poach clause violates the antitrust laws. If this clause holds down the price of labor by reducing competition for fast-food workers, that could benefit owners—and conceivably consumers too. But the antitrust laws prohibit monopsonies, just as they prohibit monopolies. See *NCAA v. Alston*, 141 S. Ct. 2141 (2021).

Claims under §1 fall into two principal categories: naked restraints, akin to cartels, are unlawful *per se*, while other restraints are evaluated under the Rule of Reason. (The quick-look approach, see *NCAA v. University of Oklahoma*, 468 U.S. 85 (1984), is a subset of analysis under the Rule of Reason.) The district court rejected plaintiffs' *per se* theory after stating that the anti-poach clause is not a naked restraint but is ancillary to each franchise agreement—and, as every new restaurant expands output, the restraint is justified. 2018 U.S. Dist. LEXIS 105260 (N.D. Ill. June 25, 2018).

The court deemed the complaint deficient under the Rule of Reason because it does not allege that

McDonald's and its franchises collectively have power in the market for restaurant workers' labor. Market power is essential to any claim under the Rule of Reason. See *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2284 (2018); *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007); *Ball Memorial Hospital, Inc. v. Mutual Hospital Insurance, Inc.*, 784 F.2d 1325, 1334–35 (7th Cir. 1986). The absence of such an allegation rendered the claim implausible, the court held. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) (establishing the plausibility requirement for antitrust complaints). The judge invited plaintiffs to file an amended complaint alleging market power. After they declined to do so, the judge dismissed the complaint with prejudice, ending the suit. 2022 U.S. Dist. LEXIS 113524 (N.D. Ill. June 28, 2022).

On appeal plaintiffs assert that they didn't "really" waive or forfeit their opportunity to allege market power, but the district court's contrary conclusion is not an abuse of discretion. Plaintiffs also contend that the existence of market power is too obvious to need allegations and proof, but that line of argument depends on treating "workers at McDonald's" as an economic market. That's not sound. People who work at McDonald's one week can work at Wendy's the next, and the reverse. People entering the labor market can choose where to go—and fast-food restaurants are only one of many options. If wages are too low at one chain, people can choose other employers. The mobility of workers—both from one employer to another and from one neighborhood to another—makes it impossible to treat employees at a single chain as a market.

The district judge found it undisputed that within three miles of Deslandes's home there are between 42 and 50 quick-service restaurants as well as two McDonald's franchises, and that within ten miles of her home there are 517 quick-service restaurants. This is not a situation in which a court can treat employment for a single enterprise as a market all its own. See also, e.g., *Elliott v. United Center*, 126 F.3d 1003 (7th Cir. 1997) (peanut sales in or near a sports arena is not a meaningful market); *Menasha Corp. v. News America Marketing In-Store, Inc.*, 354 F.3d 661 (7th Cir. 2004) (store coupons, ice cream flavors, and diet soda are not meaningful markets). So the Rule of Reason is out of this suit, and, as quick-look analysis is part of the Rule of Reason, it is out too.

But the district judge jettisoned the *per se* rule too early. The complaint alleges a horizontal restraint, and market power is not essential to antitrust claims involving naked agreements among competitors. See, e.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990).

An agreement among competitors is not naked if it is ancillary to the success of a cooperative venture. See, e.g., *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986). Consider a partnership to practice law. The partners devote their time to the law firm and pool their revenues; that's a horizontal agreement. The partners also promise not to compete with the law firm by taking their own clients. That agreement is lawful because the promise to devote all legal time to the firm's business helps each law firm compete against its rivals; in antitrust jargon, the no-compete pledge is ancillary to the venture in the sense

that it makes the partnership more effective when competing in the market for legal services. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979).

The complaint alleges that McDonald's operates many restaurants itself or through a subsidiary, and that it enforced the no-poach clause at those restaurants. This made the arrangement horizontal: workers at franchised outlets could not move to corporate outlets, or the reverse. See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212–13 (1959); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939).

Still, the district court thought that the anti-poach clause is justified as an ancillary restraint. The court deemed the restraint ancillary because it appeared in franchise agreements—and each agreement expands the output of burgers and fries. (We need not consider the possibility that new franchises replace old ones, so that "new franchise" need not imply "more output," though this may need attention later.)

One problem with this approach is that it treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing). That's not right; it is equivalent to saying that antitrust law is unconcerned with competition in the markets for inputs, and *Alston* establishes otherwise.

Another problem with using the appearance of a clause in a contract that, on the whole, increases output, is that the clause may have nothing to do with the output. A "restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶1908b (4th ed. 2022). Is

there some reason to think that a no-poach clause promotes the production of restaurant food? See *Polk Bros.*, 776 F.2d at 189. Maybe it just takes advantage of workers' sunk costs and helps each business's bottom line, without adding to output.

What we mean is this: People who choose to work at McDonald's or one of its franchises acquire business-specific (or location-specific) skills. Employees may choose to work for less than their marginal product in order to compensate the employer for the training. In a competitive market, workers recover these investments as their wages rise over time, in response to their greater productivity. But if McDonald's specifies a limited number of classifications of workers (something the complaint also alleges), that may delay promotion and frustrate workers' ability to recoup their investments in training. One way to obtain a higher salary, after paying for one's own training through lower wages, is to seek employment at another similar business where the skills can be put to use at the market wage. Deslandes alleges that this is what she tried to do, only to be blocked by the no-poach clause. And if this is what the no-poach agreement does—if it prevents workers from reaping the gains from skills they learned by agreeing to work at lower wages at the outset of their employment—then it does not promote output. It promotes profits, to be sure, as franchises capitalize on workers' sunk costs. But it does not promote output and so cannot be called "ancillary" in the sense antitrust law uses that term.

Common training and job classifications could in principle justify restraints on poaching. Suppose Franchise **A** hires workers and pays for necessary training, rather than requiring the workers to cover

their own training costs through lower wages. During training in this approach, the wage exceeds the worker's productivity, but after training the worker produces enough value to pay back the costs of training and allow **A** to recoup the "excess" wage during training time. **A** needs to keep the worker for this to pay off. If Franchise **B** offers no training but a higher wage, this will be attractive to the worker who was trained at **A**, and **B** can make a profit from free riding on **A**'s investment. **B** can do this because the restaurants have the same layout, tasks, and so on. In these circumstances a ban on poaching could allow **A** to recover its training costs and thus make training worthwhile to both franchise and worker. It would not imply monopsony. But eventually the cost of training will have been amortized, and a ban on transfer to another restaurant after that threshold could be understood as an antitrust problem.

So what was the no-poach clause doing? Was it protecting franchises' investments in training, or was it allowing them to appropriate the value of workers' own investments? That question can't be answered by observing that any given franchise contract, viewed by itself, expands the output of food. Why did the clause have a national scope, preventing a restaurant in North Dakota from hiring a worker in North Carolina, when the market for restaurant jobs is local? Why did the restriction last as long as the employment (plus six months), rather than be linked to any estimate of the time a franchise would need to recover its investments in training? If the answer to some of these questions depends (as McDonald's asserts) on the fact that the system as a whole advertises for workers and wants to prevent some outlets from free riding on the contributions of others, how do the terms of the no-poach clause reflect this objective?

These are all potentially complex questions, which cannot be answered by looking at the language of the complaint. They require careful economic analysis. More than that: the classification of a restraint as ancillary is a defense, and complaints need not anticipate and plead around defenses. *Gomez v. Toledo,* 446 U.S. 635, 640–41 (1980); *Craftwood II, Inc. v. Generac Power Systems, Inc.*, 920 F.3d 479, 482 (7th Cir. 2019); Fed. R. Civ. P. 8(c).

Some language in the district court's opinions suggests that a complaint must contain enough to *win,* but that is not so. It suffices, *Twombly* holds, to make out a plausible claim, and this complaint does so. Nor need a complaint plead law or match facts to elements of legal theories. See *Johnson v. Shelby,* 574 U.S. 10 (2014); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). Once a complaint has identified a plausible antitrust claim, further development requires discovery, economic analysis, and potentially a trial.

Plaintiffs sought class certification, and the district court said no. The court may think it wise to reconsider in light of the need for a remand and the analysis in this opinion.

The judgment is vacated and the case is remanded for further proceedings.

RIPPLE, *Circuit Judge*, concurring. I join the opinion and the judgment of the court. The issue presented by this case is an important and timely one. I therefore write separately to make clear my understanding of what we decide, and do not decide, today.

Our opinion sends the ancillary restraint defense back to the district court for further analysis. It makes clear that, in further proceedings before the district court, the defendants bear the burden of establishing that the no-poaching clause in the franchise agreement qualifies as an ancillary restraint. It further suggests the sort of inquiry that the district court should undertake in considering this question. Our opinion's discussion of these perspectives hopefully will be helpful to the district court and to the parties. However, I do not understand the court's opinion to assess in any definitive way the merits of any of these suggested avenues of further economic analysis, nor do I understand the court to preclude other approaches that the parties believe pertinent and that the district court believes relevant.

Nor do I read the court's discussion as addressing the relative usefulness of the various considerations that it discusses. As I understand the court's opinion, it leaves the district court, with the assistance of the parties, to determine the relative importance of these considerations and to identify those issues worthy of its prime attention. For instance, the district court might determine that the scope and duration of the restriction in question reduces substantially the need for extended economic analysis of other "potentially complex questions." Op. 7. If the restriction cannot be justified because of its scope and duration, it is difficult to see how it can be reasonably necessary to

the achievement of the procompetitive objectives of the franchise agreement. *See, e.g., Blackburn v. Sweeney*, 53 F.3d 825, 828–29 (7th Cir. 1995) (concluding that the "infinite duration" of the restraint meant it had no "necessary relation" to the procompetitive arrangement and so was not ancillary); *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1073 (11th Cir. 2005) ("[T]he restraint imposed must relate to the ultimate objective, and cannot be so broad that some of the restraint extinguishes competition without creating efficiency."). If we are to retain the benefits of applying a per se analysis to horizontal agreements, we need to ensure that our adjudication of possible defenses is a focused one. *Cf. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19 n.33 (1979) ("*BMI*") (cautioning against allowing the threshold inquiry to "subsume the burdensome analysis required under the rule of reason," which would effectively amount to "apply[ing] the rule of reason from the start").

Perhaps most importantly, I do not understand the court to question the continued vitality of the rule that the ancillary restraint defense requires that the defendants establish *both* that the restriction in question be "subordinate and collateral," *Rothery Storage*, 792 F.2d at 224, to a "legitimate business collaboration" among the defendants, *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006), *and* be reasonably necessary to achieve a procompetitive objective of the franchise agreement. *See Blackburn*, 53 F.3d at 828. This rule is well-established, and I do not understand this opinion to weaken surreptitiously a principle upon which the bench and bar rely.

APPENDIX B

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

LEINANI DESLANDES, Plaintiff, v. McDONALD'S USA, LLC, McDONALD'S CORPORATION, and DOES 1 through 10, Defendants.	)	No. 17 C 4857 Judge Jorge L. Alonso June 28, 2022
STEPHANIE TURNER, Plaintiff, v. McDONALD'S USA, LLC, and McDONALD'S CORPORATION, Defendants.	)	No. 19 C 5524 Judge Jorge L. Alonso

MEMORANDUM OPINION AND ORDER

After a hiring restriction prevented plaintiff Leinani Deslandes ("Deslandes") from taking a better-paying position with a rival McDonald's outlet, she filed this suit seeking relief under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Stephanie Turner ("Turner") filed a related suit, 19-cv-5524, which is consolidated with this one. Defendants have filed a motion for judgment on the pleadings or, in the alternative, for summary judgment. Plaintiffs, too, have filed a motion for summary judgment.[1] For the reasons set forth below, plaintiffs' motion is denied. Defendants' motion is granted in part and denied in part.

I. BACKGROUND

In 2017, Deslandes filed a three-count amended complaint challenging a no-hire provision in McDonald's franchise agreements. In Count I, Deslandes asserted that the no-hire provision was an unlawful restraint of trade under Section 1 of the Sherman Antitrust Act.[2] In her amended complaint (familiarity with which is assumed), plaintiff alleged that the two defendants (McDonald's Corporation and its wholly-owned subsidiary McDonald's USA, LLC) served as the franchisor for the ubiquitous McDonald's restaurants. (Plaintiffs usually refer to the two defendants collectively as McDonald's, and the Court does, as well.)

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[1] Although the parties intend for the motions to apply to both cases, they are filed on the docket of the Deslandes case.

[2] The other two counts were previously dismissed with prejudice.

Deslandes also alleged that each franchisee signed a franchise agreement that contained a no-hire restriction, which read:

> 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 [] 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.

(Am. Complt. ¶ 87). Plaintiff further alleged that, although many McDonald's restaurants were owned and operated by franchisees, many other McDonald's restaurants were owned and operated by subsidiaries of defendant McDonald's Corporation. The parties refer to the restaurants owned by McDonald's Corporation as McOpCos. Deslandes alleged that the McOpCos competed directly with restaurants owned by franchisees.

In her amended complaint, Deslandes styled her Sherman Act claim as a restraint that is unlawful either *per se* or under quick-look analysis. Defendants disagreed and filed a motion to dismiss. In their motion to dismiss, defendants argued that the restraint was most appropriately analyzed under the rule of reason, such that plaintiff, in order to state a plausible claim, was required to include in her complaint allegations of market power in the relevant market. Deslandes had not included such allegations.

In ruling on the motion to dismiss, the Court concluded that Deslandes had stated a claim for a

restraint that might be unlawful under quick-look analysis. *Deslandes v. McDonald's USA, LLC*, Case No. 17-cv-4847, 2018 WL 3105955 at *8 (N.D. Ill. June 25, 2018) ("*Deslandes I*"). (Familiarity with that decision is assumed.) The Court reasoned that plaintiff, by alleging that the McOpCos compete directly with the franchisees, had adequately alleged a horizontal restraint, because the restraint prevented defendants' competitors (the franchisees) from hiring defendants' employees. *Deslandes I*, 2018 WL 3105955 at *6. The Court further concluded that the alleged restraint could not be illegal *per se*, because it was ancillary to an output-enhancing agreement, namely the franchise agreement itself, which increased output of burgers and fries. *Deslandes I*, 2018 WL 3105955 at *7.

In denying the motion to dismiss and allowing plaintiff's claim to proceed on the theory that the alleged restraint might be unlawful under a quick look, the Court gave plaintiff an explicit but time-limited opportunity to amend her complaint to add allegations that would support the finding of an unlawful restraint under the rule of reason. Specifically, the Court said:

> Though the Court has concluded that plaintiff has stated a claim for a restraint that might be unlawful under quick-look analysis, the evidence at a later stage may not support it. *As defendants have pointed out, plaintiff has not attempted to plead a claim under the rule of reason.* This is perhaps unsurprising. To state a claim under the rule of reason, a plaintiff must allege market power in a relevant market. The relevant market for employees to do the type of work alleged in

> this case is likely to cover a relatively-small geographic area. Most employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move. That is not to say that people do not move for other reasons and then attempt to find a low-skill job; the point is merely that most people do not search long distances for a low-skill job with the idea of then moving closer to the job. Plaintiff, though, seeks to represent a nationwide class, and allegations of a large number of geographically-small relevant markets might cut against class certification. *Nonetheless, if plaintiff decides she would like to include a claim under the rule of reason, she has leave to amend, but she must do so soon, within 28 days.*

Deslandes I, 2018 WL 3105955 at *8. (emphasis added). Deslandes chose not to amend.

The parties proceeded with discovery, and, eventually, plaintiffs Deslandes and Turner (who had, by that time, filed a similar suit that was consolidated with this one) moved to certify a nationwide class of persons who were employed by a McDonald's restaurant during a five-year period. This Court denied the motion for class certification. *Deslandes v. McDonald's USA, LLC*, Case No. 17 C 4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) ("*Deslandes II*"). (Familiarity with that decision is assumed.)

The primary reason why the Court denied class certification was its conclusion that individual issues would predominate. That conclusion stemmed from the conclusion that the restraint in this case would

have to be judged under the rule of reason, which meant each plaintiff would need to establish that the restraint was anticompetitive in the relevant market in which she sold her labor. This Court explained in great detail its reasons for concluding that rule-of-reason analysis would apply. *Deslandes II*, 2021 WL 3187668 at *7-11. Those reasons included that the Supreme Court had recently decided, in a unanimous decision, that claims regarding restraints of trade "presumptively" call for rule-of-reason analysis. *Deslandes II*, 2021 WL 3187668 at *7 (citing *NCAA v. Alston*, __ U.S. __, 141 S.Ct. 2141 (2021)). Next, the Court explained that in many parts of the country (some twenty states), the no-hire agreement was only a vertical agreement between franchisor and franchisee, because, in those areas, no McOpCos competed with franchisee restaurants. *Deslandes II*, 2021 WL 3187668 at *10. Vertical agreements are judged under the rule of reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007). Finally, defendants had put forth sufficient evidence of procompetitive effects to warrant consideration of the restraint under the rule of reason. *Deslandes II*, 2021 WL 3187668 at *8-10.

Because this Court denied class certification, this case is not a class action. What remains of this case are the individual claims of two plaintiffs, Deslandes and Turner. Each seeks relief under the Sherman Act for alleged reduced wages resulting from the no-hire restriction.

Before the Court is defendants' motion for judgment on the pleadings, or, in the alternative, summary judgment. As defendants point out, neither Deslandes nor Turner ever included in her respective complaint a plausible claim under the rule of reason,

which is to say neither ever alleged a relevant market within which defendants have market power to suppress wages. Plaintiffs, too, have filed a motion for summary judgment.

The following facts are undisputed unless otherwise noted.[3]

Deslandes, at some point (the parties do not say when) was employed by a franchisee in a McDonald's restaurant in Apopka, Florida, near Orlando. Within three miles of Deslandes's home were two McDonald's restaurants and between 42 and 50 other quick-

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[3] Local Rule 56.1 outlines the requirements for the introduction of facts parties would like considered in connection with a motion for summary judgment. The Court enforces Local Rule 56.1 strictly. *See FTC v. Bay Area Business Council, Inc.*, 423 F.3d 627, 633 (7th Cir. 2005) ("Because of the important function local rules like Rule 56.1 serve in organizing the evidence and identifying disputed facts, we have consistently upheld the district court's discretion to require strict compliance with those rules."). At the summary judgment stage, a party cannot rely on allegations; she or it must put forth evidence. Fed.R.Civ.P. 56(c)(1)(A); *see also Grant v. Trustees of Indiana Univ.*, 870 F.3d 562, 568 (7th Cir. 2017) ("As the 'put up or shut up' moment in a lawsuit,' summary judgment requires a non-moving party to respond to the moving party's properly-supported motion by identifying specific, admissible evidence showing that there is a genuine dispute of material fact for trial."). Where one party supports a fact with admissible evidence (i.e., not complaint allegations) and the other party fails to controvert the fact with citation to admissible evidence (i.e., not complaint allegations), the Court deems the fact admitted. *See Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 218-19 (7th Cir. 2015); *Ammons v. Aramark Uniform Servs., Inc.*, 368 F.3d 809, 817-18 (7th Cir. 2004). This does not, however, absolve the party putting forth the fact of the duty to support the fact with admissible evidence. *See Keeton v. Morningstar, Inc.*, 667 F.3d 877, 880 (7th Cir. 2012).

service restaurants. Within ten miles of Deslandes's home were 517 quick-service restaurants.

Turner was employed, at some point (the parties do not say when), by a McOpCo in Covington, Kentucky. She was also employed, at some point (the parties do not say when), by a franchisee to work in McDonald's restaurants located in Florence, Hebron and Erlander, Kentucky. Within ten miles of Turner's home were 253 quick-serve restaurants.

II. STANDARD

A motion for judgment on the pleadings "is subject to the same standard as a motion to dismiss under Rule 12(b)(6)." *Gill v. City of Milwaukee*, 850 F.3d 335, 339 (7th Cir. 2017). Thus, the question is whether a plaintiff's complaint states a claim that is plausible on its face, meaning it "allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Gill*, 850 F.3d at 339 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

Summary judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). When considering a motion for summary judgment, the Court must construe the evidence and make all reasonable inferences in favor of the non-moving party. *Hutchison v. Fitzgerald Equip. Co., Inc.*, 910 F.3d 1016, 1021 (7th Cir. 2018). Summary judgment is appropriate when the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). "A genuine issue of material fact arises only if sufficient

evidence favoring the nonmoving party exists to permit a jury to return a verdict for that party." *Brummett v. Sinclair Broadcast Group, Inc.*, 414 F.3d 686, 692 (7th Cir. 2005).

III. DISCUSSION

A. Motion for judgment on the pleadings

Defendants' theory as to why they are entitled to judgment on the pleadings is that the Court has already determined that this case must be analyzed under the rule of reason, and neither plaintiff included in her respective complaint allegations that plausibly suggest the restraint would be unlawful under rule-of-reason analysis. Specifically, neither Deslandes nor Turner alleged in her respective complaint the relevant market in which she sold her labor or that McDonald's had market power in that relevant market. Such allegations are necessary to state a plausible claim that a restraint is unlawful under the rule of reason. *Agnew v. National Collegiate Athletic Ass'n*, 683 F.3d 328, 347 (7th Cir. 2012) (affirming dismissal of rule-of-reason claim where plaintiff failed to allege that defendant had market power within a relevant market); *see also Deslandes II*, 2021 WL 3187668 at *11 (describing the importance of defining a relevant market in vertical and horizontal restraint cases). In *Agnew*, the Seventh Circuit explained:

> Under a Rule of Reason analysis, the plaintiff carries the burden of showing that an agreement or contract has an anticompetitive effect on a given market within a given geographic area. As a threshold matter, a plaintiff must show that the defendant has market power—that is, the ability to raise

> prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing.

Agnew, 683 F.3d at 335 (internal citation omitted).

When this Court concluded that the restraint at issue must be judged under the rule of reason, it considered information outside the pleadings. The conclusion, however, is the same based solely on the pleadings. "[A]ntitrust courts must give wide berth to business judgments before finding liability." *Alston*, 141 S.Ct. at 2163. Deslandes's and Turner's claims "presumptively" call for rule-of-reason analysis. *Alston*, 141 S.Ct. at 2151 ("Determining whether a restraint is undue for purposes of the Sherman Act 'presumptively' calls for what we have described as 'rule of reason analysis.'").

In *Alston*, the Supreme Court explained that a quick look suffices:

> *only* for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in *the great in-between*—a quick look is sufficient for approval or condemnation.

Alston, 141 S.Ct. at 2155 (emphasis added). On one end of that spectrum, the Supreme Court explained, are restraints that are "so obviously incapable of harming competition that they require little scrutiny," such as joint ventures commanding such a small share of the market (say, 5-6%) that any reduction in output would be made up by the rest of the market. *Alston*, 141 S.Ct. at 2155-56. On the opposite end of the spectrum are those "agreements among competitors" that "so obviously threaten to reduce output and raise

prices that they might be condemned" after a quick look. *Alston*, 141 S.Ct. at 2156. The Supreme Court said such quick-look condemnations should be rare, explaining, "we take special care not to deploy these condemnatory tools until we have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'" *Alston*, 141 S.Ct. at 2156 (citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-887 (2007)). The restraint at issue in this case falls in "the great in-between" of restraints that require rule-of-reason analysis. This Court cannot say that it has enough experience with no-hire provisions of franchise agreements to predict with confidence that they must always be condemned, which means, under *Alston*, that the Court must apply rule-of-reason analysis to this case.

Accordingly, the Court also rejects Turner's and Deslandes's argument that the alleged restraint is unlawful *per se*. *Per se* treatment is outside quick-look treatment on either end of the spectrum and is, thus, even more rare than quick-look analysis. This Court previously rejected, at the motion-to-dismiss stage, the idea that Deslandes had alleged a restraint that was unlawful *per se*. *Deslandes I*, 2018 WL 3105955 at *7. The alleged restraint was specifically alleged to be part of a franchise agreement, which is to say it was ancillary to an agreement that was output enhancing in the market for fast food. Thus, though the restraint as alleged in the plaintiffs' respective complaints had horizontal elements (in that the franchisees competed with the franchisor for labor), the restraint is not *per se* unlawful because it "may contribute to the success of a cooperative venture that promises greater productivity and output." *Polk Bros., Inc. v. Forest*

City Enterprises, Inc., 776 F.2d 185, 189 (7th Cir. 1985). Such restraints are judged under the rule of reason. *Polk Bros.*, 776 F.2d at 188-89 ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote.").[4] The restraint plaintiffs allege must be judged under the rule of reason.

