

June 11, 2019

Hon. Makan Delrahim
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

Mr. Michael Murray
Deputy Assistant Attorney General
U.S. Department of Justice
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Dear Assistant Attorney General Delrahim and Deputy Assistant Attorney General Murray:

The Department of Justice has expressed opinions about whether no-poaching clauses in franchise agreements should be analyzed under a Rule-of-Reason approach.¹ Others, including the American Antitrust Institute, commenting on these no-poaching clauses state that, based on existing economic research, these no-poaching clauses should be analyzed at most under the “Quick-Look” standard or potentially should be *per se* illegal under antitrust laws.^{2,3}

We write to address two fundamental economic questions central in that discussion. First, do no-poaching clauses in fast food⁴ franchise agreements have an economically beneficial effect? Second, do these no-poaching clauses lead to a significant concentration of buyers in the labor market for fast food employees?

We will discuss each of these points below, but the general conclusions are the following:

* Neither the authors of this letter, Daniel S. Levy, PhD and Timothy J. Tardiff, PhD nor their employer, Advanced Analytical Consulting Group, Inc., have received compensation from any party involved in the no-poaching disputes, or related policy analysis, for writing this letter or performing other research related to no-poaching clauses.

¹ Corrected Statement of Interest of the United States of America, *Sugar v Dough Dough, Inc.*, No. 2:18-CV-00244-SAB(E.D. Washington, Ruled March 8, 2019).

² Letter from American Antitrust Institute, to Hon. Makan Delrahim (Department of Justice) and Mr. Michael Murray (Department of Justice), May 2, 2019.

³ Alan B. Krueger and Eric A. Posner, *Proposal for Protecting Low Income Workers from Monopsony and Collusion*, Washington, D.C.: The Hamilton Project, 2018.

⁴ Fast food restaurants are often divided into sub-categories. “Quick service restaurants” (QSR) are often considered distinct from restaurants that serve mainly pastries and coffee shops, such as Dunkin Donuts and Auntie Anne’s, franchised stores that are *not* included in the market definition of the QSR employee market used by the most cited paper for empirical evidence of the concentrative effects of no-poaching clauses in the fast food industry: Alan B. Krueger and Ashenfelter, Orley, “Theory and Evidence on Employer Collusion in the Franchise Sector.”, (Working Paper No. 16). Princeton University, Industrial Relations Section, 28 September 2017. Retrieved from <http://arks.princeton.edu/ark:/88435/dsp014f16c547g>.

Related to the first point, the economics literature contains significant evidence that low-skilled laborers receive training from employers that can be valuable to the employee in their current job and in future jobs.⁵ Also, the economics literature is replete with evidence that the incentive for employers to train employees can be increased through restrictions that tend to increase the amount of time employees remain with the employer.⁶ No-poaching clauses are consistent with such restrictions making no-poaching restrictions potentially beneficial to employee productivity.

In addition, participants in the fast food labor market, both employers and employees, discuss the training, experience and job opportunities employees receive, providing evidence that employers and employees in the fast food industry believe the training provided is important, even if those commenting on the fast food industry do not.^{7,8}

Related to the second point, the labor market concentrating effect of no-poaching clauses, there is no valid evidence that no-poaching clauses in franchise agreements have a significant impact on the level of competition for workers in labor markets. The only two existing empirical analyses of the concentrative effects of no-poaching clauses are within the fast food (quick service restaurant- “QSR”) franchise industry.^{9,10} The analysis of market concentration by Krueger and Ashenfelter in 2017 (K&A) was performed incorrectly.¹¹ The concentration calculations in that analysis were performed as if those no-poaching clauses restricted an employee at one franchise to negotiate with only one employer at every restaurant brand, not just the brand at which the employee currently works; no-poaching clauses in franchise agreements generally pose no restriction on employees moving across franchise brands to any employer. This calculation error in K&A’s concentration measure substantially understates the extent of

⁵ See for example, Gary S. Becker, *Human Capital*, (Chicago: The University of Chicago Press, 1964, 1994); John Kennan, “Bonding and the Enforcement of Labor Contracts.”, *Economic Letters*, 3 1979: 61-66; Daron Acemoglu and Jorn-Steffen Pischke, “The Structure of Wages and Investments in General Training.”, *Journal of Political Economy* 107 (3) 1999: 539-572; D.O. Parsons, *Handbook of Labor Economics*, (New York: North-Holland, 1986): 789-848.

