Case No. 20-55679

In the

United States Court of Appeals

for the

Ninth Circuit

AYA HEALTHCARE SERVICES, INC.
and AYA HEALTHCARE, INC.,
Plaintiffs-Appellants,

v.

AMN HEALTHCARE, INC.; AMN HEALTHCARE SERVICES, INC.;
AMN SERVICES, LLC; MEDEFIS, INC.; and SHIFTWISE, INC.,
Defendants-Appellees.

Appeal from a Decision of the United States District Court for the Southern District of California, Case No. 3:17-cv-00205-MMA-MDD · Honorable Michael M. Anello, Senior District Judge

APPELLANTS' OPENING BRIEF
(REDACTED VERSION)

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CORPORATE DISCLOSURE STATEMENT

Appellants are Aya Healthcare Services, Inc. and Aya Healthcare, Inc., which are closely held, private corporations. Aya Healthcare, Inc. has no parent company (public or private) and is the sole owner of Aya Healthcare Services, Inc., holding 100% of its stock. No publicly traded company holds any interest in either company.

DATED: November 12, 2020 Respectfully submitted,

/s/ William Markham

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INTRODUCTION

Plaintiffs-Appellants (collectively, "Aya") brought this case against Defendants-Appellees (collectively, "AMN") for violations of federal antitrust law and related California laws. The court below (the "District Court") granted summary judgment for AMN on the federal antitrust claims and dismissed the state-law claims without prejudice. Aya appeals from the District Court's summary judgment of its claims under Section 1 of the Sherman Act, 15 U.S.C. § 1 ("Section 1").

In a nutshell, Aya's evidence shows that AMN has successfully exploited its control of available work in a distinct line of commerce (the travel-nurse industry) in order to impose unreasonable restraints of trade against nearly all other market participants in the relevant labor and service markets.

To this end, AMN has given valuable "spillover" and platform assignments to hundreds of rival firms that along with AMN have accounted for [redacted] but in exchange for this valuable work AMN has obliged these rivals to accept its standard restrictive covenants (trade restraints). By these trade restraints, the rivals have permanently relinquished their right to compete against AMN for hires or sales in various strategic ways that are not reasonably related to their collaborations with AMN.

Those trade restraints are strategically reinforced by AMN's standard restrictive covenants in its employment contracts with all of its staffing professionals, who number in the thousands and historically have formed by far the largest grouping of staffing professionals in the travel-nurse industry. This set of trade restraints saddle AMN's staffing professionals with a disqualifying prohibition: after leaving AMN, they cannot "use" the "names" of nearly all known travel nurses in the travel-nurse industry, since AMN keeps those names in its database and claims that it has trade-secret rights to them. AMN does not strictly and always enforce this prohibition, but does so selectively and strategically to prevent rivals from hiring its travel-nurse recruiters in substantial numbers.

Aya has challenged AMN's use of these various trade restraints, asserting that they restrain trade in violation of Section 1 under the rule-of-reason standard, and that one of them is a naked no-poaching restraint that constitutes a per se or quick-look violation of Section 1.

The District Court never permitted Aya to present this challenge to a jury. Instead, it declined to recognize a per se rule against no-poaching agreements; severely limited the definition of no-poaching agreements that might be subject to any per se rule; declined to address Aya's quick-look challenge or request for an antitrust injunction; and held Aya to an erroneous legal standard for Section 1

claims reviewed under the rule-of-reason standard.

According to the District Court, Aya could not proceed on its Section 1 claim unless it could make an initial showing that AMN is a monopolist that uses its challenged trade restraints to impose supracompetitive prices or some other marketwide restriction of output. That was the upshot of the District Court's abstrusely stated rulings on Section 1.

That is the wrong standard for Section 1, which prohibits agreements made between two or more independent actors that unreasonably restrain competition: unreasonable restraints are those that are unlawful per se (e.g., horizontal price-fixing, horizontal market allocation); or unlawful after a quick-look review (when the restraint at issue is "obviously anticompetitive" on its face and lacks a redeeming justification); or unlawful under the rule of reason (when the restraint at issue imposes significant, marketwide restrictions of competition that lack a redeeming justification). As the Supreme Court has long recognized, Section 1 reaches harm to competition that does not rise to the level of "threatened monopolization," let alone the actual monopolization and abuse of monopoly power required by the District Court.[1]

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[1] *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984).

More fundamentally, the District Court reduced its Section 1 analysis to a series of narrow, rigid rules that it unyieldingly applied with little or no analysis. Its definition of no-poaching agreements, if left undisturbed, will serve as published "how-to" guidelines to employers that wish to suppress labor-market competition without risking per se liability under Section 1. Its rule-of-reason analysis renders Section 1 claims largely duplicative of claims made under Section 2 of the Sherman Act, 15 U.S.C. § 2 ("Section 2"), but harder to prove.

The District Court's rulings on retaliatory damages likewise lacked any rationale. The District Court was willing to permit retaliatory damages in an antitrust case only upon a showing that they were inflicted by a cartel whose members act in lockstep, but not when they were inflicted unilaterally by the ringleader of an antitrust conspiracy. There is no policy behind such a rule. It merely limits when retaliatory damages can be recovered. Instead, retaliatory damages should be allowed whenever inflicted by the ringleader of a marketwide antitrust conspiracy to punish a defector for refusing to participate. Such a rule would serve the very purpose for allowing retaliatory damages in any case–to encourage firms to expose antitrust conspiracies rather than join them.

Overall, Aya's evidence gives rise to a compelling case under Section 1. It reveals how a dominant firm, AMN, artfully uses over-the-top contractual

restraints in all of its dealings in order to protect itself from competition. Indeed, AMN has been so successful in this effort that it has significantly restrained nearly all market participants from competing against it in various strategic ways that are not reasonably related to its collaborations with them. That evidence is sufficient to establish a *prima facie* claim under Section 1. Aya's Section 1 claims therefore deserved and should receive a trial.

STATEMENT OF JURISDICTION

In this case, the District Court had subject-matter jurisdiction and personal jurisdiction under 15 U.S.C. §§ 15, 22, 26 and 28 U.S.C. §§ 1331, 1337. It entered its final order and judgment on June 22, 2020. (ER-1:1-18.) Appellants timely filed their notice of appeal on July 2, 2020 (ER-11:2298-2299). *See* 28 U.S.C. § 2107(a); Fed. R. App. P. 4(a)(1)(A). This Court therefore has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Does this Court recognize a per se rule that prohibits naked no-poaching covenants–i.e., horizontal covenants between rival employers that (1) are not reasonably related to a legitimate collaboration; and (2) proscribe or significantly limit competition between the employers to solicit or hire one another's employees?

2. Does Aya's evidence raise a triable dispute as to whether AMN's no-poaching covenants are unlawful per se under Section 1 because they are naked, horizontal restraints between rival employers that [redacted]

3. Did the District Court err by ruling on summary judgment that AMN's no-poaching covenants are "ancillary" to legitimate collaborations and therefore cannot be held unlawful per se under Section 1, even though the moving party, AMN, offered *no* evidence to support the finding, and the non-moving party, Aya, submitted substantial evidence that contradicts it?

4. Does Aya's evidence raise a triable dispute as to whether AMN's no-poaching covenants violate Section 1 under the "quick-look" standard because they are "obviously anticompetitive" in purpose and effect, so that a full-blown market analysis is not required to determine their legality under Section 1? Did the District Court err by declining to rule on this matter?

5. For Aya's rule-of-reason challenge under Section 1, does Aya's evidence raise a triable dispute as to whether AMN's various trade restraints unreasonably restrain competition in the relevant markets?

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6. For purposes of a Section 1 claim reviewed under the rule of reason, must the plaintiff make a threshold showing that the defendant holds monopoly power and has exercised it by imposing supracompetitive prices or otherwise reducing marketwide output? Did the District Court err by effectively requiring Aya to make such a threshold showing? When ruling on summary judgment, did the District Court further err by variously disregarding and discrediting evidence provided by Aya that made this threshold showing?

7. Does Aya's evidence raise a triable dispute as whether Aya can recover retaliatory losses from AMN?

8. Does Aya's evidence establish a triable dispute as to whether Aya can receive an antitrust injunction to protect its business and the relevant markets from ongoing and future harm caused by AMN's continued use of its trade restraints? Did the District Court err by declining to rule on this matter?

9. After announcing *sua sponte* that Aya's federal antitrust claims were subject to summary judgment on grounds not raised in AMN's motion for summary judgment, did the District Court err by prohibiting Aya from presenting additional evidence on the new grounds?

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STATEMENT OF THE CASE

Overview of Aya's Case

This case arises in a distinct *staffing industry*–the travel-nurse industry. (ER-3:461-472; ER-14:3066-3067 ¶¶ 7-12.) The largest provider in this industry, AMN, controls a substantial part of all available work, including the most lucrative, sought-after work. AMN allows other providers to participate in this work as its subcontractors, but only if they first accept its unusually onerous restrictive covenants ("Trade Restraints"), which it presents for [redacted] AMN treats its own staffing professionals in like manner, obliging them as a condition of employment to accept a different set of onerous Trade Restraints, which appear in its standard, non-negotiable employment agreements.

AMN has thus succeeded at signing up nearly all other providers and thousands of staffing professionals to its various Trade Restraints, which impose sweeping, disqualifying restrictions on their ability to hire and place employees in a staffing industry.

Aya's central challenge is that AMN's Trade Restraints violate Section 1: one of them is a per se or quick-look violation, and all of them together constitute a violation of Section 1 under the rule of reason.

The Commercial Realities of the Travel-Nurse Industry

Travel nurses are licensed nurses and nursing technicians who travel from place to place to perform temporary, medium-term assignments at understaffed hospitals and healthcare facilities (collectively, "hospitals"). (ER-3:461-472; ER-14:3066 ¶ 7.) Hospitals use their services as a last resort, when they cannot have their medium-term assignments performed by locally available nurses. (ER-3:464-469; ER-14:3066 ¶ 7.)

