IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 09-cv-02175-WJM-KMT

CASE RESTRICTED
LEVEL 2 RESTRICTED

UNITED STATES OF AMERICA, *ex rel*. DAVID BARBETTA,

Plaintiff,

v.

DAVITA, INC., and
TOTAL RENAL CARE, INC.,

Defendants.

UNITED STATES' COMPLAINT IN INTERVENTION

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1. The United States brings this action to recover treble damages and civil penalties under the False Claims Act, 31 U.S.C. §§ 3729-33, ("FCA"), as well as for damages and other monetary relief under common law and equity against the defendants DaVita HealthCare Partners, Inc.,[1] and Total Renal Care, Inc. (together "DaVita") for the submission of false or fraudulent claims to federal health care programs.

I. PRELIMINARY STATEMENT

2. DaVita is a dialysis company presently headquartered in Denver, Colorado. Starting on approximately March 1, 2005, through February 1, 2014, DaVita illegally expanded its dialysis business through a practice of entering into joint ventures with physicians, usually nephrologists, who were financially induced by DaVita to be the joint venture's primary referral

[1] In November 2012, DaVita, Inc., changed its name to DaVita Healthcare Partners, Inc.

sources for dialysis patients. DaVita selected physicians as joint venture partners based on the expectation that they would be the referral source for the substantial majority of the end-stage renal disease patients treated at the DaVita joint venture dialysis center. DaVita valued the potential referring physician partners based on the number of patients they would bring the new DaVita joint ventures.

3. DaVita knew that inducing these referring physicians into joint venture relationships violated the Anti-Kickback Statute ("AKS"), 42 U.S.C. § 1320a-7b(b). The AKS prohibits offering any sort of remuneration to referral sources when one purpose is to induce the referral of patients for services billed to a Federal health care program (defined at 42 U.S.C. § 1320a-7b(f)). At all relevant times, DaVita had knowledge of and failed to abide by significant government guidance that warned against the exact joint venture transaction behavior in which DaVita engaged.

4. Billing Federal health care programs for dialysis services provided to patients who were referred to a DaVita joint venture clinic by physicians with an inappropriate financial interest in the joint venture violates the AKS. As a result, DaVita also violated the FCA every time it submitted such claims to a federal health care program for payment.

II. THE PARTIES

5. The United States brings this action on behalf of the U.S. Department of Health and Human Services ("HHS") and the Centers for Medicare and Medicaid Services ("CMS"), which administers the federal health care programs, Medicare and Medicaid, and the U.S. Department of Defense, TRICARE Management Activity.

6. This is the United States' Complaint as to the claims in which it has intervened in Civil Action No. 09-cv-02175-WJM-KMT (D. Colo.).

7. Defendant DaVita HealthCare Partners, Inc. (f/k/a DaVita, Inc.), is a Delaware corporation with its corporate headquarters located in Denver, Colorado. DaVita provides dialysis services to patients suffering from chronic kidney failure, also known as end-stage renal disease or ESRD.

8. Defendant Total Renal Care, Inc. ("TRC") is a California corporation and a wholly-owned subsidiary of DaVita. DaVita uses TRC and other subsidiaries to buy, sell and hold interests in various dialysis centers and dialysis-related joint ventures.

III. JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1345, because DaVita transacts business in this district and has its corporate headquarters in this district.

10. Venue is proper in the District of Colorado under 31 U.S.C. § 3732, 28 U.S.C. § 1391(b) and (c), and 28 U.S.C. § 1395, because DaVita transacts business in this District.

IV. BACKGROUND ON DIALYSIS

11. Chronic kidney disease is a progressive disease, which ultimately destroys the kidney's ability to process and clean blood. The loss of kidney function is normally irreversible. End Stage Renal Disease (“ESRD”) is the stage of advanced kidney impairment that requires either continued dialysis treatments or a kidney transplant to sustain life. Dialysis treatment is

the removal of toxins, fluids and salt from the blood of ESRD patients by artificial means. According to the United States Renal Data System, there were approximately 415,000 ESRD dialysis patients in the United States at the end of 2010.

12. Patients suffering from ESRD generally require dialysis at least three times per week for the rest of their lives. Because each dialysis session lasts for several hours, and is required several times a week, dialysis patients usually seek treatment at centers geographically near where they live.

13. Since 1972, the federal government has provided universal payment coverage for dialysis treatments under the Medicare ESRD program, regardless of age or financial circumstances. Under this system, Congress establishes Medicare rates for dialysis treatments, related supplies, lab tests and medications. Other Government-funded health care programs and private insurance plans also routinely provide coverage for dialysis, either separately or in combination with a patient's Medicare coverage.

14. As of December 31, 2013, DaVita owned, operated and/or provided administrative services through 2,074 outpatient dialysis centers located in 44 states and the District of Columbia, serving approximately 163,000 patients, which is roughly more than a third of the entire ESRD population of the United States.

15. For the year ended December 31, 2012, approximately 90% of DaVita's dialysis patients were under government-based programs, with approximately 79% of its dialysis patients under Medicare and Medicare-assigned plans.

V. THE FEDERAL HEALTH CARE PROGRAMS

A. Medicare

16. Medicare is a federally-funded health insurance program primarily benefitting the elderly, but also benefitting patients with ESRD. The program pays for the costs of certain health care services and items for eligible beneficiaries based on age, disability or affliction with ESRD. Medicare was created in 1965 when Title XVIII of the Social Security Act was adopted.

17. The Medicare program has four parts: Part A, Part B, Part C and Part D. The relevant parts in this case are Medicare Parts A and B. Medicare Part A, the Basic Plan of Hospital Insurance, covers the cost of inpatient hospital services and post-hospital nursing facility care. Medicare Part B, the Voluntary Supplemental Insurance Plan, covers the cost of services performed by physicians and certain other health care providers, if the services are medically necessary and directly and personally provided by the provider.

18. The Medicare program provides benefits for all patients with ESRD. Individuals who are otherwise ineligible for Medicare become eligible when they develop ESRD. Medicare Part B covers dialysis services provided in outpatient clinics.

19. The Medicare program is administered through the Department of Health and Human Services, Centers for Medicare and Medicaid Services.

B. Medicaid

20. Medicaid was also created in 1965 under Title XIX of the Social Security Act. Medicaid is a joint federal-state program that provides health care benefits for certain groups,

primarily the poor and disabled. Each state administers a state Medicaid program and receives funding from the federal government, known as federal financial participation, based upon a formula set forth in the federal Medicaid statute. Thus, under Title XIX of the Social Security Act, 42 U.S.C. § 1396 *et seq.*, federal money is distributed to the states, which in turn provide certain medical services to the poor.

21. Before the beginning of each quarter, each state submits to CMS an estimate of its Medicaid funding needs for the quarter. CMS reviews and adjusts the quarterly estimate as necessary, and determines the amount of federal funding the state will be permitted to draw down as the state actually incurs expenditures during the quarter (for example, as provider claims are presented for payment). After the end of each quarter, the state submits to CMS a final expenditure report, which provides the basis for adjustment to quarterly federal funding.

C. TRICARE

22. TRICARE, administered by the United States Department of Defense, is a health care program for individuals and dependents affiliated with the armed forces.

23. Collectively these programs referred to in Section V will be referred to in this complaint as the "Federal health care programs."

VI. ANTI-KICKBACK STATUTE AND FALSE CLAIMS ACT

24. The False Claims Act ("FCA") establishes liability to the United States for an individual who, or entity that, "knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," 31 U.S.C. § 3729(a)(1)(A); or "knowingly makes,

uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," 31 U.S.C. § 3729(a)(1)(B).[2] "Knowingly" is defined to include not just actual knowledge, but also reckless disregard and deliberate ignorance. 31 U.S.C. § 3729(b)(1). No proof of specific intent to defraud is required. *Id.*

25. The Anti-Kickback Statute or AKS prohibits any individual or entity from soliciting, receiving, offering, or paying any remuneration to induce or reward any person for referring, recommending or arranging for the purchase of any item or service for which payment may be made under a Federal health care program. 42 U.S.C. § 1320a-7b(b).

26. The AKS prohibition applies to "any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind." 42 U.S.C. §§ 1320a-7b(b)(1) & (b)(2). In addition to the more obvious types of remuneration (*e.g.* cash payments, gifts, free vacations, etc.), the AKS also prohibits less direct forms of remuneration such as providing an opportunity to a referring physician to buy into a joint venture, particularly under economic terms that make the investment extremely advantageous, or investment arrangements where the referring physician has a substantial financial interest in referring his or her patients to the joint venture.

27. Court cases clarified, prior to DaVita's joint venture activity at issue in this case, that if "one purpose" of the transaction with the referring physician is to induce referrals of patients for services, the AKS has been violated. *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985). The "one purpose" rule has been reiterated through the years by many courts. The Ninth

[2] In May 2009, the False Claims Act was amended pursuant to Public Law 111-21, the Fraud Enforcement and Recovery Act of 2009 ("FERA"). Section 3729(a)(1)(A) was formerly Section 3729(a)(1), and Section 3729(a)(1)(B) was formerly Section 3729(a)(2).

Circuit, where DaVita was formerly headquartered, adopted the rule in 1989. *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989). The Fifth Circuit affirmed the "one purpose" rule in 1998. *United States v. Davis*, 132 F.3d 1092 (5th Cir. 1998). The Tenth Circuit, where DaVita relocated its headquarters in 2010, reiterated the "one purpose" rule in *United States v. McClatchey*, 217 F.3d 823 (10th Cir. 2000). The Seventh Circuit was the most recent circuit court to affirm the "one purpose" rule, in *United States v. Borrasi*, 639 F.3d 774 (7th Cir. 2011). No circuit court has rejected this rule.

