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' REPLY BRIEF
(REDACTED)

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Note: All special definitions used in Aya's Opening Brief are also used in this brief. Unless specifically indicated, internal quotations and citations have been omitted from all case-law quotations presented in this brief.

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I. INTRODUCTION

Aya's Opening Brief explains why Aya deserves a trial of its Section 1 claims, which have been its core claims since the beginning of this case. (ER-8:1673 ("This case principally concerns contractual restraints of trade of the very kind prohibited by the Sherman Act.") As the brief explains and the record shows, AMN has prevailed on nearly all other employers and providers in the travel-nurse industry to accept its interrelated Trade Restraints (its No-Poaching Restraints, Employee Restraints, Platform Restraints, and Exclusivity Restraints), which prevent others from competing against it rather than improve its own offerings. That is the hallmark of unlawful restraints of trade.

AMN's Trade Restraints strategically limit various kinds of competition, marketwide, in the relevant labor and service markets. Here are the highlights. Because of AMN's No-Poaching Restraints, [redacted] who in turn are *reluctant or unwilling to join any rival* because of AMN's Employee Restraints. On the rare occasion when recruiters leave AMN to accept better offers from a rival, AMN lowers the boom and intervenes to punish the offending rival. AMN has also used its industry-leading platforms to coopt the entire industry, rendering most sellers its *de facto* subcontractors in all but name, and binding them to its Platform Restraints, which expressly forbid them to

[redacted] Aya suffered exclusionary losses when it complied with AMN's Trade Restraints, then retaliatory losses when AMN punished it for ceasing to comply. Aya made these showings and should have been permitted to present them at trial.

In its Answering Brief, AMN fails to refute these points. Instead, it invokes an erroneous standard of review, misquotes its own No-Poaching Restraints by omitting the passage that establishes [redacted] (supplied below), misapplies the law on ancillary restraints, confuses the issues repeatedly, and makes no argument concerning the proper standard for proving harm to competition in a Section 1 case. AMN also incorrectly suggests that the District Court granted summary judgment and terminated Aya's Section 1 claims on the ground of antitrust injury. Not so. AMN further asserts that Aya has merely repeated "allegations" in its Opening Brief. This too is incorrect: every statement of fact in Aya's Opening Brief is supported by cited evidence in its Excerpts of Record. Further confusing matters, AMN persists in referring to "market shares" (Answering Br. p. 5) taken from industry reports that its own expert conceded did

not concern antitrust markets (ER-3:458-59).[1]

What AMN has not done is rebut any part of Aya's appeal, which is premised on the proper application of fundamental antitrust doctrines to the evidence in the record. Aya therefore requests that this Court reverse the District Court's grant of summary judgment and remand this case for a trial of its Section 1 claims.

II. AYA DOES NOT SEEK REVIEW OF ANY EVIDENTIARY RULING. THE STANDARD OF REVIEW IS *DE NOVO*

AMN has invited this Court to use the wrong standard of review, arguing that the review is *de novo* on some points, but should be for abuse of discretion when considering the District Court's assessment of Aya's expert evidence on summary judgment. (Answering Br. p. 16.) To support its proposed hybrid standard of review, AMN cites to appellate decisions that reviewed *evidentiary rulings* made by district courts when deciding whether to *admit or reject evidence* submitted on summary judgment. *See Fonseca*, 374 F.3d at 846–47 (review of district court's exclusion of declarations on evidentiary grounds); *Murray v. S.*

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[1] The industry reports cited by AMN show each staffing agency's overall sales, including *subcontractor sales to agencies such as AMN*, which in turn make sales to hospitals. (Opening Br. p. 11 n. 2.) The relevant service markets in this case, however, are *only for sales to hospitals*, not agencies' subcontractor services to other agencies. (ER-16:3223 ¶ 99, 3273-3283 ¶¶ 7-23.)

Route Mar. SA, 870 F.3d 915, 922 (9th Cir. 2017) (review of district court's denial of *Daubert* motion made to exclude expert declaration).

No such evidentiary ruling is at issue here. AMN did *not* bring a *Daubert* motion or make any evidentiary objection to exclude any part of the expert evidence that the District Court considered when ruling on summary judgment, and the District Court never excluded any of this evidence.[2] Rather, the District Court received this evidence without objection, then critiqued it on the merits when ruling on summary judgment.[3]

Aya thus seeks a review of the District Court's substantive ruling on summary judgment, not any evidentiary ruling to admit or exclude expert evidence submitted to support or oppose summary judgment. This Court's review is therefore *de novo*, and all evidence admitted and allowable inferences from it must

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[2] If the District Court had excluded evidence to which AMN did not object, it likely would have abused its discretion. *See Fonseca v. Sysco Food Servs. of Ariz., Inc.*, 374 F.3d 840, 846 (9th Cir. 2004) ("[T]he district court abused its discretion by excluding some evidence [submitted to oppose summary judgment] even though [the moving party] had waived any objection.") (*citing Scharf v. U.S. Att'y. Gen.*, 597 F.2d 1240, 1243 (9th Cir. 1979)).

