U.S. Department of Justice

Antitrust Division

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BY ELECTRONIC FILING

Hon. Molly C. Dwyer, Clerk of Court
U.S. Court of Appeals for the Ninth Circuit
The James R. Browning Courthouse
95 7th Street
San Francisco, CA 94103
(415) 355-8000

Re: *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679 (argued July 26, 2021 before Judges M. Smith, Jr.; Owens; and Robreno)

United States' Citation of Supplemental Authority

After the government presented oral argument, AMN's counsel referenced *NCAA v. Alston*, 141 S. Ct. 2141 (2021), a recent Supreme Court decision affirming this Court's holding that NCAA restrictions on certain benefits for student-athletes violated Sherman Act Section 1. *Alston* confirms that Section 1 protects consumers *and* workers—and thus applies equally to anticompetitive agreements in labor markets. Although the Court applied the rule of reason to restraints "of the sort that are 'ordinarily condemned' as 'illegal per se,'" it did so only due to the uniqueness of the NCAA's product—competitive sports—which must be produced jointly by competitors and for which "horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 2157 (citations omitted).

That unique context does not arise here. AMN has argued neither that the type of services it provides must be produced jointly by

competitors nor that horizontal restraints are essential for those services to be available at all.

At issue is a non-solicitation agreement between competing employers. An agreement between competitors not to solicit certain *customers* is market allocation, and—because the same rules apply on the input and output sides of the market, and employees are entitled to the same antitrust protections as any other input provider—an agreement between competitors not to solicit certain *employees* is market allocation. USA.Br.20-27; *cf. Alston*, 141 S. Ct. at 2167 (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor."); *Anderson v. Shipowners' Ass'n*, 272 U.S. 359, 362-63 (1926) (shipowners' combination assigning seamen to particular ships was "precisely what [Section 1] condemns"). Congress recently confirmed courts' longstanding determination that market allocation (along with price fixing and bid rigging) is "categorically and irredeemably anticompetitive." Pub. L. 116-159, § 4302, 134 Stat. 709, 742 (2020).

Accordingly, the challenged non-solicitation agreement falls under the per se rule against market allocation, unless AMN can establish a defense to per se illegality. AMN here asserts that the challenged agreement is ancillary; therefore, AMN must prove the restraint is reasonably necessary to a legitimate collaboration before it will be judged under the rule of reason. USA.Br.27-37.

Respectfully submitted.

/s/ Mary Helen Wimberly

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cc: All Counsel of Record (by ECF notice)