



Conspiracy Theories

2024 Edition: Eight Predictions for the Future of Cartel Enforcement

Welcome to Axinn’s inaugural Conspiracy Theories Newsletter. We offer a summary of our predictions for the year to come in cartel enforcement.

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2023 was a dramatic year for criminal antitrust enforcement in the United States. The Antitrust Division of the U.S. Department of Justice (“DOJ”) garnered big wins: three convictions at trial,¹ \$267 million in criminal fines and penalties—including novel deferred prosecution agreements (“DPAs”) and its largest penalty to date for a domestic cartel—and a Seventh Circuit US Court of Appeals decision embracing its position that labor market collusion is *per se* illegal. Yet despite these accomplishments, the year was also riddled with dismissed indictments, acquittals, and an impactful and unexpected Fourth Circuit reversal. With limited pending litigation, the enforcers’ bandwidth for a slate of new and (as many as 150)² pending investigations is now freed for 2024. Given its recent turbulent track record, there is added pressure on the DOJ to prevail.

Based on lessons learned from 2023, here is what to expect in 2024:

1. The DOJ will look to right the ship after more critical setbacks in 2023 by leaning in to international cooperation and affirmative investigative techniques.
2. The DOJ will work to blunt the sting of key negative court decisions that threaten future enforcement.
3. The DOJ’s labor market enforcement will continue, but it will evolve to prefer wage-fixing and true no-hire agreements, along with fact patterns that avoid ancillarity.
4. The DOJ will return to and expand enforcement against international cartels and continue its focus on public procurement.
5. The DOJ will continue to focus on individual accountability and producing winning evidence and insider witnesses.
6. The DOJ’s criminal prosecution of Sherman Act Section 2 violations will continue to take shape.
7. The age of the DOJ follow-on will continue, with the agency seeking enforcement opportunities from private enforcement cases.
8. The DOJ will continue its focus on corporate compliance while holding companies accountable with novel remedies.

1. Righting the Ship After Critical Setbacks

Axinn’s comprehensive survey of Antitrust Division indictments reveals that the DOJ has indicted 90 defendants since 2020—17 companies and 73 individuals. Cases against 63 of those defendants have now been resolved. Only 25 of the indicted defendants pled or otherwise admitted guilt, or were found guilty by a jury on at least one count, while 38 were acquitted or otherwise ultimately had charges against them dismissed. And of the subset ultimately tried to a jury,

only seven of 45 defendants—15.6%—were convicted on any count. Of those seven, the only Sherman Act conviction was later overturned by the Fourth Circuit. While it is always a case-specific calculus, this recent history suggests that more defendants may choose to fight indictments and take their chances with a jury. The DOJ will need to improve its track record to deter defendants from rolling those dice.

