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The Predatory Hiring Standard for Section 2 Violations of the Sherman Antitrust Act

NICOLE PAGE*

In antitrust claims of predatory hiring, plaintiffs allege that defendants have attempted to monopolize the market by eliminating their business or injuring their ability to compete by hiring away their employees. Universal Analytics, Inc., the principal case deciding this type of antitrust action, determined that unlawful predatory hiring may be established in two ways: (1) by showing the hiring was made with such predatory intent, or (2) by showing a “clear nonuse in fact.” After considering the criticism of the standards by legal scholars and examining key cases following Universal Analytics, Inc., this Note acknowledges the evolution of the application of the standard to predatory hiring claims and proposes a revision to the method to find predatory hiring. In doing so, it will reject the Universal Analytics, Inc. standard, and argue for its replacement by the new “bona fide intent to use” test. The “bona fide intent to use” test is derived from a compilation of what the courts have and must consider when determining whether the competitor has engaged in exclusionary conduct in the hiring of its competitor’s employee.

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THE PREDATORY HIRING STANDARD FOR SECTION 2 VIOLATIONS

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I. INTRODUCTION

In rare circumstances, companies have brought claims of predatory hiring under Section 2 of the Sherman Act as an antitrust violation, alleging that a monopolist with whom they compete has unlawfully stolen their employees and, in turn, has caused or will cause the companies to exit the market.¹ In order to gain an advantage over their competitors in the market, companies generally hire some or all of their competitor’s employees.² This conduct occurs the most frequently in the most powerful companies in the software, hardware engineering, and information technology industries; wherein highly skilled workers are required.³ There is not an issue in every case where a company hires its competitor’s employees, as society must not obstruct the efficient flow of workers to be employed where their skills are most productive.⁴ Nevertheless, there are some concerns about the potential damages of predatory hiring among those businesses that have acquired or maintained monopolies or are attempting to do so.⁵

If a major firm hires away employees from its competitors, that hiring may constitute predatory or exclusionary conduct in an attempted monopolization claim under Section 2 of the Sherman Act.⁶ “Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor.”⁷ Hiring an employee of a competitor and not using their talents for the purpose of impairing competition is

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³ See generally id.
⁶ Areeda & Turner, supra note 4.
⁷ Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1258 (9th Cir. 1990).
beyond the policy of the freedom to change jobs and the ability to use acquired skills and talents.\(^8\) Especially when done by a monopolist, such conduct is likely to trigger antitrust alarms.\(^9\) Unlawful predatory hiring may be established in two ways: by “showing the hiring was made with such predatory intent, i.e. to harm the competition without helping the monopolist, or by showing a clear nonuse in fact.”\(^10\)

Originally applying the Sherman Act to a claim of predatory hiring, the court in *Universal Analytics, Inc. v. Maeneal Schwendler Corp.*, held: “[I]n the absence, therefore, of the monopolist’s proved subjective intent to hire talent preclusively or of clear non-use in fact, employment should not be held exclusionary.”\(^11\) The standards for predatory hiring, “a clear non-use in fact” or a “showing the hiring was made with such predatory intent,” have been moderately criticized by legal scholars as being too narrow and, thus, bypassing an anticompetitive conduct finding in certain circumstances where it may have been found absent the application of the standard.\(^12\) The writers who have urged that the standard is unsustainable in individual case evaluation, argue that if a firm hires an employee from a competitor and puts the employee to marginal use, then that will be enough to refute the pretextual predatory hiring and, therefore, the test will allow a business to continue to restrain competition.\(^13\) However, when applied in the cases subsequent to *Universal Analytics, Inc.*, modern courts have progressively interpreted the standard beyond what it reads on its face.\(^14\) Therefore, although the standard is due for a revision, in practice there has not been a completely ignored finding of exclusionary conduct in circumstances where the “clear non-use in

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8. See 3 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 702b, at 141 (1996) (“Hiring talent cannot generally be held exclusionary even if it does weaken actual or potential rivals and strengthen a monopolist . . . because there is a high social and personal interest in maintaining a freely functioning market for talent.”).


10. *Universal Analytics, Inc.*, 914 F.2d at 1258.

11. Id.


fact” standard is applied.15 As it will be demonstrated later in Part III of this Note, most courts that have heard a predatory hiring claim have used the standard set out in Universal Analytics, Inc.,16 while some have refused to acknowledge that such a claim is cognizable.17

Although the decisions on predatory hiring are infrequent and there is very little literature focusing on it, there are many reasons to review this neglected type of exclusionary conduct, including the fact that it may help to reduce any confusion in future cases. Given recent Department of Justice investigations of agreements between several high-profile technology competitors,18 competitors may be tempted to steal employees due to the issues regarding the legality of agreements that are designed to inform competitors of their employees’ employment offers.19 Further, predatory hiring may allow a remedy for companies that suffer from a competitor’s predatory raid on its key executives in situations where the stolen employees are not subject to non-compete agreements.20 With that being said, due to the standard appearance to hinder a plaintiff to prove sufficient predatory intent,21 and to disregard any evidence of exclusionary conduct upon a showing of marginal use and concerns of a monopolist ability to escape a finding of violation of the antitrust laws set out by critics,22 this Note will use cases following Universal Analytics, Inc. to explore the evolution of the “clear non-use in fact” standard and create a new test consistent with the state of the law to diminish concerns

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15. See, e.g., cases cited supra note 14.
17. See Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 855 (7th Cir. 2011).
18. See Angie Davis et al., Developing Trends in Non-Compete Agreements and Other Restrictive Covenants, 30 ABA J. LAB. & EMP. L. 255, 270 (2015) (“Unlike traditional restrictive covenant agreements, which are entered into between an employer and an employee, no-poaching agreements are entered into between employers, cutting the employee out of the equation altogether. The practice is rumored to have originated when Apple’s then-CEO Steve Jobs directly contacted Google’s then-CEO Eric Schmidt to discuss Google’s pirating of Apple’s employees. The practice of entering no-poaching agreements spread to other large technology companies, and the parties agreed (1) not to cold-call each other’s employees; (2) to notify each other when making an offer to the other company’s employee, even if employees applied for jobs on their own initiative; and (3) that any offer would be final and would not be improved in response to a counteroffer by the employee’s current employer. This practice has garnered the attention of the Department of Justice (DOJ). In 2010, the DOJ investigated agreements between several high-profile technology companies on the basis that these restraints on employee recruitment and hiring violated antitrust laws While appellate courts have not yet ruled whether these agreements are per se illegal, several lower court rulings clearly indicate that employers should seek appropriate counsel on the issue.”).
20. Id. at 137-38.
21. Id. at 152.
22. See generally D’Arpino, supra note 13.
from the old. This Note will propose a replacement to the ways to find predatory hiring. In doing so, it will reject the predatory intent or “clear non-use in fact” standard, and argue for its replacement by the new “bona fide intent to use” test. The “bona fide intent to use” test is derived from a compilation of what the courts have and must consider when determining whether the competitor has engaged in exclusionary conduct in the hiring of its competitor’s employee. The new test, the “bona fide intent to use” test, should serve as a replacement for the “clear non-use in fact” standard, as it is consistent with antitrust laws and principles.23

