IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Criminal Action No. 21-CR-00229-RBJ

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVITA, INC., and KENT THIRY,

Defendants.

REPORTER'S TRANSCRIPT
Oral Argument

Proceedings before the HONORABLE R. BROOKE JACKSON, Judge, United States District Court for the District of Colorado, commencing on the 19th day of November, 2021, in Courtroom A902, United States Courthouse, Denver, Colorado.

APPEARANCES

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(The proceedings commenced at 9:00 a.m.)

THE COURT: Good morning. This is 21CR229, United States versus DaVita and Mr. Thiry, set for argument on the defendants' motion to dismiss. Appearances, please.

MR. VIGEN: Your Honor, William Vigen on behalf of the United States.

THE COURT: Are you going to be the primary arguer, Mr. Vigen?

MR. VIGEN: Yes, Your Honor.

THE COURT: And how about your colleagues there?

MR. VIGEN: I'm here with my colleagues James Fredricks, Sara Clingan, and Anthony Mariano.

THE COURT: Good morning.

MR. WALSH: Good morning, Your Honor. John Walsh for DaVita. I'd like to introduce as well Seth Waxman for DaVita who will be the principal arguer today for both defendants. In addition I'd like to introduce my co-counsel Clay Everett and Jack Dodds and David Lehn. And I would note that Kathleen Waters, the chief legal officer of DaVita, is present as a client representative.

THE COURT: Okay.

MR. STONE: Good morning, Your Honor. Jeffrey Stone on behalf of Mr. Thiry who is present in court sitting next to me, and also Mr. Cliff Stricklin who's co-counsel on

this case.

MR. STRICKLIN: Good morning, Your Honor.

THE COURT: Good morning. And who's going to be the primary arguer for Mr. Thiry?

MR. STONE: We have agreed that Mr. Waxman for reasons of efficiency and talent will be arguing on behalf of both defendants.

MR. WAXMAN: That's a fact not in evidence.

THE COURT: I think there's a lot of talent in this courtroom right now. All right.

MR. STONE: Thank you, Your Honor.

THE COURT: The Court, that means me, has reviewed your briefs, has reviewed the amicus briefs. My two law clerks sitting over there bright and able have reviewed your briefs as well, so at least we have some understanding of the issues. I'm going to give each side approximately an hour today to argue their case. It seems to me that although you can make any argument you want -- it's your time -- the key issues, as I see them are, number one, are these so-called poaching or no-hire agreements per se violations of the Sherman Act. Number two is the agreement at issue in this case, which the defendants label as a no-solicitation agreement but which has other features to it, the substantive equivalent of the no-poaching agreements. And number three is is this a decision that is

per se versus rule of reason the Court needs to or even should make at this stage of the case. Those are the issues that are on my mind, but you can try to convince me that the Court's issues aren't the real issues or that there is something else that's important that I have to listen to, whatever you want.

It's the defendants' motion. You may proceed, Mr. Waxman.

MR. WAXMAN: Thank you, Your Honor, and may it please the Court. I'd like to first express my appreciation for the Court's courtesy in allowing me to argue this morning pro hac. It's an honor to be before you. If the Court permits, I'd like to reserve 15 minutes of my one hour for rebuttal.

THE COURT: Sure. No problem.

MR. WAXMAN: Okay. Your Honor, I'm going to directly answer all three of your questions very straightforwardly and very simply, I think, and quite definitively. If the Court would permit, I'd like to just put in context what is at issue here although I totally -- I completely agree with the Court that the three questions you asked are the bottom-line questions in this case. And I'd start first by saying that I recognize -- we recognize that the grant of a motion to dismiss a criminal indictment is a very, very rare thing, but this is a truly exceptional case.

I can't think, and I haven't been able to find, and I've been practicing criminal law as a defense lawyer and a prosecutor for my whole life -- whole professional life -- I can't think of another instance in the federal criminal code in which there is such a thing called a per se crime. That is a crime that which once it is alleged there is strict liability. In every crime other than a very few instances under the Sherman Act the Government is required to present evidence to a grand jury and instruct the grand jury as to the elements of the offense, and the Government is required to prove beyond a reasonable doubt that each of those elements is met, and what the Government purports to do here is to sidestep all of that.

And so your decision on the last question that you asked, is this the time to make the decision, the answer is I think with respect you have to make the decision now, and your decision is freighted with enormous significance. The Supreme Court has said over and over again that per se treatment under the Sherman Act is the truly rare exception that is appropriate only when, quote, long judicial experience enables Courts to be confident that a category of agreement is thoroughgoingly anticompetitive and without setting off procompetitive benefits. That's entirely as it should be because excusing the prosecution from alleging and proving the elements of a Sherman Act violation constrains a

bevy of Fifth and Sixth Amendment rights, and that provides the basis for my contention that your decision today is freighted with enormous significance.

Now, the Government asserts that agreements between employers not to affirmatively solicit each other's employees are per se unlawful because they constitute a market allocation, but labeling something a market allocation will not do. Only agreements that, in fact, allocate an antitrust market come within the per se rule, and what the indictment here alleges is not an agreement that did or would have allocated a labor market. There is no Court anywhere that has ever found that the mere agreement not to affirmatively solicit each other's employees violates the antitrust laws under any standard, rule of reason or otherwise.

THE COURT: But I don't think this is a mere agreement not to solicit, Mr. Waxman.

MR. WAXMAN: Well, with respect, Your Honor, the relevant charging portions, and I guess this is your first question asked -- the relevant charging portions of the indictment are in -- the superseding indictment are in Paragraphs 9, 17, and 25. And looking first at Paragraph 9, the allegation is that DaVita and Thiry entered and engaged in a conspiracy with SCA to suppress competition between them for the services of senior level employees by agreeing

not to solicit each other's senior level employees.

The Government's allegation as to each of the counts in this case is not that this was a no-hire agreement. The Government acknowledges in the indictment that employers were free to hire each other's employees and that employees were free to move back and forth among the alleged coconspirators, and the Government knows very well that during the relevant period this happened many times among the three companies alleged. So what this case involves --

THE COURT: Speaking of the three companies alleged, I don't know the names of what you call -- or they call Companies B and C. I mention that only because there typically is a corporate disclosure agreement or corporate disclosure document that is filed to enable us to know whether we have any financial interest in a party, and I have no problem with that in terms of DaVita or the company that's been identified, but I don't know who Companies B and C are.

MR. WAXMAN: I mean, can we say who Companies B and C are? I mean, they're very small companies that are -- I'm not even sure they're publicly traded.

THE COURT: If that's the case, then I don't think there's a problem.

MR. WAXMAN: But I'm looking -- they are not.

They're very, very -- one is a software company based in I think the Bay Area, and the other is a very small services company based in Los Angeles, but they're private. And so what the -- I was saying that, you know, I don't think that the Government will disagree, I mean, that this is a case that alleges, as the indictment says, that the conspiracy to suppress competition was by, quote, agreeing not to solicit each other's senior level employees.

THE COURT: Right. I understand that, but both sides have used the phrase or term non-solicitation or no solicitation somewhat loosely. What I have to deal with I think is the agreement in this case, not the label.

MR. WAXMAN: I completely agree.

THE COURT: And that is why my second question asks is this particular agreement the substantive equivalent of a no-poaching or no-hire agreement.

MR. WAXMAN: And my answer to you, just so that we're very, very clear about this, I am not -- and I hope in our briefs we did not use the word no solicit in a loose or generic way. There are cases that have addressed no solicit, and there are cases that have addressed no hire. The vague word that is quite indistinct is no poach. But no hire means that two different employers agree that they will not hire each other's employees.

THE COURT: I understand. I get it.

MR. WAXMAN: Okay.

THE COURT: But this agreement not only says no solicitation, which also has implications for headhunters or recruiters, but it also has this provision that if an employee were to want to move to a -- to a competitor company they have to notify their employer. That's a twist on the non-solicitation concept that I haven't seen in these other cases.

MR. WAXMAN: Right. And so the alleged agreement in Count 1 has two components. One, assuming that the allegation -- taking the allegations of the indictment as true, that neither company will affirmatively recruit, either directly or through a recruiter, the senior level employees of the others, but that if an employee -- a senior level employee of one or the other wishes to switch to the other company, there is a requirement that the employee give notice to the employer, and as we've explained in our papers, that -- there is -- there is also no case ever that has ever suggested that an -- that a requirement or an agreement that before employees switch the individual employer be notified so that the employer can make an effort to retain the senior executive in whom it has expended tremendous, you know, training, employment, and divulged trade secrets.

THE COURT: I understand. I understand that

completely.

MR. WAXMAN: Okay.

THE COURT: The requirement that you contact your present employer and tell him or her that you would like to apply for a position with the other company also has, it seems to me, a chilling effect on an employer's (sic) likelihood of doing that, and that's part of the total mix when I say does this amount to about the same thing.

