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. 17-cv-04857 Judge Jorge L. Alonso Magistrate Judge M. David Weisman
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STEPHANIE TURNER, on behalf of herself and all others similarly situated, Plaintiff, v. McDONALD'S USA, LLC, a Delaware limited liability company, and McDONALD'S CORPORATION, a Delaware corporation, Defendants.	)	Case No. 19-cv-05524 Judge Jorge L. Alonso Magistrate Judge M. David Weisman

DEFENDANTS' BRIEF REGARDING
THE SUPREME COURT'S *NCAA v. ALSTON* DECISION

I. Introduction

In *NCAA v. Alston*, the Supreme Court confirmed that for all but the most "obvious[]" antitrust claims, the rule of reason applies, thereby putting to rest any question regarding which mode of review governs ancillary labor market restraints that generate procompetitive benefits. 141 S. Ct. 2141, 2155–56 (2021). The Court leaves no room for doubt that where the rule of reason applies, "[w]hether an antitrust violation exists necessarily depends on a careful analysis of [the] market realities." *Id*. at 2158. Such an analysis rises and falls on a well-defined market. *Id*. Plaintiffs, who pinned their hopes on this Court's application of the quick look standard, have not defined, let alone established through common proof, the necessarily localized labor markets within which McDonald's restaurants compete for labor. Consequently, *Alston* counsels that class certification should be denied: the rule of reason is the only proper method for determining whether former Paragraph 14 violated the Sherman Act, and Plaintiffs fail either to allege a claim under that framework or to offer common evidence capable of proving such a claim. Plaintiffs' *own* evidence, and the record as whole, confirm that answers to the questions of market definition and market realities are fundamentally individualized.

II. Summary of Decision

In *NCAA v. Alston*, a class of student-athletes challenged various rules that fixed the compensation and benefits member schools could offer those competing in NCAA Division I football and basketball. 141 S. Ct. at 2141. These rules principally affected educational benefits (e.g., scholarships for graduate degrees and stipends for computers or tutoring) and non-educational benefits (e.g., cash payments akin to a professional athlete's salary check). *Id.* at 2153.

Alston stands apart in that many central antitrust questions were uncontested. 141 S. Ct. at 2154. The parties agreed on the relevant market ("athletic services in men's and women's Division I basketball and FBS [("Football Bowl Subdivision")] football"), *id.* at 2151–52, that "student-athletes have nowhere else to sell their labor," *id*. at 2156, that the NCAA thus had monopsony power, *id*., and that the NCAA's "admitted horizontal price fixing" of student-athletes' compensation "*in fact* decrease[d] the compensation that student-athletes receive[d] compared to what a

competitive market would yield," *id*. at 2154. In other words, the parties agreed on market definition, market power, and competitive effects. The parties disagreed, however, on the appropriate framework for antitrust review. *Id.* at 2155.

Answering that question in a unanimous opinion, the Court held that the rule of reason applied—rejecting the "abbreviated deferential review" proposed by the NCAA. *Alston*, 141 S. Ct. at 2155–57. The result in *Alston* was a plaintiff-side victory based on the agreed-upon facts, including anticompetitive impact on an undisputed and defined market. Relevant here, however, is the Court's clear explanation that "quick look" applies "only for restraints at opposite ends of the competitive spectrum"—those "so obviously incapable of harming competition that they require little scrutiny" (e.g., joint ventures with miniscule market shares) and at the other end those that "so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look." *Id*. at 2155–56. The rule of reason, by contrast, applies to all "restraints in the great in-between," including cases involving "restrictions in [a particular] labor market yield[ing] benefits in [a corresponding] consumer market" that "present[] complex questions requiring more than a blink to answer." *Id*. at 2155–57. Demonstrating the vastness of this "great in-between," the Court found "ordinary rule of reason review" was appropriate notwithstanding the NCAA's admitted monopsony power and that the challenged restraints "can (and in fact do) harm competition." *Id*. at 2156. That is because, the Court explained, in almost all cases, "[w]hether an antitrust violation exists necessarily *depends on a careful analysis of market realities*." *Id*. at 2158 (emphasis added).

The Court then turned to whether the lower court properly found the NCAA had failed to defend its restraints on education-related benefits under the rule of reason standard. The Court explained "that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes." *Alston*, 141 S. Ct. at 2161. Indeed, the Court acknowledged that "mistaken condemnations of legitimate business arrangements 'are especially costly'" and that attempting to "meter small deviations [from perfect competition] is not an appropriate antitrust function." *Id*. But based on the NCAA's "unpersuasive evidence" at trial regarding

the connection between a cap on education-related benefits and consumer demand for college sports, the Court found the district court correctly held that the NCAA's "legitimate objective" (amateurism) was not "promoted by the challenged restraint," and affirmed the injunction ordered. *Id*. at 2162.

