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

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

s/Paul Coggins
PAUL COGGINS
LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, TX 75201
214-740-8104
214-756-8104 (facsimile)
Texas Bar No. 04504700

PAUL D. CLEMENT*
ERIN E. MURPHY*
MATTHEW D. ROWEN*
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004

JAMES H. MUTCHNIK*
DANIEL E. LAYTIN*
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654

SARA S. TATUM*
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, NY 10022

Counsel for Defendant SCAI Holdings, LLC

s/Robert L. Webster
ROBERT L. WEBSTER
7557 Rambler Road, Suite 525
Dallas, TX 75231
469-758-4150
469-758-4160 (facsimile)
Texas Bar No. 21053375

DAVID B. ANDERS*
SARAH K. EDDY*
KEVIN S. SCHWARTZ*
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd St.
New York, NY 10019

Counsel for Defendant Surgical Care Affiliates LLC

March 26, 2021

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INTRODUCTION

This prosecution marks the first time in history that the government has tried to prosecute anyone criminally for allegedly entering into an agreement not to solicit another company's employees. That is not because Congress recently passed a new statute criminalizing non-solicitation agreements. Instead, the criminal prohibition the government invokes to bring this novel prosecution is the notoriously imprecise Section 1 of the Sherman Act, which has been on the books for over a century. Because of the imprecision and potential breadth of the Sherman Act, the government itself has long forsworn the possibility of a criminal prosecution for conduct subject only to the rule of reason and has limited criminal prosecutions to conduct that constitutes a "*per se*" violation of the Act—*i.e.*, conduct that long judicial experience has proven to be inherently "pernicious" and pervasively anticompetitive. Yet no court has ever held that standalone non-solicitation agreements like the kind alleged in this Indictment are subject to the *per se* rule.

That alone should preclude this criminal prosecution. Not only has there never been a criminal prosecution for a non-solicitation agreement, but the limited judicial experience with such agreements *in the civil context* has taught precisely the opposite: Non-solicitation agreements can and often do have pro-competitive effects, and the parties to such agreements rarely have market power over employees. The Indictment thus must be dismissed as a matter of law at the threshold because it fails to state a *per se* offense. *See* Fed. R. Crim. P. 12(b)(3)(v).

Fundamental principles of due process and fair notice also bar this prosecution. Neither the Sherman Act nor any case law provides any fair notice that agreements not to solicit another company's employees are *per se* illegal. Applying a *per se* rule here for the first time in a criminal case—before *per se* treatment has been established in the civil context—would violate the bedrock rule that the criminal law must provide fair notice of what it prohibits. For this reason, too, the Indictment must be dismissed.

STATUTORY BACKGROUND

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. §1. Courts have never "taken a literal approach" to interpreting that sweeping language. *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Instead, in keeping with the reality that some conduct—although a literal "restraint of trade"—may be procompetitive and beneficial to consumers, the Supreme Court has "repeated time and again that §1 'outlaw[s] only *unreasonable* restraints.'" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (emphasis added) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)); *see also Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2283 (2018) ("'[I]n view of the common law and the law in this country' when the Sherman Act was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.'" (citation omitted)).

For this reason, courts reviewing Section 1 claims "presumptively appl[y] rule of reason analysis." *Texaco*, 547 U.S. at 5. The rule of reason requires the factfinder, in deciding whether the challenged restraint is an "unreasonable" one, to consider "all of the circumstances," including "specific information about the relevant business," "the restraint's history, nature, and effect," "[w]hether the businesses involved have market power," and the "actual effect" of the challenged restraint on the relevant market." *Leegin*, 551 U.S. at 885-86.

Since Section 1 was enacted, the Supreme Court has determined that some rare restraints are so "predictable" and "pernicious" in their anticompetitive effect, and have "such limited potential for procompetitive benefit," that they are *per se* illegal. *State Oil Co.*, 522 U.S. at 10. But *per se* treatment is justified only when courts have had such "considerable experience" evaluating a particular type of restraint that they can "predict with confidence that it would be

invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886-87.[1] That high bar reflects the harsh consequences that follow from *per se* treatment. If something is subject to *per se* treatment, then it is *per se* illegal, period, without any need to consider intent, market power, or pro-competitive justifications. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210-11 (1940). *Per se* treatment is thus understandably reserved for the very narrow class of restraints that experience has taught have such "'manifestly anticompetitive' effects" that they "'lack … any redeeming virtue.'" *Leegin*, 551 U.S. at 886.