MR. WAXMAN: So let me -- let me be very responsive to this. We have -- you may be right, and the evidence might show, although I think it would not be substantial, that there is some chilling effect. The evidence we have alleged that the notice requirement actually has procompetitive benefits, including the one I just articulated, and we are entitled to fight that out in front of the trier of fact and you at trial. We are entitled to -- the question in this case is there is -- I'll start off by saying there is -- I know you know this, but it's a predicate to the point I'm about to make.

There is no case anywhere including the one that was addressed in the Government's notice yesterday for the reasons we've explained in our responsive letter -- there is no case in this country that has ever held that a no -- that an agreement not to solicit each other's employees or an agreement to -- that you won't hire another's employees

without notice to the current employer is even illegal under any standard whatsoever. And therefore the notion that the Government can proceed -- we're not here arguing whether we're entitled to dismiss an indictment that reflects the fact that the jury has been instructed on the elements of the offense and has been presented evidence sufficient to allow it to aver that there is a violation of the Sherman Act under the rule of reason.

The Government is attempting to get you to say this, for the very first time in any court in the history of the United States under the Sherman Act, that an agreement with these two characteristics or either one of them is illegal under the Sherman Act and illegal per se such that you will have, in essence, strict liability or a directed verdict. That is they want you to tell the jury at trial that the indictment alleges an agreement with those two characteristics, if you find that there was such an agreement, you must convict, and that is an extraordinary submission in the context of the Fifth and Sixth Amendment protections.

THE COURT: Well, there's no dispute that there was the agreement, so what would there be for the jury to decide? Damages? There are no damages in a criminal case. What's there for the jury to decide?

MR. WAXMAN: Your Honor, in order to prove a

violation of the antitrust laws, and certainly a criminal violation of the antitrust laws, the Government has to -- the grand jury has to find and aver that, number one, there was an agreement, to be sure, that the agreement allocated the market in a relevant antitrust market. We -- to this very day the Government has not said exactly what it thinks the relevant market is. I mean, these are three companies among the probably 100,000 or more companies in the health services industry that the agreement was substantially and unreasonably in restraint of trade in that relevant market and that there are no offsetting procompetitive benefits.

Because under the standard Sherman Act analysis under the rule of reason, it is the Government -- it was the plaintiff's burden -- here the Government's burden -- to prove what the relevant market is, that is a market that the antitrust laws take cognizance of, that there was an agreement that operated substantially to restrain trade in that market, and if they show all those things the burden shifts to the defendant to prove that there are, quote, procompetitive benefits to the agreements.

There are lots and lots of cases establishing that even agreements that substantially restrain trade are nonetheless sufficiently procompetitive for some other reason that they don't even violate the civil provisions. But the notion here under the due process clause that

somebody could be held criminally liable for engaging in this agreement, ipso facto, that is that all the jury would have to find is did you have this agreement -- never mind about what the market was or whether the market was actually allocated or whether there are procompetitive benefits -- all you have to find is there was an agreement, and Kent Thiry goes to prison. I mean, the --

THE COURT: Well, not necessarily.

MR. WAXMAN: Well, not necessarily, but he stands convicted under the criminal laws. The fact of the matter is that an ordinary businessman could have taken a year off and read the entire 125 -- I think it's more than 125 years of decisions under the Sherman Act, never found a single case that ever found that an agreement with these two characteristics was even illegal, and nonetheless would conclude that if he signs such an agreement he would be criminally liable per se, and that's what the Government is asking you to do. And the Supreme Court has -- you know, we cited the --

THE COURT: What happens if I agree with you and say it's not a per se violation? Then what happens?

MR. WAXMAN: Well, the Government would then have the option of going back and producing evidence and instructions to the jury on the actual elements of the Sherman Act and can bring this as a rule of reason case or

just -- it could also just allege that this is -- this is what happened in the *Kemp Associates* case. The Government simply alleged that there was a violation of the antitrust laws. The defendant then moved to require the Government to carry its burden under the rule of reason. The Government said no, this is -- which was a -- a totally different -- this was a genuine market -- allocation of product markets --

THE COURT: Heir locations.

MR. WAXMAN: Excuse me?

THE COURT: Heir locations.

MR. WAXMAN: Heir locations, right. Who knew? The trial judge said you haven't established that this is a per se violation, and in any event, this case is barred by the statute of limitations. It went to the Court of Appeals. The Court of Appeals said, Well, we don't have jurisdiction here. The statute of limitations isn't an issue, but we don't have a final judgment because the district -- under the district judge's ruling, the Government can still proceed under a rule of reason theory. Now, the Government argued that it has a policy that it will not pursue criminal cases under the rule of reason.

THE COURT: And Judge Ebel said that doesn't matter.

MR. WAXMAN: Right. It doesn't matter, and not

only that, the Government can proceed civilly. I mean, the notion that it is appropriate in the absence of any prior precedent finding an agreement with these characteristics to be illegal, much less per se illegal, to proceed under a per se theory in a criminal case where the defendant is manifestly denied notice that what he is doing is ipso facto per se strict liability guilty is extraordinary.

THE COURT: Well, that gets back to my second question, doesn't it, Mr. Waxman? If, in fact, what we have is a wolf in sheep's clothing, if we have what amounts to a no-hire or no-poaching agreement just worded differently, and if those kinds of agreements have been determined to be per se violations, then a lot of the force of your due process argument leaves the courtroom because it is known to these defendants that those no-poaching agreements are no good.

MR. WAXMAN: Well --

THE COURT: I don't have any doubt but that they and their very able lawyers attempted to structure this agreement to be different enough that the law wouldn't reach it. But to say that it's just totally unfair and a violation of due process if they're just repackaging a no-poaching agreement doesn't quite work.

MR. WAXMAN: Well, I -- I want to respectfully -- very respectfully disagree with your conclusion, but let me

first --

THE COURT: Well, it's not a conclusion. I'm being a devil's advocate with my questions --

MR. WAXMAN: Let me --

THE COURT: -- because I really want to get to the bottom of this. I know the importance of it.

MR. WAXMAN: Let me say two things, and maybe this will, if not help, at least clarify what our position is. In the first place, even if this were a -- even if this agreement -- even if the indictment alleged a conspiracy not by an agreement not to solicit each other's senior level employees, but an agreement never to hire each other's senior level employees that is a real no-hire agreement, you couldn't apply per se treatment here anyway because there is no -- there is no, quote, long judicial experience holding that no-hire agreements are per se unlawful. As we explained at pages I think it's eight through ten of our motion, the case -- the Courts are in disagreement about whether no-hire agreements are even unlawful, and the weight of the authority is that they are not, and we've cited and discussed those cases in our motion.

So even if this were a case that it's not, and it were an agreement never to hire each other's employees, per se treatment would be completely inappropriate in this case. The Government could do what it has tried to do in other

cases in the civil context, which is to show that they are illegal under the Sherman Act, taking into account the elements of the crime.

THE COURT: Well, that's your answer to my first question then.

MR. WAXMAN: That is -- in a roundabout way that is my answer to the first question. Well, the first question I think was are these -- yes, right. No-hire agreements are not per se unlawful. No Court has ever said that they are, and the few Courts that have addressed no-hire agreements have come to different conclusions about whether they are or aren't unlawful, as we suggest, the predominance holding that they are not. And so for a Court in a criminal case to just say, well, I'm not even going to put -- in light of that nonagreement, no consensus among the lower courts, I'm just going to allow the Government to proceed on a per se basis is -- would be wrong even in a civil case, and it certainly is wrong in a criminal case.

I mean, you know, thinking back to the Supreme Court's long list of due process, you know, criminal cases, Skilling and Governor McDonnell and the Kelly case that involved the George Washington Bridgegate issue, nobody doubted that what Governor McDonnell did and what Governor Christie did was -- certainly seems unlawful, and they were convicted. The Supreme Court reversed decisively saying the

terms of the statute do not make collusively clear to the defendant that that activity crossed the line, and we will not permit a conviction under the due process clause for those contents under this statute.

Now, here we don't even have a statute. The Supreme Court has agreed since the 19th century that the words of the Sherman Act that all restraints on trade are unlawful can't mean what it says, because there are -- there are agreements that, quote, restrain trade all the time, and so the standard is they are unlawful only if they substantially and unreasonably restrain trade taking into account procompetitive benefits. And that's what we are entitled under the due process clause, to have the grand jury conclude and the Government prove at trial with our full Fifth and Sixth Amendment rights to cross-examine and put on our own evidence.

