FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AYA HEALTHCARE SERVICES, INC.; AYA HEALTHCARE, INC., *Plaintiffs-Appellants*,	No. 20-55679
v.	D.C. No. 3:17-cv-00205-MMA-MDD
AMN HEALTHCARE, INC.; AMN HEALTHCARE SERVICES, INC.; AMN SERVICES, LLC; MEDEFIS, INC.; SHIFTWISE, INC., *Defendants-Appellees.*	OPINION

Appeal from the United States District Court
for the Southern District of California
Michael M. Anello, District Judge, Presiding

Argued and Submitted July 26, 2021
Pasadena, California

Filed August 19, 2021

Before: MILAN D. SMITH, JR. and JOHN B. OWENS, Circuit Judges, and EDUARDO C. ROBRENO,[*] District Judge.

Opinion by Judge Milan D. Smith, Jr.

SUMMARY[**]

Antitrust

The panel affirmed the district court's summary judgment in favor of AMN Healthcare, Inc., in Aya Healthcare Services, Inc.'s antitrust action involving the non-solicitation provision within AMN's contract with Aya to provide travel nursing services to hospitals and other healthcare facilities.

Both parties are healthcare staffing agencies that place travel nurses on temporary assignments. To receive spillover assignments, Aya contracted with AMN. The contract included a provision prohibiting Aya from soliciting AMN's employees.

Aya alleged that the non-solicitation provision is an unreasonable restraint prohibited by Section 1 of the Sherman Act. The panel held that the non-solicitation agreement is an ancillary—rather than a naked—restraint

[*] The Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

because it is reasonably necessary to the parties' pro-competitive collaboration. Accordingly, the restraint is not *per se* unlawful, but is subject to the rule-of-reason standard.

The panel held that Aya failed to satisfy its initial burden under the rule-of-reason standard because it did not demonstrate through direct or indirect evidence that a triable issue of fact exists with respect to whether AMN's non-solicitation agreement has a substantial anticompetitive effect that harms consumers in the relevant market.

The panel held that Aya's claim for retaliatory damages fails because it did not present any evidence of a cartel or a concerted action in the termination of its agreement with AMN.

COUNSEL

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OPINION

M. SMITH, Circuit Judge:

In 2010, Appellee AMN Healthcare, Inc. (AMN) contracted with Appellant Aya Healthcare Services, Inc. (Aya) to provide travel nursing services to hospitals and other healthcare facilities. This case involves the non-solicitation provision within that contract. We conclude that this provision is both ancillary to the parties' broader agreement to collaborate, and a reasonable, pro-competitive restraint. We therefore affirm the judgment of the district court granting summary judgment to AMN.

FACTUAL AND PROCEDURAL BACKGROUND

Both parties are healthcare staffing agencies that "place the travel nurses on temporary assignments." *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, —F. Supp. 3d —, 2020 WL 2553181, at *1 (S.D. Cal. May 20, 2020). "Travel nurses are nurses and nurse technicians who perform temporary, medium-term assignments in understaffed hospitals and other healthcare facilities [ ] that cannot have the assignments performed by their own nurses." *Id*. "[A]gencies place the travel nurses at hospitals several ways: by directly placing the travel nurses at the agencies' hospital accounts and by indirectly placing the travel nurses at hospitals through either an agency that manages the hospitals' travel nurse needs (managed service provider or MSP) or electronic platforms that facilitate the placements." *Id.*

"AMN has been a leader in the healthcare staffing industry for over thirty years." *Id.* at *2. In 2009, AMN became "the MSP of an increasing number of hospitals," "in addition to providing travel nurses to hospitals on direct

placements." *Id.* That same year, Alan Braynin founded Aya, which places "nurses directly in hospitals" and "indirectly through MSP programs, such as those of AMN." *Id*.

As AMN grew, it became unable to "fulfill the demand of its hospital customers for travel nurse assignments." *Id.* AMN began referring "these 'spillover assignments' to its network of subcontractors, or 'associate vendors' (AVs), which were other healthcare staffing agencies," including Aya. *Id.* To receive such spillover assignments, Aya contracted with AMN. Included in that contract was a provision prohibiting Aya from soliciting AMN's employees.[1] Aya signed its first AV agreement in 2010 and began "provid[ing] travel nurses to AMN's customers." *Id.* Aya eventually "became AMN's largest AV." *Id.*

"Around May 2015, Aya began actively soliciting AMN's travel nurse recruiters." *Id.* This caused "the parties' business relationship [to] sour[]," and in September 2015, "AMN temporarily terminated Aya's access to AMN's platform." *Id.* The parties ultimately ended their relationship, permanently terminating their prior AV agreements in December 2015.

