IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA	§	
	§	
vs.	§	
	§	NO. 4:20-CR-358 ALM/KPJ
NEERAJ JINDAL (1)	§	
JOHN RODGERS (2)	§	

DEFENDANT NEERAJ JINDAL'S REPLY IN SUPPORT OF MOTION TO DISMISS COUNT ONE OF THE FIRST SUPERSEDING INDICTMENT

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I. INTRODUCTION

In its Response in Opposition to Defendant Neeraj Jindal's Motion to Dismiss Count One of the Superseding Indictment (the "Response"), the government fails to justify its unprecedented criminal prosecution for alleged conduct that does not constitute a *per se* violation of the Sherman Act. Neither the Supreme Court nor any Court of Appeals has ever classified a wage-fixing agreement between employers as a *per se* Sherman Act violation.

Unable to identify any controlling precedent classifying an alleged wage-fixing agreement as a *per se* Sherman Act violation, the government engages in legal gymnastics to attach the *per se* designation to wage fixing. The government argues that wage fixing is the same as price fixing and, because price fixing receives *per se* treatment under the Sherman Act, so too should wage fixing.

The government's theory is fatally flawed. Jindal does not dispute that the Supreme Court has designated price fixing as a *per se* Sherman Act violation. The Supreme Court has not found, however, that wage fixing is indistinguishable from price fixing. The authority on which the government relies simply does not support that proposition. Indeed, to the extent the Supreme Court has even considered alleged wage-fixing arrangements, it has made clear that such arrangements should be evaluated under the rule of reason. As such, Count One of the Indictment should be dismissed.

Equally flawed is the government's argument that Jindal received fair warning that an alleged agreement to fix contractors' wages constitutes a *per se* violation. According to the government, two Supreme Court cases—neither of which addressed wage-fixing agreements or equated wage fixing to price fixing—put Jindal on notice that wage fixing and price fixing are indistinguishable, such that an alleged wage-fixing agreement would receive *per se* treatment and subject Jindal to criminal prosecution. As explained below, the government's theory of fair

warning is incompatible with bedrock due process principles. If Count One of the Indictment is allowed to survive, it will deny Jindal his constitutional right to due process.

II. ARGUMENT & AUTHORITIES

A. The Response Highlights the Government's Failure to Allege a *Per Se* Violation.

The government does not dispute that Count One of the Indictment is viable only if the Indictment alleges conduct that is classified as a *per se* antitrust violation. Wage fixing is not a *per se* antitrust violation, and this Court should not be the first court in the nation to classify it as such.

1. The Indictment does not allege a price-fixing agreement.

As an initial matter, the government misstates Jindal's Motion as arguing that "the Court should dismiss the Indictment for failing to state an offense it should have alleged." Resp. at p. 6. That is not Jindal's argument. Nor is Jindal "implicitly ask[ing] the Court to evaluate the veracity of evidence underlying the Indictment." *Id.* at p. 5. Instead, the Court should dismiss the Indictment because it purports to allege an offense ("wage fixing") that is not a *per se* violation of the Sherman Act. Merely substituting the word "prices" for "wages" does not transform the factual allegations from alleging a wage-fixing agreement to alleging a price-fixing agreement. Despite using the term "fix prices," the Indictment does not allege a price-fixing agreement. Consequently, the government cannot rely upon case law finding that price-fixing arrangements constitute *per se* Sherman Act violations to justify similar treatment to alleged wage fixing.

2. The government's claim that "wage fixing is price fixing" lacks judicial foundation.

The government seeks to overcome the Indictment's failure to actually allege facts demonstrating a price-fixing agreement by claiming, "wage fixing is price fixing." Resp. at p. 8. However, the government fails to identify a single Supreme Court, Court of Appeals, or otherwise

controlling decision finding that "wage fixing is price fixing." Moreover, the legal authority upon which the government does rely makes clear that any alleged wage-fixing agreement should be evaluated under the rule of reason and, therefore, not prosecuted criminally.