After more than a century of experience, the universe of *per se* conduct is limited to three kinds of agreements among competitors: to fix prices, divide markets, and rig bids.[2] *See, e.g.*, *Texaco*, 547 U.S. at 5 (price fixing); *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (market allocation); *United States v. Rose*, 449 F.3d 627, 630 (5th Cir. 2006) (bid rigging). In recent years, moreover, not only has the Supreme Court "been cautious in extending the *per se* approach to [new] claims that fall outside certain previously enumerated categories of liability," *Eichorn v. AT&T Corp.*, 248 F.3d 131, 143 (3d Cir. 2001), but the trend line has been decidedly in the opposite direction. The Supreme Court has repeatedly overruled cases that extended the *per se* rule to other contexts, as time and experience have eroded the faulty categorical assumptions on which they were based. *See, e.g.*, *Leegin*, 551 U.S. at 881-82; *State Oil Co.*, 522 U.S. at 7; *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57 (1977).

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[1] *See also Texaco*, 547 U.S. at 5 ("*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.'" (quoting *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 692 (1978)); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, §1909b (4th ed. 2020) ("The premise of the *per se* rule is that *judicial* experience with a certain class of restraints justifies a more expedited treatment.").

[2] Boycotts have sometimes been described as *per se* illegal, but "precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

The critical distinction between the *per se* and rule-of-reason standards takes on even more importance in criminal cases. Given the harsh consequences that follow from criminal judgments, it is a bedrock rule of due process "that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed." *United States v. Ramos*, 537 F.3d 439, 457 (5th Cir. 2008) (quoting *United States v. Lanier*, 520 U.S. 259, 265 (1997)); *see also, e.g.*, *Skilling v. United States*, 561 U.S. 358, 402-03 (2010). Yet "unlike most traditional criminal statutes," the Sherman Act "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). On the contrary, "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-41. Imposing criminal liability, with the risk of substantial fines, imprisonment, and other collateral consequences, for conduct falling in a "gray zone" would be "difficult to square with the generally accepted functions of the criminal law." *Id.* at 441-42.

For these reasons, the government has a longstanding policy of criminally prosecuting only *per se* violations of the Sherman Act. Since the 1950s, the Department of Justice has taken the position that criminal enforcement should not extend to conduct governed by the rule of reason, but should instead be limited to price fixing and comparable cases where courts have widely concluded that "specific intent" to restrain trade is evident from the conduct itself. *See* U.S. Dep't of Justice, *Report of the Attorney General's Nat'l Comm. to Study the Antitrust Laws* (1955). This policy remains in force today. *See* U.S. Dep't of Justice, Antitrust Div., *Antitrust Division Manual*, at III-12 (5th ed. 2017), https://www.justice.gov/atr/file/761166/download ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and

territorial allocations."); *accord* Br. for the U.S. in Opp'n at 11 n.1, *Sanchez v. United States*, No. 19-288 (U.S. Nov. 25, 2019) ("*Sanchez* BIO") ("[T]he government brings criminal antitrust prosecutions only based on conduct that violates the per se rule.").

Indeed, the Justice Department could not abandon this policy even if it wanted to because a criminal rule-of-reason case would be anathema to bedrock principles of fair notice and due process. Here, too, the trend line of recent Supreme Court cases is unmistakable: In case after case, the Court has demanded greater clarity in criminal statutes and rejected federal prosecutorial efforts to push the boundaries of vague and/or broad statutory text. *See, e.g.*, *Kelly v. United States*, 140 S.Ct. 1565, 1574 (2020); *McDonnell v. United States*, 136 S.Ct. 2355, 2372-73 (2016); *Yates v. United States*, 574 U.S. 528, 547-48 (2015); *Bond v. United States*, 572 U.S. 844, 866 (2014); *Sekhar v. United States*, 570 U.S. 729, 737-38 (2013); *Skilling*, 561 U.S. at 402-03.

FACTUAL ALLEGATIONS

The Indictment charges Surgical Care Affiliates LLC and SCAI Holdings, LLC (collectively, "SCA") with violations of the Sherman Antitrust Act. SCA provides outpatient surgery services across the United States. Indictment ("Indict.") ¶2. SCA partners with physicians, health plans, and health systems to deliver appropriate surgeries outside of the hospital setting, at a lower overall cost and with better outcomes than in hospitals.

In May 2008, SCA hired "Individual 1" as its president and Chief Executive Officer. Individual 1 served in that role until 2017, after SCA was acquired by a subsidiary of UnitedHealth Group. According to the Indictment, Individual 1, on SCA's behalf, entered into agreements with the CEOs (Individuals 2 and 3) of two other companies not to solicit certain of their employees—in particular, "senior-level employees"—from their companies and not to consider those employees for a position unless they had informed their incumbent employers that they were seeking a job at the other firm. *Id.* ¶¶4, 9, 10, 11, 18, 19. Under these alleged agreements, once

an employee announced her intentions to change firms, she could be considered for a position and hired. *Id.* ¶11. The non-solicitation agreement concededly covered only senior employees and allowed for proactive recruitment of "junior people (below Director)." *Id.* ¶¶11, 19.