[3] The evidence in question was from a report on antitrust issues and damages provided by an economist, Dr. Dov Rothman. AMN brought an *unrelated* motion to exclude part of a *different report* provided by another expert, Patricia Donohoe. The District Court granted this motion, excluded part of Ms. Donohoe's report, and did not consider the excluded evidence when ruling on summary judgment. Aya has not challenged the exclusion of that evidence.

be construed in favor of the non-moving party. *See Gabriel v. Alaska Elec. Pension Fund*, 773 F.3d 945, 953 (9th Cir. 2014); *Sullivan v. U.S. Dep't of Navy*, 365 F.3d 827, 832 (9th Cir. 2004).

III. THERE SHOULD BE A TRIAL TO DETERMINE WHETHER AMN'S NO-POACHING RESTRAINTS ARE NAKED OR ANCILLARY

To defend its No-Poaching Restraints and avert Aya's per se and quick-look challenge, AMN has offered an incomplete and therefore misleading quotation of the restraints in question and otherwise confused the issues almost hopelessly. None of its points withstands a proper application of the controlling law to the evidence in the record.

A. The Doctrine of Ancillary Restraints

The starting point is the doctrine of ancillary restraints, which establishes the first and most fundamental principle in the antitrust canon. *See United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280–83 (6th Cir.1898) (Taft, J.), *aff'd as modified*, 175 U.S. 211 (1899). This doctrine confirms that *competitors cannot agree to refrain from competing in some specified way, save when they do so in furtherance of a legitimate transaction or collaboration*. *See L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984) ("The common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1 analysis

by Justice Taft in [*Addyston Pipe*, *supra*]. ... [T]he doctrine teaches that some agreements which restrain competition may be valid if they are subordinate and collateral to another legitimate transaction and necessary to make that transaction effective.... Generally, the effect of a finding of ancillarity is to remove the *per se* label from restraints otherwise falling within that category.”)*; Polk Bros. v. Forest City Enters., Inc.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (naked restraints are horizontal covenants between competitors that exist merely to suppress competition; as such, they are unlawful per se; ancillary restraints are horizontal covenants between competitors that restrain their competition, but exist to facilitate “a larger endeavor whose success they promote;” as such, they are reviewed under the rule of reason).

To avoid per se condemnation, a non-compete covenant between existing or potential competitors must be either integral and necessary to their transaction or collaboration (“core restraints”) or “reasonably related” to its success (“ancillary restraints”). *See Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 725–26 (6th Cir.), *cert. denied*, 140 S. Ct. 380 (2019); *Staley v. Gilead Scis., Inc.*, 446 F. Supp. 3d 578, 598 (N.D. Cal. 2020) (same).

Such a covenant is evaluated according to the circumstances in place when it was made (*see Polk*, 776 F.2d at 189) and must be reasonably *limited in time and*

scope and reasonably *adapted to its purposes* (*see 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.")

That is the doctrine of ancillary restraints, properly stated. It applies not only to particular transactions (most famously, the sale of businesses and partnership stakes), but to *all* legitimate transactions and collaborations, including collaborations or joint ventures between firms that *otherwise compete to hire employees*, even when they do not compete in the same output markets. *See* Areeda & Hovenkamp, *Antitrust Law* ¶¶ 2012, 2012a, 2012c.

The entire law on no-poaching restraints, as well as the per se rules against horizontal price-fixing, market allocation, and bid-rigging, are mere applications of these precepts to specific instances of naked, horizontal restraints of competition made between direct or potential competitors (i.e., firms that compete to make sales or purchases at the same level of distribution). *See id*.; 11/19/20 Amicus Br., U.S. DOJ (Dkt. 14) pp. 20-27.

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Absent such ancillarity, a covenant not to compete between rival employers is a mere naked restraint of competition, akin to a market-allocation agreement, and therefore unlawful per se. *See 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.").

Nor should this rule be arbitrarily limited only to agreements between employers that forbid *all* possible competition to hire employees, any more than the rule against price-fixing is limited to agreements between sellers that fix the price of all of their offerings rather than only some of them. *See Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) ("To fit under the per se rule an agreement need not foreclose all possible avenues of competition.").

