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“No More No-Poach”: An Antitrust Plaintiff’s Guide

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“No More No-Poach”: An Antitrust Plaintiff’s Guide

Amanda Triplett*

Abstract

It may seem that agreements between employers not to hire or solicit employees from each other would be illegal under the Sherman Act’s prohibition of conspiracies to fix prices or allocate markets. However, the complexity of this issue pushes the boundaries of antitrust law. But the core principals of antitrust law are tailored to reject them. In a market of employers, where firms are competitors, no-poach restraints have horizontal elements subject to a harsher standard of antitrust review. Firms that enter into these arrangements bypass legal methods to protect against the harms of employee loss, such as a non-compete agreement. Just as in a classic cartel, these firms are motivated by a desire to fix wages, and worse, weaken transparent wage information in the labor market. Possible vertical elements of these restraints, such as in franchise systems, should not alter this analysis—despite potential Copperweld or unilateralism defenses.

There is a strong case in antitrust jurisprudence for per se or quick-look condemnation, including through the use of the hub-and-spoke conspiracy doctrine. In the case of specialized employees, in particular, extended rule of reason condemnation is possible. Once an antitrust plaintiff meets the initial burden, it will be unlikely that a defendant can raise a pro-competitive justification defense. Only in limited circumstances are no-poach agreements truly ancillary to integrations between firms, necessary for the larger venture, and pro-competitive in their purpose.

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I. An Introduction to No-Poach Agreements

A. From Apple to McDonald’s

In the early 2000s, several Silicon Valley tech companies (including Adobe, Apple, Google, Intel, Intuit, Lucasfilm, and Pixar) entered into an interconnected web of agreements prohibiting the parties from cold calling or soliciting each other’s employees.¹ Each agreement included the “active involvement and participation of a company under the control of the late Steven P. Jobs . . . and/or a company whose board shared at least one member of Apple’s board of directors.”² It is likely that the agreements were negotiated CEO to CEO.³ Subsequent details

1. *See In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1110 (N.D. Cal. 2012) (“[E]ach company placed the names of the other company’s employees on a ‘Do Not Cold Call’ list and instructed recruiters not to cold call the employees of the other company.”).

2. *See id.* (describing the role of Apple and Steven Jobs in orchestrating the web of agreements).

3. *See id.* at 1117 (“Based on Mr. Jobs’s attempt to negotiate a ‘Do Not Cold Call’ agreement directly with Palm’s CEO, it is reasonable to infer that such agreements were negotiated directly CEO to CEO.”).

were then negotiated, executed, monitored, and concealed by senior executives at each participating company.⁴

The employees never agreed to this arrangement by signing non-compete agreements.⁵ Yet, this was the effect of the conspiracy; the agreement fractured competition in the tech labor market, depressing the “total compensation and mobility of all Defendants’ employees.”⁶ The lone defector in this agreement, Palm, Inc., stated that the “proposal that . . . neither company will hire the other’s employees, regardless of the individual’s desires, is not only wrong, it is likely illegal.”⁷ There is some evidence that his assumption was correct. The Department of Justice (DOJ) argued that this conspiracy was per se illegal and the parties responded by entering consent decrees.⁸ However, because consent decrees were entered, the court never explicitly held that these agreements were per se illegal.⁹

Consider also the plight of Leinani Deslandes.¹⁰ She began as an entry-level employee at a McDonald’s franchise, was promoted to shift-manager, then department manager, and began coursework to become a general manager.¹¹ She stated that her course was cancelled when her supervisors learned she was pregnant.¹² Although Deslandes sought a comparable position at a

4. *See id.* at 1110 (describing the role of senior executives in enforcing the no-poach agreements).

5. *See id.* (“Defendants’ employees were not informed of, nor did they agree to, the terms of any of the agreements.”).

6. *See id.* at 1111 (explaining the importance of cold-calling and non-solicitation on this labor market).

7. *See id.* at 1112 (describing Palm’s rejection of Apple’s no-poach proffer).

8. *See* Proposed Final Judgment and Competitive Impact Statement, *United States v. Adobe Systems, Inc.*, 75 Fed. Reg. 60820, 60820-01 (Oct. 1, 2010) (describing the consent decree’s terms).

9. *See* Proposed Final Judgment, *United States v. Adobe Systems, Inc.*, 75 Fed. Reg. 60820 (Oct. 1, 2010) (“[T]his Final Judgment does not constitute any admission by the Defendants that the law has been violated . . .”).

10. *See* *Deslandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *1 (N.D. Ill. June 25, 2018) (“After a no-hire agreement prevented plaintiff from obtaining a position with a rival employer, plaintiff . . . filed suit asserting, among other things, that defendants’ no-hire agreement violates the Sherman Antitrust Act . . .”).

11. *See id.* at *3 (describing Deslandes’s time as an employee with McDonald’s).

12. *See id.* (describing the facts of the case).

nearby McDonald’s franchise restaurant, she was told that the restaurant could not interview her unless she was “released” by her previous franchise employer.¹³ This policy originated from standard provisions within every McDonald’s franchise contract prohibiting franchise restaurants from poaching employees from each other.¹⁴ However, Deslandes was not released because she was “too valuable” and she ultimately had to take an entry-level job with lower pay.¹⁵ Unfortunately, Leinani Deslandes’s legal claim is highly uncertain.¹⁶ Given the unique orientation between franchisor and franchisee in these cases, the courts have struggled to identify the applicable antitrust standard.¹⁷

For the remainder of Part I, this Note will provide an overview of the antitrust framework as a solution in addition to the history and development of the current no-poach landscape.¹⁸ In Part II, this Note will outline the steps to proving the first element, the agreement requirement, of a § 1 claim.¹⁹ This will include potential complications in vertical agreements such as the unilateral action doctrine, the hub-and-spoke conspiracy, and the intra-enterprise doctrine.²⁰ In Part III, this Note will then discuss the second element of a § 1 claim—proving that the restraint at issue is unreasonable.²¹ Specifically, this Note will outline the three standards of review, concluding that per se condemnation is most

13. *See id.* (demonstrating the effect of the no-poach agreement on the employee).

14. *See id.* at *6 (outlining the contractual no-poach agreement provision in detail).

15. *See id.* at *9 (stating that Deslandes “had to start over at the bottom elsewhere” because of the no-poach agreement).

16. *See infra* Parts I.C–E and accompanying text (describing the agencies’ and federal courts’ experience with no-poach restraints).

17. *See infra* Part I.E (illustrating the unique difficulties of franchise no-poach restraints).

18. *See infra* Parts I.C–E and accompanying text (outlining the current state of no-poach antitrust jurisprudence).

19. *See infra* Part II and accompanying text (discussing the Sherman Act’s conspiracy element).

20. *See infra* Parts II.B–D and accompanying text (describing various antitrust defenses and complications that arise with vertical restraints).

21. *See infra* Part III and accompanying text (explaining the second element of a § 1 violation).

appropriate while there is a strong argument for quick-look review in the alternative.²² In Part IV, this Note will discuss the ways an antitrust plaintiff, after making out a claim, should defend against a defendant's pro-competitive justifications.²³ Should the plaintiff meet its initial burden, it is likely that the defendant will not be able to successfully raise a justification.²⁴

B. Antitrust Law as a Solution: An Overview of § 1 of the Sherman Act

Antitrust law is not intended to protect social interests beyond the maintenance of a competitive marketplace.²⁵ However, its reach is broad enough to protect employees' rights.²⁶ Antitrust law was designed to ensure the proper functioning of the markets, including the labor market.²⁷

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.²⁸

22. See *infra* Part III and accompanying text (outlining the per se, quick-look, and rule of reason antitrust standards).

23. See *infra* Part IV and accompanying text (illustrating the requirements for a successful pro-competitive defense in no-poach cases).

24. See *infra* Part IV and accompanying text (illustrating the rigorous requirements for a successful pro-competitive defense in no-poach cases).

25. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (rejecting the argument that a competitive restraint can be justified by the social dangers of promoting inferior engineering services).

26. See ANTITRUST DIV., DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 1 (2016) [hereinafter HR GUIDANCE] (describing the importance of an unconstrained labor market for employees).

27. See *id.* at 2 ("Just as competition among sellers in an open marketplace [benefits] consumers . . . competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment.").

28. See 2A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶1352c (4th ed. 2018

Because no-poach agreements occur in the labor market, however, they differ from typical restraints of trade between sellers (firms which sell, distribute, or produce goods or services for consumers).²⁹ Instead, no-poach agreements impact buyers (firms which purchase labor from employee sellers).³⁰ However, the DOJ and Federal Trade Commission (FTC) have an extended history challenging buy-side restraints on the labor market.³¹ The theory is that competition in the labor market provides actual and potential employees with higher wages, better benefits, and more varied types of employment—all of which ultimately benefit consumers because “a more competitive workforce may create more or better goods and services.”³²

In the case of no-poach agreements, the most likely avenue for antitrust relief would be § 1 of the Sherman Act. Section 1 of the Sherman Act outlaws every “contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce”³³ The law does not reach unilateral acts of monopolization by individual firms, which are governed by other antitrust laws such as § 2 of the Sherman Act.³⁴ This distinction, in fact, can constitute a defense.³⁵ The intra-enterprise doctrine, or

Cum. Supp. 2010-2017) (describing the antitrust law’s application to the labor market).

29. *See id.* ¶352a (“Employees may challenge antitrust violations that are premised on restraining the employment market . . . Standing for employees thus parallels that for ‘suppliers’ generally[.]”)

30. *See id.* (describing the employment market as a supply side market).

31. *See generally* Council of Fashion Designers of Am., 120 F.T.C. 817, 819 (1995) (bringing an FTC enforcement action against a trade association for agreeing to suppress the wages of fashion models); *In re Debes Corp.*, 115 F.T.C. 701, 704 (1992) (initiating an FTC enforcement action against nursing homes for boycotting a nurse registry requesting increased wages); Complaint at ¶ 19, *United States v. Utah Soc’y for Healthcare Human Res. Admin.*, No. 94C282G, 1994 WL 16460700 (D. Utah Mar. 14, 1994) (alleging an agreement between hospitals to share employment and budget information in order to suppress nurse wages).

32. *See* HR GUIDANCE, *supra* note 26, at 2 (describing the pro-competitive effects of an unconstrained labor market).

33. 15 U.S.C. § 1 (2018).

34. *See id.* § 2 (targeting unilateral conduct rather than conspiracies to restrain trade).

35. *See infra* Part II.D and accompanying text (describing the Copperweld defense).

Copperweld doctrine, recognizes the circumstance that two firms may operate so closely that their decisions are essentially unilateral, rendering them incapable of conspiring under § 1.³⁶

The first element in a § 1 analysis is a horizontal, vertical, or “hub and spoke” conspiracy between two or more parties.³⁷ A horizontal conspiracy is an agreement between competing firms, while a vertical conspiracy is an agreement between firms operating at different levels of the supply chain—such as a manufacturer and retailer.³⁸ A hub-and-spoke conspiracy combines these elements; it is found where a “hub” orchestrates a series of vertical agreements, with distributors for example (“spokes”), in order to facilitate a larger horizontal conspiracy among the competing distributors (“the rim”).³⁹

The second element of a § 1 violation is a “restraint of trade.”⁴⁰ However, the Sherman Act has never been read literally; it condemns only *unreasonable* restraints of trade.⁴¹ The primary mode for determining the “reasonableness” of a restraint is the rule of reason; in this analysis, a plaintiff must demonstrate that the restraint is anticompetitive.⁴² However, the courts have also fashioned per se rules for certain offenses (usually horizontal restraints) that are universally understood to be anticompetitive.⁴³ If a plaintiff demonstrates a per se violation, there is no need to

36. See *infra* Part II.D and accompanying text (describing the *Copperweld* defense).

37. See § 1 (outlawing every “contract, combination in the form of trust or otherwise, or conspiracy . . .”).

38. See *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 930 (7th Cir. 2000) (describing horizontal and vertical agreements).

39. See *id.* at 934–36 (finding the existence of a hub-and-spoke conspiracy where vertical agreements facilitated a per se unlawful, horizontal agreement among Toys “R” Us’ distributors).

40. See 15 U.S.C. § 1 (2018) (noting the statutory language of the Sherman Act).

41. See, e.g., *Texaco, Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (discussing a divergence between the literal text of the Sherman Act and its treatment by federal courts).

42. See *id.* (describing the administration of the rule of reason).

43. See *id.* (“Per se liability is reserved only for those agreements that ‘are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.’” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978))).

show anticompetitive effects.⁴⁴ Pro-competitive effects can only then be asserted as a justification in certain limited instances.⁴⁵ As a result, *per se* or rule of reason treatment can have a dramatic effect on the plaintiff’s burden—and the outcome of a case.

There is also a third, intermediate standard which falls in the middle of the spectrum between the rule of reason and *per se* standard.⁴⁶ A rule of reason analysis may be truncated upon a “quick look” in circumstances in which a layperson with a rudimentary understanding of economics would recognize the anticompetitive effects of the restraint.⁴⁷ The practical effect of this analysis—which will be important if the *per se* rule is not applied to no-poach agreements—is that the plaintiff is not required to put forth detailed evidence of anticompetitive effects through a demonstration of market power.⁴⁸

If a plaintiff can meet his or her burden under one of the three modes of analysis, the burden shifts to the defendant.⁴⁹ Under all of these modes, including the *per se* rule, the defendant can still argue that these restraints are not “naked” anticompetitive restraints but are “ancillary” to pro-competitive activities.⁵⁰ If the defendant successfully makes a justification argument, the burden shifts back to the plaintiff to show that these efficiencies could have been achieved by less restrictive means.⁵¹ The plaintiff can

44. See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (“Certain categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation.”).

45. See *infra* Part IV and accompanying text (describing the ancillary restraint doctrine’s requirements in asserting a pro-competitive efficiencies).

46. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (describing “what has come to be called abbreviated or ‘quick-look’ analysis under the rule of reason . . .”).

47. See *id.* (describing when a quick-look analysis would be appropriate).

48. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 (stating that as a matter of law, the “absence of proof of market power does not justify a naked restriction on price or output” under a quick look analysis).

49. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (“If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint.”).

50. See *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 188–89 (7th Cir. 1985) (discerning naked and ancillary restraints).

51. See *Am. Express*, 138 S. Ct. at 2284 (outlining the rule of reason burden-shifting test).

also rebut the defendant’s justification argument by showing that the harms outweigh potential efficiencies.⁵² Additionally, the justifications a defendant can put forward are limited; they must promote an integrative venture, serve a pro-competitive purpose, and be commensurate or necessary to achieve the intended efficiencies.⁵³

C. The DOJ and FTC’s Application of Antitrust Principles to No-Poach Agreements

1. The Agencies Publicize Their Intent to Criminalize No-Poach Agreements, Stating That They Constitute Per Se Unlawful Market Allocations

In October 2016, the Antitrust Division of the DOJ and the FTC issued “Antitrust Guidance for Human Resource Professionals” to call attention to no-poach agreements.⁵⁴ The agencies announced their intent to proceed criminally against these agreements because “[they] eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct.”⁵⁵ Specifically, the agencies view this conduct as “a type of allocation agreement affecting a labor market” where employers allocate the market of employees between themselves.⁵⁶ Market allocation

52. See *id.* at 2291 (“[If the defendant successfully bears this burden, the antitrust plaintiff may still carry the day by showing . . . that the legitimate objective does not outweigh the harm that competition will suffer, *i.e.*, that the agreement “on balance” remains unreasonable.”).

53. See *infra* Part IV and accompanying text (describing the limitations in asserting pro-competitive efficiencies).

54. See HR GUIDANCE, *supra* note 26, at 4 (“Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal.”).

55. HR GUIDANCE, *supra* note 26, at 4 (describing the comparable anticompetitive harms created by no-poach agreements and market allocation agreements).

56. See Statement of Interest of the United States at 1, *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2:18-MC-00798-JFC (W.D. Pa. Feb. 8, 2019) [hereinafter Statement of Interest Ry. Indus. Emp.] (describing the United States’

restraints have been held, time and time again, by the Supreme Court, to be per se unlawful.⁵⁷ As a result, the agencies correctly view no-poach agreements as per se unlawful market allocation agreements unless they are necessary in facilitating a pro-competitive venture.⁵⁸

The practical effect when companies “agree not to hire or recruit one another’s employees [is that] they are agreeing not to compete for those employees’ labor.”⁵⁹ Yet, employees’ negotiating power often depends on the existence of competing offers of employment.⁶⁰ A successful no-poach agreement restricts this competitive information; in turn, employees cannot measure the value of their services in the market against competing offers or employers in order to seek better terms of employment.⁶¹ All conspiring employers then benefit from the depressed price of labor.⁶² The employees are left in the cold and the dark, despite the fact that they never agreed to a non-compete covenant agreement

position on whether the per se rule should be applied to no-poach agreements).

57. See *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990) (per curiam) (discussing several Supreme Court decisions which found market allocation restraints illegal).

58. See Statement of Interest Ry. Indus. Emp., *supra* note 56, at 1–2 (explaining the Department of Justice’s position on the legality of no-poach agreements).

59. See *No-Poach Approach: Division Update Spring 2019*, ANTITRUST DIV., U.S. DEP’T OF JUST., <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach> (last updated Sept. 30, 2019) (last visited Nov. 2, 2019) (discussing the Department of Justice’s recent actions against employers who participate in no-poach agreements) [<https://perma.cc/925D-DFJ3>].

60. See *id.* (“Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment.”).

61. See Statement of Interest Ry. Indus. Emp., *supra* note 56, at 8 (“As with other types of allocation agreements, an employee that is victim of an allocation agreement . . . among employers cannot reap the benefits of competition among those employers that may result in higher wages or better terms of employment.”).

62. See Statement of Interest Ry. Indus. Emp., *supra* note 56, at 8 (explaining that no-poach agreements “enable employers to avoid competing over wages and other terms of employment offered to the affected employees.”).

with their employer (which would at least be more limited in its duration and scope).⁶³

Further, the agencies recognized the horizontal nature of these agreements, stating that the effect of these restraints on the labor market is the same “regardless of whether the [conspiring] firms make the same products or . . . services.”⁶⁴ In other words, firms may be horizontally aligned (as competitors for certain employees) in the labor market regardless of whether they are competitors in their downstream markets for goods and services.⁶⁵

2. *The Agencies Have Been Successful Applying This Theory in Enforcement Actions*

All of the agencies’ enforcement actions to date have dealt with purely horizontal agreements.⁶⁶ In other words, the defendants were firms who not only competed for the same employees but who also competed in the same downstream sellers’ market for goods and services.⁶⁷ For example, the agencies’ experience with no-poach agreements originated from the three DOJ enforcement actions against Silicon Valley technology companies discussed above.⁶⁸ Additionally, the Antitrust Division has more recently

63. See *infra* Part IV.B and accompanying text (noting that a justified restraint must be limited in its scope and duration).

64. Statement of Interest Ry. Indus. Emp., *supra* note 56, at 7.

65. See Statement of Interest Ry. Indus. Emp., *supra* note 56, at 7 (focusing on labor as the relevant market for a no-poach analysis, as opposed to downstream effects on consumers).

66. See *infra* Part I.C and accompanying text (describing the federal government’s experience with no-poach enforcement actions).

67. See, e.g., Competitive Impact Statement at 2–3, *United States v. Knorr-Bremse AG*, No. 1:18-cv-00747-CKK (D.D.C. Apr. 3, 2018) [hereinafter *Knorr-Bremse Competitive Impact Statement*] (discussing an agreement between manufacturers of railway equipment); Complaint at *1–2, *United States v. eBay, Inc.*, No. 5:1212-cv-05869-PSGPSG, 2012 WL 5727488 (N.D. Cal. Nov. 16, 2012) [hereinafter *eBay Complaint*] (alleging no-poach agreement between tech firms); Complaint at *1, *United States v. Lucasfilm, Ltd.*, No. 1:10-cv-02220, 2010 WL 5344347 (D.D.C. Dec. 21, 2010) [hereinafter *Lucasfilm Complaint*] (classifying the defendants as “digital animation studios”); Complaint at *1, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629-RBW, 2010 WL 11417874 (D.D.C. Sept. 24, 2010) [hereinafter *Adobe Complaint*] (identifying defendants as high-tech firms).