⁶ For example see Becker, *Human Capital*; Kennan, “Bonding and the Enforcement of Labor Contracts.”; Acemoglu and Pischke, “The Structure of Wages and Investments in General Training.” and additional articles cited within.

⁷ For discussion of job responsibilities and qualifications for various jobs at Burger King see <https://www.bk.com/careers/opportunities>.

⁸ For reviews related to experience, training and job advancement see <https://www.indeed.com/cmp/McDonald%27s/reviews?ftopic=jobsecadv>.

⁹ Alan B. Krueger and Orley Ashenfelter. “Theory and Evidence on Employer Collusion in the Franchise Sector.”

¹⁰ Levy, Daniel and Tardiff, Timothy J., “Measurement of Market Concentration Faced by Labor Pools: Theory and Evidence from Fast Food Chains in Rhode Island with No-Poaching Clauses.”, (September 14, 2018). Available at SSRN: <https://ssrn.com/abstract=3247932>, <http://dx.doi.org/10.2139/ssrn.3247932>, or <http://aacg.com/wp-content/uploads/Measurement-of-Market-Concentration-cites.pdf>

¹¹ For a replication and analysis of the calculation methods used in Krueger and Ashenfelter see Levy and Tardiff.

job opportunities available to each employee, overestimates the concentrative effects of those no-poaching clauses, and invalidates the widely cited conclusion attributed to K&A that no-poaching clauses have a significant effect on the concentration of jobs among employers.¹²

While there are many other important issues to consider when assessing the effect of no-poaching clauses, the two mentioned above are fundamental to the economic cost and benefit of no-poaching clauses, whether no-poaching clauses should be *per se* violations of antitrust law, and whether they have any beneficial or harmful effect at all. We turn to each in greater detail below.

I. Economic Theory and Empirical Information about Employer Investment in Employee Human Capital

a. Economics Literature about Employer Investment in Human Capital

On the first point, the effect of no-poaching clauses on employer investment in human capital, the economics literature is replete with evidence that employers invest in the human capital of their employees, including the low-skilled, through both training and work experience.¹³

This literature dates back to at least the late 1950s and has continued for decades.¹⁴ It is an active literature today.¹⁵ Work starting with Jacob Mincer in 1958 demonstrated that some employers invest significant amounts in low-skilled workers as well as high-skilled workers,¹⁶ i.e., investment in training, human capital and the increased productivity through on-the-job experience are not limited to high-skill employees at firms. Other early work includes T.W. Schultz (1961),¹⁷ which focused on why certain

¹² See for example for example, Rachel Abrams, “Why Aren’t Paychecks Growing? A Burger-Joint Clause Offers a Clue.” *The New York Times* (New York), September 27, 2017, available at <https://www.nytimes.com/2017/09/27/business/pay-growth-fast-food-hiring.html>; Blanchard v. Burger King Corp. Complaint, U.S. District Court for the Southern District of Florida, Case No. CV 24576, Oct. 31, 2018; and Krueger and Posner, *A Proposal for Protecting Low Income Workers from Monopsony and Collusion*.

¹³ See for example, Parsons, *Handbook of Labor Economics*, 794; John M. Barron, Mark C. Berger, and Dan A. Black, *On-The- Job Training*, (W.E. Upjohn Institute for Employment Research, Kalamazoo, 1997), Chapter 4; Jacob Mincer, “On-the-Job Training: Costs, Returns, and Some Implications.”, *Journal of Political Economy*, 70 (5, part 2), 1962: 50-79.

¹⁴ For example see Jacob Mincer, “Investment in Human Capital and Personal Income Distribution.”, *Journal of Political Economy*, 66 (4) 1958: 281-302.

