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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 **GOVERNMENT'S REPLY TO THE DEFENDANTS' OPPOSITION TO MOTION FOR RECONSIDERATION AND OBJECTION TO PROPOSED ORDER** U.S. District Court Judge David Sam Magistrate Judge Brooke C. Wells

The government respectfully submits this limited reply brief to identify a critical error underpinning the Defendants' position: their reliance on civil cases in incomparable procedural postures to argue when and how a court may decide whether a charged agreement is subject to the rule of reason. While *substantive* antitrust law is the same in criminal and civil contexts, the *procedural* law for adjudicating criminal and civil cases is materially different. That fundamental misunderstanding suffuses the Defendants' opposition and undermines their arguments. As a result, the Defendants' opposition fails to meaningfully contradict the

controlling law cited in the government's opening brief. The government respectfully requests that the Court (i) find that the government is permitted to prove to the jury that the Defendants knowingly joined a *per se* unlawful customer-allocation agreement and, (ii) per the joint request of both the government and the Defendants, issue its ruling on the Defendants' Motion to Dismiss based on the statute of limitations. *See* Defendants' Opposition to Government's Motion for Reconsideration and Objection to Proposed Order (Dkt. 91) at 18 (stating that the Defendants "join in the government's request for a ruling on the statute of limitations issue").

The Indictment in this case charges a criminal conspiracy to allocate customers, which is a *per se* violation of the Sherman Act. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citing *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam)); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990). The grand jury found probable cause that the Defendants committed that crime. This Court may not look outside the Indictment to conclude that the grand jury ought to have charged a different type of agreement that would instead be subject to the rule of reason. *See United States v. Kysar*, 459 F.2d 422, 424 (10th Cir. 1972) ("If the indictment is fair upon its face and properly found and returned, the trial court cannot look behind the indictment to determine if it is based on inadequate or incompetent evidence.").

Here, the Defendants urge the Court to look outside the Indictment, relying erroneously on *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357 (10th Cir. 1989), a case in which the Tenth Circuit affirmed the dismissal of a civil complaint because "it alleged no facts of agreement or conspiracy in restraint of trade." *Id.* at 1359. Moreover, the *Cayman* plaintiff's allegations, even if proven true, would have been "legally insufficient to state a claim." *Id.* *Cayman* is inapplicable here because the Defendants do not and cannot dispute that

the Indictment, on its face, alleges an agreement to allocate customers. *See* Defendants' Motion for Order That the Case Be Subject to the Rule of Reason and to Dismiss this Indictment at 41 ("The Indictment makes plain that the conspiracy charged is the allocation of customers between two competitors, Kemp & Associates and Blake & Blake."). Significantly, because the Tenth Circuit was reviewing a motion to dismiss, it did not look beyond the allegations in the complaint to consider whether the plaintiff had alleged something other than *per se* unlawful price fixing. Similarly here, this Court should not look beyond the Indictment to conclude that the grand jury has charged—or should have charged—something other than a *per se* unlawful customer-allocation agreement.

The Defendants' other cases further demonstrate the error of imposing the rule-of-reason standard here. Each case was decided at a later phase of litigation, in a civil context, when facts were properly before the court, either on summary judgment[1] or post-trial.[2] Courts can resolve factual issues related to the ultimate merit of a civil case at the summary judgment stage, but the Federal Rules of Criminal Procedure expressly forbid such resolutions in criminal matters. *Compare* Federal Rule of Civil Procedure 56 *with* Federal Rule of Criminal Procedure 12(b); *see*

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[1] *See Texaco Inc. v. Dagher,* 547 U.S. 1, 5 (2006) (reversing application of the *per se* rule at the summary judgment phase); *ProCaps S.A. v. Patheon, Inc*. 845 F.3d 1072 (11th Cir. 2016) (affirming application of rule of reason at summary judgment phase); *In re S.E. Milk Antitrust Litig*., 739 F.3d 1004 (7th Cir. 2012) (same); *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004 (7th Cir. 2012) (same); *California ex rel. Harris v. Safeway, Inc*., 651 F.3d 1118 (9th Cir. 2011) (en banc) (same); *Metro. Industries v. Sammi Corp*., 82 F.3d 839, 844 (9th Cir. 1986) (same); *See also In re Wholesale Grocery Products*, 752 F.3d 728 (8th Cir. 2014) (reversing grant of summary judgment and permitting plaintiffs to pursue *per se* theory at trial).

[2] *Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc.,* 441 U.S. 1, 5 (1979) (reversing application of the *per se* rule after an "8-week trial"); *see also Polk Bros. v. Forest City Enters.*, 776 F.2d 185, 191 (7th Cir. 1985) (reversing application of the *per se* rule after a "full trial").

also United States v. Pope, 613 F.3d 1255, 1261 (10th Cir. 2010) (Federal Criminal Rule 12 "is not a parallel to civil summary judgment procedures."). As the Tenth Circuit has explained, in a criminal case, the jury is "charged with determining the general issue of a defendant's guilt or innocence." *Pope*, 613 F.3d at 1259. "Fact-finding by the district court based on evidence that goes to this question can risk trespassing on territory reserved to the jury as the ultimate finder of fact in our criminal justice system." *Id.*

Contrary to this established precedent, the Defendants ask this Court to go beyond the Indictment and accept as true their version of disputed facts. For example, the government disputes the Defendants' assertion that the contents of the Guidelines document are co-extensive with the charged conspiracy. A "simple comparison" of the Guidelines and the Indictment, however, shows that they are *not* "one and the same." Dkt. 91 at 5. Among other differences, the Indictment charges an agreement beginning in September 1999, whereas the Guidelines email is dated May 2000. Furthermore, the Indictment alleges that the conspiracy continued as late as January 29, 2014, whereas the Defendants argue that the conspiracy ended in 2008, outside the statute of limitations. The Defendants' Motion for Order That the Case Be Subject to the Rule of Reason and to Dismiss this Indictment at 42.

Finally, the government vigorously disputes the Defendants' assertion that the agreement was ancillary to a legitimate joint venture. Dkt. 91 at 16-17. The Indictment charges a standalone agreement to allocate customers, and nothing in the Indictment suggests that the alleged agreement was ancillary to any joint venture. Indictment ¶¶ 9, 11(b), 11(c). At trial, the government will present evidence that the Defendants agreed to allocate customers as a way to eliminate competition rather than—as they now claim—a way to further any interest of a legitimate joint venture with their co-conspirators.

Whether the agreement was ancillary in this case to a legitimate joint venture is a factual dispute about the very nature of the Defendants' agreement, and thus, it is a question for the jury to resolve. Under the Federal Rules of Criminal Procedure, the government should be permitted to present proof of the alleged *per se* violation to the jury at trial. Depending on the evidence offered at trial, the Defendants may seek to argue that the charged agreement was ancillary to a purported joint venture—and if the jury decides that the charged agreement was ancillary to a legitimate joint venture, the jury may acquit. But at this stage, by relying on purported facts not alleged in the Indictment, the Court would "trespass[] on territory reserved to the jury as the ultimate finder of fact." *Pope*, 613 F.3d at 1259.

Dated: August 1, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ruben Martinez, hereby certify that on August 1, 2017, I caused a copy of the foregoing to be served in accordance with Fed. R. Crim. P. 49, LR 5.5, and the General Order on Electronic Case Filing (ECF) pursuant to the District Court's system as to ECF filers.

Respectfully submitted,

/s/ Ruben Martinez, Jr.

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