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No-poach agreements – Closing the enforcement gap

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+ On-Topic

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Antitrust enforcement in labour markets is increasingly gaining momentum, with several competition agencies around the globe, taking action. "Labour antitrust" has been targeted in the US for a while. At the EU member state level, there have also been several investigations and decisions regarding both no-poach and wage-fixing agreements, as well as relevant developments guidance-wise. Agreements between competitors not to hire or not to poach each other's workers can bring distortions of competition and efficiency losses downstream in labour markets, hurting consumers. This trend is expected to continue in the future and will likely contribute to closing the enforcement gap regarding such practices.

Le droit de la concurrence gagne de plus en plus de terrain sur le marché du travail avec des autorités de concurrence prenant des mesures spécifiques à travers le monde. Aux États-Unis, le "Labour antitrust" *est déjà étudié depuis un certain temps. Au niveau des États membres de l'Union européenne, plusieurs enquêtes et décisions ont eu lieu concernant à la fois des accords de non-débauchage et de fixation des salaires entre concurrents ; on a aussi vu plusieurs études pertinentes en matière de "guidance". Ces accords entre concurrents visant à ne pas débaucher les travailleurs peuvent entraîner des distorsions de concurrence importantes sur le marché du travail nuisant* in fine *aux consommateurs. L'intérêt pour ce sujet devrait se renforcer à l'avenir en favorisant une mise en œuvre du droit de la concurrence dans ces pratiques.*

Losing *per se*: Potential fallout from the U.S. Department of Justice's no-poach enforcement

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I. Introduction

1. In the United States, the Department of Justice Antitrust Division (DOJ) has made its mission over the past several years to criminally prosecute labor market conduct, including "no-poach" agreements—a term used to refer to a range of restrictions on employee mobility, including agreements not to hire or not to solicit certain employees. In doing so, it has characterized this conduct as analogous to traditional criminal conduct. This is at least in part an effort to bring labor market agreements under the per se rule—one of the DOJ's most powerful tools for winning antitrust suits—and thereby leverage the significant attendant advantages that render irrelevant evidence that defendants could otherwise use to justify their actions. In short, the DOJ has set its sights on ensuring that agreeing not to recruit a competitor's employees is treated as dividing the labor market between competing employers, and should be approached by courts with the same degree of skepticism.

2. Even though the DOJ touts its strong record of overcoming substantive motions to dismiss,[1] it has failed to convince a single jury to convict on a labor charge.[2] Perhaps more important, some courts that have declared the challenged conduct as per se illegal have added hurdles that effectively apply a standard other than the traditional per se rule. In particular, the courts in both *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. 2022) and *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. 2023) have held the DOJ to an unusually high bar to support convictions. These cases and others beg the question: have the DOJ's "wins" been worth the effort, or might the DOJ inadvertently be dulling its own most potent weapon? Put another way, is the DOJ winning the battle but losing the war?

1 *See* J. Kanter, Assist. Att'y General, Dep't of Justice, Antitrust Div., Testimony Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights (Sept. 20, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary (announcing that "[i]*n the last two years, the* [DOJ] *has brought six criminal cases alleging collusion in labor markets*," that "[t]*he juries in our first labor market prosecutions acquitted the defendants of the antitrust charges*," but that "[i]*n both cases, the courts denied the defendants' motions to dismiss, reaffirming the core principle of our labor market prosecutions: that labor market collusion is a felony under the Sherman Act*.").

2 *See* B. Koenig, DOJ Antitrust Head Calls No-Poach Prosecutions 'Righteous', *Law360* (Mar. 31, 2023, 7:06 PM), https://www.law360.com/articles/1592488 (detailing how "*the DOJ failed for the third time to win a jury conviction in the still-nascent pursuit of criminal wage-fixing and no-poach charges*" and how "[i]*ts only successful prosecution on labor-side criminal allegations, which the DOJ had only pursued civilly until 2020, has come from a pair of plea deals*"); *see United States v. DaVita Inc*., No. 21-cr-00229-RBJ (D. Colo.); *see United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn.); *see United States v. Jindal*, No. 4:20-cr-00358-ALM-KPJ (E.D. Tex.); *see United States v. Manahe*, No. 2:22-cr-00013-JAW (D. Me.).

II. Per se standard

3. U.S. courts use two main analytical frameworks to determine whether a restraint is unreasonable under the Sherman Act. The default is the rule of reason, where the factfinder undertakes a broad and fact-specific evaluation of the market to weigh the anticompetitive effects and the procompetitive justifications of the conduct before determining whether it unreasonably restrains competition in the relevant market. But certain restraints have been found by courts to be so inherently anticompetitive and damaging to the market that they deserve condemnation without a detailed inquiry into their merits. This conduct is analyzed under the per se rule, which is limited to certain types of horizontal agreements between competitors that have no purpose but to frustrate competition, called "naked" (i.e., purely anticompetitive) agreements to fix prices, rig bids, and allocate markets.

4. Per se illegality brings potent and often decisive advantages to a plaintiff. This is especially true in the criminal context where, by longstanding policy, the DOJ only prosecutes antitrust cases it deems to involve agreements between horizontal competitors.[3] The per se rule drastically limits the government's burden, requiring it to prove primarily that the specific alleged agreement was knowingly reached. Historically, the government has been relieved of the need to demonstrate negative competitive effects, define a relevant product or geographic market, or show that the conduct was unreasonable. And the per se rule also limits defendants' ability to introduce procompetitive justifications for their behavior.[4]

5. However, even where conduct is normally subject to the per se rule, the ancillary restraints doctrine, if satisfied, would cause the agreement to be evaluated under the rule of reason. A restraint is ancillary when it is imposed by a "*legitimate business collaboration*" that is "*reasonably necessary*" to a procompetitive objective of the collaboration. Such a restraint, because it is related to a facially plausible procompetitive value, is not considered "naked" and therefore deserves to be judged under the more fulsome rule of reason. The determination of whether the per se rule or the rule of reason applies to alleged conduct is a critical legal decision, and it often dictates how the remainder of the case will be litigated and what evidence will be presented.