The agreement between Individual 1 and Individual 2 allegedly began as early as May 2010 and continued until at least October 2017. *Id.* ¶9. The agreement between Individual 1 and Individual 3 allegedly began as early as February 2012 and continued until at least July 2017. *Id.* ¶17. The Indictment alleges that the terms of these agreements were communicated to people involved in the recruiting processes at all three companies, including "executives," "employees," "recruiters," and "consultants," as well as the candidates for employment. *Id.* ¶19. But the Indictment makes no allegation that anyone tried to conceal the agreements or believed they were unlawful; nor does it allege that the companies possessed market power or that the agreements resulted in the suppression of anyone's wages. Like most national companies, SCA competes to hire management employees from hundreds of companies across the country.

The Indictment alleges that the alleged agreements are *per se* violations of the Sherman Act. *See id.* ¶¶9, 17. Thus, in the government's view, to obtain a conviction, it does not need to prove market power, or intent to commit a crime or restrain trade, or any actual effect on trade; all it must prove is the bare fact that the alleged non-solicitation agreements between the participants existed. The government does not base that view on any long line of settled precedent declaring non-solicitation agreements to be *per se* violations of the Sherman Act. Nor could it, as virtually every court to confront such agreements to date has declined to subject them to *per se* analysis. Instead, the government purports, including in this criminal case for the first time in its history, to have unilaterally *declared* this non-solicitation agreement to be a *per se* violation of the Sherman Act, and to have done so through a non-binding "guidance" document the Justice Department

issued in 2016. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Guidance for Human Resource Professionals* 4 (Oct. 2016), https://www.justice.gov/atr/file/903511/download ("2016 Guidance"). That guidance was issued more than four years after the Indictment alleges that the purportedly *per se* illegal agreements at issue here were formed.

LEGAL STANDARD

"[A]n indictment must state each element of the charged crime and allege that the defendant's conduct met each of those elements." *United States v. Suarez*, 966 F.3d 376, 382 (5th Cir. 2020); *see also* Fed. R. Crim. P. 7(c)(1) (indictments must provide "a plain, concise and definite written statement of the essential facts constituting the offense charged"). A court must dismiss an indictment that fails to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). "The propriety of granting a motion to dismiss an indictment … by pretrial motion is by-and-large contingent upon whether the infirmity in the prosecution is essentially one of law or involves determinations of fact…. If a question of law is involved, then consideration of the motion is generally proper." *United States v. USPlabs, LLC*, 338 F.Supp.3d 547, 557 (N.D. Tex. 2018) (quoting *United States v. Fontenot*, 665 F.3d 640, 644 (5th Cir. 2011)). "In reviewing a challenge to an indictment alleging that it fails to state an offense, the court is required to take the allegations of the indictment as true and to determine whether an offense has been stated." *Fontenot*, 665 F.3d at 644.

The question of whether to apply the *per se* rule or the rule of reason is a question of law. *See, e.g.*, *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 337 n.3, 354 (1982); *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 848 (5th Cir. 2015). That question is particularly critical to answer as early as possible, for whether conduct is subject to the *per se* rule or the rule of reason has considerable implications for how a case proceeds. It could affect not only what instructions to provide to the jury at the start and conclusion of the trial, but also the scope of the government's pre-trial Rule 16, *Brady* and *Jencks* obligations, what evidence must be introduced at trial by the

government to establish each element of the alleged offense, what lines of cross-examination in the government's case-in-chief may be pursued by the defendants, and what defense evidence may be submitted throughout any trial. *Cf. Socony-Vacuum Oil Co.*, 310 U.S. at 210-11.

Finally, to the extent a criminal indictment does not allege the elements of a rule-of-reason offense (market power, intent, anticompetitive effect, etc.), but instead alleges only a *per se* offense, it must be dismissed if it fails to state a cognizable *per se* offense under the Sherman Act.

SUMMARY OF ARGUMENT

This case marks the first time in history that the government has ever tried to bring a criminal prosecution under the Sherman Act against anyone for entering into an agreement not to solicit another company's employees. That is not because non-solicitation agreements are novel or uncommon; they are neither. Instead, it is because no court has ever accepted the argument that non-solicitation agreements are *per se* illegal. The government is thus asking this Court to hold for the first time ever—in the context of a criminal prosecution, no less—that non-solicitation agreements are so obviously anticompetitive that entering into one is equivalent to entering into a conspiracy to fix prices or to rig bids, or to allocate customers, territories, or products. That argument not only fails on its own terms, but is foreclosed by bedrock due process principles.

