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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.**	**MOTION FOR ORDER THAT THE CASE BE SUBJECT TO THE RULE OF REASON AND TO DISMISS THE INDICTMENT** **Case No. 2:16-cr-403-DS** **U.S. District Judge David Sam** **Magistrate Judge Brooke C. Wells**

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I. RELIEF REQUESTED

Defendants Kemp & Associates, Inc. and Daniel J. Mannix hereby respectfully request that the Court issue an order: (1) ruling that this case be subject to the rule of reason for purposes of assessing the legality of conduct allegedly in violation of the Section 1 of the Sherman Act; (2) dismissing the Indictment because the Sherman Act rule of reason does not meet constitutional vagueness standards for criminal prosecution; and (3) dismissing the Indictment as barred by the statute of limitations.

II. INTRODUCTION

The Defendants in this case—Kemp & Associates, Inc. (the "Company") and its vice-president and part owner Daniel J. Mannix—were indicted on August 17, 2016 on a single-count conspiracy to violate the Sherman Act, 15 U.S.C. § 1, by engaging in customer allocation pursuant to a detailed, written agreement that was not concealed and that terminated in 2008. The Department of Justice's criminal prosecution of a longstanding, well-regarded Salt Lake City business and one of its principals operating in the obscure, mom-and-pop industry of heir location is both ill-advised and legally flawed. The agreement at issue—a set of guidelines governing joint activity (hereinafter the "Guidelines")—does not have the anticompetitive characteristics of a classic customer allocation agreement, and indeed its design makes clear its likely pro-competitive effects. Further the Guidelines terminated in 2008, years outside the applicable limitations period. Accordingly, under well-settled legal authority, the charges must be dismissed.

Under applicable law, the Court may not simply rely on the government's labeling of the restraint of trade alleged in the Indictment, but must look more deeply at its actual terms and the nature of the industry. Doing so reveals that the Guidelines agreement is not a *per se* violation of the Sherman Act, but rather must be subject to the generally applicable analytical standard for assessing claimed competitive restraints, the rule of reason. The agreement is not the type of run-of-the-mill customer allocation in a conventional setting such that the courts can have sufficient confidence in predicting its effects that it can be condemned *per se*. Instead, it took place in the context of a small and highly unusual industry: heir location services, where firms like Kemp & Associates try to locate intestate estates that would otherwise escheat to the state and contract with the heirs to bring the estate to administration and recovery of proceeds to the heirs, in exchange for a percentage of the recovery. Perhaps the Court has heard of this industry (many people are surprised to learn that it exists), but we are aware of no cases analyzing it in the antitrust context. Further, in the setting of this highly unusual industry, the Guidelines agreement charged in the Indictment bears substantial distinguishing factors that make it incompatible with customer allocation agreements and more analogous to conduct, like joint ventures, to which courts have applied the rule of reason. Indeed, the agreement's structure was likely to spur procompetitive effects, making it an ancillary rather than naked restraint, and thus reviewable under the rule of reason.

This point is not just theoretical. Analysis to date indicates that the Guidelines agreement had significant procompetitive effects, while any adverse impact on price was *de minimis*.

Further, having concluded that the case falls under the rule of reason, the Court should proceed to dismiss it. Under modern Supreme Court vagueness doctrine, the broad, common-law-based, multifactor inquiry required under the rule of reason cannot meet constitutional standards requiring that criminal statutes provide clear notice defining unlawful conduct. Indeed, the Antitrust Division of the Department of Justice has for many years effectively recognized as much in its published Manual guiding the discretion of its attorneys.

There is also an entirely separate ground that the Indictment must be dismissed: this case is time-barred. The statute of limitations for a Sherman Act prosecution is five years. Thus, the government must prove conduct in furtherance of the charged conspiracy that extended at least until August 17, 2011. But it cannot, for the simple reason that Mannix expressly terminated the Guidelines agreement described in the Indictment on July 30, 2008. As reflected in the government's response to the Defendants' demand for a bill of particulars, that is the last date as of which any new estate became subject to the Guidelines. It is indisputable that the gravamen of the claimed violation—the alleged wrongful allocation of customers—ended then, more than three years outside the limitations period.

We respectfully request that the Court determine that this case is subject to the rule of reason, and that the Court further determine that it must be dismissed on that basis and because this prosecution is barred by the applicable statute of limitations.[1] Because the critical facts upon which this motion relies are not subject to dispute, these legal issues are ripe for determination at this stage. *See United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994) ("'it is permissible and may be desirable where the facts are essentially undisputed, for the district court to examine the factual predicate for an indictment'" in certain instances at the pre-trial stage) (quoting *United States v. Brown*, 925 F.2d 1301 (10th Cir. 1991)).

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[1] As addressed further below, the Court's determination that this case is subject to the rule of reason is critical to the parties' trial preparation if, contrary to our position, the Court declines to dismiss it. That is why we present the rule of reason question and the question of dismissal on that basis as analytically separate.

III. BACKGROUND

A. The Defendants

Defendant Kemp & Associates Inc. was founded in Florida by Thomas Kemp in 1966. The company, originally named Fiduciary Research, joined what was then a small field of other firms performing heir location services. Among those companies was Blake & Blake, the other party to the agreement at issue in this case. At that time, heir location firms were usually small family operations that were geographically scattered and regionally focused, and firms rarely found themselves trying to service the same potential heirs.

Although Kemp & Associates started with a focus on Florida and the Southeast, as the Company grew larger and more successful, it expanded its footprint. In 1992, Jeff Kemp (Thomas's son) decided to move the Company to Salt Lake City, Utah because it was the location of the world's largest source of genealogical records: the Family History Library. For the last quarter century, the Company has thrived in Salt Lake City and today employs approximately 40 individuals, many of whom are seasoned genealogists and have extensive training as estate researchers.

Dan Mannix began working as an estate researcher at Kemp & Associates upon his graduation from Emory University in 1986. During his first years at the Company, Mannix took every opportunity to learn the trade, working long hours and traveling extensively to find estates. Mannix made himself a valuable and trusted employee, and when the Company moved to Salt Lake City in 1992, he and his then-fiancée went with it. Mannix still lives in Salt Lake City today with his family.

In 1998, Mannix was promoted to director of operations and placed in charge of all of Kemp & Associates' field operations. He remained in that position until 2005, when he was demoted to estate researcher. After Mannix's demotion, the Company was ineffectively led by a former researcher and began to lose both revenue and employees. Mannix was reinstated as director of operations on November 1, 2007, and became a part owner of the Company. Mannix brought the Company back on track and to this day remains in charge of the day-to-day operations of Kemp & Associates.

B. Heir Location Services

The Indictment provides a bare-bones description of heir location services, explaining that heir location firms like Kemp & Associates "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." Indictment[2] ¶ 6. The Indictment further states that potential heirs may receive contingency offers from one or more such providers and that estates can take five or more years to reach distribution based on "[t]he complexity of the estate, the determinability and number of heirs to the estates, and the law that governs the estate." *Id.* ¶ 7. Although those statements cover some of the very basics, a fuller explication of how the industry operates is important to enable the Court to assess the lawfulness of the agreement described in the Indictment.

The business of heir location firms is to find estates of individuals who died intestate, whose estates would typically escheat to the state; locate the rightful heirs of those estates through genealogical research; and then help those heirs to recover their share of the estate in exchange for a percentage of the recovery. Most of the time the heirs are not at all aware of their relationship to the decedent. This means that the inheritance they recover through the assistance

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[2] Attached as Exhibit A to the Declaration of Richard F. Albert, Esq., dated March 31, 2017 (the "Albert Decl.").

of the heir location firm is quintessential “found money”—funds the heirs never expected or knew they had the right to receive. It is very rare that an heir will have had a personal connection to the decedent or will even have known that he or she has lost a typically long-estranged or distant relative; such individuals typically do not require the assistance of an heir location firm. County public administrators, who are responsible for locating heirs and distributing intestate estates, frequently lack the motivation, resources, or specialized genealogical skill necessary to find and contact these far-flung heirs. As a result, intestate estates often escheat to the state or are distributed inequitably, to the heirs who are easiest for the public administrator to locate but who do not have as strong a claim as others.

The process of finding intestate estates is labor-intensive. Representatives (estate searchers) often drive from county courthouse to county courthouse, sometimes hundreds of miles a week, and search through hundreds of pages of paper records to locate potentially viable estates. Although the Internet has made this research easier, many probate offices still work only on paper and have not made their data repositories available online.

Locating a potentially suitable estate is just the beginning. The representative must next calculate the approximate value of the estate in order to determine whether the substantial effort required to research the heirs is likely to pay off. The representative must also be attentive to the many other factors that could affect the firm’s ability to “solve” the estate (i.e., locate and contact the heirs), including the accessibility of genealogical records, the idiosyncratic rules of intestate inheritance in that particular jurisdiction, the jurisdiction’s treatment of heir location firms, the difficulty of finding heirs with common names, and the likelihood of foreign heirs who would be expensive to track down—to name just a few. As the Indictment notes, these factors can make the process take more than five years in certain cases. *See* Indictment ¶ 7. Often, if the representative becomes aware at this point that a competitor has found the same estate, she will abandon that estate as too unlikely to pay off to justify the expenditure of additional resources and move on to the next.

Once a Kemp & Associates representative determines that the estate is worth pursuing, she will contact firm management in Salt Lake City to obtain authorization to proceed. Management further assesses the estate to evaluate whether it is large enough to provide a return on investment and whether there are likely to be significant obstacles to recovery. Once again, although there is usually no concrete information about competition at that early stage, if management believes based on experience that a competitor is likely to contact heirs first, work on the estate may be discontinued.

If further work on the estate is approved, the case is turned over to a genealogical specialist called an estate researcher. The estate researcher then begins the time-consuming task of genealogical research. Before the advent of modern Internet-based genealogical resources, researchers relied on multiple sources stored in multiple locations, from typewritten probate records to ancient city directories to handwritten documents dating from over 100 years ago. Researchers commonly encounter genealogical dead ends where the trail simply vanishes, or discover that heirs are located overseas, requiring them to enlist a foreign correspondent in order to research and contact those heirs. As websites such as Ancestry.com became more popular in the late 2000s, the researchers' tasks became easier, but the work remains time-consuming, difficult, and frequently fruitless.