Next, plaintiffs argue that they were not required to amend their complaints to add rule-of-reason allegations, because they need not plead legal theories. Plaintiffs are correct that "[f]ederal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Johnson v. Shelby*, 574 U.S. 10, 11 (2014). That does not, however, absolve either of these plaintiffs of the obligation to "plead facts sufficient to show that her claim has substantive plausibility." *Johnson*, 574 U.S. at 12 (citing *Bell*

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[4] The restraint alleged by Deslandes and Turner is similar to dual distribution, where a "manufacturer simultaneously sells to independent dealers and to those who might otherwise be customers of those dealers." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 1605a (4th and 5th Editions, 2015-2021). Such arrangements are generally judged under the rule of reason, because the restraints generally "serve legitimate purposes without harming market competition." *Id.* ¶ 1605c ("The manufacturer's own presence at the dealer level in no way alters its strategy for profit maximization. That presence would not induce it to impose restraints that reward dealers with excess profits, because such profits necessarily reduce its own manufacturer-level profits."); *see also Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982) ("dual distribution systems must be evaluated under the traditional rule of reason standard").

Atlantic Corp. v. Twombly, 550 U.S. 554 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). In other words, this Court would not dismiss either plaintiff's antitrust claim for failing to include the words "rule of reason" in her respective complaint. The Court can, however, dismiss such a claim for failure to include allegations of market power in a relevant market, because those are the facts necessary to render plausible a claim that a restraint is unlawful under rule-of-reason analysis. Deslandes and Turner failed to include such facts.

Nor are plaintiffs saved by their suggestion that employment by McDonald's restaurants constitutes a market all its own, separate from the market for employment by other quick-serve restaurants. Plaintiffs could have sold their labor to other customers. As the Seventh Circuit has explained:

> Suppose that a well-conducted survey shows that vanilla is people's favorite flavor of ice cream, and by a large margin. It would not follow that vanilla ice cream is a separate market, because if its price rises any other ice cream producer could make more vanilla and less chocolate or pistachio. For a closely related reason, [the expert's] conclusion that at-shelf coupons uniquely appeal to 'impulse shoppers' (that is, shoppers who do not prepare in advance by clipping coupons from the Sunday supplements) does not identify an economic market. *Attributes of shoppers do not identify markets.* An example from *United States v. Rockford Memorial Corp.*, 989 F.2d 1278, 1284 (7th Cir. 1990), shows why. Suppose that diabetics must drink low-calorie soft drinks, if any at all. Could producers of

> artificially sweetened soft drinks raise prices as a result of those 'locked in' customers? No, they could not. A price increase not only would drive nondiabetic customers to other products but also would induce rivals to switch some of their production from standard drinks to artificially sweetened ones. The healthy customers, and the products, combine to protect the diabetic customers. Just so with coupons. Careful shoppers and other producers protect the impulse buyers (or, to be accurate, protect the manufacturers that want to sell to impulse buyers).

Menasha Corp. v. News Am. Mkg. In-Store, Inc., 354 F.3d 661, 665 (7th Cir. 2004) (emphasis added). The idea that Deslandes and Turner sold their labor in market that was limited to McDonald's outlets is implausible. They could have sold their labor to other buyers. As in *Agnew*:

> Plaintiffs appear to have made the strategic decision to forgo identifying a specific relevant market. Whatever the reasons for the strategic decision, they cannot now offer post hoc arguments attempting to illuminate a buried market allegation.

Agnew, 683 F.3d at 347. Neither plaintiff alleged, in her respective complaint, a relevant market or that defendants had market power in that relevant market.

In a footnote, plaintiffs request leave to amend. It is far too late for that. On June 25, 2018, this Court explicitly gave plaintiff Deslandes an opportunity to file an amended complaint in order to add allegations that defendants had market power in the relevant

market. [Docket 53 at 16]. The Court set a deadline of July 23, 2018 for the amendment. [Docket 53 at 16]. Deslandes did not file an amended complaint, and, thus, as this Court has mentioned in multiple orders, plaintiff waived the chance to add those allegations. Plaintiffs argue that plaintiff Turner was not given a deadline for amending her complaint. The reason the Court did not set an explicit deadline for Turner was that such a deadline was unnecessary. When Turner asked this Court to consolidate her case with Deslandes's, she specifically stated that she was asserting the same claim as Deslandes. (Docket 146 at 5) ("Ms. Turner's addition to the case will not significantly impact the scope of discovery as *she will assert the same legal theories* as Ms. Deslandes.") (emphasis added). It is far too late in this case, after discovery has closed, for either plaintiff to add allegations of market power in the relevant market. *Cf. Chapman v. First Index, Inc.*, 796 F.3d 783, 785 (7th Cir. 2015) ("a district court has discretion to reject an attempt to remake a suit more than four years after it began"). Plaintiffs have not shown good cause for this Court to relieve them of a strategy they chose years ago. Their neglect to amend in 2018 is not excusable.

Finally, the Court notes that amendment would be futile. As this Court has previously explained, the relevant geographic market for the type of labor Deslandes and Turner were selling is a small, local area. This Court explained why, at length, previously. *Deslandes*, 2021 WL 3187668 at *12-13. It would be futile for either plaintiff to amend. It is undisputed that, within three miles of Deslandes's home were two McDonald's restaurants and between 42 and 50 other quick-serve restaurants. Within ten miles of Deslandes's home were 517 quick-serve restaurants.

Accordingly, Deslandes cannot plausibly allege that defendants had market power in the relevant market within which she sold her labor. Within ten miles of Turner's home were 253 quick-serve restaurants. Accordingly, Turner cannot plausibly allege that defendants had market power in the relevant market in which Turner sold her labor. Without market power, defendants could not suppress plaintiffs' wages; another buyer would step in to pay plaintiffs more. *See Alston*, 141 S.Ct. at 2156 (citing *Polk Bros*, 776 F.2d at 191 ("Unless the firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign.")). Amendment would be futile.

Deslandes failed to allege plausibly that the restraint is unlawful under rule-of-reason analysis. She declined to amend when she had the chance, and now it is too late. Defendants are entitled to judgment on the pleadings with respect to Count I of Deslandes's amended complaint. The same is true with respect to Turner. Defendants are entitled to judgment on the pleadings on Count I of her complaint.

B. Motions for summary judgment

Accordingly, the cross motions for summary judgment are denied as moot.

IV. CONCLUSION

For these reasons, defendants' motion [378] for judgment on the pleadings or for summary judgment is granted in part and denied in part. Plaintiffs' motion [390, 393] for summary judgment is denied as moot. Defendants' motions [409, 411] to exclude experts are denied as moot. Defendants are granted judgment on the pleadings with respect to Count I of Deslandes's amended complaint. Deslandes's claims against Does 1-10 are dismissed for want of prosecution.

Defendants are granted judgment on the pleadings with respect to Count I of Turner's complaint. Civil case terminated.

SO ORDERED. **ENTERED: June 28, 2022**

/s/ Jorge Alonso
HON. JORGE ALONSO
United States District Judge

APPENDIX C

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

LEINANI DESLANDES, Plaintiff, v. McDONALD'S USA, LLC, McDONALD'S CORPORATION, and DOES 1 through 10, Defendants.	)	No. 17 C 4857 Judge Jorge L. Alonso July 28, 2021

MEMORANDUM OPINION AND ORDER

After a hiring restriction prevented plaintiff Leinani Deslandes ("Deslandes") from taking a better-paying position with a rival McDonald's outlet, she filed this suit seeking relief under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Deslandes and Stephanie Turner ("Turner"), who filed a related suit (19-cv-5524), move for certification of a nationwide class of persons who were employed by a McDonald's restaurant during a five-year period. For the reasons set forth below, plaintiffs' motion is denied.

I. BACKGROUND

Deslandes filed suit against two defendants. The first is McDonald's USA, LLC, which is a wholly-owned subsidiary of the second defendant, McDonald's Corporation. Together ("McDonald's"), these entities are the franchisors of the popular restaurants ("McDonald's restaurants"), with McDonald's Corporation serving as franchisor for franchise agreements signed until 2005 and McDonald's USA, LLC serving as the franchisor for franchise agreements signed after that time. Although most (90-95%) of McDonald's restaurants are owned and operated by franchisees, the rest are operated by McDonald's USA, LLC (Def. Brief at 3/Docket 299 at 10) and are commonly referred to as McOpCos.

For many years, including at least 1973 to 2017, the franchise agreement contained a provision that stated:

> 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 months.

Plaintiffs allege that this provision violated the Sherman Antitrust Act and suppressed their wages.

In or about March 2017, McDonald's Corp. announced to the McOpCos and the franchisees that it would discontinue enforcement of the no-hire

provision. (Singer Report at ¶ 3). In July 2018, McDonald's Corp. entered an agreement with the Washington State Attorney General that it would neither include the hiring provision in future franchise agreements nor enforce it with respect to the franchise agreements that already include the provision. (Singer Report at ¶ 3).

II. DISCUSSION

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-701 (1979)). "A class action may be maintained if Rule 23(a) is satisfied and" if the case falls within at least one of the categories outlined in Rule 23(b). Fed.R.Civ.P. 23(b); *see also Wal-Mart Stores*, 564 U.S. at 345. Rule 23(a) allows "[o]ne or more members of a class" to "sue or be sued as representative parties on behalf of all class members only if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). Rule 23(b)(3) allows class certification where "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members,

and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3). Rule 23(c)(1)(A) requires that "[a]t an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action." Fed.R.Civ.P. 23(c)(1)(A).

To support a motion for class certification, a "party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-Mart*, 564 U.S. at 350. Thus, the "party seeking certification bears the burden of demonstrating that certification is proper by a preponderance of the evidence." *Chicago Teachers Union, Local No. 1 v. Board of Ed. of City of Chi.*, 797 F.3d 426, 433 (7th Cir 2015). A court considering a motion for class certification must engage in "a rigorous analysis" that "will frequently" overlap with the merits, because the considerations "are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Comcast Corp. v. Behrend*, 569 U.S. 27, 33-34 (2013) (citations omitted).

Plaintiffs seek to certify a class of:

> All persons who were employed at a McDonald's-branded restaurant in the United States from June 28, 2013 to July 12, 2018. Excluded from the Class are Defendants' directors and officers, the Judge, and the Judge's staff and immediate family members.

(Plfs. Brief at 1/Docket 268 at 7).

1. Numerosity

First, the Court agrees that the number of class members makes joinder impracticable. Plaintiffs assert that there are "hundreds of thousands" of class members. (Docket 268 at 8). Defendants say there are "millions" of class members. (Docket 299 at 8). Either way, the class contains far more members than would be practicable to join. *See Mulvania v. Sheriff of Rock Island Cty.*, 850 F.3d 849, 859 (7th Cir. 2017) ("While there is no magic number that applies to every case, a forty-member class is often regarded as sufficient to meet the numerosity requirement.").

2. Common issues and whether they will predominate

Next, the Court considers whether plaintiffs have shown the existence of one or more common issues and whether such common questions will predominate over individual questions. The Supreme Court has described what makes an issue common. It has said:

> Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury. This does not mean merely that they have all suffered a violation of the same provision of law. . . . Their claims must depend upon a common contention[.] . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal-Mart, 564 U.S. at 349-50 (citations omitted). In describing the difference between common and

individual questions, the Supreme Court has explained:

> An individual question is one where 'members of a proposed class will need to present evidence that varies from member to member,' while a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'

Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (citation omitted); *see also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 815 (7th Cir. 2012) ("If, to make a prima facie showing on a given question, the members of a proposed class will need to present evidence that varies from member to member, then it is an individual question.") (quoting *Blades v. Monsanto Co.*, 400 F.3d 562, 566 (8th Cir. 2005)).

To be suitable for class action treatment, a case must not only involve common questions (Fed.R.Civ.P. 23(a)(2)), but those common questions must predominate (Fed.R.Civ.P. 23(b)). "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). Rule 23(b)(3)'s "predominance criterion is far more demanding" than "Rule 23(a)'s commonality requirement[.]" *Amchem*, 521 U.S. at 623-34. "Analysis of predominance under Rule 23(b)(3) 'begins, of course, with the elements of the underlying cause of action.'" *Messner*, 669 F.3d at 815 (quoting *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011)).

The parties agree[1] that the elements of plaintiffs' cause of action are: (1) a violation of the antitrust laws; (2) injury resulting from the violation, which is to say that plaintiffs suffered antitrust "impact;" and (3) damages. *Messner*, 669 F.3d at 815. The parties do not agree, however, on the proper analysis of plaintiff's antitrust claim, so the Court must first resolve that issue.

Quick look versus Rule of Reason

The parties disagree about whether plaintiffs' antitrust claim may be considered under a quick look analysis or whether it will require rule of reason analysis.[2]

This Court has previously explained:

> Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . " 15 U.S.C. § 1. This language has long been interpreted to "outlaw only *unreasonable* restraints" of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Some restraints are deemed so anti-competitive (and, thus, unreasonable) that they are illegal *per se*, while other restraints, which may have procompetitive effects, are

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[1] S*ee* Plfs. Brief at 20/Docket 268 at 26; Def. Brief at 11, 16, 18/Docket 299 at 18, 23, 25.

[2] The Court notes the Supreme Court issued its decision in *NCAA v. Alston*, __ U.S. __, 141 S.Ct. 2141 (2021), after the parties had briefed their motion for class certification. The Court allowed each party to file a brief discussing the impact of that case on this motion.

judged under the rule of reason (or its subset: the quick look).

As the Supreme Court has explained, restraints that are "unlawful *per se*" are those that "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit" that it is obvious they are unreasonable restraints of trade. *Khan*, 522 U.S. at 10. The *per se* rule applies to restraints "'that would always or almost always tend to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886. Accordingly, the *per se* rule is reserved for restraints with respect to which "courts have had considerable experience" such that they "can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason[.]" *Leegin*, 551 U.S. at 886-87.

Most restraints are not *per se* unlawful but are instead analyzed under the rule of reason. *Khan*, 522 U.S. at 10. Under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10. Generally, this requires a plaintiff to show the defendant has "market power—that is the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive

effects on market pricing." *Agnew v. National Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012). In this case, market power would be the power to suppress wages.

Courts sometimes apply a third test of reasonableness, the quick look, which is a short form of rule of reason analysis. *Illinois Corp. Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 727 (7th Cir. 1986) ("This is the sort of short form or quick look Rule of Reason analysis endorsed in *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 & n. 42 (1984)). As the Seventh Circuit has explained:

> the quick-look approach can be used when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,' but there are nonetheless reasons to examine the potential procompetitive justifications.

Agnew, 683 F.3d at 336 (internal citation omitted) (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)). 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. *Agnew*, 683 F.3d at 336; *Chicago Prof. Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992); *see also National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109-10 n. 42

> (1984) ("While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.").

Deslandes v. McDonald's USA, LLC, Case No. 17 C 4857, 2018 WL 3105955 at *4-5 (N.D. Ill. June 25, 2018).

Plaintiff now argues, "[t]his Court has already held that an abbreviated from of the rule of reason—the quick-look test—is appropriate given the predictable effects that ensue" from the alleged conduct. (Docket 371 at 4). That is imprecise. The Court said plaintiff had *stated a claim* for a restraint that *might* be unlawful under a quick look. Specifically, the Court stated:

> Here, plaintiff argues that she has alleged the existence of a horizontal agreement in restraint of trade. Plaintiff alleges that McDonald's franchisees signed written franchise agreements pursuant to which each agreed not to hire employees (including former employees who left within the prior six months) from other McDonald's restaurants. Specifically, the franchisees were not allowed to hire anyone who was employed (or had been employed in the prior six months) by

"McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant[.]" (Am. Complt. ¶ 87). Plaintiff alleges that the McOpCos were similarly restricted.

Defendants argue that this is merely a vertical restraint, because it was spearheaded by the entity at the top of the chain. The Court agrees that the restraint has vertical elements, but the agreement is also a horizontal restraint. It restrains competition for employees among horizontal competitors: the franchisees and the McOpCos. Plaintiff has alleged that McOpCos run McDonald's-brand restaurants and, thus, compete directly with franchisees for employees. Plaintiff has also alleged that the McOpCos are subsidiaries of defendant McDonald's and that the restraint explicitly restricts franchisees from hiring employees of McDonald's subsidiaries, i.e., the franchisees' competitors. Thus, McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., *itself*) from horizontal competition for employees. *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) ("the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act"). The Court finds that plaintiff has alleged a horizontal restraint of trade.

Naked horizontal agreements (i.e., those among competitors) to fix prices or to divide

markets are *per se* unlawful. *Leegin*, 551 U.S. at 886; *Federal Trade Comm'n v. Superior Court Trial Lawyers Assoc.*, 493 U.S. 411 (1990) (horizontal agreement among lawyers not to accept appointments to represent indigent criminal defendants until fees increased was a naked price restraint and *per se* unlawful); *Blackburn v. Sweeney*, 53 F.3d 825, 827 & 828 (7th Cir. 1995) ("reciprocal agreement [among attorneys] to limit advertising to different geographical regions was . . . an agreement to allocate markets so that the *per se* rule of illegality applies"). This includes naked agreements to set wages. *Arizona Hosp.*, 2009 WL 1423378 at *3 (plaintiff's allegations that hospital association set prices for temporary nurses stated claim for *per se* violation of the Sherman Act).

A horizontal agreement not to hire competitors' employees is, in essence, a market division. *See United States v. eBay, Inc.*, 968 F.Supp. 2d 1030, 1039 (N.D. Cal. 2013) ("The court thus finds that the United States' allegations concerning agreement between eBay and Intuit [not to hire each other's employees] suffice to state a horizontal market allocation agreement."). The Department of Justice, which enforces rather than interprets the law, has warned employers that it considers naked no-hire agreements to be *per se* unlawful. (Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to*

Employee Hiring and Compensation (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.). Thus, because a no-hire agreement is, in essence, an agreement to divide a market, the Court has no trouble concluding that a naked horizontal no-hire agreement would be a *per se* violation of the antitrust laws. Even a person with a rudimentary understanding of economics would understand that if, say, large law firms in Chicago got together and decided not to hire each other's associates, the market price for mid-level associates would stagnate. With no competition for their talent (aside from lower-paying in-house or government jobs), associates would have no choice but to accept the salary set by their firms or to move to another city. Thus, such a claim would be suitable for *per se* treatment.

Not all horizontal restraints are *per se* unlawful, however. Some horizontal restraints are *ancillary* to agreements that are procompetitive, usually in the sense of enhancing output (i.e., producing either a greater quantity of goods or a new good that would not otherwise exist). *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success

they promote."). A restraint is ancillary if it "promoted enterprise and productivity when it was adopted." *Polk Bros.*, 776 F.2d at 189. When a restraint is ancillary, it is judged either under the rule of reason or given a "quick look." For example, no-hire agreements that are ancillary to the sale of a business can have procompetitive effects, so they are judged under the rule of reason. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001).

Similarly, where the horizontal restraint is necessary in order for the product to exist at all, a restraint will not be judged *per se* unlawful but rather will be judged under the rule of reason, including by "quick look." *Law v. National Collegiate Athletic Assoc.*, 134 F.3d 1010 (10th Cir. 1998); *see also Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *National Collegiate Athletic Ass'n. v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). In *Law*, a group of college basketball coaches brought suit challenging the NCAA's rule limiting annual salaries for certain assistant basketball coaches to $16,000 per year. Because some restraints were necessary in order to make college sports available, the court concluded that the horizontal price restraint should be analyzed under the rule of reason, and, in particular, the "quick look." *Law*, 134 F.3d at 1018 & 1020 ("We find it appropriate to adopt such a quick look rule of reason in this case.")

In this case, plaintiff has alleged a horizontal restraint that is ancillary to franchise agreements for McDonald's

restaurants. Each time McDonald's entered a franchise agreement, it increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive. (That is not to say that the provision itself was output enhancing. The very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign.) Because the restraint alleged in plaintiff's complaint is ancillary to an agreement with a procompetitive effect, the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per se*. Plaintiff's claim does not rise and fall on *per se* treatment, though. She claims in the alternative that the restraint is unlawful under quick-look analysis.

The next question, then, is whether plaintiff has plausibly alleged a restraint that might be found unlawful under quick-look analysis. The Court thinks she has. Even a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate. Plaintiff herself experienced the stagnation of her wages. A supervisor for a competing McDonald's restaurant told plaintiff she would like to hire plaintiff for a position that would be similar to plaintiff's position but that would pay $1.75-2.75 more per hour than she was earning. Unfortunately for plaintiff, the no-hire agreement prevented the McOpCo

> from offering plaintiff the job. When plaintiff asked her current employer to release her, plaintiff was told she was too valuable. The Court agrees that an employee working for a below-market wage would be extremely valuable to her employer.

Deslandes, 2018 WL 3105955 at *6-7.

The Court specifically stated, "Though the Court has concluded that plaintiff has stated a claim for a restraint that might be unlawful under quick-look analysis, the evidence at a later stage may not support it." *Deslandes*, 2018 WL 3105955 at *8. Accordingly, the Court gave plaintiff leave to amend to add a claim under the rule of reason. *Id.* Plaintiff declined.[3]

Alston

Since that time, the parties have engaged in discovery, and the Supreme Court has clarified when quick-look analysis applies, which is rarely. In *NCAA v. Alston*, __ U.S. __, 141 S.Ct. 2141 (2021), college athletes brought suit against the NCAA, claiming its agreement with member schools to limit compensation to student athletes amounted to an unlawful restraint of trade in violation of the Sherman Antitrust Act. The NCAA argued that the court should apply a quick look, but the Supreme Court disagreed.

The Supreme Court, in a unanimous decision, first noted that claims regarding restraints of trade "presumptively" call for rule of reason analysis.

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[3] Likewise, plaintiff Turner failed to state a claim under the rule of reason. Her complaint is limited to a quick look claim. [Case No. 19-cv-5524, Docket 1].

Alston, 141 S.Ct. at 2151. It went on to explain that a quick look suffices:

> *only* for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in *the great in-between*—a quick look is sufficient for approval or condemnation.

Alston, 141 S.Ct. at 2155 (emphasis added). On one end of that spectrum, the Supreme Court explained, are restraints that are "so obviously incapable of harming competition that they require little scrutiny," such as joint ventures commanding such a small share of the market (say, 5-6%) that any reduction in output would be made up by the rest of the market. *Alston*, 141 S.Ct. at 2155-56. On the opposite end of the spectrum are those "agreements among competitors" that "so obviously threaten to reduce output and raise prices that they might be condemned" after a quick look. *Alston*, 141 S.Ct. at 2156. The Supreme Court said such quick-look condemnations should be rare, explaining, "we take special care not to deploy these condemnatory tools until we have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'" *Alston*, 141 S.Ct. at 2156 (citing *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-887 (2007)).

This case falls in "the great in-between" of restraints that require rule-of-reason analysis. This Court cannot say that it has enough experience with no-hire provisions of franchise agreements to predict with confidence that they must always be condemned, which means, under *Alston*, that the Court must apply rule of reason analysis to this case. The Supreme

Court's recent unanimous decision in *Alston* is not, however, the only reason the Court must apply the rule of reason. Two additional reasons support applying the rule of reason.

Pro-competitive effects

First, defendants have put forth sufficient evidence of pro-competitive effects of the hiring restriction to warrant full rule of reason analysis. Specifically, defendants put forth the expert report of Dr. Justin McCrary ("Dr. McCrary"), who holds a Ph.D. in Economics and is a Professor at Columbia University.[4] (Plaintiffs do not challenge the admissibility of either Dr. McCrary's report or the report by Dr. Kevin M. Murphy ("Dr. Murphy"), defendants' other expert witness.)

Dr. McCrary first describes the benefits of a franchise business model and the free-rider problem that can be expected with such a model. Without franchising, an owner of a chain of restaurants will face several problems in trying to expand quickly. In addition to needing a significant amount of capital, the owner might have difficulty ensuring the non-owner manager of each outlet has an incentive to maximize sales and profits. This is where the franchise model can help. When each outlet is owned and operated by a franchisee, the franchisee's compensation is "directly tied to *the profits*" of running the outlet. (McCrary Rep. at ¶ 32).

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[4] The Court is not suggesting that this evidence is undisputed or that a fact-finder would find it persuasive. The point is merely that in the face of defendants' significant evidence of pro-competitive effects, a full analysis under the rule of reason, rather than a quick look, is necessary.

The franchise model allows for quicker growth of the brand but comes with a free-rider problem. As with any brand or trademark, the benefit of the brand to the consumer is the consistency the consumer can expect each time he makes a purchase from that brand and the reduced search costs inherent in sticking with what is known. For such branding to be effective in a franchise model, each franchisee must be delivering a product and experience that is nearly identical. Any given franchisee, however, (and particularly one with an outlet along, say, an interstate highway that receives few repeat customers) has an incentive to cut corners (either in food quality or customer service) in order to boost its own profits. That hurts the brand, because when a customer has a bad experience at one outlet, he might refrain from visiting other outlets in the future. Dr. McCrary describes how franchisors, in order to control the free-rider problem and promote a consistent brand, include in their franchise agreements provisions and restraints to control quality. The franchisor, thus, requires, among other things, a particular level of quality, cleanliness and service. Dr. McCrary argues that these sorts of restrictions are procompetitive, because they strengthen the quality of the brand, thereby encouraging additional franchisees to open outlets and increasing the output of the end product.