III. Discussion

For reasons McDonald's has already explained, class certification should be denied under any standard. *See* Dkt. 299 at 11–15. But *Alston* makes clear that the rule of reason applies to this case—a holding determinative of Plaintiffs' class certification motion, as they neither pled a rule of reason claim despite multiple invitations by the Court to do so, nor sought to certify a class pursuing one. *See*, *e.g.*, Dkt. 53 at 16; Dkt. 346 at 2. Moreover, Plaintiffs did not offer classwide evidence that could ever prove a rule of reason claim, as they failed to provide evidence of plausible geographic or product markets or of McDonald's market power within such markets. And Plaintiffs have made no classwide showing to rebut McDonald's evidence of individualized procompetitive effects resulting from former Paragraph 14. Because Plaintiffs bear the burden at class certification with respect to each and every one of these elements, their motion for class certification should be denied.

A. Plaintiffs Offer No Classwide Proof Of A Rule Of Reason Claim

"[T]he Sherman Act 'presumptively' calls for . . . 'rule of reason analysis.'" *Alston*, 141 S. Ct. at 2151, quoting *Texaco Inc. v. Dagher*, 547 U. S. 1, 5 (2006). Plaintiffs bear the burden of persuading the Court to apply the per se or quick look analyses. *See Agnew v. NCAA*, 683 F.3d 328, 334–39 (7th Cir. 2012) (noting that "[t]he standard framework for analyzing an action's anticompetitive effects on a market is the Rule of Reason" and that other analyses require certain preliminary showings). This includes both vertical restraints such as franchise agreements, *see Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977) (holding that "vertical restrictions . . . can be adequately policed under the rule of reason"), as well as alleged horizontal agreements, *Alston*, 141 S. Ct. at 2154 (applying rule of reason analysis to suit involving "admitted

horizontal price fixing in a market where the defendants exercise monopoly control"). Under *Alston*, analysis of such restraints requires "'a fact-specific assessment of market power and market structure' aimed at assessing the challenged restraint's 'actual effect on competition'—especially its capacity to reduce output and increase price." *Id.*, quoting *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*Amex*"). Plaintiffs offer no classwide evidence capable of proving their claims under this framework.

***Alston* Confirms That The Rule Of Reason Controls.** Plaintiffs elected in this case to forgo a rule of reason claim and rely exclusively on a quick look framework that *Alston* confirms does not apply as a matter of law. Doubling down on that decision, Plaintiffs maintained that under the quick look framework, classwide evidence of market definition and market power were irrelevant and that they therefore need not engage in "[a]n elaborate market definition exercise" because "common evidence confirms" a "horizontal" restraint. Dkt. 346 at 2. That approach was always wrong. Dkt. 299 at 12–15. As *Alston* confirms, it is a dispositive failure of proof for two distinct reasons: (1) quick look does not apply here, and (2) under the rule of reason or quick look standard, Plaintiffs must be capable of proving market power in the relevant geographic and labor markets with common evidence.

Under *Alston*, the quick look analysis is expressly limited to those cases where courts "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.'" 141 S. Ct. at 2156, quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007). Courts have no such "considerable experience" with no-poach restrictions ancillary to vertical franchise agreements. Nor could a court predict with confidence that an ancillary no-poach restriction in the franchise context "would be invalidated in all or almost all instances." *Alston*, 141 S. Ct. at 2156 (quotation omitted). *Alston* makes this clear. There, the restraint challenged was much closer to the "end[] of the competitive spectrum" than was former Paragraph 14. *Id.* at 2155. The NCAA had undisputed monopsony power in an undisputed, defined labor market consisting of athletic services in Division I basketball and football, because such student-athletes had "nowhere else to