The actual product provided by Kemp & Associates—the information required to bring the estate to administration—is built from the ground up by the estate researcher for each estate that the firm works. That information is customized: it is only relevant for a single estate.

Knowing the names and locations of the heirs to the Smith estate in Kansas City is, of course, of no value when trying to solve the Jones estates in Denver. Where an estate does not come to fruition, all resources devoted to that estate are lost.

Once the estate is solved, that is, the product is developed, the estate researcher is finally able to approach the heirs and offer to assist them in claiming their inheritance for a percentage fee. If an heir agrees to employ Kemp & Associates, he or she signs a contract assigning the Company the right to act on his or her behalf to claim the inheritance in exchange for the agreed-upon percentage of the recovery.

After that is the final phase, the administration phase. Kemp & Associates engages counsel, and carries out administrative tasks including preparing the factual material underlying necessary court and other filings, obtaining necessary information from and providing information to the heirs.

The approach to the heirs is thus a late step in a process that has typically gone on for months without any revenue to the Company. It is also the most common juncture for the entire case to fall apart. Heirs may have already signed a contract with a competitor, may simply refuse to speak to researchers, believing the offer is a scam, or may elect to try to proceed on their own. All along, however, a case may be discontinued when various risks (e.g., the discovery of a will disinheriting the intestate heirs, or a lien against the assets in the estate) could render further work on the estate untenable. Not unexpectedly, then, the return on investment is relatively low. Review of the relevant Kemp & Associates data for the period 2000 to 2014 indicates that only approximately 30% of opened cases result in signed heirs, and of those 30% a significant number never come to administration for the reasons discussed above or result in a significantly lower recovery than anticipated.

C. Competition within the Industry

Due to the unique nature of the heir location industry, in which the first competitor to contact the heir will generally succeed in signing the heir (and any subsequent heirs in that familial line, or moiety), any competition with other heir finders is generally over before the heir is ever aware of the estate. Competition chiefly occurs in the speed and efficiency with which the researchers find and "solve" the estate and contact heirs—the "race to the doorstep."

On occasion Kemp & Associates becomes aware of competitors pursuing the heirs to the same estate during the research process and is therefore able to decide whether to abandon its work on that estate early. However, such advance warning is uncommon. This means that the Company typically makes the significant investment required to develop its product without any assurance that a market will exist for that product—i.e., that heirs will not have already signed a contract with another heir location firm.

D. The Alleged Agreement

The Indictment alleges that Kemp & Associates entered into a "conspiracy with Richard A. Blake, Jr., and other unindicted co-conspirators to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services sold in the United States." Indictment ¶ 9. The government further alleges that the agreement came into effect "when both co-conspirator companies contacted the same unsigned heir to an estate," so that "the co-conspirator company that first contacted that heir would be allocated certain remaining heirs to that estate who had yet to sign a contract with an Heir Location Services provider." Indictment ¶ 11(b). Further, "the co-conspirator company to which heirs were allocated would pay to the other co-conspirator company a portion of the contingency fees ultimately collected from those allocated heirs." Indictment ¶ 11(c).

As it happens, the Guidelines agreement between Kemp & Associates and its competitor Blake & Blake was written down and confirms many of the essential points referenced in the Indictment. On May 22, 2000, Mannix sent an email to Richard A. Blake, Jr. and two other members of Blake & Blake, noting that "Kemp & Associates agrees to incorporate the guidelines below regarding all new cases that we discuss from this day forward," to which a Blake & Blake employee replied, "Blake & Blake agrees to incorporate the guidelines below regarding all new cases."[3] Ex. B to the Albert Decl.

The written Guidelines provide that when one company contacts an unsigned heir that was also contacted by the other company, the two companies split the case from that point forward, with both "keep[ing] all heirs that they have signed whether in hand or in the mail." *Id.* ¶ 1. The Indictment and the actual agreement thus make clear that heirs signed prior to the companies contacting the same heir were not subject to the profit-sharing provisions of the agreement. Similarly, the agreement *only* applied to estates located by both firms. Given the nationwide geographic spread of estates, and the finite resources of heir location firms, that could not possibly occur on every estate. Indeed, during the time period the Guidelines agreement was in place, the yearly portion of Kemp & Associates' estates subject to the agreement was at times as low as 2%, with a yearly average of approximately 10%.

Further, the companies split the fee received on the portion of the estate under the Guidelines agreement 55% to 45% with "[t]he company that has more expenses and does more work get[ting] paid more."[4] *Id.* ¶¶ 4-5. Thus, the company handling the work going forward

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[3] As we note above, the Court can properly consider this factual background because we expect it to be "essentially undisputed." *See Hall*, 20 F.3d at 1087.

[4] Over the course of the Guidelines agreement, and in some cases as applied to a specific estate, the precise agreed-upon ratio of the profit sharing was changed.

(typically the company that arrived first to the unsigned heir) took the larger share. That apportionment gave one firm the incentive to expend more of the resources necessary to bring the case through administration, in exchange for a greater portion of the fees, while the other firm could do less work while receiving a smaller portion of the fees.

Memorializing the application of the Guidelines agreement to any particular estate typically took the form of a single-page document, countersigned by representatives of Kemp & Associates and Blake & Blake, and identifying the relevant estate and the heirs, or line of heirs, subject to the agreement, and noting which firm would take the lead role in administering the estate. Attached as Exhibit C to the Albert Declaration is a representative example of the Guidelines arrangement as to one estate under the Guidelines agreement. The document describes how one line of heirs (the "paternal moiety") was subject to the Guidelines agreement and states that "Kemp & Associates will receive 60% for completing all necessary work while Blake & Blake will receive 40%."

As we explain in detail below, the terms of the Guidelines agreement as applied to heir location services cannot be analogized to the classic customer allocation agreements with which courts have had extensive experience. In short, the two are very different in critical respects.

E. The End of the Agreement

If it is unusual for a court to see an alleged criminal agreement between businesspeople reduced to writing, it is perhaps just as striking for the agreement to have a definitive end date years outside the limitations period. Yet, that is precisely the case here. On July 30, 2008, Mannix wrote an email to Kemp & Associates colleagues: "The 'formal' agreement that we have had with [Blake & Blake] for the last decade is over. . . . Thank you to everyone for your input and support for this move. I believe it is long past due to end our 'official' ties to this crew." *See* Ex. D to the Albert Decl.; *see also* Memorandum of September 30, 2014 government interview of Richard A. Blake, Jr. ("When Mannix blew up the overarching agreement, that action was effective immediately.").

The government itself has recognized that, after Mannix's termination of the Guidelines agreement in July 2008, no new estates were shared between the companies. Pursuant to a bill of particulars request from the defense, the government submitted a letter providing certain additional information about the scope of the conduct alleged in the Indictment. *See* Ex. E to the Albert Decl. Included was a list entitled "Estates Affected by the Charged Conspiracy" containing the names of 269 different estates, which make up the entire set of estates claimed to be affected by the agreement. A review of documentation for the most recent estates on the government's list makes plain that they were all entered into no later than July 30, 2008. For example, the three most recent estates reported on the government's list of estates affected by the conspiracy are the following:

Estate Name	**Date of Guidelines Application**
Russell G. Schoelkopf	May 15, 2008
Joseph Merlo	June 4, 2008
Elsie MacNeal	July 30, 2008

See Ex. F to the Albert Decl.

Thus the most recent agreement found in the government's list of estates subject to the claimed conspiracy (Estate of MacNeal) is dated July 30, 2008—the exact date that Mannix terminated the arrangement with Blake & Blake, which, as we discuss below, terminated any conspiracy for purposes of the statute of limitations.

In addition, within discovery provided to the defense is a database maintained by Blake

& Blake[5] that provides certain core information about each estate worked by Blake & Blake over approximately 20 years. One data point is the "reported date" of each estate—apparently the date an estate initially came to the attention of Blake & Blake and thus the approximate point in time it would have encountered Kemp & Associates in pursuing the estate's heirs. The Blake & Blake database demonstrates that the reported dates of all of the estates on the government's list of estates supposedly affected by the conspiracy range from 1998 through July 10, 2008, just prior to Mannix's termination of the agreement.[6] Thus, after July 30, 2008, no new agreements were entered into between Kemp & Associates and Blake & Blake pursuant to the Guidelines agreement. Nevertheless, work did continue (by the lead firm) in administering estates that had previously been made subject to the agreement. Indeed, as to these existing estates, Kemp & Associates and/or Blake & Blake had valid contracts with the signed potential heirs obligating the firms to continue processing the claims on the estates and distributing to the heirs any proceeds recovered from those estates. Had the firms stopped servicing those estates, heirs would have been deprived of their rightful property, and Kemp & Associates or Blake & Blake would have subjected themselves to liability for breaching their agreements with the heirs. Moreover, and critically for purposes of this motion, the routine, administrative work that continued on these estates had *nothing to do with allocating heirs* between Kemp & Associates and Blake &

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[5] The database is a Microsoft Access file (an analog to an Excel spreadsheet), containing thousands of rows of data that are cross-referenced across various sheets, and thus essentially impossible to attach as a hard-copy exhibit in any meaningfully reviewable form. Nevertheless, if the Court wishes defense counsel to do so, we will happily attempt to provide the relevant portions or submit a copy of the electronic file.

[6] For a handful of the estates on the government's list, no "reported date" appears in the database. Nevertheless, a review of other records relating to those few estates demonstrates that, if they even had Guidelines agreements, they predated July 2008. *See, e.g.*, Ex. G to the Albert Decl., Estate of Sorkness & Estate of Komarek (records reflect work on the estate was stopped by 2004 and 2007, respectively.)

Blake. Any claimed customer allocation—whether appropriate or not under the Sherman Act—was completed at the time the firms agreed to apply the Guidelines to the estate.