Dr. McCrary goes on to describe the exponential growth in the number of McDonald's restaurants after 1955, when Ray Kroc ("Kroc") began including brand restrictions in franchise agreements. Among the restrictions Kroc included were:

> specific requirements related to: the look of the store, the neon sign, and the parking lot;

> employee appearance, product appearance (containers, bags, napkins, spoons, etc. had to meet . . . specifications); advertising and marketing (all 'signs, cards, notices, displays or decorations' were required to be supplied or approved by McDonald's), product and service quality, operations, and inspections of financial books and operation methods.

(McCrary Rep. at ¶ 67). Kroc also added a royalty payment of 1.9 percent of gross sales and included an employment restriction similar to the one at issue in this case. Specifically, those early franchisees agreed "'not [to] employ or seek to employ any person who is at the time employed' by McDonald's or a 'similar establishment' licensed by McDonald's, i.e., one of McDonald's other franchisees.'" (McCrary Rep. at ¶ 69). After Kroc's changes, McDonald's grew from nine outlets in 1955, to 229 in 1960, to more than 2000 by the early 1970's, to about 6,000 by 1980, and to more than 14,000 today.

Today, McDonald's restaurants are still required to maintain consistency. Franchisees are required to comply with standardized employee uniforms and appearance, hours of operation and restaurant appearance. McDonald's has specific rules for menu and food preparation (including the strict procedure for cooking fries), inventory control and bookkeeping. McDonald's restaurants are audited regularly to ensure compliance with the brand standards.

To that end, Dr. McCrary reports, McDonald's also imposes strict training guidelines. Although franchisees make their own hiring and compensation decisions, they are required to follow certain training guidelines. Each restaurant must be managed by a person who has taken a week-long training class at

McDonald's Hamburger University. Defendant does not charge for that course, but the franchisee must pay the trainee's travel expenses and must also pay the trainee for the time spent there. In fact, all employees must be paid for all the time they spend training. Department managers complete about 45 weeks of training, and shift managers take about fourteen weeks of training. In 2015, McDonald's estimated the cost of training a new manager to be $4,392 and the cost to train a shift manager to be $2,744. Crew members, too, must learn restaurant maintenance, customer service and how to operate each food preparation station.

Dr. McCrary opines that the hiring restriction encourages franchisees to train their employees without fear that other outlets will free-ride on this training by hiring away employees trained in the McDonald's way. It also encourages cooperation among franchisees. For example, franchisees are required to manage their restaurants personally and are required to complete significant training (which can take years if the potential franchisee has no McDonald's experience) before signing a franchise agreement. That training sometimes involves on-the-job training in an existing franchise restaurant. Absent the hiring restriction, current franchisees would be reluctant to allow potential franchisees to train in their restaurants for fear they would use the opportunity to recruit employees.

Dr. McCrary opines that the hiring restraint increases output in the hamburger market, because it encourages the very training that enhances the brand (by ensuring uniform food quality, customer service and building cleanliness). Dr. McCrary says his opinion is consistent with labor theory developed by

Gary Becker, who noticed that "firms are more willing to invest in training that is specific to their firm because there is a smaller chance they will lose that investment to competing firms." (McCrary Rep. at ¶ 331; *see also* ¶¶ 120-130). The hiring provision makes the training related to the brand specific to the franchisee (rather than just to the brand), because it prevents other outlets from free riding on that training. All that training leads to greater brand consistency, better food quality and customer satisfaction, which is to say a strong brand. (McCrary Rep. at ¶ 145). A strong brand with satisfied customers leads to additional franchise outlets, thereby increasing output of hamburgers and fries. Dr. McCrary cites evidence that many franchisees chose a McDonald's franchise (over other potential branded restaurants) to open, because of the hiring provision. (McCrary Rep. at ¶ 131). That suggests the provision itself was output enhancing in the market for hamburgers and fries. When new outlets open, the outlets must be staffed. Thus, new restaurants also increase output in the labor market (i.e., demand for labor).

Dr. McCrary also opined that it does not make economic sense for McDonald's, as franchisor, to enable its franchisees to act as monopsony purchasers of labor. In simple terms:

> [T]he alleged monopsony conspiracy does not make economic sense for McDonald's because it would lead to a reduction in labor at each franchisee, which would lead [to] a reduction in sales at McDonald's restaurants. Indeed, a basic tenet of franchising economics is that franchisors do not benefit when their franchisees gain market power because

> franchisees will then sell less of their products, which undermines the brand's growth.

(McCrary Rep. at ¶ 201(a)). To the extent a franchisee is a labor monopsonist, the franchisee would hire less labor (reduce labor output) at a lower price. In the process, the franchisee would increase his profit but would be limited in his output of hamburgers, which, in turn reduces revenue. That is because the monopsonist franchisee is still selling into a competitive market for lunch and cannot increase price. His revenue per unit is the same, but he is selling fewer burgers, so his revenue goes down even as his profit goes up. This is good for the franchisee, but it is terrible for the franchisor, who is paid based on franchisees' revenue, not profit. So, while it might be good for the franchisee to be a labor monopsonist, it is terrible for the franchisor, who wants to increase output of hamburgers and fries. The case of McDonald's is slightly different, because it also operates restaurants, the McOpCos. As Dr. McCrary points out, however, defendant's revenue from franchise royalties is far greater than its revenue from operating restaurants.

Defendants have offered enough evidence of procompetitive effects to warrant rule of reason analysis.

Vertical restraint in many locations

Second, the evidence plaintiffs put forth in connection with their motion for class certification does not show that all of the plaintiffs faced horizontal restraints ancillary to output-enhancing agreements. The reason the Court concluded that the plaintiff had adequately *alleged* a restraint that might be subject

to quick look analysis is that plaintiff had alleged a horizontal restraint (albeit one that is ancillary to an output-enhancing agreement) by alleging that McOpCos compete directly with franchisees for labor. "[I]n the market for employees, the McDonald's franchisees and McOpCos *within a locale* are direct, horizontal competitors." *Deslandes*, 2018 WL 3105955 at 8 (emphasis added). In her complaint, plaintiff had alleged a provision of the franchise agreement that prohibited franchisees from hiring McDonald's Corp. employees within six months. That provision is part of a vertical franchise agreement (between franchisor and franchisee), but it is also a horizontal agreement because entities (McOpCos) owned by the franchisor (McDonald's Corp.) compete with the franchisees, both in selling hamburgers and in hiring employees.

At the class certification stage, plaintiffs want to certify a nationwide class. They have not, however, put forth evidence that McOpCos compete with franchisees in every part of the United States. Plaintiffs agree that only "5-10%" of the McDonald's restaurants were owned by McOpCos, but they do not say where those McOpCos operated. (Plfs. Brief at 3/Docket 268 at 9). The total number of McDonald's restaurant locations exceeds 14,000. (Docket 299 at 10). Record evidence shows that, as of 2015, only 900 out of 3000 franchisees (many of whom owned multiple locations) operated a McDonald's restaurant near a McOpCo-owned McDonald's restaurant. (King Dep. at 99/Docket 270-14 at 20). Defendants put forth evidence that in many parts (some twenty states) of the United States, no McDonald's restaurants are owned by McOpCos. (Murphy Rep. at p. 10). In locations where no McOpCos compete with franchisees, the hiring provision cannot be said to be

horizontal.[5] In locations where only franchisees compete, the hiring provision is merely vertical. Vertical restraints are judged under the rule of reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007).

For all of these reasons, the Court must apply rule of reason analysis to this case. The upshot of applying rule of reason analysis to this case is that the question of whether defendants engaged in an unreasonable restraint of trade is not a common question. It cannot be answered for all of the members of the proposed class with the same evidence, because not all of the plaintiffs sold their services in the same relevant market.

Relevant market

Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, "outlaw[s] only *unreasonable* restraints" of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (emphasis added). The rule of reason, thus:

> requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition. The goal is to 'distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating

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[5] Plaintiffs also put forth evidence that, in 2015, the McOpCos, after raising their starting wages by $1 per hour, decided not to hire employees from franchisees for a period of one year. Whether that constituted a unilateral act or a horizontal agreement in connection with a vertical relationship is not clear from the evidence. Even if it is the latter, it still would be horizontal only where McOpCos compete with franchisees, not nationwide.

> competition that are in the consumer's best interest.'

Ohio v. American Express Co., __ U.S. __, 138 S.Ct. 2274, 2284 (2018) (citations omitted). To establish a claim under the rule of reason, a plaintiff must first "prove that the challenged restraint has a substantial anticompetitive effect that harms consumers *in the relevant market*" by either using "[d]irect evidence" of "actual detrimental effects . . . such as reduced output, increased prices, or decreased quality in the *relevant market*" or "[i]ndirect evidence" of "proof of market power plus some evidence that the challenged restraint harms competition." *AmEx*, 138 S.Ct. at 2284 (emphasis added). The burden then shifts to the defendant "to show a procompetitive rationale for the restraint." *AmEx*, 138 S.Ct. at 2284. Finally, the "burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." *AmEx*, 138 S.Ct. at 2284.

Thus, the definition of a relevant market is essential on a rule of reason claim. *AmEx*, 138 S.Ct. at 2285 ("courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market"); *Alston*, 141 S.Ct. at 2158 ("Whether an antitrust violation exists necessarily depends on a careful analysis of market realities."). How precisely that relevant market must be defined depends on whether the alleged restraint is vertical or horizontal. In the case of vertical restraints, a relevant market must always be defined. *AmEx*, 138 S.Ct. at 2285 n. 7. That is because "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the

relevant market." *AmEx*, 138 S.Ct. at 2285 n. 7; *see also Republic Tobacco Co. v. North Atlantic Trading Co., Inc.*, 381 F.3d 717, 737 (7th Cir. 2004) ("As horizontal agreements are generally more suspect than vertical agreements, we must be cautious about importing relaxed standards of proof from horizontal agreement cases into vertical agreement cases."). In some cases of horizontal restraint, the definition of the market can be somewhat less precise, although the general contours of the market must be apparent. *AmEx*, 138 S.Ct. at 2285 n. 7 ("Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive.") (citing *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986)). In *Indiana Federation of Dentists*, the Supreme Court did not require a precise definition of the relevant market, where it was clear the competitors had 100% of the market in one town and 67% in the other, "in light of the reality that markets for dental services tend to be relatively localized[.]" 476 U.S. at 460-61. In other words, "if a plaintiff *can show the rough contours of a relevant market*, and show that the defendant commands a substantial share of the market, then direct evidence of anticompetitive effects can establish the defendant's market power—in lieu of the usual showing of a precisely defined relevant market." *Republic Tobacco*, 381 F.3d at 737 (emphasis added) ("Economic analysis is virtually meaningless if it is entirely unmoored from at least a rough definition of a product and geographic market.").

Plaintiffs have made no attempt to identify a relevant market, beyond arguing that "the 'rough contours' are the service market for McDonald's

restaurant workers," (Plfs. Reply at 3/Docket 346 at 10) as though a relevant market could be limited to one brand or as though all the plaintiffs live in one "company town." The evidence plaintiffs have put forth in an attempt to establish anticompetitive effects *assumes* that plaintiffs sell their labor in one national market, as does their proposed class definition.

Plaintiffs have not, however, put forth evidence that they sell their labor in a national market, and it defies logic to suppose that they do. *See* Ioana Marinescu & Herbert Hovenkamp, "Anticompetitive Mergers in Labor Markets" 94 *Indiana Law Journal* 1031, 1048 ("The boundaries of labor markets are driven mainly by employee skills or training. Geographic markets are driven mainly by the location and mobility of current or prospective employees. . . . [A]pplications for a job decline rapidly with distance[.] . . . Traditional geographic markets for products are frequently defined in terms of shipping costs . . . Measuring geographic markets for labor is more complex. Commuting 'costs' include not merely the price of a subway ticket or gasoline, but also time and convenience, and these things frequently vary from one commuter to another."); *see also* Herbert J. Hovenkamp, "Competition Policy for Labour Markets" (2019) *Faculty Scholarship at Penn Law.* 2090 at ¶ 12 ("most labour markets are geographically quite small, many of them no larger than the commuting range of employees.").

The Court has no doubt that national labor markets exist for certain jobs. The market for Chief Executive Officers is an obvious example. In the market for Chief Executive Officers, companies recruit nationally (or internationally), pay for the new

hire to relocate and sometimes allow (or require) her to commute home via the company's private jet until she relocates. Likely, there are many other high-skill, high-earning jobs (such as dermatologist or computer engineer) for which the relevant market is essentially national or regional. That could be true in any labor market where positions are so highly-skilled or highly-paid that employers can recruit from across the nation, because the labor is worth enough to the employer to pay for relocation and/or the salary is sufficiently high to incentivize an employee to move. That is not, however, the market in which these plaintiffs offer their services. As this Court has previously said about the markets in which plaintiffs sell their labor:

> The relevant market for employees to do the type of work alleged in this case is likely to cover a relatively-small geographic area. Most employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move. That is not to say that people do not move for other reasons and then attempt to find a low-skill job; the point is merely that most people do not search long distances for a low-skill job with the idea of then moving closer to the job.

Deslandes, 2018 WL 3105955 at *8. Even looking at the rough contours of the relevant markets in which plaintiffs sell their labor suggests there are hundreds or thousands of local relevant markets in this case.

The evidence put forth at the class certification stage bears out the intuition that the proposed class members sell their labor in local geographic markets,

generally within easy commuting distance. Defendants, for example, put forth evidence of McOpCos in Kearney, Nebraska that, in 2015, sought approval to increase starting wages from $9.00 per hour due to competition from local employers (which they listed as Arby's, KFC, Taco Bell, HyVee, Walmart, Hotels, Qdoba, Jimmy Johns, Applebees, Buffalo Wild Wings, Perkins, Burger King, Culvers and The Buckle), many of whom paid $10 per hour. (Docket 310-4 at 10-12). Defendants put forth evidence of franchisees' declaring that they compete for employees with local employers. [Docket 310-12 at 5 ("We sometimes offer raises to retain employees sought by other local employers, including quick-service restaurants like Wendy's and retail stores like Wal-Mart, among many others."); Docket 310-12 at 14 ("The McDonald's stores I oversee [in Orlando] compete for employees with the theme parks nearby, such as Disney and Universal, as well as Culver's, Wendy's, Chipotle, and other retail establishments."); Docket 310-12 at 21-22 ("The main competitors for labor in the Jacksonville market are the other quick service restaurants in the vicinity of our restaurants. Comparatively, the main competitors for labor in the Orlando market are the other quick service restaurants, as well as theme parks, Wal-Mart, Sam's Club, and Costco. . . . [W]e have offered raises to retain employees sought by other local employers. These employers include other quick-service restaurants, such as Krystals, LongHorn Steakhouses, KFCs, Papa John's, Panera Breads, Starbucks, Chick-fil-A's, Burger Kings, Little Caesars, Panda Expresses, Wendy's, and Fire House Subs—all of which (among others) are located throughout Jacksonville near the restaurants operated by [us]."; Docket 31012 at 29 & 31 ("The

main competitors for both workforce and customers to my McDonald's-brand restaurants in the Northern Kentucky region are other quick service restaurants such as Wendy's and Burger King." . . . "The turnover rate for my restaurants at the hourly crew person level is 139%. Most of the employees who leave fall into three categories: 1) Looking for a more specific shift (9:00 a.m. to 5:00 p.m. and/or no weekend shifts); 2) the company can provide more hours then we can; or 3) increased pay. For example, the local Amazon distribution center offers higher pay and more consistent weekly hours.")].

The expert opinions are consistent with that evidence. Even Dr. Peter Capelli ("Dr. Capelli"), one of plaintiffs' experts, recognized that crew members likely sell their labor in local markets. (Capelli Dep. at 235-36/Docket 302-1 at 608-09) ("My testimony is that for the restaurant employees in particular, the crew employees, there may be labor markets of different geographic size and that the key issue there might not even be size, it might be commuting distance."). Dr. McCrary said something similar. (McCrary Rep. at ¶ 288) ("McDonald's franchisees also report surveying competitors *in their geographic location* in order to set market-driven wages.") (emphasis added). Dr. Murphy, defendants' other expert (the admissibility of whose report plaintiffs did not challenge), similarly opined:

> For low-skilled and relatively low-wage workers, such as the majority of those in the putative class, evidence suggests that labor markets generally are local. Commuting time and costs likely are too high for distant employers to be reasonable alternatives for most employees. There are certain fixed time

> and monetary costs of relocating (finding a new place to live, moving children into new schools) and those costs likely are relatively high the lower the expected increased earnings from relocating. Given average wages at [quick service restaurants], and other employers that individual McDonald's restaurants consider to be their competitors, it is unlikely that employees will seek opportunities more than a few miles from where they reside.

(Dr. Murphy Rep. at ¶ 109). Dr. Hal J. Singer ("Dr. Singer"), plaintiffs' expert, calculated that only 8% of McDonald's employees commute ten or more miles to work. (Singer Rep. at ¶ 64/Docket 270-5 at 54). Thus, about 92% of McDonald's employees work within ten miles of home. The relevant market for each plaintiff's labor is a small, geographic area. There are likely hundreds or thousands of relevant markets among the class members.

Any given plaintiff can establish that the restraint is anticompetitive only by showing anticompetitive effects in the relevant market where she sells her labor. Those markets vary by plaintiff, which means this is not a question that can be answered with common evidence. It is simply not a question that is common to a nationwide class. To be sure, this might be a common question as to the subset of plaintiffs who work in each of the respective relevant markets across the country. For example, this is likely a common question as to every plaintiff in the relevant market of, say, the Chicago Loop (which relevant market perhaps includes areas within a mile or two radius thereof). It is not, however, a common question as to the nationwide class these

plaintiffs ask to certify. Plaintiffs do not seek to certify smaller subclasses.

The issue of anticompetitive effects in relevant markets will predominate. It will undoubtedly be true that in some relevant markets, McDonald's restaurants will have so many competitors for labor that the restraint will have no anticompetitive effect. In other markets, McOpCos and franchisees may have so little outside competition for employees that the restraint will impact the market. The anticompetitive effects of the restraint will have to be judged separately for each of the hundreds (or thousands) of relevant markets, and that will be the predominant issue, especially if, as plaintiffs assert, antitrust impact is a common question (an issue this Court need not address).[6]

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[6] Because the Court has determined that the question of whether the restraint caused anticompetitive effects in the hundreds (or thousands) of relevant markets will predominate, the Court need not consider whether the question of antitrust impact is a common question. (It is difficult, though, to imagine that it could be a common question, as opposed to a question that would need to be answered separately for each relevant market. Each person's injury is the amount his or her wages were suppressed multiplied by the hours worked. The amount each person's wages are suppressed will almost certainly vary depending on the amount of labor market power McDonald's possessed in each relevant market. *See, e.g. State of Ala. v. Blue Bird Body Co., Inc.*, 573 F.2d 309, 327-28 (5th Cir. 1978) ("This proof of injury in a price-fixing case will generally consist of some showing by the plaintiff that, as a result of this conspiracy, he had to pay supracompetitive prices for school buses. . . . [W]e do not understand how the plaintiffs can make this proof without examining the relevant school bus market where each individual plaintiff is located.").) Because the Court need not consider whether impact is a common question, the Court need not decide whether to exclude the report and testimony of plaintiff's expert,

The proposed class does not meet the predominance requirement of Rule 23(b).

3. Adequacy

Rule 23(a)'s requirement that "the representative parties will fairly and adequately protect the interests of the class," has two components: the adequacy of the named plaintiffs and the adequacy of proposed class counsel. *See Gomez v. St. Vincent Health, Inc.*, 649 F.3d 583, 592 (7th Cir. 2011) (citations omitted).

One of the reasons why courts insist that class counsel be adequate is:

> the incentive of class counsel, in complicity with the defendant's counsel, to sell out the class by agreeing with the defendant to recommend that the judge approve a settlement involving a meager recovery for the class but generous compensation for the lawyers[.]

Creative Montessori Learning Centers v. Ashford Gear LLC, 662 F.3d 913, 918 (7th Cir. 2011). The Seventh Circuit recognizes:

> There is . . . a much greater conflict of interest between the members of the class and the class lawyers than there is between an individual client and his lawyer. The class members are interested in relief for the class

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Dr. Singer. *See Messner*, 669 F.3d at 812 ("When an expert's report or testimony is 'critical to class certification,' we have held that a district court must make a conclusive ruling on any challenge to that expert's qualifications or submissions before it may rule on a motion for class certification."). Here, the outcome of this motion is the same with or without Dr. Singer's report and testimony. The same is true as to the report and testimony of Dr. Capelli.

> but the lawyers are interested in their fees, and the class members' stakes in the litigation are too small to motivate them to supervise the lawyers in an effort to make sure that the lawyers will act in their best interests.

Thorogood v. Sears, Roebuck and Co., 547 F.3d 742, 744 (7th Cir. 2008) (citations omitted). That is of "particular significance" where class members "lack both the monetary stake and the sophistication in legal and commercial matters that would motivate and enable them to monitor the efforts of class counsel on their behalf." *Creative Montessori*, 662 F.3d at 917.

Accordingly, "[a]nything 'pertinent to counsel's ability to fairly and adequately represent the class,'" bears "on the class certification decision." *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 704 F.3d 489, 498 (7th Cir. 2013) (citations omitted). Among other things, a court "must . . . consider counsel's work on the case to date." *Reliable Money Order*, 704 F.3d at 498 n. 7; *see also Nagel v. ADM Investor Services, Inc.*, 65 F. Supp.2d 740, 746 (N.D. Ill. 1999) (Easterbrook, J.) ("One important part of a judge's job under Rule 23 is to protect putative class members from self-appointed champions whose work is not up to snuff.").

Even were it not the case that individual issues will predominate, the Court would be hesitant to certify the proposed class. One unusual aspect of this case is that, while plaintiffs cannot prevail as class, they could lose as one. That owes to the fact that counsel for the named plaintiff made a strategic decision early in this case not to amend the complaint to add a claim under the rule of reason. If the Court certified a nationwide class (which, again, would not be appropriate for the reasons outlined above), it

would be to the great detriment of the class. The class members would lose on a rule-of-reason claim, because their attorneys waived it.[7] Dr. Singer, plaintiffs' expert, calculated aggregate class damages at $2.74 billion. (Singer Rep. at ¶ 5/Docket 270-5 at 9). It is no surprise, then, that attorneys might take a shot at a nationwide-class jackpot (of which they might hope to collect a third, which is about $913,000,000.00) rather than propose a small, local class under the rule of reason. The reward to any given plaintiff would likely be quite similar whether he proceeded as part of a small, local class or a massive nationwide class. Only the lawyers had something to gain by foregoing a claim under the rule of reason, which makes one wonder whether the attorneys were looking out mostly for themselves when they chose not to amend to add a claim under the rule of reason. Perhaps these attorneys took a gamble, choosing not to pursue a rule-of-reason claim in the hopes of the huge reward of certifying a nationwide class under quick-look analysis. Such a self-interested decision would not instill confidence that the attorneys would adequately represent the class.

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[7] One might think this would have prompted defendants to consent to certification of a class, such that they could win with one fell swoop. *Thomas v. UBS AG*, 706 F.3d 846, 850 (7th Cir. 2013) ("[Defendant] opposed [class] certification even though a defendant with a winning case has much to gain from it—the judgment for a defendant will be *res judicata* in any suit by a class member who had not opted out of the class, provided 'that the named plaintiff at all times adequately represent the interests of absent class members.'") (citation omitted). Perhaps defendants assume most plaintiffs will opt out of a doomed-to-fail class. In any case, defendants do not want a nationwide class certified, and they will get their wish.

This case will not proceed as a class action.[8] When plaintiff filed her complaint, it "toll[ed] the applicable statute of limitations for all persons encompassed by the class complaint." *China Agritech, Inc. v. Resh*, __ U.S. __, 138 S.Ct. 1800, 1804 (2018) (citing *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974)); *see also Collins v. Village of Palatine, Ill.*, 875 F.3d 839, 843 (7th Cir. 2017) ("the filing of a proposed class action immediately pauses the running of the statute of limitations for all class members."). Each class member remains free to pursue his or her own claim. *China Agritech*, 138 S.Ct. at 1810.

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[8] The problems discussed above are not the only problems with the proposed class definition. As defendants point out, the proposed class is overly broad in that it contains individuals who could not have been injured by the alleged wrongful conduct. "[I]f the [class] definition is so broad that it sweeps within it persons who could not have been injured by the defendant's conduct, it is too broad." *Kohen v. Pacific Inv. Mgt. Co., LLC*, 571 F.3d 672, 677 (7th Cir. 2009); *Messner*, 669 F.3d at 824 ("If, however, a class is defined so broadly as to include a great number of members who for some reason could not have been harmed by the defendant's allegedly unlawful conduct, the class is defined too broadly to permit certification."). Here, plaintiffs challenge a hiring restriction that applies only to current employees or employees who have left in the past six months. It can have no effect on new hires or on employees within the first few weeks of work. More than 2% of new hires leave within two weeks. More than 11% leave within a month. More than 20% leave within two months. (Figure 12 of Dr. Murphy Rep. at p. 67). It is clear the proposed class definition was too broad, but the Court need not decide by what degree.

