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JONATHAN S. KANTER
Assistant Attorney General
DOHA G. MEKKI
Principal Deputy Assistant Attorney General
DAVID B. LAWRENCE
Policy Director
ANDREW SCHUPANITZ (CA Bar No. 315850)
U.S. Department of Justice
Antitrust Division
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102
Telephone: (415) 934-5300
andrew.schupanitz@usdoj.gov

Attorneys for the United States

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA IN AND FOR THE COUNTY OF WASHOE

SAMUEL BECK, ET AL., Plaintiffs, v. PICKERT MEDICAL GROUP, P.C., ET AL., Defendants.	Case No. CV21-02092 Dept. No. 15

STATEMENT OF INTEREST OF THE UNITED STATES

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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 or state court. The United States enforces the federal antitrust laws and has a strong interest in promoting competition and seeing that the Sherman Act's prohibitions on restraints of trade, 15 U.S.C. § 1, are fully and correctly applied to all markets—including labor markets.[1] *See Newburger, Loeb & Co., Inc. v. Gross*, 563 F.2d 1057, 1081 (2d Cir. 1977) ("When a company interferes with free competition for one of its former employee's services, the market's ability to achieve the most economically efficient allocation of labor is impaired.").

Although the United States takes no position on the merits of plaintiffs' claims under Nevada state law, principles of federal antitrust law may be useful to the Court's assessment of those claims. Anticompetitive post-employment restraints can violate the Sherman Act, 15 U.S.C. § 1 *et seq.*, in addition to Nevada state law, NEV. REV. STAT. § 613.195. The disputed non-compete agreements raise concerns under Section 1 of the Sherman Act, as discussed below, and assessing their competitive effects pursuant to the Act may inform the Court's determination whether Nevada law treats them as void and unenforceable. Accordingly, the United States seeks to highlight the antitrust implications of the post-employment restraints at issue in this case in order to assist the Court in its resolution of related state-law questions. *See Innovation Ventures, L.L.C. v. Custom Nutrition Lab'ys, L.L.C.*, 451 F. Supp. 3d 769, 785-87 (E.D. Mich. 2020) (describing "common theme[s]" between rule-of-reason analysis under federal antitrust law and state law governing non-competes and noting that the court may "draw upon federal antitrust decisions" and take guidance from them "without necessarily imposing all the requirements of a

[1] In December 2021, the Division and the Federal Trade Commission held a two-day public workshop that examined the state of competition in labor markets. Several participants at the workshop discussed recent scholarship on employee non-compete agreements showing that these agreements can cause significant harm to labor-market competition, and thus to workers. "Contractual Restraints that Can Impede Worker Mobility," U.S. Dept. of Justice and Federal Trade Commission, Making Competition Work: Promoting Competition in Labor Markets (Dec. 6-7, 2021), https://www.ftc.gov/system/files/documents/public_events/1597830/ftc-doj_day_1_december_6_2021.pdf, at 45-69.

§ 1 Sherman Act claim"); *see also Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 487 n.8 (2016) (quoting *Kolani v. Gluska*, 64 Cal.App.4th 402 (1998)) (noting a "statutory policy favoring competition" regarding non-competes). Additionally, because challenges to post-employment restraints arise most frequently under state law,[2] state courts play an important role in considering how such restraints may affect competition. *See Newburger,* 563 F.2d at 1081 ("Although such issues have not often been raised in the federal courts, employee agreements not to compete are proper subjects for scrutiny under section 1 of the Sherman Act.").

STATEMENT

True to their name, non-compete agreements limit competition in design and effect. One of two rules of decision may apply here to determine whether they do so lawfully under federal antitrust law—either the per se rule or the rule of reason—but under either the record suggests some cause for concern that the restraints may violate the federal antitrust laws. The United States provides below the framework of analysis with citations to relevant cases and observations as to the potential bearing of facts raised in the pleadings.

