

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

KATHLEEN BLISS, ESQ.
Nevada Bar No. 7606
kb@kathleenblisslaw.com
KATHLEEN BLISS LAW PLLC
1070 West Horizon Ridge Pkwy., Suite 202
Henderson, Nevada 89012
Telephone: 702.463.9074

Attorney for Defendant VDA OC

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RYAN HEE AND VDA OC LLC,
FORMERLY ADVANTAGE ON CALL,
LLC,

Defendants.

CASE NO.: 2:21-cr-00098-RFB-BNW

**DEFENDANT VDA OC'S MOTION TO
DISMISS**

Pursuant to Federal Rule of Criminal Procedure 12(b)(3)(v), Defendant VDA OC, LLC, by and through its undersigned counsel, respectfully moves this honorable Court to dismiss the Indictment. The grounds for this Motion are set forth in the accompanying Memorandum in Support of Defendant's Motion to Dismiss.

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

Dated: September 3, 2021

Respectfully submitted,

By: Carole S. Rendon

Carole S. Rendon (*pro hac vice*)
Mary Pat Brogan (*pro hac vice*)
Sean Sandoloski (*pro hac vice pending*)
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, Ohio 44114
Telephone: 216.621.0200
Facsimile: 216.696.0740
crendon@bakerlaw.com
ssandoloski@bakerlaw.com
mbrogan@bakerlaw.com

Kathleen Bliss
KATHLEEN BLISS LAW PLLC
1070 W. Horizon Ridge Pkwy.,
Suite 202
Henderson, NV 89012
Office: 702.463.9074
kb@kathleenblisslaw.com
Attorneys for Defendant VDA OC, LLC

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1

STATUTORY BACKGROUND 2

FACTUAL ALLEGATIONS 3

LEGAL STANDARD..... 4

ARGUMENT 5

 I. The Indictment Fails to Plead A *Per Se* Violation of the Sherman Act 5

 A. “No-Poach” Agreements are Not a Per Se Violation of the Sherman Act 5

 B. The Indictment Alleges an Ancillary Restraint Subject to the Rule of Reason..... 12

 II. Extending the Per Se Rule to No-Poach Agreements for the First Time In A Criminal Prosecution Would Violate Due Process 16

 III. Application of the *Per Se* Rule to No-Poach Agreements Is an Unconstitutional Application of the Sherman Act..... 18

 IV. The Indictment Fails to Demonstrate the Alleged Conduct’s Effect on Interstate Commerce 19

CONCLUSION..... 23

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

Cases

Arizona v. Maricopa Cty. Med. Soc.,
457 U.S. 332 (1982).....5, 6

In re ATM Fee Antitrust Litig.,
554 F. Supp. 2d 1003 (N.D. Cal. 2008) (Breyer, J.).....6

Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.,
— F.4th —, 2021 WL 3671384 (9th Cir. Aug. 19, 2021)13, 14

Aydin Corp. v. Loral Corp.,
718 F.2d 897 (9th Cir. 1983)8, 12

Bogan v. Hodgkins,
166 F.3d 509 (2d Cir. 1999).....8

Conrad v. Jimmy John's Franchise, LLC,
ECF 240, No. 18-cv-00133-NJR (S.D. Ill. July 23, 2021)10, 11

Craftsmen Limousine, Inc. v. Ford Motor Co.,
363 F.3d 761 (8th Cir. 2004)5

Deslandes v. McDonald's USA, LLC,
2018 WL 3105955 (N.D. Ill. June 25, 2018)9

Deslandes v. McDonald's USA, LLC,
2021 WL 3187668, No. 17-cv-4857 (N.D. Ill. July 28, 2021)9, 16

Eichorn v. AT & T Corp.,
248 F.3d 131 (3d Cir. 2001), *as amended* (June 12, 2001).....8

Freeman v. San Diego Ass'n of Realtors,
322 F.3d 1133 (9th Cir. 2003)20

Furlong v. Long Island College Hosp.,
710 F.2d 922 (2d Cir. 1983).....22, 23

Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton Coll.,
128 F.3d 59 (2d Cir. 1997).....23

California ex rel. Harris v. Safeway, Inc.,
651 F.3d 1118 (9th Cir. 2011)6

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

KATHLEEN BLISS LAW PLLC
 1070 W. HORIZON RIDGE PKWY., SUITE 202
 HENDERSON, NEVADA 89012
 TEL 702.793.4202

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Kelsey K. v. NFL Enterprises, LLC,
 757 F. App'x 524 (9th Cir. 2018)10

L.A. Mem'l Coliseum Com'n v. Nat'l Football League,
 726 F.2d 1381 (9th Cir. 1984)8

Landgraf v. USI Film Prods.,
 511 U.S. 244 (1994).....17

Las Vegas Merchant Plumbers Ass'n v. United States,
 210 F.2d 732 (9th Cir. 1954)19

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
 551 U.S. 877 (2007).....2, 3, 10

Markson v. CRST Int'l, Inc.,
 2021 WL 1156863 (C.D. Cal. Feb. 10, 2021).....8

Med. Ctr. at Elizabeth Place, LLC v. Atrium Health Sys.,
 922 F.3d 713 (6th Cir.)5

Morissette v. United States,
 342 U.S. 246 (1952).....18

Nat'l Collegiate Athletic Ass'n v. Alston,
 141 S. Ct. 2141 (2021).....8, 9, 10

Nat'l Soc. of Prof. Engineers v. United States,
 435 U.S. 679 (1978).....2

Ohio v. Am. Express Co.,
 138 S.Ct. 2274 (2018).....2

Polk Bros., Inc. v. Forest City Enters, Inc.,
 776 F.2d 185 (7th Cir. 1985)12, 13, 15

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
 792 F.2d 210 (D.C. Cir. 1986).....12, 16

Skilling v. United States,
 561 U.S. 358 (2010).....17

State Oil Co. v. Khan,
 522 U.S. 3 (1997).....6

Summit Health, Ltd. v. Pinhas,
 500 U.S. 322 (1991) (Scalia, J., dissenting)21

KATHLEEN BLISS LAW PLLC
 1070 W. HORIZON RIDGE PKWY., SUITE 202
 HENDERSON, NEVADA 89012
 TEL 702.793.4202

1

2 *Texaco Inc. v. Dagher*,

3 547 U.S. 1 (2006).....2

4 *United States v. Alvarez-Ulloa*,

5 784 F.3d 558 (9th Cir. 2015)5

6 *United States v. eBay, Inc.*,

7 968 F. Supp.2d 1030 (N.D. Cal. 2013).....8

8 *United States v. Gypsum Co.*,

9 438 U.S. 422 (1978).....3, 5, 17

10 *United States v. Jindal*,

11 No. 4:20-cr-358-ALM (E.D. Tex.) (filed December 9, 2020).....7

12 *United States v. Kelly*,

13 874 F.3d 1037 (9th Cir. 2017)5

14 *United States v. Oregon St. Med. Society*,

15 343 U.S. 326 (1952).....20, 21

16 *United States v. Realty Multi-List, Inc.*,

17 629 F.2d 1351 (5th Cir. 1980)10

18 *United States v. Surgical Care Affiliates LLC*,

19 No. 3:21-cr-00011-L (N.D. Tex.) (filed January 5, 2021).....7

20 *United States v. Vega-Martinez*,

21 949 F.3d 43 (1st Cir. 2020).....19, 21

22 *In re Winship*,

23 397 U.S. 358 (1970).....18

24 **Statutes**

25 Sherman Act, 15 U.S.C. § 1 *passim*

26 **Rules**

27 Fed. R. Crim. P. 12(b)(3)(v) 1, 5

28 Federal Rule of Criminal Procedure 7(c)(1) 4

Other Authorities

Br. for the U.S. in Opp'n, *Sanchez v. United States*, No. 19-288 (U.S. Nov. 25,
 2019) 6