68. See *supra* notes 1–6 and accompanying text (describing the government’s early initial experience with a no-poach claim).

reiterated its position in a case involving rail component competitors Knorr-Bremse AG and Westinghouse Air Brake Technologies Corp. (Wabtec).⁶⁹ Notably, the parties consented to a judgment that enjoined the defendants from engaging in further no-poach agreements and required them to submit any evidence of additional no-poach agreements with other companies.⁷⁰

The FTC also recently brought an FTC Act, Section 5 claim against competing home-care staffing agencies in the matter of *Your Therapy Source* and entered a consent decree in July 2018.⁷¹ In this case, the agreement was not technically a no-poach agreement but a wage-fixing agreement; respondents exchanged “pay rate information with each other and jointly agreed to lower therapist pay rates to the same level.”⁷² The effect was the same, however; the defendants agreed not to compete in the labor market “in an attempt to prevent therapists from switching to competing staffing companies paying higher rates.”⁷³

To date, the agencies have not prosecuted a no-poach claim with vertical elements.⁷⁴ A vertical element would present trickier questions of law.⁷⁵ First, it would test the agencies’ position that agreements between vertically oriented firms nonetheless constitute horizontal agreements between competitors in the labor

69. See Knorr-Bremse Competitive Impact Statement, *supra* note 67, at *88 (reiterating the view that no-poach agreements are per se unlawful horizontal labor market allocation agreements—unless they are reasonably necessary to a separate, legitimate collaboration or transaction).

70. See Final Judgment at *1–2, *United States v. Knorr-Bremse AG*, No. 1:18-cv-00747, 2018 WL 4386565 CKK (D.D.C. July 11, 2018) (describing the agreed-upon terms between the parties).

71. See Analysis of Agreement Containing Consent Order to Aid Public Comment at *2, *In re Your Therapy Source, LLC*, No. 171-0134, 2018 WL 3769237 (F.T.C. July 31, 2018) (explaining the terms of the consent agreement).

72. See *id.* at *1 (stating that the alleged behavior violated Section 5 of the FTC Act, depriving therapists of the benefits of competition by coordinating wages).

73. See Complaint at 3, *In re Your Therapy Source, LLC*, No. 171-0134, 2018 WL 3769237 (F.T.C. July 31, 2018) (alleging the nature of the Respondents’ conduct).

74. See *infra* Part I.C and accompanying text (describing the government’s experience with no-poach restraints).

75. See *infra* notes 76–79 and accompanying text.

market.⁷⁶ And because the more permissive rule of reason typically applies to vertical agreements, this distinction is important.⁷⁷ Additionally, the reason that vertical relationships are treated differently in the law is because of their potential for pro-competitive efficiencies.⁷⁸ As a result, no-poach agreements with vertical elements are more likely to present potential justification arguments.⁷⁹ Despite the agencies' inaction in the franchise context, however, private no-poach claims against franchises have raised these questions.⁸⁰ In doing so, they raised the public's attention and invoked a response from the Front Office of the Department of Justice.⁸¹

D. Federal Courts Grapple with Private No-Poach Franchise Claims

Attorneys General of ten states and the District of Columbia announced in 2018 that they were investigating contractual no-hire provisions in fast-food franchise agreements.⁸² Shortly thereafter, seven fast-food chains agreed to remove these provisions from their franchise agreements or not to enforce them.⁸³ However, a number of franchise employees have filed class action complaints against franchisors and franchisees.⁸⁴

76. See *infra* Part I.C.1 and accompanying text (laying out the government's theory concerning no-poach restraints).

77. See, e.g., *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 888 (2007) (noting that the antitrust laws treat vertical and horizontal agreements differently).

78. See *id.* at 894 (arguing against the use of a per se analysis for vertical restraints because they often create market efficiencies).

79. See *id.* (describing the potential efficiencies of vertical restraints).

80. See *infra* notes 82–95 and accompanying text (describing private no-poach claims).

81. See *infra* Part I.E (noting the government's response to the issues raised in recent private no-poach claims).

82. See Anthony Noto, *New York AG Joins Coalition to go After Fast-Food Franchisors*, NEW YORK BUS. J. (July 9, 2018, 1:17 PM), <https://www.bizjournals.com/newyork/news/2018/07/09/new-york-ag-joins-coalition-to-go-after-fast-food.html> (last visited Nov. 2, 2019) (listing the chains that have no-poach provisions in their franchise contracts) [<https://perma.cc/N8PG-LKMH>].

83. See *id.* (noting the effect of the Attorneys Generals' announcements).

84. See, e.g., Class Action Complaint ¶ 1, *Deslandes v. McDonald's USA*,

Additionally, Senators Cory Booker and Elizabeth Warren introduced the End Employer Collusion Act, a bill that includes prohibitions on no-poach agreements, particularly those between franchisors and franchisees.⁸⁵ Senators Booker and Warren also sent a letter to then-Attorney General Jeff Sessions, asking for additional guidance on the treatment of franchise no-poach agreements.⁸⁶

Although Sessions did not respond, three district court judges have denied defendants’ motions to dismiss in franchise no-poach cases against Jimmy John’s, McDonalds, and Cinnabon.⁸⁷ Each court recognized that no-poach provisions in franchise contracts are vertical agreements that may have horizontal elements as well.⁸⁸ Two of these courts remained open to applying the *per se* standard of review if the plaintiff could show a horizontal relationship among franchisees.⁸⁹ Additionally, two courts

LLC, No. 1:17-cv-04857, 2017 WL 2804891 (N.D. Ill. June 28, 2017) (alleging that “franchisees agreed not to recruit or hire each other’s employees or employees of McDonald’s or its affiliates”); Class Action Complaint ¶ 1, *Ion v. Pizza Hut, LLC*, No. 4:17-cv-00788, 2017 WL 5078431 (E.D. Tex. Nov. 3, 2017) (alleging a no-solicitation and no-hire agreement among the defendants); Class Action Complaint ¶ 1, *Butler v. Jimmy John’s Franchise, LLC*, No. 3:18-cv-00133, 2018 WL 565099565099 (S.D. Ill. Jan. 24, 2018) (alleging that franchisees “agreed not to solicit, recruit, or hire each other’s employees”).

85. See End Employer Collusion Act, S. 2215, 116th Cong. (2019) (asking that employers amend their franchise agreements by removing restrictive employment provisions).

86. See Letter from Cory A. Booker & Elizabeth Warren, Members, U.S. Senate, to Jefferson Beauregard Sessions III, Attorney Gen., U.S. Dep’t of Justice (Nov. 21, 2017) (“Despite this clear guidance, no-poach agreements continue to proliferate in franchise agreements, even though many franchise companies claim that they are not joint employers regarding their franchisees.”).

87. See *Yi v. SK Bakeries, LLC*, 2018 No. 18 5627 RJB, 2018 WL 8918587, at *1 (W.D. Wash. Nov. 13, 2018); *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. July 31, 2018); *Deslandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018).

88. See *Yi*, 2018 WL 8918587, at *4 (discussing vertical and horizontal elements in the agreements not to solicit or hire Cinnabon employees); *Butler*, 331 F. Supp. 3d at 795 (recognizing vertical elements but stating that the “effects are felt strictly at the horizontal level”); *Deslandes*, 2018 WL 3105955, at * 6 (stating that “the agreement was spearheaded by an entity at the top of the chain”).

89. See *Butler*, 331 F. Supp. 3d at 792–93 (stating that the plaintiff must first distinguish whether the restraint constitutes a vertical or horizontal restraint subject to *per se* condemnation); *Deslandes*, 2018 WL 3105955, at * 5–

contemplated the intra-enterprise doctrine,⁹⁰ with one noting that this conclusion would depend on the evidence uncovered during discovery.⁹¹ One court also recognized the potential for a per se violation to be shown via a hub-and-spoke conspiracy.⁹² Additionally, all of the courts recognized the potential applicability of the abbreviated rule of reason or “quick-look” standard (an intermediate level of review between per se and extended rule of reason review).⁹³ Finally, while the courts recognized potential ancillary justifications,⁹⁴ one court in particular expressed doubt that these would be viable.⁹⁵

6 (noting that per se treatment may apply in the absence of an ancillary pro-competitive justification).

90. See *Yi*, 2018 WL 8918587, at *33 (“[A]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself—here competing for labor with Cinnabon and the other franchisees.”); *Butler*, 331 F. Supp. 3d at 797 (noting that the plaintiff plausibly stated a claim but that the analysis may depend on how independent the franchisees were in relation to the franchisor with respect to the intra-enterprise doctrine).

91. See *Butler*, 331 F. Supp. 3d at 797 (“[If] the evidence of franchisee independence is weak, or if Jimmy John’s carries its burden under the quick look approach, then the rule of reason may rear its head and burn this case to the ground.”).

92. See *id.* at 795 (noting that the claimant plausibly stated a hub-and-spoke conspiracy where “the ‘hub’ firm enters into a collection of vertical agreements with other firms—the ‘spokes’—and those spokes then enter into a collection of horizontal agreements that make up the ‘wheel’”).

93. See *Yi v. SK Bakeries, LLC*, No. 18-5627 RJB, 2018 WL 8918587, at *4 (W.D. Wash. Nov. 13, 2018) (noting that the plaintiff plausibly alleged anticompetitive effects under the quick look standard but that the defendant raised plausible pro-competitive arguments, invalidating a per se standard of review); *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. July 31, 2018) (failing to reach a conclusion about the standard of review but remaining open to per se, quick look, and rule of reason analysis while noting that quick look was most likely to apply); *Deslandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *7 (N.D. Ill. June 25, 2018) (recognizing the possibility that the restraint was potentially ancillary to a pro-competitive collaboration between franchisor and franchisee, subjecting to “some form” of rule of reason analysis such as quick look analysis).

94. See *Yi*, 2018 WL 8918587, at *4 (stating that “it is not clear that the Defendants’ agreements lack any redeeming virtue”); *Butler*, 331 F. Supp. 3d at 797 (recognizing that the agreements may have procompetitive intrabrand benefits); *Deslandes*, 2018 WL 3105955, at *7 (“Each time McDonald’s entered a franchise agreement, it increased output of burgers and fries, which is to say the agreement was output enhancing and thus procompetitive.”).

95. See *Deslandes*, 2018 WL 3105955, at *7–9 (“In this case, plaintiff has

In Ms. Deslandes’s claim against McDonald’s, Judge Alonso explained the potential issues facing a franchise defendant who raises a pro-competitive justification that the provision promotes interbrand competition (between separate restaurant chains).⁹⁶ He stated that “the very fact that McDonald’s has managed to continue signing franchise agreements even after it stopped including the provision in 2017 suggests that the no-hire provision was not necessary to encourage franchisees to sign.”⁹⁷ Importantly, he noted that McDonald’s justification argument is grounded in the conclusion that the relevant antitrust market is the market for hamburgers rather than employees.⁹⁸ He disagreed with this theory, stating that “[t]his case . . . is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald’s franchisees and McOpCos within a locale are direct, horizontal, competitors.”⁹⁹ He concludes that:

A way to promote intrabrand competition for employees would be an advertising campaign extolling the virtues of working for McDonald’s. That is not what defendants are alleged to have done here. Here, they are alleged to have divided the market for employees by prohibiting restaurants from hiring each other’s current or former (for the prior six months, anyway) employees. In the employment market, the various McDonald’s stores are competing brands. Dividing the market does not promote intrabrand competition for employees, it stifles interbrand

alleged a horizontal restraint that is ancillary to franchise agreements for McDonald’s restaurants . . . That is not to say that the provision itself was output enhancing.”).

96. See *Deslandes*, 2018 WL 3105955, at *7–8 (describing the issues with asserting a procompetitive justification).

97. *Id.* at *7.

98. See *id.* at *8

It makes sense for McDonald’s franchisees and the McOpCos to cooperate to promote intrabrand competition for hamburgers, because a customer who is satisfied with a hamburger she buys today at the McDonald’s at 111 W. Jackson might tomorrow prefer a hamburger from the McDonald’s at 233 W. Jackson to a hamburger from Burger King.

99. See *id.* (clarifying the relevant antitrust market as the labor market).

competition.¹⁰⁰

E. DOJ Officials Respond, Expressing Reluctance to Apply the Theory to Vertical Entities

Beginning in 2019, the Department of Justice began to make the unusual move of issuing statements of interest in private lawsuits.¹⁰¹ Also unusual was the fact that these statements were signed by President Trump's appointed Assistant Attorney General Makan Delrahim, and other Front Office officials.¹⁰² Several of these statements of interest simply restate the agency's position that no-poach agreements are per se illegal in the absence of a pro-competitive collaboration.¹⁰³ These were written in response to cases in which the parties are competitors.¹⁰⁴

For example, one of the DOJ's recently filed statements of interest was in *Seaman v. Duke University*,¹⁰⁵ a private action alleging that Duke University and the University of North Carolina agreed not to solicit each other's medical school faculty.¹⁰⁶ In this statement, the DOJ reiterated its opinion that no-poach agreements are simply a variant of a per se illegal market allocation and should be condemned under existing law.¹⁰⁷ Further, it stated that Duke's arguments that the restraints were

100. *Id.*

101. See Corrected Statement of Interest of the United States at i, *Harris v. CJ Star, LLC*, No. 2:18-cv-00247-SAB (E.D. Wash. Mar. 8, 2019) [hereinafter *Harris*] (providing an example of a DOJ statement of interest in a private lawsuit); Statement of Interest of the United States at i, *Seaman v. Duke Univ.*, No. 1:15-cv-462 (M.D.N.C. Mar. 7, 2019) [hereinafter *Seaman*] (same).

102. See, e.g., *Harris*, *supra* note 101 at 18 (naming the Assistant Attorney General, Deputy Assistant Attorney General, and Chief of Staff and General Counsel, in addition to attorneys from the Antitrust Division).

103. See *Harris*, *supra* note 101, at 10 (comparing the effects of no-poach and wage-fixing agreements).

104. See, e.g., *infra* notes 105–110 and accompanying text (describing a no-poach agreement between competing universities).

105. *Seaman*, *supra* 101.

106. See *Seaman*, *supra* 101, at 3 (discussing the facts of the underlying litigation).

107. See *Seaman*, *supra* 101, at 5 (stating that the no-poach agreement is a form of agreed market-allocation).

ancillary to a pro-competitive justification should be rejected.¹⁰⁸ The defendants’ justifications were not related to any legitimate integration between the universities and, as a result, they could not argue that the conduct was necessary to promote this venture.¹⁰⁹ Notably, within this statement, the DOJ referred to the fact that its position in this case with horizontal competitors would differ in the franchise context.¹¹⁰

Rather than filing its own litigation, the DOJ filed statements of interest in class action lawsuits against Carl’s Jr., Auntie Anne’s, and Arby’s—clarifying that no-poach agreements between a franchisor and franchisee typically merit rule of reason analysis, that quick-look analysis should not apply, and that the franchise model does not necessarily constitute a hub-and-spoke conspiracy.¹¹¹ The timing of these statements of interests indicates that they are a response to the district courts’ conclusions in private no-poach actions.¹¹² The statements could indicate a reluctance to create law that could constrain vertical agreements, which more conservative antitrust theorists have traditionally presumed to be output-enhancing.¹¹³ In addition to examining the antitrust analysis for no-poach agreements through a wider lens, this Note will weigh these conclusions in the franchise context.

108. See *Seaman*, *supra* note 101, at 28–29 (“Duke also wrongly argues that the rule of reason must apply because ‘the schools collaborate and support each other’ and a no-poach agreement could help prevent ‘free riding’ on their investment in medical faculty.”).

109. See *Seaman*, *supra* note 101, at 29 (stating that Duke did not identify any specific procompetitive collaborations with its competitor).

110. See *Seaman*, *supra* note 101, at 26–27 (“Moreover, both *Yi* and *Deslandes* involve no-poach provisions in franchise agreements, which are quite different from the naked no-poach agreement between competitors alleged here.”).

111. See generally *Harris*, *supra* note 101; Statement of Interest of the United States, *Richmond v. Bergey Pullman Inc.*, No. 2:18-cv-00246 (E.D. Wash. Mar. 8, 2019) [hereinafter *Richmond*]; Corrected Statement of Interest of the United States, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 8, 2019) [hereinafter *Stigar*].

112. Compare *supra* Part I.C, with *supra* note 111 and accompanying text (detailing the existing private franchise no-poach cases and accompanying statements of interests).

113. See ROBERT H. BORK, *THE ANTITRUST PARADOX* 291 (1978) (“We have seen that vertical price fixing (resale price maintenance), vertical market division (closed dealer territories), and, indeed, all vertical restraints are beneficial to consumers and should for that reason be completely lawful.”).

II. Element 1: Proving an Agreement

A. Agreements Are Shown by Evidence of Express Agreement or by “Plus Factors”

In the cases brought by the Antitrust Division, the agreements were evidenced by email communications describing hiring policies, internal approvals of employees to be hired from conspiring firms, direct and explicit communications to enforce the no-poach agreement, evidence of senior executives negotiating the agreements, and in some cases, written contracts.¹¹⁴ Although the high-tech antitrust actions brought by the Antitrust Division were settled, a court adjudicating a follow-on class action assessed the sufficiency of the evidence of a conspiracy in this case.¹¹⁵ The district court in the Ninth Circuit found that there was ample evidence to support the existence of an agreement; direct communications in addition to circumstantial evidence including substantially identical agreements between the tech companies and company-wide enforcement of the contracts by senior executives.¹¹⁶ Tellingly, after this proceeding, the companies also reached a settlement.¹¹⁷

The Ninth Circuit’s conclusion is in line with existing antitrust principles.¹¹⁸ First, a court examining a no-poach agreement would

114. See Knorr-Bremse Competitive Impact Statement, *supra* note 67, at 2–3 (describing email communications between the defendants’ senior executives); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1112 (N.D. Cal. 2012) (“Apple and Adobe reached the agreement through direct and explicit communications between their senior executives, who actively managed and enforced the agreement through further direct communications.”); eBay Complaint, *supra* note 67, at 5 (alleging in-person meetings between senior managers of the defendant firms); Adobe Complaint, *supra* note 67 (alleging “direct and explicit communications” between senior executives of the named defendants); Lucasfilm Complaint, *supra* note 67, at 4 (alleging that Pixar executives drafted written terms and supplied them to Lucasfilm).

115. See *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1115–23 (N.D. Cal. 2012) (assessing the plausibility of a conspiracy in light of the evidence).

116. See *id.* at 1116–18 (weighing the plausibility of an unlawful agreement on the basis of the plaintiffs’ factual allegations).

117. See Settlement Agreement, *In re High-Tech Emp. Antitrust Litig.*, No. 5:11CV02509, 2013 WL 8480300 (N.D. Cal. Sept. 21, 2013) (resolving the dispute).

118. See *infra* notes 119–122 and accompanying text (describing the antitrust analysis for the conspiracy element of a § 1 claim).

consider direct evidence including documents, meetings, and testimony that “defendants exchanged commitments or collaborated by some means other than making a market place decision.”¹¹⁹ Circumstantial evidence is also considered, especially where direct evidence is insufficient.¹²⁰ If evidence of an express agreement does not exist, the court will also consider whether the parallel behavior (i.e. no-poaching conduct) is likely to be caused by an agreement rather than natural market forces.¹²¹ If interdependence between the firms seems likely, the court must weigh all of the evidence to decide whether the possibility of conspiracy is more probable than not.¹²²

1. Proving a Conspiracy by Evidence of an Express Agreement

Although direct evidence of an express agreement is often decisive, it is not commonly found.¹²³ However, in the actions brought by the Antitrust Division, direct and circumstantial evidence of an express agreement were available; the reason for this may be that some form of communication is often necessary in a very practical sense in order to effectuate and enforce no-poaching agreements.¹²⁴ Nonetheless, in the case that

119. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1410, at 60 (2d ed. 2003) (describing the question of whether the behavior was concerted or had another plausible explanation based on competitive market conditions).

120. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1410, at 60 (2d ed. 2003) (explaining the process a court should follow when weighing evidence of a conspiracy in antitrust litigation).

121. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1410, at 60 (2d ed. 2003) (describing the question of whether the behavior was concerted or has another plausible explanation based on competitive market conditions).

122. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1410, at 60 (2d ed. 2003) (explaining the steps a court should take in weighing evidence of conspiracy in antitrust litigation).

123. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1410, at 60 (2d ed. 2003) (recognizing the clandestine nature of conspiracies).