The sellers of travel-nurse services ("providers") are specialized staffing agencies ("agencies"), operators of managed-service programs ("MSPs"), and operators of online platforms ("platforms"). (ER-14:3066-3067 ¶¶ 9-12; ER-16:3194-3198 ¶¶ 29-33.)

Agencies employ recruiters of travel nurses ("recruiters") and other staffing professionals to perform their essential work, which is to seek, find, vet, and develop ongoing affiliations with travel nurses, then hire them for temporary assignments in understaffed hospitals. (ER-3:527-537; ER-16:3206-3207 ¶¶ 43-44, 3339-3340 ¶¶ 24-26.) Agencies sometimes place travel nurses directly in hospitals (ER-16:3359-3361 ¶¶ 60-61), but increasingly they serve as subcontractors of MSPs and platforms (ER-16:3201-3202 ¶ 36), so that the MSPs and platforms maintain direct relationships with their hospital customers, and agencies furnish

these hospitals with travel nurses as directed to do by the MSPs and platforms (ER-14:3066-3067 ¶¶ 9-12; ER-16:3201-3202 ¶¶ 36-37, 3338-3339 ¶¶ 22-23, 3361 ¶ 62, 3365-3367 ¶¶ 65-66.)

Lastly, MSPs and platforms manage and fulfill their hospital customers' requirements for travel nurses and other kinds of temporary healthcare professionals. (ER-14:3066-3067 ¶¶ 10-12; 3068 ¶ 18; ER-16:3361-3368 ¶¶ 62-67.) Most MSPs and platforms are operated by large agencies that have their own travel nurses and a network of subcontractors. (ER-14:3067 ¶¶ 15-17, ER-16:3202-3204 ¶¶ 37-39, 3365-3366 ¶ 65, 3369 ¶ 69.) A few rely entirely on subcontractors. (ER-16:3203-3204 ¶ 39.)

The upshot is that *travel-nurse providers routinely compete and collaborate with one another*.

- Agencies, MSPs, and platforms compete to sell travel-nurse services to hospitals. (ER-14:3066-3067 ¶¶ 9-12; ER-16:3200 ¶ 35, 3373-3374 ¶ 75.)
- Agencies act as subcontractors of MSPs and platforms. (ER-16:3199-3200 ¶ 34, 3339 ¶ 23, 3365-3366 ¶ 65.)
- Agencies compete with one another to hire travel nurses, recruiters, and other staffing professionals. (ER-16:3373-3374 ¶ 75.)

Those are the underlying commercial realities in the travel-nurse industry. Aya's Section 1 claims concern AMN's use of its Trade Restraints to restrain competition in the related labor and service markets in this industry. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005) ("[E]conomic realities rather than a formalistic approach must govern review of antitrust activity.").

The Relevant Markets[2]

Aya's economist has explained that the following lines of commerce constitute "relevant markets" for purposes of antitrust analysis:

- *Regional service markets across the United States for the sale of travel-nurse services to hospitals.* (ER-16:3223 ¶ 99, 3273-3283 ¶¶ 7-23.) Agencies, platforms, and MSPs are the sellers in these markets. (ER-16:3373-3374 ¶ 75.)

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[2] AMN did *not* contest Aya's market definitions on summary judgment. The industry reports that it submitted only show each provider's overall sales revenues from travel-nurse placements, *including those made while acting as a subcontractor of other providers.* (ER-12:2362-2368.) AMN's own antitrust expert conceded that these reports do *not* concern relevant markets within the meaning of antitrust law–i.e., a distinct line of commerce that can be restrained or monopolized unlawfully. (ER-3:458-59.) He clarified that the reports presented by AMN show only "industry shares," but not market shares. (*Id*.) AMN nonetheless submitted them and improperly argued that they showed each party's respective "travel nurse market share" in the present antitrust case. (ER-14:2860 lines 17-23.)

- *Regional labor markets across the United States for travel nurses*. (ER-16:3283-3289 ¶¶ 24-38.) Agencies are the buyers in these markets. They compete with one another to hire travel nurses for temporary assignments. (ER-16:3204-3206 ¶¶ 40-42, 3231 ¶ 113.)
- *A national labor market in the United States for recruiters*. (ER-16:3290-3293 ¶¶ 39-46.) Agencies are the buyers in these markets. They compete to hire recruiters. (ER-16:3206-3207 ¶¶ 43-44, 3231 ¶ 113.)

AMN's Dominant Position and Market Shares

Historically, AMN has been the "dominant" provider in its markets (that is AMN's own description). (ER-4:551-552.) In the most recent year for which Aya has the necessary sales data (2017), AMN made at least 30% of all travel-nurse placements in hospitals in 35 regional markets for travel-nurse services, and in 23 of these markets its market shares were much higher and exceeded the usual thresholds for monopoly and near-monopoly power. In six markets, AMN made 86.7% to 67.4% of all placements (exceeding the monopoly threshold),[3] and in 17 others it made from 56.6% to 44.9% of all placements (exceeding the near-

[3] *See Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1206 (9th Cir. 1997) ("Courts generally require a 65% market share" protected by market barriers to show that defendant has monopoly power.)

monopoly threshold).[4] (ER-16:3224-3225 ¶¶ 101-103, 3269-3271 Ex. V-2.)

Overall, AMN's market shares have been increasing in the travel-nurse markets since 2010 (ER-16:3225 ¶ 103), and its market shares are protected by the following barriers to entry and expansion ("market barriers"): AMN's Trade Restraints; a chronic shortage of available travel nurses; and the need to develop a trusted brand. (ER-16:3225-3227 ¶¶ 104-107).

AMN Has Exploited Its Control of Available Work to Impose Its Trade Restraints

AMN operates the largest agency in the travel-nurse industry, maintains the largest pool of travel nurses, manages the largest network of subcontractors, and also operates two market-leading online platforms as well as the largest MSP program. Its ShiftWise platform serves more than [redacted] its Medefis platform serves more than [redacted] and its MSP program serves by far the largest share of major hospital systems in the United States. (ER-15:3152 ¶ 29; 3168 ¶ 4; ER-16:3209-3210 ¶¶ 47-48, 3378-3380 ¶¶ 81-83.) No other provider serves nearly so many large hospitals and major hospital systems (ER-15:3152 ¶ 29), which are the customers that make the largest, most profitable purchases of

[4] *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) (To show threatened monopolization in support of a claim for attempted monopolization, a "market share of 44 percent is sufficient" if it is protected by market barriers.)

travel-nurse services (ER-16:3202-3203 ¶¶ 37-38).

Because AMN is the MSP for so many large hospitals, it controls a substantial part of all available work in the travel-nurse industry, especially the most coveted assignments at large and highly regarded hospitals. (ER-14:3068-3069 ¶¶ 19-20 ¶ 23; ER-16:3233 ¶ 119; 3378-3380 ¶¶ 82-83.)

AMN has exploited this advantage to prevail on its recruiters, other staffing professionals, and subcontractor agencies to accept onerous, [redacted] restrictive covenants (AMN's Trade Restraints). Its counterparties are so keen to receive its work, or depend so much on receiving it, that they submit to its Trade Restraints. (ER-16:3233 ¶¶ 118-119; *see also* ER-3:355-356 ¶¶ 5-7, 374-375 ¶¶ 6-8; ER-5:1049-1051, 1054; ER-14:3068 ¶ 20; ER-15:3168-3169 ¶¶ 4-7.)

By accepting AMN's Trade Restraints, AMN's recruiters and subcontractors (which are also rival agencies) [redacted] (ER-16:3189-3191 ¶ 19, 3193 ¶ 25, 3256-3263 ¶¶ 158-173; *see also* ER-3:391-393 ¶¶ 6-7 ¶ 10-12, 399 ¶ 4-7, 406-407 ¶¶ 4-7; ER-5:1048; ER-14:3068-3069 ¶¶ 19-22 3070-3072 ¶¶ 28-33.)

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AMN's Employee Restraints

AMN uses one set of its Trade Restraints ("Employee Restraints") in its standard employment contracts with all of its staffing professionals (also called "corporate employees"), including its recruiters (ER-4:564, 568-570). These staffing professionals number in the thousands (ER-12:2456), work in AMN's offices across the country (ER-4:548-549) and historically have constituted the largest grouping of staffing professionals in the travel-nurse industry (ER-5:1047; ER-16:3378 ¶ 81).

AMN's Employee Restraints are designed to prevent AMN's staffing professionals, especially its recruiters, from leaving AMN to perform the same or similar work for any rival. To this end, these restraints *permanently* forbid former recruiters to "use" any of AMN's purported trade secrets, which include the "names" of travel nurses kept in AMN's database. (ER-4:572-573 §§ 1.2, 2.) In fact, AMN keeps "hundreds of thousands" of such names in its database (ER-4:609), and they are the names of *most known travel nurses in the United States* (ER-15:3152 ¶ 30). These names include (1) travel nurses who have no pending assignment from AMN; (2) travel nurses who have asked AMN not to contact them; and (3) travel nurses whom AMN has placed on an internal no-hire list and would not hire for any assignment. (ER-4:611-620.)

AMN's Employee Restraints also forbid any recruiter who leaves AMN to solicit any of AMN's "employees" for the next eighteen months. (ER-4:573 § 3.2.) AMN construes this provision to bar its former recruiters from soliciting any of its staffing professionals or travel nurses. (ER-4:601-612).

AMN's No-Poaching Restraints

Until recently, AMN used a second, reinforcing set of Trade Restraints ("No-Poaching Restraints") in its standard subcontractor agreements with other agencies that participate in its MSP programs.[5] These subcontractor agreements are called "Associate Vendor Agreements" ("AV Agreements") and memorialize the terms and conditions on which other agencies ("AV Subcontractors") send travel nurses to AMN's hospital customers at AMN's request. (ER-12:2477-2483; ER-14:3068-3069 ¶¶ 21-22.)