The Supreme Court has made clear both that the *per se* rule is reserved for conduct that is "manifestly anticompetitive" and without social value, *Leegin*, 551 U.S. at 886, and that a practice can be declared *per se* illegal only after substantial judicial experience applying the rule of reason confirms that the practice is virtually always anticompetitive. Yet only a handful of courts have even considered challenges to employee non-solicitation agreements—all in the civil context, and all over the past decade. And not one of those courts has held that they are *per se* violations of the Sherman Act. Indeed, even the government has recognized that what it collectively labels "no-

poaching" agreements are not always anticompetitive—a concession that should foreclose its attempt to convert a subset of those agreements into *per se* violations.

Subjecting non-solicitation agreements to *per se* treatment for the first time ever in this *criminal* prosecution would also violate the fundamental due process principle that the relevant law must provide clear and fair notice of what it proscribes. Because the Sherman Act itself is lacking in clarity, and there is no body of formal regulations identifying what it proscribes, fair notice in this context comes from judicial decisions. And at least in the criminal context, fair notice must come from case law pre-dating the conduct that clearly establishes that such conduct is a *per se* violation. Extending the *per se* rule to this novel context in this novel prosecution thus would violate foundational rules of fair notice and due process.

The dynamics presented by this motion to dismiss this unprecedented criminal indictment are asymmetrical. If the Court grants the motion, the government may then immediately seek appellate review under 18 U.S.C. §3731 without any risk that double jeopardy might bar further proceedings. By contrast, if the Court denies the motion, SCA will have to defend itself at trial against that unprecedented *per se* theory before it ever obtains further legal review. Moreover, if the Court accepts the government's novel *per se* theory, the government may also seek to reject meaningful discovery, cross-examination, trial defenses, and jury instructions on issues like intent, market power, and market effects. Dismissal thus not only is legally correct, but is the best way to avoid expending considerable party and judicial resources on a fundamentally flawed trial.

ARGUMENT

I. The Indictment Fails To Plead A *Per Se* Violation Of The Sherman Act.

The Indictment alleges that SCA committed a *per se* violation of the Sherman Act. *See* Indict. ¶¶9, 17. But the mere fact that the Indictment alleges a *per se* violation does not make it so. Instead, whether the allegations in the Indictment *actually* constitute a *per se* violation is a

legal question for this Court to resolve. *See Maricopa Cnty*., 457 U.S. at 337 n.3, 354; *MM Steel*, 806 F.3d at 847; *see also* Areeda & Hovenkamp, *supra*, §1909b ("selection of a [standard] is entirely a question of law"). The question when determining whether the *per se* rule applies is whether "experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *State Oil Co.*, 522 U.S. at 10 (quoting *Maricopa Cnty.*, 457 U.S. 344). It is "only after considerable experience with certain business relationships that courts classify them as *per se* violations." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 607-08 (1972). "When the Courts are uncertain of the competitive significance of a particular type of restraint, they decline to apply the *per se* label." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1365 (5th Cir. 1980). For the *per se* label to apply, there must be both considerable judicial experience with the type of restraint at issue and a clear consensus that the restraint is categorically anticompetitive. Here, there is neither.

Neither the Supreme Court nor any court of appeals has ever even *addressed* whether a standalone agreement not to solicit another employer's employees violates Section 1 of the Sherman Act, let alone held such agreements to be *per se* illegal. And of the handful of district courts that have considered such agreements in the civil context in recent years, not one has applied the *per se* rule to such an agreement. Most courts that been asked to do so have refused. *See, e.g.*, *Yi v. SK Bakeries, LLC*, 2018 WL 8918587, at *4 (W.D. Wash. Nov. 13, 2018); *Molinari v. Consol. Energy Inc.*, 2012 WL 4928489, at *4 (W.D. Pa. Oct. 16, 2012). Others (none of which involved a standalone non-solicitation agreement) did not categorically reject *per se* treatment at the threshold, but concluded that additional factual development might well compel application of the rule of reason. *See, e.g.*, *United States v. eBay, Inc.*, 968 F.Supp.2d 1030, 1039-40 (N.D. Cal. 2013); *Fonseca v. Hewlett-Packard Co.*, 2020 WL 6083448, at *10 (S.D. Cal. Feb. 3, 2020); *In re*

High-Tech Emp. Antitrust Litig., 856 F.Supp.2d 1103, 1122 (N.D. Cal. 2012). And in the only one of those cases that later resolved the question after initially reserving judgment, the court declined to apply the *per se* rule. *See Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 2020 WL 2553181, at *13 (S.D. Cal. May 20, 2020). Accordingly, to the extent there is any judicial consensus about non-solicitation agreements, it is that they are *not* subject to *per se* treatment.