124. See Complaint at 2, *United States v. Knorr-Bremse AG*, No. 1:18-cv-00747, 2018 WL 4386565 (D.D.C. Apr. 3, 2018) (prosecuting naked no-poach agreements in which direct evidence of a contract between competitors or internal communications documenting an agreement were available); *see also* Adobe Complaint, *supra* note 67 (same); Lucasfilm Complaint, *supra* note 67, at *2 (same); eBay Complaint, *supra* note 67, at *2 (same).

conspirators are careful not to discuss no-poaching agreements over email or other easily documented forms of communications, this is not the only way to uncover evidence of an express agreement.¹²⁵

Evidence of an express agreement may range from a meeting of minds sufficient to form an enforceable contract to the ambiguous situation where parties refuse to utter words of acceptance after requesting common action.¹²⁶ The line drawn for when communications become a conspiracy is not a clear one and is usually an issue for the trier of fact.¹²⁷ However, the Supreme Court's approach in *United States v. Socony-Vacuum Oil Co.*¹²⁸ illustrates the theoretical underpinnings of this inquiry.¹²⁹ In this case, the defendants formed an informal "gentlemen's agreement" where each major oil company would purchase an unspecified quantity of excess distress oil from specified suppliers (or "dancing partners") to exploit gasoline spot markets and extract monopoly prices.¹³⁰ The case effectuates the "statutory purpose, for even a vague understanding between competitors on a common course of action involves both collective decision-making on future behavior and some degree of express mutual assurance"¹³¹ And when this understanding is between competitors, a conspiracy is more likely to be inferred.¹³²

In the no-poach context, an agreement is the key component that makes the arrangement beneficial to each party.¹³³ Without

125. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1404 (2d ed. 2003) (stating that direct communication is not necessary to establish a conspiracy under Sherman Act § 1).

126. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1404 (2d ed. 2003) (describing an antitrust conspiracy reduced to its most basic form).

127. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1410 (2d ed. 2003) (explaining the fact intensive nature of the inquiry).

128. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 105, 218–20 (1940) (describing the theoretical approach to finding an antitrust conspiracy).

129. See *id.* (describing the theoretical factual inquiry that a court must undergo to find a conspiracy under the Sherman Act).

130. See *id.* at 177–96 (describing the alleged agreements among gas companies that amount to an antitrust violation).

131. 6 AREEDA & HOVENKAMP, *supra* note 28, § 1404 (2d ed. 2003).

132. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1404 (2d ed. 2003) (highlighting the increased scrutiny of communications between competitors).

133. See *No More No-Poach: The Antitrust Division Continues to Investigate and Prosecute No-Poach and Wage-Fixing Agreements*, U.S. DEPT OF JUST.,

an agreement, a company would simply lose its own employees while halting its recruitment efforts.¹³⁴ The restraint would not be effective in the absence of mutual assurances and collective-decision making.¹³⁵ As seen in the agencies’ enforcement actions, this fact seems to make the existence of direct and circumstantial evidence more likely.¹³⁶ A company would not be likely to engage in this practice with just a wink and a nod.¹³⁷ Further, this practice would need to be communicated and policed internally.¹³⁸ If explicit communications between the companies are not available, evidence of meetings or other potential collective decision-making behavior between the firms may support an express agreement.¹³⁹

2. *Inferring a Conspiracy Through “Plus Factors”*

Beyond direct and circumstantial evidence of an express agreement, several other “plus factors” may also help distinguish an agreement from conscious parallelism.¹⁴⁰ The Court in

<https://www.justice.gov/atr/division-operations/division-update-spring-2018/antitrust-division-continues-investigate-and-prosecute-no-poach-and-wage-fixing-agreements> (last updated Apr. 10, 2018) (last visited Dec. 7, 2019) (stating that no-poach agreements are ineffective unless they are of mutual benefit to the agreeing parties) [<https://perma.cc/BE4C-MK5B>].

134. See *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, No. 2850, 2019 WL 2542241, *14–15 (W.D. Pa. June 20, 2019) (describing plausible motivations for entering into a no-poach agreement).

135. See, e.g., *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1181–84 (N.D. Cal. 2015) (describing the factual allegations of a joint anti-solicitation scheme where the mutual benefit expressly motivated the parties’ entry into an agreement).

136. See, e.g., *id.* (describing e-mail correspondence and other facts supporting the existence of a conspiracy).

137. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1404 (2d ed. 2003) (describing the level of conduct generally required to find that an agreement existed).

138. See, e.g., *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1110 (N.D. Cal. 2012) (describing the role of senior executives in enforcing the Silicon Valley no-poach agreements).

139. See 6 AREEDA & HOVENKAMP, *supra* note 28, § 1410 (2d ed. 2003) (describing the factual inquiry for finding a conspiracy in the absence of an express agreement).

140. See, e.g., *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383,

*Matsushita Electric Industrial Co. v. Zenith Radio Corp.*¹⁴¹ stated that conduct “as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy . . . a plaintiff . . . must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.”¹⁴² The Court identified two fact specific inquiries relevant to this question: first, whether the defendant had a rational motive to join the conspiracy and second, whether the conduct is consistent with the defendant’s individual self-interest.¹⁴³

In response, courts have devised a series of “plus factors” that tend to indicate the likelihood of an agreement.¹⁴⁴ In accordance with *Matsushita*’s two questions, the most important factor is whether, acting alone, the conduct is contrary to the parties’ economic self-interests but would be beneficial when executed collectively.¹⁴⁵ This factor alone is often sufficient to state a claim.¹⁴⁶ The next most important factor is whether a joint act of standardization such as a price change occurs (especially in times

360 (3d Cir. 2015) (identifying a non-exhaustive list of “plus factors” to distinguish conspiracy from conscious parallelism—when companies act similarly due to independent decision-making based on rational market decisions).

141. See *Matsushita Electr. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (stating the modern standard for agreement under § 1 of the Sherman Act).

142. *Id.*

143. See *id.* (identifying the two major questions distinguishing agreement and conscious parallelism).

144. See, e.g., *Chocolate Confectionary*, 801 F.3d 383 at 398 (identifying a non-exhaustive list of “plus” factors).

145. See *Interstate Cir., Inc. v. United States*, 306 U.S. 208, 222 (1939) (“[W]ithout substantially unanimous action . . . there was risk of a substantial loss of business and good will . . . but that with it there was the prospect of increased profits.”); see also, *Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540–42 (1954) (upholding a jury verdict where evidence showed each party’s self-interest should have led them to refuse the scheme); *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 165 (3d Cir. 2003); *Re/Max Int’l v. Realty One*, 173 F.3d 995, 1009–10 (6th Cir. 1999); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1456 n.30 (11th Cir. 1991); *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 896–97 (N.D. Ill. 2009); *In re Currency Conversion Fee Antitrust Litig.*, 265 F. Supp. 2d 385, 419 (S.D.N.Y. 2003).

146. See, e.g., *Starr v. Sony Music Entm’t*, 592 F.3d 314, 327 (2d Cir. 2010) (“[P]laintiffs have alleged behavior that would plausibly contravene each defendant’s self-interest ‘in the absence of similar behavior by rivals.’” (quoting 6 AREEDA & HOVENKAMP, *supra* note 28, § 1415a (2d ed. 2003))).

where price should move in a contrary manner based on supply and demand).¹⁴⁷ Finally, if the company cannot offer a legitimate explanation for the action and posits pre-textual justifications, this further reinforces the likelihood of concerted action.¹⁴⁸ Ultimately, any fact delineating whether the action resulted from an agreement may constitute a “plus factor”; all of these facts would be weighed in the aggregate to determine the existence of a conspiracy.¹⁴⁹

A consideration of these core “plus factors” weighs in favor of condemning no-poach agreements. Facially, a restriction on hiring which prevents a company from competing for the best employees is not in an individual company’s self-interest.¹⁵⁰ Although a defendant may argue that it is beneficial for a company to stop hiring competitor employees in order to prevent the loss of its own employees, this is not a practice that a company can effectuate on its own without an agreement—outside of its own internal retention programs.¹⁵¹ By their very nature, no-poaching

147. See *Am. Tobacco v. United States*, 328 U.S. 781,805 (1946) (noting the defendants’ behavior was incongruent with supply and demand); see also *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 497 (9th Cir. 1952) (same); *Haley Paint Co. v. E.I. DuPont De Nemours & Co.*, 804 F. Supp. 2d 419, 425–26 (D. Md. 2011) (same); *In re Plasma-Derivative Protein Therapies Antitrust Litig.*, 764 F. Supp. 2d 991, 999–1001 (N.D. Ill. 2011) (same).

148. See, e.g., *Am. Tobacco*, 328 U.S. at 805 (noting the analysis of “plus factors” functions in the aggregate); see also *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 147–80 (9th Cir. 1986) (same).

149. See, e.g., *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698–99 (1962) (“[P]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.”).

150. See, e.g., *To Raise Wages, Make Companies Compete for Workers*, N.Y. TIMES (Sept. 19, 2019), <https://www.nytimes.com/2019/09/19/opinion/oregon-noncompete.html> (last visited Dec. 2, 2019) (discussing how wages increased in Oregon after a law was passed making it easier for employees to take positions at different companies, thus creating a more competitive pool of employees) [<https://perma.cc/4FHB-WHDV>].

151. See Michael A. Lindsay, *McDonald’s and Medicine: Developments in the Law of No-Poaching and Wage-Fixing Agreements*, 33 A.B.A. ANTITRUST, Spring 2019, at 18 (describing UNC’s retention program put in place to respond to Duke’s attempts to poach employees).

agreements require collective conspiratorial action with an understanding of mutual assurance in a common scheme.¹⁵²

When companies successfully conspire to restrict hiring, those employees are then less able to switch or obtain higher wages—allowing employers to depress wages.¹⁵³ As a result, evidence of depressed wages, especially during a shortage of labor, would be indicative of a conspiracy because this trend would be economically infeasible.¹⁵⁴ Finally, outside of certain justifications discussed in Part IV of this Note (such as a desire to protect a joint venture’s progress or to protect intellectual property rights), it will likely be difficult for a company to provide an alternate explanation for its refusal to hire certain companies’ employees.¹⁵⁵

B. An Additional Challenge in Proving an Agreement Between Vertical Entities: The Colgate Unilateral Action Doctrine

Although the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*¹⁵⁶ established that horizontal and vertical conspiracies are shown in the same manner, vertical elements present additional challenges in proving an agreement.¹⁵⁷ In this same decision, the Court revived the *Colgate* “unilateralism” doctrine, which allows a firm to announce its pricing policies and terms of dealing with distributors without soliciting a conspiracy.¹⁵⁸ A firm that complies with the policy is also free from liability since compliance constitutes its unilateral decision to act

152. See *id.* (describing the type of collective behavior that could culminate in a conspiracy).

153. See HR GUIDANCE, *supra* note 26 (describing the competitive effects of no-poach agreements).

154. See *supra* note 148 and accompanying text (describing economically irrational trends as a significant “plus factor”).

155. See *infra* Part IV (noting the strict requirements in asserting a procompetitive justification).

156. See *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984) (explaining the evidentiary standard for showing a plausible conspiracy).

157. See *id.* (“There must be direct or circumstantial evidence that reasonably tends to prove . . . a conscious commitment to a common scheme . . .”).

158. See *id.* at 762 (describing the limited circumstances that unilateral, independent decisions by a firm to comply with another’s terms of business do not form an antitrust conspiracy).

in its own economic self-interest.¹⁵⁹ However, a closer look at the development of this doctrine reveals that it is a narrow exception and that no-poach agreements are unlikely to fall within it.¹⁶⁰

In *United States v. Colgate & Co.*,¹⁶¹ the manufacturer announced a uniform dealer pricing policy and stated that non-complying dealers would be terminated.¹⁶² However, there was no averment that the parties bound themselves in a common scheme to maintain prices.¹⁶³ Colgate simply announced the prices that it planned to sell its products; it did not meet with dealers in order to influence their decisions.¹⁶⁴ The vendors could, in fact, receive and give away Colgate’s products; they did not enter a preemptive agreement forbidding them from selling at other prices.¹⁶⁵ The manufacturer was free to exercise his discretion to terminate the dealer and the supplier would be able to decide whether or not to comply—even if the alternative was to face termination.¹⁶⁶ However, the Court made it clear that where evidence of an agreement exists, *Colgate* will not otherwise excuse the conduct.¹⁶⁷

159. *See id.* at 761 (explaining the rationale for the *Colgate* doctrine).

160. *See infra* notes 161–194 and accompanying text (discussing the development of the *Colgate* doctrine).

161. *See United States v. Colgate & Co.*, 250 U.S. 300, 303–04 (1919) (distinguishing a unilateral decision from a conspiracy).

162. *See id.* (distinguishing a unilateral decision from a conspiracy).

163. *See id.* at 305 (“The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant . . . and his customers, bound themselves to enhance and maintain prices.”).

164. *See id.* (describing Colgate’s limited contact with its distributors in forming its independent policy).

165. *See id.* (noting the limited control exercised by Colgate in terms of its distributors’ acquiescence).

166. *See id.* (showing that Colgate product distributors retained their own independent decision-making processes).

167. *See United States v. A. Schrader’s Son*, 252 U.S. 85, 98 (1920) (stating that the contracts at issue were unlike the policy in *Colgate* where the parties had failed to show that Colgate “made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices.”); *see also Frey & Son v. Cudahy Packing Co.*, 256 U.S. 208, 212–14 (1921) (stating that the existence of an agreement should have been decided by the jury rather than being dismissed under *Colgate*).

In later cases, the Supreme Court attempted to further clarify the point at which unilateral decision-making becomes concerted action.¹⁶⁸ In *FTC v. Beech Nut Packing Co.*,¹⁶⁹ the defendant not only refused to sell to wholesalers who did not abide by listed retail prices but also required that they restrict their sales to sub-retailers who complied with the policy.¹⁷⁰ The Supreme Court held that a manufacturer may refuse to sell to vendors who deviate from list prices but may not “go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade.”¹⁷¹

Forty years later, the Supreme Court in *United States v. Bausch & Lomb Optical Co.*¹⁷² read *Beech-Nut* as limiting *Colgate* to mere acquiescence in a manufacturer’s published pricing lists.¹⁷³ The court found that the scheme in *Bausch & Lomb* was comparable to that in *Beech-Nut* in that it went beyond wholesaler adherence to resale prices by restricting its wholesaler’s customers as a part of a larger scheme.¹⁷⁴ Specifically, Bausch & Lomb agreed not to sell pink tinted glass or lenses to any of Soft-Lite’s competitors and not to compete with Soft-Lite in the marketing of any other pink tinted lens.¹⁷⁵ The Court stated that Bausch & Lomb participated in the distribution scheme by accepting “Soft-Lite’s proffer of a plan of distribution by cooperating in prices, limit[ing] sales to and approval of retail licensees. That is sufficient.”¹⁷⁶

168. See *infra* notes 173–98 (discussing the development of the *Colgate* doctrine).

169. See *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (describing the Beech-Nut policy).

170. See *id.* at 445 (describing the Beech-Nut policy).

171. See *id.* at 453 (summarizing *Schrader’s Son* and *Frey & Son*).

172. See *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721–23 (1944) (comparing the facts of the case to *Beech-Nut*).

173. See *id.* (“As in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers in Sofe-Lite’s published resale price list.”).

174. See *id.* (stating the rationale for finding an agreement).

175. See *id.* at 717 (describing the Bausch & Lomb marketing plan).

176. See *id.* at 721 (citing *Interstate Circuit v. United States*, 306 U.S. 208, 221 (1939)).

In *United States v. Parke, Davis & Co.*,¹⁷⁷ the Supreme Court summarized *Beech-Nut* and *Bausch & Lomb*, adding that a proffer occurs when “a manufacturer is unwilling to rely on individual self-interest to bring about general voluntary acquiescence . . . and takes affirmative action to achieve uniform adherence.”¹⁷⁸ The Court in *Parke, Davis* noted evidence of an express agreement—consistent with the type of facts outlined in Part II.B to evidence a horizontal agreement.¹⁷⁹ The defendant negotiated directly with retailers charging less than specified prices, received their assurances, and used those assurances as well as the complaints of these retailers to effectuate the scheme.¹⁸⁰ In other words, Parke, Davis did not “rest with the simple announcement to the trade of its policy . . . [i]t was only by actively bringing about substantial unanimity among the competitors that Parke, Davis was able to gain adherence to its policy.”¹⁸¹ In light of these individual negotiations and meetings, a traditional agreement could be shown if, after the meeting, the dealer then adhered to these prices.¹⁸²

As in *Parke, Davis*, evidence of an express agreement was also decisive in *Monsanto* and illustrates that coercive conduct is a “plus factor” that is more likely to occur in vertical agreement cases.¹⁸³ In this case, Monsanto approached two price-cutting distributors and advised them that if they did not meet resale price limits, their supply of herbicide would be cut off.¹⁸⁴ When one of

177. See *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960) (describing the standards for finding an agreement under *Bausch & Lomb Optical* and *Beech-Nut*).

178. See *id.* (articulating the importance of independent decision making when classifying actions as unilateral).

179. See *supra* Part II.B.1 (describing the analysis to show a conspiracy through evidence of an express agreement).

180. See *Parke, Davis & Co.*, 362 U.S. at 46 (listing the defendant’s intervening actions with respect to its distributors and retailers).

181. *Id.*

182. See *id.* at 46 n.6 (stating that if the suspended retailer resumed adherence after the interview with Parke, Davis management, the companies will have entered into an agreement in violation of the Sherman Act).

183. See *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764–67 (1984) (describing Monsanto’s scheme).

184. See *id.* (detailing the retail price maintenance scheme implemented by

the distributors refused, Monsanto complained to its parent company and subsequently received assurances of compliance.¹⁸⁵ The Supreme Court found that this direct evidence of an agreement was “plainly relevant and persuasive as to a meeting of minds.”¹⁸⁶

Further, the court considered the timing of Monsanto’s threat during shipping season when herbicide was in short supply; it stated that “the jury could have reasonably concluded that Monsanto sought this agreement at a time when it was able to use supply as a lever to force compliance.”¹⁸⁷ Additionally, the court evaluated a dealer’s letter to its customers, written after a meeting with Monsanto; the letter stated that the dealer was sure that Monsanto outlets would maintain a minimum price level and that Monsanto dictated the “rules of the game.”¹⁸⁸ The Court found that the evidence tended to support the existence of a conspiracy.¹⁸⁹ More recent cases also support the inference of an illegal agreement based on evidence of threats, incentives to comply, individual negotiations or other actions beyond complaints or fear of termination.¹⁹⁰

Monsanto Co.).

185. *See id.* (describing Monsanto’s actions with respect to non-compliance with set prices).

186. *See id.* (relying on direct evidence to show an agreement).

187. *See id.* at 765 n.10 (relying additionally on circumstantial evidence to support the existence of an agreement).

188. *See id.* (relying additionally on circumstantial evidence to support the existence of an agreement).

189. *See id.* (finding that direct and circumstantial evidence of an agreement supported the jury’s finding and was sufficient because it tended to exclude independent action).

190. *See Miles Distrib. v. Specialty Constr. Brands*, 476 F.3d 442, 451–52 (7th Cir. 2006) (stating that price complaints are insufficient, without more, to establish vertical agreements); *see also InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 150 (3d Cir. 2003) (“InterVest does not present evidence indicating that Bloomberg was threatened into doing so or that there was an agreement . . .”); *Viazis v. Am. Ass’n of Orthodontists*, 314 F.3d 758, 763–65 (5th Cir. 2002) (stating that the plaintiff failed to present evidence that defendant threatened the distributor); *Rossi v. Standard Roofing*, 156 F.3d 452, 478–79 (3d Cir. 1998) (finding that evidence of responses to distributor complaints, threats to non-complying distributors, and monitoring supported the existence of an agreement); *DeLong Equip. Co. v. Wash. Mills Electro Minerals Corp.*, 990 F.2d 1186, 1194–96 (11th Cir. 1993) (condemning distributor who was given kickbacks to maintain appearance of equal resale prices).

To summarize, *Beech-Nut*, *Bausch & Lomb*, and *Parke, Davis* read *Colgate* narrowly to find that each company executed restraints going beyond a unilateral (and purely vertically oriented) decision to select dealers who would abide by listed resale prices.¹⁹¹ Each company extended its influence beyond the selection of its vertically oriented vendors, using the threat of termination to effectuate a larger scheme that went beyond this relationship.¹⁹² The *Colgate* doctrine does not shelter this conduct.¹⁹³ This type of scheme often accompanies direct evidence of an agreement which invalidates the defense as well; in *Parke, Davis* and *Monsanto*, the companies needed to communicate directly with and even pressure its dealers into compliance with the aim of perpetuating a larger (horizontal) scheme.¹⁹⁴

Under this framework, no-poach agreements are unlikely to be protected by the *Colgate* doctrine because they are not limited to terminating vertically oriented partners that fail to abide with a firm’s sales or distribution policies for its product.¹⁹⁵ The intent of a successful no-poach agreement is to carry out a greater conspiracy between *competing* firms in the labor market, even if those firms are the vertical entities themselves.¹⁹⁶ For example, a conceivable scenario with vertical elements could occur when a robot component manufacturer (who makes part of a robot) asks its customer—a robot manufacturer—to stop poaching its tech employees.¹⁹⁷

191. See *supra* notes 169–190 and accompanying text (summarizing *Beech-Nut*, *Bausch & Lomb*, and *Parke, Davis*).

192. See *supra* notes 169–190 and accompanying text (describing *Beech-Nut*, *Bausch & Lomb*, and *Parke, Davis*).

193. See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (introducing the theory that announcement and termination constitutes unilateral behavior).