III. CONCLUSION

For all of these reasons, plaintiffs' motions [268, 269] for class certification are denied. Defendants' *Daubert* motions [301, 307] to exclude the expert testimony of Dr. Singer are denied (without prejudice) as moot, and defendants' *Daubert* motions [300, 304] to exclude the expert testimony of Dr. Capelli are denied (without prejudice) as moot. Plaintiff's unopposed motion [288] to file supplemental expert report is granted. Defendants' motion to [348] file surreply is granted.

This case is set for status hearing on October 5, 2021 at 9:30 a.m.

SO ORDERED. **ENTERED: July 28, 2021**

/s/ Jorge Alonso
HON. JORGE ALONSO
United States District Judge

APPENDIX D

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

LEINANI DESLANDES, Plaintiff,	)	
v.	)	No. 17 C 4857
McDONALD'S USA, LLC, McDONALD'S CORPORATION, and DOES 1 through 10,	)	Judge Jorge L. Alonso
Defendants.	)	June 25, 2018

MEMORANDUM OPINION AND ORDER

After a no-hire agreement prevented plaintiff from obtaining a position with a rival employer, plaintiff Leinani Deslandes ("Deslandes") filed suit asserting, among other things, that defendants' no-hire agreement violates the Sherman Antitrust Act, 15 U.S.C. § 1. Defendants McDonald's USA, LLC and McDonald's Corporation move to dismiss. For the reasons set forth below, the Court grants in part and denies in part defendants' motion to dismiss [34].

I. BACKGROUND

Plaintiff's story is one of employment success: she started as an entry-level crew member paid $7.00 per hour at a McDonald's franchise and worked her way up into management. When she applied for a better-paying position with a competing McDonald's restaurant, she was foiled by a no-hire agreement which forbid the competing McDonald's restaurant to hire both current employees of other McDonald's restaurants and anyone who had worked for a competing McDonald's restaurant in the last six months. Given that most individuals in the low-skill employment market do not have the luxury of being unemployed by choice for six months, the no-hire provision effectively prevented competing McDonald's franchises (as well as the company-owned stores) from competing for experienced, low-skill employees. The following facts are from plaintiff's complaint and are taken as true.

Defendant McDonald's USA, LLC is a wholly-owned subsidiary of defendant McDonald's Corporation. Plaintiff generally refers to them collectively as "McDonald's." The ubiquitous purveyor of hamburgers serves 68,000,000 customers per day from some 36,000 outlets around the world. According to plaintiff's complaint, nearly two million people work for McDonald's or its franchisees.

Many McDonald's-brand restaurants are owned and operated by McDonald's Operating Companies ("McOpCos"), which are direct or indirect subsidiaries of McDonald's Corporation. McDonald's also franchises McDonald's-brand restaurants. Thus, many McDonald's-brand restaurants are independently owned and operated by franchisees.

McDonald's receives revenue from the franchisees in the form of rent, royalties and fees.

McDonald's restaurants compete with one another. Franchisees are not granted exclusive rights or territories and are specifically warned that they may face competition from other franchisees, new franchisees and restaurants owned by McOpCos. Thus, restaurants owned by McOpCos compete directly with McDonald's franchisees (who, in turn, compete with each other) to sell hamburgers and fries to customers.

When franchising restaurants, McDonald's enters a standard franchise agreement with its franchisees.[1] Because the agreement is standard, franchisees know the basic contents of each other's agreements. Generally, each franchise agreement lasts for twenty years. In addition to a franchise fee, franchisees agree to pay McDonald's a percentage of gross revenue. McDonald's has an incentive to promote revenue growth in its franchisees' restaurants and encourages competition between franchisees for food sales.

Under the standard franchise agreement, each franchisee is an independent business responsible for the operation of its particular McDonald's-brand restaurant. Under the agreement, franchisees are required to purchase supplies from approved suppliers. They can, however, seek approval of new suppliers, and they negotiate directly with the suppliers as to purchasing terms, such as price.

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[1] Plaintiff alleges that McDonald's Corporation is the franchisor for franchise agreements signed before 2005 and that McDonald's USA, LLC is the franchisor for franchise agreements signed from 2005 to the present.

Franchisees, as independent business owners, are also responsible for the day-to-day operations of their respective restaurants and for, among other things, employment matters. Franchisees make their own decisions with respect to hiring, firing, wages and promotions. The standard franchise agreement specifically states that franchisees are not agents of McDonald's and that McDonald's is not a joint employer with respect to the franchisees' employees.

Although franchisees make most of their employment decisions independently, their hiring decisions are restricted in one respect by the standard franchise agreement. The standard agreement that was used until some point in 2017 contained a no-hire provision. Specifically, the relevant provision 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 [] 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.

(Am. Complt. ¶ 87). Although McDonald's stopped including the no-hire provision in new franchise agreements at some point in 2017, the provision remains in the franchise agreements applicable to some 13,000 currently-operating McDonald's-brand restaurants. McDonald's has applied the same restraint to hiring by the McOpCos.

Franchisees ignore the no-hire provision at their peril. A breach of the no-hire provision gives McDonald's the right not to consent to a transfer of the franchise. With repeated breaches, McDonald's has the right to terminate the franchise. Plaintiff alleges that the provision promoted collusion among franchisees, because each knew the other had signed an agreement with the same provision. Plaintiff alleges that the no-hire provision is against each franchisee's individual interest, because it denies each franchisee opportunities to hire the best employees. Plaintiff also alleges that, so long as the other franchisees also refrain from poaching employees, the no-hire provision helps franchisees keep costs low by allowing them to pay below-market wages to their own employees.

Although franchisees are generally responsible for their own employment decisions (so far as they do not violate the no-hire agreement, anyway), many McDonald's-brand restaurants are staffed in similar ways. Many stores have managers with varying titles, such as swing manager, assistant manager and store manager. Assistant and store managers are responsible for such tasks as payroll processing, time-sheet updating, tracking supplies and orders and training entry-level employees. McDonald's requires franchisees to enroll present and future managers in training programs at McDonald's training centers. The cost of the training is borne by the franchisees.

A McDonald's franchise in Florida ("Bam-B") first hired plaintiff in 2009. Plaintiff started as an entry-level employee earning $7.00 per hour, and, within three months, plaintiff had earned a promotion to shift manager, with a wage bump to $10.00 per hour. By 2011, plaintiff was a Department Manager for

Guest Services, earning $12.00 per hour. At that point, plaintiff began coursework to become eligible for a position as General Manager. Plaintiff's employer enrolled her in a week-long training course at McDonald's Hamburger University. The training was scheduled to take place in April 2015, but plaintiff's supervisors canceled her training when they learned plaintiff was pregnant.[2]

Fed up, plaintiff decided to put her skills to work elsewhere. Plaintiff found an opening for a position similar to hers at a nearby McDonald's restaurant. The restaurant was owned and operated by a McOpCo, which was a subsidiary of defendant McDonald's USA, LLC and which was subject to the no-hire provision. The positon at the McOpCo restaurant offered a wage of $13.75 per hour to start, with an expected bump to $14.75 after a 90-day probationary period. Plaintiff applied online and received a call from the store manager, who told plaintiff she would like to hire her. Plaintiff told the store manager that she worked for Bam-B. The next day, plaintiff received a call from a McDonald's corporate employee who told plaintiff the restaurant could neither interview nor hire her unless she was "released" by Bam-B to work for the McOpCo restaurant.

When plaintiff arrived at work the next day, she asked Bam-B to release her to work for the McOpCo restaurant. Bam-B said no, because plaintiff was "too valuable." Plaintiff continued to work for Bam-B for several months, but, ultimately, she took an entry-level job with Hobby Lobby for less money, $10.25 per

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[2] Bam-B, plaintiff's former employer, is not a defendant in this action, and plaintiff has not asserted a claim for discrimination.

hour. Plaintiff alleges that some of the skills she developed as a manager of a McDonald's outlet were not transferable to management positions at employers outside of the McDonald's brand, so she had to start over at the bottom elsewhere.

Based on these allegations, plaintiff asserts that defendants violated § 1 of the Sherman Antitrust Act. Plaintiff alleges that defendants and their franchisees engaged in concerted activity to restrict competition among them for employees, thereby lowering their employment costs and limiting the employees' ability to earn higher wages. Plaintiff also asserts that the alleged conduct violates the Illinois Antitrust Act and the Illinois Consumer Fraud and Deceptive Trade Practices Act. Defendants move to dismiss.

II. STANDARD ON A MOTION TO DISMISS

The Court may dismiss a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure if the plaintiff fails "to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). Under the notice-pleading requirements of the Federal Rules of Civil Procedure, a complaint must "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A complaint need not provide detailed factual allegations, but mere conclusions and a "formulaic recitation of the elements of a cause of action" will not suffice. *Twombly*, 550 U.S. at 555. To survive a motion to dismiss, a claim must be plausible. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Allegations that are as consistent with lawful conduct as they are with unlawful conduct are not sufficient; rather, plaintiffs must include allegations that "nudg[e] their

claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

In considering a motion to dismiss, the Court accepts as true the factual allegations in the complaint and draws permissible inferences in favor of the plaintiff. *Boucher v. Finance Syst. of Green Bay, Inc.*, 880 F.3d 362, 365 (7th Cir. 2018). Conclusory allegations "are not entitled to be assumed true," nor are legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662, 680 & 681 (2009) (noting that a "legal conclusion" was "not entitled to the assumption of truth[;]" and rejecting, as conclusory, allegations that "'petitioners 'knew of, condoned, and willfully and maliciously agreed to subject [him]' to harsh conditions of confinement"). The notice-pleading rule "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-679.

III. DISCUSSION

A. Plaintiff's Sherman Act claim

Plaintiff seeks relief under § 4 of the Clayton Act, 15 U.S.C. § 15, which provides a private right of action for treble damages to any person "injured in his business or property by reason of anything forbidden in the antitrust laws[.]" 15 U.S.C. § 15.

The antitrust laws protect market competition, which usually, though not always, means the goal is enhancing output and reducing price. *See Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 348 (1982) ("The *per se* rule 'is grounded on faith in price competition as a market force'") (citations omitted); *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 895 (2007) ("the antitrust laws are designed primarily to protect interbrand competition, from

which lower prices can later result"). Accordingly, a plaintiff must allege antitrust injury, an injury attributable to "an anti-competitive aspect of the practice under scrutiny[.]" *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990). This case involves a restraint affecting competition in the supply of an input (labor) for a final product. Usually a cheaper input means a cheaper final price—something the antitrust laws traditionally prefer. Nonetheless, defendants do not dispute (nor could they) that plaintiff has alleged antitrust injury in this case, just like other suppliers do when they allege a restraint in a supply market. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 142 (3d Cir. 2001) (employees challenging no-hire agreement had antitrust standing to sue); *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 545 (10th Cir. 1995) (employee had antitrust standing to challenge agreement between employers not to hire each other's employees); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶352a (3rd and 4th Editions, 2018 Cum. Supp. 2010-2017) ("Employees may challenge antitrust violations that are premised on restraining the employment market . . . Standing for employees thus parallels that for 'suppliers' generally[.]"); *Doe v. Arizona Hosp. and Healthcare Ass'n*, Case No. CV 07-1292, 2009 WL 1423378 at *3 (D. Ariz. March 19, 2009) ("Price-fixing agreements among buyers, like those among sellers, are prohibited by the Sherman Act, even where the damages caused by the agreement is to sellers and not consumers."); *cf. Mandeville Island Farms v. American Chrystal Sugar Co.*, 334 U.S. 219 (1948) (sugar beet suppliers had antitrust claim for price-fixing against sugar beet refiners).

Section 1 of the Sherman Antitrust Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. This language has long been interpreted to "outlaw only *unreasonable* restraints" of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Some restraints are deemed so anti-competitive (and, thus, unreasonable) that they are illegal *per se*, while other restraints, which may have procompetitive effects, are judged under the rule of reason (or its subset: the quick look).

As the Supreme Court has explained, restraints that are "unlawful *per se*" are those that "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit" that it is obvious they are unreasonable restraints of trade. *Khan*, 522 U.S. at 10. The *per se* rule applies to restraints "'that would always or almost always tend to restrict competition and decrease output.'" *Leegin*, 551 U.S. at 886. Accordingly, the *per se* rule is reserved for restraints with respect to which "courts have had considerable experience" such that they "can predict with confidence that [the restraint] would be invalidated in all or almost all instances under the rule of reason[.]" *Leegin*, 551 U.S. at 886-87.

Most restraints are not *per se* unlawful but are instead analyzed under the rule of reason. *Khan*, 522 U.S. at 10. Under the rule of reason, "the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *Khan*, 522 U.S. at 10. Generally, this requires a plaintiff to show the

defendant has "market power—that is the ability to raise prices significantly without going out of business—without which the defendant could not cause anticompetitive effects on market pricing." *Agnew v. National Collegiate Athletic Ass'n*, 683 F.3d 328, 335 (7th Cir. 2012). In this case, market power would be the power to suppress wages.

Courts sometimes apply a third test of reasonableness, the quick look, which is a short form of rule of reason analysis. *Illinois Corp. Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722, 727 (7th Cir. 1986) ("This is the sort of short form or quick look Rule of Reason analysis endorsed in *NCAA v. Board of Regents*, 468 U.S. 85, 109-10 & n. 42 (1984)). As the Seventh Circuit has explained:

> the quick-look approach can be used when 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets,' but there are nonetheless reasons to examine the potential procompetitive justifications.

Agnew, 683 F.3d at 336 (internal citation omitted) (quoting *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999)). 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. *Agnew*, 683 F.3d at 336; *Chicago Prof. Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992); *see also National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109-10 n. 42 (1984) ("While the 'reasonableness' of a particular alleged restraint often depends on the market power

of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.").

In this case, plaintiff has styled her Sherman Act claim as a restraint that is either unlawful *per se* or is unlawful under quick-look analysis. Defendant disagrees. Defendant argues that the restraint at issue in this case is most appropriately analyzed under the rule of reason such that plaintiff must include allegations of market power in the relevant market in order to state a claim. As defendants point out, plaintiff has not included allegations of market power in a relevant market. To decide which standard to apply, the Court must first consider the alleged restraint.

Here, plaintiff argues that she has alleged the existence of a horizontal agreement in restraint of trade. Plaintiff alleges that McDonald's franchisees signed written franchise agreements pursuant to which each agreed not to hire employees (including former employees who left within the prior six months) from other McDonald's restaurants. Specifically, the franchisees were not allowed to hire anyone who was employed (or had been employed in the prior six months) by "McDonald's, any of its subsidiaries, or by any person who is at the time operating a McDonald's restaurant[.]" (Am. Complt. ¶ 87). Plaintiff alleges that the McOpCos were similarly restricted.

Defendants argue that this is merely a vertical restraint, because it was spearheaded by the entity at the top of the chain. The Court agrees that the restraint has vertical elements, but the agreement is also a horizontal restraint. It restrains competition for employees among horizontal competitors: the franchisees and the McOpCos. Plaintiff has alleged that McOpCos run McDonald's-brand restaurants and, thus, compete directly with franchisees for employees. Plaintiff has also alleged that the McOpCos are subsidiaries of defendant McDonald's and that the restraint explicitly restricts franchisees from hiring employees of McDonald's subsidiaries, i.e., the franchisees' competitors. Thus, McDonald's, by including the no-hire provision in its agreement with franchisees, was protecting its own restaurants (i.e., *itself*) from horizontal competition for employees. *Cf. Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984) ("the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act"). The Court finds that plaintiff has alleged a horizontal restraint of trade.

Naked horizontal agreements (i.e., those among competitors) to fix prices or to divide markets are *per se* unlawful. *Leegin*, 551 U.S. at 886; *Federal Trade Comm'n v. Superior Court Trial Lawyers Assoc.*, 493 U.S. 411 (1990) (horizontal agreement among lawyers not to accept appointments to represent indigent criminal defendants until fees increased was a naked price restraint and *per se* unlawful); *Blackburn v. Sweeney*, 53 F.3d 825, 827 & 828 (7th Cir. 1995) ("reciprocal agreement [among attorneys] to limit advertising to different geographical regions was . . . an agreement to allocate markets so that the *per se* rule of illegality applies"). This includes naked

agreements to set wages. *Arizona Hosp.*, 2009 WL 1423378 at *3 (plaintiff's allegations that hospital association set prices for temporary nurses stated claim for *per se* violation of the Sherman Act).

A horizontal agreement not to hire competitors' employees is, in essence, a market division. *See United States v. eBay, Inc.*, 968 F.Supp. 2d 1030, 1039 (N.D. Cal. 2013) ("The court thus finds that the United States' allegations concerning agreement between eBay and Intuit [not to hire each other's employees] suffice to state a horizontal market allocation agreement."). The Department of Justice, which enforces rather than interprets the law, has warned employers that it considers naked no-hire agreements to be *per se* unlawful. (Press Release, U.S. Dep't of Justice, *Justice Department and Federal Trade Commission Release Guidance for Human Resource Professionals on How Antitrust Law Applies to Employee Hiring and Compensation* (Oct. 20, 2016), *available at* https://www.justice.gov/opa/pr/justice-department-and-federal-trade-commission-release-guidance-human-resource-professionals.). Thus, because a no-hire agreement is, in essence, an agreement to divide a market, the Court has no trouble concluding that a naked horizontal no-hire agreement would be a *per se* violation of the antitrust laws. Even a person with a rudimentary understanding of economics would understand that if, say, large law firms in Chicago got together and decided not to hire each other's associates, the market price for mid-level associates would stagnate. With no competition for their talent (aside from lower-paying in-house or government jobs), associates would have no choice but to accept the salary set by their firms or to move to another city. Thus, such a claim would be suitable for *per se* treatment.

Not all horizontal restraints are *per se* unlawful, however. Some horizontal restraints are *ancillary* to agreements that are procompetitive, usually in the sense of enhancing output (i.e., producing either a greater quantity of goods or a new good that would not otherwise exist). *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote."). A restraint is ancillary if it "promoted enterprise and productivity when it was adopted." *Polk Bros.*, 776 F.2d at 189. When a restraint is ancillary, it is judged either under the rule of reason or given a "quick look." For example, no-hire agreements that are ancillary to the sale of a business can have procompetitive effects, so they are judged under the rule of reason. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001).

Similarly, where the horizontal restraint is necessary in order for the product to exist at all, a restraint will not be judged *per se* unlawful but rather will be judged under the rule of reason, including by "quick look." *Law v. National Collegiate Athletic Assoc.*, 134 F.3d 1010 (10th Cir. 1998); *see also Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979); *National Collegiate Athletic Ass'n. v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984). In *Law*, a group of college basketball coaches brought suit challenging the NCAA's rule limiting annual salaries for certain assistant basketball coaches to $16,000 per year. Because some restraints were necessary in order to make college sports available, the court concluded that the horizontal price restraint should be analyzed under

the rule of reason, and, in particular, the "quick look." *Law*, 134 F.3d at 1018 & 1020 ("We find it appropriate to adopt such a quick look rule of reason in this case.")

In this case, plaintiff has alleged a horizontal restraint that is ancillary to franchise agreements for McDonald's restaurants. Each time McDonald's entered a franchise agreement, it increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive. (That is not to say that the provision itself was output enhancing. The very fact that McDonald's has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign.) Because the restraint alleged in plaintiff's complaint is ancillary to an agreement with a procompetitive effect, the restraint alleged in plaintiff's complaint cannot be deemed unlawful *per se*. Plaintiff's claim does not rise and fall on *per se* treatment, though. She claims in the alternative that the restraint is unlawful under quick-look analysis.

The next question, then, is whether plaintiff has plausibly alleged a restraint that might be found unlawful under quick-look analysis. The Court thinks she has. Even a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate. Plaintiff herself experienced the stagnation of her wages. A supervisor for a competing McDonald's restaurant told plaintiff she would like to hire plaintiff for a position that would be similar to plaintiff's position but that would pay $1.75-2.75 more per hour than she was earning. Unfortunately for plaintiff, the no-hire agreement

prevented the McOpCo from offering plaintiff the job. When plaintiff asked her current employer to release her, plaintiff was told she was too valuable. The Court agrees that an employee working for a below-market wage would be extremely valuable to her employer.

Defendants, nonetheless, argue that their restraint has pro-competitive benefits. Specifically, defendants argue that the no-hire restriction promotes interbrand competition, by which they mean the competition between McDonald's and Burger King, rather than the intrabrand competition between the McDonald's restaurant at, say, 111 W. Jackson and the McDonald's at, say, 233 W. Jackson. It makes sense for McDonald's franchisees and the McOpCos to cooperate to promote intrabrand competition for hamburgers, because a customer who is satisfied with a hamburger she buys today at the McDonald's at 111 W. Jackson might tomorrow prefer a hamburger from the McDonald's at 233 W. Jackson to a hamburger from Burger King. This case, though, is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald's franchisees and McOpCos within a locale are direct, horizontal, competitors.[3] A way to promote intrabrand competition for employees would be an advertising campaign extolling the virtues of working for McDonald's. That is not what defendants are alleged to have done here. Here, they are alleged to have divided the market for employees by prohibiting restaurants from hiring each other's current or former

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[3] Realistically, only restaurants within the same locale compete for employees. A McDonald's restaurant in Chicago does not compete for employees with a McDonald's restaurant in Florida.

(for the prior six months, anyway) employees. In the employment market, the various McDonald's stores are competing brands. Dividing the market does not promote intrabrand competition for employees, it stifles interbrand competition.

Defendants argue that the no-hire restriction promotes intrabrand competition for hamburgers by encouraging franchisees to train employees for management positions. Presumably, the theory is that better service equals happier customers. The Court has no doubt, as defendants argue, that McOpCos and franchisees were concerned about training and then losing employees. The restraint, though, is not limited to management employees who had received expensive training at Hamburger University. The restraint applies even to entry-level employees with no management training. Nor was the restraint limited to a reasonable period of time (say six months) after the employee had received the expensive training at Hamburger University. In any case, every employer fears losing the employees it has trained. That fear does not, however, justify, say, law firms agreeing not to hire each other's associates. Employers have plenty of other means to encourage their employees to stay without resorting to unlawful market division. Those options include paying higher wages/salaries and contracting directly with each employee to set an employment term.

Though the Court has concluded that plaintiff has stated a claim for a restraint that might be unlawful under quick-look analysis, the evidence at a later stage may not support it. As defendants have pointed out, plaintiff has not attempted to plead a claim under the rule of reason. This is perhaps unsurprising. To state a claim under the rule of reason, a plaintiff must

allege market power in a relevant market. The relevant market for employees to do the type of work alleged in this case is likely to cover a relatively-small geographic area. Most employees who hold low-skill retail or restaurant jobs are looking for a position in the geographic area in which they already live and work, not a position requiring a long commute or a move. That is not to say that people do not move for other reasons and then attempt to find a low-skill job; the point is merely that most people do not search long distances for a low-skill job with the idea of then moving closer to the job. Plaintiff, though, seeks to represent a nationwide class, and allegations of a large number of geographically-small relevant markets might cut against class certification. Nonetheless, if plaintiff decides she would like to include a claim under the rule of reason, she has leave to amend, but she must do so soon, within 28 days.

B. Plaintiff's state-law claims

Plaintiff also asserts two state-law claims. First, in Count II, plaintiff asserts a claim under the Illinois Antitrust Act, 740 ILCS 10/1 *et seq.* The Illinois Antitrust Act states, in relevant part, that it is unlawful to "[m]ake any contract . . . (a) for the purpose or with the effect of fixing, controlling, or maintaining the price . . . or the fee . . . paid for any service . . . received by the parties thereto[.]" 740 ILCS 10/3(a)(1). The Illinois Antitrust Act goes on to state that "'[s]ervice' shall not be deemed to include labor which is performed by natural persons as employees of others." 740 ILCS 10/4.

Defendants argue that the plaintiff's claim is, thus, excluded from coverage under the Illinois Antitrust Act. The Court agrees that the plain language of the statute excludes plaintiff's claim,

which alleges that the no-hire agreement artificially suppressed her wage, i.e., the price paid for her service. *See O'Regan v. Arbitration Forums, Inc.*, 121 F.3d 1060, 1066 (7th Cir. 1997) ("[T]o the extent [plaintiff's] claims relate to an alleged market for labor services, they are specifically excluded by § 10/4 of the [Illinois Antitrust] Act."). Although plaintiff suggests this is merely an exception for collective bargaining, the statute includes a separate labor exemption. 740 ILCS 10/5(1) ("No provisions of this Act shall be construed to make illegal: (1) the activities of any labor organization or of individual members thereof which are directed solely to labor objectives which are legitimate under the laws of either the State of Illinois or the United States.").

Accordingly, defendants' motion to dismiss is granted as to Count II, and Count II is dismissed with prejudice.

Next, in Count III, plaintiff asserts a claim for violation of the Illinois Consumer Fraud and Deceptive Trade Practices Act. Defendants move to dismiss, and the Court agrees that plaintiff cannot move forward on this claim.

To begin with, as defendants point out, the Illinois Supreme Court has concluded that the Illinois Consumer Fraud Act aims to protect consumers from fraud, not to provide extra enforcement of the antitrust laws. *Laughlin v. Evanston Hosp.*, 133 Ill.2d 374, 390 (Ill. 1990). There, the Illinois Supreme Court said:

> There is no indication that the legislature intended that the Consumer Fraud Act be an additional antitrust enforcement mechanism. The language of the Act shows that its reach

> was to be limited to conduct that defrauds or deceives consumers or others. The title of the Act is consistent with its content.