sell their labor." *Id.* at 2156. It was further agreed that the NCAA's rules were "admitted horizontal price fixing" that "*in fact* decrease[d] [student-athletes'] compensation" and suppressed output. *Id*. at 2154 (emphasis in original). That is, in *Alston*, a monopsonist admittedly suppressed wages in a well-defined market through undisputed horizontal wage-fixing. Even so, the Supreme Court declined to condemn (or bless) the NCAA's restraints "after only a quick look." *Id.* at 2156. Here, there is a similar dearth of decisions applying anything but the rule of reason in franchise no-poach cases. *See* Corrected Statement of Interest of the United States of America, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 8, 2019); *see also Williams v. Nevada*, 794 F. Supp. 1026, 1033 (D. Nev. 1992), *aff'd sub nom*. *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993) (applying rule of reason analysis to a franchise no-poach agreement and holding that "the purpose and effect of the hiring agreement" were not anticompetitive because the agreement did not bar *inter*brand competitors from hiring the employees subject to the restraint). Plaintiffs made a strategic decision in this case—not once, but twice—to allege only per se and quick look theories, and to forgo alleging a rule of reason claim. Dkt. 32 ¶¶ 133–34, Dkt. 180-1 ¶¶ 131–32, Dkt. 53 at 16. They also failed to offer classwide evidence capable of proving such a claim, insisting they had no obligation to do so. Dkt. 346 at 2. Having forgone a claim under the controlling theory of antitrust liability, *Alston*, 141 S. Ct. at 2155–57, and having failed to offer any evidence under which they can prove a cognizable claim, much less with common proof, class certification must be denied, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 355–58 (2011).

***Alston* Confirms Plaintiffs Must Offer Classwide Proof Of Market Power.** Labels aside, *Alston* also illustrates why discerning analysis of market realities is needed in cases like this one—and why Plaintiffs' failure to offer classwide proof is fatal to class certification. As the Court explained, the ultimate goal of any antitrust court is to devise "an enquiry meet for the case." *Alston*, 141 S. Ct. at 2160 (citations omitted). "Whether an antitrust violation exists necessarily depends on a careful analysis of market realities." *Id.* at 2158. The very question that drove the Supreme Court to conclude that "fuller review" was necessary in *Alston*—"whether and to what

extent [the challenged] restrictions in [a] labor market yield benefits in [a corresponding] consumer market"—is presented here. *Id.* at 2157.

Plaintiffs offer no classwide proof through which to answer that question, nor could they. As this Court recognized at an early stage of this case, "the type of work alleged in this case is likely to cover a relatively-small geographic area." Dkt. 53 at 16. Plaintiffs' expert Dr. Cappelli agreed: "[T]here may be labor markets of different geographic size and [] the key issue . . . might be the commuting distance." Dkt. 302-1, Ex. 3, Cappelli Dep. 235:15–236:21. But neither Plaintiffs' statistical expert Dr. Singer nor Dr. Cappelli undertook that analysis—or any market definition or market power analysis at all. Dkt. 299 at 13–15; Dkt. 301-1 at 4–8; Dkt. 300-1 at 4–6; Dkt. 336 at 2–8; Dkt. 337 at 2–6. When those analyses were actually undertaken by McDonald's expert Dr. Murphy, they showed that whether putative class members suffered any wage suppression under Dr. Singer's model turns (among other things) on where they worked. Dkt. 302-1, Ex. 2, Figs. 19–24; *see also* Dkt. 299 at 16–19. When deposed by Plaintiffs' counsel, the franchisee declarants testified to the local nature of competition for workers and to the effect of such local competition on wage decisions. *See*, *e.g.*, Dkt. 348-1, Ex. 3, Groen Dep. 96:10–97:12, 100:6–103:5; Ex. 4, Lopez Dep. 129:6–130:7, 146:23–147:13, 148:25–149:18 (testifying that they compete for employees with a broad range of employers in local geographic areas, and that wages are determined based on local market rates).

In response, Plaintiffs offer merely that "the service market for McDonald's restaurant workers" marks out the "rough contours" of a market. Dkt. 346 at 3. That does not satisfy their burden of proof. Mapping out "rough contours" is inconsistent with *Alston*, which confirmed that *Amex*'s categorical requirement for proving market definition applies in cases involving labor market restraints with cross-market procompetitive justifications. *See Amex*, 138 S. Ct. at 2285 & n.7 ("courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market," "actual evidence of adverse effects on competition" notwithstanding). Nor have Plaintiffs offered *any*, even "rough," geographic markets. Dkt. 299 at 12–15.