194. See *supra* notes 169–190 and accompanying text (outlining *Beech-Nut*, *Bausch & Lomb*, and *Parke, Davis*).

195. See *Colgate & Co.*, 250 U.S. at 307 (introducing the theory that announcement and termination constitutes unilateral behavior).

196. See, e.g., *In re High-Tech Employment Antitrust Litig.*, 856 F. Supp. 2d 1103, 1111 (N.D. Cal. 2012) (explaining the purpose for entering into a no-poach agreement with market competitors).

197. See, e.g., *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928, 930 (7th Cir. 2000) (describing horizontal and vertical agreements).

In this scenario, and in the franchise context, the no-poach restraint is not truly vertical because it has nothing to do with the joint effort of manufacturing robots or burgers.¹⁹⁸ The restraints extend beyond this vertical relationship and impact their horizontal relationship in the labor market.¹⁹⁹ In other words, these restraints would condition (vertical) business dealings in the downstream market on the firms' behavior with its horizontal competitors in the labor market.²⁰⁰ No-poach agreements occur in the same way that Beech-Nut, Bausch & Lomb, Parke, Davis, and Monsanto used their positions in a vertical downstream market to condition a larger horizontal restriction among their vendors.²⁰¹

If the robot manufacturer is dependent on the robot component manufacturer's machine parts, it may feel pressured into accepting the offer.²⁰² Similarly, a franchisee may only be able to participate in a franchise if it agrees to a contractual no-poach provision.²⁰³ As seen in *Monsanto*, evidence of an agreement—such as individual communications followed by the conspirator's compliance—would foreclose *Colgate* protection.²⁰⁴ In a case with vertical elements, power imbalances between the firms are more likely to result in this type of coercive conduct.²⁰⁵ Further, it is unlikely that a company would publicly announce a no-poach policy and give free rein to partnering companies to decide on their

198. See *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018) (“This case . . . is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald's franchisees and McOpCos within a locale are direct, horizontal, competitors.”).

199. See HR GUIDANCE, *supra* note 26 (describing the competitive effects of no-poach agreements).

200. See *supra* notes 191–194 and accompanying text (summarizing outlier cases in the *Colgate* line of cases).

201. See *supra* notes 191–194 and accompanying text (summarizing outlier cases in the *Colgate* line of cases).

202. See, e.g., *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764–67 (1984) (describing Monsanto's conduct with its wholesalers).

203. See, e.g., *Deslandes v. McDonald's USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *6 (N.D. Ill. June 25, 2018) (outlining the contractual no-poach agreement provision in detail).

204. See *Monsanto*, 465 U.S. at 764 (describing the evidentiary standard for showing an agreement).

205. See *id.* (contrasting a major company such as Monsanto with a family business like Spray-Rite).

own whether or not to comply.²⁰⁶ It is much more likely that a company would have certain key business relationships and would discuss a no-poaching policy with these firms directly.²⁰⁷ As a result, the likelihood of evidence of direct collusion would potentially foreclose *Colgate* protection as well.²⁰⁸

C. Combining Vertical and Horizontal Elements: Proving a Hub-and-Spoke Conspiracy

One theory rearing its head in the franchise cases is the hub-and-spoke conspiracy.²⁰⁹ According to this theory, a plaintiff can demonstrate a horizontal agreement between competitors who are connected to a common “hub” through a series of vertical agreements.²¹⁰ Successfully proving a “hub-and-spoke” conspiracy can have a dramatic effect; the Supreme Court has consistently established that per se rules applicable to horizontal restraints also apply to these conspiracies.²¹¹ The reason is that a

206. See, e.g., *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1119 (N.D. Cal. 2012) (noting an e-mail that demonstrated the understanding that an agreement was necessary to make internal no-poach policies effective).

207. See, e.g., *id.* (describing the various business relationships Steve Jobs leveraged to garner widespread participation in a non-solicitation scheme).

208. See *supra* note 195–208 and accompanying text (explaining the *Colgate* framework).

209. See *infra* notes 210–212 and accompanying text (discussing the hub-and-spoke theory).

210. See *Toys “R” Us v. FTC*, 221 F.3d 928, 930 (7th Cir. 2000) (describing horizontal and vertical agreements, finding that the agreement at issue was a hub-and-spoke conspiracy).

211. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (inferring a per se illegal horizontal conspiracy where the agreement only benefitted competitors if they each agree to similar terms with the ‘hub’—who facilitates and assures this compliance); see also *United States v. Masonite Corp.*, 316 U.S. 265 (1942) (reaffirming the *Interstate Circuit* inference standard); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 46 (1960) (stating that Parke, Davis’ conduct was not covered by the *Colgate* unilateral action doctrine and a horizontal conspiracy was formed when it “sought assurances of compliance and got them, as well as the compliance itself.”); *United States v. Gen. Motors Corp.*, 384 U.S. 127, 143 (1966) (inferring a horizontal conspiracy when “[t]he dealers collaborated . . . among themselves and with [the manufacturer] both to enlist the aid of [the manufacturer] and to enforce dealers’ promises to forsake the discounters.”).

hub-and-spoke conspiracy simply incorporates vertical elements in order to facilitate horizontal collusion.²¹²

The Supreme Court handed down five decisions between 1940 and 1970 inferring horizontal conspiracies from a series of vertical relationships.²¹³ These decisions recognizing hub-and-spoke agreements have never been overturned.²¹⁴ The decisions generally hold that the totality of circumstances surrounding vertical restraints may also provide circumstantial evidence of a horizontal conspiracy.²¹⁵ The disparate legal treatment of vertical and horizontal relationships in antitrust law did not exist during this time but recent Supreme Court cases continue to endorse the older hub-and-spoke decisions.²¹⁶ Each of the more recent decisions continue to recognize that vertical agreements facilitating a horizontal conspiracy may warrant per se treatment even if vertical agreements are evaluated under the rule of reason.²¹⁷

The Seventh Circuit's landmark case, *Toys "R" Us v. FTC*,²¹⁸ forcefully articulated the legal standards for the hub-and-spoke conspiracy (in keeping with past Supreme Court decisions).²¹⁹ In this case, the toy retailer faced competition from discount

212. See *Interstate Circuit*, 306 U.S. at 202 (describing the inference standard for hub-and-spoke conspiracies).

213. See cases cited *supra* note 211 and accompanying text (listing four Supreme Court hub-and-spoke cases).

214. See cases cited *supra* note 211 and accompanying text (listing four Supreme Court cases that have not been overturned).

215. See cases cited *supra* note 211 and accompanying text (describing the inference standard for a hub-and-spoke agreement).

216. See *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n. 28 (1977) ("There may be occasional problems in differentiating vertical restrictions from horizontal restrictions . . . but we do not regard the problems of proof as sufficiently great to justify a per se rule."); see also *Bus. Elecs. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 734–35 (1988) (explaining that the per se rule applied also in *Klor's*, *Parke, Davis*, and *General Motors*); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 892–94 (2007) (explaining that price maintenance agreements could facilitate horizontal cartels).

217. See *Leegin*, 551 U.S. at 892–94 (explaining that although vertical and horizontal agreements are treated differently under the law, these elements can blur together to form horizontal conspiracies).

218. See *In re Toys "R" Us, Inc.*, 126 F.T.C. 415, 574–82 (1998) (discussing the agreement between Toys R Us and its manufacturers).

219. See *id.* (stating that the agreement between Toys "R" Us and its manufacturers mirrored the conspiracy in the *Interstate Circuit* decision but also included direct evidence of an agreement).

warehouse clubs and met individually with each of its manufacturers to ask them to restrict offerings to warehouse clubs.²²⁰ After explaining the policy, Toys “R” Us asked each manufacturer how it intended to proceed.²²¹ Each manufacturer eventually agreed to sell the differentiated products in order to eliminate competition for Toys “R” Us on the condition that the others also agreed to do so.²²²

The FTC promptly found that these negotiations constituted vertical agreements and discarded the defendant’s arguments that the agreement was governed by the *Colgate* doctrine.²²³ These points were not challenged on appeal but the Seventh Circuit still condemned the *Colgate* defense, stating that “unilateral actions of the sort protected by *Monsanto* and *Colgate* are not the same thing as a retailer’s request to the manufacturer to change the latter’s business practice.”²²⁴ As in *Beech-Nut* and *Bausch & Lomb*, Toys “R” Us went beyond announcing its terms of sale to its distributors in order to effectuate a larger scheme.²²⁵

Further, the court went on to acknowledge that the ten vertical agreements formed the spokes of a hub-and-spoke conspiracy.²²⁶ Toys “R” Us worked for years to establish vertical arrangements but was unsuccessful until the seven manufacturers finally accepted “on the condition that their competitors would do the same.”²²⁷ This crucial fact was lethal to Toys “R” Us’ defense

220. See *Toys “R” Us v. FTC*, 221 F.3d 928, 930–32 (7th Cir. 2000) (describing the facts specific to the alleged conspiracy).

221. See *id.* (noting Toys “R” Us’ role in policing the conspiracy).

222. See *id.* at 934 (stating that the parties were “forcing the clubs’ customers to buy products they did not want, and frustrating customers’ ability to make direct price comparisons of club prices and Toys R Us prices).

223. See *id.* at 937 (“The Commission rejected the point, because it found that TRU had repeatedly crossed the line from unilateral to concerted behavior in illegal ways . . .”).

224. See *id.* (“[U]nilateral actions of the sort protected by *Monsanto* and *Colgate* are not the same thing as a retailer’s request to the manufacturer to change the latter’s business practice.”).

225. See *id.* at 932 (describing the efforts of Toys R Us).

226. See *id.* (“TRU was not content to stop with vertical agreements. Instead, the Commission found, it decided to go further.”).

227. See *id.* at (noting that one executive “made a point to tell each of the vendors that we spoke to that we would be talking to our other key suppliers.”).

and was the key to establishing the horizontal rim of the wheel.²²⁸ Using a variety of “plus factors,” the Seventh Circuit found sufficient evidence to exclude the possibility of independent action.²²⁹

First, it would have been contrary to a manufacturer’s self-interest to enter into these agreements independently.²³⁰ The manufacturers wanted to diversify from Toys “R” Us products; warehouse clubs were a lucrative opportunity and were beneficial for consumers due to their lower mark-ups.²³¹ Second, the court found that the manufacturers would not have engaged in this practice independently; the companies were “reluctant to give up a fast-growing, and profitable channel of distribution” and feared that a rival “who broke ranks and sold to the clubs might gain sales at their expense.”²³²

This analysis was more recently confirmed by the Second Circuit when it inferred a horizontal conspiracy in *United States v. Apple*²³³—also known as the “eBook case.”²³⁴ Citing *Toys “R” Us* and *Interstate Circuit*, the court recognized the existence of a hub-and-spoke conspiracy orchestrated by Apple when it entered the e-book market.²³⁵ In order to compete with Amazon, the court found that Apple enlisted the Big Six publishers in the United States into most-favored-nation clauses in which the publishers retained the right to set prices of e-books (set at caps of \$14.99,

228. See *id.* at 934 (analyzing the horizontal conspiracy).

229. See *id.* at 936 (concluding that there was sufficient evidence to dispel the independent self-interest theory).

230. See *id.* (noting the assurances that the warehousing clubs received in joining the conspiracy).

231. See *id.* (“[I]nternal documents from the manufacturers revealed that they were trying to expand, not to restrict, the number of their major retail outlets and . . . [t]hey were specifically interested in cultivating a relationship with the warehouse clubs.”).

232. See *id.* at 932 (stating that the behavior was not consistent with the firms’ independent competitive motives).

233. See *United States v. Apple, Inc.*, 791 F.3d 290, 313–14 (2d Cir. 2015) (finding the existence of an antitrust conspiracy among publishing companies).

234. See *id.* (stating that the district court correctly found that Apple orchestrated a conspiracy among the Big Six publishers in order to increase prices).

235. See *id.* at 297 (stating that the conspiracy was organized in order to avoid the “necessity of competing with Amazon.”).

\$12.99, and \$9.99).²³⁶ This structure created strong incentives to increase prices and it led to this exact result.²³⁷ In finding a horizontal conspiracy, the court relied on the contractual agreements offered by Apple—which would only be attractive if the publishers acted collectively to shift Amazon away from a discount strategy to an agency model.²³⁸ The court also examined the collusive nature of the publishing industry and the fact that the Big Six CEOs met on a quarterly basis without counsel and “had no qualms communicating about the need to act together.”²³⁹ The court found that there was sufficient evidence showing that an agreement was “more likely than not,” stressing that the character and “effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.”²⁴⁰

Franchise agreements should be condemned under the same analysis.²⁴¹ The contractual provisions in franchise agreements often implement no-poach agreements between restaurants, which are horizontal entities competing for the same labor pool.²⁴² The

236. See *id.* (describing the scheme set forth by Apple).

237. See *id.* at 300 (“Because they ‘did not compete with each other on price,’ but over authors and agents, the publishers ‘felt no hesitation in freely discussing Amazon’s prices with each other and their joint strategies for raising those prices.’” (quoting *United States v. Apple, Inc.*, 952 F. Supp. 2d 638, 651 (S.D.N.Y. 2013))).

238. See *id.* (detailing the evidence indicating the existence of a horizontal conspiracy).

239. See *id.* (describing the close-knit nature of communications between the publishing companies).

240. See *id.* (citing *Cont’l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (applying the per se standard although the dissent judge argued for a rule of reason standard)).

241. See *No-Poach Approach*, U.S. DEPT OF JUST., <https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach> (last updated Sept. 30, 2019) (last visited Oct. 09, 2019) (explaining that in three cases involving franchise agreements, the Antitrust Division filed statements of interest urging that the correct analysis was the rule of reason) [<https://perma.cc/4ZTU-RCPW>].

242. See Akin, Gump, Strauss, Hauer, & Feld LLP, *A Fresh Approach to No-Poach Provisions in Franchise Agreements* (Apr. 2, 2019), <https://www.akingump.com/images/content/1/0/v2/102953/A-Fresh-Approach-to-No-Poach-Provisions-in-Franchise-Agreements..pdf> (last visited Dec. 9, 2019) (explaining the issues of no-poach analysis in franchise agreements)

vertical agreement is present through the standard contract provisions between the franchisor and franchisee.²⁴³ The issue is demonstrating the horizontal relationship between franchisees.²⁴⁴ However, as in *Toys “R” Us*, the franchise contract’s no-poach provision only makes sense for franchisees on the condition that all other franchisees sign it.²⁴⁵ As shown in Part II.B, the nature of no-poach restrictions supports finding a horizontal conspiracy.²⁴⁶ If franchisees sign this provision without the knowledge that all other franchisees will participate, the provision is not in their individual self-interest.²⁴⁷ They will simply stop competing in the labor market while everyone else continues to do so.²⁴⁸ However, with the mutually assured compliance guaranteed by the franchisor’s standard contract, a franchisee can safely benefit from the no-poach conspiracy.²⁴⁹ The end result is that the franchise can deter employee turnover and depress wages through its franchisees.²⁵⁰ If the horizontal rim of the agreement is shown in this manner, the franchisor and franchisees should then both be held liable under the per se rule condemning market allocations.²⁵¹

In short, the key to this analysis is to present enough evidence pointing to the existence of a horizontal rim; it is not enough to rely on the mere existence of a series of vertical agreements.²⁵²

[<https://perma.cc/7W4N-PJVN>].

243. See *id.* (describing a franchise agreement).

244. See *No-Poach Approach*, *supra* note 241 (explaining that franchisees are each independent entities).

245. See *supra* notes 230–232 and accompanying text (discussing how no-poach agreements are only effective when employers conspire).

246. See *supra* Part II.B (describing how the inference standard for horizontal agreements applies to no-poach agreements).

247. See *Toys “R” Us v. FTC*, 221 F.3d 928, 932 (7th Cir. 2000) (describing an anti-competition scheme among toy manufacturers whereby they only participated with the knowledge that their competitors participated).

248. See *id.* (explaining the incentives for joining a conspiracy).

249. See *Deslandes v. McDonald’s USA, LLC*, 2018 WL 3105955, at * 2 (N.D. Ill. June 25, 2018) (explaining the implications of McDonald’s standard franchise agreement).

250. See *id.* (stating that the agreement strengthens the franchisors hiring influence and allows the franchisee to keep costs low.)

251. See cases cited *supra* note 211 and accompanying text (listing Supreme Court precedent for application of the per se rule when a hub-and-spoke conspiracy is demonstrated).

252. See, e.g., *Dickson v. Microsoft*, 309 F.3d 193, 203–05 (4th Cir. 2002)

Caution is warranted on this point because some courts have required more evidence than others.²⁵³ In a case implicating the musical instrument retailer Guitar Center, the Ninth Circuit seemed to nearly require direct evidence of collusion between the horizontal conspirators.²⁵⁴ In this case, the plaintiffs alleged that Guitar Center pressured five leading guitar manufacturers into accepting minimum advertising price terms.²⁵⁵ Several significant “plus factors” were alleged: that defendants shared a common motive to conspire, the manufacturers acted against their self-interest, the manufacturers simultaneously adopted substantially similar agreements, an FTC consent decree finding that defendants participated in an illegal information exchange, and the fact that retail prices rose as the number of units sold fell.²⁵⁶ Despite an abundance of circumstantial evidence—consistent with what the Supreme Court has required in the past—the Ninth Circuit did not infer a horizontal conspiracy.²⁵⁷

Additionally, the DOJ’s analysis within its statement of interest concerning the Cinnabon litigation also reaffirms that evidence beyond the existence of the franchise agreement is essential.²⁵⁸ The DOJ seems to suggest, though, that franchise

(stating that vertical distribution agreements between Microsoft and original equipment manufacturers was not sufficient to establish a conspiracy among the manufacturers without evidence of a rim to the wheel); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 111 (2d Cir. 2002) (stating that loyalty agreements forcing distributors to offer either Pepsi or Coke products exclusively did not, on their face, constitute a hub-and-spoke conspiracy).

253. Compare *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 629 (7th Cir. 2010) (“Circumstantial evidence can establish an antitrust conspiracy.”), with *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015) (“Parallel action is not by itself, sufficient to prove the existence of a conspiracy.”).

254. See *In re Musical Instrs. & Equip. Antitrust Litig.*, 798 F.3d 1186, 1189 (9th Cir. 2015) (stating that despite substantial circumstantial evidence, “plaintiffs’ ‘plus factors’ add nothing . . . we affirm the judgment of the district court dismissing plaintiffs’ § 1 claim.”).

255. See *id.* at 1189–90 (describing the plaintiff’s allegations and theory of harm).

256. See *id.* at 1194 (noting the lack of direct evidence while listing six “plus factors” alleged in the plaintiff’s complaint).

257. See *id.* at 1189 (stating that the agreement could be indicative of conscious parallelism rather than concerted action).

258. See *Stigar, supra* note 111, at 20 (“The key to the per se illegal hub-and-spoke conspiracy is ‘the existence of a rim to the wheel in the form of an agreement

agreements are more likely to be categorized as rimless conspiracies where “parallel but independent vertical agreements are not per se unlawful; they are subject to the rule of reason.”²⁵⁹ The agency notes that even if plaintiffs had successfully pleaded the rim to the conspiracy, that the “franchise relationship . . . is a legitimate business collaboration in which the franchisees operate under the same brand.”²⁶⁰ Because of this, the no-poach agreements would be considered ancillary restraints to be evaluated under the rule of reason.²⁶¹ First, as explained above, there is an argument to condemn franchise no-poach restraints as a hub-and-spoke conspiracy and multiple district courts have agreed.²⁶² Second, as explained in Part IV, this conclusion that no-poach agreements are covered by the ancillary restraints doctrine is questionable.²⁶³ More on point within this section, the ancillary restraints concern has no meaning in the analysis for finding a hub-and-spoke conspiracy.²⁶⁴ Per se treatment would apply if a hub-and-spoke conspiracy is found.²⁶⁵ The rule of reason would only become appropriate if the defendant successfully makes out a

among the horizontal competitors.”).

