UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE OUTPATIENT MEDICAL CENTER EMPLOYEE ANTITRUST LITIGATION	Master Docket No. 1:21-cv-00305
THIS DOCUMENT RELATES TO: All Actions	

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

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INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest under the authority of 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 federal court, and this Court's minute entry, dated November 1, 2021 (Doc. 83 at 1).

The United States enforces the federal antitrust laws and has a strong interest in their correct application. This case addresses the antitrust laws' application to agreements among employers not to solicit or hire each other's employees without the consent of the employee's current firm. The United States brings enforcement proceedings against employers that enter into no-hire or nonsolicitation agreements, and it is currently prosecuting four of the parties named as defendants in this action for entering into these types of agreements. *United States v. DaVita Inc.*, No. 21-00229, Superseding Indictment, Doc. 74 (D. Colo. Nov. 3, 2021); *United States v. Surgical Care Affiliates, LLC*, No. 21-00011, Superseding Indictment, Doc. 48 (N.D. Tex. July 8, 2021). The United States has filed statements of interest or *amicus curiae* briefs in multiple matters addressing the antitrust laws' application to no-hire or nonsolicitation agreements. *See, e.g.*, *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679, Doc. 14 (9th Cir. Nov. 19, 2020). The United States submits this Statement of Interest to respond to two arguments raised by the defendants in their motions to dismiss the plaintiffs' complaint. Without taking a position on the other arguments raised by the defendants, the United States urges the Court to reject each of these two bases for dismissal for the reasons explained below.

BACKGROUND

The plaintiffs allege that the defendants operate outpatient medical centers and "ostensibly compete . . . to hire and retain employees." Amended Complaint ("Compl."), Doc. 57, ¶¶ 1, 6. Despite this apparent competition, two sets of defendants—(1) Surgical Care Affiliates, LLC, and its associates and (2) United Surgical Partners International, Inc., and its associates—agreed no later than 2010 "to avoid competing" for senior employees "by refraining from soliciting or hiring each other's employees absent the knowledge and consent of their existing employers." *Id.* ¶ 6; *see id.* ¶¶ 55–59. No later than 2012, the conspiracy allegedly expanded when DaVita Inc. and its CEO agreed with Surgical Care Affiliates and its associates "to suppress competition between them for the services of senior-level employees by agreeing not to solicit each other's senior-level employees." *Id.* ¶ 7; *see id.* ¶¶ 60–66. No later than 2017, the conspiracy allegedly expanded again when DaVita and its CEO agreed with an unnamed company, referred to in the complaint as Company B or Doe 1, "to suppress competition between them for the services of employees by agreeing that Company B would not solicit DaVita's employees." *Id.* ¶ 8; *see id.* ¶¶ 67–70. Based on these allegations, the plaintiffs claim that the defendants' conduct is a "*per se* violation[]" of Section 1 of the Sherman Act. *Id.* ¶ 117.

SUMMARY OF ARGUMENT

The defendants argue that the plaintiffs' Sherman Act claim fails because (1) it does not allege a per se violation of Section 1; and (2) it does not, as to DaVita, its CEO, and Doe 1, allege that they made a bilateral commitment to each other. Neither argument has merit.

First, the alleged conduct is a per se violation of Section 1. The Supreme Court and the Seventh Circuit have held that certain conduct, including agreements among competitors to divide markets, is per se unreasonable under Section 1 unless ancillary to potentially procompetitive collaborations, such as joint ventures. If non-ancillary conduct falls into a per se category, the Sherman Act prohibits it without further inquiry into the conduct's competitive effects. In this case, the defendants—competitors for the plaintiffs' labor—agreed to divide certain employees among themselves and compete for those employees' labor only on specified terms. As a market allocation among competitors, this conduct is a per se violation.

