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

UNITED STATES OF AMERICA, **Plaintiff,** **v.** **KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX** **Defendants.**	**DEFENDANTS' REPLY TO MOTION FOR AN 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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INTRODUCTION

In its response to Defendants' Motion for an Order that the Case Be Subject to the Rule of Reason and to Dismiss the Indictment ("Motion"), the government strains to suggest that this case is as simple as can be. All it need do is assert the existence of an agreement it claims to be a criminal violation of the Sherman Act, and, according to the government, the Court has no role—at this point, or ever, because evidence on the issue is not admissible at trial—to assess whether such an agreement actually is a crime. Also, the government's view is it need only allege that routine administration of fees under the agreement continued in order to avoid the impact of the statute of limitations, without regard to the fact that all efforts to achieve the allegedly illegal objective of the agreement—allocation of customers—incontestably ceased in 2008. But the Court has a role to play; the law requires that the Court look more deeply and not just rely on the government's say-so. And when it does, the fundamental flaws in the government's case are apparent. The rule of reason applies and requires dismissal of the Indictment, and the statute of limitations bars this prosecution.

As to the first prong of Defendants' motion, the standard of analysis under the Sherman Act, the government effectively claims that if the Indictment merely contains the words "customer allocation" or "allocate customers," the conduct thereby challenged is subject to the *per se* rule. Under applicable law, that is simply not how a court decides whether to deviate from the presumptive rule of reason standard. The Motion explains at length the principles that guide the Court's analysis and shows that the conduct challenged here (which we refer to as the "Guidelines" agreement) does not fit the template of customer allocations that have previously been condemned *per se*. Defendants challenged the government to offer any example of a customer allocation agreement deemed *per se* illegal by a court that has contours similar to the

Guidelines. The government failed to do so because there is no such example.

In the Motion, Defendants demonstrated that the Guidelines were a limited agreement, effectively a joint venture that came into effect only where it made sense for the firms to pool resources on a particular estate by having a single firm administer the estate from that point forward. The Guidelines thereby avoided duplication and were efficiency-enhancing, and thus are properly considered an ancillary restraint. Defendants further showed that, not only was the efficiency-enhancing impact of the Guidelines apparent from their design, but the Guidelines actually had such effect, with *de minimis* price impact. The government simply failed to address any of these points, saying nothing whatsoever about the estate administration phase (also referred to as the "legal" phase), and responding only with the assertion that the Guidelines were not ancillary, with no explanation why. But under well-settled law in this area, the Court cannot simply take the government's word for it. The Court must conduct a careful review of the conduct alleged, which is set forth in the written Guidelines. The government, like any party asserting a legal claim based on a written agreement, cannot avoid the aspects of the agreement it does not like by trying to shield them from the Court's gaze. When, as the law requires, the agreement alleged is analyzed in context, there can be only one conclusion: the rule of reason applies.

The Motion also set out an equally compelling basis on which the Court should grant dismissal. The Guidelines, reduced to writing in May 2000 (when Mannix was an employee of Kemp & Associates, and not a part-owner or officer), were expressly terminated by Mannix in July 2008. From that point forward, no customers were allocated pursuant to the Guidelines. Indeed, the estates identified by the government's bill of particulars response demonstrate as much, a fact the government has not contested. Because the conspiracy is defined in the

Indictment as one to allocate customers, the limitations period thus began running in July 2008, and expired in July 2013—more than three years before the Indictment was filed.

Yet the government bases its limitations position solely on conduct occurring during the administration phase of estates, a stage that the government studiously avoids when discussing the potential application of the rule of reason. Such a limitations rule is unworkable. The Guidelines applied to a limited but open-ended segment of estates, and the length of administration for each estate is affected by several factors outside the control of the heir location firms and can extend out many years. Thus a limitations period based on administration of estates would be arbitrary and inconsistent with the purpose of limitations periods in the first place.

As we show below, the government's Opposition does not disturb what the Motion established. The rule of reason applies and warrants dismissal of the Indictment; and the same result is required by application of the statute of limitations.