Laughlin, 133 Ill.2d at 390. Thus, plaintiff cannot use the ICFA to bring her antitrust claim. According to plaintiff's allegations, she was injured because a no-hire agreement prohibited a potential employer from hiring her. Plaintiff was harmed in her capacity as an employee, which is to say in her capacity as a supplier of services. She was not defrauded as a consumer of hamburgers, and she cannot state a claim under the ICFA. *Hess v. Kanoski & Assoc.*, 668 F.3d 446, 454 (7th Cir. 2012) ("[Plaintiff] has no claim under the Illinois Consumer Fraud Act . . . because [she] was an employee, not a 'consumer.'").

Count III is dismissed with prejudice.

IV. CONCLUSION

For the reasons set forth above, the Court grants in part and denies in part defendants' motion to dismiss [34].[4] The motion is denied as to Count I. The motion is granted as to Counts II and III, which are dismissed with prejudice. This case is set for status on 8/15/18 at 9:30 a.m.

SO ORDERED. **ENTERED:** June 25, 2018

/s/ Jorge L. Alonso
JORGE L. ALONSO
United States District Judge

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[4] In their motion, defendants also request that the Court dismiss plaintiff's demand for injunctive relief. Defendants have not sufficiently developed this argument, so the request is denied without prejudice.

APPENDIX E

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

LEINANI DESLANDES, 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; and DOES 1 through 10, inclusive, Defendants.	))))))))))))))))	Case No.: 1:17-cv-04857 Hon. Jorge L. Alonso, U.S.D.J. Jury Trial Demanded

AMENDED CLASS ACTION COMPLAINT

Plaintiff, Leinani Deslandes, on behalf of herself and all others similarly situated, with knowledge as to her own actions and events, and upon information and belief as to other matters, complains and alleges as follows:

NATURE OF THE ACTION

1. This action challenges under Section 1 of the Sherman Act a no-solicitation and no-hiring contract, combination, or conspiracy between and among Defendants McDonald's USA, LLC, McDonald's Corporation (together, "Defendant" or "McDonald's") and their franchisees, pursuant to which McDonald's and the franchisees agreed not to recruit or hire each other's employees. McDonald's, at its principal place of business located in Oak Brook, Illinois, was intimately involved in forming, monitoring, and enforcing this anti-competitive contract, combination, or conspiracy. McDonald's orchestrated, dispersed, and enforced the agreement among itself and all franchisees, at least in part, through an explicit contractual prohibition contained in standard McDonald's franchise agreements. That standard agreement was executed by McDonald's and by franchisees alike—at least up until the time that this lawsuit was commenced. *That is, apparently in response to this lawsuit, McDonald's removed the no-hire and no-solicit provision from its standard franchise agreement on a going-forward basis.* The practice at issue reflects a naked horizontal restraint of competition and a per se violation of the antitrust laws.

2. McDonald's is the world's leading global food service retailer with over 36,000 locations in over 100 countries. More than 80% of McDonald's restaurants worldwide are franchise businesses that are

independently owned and operated, and are separate and distinct entities from McDonald's.

3. In the U.S., approximately 90% of McDonald's restaurants are operated by independently-owned and -operated franchisees who have executed a standard form franchise agreement with either McDonald's USA, LLC or McDonald's Corporation. Some or all of the remaining U.S. McDonald's restaurants are operated by McDonald's itself.

4. McDonald's boasts on its corporate website that in the U.S. market, it possesses "a unique and **powerful field organization structure** that, when optimized, gives us a significant competitive advantage."[1] McDonald's also considers itself an "iconic brand, moving toward the future" with "commitments to our people, our communities and our world."[2]

5. As part of McDonald's system to maintain its significant competitive advantage, together with its franchisees, McDonald's has colluded to suppress the wages of the restaurant-based employees who work not only at McDonald's in Orange County, Florida, but also throughout the United States. In particular, McDonald's and its franchisees have contracted, combined, and/or conspired to neither hire nor solicit each other's employees. McDonald's effects this plan, in part, through an explicit contractual "no hire" and "no solicitation" clause in its franchise agreements

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[1] Available at http://corporate.mcdonalds.com/mcd/investors/company-overview/company-overview-segment-information.html (emphasis supplied) (last visited September 18, 2017).

[2] Available at http://corporate.mcdonalds.com/mcd/our_company.html (last visited April 1, 2017).

that expressly prohibits its franchisees from "employ[ing] or seek[ing] to employ any person" who at the time is, or within the preceding six months has been, employed by McDonald's, by any of its subsidiaries, or by any other franchisee. This agreement, which is or was evidenced by express contractual provisions in the standard McDonald's franchise agreement, is an unreasonable restraint of trade.

6. As further described below, this also is or was not merely a one-way agreement by *franchisees* to not solicit or hire employees away from McDonald's company-owned stores or from other franchisees; rather, *McDonald's itself* adheres to the same agreement in the operation of its company-owned stores.

7. As the Department of Justice Antitrust Division and Federal Trade Commission's joint *Antitrust Guidance for Human Resource Professionals* (October 2016) states: "Naked wage-fixing or no-poaching agreements among employers, whether entered into directly or through a third party intermediary, are per se illegal under the antitrust laws."[3] The *Guidance* further elaborates:

> From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services. It is unlawful for competitors to expressly or implicitly agree not to compete

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[3] Available at https://www.justice.gov/atr/file/903511/download (last visited September 17, 2017).

with one another, even if they are motivated by a desire to reduce costs.[4]

8. The principle of free competition applies to the labor market as well as to trade. "In terms of suppressing competition, companies agreeing not to compete for each other's employees is the same as companies agreeing not to compete for each other's customers," says Joseph Harrington, Wharton professor of business economics and public policy, in his description of a no-poaching agreement.

9. According to Peter Cappelli, Wharton management professor and director of Wharton's Center for Human Resources, no-poaching agreements are unfair to employees and such a pact "benefits the companies at the expense of their employees." Mr. Cappelli notes that the reason such agreements are illegal and violate both anti-trust and employment laws is because "[c]ompanies could achieve the same results by making it attractive enough for employees not to leave."

10. The collusion of employers to refrain from hiring each other's employees restricts employee mobility and competition in the labor market. This raises employers' power at the expense of employees and diminishes employee bargaining power for workers within franchise chains. This is especially harmful to employees of McDonald's and its franchises as those employees are usually paid below a living wage[5], and their marketable skills acquired

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[4] *Id.*

[5] In 2014, the average hourly wage of fast food employees is $9.09 or less than $19,000 per year for a full time worker. The poverty level of a family of four in the U.S. is $23,850. Patrick M. Sheridan, *Low Wage, health activists prepare McDonald's attack,*

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.

11. This no-solicitation and no-hiring agreement between and among McDonald's and McDonald's franchisees, pursuant to which McDonald's and its franchisees agreed not to recruit each other's employees (even those employees that approached another McDonald's restaurant for a job on their own volition) eliminated franchisees' and company-owned stores' incentives and ability to compete for employees, and restricted employees' mobility. This agreement, far from being a "commitment to [its] people," instead 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.

12. The agreement between and among McDonald's and McDonald's franchisees is a naked restraint of trade that is per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1.

THE PARTIES

13. Plaintiff Leinani Deslandes ("Plaintiff") is a resident of Orange County, Florida. Plaintiff was an employee of Bam-B Enterprises of Central Florida, Inc., which owned and operated the McDonald's store located at 3114 South Semoran Boulevard, Apopka, Florida.

14. Plaintiff has suffered reduced wages, loss of professional growth opportunities, and worsened,

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CNN Money (May 20, 2014) http://money.cnn.com/2014/05/20/news/companies/mcdonalds-meeting (last visited May 17, 2017).

illegal working conditions because of the express restraint of trade agreed to between and among McDonald's and its franchisees, prohibiting each from "employ[ing] or seek[ing] to employ" anyone who works (or in the last six months has worked) as an employee at McDonald's, a McDonald's subsidiary, or any other McDonald's franchise. Specifically, Plaintiff sought employment at a McDonald's corporate-owned restaurant nearby to the one where she worked that would have paid her significantly more money, but because of the no-solicitation and no-hiring agreement between and among the franchisees and Defendant McDonald's, the prospective employer could not offer her the position. Despite being qualified, Plaintiff was not hired for a position that paid more and had better growth potential simply because she was currently employed by another franchise.

15. Defendant McDonald's USA, LLC is a Delaware limited liability company with its principal place of business in Oak Brook, Illinois. It is a wholly-owned subsidiary of its parent and predecessor, McDonald's Corporation, which is a Delaware corporation with its principal place of business in Oak Brook, Illinois. McDonald's is in the business of selling food to customers primarily through independently owned and operated franchise restaurants. It has multiple McDonald's franchise restaurants in Illinois, Florida, and every state in the United States. It owns and operates multiple company-owned McDonald's restaurants in Illinois, Florida, and approximately 35 other U.S. states and territories.

16. Plaintiff is ignorant of the true names and capacities, whether individual, corporate, or

associate, of those defendants fictitiously sued as DOES 1 through 10 inclusive and so Plaintiff sues them by these fictitious names. Plaintiff is informed and believes that the DOE defendants 1 through 10 reside in the United States, the State of Illinois, and/or the State of Florida, and are all in some manner responsible for the conduct alleged herein. Upon discovering the true names and capacities of these fictitiously named defendants, Plaintiff will amend this Complaint to show the true names and capacities of these fictitiously named defendants.

CO-CONSIPRATORS

17. Various other corporations and persons not made defendants in this Amended Complaint, including McDonald's franchisees and the McDonald's operating companies that operate company-owned restaurants, participated as co-conspirators in the violations alleged and performed acts and made statements in furtherance of the violations alleged.

JURISDICTION AND VENUE

18. This action is instituted under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to recover treble damages and the costs of this suit, including reasonable attorneys' fees, against Defendant for the injuries sustained by Plaintiff by virtue of Defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 and to enjoin further violations. The Court has subject matter jurisdiction under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, under Section 4 of the Sherman Act, 15 U.S.C. § 4, and under 28 U.S.C. §§ 1331, 1332, 1337 and 1367 to prevent and restrain the Defendant from violating Section 1 of the Sherman Act, 15 U.S.C. § 1.

19. Venue is proper in this judicial district under Sections 4, 12, and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22, and 26, and under 28 U.S.C. § 1391(b)(2), (c)(2). McDonald's transacts or has transacted business in this district and has its principal place of business here. Based on information and belief, a substantial part of the events that gave rise to this action occurred here, namely, the decision to implement the no-solicit and no-hire contract, combination, or conspiracy, the drafting of the no-solicit and no-hire clause in the franchise agreements, McDonald's entry into that agreement, and the selection of Illinois law to interpret and govern that agreement. McDonald's standard franchise agreement states that the provisions and terms of the agreement are to be interpreted in accordance with and governed by the laws of the state of Illinois. It specifies that all notices are to be directed and delivered to McDonald's address at its principal place of business, in Oak Brook, Illinois.

20. McDonald's is in the business of selling food to consumers, in part, through independently owned and operated franchise restaurants. These restaurants are in each state in the United States, and McDonald's has substantial business activities with each franchised restaurant, including entering into a contractual franchise agreement with the owner of the franchise.

21. McDonald's also sells food to consumers through its own company-owned stores. These restaurants are owned by McDonald's Operating Companies ("McOpCo's"), which are indirect or direct subsidiaries of Defendant McDonald's Corporation. More than 35 U.S. states and territories, including both Florida and Illinois, boast multiple McOpCo

McDonald's restaurants. More than 1,000 McOpCo McDonald's restaurants have operated in the U.S. every year since 2010. McDonald's engages in substantial business activities with the McOpCo restaurants.

22. McDonald's engages in substantial activities at issue in this Amended Complaint that are in the flow of and substantially affect interstate commerce.

FACTS COMMON TO ALL COUNTS

A. The McDonald's Model: "Freedom Within A Framework"

23. McDonald's is one of the world's largest restaurant chains, serving approximately 68 million customers daily in 120 countries across approximately 36,899 outlets. McDonald's primarily sells hamburgers, cheeseburgers, chicken products, french fries, breakfast items, soft drinks, milkshakes, wraps, and desserts.

24. A McDonald's restaurant is operated by either a franchisee, an affiliate, or, in the case of company-operated stores, by a McOpCo. McDonald's revenues come from the rent, royalties, and fees paid by the franchisees, as well as from sales in the McOpCo restaurants.

25. Currently, McDonald's has franchised approximately 90% of its U.S. restaurants, while the remainder are owned and operated by the company. Most McDonald's franchisees are subject to a standard 20-year franchise license agreement.

26. Any existing McDonald's franchise agreement entered into (and not later amended or superseded) prior to approximately 2005 is an agreement in which McDonald's Corporation is the franchisor. Any

existing McDonald's franchise agreement entered into since approximately 2005 is an agreement in which McDonald's USA, LLC is the franchisor.

27. Each franchise is operated by an entity that is a separate legal entity from McDonald's USA, LLC and McDonald's Corporation. Each franchise is an independently owned and independently managed business.

28. In McDonald's ownership and operation of the McOpCo company-owned restaurants, McDonald's acts as a competitor of independently-owned and -operated McDonald's franchisee restaurants.

29. There are approximately 420,000 employees that work for McDonald's or its franchise restaurants in the United States. McDonald's had a net income of $4.686 billion for the fiscal year 2016. McDonald's current valuation is over $90 billion.

30. According to a BBC report published in 2012, McDonald's franchises are the world's second largest private employer, with 1.5 million employees working for franchises.

31. According to *Fast Food Nation* by Eric Schlosser (2001), nearly one in eight workers in the United States has at some time been employed by a McDonald's restaurant.

32. Overall, franchising is very important to McDonald's profitability. The chart below illustrates the margins McDonald's receives from this part of its business:

Franchised margins

In millions	***2012***	*2011*	*2010*
U.S.	**$3,594**	$3,436	$3,239
Europe	**2,352**	2,400	2,063
APMEA	**924**	858	686
Other Countries & Corporate	**567**	538	476
Total	**$7,437**	$7,232	$6,464

Percent of revenues			
U.S.	**83.9%**	83.9%	83.4%
Europe	**79.0**	79.1	78.2
APMEA	**88.8**	89.5	89.3
Other Countries & Corporate	**85.6**	86.1	86.0
Total	**83.0%**	83.0%	82.4%

33. In McDonald's operated restaurants/franchises, the company develops and refines operating standards, marketing concepts, and product and pricing strategies.

34. McDonald's also regularly leases to the franchisee the property where the McDonald's franchise is operated.

35. McDonald's license agreements and operator's lease agreement both provide that the

franchisees are independent of McDonald's and are responsible for all obligations and liabilities of the business, and responsible for the day-to-day operations of the business.

36. The franchise agreement specifies that McDonald's franchisees have no exclusive, protected, or territorial rights in the contiguous market area of their restaurant location(s). Franchisees are informed and McDonald's discloses that franchisees may face competition from other franchisees, new franchisees, and new McDonald's restaurants owned and operated by McDonald's itself.

37. Franchise agreements entered into with McDonald's franchisees before the initiation of this lawsuit included express language that contractually prohibited franchisees from employing, or seeking to employ, any person who is at the time employed by McDonald's, any of its subsidiaries, or any of its other franchises, unless the employee has left that employment for a period in excess of six (6) months. The same franchise agreements contractually prohibited franchisees from inducing, directly or indirectly, such persons to leave such employment.

38. As described herein, McDonald's has treated this as a bilateral prohibition, precluding McDonald's company-owned stores from hiring persons employed by franchisees.

B. McDonald's Has Continually Sought to Cut Employee Wages

39. Since the late 1990s, McDonald's has continually attempted to reduce labor costs. This included replacing employees with electronic kiosks which would perform actions such taking orders and accepting money. In 1999, McDonald's first tested "E-

Clerks" in suburban Chicago, Illinois, and Wyoming, Michigan, with the devices being able to "save money on live staffers" and attracting larger purchase amounts than average employees.

40. A study conducted by Anzalone Liszt Grove Research and released by *Fast Food Forward* showed that approximately eighty-four percent (84%) of all fast food employees working in New York City in April 2013 had been paid less than their legal wages by their employers.

41. From 2007 to 2011, fast food workers in the U.S. drew an average of $7 billion of public assistance annually resulting from receiving low wages.

42. Because McDonald's franchise employees were paid less than a living wage, McResource, the McDonald's intranet website, advised employees to break their food into smaller pieces to feel fuller, seek refunds for unopened holiday purchases, sell possessions online for quick cash, and to "quit complaining" as "stress hormone levels rise by 15 percent after ten minutes of complaining."[6]

43. In December 2013, McDonald's shut down the McResource website amidst negative publicity and criticism.

44. The *Roosevelt Institute* accuses some McDonald's restaurants of actually paying less than

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[6] Susanna Kim, *McDonald's Defends Telling Workers to 'Quit Complaining' to Reduce Stress*, ABC News (November 21, 2013) http://abcnews.go.com/Business/mcdonalds-defends-employees-tips-deemed-offensive-clueless-sdovcacy/story?id=20954354 (last visited April 1, 2017).

the minimum wage to entry positions due to "rampant" wage theft.[7]

45. For example, in South Korea, McDonald's pays part-time employees $5.50 per hour and is accused of paying less with arbitrary schedules, adjustments and pay delays, thereby taking full advantage when there are little to no legal protection of employees.

46. In late 2015, anonymous aggregated data collected by *Glassdoor* concluded that McDonald's pays entry-level employees in the United States between $7.25 per hour and $11 per hour, with an average of $8.69 per hour. Shift managers are paid an average of $10.34 per hour. Assistant managers are paid an average of $11.57 per hour.

47. In 2015, McDonald's CEO, Steve Easterbrook, earned an annual salary of $7.9 million, a 368% raise over his 2014 salary; all while low-wage McDonald's workers are striking around the world for a livable income.

48. McDonald's workers have on occasion decided to strike over pay, with most of the employees on strike seeking to be paid $15.00. McDonald's has helped franchise owners beat back union-backed strikes calling for living wages.

49. When interviewed about the strikes, former McDonald's CEO Ed Rensi argued that increasing employee wages would take away from entry-level jobs: "It's cheaper to buy a $35,000 robotic arm than

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[7] Harmony Goldberg, *How McDonald's gets away with rampant wage theft,* Salon, (April 6, 2015), http://www.salon.com/2014/04/06/how_mcdonalds_gets_away_with_rampant_wage_theft_partner/ (last visited April 1, 2017).

it is to hire an employee who's inefficient making $15 per hour bagging french fries."[8] McDonald's attitude towards working conditions is not much better than its attitude toward wages. In March 2015, McDonald's workers in 19 U.S. cities filed 28 health and safety complaints with OSHA, which allege that low staffing, lack of protective gear, poor training and pressure to work fast have resulted in injuries. The complaints also allege that, because of a lack of first aid supplies, workers were told by management to treat burn injuries with condiments such as mayonnaise and mustard.

50. Despite the objections of McDonald's, the term "McJob" was added to Merriam-Webster's Collegiate Dictionary in 2003. The term is defined as "a low-paying job that requires little skill and provides little opportunity for advancement."[9]

C. Plaintiff and the Putative Class Members Work as Employees at McDonald's McOpCo Restaurants or at McDonald's Franchise Restaurants

51. Like other fast food chains in the industry, McDonald's restaurants maintain teams of staff in order to oversee operations and guide entry-level employees through daily responsibilities.

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[8] Kate Taylor, *McDonald's ex-CEO just revealed a terrifying reality for fast-food workers*, Insider (May 25, 2016), http://www.businessinsider.com/mcdonalds-ex-ceo-takes-on-minimum-wage-2016-5 (last visited April 1, 2017).

[9] Available at https://www.merriam-webster.com/dictionary/McJob (last visited September 18, 2017).

52. Specific job titles falling under the category of "management" include shift or swing manager, assistant manager, and store manager.

53. Swing managers may work part-time or full-time, depending on the needs of the specific location.

54. Assistant managers and store managers usually work full-time schedules of 40 hours or more per week. Processing payroll, updating time sheets, demonstrating protocol, tracking supply and shipment orders and communicating with the company regional offices are additional job duties of assistant and store managers.

55. Wages and salaries for employees of franchised stores are not dictated in any way by McDonald's, but average pay scales start out at $8.00 per hour for inexperienced shift managers and eventually rise to roughly $12.00 per hour for highly qualified or tenured shift managers.

56. Assistant manager positions yield annual salary options slightly varied by location but usually falling between $20,000 and $30,000.

57. Store managers may begin at $30,000 per year and receive raises or pay increases.

58. Each franchise (and McDonald's itself, for the McOpCo restaurants) is its own economic decision-maker on employment issues, so wages are not uniform among the competing franchisee and McOpCo stores. Low wages, however, are consistent across the McDonald's empire of company and franchise-owned restaurants, and have allowed McDonald's shareholders and executives, and thousands of its franchise owners, to become very wealthy while full-time, hardworking employees have to seek government benefits just to put food on their

own tables. A significant reason that gross inequity exists between McDonald's and franchise owners on the one hand, and their employees on the other, is that McDonald's is stifling employee wages through its no-hire prohibition.

PLAINTIFF DESLANDES

59. In 2009, Plaintiff began working for Bam-B at its franchised McDonald's-brand restaurant in Apopka, Florida. At all relevant times herein, Plaintiff was paid on an hourly basis and properly recorded all of her hours worked.

60. Between 2009 and 2010, Plaintiff received various promotions and raises and did exemplary work.

61. Plaintiff started as an entry-level crew person earning $7.00 per hour. After about three months, Plaintiff was promoted to Shift Manager earning $10.00 per hour.

62. In 2011, Plaintiff was promoted to Department Manager of Guest Services earning $12.00, where she was responsible for guest services and managing the cash. There were two other Department Managers on her level. One was in charge of employees and human resources, and the other was in charge of kitchen and ordering.

63. After becoming Department Manager, Plaintiff began course work to become eligible for a General Manager position. McDonald's offers proprietary training programs necessary in order to advance through the McDonald's system. Plaintiff took on required weeklong training courses, online classes, and phone conferences put on by McDonald's. In continuing her knowledge, expertise, and education in the McDonald's system, Plaintiff tolerated a

difficult work environment at Bam-B, where Bam-B required her to work overtime, but failed to pay overtime wages; provided her difficult shifts in which she had to sacrifice time with her children to meet management expectations; and failed to provide raises and bonuses.

64. Before Plaintiff could become a General Manager, she had to complete one final weeklong proprietary McDonald's training course at McDonald's "Hamburger University" in Illinois. The training was scheduled for April 2015; however, before Plaintiff could go, her supervisors found out she was several months pregnant and they cancelled her training. Plaintiff was not due until more than six months later. It was clear that this franchise that had suppressed her wages and abused the overtime laws was now going to hinder her McDonald's system education and promotion because she was pregnant.

65. Plaintiff immediately decided to look for another managerial job that would appreciate her skills, not violate overtime law, not discriminate against her because she was pregnant, and would give her the pay and promotion opportunities she deserved based on her performance. For reasons that are further described below, the experience and education Plaintiff developed over the previous four years at Bam-B and in McDonald's training had significant value in the McDonald's organization made up of thousands of different franchises and McOpCo restaurants, but they did not translate to restaurants outside of the McDonald's system.

66. Soon thereafter, Plaintiff located a departmental manager opening at a nearby McDonald's restaurant, located at 451 S. Goldenrod Road, in Orlando. That McDonald's restaurant is a

McOpCo restaurant, owned by McDonald's Restaurants of Florida, Inc. Defendant McDonald's USA, LLC is the immediate parent of McDonald's Restaurants of Florida, Inc., and Defendant McDonald's Corporation is the ultimate parent.

67. For performing the same job Plaintiff had fulfilled at Bam-B, the McOpCo restaurant position in Orlando started at $13.75 per hour, a substantial 15 percent raise for Plaintiff, and after a 90-day probation period, the pay would increase to $14.75 per hour, which would have been a 23 percent increase in pay from her stagnated $12.00 per hour at Bam-B. Further, the McOpCo McDonald's restaurant did not appear to be violating overtime laws, which would either give Plaintiff an additional effective increase in pay, or give her more time with her family.

68. This appeared to be a very good opportunity to leave a business that was underpaying employees, denying promotions and raises, and violating labor laws. Plaintiff applied for this position online. She spoke with the manager of the McOpCo McDonald's restaurant, who called Plaintiff and expressed a desire to hire Plaintiff with more pay, better promotion opportunities, and a better shift. Plaintiff informed the manager that she was currently employed at Bam-B's restaurant and that she wanted to leave. The next day, Plaintiff received a call from a McDonald's corporate employee, who explained that the McOpCo restaurant could not even interview (much less hire) Plaintiff because she was currently employed by a McDonald's franchisee and it could not hire employees working at other McDonald's franchises unless she was "released" by the Bam-B franchise.

