UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

DANIELLE SEAMAN, individually and on behalf of all others similarly situated,	)	Civil No. 1:15-cv-462
Plaintiff,	)	Judge Catherine C. Eagles
v.	)	
DUKE UNIVERSITY, *et al.*,	)	
Defendants.	)	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTEREST OF THE UNITED STATES

The United States respectfully submits this statement pursuant to 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal court. The United States has a strong interest in the correct application of the federal antitrust laws.

The United States has a particular interest in addressing the proper application of the "state action" defense to liability under *Parker v. Brown*, 317 U.S. 341 (1943), and the standard for judging the legality of alleged no-poach agreements under Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States has filed numerous briefs on the "state action" doctrine. The United States also has repeatedly enforced the antitrust laws against no-poach agreements, *United States v. Knorr-Bremse AG*, No. 18-cv-747, Final Judgment, Doc. 19 (D.D.C. July 11, 2018); *United States v. eBay, Inc.*, No. 12-cv-5869, Final Judgment, Doc. 66 (N.D. Cal. Sept. 2, 2014); *United States v. Adobe Sys., Inc.*, No. 1:10-cv-1629, Final Judgment, Doc. 17 (D.D.C. Mar. 18, 2011); *United States v. Lucasfilm Ltd.*, No. 1:10-cv-2220, Final Judgment, Doc. 6-1 (D.D.C. May 9, 2011), and recently filed a statement of interest on the issue in *In re Railway Industry Employee No-Poach Antitrust Litigation*, No. 2:18-mc-798 (W.D. Pa. Feb. 8, 2019) (Doc. 158).

The United States takes no position on the factual question of whether defendants entered into a no-poach agreement. It does, however, urge the Court to reject defendants' arguments that such an agreement would be exempt from antitrust liability under *Parker* and must be analyzed under the full rule of reason.

BACKGROUND

Dr. Danielle Seaman worked as an Assistant Professor of Radiology at Duke School of Medicine in the Cardiothoracic Imaging Group. Second Amended Complaint (SAC), Doc. 109, ¶ 52.[1] In February 2015, she contacted the Chief of Cardiothoracic Imaging at University of North Carolina Chapel Hill School of Medicine (UNCSM) and expressed interest in becoming a Thoracic Radiologist at UNCSM. *Id.* ¶ 56. The Chief e-mailed her that she "would be a great fit" for UNCSM but "[u]nfortunately" the Dean's office confirmed "that lateral moves of faculty between Duke and UNC are not permitted" because of a "'guideline' which was agreed upon between the deans of UNC and Duke a few years back." *Id.* ¶ 57. Under the guideline, "they would not hire each other's faculty in a lateral move [unless] there is an upward move, ie a promotion." *Id.* ¶ 59.

Dr. Seaman filed a class action against Duke and UNC entities, alleging that this "no-hire agreement" is a *per se* violation of Section 1 of the Sherman Act. SAC ¶¶ 9-18, 69-80. She alleged that, because "Duke/DUHS and UNC/UNC Health are the two largest academic medical systems in North Carolina, and indeed two of the largest employers in the state, their no-hire agreement has reduced competition for medical facility faculty and certain staff, thereby suppressing faculty and staff pay." *Id.* ¶ 2.

[1] This statement relies on the SAC and public versions of briefs provided to the United States. Under the case management order, Doc. 299, those briefs have not yet been publicly filed.

Defendants moved to dismiss the Section 1 claims under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). This Court denied the motions. The UNC entities settled, "securing broad injunctive relief for the Settlement Class." Doc. 185, at 3. The Court certified a "class composed of faculty members." Doc. 189, at 24.

This Court set a comprehensive schedule for summary judgment briefing. Doc. 299. This Statement concerns those parts of the parties' briefs addressing the "state action" doctrine and the standard for judging the legality of the alleged no-hire agreement.[2]

The Duke Defendants (Duke) argue that they are entitled to summary judgment because UNC "is a sovereign representative of the state" that is automatically exempt under *Parker*. Duke Br. for Summ. Judg. on State Action Immunity (Duke SA Br.), at 1-2, 12-15. Duke argues, in the alternative, that Section 1 does not apply because UNC "was acting pursuant to a clearly articulated state policy" to displace competition in "faculty hiring, compensation, and retention." *Id.* at 1-2, 4-12. In contrast, plaintiffs argue that *Parker* exemption is inapplicable because (i) UNC is not a sovereign actor entitled to *ipso facto* immunity; (ii) North Carolina has a clear policy supporting competition, not against it; (iii) the State never supervised the secret agreement; and (iv) *Parker* applies only to state regulatory action, not market participation. Memo. In Supp. of Pls. Mot. For Summ. Judg. Re: State Action Immunity Defense, at 4.

[2] While 28 U.S.C. § 517 and the Federal Rules of Civil Procedure do not limit the length of this statement, it approximates the length of these two parts. *See* Doc. 280.

Although denying that it entered into a no-poach agreement, Duke argues that any such agreement must be analyzed under the "full rule of reason," rather than the *per se* rule. Duke Br. on Application of the Rule of Reason Standard (Duke RoR Br.), at 1. Duke argues that applying the *per se* rule to no-poach agreements is improper because it would create a new *per se* category, *id.* at 1-4; because defendants are "not for profit academic institutions," *id.* at 4-6; and due to their need to "collaborate and support each other," *id.* at 8. Plaintiffs, by contrast, argue that the *per se* rule applies because the no-poach agreement "is a classic market allocation agreement—a pernicious form of collusion that has long been per se unlawful," and Duke has not "identif[ied] a single procompetitive collaboration with UNC requiring the no-poach agreement." Pls. Opp. To Duke RoR Br. at 1.