Indeed, courts have not even applied the *per se* rule even when dealing with agreements more restrictive than those alleged here, such as agreements not to *hire* (as opposed to not to *solicit*) certain individuals from competitors. *See, e.g.*, *Eichorn*, 248 F.3d at 143 (rejecting contention that "no-hire agreement was per se illegal" after finding "no support within the relevant case law for this label"); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (rejecting *per se* label because "no-switching" agreement did not "fit into any of the established *per se* categories" and the "anticompetitive effect on the market … [was] not obvious"); *Coleman v. Gen. Elec. Co.*, 643 F.Supp. 1229, 1243 (E.D. Tenn. 1986) (rejecting application of *per se* rule to no-hire agreement), *aff'd* 822 F.2d 59 (6th Cir. 1987); *Nichols v. Spencer Int'l Press, Inc.*, 371 F.2d 332, 336-37 (7th Cir. 1967) (remanding for application of rule of reason to challenge to "no-switching" agreements); *cf. Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 900 (9th Cir. 1983) (rejecting *per se* label for "noninterference agreement" with departing executive); *id.* at 906 (Kennedy, J., concurring in part and dissenting in part) ("In my view, the agreement is pro-competitive; it is not governed by per se tests, and it satisfies the rule of reason."). In fact, only a single district court has held a no-hire agreement *per se* illegal—and even that single decision was concededly hard to reconcile with circuit precedent. *See In re Ry. Indus. Emp. No-Poach Antitrust Litig.*, 395 F.Supp.3d 464 (W.D. Pa. 2019). *But see Eichorn*, 248 F.3d at 143 (reviewing "the relevant case law" and finding "no

support" for the proposition that a "no-hire agreement [i]s per se illegal"). No other court has embraced that rule, let alone extended it to non-solicitation agreements.[3]

While the Fifth Circuit has not squarely addressed the question, it too has indicated that even no-hire agreements are not subject to the *per se* rule. In *Quinonez v. National Association of Securities Dealers*, 540 F.2d 824, 827 (5th Cir. 1976), the court considered a blanket no-hire agreement not to "pirate" one another's employees or hire employees who had been fired or rejected by the other firms. *Id.* at 827. The appeal arose because the district court held that a no-hire agreement did not even state a potential violation of the Sherman Act. The Fifth Circuit reversed, concluding that the district court "should have grappled with these antitrust claims on a factual record" because it was not clear there could be "no set of facts" entitling the plaintiff to relief. *Id.* at 830. But in doing so, the Fifth Circuit nowhere suggested that the *per se* rule might be appropriate; to the contrary, the court went out of its way to note that the "real facts" *would likely foreclose relief*. *Id.* And the court relied on a Seventh Circuit case that applied the "standard of reasonableness" to "no-switching" agreements. *Nichols*, 371 F.2d at 337. None of that is consistent with a rule that no-hire (let alone less restrictive non-solicitation) agreements are *per se* unlawful.

The Supreme Court's decision in *Radovich v. NFL*, 352 U.S. 445 (1957), likewise supports the proposition that no-hire agreements are not *per se* anticompetitive. There, the plaintiff alleged that he had been "blacklisted" pursuant to an agreement among various professional football

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[3] Courts have also confronted the issue of non-solicitation and no-hire agreements in the specific context of franchise agreements, where one franchisee is prevented from hiring another's employee for a period of time. While franchise agreements raise distinct issues, no court has applied the *per se* rule to a standalone non-solicitation agreement in that context either. *See Fuentes v. Royal Dutch Shell PLC*, 2019 WL 7584654, at *1 (E.D. Pa. Nov. 25, 2019) (collecting cases).

organizations not to hire certain players. *Id.* at 448. And there, too, the lower courts held that such allegations did not suffice to state any kind of Sherman Act claim. The Court reversed, but in doing so, it made clear that the "claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade'"—*i.e.*, under the rule of reason. *Id.* at 453. Such a blanket no-hire policy is obviously more restrictive than an agreement that employers will not solicit each other's employees, but are free to hire anyone who approaches them of her own accord. Yet the Court in *Radovich still* did not apply the *per se* rule.

The absence of cases extending the *per se* rule to non-solicitation agreements—or even more restrictive no-hire agreements—is no historical accident. Such agreements are not obviously anticompetitive. Employers rarely (if ever) wield market power over the host of diverse and fluid labor markets from which employees are hired. *See Bogan*, 166 F.3d at 515-16; *Coleman*, 643 F.Supp. at 1243-44; *cf. Weisfeld v. Sun Chem. Corp.*, 84 F.App'x 257 (3d Cir. 2004) (affirming decision declining to certify a class of employees of companies that had entered into a "no hire" agreement given variation among employees, including their propensity to seek out new jobs if they were unhappy with their wages and the extent of their skills and responsibilities). In addition, companies employ similar restrictions on their employees unilaterally, which suggests that these restrictions are neither inherently anticompetitive nor inherently an effort to abuse market power.

