MORVILLO ABRAMOWITZ GRAND IASON & ANELLO P.C.

ELKAN ABRAMOWITZ
RICHARD F. ALBERT
ROBERT J. ANELLO*
LAWRENCE S. BADER
BENJAMIN S. FISCHER
CATHERINE M. FOTI
PAUL R. GRAND
LAWRENCE IASON
BRIAN A. JACOBS
JUDITH L. MOGUL
JODI MISHER PEIKIN
ROBERT M. RADICK*
JONATHAN S. SACK**
EDWARD M. SPIRO
JEREMY H. TEMKIN
RICHARD D. WEINBERG

565 FIFTH AVENUE
NEW YORK, NEW YORK 10017
(212) 856-9600
FAX: (212) 856-9494

www.maglaw.com

WRITER'S CONTACT INFORMATION
(212) 880-9560
ralbert@maglaw.com

COUNSEL
JASMINE JUTEAU
CURTIS B. LEITNER
JACOB W. MERMELSTEIN
DANIEL F. WACHTELL

ROBERT G. MORVILLO
1938-2011
MICHAEL C. SILBERBERG
1940-2002
JOHN J. TIGUE, JR.
1939-2009

*ALSO ADMITTED IN WASHINGTON, D.C.
**ALSO ADMITTED IN CONNECTICUT

August 4, 2017

BY ECF
Honorable David Sam
United States District Judge
District of Utah
351 South West Temple
Salt Lake City, UT 84101

Re: *United States v. Kemp & Assocs. and Daniel J. Mannix*, 16 Cr. 403 (DS)

Dear Judge Sam:

On August 1, 2017, the government submitted a reply in support of its reconsideration motion. Dkt. 94. Mindful that sur-replies are typically disfavored, we nevertheless respectfully request that the Court consider this brief letter on behalf of our client Daniel Mannix and defendant Kemp & Associates, Inc. to address two ways that the government has shifted its approach for the first time on reply.

First, the government now contends that the Court's application of the rule of reason is impermissible at the pretrial stage. The government bases this argument on a supposed procedural distinction between civil and criminal Sherman Act cases, after acknowledging that the substantive law, which is the basis for the Court's ruling, remains the same. But a pretrial decision on this question of law is just as proper in a criminal as a civil case. *See, e.g.*, *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990) (affirming district court's decision on pretrial motion by government). The government is aware of this, because in its opposition to the Defense Motion, it expressly asked for a pretrial ruling that the *per se* rule applies, Opp'n to Defense Motion at 7, which it then reiterated at oral argument, Dkt. 88, June 21 Tr. at 27, and which it believes will preclude the defense from introducing various evidence at trial, *id.*; Opp'n at 11. Taken together, these statements demonstrate that the government views the *per se* or rule of reason determination as properly made pretrial, provided that the Court may only rule in the government's favor. But the issue is not a one-way street. Thus, even though the government dresses up its argument as a procedural one, the point is little more than new spin on the government's favorite claim: that the Court must accept the labels the government has used in the Indictment. That is not the law, as we explain at length in each of our other briefs.

Moreover, the government wrongly implies, Reply at 2, that the grand jury's action in returning the Indictment as written somehow decides the legal question of whether the rule of reason applies. The government does not, however, claim that it explained to the grand jury the difference between *per se* analysis and rule of reason analysis, much less offered the grand jurors the opportunity to choose which legal methodology should apply. It is, of course, the Court's role to determine this legal issue.

Second, the Court has not resolved any factual dispute by making the legal determination that this is a rule of reason case. The Court may properly consider the written Guidelines, because, even now, given a fourth chance, the government does not effectively dispute that they were the charged agreement. In its Reply, the government makes another attempt—asserting that the agreement was not immediately reduced to writing, that the parties disagree about when the agreement ended for limitations purposes, and that the Indictment paraphrases instead of quoting the written agreement—but it is a weak one indeed. Likewise, no one disputes that whether a defendant ultimately prevails on the doctrine of ancillary restraints is a fact issue for the jury. However, whether that doctrine applies based on plausible procompetitive benefits, and thus whether the defendant can present that defense to the jury under the rule of reason, is a legal issue, which the Court has properly determined. The obstacle to the jury actually trying that fact issue is government policy not to pursue criminally rule of reason cases, not the Court's legal ruling.

Respectfully,

Richard F. Albert