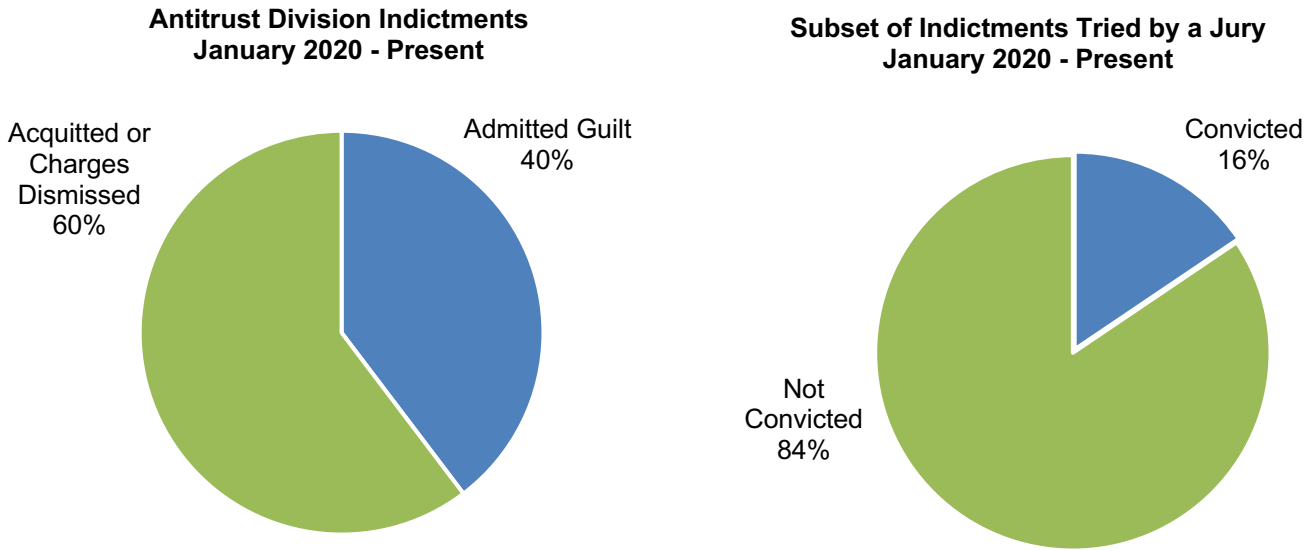


Figure 1: Antitrust Division Indictments and Subset of Indictments Tried by a Jury From January 2020 Through Present

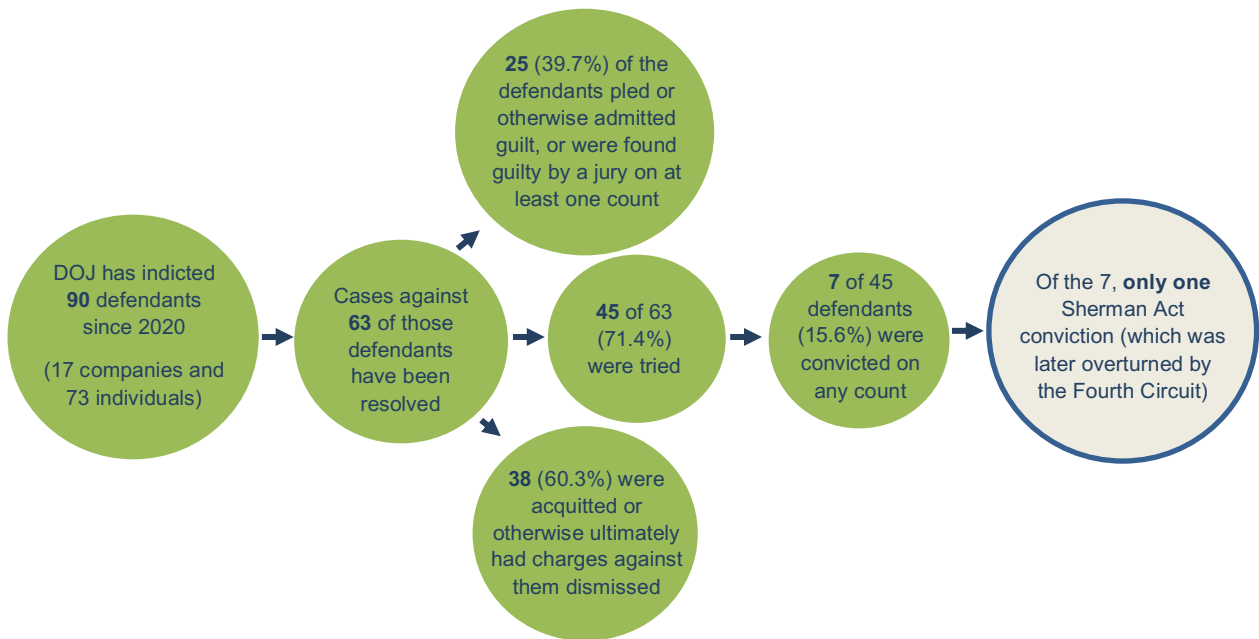


Figure 2: Survey of Antitrust Division Indictments From January 2020 Through Present



2. Blunting *Brewbaker* and *Patel* Threats to ‘Per Se’ Enforcement

Of the DOJ’s recent litigation, *Brewbaker* and *Patel* are of particular note because they threaten to undermine the application of the *per se* rule when seeking antitrust convictions. *Brewbaker* challenged the application of *per se* analysis to bid-rigging allegations where the conspirators had a dual-distribution relationship. Because of this vertical relationship, the Fourth Circuit held the indictment did not allege a *per se* violation and should have been dismissed. The DOJ sought rehearing of this decision, arguing that it “jeopardizes”³ the department’s ability to prosecute cartels because it limits *per se* treatment to “purely horizontal” restraints between “entities who are *only* related as competitors.”⁴ But the DOJ was not successful, as the Fourth Circuit denied this request on February 15.⁵