ARGUMENT

Duke's expansive arguments on the "state action" doctrine and indulgent treatment of no-poach agreements are not supported by precedent and risk significant harm to competition, consumers, and workers in North Carolina. The United States urges the Court to hold the following:

First, UNCSM is not *ipso facto* exempt from the Sherman Act. State agencies do not "automatically qualify as that of the sovereign State" for state-action purposes. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015) (*N.C. Dental*). Thus, as a state agency, *ipso facto* exemption does not apply to UNCSM. *Ipso facto* exemption also is inapplicable here because, in entering into the no-poach agreement, UNCSM

would be acting purely as a labor market participant, and not as a regulator. Duke's arguments to the contrary are unsound and could harm competition in markets where state agencies are market participants.

Second, Duke cannot satisfy the applicable two-prong test for state-action exemption under *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (*Midcal*): (i) that the State has clearly articulated a policy to allow the anticompetitive conduct (clear articulation); and (ii) that the State has actively supervised the anticompetitive conduct (active supervision). Duke cannot satisfy the first *Midcal* prong because there is no policy by the North Carolina legislature to displace competition in medical faculty hiring. Duke appears to concede that it cannot satisfy the second *Midcal* prong, instead wrongly arguing that it does not apply. When a state agency acts purely as a market participant, as UNCSM here, active supervision is required for *Parker* exemption.[3]

Third, courts have long held that customer- and market-allocation agreements among competitors are *per se* unlawful. The alleged no-hire agreement is a market-allocation agreement in a labor market. As with other allocation agreements, it is *per se* unlawful unless the facts show that it is reasonably necessary to a separate, legitimate collaboration between Duke and UNC. Duke cannot establish such reasonably necessity while also arguing the agreement never existed.

[3] Because UNC is not exempt under *Parker*, we do not address Duke's argument that "UNC's immunity applies to Duke." Duke SA Br. 15.

I. Defendants Are Not Exempt From Antitrust Liability Under *Parker*

In *Parker*, the Supreme Court "interpreted the antitrust laws to confer [implied] immunity on anticompetitive conduct by the States when acting in their sovereign capacity." *N.C. Dental*, 135 S. Ct. at 1110. This is often called "state-action immunity," *id.*, though it is more accurately described as an "exemption" from the antitrust laws rather than an "immunity from suit." *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 445-46 (4th Cir. 2006) (*S.C. Dentistry*).

The state-action defense is limited. "Federal Antitrust law is a central safeguard for the Nation's free market structures" and "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *N.C. Dental*, 135 S. Ct. at 1109. "Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication." *Id.* at 1110.

The state-action defense applies only "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013) (citation omitted); *see also Patrick v. Burget*, 486 U.S. 94, 100 (1988) (the challenged conduct must be "truly the product of state regulation"). Thus, state legislation and a "decision of a state supreme court acting legislatively rather than judicially" "*ipso facto* are exempt from operation of the antitrust laws" under the "state-action doctrine." *Hoover v.*

Ronwin, 466 U.S. 558, 567-68 (1984). Yet "[c]loser analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." *Id.* at 568 (footnote omitted). The two *Midcal* factors—clear articulation and active supervision—ensure the challenged anticompetitive activity is "indeed the policy of a State." *N.C. Dental*, 135 S. Ct. at 1111-12.

A. UNCSM Is Not *Ipso Facto* Exempt

Unlike state legislatures and state supreme courts acting legislatively, UNC is not a sovereign actor for *Parker* purposes. Duke's arguments for extending *ipso facto* exemption to UNC are unavailing.

1. State Agencies Are Not *Ipso Facto* Exempt Under *Parker*

N.C. Dental makes clear that state agencies are not *ipso facto* exempt from antitrust liability for their anticompetitive conduct. The Supreme Court emphasized that it has recognized *ipso facto* exemption only for state legislation and decisions of a state supreme court acting legislatively, and explained that both "automatically qualify" as state action under *Parker* because "they are an undoubted exercise of state sovereign authority." 135 S. Ct. at 1110-11.[4] While lower court decisions before *N.C. Dental* had "extend[ed] the *ipso facto Parker* exemption to executive officers and agencies," *S.C. Dentistry*, 455 F.3d at 442 n.6, the Supreme Court in *N.C. Dental* held that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of

[4] *Hoover* reserved judgment on whether a governor is *ipso facto* exempt. 466 U.S. at 568 n.17; *S.C. Dentistry*, 455 F.3d at 442 n.6. We take no position on the issue here.

state-action immunity." 135 S. Ct. at 1111; *see also Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"); 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 221c, at 53 (4th ed. 2013) ("the antitrust immunity established in *Parker* does not extend to every transaction or activity in which a state is involved"). Rather, for state agencies engaged in anticompetitive conduct, courts must ensure the conduct truly represents State policy, which is "necessary in light of *Parker*'s implied rationale to ensure the States accept political accountability for the anticompetitive conduct they permit and control." *N.C. Dental*, 135 S. Ct. at 1111.