Second, the Sherman Act does not require the plaintiffs to allege that the defendants made bilateral commitments to each other. The defendants contend that, because Doe 1 allegedly agreed to refrain from soliciting DaVita's employees without extracting a reciprocal nonsolicitation commitment from DaVita, the parties did not conspire to restrain trade. The focus of antitrust analysis, however, is on whether the conspirators agreed to a common plan—not on how many of the conspirators made reciprocal commitments under that plan. If DaVita and Doe 1 agreed that Doe 1 would not compete for DaVita's employees except on specified terms (as the plaintiffs allege), their agreement satisfies Section 1's requirement that the parties act in concert. The defendants' attempt to supplement this concerted-action requirement with a *quid pro quo* requirement has no basis in the Sherman Act or the case law interpreting it.

ARGUMENT

Section 1 of the Sherman Act states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Although the act, "by its terms, prohibits every agreement 'in restraint of trade,'" the Supreme Court has held "that Congress intended to outlaw only unreasonable restraints." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

Courts use two rules to decide whether a restraint violates Section 1. Under the first, the rule of reason, "the factfinder weighs all of the circumstances of a case," such as the defendants' market power and "the restraint's history, nature, and effect," to decide whether the restraint is unlawful. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007) (quoting *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977); *Khan*, 522 U.S. at

10). The second rule, the per se rule, recognizes that some restraints have "such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit," *Khan*, 522 U.S. at 10, that the Sherman Act deems them unlawful without analysis of "the precise harm they have caused or the business excuse for their use," *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). "Typically only 'horizontal' restraints—restraints 'imposed by agreement between competitors,'" as distinguished from vertical restraints that are "imposed by agreement between firms at different levels of distribution," such as wholesalers and retailers—"qualify as unreasonable *per se*." *Ohio v. Am. Exp. Co.*, 138 S. Ct. 2274, 2283–84 (2018) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988)).

Per se illegal restraints include "naked" agreements among competitors to fix prices, *e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980), rig bids, *e.g.*, *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979), or divide markets, *e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990). "Naked" restraints are "those in which the restriction on competition is unaccompanied by new production or products." *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 (7th Cir. 1985). The ancillary-restraints doctrine, on the other hand, "governs the validity of restrictions imposed by a legitimate business collaboration . . . on nonventure activities." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). Under this "defense," *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1152 (9th Cir. 2003), an agreement ordinarily condemned as per se unlawful is subject to the rule of reason if the defendant shows that it is (1) "subordinate and collateral," *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986), to "a legitimate business collaboration, such as a business association or joint venture," *Dagher*, 547 U.S. at 7, and (2) "reasonably necessary" to achieve that collaboration's potentially procompetitive purpose, *United States v. Addyston*

Pipe & Steel Co., 85 F. 271, 281 (6th Cir. 1898), *aff'd in relevant part & modified on other grounds*, 175 U.S. 211 (1899); *see Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021). For instance, in *Polk Brothers*, potential competitors agreed to operate stores on the same site, subject to the condition that each would not sell certain products stocked by the other; the Seventh Circuit applied the rule of reason to this condition because it was ancillary to the parties' "productive" agreement to share a location. 776 F.2d at 187–90.

I. PLAINTIFFS ALLEGE A PER SE VIOLATION OF SECTION 1

The defendants' alleged conduct is a per se violation of Section 1. As the Supreme Court and the Seventh Circuit have held repeatedly, naked horizontal agreements to divide (or "allocate") markets are per se unreasonable. *Palmer*, 498 U.S. at 49–50 (allocating territories); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608–12 (1972) (allocating territories and customers); *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415–16 (7th Cir. 1995) (allocating territories); *Hammes v. AAMCO Transmissions Inc.*, 33 F.3d 774, 782 (7th Cir. 1994) (allocating customers); *United States v. Brown*, 936 F.2d 1042, 1044–45 & n.1 (9th Cir. 1991) (allocating input suppliers). The plaintiffs allege that:

- the defendants "were competitors in the recruitment and retention of employees," Compl. ¶ 53—that is, were in a horizontal relationship with respect to employees' services;

- the defendants agreed that, for certain employees associated with competitors, the defendants would refrain from solicitation or hiring unless specified conditions were met—that is, agreed to divide employees among themselves and not to engage in certain forms of competition as to employees allocated to competitors, *id.* ¶¶ 6–8, 53–70; and

- the defendants' agreement "was not necessary to any legitimate business transaction or lawful collaboration among the companies"—that is, the agreement was naked, *id.* ¶ 9.

