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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX** **Defendants.**	**DEFENDANTS' OPPOSITION TO GOVERNMENT'S MOTION FOR RECONSIDERATION AND OBJECTION TO PROPOSED ORDER** **Case No. 2:16-cr-403-DS** **U.S. District Judge David Sam** **Magistrate Judge Brooke C. Wells**

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INTRODUCTION

In moving for reconsideration of the Court's decision that the rule of reason governs this case, the government says nothing new. It merely reiterates its displeasure with the well-settled rule that it is this Court's role, not the government's, to make the legal determination whether or not a particular agreement constitutes a *per se* violation of the Sherman Act, and then voices its disappointment that its view on that issue did not prevail. That is not a basis for reconsideration. The only error here lies in the government's decision to subject the defendants to a criminal prosecution, despite ample prior warning of its legal flaws. The Court's ruling was and remains correct, and the government's motion should be rejected.

The defendants Kemp & Associates, Inc. and Daniel J. Mannix were indicted on August 17, 2016 on a single-count conspiracy to violate the Sherman Act, 15 U.S.C. § 1. Pursuant to a scheduling order, on March 31, 2017 the defendants filed under seal their Motion for Order that the Case Be Subject to the Rule of Reason and to Dismiss the Indictment (the "Defense Motion"). At the conclusion of the June 21, 2017 oral argument on the Defense Motion, the Court ruled that the rule of reason governs this case. *See* Dkt. 88, June 21, 2017 Tr. at 50-51. The government now asks for reconsideration of that decision and challenges the appropriateness of the proposed order that the defendants, pursuant to the Court's instruction, submitted on June 30, 2017. Dkt. 90. Respectfully, the government's requests should be denied on both procedural and substantive grounds.

First, motions to reconsider are disfavored. That is particularly true where, as here, the losing party does nothing more than rehash its losing arguments. On that basis alone, the Court is justified in denying the motion.

Second, reworded though they may be in some respects, the government's arguments are

still entirely unavailing. Most notably, the government stubbornly persists in its theory that once it has labeled the conduct at issue here a customer allocation, the Court's hands are tied; it cannot make the legal assessment whether the conduct meets that standard but must instead simply give way to a *per se* trial. The Court correctly rejected that unfounded proposition the first time around and should adhere to its conclusion now.

Further, as a result of the government's unwillingness to engage the correct standard for determining whether alleged conduct fits within a *per se* category, it repeats a number of misstatements of law in its reconsideration motion. The government is simply wrong in contending that the industry in which the conduct occurred is irrelevant to the Court's analysis. It then mischaracterizes the way in which the limited nature of the agreement at issue here is legally relevant. While the number of purported victims may or may not impact the rule of reason analysis, the narrow reach of the Guidelines does distinguish it from other customer allocations, supporting the conclusion that the *per se* category does not fit here. And the new spin the government puts on its argument—the claim that the doctrine of ancillary restraints is a merits question for the jury mistakenly conflates a two-step analysis. Critical here, whether that doctrine applies is determined as a matter of law based on a consideration of the structure of the agreement; and, where it does apply, so too does the rule of reason.

Finally, the government imagines dire consequences to its prosecution regime from the Court's ruling. That rhetoric is overblown. The Court, in correctly finding that the rule of reason governs, made a legal determination that applies only to the specific, unusual circumstances of this case. To the extent that the government sees a precedent that threatens the *per se* rule's clear boundaries, that comes only from the government's misguided original decision to pursue (and its more recent decision to continue to pursue) this particular legally flawed criminal charge.