259. See *Stigar*, *supra* note 111, at 21 (“Here, there is no indication that plaintiffs have successfully pleaded the existence of a ‘rim’ on which to base a ‘hub-and-spoke’ conspiracy.”).

260. See *Stigar*, *supra* note 111, at 21 (distinguishing franchise no-poach agreements from typical hub-and-spoke conspiracies).

261. See *Stigar*, *supra* note 111, at 21 (“No-poach agreements would thus qualify as ancillary restraints if they are reasonably necessary to the legitimate franchise collaboration and not overbroad.”).

262. See *supra* notes 241–251 and accompanying text (noting the case for condemning franchise no-poach agreements under a hub-and-spoke analysis); see also, e.g., *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786, 797 (S.D. Ill. July 31, 2018) (noting that the claimant plausibly stated a hub-and-spoke conspiracy where “the ‘hub’ firm enters into a collection of vertical agreements with other firms—the ‘spokes’—and those spokes then enter into a collection of horizontal agreements that make up the ‘wheel’”).

263. See *infra* Part IV (describing how a defendant would make an ancillary pro-competitive justification argument).

264. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (describing the § 1 burden-shifting test).

265. See, e.g., *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939) (inferring a per se illegal horizontal conspiracy where the agreement only benefitted competitors if they each agree to similar terms with the ‘hub’—who facilitates and assures this compliance).

pro-competitive justification defense after the plaintiff meets their burden.²⁶⁶

D. Evading the Intra-Enterprise Doctrine or Copperweld Defense

One final issue that arises in the context of proving an agreement between vertically oriented firms is the intra-enterprise doctrine.²⁶⁷ When a corporation coordinates its activities with a parent, subsidiary, affiliated corporations, or agents, these actions may fall outside of § 1 according to the *Copperweld* doctrine.²⁶⁸ The boundary for firms which can be “*Copperwelded*” is unclear, however, since this case involved a corporation and its wholly owned subsidiary.²⁶⁹ The Supreme Court explicitly left the door open in this decision as to which other situations warrant exemption from § 1.²⁷⁰ Lower courts have extended this doctrine outside of the parent and wholly owned subsidiary relationship, however.²⁷¹ Most courts have held that the *Copperweld* doctrine extends to agreements between sister corporations.²⁷² Similarly, some courts have held that corporations

266. See *Am. Express Co.*, 138 S. Ct. at 2284 (“If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rational for the restraint.”).

267. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 759 (1984) (“[P]rovides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership . . .”).

268. See *id.* at 753 (stating that a parent and a wholly owned subsidiary must be viewed as a single enterprise which unilaterally makes decisions).

269. See *id.* (“Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy.”).

270. See *id.* 753 (construing the facts narrowly as pertaining to a wholly owned subsidiary and parent company).

271. See *Crosby v. Hosp. Auth. of Valdosta & Lowndes Cty.*, 93 F.3d 1515, 1529 (11th Cir. 1996) (“[S]taff physicians may in certain contexts be agents of the hospital for purposes of state action immunity.”).

272. See generally *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001); *Advanced Health-Care Servs. v. Radford Cmty. Hosp.*, 910 F.2d 139, 146 (4th Cir. 1990); *Odishelidza v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23 (1st Cir. 1988); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 611 (6th Cir. 1987); *Greenwood Utils. Comm’n v. Miss. Power Co.*, 751 F.2d 1484, 1497 n. 8

owned by the same holding group are incapable of conspiring.²⁷³ Most courts have found that parents and majority-owned subsidiaries are incapable of conspiring although the degree of control required has never been precisely defined.²⁷⁴

However, in 2010, the Supreme Court provided some clarifying guidance, as if to steer the courts away from more formalistic rule-setting, in its *American Needle, Inc. NFL* decision.²⁷⁵ The Court revisited the *Copperweld* doctrine, noting that the key to the analysis is “whether the parties act on interests separate from those of the firm itself” or if the agreement “joins . . . separate decisionmakers” pursuing separate economic interests.²⁷⁶ In other words, if the parties are joined in an agreement but have independent economic interests, they are not acting unilaterally as one entity.²⁷⁷

In 1993, before the current spotlight on no-poach agreements and before *American Needle*, the Ninth Circuit stated in *Williams v. I.B. Fishcher Nevada*²⁷⁸ that franchisors and franchisees of a fast-food restaurant cannot conspire under the antitrust laws.²⁷⁹ The claim theorized that “no-switching” agreements by Jack-in-the-Box constituted a group boycott (rather than a

(5th Cir. 1985).

273. See, e.g., *Century Oil Tool Co. v. Prod. Specialties*, 737 F.2d 1316, 1317 (5th Cir. 1984) (stating that there is no difference between two a parent and wholly owned subsidiary and two corporations wholly owned by the same persons).

274. See, e.g., *Siegel Transfer, Inc. v. Carrier Express*, 54 F.3d 1125, 1133 (3d Cir. 1995) (stating that a 99.92% owned subsidiary is ‘*Copperwelded*’); *Computer Identics Corp. v. S. Pac. Co.*, 756 F.2d 200, 205 (1st Cir. 1985) (stating that an 80% owned subsidiary cannot conspire with its parent).

275. See *American Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 196 (2010) (holding that the *Copperweld* doctrine did not apply to member teams of a sports league since the inquiry was not based on legal structure but competitive realities).

276. See *id.* at 184 (highlighting the importance of evaluating competitive realities rather than legal structure).

277. See *id.* at 191 (“[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved . . . actually operate.”).

278. See *Williams v. I.B. Fischer Nev.*, 999 F.2d 445, 448 (9th Cir. 1993) (holding that franchisors and franchisees were incapable of conspiring).

279. See *id.* at 447 (stating that the franchisor and franchisees’ interests continue beyond the payment of the licensing fee).

horizontal market allocation of the labor market).²⁸⁰ Specifically, franchisees could not offer employment to another franchisee’s manager within six months of the manager’s termination without a release from the franchisee.²⁸¹ The court found that the degree of control and uniformity that the centrally managed franchisor demanded from its franchisees supported the existence of a “common enterprise.”²⁸² The court looked past evidence that each franchise could charge its own prices, that the franchise agreement called its franchisees “independent contractors,” and the argument that the relationship was more appropriately categorized as a licensing relationship.²⁸³

However, this decision predates the Supreme Court’s view in *American Needle* that “the inquiry is one of competitive reality.”²⁸⁴ In this decision, the Court held that NFL teams were independently owned and managed businesses that competed with one another.²⁸⁵ The Court focused on the fact that the teams typically pursue their own individual efforts when they license intellectual property rather than the interests of the whole league.²⁸⁶ In other words, “[t]o a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks.”²⁸⁷ The teams compete against each other in the market for intellectual property and are capable of conspiring under § 1 by jointly authorizing NFL Properties to award exclusive licenses on their behalf.²⁸⁸

280. *Id.*

281. *Id.*

282. *See Williams v. I.B. Fischer Nev.*, 794 F. Supp. 1026, 1030–33 (D. Nev. 1992) (describing the independence of the franchisees and franchisors).

283. *See id.* (rejecting plaintiffs’ contrary arguments).

284. *See American Needle, Inc., v. Nat’l Football League*, 560 U.S. 183, 196 (2010) (stating that the inquiry is one of competitive reality).

285. *See id.* (holding that the *Copperweld* doctrine did not apply to member teams of a sports league since the inquiry was not based on legal structure but competitive reality).

286. *See id.* at 197 (“The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action.”).

287. *See id.* (explaining that NFL teams are competitors in the market for licensed merchandise).

288. *See id.* (“[T]he teams voted to authorize NFLP to grant exclusive licenses,

No-poach agreements operate in a similar fashion.²⁸⁹ Each franchisee pursues its own independent economic interests through hiring and recruitment efforts.²⁹⁰ It is in each franchise restaurant's best interest to compete for high-quality employees in order to increase productivity and profitability.²⁹¹ Like any other no-poach restraint and like the restraint in *American Needle*, a franchise no-poach restraint curbs competition among competing entities.²⁹² This allows entities to act against their individual competitive interests by conspiring to depress wages and prevent employee turnover between them.²⁹³ This is the key to establishing that vertically related firms are separate entities under § 1.²⁹⁴

As a final point, it did not matter to the Supreme Court in *American Needle* that the league, by its nature, required the teams' cooperation in order to compete against other sports leagues or forms of entertainment.²⁹⁵ The Court seemed reluctant to broadly immunize football leagues and other ventures from the reach of antitrust law in this way.²⁹⁶ Instead, the Court stated that this question of cooperation is better suited to assessing the legitimacy of a pro-competitive justification.²⁹⁷ This analysis overrules the

and NFLP granted Reebok International Ltd. an exclusive 10-year license . . .").

289. See *Ogden v. Little Caesar*, 393 F. Supp. 3d 622, 633 (E.D. Mich. 2019) ("[I]n the market for employees, the McDonald's franchisees and McOpCos within a locale are direct, horizontal, competitors.").

290. See *Deslandes v. McDonald's USA, LLC*, 2018 WL 3105955, at * 2 (N.D. Ill. June 25, 2018) ("Franchisees . . . are also responsible for the day-to-day operations of their respective restaurants and for . . . hiring.").

291. See *id.* (explaining that McDonald's franchisee hiring decisions were restricted by the no-hire provision).

292. See *Butler v. Jimmy John's Franchise, LLC*, 331 F. Supp. 786, 792 (S.D. Ill. 2018) ("[A]greements made among direct competitors . . . always or almost always tend to restrict competition and decrease output.").

293. See *Yi v. SK Bakeries, LLC*, No. 18-5627 RJB, 2018 WL 8918587, at *5 (W.D. Wash. Nov. 13, 2018) ("Even a person with a rudimentary understanding of economics would understand that if competitors agree not to hire each other's employees, wages for employees will stagnate.").

294. See *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 183 (2010) (explaining how the relevant inquiry is one of operation, not form).

295. See *id.* at 199 ("The justification for cooperation is not relevant to whether that cooperation is concerted or independent action.").

296. See *id.* at 202–03 (stating that football teams needing to cooperate are not limited by antitrust law because "the special characteristics of this industry may provide a justification" for many kinds of agreements").

297. See *id.* (noting that in some instances, the justification may warrant rule

Ninth Circuit’s previous conclusion in *Williams v. I.B. Fischer Nevada*, that franchises are single entities because they inherently require cooperation and uniformity.²⁹⁸ In the no-poach context, although franchisee or other entities’ cooperative efforts may be required in certain aspects to support a larger venture, the venture should not necessarily be summarily immunized.²⁹⁹ The question of the franchise should be evaluated in more detail when asserted as a defense.³⁰⁰

*III. Element Two: Analyzing the Restraint’s Reasonableness
Under the Per Se, Quick-Look, or Extended Rule of Reason
Standard*

The second element, an unreasonable restraint of trade, will be governed by one of three possible standards of review.³⁰¹ These standards require different showings by the plaintiff.³⁰² Per se review only requires that the plaintiff show the existence of a presumptively unlawful per se restraint.³⁰³ Quick-look or abbreviated rule of reason analysis requires that the plaintiff show the existence of an inherently anticompetitive restraint which one with only a rudimentary understanding of economics would infer

of reason analysis but was “still concerted activity under the Sherman Act that is subject to § 1 analysis.”).

298. See *Williams v. I.B. Fishcher Nev.*, 794 F. Supp. 1026, 1032 (D. Nev. 1992) (“[T]he franchisor does everything in its power to minimize competition and promote uniformity between franchises.”).

299. See *American Needle*, 560 U.S. at 200 (“[I]ntrafirm agreements may simply be a formalistic shell for ongoing concerted action.”).

300. See *id.* at 202–03 (noting that in some instances, the justification may warrant rule of reason analysis but was “still concerted activity under the Sherman Act that is subject to § 1 analysis”).

301. See *Agnew v. NCAA*, 683 F.3d 328, 335 (7th Cir. 2012) (“Courts have established three categories of analysis—per se, quick-look, and Rule of Reason . . . though the methods often blend together.”).

302. See *id.* (explaining the requirements of the different standards).

303. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 (1984) (“Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.”).

to be anticompetitive.³⁰⁴ The quick-look standard specifically does not require that the plaintiff demonstrate the defendant's market power.³⁰⁵ Finally, the extended rule of reason is the most onerous; it requires elaborate economic analysis, including demonstrating market power, in order to show anticompetitive effects.³⁰⁶ The no-poach antitrust plaintiff has a good case for per se condemnation but should assert quick-look review in the alternative.³⁰⁷ An extended rule of reason case presents potential challenges, which may be difficult, but not impossible, for a plaintiff to surmount.³⁰⁸

A. The Agencies' Position That No-Poach Agreements Warrant Per Se Treatment Is the Most Convincing Theory

As described in Part I.C.1, the DOJ and FTC have convincingly outlined the theory that no-poach agreements are per se illegal market allocations.³⁰⁹ The settlement of every single "pure" horizontal no-poach case (between competitor universities, railway component companies, technology companies) demonstrates the strength of this argument.³¹⁰ In cases involving vertically oriented firms, however, the plaintiff should anchor onto the agencies' statements in the HR Guidelines, which note that a

304. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 691 (1978) ("While [this act] is not [per se illegal] price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.").

305. See *Bd. of Regents*, 468 U.S. at 109

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

(quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

306. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the restraint's actual effect" on competition.").

307. See *infra* Parts III.A–B (describing the applicability of the per se rule and quick-look in the alternative).

308. See discussion *infra* Part III.C (describing a rule of reason analysis in the no-poach context).

309. See discussion *supra* Part I.C (describing the DOJ and FTC's application of antitrust law in the no-poach context).

310. See discussion *supra* Part I.C (describing the DOJ's no-poach actions).

firm’s downstream market position is inconsequential.³¹¹ Additionally, the DOJ in a statement of interest in a franchise case has confirmed this analysis.³¹² Further, a recent decision in the Southern District of California found a per se illegal restraint when “unlike agreements made up and down a supply chain between buyers and sellers, Defendants [who] use their no-poaching restraints . . . with virtually all other [medical service sub-contractors], thereby compromise[e] their [sub-contractors]’ ability to compete freely to hire qualified travelers and sell medical-traveler services to hospitals.”³¹³ The court focused not on the vertical element in the downstream markets but on the horizontal effect of the restraint on the relevant employment market.³¹⁴

In other words, an antitrust plaintiff’s argument should be that the relevant market for a no-poach agreement is the labor market.³¹⁵ The restraint does not restrain competition for iPhones, for example, but for employees.³¹⁶ And in the labor market, an electronic equipment producer can compete for the same

311. See HR GUIDANCE, *supra* note 26, at 2 (“From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”).

312. See *Stigar*, *supra* note 111, at 20 (“Even though the typical no-poach agreement between a franchisor and one of its franchisees is vertical, it could be horizontal if it restrains competition between the two interrelated entities.”).

313. See *Aya Healthcare Services, Inc. v. AMN Healthcare Inc.*, No. 17cv205-MMA (MDD), 2018 WL 3032552, at *10 (S.D. Cal. June 19, 2018) (focusing on the horizontal aspects of the no-poach restraint).

314. See *id.* (noting that per se treatment applied given the pervasiveness of the vertical restraints and their horizontal effect on the labor market); see also *Yi v. SK Bakeries, LLC*, No. 18-5627 RJB, 2018 WL 8918587, at *4 (W.D. Wash. Nov. 13, 2018) (discussing vertical and horizontal elements in the agreements not to solicit or hire Cinnabon employees); *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 786, 795 (S.D. Ill. 2018) (recognizing vertical elements but stating that the “effects are felt strictly at the horizontal level”).

315. See *Deslandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018) (“This case . . . is not about competition for the sale of hamburgers to consumers. It is about competition for employees, and, in the market for employees, the McDonald’s franchisees and McOpCos within a locale are direct, horizontal, competitors.”).

316. See *id.* (describing the relevant market).

employees that an electronic device manufacturer would.³¹⁷ In other words, there are multiple markets that a firm participates in.³¹⁸ It can operate in a certain downstream product market while also operating in supply-side markets, such as the labor market.³¹⁹ Its competitors in these markets may differ and these competitors may be partners in other markets.³²⁰ Ultimately, the labor market is the one that is relevant for no-poach agreements; a vertical relationship in another market does not change the fact that the firms are competitors in the labor market.³²¹ If this argument is successful, the plaintiff can use the agencies' theory to assert a per se illegal market allocation—even though it is between two entities who share a vertical element in other markets.³²²

B. The Plaintiff Should Argue for Quick-Look Analysis in the Alternative

Under the quick-look standard, courts may condemn restraints which “an observer with even a rudimentary understanding of economics could conclude . . . have an anticompetitive effect on customers and markets.”³²³ An analysis of this framework reveals that no-poach agreements are a perfect example of restraints that should be condemned under a quick-look

317. See HR GUIDANCE, *supra* note 26, at 2 (“From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”).

318. See *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152 (D.D.C. 2016) (describing National Records Center, Inc. as a competitor in multiple markets).

319. See *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1051 (D.C. Cir. 1995) (recognizing the distinction between labor markets and product markets).

320. See *id.* (describing restraints on competition that may have an effect on the labor market but not the product market).

321. See HR GUIDANCE, *supra* note 26, at 2 (“From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”).

322. See discussion *supra* Part I.C (describing the DOJ and FTC’s application of antitrust law in the no-poach context).

323. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (1999) (noting the standard for quick-look analysis).

because they directly restrain price competition.³²⁴ As a result, a plaintiff should be able to meet the initial burden of proof without showing evidence of market power or other elaborate industry analysis.³²⁵

In one of the Supreme Court’s first quick-look cases—*National Society of Professional Engineers v. United States*³²⁶—a group of competitors agreed not to discuss prices with their customers until they selected an engineer.³²⁷ Although the restraints were not per se illegal, the Court found that they completely banned competitive bidding, price comparisons, and “imposed[d] the Society’s view of the costs and benefits of competition on the entire marketplace.”³²⁸ In other words, the restraint very closely resembled a variety of per se violations but did not quite fall into any of those categories.³²⁹ Rather than go to the extended rule of reason, the Court found that this was a facially anticompetitive restraint since price is the “central nervous system of the economy” and an agreement interfering with this competition is “illegal on its face.”³³⁰ It also held that “no elaborate industry analysis was required to demonstrate the anticompetitive character of the agreement.”³³¹

324. See, e.g., *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 786, 792 (S.D. Ill. 2018) (“[A]greements made among direct competitors . . . always or almost always tend to restrict competition and decrease output.”).

325. See *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1134 (9th Cir. 2011) (“Full rule of reason treatment is unnecessary where the anticompetitive effects are clear even in the absence of a detailed market analysis.”).

326. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 697 (1978) (finding that a canon of ethics prohibiting competitive bidding was not justified under Rule of Reason).

327. See *id.* at 691 (describing the association’s agreement).

328. See *id.* at 694–95 (noting the restraint’s effect was to eliminate price competition).

329. See *id.* at 692 (“While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”).

330. See *id.* at 692–93 (citing *United States v. Container Corp.*, 393 U.S. 333, 337 (1969)).

331. See *id.* (noting the abbreviated review due to the egregious nature of the alleged violation).

In *NCAA v. Board of Regents*, the Supreme Court again condemned restraints on a quick-look.³³² In this decision, the Court found that the effects of the NCAA's scheme to control teams' television rights were apparent; NCAA teams lost their freedom to compete, the restraints increased price while lowering output, and most importantly—the restraints caused price and output to become unresponsive to customer preference.³³³ The defendant did not try to rebut these findings, in effect admitting that the restraints were naked.³³⁴ Instead, the defendant stated that the NCAA lacked the market power necessary to affect supply and demand in the market.³³⁵ The Supreme Court rejected “this argument for two reasons, one legal, one factual.”³³⁶ It found that as a matter of law, that the “absence of proof of market power does not justify a naked restriction on price or output.”³³⁷ The restraint was inconsistent with the “Sherman Act’s command that price and supply be responsive to consumer preference. We have never required proof of market power in such a case.”³³⁸ In addition to this, the Court found that as a factual matter, the NCAA did possess market power.³³⁹

In *FTC v. Indiana Federation of Dentists*, the Supreme Court once again rejected the Seventh Circuit’s requirement that the plaintiff define the dentists’ market power.³⁴⁰ The Court again

332. See *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984) (“Because it restrains price and output, the NCAA’s television plan has a significant potential for anticompetitive effects.”).

333. See *id.* (“A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with [the] fundamental goal of antitrust law.”).

334. See *id.* at 109 (“Petitioner does not quarrel with the District Court’s finding that price and output are not responsive to demand.”).