Duke's argument that UNC "is a constitutional agency of the State of North Carolina" enshrined "in the North Carolina Constitution," Duke SA Br. 12, does not establish *ipso facto* exemption under *Parker* because nothing in North Carolina's Constitution confers sovereign powers on UNC or implies its sovereignty for "purposes of *Parker*," *N.C. Dental*, 135 S. Ct. at 1111. North Carolina's constitution also provides for the creation of "administrative departments and agencies of the State," N.C. Const. art. III, § 5(10), but *N.C. Dental* squarely holds that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." 135 S. Ct. at 1111. Its constitution also provides "for the organization and government and the fixing of boundaries of counties, cities and towns," N.C. Const. art. VII, §1, but *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985), holds that municipalities

"are not themselves sovereign." Finally, its constitution permits the creation of corporations, N.C. Const. art. VIII, § 1, and seaport and airport facilities, *id.* art. V, § 13, but such commercial enterprises lack any tinge of sovereign character.

Duke seeks to distinguish cases involving municipalities and political subdivisions on the purported ground that they "serve only a portion of state," while UNC pursues "state-wide concerns." Duke SA Br. 13. UNC's jurisdiction, however, appears no more "state-wide" than the state board of dental examiners, which *N.C. Dental* did not find *ipso facto* exempt. In any event, this distinction does not matter. For *Parker* purposes, "a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." *N.C. Dental*, 135 S. Ct. at 1111. Conduct qualifies as such automatically only when it is "an undoubted exercise of state sovereign authority." *Id.* at 1110. Anticompetitive conduct by universities does not meet this requirement. *Edinboro College Park Apartments v. Edinboro Univ. Found.*, 850 F.3d 567, 576-77 (3d Cir. 2017).

Duke also wrongly suggests that UNCSM is *ipso facto* exempt because UNC is a state actor for Eleventh Amendment purposes. Duke SA Br. 14. That an entity "is an arm of the state under the Eleventh Amendment," however, does not make it "'sovereign' for purposes of *Parker*." *Edinboro*, 850 F.3d at 575. "Sovereign action for purposes of direct *Parker* immunity is 'qualitatively different' from state action in more familiar contexts," such as "the Eleventh Amendment." *Id.* (citation omitted). While in other contexts, state action can cover "acts reflecting the discretion of individual officials,"

state action "'in antitrust adjudication refers only to . . . the state's policies.'" *Id.* (citation omitted); *see also S.C. Dentistry*, 455 F.3d at 446-47 (distinguishing *Parker* exemption from Eleventh Amendment immunity).

Duke's reliance on *Board of Governors v. Helpingstine*, 714 F. Supp. 167 (M.D.N.C. 1989), is misplaced because *Helpingstine* is not good law. First, *Helpingstine* relies significantly on *Reid v. University of Minnesota*, 107 F. Supp. 439 (N.D. Ohio 1952), which it misread as holding the University of Minnesota Press "immune from suit under the Sherman Act." 714 F. Supp. at 175. *Reid*, however, held only that the court lacked personal jurisdiction over the Press, and thus the court did "not feel called upon to determine" if *Parker* protected the Press. 107 F. Supp. at 440-41, 443.

In addition, *Helpingstine* rests on several repudiated precedents, including *Saenz v. University Interscholastic League*, 487 F.2d 1026, 1027-28 (5th Cir. 1973), and *Deak-Perera Hawaii, Inc. v. Department of Transportation*, 745 F. 2d 1281 (9th Cir. 1984). *Saenz* held Section 1 inapplicable to a state university because the court incorrectly assumed all "governmental action" was exempt from the Sherman Act. 487 F.2d at 1028. As the Third Circuit recently explained, that reasoning is inconsistent with *N.C. Dental. Edinboro*, 850 F.3d at 578. Because "the analysis we are required to apply did not exist at the time *Saenz* was decided," the Third Circuit declined to follow *Saenz* and instead "join[ed] those courts that have applied modern state-action principles to deny *ipso facto* immunity to public universities." *Id.* In *Deak-Perera*, the Ninth Circuit held that the Hawaii Department of Transportation was sovereign if it was "operating within its

constitutional and statutory authority." 745 F.2d at 1283. Yet that reasoning was repudiated by the Supreme Court in *Phoebe Putney*, which "ma[kes] clear that state-law authority to act is insufficient to establish state-action immunity." 568 U.S. at 228.[5] Thus, there is no legitimate basis to find a state agency like UNC *ipso facto* exempt from antitrust liability under *Parker*.

2. *Ipso Facto* Exemption Also Is Inapplicable Because UNCSM Acted Purely as a Labor Market Participant, Not a Regulator

Ipso facto exemption also does not apply for the additional reason that, in agreeing with Duke not to hire each other's medical faculty, UNCSM acted purely as a participant in the labor market, not as a regulator. UNCSM was not performing an essentially governmental function.