I. Factual and Procedural Background

Plaintiffs are anesthesiologists and employees of defendant Pickert Medical Group, which employs approximately two-thirds of all permanently employed anesthesiologists who are currently working and living in Northern Nevada. Complaint (Nov. 22, 2021) ¶ 2. Plaintiffs provide anesthesiology services to Renown Regional Medical Center pursuant to a Professional Services Agreement ("PSA") between Pickert and Renown.[3] *Id.* Renown is the only trauma center in the region and the major provider of complex surgical care. *Id.* ¶ 8. Under the PSA, Pickert is Renown's sole and exclusive source of anesthesiology services, and Pickert has promised to supply Renown exclusively. Defendants' Opposition to Renown's Motion for

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[2] *See* Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 628 n.8 (1960) (noting that while unreasonable post-employment restraints "would clearly seem to violate the Sherman Act," "[v]irtually all" of the thousands of reported cases regarding such restraints "were suits brought by employers seeking injunctive relief or damages, or both"); *Bradford v. New York Times Co.*, 501 F.2d 51, 60 (2d Cir. 1974) (observing that "a state court or, in a diversity case, a federal court applying state law, provides the usual forum" for assessing whether a post-employment restraint is unreasonable).

[3] Renown is now a third-party defendant and counterclaimant in this action.

Preliminary Injunction (Feb. 9, 2022), at 7.[4] As part of their employment agreements with Pickert, plaintiffs are subject to two-year, post-employment non-compete restraints that prohibit them from providing anesthesiology services within 25 miles of Renown or at any other facility where they worked for the two years before termination of their employment.[5] *Id.* ¶ 3.

In October 2021, Renown issued a written 90-day notice of its intent to terminate the PSA based on Pickert's alleged failure to meet the staffing levels set out in the PSA. *Id.* ¶ 19. Plaintiffs filed their complaint challenging the validity of the non-compete restraints under NRS 613.195 and seeking declaratory and injunctive relief. *Id.* ¶¶ 24-40. Currently pending are (1) plaintiffs' motion for a preliminary injunction and temporary restraining order against defendants from enforcing the non-competes, (2) defendant's motion for a temporary restraining order and preliminary injunction against Renown from terminating the PSA, and (3) Renown's motion for a preliminary injunction seeking invalidation of the restrictive covenants in the PSA.[6]

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[4] Though not the focus of this Statement, the United States notes that exclusive-dealing restraints can raise competitive concerns under the Sherman Act—particularly where the restraint forecloses a significant percentage of the market or where a party exercises significant market power. *See CollegeNet, Inc. v. Common Application, Inc.*, 355 F. Supp. 3d 926, 952-53 (D. Or. 2018) (finding substantial foreclosure plausible where defendant controlled 60% of the market and engaged in exclusive dealing contracts); *McWane, Inc. v. FTC*, 783 F.3d 814, 837 (11th Cir. 2015) (while "foreclosure percentage of at least 40%" often required, "some courts have found that a lesser degree of foreclosure is required when the defendant is a monopolist").

[5] Though plaintiffs are all subject to two-year post-employment non-compete restraints, the employment agreements containing those restraints are not identical. Some plaintiffs were shareholders or employees of a prior entity, Associated Anesthesiologists, and signed new employment agreements in 2016 after the merger with Pickert. As part of the merger, shareholder plaintiffs also agreed to a separate five year non-compete. Complaint ¶¶ 13-14. Plaintiffs hired by Pickert since the merger have signed non-shareholder agreements (between 2016 and 2020) or employment agreements (between 2020 and 2021). *Id.* ¶ 15. Though the terms of these agreements vary somewhat, they all contain a two-year, post-employment non-compete restraint.

[6] In addition to its provisions regarding exclusivity, the PSA also contains a no-hire restraint that prohibits Renown from contracting with or employing any anesthesiologist who has provided anesthesiology services under the PSA for two years following termination of the PSA. Third-Party Defendants and Counterclaimants' Motion for Preliminary Injunction (Jan. 25, 2022) at 12-13. The United States has addressed no-hire provisions in other contexts and takes no position on the separate issue of the no-hire provision's competitive effects here—except to note that many of the principles outlined below may be relevant and useful to the Court in evaluating the reasonableness of that restraint as well.

The United States submits this Statement of Interest primarily to address matters relevant to the first issue.

II. Legal Background

"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [T]he policy unequivocally laid down by the Act is competition." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). Section 1 of the Sherman Act declares "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . illegal." 15 U.S.C. § 1. Despite the sweeping text, the Supreme Court has long interpreted this provision to outlaw "unreasonable" restraints of trade. Accordingly, courts interpret Section 1 to have two primary elements: (1) concerted action that (2) imposes an unreasonable restraint of trade. *See, e.g.*, *Cap. Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 542 (2d Cir. 1993).