6. The massive advantages of the per se standard have historically been instrumental in the DOJ's ability to obtain antitrust convictions. But because the interpretation of the Sherman Act relies heavily on cases to form an antitrust common law, these standards can evolve as courts examine and classify new or different business practices. In this way, the DOJ's recent efforts to criminally prosecute labor-related offenses have opened new opportunities for courts to examine and classify labor-related agreements. And while multiple courts have ostensibly accepted the DOJ's characterization of no-poach agreements as per se unlawful market allocations, several early cases, such as *DaVita* and *Patel*, signal that change is still afoot.

III. United States v. DaVita: "No poach" acquittal and heightened intent standard

7. In July 2021 in the U.S. District Court for the District of Colorado, the DOJ charged DaVita Inc., owner and operator of outpatient medical care facilities, and Kent Thiry, its CEO, for conspiring with another outpatient medical care facility company to "*suppress competition between them*" for the services of employees, in part by "*agreeing not to solicit each other's senior-level employees*."[5] What followed was the first-ever U.S. criminal trial challenging an alleged "no-poach" agreement.[6]

8. The DOJ achieved some early success in its prosecution of DaVita, securing court buy-in for its novel position[7] that no-poach agreements are essentially horizontal agreements to allocate a market for employees, meaning they should be judged under the per se standard.[8]

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3 See U.S. Dep't of Justice Manual, 7-2.200 (updated Apr. 2022), https://www.justice.gov/jm/jm-7-2000-prior-approvals ("While a violation of this Act may be prosecuted as a felony, in general, the Department reserves criminal prosecution under Section 1 for 'per se' unlawful restraints of trade among competitors, e.g., price fixing, bid rigging, and market allocation agreements. It may also bring, and has brought, criminal charges under Section 2.").

4 See Northern Pac. Ry. Co. v. U.S., 356 U.S. 1, 5 (1958) ("This principle of per se unreasonableness (. . .) avoids the necessity for an incredibly complicated and prolonged economic investigation into (. . .) whether a particular restraint has been unreasonable"); see In re Flat Glass Antitrust Litig., 385 F.3d 350, 356 (3rd Cir. 2004) (per se "restraints of trade are conclusively presumed to unreasonably restrain competition without elaborate inquiry as to [any] business excuse for [its] use" (internal citations and quotations omitted) (second alteration in original)).

5 Indictment at 1–3, 6, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. July 14, 2021), ECF No. 1.

6 The DOJ's decision to seek criminal penalties for alleged agreements between labor market competitors to restrict employees' freedom of movement or to fix employee wages is of relatively recent vintage. *See* U.S. Dep't of Justice, Antitrust Div. and Fed. Trade Comm'n, Antitrust Guidance for Human Resource Professionals 4 (Oct. 2016), https://www.justice.gov/atr/file/903511/download ("*Going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching agreements*.").

7 In an order resolving disputes regarding jury instructions (to be discussed in greater detail below), the district court highlighted the "novelty" of the DOJ's position, finding that the fact the case was "*among the first ever criminal prosecutions for allocating a labor market*" warranted certain departures from the settled principles applicable to more traditional horizontal market allocations. Order Resolving Disputes on Proposed Jury Instr. at 3, 8–9 *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214.

8 Order Denying Defs.' Mot. to Dismiss at 4–6, 17, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Jan. 28, 2022), ECF No. 132 (acknowledging that "[v]*iolations of Section 1 are analyzed under the rule of reason as a default*" and that the rule of reason requires courts to consider "*a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect*" (internal quotations and citations omitted)).

The applicable legal standard was hotly contested. DaVita argued in its motion to dismiss that the per se standard was inapplicable because no-poach agreements are "*not actually market-allocation agreements*," "*there is no valid basis to declare the types of agreements alleged here per se illegal*" otherwise, and even if the court were to apply a per se standard, it would violate DaVita's constitutional right to due process by outlawing its conduct "*for the first time in a criminal case*."[9] In support of its position, DaVita highlighted that, far from being the rare restraint that "*considerable judicial experience has shown to be inherently anticompetitive and without any plausible procompetitive justification*," not a single no-poach agreement had ever been adjudged by a U.S. court to be per se illegal.[10]

9. The DOJ took the position that the per se category is defined by the "*practice involved, rather than the industry in which the allegedly unlawful practice was used*," and that the practice of allocating markets was not new, despite the lack of precedent specific to the alleged allocation of a labor market.[11] In any case, argued the DOJ, "[t]*he judicial decisions construing Section 1* (. . .) *provided fair notice under the Due Process Clause*."[12]

10. The court was not convinced that the lack of precedent for no-poach prosecution necessitated a fulsome rule of reason review. The judge concluded that the per se rule applied because the challenged agreement was just a "*horizontal market allocation agreement*" of a different stripe; the fact that the challenged agreement was to allocate a labor market as opposed to a product market "*makes no difference*."[13] To many observers, it appeared that if the DOJ could convince a court that the per se rule applied such that the court need not consider defendants' justifications for restricting employees' freedom of movement, then the DOJ's path to securing convictions should be straightforward. In short, it seemed the DOJ had overcome the most significant hurdle to realizing its first criminal conviction for a no-poach agreement.