Meanwhile, in *Patel*, a Connecticut court issued a rarely granted motion for judgment of acquittal that dismissed the DOJ’s case before it got to the jury. The *Patel* court ruled that the alleged no-poach agreement was not subject to the *per se* rule because the alleged conspiracy did not allocate the market “to any meaningful extent” and exceptions to the alleged agreement swallowed the rule. The case calls into question whether mere nonsolicitation can amount to market allocation. The court did not address the ancillary restraints doctrine in its dismissal order, but its proposed jury instructions would have required prosecutors to prove that the conspiracy was *not* ancillary to a legitimate business collaboration.⁶ The DOJ will strive to convince the courts that both the *Brewbaker* and *Patel* courts veered off course from well-established law.

3. Labor Market Enforcement

In late 2023, the DOJ’s no-poach campaign came full circle as it dismissed its last active criminal no-poach case—ironically, also its earliest-filed indictment prosecuting labor market allocation after the release of the Antitrust Guidance for Human Resources Professionals—against Surgical Care Affiliates, LLC.⁷ And yet, despite further setbacks, the DOJ remains committed to pursuing criminal violations of the Sherman Act in labor markets.⁸ To reverse its fortunes, evolution will be necessary. In particular, the DOJ has vowed to overcome juries’ skepticism of its cooperating witnesses’ credibility that contributed to the DOJ’s losses in no-poach and wage-fixing cases, such as *Jindal* and *Manaha*.⁹ As 2024 begins, the government’s case selection decisions will be ever more important, as the DOJ must account for new hurdles to *per se* treatment and criminal convictions created by decisions in cases like *DaVita* (requiring agreement “with the purpose of allocating the market”) and *Patel* (requiring that the restraint impose a “meaningful” effect on the market). Expect the DOJ to do so by prioritizing wage-fixing cases and avoiding fact patterns involving legitimate business collaborations among the allegedly colluding parties.

Fortunately for the DOJ, the Seventh Circuit, in *McDonald’s*, supports the government’s view that no-poach agreements can be subject to *per se* treatment and that ancillarity is a defense that plaintiffs need not anticipate at the pleading stage.¹⁰ While this ruling will be cited by private plaintiffs seeking to overcome motions to dismiss, its application to criminal cases is unclear. In *Patel*, for example, the court placed the burden on the government to prove the agreement was not ancillary and gave wide latitude to the defendants to support their ancillarity defense at trial. Coupled with the *McDonald’s* and *Brewbaker* invitations to consider economic evidence that Antitrust Division prosecutors have long sought to exclude from *per se* criminal prosecutions, the DOJ faces strong headwinds in continuing its labor crusade.

4. Return of International Cartels and Continued Focus on Public Procurement

In contrast to prior eras of cartel enforcement, the DOJ's recent headline cases and largest fines have involved domestic, and even local, conduct. But the tide appears to be changing. Public and repeated commitments to cooperation among international enforcers, recent coordination of cross-border raids, and the success, expansion, and international focus of the Procurement Collusion Strike Force ("PCSF") indicate a renewed focus on international cartels. Indeed, in recent remarks, Deputy Assistant Attorney General Manish Kumar stated that 50 of the division's ongoing investigations have an international element.¹¹

Two international cartel probes were publicly reported in 2023: one in the consumer fragrance industry and the other in the construction chemicals sector. The dawn raids and investigations exemplified the far reach of global antitrust enforcement coordination by involving numerous agencies across the U.S. and Europe. North American enforcers also presented a united front in announcing a joint initiative to deter, detect, and prosecute collusive schemes in the provision of goods and services for the 2026 FIFA World Cup.