The supposedly wrongful agreement thus ended at the instigation of Mannix more than eight years before the Indictment issued.

IV. MOTION THAT THE CASE BE SUBJECT TO THE RULE OF REASON

Section 1 of the Sherman Act, under which this case is brought, on its face prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. As Justice Brandeis famously explained, the language of the Sherman Act cannot be read literally because "[e]very agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence"; instead "[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918). Thus, "the 'rule of reason' limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications." *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir. 1994) (quotations omitted). "Under 'rule of reason' analysis, the factfinder weighs all of the circumstances of a case to decide whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990).

Certain practices, however, have been deemed by the courts after extensive review to constitute *per se* violations of the Sherman Act, so that they are "'conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.'" *Id.* at 472-73 (quoting *N. Pac. R. Co. v. United*

States, 356 U.S. 1, 5 (1958)). But *per se* condemnation is reserved for rare circumstances, and courts have "expressed reluctance to adopt *per se* rules with regard to 'restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious.'" *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997) (quoting *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-459 (1986)); *see also Nat'l Soc'y of Prof'l Eng'rs. v. United States*, 435 U.S. 679, 692 (1978) ("Courts avoid applying a *per se* standard without some knowledge of the competitive landscape and effect of the allegedly pernicious provision.").

Whether the restraint alleged in the Indictment should be analyzed under the rule of reason or treated as a *per se* violation of the Sherman Act is a critical question in this case. It is respectfully submitted that, for the reasons we discuss below, this case should be considered subject to the rule of reason analysis. That result raises two separate potential consequences: (1) that the case may not proceed as a criminal matter at all; that is, as we argue below, the Indictment must be dismissed; or (2) if the case were to proceed to trial, the defendants should be allowed to present evidence and have instructions to the jury consistent with a review of the case under a rule of reason analysis—in essence a balancing of any pro-competitive aspects of the Guidelines agreement with any anticompetitive aspects. Accordingly, deciding the question before trial is necessary and appropriate to allow the parties to adequately prepare their cases. *See In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1008 (7th Cir. 2012).

The Indictment seeks to treat the unusual Guidelines agreement as a classic customer allocation arrangement in order to squeeze it into the category of a *per se* violation. Because in the atypical context of the heir location business the Guidelines agreement is far from an ordinary customer allocation, and instead bears more in common with joint ventures analyzed under the rule of reason, and because the procompetitive effects of the Guidelines agreement, in the form of increased output, are apparent from its structure, the Court should conclude that the agreement is subject to the rule of reason.

A. Legal Standard

Whether an alleged restraint of trade is analyzed as a *per se* violation or using the rule or reason is a question of law to be decided by the court. *See, e.g.*, *MM Steel, L.P. v. JSW Steel (USA) Inc.*, 806 F.3d 835, 847 (5th Cir. 2015); *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 271 (6th Cir. 2014); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761 (8th Cir. 2004), *aff'd*, 491 F.3d 380 (8th Cir.), *cert. denied*, 552 U.S. 1040 (2007).[7]

This case is particularly well suited to a pre-trial ruling on the mode of analysis because there is a written, executed agreement between the parties setting forth the terms that are claimed to be criminal. That bears emphasis, and itself demonstrates why this case is clearly unsuited to *per se* treatment. As juries are commonly instructed every day in courthouses across this country, one does not expect to see participants commit the terms of their claimed criminal enterprise to writing. This case proves the wisdom of that adage because the Guidelines agreement in fact is not a *per se* violation of the antitrust law and thus not a valid basis for a criminal prosecution. But in addition to so powerfully illustrating the absence of awareness of wrongdoing characteristic of criminal conduct, the fact that the terms of the Guidelines agreement were committed to writing enables the Court to address the mode of analysis now and determine that the agreement is subject to the rule of reason, not *per se* treatment, *see Hall,* 20 F.3d at 1087

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[7] Where, however, there are underlying factual questions about what was actually agreed between the parties, such may preclude a pre-trial ruling until the facts are established at trial. *In re Wholesale Grocery Products Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014) (on question whether claimed customer allocation was subject to *per se* or rule of reason analysis: "To be sure, the selection of a mode [of analysis] is entirely a question of law . . . . But underpinning that purely legal decision are numerous factual questions.") (citations and quotations omitted).

(where critical facts are undisputed, court may properly examine the factual predicate for an indictment at the pre-trial stage) (citing *United States v. Brown*, 925 F.2d 1301 (10th Cir. 1991)); *see also, e.g., Suntar Roofing*, 897 F.2d at 473 (upholding pre-trial ruling, based on claimed terms of the agreement, that assuming such agreement was proved at trial, it was subject to *per se* analysis).

Indeed, historically courts have not been shy about concluding on pre-trial motions that agreements characterized as *per se* violations by one party are in fact subject to the rule of reason.[8] *See Cayman Exploration Corp. v. Utd. Gas Pipe Line Co.*, 873 F.2d 1357, 1360 (10th Cir. 1989) (upholding ruling rejecting plaintiff's attempts to construe conduct as a *per se* price-fixing arrangement; further refusing to conclude that "an alleged business practice not previously covered by *per se* illegality is a *per se* violation"); *see also Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1083-84 (11th Cir. 2016) (upholding pre-trial ruling rejecting claimed *per se* violation where partner to joint venture claimed that counterparty's acquisition of competitor was a horizontal market allocation; distinguishing conduct from traditional allocation agreements and discussing its novelty); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1137 (9th Cir. 2011) (en banc) (on pre-trial motion, ruling that revenue-sharing provision of larger agreement among grocery retailers regarding possible work stoppage was not a customer allocation or other "'classic' horizontal market division agreement[]"); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (upholding summary judgment rejecting claims of *per se* violation through agreement that restricted insurance general agents from transferring among agencies within relevant areas because, among other things, agreement "does not allocate the market for agents to any

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[8] To the extent we rely on civil case law, we note the Sherman Act is interpreted the same way "regardless of whether the impetus for interpretation is criminal or civil." *United States v. Nippon Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

meaningful extent"); *Meijer, Inc. v. Barr Pharms., Inc.*, 572 F. Supp. 2d 38, 49 (D.D.C. 2008) (determining on summary judgment that non-compete agreement between brand-name and generic drug suppliers was not *per se* horizontal market division, but instead subject to rule of reason, after review of totality of the agreement).

B. The Guidelines Agreement Should Be Analyzed under the Rule of Reason

1. *The Indictment Does Not Allege the Type of Customer Allocation Agreement that Can Be Treated as a* Per Se *Violation*

a. <u>The Agreement Must Be Scrutinized as a Whole to Determine Whether It Is a "Garden Variety" Example of a Restraint Condemned *Per Se*</u>

A court's default assumption should always be that the rule of reason applies. *See Procaps*, 845 F.3d at 1083 (citing *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006)); *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014). As noted above, "condemnation *per se* is an unusual step that depends on confidence that a whole category of restraints is so likely to be anticompetitive that there is no point in searching for a potentially beneficial instance." *Polk Bros. v. Forest City Enter.*, 776 F.2d 185, 189 (7th Cir. 1985)." Several principles govern this inquiry.

First, the mere fact that the government has invoked a potentially *per se* restraint by using in the Indictment the phrase "allocate customers" is not determinative. *See Procaps S.A.*, 845 F.3d at 1083 ("[J]ust because an agreement is capable of being characterized as a market allocation agreement does not mean that the *per se* rule applies."); *Meijer*, 572 F. Supp. at 49 ("Plaintiffs' desire to characterize [an agreement] as a horizontal market allocation agreement" failed in light of the overall structure of the agreement). Instead, the restraint must be analyzed in light of the industry in which it is being applied, and "[u]nless [it] falls squarely into a *per se* category, the rule of reason should be used instead." *See Se. Milk Antitrust Litig.*, 739 F.3d at

271; *see also Cayman*, 873 F.2d at 1360 (despite label, circumstances did not support claim of vertical or horizontal price-fixing).

Second, "the law does not allow a party to simply isolate one particular provision or restraint within an overall agreement and argue, in isolation, that the restraint is subject to *per se* condemnation." *Meijer*, 572 F. Supp. 2d at 49. Instead, the "Court must focus on market realities associated with the entire [a]greement to determine whether it should be condemned as a *per se* unlawful restraint of trade, not facial characterizations of the [a]greement's constituent parts." *Id.* As discussed below, the portion of the agreement in this case relating to unsigned heirs of a mutually found estate is only one of the agreement's salient features (and not the most important to understanding its likely effects on competition), while other features distinguish the agreement from typical allocations of customers.

Third, where the 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." *Sulfuric Acid*, 703 F.3d at 1011; *see also Procaps*, 845 F.3d at 1084 (applying rule of reason in part because "[n]either party could point to a case" involving the exact conduct at issue). Accordingly, "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, at *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."). This requires a "'nuanced and case-specific inquiry,'" *Meijer*, 572 F. Supp. 2d at 49 (quoting *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 33-34 (D.C. Cir. 2005)), as courts "'should not throw labels like *per se* around loosely, without some appreciation for the economic arrangement [they] are evaluating,'" *id.* (quoting *Generac Corp. v. Caterpillar, Inc.*, 172 F.3d 971, 977 (7th Cir. 1999)). No one could fairly claim that heir location services is a run-of-the-mill consumer industry; that in itself should undermine the confidence necessary for the Court to conclude that restraints in that field would have the same competitive effects as they would elsewhere.