B. The Proper Application of the Doctrine of Ancillary Restraints to AMN's No-Poaching Restraints

Applying this doctrine to AMN's No-Poaching Restraints presents an easy call, as is explained below.

1. The [redacted] of AMN's No-Poaching Restraints Renders Them Naked Restraints That Are Unlawful Per Se

AMN's No-Poaching Restraints (ER-12:2547 § VII.C, 2564 § V.I. (b)) appear in each of AMN's AV Agreements (ER-12:2477-2483; ER-14:3068-3069

¶¶ 21-22), which in turn AMN uses to state the [redacted] terms and conditions on which it permits other staffing agencies to send travel nurses to AMN's hospital customers in order to fill spillover orders that AMN cannot fill itself (*id.*).

Each AV Agreement is [redacted] (ER-12:2542 § III.B, 2562 § III.B). In contrast, the No-Poaching Restraints within each AV Agreement [redacted] (ER-12:2547 § VII.F, 2564 § V.I.(c).).

Even the District Court conceded that this interpretation is supported by the very language of the No-Poaching Restraints (ER-17:3493), but AMN tellingly omitted this language from its quotation of these restraints (Answering Br. p.4).

Aya therefore offers the following accurate quotation of the No-Poaching Restraints, including the [redacted] missing from AMN's quotation in its Answering Brief:

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[redacted]

(....)

[redacted]

(ER-12:2547 § VII.C, § VII.F) (emphasis supplied).

This last clause places AMN's No-Poaching Restraints on all fours with *Blackburn v. Sweeney*, in which the Seventh Circuit held a horizontal non-compete restraint to be unlawful per se because, [redacted] *See* *Blackburn*, 53 F.3d 825, 828–29 (7th Cir. 1995) ("There is no time limit attached to the advertising restrictions. (....) The restriction on advertising is thus naked, not ancillary, and per se illegal to boot.").

In *Blackburn*, partners in a law firm dissolved their partnerships by a dissolution agreement that confirmed the dissolution, created two successor firms,

established a five-year period for reconciling accounts, and included a covenant by which the successor firms agreed not to advertise in one another's territory. *Id*., at 826–29. The covenant thus restricted a certain kind of direct competition between the successor firms. *Id.* at 828–29.

One of the firms subsequently challenged the covenant's legality under Section 1. The other defended the covenant by arguing that it was "ancillary" to the dissolution agreement. The Seventh Circuit observed that this defense at first glance seemed "plausible" (*id*. at 828), but then ruled that the defense failed because the non-compete covenant in the dissolution agreement [redacted] and therefore could not be ancillary to a dissolution accomplished by the agreement or even to the five-year payment obligations required by the agreement to reconcile accounts (*id*. at 828-29). Rather, the challenged covenant was unlawful per se *because it lacked* [redacted]*, even though it appeared in an otherwise legitimate agreement*. (*Id*.) On this ground alone, such a covenant could not be treated as ancillary to any transaction or collaboration and was therefore a mere naked restraint of competition and unlawful per se. (*Id*.)

The *Blackburn* rule should end the inquiry in Aya's case. The [redacted] of AMN's No-Poaching Restraints render them unlawful per se. At the very least, Aya should be permitted to proceed to trial to

confirm this interpretation and prove this point.

2. The Scope of AMN's No-Poaching Restraints Renders Them Naked and Therefore Unlawful Per Se

Putting aside their [redacted], the stated scope of AMN's No-Poaching Restraints is *over the top* and dramatically exceeds any reasonable protection that AMN might require before collaborating with rivals under its AV Agreements. But that supposed protection is AMN's *sole* and *unsubstantiated* justification for including its No-Poaching Restraints in its AV Agreements.

The only evidence on point would seem to foreclose the issue in Aya's favor, or at least justify a trial.

Specifically, each AV collaboration entails interactions between only a few employees of each agency, none of whom is ever one of AMN's recruiters, but only the following AMN employees: *one or two credentialing specialists; one or two specialists in billings and payroll; and one account manager*. In addition, a few travel nurses dispatched to a hospital by AMN might have chance interactions with a few travel nurses dispatched there by another agency under an AV Agreement. (ER-14:3071 ¶ 30.) The AV Agreements do not entail any other interactions between AMN's employees and any other staffing agency (*Id*.).

But AMN's No-Poaching Restraints [redacted] (ER-12:2456),

including [redacted] *of recruiters* (*id*.), as well as [redacted] of AMN's travel nurses, who according to AMN number in the *hundreds of thousands* (ER-4:609). These same restraints [redacted].[4] (ER-12:2456, 2547 § VII.C, F.)

