IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 2:16-CR-403DS
	)	
KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX,	)	
	)	
Defendants.	)	
	)	
_____	)	

BEFORE THE HONORABLE DAVID SAM

June 21, 2017

Motions Hearing

Laura W. Robinson, RPR, FCRR, CSR, CP
351 South West Temple
8.430 U.S. Courthouse
Salt Lake City, Utah 84101
(801)328-4800

Appearances of Counsel:

For the Plaintiff:

Molly Anne Kelley
Kalina M. Tulley
Robert Jacobs
Ruben Martinez, Jr.
Attorneys at Law
US Department of Justice
Antitrust Division
209 S. LaSalle Street Suite 600
Chicago, Illinois 60604

Jacob J. Strain
Attorney at Law
U.S. Attorney's Office
111 South Main Street
Suite 1800
Salt Lake City, Utah 84111

For Kemp & Associates:

James A. Mitchell
Attorney at Law
Ballard Spahr LLP
919 Third Avenue
New York, New York 10022

Jason D. Boren
Attorney at Law
Ballard Spahr, LLP (UT)
201 South Main Street
Suite 800
Salt Lake City, Utah 84111

Michael J. Grudberg
Attorney at Law
Tarter Krinsky & Drogin LLP
1350 Broadway
New York, New York 10018

For Daniel J. Mannix:

Robert F. Albert
Devin M. Cain
Attorneys at Law
Morvillo Abramowith Grand Iason
& Anello PC
565 Fifth Avenue
New York, New York 10017

Salt Lake City, Utah, June 21, 2017

(10:02 a.m.)

THE COURT: Good morning counsel and others who are present for this hearing. The court welcomes you here this morning.

We are here to address case number 2:16-CR-403, *United States of America versus Kemp & Associates and others*. And counsel, at counsel table, I believe the last time we had Ms. Tulley, is that right?

MS. TULLEY: Yes, Your Honor.

THE COURT: And you have with you -- who do you have with you at counsel table?

MS. TULLEY: Your Honor, this is Molly Kelley, she is going to be arguing for the government, and also with me is Robert Jacobs and Ruben Martinez.

THE COURT: All right, very well. Thank you, counsel. And for the defendants, we have -- I think Jason Boren was here last time.

MR. BOREN: Good morning, Your Honor. Yes, today we have Richard Albert at counsel table along with Devin Cain. We also have Mr. Mannix sitting at the front table.

THE COURT: Yes. Mr. Mannix, the court welcomes you as well.

MR. BOREN: At the back table we have counsel for Kemp & Associates. We have Jim Mitchell and Michael Grudberg.

MR. GRUDBERG: Good morning, Judge.

THE COURT: All right, very well. And Mr. Cain is going to be arguing; is that right?

MR. ALBERT: Your Honor, I'm, with the court's permission, I'm going to be arguing the Rule of Reason argument and with the court's permission Mr. Mitchell will be arguing the statute of limitations piece for the defendants.

THE COURT: All right, very well. My notes do reflect that we have one motion in abeyance and we have the motion today to the Rule of Reason, whether the case is subject to the Rule of Reason or the per se rule, right?

MR. ALBERT: Yes, Your Honor.

THE COURT: And this is the defendant's motion. Do you have an estimate, counsel? I would like an estimate of your time.

MR. ALBERT: Um, Your Honor, I think my piece might go around a half hour. I think Mr. Mitchell's piece around --

MR. MITCHELL: 10 to 15 minutes, judge.

THE COURT: So a total, a maximum 45 minutes; is that correct?

MR. ALBERT: Yes, Your Honor. We would like to reserve, obviously, some time to respond to whatever the government has.

THE COURT: For the government?

MS. KELLEY: Your Honor, I don't expect to exceed 15 minutes.

THE COURT: All right, 15 minutes, very well. All right counsel, um, we will look forward to hearing your argument.

MR. ALBERT: Thank you, Your Honor. Your Honor, um, one of our central points is that just putting a label on a particular conduct, customer allocation, that doesn't end the discussion that starts the discussion. Because the case law in this area, and they're mostly civil cases, of course, but it is the exact same statute, it's the Sherman Act and it is the exact same case law doctrine. The cases are pretty much all about one party labeling certain conduct so that it seems at first blush to fit into a per se box. They use the label price-fixing or customer allocation and market allocation, and there are a multitude of cases, and we cite a number of them in our papers, that shows what the court must do then is look behind and make its own determination as to whether the conduct actually fits in those very narrowly defined per se category, or whether it falls under the general rule of the Sherman Act the Rule of Reason. There is a number of cases that we cite where the courts -- I mean essentially the cases are really all about looking past the label and saying is it right or not.

The Tenth Circuit case, *Cayman Exploration Corp,* that

is labeled price-fixing, customer allocation cases Page 17 and 18 and 22 through 25 of our main brief. There is the *Wholesale Grocery Products* case and the Eighth Circuit *Sulfuric Acid,* which we'll be talking about, *Harris V Safeway*, which is a Ninth Circuit en banc, *Polk Brothers,* another one from the Seventh Circuit that is particularly useful. *Procaps* major which is a District of Columbia case. And what you see when you -- when you look at those cases and you study the area is that for customer allocation the authorities and I would say the Areeda & Hovenkamp treatise is also very helpful and cited regularly by the Supreme Court, but the authorities recognize two classic case types of customer allocations that have been held to fall into the per se category. Geographic allocation, where somebody says I will take Kansas, you take Nebraska, and existing customer allocations. I have this customer, you know, I am servicing these businesses, you're servicing those, don't raid mine. Those are the -- those are the cases. Those are the classic cases that fit in the per se category. This case is neither of those and it's not even close. It's an unusual agreement, we refer to it as the guidelines because that's actually the title on the document by which it was documented that applied in very limited circumstances in an unusual industry, heir location, and our main point is that the court has to look past the label. It's particularly

something that is appropriate in a case like this where there is a written agreement that you can actually look at and you have to analyze it in the context of the market and the industry at issue. And it's striking because the government in its papers, and maybe they will -- they will straighten this up when they speak, but they are saying you can't look at the agreement itself, you can't look past what we say in the indictment, and why its design is pro-efficiency and pro-competitive, and you can't look past the label now, and you can't do it at trial because no evidence regarding pro-efficiency aspects of the guidelines, no evidence regarding why the guidelines were reasonable, is admissible at trial. That's on Page 11 of the government's brief. And that's really directly contrary to what the decisions instruct in this area. Now I must tell you if the government's view on those points prevail and what we would have in this case would be a document -- the government would call one witness, a document custodian and ask is this a copy of the guidelines agreement? Yes, it is and it would be admitted, and then the court would instruct the jury that's a customer allocation agreement and we could all go home and Kemp would be convicted and Mr. Mannix could go directly to sentencing. That's not fair, it's not just, and it's not what the cases in this area teach as to how it is -- how this process is supposed to work. And the

government's argument on this is also striking because we have put facts forward and our motion analysis shows that not only is the pro-efficiency aspect of the guidelines apparent from its design, and I'm going to speak to that further in a few minutes, but, in fact, in the real world, the pro-efficiency impact actually happened because the data shows that Kemp was able to service a significantly greater portion -- proportion of small estates during the guidelines period and also that the guidelines had a de minimis, de minimis impact on price. And if we could have the charts, please.