At the end of the day, the question for the Court, in light of these factors, is whether the agreement described in the Indictment is "a garden-variety horizontal agreement." *See Metro. Industries v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1986); *see also Se. Milk Antitrust Litig.*, 739 F.3d at 273 ("[T]he court may apply the *per se* rule only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed *per se* anticompetitive.") (quotations omitted); *Bogan*, 166 F.3d at 515 (refusing to treat an agreement as a *per se* group boycott because it did "not fit the classic model of a group boycott"). As we next discuss, the agreement here is plainly not a conventional allocation scheme.

b. The Guidelines Lack the Basic Structure that Makes an Allocation Agreement Anticompetitive, While Incorporating Features Altogether Lacking in Other Allocation Cases

The peculiar nature of the heir location services industry, coupled with the structural limitations of the Guidelines agreement, distinguish it from traditional allocation cases that have been deemed *per se* violations by the courts. Specifically, the fact that the product created by firms like Kemp & Associates was customized (i.e., valuable only for the specific estate for which it was developed), and the fact that the agreement sprung into effect only on specific estates meeting certain criteria, rather than applying generally across some segment of the industry, negate a finding that the alleged conspirators were able to create the sort of ongoing zones of exclusivity that would allow them to raise prices in their relevant zones. Indeed, the evidence shows that it in fact did not. Further, because of the unusual way the heir location business works—requiring an undisclosed upfront outlay of resources for a product valuable only to one or a handful of potential customers—the Guidelines agreement would only be triggered when both parties had invested in the same, unique product. The agreement, by enabling them to pool that outlay and serve the customer more efficiently, was thus a form of joint venture agreement, which is well settled to be subject to rule of reason analysis.

A classic customer allocation agreement, or "no solicitation" agreement, occurs where competitors agree to respect some defined, pre-existing segment of each other's customers. The danger of such horizontal allocation agreements is that "each [competitor] becomes a monopolist in its own half without concern about competition from the other." Areeda & Hovenkamp, ¶ 2000b, at 6; *id.* ¶ 2030a, at 218 ("Naked horizontal market division agreements enable the participants to reduce output in their assigned territorial, product, or customer area, thus raising the price above competitive levels."). As the cases dealing with traditional customer allocations demonstrate, the purpose is to create a pool of exclusive, repeat customers as to whom the assigned competitor can raise prices. *See, e.g.*, *Suntar Roofing*, 897 F.2d at 472 (roofing construction and installation for new homes; defendants alleged to agree not to compete for each other's established customers); *United States v. Cooperative Theatres of Ohio, Inc.* 845 F.2d 1367, 1371 (8th Cir. 1988) (agreement between theater booking agents (middlemen between movie distributors and theaters) not to compete for established customers); *United States v. Goodman*, 850 F.2d 1473, 1475 (11th Cir. 1988) (garbage disposal companies agreed not to solicit each other's established accounts).

The industries at issue in these cases are conventional. They are not characterized by the highly unusual features of heir location: a custom product (information) of value only to a handful of potential customers; which must be developed without the potential customer's knowledge; and the value of which can be destroyed in a moment by its disclosure. Indeed, few people seem to be aware that heir location firms even exist, and our research has uncovered no example of a court analyzing the industry for purposes of the Sherman Act. Those facts alone make the Guidelines agreement unsuited to *per se* treatment under the Act. *See Procaps*, 845 F.3d at 1084; *Sulfuric Acid*, 703 F.3d at 1011.

Significantly, consideration of the nature of heir location services demonstrates that the Guidelines agreement charged in the Indictment failed to implicate the same competitive dangers found in the customer allocation agreements at issue in *Suntar Roofing, Cooperative Theatres, Goodman*, and similar cases, because there are no repeat customers in the heir locations services business. In the more conventional industries at issue in those cases, the competitors could rely on continued business from existing customers, to the detriment of those customers. But here, each estate is its own product and, once solved and brought to administration, produces no further revenue and leaves behind no go-forward value. Meanwhile, the heirs to one intestate estate of sufficient size for a private firm to pursue are so extraordinarily unlikely to be heirs to another such estate that firms in this industry are not able to allocate a customer and then rely on that customer for continued business in the way that a booking agent or garbage hauler could. Simply put, the Guidelines agreement here is in no respect the type of customer allocation agreement functioning in a conventional industry to which the *per se* rule has been applied.

The Eighth Circuit's decision in *In re Wholesale Grocery Products Antitrust Litigation*, 752 F.3d 728 (8th Cir. 2014), demonstrates how a court must closely scrutinize the precise terms of a claimed customer allocation agreement to assess if *per se* treatment is actually warranted. In that case, the defendants, two wholesale grocery competitors, entered into a series of transactions in which they exchanged various assets and agreed to reciprocal non-compete agreements whereby they could not solicit their former customers in specified geographic regions for a period of time. *See id.* at 730. The plaintiffs alleged that the defendants further agreed not to compete for new and existing customers as well. *See id.* "[L]ook[ing] solely at the written terms of the wholesalers' non-compete agreement," without the agreement as to new and existing customers, the district court properly concluded that the written agreement, "by its plain terms . . . is not a pure, horizontal division of customers or geographic territories." *Id.* at 734. The Eighth Circuit clarified that the agreement would have amounted to *per se* customer allocation only if the facts at trial confirmed the plaintiffs' evidence of an agreement, beyond the terms of the written agreement, that extended beyond former customers, *id.* at 734-35, that is, the type of continuing exclusivity promised by the typical customer allocation. Without those features, the agreement in *Wholesale Grocery Products* was not squarely the type of customer allocation treated as *per se* and instead had to be analyzed under the rule of reason.

Similarly, the agreement in this case lacks the distinctive characteristics of a *per se* customer allocation—allocation of repeat customers—and therefore must be viewed under the rule of reason. Unlike *Wholesale Grocery Products*, *see id.* at 735, absent from the Indictment are allegations that the other necessary characteristics of *per se* allocation existed but were not written into the agreement.

The Court must resist the government's urging that the agreement fits squarely in one category of restraint when it blends elements of several and has distinct features. In *Sulfuric Acid*, what the plaintiffs claimed as simple territorial allocation, the Seventh Circuit found to be more complex and, as a result, subject to the rule of reason. In that case, two Canadian acid producers that wanted to enter the U.S. market entered into contracts with certain U.S. producers, whereby the latter would curtail their own production and become distributors for the Canadian producers, in exchange for an exclusive distribution territory and better pricing. 703 F.3d at 1009. The Seventh Circuit refused to treat the conduct as a *per se* violation, noting that in connection with the U.S. producers' agreement to stop production (shutdown agreements), the entire contract provided the U.S. producers with an incentive to take the risk of changing their business model to allow the Canadian producers to enter the U.S. market. *See id.* at 1012-13. Taken as a whole, the agreements decreased competition at the distribution level, but increased it at the production level. *See id.* at 1013. Here, the Guidelines had the effect of increasing competition at the production level (and, as we explain below, the added benefit of producing no negative effects at the distribution level).

Similarly, the Ninth's Circuit decision in *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (en banc) addressed a case where, in anticipation of the expiration of a collective bargaining agreement with workers, supermarket stores formed a mutual strike assistance agreement to prevent unions from targeting one employer with a strike. The agreement "included a revenue-sharing provision [], providing that in the event of a strike/lockout, any grocer that earned revenues above its historical share relative to the other chains during the strike period would pay 15% of those excess revenues as reimbursement to the other grocers to restore their pre-strike shares." *Id.* at 1123. The plaintiffs contended that the agreement was a market allocation based on the stores' respective market shares, but the Ninth Circuit refused to treat it as one because of its lack of forward-going effect, and further refused to treat it as a pernicious profit-sharing agreement because "it evades any 'easy label.'" *Id.* at 1137. The Guidelines agreement likewise evades easy labels: not least the classic customer allocation label the government has tried to stick on it.

Textbook examples of customer allocation agreements exist. This is simply not one.

c. The Guidelines Are Better Understood as a Joint Venture and Thus Subject to the Rule of Reason

In addition, the agreement charged in the Indictment—unlike any reported allocation case we have been able to locate—contains a fee-sharing mechanism. That additional component of the Guidelines agreement is further indication that allocating customers would not work in the heir location industry the same way it would in other industries. Had the agreement created the same incentives that traditional allocation agreements do, fee sharing would be unnecessary. The inclusion of that provision means that, viewed in its entirety, *see Meijer, Inc.*, 572 F. Supp. 2d at 49, the agreement looks much like a joint venture, which is typically subject to rule of reason analysis, *SCFC ILC*, 36 F.3d at 963-64 (citing *Broadcast Music, Inc. v. Columbia Broadcasting, Inc.*, 441 U.S. 1 (1979); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85 (1984); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985)).

"A joint venture is a form of organization in which two or more firms agree to cooperate in producing some input that they would otherwise have produced individually, acquired on the market, or perhaps done without." Areeda & Hovenkamp, ¶ 2100a, at 3; *see also* FTC & U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, § 2.1, at 6 (April 2000) ("The Agencies recognize that consumers may benefit from competitor collaborations in a variety of ways. For example . . . [a] collaboration may allow its participants to better use existing assets, or may provide incentives for them to make output-enhancing investments that would not occur absent the collaboration.").

In the industry at issue here, there were two stages of services produced by the firms: the estate location/heir finding stage, and the estate administration stage. The Guidelines agreement was triggered only in cases where both Kemp & Associates and Blake & Blake invested in the same case and "ran into" each other by contacting the same unsigned heir; from that point, they pooled their investment resources—that is, information about the estate and the heirs—and jointly allowed one firm to take the lead on conducting the estate administration stage of the project, sharing the profits with the other firm. This was a more efficient way to produce the combined product. The agreement charged in the Indictment was thus a limited joint venture tailored to the unique characteristics of this unusual industry.

Highly analogous and instructive is the Seventh Circuit's refusal to apply the *per se* label to the joint venture at issue in *Sulfuric Acid*.[9] There, two Canadian acid production companies formed a joint venture with DuPont, a U.S. acid producer. 703 F.3d at 1013. Pursuant to the agreement, the three firms pooled their acid output for distribution in the United States. *Id.* The plaintiffs claimed that the sole purpose of the joint venture was to eliminate competition between the Canadian companies and DuPont. The Seventh Circuit refused to view the venture in those narrow terms, instead focusing on the fact that the venture made available to the Canadian companies "DuPont's very extensive U.S. distribution network," thus "enabl[ing] substantial economies in transportation and marketing." *Id.* The plaintiffs argued that joint ventures would thus enable any two competitors to fix prices through a new entity, but the Seventh Circuit held that "if a joint venture has a legitimate business purpose . . . the fact that as part of the venture the prices of the venturers are coordinated does not condemn it out of hand, but instead subjects it to scrutiny under the rule of reason." *Id.*

Here, the functional joint venture that arose between Kemp & Associates and Blake &

[9] The decision in *Sulfuric Acid* addressed two separate restraints allegedly in violation of the Sherman Act. The other restraint (territorial allocation) is discussed above in § IV.B.1.b.