¹⁵ For example, see Maria Sequeda Andries de Grip, and Rolf van der Velden, “Does Informal Learning at Work Differ between Temporary and Permanent Workers.”, *IZA Discussion Paper Series*, 2015; Acemoglu, Daron and Jorn-Steffen Pischke, “Why Do Firms Train? Theory and Evidence.”, *Quarterly Journal of Economics*, 113 (1) 1998: 79-119; Acemoglu, Daron and Jorn-Steffen Pischke, “The Structure of Wages and Investments in General Training.”, 539-572.

¹⁶ Mincer, Jacob, “On-the-Job Training: Costs, Returns, and Some Implications.” Also see Parsons, *Handbook of Labor Economics*, 794.

¹⁷ T.W. Schultz, “Investment in Human Capital.”, *American Economic Review*, 51(1) 1961: 1-17.

low-skill groups within the United States and in developing countries did not acquire more human capital, instead remaining stagnant as low-skill levels.¹⁸ This and subsequent economic research established that many of these individuals did not have the resources to invest in their own human capital and employers or investors with funds would not invest in the human capital of others because there was no mechanism to recoup their investment. Gary S. Becker (1964) continued the exploration of these issues and described mechanisms for investment in human capital that are specific to a given firm as opposed to general to the labor market.¹⁹

John Kennan (1979) described how limitations on labor movement can lead to greater investment in employees by employers and how that investment increases productivity.²⁰ Kennan also described some ways in which those human capital investments can be achieved through longer-term commitments on the part of the employer and employee. Other papers have followed, advancing the theory and empirical research about why, and under what conditions, employers invest in the training of even low-skilled and entry-level workers.²¹

This line of research about investments in human capital has contributed significantly to two Nobel Prizes in economics. The first was awarded to T.W. Schultz in 1979. The Nobel Prize Committee lists his contribution as based on his “analysis of the role of investment in human capital for economic development, particularly in agriculture.”²²

The second Nobel Prize related to human capital, including work that discussed under what conditions employers would invest in the human capital of their employees, was to Gary S. Becker in 1997. In part the Nobel Prize Committee describe his work as including “. . . models in several areas: investments in people's competence (or human capital), behavior in households and families, crime and punishment, and discrimination in labor and other markets.”²³

¹⁸ T.W. Schultz, Nobel Prize Lecture, 1979. In describing the importance of human capital investment among poor farmers in developing countries, Schultz noted that “. . . investment in improving population quality can significantly enhance the economic prospects and the welfare of poor people.” Nobel Prize Lecture, available at <https://www.nobelprize.org/prizes/economic-sciences/1979/schultz/lecture/> downloaded May 25, 2019.

Also see T.W. Schultz, “Investment in Human Capital.”, 1-17.

¹⁹ Becker, *Human Capital*.

²⁰ Kennan, “Bonding and the Enforcement of Labor Contracts.”; Schultz, “Investment in Human Capital.”, 1-17.

²¹ For example see, Acemoglu and Pischke, “The Structure of Wages and Investments in General Training.”, 539-572.

²² See <https://www.nobelprize.org/prizes/economic-sciences/1979/schultz/biographical/>

²³ See <https://www.nobelprize.org/prizes/economic-sciences/1992/becker/facts/>

These works, and many others, make it obvious that there is an extensive literature about employer investment in employee human capital and that employment terms or practices that limit turnover can increase employee productivity through increased employer investment in human capital. We have not seen research about this topic specific to QSR employers or to no-poaching clauses in franchise agreements either demonstrating the benefits of no-poaching agreements in promoting employer investment in human capital or refuting it.²⁴

b. Industry Marketing to Employees about Human Capital Investment and Employee Responses

Although empirical academic research has not yet addressed the importance of human capital investment in the QSR labor market, it is clearly an important topic for employees and employers. The investment that QSRs make in workers is central to the recruiting efforts of several quick-service restaurants. For example, McDonald's advertises their training and educational benefits for employees at various levels of employment.²⁵ McDonald's Corporation provides English as a Second Language (ESL) to employees and their family members, GED programs and college tuition assistance free of charge to employees.²⁶ Other training, including off-site training in formal classes and of course job-specific experience and on-the-job training, are borne by the franchisees.²⁷ McDonald's franchisees also often send franchise managers for training at Hamburger University outside of Chicago. This is a significant investment by a franchisee, including transportation, room and board, in addition to the cost of the training.²⁸ These training and educational benefits are provided by individual franchisees.

