

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

BRENT BREWBAKER

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

ELIZABETH B. PRELOGAR

Solicitor General

Counsel of Record

JONATHAN S. KANTER

Assistant Attorney General

MALCOLM L. STEWART

Deputy Solicitor General

VIVEK SURI

Assistant to the Solicitor

General

DAVID B. LAWRENCE

DANIEL E. HAAR

STRATTON C. STRAND

PETER M. BOZZO

Attorneys

Department of Justice

Washington, D.C. 20530-0001

SupremeCtBriefs@usdoj.gov

(202) 514-2217

QUESTION PRESENTED

Under Section 1 of the Sherman Act, 15 U.S.C. 1, a horizontal agreement to rig bids is a per se unlawful restraint of trade. Respondent was indicted and convicted for violating Section 1 by participating in such an agreement. The question presented is as follows:

Whether the existence of a vertical relationship between the competing bidders precluded the application of the established per se rule against horizontal bid rigging to respondent's conduct.

PARTIES TO THE PROCEEDING

Petitioner United States of America was the appellee below. Respondent Brent Brewbaker was the appellant below. Contech Engineered Solutions LLC was a defendant in district court but did not participate in the proceedings in the court of appeals.

RELATED PROCEEDINGS

United States District Court (E.D.N.C.):

United States v. Brewbaker, No. 20-cr-481
(Sept. 8, 2022)

United States Court of Appeals (4th Cir.):

United States v. Brewbaker, No. 22-4544
(Feb. 15, 2024)

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutory provision involved.....	2
Statement	2
Reasons for granting the petition	9
A. The decision below is wrong.....	9
B. The question presented warrants this Court’s review, and this case is an excellent vehicle for resolving it.....	18
Conclusion	24
Appendix A — Court of appeals opinion (Dec. 1, 2023).....	1a
Appendix B — District court order (Jan. 13, 2022).....	36a
Appendix C — District court order (Mar. 16, 2021)	48a
Appendix D — Court of appeals order (Feb. 15, 2024).....	78a
Appendix E — Indictment (Oct. 21, 2020)	79a

TABLE OF AUTHORITIES

Cases:

<i>Apex Hosiery Co. v. Leader</i> , 310 U.S. 469 (1940).....	11
<i>Atcheson v. Mallon</i> , 43 N.Y. 147 (1870)	10
<i>Borozny v. Raytheon Technologies Corp.</i> , No. 21-cv-1657, 2023 WL 348323 (D. Conn. Jan. 20, 2023)	21
<i>Boyce Motor Lines, Inc. v. United States</i> , 342 U.S. 337 (1952).....	23
<i>Boyle v. Adams</i> , 52 N.W. 860 (Minn. 1892).....	10
<i>Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.</i> , 441 U.S. 1 (1979).....	21
<i>Business Electronics Corp. v. Sharp Electronics Corp.</i> , 485 U.S. 717 (1988)	2

IV

Cases—Continued:	Page
<i>Business Electronics Corp. v. Sharp Electronics Corp.</i> , 485 U.S. 717 (1988)	21
<i>Continental T.V., Inc. v. GTE Sylvania Inc.</i> , 433 U.S. 36 (1977)	21
<i>Deslandes v. McDonald’s USA, LLC</i> , 81 F.4th 699 (7th Cir. 2023), cert. denied, 144 S. Ct. 1057 (2024)...	19, 20
<i>Gibbs v. Smith</i> , 115 Mass. 592 (1874)	10
<i>Giordano v. Saks Inc.</i> , 654 F. Supp. 3d 174 (E.D.N.Y. 2023).....	21
<i>Graham v. Theis</i> , 47 Ga. 479 (1873).....	10
<i>Hannah v. Fife</i> , 27 Mich. 172 (1873).....	10
<i>Hunter v. Pfeiffer</i> , 9 N.E. 124 (Ind. 1886).....	10
<i>Illinois v. Abbott & Associates, Inc.</i> , 460 U.S. 557 (1983).....	9
<i>Jefferson Parish Hospital District No. 2 v. Hyde</i> , 466 U.S. 2 (1984)	21
<i>Kine v. Turner</i> , 41 P. 664 (Or. 1895).....	10
<i>King v. Winants</i> , 71 N.C. 469 (1874)	10, 14
<i>Leegin Creative Leather Products, Inc. v. PSKS, Inc.</i> , 551 U.S. 877 (2007).....	3, 21
<i>Loyd v. Malone</i> , 23 Ill. 43 (1859).....	10
<i>Martin v. Evans</i> , 19 S.C. Eq. 368 (1845).....	10
<i>McMullen v. Hoffman</i> , 174 U.S. 639 (1899)	10-12
<i>Mitchel v. Reynolds</i> , 24 Eng. Rep. 347 (Q.B. 1711)	16
<i>Musacchio v. United States</i> , 577 U.S. 237 (2016).....	17
<i>NCAA v. Board of Regents</i> , 468 U.S. 85 (1984).....	12
<i>NYNEX Corp. v. Discon, Inc.</i> , 525 U.S. 128 (1998)	21
<i>National Society of Professional Engineers v. United States</i> , 435 U.S. 679 (1978).....	15, 16
<i>North Carolina State Board of Dental Examiners v. FTC</i> , 574 U.S. 494 (2015).....	20
<i>Ohio v. American Express Co.</i> , 585 U.S. 529 (2018) ..	2, 3, 13

Cases—Continued:	Page
<i>Palmer v. BRG of Georgia, Inc.</i> , 498 U.S. 46 (1990).....	14
<i>Ralphsnyder v. Shaw</i> , 31 S.E. 953 (W.V. 1898).....	10
<i>Saxton v. Sieberling</i> , 29 N.E. 179 (Ohio 1891)	10
<i>Standard Oil Co. v. United States</i> , 221 U.S. 1 (1911)	3, 21
<i>State Oil Co. v. Khan</i> , 522 U.S. 3 (1997).....	21
<i>Swan v. Chorpenning</i> , 20 Cal. 182 (Cal. 1862)	10
<i>Texaco Inc. v. Dagher</i> , 547 U.S. 1 (2006)	21
<i>United States v. Addyston Pipe & Steel Co.</i> , 85 F. 271 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899).....	3, 11, 12, 15-17
<i>United States v. Aiyer</i> , 33 F.4th 97 (2d Cir. 2022)	10
<i>United States v. Apple, Inc.</i> , 791 F.3d 290 (2d Cir. 2015), cert. denied, 577 U.S. 1193 (2016)	19
<i>United States v. Heffernan</i> , 43 F.3d 1144 (7th Cir. 1994).....	22
<i>United States v. Koppers Co.</i> , 652 F.2d 290 (2d Cir.), cert. denied, 454 U.S. 1083 (1981)	18, 19
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 (1940).....	13, 14
<i>United States v. Topco Associates Inc.</i> , 405 U.S. 596 (1972).....	14, 21
<i>United States v. Trenton Potteries Co.</i> , 273 U.S. 392 (1927).....	10
<i>United States v. United States Gypsum Co.</i> , 438 U.S. 422 (1978).....	3, 4
<i>Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP</i> , 540 U.S. 398 (2004)	20
<i>Weld v. Lancaster</i> , 56 Me. 453 (1868).....	10
<i>Winn-Dixie Stores, Inc. v. Eastern Mushroom Marketing Cooperative, Inc.</i> , 89 F.4th 430 (3d Cir. 2023).....	21

VI

Cases—Continued:	Page
<i>Woodruff v. Berry</i> , 40 Ark. 251 (1882).....	10
<i>Wooton v. Hinkle</i> , 20 Mo. 290 (1855).....	10

Statutes:

Sherman Act, ch. 647, 26 Stat. 209 (15 U.S.C. 1 <i>et seq.</i>).....	2
15 U.S.C. 1.....	2-4, 6-12, 16, 18, 20, 21
15 U.S.C. 4.....	3
15 U.S.C. 15.....	3
15 U.S.C. 15a.....	3
18 U.S.C. 1341	6
18 U.S.C. 1343	6
18 U.S.C. 1349	6

Miscellaneous:

Antitrust Div., U.S. Dep’t of Justice: <i>Antitrust Resource Manual</i> (rev. Nov. 2017), https://www.justice.gov/archive/usao/ usam/1997/1997ATRM.pdf	22
<i>Federal Antitrust Crime: A Primer for Law Enforcement Personnel</i> (updated Oct. 2023), https://www.justice.gov/atr/page/file/1091651/ dl?inline	15
<i>Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation in Post-Disaster Rebuilding Projects</i> (rev. Oct. 10, 2023), https://www.justice.gov/ sites/default/files/atr/legacy/2013/01/31/ disaster_primer.pdf	22

VII

Miscellaneous—Continued:	Page
<i>Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For</i> (rev. Feb. 2021), https://www.justice.gov/d9/pages/attachments/2016/01/05/211578.pdf	22
Interdepartmental Bid Rigging Investigations Coordinating Committee, U.S. Dep’t of Transportation & U.S. Dep’t of Justice, <i>Suggestions for the Detection and Prevention of Construction Contract Bid Rigging</i> (Feb. 1983), https://www.fhwa.dot.gov/programadmin/contracts/dotjbid.pdf	22
Organisation for Economic Cooperation and Development, <i>Detecting Bid Rigging in Public Procurement</i> (2009), https://www.oecd.org/daf/competition/42594486.pdf	23
2 John Norton Pomeroy, <i>A Treatise on Equity Jurisprudence</i> (1882)	11
Procurement Div., Office of Supply Chain Management, Dep’t of Operational Support, United Nations, <i>United Nations Procurement Manual</i> (2020), https://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/pm.pdf	23
1 Joseph Story, <i>Commentaries on Equity Jurisprudence</i> (1836)	11
William W. Story, <i>A Treatise on the Law of Sales of Personal Property</i> (1847).....	11
Joel Tiffany & E.F. Bullard, <i>The Law of Trusts and Trustees</i> (1862).....	11
U.S. Dep’t of Justice, <i>Justice Manual</i> (updated Apr. 2022), https://www.justice.gov/jm/justice-manual	4

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

BRENT BREWBAKER

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT*

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-35a) is reported at 87 F.4th 563. An order of the district court (App., *infra*, 36a-47a) is not published in the Federal Supplement but is available at 2022 WL 391310. An additional order of the district court (App., *infra*, 48a-77a) is not published in the Federal Supplement but is available at 2021 WL 1011046.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 2023. A petition for rehearing was denied on February 15, 2024 (App., *infra*, 78a). On April 29,

2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 14, 2024. On May 31, 2024, the Chief Justice further extended the time to and including July 12, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. 1, provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

STATEMENT

1. In 1890, Congress enacted the Sherman Act, ch. 647, 26 Stat. 209 (15 U.S.C. 1 *et seq.*), in order to protect competition. Section 1 of the Sherman Act forbids “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. 1. The phrase “restraint of trade,” a term of art borrowed from the common law, encompasses only “unreasonable” restraints. *Ohio v. American Express Co.*, 585 U.S. 529, 540 (2018) (citation and emphasis omitted).

A restraint can be unreasonable in either of two ways. First, some types of restraints are unreasonable

per se. See *American Express*, 585 U.S. at 540. Such restraints categorically violate Section 1 by virtue of “the nature and character of the contract or agreement.” *Standard Oil Co. v. United States*, 221 U.S. 1, 64 (1911). Second, a restraint is unreasonable if it violates a fact-intensive standard known as the rule of reason. See *American Express*, 585 U.S. at 540. A court applying the rule of reason must evaluate “the surrounding circumstances” to determine whether the restraint harms competition. *Standard Oil*, 221 U.S. at 58; see *American Express*, 585 U.S. at 540.

In applying Section 1, this Court has distinguished between horizontal and vertical restraints. Horizontal restraints are agreements among competitors about how to compete, while vertical restraints are agreements among firms at different levels of distribution—*e.g.*, between sellers and buyers of goods—about matters on which they do not compete. See *American Express*, 585 U.S. at 540-541. In general, only horizontal restraints are subject to per se condemnation. See *ibid.* Per se unlawful horizontal restraints include agreements among competitors to divide markets, fix prices, or rig bids. See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (Taft, J.), *aff’d as modified*, 175 U.S. 211 (1899).

A violation of Section 1 is a felony. See 15 U.S.C. 1; *United States v. United States Gypsum Co.*, 438 U.S. 422, 435 (1978). The United States also may bring civil suits seeking to enjoin violations of Section 1, and injured parties, including the United States, may bring civil suits seeking damages. See 15 U.S.C. 4, 15, 15a. Under a longstanding policy of the Department of Justice, the United States generally reserves criminal

prosecution under Section 1 for per se violations, opting for civil enforcement when a restraint violates only the rule of reason. See U.S. Dep't of Justice, *Justice Manual* § 7-2.200 (updated Apr. 2022); *Gypsum*, 438 U.S. at 439-440.

2. This case arises out of a conspiracy to rig bids for construction contracts awarded by the North Carolina Department of Transportation (NCDOT). See App., *infra*, 79a. Under those contracts, NCDOT pays firms to install aluminum structures that prevent flooding near roads, bridges, and overpasses. See *ibid.* To complete a project, the firm that is awarded a contract must build or buy aluminum pieces, ship them to the project site, assemble them, and install the assembled structure at the site. See *id.* at 80a-81a, 87a.

Three firms—Pomona Pipe Products, Contech Engineered Solutions, and Lane Enterprises—consistently bid for those contracts. See App., *infra*, 2a. Although Pomona and Contech competed against each other for the contracts, they also had a supply relationship: Pomona bought aluminum from Contech, and it used that aluminum in performing the NCDOT contracts for which Pomona was the winning bidder. See *ibid.*

In approximately 2009, Contech put respondent Brent Brewbaker, a sales manager, in charge of its bids for aluminum-structure contracts. See App., *infra*, 3a. Starting around that time, respondent conspired with Pomona to rig the bids. See *ibid.* Pomona would first tell respondent or one of his subordinates how much it was planning to bid, and Contech would then submit a higher, losing bid. See *ibid.* Because Lane's bids were usually higher than Pomona's and Contech's, Contech's submission of a losing bid generally ensured that Pomona would win the contract. See *ibid.* Pomona then

would complete the projects using aluminum bought from Contech. See *id.* at 6a.

Respondent's deliberate submission of losing bids on behalf of Contech formed an essential part of the bid-rigging scheme. Respondent believed that NCDOT would award a contract only if it received at least three bids. See C.A. J.A. 1826. He feared that, if Contech stopped bidding altogether and left Pomona and Lane as the only remaining bidders, the contracts would go unawarded. See *ibid.* By deliberately submitting losing bids, respondent suppressed competition, yet created an illusion of competition that misled NCDOT into awarding the contracts. See *ibid.* Compounding the deception, respondent falsely certified that the bids were "submitted competitively and without collusion." App., *infra*, 4a (citation omitted).

That arrangement benefited Pomona, Contech, and respondent. Pomona won contracts to build aluminum structures; Contech obtained business supplying aluminum to Pomona; and respondent earned bonuses based on Contech's performance. See App., *infra*, 4a, 6a; C.A. J.A. 2183-2186. But that arrangement harmed NCDOT and, ultimately, the taxpayers. Before 2009, Contech had sometimes submitted lower bids than Pomona, and respondent's bid-rigging scheme deprived NCDOT of the money that it would have saved if Contech had continued to compete actively for aluminum-structure contracts. See C.A. J.A. 2120-2121. And, to the extent that the illusion of true competition induced NCDOT to award contracts that it would not have awarded if it had known that Contech's bids were deliberately inflated, those awards caused further harm to the public fisc.

Respondent, who received regular training on anti-trust compliance, understood that his bid-rigging scheme

violated federal law. See App., *infra*, 4a. One training document warned respondent that “Contech cannot agree with the dealer to supply a higher bid.” C.A. J.A. 2189-2190. Another document advised respondent to “[a]void discussion with the dealer about the areas on which you are competing (i.e., your price to contractors or what you are bidding on a project).” *Id.* at 2137. A third document asked: “Can Contech and the dealer agree on the amount of either Contech’s or the dealer’s submitted bid price?” *Ibid.* It answered: “No. In this context Contech and the dealer are competitors.” *Ibid.* But instead of heeding those warnings, respondent tried to avoid detection through actions such as deleting text messages containing evidence of the collusion. See App., *infra*, 4a.