335. See *id.* (“Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market.”).

336. *Id.*

337. *Id.*

338. *Id.*

339. See *id.* (arguing that the NCAA did possess market power in a narrower market for football broadcasting).

340. See *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460 (1986) (“[E]ven if the restriction imposed by the Federation is not sufficiently “naked” to call this principle into play, the Commission’s failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason.”).

concluded that this step was unnecessary because an agreement to restrict insurers’ access to patients’ x-rays was a direct restraint on output.³⁴¹ The restraint impeded the natural flow of the market and impaired “the ability of the market to . . . ensure the provision of desired good and services to consumers at a price approximating the marginal cost of providing them.”³⁴² In the absence of a pro-competitive justification, the Court condemned them as naked restrictions.³⁴³

Quick-look analysis is inappropriate where the plaintiff fails to show that anticompetitive effects are obvious or “rudimentary.”³⁴⁴ For example, it was unclear to the Supreme Court in *California Dental* whether restraints on deceptive advertising would harm competition or increase consumer confidence—thereby creating a greater demand for dental services.³⁴⁵ It was similarly unclear to lower courts whether banning independent team websites had redeeming value to the NHL, whether a racing association restrained competition by forbidding the use of a certain transmission, or whether the agreement to install x-ray machines limiting the size of bags created anticompetitive effects.³⁴⁶

No-poach agreements are not subject to the same defects; the effect of a no-poach restraint is clear.³⁴⁷ Under the *Engineers*

341. *See id.* (finding that the defendant’s restraints were naked restraints on trade).

342. *See id.* at 459 (describing the economic effects of the restraint).

343. *See id.* (“[T]he evidence did not support a finding that the careful use of x rays as a basis for evaluating insurance claims is in fact destructive of proper standards of dental care.”).

344. *See* *FTC v. Actavis, Inc.*, 570 U.S. 136, 159 (2013) (refusing to apply a quick-look approach because an observer with a rudimentary understanding of economics could not conclude that the arrangements in question were anticompetitive).

345. *See* *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 770 (“The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious.”).

346. *See* *Madison Square Garden, L.P. v. Nat’l Hockey League*, 270 F. App’x 56, 59 (2d Cir. 2008); *Cont’l Airlines v. United Airlines*, 277 F.3d 499, 511 (4th Cir. 2002); *Brookins v. Int’l Motor Contest Ass’n*, 219 F.3d 849, 853–54 (8th Cir. 2000).

347. *See, e.g., Yi v. SK Bakeries, LLC*, No. 18-5627 RJB, 2018 WL 8918587, at *5 (W.D. Wash. Nov. 13, 2018) (“Even a person with a rudimentary

standard, where price is the central nervous system of the economy and agreements interfering with price competition are illegal, no-poach restraints should be condemned.³⁴⁸ These agreements prevent employees from obtaining pricing information necessary to ascertain the competitive value of their labor.³⁴⁹ Additionally, as in *Board of Regents* and *Federation of Dentists*, no-poach agreements disrupt the natural flow of the free market so that price (wages) and output (productivity) are not responsive to employer demand; both are artificially depressed.³⁵⁰ There does not appear to be any efficiency benefit from franchise no-poaching agreements in the relevant labor market.³⁵¹

In its statements of interest in franchise no-poach cases, the Department of Justice appears reluctant to extend the quick-look given the vertical elements involved.³⁵² It first states, without citing a source, that “quick-look analysis does not apply to a vertical agreement between a franchisor and a franchisee.”³⁵³ However, the Supreme Court’s quintessential quick-look cases outline cases in which participating member teams agreed to restraints imposed by the NCAA or when professionals agreed to

understanding of economics would understand that if competitors agree not to hire each other’s employees, wages for employees will stagnate.”).

348. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978) (“[A]n agreement that ‘interferes with the setting of price by free market forces’ is illegal on its face.”).

349. See *Yi*, 2018 WL 8918587, at *5 (explaining how no-hire provisions deflate wages).

350. See *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 461 (2009) (stating that disrupting the proper functioning of the price-setting mechanism of the market should be condemned).

351. See Interview by GCR USA with Joseph Simons, Chairman, Fed. Trade Comm’n, (Dec. 13, 2018) (“The FTC doesn’t see what the benefits of a non-compete agreement are when there is no highly skilled labour involved . . . There doesn’t seem to be any efficiency benefit, so outlawing that would seem not to have a cost to it; actually it might have a benefit.”).

352. Compare Statement of Interest *Ry. Indus. Emp.*, *supra* note 56, at 16 (stating that a per se rule was inapplicable in the case of McDonald’s having no-hire provisions with franchisees), with HR GUIDANCE, *supra* note 26, at 2 (“From an antitrust perspective, firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services.”).

353. See *Stigar*, *supra* note 111, at 22 (stating that quick-look is generally inapplicable to vertical franchise agreements).

restraints that were formalized by a professional trade organization.³⁵⁴

The agency then quickly shifts its analysis, stating that when no-poach restraints are ancillary to the franchise system, then “by definition, quick-look analysis is not appropriate.”³⁵⁵ However, this only holds true where an pro-competitive argument is accepted.³⁵⁶ For example, in *NCAA v. Board of Regents*, the Court recognized that the NCAA’s rules play “a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed . . . and hence can be viewed as procompetitive.”³⁵⁷ This did not stop the Supreme Court from condemning the restraints under a quick-look because the restraints were not necessary to further these pro-competitive goals.³⁵⁸

Essentially, the agency seems to be asserting that the vertical nature of the franchise relationship inherently creates doubt that the restraint can be readily condemned as anticompetitive.³⁵⁹ But the DOJ’s concern with vertical efficiencies is, again, more appropriately placed at the stage that the defendant asserts a pro-competitive justification.³⁶⁰ However, this Note makes note that it is unlikely that a defendant will be able to properly assert

354. See *supra* notes 326–343 and accompanying text (noting Supreme Court jurisprudence on quick-look analysis).

355. See *Stigar, supra* note 111, at 22 (“The ‘quick-look analysis’ applies only in rare cases ‘when the great likelihood of anticompetitive effects can easily be ascertained,’ and it is ‘implausible’ that procompetitive benefits would outweigh harm to competition.”).

356. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 114 (1984) (condemning the restraint because it “cannot be said that ‘the agreement on price is necessary to market the product at all’”).

357. *Id.* at 102.

358. See *id.* at 106–07 (“The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference.”).

359. See *Stigar, supra* note 111, at 12 (“Accordingly, because vertical territorial allocation agreements may have both procompetitive and anticompetitive effects, courts evaluate their legality using the rule of reason’s balancing approach.”).

360. See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) (“If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rational for the restraint.”).

a pro-competitive justification under the ancillary restraints doctrine.³⁶¹ As a result, at the least, quick-look treatment will likely apply.³⁶²

C. As a Last Resort, Plaintiff Can Make a Claim Under the Rule of Reason

Plaintiffs should try to avoid an extended rule of reason analysis because of the likely difficulties of proving market power.³⁶³ However, plaintiffs can still attempt to meet their initial burden under the extended rule of reason by: (1) showing an adverse effect on competition by direct evidence of anticompetitive effects or (2) by showing circumstantial evidence of the defendants' market power.³⁶⁴

Under the second method, when the defendant has a dominant share of the market or entry or expansion barriers exist, the court may infer adverse effects on competition.³⁶⁵ Although market power is defined as the power to foreclose competitors or raise prices and can be evidenced by many qualitative factors, courts tend to look heavily at market share.³⁶⁶ Concern tends to arise

361. See discussion *infra* Part IV (noting the strict requirements in asserting a procompetitive justification).

362. See *supra* notes 326–343 and accompanying text (noting Supreme Court jurisprudence on quick-look analysis).

363. See *Am. Express Co.*, 138 S. Ct. 2274 (stating that it would be difficult for a plaintiff challenging a vertical agreement between a franchisor and franchisee to find sufficient market power).

364. See *id.* at 2285–84

The plaintiffs can make this showing directly or indirectly. Direct evidence of anticompetitive effects would be “proof of actual detrimental effects [on competition],” such as reduced output, increased prices, or decreased quality . . . Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.

(citations omitted).

365. See *id.* (explaining that adverse effects can be implied by market power).

366. See *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 7 (1984) (indicating that a firm must have at least a 30% market share to infer market power); see also *Drug Emporium, Inc. v. Blue Cross*, 104 F. Supp. 2d 184, 189 (W.D.N.Y. 2000) (stating the Supreme “Court has concluded that as a matter of law a defendant with 30% or less of the relevant market lacked market power for an antitrust violation”).

when the defendants’ market share is around thirty to thirty-five percent.³⁶⁷ The focus on market share is so strong that some courts may initially require a showing of market power, however, to dispose of cases without merit.³⁶⁸

1. *Showing Direct Evidence of Anticompetitive Effects*

However, the first method of showing direct evidence of effects, or “proof of actual detrimental effects such as a reduction of output,” obviates the need for an inquiry into market power.³⁶⁹ The Supreme Court noted direct evidence of anticompetitive effects where insurers were unable to obtain X-rays in locations dominated by the Federation.³⁷⁰ The evidence of “sustained adverse effects on competition in those areas where IFD dentists predominated, viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.”³⁷¹

Proof of actual harm “can obviate the need for an inquiry into market power,” since the entire purpose of deducing market power is to determine the potential for anticompetitive effects.³⁷² In the no-poach context, evidence of actual anticompetitive effect could

367. See *Drug Emporium*, 104 F. Supp. 2d at 189 (stating market power benchmarks).

368. See, e.g., *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (stating that “by definition, without [market power] a firm or group of firms can’t harm competition”).

369. See *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 461 (2000) (“[T]he finding of actual, sustained adverse effects on competition . . . viewed in light of the reality that markets for dental services tend to be relatively localized, is legally sufficient to support a finding that the challenged restraint was unreasonable even in the absence of elaborate market analysis.”); see also *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 240 (2d Cir. 2003) (stating that there was sufficient evidence of anticompetitive harm based on reduced card output, fewer card features, decreased network services, and stunting of price and innovation).

370. See *Ind. Fed’n of Dentists*, 476 U.S. at 461 (stating that actual effects of competitive harm were apparent).

371. See *id.* (stating that that the inquiry into market power is but a “surrogate for detrimental effects”).

372. See *id.* (describing the essential purpose of the market power analysis).

include: decreases or increases in salaries across industries, whether employees who leave suffer pay cuts when switching to other industries or roles, and whether it takes longer for displaced employees to find work in another field.³⁷³ If the plaintiff is able to demonstrate this type of evidence, rule of reason analysis may be much less burdensome.³⁷⁴

2. *Showing Circumstantial Evidence of Anticompetitive Effects*

In the event that direct evidence of harm is absent or the court first requires a market power inquiry, the plaintiff must turn to circumstantial evidence based on market share as demonstrated by qualitative factors and other economic analyses.³⁷⁵ The first step is to define the relevant market.³⁷⁶ This allows the court to identify significant competitors who would be able to constrain the defendant's monopsony power.³⁷⁷ At this point, relative market shares can then be computed.³⁷⁸ This process has to be performed

373. See *Todd v. Exxon Corp.*, 275 F.3d 191, 202–04 (2d Cir. 2001) (describing potential direct evidence of anticompetitive effect).

374. See *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (stating that a plaintiff can satisfy their burden under the Rule of Reason by proving the existence of actual anticompetitive effects, “such as reduction of output . . . increase in price, or deterioration in quality of goods or services”).

375. See, e.g., *NCAA v. Bd. of Regents*, 468 U.S. 85, 110 n. 42 (1984) (“While the reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.'”).

376. See *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 611–13 (1953) (outlining the steps in relevant market definition); see also *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948) (same).

377. See, e.g., *Se. Mo. Hosp. v. C.R. Bard, Inc.*, 642 F.3d 608, 613 (8th Cir. 2011) (“Determining the limits of a relevant . . . market requires identifying the choices available to consumers.”); *Geneva Pharms. Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 496 (2d Cir. 2004) (“The goal in defining the relevant market is to identify the market participants and competitive pressures that restrain an individual firm's ability to raise prices or restrict output.”); *Doctor's Hosp. v. Se. Med. Alliance*, 123 F.3d 301, 311 (5th Cir. 1997) (“To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's products or services.”).

378. See *Times-Picayune Publ'g Co.*, 345 U.S. at 612 (evaluating the percentages of market share among competitors).

twice—for the relevant supply (rather than product) market and the geographic market.³⁷⁹

The objective, in a monopsony labor market, is to draw a boundary between buyers of labor who are competing with one another for employees and those that are not competing for the same pool of labor.³⁸⁰ The focal point is the interchangeability of the firms in the eyes of employees; in other words, to identify the employers who are reasonable substitutes for employment.³⁸¹ The inquiry asks whether “from the perspective of an . . . employee, a job opportunity in the oil industry [is interchangeable] with, for example, one in the pharmaceutical industry.”³⁸² The focus is on whether an employer is interchangeable, whether it can serve as a substitute for a competitor’s fleeing employees if that competitor exercises its market power by lowering wages.³⁸³

It is in the plaintiff’s best interest to define the relevant markets as narrowly as possible since a defendant’s market share in a smaller market will be larger than in a broader one.³⁸⁴ This will likely come down to how specialized the employees are (in addition to how far employees would travel for other potential employment).³⁸⁵ This is because it is “consistent with common

379. *See Se. Mo. Hosp.*, 642 F.3d at 613 (describing the relevant product analysis and geographic market definition).

380. *See, e.g., Todd v. Exxon Corp.*, 275 F.3d 191, 202 (2d Cir. 2001) (explaining that “in such a case, ‘the market is not the market of competing sellers but of competing buyers. This market is comprised of buyers who are seen by sellers as being reasonably good substitutes.’”); *see also* *Campfield v. State Farm Mut. Auto. Ins. Co.*, 532 F.3d 1111, 1118 (5th Cir. 2008) (same).

381. *See Exxon Corp.*, 275 F.3d at 202 (“This market is comprised of buyers who are seen by sellers as being reasonably good substitutes.”).

382. *See id.* (“Plaintiff is right to urge that ‘the proper focus is . . . the commonality and interchangeability of the buyers, not the commonality or interchangeability of the sellers.’”).

383. *See id.* (“Where market power is exercised by buyers, it is the elasticity of the sellers’ supply that is at issue.”).

384. *See* *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015) (“[M]arket definition is guided by the ‘narrowest market principle’ . . . The circle must be drawn narrowly to exclude any other product . . .”).

385. *See Exxon Corp.*, 275 F.3d at 203 (citing Bruce C. Fallick, *A Review of the Recent Empirical Literature on Displaced Workers*, 50 INDUS. & LAB. REL. REV. 5, 12 (1996) (“Less technical jobs tend to involve skills that are not as industry-specific, creating greater cross-elasticity for these employees.”)).

sense and empirical research that employees' industry-specific experience may cause them to suffer a pay cut if forced to switch industries."³⁸⁶ These questions tend to make certain positions less substitutable than others and makes the market narrower (inflating the market share of the firms in this smaller market).³⁸⁷ In the same way, specialization may decrease the size of the relevant geographic market.³⁸⁸ Employees may be less willing to substitute to other regions where their industry or role is not as well represented.³⁸⁹ This would also shrink the relevant geographic market.³⁹⁰

By contrast, less technical jobs (such as those held by non-managerial franchise employees) "tend to involve skills that are not as industry-specific, creating greater cross elasticity for these employees" in other roles.³⁹¹ This conclusion that specialized professionals (such as engineers, technology specialists, and therapists) constitute smaller relevant markets seems to square with the cases brought by the antitrust enforcement agencies.³⁹²

386. See *id.* (citing Elisabetta Magnani, *Risk of Labor Displacement and Cross-Industry Labor Mobility*, 54 INDUS. & LAB. REL. REV. 593, 593–94 (2001) (referring to the empirical research indicating that wage losses generally accompany industry mobility)).

387. See *supra* text accompanying note 384 (describing how defining the relevant market impacts the computation of market shares); see also *infra* text accompanying note 391 (describing the effect of specialized roles on the cross-elasticity of demand for these roles).

388. See *Eichorn v. AT&T Corp.*, 248 F.3d 131, 147 (3d Cir. 2001) ("Additionally, we have said, 'the relevant geographic market is the area in which a potential buyer may rationally look for the goods or services he or she seek.'" (quoting *Pa. Dental Ass'n v. Med. Serv. Ass'n*, 745 F.2d 248, 260 (3d Cir. 1984))).

389. See *id.* (stating that geographic markets must conform to commercial realities).

390. See *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 51 (D.D.C. 2015) (outlining the defendant's arguments that the relevant market should have been larger and included more firms).

391. See *Todd v. Exxon Corp.*, 275 F.3d 191, 203 (2d Cir. 2001) (citing Bruce C. Fallick, *A Review of the Recent Empirical Literature on Displaced Workers*, 50 INDUS. & LAB. REL. REV. 5, 12 (1996) (noting the impact of employee specialization on the labor market)).

392. See *Complaint, In re Your Therapy Source, LLC.*, No. 1710134 (FTC July 31, 2018) (concerning the employment of therapy professionals); *Stipulation and Proposed Final Judgment, United States v. Knorr-Bremse AG*, No. 1:18-cv-00747 (D.D.C. Apr. 3, 2018) (concerning the employment of engineers and other highly specialized rail component positions); *In re High-Tech Empl. Antitrust Litig.*, 856 F. Supp. 2d 1103 (N.D. Cal. Apr. 18, 2012) (concerning the employment of

By contrast, non-managerial restaurant franchise employees may be able to switch to roles in retail franchises, supermarkets, or various other types of roles.³⁹³ In addition to the relevant labor market, the geographic region may be more expansive where the industry is less specialized.³⁹⁴

The courts will first consider qualitative characteristics of the market in order to define the substitutability of certain roles in various geographic regions.³⁹⁵ One qualitative factor is whether the industry views the defendant as a competitor in the proposed market (and whether the defendant views itself that way).³⁹⁶ Customers’ views on the interchangeability of demand may also be probative.³⁹⁷ In the Second Circuit’s *Todd v. Exxon* decision, the plaintiff contended that “the defendants’ own conduct and apparent perceptions support the alleged product market.”³⁹⁸

technology professionals).

393. See *Exxon Corp.*, 275 F.3d at 202–03 (“The district court found that “plaintiff fails to adequately explain why an antitrust lawyer employed by an oil company does not compete in the same market as an antitrust lawyer at a commercial bank or in a private law firm.”).

394. See, e.g., *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 441 (4th Cir. 2011) (“The relevant geographic market inquiry focuses on that geographic area within which the defendant’s customers who are affected by the challenged practice can predictably turn to alternative suppliers if the defendant were to raise prices or restrict its output.”).

395. See *Brown Shoe v. United States*, 370 U.S. 294, 325 (1962) (listing several practical indicia to discern interchangeability of use and cross-elasticity of demand).

396. See *United States v. Cont’l Can Co.*, 378 U.S. 441, 453–55 (1964) (relying on the fact that can and bottle makers compare prices); *United States v. Microsoft Corp.*, 253 F.3d 34, 52–53 (D.C. Cir. 2001) (rejecting middleware products in relevant market for search engines/OS since Microsoft viewed it as only a potential threat); *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098, 1121, 1160–61 (N.D. Cal. 2004) (rejecting proposed market since the term “high function” software lacked meaning in the industry).

397. See, e.g., *FTC v. Lundbeck*, 650 F.3d 1236, 1240 (8th Cir. 2011) (stating that two drugs were not interchangeable since prescribers did not switch between the two); *Jacobs v. Tempur-Pedic Int’l*, 626 F.3d 1327, 1338 (11th Cir. 2010) (stating that consumer preference was not adequately accounted for in defining the relevant product market); *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 199 (3d Cir. 1992) (considering consumer preference for different types of floor coverings to suit certain room); *R.D. Imps. Ryno Indus. v. Mazda Distribs.*, 807 F.2d 1222, 1225 (5th Cir. 1987) (finding that the market included foreign and domestic cars that consumers chose as substitutes).

398. See *Todd v. Exxon Corp.*, 275 F.3d 191, 205 (2d Cir. 2001) (describing the

Notably, the defendant relied on salary information within the petrochemical industry to execute the restraint; the plaintiff asserted that their reliance on this industry specific data indicated the relevant market.³⁹⁹ The Second Circuit noted that this argument was dismissed too hastily by the District Court since “industry recognition is well-established as a factor that courts consider in defining a market . . . [and that] economic actors usually have accurate perceptions of economic realities.”⁴⁰⁰ As a result, the defendant’s own data and conclusions about its competitive standpoint in the labor market can be very useful in assessing the relevant market.