ARGUMENT

I. The Rule of Reason Governs the Guidelines Agreement and Necessitates Dismissal

A. The Court Can and Should Decide that the Rule of Reason Applies Based on the Papers Presented

In the Motion, Defendants described heir location services, Motion at 5-9, as well as certain facts that are not subject to any real dispute, principally the terms of the Guidelines, which are memorialized in a written agreement, *id.* at 9-14. In response, the government merely states that "the facts are far from undisputed," Opp'n at 3, with no indication of which facts it contests. But nowhere does the government challenge, nor could it, that the written Guidelines, which line up precisely with the language of the Indictment, constitute the agreement complained

of in the Indictment. *Compare* Albert. Decl. Ex. B, *with* Ind. ¶¶ 11(b), (c), (d), (g). Just as surely, the actual language of the agreement the government challenges cannot be fairly characterized as "misleading, irrelevant, and improperly before the Court," *see* Opp'n at 7. Indeed, it is black letter law that a party who asserts a legal claim based upon a written agreement cannot avoid the Court's consideration of its terms. *See, e.g.*, *Borde v. Bd. of Comm'rs*, 514 F. App'x 795, 799 (10th Cir. 2013) (defendant on motion to dismiss permitted to rely upon written agreement referred to but not attached to complaint). Such consideration is particularly vital here where the heart of this case—the central contested issue—is the legal import of the Guidelines.

The primary bases on which Defendants argue in favor of the rule of reason rely on the terms of the Guidelines, which are expressly set forth in the Indictment, as well as facts about the industry that are either alleged or "necessarily implied" by the Indictment, *see* Opp'n at 7 (citing *United States v. Phillips*, 869 F.2d 1361, 1364 (10th Cir. 1988)). To the extent the Motion does rely on facts outside the Indictment, the Tenth Circuit has endorsed courts considering such facts at the motion to dismiss stage in cases like this one, where the operative facts "are essentially undisputed." *United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); *accord United States v. Brown*, 925 F.2d 1301 (10th Cir. 1991). That principle stems from the conclusion that no legitimate interests are served by imposing on the defendants the substantial costs and other hardships of going through a criminal trial when the flaws in the government's legal theory may be addressed beforehand. *See United States v. Bongiorno*, 2006 WL 1140864 at *4 (S.D.N.Y., May 1, 2006) ("improper and a waste of resources" to try a case premised on an infirm legal theory, notwithstanding indictment's recitation of statutory elements). Dismissal is the appropriate result here, and the Court is not prevented from reaching it where the government has not pointed to any specific disputed facts material to the resolution of the Motion.

B. In the Alternative, the Court Should Hold an Evidentiary Hearing to Determine that the Rule of Reason Applies

If, however, the Court determines that it desires a fuller factual record in order to decide the applicability of the rule of reason, the appropriate course is a pre-trial evidentiary hearing. That approach would enable the Court to consider evidence (including, where appropriate, expert testimony), regarding among other things: a fuller background regarding the heir location business; the structure and operation of the Guidelines; how the design of the Guidelines would be expected to, and did, increase efficiency; and the integration between Blake & Blake and Kemp & Associates that occurred under the Guidelines.

Indeed, conducting a pre-trial evidentiary hearing follows directly from the government's acknowledgement in its Opposition that the existence of integration between the firms befitting a joint venture "reflects a factual dispute." Opp'n at 16. We argued in the Motion, and reiterate below in § I.F, that such integration is apparent on the face of the Guidelines. But if the Court determines that more information would be helpful to its decision, this issue—along with any other factual questions regarding the application of the rule of reason rather than the *per se* standard—should be resolved before trial, and cannot appropriately await trial as the government suggests. Opp'n at 16. At such a hearing, we submit, there would be substantial evidence demonstrating the integration and pooling of resources between Blake & Blake and Kemp & Associates that occurred pursuant to the Guidelines.

Whether to conduct a hearing on a pre-trial motion generally "is in the sound discretion of the district court." *United States v. Smith*, 569 F.3d 1209, 1212 (10th Cir. 2009); *see Hall*, 20 F.3d 1087 (upholding pre-trial dismissal of indictment based on evidentiary hearing); *Brown*, 925 F.2d at 1303-04 (same). In certain instances, whether to deviate from the rule of reason

presents a mixed question of fact and law, *see* Motion at 16 n.7 (citing *In re Wholesale Grocery Products Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014)), and such questions by their nature can necessitate evidentiary hearings, *see United States v. Thompson*, 134 F. Supp. 2d 1227, 1231 (D. Utah 2001) (granting pre-trial hearing on issue of knowing and intelligent waiver in light "of the intensive factual and legal examination required"). Indeed, when a criminal defendant brings forward facts justifying relief determinative of whether evidence can be offered at trial, an evidentiary hearing must be granted. *See, e.g.*, *United States v. Ary*, 518 F.3d 775, 782 (10th Cir. 2008); *United States v. Smith*, 495 F.2d 668, 670 (10th Cir. 1974) (reversing denial of motion to suppress and remanding for a hearing, where trial court did not allow evidence on the issue despite defendant showing a factual dispute; "The statements of counsel are no substitute for a hearing").