Indeed, non-solicitation agreements can have the procompetitive benefit of ensuring employee longevity and minimizing volatility in ways that make a company a better and more vigorous competitor. Employers, particularly in specialized industries, invest significant time and money into training employees and depend on employee longevity to compete effectively. A non-solicitation agreement lessens the risk that a competitor will free ride on that training investment and disrupt employee longevity by waiting until employees are fully trained and then poaching the

best ones. That concern is especially acute with firms that come together for economically productive cooperation like a divestiture or consulting project. Absent an agreement not to solicit each other's employees, firms would be hesitant to cooperate with potential competitors for fear of losing their best talent. For similar reasons, courts have held that non-solicitation and non-compete agreements between employers and their employees are generally enforceable, and an agreement not to invite a competitor's employees to breach those agreements avoids unnecessary and burdensome litigation over tortious interference with contract and related theories. In fact, courts have upheld reciprocal no-hire agreements when executed for the joint purpose of avoiding litigation arising from violations of the companies' respective non-compete agreements. *See, e.g.*, *Hangar v. Berkley Grp., Inc.*, 2015 WL 3439255, at *7 (W.D. Va. May 28, 2015); *cf. Aydin Corp.*, 718 F.2d at 900 (analyzing noninterference agreement and recognizing interest in "preserving trade secrets and protecting investments in personnel").

Consistent with those pro-competitive realities, even the government has not claimed that non-solicitation (or even no-hire) agreements are always anticompetitive. When the government put out its most recent "primer" on *per se* antitrust offenses, it failed even to mention "no-poaching" agreements. *See* U.S. Dep't of Justice, *Price Fixing, Bid Rigging, And Market Allocation: What They Are And What To Look For* (Feb. 2021), https://www.justice.gov/atr/file/810261/download. And in issuing its guidance in 2016, the government challenged as *per se* illegal only "naked" "no-poaching agreements," while recognizing that such agreements are permissible if "ancillary" to certain other activities. 2016 Guidance 4; *see also, e.g.*, Corrected Statement of Interest at 11-12, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-00244-SAB (E.D. Wash. Mar. 8, 2019), Dkt. 34 (conceding that "the per se rule does not apply to all no-hire and no-solicitation agreements"); Corrected Statement of Interest at 11-13,

Richmond v. Pullman Inc., No. 2:18-cv-00246-SAB (E.D. Wash. Mar. 8, 2019), Dkt. 45 (same); Corrected Statement of Interest at 11-14, *Harris v. CJ Star, LLC*, No. 2:18-cv-00247-SAB (E.D. Wash. Mar. 8, 2019), Dkt. 38 (same).

The government's concession that not all non-solicitation agreements are unlawful is fatal to its *per se* theory here. If non-solicitation agreements are permissible in some circumstances, then it follows that they are not illegal *per se*. After all, "[t]he *per se* rule is based on the premise that particular restraints are unreasonable *as a class*." Areeda & Hovenkamp, *supra*, §1910b. The prohibition on price fixing, for example, is not limited to "naked" price fixing. No such qualifier is necessary when the *per se* rule has *correctly* been applied. By conceding that not all non-solicitation agreements are anticompetitive, the government concedes away any case for *per se* treatment. Accordingly, and because the Indictment does not allege the elements of a rule-of-reason offense (market power, no intent, no anticompetitive effect, etc.), it must be dismissed.

II. Extending The *Per Se* Rule To Non-Solicitation Agreements For The First Time Ever In A Criminal Prosecution Would Violate Due Process.

The government's *per se* theory also fails because it is impermissible to declare employee non-solicitation agreements *per se* illegal for the very first time in a criminal prosecution. The law requires that everyone "should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). That applies with particular force in the criminal context, where "[t]he 'fair warning' requirement protected by the Due Process Clause reflects the legal principle 'that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'" *Ramos*, 537 F.3d at 457 (quoting *Lanier*, 520 U.S. at 265). Accordingly, "to satisfy due process, a penal statute [must] define the criminal offense … with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling*, 561 U.S. at 402. That is particularly critical in the Sherman

Act context given that criminal intent is an element of a criminal antitrust violation. *U.S. Gypsum Co*., 438 U.S. at 439. Criminal liability cannot turn on the vagaries of rule-of-reason analysis or on the violation of a *per se* rule that has never previously been established in a non-criminal case. Without prior judicial precedent recognizing conduct as a *per se* violation, the defendant has no notice that its conduct is illegal, and lenity accordingly prohibits a conviction.

The Sherman Act itself plainly does not provide that notice, as it "does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *Id.* at 438. On the contrary, "the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-41. And obvious due process problems would result from "[t]he imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in … conduct which only after the fact is determined to violate the statute because of anticompetitive effects." *Id.* at 441. That is precisely why the government has long recognized that it may criminally prosecute only *per se* violations of the Sherman Act—*i.e.*, agreements that experience has taught are virtually always anticompetitive. As the Seventh Circuit described the government's longstanding position decades ago, once something has been judicially established as a *per se* violation, "[i]t is as if the Sherman Act read: 'An agreement among competitors to rig bids is illegal.'" *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979); *see also Sanchez* BIO 13. In other words, established judicial construction may supply the fair notice that the text lacks. But imposing criminal liability in the absence of judicial decisions plainly marking out conduct as categorically forbidden cannot be squared with due process.