If the Government continues to insist that it's entitled to an instruction to the jury on a per se theory, you'll have to make that decision probably in a Rule 29 motion, or in any event, in a motion at the end of the evidence as to whether to instruct the jury that it has to find liability under the element, the Government has to prove beyond a reasonable doubt all the elements of the Sherman Act crime alleged, or whether all the jury has to find is that there was this agreement. And if the

Government chooses to proceed that way under an indictment that doesn't limit itself to a per se theory, you know, I wouldn't say we're ready for trial, but we are pretty darn ready for trial.

I just want to say one other thing, which is I think I can't sit down without talking about the one case that the Government -- that the Government has correctly pointed out involved a no-solicitation agreement and found it to be per se unlawful, and that's the Sixth Circuit decision in the *Cooperative Theaters* case. Again, I don't want to repeat what we said in our briefs. I know Your Honor and Your Honor's law clerks have read it and undoubtedly have read the case. I want to emphasize just three things about that.

Number one, it was important to the Sixth Circuit, the per curiam Sixth Circuit, that the defendants in that case never alleged, much less proved, that there were any plausible procompetitive benefits to this -- to the agreements that were enacted. And the Supreme Court case law is utterly clear that a horizontal restraint is not per se unlawful if it does plausibly provide procompetitive benefits.

THE COURT: Does that get into what has been called the ancillary?

MR. WAXMAN: Yes and no. Ancillary, for sure, and

that's an issue where even if you allow the Government to proceed per se we could put on evidence at trial that these agreements were ancillary to a broader agreement among the companies to cooperate that was procompetitive. But it's not that. It's not just that. It is either that they are ancillary, or that the procompetitive benefits outweigh the anticompetitive effect such that there is no violation in the first place. And, you know, the U.S. Supreme Court has said many, many times that the -- where there is -- where there are -- in determining whether per se treatment is allowed or not, where there are plausible procompetitive benefits per se plausible -- we don't have to prove them at this point, but if they are plausible, that per se treatment is unlawful. I mean --

THE COURT: Well, the benefits in these cases such as the *Cinnabon* case and some of the other cases aren't just that by keeping the employees in house you don't waste your time training them only to lose them to a competitor and so forth. I think the Courts have said that isn't the kind of procompetitive benefits we're talking about.

MR. WAXMAN: Oh, I guess I --

THE COURT: Of course that's true.

MR. WAXMAN: Well, the issue -- I don't think the Courts have said that those aren't procompetitive benefits, and I can cite you a long line of cases that have held that

they are, including the, you know, then Chief Judge Taft's decision for the Sixth Circuit in *Addyston Pipe* and the Supreme Court's decision in *Polk Brothers* and the Ninth Circuit's decision in *Aya*.

THE COURT: But those benefits go to the company that retains the employees. Of course there're going to be benefits to retaining key employees. But the issue here isn't is it good for DaVita to retain key employees. The issue is whether it's unfair to DaVita's senior management people and the other company's senior manager people to in effect reduce their availability to either get a higher paying job at the competitor company or negotiate a higher salary with DaVita.

MR. WAXMAN: I don't disagree with Your Honor at all. The question at this stage, at the pleading stage, is whether -- and I agree the issue isn't only whether DaVita would lose something by losing a valued employee to whom it had entrusted trade secrets and invested all sorts of stuff which heavily distinguishes this context from the goods markets. The Supreme Court and the lower courts have recognized that there are benefits to competition which we could explore at trial if we were allowed to put on evidence about this at trial, not just to DaVita, but to competition, to the employees themselves. For example, I know that you take the facts as alleged as true, but in Paragraph 11(e) of

the indictment, the Government has very selectively quoted one portion of an e-mail involving one DaVita employee who wanted to move or was thinking about moving.

THE COURT: I won't do that to Kent.

MR. WAXMAN: Right. The Government knows darn well that that employee when he told Kent was given a raise and given a promotion and decided not to go to SCA in response to its offer. And, again, I'm not here to argue the facts. All we have to do is to show you that there are plausible procompetitive benefits to these agreements in order to stand trial if the Government chooses under the rule of reason. Now, so my first -- I'm getting myself a little bit off, but the first way I would distinguish *Cooperative Theaters* is that we have alleged what the Courts have recognized are at least plausible procompetitive benefits. That was the Government -- the Court in *Cooperative Theaters* said there was no such allegation, no such suggestion.

Number two, an agreement not to solicit in a goods market cannot be automatically transferred to an agreement not to solicit in the labor market . Now, I will -- of course we agree that the antitrust laws apply to labor markets just as they do to goods markets. But, again, the Supreme Court has emphasized over and over and over again that it is the, quote, context or practice that matters, and the Supreme Court -- and, again, I'm quoting from the

Supreme Court's decision in *Leegin*, but the same point is made in *Indiana Federation of Dentists*, that the appropriateness of applying per se treatment requires a careful examination, quote, of the context of the business relations in which the practice occurs.

And the Government not only -- in terms of thinking about the propriety of transmitting this 25-year-old per curiam decision of the Sixth Circuit in a very different context in a very different market to the employment context is not only inappropriate because it is a very different context. You would think that if *Cooperative Theaters* really stood for the proposition that in any kind of market a non-solicitation agreement was per se unlawful that a couple of Courts somewhere else in the country might have said that.

The Government has marshalled a lot of cases in its written submission to you. It has cited two cases in which *Cooperative Theaters* is even mentioned. The first one, *United States vs. Brown*, a Ninth Circuit case from 1991, is cited by the Government for the proposition that the per se rule typically applies to horizontal restraints such as allocating or dividing markets. Nothing whatsoever to do with no solicitation.

The other case that they cite is the Tenth Circuit's decision in *Suntar Roofing* in which, of course,

there was -- as Your Honor knows from reading the decision -- there was no serious argument -- it was a product market case in any event -- that the agreement was not horizontal market allocation and was entitled to per se treatment. That was -- that was not contested. And the only thing the Government cites -- the only reason that *Suntar Roofing* in that very different product market context cites *Cooperative Theaters* is that an agreement to allocate or divide customers between competitors within the same horizontal antitrust market constitutes a per se violation, which, of course, we don't disagree with.

And so the notion that there is one case out there in such a very different context where no procompetitive benefits were alleged and has essentially fallen into a complete black hole of American jurisprudence and has never been applied or even cited in a case involving the employment context could be the predicate for the application of per se treatment here is -- I mean, it's -- this is just not even a close case. It took the Supreme Court years to find that bid rigging, price fixing are so thoroughgoingly anticompetitive and so devoid of procompetitive benefits that it was appropriate for Courts to in effect create a new criminal statute, which is what the per se rule does, to say price fixing is a crime under -- in the United States, bid rigging is a crime under the --

in the United States. Not you have to weigh all these factors. That's the only way you can understand these limited exceptions under the antitrust laws that you can reconcile them with the defendants' rights under the Fifth and Sixth Amendments, and we don't have -- we don't have -- we're not even in the same time zone as that here.

So I just want to -- you know, unless the Court has further questions, I'll just -- I'll just yield the podium to my friend Mr. Vigen on the other side with this thought. This indictment is a dangerous and inappropriate overreach of the criminal laws. If the Government thinks that it can show beyond a reasonable doubt that the agreements alleged here substantially and unreasonably restrain trade in a relevant antitrust market, it should be required to present an indictment that alleges the requisite elements and then prove them at trial, not just tell the jury, or the grand jury for that matter, that it is so. And I'll -- with the Court's indulgence, I'll reserve the balance of my time.

THE COURT: All right. Thank you, Mr. Waxman. Does anybody need a break before we proceed? No.

Mr. Vigen.

MR. VIGEN: Thank you, Your Honor. Your Honor, thank you. The United States and defendants have a fundamental disagreement over what the per se rule is and how it should be applied here. I think if you look at *Kemp*

and *Maricopa County* there can be no doubt that if there is a horizontal agreement among direct competitors who agree not to compete for a segment of the market, that that is per se illegal, and it doesn't matter what industry you're in, and it doesn't matter about procompetitive benefits or the judicial experience in that industry. *Maricopa County* and *Kemp* stress that that is irrelevant. We do not need to go into the procompetitive justifications or if these were, in fact, unreasonable. They were unreasonable as a matter of law, per se unreasonable. That is what the Supreme Court teaches, and let's make --

THE COURT: Well, Mr. Waxman says this would be the first case to ever so hold.

MR. VIGEN: I disagree. I disagree. It would be no different than the first case against the heir location services. Those were never determined before to be per se illegal, yet the Tenth Circuit reminded the district court that those procompetitive justifications even in that unique heir location services market had no role in the analysis. The analysis is what the practice is that is alleged that is illegal. And here the indictment alleges a classic per se market allocation agreement, a naked agreement amongst competitors at the same level of the market structure who have agreed not to compete with each other in some way in that market, thereby minimizing competition. And defendants

did that here three times, three times over with other companies.

