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

LEINANI DESLANDES, on Behalf of Herself and All Others Similarly Situated, Plaintiff, v. McDONALD'S USA, LLC, *et al.*, Defendants.	Civil Case No. 17-cv-04857 Judge Jorge L. Alonso Magistrate Judge M. David Weisman
STEPHANIE TURNER, on Behalf of Herself and All Others Similarly Situated, Plaintiff, v. McDONALD'S USA, LLC, *et al.*, Defendants.	Civil No. 19-cv-05524

PLAINTIFFS' SUPPLEMENTAL BRIEF RE: *NCAA V. ALSTON*

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I. INTRODUCTION

NCAA v. Alston, 141 S. Ct. 2141 (2021), did not review a class certification order, so it does not squarely address Plaintiffs' motion. Nevertheless, its guidance on antitrust law confirms that class-wide evidence answers the common question whether McDonald's No-Hire Agreement was unlawful. Plaintiffs' motion should be granted.

Alston reiterates that the rule of reason is flexible, and requires a court to "furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint' to ensure that it unduly harms competition." 141 S. Ct. at 2160 (citation omitted). This Court has already held that an abbreviated form of the rule of reason—the quick-look test—is appropriate given the predictable anticompetitive effects that ensue from an explicit agreement between employers to refrain from competing for workers, a market allocation. Dkt. 53 at 14-15. The evidence here confirms the Court's holding at the pleading stage. The No-Hire Agreement's purpose was to prevent bidding wars among McOpCo and franchisees for employees, a fact even McDonald's purported defense of "protecting" investments in training concedes. Dr. Singer's regressions confirm the No-Hire Agreement suppressed wages, even after accounting for local economic factors and non-McDonald's employers. Applying the quick-look test is appropriate under *Alston*.

Even if a more elaborate version of the rule of reason applied, Plaintiffs have introduced class-wide evidence to meet that burden under *Alston*. Dr. Singer's finding of wage suppression would not be possible unless McDonald's and its franchisees collectively possessed wage-setting power over their employees notwithstanding the existence of other employers. That is precisely what *Alston* defines as the plaintiff's initial burden under the rule of reason. Thus, here, there is little practical difference between the quick-look test and an appropriately-fashioned rule of reason inquiry.

Notwithstanding *Alston*'s clear message, McDonald's manages to find a way to turn the opinion—a unanimous victory for the *plaintiffs*—on its head. It wrongly asserts that *Alston* requires more in *this* case because labor restraints supposedly involve "potential procompetitive

benefits," and courts have not amassed sufficient experience "to bless or condemn them 'after only a quick look.'" Dkt. 367-1 at 2 (quoting *Alston*, 141 S. Ct. at 2156).

But this is wrong on at least two counts. *First*, the mere existence of purported procompetitive justifications cannot preclude the quick-look test. That is the *entire point* of the quick-look test: to give a defendant a chance to justify alleged misconduct that appears similar to a *per se* violation. *Second*, there is no special antitrust deference given to those who restrain competition for labor. *Alston* discusses approvingly *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), which applied the *per se* standard to a horizontal agreement regarding lawyer compensation. 141 S. Ct. at 2159; *see also id.* at 2167-68 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."). Even in the specific and unusual context of NCAA athletics, where the product itself consists of performed coordination among competing schools, *Alston* acknowledges that the quick-look standard may be appropriate depending upon the nature of the restraint. *Id.* at 2155. For instance, *Alston* substantially relies upon *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), in which the Supreme Court condemned the NCAA's plan to televise college football with a quick look.

McDonald's also ignores a critical difference between *Alston* and this case. In *Alston*, the plaintiffs did not ask the Supreme Court to declare the NCAA rule unlawful under the quick-look test. Quite the opposite: the *defendant* NCAA asked the Court to ignore the plaintiffs' evidence of actual anticompetitive effects, and instead to "give[] its restrictions at most an 'abbreviated deferential review,' or a 'quick look,' before approving them." 141 S. Ct. at 2155. The Court explained that quick-look *approval* was inappropriate because the compensation cap had nothing to do with the rules needed to play the sports in question. *Id.* at 2156-57 (such circumstances "hardly . . . warrant quick-look *approval*" of NCAA's rule (emphasis added)). At the same time, *Alston* reiterated that a restraint could be *condemned* "after only a quick look" when it "obviously threaten[s]" anticompetitive harm. *Id.* at 2156. In rejecting the NCAA's attempt to

turn the quick-look test to its favor, the Supreme Court cited *Board of Regents*, where the Court had "invoked abbreviated anti-trust review as a path to condemnation, not salvation." *Id.* at 2157. There is simply no support for McDonald's position that *Alston* forecloses quick-look *condemnation* of McDonald's No-Hire Agreement.