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Brief of Amicus United States in Support of Neither Party, *Aya Healthcare Servs., Inc v. AMN Healthcare, Inc.*, 2020 WL 7029426 (C.A.9).....13, 14

Bryan Koenig, *DaVita Indictment, Biden Order Ramp Up No-Poach Pressure*, LAW360 (July 19, 2021), available at <https://www.law360.com/articles/1403705/davita-indictment-biden-order-ramp-up-no-poach-pressure>7

Corrected Statement of Interest of the United States, ECF 34, *Stigar v. Dough Dough, Inc.* No. 18-cv-244 (E.D. Wash. March 8, 2019).....11, 13

Gregory J. Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 717 (1998).....13

Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are In The Works* (Jan. 19, 2019), available at <https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-work>7

Memorandum in Support of Defendants' Motion to Dismiss, *United States v. Surgical Care Affiliates LLC*, ECF 38 at 18, No. 3:21-cr-00011-L (N.D. Tex.).....18

Report of the Attorney General’s National Committee to Study the Antitrust Laws 349 (1955).....6

Robert E. Connolly, *Some “Twinkling of the Eye” Thoughts on NCAA v. Alston*, <http://antitrustconnect.com/2021/06/30/some-twinkling-of-the-eye-thoughts-on-ncaa-v-alston/>.....19

Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, COLUM. BUS. L.R. (2020) available at <https://journals.library.columbia.edu/index.php/CBLR/article/view/8477>.....19

Statement of Interest of the United States, ECF 325, *Seaman v. Duke University*, No. 1:15-cv-462 (M.D.N.C. March 7, 2019).....11

U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidance for Human Resources Professionals* (Oct. 2016), <https://www.justice.gov/atr/file/903511/download>.....6

United States' Opp. to Defs.' Mot. to Dismiss, *United States v. Surgical Care Associates*, ECF 44 at 29, 3:21-cr-00011-L (N.D. Tex.)17

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

INTRODUCTION

1
2
3 This prosecution—against a company that ceased operations in July 2017 and has been
4 dissolved for more than two years and a former employee of that company—is one of the first
5 criminal cases the Antitrust Division of the Department of Justice has brought as part of its
6 publicized campaign to criminalize agreements between employers not to recruit or hire each
7 other’s employees. No statute specifically criminalizes such conduct and no court has recognized
8 this conduct as criminal. The alleged conspirators were healthcare staffing agencies who placed
9 nurses with a school district for the daily care of students with medically complex needs, and the
10 entire alleged conspiracy began and ended in less than one school year.

11
12 The Antitrust Division has a policy of only prosecuting *per se* violations of the Sherman
13 Act, not ones that are subject to the rule of reason, which requires a higher level of analysis of
14 whether the conduct involved is an illegal restraint of trade. In order for conduct to be a *per se*
15 violation, there must be a consistent history of court recognition that the conduct is *per se* violative.
16 Very few courts have even considered this question and no courts have concluded that agreements
17 not to recruit or hire employees are *per se* violations of the Sherman Act, so the Government cannot
18 demonstrate the requisite history of judicial interpretation. On this basis alone, the Indictment must
19 be dismissed for failure to state a *per se* offense. *See* Fed. R. Crim. P. 12(b)(3)(v).

20
21 Moreover, allowing this prosecution to continue would violate Mr. Hee and VDA OC’s
22 constitutional rights to due process, fair notice, and the right to a jury trial. Application of a novel
23 and unsupported theory of law is necessarily violative of due process and fair notice. And allowing
24 prosecution as if this were a *per se* offense would prevent a jury from determining whether the
25 government has proven an element of the offense beyond a reasonable doubt.
26
27
28

1
2 **STATUTORY BACKGROUND**

3 Defendants are charged with a conspiracy to violate Section 1 of the Sherman Act, 15
4 U.S.C. § 1. Section 1 makes illegal “[e]very contract, combination in the form of trust or otherwise,
5 or conspiracy, in restraint of trade or commerce among the several states... is declared to be
6 illegal.” 15 U.S.C. § 1. Recognizing that some conduct that may facially be a “restraint of trade”
7 may be reasonable, procompetitive, and beneficial, the Supreme Court has “repeated time and
8 again that § 1 ‘outlaw[s] only unreasonable restraints.’” *Leegin Creative Leather Prods., Inc. v.*
9 *PSKS, Inc.*, 551 U.S. 877, 885 (2007) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)); *see*
10 *also Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2283 (2018) (“In view of the common law and the
11 law in this country when the Sherman Act was passed, the phrase ‘restraint of trade’ is best read
12 to mean ‘undue restraint.’” (alterations and citation omitted)).

13
14
15 In order to limit the enforcement of the Sherman Act to only such unreasonable restraints,
16 the Supreme Court has explained that courts should “not take[] a literal approach” and instead
17 should “presumptively appl[y] rule of reason analysis” which requires proof “that a particular
18 contract or combination is in fact unreasonable and anticompetitive before it will be found
19 unlawful.” *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Rule of reason analysis requires
20 “analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it
21 was imposed.” *Nat’l Soc. of Prof. Engineers v. United States*, 435 U.S. 679, 692 (1978). “*Per se*
22 liability is reserved for only those agreements that are ‘so plainly anticompetitive that no elaborate
23 study of the industry is needed to establish their illegality.’” *Dagher*, 547 U.S. at 5. (quoting *Nat’l*
24 *Soc. of Prof. Engineers*, 435 U.S. at 692). The limited *per se* treatment “is appropriate only after
25 courts have had considerable experience with the type of restraint at issue, and only if courts can
26 predict with confidence that it would be invalidated in all or almost all instances under the rule of
27
28

1
2 reason.” *Leegin*, 551 U.S. at 886–87 (citation omitted). Further, courts are “reluctan[t] to adopt *per*
3 *se* rules with regard to restraints imposed in the context of business relationships where the
4 economic impact of certain practices is not immediately obvious.” *Id.* at 887 (quoting *Khan*, 522
5 U.S. at 10). As a result, only those restraints that “have manifestly anticompetitive effects ... and
6 lack any redeeming virtue” can be deemed *per se* violations of the Sherman Act. *Id.* at 886
7 (alterations and quotations omitted).

8
9 The Sherman Act is enforced both criminally and civilly. When it is enforced criminally,
10 the restrictions on *per se* treatment are even more significant because improper application of the
11 doctrine would lead to criminal prosecution of “behavior . . . [that] is often difficult to distinguish
12 from the gray zone of socially acceptable and economically justifiable business conduct.” *United*
13 *States v. Gypsum Co.*, 438 U.S. 422, 440-41 (1978). Allowing prosecutions of conduct that may
14 be in this gray zone would permit “criminal sanctions [to] be used, not to punish conscious and
15 calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business
16 practices[.]” *Id.* at 442. Civil enforcement of the Sherman Act is the vehicle for this sort of business
17 regulation, not criminal punishment.

