

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

SURGICAL CARE AFFILIATES LLC, and
SCAI HOLDINGS, LLC

Defendants.

No. 3-21-cr-00011-L

DEFENDANTS' NOTICE OF ADDITIONAL AUTHORITY

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April 21, 2022

Defendants file the instant notice to bring to the Court's attention recent developments in two cases that the United States previously flagged for the Court.

DaVita. On February 1, 2022, the United States filed a Notice of Additional Authority "to bring to the Court's attention" the decision in *United States v. DaVita Inc.*, No. 21-cr-00229 (D. Colo.), "denying a motion to dismiss" the indictment in that case. Dkt. 96 ("February 1 Notice"). As the United States explained in its February 1 Notice, and as this Court is well aware, "[t]he conduct charged in Count 1 of *DaVita* charges the same conspiracy and consists of substantially the same allegations as Count 2 in this case." *Id.*

Defendants filed a response to that February 1 Notice on February 10, 2022, observing that the *DaVita* decision was not nearly as favorable to the government as it had suggested. Dkt. 101. Specifically, Defendants pointed out that the *DaVita* court (1) rejected the government's theory that employee non-solicitation agreements are by definition *per se* unlawful market-allocation restraints, (2) concluded that even no-hire agreements do not automatically trigger *per se* condemnation, and (3) ruled that, to obtain a Sherman Act conviction based on a non-solicitation/no-hire agreement, the government must prove (a) that the specific agreement alleged is in fact an agreement to "allocate the market," and (b) that the "main purpose" of the agreement was to "stifl[e] competition." *Id.*; see Dkt. 96 Ex. A at 17-18.

Recent developments in the *DaVita* case confirm that the earlier decision the government flagged for the Court in its February 1 Notice fatally undermined the government's *per se* theory. Trial commenced in *DaVita* on April 4, 2022. After a ten-day trial, the jury in *DaVita* returned a verdict on April 15, 2022. The jury found all defendants **not guilty** on all counts. See Ex. A, Jury Verdict, *United States v. DaVita Inc.*, No. 21-cr-00229 (D. Colo. Apr. 15, 2022), Dkt. 264.

Jindal. On December 8, 2021, the United States filed a Notice of Additional Authorities “to bring to the Court’s attention,” *inter alia*, the decision in *United States v. Jindal*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex.), denying “a motion to dismiss an indictment charging the defendants with a *per se* Section 1 Sherman Act violation for entering into an agreement to fix wages.” Dkt. 71 (“December 8 Notice”) at 1. Defendants filed a response to that December 8 Notice on December 17, 2021, observing that the *Jindal* decision was not nearly as favorable to the government as it had suggested. Dkt. 81. Specifically, Defendants pointed out that the *Jindal* court (1) “clearly stated that the government may criminally prosecute parties to an allegedly unlawful agreement **only** when the type of agreement at issue ‘ha[s] been *per se* illegal for years,’ and (2) concluded that the alleged agreement there—unlike the alleged agreement here—was one to explicitly fix wages. *Id.* at 1-2.

Recent developments in the *Jindal* case confirm that the government’s *per se* theory here is a dead letter. Trial commenced in *Jindal* on April 4, 2022. After a nine-day trial, the jury in *Jindal* returned a verdict on April 14, 2022. The jury found all defendants **not guilty** on all antitrust counts.¹ *See* Ex. B, Jury Verdict, *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex. Apr. 14, 2022), Dkt. 112.

¹ The jury found *Jindal* guilty on a single, unrelated count for obstruction based on making false and misleading statements to the Federal Trade Commission. *See* Ex. B, Jury Verdict, *Jindal* (finding *Jindal* guilty on Count Three of the First Superseding Indictment); *see also* Ex. C, First Superseding Indictment, *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex. Apr. 15, 2021), Dkt. 21.

CERTIFICATE OF SERVICE

I hereby certify that on April 21, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of Texas by using the CM/ECF system per Local Rule 49.2. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/Taj J. Clayton
Taj J. Clayton