SEALED

FILED
U.S. DISTRICT COURT

2017 APR 28 P 3:37

DISTRICT OF UTAH

BY: ____________
DEPUTY CLERK

JOHN W. HUBER, United States Attorney (#7226)
JACOB J. STRAIN, Assistant United States Attorney (#12680)
111 South Main Street, Ste. 1800 • Salt Lake City, Utah 84111
Telephone: (801) 524-5682 • Facsimile: (801) 325-3387

KALINA M. TULLEY, Asst. Chief, Antitrust Division, U.S. Dept. of Justice (IL 6210304)
ROBERT M. JACOBS, Trial Attorney, Antitrust Division, U.S. Dept. of Justice (IL 6289819)
RUBEN MARTINEZ, JR., Trial Attorney, Antitrust Division, U.S. Dept. of Justice (TX 24052278)
MOLLY A. KELLEY, Trial Attorney, Antitrust Division, U.S. Dept. of Justice (IL 6303678)

Attorneys for the United States of America

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX Defendants.	Case No. 2:16-cr-00403-DS **UNDER SEAL** OPPOSITION TO DEFENDANTS' MOTION FOR AN ORDER THAT THE CASE BE SUBJECT TO THE RULE OF REASON AND TO DISMISS THE INDICTMENT U.S. District Court Judge David Sam Magistrate Judge Brooke C. Wells

GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION FOR ORDER THAT THE CASE BE SUBJECT TO THE RULE OF REASON AND TO DISMISS THE INDICTMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

The government respectfully submits this Opposition to Defendants' Motion for Order that the Case Be Subject to the Rule of Reason and to Dismiss the Indictment (Motion; Mot.). The government requests that the Motion be DENIED.

The Indictment alleges a classic customer allocation agreement, a *per se* violation of the Sherman Act. Based on this Indictment alone, the Court may determine that the *per se* rule applies and that this matter should proceed to trial. At this stage, extraneous factual proffering is inappropriate and irrelevant. Regardless, neither the heir location industry's distinctiveness, nor this agreement's particular features, preclude the *per se* rule's application.

The Indictment also alleges that the charged conspiracy to allocate customers continued until as late as January 29, 2014, which is well within the five-year statute of limitations period. Specifically, it charges, among other things, that in furtherance of the charged conspiracy and within five years of the Indictment's return, Defendants and their co-conspirators collected contingency fee payments for heir location services sold to allocated heirs at collusive and noncompetitive levels and paid each other from the spoils of their scheme. Because these payments were within the scope of, and thus continued, the conspiracy, they were sufficient to delay the start of the limitations period under established Tenth Circuit law. Accordingly, the Indictment is not time-barred.

LEGAL STANDARD

A grand jury's indictment is constitutionally sufficient if it (1) contains the essential elements of the offense intended to be charged, (2) sufficiently apprises the accused of what he must be prepared to defend against, and (3) enables the accused to plead an acquittal or conviction under the indictment as a bar to any subsequent prosecutions for the same offense. *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994). A facially valid indictment "is enough to call for trial of the charge on the merits." *Costello v. United States*, 350 U.S. 359, 363 (1956). At the pretrial phase, courts should refrain from considering evidence outside "the four corners of the indictment," unless the facts are undisputed. *Hall*, 20 F.3d at 1087-88.

Here the facts are far from undisputed. (Compare Mot. at 3, 10 n.3, 17). Indeed, throughout their Motion, Defendants make extraneous factual assertions, which the government disputes as misleading, irrelevant, and improperly before the Court. The Court need not look beyond the four corners of the Indictment to permit this matter to proceed to trial. *United States v. Pope*, 613 F.3d 1255, 1259-61 (10th Cir. 2010). Because the Indictment facially alleges a classic customer allocation conspiracy, the Court should rule pretrial that the *per se* rule applies. *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990) (affirming pre-trial ruling that the indictment alleged a *per se* violation of the Sherman Act, and excluding defense evidence of reasonableness and justification at trial).

