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

KENNETH MANNING, *et al.*,	)	
	)	No. 1:23-cv-00210
Plaintiffs,	)	
	)	Hon. Steven C. Seeger,
v.	)	District Judge
	)	
McDONALD'S USA, LLC,	)	
McDONALD's CORPORATION, *et al.*,	)	
	)	JURY TRIAL DEMANDED
Defendants.	)	

PLAINTIFFS' AMENDED RESPONSE IN OPPOSITION TO THE DEFENDANTS' MOTION TO DISMISS

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The Manning Plaintiffs submit this amended response in opposition to Defendants McDonald's USA, LLC and McDonald's Corporation's (collectively "Defendants" or "McDonald's") motion to dismiss Plaintiff's Second Amended Complaint pursuant to Rule 12(b)(6) for failure to state a claim.[1]

INTRODUCTION

This case concerns McDonald's racism and systematic mistreatment of 48 of its Black franchisees, who were economically harmed and ultimately forced to leave their businesses in the McDonald's system because of McDonald's racial discrimination. Since the case was filed in 2020, McDonald's has fought strenuously for dismissal, arguing that certain claims were filed too late and asserting generally that Plaintiffs' race discrimination claims amount to an inconceivable, nationwide conspiracy theory. But Plaintiffs' civil rights and state law claims are serious and highly meritorious. After this Court granted leave, Plaintiffs filed a Second Amended Complaint (hereafter "SAC"), which now develops their factual allegations far beyond prior complaints and pleads facts establishing each individual Plaintiff's specific claims against McDonald's in a level of rich detail that far exceeds Rule 8's plausibility standard. Plaintiffs deserve their day in Court. It is time to deny McDonald's attempt to obtain an early dismissal of Plaintiffs' claims, to subject those claims (and any defenses McDonald's might raise) to discovery, and to adjudicate McDonald's alleged racial discrimination against its Black business partners on the merits.

While the depth and persistence of McDonald's alleged racist treatment of its Black franchisees may be inconceivable in the sense that it is difficult to comprehend, that does not negate the plausibility of Plaintiffs' allegations. The new complaint sets out in detail 48 narratives of

[1] McDonald's filed a motion to extend the briefing schedule (*King* Dkt. 104), Plaintiff submitted a version of this brief before the motion was granted (Dkt. 29), and then this Court granted the motion (Dkt. 108). Plaintiff is submitting this revised brief on the revised briefing schedule.

McDonald's discriminatory acts against 48 Black franchisees and it describes the specific illegal acts and particular injuries caused by McDonald's conduct. And while each individual Plaintiff's allegations could stand on their own, their common experiences are striking and demonstrate that McDonald's program of racist treatment was endemic to the company and pervaded all its interactions with its business partners.

Consider by way of introduction that McDonald's allegedly gave Black franchisees the most undesirable stores because of the color of their skin. Exercising its power to direct Black franchisees to particular stores, Dkt. 19 at 5, McDonald's, its Vice Presidents of Operations, Regional Managers, and Franchise Managers engaged in illegal "race matching," placing Black franchisees in substandard, low-volume stores in high-crime areas only because they were Black, while reserving the most lucrative, suburban locations in majority white areas for white franchisees. At the same time, McDonald's Regional Vice Presidents routinely denied opportunities to Black franchisees because they were Black that McDonald's regularly provided to their white counterparts, including approving the purchase of profitable stores and granting rent relief. Both measures were necessary to offset the costs of security and low profits of the substandard stores assigned to Plaintiffs, but both were denied to Black franchisees because they were Black. McDonald's racial discrimination was evident also in the different standards it applied to Black versus white franchisees, singling out the former group for costly store renovations and stricter grading during store visits, while offering the latter group ample leeway on both fronts. When a McDonald's Vice President of Operations identified a Black franchisee that it wanted out of the system, McDonald's used constant unannounced inspections by Field Service Consultants, including on holidays, to find defects that McDonald's said justified a Plaintiff's removal. Often McDonald's would sell off the stores that Black franchisees had made profitable to McDonald's own preferred white operators. McDonald's racism and other tortious conduct described in the SAC is more than enough to state a claim.

McDonald's must see that Plaintiffs' Second Amended Complaint is not arguably subject to dismissal under Rule 12(b)(6). There is no question the plausible allegations put McDonald's on notice of the claims against it. So, McDonald's advances arguments in its motion to dismiss that utterly lack merit. Throughout its brief, McDonald's focuses on the pleadings of the no-longer-operative First Amended Complaint, instead of confronting the detailed, individualized allegations of the Second Amended Complaint. It argues for inflated pleading standards—something exceeding fact pleading—that have long been rejected in cases like this one. It incorrectly makes arguments based on legal standards that do not govern Plaintiffs' claims, including relying on a disparate impact case as instructive for the differential treatment allegations at issue. It asserts that claims should be dismissed as untimely filed, despite that such a defense cannot be resolved at this stage and certainly not when the facts on which it depends will likely be disputed. All the while, McDonald's arguments are phrased in blanket terms, without identifying problems in any Plaintiff's pleadings and without articulating specific arguments for dismissal. McDonald's goes so far as to present an alternative account of its own: it blames Black franchisees for their own injuries and insists that Plaintiffs' claims should be dismissed because every franchisee is governed by the same Franchise Agreement. While that alternative account might be one that McDonald's one day presents to a jury, it is not an argument about the plausibility of the SAC, and acceptance of that argument would contravene exactly what Section 1981 was designed to prevent: the differential enforcement of contracts based on race. This Court should deny its motion.

PLAINTIFFS' SECOND AMENDED COMPLAINT

Plaintiffs initially filed suit against McDonald's as part of a larger group of former franchisees, who alleged racial discrimination under Section 1981 and various state-law theories in general terms. *King*, No. 20 C 5132, Dkt. 1 (hereafter "*King* Dkt."). This Court granted a previous motion to dismiss without prejudice and with leave to replead. *King* Dkt. 68. The Court ordered each

of the plaintiffs to be more specific about the particular facts giving rise to each of their individual discrimination and state-law claims. *Id.* After that order, this Court granted the undersigned counsel leave to substitute as counsel for the 48 Manning Plaintiffs, and it severed their case from the other plaintiffs. *King* Dkt. 74, 83.

The Manning Plaintiffs then filed their SAC, addressing the Court's specific criticisms. Dkt. 2. In 836 paragraphs spanning 158 pages, Plaintiffs' SAC sets forth how Defendants' misconduct violated each of their rights and caused them harm. The SAC pleads each of the 48 Plaintiff's cases with specificity, identifies the McDonald's employees responsible for particular racially discriminatory actions, and explains how Plaintiff's white counterparts were treated differently because of race. *Id.* Plaintiffs also added new legal theories (even though legal theories need not be pleaded in the first place), including Section 1982 discrimination, pattern or practice discrimination, tortious interference with business relationships, and unjust enrichment. *Id.* The new complaint is likely one of the most detailed federal civil rights complaints ever filed.

Instead of summarizing the SAC's extensive narrative here, Plaintiffs incorporate their allegations by reference. Dkt. 2. They discuss the complaint below as necessary to respond to Defendants' particular arguments. At this stage, "the court must construe all of the plaintiff's factual allegations as true, and must draw all reasonable inferences in the plaintiff's favor." *Virnich v. Vorwald*, 664 F.3d 206, 212 (7th Cir. 2011).

ARGUMENT

I. PLAINTIFFS' COMPLAINT SATISFIES ESTABLISHED RULE 8 STANDARDS

McDonald's moves to dismiss under Rule 12(b)(6), asserting that Plaintiffs' complaint fails to state a claim on upon which relief can be granted. The motion must be denied. This is not the type of complaint that can be dismissed based on a correct understanding of the Federal Rules of Civil Procedure, the law governing Plaintiffs' claims, and the plausible facts in the complaint.

McDonald's arguments depend entirely on an imagined heightened pleading standard, inapplicable legal standards, ignoring or misconstruing the well-pled facts, and improperly arguing that the Court should resolve factual issues—including defenses—based on materials outside of the complaint. As such, a review of the governing legal standards is appropriate.

The Federal Rules permit notice pleading and only require "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). Plaintiffs need only provide McDonald's with fair notice of their claims, and they are not required to make "detailed factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal for failure to state a claim under Rule 12(b)(6) is warranted only if "the allegations in the complaint, however true, could not raise a claim of entitlement to relief." *Virnich*, 664 F.3d at 212.

First, while McDonald's focuses throughout the motion on what Plaintiffs must prove to ultimately succeed, Rule 12(b)(6) is not used to assess the merits of claims. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 (2007). The Supreme Court has very recently reiterated that at this stage Plaintiffs need not "definitively prove" their claims. *Tyler v. Hennepin County*, No. 22-166, 2023 WL 3632754, slip op. at 4 (U.S. May 25, 2023). For it is not this Court's role at this stage to determine whether Plaintiffs' account will ultimately hold up: "'Plausibility' . . . does not imply that the district court should decide whose version to believe, or which version is more likely than not," the Seventh Circuit has cautioned, "the [Supreme] Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together … the court will ask itself *could* these things have happened, not *did* they happen." *Swanson v. Citibank, N.A.*, 614 F.3d 400, 404 (7th Cir. 2010) (emphasis in original).

Second, there is no heightened pleading standard for civil rights claims, including discrimination claims. Although a civil rights plaintiff (like any other plaintiff) must plead each element of a claim, *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1019 (2020),

the Supreme Court and Seventh Circuit have repeatedly reversed lower courts that impose a heightened pleading requirement in these cases, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (unanimously rejecting requirement that discrimination complaint plead facts satisfying elements of prima facie case as conflicting with Rule 8); see also *Erickson v. Pardus*, 551 U.S. 89 (2007) (reversing dismissal of civil rights claim where lower courts had concluded that the pleading was too conclusory); *Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) (rejecting heightened pleading standard for section 1983 claims); *Jackson v. Marion Cnty.*, 66 F.3d 151, 153 (7th Cir. 1995).

Third, although McDonald's asks this Court to take up statute of limitations issues based on materials outside of the complaint, as discussed in more detail below (*infra* at 7-9) this Court cannot do so at this stage. *Federated Mut. Ins. Co. v. Coyle Mechanical Supply, Inc.*, 983 F.3d 307, 313 (7th Cir. 2020). Moreover, the Court cannot take up and resolve limitations issues mired in factual disputes. *Sidney Hillman Health Ctr. v. Abbott Labs., Inc.*, 782 F.3d 922, 690 (7th Cir. 2012).