The use of *per se* rules in a criminal prosecution comports with due process and fundamental principles of lenity only if everyone knows what those rules are.[4] The government cannot just announce a *per se* prohibition on a new category of market practices. If courts are still engaged in the process of applying rule-of-reason analysis to determine whether a practice is so inherently anticompetitive that defendants should not even be able to try to defend it, then by definition individuals and companies lack adequate notice that the conduct is *per se* illegal and cannot "predict with confidence" whether they are about to cross a criminal line. One would not reasonably understand the Sherman Act to read "an agreement among competitors not to solicit each other's employees is categorically illegal" when no court has ever so held.

Accordingly, the government is free to try to establish through a civil action that a particular non-solicitation agreement is anticompetitive, and then try to establish through a string of victories in civil actions that non-solicitation agreements are so frequently anticompetitive that courts should eventually declare them subject to the *per se* rule (although that would be a high hurdle). But at this nascent juncture in the development of the law surrounding such agreements, it cannot bring a criminal prosecution premised (as this one expressly is) on the theory that non-solicitation agreements are so patently illegal that it need establish nothing more that the defendant entered into one to secure a conviction.

The government may contend that *it* gave the world sufficient notice in 2016—many years *after* it alleges that the agreements at issue here were formed—by issuing a guidance document.

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[4] Even then, criminal liability for *per se* violations is in some tension with the Supreme Court's consistent recognition that common-law crimes are antithetical to due process. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32-33 (1812). Moreover, applying the *per se* rule in the criminal context is difficult to reconcile with the Supreme Court's repeated holdings that irrebuttable presumptions violate the Fifth and Sixth Amendments. *See, e.g.*, *Francis v. Franklin*, 471 U.S. 307 (1985); *cf. Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). SCA reserves all rights to press those constitutional arguments should this Court allow this prosecution to proceed.

See 2016 Guidance 3, 4. But that is not how our criminal justice system works, or remotely enough to satisfy the requirements of due process. The executive branch does not get to create new criminal prohibitions simply by unilaterally declaring conduct *per se* illegal under the Sherman Act—let alone do so through non-binding policy guidance that cannot be preemptively tested in court. Congress can declare conduct illegal, and federal agencies may create binding rules within the scope of their delegated authority. But guidance documents do not have the force of law, let alone criminal law. *See Aya Healthcare Servs.*, 2020 WL 2553181, at *13 ("DOJ's policy is not binding authority"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 883 (7th Cir. 2002) (Easterbrook, J., concurring) ("[j]udges do not apply *Chevron* to the Attorney General's interpretation of the Sherman Antitrust Act"); *cf. Azar v. Allina Health Servs.*, 139 S.Ct. 1804 (2019).

Moreover, even if the government could make conduct criminal simply by declaring it *per se* illegal, it would still not save this Indictment because, by the government's own telling, the agreements alleged here pre-date that guidance by several years, making it exceedingly difficult to treat them as a potential source of notice in *this* case. *See* Indict. ¶¶9, 17. Indeed, the government itself has taken the position that it would not prosecute conduct that occurred before it issued that guidance. *Cf.* U.S. Dep't of Justice, *Justice News: Deputy Assistant Attorney General Michael Murray Delivers Remarks at the Santa Clara University School of Law* (Mar. 1, 2019), https://bit.ly/2MsVT1G (explaining that the government would not prosecute conduct that occurred before October 2016). And the government *still* does not include "no-poach" agreements in its even more recent primer on how to avoid *per se* violations. *See* p.14, *supra*.

The very fact that the government felt the need to issue guidance announcing its view that non-solicitation agreements *should* be subject to *per se* treatment is a sure sign that they are not *presently* so, as there would be no need to make such a pronouncement if courts had already

repeatedly and routinely concluded that such agreements have "'manifestly anticompetitive' effects" and "lack … any redeeming virtue." *Leegin*, 551 U.S. at 886. The Justice Department certainly has not felt the need to issue "guidance" making clear its intention to treat price fixing as a *per se* violation of the Sherman Act. And it is particularly conspicuous that the 2016 Guidance identifies not a single case holding that non-solicitation agreements are *per se* illegal (because there is none). Instead, the only "authority" the Guidance identifies that even remotely supports the government's position here is a handful of civil cases that were resolved by consent decrees without even resolving the *per se* question. *See* 2016 Guidance 3-4.