AMN's No-Poaching Restraints [redacted].[6] (ER-12:2547 § VII.C, 2564 § V.I. (b).) [redacted]

[5] AMN apparently ceased to use the offending language in mid-2018, presumably in response to this lawsuit, but as shown below the offending language imposed [redacted] (ER-12:2519-2520.) Regardless, only an antitrust intervention would prevent AMN from reinstating the offending language after this case is concluded.

[6] Employers use "cold-calling" to recruit skilled employees. The term refers to unsolicited employment overtures that an employer makes to qualified employees already trained to hold the position that the employer seeks to fill. Cold-

(continued...)

[redacted] (ER-12:2456), [redacted] (ER-12:2547 § VII.C; *see also* ER-4:609.)

AMN's No-Poaching Restraints further [redacted] Namely, an AV Subcontractor [redacted] (ER-12:2547 § VII.C, 2564 § V.I. (b).) [redacted] (*Id*.)

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[6](...continued)
calling is deemed to be a vital part of competition between employers of skilled employees, and its natural tendency is to increase the pay, opportunities, and mobility of *all* employees in any labor market in which it is widely practiced. *See In re High-Tech Employee Antitrust Litig.*, 856 F. Supp. 2d 1103, 1121 (N.D. Cal. 2012) (explaining how cold-calling works and how it tends to increase pay, mobility, available information, and opportunities for all employees in any given labor market); *In re Ry. Indus. Employee No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 507 (W.D. Pa. 2019) (describing cold-calling as a "recruitment tool that Defendants viewed as likely to yield the most valuable recruits" and that resulted in "the dissemination of information about salaries and benefits" to affected employees.).

On the contrary, AMN's No-Poaching Restraints have [redacted] (ER-12:2547 § VII.F, 2564 § V.I. (c).) These restraints therefore have [redacted] (*Id.*)

Equally important, the *scope* of AMN's No-Poaching Restraints *vastly* exceeds any reasonable protection that AMN might require before agreeing to participate in an AV collaboration. On the one hand, these collaborations entail limited interactions between only a few of AMN's staffing professionals (none of whom is ever a recruiter) and a few employees of the AV Subcontractor. (ER-14:3071 ¶ 30.) On the other hand, AMN's No-Poaching Restraints [redacted] (ER-12:2547 § VII.C, F; 2564 § V.I. (b), (c); *see also* ER-14:3070 ¶¶ 27-28.)

It is instructive that [redacted] Under its AV Agreements, [redacted]

[redacted] (ER-§12:2547 § A, 2567 § XIII.A.)

AMN's Platform Restraints

AMN uses a third set of Trade Restraints ("Platform Restraints") in its standard agreements with subcontractor agencies that serve its two online platforms, which are called ShiftWise and Medefis. (ER-4:740; ER-13:2625, 2665; ER-14:3081-3082 ¶¶ 77-81.) AMN's Platform Restraints [redacted] (ER-4:740-741; ER-13:2623-2625; ER-14:3082 ¶ 79; ER-16:3378 ¶ 82.)

Most notably, AMN's Platform Restraints [redacted][7] (ER-13:2613 § 3.b; 2647-2648 §§ III, V; *see also* ER-4:740; ER-13:2626-2630,

[7] On AMN's Medefis platform, the obligation is express and unambiguously stated in AMN's standard contract for its Medefis subcontractors. (ER-13:2613 § 3.b.) On AMN's ShiftWise platform, the obligation is apparently established by a [redacted] at Section III and an [redacted] in Section V of AMN's standard contract for its ShiftWise subcontractors. (ER-13:2647-2648 §§ III, V.) Most if not all agencies that serve AMN's platforms cannot afford to be evicted from them and therefore do not test the meaning or reach of these provisions. (ER-5:1054; ER-14:3085-3086 ¶¶ 95, 98.)

2666-2667; *see also* ER-14:3083-3084 ¶¶ 88-91.)

[redacted] (ER-13:2613 § 3.b) [redacted] (ER-13:2647-2648 § V). In addition, a subcontractor agency that serves AMN's ShiftWise platform [redacted] (ER-13:2647 § III.) To enforce this provision, AMN [redacted] (*Id*; ER-16:3218 ¶ 74.) On Medefis, AMN enforces the [redacted].

(ER-16:3215 n.110.)

The foregoing restraints are reinforced by AMN's [redacted] On ShiftWise, [redacted] (ER-13:2637 § 4(a).) On Medefis, [redacted] (ER-13:2602 § 3.1), and [redacted] (*id*. § 3.3).

AMN's Platform Restraints otherwise impose [redacted]

[redacted] (ER-13:2614 § 5.e, 2630-2633, 2647 § III; ER-16:3216-3217 ¶¶ 68, 70, 3219 ¶ 77.)

[redacted] (ER-16:3378 ¶ 82) [redacted] (ER-13:2613 § 3.b; *see also* ER-16:3215-3216 ¶ 67.) This prohibition severely limits how other agencies can form their own subcontractor networks or compete to hire employees in the relevant labor markets, since nearly all agencies in the travel-nurse industry serve AMN's platforms. (ER-16:3253 ¶ 150, 3255-3256 ¶¶ 156-157.)

Lastly, AMN [redacted] (ER-14:3082-3083 ¶¶ 84-86; ER-13:2656-2662, 2669-2679; ER-16:3219 ¶ 76.)

AMN's Exclusive-Dealing Restraints Reinforce Its Other Trade Restraints

AMN uses a fourth set of restrictive covenants ("Exclusive-Dealing Restraints") in most or all of its contracts with hospital customers. With limited exceptions, [redacted] (ER-14:3086 ¶ 100; ER-16:3220 ¶ 79.)

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AMN's Exclusive-Dealing Restraints bind many of the largest hospitals in the country. (ER-14:3068-3069 ¶¶ 19-20 ¶ 23; ER-15:3152 ¶ 29, 3168 ¶ 4; ER-16:3378-3380 ¶¶ 82-83.) This circumstance explains how AMN can successfully impose its other Trade Restraints: if AMN did not control so much valuable work with so many large and prestigious hospitals, it likely could never impose its Employee Restraints on recruiters or its No-Poaching Restraints and Platform Restraints on other agencies.[8] (ER-16:3233 ¶¶ 118-119, 3234 ¶¶ 122-123; *see also* ER-3:355-356 ¶¶ 5-6; 374-375 ¶¶ 7-8; ER-5:1050-1051, 1054; ER-14:3068 ¶ 20, 3085-3086 ¶ 98; ER-15:3168-3169 ¶¶ 4-7.)

AMN's Selective Enforcement of Its Trade Restraints

AMN does not always enforce its Trade Restraints to the letter, but it arms itself with them, threatens to enforce them, and selectively enforces them, sometimes very abusively. It does so not to facilitate collaborations, but to discourage and impede competition in the relevant labor and service markets and in particular to prevent threatening rivals from hiring its recruiters by offering them better pay, remote work, and greater career opportunities. (*See generally* ER-

[8] AMN's ability to impose these Trade Restraints is itself proof of its market power over other agencies. (ER-16:3233 ¶ 118.) *Cf. Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 464 (1992) ("Market power is the power to force a purchaser to do something that he would not do in a competitive market.").

14:3012-3018) (all proofs cited therein are presented in Aya's Excerpts of Record.)

AMN's Enforcement of Its Employee Restraints

AMN apparently uses its Employee Restraints to (1) punish agencies that hire its recruiters; (2) discourage its recruiters from leaving; and (3) inhibit its former recruiters. Those points can be inferred from the evidence.

First, AMN's management regularly reminds current and departing recruiters of their post-employment obligations to the company: after leaving, a recruiter is forbidden for eighteen months to solicit any travel nurse whom AMN claims as its own "employee" and is further forbidden to "use" the names of its travel nurses, but without clear guidance as to which travel nurses AMN claims as its own. (ER-3:356-358 ¶¶ 6-16, 391-394 ¶¶ 6-14, 399-401 ¶¶ 6-13, 406-408 ¶¶ 4-9, 409-410 ¶¶ 19-23.)

Second, AMN's management conducts intimidating "exit interviews" with departing recruiters, insisting that they respect their post-employment obligations, and sometimes stating that they should consider a different line of work rather than risk problems with AMN. (ER-3:359 ¶¶ 19-20, 402 ¶¶ 17-18, 408-409 ¶¶ 11-17; ER-4:606-610.)

Third, AMN has its attorneys regularly send unnerving cease-and-desist correspondence to former recruiters. (ER-3:360 ¶ 23, 371-372, 377-379 ¶¶ 21-28;

388-389; 395 ¶ 20; ER-4:781-783; ER-5:906-911; ER-14:3076 ¶ 55, 3077 ¶ 57.)

Fourth, AMN conducts baseless, disruptive litigation against former recruiters and their new agencies (ER-5:965-972, 1016-1018). Its case against Aya and four former recruiters was adjudicated to be "objectively specious" and to have been litigated in "bad faith" in order to "intimidate a competitor [Aya]." (ER:5-1020-1022). (*See also* ER-3:359-361, ¶¶ 24-31, 379-380 ¶¶ 28-34, 395-396 ¶¶ 21-26; ER-5:5:873-874, 904, 930-935, 939, 942, 945-951, 957-959. ER-5:939, 942, 945-946, 948-950, 957-959, 953, 960, 962-963.)

During these litigations, AMN attempts or concludes sham settlements that afford it all of the following:

- Large public judgments (ER-5:852 ¶ 4; ER-12:2395 ¶ 1);
- Large public satisfactions (ER-5:852-853 ¶¶ 4, 5(b), ER-12:2396 ¶ 2.A);
- Secret token payments (ER-5:853 ¶ 5, 854 ¶ 11(a), 874-875; ER-12:2396 ¶ 2.B);
- Oppressive confidentiality provisions (ER-5:855 ¶¶ 11(e)-12; ER-12:2399 ¶ 7); and
- Naked, non-reciprocal no-poaching covenants (ER-5:853 ¶ 5(c), 868-870; ER-12:2398 ¶ 5.D).