We also expect the PCSF to continue its international focus and willingness to charge crimes beyond the Sherman Act. Indeed, one of the division's most recent international charges involved the PCSF: the September sentencing of a Korean company for rigging bids and defrauding the U.S. Department of Defense in providing subcontract work to the U.S. military abroad.¹² Likewise, the division's efforts to police domestic procurement are also poised to continue in 2024, bolstered by a broadened PCSF leadership team and continued efforts to train over 31,000 agents and procurement officials to recognize and report leads to the PCSF.¹³

5. Continued Focus on Individual Accountability and Bolstering Evidence

The DOJ's "number one priority"¹⁴ has long been holding individuals accountable for corporate misconduct. As evidence, last year the division charged 22 individuals and only two companies. We expect individual accountability will continue to be the first concern for both the division and the department.

Accountability for antitrust crimes doesn't necessarily mean jail time, though. Notably, 2023 saw sentencing of the first defendant, who received probation with home detention and a \$27,000 fine.¹⁵ Average prison sentences in antitrust cases have dropped from 20 months between 2000 and 2009 to 18 months between 2010 and 2019 and now to 15 months between 2020 and 2023.¹⁶ But beyond just declining sentences, as we've explained elsewhere,¹⁷ 2023 changes to the U.S. sentencing guidelines make first-time antitrust offenders even less likely to face jail time. Last year saw three post-indictment agreements to pretrial diversion and pleas to probation, which indicate a healthy willingness by the DOJ to recommend sentences grounded in individual circumstances.¹⁸

Moreover, a key factor in the division's recent trial losses has been a lack of reliable insider witnesses. James Pedrick's plea-to-probation case,¹⁹ in particular, appears to reflect a recognition that witnesses who admit to the crime but may do no time are still a critical piece in trials against alleged co-conspirators. In this vein, the DOJ has reaffirmed its commitment to using affirmative investigative techniques, including wiretaps, which it has publicly noted is a key part of the DOJ's offer to improve its litigation record by building stronger cases.²⁰



6. Development of Criminal Prosecution of Sherman Act Section 2 Violations

For the first time in decades, the DOJ has criminally charged monopolization under Section 2 of the Sherman Act. The two cases brought so far illustrate that the DOJ will consider Section 2 charges where conduct resembles traditionally prohibited *per se* Section 1 activity but the legal elements of Section 1 are not met, or in concert with charging other crimes. In *U.S. v. Zito*, the DOJ charged attempted monopolization when it lacked evidence of an agreement to rig bids or allocate the market necessary for a Section 1 charge.²¹ In *U.S. v. Martinez*, by contrast, the DOJ charged conspiracy to monopolize in addition to several other crimes, including a Section 1 conspiracy to fix prices and allocate the market, as well as extortion and money laundering.²²

Amid the defense bar clamor for additional guidance, the DOJ updated its primer for law enforcement personnel. It explains that the line between civil and criminal enforcement of Section 2 often comes down to whether the conduct otherwise amounts to a crime.²³ Other relevant factors can also tilt the scales toward criminal treatment, such as “a serious violation, pattern of wrongdoing,” or recidivism.²⁴ Given the recent criminal charges and the DOJ’s update to its law enforcement primer, we expect the division to be on the continued lookout for criminal violations of Section 2 in 2024.

7. Enforcement Opportunities in Private Cases

Following a recent trend, private plaintiffs and state attorneys general are frequently beating the DOJ to the punch in unearthing and challenging potential antitrust conspiracies, particularly those in which intermediaries facilitate the exchange of competitively sensitive information, often to feed pricing algorithms. Various algorithm developers, along with the Las Vegas hotels,²⁵ Atlantic City casino hotels,²⁶ and landlords²⁷ that used their algorithms, are facing lawsuits accusing them of

colluding to raise prices by using software-recommended prices fed by nonpublic data.