Respondent’s bid-rigging scheme lasted from around 2009 until 2018. See App., *infra*, 80a. Over that period, Pomona won approximately 340 aluminum-structure contracts worth a total of more than \$23.9 million. See C.A. J.A. 2235, 2290.

3. A federal grand jury in the Eastern District of North Carolina indicted respondent and Contech on one count of committing a per se violation of Section 1 of the Sherman Act by conspiring to rig bids. See App., *infra*, 85a-87a. The grand jury also indicted respondent and Contech on three counts of mail fraud, in violation of 18 U.S.C. 1341; one count of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiring to commit mail and wire fraud, in violation of 18 U.S.C. 1349. See App., *infra*, 87a-96a.

Before trial, Contech and respondent filed a motion asking the district court to apply the rule of reason in determining whether the indictment stated a Sherman Act violation. See App., *infra*, 48a & n.1. Observing

that the indictment alleged only a per se violation, the court construed that filing as a motion to dismiss the indictment's Sherman Act count. See *id.* at 55a-57a. The court denied that motion, see *id.* at 48a-77a, explaining that a horizontal agreement to rig bids constitutes a per se violation of Section 1, see *id.* at 59a.

Contech and respondent argued that Contech's agreement with Pomona "fail[ed] the definition of bid-rigging condemned as per se unreasonable" because Contech and Pomona "were engaged in a vertical manufacturer-distributor relationship" insofar as Contech supplied aluminum to Pomona. App., *infra*, 69a. The district court rejected that contention, see *id.* at 69a-77a, explaining that the argument "ignore[d] the fact that, in their roles as separate bidders for NCDOT projects, defendant Contech and [Pomona] facially competed for award of the projects," *id.* at 69a. Although the court acknowledged that the overall Contech-Pomona relationship had vertical "aspects," it determined that "the restraint at issue was horizontal" because it "restrained how the two companies would compete against one another in the bidding process." *Id.* at 76a-77a. Respondent renewed his argument in a later motion to dismiss the Sherman Act count, but the district court denied that motion as well. See *id.* at 36a-47a.

Contech pleaded guilty, but respondent proceeded to trial. See App., *infra*, 7a. The jury found respondent guilty on all counts. See Judgment 1-2. The district court sentenced him to 18 months of imprisonment, to be followed by two years of supervised release, and imposed a fine. See Judgment 3-4.

4. The Fourth Circuit reversed respondent's conviction on the Sherman Act count, affirmed his convictions

on the fraud counts, and remanded for resentencing. See App., *infra*, 1a-35a.

The court of appeals held that the district court should have dismissed Count One of the indictment, which charged respondent with a *per se* violation of Section 1. See App., *infra*, 8a-31a. The court stated that, “when determining whether a restraint is horizontal or vertical,” a court should “look at the *relationship* of the parties, not just the nature of the limitation imposed.” *Id.* at 18a. “The only restraints that the Supreme Court has held to be *per se* unreasonable,” the court claimed, “are purely horizontal, or, in other words, are agreements between entities who are *only* related as competitors.” *Id.* at 16a n.9. Noting that Contech and Pomona were “related *both* vertically and horizontally,” the court concluded that the agreement alleged in the indictment fell outside the scope of the *per se* rule recognized by this Court’s precedents. *Id.* at 19a.

The court of appeals then concluded that the *per se* rule should not be “extended” to “the category of restraint alleged in the indictment.” App., *infra*, 24a-25a. The court stated that, “before we apply the *per se* rule to a new category of restraint, we must apply a presumption in favor of the rule of reason that may be overcome only with demonstrable economic effect.” *Id.* at 22a. In the court’s view, the presumption could not be overcome here because “economic analysis” showed that “this type of restraint has possible procompetitive effects.” *Id.* at 25a. Specifically, the court suggested that the bid rigging “allow[ed] Contech to maintain its relationship with Pomona by making sure it never undercut, and thus upset, its distributor.” *Id.* at 30a. “By increasing Pomona’s sales of Contech’s aluminum,” the court continued, the restraint could have led “to greater

competition between Contech and other aluminum manufacturers.” *Ibid.* The court of appeals emphasized that it was not “decid[ing] whether the particular restraint here was actually procompetitive.” *Id.* at 25a n.13. The court held, however, that “Count One of the indictment should have been dismissed for failing to state an offense” because Count One charged a per se antitrust violation and the agreement alleged here was not per se unlawful. *Id.* at 31a.

The United States filed a petition for rehearing, which the court of appeals denied. See App., *infra*, 78a.

REASONS FOR GRANTING THE PETITION

For more than a century, courts have understood that an agreement between competing bidders to submit collusive bids constitutes a per se violation of Section 1. In the decision below, however, the Fourth Circuit held that the longstanding per se rule against bid-rigging does not apply when the competing bidders also have a vertical relationship with each other. That decision conflicts with this Court’s precedents, distorts established antitrust doctrine, and defies common sense. It also conflicts with decisions of the Second and Seventh Circuits, and it has significant practical implications. This Court should grant the petition for a writ of certiorari and reverse.

A. The Decision Below Is Wrong

Contech’s agreement with Pomona constituted a per se unlawful horizontal restraint. The court of appeals erred in holding that the agreement should instead be analyzed under the rule of reason.

1. “[B]id rigging” schemes are “core Sherman Act violations.” *Illinois v. Abbott & Associates, Inc.*, 460 U.S. 557, 572 (1983). Competing bidders engage in per

se unlawful conduct when they conspire to refrain from bidding or to submit collusive bids. See, e.g., *United States v. Aiyer*, 33 F.4th 97, 115 (2d Cir. 2022).

The per se rule against bid-rigging schemes follows from the well-established per se rule against horizontal agreements to fix prices. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 395-402 (1927). Bid rigging is simply a form of horizontal price fixing: Competing bidders agree upon the price to be paid in an auction. See *Aiyer*, 33 F.4th at 115.

The per se rule against bid rigging was an established common-law rule when Section 1 was enacted. Common-law courts treated agreements among bidders to “suppress competition,” including by submitting “fictitious bids,” as unlawful restraints of trade. *McMullen v. Hoffman*, 174 U.S. 639, 649-650 (1899). They regarded such agreements as “illegal in their nature,” so that “no inquiry [wa]s necessary as to the particular effect of any one contract.” *Id.* at 649. State courts thus routinely invalidated agreements among potential competitors “not to bid against each other, so as to enable one or both to get the contract at a much higher rate.” *King v. Winants*, 71 N.C. 469, 470 (1874).¹ And commentators recognized that the law forbade “agree-

¹ See, e.g., *Ralphsnyder v. Shaw*, 31 S.E. 953, 956 (W.V. 1898); *Kine v. Turner*, 41 P. 664, 665 (Or. 1895); *Boyle v. Adams*, 52 N.W. 860, 861 (Minn. 1892); *Saxton v. Sieberling*, 29 N.E. 179, 181 (Ohio 1891); *Hunter v. Pfeiffer*, 9 N.E. 124, 126-127 (Ind. 1886); *Woodruff v. Berry*, 40 Ark. 251, 263-269 (1882); *Gibbs v. Smith*, 115 Mass. 592, 593 (1874); *Hannah v. Fife*, 27 Mich. 172, 179-181 (1873); *Graham v. Theis*, 47 Ga. 479, 483 (1873); *Atcheson v. Mallon*, 43 N.Y. 147, 150 (1870); *Weld v. Lancaster*, 56 Me. 453, 456-457 (1868); *Swan v. Chorpenning*, 20 Cal. 182, 184-185 (1862); *Loyd v. Malone*, 23 Ill. 43, 48 (1859); *Wooton v. Hinkle*, 20 Mo. 290, 292-294 (1855); *Martin v. Evans*, 19 S.C. Eq. 368, 380-384 (1845).

ments, whereby parties engage not to bid against each other at a public auction.” 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 293, at 290 (1836).²

In a landmark decision issued eight years after Section 1’s enactment, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff’d as modified, 175 U.S. 211 (1899), then-Judge Taft explained that Section 1 incorporated those background common-law principles. In that case, pipe manufacturers had conspired to rig the bidding for the sale of iron pipes to local governments. See *id.* at 293-294. Judge Taft determined that the agreement constituted a per se unlawful restraint of trade. See *ibid.* “It is well settled,” he explained, “that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor, and the ensuing sale or contract will be set aside.” *Id.* at 293. This Court has treated Judge Taft’s “classic opinion” as an authoritative exposition of the Sherman Act and its common-law antecedents. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 498 (1940).