11. When it came to jury instructions, however, the *DaVita* court began to depart from directions normally used under the per se rule. In a typical per se case, the jury is instructed that it must convict if the DOJ proves the following basic facts: (i) the challenged agreement existed; (ii) the defendant voluntarily entered the agreement with knowledge of its purpose; and (iii) the agreement affected interstate commerce.[14] A jury is accordingly not permitted to acquit on the basis that the charged company or individual did not specifically intend for the agreement it entered to harm competition or to break the law. Instead, a "not guilty" verdict would typically be supported by a finding that (i) no agreement existed; (ii) a defendant did not intend to enter the agreement (e.g., an executive's casual body adjustment is misinterpreted by a competitor as a nod of assent); or (iii) a defendant did not know what it was agreeing to (e.g., an executive agrees to vaguely "be reasonable," without understanding such agreement to amount to a commitment not to price below a certain level).

12. Unexpectedly, the *DaVita* court departed from this well-worn path, essentially allowing the jury to acquit based on a finding that would have previously been legally irrelevant. The jury instructions introduced a new requirement that the DOJ establish that the defendants had a particular "purpose" for entering the challenged agreement. The ordered jury instructions read in full:

> "*In order to establish the offense of conspiracy to allocate the market for employees charged in the Indictment, the government must prove each of these elements beyond a reasonable doubt:*
>
> *1. A conspiracy existed on or about the time periods alleged (a) to allocate the market for senior executives of DaVita and SCA (Count 1); (b) to allocate the market for employees of DaVita (Counts 2 and 3).*
>
> *2. The defendant knowingly entered into the conspiracy with the purpose of allocating the market with respect to that conspiracy.*
>
> *3. The Conspiracy occurred in the flow of or substantially affected interstate trade or commerce*."[15]

13. The addition of this "purpose" element essentially gave the jury permission to acquit based on a finding that, although the defendants may have voluntarily entered the no-poach agreement with the knowledge that they were agreeing not to hire or solicit certain competitor

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9 Defs.' Joint Renewed Mot. to Dismiss at 2, *United States v. DaVita Inc*., No. 1:21-cr-00229-RBJ (D. Colo. Nov. 10, 2021), ECF No. 83.

10 Defs.'Joint Mot. to Dismiss at 1–2, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Sep. 14, 2021), ECF No. 49. Notably, the court appeared to disagree with DaVita's position that it was in uncharted territory, analogizing to a case examining a customer non-solicitation agreement, *United States v. Cooperative Theatres of Ohio, Inc.* 845 F.2d 1367 (6th Cir. 1988), as precedent. Regardless, according to the court, "[e]*ven if there were no prior cases finding that a non-solicitation agreement had violated Section 1, that would not prevent* [the court] *from finding that this non-solicitation agreement was sufficiently alleged to have allocated the market, and thus that per se treatment was appropriate*."Order Denying Defs.'Mot. to Dismiss at 14, *United States v. DaVita Inc*., No. 1:21-cr-00229-RBJ (D. Colo. Jan. 28, 2022), ECF No. 132.

11 United States' Opp. to Defs.' Joint Mot. to Dismiss at 5, *United States v. DaVita Inc*., No. 21-cr-00229-RBJ (D. Colo. Oct. 19, 2021), ECF No. 67.

12 Ibid. at 2.

13 United States'Order Denying Defs.'Mot. to Dismiss at 5, *United States. v. DaVita Inc*., No. 21-cr-00229-RBJ (D. Colo. Jan. 28. 2022), ECF No. 132.

14 E.g., Jury Instr. at 19, *United States v. Penn*, No. 1:20-cr-00152-PAB (D. Colo. July 7, 2022), ECF No. 1421 (explaining that the government must prove"[1] *that the charged price-fixing and bid-rigging conspiracy existed* (. . .); [2] *that the defendant knowingly—that is, voluntarily and intentionally—became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it; and,* [3] *that the conspiracy affected interstate commerce*"); Jury Instr. at 20–21, 23, *United States v. Tokai Kogyo Co*., No. 1:16-cr-00063-TSB (S.D. Ohio Dec. 5, 2017), ECF No. 235 (requiring that government must prove"[1] *that there was a mutual understanding, either spoken or unspoken, between two or more people, to cooperate with each other to allocate sales, rig bids, and fix prices* (. . .), [2] *that each defendant knowingly and voluntarily joined that conspiracy* (. . .) *intending to help advance or achieve its goals*," and "[3] *that the conspiracy charged in the indictment either occurred in the flow of interstate commerce or affected interstate commerce in goods and/or services*"); Jury Instr. at 16, *United States v. Lischewski*, No. 3:18-cr-00203-EMC (N.D. Cal. Dec. 2, 2019), ECF No. 626 (informing that government must prove"[1] *that the charged price-fixing conspiracy existed at or about the time alleged;* [2] *that the defendant knowingly—that is, voluntarily and intentionally—became a member of the conspiracy charged in the indictment, knowing of its goal and intending to help accomplish it; and,* [3] *that the conspiracy occurred within the flow of, or substantially affected, interstate commerce*").

15 Jury Instr. at 15, *United States v. DaVita Inc*., No. 1:21-cr-00229-RBJ (D. Colo. Apr. 13, 2022), ECF No. 254.

employees, the defendants did not subjectively intend to "*allocate the market*." The court inserted this element over the objection of the DOJ. The DOJ argued a purpose requirement would allow defendants to circumvent the per se rules by introducing "*irrelevant*" evidence that the agreement may have been motivated by a desire to, for example, increase compensation.[16] But the court found that while the DOJ was correct that it was "*immaterial*" whether a per se unlawful agreement "*was actually good for the company or even good for the market as a whole*," evidence of beneficial effects of the agreement could still be relevant to "*disprove that the purpose of the agreement was to allocate a market*."[17] The court's stated goal was to help the jury understand that "*an agreement may have multiple purposes, but a guilty verdict could be appropriate if one of the purposes was to allocate a market*."[18] In other words, the court intended to require the DOJ to prove only that market allocation was a partial and not necessarily the sole motivator for the agreement.