ARGUMENT

I. Reconsideration Is Disfavored and Unwarranted Here

"To the extent that motions to reconsider are recognized, they are disfavored." *E.g.*, *Swasey v. West Valley City*, No. 13-cv-768, 2017 WL 1288534, at *2 (D. Utah Apr. 6, 2017). "Such [] motion[s] . . . should be rarely heard and seldom granted"; they "'do not provide litigants with an opportunity for a second bite at the apple'"; and they "'are not vehicles for relitigating old issues.'" *Vision Security, LLC v. Xcentric Ventures, LLC*, No. 13-cv-926, 2015 WL 12780892, at *1 (D. Utah Aug. 27, 2015) (quoting *MacArthur v. San Juan County*, 405 F. Supp. 2d 1032, 1305-06 (D. Utah 2005)). Thus, absent extraordinary circumstances, the basis for reconsideration must not have been available when the underlying motion was argued. *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *see United States v. Koerber*, 966 F. Supp. 2d 1207, 1211-12 (D. Utah 2013) (government could not use reconsideration to correct strategic error in how it initially argued motion); *United States v. Allums*, No. 08-cr-30, 2009 WL 922183, at *1 (D. Utah Mar. 31, 2009) ("The government's Motion for Reconsideration is inappropriate, as it merely advances arguments that could have been raised previously.").

Against this high standard, motions to reconsider are routinely denied. *See Lens.Com, Inc. v. 1-800 Contacts, Inc.*, No. 12-cv-352, 2014 WL 12596493, at *1 (D. Utah Mar. 3, 2014) (Sam, J.) (noting denial of reconsideration); *Ins. Co. of the West v. Wallace Investment Ltd. P'ship*, No. 11-cv-500, 2013 WL 5673417 (D. Utah Dec. 30, 2013) (Sam, J.) (denying reconsideration); *United States v. Gwilliam*, No. 11-cv-922, 2012 WL 3527893, at *1-*2 (D. Utah Aug. 14, 2012) (Sam, J.) (noting denial of reconsideration); *Garrett v. ReconTrust Co.*, No. 11-cv-763, 2012 WL 12895148 (D. Utah Apr. 25, 2012) (Sam, J.) (denying reconsideration);

United States v. $72,100 in U.S. Currency, No. 03-cv-140, 2008 WL 906762, at *1 n.1 (D. Utah Apr. 1, 2008) (Sam, J.) (noting denial of reconsideration); *Zaccardi v. United States*, No. 07-cv-439, 2008 WL 123592 (D. Utah Jan. 10, 2008) (Sam, J.) (denying reconsideration).

Here, the government has advanced no new arguments to support its view that the Court committed clear error. Rather, it has merely rehashed, rephrased, and reorganized the arguments it made in its opposition to the Defense Motion and at oral argument. *Cf. United States v. Christy*, 739 F.3d 534, 539-40 (10th Cir. 2014) (reconsideration appropriate to correct "clear error in [district court's] failing to address [alternative argument] at all"). The government points to no controlling authority that the Court has overlooked, nor could the handful of new cases cited by the government demonstrate that the Court erred, as the government failed to timely put those cases before the Court. At any rate, as we discuss below, those cases should only serve to confirm the Court's confidence in its decision.

Further, to the extent any point the government makes or any position the government takes in the instant motion could be characterized as new (which, we submit, is not the case), the government has failed to offer any justification whatsoever for its failure to do so earlier. That failure is inexcusable here. The conduct charged in the Indictment ended nearly nine years ago. The government began investigating this case over three and a half years ago. It filed the Indictment nearly a year ago, by which time it had been fully advised of the defense's view that the case was legally flawed because the agreement was properly subject to the rule of reason. The government had four weeks to respond to the defense's moving papers, pursuant to a briefing schedule agreed to by the government in early March, *see* Dkt. 62. Ten days after the defense filed its reply, the Court directed oral argument on the Defense Motion, noting that it was "an important motion." Dkt. 83, May 22, 2017 Tr. at 4. Then another full month passed

before oral argument was heard. The government is simply in no position to claim that it was unprepared when the Defense Motion was briefed, nor when oral argument was heard, and it has not pointed to any change in law or facts in the subsequent three and a half weeks.