Alston confirms the rule of reason is flexible and an abbreviated version such as the quick-look test is appropriate to condemn McDonald's No-Hire Agreement. Whichever test is applied, however, common evidence answers, on a class-wide basis, whether McDonald's No-Hire Agreement violated the antitrust laws.

II. ***ALSTON* CONFIRMS THE QUICK-LOOK TEST IS APPROPRIATE HERE**

In *Alston*, college football and basketball players alleged that the NCAA's restrictions on member schools' ability to provide education-related benefits to them were anticompetitive. The agreement eliminated horizontal competition because the schools compete against each other for student athletes. *Id.* at 2154. Contrary to McDonald's suggestion, the Court did *not* hold that the quick-look test could not be used to condemn the NCAA teams' compensation agreements. The plaintiffs did not ask the Court to do so, because they had developed actual evidence of anticompetitive effects, *i.e.*, that the college athletes would have likely earned more benefits without the challenged NCAA rule. *Id.* at 2152, 2154.

In addition, the Court emphasized that whether the quick-look test is appropriate depends on the relationship between the restraint and the product in question, quoting the Seventh Circuit for the proposition that, "[j]ust as the ability of ***McDonald's franchisees*** to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players." *Id.* at 2157 (quoting *Chi. Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (emphasis added)). In other words, legitimate cooperation between McDonald's and its franchisees with respect to their food menus and the like provides no justification to restrain competition for each other's workers. *See also Polygram Holding, Inc. v.*

F.T.C., 416 F.3d 29, 37 (D.C. Cir. 2005) (applying quick-look test to condemn a restraint because "[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement between competitors"). *See also* Dkt. 268 at 6 (citing record evidence that McDonald's and franchisees are independent employers who disclaim joint venture status).

Alston's reliance on *Chicago Professional Sports* in this context refutes another of McDonald's suggestions: the notion that the No-Hire Agreement's anticompetitive effects are somehow unpredictable merely because they arise in the context of a fast-food franchise, as if rudimentary principles of economics are suspended there. *Cf. Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 351 (1982) (rejecting notion that antitrust rules "must be rejustified for every industry that has not been subject to significant antitrust litigation"). But the existence of procompetitive justifications is not what differentiates the rule of reason from the quick-look test, because both allow for potential procompetitive justifications. The only difference is how stringent the plaintiff's initial burden will be. Thus, whether McDonald's has good reason for the restraint does not change that it is a labor-market division that suppresses worker wages.

McDonald's ignores this extensive discussion in *Alston*, twisting the meaning and import of the Supreme Court's analysis. The fallacy of McDonald's position is further clarified by a review of the *Board of Regents* case that *Alston* relied on as an example of quick-look condemnation. In *Board of Regents*, the Supreme Court reviewed the lawfulness of an NCAA rule limiting the number of times a team could televise a game as well as the networks on which it could appear. 468 U.S. at 92-94. The Supreme Court held that the rules "no doubt . . . limit[ed] members' freedom to negotiate and enter into their own television contracts," and thus "share[d] characteristics of restraints . . . previously held unreasonable." *Id.* at 98-99. Namely, because NCAA member schools "compete against each other to attract television revenues, not to mention fans and athletes," their "participat[ion] in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights

that can be offered to broadcasters . . . created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *Id.* at 99.

Board of Regents notes that such restraints are typically illegal *per se*, but that it would not apply that rule "to this case," emphasizing that "[t]his decision is *not* based on a lack of judicial experience with this type of arrangement," but rather because "this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 100-01 (emphasis added). Instead, the Court applied the quick-look test because "[t]he anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete." *Id.* at 106.

The NCAA, on the other hand, argued—much like McDonald's does here—that "its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market." *Bd. of Regents*, 468 U.S. at 109. But the Supreme Court rejected this proposition: "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 109 (citation omitted). Because the restraint on its face made price non-responsive to demand, no proof of market power was needed and the restraint "requires some competitive justification even in the absence of a detailed market analysis." *Id.* at 110 & n.42 (agreeing "[t]here was no need . . . to establish monopoly power in any precisely defined market"). The Court then rejected the NCAA's procompetitive justifications. *Id.* at 114-20.