69. The next day Plaintiff reported for her 8 a.m. to 4 p.m. shift and asked her supervisors at Bam-B to "release" her so that she could pursue this opportunity. Her supervisors informed her that her request was denied and they would not release her because she was "too valuable." She continued working for Bam-B, unable to use her skills, expertise and education at McDonald's to secure a raise or promotion. However, Plaintiff had a family to feed; therefore, she continued to work for Bam-B.

70. In January 2016, Plaintiff finally quit her job with Bam-B because she continued to work without raises, promotions or promotion opportunities,[10] all while Bam-B continued to engage in violation of overtime laws. It was clear that things were not going to change, and Bam-B was not going to release her to use her skills, education and experience at another McDonald's location.

71. Plaintiff's training was in McDonald's management, which is only valuable and transferrable within the McDonald's system. Plaintiff knew it would be futile to obtain employment in another McDonald's store. The no-solicit and no-hire prohibition plus disenchantment with the McDonald's organization for allowing this to happen, meant that she had to start work with a new organization, back at an entry level position. Plaintiff consequently took employment with Hobby Lobby, a retail store, at a significantly lower pay rate of $10.25 per hour.

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[10] Plaintiff never received any further opportunity to complete her Hamburger University training to become a General Manager (despite the fact she was assigned to perform many of the general manager duties as there was a constant rotation of general managers).

D. McDonald's Model Is Designed to Encourage Competition With Regard to Sales Between and Among Franchisees and McOpCo Stores

72. While McDonald's implemented policies to actively thwart competition for employees between and among it and franchises in order to suppress employee wages, it encouraged competition between franchises in food sales that benefitted McDonald's and it emphasized that franchisees are independent of McDonald's.

73. McDonald's public disclosures and agreements with McDonald's franchisees emphasize that McDonald's franchisees operate separately from each other and from McDonald's.

74. McDonald's standard franchise agreement itself contains a provision with the header "***Franchisee Not an Agent of McDonald's***" (emphasis in original), that characterizes franchisees as "independent contractors." Pursuant to that provision, McDonald's and franchisees agree that, "Franchisee shall have no authority, express or implied, to act as agent of McDonald's or any of its affiliates for any purpose. . . . Further, Franchisee and McDonald's are not and do not intend to be partners, associates, or joint employers in any way and McDonald's shall not be construed to be jointly liable for any acts or omissions of Franchisee under any circumstances."

75. Unlike other franchise business models, McDonald's does not permit its franchisees an exclusive geographic territory within which they will not face competition from other McDonald's restaurants, including McOpCo restaurants. The

McDonald's Franchise Disclosure Document ("FDD") states at the outset that franchisees "should not have any expectation that the economic and demographic factors that exist at your McDonald's restaurant location will remain constant. In addition, other McDonald's restaurants (including those that we develop in the future) may have an effect on the sales of your McDonald's restaurant, since customers typically patronize various McDonald's restaurants depending on their travel patterns and other factors."

76. McDonald's FDD specifies that the Franchise Agreement "does not contain any exclusive grant, exclusive area, exclusive territorial rights, protected territory, or any right to exclude, control, or impose conditions on the location or development of future McDonald's restaurants at any time. You will not receive an exclusive territory."

77. The FDD further stresses that the franchisee "may face competition from other franchisees, from outlets that we own, or from other channels of distribution or competitive brands that we control[,] and that "[t]he sales and customer trading patterns . . . . do not represent any continuing franchisee entitlement or expectation. McDonald's may establish other franchisee or . . . McOpCo company-owned outlets that may alter customer trading patterns and affect the sales of, and compete with, your location." The FDD notes that McDonald's reserves the right to use McDonald's trademarks and to sell similar goods and services through "any other channel of distribution."

78. McDonald's standard franchise agreement itself specifies that the franchisee is authorized to use the McDonald's system (for a specified period of time) only at the particular restaurant specified therein. It

also states that the franchisee has no "'exclusive,' 'protected,' or other territorial rights in the contiguous market area" of the specified restaurant location.

79. While franchisees are required to pay to McDonald's a percentage of gross sales revenues, franchisees are free to negotiate purchasing terms with approved suppliers and to seek approval of new suppliers.

80. Franchisees may also compete with each other by allowing customers to use certain credit and debit cards or certain gift cards, neither of which is a system-wide requirement.

81. A franchisee's profitability is a function of a number of inputs, including its cost of labor, which McDonald's specifically identifies as a franchisee operating expense. Franchisees are required to enroll present and future managers at McDonald's training centers, the travel cost and expense of which is borne by franchisees.

82. According to McDonald's Senior Director of U.S. Franchising, franchisees are responsible for the day-to-day operations of their restaurants, including employment matters and legal compliance.

83. But for the no-hire agreement, each McDonald's franchise (and McDonald's itself in its McOpCo stores) is its own economic decision-maker with respect to hiring, firing, staffing, promotions and employee wages. But for the no-hire agreement, each McDonald's franchise (and McDonald's itself) would compete with each other for the best-performing employees.

E. <u>The "No Hire" Agreement</u>

84. While independent business owners should be encouraged to compete with each other for employees, McDonald's and its franchisees have agreed not to compete among each other for employees.

85. Franchises are made available on standardized terms, so a franchisee who enters into a franchise agreement knows that the same terms it has agreed-to also apply to other franchisees.

86. Until sometime in 2017, McDonald's and its franchisees entered into express contractual agreements forbidding competition for employees among franchisees and McDonald's company-owned stores. In particular, the standard language in McDonald's franchise agreements with all franchisees who executed franchise agreements prior to sometime in 2017 includes an express "no-solicit" and "no-hire" provision that prohibits franchisees from hiring employees of other McDonald's franchisees or of McDonald's or its subsidiaries.

87. The relevant provision from the McDonald's franchise agreement states:

> *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 [] 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.

88. As described above, this provision was interpreted and enforced by McDonald's itself as applying not only to franchisee hiring, but also to McDonald's hiring in its company-owned McOpCo stores. Plaintiff applied for a position with a McOpCo store in Orlando, Florida, and was informed by a McDonald's corporate representative that the McOpCo store could neither interview nor hire her unless she was "released" by her employer, Bam-B.

89. According to the standard franchise agreement, any breach of this no-hire and no-solicitation provision would give McDonald's the right to seek judicial enforcement of its rights and remedies, including injunctive relief, damages, or specific performance. An uncured breach qualifies as sufficient reason for McDonald's to withhold approval of its consent to any assignment or transfer of the franchisee's interest in the franchise, and repeated breaches could constitute grounds for termination of the franchise.

90. The no-hire and no-solicitation provision quoted above appeared in the standard McDonald's franchise agreement appended to its 2013 FDD (with "Issuance Date" of May 1, 2013, "as amended October 25, 2013").

91. The no-hire and no-solicitation provision quoted above also appeared (unchanged) in the standard McDonald's franchise agreement appended to its 2014 FDD, amended in 2015 (with "Issuance Date" of May 1, 2014, "as amended" on both November 6, 2014 and January 25, 2015).

92. In 2017, apparently after the filing of this lawsuit, McDonald's removed the no-hire and no-solicitation provision from its standard franchise

agreement. The no-hire and no-solicitation provision is no longer a part of the standard McDonald's franchise agreement appended to McDonald's current FDD. The current FDD states an "Issuance Date" of May 1, 2017, "as amended August 1, 2017." The current FDD disclosure of "Litigation—Pending Cases" includes a one-paragraph description of this lawsuit, which was filed on June 28, 2017.

93. At the beginning of 2017, McDonald's had more than 13,000 restaurants operating under existing franchise agreements. None of these franchisees executed the form of standard franchise agreement first issued in 2017 after the filing of this lawsuit. The franchise agreement executed by each such franchisee included the no-solicitation and no-hire provision quoted above.

94. Any new provisions of the 2017 standard franchise agreement (including the absence of the express no-hire and no-solicitation provision) do not govern McDonald's contractual franchise relationship with existing franchisees. Those franchisees are governed by the franchise agreements that they previously executed with McDonald's, typically with 20-year terms. Execution of a new franchise agreement typically requires the franchisee to pay a new franchise fee (currently $45,000) for a new term, if approved by McDonald's.

95. The franchise agreement itself contains an integration clause stating that the agreement "constitutes the entire agreement between the parties and supersedes all prior and contemporaneous, oral or written, agreements or understandings of the parties." It states further that nothing in the agreement "is intended to disclaim the

representations made in the [FDD] furnished to the Franchisee."

96. The FDD confirms that there are "No modifications generally" of the agreement, but that operations and training manuals may be subject to change. Further, "Only the terms of the Franchise Agreement are binding (subject to state law)." The FDD also specifies that "Internal policies which McDonald's may apply and modify periodically in connection with decisions to develop new restaurants are not part of the Franchise Agreement and do not involve any contract right granted to [the franchisee]." Franchisees that executed franchise agreements prior to 2017 continue to be bound by the terms of those agreements.

F. Other Evidence of a Horizontal Agreement among Competing Franchisees and McDonald's

97. Public corporate filings reveal that McDonald's admits that its success depends in part on its "System's ability to recruit, motivate and retain a qualified workforce to work in our restaurants in an intensely competitive environment" and the "[i]ncreased costs associated" with retaining qualified employees applies to its franchisees.

98. Employment applications available online for McDonald's restaurants ask applicants whether they have worked for McDonald's before. That question is separate and apart from the history of employment portion on the application. This helps the prospective employer easily flag current employees employed by competing McDonald's franchisees or McOpCo stores and prevents violation of the no-hire provision.

99. The "no-solicit" and "no-hire" agreement embodies norms that are widely accepted across the fast-food industry and familiar to franchisees. In advising new restaurant owners on how to hire their first general manager, one industry expert instructs that, "you have to be careful that you do not earn a reputation for stealing other people's employees."

100. The potential for broader collusion in franchise chains is clearly enhanced when no-poaching agreements are in place. Collusion is promoted when the no-poach agreements can be easily generated and monitored amongst a concentrated group of competitors who all stand to gain profits from the collusion while maintaining similar costs.

101. Plaintiff was a direct victim of the "no-solicit" and "no-hire" agreement, in that it was adhered to by both a McOpCo McDonald's restaurant and by an independent franchise owner (Bam-B) in order to prevent Plaintiff from using competition to obtain a living wage, promotion opportunities, and find comparable and/or better employment. It was a McDonald's corporate employee (and not the manager of the Orlando McOpCo restaurant at which she applied) who informed Plaintiff that she could not be hired or even interviewed for the McOpCo restaurant position due to her employment at another McDonald's location.

G. The "No-Hire" Agreement Is Against the Independent Interests of the Franchisees and of the McOpCo Restaurants in their Capacity as Competitors

102. This no-hire provision is short-sighted and ultimately not in the independent interests of the

franchisees or the McOpCo restaurants in their capacity as competitors of each other, even though it is in the collective interest of the conspirators as a whole when acting together. Employees are critical to the success of McDonald's franchisees and McOpCo restaurants.

103. It is the sales in franchise-operated restaurants that brings the most revenue to McDonald's, so McDonald's profits hinge on the success or failure of its franchisees. A significant component of making the franchise profitable is hiring qualified, motivated, and superior employees.

104. Therefore, it is in the independent interest of each McDonald's franchisee to compete for the most talented and experienced restaurant employees.

105. By adhering to the no-hire agreement, franchisees and McOpCo restaurants artificially restrict their own ability to hire other employees in a manner that is inconsistent with their own unilateral economic interests. By acting in concert, however, they also artificially protect themselves from having their own employees poached by other franchises or locations that see additional value in those employees, such as their training, experience and/or work ethic. This allows franchisees or McOpCo 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.

106. The "no-hire" agreement does not serve the interests of ensuring that McDonald's restaurants produce a quality product.

107. The "no-hire" agreement does not serve employees because it does not incentivize McDonald's

franchisees and McOpCo restaurants to invest in higher wages, benefits, and working conditions. It also dis-incentivizes employees to perform their best work as their opportunities by doing so are limited. Alternatively, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment.

108. The "no-hire" agreement does not serve fast-food customers because it does not incentivize McDonald's franchisees or McOpCo restaurants to invest in training workers to improve the McDonald's food, experience and service.

109. Consumers can gain from competition among employers because a more competitive workforce may create more or better goods and services. Furthermore, unemployment has reached a 16-year low and job openings are at an all-time high, yet wage growth has remained surprisingly sluggish with fast-food workers relying on public assistance to supplement their income. Higher wages will lessen the strain on public benefits, benefiting all consumers.

H. Employment with Non-McDonald's Brands is Not a Reasonable Substitute for McDonald's Employees

110. Consistent with Plaintiff's experience, online reviews for employment at McDonald's restaurants report that there was little or no way "to advance after working for nearly two years;" "management told [employees] they were easily replaceable;" "advancement never an option" and working at McDonald's offered "no real opportunity for advancement." That is all made possible by the "no-hire" prohibition. If franchisees and McOpCo restaurants had to either pay and promote good

employees, or lose them to competitor locations, they would be forced to pay competitive wages and provide competitive promotion opportunities. However, because of the no-hire prohibition, and because the education, training and experience within the McDonald's enterprise are unique to McDonald's and not transferrable to other restaurants, McDonald's franchisees and McOpCo restaurants do not have to compete with non-McDonald's businesses for their employees except at the entry-level position.

111. 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. Franchises electronically submit their store financial information to McDonald's via a separate proprietary web-based system. Experience with these systems is of little value to other restaurants.

112. 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." The Disclosure informs that it takes "approximately

two years" to complete all of the learning plans from Shift Manager through General Manager.

113. A no-hire agreement like this one reduces workers' outside options and lowers their quit rate, increasing the share of net-returns captured by employers. Further, a franchise-wide no-hire agreement increases the specificity of human capital investment, as training that is productive throughout the franchise chain can only be used at one franchisee under the agreement.

114. Because Plaintiff was unable to transfer her skills and experience to a competing McDonald's restaurant at significantly more money, her only option was to quit and start over at an entry-level job and salary in another industry.

I. Plaintiff and the Class Members Have Suffered Antitrust Injury

115. Because of the "no-solicit" and "no-hire" agreement, Plaintiff and the putative class have suffered injury in the form of reduced wages and worsened working conditions.

116. Suppressed wages due to employers' agreement not to compete with each other is injury of the type the antitrust laws were intended to prevent and flows from that which makes the "no-hire" and "no-solicit" agreement unlawful.

CLASS ALLEGATIONS

117. Plaintiff brings this action on her own behalf, and on behalf of a nationwide class pursuant to Federal Rules of Civil Procedure, Rules 23(a), 23(b)(2), and/or 23(b)(3).

Nationwide Class:

> All persons in the United States who are current or former employees and/or managers at all McDonald's restaurants whether operated by McDonald's itself or by a McDonald's Franchisee.

118. Alternatively, Plaintiff brings this action on her own behalf, and on behalf of a Class of Florida residents pursuant to Rule 23(a), 23(b)(2), and/or 23(b)(3).

Florida Class:

> All persons in the State of Florida who are current or former employees and/or managers at all McDonald's restaurants whether operated by McDonald's itself or by a McDonald's Franchisee.

119. Except where necessary to differentiate, the Nationwide Class, the Florida Class, and their members shall be referred to herein as the "Class," the "Classes" or "Class Members." Excluded from the Classes are Defendant McDonald's, its affiliates, officers and directors, and the Judge(s) assigned to this case. Plaintiff reserves the right to modify, change, or expand the Class definitions on discovery and further investigation.

120. Numerosity: Upon information and belief, the Classes are so numerous that joinder of all members is impractical; there are over 14,000 McDonald's restaurants in the United States. While the exact number and identities of the individual Members of the Classes are unknown at this time, such information being in the sole possession of Defendant and obtainable by Plaintiff only through the discovery process, Plaintiff believes, and on that

basis alleges, that thousands of Class Members are the subjects of the Class.

121. Existence and Predominance of Common Questions of Fact and Law: Common questions of fact and law exist as to all Members of the Class. These questions predominate over the questions affecting individual Class Members. These common legal and factual questions include, but are not limited to, whether:

a. Defendant engaged in unlawful contracts, combinations, and/or conspiracies in restraint of trade and commerce;

b. Defendant's conduct constituted unfair competition;

c. Defendant's conduct constituted unlawful, unfair, and fraudulent business acts and practices;

d. Defendant violated the Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.*;

e. Defendant violated the Illinois Antitrust Act, 740 ILCS 10/1, *et seq.*;

f. Defendant violated the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq.*;

g. Defendant should be required to disclose the existence of such agreements, contracts, combinations, and/or conspiracies;

h. Plaintiff and Class Members are entitled to damages, restitution, restitutionary disgorgement, equitable relief, and/or other relief; and

i. The amount and nature of such relief to be awarded to Plaintiff and the Class.

122. Typicality: All of Plaintiff's claims are typical of the claims of the Class inasmuch as Plaintiff was a McDonald's franchisee restaurant manager/employee, and each Member of the Class either was or is a McDonald's owned or franchisee restaurant employee/manager subject to the same agreements and rules as Plaintiff. Further, Plaintiff and all the Members of the Class sustained the same monetary and economic injuries of being subjected to artificial suppression of compensation, wages, benefits, and growth opportunity, and the remedy sought for each is the same in which Plaintiff seeks relief against Defendant for herself and all absent Class Members.

123. Adequacy: Plaintiff is an adequate representative because her interest does not conflict with the interest of the Classes that she seeks to represent, she has retained counsel competent and highly experienced in complex Class Action litigation, and she intends to prosecute this action vigorously. The interest of the Class will be fairly and adequately protected by Plaintiff and her counsel.

124. Superiority: A class action is superior to all other available means of fair and efficient adjudication of the claims of Plaintiff and members of the Classes. The injuries suffered by each individual Class Member are relatively small in comparison to the burden and expense of the individual prosecution of the complex and extensive litigation necessitated by Defendant's conduct. It would be virtually impossible for members of the Classes individually to redress effectively the wrongs done to them. Even if the Members of the Classes could afford such individual

litigation, the court system could not. Individualized litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties, and to the court system, presented by the complex legal and factual issues of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, an economy of scale, and comprehensive supervision by a single court. Upon information and belief, Members of the Classes can be readily identified and notified based on, inter alia, Defendant's employment records and franchisees' records.

125. Defendant has acted, and refuses to act, on grounds generally applicable to the Classes, thereby making appropriate final equitable relief with respect to the Classes as a whole.

CLAIMS FOR RELIEF

COUNT I: VIOLATIONS OF SECTION 1 OF THE SHERMAN ACT

15 U.S.C. § 1, *et seq.*

(By Plaintiff on Behalf of the Nationwide Class and, Alternatively, the Florida Class)

126. Plaintiff, on behalf of herself and all others similarly situated, re-alleges and incorporates by reference the allegations contained in the preceding and succeeding paragraphs of this Complaint, and further alleges against Defendant as follows:

127. Beginning no later than 2013, Defendant entered into and engaged in unlawful contracts, combinations in the form of trust or otherwise, and/or conspiracies in restraint of trade and commerce in

violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, *et seq*.

128. Defendant engaged in predatory and anticompetitive behavior by restricting competition among and between business franchisees and itself in McOpCo restaurants, which unfairly suppressed employee wages, and unreasonably restrained trade.

129. Defendant's conduct included concerted efforts, actions and undertakings among the Defendant and franchisee owners with the intent, purpose and effect of: (a) artificially suppressing the compensation of Plaintiff and Class Members; (b) eliminating competition among Defendant and franchise owners for skilled labor; and (c) restraining employees' ability to secure better compensation, advancement, benefits, and working conditions.

130. Defendant perpetrated the scheme with the specific intent of lowering costs to the benefit of Defendant and franchise owners.

131. Defendant's conduct in furtherance of its contracts, combinations and/or conspiracies were authorized, ordered, or done by its respective officers, directors, agents, employees, or representatives while actively engaging in the management of Defendant's affairs.

132. Plaintiff and Class Members have received lower compensation from Defendant and independent franchise businesses than they would otherwise would have received in the absence of Defendant's unlawful conduct and, as a result, have been injured in their property and have suffered damages in an amount according to proof at trial.

133. Defendant's contracts, combinations, and/or conspiracies are per se violations of Section 1 of the Sherman Act.

134. In the alternative, Defendant is liable under a "quick look" analysis where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.

135. Defendant's contracts, combinations, and/or conspiracies have had a substantial effect on interstate commerce.

136. As a direct and proximate result of Defendant's contract, combination, and/or conspiracy to restrain trade and commerce, Plaintiff and Class Members have suffered injury to their business or property and will continue to suffer economic injury and deprivation of the benefit of free and fair competition.

137. Plaintiff and the Class Members are entitled to treble damages, attorneys' fees, reasonable expenses, and costs of suit for the violations of the Sherman Act alleged herein.

COUNT II: VIOLATIONS OF THE ILLINOIS ANTITRUST ACT

740 ILCS 10/1, *et seq.*

(By Plaintiff on Behalf of the Nationwide Class and, Alternatively, the Florida Class)

138. Plaintiff, on behalf of herself and all others similarly situated, re-alleges and incorporates by reference the allegations contained in the preceding and succeeding paragraphs of this Complaint, and further alleges against Defendant as follows:

139. Defendant engaged in unlawful contracts, combinations, and/or conspiracies in restraint, trade or commerce in violation of Illinois Antitrust Act, 740 ILCS 10/1, *et seq*.

140. As alleged above, Defendant engaged in predatory and anticompetitive behavior to not solicit restaurant-based employees and/or managers from other McDonald's restaurants. The no-hire agreements were unknown to workers and were not an agreement involving traditional labor disputes traditionally subject to state and federal labor laws.

141. Defendant's specific intent has been to substantially lessen competition in the market for employee and/or manager positions among McDonald's restaurants and limit the compensation, benefits, and opportunities for such positions.

142. A substantial amount of trade and commerce has been affected and will continue to be affected, in the market for McDonald's employees and/or managers as a result of Defendant's unreasonable restraint of trade and commerce.

143. A substantial portion of Defendant's behavior constituting the violations alleged above occurred in the State of Illinois and has had a substantial impact of trade or commerce within the State of Illinois.

144. As alleged above, Defendant's contract, combination, and/or conspiracy constitutes unreasonable restraints on trade and commerce, all of which are per se violations of the Illinois Antitrust Act, 740 ILCS 10/3, *et seq*., or in the alternative, violations under the rule of reason.

145. As a direct and proximate result of Defendant's contract, combination, and/or conspiracy

to restrain trade and commerce, Plaintiff and Class Members have suffered injury to their business or property and will continue to suffer economic injury and deprivation of the benefit of free and fair competition.

146. Plaintiff and the Class Members are entitled to treble damages, attorneys' fees, reasonable expenses, and costs of suit for the violations of the Illinois Antitrust Act alleged herein.

COUNT III: VIOLATIONS OF THE ILLINOIS CONSUMER FRAUD AND DECEPTIVE BUSINESS PRACTICES ACT

815 ILCS 505/1, *et seq.*

(By Plaintiff on Behalf of the Nationwide Class or, Alternatively, the Florida Class)

147. Plaintiff, on behalf of herself and all others similarly situated, re-alleges and incorporates by reference the allegations contained in the preceding and succeeding paragraphs of this Complaint, and further alleges against Defendant as follows:

148. At all times relevant, Plaintiff, the Class, and Defendants are all persons within the meaning of 815 ILCS 505/1(c).

149. At all relevant times, Plaintiff and the Class are consumers within the meaning of 815 ILCS 505/1(e). Plaintiff and the Class are consumers within the meaning of the Illinois Consumer Fraud Act given that Defendant's practices were addressed to the market generally and/or otherwise implicate consumer protection issues, including, but not limited to, the fact that a lack of competitive workforce in the franchise industry prevents better goods and services, restricts wages and mobility of the workforce, creates

a strain on public assistance, and thereby affects all consumers generally.

150. At all times material, Defendant's acts and omissions occurred in the course of trade and commerce within the meaning of 815 ILCS 505/1(f).

151. Section 2 of the Illinois Consumer Fraud Act provides, in relevant part:

> Unfair methods of competition and unfair or deceptive acts or practices, including but not limited to the use of or employment of any deceptive, fraud, false pretense, false promise, misrepresentation or the concealment, suppression or omission of any material fact, with intent that others rely upon the concealment, suppression or omission of such material fact, or the use of employment of any practice described in Section 2 of the "Uniform Deceptive Trade Practices Act," approved August 5, 1965, in the conduct of any trade or commerce are hereby declared unlawful whether any person has in fact been misled, deceived or damaged thereby. In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act.

815 ILSC 505/1 (footnotes omitted).

152. Defendant's actions to restrain trade and fix the total compensation of the Class Members constitutes unfair competition and unlawful, unfair, and fraudulent business acts and practices in violation of the Illinois Consumer Fraud and

Deceptive Business Practices Act, 815 ILCS 505/1, *et seq*.

153. Defendant illegally participated in an agreement among competitors that restrained employees from engaging in a lawful profession, trade, or business. Defendant perpetrated the scheme with the purpose of fixing lower costs to the benefit of Defendant and franchise owners.