In *Parker*, the Court held that the antitrust laws do not apply when the "sovereign[] imposed the restraint as an act of government," such as when "[t]he state itself exercises its legislative authority in making [a] regulation and in prescribing the conditions of its application." 317 U.S at 352. The Court distinguished a situation when "the state or its municipality becom[es] a participant in a private agreement or

[5] Duke also relies upon *Nicholl v. Board of Regents*, 2016 WL 9651773 (N.D. Ga. Nov. 30, 2016); *Pharmaceutical & Diagnostic Services, Inc. v. University of Utah*, 801 F. Supp. 508 (D. Utah 1990), and *Cowboy Book, Ltd. v. Board of Regents*, 728 F. Supp. 1518 (W.D. Okla. 1989). Duke SA Br. 13. These cases relied significantly on "the holdings of the Fifth and Ninth Circuit," and on the Eleventh Amendment. *See Pharm.*, 801 F. Supp. at 513; *Nicholl*, 2016 WL 9651773, at *5. As explained above, however, these holdings are inconsistent with *N.C. Dental* and other binding precedent.

combination by others for restraint of trade." *Id.* at 351-52 (citing *Union Pacific Ry. Co. v. United States*, 313 U.S. 450 (1941)).

As the Court subsequently made clear, *Parker* did not create a general "conspiracy exception" for political entities that conspired with private actors, but rather was distinguishing cases like *Union Pacific* "where the State acts not in a regulatory capacity but as a commercial participant in a given market." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374-75 (1991). The Court concluded by "reiterat[ing] that" the antitrust laws do not apply to state action "with the possible market participant exception." *Id.* at 379.

More recently, the Court emphasized that "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants." *N.C. Dental*, 135 S. Ct. at 1111. That is because "prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy." *Id.* Thus, *ipso facto* exemption does not apply when a state agency "controlled by active market participants" engages in regulation. *Id.* at 1113. It follows that *ipso facto* exemption is inappropriate when a state agency *acts* purely as a market participant, and thus not in a regulatory capacity at all. *Cf. Phoebe Putney*, 568 U.S. at 236 ("*Parker* and its progeny" protect "the States' sovereign capacity to regulate their economies and provide services to their citizens"). When a state agency is a market participant, it cannot be presumed to have different incentives than its private counterparts.

Although the Supreme Court has not precisely defined what constitutes market participation for *Parker* purposes, a line of dormant Commerce Clause cases, beginning with *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), treats state agencies essentially as private parties, and hence free from the Clause's strictures, when they participate in a market as buyers or sellers instead of as regulators. *See Brooks v. Vassar*, 462 F.3d 341, 355-57 (4th Cir. 2006); *see also Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 592-93 (1997) (market participation includes "a State acting in its proprietary capacity as a purchaser or seller."). These cases explain that it "makes good sense and sound law" to treat state entities acting as market participants like private firms, because "state proprietary activities may be, and often are, burdened with the same restrictions imposed on private market participants." *Reeves, Inc. v. Stake*, 447 U.S. 429, 436, 439 (1980). The Sherman Act is one of those restrictions. *Cf. Jefferson County Pharm. Ass'n, Inc. v. Abbott Labs.*, 460 U.S. 150-58, 170 (1984) (looking to state-action cases and holding that "purchases by a State for the purpose of competing in the private retail market" are not exempt from the Robinson-Patman Act). Accordingly, for the additional reason that UNCSM was acting purely as a labor market participant, it is not *ipso facto* exempt from Section 1.[6]

[6] Duke cites several lower court cases declining to recognize a market-participant exception to *Parker*. *See* Duke Opp. to Pls. SA Br. 6. Those cases, however, all pre-dated *N.C. Dental*, and none held the defendant *ipso facto* exempt.

B. *Midcal* Is Not Satisfied

Because UNC is acting purely as market participant, it must satisfy both *Midcal* prongs: clear articulation and active supervision. UNC satisfies neither prong.

1. North Carolina Has Not Clearly Articulated a Policy To Displace Competition in Medical Faculty Hiring

To satisfy *Midcal*'s first prong, there must be a "clearly articulated and affirmatively expressed" state policy to displace competition in medical faculty hiring. 445 U.S. at 105. Although a state legislature need not "explicitly authorize specific anticompetitive effects" of the challenged actions, such effects must be "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 568 U.S. at 229. "[T]he State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id*. Thus, in *Phoebe Putney*, the Supreme Court held that the clear-articulation requirement was not satisfied by statutes giving hospital authorities general corporate powers, including the ability to acquire hospitals, because they did not clearly express a state policy "to make acquisitions of existing hospitals that will substantially lessen competition." *Id.*

The "clear articulation" inquiry is a "precise one." *Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 782 (9th Cir. 2018), *pet. for reh'g en banc denied* (Sept. 14, 2018). "[T]he relevant question is whether the regulatory structure which has been adopted by the state has *specifically authorized the conduct* alleged to violate the Sherman Act." *Id.* (citation and internal quotation marks omitted). Washington statutes did not satisfy that requirement in *Chamber of Commerce*, because while they authorized

regulation of "for hire transportation services without liability under federal antitrust laws," they were "silent on the issue of [driver] compensation contracts," and thus did not clearly articulate a state policy "to displace competition with respect to for-hire drivers' compensation." *Id.* at 783-84.

As in *Chamber of Commerce*, the North Carolina statutes cited by Duke (SA Br. 5) do not satisfy the clear-articulation requirement. Most of the cited statutes generally instruct UNC to make an "economical use of the State's resources." *See* N.C. Gen. Stat. §§ 116-1(a), (b), 116-11(11). Yet no-poaching agreements are not "the inherent, logical, or ordinary result" of such general statutory directives. *Phoebe Putney*, 568 U.S. at 229. Rather, such general policies "can be, and typically are" carried out "in ways that raise no federal antitrust concerns," so they do not satisfy the clear-articulation test. *Id.* at 228.