Part II of this Note will explain how predatory conduct may constitute a Section 2 violation of the Sherman Antitrust Act. Part III of this Note will consider the critics’ stance on the Universal Analytics, Inc. standard, review the courts’ progression of the application of the standard in determining whether unlawful predatory hiring occurs, and will then argue that the standard should be altered not because it generously allows evidence of exclusionary conduct to be undermined where there is a mere showing of use, but for the sake of clarity, as courts have applied the standard more comprehensively than what the standard reads.24 Qualifiers of the standard that the courts have used in its analysis will be suggested to be used exhaustively to show a more compelling case of the purpose to drive the competitor out of the market. Part IV of this Note will further promote the “bona fide intent to use” test that should be used by courts when analyzing whether the competitor has engaged in predatory or exclusionary conduct by hiring the employee, rejecting the Universal Analytics, Inc. two-part test. These suggestions will do one of two things: they will either diminish the likelihood of anticompetitive behavior when it is apparent, or they will help show that predatory hiring is prevalent when it is not substantially evident. Part V of this Note will briefly conclude.

II. HOW PREDATORY CONDUCT MAY CONSTITUTE A SECTION 2 VIOLATION OF THE SHERMAN ANTITRUST ACT

A. MONOPOLIZATION UNDER SECTION 2

The offense of monopoly under s[ection] 2 of the Sherman Act has two elements: (1) the possession

23. See United States Dep’t of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act, 2008 WL 4606679, at *30 (Sept. 1, 2008) (“While the Supreme Court has established conduct-specific tests for predatory pricing and bidding, it has neither articulated similarly explicit standards for many other types of potentially exclusionary conduct nor adopted a test applicable to all conduct. The lower courts also have not settled on either a general test or conduct-specific test.”).

24. See, e.g., cases cited supra note 14; Braun & Williams, supra note 12; Carey, supra note 19; D’Arpino, supra note 13.
of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. 25

As to the first element, the plaintiff must first define the relevant market and then show that the defendant has monopoly power in the relevant market in which plaintiff and defendant competed. 26 "The relevant product market identifies the products or services that compete with each other, and the relevant geographic market identifies the area where the competition in the relevant product market takes place." 27 "If consumers view the products as substitutes, the products are part of the same market." 28

Monopoly power is a high degree of market power or "the power to control prices or exclude competition." 29 Once a firm has the ability to unilaterally "raise prices and profitably maintain those prices above competitive levels and/or restrict output in the market," market power is established. 30 In the event "no specific market is threatened with monopolization, predatory hiring cannot possibly harm competition in the long run, because remaining competitors prevent the predator from ever recouping its costs through higher prices." 31 "If a party does not have monopolistic control over a market, its unfair business conduct implicates the attempt provision of the antitrust laws only if that conduct threatens to create a monopoly." 32 In an attempted monopolization claim, "the plaintiff must show that there was a dangerous probability the defendant would achieve monopoly status as the result of the predatory conduct alleged by the plaintiff." 33 In establishing whether a firm has

28. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1435 (9th Cir. 1995).
33. Id.
market power, substantial entry barriers to the market will further demonstrate a showing that monopoly power exists. Those factors are key in supporting an outcome that the competitor whose employees were stolen is actually likely to exit the market.

B. UNLAWFUL MONOPOLIZATION UNDER SECTION 2: ANTICOMPETITIVE CONDUCT

Once monopoly power is established, the second element is the willful acquisition or maintenance of that power. "Monopolization, ... is illegal conduct by which a single firm seeks either to obtain or to retain market power." Merely acquiring monopoly power does not violate Section 2. Accordingly, the mere size of the corporate position in a market does not make it per se illegal "provided such size is the result of natural and legitimate growth." Therefore, if the monopolist dominance is a result of its own skill or efficiency, then there is no Section 2 violation. However, when the size of the corporation is a result of unlawful means to control the market, it is illegal. Under the first element, "the acquisition or possession of monopoly power must be accompanied by some anticompetitive conduct on the part of the possessor." Conduct may be deemed anticompetitive if it impairs the opportunities of rivals and "either does not further competition on the merits or does so in an unnecessarily restrictive way." Courts have found this type

35. See Oahu Gas Serv., Inc. v. Pac. Res., Inc., 838 F.2d 360, 366 (9th Cir. 1988) ("A high market share, though it may ordinarily raise an inference of monopoly power, will not do so in a market with low entry barriers or other evidence of a defendant’s inability to control prices or exclude competitors.").
36. Broadcom Corp., 501 F.3d at 308.
40. SULLIVAN ET AL., supra note 37, at 580.
41. SULLIVAN ET AL., supra note 37, at 580.
42. Broadcom Corp. v. Qualcomm Inc., 501 F.3d 297, 308 (3d Cir. 2007).
of conduct in many different forms. The conventional cases of predatory conduct include predatory pricing and refusals to deal.

1. Predatory Pricing

Predatory pricing has been defined as setting prices below an appropriate measure of cost to cause an elimination of competitors in the short run and, in turn, reduce competition in the long run. Generally, above-cost prices are not anticompetitive; however, there are some rare cases where above-cost prices become anticompetitive. To prevail on a predatory pricing claim, two requirements must be established: “(1) ‘the prices complained of are below an appropriate measure of its rival’s costs’; and (2) ‘there is a ‘dangerous probability’ that the defendant will be able to recoup its ‘investment’ in below-cost prices.” In a successful predatory pricing claim, it should be shown that the competitor has the capacity to not only eliminate its competitors through predation, but also be able to change monopoly prices and recoup monopoly profits in the future.

2. Refusals to deal

Under certain circumstances, a refusal to cooperate with another business may constitute anticompetitive conduct and violate Section 2 of the Sherman Act. Under the antitrust laws, a business “generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.” The exception to this is the rare occasion of acts by a monopolist that lack a business justification. Acts that either do not further competi-

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44. Caribbean Broad. Sys., Ltd. v. Cable & Wireless P.L.C., 148 F.3d 1080, 1087 (D.C. Cir. 1998) (“‘Anticompetitive conduct’ can come in too many different forms, and is too dependent upon context, for any court or commentator ever to have enumerated all the varieties.”).
45. Katherine McClelland, Should College Football’s Currency Read “In BCS We Trust” or Is It Just Monopoly Money?: Antitrust Implications of the Bowl Championship Series, 37 Tex. Tech L. Rev. 167, 197 (2004) (“The most common examples of per se antitrust violations include price fixing and refusals-to-deal because these, by their very nature, are anticompetitive and illegally restrain trade.”).
49. United States Dep’t of Justice, supra note 23, at *37-38.
tion on the merits or do so in an unnecessarily restrictive way, may be antitrust violations.\textsuperscript{51} In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the right to exercise independent discretion as to parties with whom to deal.\textsuperscript{52}