Significantly, the government relies entirely upon civil cases to argue that wage fixing is the same as price fixing and, therefore, should be subject to *per se* treatment. Yet, the government cannot identify a single case classifying an alleged wage-fixing agreement as a criminal offense. Nor does the government cite a single Supreme Court or Court of Appeals case classifying an alleged wage-fixing agreement as a *per se* Sherman Act violation.[1] In seeking to make this case the first such instance in history, the government cites inapplicable civil cases that offer no support for the argument that wage fixing should be classified as a *per se* violation.

a. Anderson v. Shipowners' Ass'n of Pacific Coast

The government relies upon the 1926 Supreme Court case, *Anderson v. Shipowners' Ass'n of Pacific Coast*, to support its contention that wage fixing is the same as price fixing. 272 U.S. 359 (1926). *Anderson* is neither a price-fixing nor a wage-fixing case. It does not even mention price fixing, much less equate wage fixing to price fixing. *See id.* Other than a single reference to "fix[ing] the wages . . . paid [to] the seamen," the opinion does not otherwise mention wages. *Id.* at 362. The opinion fails to indicate whether the Court even considered the alleged fixing of wages in evaluating the restraints at issue. Moreover, although *Anderson* involved allegations of restraints on labor, the alleged restraints were highly distinguishable from, and much more severe than, anything alleged in the Indictment.

In *Anderson*, the respondent association of shipowners exercised complete control over

[1] The few district court cases the government identifies as having labeled wage fixing as a *per se* violation are not binding authority and did so in a conclusory manner, as Jindal noted in his Motion. *See* Motion at p. 7, n.2 (notifying the Court of civil cases conclusorily labeling wage fixing as a *per se* violation).

employment of *all* seamen on *all* merchant vessels on the Pacific Coast. To gain employment on any vessel, every seaman was required to register with the association, obtain a certificate and a number, and wait his turn in accordance with the number before seeking employment. *Id.* at 361. Each seaman had to accept employment on a specific ship when offered, or get no employment whatsoever, regardless of qualifications or the seaman's desire to "work on a particular vessel or for a particular voyage." *Id.* at 362. Similarly, the officers of the vessels were "deprived of the right to select their own men or those deemed most suitable." *Id.*

The sole reference to wages consists of a single, isolated sentence noting, "The associations fix the wages which shall be paid the seamen," without any opinion, analysis, or discussion of whether it was inappropriate for the associations to do so. *Id.* In fact, the basis of the petitioner's complaint was unrelated to wage fixing. Instead, the petitioner seaman complained that the association's requirements had twice denied him employment. First, because he did not have a discharge book, and later because the association refused to grant him an assignment on a vessel that had sought to employ him, leading the vessel to retract the employment offer. *Id.*

Nothing in *Anderson* suggests, as the government claims, that the Supreme Court found that the Sherman Act prohibits "fixing the prices paid to workers for their labor." Resp. at 9. Nor does *Anderson* support the proposition that "wage fixing is price fixing." It certainly does not support the government's claim that wage fixing is a *per se* Sherman Act violation. Indeed, the decision offers no indication of whether the association's restraints on employment of seamen, which extended far beyond the fixing of wages, would be invalid *per se*.

b. FTC v. Superior Ct. Trial Laws. Ass'n

The government also improperly relies on *FTC v. Superior Ct. Trial Laws. Ass'n*, 493 U.S. 411 (1990), to support the claim that "wage fixing is price fixing." Like *Anderson*, *Superior Ct.*

was a civil action and not a wage-fixing case. Instead, *Superior Ct.* involved a group boycott *and* a horizontal *price*-fixing agreement.[2] *Superior Ct.*, 493 U.S. at 422.

In *Superior Ct.*, lawyers engaged in a group boycott by agreeing to refuse to accept any appointments pursuant to the District of Columbia Criminal Justice Act ("CJA"), on the grounds that the rates paid for the lawyers' services were insufficient. *Id.* at 416. *Superior Ct.* involved an agreement by the service *providers* (i.e. the lawyers) to try to increase the price of their services. There was no agreement among any competitor employers (whether governmental agencies paying the CJA rates or the clients receiving the legal services) not to compete on compensation paid to the lawyers. *See id. generally*.

To draw a parallel to the allegations in the Indictment, the lawyers in *Superior Ct.* who engaged in the group boycott were the providers of legal services, much like the physical therapists (PTs) and physical therapist assistants (PTAs) described in the Indictment are the providers of therapy services. Therefore, the conduct in *Superior Ct.*, is classic price fixing, not wage fixing. *See* Motion at p. 12 (citing U.S. DEPT. OF JUSTICE ANTITRUST DIVISION, AN ANTITRUST PRIMER FOR FEDERAL LAW ENFORCEMENT PERSONNEL 3, 6 (2018) for the DOJ's definitions of price fixing and wage fixing). *Superior Ct.*, like *Anderson*, does not support the government's claim that "wage fixing is price fixing," and offers no support for categorizing an alleged wage-fixing agreement as a *per se* violation of the Sherman Act.

c. Roman v. Cessna Aircraft Co.