That is the express scope of AMN's No-Poaching Restraints. On no possible telling do AMN's narrow collaborations with other agencies under its AV Agreements reasonably require such [redacted] over-the-top restraints. (ER-14:3088-3089 ¶¶ 108–109.)

If AMN wished to establish reasonable protections to facilitate its AV collaborations, it would limit its No-Poaching Restraints to protect *those of its employees who interact or are likely to interact with employees of the other staffing agency during collaborations under an AV Agreement*. (*Id*.)

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[4] For example, if a rival accepts an AV Agreement to send travel nurses to any facility of Kaiser Foundation Hospitals, [redacted] (ER-12:2456, 2547 § VII.C, F.) AMN entered into more than [redacted] such agreements with hundreds of other staffing agencies concerning their provision of travel nurses to hundreds of hospitals, including many of the largest hospital systems in the country. (ER-16:3296-3316 Ex. H-1.)

The No-Poaching Restraints challenged in this case are thus *over-the-top restraints* (see above), which AMN assiduously obtains from nearly all other rival employers/rival sellers in the travel-nurse industry (ER-16:3188 Table 1). Aya should be permitted to present this evidence at trial to show that these restraints are naked, horizontal restraints, or at best are "obviously anticompetitive" and therefore unlawful per se or after a "quick look."

C. AMN's Obfuscations and Implied Misstatement of the Doctrine of Ancillary Restraints

To avert a trial of these points, AMN has simply skipped a necessary part of the required analysis. It has never shown or even argued why its over-the-top No-Poaching Restraints are reasonably related to the success of its collaborations with other staffing agencies under its AV Agreements. It merely asserts this point to be true and also asserts that [redacted], but without disclosing the above facts that render this statement absurd.

AMN also pointedly urges that the rule of reason is used to review both legitimate joint-ventures and non-compete agreements between an employer and its own employees. (Answering Br. pp. 28–30.) But the per se rule applies to naked covenants included in legitimate joint-venture agreements, and naked non-compete covenants between rival employers are unlawful per se. (*See* Opening Br. pp. 44–46.)

Without expressly saying so, AMN also suggests a new approach to the doctrine of ancillary restraints–one that would establish a "how-to" guide for colluding employers. AMN thus appears to argue that a horizontal restraint can be deemed naked and therefore condemned per se *only if it is set forth in a physically separate agreement* or perhaps is secretly made by colluding competitors. (Answering Br. pp. 25-26, 28-30.)

On this telling, major auto manufacturers (e.g., Ford and GM) could form a joint venture to produce, say, electric pickup trucks, then include in their joint-venture agreement a covenant that fixed prices for their gasoline-powered compact autos. So long as they took care to place the covenant in the legitimate joint-venture agreement, it would not be subject to a per se rule under AMN's test.

But that is not the law. If a legitimate, procompetitive agreement between competitors includes a covenant that proscribes or limits competition between them, and if this covenant is not integral to the agreement, nor reasonably related to its success, but serves only to proscribe or limit competition, the covenant is treated as a naked restraint of trade that is unlawful per se. *See Med. Ctr.*, 922 F.3d at 725; *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003), *as amended on denial of reh'g*, (Apr. 24, 2003) (to be saved from per se condemnation, a horizontal restraint of direct competition included in a joint venture "must still be

reasonably ancillary to the legitimate cooperative aspects of the venture.") (*citing Regents of the Univ. of Cal. v. ABC*, 747 F.2d 511, 517 (9th Cir.1984)); *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 345–46 (3d Cir. 2010) (same).

Indeed, the above hypothetical about auto manufacturers might seem far-fetched, but it is not so different from AMN's No-Poaching Restraints. AMN and its rivals have agreed [redacted] and they have included this agreement in a joint venture that memorializes discrete collaborations between them that have nothing to do with nearly any of these employees. If there were any doubt, it is removed by the [redacted]

That is why the proper test is whether a non-compete covenant between competitors is reasonably related to the successful performance of a legitimate collaboration or transaction, not whether it appears in the same document that memorializes the collaboration or transaction. *See Med. Ctr.*, 922 F.3d at 725.

D. AMN Has Successfully Enforced Its No-Poaching Restraints

Contrary to AMN's assertions, Aya has furnished abundant evidence of AMN's enforcement of its No-Poaching Restraints. Here is a short summary of the evidence on point, which for want of space and in the interest of brevity omits many of the

telling and genuinely shocking particulars:

1. AMN has prevailed on [redacted] of other staffing agencies to accept its No-Poaching Restraints. (ER-16:3296-3316 Ex. H-1.) Along with AMN, these agencies employed and placed [redacted] (the last year for which Aya has the data). (ER-16:3188 Table 1.)