Blake on estates administered under the agreement accomplished just what the joint venture in *Sulfuric Acid* did. It made sense, where the firms encountered each other on an estate, both having invested significant resources to date, for them to pool their genealogical research and take advantage of the efficiencies of having one firm administer the estate from that point forward. In other words, the firms pooled their production in order to benefit from using one instead of two existing distribution networks (thereby freeing up the other distribution network).

Indeed, the most obvious difference between the agreement in *Sulfuric Acid* and the Guidelines is that the former was the handiwork of a presumably deep roster of lawyers, arising as it did among large, multi-national chemical companies, whereas the Guidelines were carried out between two small firms in an obscure, mom-and-pop industry, without the benefit of sophisticated lawyering. That cannot, however, be the difference between an agreement that is perfectly legal, on the one hand, and an agreement that is a crime.

The agreement between the competitors in *Polk Brothers* follows a similar pattern as the agreement in *Sulfuric Acid*, and is likewise instructive here. Two home goods stores chose to build a complex big enough to house both of them, with one store leasing space from the other, but only with a covenant specifying what each could sell. 776 F.2d at 187. The resulting joint facility may have technically allocated customers, in the sense that certain products could only be purchased at one of the stores, but the Seventh Circuit found the procompetitive benefits of integration too compelling to apply the *per se* standard. Essentially, the firms could market in a more limited way, confident that customers would use both stores once they arrived at the facility, and each store would serve more total customers that way; in turn, customers would benefit from the joint shopping experience. *See id.* at 189-90. Those efficiencies would not have been possible without the reciprocal covenants. *See id.* Again, the firms in this case agreed that it made sense to work jointly as to certain customers to avoid duplication of efforts and free up resources for new customers.

The controlling legal authorities require that the Court look past the form—and past the fact that for whatever reason the government has chosen to pursue this as a criminal case—to the substance of the agreement. When the Court does so, it is clear that this case must be governed by the rule of reason.

2. The Guidelines Agreement Is Ancillary Because It Would Increase Output

Beyond the classification approach discussed above, restraints are subject to the *per se* rule when they are considered "naked" restraints, the primary purpose of which is anticompetitive, as opposed to "ancillary" restraints that impose some potential anticompetitive effects but only secondary to legitimate, procompetitive results. As the Seventh Circuit explained in *Polk Brothers*,

> [T]he *per se* rule is designed for 'naked' restraints rather than agreements that facilitate productive activity. . . . Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production. . . . Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment. When cooperation contributes to productivity through integration of efforts, the Rule of Reason is the norm. . . .
>
> 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.

776 F.2d at 188-89. A test of whether an agreement promotes enterprise and productivity is to measure its effect on output. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441

U.S. 1, 19-20 (1979) (*per se* violations are ones "that would always or almost always tend to restrict competition *and decrease output*") (emphasis added); Areeda & Hovenkamp, ¶ 1901d, at 227 ("As a basic proposition, a restraint that increases the output of participants and does not anticompetitively exclude rivals cannot reduce marketwide output and must therefore be regarded as procompetitive."). One obvious way to increase output is to service more customers. *See Polk Bros.*, 776 F.2d at 190 ("[T]he parties 'hoped to attract more customers because of the proximity of two stores, selling different but complementary items for the home.' This was productive cooperation.").

The relevant inquiry at this stage—that is, in determining that the *per se* rule does not apply, and that the rule of reason does—is not whether procompetitive benefits were, in fact, the end result of the agreement, "but whether they *could be*" at the time the agreement was formed. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 775 (8th Cir. 2004) (emphasis in original); *Polk Bros.*, 776 F.2d at 188 ("A court must ask whether an agreement promoted enterprise and productivity *at the time it was adopted*.") (emphasis added). Any ambiguity in what the effects of the agreement would be should be resolved in favor of the rule of reason, as the Supreme Court has cautioned against "extend[ing] *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not obvious." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458-59 (1966).

On its face, the Guidelines agreement in this case more than meets that standard, as its design clearly encouraged a procompetitive increase in output. As explained above, on those estates where the firms attempted to sign the same unsigned heir, the first firm to make such contact would keep that heir and any remaining unsigned heirs, and the second firm would receive a portion of the estate proceeds from the heirs under the agreement. The profits were apportioned to compensate the first firm for doing the larger share of the work—that is, for conducting the administration phase of the work. Further, previously signed heirs were not subject to the agreement, so that where one firm signed all heirs before the other firm arrived, that firm would have kept the entire estate. The agreement thus encouraged both firms (1) to locate and sign as many heirs as possible, as quickly as possible, before the firms encountered each other on an unsigned heir, and (2) to coordinate their efforts to bring shared estates through the administration phase as efficiently as possible.

Thus the expected net effect of the agreement was increased output in terms of estates worked. In order for an heir location firm to profit from an estate, the estate must be successfully administered. However, regardless of the number of heirs, administration happens only once. Where the firms were working the same estate separately, they would have each needed to expend a certain amount of resources to bring the estate to administration, even though one of them could have done so alone, using the same amount of resources. However, with the Guidelines agreement in place, the firms would be incentivized to pool resources on the administration of the single estate, with the apportionment of profits roughly reflecting that breakdown. By working together, they could limit the expenditure of resources roughly to what one firm would typically expend on a single estate. That would allow the firm not using its resources on the administration phase to invest such resources elsewhere, to locate and bring to administration another estate, perhaps in a different area, thereby increasing output and providing a procompetitive effect. That is particularly true for this industry, where the market was never close to saturated.

The Guidelines agreement contains another output-increasing feature as well. Where the two firms found themselves working the same estate, each could in theory disclose enough information to the heirs to an estate to allow those heirs to circumvent both firms altogether, as a way to prevent a competitor from generating business. "Blowing up" an estate this way would cause both firms to discontinue their work; neither firm would profit, no output would exist, and the heirs may or may not have been able to bring the estate to administration on their own. Such conduct was, in fact, a significant concern for both firms at the time the agreement was entered. By essentially eliminating the incentive for either firm to "blow up" an estate that they both found, the agreement allowed certain cases to proceed that otherwise would not have. Where an agreement serves to make a product available to customers, any resulting restraint is ancillary to that legitimate business purpose and evaluated under the rule of reason. *See Broadcast Music,* 441 U.S. at 23.

The Guidelines agreement thus allowed the firms to allocate resources via joint activity where it made sense to do so, a benefit to which any allocation of customers was ancillary. *See* Areeda & Hovenkamp, ¶ 1902a, at 233 ("Horizontal agreements often increase output and thus are deemed procompetitive, when joint activity reduces the costs or risk facing individual firms or enables the firms to develop a product or process that, acting individually, they could not develop.").

Indeed, the estates at greatest risk of not being worked by heir location firms, and thus those that would be expected to most benefit from the efficiencies created by the Guidelines agreement, are the lowest-value estates, where expenses would constitute a greater portion of the estate, and where the ordinary risks that the estate might not come to fruition may not be sufficiently outweighed by the potential reward to the firms. As it happens, this effect is not just theoretical: review of available data reveals this is what in fact occurred. Specifically, focusing on estates valued at less than $200,000 as indicative of the lowest-value estates, available data shows that the percentage of estates worked by Kemp & Associates that were small estates was between 36% and 49% per year during the period the Guidelines agreement was in effect, from 2000 to 2008 (with an average of 41.4%), but then fell to between 24% and 34% per year from 2009 to 2014 (with an average of 30.9%). Based on our analysis to date, a significant pro-competitive effect resulted from the agreement in the form of comparatively more resources being available to devote to small estates.

Finally, the conceivable offsetting anticompetitive effect—increased prices (that is, rates) to customers affected by the agreement[10]—would have been, based on the structure of the agreement and the nature of the industry, highly unlikely, and likewise unlikely to outweigh the increase in output. Because the proceeds from the estate would be classic "found money" to the heir, heirs had little incentive to negotiate vigorously on price in any circumstances. We would thus expect any potential effect of the agreement on price to be *de minimis* in light of the unusual nature of customer interactions in the heir location services industry.

Once again, the argument is not just theoretical. Although our analysis is still ongoing, the evidence shows that the Guidelines agreement in fact had a *de minimis* impact on price during the period that it existed. Initial review of data available so far reveals that from 2000 to 2008, the a contingency rate Kemp & Associates received for estates allegedly affected by the agreement (as identified by the government in its bill of particulars) was 32.92%, whereas the Company received an average rate of 32.27% on all other estates. That amounts to a minuscule 0.65% difference in prices. The following chart illustrates just how negligible was the difference in prices:

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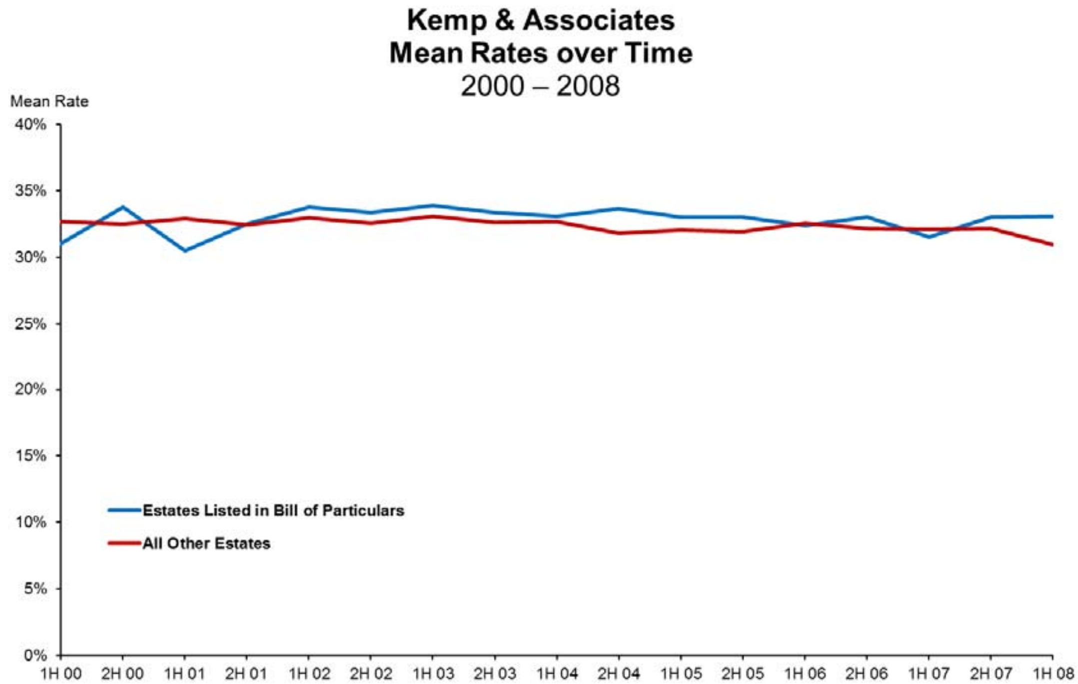
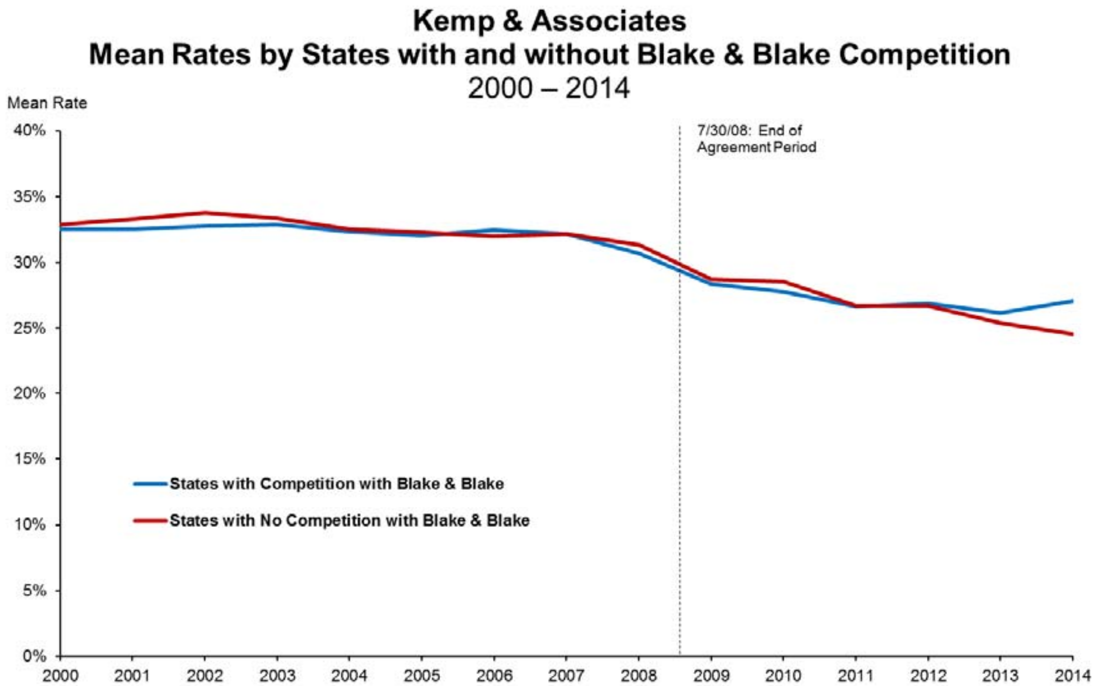
[10] *See* Indictment ¶ 11(h) & (i) (referring to "collusive and noncompetitive contingency fee rates").



Further, although our analysis is still in process, the evidence indicates that, considering applicable control groups, there was no statistically significant variation in the difference between the rates charged by Kemp & Associates during and after the agreement. For example, a comparison of the difference in rates charges by Kemp & Associates in states where it faced competition with Blake and Blake versus such rates in states where it did not face such competition (that is, a natural control group), during the period when the Guidelines Agreement was in effect and when it was not, shows a variation of only a minuscule 0.6%. As the following chart shows, the rates are virtually indistinguishable over time.



Put simply, focusing on trends during and after the Guidelines agreement demonstrates that the agreement had no meaningful impact on prices.

In short, because the Guidelines agreement is properly viewed as ancillary to legitimate procompetitive purposes—an increase in output in the form of customers serviced—it must be analyzed under the rule of reason.

3. The Rule of Lenity Militates in Favor of the Rule of Reason

The foregoing analysis amply demonstrates that both in the ways it varies from traditional customer allocation agreements and by the nature of its design in the context of the heir location business, the Guidelines agreement described in the Indictment was not one that a layperson could reasonably anticipate to be as a *per se* violation of the Sherman Act. Indeed, "numerous restraints once deemed unlawful *per se* because they reduce rivalry without possible benefits are now analyzed under the rule of reason." Alan J. Meese, *In Praise of All or Nothing Dichotomy Categories: Why Antitrust Law Should Reject the Quick Look,* 104 Geo. L.J. 835, 852

(2016).

Even if the Court may consider the choice of analytical approach in this case to be a close question, the rule of lenity applies in criminal cases to dictate that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor lenity.'" *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). The purpose of the rule is to "ensure[] that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

Where courts face close questions in criminal cases regarding how to analyze a restraint of trade, the rule of lenity demands that courts resolve those questions in favor of the defendant by applying the rule of reason. "Fair warning" did not exist that the peculiar agreement at issue here was a *per se* violation of the Sherman Act. It cannot and should not be considered one in a criminal prosecution, where an individual's liberty is at stake.

V. MOTION THAT THE INDICTMENT BE DISMISSED

A. A Rule of Reason Prosecution Is Constitutionally Impermissible

The Indictment must comport with Fifth Amendment guarantees of due process, including the requirement that the law give persons subject to it fair notice of the conduct it punishes. Sherman Act criminal prosecutions under the rule of reason—which involves a fine-tuned, *post hoc* econometric balancing of procompetitive and anticompetitive effects of challenged conduct within a defined market to determine the "reasonableness" of a claimed restraint—are incapable of providing fair notice that conduct constitutes a criminal offense.

1. The Void for Vagueness Doctrine

The Fifth Amendment provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Accordingly, "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 681 (10th Cir. 2010) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). The Supreme Court has explained that:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.

Village of Hoffman Estates v. The Flipside, 455 U.S. 489, 498 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972)) (footnote omitted). "Elemental to our concept of due process is the assurance that criminal laws must 'give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and those that fail this test are treated as no laws at all: they are 'void for vagueness.'" *United States v. Lovern*, 590 F.3d 1095, 1103 (10th Cir. 2009). Beyond the norm of fair notice to the citizen, the Supreme Court has observed that the "more important aspect" of the vagueness doctrine is "the requirement that a legislature establish minimal guidelines to govern law enforcement," as a bulwark against arbitrary prosecutions. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983).

Accordingly, where the language of a statute could be read to affect both innocent and blameworthy conduct, a court may dismiss the cause by finding the law unconstitutional *as applied* to the particular factual scenario. *See, e.g.*, *Palmer v. City of Euclid*, 402 U.S. 544 (1971) (invalidating application of "suspicious person ordinance" to defendant arrested after dropping off a friend and using a two-way radio); *United States v. Nat'l Dairy Products Corp.*, 372 U.S. 29, 32-33 (1963) (analyzing adequacy of notice to milk distributors of illegality of predatory-pricing under Robinson-Patman Act).

2. Defendants Lacked Any Effective Notice that the Agreement Was Criminal

The Indictment's *post facto* characterization of the Guidelines agreement as a *per se* customer allocation violation failed to provide Defendants with adequate notice for Due Process purposes. Instead, and as explained in more detail above, the Defendants had every reason to think that the Guidelines agreement, if ever challenged at all, would be subject to the rule of reason (and vindicated by its procompetitive structure and effects). Briefly:

- The agreement on its face does not seek to carve out or regulate a market, or to create exclusive zones for exploitation, but instead to efficiently administer the rare cases where both firms contacted an unsigned heir to the same estate. On its face and in practice, the agreement was substantially procompetitive.

- The firms actually and vigorously competed throughout the period of the agreement, including competing to reach as many heirs as possible before the other firm might arrive on the scene (as those pre-overlap heirs remained solely the revenue of the first-signing firm).

- No guidance on applying antitrust principles to this unique industry was ever available, and the agreement would have looked to a reasonable businessperson far more akin to permissible joint ventures than to *per se* banned customer allocations.

In the unique setting of heir location services, there was nothing inherent in the act of two firms combining to offer estate administration services, otherwise offered by one alone, that would alert a participant that he risked criminal prosecution. In particular, entirely lacking here is a factor courts typically rely on in determining whether obscure laws can survive constitutional attack: guidance in the case law from similar fact patterns or actions. *See, e.g.*, *Kolender*, 461 U.S. at 355 ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered.")

(quoting *Hoffman Estates*, 455 U.S. at 494, n.5); *United States v. Lanier*, 520 U.S. 259, 267-69 (1997) (discussing the significance of Supreme Court and other appellate decisions to the "fair warning" required by due process).

More generally, few types of conduct fall as squarely within the ambit of void-for-vagueness protection as activities challenged under the rule of reason. "Under rule-of-reason analysis, courts seek to ascertain the extent to which challenged conduct harms competition and to then determine whether any such harm is nonetheless justified by countervailing procompetitive benefits." *Buccaneer Energy (USA) Inc. v. Gunnison Energy Corp.*, 846 F.3d 1297, 1306 (10th Cir. 2017). The process "calls for a holistic assessment of the parties' evidence," and typically proceeds through an elaborate burden-shifting process that involves, among other things, defining relevant markets and proving market power. *See id.* at 1310-11.