18 FACTUAL ALLEGATIONS

19
20 The Indictment charges VDA OC, LLC (formerly Advantage On Call or AOC) and Ryan
21 Hee with a conspiracy to restrain trade in violation of the Sherman Act. AOC operated as a
22 healthcare staffing agency that provided nurses to various healthcare facilities, including school
23 systems. (ECF 1, Indictment at ¶ 3). Hee worked for AOC as a Regional Manager in Las Vegas.
24 (ECF 1 at ¶ 4). In 2013, AOC was one of multiple companies to bid on and receive a contract to
25 provide staffing services to the Clark County School District (CCSD) in Nevada to provide nurses
26 to care for medically fragile students. (ECF 1 at ¶¶ 2, 8). Company A was also a contracted
27
28

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

provider of nursing staff to CCSD. (ECF 1 at ¶ 8).

The Indictment alleges that in October 2016, Mr. Hee and AOC entered a conspiracy with Company A and Individual 1 to allocate nurses assigned to CCSD and to refrain from raising wages for those nurses. (ECF 1 ¶ 12). The only specific conduct alleged to have been taken by AOC or Mr. Hee occurred on or about October 21, 2016, as reflected in an email on that date. (ECF 1 ¶ 14). The Indictment does not allege that any nurse at AOC who was assigned to CCSD was ever refused a raise, nor that any nurse from Company A who was assigned to CCSD ever sought employment at AOC and was denied. Indeed, the Indictment alleges only that Company A employees were “instructed . . . not to recruit or hire a co-conspirators company’s nurses assigned to CCSD” and that a nurse employed at Company A was denied a raise. (ECF 1 at ¶ 14(e), (g)). In contrast, there is no allegation that Mr. Hee or AOC ever instructed AOC’s employees not to recruit or hire Company A’s employees.

The Indictment alleges that this agreement began in October 2016 and lasted until July 2017. (ECF 1 at ¶ 12). In July 2017, AOC ceased operations when it was sold to another healthcare staffing company. The legacy company, which did not continue to operate or provide any staffing services, was renamed as VDA OC, LLC in July 2017. (*See* ECF 1 at ¶ 3). Thus, the Indictment alleges a conspiracy affecting only nurses assigned to a single school district and occurring within a single academic year.

LEGAL STANDARD

Federal Rule of Criminal Procedure 7(c)(1) requires that Indictments provide “a plain, concise and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). The Indictment must articulate “the crime charged, the essential elements of the indicated crime, and the acts alleged to constitute the offense in detail sufficient to bring them

1
2 within the scope of the offense and sufficient to inform the accused generally of the acts attributed
3 to him and the time of their commission.” *United States v. Alvarez-Ulloa*, 784 F.3d 558, 570 (9th
4 Cir. 2015) (quotations omitted). An Indictment that fails to state an offense must be dismissed.
5 Fed. R. Crim. P. 12(b)(3)(B)(v). “A motion to dismiss is generally capable of determination before
6 trial if it involves questions of law rather than fact.” *United States v. Kelly*, 874 F.3d 1037, 1046
7 (9th Cir. 2017) (quotations and alterations omitted). Because Defendants’ challenges to the
8 Indictment here “are based on legal issues,” the court “may resolve the issues here without
9 intruding upon the province of the ultimate finder of fact.” *Id.* at 1046-47.

10
11 Whether to apply the *per se* rule or the rule of reason is a question of law. *See, e.g. Arizona*
12 *v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 337, n.3, 354 (1982); *Med. Ctr. at Elizabeth Place, LLC*
13 *v. Atrium Health Sys.*, 922 F.3d 713, 727 (6th Cir.) (“Whether challenged conduct belongs in the
14 *per se* category is a question of law.”); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d
15 761, 772 (8th Cir. 2004) (reviewing *de novo* whether an agreement constituted a *per se* antitrust
16 violation).

17
18 Because the Government only alleges a *per se* violation of the Sherman Act, determination
19 of which analytical rule applies could be dispositive and is therefore ripe for decision on a motion
20 to dismiss.

21 ARGUMENT

22 I. THE INDICTMENT FAILS TO PLEAD A *PER SE* VIOLATION OF THE 23 SHERMAN ACT

24 A. “No-Poach” Agreements are Not a Per Se Violation of the Sherman Act

25 Unlike most traditional criminal statutes, the Sherman Act, “does not, in clear and
26 categorical terms, precisely identify the conduct which it proscribes.” *U.S. Gypsum Co.*, 438 U.S.
27 at 438. Because of the opaque and imprecise nature of the statute, the Antitrust Division prosecutes
28

KATHLEEN BLISS LAW PLLC
 1070 W. HORIZON RIDGE PKWY., SUITE 202
 HENDERSON, NEVADA 89012
 TEL 702.793.4202

1
 2 only *per se* violations of the Act, meaning conduct that courts have previously and consistently
 3 recognized as pervasively anticompetitive and a clear violation of the Sherman Act. *See, e.g.*, Br.
 4 for the U.S. in Opp’n at 11 n.1, *Sanchez v. United States*, No. 19-288 (U.S. Nov. 25, 2019) (“[T]he
 5 government brings criminal antitrust prosecutions only based on conduct that violates the *per se*
 6 rule.”); Report of the Attorney General’s National Committee to Study the Antitrust Laws 349
 7 (1955) (recommending that enforcement of the Sherman Act through “criminal process should be
 8 used only where the law is clear and the facts reveal a flagrant offense and plain intent
 9 unreasonably to restrain trade.”).

10
 11 Whether the allegations in the Indictment constitute a *per se* violation is a legal question
 12 for the Court. *Arizona v. Maricopa County*, 457 U.S. 332, 337 n.3, 354 (1982); *see also In re ATM*
 13 *Fee Antitrust Litig.*, 554 F. Supp. 2d 1003, 1010 (N.D. Cal. 2008) (Breyer, J.) (“[T]he decision of
 14 what mode of analysis to apply—*per se*, rule of reason, or otherwise—is entirely a question of law
 15 for the Court, even though the question might involve factual disputes.”) The operative question
 16 is whether “experience with a particular kind of restraint enables the Court to predict with
 17 confidence that” the antitrust laws condemn it categorically. *State Oil Co. v. Kahn*, 522 U.S. 3, 10
 18 (1997); *see also California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1132 (9th Cir. 2011).