In determining whether the statute of limitations has run, the Court must look to the scope of the alleged conspiracy and is "bound by the language of the indictment." *United States v. Qayyum*, 451 F.3d 1214, 1218-19 (10th Cir. 2006) (citations omitted). Furthermore, "[a]n indictment should be read in its entirety, construed according to common sense and interpreted to include facts which are necessarily implied." *United States v. Phillips*, 869 F.2d 1361, 1364 (10th Cir. 1988) (citation omitted). Because the Indictment alleges that Defendants committed acts within the scope of the conspiracy and within the five years preceding the Indictment, Defendants'

Motion to Dismiss on statute of limitations grounds is meritless.

STATEMENT

The Indictment alleges a classic customer allocation conspiracy. Motivated by a desire to stop the mutually unprofitable price competition between them, (Dkt. 1 at ¶¶ 9, 11(h), 11(i)), Defendants conspired with horizontal competitor, Richard A. Blake, Jr., and others to suppress and eliminate that competition by agreeing to allocate customers of heir location services. Dkt. 1 at ¶ 9. As the Indictment explains, heir location companies identify heirs to estates of intestate decedents and, in exchange for a contingency fee, develop evidence and prove heirs' claims to an inheritance in probate court. Dkt. 1 at ¶ 6. Heir location companies vying for the same heir would normally compete by offering a lower, more attractive contingency fee rate. Dkt. 1 at ¶ 7. But the conspirators here agreed to suppress and eliminate competition between them by refraining from making offers to designated heirs on estates they both pursued. Specifically, they agreed that the second company to solicit an heir on an estate would refrain from making a better offer, and instead would cede the remaining business to the first company. Dkt. 1 at ¶ 11(b), (g). In exchange for backing off, the first company would then pay the second company a portion of the contingency fees ultimately collected from the allocated heirs. Dkt. 1 at ¶ 11(c), (f). To the extent Defendants shared any research, (Mot. at 26-27), it was done to trigger or implement the agreement, not to legitimately collaborate. See Dkt. 1 at ¶ 11(a), (d), (g), (j). The conspirators memorialized, monitored, enforced, and profited from this agreement from as early as September 1999 until as late as January 2014. Dkt. 1 at ¶ 9.

ARGUMENT

I. Defendants' Conduct Is Subject to the *Per Se* Rule

Defendants are charged with violating Section 1 of the Sherman Act, which declares "[e]very contract, combination [] or conspiracy [] in restraint of trade [] to be illegal." 15 U.S.C. § 1. Courts interpret this broad language to prohibit only unreasonable restraints of trade. *Standard Oil Co. v. United States*, 221 U.S. 1, 54-55 (1911). Most restraints "are analyzed under a 'rule of reason,' according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account 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." *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

But the "rule of reason does not govern all restraints." *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Rather, some "types of restraints [] have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*." *Khan*, 522 U.S. at 10. The "*per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive." *Nw. Wholesale Stationers v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1985). And thus, the "*per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin*, 551 U.S. at 886. Accordingly, for practices that are *per se* illegal there is "no offsetting economic or efficiency justifications" that can "salvag[e] them." *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994).

The restraint described in the Indictment is a customer allocation agreement (a conspiracy between competitors not to compete for the business of particular customers). This is a *per se* violation of the Sherman Act. *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990).

A. The Indictment alleges a *per se* violation

The Indictment alleges facts sufficient to show that Defendants engaged in a *per se* illegal customer allocation agreement. Essentially, Defendants and their co-conspirators agreed to allocate certain heirs instead of competing for them.