28. This legal prohibition against using any kind of remuneration to induce patient referrals arose out of congressional concern that such kickbacks to those who can influence health care decisions would result in goods or services being provided in response to economic self-interest rather than untainted medical judgment concerning the needs of the patient. This corruption of medical judgment can result in goods or services being provided that are medically unnecessary, of poor quality, or even harmful to a vulnerable patient population. As stated by the United States Department of Health and Human Services, Office of Inspector General ("HHS-OIG"), the AKS "seeks to ensure that referrals will be based on sound medical judgment and that health care professionals will compete for business based on quality and convenience, *instead of paying for referrals.*" OIG Advisory Opinion No. 12-06, OIG, 7 (May 25, 2012), http:oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-06.pdf (emphasis added).

29. To protect the Medicare and Medicaid programs, Congress first enacted, and then strengthened through a series of amendments, the prohibition against paying kickbacks in any form. After the statute's enactment in 1972, Congress strengthened the AKS in 1977 and 1987 to ensure that kickbacks masquerading as legitimate business transactions did not evade its reach.

See Social Security Amendments of 1972, Pub. L. No. 92-603, §§ 242(b) and (c), 86 Stat. 1329, 1419-20 (1972), Medicare-Medicaid Anti-Fraud and Abuse Amendments of 1977, Pub. L. No. 95-142, 91 Stat. 1175 (1977); Medicare and Medicaid Patient and Program Protection Act of 1987, Pub. L. No. 100-93, 100 Stat. 680 (1987).

30. In the Patient Protection and Affordable Care Act of 2010 ("PPACA"), Pub. L. No. 111-148, § 6402(f), 124 Stat. 119, 759 (2010), codified at 42 U.S.C. § 1320a-7b(g), Congress amended the AKS to state explicitly that "a claim that includes items or services resulting from a violation of this section constitutes a false or fraudulent claim for purposes of [the False Claims Act]."

31. According to the legislative history of the PPACA, this amendment to the AKS was intended to clarify "that all claims resulting from illegal kickbacks are considered false claims for purposes of civil action under the False Claims Act . . ." 155 Cong. Rec. S10854 (daily ed. Dec. 21, 2010).

32. The PPACA thus confirms that at all times relevant to Davita's conduct, compliance with the AKS is a condition of payment under the Federal health care programs.

VII. THE GOVERNMENT HAS PROVIDED GUIDANCE TO PREVENT PROVIDERS FROM VIOLATING THE ANTI-KICKBACK STATUTE

33. HHS-OIG issues regulations and guidance interpreting the AKS. To assist DaVita and other providers in understanding what business transactions with physicians may violate the AKS, HHS-OIG has provided detailed guidance for those who want to engage in legitimate joint ventures that do not violate the AKS.

34. Congress enacted a mechanism for providing specific guidance to the health care industry to help providers determine what business transactions, including joint ventures, may be at risk of violating the AKS. 42 U.S.C. § 1320a-7d(b); *see also* 42 C.F.R. pt. 1008. Providers may seek an advisory opinion from HHS-OIG, describing the proposed transaction and obtaining advice.[3] These advisory opinions are then published on HHS-OIG's website so that all providers may benefit from the guidance. In numerous advisory opinions, HHS-OIG has consistently informed the health care industry that a violation of the AKS will result where one purpose of a business transaction is to provide physicians with remuneration to induce referrals of patients for services.

35. In one of the first advisory opinions it issued, Advisory Opinion 97-5, HHS-OIG provided guidance to parties contemplating entering into a joint venture. In this opinion, HHS-OIG confirmed that the AKS is violated "where <u>one</u> purpose of the remuneration is to obtain money for the referral of services or to induce further referrals." Advisory Opinion No. 97-5, OIG, 4 (Oct. 6, 1997), http://oig.hhs.gov/fraud/docs/advisoryopinions/1997/ao97_5.pdf., citing *United States v. Kats*, 871 F.2d 105 (9th Cir. 1989) and *United States v. Greber*, 760 F.2d 68 (3d Cir. 1985).

36. HHS-OIG also warned that joint ventures with potential referral sources raise special concerns. In particular, it warned that "the major concern is that the profit distributions to investors in the joint venture, who are also referral sources to the joint venture, may potentially represent remuneration for those referrals." Advisory Opinion No. 97-5, at 7.

[3] On February 19, 1997, HHS-OIG published Interim Final Rules on the issuance of Advisory Opinions as required by HIPAA. 62 Fed. Reg. 7335, 7350-7360 (Feb. 19, 1997); *see also* 42 C.F.R. pt. 1008.

Because of this:

> even in situations where each party's return is proportionate with its investment, *the mere opportunity to invest* (and consequently receive profit distributions) may in certain circumstances constitute illegal remuneration if offered in exchange for past or future referrals. Such situations may include arrangements where one or several investors in a joint venture control a sufficiently large stream of referrals to make the venture's financial success highly likely, or where one investor has an established track record with similar ventures or the financial investment required is so small that the investors have little or no real risk.

Id. at 10 (emphasis added).

37. HHS-OIG warned health care providers that it had long-standing concerns about arrangements, such as joint ventures, between those in a position to refer business and those furnishing items or services for which Medicare or Medicaid pays, *especially when all or most of the business of the joint venture is derived from one or more of the joint venturers*. *See* OIG Special Fraud Alert, *Joint Venture Arrangements* (1989), republished at 59 Fed. Reg. 65,372 (Dec. 19, 1994).

38. This Special Fraud Alert, which HHS-OIG initially issued directly to health care providers in 1989 and subsequently published in the Federal Register in 1994, had a section entitled "Suspect Joint Ventures: What to Look For." This section warned that the following features relevant to DaVita's joint venture arrangements may violate the AKS:

- Investors are chosen because they are in a position to make referrals.
- Physicians who are expected to make a large number of referrals may be offered a greater investment opportunity in the joint venture than those anticipated to make fewer referrals . . . .
- Investors may be required to divest their ownership interest if they cease to practice in the service area, for example, if they move, become disabled or retire.
- Investment interests may be nontransferable . . . .
- The amount of capital invested by the physician may be disproportionately small and the returns on the investment may be disproportionately large when compared to a typical investment in a new business enterprise . . . .

- Investors may be paid extraordinary returns on the investment in comparison with the risk involved, often well over 50 to 100 percent per year.

39. In OIG Advisory Opinion No. 98-19, the following guidance was provided:

> Health care joint ventures in which investors are also sources of referrals or suppliers of items or services to the joint venture raise many questions under the anti-kickback statute. In 1989, the OIG issued a Special Fraud Alert specifically discussing joint venture arrangement that may violate the anti-kickback statute. In general, joint ventures between physicians and hospitals in which they practice may be suspect, because distributions from the joint ventures may be disguised remuneration paid in return for referrals.

OIG Advisory Opinion No. 98-19, OIG, 6 (Dec. 14, 1998). http://oig.hhs.gov/fraud/docs/advisoryopinions/1998/ao98_19.htm.

40. In a March 16, 1999 published letter responding to an inquiry about whether nephrologists owning a home dialysis supply company would violate the AKS, the Chief of HHS-OIG's Industry Guidance Branch warned:

> Substantial ownership by investors who are in a position to refer patients to the joint venture is an indicator of a suspect joint venture because such ownership increases the likelihood that one of the joint venture's purposes is to control a stream of referrals and compensate the referring investors indirectly for their referrals. Other factors that could indicate potentially unlawful activity include an investor in a position to refer business receiving a disproportionate return on his or her investment, and participation in the joint venture by an on-going entity that is already engaged in the same line of business as the joint venture.

Nephrologist, Home Dialysis Supplies Joint Venture, OIG, 1 (Mar. 16, 1999). https://oig.hhs.gov/fraud/docs/safeharborregulations/k2.htm.

> In general, health care joint ventures in which investors are also sources of referrals or suppliers of items or services to the joint venture raise many questions under the anti-kickback statute . ... With respect to joint ventures, one major concern is that the profit distributions to investors in the joint venture who are also referral sources to the joint venture may potentially represent remuneration for those referrals.

Id. at 2.

41. "[HHS-OIG] has also stated on numerous occasions its view that the opportunity for a referring physician to earn a profit, including through an investment in an entity for which he or she generates business, could constitute an illegal inducement under the anti-kickback statute." OIG Advisory Opinion No. 12-06, OIG, 7-8 (May 25, 2012). http://oig.hhs.gov/fraud/docs/advisoryopinions/1012/AdvOpn 12-06.pdf.

42. Because joint ventures with referral sources could so obviously violate the AKS, HHS-OIG created a "safe harbor" for providers that believe they have legitimate business reasons for investing in entities to which they refer but that want to avoid violating the AKS. The safe harbor is published in the federal regulations at 42 C.F.R. § 1001.952(a).

43. The investment interests "safe harbor" is narrowly tailored to prevent improper economic inducements from being disguised as legitimate investment mechanisms. As HHS-OIG explained: "With respect to joint ventures, the major concern is that the profit distributions to investors in the joint venture, who are also referral sources to the joint venture, may potentially represent remuneration for those referrals." Advisory Opinion 97-5, at 7.

44. An entity whose activity otherwise would be covered by the broad, remedial language of the AKS is exempted from liability through the "safe harbor" only if that entity's investment interests and conduct meet *all* of the applicable standards set forth in the safe harbors. 42 C.F.R. §1001.952(a). Subsection 1001.952(a)(2) lists four “safe harbor” requirements that are particularly relevant in the present case:

> (i) No more than 40 percent of the value of the investment interest of each class of investment interests may be held in the previous fiscal year or previous 12 month period by investors who are in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity; . . .

> (ii) The terms on which an investment interest is offered to an investor who is in a position to make or influence referrals to, furnish items or services to, or otherwise generate business for the entity must not be related to the previous or expected volume of referrals, items or services furnished, or the amount of business otherwise generated from that investor to the entity; . . .
>
> (v) No more than 40 percent of the entity's gross revenue related to the furnishing of health care items and services in the previous fiscal year or previous 12 month period may come from referrals or business otherwise generated from investors; . . . and
>
> (viii) The amount of payment to an investor in return for the investment interest must be directly proportional to the amount of the capital investment (including the fair market value of any pre-operational services rendered) of that investor.