Your Honor, this is, once we get it up on the screen, this is a chart that is in our papers in our main brief and it shows the blue line is the state -- the government's -- the states the government has listed in stills particulars as those impacted by the guidelines and the red line is all other states serviced by Kemp during the period. And if you look at the chart, you can see that the difference is de minimis and this is for the entire period or the period for which we have data that -- that the guidelines was in place. The difference is de minimis. It is .65 percent, it's negligible. And if we could have the next slide, please, we did it another way, um, where we looked at states -- that the blue line is states where -- where Kemp & Associates had -- where both Kemp and Blake & Blake operated, and the red

line is where Blake didn't operate but Kemp did. So that's a control group. And, again, if you look at it, um, you see that the difference in rates is negligible, it is .6 percent in this case, and this one also shows when the end of the agreement is in July of '08. So if you could take that down.

So, you know, preventing harmful price impact to customers is really, really what the antitrust laws are all about and assessing if an agreement helps productivity and efficiency is also what the antitrust law is all about. But the government is claiming that the court can't look at that and the jury can't look at that and that is striking. And Your Honor I just want to briefly speak a little bit about the heir location industry. We've laid it out in our papers but I think it just worth walking through a little bit because it is an unusual industry.

THE COURT: Yes, I don't think there is many companies that operate in this area, are there?

MR. ALBERT: There are not. There has been a handful over time, it's a sort of mom and pop industry, um, a lot of family run shops, um, originally started pretty local and then they expanded over time. But it's sort of a -- it's sort of an unusual industry and obviously the business of this -- of firms in this industry is to look for estates or individuals who died intestate so the estates would

typically escheat to the state and then locate the rightful heirs to those estates, if they can, through genealogical research, and then help the heirs recover their share of the estate in exchange for a percentage of the recovery most of the time for these estates the heirs really had no awareness of their relationships to the decedent so any money, any inheritance they get is really, you know, your quintessential found money. And finding estates is labor intensive. I mean the way the business works is the field reps are just driving from county courthouse to county courthouse. Of course now a days more records are electronic, but at the time of this case that really was not so much the case and it was just pounding the pavement.

Once the estate is located, there is a complicated evaluation process, a little bit more art than science but is the estate large enough to be able to solve -- to be able -- large enough and likely enough to be able to be solved that it justifies putting the resources in to do it. Obstacles to recovery, there are many of them. I mean one of them is very basic. But if you have somebody named Smith, it is almost -- it's very difficult. If you have a very, very common surname, it can be very difficult to do the -- to do the searching. Um, and the difficulty of the genealogical searching is actually what lead Kemp & Associates to be here in Salt Lake City. They moved here

from Florida to take advantage of the Family History Library here in Salt Lake City.

Obviously, the genealogical searching for the heirs is just part of it. There is a lot of additional work then to track down the heirs, and then, um, and, of course, the work that's done, which is all done before you ever approach the heir, all of that work is customized to that one estate. It's not like there is value to it for anything other than that one estate.

And then once the estate is, they use the phrase solved, the next phase is to approach the heirs and talk to them about work, offer to help them in claiming the inheritance in exchange for a percentage of the recovery. If they agree they sign a contract assigning their rights to Kemp or Blake and the company acts on their behalf in claiming the inheritance. And then after that is the final phase and it is an important phase we call it the administration phrase in our papers, sometimes referred to as the legal phase because lawyers are involved where the heir location firm engages counsel, prepares the factual material underlying the court filings, and other material that are needed for probate court, and then gets more information from the heirs, provides information to the heirs, and administers the distribution of the estate and payment of counsel and any vendors.

That last phase can go on for quite a while because some probate court move quite slowly and there is a lot of work. There are people at Kemp whose pretty much sole job is to handle that last phase.

Now, I would like to talk a little bit about the guidelines agreement itself. Um, I've talked a lot about it but it's worth a little tighter analysis of its language. If I could have the slide on that, please. Okay, so what this is -- both -- this is just highlighting some of the language from the indictment and the guidelines. These materials are in the papers before Your Honor. The guidelines are Exhibit B to my declaration. But -- so just looking at the -- on the right, the guidelines, the first paragraph, the very first sentence of the guideline says, if company A contacts an unsigned heir that has been hit by company B, then company A contacts company B and splits the case. That's kind of the main -- one of the main operative aspects of the guidelines basically, but it points out how narrow the guidelines are. It's only in the unusual -- only in the circumstance where both companies find themselves having invested the significant resources to find the estate, chase down the heirs, and then actually show up at one of the heirs that they are in that situation where they are duplicating each other's work. That is the only time that the guidelines can potentially kick in. It's very

different from any of the other -- that narrow application and being isolated to just situations where they're duplicating efforts. It is very different from the cases that are cited in the papers. And then there is that term below that is highlighted in blue that says that the company that was there first, which is company B, gets to keep the full value of the assignments that are in their hand or are dated prior to the date that company A calls. And that -- that clause which is not mentioned in the indictment, is an efficiency enhancing provision because -- because it maintains the incentive for both firms to race to get the best heirs first. That's where the competition really happens in racing to find -- doing the research and finding heirs and if you already have some in hand, those are not split. So that is an efficiency enhancing part of the -- of the guidelines.

Going to the next paragraph below, this just specifies that the process does -- is only initiated when one company contacts an unsigned heir that has been touched by the other company. And if that's not the situation, the contacted company is under no obligation to discuss the case. Again, the guidelines only come in when there is proof that they're working on that they've solved the same estate. And in this way, Your Honor, it's interesting but the guidelines are just kind of a variance of another agreement that is very

common in the heir location industry which is a correspondent agreement where because the firms were geographically diverse, sometimes in the old days, firms would have more resources on the ground in a particular area and they would find that oh, the heirs are located in Florida, Kemp is in Florida, I'm in Seattle, and so we will, you know, they will agree among themselves to split the work, split -- and split the estate.

And that often happens when you have the mother side on one -- in one location and the father side in the other. This agreement, the guidelines agreement, is just a variant on that correspondent coordination agreement which is very much like what we see certainly in New York we see a lot two plaintiff law firms coming together on the same case, um, a big class action case and they get together and they agree okay I will take this responsibility for discovery, you take that responsibility for pretrial and they split the fees. That is -- that is the -- and by the way, it is very public that heir location firms do this correspondent type relationship, it is even on the website of Blake & Blake. So the guidelines were just sort of a variance of that longstanding situation or way of organizing firms coordinating that nobody I'm not aware of anybody claiming was illegal or inappropriate.