Significantly, one key lawsuit against RealPage and several landlords that used its algorithmic pricing tool withstood a consequential motion to dismiss.²⁸ Though not a party, the DOJ filed a brief arguing that Section 1 prohibits competitors from knowingly sharing their competitive information with, and then relying on pricing decisions from, a common software algorithm that analyzes competitors’ information.²⁹ The DOJ further argued that the *per se* rule applied.³⁰ But the court declined, finding that without “an absolute delegation of [defendants’] price-setting to RealPage... the conspiracy alleged is not the straightforward form of horizontal price-fixing conspiracy for which courts apply the *per se* standard.”³¹ Under the rule of reason, the court found that the plaintiffs had plausibly alleged an unreasonable restraint of trade.³² Surviving the motion to dismiss is two steps forward for private plaintiffs because it incentivizes the investigation and litigation of these novel theories of collusion. But it is also a big step backward for both private litigants and enforcers, as the court found that for the *per se* rule to apply, plaintiffs must allege an “absolute delegation” of price setting.³³

More broadly, the DOJ’s enforcement efforts used to inspire follow-on litigation, but private plaintiffs now consistently beat the DOJ to filing suit against potential antitrust conspiracies. It has become increasingly common for private plaintiffs’ allegations to pique the DOJ’s interest and prompt a criminal investigation, particularly when allegations include insider accounts, such as from confidential witnesses. Moreover, the DOJ has intervened in private litigation to try to shape the law’s application to novel theories of collusion. The result is that private defendants should be prepared to defend their conduct on multiple fronts, particularly when it comes to algorithms, information exchange, and intermediaries with a hand in pricing. Keeping antitrust optics and compliance top of mind is well worth the investment.

8. Increased Focus on Compliance While Holding Companies Accountable

Companies in the DOJ's crosshairs should consider the carrot of voluntary self-disclosure; the stick of suspension, debarment, and exclusion; and the DOJ's greater appetite for novel criminal remedies. The Department of Justice has expanded its menu of voluntary self-disclosure policies. In September 2022, the department announced that every component will have a policy—like the Antitrust Division's Leniency Policy—under which companies that voluntarily self-disclose criminal conduct, cooperate, and remediate misconduct will avoid a guilty plea.³⁴ In October 2023, the department announced its new safe harbor policy for voluntary self-disclosures made in connection with mergers and acquisitions.³⁵ Both policies are meant to incentivize investments in compliance and encourage voluntary self-disclosure of misconduct that facilitates the prosecution of responsible executives.

The department has also hinted that companies will face a heightened risk of suspension, debarment, and exclusion going forward. In September 2022, the department announced that it will continue to improve its approach to corporate crime by enhancing the effectiveness of the federal government's system for suspension and debarment.³⁶ In December 2022, the

Antitrust Division and the U.S. Department of Health and Human Services Office of Inspector General memorialized their intentions to resolve criminal charges against health care companies by seeking convictions resulting in exclusion from key federal health care programs.³⁷ These signals demonstrate that the DOJ is prepared to use the sticks in its toolkit to hold companies accountable.

Still, in some cases, the DOJ has exhibited a greater appetite for novel criminal remedies that avoid exclusion. The Teva and Glenmark Pharmaceuticals DPAs illustrate the DOJ's creativity in holding companies accountable—while keeping them in business. Under their DPAs, Teva and Glenmark agreed to pay \$255 million in criminal penalties and Teva agreed to make a donation of \$50 million to humanitarian organizations.³⁸ The DOJ also got creative with these DPAs by requiring Teva and Glenmark to divest key business lines, suggesting that DOJ may seek structural remedies in future corporate resolutions.

Beyond a continuing willingness to impose novel remedies, we expect the Antitrust Division's carrot-and-stick approach to corporate crime will mirror the department's. On the one hand, the door is open for companies that invest in compliance to avoid criminal conviction and receive the Antitrust Division's first compliance-driven DPA. On the other hand, the division will continue to threaten its willingness to insist on resolutions that may result in collateral consequences of suspension, debarment, and exclusion.

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¹ *United States v. Carson, Hayes & Flores*, 1:22-cr-00197-UNA (N.D. Ga.).

² Manish Kumar, Deputy Assistant Attorney General, U.S. Dep't of Justice, *Remarks on the Evolution of International Cartel Enforcement Coordination at the New York State Bar Association* (Jan. 16, 2024), <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-manish-kumar-delivers-introductory-remarks-evolution>.

³ Petition of the United States for Panel Rehearing and Rehearing en Banc, *United States v. Brewbaker*, USCA4 Appeal: 22-4544 (4th Cir. Jan. 16, 2024), ECF No. 65-2.