Plaintiffs are likely to argue that, if necessary, they *could* prove market definition and market power with common proof. Dkt. 270-5 ¶¶ 63–65; Dkt. 310-1, Ex. 4, Singer Dep. 154:3–157:7 (claiming that "however" market definition is done, it can be done with common methods and evidence). But that is too little too late. Plaintiffs bear that burden now—*at class certification*. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 811, 815 (7th Cir. 2012). Yet Dr. Singer conceded he never "commit[ed] to what the relevant geographic market is." Dkt. 310-1, Ex. 4, Singer Dep. 159:2–160:17. Plaintiffs similarly just assume that McDonald's has 100% share in a product market defined as McDonald's employment opportunities alone. Dkt. 346 at 3. But unlike the student-athletes in *Alston* who "have nowhere else to sell their labor," 141 S. Ct. at 2156, the undisputed record evidence in this case demonstrates that putative class members have a wide swath of other places to sell their labor. *See* Dkt. 302-1, Ex. 2 ¶¶ 110–22, Figs. 5–11. Thus, in contrast to the NCAA Division I basketball player with no other competitive amateur basketball option, *Alston*, 141 S. Ct. at 2156, the experiences of McDonald's workers generally, and of Ms. Turner and Ms. Deslandes specifically, speak to the ability of McDonald's employees to leverage their McDonald's training into higher wage jobs outside the McDonald's franchise system. Dkt. 302-1, Ex. 2 ¶¶ 111–19. McDonald's franchisees are thus akin to the joint ventures described in *Alston* as having so small a market share that they are "incapable of impairing competition." 141 S. Ct. at 2156. Class certification was Plaintiffs' opportunity to prove that they could define a relevant market (or markets) with actual classwide evidence. They did not do so: the only record evidence demonstrates that a market defined by McDonald's employment opportunities alone in which McDonald's restaurants have monopsony power does not exist.

This failure of evidence of classwide proof is not limited to the issue of market power. Market-specific evidence and analysis also bears on whether Plaintiffs can prove that anticompetitive effects outweigh procompetitive benefits on a classwide basis. *See Alston*, 141 S. Ct. at 2160–62. They cannot.

First, as McDonald's experts have explained, the conduct challenged here fostered multiple cross-market efficiencies such as investment in training, elimination of free-riding, and promotion

of cooperation among restaurants, all of which enhanced interbrand competition between McDonald's and its competitors for both the hiring and retention of workers and interbrand competition for quick-serve customers.[1] Dkt. 302-1, Ex. 1 § 5; Dkt. 302-1, Ex. 2 § XI. A factfinder can only evaluate those procompetitive justifications on a market-by-market basis, comparing, for example, the nature and extent to which former Paragraph 14 was enforced—and the effect that it had (if any) on employees' wages in that market—with the procompetitive benefits McDonald's employees and restaurants in that market derived from it. *See* Dkt. 302-1, Ex. 2 ¶ 285 (describing classwide variation). Critically, as the *Alston* Court explains, these "hard-to-see efficiencies attendant to complex business arrangements" require careful rule of reason analysis. 141 S. Ct. at 2156.

Second, Plaintiffs' experts cannot show classwide anticompetitive effects. Rather, as Dr. Murphy explains, Dr. Singer's analysis is riddled with false positives that indicate impact across the class where none could possibly exist. Dkt. 299 at 19; Dkt. 301-1 at 11–12. While that alone is a fatal defect, *see TransUnion LLC v. Ramirez*, 2021 WL 2599472, at *14 (U.S. June 25, 2021) (requiring absent class member injury), here it also demonstrates why classwide proof is impossible under the rule of reason. For example, Dr. Singer's regression finds impact on employees hired *after* the removal of Paragraph 14 in March 2017. Dkt. 302-1, Ex. 2 ¶¶ 162, 227. Impossible. And the regression would also impute harm to 85% of class members even when the estimated wage suppression is zero. *Id.* ¶ 224. Plaintiffs have thus failed to meet their predominance requirement. *See*, *e.g.*, *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 792 (9th Cir. 2021) ("Although we have not established a threshold for how great a percentage of uninjured class members would be enough to defeat predominance, it must be de

[1] To be clear, McDonald's does not suggest that "the ability of McDonald's franchises to coordinate the release of a new hamburger . . . impl[ies] their ability to agree on wages for counter workers." *Alston*, 141 S. Ct. at 2157. Indeed, Plaintiffs do not claim that McDonald's restaurants agreed upon wages for their workers, and the undisputed evidence demonstrates not only that such an agreement did not exist, but that in fact franchisees exercised complete discretion in wage setting, resulting in a wide variance in wages as between restaurants. Dkt. 302-1, Ex. 2 ¶¶ 228–55; *see also* Dkt. 348-1, Ex. 3, Groen Dep. 100:11–103:5; Ex. 4, Lopez Dep. 129:6–130:7, 148:25–149:18; Ex. 5, Vidler Dep. 127:25–128:17, 130:17–131:20; Ex. 6, Miller Dep. 99:1–16; Ex. 7, Watson Dep. 84:17-85:5.

minimis…[and] the few reported decisions involving uninjured class members suggest that 5% to 6% constitutes the outer limits of a de minimis number.") (internal quotation omitted); *see also In re Rail Freight Fuel Surcharge Antitrust Litig.*, 934 F.3d 619, 623–25 (D.C. Cir. 2019) (lack of injury to 12.7% of the class precludes predominance).