42 C.F.R. § 1001.952(a)(2)(i), (iii), (vi), (viii).

None of the DaVita joint ventures subject to this complaint satisfies all of these requirements.

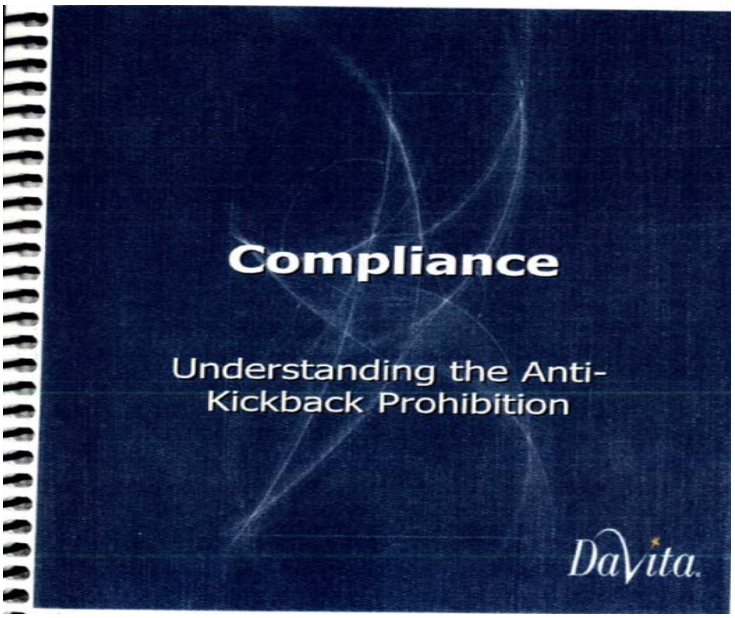
45. One way in which DaVita's joint venture transactions with physicians uniformly failed to comply with the safe harbor provisions was that DaVita would only offer joint ventures to physicians who could and would refer substantially more than 40% of the patients needed to make the joint ventures profitable.

46. The investment terms DaVita offered to referring physicians also failed to meet the safe harbor requirement that transactions not be based on “the previous or expected volume of referrals, items or services furnished, or the amount of business otherwise generated from the investor to the entity." 42 C.F.R. § 1001.952(a)(2)(iii).

VIII. DAVITA'S JOINT VENTURES PROVIDED REMUNERATION TO INDUCE PATIENT REFERRALS

47. DaVita's Compliance Handbook from the 2004 to 2006 time period acknowledged much of the HHS-OIG guidance discussed above focusing on the prohibition against seeking referring physicians as joint venture partners because of their ability to refer patients and then providing exclusive economic incentives to them to induce referrals of those patients to DaVita. The DaVita Compliance Handbook also recommended ensuring that joint ventures qualified for safe harbor protection whenever possible to avoid violating the AKS.

48. An excerpt of DaVita's Compliance Handbook, which is pictured below, correctly warned that "Prohibited Conduct" under the AKS included remuneration in cash or in kind (anything of value), to any person, in return for referring patients whose care is reimbursed by government programs.



DaVita Compliance Handbook.

49. This Compliance Handbook was in existence during DaVita's acquisition of Gambro Healthcare ("Gambro"), a dialysis company. DaVita agreed to acquire Gambro's dialysis business on December 7, 2004, just five days after Gambro settled a False Claims Act case with the United States, in part, for violating the AKS in some of its joint ventures with referring physicians. Gambro paid more than $350,000,000 in criminal fines and civil penalties to the United States to settle allegations of fraud. The United States publically explained the basis for that settlement on December 2, 2004: "Gambro also violated the Anti-Kickback Act by entering into joint venture relationships with physician partners. Again, Gambro's contractual dealings were premised upon the number and volume of anticipated patient referrals." Department of Justice, Gambro Healthcare Agrees to Pay Over $350 Million to Resolve Civil & Criminal Allegations in Medicare Fraud Case (Dec. 2, 2004). http://www.justice.gov/opa/pr/2004/December/04_civ_774.htm. As part of the global settlement, Gambro entered into a Corporate Integrity Agreement ("CIA") with HHS-OIG that was intended to prevent further violations of the False Claims Act, including the submission of claims tainted by unlawful remuneration offered or provided by Gambro in violation of the AKS.

50. As the new owner of Gambro, DaVita inherited both the obligation to ensure that Gambro dissolve the illegal joint ventures as well as the obligation to ensure that its new subsidiary complied with the CIA with HHS-OIG to prevent future violations of the AKS. These obligations put DaVita on heightened notice that entering into joint ventures with referring physicians to capture patient referrals violated the AKS.

51. Despite HHS-OIG's repeated warnings concerning joint ventures with referring physicians, Gambro's violations of the AKS and the False Claims Act, and DaVita's obligations

to dissolve Gambro's illegal joint ventures and operate its Gambro subsidiary in accordance with the terms of the CIA, DaVita put an extraordinary emphasis on expanding its business through the use of joint ventures with referring physicians. As explained by DaVita's CEO Kent Thiry "we [DaVita] already do more joint-venture dialysis centers with doctors than anyone else in America, by far. And that has been true for a long, long time." First Quarter Earnings Conference Call (May 02, 2012).

52. DaVita's joint venture business model is fundamentally dependent on its relationship with physicians who refer patients to its dialysis centers. Most important were its relationships with the few key physicians who are responsible for a major share of the patients treated at each center. DaVita explained this dynamic succinctly in its 2010 annual report filed with the Securities and Exchange Commission as follows:

> As is typical in the dialysis industry, one or a few physicians, including the outpatient dialysis center's medical director, usually account for all or a significant portion of an outpatient dialysis center's patient base. If a significant number of physicians, including an outpatient dialysis center's medical director, were to cease referring patients to our outpatient dialysis centers, our business could be adversely affected.

53. Rather than generating business by simply demonstrating superior quality of clinical services and patient care or providing more convenient care options, DaVita sought out physicians and provided them an economic inducement to ensure that physician/partners would use their considerable influence over their patients to provide referrals. DaVita routinely entered into joint ventures with these physicians, selling them undervalued shares of existing DaVita dialysis centers ("partial divestitures"), buying over-valued shares of physician-owned dialysis centers ("partial acquisitions"), or engaging in both activities in a "paired" transaction which was a joint venture formed by both buying and selling partial interests. Such deals aligned physician

economic interests with DaVita, ensuring that physicians would direct client referrals to those centers where the physicians shared profits.

54. One DaVita manager explained that DaVita's Mergers and Acquisitions department, known within DaVita as "Deal Depot," which was the corporate group tasked with pursing joint ventures with referring physicians, used these deals to funnel "a bag of money" to the physicians.

IX. DAVITA TARGETED REFERRING PHYSICIANS FOR EXCLUSIVE OPPORTUNITIES TO ENTER INTO JOINT VENTURES

A. DaVita Targeted Potential Physician Partners Based on Their Ability to Refer a Substantial Number of Patients.

55. DaVita offered joint venture opportunities to physicians if they had referred substantial numbers of patients to DaVita centers in the past, or were in a position to do so in the future.

56. DaVita did not offer joint venture partnerships to physicians to raise capital. In fact, during most of the time period at issue, DaVita often had substantial reserves of capital to invest. DaVita also did not offer joint venture opportunities to physicians who did not have an established practice with patients who could be referred for dialysis treatment. Further, DaVita would only offer to partner with physicians within a small geographic radius, usually a 30 mile radius, of the physicians' practice and patient base. A joint venture outside of this geographical location would severely limit the physician's ability to get his or her patients to use the joint venture dialysis center and, therefore, was not valuable to DaVita.

57. To ensure that a potential physician partner could refer a sufficient number of dialysis patients, DaVita developed data that provided it with detailed information concerning the location of each ESRD patient and that patient's physician. This analysis enabled DaVita to determine the potential value of partnering with any particular physician with substantial precision.

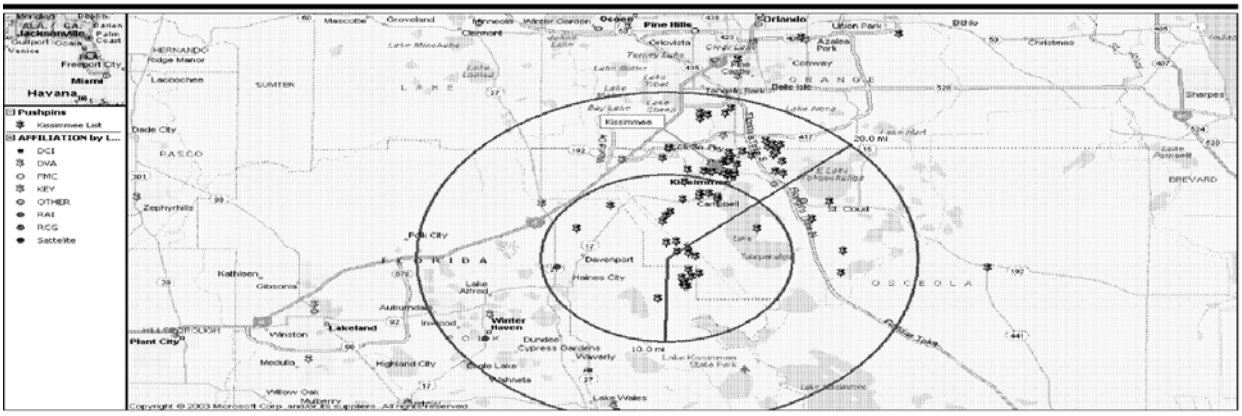
58. As an example, DaVita violated the AKS by offering a joint venture opportunity to a physician group in Florida. DaVita called this the "IMS/St. Cloud" transaction. Years earlier, Internal Medicine Specialists ("IMS") had been a joint venture partner with Gambro, but had been required to sell its minority position to Gambro as part of the 2004 settlement with the United States for violation of the AKS. Despite this background, after DaVita assumed control of Gambro's dialysis centers, DaVita sought to enter into a joint venture agreement with this physician group. DaVita determined which dialysis centers that it would offer a partnership in based on its detailed analysis of how many patients IMS did or could refer to the centers. After having done this analysis, DaVita offered IMS a paired joint venture transaction in which DaVita would acquire an interest in an existing IMS dialysis center and simultaneously sell the same physicians interests in several DaVita centers, resulting in a cash and working capital payment of over $3.1 million benefiting IMS.