Finally, faithful adherence to normal pleading standards is particularly important in the context of enforcing our nation's deeply rooted federal laws prohibiting race discrimination, which are "of course understood to guarantee continuous equality between white and nonwhite citizens[.]" *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768 (2019). Plaintiffs' well-pleaded claims in the complaint should be the subject of discovery and adjudicated on their merits.

II. MCDONALD'S FAILS TO DEVELOP ITS ARGUMENTS IN SUFFICIENT DETAIL AND THE MOTION SHOULD BE DENIED ON THAT GROUND

Before turning to those arguments that McDonald's does make, it is important to observe that in most of its motion McDonald's does not articulate what defects in which of Plaintiffs' different claims warrant dismissal or whether its arguments apply to one, multiple, or all of Plaintiffs' different allegations. *See* Dkt. 19 at 9-18. Many of McDonald's arguments are blanket assertions of deficiency, *id.* at 9-11, 15-16; or arguments aimed at a no-longer-operative version of the complaint, *see e.g., id.* at 12-13

(asserting that "Plaintiffs continue to allege in conclusory fashion that Black franchisees were treated worse than white franchisees," while citing only to Plaintiffs' background section of the SAC); *id.* at 17-18, 20-21; or generalized statements about their defenses, *id.* at 18-20, 26-27 (stating that it is "unreasonable to infer that [Plaintiffs' breach of contract] claims are timely while conceding that they all fall within the 10-year statute of limitations period); or assertions that simply ignore the actual allegations in the complaint, *id.* at 13, 25.

These arguments cannot support dismissal of a complaint. District courts routinely reject as waived or forfeited motion to dismiss arguments this undeveloped, nonspecific, or unsupported. *BNSF Railway Co. v. Cicero*, 592 F. Supp. 3d 716, 735 (N.D. Ill. Mar. 21, 2022); see also *Eckhardt v. State Farm Bank FSB*, No. 18-cv-01180, 2019 WL 1177954, at *8 (C.D. Ill. Mar. 13, 2019) (citation omitted); *Godbole v. Ries*, No. 15 C 5191, 2017 WL 219506, at *2 (N.D. Ill. Jan. 19, 2017) ("The Court is not required to construct arguments for Defendants."); *Galesburg 67, LLC v. Nw. Television*, No. 15-cv-5650, 2015 WL 6736682, at *2 (N.D. Ill. Nov. 3, 2015). "Ours is an adversary system, and it is up to the party seeking relief to sufficiently develop his arguments." *Boloun v. Williams*, No. 00-cv-7584, 2002 WL 31426647, at *9 (N.D. Ill. Oct. 25, 2002) (quoting *United States v. South*, 28 F.3d 619, 629 (7th Cir.1994)) (cleaned up).

III. THIS COURT CANNOT DISMISS CLAIMS BASED ON MCDONALD'S ASSERTED STATUTE OF LIMITATIONS DEFENSES

Central to McDonald's motion to dismiss is its assertion that the Court should dismiss parts of the complaint as untimely filed. Dkt. 19. at 2, 18-20, 26-27, 29, 32-33, 35-36, 38-39. This Court cannot do so. The statute of limitations is an affirmative defense that cannot be resolved at this stage of the case. Reading the allegations in the complaint as true and drawing inferences for Plaintiffs, all claims are timely. Moreover, to the extent there is a factual dispute about whether Plaintiffs' claims are timely filed and, if not, whether McDonald's can successfully assert a limitations defense, those

disputes may be considered—at the earliest—in connection with motions for summary judgment, not on a motion to dismiss.

A. Statute of Limitations Defenses Cannot Be Resolved at the Motion-to-Dismiss Stage

McDonald's suggestion that the court resolve fact-bound statute of limitations questions and dismiss Plaintiffs' claims based on that defense is foreclosed by established law. The Supreme Court recently reaffirmed that "[a]t this initial stage of the case, [the plaintiff] need not . . . disprove [the defendant's] defenses." *Tyler*, 2023 WL 3632754, slip op. at 4. It has long been a rule in the Seventh Circuit that dismissing a complaint based on an asserted statute of limitations is "not permissible even in principle," because "complaints need not allege facts that tend to defeat affirmative defenses." *U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 628 (7th Cir. 2003).

A statute of limitations defense must be raised by answer, not motion. *Luna Vanegas v. Signet Builders, Inc.*, 46 F.4th 636, 640 (7th Cir. 2022). The burden is on McDonald's to plead and prove that defense. *United States for Use and Benefit of A&C Construct. & Installation Co. v. Zurich Am. Ins. Co.*, No. 17-cv-4307, 2019 WL 195025, at *2 (N.D. Ill. Jan. 15, 2019). Rarely will the face of the complaint so clearly prove the opponent's affirmative defense that it warrants immediate dismissal. *Luna Vanegas*, 46 F.4th at 640. Resolution of a defense under Rule 12(b)(6) based on evidence beyond the complaint is inappropriate. *Richards v. Mitcheff*, 696 F.3d 635, 636-38 (7th Cir. 2012). To consider such evidence, at minimum a court must convert the motion into one for summary judgment. *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998). Where district courts resolve facts surrounding a limitations defense and grant a motion to dismiss for failure to state a claim, the Seventh Circuit has reversed and remanded for proper factual development of the claims and defense, and resolution at a later stage. *Clark v. Braidwood*, 318 F.3d 764, 767-68 (7th Cir. 2003).

There is no question that the face of Plaintiffs' complaint does not establish any limitations defense. Where the complaint pleads anything relating to timing, the pleadings taken as true and construed in Plaintiffs' favor confirm that McDonald's has no limitations defense. There is also no question that McDonald's motion to dismiss has not been converted to one for summary judgment. While McDonald's attempts to adduce evidence from outside of the pleadings, *e.g.*, *King* Dkt. 87, 90, that evidence cannot be considered at this stage (and it does not establish a limitations defense even if it could be considered). Finally, while this Court has expressed that the parties should begin to develop the facts necessary to resolve disputes regarding statutes of limitation defenses, *e.g.*, *King* Dkt. 87, that evidence is not yet obtained, the case has not reached summary judgment, and the Court cannot consider resolving the statute of limitations argument at this stage.

Additionally, much of Defendants' argument that the SAC fails to state federal discrimination or state law claims veers off course and makes assertions regarding the statutes of limitations. Yet, the limitations issues have no bearing on whether Plaintiffs have stated a claim in the first place, and those arguments should not be intertwined. *Early v. Bankers Life & Cas. Co.*, 969 F.2d 75, 80 (7th Cir. 1992) (question at pleading stage is "not what are the facts" as relating to the statute of limitations, "but is there a set of facts that if proved would show that the case had merit?"). That McDonald's has done so reveals the weakness of McDonald's merits arguments in the face of the detailed, individualized allegations in the SAC. This Court should reject McDonald's statute of limitations defense because it cannot be resolved on the pleadings.

B. McDonald's Statute of Limitations Defenses Are Mired in Factual Disputes

In addition, it is significant in this case that McDonald's asserted statute of limitations defenses depend on facts far beyond the pleadings. The questions whether Plaintiffs' claims are timely or whether McDonald's may assert a particular statute of limitations defense concern factual disputes that at earliest might be taken up at summary judgment, but which most likely will have to

be resolved at trial. This section describes those factual disputes, not to suggest the Court accept McDonald's invitation to take them up now, but instead to illustrate why they cannot be considered at this stage of the case, before any answer and discovery.

1. The Parties Dispute Basic Facts About Timing

As discussed already, in no instance do Plaintiffs plead facts about their claims that establish a limitations defense. It is already clear that the parties will dispute many facts about the timing of events, which will be necessary to resolving any statute of limitations defense. For instance, the parties will dispute when McDonald's took actions against them that form the basis of their claims. For example, Defendants contend that eight Plaintiffs lack allegations for their breach of contract claims within the ten-year time limit. Plaintiffs will contest that assertion with a more complete factual record. *See*, *e.g.*, SAC ¶ 533 (William Rasul alleges unreasonable inspections); ¶¶ 615-16 (Jeremiah Simmons alleges interference in sale of stores); ¶¶ 337-38 (Anthony and Jacqueline George allege inequitable denial of rent relief and forced sale); ¶ 547 (Dwayne Johnson alleges unjustified denial of rewrite); ¶ 700-01 (Karen and Serge Tancrede allege unreasonable inspections and renovation demands); ¶ 723 (Errol Thybulle alleges unreasonable inspections). Factual disputes like these are precisely why courts refrain from deciding statute of limitations questions at the pleading stage. *See Sidney Hillman Health Ctr.*, 782 F.3d at 690.

2. The Parties Dispute Facts That Will Determine When Plaintiffs' Claims Accrued

The parties will also dispute facts that will determine when different claims accrued. For instance, Plaintiffs' § 1981 claims have a four-year statute of limitations. 28 U.S.C. § 1658; *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369 (2004). The question of when Plaintiffs' § 1981 claims accrued is a question of federal law that is not resolved by reference to state law. *Wallace v. Kato*, 549 U.S. 384, 388 (2007). "[I]t is the standard rule that accrual occurs when the plaintiff has a complete

and present cause of action." *Id.* (cleaned up). "Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become 'complete and present' for limitations purposes until the plaintiff can file suit and obtain relief." *Bay Area Laundry v. Ferbar*, 522 U.S. 192, 201 (1997).

Consistent with these general principles, the discovery rule provides that a federal claim accrues "only when the plaintiff learns that he's been injured, and by whom." *United States v. Norwood*, 602 F.3d 830, 837 (7th Cir. 2010) (citing *United States v. Kubrick*, 444 U.S. 111 (1979); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir.1990)). Here the injury is a violation of civil rights, and such claims "accrue when the plaintiff knows or should know that his or her constitutional rights have been violated." *Wilson v. Giesen*, 956 F.2d 738, 740 (7th Cir. 1992). Accordingly, in this case, any one Plaintiff's discovery of Defendants' race discrimination is the date on which that Plaintiff's § 1981 claim accrued. *Delaware State College v. Ricks*, 449 U.S. 250 (1980); *Hileman v. Maze*, 367 F.3d 694, 698 (7th Cir. 2004); *Soignier v. Am. Bd. of Plastic Surgery*, 92 F.3d 547, 551 (7th Cir. 1996).

The parties will hotly dispute facts about when Plaintiffs discovered Defendants' race discrimination. For example, many Plaintiffs did not know until years after they had purchased substandard stores that McDonald's placed them in such stores as part of its practice of "race matching." Still others did not realize they had been discriminated against when McDonald's denied them rent relief or engaged in incessant inspections until years later, when they spoke with white franchisees who had never been subject to such practices. When each Plaintiff discovered he or she was the target of McDonald's discriminatory practices is a highly fact-bound, individualized question that the pleadings cannot answer.