⁴ Opinion, *United States v. Brewbaker*, USCA4 Appeal: 22-4544 (4th Cir. Dec. 1, 2023), ECF No. 57-1.

⁵ Order, *United States v. Brewbaker*, USCA4 Appeal: 22-4544 (4th Cir. Feb. 15, 2024), ECF No. 68.

⁶ See Dan Oakes, Tiffany Rider, and Lindsey Strang, *Losing Per Se: Potential Fallout From the U.S. Department of Justice's No-Poach Enforcement*, *Concurrences*, *Competition Law Review* (Nov. 24, 2023), <https://www.axinn.com/media-articles-Losing-Per-Se-Potential-Fallout-From-the-US-Department-of-Justices-No-Poach-Enforcement.html>.

⁷ United States' Motion to Dismiss, *United States v. Surgical Care Affiliates LLC et al.*, No. 3:21-cr-00011 (N.D. Tex. Nov. 13, 2023), ECF No. 203; Jury Verdict, *United States v. DaVita Inc. et al.*, No. 21-CR-00229 (D. Colo. Apr. 15, 2022), ECF No. 264. See also Dan Oakes, *Ending Where It Began?: DOJ No-Poach Prosecutions Take Another Hit*, *Axinn* (Nov. 15, 2023), <https://viewpoints.axinn.com/post/102isld/ending-where-it-began-doj-no-poach-prosecutions-take-another-hit>.

⁸ Jonathan Kanter, Assistant Attorney General, U.S. Dep't of Justice, *Remarks at the Fordham Competition Law Institute's International Antitrust Law and Policy Conference* (Sept. 22, 2023), See RealPage MTD Opinion, *supra* note 28, at 46.

⁹ Davide Mamone, *Mekki: DOJ Bringing More No-Poach and Wage-Fixing Cases*, *Global Competition Review* (Dec. 7, 2023), <https://globalcompetitionreview.com/gcr-usa/article/mekki-doj-bringing-more-no-poach-and-wage-fixing-cases>.

¹⁰ *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 705 (7th Cir. 2023).

¹¹ Kumar, *supra* note 2.

¹² Press Release, U.S. Dep't of Justice, *Subcontractor Sentenced to Pay Nearly \$9 Million in a Criminal Fine and Restitution for Rigging Bids and Defrauding the U.S. Military* (Sept. 12, 2023), <https://www.justice.gov/opa/pr/subcontractor-sentenced-pay-nearly-9-million-criminal-fine-and-restitution-rigging-bids-and>.

¹³ U.S. Dep't of Justice, *Procurement Collusion Strike Force*, <https://www.justice.gov/atr/procurement-collusion-strike-force>.

¹⁴ Lisa O. Monaco, Deputy Attorney General, U.S. Dep't of Justice, *Remarks on Corporate Criminal Enforcement* (Sept. 15, 2022), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>.

¹⁵ Plea Agreement, *United States v. Zito*, No. 1:22-cr-113-SPW (D. Mont. Sept. 19, 2022).

¹⁶ U.S. Dep't of Justice, *Criminal Enforcement Trends Charts*, <https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts>.

¹⁷ Jimmy Attridge, *Probation Nation? What Upcoming Changes to the Sentencing Guidelines Mean for Antitrust Defendants*, *Axinn* (Oct. 11, 2023), <https://viewpoints.axinn.com/post/102ipqe/probation-nation-what-upcoming-changes-to-the-sentencing-guidelines-mean-for-ant>.

¹⁸ Plea Agreement, *United States v. Hee*, 2:21-cr-98-RFB-BNW (D. Nev. Jan. 23, 2023), ECF No. 106; Plea Agreement, *United States v. Harwin*, 2:20-cr-115-JLB-MRM (M.D. Fla. Jan. 12, 2023); and Plea Agreement, *United States v. Pedrick*, 4:20-cr-81-RSB-CLR (S.D. Ga. Sept. 19, 2023).

¹⁹ Plea Agreement, *United States v. Pedrick*, 4:20-cr-81-RSB-CLR (S.D. Ga. Sept. 19, 2023).