14. For the defendants, this was a big win—they went on to argue, for example, that the intent of the DaVita CEO in agreeing with competing employers was merely to learn which of his employees were considering leaving for employment with a competitor so that he could compete to retain them.[19] By giving the jury leeway to acquit defendants based on a lack of intent to harm competition, the *DaVita* court essentially sealed the DOJ's fate. On April 15, 2022, a federal jury acquitted the defendants on all counts.[20]

15. The imposition of an intent requirement was a departure from per se precedent. It allowed for the introduction by defendants of certain evidence that beneficial effects of the agreement were relevant to disprove that the purpose of the agreement was to allocate a market.

16. The DOJ has decried this departure in subsequent cases in which defendants have urged courts to follow *DaVita*'s lead in requiring a demonstration of intent. For example, in opposing a similar jury instruction in the later *Patel* case (discussed below), the DOJ claimed the *DaVita* court's emphasis on the individual defendant's purpose for entering the conspiracy is "*plainly incorrect*,"[21] and entirely at odds with "*the whole point*" of the per se standard, which is that "*certain types of conspiracies* [are] *unreasonable, and thus unlawful, as a matter of law, without regard to the motives or justifications offered by conspirators*."[22] And more recently, in opposing a similar instruction in *United States v. Surgical Care Affiliates*, No. 3-21-cr-00011-L (N.D. Tex.), the DOJ again argued the imposition of an intent requirement was "*erroneous*" and contrary to precedent, highlighting that "*simply because Defendants did not think of their agreements in the antitrust terminology of an 'allocation' is irrelevant*."[23] Regardless, *DaVita* foretold that courts may be willing to take a more flexible and nuanced approach in the no-poach context, suggesting a court's initial acceptance of the per se standard might be just the beginning and not the end of the story.

IV. *United States v. Patel*: Court reversal on per se

17. This pattern was further demonstrated in *United States v. Patel*. In December 2021 in the U.S. District Court for the District of Connecticut, the DOJ charged six individuals, one employed by an aerospace company and the remaining by several of its engineer staffing suppliers, with one count of conspiracy in violation of Section 1 of the Sherman Act. The DOJ alleged that the defendants engaged in a no-poach agreement to "*suppress competition by allocating employees in the aerospace industry working on projects*" for the aerospace company by agreeing to "*restrict the hiring and recruiting of engineers and other skilled-labor employees*" between and among the companies.[24]

18. The defendants moved to dismiss the indictment on two principal grounds, both of which related to the application of the per se rule.

19. First, like in *DaVita*, defendants argued that courts lacked sufficient judicial experience with no-poach agreements to justify per se treatment.[25] The *Patel* court agreed that the allegations did not qualify as an independent category of per se unlawful restraint. But the court sided with the DOJ that the alleged no-poach agreement was properly fashioned as a horizontal allocation of a labor market.[26] Importantly, however, the court warned that "*not all no*[-]*poach agreements are market allocations subject to* per se *treatment*."[27] Thus, while the court ruled in the government's favor on the pleadings, it effectively left open the legal question of whether the particular restraint deserved per se treatment until justified at

16 Order Resolving Disputes on Proposed Jury Instr. at 9, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214.

17 Ibid. at 9–10.

18 Ibid. at 11.

19 C. Salvatore, DaVita, Ex-CEO Acquitted In Antitrust No-Poach Trial, *Law360* (Sept. 25, 2023, 5:08 PM), https://www.law360.com/articles/1484766/davita-ex-ceo-acquitted-in-antitrust-no-poach-trial?

20 *See* Verdict at 1–2, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Colo. Apr. 15, 2022), ECF No. 264.

21 United States' Objections to Defs.' Proposed Jury Instr. at 5, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Apr. 28, 2023), ECF No. 421.

22 Ibid. at 8.

23 United States' Objections To Defs.' Proposed Jury Instr. at 4–6, *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-00011-L (N.D. Tex. Oct. 28, 2022), ECF No. 166.

24 Indictment at 4, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021), ECF No. 20.

25 Defs.' Joint Mot. to Dismiss at 2, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. June 29, 2022), ECF No. 174.

26 See Order Denying Mot. to Dismiss at 21, No. 3:21-cr-00220-VAB (D. Conn. 2023), ECF No. 257 ("[T]his agreement, as described in the Indictment, is sufficient because it describes a horizontal agreement to allocate employees in a specific labor market.").

27 Ibid.

trial.[28] Though few observers may have fully appreciated the significance of that language at the time, it foreshadowed the possibility that a failure of proof of actual market allocation could rule out the application of the per se rule and doom the government's case.

20. Second, defendants argued that the agreement should not be criminally prosecutable because it was ancillary. Because all the outsource employees were working for the benefit of the engineering firm, the alleged agreement increased efficiency by helping to "*promote consistent staffing, avoid*[] *disruptions, and incentivize*[] *outsource firms to invest in recruitment and training of outsource engineers by preventing free riding*."[29] The DOJ, on the other hand, argued that ancillarity was a fact-intensive question beyond the pleadings, and more importantly, defendants held the initial burden of proving ancillarity, not the government.[30] While the court punted on the burden, it agreed with the DOJ that the indictment as drafted did not evince ancillarity because the suppliers competed, rather than cooperated, for the engineering firm's business.[31] But, like with the legal standard, the court allowed defendants to contest the characterization with facts later in the proceedings.[32]

21. These holdings may have been predictable based on *DaVita*, but things changed in the lead-up to trial as the court decided several pre-trial motions in ways that contrast with those typically permitted in a per se case. First, the court ruled that evidence regarding an ancillary restraints defense would be admissible, allowing for the defense's challenge to the application of the per se rule.[33] Second, although defendants were barred from presenting evidence to support the inference that the alleged agreement had procompetitive benefits—a standard exclusion in per se cases—the court permitted evidence of procompetitive benefits as relevant to arguments such as "*whether Defendants joined the charged conspiracy, whether the conspiracy existed as alleged, and whether Defendants had the requisite intent to join such a conspiracy*."[34] Third, over the DOJ's objection, the court permitted defendants to call an economic expert witness to offer opinions "*relevant to rebut the charges*." These opinions included procompetitive justification evidence normally excluded from a per se case. For example, in one opinion, the expert planned to opine that no "*statistical support*" existed that the alleged conspiracy had any adverse impact on engineers' wages.[35] Another permitted opinion related to the alleged relevant market definition, which the DOJ argued was irrelevant, risked confusing the issues, and would mislead the jury because of the per se illegality of the alleged agreement.[36] The court also allowed testimony that the conduct was inconsistent with suppressing wages. This type of economic expert testimony, once rare in criminal antitrust cases, further signaled a highly permissive approach to allowable testimony in the trial of a per se case.