Aya filed its first amended complaint against AMN in February 2017, alleging four claims pursuant to Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, and three California state law claims. The district court granted AMN's motion to dismiss without prejudice, holding that Aya did not sufficiently allege that it had suffered antitrust

[1] The provision remains under seal and, therefore, its text will not be included here. We will refer to this provision as the parties' "non-solicitation agreement."

injuries, and deferred ruling on Aya's state law claims. Aya then filed a second amended complaint, again alleging three California state law claims and realleging three federal antitrust claims: a '*per se*' claim and a quick-look/rule-of-reason claim pursuant to Section 1 of the Sherman Act, and a claim for attempted monopolization pursuant to Section 2 of the Sherman Act. The district court granted in part and denied in part AMN's motion to dismiss the amended complaint, dismissing Aya's tortious interference claim with leave to amend, and allowing Aya's federal claims and other state law claims to proceed. Aya then amended its complaint for a third time, realleging its tortious interference claim and adding a Section 2 claim for monopolization. Aya claimed that "it suffered 'exclusionary damages' as a result of AMN's non-solicitation covenant in the parties' AV agreements and 'retaliatory damages' as a result of AMN's decision to terminate its AV relationship with Aya." *Aya Healthcare*, 2020 WL 2553181, at *3.

Discovery commenced. Aya offered expert economics testimony from Dr. Dov Rothman. Dr. Rothman attributed Aya's exclusionary damages to the non-solicitation provision in its AV agreement with AMN during a limited time period, between February 2013 and mid-2015. Dr. Rothman quantified Aya's retaliatory damages as its lost profits resulting from the termination of the parties' AV agreement in 2015.

AMN then moved for summary judgment. In May 2020, the district court granted the motion as to Aya's claims for retaliatory damages pursuant to Sections 1 and 2 of the Sherman Act. The court determined that there was "no evidence of a cartel of healthcare staffing agencies that all agreed to refrain from soliciting or hiring each other's employees or to retaliate against Aya for reneging on such

an agreement." *Id.* at *18. The court further held that "Aya [ ] failed to proffer evidence that AMN ha[d] sufficient market power in the various markets identified for Aya's Section 2 claims, or that AMN's conduct ha[d] harmed competition." *Id.* The district court ordered the parties to submit supplemental briefing on whether it should grant AMN's motion for summary judgment as to Aya's claims for exclusionary damages.

In June 2020, after considering the supplemental briefing, the district court granted AMN's motion for summary judgment on Aya's claims for exclusionary damages, and declined to exercise supplemental jurisdiction over Aya's state law claims. The district court concluded that "Aya fail[ed] to raise a genuine issue of material fact regarding whether AMN has market power." In both orders granting summary judgment, the district court found Dr. Rothman's work deficient and his studies unreliable.

On appeal, Aya first requests that we recognize a *per se* rule against naked no-poaching restraints pursuant to Section 1 of the Sherman Act. Aya asserts that its evidence raises a triable dispute as to whether AMN's non-solicitation provision constitutes a naked no-poaching restraint. Aya then argues that its evidence establishes a triable dispute as to whether AMN's non-solicitation provision violates Section 1 under the quick-look standard and the rule-of-reason standard.[2] Aya contends that it is entitled to retaliatory damages under the *Hammes* doctrine because AMN effectively 'cartelized' the labor market and retaliated against Aya. Finally, Aya argues that it should have been

[2] Aya's Section 2 claims are not on appeal.

allowed to introduce further evidence on new issues that the district court examined *sua sponte*.

In response, AMN argues that the district court correctly held that AMN was entitled to summary judgment on Aya's claims for exclusionary damages. AMN asserts that the relevant non-solicitation provision is not of the type that has been found *per se* unlawful. As such, the district court properly applied the rule-of-reason standard, and determined that the restriction was ancillary to a pro-competitive collaboration. AMN further argues that Aya failed to show a triable issue of fact as to whether the relevant provision harmed competition.

The United States has also weighed in on the matter, filing an amicus brief "to explain its views on the law applicable to non-solicitation agreements between competing employers." It takes no position concerning the appropriate disposition of this case.