2. Two major non-party agencies deposed in the case expressly confirmed that they had complied with AMN's No-Poaching Restraints (ER-13:2718-2726) and the remaining large agencies confirmed in response to subpoena requests that they lacked any record of having solicited and then hired any of AMN's staffing professionals, with [redacted] neither of which was an AMN recruiter (ER-16:3236-3237 ¶ 128, n.170).

3. AMN itself confirmed that, of the [redacted] of agencies bound by its No-Poaching Restraints, only [redacted] (ER-5:879–80.) AMN took swift, decisive measures against each one to prevent the rival from persisting. (Opening Br. pp. 24–26.) The details of AMN's retaliations are truly shocking: they entailed baseless litigation against young recruiters and the offending rival agencies that hired them, as well as sham public judgments and AMN's broad dissemination of misleading information about these matters to its recruiters in order to intimidate them and discourage them

from leaving its employ. (*Id.*) AMN has thus obtained broad, industry-wide compliance with its No-Poaching Restraints.

4. Aya is perhaps the only agency that has successfully resisted AMN's retaliatory conduct (ER-14:3079-3081 ¶¶ 71-76), while an anxious industry observes the outcome of its antitrust challenge.

5. AMN and the other staffing agencies regard AMN's No-Poaching Restraints not as a reasonable protection afforded to AMN, but rather as an *independent concession* required by it. (ER-14:3068-3069 ¶¶ 19-24, 3071-3072 ¶¶ 29-33.) In the words of the CEO of a non-party agency, each agency's agreement not to compete is a "quid pro quo," not a reasonably related, ancillary protection. (ER-5:1050–1051.)

6. AMN itself has confirmed that it terminated its dealings with Aya because Aya began to solicit and hire AMN's *recruiters* (ER-5:1030), an act that it considered to be in breach of its groundrules–i.e., its No-Poaching Restraints (ER-14:3073-3077 ¶¶ 41-48, 56.)

7. AMN is a publicly-traded, substantial corporation with a board of directors, central organization, modern management practices, and platoons of highly paid attorneys who do its bidding. (ER-4:540-542.) It has taken care to accumulate its No-Poaching Restraints from nearly all competing employers (ER-16:3296-3316 Ex.

H-1), and it enforces them strategically and selectively to accomplish its purposes (Opening Br. pp. 24-26).

For all of the above reasons, and those given in its Opening Brief, Aya should be permitted to try its claims that AMN's No-Poaching Restraints constitute per se or quick-look violations of Section 1.

IV. THERE SHOULD BE A TRIAL OF AYA'S RULE-OF-REASON CHALLENGE

AMN has ceded the field on Aya's rule-of-reason challenge under Section 1, choosing not to oppose Aya's arguments on this matter. AMN states only that it finds this challenge "baffling" (and presumably unworthy of a response), and it maintains that the District Court followed the correct standard because it accurately recited general standards for adjudicating trade restraints. (Answering Br. p. 39 n. 21.) That is *all* that AMN has to offer on this part of Aya's appeal. It is tantamount to a waiver of its arguments on this issue. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009) (appellee waives its arguments and objections to any substantive challenge raised on appeal that it declines to address in its answering brief); *United States v. Gamboa–Cardenas*, 508 F.3d 491, 502 (9th Cir. 2007) (when appellees fail to raise an argument in their answering brief, "they have waived it") (*citing United States v. Nunez*, 223 F.3d 956, 958–59 (9th Cir. 2000)).

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As for the District Court's recitation of general standards for reviewing trade restraints (ER-13:2836), Aya agrees that it was accurate, but after much further discussion the District Court required Aya to show by either direct or indirect evidence that AMN held monopoly power and used its Trade Restraints to impose supracompetitive prices or some other marketwide restriction of output (ER-13:2835-2837, 2840-2846). That was the upshot of the District Court's extensive commentary and analysis. (*Id*.). It was an erroneous standard for proving harm to competition for a Section 1 claim reviewed under the rule of reason. (Opening Br. pp. 56-61.)