These are just some of the examples of the fact-bound accrual questions that cannot be resolved at this stage. If an accrual determination turns on the resolution of such factual questions,

even summary judgment is inappropriate, and the issue must be submitted to jury. *Yorger v. Pittsburg Corning Corp.*, 733 F.2d 1215, 1219 (7th Cir. 1984).

3. The Parties Dispute Facts That Will Determine Whether the Statute of Limitations Is Equitably Tolled

Suppose the Court decided there was no factual dispute about when Plaintiffs' claims accrued and decided the statute of limitations began to run on particular dates certain. Even if that were the case, factual questions would still abound in the statute of limitations analysis. Consider Plaintiffs' § 1981 claims again. Even if those claims accrued and the statute of limitations might have started to run more than four years before Plaintiffs filed their claims, the statute of limitations is equitably tolled under federal law "if despite all due diligence [the plaintiff] is unable to obtain vital information bearing on the existence of his claim." *Cada*, 920 F.2d at 451. Equitable tolling does not require any wrongful effort by the defendant to prevent a suit from being brought. *Id.* Nor does it require the plaintiff to be ignorant of an injury. *Id.* Instead, it simply requires the plaintiff to show that "he [could not] obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Id.*

Even assuming for the sake of argument that there were no factual disputes about when Plaintiffs discovered their injuries (and thus when their § 1981 claims accrued), the parties will still dispute whether Plaintiffs could have through reasonable diligence obtained information from McDonald's necessary to decide whether those injuries were due to wrongdoing or wrongdoing by Defendants. Plaintiffs did not learn that McDonald's had systematically and intentionally discriminated against its Black franchisees until two female Black executives sued McDonald's for discrimination in January 2020. Given McDonald's pronounced commitment to equity and control of information as the franchisor, Plaintiffs would have had no reason to believe they were the subject of systemic discriminatory practices until that information came to light. In fact, Plaintiffs

even plead in their complaint—though such allegations are not necessary at this stage—that they lacked this vital information bearing on the existence of their claims until shortly before they filed suit. *See* SAC ¶¶ 104-06.

The Seventh Circuit observed that "[j]udges should respect the norm that complaints need not anticipate or meet potential affirmative defenses." *Richards v. Mitcheff*, 696 F.3d 635, 638 (7th Cir. 2012). The Court continued that, where the statute of limitations is raised, "[i]f the facts are uncontested . . . , it may be possible to decide under rule 12(c); if the parties do not agree, but one side cannot substantiate its position with admissible evidence, the court may grant summary judgment under Rule 56." *Id.* But the Court emphasized "the rule that judges must not make findings of fact at the pleading stage (or for that matter the summary judgment stage)." *Id.* "A complaint that invokes a recognized legal theory (as this one does) and contains plausible allegations on the material issues (as this one does) cannot be dismissed under Rule 12." *Id.*

IV. THIS COURT CANNOT DISMISS PLAINTIFFS' SECTION 1981 AND SECTION 1982 RACIAL DISCRIMINATION CLAIMS

Defendants argue that Plaintiffs fail to plausibly allege that McDonald's discriminated against Black franchisees under Section 1981 and Section 1982. McDonald's argument should be rejected because McDonald's fails to grapple with Plaintiffs' individual allegations, incorrectly imposes evidentiary burdens on the statutory pleading standards, and applies the wrong legal standards.

To plead a Section 1981 claim, "a plaintiff must allege: (1) membership in a racial minority; (2) an intent by the defendant to discriminate on the basis of race; (3) the discrimination concerns one or more of the activities enumerated in Section 1981(b); and (4) but for race, the plaintiff would not have suffered the loss of a legally protected right." *Byrd v. McDonald's USA, LLC*, No. 20-cv-6447, 2021 WL 2329639, at *2 (N.D. Ill. June 8, 2021) (citation omitted). Try as Defendants might to characterize this standard as impossible to meet, it is not. Put simply, Plaintiffs must sufficiently

plead that Defendants discriminated against them because of their race. And Plaintiffs have more than done so here. McDonald's motion imagines a complaint that is far different than the actual SAC. McDonald's argues that Plaintiffs provide only vague, high-level allegations of discrimination without explaining what actually happened to them. The reality is there for the Court to see when it looks at the SAC: Plaintiffs provide detailed individual allegations of discrimination.

A. Plaintiffs Plead That McDonald's Intended to Discriminate Against Them

Defendants argue that Plaintiffs have failed to plead intentional discrimination. Any fair examination of the SAC reveals the opposite: Plaintiffs aver specific acts of discrimination directed at them. McDonald's ignores these allegations completely, instead attacking the background allegations in the SAC as insufficient to state a claim, largely tracking McDonald's arguments for and this Court's dismissal of the First Amended Complaint.

The method for proving intent to discriminate is well-established. "A plaintiff may prove intentional discrimination, under Title VII or § 1981, through direct or circumstantial evidence (direct method) or resort to the indirect burden-shifting method described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)." *Dandy v. UPS*, 388 F.3d 263, 272 (7th Cir. 2004).[2] Direct evidence, the rarer of the two, would include an employer's admission that he or she is taking an adverse action against a plaintiff based on race. *Id.* at 272. Circumstantial evidence takes a variety of forms, including "suspicious timing, ambiguous statements oral or written, [and/or] behavior towards or comments directed at other employees in the protected group." *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 737 (7th Cir. 1994). Comments like "[r]acial epithets" or "stray remarks" can constitute

[2] Defendants rely on an incorrect legal standard. McDonald's argues that the standards of *McReynolds v. Merrill Lynch & Co.*, 694 F.3d 873 (7th Cir. 2012), apply here. However, the *McReynolds* court analyzed intent in a disparate impact claim, which Plaintiffs do not plead here. Plaintiffs set forth the correct standard here.

either direct or circumstantial evidence of intent to discriminate, depending on how connected they are to the decision at issue. *Dandy*, 388 F.3d at 272.

Moreover, proving intentional discrimination does not require a detailed litany of racist acts. Instead, a plaintiff need only put forward facts that "support an inference that facially-neutral acts might have been motivated by racial animus." *Douglas v. Alfasigma, USA*, No. 19-cv-2272, 2021 WL 2473790, at *13 (N.D. Ill. June 17, 2021) (Seeger, J.).

Each Plaintiff has satisfied that standard here. Plaintiffs' evidence of Defendants' intent largely falls into four categories: (1) explicit or coded racist comments; (2) exclusion from opportunities provided to white franchisees; (3) being held to a higher standard than white franchises; and (4) being targeted for undesirable opportunities, as compared to white franchisees.

Explicit or Coded Racist Comments

First, nine of Plaintiffs' supervisors made racist remarks during their tenure as franchisees. For example, Plaintiff Al Harris was explicitly told by the East Coast Division Manager that McDonald's would never let him purchase stores in an affluent white area because "[y]ou're black." SAC ¶ 360. A Vice President of Franchising told Plaintiff Kenneth Manning and a group of Black franchisees that he "was wondering why there was no more fried chicken in Detroit" during a National Black McDonald's Operators Association meeting in Detroit. *Id.* ¶ 142. McDonald's supervisors also told Black franchisees in coded language that they were not suited for particular stores because of their race, or vice versa. *See id.* ¶ 198 (Regional Manager informed Plaintiffs Delores and Christine Crawford they could not sell restaurants to buyers who were not "class picture of the future of the region," implying that group did not include Black franchisees); *id.* ¶ 453 (Regional Manager asked Plaintiff Joseph Mbanefo how he could be part of the McDonald's system if he was not familiar with Beatles music); *id.* ¶ 169 (Director of Operations told Plaintiff Keith Manning that he was better suited to operate among Black customers because of his race).

At other times, McDonald's deliberately chose to do nothing about racist hate crimes that Black franchisees faced. *See id.* ¶¶ 278, 285 (QSCVP ignored Plaintiff Juneth Daniel's reports that she was being threatened by the KKK and her store had been vandalized with the "N-word"); *id.* ¶ 319 (Regional Manager responded "it is what it is" after Plaintiff Wise Finley reported that white men had vandalized his restaurant with "KKK" markings). These race-based remarks and acts serve as direct evidence of McDonald's intent to discriminate against Black franchisees.

Exclusion from Benefits Provided to White Franchisees

Second, 31 Plaintiffs were excluded from benefits provided to their white counterparts. Specifically, McDonald's denied these Plaintiffs rent relief without justification, while offering financial assistance to white owner/operators in Plaintiffs' regions.

> *See* SAC ¶ 191 (Christine and Delores Crawford); ¶ 707 (Gordon Thornton); ¶ 388 (Lawrence Holland; ¶ 337 (Jacqueline and Anthony George); ¶ 468 (Lois and Mitchell McGuire); ¶ 651 (Allen Stafford); ¶ 251 (Benny and Eleanor Clark); ¶ 411 (Glenna and Douglas Hollis); ¶ 238 (Larry Brown); ¶¶ 686-87 (Karen and Serge Tancrede); ¶ 722 (Errol Thybulle); ¶¶ 634, 651 (Floyd Sims); ¶¶ 568-70 (Jeffery Rogers); ¶ 754 (Norman Williams); ¶ 347 (Wesley Hall); ¶¶ 589-90 (Carrie Salone); ¶ 610 (Jeremiah Simmons); ¶ 269 (Juneth Daniel); ¶ 530 (William Rasul); ¶ 258 (Glenda Claypool); ¶¶ 520-21 (Dawn Mussenden); ¶¶ 316-17 (Wise Finley); ¶¶ 170-71, 173 (Keith Manning); ¶ 716 (Ronnie Thornton).

Others were denied the opportunity to purchase stores or take over leases that McDonald's then granted to white franchisees.

> *See id.* ¶¶ 133, 145, 149, 154-55 (Ken Manning); ¶ 218 (Annis Alston-Staley and Harry Staley); ¶¶ 469, 472 (Lois and Mitchell McGuire); ¶¶ 712-13 (Ronnie Thornton); ¶ 242 (Larry Brown); ¶ 172 (Keith Manning); ¶ 456 (Joseph Mbanefo); ¶¶ 360, 365 (Kristen and Al Harris); ¶¶ 745-46 (Norman Williams); ¶¶ 585-86 (Carrie Salone); ¶ 606 (Jeremiah Simmons); ¶¶ 516-18 (Dawn Mussenden); ¶ 432 (Harold and Jeremy Lewis); ¶ 231 (Robert Bonner); ¶ 411 (Glenna and Douglas Hollis).[3]

Applying Different Standards to Black Franchisees Than White Franchisees

[3] In addition to the acts alleged in the SAC, Mr. and Ms. Hollis could also allege in a further amended complaint that Regional Manager Carter Drew denied Douglas Hollis's requests for expansion opportunities, including his application to a new store opening in Trenton. Drew conceded at a BMOA meeting in

Third, Defendants subjected 32 Plaintiffs to a more rigorous standard than their white counterparts, including conducting increased inspections of their stores, applying more stringent grading during those inspections, and requiring store renovations over shorter time periods.