One other factor that tends to indicate a defendant’s market power is that labor markets are inherently inelastic (unresponsive to changes in price).⁴⁰¹ This creates a situation where employers may possess more power than their market share indicates since employees cannot easily respond to wage decreases. For example, “supply could be elastic if . . . [employees] have the option of withholding some output from the market in hopes of higher prices in future years.”⁴⁰² However, labor is “an extremely perishable commodity—an hour not worked today can never be recovered.”⁴⁰³ As a result, “collusion among employers can drive the wage down to the individual’s reservation wage” since employees cannot easily substitute or “switch” to alternative employment to mitigate the hours they lose.⁴⁰⁴ The supply of labor, as a result, will not respond as quickly to changes in wages and this constitutes a strong structural indicator of the defendant’s inflated market power.⁴⁰⁵

defendant’s conduct with respect to defining the relevant market).

399. *See id.* at 204 (“In other words, the very fact that defendants rely on data regarding MPT salaries in the oil and petrochemical industry suggests that this is the relevant market.”).

400. *See id.* at 205 (citing *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 219 n.4 (D.C. Cir. 1986)).

401. *See id.* at 211 (“[T]he supply of labor has an inherently inelastic quality.”)

402. *Id.* at 201 (citing Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 313 (1991)).

403. *See id.* (describing the inelasticity of demand impacting labor markets).

404. *See id.* at 211 (explaining the effects of collusion on employees).

405. *See* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 7.2 (2010) [hereinafter MERGER GUIDELINES] (“The prospect of harm depends on the collective market power, in the relevant market, of firms whose

While qualitative indicators of market power may defend against a 12(b)(6) motion for dismissal, at trial, a plaintiff would also have to show economic evidence of the cross-elasticity of supply for employees and the geographic regions in which they operate.⁴⁰⁶ The primary economic test for this purpose is the hypothetical monopolist test.⁴⁰⁷ This method—employed by the FTC, Antitrust Division, and the vast majority of courts—asks whether a “hypothetical monopolist” is likely to impose a small but significant and non-transitory increase in price (SSNIP).⁴⁰⁸ If the hypothetical monopolist could sustain a price increase at this level, the product market and geographic area indicated by the firm or firms is the relevant market.⁴⁰⁹

A plaintiff should note that this test does not examine every reasonable substitute but only those that constrain the dominant firm from raising prices.⁴¹⁰ As a result, the plaintiff should distinguish potential substitutes that would not adequately constrain the defendant’s market power. In line with this concept, the “smallest market principle” will also help a plaintiff narrowly

incentives to compete are substantially weakened by coordinated conduct. This collective market power is greater, the lower is the market elasticity of demand.”).

406. See, e.g., *Flovac v. Airvac*, 84 F. Supp. 3d 95, 102 (D.P.R. 2015), *aff’d*, 817 F.3d 849 (1st Cir. 2016) (“[A]n antitrust plaintiff facing a properly configured summary-judgment motion, . . . must still marshal competent ‘adequate evidence to establish a genuine issue of material fact.’ And because defining the relevant market is, at bottom, a ‘key economic question,’ it stands to reason that [plaintiff] introduce *some* type of economic evidence . . .”) (citations omitted).

407. See, e.g., *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 277–78 (6th Cir. 2014) (noting the mechanics of the SSNIP in geographic market definition); MERGER GUIDELINES, *supra* note 405, § 4.2 (stating that the mechanics of the hypothetical monopolist test are the same for product market and geographic market definition).

408. See *In re Se. Milk*, 739 F.3d at 277–78 (describing the SSNIP test or hypothetical monopolist inquiry).

409. See, e.g., MERGER GUIDELINES, *supra* note 405, § 4.1.1 (“Specifically, the test requires that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future seller of those products (‘hypothetical monopolist’) likely would impose at least a small but significant and non-transitory increase in price . . .”).

410. See MERGER GUIDELINES, *supra* note 405, § 4.1.1 (“Market shares of different products in narrowly defined markets are more likely to capture the relative competitive significance of these products, and often more accurately reflect competition between close substitutes.”); see also *United States v. H&R Block, Inc.*, 833 F. Supp. 2d 36 (D.D.C. 2011).

define the relevant market.⁴¹¹ If one were to draw a circle around a firm, applying the test and extending the circle to the next potential substitute firms until the hypothetical monopolist could raise prices, this point would demarcate the bounds of the relevant markets—even though other larger supply and geographic markets may also exist.⁴¹² This principle helps define a market that is neither too narrow nor too broad, where interchangeability becomes more speculative.⁴¹³

IV. Defending Against an Ancillary Pro-Competitive Justification

If a plaintiff shows an agreement and an unreasonable restraint of trade under one of the three standards of review, the defendant can assert that the restraint was ancillary to a larger pro-competitive goal.⁴¹⁴ Luckily, if a plaintiff can meet the initial burden, it is likely that the defendant will not be able to successfully assert a pro-competitive justification.⁴¹⁵

First, what is an ancillary restraint? Judge Taft first introduced the concepts of naked and ancillary restraints in *United States v. Addyston Pipe & Steel Co.*⁴¹⁶ He rejected a bid-rigging scheme, stating that “no conventional restraint of trade can be enforced unless . . . it is merely ancillary to the main purpose of a

411. See, e.g., *FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 26 (D.D.C. 2015) (“[M]arket definition is guided by the ‘narrowest market’ principle. . . . The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn”).

412. See *id.* (describing the smallest market principle).

413. See MERGER GUIDELINES, *supra* note 405, § 4.2 (“[H]ypothetical monopolist test ensures that markets are not defined too narrowly, but it does not lead to a single relevant market.”).

414. See *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring) (explaining that the rule of reason applies to ancillary restraints—those that a part of a larger endeavor and are necessary for it to reach its “efficiency-enhancing benefits”); see also *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 5, 63 (1st Cir. 2004) (“[R]estraints that are truly ancillary to a larger efficiency-gaining enterprise . . . are not normally condemned per se without looking at likely consequences.”).

415. See *infra* Parts IV.A–C (describing the outer bounds of the ancillary restraints doctrine).

416. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), *aff’d*, 175 U.S. 211 (1899) (articulating the ancillary restraints doctrine for the first time).

lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract”⁴¹⁷ First, Judge Taft found that where the aim of the restraint is merely to restrain competition, it is naked and “there [is] nothing to justify or excuse the restraint.”⁴¹⁸ He then qualified the ancillary restraints doctrine by stating that an ancillary restraint must be “commensurate with the reasonable protection of the covenantee in respect to the main transactions affected by the contract.”⁴¹⁹ Finally, Judge Taft famously warned that “[t]here are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules . . . have set sail on a sea of doubt . . . in respect to contracts which have no other purpose . . . [other] than the mutual restraint of the parties.”⁴²⁰ No-poach agreements usually fall within this category.⁴²¹ Outside of a limited few cases, if a no-poach plaintiff can meet his burden under either the per se, quick-look, or extended rule of reason standard, it is unlikely that a defendant will be able to successfully assert a pro-competitive justification in response.⁴²²

A. *First, Collaboration or Integration Is Required*

A careful analysis of the ancillary restraints doctrine supports the conclusion that no-poach agreements are often not intended to promote any collaborative effort designed to bring pro-competitive benefits to consumers. To distinguish an ancillary restraint from a naked restraint, the first step is to determine if the restraint is

417. *See id.* (noting that without the ancillary restraints doctrine, nearly every contract would be an illegal restraint of trade).

418. *See id.* (using the term ‘naked’ to describe restraints of trade with no conceivable pro-competitive aim).

419. *See id.* (limiting the reach of the ancillary restraints doctrine to those restraints that are necessary to perpetuate the contract or collaboration).

420. *See id.* at 284 (hinting that to the extent an ancillary restraint’s benefits are unclear, courts should not speculate and extend this doctrine beyond its appropriate reach).

421. *See infra* Parts IV.A–C (describing how no-poach restraints are likely to fail under the ancillary restraints doctrine).

422. *See infra* Parts IV.A–C (describing the outer bounds of the ancillary restraints doctrine).

made with respect to a larger venture or collaboration.⁴²³ In *Polk Bros., Inc. v. Forest City Enterprises, Inc.*,⁴²⁴ Judge Easterbrook declared that “cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production.”⁴²⁵ By contrast, naked restraints are agreements that do not promote collaboration at the time they are adopted.⁴²⁶

Easterbrook illustrated this principle, stating that, “[i]f two people meet one day and decide not to compete, the restraint . . . does nothing but suppress competition. If A hires B as a salesman and passes customer lists to B, then B’s reciprocal covenant not to compete with A is ancillary” to a pro-competitive venture.⁴²⁷ The collaboration in *Polk Bros* fell into the latter category; two businesses entered a lease agreement for a shared building and agreed to divide between them the types of products they would sell.⁴²⁸ This restraint was an agreement that allowed the firms to collaborate safely; it limited free-riding where one company could spend large amounts of money on advertising—only to be undercut by its neighbor at the last second.⁴²⁹ It allowed the companies to complement each other’s products and created a new offering to the public.⁴³⁰

423. See 11 AREEDA & HOVENKAMP, *supra* note 28, § 1907 (1998) (analyzing the steps with respect to raising a pro-competitive efficiency argument); see, e.g., *Am. Needle, Inc. v. Nat’l Football League*, 560 U.S. 183, 203 (2013) (“When ‘restraints on competition are essential if the product is to be available to all,’ per se rules of illegality are appropriate, and instead the restraint must be judged according to the flexible Rule of Reason.”); *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (“[I]t is commonly understood today that per se condemnation is limited to ‘naked’ . . . agreements, that is, those that are not part of a larger pro-competitive joint venture.”).

424. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185 (7th Cir. 1985).

425. *Id.* at 188 (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)).

426. See *id.* at 189 (explaining that the restraint’s benefits are judged by the time they are entered).

427. See *id.* (describing the ancillary restraints doctrine and when it applies).

428. See *id.* at 187–88 (describing the venture).

429. See *id.* at 190 (“[T]he control of free riding is a legitimate objective of a system of distribution.”).

430. See *id.* (“Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production.”).

Similarly, in *Broadcast Music v. Columbia Broadcasting System*,⁴³¹ the Supreme Court found that the collaboration between thousands of authors and composers to grant licenses for a blanket fee was not a naked restraint.⁴³² It “accompanied the integration of sales, monitoring, and enforcement,” to offer benefits to buyers and sellers of the music.⁴³³ In *NCAA v. Board of Regents of University of Oklahoma*,⁴³⁴ the Supreme Court also found that the NCAA’s broadcast provisions may be necessary to coordinate its member teams “if the product is to be available at all” to the public.⁴³⁵ In all of these cases, the restraint was intended to facilitate larger collaborations between competing entities.

By contrast, in *Timken Roller Bearing Co. v. United States*,⁴³⁶ the Supreme Court found that a cartel was not a pro-competitive venture since there was no integration and its sole purpose was to eliminate a competitor.⁴³⁷ In *Arizona v. Maricopa County Medical Society*,⁴³⁸ the Court also found that a price-fixing agreement was a naked restraint in the absence of any meaningful integration between network doctors.⁴³⁹ The joint network of doctors was simply a grouping of independent competitors, it did not promise any new, integrated service options, and it only resulted in the manipulation of prices for medical care.⁴⁴⁰ A similar case in the Seventh Circuit met similar results; in *General Leaseways, Inc. v.*

431. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979).

432. *See id.* at 7 (remanding for analysis under the rule of reason rather than condemning the restraint as per se unlawful).

433. *See id.* at 2 (stating its rationale for rule of reason treatment).

434. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984).

435. *See id.* at 100 (applying the quick-look or abbreviated rule of reason standard of review).

436. *See Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), *overruled by Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752 (1984).

437. *See id.* at 596 (accepting the lower court’s findings that the purpose of the restraint was to protect each other’s markets and eliminate other competition).

438. *Arizona v. Maricopa Med. Soc’y*, 457 U.S. 332 (1982).

439. *See id.* at 355 (stating that the pricing lists coordinated by the medical society were per se unlawful violations instituted by competitors).

440. *See id.* (“[T]he foundations are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunity for profit . . .”).

National Truck Leasing Ass'n,⁴⁴¹ Judge Posner stated that a trucking association was not integrated with the purpose of creating any new functionality and “sells nothing.”⁴⁴² Finally, in *Palmer v. BRG of Georgia, Inc.*,⁴⁴³ the Supreme Court found that agreements to divide the bar preparation market were per se violations.⁴⁴⁴ No other cooperation between the firms occurred, they were simply competitors dividing market territories.⁴⁴⁵ Additional Seventh Circuit decisions further support the idea that productive output and integrative efforts are required.⁴⁴⁶ Other jurisdictions concur in this analysis as well.⁴⁴⁷

One of the only plausible integrations exists when two firms engage in a joint venture where the no-poach restraint is designed to prevent employee raiding during the collaboration or to protect intellectual property that certain employees may possess.⁴⁴⁸

441. *General Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588 (7th Cir. 1984).

442. *See id.* at 595 (“The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se rule to the rule of reason category.”).

443. *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990).

444. *See id.* at 50 (citing *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (“The defendants in *Topco* had never competed in the same market, but had simply agreed to allocate markets.”)).

445. *See id.* (“Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other.”).

446. *See Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (stating that attorneys’ agreements not to advertise in certain territories were naked market divisions because they were unrelated to the dissolution of their partnership or any collaborative purpose); *Blue Cross & Blue Shield United v. Marshfield Clinic*, 65 F.3d 1406 (7th Cir. 1995) (stating that the clinic failed to allege that the restraint was related to their Free Flow collaboration and that, therefore, the restraint could not be ancillary).

447. *See, e.g., United States v. Apple*, 791 F.3d 290, 326 (2d Cir. 2015) (stating that Apple’s per se illegal price fixing agreements with publishers were not necessary to implement the iBookstore); *Engine Specialties v. Bombardier*, 605 F.2d 1, 11 (1st Cir. 1979) (“[T]he fact that the alleged territorial restrictions were facially connected to a joint venture cannot immunize it from the reach of the antitrust laws.”); *New York ex rel. Spitzer v. St. Francis Hosp.*, 94 Supp. 2d 399 (S.D.N.Y. 2000) (“[C]laims of improved quality of service do not shield price-fixing and market allocation activities from per se treatment.” (quoting *Arizona v. Maricopa Med. Soc’y*, 457 U.S. 332, 351 (1982))); *United States v. Dynallectric Co.*, 859 F.2d 1559, 1562 (11th Cir. 1988).

448. *See AYA Healthcare Services, Inc. v. AMN Healthcare, Inc.*, 2018 WL

Additionally, no-poach agreements may protect the value of an investment, such as the purchase of a business and its assets.⁴⁴⁹ Finally, and only with respect to asserting an integration between firms, no-poach agreements may be ancillary to a greater integration between entities in a franchise system or other vertically related entities.⁴⁵⁰ Beyond these collaborations, it is difficult to conceive of a situation in which no-poach agreements may facilitate an integration between firms. However, all three of these potential justifications should fail in a no-poach case for being either unnecessary to achieve the venture’s goal,⁴⁵¹ or for failing to promote pro-competitive efficiencies.⁴⁵²

B. Ancillary Restraints Must Be Commensurate with the Main Transaction and Cannot Be Overly Broad

If the restraint facilitates a transaction, the restraint must be commensurate or necessary to promote the main transactions affected by the contract.⁴⁵³ This concept applies to non-compete

3032552, at *10–12, *15 (S.D. Cal. June 19, 2018) (finding that defendants were plausibly engaged in a joint venture).

449. See *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143–45 (3d Cir. 2001) (finding that a no-poach restriction conditioned on the sale of a business was an ancillary transaction).

450. See *Deslandes v. McDonald’s USA, LLC*, 2018 WL 3105955, at *2, *7 (N.D. Ill. June 25, 2018) (weighing whether a no-poach restraint was ancillary to the McDonald’s collaborative franchise venture).

451. See *infra* Part IV.B (stating that ancillary restraints must be necessary to achieve the pro-competitive goals intended by the collaboration).

452. See *infra* Part IV.C (noting that only certain types of pro-competitive justification arguments are recognized in antitrust law).

453. See 11 AREEDA & HOVENKAMP, *supra* note 28, § 1907 (1998) (noting the limits to the ancillary restraints doctrine). See, e.g., *Eichorn v. AT&T Corp.*, 248 F.3d 131, 146 (3d Cir. 2001)

The question in every case involving a covenant not to compete ancillary to the sale of a business is whether the restraint is reasonably calculated to protect the legitimate interests of the purchaser in what he has purchased, or whether it goes so far beyond what is necessary as to provide a basis for the inference that its real purpose is the fostering of monopoly.

Perceptron, Inc. v. Sensor Adaptive Machs., 221 F.3d 913, 919 (6th Cir. 2000) (“Covenants not to compete are valid if (1) ancillary to the main business purpose of a lawful contract, and (2) necessary to protect the covenantee’s legitimate

restraints particularly well and these restraints are comparable to no-poach agreements in this respect.⁴⁵⁴ In deciding whether to uphold this type of restraint, courts usually examine the

property interests, which require that the covenants be as limited as is reasonable to protect the covenantee's interests.”); *LDDS Commc’ns v. Automated Commc’ns*, 35 F.3d 198, 199 (5th Cir. 1994)

The district court read the two covenants as exacting a nationwide cease fire although they were part of a sale of assets in Arizona and New Mexico . . . We resolve their ambiguity in favor of the lesser restraint and are persuaded that these two covenants not to compete are not fairly read to reach beyond Arizona and New Mexico.

Basicomputer Corp. v. Scott, 973 F.2d 507, 512 (6th Cir. 1992) (“[A] non-competition covenant ‘is reasonable if it is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.’” (quoting *Raimonde v. Van Vlerah*, 325 N.E.2d 544, 547 (1975))).

454. *See, e.g.*, *Global Telesystems v. IPNQwest, N.V.*, 151 F. Supp. 2d 478, 484 (S.D.N.Y. 2001) (granting a temporary restraining order prohibiting the defendant from employing professional services of the defendant’s former employee because there was a plain no-solicit and no-hire clause in an agreement between the parties and the hiring would result in hardship to the plaintiff); *Automated Concepts Inc. v. Weaver*, 2000 U.S. Dist. LEXIS 11560, at *11–12 (N.D. Ill. 2000)

Unlike a covenant not to compete, which has the potential of threatening a person’s livelihood, a covenant not to solicit employees merely prohibits a person from pirating employees of the former employer and inducing them to work for another entity . . . Thus, the Court finds that an employer’s interest in preventing a current or former employee from raiding its employee rosters is reasonable.

reasonableness of the restraint with respect to duration,⁴⁵⁵ territory,⁴⁵⁶ and type of product or service.⁴⁵⁷

The Supreme Court, D.C. Circuit, and Seventh Circuit have also condemned other types of restraints by these same metrics.⁴⁵⁸ In *Blackburn v. Sweeney*,⁴⁵⁹ the Seventh Circuit noted that the

455. See, e.g., *Compton v. Metal Products, Inc.*, 453 F.2d 38, 45 (4th Cir. 2010) (“[C]ovenants not to compete which are unlimited as to space or time are invalid and unenforceable.”); *Eichorn v. AT&T Corp.*, 248 F.3d 131, 145 (3d Cir. 2001) (stating that a covenant not to compete does not violate the Sherman Act when reasonably limited in time and territory); *Tri-Continental Fin. Corp. v. Tropical Marine Enters.*, 265 F.2d 619, 624–25 (5th Cir. 1959) (affirming lower court’s finding that a restrictive covenant prohibiting the purchase of a vessel was reasonable in time, territory, and extent); *Sound Ship Bldg. Corp. v. Bethlehem Steel Corp.*, 387 F. Supp. 252, 256 (D.N.J. 1975), *aff’d*, 533 F.2d 96 (3d Cir. 1976) (finding that the covenant was reasonable under the meaning of the Sherman Act because the covenant was “ancillary to the main purpose of the contract . . . sufficiently limited in scope and time . . . Plaintiff has not alleged facts to indicate [defendant] had monopolistic powers”); *Alders v. AFA Corp.*, 353 F. Supp. 654, 656 (S.D. Fla. 1973), *aff’d mem.*, 490 F.2d 990 (5th Cir. 1974) (“[I]t has been recognized that the validity of covenants not to compete turns upon the reasonableness of the restraint in each case.”).