Antitrust law treats horizontal bid-rigging schemes as per se unlawful because of their inherently anticompetitive nature. Bid rigging “compel[s] the public to pay an increase over what the price would have been, if fixed by competition.” *Addyston Pipe*, 85 F. at 292; see *McMullen*, 174 U.S. at 651 (“The bids might have been lower yet if there had been competition.”). It also tends to “create in the minds of the [entities] inviting bids the

² See, e.g., 2 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 934, at 445 (1882); Joel Tiffany & E.F. Bullard, *The Law of Trusts and Trustees* 127 (1862); William W. Story, *A Treatise on the Law of Sales of Personal Property* § 484, at 415-419 (1847).

[false] belief that competition existed,” *Addyston Pipe*, 85 F. at 293, thereby deterring those entities from “re-ject[ing] all the bids and advertis[ing] for a new letting,” *McMullen*, 174 U.S. at 647.

Under those principles, respondent’s agreement with Pomona constitutes a per se unlawful restraint of trade. Respondent entered into the very type of agreement that the Sherman Act has forbidden since its enactment: “an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition.” *Addyston Pipe*, 85 F. at 293.

2. The court of appeals nonetheless concluded that the well-established per se rule against bid rigging did not apply to the agreement alleged in the indictment. The court stated that the per se rule applies only to “certain categories of horizontal restraints,” and that “when determining whether a restraint is horizontal or vertical,” a court should “look at the *relationship* of the parties, not just the nature of the limitation imposed.” App., *infra*, 14a, 18a. The court then determined that Contech and Pomona had “a hybrid relationship with both vertical and horizontal components”; that respondent’s bid-rigging scheme accordingly constituted a “hybrid restraint” rather than a horizontal restraint; and that this Court has yet to “apply the *per se* rule to [this] new category of restraint.” *Id.* at 16a, 21a-22a. The court of appeals was correct that, under this Court’s Section 1 precedents, per se condemnation is generally reserved for horizontal restraints. See p. 3, *supra*. The rest of the court’s analysis, however, is deeply flawed.

A “horizontal restraint” is “an agreement among competitors on the way in which they will compete with one another.” *NCAA v. Board of Regents*, 468 U.S. 85,

99 (1984); see *Ohio v. American Express Co.*, 585 U.S. 529, 543 n.7 (2018) (“[H]orizontal restraints involve agreements between competitors not to compete in some way.”). The agreement alleged in the indictment fits that definition. To be sure, once NCDOT had awarded a particular aluminum-structure contract to Pomona, and Pomona set out to perform the contract, Contech’s sale to Pomona of the necessary aluminum created a vertical relationship between the companies. But at the antecedent stage when NCDOT decided whether and to whom a particular aluminum-structure contract would be awarded, the two companies stood in a horizontal relationship as competing bidders. See App., *infra*, 69a (“[I]n their roles as separate bidders for NCDOT projects, defendant Contech and [Pomona] facially competed for award of the projects.”). And the agreement for which respondent was convicted concerned the way in which those companies would compete with one another: It provided that Contech would submit bids higher than Pomona’s so that Pomona would win the contracts. See *id.* at 76a-77a (district court explains that the bid-rigging agreement alleged in the indictment “restrained how the two companies would compete against one another in the bidding process”). The charged agreement was therefore a per se unlawful horizontal restraint.

It makes no difference that the overall relationship between Contech and Pomona also had a vertical component. This Court has treated agreements among competitors not to compete as per se unlawful horizontal restraints even when the competitors also had vertical relationships. For example, in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), oil companies conspired with each other to fix gasoline prices.

See *id.* at 166-168 & n.4. The Court held that the conspiracy violated the per se rule against horizontal price fixing, even though the oil companies' relationship had vertical components as well, since some of the companies had bought gasoline from some of the other companies. See *id.* at 167-168, 210-228. Similarly in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam), a pair of bar-review companies, BRG and Harcourt, agreed that BRG would sell bar-review courses only in Georgia while Harcourt would sell them only outside Georgia. See *id.* at 47. The two companies also had a vertical relationship, in that BRG obtained a license to use Harcourt's bar-review materials in Georgia. *Ibid.* The Court nevertheless held that the parties' market-allocation agreement "was unlawful on its face," *id.* at 50, citing the established per se rule against "agreements between competitors to allocate territories to minimize competition," *id.* at 49 (citing *United States v. Topco Associates Inc.*, 405 U.S. 596, 608 (1972)).

The court of appeals' decision is inconsistent not only with this Court's precedents, but also with the Sherman Act's common-law background and original meaning. In line with the Court's modern precedents defining horizontal restraints, common-law courts asked simply whether competing bidders had agreed upon the way in which they would compete in the bidding process. See, e.g., *King*, 71 N.C. at 470. Neither the court of appeals nor respondent has identified any common-law case in which the court asked whether the competing bidders also had a vertical relationship. Nor did Judge Taft conduct any such inquiry in *Addyston Pipe*.

The court of appeals' approach defies common sense as well. In a bid-rigging scheme, the winner usually must compensate the loser for agreeing to submit a los-

ing bid. See, *e.g.*, *Addyston Pipe*, 85 F. at 294 (explaining that the winner paid a “bonus” to the other bidders). Often, the winner will “pay off the co-conspirators through * * * subcontracts.” Antitrust Div., U.S. Dep’t of Justice, *Federal Antitrust Crime: A Primer for Law Enforcement Personnel* 3 (updated Oct. 2023). And in this case, Contech benefited from the bid-rigging scheme because it supplied aluminum for the NCDOT projects. See p. 5, *supra*. Under the court of appeals’ approach, however, the very act of paying off the losing bidder—*e.g.*, by awarding it a subcontract or by buying materials from it—establishes a vertical relationship with that firm, exempts the conspiracy from the established per se rule, and effectively shields the conspirators from criminal prosecution. A court should not read Section 1 to produce such a perverse outcome.

3. For the reasons stated above, the determination whether a particular restraint is horizontal or vertical turns on the nature of *that restraint*, not on the overall relationship between the parties to the agreement. In some circumstances, however, the existence of a legitimate vertical collaboration between the parties may bear on whether a challenged horizontal restraint is *lawful*. Antitrust law includes an established framework—the ancillary-restraints doctrine—for addressing horizontal restraints imposed by competitors who also have collaborative relationships, including vertical relationships. Under that doctrine, an otherwise per se unlawful horizontal restraint may be lawful if it is ancillary to a legitimate transaction or collaboration and promotes competition overall. See *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689 (1978).

The ancillary-restraints doctrine was an established feature of the common law before the Sherman Act was enacted. See *Professional Engineers*, 435 U.S. at 689. In the case that pioneered the doctrine, the owner of a bakery sold his business and promised not to compete with the purchaser. See *Mitchel v. Reynolds*, 24 Eng. Rep. 347, 348 (Q.B. 1711). Although a promise not to compete ordinarily constitutes an unlawful restraint of trade, the Court of Queen’s Bench enforced the promise because it was ancillary to the sale of the business. See *ibid.* As this Court later observed, “[t]he long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition.” *Professional Engineers*, 435 U.S. at 689. Judge Taft explained in *Addyston Pipe*, and this Court has since confirmed, that Section 1 incorporates that common-law doctrine. See *ibid.*; *Addyston Pipe*, 85 F. at 282-283.