According to the District Court, Aya must have shown either of the following scenarios to proceed to trial on its Section 1 claim under the rule of reason:

(1) AMN used its Trade Restraints to impose supracompetitive prices or some other marketwide restriction of output (ER-13:2836)–which only a monopolist or marketwide cartel can do (*see United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001); *or*, in the alternative,

(2) AMN held a dominant market position in a properly defined market, and its dominant position was protected by high market barriers–i.e., AMN held a monopoly position (*see id.* 253 F.3d at 51); *and* AMN used its Trade Restraints to restrain interbrand competition or exploit the market structure in ways that resulted in (a) a lack of allocative efficiency; *and* (b) supracompetitive prices or some other

marketwide reduction of output (ER-13:2840-2846)–which, again, only a monopolist or marketwide cartel can do (*see Microsoft*, 253 F.3d at 51).[5]

According to the District Court, Aya failed to make either threshold showing, and therefore its rule-of-reason challenge under Section 1 must fail. (ER-13:2846.) This standard was erroneous and is directly contradicted by the Supreme Court's express rulings on the matter, which confirm that harm to competition in a Section 1 case includes lesser harms than attempted monopolization, let alone actual monopolization and demonstrated misuse of monopoly power. *See Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190-91 (2010)*; Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) (quotations from these cases provided in Aya's Opening Brief pp. 58, 60).

Nonetheless, Aya offered the very proofs that the District Court said it required for its fantastical threshold showing. (Opening Br. pp. 61-62.) If the District Court had not forbidden further exhibits after announcing its *sua sponte* ruling on this point (ER-17:3509), Aya would have offered the entirety of Dr. Rothman's antitrust report, having previously withheld its complete statement of conclusions, an appendix that explains its methodology, and charts that provide key information about the relevant

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[5] *See id.* at 51 (a firm wields monopoly power if it can profitably charge supracompetitive prices or holds "a dominant share of a relevant market that is protected by entry barriers.")

labor and service markets (which would have clarified the District Court's apparent misunderstanding about whether Aya used the same data to define both sets of markets).[6]

Even more important, Aya's proofs make the required threshold showing under the proper standard by showing the following points: (1) AMN prevailed on nearly all other rival employers/rival providers in the relevant markets to accept its interrelated Trade Restraints (ER-16:3188 Table 1, 3296-3331 Exs. H-1, H-3), so that these restraints have had the *potential* to have an adverse impact on competition between rivals in these markets[7]; and (2) these restraints are worded, understood, and practiced in ways that have significantly and indefensibly restricted competition between rival travel-nurse agencies for hires in the relevant labor markets and sales in the relevant service markets (Opening Br. pp. 15-30).

That is sufficient to make a prima facie showing of harm to competition for a claim under Section 1. *See Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir.

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[6] Aya states these matters in response to AMN's assertion that it submitted to the District Court all of the report except for "some random pages." (Answering Br. p. 16.)

[7] *See 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.").

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."); Opening Br. pp. 52-56.

Few industries are as wholly restrained as is the entire travel-nurse industry by AMN's Trade Restraints, which bind providers that collectively have [redacted] (ER-16:3188 Table 1.) Nor do employers or sellers in most industries routinely accept such severe limits on their ability to recruit skilled employees or make sales. (Opening Br. pp. 15-30.) But AMN's Trade Restraints impose such limits, and that is their principal or only purpose and effect. *AMN uses them not to improve its own offerings or promote productive collaborations, but to prevent others from competing against it*. (*Id.*)

Aya submits that the above showing is remarkable and clearly warrants a trial of its rule-of-reason challenge. *See* Areeda & Hovenkamp, *Antitrust Law* ¶574 (4th and 5th Editions 2013-2020) (examining decisions that condemned trade restraints binding on numerous market participants and limiting competition between them); *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1303 (9th Cir.

1982) (Harm to competition shown where the defendant uses "single contracts that belong to a pattern of contractual relations that significantly restrain trade in a relevant market.").

The Court should therefore grant this part of Aya's appeal, ordering a trial of Aya's claim that AMN has committed rule-of-reason violations of Section 1 by imposing its interrelated, marketwide Trade Restraints in order to impede or prevent most market participants from competing against it in various ways.

V. THERE IS A TRIABLE DISPUTE AS TO WHETHER AYA SUSTAINED ANTITRUST INJURY

By its phrasing of the issues presented, AMN suggests in its Answering Brief that the District Court granted summary judgment because Aya's evidence failed to show antitrust injury. (Answering Br. p. 2, Issue No. 1.) That is not correct. Rather, the District Court partly sustained and partly denied this defense, which was AMN's sole ground for summary judgment. (ER-17:3491-3495, 3499.)

After framing the issue in this manner, AMN re-hashes its points about Aya's exclusionary damages (Answering Br. pp. 46–49), all of which the District Court *rejected* (ER-17:3491-3495).