Under this framework, horizontal restraints—that is, restraints imposed by agreement among actual or potential "competitors on the way in which they will compete with one another"—are especially concerning. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984). Indeed, some horizontal restraints—namely, agreements among actual or potential competitors to fix prices, rig bids, or allocate markets—are illegal per se because of their inherent anticompetitive tendencies. *See State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). "Typically only 'horizontal' restraints . . . qualify as unreasonable per se." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283-84 (2018).

Restraints that are not per se unlawful are evaluated under the "rule of reason," according to which courts "conduct a fact-specific assessment . . . to assess the restraint's actual effect on competition." *Id*. at 2284 (cleaned up) (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984)). Under the rule of reason, "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." *Khan*, 522 U.S. at 10. This holistic assessment distinguishes between restraints that "may suppress or even

destroy competition" and those that "merely regulate[] and perhaps thereby promote[] competition." *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918). Courts generally assess non-horizontal restraints under the rule of reason. *See Am. Express*, 138 S. Ct. at 2284 ("[N]early every . . . vertical restraint . . . should be assessed under the rule of reason.").

The rule-of-reason inquiry need not impose a particularly exacting burden on plaintiffs. In fact, some horizontal restraints, while not per se unlawful, have been deemed sufficiently anticompetitive that they may be condemned after a quick look, or truncated rule-of-reason analysis. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999); *see also*. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692–96 (1978) (condemning after quick look engineering society's rule prohibiting competitive bidding); *Bd. of Regents*, 468 U.S. at 109-10 (same for NCAA television plan restricting output); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (same for dental association rule prohibiting members from submitting x-rays to insurers). "[S]uch a restriction 'requires some competitive justification even in the absence of a detailed market analysis.'" *Id.* at 460 (citation omitted).

Courts are generally more skeptical of horizontal restraints, but courts do not apply per se treatment to every horizontal agreement. A horizontal agreement may be subject to a more fact-specific analysis under the rule of reason, 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). To qualify as ancillary, a restraint must be "(1) 'subordinate and collateral to a separate, legitimate transaction,' and (2) 'reasonably necessary' to achieving that transaction's pro-competitive purpose." *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (internal citations omitted); *accord Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 335-38 (2d Cir. 2008) (Sotomayor, J., concurring); *Rothery Storage*, 792 F.2d at 224, 227; *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985); *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 265, 269 (7th Cir. 1981); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (Taft, J.), *aff'd as modified in other part*, 175 U.S. 211 (1899).

ARGUMENT

The allegations in the complaint and other filings suggest several ways in which the post-employment non-competes at issue in this matter may be unlawful under either Sherman Act test for unreasonableness. First, the allegations suggest a horizontal agreement—limiting the ability of direct competitors to compete against each other in providing anesthesiology services—and one that allocates territories, which potentially warrants condemnation under the Sherman Act's per se rule. Moreover, even if the rule of reason applied, a collection of non-competes that collectively lock up around two-thirds of the anesthesiologists in Northern Nevada, as alleged, may result in a significant enough anticompetitive effect to run afoul of that standard, particularly in light of less restrictive means that appear to be available to achieve any potential benefits.

I. The Post-Employment Agreements Between Plaintiffs and Defendants Not To Compete May Be Characterized as Horizontal Territorial Allocations Subject to the Per Se Rule

Non-compete agreements between employers and employees constitute concerted action properly subject to scrutiny under Section 1 of the Sherman Act. *See Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1154 (9th Cir. 2003) (evidence of "signed agreements" established concerted action). Therefore, the key question under Section 1 is whether the agreements are unreasonable.

The plaintiffs allege agreements among actual or potential competitors, and as such present facts suggesting the agreements potentially could be subject to the per se rule. Here, the plaintiffs are doctors who perform anesthesiology services—whether as members of a medical group like defendant Pickert Medical Group, or as individual practitioners. The restraint thus forecloses not just an input (in the form of labor) to competitors of the employer, but also current and future competition for the provision of anesthesiology services directly from the employees. Because individual plaintiffs were board-certified and licensed anesthesiologists at the time they signed their agreements with defendants, they were actual or potential competitors of Pickert when they agreed to the non-competes. And because the restraints were imposed by agreements between competitors "on the way they will compete with one another" in the future, *Bd. of*