59. DaVita's overall approach required that the IMS/St. Cloud physicians be ready, willing and able to refer patients to a specific DaVita center as a prerequisite to DaVita offering a business relationship at any particular location. If the physicians could not refer patients, then DaVita had no reason to offer a joint venture. The value of the IMS/St. Cloud transaction was based on the value of the patients that the physicians could refer to the new DaVita joint venture.

60. To ensure that the IMS physicians would be able to provide patient referrals, DaVita tracked and located the IMS physicians patients with precision as shown by internal DaVita documents.

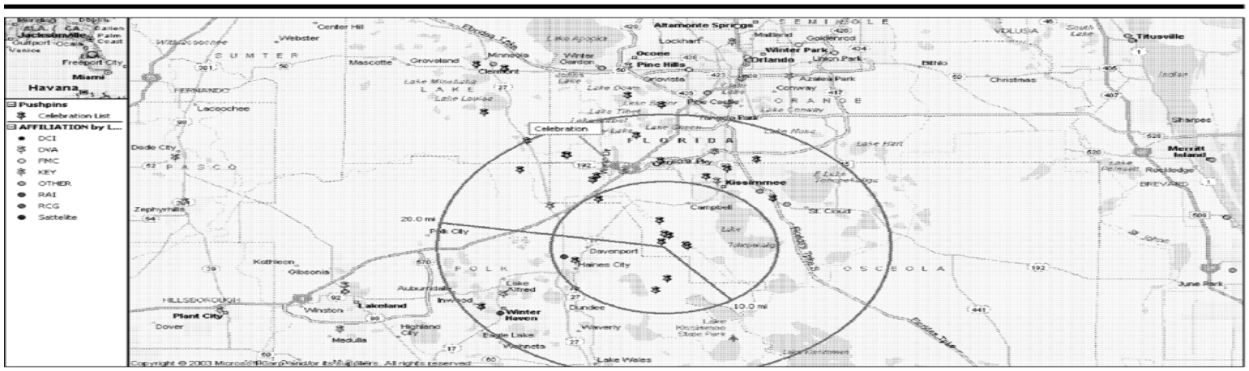
61. The following excerpt from an internal DaVita powerpoint describing the IMS deal shows the precision with which DaVita tracked the potential physician partners' patients and patient locations:

Kissimmee, FL



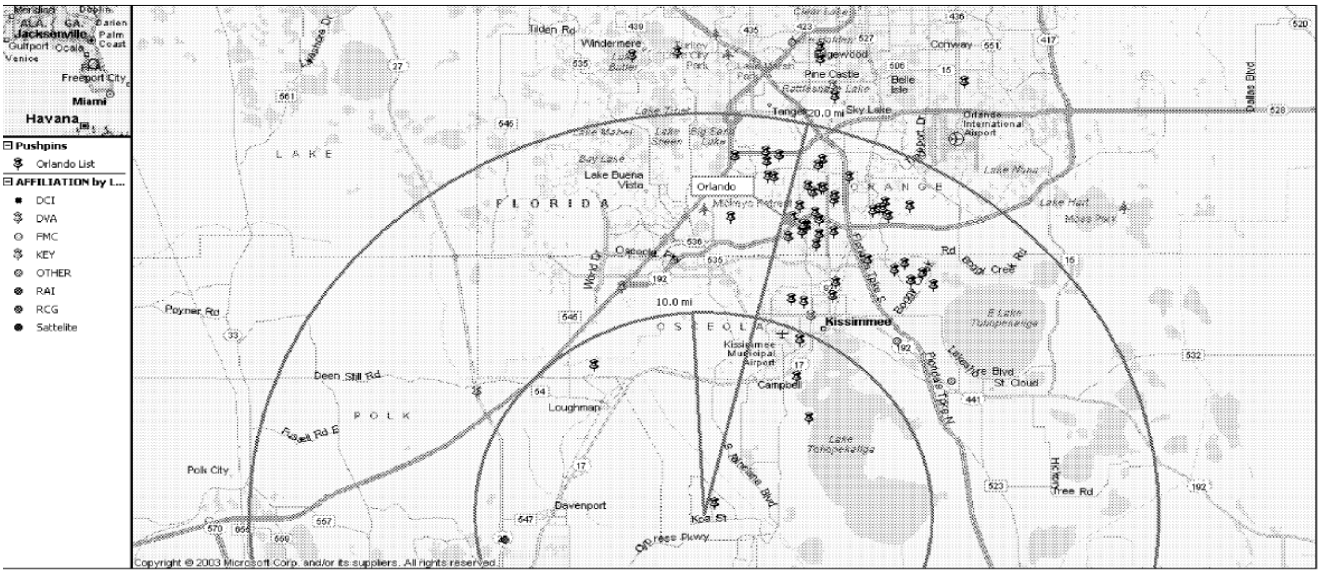
29 patients inside the 10 mi. radius (at least 21 are IMS referred – could be as many as 25)
21 patients are closer to Poinciana (at least 14 are IMS referred – could be as many as 17)
At least 69 (maybe up to 76) of the 86 local pts are IMS referred

Celebration, FL



12 patients inside the 10 mi. radius (6 of which are IMS referred)
12 patients are closer to Poinciana (7 of which are IMS referred)
At least 18 (maybe up to 20) of the 34 local pts are IMS referred

Orlando, FL



5 patients inside the 10 mi. radius (3-4 of which are IMS referred)

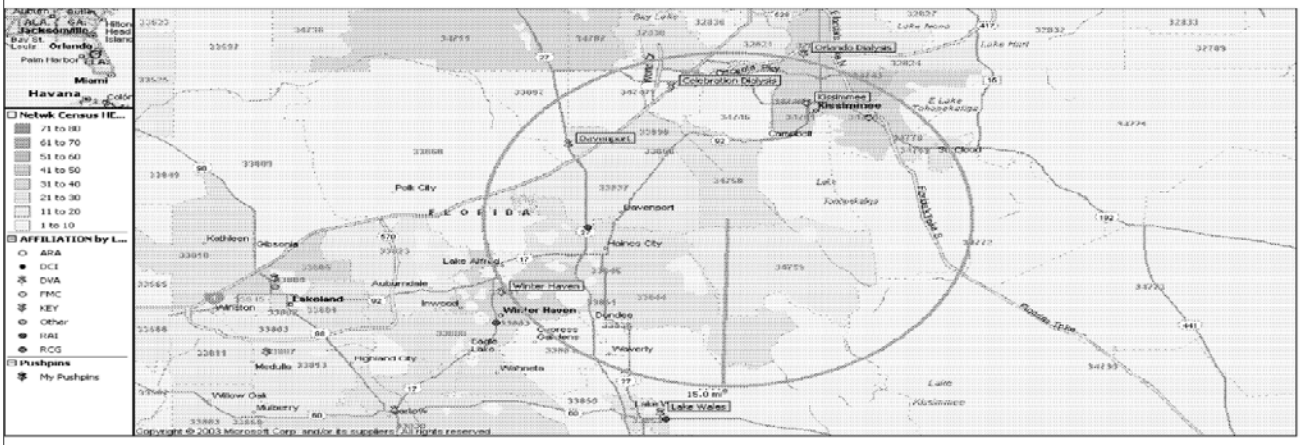
4 patients closer to Poinciana (3 of which are IMS referred)

At least 45 (maybe up to 51) of the 70 local pts are IMS referred

62. As shown above, in areas where the targeted IMS physicians had patients, DaVita decided to offer a joint venture. In other locations where the IMS physicians did not have patients, no joint venture opportunities were offered by DaVita to the physicians.

63. Internal DaVita presentations regarding IMS referenced two DaVita centers (Winter Haven and Lake Wales) that were not offered as potential joint venture centers because the IMS physicians did not have any patients that they could refer in the area:

DVA Centers with Exposure to Poinciana, FL



•Six centers within ~15 miles of Poinciana – Kissimmee, Orlando, Celebration, Davenport, Winter Haven, & Lake Wales
•Winter Haven and Lake Wales were excluded from the analysis due to their lack of IMS patients and their location right at the 15 mile perimeter of Poinciana

As stated in this document, two dialysis centers "were excluded from the analysis due to their lack of IMS patients."

B. DaVita Ranked and Selected "Winning" Physician Practices as Joint Venture Partners.

64. In selecting physicians for potential joint venture partnerships, Deal Depot also defined what DaVita considered to be a "winning practice." The definition of a winning practice, which made an attractive joint venture partner, had nothing to do with quality of care or physician expertise. Instead, it focused exclusively on the potential for patient referral growth. On a scale of 1 to 5, with 5 being the best potential for joint venture partnership, DaVita had the following descriptions:

> 1 = Not growing (senior physicians only), 2 = Not growing (mix of mostly senior/some young physicians), 3 = Moderate growth (not aggressive), 4 = Solid growth (could become aggressive), and 5 = Comprehensive understanding of the market direction (young and vibrant practice).

65. In the case of at least one transaction, DaVita described the fact that the physicians were young *and in debt* as a positive factor. Such physicians could be counted on to maximize their personal economic return by referring patients to DaVita.

66. DaVita's standard "Regional Director Summary of Due Diligence Assessments" form for joint venture transactions had a specific section entitled "Physician Relations Assessment" that requires information on the physicians' "Referral Patterns." Before concluding a deal, DaVita explicitly evaluated the physicians' total number of patients and their ability to refer those patients:

DaVita

Regional Director Summary of Due Diligence Assessments

Entity:

Date:

By:

The Regional Operations Director Due Diligence document should be an Executive Summary. A high level overview with areas of opportunity highlighted along with plans to address issues. The following areas should be addressed. The bullet points below are examples of potential highlighted areas not necessarily areas that need to be addressed.