They declared off limits employees who were not actively looking for another job or who did not want to jump through the hoops of the rules that these CEOs had between each other for how they should treat competition for these employees. Those employees no longer received the benefit of the free and open competition that our economy is based on and that the Congress laid down as national policy in the Sherman Act.

THE COURT: Well, they can move to the other company if they want to.

MR. VIGEN: Not if they were not actually looking for a job. Those employees were allocated to their current employer and the conspirators ceased competing for those employees.

THE COURT: We're talking about senior management people. They're pretty smart. They can decide on their own, can't they, if they want to apply for a job with a different company if they think maybe they can use that for negotiating leverage. We're not talking about, you know, the people that are running the kidney machine. We're talking about people at Mr. Thiry's level.

MR. VIGEN: Well, Your Honor, with respect, that's only accurate with respect to Count 1. So Count 1 is

limited to senior employees. Counts 2 and 3 cover employees generally. I also think, though, that that cessation of competition has actual impact. So, yes, they could in their busy lives if they wanted to try to look out in the job market and do that, but they no longer receive those cold calls from recruiters that they could use to either -- if they weren't aware of the opportunity, or even if they -- or if they weren't aware of that opportunity and they weren't interested in leaving, they could use that as leverage with DaVita to try to obtain perhaps a raise or a promotion. But the whole point of this agreement is to cease that competition, stop it in its tracks so that those employees did not get the benefit of that competition so that they did not have to compete over those employees.

THE COURT: I think Mr. Waxman said that you know that a number of management level or lower-level employees have, in fact, despite this agreement moved. Is that true?

MR. VIGEN: There are examples that we are aware of where that did happen. But let me use an example from Count 1 of the indictment between defendants and Surgical Care Affiliates. So in one of the means and methods the recruiter at SCA -- or sorry -- the human resources professional at SCA informed a recruiter that DaVita employees were, quote, off limits to SCA. So we will never know how many employees at DaVita did not receive a

solicitation or were informed about that job opportunity. They weren't able to use that to go to their boss to obtain leverage or switch companies because they didn't know about it. We'll never know how many people were not contacted because of that single e-mail.

THE COURT: Well, maybe that's one thing that you explore in a rule of reason context preparing for trial. You go out and find those people.

MR. VIGEN: Well, Your Honor, respectfully, what has been alleged here is a per se violation, that when competitors who should be competing with each other instead decide to cease competition, that that is a per se violation, and we don't get into that. And so I do agree with defense counsel -- and this goes back to Your Honor's third question, which is that this is the time to decide this issue. The indictment either alleges or does not allege a per se violation.

THE COURT: So if I decide that it's a per se violation, in effect, I'm deciding that these people are guilty.

MR. VIGEN: Not at all, Your Honor.

THE COURT: Why not?

MR. VIGEN: Well, so we still have to meet the elements of the Sherman Act.

THE COURT: Which are?

MR. VIGEN: The elements of a per se crime we have to prove that the agreement existed.

THE COURT: That's not disputed.

MR. VIGEN: I would -- that was the defense's position here and they conceded that first element, but that will be what the Government has to prove at trial, that the agreement existed.

THE COURT: It's undisputed.

MR. VIGEN: That they knowingly entered into the agreement.

THE COURT: They what?

MR. VIGEN: That they knowingly entered into the agreement.

THE COURT: That's obvious.

MR. VIGEN: And that it affected interstate commerce.

THE COURT: Yes. So if I find it's a per se violation, they're guilty.

MR. VIGEN: If those elements are met, and that is no different than what the United States had to do in *United States vs. Kemp* or in the *United States vs. Cooperative Theaters*. All that needed to be proved at trial and which was in Cooperative Theaters' sense is that the agreement existed. That is where I think we have this fundamental disagreement with defendants that that matters at all.

THE COURT: Okay.

MR. VIGEN: From the beginning of time --

THE COURT: Let's have you show me a case, whether it's a no-poaching case or a non-solicitation-type case, any case where the Court on a motion such as this effectively found the defendant guilty without trial, without an opportunity to defend themselves, nothing. Show me a case like that.

MR. VIGEN: Well, Your Honor, that is *Kemp*. So the district court on remand after being informed or instructed by the Tenth Circuit said that the per se rule is going to apply. That's exactly what happened in *Kemp*. And it doesn't matter --

THE COURT: So that's what you're hanging your hat on is the *Kemp* case on remand.

MR. VIGEN: Your Honor, it's no different than any other criminal per se case where judges routinely uphold the indictments and allow, for example, price fixing cases to go forward.

THE COURT: Okay. I'm not talking about what Courts do routinely in price fixing cases, Mr. Vigen. I'm talking about no-poach cases and non-solicitation cases where you want the Court to say as a matter of law, in effect, you're guilty, and then if I find it to be appropriate, put Mr. Thiry in prison. I'd like to know what

precedent there is for that.

MR. VIGEN: In a criminal labor context, there is -- there is not a case such as that. This is one of the first cases that we have brought in the criminal context that is a market allocation --

THE COURT: Well, it's the first case if there's no such case. It's the first case. I know you've got the SCA case down in Texas. What's the status of that case?

MR. VIGEN: So that is fully briefed on a motion to dismiss, and there is currently not a hearing set, and it is awaiting a ruling from the judge there. There's also the *United States vs. Hee* case in the District of Nevada. That one also recently was just heard on a motion to dismiss, and the judge indicated he would be denying it. But the fact that this is the first --

THE COURT: Which case?

MR. VIGEN: Hee, *United States vs. Hee*, which is in the District Court of Nevada. I believe we referenced it in a footnote of our brief.

THE COURT: That's one that I don't remember. I'm sorry. You cited quite a few cases.

MR. VIGEN: Fair enough, Your Honor. Fair enough.

THE COURT: And so the Court indicated at argument that the motion was going to be denied?

MR. VIGEN: He took it under advisement, but

indicated that the parties -- that the case should proceed, and I believe indicated he was likely to deny the motion. And that --

THE COURT: So you struck out in Nevada. You're waiting to hear in Texas. But right now this is the first case -- or it would be if I go your way, right?

MR. VIGEN: Well, I disagree that we struck out in Nevada. I think it's that the judge is going to deny the motion to dismiss, but I agree with Your Honor's fundamental -- fundamental point. But that's no different than the first case that was brought by the United States criminally for customer allocation cases, and this is what *Kemp* teaches, that we're supposed to --

THE COURT: Right. One of the judges said there has to be a first time.

MR. VIGEN: There has to be a first for everything, Your Honor, and what matters for purposes of due process and for what the per se rule says is what the practice is, and the practice are two employers who should be competing, they should be competing aggressively, but deciding amongst themselves, amongst the CEOs, you know what, it might be best if we don't do that, and it's obvious why that would be good for them, so they can avoid competition. That's what they're worried about. It's obvious that they didn't do this to provide more training to their employees. It's

obvious that they didn't do this to protect trade secrets. They know very well how to do that in employment agreements with the actual employee, and that they can have a bargain for exchange with the employee.

THE COURT: What was the case -- it was in California where the companies entered a series of bilateral contracts to not poach, and at one point the executive -- I think it was even Steven Jobs himself -- contacted some company himself and said, Hey, you got to do this, and the guy said, Wait a minute, it's not right, and it's probably illegal. Forget about it.

MR. VIGEN: Right. That would be one of the cases from California. I believe it's the *eBay* case.

THE COURT: But that was a civil case, not a criminal case.

MR. VIGEN: That's correct. But the Sherman Act can be enforced both civilly and criminally, and the Department of Justice's position is if it is a per se violation we will proceed criminally, as we have here. And we have determined in our acts of prosecutorial discretion that just as customer allocation agreements are per se illegal, employee allocation agreements are per se illegal and should be treated the same way.

THE COURT: Well, your prosecutorial discretion is if I have an easy win by having the judge call it per se we

go home and celebrate, and if we have to do the hard work of proving unreasonable restraint of trade, we're not going to do it. We'll let someone else worry about it.

MR. VIGEN: With respect, Your Honor, I do believe you have that backwards, which is the Supreme Court has been the one that has interpreted the Sherman Act as being directly applicable in terms of per se agreements being the worst evil violations of the Sherman Act. So it is the per se agreement that makes it the problem that price fixing, market allocation, bid rigging, those are considered the worst of the worst. And so that is how the Supreme Court has defined the statute -- or has explained the statute in those contexts, and so consistent with that, the Department of Justice believes that criminal prosecution is appropriate for those types of agreements. So it's not because we're trying to avoid any type of showing. It's because they have been declared particularly pernicious by the Supreme Court.

THE COURT: Well, what happens, Mr. Vigen, if I disagree with you, and does that mean that the so-called non-solicitation agreement is fine now? No one 's going to prosecute it. No one's going to challenge it. Because if the Department of Justice isn't, who is?