> *See id.* ¶ 244 (Larry Brown); ¶ 250 (Benny and Eleanor Clark); ¶¶ 723-24 (Errol Thybulle); ¶¶ 639, 645, 650-51, 653 (Floyd Sims); ¶¶ 714-15 (Ronnie Thornton); ¶¶ 405, 407 (Glenna and Douglas Hollis)[4]; ¶¶ 472, 475-76 (Lois and Mitchell McGuire); ¶ 665-66, 673-74 (Allen Stafford); ¶ 731 (William (Pete) Washington); ¶ 598 (Carrie Salone); ¶¶ 395, 398 (Lawrence Holland); ¶¶ 346, 354 (Wesley Hall); ¶ 553 (William Rasul); ¶¶ 453-54, (Joseph Mbanefo); ¶¶ 525-26 (Dawn Mussenden); ¶ 544 (Dwayne Richard Johnson); ¶¶ 259-61 (Glenda Claypool); ¶¶ 190 (Christine and Delores Crawford); ¶¶ 368, 381 (Kristen and Al Harris); ¶¶ 557-58, 564-65, 567, 576-77, 579-80 (Jeffery Rogers); ¶¶ 310-11, 326 (Wise Finley); ¶¶ 770, 772, 774 (Jacqueline Wynn); ¶¶ 205-06, 209-10 (Van Jakes); ¶¶ 290 (Juneth Daniel); ¶¶ 303-04, 306 (Yves Dominique); ¶¶ 146-47, 150, 151, 158 (Ken Manning); ¶ 175 (Keith Manning); ¶¶ 229-30 (Robert Bonner); ¶¶ 739-40, 742 (Lance Williams); ¶¶ 708 (Gordon Thornton); ¶ 494 (Dwight and Scott Miller); ¶¶ 680, 698-99, 700 (Serge and Karen Tancrede).

Placing Black Franchisees in Less Profitable Locations

Finally, Defendants targeted 32 Plaintiffs for undesirable opportunities by placing them in substandard, low-volume stores in predominantly African American neighborhoods.

> *See id.* ¶ 236-37 (Larry Brown); ¶ 249 (Benny and Eleanor Clark); ¶ 684 (Karen and Serge Tancrede); ¶ 719 (Errol Thybulle); ¶ 618 (Floyd Sims); ¶ 403 (Glenna and Douglas Hollis); ¶¶ 468, 471, 474 (Lois and Mitchell McGuire); ¶¶ 668, 671 (Allen Stafford); ¶ 729 (William (Pete) Washington); ¶¶ 584-85 (Carrie Salone); ¶ 398 (Lawrence Holland); ¶¶ 342, 348 (Wesley Hall); ¶ 531 (William Rasul); ¶¶ 444, 448-50 (Joseph Mbanefo); ¶¶ 508-10, 515-16, 520 (Dawn Mussenden); ¶¶ 540, 543 (Dwayne Richard Johnson); ¶ 255 (Glenda Claypool); ¶ 183 (Christine and Delores Crawford); ¶¶ 360-62, 366-67 (Kristen and Al Harris); ¶¶ 550-53 (Jeffery Rogers); ¶ 308 (Wise Finley); ¶ 751-52 (Norman Williams); ¶ 607 (Jeremiah Simmons); ¶ 415 (Laetitia Johnson); ¶ 767 (Jacqueline Wynn); ¶ 204 (Van Jakes); ¶¶ 265, 271 (Juneth Daniel); ¶¶ 300-01 (Yves Dominique); ¶ 221 (Annis Alston-Staley and Harry Staley); ¶¶ 136-37 (Kenneth Manning); ¶¶ 429-31 (Harold and Jeremy Lewis); and ¶¶ 168-69 (Keith

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Wilmington, Delaware that he would never jeopardize his career by supporting a franchising decision for a Black franchisee. *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n.1 (7th Cir. 2012) (holding that a plaintiff may elaborate on factual allegations in response to a motion to dismiss in a manner consistent with the pleadings (citing *Chavez v. Illinois State Police*, 251 F.3d 612, 650 (7th Cir. 2001)).

[4] Additionally, during his tenure operating five stores in Orlando between 2001 and 2013, Hollis was subjected to increased, unannounced inspections, at the direction of Field Service Manager Jim McCabe and Regional Vice President Karen King.

Manning).

These instances of racial discrimination mirror other cases in which courts have found an intent to discriminate in the Section 1981 context. *See Douglas*, 2021 WL 2473790, at *13 (employees sent racist text messages and did not invite African American plaintiffs to team outings); *Williams v. State Farm Mutual Auto. Ins. Co.*, 609 F. Supp. 3d 662, 675-76 (N.D. Ill. 2022) (employer "race match[ed]" African American insurance agents to regions with higher African American populations and imposed higher burdens on them to develop their business than white agents); *Guster-Hines v. McDonald's USA, LLC*, No. 20-cv-00117, 2021 WL 2633303, at *11 (N.D. Ill. June 25, 2021) (purge of African Americans from McDonald's executive ranks plausibly alleged intentional discrimination).

Like in these cases, McDonald's differential treatment of Black and white franchisees suggests that a "facially-neutral act," like the denial of rent relief or a Christmas Eve inspection, was undertaken out of racial animus. *Douglas*, 2021 WL 2473790, at *13. As a result, Plaintiffs have fulsomely alleged intentional discrimination on McDonald's part.

Defendants also maintain that McDonald's intentional discrimination is not plausible because the Franchise Agreement governs relationships with all franchisees and requires the same obligations of every franchisee, regardless of their race. This contention overlooks the language of Section 1981, which ensures the equality to "make and *enforce* contracts," which is defined as "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, and conditions of the contractual relationship." 42 U.S.C. § 1981(a)-(b). It is a textbook violation of the statute for an entity to enforce a contract differently, including providing or denying certain privileges, based on race. *See Domino's Pizza, Inc. v. McDonald*, 546 U.S. 470, 476 ("Section 1981 offers relief . . . when racial discrimination impairs an existing contractual relationship."). This is exactly what Plaintiffs allege McDonald's to have done. McDonald's cannot fall back on the

language of its Franchise Agreement without confronting the difference in its enforcement between white and Black franchisees.

B. Plaintiffs Plausibly Plead That But For Their Race, Defendants Would Not Have Acted Against Them

Defendants argue that Plaintiffs have failed to allege "but for causation," while once again mischaracterizing the relevant standard. Under Section 1981, a plaintiff must plausibly allege that the defendant would not have acted against him or her but for race. *Comcast Corp.*, 140 S. Ct. at 1019. Put differently, at this stage the plaintiff is required to allege that, had the defendant not discriminated, the plaintiff would not have suffered his or her injury. *Id.* at 1014.

In analyzing whether plaintiffs have alleged but-for causation, courts have asked whether there is an obvious alternative explanation for plaintiff's injuries, aside from discrimination. *See Bowes-Northern v. JPMorgan Chase Bank NA*, 3:21-cv-803, 2022 WL 2237146, at *6 (N.D. Ind. June 21, 2022); *Newman v. Amazon.com*, No. 21-cv-531, 2022 WL 971297, at *7 (D.D.C. Mar. 31, 2022) (plaintiff plausibly alleged but-for causation where she alleged race discrimination and did not "provide any nondiscriminatory explanations" for her treatment). If the answer is that there is an obvious alternative explanation for the injuries, then plaintiffs have failed to plausibly allege that race was a but-for cause of their injuries.

The answer here is resounding: there is no plausible explanation for Plaintiffs' injuries other than race discrimination. Plaintiffs have described in detail McDonald's adverse treatment of them, ranging from "race matching" them to underperforming stores in majority African American neighborhoods, making racist remarks, denying them rent relief and other financial assistance, requiring rushed renovations, and deploying a common tactic to force them out of the system through increased inspections, among other practices. Additionally, Plaintiffs have named white franchisees whom McDonald's favored in all these aspects, further demonstrating their

discriminatory treatment. *See, e.g.* SAC ¶ 372 (identifying white franchisee who received impact funding, as compared to Plaintiff Al Harris who was denied such funding); *id.* ¶ 397 (former white franchisee was not required to make renovations to store despite experiencing the same issues, as compared to Plaintiff Lawrence Holland); *id.* ¶ 439 (identifying white franchisee who was permitted to sell his stores to his children, while Plaintiff Harold Lewis was denied the opportunity to do so, without justification). There is no obvious alternative explanation for such differential treatment other than racial discrimination.

Defendants attempt to counter Plaintiffs' allegations by cherry-picking three individual Plaintiffs' allegations that, in their view, suggest alternative reasons for Plaintiffs' injuries. *See* Dkt. 19 at 18. Putting to one side the fact that McDonald's cherry-picking of three of Plaintiffs' many allegations regarding but-for causation would not justify dismissal of the SAC, McDonald's is also wrong about what these three Plaintiffs have alleged. They first point to Plaintiff Wise Finley's allegation that he was forced to sell his stores because of loss of sales. SAC ¶ 332. However, this contention ignores the preceding paragraphs, in which Plaintiff Finley alleges that McDonald's stripped him of his most lucrative products without explanation, and then granted rent relief to the non-African American franchisee who purchased Finley's stores, though they had previously denied such relief to Finley. *Id.* ¶¶ 328-31. But for his race, McDonald's would have provided rent relief to Finley and allowed him to continue selling his most lucrative products. But for his race, Finley's stores would not have lost sales, and he would not have been forced to sell them.

Defendants target Plaintiffs Al and Kristen Harris next, asserting that they lost their stores not because of racism, but because they failed a company visit. *Id.* ¶ 381. Again, this alternative explanation omits crucial facts: the visit and inspection results were pretextual given that the Harrises were outperforming their region at the time of the visit and failed it on a discretionary guideline. *Id.* Rather than defeat the Harrises' claim of racial discrimination, the allegations of

pretextual inspections in fact reinforces that claim. Because of their race, McDonald's targeted the Harrises for removal from the system.