22. Finally, and perhaps most consequentially for future labor cases, the *Patel* court's jury instructions further challenged the DOJ's paradigm of what must be proven in a per se case. Prosecution-friendly instructions were accepted on several of the basic elements of the offense, including the court's refusal to incorporate the *DaVita* instruction regarding intent to allocate a market. But over the government's objection that defendants must first shoulder an initial demonstration of ancillarity,[37] the court required the DOJ to bear the burden of proving, beyond a reasonable doubt, that the ancillary restraints doctrine does not apply to the alleged agreement.[38] The court further approved a relaxed standard for defendants to show ancillarity by finding that the charged agreement need not be "*absolutely essential*" to achieve the claimed procompetitive benefits, nor did it need to be the "*only possible way to achieve those benefits*" in order to bring the case out of the ambit of the per se rule.[39] These rulings, if followed in later cases, would significantly complicate the DOJ's burden in winning labor cases, and hand defendants ample opportunity to show that a no-poach restraint was justified.

23. As the case proceeded to trial, these departures from per se norms appear to have played a role in altering the trajectory of the case. Trial documents indicate that defendants elicited from DOJ witnesses a substantial amount of testimony indicating that any agreement that was reached between the engineering firm and its suppliers

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28 Mem. In Opp. to Mot. to Dismiss at 21, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Aug. 10, 2022), ECF No. 216.

29 Ruling and Order on Mots. at 26, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 2, 2022), ECF No. 257.

30 Ibid. at 24–26.

31 Ibid. at 29.

32 The *DaVita* court came to a similar conclusion that an ultimate factual finding that the agreement was not ancillary would be necessary to support the applicability of the per se standard: "*What I conclude is that if naked non-solicitation agreements or no-hire agreements allocate the market, they are per se unreasonable*." Order Denying Defs.' Mot. to Dismiss at 17, *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ (D. Conn. Jan. 28, 2022), ECF No. 132.

33 Ruling and Order on Mots. in Limine at 16, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. Aug. 10, 2022), ECF No. 457.

34 Ibid. at 13.

35 Ibid. at 68–71.

36 Ibid. at 68.

37 *See* United States' Objections to Defs.' Proposed Jury Instr. at 24, n. 7, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Mar. 20, 2023), ECF No. 421. The Court also rejected the DOJ's request that defendants make a preliminary proffer of ancillary restraint evidence prior to trial in order to avoid the presentation of "*prejudicial and irrelevant procompetitive benefits evidence* (. . .) *that will ultimately fail to warrant a jury instruction*." Ibid. at 24 n. 7.

38 Proposed Post-Trial Annotated Jury Instr. at 54, United States v. Patel, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456 ("Even if the Government proves the three elements beyond a reasonable doubt, if the charged agreement is ancillary to a legitimate business collaboration you must find the Defendants not guilty. The Government bears the burden of proving the charged agreement is not ancillary. To be ancillary, the charged agreement must be two things. First, the agreement must be subordinate and collateral to a separate, legitimate business collaboration; and Second, the agreement must be reasonably necessary to achieving the legitimate and pro-competitive purposes of the business collaboration."). In an alternative jury instruction, the DOJ acknowledged that, should the defendants first establish an ancillarity defense, it would be required to "prove beyond a reasonable doubt that the charged employee allocation agreement was not an ancillary restraint." United States' Objections to Defs.' Proposed Jury Instr., Exhibit C at 1, United States v. Patel, No. 3:21-cr-00220-VAB (D. Conn. Mar. 20, 2023), ECF No. 421-3.

39 Proposed Post-Trial Annotated Jury Instr. at 51, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456.

was indefinite, inconsistently adopted or followed, and riddled with exceptions. The engineering firm regularly hired directly from suppliers at will,[40] and suppliers also hired from each other as needed.[41] In fact, many of the government's own witnesses were individuals who, even if initially unsuccessful in jumping from employment with the outsourcing company to the engineering firm, were ultimately able to do so.[42] Any restrictions in place by the alleged agreement continuously changed throughout the course of the alleged conspiracy. In an ordinary per se case, it is no defense that the parties to an agreement failed to abide by it.[43] But in *Patel*, the defendants were given wide latitude to offer that argument directly, even if the evidence was not being used solely to disprove the existence of a conspiracy.

24. After the DOJ rested its four-week case-in-chief, defendants sought a judgment of acquittal under Federal Rule of Criminal Procedure 29, whereby courts may acquit only if the evidence of the crime is nonexistent or "*so meager that no reasonable jury could find guilt beyond a reasonable doubt*."[44] Under this high standard—which had not yielded an acquittal in an antitrust case for decades—the court granted the motion and acquitted all defendants on April 28, 2023.[45] Despite its motion to dismiss holding and a reaffirmation that horizontal market allocation agreements are usually subject to per se treatment,[46] the court concluded the alleged agreement was not a market allocation at all and declined to apply the per se rule, resulting in acquittal.