If we could flip to the next slide, please. So I'm

going, just to move along, I'm going to go to the second paragraph which is paragraph four of the guidelines and, again, this is one of the key operative paragraphs of the guidelines. It says the split should be 55/45 with the attorney fees coming off the top. The company that does the signing and documenting gets the 55 percent share. The company that has more expenses and does more work gets paid more. This is a critical, you know, efficiency enhancing aspect of the guidelines and -- and it's just laying right out there that the companies doing more work should get paid more. And by the way, and when we speak about right in the guidelines where it says the signing and documenting, the signing and the documenting is what I call the administrative phase. It's the documenting of, you know, of getting the paperwork from the heirs and getting that into proper form for the probate court to -- to get paid out on the will. The guidelines are structured to encourage the firm to do more work and get the bigger share of the fee.

Finally, in the third scenario another efficiency enhancing aspect of the guidelines it has a separate rule for smaller estates. Smaller estates have higher risk, or at least equal risk but lower return because of the value. And so in order to encourage the firms to work on these smaller estates it increases the percentage. Again, an efficiency enhancing aspect of the guidelines and that is

borne out in the actual impact in the real world.

Finally, if we could have the last slide. Another sort of efficiency enhancing aspect of the guidelines not mentioned in the indictment but right there in black and white, and I'm going to focus on scenario B and C. Basically these scenarios show that the company that's there first, if that company finds superior heirs, not a cousin but say a niece or a nephew, then that company can reject the split, um, and there is -- or if only one company has superior heirs and the other one had inferior heirs, that the company can, with the superior heirs, can reject the split also. That's in paragraph B and C. And again, that is all toward encouraging the companies to do the best research and find the best heirs quickly.

So there is a lot of efficiency enhancing aspects written right into the language of the guidelines that are, you know, critically important for the court to consider.

Your Honor, I'm -- moving on from the guidelines I just want to speak briefly about Dan Mannix, he is my client. It's pretty obvious that the company is Kemp & Associates and his name isn't Kemp so he is one of the associates. At the time the guidelines agreement was entered into he had no ownership in the company, he wasn't an officer. The Kemp family owned the company, controlled it, and they still do.

At the time that the guidelines were entered into back in around 2000, Dan was director of operations of the company, but he was ousted from that position by Jeff Kemp in 2005, he was demoted, and he didn't really reassume any sort of leadership position in the company until 2007 when he became owner of a small minority share and director of operations again. And it was a few months after Mr. Mannix was given back authority in the company that he withdrew the company from the guidelines in 2008, July of 2008. Mr. Mitchell is going to speak more to that.

So Your Honor, and just Mr. Mannix is also one of the top high school LaCrosse coaches in the State of Utah, for what it's worth, which is actually quite a lot.

So why is the guidelines agreement properly analyzed under the Rule of Reason and not -- and not the per se rule? As we say in our papers, Rule of Reason is the general rule, per se only applies in specific circumstances. Particular cases that have been recognized overtime and I think the language I mean right out of the Tenth Circuit *Cayman Exploration* case says the per se rule should not be applied to a challenged practice until experience with a particular kind of restraint enables the court to predict with confidence that the Rule of Reason will condemn it. Unless the agreement falls squarely in the per se category, the Rule of Reason applies. That's a quote from the *Milk*

Antitrust case. There's many, many quotes in the cases that talk about how important it is to keep the per se rule in its place. You have to look at the agreement as a whole, and you have to conduct a detailed and case specific analysis in the context of the particular industry.

Now, we're not saying the government argues in their papers oh, the per se rule applies to all industries. Okay, it can, but -- but you can't -- you can't apply it. I mean if there were blatant price-fixing that would be a different story. But when you have a different kind of unusual kind of agreement in an unusual kind of industry, both of which you have here, you can't just stick it in per se in the per se category particularly in a criminal case. This is a criminal case.

Now, as we have said, the government claims customer allocation. It doesn't fit the two recognized classic cases, geographic or existing customers. We pointed out in our papers that we could not find any case that was condemned per se that looks like the guidelines. The government in its response also failed to identify any case that looks like the guidelines having that kind of unusual structure of an occasional when efficient joint service of clients and weighted profit sharing. The government is trying to squeeze this case into the template of the *Suntar Roofing* case. It doesn't fit. It's just very different

kind -- I mean *Suntar* is your classic existing customer allocation case, you know. You don't service my -- my construction companies for roofing, I won't service yours, we won't compete for them. That's it. This case is not near that.

So what are the unique aspects of the guidelines that make it -- take it out of the classic customer allocation agreement? I have said it, but let me just try to list it. The agreement sprung into effect only when it was efficient, only when the two heir location firms had both invested the significant resources to produce the same exact and unique product which is the information relating to the same estate. That's the only time the agreement sprung into effect. And it was efficient at that point for both firms to have one of them take the lead on the last phase of the process which is the administration phase. That's -- it's an unusual circumstance, they both have done it, and in that situation it's sufficient for one to take the lead rather than duplicating the efforts.

And as I have said, we said in our papers, this is a very limited group of estates. Two and a half to three and a half percent total of the total estates worked by Kemp during the relevant period. The guidelines, in addition, they entailed the firm's pooling resources, information regarding the identity and location of the heirs that they

have found. They pooled those resources and used it jointly to their mutual benefit and they also shared the risk of loss, because once they came together, and had one firm take the lead, if the case did not make it through to successful conclusion, they pooled the risk of loss. And that was -- that was a regular occurrence. Not, you know, because a will can show up, a superior heir can show up, and then they're both having invested all this money, they're out.

We point out in our reply brief how the government simply doesn't address these arguments. They ignore the administrative phase which we rely on repeatedly. And as I said, this phase is referenced right in the language of the guidelines agreement because it's the documenting phase.

Your Honor, I want to mention briefly there is another efficiency enhancing aspect of the guidelines, it's mentioned in our papers but we actually have found a new case on this that I want to mention.

THE COURT: Now, this case is not mentioned in your briefing?

MR. ALBERT: I'm about to mention a case that we have not mentioned, yes. We mentioned the efficiency enhancing aspect of the guidelines avoiding what we call blow ups. So this is another thing that makes this industry strange. Because the product is this information, and once it's revealed, in theory, somebody could go and seek -- seek

their inheritance on their own, or they could use somebody. So when both Blake & Blake and Kemp found themselves at an heir and they had done the work on the same estate and they found themselves, if one was angry and resentful and said well, if I'm not going to get it nobody is going to get it, they can reveal the information to the heir and there were incidents of that where basically when Blake & Blake believed it was not going to get the estate, was not going to get the heirs, they would -- they would give the contact information for the estate administrator right to the heir to let them go do it on their own. And that would -- now and often people thought they could get the estate and they wouldn't, it's basically heir location services are not going to be part of this when that -- when Blake & Blake did that. That's tortious conduct. That is tortious interference with prospective economic advantage, it's unfair competition, and it was something that Blake & Blake was engaging in that led to the entering into the guidelines in the first place. And the Sherman Act recognizes, and this is where the case comes in, the Sherman Act recognizes that responding to tortious conduct can make conduct reasonable under the Sherman Act. And that's the case that I am about to mention which is *Avaya, Inc. versus Telecom Labs, Inc.*, 838 F -- 838 F.3d 354, it's Third Circuit 2016. I have a copy, I'm going to hand a copy to the government.