Finally, Defendants argue that Plaintiffs Scott and Dwight Miller were forced out after failing a business review, despite the preceding paragraph explaining that they were failed based on a newly invented, unheard-of guideline. *Id.* ¶¶ 493-94. Indeed, McDonald's soon thereafter allowed a white franchisee who had also failed this guideline to purchase more stores, thus demonstrating that they were looking for a reason to fail the Millers. *Id.* ¶ 503. Such a pretextual reason supports an inference that McDonald's wanted to push out the Millers—the only two Black operators in their area—from their successful stores in favor of white franchisees, which they ultimately did.

Plaintiffs in race discrimination suits have met the but-for causation pleading standard in a case using strikingly similar allegations to those at issue here. In *Williams v. State Farm Mutual Automobile Insurance*, a group of African American former State Farm Agents sued State Farm for racial discrimination under Section 1981. 609 F. Supp. 3d at 665-66. There, the plaintiffs alleged State Farm's discriminatory practices against them, including race matching to under-performing regions, denial of opportunities, harsher discipline than their white peers, and termination. *Id.* at 681. The court found that these allegations amounted to an inference that the defendant acted against the plaintiffs "*because of their race*" and that plaintiffs did not merely "tack 'because of race' onto their allegations." *Id.*

So too, here. In detailing their adverse treatment as compared to white franchisees, Plaintiffs have adhered to this Court's ruling that "[a]lleging that an entity treated someone adversely without more, is not enough to create a plausible inference that an entity treated someone adversely because of their race." MTD Order at 16:13-16. The SAC provides the "more" by offering details about the things McDonald's kept from Plaintiffs while offering them to white franchisees and the things McDonald's did to Plaintiffs that McDonald's did not do to white franchisees.

C. Plaintiffs Plausibly Plead Discrimination in Compliance with Rule 8

Defendants next argue that the individualized allegations in Plaintiffs' SAC fail to establish the "what," "who," and "when," required by Rule 8. But Defendants attempt to impose a heightened evidentiary burden at the pleading stage, and their arguments should be rejected.

Defendants' efforts to pick apart Plaintiffs' allegations for missing facts is precisely the type of standard courts have disavowed. "[I]t is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences." *Swanson*, 614 F.3d at 404. Instead, a plaintiff must "present a story that holds together," meaning "the court will ask itself *could* these things have happened, not *did* they happen." *Id.*

Plaintiffs have presented 48 such stories in the SAC, identifying the discriminatory acts they endured, the McDonald's employees responsible for those acts, and when they occurred. Defendants misrepresent individual Plaintiffs' allegations as deficient for seven reasons, as set forth below:

First, Defendants mischaracterize six Plaintiffs' allegations as lacking key dates and discriminatory actions. As discussed, each identified Plaintiff provided the requisite "what" and "when" of the discriminatory acts they endured.

> *See* SAC ¶¶ 201-13 (McDonald's adverse treatment of Plaintiff Van Jakes, including placing him in substandard stores in 1994, requiring more reinvestments than his white counterpart, denying him an opportunity to purchase a new store and offering it to a white franchisee in 2014, subjecting him to more inspections than a white counterpart, and denying him the opportunity to become a vendor in 2015); ¶¶ 297-306 (McDonald's adverse treatment of Plaintiff Dominique, including being placed in a substandard location in 2008, refusing to approve the sale to him of white-owned, profitable locations, raising the rent on him but no others in the region in 2012, and forcing him to sell his profitable store to a white owner in 2017, rather than to his preferred buyer); ¶¶ 307-32 (McDonald's adverse treatment of Plaintiff Finley, including placing him in a substandard store, denying him impact funding, failing to respond to racist hate crimes at his store, pulling his most successful products in 2013, and providing rent relief to the non-Black franchisee who purchased his store though it had denied his request for it); ¶¶ 413-26 (McDonald's adverse treatment of Plaintiff

> Johnson, including placing her in a substandard store, denying her refinancing, refusing to approve the sale of her stores to her sons, and pressuring her to sell them to white operators in 2018); ¶¶ 505-27 (McDonald's adverse treatment of Plaintiff Mussenden, including placing her in substandard stores, refusing to provide financial assistance for security costs, denying her opportunities for expansion in favor of white operators, informing her she could not survive the imminent Bigger Bolder Vision 2020 plan, and forcing her out of the system through increased inspections); ¶¶ 743-62 (McDonald's adverse treatment of Plaintiff Williams, including denying him stores in his preferred city in favor of white operators, placing him in low-volume stores, denying him permission to sell his store while allowing it for white operators in the area, telling him he would do better in locations than other operators implicitly because of his race, increasing his rent payments while keeping those of white franchisees' stable, denying him rent relief while providing it to a white franchisee in the region, acknowledging that they had given him poorly performing stores, denying him rewrite, and interfering in the sale of his store to his preferred buyer).

Second, Defendants contend that though three plaintiffs allege they were denied rewrite and were held to more stringent standards than white franchisees, that is insufficient to plausibly plead discrimination. Dkt. 19 at 15 (citing Plaintiffs Juneth Daniel, Scott Miller, and Dwight Miller's allegations). This argument misses the mark, given that a plaintiff plausibly alleges discrimination by not only arguing they were treated poorly, but that similarly situated white employees were treated more favorably. *Douglas*, 2021 WL 2473790, at *3. The allegations must provide "detail about how McDonald's treated [the plaintiff] differently because of his [or her] race." MTD Order at 16:1-4. Plaintiffs have done that here.

> *See* SAC ¶¶ 281, 283, 286 (denying Plaintiff Juneth Daniel rewrite after a series of unreasonable inspections and stringent grading visits, while local white franchisees in the area were not penalized for a major food safety violation); ¶ 501 (denying Plaintiffs Scott and Dwight Miller rewrite for pretextual reason that they were below TV market sales, while allowing a white owner-operator who was also below the TV market sales to purchase more stores).

Alleged differential treatment is enough to allow for an inference of discrimination.

Third, Defendants similarly misinterpret Rule 8 in asserting that McDonald's enforcement of more stringent renovation requirements on Plaintiffs is insufficient to establish discrimination. Dkt. 19 at 15-16 (pointing to Plaintiffs Keith Manning, Allen Stafford, and Ronnie Thornton). But once again, Plaintiffs here allege that they were subjected to more rigorous renovation requirements than

their white counterparts, thus plausibly alleging differential treatment because of their race. *See* SAC ¶ 175 (McDonald's supervisors pressured Plaintiff Keith Manning to complete renovations in extremely short time frames, as compared to white owner/operators); ¶¶ 663, 672 (Defendants required Plaintiff Stafford to complete renovations in shorter time frames than white franchisees for several stores); ¶ 715 (same for Plaintiff Thornton).

Fourth, Defendants assert that McDonald's alleged interference in the sales of Plaintiffs' stores does not establish discrimination. Dkt. 19 at 15-16. McDonald's interference in these sales violated Plaintiffs' Franchising Agreements, which expressly provide that McDonald's will not arbitrarily withhold its consent to a sale. By withholding its consent to these Plaintiffs' sales or forcing sale to a particular buyer, McDonald's displayed its preference for white owner/operators to take over successful locations. *See* SAC ¶¶ 139-41, 163 (McDonald's denied Ken Manning's sale of his stores to his brother because of his race, and later forced his stores' sale to a white franchisee for a lower price); ¶¶ 197 – 200 (McDonald's forced sale of Plaintiffs Christine and Delores Crawford's stores to white franchisee they had hand-picked); ¶¶ 234-46 (McDonald's forced sale of Plaintiff Larry Brown's store to preferred franchisee for less than its worth).

Fifth, Defendants argue that three Plaintiffs' allegations of increased inspections are insufficient because they do not provide the specific dates, bases, and names of each inspection. Dkt. 19 at 16. But requiring Plaintiffs to name the individual inspectors, bases, and dates for hundreds of inspections over the course of years is beyond the scope of what Rule 8 requires. *See Murdock-Alexander v. Tempsnow Employment*, No. 16-cv-5182, 2016 WL 6833961, at *7 (N.D. Ill. Nov. 21, 2016) (finding Plaintiff's omission of specific dates on which he alleged he was overlooked for temporary job assignments because of his race did not warrant dismissal); *Pruitt v. Personnel Staffing Group, LLC*, No. 16-cv-5079, 2016 WL 6995566, at *4 (N.D. Ill. Nov. 30, 2016) (exact dates plaintiffs sought employment and names of individuals were not necessary at pleading stage);

Williams, 609 F. Supp. 3d at 677-78 (alleging that discrimination "took place throughout their tenures" at company satisfies the "when" under Rule 8). Defendants functionally seek to raise the standard for pleading discrimination under Rule 8 to that of pleading fraud under Rule 9.

Sixth, Defendants contend that a Plaintiff's allegation of discriminatory denial of rent relief does not suffice because rent relief was not guaranteed to any franchisee under the Franchising Agreement. Whether the Franchising Agreement guaranteed or disclaimed a particular privilege does not matter when the question is whether Plaintiffs have plausibly alleged that McDonald's executed that agreement in a racially discriminatory matter, offering privileges to white franchisees, and denying them to Black franchisees. Rent relief was a common form of assistance that McDonald's denied Black franchisees, including William (Pete) Washington, but offered to white franchisees, like Sue Derlack, a white franchisee in Washington's region. SAC ¶ 732. Such differential treatment based on race is enough to plausibly allege discrimination, and McDonald's cannot disclaim it by relying on the language of its Franchising Agreement and ignoring how it executed its agreements.

Finally, Defendants point to Plaintiffs Kristen and Al Harris's allegations of harassment as not probative of discrimination. Dkt. 19 at 16. Yet, the derogatory comment itself is not at issue; rather McDonald's response to it illuminates its discriminatory behavior. Specifically, Plaintiffs complained to the Regional Supervisor about the Business Consultant's remarks and were ignored, while a similarly situated white franchisee complained and was assigned a new Business Consultant. SAC ¶¶ 378-80. Such differential treatment set up the white franchisee for success and hampered the Harrises' opportunities to receive fair gradings. This type of differential treatment plausibly claims discrimination on McDonald's part.

Plaintiffs have satisfied Rule 8's requirement of establishing the "what," "who," and "when," of the case, as they have detailed the discriminatory actions they suffered, named the individual McDonald's decisionmakers responsible for the actions, and provided the time frames of when

those actions occurred. They have provided sufficient facts establishing discrimination on McDonald's part.

D. Plaintiffs Plausibly Plead a Pattern and Practice of Discrimination

Defendants inaccurately characterize as "black-letter law" that individual plaintiffs are foreclosed from pattern or practice discrimination claims. In their telling, this claim is reserved for putative classes. In reality, whether an individual plaintiff may bring a pattern or practice claim is an open question in the Seventh Circuit.