The Tenth Circuit has held that customer allocation agreements, like the one in this case, are *per se* illegal. *Suntar Roofing, Inc.,* 897 F.2d at 473. There, the indictment alleged that competing roofers engaged in a conspiracy to allocate customers for the construction and installation of cedar shake roofs on single and multifamily homes in and around Kansas City, Kansas. *Id.* at 472. To do so, the conspirators agreed to refrain from pursuing each other's customers. *Id.* Rejecting the argument that the restraint at issue was "not clearly 'pernicious,'" the Tenth Circuit explained that an agreement among horizontal competitors to allocate customers is "illegal *per se*," and so evidence of "reasonableness or justification"—that is, evidence that the restraint is not pernicious—is irrelevant. *Id.* at 473. Market allocation agreements were likewise criminally prosecuted under the *per se* rule in *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (holding that agreement by competing billboard advertisers to allocate billboard sites is *per se* unlawful); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1087-88 (5th Cir. 1978) (holding that agreement by competing industrial garment rental companies to allocate existing customers is *per se* unlawful); and *United States v. Cooperative Theatres of Ohio*, 845

F.2d 1367, 1371-73 (6th Cir. 1988) (holding that agreement between movie theatre booking agents to allocate existing customers by not actively soliciting each others' existing customers is *per se* unlawful).

As in *Suntar Roofing, Inc.* and the other cases cited above, the Indictment alleges a "naked" customer allocation agreement. Defendants and their co-conspirators allocated heirs to stop the unprofitable price competition between them. An agreement among competitors not to compete for the business of potential or existing customers is precisely the type of agreement that is *per se* unlawful.

Since the Indictment pleads such an agreement, evidence of the effects of the agreement is irrelevant at this stage of the case. *Suntar Roofing, Inc.*, 897 F.2d at 473. And if the government "present[s] evidence establishing the violation charged in the indictment," then the Defendants will also "be precluded from introducing evidence of reasonableness or justification at trial." *Id.*

B. <u>The *per se* rule applies to all industries alike, including heir location services</u>

Defendants argue that the *per se* rule does not apply to their customer allocation because it arises in the heir location services industry. (Mot. at 1, 2, 15, 20-22, 26-27). This is wrong as a matter of law. The applicability of the *per se* rule turns on the nature of the restraint and not the industry in which it arises. *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349 (1982); *see also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940). In fact, the Supreme Court has specifically rejected the argument that the *per se* rule should not apply "when the judiciary has little antitrust experience" in a particular industry, explaining that this argument should not be "confused with the established position that a *new per se* rule is not justified until the judiciary obtains considerable rule-of-reason experience with the particular type of restraint challenged." *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 349, 349 n.19. Contrary to Defendants' position, (Mot. at 22), precedent makes clear that the *per se* rule applies to classic anticompetitive restraints, regardless of whether a particular industry has experienced antitrust enforcement.

Defendants point to no authority for applying the *per se* rule differently to the heir location services industry. In fact, case law contradicts their various arguments. For instance, according to Defendants, the capital investment required to run an heir location business makes the *per se* rule inapplicable to this allocation agreement. (Mot. 6, 7, 8, 9, 21). But a similar argument was rejected in *Cadillac Overall Supply Co.*, 568 F.2d at 1087-88. There, on appeal, the defendants challenged application of the *per se* rule to a customer allocation agreement in the industrial garment rental business, asserting that free and open competition in that industry would cause accounts to be "raid[ed]," resulting in the loss of a "substantial capital investment." *Id.* at 1088. Rejecting these arguments, the *Cadillac* Court explained that while it may well be that "fierce competition would damage the defendant's business," that possibility cannot justify a *per se* illegal restraint like customer allocation. *Id.* at 1089.

Defendants also contend that the Sherman Act should apply differently here, given that customers in the heir location industry are not expected to yield repeat business, and because the services rendered are customized. (Mot. 20-23). But case law is replete with examples of *per se* illegal agreements in industries that may well be characterized by few repeat customers, *see, e.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (bar review courses), or customized services, *see, e.g.*, *Blackburn v. Sweeney*, 53 F.3d 825 (7th Cir. 1995) (personal injury law services). These traits do not factor in the courts' determination that the *per se* rule applies to the challenged restraints.