Like the unsuccessful defendant in *Phoebe Putney*, Duke also relies on the general powers granted to the UNC Health board of directors in N.C. Gen. Stat. § 116-37(d). That section authorizes the board to perform various functions, including "fix[ing] or approv[ing] the schedules of pay," and adopting rules and regulations concerning conditions for employment such as "annual leave" and other "personnel policies." *Id.* This section does not satisfy the clear-articulation requirement for two independent reasons.

First, to satisfy the clear-articulation test, "[t]he relevant statutory provisions must plainly show that the [state] legislature *contemplated* the sort of activity that is challenged." *Chamber of Commerce*, 890 F.3d at 782 (citation and internal quotation

marks omitted). Yet nothing in Section 116-37(d) suggests that the state legislature contemplated UNCSM entering into no-poach agreements. While the section includes a catch-all provision allowing the board of directors to take "any other measures that promote the hiring and retention of capable, diligent, and effective career employees," that provision must be read in context with the rest of the statute's focus on employment conditions. *See United States v. Turkette*, 452 U.S. 576, 581 (1981) ("where general words follow a specific enumeration of persons or things, the general words should be limited to persons or things similar to those specifically enumerated" (*ejusdem generis*)). There is a significant difference between offering annual leave and adopting a no-poach agreement. The Supreme Court has cautioned against "appl[ying] the concept of 'foreseeability' from [the] clear-articulation test too loosely." *Phoebe Putney*, 568 U.S. at 229. Second, by its terms, the statute authorizes actions by *the board of directors*, not a secret agreement by the UNCSM Dean (the existence of which Duke denies).

Duke also cites evidence that "UNC [has] enacted salary ceilings for its medical faculty," Duke SA Br. 2, 5, but UNC unilaterally setting salaries is materially different from colluding with Duke to fix those salaries or not to poach each other's medical faculty. *Cf. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("collusion" between competitors is "the supreme evil of antitrust"). Nothing suggests that the North Carolina legislature contemplated collusive undertakings by UNCSM.

Finally, Duke improperly relies on the holding in *Edinboro*, 850 F.3d at 580, that "mandating on-campus residency is a foreseeable consequence of the legislative mandate to provide appropriate student living facilities," and argues there were similar foreseeable consequences here. *See* Duke SA Br. 7-8. Unlike in *Edinboro*, however, there is no clear nexus between the legislative mandate and the challenged no-poach agreement. If there were, Duke would not need to deny the agreement's existence.

2. Active Supervision Is Required, But Absent Here

Since Duke denies the agreement occurred, Duke cannot credibly argue that the agreement was actively supervised. Instead, Duke wrongly argues that "[b]ecause UNC is a prototypical state agency," it need not show active supervision. Duke SA Br. 10-12. Because UNCSM would be acting purely as a labor market participant in entering into the alleged no-poach agreement, active supervision is required, just as it is with private parties.

The active-supervision requirement demands "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *N.C. Dental*, 135 S. Ct. at 1112 (citation omitted). The active-supervision requirement is crucial because it helps ensure that the "anticompetitive policy is indeed the policy of a State." *Id.* The clear-articulation requirement "rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." *Id.*

N.C. Dental held that "active supervision" is "an essential condition of state-action immunity when a nonsovereign actor has 'an incentive to pursue [its] own self-interest.'" *Id.* at 1113 (quoting *Phoebe Putney*, 568 U.S. at 226). That reasoning compels the application of the active-supervision requirement in the circumstances here. As discussed above (at pp. 7-11), UNCSM is a "nonsovereign actor" for *Parker* purposes. Moreover, as a labor market participant, it has an incentive to pursue its own self-interest in hiring medical faculty. Thus, here too, active supervision is "an essential condition of state-action immunity." *N.C. Dental*, 135 S. Ct. at 1113.

Duke incorrectly relies on *Edinboro* to buttress its argument that active supervision is not required. Duke SA Br. 11. In *Edinboro*, however, the Third Circuit held that active supervision was not required when a university "expand[ed] its on-campus residency rule" from two to four semesters, which furthered its "educational mission" and parental role. *Id.* at 850 F.3d at 574, 581 ("rules requiring on-campus residency are 'common at many colleges and universities,' and are justified, at least in part, by the educational benefits of a 'living and learning' environment and . . . 'the school's attempts to fulfill a 'parental' role"). There was no suggestion that the university was acting purely as a market participant. Here, by contrast, UNCSM is acting purely as a labor market participant, and thus must satisfy the active-supervision requirement just like Duke. The United States takes no position on whether active supervision is required for all anticompetitive conduct by universities.

Finally, contrary to Duke's argument (Duke SA Br. 10-11), *Hallie* does not support dispensing with the active-supervision requirement in this case. *Hallie* held that municipalities need not prove active supervision in large part because they "are electorally accountable and lack the kind of private incentives characteristic of active participants in the market." *N.C. Dental*, 135 S. Ct. at 1112. Neither of those descriptions fits UNCSM here. Accordingly, Duke's failure to show active supervision is dispositive.