Having signed up thousands of staffing professionals to its absurdly overbroad Employee Restraints, AMN uses them in ways that indefensibly restrain lawful commerce. The upshot is that many recruiters are afraid to leave AMN, the other agencies are mostly afraid to hire them, and AMN's former recruiters, if they remain in the trade, are unsure which travel nurses they can recruit. (ER-3:409-410 ¶¶ 19-23; *see also* ER-3:356-358 ¶¶ 7-16, 360-361 ¶¶ 28-30, 361 ¶ 33, 379-380 ¶¶ 30-32, 380 ¶ 33, 392-394 ¶¶ 7-14, 396 ¶ 25, 399-400 ¶¶ 7-12, 402 ¶ 19, 402 ¶ 18, 407-408 ¶¶ 7-9, 408-409 ¶¶ 14-17; ER-5:879-880; ER-15:3150-3153 ¶¶ 23-32.)

This state of affairs would not last long in a competitive labor market, since AMN offers its recruiters uncompetitive pay, exceptionally demanding workloads, inflexible policies on remote work (generally not allowed before the pandemic), and an intimidating work environment (ER-15:3151-3153 ¶ 26, ¶ 28, ¶¶ 31-32; *see also* ER-3:362-363 ¶¶ 36-40, 400-401 ¶ 12, 410-411 ¶¶ 24-26; ER-4:793-795; ER-5:895-897; ER-14:3075-3076 ¶¶ 49-54.)

AMN's Enforcement of Its No-Poaching Restraints

[redacted]

[redacted] (ER-16:3188 Table 1.)

[redacted] (ER-13:2718-2726; ER-16:3236-3237 ¶ 128), and that AMN has also [redacted] (ER-4:791-792; ER-5:810-811; 853 ¶ 5(c); ER-13:2696-2697).

Of the [redacted] of agencies bound by AMN's No-Poaching Restraints, only *four* have ever hired away AMN's recruiters in substantial numbers (ER-5:879-880). One of them did so only before it became bound by the restraint. (ER-4:791-793.) To put an end to that threat, AMN prevailed on the agency to accept a [redacted] (ER-4:791-792; ER-5:810-811.)

Unlike its Employee Restraints, [redacted] But it enforces its Employee Restraints most aggressively on the rare occasions when a rival agency hires its recruiters. (*See* pp. 23-25, *supra*; *see also* ER-14:3013-3017.)

AMN also retaliates against these rivals by blacklisting them from its AV program and suddenly cutting off their access to their own travel nurses placed in this program, even though doing so entails severe staffing disruptions in its

customers' understaffed hospitals. (ER-5:1041-1042; ER-6:1282-1290; ER-14:3078-3079 ¶¶ 62-70; ER-15:3169-3170 ¶¶ 8-14.)

AMN's Enforcement of Its Platform Restraints

Like the No-Poaching Restraints, AMN's Platform Restraints are marketwide in reach. [redacted] (ER-16:3188 Table 1.)

These restraints are also largely self-enforcing. Most if not all of the subcontractor agencies that serve AMN's platforms cannot afford to have their accounts terminated or even suspended. (ER-5:1054; ER-14:3085 ¶ 95; ER-16:3233 ¶ 119.) That means that they have a strong incentive to comply with AMN's Platform Restraints.

Regardless, AMN has armed itself with not only these restraints, but also strong contract remedies for their breach. [redacted] (ER-13:2613 §§ 3(b), 3(d), 2616 § 15, 2647-2648 §§ III, V, 2650-2651 § XIII, 2652 § XVII (e).) That is likely more than sufficient.

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AMN's Trade Restraints Have Harmed Competition in the Relevant Markets

AMN's Trade Restraints have largely functioned as they were designed to do: they have greatly hindered rival agencies from improving their own offerings and evolving into efficient competitors, and they have stunted the circulation of skilled employees in the relevant labor markets - and all of this in a staffing industry. (ER-16:3234-3256 ¶¶ 124-157.)

One demonstrable consequence is that marketwide prices for travel-nurse services are supracompetitive in the markets most vulnerable to the effects of AMN's Trade Restraints – the 35 regional markets in which AMN makes at least 30% of placements and most rival agencies are bound by one or more of its Trade Restraints ("AMN's Markets"). In these markets, prevailing marketwide prices for travel-nurse services are significantly higher than they are in regional markets in which AMN's market shares are lower. This price discrepancy is most pronounced between AMN's Markets and regional markets in which AMN makes less than 15% of sales. (ER-13:2713-2716 ¶¶ 11-19.)

According to Aya's economist, the likely or only possible explanation is that AMN's Trade Restraints have their most pernicious effect where AMN already has a large or dominant market share: in those markets especially, its Trade Restraints needlessly impede its rivals from improving their offerings and evolving into

attractive, efficient providers of travel nurses to hospitals, especially the largest ones. (ER-16:3234-3256 ¶¶ 124-157.)

This explanation is further confirmed by Aya's numerous percipient witnesses. Their evidence shows how AMN's Trade Restraints burden and greatly hinder other agencies. (ER-5:1048; ER-14:3072-3073 ¶¶ 32-40, 3078-3079 ¶¶ 62-70, 3086 ¶ 99; *see also*, ER-3:379 ¶¶ 30-31, 396 ¶ 25, 399 ¶ 7, 402 ¶ 19, 407 ¶ 7, 409-410 ¶¶ 19-23; ER-5:948-950, 953, 960, 963; ER-14:3071-3073 ¶¶ 31-40; ER-15:3151-3153 ¶¶ 24-32.)

There is a more fundamental point, which Aya submits is far more important than all the rest. To prove harm to competition in a Section 1 case, a plaintiff need not show the kinds of harm that only monopolists, near-monopolists, and cartels can inflict. The Supreme Court has long recognized this very point. Proving supracompetitive prices or other marketwide reductions of output is not the *sine qua non* of a Section 1 claim. (See pp. 52-56, 59-61, *infra*.)

In a Section 1 case, it suffices to show that the trade restraints at issue *impose significant, indefensible constraints on marketwide competition that have the tendency to result in uncompetitive markets or monopoly*. AMN's use of its Trade Restraints and their various effects (described above in great detail) easily meet that threshold. (*See id*.)

Lastly, Aya offered *unchallenged* evidence that explains how AMN could readily use far less restrictive measures to accomplish its stated justifications for its Trade Restraints. (ER-14:3086-3089 ¶¶ 101-111.) AMN for its part merely alluded to its justifications in its briefs, but never furnished extrinsic evidence to support any of them.

Aya's Losses

Aya, which brings this challenge, is a substantial, successful provider of travel nurses. (ER-14:3067 ¶¶ 13-14, 3069-3070 ¶¶ 24-26, 3079-3081 ¶¶ 71-76.) It was harmed while it acquiesced in AMN's No-Poaching Restraints from 2010 to mid-2015 (ER-14:3072-3073 ¶¶ 34-40; ER-16:3264-3268 ¶ 176 ¶¶ 182-189 Table 3), and it was harmed much more when it ceased to heed these restraints and suffered AMN's ensuing retaliation (ER-14:3076-3079 ¶¶ 55-70; ER-16:3263-3264 ¶ 175 ¶¶ 178-179). Aya also apprehends future harm to its business. (ER-14:3085-3086 ¶¶ 96-99; ER-15:3152-3153 ¶ 32.)

Aya's Antitrust Challenge Under Section 1

According to Aya's challenge, AMN's No-Poaching Restraints constitute per se or quick-look violations of Section 1, and all of AMN's Trade Restraints mutually reinforce one another and violate Section 1 under the rule of reason. *See generally California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1132-34 (9th

Cir. 2011) (explaining Section 1 claims and their adjudication under the above three standards of review).

The District Court's Rulings

The District Court granted summary judgment to AMN on the basis of the following findings and conclusions.

1. The District Court declined to recognize a per se rule against no-poaching restraints and stated that any such rule, if established, would not apply to AMN's No-Poaching Restraints. (ER-17:3498 lines 2-10.) According to the District Court, these restraints [redacted] and therefore were commonplace restraints on [redacted] that were not subject to no-poaching law. (*Id*.) The District Court further found that AMN's No-Poaching Restraints were ancillary to AMN's AV Agreements rather than naked restraints, and that these restraints therefore could not be condemned as per se violations of Section 1. (*Id.* lines 14-17.)

2. The District Court concluded that Aya's rule-of-reason claim under Section 1 was untenable because Aya's direct and indirect evidence failed to make a *prima facie* showing of harm to competition sufficient for a Section 1 claim. (ER-13:2835-2847.)

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3. The District Court concluded that Aya was ineligible to recover retaliatory damages because AMN did not preside over an employers' cartel, but only entered into a series of bilateral agreements with other employers. (ER-17:3495-3499.)

4. The District Court made no findings or rulings on the following issues: (a) whether AMN's No-Poaching Restraints were violations of Section 1 under the quick-look standard; or (b) whether Aya was entitled to an antitrust injunction. (*See* ER-13:2831-2847; ER-17:3473-3509)

5. The District Court also concluded that Aya's two claims under Section 2 were untenable as a matter of law, and it declined to maintain supplemental jurisdiction over Aya's state-law claims. (ER-13:2833; ER-17:3501-3508.)

STANDARD OF REVIEW

Aya appeals from the District Court's grant of summary judgment in favor of AMN on Aya's claims under Section 1. The standard of review is *de novo*. This Court should conduct its own independent review of the matters decided below on summary judgment, viewing all admitted evidence in the light most favorable to Aya. *See Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130–31 (9th Cir. 1994.)

SUMMARY OF THE ARGUMENT

I. This Court should decide unresolved points of antitrust law that are dispositive of issues in this case. Namely, are naked no-poaching restraints unlawful per se under Section 1? If so, what is the proper definition of a naked no-poaching restraint? Aya requests that this Court confirm a per se rule against naked no-poaching restraints, which in turn should be defined as any non-ancillary agreement or covenant between rival employers that proscribes or significantly limits the right of either employer to solicit or hire employees of the other.