A trial that commences with the parties and the Court not knowing whether or not the Guidelines are properly considered under the *per se* or rule of reason standard would be highly confusing to the jury and unworkable. Substantial portions of the trial would be spent adducing evidence and making arguments that the jury might later be instructed not to consider, or to consider only for a very different purpose. Pertinent Sherman Act decisions counsel against conducting a trial without a prior determination regarding whether the *per se* rule or rule of reason applies. *See In re Sulfuric Acid*, 703 F.2d 1004, 1008 (7th Cir. 2012). The importance of a pre-trial ruling is magnified in a criminal case. Thus, if the Court believes that a fuller factual record would be necessary or helpful to its determination, we submit that the proper course is to hold a pre-trial evidentiary hearing.

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

In deciding the Motion, a primary issue for the Court is how to go about determining whether a challenged restraint fits into one of the *per se* categories. The parties agree that the rule of reason is the default standard, to be deviated from only in narrow, specified circumstances. *See* Motion at 18; Opp'n at 9. Defendants discussed the detailed set of principles, established in the case law, to guide its decision whether to deviate from the rule of reason, including that: (1) a court must look beyond mere labels and analyze the challenged conduct as it existed; (2) the conduct must be viewed as a whole; and (3) the industry in which the conduct occurred must be considered with respect to the anticipated effects of the restraint. Motion at 18-19. At the end of the day, the Court's task is to determine whether the challenged restraint is, in light of these considerations, a "garden-variety horizontal agreement." *See Metro. Industries v. Sammi Corp.*, 82 F.3d 839, 844 (9th Cir. 1986); *see also In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014).

By contrast, the government merely informs the Court that the Tenth Circuit held *per se* illegal the agreement between two roofing installers not to compete for each other's established customers in *United States v. Suntar Roofing, Inc.*, 897 F.2d 469 (10th Cir. 1990), and that the Indictment here says that the Guidelines are a customer allocation. Opp'n at 10-11. But reliance on mere labels is insufficient, and the government provides no analysis or other basis to support its conclusory contention that the agreement in *Suntar* is "like the one in this case." *Id.* at 10. It is not, which becomes clear when the factors noted above are applied to the Guidelines. *See* Motion at 18-28. Nor is the Court precluded from engaging a searching analysis of the Guidelines at this stage. *See id.* at 16-18 (citing multiple cases deciding this issue pre-trial), even if the government

declines to do so. Indeed, that is just what the Court must do. As just one example, in *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, the Tenth Circuit upheld dismissal with prejudice of a complaint after concluding that allegations labelling a restraint *per se* price-fixing did not support that assertion. 873 F.2d 1357, 1360 (10th Cir. 1989).

The government's failure to show that the Guidelines were analogous to condemned customer allocations is critical, because not all agreements that can, from some perspective, be termed customer allocations are *per se* violations.[1] Defendants demonstrated this in the Motion with reference to three cases where, after analyzing the agreement, the court rejected one side's attempt to label a restraint a wrongful customer allocation. *See id.* at 22-25 (citing *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014); *In re Sulfuric Acid*, 703 F.2d 1004 (7th Cir. 2012); *California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118 (9th Cir. 2011) (en banc)). Moreover, *Polk Brothers, Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985), which both parties cite as a seminal rule of reason case, could also be seen on one level as customer allocation. Two competing home goods stores agreed to operate out of a joint facility and entered reciprocal covenants specifying what each could sell. *Id.* at 187. Although the firms clearly could be said to have allocated customers based on what those customers were shopping for, the Seventh Circuit relied on the structure of the agreement as a whole to conclude that the rule of reason was the appropriate standard.[2] *See id.* at 189-90.

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[1] This follows the more general principle that not all horizontal restraints are *per se* illegal. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 228-29 (D.C. Cir. 1986).