Board of Regents and *Alston* confirm there is no credence to McDonald's assertion that *Alston* precludes condemnation of its No-Hire Agreement under the quick-look test. To the contrary, the salient points justifying quick-look condemnation in *Board of Regents* apply here: the restraint embodied in the No-Hire Agreement "limit[s] [franchisees'] freedom to negotiate and enter into [employment contracts]" with employees of McOpCo or other McDonald's franchisees, and it prevents McDonald's restaurants "from competing against each other on the

basis of price [i.e., wages paid to workers]." *Id.* at 99. Thus, "[i]ndividual competitors lose their freedom to compete," so the restraint "has the effect of reducing the importance of [employee] preference in setting [wages]," and "eliminates competitors from the market." *Id.* at 106-08.

Moreover, the Supreme Court confirmed this Court got it exactly right by holding that "the quick look approach can be used where an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect." Dkt. 53 at 9 (citation omitted). *See, e.g.*, *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 770 (1999) (explaining "quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained" (citing *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (condemning cap on coach salaries after a "quick look") and *Chi. Pro. Sports*, 961 F.2d at 674-76 (same re: broadcasting limitations))).[1]

In addition, *Alston* had no trouble characterizing the NCAA rule as a "horizontal" restraint given the relationship of the teams in the labor market, even though the plaintiffs proved only common adherence to a centralized NCAA rule, rather than separate proof of direct, bilateral agreements between each and every sports team. 141 S. Ct. at 2154. This refutes McDonald's argument that a class cannot be certified unless common proof of such direct agreements between each and every franchisee is introduced. Dkt. 299 at 20-26.

In sum, *Alston* provides further support for the Court's earlier order holding that Plaintiffs stated a plausible claim under quick-look review. *See* Dkt. 53.

[1] McDonald's is also wrong to suggest that, in a labor restraint case, *Alston* requires the anticompetitive effect in the labor market to be balanced against supposedly procompetitive benefits in a consumer market. *See* Dkt. 367-1 at 2. In fact, the Supreme Court expressly stated that it was *not* adopting such a requirement because the parties had not presented the question to the Court. *See Alston*, 141 S. Ct. at 2155 (explaining that some *amici* had challenged the suitability of a cross-market analysis but "the parties before us do not pursue this line" and "we express no views on [such issues]"). The language quoted by McDonald's came from the Court's summary of the *parties'* dispute, not a statement about what issues the Court believed required a "fuller review." *See id.* at 2157. If anything, the opposite is true, since the Court approvingly quoted from a Seventh Circuit decision explaining that product coordination is *irrelevant* to the lawfulness of labor restraints. *Id*. (quoting *Chi. Prof. Sports*, 95 F.3d at 600).

III. *ALSTON* CONFIRMS THAT THE RULE OF REASON IS FLEXIBLE AND MUST BE FASHIONED TO THE FACTS OF THE CASE

McDonald's also distorts *Alston*'s guidance on the rule of reason. *Alston* explains that the rule of reason involves a "three-step, burden-shifting framework," according to which: (1) the plaintiff has the burden to prove the challenged restraint has a substantial anticompetitive effect; (2) the defendant then has the burden to show a procompetitive rationale for the restraint; and, if successful, (3) the plaintiff then must demonstrate that said procompetitive efficiencies can be achieved through less anticompetitive means. 141 S. Ct. at 2160 (citation omitted).[2]

The Supreme Court emphasized that there is no one-size-fits-all rigid rule of reason test, as McDonald's suggests. To the contrary, the framework "do[es] not represent a rote checklist, nor may [the steps] be employed as an inflexible substitute for careful analysis." *Alston*, 141 S. Ct. at 2160. Rather, "what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances." *Id.* "The whole point of the rule of reason is to furnish 'an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint' to ensure that it unduly harms competition before a court declares it unlawful." *Id.*

A. Anticompetitive Effects May Be Proven With Class-wide Evidence

Plaintiffs satisfy their initial burden to demonstrate anticompetitive effects under the rule of reason by showing a defendant's wage-setting power. *Alston*, 141 S. Ct. at 2161.