In such cases, it is simply impossible to know in advance whether a retrospective analysis of the conduct will show sufficient procompetitive effects that the fact-finder in a specific case will consider it reasonable. *See* Robert E. Connelly, *Per Se 'Plus': A Proposal to Revise the Per Se Rule in Criminal Antitrust Cases*, 29 Antitrust 105, 108 (2015) ("the rule of reason . . . is not an appropriate tool to measure criminal liability. An after-the-fact determination that a defendant's conduct was unreasonable in light of all the circumstances present in a particular industry is too vague a standard to measure criminal culpability. It would likely be found to be unconstitutional.") (author spent nineteen years in the Department of Justice Antitrust Division). Accordingly, rule of reason prosecutions in general, and the prosecution of the Guidelines agreement at issue here in particular, cannot provide fair notice under the Due Process Clause.

3. *Recent Precedent Undermines the Constitutional Viability of Rule of Reason Prosecutions*

Finally, we submit that any deference to older precedent rejecting other vagueness challenges in antitrust conspiracies would be unwarranted, not only because of the unique and uncharted nature of the industry, but also in recognition of recent Supreme Court cases robustly enforcing the fair-notice strictures of the Due Process Clause. For instance, in *Yates*, although the Court was there employing the rule of lenity to avoid unfair enforcement, rather than a constitutional challenge as such, Justice Ginsburg noted that the broad reading there urged by the government would "expose[] individuals to 20-year prison sentences" for a vast and un-enumerated range of actions. 135 S. Ct. at 1088; *cf. Lanier*, 520 U.S. at 266 (describing rule of lenity as a "junior version of the vagueness doctrine"). Similarly, in *Skilling v. United States*, 130 S. Ct. 2896 (2010), the Court vacated an "honest services" wire fraud conviction in an Enron prosecution, and avoided constitutional vagueness concerns, by construing the statute to embrace only "core" theories of bribery and kickback schemes.

The Court's attentiveness to the mischief inherent in vague criminal proscriptions was reaffirmed most recently, and forcefully, in *Johnson v. United States*, 135 S. Ct. 2551 (2015). In *Johnson* the majority jettisoned its previous decade's worth of jurisprudence interpreting the "residual clause" of the Armed Career Criminal Act, determining that experience had shown—in spite of the Court's prior rejection of vagueness challenges—that the attempt to divine clear meaning from the clause was a "failed enterprise," and that "[i]nvoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the constitution's guarantee of due process." *Id*. at 2560.

Meanwhile, the most recent Supreme Court case typically cited as affirming criminal sanctions for violating the rule of reason was *United States v. U.S. Gypsum Co.*, 438 U.S. 422

(1978)—a case that is almost forty years old. And even if that decision technically sanctioned rule of reason prosecutions, it nevertheless laid out the case against them, noting that "the behavior proscribed by the [Sherman] Act is often too difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct." *Id.* at 440-41.

Finally, deference is particularly unwarranted because the courts are so unlikely to face this question. The Department of Justice Antitrust Division Manual, § III-12 (5th ed. 2015) expressly reserves criminal investigation and prosecution for cases "involving horizontal, *per se* unlawful agreements," while providing for the use of civil process for "other suspected antitrust violations, including those that require analysis under the rule of reason as well as some offenses that historically have been labeled '*per se*' by the courts." The Antitrust Division thus agrees with our position that rule of reason prosecutions are improper and, by not bringing any such prosecutions, deprives the courts of the opportunity to express their agreement.

It is implausible that the *Yates*, *Skilling*, and *Johnson* Court, faced directly with the question of whether rule of reason prosecutions are permissible under the Due Process Clause, would vote in the affirmative. Respectfully, *U.S. Gypsum* is old law, well recognized in the antitrust field to no longer comport with current constitutional doctrine. Given the rare post-1978 opportunity to address a government attempt at a rule-of-reason criminal prosecution, this court should not hesitate to confirm that it is constitutionally out of bounds.

B. The Statute of Limitations Bars This Indictment

1. The Purpose of Limitations Periods

Statutes of limitation provide crucial protections to a defendant's right to a fair trial. Over time, recollections fail, and witnesses and documentary evidence become unavailable; it becomes difficult or impossible for defendants (and prosecutors) to present a complete, fair picture of the facts. Further, limitations periods exist to make sure the government does not unreasonably delay in bringing a case and that the societal interest in repose is served—that there is a time sufficiently distant from the underlying conduct when an individual need no longer worry about defending him or herself against increasingly stale criminal charges.

"[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges." *United States v. Marion*, 404 U.S. 307, 322 (1971) (citing *United States v. Ewell*, 383 U.S. 116, 122 (1966)). "Such statutes represent legislative assessments of relative interests of the State and the defendant in administering and receiving justice; they 'are made for the repose of society and the protection of those who may (during the limitation) . . . have lost their means of defence.'" *Id.* (citing *Pub. Schs v. Walker*, 76 U.S. 282, 288 (1870)). Given the fundamental protections they provide, "criminal statutes of limitation are to be 'liberally interpreted in favor of repose.'" *United States v. Habig*, 390 U.S. 222, 227 (1968) (quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932). The Indictment here implicates all of these concerns.

2. The Sole Count of the Indictment Is Barred by the Statute of Limitations

The Indictment alleges a single conspiracy to violate Section One of the Sherman Act in that the Defendants entered into a conspiracy with Richard A. Blake Jr. and others "to suppress and eliminate competition by agreeing to allocate customers of the Heir Location Services sold in the United States." Indictment ¶ 9. The Indictment makes plain that the conspiracy charged is the allocation of customers between two competitors, Kemp & Associates and Blake & Blake. Indeed the charging instrument emphasizes that "the *substantial terms* of [the conspiracy] were to *allocate customers of Heir Location Services* sold in the United States." Indictment ¶ 10 (emphasis supplied).

The limitations period for a conspiracy to violate the antitrust laws is five years. 18 U.S.C. § 3282(a). However, as set forth above, § III.E, *supra*, by the end of July 2008 there was no more Guidelines agreement between Kemp & Associates and Blake & Blake, no more estates became subject to the Guidelines, and thus no more supposedly wrongful allocation of customers. *See, e.g.*, Ex. D to the Albert Decl. (July 30, 2008 email from Mannix to Kemp & Associates management stating that "[t]he 'formal' agreement that we have had with [Blake & Blake] for the last decade is over"). In short, the allegedly criminal purpose of the conspiracy was abandoned and over with more than eight years before the Indictment was filed in this case.

The government will no doubt assert that the Indictment is spared the effect of the statute of limitations because, for some of the estates subject to the Guidelines, certain administration work continued into the five-year period prior to the Indictment, including the recovery of monies for heirs, and the payment of the firms themselves. Indeed, it is not uncommon for the full administration of an estate to take several years, depending on the jurisdiction involved and other factors that can lengthen the process. While we expect the government will claim that such conduct represents overt acts in furtherance of the conspiracy, that ignores both the purpose of the conspiracy as charged in the Indictment and the *actual* nature of what happened to an estate being processed after the Guidelines were applied.

Furthermore, such a theory would create a significant arbitrariness regarding the length of the limitations period. The period would change based on factors such as the number of heirs, the jurisdiction of the estate, the speed that the lawyers handle the matter, and myriad others. *See* Indictment ¶ 7. That is not consistent with the very reasons limitations periods exist in the first place in criminal cases. *See Habig*, 390 U.S. at 227 (Given the fundamental protections provided by them, "criminal statutes of limitation are to be liberally interpreted in favor of repose.")

(quoting *United States v. Scharton*, 285 U.S. 518, 522 (1932)); *United States v. Marion*, 404 U.S. 307, 322 (1971) ("[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.") (citing *United States v. Ewell*, 383 U.S. 116, 122 (1966)).

It is well-settled that "the crucial question in determining whether the statute of limitations has run is the *scope* of the conspiratorial agreement, for it is that which determines both the duration of the conspiracy, and whether the act relied on as an overt act may properly be regarded as in furtherance of the conspiracy." *Grunewald v. United States*, 353 U.S. 391, 397 (1957). The routine administration of estates after the initial application of the Guidelines is agreed upon is outside the scope of the conspiracy as the government itself defines it in the Indictment, and thus cannot extend the statute of limitations.

a. Any Alleged Conduct that Took Place During the Limitations Period Falls Outside the Scope of the Charged Conspiratorial Agreement

The source for defining the scope of the conspiracy charged is the Indictment. Indeed the Court is bound by the language of the Indictment when determining the scope of the alleged conspiracy. *United States v. Qayyum*, 451 F.3d 1214, 1218 (10th Cir. 2006) (internal citations and quotations omitted). Here, the language could not be clearer: the scope of the alleged conspiracy is "to suppress and eliminate competition by agreeing to allocate customers of Heir Location Services sold in the United States." Said another way, any conspiratorial agreement ceased to exist once the allocation of customers through the Guidelines ceased. Once a given estate was allocated for administration to either Kemp & Associates or Blake & Blake, there was nothing more done with respect to that estate that served the purpose of "suppressing" or "eliminating" competition between the two. All that happened after the firms agreed to apply the Guidelines were the routine, administrative consequences of a concluded allocation agreement.

The scope of a conspiracy—its "precise nature and extent"—"must be determined by reference to the agreement which embraces and defines its objects." *Braverman v. United States*, 317 U.S. 49, 53 (1942). In regard to a conspiracy to violate the Sherman Act, it exists only for so long as its members continue to commit acts in furtherance of the agreement that tend to suppress or restrain competition. *United States v. Inryco*, 642 F.2d 290, 293 (9th Cir. 1981) ("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.") (emphasis added); *see also United States v. Great Western Sugar Co.*, 39 F.2d 152, 154 (D. Neb. 1930) (dismissing Sherman Act charge involving alleged predatory pricing in beet industry where contracts had been completed outside the limitations period, but some of the beets were delivered within it; the deliveries "were just things that transpired in the course of business after the [price] war had been waged").