²⁴ K&A, p 17 investigates the correlation between no-poaching clauses and "turnover, average wages (for hourly workers), and average years of education." This analysis does not investigate the effect of no-poaching clauses on employer incentive to provide training.

²⁵ See <https://www.mcdonalds.com/us/en-us/careers/training-and-education.html>

²⁶ These programs are paid for by McDonald's Corporation. These no-poaching clauses will not alter the franchisee's financial incentive to approve them for an employee. (see http://www.archwaystoopportunity.com/about_archways.html, <https://prezi.com/gjex49v-t1nw/archways-to-opportunity/> At 19 clicks into this Prezi set of slides McDonald's states that McDonald's Corporation pays for tuition assistance).

²⁷ See <https://www.franchisedirect.com/foodfranchises/mcdonalds-franchise-07030/ufoc/> and <http://www.chicagotribune.com/business/ct-mcdonalds-hamburger-university-0419-biz-20150407-story.html>

²⁸ An example of this type of more extensive training occurs at McDonald's where manager-level employees may be sent to McDonald's central training facility outside Chicago, with costs including flight, housing, food and courses for a week-long session. Further many McDonald's Managers have taken the equivalent of a full semester of college-level credits. A description of McDonald's training is available at <http://www.marketwired.com/press-release/mcdonalds-celebrates-50-years-training-developing-employees-hamburger-university-nyse-mcd-1422879.htm>.

In addition, Burger King advertises for employees that have at least one year of management experience in the fast-food industry to fill their Assistant Manager positions.²⁹ This demonstrates that experience in the fast food industry at one branded franchise is valuable at least at some other branded franchises. Clearly, McDonald's and Burger King believe that employees value training and that training and that experience in the fast food industry provides promotion opportunities for workers.

In addition, employees often discuss training and advancement opportunities in their reviews of restaurant jobs. See for example the website Indeed.com where employees evaluate their jobs. The voluntary reviews of McDonald's jobs contain over 7,000 reviews, out of over 75,000, about experience, training, and advancement. Many are positive, with comments such as it is a good first job, and "It's a good place for those who are trying to develop their professional skills."³⁰ Others are negative such as "I however had little room to move up."³¹

These posted job requirements, informational/advertisement materials for potential employees, and employee reviews make it clear that training, education, job-experience and human capital investment by employers in the QSR labor market are important to many employees, and employers know it.

While some economists/policy advocates/regulators/legislators commenting on the extent of training at QSR franchises do not see any significant benefit conferred by the experience or training obtained on the job at QSRs, many involved in those businesses as employers and employees appear to value the training and experience.

II. Evidence About Effect of No-poaching Clauses on QSR Employer Market Concentration

a. Errant Calculation of Effect of No-poaching Clauses on Market Concentration

On the second fundamental empirical question, whether no-poaching clauses in franchise agreements lead to a significant concentration of buyers in the labor market for QSR employees, there is no valid empirical evidence that no-poaching clauses within franchise agreements increase the monopsonistic concentration of jobs in the QSR labor market.³² There has been significant discussion, starting in the popular press,³³