Under established Section 1 precedent, a court should apply the ancillary-restraints doctrine when a defendant argues that a particular horizontal restraint enhances competition, and therefore complies with Section 1, because it promotes a procompetitive vertical collaboration. Under that approach, a court first decides whether the challenged restraint is ancillary to a legitimate collaboration and then (if the court answers that question in the affirmative) determines whether the overall arrangement is procompetitive under the rule of reason. In this case, respondent had the opportunity to argue that Contech’s agreement not to compete with Pomona satisfied those requirements. Although respondent stated in his motion to dismiss the indictment that “his bidding conduct was * * * ancillary

to” that supply relationship, he did not develop that argument. C.A. J.A. 1090 n.11. And respondent in any event forfeited any such defense at trial by failing to adduce any evidence to support it and by failing to request a jury instruction on it. See *id.* at 1491-1617 (proposed instructions); see also *Musacchio v. United States*, 577 U.S. 237, 246-247 (2016) (explaining that a criminal defendant must present a defense at trial in order to preserve it for appeal).

In concluding that respondent’s bid-rigging scheme was not *per se* unlawful, the court of appeals surmised that Contech’s submission of deliberately inflated bids “could allow Contech to maintain its relationship with Pomona by making sure it never undercut, and thus upset, its distributor.” App., *infra*, 30a. Insofar as the court noted the possibility that the two firms’ horizontal collusion might have furthered their vertical collaboration as supplier and purchaser of aluminum, the court’s discussion bore a superficial resemblance to an ancillary-restraints inquiry. The two modes of analysis differ, however, in important respects.

Under the ancillary-restraints doctrine, respondent would bear the burden of showing not only that a separate, legitimate collaboration between Contech and Pomona existed, but also (among other things) that the horizontal bid-rigging conspiracy was “subordinate” and collateral to that legitimate collaboration and “reasonably necessary” to achieve its procompetitive objectives. *Addyston Pipe*, 85 F. at 285, 291. Under the court of appeals’ approach, by contrast, the mere existence of a vertical aspect to the alleged conspirators’ overall relationship means that *no* agreement between those two parties can be deemed “horizontal,” and that a court must ask whether “the *per se* rule should be extended”

to a purported “hybrid restraint.” App., *infra*, 16a, 24a-25a. The Fourth Circuit further held that, in determining whether to “apply the *per se* rule to a new category of restraint,” a court “must apply a presumption in favor of the rule of reason that may be overcome only with demonstrable economic effect.” *Id.* at 22a. That analytic approach is far more accommodating to antitrust defendants, and far less consistent with the historically disfavored status of practices like collusive bidding, than the established ancillary-restraints doctrine.

B. The Question Presented Warrants This Court’s Review, And This Case Is An Excellent Vehicle For Resolving It

1. The court of appeals’ decision creates a circuit conflict concerning Section 1’s proper application to circumstances like these, where competing firms that also have a vertical relationship agree as to the manner in which they will compete. Two courts of appeals, the Second and Seventh Circuits, have held that such agreements constitute *per se* unlawful horizontal restraints. Those courts have rejected the legal theory that the Fourth Circuit accepted here—namely, that the existence of any vertical aspect to the competitors’ overall relationship is a sufficient ground for conducting rule-of-reason review. This Court should grant certiorari to resolve that conflict.

In *United States v. Koppers Co.*, 652 F.2d 290, cert. denied, 454 U.S. 1083 (1981), the Second Circuit rejected the mode of analysis that the Fourth Circuit later adopted here. In *Koppers*, two firms agreed to rig bids and to allocate markets for contracts to resurface roads. See *id.* at 291-293. The firms had both a horizontal relationship (they competed for the contracts) and a vertical relationship (one of them bought road tar from the other). See *id.* at 292. The court held that the bid-

rigging and market-allocation agreement “clearly” constituted “a *per se* violation” because “the two firms were indisputably horizontal competitors.” *Id.* at 297. It expressly rejected the contention that the agreement was instead subject to the rule of reason because the firms’ relationship had “vertical elements.” *Ibid.*

The Second Circuit adhered to that approach in *United States v. Apple, Inc.*, 791 F.3d 290 (2015), cert. denied, 577 U.S. 1193 (2016). Apple, which was planning to enter the market to sell e-books, orchestrated and participated in a conspiracy among e-book publishers to fix e-book prices. See *id.* at 296-297. Although Apple had vertical relationships with the publishers—it distributed their e-books through its electronic bookstore—the Second Circuit held that the conspiracy was *per se* unlawful. See *id.* at 321-325. The Second Circuit explained that courts must evaluate “the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked.” *Id.* at 297. That approach directly conflicts with the Fourth Circuit’s approach here, under which a court must focus on “the *relationship* of the parties” rather than on “the nature of the limitation imposed.” App., *infra*, 18a. The Fourth Circuit sought to distinguish that decision on the ground that Apple “encouraged” but did not become “a party to the [e-book publishers’] agreement.” *Id.* at 20a. That purported distinction reflects a misunderstanding of the Second Circuit’s decision, which stated that Apple had “agreed to participate in the horizontal conspiracy.” *Apple*, 791 F.3d at 325.

In *Deslandes v. McDonald’s USA, LLC*, 81 F.4th 699 (2023) (Easterbrook, J.), cert. denied, 144 S. Ct. 1057 (2024), the Seventh Circuit likewise rejected the legal

theory underlying the decision below. That case involved a clause of the McDonald's franchise agreement prohibiting a franchise operator from poaching workers from other franchisees or from McDonald's itself. See *id.* at 702. McDonald's and the franchisees had both a horizontal relationship (McDonald's operated its own restaurants and thus competed with the franchisees for labor) and a vertical relationship created by the franchise agreement. See *ibid.* In defending against a civil suit under Section 1, McDonald's argued that the agreements were subject to the rule of reason because the relationship between McDonald's and its franchisees had "vertical aspects." McDonald's Br. at 20, *Deslandes, supra* (No. 22-2333) (citation omitted). The Seventh Circuit rejected that argument, explaining that McDonald's had imposed "a horizontal restraint" by agreeing with its franchisees about how to compete for labor. *Deslandes*, 81 F.4th at 703. The court added that the ancillary-restraints doctrine provided the right framework for evaluating the argument that the promises not to poach workers facilitated McDonald's vertical relationship with its franchisees. See *ibid.*

2. The practical importance of the question presented increases the need for this Court's review. The Sherman Act is the "Magna Carta of free enterprise." *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415 (2004) (citation omitted). It is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015) (citation omitted).

The established principles that govern a court’s choice between the rule of reason and the per se rule are a fundamental and practically consequential aspect of federal antitrust law. As discussed above, a longstanding Department of Justice policy generally reserves criminal prosecution under Section 1 for per se violations. See pp. 3-4, *supra*. The choice between the rule of reason and the per se rule also shapes the course of civil antitrust litigation. A court applying the rule of reason must conduct a fact-intensive inquiry into “surrounding circumstances,” while a court applying the per se rule need consider only “the nature or character of the contract.” *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). This Court has often granted review to decide whether particular types of restraints are per se unlawful or are instead subject to the rule of reason.³

Heightening the practical importance of the question presented, so-called “hybrid” relationships are ubiquitous in today’s economy. Courts routinely encounter antitrust cases involving firms with both horizontal and vertical relationships.⁴ By granting review in this case,

³ See, e.g., *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998); *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977); *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

⁴ See, e.g., *Winn-Dixie Stores, Inc. v. Eastern Mushroom Marketing Cooperative, Inc.*, 89 F.4th 430, 436 (3d Cir. 2023) (“conspiracy involving interconnected horizontal and vertical elements”); *Giordano v. Saks Inc.*, 654 F. Supp. 3d 174, 204 (E.D.N.Y. 2023) (“no-hire agreements that have both horizontal and vertical ele-

this Court can clarify how Section 1 applies to those recurring fact patterns.

3. The court of appeals’ refusal to apply the per se rule to respondent’s bid-rigging scheme highlights the aberrant nature of the court’s ruling and the need for this Court’s review. Bid rigging is “an enormously common form of price fixing” and “an enormous emphasis of the Department of Justice in enforcing the Sherman Act.” *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) (Posner, J.). The Department’s Antitrust Division recently described bid rigging as “[o]ne of the most common violations” that it prosecutes. Antitrust Div., U.S. Dep’t of Justice, *Preventing and Detecting Bid Rigging, Price Fixing, and Market Allocation in Post-Disaster Rebuilding Projects 2* (rev. Oct. 10, 2023).