Defendants rely on *Matthews v. Waukesha County*, 759 F.3d 821, 829 (7th Cir. 2014), for this rule. But *Matthews* does not go so far as Defendants say. In fact, *Matthews* itself holds that pattern and practice evidence *can be* collateral evidence of individual discrimination if the plaintiff also offers evidence of direct discrimination. *See id.* Here, Plaintiffs allege that they suffered direct discrimination. As such, the pattern and practice evidence offered by Plaintiffs is pertinent to their claims, even under the holding in *Matthews*. In fact, in *Matthews*, the Seventh Circuit was considering the case on summary judgment, not a motion to dismiss, which is consistent with the idea that allegations of a pattern and practice of discrimination are adequate to overcome a motion to dismiss.

Further, it is an open question in the Seventh Circuit whether a plaintiff could pursue a pattern-and-practice theory even where a plaintiff lacks any evidence of direct individual discrimination. In the most oft-cited case on individual pattern or practice claims in this Circuit, *Babrocky v. Jewel Food Company*, 773 F.2d 857, 866 n.6 (7th Cir. 1985), the court merely stated in a footnote that these types of claims *typically* involve class-wide discrimination.

Significantly, as two district courts have discussed, this dicta is not enough to settle the question. *See Does 1-5 v. City of Chicago*, No. 18-cv-03054, 2019 WL 2173784, at *3 (N.D. Ill. May 20, 2019) (citing *Babrocky* and concluding "that it is an open question in this Circuit as to whether an individual can bring a pattern-or-practice claim . . . , as opposed to a class action claim"); *Bhd. of*

Maintenance of Way Employees Div. of the Int'l Bhd. Of Teamsters v. Indiana Harbor Belt R.R., No. 2:13-cv-18, 2014 WL 4987972, at *2 n.1 (N.D. Ind. Oct. 7, 2014) ("Importantly, the Seventh Circuit has not yet addressed whether an individual can bring a pattern-or-practice claim . . . . At most, it has merely questioned in a footnote whether allow such claims by an individual outside of the class context is proper, without deciding the issue."). *See also Flavel v. Svedala Industries, Inc.*, 875 F. Supp. 550, 557 (E.D. Wis. 1994) (allowing multi-plaintiff action alleging pattern or practice of age discrimination to go forward).

There is good reason to find that pattern or practice claims can be alleged in individual cases, particularly in a multi-plaintiff action. That is because a pattern or practice claim can be used as "a method of proving a Title VII claim." *Karp v. CIGNA Healthcare*, 882 F. Supp. 2d 199, 212 (D. Mass. 2012).[5] "[I]f an individual can be permitted to prove that she was the victim of an isolated incident of discrimination . . . surely she should be allowed to prove that she was the victim of a more egregious form of discrimination, involving the unlawful practices of the entire company." *Id.* at 213. Plaintiffs may use statistical evidence or accounts of other similarly situated individuals who were discriminated against to prove this claim. *Id.* at 210 (citing *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2555-56 (2011)).

A pattern or practice claim is particularly suited to a multi-plaintiff action, like this one, where plaintiffs plead their individual experiences of discrimination against a common actor and those experiences reinforce one another. *See Trivette v. Tennessee Dep't of Corrs.*, No. 3:20-cv-00276, 2020 WL 6685557, at *7 (M.D. Tenn. Nov. 12, 2020) (finding that plaintiffs alleging same deprivation across multiple prisons "supports an inference that the plaintiffs are challenging a

[5] The Seventh Circuit has recognized the "substantive standard governing liability for § 1981 claims and Title VII disparate treatment claims" as "identical." *Melendez v. Ill. Bell Tel. Co.*, 79 F.3d 661, 669 (7th Cir. 1996).

shared, deeper problem that they can effectively litigate together"). Statistical evidence and similarly situated Black franchisees' experiences of discrimination would serve as powerful evidence of McDonald's systemic discrimination against Black franchisees. As a result, a pattern or practice discrimination, used as one method of many to prove McDonald's discrimination against Black franchisees, should not be foreclosed at this early stage.

E. Plaintiffs Plausibly Plead Discrimination Under Section 1982

The pleading requirements for Section 1982 claims mirror those of Section 1981, with the distinction that they concern real property instead of a contract. 42 U.S.C § 1982; *Hatch v. City of Milwaukee*, No. 21-2805, 2022 WL 897676, at *2 (7th Cir. Mar. 28, 2022).

As discussed above, 32 Plaintiffs allege that McDonald's intentionally placed them in low-volume, substandard stores, typically in high-crime areas, while reserving the more profitable, suburban locations for white franchisees. *See supra* page 17-18. Such differential treatment allows for an inference of race discrimination, satisfying the second prong of a Section 1982 claim. This discrimination involved McDonald's leasing substandard stores to Black franchisees and denying leases for favorable locations to Black franchisees, thus meeting the third prong. The Seventh Circuit has recognized this type of racial steering as prohibited under Section 1982. *See City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1101 (7th Cir. 1992) (affirming liability of defendant real estate agency under Section 1982 for racial steering). McDonald's cursory discussion of Plaintiffs' Section 1982 claim and intertwining of that discussion with its statute of limitations arguments provides no substantive reason for dismissal of that claim.

V. PLAINTIFFS PLAUSIBLY PLEAD BREACH OF CONTRACT CLAIMS UNDER SECTIONS 3, 12, AND 15 OF THE FRANCHISE AGREEMENT

As with the other claims, Defendants impermissibly inflate the pleading standard for contract claims at the motion to dismiss stage.

Under Illinois law, a breach of contract claim must allege "(1) the existence of a valid and enforceable contract; (2) substantial performance by the plaintiff; (3) a breach by the defendant; and (4) damages." *Gociman v. Loyola University of Chicago*, 41 F.4th 873, 883 (7th Cir. 2022). Defendants do not contest the existence of a valid and enforceable contract agreement between Defendants and Plaintiffs or damages. Instead, Defendants contest whether Plaintiffs have plausibly pleaded a breach or their substantial performance. Dkt. 19 at 20-26.

Defendants' arguments ignore the plain language of the Franchise Agreement ("FA") and Franchise Disclosure Document ("FDD") as well as core contracting principles. A breach occurs "where a party fails to carry out a term, promise, or condition of a contract." *Talbert v. Home Sav. of Am., F.A.*, 638 N.E.2d 354, 358 (Ill. App. Ct. 1994). At the motion to dismiss phase, all Plaintiffs must do is plausibly allege that Defendants violated the contract terms. A breach of contract claim that provides Defendants fair notice of the grounds upon which it rests is sufficient. *Argonaut Ins. Co. v. Broadspire Servs., Inc.*, No. 05-cv-218, 2008 WL 4346418, at *3 (N.D. Ill. Mar. 25, 2008). Defendants cannot evade engaging with the claim by retrofitting the standard for their purposes. The complaint plausibly pleads that Defendants breached the FA by denying Plaintiffs assistance under Section 3, violating their duties under Section 12, and acting arbitrarily under Section 15.

A. Plaintiffs Plausibly Plead Breach Claims Under Section 3 of the Franchise Agreement

Defendants' first argument for dismissal of the breach of contract claims depends entirely on ignoring the plain language of the FDD and Section 3's terms. Dkt. 19 at 21-22.

Contracts must be "construed as a whole." *Della Parola Cap. Mgmt., LLC v. Blaze Portfolio Sys., LLC*, No. 21-cv-321, 2021 WL 3674613, at *2 (N.D. Ill. Aug. 19, 2021) (citation omitted). The FDD explicitly states that "except as listed below, McDonald's is not required to provide you with any assistance." Ex. A at 24. Among these obligations exempted from this disclaimer is the same

obligation listed in FA Section 3. Ex. B at 25. Together, Defendants' own documents make clear that Section 3 confers explicit obligations on Defendants. Nothing is disclaimed after all.

The plain language of Section 3 underscores this interpretation. Plainly construed, this provision of the FA states that 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." Ex. A ¶ 3. If "the words in the contract are clear and unambiguous, they must be given their plain, ordinary and popular meaning." *Della Parola Cap. Mgmt., LLC*, 2021 WL 3674613, at *2 (citation omitted). In interpreting this contract provision, "shall" is given "its common and ordinary meaning" and always carries "a peremptory, imperative, compulsory and mandatory sense, as opposed to a permissive sense." *Weill v. Centralia Serv. & Oil Co.*, 51 N.E.2d 345, 347 (Ill. App. Ct. 1943). "[W]hen employed with reference to a right or benefit to anyone, which right or benefit depends on giving a mandatory meaning to the word, it cannot be given a permissive meaning." *Id.* Fundamentally, the plain meaning of the phrase imposes an obligation on Defendants to provide these benefits to Plaintiffs as they did to white franchisees.[6]

[6] Likewise, Defendants' reference to *McDonald's Corp. v. C.B. Mgmt. Co.* is a red herring. That case did not hold that Section 3 confers no obligations, as Defendants claim. There, McDonald's sent a notice to a franchisee in default on its rent payments that it would terminate its franchise agreement if it did not cure all defaults. *McDonald's Corp. v. C.B. Mgmt. Co.*, 13 F. Supp. 2d 705, 708 (N.D. Ill. 1998). The franchisee applied for a loan from a third-party financial institution to cure its amounts owed. *Id.* Even though McDonald's had previously consented to subordinate its interests to those of a franchisee's chosen lender, it did not do so and terminated the lease. *Id.* In a counterclaim, the franchisee alleged McDonald's had discretion to subordinate its interests under Section 3 and abused its contractual discretion in violation of its obligation to act in good faith. *Id.* at 711. In evaluating the plain language of Section 3, the court only determined that Section 3 did not create discretion with subordination and termination. *Id.* at 712. It says nothing about whether McDonald's was obligated to make available the services at issue in this case.

Here, Plaintiffs plausibly plead that Defendants violated their obligations under Section 3. Twenty-three Plaintiffs were denied rent relief and impact funds, while other white franchisees had been granted those privileges:

> *See* SAC ¶¶ 171, 173 (Keith Manning); ¶ 191 (Delores and Christine Crawford); ¶¶ 238, 245-46 (Larry Brown); ¶ 258 (Glenda Claypool, on behalf of Sherman Claypool); ¶¶ 269, 275 (Juneth Daniel); ¶¶ 317, 329-31 (Wise Finley); ¶¶ 336-37 (Jacqueline and Anthony George); ¶¶ 347, 352 (Wesley Hall); ¶¶ 370-71 (Al and Kristen Harris); ¶ 388 (Lawrence Holland); ¶¶ 470, 480-81 (Lois and Mitchell McGuire); ¶¶ 510-13 (Dawn Mussenden); ¶ 532 (William Rasul); ¶¶ 585, 591, 602 (Carrie Salone); ¶ 612 (Jeremiah Simmons); ¶ 636 (Jeremiah Simmons); ¶¶ 664, 668, 672 (Allen Stafford); ¶¶ 686-87, 692, 694-95 (Serge & Karen Tancrede); ¶ 707 (Gordon Thornton); ¶ 716 (Ronnie Thornton); ¶¶ 720-22 (Errol Thybulle); ¶ 732 (William Washington); ¶¶ 754, 759 (Norman Williams).