Plaintiffs have introduced abundant class-wide evidence and methods showing that McDonald's restaurants had such power, including sophisticated econometric models confirming wage suppression beyond the highest standard degree of statistical confidence. Singer Rept. ¶¶ 21-28, 32-38, 39-65. Dr. Singer controlled for local wages in the quick-service restaurant industry and other local economic factors including minimum wage, demonstrating a wage effect notwithstanding the existence of other low-wage employers besides McDonald's. *Id.* ¶¶ 49-50,

[2] The difference between the rule of reason and the *per se* test is that for the latter category, the law conclusively presumes anticompetitive effects at step (1) and does not permit the defendant to attempt to justify it through procompetitive rationales at step (2). The difference between the rule of reason and the quick-look test is that the plaintiff's burden at step (1) is relaxed, but the defendant still has the opportunity to justify the restraint at step (2). All three tests answer the same question: whether a restraint is anticompetitive. *See Bd. of Regents*, 468 U.S. at 104. Thus, they are not three different legal claims, but three ways of assessing the same cause of action under the Sherman Act.

58-59. McDonald's does not propose any omitted variable, much less one capable of accounting for the wage suppression. These results confirm "rudimentary economics": when "competitors agree not to hire each other's employees, wages for employees will stagnate." Dkt. 53 at 14. That wage effect is only possible because McDonald's and its franchisees actually possess a meaningful degree of monopsony power over class members. Singer Rept. ¶¶ 25-28, 60-65. No further market definition exercise is required to reach that conclusion. *Id.*; Dkt. 268 at 22-26 (explaining classwide proof of monopsony power and impact); Dkt. 346 at 2-5; Dkt. 325 at 3-6.

Market definition cannot alter the analysis here because Dr. Singer's method of showing anticompetitive effects does not depend upon it. This is in line with standard and well-accepted methods of estimating wage effects in labor economics, including in peer-reviewed scholarship from McDonald's own expert. *E.g.*, Dkt. 325 at 3-6. This also follows the Supreme Court's guidance in *Board of Regents*, 468 U.S. at 110 & n.42, on which *Alston* substantially relies, as set forth above. No more should be required, particularly given that the No-Hire Agreement is an express market allocation among direct horizontal competitors—properly characterized by this Court as *competing* brands in the labor market.[3] Dkt. 53 at 15. Even if the franchise context precludes the *per se* standard (and it should not[4]), or even the quick-look test (it most certainly does not), the misconduct here is "close enough" to a naked market allocation that Plaintiffs may

[3] Indeed, because McOpCo also employs people to work in its own restaurants, it competes directly as an employer with franchisees. Dkt. 53 at 14-15 ("in the market for employees, the McDonald's franchisees and McOpCos within a locale are direct, horizontal, competitors"). The relationship between McOpCo and franchisees is thus even more horizontal than in *Alston*, because only the NCAA member schools—not the NCAA itself—compete for student athletes' labor.

[4] At the motion to dismiss stage, the Court reasoned that the No-Hire Agreement was "ancillary" because it was in the franchise agreements. Dkt. 53 at 13-14. Respectfully, this conclusion was premature. "[C]learly 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* ¶ 1908 (4th ed. 2021). Rather, it is only ancillary if necessary to achieve otherwise unattainable procompetitive benefits, a question of fact based on the substance of a restraint not the form in which it is memorialized. *See Blackburn v. Sweeney*, 53 F.3d 825, 827-29 (7th Cir. 1995) (holding that market division agreement within law firm dissolution agreement was "naked," not "ancillary," because "at the time it was entered it was not necessary for the dissolution of the partnership and the resulting potential increase in competition" and had "infinite duration"); *see also Bd. of Regents*, 468 U.S. at 110 (describing restraint as "naked" even though it was part of larger contract and collaborative activity); *Polygram Holding*, 416 F.3d at 37 (restraint in joint venture "naked" when concerning product outside the collaboration). At the merits stage, Plaintiffs will show that the No-Hire Agreement was unnecessary to any purported pro-competitive benefit, with common evidence.

satisfy their initial burden upon direct proof of market power through wage suppression, and then the burden would shift to McDonald's to attempt to justify the restraint. *See In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007-08 (7th Cir. 2012) (rejecting the proposition that the rule of reason always requires proof of market power through market definition because "even if a challenged practice doesn't quite rise to the level of *per se* illegality, it may be close enough to shift [the burden] to the defendant"). This is the appropriate "enquiry meet for the case." *Alston*, 141 S. Ct. at 2160 (citation omitted).