Regents, 468 U.S. at 99, the post-employment non-compete agreements appear to qualify as "horizontal restraint[s]." *Id.*; *see Polk Bros.*, 776 F.2d at 189 ("A covenant not to compete following employment does not operate any differently from a horizontal market division among competitors—not at the time the covenant has its bite, anyway.").[7]

Defendants appear to characterize the plaintiffs as competitors. For example, defendants accuse Renown of working with plaintiffs to "eliminate Pickert" and "enter into *direct contracts with the physicians*" in place of the PSA. Defendants' Opposition to Renown's Motion for Preliminary Injunction (Feb. 9, 2022), at 3-4 (emphasis added). Likewise, some of the non-compete provisions at issue in this case explicitly provide that "*Employer has a legitimate interest in protection from competition by Employee*" and mention "Employer's interest in its investment from competition." Plaintiffs' Motion for Ex Parte Temporary Restraining Order and Motion for Preliminary Injunction (Nov. 23, 2021) ("Plaintiffs' TRO Mot."), Ex. G (2021 Agreements) ¶ 16.A (emphasis added).

If a restraint is properly characterized as horizontal, then a court applying Section 1 will condemn it outright if it falls into a category of restraints that courts have described as per se unlawful. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979). Such restraints are anticompetitive by their "nature and character" and thus fall categorically "within the purview of the statute." *Standard Oil Co. v. United States*, 221 U.S. 1, 64-65 (1911). Categorically unreasonable restraints include horizontal agreements to "allocate territories." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972). The post-employment restraints

[7] Where employees and employers are not actual or potential competitors, a post-employment non-compete agreement likely qualifies as a vertical restraint. The employee has agreed not to provide his or her labor as an input to certain direct competitors of the employer, who are not parties to the agreement. In this context, the non-compete agreement is between parties "at different levels of distribution" and governs matters over which they do not compete. *Am. Express*, 138 S. Ct. at 2284. The non-competes here prevent the anesthesiologists from competing directly (a horizontal restriction) or through another employer (a vertical restriction). Concerted action that limits horizontal competition, even if it has additional vertical elements, is properly analyzed under the frameworks applied to horizontal restraints. *See United States v. Apple, Inc.*, 791 F.3d 290, 314 (2d Cir. 2015) (conspiracy among publishers and vertically related distributor to fix publisher prices, effectuated through vertical contracts, properly analyzed as "horizontal price fixing-conspiracy").

at issue here could be characterized as agreements among actual or potential competitors to allocate to Pickert the area within 25 miles of Renown or at any other facility where the anesthesiologists employed by Pickert worked. Thus, they would constitute horizontal agreements to allocate territories subject to the per se rule unless the ancillary-restraints defense applies, *see* § II., *infra*.

II. If the Non-Compete Agreements Are Horizontal Territorial Allocations, Defendants Bear the Burden of Demonstrating Facts Showing that the Restraints Are Reasonably Necessary to a Legitimate, Pro-Competitive Collaboration Among the Parties

Under the Sherman Act, defendants may raise an ancillary-restraints defense for agreements otherwise subject to the per se rule. The defense requires defendants to establish that the restraint is "(1) 'subordinate and collateral to a separate, legitimate transaction,' and (2) 'reasonably necessary' to achieving that transaction's pro-competitive purpose." *Aya Healthcare*, 9 F.4th at 1109; *see Rothery Storage*, 792 F.2d at 224; *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 726 F.2d 1381, 1395 (9th Cir. 1984). A defendant bears the burden of demonstrating that a restraint is ancillary. *See, e.g.*, *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1150-54 (9th Cir. 2003) (describing doctrine as a "defense"); Gregory J. Werden, *The Ancillary Restraints Doctrine After* Dagher, 8 Sedona Conf. J. 17, 23-24 (2007) (collecting cases placing burden on defendant). Courts may look to the time the agreement was adopted in evaluating whether a restraint was reasonably necessary to achieving a pro-competitive purpose. *See Aya Healthcare*, F.4th at 1110).

A horizontal restraint that satisfies both of these prongs will be judged under a more fact-specific rule-of-reason analysis. Conversely, if a horizontal restraint cannot satisfy both prongs, it is viewed as a "naked" restraint, *see White Motor Co. v. United States*, 372 U.S. 253, 263 (1963) (restraints are naked if they have "no purpose except stifling of competition"); *Aya*, 9 F.4th at 1109 (horizontal restraints either "naked or ancillary"), and thus would be subject to per se treatment if it falls in a category of restraints that courts have described as per se unlawful, such as territorial allocation. *See Topco,* 405 U.S. at 608; *Newburger*, 563 F.2d at 1082 ("Will the restrictive covenant operate in circumstances where no valid business interest of the ex-

employer is at stake? Restraints on postemployment competition that serve no legitimate purpose at the time they are adopted would be per se invalid.").