“Subcontracting arrangements are often part of a bid-rigging scheme. Competitors who agree not to bid or to submit a losing bid frequently receive subcontracts * * * in exchange from the successful low bidder.” Antitrust Div., U.S. Dep’t of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For 3* (rev. Feb. 2021). Law-enforcement manuals therefore advise investigators to look for patterns in which a “successful bidder subcontracts work to competitors that submitted unsuccessful bids on the same project.” *Id.* at 4.⁵

ments”); *Borozny v. Raytheon Technologies Corp.*, No. 21-cv-1657, 2023 WL 348323, at *7 (D. Conn. Jan. 20, 2023) (conspiracy “among competitors” whose relationship included “some potentially vertical elements”).

⁵ See, e.g., Antitrust Div., U.S. Dep’t of Justice, *Antitrust Resource Manual 5* (rev. Nov. 2017) (“Where companies that submitted high bids on a specific project are later identified as project subcontractors, the bids should be analyzed carefully.”); Interdepart-

The court of appeals’ decision, however, transforms that common feature of bid-rigging schemes from a clue that helps investigators catch violators into a shield that helps violators escape criminal liability. The subcontract creates a vertical relationship between the two firms, and the Fourth Circuit treats that vertical relationship as exempting both the winning and losing bidders from the settled per se rule against horizontal bid rigging. That inversion makes it substantially more difficult for the government to protect taxpayers from schemes to rig bids for government contracts.

4. This case is an excellent vehicle for resolving the question presented. No threshold procedural obstacle would prevent the Court from reaching that question. The parties litigated the question in both the district court and the court of appeals, and each court issued a thorough opinion resolving it. See App., *infra*, 8a-31a, 69a-77a. And because the case arises on a motion to dis-

mental Bid Rigging Investigations Coordinating Committee, U.S. Dep’t of Transportation & U.S. Dep’t of Justice, *Suggestions for the Detection and Prevention of Construction Contract Bid Rigging* 4 (Feb. 1983) (“These practices have, in the past, indicated collusion: * * * The successful bidder repeatedly subcontracts work to companies that submitted higher bids on the same projects.”) (capitalization altered; emphasis omitted); Organisation for Economic Cooperation and Development, *Detecting Bid Rigging in Public Procurement* 9 (2009) (“Look for any relationships among the bidders after the successful bid is announced. * * * Sometimes the winning firm may pay the other bidders directly; however, the ‘profit split’ can also be passed on through lucrative sub-contracts to do some of the work or to supply inputs to the project.”); Procurement Div., Office of Supply Chain Management, Dep’t of Operational Support, United Nations, *United Nations Procurement Manual* 106 (2020) (“Patterns of Potential Bid Rigging: * * * A successful bidder subcontracts work to competitors that submitted unsuccessful bids for the same project.”).

miss the indictment, a court must accept the indictment's allegations as true. See *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16 (1952). This Court should therefore grant the petition for a writ of certiorari and reverse the judgment of the Fourth Circuit.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

JONATHAN S. KANTER
Assistant Attorney General

MALCOLM L. STEWART
Deputy Solicitor General

VIVEK SURI
*Assistant to the Solicitor
General*

DAVID B. LAWRENCE
DANIEL E. HAAR
STRATTON C. STRAND
PETER M. BOZZO
Attorneys

JUNE 2024

APPENDIX

TABLE OF CONTENTS

	Page
Appendix A — Court of appeals opinion (Dec. 1, 2023).....	1a
Appendix B — District court order (Jan. 13, 2022).....	36a
Appendix C — District court order (Mar. 16, 2021).....	48a
Appendix D — Court of appeals order (Feb. 15, 2024)	78a
Appendix E — Indictment (Oct. 21, 2020).....	79a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4544

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BRENT BREWBAKER, DEFENDANT-APPELLANT

Argued: Sept. 22, 2023

Decided: Dec. 1, 2023

Appeal from the United States District Court
for the Eastern District of North Carolina,
at Raleigh. Louise W. Flanagan, District Judge.
(5:20-cr-00481-FL)

Before GREGORY and RICHARDSON, Circuit Judges, and
PATRICIA TOLLIVER GILES, United States District
Judge for the Eastern District of Virginia, sitting by
designation.

RICHARDSON, Circuit Judge:

Brent Brewbaker appeals from his conviction of a *per se* antitrust violation under § 1 of the Sherman Act, as well as five counts of mail and wire fraud. Before his five-day trial, Brewbaker asked the district court to dismiss the Sherman Act count for failing to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v). The district court didn't. But it should have—caselaw and economics show that the indictment failed to state a *per se* anti-

trust offense as it purported to do. So we reverse Brewbaker’s Sherman Act conviction. But we affirm his fraud convictions and remand for resentencing.

I. Background

Contech Engineering Solutions manufactured and sold corrugated steel and aluminum pipe and plate. Starting in 1988, Contech relied on its distributor and exclusive dealer in North Carolina, Pomona Pipe Products, for one way to sell its goods.

One element of Contech and Pomona’s manufacturer-distributor relationship was their involvement in North Carolina Department of Transit (“NCDOT”) aluminum-structure projects.¹ These projects, scattered throughout North Carolina, involved installing aluminum structures to prevent flooding. To award these projects, NCDOT used a bidding process. There were only three consistent bidders: Contech, Pomona, and Lane Enterprises.

But the apparent contest between Contech and Pomona was really a win-win for both companies. When Pomona won a NCDOT project, it would complete the required services using Contech’s aluminum. *See* J.A. 1843 (aluminum from Contech accounted for around 75% of Pomona’s bid). And if Contech won, the opposite was true—it’d supply the aluminum, but Pomona would provide the necessary services. So in the end, as long as one of them won, both companies got paid. And they often won, as Lane’s bids were consistently higher than either Contech’s or Pomona’s.

¹ It’s unclear when Contech and Pomona both started bidding on NCDOT projects. But it was by 2007 at the latest.

One consequence of Contech and Pomona's win-win situation was that they had to communicate to calculate their bids. Neither company could submit a bid otherwise; Contech couldn't come up with its bid price without knowing how much Pomona would charge for its services, just as Pomona couldn't come up with its bid price without knowing how much Contech would charge for the aluminum. Thus, up until 2009, this communication was the norm.

In 2009, however, the norm changed. That year, Brewbaker—then a sales manager—was put in charge of Contech's NCDOT bids. And when he took charge, he saw an opportunity to strengthen Contech's relationship with its long-time distributor by ensuring Pomona won the NCDOT projects.

For Pomona to win, Brewbaker had to make sure Contech lost. So, when he calculated Contech's bid price, Brewbaker didn't just ask Pomona what it'd charge for its services. Instead, he—or another Contech employee at his direction—would ask Pomona for its total bid price. Then, Contech would add a small percentage to Pomona's number to arrive at Contech's own bid. This ensured that Pomona's bid was always lower than Contech's. And because Lane's bids were nearly always higher than both Pomona's and Contech's, Pomona would generally win.

Beyond pleasing Pomona, Brewbaker saw that submitting losing bids had two other perks. First, it allowed Contech to stay on NCDOT's "emergency bid list" that would qualify Contech for additional aluminum supply business if it came up. Second, it would allow Contech's losing bids to serve as backups—if Pomona lost a

bid for some technical reason, Contech would still get the project and still get paid.

Naturally, Pomona was all for winning the NCDOT bids, so it went along with Brewbaker's plan. Thus, starting around 2009, Pomona routinely shared its NCDOT bid prices with Contech, and Contech used the bids to calculate its own, higher bids. All the while, Contech and Pomona were submitting certifications along with their bids that stated the bids were "submitted competitively and without collusion." *E.g.*, J.A. 685.

Also during this time, Brewbaker tried to cover his tracks. He deleted conversations between Pomona and Contech employees, otherwise opted for phone calls over digital paper trails, and made sure that the percent he added to Pomona's bid varied to avoid raising "red flag[s]" to NCDOT. J.A. 2315. This may have stemmed from Contech's antitrust training, which cautioned against getting information from competitors.