THE COURT: Do you have a copy for the court?

MR. ALBERT: I think I only -- I only have one copy so we will provide one.

THE COURT: Very well.

MR. ALBERT: But that case basically stands for -- I mean in that case, a telecommunications equipment manufacturer sued a manufacturer of -- a provider of services for that equipment because it had previously, the service provider, previously had a license and got access to these proprietary maintenance codes and then the telecom manufacturer terminated the contract and sued the maintenance provider for continuing to access its proprietary information after the contract was over, and so sued for tortious interference and then the maintenance company countersued for Sherman Act violations and saying essentially you're trying to suppress competition for maintenance services. And the Third Circuit found that it was error to dismiss the manufacturer's tort claims and further found that the error tainted the jury's finding against the manufacturer on the antitrust claims because if the jury found that the maintenance company's conduct was tortious, that could have made the manufacturer's alleged anticompetitive conduct undertaken to combat tortious conduct reasonable and not in violation of the Sherman Act. That is -- that is another aspect of the guidelines and how

they came to be, and I think that the *Avaya* decision clearly stands for that proposition.

So Your Honor, our point is that, by their very structure, the guidelines were efficiency enhancing, they allowed for the pooling of resources in the estate administration phase, they also were efficiency enhancing because they provided a mechanism to address further tortious conduct that Blake & Blake was engaging in and blowing up -- blowing up estates. And as we have said, the efficiency enhancing was not just theoretical, it -- it increased the proportion of smaller cases that were worked and had a de minimus impact on price. Whether for purposes of antitrust doctrine you look at this as being reasonable and justified because it's ancillary, um, to the increase in efficiency, or whether you look at it as being effectively a joint venture, um, under either of those two antitrust doctrines we submit that the test for reasonableness is met here, but for purposes of today, um, this motion, we believe that the court can rule now that this -- that these unusual guidelines can't be pigeonholed as on their face per se violative of the antitrust laws and must be addressed under the Rule of Reason and our view is that that leads to a dismissal. I don't think the government -- if the court rules that this is a Rule of Reason case, I don't think the government will pursue it further as a criminal case. They

might have the option to pursue it civilly, but not as a criminal case. As we said, we think the court can rule that way now, but if the court thinks it would be useful to have a fuller factual record, we think the way to go on that is to have a hearing. Um, there are a number of issues around the background of the guideline, their impact, the potential expert analysis of the market and the impact on the market, um, the pooling of resources that could be addressed, and we think that the appropriate way to address it is a hearing prior to trial. So Your Honor with that --

THE COURT: Yes. Let me -- let me just see if I have the main thrust of your argument here in my notes. Now this agreement, and I think there is some question about the termination, that is, whether the agreement there's a violation of the statute of limitations here, I think that is a valid argument or appears to be, but it seems to me now your argument is focused on the agreement came into effect only when the two firms had invested some considerable amount of money in the venture; is that right?

MR. ALBERT: Yes.

THE COURT: That is number one. Number two, that the agreement was efficient enhancing, correct?

MR. ALBERT: Yes.

THE COURT: And number three, that only a small amount of estates were involved in this -- that came into play

under the application of the agreement; is that correct?

MR. ALBERT: Yes.

THE COURT: All right. Anything else?

MR. ALBERT: And just that in the real world, the impact of this agreement was actually helpful and not -- had no negative impact on price. Yes, those are the high points, Your Honor. Thank you with our request to reserve time to respond to what the government adds. By the way, I don't know if the court wants to hear from Mr. Mitchell now.

THE COURT: That is what I was going to ask next. I don't know if -- Ms. Kelley, do you want to respond to this now, or do you want to wait until after we hear the argument on the statute of limitations?

MS. KELLEY: Your Honor, I'm happy to address it now.

THE COURT: All right, very well. You may do so.

MS. KELLEY: May it please the court, Molly Kelley for the United States. Your Honor, I want to respond by addressing two points. First, I want to clarify the legal standard that applies to this action. Then I'll address why the per se rule applies and how it applies here.

So first as the court well knows, this is a criminal case and the Federal Rules of Criminal Procedure apply. We have a valid indictment, and counsel has raised a factual dispute about the very nature of the charged agreement. The government objects to any consideration of factual material

outside of the indictment at this phase. In fact, the nature of the charged agreement is the ultimate question and cannot be decided without a trial on the merits. In particular, I would like to draw the court's attention to the Tenth Circuit case, *United States versus Pope*. There, the Tenth Circuit affirmed this court's correct decision to deny a motion to dismiss that was based entirely on facts outside of the indictment. Also, the *Pope* court explained that pretrial evidentiary hearings on the issue of guilt or innocence, essentially a mini trial, isn't permitted under the criminal rules.

Accordingly, the government requests that the court disregard the extraneous facts including the guidelines agreement and the charts that counsel just showed to Your Honor.

We also requested the court decline to hold a pretrial evidentiary hearing, and we request that the court permit this matter to proceed to trial. And at trial, the government intends to prove exactly what we have alleged in the indictment that this was a per se violation of the Sherman Act. And our evidence will go beyond the mere guidelines document. We will also have witnesses who will explain how it operated exactly like a classic customer allocation conspiracy.

So just to back up for a second, I want to just

explain a little bit more about the per se rule. Now, according to the Supreme Court, certain types of restraints are so predictably and predominantly anticompetitive that they are categorically deemed unlawful per se. These categories of restraints include price-fixing, bid-rigging, and allocation, whether it be an allocation of territories, products or customers. And as counsel correctly pointed out, if these restraints are present in any market, the per se rule can apply.

Now here the indictment alleges a customer allocation agreement. That is, an agreement between horizontal competitors not to compete. Now, an important point that I want to make is that the indictment here, the offense described in the indictment, is more than a mere label. A grand jury found probable cause to indict these defendants for this offense. Now in our paper we request that the court make a pretrial ruling that the per se rule applies to this case.

THE COURT: Yes, I intend to do that, counsel.