19
 20 In October 2016, the Antitrust Division proclaimed that “[g]oing forward, the DOJ intends
 21 to proceed criminally against naked wage fixing or no-poaching agreements.” *See* U.S. Dep’t of
 22 Justice & Fed. Trade Comm’n, *Antitrust Guidance for Human Resources Professionals* at 4 (Oct.
 23 2016), <https://www.justice.gov/atr/file/903511/download> (“2016 H.R. Guidance”). And it has
 24 been on the hunt for a case—any case—to test out its novel theory.¹ After this highly publicized
 25

26
 27 ¹ The then-head of the Antitrust Division, Assistant Attorney General Makan Delrahim, announced
 28 on January 19, 2018, that the Division would be bringing its first such case “in the coming couple
 of months.” *See* Matthew Perlman, *Delrahim Says Criminal No-Poach Cases Are In The Works*,

KATHLEEN BLISS LAW PLLC
 1070 W. HORIZON RIDGE PKWY., SUITE 202
 HENDERSON, NEVADA 89012
 TEL 702.793.4202

1
 2 effort in the last few years, and amid growing pressure to bring so-called criminal “no-poach”
 3 cases,² the Antitrust Division brought three criminal cases within four months of one another—
 4 including this one—on the novel and untested theory that agreements not to hire employees
 5 constitute criminal conduct under the Sherman Act. *See United States v. Surgical Care Affiliates*
 6 *LLC*, No. 3:21-cr-00011-L (N.D. Tex.) (filed January 5, 2021); *United States v. Jindal*, No. 4:20-
 7 cr-358-ALM (E.D. Tex.) (filed December 9, 2020).³ Of note, all of these cases target the
 8 healthcare industry.
 9

10 The Antitrust Division in this case is trying to do something no other federal court or jury
 11 in this country has sanctioned. The Antitrust Division proclaims the alleged conduct in this case is
 12 criminal conduct that is *per se* illegal under the Sherman Act. But just because the Antitrust
 13 Division wants to criminalize “no-poach agreements,” does not make it so. No federal court has
 14 ever even concluded that agreements not to solicit employees are *per se* illegal under the Sherman
 15 Act, let alone found that agreements not to recruit another company’s employees are criminal
 16 violations of the Sherman Act.⁴ *See, e.g., Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 900 (9th Cir.
 17
 18

19

LAW360 (Jan. 19, 2019), available at <https://www.law360.com/articles/1003788/delrahim-says-criminal-no-poach-cases-are-in-the-works>.
 20

21 ² *See, e.g.,* Bryan Koenig, *DaVita Indictment, Biden Order Ramp Up No-Poach Pressure*, LAW360
 22 (July 19, 2021), available at <https://www.law360.com/articles/1403705/davita-indictment-biden-order-ramp-up-no-poach-pressure>.

23 ³ At the time of this briefing, there is a fully briefed motion to dismiss pending in the *Surgical*
 24 *Care Affiliates* case (ECF Nos. 38, 44, 45, No. 3:21-cr-00011-L (N.D. Tex.)). The Chamber of
 25 Commerce of the United States also filed an *amicus curiae* brief in the *Surgical Care Affiliates*
 26 case in support of the motion to dismiss. (ECF No. 39, No. 3:21-cr-00011-L (N.D. Tex.)) There
 are two fully briefed motions to dismiss pending in the *Jindal* case, one on the merits filed by
 Jindal (ECF Nos. 36, 46, 47, No. 4:20-cr-00358, (E.D. Tex)) and one filed by co-defendant
 Rodgers moving for dismissal based on the government’s improper recission of a non-prosecution
 agreement (ECF Nos. 45, 48, 50 No. 4:20-cr-00358, (E.D. Tex)).

27 ⁴ *Markson v. CRST Int’l, Inc.* is not to the contrary. There the court concluded only that Plaintiffs
 28 had “alleged sufficient facts to support a plausible *per se* claim,” not that such an agreement is a
per se violation of the Sherman Act. *Markson v. CRST Int’l, Inc.*, 2021 WL 1156863, at *4 (C.D.

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

1
2 1983) (refusing to apply the *per se* rule to employee covenants not to compete); *Eichorn v. AT &*
3 *T Corp.*, 248 F.3d 131, 143 (3d Cir. 2001), *as amended* (June 12, 2001) (“While plaintiffs contend
4 the no-hire agreement was *per se* illegal because it was a horizontal group boycott and a price-
5 fixing conspiracy, we can find no support within the relevant case law for this label.”); *Bogan v.*
6 *Hodgkins*, 166 F.3d 509 (2d Cir. 1999) (allegations regarding restrictions on life insurance agents
7 switching agencies in a given market did “not trigger *per se* treatment because the Agreement does
8 not fit into any of the established *per se* categories.”). This fact is fatal to the Antitrust Division’s
9 case here. The *per se* rule is only to be used “[w]hen judicial experience with a particular kind of
10 restraint enables a court to predict with certainty that the rule of reason will condemn the restraint.”
11 *L.A. Mem’l Coliseum Com’n v. Nat’l Football League*, 726 F.2d 1381, 1387 (9th Cir. 1984).

12
13
14 As the Supreme Court recently explained in *NCAA v. Alston*, “[r]ecognizing the inherent
15 limits on a court’s ability to master an entire industry—and aware that there are often hard-to-see
16 efficiencies attendant to complex business arrangements” courts must “take special care not to
17 deploy these condemnatory tools until we have amassed ‘considerable experience with the type of
18 restraint at issue’ and ‘can predict with confidence that it would be invalidated in all or almost all
19 instances.’” *Nat’l Collegiate Athletic Ass’n v. Alston*, 141 S. Ct. 2141, 2156 (2021) (quoting *Leegin*
20 551 U.S. at 886–887). This is so because “even under the best of circumstances, applying the
21 antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements
22 are especially costly, because they chill the very procompetitive conduct the antitrust laws are
23 designed to protect.” *Id.* at 2161 (quoting *Verizon Communications Inc. v. Law Offices of Curtis*
24
25
26
27 Cal. Feb. 10, 2021); *cf. United States v. eBay, Inc.*, 968 F. Supp.2d 1030, 1039 (N.D. Cal. 2013)
28 (“The fact that the court finds that the United States adequately alleged a market allocation
agreement does not in and of itself indicate that *per se* treatment is imminent.”).

1
2 *V. Trinko, LLP*, 540 U.S. 398, 414 (2004)).

3 The Supreme Court’s recent recitation of the high-standard for *per se* cases already has
4 manifested itself in “no-poach” cases. Take *Deslandes v. McDonald’s USA, LLC*, in which
5 plaintiffs allege that multiple McDonald’s franchises had agreed not to hire each other’s
6 employees. *Deslandes v. McDonald’s USA, LLC*, 2021 WL 3187668, No. 17-cv-4857 at *7 (N.D.
7 Ill. July 28, 2021). The district court concluded that the alleged agreement not to hire was subject
8 to the rule of reason analysis, noting that the “Court cannot say that it has enough experience with
9 no-hire provisions of franchise agreements to predict with confidence that they must always be
10 condemned, which means, under *Alston*, that the Court must apply the rule of reason analysis to
11 this case.” *Id.*⁵

12
13 So too here. No federal court has had sufficient experience with alleged no-poach
14 agreements—let alone those in the somewhat complex market of healthcare staffing agencies
15 providing nurses to school systems—to conclude that all agreements not to recruit or hire
16 employees are always anticompetitive. In fact, courts that have addressed these issues have come
17 to different conclusions on this issue. When courts “are uncertain of the competitive significance
18 of a particular type of restraint, they decline to apply the *per se* label.” *United States v. Realty*

19
20
21
22 _____
23 ⁵ The government relied on an earlier decision in this case in its brief opposing the motion to
24 dismiss in the *Surgical Care Affiliates*. ECF 44, at 20, 3:21-cr-00011-L (N.D. Tex.) (“[E]ven courts
25 assessing franchise restraints have noted that the *per se* rule would apply to naked horizontal
26 restraints. *See, e.g., Deslandes*, 2018 WL 3105955, at *6.”). That earlier decision acknowledged
27 in dicta that an agreement not to hire could be “suitable for *per se* treatment,” but held that the
28 restraint alleged was ancillary and therefore not subject to *per se* treatment. *Deslandes v.*
McDonald’s USA, LLC, 2018 WL 3105955, at *6-*7 (N.D. Ill. June 25, 2018). The court
concluded that the alleged agreement might be subject to the “quick look” analysis, which falls
between the *per se* approach and the rule of reason. *Id.* However, after applying *Alston*, the
Northern District of Illinois concluded that even the “quick look” analysis was inapplicable and
rule of reason analysis was required based on the court’s lack of experience with no-hire provisions
of franchise agreements. *Deslandes*, 2021 WL 3187668 at *7.