In the leading case for Section 2 liability based on refusal to deal, \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.}, the defendant and owner of three of the four major Aspen Ski facilities terminated its agreement with the plaintiff, owner of the other major mountain facility.\textsuperscript{53} Both competitors cooperated for years in the joint venture where they provided customers with the convenience of access to all four of the mountains and an interchangeable “6-day all-Aspen ticket.”\textsuperscript{54} The court agreed that it was reasonable to infer that the defendants were willing to forsake short-term profits to achieve an anticompetitive end by reducing competition over the long run, given the fact that the defendant rejected the offer of its competitor to sell tickets at retail price.\textsuperscript{55}

C. PREDATORY HIRING

Antitrust claims alleging predatory hiring have been considered only in limited circumstances.\textsuperscript{56} Compared to other forms of anticompetitive conduct, courts use more caution when imposing antitrust liability for a firm’s hiring practices.\textsuperscript{57} In such cases, plaintiffs allege that the defendants have attempted to monopolize the market by, among other things, eliminating their business or injuring their ability to compete by hiring away the competitor’s employees.\textsuperscript{58} It is important to note that the mere hiring of a competitor’s employee that results as an injury to the competitor is not enough to be considered anticompetitive.\textsuperscript{59} It is sufficient to be considered anticompetitive

\textsuperscript{53} \textit{Aspen Skiing Co.}, 472 U.S. at 592-93.
\textsuperscript{54} \textit{Id.} at 589-90.
\textsuperscript{55} \textit{Id.} at 610-11.
\textsuperscript{56} GARY R. SINISCALCO, \textit{UNITED STATES LAW ON RESTRICTIVE COVENANTS AND TRADE SECRETS}, ABA 49 (May 9-13, 2010), http://apps.americanbar.org/labor/intlcomm/mw/papers/2010/pdf/siniscalco.pdf (“The utility to employers of a claim of predatory hiring may be limited because it only applies to competitors with monopoly power and because evidence of predatory intent, e.g., the competitor’s nonuse of the acquired employee, may be difficult to establish.”).
\textsuperscript{58} \textit{Id.}
\textsuperscript{59} Areeda & Hovenkamp, \textit{supra} note 8; (“Hiring talent cannot generally be held exclusionary even if it does weaken actual or potential rivals and strengthen a monopolist . . .
when the plaintiffs prove that the hiring was intended to destroy competition itself.\textsuperscript{60} When the hiring eliminates the competitor’s ability to compete, it can constitute predatory or exclusionary conduct in a monopolization claim under Section 2 of the Sherman Act.\textsuperscript{61} Unlawful predatory hiring is established when “talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor.”\textsuperscript{62} This principle may be established by “showing the hiring was made with such predatory intent, i.e., to harm the competition without helping the monopolist, or showing a clear nonuse in fact.”\textsuperscript{63} The unintended concerns of this standard are the main focus of this Note.

III. PREDATORY HIRING

A. UNIVERSAL ANALYTICS, INC. STANDARD FOR PREDATORY HIRING

In the leading case of predatory hiring, \textit{Universal Analytics, Inc. v. Macneal Schwendler Corp.}, Universal Analytics, Inc (“UAI”) claimed that Macneal Schwendler Corp. (“MSC”)’s hiring of five of UAI’s five key technical employees was predatory, in violation of Section 2 of the Sherman Act.\textsuperscript{64} The principal evidence offered by UAI in support of its predatory hiring claim against MSC was a memo from the executive vice president of MSC to MSC’s chief executive officer that read, by hiring UAI employees, “we wound UAI again.”\textsuperscript{65} Although the memo was evidence that one reason for the hiring was to disadvantage the competition, the court held that MSC had no intention of retaining the employees unproductively as there was evidence that the employees were hired primarily for their programming competence.

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\textsuperscript{60} Florida Fuels, Inc. v. Belcher Oil Co., 717 F. Supp. 1528, 1532 (S.D.Fla.1989). (“[M]ere existence of monopoly power does not imply a violation of the [Sherman] Act, the use of monopoly power, no matter how lawfully acquired, to foreclose competition, to generate a competitive advantage, or to destroy a competitor, is unlawful.”). \textit{See} Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (3d Cir. 2010) (“Ultimately, Section 2 is directed against conduct that ‘unfairly tends to destroy competition itself,’ as opposed to even ‘severe’ competition.”).

\textsuperscript{61} \textit{See} McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc., No. CIV.08-00080 JMS/BMK, 2008 WL 2437739, at *5 (D. Haw. June 17, 2008) (“The inability to compete with Defendant and hence, the lessening of competition—flows from Defendant’s unlawful predatory hiring. This resulting lessening of competition is precisely the type of injury that the antitrust laws were intended to prevent.”).

\textsuperscript{62} Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1258 (9th Cir. 1990).

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} \textit{Id.} at 1257.

\textsuperscript{65} \textit{Id.} at 1258-59.
in their specialized areas. Additionally, each of the five UAI employees were immediately assigned to work in their areas of specialization. Neither of the UAI employees was allowed to engage in nonproductive or underproductive capacities. Accordingly, the court found there was no claim for predatory hiring because there was no predatory conduct as the plaintiff’s memo was insufficient for a finding of predatory conduct and there was no “clear non-use in fact” as the employees hired from the plaintiff’s firm were used for their talents.

*Universal Analytics, Inc.* adopted the predatory hiring standard from Professors Areeda and Turner who wrote:

> Acquiring talent not to use it but to deny it to possible rivals is exclusionary. Such an arrangement has the same harmful tendency and the same lack of redeeming virtue as the promise by a non-employee that he will not compete with the monopolist. But unlike the latter agreement whose existence or non-existence is a rather clear-cut question, exclusionary employment would be hard to identify. A monopolist would probably use important talent once acquired. And the court should not try to judge whether the acquired talent was used more effectively than readily available alternative personnel. Nor should it try to do so when the defendant pursues a hard-to-match, if not unmatchable, program of recruiting, say, young researchers in his field. In the absence, therefore, of the monopolist’s proved subjective intent to hire talent preclusively or of clear non-use in fact, employment should not be held exclusionary.

The court adopted this authority in holding that predatory hiring is established only where there is evidence that the poaching competitor does not use the employee or where there is evidence that the poacher intended to hire the employee merely for the purpose of denying the employee’s talents to its competitor. It further stated that evidence of wounding the competitors was insufficient to support a claim of predatory hiring.