In addition, the government relies on the Tenth Circuit decision in *Roman v. Cessna Aircraft Co.* for the proposition that the "antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers

[2] Notably, despite involving *two* types of restraints in trade that can be characterized as *per se* violations, the government maintained a civil, not criminal, action against the defendants.

of employment services." 55 F.3d 542, 544 (10th Cir. 1995) (internal quotations omitted). As with the Supreme Court cases on which the government relies, *Roman* does not endorse the *per se* treatment of alleged wage-fixing agreements. *Roman* involved an alleged non-solicitation conspiracy among competing employers, not wage fixing. *Id.* at 543. Significantly, *Roman* also did not specify whether alleged restraints involving "employment services" should be designated as *per se* violations. The mere fact that the Sherman Act can apply to alleged restraints in the labor market does not mean that any such restraint, including alleged wage fixing, is *per se* unlawful.

d. NCAA v. Alston

The only Supreme Court or Court of Appeals case identified by the government that even addresses wage fixing, in any form, is the Supreme Court's recent decision in *National Collegiate Athletic Ass'n. v. Alston*, Nos. 20-512 and 20-520, 2021 WL 2519036 (U.S. June 21, 2021). In *Alston*, the Supreme Court reviewed a lower court ruling that the National Collegiate Athletic Association and eleven (11) Division I athletic conferences (together, the "NCAA") were enjoined "from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball." *Id.* at **8-9. The NCAA's ability to "fix compensation and benefits unrelated to education . . . remained untouched" and was not before the Court. *Id.* at *8.

Alston does not support the government's claim that wage fixing has been classified as a *per se* violation of the Sherman Act. Indeed, *Alston* justifies dismissal of Count One of the Indictment because the Supreme Court evaluated the NCAA's limit on education-related compensation under the rule of reason. *Id.* at **10-11. Thus, not only has the government failed to identify a Supreme Court or Court of Appeals case that classified wage fixing as a *per se* violation of the Sherman Act, the one controlling wage-fixing case cited by the government applied the rule of reason.

Contrary to the government's assertion, Justice Kavanaugh's concurring opinion in *Alston* does not justify the classification of alleged wage fixing as a *per se* violation. Justice Kavanaugh's concurrence, including his statement that "[p]rice-fixing labor is price-fixing labor," is clearly dicta with respect to the holding. *Id.* at *21. For that reason alone, it does not serve as a basis for this Court to apply *per se* analysis to the alleged wage-fixing agreement. To the extent the Court does consider Justice Kavanaugh's concurrence as persuasive authority, it still does not support a finding that wage fixing constitutes a *per se* antitrust violation.

While Justice Kavanaugh referred to "price-fixing labor [a]s ordinarily a textbook antitrust problem," he never explains whether the *per se* rule or the rule of reason should apply. *Id.*[3] He merely suggests that "price-fixing labor" would be an antitrust violation. As the majority in *Alston* reiterated, "[d]etermining whether a restraint is undue for purposes of the Sherman Act 'presumptively' calls for what we have described as a 'rule of reason analysis.'" *Id.* at *6 (quoting *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)).

The limited authority the government cites in the Response bolsters Jindal's argument that courts have not had the "considerable experience" with wage-fixing conduct that is necessary to apply *per se* treatment to the allegations in the Indictment. Motion at p. 8 (citing *Leegin Creative Leather Prods. Inc. v. PSKS, Inc.*, 551 U.S. 877, 866 (2007); *see also Alston*, 2021 WL 2519036, at *10 ("[W]e take special care not to deploy these condemnatory tools until we have amassed 'considerable experience with the type of restraint at issue' and 'can predict with confidence that it would be invalidated in all or almost all instances.'") (citing *Leegin*, 551 U.S. at 886-87)).

[3] The inapplicability of Justice Kavanaugh's concurrence is also apparent by the hypothetical situations he refers to as "flatly illegal," such as that "***all*** of the restaurants in a region cannot come together to cut cooks' wages . . ." *Alston*, 2021 WL 2519036, at *21 (emphasis added). The NCAA in *Alston*, and the hypotheticals in Kavanaugh's concurrence, involve situations of actual monopolistic (or monopsony) control of a relevant market. Here, the Indictment alleges that Jindal entered into an agreement to fix wages with ***one*** other therapist staffing company, not ***all*** therapist staffing companies in a relevant market. In addition, the Indictment lacks any allegation that the alleged agreement involved the potential for Jindal or anyone else to control the wages of PTs or PTAs in a relevant market.

Consequently, the Court should dismiss Count One because the Indictment fails to allege a *per se* Sherman Act violation.

