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Ex-DaVita CEO Denies Anti-Poach 'Intent' As Feds Rest

By **Cara Salvatore**

Law360 (April 12, 2022, 11:13 PM EDT) -- Dialysis giant DaVita's former CEO gave his opening argument Tuesday minutes after prosecutors rested their case alleging that he and the company struck no-poach agreements with rivals, exhorting jurors to focus on the executive's "intent" and to be wary of witnesses whose testimony they had watched and who had "axes to grind."

DaVita and former CEO Kent Thiry have been on trial with the U.S. Department of Justice's Antitrust Division over claims that they entered into illegal anti-poach and anti-solicitation agreements with three companies run by DaVita alumni — Surgical Care Affiliates, Radiology Partners, and Hazel Health. Tuesday morning, the DOJ rested its case.

At the beginning of the trial last week, Thiry reserved his opening argument until the start of the defense case. Defense counsel Tom Melsheimer of Winston & Strawn delivered that argument Tuesday, reminding the Denver jurors what they will have to focus on in their deliberations.

"The core issue in this case," Melsheimer said, "it's the issue of intent: whether there was the necessary intent to allocate a market."

"Mr. Thiry did not act with an illegal purpose and intent," he said. But he also reminded the jury the defense need not prove a thing, and said it would be logically impossible to prove the absence of an intent.

Melsheimer told the jury not to give credence to "witnesses with no personal knowledge, witnesses who had axes to grind or witnesses who had promises from the prosecution."

Previewing the defense's planned case for the jury, he told them they were about to meet its lone witness, labor economist Pierre Cremieux, who analyzed statistics relating to transfers of employees between the companies in question, turnover within the companies, and compensation at the companies.

"He's the only person ... who has analyzed and studied the objective data that can assist you in making a decision," Melsheimer said. "He's applied something called the scientific method."

Cremieux, president of Analysis Group, took the stand Tuesday afternoon to tell the jury about his three analyses. The first looked at the number of hires from DaVita to each of the three other companies during the period of the alleged conspiracy and compared it to the number before the scheme is said to have started.

In the second, he compared turnover against a benchmark of Bureau of Labor Statistics data from the outpatient health care sector. In the third, he compared compensation increases to a benchmark of BLS data from the outpatient health care sector.

Cremieux did not look at failed or aborted recruiting efforts, only hires. Nor did he give special weight to the close relationships between DaVita and the three companies given that their heads were alumni.

For the first question, the number of hires, Cremieux said SCA's number dropped from eight hires pre-conspiracy, or pre-2012, to one during the alleged conspiracy, or 2012 to 2017. He attributed

this to SCA having needed to staff up, but then having finished that push by that point. The single hire during the later period was not out of line with the set of all companies anywhere that hired someone from DaVita — the median number hired was one, and SCA's was, too, he said.

"It tells me that during the period of the alleged conspiracy, what SCA is doing in terms of hiring from DaVita is no different from what other companies are doing with respect to hiring from DaVita," he said.

The industry's turnover rate was decreasing slightly as DaVita's rate had a small increase, Cremieux found. One would expect DaVita's to decrease, and decrease even more than the industry's, if there had been a "market allocation" for employees in effect, he added.

The jury also heard Tuesday morning from the prosecution's final witness, Elliot Holder, a former young DaVita executive now at Smile Brands whose testimony on direct examination told a story that his career had been interfered with by the communication between DaVita and RP.

In 2016, Holder had gone through multiple rounds of interviews at Radiology Partners for a management position but was told near the end of the process, before receiving a formal offer, that he would need to tell his superiors about the job hunt.

"I remembered it was really weird. I felt pretty anxious," Holder said. He said he worried about "jeopardizing my place at DaVita; I guess kind of giving up two opportunities in case this position with Radiology Partners didn't work out."

Holder said he "100%" wanted to keep his job search confidential and thought if it was known it would "jeopardize my future or my career path." A few minutes later he said it would be "risking the current position that I had."

After doing on-site interviews at RP with a handful of people and hearing back that things looked good, he then received a confusing email saying an RP manager needed to hop on the phone with him to "talk through steps you will need to take to notify your leadership of your interest." The email came from a former DaVita person who also was offering advice on "my experience going through this process when I left."

Holder talked to his business mentor, his older brother, and decided it was too risky. He sent the RP executive a polite note saying, "various circumstances in my professional life have changed, causing me to align with a different path."

"What was the reason you withdrew from consideration with Radiology Partners?" a prosecutor asked Holder.

"100% because of their requirement to tell my leadership," he said.

On cross-examination, Melsheimer discussed with Holder an offer he had received in 2015 from a different company that he did tell his superiors about. Holder used that offer to leverage a raise at DaVita.

"You learned how valued you were at DaVita, fair?" Melsheimer asked.

"Yeah, it's fair," Holder said.

When the jury was given an opportunity to submit questions for Holder, one asked what the culture was like at DaVita. Holder said there was a strong culture. "Everything at the company has a synonym or like a different name." Thiry's references to the company as The Village and its departed executives as "ripples" are two that jurors have heard about over the trial. Holder said that he was drawn by the "very intentional" culture, but that it "could be overwhelming at times."

Another juror asked, "What do you think the reaction would have been from your superiors if you had told them about the Radiology Partners [candidacy] before having an offer?"

He thought for a few moments and then speculated he probably wouldn't have gotten a promotion he

coincidentally received in late 2016 after withdrawing. But, he said, "My team had like an 80% turnover in terms of people, so I was kind of the core piece on the team. So they probably would have tried to retain me."

Meanwhile, although there are three companies in the indictment, the jury has heard directly from only two of them. Much of the case regarding Hazel Health was made through texts and emails introduced during the testimony of an FBI investigating agent on Monday.

The government is represented by Megan Lewis, Sara Clingan, William Vigen and Anthony Mariano of the U.S. Department of Justice.

DaVita is represented by John Walsh III of WilmerHale and John Dodds of Morgan Lewis & Bockius LLP. Thiry is represented by Juanita Brooks of Fish & Richardson PC and by Thomas Melsheimer of Winston & Strawn LLP.

The case is U.S. v. DaVita Inc. et al., case number 1:21-cr-00229, in the U.S. District Court for the District of Colorado.

--Additional reporting by Matthew Perlman, Craig Clough and Bryan Koenig. Editing by Peter Rozovsky.

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