Facility Operation Overview (From CSS assessment)

- Total # patients
- Number of stations
- Days of Operation
- Number of Patient Shifts
- Capacity
- Modalities offered
- Missed Treatment Factor
- Average Treatments per month

Physician Relations Assessment (Regional Operations Director)

- Referral Patterns
- Competition
- Opportunities
- Strengths
- Weaknesses
- Threats
- Plan

X. DAVITA'S JOINT VENTURES WITH REFERRING PHYSICIANS PROVIDED REMUNERATION BASED ON THE VALUE OF POTENTIAL PATIENT REFERRALS

67. Internal Deal Depot documents make it clear that DaVita specifically valued and negotiated for patients when deciding which physicians to offer joint venture partnerships to, and how much money to provide the referring physicians to entice them to enter into the joint venture partnership.

68. DaVita's Code of Conduct stated that an example of prohibited conduct under the AKS was the "payment of any money in exchange for patient referrals." Yet, business documents used by the Deal Depot made it clear that in many joint venture transactions with referring physicians, DaVita valued the deal based on the patients the physicians were expected to refer. By doing so, DaVita knowingly violated its own "code of conduct," as well as the AKS.

69. For example, a Closed Deal list for YTD 2008 quantified the price DaVita paid per patient for certain acquisitions of physician-owned dialysis centers:

Deal Depot — Closed Deals YTD 2008

	Deal Name	Date of Close	Transaction Value	(a)	Patients	(b)	Centers	IRR	Year 3 Cash on Cash	EBITDA Year 1	(a)	Price/Pt	x EBITDA
	2008 Acquisitions												
1.	Fayetteville	1-Feb-08	$ 3,790,000		110		4	16.6%	14.8%	$ (423,233)		$ 34,455	-9.0 x
2.	Decatur	1-Apr-08	$ 8,000,000		168		2	16.2%	14.2%	$ 1,209,252		$ 47,619	6.6 x
3.	Coastal	1-May-08	$ 5,400,000		111		1	12.5%	12.0%	$ 749,078		$ 48,649	7.2 x
4.	Kansas	1-Jun-08	$ 18,750,000		189		3	14.0%	12.3%	$ 2,887,596		$ 99,206	6.5 x
5.	Vidalia	1-Aug-08	$ 514,000		23		1					$ 22,348	
6.	Cuero	1-Aug-08	$ 300,000		18		1					$ 16,667	
7.	Trover	1-Aug-08	$ 1,100,000		87		1	15.5%	13.3%	$ 220,739		$ 12,644	5.0 x
8.	Payton	30-Sep-08	$ 28,275,000		295		3	14.5%	10.7%	$ 4,306,975		$ 95,847	6.6 x
9.	Port Lavaca	1-Oct-08	$ 800,000		39		1	2.0%	10.1%	$ 114,411		$ 20,513	7.0 x
10.	Stemmer	1-Dec-08	$ 10,000,000		111		1	17.4%	11.5%	$ 1,288,987		$ 90,090	7.8 x
11.	Caucus	1-Dec-08	$ 14,000,000		170		2	13.3%	12.5%	$ 1,148,410		$ 82,319	12.2 x
12.	Dialysis Services of Central Florida	1-Feb-09	$ 32,800,000		474		5	12.2%	9.9%	$ 3,173,219		$ 69,198	10.3 x
	Total		**123,729,000**		**1,795**		**25**	**13.8%**	(c) **11.4%**	(c) **14,675,435**		**$ 78,513**	**8.4 x**

70. "Price per patient" was a metric used in transaction documents for multiple transactions, including the IMS/St. Cloud joint venture:

St. Cloud Transaction Summary

	Valuation	EBITDA (1)	EBITDA Multiple	Patients	Price per Patient
Partially Acquired Center					
St. Cloud	$ 5,975,000	$ 1,015,306	5.9x	126	$ 47,421
Partially Divested Centers (2)					
Celebration Dialysis	$ 1,025,000	$ 1,162,639	0.9x	154	$ 6,656
Orlando Dialysis	$ 1,025,000	?	?	?	?
Kissimmee	$ 1,025,000	?	?	?	?

(1) For the acquired centers, projected year 1 EBITDA. For the divested centers, historical EBITDA.
(2) Valuations for the divested centers is a per-center average.

XI. DAVITA MANIPULATED JOINT VENTURE VALUATIONS TO HIDE KICKBACKS

71. In legitimate business transactions, participants ordinarily try to sell their goods and services for as much as possible, and buy goods and services as cheaply as possible (*i.e.* Buy Low/Sell High). DaVita's approach when negotiating with potential or actual referring physicians was the reverse. To ensure patient referrals, DaVita deliberately paid more than market value for dialysis centers it bought from physicians, but regularly sold interests in existing DaVita dialysis centers to physicians at cut-rate, below market prices.

72. Because such a "Buy High/Sell Low" business strategy obviously indicates a kickback to physicians to induce referrals, DaVita masked its strategy by manipulating the financial models it ordinarily used for its own analysts and for its outside appraisers to calculate the value of dialysis centers.

73. DaVita personnel in its Deal Depot, under direct orders from the Vice Presidents and other managers in charge of the department, manipulated the valuation process with both ad hoc adjustments to various financial models, and through the application of non-standard — even illogical (from an accounting point of view) — formulas and algorithms. Operational costs and income estimates could be raised or lowered depending on the desired value outcome. Some of the value factors that DaVita's Deal Depot used to manipulate values were flexible assumptions about the future compensation level that might be paid by private insurers for dialysis, the number of high paying private insurance patients a facility might have, changes in labor costs, changes in general and administrative ("G&A") expenses, and the estimated expense per treatment.

74. Some of the non-standard algorithms DaVita used to "game" its projections tended to decrease the projected value of a dialysis center. Others generally had the opposite effect, increasing the projected value of a center. When DaVita partially divested interests in its dialysis centers to physicians, it used the algorithms that decreased the value of the centers, thus decreasing the purchase price to physicians and allowing the physicians to buy a valuable, income-producing asset at an unrealistically low price. Conversely, in buying an interest in an existing physician-owned dialysis center, DaVita tended to use only the algorithms and assumptions that increase the value of centers, thus increasing the price paid to the potential physician joint venture partner. The manipulative application of these algorithms, as standard practice, led to the overvaluing of the centers DaVita bought, and the systematic undervaluing of the centers it sold.

75. The primary mechanism DaVita used to depress the value of centers DaVita partially divested to physicians was the application of a financial algorithm known internally at DaVita as "HIPPER compression." HIPPER compression was based on an assumption that all private insurance companies that insure a small but valuable number of patients will substantially reduce their compensation to DaVita at a defined point in time, typically three years after the date of the transaction. Since this "HIPPER compression" assumption was speculative and arbitrary, it provided DaVita with a powerful tool, in its valuation methodology, to depress its estimate of the economic value of any centers it wanted to partially divest to potential referring physicians to form a joint venture and, thereby, obtain their patient referrals. In addition to this structural machination, DaVita routinely manipulated its financial models by using artificial and unreasonable values for expected costs or other key financial indicators. The final result was a valuation methodology that was so flexible that DaVita could justify any value it wanted. This in turn allowed DaVita to provide remuneration to physicians under the cover of a supposedly legitimate business transaction.

76. DaVita's Deal Depot selectively used assumptions that would allow it to establish nearly any value it needed to justify transactions it had already decided were in DaVita's interest. That many of these assumptions had no basis in reality was clearly understood by DaVita's Deal Depot personnel. Even DaVita's Chief Financial Officer understood HIPPER compression to be a fiction. Internally, he wrote: "If all our private pay compresses to 750 without increases in the lower rate biz or mcare . . . we are out of business. In other words this is not a realistic assumption." E-mail from Chief Financial Officer, DaVita, Inc., (May 20, 2009).

77. In many joint venture transactions, DaVita's Deal Depot flexibly manipulated economic assumptions simply to justify the price required to induce the physician to enter into partnership with DaVita. The numerous manipulations and their inconsistent use demonstrated that for many transactions the real value was simply the value of the referrals from the physician.

78. DaVita's Deal Depot personnel understood that there was no business integrity to the valuation modeling and that it was only being used as window dressing to hide the real purpose: securing patient referrals from physicians through joint ventures. In a July 24, 2009 email, DaVita's Vice President of Special Projects, wrote to a departing Deal Depot member:

> Sorry to hear you are leaving us, but do wish you the best. I was hopeful before you leave you, or you and Queenie, can give us a list of the most common things one could do with the model to make sure it passes the COC ["Cash-on-Cash"] and IRR ["Internal Rate of Return"] hurdles. As we redesign the model I would like to be mindful of these.

79. In this same e-mail string the Vice President of Finance responded: "Bryan – you mean 'gaming' to model, right?" To which the Vice President of Special Projects replied: "I do. Thanks Chet."

80. DaVita management understood that these manipulations undercut any validity that the valuation modeling might have had. As a result DaVita was able to selectively use these numerous value manipulations, which allowed it to effectively back into the valuation level it needed to secure its relationship with the referring physicians while simultaneously creating a phony justification for the value of the joint venture, no matter how low or high.

A. Valuation Manipulations in "Partial Divestitures."

81. "Partial divestiture" transactions were joint ventures formed by DaVita divesting an ownership interest in one of its existing, wholly-owned dialysis centers to a referring physician. Divesting substantial interests in existing, profitable dialysis centers does not make business sense for a company in the dialysis business that is attempting to grow and capture an even larger share of the market. In many instances the only demonstrable business advantage of divesting to a physician is to ensure patient referrals from the physician.

82. As an example, in the "Wauseon" partial divestiture in Ohio in November 2008, DaVita sold additional shares of a center to an existing joint venture physician referral source. By using HIPPER compression, DaVita drove down the value of its own asset by more than 50%, from approximately $4.0 million to $1.7 million. This artificially low value was contrary to normal business practices and only made sense as an effort to secure patient referrals from the physician referral source by providing otherwise unwarranted remuneration.