STANDARD OF REVIEW

We review de novo a district court's decision to grant summary judgment. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc). We "must determine whether, viewing the evidence in the light most favorable to the nonmoving party, there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

ANALYSIS

A.

Section 1 of the Sherman Act bars "[e]very contract, combination in the form of trust or otherwise, or conspiracy,

in restraint of trade or commerce among the several States." 15 U.S.C. § 1. The Supreme Court has interpreted this text "to outlaw only unreasonable restraints." *State Oil v. Khan*, 522 U.S. 3, 10 (1997); *see also United States v. Joyce*, 895 F.3d 673, 676 (9th Cir. 2018).

Restraints are generally categorized as horizontal or vertical. A horizontal restraint is "an agreement among competitors on the way in which they will compete with one another." *NCAA v. Bd. of Regents*, 468 U.S. 85, 99 (1984). Vertical restraints are "restraints 'imposed by agreement between firms at different levels of distribution.'" *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988)).

We employ two different standards to determine whether a particular restraint is unreasonable. *Id.* at 2283. The first standard "involves a factual inquiry commonly known as the 'rule of reason.'" *Joyce*, 895 F.3d at 676 (quoting *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 843 (9th Cir. 1996)). "The rule of reason weighs legitimate justifications for a restraint against any anticompetitive effects." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1156 (9th Cir. 2003). "[N]early every [ ] vertical restraint" is "assessed under the rule of reason." *Am. Express*, 138 S. Ct. at 2284. We "conduct a fact-specific assessment," *id.*, to "distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest," *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

The second standard is the *per se* standard, which recognizes that "[a] small group of restraints are unreasonable *per se* because they always or almost always

tend to restrict competition and decrease output." *Am. Express*, 138 S. Ct. at 2283 (citation and internal quotation marks omitted). "Such agreements or practices are 'conclusively presumed to be unreasonable' because of their 'pernicious effect on competition and lack of any redeeming virtue.'" *Joyce*, 895 F.3d at 676 (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)). "Typically only 'horizontal' restraints . . . qualify as unreasonable *per se*." *Am. Express*, 138 S. Ct. at 2283–84.

However, not all horizontal restraints are analyzed pursuant to the *per se* standard. Under the "ancillary restraints" doctrine, a horizontal agreement is "exempt from the per se rule," and analyzed under the rule-of-reason, if it meets two requirements. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *see also L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1395 (9th Cir. 1984) (noting that "[t]he common-law ancillary restraint doctrine was, in effect, incorporated into Sherman Act section 1"). These requirements are that the restraint must be (1) "subordinate and collateral to a separate, legitimate transaction," *Rothery Storage*, 792 F.2d at 224, and (2) "reasonably necessary" to achieving that transaction's pro-competitive purpose, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); *see also L.A. Mem'l*, 726 F.2d at 1395 ("[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.'" (citation omitted)).

"Naked restraints" are categorically not "ancillary restraints." *Rothery Storage*, 792 F.2d at 224 n.10. Thus, naked horizontal restraints are always analyzed under the *per*

se standard. A restraint is naked if it has "no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Some examples of these restraints include agreements among actual or potential competitors to fix prices, *e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam); rig bids, *e.g.*, *Joyce*, 895 F.3d at 677; or divide markets, *e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam).

B.

It is undisputed that the parties' non-solicitation agreement constitutes a horizontal restraint. As the United States notes, although the parties were "in a subcontractor-subcontractee relationship," the agreement "restricts AMN's actual or potential employer-rival, Aya, from competing with AMN for its employees by soliciting them to work for Aya."

Accordingly, the threshold question on appeal is whether the restraint in this case is naked or ancillary, and in turn, whether it is *per se* unlawful or subject to the rule-of-reason, respectively. The district court concluded that the non-solicitation agreement was an ancillary restraint because Aya admitted in its declarations that the agreement was "part of a collaboration agreement to fulfill the demand of hospitals for travel nurses," which constitutes a pro-competitive purpose.[3] *Aya Healthcare*, 2020 WL 2553181,

[3] The district court questioned whether the restraint was a no-poaching agreement or a non-solicitation agreement and concluded that it was a non-solicitation agreement. The United States argues that this distinction is not determinative, and we agree. The relevant distinction is whether the restraint is an ancillary restraint or a naked restraint, not whether it is classified as a no-poaching agreement or non-solicitation agreement. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006).

at *12. On appeal, Aya contends that its evidence established a triable dispute as to whether the non-solicitation agreement is a naked horizontal restraint because the provision is not necessary to the parties' broader agreement and is permanent, meaning it outlives the parties' collaboration. Aya does not challenge the district court's conclusion that the non-solicitation agreement is subordinate and collateral to its legitimate business collaboration with AMN.

