IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. KEMP & ASSOCIATES, INC. AND DANIEL J. MANNIX Defendants.	Case No. 2:16-cr-00403-DS ORDER ON DEFENSE MOTION REGARDING APPLICATION OF RULE OF REASON U.S. District Court Judge David Sam Magistrate Judge Brooke C. Wells

WHEREAS, on August 17, 2016, the defendants were charged by way of Indictment with one count of violating the Sherman Act, 15 U.S.C. § 1;

WHEREAS, the defendants moved on March 31, 2017 for an order that this case be subject to the rule of reason for purposes of assessing the legality of the charged conduct under the Sherman Act;[1]

WHEREAS, the government submitted its opposition to the motion on April 28, 2017;

WHEREAS, the defendants submitted their reply on May 12, 2017;

WHEREAS, the Court heard oral argument on the motion on June 21, 2017, at the conclusion of which the Court ruled orally this case is subject to the rule of reason,

The Court hereby makings the following findings:

1. In Sherman Act cases, the rule of reason presumptively applies. *See Texaco Inc. v.*

[1] The defendants' motion further requested an order that the Indictment be dismissed because a rule of reason prosecution does not meet constitutional vagueness standards or, in the alternative, because the statute of limitations bars this prosecution. The Court has not yet ruled on those issues, and they are not addressed in this Order.

Dagher, 547 U.S. 1, 5 (2006). *Per se* liability applies only where the practice fits a *per* se category established by prior precedent, or on its face appears to be one that would always restrict competition and decrease output. *See Cayman Exploration Corp. v. Utd. Gas Pipe Line Co.*, 873 F.2d 1357, 1360 (10th Cir. 1989); *see also Dagher*, 547 U.S. at 5. "The *per se* rule's conclusive presumption that the restraint is unreasonable 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.'" *Cayman Exploration*, 873 F.2d at 1360 (*quoting Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 344 (1982)).

2. In the Indictment, the government characterizes the defendants' conduct as customer allocation, Dkt. 1 ¶¶ 9-10, which has previously been recognized in certain circumstances as a *per se* violation, including by the Tenth Circuit, *see United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 472 (10th Cir. 1990). The Court may not rely on labels applied by the government, however, and must instead analyze the substance of the allegations to determine whether the challenged conduct constitutes customer allocation in a form that has been treated by the courts as a *per se* violation. *See Cayman Exploration*, 873 F.2d at 1360; *see also Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1083-84 (11th Cir. 2016); *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, 1137 (9th Cir. 2011) (en banc); *Polk Bros. Inc. v. Forest City Enters.*, 776 F.2d 185, 187-90 (7th Cir. 1985).

3. The main forms of customer allocation recognized by prior precedent are geographic and existing-customer allocations. But the agreement charged in the Indictment (set forth in a written agreement titled the "Guidelines")[2] does not resemble either of those, and in

[2] The written agreement, called the "Guidelines," documenting the charged conduct was submitted by the defendants' with their motion. The Court may properly consider that document

particular it does not resemble the existing-customer allocation at issue in *Suntar Roofing*. Among other things, the Guidelines were structured in an unusual way, affected a small number of estates, and occurred in a relatively obscure industry (heir location services) with an unusual manner of operation. The government has not identified, and the Court is not aware of, any case addressing the particular kind of restraint at issue here, or otherwise closely resembling this one. *See Cayman Exploration*, 873 F.2d at 1360; *Procaps*, 845 F.3d at 1084. The Court therefore cannot predict with any confidence, and does not believe, that the Guidelines operated as a classic customer allocation. *See In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 273 (6th Cir. 2014).

4. Indeed, unlike other customer allocations, the Guidelines on their face would not necessarily restrict competition or decrease output, but instead contained efficiency-enhancing potential. The Guidelines applied only where two firms had already invested significant resources investigating the same estate. The Guidelines provided for the firms to integrate their efforts going forward, specifically in administering the probate process of the estate, which needed to be done only once. The potential for increased efficiency supports application of the rule of reason instead of the *per se* standard. *See Sulfuric Acid*, 703 F.3d at 1013; *Polk Bros.*, 776 F.2d at 187-90.

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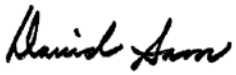
at this stage because it forms the basis of the government's allegations, *see, e.g.*, *Borde v. Bd. of Comm'rs*, 514 F. App'x 795, 799 (10th Cir. 2013), and because the government never disputed as much, *see United States v. Hall*, 20 F.3d 1084, 1087 (10th Cir. 1994); *United States v. Brown*, 925 F.2d 1301 (10th Cir. 1991). Nevertheless, the Court can and would reach the same result based solely on the conduct as it is described in the Indictment.

Based on the foregoing findings, it is hereby ORDERED that this case is subject to the rule of reason for purposes of determining whether the conduct charged in the Indictment violates the Sherman Act.

Dated this 28th day of August, 2017.

BY THE COURT:



Judge David Sam
United States District Court Judge