C. Evidence of Defendants' written agreement and its profit-sharing provision proves this *per se* violation

Defendants contend that their agreement with their co-conspirators lacked the features of traditional *per se* illegal agreements because it was written and included a profit-sharing provision. (Mot. at 10, 11, 15, 16). But any written documentation detailing Defendants' allocation of heirs would not exculpate them. Rather, it would be inculpatory evidence because it would show the existence of the charged *per se* illegal agreement. And it would hardly be unheard of for conspirators to document their agreement. *See, e.g, Brown*, 936 F.2d at 1044-45 (written agreement to allocate billboard customers); *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (signed agreement to allocate advertising territories); *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 414, 416 (1990) (highly-publicized, signed boycott petition).

To illustrate, in *United States v. Brown*, competing billboard advertisers entered into a written agreement, part of which provided that the companies would refrain from bidding on each other's former leaseholds. The written agreement further established a "notification procedure" whereby each company would send written notice to the other when it leased a new billboard or removed a billboard site. *Id.* at 1044. Paying no mind to whether the agreement was written or otherwise, the court affirmed the defendants' criminal convictions, holding that the agreement was *per se* illegal because it "restrained each company's ability to compete for the other's billboard sites" – a clear market allocation. *Id.* at 1045.

Moreover, Defendants' documentation of the conspiracy is probative of their intent to "knowingly" join and participate in the conspiracy, which is the operative *mens rea* here. *See Suntar Roofing, Inc.*, 897 F.2d at 479-80. Contrary to Defendants' position (Mot. at 16, 34-37), it is irrelevant whether the documentation demonstrates specific intent to violate the antitrust laws or to harm competition. *Coop. Theaters of Ohio*, 845 F.2d at 1373 (stating, "the government is not required in a *per se* case to show that the conspirators entered into the agreement with knowledge of its probable anti-competitive effects"); *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1161 (4th Cir. 1986) (affirming jury instruction that "it is [] unnecessary for the government to prove that the defendants knew that the agreement, combination or conspiracy [] was a violation of the law").

Defendants further contend that this agreement's profit-sharing provision is inconsistent with *per se* illegality. (Mot. at 25). Not so. *See Palmer*, 498 U.S. at 49. In *Palmer*, competing providers of bar review courses agreed to allocate territories and share revenues. *Id.* Applying the *per se* rule, the *Palmer* Court found that the revenue-sharing formula in the challenged customer allocation agreement helped establish its illegal purpose. *Id.* Indeed, similar payoffs between conspirators are not uncommon in criminal antitrust cases. *See e.g., United States v. Dynalectric Co.*, 859 F.2d 1559, 1562 (11th Cir. 1988) (profit-sharing in bid-rigging conspiracy); *United States v. A-A-A Elec. Co.*, 788 F.2d 242, 245 (4th Cir. 1986) (payoffs to competitors who helped secure rigged projects).

D. <u>Defendants had no legitimate collaboration with their co-conspirators</u>

Defendants suggest that the doctrine of ancillary restraints should save their customer allocation agreement from *per se* scrutiny. (Mot. at 28). But this doctrine provides no such sanctuary here because Defendants' had no legitimate collaboration with their co-conspirators, let alone a potentially efficiency-enhancing integration of economic activity that necessitated the allocation of customers whenever they encountered the same potential customer.

The ancillary restraints doctrine "governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities." *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006). Under that doctrine, a restraint between horizontal competitors may be subject to the rule of reason, if it is ancillary to an efficiency-enhancing integration of economic activity. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224-30 (D.D.C. 1986); *FTC & U.S. Dept. of Justice Antitrust Guidelines for Collaborations Among Competitors* (*Collaboration Guidelines*) (April 2000), at §3.2. A restraint is deemed "ancillary" if it is "subordinate and collateral" to the joint venture and reasonably necessary to "make the [venture] more effective [or efficient] in accomplishing its purpose." *Rothery Storage,* 792 F.2d at 224; *see Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 289-91 (6th Cir. 1898), aff'd 175 U.S. 211 (1899); *see also SCFC ILC, Inc.*, 36 F.3d at 963-65 (discussing difference between joint venture agreements and naked cartel agreements).