The Court would be well within its discretion to deny the government's motion solely on these procedural grounds. Nevertheless, as we discuss below, the merits compel the same result.

II. The Court's Ruling Was Correct and Should Be Reaffirmed

A. The Court's Ruling Is Proper With or Without Reference to the Written Guidelines

The Court's decision that the rule of reason governs this case is fully supported by the allegations presented in the Indictment. However, relying on the terms of the written Guidelines at this stage is entirely appropriate as well.

"Essentially undisputed" facts are properly considered on a motion to dismiss an indictment. *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); *accord United States v. Brown*, 925 F.2d 1301, 1303-04 (10th Cir. 1991). There is effectively no dispute that the written Guidelines are one and the same as the agreement described in the Indictment. A simple comparison of the allegations in the Indictment and the actual written Guidelines proves the point. For this comparison, we refer to Exhibit A attached to this Opposition, which documents the manifest similarities and which we presented at oral argument, *see* June 21, 2017 Tr. at 12-16.

That chart also highlights certain areas in which the Guidelines are more detailed than the allegations in the Indictment. Far from showing that the defense is addressing the wrong agreement, that additional detail explains why the government wishes to shield the actual written agreement from the Court's view, by making the various procompetitive features of the agreement even plainer than the Indictment does, *see* June 21, 2017 Tr. at 12-16. Unfortunately

for the government, a party bringing a legal claim based upon an agreement cannot avoid the Court's consideration of all of the agreement's actual terms. *See, e.g.*, *Borde v. Bd. of Comm'rs*, 514 F. App'x 795, 799 (10th Cir. 2013).

Finally, even at this late stage, the government does not dispute that the Guidelines are the charged agreement. This is not surprising, given that the government also made no such claim in its opposition to the Defense Motion and at oral argument. Instead, now as then, the government merely insists that the Guidelines not be considered.[1]

The government's oblique effort to suggest a fact dispute with its new statements that the Guidelines are not the "entire basis of the allegations in the Indictment" and do not "reflect every aspect of the conspiracy," Mot. at 11, is unavailing. No written agreement encompasses every single thing that the parties did pursuant to that agreement. But where the charge is conspiracy, the fundamental question is: what is the operative agreement? Here, it is the written Guidelines. The government does not and cannot claim otherwise. That point is confirmed by the government's failure to identify any relevant understanding between the parties that is not found in the written Guidelines.

In that way, this case presents a marked contrast from the Eighth Circuit's decision in *In re Wholesale Grocery Products Antitrust Litigation*, 752 F.3d 728 (8th Cir. 2014), which the defendants relied upon in their opening brief. There, two wholesale grocery competitors entered into a series of transactions in which they exchanged various assets and agreed to reciprocal agreements not to compete for former customers in specified areas. *See id.* at 730. The plaintiffs alleged that the grocers separately agreed not to compete for new and existing customers as well.

[1] Protesting that something not be considered is not the same as actually disputing it. Otherwise, undisputed facts could be considered at the motion to dismiss stage only if and when the government wanted them to be. That is not the law.

See id. The Eighth Circuit held that only the second alleged agreement could properly be considered a *per se* customer allocation. *Id.* at 734-35. No such second or different agreement has been alleged in this case. Nor could it be.

Likewise, in *United States v. Green*, 592 F.3d 1057, 1068-69 (9th Cir. 2010), which the government cites for the first time now, the parties presented two competing versions of events regarding a bid rigging charge, and the Ninth Circuit concluded that sufficient evidence supported the government's view. Here, there is no claim that the defense will prove the Guidelines but the government will prove some other agreement.[2] Nor is there any good-faith dispute as to what the Guidelines entailed.

Although the Court could reaffirm its decision on the basis of the Indictment, it is on very firm ground in doing so in reliance upon the written Guidelines. The government's claims otherwise are contrary to the case law and common sense.