Defendants will likely make factual arguments that the restraints are ancillary to (1) the 2016 merger with Pickert, or (2) the employment agreements of which they are a part. Even if the restraints are subordinate and collateral to these larger transactions,[8] however, several allegations and facts call into question whether the restraints are "reasonably necessary" to achieving the purpose of those transactions. In evaluating whether restraints are reasonably necessary, courts consider the scope and duration of the restraint, *see Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995), which should be tailored to the collaboration's benefits, *see* Werden, *supra* at 23 & n.62 (describing cases following the requisite analysis). Even assuming that the post-employment restraints are subordinate and collateral to the Pickert merger or to the employment relationship, the Court could look to several factors suggesting the restraints may not be reasonably necessary to achieving the pro-competitive purposes of those transactions.

First, the Court should consider whether the non-compete restrictions last for longer than necessary to effectuate the merger or to protect the employer's incentives to invest in their employees. *Compare Addyston Pipe*, 85 F. at 281 (distinguishing restraints "reasonably necessary . . . to the enjoyment by the buyer of the property, good will, or interest in the partnership bought"), *with Blackburn*, 53 F.3d at 828 (finding restraint on advertising not reasonably necessary where it was of "infinite duration"). The time period of restraints found

[8] Whether the non-compete restraints in the employment agreements signed pursuant to the 2016 Pickert merger are subordinate and collateral to the merger likely depends in part on the language of the merger transaction agreement. The restraints could qualify as subordinate to the merger if, for example, the transaction agreement required shareholders and key employees to enter into employment agreements with the new entity. On the other hand, if the transaction agreement contained an entirely *separate* five-year non-compete that began at the time of the merger and has now expired, as plaintiffs allege, Plaintiffs' TRO Mot., Ex. B (Declaration of Scott Parkhill, M.D.) ¶ 6, that would favor a finding that the non-compete restraints contained in these agreements were subordinate and collateral only to those separate agreements, not to the Pickert merger. Defendants would also have a difficult time arguing that the employment agreements signed after the Pickert merger—what plaintiffs refer to as the "Non-Legacy Agreements" and "NAPA Agreement," *see* Plantiffs' TRO Mot. at 5—were subordinate and collateral to a merger that occurred anywhere between months and five years prior to the signing of those agreements.

reasonable under this doctrine usually has been no more than a few years. *See, e.g.*, *Eichorn v. AT&T Corp.*, 248 F.3d 131, 136-37, 145-46 (3d Cir. 2001) (245 days); *Syntex Labs., Inc., v. Norwich Pharmacal Co.*, 315 F. Supp. 45, 56 (S.D.N.Y. 1970) (two years), *aff'd*, 437 F.2d 566 (2d Cir. 1971). Here, however, some of the non-compete restrictions appear to operate for significantly longer. The 2016 Shareholder Agreement, for example, is a seven-year minimum term contract, after which the non-compete provision applies for an additional two years—meaning that the non-compete restraint could be in force for a minimum of *nine years* after the merger.[9] Plaintiffs' TRO Mot., Ex. D (Shareholder Agreements) ¶¶ VIII.A.1 & XI.A.

Second, the Court should consider whether the non-competes are sufficiently tailored to the interests they purportedly protect. On this question, the non-competes may be overbroad—especially if the transaction to which they are subordinate is the employment agreement itself rather than the Pickert merger. *See Ellis v. McDaniel*, 95 Nev. 455, 459 (1979) ("[B]ecause the loss of a person's livelihood is a very serious matter, post employment anti-competitive covenants are scrutinized with greater care than are similar covenants incident to the sale of a business."). The agreements mention "Employee's unique and specialized skill and experience"—describing the employees at the time they were hired—which suggests that the restraints are less about inducing productive employment or new investment in human capital and more about "protection from competition by Employee." Plaintiffs' TRO Mot., Ex. G ¶ 16.A. Even if the restraints are aimed at protecting defendants' confidential information and trade secrets, the non-compete provision may not be reasonably necessary where, as here, the employment agreements already contain numerous other restrictions and covenants on those subjects. *See, e.g.*, *id.*, Ex. D ¶¶ X.A (Confidential Information and Trade Secrets), X.B (Disclosure of Confidential Information), X.D (Ownership of Work Product and Other Rights), X.E (Clearance Procedure for Proprietary Rights Not Claimed By Employer), XI.B (Non-Solicitation of Patients and Other Customers), XI.C (Non-Solicitation and No Hire of Employees), XI.D (Cooperation and Non-Disparagement).