66. *Id.* at 1259.
68. *Id.*
69. *Id.* at 1258.
70. *Id.*
71. *Id.* at 1258-59.
72. *Universal Analytics, Inc.*, 914 F.2d at 1259.
B. CRITICS STANCE OF THE *UNIVERSAL ANALYTICS, INC.* STANDARD

Gaps in this standard have been recognized by Kristina L. Carey, who discussed the notion of predatory hiring as a possible alternative to the non-compete agreement for employers seeking protection from employees who leave to work for competitors.73 Acknowledging that the test is a great obstacle to the plaintiff given the narrowly tailored standard, she states that the sole purpose standard (the sole purpose is to use them for their skills and not of acquiring a monopoly power or of clear non-use in fact) should be relaxed because it favors larger companies over smaller ones given the cost of pursuing a claim compared with the likelihood of success.74

In their co-authored journal article, legal professional, Richard J. Braun, and business professional, Michael A. Williams, made the argument, using a case study, that even when “a dominant firm uses talent hired away from its competitors, that hiring can constitute predatory or exclusionary conduct in an attempted monopolization claim under Section 2 of the Sherman Act.”75 By using internal company documents and deposition testimonies from a case study, Braun and Williams demonstrated that the current standard for proving predatory hiring may prevent plaintiffs from success in cases in which antitrust impact and injury truly exist.76

Over twenty years ago, Vincent A. D’Arpino thoroughly argued in his article that “[t]he clear non-use prong of the Ninth Circuit’s test offers little help in identifying most cases of predatory hiring,” and it “will prove unhelpful in reducing a substantial amount of such predatory behavior.”77 D’Arpino further stated, “under a clear non-use standard, as long as firms put the lured employee to even marginal use, they will survive a section 2 challenge to their hiring practices” and that “subsequent non-use of a competitor’s employees clearly violates the pro-competitive language of federal antitrust laws.”78 He also argued that the second way to establish predatory hiring, by a finding of subjective intent of predatory conduct, was problematic and would be burdensome for plaintiffs to meet.79 He reasoned that to establish predatory hiring, predatory types of behavior should be identified in accordance with objective factors in claims of predatory pricing since predatory hiring was a new claim at the time.80 In his view, “the most accurate way to

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determine whether present behavior is predatory is to analyze objective market factors and expected effects on the market in the long run.\textsuperscript{81} Such factors include: “market structure, available talent, and salary structure.”\textsuperscript{82}

The “clear non-use in fact” standard set forth in the first known predatory hiring claim continues to be referenced by succeeding courts regardless of the concerns set forth in articles written from over twenty years ago up until two years ago.\textsuperscript{83} However, the standard is not totally inconsistent with the principles of antitrust law. In fact, as case law developed, the courts applied the standard in a way that alleviates some of the concerns.\textsuperscript{84} Interpreting \textit{Universal Analytics, Inc.’s} declaration of predatory hiring to mean that mere use of the competitors hired employee is unlimited is a mistake; it ignores the large limitations placed on predatory hiring by the \textit{Universal Analytics, Inc.} court and the courts which have relied on that decision.\textsuperscript{85} Some may have misunderstood the heart of \textit{Universal Analytics, Inc.} and its potential expansion. However, this Note attempts to reconcile these positions by reconsidering D’Arpino’s and others’ arguments in favor of transition by creating a new and improved standard for predatory hiring consistent with case law. The vast majority of courts that have heard this rare type of suit have explicitly relied on the \textit{Universal Analytics, Inc.} standard.\textsuperscript{86}

C. EXPANSION OF THE \textit{UNIVERSAL ANALYTICS, INC.} STANDARD

Over the years, the depth of the \textit{Universal Analytics, Inc.} standard for predatory hiring has expanded through case law. A year later in \textit{Midwest Radio Co., Inc. v. Forum Pub. Co.}, a radio company brought an antitrust action alleging that the defendant intended to monopolize the mass media advertising market through anti-competitive acts, including the predatory hiring of seven of its key personnel.\textsuperscript{87} Evidence showed that the seven employees hired away were used to improve the radio station’s operating performance.\textsuperscript{88} The station’s acts of hiring new talented employees from the defendant were to attract new listeners and new advertisers.\textsuperscript{89} Here the court concluded that the

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\textsuperscript{81} D’Arpino, \textit{supra} note 13, at 347.
\textsuperscript{82} D’Arpino, \textit{supra} note 13, at 350.
\textsuperscript{83} See \textit{Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp.}, 45 F. Supp. 2d 1164, 1196 (D. Kan. 1999) (“[A]ll cases discussing the predatory hiring of employees, including \textit{Universal Analytics}, are closely tied to the discussion by Professors Areeda and Turner. . .”)\textsuperscript{84} See, e.g., cases cited \textit{supra} note 14.
\textsuperscript{85} See cases cited \textit{supra} note 14.
\textsuperscript{86} See cases cited \textit{supra} note 14.
\textsuperscript{87} \textit{Midwest Radio Co. v. Forum Pub. Co.}, 942 F.2d 1294, 1296 (8th Cir. 1991).
\textsuperscript{88} Id. at 1297.
\textsuperscript{89} Id. at 1298.
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The defendant’s attempt to revive the failing station “constituted a valid justification for improving its services to its customers,” which included both advertisers and listeners.90 The court applied the Universal Analytics, Inc. standard by not only looking to whether the stolen employees were simply used, but whether the employees were used for their talents and whether there was a need for the employees’ help.91

In a later case, Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., the plaintiffs alleged that the hiring of its physicians by the defendant constituted predatory conduct because the defendants intended to monopolize health care services and drive the plaintiffs out of business by offering excessive salaries to their employees.92 The court also cited Universal Analytics, Inc. for the rule that “predatory hiring should be restricted to cases in which the plaintiff can demonstrate either nonuse of the employee or a proven intent to hire for the sole purpose of denying the employee to the plaintiff.”93 The court found no proof of either method for finding predatory hiring because evidence was lacking that the hired physicians were only hired to keep them from being used by the plaintiff as well as proof that the physicians were not actively employed.94 The evidence actually showed both: that the defendant continued to actively use the physicians, and that defendant had obtained benefits from their services.95 Thus, even though the employees were used, the court still analyzed the extent of use by considering that the defendants continued to actively use the physicians, which defeats concerns of subsequent non-use of a competitor’s employees.96 Although sufficient use was found, the court nonetheless evaluated the second method for finding predatory hiring: intent to deny talents, by taking into consideration that the competitor benefited from their services.97 The court reasoned that there were no grounds that the allegedly excessive salaries were compelling to constitute predatory conduct.98

In American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publication, Inc., the court found the defendant’s conduct of hiring one law professor away from the plaintiff was insufficient to constitute an antitrust violation, absent a continued pattern of

90. Id.
91. Id. at 1297.
93. Id. at 1196.
94. Id.
95. Id.
96. See id.
97. Wichita Clinic, P.A., 45 F. Supp. 2d at 1197.
98. Id.
such conduct. Although the inducing and hiring of the competitor’s employee alone is generally not enough for a finding of antitrust liability, some courts find predatory conduct when there is a combination of wrongful acts complementing the hiring. In Natsource LLC. v. GFI Group, Inc., the court found Natsource’s allegations that the defendants attempted to monopolize by the hiring of a competitor’s employees were sufficient to raise a claim of antitrust liability given the pattern of wrongful acts by the defendant. These wrongful acts consisted of aiding and abetting the competitor’s employees in breaches of their fiduciary duties and misappropriating trade secrets.

In McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc., the plaintiff alleged that the defendant engaged in predatory conduct when the defendant attempted to hire 108 of the plaintiff’s employees. Defendant argued that “its sole intent cannot be to harm Plaintiff, because . . . [the] Defendant will use the new employees, . . . and is using Plaintiff’s employees now.” The McCabe court found that although the defendant’s use of all of the employees 60% of the time was certainly adequate use, “clear non-use in fact” test is not the only way to find predatory hiring, as the standard is either hiring to harm competition without helping the monopolist or a “clear non-use in fact.” The McCabe court recognized that the allegations presented by the plaintiff sufficiently stated a predatory hiring claim by arguing there was harm to the plaintiff due to the defendant hiring the plaintiff’s employees to prevent the plaintiff’s from being able to compete. Contrary to the stance taken by some critics, the McCabe court’s analysis did not imply that a marginal use would be sufficient; it actually stated the reverse as it indicated that an employee use of only 40% will not be enough to support a defense for predatory conduct. Although it considered the defendant’s 60% usage to be sufficient, the court did not end the analysis there. Instead, the court went on to determine if there was hiring to injure competition without helping the monopolist.

101. Id. at 632.
102. Id.
104. Id. at *6.
105. Id.
106. Id.
107. Id.
109. Id. at *6.
In *Total Renal Care, Inc. v. W. Nephrology & Metabolic Bone Disease P.C.*, the court found that a claim of predatory hiring brought by TRC alleging ARA’s “locking up” its own employees to keep them from moving to another firm by asserting illegal non-compete agreements was analogous to predatory hiring of a rival’s employees because “in both circumstances, the defendant seeks to prevent a rival from competing by denying that rival key employees.” The court applied the *Universal Analytics, Inc.* analysis in finding that TRC took all possible measures to retain its staff, which was a sufficient business reason given that there was a shortage of qualified nurses and that the time to train and deploy nurses was substantial. Therefore, there was no way for TRC to harm the competition without helping its own business.

In a more recent case alleging a claim of predatory hiring, *West Penn Allegheny Health System, Inc. v. UPMC*, Pittsburgh’s second largest hospital system, sued the defendant UPMC, Pittsburgh’s dominant hospital system and health insurer, for attempting to monopolize the Pittsburgh market for hospital services by raiding West Penn’s key physicians. UPMC poached physicians, paying them salaries well above market rates even though they lacked the sufficient capacity to keep them employed, and admitted sacrificing financial loss in order to drive competing hospitals out of business. Referring to the *Universal Analytics, Inc.* two-part test, the court found the allegations sufficient to show that UPMC engaged in anticompetitive conduct through their hiring activities. This case is a solid example of predatory hiring and the anticompetitive acts that accompany predation.

Courts have not always accepted predatory hiring claims. For example, in *Storage Technology Corp. v. Cisco Systems, Inc.*, the circuit court affirmed the district court’s rejection of Storage Technology’s claim of corporate raiding. Holding that “Minnesota had not recognized a cause of action for corporate raiding and that Minnesota has disfavored any cause of action that would inhibit employees’ mobility in the workforce,” the court declined to recognize a predatory hiring claim.

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111. *Id.* at *13.
112. *Id.*
113. *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 95-96 (3d Cir. 2010).
114. *Id.* at 95.
115. *Id.* at 109.
117. *Id.* at 924.
118. *Id.; see also* Mercatus Grp., LLC v. Lake Forest Hosp., 641 F.3d 834, 854 n.12 (7th Cir. 2011) ("We have never recognized predatory hiring as a valid theory of antitrust...")
One thing is clear from the standard: if you hire a competitor’s employee, you must use them.119 However, the courts do not allow any degree of use to bypass a finding of predatory conduct.120 Courts will consider the extent of the use.121 Critics have argued, “[u]nder a clear non-use standard, as long as firms put the lured employee to marginal use, they will survive a section 2 challenge to their hiring practice.”122 As demonstrated through case law, a mere showing of use does not defeat a claim of predatory hiring.123 The “clear non-use in fact” standard does not allow competitors to escape antitrust violations with nominal use. Because courts look to the extent of the use, evasion of liability through marginal use is negated.124 These cases show that when employees are hired by their competitor, they must be used and immediately put to work in their area of specialization.125 Courts have held that there must be a need for the employees’ talents, even in cases where employees are immediately utilized and used for their talents.126 However, even if there is such a need, the employer must have the capacity to keep liability and need not do so at this time since Mercatus has said it does not assert a predatory hiring claim.”.


120. See cases cited supra note 14.

121. See cases cited supra note 14.

122. D’Arpino, supra note 13, at 343.

123. See W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 109 (3d Cir. 2010) (the court evaluated whether the competitor’s business had the capacity to keep the hired employees employed); Am. Prof’l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof’l Publ’n’s, Inc., 108 F.3d 1147, 1153 (9th Cir. 1997) (the court evaluated whether there was a continued hiring of the competitor’s employees); Midwest Radio Co. v. Forum Pub. Co., 942 F.2d 1294, 1297-98 (8th Cir. 1991) (the court considered whether there was a need for the employees’ services); McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc., No. CIV.08-00080 JMS/BMK, 2008 WL 2437739, at *6 (D. Haw. June 17, 2008) (the court evaluated whether all of the employees or a sufficient number of employees hired were used); Natsource LLC. v. GFI Grp., Inc., 332 F. Supp. 2d 626, 631-32 (S.D.N.Y. 2004) (the court considered other wrongful acts deriving out of hiring a competitor’s employee in order to find predatory conduct); Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., 45 F. Supp. 2d 1164, 1196 (D. Kan. 1999) (the court took into consideration that the employees hired from the competitors were actively and continuously used).

124. See cases cited supra note 123.

125. Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1259 (9th Cir. 1990).

126. See Midwest Radio Co., 942 F.2d at 1298.
them employed. Additionally, the amount of employees hired must be sufficiently used. There must be a continued use of the employee in which the employer is obtaining profits and other benefits from and not a use that is primarily meant to injure the competitor. Finally, if there is only one employee hired away from the competitor, unless the defendant has engaged in other wrongful acts such as aiding and abetting the competitor’s employees in breaching their fiduciary duties and misappropriating trade secrets, then that will not be enough to constitute exclusionary conduct.

Under the framework established above, the following occurs:

1. A plaintiff firm makes a claim for predatory hiring and gives evidence of predatory conduct;
2. The defendant shows that they have merely used the stolen employee;
3. The claim is defeated by a showing that the employee was used.