154. Defendant has committed unfair or deceptive acts by engaging in the acts and practices alleged herein. Defendant's conduct included concerted efforts, actions and undertakings among the Defendant and franchise owners with the intent, purpose and effect of: (a) creating and carrying out restrictions in trade and commerce; (b) artificially suppressing the compensation of Plaintiff and Class Member; (c) eliminating competition among Defendant and franchise owners for skilled labor; (d) restraining employees' ability to secure better compensation, advancement, benefits, and working conditions; (e) fixing the compensation of Class Members at artificially low levels; and (f) creating a burden on public assistance, constituting unfair competition and unlawful, unfair, and fraudulent business acts and practices within the meaning of the Illinois Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1, *et seq*. Defendant's conduct violates public policy by unfairly suppressing employee wages, and unreasonably restrained trade, and Plaintiff and the Class were unaware of the "no-hire" clause and had no choice but to submit, thereby preventing Plaintiff and the Class from negotiating better wages and conditions, causing substantial injury by interfering with prospective relations and stifling competition.

155. Defendant's conduct, individually and in concert as alleged above and herein is immoral, unethical, oppressive, unjust, unconscionable and unscrupulous, and caused and continues to cause substantial economic injury to Plaintiff and the Class.

156. Defendant's conduct is driven by greed, profiteering, and conspiracy to artificially suppress the supply and demand for workers to the detriment of Plaintiff and the Class as alleged herein.

157. Defendant intended that Plaintiff and the Class rely on material misrepresentations, deceptions, unfair practices, and/or omissions alleged herein.

158. Defendant's unfair and deceptive conduct are willful and wanton, constitute intentional violations of the relevant statutes.

159. As a result of Defendant's violations of the Illinois Consumer Fraud and Deceptive Business Practices Act, Defendant has unjustly enriched itself at the expense of Plaintiff and the Classes. The unjust enrichment continues to accrue as the unlawful, unfair, and fraudulent business acts and practices continue.

160. The conduct is unfair, unlawful, or unconscionable under Illinois law.

161. To prevent their unjust enrichment, Defendant and its co-conspirators should be required to disgorge their illegal gains for the purpose of making full restitution to all injured Class Members identified hereinabove.

162. Defendant should also be permanently enjoined from continuing its violations of the Illinois

Consumer Fraud and Deceptive Business Practices Act.

163. A substantial portion of Defendant's behavior constituting the violations alleged above occurred in the State of Illinois and has had a substantial impact of trade or commerce within the State of Illinois.

164. As a direct and proximate result of Defendant's contract, combination, and/or conspiracy to restrain trade and commerce, Plaintiff and Members of the Class have suffered and will continue to suffer economic injury and deprivation of the benefit of free and fair competition.

PRAYER FOR RELIEF

Wherefore, Plaintiff, on behalf of herself and Members of the Class, requests that this Court:

A. determine that the claims alleged herein may be maintained as a Class Action under Rule 23 of the Federal Rules of Civil Procedure, and issue an order certifying the Class as defined above;

B. appoint Plaintiff as the representative of the Class and her counsel as Class Counsel;

C. declare that Defendant's actions as set forth in this Complaint violate the law;

D. award Plaintiff and the Class damages in an amount according to proof against Defendant for Defendant's violations of 15 U.S.C. §1, to be trebled in accordance with those laws;

E. award Plaintiff and the Class damages in an amount according to proof against Defendant for Defendant's violations of 740 ILCS 10/1 *et*

seq., to be trebled in accordance with those laws;

F. award all actual, general, special, incidental, statutory, punitive, and consequential damages and restitution to which Plaintiff and the Class Members are entitled;

G. grant equitable relief, including a judicial determination of the rights and responsibilities of the parties;

H. grant a permanent injunction enjoining Defendant from enforcing or adhering to any existing agreement that unreasonably restricts competition as described herein;

I. declare Defendant be permanently enjoined and restrained from establishing any similar agreement unreasonably restricting competition for employees except as prescribed by this Court;

J. grant judgment against Defendant and in favor of Plaintiff and each Member of the Class she represents, for restitution and disgorgement of ill-gotten gains as allowed by law and equity as determined to have been sustained by them and/or imposing a constructive trust upon Defendant's ill-gotten gains, freezing Defendant's assets, and/or requiring Defendant to pay restitution to Plaintiff and to all Members of the Class of all funds acquired by means of any act or practice declared by this Court to be unlawful, unfair, or fraudulent;

K. declare Defendant to be financially responsible for the costs and expenses of a Court-approved notice program by mail,

broadcast media, and publication designed to give immediate notification to Class Members;

L. award pre-judgment and post-judgment interest on such monetary relief;

M. award reasonable attorneys' fees and costs; and

N. grant such further relief that this Court deems appropriate.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

Date: September 18, 2017

Respectfully Submitted,

LEINANI DESLANDES

s/ Derek Y. Brandt
One of the Attorneys for Plaintiff

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* *Pro Hac Vice* Application
to be Submitted

Attorneys for Plaintiff

APPENDIX F

EXHIBIT 1

FRANCHISE DISCLOSURE DOCUMENT

McDonald's USA, LLC
a Delaware limited liability company
One McDonald's Plaza
Oak Brook, Illinois 60523
(630) 623-3000
www.mcdonalds.com

The franchisee will own and operate a quick service restaurant offering a limited menu of value-priced foods using the McDonald's System.

The total investment necessary to begin operation of a traditional McDonald's franchise ranges from $1,031,350 to $2,182,050 (see Item 7 for small town oil, small town retail, and Satellite locations). This includes an initial franchise fee of $45,000.00 (see Item 5 for small town oil, small town retail, and Satellite locations) that must be paid to the franchisor.

This disclosure document summarizes certain provisions of your franchise agreement and other information in plain English. Read this disclosure document and all accompanying agreements carefully. You must receive this disclosure document at least 14 calendar-days before you sign a binding agreement with, or make any payment to, the franchisor or an affiliate in connection with the proposed franchise sale. **Note, however, that no**

governmental agency has verified the information contained in this document.

You may wish to receive your disclosure document in another format that is more convenient for you. To discuss the availability of disclosures in different formats, contact the Franchise Practice Group at 2915 Jorie Boulevard, Oak Brook, IL 60523 and (630) 623-6934.

The terms of your contract will govern your franchise relationship. Don't rely on the disclosure document alone to understand your contract. Read all of your contract carefully. Show your contract and this disclosure document to an advisor, like a lawyer or an accountant.

Buying a franchise is a complex investment. The information in this disclosure document can help you make up your mind. More information on franchising, such as "A Consumer's Guide to Buying a Franchise," which can help you understand how to use this disclosure document, is available from the Federal Trade Commission. You can contact the FTC at 1-877-FTC-HELP or by writing to the FTC at 600 Pennsylvania Avenue, NW, Washington, D.C. 20580. You can also visit the FTC's home page at www.ftc.gov for additional information. Call your state agency or visit your public library for other sources of information on franchising.

There may also be laws on franchising in your state. Ask your state agencies about them.

Issuance Date: May 1, 2013, as amended October 25, 2013

Exhibits

* * *

B. Franchise Agreement (Traditional)

* * *

Item 1
The Franchisor and any Parents, Predecessors, and Affiliates

The Franchisor is McDonald's USA, LLC, which will be referred to in this disclosure document as "McDonald's", "we", "us" or "our". A person who buys a franchise from McDonald's will be referred to in this disclosure document as "you".

We are a Delaware limited liability company. Our principal place of business is One McDonald's Plaza, Oak Brook, Illinois, 60523. We currently do business under the name of McDonald's USA, LLC. Our agents for service of process are disclosed in Exhibit O. We are a wholly-owned subsidiary of our parent and predecessor, McDonald's Corporation, a Delaware corporation. Our predecessor's principal place of business is One McDonald's Plaza, Oak Brook, Illinois, 60523. Our predecessor currently does not offer franchises. Neither we nor our predecessor have ever offered franchises in any other line of business.

We have domestic affiliates and international affiliates. Some of our international affiliates offer McDonald's franchises outside of the United States. None of them have offered franchises in any other line of business. These international affiliates are disclosed in Exhibit Q.

We develop, operate, franchise, and service a system of restaurants that prepare, assemble, package, and sell a limited menu of value-priced foods under the McDonald's System in the U.S. The "McDonald's System" is a concept of restaurant operations that includes, among other things, certain rights in trademarks, manuals, and other confidential business information; operational, real estate, and

marketing information; and the expertise and continuing information that we provide. All McDonald's restaurant businesses in the U.S. are operated under franchise agreements and are owned by franchisees who are independent third parties, by affiliates operating as joint partnerships, or by our wholly-owned subsidiaries ("McOpCo companies"). Currently, about 89% of all U.S. restaurants are franchised to independent franchisees or affiliates operating as joint partnerships, and about 11% are franchised to McOpCo companies.

McDonald's restaurants offer the public a high standard of quality and uniformity in food, service, and decor. McDonald's restaurants are located in freestanding buildings, storefronts, food courts, and other locations that are appropriate to McDonald's image. A grant of a McDonald's franchise authorizes you to operate a McDonald's restaurant business at a specific location and to use the McDonald's System in the operation of that restaurant business for a specific period of time, usually 20 years. We also grant franchises for McDonald's restaurant businesses located in retail stores such as Walmart. We call these satellite ("Satellite") locations. McDonald's restaurants located in strip centers, airports, universities, shopping malls, hospitals, and other diverse locations may also be Satellites. Satellites may serve a scaled-down menu of a traditional McDonald's restaurant and, in some cases, will also serve non-McDonald's trademarked products. The term of the franchise for a Satellite depends on its location.

Some McDonald's restaurants that are located in fuel station/convenience store facilities are called small town oil ("STO") locations. STOs are full-menu

restaurants that share building space with a convenience store and have a fuel station located outside of the building. At each STO, the fuel station/convenience store typically will be associated with a national or regional branded chain. Some McDonald's restaurants that anchor a small retail center in rural communities are called small town retail ("STR") locations. STOs and STRs are not Satellites. The term of the franchise for STOs and STRs is usually 10 years.

In certain limited cases, we may also grant franchises with leases that include the business facilities. We call these Business Facilities Lease ("BFL") franchises. A BFL is a special arrangement that we may offer when certain economic and other factors exist. The term of a BFL is usually 3 years. Under a BFL, you may have a conditional option to purchase certain restaurant assets after the first year and extend the franchise for up to 20 years after the beginning of the term. In this disclosure document, the word "restaurant" refers to each McDonald's restaurant business location generally, regardless of whether it is franchised as a traditional restaurant, Satellite, STO, STR, or BFL (unless otherwise provided).

All franchisees who operate a restaurant, whether a traditional, Satellite, STO, STR, or BFL location, will sign the applicable form of our standard franchise agreement attached as Exhibits B, C, and D (collectively "Franchise Agreement").

In 1955, our predecessor, McDonald's Corporation, began granting franchises to individuals for the operation of McDonald's restaurants. In 1960, our predecessor began forming and granting franchises to McOpCo companies for the operation of

McDonald's restaurants. In 2004, our predecessor formed us as a subsidiary and in 2005, as part of a global company alignment, transferred to us a majority of the assets used in its U.S. business, including its interests in the McOpCo companies and the franchises for McDonald's restaurants in the U.S. In 2007, restaurants in Puerto Rico and the Virgin Islands operated by McOpCo companies were sold to, and a master franchise to offer and sell franchises in Puerto Rico and the Virgin Islands was granted to, LatAm, LLC, a Delaware limited liability company, which is not an affiliate of McDonald's.

In May 2010, our predecessor acquired the portion of the business and assets of Verety Software International LLC (VSI) and related entities that serve the McDonald's System in the U.S. and other countries. Prior to the acquisition, VSI was the vendor of our proprietary point of sale ("POS") platform known as NewPOS (the current version is NP6). Our predecessor formed a subsidiary, Restaurant Application Development International LLC (RDI), a Delaware limited liability company, to acquire the portion of the business and assets of VSI that served the McDonald's System. RDI's principal place of business is 1420 Kensington Road, Suite 106, Oak Brook, IL 60523.

As a franchisee, you should not have any expectation that the economic and demographic factors that exist at your McDonald's restaurant location will remain constant. In addition, other McDonald's restaurants (including those that we develop in the future) may have an effect on the sales of your McDonald's restaurant, since customers typically patronize various McDonald's restaurants depending on their travel patterns and other factors.

You also will be competing with other restaurants, food service businesses and convenience stores that offer the same types of products that you do. These restaurants, food service businesses and convenience stores may be associated with national or regional chains (whether or not franchised) or may be local, single restaurant locations. You will compete with other restaurants, food service businesses and convenience stores that feature products different from those in a McDonald's restaurant. In certain STOs, the fuel station/convenience store operators will have the right to sell fountain drinks and hot beverages in the convenience store located within the same building as the McDonald's restaurant. Your products and services will be offered primarily to individual consumers for on-site or off-site consumption. The market for the products you will offer is developed in some areas and still developing in other areas, depending on the number of restaurants of this type operating in each particular area.

You will be required to comply with all local, state, and federal laws, including health and sanitation laws and menu-labeling requirements, that apply to restaurant operations. There are other laws that apply generally to all businesses, including, but not limited to, the Americans with Disabilities Act, and we encourage you to make further inquiries about these laws.

EXHIBIT B

FRANCHISE AGREEMENT (TRADITIONAL)

[CITY, STATE]
[Address]
L/C: ____________
File #: __________

FRANCHISE AGREEMENT

THIS FRANCHISE AGREEMENT ("Franchise") made this _____ day of ___________, for the operation of a McDonald's restaurant located at __________________________ (the "Restaurant") by and between:

McDONALD'S USA, LLC,

a Delaware limited liability company,

("McDonald's")

and

____

____

(collectively "Franchisee")

for the purpose of granting the Franchisee the rights necessary to operate the Restaurant.

In consideration of the mutual rights and obligations contained herein McDonald's and Franchisee agree as follows:

1. ***Nature and Scope of Franchise***.

(a) McDonald's operates a restaurant system ("McDonald's System"). The McDonald's System is a comprehensive system for the ongoing development, operation, and maintenance of McDonald's restaurant locations which have been selected and developed for

the retailing of a limited menu of uniform and quality food products, emphasizing prompt and courteous service in a clean, wholesome atmosphere which is intended to be attractive to children and families and includes proprietary rights in certain valuable trade names, service marks, and trademarks, including the trade names "McDonald's" and "McDonald's Hamburgers," designs and color schemes for restaurant buildings, signs, equipment layouts, formulas and specifications for certain food products, methods of inventory and operation control, bookkeeping and accounting, and manuals covering business practices and policies. The McDonald's System is operated and is advertised widely within the United States of America and in certain foreign countries.

(b) McDonald's holds the right to authorize the adoption and use of the McDonald's System at the Restaurant. The rights granted to the Franchisee to operate the Restaurant are set forth in this Franchise, including the Operator's Lease ("Lease") which is attached hereto as Exhibit A, incorporated in this Franchise.

(c) The foundation of the McDonald's System and the essence of this Franchise is the adherence by Franchisee to standards and policies of McDonald's providing for the uniform operation of all McDonald's restaurants within the McDonald's System including, but not limited to, serving only designated food and beverage products; the use of only prescribed equipment and building layout and designs; strict adherence to designated food and beverage specifications and to McDonald's prescribed standards of Quality, Service, and Cleanliness in the Restaurant operation. Compliance by Franchisee

with the foregoing standards and policies in conjunction with the McDonald's trademarks and service marks provides the basis for the valuable goodwill and wide family acceptance of the McDonald's System. Moreover, the establishment and maintenance of a close personal working relationship with McDonald's in the conduct of Franchisee's McDonald's restaurant business, Franchisee's accountability for performance of the obligations contained in this Franchise, and Franchisee's adherence to the tenets of the McDonald's System constitute the essence of this Franchise.

(d) The provisions of this Franchise shall be interpreted to give effect to the intent of the parties stated in this paragraph 1 so that the Restaurant shall be operated in conformity to the McDonald's System through strict adherence to McDonald's standards and policies as they exist now and as they may be from time to time modified.

(e) Franchisee acknowledges Franchisee's understanding of McDonald's basic business policy that McDonald's will grant franchises only to those individuals who live in the locality of their McDonald's restaurant, actually own the entire equity interest in the business of the Restaurant and its profits, and who will work full time at their McDonald's restaurant business. Franchisee represents, warrants, and agrees that Franchisee actually owns the complete equity interest in this Franchise and the profits from the operation of the Restaurant, and that Franchisee shall maintain such interest during the term of this Franchise except only as otherwise permitted pursuant to the terms and conditions of this Franchise. Franchisee agrees to furnish McDonald's

with such evidence as McDonald's may request, from time to time, for the purpose of assuring McDonald's that Franchisee's interest remains as represented herein.

(f) Franchisee agrees to pay to McDonald's all required payments under this Franchise, including, without limitation, the payments set forth in paragraphs 8 and 9 herein and paragraph 3.01 of the Lease. All payments hereby required constitute a single financial arrangement between Franchisee and McDonald's which, taken as a whole and without regard to any designation or descriptions, reflect the value of the authorization being made available to the Franchisee by McDonald's in this Franchise and the services rendered by McDonald's during the term hereof.

2. ***Franchise Grant and Term***.

(a) McDonald's grants to Franchisee for the following stated term the right, license, and privilege:

(i) to adopt and use the McDonald's System at the Restaurant;

(ii) to advertise to the public that Franchisee is a franchisee of McDonald's;

(iii) to adopt and use, but only in connection with the sale of those food and beverage products which have been designated by McDonald's at the Restaurant, the trade names, trademarks, and service marks which McDonald's shall designate, from time to time, to be part of the McDonald's System; and

(iv) to occupy the Restaurant as provided herein.

The rights granted under this Franchise are limited to the Restaurant's location only.

(b) The term of this Franchise shall begin on ________________ and end on ________________, unless terminated prior thereto pursuant to the provisions hereof.

3. ***General Services of McDonald's***. McDonald's shall advise and consult with Franchisee periodically in connection with the operation of the Restaurant and also, upon Franchisee's request, at other reasonable times. McDonald's shall communicate to Franchisee know-how, new developments, techniques, and improvements in areas of restaurant management, food preparation, and service which are pertinent to the operation of a restaurant using the McDonald's System. The communications shall be accomplished by visits by operations consultants, printed and filmed reports, seminars, and newsletter mailings. McDonald's shall also make available to Franchisee all additional services, facilities, rights, and privileges relating to the operation of the Restaurant which McDonald's makes generally available, from time to time, to all its franchisees operating McDonald's restaurants.

4. ***Manuals***. McDonald's shall provide Franchisee with the business manuals prepared for use by franchisees of McDonald's restaurants similar to the Restaurant. The business manuals contain detailed information including: (a) required operations procedures; (b) methods of inventory control; (c) bookkeeping and accounting procedures; (d) business practices and policies; and (e) other management and advertising policies. Franchisee agrees to promptly adopt and use exclusively the formulas, methods, and policies contained in the business manuals, now and as they may be modified from time to time. Franchisee acknowledges that

McDonald's or its affiliates own all proprietary rights in and to the McDonald's System and that the information revealed in the business manuals, in their entirety, constitute confidential trade secrets. Without the prior written consent of McDonald's, Franchisee shall not disclose the contents of the business manuals to any person, except employees of Franchisee for purposes related solely to the operation of the Restaurant, nor shall Franchisee reprint or reproduce the manuals in whole or in part for any purpose except in connection with instruction of employees in the operation of the Restaurant. Such manuals, as modified from time to time, and the policies contained therein, are incorporated in this Franchise by reference.

5. ***Advertising***. McDonald's employs both public relations and advertising specialists who formulate and carry out national and local advertising programs for the McDonald's System.

Franchisee shall use only advertising and promotional materials and programs provided by McDonald's or approved in advance, in writing, by McDonald's. Neither the approval by McDonald's of Franchisee's advertising and promotional material nor the providing of such material by McDonald's to Franchisee shall, directly or indirectly, require McDonald's to pay for such advertising or promotion.

Franchisee shall expend during each calendar year for advertising and promotion of the Restaurant to the general public an amount which is not less than four percent (4%) of Gross Sales (as that term is defined in paragraph 7) for such year. Expenditures by Franchisee to national and regional cooperative advertising and promotion of the McDonald's System, or to a group of McDonald's restaurants which

includes the Restaurant, shall be a credit against the required minimum expenditures for advertising and promotion to the general public.

6. ***Training***. McDonald's shall make available to Franchisee the services of Hamburger University, the international training center for the McDonald's System. Franchisee acknowledges the importance of quality of business operation among all restaurants in the McDonald's System and agrees to enroll Franchisee and Franchisee's managers, present and future, at Hamburger University or at such other training center as may be designated by McDonald's from time to time. McDonald's shall bear the cost of maintaining Hamburger University and any other training centers, including the overhead costs of training, staff salaries, materials, and all technical training tools, and agrees to provide to Franchisee both basic and advanced instruction for the operation of a McDonald's System restaurant. Franchisee shall pay all traveling, living, compensation, or other expenses incurred by Franchisee and Franchisee's employees in connection with attendance at Hamburger University or such other training centers.

7. ***Gross Sales***. For the purposes of this Franchise, the term "Gross Sales" shall mean all revenues from sales of the Franchisee based upon all business conducted upon or from the Restaurant, whether such sales be evidenced by check, cash, credit, charge account, exchange, or otherwise, and shall include, but not be limited to, the amounts received from the sale of goods, wares, and merchandise, including sales of food, beverages, and tangible property of every kind and nature, promotional or otherwise, and for services performed from or at the Restaurant, together with the amount

of all orders taken or received at the Restaurant, whether such orders be filled from the Restaurant or elsewhere. Gross Sales shall not include sales of merchandise for which cash has been refunded, provided that such sales shall have previously been included in Gross Sales. There shall be deducted from Gross Sales the price of merchandise returned by customers for exchange, provided that such returned merchandise shall have been previously included in Gross Sales, and provided that the sales price of merchandise delivered to the customer in exchange shall be included in Gross Sales. Gross Sales shall not include the amount of any sales tax imposed by any federal, state, municipal, or other governmental authority directly on sales and collected from customers, provided that the amount thereof is added to the selling price or absorbed therein and actually paid by the Franchisee to such governmental authority. Each charge or sale upon credit shall be treated as a sale for the full price in the month during which such charge or sale shall be made, irrespective of the time when the Franchisee shall receive payment (whether full or partial) therefor.

8. (a) ***Service Fee***. Franchisee shall pay a monthly service fee on or before the tenth (10th) day of the following month in an amount equal to four percent (4.0%) of the Gross Sales of the Restaurant for the preceding month immediately ended.

(b) ***Method of Payment***. Franchisee shall at all times participate in the McDonald's automatic debit/credit transfer program as specified by McDonald's from time to time for the payment of all amounts due McDonald's pursuant to this Franchise. Franchisee shall execute and deliver to McDonald's such documents and instruments as may be necessary

to establish and maintain said automatic debit/credit transfer program.

(c) ***Interest on Delinquencies***. In the event that the Franchisee is past due on the payment of any amount due McDonald's under this Franchise, including accrued interest, the Franchisee shall be required, to the extent permitted by law, to pay interest on the past due amount to McDonald's for the period beginning with the original due date for payment to the date of actual payment at an annual rate equal to the highest rate allowed by law or, if there is no maximum rate permitted by law, then fifteen percent (15%). Such interest will be calculated on the basis of monthly compounding and the actual number of days elapsed divided by 365.

9. ***Initial Fee***. Franchisee acknowledges that: (a) the initial grant of this Franchise constitutes the sole consideration for the payment of an Initial Fee of Forty-Five Thousand Dollars ($45,000.00) paid by Franchisee to McDonald's; and (b) the fee has been earned by McDonald's (except where the construction of the Restaurant has not been completed within one (1) year from the date of the execution and delivery of this Franchise). If the Restaurant has not been constructed or is not ready for occupancy at the time of the execution of this Franchise, McDonald's shall use its best efforts to expedite the construction and lease of the Restaurant to Franchisee. However, McDonald's shall not be liable to Franchisee in any manner for any delays in or lack of completion of such construction for any reason. McDonald's shall be under no obligation to enforce performance or to seek other remedies for non-performance of any lease, clause, or contract necessary for the construction of the Restaurant and reserves the right, in case

construction of the Restaurant should be abandoned, the lease assigned, or other interest in the premises be relinquished, to terminate this Franchise upon reimbursement to Franchisee of the Initial Fee. At such time as the Restaurant is completed and ready for occupancy, the Initial Fee shall be deemed to be earned. If the Restaurant is not ready for occupancy within one (1) year from the date of this Franchise, Franchisee shall have the right to terminate this Franchise and obtain an immediate refund of the Initial Fee upon written request to McDonald's.