Implicitly recognizing the absence of authority for the position that non-solicitation agreements are *per se* illegal under the Sherman Act, the 2016 Guidance posits that such agreements are akin to "agreement[s] to … allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." *Id.* at 4. But that assertion is meritless. Market allocation agreements involve competitors agreeing to allocate customers amongst themselves, whether by dividing up territories or by devising some other means of divvying up business. *See, e.g.*, *BRG of Georgia*, 498 U.S. at 49. Such agreements have long been subject to *per se* treatment because their obvious (and intended) effect is to deprive customers of any "free choice." *See United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1089 (5th Cir. 1978). In contrast, restrictions on soliciting or even hiring have long been understood as falling in a different category. When the Supreme Court in *Radovich* and the Fifth Circuit in *Quinonez* confronted no-hire agreements, they did not treat them as merely a variant of market allocation agreements and subject them to *per se* treatment on that ground. They treated them as a distinct form of agreement subject to the rule of reason. The government is thus no more empowered to

announce unilaterally that no-hire and no-solicitation agreements are a species of market-allocation agreements than it is free to announce they are subject to the *per se* rule directly.

Moreover, even assuming that customer-allocation principles could be imported into the decidedly different employer-employee context, the kind of non-solicitation agreement the government seeks to prosecute here looks nothing like the customer-allocation cases upon which its theory is based. SCA is not accused of depriving employees of any choice in their employment. By the government's own telling, employees remained free under the alleged agreements to seek employment elsewhere, and the other parties to the agreements remained free to hire them (as did any other employer, competitors and non-competitors of SCA alike). The parties to the agreements are alleged simply to have agreed not to actively try to recruit each other's employees. *See Aya Healthcare Servs.*, 2020 WL 2553181, at *13 (distinguishing no-poaching agreements from non-solicitation agreements). That is hardly "hardcore cartel conduct" (2016 Guidance 4)—as evidenced by the fact that the Indictment itself alleges that the agreements in this case were openly discussed with outside recruiters and candidates. Indict. ¶19.

CONCLUSION

Even assuming the truth of the Indictment's allegations, the government has claimed a *per se* violation of the Sherman Act here when no court has ever found the conduct alleged to be *per se* unlawful. The Indictment therefore fails to state an offense and must be dismissed, because the government has not alleged the elements of a rule-of-reason offense. Moreover, the complete absence of any precedent supporting the government's *per se* theory confirms that SCA was not on fair notice that its conduct was criminal. And to hold that a defendant is precluded from even trying to demonstrate that an agreement never before held to be *per se* illegal does not actually run afoul of the Sherman Act would deprive the defendant not just of fair notice, but of its more fundamental opportunity to mount a defense. Particularly when combined with the Supreme

Court's recent and repeated admonitions that courts should be loath to sanction efforts to push the boundaries of vague and broad statutory text, *see, e.g.*, *Kelly*, 140 S.Ct. at 1574; *McDonnell*, 136 S.Ct. at 2372-73; *Yates*, 574 U.S. at 547-48; *Bond*, 572 U.S. at 866; *Sekhar*, 570 U.S. at 737-38; *Skilling*, 561 U.S. at 402-03, this is the very last context in which the Court should accept the government's invitation to take the decidedly disfavored step of breaking new *per se* ground.

Respectfully submitted,

s/Paul Coggins
PAUL COGGINS
LOCKE LORD LLP
2200 Ross Avenue, Suite 2800
Dallas, TX 75201
214-740-8104
214-756-8104 (facsimile)
Texas Bar No. 04504700
pcoggins@lockelord.com

PAUL D. CLEMENT*
ERIN E. MURPHY*
MATTHEW D. ROWEN*
KIRKLAND & ELLIS LLP
1301 Pennsylvania Ave. NW
Washington, DC 20004
202-389-5000
202-389-5200 (facsimile)

JAMES H. MUTCHNIK*
DANIEL E. LAYTIN*
KIRKLAND & ELLIS LLP
300 N. LaSalle
Chicago, IL 60654

SARA S. TATUM*
KIRKLAND & ELLIS LLP
601 Lexington Ave.
New York, NY 10022

Counsel for Defendant
SCAI Holdings, LLC

s/Robert L. Webster
ROBERT L. WEBSTER
7557 Rambler Road, Suite 525
Dallas, TX 75231
469-758-4150
469-758-4160 (facsimile)
Texas Bar No. 21053375
robert.webster@bobwebsterlaw.com

DAVID B. ANDERS*
SARAH K. EDDY*
KEVIN S. SCHWARTZ*
WACHTELL, LIPTON, ROSEN & KATZ
51 West 52nd St.
New York, NY 10019
212-403-1000
212-403-2000 (facsimile)

Counsel for Defendant
Surgical Care Affiliates LLC

* admitted *pro hac vice*

March 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, 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/Paul Coggins
Paul Coggins