Eight Plaintiffs were denied the opportunity to acquire or rewrite loans, while other white franchisees had been granted those:

> *See id.* ¶ 171 (Keith Manning); ¶¶ 193-94 (Delores and Christine Crawford); ¶ 420 (Laetitia Johnson); ¶ 503 (Scott and Dwight Miller); ¶¶ 546-47 (Dwayne Richard Johnson); ¶¶ 570-73 (Jeffrey Rogers); ¶ 590 (Carrie Salone); ¶ 760 (Norman Williams).

Each Plaintiff alleges a valid and enforceable contract under the FA, a breach of Section 3, substantial performance pursuant to the FA, and damages. No more is required.

B. Plaintiffs Plausibly Plead Breach Claims Under Section 12 of the Franchise Agreement

Defendants misread Section 12 as well. Dkt. 19 at 22-23. Section 12 confers on McDonald's "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." Ex. B ¶ 12. Likewise, McDonald's may require Plaintiffs to maintain and renovate their locations in accordance with the standards set forth in the McDonald's System. *Id.* ¶¶ 12(a)-(c). If Plaintiffs fail to maintain the location or deny McDonald's the right to inspect the premises, that constitutes a "material breach" under the contract terms, which gives Defendants the right to terminate the Franchise at its discretion. *Id.* ¶ 18(a), (d).

Functionally, Defendants have a kill switch for the contractual relationship. Such a severe remedy underscores the importance of Defendants acting reasonably. According to Black's Law Dictionary, "reasonable" refers to "fair, proper, or moderate under the circumstances." *Reasonable*, BLACK'S LAW DICTIONARY (11th ed. 2019). A "reasonable time" for purposes of contracting refers to "[t]he time to do what a contract requires to be done, based on subjective circumstances." *Reasonable Time*, BLACK'S LAW DICTIONARY (11th ed. 2019). A party vested with such discretion must exercise it in good faith. *See Bank One, Springfield v. Roscetti*, 723 N.E.2d 755, 764 (Ill. App. Ct. 1999). Defendants did not.

Plaintiffs plausibly allege that Defendants used unreasonable inspections and renovations to overburden Plaintiffs. Nineteen Plaintiffs were subjected to unreasonable renovation requirements, despite white franchisees not being subjected to similar requirements:

> *See* SAC ¶¶ 135, 146-47, 164 (Kenneth Manning); ¶ 176 (Keith Manning); ¶ 205 (Van Jakes); ¶ 230 (Robert Bonner); ¶ 243 (Larry Brown); ¶¶ 260-61 (Glenda Claypool on behalf of Sherman Claypool); ¶¶ 272-73 (Juneth Daniel); ¶ 304 (Yves Dominique); ¶ 310 (Wise Finley); ¶ 368 (Al and Kristen Harris); ¶ 451 (Joseph Mbanefo); ¶¶ 472, 474, 476 (Lois and Mitchell McGuire); ¶¶ 544-45 (Dwayne Richard Johnson); ¶¶ 557-558, 579 (Jeffrey Rogers); ¶¶ 613-14 (Jeremiah Simmons); ¶ 673 (Allen Stafford); ¶¶ 700-01 (Serge and Karen Tancrede); ¶ 708 (Gordon Thornton); ¶¶ 715, 717 (Ronnie Thornton); ¶¶ 771, 774 (Jacqueline Wynn).

In addition, the following 22 Plaintiffs allege unreasonable inspections, thereby plausibly staking out a claim for breach of contract:

> *See id.* ¶¶ 150-151, 157-58 (Kenneth Manning); ¶¶ 209-10 (Van Jakes); ¶ 229 (Robert Bonner); ¶ 244 (Larry Brown); ¶ 250 (Benny and Eleanor Clark); ¶ 259 (Glenda Claypool on behalf of Sherman Claypool); ¶¶ 290, 295 (Juneth Daniel); ¶ 407 (Glenna and Douglas Hollis); ¶¶ 452-53 (Joseph Mbanefo); ¶¶ 524-25 (Dawn Mussenden); ¶ 533 (William Rasul); ¶¶ 538, 544 (Dwayne Richard Johnson); ¶¶ 564-65, 576-77 (Jeffrey Rogers); ¶¶ 594, 598 (Carrie Salone); ¶¶ 639, 645, 650-53 (Floyd Sims); ¶¶ 665-66, 674 (Allen Stafford); ¶¶ 698-99 (Serge and Karen Tancrede); ¶ 714 (Ronnie Thorton); ¶¶ 723-24 (Errol Thybulle); ¶ 731 (William Washington); ¶¶ 738-40 (Lance

Williams); ¶¶ 770, 772 (Jacqueline Wynn).

As before, each Plaintiff plausibly alleges a valid contract under the FA, a breach of Section 12, substantial performance, and damages. That is sufficient at this stage.

C. Plaintiffs Plausibly Plead Breach Claims Under Section 15 of the Franchise Agreement

Defendants misunderstand the alleged breach under Section 15. Dkt. 19 at 24. Section 15(d) states that "Franchisee shall not sell, transfer, or assign this Franchise to any person or persons without McDonald's prior written consent." Ex. B ¶ 15(d). It continues: "Such consent *shall not be arbitrarily withheld*." *Id.* (emphasis added). To evaluate a potential sale, transfer, or assignment, the FA provides a set of criteria: "(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." *Id.* While Defendants argue that this provision confers no obligations on them, theyignores basic contracting principles.

Typically, "[o]ne who by mutual contract confers on another a right, or imposes a duty, impliedly agrees not to defeat that right or make impossible performance of a duty by any affirmative acts of his own." *Ryan v. Napier*, 252 F. Supp. 730, 733 (N.D. Ill. 1966). In other words, "[i]n addition to the express covenants of a contract, there may be an implied agreement that neither party will do anything to prevent or tend to prevent its performance." *Id.* "Failure to do so is a breach of the contract." *Id.* A party vested with discretion under the terms of a contract cannot exercise it "arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties." *Bank One, Springfield*, 723 N.E.2d at 764. Defendants say so themselves. Ex. A (FA) at ¶ 15(d). Arbitrary refers to decision making "without consideration of or regard for facts, circumstances, fixed rules, or procedures." *Arbitrary*, BLACK'S LAW DICTIONARY (11th ed. 2019).

Yet, Defendants allegedly defeated Plaintiffs' ability to exercise their rights by arbitrarily withholding their consent to sales. Thirteen Plaintiffs plausibly allege that they could not exercise their rights to sell their locations when McDonald's arbitrarily withheld its consent to sale:

> ¶¶ 140-41, 145, 149, 162 (Kenneth Manning); ¶ 172 (Keith Manning); ¶¶ 197-200 (Delores and Christine Crawford); ¶ 231 (Robert Bonner); ¶ 305 (Yves Dominique); ¶¶ 321-22 (Wise Finley); ¶¶ 366, 374-75 (Al and Kristen Harris); ¶¶ 423-26 (Laetitia Johnson); ¶ 464 (Joseph Mbanefo); ¶¶ 499-502 (Scott and Dwight Miller); ¶ 578 (Jeffrey Rogers); ¶ 606 (Jeremiah Simmons); ¶ 761 (Norman Williams).

Likewise, six Plaintiffs plausibly allege that they were given no notice to buy available locations despite white franchisees being given that notice: ¶¶ 143, 453 (Kenneth Manning); ¶ 181 (Delores and Christine Crawford); ¶ 279 (Juneth Daniel); ¶ 432 (Harold and Jeremy Lewis); ¶¶ 490, 492 (Scott and Dwight Miller); ¶ 518 (Dawn Mussenden). As before, each Plaintiff plausibly alleges a valid and enforceable contract under the FA, a breach of Section 15, substantial performance pursuant to the FA, and damages.

D. Plaintiffs Plausibly Plead Substantial Performance Under the Franchise Agreement

Finally, Defendants make a cursory reference to Plaintiffs' substantial performance under the contracts. Dkt. 19 at 26. To sue for breach of contract, a party must allege that they "substantially complied with all the material terms of the agreement." *Costelle v. Grundon*, 651 F.3d 614, 640 (7th Cir. 2011) (citation omitted). Substantial performance may be shown through evidence of "an honest and faithful performance of the contract in its material and substantial parts, with no willful departure from or omission of, the essential points of the contract." *Delta Const., Inc. v. Dressler*, 381 N.E.2d 1023, 1027 (Ill. App. 1978).

Defendants claim Plaintiffs made no showing of substantial performance with their obligations and responsibilities, ignoring the well-pleaded facts showing each Plaintiffs' diligent efforts to comply with McDonald's requirements over the course of their franchise operations.

These facts are outlined in Section IV(B)-(D) above. Plaintiffs allege that they promptly made rent payments and sought rent relief when circumstances outside of their control threatened to impede their abilities to fulfill those obligations. They allege that they made renovations and improvements to their facilities and equipment at Defendants' requests. They allege that they allowed Defendants to inspect their facilities, even when such requests were at unreasonable times and excessive frequencies. Defendants do nothing to challenge the sufficiency of these well-pleaded facts.

VI. THIS COURT CANNOT DISMISS PLAINTIFFS' FRAUDULENT CONCEALMENT CLAIMS

A. Defendants Inflate the Pleading Standard Under Rule 9(b)

With respect to Plaintiffs' fraudulent concealment claims, rather than grapple with the additional details included in Plaintiffs' SAC, Defendants revive the same argument they did before: that Plaintiffs have not pleaded enough for a valid fraud claim. Dkt. 19 at 27-29. Unlike Plaintiffs' other claims, Rule 9(b) *does* impose a higher pleading standard than Rule 8(a)(2). *Blankenship v. Pushpin Holdings, LLC*, No. 14-cv-6636, 2015 WL 5895416, at *5 (N.D. Ill. Oct. 6, 2015). Fraud must be pled with "particularity," meaning the pleading includes the who, what, when, where, and how of the fraud. *U.S. ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1106 (7th Cir. 2014) (citation omitted). The purpose of the heightened pleading requirement is so that plaintiffs "do their homework" by conducting sufficient pre-complaint investigation "to assure that the charge of fraud is responsible and supported." *Putzier v. Ace Hardware Corp.*, 50 F. Supp. 3d 964, 987 (N.D. Ill. 2014).