We agree with the district court that the challenged restraint is reasonably necessary to the parties' pro-competitive collaboration. The purpose of the parties' contract was to supply hospitals with traveling nurses. The non-solicitation agreement is necessary to achieving that end because it ensures that AMN will not lose its personnel during the collaboration. As the district court noted, AMN may want to "guard[] its investments and establish[] AV relationships with only those agencies that agree, *inter alia*, not to abuse the relationship by proactively raiding AMN's employees, AVs, and customers." *Id.* at *14. Without the restraint, AMN "would likely be less willing or unwilling to deal with other agencies to supply travel nurses to hospitals which, as Aya also recognize[d], already experience a 'chronic shortage of nurses.'" *Id*. And with the restraint, AMN may collaborate with its competitor for the benefit of its client without "cutting [its] own throat." *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985). The non-solicitation agreement, therefore, promotes "competitiveness in the healthcare staffing industry"—more hospitals receive more traveling nurses because the non-solicitation agreement allows AMN to give spillover assignments to Aya without endangering its "establish[ed] network[] [of] recruiters, travel nurses, AVs, and of course, hospital customers." *Aya Healthcare*, 2020 WL 2553181,

at *14. Accordingly, the restraint qualifies as an ancillary restraint, which triggers a rule-of-reason analysis.[4] *See Polk*, 776 F.2d at 189 ("A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output."); *see also Addyston Pipe*, 85 F. at 289.

Aya's best argument to the contrary is that the unlimited duration of AMN's non-solicitation agreement renders it a naked restraint. Aya cites *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995), in support of this theory. In that case, the Seventh Circuit held that an agreement between competitors to not advertise in each other's territory was *per se* unlawful. *Blackburn*, 53 F.3d at 828–29. The court rejected the defendant's argument that the advertising agreement was ancillary to the parties' broader agreement to dissolve its partnership because "it was not necessary for the dissolution of the partnership" and—most importantly for Aya's argument—the agreement was "infinite [in] duration." *Id.* at 828. In holding that the duration of the agreement was a fatal flaw, the court relied primarily on *Polk*. *Id.* "*Polk* teaches that courts must look to the time an agreement was adopted in assessing its potential for promoting enterprise and productivity." *Id.* Because the agreement in *Blackburn* was made *after* the parties' joint venture concluded—and thus had no pro-competitive

[4] A large portion of Aya's opening brief argues that the district court erred in declining to recognize a *per se* prohibition of naked "no-poaching restraints." The United States agrees that the *per se* rule applies to naked non-solicitation agreements because it is "a form of labor-market allocation that, when not an ancillary restraint, [ ] is per se illegal." Although the Government's arguments have considerable merit, we decline to decide this issue given our conclusion that the challenged restraint is ancillary, and thus subject to the rule-of-reason.

effects—the agreement was a naked restraint and *per se* unlawful. *See id.* at 829.

AMN's non-solicitation agreement more closely resembles the restraint in *Polk* than the restraint in *Blackburn*. Like *Polk*, this case involves a restraint that was entered into at the same time the parties agreed to collaborate on a joint venture. 776 F.2d at 189. And, because the restraint "promoted enterprise and productivity at the time it was adopted," the restraint is properly characterized as ancillary, not naked. *Id*. Whether "there is nothing left but [the] restraint" after the joint venture ends "is the wrong focus." *Id.* Aya's argument concerning the duration of the non-solicitation agreement is therefore not compelling.