[9] This restraint is in addition to the five-year non-compete signed by shareholders during the 2016 merger, *see* Complaint ¶¶ 13-14.

The Court may also consider whether the non-competes at issue do, in fact, promote the interests asserted by the employers; there is reason to believe they may not. Recent empirical scholarship suggests that the assumptions sometimes relied on to support non-competes may not be valid—particularly in light of their anticompetitive effects. For example, one study on non-competes for high-skilled workers found that there was no gain in investment in human capital in states with greater enforcement of non-competes. Natarajan Balasubramanian et al., *Locked In? The Enforceability of Covenants Not to Compete and the Careers of High-Tech Workers* (U.S. Census Bureau Ctr. for Econ. Stud., Paper No. CES-WP-17-09, 2019), J. Hum. Resources (forthcoming). Another found that higher enforceability of non-competes diminishes worker earnings and job mobility. Matthew S. Johnson et al., *The Labor Market Effects of Legal Restrictions on Worker Mobility* (Working Paper, June 6, 2020), https://ssrn.com/abstract=3455381.[10] A number of recent studies have also called into question long-held assumptions about the operation of labor markets. For example, labor markets may have greater friction impeding the mobility of employees than previously understood. *See* Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 Antitrust L.J. 165, 181 (2020). Where such "frictions lower the probability that workers will leave an employer who trains her or entrusts an intangible asset with her, the noncompete may be unnecessary." *Id.*

III. The Allegations Regarding the Non-Compete Agreements Raise Significant Concerns Even Under a Rule-of-Reason Standard

Even if the Court concludes that the restraints are vertical, or are horizontal but reasonably necessary (and thus ancillary) to a broader collaboration, several allegations suggest they would be unreasonable under a rule-of-reason analysis. The rule of reason requires a fact-specific evaluation "to assess the [restraint]'s actual effect" on competition. *Copperweld Corp.*, 467 U.S. at 768. The finder of fact often uses "a three-step, burden-shifting framework" to determine whether a restraint is unreasonable under the rule of reason. *Am. Express*, 138 S. Ct. at

[10] In addition to the works cited above, see, e.g., Evan P. Starr et al., *Noncompete Agreements in the US Labor Force*, 64 J.L. & Econ. 53 (2021); Michael Lipsitz & Evan Starr, *Low-Wage Workers and the Enforceability of Non-Compete Agreements*, 68 Mgmt. Sci. 143 (2021).

2284. First, a plaintiff has the initial burden of demonstrating that the challenged restraint "has a substantial anticompetitive effect" in the relevant market. *Id.* Second, if an anticompetitive effect is shown, the burden shifts to the defendant to demonstrate a procompetitive benefit of the restraint. *Id.* Third, if the defendant successfully demonstrates a procompetitive benefit, the burden shifts back to the plaintiff to show that such "procompetitive efficiencies could be reasonably achieved" via less restrictive means. *Id*. "Ultimately, it remains for the factfinder to weigh the harms and benefits of the challenged behavior." *Cap. Imaging Assocs.*, 996 F.2d at 543. Here, under a rule-of-reason framework, the allegations suggest that the restraints may be anticompetitive, and lacking a sufficient procompetitive justification, and thus unlawful.

A. The Allegations Suggest the Non-Compete Agreements Restrain a Significant Portion of the Market for Anesthesiology Services

An initial showing of anticompetitive effects can be made directly or indirectly. Direct proof of anticompetitive harm would be evidence of "actual detrimental effects," *Ind. Fed'n of Dentists*, 476 U.S. at 460, including "reduced output" and "decreased quality in the relevant market." *Am. Express*, 138 S. Ct. at 2284 (citing *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380, 390 (8th Cir. 2007); *Virgin Atl. Airways Ltd. v. British Airways PLC*, 257 F.3d 256, 264 (2d Cir. 2001)). Indirect evidence, by contrast, "would be proof of market power plus some evidence that the challenged restraint harms competition." *Am. Express*, 138 S. Ct. at 2284 (citing *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 97 (2d Cir. 1998); *Spanish Broad. Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1073 (11th Cir. 2004)).