MS. KELLEY: Thank you, Your Honor. In accordance with the *Suntar Roofing* case. So at trial I just want to clarify how the per se rule will apply. It's accurate that the per se rule has evidentiary significance. It forecloses certain avenues for the defense to defend the case. So, for example, it would be improper and inadmissible for a

defendant in a per se antitrust case to essentially admit what we call in an antitrust world a naked restraint of trade. But to say the jury should acquit because actually the naked restraint was justified by a need to prevent damage to the business. Or the naked restraint was okay because the prices at the end of the day were reasonable. The per se rule says none of that is proper in a per se antitrust case.

On the other hand, the per se rule does not foreclose a defense that, in fact, this wasn't a naked restraint at all. In fact, the agreement was ancillary to some legitimate joint venture. A joint venture would be characterized by a substantial integration, both partners putting forward capital and technology to create something new, sort of, for example, in the *Polk Brothers* case that both parties cite, there, there was a product allocation between the two parties, but that was necessary and related to the creation of a joint retail facility and joint parking lot.

If those defendants were in a criminal case, the jury would have to acquit them because that would not be a per se violation of the antitrust law. Similarly, in the *BMI* case, yes, there was a price-fixing agreement related to and in support of the blanket copyright music licenses that they were creating. Similarly, if that had been a criminal case

and they had been charged with a per se violation of the Sherman Act, the jury would have been instructed to acquit because that's not a per se violation. Here in the heir location services industry, if a defendant were able to say yes, there was a customer allocation but it was ancillary and in support of some joint venture, say the creation of a genealogical library or a genealogical database, something new, then that too would not be a per se violation. But here, the government is aware of no such legitimate collaboration between these defendants. And, at trial, we intend to show that this agreement operated exactly like a classic garden variety customer allocation agreement.

Now, I'll just turn briefly to addressing some of the questions that the court asked Mr. Albert. Um, first the court asked if it was the defendant's position that the agreement only came into effect when the parties had invested money into the venture. That's irrelevant under the *Cadillac Overall Supply* case that we cite in our brief. That case involved the garment rental industry, and defendants attempted to justify their agreement by saying, without the allocation, there would be a substantial raise on the account and it would -- that they would lose their investment. It's irrelevant in a per se antitrust case.

Next, the court asked Mr. Albert if it was the defendant's position that the agreement was efficiency

enhancing. Well, what the *Polk Brothers* case teaches is that we look to the type of restraint at the time it was entered into. And here, at trial, the government intends to prove that this was a classical customer allocation scheme at the time it was entered into.

Additionally, Your Honor asked Mr. Albert if it's the defense position that only a small number of estates were affected. This consideration is also irrelevant under the *United States versus Cooperative Theatres* case. There the defendants also tried to define the conduct by saying it only affected a small amount of business. That's irrelevant. Unless Your Honor has further questions on this point, I will turn it over.

THE COURT: No, that is fine. You may -- you may be seated, counsel. Do you wish to respond to that now, counsel, or do you want to reserve until after we hear the argument on the statute of limitations?

MR. ALBERT: I think we would like to respond now if we could just have one moment, Your Honor.

THE COURT: Yes, you may have a moment.

(Brief pause in proceedings.)

MR. ALBERT: Your Honor, I'm going to try to be very brief. It is, of course, a legal ruling. It is a legal ruling as to whether this is per se or Rule of Reason. There's no dispute about that. The question is how and when

can this court make that determination.

In our view, the guidelines in and of themselves enable the court to say this is just not a classic. It's just not -- it's just not one of the classics. It's strange, it's unusual, and the industry is unusual. And under those circumstances the court has enough to make that ruling at this time.

Now, I must say it's surprising for the government to try to argue in my mind that the guidelines themselves the court can't look at them. It's just like a -- I mean it -- this case peculiarly is like a contract case. In a contract case, the party saying they breached or arguing anything based a contract can't avoid people looking at the agreement. You know that is something that they are stuck with. And if you look at that agreement and you just can basically consider how this industry generally works, you can see it doesn't fit into the little narrow box. And we think the court can make that decision now.

With regard to whether there should be a hearing or not, if the court wanted to have more information --

THE COURT: I don't think I'm going to have a hearing, counsel, so just go on.

MR. ALBERT: Okay. Um, Your Honor, another argument that the government made is in order for this to be efficiency enhancing it has to be something new, you have to

be creating something new. That is -- that is not borne out by the case law. In the *BMI* case, it is -- that was not the joint licensing for music was not something new, it existed. In many of these cases, the product or service is not something brand new, it's -- it exists, it's being made more efficient, and it's being made more productive through the existence of the agreement. In every one of these cases that the government argues or the plaintiff argues, that's just a naked -- that's just a naked division of markets. It's just a naked price fix. And then you take two steps back and you look at the whole thing and you see that it's not naked. And now -- and the government said and the government this is a classical -- a classical horizontal agreement but they have not identified any agreement that's like it. And when you look into the cases, that is what the courts are doing. They're searching through and they say, you know, one of the cases is *Procaps* where a party argued oh my gosh, we had a legitimate joint venture and then one of the partners to the joint venture merged with another company and then they took that company's manufacturing capabilities off the market. And that's changed this into a naked horizontal agreement to reduce capacity because the -- no, you have to look at the whole thing. You can't just look at that one little aspect of it. Yes, they took the manufacturing capability off the market, but it was part and

parcel of a whole economic relationship and all of these cases are about looking at the economic relationship. And when you do that, um, when you do that, you can see that it's not a naked restraint. The only other thing I would just point out is I think what the government is saying under their view of life, if the court doesn't grant -- doesn't grant the motion, that evidence, all evidence that goes to whether it is per se or Rule of Reason comes in in front of the jury during the trial, and then presumably at the end of it, we both move for the legal ruling and Your Honor decides it. That -- that is a way to go. We don't think it is the best way to go because then the jury is going to be subject to a lot of evidence that either maybe they shouldn't have heard or maybe they have heard for a different reason and it would be a confusing trial for the jury. I just point that out to Your Honor.

THE COURT: Very well. Thank you, counsel.

MR. ALBERT: Thank you.

THE COURT: You may now address the statute of limitations issue.

MR. MITCHELL: Thank you, judge, appreciate your patience. Um, good morning, Your Honor.

THE COURT: Good morning.

MR. MITCHELL: My name is Jim Mitchell and I represent Kemp & Associates, the corporate defendant. And I am going

to address statute of limitations as everyone has said. Um, we have briefed these issues somewhat extensively already for Your Honor and I certainly do not want to repeat everything that was said, but there are a number of key issues that I think would be worth emphasizing today.

So what are statute of limitations? They exist for a well established concern under the law. That is repose. A person need not worry about defending him or herself from charges relating to conduct that is invariably so old, in some cases the evidence is stale, or in other cases just completely not even there. As a result, Your Honor, our Supreme Court has said multiple times that statutes of limitations should be liberally interpreted in favor of this --

THE COURT: Let me just -- let me just interrupt, counsel.

MR. MITCHELL: Please do.