Any such trade restraint should be treated as a per se violation of Section 1, since it is a naked, horizontal restraint of direct competition between employers as well as a buyers' horizontal allocation of a labor market. Usually, the only purpose of such an agreement is to lessen the pay and mobility of employees who sell their services in the affected labor markets, but in this case, which arises in a staffing industry, AMN also uses its No-Poaching Restraints to impose severe, non-ancillary restrictions on its rivals' ability to compete against it [redacted]

II. Aya submitted substantial evidence that creates a triable dispute as to whether AMN's No-Poaching Restraints should be condemned as per se violations of Section 1. That evidence shows that (1) AMN's No-Poaching Restraints impose

severe limitations on the right of AMN's rivals to solicit or hire AMN's employees; and (2) these restraints are not "ancillary" to the AV Agreements in which they appear–i.e., the restraints are not "reasonably related" to the successful performance of the AV Agreements.

The District Court disregarded this evidence and instead found that AMN's No-Poaching Restraints are ancillary to its AV Agreements and therefore cannot be condemned under a per se rule against no-poaching restraints. The District Court made this finding without explaining it, which by itself was erroneous, and the District Court reached this finding even though AMN presented *no* evidence to support it (other than the AV Agreements themselves), while Aya presented substantial evidence that showed that AMN's No-Poaching Restraints fail to meet the controlling standard for determining the ancillarity of trade restraints.

III. Aya submitted substantial evidence that creates a triable dispute as to whether AMN's No-Poaching Restraints should be condemned as violations of Section 1 under the quick-look standard. The District Court did not rule on this matter, but it should have permitted Aya to present its quick-look challenge at trial.

IV. Aya submitted substantial evidence that creates a triable dispute as to whether all of AMN's Trade Restraints cumulatively violate Section 1 under the rule-of-reason standard. In particular, Aya met its initial burden of showing harm

to competition sufficient for this claim. Its evidence demonstrates how AMN's Trade Restraints bind *the overwhelming majority* of market participants in the relevant markets, impose significant limitations on their ability to compete against AMN, and are anticompetitive in apparent purpose and actual effect. Marketwide in reach, these restraints are principally directed not at improving AMN's services, but at impeding rivals from improving their own services and from competing against AMN. That evidence should suffice to establish a *prima facie* showing of harm to competition and oblige AMN to defend its use of its Trade Restraints at trial.

The District Court wrongly deemed this evidence insufficient and instead required Aya to demonstrate by direct or indirect evidence that *AMN holds monopoly power in a relevant market and uses its Trade Restraints to facilitate its exercise of this monopoly power.* Once distilled to its essentials, that was the threshold standard that the District Court adopted for Aya's rule-of-reason challenge under Section 1.

That was the wrong legal standard. The Supreme Court's landmark decisions establish that Section 1 reaches agreements between independent actors that significantly impair competitive processes in a relevant market, but such harm to competition need not rise to the level of "threatened monopolization," much less

the actual monopolization and demonstrable exercise of monopoly power required by the District Court.

Aya's evidence easily meets the correct, long-recognized standard and even meets the District Court's erroneous standard, but the District Court improperly disregarded or disbelieved Aya's evidence when considering it on summary judgment.

V. Aya's evidence raises a triable dispute of fact as to whether it can recover its retaliatory losses. Its evidence shows that (1) AMN used more than [redacted] in order to organize and enforce a marketwide regimentation of the relevant labor markets: [redacted] and (2) AMN took episodic, drastic retaliatory measures against the rare defectors, especially Aya, which suffered significant losses in consequence.

Those facts are sufficient to place the present case within the rule on retaliatory damages announced in *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 783 (7th Cir. 1994) ("Losses inflicted by a cartel in retaliation for an

attempt by one member to compete with the others are certainly compensable under the antitrust laws, for otherwise an effective deterrent to successful cartelization would be eliminated....").

There is no reason to limit *Hammes*, as the District Court did, to orthodox cartels in which all members consciously act in lockstep. Instead, the *Hammes* rule should be applied to serve its purposes – to encourage firms to compete rather than collude and to expose antitrust conspiracies of which they have direct knowledge. If that is the proper meaning of *Hammes*, then Aya's case is governed by its rule on retaliatory damages.

That is how it should be. Ringleaders of antitrust conspiracies are usually powerful firms that can browbeat reluctant counterparties to participate in unlawful antitrust schemes. They do so by credibly threatening and occasionally inflicting severe retaliatory harm, as Aya's evidence shows AMN did. That retaliation is never pro-competitive: it does nothing to improve the ringleader's offerings and only harms unwilling counterparties for the sake of setting an example. Such harm suffered by an unwilling counterparty should count as compensable exclusionary harm for the very reasons it was so treated in *Hammes.*

VI. The District Court declined to rule on Aya's request for an antitrust injunction, but instead terminated it on summary judgment without comment. Aya

should have received a ruling as to why it could not present its demand for injunctive relief at trial.

VII. The District Court erroneously prohibited Aya from introducing new evidence to address issues that the District Court raised *sua sponte* when ruling on AMN's motion for summary judgment on an unrelated ground. Aya's further evidence would have provided further proof of the very matters that the District Court incorrectly found were fatally absent in this case–namely, a threshold showing of harm to competition sufficient to support a Section 1 claim.

ARGUMENT

I. THIS COURT SHOULD RECOGNIZE THE PER SE RULE AGAINST NAKED NO-POACHING RESTRAINTS

The District Court declined to recognize a per se prohibition of naked no-poaching restraints made between rival employers, stating instead that "neither the Supreme Court nor the Ninth Circuit has held so-called 'no-poaching' agreements to be *per se* illegal under the antitrust laws." (ER-17:3498, lines 2-3.)

But such a rule has been expressly or impliedly recognized by several district courts, as well as federal antitrust enforcers and the leading scholarly authority on federal antitrust law (Areeda and Hovenkamp). All of these authorities agree that a no-poaching restraint between rival employers, if naked, can be condemned as a per se violation of Section 1. *See, e.g.*, *High-Tech Employee*, 856

F. Supp. 2d 1103, 1122 (N.D. Cal. 2012) (Plaintiffs sufficiently pled per se violations of Section 1 by alleging that Defendants observed bilateral agreements that imposed naked bans on cold-calling one another's skilled employees); *United States v. eBay, Inc.*, 968 F.Supp. 2d 1030, 1039 (N.D. Cal. 2013) (plaintiff pled actionable claim for a per se violation of Section 1 by alleging that defendant employers observed a naked agreement not to solicit or hire one another's employees); *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955 at *6 (N.D. Ill. June 25, 2018) ("A horizontal agreement not to hire competitors' employees is, in essence, a market division.... [A] naked horizontal no-hire agreement would be a per se violation of the antitrust laws."); *Ry. Indus. Employee*, 395 F. Supp. 3d 464, 481 (W.D. Pa. 2019) (plaintiffs pled actionable per se violations of Section 1 by alleging that rival employers observed naked, bilateral agreements not to solicit or make offers to one another's employees without the other's consent; those agreements, as pled, "are per se unlawful under the antitrust laws."); *see also* Fed. Trade Comm'n and Antitrust Division of the US Dept. of Justice, *Antitrust Guidance for Human Resource Professionals* (Oct. 2016) ("*FTC-Division Antitrust Guidance*") at *3 ("Naked wage-fixing or no-poaching agreements among employers ... are per se illegal under the antitrust laws. That means that if the agreement is separate from or not reasonably necessary

to a larger legitimate collaboration between the employers, the agreement is deemed illegal without any inquiry into its competitive effects."); Areeda & Hovenkamp, *Fundamentals of Antitrust Law* (3d. ed. 2010) § 20.05c ("An agreement among employers competing in the labor market is clearly covered by § 1 of the Sherman Act.... [A] naked agreement among employers ... is unlawful *per se*.").

Since the District Court was unwilling to recognize a per se rule against no-poaching agreements, and since the matter is directly relevant to the present case, Aya asks that this Court now decide whether naked no-poaching restraints are unlawful per se under Section 1.

As an antitrust issue, the matter is straightforward. Employers and employees are respectively buyers and sellers of labor in distinct labor markets (e.g., law firms and recent law-school graduates buy and sell junior-associate services in regional labor markets for these services). When employers agree to limit this competition, their agreement is subject to antitrust law in the same way as is an agreement between two sellers to limit their competition in an output market (i.e., a market in which they compete to sell goods or services). *See Areeda & Hovenkamp, Antitrust Law*, ¶ 352c (4th ed. 2020) ("Antitrust law addresses employer conspiracies controlling employment terms precisely because they

tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.").

If two employers agree not to solicit or hire one another's employees, each removes or reduces a threat that the other employer might hire away its employees. That is their incentive for a no-poaching restraint. Such an agreement might be an appropriate protection of a pro-competitive collaboration undertaken by rival employers, but only if it is "ancillary" to the collaboration (*see* pp. 45-46, *infra*.) Even then, no-poaching restraints are not innocuous, since employees subject to them generally end up receiving lesser pay, less attractive working conditions, reduced mobility, fewer opportunities, and less information about career opportunities (collectively, "reduced pay and mobility"). That is what happens when employers are insulated from competitive pressure to keep their employees by offering them better pay and benefits. *See FTC-Division Antitrust Guidance* ("[C]ompetition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment.").

When rival employers enforce a no-poaching agreement only for the sake of diminishing employee pay and mobility, there is no case to be made for the

agreement. It should be condemned per se under Section 1 as a naked market-allocation agreement. *See High-Tech Employee,* 856 F. Supp. 2d at 1122 (plaintiffs pled an actionable claim for per se violations of Section 1 by plausibly alleging that defendants' agreements not to cold-call one another's employees were naked agreements that "succeeded in lowering the compensation and mobility of their employees below what would have prevailed in a lawful and properly functioning labor market."); *Deslandes*, 2018 WL 3105955 at *6 ("Even a person with a rudimentary understanding of economics would understand that if, say, large law firms in Chicago got together and decided not to hire each other's associates, the market price for mid-level associates would stagnate. With no competition for their talent (aside from lower-paying in-house or government jobs), associates would have no choice but to accept the salary set by their firms or to move to another city. Thus, such a claim would be suitable for per se treatment.").

