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Navigating Choppy Waters Post-Patel: Lessons Learned from Insider Trading and Spoofing for Securing No-Poach Convictions

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I. Introduction

In the last two years, the United States Department of Justice Antitrust Division's ("Antitrust Division") criminal enforcement program has encountered a streak of trial losses in cases involving alleged conspiracies to fix wages and restrict hiring practices among competitors in labor markets. With its first four trials involving alleged labor market abuse ending in acquittals, the Antitrust Division faces a growing chorus of skeptics. The Antitrust Division's recent struggles at trial, however, are not unprecedented in the United States Department of Justice's ("DOJ") long history of trying complex criminal cases. As explained in this article, the challenges that the Antitrust Division faces in prosecuting labor-related conspiracies resemble challenges that DOJ prosecutors overcame in insider trading and market manipulation prosecutions over the last decade.

A closer examination of the DOJ's past prosecutions can shed light on the play book that the Antitrust Division may employ to address competitive harms to labor markets. Specifically, the strategies that the DOJ implemented to strengthen its insider trading and spoofing cases underscore the importance of certain key efforts to bring cases that meet the thresholds for prosecution in the Justice Manual:

(1) the effective use of cooperating witnesses;

(2) reassessing charging decisions and evidence with an eye toward trial presentation; and

(3) challenging adverse rulings to develop stronger legal foundations on which to build future prosecutions.

Indeed, the Antitrust Division appears unfazed and committed to bring criminal charges for cartel conduct affecting competition in labor markets. The Antitrust Division has used these strategies in the past, so they seem likely to play a critical role in the Antitrust Division's rebound.

II. Evolution of Antitrust Division's Labor Market Enforcement

In 2016, the Antitrust Division and the Federal Trade Commission issued Antitrust Guidance for Human Resource Professionals and stated for the first time the Antitrust Division's intent to prosecute criminally individuals and companies for engaging in naked wage-fixing and non-solicitation, i.e., "no-poach" hiring agreements.[1] The guidance states that these agreements "eliminate competition in the same irredeemable way" as price fixing and market allocation, which are criminally prosecuted as hardcore cartel conduct under Section 1 of the Sherman Act. [2]

To date the Antitrust Division has secured only one conviction in a no-poach case, against a medical staffing company, by way of guilty plea.[3] The Antitrust Division has not yet persuaded a jury to convict a defendant on

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[1] U.S. DEPT. OF JUSTICE ANTITRUST DIV. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS, OCTOBER 2016, *available at* https://www.justice.gov/atr/file/903511/download.

[2] *Id.* at 4.

[3] *See* Plea Agreement, *United States v. Hee*, No. 2:21-cr-00098 (D. Nev. Oct. 27, 2022), Dkt. 106. DOJ also charged an individual manager who admitted to the charged anticompetitive conduct as part of a pretrial diversion agreement. The indictment as to the manager was ultimately dismissed. *Hee*, Order, Dkt. 118.

antitrust charges in any wage-fixing or no-poach trials.

A. Acquittals in Wage-Fixing and No-Poach Trials

In 2022, the Antitrust Division suffered two trial losses in no-poach and wage-fixing cases. In *United States v. Jindal*, two individuals faced changes for conspiring to suppress pay for physical therapists and their staff.[4] After a six-day trial in April 2022, a Texas jury acquitted both defendants on the wage-fixing charges.[5] Later that month in *United States v. DaVita Inc.,* a jury in Denver acquitted a kidney dialysis company and its former CEO of charges alleging a no-poach conspiracy restrained hiring of key employees between competitors.[6]

This year, the Antitrust Division remains winless after another two trials involving wage-fixing and no-poach conspiracy charges ended in acquittals. In March, jurors in Maine acquitted four home health agency managers charged with conspiring to fix wages for healthcare providers in *United States v. Manahe*.[7] Additionally, in a closely watched no-poach case filed in Connecticut, *United States v. Patel*, the Antitrust Division indicted six aerospace industry managers alleging a conspiracy to allocate the labor market for engineers and specialized employees.[8] The *Patel* defendants went to trial and after the prosecution rested, the court granted defendants' joint motion for judgment of acquittal under Federal Rule of Criminal Procedure 29, preventing the case from being submitted to the jury.[9]

