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	

UNITED STATES' RESPONSE TO NOTICE OF JUDGMENTS OF ACQUITTAL

Under the authority of 28 U.S.C. § 517, the United States files this response to the defendants' Notice of Judgments of Acquittal (Doc. 127), which incorrectly argues that the recent acquittals in *United States v. DaVita Inc.*, No. 21-00229, Docs. 266, 267 (D. Colo. Apr. 20, 2022), support dismissal of the plaintiffs' complaint. The outcome of acquittal in *DaVita*, however, is not relevant to the pending motions to dismiss. Moreover, the legal propositions for which the defendants cite *DaVita* are flawed, as a recent Second Circuit decision demonstrates, *see United States v. Aiyer*, No. 20-3594 (2d Cir. May 2, 2022).

First, the *DaVita* jury's verdicts have no bearing on whether the plaintiffs' complaint states a claim as a matter of law. As the United States demonstrated in its Statement of Interest, the plaintiffs pleaded a per se violation of Section 1 of the Sherman Act by alleging that "the defendants—competitors for the plaintiffs' labor—agreed to divide certain employees among themselves and compete for those employees' labor only on specified terms." Doc. 91 at 2–3; *see id.* at 5–13. Because the jury's verdicts do nothing to undermine this legal proposition, they do not support dismissal of the plaintiffs' Section 1 claim.

Second, the *DaVita* court's ruling on the defendants' motion to dismiss—which *denied* the motion—does not support, and in fact counsels against, dismissal in this matter. Doc. 109-1.

As the *DaVita* court recognized, the non-solicitation agreement alleged in the indictment was a horizontal market-allocation scheme, *id.* at 11–12, 17–18; *cf. Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 782 (7th Cir. 1994); *United States v. Coop. Theatres of Ohio, Inc.*, 845 F.2d 1367, 1370–73 (6th Cir. 1988) (per curiam), and horizontal market-allocation schemes are per se Section 1 violations, Doc. 109-1 at 10, 15, 23; *see Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49–50 (1990); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972). The United States' Statement of Interest urges this Court to reach exactly the same conclusions and likewise to hold that this case should proceed under a per se theory. Doc. 91 at 5–13.

The *DaVita* court erred, however, in holding (and subsequently instructing the jury) that the "government will have to prove more than that defendants had entered into a non-solicitation agreement—it will have to prove that the defendants intended to allocate the market," Doc. 109-1 at 24; *see* Final Instructions Given, *United States v. DaVita Inc.*, No. 21-00229, Doc. 254 at 19–21 (D. Colo. Apr. 13, 2022) (instructing jury that United States must prove that defendants "intended to allocate the market for senior level employees" and "for employees of DaVita" and that "you may not find that a conspiracy to allocate the market for the employees existed unless you find that the alleged agreements and understandings sought to end meaningful competition for the services of the affected employees"). The sole elements of a per se offense—in addition to the interstate/foreign commerce requirement—are that (1) a conspiracy existed to engage in the per se illegal conduct and (2) the defendants knowingly joined the conspiracy. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) ("[I]t is . . . well settled that conspiracies under the Sherman Act are not dependent on any overt act other than the act of conspiring."); *United States v. Andreas*, 216 F.3d 645, 669 (7th Cir. 2000) (upholding jury instruction describing intent element of per se offense as "knowingly and intentionally

bec[oming] a member of the charged conspiracy"). But establishing those elements is precisely what the *DaVita* court held was *not* sufficient when it required the United States "to prove *more* than that defendants had entered into a non-solicitation agreement." Doc. 109-1 at 24 (emphasis added).

In addition, the "more" that the *DaVita* court demanded—"that the defendants intended to allocate the market," *id.*—violates the rule, recognized by all courts of appeals to have addressed the issue,[1] that the United States need not prove that the defendants acted with the specific "intent to restrain trade or commerce" in a per se case. *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979). Indeed, the *DaVita* court acknowledged that it was throwing the defendants "a lifeline" by requiring the government "to prove beyond a reasonable doubt the intent to allocate the market" and admitting evidence of purposes "other than allocating the market," such as "improv[ing] your ability to compete" and "improv[ing] the lot of the employees." Ex. 1 (*DaVita* Tr.) at 1–2. This Court should not extend a similar "lifeline" by imposing an extraneous, unsupported pleading requirement on the plaintiffs.

The Second Circuit's recent decision in *United States v. Aiyer*, 2022 WL 1296806 (2d Cir. May 2, 2022), provides a striking counterpoint to *DaVita* and illustrates how this Court should apply the per se rule. In contrast to *DaVita*'s assertion that the government needed to prove something "more," the *Aiyer* court stated, "[I]n a criminal antitrust case alleging conduct falling within the *per se* rule, the government 'need prove only that [the offense conduct] occurred in order to win [its] case, there being no other elements to the offense and no allowable

[1] *United States v. Giordano*, 261 F.3d 1134, 1143–44 (11th Cir. 2001); *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 7 (1st Cir. 1997); *United States v. Misle Bus & Equip. Co.*, 967 F.2d 1227, 1235 & n.5 (8th Cir. 1992); *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 479–80 (10th Cir. 1990); *Coop. Theatres*, 845 F.2d at 1373; *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981); *United States v. Koppers Co.*, 652 F.2d 290, 295–96 n.6 (2d Cir. 1981); *United States v. Soc'y of Indep. Gasoline Marketers*, 624 F.2d 461, 465 (4th Cir. 1979); *United States v. Gillen*, 599 F.2d 541, 545 (3d Cir. 1979).

defense.'" *Id.* at *9 (quoting *Koppers*, 652 F.2d at 294). And in contrast to *DaVita*'s assertion that the government needed to prove an intent to allocate the market, the *Aiyer* court stated, "[T]here is likewise no need for the government to prove that a defendant in a [per se] criminal antitrust case was consciously aware that anticompetitive effects would most likely result from his alleged misconduct." *Id.* at *17. *Aiyer* stands in stark opposition to *DaVita* and demonstrates where the latter decision went wrong.

The *DaVita* acquittals are irrelevant to the pending motions to dismiss, and, as the Second Circuit's decision in *Aiyer* shows, the legal principles for which the defendants cite them are erroneous. When parties knowingly enter into an agreement and the agreement falls within the ambit of the per se rule, that is enough for per se liability. The defendants' notice does nothing to undermine the United States' position that the plaintiffs pleaded a per se violation of Section 1.

May 11, 2022

Respectfully submitted,

/s/ Peter M. Bozzo

JONATHAN S. KANTER
Assistant Attorney General
Antitrust Division

RICHARD A. POWERS
Deputy Assistant Attorney General
Antitrust Division

DANIEL E. HAAR
STRATTON C. STRAND
PETER M. BOZZO
Attorneys

United States Department of Justice
Antitrust Division

950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
Telephone: (202) 368-4122
Email: peter.bozzo@usdoj.gov

JAMES J. FREDRICKS
ANTHONY W. MARIANO
Attorneys

United States Department of Justice
Antitrust Division

450 Fifth Street, NW
Suite 11400
Washington, DC 20530-0001