II. The *Per Se* Rule Applies To The Alleged No-Poach Agreement Unless Duke Proves That It Is Reasonably Necessary To A Separate Legitimate Collaboration With UNCSM

Agreements between competitors not to solicit or hire each other's employees harm competition in labor markets in the same way that agreements between them to allocate customers or divide product markets harms competition in those markets. Like other types of allocation agreements, such no-poach agreements between competing employers are *per se* unlawful unless they are reasonably necessary to a separate legitimate business transaction or collaboration between the employers, in which case the rule of reason applies.

A. Customer- and Market-Allocation Agreements Are *Per Se* Unlawful

Section 1 of the Sherman Act declares "contract[s] . . . in restraint of trade or commerce among the several States . . . illegal." 15 U.S.C. § 1. The legality of many restraints is "analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition,

taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

Yet the "rule of reason does not govern all restraints." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Rather, some "types of restraints" have "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *Khan*, 522 U.S. at 10. The "*per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive," *Nw. Wholesale Stationers Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985), including "market-allocation agreements." *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 373 n.10 (4th Cir. 2013), *aff'd by N.C. Dental*. The Supreme Court has "reiterated time and time again that [agreements allocating markets among competitors] are naked restraints of trade with no purpose except stifling of competition. Such limitations are *per se* violations of the Sherman Act." *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49 (1990) (per curiam) (internal quotation marks omitted).

The prohibition against allocating markets extends to agreements "between two competitors to refrain from seeking business from each other's existing accounts." *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367, 1372-73 (6th Cir. 1988). Such "customer allocation scheme[s]" are a "classic example[]" of *per se* violations. *Id.* at 1371. An agreement not to compete for certain customers is manifestly

anticompetitive because it forces the allocated customer to "face[] a monopoly seller" rather than reap the benefits of competition between sellers that would result in lower prices or better product offerings. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994). Thus, an agreement to "allocate customers among the conspirators" has effects "almost identical to those of price-fixing and is treated the same by the law." *Id.* Indeed, "[i]t would be a strange interpretation of antitrust law that forbade competitors to agree on what price to charge, thus eliminating price competition among them, but allowed them to divide markets, thus eliminating *all* competition among them." *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995) (emphasis added).

The *per se* rule applies to a customer-allocation agreement regardless of whether the agreement applies to new or existing customers, *Palmer*, 498 U.S. at 49-50; whether customers are divided geographically or on some other basis, *see United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1088 (5th Cir. 1978); or whether it "would only affect a small number of potential customers," *United States v. Kemp & Assocs.*, 907 F.3d 1264, 1277 (10th Cir. 2018) (citing *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992)).

The United States has criminally prosecuted many customer- and market-allocation agreements as *per se* violations of Section 1. *E.g.*, *Cooperative Theatres of Ohio*, 845 F.2d at 1372-73 (allocating movie-theater customers); *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (en banc) (allocating billboard sites); *United States*

v. Suntar Roofing, Inc., 897 F.2d 469, 473 (10th Cir. 1990) (allocating roofing customers); *United States v. Goodman*, 850 F.2d 1473, 1477 (11th Cir. 1988) (allocating customers in garbage disposal industry); *United States v. Koppers Co.*, 652 F.2d 290, 293 (2d Cir. 1981) (allocating territories in the sale of road tar); *Cadillac Overall Supply Co.*, 568 F.2d at 1090 (allocating customers of garment providers). Those prosecutions have included both input- and output-market allocations. *See, e.g.*, *Brown*, 936 F.2d at 1044-45 (recognizing that an agreement allocating an input market (leaseholds for billboards) was "a classic *per se* antitrust violation"); pp. 20-21, *supra* (discussing *Cooperative Theatres*).

B. No-Poach Agreements Between Competing Employers Allocate Employees Within A Labor Market

Just as an agreement between competitors to allocate customers eliminates competition for those customers, an agreement between them to allocate employees eliminates competition for those employees. As with other types of allocation agreements, an employee that is a victim of an allocation agreement between employers cannot reap the benefits of competition between those employers that may result in higher wages or better terms of employment. Furthermore, just as allocation agreements in product markets have almost identical anticompetitive effects to price-fixing agreements, *see* p. 21, *supra*, no-poach agreements between competing employers have almost identical anticompetitive effects to wage-fixing agreements: they enable the employers to avoid competing over wages and other terms of employment offered to the affected employees.

For these reasons, courts have held that no-poach agreements among competitors in labor markets are *per se* unlawful in the same way that customer- and market-allocation agreements in product markets are *per se* unlawful. In *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030 (N.D. Cal. 2013), for example, the district court held that the United States adequately pleaded a *per se* violation by alleging a naked agreement between eBay and Intuit not to solicit or hire each other's employees. The court denied a motion to dismiss, ruling that the alleged restraint was "a 'classic' horizontal market division" and that "[a]ntitrust law does not treat employment markets differently from other markets in this respect." *Id.* at 1039-40. The defendants ultimately entered into a consent decree enjoining the unlawful agreement. *See United States v. eBay, Inc.*, No. 12-cv-05869, Final Judgment, Doc. 66, at 2 (N.D. Cal. Sept. 2, 2014). Likewise, in *In re High-Tech Employee Antitrust Litigation*, 856 F. Supp. 2d 1103, 1122 (N.D. Cal. 2012), the court held that allegations of bilateral "Do Not Cold Call" agreements among high-tech firms were sufficient to plead a *per se* violation of the Sherman Act.[7]