B. The Guidelines Were Not a Garden-Variety Horizontal Agreement, and the Government's Recitation of *Per Se* Labels Cannot Make Them So

Central to resolving the Defense Motion is how the Court goes about deciding whether the charged conduct falls into one of the *per se* categories. Although the defense answered this question in both its moving papers and its reply, we briefly do so again because the government still fails to offer the Court any guidance.

In Sherman Act cases, the rule of reason presumptively applies. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). *Per se* liability applies only where the practice (1) fits a *per* se category established by prior precedent, or (2) on its face appears to be one that would always restrict competition and decrease output. *See Cayman Exploration Corp. v. Utd. Gas Pipe Line*

[2] The government's repeated reference to a hypothetical joint effort to create a genealogical library, Mot. at 10; June 21, 2017 Tr. at 29, is puzzling. It has no basis in the factual record or any claim by the defense.

Co., 873 F.2d 1357, 1360 (10th Cir. 1989); *see also Dagher*, 547 U.S. at 5. "The *per se* rule's conclusive presumption that the restraint is unreasonable should not be applied to a challenged practice until 'experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" *Cayman Exploration*, 873 F.2d at 1360 (quoting *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)).

Those general principles do not end the matter. The defendants discussed a detailed set of factors, established in the case law, to guide the Court's decision whether to deviate from the rule of reason under the first prong of *Cayman Exploration*, *i.e.*, whether the restraint fits into an established *per se* category. Those principles include that: (1) a court must look beyond mere labels and analyze the challenged conduct as it existed; (2) the conduct must be viewed as a whole; and (3) the industry in which the conduct occurred must be considered with respect to the anticipated effects of the restraint. *See* Defense Motion at 18-19; Reply to Defense Motion at 7. At the end of the day, the Court's task is to determine whether the challenged restraint is, in light of these considerations, a "garden-variety horizontal agreement." *See Metro. Industries v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1986); *see also In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014).

Particularly important is the injunction against merely relying on labels. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 (1979) ("[E]asy labels do not always supply ready answers."); *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1083 (11th Cir. 2016) ("[J]ust because an agreement is capable of being characterized as a market allocation agreement does not mean that the *per se* rule applies."). This is a naked restraint, the government's argument goes, and naked restraints are subject to the *per se* rule, so the *per se* rule applies here. But calling the restraint "naked" is not enough. Such language is used by virtually

every party that asserts a violation of the antitrust laws.

Indeed, that is precisely what the plaintiff in *Cayman Exploration* did, to no avail. The court's role is to determine whether the party so claiming is correct as a matter of law. So, rejecting a mere labeling exercise as a matter of course, the Tenth Circuit in *Cayman Exploration* focused on whether the restraint actually was a naked one, and determined that the plaintiff was incorrect. 873 F.2d at 1360 (despite labeling, circumstances did not support claim of vertical or horizontal price-fixing). Although the government wants the Court to take its word on this issue, rather than conduct its own analysis, *Cayman Exploration*—controlling authority cited in our moving papers and reply, and never addressed by the government—does not permit that approach. *See also* Defense Motion at 22-24 (discussing cases where courts rejected customer allocation label); Reply to Defense Motion at 9-10 (distinguishing dissimilar customer allocation cases cited by the government).

The government belatedly attempts to bolster its argument by citing two more *per se* cases that are not at all similar to the Guidelines. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994) is far off the mark. In that case, auto parts dealers set up an automatic call-forwarding scheme, using phonebook listings for phantom companies, to geographically allocate customers located in border zones. *Id.* at 782. *Hammes* bears no similarity to the Guidelines. The *Hammes* agreement was across-the-board and did not apply exclusively to instances where joint activity would be efficient; did not entail joint efforts as to individual customers, as present in the estate administration phase here; and did not include a profit-sharing mechanism.