B. Plaintiffs Plausibly Plead Fraudulent Concealment

Defendants misunderstand Plaintiffs' fraud claim altogether. Plaintiffs do not bring a fraudulent misrepresentation claim, as Defendants contend. Dkt. 19 at 27-28. Instead, Plaintiffs bring a fraudulent *concealment* claim.

"In order to state a claim for fraudulent concealment, a plaintiff must allege that the defendant concealed a material fact when he was under a duty to disclose that fact to the plaintiff." *Toulon v. Cont'l Cas. Co.*, 877 F.3d 725, 737 (7th Cir. 2017). A duty to disclose is "based on a fiduciary relationship or a relationship of trust and confidence where 'defendant [is] in a position of influence and superiority over plaintiff.'" *Id.* (citation omitted). Alternatively, the duty to disclose may arise "when a defendant tells a half-truth and then becomes obligated to tell the full truth." *Id.* While parties to a contract do not owe one another a fiduciary relationship, *Oil Exp. Nat., Inc. v. Burgstone*, 958 F. Supp. 366, 370 (N.D. Ill. 1997), Defendants still owed Plaintiffs a duty based on the position of influence and superiority they held over Plaintiffs. Defendants controlled virtually every aspect of Plaintiffs' franchise opportunities. *See generally* Ex. B. The language of the FA on its own made it clear to franchise operators that their interests were always subordinate to Defendants'. Defendants cannot evade responsibility after enjoying the benefits of such extreme influence.

Moreover, Plaintiffs sufficiently plead that Defendants concealed material facts during their contractual relationships that they were under a duty to disclose. For example, in 2014, the Finance Director of the Raleigh region concealed from Kenneth Manning that he would be responsible for rent during the rebuild of a store outside Durham, which lowered the anticipated value of the restaurant. SAC ¶ 174. This was also a half-truth in that McDonald's mandated the rebuild but did not disclose the ongoing rent obligations. This information would have influenced Manning's decision to buy the location. Similarly, the Tancredes accepted a two-store package, and McDonald's failed to disclose that one location was infested with mold and that the street in front of the restaurant would undergo construction. *Id.* ¶ 685.

Fifteen Plaintiffs plead their allegations with particularity: SAC ¶ 174 (Kenneth Manning); ¶¶ 239-40 (Larry Brown); ¶ 685 (Serge and Karen Tancrede); ¶¶ 266-67 (Juneth Daniel); ¶ 769 (Jacqueline Wynn); ¶ 509 (Dawn Mussenden); ¶¶ 477-78 (Lois and Mitchell McGuire); ¶ 172 (Keith

Manning); ¶ 406 (Glenna and Douglas Hollis); ¶ 559 (Jeffrey Rogers); ¶¶ 340-41 (Wesley Hall); ¶ 221 (Annis Alston-Staley); ¶¶ 396-98 (Lawrence Holland); ¶ 621 (Floyd Sims); ¶ 669 (Allen Stafford). Their fraud claims cannot be dismissed based on Defendants' faulty understanding of Plaintiffs' fraud theory.

VII. THE COURT CANNOT DISMISS PLAINTIFFS' TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE CLAIMS

Defendants also misunderstand the tortious interference claim. They argue that that Plaintiffs failed to identify any valid and enforceable contracts with which Defendants interfered and, even if Defendants did interfere, that Plaintiffs did not plead that McDonald's did so unjustifiably. Dkt. 19 at 34. Both are wrong. Plaintiffs plausibly allege that Defendants blocked or interfered with multiple attempts by Plaintiffs to sell or assign their stores to third parties. Likewise, Plaintiffs repeatedly allege that Defendants did so without legitimate business justification.

To sue for tortious interference with prospective economic advantage, a party must allege: "(1) a reasonable expectancy of entering into a valid business relationship; (2) the defendant's knowledge of the expectancy; (3) an intentional and unjustified interference by the defendant that induced or cause a breach or termination of the expectancy; and (4) damage to the plaintiff resulting from the defendant's interference." *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 508 (7th Cir. 2007).

Defendants are correct in that they may veto a sale pursuant to their right under the FA to regulate and protect their brand. But that privilege is not absolute. They cannot do so without legitimate business justification. *Delloma v. Consolidation Coal Co.*, 996 F.2d 168, 171 (7th Cir. 1993). Racial bias is not a legitimate business justification. Additionally, Defendants are correct that no Plaintiff had executed a written contractual agreement with a third party at the time of Defendants' interference. That is precisely the problem. Defendants *prevented* Plaintiffs from doing so as a result

of their interference. The claim is not so narrow that it only protects executed contracts, as Defendants assert. Dkt. 19 at 34. Prospective contractual agreements are covered too.

Plaintiffs plausibly allege each element of the claim. Eight Plaintiffs bring tortious interference claims: SAC ¶¶ 155, 162 (Kenneth Manning); ¶ 211 (Van Jakes); ¶¶ 242, 289 (Larry Brown); ¶ 302 (Yves Dominique); ¶¶ 197-99 (Delores and Christine Crawford); ¶ 277 (Juneth Daniel); ¶¶ 615-16 (Jeremiah Simmons); ¶ 729 (William Washington). In these portions of the SAC, Plaintiffs outline where they anticipated entering valid business relationships—such as contracting with third parties for the sale/acquisition of other restaurant locations—and Defendants terminated those opportunities before they could come to fruition. At the motion to dismiss phase, no more is required than plausible allegations beyond mere speculation that suggest Defendants are liable for this cause of action.

VIII. THE COURT CANNOT DISMISS PLAINTIFFS' UNJUST ENRICHMENT CLAIM

McDonald's argues that this Court must dismiss Plaintiffs' unjust enrichment claim (Count X). Dkt. 19 at 36-38. McDonald's contends that Plaintiffs cannot maintain an unjust enrichment claim because McDonald's and Plaintiffs had an express contract between them. *Id.* McDonald's argument misapprehends the nature of Plaintiffs' unjust enrichment claim.

Unjust enrichment claims arise when "the defendant has unjustly retained a benefit to the plaintiff's detriment, and that defendant's retention of the benefit violates the fundamental principles of justice, equity, and good conscience." *In re Sears, Roebuck & Co. Tools Mktg. & Sales Pracs. Litig.*, No. 05-cv-2623, 2006 WL 3754823, at *4 (N.D. Ill. Dec. 18, 2006) (*citing HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.,* 131 Ill.2d 145, 137 Ill. Dec. 19, 545 N.E.2d 672, 679 (Ill. 1989)).

Unjust enrichment claims can be based either on (1) a "condition that may be brought about by unlawful or improper conduct as defined by law, such as fraud, duress, or undue influence" or (2)

"it may be based on contracts which are implied in law." *Gagnon v. Schickel*, 83 N.E.2d 1044, 1052 (Ill. App. Ct. 2012) (internal citations and quotations omitted). In other words, unjust enrichment can be based either on quasi-contract *or* on tort-fraud. *In re Sears, Roebuck & Co.*, 2006 WL 3754823, at *3. Where the unjust enrichment claim is based on wrongful conduct (and not quasi-contract), the fact that the parties have a written contract "is neither here nor there." *Id.*

Here, Plaintiffs allege that McDonald's wrongful conduct resulted in McDonald's unjust enrichment, not that there was some quasi-contract that conferred a benefit on McDonald's. Plaintiffs allege that McDonald's fraudulently misrepresented the financial performance of Plaintiffs' restaurants (SAC ¶ 833); fraudulently concealed the physical and financial conditions of' restaurants (*see supra* Section VI); and illegally discriminated against Plaintiffs (*see supra* Section IV). These actions constitute "unlawful or improper conduct as defined by law." Indeed, it is difficult to contemplate a more improper act than discriminating against someone because of the color of their skin.

McDonald's offers no argument that Plaintiffs have failed to allege wrongful conduct as the basis for Plaintiffs' unjust enrichment claim, thereby forfeiting any such argument. In any event, Plaintiffs allege that McDonald's received a benefit because of its unlawful and improper conduct; Count X should not be dismissed.

IX. THERE IS NO BASIS TO LIMIT THE CLAIMS AND LEGAL THEORIES

Lastly, Defendants argue that Plaintiffs are only allowed to replead the breach of contract and fraudulent misrepresentation claims from the first amended complaint. Dkt. 19 at 39-40. Not true.

First, in ruling on the original motion to dismiss, the Court granted leave to amend the complaint without restriction. Dkt. 68 at 5:6-8; 20:11-15. Plaintiffs do not need to seek leave of the Court to add new claims or theories. Both the tortious interference and unjust enrichment claims may proceed.

Second, even if the SAC exceeded the leave afforded in the motion to dismiss ruling, Rule 15 requires courts to freely grant amendments. FED. R. CIV. P. 15(a)(2). "The central inquiry is whether the amendment would result in undue prejudice to the defendant." *Alberto-Culver Co. v. Gillette Co.*, 408 F. Supp. 1160, 1161 (N.D. Ill. 1976). Absent some justification to refuse the amendment, the court must grant leave to amend. *Id.* Here, Defendants make no argument that the newly added claims would unduly prejudice them. Defendants have been provided ample notice of both claims and were afforded substantial detail to counter if they had wished to contest the sufficiency of Plaintiffs' pleading.

Third, dismissal would be inappropriate where plausibly pleaded claims should be decided on the merits. "[P]leadings are not an end in themselves but are only a means to assist the presentation of a case to enable it to be decided on the merits." 6 Fed. Prac. & Proc. Civ. § 1473 (3d ed.). In line with the motion to dismiss standard, Rule 15 discourages dismissal of newly pleaded claims. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962).

Fourth, where there is no requirement that a plaintiff plead legal theories in the first place, McDonald's arguments that Plaintiffs should not be allowed to amend to plead particular theories is without a legal basis. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 721 (7th Cir. 2011) ("we have stated repeatedly (and frequently) that a complaint need not plead legal theories"). When Plaintiffs included two new legal theories in their SAC, they acted well within the law and the scope of the leave granted by the Court. Dismissal of these theories would be inappropriate.

CONCLUSION

For the reasons above, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint.

RESPECTFULLY SUBMITTED:
KENNETH MANNING, ET AL.

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2023, I electronically filed the foregoing document with the Clerk for the United States District Court, Northern District of Illinois. The electronic case filing system (CM/ECF) will send a Notice of Electronic Filing (NEF) to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

By: */s/ Steve Art*

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