25. In doing so, the court principally relied on *Bogan v. Hodgkins*,[47] a case the court originally distinguished in favor of the DOJ in denying the motion to dismiss. In *Bogan*, the Second Circuit considered an agreement among general insurance agents not to allow transfers of active subordinate agents without mutual permission.[48] The Second Circuit found that although the agreement constrained competition to some degree, it did not allocate the market "*to any meaningful extent*."[49] Under this reasoning, the *Patel* court could not find "*any meaningful difference*" between *Patel* and *Bogan*. Also citing *DaVita*,[50] the *Patel* court held that a market allocation agreement must result in a "*cessation of 'meaningful competition' in the allocated market*,"[51] which the court found was not established by the DOJ's evidence in the case. The court assumed the DOJ had proven an agreement among the defendants to restrict hiring, but because the alleged agreement had so many exceptions, it could not meaningfully allocate the relevant labor market. Therefore, the court removed the case from per se treatment as a matter of law.[52]

26. The *Patel* court's stunning Rule 29 order seemed to reverse its motion to dismiss order on the applicability of the per se rule. But did it? Likely not. At motion to dismiss, the court found only that the agreement was properly alleged as a per se market allocation, but it clearly did not make a final determination on this question. Despite the "favorable" denial of the dismissal bid, the DOJ remained in limbo; its obligation to establish the application of the per se rule to the evidence at trial, including the *Bogan* requirement that the restraint on the labor market be "meaningful," would simply be left for another day. Worse still for the government, the court's order also implied that the DOJ must "*submit sufficient evidence of the relevant market*" alleged in the complaint.[53] Of course, defining a relevant market—which is a tool for assessing anticompetitive effects—is not generally an element of a pure per se offense.[54]

27. These holdings also stood in contrast with the jury instructions issued prior to trial that contained no such impact or effect requirements of proof by the DOJ.

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40 In one example, the government introduced an exhibit showing that the engineering firm hired more than 40 people from its alleged co-conspirator in a span of 14 months of the alleged 8-year conspiracy. *See* Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 17, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Apr. 28, 2023), ECF No. 599; *see* Indictment at 4, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Dec. 15, 2021), ECF No. 20 ("*Beginning at least as early as 2011 and continuing until as late as September 2019* (. . .) [the defendants] *knowingly entered into and engaged in a combination and conspiracy* (. . .) to suppress competition (. . .)"); *see also* Memo. of Law in Supp. of Defs.' Joint Mot. for Judgment of Acquittal at 20, No. 3:21-CR-220 (VAB) (D. Conn. Apr. 24, 2023), ECF No. 578-1.

41 *See*, e.g., Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 14, *United States v. Patel*, No. 3:21-cr-00220-VAB (D. Conn. Apr. 28, 2023), ECF No. 599 (explaining "*that Cyient hired 'whoever [it] needed when [it] really needed them' and that the only directive he received from Defendant Edwards was to 'hire whoever we need*'" (alterations in original)).

42 See ibid. at 17–18 ("[A]l but one of the engineers who testified during the Government's case-in-chief now work at one of the companies that they had applied to during the time period of the alleged conspiracy.").

43 See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, (1940) ("Conspiracies under the Sherman Act are on 'the common law footing': they are not dependent on the 'doing of any act other than the act of conspiring' as a condition of liability.").

44 Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 5, *United States v. Patel*, No. 3:21-cr-220-VAB (D. Conn. April 28, 2023), ECF No. 599 (quoting from *United States v. Facen*, 812 F.3d 280, 286 (2d Cir. 2016)).

45 *See* ibid.

46 Ibid. at 94 ("Horizontal market allocation agreements are traditionally subject to per se treatment (. . .)").

47 *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999).

48 *See* ibid. at 511–12.

49 Ibid. at 515. Perhaps foreshadowing this holding, the court's Jury Instructions cited *Bogan* for this proposition. Annotated Post-Trial Jury Instr. at 33, n. 9, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456.

50 United States v. DaVita Inc., No. 1:21-cr-00229-RBJ, 2022 WL 1288585, at *3 ("Second, I find that a horizontal market allocation requires cessation of 'meaningful competition' in the allocated market. This standard requires the government prove actual employee allocation (or, in this case, a conspiracy to actually allocate), but it does not allow defendants to disprove the government's case by showing that switching employers is theoretically possible or occurred in a few exceptional cases.").

51 Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 18, No. 3:21-cr-220 (VAB) (D. Conn. Apr. 28, 2023), ECF No. 599 (quoting *United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 WL 1288585, at *3. (D. Colo. Mar. 25, 2022)).

52 See ibid. at 11–12, 17–18 ("[T]he agreement here cannot be said to 'allocate the market . . . to any meaningful extent,' and therefore, it is not a market allocation agreement as a matter of law" (quoting Bogan v. Hodgkins, 166 F.3d 509, 515 (2d Cir. 1999) (alteration in original))).

53 Ibid. at 13.

54 See ibid. at 12–13 ("[E]ven assuming the Government has proved that there was an agreement between Defendants to restrict hiring and assuming that the Government has submitted sufficient evidence of the relevant market—engineers or other skilled labor employees at QuEST, Belcan, Cyient, PSI, and Agilis working on projects for Pratt & Whitney (. . .) this alleged agreement 'does not allocate the [relevant labor] market . . . to any meaningful extent'" (quoting Bogan v. Hodgkins, 166 F.3d at 515)) (second and third alteration in original). Note that the DaVita court rejected the invitation to require the DOJ to define a relevant market. United States v. DaVita Inc., No. 1:21-CR-00229-RBJ, 2022 WL 1288585, at *2–3 (D. Colo. Mar. 25, 2022).