MR. VIGEN: So if you -- if you disagree with us that it's not a per se violation, then the indictment should be dismissed, and as a matter of prosecutorial discretion,

we do not bring rule of reason cases criminally. So it could proceed civilly, or private civil plaintiffs, as they have here, could sue on their behalf for damages. But I do believe that there is a very important issue here, which is it is the policy of the Department of Justice to prosecute per se violations criminally. We should be allowed to do that. And this is a per se case. This is an agreement between two competitors who have ceased competing over employees in some respect --

THE COURT: When the judge in Nevada signaled that he or she was going to deny the motion to dismiss, did that judge explain what the reasoning was for that decision or is that to be disclosed in some written document not yet issued?

MR. VIGEN: Right. So I don't want to get too far ahead of my skis in terms of relying on the Hee case. It did involve allegations of both wage fixing and no hire. It was a single count alleging suppression of competition in the labor market based off of those two -- their sub agreement. So I don't want to overplay in terms of that authority, but I do believe --

THE COURT: So it was a different kind of an agreement, you're saying.

MR. VIGEN: At the end of the day it's the same theory in terms of two horizontal competitors reaching a

naked agreement not to compete. It doesn't matter if they agree on wages. It doesn't matter if they agree not to hire. It doesn't matter if they agree not to solicit. That suppressed competition, and there is no procompetitive justification under the per se rule that can take them out of the per se rule.

The reason for that is exactly -- when we talk about naked allocation agreements. I think Your Honor was on to something there with the ancillarity issue. You can have an agreement among competitors not to compete in some way, but the only thing that would save that is if it was subordinate and collateral to a legitimate business collaboration that those defendants have, and if the agreement was necessary to further that legitimate business collaboration. So these cases that the defense cites about business contexts, those cases when you actually look at them arise in that type of context where there is some other procompetitive business collaboration or vertical relationship which the Supreme Court has acknowledged is a different analysis than horizontal agreements. That's the business context they're talking about there.

There is no business context here that should save an agreement amongst employees not to compete for employees. What that is is an argument that they should be excepted -- they should have an exception for employer collusion under

the Sherman Act. That's really what they're arguing. And if that's their argument, they need to go to Congress. They need to ask for an exemption. And the Chamber of Commerce can lobby Congress and ask for that. But the Supreme Court made clear in *Maricopa County* that if the practice is per se illegal, it doesn't matter if it arises in a new market. You don't consider the procompetitive justifications, and the Tenth Circuit followed that in *Kemp*.

So if there was ever a business context perhaps where you could avoid the per se rule it might have been the heir location services or it might have been in *Maricopa County* where doctors were fixing a maximum fee. And the Supreme Court said, We don't care that you're in the healthcare industry or that you're doctors. It doesn't matter. It doesn't matter if you don't have experience with that. And the Supreme Court said, You might be right, Doctors. Maybe -- maybe you are right that a full examination of the rule of reason would prove the price fixing there to be reasonable, because they argued that we actually advanced consumer benefits by allowing better insurance options. The Supreme Court said doesn't matter. What we have done is declared certain practices per se illegal, and that we do not double guess that it arises in a new context. All of their cases about business context relate to an entirely different situation, not naked

agreements among horizontal competitors not to compete.

I do want to spend a moment, if I could, on your second question, which is is an agreement --

THE COURT: Well, what's the answer to my first question?

MR. VIGEN: The answer to your first question, I should have been more clear, I believe I was trying to articulate this entire time which is, yes, a no-poach agreement, a no-hire agreement, however you want to put it, is a per se market allocation.

THE COURT: And you rely on what case for that argument?

MR. VIGEN: So we rely on the district court cases that we've cited in our brief, which themselves rely --

THE COURT: I'm asking you what is your case, what is your best case to answer yes to question number one.

MR. VIGEN: So that is In re Railroad, and the reason why that's the best case, that involved a no-poach, no-hire. But the Court there I believe in a very reasoned way explained why a no-poach agreement is a market allocation agreement, and that case even cites *Kemp* in support of that question, because at bottom what's happening here it is a naked allocation agreement between two employers that should be competing who are agreeing not to compete in some way. That's what In re Railroad explains,

using these market allocations cases to explain why the practice is per se illegal and that there is no labor market exception.

THE COURT: Was that a criminal case?

MR. VIGEN: That was not a criminal case, but it doesn't matter. It is the practice that's declared per se illegal, whether it's civilly or criminally, and once it's a per se practice, that is a charge that we will pursue criminally.

THE COURT: Well, it might matter to this Court because the rights that a defendant has in a criminal case are rather different than the rights that a defendant has in a civil case.

MR. VIGEN: So I believe even if we didn't have In re Railroad or *eBay* where the United States brought a civil per se case and these district court cases upheld the per se treatment or the per se allegation, and even if there wasn't *United States vs. Cooperative Theaters* where they held that a customer non-solicitation agreement was per se illegal in a criminal context, even if there wasn't *Roman* in the Tenth Circuit that said a no-poaching agreement was, quote/unquote, an illegal agreement, even if we did not have all those cases, this would still be a per se illegal market allocation that defendant had fair notice of.

And that goes all the way back to *Addyston Pipe*

through to at least *Topco* where the Court has explained what you can't do is have a naked agreement with your direct competitor to stop competing in some way. That is what provided reasonable notice to the defendant here. And as Your Honor rightly noted, there's a first time for everything. That doesn't mean that the principals here have not remained the same from the very beginning, and that is why we're proceeding this way and the motion should be denied.

So if there's not anything further on that, I do want to talk about this distinction between no-hire agreements and non-solicitation agreements.

THE COURT: Well, I'm still on the first question. Has the Government filed a per se criminal case on a no-poaching contract other than this case?

MR. VIGEN: In the labor market other than this case and SCA and Hee, these are the first.

THE COURT: Other than this case, SCA --

MR. VIGEN: And Hee.

THE COURT: And Hee in Nevada.

MR. VIGEN: Criminally in the labor market these are the first ones.

THE COURT: So this -- this must be something new for the Government because these types of agreements have existed before. Why are you now for the first time filing

these criminal cases and alleged per se violations?

MR. VIGEN: So two answers to that, Your Honor. One, I believe, as you might see in the district court cases, you see an uptick in these civilly. So we start with the *High-Tech* case, *eBay*, Railroad. Those are the cases that are presenting these per se questions civilly, and so I don't know if -- necessarily know that I agree with you that if these type of agreements had existed for a long time that folks were aware of them to try to root them out.

THE COURT: Well, I guess I don't know that either, to be honest. I don't know when somebody came up with the bright idea of having these no cold call, no-poaching, no-hire agreements. I didn't realize that that was some new phenomena, but people are creative, and they come up with things.

MR. VIGEN: And then my second response to your question would be to look at *United States vs. Cinemette*, a movie theater case where for a long time this was out in the open. These movie theaters had agreed called -- they're called split agreements -- had agreed not to compete for the movie theaters distributing their movies. So in a market they would decide I get the X-Men movie and you get the Wonder Woman movie, and so they would divide the market that way. And for a long time -- the *Cinemette* case explains the defendants' arguments there -- those were not viewed as

illegal, or the United States Department of Justice did not pursue them that way.

And, in fact, the defendants argued there that they actually received a letter from the Department of Justice saying that the Department of Justice would treat those civilly, and the Court there said it didn't matter with respect to due process. The United States Department of Justice did not need to proceed civilly first and rack up per se wins in that context. That it was a straightforward agreement not to compete, and that's per se illegal, and you had notice of that from those other cases even though there weren't prior split agreement cases and even though this was the first criminal split agreement case. The Court there said it didn't matter for due process reasons, and that's because all that needs to be true for there not to be a violation of due process is that the law was reasonably clear that the conduct was criminal. So what we believe was reasonably clear here based off the judicial decisions is that you can't agree with your horizontal competitor not to compete over the very thing you should be competing over.

The other point I don't want to lose here, or before I forget, is this idea that the labor market is special in some way. There's been no business context that's been advanced by the defendants to believe that's true. And case after case in the Supreme Court, the Tenth

Circuit has held that the Sherman Act applies with equal vigor, and that there's no reason to treat that type of practice that's noncompetition practice any differently.

I don't know if Your Honor had any other questions on the prior point, your first question, but I would like to move on to the second question, if that's appropriate.

THE COURT: Yeah, sure.

MR. VIGEN: So -- and that is whether this sort of non-solicitation practice, if it's equivalent of those no-poaching cases, and I think Your Honor is right to focus on the practicalities of this, and so that's the Tenth Circuit standard for dismissing an indictment that -- you need to look at the practical rather than technical considerations.

THE COURT: If this agreement didn't have the you've-got-to-tell-your-boss piece to it, if it were simply we won't solicit each other's employees, period, end of agreement, would your position be the same?