²⁰ The most recent example of this is a December 12 indictment charging two executives for a bid-rigging, market allocation, and fraud scheme in the procurement of firefighting services, spurred by an investigation using a court-authorized wiretap. Press Release, U.S. Dep't of Justice, *Executives Charged with Bid Rigging, Territorial Allocation and Defrauding the U.S. Forest Service After a Wiretap Investigation* (Dec. 15, 2023), <https://www.justice.gov/opa/pr/executives-charged-bid-rigging-territorial-allocation-and-defrauding-us-forest-service-after>.

²¹ Information, *United States v. Zito*, No. 22-cr-113-SPW (D. Mont. Sept. 19, 2022).

²² Indictment, *United States v. Martinez*, No. 4:22-cr-650 (S.D. Tex. Nov. 9, 2022).

²³ See U.S. Dep't of Justice, Antitrust Div., *Federal Antitrust Crime: A Primer for Law Enforcement Personnel* (Oct. 2023), <https://www.justice.gov/atr/page/file/1091651/dl?inline>; see also Jimmy Attridge, *DOJ Provides More Specific Guidance About Criminal Enforcement of Section 2*, *Axinn* (Nov. 16, 2023), <https://viewpoints.axinn.com/post/102isi6/doj-provides-more-specific-guidance-about-criminal-enforcement-of-section-2>.

²⁴ See U.S. Dep't of Justice, Justice Manual 9-28.1200, <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.1200>.

²⁵ See First Amended Class Action Complaint, *Gibson et al. v. Cendyn Group, LLC, et al.*, Case No. 2:23-cv-140 (D. Nev. Nov. 27, 2023), ECF No. 144.

²⁶ See Amended Class Action Complaint, *Altman et al. v. Caesars Entertainment, Inc. et al.*, Case No. 1:23-cv-2536 (D.N.J. Aug. 21, 2023), ECF No. 53.

²⁷ See Second Amended Consolidated Class Action Complaint, *In re: RealPage Rental Software Antitrust Litigation (No. II)*, Case No. 3:23-MD-03071 (M.D. Tenn. Sept. 7, 2023), ECF No. 530; Complaint, *District of Columbia v. RealPage, Inc. et al.*, Case No. 2023-CAB-6762 (D.C. Super. Ct. Nov. 1, 2023); First Amended Class Action Complaint, *Duffy v. Yardi Systems Inc. et al.*, Case No. 2:23-cv-1391 (W.D. Wash. Nov. 3, 2023), ECF No. 113.

²⁸ See Memorandum Opinion, *In re: RealPage Rental Software Antitrust Litigation (No. II)*, Case No. 3:23-MD-3071 (M.D. Tenn. Dec. 28, 2023), ECF No. 690 (hereinafter "RealPage MTD Opinion").

²⁹ Memorandum of Law in Support of the Statement of Interest of the United States at 2, *In re: RealPage Rental Software Antitrust Litigation (No. II)*, Case No. 3:23-MD-3071 (M.D. Tenn. Nov. 15, 2023), ECF No. 628.

³⁰ *Id.* at 15.

³¹ See RealPage MTD Opinion, *supra* note 28, at 46.

³² See *id.* at 61.

³³ See *id.* at 46.

³⁴ Monaco, *supra* note 14.

³⁵ Monaco, *New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection with Mergers and Acquisitions* (Oct. 4, 2023), <https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-announces-new-safe-harbor-policy-voluntary-self>.

³⁶ Monaco, *supra* note 14.

³⁷ See James Attridge, Daniel Oakes, and Tasneem Chowdhury, *Shift In Health Care Antitrust Prosecutions Is Likely*, Law360 (Feb. 7, 2023), <https://www.law360.com/articles/1572153/shift-in-health-care-antitrust-prosecutions-is-likely>.

³⁸ Press Release, U.S. Dep't of Justice, *Major Generic Drug Companies to Pay Over Quarter of a Billion Dollars to Resolve Price-Fixing Charges and Divest Key Drug at the Center of Their Conspiracy* (Aug. 21, 2023), <https://www.justice.gov/opa/pr/major-generic-drug-companies-pay-over-quarter-billion-dollars-resolve-price-fixing-charges>.