In fact, the jury instructions regarding the element of the offense were broadly in line with commonly accepted antitrust jury instructions regarding per se offenses—focused on the existence of an agreement, not its effect on the market.[55] So, for example, under the *Patel* jury instructions, if an alleged agreement to allocate the labor market existed, it would not matter whether the alleged coconspirators chose not to participate, cheated, failed to abide by, or were otherwise unsuccessful in carrying out the plan.[56] "*The agreement is the crime, even if it was never carried out*."[57] These jury instructions, which presumed per se treatment, are harder to square with the court's requirement that the restraint "meaningfully" affect an allocation of the labor market at issue.

28. The *Patel* court preemptively addressed the charge that its holding would alter or add elements to the per se standard. The court claimed only to be putting the DOJ through its paces to prove that per se treatment was justified. In a parting shot, the court stated that it was, in fact, the DOJ that "*has tried to expand the common and accepted definition of market allocation in a way not clearly used before*."[58] These holdings, made possible by an effective deferral of the decision on application of the per se treatment, may have allowed broader latitude for defendants to elicit and introduce favorable evidence than would be allowed in a pure per se case.

29. Because the double jeopardy clause of the Fifth Amendment bars appeals from Rule 29 acquittals,[59] the DOJ was unable to challenge, or even object to, the *Patel* court's holding directly. But in May 2023, the DOJ responded to the *Patel* ruling through a filing in a separate labor market prosecution, *United States v. Surgical Care Affiliates* (SCA), in the Northern District of Texas. There, the DOJ argued the *Patel* ruling is contrary to relevant Supreme Court and Fifth Circuit precedent[60] that categorizes horizontal no-poach agreements as per se unlawful market allocations, "*even though such agreements merely limit, rather than eliminate, competition*."[61] The DOJ clearly took issue with the *Patel* court's decision to require proof that the alleged conspiracy amounted to a "*cessation of 'meaningful competition' in the allocated market*" to be per se illegal.[62] The *Patel* ruling was also erroneous, argued the DOJ, because once a horizontal employee-allocation conspiracy is categorized as per se unlawful at the motion to dismiss stage, no further inquiry into the efficacy, unreasonableness, or quantum of harm of the conspiracy is necessary or allowed based on proof offered at trial.

V. Takeaways, looking forward

30. It is too soon to tell how the DOJ's labor market prosecution campaign will develop in the future or how the *DaVita* and *Patel* cases will impact those enforcement efforts. It seems clear that courts have accepted the notional analogy of no-poach agreements to more traditional market allocation agreements subject to the per se rule. There is also reason to believe the DOJ will continue to successfully survive dismissal bids if it chooses to continue to pursue labor cases. In fact, recent holdings in the civil context reinforce the inability of defendants to raise, as a defense, the nature of an alleged restraint and its ancillarity to legitimate conduct at the pleading stage.[63] However, other than a sole negotiated corporate conviction,[64] the DOJ has not managed to translate its ability to survive dismissal motions into labor market convictions.

31. If future courts adopt the approaches of the *DaVita* and *Patel* courts, the denial of a motion to dismiss will fail to carry the significance it traditionally has in per se prosecutions. Over the DOJ objections that the analytical

55 The proposed charges were primarily derived from relevant portions of the *Modern Federal Jury Instructions—Criminal*, the ABA Section of Antitrust Law *Model Jury Instructions in Criminal Antitrust Cases*, and recent jury instructions in per se criminal cases. *See Modern Federal Jury Instructions—Criminal* (Matthew Bedner and Co.); *see Model Jury Instructions in Criminal Antitrust Cases* (ABA, 12th ed., 2010); *see United States v. Lischewski*, No. 3:18-cr-203 (N.D. Cal.); *see United States v. Penn*, No. 20-cr-152 (D. Colo.); *see United States v. Aiyer*, No. 18-cr-333 (JGK) (S.D.N.Y.).

56 Annotated Post-Trial Jury Instr. at 36, No. 3:21-cr-00220-VAB (D. Conn. Mar. 27, 2023), ECF No. 456 ("If you should find that the Defendants and alleged coconspirators entered into the charged agreement to allocate or divide the labor market, the fact that the Defendants or their alleged coconspirators did not abide by it, or that one or more of them may not have lived up to some aspect of the agreement, or that they may not have been successful in achieving their objectives, is no defense. The agreement is the crime, even if it was never carried out.").

57 Ibid. at 36; see also ibid. at 33 ("The agreement itself is a crime. Whether the agreement is ever carried out, or whether it succeeds or fails, does not matter. Indeed, the agreement need not be consistently followed. Conspirators may cheat on each other and still be conspirators. It is the agreement to do something that violates the law that is the essence of a conspiracy.").

58 Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 18 n. 7, No. 3:21-cr-220 (VAB) (D. Conn. Apr. 28, 2023), ECF No. 599.

59 See United States v. Martin Linen Supply Co., 430 U.S. 564, 571–72 (1977) ("Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution'" (quoting United States v. Ball, 163 U.S. 662, 671 (1896) (alterations in original)).

60 See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220–21 (1940) ("[T]he fact that sales on the spot markets were still governed by some competition is of no consequence," and the conspiracy was per se unlawful even though participants "were in no position to control the market"); ibid. at 224 n. 59 ("Price-fixing agreements may or may not be aimed at complete elimination of price competition"); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (per curiam) (agreement that related only to credit terms still deemed per se unlawful); United States v. Realty Multi-List, Inc., 629 F.2d 1351, 1362, 1365 (5th Cir. 1980) (explaining that, for per se unlawful agreements, "it is irrelevant that a particular agreement may be between two small firms occupying an insignificant market position").

61 United States' Response to Defs.' Notice of Additional Authority at 1–2, *United States v. Surgical Care Affiliates*, No. 3-21-cr-00011-L (N.D. Tex.), ECF No. 201.