United States v. Flom, 558 F.2d 1179 (5th Cir. 1977) is similarly irrelevant. *Flom* is a bid-rigging case, *id.* at 1183 ("Conspiracies between firms to submit collusive, non-competitive,

rigged bids are *per se* violations of the statute."), and thus not instructive in the least about what constitutes *per se* customer allocation. Even if the Court considered *Flom*, it would find only one more example of conduct—construction firms holding regular meetings to decide in advance who would win upcoming construction contracts, *id.* at 1182—that does not at all resemble the Guidelines.

Meanwhile, the one relevant case the government does bring forward on this point undermines its position. In *Major League Baseball Properties, Inc. v. Salvino, Inc.*, the counterclaim plaintiff repeatedly argued that an intellectual property exclusivity agreement was a "naked output . . . restriction" and that the "agreement restricts output by its terms." 542 F.3d 290, 318 (2d Cir. 2008) (quotations omitted). But the Second Circuit refused to accept the plaintiff's characterizations, finding "no evidence to support" them and instead concluding that the agreement did not reduce output but "merely alter[ed] the identity of the licenses' issuer." *Id.* That is precisely the type of analysis that the government is eager for the Court to avoid here.

The government's continued inability to come forward with a substantially similar agreement makes our point: the Guidelines were not a "garden-variety horizontal agreement." *See Metro. Industries*, 82 F.3d at 844 (plaintiff "does not point to, and we have not found, a single instance in which an arrangement similar to [this] has undergone judicial scrutiny in the Sherman Act context"); *see also Broadcast Music*, 441 U.S. at 10 ("We have never examined a practice like this one before . . . ."); *Procaps*, 845 F.3d at 1084 ("Neither party could point to a case" involving the conduct at issue).

C. The Industry at Issue Is Relevant to the Court's Analysis

Where a restraint arises in "a novel way of doing business (or an old way in a new and previously unexamined context[])," subjecting the conduct to *per se* treatment is a "bad idea." *In*

re Sulfuric Acid Antitrust Litig., 703 F.3d 1004, 1011 (7th Cir. 2012). So "even when the *per se* label applie[s] to a category of anticompetitive conduct, the cases establish that courts may still look to see whether the economic effects of a particular practice in a particular industry justify abandoning a rule of reason analysis." *Behrend v. Comcast Corp.*, No. 03-6604, 2012 WL 1231794, *11 (E.D. Pa. Apr. 12, 2012); *see* Areeda & Hovenkamp, *Antitrust Law*, ¶ 1475b, at 325 (3d ed. 2011) ("Even the *per se* categories cannot automatically be applied to situations for which they were not designed."). These precautions make sense. *Per se* standards are necessarily over-inclusive and thus only established "[o]nce a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982); *see Broadcast Music*, 441 U.S. at 10 (declining to apply *per se* standard: "[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*") (citation omitted).

Nevertheless, repeating near verbatim an argument from its opposition to the Defense Motion, the government contends that the nature of the industry in which the restraint occurs is irrelevant. Mot. at 6. Once again, the government relies almost exclusively on a single case: *Maricopa*. But as we explained in our reply, that case persuasively undermines the very point the government seeks to make by noting that in earlier decisions the Supreme Court had considered unique aspects of certain industries (public service for state bar associations and ethical norms for engineers) as potential bases for affording different treatment to conduct that otherwise would be viewed as a Sherman Act violation. 457 U.S. at 348-49 (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978)). Indeed, the Court made this point plain just two years after its decision in *Maricopa* when it applied the rule of reason to NCAA restrictions on televising college football games precisely

because of the unique nature of the industry. *NCAA v. Bd. of Regents*, 468 U.S. 85, 100-01 (1984) (unique way that industry functioned was "what is critical" in analyzing claimed horizontal restraints on competition).

In light of the *NCAA* decision, the government's suggestion that the Court's ruling overturns *Maricopa* is nonsensical. *See* Mot. at 6. Where, as here, "easy labels" prove unhelpful, *see Broadcast Music*, 441 U.S. at 8, a "'nuanced and case-specific inquiry'" is required, *see Meijer, Inc. v. Barr Pharms., Inc.*, 572 F. Supp. 2d 38, 49 (D.D.C. 2012) (quoting *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 33-34 (D.C. Cir. 2005)), and that includes an understanding of the industry at issue. This Court has not called the Supreme Court's holding in *Maricopa* into question. The only matter at stake here is the future of this specific improvident criminal prosecution.