THE COURT: This agreement ended in 2008, right?

MR. MITCHELL: It did, Your Honor.

THE COURT: Now, the government argues that there were facts however that extended that time. Now, can you address that?

MR. MITCHELL: I certainly can, Your Honor.

THE COURT: Very well.

MR. MITCHELL: What happened, and I'll start by saying

what happened in 2008 because it was alluded to by Mr. Albert. On July 30th, 2008, Daniel Mannix, the defendant here, sent an e-mail to his administrative staff. And he basically said, and I'll quote it specifically for Your Honor so it's attached to Mr. Albert's declaration, what he wrote, quote, "the formal agreement that we have had with B&B for the last decade is over," end quote. It couldn't be any clearer. At that point this time, Your Honor, what happened and it's not only what Mr. Mannix said, but it's played out by what actually happened, indeed there were no more allocations of heirs under the guidelines after July 30th, 2008. The government, upon our request, gave us a bill of particulars. And we said to them give us a list of all of the estates that are affected by the conspiracy. And they gave us a list, it was 269 estates, Your Honor. And we looked at that list and we went through it and we determined that the very last date that any estate on that list had ever been subject or made subject to the guidelines by either Kemp or Blake & Blake was, in fact, July 30th, 2008.

So our view is, as Your Honor mentioned, that the conspiracy, the scope of the conspiracy, the purpose of the conspiracy, and the wrongful quote, societal danger that the government is alleging here, is all over as of July 30th, 2008. The government, of course, has a different view.

What the government says is that no, things happened after 2008. There were things that happened in the form of administration of the probate of the estates. And what happens, we don't deny it, Your Honor, once an estate is in probate, there is a period of time that it has to actually be probated. And there are things that can make that process of probate extend for any number of years and it can vary. Depends on what jurisdiction you're in, some jurisdictions move faster than others. Depends on how many heirs there are. Depends on sometimes new assets are found, sometimes new heirs are found. All of these things can change the length and the nature of what happens.

THE COURT: So why does that not toll the statute?

MR. MITCHELL: Well, Your Honor, it doesn't toll the status because it has nothing to do with the evil that is charged in this indictment. That is market allocation. No suppression of competition, no market allocation is going on at all. All that's happening in that period of time is the routine processing of the probate. The hiring the lawyers, the gathering information. Yes, there is trading back and forth of -- of communications sometimes when necessary between the heir location services and indeed as the government points out, its indictment does have language in it that says sometimes the money comes out, the heirs have to be paid, and there is -- there is distribution of the

fees to the, excuse me, to the heir location service company. That is not what is charged as the wrongful conduct. That, Your Honor, are the results of the wrongful conduct. And we have cited a lot of cases for the court that say when you have these types of situations where the wrongful conduct, the thing that is the target of the indictment is over, but there is some sort of tail, something that happens after the fact, that is not -- it doesn't require or it doesn't involve the actual wrongful conduct that is so clearly charged in the indictment or charged as the wrongful act, that doesn't equal extension of the statute of limitations for purposes of the conspiracy. And that's exactly what we have here, Your Honor.

Part of the problems, as well, statute of limitations are very concerned with definiteness and not arbitrariness. And if you took the government's position here, Your Honor, they would have those issues in spades. What would happen here is because of the variability of the way these estates are administered, because there are so many different ways that things can slow down or speed up, someone market -- even if you did a wrongful market allocation of these heirs back in 2008, you would have no way whatsoever to know whether your statute of limitations was going to run five years later, 10 years later, 20 years later. It just doesn't make any sense. That's the real concern with all of

the cases under the law.

Of the cases, Your Honor, I know I'm skipping around, I'm trying to answer Your Honor's question.

THE COURT: Oh, no, I think you're doing okay.

MR. MITCHELL: The cases that the court gets cited by the government are different. They're bid-rigging cases, yes, but they have a significant difference in two different ways from what our cases are, what our case is here and the cases we cite.

One, in those cases, I'm going to read from -- in those cases the court there -- the court in those cases was able to conclude from the substance of what was being charged that, in fact, the central purpose, scope of the conspiracy, was economic enrichment, payment of money. That, I submit, is not what we have here. It is not what they charged in the indictment. If you look in the indictment at the description of the offense, there is two paragraphs under it and they both say only things about market allocation and suppression and market allocation of heirs. Towards the end, when they have a list of a bunch of things that say oh these are the manner and means of the conspiracy, yes they mention the payment of money but that is not the scope of this indictment as described.

The other thing that separates this case, Your Honor, from their cases, is what I call the indefiniteness or

duration of the supposed wrongful conduct. For example, they cite and rely on two Tenth Circuit -- or one Tenth Circuit and one, I think, Eighth Circuit bid-rigging cases where they say that the -- or the court found that the bid-rigging wasn't just the end of the statute of limitations, didn't start the limitations period running, but it extended through the point in time when the payment for the underlying contract went on.

But in those situations, Your Honor, two of them, *U.S. V Evans & Associates*, the bids were let in September of 1979 and the last payment on the contract was 1981. Less than two years. The other one they rely on, *Northern Improvement Company,* the project was awarded in March of 1980, and the last payment was July of 1981. In that case just a little over a year. That is very different, Your Honor, than the situation we have here where if you took the government's position, you would have many, many, many years that these statute of limitations would remain open, and no one could really tell, as I said at the outset, what -- what the end of the day was going to be because there are so many events and circumstances, all of the variables to how the estate is administered that would never allow you to know what is going to happen and when there is going to be a point in time when you could actually say the statute of limitations has started running or ended running.

That, Your Honor, is the very reason we have statute of limitations in the first place, this concern with repose. And if you accept the government's view, that is going to be a very unworkable and contrary to congressional policy application here.

One minute, Your Honor. I did want to say, Your Honor, if you will allow me to go back to something. Now, we have cited for Your Honor a number of cases where there is this problem, where there is this conduct that is the wrongful conduct or the conduct in furtherance of the conspiracy outside of the statute of limitations and there is this tail that something that happens that goes past and into the limitations period. And we cited, Your Honor, a bunch of the cases in our briefs *Dougherty* is one, the *Grimm* case is one, the *Hare* case is another one. I don't want to go through those cases again, I'm happy to if Your Honor wants me to, but there is one case that I kind of gave short-shrift to in our brief and I think it is something that I would like to walk through for the court because I think is a really good example of this issue and sort of crystalizes the very point I'm talking about. It's called *United States versus Great Western Sugar Company,* and it's from the District of Nebraska, a 1930 case. Granted it is old, but it is very helpful, I think.

The case, Your Honor, concerns a price war that took

place in the beet sugar manufacturing industry. As best as I can understand it, this is an industry where companies would buy the raw beet sugar from farmers, take it, process it at their manufacturing plants and then sell it to some ultimate customers.