Courts have applied the rule of reason, for example, to a product allocation agreement that was ancillary to the joint financing and construction of a shared retail facility, *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 190 (7th Cir. 1985); to an exclusionary membership rule ancillary to the operation of a trade association, *SCFC ILC, Inc.,* 36 F.3d at 970; to a price restraint ancillary to a distribution and marketing joint venture, *In re Sulfuric Acid Antitrust Litigation*, 703 F.3d 1004, 1013 (7th Cir. 2012); and to a price restriction necessary to issue a "blanket" intellectual property license, *Broadcast Music Inc., v. Columbia Broadcasting Sys., Inc.(BMI)*, 441 U.S. 1, 23 (1979).

On the other hand, "mere coordination" on customers without integration is *per se* illegal.

Collaboration Guidelines, at §3.2; *see Maricopa Cnty. Med. Soc'y*, 457 U.S. at 356-57 (agreement among independent, competing doctors "not analogous to partnerships or other joint arrangements"; rather "fit squarely into the horizontal price-fixing mold"); *see also Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.'"), *overruled on other grounds by Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

Here, although Defendants now call it a "functional joint venture" (Mot. at 26), they point to no meaningful integration with their co-conspirators. *See Dynalectric Co.*, 859 F.2d at 1562 (rejecting "silent joint venture" defense). They did not jointly invest in a shared, complementary retail facility. *Cf.*, *Polk Bros.*, *supra*. Nor did they pool resources to create some innovation or new product. *Cf.*, *BMI, supra*. Defendants can point to no cooperative venture with their co-conspirators, other than their "naked" agreement not to compete for heirs. And even if they asserted such a venture, that reflects a factual dispute for resolution at trial.

As charged in the Indictment, the conspiracy is subject to the *per se* rule of illegality. At trial, the jury should be instructed that, if the charged conspiracy is proven beyond a reasonable doubt, it should find each Defendant guilty without any further inquiry into the conspiracy's competitive effect. *See Suntar*, 897 F.2d at 473.

II. Criminal Prosecution under the *Per Se* Rule Is Appropriate

The Supreme Court has long held that criminal enforcement under the Sherman Act is constitutional. *United States v. Nash*, 229 U.S. 373, 378 (1913) (rejecting vagueness challenge to criminal prosecution under Sherman Act). To the extent Defendants claim that criminally prosecuting conduct subject to the rule of reason would run afoul of the Due Process Clause, (Mot. 35), they ignore the fact that the Indictment charges conduct subject to the *per se* rule. The United States has long eschewed prosecuting conduct subject to the rule of reason[1], and it has no interest in doing so here.

Although the rule of lenity may preclude enforcement of a "grievously ambiguous" law, lenity does not apply simply because a defendant disputes the law's application in particular circumstances. *See Muscarello v. United States*, 524 U.S. 125, 138-39 (1998); (*cf.*, Mot. at 34-35). The rule of lenity provides Defendants no relief here. *See Suntar Roofing, supra*; *see also United States v. Farmer*, 26 F. Supp. 3d 141 (D.P.R. 2014) (rejecting rule of lenity's application to Sherman Act prosecution).

III. The Indictment Alleges that Defendants and their Co-conspirators Received Payments at Anti-competitive Levels and then Divided the Spoils Derived from those Payments, all Within the Statute of Limitations Period

The statute of limitations applicable here requires that the Indictment is returned "within five years next after [the] offense shall have been committed." 18 U.S.C. § 3282(a). "While a Sherman Act conspiracy is technically ripe when the agreement to restrain competition is formed, it remains actionable until its purpose has been achieved or abandoned, and the statute of limitations does not run so long as the co-conspirators engage in overt acts designed to accomplish its objectives." *United States v. Inryco, Inc.*, 642 F.2d 290, 293 (9th Cir. 1981) (citing *United*

---

[1] *See* Antitrust Division Manual, Chapter III Investigation and Case Development at Page III-12 (5th Ed.), *available at* https://www.justice.gov/atr/file/761141/download; *cf. United States v. U.S. Gypsum Co.*, 438 U.S. 422, 440-42 (1978).