456. See, e.g., *Lektro-Vend Corp. v. Endo Co.*, 660 F.2d 255, 267 (7th Cir. 1981) (“[M]ost modern courts will uphold a covenant to the extent that a breach of the covenant has occurred within a reasonable geographic area and time period, and, where applicable, with respect to a product reasonably related to the legitimate purpose of the restraint.”); *Domino’s Pizza, Inc. v. El-Tan, Inc.*, 1995 U.S. Dist. LEXIS 20550, at *10 (N.D. Okla. May 1, 1995) (finding that a covenant restricting the operation of a pizza business after termination of the contract within a 10-mile radius was reasonable); *Verson Wilkins, Ltd. v. Allied Prods. Corp.*, 723 F. Supp. 1, 12013 (N.D. Ill. 1989) (stating that territorial limits were unreasonable because they were not limited to protecting goodwill).

457. See, e.g., *Drury Inn-Col. Springs v. Olive Co.*, 878 F.2d 340, 343 (10th Cir. 1989) (finding that the 20% price term set was “unrelated to the conduct and action intended by the agreement.”); *Newburger, Loeb & Co. v. Gross*, 563 F.2d 1057, 1082–83 (2d Cir. 1977) (stating that a non-compete agreement was reasonable where it limited only the trading of securities for a former employer’s customers).

458. See *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (stating that market allocation restraints were not ancillary to the sale of a business due to the timing of the agreement); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (requiring an ancillary restraint to be limited to the geographical bounds the larger agreement impacts); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (2005) (limiting an ancillary restraint to the products at issue in the collaboration between firms).

459. See *Blackburn*, 53 F.3d at 830 (“Therefore, because the harm suffered by a consumer forced to pay inflated prices, and the harm inflicted on an excluded competitor and onetime cohort . . . both result from the anti-competitive effect of

timing of the agreement is essential; where a firm has disbanded, it cannot argue that market allocation restraints were necessary to protect the firms during their dissolution.⁴⁶⁰ Further, in *Palmer*, the Court looked at geography, finding that an allocation of the U.S. market as a whole went beyond the firms' statement that the restraint protected its interests regarding an acquisition in Georgia.⁴⁶¹ In reality, the restraint was intended to lock the smaller company out of competition in other U.S. territories in exchange for the entire Georgia market.⁴⁶² Finally, in *Polygram Holding, Inc. v. F.T.C.*,⁴⁶³ Judge Ginsburg of the D.C. Circuit found that an agreement to limit advertising and discounting of The Three Tenors' two previous recordings went beyond the joint venture's purpose of distributing a recording of their 1998 concert.⁴⁶⁴ The restraint instead simply destroyed the "competition of products that were not part of the joint undertaking."⁴⁶⁵

No-poach agreements may be subject to these same defects. The timing of a no-poach agreement should coincide with a collaboration and not after the collaborative effort has been completed.⁴⁶⁶ It cannot be unlimited in duration, geography, or other relevant bounds.⁴⁶⁷ Another common issue is that if a no-poach agreement applies broadly to all employees rather than

the cartel agreement, they are both antitrust injuries.").

460. See *id.* at 828–29 (“*Polk* teaches that courts must look to the time an agreement was adopted in assessing its potential for promoting enterprise and productivity—or, in this case, competition in the legal market.” (citing *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 189 (7th Cir. 1985))).

461. See *Palmer v. BRG of Ga., Inc.*, 874 F.2d 1417 (11th Cir. 1989), *rev'd*, 498 U.S. 46 (1990) (“The written agreement has the effect of reducing price competition in Georgia and markets into which BRG might have otherwise entered absent the agreement.”).

462. See *id.* (“The agreement also has no redeeming procompetitive virtues.”).

463. *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

464. See *id.* at 38 (“[M]ere profitability or cost savings have not qualified as a defense under the antitrust laws.” (quoting *Law v. NCAA*, 134 F.3d 1010, 1023 (10th Cir. 1998))).

465. See *id.* (noting the restraint's lack of pro-competitive effects).

466. See *Blackburn v. Sweeney*, 53 F.3d 825, 829 (7th Cir. 1995) (stating that market allocation restraints were not ancillary to the sale of a business due to the timing of the agreement).

467. See *supra* notes 453–465 and accompanying text (noting that the scope of the restraint must be appropriately limited).

certain joint venture employees, the restraint goes beyond the intent of the collaboration.⁴⁶⁸

This question is central in franchise no-poaching cases and the franchise justification will likely hinge on whether the restraint is commensurate with and necessary to promote the larger integration.⁴⁶⁹ In the franchise context, the DOJ seems to more readily accept the franchise and franchisee relationship as a potential justification in most franchises.⁴⁷⁰ It states that “territorial allocation agreements are common in franchise and analogous relationships. They serve to [increase interbrand competition and] limit geographically ‘the number of sellers of a particular product competing for the business of a given group of buyers.’”⁴⁷¹ It translates this justification to a no-poach restraint, stating that it “is a vertical allocation agreement ‘limiting the number of [employers] competing for . . . a given group of [employees] . . .’”⁴⁷²

The DOJ relies on *Continental T.V., Inc. v. GTE Sylvania Inc.*, but in this case, a television manufacturer used territory allocations to limit the sales of its products to the franchise locations that it approved.⁴⁷³ In a manner that is reminiscent of the *Colgate* discussion above, the restraint in *Continental* only concerned the vertical relationship between manufacturer and retailer.⁴⁷⁴ The Court narrowly recognized that “vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of

468. See *Polygram Holding, Inc.*, 416 F.3d 29 (limiting an ancillary restraint to the products at issue in the collaboration between firms).

469. See *infra* notes 470–472 and accompanying text (describing the DOJ’s position on a franchise system as a pro-competitive justification).

470. See *Stigar*, *supra* note 111, at 17 (“Accordingly, because vertical territorial allocation agreements may have both procompetitive and anticompetitive effects, courts evaluate their legality using the rule of reason’s balancing approach.”).

471. See *Stigar*, *supra* note 111, at 17 (describing the rationale for the potential pro-competitive benefits of franchise no-poach restraints).

472. See *Stigar*, *supra* note 111, at 17 (applying its theory in the no-poach context).

473. See *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 38-39 (1977) (describing the vertical restrictions).

474. See *id.* (describing the vertical restrictions).

his products.”⁴⁷⁵ By limiting the “number of sellers of a particular product competing for the business of a given group of buyers,” the manufacturer can ensure and more easily monitor the quality of its sellers, encourage increased investments in the sale of its products, and standardize services offered by its retailers.⁴⁷⁶ The vertical restriction was directly related to the distribution of its goods and necessary to achieve these effects.⁴⁷⁷

This is not the case in franchise no-poach claims because the restraints impact the horizontal labor market and are too attenuated; as a result, no-poach provisions do not similarly increase the efficiency of the franchisees within the brand.⁴⁷⁸ In fact, the opposite result occurs; by completely eliminating competition among franchisees for employees, the strongest franchisees cannot freely compete for the most talented employees.⁴⁷⁹ As a result, the franchisees have a less competitive work force and this has a negative impact on the downstream product or service market.⁴⁸⁰ A no-poach provision is not related to the goal of promoting investment, increased efficiency, or standardization of quality and services across the franchise.⁴⁸¹ This is because a franchise no-poach restraint uses a vertical relationship in one market to create a restriction in another; it is not a purely vertical restraint that promotes the franchise or its downstream products.⁴⁸²

Additionally, the Supreme Court took care in *Continental TV* to distinguish the restraint from that in *United States v. Topco*

475. *Id.* at 54–55.

476. *See id.* at 54–57 (noting the intrabrand benefits of vertical restraints between a manufacturer and retailer).

477. *See id.* at 38–39 (describing how its restraints were implemented according to its marketing strategy to phase out wholesalers in favor of specialized retailers).

478. *See supra* Part I.B (describing the anticompetitive effects of a no-poach agreement).

479. *See supra* Part I.B.

480. *See supra* Part I.B.

481. *See supra* notes 475–477 and accompanying text (describing intrabrand efficiencies of vertical restraints and how no-poach agreements disrupt competition in downstream product markets).

482. *See, e.g.,* *Butler v. Jimmy John’s Franchise, LLC*, 331 F. Supp. 3d 786, 795 (S.D. Ill. 2018) (recognizing vertical elements but stating that the “effects are felt strictly at the horizontal level”).

Associates (and reaffirmed that previous decision in a footnote).⁴⁸³ Topco was a cooperative association of independent regional supermarket chains; its member supermarket chains wanted to create a brand of food products that it could distribute through associated supermarkets.⁴⁸⁴ However, “members [had] a veto of sorts over actual or potential competition in the territorial areas in which they are concerned.”⁴⁸⁵ Topco maintained that “it [needed] territorial divisions to compete with larger chains . . . [and] the association actually increases competition by enabling its members to compete successfully with larger regional and national chains.”⁴⁸⁶

This justification was rejected.⁴⁸⁷ The Supreme Court found that Topco, a joint venture between horizontal competitors, engaged in per se illegal horizontal market allocations by restricting new members who operated too closely to the existing members.⁴⁸⁸ The purpose of the restraint was not necessary or related to the purpose of promoting the brand (the joint venture) but was a separate mechanism to shelter its members from competition.⁴⁸⁹ Although *Topco* can be distinguished from franchises in that the members of the association had very significant control over the venture, making the restraint more clearly horizontal, this question is still a factual one to be decided

483. See *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 57 n. 27 (1977) (“United States v. Topco Associates . . . is not to the contrary, for it involved a horizontal restriction among ostensible competitors.”).

484. See *United States v. Topco Assocs.*, 405 U.S. 596, 598-601 (1972) (describing the Topco Associates venture).

485. *Id.* at 602.

486. *Id.* at 605.

487. See *id.* at 606 (“The [district] court held that Topco's practices were procompetitive and, therefore, consistent with the purposes of the antitrust laws. But we conclude that the District Court used an improper analysis in reaching its result.”).

488. See *id.* at 609 (finding that the restraints were per se illegal, matching the types of restraints found in *United States v. Sealy Inc.*).

489. See *id.* (“Just as in this case, Sealy agreed with the licensees not to license other manufacturers or sellers to sell Sealy-brand products in a designated territory in exchange for the promise of the licensee who sold in that territory not to expand its sales beyond the area demarcated by Sealy.”).

in each case.⁴⁹⁰

C. The Justifications Must Actually Promote Competition

Finally, the Sherman Act is limited to the protection of competition, reflecting society's judgment that competition is the best method to ensure fair prices and high-quality products.⁴⁹¹ As a result, justifications that go beyond this limited inquiry should be squarely rejected; the antitrust laws do not support "a defense based on the assumption that competition itself is unreasonable."⁴⁹² These types of arguments generally possess the defect of focusing on speculative long-term effects, allowing firms in cartels to dominate stronger firms when natural market forces would have eliminated them, or acknowledging short-term losses exchanged for uncertain future benefits.⁴⁹³

This seems to have been an undercurrent in *Topco* as well.⁴⁹⁴ The Court rejected the defendant's argument that "it needs territorial divisions to compete with larger chains" and that the "anti-competitive effect [of] these practices . . . is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories."⁴⁹⁵ If the Court had accepted this argument, it would have essentially taken the position that "competition itself is unreasonable."⁴⁹⁶ If natural market forces result in the demise of smaller grocery chains in favor of larger chains, that is the will

490. See *id.* at 598 ("All of the stock in Topco is owned by the members The board of directors, which controls the operation of the association, is drawn from the members and is normally composed of high-ranking executive officers of member chains.").

491. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (rejecting the argument that a restraint is justified by the dangers of inferior engineering services).

492. See *id.* (recognizing that the argument that public policy dictates against competition is inconsistent with the Sherman Act).

493. See 11 AREEDA & HOVENKAMP, *supra* note 28, § 1906(b) (1998) (noting the defects of arguments that restriction of competition is necessary).

494. See *United States v. Topco Assocs.*, 405 U.S. 596, 605 (1972) (describing the defendant's justification).

495. *Id.*

496. See *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 (rejecting the argument that a restraint is justified by the dangers of inferior engineering services).

of market and this result is not to be deterred by a conspiracy that artificially props up less efficient firms.⁴⁹⁷ Variations of this argument, such as the argument that certain restraints are necessary to withstand “ruinous competition” or to stabilize a market have also been squarely rejected by the Supreme Court.⁴⁹⁸ And arguments that restraints are necessary in a shortage of labor or to balance losses in one market meet similar results.⁴⁹⁹

Finally, one argument that seems compelling at first is that a decrease in labor costs will lead to efficiencies by increasing a firm’s profitability and ability to create additional output for the consumers in other markets.⁵⁰⁰ This argument appeared to be

497. See *id.* at 689 (“[I]t cannot be argued that monopolistic arrangements in a particular industry having special characteristics should be allowed because such monopolistic arrangements will better promote trade and commerce than competition.”).

498. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221–22 (1940) (“Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies.”); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (“The reasonable price fixed today may through economic and business changes become the unreasonable price of to-morrow. Once established, it may be maintained and unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.”); *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 331 (1897)

To the question why competition should necessarily be conduct to such an extent as to result in this relentless and continued war, to eventuate only in the financial ruin of one or all of the companies indulging in it, the answer is made that, if competing railroad companies be left subject to the sway of free and unrestricted competition, the results above foreshadowed necessarily happen from the nature of the case.

499. See *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984) (rejecting the idea that restrictions in televising games were necessary to protect a separate market for live game attendance); *Catalano, Inc. v. Target Sales, Inc.*, 46 U.S. 643, 648 (1980) (rejecting the premise that eliminating competition in credit terms would refocus price competition); *Nat’l Macaroni Mfrs. Ass’n v. FTC*, 345 F.2d 421, 423 (7th Cir. 1986) (noting that an association’s restraint on durum and wheat used to manufacture macaroni were not justified by shortages in these markets); *Hosp. Corp. of Am. V. FTC*, 807 F.2d 1381 (7th Cir. 1986) (rejecting the argument that price coordination in one merging market would be offset by competition in other services).

500. See *supra* notes 423–435 and accompanying text (reviewing the pro-competitive justifications asserted in *Polk* and *Broadcast Music*).

vindicated in *Polk* and *Broadcast Music*.⁵⁰¹ However, in these cases, the restraints actually increased competition, created new and tangible competitive offerings, and were necessary to facilitate greater collaboration between the firms.⁵⁰² No-poach agreements do not fulfill these requirements; they instead appear to be attempts to increase revenue with speculative future benefits.⁵⁰³ The mere profitability of a practice or the creation of cost savings does not qualify as a defense under the Sherman Act; after all, what would stop a firm from simply pocketing the profits?⁵⁰⁴ From a more technical standpoint, these profits should also not qualify as efficiencies since they do not benefit the relevant market for labor.⁵⁰⁵

Finally, antitrust law also does not tend to apply rule of reason analysis to the “costs of operating the competitive market itself.”⁵⁰⁶ For example, information and other advertising costs are necessary to ensure ongoing competition between firms.⁵⁰⁷ The Supreme Court has explicitly recognized the necessity of correcting this information and other market information asymmetries.⁵⁰⁸ The costs of competing for labor and the information asymmetries

501. See *supra* notes 423–435 and accompanying text (reviewing the pro-competitive justifications asserted in *Polk*, *Broadcast Music*, and *Board of Regents*).

502. See *supra* notes 423–435 and accompanying text (reviewing the pro-competitive justifications asserted in *Polk* and *Broadcast Music*).

503. See *supra* note 493 and accompanying text (describing how arguments that are unrelated to the goal of increasing competition often have the effect of asserting speculative future benefits).

504. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 38 (D.C. Cir. 2005) (“A restraint cannot be justified solely on the ground that it increases the profitability of the enterprise that introduces the new product . . .”).

505. See, e.g., MERGER GUIDELINES, *supra* note 405, § 7.2 (stating that merger specific efficiencies are only recognized if they “would be sufficient to reverse the merger’s potential to harm customers in the relevant market, e.g., by preventing price increases in that market”).

506. See 11 AREEDA & HOVENKAMP, *supra* note 28, § 1907 (1998) (highlighting antitrust law’s goal of promoting competition rather than quelling these processes).

507. See 11 AREEDA & HOVENKAMP, *supra* note 28, § 1907 (1998) (“[A] sine qua non of a well-functioning market is well informed participants and an agreement not to advertise threatens the right of consumers to become well informed.”).

508. See *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 764 (1999) (stating that advertising restrictions could restrain price although the probability of this harm was uncertain).

for wage information that no-poach agreements create fall squarely into this protected category.⁵⁰⁹ As a result, justifications for no-poach restraints—which have the effect of manipulating information costs in the labor market—are inherently suspect and have few plausible pro-competitive purposes.⁵¹⁰

V. Conclusion

Although the prosecution of no-poach restraints is relatively new and relevant jurisprudence is pending in this area, basic doctrinal principles of antitrust law support their condemnation. The nature of these restraints is inherently horizontal because they create restrictions between competitors in the labor market.⁵¹¹ A horizontal agreement can also be found via a hub-and-spoke theory in franchise cases.⁵¹² A horizontal agreement can also include companies which are vertically related in certain markets (still competitors in the same labor market).⁵¹³ And when these employers enter into no-poach agreements, they form cartels.⁵¹⁴ They are motivated by a shared desire to depress the wages of employees and reduce employee turnover between them.⁵¹⁵ This type of agreement is unlikely to occur in the absence of collusion since employers are usually motivated to compete against each other for the best employees.⁵¹⁶

509. See *No-Poach Approach*, *supra* note 59 (“Robbing employees of labor market competition deprives them of job opportunities, information, and the ability to use competing offers to negotiate better terms of employment.”).

510. See, e.g., *Deslandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2018 WL 3105955, at *8 (N.D. Ill. June 25, 2018) (“Dividing the market does not promote intrabrand competition for employees, it stifles interbrand competition.”).

511. See *supra* Part I.C.1 (discussing the antitrust agencies’ theory on no-poach restraints).

512. See *supra* Part II.C. (arguing that the hub-and-spoke theory may be applicable to franchise no-poach restraints).

513. See *supra* notes 311–324 and accompanying text (describing how no-poach agreements should be viewed as horizontal restraints).

514. See *supra* note 55 and accompanying text (explaining how the agencies have described no-poach agreements as “hardcore cartel conduct”).

515. See *supra* note 32 and accompanying text (explaining that competition in the labor market provides employees with higher wages, among other things).

516. See *supra* notes 61–65 and accompanying text (detailing the effects of no-poach agreements).

Because no-poach agreements are—in form and effect—horizontal market allocation agreements, the agencies’ position that they warrant per se condemnation is appropriate.⁵¹⁷ In the alternative, no-poach agreements are well suited for quick-look analysis given their inherently anticompetitive nature and direct impact on price information in the labor market.⁵¹⁸ There is a strong case for either per se or quick-look condemnation.⁵¹⁹ And although the extended rule of reason is the standard of last resort for an antitrust plaintiff, it is possible to prevail under this standard as well, especially where the affected employees have specialized roles.⁵²⁰

The antitrust plaintiff’s real challenge is meeting the initial burden.⁵²¹ Once this has been accomplished, it is unlikely that a defendant can successfully raise a pro-competitive justification defense and receive a more lenient standard of review, such as the rule of reason.⁵²² Only in limited circumstances are no-poach agreements truly ancillary to integrations between firms, necessary for the larger venture, and pro-competitive in their purpose.⁵²³ A close examination of no-poach agreements reflects their anticompetitive nature and dearth of efficiencies or justifications.⁵²⁴ Luckily, antitrust jurisprudence has evolved over

517. See *supra* notes 56–60 and accompanying text (stating the antitrust agencies’ position on the legal treatment of no-poach agreements).

518. See discussion *supra* Part III.B (discussing the applicability of the quick-look rule in no-poach cases given their direct impact on price and output).

519. See discussion *supra* Parts III.A–B (examining the applicability of the per se and quick-look rule in no-poach cases).

520. See discussion *supra* Part III.C (describing how a no-poach plaintiff should approach an extended rule of reason analysis).

521. See *supra* Parts IV.A–C (describing how no-poach restraints are likely to fail under the ancillary restraints doctrine).

522. See *supra* Parts IV.A–C (stating that once a no-poach plaintiff meets their burden under either the per se, quick-look, or extended rule of reason standard, it is unlikely that a defendant will be able to assert a pro-competition justification).

523. See *supra* Parts IV.A–C (explaining that a pro-competitive justification offered must promote an integrative venture, serve a pro-competitive purpose, and be commensurate or necessary to achieve the intended purpose).

524. See *supra* Parts II.B (describing how no-poach restraints, on their face, are anticompetitive even to those with only a rudimentary understanding of economics), IV (noting no-poach restraints’ lack of redeeming qualities or pro-competitive purposes).

the years to carve out several places to reject these types of restraints.