Now, apparently some competitors learned that another competitor was going to build a manufacturing plant in their area and they got upset. So what they did was they got together and they conspired to basically buy up all of the existing beet product from the farmers by paying exorbitant prices for the beets, essentially cutting off the supply to the guys who wanted to build the factory. The result, Your Honor, of course, was that contracts were signed where and purchases were made of beets at inflated prices and that lead these competitors to be indicted under the Sherman Act for an illegal restraint of trade. And a limitations issue arises in this case for basically the reasons we have here. The contracts that these sort of contracts that inflated prices with wrongful prices, everybody acknowledged they all existed outside of the five-year statute of limitations, or it may have been three in that case, I can't remember, outside the limitations period. But what happened inside the limitations period was that on occasion some of these beets were delivered from the farmers to the manufacturers and paid for. So there was this activity within the period

of time that the limitations period covered. And the government, of course, relied on that to say aha, that makes this timely, those are acts in furtherance of the conspiracy, blah, blah, blah. Well the courts correctly and I think in words that are really relevant here rejected that argument. They said basically basing their view on what conduct was actually charged as wrongful in the indictment, this was not timely. And here I'm going to quote Your Honor from the case. Quote, "the act of price warfare was not the acceptance of the beets or paying for them or slicing them up in factories. It was the price boost by offer to contract at the accepted price and contracting," end quote. The court went on to say that the delivery and the payment for the beets were quote, "just things that transpired in the course of business after the wrongful price war," end quote. And that is Page 154.

I think the parallel here is striking. Even if the conduct, the market allocation were wrongful, of course we deny that and vehemently oppose that conclusion, but it ended. It ended in July of 2008. And the tail, the routine administration of the estates in this case were quote, "just things that happened in the course of business after that market allocation." So I think it's pretty clear, Your Honor, that the government is stretching here and they didn't bring this case in a timely manner. Frankly, they

had every opportunity in our view to do that. We have cited in our briefs some of the points -- some of the stuff we found in discovery that made clear that the government had people coming to them certainly in 2014 and apparently back as far as 2008 and '09 where this issue was being raised by people. Now, an interesting side light to that, Your Honor, and I'll just throw it in here, statute of limitations are concerned with repose. Apparently, on behalf of two former and disquieted employees of Kemp, they had somebody approach the Department of Justice in San Francisco back in, I think, 2008 or '09. We learned about this through discovery. We asked the government about it and said is there anything more to this? And they apparently checked with the San Francisco office and found nothing. Now I would find it hard to believe that if that approach had happened, there wouldn't be some record but it doesn't exist. Now, I'm not saying the government is hiding it, but so much time has gone by that it's not there any more. And that strikes me as the very reason we have statute of limitations in the first place to address concerns like that because it could have been very helpful if we had a document to that point to explain or see what happened here with the statute of limitations. So I'm happy to answer any questions that Your Honor has but --

THE COURT: Thank you, counsel.

MR. MITCHELL: You're welcome.

THE COURT: You may respond, Ms. Kelley.

MS. KELLEY: Thank you, Your Honor. Again, as the court well knows, at this stage the court is bound by the language of the indictment. Here the indictment alleges a broad conspiracy involving not only allocation, but also payments derived from that allocation within the statute of limitations. And a commonsense reading of the indictment is required. Allocation is not an end in itself. The object was to profit from the allocation. And specifically the indictment alleges two types of payments that were part of this conspiracy. The indictment alleges that the conspirators received noncompetitive contingency fees within the statute of limitations and that's alleged at Paragraph 11(h) and 11(i). That type of payment delays the statute of limitations under *Evans & Associates,* the Tenth Circuit case.

Additionally, the indictment also alleges payoffs between conspirators within the statute of limitations. That also delays the statute of limitations under the *Morgan* case and the *Triple A* and *Walker* cases from other circuits.

Now these payoffs between co-conspirators involves continued concerted action, not mere administration, not mere results of the conspiracy. That's continued concerted action and that tolls the statute of limitations. The

government, having alleged as such, should be permitted to prove these overt acts in furtherance of the conspiracy within the statute of limitations to the jury at trial. Now to the extent the defendants are planning to submit a withdrawal of defense, they will bear the burden of proof at trial. Unless the court has any questions for me?

THE COURT: No. I still am not clear. Are you saying that the statute of limitations does not apply to this case?

MS. KELLEY: Your Honor, I'm -- I'm saying that the indictment alleges overt acts within the statute of limitations. So the statute of limitations does not bar this case. And at trial, we will prove acts in furtherance of the conspiracy that happened within five years of the return of the indictment within the statute of limitations.

THE COURT: Even though the agreement was terminated in 2008? Now I still don't understand your argument, counsel.

MS. KELLEY: So the -- first without waiving our objection to consideration of facts outside of the indictment, the alleged conspiracy is that there was an allocation plus payoffs. Even if the allocation of the estates terminated in 2008, the conspirators continued to profit from their conspiracy. They continued to receive noncompetitive contingency fees from their customers which was the object of the conspiracy. They also continued to

pay each other from the spoils of their conspiracy. Both of those overt acts, happening within the statute of limitations, continues the conspiracy effectively.

THE COURT: Okay. Let's hear if there is any response to your argument.

MS. KELLEY: Thank you.

THE COURT: Any response counsel?

MR. MITCHELL: May I have two minutes, Your Honor? Would that be okay?

THE COURT: Pardon me?

MR. MITCHELL: May I have two minutes?

THE COURT: Yes.

MR. MITCHELL: Thank you. First of all, Ms. Kelley uses the word payoffs. That does not appear in the indictment. The indictment has a section at the end that says manner and means of the conspiracy. And that talks about the fact that certainly there were a point in time in all of these estates where the estate is probated and the money comes out and it has to get paid to the heirs and to the heir location services that actually did the work to cause the money to come out. That's what we're talking about. These are not the hidden payoffs. This is the routine compensation for the heir location services for putting in what could be years of work to get the estate to that point. So that's not what I would call a payoff that

is part of the actual wrongful conduct being alleged.

The other thing, Your Honor, I just want to say, every economic crime, I think you could say, has an object to make money. The question really is whether or not the substance of the criminal act charged in the indictment is over and when it's over. And here I don't think I have ever seen a clearer record where you have the actual defendant writing an e-mail saying that agreement, that market allocation agreement, is over as of this date.

And my last point, Your Honor, is although they seem to want to push the indictment read as a whole and move from the back to front what is the sort of the end of the day payments that I'm talking about, you got to look at the indictment because under the title description of the offense there are two paragraphs. They deal only with the suppression of elimination of competition through market allocation. They don't say anything about the routine stuff at the end including the fee payment. So I think that it's pretty clear what the indictment is saying is the wrongful conduct which ended again in 2008. Thank you.