States v. Kissel, 218 U.S. 601, 607-08 (1910)). Thus, like other conspiracies, the crucial issue here is "the scope of the conspiratorial agreement" as alleged in the Indictment. *United States v. Qayyum*, 451 F.3d 1214, 1218-19 (10th Cir. 2006) (citations omitted). In answering this question, the Court is "bound by the language of the [I]ndictment," *id.* at 1218, and the government objects to any consideration of factual assertions not contained therein. Here, the Indictment alleges a broad conspiracy involving not only the allocation of customers, but also payments derived from that allocation. *See* Dkt. 1 at ¶¶ 9, 11(b), (c), (f), (i). Moreover, the Indictment alleges that the conspiracy continued until as late as January 2014, well within the statute of limitations period.

These payments are within the scope of a conspiracy because they were collected and shared among the conspirators to achieve the conspiracy's object of economic enrichment. The conspiracy thus continues, and the statute of limitations does not begin to run. Controlling precedent in this Circuit holds that the receipt of such payments by conspirators to realize the economic gain from an antitrust conspiracy is within the scope of the conspiracy and thus delays the running of the statute of limitations. *United States v. Evans & Assocs. Constr. Co.*, 839 F.2d 656, 661 (10th Cir. 1988). In *Evans*, the district court had dismissed an indictment alleging that the conspirators had rigged bids for a highway construction project as time barred believing the five-year statute of limitations began to run when the bids were let in September 1979, more than six years before the indictment was returned. *Id.* But the Tenth Circuit reversed, holding that the antitrust conspiracy "was 'accomplished by both the submission of noncompetitive bids *and* by the request for and receipt of payments at anti-competitive levels.'" *Id.* (quoting *United States v. N. Improvement Co.*, 814 F.2d 540, 543 n.2 (8th Cir. 1987)). While the defendant's co-conspirator had won the contract and received payments on it and none of the contractual payments were divided among the conspirators, the receipt of money by that one conspirator was "sufficient to delay the start of the statute." *Id.* Other circuits similarly hold that the making or receipt of payments continues the conspiracy, recognizing that the defendant's "interest lay not in securing the contract itself but in obtaining the money thereunder" and thus "the conspiracy continue[s] until [the defendant] ha[s] realized fully his anticipated economic benefits." *United States v. Girard*, 744 F.2d 1170, 1172 (5th Cir. 1984); *e.g., United States v. Anderson*, 326 F.3d 1319, 1328 (11th Cir. 2003); *N. Improvement Co.*, 814 F.2d at 542; *United States v. A-A-A Elec. Co., Inc.*, 788 F.2d 242, 245 (4th Cir. 1986); *United States v. Walker*, 653 F.2d 1343, 1346-49 (9th Cir. 1981).

Here the Indictment alleges that Defendants received payments within the scope of the conspiracy. Dkt. 1 at ¶¶ 9, 11(b), (i). Specifically, the Indictment alleges that Defendants accepted noncompetitive contingency fee rate payments from their customers. Dkt.1 at ¶ 11(h). These alleged payments satisfy the Tenth Circuit's standard set forth in *Evans & Assocs.* because Defendants and their co-conspirators received payments from heirs at collusive and noncompetitive contingency fee rates within the statute of limitations.

The Tenth Circuit further holds that the distribution of a conspiracy's proceeds is also within the scope of the conspiracy. *United States v. Morgan*, 748 F.3d 1024, 1036-37 (10th Cir. 2010) (sharing of proceeds was within scope of a conspiracy to kidnap). The Indictment here also alleges that Defendants and their co-conspirators paid each other a portion of the noncompetitive payments that they received from the heirs they allocated. Dkt.1 at ¶ 11(c), (f). "[I]t is well settled that the distribution of the proceeds of a conspiracy is an act occurring during the pendency of the conspiracy." *Morgan*, 748 F.3d at 1036-37. The Indictment sufficiently alleges these payments within the statute of limitations.