To assist an analysis of competitive effects, courts often define relevant product and geographic markets—the area of competition where anticompetitive effects are expected. Although the United States has not conducted an independent market-definition analysis here, the evidence and relevant caselaw suggests that the relevant market may be both (1) the job market for anesthesia service positions in Northern Nevada and (2) the patient market for anesthesiology services in the Reno area[11]—and that both markets would be relevant for

[11] *See Bhan v. NME Hosps., Inc.*, 929 F.2d 1404 (9th Cir. 1991) (anesthesiology services a relevant market); *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1446-47 (9th Cir. 1988) ("job

assessing the anticompetitive effects of the restraints.[12]

Given these product and geographic markets, the allegations suggest that the non-competes—by limiting direct competition as well as by foreclosing competitors from hiring the anesthesiologists subject to them—collectively tie up approximately two-thirds of all permanently employed anesthesiologists in Northern Nevada, Complaint ¶ 2, thus constituting a significant restraint on competition for anesthesiology services in the relevant market. *See McWane*, 783 at 837 (noting that "some courts have found that a lesser [than 40%] degree of foreclosure is required when the defendant is a monopolist"); *CollegeNet*, 355 F. Supp. 3d at 952-53 (substantial foreclosure plausible where defendant controlled 60% of the market and engaged in exclusive dealing contracts). Indeed, because Renown is the only major trauma center in the region and there are virtually no hospitals in Northern Nevada outside the 25-mile area surrounding Renown, *see* Plaintiffs' TRO Mot. at 14, termination of the PSA between Renown and Pickert may greatly increase the likelihood of competitive harm imposed by the non-compete agreements. Without another customer, and without the ability to leave Pickert and work as a competing anesthesiologist in the Reno area, defendants' employees could be

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market for anesthesia service positions" and "patient market for anesthesia care" both relevant markets for assessing anticompetitive harms). On the relevant geographic market, *see* Complaint ¶ 16, *In re Renown Health*, No. C-4366 (F.T.C., Aug. 3, 2012), https://perma.cc/BDU7-F9HC ("The relevant geographic market in which to assess the [competitive] effect of . . . mergers with Renown Health is the Reno area"); *cf. Oltz*, 861 F.2d at 1447-48 ("The conclusion that Helena was the relevant geographic market for assessing such harm [to patient anesthesia services] is inescapable."). With respect to the job market for anesthesia service positions, *cf. Bhan*, 929 F.2d at 1413-14 (observing that the relevant geographic area for hospitals competing for anesthesia services positions was much larger than the town of Manteca, since hospitals "may acquire [anesthesia providers] from hundreds of miles away").

[12] Defendants criticize the plaintiffs for claiming "only irreparable injury on behalf of Renown . . . and on behalf of the public" to support their position. Defendants' Opp. to Mot. for TRO, at 29. The United States takes no position on whether plaintiffs have met their burden for relief under state law, but notes that harms to Renown and the public can certainly be relevant to a consideration of whether the post-employment restraints are anticompetitive and thus unreasonable under Section 1. In *Oltz*, the Ninth Circuit observed that a restraint on anesthesiology service providers potentially affected both the job market for anesthesia positions and the patient market for anesthesia care, and that "both were relevant to the search for competitive harm." 861 F.2d at 1446. Citing *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the court concluded that "injury to competition could exist in either" relevant market. *Oltz*, 861 F.2d at 1447.

functionally prohibited from performing anesthesiology services in the region. The non-compete agreements could effectively freeze the majority of the job market for anesthesiology services as well as the patient market for anesthesiology care. Indeed, if enforcement of the non-competes caused a shortage of anesthesiology services for patients in Reno, that would constitute evidence of "actual detrimental effects," *Ind. Fed'n of Dentists*, 476 U.S. at 460, sufficient to establish a prima facie rule-of-reason claim.

B. Defendants' Proffered Rationale for the Non-Compete Agreements Does Not Appear To Be Procompetitive

Other allegations suggest that the competitive rationales proffered by defendants may not be sufficient to overcome the agreements' potential anticompetitive effects. Once plaintiffs make out a prima facie case of harm to competition under the rule of reason, defendants must establish a sufficient procompetitive justification. To be cognizable, a procompetitive justification must show that a defendant's actions benefited, rather than harmed, competition. *See Cap. Imaging Assocs.*, 996 F.2d at 543 (defendant must offer "evidence of the pro-competitive 'redeeming virtues' of their combination").