The across-the-board acquittals in *Patel* were surprising because Rule 29 motions are rarely granted due to the rule's highly deferential standard. Under Rule 29, the court must view the evidence in "the light most favorable to the prosecution" to determine whether "*any* rational trier of fact" could have found the elements of the crime beyond a reasonable doubt.[10] In *Patel*, the court held "[a]s a matter of law, this case does not involve a market allocation under the per se rule." Instead, the court reasoned that the *per se* rule applied to no-poach agreements that allocated the relevant labor market to a "meaningful extent,"[11] which the government failed to show. This holding represents a significant legal setback to the Antitrust Division's efforts in prosecuting no-poach agreements as *per se* antitrust violations, which ordinarily does not require proving an anticompetitive effect on an alleged market to sustain a conviction.

In *Patel* and in the three previous no-poach and wage-fixing trials, the Antitrust Division had successfully opposed defendants' motions to dismiss the indictment by persuading courts that the alleged conspiracies constituted *per se* violations as naked horizontal agreements between competitors. The Antitrust Division proceeded to trial with the assurance of the courts' prior rulings that seemingly validated the view that no-poach agreements were strains of hardcore cartel conduct subject to *per se* treatment and a felony charge. Accordingly, *Patel* highlights the gap between the Antitrust Division's view of hardcore cartel conduct in labor-related cases and how courts and juries view these cases.

B. Antitrust Division Leadership: No Signs of Slowing Criminal Enforcement

Despite its losing record, the Antitrust Division has reinforced its commitment to targeting labor market abuses. After the acquittals in *Davita* and *Jindal*, Assistant Attorney General Jonathan Kanter publicly stated, "that which does not kill us makes us stronger" while declaring that the "era of lax enforcement is over."[12] Kanter also described labor market

[4] *United States v. Jindal*, No. 4:20-cr-00358 (E.D. Tex.).

[5] *Id.* One defendant was convicted for obstructing the government's investigation.

[6] Jury Verdict, *United States v. DaVita Inc.*, No. 1:21-cr-00229 (D. Colo. Apr. 15, 2022).

[7] Jury Verdict, *United States v. Manahe*, No. 2:22-cr-00013 (D. Me. March 22, 2023).

[8] Sealed Indictment, *United States v. Patel*, No. 3:21-cr-220 (D. Conn. Dec. 15, 2021).

[9] *Patel*, Order, Dkt. 18.

[10] *Patel*, Order at 4, Dkt. 18, citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

[11] *Id.*at 18.

[12]Jonathan Kanter, Assistant Attorney General, DOJ Antitrust Div., Keynote Address at the University of Chicago 2022 Antitrust and Competition Conference (Apr. 21, 2022), *available at* https://www.youtube.com/watch?v=FtDZM3oOJvA.

prosecutions as "extremely important" in establishing that harm to workers is antitrust harm and that the Antitrust Division was not "backing down."[13] Months later, after *Manahe* ended in acquittals, Kanter spoke at the annual ABA Antitrust Section of Law Spring Meeting where he reemphasized the Antitrust Division's aggressive enforcement efforts by noting that it had more open grand jury investigations than at any time since 1989.[14]

III. Drawing Parallels to Setbacks in Insider Trading and Spoofing Prosecutions

In light of the Antitrust Division's continued commitment to addressing labor market collusion and with another no-poach trial on the horizon, practitioners and commentators alike are left to wonder how the Antitrust Division can overcome the vulnerabilities exposed in its recent no-poach trials. Some answers may lie in prosecutors' past responses to legal setbacks and trial losses in insider trading cases and spoofing prosecutions in the last decade.

A. Insider Trading Prosecutions

In January 2014, former U.S. Attorney Preet Bharara touted his office's surge of insider trading prosecutions. Between 2009 and 2014, the U.S. Attorney's Office for the Southern District of New York ("DOJ") secured over 70 insider trading convictions by either trial or guilty plea.[15] That trend slowed in December 2014 after the Second Circuit's decision in *United States v. Newman* overturned two convictions causing the DOJ to reassess its insider trading prosecution strategy.