²⁹ See <https://www.bk.com/careers/opportunities>

³⁰ See <https://www.indeed.com/cmp/McDonald's/reviews?ftopic=jobsecadv&start=20>

³¹ See <https://www.indeed.com/cmp/McDonald's/reviews?ftopic=jobsecadv&start=20>

³² In addition to the present authors, this conclusion also has been expressed by at least one other economist assessing the state of knowledge about no-poaching clauses as opposed to non-compete clauses. See, Evan Starr,

and continuing with legal filings,³⁴ statements and actions by States Attorneys General,³⁵ and policy papers,³⁶ that cite the paper by Krueger and Ashenfelter (“K&A”) as evidence that no-poaching clauses lead to an important increase in the concentration of fast food jobs among buyers of fast food employee service (franchisees).³⁷ K&A and Levy and Tardiff (“L&T”) are the only works with any empirical analysis of the concentrative effects of no-poaching clauses in the fast food employee jobs. While K&A presented their empirical analysis as an “empirical example” and refrained from drawing strong conclusions from their work, those citing it in the popular press, court actions, regulatory and legislative initiatives³⁸ and policy papers, including Krueger in a subsequent paper coauthored with Posner,³⁹ have relied on K&A as evidence of important anticompetitive effects of no-poaching clauses in franchise agreements. The result has been significant legal claims, proposals to make no-poaching clauses *per se* violations of antitrust law⁴⁰ and the successful demand that franchises alter contracts between franchisors and franchisees.⁴¹

Because of the broad and significant reliance on K&A by the press, litigants, enforcement agencies, and legislators, K&A has to be considered and reviewed seriously.

An important problem in K&A is that the measure of concentration and the change in concentration attributed to no-poaching clauses do not reflect the concentration and change in concentration of jobs that fast food employees face due to no-poaching clauses in the market for fast food laborers. The no-poaching clauses in question restrict franchisees within the same brand from hiring employees from other franchisees within the same brand. They do not place any restrictions on hiring employees working at

“Are Noncompetes Holding Down Wages?” *Unrigging the Labor Market: Convening to Restore Competitive Labor Markets.*, Cambridge, MA: Harvard Law School. 2018.

³³ See for example, Rachel Abrams, “Why Aren’t Paychecks Growing? A Burger-Joint Clause Offers a Clue.”

³⁴ See, for example, *Blanchard v. Burger King Corp.* Complaint.

³⁵ See Washington State Off. of the Att’y Gen., *AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-Wage Workers Nationwide.*, (July 12, 2018), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-announces-fast-foodchains-will-end-restrictions-low-wage-workers>, citing Rachel Adams, “Why Aren’t Paychecks Growing? A Burger-Joint Clause Offers a Clue” and economists.

³⁶ Krueger and Posner, *A Proposal for Protecting Low Income Workers from Monopsony and Collusion.*

³⁷ The labor market in which QSR workers operate may be much larger than QSR franchises or even restaurants or food service in general. It may include other retail jobs, or entry-level jobs in the trades, among many others. Empirical information about the job boundaries, as well as geographic boundaries, is essential in examining the effect of no-poaching clauses.

³⁸ See <https://www.warren.senate.gov/oversight/letters/warren-booker-urge-nearly-100-franchise-ceos-to-abandon-collusive-no-poach-clauses>

³⁹ Krueger and Posner, *A Proposal for Protecting Low Income Workers from Monopsony and Collusion.*, Washington, D.C.: The Hamilton Project 2018.

⁴⁰ Krueger and Posner, *A Proposal for Protecting Low Income Workers from Monopsony and Collusion.*, 13.

⁴¹ See Washington State Off. of the Att’y Gen., *AG Ferguson Announces Fast-Food Chains Will End Restrictions on Low-WageWorkers Nationwide.*

other branded franchises. L&T recreated the concentration measures used in K&A, demonstrating that the Herfindahl-Hershman Indexes (HHI) used in K&A are calculated as if employees at one franchise may only apply for a job with a single employer at any franchised fast food brand, including those outside the employee's current franchise brand. However, as L&T point out, this is clearly not the case. Employees, for example, at McDonald's may apply for jobs at every Burger King restaurant; each of the independently owned Burger King locations compete with each other for McDonald's employees' labor, just like they compete for laborers who have never worked at a QSR, anywhere, previously. If there are 10 independent Burger King restaurants in the relevant geographic market, these 10 independent franchisees⁴² may all compete for all McDonald's employees' labor. K&A's calculation of the effect of no-poaching clauses assumes, incorrectly, that these 10 Burger King franchisees act as a single employer in negotiating with, not only the existing Burger King employees, but also all employees in the market. K&A's assumption is inconsistent with the terms of the no-poaching clauses and K&A offer no additional explanation why such an additional level of concentration would result from no-poaching clauses.