THE COURT: All right, very well. Counsel, excuse me, what I would like to do is meet with my staff attorney and if I have any further questions I will come back on the bench and indicate what questions I wish to have you further address. Or if there is a basis to make some oral ruling,

I -- I will make an oral ruling. If not, I will take it under advisement. So those are the alternatives that will be addressed here in your absence and then I will let you know.

MR. ALBERT: Your Honor, thank you. I just, if I may, I would like to hand up a copy of that *Avaya* case that I mentioned that we --

THE COURT: Yes, you may do so.

MR. ALBERT: And I'll hand a copy. It is a little bit long to read but --

THE COURT: I want to also mention I have in the jury box two outstanding young men who are my externs during their term of law school. One is Brock Humberg, Brock, do you want to raise your hand. The other is Taylor Hadfield. They're both outstanding young men. And one of the great benefits that these externs have, I believe, which I never had when I was in law school, is to be with us and to meet you and if they have any questions because we have outstanding members of our noble profession here on this case, that they can get the spirit of you outstanding lawyers and maybe during this interim, unless they want to come back and meet with me or I don't know, they haven't had the benefit of going all through the briefing, but maybe this would be a good time for them to meet with you. Okay?

So we'll be in recess and I'll meet with my staff

attorney assigned to the case.

MR. ALBERT: Thank you, Your Honor.

THE COURT: Thank you very much counsel for your presentation. I think it has been very helpful and your briefing, I believe, has also been very well presented as far as your respective positions are concerned.

MR. ALBERT: Thank you.

THE COURT: Thank you very much.

(Recess.)

THE COURT: Again, counsel, thank you very much. This has been a -- is an interesting case and I'm going to give you just some comment as to the court's inclinations. It does seem to me that this is a rather unique and unusual case. My view of the Sherman Antitrust Act involves cases that this case does not, in my view, fit like I would like to see cases fit under the Sherman Antitrust Act.

I'm going to take the issue of the statute of limitations, I'm going to give that some further consideration before I make a ruling on that. I think, again, this is -- because it is a rather unusual and interesting case in my view that there may be some application of the statute of limitations here that are going to have to be applied possibly. I'm not sure on that yet. I wanted to ask you, however, the question on the -- whether what standard applies here as to how this case

should be addressed under the Rule of Reason or the per se standard. My inclination is that it is a Rule of Reason case or standard. Now, what effect does that have, counsel, can you tell me?

MS. KELLEY: Yes, Your Honor. Your Honor, the government's position is that the per se rule applies to the indictment.

THE COURT: Yes, I understand. You have made that very clear, counsel.

MS. KELLEY: In the event that Your Honor decides that the Rule of Reason should apply, the government will reassess its options at that point. But --

THE COURT: So maybe what I should do then is make that ruling because that's my inclination is to find that it is a Rule of Reason case because it is unique and unusual in my view. It doesn't affect a very large part of our society, it's just very narrowly focused, and so that will be my ruling. Now, if that -- and then hold in reserve the statute of limitations or do you want me to rule on that too?

MS. KELLEY: If Your Honor sees fit to rule at this time, it's Your Honor's prerogative.

THE COURT: Yes, that's my -- well, counsel, maybe I should ask the defendants in that regard. Did you understand what I am --

MR. ALBERT: I do, Your Honor. Um, we think that Your Honor's ruling on the Rule of Reason will likely complete the case so --

THE COURT: Well, what part will that complete? That's the part that I'm concerned with here. It seems to me, based on what I've said, and what I have heard, that it is my view because it is unique, it is unusual, it doesn't seem to me to fit the classic Sherman Antitrust Act type cases and that the -- it seems to me that it is a Rule of Reason standard. Now am I saying that correct?

MR. ALBERT: Yes, Your Honor, I think you are saying it quite right.

THE COURT: Yes.

MR. ALBERT: I mean I, you know, I guess the ball is in the government's court, but I don't think the government is likely to continue to proceed in a rule of reason case.

THE COURT: Maybe I don't need to address the statute of limitations then.

MR. MITCHELL: Well, and Your Honor, if I may, I don't mean to interrupt but if -- if Your Honor -- given Your Honor's view of the Rule of Reason, I, again, am not sure what the government's response would be, whether it is anticipated though they might try to appeal that issue. If that were to be the case, I think it might be as a matter of practical benefit to have, if there is going to be a statute

of limitations issue that they need to address or we need to address, to have that essentially be part of the appeal issue as well.

THE COURT: Well, I agree with that as well. Do you want to consider this first under the Rule of Reason position that the court is taking, and then indicate whether you are going to move forward. If you are, then I will -- I will rule on the statute of limitations before anything further is done.

MS. KELLEY: Your Honor, the government does not see that it will move forward with a Rule of Reason case.

THE COURT: I didn't understand that, counsel. The government would not what?

MS. KELLEY: If Your Honor decides to proceed under a Rule of Reason, the government would like to assess its options. But as we said in our paper, we don't intend to pursue a Rule of Reason case.

THE COURT: Well then --

MR. ALBERT: I'm sorry, Your Honor. I think Mr. Mitchell actually had a good point. I think that we have the court's ruling that it is Rule of Reason. I think that there is at least a chance that the government will appeal, we hope they won't, we hope that we could resolve it and maybe -- maybe we could. But, um, if the government does appeal, um, I think they would probably -- everyone --

it would be useful for everyone to have a ruling on the statute of limitations. So, um, one option, if your court may, would be to we have that ruling, we could speak to the government and see and then get back to the court in a few days.

THE COURT: I think that would be the way that I would like you to proceed, counsel. Is that okay?

MS. KELLEY: Yes, Your Honor.

THE COURT: All right. And then indicate that to the court and then I will decide it or maybe I won't have to decide, but either the case will be done or the court will then rule on the statute of limitations issue.

MR. ALBERT: Thank you, Your Honor.

MR. MITCHELL: Thank you, Your Honor.

THE COURT: Well, counsel, you have been wonderful and I just appreciate you and I hope you had a great exchange with my externs. I didn't mention they are both in their second year at the J. Reuben Clark Law School at the Brigham Young University and it's just wonderful to have these young students in the law become great professionals such as you. Okay. All right. We'll be in recess then, counsel. Thank you very much.

MR. ALBERT: Thank you, Your Honor.

THE COURT: You want to prepare an order for the court to sign?

MR. ALBERT: We will, Your Honor.

THE COURT: All right, very well.

MR. ALBERT: Thank you.

THE COURT: Thank you. We'll address down the road, if necessary, another trial date or whatever but that is stricken for now.

MR. ALBERT: Thank you, judge.

MR. MITCHELL: Thank you, Your Honor.

(Whereupon, the hearing concluded.)

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

I, Laura W. Robinson, Certified Shorthand Reporter, Registered Professional Reporter and Notary Public within and for the County of Salt Lake, State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof I have subscribed my name this 26th day of June, 2017.

_____

Laura W. Robinson

RPR, FCRR, CSR, CP