Newman raised prosecutors' evidentiary burden in insider trading cases involving remote tippees. *Newman* required the government to prove that a trader who had received material non-public information (1) knew that the tipper received something in exchange for the tip, and (2) that the benefit was of "some consequence."[16] Showing that the benefit to the tipper was consequential was at odds with the Second Circuit practice in this area because before *Newman* prosecutors could satisfy the so-called personal benefit requirement by showing, for example, that the tip was a gift of information to a friend.[17]

As a result, *Newman* had an immediate impact on the DOJ's insider trading enforcement. The DOJ dismissed charges against multiple defendants including some who had already pled guilty.[18] A judge vacated four defendants' guilty pleas after *Newman* because the factual bases to which they pled guilty were no longer sufficient to support their convictions.[19] Insider trading prosecutions slowed to a trickle in 2015 after *Newman,* when the DOJ prosecutors in the Southern District of New York charged only four people.[20]

The DOJ reignited its insider trading enforcement when it announced indictments charging 11 individuals with insider trading by the first half of 2016. The DOJ appeared to address *Newman* head-on by using cooperating witnesses in all insider trading cases it brought

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[13] Mike Scarcella, *After DOJ Antitrust Losses in Employment Trials, Defense Lawyers Urge 'Rethink'*, REUTERS (Apr. 22, 2022), https://www.reuters.com/legal/litigation/after-doj-antitrust-losses-employment-trials-defense-lawyers-urge-rethink-2022-04-22/.

[14] Jonathan Kanter, Assistant Attorney General, DOJ Antitrust Div., "Enforcers Roundtable" Panel at the ABA Annual Antitrust Spring Meeting (March 31, 2023), *available at* https://www.justice.gov/opa/video/assistant-attorney-general-antitrust-division-jonathan-kanter-speaks-enforcers-roundtable.

[15] Jason M. Breslow, "Preet Bharara: Insider Trading Is 'Rampant' On Wall Street," FRONTLINE (Jan. 7, 2014), https://www.pbs.org/wgbh/frontline/article/preet-bharara-insider-trading-is-rampant-on-wall-street/.

[16] *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014).

[17] *SEC v. Obus*, 693 F.3d 276, 291 (2d Cir. 2012) (finding that the fact that the tipper and tippee were friends from college was sufficient to send the personal benefit question to the jury).

[18] Press Release, U.S. Att'y's Office, S.D.N.Y., Statement Of U.S. Attorney Preet Bharara On Dismissal Of Charges Against Michael Steinberg And Six Other Insider Trading Defendants (Oct. 22, 2015) (available at https://www.justice.gov/usao-sdny/pr/statement-us-attorney-preet-bharara-dismissal-charges-against-michael-steinberg-and-six).

[19] *United States v. Conradt*, No. 12-cr-887 (S.D.N.Y. Jan. 22, 2015).

[20] *See* Nate Raymond, *After Setbacks, N.Y. Prosecutors Resume Insider Trading Crackdown*, REUTERS (June 23, 2016), https://www.reuters.com/article/us-usa-insidertrading/after-setbacks-n-y-prosecutors-resume-insider-trading-crackdown-idUSKCN0Z915C; *see United States v. Maillard*, No. 1:14-cr-829 (S.D.N.Y. Feb. 3, 2015); *United States v. Cuniffe*, No. 1:15-cr-287 (S.D.N.Y. May 12, 2015).

in 2016.[21] The DOJ's use of cooperating witnesses in insider trading prosecution immediately after *Newman* suggests that DOJ would rely on testimony from witnesses who were likely to have insight into consequential benefits exchanged and details about the relationships between tipper and tippee.[22]

Newman's heightened evidentiary requirement was short-lived as the Supreme Court and Second Circuit overruled *Newman* in 2016 and 2017, respectively.[23] Nonetheless, in the two years before Newman was overturned, DOJ adapted their trial strategy to meet the heightened standard.

B. Spoofing Prosecutions

The DOJ also encountered setbacks and challenges in its early anti-spoofing criminal prosecutions.[24] Spoofing is a form of market manipulation in which a security or commodities trader submits bids or offers with the intent of cancelling those bids or offers.[25]

In 2018, the DOJ's second spoofing trial ended with the acquittal of a commodities trader.[26] Defense counsel in that case argued that the government's trading data analysis was merely "prosecution by statistics," and without context was insufficient to prove intent.[27] Defense also attacked the credibility of a government witnesses who received immunity and argued that the defendants' communications with colleagues did not prove a conspiracy.[28]

In 2019, the DOJ lost another trial that tested the boundaries of criminal liability for spoofing. In *United States v. Thakkar*, the DOJ charged a software engineer in a spoofing conspiracy for providing traders with software that enabled spoofing.[29] After the government's case-in-chief, however, the court granted the defendant's Rule 29 motion for acquittal on the conspiracy charge.[30]

Eventually the DOJ's spoofing enforcement made a comeback. The DOJ secured convictions of two JPMorgan commodities traders for conspiracy, wire fraud, commodities fraud, and spoofing in *United States v. Smith, et al.*.[31] In *Smith*, prosecutors relied on two co-conspirators-turned-cooperating witnesses who each pled guilty to spoofing charges before trial.[32] Once again, DOJ adapted following the trial losses and used cooperating witness to strengthen their case-in-chief.