Furthermore, and contrary to the United States' amicus brief, AMN need not satisfy a less-restrictive-means test to demonstrate that the non-solicitation agreement is an ancillary restraint. Our opinion in *Los Angeles Memorial Coliseum Commission* makes clear that the less restrictive alternative analysis falls within the rule-of-reason analysis, not the ancillary restraint consideration. *See* 726 F.2d at 1395. Interestingly, the United States does not dispute this interpretation. Instead, the United States requests that we "clarify" that a district court "must engage in a distinct reasonable-necessity analysis" that includes a less restrictive means consideration.[5] The United States does not cite any

[5] At oral argument, the United States presented a different theory: Appellees must demonstrate that the restraint is "a reasonably tailored means of achieving the goal." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003). We are not convinced that "reasonably tailored" carries a materially different meaning than "reasonably necessary." In any event, the parties' non-solicitation agreement is both reasonably necessary to, and a reasonably tailored means of achieving, pro-competitive collaboration.

case law in support of this argument. Furthermore, its proposition conflicts with the Supreme Court's "reluctance to adopt *per se* rules" in cases "where the economic impact" of the restraints "is not *immediately obvious*." *Leegin*, 551 U.S. at 887 (emphasis added) (citation omitted); *see also Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977) ("[D]eparture from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing."). We thus decline the United States' request to create new law within the ancillary restraint doctrine.

C.

Given that the restraint is ancillary to the parties' broader agreement, the district court correctly subjected it to the rule-of-reason standard. To determine whether a restraint violates the rule-of-reason, we apply a three-step, burden-shifting framework. *Am. Express*, 138 S. Ct. at 2284. First,

> the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Id. (internal citations committed). Here, the district court concluded that Aya failed to satisfy its initial burden: it did not demonstrate that "a triable issue of fact exists with

respect to harm to competition." We agree with the district court's conclusion that Aya has not carried its burden at step one.

There are two ways a plaintiff may prove that the relevant restraint has a substantial anticompetitive effect that harms consumers. First, the plaintiff may provide the court with "[d]irect evidence of anticompetitive effects," which would include "proof of actual detrimental effects [on competition], such as reduced output, increased prices, or decreased quality in the relevant market." *Id.* (alteration in original) (internal quotation marks and citations omitted). Second, the plaintiff may provide "[i]ndirect evidence," which "would be proof of market power plus some evidence that the challenged restraint harms competition." *Id.*

Aya's direct evidence of harm to competition was a claim of supracompetitive pricing in certain regional markets. Relying on a study performed by its expert economist, Dr. Dov Rothman, Aya argued that there were increased prices for travel nurse services in markets in which AMN makes at least 30% of overall sales, compared to prices in markets in which AMN's overall share of sales was less than 15%. The district court rejected this argument for two reasons. First, "Aya fail[ed] to proffer any evidence to support its assertion that higher prices in certain markets [were] attributable to the challenged provisions." Aya's reliance on Dr. Rothman's report did nothing to help its argument because he also failed to support this assertion with any economic analysis. Second, Aya's direct evidence was "deficient because Dr. Rothman's study allegedly showing supracompetitive prices [was] seriously flawed." The court found that "Dr. Rothman's market share calculations capture[d] AMN's direct placements even though [those placements] do not involve AMN

collaborating with and imposing non-solicitation covenants on AVs," like Aya. The study, therefore, was "unreliable and of marginal relevance." Aya presented no evidence "from which a reasonable juror could conclude that prices in certain markets are supracompetitive or that rival agencies are otherwise prevented from undercutting AMN on price."

Aya does not directly challenge this holding on appeal. Aya's brief merely reiterates that "prevailing prices for travel-nurse services have been supracompetitive in the markets . . . where AMN controls a substantial part of the overall workflow" and "the likely or only possible explanation for supracompetitive prices . . . [is] the persistent effect of AMN's Trade Restraints." This conclusory argument does not address the district court's findings. Like it did in the district court, Aya fails to connect the prevailing prices to the challenged non-solicitation agreement and ignores the flaws in Dr. Rothman's study. Accordingly, we affirm the district court's conclusion that Aya did not proffer direct evidence of harm to competition.

Regarding indirect evidence, the district court found that Aya failed to make the requisite showing of "market power plus . . . harm[] [to] competition." *Am. Express*, 138 S. Ct. at 2284. "Market power is the ability to raise prices above those that would be charged in a competitive market." *NCAA*, 468 U.S. at 109 n.38. In determining whether a company has market power, we must first define the relevant market. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). As the district court noted, Aya "define[d] the relevant markets" as the "[r]egional service markets for the sale of travel nurses to hospitals," the "[r]egional labor markets for the labor of travel nurses," and the "national labor market for the labor of travel-nurse recruiters." Aya then argued that AMN has market power in