Despite Brewbaker's efforts, the FBI and the Department of Justice's Antitrust Division eventually caught up with him. In October 2020, a grand jury indicted both him and Contech on six counts. Count One alleged a *per se* violation of the Sherman Act's § 1, 15 U.S.C. § 1, while Counts Two through Six alleged federal mail- and wire-fraud violations, 18 U.S.C. §§ 1341, 1343.

To support the Sherman Act count, the indictment alleged that Contech and Brewbaker "rig[ged] bids." *E.g.*, J.A. 50. The speaking indictment specified:

- Contech “ma[de] products such as . . . aluminum pipe and fittings,” J.A. 45;
- Pomona² was “an aluminum structure design and installation company” that also “served as a dealer for” Contech, J.A. 46;
- Contech “regularly sold aluminum pieces” to Pomona which Pomona “used . . . to complete work on behalf of NCDOT, including for aluminum structure projects,” J.A. 46;
- Contech and Pomona (among others) submitted bids for NCDOT aluminum structure projects; and
- Under an agreement between Contech and Pomona, Contech and Brewbaker obtained Pomona’s bid price and added a nominal amount to create Contech’s own, intentionally losing bid.

According to the indictment, these allegations showed Contech and Brewbaker’s agreement with Pomona “was a per se unlawful, and thus unreasonable, restraint of interstate trade and commerce.” J.A. 50.

As for the fraud counts, the indictment alleged that Contech and Brewbaker misled NCDOT by submitting intentionally losing bids and by falsely certifying that the bids were submitted competitively and without collusion. The indictment asserted that these certifications were false and fraudulent because Contech colluded with Pomona on the bid price and submitted a non-competitive bid that was intentionally higher than Po-

² The indictment didn’t refer to Pomona by name. Instead, it called Pomona “Company A.” But, at trial, Company A’s identity was revealed.

mona's. As alleged, Contech "held itself out as a competitor to" Pomona when submitting bids, even though Contech "also benefitted when [Pomona] won . . . because it supplied aluminum pieces to [Pomona] for use in" the projects. J.A. 56.

In December 2020, Contech moved "to apply the rule of reason" under Federal Rule of Criminal Procedure Rule 12(a)(1). J.A. 63- 64. Brewbaker joined the motion. Contech and Brewbaker argued that the indictment merely alleged that Contech "submitted an additional direct bid that would not undercut its dealer's price." J.A. 75. This, according to Contech, wasn't a *per se* § 1 violation but a business practice that should be analyzed under the rule of reason.

Contech also explained that the indictment didn't allege a horizontal restraint, but a vertical one. A horizontal restraint is one between competitors, while a vertical restraint is one between firms at different levels of distribution.³ *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018). And the Supreme Court has held that only some *horizontal* restraints are subject to the *per se* rule. Vertical restraints, on the other hand, are subject to the rule of reason. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886, 907 (2007). From Contech and Brewbaker's perspective, the indictment alleged a restraint between Contech as supplier

³ To illustrate the horizontal-vertical distinction, consider the sale of Nike shoes. Foot Locker and Dick's Sporting Goods compete to sell Nike shoes to consumers. So an agreement between them to set the price of shoes would be a horizontal restraint. But an agreement between Nike and Foot Locker to set the price of shoes that Nike supplies to Foot Locker for sale to consumers would be vertical.

and Pomona as distributor, so the rule of reason should apply.

In support of its motion, Contech submitted various exhibits. Some were affidavits that addressed the factual underpinnings of the case against Contech and Brewbaker. But there was also an affidavit by anti-trust professor Dr. Kenneth G. Elzinga. In that affidavit, Dr. Elzinga described the economics behind Contech and Pomona's relationship. In short, he explained that it was an example of a so-called "dual distribution" arrangement, in which "a manufacturer and its distributor both offer prices for the manufacturer's products." J.A. 108. And the alleged bid rigging within this arrangement, Dr. Elzinga concluded, wouldn't "always or almost always" hurt competition. J.A. 108.

The district court, however, denied Contech and Brewbaker's motion without considering its exhibits. Treating the motion as a motion to dismiss Count One for failure to state an offense, Fed. R. Crim. P. 12(b)(3)(B)(v), the district court determined it was prohibited from looking at such "extrinsic evidence," J.A. 968-69. Then, it concluded that the indictment alleged on its face a horizontal bid-rigging restraint between competitors subject to the *per se* rule. So it denied the motion.

Soon after, Contech pleaded guilty to Counts One and Two. But Brewbaker proceeded to trial. During Brewbaker's trial, the jury heard testimony that established the facts as described above (*e.g.*, Brewbaker's concoction and submission of intentionally losing NCDOT bids, his efforts to conceal the scheme, his certifications that the bids were submitted competitively and without collusion, *etc.*). They didn't hear evidence, however, as to

the procompetitive intent or effects of Contech and Pomona's particular setup. That evidence was irrelevant once the district court applied the *per se* rule because a restraint subject to the *per se* rule is necessarily anti-competitive. See *United States v. W.F. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1162 (4th Cir. 1986). And the jury was instructed that they "need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any done by it," when determining Brewbaker's guilt under the Sherman Act. J.A. 2593.

In the end, the jury found Brewbaker guilty on all counts. He was sentenced to 18 months' imprisonment. This timely appeal followed.

II. Discussion

On appeal, Brewbaker advances several arguments against his Sherman Act conviction. One is that the indictment should have been dismissed because it did not state a *per se* Sherman Act offense. We agree and therefore reverse his Sherman Act conviction. But the Sherman Act jury instructions didn't so infect the jury's consideration of the mail- and wire-fraud counts as to require their reversal. So we affirm those convictions.

A. The Sherman Act count should have been dismissed.

A criminal indictment—like a civil complaint—should be dismissed for failing "to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v); *cf.* Fed. R. Civ. P. 12(b)(6). And an indictment—much like a civil complaint—must contain "a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1); *cf.* Fed. R. Civ. P. 8(a)(2). De-

spite the similarity in the criminal and civil rules, we rarely see district courts dismiss indictments for the failure to state an offense. *See* James M. Burnham, *Why Don't Courts Dismiss Indictments?*, 18 Green Bag 2d 347 (2015). But district courts have as much of a responsibility to police criminal indictments as they do civil complaints.

Whether the district court grants or denies a motion to dismiss an indictment, we review the court's legal conclusions *de novo* and any factual findings for clear error. *United States v. Perry*, 757 F.3d 166, 171 (4th Cir. 2014). An indictment may legally fail to state an offense by omitting a necessary element. *United States v. Hooker*, 841 F.2d 1225, 1227-28 (4th Cir. 1988) (en banc). But it may also fail to state an offense if “the allegations therein, even if true, would not state an offense.” *United States v. Thomas*, 367 F.3d 194, 197 (4th Cir. 2004). And whether the allegations fail to state an offense is a legal question that we review *de novo*. *United States v. Good*, 326 F.3d 589, 591-92 (4th Cir. 2003).

To state an offense under § 1 of the Sherman Act, an indictment must allege the defendant (1) knowingly entered (2) an agreement (3) that imposed an unreasonable restraint of trade (4) in interstate or foreign commerce. *See Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002); *W.F. Brinkley*, 783 F.2d at 1162.⁴

⁴ Section 1 of the Sherman Act declares “[e]very contract, combination . . . , or conspiracy, in restraint of trade or commerce . . . to be illegal.” 15 U.S.C. § 1. While the plain language might broadly cover any agreement to restrain trade, the Supreme Court has repeatedly instructed that “Congress intended to outlaw only unreasonable restraints.” *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

The indictment here alleged that the agreement was an “unreasonable restraint” because it fell within the class of agreements that are *per se* unreasonable under the Sherman Act. See *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir. 1982).