1
2 *Multi-List, Inc.*, 629 F.2d 1351, 1365 (5th Cir. 1980).

3 Even if courts had sufficient experience with no-poach restraints, applying the *per se* rule
4 would not be appropriate here. “[D]eparture from the rule-of-reason standard must be based upon
5 demonstrable economic effect rather than ... upon formalistic line drawing.” *Leegin*, 551 U.S. at
6 887 (quoting *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977)). The courts’
7 treatment of “no-poach” cases demonstrates that not all cases can show such a demonstrable
8 economic effect. *See supra. Kelsey K. v. NFL Enterprises, LLC*, however, provides a more specific,
9 recent example of how courts have analyzed these “no-poach” agreements and concluded that they
10 do not always demonstrate a negative economic effect. 757 F. App’x 524 (9th Cir. 2018). A
11 cheerleader for the San Francisco 49ers alleged that the NFL and 27 NFL teams engaged in a
12 conspiracy to violate the Sherman Act by two agreements, “namely a no-poaching agreement and
13 a wage fixing agreement” based on an annually ratified agreement prohibiting NFL teams “from
14 tampering with other teams’ employees while they are under contract.” *Id.* at 526. The Ninth
15 Circuit affirmed dismissal of the complaint because the cheerleader “fail[ed] to plausibly allege
16 *per se* illegality of either agreement” because her allegations did not show “inten[t] to harm or
17 restrain trade.” *Id.* To the contrary, they “suggest[ed] rational, legal business behavior, not a
18 violation of the antitrust laws.” *Id.*

19
20
21
22 The Southern District of Illinois’s recent opinion in *Conrad v. Jimmy John’s Franchise,*
23 *LLC*— one of the first to address the issue after the Supreme Court’s decision in *Alston*, 141 S.
24 Ct. 2141—is also instructive. The plaintiffs in that case alleged that Jimmy John’s Franchise
25 Agreement prohibited employees from switching between franchises and therefore was a “naked
26 restraint of competition” and a no-poach agreement that violated the Sherman Act. *Conrad v.*
27 *Jimmy John's Franchise, LLC*, ECF 240, at 4, No. 18-cv-00133-NJR (S.D. Ill. July 23, 2021)
28 (attached hereto as Exhibit A). Applying *Alston* to an alleged no-poach provision, the Court

1
2 concluded that “monopsony claims were appropriately analyzed under the rule of reason, not the
3 per se rule.” (Exhibit A at 25-26). The court in *Conrad* noted that despite an admission from the
4 NCAA in *Alston* that their conduct constituted “horizontal price fixing in a market” in which they
5 “exercise[d] monopoly control,” the Supreme Court took “special care not to deploy” a *per se*
6 analysis given the “often hard-to-see efficiencies attendant to complex business arrangements.”
7 (*Id.* at 25 (quoting *Alston*, 141 S. Ct. at 2156)).
8

9 Indeed, no-poach agreements can have procompetitive effects, as even the Government has
10 conceded, contradicting the proposition that they are *per se* illegal. As the Antitrust Division
11 noted in a Statement of Interest filed in *Seaman v. Duke University*, No. 15-cv-462 (M.D.N.C.),
12 “[i]f a no-poach agreement is reasonably necessary to a separate, legitimate business ...
13 [c]ollaboration among the employers, it is not *per se* unlawful as a naked restraint, but instead
14 judged under the rule of reason.” Statement of Interest of the United States, ECF 325 at 24, *Seaman*
15 *v. Duke University*, No. 1:15-cv-462 (M.D.N.C. March 7, 2019); *see also* Corrected Statement of
16 Interest of the United States, ECF 34 at 11-12, *Stigar v. Dough Dough, Inc.* No. 18-cv-244 (E.D.
17 Wash. March 8, 2019) (certain no-poach provisions should be analyzed under the rule of reason).
18 And even the 2016 H.R. Guidance—where the Division first took it upon itself to declare “no-
19 poach” cases criminal—recognized that “no-poaching agreements” are permissible if they are
20 ancillary to other activities and are only (in their view) *per se* violations if they are “naked”
21 agreements. Antitrust Guidance for Human Resources Professionals at 3 (Oct. 2016). No
22 categories of consistently recognized *per se* violations require the conduct to have a “naked”
23 qualifier to be deemed *per se*.
24
25

26 Because of the absence of any courts recognizing no-poach agreements as *per se* violations
27 of the Sherman Act and the potentially procompetitive effects of such agreements, Defendants ask
28

1
2 the Court not to be the first to create a new category of *per se* violations and instead to dismiss the
3 Indictment.

4 **B. The Indictment Alleges an Ancillary Restraint Subject to the Rule**
5 **of Reason**

6 An agreement that would otherwise be condemned as *per se* unlawful is still subject to the
7 rule of reason if it is an ancillary restraint on competition. *See Aydin Corp. v. Loral Corp.*, 718
8 F.2d 897, 901 (9th Cir. 1983) (“The proper function of ancillarity in antitrust analysis is to remove
9 in some instances the *per se* label from restraints otherwise falling within the category.” (quotation
10 and citation omitted)). “To be ancillary, and hence exempt from the *per se* rule, an agreement
11 eliminating competition must be subordinate and collateral to a separate, legitimate transaction.”
12 *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986). A restraint
13 qualifies as ancillary when it “serves to make the main transaction” between entities in a joint
14 venture “more effective in accomplishing its purpose,” *id.*, or is “part of a larger endeavor whose
15 success [it] promote[s].” *Polk Bros., Inc. v. Forest City Enters, Inc.*, 776 F.2d 185, 189 (7th Cir.
16 1985).

17
18 In evaluating whether the alleged agreement between AOC and Company A was ancillary,
19 the ultimate question is “whether [the] agreement promoted enterprise and productivity at the time
20 it was adopted. If it arguably did, then the court must apply the Rule of Reason to make a more
21 discriminating assessment.” *Polk Bros.*, 776 F.2d at 189. Put another way, did the restraint in
22 question “viewed at the time it was adopted . . . promote the success of this more extensive
23 cooperation”? *Id.* “Any genuine economic integration that plausibly could confer nontrivial social
24 benefits suffices to take a joint venture outside the purview of the *per se* rule.” Gregory J.
25 Werden, *Antitrust Analysis of Joint Ventures: An Overview*, 66 ANTITRUST L.J. 701, 717 (1998).