IV. Correcting Course for Future No-poach and Wage-fixing Prosecutions

In the wake of the Antitrust Division's recent no-poach and wage-fixing criminal trials, division leadership and trial attorneys have likely conducted meticulous post-trial analysis to identify potential weaknesses and areas for improvement. As a starting point, the agency may consider whether its no-poach and wage-

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[21] *See e.g.,* Raymond, *supra* note 22; *see United States v. Davis*, No. 1:16-cr-338 (S.D.N.Y. May 16, 2016); *United States v. Afriyie*, No. 1:16-cr-377 (S.D.N.Y. Apr. 13, 2016); *United States v. Johnston*, No. 1:16-cr-406 (S.D.N.Y. June 13, 2016); *United States v. Maciocio*, No. 1:16-cr-351 (S.D.N.Y. May 20, 2016); *United States v. Nedev*, No. 1:16-cr-93 (S.D.N.Y. March 10, 2016); *United States v. Plaford*, No. 1:16-cr-400 (S.D.N.Y. June 9, 2016); *United States v. Pusey*, No. 1:16-cr-369 (S.D.N.Y. May 27, 2016); *United States v. Valvani*, No. 1:16-cr-412 (S.D.N.Y. June 14, 2016).

[22] The DOJ secured its first insider trading conviction at trial post-*Newman* in a case that built momentum off of two individual guilty pleas from a cooperating witness and the defendant's father leading up to trial. *See Cuniffe*, *et al*. No. 1:15-cr-287.

[23] *Salman v. United States*, 137 S. Ct. 420 (2016); *United States. v. Martoma*, 894 F.3d 64 (2d Cir. 2017).

[24] Under 7 U.S.C. § 6c(a)(5)(C) spoofing can be prosecuted criminally or civilly.

[25] Traders can engage in spoofing to delay another person's trade execution, to create a false impression of market depth, or to create artificial price movements. Deniz Aktas, *X. Spoofing*, 33 REV. BANKING & FIN. L. 89, 89 (2013.

[26] Peter J. Henning, *The Problem with Prosecuting Spoofing*, N.Y. TIMES (May 3, 2018), https://www.nytimes.com/2018/05/03/business/dealbook/spoofing-prosecuting-andre-flotron.html; *see* Judgment, *United States v. Flotron*, No. 3:17-cr-220, Judgment of Acquittal (D. Conn. Apr. 25, 2018), Dkt. 218

[27] Jon Hill, *Ex-UBS Trader Acquitted of Spoofing Scheme*, LAW 360 (Apr. 25, 2018), https://www.law360.com/articles/1037130/ex-ubs-trader-acquitted-of-spoofing-scheme; *Flotron* Transcript, Dkt. 234, p. 68.

[28] *Flotron*, Transcript of Proceedings, Dkt. 234, p. 69–73.

[29] *United States v. Thakkar*, No. 1:18-cr-36 (N.D. Ill. Feb. 14, 2018).

[30] *Thakkar*, Transcript, Dkt. 124. The jury was deadlocked on the remaining aiding and abetting count resulting in a mistrial.

[31] Jury Verdict, *United States v. Smith*, No. 1:19-cr-669, (N.D. Ill. Aug. 10, 2022), Dkt. 676, 677.

[32] *See Smith*, Dkt. 448.

fixing prosecutions meet the objective guidelines outlined in the DOJ's Justice Manual.

A. Justice Manual Considerations

The Justice Manual provides criteria that DOJ attorneys must consider when deciding to commence or decline criminal prosecutions. It dictates that attorneys should consider, among other things, opening investigations if they believe that a federal offense is committed and that "the admissible evidence will probably be sufficient to obtain and sustain a conviction."[33] Unsurprisingly this threshold standard tracks Rule 29 as it is intended to avoid judgments of acquittal and, as a matter of fundamental fairness, requires that prosecutors go to trial only with the belief that their admissible evidence has more than a fifty-percent chance, to prove beyond a reasonable doubt that the defendant committed the charged offense. Given recent jury verdicts in no-poach and wage-fixing cases, Antitrust Division trial attorneys are likely to recalibrate their assessments concerning the strength of their evidence and the probability of securing convictions.