10. ***Reports***. On or before 11:00 a.m. Central Standard Time on the first business day of each month, Franchisee shall render, in a manner specified by McDonald's, a statement, in such form as McDonald's shall reasonably require from time to time, of all receipts from the operation of the Restaurant for the preceding month immediately ended. On or before the twenty-fifth (25th) day of each month Franchisee shall submit to McDonald's an operating statement and a statistical report for the previous month in form satisfactory to McDonald's. Franchisee shall keep and preserve full and complete records of Gross Sales for at least three (3) years in a manner and form satisfactory to McDonald's and shall also deliver such additional financial and operating reports and other information as McDonald's may reasonably request on the forms and in the manner prescribed by McDonald's. Franchisee further agrees to submit within ninety (90) days following the close of each fiscal year of the Restaurant's operation, a profit and loss statement covering operations during such fiscal year and a balance sheet taken as of the close of such fiscal year, all prepared in accordance with generally accepted accounting principles. The profit and loss statement and the balance sheet shall,

if McDonald's shall request certification, be certified by a certified public accountant. Franchisee shall at Franchisee's expense cause Franchisee's public accountant and certified public accountant, if any, to consult with McDonald's concerning such statement and balance sheet. The original of each such report required by this paragraph 10 shall be mailed to McDonald's at the address indicated in paragraph 22 herein.

McDonald's shall have the right to inspect and/or audit Franchisee's accounts, books, records, and tax returns at all reasonable times to ensure that Franchisee is complying with the terms of this Franchise. If such inspection discloses that Gross Sales actually exceeded the amount reported by Franchisee as Gross Sales by an amount equal to two percent (2%) or more of Gross Sales originally reported to McDonald's, Franchisee shall bear the cost of such inspection and audit.

11. ***Restrictions***. Franchisee agrees and covenants as follows:

(a) During the term of this Franchise, Franchisee shall not, without the prior written consent of McDonald's, directly or indirectly, engage in, acquire any financial or beneficial interest (including interests in corporations, partnerships, trusts, unincorporated associations, or joint ventures) in, or become a landlord for any restaurant business, which is similar to the Restaurant.

(b) Franchisee shall not, for a period of eighteen (18) months after termination of this Franchise for any reason or the sale of the Restaurant, directly or indirectly, engage in or acquire any financial or beneficial interest (including any interest in

corporations, partnerships, trusts, unincorporated associations, or joint ventures) in, or become a landlord of any restaurant business which is similar to the Restaurant within a ten-mile radius of the Restaurant.

(c) Franchisee shall not appropriate, use, or duplicate the McDonald's System, or any portion thereof, for use at any other self-service, carry-out, or other similar restaurant business.

(d) Franchisee shall not disclose or reveal any portion of the McDonald's System to a non-franchisee other than to Franchisee's Restaurant employees as an incident of their training.

(e) Franchisee shall acquire no right to use, or to license the use of, any name, mark, or other intellectual property right granted or to be granted herein, except in connection with the operation of the Restaurant.

The restrictions contained in paragraphs 11(a) and 11(b) herein shall not apply to ownership of less than two percent (2%) of the shares of a company whose shares are listed and traded on a national or regional securities exchange.

12. ***Compliance With Entire System***. Franchisee acknowledges that every component of the McDonald's System is important to McDonald's and to the operation of the Restaurant as a McDonald's restaurant, including a designated menu of food and beverage products; uniformity of food specifications, preparation methods, quality, and appearance; and uniformity of facilities and service.

McDonald's shall have the right to inspect the Restaurant at all reasonable times to ensure that

Franchisee's operation thereof is in compliance with the standards and policies of the McDonald's System.

Franchisee shall comply with the entire McDonald's System, including, but not limited to, the following:

(a) Operate the Restaurant in a clean, wholesome manner in compliance with prescribed standards of Quality, Service, and Cleanliness; comply with all business policies, practices, and procedures imposed by McDonald's; serve at the Restaurant only those food and beverage products now or hereafter designated by McDonald's; and maintain the building, fixtures, equipment, signage, seating and decor, and parking area in a good, clean, wholesome condition and repair, and well lighted and in compliance with designated standards as may be prescribed from time to time by McDonald's;

(b) Purchase kitchen fixtures, lighting, seating, signs, and other equipment in accordance with the equipment specifications and layout initially designated by McDonald's and, promptly after notice from McDonald's that the Restaurant premises are ready for occupancy, cause the installation thereof;

(c) Keep the Restaurant constructed and equipped in accordance with the building blueprints and equipment layout plans that are standard in the McDonald's System or as such blueprints and plans may be reasonably changed from time to time by McDonald's;

(d) Franchisee shall not, without the prior written consent of McDonald's: (i) make any building design conversion or (ii) make any alterations, conversions, or additions to the building, equipment, or parking area;

(e) Make repairs or replacements required: (i) because of damage or wear and tear or (ii) in order to maintain the Restaurant building and parking area in good condition and in conformity to blueprints and plans;

(f) Where parking is provided, maintain the parking area for the exclusive use of Restaurant customers;

(g) Operate the Restaurant seven (7) days per week throughout the year and at least during the hours from 7:00 a.m. to 11:00 p.m., or such other hours as may from time to time be prescribed by McDonald's (except when the Restaurant is untenantable as a result of fire or other casualty), maintain sufficient supplies of food and paper products, and employ adequate personnel so as to operate the Restaurant at its maximum capacity and efficiency;

(h) Cause all employees of Franchisee, while working in the Restaurant, to: (i) wear uniforms of such color, design, and other specifications as McDonald's may designate from time to time; (ii) present a neat and clean appearance; and (iii) render competent and courteous service to Restaurant customers;

(i) In the dispensing and sale of food products: (i) use only containers, cartons, bags, napkins, other paper goods, and packaging bearing the approved trademarks and which meet the McDonald's System specifications and quality standards which McDonald's may designate from time to time; (ii) use only those flavorings, garnishments, and food and beverage ingredients which meet the McDonald's System specifications and quality standards which McDonald's may designate from time

to time; and (iii) employ only those methods of food handling and preparation which McDonald's may designate from time to time;

(j) To make prompt payment in accordance with the terms of invoices rendered to Franchisee on Franchisee's purchase of fixtures, signs, equipment, and food and paper supplies; and

(k) At Franchisee's own expense, comply with all federal, state, and local laws, ordinances, and regulations affecting the operation of the Restaurant.

13. ***Best Efforts***. Franchisee shall diligently and fully exploit the rights granted in this Franchise by personally devoting full time and best efforts and, in case more than one individual has executed this Franchise as the Franchisee, then ____________________ shall personally devote full time and best efforts to the operation of the Restaurant. Franchisee shall keep free from conflicting enterprises or any other activities which would be detrimental to or interfere with the business of the Restaurant.

14. ***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.

15. ***Assignment***. Without the prior written consent of McDonald's, Franchisee's interest in this

Franchise shall not be assigned or otherwise transferred in whole or in part (whether voluntarily or by operation of law) directly, indirectly, or contingently, and then only in accordance with the terms of this paragraph 15.

(a) Death or Permanent Incapacity of Franchisee. Upon the death or permanent incapacity of Franchisee, the interest of Franchisee in this Franchise may be assigned either pursuant to the terms of paragraph 15(d) herein or to one or more of the following persons: Franchisee's spouse, heirs, or nearest relatives by blood or marriage, subject to the following conditions: (i) if, in the sole discretion of McDonald's, such person shall be capable of conducting the Restaurant business in accordance with the terms and conditions of this Franchise and (ii) if such person shall also execute an agreement by which the person personally assumes full and unconditional liability for and agrees to perform all the terms and conditions of this Franchise to the same extent as the original Franchisee. If, in McDonald's sole discretion, such person cannot devote full time and best efforts to the operation of the Restaurant or lacks the capacity to operate the Restaurant in accordance with this Franchise, McDonald's shall have an option to operate and/or manage the Restaurant for the account of Franchisee or of Franchisee's estate until the deceased or incapacitated Franchisee's interest is transferred to another party acceptable to McDonald's in accordance with the terms and conditions of this Franchise. However, in no event shall such McDonald's operation and management of the Restaurant continue for a period in excess of twelve (12) full calendar months without the consent of Franchisee or Franchisee's estate. In the event that McDonald's so operates

and/or manages the Restaurant, McDonald's shall make a complete account to and return the net income from such operation to the Franchisee or to Franchisee's estate, less a reasonable management fee and expenses. If the disposition of the Restaurant to a party acceptable to McDonald's has not taken place within twelve (12) months from the date that McDonald's has commenced the operation or management of the Restaurant on behalf of the deceased or incapacitated Franchisee, then, in that event, McDonald's shall have the option to purchase the Restaurant at fair market value for cash or its common stock at its option.

(b) Assignment to Franchisee's Corporation. Upon Franchisee's compliance with such requirements as may from time to time be prescribed by McDonald's, including a Stockholders Agreement in the form prescribed by McDonald's, McDonald's shall consent to an assignment to a corporation whose shares are wholly owned and controlled by Franchisee. The corporate name of the corporation shall not include any of the names or trademarks granted by this Franchise. Any subsequent assignment or transfer, either voluntarily or by operation of law, of all or any part of said shares shall be made in compliance with the terms and conditions set forth in paragraphs 15(a) and 15(d) herein.

(c) First Option to Purchase. Franchisee or Franchisee's representative shall, at least twenty (20) days prior to the proposed effective date, give McDonald's written notice of intent to sell or otherwise transfer this Franchise pursuant to paragraph 15(d). The notice shall set forth the name and address of the proposed purchaser and all the terms and conditions of any offer. McDonald's shall

have the first option to purchase the Restaurant by giving written notice to Franchisee of its intention to purchase on the same terms as the offer within ten (10) days following McDonald's receipt of such notice. However, if McDonald's fails to exercise its option and the Restaurant is not subsequently sold to the proposed purchaser for any reason, McDonald's shall continue to have, upon the same conditions, a first option to purchase the Restaurant upon the terms and conditions of any subsequent offer.

(d) Other Assignment. In addition to any assignments or contingent assignments contemplated by the terms of paragraphs 15(a) and 15(b), Franchisee shall not sell, transfer, or assign this Franchise to any person or persons without McDonald's prior written consent. Such consent shall not be arbitrarily withheld.

In determining whether to grant or to withhold such consent, McDonald's shall consider of each prospective transferee, by way of illustration, the following: (i) work experience and aptitude, (ii) financial background, (iii) character, (iv) ability to personally devote full time and best efforts to managing the Restaurant, (v) residence in the locality of the Restaurant, (vi) equity interest in the Restaurant, (vii) conflicting interests, and (viii) such other criteria and conditions as McDonald's shall then apply in the case of an application for a new franchise to operate a McDonald's restaurant. McDonald's consent shall also be conditioned each upon such transferee's execution of an agreement by which transferee personally assumes full and unconditional liability for and agrees to perform from the date of such transfer all obligations, covenants, and agreements contained in this Franchise to the same

extent as if transferee had been an original party to this Franchise. Franchisee and each transferor shall continue to remain personally liable for all affirmative obligations, covenants, and agreements contained herein for the full term of this Franchise or for such shorter period as McDonald's may, in its sole discretion, determine. Upon each assignment or other transfer of this Franchise to any person or persons under the terms and conditions of this paragraph 15(d), the percentage service fee charge owing to McDonald's after the date of such assignment or transfer shall be automatically adjusted to the then prevailing percentage service fee charge required under new Franchises issued by McDonald's for similar McDonald's restaurants at the time of such assignment or transfer.

16. ***Franchisee Not an Agent of McDonald's***. Franchisee shall have no authority, express or implied, to act as agent of McDonald's or any of its affiliates for any purpose. Franchisee is, and shall remain, an independent contractor responsible for all obligations and liabilities of, and for all loss or damage to, the Restaurant and its business, including any personal property, equipment, fixtures, or real property connected therewith, and for all claims or demands based on damage or destruction of property or based on injury, illness, or death of any person or persons, directly or indirectly, resulting from the operation of the Restaurant. Further, Franchisee and McDonald's are not and do not intend to be partners, associates, or joint employers in any way and McDonald's shall not be construed to be jointly liable for any acts or omissions of Franchisee under any circumstances.

17. ***Insurance***. Franchisee shall, upon taking possession of the Restaurant, acquire and maintain in effect such insurance with such coverages as may be required by the terms of any lease of the Restaurant premises to McDonald's, and in any event, Franchisee shall acquire and maintain in effect not less than the following coverages in the following minimum amounts:

(a) Worker's Compensation insurance prescribed by law in the state in which the Restaurant is located and Employer's Liability Insurance with $100,000/$500,000/$100,000 minimum limit. If the state in which the Restaurant is located allows the option of not carrying Worker's Compensation Insurance, and Franchisee chooses to exercise that option, Franchisee shall nonetheless carry and maintain other insurance with coverage and limits as approved by McDonald's.

(b) Commercial general liability insurance in a form approved by McDonald's with a limit of $5,000,000 per occurrence/$5,000,000 aggregate.

(c) All such insurance as may be required under the Lease.

All insurance policies required to be carried hereunder shall name McDonald's and any party designated by McDonald's as additional insureds, as their interests may appear in this Franchise. All policies shall be effective on or prior to the date Franchisee is given possession of the Restaurant premises for the purpose of installing equipment or opening the Restaurant, whichever occurs first, and evidence of payment of premiums and duplicate copies of policies of the insurance required herein shall be delivered to McDonald's at least thirty

(30) days prior to the date that Franchisee opens for business and/or thirty (30) days prior to the expiration date of an existing policy of insurance. All policies of insurance shall include a provision prohibiting cancellations or material changes to the policy thereof until thirty (30) days prior written notice has been given to McDonald's.

In the event Franchisee shall fail to obtain the insurance required herein, McDonald's may, but is not obligated to, purchase said insurance, adding the premiums paid to Franchisee's monthly rent. (Franchisee may authorize McDonald's to purchase and to administer the required minimum insurance on Franchisee's behalf. However, McDonald's, by placement of the required minimum insurance, assumes no responsibility for premium expense nor guarantees payment for any losses sustained by Franchisee.) McDonald's may relieve itself of all obligations with respect to the purchase and administration of such required insurance coverage by giving ten (10) days written notice to Franchisee.

All insurance shall be placed with a reputable insurance company licensed to do business in the state in which the Restaurant is located and having a Financial Size Category equal to or greater than IX and Policyholders Rating of "A+" or "A", as assigned by Alfred M. Best and Company, Inc., unless otherwise approved by McDonald's.

18. ***Material Breach***. The parties agree that the happening of any of the following events shall constitute a material breach of this Franchise and violate the essence of Franchisee's obligations and, without prejudice to any of its other rights or remedies at law or in equity, McDonald's, at its election, may

terminate this Franchise upon the happening of any of the following events:

(a) Franchisee shall fail to maintain and operate the Restaurant in a good, clean, wholesome manner and in compliance with the standards prescribed by the McDonald's System;

(b) Franchisee shall be adjudicated a bankrupt, become insolvent, or a receiver, whether permanent or temporary, for all or substantially all of Franchisee's property, shall be appointed by any court, or Franchisee shall make a general assignment for the benefit of creditors, or a voluntary or involuntary petition under any bankruptcy law shall be filed with respect to Franchisee and shall not be dismissed within thirty (30) days thereafter;

(c) Any payment owing to McDonald's is not paid within thirty (30) days after the date such payment is due;

(d) Any judgment or judgments aggregating in excess of $5,000.00 against Franchisee or any lien in excess of $5,000.00 against Franchisee's property shall remain unsatisfied or unbonded of record in excess of thirty (30) days;

(e) Franchisee shall cause, suffer, or permit (voluntarily or involuntarily) Franchisee's right of possession as lessee or sublessee of the premises on which the Restaurant is located to be terminated prematurely for any cause whatever;

(f) Franchisee shall acquire any interest in a business in violation of paragraph 11(a);

(g) Franchisee shall duplicate the McDonald's System in violation of paragraph 11(c);

(h) Franchisee shall make or cause a disclosure of any portion of the McDonald's System in violation of paragraph 11(d) or shall make or cause a disclosure of part of the McDonald's System business manuals;

(i) Franchisee shall violate paragraph 11(e) by use of any name, trademark, service mark, or other intellectual property right exceeding the restrictions of said paragraph 11;

(j) Franchisee shall knowingly sell food or beverage products other than those designated by McDonald's or which fail to conform to McDonald's System specifications for those products, or which are not prepared in accordance with the methods prescribed by McDonald's, or fail to sell products designated by McDonald's;

(k) Any assignment or other transfer of any interest of the Franchisee in this Franchise shall occur in violation of paragraph 15(d) herein;

(l) Franchisee shall deny McDonald's the right to inspect the Restaurant at reasonable times;

(m) Franchisee shall fail to make or make repeated delays in the prompt payment of undisputed invoices from suppliers or in the remittance of payments as required by this Franchise;

(n) Franchisee makes any misrepresentations to McDonald's relating to the acquisition and/or ownership of this Franchise;

(o) Franchisee engages in public conduct which reflects materially and unfavorably upon the operation of the Restaurant, the reputation of the McDonald's System, or the goodwill associated with the McDonald's trademarks; provided that engaging

in legitimate political activity (including testifying, lobbying, or otherwise attempting to influence legislation) shall not be grounds for termination;

(p) Franchisee is convicted of, pleads guilty or no contest to a felony, or any other crime that is reasonably likely to adversely affect the McDonald's System, the Restaurant, or the goodwill associated with the McDonald's trademarks; or

(q) Franchisee intentionally understates Gross Sales reported to McDonald's.

19. ***Other Breaches***. If Franchisee fails in the performance of any of the terms and conditions of this Franchise (other than performance of the terms and conditions listed in paragraph 18), Franchisee shall be guilty of a breach of this Franchise which shall not (except in the case of repeated breaches of the same or of different terms and conditions of this Franchise) constitute grounds for termination of this Franchise. McDonald's shall have the right to seek judicial enforcement of its rights and remedies, including, but not limited to, injunctive relief, damages, or specific performance. Notwithstanding any of the provisions of this paragraph 19, any uncured breach of the terms of this Franchise (whether of paragraph 18 or 19) shall be sufficient reason for McDonald's to withhold approval of its consent to any assignment or transfer of Franchisee's interest in this Franchise provided for herein.

20. ***Effect of Termination***.

(a) In the event of any material breach of this Franchise, McDonald's shall have an immediate right to enter and take possession of the Restaurant in order to maintain continuous operation of the Restaurant, to provide for orderly change of

management and disposition of personal property, and to otherwise protect McDonald's interest.

(b) Upon termination of this Franchise due to any breach or breaches, Franchisee shall not, without the prior written consent of McDonald's, remove any furniture, fixtures, signs, equipment, other property, or leasehold improvements from the premises either prior to or for a period of thirty (30) days following such termination. McDonald's shall have the option for thirty (30) days following any such termination to purchase Franchisee's furniture, fixtures, signs, equipment, other property, and leasehold improvements or any portion thereof for a sum equal to the fair market value of such property. In the event of such a termination, there shall be no payment by McDonald's for intangible assets of Franchisee.

(c) Upon termination of this Franchise due to the expiration of its term or as a result of any eminent domain proceedings affecting the premises upon which the Restaurant is situated, Franchisee shall not remove any furniture, fixtures, signs, equipment, other property, or leasehold improvements within sixty (60) days prior to the date specified for termination or the date specified for takeover by any public authority. McDonald's shall, upon written notice of its intention to purchase said property at least thirty (30) days prior to such date of termination, have the option to purchase Franchisee's furniture, fixtures, signs, equipment, other property, and leasehold improvements or any portion thereof for a sum equal to the fair market value of such property. In the event of such a termination, there shall be no payment by McDonald's for intangible assets of Franchisee.

(d) Upon termination or expiration of this Franchise, Franchisee shall: (i) forthwith return to McDonald's the business manuals furnished to Franchisee, together with all other material containing trade secrets, operating instructions, or business practices; (ii) discontinue the use of the McDonald's System and its associated trade names, service marks, and trademarks or the use of any and all signs and printed goods bearing such names and marks, or any reference to them; (iii) not disclose, reveal, or publish all or any portion of the McDonald's System; and (iv) not thereafter use any trade name, service mark, or trademark similar to or likely to be confused with any trade name, service mark, or trademark used at any time in the McDonald's System.

21. ***Effect of Waivers***. No waiver by McDonald's or any breach or a series of breaches of this Franchise shall constitute a waiver of any subsequent breach or waiver of the terms of this Franchise.

22. ***Notices***. Any notice hereunder shall be in writing and shall be delivered by personal service or by United States certified or registered mail, with postage prepaid, addressed to Franchisee at the Restaurant or to McDonald's at **ONE McDONALD'S PLAZA, OAK BROOK, ILLINOIS 60523**. Either party, by a similar written notice, may change the address to which notices shall be sent.

23. ***Cost of Enforcement***. If McDonald's institutes any action at law or in equity against Franchisee to secure or protect McDonald's rights under or to enforce the terms of this Franchise, in addition to any judgment entered in its favor, McDonald's shall be entitled to recover such reasonable attorneys' fees as may be allowed by the

court together with court costs and expenses of litigation.

24. ***Indemnification***. If McDonald's shall be subject to any claim, demand, or penalty or become a party to any suit or other judicial or administrative proceeding by reason of any claimed act or omission by Franchisee or Franchisee's employees or agents, or by reason of any act occurring on the Restaurant premises, or by reason of an omission with respect to the business or operation of the Restaurant, Franchisee shall indemnify and hold McDonald's harmless against all judgments, settlements, penalties, and expenses, including attorneys' fees, court costs, and other expenses of litigation or administrative proceeding, incurred by or imposed on McDonald's in connection with the investigation or defense relating to such claim, litigation, or administrative proceeding and, at the election of McDonald's, Franchisee shall also defend McDonald's.

25. ***Construction and Severability***. All references in this Franchise to the singular shall include the plural where applicable. If any part of this Franchise for any reason shall be declared invalid, such decision shall not affect the validity of any remaining portion, which shall remain in full force and effect. In the event that any material provision of this Franchise shall be stricken or declared invalid, McDonald's reserves the right to terminate this Franchise.

26. ***Scope and Modification of Franchise***. This Franchise (including Exhibit A and any riders hereto) constitutes the entire agreement between the parties and supersedes all prior and contemporaneous, oral or written, agreements or understandings of the parties. Nothing in this

Franchise or in any related agreement, however, is intended to disclaim the representations made in the Franchise Disclosure Document furnished to Franchisee. No interpretation, change, termination, or waiver of any of the provisions hereof shall be binding upon McDonald's unless in writing signed by an officer or franchising director of McDonald's, and which is specifically identified as an amendment hereto. No modification, waiver, termination, rescission, discharge, or cancellation of this Franchise shall affect the right of any party hereto to enforce any claim or right hereunder, whether or not liquidated, which occurred prior to the date of such modification, waiver, termination, rescission, discharge, or cancellation.

27. ***Governing Laws***. The terms and provisions of this Franchise shall be interpreted in accordance with and governed by the laws of the state of Illinois.

28. ***Acknowledgment***. Franchisee acknowledges that:

(a) The term of this Franchise is set forth in paragraph 2(b) hereof with no promise or representation as to the renewal of this Franchise or the grant of a new franchise;

(b) Franchisee hereby represents that Franchisee has received a copy of this Franchise, has read and understands all obligations being undertaken, and has had an opportunity to consult with Franchisee's attorney with respect thereto at least seven (7) calendar days prior to execution;

(c) No representation has been made by McDonald's as to the future profitability of the Restaurant;

(d) Prior to the execution of this Franchise, Franchisee has worked at a McDonald's restaurant and has had ample opportunity to contact existing franchisees of McDonald's and to investigate all representations made by McDonald's relating to the McDonald's System;

(e) This Franchise establishes the Restaurant at the location specified on page 1 hereof only and that no "exclusive," "protected," or other territorial rights in the contiguous market area of such Restaurant is hereby granted or inferred;

(f) This Franchise supersedes any and all other agreements and representations respecting the Restaurant and contains all the terms, conditions, and obligations of the parties with respect to the grant of this Franchise; however, nothing in this Franchise or in any related agreement is intended to disclaim the representations made in the Franchise Disclosure Document furnished to Franchisee;

(g) McDonald's or its affiliates are the sole owner(s) of the trademarks, trade names, service marks, and goodwill associated therewith, respectively, and Franchisee acquires no right, title, or interest in those names and marks other than the right to use them only in the manner and to the extent prescribed and approved by McDonald's;

(h) No future franchise or offers of franchises for additional McDonald's restaurants, other than this Franchise, have been promised to Franchisee and any other franchise offer shall only be in writing, executed by an officer or franchising director of McDonald's, and identified as a Franchise Agreement or Rewrite (New Term) Offer Letter;

(i) Neither McDonald's nor anyone acting on its behalf has made any representations, inducements, promises, or agreements, orally or otherwise, respecting the subject matter of this Franchise, which is not embodied herein or set forth in the Franchise Disclosure Document; and

(j) This Franchise is offered to Franchisee personally and to no others, and may not be accepted by any other person, partnership, or corporation, or transferred by assignment, will, or operation of law.

IN WITNESS WHEREOF, the parties hereto set their hands and seals, in duplicate, the day and year in this instrument first above written.

McDONALD'S USA, LLC	**Franchisee**
By: ____________________	____________________
	Date
Prepared By: __________	____________________
	Date