These allegations plead the existence of a naked horizontal market-allocation agreement. Courts have consistently held that naked horizontal agreements to allocate employees are, like other market divisions, subject to the per se rule. *Markson v. CRST Int'l, Inc.*, No. 17-01261, 2021 WL

1156863, at *4 (C.D. Cal. Feb. 10, 2021); *In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F. Supp. 3d 464, 480–85 (W.D. Pa. 2019); *In re Animation Workers Antitrust Litig.*, 123 F. Supp. 3d 1175, 1211–14 (N.D. Cal. 2015); *United States v. eBay, Inc.*, 968 F. Supp. 2d 1030, 1038–39 (N.D. Cal. 2013); *In re High-Tech Emp. Antitrust Litig.*, 856 F. Supp. 2d 1103, 1110–12, 1122 (N.D. Cal. 2012); *see also Aya*, 9 F.4th at 1110 n.4 (without deciding issue, finding "considerable merit" in treating naked nonsolicitation agreements as per se unlawful); *In re Geisinger Health & Evangelical Cmty. Hosp. Healthcare Workers Antitrust Litig.*, No. 21-00196, 2021 WL 5330783, at *2–4 (M.D. Pa. Nov. 16, 2021) (denying motion to dismiss per se claim based on no-poach agreement); Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 2013a (5th ed. 2021) ("'Anti-poaching' agreements . . . operate as market-division agreements" that, "[a]s a general proposition, . . . are illegal per se" if naked and not otherwise immunized.).

The defendants argue that a market-allocation scheme is an agreement to "cease competing in another's territory or to cease competing for specific customers," while the defendants' agreement left them "free to solicit and hire" each other's employees if the employees "gave notice of their intent to search." Memorandum in Support of Defendants' Motion to Dismiss ("Mem."), Doc. 76, at 12. The Seventh Circuit rejected this argument in *Blackburn v. Sweeney*, in which two lawyers challenged an agreement that barred them from advertising in parts of Indiana. *See* 53 F.3d 825, 827–28 (7th Cir. 1995). The defendants argued against per se treatment "because all parties to the Agreement can still practice law in all parts of Indiana"—that is, the agreement forbade solicitation but permitted work for unsolicited clients. *Id.* at 827. The Seventh Circuit held that this assertion was "mistaken" because, "[t]o fit under the *per se* rule an agreement need not foreclose all possible avenues of competition." *Id.*; *see United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 235 n.61 (1940). Reaching the same outcome, other courts have held that nonsolicitation agreements are per se violations, even when the defendants still compete in ways other than solicitation. *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1370–73 (6th Cir. 1988); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087–90 (5th Cir. 1978). In the labor context, the Ninth Circuit recently held that a restraint's status as a "non-solicitation" (as opposed to "no-poaching") agreement was "not determinative" in assessing a Section 1 challenge, *Aya*, 9 F.4th at 1109 n.3 ("relevant distinction is whether the restraint is an ancillary restraint or a naked restraint"), and another court held that a nonsolicitation conspiracy (without a no-hire component) was a per se violation, *High-Tech Emp.*, 856 F. Supp. 2d at 1110–12, 1122. Just as the defendants in those cases agreed to stop competing along some (but not all) vectors, the current defendants' agreement to limit solicitation and hiring to specified circumstances was a market allocation that calls for per se treatment even if the defendants did not "cease competing" altogether (Mem. at 12).