In this regard, the Supreme Court's decision in *Grunewald* is particularly instructive. In *Grunewald*, three petitioners stood accused of a conspiracy to defraud the United States through a tax scheme, whose convictions at the trial court were predicated, in part, on acts of concealment during the limitations period. 353 U.S. at 393. Similar to the government's likely position here as to the acts involved in administering an estate and recovering proceeds, the government in *Grunewald* argued that, even if these acts were not in furtherance of the "main object of the conspiracy," they nonetheless represented "a subsidiary element" of the agreement and in so doing served to toll the statute of limitations. *Id.* at 398.

The *Grunewald* Court declined to adopt the government's theory. *Id.* at 398-399. To hold otherwise, the Court reasoned, "would for all practical purposes wipe out the statute of limitations in conspiracy cases . . . .” *Id.* at 402. In reaching its decision, the Court was careful to distinguish “acts of concealment done in furtherance of the main criminal objectives of the conspiracy,” which are necessary for its successful accomplishment, and “acts of concealment done after these central objectives have been attained, for the purpose only of covering up after the crime.” *Id.* at 405 (emphasis in original). Applying that reasoning to the present case, any collection of proceeds on a Guidelines estate within the limitations period could not possibly have been necessary for the successful accomplishment of allocating customers, which, by the government’s theory, the firms agreed to and completed long before.

The Tenth Circuit has reinforced the principle in *Grunewald* that, following completion of the sole objective alleged in the indictment, subsequent conduct is not, for purposes of the statute of limitations, an overt act in furtherance of the conspiracy. *United States v. Qayyum*, 451 F.3d 1214, 1220 (10th Cir. 2006). In *Qayyum*, the issue was whether, on charges of a conspiracy to defraud the United States by obstructing immigration laws, acts beyond the limitations period furthered the objective of aiding an illegal immigrant to “remain in” the United States. Contrary to *Grunewald* and the instant facts, the *Qayyum* court reasoned that the conspiracy’s purpose there included a temporal element; namely to fraudulently assist an illegal entrant to “enter *and remain* in the United States.” *Id.* Given this, the conduct at issue—defendant’s alleged false statements to government agents to conceal the illegal immigrant’s entry—“formed part of the [charged] conspiracy because they did not follow the accomplishment of its central criminal objectives but rather *were acts in furtherance of those aims*.” *Qayyum* at 1219-20 (citing *United States v. Kissel,* 218 U.S. 601, 607, (1910) (describing how a conspiracy continues “when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up") (emphasis supplied)).[11]

b. Any Alleged Conduct that Took Place During the Limitations Period Does Not Amount to an Overt Act

Courts have consistently been unwilling to extend a statute of limitations to reach the kind of routine, administrative conduct that took place after July 2008. The Indictment does list a series of actions identified as the "Means and Methods of the Conspiracy" that the government will no doubt assert continued into the limitations period and thus make the Indictment timely. However, among the items listed the only ones that could conceivably have extended into the limitations period are those related to the routine administration of the estates, particularly the making or receiving of payments by one of the heir location firms from the proceeds of an estate and "conversations and other communications" that may have taken place as part of the process of administering the estates. *See* Indictment ¶ 11.

These actions represent nothing more than "results" of a previous agreement claimed to allocate customers. Under the law, it is well settled that such actions do not constitute overt acts. *See Fiswick v. United States*, 329 U.S. 211, 216 (1946) ("Though the result of a conspiracy may be continuing, the conspiracy does not thereby become a continuing one."); *United States v. Lewis*, 161 F.2d 683, 684 (2d Cir. 1947) (Hand, J.) ("It is true that conspiracy is a continuing offence so long as any concerted action continues, but even in conspiracy the concert may end and only the 'result' remain, and in that event the limitation runs from the end of the concert

[11] Mannix's actions to terminate the agreement on July 30, 2008 may also be appropriately viewed as an abandonment of, or withdrawal from, the conspiracy such that the statute of limitations began running as to those two defendants at that time, even if not as to any other alleged co-conspirators. *See, e.g., Eldredge v. United States*, 62 F.2d 449, 451 (10th Cir. 1932) ("If a member effectively withdraws from a conspiracy, he is not liable for the acts of his former associates after his withdrawal; and the statute of limitations commences to run, as to him, upon his withdrawal").

which may be the last overt act.").

The Fourth Circuit's opinion in *United States v. Hare*, 618 F.2d 1085 (4th. Cir. 1980) provides a close parallel to the case at hand. *Hare* concerned an indictment of a public official for wrongfully obtaining a loan with "favorable interest and payment provisions." *Id.* at 1086. The allegedly corrupt loan had been obtained nine years prior to the indictment—well outside the applicable five year limitations period. The government argued (as it likely will here) that because the defendant had obtained certain benefits as to the required loan repayments (including a better interest rate), the fact that those repayments extended into the five-year limitations period made the prosecution timely. The argument was soundly rejected:

> In 1970 when the loan was made, defendant received contractual rights to pay a favorable interest rate, to pay the loan under liberal payment provisions, and to be exempt from late payment penalties. *His payment of the loan thereafter was the result of the beneficial concessions he was given through the [allegedly wrongfully obtained] contract concluded* in *1970*. If the government's argument were accepted, the term of the loan would determine the application of the statute of limitations. For example, a twenty-five-year loan would permit prosecution ... thirty years after the terms of the loan had been fixed and the loan proceeds had been received by the [defendant.] Such a result would be contrary to the Supreme Court's admonition in *Toussie v. United States* . . . that federal statutes of limitations should be applied strictly in order to further the congressional policy favoring repose.

Id. at 1086-87 (emphasis added).

Hare's reasoning squarely fits this case. First, any payment of estate proceeds resulted directly from an alleged wrongful Guidelines agreement completed long prior to the limitations period. Second, as the *Hare* court recognized, such a theory would make the length of the applicable limitations period arbitrary, indefinite, and contrary to the limitations law's fundamental concern with defining a period of repose.

In *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013) the Second Circuit recently reinforced the notion that mere results of a conspiracy cannot make an indictment timely. *Grimm* involved an alleged scheme by three corporate employees to fix below-market interest rates on certain investment contracts by bribing various brokers to rig auctions for the contracts. While the auctions took place beyond the reach of the limitations period, the government argued that subsequent interest payments made under the investment contracts made the charges timely. The Court—in language directly applicable here—stated a "[criminal] conspiracy ends notwithstanding the [later] receipt of anticipated profits where the payoff merely consists of a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions and there is no evidence that any concerted activity posing the special societal dangers of conspiracy is still taking place." *Id.* at 502 (quotation marks, ellipses, brackets and citations omitted).

The *Grimm* court concluded that payments of interest on the investment contracts were ordinary, noncriminal in themselves, and made unilaterally for an indefinite period of time. While these payments represented "anticipated economic benefit," there was also no indication that the "underlying concern of concerted action" still existed. *Id.* at 504. As such, the interest payments were considered the "result of a completed conspiracy," and "not in furtherance of one that is ongoing." *Id.* at 503-04 (internal citations and quotations omitted).

Here, just as in *Grimm*, the only acts alleged to have taken place during the limitations period are routine payments and administrative tasks made as a *result* of a prior agreement. The government, through the plain language of the Indictment, asserts that the Guidelines were in furtherance of a conspiracy to restrain trade by allocating customers. The alleged conspirators' subsequent receipt of proceeds from the administration of estates is the mere result of the conspiratorial conduct—which was completed when the last customers were allegedly allocated in 2008—that will not serve to toll the statute of limitations. *Grimm* at 502; *United States v. Kang*, 715 F.Supp.2d 657, 666-67, 679-80 (D.S.C. 2010) ("[A]lthough a conspiracy is a continuing offense, conspiracies are not immortal . . . . To accept the government's argument, no conspiracy would end until every conspirator no longer retained any economic benefit no matter how residual.").

c. The Government Was Aware of the Guidelines Agreement Long Before Bringing this Indictment

Kemp & Associates learned of this investigation by the Department of Justice's Antitrust Division on January 29, 2014 when a large team of law enforcement agents and prosecutors served subpoenas on, and sought to interview, many of the Company's employees. A review of the interview memoranda produced by the government in discovery demonstrates that the earliest interview relating to this investigation produced is of Jeffrey Schroeder, a former Kemp & Associates employee. That interview took place more than two years earlier, on June 14, 2012. The Memorandum of Interview contains several pages describing Schroeder's recollection of the Guidelines agreement.

Further, the government has produced additional information indicating that the Department of Justice's Antitrust Division was aware of the facts at issue here much earlier. In particular, discovery includes a Memorandum describing an interview of James Kohout, another former Kemp & Associates employee, which took place on April 20 and 21, 2015. This memorandum reflects Kohout informing the government attorneys that at some point within the two-year period following his termination from Kemp & Associates in November 2007, he and Schroeder, or an attorney on their behalf, contacted the San Francisco office of the Department of Justice as part of a "strategy" to "make known to the DOJ the 'scheme' and the business practices of [Kemp & Associates] as it relates to the Sherman Antitrust Act." Furthermore, in an October 14, 2016 letter, the government refers to Schroeder having told the government that "in approximately 2008-2009" an attorney contacted the San Francisco Antitrust Division (with

Kohout and Schroeder remaining anonymous) and gave "general information about the industry."[12]

Thus the government appears to have conducted a substantive interview of a former Kemp & Associates employee that included discussion of the Company's Guidelines agreement with Blake & Blake by June 2012—over four years prior to filing of the Indictment—and also received some information about misconduct in the heir location industry before the end of 2009—at least seven years prior to bringing the Indictment.

In short, the government had more than ample opportunity to bring this case in timely fashion. Because it failed to do so, under applicable law, and for all of the reasons why criminal statutes of limitation are imposed in the first place, this case must be dismissed.

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[12] The October 14, 2016 letter indicates that the government was unable to locate any documents concerning this interaction.

VI. CONCLUSION

For the foregoing reasons, we respectfully move for an order that the case be tried under the rule of reason and a further order dismissing the case as an impermissible prosecution or, in the alternative, as barred by the statute of limitations.

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