those markets because AMN "wields extraordinary control over the available workflow and plum assignments." The district court found this argument unconvincing, and we agree. This conclusory contention "is a far cry from the evidence of consumer preference, supracompetitive prices, and lower quality services" that constitutes indirect evidence of harm to competition. Next, Aya claimed that Dr. Rothman's proffered chart demonstrated "that AMN ha[d] a 30% share or higher for a least one year between 2013 and 2015," the time period in which Aya claims exclusionary damages. The district court rejected this argument as well, holding that "market share calculations alone are insufficient to demonstrate a defendant's market power." Because Aya did not provide "sufficient evidence of *significant* barriers to entry or expansion" to accompany its market share calculations, Aya failed to demonstrate AMN could actually carry out a predatory scheme. Finally, the district court found that Aya also failed to proffer evidence of the non-solicitation agreement's anticompetitive effects, "which is required, in addition to a showing of market power."

Again, Aya does not directly challenge the district court's findings on appeal. Instead, Aya contends that the district court's rule-of-reason analysis was incorrect because it "conflated proofs required for a Section 1 claim with those required for a Section 2 claim." According to Aya, the district court required it to prove that AMN held "a monopoly position in the relevant market, *and* it . . . used its Trade Restraints to facilitate its exercise of monopoly power." Aya's argument is not persuasive—the district court properly conducted a rule-of-reason analysis pursuant to the Supreme Court's reasoning in *American Express* and other circuits' case law. *See Am. Express*, 138 S. Ct. at 2284; *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 97

(2d Cir. 1998) (holding that market power alone does not suffice as indirect evidence for a rule-of-reason analysis). Aya presents no other argument challenging the district court's conclusion that it failed to proffer sufficient indirect evidence that the non-solicitation agreement has a substantial anticompetitive effect that harms consumers.

In summary, we agree with the district court's conclusion that Aya did not carry its initial burden to prove that AMN's non-solicitation agreement has a substantial anticompetitive effect that harms consumers in the relevant market. Aya therefore cannot demonstrate that the restraint violates the rule-of-reason standard.[6]

D.

Aya contends that it can recover retaliatory damages pursuant to the *Hammes* doctrine. Aya supports its argument with two factual allegations: "(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." The district court properly rejected this argument.

The Seventh Circuit's decision in *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994), involved an actual cartel and an agreement to allocate the Indianapolis

[6] Aya briefly argues that the district court erred in declining to rule on its quick-look challenge of the non-solicitation agreement. The quick-look standard, however, is not appropriate in this context—it is applied "to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability." *Dagher*, 547 U.S. at 7 n.3. Because "*per se* liability is unwarranted here," the quick-look standard is also inapplicable. *Id.*

transmission repair market. The cartel members agreed to block the inclusion of one repair center in the arrangement because that repair center refused to pay its share, and eventually, it failed. *Hammes*, 33 F.3d at 777. The Seventh Circuit reversed the district court's dismissal of the excluded repair center's claim, holding that "[l]osses inflicted by a cartel in retaliation for an attempt by one member to compete with the others are certainly compensable under the antitrust laws." *Id.* at 783.

Unlike the excluded repair center in *Hammes*, Aya provided the district court with no evidence of a cartel or of any concerted action in relation to AMN's termination of its agreement with Aya. Accordingly, the district court found *Hammes* inapplicable to Aya's claim. On appeal, Aya does not directly challenge the district court's conclusions. Instead, it merely repeats conclusory allegations that "AMN effectively 'cartelized' the relevant labor markets." This is not enough to warrant reversal of the district court's grant of summary judgment in favor of AMN.[7]

CONCLUSION

The district court did not err in granting AMN's motion for summary judgment. The non-solicitation agreement is an ancillary restraint and therefore is subject to the rule-of-reason—not the *per se* rule. The agreement does not violate the rule-of-reason because Aya failed to carry its burden of

[7] Aya presents two other meritless claims. First, it contends that it was entitled to injunctive relief. Because Aya loses on the merits of its claims, it is not entitled to injunctive relief. Aya also asserts that it "should have been allowed to introduce further evidence on new issues that the district court examined *sua sponte*." This is also baseless—Aya was given many opportunities before the district court to submit evidence, and it never sought leave to offer additional evidence.

proving the agreement has a substantial anticompetitive effect that harms consumers in the relevant market. Aya's claim for retaliatory damages also fails because it did not present any evidence of a cartel or a concerted action in the termination of its agreement with AMN.

AFFIRMED.