[2] Efficient joint ventures such as the one in *Polk Brothers* are at greatest risk for being mistaken for impermissible market allocations. *See* Areeda & Hovenkamp, *Antitrust Law*, ¶ 1908d, at 291-92 & n.38 (3d ed. 2011) ("[A] significant number of horizontal market division agreements are procompetitive when undertaken in the context of efficient joint ventures."). In Section I.F below, we again show how the Guidelines were an efficient joint venture.

The troubling nature of the government's position is best demonstrated by the second paragraph on page 11 of its Opposition. There, the government asserts that, having pled what it claims to be a *per se* customer allocation agreement, (1) no analysis of the agreement's effects is permissible at this stage, and (2) none will be permissible at trial, because evidence relevant to whether or not it is properly considered under the *per se* standard is not admissible. Apparently, the Court's task, under the government's theory, is to take the government at its word; Defendants are denied the opportunity to defend their conduct; and the appropriate time for legal scrutiny of the Guidelines is never. Under well settled law, however, the Court cannot apply the *per se* rule based solely on the government's say-so.

The Motion emphasizes that we could find no agreement condemned *per se* that is comparable to the Guidelines, and in particular their blend of an occasional (as-needed) joint service of customers and weighted profit-sharing,[3] thus challenging the government to find such a case. The government did not. The closest it could come, it seems, is *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990), which involved a geographic allocation, a classic form of horizontal allocation well-recognized in the case law, unlike the unusual agreement here. That case arose out of a licensing agreement, pursuant to which the licensor agreed not to compete in Georgia in exchange for a portion of the licensee's Georgia profits and a reciprocal agreement that the licensee would not compete outside Georgia. *See id.* at 401-02. But the Guidelines had nothing like that nationwide scope, applying instead to a limited subset of estates that both

[3] The government misconstrues Defendants' argument that profit-sharing distinguishes the Guidelines from traditional customer allocations. *See* Opp'n at 14. Defendants do not claim that there are no *per se* agreements that involve profit-sharing; rather that there are no *per se* cases that entail joint efforts related to particular customers as well as profit-sharing. The reason is that such cases, like this one, do not fit the *per se* category.

parties had expended resources on and would need to spend more on to administer.[4]

The government's reliance on *Suntar* throughout the Opposition is unpersuasive because the conduct at issue in *Suntar* bears little resemblance to the Guidelines, *see* Motion at 21-22. The agreement between roofing companies (a standard industry) in *Suntar* involved a reciprocal non-compete as to all established customers. Along with geographic allocation, this is the other classic form of horizontal allocation long recognized in the Sherman Act case law.[5] The *Suntar* agreement did not entail joint efforts as to individual customers, as present in the estate administration phase here, and did not include a profit-sharing mechanism. These are not minor distinctions. As the case law teaches, the fundamental difference—that here two companies are creating efficiency and avoiding duplication by having only one take the lead role in conducting the administrative phase on a given case, and sharing profits—takes this case outside those traditionally deemed *per se.*

The government's further citation to two bid-rigging cases that involved kickbacks among conspirators as examples of profit-sharing agreements, *see* Opp'n at 14 (citing *United States v. Dynalectric Co.*, 859 F.2d 1559 (11th Cir. 1988); *United States v. A-A-A Elec. Co.*, 788 F.2d 242 (4th Cir. 1986)), is misplaced. Again, bid-rigging is its own well-recognized category of *per se* horizontal violation. *See, e.g.*, *United States v. Reicher*, 983 F.2d 168, 170 (10th Cir. 1992). The government's inability to come forward with a substantially similar agreement makes

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[4] Indeed, the 269 allegedly affected estates cited by the government constitute no more than approximately 2.5-3.5% of the total cases Kemp & Associates worked during the relevant period prior the termination of the Guidelines. Further, in *Palmer*, the immediate effect of the agreement was a \$150-to-\$400 price hike in Georgia, *see id.*, which the Supreme Court saw as evidence that the agreement was formed as a way to raise prices, *see id.* at 49. Here, prices were essentially unaffected by the Guidelines, *see* Motion at 32-34.

[5] *See Suntar*, 897 F.2d at 473 (collecting geographic and customer allocation cases in restating *per se* rule applicable to horizontal allocations).

our point: the Guidelines were not a "garden-variety horizontal agreement."