MR. VIGEN: Yes, Your Honor. And so --

THE COURT: So the second piece that seemed significant to me is not to you.

MR. VIGEN: Well, and I hope to clarify for why I believe that to be the case. So if you look at the market allocation cases, with respect that's what's required to show a market -- a per se market allocation agreement. The

Supreme Court in *Topco* speaks only in terms of minimizing competition. In *Socony-Vacuum* the Supreme Court rejected an argument as wholly immaterial that the conspiracy did not eliminate all competition. And there are a number of other examples of the cases we cite in the briefs where the Court applied a per se market allocation rule where competition was only suppressed in some way rather than erased altogether.

So we obviously have the *Cooperative Theaters* case where they could still compete over unsolicited business and that the Tenth Circuit relied on in *Suntar.* But consider *Kemp*. So by all accounts those heir location services companies competed heavily over finding the first heir. It was only after that that they agreed to split up the remaining heirs of that estate. So there was competition in that market to some extent. All competition in that market did not cease. Same in *Suntar Roofing*. They competed over new employees -- or sorry -- new customers. They only allocated established customers.

Or the case out of the Ninth Circuit, *United States vs. Brown*, which I think is maybe the most drastic here. Again, a criminal case where they stopped competing for -- these are billboard companies that put up billboards on the side of the road, but they actually lease that space from the landowners. And the agreement was that they would not

compete over those leaseholds that had expired, and then only up for a period of one year. So they competed for leaseholders around the world, around the country, and they competed for leases after that one-year mark.

So this distinction that all competition must cease I think is just a red herring in terms of what market allocation -- per se market allocation violations require. But I also think in a very real sense all competition did cease for a segment of this market. If you weren't looking for a job, and if you didn't want to jump through the hoops that the CEOs decided amongst themselves you should jump through to get an offer, all competition ceased. And that is what *Midwest* in the Tenth Circuit talks about is the hallmark of a market allocation agreement.

And I believe that's why the Ninth Circuit in *Aya* found, quote, considerable merit, unquote, with the antitrust division's position just a few months ago that there was no distinction between non-solicitation and no-hire agreements. So in footnote three the Ninth Circuit stated, The district court questioned whether the restraint was a no-poaching agreement or a non-solicitation agreement and concluded that it was a non-solicitation agreement. The United States argues that this distinction is not determinative, and we agree. But what the United States argued as amicus --

THE COURT: So that whole answer to my question number two was treated in a footnote.

MR. VIGEN: Yes, Your Honor. That's how the Ninth Circuit decided -- and that was because the Ninth Circuit decided that case on the ancillary restraints doctrine and noted that the no solicitation -- or non-solicit versus no-hire was not determinative, and that's because citing the United States that they agreed with the United States, and that's because in the amicus brief the United States said that there was no difference, that non-solicitation agreements are per se illegal just as no-hire agreements are per se illegal. That was on page 21 where that was explained more clearly.

THE COURT: If they're per se illegal, then why were they worried about ancillary agreements or effects?

MR. VIGEN: Right. So in *Aya* what you're talking about is a vertical agreement for nurse -- nurse services. And so one of the defenses to a per se allegation is this ancillary defense, and so the Ninth Circuit held that there because of the vertical nature of the agreement between these two companies, one was subsourcing the other, and in that contract there was a non-solicit agreement, that because that supported the procompetitive venture itself, the vertical relationship itself, that the ancillary restraints doctrine was applicable, and therefore the rule

of reason applied.

But defendants here have disclaimed any argument of ancillarity. If they wanted to put on such a defense, just like a murder defendant might put on self-defense, we would go to trial. The United States would put on its evidence that this was a naked agreement, and they could put on its evidence that, no, this is ancillary to some procompetitive business venture. We don't believe they're going to be able to do that.

THE COURT: I'm not sure they disclaimed it. I think they postponed it.

MR. VIGEN: Postponed it. For purposes of this motion they disclaimed that argument. And so if they have that defense, it's perceived on the allegation, which is a per se claim, because if it was naked it would be a per se market allocation, and to get it out of that realm and to -- as a defense, they would be able -- allowed to put on evidence of ancillarity at trial. What they can't do and what *Maricopa County* and *Kemp* explained is they can't just put on procompetitive justifications as it relates just to the agreement itself, because in the ancillarity context the restraint needs to be subordinate and collateral to a procompetitive business venture.

So they would need to show that. We don't believe they would be able to show that. They would need to be able

to show that the restraint was reasonably necessary to achieving that procompetitive business collaboration, and we don't believe they'll be able to show that. Because even if there was some -- let's say, one joint venture in Los Angeles between these companies, that wouldn't justify a companywide non-solicitation agreement. Maybe it could justify in the contract that people you meet on this project you won't solicit, because that would be reasonably necessary to making sure you want to enter into the project to begin with, but it wouldn't justify this agreement as alleged in the complaint, which is a companywide no-solicit agreement.

I also want to talk for a moment, if I can, about their arguments for procompetitive justifications. So as *Kemp* and *Maricopa County* explained, if the practice is illegal, it doesn't matter that we arrive in a new industry that these practices are being confronted, at least for a judicial decision, for the first time in a new industry like the labor market.

THE COURT REPORTER: Can you slow down a little, please.

MR. VIGEN: Yeah, sure.

THE COURT: You've got plenty of time left, so you can relax.

MR. VIGEN: I see your note here.

THE COURT: Why don't you read that note out loud.

MR. VIGEN: Just speak nice and slow, and nobody gets hurt.

THE COURT: That was the court reporter's note, by the way.

MR. VIGEN: I appreciate it. Thank you. So if the practice is per se illegal, *Maricopa County* and *Kemp* teach that the procompetitive justifications have no role. They're not cognizable. They should not be considered at all. But I do want to explain why that's the case particularly here, and how these have been rejected -- similar arguments have been rejected in per se cases, but first I want to back up and provide sort of an analogy here.

So in some sense market allocations are efficient, all right? Let's take the example of two private trash collection companies, and they agree classic *Topco* territorial market allocation. You take west of I-25. Company B takes east of I-25. The per se rule would say that that is illegal. If the United States discovered that here in Denver we would bring a per se -- after requisite approval and grand jury approval -- we would bring it as a per se case. Their lawyers could not show up to court and say, well, we shouldn't be treated as a per se rule strict liability, show up to court, prove the agreement, and we go to jail. We should be able to show that this allocation is

procompetitive, that it has some efficiencies.

So Company A on the west side of town can center their trash trucks on the west side of town. Doesn't have to cross I-25. They can get to the houses faster. They can take shorter routes, which means they can charge the customers less. It's way more efficient to allocate the market that way. And there're great lawyers who can show up and make those procompetitive arguments, but they would be rejected. They would be laughed out of court, and I think the same type of arguments are being made here to justify a naked agreement among competing employers not to compete.

So take training and opportunities.

THE COURT: Well, I don't know if this is a naked agreement or if it's just partially clothed. That's my second question.

MR. VIGEN: What we talk about in terms of naked is it's not collateral to a procompetitive business venture. That's what that means, that it's not ancillary to something that actually would be potential for benefits to the consumer. That's what that means in term of naked. It's not tied to anything else. It's two CEOs getting together in a room and deciding how they'll compete with each other. And *Cadillac Overall Supply Company*, a case out of the circuit rejected sort of an analogous argument in the sale of goods context with regard to capital investment. Found

that customer allocation there was per se illegal. The defendants raised this argument that, well, the garment industry is a little unique because these aren't off-the-shelf garments. We need to retool our looms every time that we get a new customer, so we have to put a lot of money into retooling that and invest in those customers, and so we should be able to keep those customers. It's way more efficient for us to do so. And the Fifth Circuit said, no, this is a per se case. Those type of agreements aren't cognizable because in every sense putting capital at risk is how you compete, so you can't just rely on the agreement itself as a procompetitive justification. And the *Deslandes* Court, the district court opinion dealing with a no-poach or no-hire agreement in a franchise context, made the same point. Quote, every employer fears losing the employee that is trained. Employers have plenty of other means to encourage their employees to stay without resorting to unlawful market division. Those options include paying higher wages or salaries and contracting directly with each employee to set an employment term.

THE COURT: Well, I think that sounds like the point I was making to Mr. Waxman.

MR. VIGEN: I think that's correct. What you can't do is agree with your competitor not to compete, and then you can't use that agreement to justify, you know, as

procompetitive arguments springing forth from that naked horizontal agreement not to compete to justify the agreement in the first place. That's what *Cadillac* stands for, and that's what my example using the trash collection companies, I believe, tries to explain.