The defendants do not offer any other basis for distinguishing their agreement from a market allocation, and none is available to them. That the defendants acted in their role as buyers of employees' services, rather than sellers of goods or services, makes no difference because the Sherman Act applies to both buyers' and sellers' cartels. *See Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235–36 (1948); *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 705 (7th Cir. 2011); *Brown*, 936 F.2d at 1044–45; *United States v. Jindal*, No. 20-00358, 2021 WL 5578687, at *5–6 (E.D. Tex. Nov. 29, 2021). That the agreement arose in the labor market similarly does not defeat application of the per se rule, as the defendants seem to recognize, because the Sherman Act applies "to all industries alike." *Socony-Vacuum*, 310 U.S. at 222; *see* Mem. at 12 (recognizing possibility of "analogizing customers to employees"). Illustrating this principle, courts have consistently applied the Sherman Act to labor-market restraints. *Anderson v. Shipowners' Ass'n of Pac. Coast*, 272 U.S. 359, 360–65 (1926); *Quinonez v. Nat'l Ass'n of Sec. Dealers, Inc.*, 540 F.2d 824, 826, 828–29 (5th Cir. 1976); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 335–37 (7th Cir. 1967); *see Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 543–45 (10th Cir 1995) (finding antitrust injury based on no-hire agreement).

Whether facing employer agreements to fix wages or seller agreements on products or services, courts consistently apply the same rule—the per se rule—that governs all price-fixing agreements. *Catalano*, 446 U.S. at 650; *Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 624–25 (E.D. Mich. 2012); *Doe v. Ariz. Hosp. & Healthcare Ass'n*, No. 07-1292, 2009 WL 1423378, at *2–4 (D. Ariz. Mar. 19, 2009); *In re Eur. Rail Pass Antitrust Litig.*, 166 F. Supp. 2d 836, 839–44 (S.D.N.Y. 2001); *see NCAA v. Alston*, 141 S. Ct. 2141, 2167 (2021) (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor."); *see also Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998) (wage-fixing is "the type of naked horizontal agreement among competitive purchasers to fix prices usually found to be illegal *per se*"). As one court recently explained in applying the per se rule to a criminal indictment's allegation of a wage-fixing conspiracy, the "antitrust laws fully apply to the labor markets" and "employees are no less entitled to the protection of the Sherman Act than are consumers." *Jindal*, 2021 WL 5578687, at *5–6. By the same logic, courts should assess worker-allocation agreements among employers using the same per se rule that applies to customer-allocation agreements among sellers.

The defendants' remaining arguments misconceive the analytical framework used to decide whether conduct is per se unlawful. When facing an allegedly anticompetitive scheme, courts must "characterize the challenged conduct as falling within or without that category of behavior" that courts have identified as per se unreasonable. *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 9 (1979). Beyond sports leagues and other ventures in which horizontal restraints "are essential if the product is to be available at all," *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984), agreements that fall into a per se category are unlawful regardless of whether injury "actually occurred" in the "individual case," *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). The defendants seek rule-of-reason treatment because courts purportedly lack experience with no-hire or nonsolicitation agreements (Mem. at 9–12). But this argument asks the Court to act as if it were deciding whether "a *new per se* rule" is justified, *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 349 n.19 (1982) (emphasis in original) (looking to "experience with the particular type of restraint challenged"), even though prior cases establish that the per se rule applies to horizontal market-allocation schemes—of which the defendants' agreement is one. *See Jindal*, 2021 WL 5578687, at *7–8.

The Supreme Court's decisions in *Catalano* and *Maricopa County* belie the defendants' assertion that courts lack enough experience to apply the per se rule to their agreement. In *Catalano*, competing wholesalers agreed not to extend credit to retailers, instead demanding payment "in advance or upon delivery." 446 U.S. at 644. Although fixing credit terms was a different means of affecting price than the Court had confronted in past cases, it stated that "the machinery employed by a combination for price-fixing is immaterial." *Id.* at 647 (quoting *Socony-Vacuum*, 310 U.S. at 223). Because the agreement was "merely one form of price fixing, and since price-fixing agreements have been adjudged to lack any 'redeeming virtue,'" the credit-fixing scheme was per se unreasonable "without further examination under the rule of reason." *Id.* at 650. In *Maricopa County*, the Court held that an agreement to fix maximum prices "fit squarely into the horizontal price-fixing mold" and, as a result, required per se treatment. 457 U.S. at 355–57. Following the Supreme Court's lead, the Seventh Circuit held that an agreement to allocate sales volumes was a per se unlawful market division, dismissing the defendants' objection "that neither the words 'sales volume allocation' nor any practices precisely identical to their scheme appear in the case law as a *per se* violation." *United States v. Andreas*, 216 F.3d 645, 666–68 (7th Cir. 2000). To support the claim that courts have not found their precise conduct per se unlawful, the defendants characterize the conduct at a level of specificity (Mem. at 9–12) that courts have repeatedly rejected; *Catalano*, *Maricopa County*, and *Andreas* show that the defendants' agreement, even if not "precisely identical" to agreements previously found unlawful, *see Andreas*, 216 F.3d at 667, receives per se treatment as a type of conduct (market allocation) classified as per se unreasonable. *See Jindal*, 2021 WL 5578687, at *7–8.