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

The government mistakenly claims that the industry in which a restraint arises is irrelevant to the Court's analysis. While Defendants do not claim that the nature of the industry at issue is determinative, the case law is clear that it is an important consideration in assessing the overall agreement. After all, *per se* standards are established "[o]nce a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982). Where unusual aspects of a particular industry as applied to a given restraint undermine predictability and confidence, those aspects must be considered in deciding whether *per se* treatment is warranted. *See* Motion at 19-20. Indeed, the government's lead case on this topic, *Maricopa*, makes just this point by noting that in earlier decisions the Supreme Court had considered unique aspects of certain industries (public service for state bar associations and ethical norms for engineers) as potential bases for affording different treatment to conduct that otherwise would be viewed as a Sherman Act violation. 457 U.S. at 348-49 (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978)).

To be clear, Defendants are not making the argument, rejected in *Maricopa*, that competition has no place in, or is not the preferred form of interaction, in the heir location services business. *See* Opp'n at 12 (attributing this argument to Defendants). Rather because of the unusual characteristics of heir location, and the efficiency benefits evident in the design of the Guidelines that make it far from a garden-variety horizontal agreement, a court cannot predict with any confidence that rule of reason analysis would show that its anticompetitive

effects outweigh its pro-efficiency (and thus pro-competitive) effects.[6] Indeed, as set forth in the Motion (*see* Motion at 31-32) and not contested by the government in its Opposition, there plainly were substantial pro-competitive effects to the Guidelines. .

E. The Guidelines Did Not Create the Exclusivity Concerns that a Typical Allocation Agreement Would

The Motion explains that the unavailability of repeat customers in this industry eliminates the possibility that heir location firms can allocate customers to achieve respective monopolies. *See* Motion at 22. The government counters by pointing to two allocation agreements deemed *per se* illegal in industries where repeat customers are unlikely. Opp'n 12. But both of those cases are geographic allocations, not allocations of specific customers. *See Palmer*, 498 U.S. at 47 (market divided between Georgia and all other states); *Blackburn v. Sweeney*, 53 F.3d 825, 827 (7th Cir. 1995) (lawyers placed regional intrastate restrictions on solicitation). Competitors that divide the market territorially can rely on the exclusive stream of all customers—significantly, to include new customers—located in that territory, and need not rely on repeat customers. *See* Areeda & Hovenkamp, ¶ 2000b, at 6 (danger of allocation agreements is creation of monopolies); *id.* ¶ 2030a, at 218. Thus, those cases have no application to Defendants' argument because the Guidelines agreement was not a geographic allocation.

F. Viewed in their Entirety, the Guidelines Have the Structure and Effects of a Joint Venture

In the Motion, Defendants offered an extended analysis of why the Guidelines comfortably fit the framework of joint ventures—which, the government acknowledges, are

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[6] *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (distinguishing between practices that "restrict competition and decrease output, and ones that are "designed to increase economic efficiency and render markets more, rather than less, competitive") (quotation omitted); *Rothery*, 792 F.2d at 221 (upholding as efficiency-enhancing restriction on agents imposed by van line).

typically accorded rule of reason treatment—including by virtue of their output-enhancing potential. *See* Motion at 25-34. The government offered no countervailing analysis.

Perhaps most critically, the Motion describes the integration between the firms occasioned by the Guidelines. Specifically, the firms pooled genealogical research and took advantage of the efficiencies of having one firm administer the estate. Motion at 27, 29-30. Thereby, the administering firm would typically be reliant in part on the other firm's research to conclude the estate, and the second firm reliant on the first firm's successful administration in order to receive its contingency fees. The firms thus shared not only certain profits, but the risk of loss as well. The government provides no response to our explanation of integration, other than the unsupported assertion that Defendants failed to demonstrate "meaningful integration." *See* Opp'n at 16. Indeed, the government makes no reference whatsoever to the estate administration phase of heir location firms' work, which is a central focus of the Motion. The government cannot wish away this critical phase of the business, nor this critical pro-efficiency aspect of the Guidelines, by simply ignoring it.