[7] The United States filed a complaint alleging these agreements were *per se* unlawful, and they were enjoined pursuant to a consent decree. *See* Complaint, Doc. 1, *United States v. Adobe Sys., Inc.*, No. 1:10-cv-01629, ¶ 35 (D.D.C. Sept. 24, 2010); Competitive Impact Statement, Doc. 2, at 2, 8-10 (D.D.C. Sept. 24, 2010); Final Judgment, Doc. 17, at 4 (D.D.C. Mar. 18, 2011); *see also* Complaint, Doc. 1, *United States v. Lucasfilm Ltd.*, No. 1:10-cv-02220, ¶ 23 (D.D.C. Dec. 21, 2010); Final Judgment, Doc. 6-1, at 4 (D.D.C. May 9, 2011). The United States also challenged no-poach agreements among competing railways as *per se* unlawful, which were enjoined pursuant to a consent decree in *United States v. Knorr-Bremse AG*, No. 18-cv-747, Final Judgment, Doc. 19 (D.D.C. July 11, 2018). In private follow-on litigation, *In re Railway Industry Employee No-Poach Antitrust Litigation*, No. 2:18-mc-798 (W.D. Pa.), a motion to dismiss the complaint is

C. Ancillary No-Poach Agreements Are Not *Per Se* Unlawful

The *per se* rule, however, does not apply to all no-poach agreements. If a no-poach agreement is reasonably necessary to a separate, legitimate business transaction or collaboration among the employers, it is not *per se* unlawful as a naked restraint, but instead judged under the rule of reason. Under the "ancillary restraints doctrine," an agreement ordinarily condemned as *per se* unlawful is "exempt from the *per se* rule" if it is ancillary to a separate, legitimate venture between the competitors. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224, (D.C. Cir. 1986) (Bork, J.).

"To be ancillary," an "agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction," and reasonably necessary to "make the main transaction more effective in accomplishing its purpose." *Id.* at 224, 227; *accord Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335-38 (2d Cir. 2008) (Sotomayor, J., concurring); *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd*, 175 U.S. 211 (1899); Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 Antitrust L.J. 701, 705-09 (1998). Ancillary restraints are subject to the rule of reason. *Rothery Storage*, 792 F.2d at 224; *Salvino*, 542 F.3d at 338 (Sotomayor, J., concurring).

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pending. In *Railway*, the United States filed a Statement of Interest urging the court to deny the motion to dismiss on February 8, 2019.

For example, in *Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001), the seller of a company entered into a "no-hire" agreement with the buyer providing that the seller would not hire the company's employees for eight months. *Id.* at 136-137. The Third Circuit held that because the no-hire agreement was an "ancillary" agreement "executed upon the sale of a corporation," it was properly analyzed under the rule of reason. *Id.* at 143, 145. Likewise, a district court recently held the *per se* rule inapplicable to a clause in McDonald's franchise agreements prohibiting franchisees from hiring employees at other McDonald's restaurants, because the hiring restriction was "ancillary to franchise agreements for McDonald's restaurants." *Deslandes v. McDonald's USA, LLC*, 2018 WL 3105955, at *2, *7 (N.D. Ill. June 25, 2018).[8]

D. Duke's Arguments For Applying The Full Rule Of Reason Lack Merit

Duke incorrectly asserts that "[n]o court has ever ruled that an alleged employee 'no poach' agreement is subject to the *per se* standard." Duke RoR Br. 1. As discussed above, courts have denied motions to dismiss *per se* claims and held that the challenged no-poach agreements would be subject to the *per se* rule if the allegations of nakedness are supported by the evidence. While those cases did not reach an ultimate adjudication of liability, that was because the defendants settled and entered into consent judgments enjoining the agreements. *See* p. 23 & n.7, *supra.*

[8] The court nonetheless recognized that, "because a no-hire agreement is, in essence, an agreement to divide a market, the Court has no trouble concluding that a naked horizontal no-hire agreement would be a *per se* violation of the antitrust laws." *Deslandes*, 2018 WL 3105955, at *6.

While courts are reluctant to create new *per se* categories, Duke is wrong to assert that application of the *per se* rule to the no-poach agreement at issue here would create a new *per se* category. Market-allocation agreements have long been held *per se* illegal. As the *eBay* court explained, no-poach agreements among competitors are "a 'classic' horizontal market division," just in an "employment market" rather than a product market. 968 F. Supp. 2d at 1039-40. Likewise, the leading antitrust treatise states that "[a]n agreement among employers that they will not compete against each other for the services of a particular employee or prospective employee is, in fact, a service division agreement, analogous to a product division agreement" and is "generally unlawful *per se*" if not negotiated as part of a collective bargaining process. 12 Herbert Hovenkamp, *Antitrust Law* ¶ 2013b, at 148 (3d ed. 2012). The Supreme Court has made clear that the application of the *per se* rule does not depend on the amount of judicial experience with the particular "industry" at issue, but instead turns on the amount of experience "with the particular type of restraint challenged." *Arizona v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 349 & n.19 (1982). There is ample judicial experience with allocation agreements. *See* pp. 21-23, *supra*.