However, this is incorrect because the courts analyze the claim as demonstrated:

1. A plaintiff firm makes a claim for predatory hiring and gives evidence of predatory conduct;
2. Courts evaluate the extent of the use and whether the evidence is sufficient enough to constitute predatory intent or if the evidence is minimal and may just disadvantage the competition; and

129. W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85, 109 (3d Cir. 2010); Am. Prof’l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof’l Publ’ns, Inc., 108 F.3d 1147, 1153 (9th Cir. 1997); Universal Analytics, Inc., 914 F.2d at 1258-59.
3. Courts evaluate whether there is a legitimate justification or benefit to the business from the hiring of the employee that has harmed the competition for a finding of anticompetitive intent in the hiring.\footnote{132}

Courts do not hold that because the defendant used the employee there is no claim for predatory conduct irrespective of the evidence that may show that the defendant acted with predatory intent.\footnote{133} Courts evaluate the claim using both methods for finding predatory hiring, i.e., (1) whether the hiring was made with such predatory intent or to harm the competition without helping the monopolist; and (2) a "clear non-use in fact".\footnote{134} According to the standard, unlawful predatory hiring is established when "showing the hiring was made with such predatory intent, i.e., to harm the competition without helping the monopolist, or showing a clear non-use in fact."\footnote{135} Because the standard is constructed with the conjunction or, the standard is read on its face as allowing a predatory hiring claim to be defeated as long as the stolen employee is being used in some way.\footnote{136} However, the basic option of showing either use of the employee or harming the competition without helping the monopolist to defeat the claim has not been practiced by courts.\footnote{137} The standard would be more certain if it was stated as practiced. Courts take the evidence of the alleged injury into consideration when evaluating whether competition is harmed and whether there is a legitimate justification for the hiring of the employees that caused the injury in question.\footnote{138} A legitimate justification is found when the business has benefited from the hiring by using the employee.\footnote{139} It is well established that "when a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a section 2 violation."\footnote{140} It is important to note when the mere hiring of a competitor’s employee results in an injury

\begin{itemize}
\item \footnote{132}{See generally cases cited supra note 131.}
\item \footnote{133}{See generally cases cited supra note 131.}
\item \footnote{134}{See generally cases cited supra note 131.}
\item \footnote{135}{See generally cases cited supra note 131.}
\item \footnote{136}{See generally cases cited supra note 131.}
\item \footnote{137}{See generally cases cited supra note 131.}
\item \footnote{138}{See generally cases cited supra note 131.}
\item \footnote{139}{See Taylor Pub. Co. v. Jostens, Inc., 216 F.3d 465, 475 (5th Cir. 2000) ("To determine whether conduct is exclusionary, we look to the proffered business justification for the act. Where ‘the conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported.’").}
\item \footnote{140}{Midwest Radio Co., Inc. v. Forum Pub. Co., 942 F.2d 1294, 1297-98 (8th Cir. 1991).}
\end{itemize}
to the competitor, that alone is not enough to be considered anticompetitive.\textsuperscript{141} It is sufficient when the plaintiff proves that the hiring was intended to destroy competition itself.\textsuperscript{142}

IV. BONA FIDE INTENT TO USE TEST

A. VALID BUSINESS REASONS EXIST FOR COMPETITOR’S CONDUCT

Proving a case of predatory hiring by showing that “the hiring was made with such predatory intent or to harm the competition without helping the monopolist”\textsuperscript{143} has been criticized as being too narrow and, thus, fails to take into consideration that the poaching competitor may benefit from the employer but still engage in exclusionary conduct.\textsuperscript{144} The standard should not allow a competitor to escape a finding of predatory conduct just because the use of the employee benefitted their business when there are anticompetitive acts. As the proponents for a new test recognize, the plaintiff’s claim will almost never prevail because the employee will eventually benefit when they have hired away all the competition.\textsuperscript{145} The claim should not only be defeated by a showing of adequate use, but also when a legitimate business justification exists, yet sufficient evidence is lacking to show that the hiring was more than just harmful, but rather that it was predatory.\textsuperscript{146}

The standard for the legitimate business prong should instead be: in the event that the defendant’s legitimate business reasons for hiring the plaintiff’s employee are pretextual and proven so by compelling evidence presented of exclusionary conduct, the hiring will constitute a claim for predatory hiring even if the poaching competitor has used the employee adequately. This is so because predatory conduct cannot be legitimate.\textsuperscript{147} However, the evidence needs to be more than a memo stating a goal to injure the competitor’s business or pay higher salaries, as courts view the business’s

\textsuperscript{141} Taylor Pub. Co., 216 F.3d at 480. ("[T]he mere hiring away of a rival’s employees is legal under the antitrust laws . . . . ").

\textsuperscript{142} See Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57, 75 (3d Cir. 2010) ("Ultimately, Section 2 is directed against conduct that ‘unfairly tends to destroy competition itself,’ as opposed to even ‘severe’ competition.").

\textsuperscript{143} Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256, 1258 (9th Cir. 1990).

\textsuperscript{144} Braun & Williams, supra note 12, at 1, 3.

\textsuperscript{145} Braun & Williams, supra note 12, at 1, 3.

\textsuperscript{146} Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 378 (7th Cir. 1986) ("Conjoined with other evidence, lack of business justification may indicate probable anticompetitive effect.").

\textsuperscript{147} See Universal Analytics, Inc., 914 F.2d at 1259 (citing Tech. Servs., Inc. v. Eastman Kodak Co., 903 F.2d 612, 620 (9th Cir. 1990)).
attempt to improve its position in the market by providing a better product for consumers through providing better talent as a valid business justification and not anticompetitive.  

Further, the U.S. Department of Justice has explicitly stated that “the Department does not believe that a trivial benefit should protect conduct that is significantly harmful to consumers and the competitive process.”  

As we have seen, when there is actual evidence that the defendant is paying the stolen employee from the competitor salaries well above market rates, such as four times as the market value as opposed to just a higher amount, the court should find that the circumstances are sufficiently fact-compelling to constitute predatory conduct. Likewise, even when a business reason does exist for hiring the competitor’s employee, the hiring may still constitute predatory hiring when the poaching firm lacks the sufficient capacity to keep them employed. Further, even if there is a business justification for the hiring, if there is an admission by the defendant to drive the competitor out of business, predatory conduct is more obvious. The purpose of Section 2 is to prevent conduct that harms the competitive process, while not discouraging aggressive competition, whether that aggressive competition is from monopolists or other competitors.  

B. BONA FIDE INTENT TO USE TEST  

Courts are going the right direction with the “clear non-use in fact” standard by analyzing when there is use and the extent to which the use is sufficient. However, the finding of non-use could be more time focused when determining whether there is continued use of the employee to offer stricter protections against exclusionary conduct. Although the courts have
recognized that a significant amount of the stolen employees should be used when there are many hired, courts should anticipate a situation where a business hires employees from its competitor and uses them all for their full talents, but only for a trivial amount of time such as once a month. Similarly, just because an employee is used immediately for their talents does not mean that the conduct of hiring was not anticompetitive because one could also be using them immediately for only one day a week, one hour a day, if that. This is especially true in situations where the business hires a significant amount of its competitor’s employees and after a certain amount of time they learn that they do not have the capacity to keep the employees after the competitor has been run out of business. Courts must be careful when evaluating what the business is doing presently and how it might show potential for harm in the long run. Thus, courts should completely address the anticompetitive maneuvers that can be used in order to illegally acquire or maintain a monopoly. The concern of the hiring competitor using the employee for a trivial period of time and continued use of the employment may be negated by the showing of an employment contract.