Further, in the Motion:

- We set forth the analytical platform for considering the Guidelines to function as a joint venture. Motion at 26-28. The government cites a decision rejecting a "silent joint venture" defense. Opp'n at 16. But the defendants' conduct in that case—a bid-ridding scheme in which the selected winner paid kickbacks to two co-conspirators—bore no resemblance to a joint venture, much less to the Guidelines. *See United States v. Dynalectric Co.*, 859 F.2d 1559, 1562-63 (1988). Critically, here, unlike that bid-rigging case, there was no silence, there was a written effective-joint venture agreement for the court to analyze: the Guidelines.[7]

- We show that the Guidelines would be expected to increase output in the form of the firms working more estates (each estate being its own product) because pooling resources on one estate would free resources to pursue others. *See* Motion at 29-30.

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[7] Surely the government is not contending that lay businessmen titling the agreement "Guidelines" rather than "Joint Venture" is determinative.

We also show that the Guidelines provided an incentive for the firms not to "blow up" estates and thereby take product off the market. *See id.* at 30-31. Such an increase in output was explicitly recognized as establishing an ancillary restraint by *Polk Brothers*, 776 F.2d at 190, and refutes the government's argument that the firms did not "pool resources to create some innovation or new product," *see* Opp'n at 16.

- We show that the Guidelines were unlikely to affect price because of the industry's structure. *See* Motion at 32. The government, aiming for a criminal conviction "without any further inquiry into the conspiracy's competitive effect," Opp'n at 16, presents no assessment of those effects.

For those reasons, the Guidelines were simply not "the type [of practice] that almost always decrease[s] output rather than increasing efficiency" to which "the *per se* rule is confined." *Rothery*, 792 F.2d at 229.

The government also invokes the general proposition that, to be ancillary, a restraint must be subordinate to an efficiency-enhancing purpose, without showing how that is untrue of the Guidelines. *See* Opp'n at 15 (citing *Rothery*). But again, the government simply ignores the efficiency-enhancing purpose addressed at length in the Motion: avoiding the duplication of work by the two heir location firms in the lengthy estate administration phase of the process, Motion at 25-26, 29-30.

The Guidelines thus meet the test of being ancillary to an efficiency-enhancing effect. To see why, the Court should consider that, although the government alleges the Guidelines were "[m]otivated by a desire to stop the mutually unprofitable price competition between them," Opp'n at 8, the firms did not simply agree to fix prices across-the-board or in certain counties, the obvious solution to that problem. Instead, the firms negotiated an agreement that is limited to those occasional cases where the firms could coordinate on mutual estates and thus reduce inefficiencies and create opportunities to locate new estates. The Guidelines facilitated those overarching goals by ensuring an efficient process and avoiding duplication of efforts once the

firms met at the same unsigned heir.

G. The Rule of Lenity Tilts the Court's Analysis in a Criminal Defendant's Favor

The government misunderstands Defendants' application of the rule of lenity. We are not disputing whether a *per se* prosecution is permissible, the apparent basis for the government's citation to *Suntar*, *see* Opp'n at 17.[8]

Instead, we explained that lenity, which calls for ambiguities in criminal statutes to be resolved in favor of the defendant as a way to ensure fair warning, dictates that a close question regarding whether to deviate from the rule of reason should be answered in the negative. The *per se* rule, for efficiency reasons, invalidates some agreements that under a full analysis might have been upheld, *Maricopa*, 457 U.S. at 344, yet imposing criminal liability for conduct that is in fact reasonable could not have been the purpose of the *per se* rule. That concern is paramount here. In the Motion, Defendants present more than ample reason for the Court to question whether the Guidelines would be deemed improper under rule of reason analysis because they increased certain output and had *de minimis* effect on prices. *See* Motion at 31-34. The government has not claimed otherwise. Respectfully, a court should be quite certain that a challenged restraint fits squarely within an established *per se* category before allowing a criminal prosecution to go forward under that standard.

H. This Rule of Reason Indictment Must Be Dismissed

The government states that it "has long eschewed prosecuting conduct subject to the rule of reason, and [] has no interest in doing so here," Opp'n at 17. The government thus effectively

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[8] *United States v. Farmer*, 26 F. Supp. 3d 141, 144 (D.P.R. 2014), which addressed the rule of lenity based on uncertainty whether Puerto Rico is a "State" for purposes of Section 1, likewise has no application here, where the uncertainty regarding the statute's application squarely implicates the nature of the conduct criminally barred.

agrees that if the Court determines, as we argue it must, that the rule of reason applies, this case cannot proceed, and the Court should dismiss the Indictment.