D. The Scope of the Restraint Is Relevant

"[A] restraint in a limited aspect of a market may actually enhance marketwide competition." *NCAA*, 468 U.S. at 103 (citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 51–57 (1977)); *see also Broadcast Music*, 441 U.S. at 23 ("[W]e have some doubt—enough to counsel against application of the *per se* rule—about the extent to which this practice threatens the central nervous system of the economy . . . .") (quotations omitted). Accordingly, the scope of a restraint is relevant to the *per se* analysis. All the more so here, where the limited nature of the Guidelines both distinguishes that agreement from customer allocation case law and builds the case for the efficiency-enhancing potential of the agreement.

The design of the Guidelines, as we have consistently demonstrated, is fundamentally incompatible with restraints that the government relies on in trying to invoke the *per se* rule. The Guidelines did not apply to all new customers; did not apply to all existing customers; and did

not apply to all customers in a geographic area.[3] Instead, the Guidelines applied only to those few situations where both firms found the same estate, performed the correct genealogical research, and successfully located the same unsigned heir. It was in those limited circumstances that it would likewise be efficient for both firms, having already invested time and money in the same case, to avoid duplicating efforts in the administrative stage.

The government now presses a slightly different angle, namely that the number of impacted parties is irrelevant. *See* Mot. at 6. To try to support this out-of-place assertion, the government primarily relies on bid-rigging cases, *see id.*, which by their nature may involve just a single contract and a single affected party. Those cases, arising in the context of a type misconduct, bid rigging, that is well settled to be *per se* illegal and that has no relevance to the conduct here—simply offer no rebuttal to the principle that an agreement's structure, including its scope, is a relevant consideration. The government would be all too happy to avoid grappling with that structure, but as we next discuss, that analysis is necessary.

E. Assessing Whether the Doctrine of Ancillary Restraints Applies Is a Question of Law Properly Addressed Pretrial

Whether the doctrine of ancillary restraints applies to a given case is a question of law properly addressed pretrial, and, if answered in the affirmative, requires the restraint to be assessed under the rule of reason. That is, whether the doctrine applies is merely a way of determining the second prong of the standard set out in *Cayman Exploration*: whether the restraint would be expected to always restrict competition and decrease output, and is therefore naked; or whether the restraint is ancillary to increased efficiency. The government mistakenly conflates this inquiry with a merits question. Mot. at 8 (arguing that the issue requires the Court

[3] *United States v. Cooperative Theatres of Ohio, Inc.*, 845 F.2d 1367 (6th Cir. 1988), relied on by the government in its reconsideration motion, was a classic existing-customer allocation, precisely one of the "cases [that] fit under the Sherman Antitrust Act," June 21, 2017 Tr. at 49.

to "decide the ultimate issue in this case"). But that merges a two-step process into one. The court first decides the legal question of whether the doctrine applies, which mandates application of the rule of reason. Where it does, the jury then makes the ultimate determination whether the restraint passes or fails under the rule of reason.

Cases cited by both parties make this clear. *Polk Brothers v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985) is perhaps the seminal case explaining and applying the doctrine of ancillary restraints. The following passage, cited in our moving papers, Defense Motion at 28, crystallizes the first step:

> [T]he *per se* rule is designed for 'naked' restraints rather than agreements that facilitate productive activity. . . . A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then the court must apply the Rule of Reason to make a more discriminating assessment.
>
> A restraint is ancillary when it may contribute to the success of a cooperative venture that promises greater productivity and output. . . . If the restraint, viewed at the time it was adopted, may promote the success of this more extensive cooperation, then the court must scrutinize things carefully under the Rule of Reason.