Reflecting on the above analysis, the current judicial standard seems to underestimate the realities of strategic predation possibilities as to the predatory intent or harm to the competition without helping the monopolist standard. The standard should not allow a competitor to escape a finding of predatory intent just because the use of the employee benefitted its business when there was also predatory conduct. Even if the employees are put to work and are being used 100% of the time at work and have benefited the company, those factors can still add up to be anticompetitive if the employees are fired when the competitor exited the market because the predatory business would have benefited from the stolen employees in some way. It is important that we protect the consumers’ right to choose, which is provided by the different businesses to which the employees contribute. On the other hand, it is also important that we let businesses hire whom they need without fear of being sued for predatory hiring when they have no intent to illegally hire or to destroy competition.

156. See W. Penn Allegheny Health Sys., Inc., 627 F.3d at 101-02.
157. See Transamerica Computer Co., Inc. v. Intl. Bus. Machines Corp., 698 F.2d 1377, 1387 (9th Cir. 1983) (“It may be difficult in many or most instances to assess the long-run consequences of challenged pricing policies. But where those difficulties can be overcome, the law should not prevent plaintiffs from proving antitrust violations.”).
158. See Braun & Williams, supra note 12, at 1, 3.
159. Ross v. Bank of Am., N.A. (USA), 524 F.3d 217, 224 (2d Cir. 2008) (“[T]he antitrust laws do not protect consumer choice per se; they protect consumer choice where doing so promotes the efficient allocation of goods and services in the marketplace, i.e., has an ascertainable economic impact.”).
160. Id.
When analyzing claims of predatory hiring, courts should replace the *Universal Analytics, Inc.* standard with the “bona fide intent to use” test in order to determine if a business hired an employee from a competitor with a bona fide intent to use, exclusive of predatory conduct.

If the defendant’s legitimate business reasons for hiring the plaintiff’s employee is pre-textual and proven so by compelling evidence presented of exclusionary conduct, then the hiring will constitute a claim for predatory hiring even if the poaching competitor has used the employee. Evidence presented of exclusionary conduct is compelling when the employee is hired from a direct competitor and:

1. There is actual evidence that the defendant hired a significant amount of employees or key employees from a direct competitor with the intent to cause the other to exit the market. Intent may be shown by admittance of the defendant either verbally or written; or

2. The defendant has hired a substantial number of its direct competitors’ employees and has engaged in wrongful acts such as aiding and abetting the competitors’ employees in breaches of their fiduciary duties, misappropriating trade secrets, and offer salaries well above market rates. [add footnote].

If there is no evidence of exclusionary conduct and the defendant has a legitimate business justification for the employment, then the employee must still be adequately used. To determine if the use is sufficient, the following factors should be evaluated:

1. The usual hiring practices of the business;¹⁶¹

2. Whether the employees were hired primarily for their talents;¹⁶²

¹⁶¹ See McCabe Hamilton & Renny, Co. v. Matson Terminals, Inc., No. CIV.08-00080 JMS/BMK, 2008 WL 2437739 (D. Haw. June 17, 2008) (“Defendant's attempt to hire these employees is completely unlike ‘the manner in and degree to which Defendant has hired and trained longshoremen for decades’ such that this hiring will disrupt the provision of stevedoring services on Oahu for Defendant.” Given the allegation that Defendant's use of these employees would disrupt its business, it appears that these employees would provide no actual benefit to Defendant, i.e., there is no business purpose to hire these employees other than to deny these employees to Plaintiff.”).

¹⁶² See Universal Analytics, Inc. v. MacNeal-Schwendler Corp., 914 F.2d 1256 (9th Cir. 1990).
3. Whether the employees were immediately put to work in their area of specialization;\textsuperscript{163}

4. Need or demand for the employees’ help;\textsuperscript{164}

5. Continued pattern of hiring employees from defendant;\textsuperscript{165}

6. A substantial number of employees are hired from defendant;

7. Combination of wrongful acts complementing the hiring;\textsuperscript{166}

8. Use of all employees for a sufficient time;\textsuperscript{167}

9. Duration of employment;

10. Terms of employment contract;

11. Shortage of qualified employees (time to train and deploy substantial);\textsuperscript{168}

12. Paying salaries well above market rates;\textsuperscript{169}

13. Lacked the sufficient capacity to keep employees employed;\textsuperscript{170}

14. Incurring financial losses as a sacrifice of the hiring;\textsuperscript{171} and


\textsuperscript{165} See Am. Prof’l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof’l Publications, Inc., 108 F.3d 1147 (9th Cir. 1997).

\textsuperscript{166} See Natsource LLC. v. GFI Grp., Inc., 332 F. Supp. 2d 626 (S.D.N.Y. 2004).


\textsuperscript{169} See W. Penn Allegheny Health Sys., Inc. v. UPMC, 627 F.3d 85 (3d Cir. 2010).

\textsuperscript{170} Id.

\textsuperscript{171} Id.
15. Admitted intent to drive the company out of business without earning profits.\textsuperscript{172}

“Courts and commentators increasingly have recognized that section 2 standards cannot ‘embody every economic complexity and qualification’\ldots \textsuperscript{173} However, the list of factors above should be considered to show a more compelling case of use or non-use. The list is derived from the factors that the courts have considered when looking to the extent to which the competitor employee was used as well as what the courts have failed to consider. The standard set forth in this section is to clarify and tailor a test specifically for determining whether conduct was predatory when the hiring occurred and to eliminate the appearance of the weaknesses in predatory hiring claims caused by the \textit{Universal Analytics, Inc.} standard. By eliminating the nearly thirty-year-old \textit{Universal Analytics, Inc.} two-part test and replacing it with the “bona fide intent to use” test, which utilizes factors that embrace what courts have already been doing, courts will be able to utilize a standard that protects both the incentive to hire a competitor’s employees and, at the same time, protects those businesses whose employees were stolen. The new “bona fide intent to use” test is an attempt to provide a workable answer to the concerns of unlawful predatory hiring from the \textit{Universal Analytics, Inc.} test.\textsuperscript{174} The new bona fide intent to use test would not permit those who merely use employees to escape a finding of antitrust liability. Under the proposal, the extent of use of the employee, which determines the competitor’s intent, is reflected to assure that the employment is not temporary and will be held constant through the employment and not merely during litigation, thus precluding any dispute about the motive to fire subsequently.\textsuperscript{175} It is consistent with the leading case and is driven by the same concern—maintaining fair competition and balance of freedom to change jobs and the ability to use acquired skills and talents.\textsuperscript{176}