II. <u>The Statute of Limitations Bars this Case</u>

A. The Scope of the Criminal Conspiracy Ended More Than Three Years Outside the Limitations Period

The parties agree that "the crucial issue" with respect to Defendants' statute of limitations motion is how "the conspiratorial agreement" is defined in the Indictment. *See* Opp'n at 18 (quoting *United States v. Qayyum*, 451 F.3d 1214, 1218-19 (10th Cir. 2006)). We submit that the nature of the conspiracy charged in this case could not be plainer. Under the heading "Description of the Offense," the Indictment defines the conspiracy as one "to suppress and eliminate competition by *agreeing to allocate customers* of Heir Location Services sold in the United States." Ind. ¶ 9 (emphasis added). The very next paragraph of the indictment reaffirms that the "substantial terms of [the conspiracy] were to *allocate customers* of Heir Location Services sold in the United States." *Id.* ¶ 10 (emphasis added). Given that the last time a customer was purportedly allocated between Kemp & Associates and Blake & Blake was in July 2008—more than eight years prior to the Indictment—the charge is untimely and should be dismissed.

In its Opposition, the government does not dispute that any allocation of heirs or estates between the two competitors ended by July 2008. Rather, it argues that another object of the conspiracy was "economic enrichment," Opp'n at 18, and thus, in its view, the receipt or distribution of any proceeds from the administration of estates that were subject to the Guidelines represents conduct in furtherance of the conspiracy and makes the charge timely. The government's argument, however, confuses the results of a conspiracy with actual conduct in

furtherance of it. A conspiracy's statute of limitations should not be extended "indefinitely beyond the period when the unique threats to society posed by a conspiracy are present." *United States v. Doherty*, 867 F.2d 47, 62 (1st Cir. 1989). Here, the "unique threat" identified in the indictment is the alleged customer allocation underlying the only charge in the case. That threat ended with the cessation of the Guidelines in July 2008, and the government makes no attempt to explain how the ministerial distribution of proceeds from the administration of an estate is in furtherance of the supposed wrongful customer allocation that took place, in some instances, many years earlier.

Further, to the extent that payments forming the results of a conspiracy can extend the limitations period, they do so only where they "consist[] of one action, or a handful of actions, taking place over a limited time," and not "a lengthy, indefinite series of ordinary, typically noncriminal, unilateral actions." *Id.* at 61. Accordingly, in *Doherty*, the court concluded that even though the defendant police officers cheated on the civil service exam to obtain promotions with the specific intent to receive larger salaries, those salary payments would not qualify as overt acts for limitations purposes unless they amounted to "one or a few discrete events, not an indefinite series continuing long after any active cooperation ceased." *Id.* at 61-62.

For these reasons, the holding of *United States v. Evans & Associates Construction Co.*, 839 F.2d 656 (10th Cir.1988) is properly limited to bid-rigging cases where a central purpose of the conspiracy is to obtain wrongful proceeds, and thus is inapposite here. *Evans*, and the Eighth Circuit bid-rigging case it relies upon, *United States v. Northern Improvement Co.*, 814 F.2d 540 (8th Cir. 1987), involve situations where the central objective of the conspiracy encompassed the receipt of ill-gotten gains. *See Evans*, 839 F.2d at 661 ("the Sherman Act violation was 'accomplished both by the submission of noncompetitive bids *and* by the request for and receipt

of payments at anti-competitive levels'") (emphasis in original) (quoting *N. Improvement*, 814 F.2d at 543 n.2); *N. Improvement*, 814 F.2d at 542 ("the object and purpose of this illegal agreement was illicit gain"). While the Indictment here mentions the payment of proceeds, Ind. ¶¶ (h), (i), it is simply not accurate to say, as the government now claims, that "economic enrichment" was alleged as the central purpose of the conspiracy charged. Administering estates bore no relation to customer allocation, the threat claimed to be the purpose of the conspiracy. In addition, the government has identified 269 allegedly affected estates, the administration of which consisted of a series of ordinary, non-criminal events that, even the government acknowledges, could last many years. *Evans*, by contrast, involved the bid for one contract, which was bid, granted, completed and fully paid within two years. *See* 839 F.2d at 657, 660-61.