At the *merits* stage, whatever legal standard applies to the jury's evaluation of McDonald's No-Hire Agreement, Plaintiffs will use common evidence and methods to satisfy their initial burden. In addition to Dr. Singer's econometrics, Plaintiffs have marshalled other expert, documentary, and testimonial evidence that McDonald's employees receive specific, consistent training nationwide, creating a cognizable market for those skills among independent McDonald's restaurant employers. *See* Dkt. 346 at 3-4; Cappelli Rept. ¶¶ 48-62; Dkt. 325 at 5-6.

B. McDonald's Purported Procompetitive Justification Is A Common Question With A Common Answer

Under all versions of the rule of reason, once Plaintiffs have met their initial burden, then McDonald's must marshal *legitimate* procompetitive justifications.[5] *Alston*, 141 S. Ct. at 2160. McDonald's asserts the No-Hire Agreement "protects" franchisees' investment in training. Dkt. 299 at 3. But this is merely a euphemism for preventing labor competition and suppressing wages. Singer Rept. ¶ 88. To make this argument, McDonald's must admit that the No-Hire Agreement reduced franchisees' costs by removing the most obvious alternative employers (other McDonald's restaurants) from the competitive landscape, thus enabling them to pay their employees less than they otherwise would need to. As the Court observed, instead of "unlawful

[5] This will be a difficult task for McDonald's. As a leading authority on antitrust law, Professor Herbert Hovenkamp, has recently observed with respect *to this very case*, "broad limitations on inter-franchisee transfer of employees [should] be regarded with suspicion, "the usual free rider rationales . . . should not be accepted without clear proof that they apply in a particular case," and "[w]hat [economics] suggests is that the real initiative for these franchise wide agreements covering all types of employees is not the protection of learning at all, but rather cartel suppression of wages." Herbert J. Hovenkamp, *Competition Policy for Labour Markets*, U. of Penn. Inst. for Law & Econ. Research Paper No. 19-29, at 11-13 (May 17, 2019), available at https://scholarship.law.upenn.edu/faculty_scholarship/2090/.

market division," the obvious antidote to the threat of other employers hiring away workers is "paying higher wages/salaries." Dkt. 53 at 15. And this is what happened. When the No-Hire Agreement ended, Class member wages rose, and McDonald's continued to operate as before. McDonald's employers "protected" their investments in training by paying employees more competitive wages, without resorting to unlawful market division. This is the goal of the antitrust laws. "In the Sherman Act, Congress tasked Courts with enforcing a policy of competition on the belief that market forces 'yield the best allocation' of the Nation's resources." *Alston*, 141 S. Ct. at 2147 (quoting *Bd. of Regents*, 468 U.S. at 104 n.27).

McDonald's also suggests the No-Hire Agreement somehow makes McDonald's more competitive in the hamburger market. Dkt. 367-1 at 2. McDonald's cites no authority for the notion that a restraint in one market can be justified by purported benefits in another, and *Alston* "express[ed] no view[]" on this. 141 S. Ct. at 2155. *But see United States v. Topco Assocs., Inc.*, 405 U.S. 596, 611 (1972) ("If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion this . . . is a decision that must be made by Congress and not by private forces or by the courts."). But this unexplained and unsupported assertion is also mind-boggling: why would consumer preference or burger quality require workers with limited mobility and sub-competitive wages? These are not cognizable pro-competitive justifications. *Cf. Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) ("All of the restaurants in a region cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks."). Rather, it is just McDonald's invalid attempt to "launder its [restraint] of labor by calling it product definition." *Id.* at 2168.

Regardless, whether McDonald's has a legitimate procompetitive justification is a common question that will be resolved by common evidence, as McDonald's own expert admits. *See* Noss Decl., Ex. 1 at 185:6-8.

IV. CONCLUSION

Alston confirms that Plaintiffs' claims and McDonald's purported defenses can both be evaluated with common evidence that will generate class-wide answers.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dean M. Harvey, an attorney, hereby certify that the **Plaintiffs' Supplemental Brief re: *NCAA v. Alston*** was electronically filed on July 9, 2021 and will be served electronically via the Court's ECF Notice system upon the registered parties of record.

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