The defendants claim that courts have declined to apply the per se rule to similar agreements (Mem. at 9–11), but the cited cases are inapposite: Some address ancillary (rather than naked) restraints, some do not address the per se rule's applicability at all, and the remaining cases are either factually distinguishable or (in one instance) incorrectly decided. As to the ancillary-restraints cases, several (*id.* at 9) held that, while the complaint alleged a per se claim based on a no-hire or nonsolicitation scheme, the rule of reason would apply if discovery showed that the agreement was ancillary to a procompetitive collaboration. *High-Tech Emp.*, 856 F. Supp. 2d at 1122; *eBay*, 968 F. Supp. 2d at 1038–40; *see Fonseca v. Hewlett-Packard Co.*, No. 19-1748, 2020 WL 6083448, at *9–10 (S.D. Cal. Feb. 3, 2020) ("premature" to apply per se rule on motion to dismiss). In other cases (Mem. at 9–10, 13–14), courts held that no-hire or nonsolicitation schemes ancillary to other arrangements, such as franchise agreements or sales of corporate assets, called for the rule of reason. *Aya*, 9 F.4th at 1109–11, *aff'g* --- F. Supp. 3d ---, 2020 WL 2553181 (S.D. Cal. May 20, 2020); *Eichorn v. AT & T Corp.*, 248 F.3d 131, 142–47 (3d Cir. 2001); *Deslandes v. McDonald's USA, LLC*, No. 17-4857, 2021 WL 3187668, at *6 (N.D. Ill. July 28, 2021); *Yi v. SK Bakeries, LLC*, No. 18-5627, 2018 WL 8918587, at *1, *4

(W.D. Wash. Nov. 13, 2018); *Hanger v. Berkley Grp., Inc.*, No. 13-113, 2015 WL 3439255, at *5–7 (W.D. Va. May 28, 2015); *Coleman v. Gen. Elec. Co.*, 643 F. Supp. 1229, 1232, 1243 (E.D. Tenn. 1986), *aff'd*, 822 F.2d 59 (6th Cir. 1987) (table). While these cases show that *ancillary* no-hire or nonsolicitation agreements are subject to the rule of reason, none suggests—let alone holds—that naked versions of those agreements are exempt from the per se rule.

The defendants also rely on two cases (Mem. at 10) that do not take a position on whether the per se rule or the rule of reason applies. In *Radovich v. National Football League*, the Supreme Court held that an agreement to bar the plaintiff from working for a competitor should "be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,'" 352 U.S. 445, 453 (1957) (quoting *Times-Picayune Pub'g Co. v. United States*, 345 U.S. 594, 614 (1953)), and in *Nichols v. Spencer International Press, Inc.*, the Seventh Circuit stated that a no-hire agreement should be "tested by a standard of reasonableness," 371 F.2d at 337. In neither case did the court specify whether the per se rule or the rule of reason provided the appropriate test for assessing reasonableness, and *Nichols* expressly disclaimed any "attempt to deal with questions" regarding the no-hire agreement's reasonableness "at this stage," *id.*