The other cases cited by the parties corroborate *Doherty*'s analysis and underscore *Evans*'s inapplicability. The court in *United States v. Grimm*, 738 F.3d 498 (2d Cir. 2013) also recognized that payments made during the limitations period did not make the charge timely where "there [was] no evidence that any concerted activity posing the special societal dangers of conspiracy [was] still taking place." *Id.* at 502 (quoting *United States v. Salmonese,* 352 F.3d 608, 616 (2d Cir. 2003)). In words that have direct applicability here, the court stated that:

> [O]vert acts have ended when the conspiracy has completed its influence on an otherwise legitimate course of common dealing that remains ongoing for a prolonged time, without measures of concealment, adjustment or any other corrupt intervention by any conspirator.

Id. at 503.

By contrast, in *United States. v. Walker*, 653 F.2d 1343 (9th Cir. 1981), another bid-rigging case relied on by the government, the defendant was convicted of conspiring to defraud the United States. The court rejected the defendant's claim that the offense ended when

the relevant timber contracts were awarded despite a false certification, reasoning that the United States was defrauded "of a competitive price for its timber each time he" cut timber and paid his co-conspirators. *Id.* at 1347. In *Walker*, the United States was repeatedly defrauded, but here an heir could only be allocated once. Further, the scheme in *Walker* relied on "continuing cooperation" to achieve its unlawful ends, the basis on which *Doherty* distinguished that earlier decision. *See Doherty*, 867 F.2d at 62.

Similarly, the government's reliance on *United States v. Morgan*, 748 F.3d 1024 (10th Cir. 2014), is not helpful to its cause. In *Morgan*, because the evidence showed that "*the central purpose* of [the] kidnapping and robbing [] was to obtain money and divide it among the co-conspirators," statements regarding the distribution of proceeds "were made in the course of and in furtherance of the conspiracy." *Id*. at 1036-37 (emphasis added); *see also United States v. Qayyum*, 451 F.3d 1214, 1220 (10th Cir. 2006) (assessing whether certain conduct "follow[ed] the accomplishment of [the alleged conspiracy's] central criminal objectives . . . [or] rather were acts in furtherance of those aims.").

The government, citing *Morgan*, writes that the "Tenth Circuit further holds that the distribution of a conspiracy's proceeds is also within the scope of the conspiracy." Opp'n at 19. But that reasoning misses an important step. Under the very cases the government cites, the distribution of proceeds is *only* within the scope of the conspiracy when the conspiracy is defined broadly enough to include the distribution of those proceeds as a central purpose. Again, the alleged conspiracy here was to allocate heirs, an object that the government effectively concedes did not continue past when Mannix terminated the Guidelines in July 2008.

B. The Indefinite Limitations Period Proposed by the Government Is Impermissible

A further point raised in our Motion, but largely ignored by the government, is that the government's position here would result in arbitrary and indefinite periods of limitation—a result in direct contrast with the principal purpose of limitations periods. The period of time it takes to complete the administration of an estate depends on many different factors and varies significantly from estate to estate. *See* Ind. ¶ 7. For example, one estate may wind up in a litigation among the potential heirs that goes on for many years. And sometimes an estate is believed to be fully distributed, only to be reopened at a later point when additional assets are located. In that instance, under the government's theory, a limitations period thought to have run because of the "final" payment would seemingly be recommenced by the subsequently found assets and their distribution. Such a result is, we submit, simply not workable. *See United States v. Hare*, 618 F.2d 1085, 1086 (4th Cir. 1980) (refusing to extend limitations period for loan obtained as bribe to encompass favorable interest rate payments under the loan, as they were the "result of beneficial concessions" obtained when the loan was first made; otherwise, "the term of the loan would determine the application of the statute of limitations" in contravention of policy favoring repose). It is for just such reasons that limitations periods should not be subject to the type of indefinite calculus suggested by the government here. Statutes of limitations "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 defense.'" *United States v. Marion*, 404 U.S. 307, 322 (1971) (citing *Pub. Schs. v. Walker*, 76 U.S. 282 (1870)). To that end, "criminal statutes

of limitation are to be 'liberally interpreted in favor of repose.'" *United States v. Habig*, 390 U.S. 222, 227 (1968).

CONCLUSION

For the foregoing reasons, and for all the reasons laid out in Defendants' Motion, 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.

Given the nature and importance of the issues presented, Defendants request that the Court hear oral argument on the Motion.

Dated: May 12, 2017

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