Nonetheless, the District Court declined to recognize a per se rule against naked no-poaching restraints on the simple ground that neither this Court nor the Supreme Court has yet done so. Aya therefore asks that this Court confirm that naked no-poaching restraints made between rival employers are unlawful per se under Section 1.

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A. A Naked No-Poaching Restraint Is Any Non-Ancillary Agreement Between Rival Employers That Significantly Limits the Right of Either Employer to Solicit or Hire the Other's Employees

The District Court ruled that a per se rule against naked no-poaching restraints, if established, would not apply to AMN's No-Poaching Restraints, since according to the District Court these restraints concern [redacted] (In so ruling, the District Court overlooked that AMN's No-Poaching Restraints also [redacted]) (ER-17:3498, lines 3-10.)

According to the District Court, a per se rule against no-poaching restraints, if finally confirmed, would apply only to agreements between employers that forbid *all four* of the following categories of competition between rival employers: (1) soliciting; (2) recruiting; (3) hiring without the other employer's prior approval; *and* (4) competing for employees by any other means. (*Id*.)

The District Court's narrow definition of a no-poaching agreement departs from other rulings. *See, e.g., High-Tech Employee*, 856 F. Supp. 2d at 1110 (Plaintiff pled per se claim under Section 1 by alleging naked, bilateral agreements between employers not to cold-call one another's employees.).

The District Court did not offer any rationale for its narrow definition, which merely imposes arbitrary limits on the reach of no-poaching law. If left

undisturbed, this definition will likely *invite* anticompetitive collusion between rival employers and serve as published, official guidelines to employers that wish to suppress labor-market competition without risking per se liability under Section 1.

The reach of no-poaching law should not be arbitrarily limited, but instead applied to fulfill its purpose, which is to prevent employers from making naked agreements not to solicit or hire one another's employees. To accomplish this purpose, the per se rule against naked no-poaching restraints should apply to *any* non-ancillary covenant between rival employers that proscribes or significantly limits the right of either to solicit or hire the other's employees. This Court should adopt this statement of the rule so that it accomplishes its purpose.

B. A Restraint is Naked When It is Not "Reasonably Related" to a Legitimate Collaboration or Transaction

According to the doctrine of ancillary restraints, a no-poaching restraint between rival employers should be deemed "naked" and therefore unlawful per se under Section 1, unless it is "ancillary" to a legitimate collaboration or transaction. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281-82 (6th Cir.1898), *aff'd as modified*, 175 U.S. 211 (1899) (Taft, J.) (establishing the doctrine of ancillary restraints, which is that a horizontal restraint of trade is unlawful per se under Section 1 unless it is "ancillary" to a legitimate collaboration or transaction);

Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League, 726 F.2d 1381, 1395 (9th Cir. 1984) (confirming the doctrine of ancillary restraints).

The term "ancillary" in turn refers to a horizontal trade restraint that is "reasonably related" to the successful performance of a legitimate collaboration or transaction. *See Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 725 (6th Cir.), *cert. denied*, 140 S. Ct. 380 (2019) (Ancillary restraints are "restraints by a joint venture that are not integral to the running of the joint venture, but may contribute to the success of a cooperative venture. A restraint is ancillary if it bears a *reasonable* relationship to the joint venture's success."); *Staley v. Gilead Scis., Inc.*, 446 F. Supp. 3d 578, 598 (N.D. Cal. 2020) (same).[9]

The Ninth Circuit should therefore confirm that a naked no-poaching restraint is any covenant made between rival employers that (1) proscribes or

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[9] This standard of ancillarity is the more permissive one. Some authorities urge that a trade restraint be deemed ancillary only if it is *reasonably necessary* to the successful performance of a legitimate collaboration or agreement. *See Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring) (an ancillary restraint is one that limits competition but is "reasonably necessary to achieve a joint venture's efficiency-enhancing purposes."); *U.S. Dept. of Justice, Antitrust Division, "Competitive Impact Statement"* (Dkt. 3) in *United States v. Knorr-Bremse AG*, No. 1:18-CV-00747-CKK at *8 (D.D.C. 2018) ("No-Poach Agreements that are not reasonably necessary to any separate, legitimate business transaction or collaboration are properly considered per se unlawful market allocation agreements under Section 1 of the Sherman Act.").

imposes significant limitations on either employer's lawful right to solicit or hire the other's employees; and (2) is not reasonably related to the successful performance of a legitimate collaboration or transaction. Any such trade restraint should be declared unlawful per se under Section 1.

II. AYA'S EVIDENCE ESTABLISHES A TRIABLE DISPUTE AS TO WHETHER AMN'S NO-POACHING RESTRAINTS ARE NAKED HORIZONTAL RESTRAINTS AND THEREFORE UNLAWFUL PER SE

Aya's evidence raises a triable dispute as to whether AMN's No-Poaching Restraints are naked restraints of horizontal competition between rival employers, even if they are set forth in otherwise legitimate subcontractor agreements (AMN's AV Agreements).

In particular, Aya's evidence establishes the following points:

First, AMN and agencies bound by its AV Agreements directly compete at the same level of distribution to hire recruiters and travel nurses in the same labor markets and to sell travel-nurse services to hospitals in the same service markets. (ER-16:3200 ¶ 35, 3373-3374 ¶ 75.)

Second, a covenant between AMN and any of these agencies that proscribes or limits this direct competition is therefore a horizontal restraint of trade, even if the covenant appears in a subcontractor agreement that otherwise establishes a legitimate collaboration. *See Areeda & Hovenkamp, Antitrust Law* ¶ 1901b ("An

arrangement is said to be "horizontal" when its participants are (1) either actual or potential rivals at the time the agreement is made; and (2) the agreement eliminates some avenue of rivalry among them."); *id.* ¶ 2012a ("In determining whether a buyers' agreement involves competitors, the market in which the existence of competition must be measured is the market for the purchased input, not the market in which the firms resell.").

Third, the performance of each AV Agreement entails only limited interactions between a few of AMN's staffing professionals (none of whom is a recruiter) and a few staffing professionals of each subcontractor agency. (ER-14:3071-3072 ¶¶ 30-31, 3088-3089 ¶¶ 108-109; ER-16:3257-3258 ¶¶ 163-164.)

Fourth, AMN's No-Poaching Restraints, which appear in its AV Agreements, prohibit each subcontractor/rival agency from [redacted] (ER-12:2547 § VII.C, F; 2564 § V.I. (b), (c).)

Fifth, AMN's No-Poaching Restraints also [redacted] (*Id.*)

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Sixth, AMN's No-Poaching Restraints [redacted] (ER-12:2547 § VII.F; 2564 § V.I. (c).) This circumstance by itself suffices to condemn the restraints as per se violations of Section 1. *See Blackburn v. Sweeney*, 53 F.3d 825, 828–29 (7th Cir. 1995) (Defendant law firms' covenant not to advertise in one another's territories was not ancillary to the partnership dissolution agreement in which it appeared because the covenant lacked a termination date; the covenant was therefore unlawful per se under Section 1.).

Indeed, Aya's evidence confirms that AMN's No-Poaching Restraints are naked concessions that AMN requires of any agency that wishes to participate in its lucrative work. AMN will agree to refer the work, but only if the rival renounces its right to compete against Aya in significant ways that are unrelated to this work. (ER-14:3068-3069 ¶¶ 19-24, 3071-3072 ¶¶ 29-33.) In the words of the CEO of another staffing agency, the arrangement is a "*quid pro quo*." (ER-5:1050-1051.)

Nor do AMN's No-Poaching Restraints meet *any* of the key criteria for ancillarity favored by the Antitrust Division of the U.S. Department of Justice, which were recently adopted for use in another no-poaching case. *See United*

States v. Knorr-Bremse AG, 2018 WL 4386565 at *2 (per consent decree, a no-poaching restraint between defendants will be treated as ancillary to a legitimate agreement *only* if (1) the restraint is "narrowly tailored to affect only employees who are reasonably anticipated to be directly involved in the [legitimate agreement]"; (2) the restraint identifies those employees "with reasonable specificity"; *and* (3) the restraint is limited by "a specific termination date or event.").

The above evidence, all of it unopposed, compels a finding that AMN's No-Poaching Restraints are horizontal restraints of labor-market competition between rival employers, but are not ancillary to collaborations between these employers. *See Med. Ctr.*, 922 F.3d at 725; *Staley*, 446 F. Supp. 3d at 598; *see also Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) ("To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction.... If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.").

AMN offered *no* evidence on any of these points or to support its assertion that its No-Poaching Restraints merely prevent agencies from taking advantage of their AV collaborations to raid AMN's employees.

Nevertheless, the District Court found that AMN's No-Poaching Restraints were ancillary to AMN's AV Agreements. (ER-17:3498 lines 14-17, 3501 lines 5-8.) That ruling was erroneous: on summary judgment, the District Court was required to view all of the evidence in the light most favorable to the non-moving party, Aya. *See Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 459 (9th Cir. 2018) (When ruling on summary judgment, a court "must view the evidence in the light most favorable to the nonmoving party and draw all reasonable inference in the nonmoving party's favor.").

Lastly, the District Court did not explain its reasoning on this point. (ER-17:3498-3499.) That too was erroneous. *See California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 780 (1999) (in antitrust cases, it is necessary that "courts explain the logic of their conclusions.").

This Court should rule that Aya's evidence establishes a triable dispute as to whether AMN's No-Poaching Restraints are naked, horizontal restraints of competition between rival employers, even if they are set forth in otherwise legitimate AV Agreements.