B. Count One of the Indictment Deprives Jindal of His Due Process Rights

Without the judicial precedent necessary to subject an alleged wage-fixing agreement to *per se* condemnation, constitutional due process requirements preclude this Court from entertaining the Sherman Act charge against Jindal. Bedrock principles of notice bar the imposition of criminal liability for violating general prohibitions that have not been reduced to clear guidance that provides "fair warning" of what is prohibited. *United States v. Lanier*, 520 U.S. 259, 266 (1997). In this case, fair warning is wholly lacking for Count One.

Contrary to the government's Response, Jindal does not contend that the Sherman Act is unconstitutionally vague; nor does he need to do so to assert his due process rights. Instead, Count One of the Indictment violates due process because "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *Lanier*, 520 U.S. at 266. Fair notice of what the Sherman Act prohibits must come from the courts because it "does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 438 (1978). Here, the government has not identified any Supreme Court or Court of Appeals case holding that alleged wage fixing constitutes a *per se* antitrust violation that might provide Jindal (or anyone else) with fair warning that the conduct falls within the Sherman Act's criminal scope.

To support its claim that Jindal received fair warning that an alleged agreement between two employers to fix wages constitutes a *per se* criminal violation, the government falls back on its claim that the "Supreme Court has long recognized that wage fixing is price fixing." Resp. at p. 15. Thus, the government suggests that Jindal had fair warning that an alleged agreement with

one other competitor to fix wages may subject him to criminal prosecution because wage fixing is a form of price fixing, and courts have found price fixing to be a *per se* antitrust violation. The authority on which the government relies undercuts its due process argument.

The Supreme Court has *not* "long recognized that wage fixing is price fixing." To support that proposition, the government relies again on *Superior Ct.* and *Anderson.*[4] As explained *supra*, neither of those cases are wage-fixing cases, and neither stands for the proposition that "wage fixing is price fixing." *See supra* at § II.A. Therefore, neither *Superior Ct.* nor *Anderson* could provide Jindal, or any other defendant, with fair notice that an alleged wage-fixing agreement would be subjected to *per se* treatment as a form of price fixing. The government's misplaced reliance on *Superior Ct.* and *Anderson* is fatal to Count One.

The government's reliance on the analogy of "wage fixing equals price fixing" also mandates application of the rule of lenity. Despite the government's assertion to the contrary, there does remain "a grievous ambiguity or uncertainty" regarding the application of the *per se* rule to an alleged wage-fixing agreement. *United States v. Bittner*, 469 F. Supp. 3d 709, 723 (E.D. Tex. 2020) (Mazzant, J.). There is grievous uncertainty as to whether the Supreme Court condemns wage fixing as a *per se* antitrust violation, because it has never evaluated it as such. Indeed, the Supreme Court had not evaluated a wage-fixing agreement at all until *Alston*, where it applied the rule of reason.[5] Thus, the only certainty is that, when faced with allegations of wage

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[4] Notably, the government does not cite a single case that endorses the government's claim that either *Superior Ct.* or *Anderson* stand for the proposition that wage fixing is price fixing.

[5] The government cannot rely on *Alston*, including Justice Kavanaugh's concurrence, to contest Jindal's due process arguments, as *Alston* could not possibly have given Jindal notice that an alleged wage-fixing agreement could constitute a *per se* antitrust violation. The Supreme Court decided *Alston* in June 2021, more than four (4) years after the government alleges Jindal entered into an agreement to fix the wages of the PT and PTA contractors.

fixing, the Supreme Court applied the rule of reason. As such, the rule of lenity prohibits *per se* treatment of the alleged wage-fixing agreement and requires the dismissal of Count One.[6]

III. CONCLUSION

The absence of authority for designating wage fixing as a *per se* violation makes clear that the prosecution of Jindal is fatally flawed. The government has not cited any binding authority establishing that an alleged wage-fixing agreement is a *per se* violation or that wage fixing is indistinguishable from price fixing, and this Court should not be the first in history to so hold in a criminal case. Permitting the government to pursue Count One would be unprecedented, unfair, and unconstitutional.

The Court should dismiss Count One of the Indictment.

[6] The *per se* theory of criminal liability is replete with constitutional concerns in its own right. As Jindal states in the Motion, the *per se* rule improperly promotes a presumption of intent. Motion at p. 18. "The defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000). The presumption of intent is only one constitutional concern with respect to the *per se* rule. *See* Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, 2021 Colum. Bus. Law Rev. 113, 151-161 (2021) (discussing improper presumption of intent and vagueness as constitutional bars to applying the *per se* rule in criminal cases).

Dated: July 6, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served upon all counsel of record via the Court's electronic filing service on this 6th day of July, 2021.

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