As Aya's evidence shows, Aya earned less profit than it otherwise would have done because of AMN's antitrust violations. (ER-16:3263-3268 ¶¶ 174, 176, 182-189, Table 3.) That is compensable antitrust injury. *See Image Tech. Servs., Inc. v. Eastman*

Kodak Co., 125 F.3d 1195, 1222 (9th Cir. 1997) ("Juries may award damages to profitable businesses for lost sales as the result of anticompetitive behavior."); *Pierce v. Ramsey Winch Co*., 753 F.2d 416, 436-37 (5th Cir. 1985) (plaintiff can establish antitrust injury by showing that it would have earned an even higher profit but for antitrust injury).

Those losses constitute classical antitrust injury because they were occasioned by AMN's efforts to impede and exclude rivals: if a defendant offers better products or services that customers prefer to those offered by competitors, no competitor's ensuing loss qualifies as antitrust injury; but if in furtherance of an antitrust violation a defendant impedes rivals to prevent them from competing, their ensuing losses are compensable antitrust injury. *See Cascade Health Sols. v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008) ("Anticompetitive conduct is behavior that tends to impair the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way."). *See generally* Areeda & Hovenkamp, *Antitrust Law* ¶ 397 ("Damages for Exclusionary Practices").

A. Aya Furnished Sufficient Evidence of Actionable Exclusionary Losses

To demonstrate its exclusionary losses, Aya adopted a cautious, methodical approach, showing how AMN's enforcement of its interrelated Trade Restraints and in particular its No-Poaching Restraints caused it to forgo additional profits of

approximately $300,000. (ER-16:3264-3268 ¶¶ 176, 182-189, Table 3.) Aya sustained these losses while it heeded AMN's No-Poaching Restraints. (*Id*.) During this period, [redacted] including many located at its offices in the same city as Aya's headquarters, even though Aya otherwise would have offered them better pay and opportunities to lure them away from AMN's uncompetitive pay and exploitive working environment. (ER-14:3071-3073 ¶¶ 31-40; ER-15:3148 ¶ 15.)

AMN's No-Poaching Restraints thus impeded Aya's ability to hire recruiters in a national labor market for recruiters (*id*.), and that circumstance in turn impeded Aya's ability to place travel nurses in various locales (*id*.). There was never an exact correlation between Aya's own losses and AMN's market share in any regional market, nor any reason why there should be such an exact correlation, but AMN held a substantial market share (30% to 64%) or a dominant one (65% +) in *every* regional market where Aya suffered these losses. (*Compare* ER-16:3268 Table 3 *with* ER-16:3269-3270 Ex. V-2.)

Indeed, Aya's percipient and admitted expert evidence supplies the very analytical gap that AMN decries in its papers. Namely, AMN's Trade Restraints tended to lessen Aya's overall competitiveness and attractiveness to larger customers, particularly medium-sized and large hospital systems: with fewer and less qualified

recruiters, Aya was unable to attract a larger, more diversified pool of affiliated travel nurses, and therefore its offerings were not competitive with those of AMN. (ER-14:3071-3073 ¶¶ 31-40; ER-15:3148 ¶ 15.)

Aya's own success after it ceased acquiescing in AMN's No-Poaching Restraints affords a before-and-after demonstration of its exclusionary losses: Aya's profits increased significantly and ever more quickly after it began to solicit and hire recruiters from AMN. (ER-15:3144; ER-16:3264-3268 ¶¶ 176, 182-189, Table 3.) By attracting talented recruiters from AMN, Aya was able to offer a larger number and variety of better-qualified and more experienced travel nurses to hospital systems confronted with chronic shortages of skilled nurses. (ER-14:3079-3080 ¶¶ 71-72; ER-15:3152-3154 ¶ 31-32, 36–38.) For this very reason, Aya finally won substantial contracts with medium-sized hospitals and offered them lower prices than AMN would have charged. (See ER-14:3080 ¶ 73; ER-16:3247– 3253 ¶¶ 143-149.) Upon gaining these contracts, Aya became a more attractive destination for yet more recruiters and their travel nurses, and it began to refer more assignments to a growing network of subcontractor agencies, thus developing a larger network of them. (See ER-14:3080-3081 ¶¶ 73-76; ER-15:3152-3154 ¶ 32, 36–38.) These developments and Aya's proven track record serving medium-sized systems made Aya more attractive to other medium-sized hospitals, and so Aya went from strength to strength, bucking

the industrywide, competition-suppressing groundrules that AMN established and believes itself entitled to enforce despite our antitrust laws. (*Id*.)

Aya's exclusionary damages merely show the additional profits that it would have earned, if it had stopped acquiescing in AMN's unlawful No-Poaching Restraints at an earlier date or had never been bound by them. (ER-16:3264-3268 ¶¶ 176, 182-189, Table 3.) That is compensable antitrust injury. *See Image Tech. Servs.,* 125 F.3d at 1222; *Pierce*, 753 F.2d at 436-37.