I also want to talk about the trade secrets point they make, because I also think it's a very important idea for this Court to understand the distinction between a vertical and a horizontal restraint. So the cases they cite as a procompetitive justification for the trade secrets, protecting trade secrets, are vertical agreements. So it's an agreement between an employer and an employee that one of the benefits of that, of not soliciting or having that in that contract is to protect trade secrets. But that is in a bargain for exchange. So in exchange for giving up that right, the employee has agreed to that limitation, and defendants are free to make reasonable contracts like that with their employees if they want to retain them or if they want to protect trade secrets.

But in reply -- when we make that point in our opposition or reply, the defendants say, well, that doesn't matter that it was in a vertical context. It was still procompetitive. That same procompetitive argument should get us out of a horizontal per se agreement to avoid that rule. But that, frankly, is not the law. I think the

Supreme Court case of *Continental vs. GTE* explains that most clearly, and that's a case cited by defendants in their opening brief, so if I can just take a moment to explain that distinction.

So in that case there was a vertical restraint, a vertical territorial restraint. So a manufacturer of TVs had identified retailers that it wanted to sell those TVs, but very much like a franchise context, split them up by territory, and they could only sell in their territory. So they sold to these retailers, and they could only sell in their territory. And the Supreme Court said because this is vertical, there can be procompetitive justification for that. It allows for investment in these retailers, to educate the consumer about the benefits of these TVs that the manufacturer thought had a better quality, and it avoids the free rider problem.

But the Supreme Court noted at footnote 28 that there's no doubt that restrictions -- if those same territorial restrictions had existed between the retailers directly among themselves, there was no vertical element to this agreement, there would be no doubt that that would be illegal per se, and all of those procompetitive justifications would not be heard because they can't spring from the actual horizontal agreement itself.

And then finally I want to talk about this bidding

war example, and I think it also ties back in with what I had been saying about the difference between non-solicitation and no hire. So, first of all, this idea that it could spring a bidding war is outside the four corners of the complaint, but very -- in a very real sense there was no bidding war for employees who were never solicited. Those are the employees, and those employees who refused to jump through the hoops that the CEOs decided they needed to jump through before they had the benefit of some sort of competitive process, there was no bidding war for those people.

And, in addition, those employees, had they had an offer, could always choose to go to their employer to disclose that at a time and choice of their choosing. And in the reply they say, well, it might have spurred some people on that otherwise might have done that. That's awfully paternalistic. It's up to the employee to decide when to do that, and our free market decides on individuals making choices for themselves. Employers who are supposed to be competing with each other making the choice to compete to provide a solicitation by themselves, not agreeing with their competitor to stop that activity, to minimize competition, and to cease competing over employees who are not actively looking or who would not jump through their hoops.

So for that reason, Your Honor, if you have no further questions, I would ask that you deny the motion to dismiss.

THE COURT: Thank you.

MR. WAXMAN: Your Honor, of course I'm up here first and foremost to answer questions that you have, but let me just make a few responses to Mr. Vigen's submission. Mr. Vigen has cited -- has taken us through the Bataan Death March of every case cited in his brief, and I'm not going to reciprocate. We've said what we have to say about the cases they're relying on. They've said what they have to say about the cases we're relying on. It's perfectly obvious from this argument that Your Honor has read those cases and will read those cases again.

They have made in large part lots and lots of arguments about why the agreements that are alleged in this complaint, and, you know, Mr. Vigen is quite right that the agreement alleged in Count 1 is for senior level executives. In Counts 2 and 3 it's for employees. Interestingly, he didn't mention that Counts 2 and 3 don't actually even allege a bilateral undertaking. They just allege a promise by one of the two employers that it will not actively solicit employees of the other without any reciprocity.

But the point here is that the Courts are open for decision about whether non-solicit, as they call it naked

non-solicit agreements with a provision -- with or without a provision that basically requires notice for employees who are thinking about or have decided to move prior to actually moving could be illegal. Maybe under the circumstances, maybe if it involved a real market that is a market under the antitrust laws, and they could prove that those types of agreements inevitably substantially and thoroughly restrain trade, and that the argument that we're having back and forth where I say there are plausible procompetitive benefits, they say they're implausible, that's not -- you don't have to decide now whether on balance, you know, in the absence of this -- of these non-solicitation agreements some executive might have -- some company might have actually solicited another executive who wouldn't exercise her or his own initiative to look for better employment.

If we have a rule of reason trial where they have the burden to prove that there are, in fact -- plausible or not -- there are, in fact, procompetitive benefits that suffice to overcome the substantiality of the restraint of trade in a relevant market, then we're going to lose at trial. But the fact that -- I mean, just looking at my friend's answer to your question one, he says his best case is In re Railroad -- Railway Employees Association. Again, if that's his best case for a pure non-solicitation agreement, then it seems to me that the correct answer to

your question number one, which is is what is alleged here a no-hire agreement and does -- do no-hire agreements violate the antitrust laws, again, if we're talking about a pure no-hire agreement, which we are not, but hypothetically if we were, what you will find in the case law is some civil cases saying, yes, you know, we've considered all the evidence and this did violate the antitrust laws, and you'll find some cases that say, no, this no-hire agreement didn't violate the antitrust laws.

That fact, the existence of that state of the case law precludes per se treatment much less per se treatment in a criminal case. If the case law is not clear, if long judicial experience does not demonstrate a judicial consensus that a particular kind of agreement is so thoroughgoingly anticompetitive and devoid of procompetitive justifications in the real world, then it's appropriate for some Court to say I'm going to allow the plaintiff to proceed under a per se theory.

Now, the Government basically says, well, just look at *eBay*, just look at *High-Tech*, just look at *Cinemette*, just look at *Roman*, well, *eBay*, which was a civil case, which was a straight-out no-hire agreement, the Court in that case said that it's not making a decision about whether per se treatment is appropriate or not. It is going to permit discovery, and we'll take this up under -- you know,

at summary judgment, which, of course, is not an option that's available to you, and subject to Rule 11 a civil plaintiff can allege whatever it wants, but the Government under the Fifth Amendment can't allege whatever it wants.

It is the grand jury that has to allege, and the grand jury has to be instructed as to what the elements of the crime are and what evidence there is to support probable cause to believe that crime was submitted. Now, neither you nor I know what is in the grand jury transcript, but there is nothing in this indictment to suggest that any member of the grand jury was told what the elements of the Sherman Act were or what the Government's evidence was as to what the relevant market was, why the alleged procompetitive benefits aren't, you know, et cetera, et cetera.

THE COURT: I can imagine the grand jury's heads were swimming if they heard these kinds of arguments.

MR. WAXMAN: Well, you know, I would say that it's highly unlikely -- in our system of prosecutorial -- of adversary justice the grand jury is never -- I would say as currently now a defense lawyer, sadly the defendant is never -- the grand jury is never given the benefit of an argument pro and con. All it has to find is, okay, I know what the elements are. I've heard the prosecutors show me evidence that there is some evidence to support each of the elements. We find probable cause.

So -- but so the *eBay* case, no decision that it was per se. It was a flat-out no-hire agreement. The *High-Tech* case, which I think Your Honor was -- it was the case that Your Honor was asking about, the do-not-cold-call case, I mean, that was a case, first of all, that was not just do not solicit. It was also we will not compete on compensation. That is we won't engage in what happened between these companies, which is a bidding war. It was an alleged conspiracy -- I'm quoting from the complaint -- I'm quoting from the opinion -- to fix and suppress employee competition and to restrain employee mobility.

And saliently for precedential purposes, the defendants in that case didn't even argue that the agreement didn't actually allocate the market or that it wasn't otherwise subject to per se treatment. The only argument that the defendants were making is that they lacked sufficient market power, and the Court's only statement was -- at the motion to dismiss -- what's alleged is a per se crime, you're not disputing that at this time, and if something is a per se crime the Government -- the plaintiffs don't have to show market power. The Court said this complaint survives a motion to dismiss because, quote, all parties agree that the per se issue needs to be resolved after discovery and briefing on summary judgment. The Hee case which the Government has now talked about --

THE COURT: That was why I asked do I need to decide this at this stage, and both sides said, yes, you do.

MR. WAXMAN: So I think you certainly do, because there is no -- let me put it this way. If it wasn't for the defect in the indictment itself, if you had an indictment in this case like the indictment in *Aya*, which didn't allege just this is a per se -- this is a per se crime, period, it alleged that this was a violation of the Sherman Act and left for subsequent argument between the parties before the judge whether the Government could proceed under a per se theory or not, if we had that indictment in this case, that is not an indictment that commits to per se, you could say that's fine.

As a matter of -- we'll have a trial. At that trial the jury will be the trier of fact, but if the Government wants to proceed under a per se theory, as a matter of law, I have to conclude that this was actually a genuine allocation of a recognized antitrust market with no countervailing procompetitive benefits. Otherwise, I will force the Government to submit the case to the jury under the standard Sherman Act here are the elements, the Government has the burden, et cetera, et cetera.