26
27
28 As noted above, the Department of Justice has been explicit that the ancillary restraints

1
2 doctrine applies in the no-poach context: the rule of reason applies to “agreements between labor-
3 market competitors not to poach each other’s employees” if “reasonably necessary to a separate,
4 legitimate business transaction or collaboration between the companies.” Corrected Statement of
5 Interest at 8, *Stiger v. Dough Dough, Inc.*, No. 18-cv-244 (E.D. Wash. March 8, 2019); *see also*
6 Antitrust Guidance for Human Resources Professionals at 3 (Oct. 2016).
7

8 But perhaps most on point, the Ninth Circuit recently examined whether the *per se* rule or
9 the rule of reason should apply to a non-solicitation agreement between two companies that supply
10 temporary nurses to hospitals, concluding that the *per se* rule did not apply because the alleged
11 conduct was an ancillary restraint. *Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, — F.4th
12 —, 2021 WL 3671384, (9th Cir. Aug. 19, 2021). In *Aya*, both parties were healthcare staffing
13 agencies that placed nurses with hospitals or other facilities for temporary assignments. *Id.* at *1.
14 AMN used *Aya* as an “associate vendor” that could fill assignments that AMN was unable to fill.
15 *Id.* at *2. However, *Aya* also competed directly with AMN, because it also independently filled
16 assignments for hospitals and other facilities. *Id.* As part of *Aya* and AMN’s contract, *Aya* was
17 prohibited from soliciting AMN’s employees. *Id.*
18

19 The United States submitted an *amicus* brief to the Ninth Circuit in *Aya* “to explain its
20 views on the law applicable to non-solicitation agreements between competing employers.” Brief
21 of Amicus United States in Support of Neither Party at *1, *Aya Healthcare Servs., Inc v. AMN*
22 *Healthcare, Inc.*, 2020 WL 7029426 (C.A.9). In that brief, the United States took the unequivocal
23 position that the AMN contract should be viewed as a no-poach agreement and explained that it
24 defines “no-poach agreement” to “identify a particular type of labor-market allocation: an
25 agreement among employers that includes any or all of the commitments not to solicit, hire, or
26 otherwise compete for certain employees.” *Id.* at *25. The United States urged the Ninth Circuit
27
28

1
2 to find that such no-poach agreements were a *per se* violation. The Ninth Circuit categorically
3 refused.

4 Instead, the Ninth Circuit held that the agreement between providers of traveling nurses
5 not to poach each other’s nurses was an ancillary restraint “reasonably necessary to the parties’
6 procompetitive collaboration” and therefore subject to the rule of reason. *Aya Healthcare*, — F.4th
7 —, 2021 WL 3671384, at *5. It concluded that “[t]he purpose of the parties’ contract was to supply
8 hospitals with traveling nurses. The non-solicitation agreement is necessary to achieving that end
9 because it ensures that AMN will not lose its personnel during the collaboration.” *Id.* And so, as
10 the Ninth Circuit recognized, the restraint was ancillary and therefore subject to the rule of reason
11 analysis, not the *per se* rule.
12

13 Here, AOC and Company A both had contracts to “provide nurse staffing services to
14 support students with complex medical needs” at CCSD schools. (ECF 1 ¶¶ 2, 8). The main
15 transaction originated with a Request for Proposal (RFP) put out by CCSD in August 2013. (ECF
16 1 at ¶ 2). The purpose of that RFP was to outsource the hiring of professionals with a special skill
17 set necessary to “provide constant care to medically fragile students, including during classroom
18 time, traveling the hallways, bus rides, meals, field trips, and other school-based activities.” (ECF
19 1 at ¶ 2). Cooperation and integration of the nurses and the companies providing those nurses
20 would achieve the purpose of the CCSD contract more efficiently and effectively. The alleged
21 agreement between AOC and Company A ran for less than one school year. In a single school
22 year, it served CCSD to have a stable source of nurses over the course of that school year to provide
23 consistent care to its medically fragile students and not to have nurses leaving or switching
24 employers in the middle of the school year. Any alleged agreement between these two companies
25 therefore must be considered ancillary to their shared role for CCSD. Time spent by either
26
27
28

1
2 company to recruit or hire nurses already working at CCSD would not contribute to their shared
3 contractual purpose of providing consistent and stable medical services to CCSD’s students.

4 It has also been recognized that agreements between competitors operating in shared
5 facilities may also be considered ancillary. *See, e.g., Polk Bros.*, 776 F.2d at 190; *see also* Antitrust
6 Guidance for Human Resources Professionals at 3 (Oct. 2016). In *Polk Brothers*, the Seventh
7 Circuit interpreted Illinois’ antitrust laws in accord with federal antitrust laws and concluded that
8 where two stores shared the same building with the purpose of providing a more convenient
9 shopping experience for customers, their agreement not to sell certain products over which they
10 would otherwise compete was ancillary and therefore subject to the rule of reason. *Polk Bros.*, 776
11 F.2d at 190. Here, the nurses from AOC and Company A served the same student populations at
12 CCSD and were not divided between specific schools. They operated in shared space and facilities,
13 often working side-by-side in the same classroom providing hands-on care to the students with
14 complex medical needs. This day-to-day partnership and collaboration of nurses requires
15 recognition that the alleged agreement must be considered ancillary to the main transaction of
16 providing nursing care to CCSD students.

17 Further, the need to avoid the “free rider” problem also provides yet another classic reason
18 that the alleged restraint in the instant case should be recognized as ancillary and subject to the
19 rule of reason rather than the *per se* rule. *Rothery*, 792 F.2d at 214 (“Atlas’ new policy does not
20 offend the antitrust laws. The challenged restraint is ancillary to the economic integration of Atlas
21 and its agents so that the rule of per se illegality does not apply.”). In *Rothery*, Atlas Van Lines
22 prohibited its agent van lines from using Atlas equipment, facilities, or equipment. The D.C.
23 Circuit concluded that this was an ancillary restraint subject to the rule of reason because it
24 “preserve[d] the efficiencies of the nationwide van line by eliminating the problem of the free
25
26
27
28

1
2 ride.” *Id.* at 229. The court reasoned that the “Supreme Court made it clear that elimination of the
3 free ride is an efficiency justification available to horizontal restraints that are ancillary to a
4 contract integration.” *Id.* at 228. “A free ride occurs when one party to an arrangement reaps
5 benefits for which another party pays, though that transfer of wealth is not part of the agreement
6 between them.” *Id.* at 212.

7
8 Any no-poach agreement between AOC and Company A would similarly serve the
9 efficient and ancillary purpose of eliminating the free ride. AOC and Company A both had
10 contracts with CCSD to supply nurses to provide medical services to individual students with
11 complex medical needs. AOC and Company A therefore competed to recruit nurses to fulfill their
12 contractual obligations to CCSD. Once one company expended the financial and human resources
13 to recruit and a vet a candidate and then support them through CCSD’s own hiring process, and
14 finally placed that nurse in a position that CCSD had hired them to fill, if the other company could
15 then hire that same nurse to fill one of its spots with CCSD whilst skipping the required legwork
16 to have the nurse approved to work at CCSD and trained, the second company would have a free
17 ride. *See DeSlandes v. McDonald's USA, LLC*, 2021 WL 3187668, at *9 (N.D. Ill. July 28, 2021)
18 (recognizing the procompetitive value that an ancillary “hiring restriction” provides by
19 “encourag[ing] franchisees to train their employees without fear that other outlets will free-ride on
20 this training by hiring away employees trained in the McDonald’s way”).
21
22

23 **II. EXTENDING THE PER SE RULE TO NO-POACH AGREEMENTS FOR THE**
24 **FIRST TIME IN A CRIMINAL PROSECUTION WOULD VIOLATE DUE**
25 **PROCESS**

26 To prosecute Mr. Hee and VDA OC under a never before adopted theory that no-poach
27 agreements are *per se* violations of the Sherman Act would deny defendants due process. Everyone
28 “should have an opportunity to know what the law is and to conform their conduct accordingly.”