A major benefit of the new “bona fide intent to use” test is that it would not allow exclusionary conduct to go unchallenged until consumers and competitors suffer substantial injury or prolonged irreversible injury to competition. The factors of the test can show actual anticompetitive conduct during employment which is likely to lead to unlawful monopolization and induce exit.

\begin{itemize}
\item \textsuperscript{172} \textit{Id.}
\item \textsuperscript{173} \textit{See United States Dep’t of Justice, supra} note 23, at *19.
\item \textsuperscript{174} \textit{See} D’Arpino, \textit{supra} note 13; Braun & Williams, \textit{supra} note 12, at 1, 3; Carey, \textit{supra} note 19.
\item \textsuperscript{175} \textit{See} D’Arpino, \textit{supra} note 13, at 343-44 (expressing concern at the ease “to mask predatory hiring practices with evidence of employee use”).
\item \textsuperscript{176} \textit{See} Universal Analytics, Inc. \textit{v.} MacNeal-Schwendler Corp., 914 F.2d 1256, 1258-59 (9th Cir. 1990).
\end{itemize}
Such conduct is not classified as predatory simply because it negatively impacts a competitor or violates a contract. Rather, conduct is predatory when it is “inconsistent with competition on the merits” and has a “potential for making a significant contribution to monopoly power.”

While the amount of market share of the defendant firm has been downplayed, it is very important to reiterate that the hiring of a competitor’s employees in most cases is not enough for a claim of predatory hiring. It is key that there must be a monopoly or a threat of acquiring a monopoly as a result from the hiring in order to succeed on a claim of predatory hiring. Predatory hiring is more compelling where the competitors are in direct competition and where the factors set forth in the new “bona fide intent to use” test have shown that the one business was targeted by the other to hire its employees in a manner to cause them to no longer to compete with the other. Further, it is just as important to repeat that merely harming competitors is not enough to constitute predatory targeting. The factors from the new “bona fide intent to use” test are important to consider because they will support a showing that the competitor whose employees were stolen is actually likely to be forced to exit the market. The test will help show a difference from pretextual predatory conduct and legitimate business justifications.

177. White Mule Co. v. ATC Leasing Co. LLC, 540 F. Supp. 2d 869 (N.D. Ohio 2008) (“[P]laintiffs must show more than that the defendants’ conduct caused them injury. The plaintiff must show that they suffered antitrust injury or an ‘injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.’”).


180. United States Dep’t of Justice, supra note 23, at *12 (“[C]onduct that is illegal for a monopolist may be legal for a firm that lacks monopoly power because certain conduct may not have anticompetitive effects unless undertaken by a firm already possessing monopoly power.”).

181. Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ’n, Inc., 108 F.3d 1147, 1151 (9th Cir. 1997) (“While the disparagement of a rival or compromising a rival's employee may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act.”).

182. Am. Prof'l Testing Serv., Inc., 108 F.3d at 1153 (“Absent a continued pattern of compromising American's employees, this one-time hiring of Jarvis by Harcourt is not sufficient to constitute an antitrust violation, ‘[n]or should the actual compromising of rival employees be grounds for § 2 liability in the absence of a continued pattern of such behavior or of reason to believe that the actual effect was probably significant.’”).
Competitive and exclusionary conduct is difficult to distinguish because both may have beneficial and exclusionary effects. The set of factors that are consistent with predatory hiring, such as the amount of time the employment lasts, the amount of employees taken, the position of employment, and whether compensation is commensurate to the employee’s skills, all help determine whether the employer is likely to have or have not preyed. In the absence of a showing of any of the factors listed in the “bona fide intent to use” test, “conduct should be unlawful under section 2 if its anticompetitive effects are shown to be substantially disproportionate to any associated pro-competitive effects.”

V. CONCLUSION

Merely hiring a competitor’s employee does not amount to illegal anti-competitive conduct sufficient for a Section 2 antitrust violation. In order for such conduct to be unlawful, a competitor must either have wrongful intent to eliminate competition or intent not to use the employee. In minimal instances, courts have ruled on the issue of whether a competitor’s conduct was unlawfully anticompetitive by applying the Universal Analytics, Inc. test. However, the Universal Analytics, Inc. test is an inadequate analysis, as it may allow anticompetitive maneuvers that can be used in order to illegally acquire or maintain a monopolist ability to bypass a finding of violation of the antitrust laws. “Competition and consumers are best served if section 2 standards are sound, clear, objective, effective, and administrable.” The new “bona fide intent to use” test, which is derived from a compilation of what the courts have considered and must consider when determining whether the competitor has engaged in exclusionary conduct in the hiring of

183. See United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (discussing difficulty in distinguishing legitimate competition from exclusionary conduct that harms competition).

184. LePage’s Inc. v. 3M, 324 F.3d 141, 178 (3d Cir. 2003) (“[W]hen a company acts against its economic interests and there is no valid business justification for its actions, then it is a good sign that its acts were intended to eliminate competition.”).

185. United States Dep’t of Justice, supra note 23, at *4.

186. United States Dep’t of Justice, supra note 23, at *14 (“Mere harm to competitors- without harm to the competitive process- does not violate section 2.”).

187. Universal Analytics, Inc. v. MacNeal–Schwendler Corp., 914 F.2d 1256, 1258 (9th Cir. 1990) (“Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor.”).

188. See Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., No. 96–1336, 1997 WL 225966, at *9 (D. Kan. April 8, 1997) (“[T]he courts have examined more closely claims of anticompetitive hiring than other forms of anticompetitive conduct.”).

189. United States Dep’t of Justice, supra note 23, at *2.
its competitor’s employee, will either diminish the likelihood of anticompetitive behavior when it is apparent or help to identify predatory hiring. The law favors competition in the job market, focusing on employee talents and skills, and balancing those attributes with the high interest in maintaining a freely functioning market. But the balance will lack stability if the mentioned variables are not considered in order to fully analyze the situation and, in turn, underestimate anticompetitive behavior. “[M]any single-firm practices presumed to violate section 2 can create efficiencies and benefit consumers.” “At the same time, there is a greater appreciation for the potential harm from excessive restrictions on single-firm conduct, particularly harm to innovation, which is the most important source of economic growth.” “[I]nnovation. . . is the principal source of economic growth” which is why it is important to reconsider the predatory hiring standard in order to impose liability on a monopolist who plans to hire his or her competitor’s employees with the intent to run competition out of the market. If a monopolist does such hiring, then those employees who could have been used to create a better product or service for consumers in another business will undermine the competitive process by not being used efficiently in the monopolist’s business.

190. Areeda & Hovenkamp, supra note 8.
191. United States Dep’t of Justice, supra note 23, at *8.
192. United States Dep’t of Justice, supra note 23, at *8.
193. United States Dep’t of Justice, supra note 23, at *2.
194. United States Dep’t of Justice, supra note 23, at *2.