B. Valuation Manipulations in "Paired Transactions."

83. In "paired transactions" DaVita would acquire an interest in a physician-owned center while simultaneously selling an interest in an existing DaVita-owned center to these same physicians. The lack of integrity in DaVita's economic valuations was most clearly demonstrated in these paired transactions.

84. To ensure a favorable return to the physicians, DaVita would use its valuation manipulations to increase the value of the physician-owned center and then frequently use dramatically different economic assumptions to reduce the value of the DaVita-owned center.

85. EBITDA is an accounting convention representing "Earnings Before Interest, Taxes, Depreciation and Amortization." DaVita used EBITDA as a metric to value dialysis centers. EBITDA represents a measure of a center's earnings. One way DaVita gauged the value of centers is by using a multiple of annual EBITDA. The higher the multiple, the more the buyer is paying for a particular stream of profits.

86. Analysis of EBITDA values comparing DaVita center interests partially divested and physician center interests acquired by DaVita confirms DaVita's value manipulations leading to a buy high/sell low strategy used to gain referrals. DaVita repeatedly assigned lower EBITDA values to DaVita-owned centers it was partially divesting than to physician-owned centers DaVita was buying.

C. The Valuation Manipulations Resulted in Physician Joint Venture Partners Receiving Unreasonable Rates of Return on Investment.

87. The result of these valuation manipulations inevitably was that the severe undervaluation of the dialysis centers in divestitures and overvaluation in acquisitions allowed a disproportionate return to the referring physicians. As a result of DaVita's valuation manipulations, the physicians were able in several instances to get pre-tax annual returns on investment exceeding 100%. In other words, DaVita provided these referral source physicians with a joint venture deal where the physicians recouped their entire investment in one year. Income for each subsequent year was pure profit — provided that the physicians continued to keep the DaVita dialysis center making money by referring their patients to the joint venture.

XII. LOCKING THE PHYSICIANS IN TO ENSURE PATIENT REFERRALS

A. DaVita Offered Joint Ventures to Physicians Whose Medical Directorship Covenant Not to Compete Was Expiring

88. Further evidence that some of DaVita's joint ventures were intended to secure patient referrals was DaVita's use of potential competition "hotspots" to determine appropriate targets for joint venture partnerships.

89. Internally at DaVita, a "hotspot" was a name for a competitive situation in which DaVita risked losing a prime relationship with a physician group to a DaVita competitor. Hotspots frequently involved a DaVita dialysis center where the current Medical Director, a physician,[4] was both a significant source of patient referral for DaVita and had signed a covenant-not-to-compete with DaVita that was nearing expiration. Physicians who invested in joint ventures with DaVita were required to sign covenants-not-to-compete. Because DaVita believed the covenant-not-to-compete was a significant barrier to the physician referring patients to DaVita's competitors or establishing his or her own dialysis center, it was important for DaVita to ensure the referral of patients by requiring that Medical Directors who were offered the opportunity to enter into joint venture arrangements that were economically advantageous to those Medical Directors, also had to sign a non-compete covenant.

90. DaVita's Deal Depot tracked all of these hotspots on what it called a "dashboard." When these physicians were successfully enticed into joint ventures relationships and had signed new covenants-not-to-compete, Deal Depot quantified its success in terms of the number of

[4] Every dialysis center is required by regulation to have a physician Medical Director to ensure the quality of the dialysis treatments. 42 C.F.R. § 494.150. DaVita compensated physician Medical Directors but also required them to sign a Medical Directorship agreement that includes a covenant-not-to-compete. In dialysis centers wholly owned by DaVita, the majority of the patients are referred to the center by the Medical Director.

patients “saved” and revenue “saved” under the assumption that had the covenant-not-to-compete expired, the physician would have referred his or her patients to a competitor.

B. Binding Referral Source Physicians with Non-Competition, Non-Solicitation And Non-Disparagement Clauses.

91. Having selected physicians who could refer patients, and then having enticed those physicians to partner with DaVita in a dialysis joint venture, DaVita then took steps to lock the physicians into the deal and inserted provisions in the agreement that made it substantially more difficult for the physician to leave the joint venture, compete with DaVita in any way, or enter into any transactions with DaVita competitors.

92. In a December 22, 1992 letter, the Associate General Counsel to HHS, Inspector General Division, cautioned that "payment for covenants not to compete" where there is a continuing relationship of referrals would raise the question of compliance with the AKS. In some cases, payments for non-competition agreements unlawfully compensate a physician for steering patients for federally-funded medical care or services. Letter from D. McCarty Thornton, Associate General Counsel, Inspector General Division, to T. J. Sullivan, Technical Assistant, Office of the Associate Chief Counsel, Internal Revenue Service (Dec. 22, 1992). http://oig.hhs.gov/fraud/docs/safeharborregulations/acquisistion122292.htm.

93. In an April 2003 Special Advisory Bulletin, HHS-OIG also cited concerns about joint ventures that "result in either practical or legal exclusivity for the Manager/Supplier through inclusion of non-competition provisions or restrictions on access. While the contract terms of these arrangements may appear to place the Owner at a financial risk, the Owner's actual business risk is minimal because of the Owner's ability to influence substantial referrals to the

new business." Special Advisory Bulletin: Contractual Joint Ventures, OIG, 3 (Apr. 2003). http://oig.hhs.gov/fraud/docs/alertsandbulletins/042303SABJointVentures.pdf.

94. Despite this guidance, DaVita's joint venture agreements routinely included non-competition provisions and other restrictions on its referring physician partners.

95. The April 2003 Special Advisory Bulletin also warned that indicia of a suspect contractual joint venture —a joint venture that could violate the AKS — include a "captive referral base" where the newly-created business predominately or exclusively serves the Owner's existing patient base (or patients under the control or influence of the Owner). *Id*. at 5-6.

96. DaVita's joint ventures had these suspect indicia. DaVita's "Non-Competition and Non-Solicitation" clauses for its joint ventures were for the life of the agreement and included an extension for a period of time after the agreement ended (*i.e*., a "tail"), usually around five years. During this "restricted period" the physician partner could not "directly or indirectly, own any interest in, lease, operate or extend credit to, any Competitor, or otherwise participate with or be employed or retained by (*e.g*. as an employee, medical director, contractor, or consultant to, for or with) any Competitor." As a result of these contractual restrictions, DaVita effectively established its own joint ventures as the exclusive option for each physician partner to refer patients.

97. Further, many of DaVita's joint ventures required physician partners to agree not to induce any patient to go to any other competing dialysis center as follows:

> The Members [other than DaVita] further agree that, during the Restricted Period, they will not, directly or indirectly (i) induce any customer of Company or LLC Manager (either individually or in the aggregate) to patronize any competing dialysis facility; (ii)

> request or advise any patient or customer of Company or LLC Manager to withdraw, curtail or cancel such person's business with Company or LLC Manager, (iii) enter into any contract (whether for sale of such Member's medical practice or otherwise), the purpose or result of which would benefit such Member if any customer of Company or LLC Manager were to withdraw, curtail, or cancel such customer's business with Company or LLC Manager; (iv) solicit, induce or encourage any physician affiliated with Company or LLC Manager or other Person employed by the Company or LLC Manager to curtail or terminate such Person's affiliation or employment; or (v) disclose to any other Person the names or addresses of any customer of Company or LLC Manager, either individually or collectively.

This language effectively restricted the free exercise of a physician's medical judgment for the benefit of his or her patients, which is one of the things Congress enacted the AKS to prevent.

98. Some of the joint venture agreements also contained a "non-disparagement" clause that prevented physician joint venture partners from "criticizing, denigrating or disparaging Company [DaVita] or Center."

99. The critical role these non-competition agreements, and their corresponding implicit guarantee of referrals, played in DaVita's joint venture transactions with referring physicians is illustrated in a July 25, 2008 email exchange between a DaVita Transaction Director, and the Division Vice President, concerning a deal in the Klamath Falls region of Oregon. DaVita was buying a dialysis center, Sky Lakes Dialysis, and contemplating hiring as medical directors a group of physicians (Renal Care Consultants or "RCC"). RCC themselves owned a separate group of dialysis centers. The RCC physicians were also responsible for a substantial portion of the referrals to the Sky Lakes center. The Division Transaction Director asked the Division Vice President:

> Do you want us to proceed with the acquisition in the event RCC sells their centers to FMC [a DaVita competitor] or some other competitor (whether or not RCC is the Sky Lakes medical director)?
>
> Our concern is being able to close the Sky Lakes acquisition prior to knowing if RCC will sell to us or FMC. If you two are comfortable closing the Sky Lakes acquisition as long as RCC is the medical director (and is bound by a reasonable non-compete clause), we will push both Sky Lakes and RCC for a quick resolution to this issue. If we aren't willing to close Sky Lakes until we know whether or not we're buying RCC's centers, we'll need to delay the Sky Lakes close (thereby potentially putting the deal in jeopardy) until we have closure on RCC.

100. The Division Vice President responded:

> I am less concerned about whether or not RCC sells its centers to us or not. The important thing is that they sign a 10-year MDA with a 25 mile non-compete around Klamath Falls. If they will not sign that agreement, then we are wasting our time and money. *All the patients in Klamath Falls are theirs. Without the agreement and non-compete, they will simply build [a center of their own] and move their referrals to the center and we will be left with nothing*. Call me if you want to discuss. I will not approve closing without RCC signing an MDA.

7-25- 2008 email re: Klamath Falls. (Emphasis added).

101. A central value to DaVita in these joint ventures with physician partners was the covenant-not-to-compete and other binding clauses that DaVita used to effectively lock in patient referrals from their physician partners to DaVita centers.