L&T analyzed the same labor market analyzed by K&A, where for example McDonald's, the largest QSR franchisor operating with no-poaching clauses, had 31 restaurants out of 262 QSRs in what K&A used as a market.⁴³ While the McDonald's no-poaching clause prevents the employees of the 31 McDonald's from moving to any of the other of the 30 McDonald's without the approval of their current employer, they are free to negotiate with the other 231 employers at any of the other branded franchisees, whether those franchisees have signed no-poaching clauses or not. Based on their errant interpretation, or empirical implementation, of the no-poaching clauses, K&A calculate that the no-poaching clauses in the QSR business in Rhode Island cause the HHI to increase from 38.3 to 1,678, which K&A characterize as highly concentrated.⁴⁴ However, recognizing that employees at one QSR franchise brand face no limitation on movement to any location at the other branded QSR franchises due to no-poaching clauses at either their own brand or any other, the relevant concentration measure for laborers at McDonald's increases from just over 38 to only just over 173.⁴⁵ This is a minimal increase based on the standards used by the Department of Justice (DoJ) and Federal Trade Commission in assessing concentration for mergers.

⁴² Note that in some markets a single franchisee may own multiple locations. However, no-poaching clauses have no incremental effect on labor concentration where a set of locations are owned by a single franchisee, as that franchisee is free to not compete with himself/herself across restaurant locations.

⁴³ K&A found 261 quick-service restaurants. L&T used 262. See L&T, 19.

⁴⁴ K&A, 13.

⁴⁵ L&T, 22.

Furthermore, among chains with no-poaching clauses, McDonald's has the largest number of locations in the geographic QSR market as defined by K&A. Laborers at other franchised QSRs experience smaller increases in concentration due to no-poaching clauses than those at McDonald's. This means that laborers face their own level of market concentration based on the franchise brand were they are currently employed. The level of concentration faced by a specific labor group and the change in that labor-group-specific concentration due to no-poaching clauses depends on which franchise brand the laborer works for. At McDonald's in the Rhode Island market defined by K&A, the labor group-specific concentration index (LI)⁴⁶ increased from just over 38 to just over 173, but for those employed at A&W, Chick-Fil-A, or Sonic there was no increase in the LI because there were no other franchisees of the same brand within the market defined by K&A. Those employees were not limited by any no-poaching restrictions placed on any potential employer in the defined market and can seek employment across the entire 262 employers in the market for QSR labor as defined by K&A. At Panera Bread, the LI increased from just over 38 to just over 46; Panera bread had 8 locations in the market defined by K&A. There is a range of market concentrations faced by laborers in the QSR market, but all of them in the Rhode Island market defined by K&A are very low by typical standards described by the DoJ, at least for the purpose of merger analysis, and they remain low even when any restrictions due to no-poaching clauses are considered. In other markets, which have not been analyzed, the results may be different. Further, it is possible that a dominant franchise, with a large increase in LI, may impact wages in the market even for those workers who are at employers with low LIs. That is an empirical question which remains to be determined. However, as it stands now there is not empirical evidence that no-poaching clauses significantly increase concentration of jobs in the control of QSR franchisees.

b. Additional Shortcomings of Market Definition Used in Cited Empirical Research about No-poaching Clauses

Krueger and Ashenfelter labeled their market concentration analysis an "empirical example."⁴⁷ They may not have considered it complete or even a true analysis of a relevant market, even though Krueger and Posner cite K&A as empirical evidence in their call for no-poaching clauses to be deemed *per se* violations of antitrust law.⁴⁸ However, in addition to the incorrect interpretation of the effect of no-poaching clauses on employee mobility, K&A defined the geographic and labor market used in the HHI calculation in ways that do not reflect actual labor markets. K&A defined the geographic boundaries of

⁴⁶ See L&T, 10 for details about calculation of LI and how it differs from HHI.