Duke's reliance on *Weisfeld v. Sun Chem. Corp.*, 210 F.R.D. 136, 143 (D.N.J. 2002), *aff'd*, 84 F. App'x 257 (3d Cir. 2004), *Yi v. SK Bakeries, Inc.*, No. 18-5627 RJB, Dkt. 33 (W.D. Wa. Nov. 13, 2018), and *Deslandes*, Duke RoR Br. 4, is misplaced. In *Weisfeld*, the district court stated that the rule of reason would apply to several no-hire agreements under *Eichorn* as part of a decision denying class certification. 210 F.R.D. at

143; *see* p. 25, *supra* (discussing *Eichorn*).[9] While affirming that denial because of the lack of proof of class-wide injury, the Third Circuit went out of its way to criticize the district court's analysis of the no-hire agreements, noting that "the facts in *Eichorn* are different than those here" and suggesting those factual differences could affect the appropriate legal analysis of the no-hire agreements. 84 Fed. App'x at 260 & n.2.[10] 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.[11]

Duke's argument that the *per se* rule does not apply because "the alleged conspirators are not-for-profit academic institutions that serve public interests in lieu of profit-maximization," Duke RoR Br. 4-6, is also mistaken. As the Supreme Court has made clear, "[t]here is no doubt that the sweeping language of [Section 1] applies to nonprofit entities, and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct." *NCAA v. Bd. of Regents*, 468 U.S. 85,

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[9] In *Weisfeld*, Sun Chemical Corp. and Flint Ink agreed in a settlement that for "five years neither company would solicit the other's employees" or "hire an unsolicited employee" without prior notice. 210 F.R.D. at 138. Sun, Flint, and another ink manufacturer, INX, "later entered into more extensive agreements" promising "not to hire each other's employees at all." *Id.*

[10] The Third Circuit ultimately declined to address whether the *per se* rule or rule of reason applied, finding the issue "irrelevant" given the lack of class-wide proof of antitrust injury. *Id.* at 260.

[11] The vertical agreements between the franchisor and franchisees are evaluated under the rule of reason, and any horizontal agreements among the franchisees may implicate the ancillary restraints doctrine.

101 n.22 (1984) (citations omitted). Like other firms, nonprofit entities can "seek to maximize profits" through avoiding competition. *United States v. Rockford Memorial Corp.*, 898 F.2d 1278, 1285 (7th Cir. 1990).

Citing two cases from other circuits, Duke makes the sweeping assertion that "agreements between universities necessitate rule of reason analysis because such agreements may serve different goals, and have different effects, from those of a traditional firm." Duke RoR Br. 5 (citing *United States v. Brown Univ.*, 5 F.3d 658, 671-72 (3d Cir. 1993); and *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir. 2001)). Neither case, however, involved a no-poach agreement, and neither applied the rule of reason simply because the defendants were universities. *Brown University* focused on the particulars of the conduct, which involved need-based financial aid. The court found significant "the undisputed public interest in equality of educational access and opportunity" in connection with the "alleged pure altruistic motive and alleged absence of any revenue maximizing purpose." 5 F.3d at 672. This is different from the no-poach agreement here that Duke claims (in its state action briefing) would be supported by UNCSM's desire to pay medical faculty less to save resources. *See* p. 15, *supra*. In *Tanaka*, the transfer rule was part of a broad set of restrictions on intercollegiate athletics, not a naked restraint with no purpose except stifling competition, as alleged here.

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. Duke RoR Br. 9-10. This is exactly the

sort of argument the ancillary restraints doctrine is designed to address, *see supra* Part II.C, but there are two deficiencies in Duke's showing. First, for a restraint to be ancillary, there must be a separate legitimate collaboration that it renders more effective.[12] Duke has not identified any specific collaboration between it and UNCSM to which the no-poach agreement would have been ancillary. Second, to be ancillary, a restraint must be *reasonably necessary* to achieve the benefits of the legitimate collaboration, but Duke cannot show that here while denying the restraint's existence.

This case is at the summary judgment stage, and the facts are to be determined at trial. Yet if the evidence proves that Duke and UNCSM entered into a naked no-poach agreement, the Court should not hesitate to declare it *per se* unlawful.

CONCLUSION

The Court should reject Duke's arguments that it is exempt under *Parker* and that the alleged no-poach agreement must be analyzed under the full rule of reason as a matter of law.

Dated: March 7, 2019

Respectfully submitted,

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[12] A restraint also could be ancillary to the sale of a business, as in *Eichorn*, however no such sale is alleged here.

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CERTIFICATE OF WORD COUNT

I certify that this Statement of Interest contains 7,675 words in the body of the statement, including headings and footnotes, as determined by the word count feature in Microsoft Word. This approximates the total word limits on the state-action and rule-of-reason briefs under this Court's order extending word limits and authorizing separate summary judgment briefs. *See* Doc. 280, at 3 (authorizing the parties to file briefs up to 5,000 words on state action, and to file separate briefs on the remaining summary judgment issues up to 7,000 words collectively); Duke RoR Br. 13 (certifying the brief is 2,767 words); Pls. Opp. to RoR Br. 13 (certifying the brief is 2,774 words).

Dated: March 7, 2019

/s/ Nickolai G. Levin
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2019, I caused to be electronically filed the foregoing Statement of Interest with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all parties by operation of the Court's electronic filing systems.

Dated: March 7, 2019

/s/ Nickolai G. Levin
Attorney