Id. at 188-89. Simply put, the first inquiry is whether the rule of reason applies.[4] The government should be aware of this, for it quotes part of this exact passage from *Polk Brothers* in its reconsideration papers, *see* Mot. at 10, as well as other cases that make the same point. Thus, in her *Major League Baseball* concurrence, on which the government relies here and in its opposition to the Defense Motion, then-Judge Sotomayor wrote: "an ancillary restraint is not

[4] That this analysis is merely an alternative way of deciding whether the *per se* rule applies is best exemplified by the competing opinions in *Major League Baseball*. Writing for the court, Judge Kearse assessed the structure of the alleged restraint and reviewed relevant *per se* precedent to determine whether it fit any established *per se* category. 542 F.3d at 318-25. Then-Judge Sotomayor, concurring, alternatively chose to "apply[] the doctrine of ancillary restraints" on the view that it "more efficiently addresses the issues presented." *Id.* at 334 (Sotomayor, J., concurring).

necessarily lawful. Its competitive benefits and harms must still be weighed, as part of the joint venture, under a rule-of-reason analysis." 542 F.3d at 339 n.7 (Sotomayor, J., concurring). And Judge Posner, in an opinion cited for the first time on reconsideration, clarifies that the rule of reason applies where it is "arguable . . . that the [] restriction was 'ancillary' to a lawful main purpose." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984).

Accordingly, this initial step merely requires the Court to determine what analytical standard applies to this case. That is a question of law, *e.g.*, *Se. Milk*, 739 F.3d at 271; *see also Polk Bros.*, 776 F.2d at 188-89, which should be resolved pretrial, *Sulfuric Acid*, 703 F.3d at 1008. The separate merits question, the second step, is whether the restraint was reasonable in practice. The government has cited no authority in any way suggesting that a jury decides whether the rule of reason applies.[5] Yet its desire to conflate the two steps may be explainable: in a Sherman Act criminal case, the initial non-merits question appears to be dispositive because the government concedes that it cannot pursue criminal antitrust charges under the rule of reason. *See* Opp'n to Defense Motion at 16-17; June 21, 2017 Tr. at 52; Mot. at 2-3. That restriction as a matter of government policy, however, does not render the question one on the merits.

The government strains to suggest that the Court has overstepped its bounds, but it has done no such thing. The Court merely decided before trial a question of law that should be decided before trial. That the government is unhappy with the choices it now faces provides no basis for reconsideration.[6]

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[5] As discussed above, the Ninth Circuit's decision in *United States v. Green* does not touch on that issue at all, but merely holds that the jury had sufficient evidence to convict on a *per se* violation over the defendant's presentation of an alternative version of events. *See* 592 F.3d at 1068-69.

[6] This particular problem would not have arisen had the government chosen to pursue a civil Sherman Act proceeding, rather than a criminal one.

F. The Doctrine of Ancillary Restraints Applies to the Guidelines

To determine whether the doctrine of ancillary restraints applies, a court assesses whether the challenged restraint could contribute to a cooperative venture that promises greater productivity and output. *Polk Bros.*, 776 F.2d at 188-89. That assessment is performed based on the structure of the agreement and thus focuses not on whether procompetitive benefits occurred in practice, but on whether such benefits could be anticipated at the time the agreement was formed. *Id.* at 188; *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 775 (8th Cir. 2004).

First, the very need to predict the competitive effects of a restraint is fatal to the government's efforts to keep the Court from considering any efficiency-enhancing effects. *See* Mot. at 7-8; *see also Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) ("The *per se* rule condemns practices that are entirely void of redeeming competitive rationales.") (quotations omitted). Second, the government's substantive response to this doctrine once again rests almost exclusively on the use of labels. To that end, the government writes that the doctrine does not apply because "the Indictment does not charge an agreement ancillary to a joint venture." Mot. at 9. The government's effort to have the Court accept the labels used in the Indictment, instead of analyzing the structure of the agreement itself, is part of a misguided pattern.