C. Joinder Provisions Ensured Additional Patient Referrals.

102. Because the referral of patients from the physician's practice was key to DaVita's underlying economic assumptions and reasons for entering into joint ventures, it was important that all physicians in the practice, even physicians who were not partners to the joint venture, be bound by the non-competition and non-solicitation agreements contained variously in the joint venture's medical directorship agreement, management agreement or purchase agreement. Therefore, junior physicians practicing with more established physicians were required by their

employer to sign non-competition, non-solicitation agreements benefiting DaVita, whether or not they were actually partners to the joint venture.

103. DaVita placed real economic value on these "joinders." For instance, an e-mail from an employee in DaVita's Deal Depot authorized increasing an offer to physicians in Klamath Falls, Oregon up to $3.5 million if all four physicians in the practice signed joinder agreements. E-mail to Transaction Director, DaVita, Inc. (Oct. 8, 2006).

D. Non-Transferability Clauses Ensure Patient Referrals

104. Another feature of some of DaVita's joint ventures is that the physicians' interests in the joint ventures were non-transferable. HHS-OIG has noted that one indication that a joint venture may violate the AKS is if the investment interest is non-transferable. OIG Special Fraud Alert, *Joint Venture Arrangements* (1989), republished at 59 Fed. Reg. 65,372 (Dec. 19, 1994). Although DaVita could sell its interest in the joint venture, the physician partner could not. This was a strong indication that the physician's ability to refer, which was unique to the physician and could not be duplicated by other potential investors, was the real purpose behind the partnership.

105. Added to the non-transferability clause were provisions, usually included in an accompanying Medical Directorship Agreement, which prohibited the physician from selling or terminating his or her medical practice. Because the physician partner's medical practice was the source of patient referrals, termination or sale of that practice would prevent the physician from being the partner that DaVita wanted — a partner who could, and did, refer patients to the joint venture.

XIII. EXAMPLES WHERE DAVITA PROVIDED A KICKBACK THOUGH A JOINT VENTURE TRANSACTION

A. IMS/St. Cloud, Florida Transaction. (South Central Florida Dialysis Partners, LLC)

106. An example of a transaction where DaVita both bought and sold shares of dialysis centers in the same general market, to the same physicians, and at the same time, was the St. Cloud transaction in Florida in August 2007. In this transaction, DaVita: (1) bought a 60% interest in Nephrology Consultants Dialysis Center from its physician-owners; (2) sold a 40% interest in three existing DaVita dialysis centers in the same area to the same physician group; and (3) created a joint-venture with that physician group, which included ownership in 4 dialysis centers: Celebration Dialysis, in Celebration, Florida; Hunters Creek Dialysis and Hunters Creek at Home, in Orlando, Florida; Kissimmee Dialysis, in Kissimmee, Florida; and St. Cloud Dialysis, in St. Cloud, Florida.

107. In an internal document titled "Hotspot Resolution Proposal," IMS is described by DaVita personnel as a former joint venture partner with Gambro that was required to sell its minority position to Gambro as part of part of Gambro's Settlement Agreement with the United States. As part of Gambro's unwinding settlement with IMS, Gambro allowed IMS a "carve out" from its non-competition agreement which then allowed IMS to open its own dialysis center in St. Cloud, Florida.

108. IMS then questioned the legitimacy of its Medical Directorship agreements and covenants-not-to-compete with Gambro that were acquired by DaVita when DaVita purchased Gambro. Without these covenants-not-to-compete, DaVita feared that the physicians would cease referring their patients to DaVita dialysis centers.

109. DaVita's solution was to offer to buy a majority position in IMS's independent St. Cloud dialysis center as a paired transaction with allowing these physicians to buy a 40% ownership interest in three DaVita-owned dialysis centers which were selected by determining how many patients the IMS physicians had who lived close to the DaVita dialysis centers. As part of these transactions the IMS physicians would sign new covenants-not-to-compete, effectively locking in the patient referrals.

110. DaVita originally offered to buy the St. Cloud center from the physicians for $3.1 million. IMS informed DaVita that it wanted $7 million to do the deal. DaVita rapidly agreed to more than double its original offer to $6.6 million based on the same economic data. To reach this figure, DaVita had to place more than twice the value on the physicians' existing center than it placed on its own dialysis center. This was a classic example of DaVita buying high and selling low, which was contrary to ordinary business practice but consistent with paying remuneration to physicians to induce referrals in violation of the AKS.

111. DaVita executed this transaction by forming a joint venture named South Central Florida Dialysis Partners, LLC, because, according to the Executive Summary of the deal analysis, the deal would: "Further align our [DaVita's] interests with Internal Medicine Specialists (IMS), a leading physician group in Orlando with medical directorships . . . at 10 Orlando-area DaVita dialysis centers." In other words, the center was owned by an influential physician group which was responsible for a substantial portion of the referrals to ten existing DaVita dialysis centers.

112. A comparison of financial performance data for the center DaVita bought and one of the three centers it sold shows that the centers had comparable profits. The center DaVita sold

earned $1.16 million, versus $1.05 million earned by the IMS-owned center DaVita bought. The center DaVita sold was also larger, serving 154 patients, versus 126 patients serviced by the IMS center.

113. Notwithstanding the comparable features of the two centers, DaVita attributed a much higher value to the center it bought into. DaVita valued the center it bought into at $5,975,000. In contrast, DaVita valued the three centers it partially divested only at $3,075,000 total ($1,025,000 each).

114. To justify the inflated price for the center it bought, DaVita gamed the valuations by simply increasing the expected revenue per treatment from $246 to $268 for the center it purchased. DaVita also used artificially low figures for bad debt ($4.91 per treatment versus the average in that region of $9.20) and G&A expenses ($13.50 per treatment versus the average in that region of $22.62).

115. Even after DaVita gamed the profitability of the financial model for the center it bought, that center was still only slightly more profitable on a per-treatment basis than one of the centers it sold — still far from justifying the highly inflated purchase price.

116. As a result of these unwarranted value manipulations, DaVita's joint venture offer to the physicians constituted remuneration to the physicians prohibited by the AKS. The physicians then referred patients to DaVita for dialysis services that were billed by DaVita to the Federal health care programs starting on August 1, 2007, in violation of the FCA.

B. Columbus Ohio Transaction (Columbus-RNA-DaVita, LLC)

117. A joint venture in Columbus, Ohio, provides another example of the different prices DaVita assigned to similar dialysis centers in the same market. In 2005, Gambro had ended its joint venture with RNA physician group in Columbus, Ohio, by buying their entire interest in the dialysis centers. Gambro valued the joint venture centers at $27 million when it paid these physicians for their interest to terminate the joint venture pursuant to the settlement with the United States. Three years later, despite the fact that these dialysis centers had grown and were more profitable, DaVita, which had acquired the dialysis centers from Gambro, used its value modeling manipulations to value them at a mere $6.5 million. Thus, these referring physicians were allowed to buy back into these dialysis centers at an absurdly low price. It is clear that this opportunity and price were available to these physicians only because of their ability to refer dialysis patients. The resulting joint venture, Columbus-RNA-DaVita, Inc., included three dialysis centers: Columbus Dialysis, in Columbus, Ohio; Columbus East Dialysis, also in Columbus; and Columbus Downtown Dialysis, also in Columbus.

118. This transaction was so absurd from a business standpoint that a DaVita Deal Depot employee forwarded the analysis showing Gambro's 2005 buyout valuation of $27 million, growth in revenues and then DaVita's 2008 partial divestiture valuation of $6.5 million, to another Deal Depot employee with the simple statement, "fyi - lol" ("for your information - laugh out loud").

119. As a result of these unwarranted value manipulations DaVita's joint venture offer to the physicians constituted AKS-prohibited remuneration to the physicians. The physicians

then referred patients to DaVita for dialysis services that were billed by DaVita to the Federal health care programs starting on March 1, 2008, in violation of the FCA.

C. Rocky Mountain Dialysis / Mountain West Dialysis Transaction (Mountain West Dialysis Services, LLC)

120. Another example of DaVita's use of illegal remuneration masked as joint ventures to respond to a "competitive hot spot" — *i.e.*, the risk of loss of business to a competitor - occurred in Denver, Colorado in June 2008. This transaction, in which DaVita bought and sold centers in the same geographic market at the same time, is particularly revealing of DaVita's goal to funnel cash and other illegal remuneration to referring physicians.

121. In the spring of 2008, a physician practice called Western Nephrology that had Medical Directorship agreements with DaVita terminated its relationship with DaVita and moved forward with plans to build (and send its patients to) new dialysis centers in a joint venture with a different dialysis company. Prior to that time Western Nephrology was responsible for a substantial portion of the patient referrals to DaVita's dialysis centers on the west side of Denver.

122. To replace that business and maintain its market share, DaVita approached Denver Nephrology, the physician practice that provided most of the referrals to DaVita's dialysis centers on the east side of Denver, to see if it would be interested in expanding to the west side of Denver. At that time, DaVita and Denver Nephrology were co-owners of Rocky Mountain Dialysis, a joint venture that ran three dialysis centers on Denver's east side.

123. At that time Denver Nephrology did not have any offices on the west side of Denver. Denver Nephrology was interested in DaVita's proposal, but did not want to commit the

capital to open the necessary new offices across town. In order to entice Denver Nephrology into a relationship with DaVita it was necessary to provide money for Denver Nephrology to open new offices, and cover any losses the offices would experience. To do this DaVita proposed a transaction that would provide both an immediate cash infusion to Denver Nephrology, and an ongoing share of the profits from DaVita's west-side dialysis centers. DaVita and Denver Nephrology entered into a deal where DaVita: (1) bought the remaining 49% of Denver Nephrology's shares of Rocky Mountain Dialysis for almost $19 million and (2) sold Denver Nephrology a 49% interest in joint ventures containing eight of DaVita's dialysis centers on the west side of Denver, for $1.9 million.

124. Although the centers were all in the same city/geographic region, the price paid for the two types of transactions (purchase versus sale) were starkly different. On average, DaVita valued the centers it bought at approximately $13 million each (100% value of the centers), but only valued the centers it sold at approximately $635,000 each (100% value). These price differentials reflect the impact of HIPPER compression and other ad hoc manipulations DaVita used to fit the transaction into its Buy High/Sell Low kickback strategy.