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III. AYA'S EVIDENCE ESTABLISHES A TRIABLE DISPUTE AS TO WHETHER AMN'S NO-POACHING RESTRAINTS VIOLATE SECTION 1 UNDER THE QUICK-LOOK STANDARD

The District Court did not rule on Aya's quick-look challenge of AMN's No-Poaching Restraints. But the challenge is sound and supported by substantial evidence, which raises a triable dispute as to whether AMN's No-Poaching Restraints are so overbroad in scope and duration as to be "obviously anticompetitive" and therefore subject to condemnation under Section 1 after a "quick-look" review. *See Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1020 (10th Cir. 1998) (a quick-look review is used when a trade restraint is not unlawful per se, but "has obvious anticompetitive effects," in which case the court need not conduct a market analysis and can directly decide "whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects."); *Safeway*, 651 F.3d at 1134 (same).

Indeed, the quick-look approach has been recently favored by other courts in no-poaching cases whose facts are analogous, but far less egregious. *See Deslandes*, 2018 WL 3105955, at ** 5-7 (denying motion to dismiss and permitting plaintiff to maintain a quick-look challenge to no-poaching provisions in bilateral franchising agreements between a franchisor and its franchisees); *see also Blanton v. Domino's Pizza Franchising LLC*, No. 18-13207, 2019 WL

2247731, at *5 (E.D. Mich. May 24, 2019) (same, except that plaintiff was permitted to maintain both a per se challenge and a quick-look challenge).

Aya should be permitted to present its quick-look challenge to a jury.

IV. FOR PURPOSES OF ITS SECTION 1 CLAIM, AYA'S EVIDENCE ESTABLISHES A TRIABLE DISPUTE AS TO WHETHER AMN'S TRADE RESTRAINTS HAVE HARMED COMPETITION

When a plaintiff asserts a claim against a defendant for violations of Section 1 under the-rule-of-reason standard, it bears the initial burden to show that (1) the defendant's challenged trade restraint is an agreement or arrangement between the defendant and at least one independent entity; and (2) the defendant has used the trade restraint to impose "unreasonable" restrictions on competition. *See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1178 (9th Cir. 2016) ("To establish liability under § 1, a plaintiff must prove (1) the existence of an agreement, and (2) that the agreement was in unreasonable restraint of trade.").

To make a *prima facie* showing of these points, a plaintiff can offer direct evidence that the trade restraint has resulted in "anticompetitive effects," such as "reduced output, increased prices, or decreased quality in the relevant market." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*AmEx*").

Alternatively, a plaintiff can offer indirect evidence of harm to competition by defining a relevant market and showing that the challenged trade restraints have

"significant magnitude" and are sufficiently restrictive so that they are capable of impairing competitive processes in this market. *See Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) ("To meet his initial burden [for a rule-of-reason challenge under Section 1], plaintiff must show that the activity is the type that restrains trade and that the restraint is likely to be of significant magnitude. Ordinarily, a plaintiff to do this must delineate a relevant market and show that the defendant plays enough of a role in that market to impair competition significantly."); *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1072 (11th Cir. 2004) (A plaintiff can meet its initial burden under Section 1 by showing that "the [challenged] behavior had the potential for genuine adverse effects on competition."); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460–61 (1986) (In Section 1 cases, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition"); *Eichorn v. AT & T Corp.*, 248 F.3d 131, 144–45 (3d Cir. 2001), *as amended* (June 12, 2001) ("Under the rule of reason, we look at the totality of the circumstances surrounding an alleged anti-competitive activity. ... In applying this test, we examine the competitive significance of the alleged restraint to determine whether it has an anti-competitive effect on the market and is an unreasonable restraint on trade.").

Aya's evidence shows that AMN has used its interrelated Trade Restraints with (1) [redacted] (2) all its staffing professionals [redacted] and (3) substantially all of its hospital customers [redacted] Also, these restraints purport to forbid the unauthorized "use" of the names of most travel nurses in the United States (numbering in the hundreds of thousands). These restraints thus have extraordinary "magnitude" in the relevant markets. (*See* pp. 13-29, *supra*.)

AMN's Trade Restraints are not only marketwide, but also impose severe limitations on the ability of AMN's rivals and former employees to compete against AMN in the relevant markets. They impede rival firms in a staffing industry from hiring recruiters, hiring and placing travel nurses, and selling travel-nurse services. On their face, and by their apparent purpose and observed effect, these restraints are overbroad, mutually reinforcing, and directed at preventing or impeding others from competing against AMN, not at improving AMN's offerings. (*See id*.)

That evidence suffices to carry Aya's initial burden for its Section 1 claim under the rule-of-reason standard. *See Bhan*, 929 F.2d at 1413; *see also Twin City*

Sportservice, Inc. v. Charles O. Finley & Co., 676 F.2d 1291, 1303 (9th Cir. 1982) (Harm to competition is shown where the defendant uses "single contracts that belong to a pattern of contractual relations that significantly restrain trade in a relevant market."); *Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 967 F. Supp. 2d 1347, 1361-62 (N.D. Cal. 2013) (a single defendant can unlawfully restrain trade by using numerous bilateral contracts that cumulatively restrain trade in a market); *Areeda & Hovenkamp, Antitrust Law* ¶ 310c.1 (4th Ed. 2020) ("contract aggregation" is appropriate to assess cumulative impact of numerous bilateral contracts between a seller and its counterparties).

Indeed, Aya's evidence makes the very kind of showing that the U.S. Supreme Court has always deemed sufficient. *See, e.g.*, *California Dental*, 526 U.S. at 781 (remanding case for full rule-of-reason review of dental association's restrictions of dental advertising, since the restraints were binding on most dentists in various local markets and, as worded, appeared likely to result in less competition on price and quality in these markets); *Indiana Fed'n of Dentists*, 476 U.S. at 460–61 (an association of dentists violated Section 1 under the rule of reason by enforcing a rule that none of its members could provide x-rays to their payors, since the rule was binding on the "great majority" of dentists in three counties in Indiana and tended to diminish marketwide competition among them);

Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692–93 (1978) (condemning as an obvious violation of Section 1 a national association's rule that its members, all professional engineers, could not offer prices when making initial bids for engineering projects and could only describe how the project should be performed, since the challenged restraint would significantly limit competitive bidding for a substantial part of engineering projects in the United States).

A. The District Court Applied the Wrong Standard for Section 1 Claims Reviewed under the Rule of Reason

The District Court did not apply the foregoing standard. Instead, it required Aya to meet a fantastically demanding threshold, then overlooked or openly disbelieved Aya's evidence that actually met it. According to this standard, Aya can show harm to competition sufficient to sustain its rule-of-reason challenge under Section 1 only by proving either of the following scenarios–each of which is tantamount to a showing of *AMN's possession and exercise of monopoly power*:

Alternative Showing No. 1. By using its Trade Restraints, AMN has successfully charged supracompetitive prices or otherwise reduced marketwide output in a relevant market (which only a monopoly or marketwide cartel can do);

or

Alternative Showing No 2. AMN holds a dominant market share of a relevant market, and its market share is protected by high market barriers (i.e.,

AMN holds a monopoly position); *and* AMN's Trade Restraints have caused harm to competition in that market, which the District Court characterized as both (1) an impairment of allocative efficiency *and* (2) the imposition of supracompetitive prices or some other kind of restricted output (which only a monopoly or marketwide cartel can do). This latter showing in turn requires proof that AMN's Trade Restraints limit inter-brand competition or exploit the market's structure and thereby permit AMN to charge supracompetitive prices or otherwise reduce marketwide output: in other words, AMN must hold a monopoly position in the relevant market, *and* it must have used its Trade Restraints to facilitate its exercise of monopoly power. (ER-13:2835-2837, 2840-2846.)

The District Court required Aya to meet one or the other standard in order to make a *prima facie* showing of harm to competition for its Section 1 claim under the rule-of-reason standard. (*Id*.)

Crucially, each required showing constituted proof of (1) AMN's monopoly power; *and* (2) AMN's use of its Trade Restraints to exercise its monopoly power–i.e., its use of them to facilitate the imposition of supracompetitive prices or some other reduction of marketwide output. *See United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("[A] firm is a monopolist if it can profitably raise prices substantially above the competitive level. Where evidence indicates

that a firm has in fact profitably done so, the existence of monopoly power is clear. Because such direct proof is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power. Under this structural approach, monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers.").

By establishing this threshold requirement, the District Court conflated proofs required for a Section 1 claim with those required for a Section 2 claim: although Section 1 and Section 2 often overlap, they are directed at different evils and require different proofs.

Section 1 forbids concerted conduct by independent actors that imposes unreasonable restraints on competition, which are not limited to restraints that result in monopolization or threatened monopolization. *See Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010) ("Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action monopolizes or threatens actual monopolization, a category that is narrower than restraint of trade.*"*).

Section 2 has a different focus. It forbids single firms to use anticompetitive practices to acquire or maintain monopoly positions, or to attempt to do so, or to collude with others so that one of them will gain monopoly power. *See Image*

Tech. Servs., Inc. v. Eastman Kodak Co., 125 F.3d 1195, 1202 (9th Cir. 1997) ("Section 2 of the Sherman Act prohibits monopolies, attempts to form monopolies, as well as combinations and conspiracies to do so.").

A Section 2 claim will not lie unless the alleged monopolist has acquired or nearly acquired monopoly power, which is established if the monopolist either has profitably imposed supracompetitive prices or has a dominant market share protected by high market barriers. *See Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306-07 (3d Cir. 2007) (Section 2 is "the provision of the antitrust laws designed to curb the excesses of monopolists and near-monopolists" and requires a showing that the alleged monopolist possesses or nearly possesses monopoly power–which in turn can be shown by direct evidence of its supracompetitive prices or by indirect evidence of its dominant, protected market share.).