B. Aya Furnished Sufficient Evidence of Its Retaliatory Losses

Aya also seeks to recoup the far greater losses it bore because AMN retaliated against it for hiring and collaborating with AMN's recruiters in violation of AMN's No-Poaching Restraints and Employee Restraints. (ER-16:3263-3264 ¶¶ 174-175.) Those are Aya's retaliatory losses: they are the minimum profits that Aya would have earned from its continued work for AMN, had AMN not abruptly severed all ties to punish Aya's breach of AMN's anticompetitive groundrules. (*Id.*)

If, as here, a plaintiff can show that a ringleader defendant has harmed the plaintiff's business solely to punish it for refusing to participate in an anticompetitive conspiracy, the plaintiff's losses should be treated as compensable antitrust injury. By proving these facts, the plaintiff demonstrates conduct that (1) lacks any procompetitive benefit (the ringleader does not employ the conduct to improve any

good or service); and (2) is strictly anticompetitive in purpose and effect (the conduct's only purpose is to punish defectors in order to coerce compliance with the ringleader's anticompetitive scheme). When such conduct is unambiguously done in furtherance of an antitrust violation and causes harm to the plaintiff's business, it should be treated as antitrust injury under well-established tests for discerning antitrust injury. *See W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 102 (3d Cir. 2010) (antitrust injury occurs to a competitor or other market participant "whose injuries are the means by which the defendants seek to achieve their anticompetitive end"); *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) ("The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant's behavior.").

On this matter, AMN is again silent. It merely assumes that retaliatory damages must be limited to cases in which an orthodox cartel, acting in lockstep, jointly inflicts retaliation on a defector (Answering Br. pp. 51-52) because that was the fact scenario in *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994).

But *Hammes* should not be read so narrowly. Rather, it establishes that retaliatory damages constitute compensable antitrust injury because awarding them encourages plaintiffs to resist pressure to join antitrust conspiracies, to compete

instead, to expose and stop antitrust conspiracies, and to obtain redress for retaliatory harm endured because of these efforts. *See id*. 33 F.3d at 783. Aya's evidence meets this rule, or at least raises a triable dispute of fact on the point.

AMN further argues that it cannot be liable to Aya under Section 1 because it never acted with another entity to harm Aya. That argument is unavailing, as even the District Court ruled (ER-17:3492-3493.) Rather, a plaintiff obliged to accept an unlawful trade restraint, such as Aya in this case, can seek redress from the defendant that imposed it and thereby harmed the plaintiff's business. The contract itself is the trade restraint by which the defendant caused the harm. *See, e.g., US Airways, Inc. v. Sabre Holdings Corp.*, 938 F.3d 43, 48-49 (2d Cir. 2019) (plaintiff permitted to recoup antitrust damages caused by its adherence to a contract in restraint of trade imposed by its counterparty).

Aya has therefore placed in issue its own antitrust injury. That injury was caused by AMN's use of its Trade Restraints to impede Aya from competing, then by AMN's retaliation to punish Aya for having ceased to acquiesce in these Trade Restraints. (ER-14:3076-3079 ¶¶ 55-70.)

C. The Court Should Not Adopt AMN's Myopic Statement of the Case

Lastly, AMN seeks to turn the doctrine of antitrust injury on its head by studiously disregarding every part of this case not strictly related to the matters it

argues were the only proximate cause of Aya's exclusionary losses. But Aya's evidence shows how AMN uses its mutually reinforcing Trade Restraints and retaliatory tactics to preserve strategic advantages over all competitors by restricting their ability to compete against it. The harm to Aya was part of this larger effort. (Opening Br. pp. 15-30.) Aya's showing of these matters is not only proper, but *required* for its rule-of-reason challenge. *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) (to prove Section 1 claim under the rule of reason, "the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself.").

AMN may wish to present its myopic view of the case at trial, but this Court should not adopt it when examining Aya's Section 1 claims on summary judgment. *See In re NFL's Sun. Ticket Antitrust Litig.*, 933 F.3d 1136, 1152 (9th Cir. 2019) ("[W]e are required to take a holistic look at how the interlocking agreements actually impact competition. Indeed, the essential inquiry is whether or not the challenged restraint enhances competition, which is assessed by considering the totality of the nature or character of the contracts.").

VI. CONCLUSION

The Court should reverse the District Court's summary judgment of Aya's Section 1 claims and remand them to the District Court for a trial.

DATED: February 3, 2021 Respectfully submitted,

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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 6,982 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: February 3, 2021 Respectfully submitted,

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FOR THE NINTH CIRCUIT

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