62 *See* Ruling and Order on Defs.' Mots. for Judgment of Acquittal at 18, No. 3:21-cr-220 (VAB) (D. Conn. Apr. 28, 2023), ECF No. 599 (*quoting United States v. DaVita Inc.*, No. 1:21-cr-00229-RBJ, 2022 WL 1288585, at *3. (D. Colo. Mar. 25, 2022)). Notably, the *DaVita* court similarly found that "*a horizontal market allocation requires cessation of 'meaningful competition' in the allocated market*." Order Resolving Disputes on Proposed Jury Instr. at 6, No. 1:21-cr-00229-RBJ (D. Colo. Mar. 25, 2022), ECF No. 214.

63 *See Deslandes v. McDonald's USA*, LLC, No. 22-2333, 2023 WL 5496957, at *1–4 (7th Cir. Aug. 25, 2023), ECF No. 109 (reversing a district court's decision to dismiss the case because "[t]*he complaint alleges a horizontal restraint, and market power is not* [always necessary] *to antitrust claims involving naked agreements among competitors*.").

64 *See* Office of Pub. Affairs, Dep't of Justice, Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses (Sept. 27, 2023, 12:43 PM), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses.

standard is locked in at motion to dismiss, an early win for the government will not provide finality that a "pure" per se legal standard will apply in the jury room.[65] Moreover, the crucial intent and market impact holdings in *DaVita* and *Patel* will significantly increase the government's trial burden. It also remains to be seen how the *Patel* holding that the government bears the burden to prove lack of ancillarity—which never fully played out in *Patel* because the trial was terminated before the defense put on its case—will affect the DOJ's ability to obtain convictions. In cases like *Patel*, where the defendants have both horizontal and vertical business relationships with each other, the challenge of proving a lack of ancillarity beyond a reasonable doubt may become an insurmountable challenge. The DOJ's case selection going forward will be of significant importance to its likelihood of success.

32. A number of other important questions remain about the impact of the DOJ's early prosecution efforts. First, while the *Patel* court explicitly denied that its holding changed the legal standard, it is fair to question whether some form of modified per se rule is emerging as applicable to no-poach agreements. Courts are willing to accept the DOJ's view that no-poach agreements are subject to the per se standard, but when it comes time to apply that standard, at least in the criminal context, for whatever reason, they are veering off-course. And there are signs this trend may reach civil enforcement as well. For example, in *Borozny v. Raytheon Technologies Corp.*, the civil follow-on damages suit regarding the aerospace industry labor market conspiracy alleged in *Patel*, the District of Connecticut held that plaintiffs must "*describe the relevant market*" even in claims alleging a per se violation, even though market definition is not required in per se cases.[66] It is possible that the DOJ will prevail in convincing subsequent courts that these early decisions reflect unwarranted departures from well-established law and should not be followed. But it seems equally, or even more, likely that future courts will follow this lead, creating what is essentially a different, more difficult legal standard applicable to no-poach and no-solicitation agreements.

33. Second, to the extent courts continue to add to the elements the DOJ must prove at trial and allow defendants to adduce evidence on the procompetitive justifications for no-poach agreements, it will be crucial to see whether such a trend has spillover effects outside of the labor context. While at first blush, such a result would seem unlikely given the well-established case law supporting the traditional per se standard's application to ordinary horizontal agreements to fix prices, rig bids, or allocate product markets, it is not out of the realm of possibility. As long as courts departing from the usual bounds of per se litigation do not expressly cabin those departures to agreements to allocate labor markets, there is nothing to stop defendants in other contexts from pushing for a similarly flexible approach to judging alleged conspiracies. Thus, there is at least some cause to suspect the DOJ's losses could be creating precedent that will make it easier for defendants to ward off antitrust claims even outside the labor context.

34. In light of these developments, one might wonder whether the DOJ ought to cut its losses and quit its pursuit of criminal convictions for no-poach agreements. But if the Division's head, Assistant Attorney General Jonathan Kanter's public statements are any indication, there is little risk of that.[67] There appear to be more than pragmatics at play. As Kanter put it, the DOJ's no-poach pursuits are "*righteous cases*," in which "*the ability of hardworking people to find jobs*" is on the line.[68] But no matter how "righteous" its cause, without the threat of a pure per se standard, the DOJ may lose some of the leverage it has historically enjoyed in plea negotiations. The labor cases tried to date suggest no-poach defendants can reasonably expect a more nuanced examination of their conduct at trial, which may give them the confidence to continue to take their chances with juries. ■

65 Indeed, a recent civil case challenging a no-poach agreement reiterated this takeaway from *DaVita* and *Patel*, holding that per se was the appropriate legal standard to apply at the motion dismiss stage to an alleged no-poach agreement, but that a factual finding at trial that the agreement was ancillary would suffice to pull the case out of the per se domain. *See Deslandes v. McDonald's USA, LLC*, No. 22-2333, slip op., at *4, *7–8 (7th Cir. Aug. 25, 2023), ECF No. 109. ("[T]*he district judge jettisoned the* per se *rule too early*," because "*the classification of a restraint as ancillary is a defense, and complaints need not anticipate and plead around defenses*.").

66 Ruling and Order on Plaintiffs' Mot. for Reconsideration at 1–2, 6–7, *Borozny v. Raytheon Techs. Corp.*, No. 3:21-cv-1657-SVN (D. Conn. May 30, 2023), ECF No. 647 (in denying Defendants' motion to dismiss, the court held—again in reliance on *Bogan*—that "*it is an element of a per se case to describe the relevant market in which we may presume the anticompetitive effect would occur*").

67 *See* J. Kanter, Assist. Att'y General, Dep't of Justice, Antitrust Div., Remarks at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference (Sept. 22, 2023), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-fordham-competition-law (Kanter affirming the DOJ remains "*just as committed as ever to, when appropriate, using our congressionally given authority to prosecute criminal violations of the Sherman Act in labor markets*").

68 *See* Koenig, *supra* note 2.

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