125. To reach these values, DaVita had to engage in a number of unfounded and illegitimate valuation manipulations. When DaVita first began analyzing this potential deal, the Transaction Director approached a Deal Depot staff member and asked him to produce an analysis of the projected value of the three centers in the Rocky Mountain joint venture using DaVita's standard assumptions. This preliminary model projected that the three centers DaVita needed to buy from Denver Nephrology were collectively worth $21.1 million.

126. Because this was not enough money to close the deal with Denver Nephrology, the Transaction Director directed that HIPPER compression be offset with other assumptions. Accordingly, the model was gamed as follows: the effect of HIPPER Compression was offset arbitrarily by increasing the expected revenue per treatment from $299 to $315; operating costs were arbitrarily reduced by decreasing the expected bad debt from $14.29 per treatment to only $7.88, and expected G&A costs were reduced from $23.04 to $13.50.

127. The Transaction Director then told the Deal Depot staff member that the Senior Vice President of Corporate Development had requested a table showing the projected value for the centers that would result if the model was further manipulated to reflect various EBITDA multiples and growth rates.

128. DaVita ultimately moved forward with the deal, but with an increased value for the Rocky Mountain joint venture of $39.5 million. To reach this value, Deal Depot management "gamed" the model even further, increasing the "terminal value" from $25 million to $29 million, and slashing DaVita's required pre-tax internal rate of return on its investment in the transaction ("IRR") for itself from 16.7% to 3.5%.

129. Near the time the transaction was set to close, Deal Depot's management sought a third-party opinion to reflect that the approximate $39 million price for these three centers was fair market value. This was unusual because typically Deal Depot only sought fair-market-value opinions on the value of centers it was selling. Rather than use Deal Depot's usual valuation firm, they gave the task to a new firm. The new firm's analysis did not support DaVita's desired $39 million price. Instead, even using the doctored financial data provided by DaVita, this new firm reported that fair market value for the three centers was no more than $30 million. When

the valuation firm orally reported its findings, DaVita ordered the company not to produce a written report of its findings. DaVita then consummated the deal based on its inflated $39 million price. DaVita managers told Relator that DaVita paid the new valuation firm thousands of dollars for its unwritten services that DaVita ended up not using in the deal.

130. Despite the valuation gaming employed to inflate the purchase price of centers bought from referring physicians, no such favorable manipulations were made when valuing the eight centers DaVita sold to Denver Nephrology. Instead, projected revenues for the DaVita dialysis centers were dramatically depressed using HIPPER compression. As a result, the prices charged to the physicians for these centers were barely at the value of the hard assets of the centers.

131. The specific dialysis centers included in the Mountain West Dialysis Services, LLC joint venture are: Lakewood Crossing Dialysis, in Lakewood, Colorado; Longmont Dialysis Center, in Longmont, Colorado; Lakewood Dialysis Center and Lakewood at Home, in Lakewood, Colorado; Thornton Dialysis Center, in Thornton, Colorado; Boulder Dialysis Center, in Boulder, Colorado; Arvada Dialysis Center, in Arvada, Colorado; and Mile High Home Dialysis PD, in Lakewood, Colorado.

132. It was key to DaVita to manipulate its valuation models to get to dollar figures that sufficiently induced the physicians to sign covenants-not-to-compete and lock up current and future referrals. The manipulations of the value confirm that DaVita's valuation process lacked any integrity and could be used to justify any value that DaVita needed to entice referring physicians to enter into joint ventures with it. Ultimately the only purpose it served was as complicated window-dressing to give the joint venture transactions an appearance of legitimacy.

133. As a result of DaVita's offering remuneration to the physicians in the form of the joint venture, the physicians referred patients to DaVita for dialysis services that were billed to the Federal health care programs starting June 1, 2008, in violation of the FCA.

134. In the examples above of joint venture transactions, as well as other transactions, the kickbacks provided to physicians are further evidenced by the extraordinarily high returns on the physicians' investments in the joint ventures. Such returns approximately range from 120% to 220% or more within two years from the initial investment. When compared to returns expected from a typical investment in a new enterprise, or even when compared to the expected returns on investment for dialysis centers, the physicians' returns on investment in the joint ventures with DaVita were disproportionately large. Such returns evidence not only the immediate kickback received upon the creation of the joint venture, but also the ongoing stream of kickbacks in the form of distributions of profits from the centers.

135. In addition to the joint ventures discussed above, there were other DaVita joint venture transactions that specifically illustrate this pattern of targeting referral physicians, providing remuneration to them in the form of advantageous economic returns, and then locking the physicians into the deal with contract terms. These other transactions include:

a. Llano Dialysis , LLC ("East Bay") a joint venture consisting of four dialysis centers:

- Oakland Peritoneal Dialysis Center and Oakland Peritoneal At Home, in Oakland, California;
- Vallejo Dialysis, in Vallejo, California;
- San Pablo Dialysis, in San Pablo, California;

- El Cerrito Dialysis, in El Cerrito, California.

b. University Dialysis Center, LLC, a joint venture consisting of one dialysis center:

- University Dialysis Center, in Sacramento, California.

c. Shadow Dialysis, LLC, a joint venture consisting of one dialysis center:

- Antelope Dialysis Center, in Citrus Heights, California.

d. Doves Dialysis, LLC, a joint venture consisting of one dialysis center:

- Carmel Mountain Dialysis, in San Diego, California.

e. Animas Dialysis, LLC, a joint venture consisting of two dialysis centers:

- Doctors Dialysis of East Los Angeles, in Los Angeles, California;
- Doctors Dialysis Center of Montebello, in Montebello, California.

f. Bright Dialysis, LLC, a joint venture consisting of one dialysis center:

- Bright Dialysis, in Fort Pierce, Florida.

g. Central Kentucky Dialysis Centers, LLC, a joint venture consisting of one dialysis center:

- Woodland Dialysis Center, in Elizabethtown, Kentucky.

h. Wauseon Dialysis, LLC, a joint venture consisting of one dialysis center:

- Wauseon Dialysis Center, in Wauseon, Ohio.

136. Each of these above-listed transactions combined DaVita's pattern of targeting referral source physicians, providing an unrealistically advantageous joint venture offer to the physicians, providing physician-partners with immediate remuneration as well as a continuous

stream of remuneration in terms of extraordinarily high rates of return on their "investment", and then locking the physicians into the deal with contractual clauses including covenants-not-to-compete.

137. As a result of DaVita's offering remuneration to the physicians in the form of joint ventures, the physicians referred patients to DaVita for dialysis services that were billed to the Federal health care programs by DaVita in violation of the FCA.

COUNT I: FALSE CLAIMS ACT (PRESENTMENT OF FALSE CLAIMS)

138. The United States hereby incorporates by reference the documents and exhibits attached, recited or referenced in the Relator's Complaint in this matter.

139. The United States re-alleges the preceding paragraphs as if fully set forth herein.

140. The United States seeks relief against DaVita under Section 3729(a)(1) of the False Claims Act, 31 U.S.C. § 3729(a)(1) (2006) and, as amended, 31 U.S.C. § 3729(a)(1)(A).

141. As a result of DaVita's payment of remuneration to induce physician joint venture partners to refer their ESRD patients to the joint venture in violation of the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2), the claims for payment submitted to the Federal health care programs were false and fraudulent because they were tainted by the kickbacks and, therefore, were ineligible for payment. Accordingly, DaVita knowingly cause to be presented false or fraudulent claims for payment or approval in violation of the False Claims Act, 31 U.S.C. § 3729(a)(1)(2006), and, as amended, 31 U.S.C. § 3729(a)(1)(A).

142. By reason of the false or fraudulent claims, the United States has sustained damages in a substantial amount to be determined at trial, and is entitled to treble damages plus a civil penalty for each violation.

COUNT II: FALSE CLAIMS ACT (FALSE STATEMENTS)

143. The United States re-alleges the preceding paragraphs as if fully set forth herein.

144. The United States seeks relief against DaVita under the False Claims Act, 31 U.S.C. § 3729(a)(1)(B) and former 31 U.S.C. § 3729(a)(2). 147. As a result of DaVita's kickbacks to induce doctors to refer patients in violation of the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b)(2), DaVita knowingly caused the joint ventures to make false records or statements that were material to false or fraudulent claims for payment submitted to federal health care programs. The false records or statements were the joint ventures' false certifications and representations of full compliance with all federal and state laws and regulations prohibiting fraudulent and false reporting, including, but not limited to the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b.

145. By reason of these false records or statements, the United States has sustained damages in a substantial amount to be determined at trial, and is entitled to treble damages plus civil penalties for each violation.

COUNT III: UNJUST ENRICHMENT/DISGORGEMENT

146. The United States re-alleges the preceding paragraphs as if fully set forth herein.

147. As a consequence of the acts set forth above, DaVita was unjustly enriched and received illegal profits. The United States conferred benefits upon DaVita, DaVita knew of and appreciated these benefits, and DaVita's retention of these benefits under the circumstances would be unjust as a result of its conduct.

148. The United States therefore claims the recovery of all monies by which DaVita has been unjustly enriched and has illegally profited, in an amount to be determined, which in equity should be paid to the United States.

PRAYER FOR RELIEF

WHEREFORE, the United States seeks against DaVita the following:

1. On Counts One and Two under the False Claims Act, the amount of the United States' damages, trebled as required by law, and such civil penalties as are required by law, together with all such further relief as may be just and proper.

2. On Count Three for unjust enrichment/disgorgement, the damages sustained and/or amounts by which DaVita was unjustly enriched or obtained illegally, plus interest, costs, and expenses, and all such further relief as may be just and proper.

DEMAND FOR JURY TRIAL

The United States demands a jury trial in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2014, I electronically filed the foregoing using the CM/ECF system, which will cause a copy of the foregoing to be e-mailed to the following:

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