Defendants suggest some possibly procompetitive rationales in their papers. *See* Defendants' Opp. to Mot. for TRO at 26 (calling non-competes "a mechanism that promotes the safety and security of capital investment," a "protection of investment backed decisions in the marketplace," and "an investment in human capital"). According to some courts, however, "general skills in sales and product development as well as industry knowledge" are "not a protectible interest . . . that would justify enforcement of a noncompete agreement." *Nike, Inc. v. McCarthy*, 379 F.3d 576, 585 (9th Cir. 2004): *see also supra* note 10 and accompanying text (citing recent empirical scholarship detailing anticompetitive effects of non-competes and calling justifications into question). Moreover, since plaintiffs are board-certified anesthesiologists who already completed extensive medical education and training prior to being employed by defendants, it may be difficult for defendants to justify the non-compete restraints on the basis of future "investment in human capital." And, as previously noted, defendants would have to contend with the explicit language—which defendants presumably themselves chose—in at least some of the relevant employment agreements acknowledging that plaintiff employees are a

competitive threat "given Employee's unique and specialized skill and experience," and characterizing the defendants' interest as "protection from competition by Employee." Plaintiffs' TRO Mot., Ex. G ¶ 16.A. Not all restraints are procompetitive, and a restraint cannot be procompetitive simply because its purpose is to "protect Employer's interest in its investment from competition." *Id.* "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 696.

C. The Allegations Suggest Any Purported Procompetitive Efficiencies Can Be Achieved Through Less Restrictive Means

Even if the defendants could demonstrate valid and sufficient procompetitive justifications for the non-compete agreements, a court would examine them further to determine whether any benefits could likely be achieved via less restrictive means. Indeed, the employment agreements already incorporate a number of less-restrictive provisions that safeguard defendants' interests. For example, as noted above, several non-interference clauses already prohibit plaintiffs from soliciting patients or customers, or soliciting or hiring employees during the same two-year post-employment period as the non-compete provision. *See* Plaintiffs' TRO Mot., Ex. D ¶¶ XI.B-C. Additionally, the employment agreements already prohibit the disclosure of a wide range of confidential information and trade secrets. *Id.*, Ex. D ¶¶ X.A-E. Compared to the non-compete provisions—which would effectively prevent plaintiffs from practicing their chosen field of medicine in the region for two years—these covenants are relatively targeted and specifically tailored to the protection of defendants' interests.

In short, defendants appear to have deployed several overlapping contractual restrictions available to protect their business. To the extent that there is any procompetitive rationale behind the non-compete provisions, it may already be effectuated sufficiently by these less restrictive and more narrowly tailored covenants. If that is the case, then the non-compete agreements would be unreasonable, even under the more accommodating rule-of-reason standard.

CONCLUSION

For the foregoing reasons, the United States respectfully recommends that the Court consider the above-discussed antitrust principles when it evaluates whether the post-employment restraints at issue are unreasonable and thus void and unenforceable under Nevada state law.[13]

Pursuant to NRS 239B.030, the undersigned affirms that this document does not contain the social security number of any person.

Dated: February 25, 2022

Respectfully submitted,

JONATHAN S. KANTER
Assistant Attorney General
DOHA G. MEKKI
Principal Deputy Assistant Attorney General
DAVID B. LAWRENCE
Policy Director

/s/ Andrew Schupanitz
ANDREW SCHUPANITZ
Attorney
U.S. Department of Justice
Antitrust Division
San Francisco Office
450 Golden Gate Avenue
Box 36046, Room 10-0101
San Francisco, CA 94102
Telephone: (415) 934-5300
andrew.schupanitz@usdoj.gov

[13] If it would please the Court, the United States can make itself available at the upcoming evidentiary hearing to address any issues presented in this Statement.

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I certify that on February 25, 2022, I electronically filed the foregoing **Statement of Interest of the United States** with the Clerk of the Court by using the electronic filing system, which will send notice of electronic filing to all parties.

/s/ Andrew Schupanitz
ANDREW SCHUPANITZ
Attorney
U.S. Department of Justice
Antitrust Division