Third, the government's desire to avoid the necessary analysis begins to make sense when the government's substantive arguments are lined up against what the defense has demonstrated to date. In our moving papers and our reply, we offered an extended analysis of why the Guidelines comfortably fit the framework of joint ventures. Defense Motion at 25-34; Reply to Defense Motion at 12-15. Specifically, the firms pooled their complementary genealogical research and took advantage of the efficiencies of having one firm administer the

estate, and in the process shared not only certain profits, but the risk of loss as well. The Guidelines would therefore be expected to increase output, and at the same time preserved competition between the firms in the race to find and solve the case. *See* June 21, 2017 Tr. at 12-16; Ex. A. These are hallmarks of a joint venture. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) ("[T]he efficiencies created by joint ventures [include] *risk-sharing*, economies of scale, *access to complementary resources*, and *the elimination of duplication and waste*." Unlike mergers, joint ventures "allow their partners to continue to compete with each other in the relevant market.") (emphasis added, quotations omitted).

The government counters that "it is doubtful" that the firms would thereby conserve resources incurred in identifying a potential estate and locating heirs. *See* Mot. at 8. But that misses the point. The structure of the Guidelines promised resource savings at a different point in time, the administration phrase, which the government continues to studiously avoid analyzing despite the fact that is written into the Guidelines, *see* June 21, 2017 Tr. at 15. The government's refusal to grapple with the firms' actual agreement is best demonstrated by its mistaken claim that the Guidelines "ensured that each heir faced a single seller" instead of two. Mot. at 5. Even the Indictment makes clear that the Guidelines applied in limited circumstances, "when both co-conspirator companies contacted the same unsigned heir to an estate." Ind. ¶ 11(b).

Despite the government's view, the defense's "claim of economies" is not "implausible." *See* Mot. at 8. It finds ample support in the challenged agreement, both as described in the Indictment and as documented in the Guidelines, and was laid out in extensive briefing and at oral argument. Even if now were the proper time for the government to respond (it is not), the government's argument would still fail.

Finally, the government's new position that the jury should decide whether the doctrine

of ancillary restraints applies, Mot. at 10—an inquiry that requires analysis of efficiency enhancements—cannot be reconciled with its previous position that the defendants will "be precluded from introducing evidence of reasonableness or justification at trial," Opp'n to Defense Motion at 11 (quotations omitted)—a position that, adding to the confusion, the government has also reiterated in this motion, Mot. at 7-8. The government's muddled statements merely confirm the need for the Court to decide this matter pretrial. Of course, the Court has already done so, and done so correctly.

* * *

The reconsideration motion, styled as an effort to correct clear error, is in reality a plea that the Court rescue the government from its misguided charging decision. That is no basis for reconsideration, nor is any other argument the government has rehashed in the instant motion.

III. A Ruling on the Statute of Limitations Is Now Appropriate

At oral argument, the Court suggested that the parties confer about the continued viability of this case. *See* June 21, 2017 Tr. at 53. The defense's attempts to address that issue with the government were not successful. Accordingly, we respectfully join the government's request for a ruling on the statute of limitations issue.

We agree with Your Honor's comment at the oral argument that, given the undisputed fact that the Guidelines were ended by Defendant Mannix over eight years before the Indictment issued, the government's position on limitations is difficult to understand, *see id.* at 45. Moreover, it would thwart the interest in repose that is the very reason limitations periods exist in the first place. For the reasons we have stated, we respectfully submit that the Court should now rule that the statute of limitations applies and constitutes a separate bar to proceeding with this case.

CONCLUSION

For the foregoing reasons, and for all the reasons set forth in our moving papers, our reply, and our presentation at oral argument, we respectfully submit that the Court should deny the government's request for reconsideration, reaffirm its ruling that the rule of reason governs this case, and enter the proposed order that the defendants submitted to the Court.

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