The Justice Manual also counsels for broader prosecutorial discretion in charging related offenses that "adequately reflect […] the nature and extent of the criminal conduct involved" and "significantly enhance the strength of the government's case against the defendant or a codefendant." [34]

Accordingly, navigating closely to these tenets of federal prosecution will likely provide a critical baseline for assessing the merits and viability of future no-poach and wage future investigations.

B. Securing Cooperating Witness Testimony

Consideration of the prosecution strategies that drove successful insider trading, spoofing, and other cartel cases can provide helpful data points for future no-poach investigations and prosecutions.

The DOJ appeared to make effective use of cooperators in its successful insider trading and spoofing cases noted above. Developing investigations with cooperation plea agreements from co-conspirators before going to trial against the most culpable defendants increases the likelihood that prosecutors will have sufficient evidence to sustain a conviction. Cooperating witnesses can offer compelling narratives with details about the defendant's state of mind, which cannot easily be inferred from documents or market data. They can also distill for jurors complicated industry relationships and market dynamics that are difficult to retain in a multi-week trial against multiple defendants.

The Antitrust Division's leniency program has historically used cooperating witness to great effect in prosecuting cartels. Notably, however, the Antitrust Division's recent no-poach and wage-fixing trials did not feature cooperating witnesses as one might expect in cases alleging wide-ranging conspiracies to suppress competition in labor markets. In *Manahe*, for example, prosecutors tried four defendants without the benefit of a single co-conspirator cooperator. And in *Jindal*, the Antitrust Division's key fact witness received immunity for her part in the alleged conspiracy. This arrangement can be problematic because a cooperator who pleads guilty necessarily accepts full responsibility for their part in the offense without any guarantees in terms of sentencing, while a witness who testifies under a non-prosecution agreement is more vulnerable to defendant's attacks on their credibility.

When it comes to cooperating witnesses, there is power in numbers. Multiple cooperating witnesses can be persuasive when they independently corroborate the same details of a conspiracy. Multiple cooperators allow prosecutors to repeat key events and themes for jurors and can counter the perception that the government's witnesses are merely providing self-serving testimony in hopes of favorable treatment at sentencing.

The Antitrust Division may pivot and charge cases that rely on multiple cooperators in future no-poach and wage-fixing cases, particularly if the government does not have a victim witness

[33] DOJ, JUSTICE MANUAL § 9-27.220 (2023)

[34] DOJ, JUSTICE MANUAL § 9-27.320 (2023).

and defense counsel can present evidence of procompetitive justifications.

C. Expansive Charging Considerations

Investigating and charging offenses that account for the full scope of a defendant's criminal conduct can provide prosecutors an opportunity to present broader evidence at trial. In the 2019 *Smith* anti-spoofing trial, for example, the DOJ charged defendants with conspiracy, commodities fraud, wire fraud, and RICO counts in addition to the spoofing counts. By including these charges the prosecution's evidence was not limited to facts relevant to the spoofing elements. In this way, bringing related charges can expand the scope of prosecutors' trial presentations and give jurors a complete picture of defendant's conduct to persuasive effect.

Charging related offenses can also incentivize individual defendants to accept guilty pleas in the face of higher potential prison sentences. Many offenses under Title 18, including mail and wire fraud, carry a statutory maximum sentence of 20 years' imprisonment, which is greater than the 10-year maximum term under the Sherman Act. The federal Sentencing Guidelines applicable to Title 18 offenses implicate additional offense-specific adjustments and the loss calculations under the fraud guidelines typically produce higher sentencing ranges than that under the antitrust guidelines. In this way, charging related offense can also help leverage cooperation plea agreements earlier in investigations.