The remaining cases cited by the defendants are factually distinguishable or, in one case, mistaken. In *Bogan v. Hodgkins* (Mem. at 10), the court addressed what it saw as "an *intra* firm agreement" and held that the plaintiffs "might have" successfully pleaded a per se claim but for their failure to support a critical allegation "factually," 166 F.3d 509, 515–16 (2d Cir. 1999); this case, in contrast, addresses the type of "classic interfirm horizontal restraint of trade" that the *Bogan* court thought was absent, *see id.* at 515, and the defendants do not raise the factual challenge that doomed the claim in that case. *NCAA v. Alston* (Mem. at 10–11) applied the rule of reason to limits on student-athlete compensation "only because they arose in 'an industry' in which some 'horizontal restraints on competition are essential if the product is to be available at all,'" 141 S. Ct. at 2157 (quoting *Bd. of Regents*, 468 U.S. at 101)—a characterization that is inapplicable (and that the defendants do not try to ascribe) to their own industry. The defendants also cite *Alston*, along with *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004 (7th Cir. 2012) (Mem. at 10–11), for the uncontroversial principle that courts hesitate to apply the per se rule when they "have never seen or heard of an antitrust case quite like" the one before them, 703 F.3d at 1011; *see Alston*, 141 S. Ct. at 2156—another inapplicable characterization given that the defendants engaged in anticompetitive behavior (market allocation) that courts have "seen or heard of" many times before. Finally, *Molinari v. Consol Energy Inc.* (Mem. at 9) is an unpublished, out-of-circuit, incorrectly decided case that mistakenly relied on a precedent regarding an *ancillary* no-hire agreement to hold that a *naked* no-hire agreement was subject to the rule of reason. No. 12-1085, 2012 WL 4928489, at *4 (W.D. Pa. Oct. 16, 2012). No court has ever cited *Molinari*, and this Court should not be the first to follow its erroneous holding.

The defendants conclude by arguing that the rule of reason applies because labor-market restraints may be procompetitive (Mem. at 12–14), but the argument's premise is flawed. "The anticompetitive potential" of all market-allocation schemes "justifies their facial invalidation even if procompetitive justifications are offered for some." *See Maricopa Cty.*, 457 U.S. at 351; *see also Topco*, 405 U.S. at 610. In any event, the defendants' procompetitive justifications are wanting. They contend that their agreement fosters "employee longevity" and lessens "volatility" (Mem. at 12), but those are euphemistic ways of saying that the defendants prefer to bind employees to their current jobs rather than compete for their labor. "The argument is, in essence, that an unrestrained market" would lead to "unwise" decisions by employees about switching jobs, *see FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986), but such arguments are "nothing less than a frontal assault on the basic policy" of the statute to promote competition, *see Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

The defendants also cite cases that discuss the procompetitive benefits of non-compete agreements between employers and their employees (Mem. at 13–14), but these cases address agreements that were not among horizontal competitors and are typically subject to the rule of reason—agreements with no relevance to the defendants' horizontal conspiracy. *See CertainTeed Corp. v. Williams*, 481 F.3d 528, 528–29 (7th Cir. 2007); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 899–900 (9th Cir. 1983); *Malone v. Cort Furniture Corp.*, No. 02-1729, 2002 WL 1874819, at *1 (N.D. Ill. Aug. 13, 2002). If anything, these cases show that, rather than colluding with competitors—"the supreme evil of antitrust," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004)—the defendants could have sought to obtain the benefits allegedly flowing from their conspiracy through less restrictive, bargained-for arrangements.

II. PLAINTIFFS DO NOT NEED TO ALLEGE A BILATERAL COMMITMENT OR *QUID PRO QUO* TO PLEAD CONCERTED ACTION

In addition to pleading that the defendants' conduct was unreasonable, the plaintiffs must allege that the defendants entered into a "contract, combination in the form of trust or otherwise, or conspiracy," 15 U.S.C. § 1—that is, that the defendants engaged in "concerted action," defined as conduct that "joins together separate decisionmakers," *Am. Needle, Inc. v. NFL*, 560 U.S. 183, 190, 195 (2010). "Congress 'treated concerted behavior more strictly than unilateral behavior'" in Section 1 because, "unlike independent action, '[c]oncerted activity inherently is fraught with anticompetitive risk' insofar as it 'deprives the marketplace of independent centers of decisionmaking that competition assumes and demands.'" *Id.* at 190 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768–69 (1984)). As to DaVita and Doe 1, the plaintiffs satisfy the concerted-action requirement by alleging—and pointing to emails and text messages documenting—that these entities, which were otherwise distinct economic actors, "agree[d]" that Doe 1 "would not solicit DaVita's employees," *see* Compl. ¶¶ 8, 67–70.