1
2 *Landgraf v. USI Film Prods*, 511 U.S. 244, 265 (1994). Neither Mr. Hee nor VDA OC had an
3 opportunity to know that no-poach agreements are *per se* violations of the Sherman Act because
4 no court has ever held that.

5
6 A penal statute must “define the criminal offense with sufficient definiteness that ordinary
7 people can understand what conduct is prohibited.” *Skilling v. United States*, 561 U.S. 358, 402
8 (2010). The Sherman Act itself does not provide that notice. It “does not, in clear and categorical
9 terms, precisely identify the conduct which it proscribes.” *U.S. Gypsum Co.*, 438 U.S. at 438.
10 Instead, it relies on the history of judicial interpretation and application. Criminal liability cannot
11 turn on the vagaries of rule-of-reason analysis or on the violation of a *per se* rule that has never
12 before been judicially established. And the Government’s Antitrust Guidance for Human
13 Resources Professionals, issued literally the day before the alleged agreement in this case, cannot
14 be relied upon to satisfy due process because it does not have the force of law. Indeed, the
15 Government admitted as much in another no-poach case. *See* United States’ Opp. to Defs.’ Mot.
16 to Dismiss, *United States v. Surgical Care Associates*, ECF 44 at 29, 3:21-cr-00011-L (N.D. Tex.)
17 (“The Department of Justice does not make law when it issues guidance documents to the
18 public....”). Even if the Antitrust Division’s Guidance document could proclaim what “going
19 forward” will be a crime under the Sherman Act, the publication of that Guidance the day before
20 the alleged agreement certainly did not provide sufficient notice to these defendants. *See* Antitrust
21 Guidance for Human Resources Professionals at 4 (Oct. 2016). The Government saying something
22 is a *per se* crime does not make it so.⁶

23
24
25
26
27 ⁶ *See* Memorandum in Support of Defendants’ Motion to Dismiss at 18, *United States v. Surgical Care*
28 *Affiliates LLC*, ECF 38 at 18, No. 3:21-cr-00011-L (N.D. Tex.) (“The executive branch does not get to
create new criminal prohibitions”)

1
2 **III. APPLICATION OF THE *PER SE* RULE TO NO-POACH AGREEMENTS IS**
3 **AN UNCONSTITUTIONAL APPLICATION OF THE SHERMAN ACT.**

4 Not only does this prosecution violate Defendants’ due process rights because they lacked
5 sufficient notice that the alleged conduct was criminal, but the Government’s theory is an
6 unconstitutional application of the Sherman Act. The Government’s current efforts to criminalize
7 conduct never previously recognized as criminal without the authority of a specific statute
8 identifying the conduct serves to highlight the longstanding problems of relying on the vague
9 language of the Sherman Act and *per se* jurisprudence to prosecute crimes. This practice
10 contradicts the Supreme Court’s holdings that condemn irrebuttable presumptions in the criminal
11 context. *See, e.g., Morissette v. United States*, 342 U.S. 246, 274 (1952) (holding that for the
12 element of intent, “the trial court may not withdraw or prejudge the issue by instruction that the
13 law raises a presumption of intent from an act”).

14
15
16 Moreover, prosecution of “naked” no-poach agreements, as opposed to ancillary no-poach
17 agreements, requires a judicial determination of the category of restraint. Once that determination
18 is made against a defendant, the defendant is unable to argue to the jury that the alleged agreement
19 did not restrain trade, but instead served a pro-competitive purpose. The jury will be left only to
20 determine whether an agreement was reached, not whether the agreement violated the Sherman
21 Act. In other words, a critical element of a criminal offense would not be decided by the jury. This
22 violates due process. *In re Winship*, 397 U.S. 358, 364 (1970) (“Lest there remain any doubt about
23 the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process
24 Clause protects the accused against conviction except upon proof beyond a reasonable doubt of
25 every fact necessary to constitute the crime with which he is charged.”); *see also* Robert E.
26 Connolly, *Some “Twinkling of the Eye” Thoughts on NCAA v. Alston*,

1
2 <http://antitrustconnect.com/2021/06/30/some-twinkling-of-the-eye-thoughts-on-ncaa-v-alston/>;
3 Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, COLUM. BUS. L.R. (2020)
4 available at <https://journals.library.columbia.edu/index.php/CBLR/article/view/8477>.

5
6 **IV. THE INDICTMENT FAILS TO DEMONSTRATE THE ALLEGED
CONDUCT’S EFFECT ON INTERSTATE COMMERCE**

7
8 “The Sherman Act reaches only activities in the flow of interstate commerce or that, ‘while
9 wholly local in nature,’ would substantially affect interstate commerce if successful.” *United*
10 *States v. Vega-Martinez*, 949 F.3d 43, 48 (1st Cir. 2020) (quoting *McLain v. Real Estate Bd. of*
11 *New Orleans, Inc.*, 444 U.S. 232, 241–42 (1980)). There are two theories available to satisfy the
12 interstate commerce element of antitrust laws. First, “that the acts complained of, occurred within
13 the flow of interstate commerce,” and second, that “the acts complained of, occurred wholly on
14 the state or local level, in intrastate commerce, but substantially affected interstate commerce.”
15 *Las Vegas Merchant Plumbers Ass’n v. United States*, 210 F.2d 732, 739 n.3 (9th Cir. 1954). The
16 Indictment failed to adequately allege interstate commerce sufficiently to satisfy either theory of
17 this element.

18
19 Here, all alleged conduct was limited to a single customer in a single market: CCSD.
20 Indeed, most of the allegations center on nurses who worked at a single school, the John F. Miller
21 School, within the Clark County school district. Even if the Government sufficiently alleged an
22 agreement to fix the wages of nurses working at CCSD, the government has failed to allege that
23 the agreement affected interstate commerce. There are no allegations that any affected nurse lived
24 anywhere other than Nevada. There are no allegations that any customer of AOC or Company A
25 other than CCSD, located entirely in Nevada, was affected. There are no allegations that any
26 employees of AOC or Company A engaged in the alleged agreement outside of Nevada. And there
27
28

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

1
2 are no allegations that any conduct alleged to be taken by Mr. Hee or by Individual 1 occurred
3 outside of Nevada. The possibility of proving that the conduct happened in the flow of interstate
4 commerce is therefore foreclosed. *See Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133,
5 1143 (9th Cir. 2003) (“Monopolizing the local lemonade stand doesn’t get you into federal
6 court.”).