The Antitrust Division has already secured convictions for related Title 18 offenses in cartel matters outside of the labor market context. For example, in the Antitrust Division's Procurement Collusion Strike Force's first trial it secured convictions against defendants charged with conspiracy and wire fraud in connection with a bid rigging scheme for government contracts.[35] Additionally, in 2022, AAG Kanter noted that the Antitrust Division would "use all the tools at its disposal" to target anticompetitive conduct when he announced an 11-count indictment charging 12 individuals in a price fixing conspiracy, in addition to money laundering and federal extortion charges.[36] In June 2023, AAG Manish Kumar reaffirmed this sentiment stating that the Antitrust Division would expand its "toolkit" of statutes it charges and the investigative strategies it employs.[37] These cases show that the Antitrust Division leadership has taken an expansive view of targeting harm to competition together with other criminal conduct. Accordingly, the Antitrust Division will likely continue to look beyond anticompetitive conduct and charge related offenses in future no-poach and wage-fixing cases.

D. Staying the Course: Appellate Court Validation of Per Se *Rule in No-Poach Cases*

The acquittals in no-poach cases to date have resulted in potentially problematic precedent for the Antitrust Division's pending criminal no-poach cases. Promptly addressing these rulings on appeal and in other cases will be a crucial to the Antitrust Division's overall criminal enforcement strategy in securing convictions in this area.

Even though the *Patel* decision cannot be appealed, the Antitrust Division has already voiced opposition to the ruling in another no-poach case set for trial in the Northern District of Texas. The defendants in that case filed a supplemental "notice of additional authority" to bolster their pending motion to dismiss the indictment.[38] Citing *Patel*, the defendants argued that an alleged no-poach agreement that merely constrains employee movement is not *per se* unlawful unless it allocates the relevant labor market to a meaningful extent.[39] In response, the Antitrust Division's made clear its

[35] *United States v. Brewbaker*, No. 5:20-cr-481 (E.D.N.C. 2021).

[36] Press Release, DOJ, Off. of Pub. Affairs., Criminal Charges Unsealed Against 12 Individuals in Wide-Ranging Scheme to Monopolize Transmigrante Industry and Extort Competitors Near U.S.-Mexico Border (Dec. 6, 2022) (available at https://www.justice.gov/opa/pr/criminal-charges-unsealed-against-12-individuals-wide-ranging-scheme-monopolize-transmigran-0).

[37] Manish Kumar, Assistant Attorney General, DOJ Antitrust Div., Remarks at Global Competition Review Live: Cartels 2023 (June 7, 2023), *available at https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-manish-kumar-delivers-remarks-global-competition-review*.

[38] Defendant's Notice of Additional Authority, *United States v. Surgical Care Affiliates, LLC,* No. 3:21-cr-11 (N.D. Tex. May 9, 2023).

[39] *Id.*

view that *Patel* contravenes Circuit-level and Supreme Court precedent in requiring that the government prove a "meaningful cessation of competition" to establish a *per se* unlawful market allocation agreement.[40]

The DOJ made similar efforts to challenge on appeal and re-litigate the adverse rulings that slowed insider trading and spoofing prosecutions. These efforts proved successful and eventually paved the way for convictions in those areas. In the insider trading context, ultimately both the Supreme Court and Second Circuit overturned the evidentiary standard articulated in *Newman* requiring a stronger showing of a consequential personal benefit.[41] Likewise, the Seventh Circuit affirmed the DOJ's first spoofing conviction squarely rejecting defendant's constitutional challenges and creating circuit-level authority to oppose defendants' motions to dismiss in spoofing cases.[42] It follows that the Antitrust Division's may eventually find a silver lining in the *Patel* acquittals through its continued litigation over the scope of the *per se* rule in no-poach cases alleging market allocation.

V. Conclusion

The results of the first no-poach and wage-fixing criminal antitrust trials have given both the Antitrust Division and the cartel defense bar much to consider when weighing the costs and benefits of proceeding to trial. On one hand, the Antitrust Division's failure to secure criminal convictions in no-poach and wage-fixing trials to date has highlighted viable defense arguments to introduce evidence of procompetitive benefits in a defense case while holding the government to prove a meaningful impact of an alleged market allocation conspiracy. On the other hand, recent history has shown that the pendulum is bound to swing in the other direction as trial losses and adverse precedent have tended to strengthen the DOJ's resolve and led to securing convictions.

[40] *Surgical Care Affiliates,* United States' Response to Defendant's Notice of Additional Authority, Dkt. 201.

[41] *Salman supra* note 26; *Martoma supra* note 26.

[42] *See United States v. Coscia*, 866 F.3d 782 (7th Cir. 2017).