While DaVita and its CEO, Kent Thiry, argue that the plaintiffs must also allege a "bilateral commitment between DaVita, Thiry, and Doe 1 to refrain from soliciting *each other's* employees," Supplemental Memorandum in Support of Motion to Dismiss ("Supp. Mem."), Doc. 80, at 5, the Sherman Act contains no such requirement. Multiple courts have imposed criminal sanctions under Section 1 on firms that entered into one-sided bid-rigging agreements—conspiracies in which some parties, without extracting commitments for themselves, promised to submit a high bid so that their co-conspirator would win a contract. *United States v. Reicher*, 983 F.2d 168, 169–70, 172 (10th Cir. 1992); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1159–60 (4th Cir. 1986); *United States v. Bensinger Co.*, 430 F.2d 584, 586–87, 589 (8th Cir. 1970). As these holdings show, treating the defendants' conduct as concerted action promotes the Sherman Act's goals. Doe 1 "surrendered" its "freedom of action in the matter of employing" workers "and agreed to abide by the will" of DaVita, *see Anderson*, 272 U.S. at 364–65, eliminating the "independent centers of decisionmaking" prized by the act, *see Copperweld*, 467 U.S. at 769. Because it evinces Doe 1's "intention to be bound" by its nonsolicitation commitment, the agreement is "more dangerous" than Doe 1's "action in the absence of such a promise." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1402b2 (5th ed. 2021). For that reason, "it differs significantly from unilateral action and may be considered a conspiracy." *Id.*

The cases cited by DaVita and Mr. Thiry do not support imposing a bilateral-commitment or *quid pro quo* requirement. Instead, those cases state that the parties must have "a conscious commitment to a common scheme," *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984), or that an antitrust conspiracy exists when "two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit," *Copperweld*, 467 U.S. at 769; *see Omnicare*, 629 F.3d at 706. The plaintiffs satisfy these standards because their complaint shows that the conspirators, which "previously pursued their own interests separately," made a "conscious commitment to a common scheme"—Doe 1's nonsolicitation of DaVita's employees. None of the cited cases suggests that the plaintiffs needed to go further and allege that the "common scheme" encompassed a bilateral commitment.

DaVita and Mr. Thiry also note that Section 1 plaintiffs must plausibly show that the defendants engaged in concerted—rather than "unilateral"—action (Supp. Mem. at 4–5), but a defendant can engage in concerted, non-unilateral action without making a reciprocal commitment. The cases cited by DaVita and Mr. Thiry do not distinguish non-reciprocal from reciprocal commitments, but instead distinguish unilateral behavior, undertaken based on independent decision-making, from concerted behavior undertaken based on agreement. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007) (distinguishing a "conspiracy" from a "business strategy unilaterally prompted by common perceptions"); *Monsanto*, 465 U.S. at 761 (describing "basic distinction between concerted and independent action"); *Alarm Detection Sys., Inc. v. Village of Schaumburg*, 930 F.3d 812, 828 (7th Cir. 2019) (distinguishing "an agreement" from "an independent . . . decision"); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3d Cir. 1998) (distinguishing "concerted action or an agreement" from "[u]nilateral activity"). The Court should reject the defendants' conflation of the concerted-action requirement with a bilateral-commitment requirement that has no basis in the Sherman Act or the cases construing it.

CONCLUSION

The Court should reject the defendants' arguments that the plaintiffs (1) failed to allege a per se violation; and (2) failed to allege concerted action among DaVita, Mr. Thiry, and Doe 1.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2021, I electronically filed the foregoing brief by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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