Crucially, Section 1 reaches *lesser harms to competition* than attempted or actual monopolization, but only when caused by agreements made by two or more independent entities. This seminal point was explained in a landmark Supreme Court decision:

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> Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements ... are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. Other combinations ... are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 (1984). *Accord*: *Am. Needle,* 560 U.S. 191 ("§ 1 prohibits any concerted action in restraint of trade or commerce, even if the action does not threaten monopolization."). *See also Kodak*, 504 U.S. at 481 ("Monopoly power under § 2 requires, of course, something greater than market power under § 1."); *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 502–03 (1969) (A single defendant's required market power for a tying claim under Section 1 is less than "a monopoly or even a dominant position throughout the market," since a defendant that has some degree of market power over some customers can abuse that power to force sales of its tied product, which is one kind of trade restraint that is antithetical to competition and therefore a violation of Section 1.).

The District Court departed from these precepts by erroneously conflating the proofs required for a Section 2 claim with those required for a Section 1 claim. It then dismissed Aya's Section 1 claim solely on the ground that Aya failed to

meet its erroneous standard. That was reversible error.

B. Aya's Evidence Satisfied the District Court's Erroneous Standard of Harm to Competition in a Section 1 Case

Aya's evidence met the District Court's erroneous standard for harm to competition for a Section 1 claim, but the District Court by turns overlooked and rejected this evidence. That was improper when ruling on summary judgment. *See Rookaird*, 908 F.3d at 459.

Specifically, Aya's evidence made the following showings: (1) AMN holds dominant market positions in numerous regional markets for the sale of travel-nurse services, surpassing the monopoly threshold or near-monopoly threshold in 23 regional markets (*see* pp. 12-13, *supra*); (2) AMN's market positions have been generally increasing (ER-16:3226 ¶ 103), are protected by substantial market barriers (ER-16:3226-3227 ¶¶ 104-107), and have not been disrupted by Aya's own success (ER-14:3080 ¶¶ 72-73), which Aya attributes principally to its decision to cease heeding the principal market barrier–AMN's Trade Restraints (ER-14:3079-3080 ¶¶ 71-72; ER-15:3154 ¶¶ 36-38);[10] (3) prevailing prices for

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[10] The District Court apparently adopted an erroneous standard to determine the existence of market barriers, reasoning that a market barrier must be some circumstance peculiar to the travel-nurse industry that impedes entry or expansion in the travel-nurse markets. (ER-17:3504 lines 4-5.) But a market barrier is *any* circumstance, lawful or otherwise, that significantly impedes entry or

(continued...)

travel-nurse services have been supracompetitive in the markets most susceptible to harm from AMN's Trade Restraints (AMN's Markets), where AMN controls a substantial part of the overall workflow and most of its rivals are bound by its Trade Restraints (ER-13:2712-2716 ¶¶ 11-19); and (4) the likely or only possible explanation for supracompetitive prices in AMN's Markets are the persistent effect of AMN's Trade Restraints, which impede AMN's rivals from evolving into efficient competitors. (ER-16:3234-3256 ¶¶124-157.)

Those showings, if credited, suffice to meet the District Court's extraordinary threshold requirements for a Section 1 claim. But the District Court did not comment on much of Aya's evidence, rejected any cause-and-effect nexus between AMN's Trade Restraints and supracompetitive prices in AMN's Markets, and explained at length why Aya's expert evidence lacked credibility. (ER-13:2837-2839.) That was improper on summary judgment. *See Rookaird*, 908 F.3d at 459.

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[10](...continued)
expansion. *See Microsoft*, 253 F.3d at 51 (confirming this point). The District Court was also mistaken when it apparently ruled that the need to develop a brand cannot be deemed a market barrier. (ER-17:3504 lines 4-5.) *See Rebel Oil*, 51 F.3d at 1439 (listing recognized market barriers, including "entrenched buyer preferences for established brands.").

V. AYA CAN RECOVER RETALIATORY DAMAGES UNDER THE *HAMMES* DOCTRINE

Aya's evidence establishes a triable dispute as to whether Aya is entitled to a recovery under the *Hammes* doctrine. *See Hammes*, 33 F.3d at 783 (permitting plaintiff to recover retaliatory losses inflicted by a cartel, since allowing these damages encourages plaintiffs to expose cartel activity and compete against cartels rather than join them).

Specifically, Aya's evidence shows that AMN has successfully imposed its No-Poaching Restraints on [redacted] of rival employers, which together with AMN have accounted for the overwhelming majority of all travel-nurse placements in the United States. By these restraints, AMN's rivals have [redacted] whose retention has been AMN's animating concern. Of the [redacted] of rival employers in travel-nurse industry, only four have hired away AMN's recruiters in substantial numbers. AMN has taken swift, decisive action each time, [redacted] (*See* pp. 26-27, *supra.*) Only one defector, Aya, successfully resisted, but it endured costly losses because of AMN's years-long campaign of retaliation. (ER-14:3076-3079 ¶¶ 55-70.)

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Those facts indicate that (1) AMN "cartelized" the relevant labor markets by entering into bilateral no-poaching agreements with nearly all other rival employers; and (2) AMN took severe retaliatory action against the few defectors, including Aya.

If a jury were to make these findings, it should be permitted under the *Hammes* doctrine to compensate Aya for the harm caused by AMN's retaliation. That outcome would promote the very rationale for the doctrine–to encourage firms to (1) compete rather than collude and (2) come forward to expose unlawful antitrust conspiracies. *See Hammes*, 33 F.3d at 783.

Indeed, the *Hammes* rule should be extended to *all* marketwide antitrust conspiracies. Its rationale is that allowing retaliatory damages deters antitrust conspiracies, rewards those who refuse to participate, and encourages them to expose the wrongdoing. *See id*. There is no reason to apply the rule only to orthodox cartels whose members all knowingly collude.

If an antitrust plaintiff withdraws from an antitrust conspiracy, or refuses an invitation to join it, and if in consequence the ringleader of the conspiracy unambiguously retaliates against the plaintiff, the ensuing losses borne by the plaintiff should be treated as compensable antitrust injury for the very reasons given in *Hammes*. *See id.*

Ringleaders are often powerful firms that threaten or inflict retaliatory losses on their unwilling accomplices in order to coerce their acquiescence or make examples of them if they refuse. By affording retaliatory damages, courts can give incentive to firms to compete rather than collude and to expose antitrust conspiracies. *See id*. *Cf. Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 258 (2d Cir.), *amended*, 890 F.2d 569 (2d Cir. 1989) ("[A] member of a section 1 conspiracy has standing to challenge the restraint upon its freedom to compete....").

Such a rule would pose little risk of discouraging procompetitive conduct. By retaliating, a firm *never* improves its own offerings. It only harms the defector (the unwilling accomplice) and dissuades others from emulating the defector. Punishing this kind of behavior would send the right signals without deterring procompetitive conduct. There is therefore no reason to limit the *Hammes* rule to orthodox cartels or the specific facts present in that case. The rule should be applied so as to accomplish its purposes without deterring procompetitive conduct.

Regardless, AMN effectively "cartelized" the relevant labor markets in this case, which therefore fits within the *Hammes* rule even if it is not extended to cover all unlawful antitrust conspiracies.

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VI. THE DISTRICT COURT IGNORED AYA'S REQUEST FOR INJUNCTIVE RELIEF

The District Court was silent as to Aya's extensive arguments and abundant evidence on AMN's Employee Restraints, Platform Restraints, the mutually reinforcing effects of all of AMN's Trade Restraints, or Aya's request under 15 U.S.C. § 26 for an antitrust injunction to protect its business and the relevant markets from their future harmful effects, which Aya reasonably apprehends.

That was a further reversible error. *See Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc.*, 140 F.3d 1228, 1235 (9th Cir. 1998) ("[A]n antitrust plaintiff seeking injunctive relief need only show a threatened injury, not an actual one.").

VII. AYA SHOULD HAVE BEEN ALLOWED TO INTRODUCE FURTHER EVIDENCE ON NEW ISSUES THAT THE DISTRICT COURT EXAMINED *SUA SPONTE*

In its motion for summary judgment, AMN sought dismissal of Aya's entire case on the sole issue of antitrust injury. In passing, AMN also made various asides about other aspects of the case. Aya opposed the motion by offering what it believed was sufficient evidence to rebut AMN's points. //

The District Court did not grant judgment on AMN's stated ground, but acting *sua sponte* it raised new matters not argued by AMN, announced its findings

on these new matters, instructed the parties to provide limited supplemental briefing, and *expressly prohibited them from submitting any further evidence*. (ER-17:3509 lines 10-12.)

Otherwise, Aya would have offered the complete version of its expert economist's antitrust report, not only excerpts from it. The complete report would have furnished substantial further evidence on the very points that the District Court ultimately deemed dispositive.

If the District Court contemplated granting summary judgment against Aya on *sua sponte* grounds, it must have afforded Aya a reasonable opportunity to provide further evidence on these grounds. *See United States v. Grayson*, 879 F.2d 620, 625 (9th Cir. 1989) ("As a general rule, a district court may not *sua sponte* grant summary judgment on a claim without giving the losing party ten days' notice and an opportunity to present new evidence as required by Federal Rule of Civil Procedure 56(c).").

VIII. CONCLUSION

For the above reasons, this Court should reverse the District Court's judgment on Aya's claims under Section 1 and remand this case to the District Court for a trial of those claims.

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DATED: November 12, 2020 Respectfully submitted,

/s/ William Markham

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies the following matters to the Court: (1) this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(I) and Circuit Rule 32-1(a) because it contains 13,915 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and (2) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportional font that includes serifs (Times New Roman) and has a uniform font size of 14 points.

DATED: November 12, 2020 Respectfully submitted,

/s/ William Markham

By: William A. Markham,
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Attorneys for Plaintiffs-Appellants,
AYA HEALTHCARE SERVICES, INC. and
AYA HEALTHCARE, INC.

STATEMENT OF RELATED CASES

Appellants are unaware of any related case pending in this Court.

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FOR THE NINTH CIRCUIT

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