So you -- the consequence -- you have to decide now whether you're going to allow them, and Mr. Vigen has been quite candid about the fact that if you allow them to pursue

-- to go forward under a per se theory, they're going to argue that our evidence that this wasn't, you know -- this didn't actually allocate markets, that the market here is not the market for -- even the market for healthcare services, that we didn't have -- that there are procompetitive benefits, et cetera, none of that -- under their theory, none of that goes forward. And so that's why the decision at this point has to be made, and why it's so freighted with significance.

If you deny their motion, they can go to the grand jury, instruct the grand jury properly, and have the grand jury come out and say, The grand jury alleges that this is a crime under the Sherman Act because it, and then just recite all the elements of the crime, and we could have a trial. But they don't have that here, and they've told you that they aren't going to proceed civilly if they have to proceed under the rule of reason.

Now, as Mr. Vigen pointed out, of course they could do what has always been done so far under this, quote, new phenomenon, either of these employer agreements which cannot possibly be new, but if they are it further demonstrates there's no long judicial experience with them, they can -- they can put on evidence to prove what they are insisting to you today, which is this was an agreement not to compete, and agreements not to compete are per se illegal. I can't

think of how many times Mr. Vigen said that.

Agreements not to compete are the essential allegation of every Sherman Act case, civil or criminal, under the rule of reason, the quick look per se, or whatever. Just because the Government says and might even be able to prove at trial that something is an agreement not to compete doesn't mean that they get to go through the trap door of a directed verdict. They are put to their proof. Every complaint under Sherman 1 is there was an agreement not to compete that unreasonably --

THE COURT: Yes, but they're saying that this type of horizontal market allocation agreement is a per se violation. They're not saying that every agreement not to compete is.

MR. WAXMAN: Right. And, again, I am trying Your Honor's patience by saying this so many times, that it really is the fundamental issue in this case. Even if you thought, and I think, with respect, there would be no basis to conclude, that the agreement here is no hire, because, in fact, the indictment says the agreement was no solicit, and the agreement acknowledges in Paragraphs 11 and 19 -- and I can't remember the relevant paragraph in Count 3 -- that employees were free to move, and employers were free to hire each other's employees. Now, the Government says, Well, you know, maybe there were some executives or employees who

would have moved if they'd been recruited.

THE COURT: The Government says that as a practical matter it's a no-hire, no-poaching agreement.

MR. WAXMAN: Let them prove it. And if they can prove it, let them establish that that -- that was an unreasonable restraint of trade. That's where the facts come in. Even if this were a pure no-hire agreement, you couldn't possibly allow this to go -- with respect -- of course, you could possibly, but you shouldn't --

THE COURT: I could, but I would be a dummy.

MR. WAXMAN: You could, but you would be -- you would be wrong, in my humble opinion, and I hope in the opinion of the Tenth Circuit. That even if this is a no-hire agreement, when you look at the long judicial experience with these agreements, you will find two things: Number one, there is no long judicial experience; and, number two, the experience to date is that there is no case holding that such an agreement is entitled to per se treatment, and that the cases are -- and that there's a consensus -- there's no consensus it's entitled to per se treatment and no consensus they're per se illegal under the rule of reason because of the nature of markets and the nature of the plausible procompetitive benefits. So you couldn't possibly say that long judicial experience allows me to give the Government this essentially shortcut to a

conviction, particularly given the notice requirement that is so at the center of the due process clause in criminal cases.

Now, the Government says, Well, you know, it's true I've cited a whole lot of cases involving goods or products and not employers and employment agreements, but, you know, the antitrust laws apply the same way. As I think I said at the outset, the Supreme Court has taught and the Tenth Circuit has taught that what's relevant when you're talking about two different kinds of markets that are both conceivably subject to the Sherman Act, the proprietary of relying on a per se treatment requires a careful examination of the context of the business relations in which the practice occurs.

We can't have -- and I suppose in front of Your Honor we've had a lively debate about whether or not in the real world a company's investment in training its executives, in disclosing to executives trade secrets is or is not on balance procompetitive, but the notion that what one Court has said in the context of a goods market in which the defense was, well, this agreement to allocate the markets, because that wasn't what was at issue in that case, shouldn't be subject to -- isn't illegal because we had the procompetitive benefit -- had the procompetitive allowing us to have sufficient inventory to meet our customers' needs,

and the Court said that's not going to be enough to save this.

There is a substantial difference in the way in which companies invest in and the consequence to them if those investments turn out to be either lost, the company doesn't have those talents on a going-forward basis, or worse, they go to the service of a competitor. Now, the Government can say, Well, if that's the case, you know, you could -- a company could basically have an agreement, require employees to a noncompete clause, which within reason are generally upheld. This alleged agreement is much less restrictive of trade than a noncompete clause because they can compete. Walmart doesn't have to train its customers how to decide what product to buy. It doesn't have to train -- it doesn't have to give its customers trade secrets in order to have them. If it loses a customer, it's lost the opportunity to get some revenue. When a company loses an executive, it's lost a major investment in its going-forward ability to compete in the marketplace.

Now, there was some mention of the Hee case. I want to just provide the Court the citation in case, you know, you can find the docket. It's in the -- it was a criminal case brought in the District of Nevada. It's number 2:21-CR-00098, and we can provide, if the Court wishes -- and provide to the Court and the Government right

after this hearing an electronic copy of the transcript of that argument in which I can assure you that the judge did not say she was denying the motion, and -- or he, I'm sorry -- he, that is the judge, and you will see that that was -- I think as the Government admits a very, very different case. I mean, it was a case that is flat-out no hire and wage fixing.

THE COURT: When was that case argued?

MR. WAXMAN: A couple of weeks ago. The indictment -- as Mr. Vigen says, the indictment alleges that there was a flat-out no-hire agreement that fixed wages of the employees. Neither of those is characteristic here, but, you know, I think the actual oral argument colloquy is -- I mean, if you're looking for a broad level education we can provide you a copy of the transcript.

Finally, I'll just say I think you either asked or somehow it came up -- in any event, it's in my notes -- have Courts actually dismissed complaints or indictments that proceeded under a per se theory because per se wasn't appropriate. You only have to look -- if you just want to stay in this circuit, you only have to look at the Tenth Circuit's decision in *Diaz* and *Cayman Exploration* which did both of those things. I mean, there are many, many cases around the country, including a case I argued in the Third Circuit long ago, which is cited, called *In re Insurance*

Brokerage Industry. But, yes, Courts have said the allegation here is pure per se. The complaint doesn't allege facts that could plausibly support per se illegality, therefore it's dismissed.

Now, it is true that I can't cite you a criminal case in this context because this is the -- as the Government alleges, this is the first case -- this is among two -- its companion case in the Northern District of Texas are the first two cases in which they've even asked for in any context the per se -- in the criminal context the per se treatment here. But what I can say is I think it's because if you look at the case -- the criminal cases that the antitrust division has brought over the decades, I would venture to say that 90 percent of them at least are naked bid rigging and price fixing cases that are not at issue here. There's nothing like what's at issue here. It doesn't involve the slightest inquiry into what the relevant market is, you know, et cetera, et cetera.

Here their allegation is that what's alleged in this indictment is an allocation of markets. The definition of what the market is and proof that the market was actually allocated in an antitrust sense so as to preclude competition is the very nature of the category that they're simply asserting ipso facto exists. And so I stand again by my earlier submission that, you know, if Kent Thiry and

DaVita's general counsel Kathleen Waters, who's also here, had taken a year off, if they had become Areeda and Hovenkamp on antitrust law, they would not have found a single case ever that had found that the agreements of the nature -- agreements of the nature charged in the indictment were ever -- have ever even been found to be illegal, nor have they ever previously been subject to per se treatment, and therefore the notion that there would be no notice to Mr. Thiry that if he signed such an agreement he would be ipso facto guilty, that's it. He voluntarily signed such agreement, therefore you are guilty of a crime is an apostasy under the Constitution. Thank you.

THE COURT: Thank you. Mr. Vigen, you didn't use all your time. Mr. Waxman did. Do you want to say anything further?

MR. VIGEN: No, Your Honor. Thank you very much.

THE COURT: All right. The case will stand submitted. Thank you all. Good day.

THE COURTROOM DEPUTY: All rise. Court is in recess.

(The proceedings were concluded at 10:48 a.m.)

REPORTER'S CERTIFICATE

I, SARAH K. MITCHELL, Official Court Reporter for the United States District Court for the District of Colorado, a Registered Professional Reporter and Certified Realtime Reporter, do hereby certify that I reported by machine shorthand the proceedings contained herein at the time and place aforementioned and that the foregoing pages constitute a full, true and correct transcript.

Dated this 22nd day of November, 2021.

/s/ Sarah K. Mitchell

SARAH K. MITCHELL
Official Court Reporter
Registered Professional Reporter
Certified Realtime Reporter