7
8 Neither has the Government alleged any substantial effect on interstate commerce. There
9 is no allegation here that the restraint itself (the alleged no-poach agreement) had a substantial
10 adverse effect on interstate commerce. Instead, the Government made a feeble attempt to satisfy
11 the interstate commerce element by alleging that: (1) CCSD paid AOC and Company A money
12 that traveled in interstate commerce; (2) AOC and Company A paid their nurses money that
13 traveled in interstate commerce; (3) “the payments that CCSD made to AOC and to Company A
14 for the services rendered by their respective nurses were funded in substantial part by the State of
15 Nevada. The State of Nevada funding included a substantial portion of federal funding from
16 Medicaid. . . .”; and (4) AOC and Company A employed healthcare workers in multiple states.
17 (ECF 1 at ¶ 15(a-d)).

18
19 These allegations are insufficient to establish a substantial effect on interstate commerce.
20 Merely alleging that “payments . . . traveled in interstate commerce” is insufficient to meet the
21 interstate commerce element of a Sherman Act claim. In *United States v. Oregon St. Med. Society*,
22 the Supreme Court concluded that the interstate commerce element was not met where the alleged
23 restraint—an allocation of territories—occurred only in one state and interstate commerce was
24 “not proven . . . to be adversely affected” even though some payments traveled to out of state
25 entities. 343 U.S. 326, 338 (1952); *see also Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 342
26 (1991) (Scalia, J., dissenting) (summarizing *United States v. Oregon* as holding that “in order to
27
28

1
2 prevail, the Government had to show that the *restraint itself* (the allocation of territories), had a
3 substantial adverse effect on interstate commerce.”). To allow this theory to support a criminal
4 antitrust case would mean that any good or service for which money is paid substantially affects
5 interstate commerce if payment simply moves via wire from one bank to another across state lines.
6
7 If that were sufficient, it would subject every good or service paid for to the federal application of
8 the Sherman Act. This would effectively eliminate this element of the Sherman Act, federalizing
9 all commerce and potentially having significant constitutional implications.

10 Nor does a mere allegation of federal funding meet the level necessary to allege adequate
11 interstate commerce. Even the relatively recent First Circuit decision addressing the interstate
12 commerce element of criminal Sherman Act violations, *United States v. Vega-Martinez*, 949 F.3d
13 43 (1st Cir. 2020), is distinguishable. The activity in this case is at least one level removed from
14 the federal funding in that case. In *Vega-Martinez*, the defendants were rigging bids and allocating
15 the market for transportation contracts that were being paid with funds allocated via federal No
16 Child Left Behind funds. *Vega-Martinez*, 949 F.3d at 49. The unlawful activity had a direct effect
17 on the federal funding because the amount of federal funds being spent was directly impacted by
18 the activity. *Vega-Martinez*, 949 F.3d at 50. Moreover, the buses that would be used in the
19 execution of the transportation contracts also traveled in interstate commerce because they were
20 purchased in Florida and used in Puerto Rico. *Id.*

21
22
23 Not so here. Instead, in this Indictment, the Government alleges only that the State of
24 Nevada received federal funding, that CCSD received funding from the State of Nevada, and that
25 CCSD paid AOC and Company A. But the Indictment fails to allege that the money paid to AOC
26 and Company A actually came from federal funds. And there is no allegation that the alleged
27 conduct affected the amount of funding the federal government provided to the State of Nevada.
28

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

1
2 In fact, the Government does not even allege that the contracts between the CCSD and AOC and
3 between CCSD and Company A were affected by the supposed agreement. Only the employment
4 relationship among AOC and Company A and the nurses themselves was allegedly affected. And
5 while the Indictment alleges that CCSD's relationship with AOC and Company A was based on
6 contracts entered into in August 2013, years before the alleged agreement (ECF 1 ¶ 8) and
7 "periodic amendments extending the contract" (¶ 9), the entire alleged conspiracy occurred within
8 one academic year. Without additional allegations regarding how the alleged agreement might
9 have affected the payment terms of the 2013 agreement between AOC and CCSD, there could be
10 no allegation that federal funding was affected. And without an effect on federal funding, the mere
11 allegation that federal funds were provided to an entity at least two steps removed from the conduct
12 cannot be sufficient, or else it would completely read the interstate commerce requirement out of
13 any antitrust matter involving a state or municipal entity.
14
15

16 Finally, the fact that AOC operated in multiple states is not sufficient to meet the interstate
17 commerce element. It is not enough to show that "some aspects of a defendant's business have a
18 relationship to interstate commerce." *Furlong v. Long Island College Hosp.*, 710 F.2d 922, 926
19 (2d Cir. 1983). "Rather, the inquiry must be whether the defendant's activity that has allegedly
20 been 'infected' by unlawful conduct can be shown 'as a matter of practical economics' to have a
21 not insubstantial effect on the interstate commerce involved." *Id*; see also *Hamilton Chapter of*
22 *Alpha Delta Phi, Inc. v. Hamilton Coll.*, 128 F.3d 59, 67 (2d Cir. 1997) (*Furlong* stands for the
23 proposition that one cannot "establish the requisite impact on commerce by reference to all of a
24 defendant's business activities.").

25
26 Here, the Indictment does not allege any effect on interstate commerce and certainly not a
27 substantial effect. It must be dismissed for that reason as well.
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

The Government seeks to break new legal ground with this Indictment. It is antithetical to the constitutional principles of due process and fair notice to allow a criminal prosecution to establish new law. No court has recognized agreements not to recruit or hire employees as a *per se* violation of the Sherman Act, and the first court to do so—if any—must do so in a civil case. Without a history of recognition of the alleged conduct as a *per se* violation of the Sherman Act, the Government has failed to allege a *per se* violation. Finally, the Indictment does not allege any effect on interstate commerce and certainly not a substantial effect. For the reasons stated herein, the Indictment should be dismissed.

Dated: September 3, 2021

Respectfully submitted,

By: Carole S. Rendon
Carole S. Rendon (*pro hac vice*)
Mary Pat Brogan (*pro hac vice*)
Sean Sandolowski (*pro hac vice pending*)
BAKER & HOSTETLER LLP
127 Public Square, Suite 2000
Cleveland, Ohio 44114
Telephone: 216.621.0200
Facsimile: 216.696.0740
crendon@bakerlaw.com
ssandolowski@bakerlaw.com
mbrogan@bakerlaw.com

Kathleen Bliss
KATHLEEN BLISS LAW PLLC
1070 W. Horizon Ridge Pkwy.,
Suite 202
Henderson, NV 89012
Office: 702.463.9074
kb@kathleenblisslaw.com
Attorneys for Defendant VDA OC, LLC

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

In accordance with Rule 49(c) of the Federal Rules of Criminal Procedure and Rule 47-11 of the Local Rules of Practice of the United States District for the District of Nevada, I certify that I am an employee of KATHLEEN BLISS LAW PLLC, and that on this 3rd day of September 2021, I did cause a true copy of:

DEFENDANT VDA OC'S MOTION TO DISMISS

To be served via electronic service by the U.S. District Court CM/ECF system to the parties on the Electronic Filing system in this action.

By: /s/ Priscilla Horvath
An employee of
KATHLEEN BLISS LAW PLLC

KATHLEEN BLISS LAW PLLC
1070 W. HORIZON RIDGE PKWY., SUITE 202
HENDERSON, NEVADA 89012
TEL 702.793.4202