The fact that the Indictment alleges that the conspirators received these noncompetitive payments distinguishes this case from *United States v. Hare*, 618 F.2d 1085 (4th Cir. 1980). Hare was charged with receipt of an illegal gratuity under 18 U.S.C. § 201(g), which outlaws the receipt of anything of value by an official for an official act, not with conspiring for economic enrichment. 618 F.2d at 1086. The thing of value allegedly received by Hare was a favorable loan, not smaller loan repayments or forbearance from legal action after default. *Id.* at 1087. As a result, the prosecution could not rely on receipt of those other things. *Id.* Moreover, the court expressly limited its holding to the facts alleged in the indictment. *Id.* In contrast, here the Indictment clearly alleges that the conspiracy contemplated that Defendants and their co-conspirators would receive the noncompetitive payments: that was the very point of the conspiracy.

Moreover, the Indictment's allegation that Defendants exchanged ill-gotten gains with their co-conspirators also distinguishes this case from *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013). There, the court found that a conspirator bank's unilateral making of interest payments to a non-conspirator municipality alone lacked the "underlying concern of concerted action" needed to come within the scope of the conspiracy. 738 F.3d at 503. Here, however, the Indictment alleges continued concerted and bilateral conduct. In addition to accepting contingency payments from the allocated heirs, the conspirators also paid each other a portion of the contingency fees collected from these individuals and monitored and communicated about these payments. Dkt.1 at ¶ 11(c), (f), (j). This is precisely the kind of division of spoils that the Second Circuit recognized was outside its holding in *Grimm*. 738 F.3d at 504 n.6 (explaining that *United States v. A-A-A Elec. Co.,* 788 F.2d 242 (4th Cir. 1986) and *United States v. Walker,* 653

F.2d 1343 (9th Cir. 1981), were "consistent with [its] approach" because they involved "continued concerted action," respectively, "payoffs to co-conspirators after award of contract" and "conspirators continued to divide profits from scheme on a yearly basis"). In any event, in addition to *Grimm* being distinguishable from the present case and not controlling in this Circuit, it is also wrongly decided, *see Grimm*, 738 F.3d at 504-09 (Kearse, J., dissenting), and irreconcilable with the Tenth Circuit's holding in *Evans & Assocs.* that an antitrust conspiracy continued as long as a conspirator received a payment under an affected contract. 839 F.2d at 661.

Because the Indictment properly alleges these acts committed by Defendants and their co-conspirators in furtherance of the conspiracy within the statute of limitations, it is not time-barred.

IV. Issues of Withdrawal and Pre-Indictment Delay Are Not Properly Before the Court

The Indictment's allegations also overcome a pre-trial claim of withdrawal. (Mot. at 46 n.11). As noted above, the Indictment's allegations, including those about the conspiracy's duration, are to be taken as true. *See Qayyum*, 451 F.3d at 1218-19. To the extent Defendants wish to argue withdrawal, they will bear the burden of proof on this issue at trial. *Smith v. United States*, 568 U.S. 106 (2013); *United States v. Parnell*, 581 F.2d 1374, 1384 (10th Cir. 1978).

Also, Defendants provided a narrative that the government may have learned of misconduct in the heir location industry as early as before the end of 2009 and as late as June 2012. (Mot. at 49-50). But they do not make any claims of actual prejudice related to pre-indictment delay, nor do they ask the Court for any specific relief as a result. These assertions are not properly before the Court, and so should be ignored.

CONCLUSION

For the reasons above, this criminal prosecution should proceed to trial under the *per se* rule. Based on the Indictment and *Suntar Roofing, supra*, the government respectfully requests that the Court make this pre-trial determination and DENY Defendants' Motion That The Case Be Subject To The Rule of Reason and to DENY Defendants' Motion That The Indictment Be Dismissed.

Dated: 4-28-17

Respectfully submitted,

Kal M Tulley

KALINA M. TULLEY, IL Bar No. 6210304
Assistant Chief

ROBERT M. JACOBS, IL Bar No. 6289819
RUBEN MARTINEZ, JR., TX Bar No. 24052278
MOLLY A. KELLEY, IL Bar No. 6303678
Trial Attorneys
Antitrust Division
U.S. Department of Justice
Chicago Office
209 S. LaSalle Street
Suite 600
Chicago, Illinois 60604
(312) 984-7200