Because Plaintiffs fail to offer common proof of market definition, market power, and anticompetitive effects, class certification should be denied. *Messner*, 669 F.3d at 818.

B. Plaintiffs' Circular "Market Allocation" Argument Does Not Solve Their Failure Of Classwide Proof

Equally unavailing is Plaintiffs' last-ditch effort to elide the "careful analysis" of the "circumstances, details, and logic of a restraint" required by the rule of reason, *Alston*, 141 S. Ct. at 2160, through the bald assertion that the procompetitive benefits McDonald's and its employees gained from former Paragraph 14 "concede[] an anticompetitive market division," Dkt. 346 at 3. This position is utterly "circular and unpersuasive," 141 S. Ct. at 2167 (Kavanaugh, J., concurring), as it assumes not only that such a market exists but also that the market was in fact divided. McDonald's has not only demonstrated the opposite, it has also shown that the very question is fundamentally individualized. *See*, *e.g.*, Dkt. 299 at 5–9; Dkt. 302-1, Ex. 1 § 7; Dkt. 302-1, Ex. 2 § IX.H. Critically, rather than "acknowledge[] that it controls the market[s]" for workers in the quick-service restaurant industry, 141 S. Ct. at 2167, McDonald's has offered uncontested evidence that McDonald's restaurants (1) competed for employees against a wide array of other employers in hundreds if not thousands of local labor markets nationwide, *see* Dkt. 299 at 15, (2) offered wages and benefits that met or exceeded market rates, *see* Dkt. 310-10, Ex. 124, Groen Decl. ¶ 9; Ex. 121, Miller Decl. ¶ 10, and (3) frequently saw employees (including Ms. Turner) move among interbrand and intrabrand employers for higher wages and other advantages, *see* Dkt. 302-1, Ex. 2 ¶¶ 105–22.

Plaintiffs' "perhaps unsurprising" litigation strategy, whereby they deliberately forwent pleading any claims under the rule of reason, leaves them in the untenable position of hazarding that the claims in this case deserve a less-careful review than those in *Alston*. Dkt. 53 at 16. In so

hazarding, Plaintiffs plainly invite this Court to disregard "an exhaustive factual record" and to forgo "a thoughtful legal analysis consistent with established antitrust principles." *Alston*, 141 S. Ct. at 2166. This Court should instead heed *Alston*'s specific caution to "be wary about invitations to set sail on a sea of doubt." *Id*. (quotations omitted).

C. Deferring A Decision On The Standard Of Review Would Be Erroneous

The decision regarding whether the rule of reason or the quick look standard of review governs Plaintiffs' claims should be made now—at class certification. The Court must know what the common questions are to determine whether they are capable of common answers. *See Dukes*, 564 U.S. at 350. In this case, determining whether common questions exist and predominate as to the proposed class hinges directly on whether there was an antitrust violation in the first place. *See id*. at 352 ("proof of commonality necessarily overlaps with [plaintiffs'] merits contention."). *Alston* clarifies that the rule of reason standard alone governs that analysis where, as here, the alleged violations involve ancillary labor-market restraints. *See Alston*, 141 S. Ct. at 2155–57. Because Plaintiffs assert no rule of reason claim and likewise fail to offer classwide evidence capable of proving one, they have not met the Rule 23(a) commonality and Rule 23(b)(3) predominance requirements. Plaintiffs litigated this case—from day one through the close of fact discovery—as one in which they prevail under the quick look rule or not at all. Under *Alston*, 'not at all' it must be. *See Polk Bros. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 191 (7th Cir. 1985).[2]

IV. Conclusion

Alston confirms that the rule of reason standard governs the claims in this case. Because Plaintiffs decided to forgo pleading their case under the rule of reason, or attempting to prove such a claim based on common evidence, their motion for class certification must be denied.

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[2] This Court previously held that because former Paragraph 14 was "ancillary to an agreement with a procompetitive effect" it was not *per se* unlawful under the Sherman Act. Dkt. 53 at 13–14. That distinguishes this case from *In re High-Tech Employee Antitrust Litigation*, where the court found that "[p]laintiffs ha[d] successfully pled a *per se* violation." 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2013). Moreover, while the parties there agreed to defer the standard of review question until summary judgment, *id*., McDonald's does not so stipulate.

Dated: July 9, 2021

Respectfully submitted,

McDONALD'S USA, LLC and McDONALD'S CORPORATION

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CERTIFICATE OF SERVICE

I, Rachel S. Brass, an attorney, hereby certify that the foregoing document 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.

/s/ Rachel S. Brass
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