⁴⁷ K&A, 12.

⁴⁸ Krueger and Posner, *A Proposal for Protecting Low Income Workers from Monopsony and Collusion.*, 13.

their market as the state boundaries of Rhode Island, without regard for the fact that the most populous part of Rhode Island borders a QSR-rich part of Massachusetts, which they did not include in their market. Further it seems less likely that employees at the McDonald's in East Providence RI in eastern Rhode Island, will commute the 45 miles to a Wendy's in Westerly, Rhode Island in southwest Rhode Island for alternative employment, than go to a Subway in Massachusetts less than 1,000 yards away. Yet K&A omitted the Subway in MA from their market definition and included the Wendy's in south west Rhode Island. K&A have omitted a large number of locations in Massachusetts that likely function in the same labor market for QSR employees in Providence and East Providence and included locations, many fewer, in the central and western portion of Rhode Island that are less likely to be within the relevant geographic market for many employees, especially those without cars.

K&A also did not include any other jobs which may be substitutes for employment to QSR restaurant jobs, such as other low-skilled or entry level jobs; it also excluded all other restaurant jobs, even those at Dunkin Donuts, because K&A did not defined them as a QSRs. The labor market for employees in QSRs may also include entry-level jobs at other types of restaurants or non-franchised locations, such as Starbucks, which also is excluded from the definition of the relevant labor market for QSRs defined by K&A, because Starbucks is not a franchised brand. Similarly, the exclusion of Dunkin Donuts artificially reduces the apparent number of employers at which QSR employees can seek employment, inflating the concentration calculations found in K&A beyond what actually exists in the market. Dunkin Donuts and Starbucks have many more locations in Rhode Island than the largest QSR in the market as defined by K&A. And the largest QSR in the market defined by K&A, Subway, did not have no-poaching clauses in its franchise agreements, and therefore has no concentrative effect due to no-poaching clauses.⁴⁹

The replication of K&A performed in L&T uses the same market definition, simply to replicate the K&A findings and to focus on the effect of the errant interpretation of no-poaching clauses in K&A. A better definition of the geographic and job markets is needed based on the dimensions discussed above and many others. However, given that so many significant fast food restaurants were excluded and that the proximate geographic market in Massachusetts with a large number of restaurants was excluded, it seems that the relevant market concentration is not reflected in K&A. Furthermore, the errant interpretation of

⁴⁹ The definition of the market in K&A also ignored the differing number of employees across QSR locations within brands and across brands.

no-poaching clauses and the poor definition of the relevant labor market mean that K&A does not provide any valid information about the concentrative effects of no-poaching clauses.⁵⁰

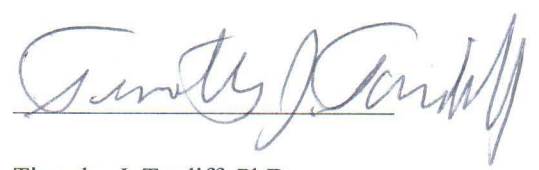
III. Conclusion

When the effect of no-poaching clauses is analyzed based on how no-poaching clauses actually function, it is clear that at least within the market defined by K&A and relied upon by the press, litigants, legislators and regulators, no-poaching clauses have a minimal effect on the level of concentration in the QSR labor market. On the other hand, the economics literature is replete with theoretical and empirical studies that show that many workers, including low-skilled, receive significant experience and training from their employers and that agreements limiting labor mobility in exchange for training can increase worker productivity and improve laborers' career progression. The relative effect of no-poaching clauses on concentration and investment in laborers' human capital may vary across markets. Furthermore, future research may show that the labor market concentrative effects of no-poaching clauses may dominate the benefits from increased employer investment in human capital, perhaps nearly universally enough to establish no-poaching clauses within franchise agreements worthy of legal prohibition or establishing them as a *per se* violation of antitrust law. The current empirical analysis, corrected for clear errors, does not.



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⁵⁰ L&T use the same labor market definition used by K&A to focus on the effect of K&A's interpretation of no-poaching clauses on the change in employer labor market concentration, however the labor market was defined.