As an initial matter, the district court properly treated Brewbaker’s “Motion to Apply the Rule of Reason” as a motion to dismiss the indictment for failure to state an offense constituting a *per se* Sherman Act violation. J.A. 968. The indictment only alleged that the restraint was a *per se* violation. To permit conviction under the rule of reason—*i.e.*, another method of establishing § 1’s “unreasonable” element—would constructively amend the indictment. Cf. *Stirone v. United States*, 361 U.S. 212, 217 (1960). A constructive amendment occurs whenever “the government or the court broadens the possible bases for conviction beyond those included in the indictment” by, for example, asserting a specific legal theory in an indictment but then relying on a different theory at trial. *United States v. Ellis*, 121 F.3d 908, 923 (4th Cir. 1997). And that’s impermissible. *Stirone*, 361 U.S. at 217; *Russell v. United States*, 369 U.S. 749, 770 (1962).

So now we must consider whether the district court should have dismissed the indictment for failure to state a *per se* offense. We think so.

1. The factual allegations in the indictment did not state a *per se* violation of the Sherman Act.

Contrary to the district court’s conclusion, the indictment did not allege a *per se* violation of the Sherman Act. That’s because (1) it alleged a price-fixing restraint with both horizontal and vertical aspects and (2) caselaw and

economic analysis shows that category of restraint may have procompetitive effects.

a. *Per se* rule versus the rule of reason

Despite its broad language, § 1 of the Sherman Act only prohibits unreasonable restraints of trade. *Leegin*, 551 U.S. at 885. There are two dominant ways to determine whether a restraint is unreasonable: the rule of reason and the *per se* rule.⁵

The rule of reason is the default. *Leegin*, 551 U.S. at 885. It requires that “the factfinder weigh[] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.” *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). This involves inquiries into the specific business and market, along with the restraint’s history, nature, and effect, to identify the specific restraint’s actual competitive impact. *Leegin*, 551 U.S. at 885-86.

Certain “categories of restraints,” however, have been held *per se* unreasonable. *Leegin*, 551 U.S. at 886. In other words, the nature of the restraint makes it “necessarily illegal” without inquiry into—or evidence about—the particular restraint’s anticompetitive impact. *Id.* But this blanket illegality isn’t applied loosely; it is “confined to restraints . . . ‘that would

⁵ Note that we say these two rules are the dominant rules, not the only rules. See *Cal. Dental Ass’n v. F.T.C.*, 526 U.S. 756, 779-80 (1999). In civil cases, the district court often must decide which mode of analysis will be used at trial. But when a district court is asked whether a criminal indictment properly states a *per se* offense, it must decide only whether the *per se* rule applies to the allegations.

always or almost always tend to restrict competition and decrease output.” *Id.* (quoting *Bus. Electrs. Corp. v. Sharp Electrs. Corp.*, 485 U.S. 717, 723 (1988)). So the *per se* rule can be applied to a category of restraints only after economic evidence shows the restraint has “manifestly anticompetitive effects” and “lack[s] . . . any redeeming virtue.” *Id.* at 886-87 (quotations and citations omitted). Put differently, the *per se* rule only applies automatically to restraints that already have been held to be devoid of procompetitive effects; it cannot be extended to new categories of restraints except through economic analysis that shows the new type of restraint is always anticompetitive. *Id.* at 887 (noting that the *per se* rule applies “only after courts have considerable experience with the type of restraint at issue” and have “confidence it would be invalidated in all or almost all instances under the rule of reason” (citations omitted)).

Whether the *per se* rule applies didn’t always turn on the restraint’s economic effects. Previously, the *per se* rule was extended to new categories of restraints largely because they resembled other *per se* restraints. For example, some vertical restraints were declared *per se* unreasonable largely because similar horizontal restraints were already subject to the *per se* rule. See, e.g., *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 379 (1967), *overruled by GTE Sylvania*, 433 U.S. 36; *Albrecht v. Herald Co.*, 390 U.S. 145, 152-54 (1968), *overruled by State Oil v. Khan*, 522 U.S. 3 (1997). Economic evidence that the vertical restraint increased competition, or that the restraint “may have different consequences” in different contexts, was ignored. See *Albrecht*, 390 U.S. at 152-53; *Schwinn*, 388 U.S. at 384 (Stewart, J. concurring).

But the Supreme Court has since cautioned courts against over-analogizing in the antitrust context, recognizing that the classes of restraints subject to *per se* condemnation should be narrowly construed. *Leegin*, 551 U.S. at 888. Rather than look only at the label attached to the restraint, such as “price fixing” or “market allocation,” courts must consider the restraint in context—including how the parties are related—before applying the *per se* rule. *Id.* And when a case involves a category of restraint not yet classified under either the rule of reason or the *per se* rule, “departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing.” *GTE Sylvania*, 433 U.S. at 58.

In determining whether a category of restraint’s “demonstrable economic effect” warrants *per se* treatment, the Court has repeatedly told us that antitrust’s North Star is the restraint’s impact on interbrand competition. *See, e.g., id.* at 52 n.19. Rather than *intra*brand competition (*i.e.*, competition among the retailers who sell one manufacturer’s product), *inter*brand competition (*i.e.*, competition between manufacturers of similar products) “is the primary concern of antitrust law.” *Id.* And the Court now routinely accepts that restraints boosting interbrand competition at the expense of *intra*brand competition do *not* warrant *per se* treatment.

For this reason, the Court in *GTE Sylvania* overruled *Arnold, Schwinn & Co.*, which had held that vertical territorial restraints were *per se* unreasonable. Reviewing the economics of such restraints, the Court determined that the vertical restraints at issue there were not devoid of “any redeeming virtue,” even though they reduced *intra*brand competition, because they in-

creased interbrand competition via distributional efficiencies. *Id.* at 54-58. Similarly, in *Khan* and *Leegin*, the Court overruled cases holding that vertical price-fixing restraints warrant the *per se* rule. A central reason for both reversals was that economics showed that vertical restraints can promote interbrand competition. *Khan*, 522 U.S. at 15-20; *Leegin*, 551 U.S. at 889-92.⁶

The takeaway is that, before the *per se* rule applies outside of its predetermined, narrow confines, economic evidence must make certain that a restraint has solely anticompetitive effects. And after *GTE Sylvania*, *Khan*, and *Leegin* rejected applying the *per se* rule to vertical restraints, the *per se* rule's predetermined, narrow confines only extend to certain categories of horizontal restraints, including agreements between com-

⁶ To illustrate why vertical restraints may increase interbrand competition, pretend you are a shoe store selling Nikes. If you know that every other store in town is selling Nikes, you may conclude that you're better off relying on those retailers' Nike marketing efforts rather than spending your own resources. In other words, you decide to free-ride. But if you decide to free-ride, it's likely the other retailers do, too. That means less Nikes are sold, and there's less competition between Nike and other brands like Adidas. However, let's say that Nike places a territorial restriction, limiting the sale of Nikes to a single retailer in a given city. If you're that retailer, you no longer can free-ride on others. You want to get the Nikes out the door, and so you spend your own resources on marketing and value-adding services to entice customers. Thus you sell more Nikes. And that increases Nike's interbrand competition with Adidas. The same logic applies when it comes to prices; if Nike sets a minimum resale price on its shoes, its retailers cannot undercut each other and cause a race-to-the-bottom that sinks Nike's profits. Instead, they are incentivized to draw people into their stores with marketing and services that lead to increased sales at increased prices.

petitors to fix prices or divide markets. *Leegin*, 551 U.S. at 886.

This has led courts to determine whether the *per se* rule applies by first asking whether the alleged restraint is horizontal or vertical. The district court here did just that. And that is the right threshold question—in a broad sense. For if the restraint is horizontal, then the *per se* rule will generally apply.⁷ And if the restraint is vertical, then the rule of reason will apply.

The Supreme Court has explained that whether a restraint is horizontal or vertical depends on the relationship between the parties to the agreement that imposes the restraint. Horizontal restraints are “restraints ‘imposed by agreement between competitors.’” *Am. Express*, 138 S. Ct. at 2283 (quoting *Bus. Electrs.*, 485 U.S. at 730). And vertical restraints are “restraints ‘imposed by agreement between firms at different levels of distribution.’” *Id.* (quoting *Bus. Electrs.*, 485 U.S. at 730).⁸ So we ask here if the agreement between Contech and Pomona was made by competitors or by firms at different levels of distribution. *See Bus. Electrs.*, 485 U.S. at 730 n.4 (“[A] restraint is horizontal not be-

⁷ Some horizontal price-fixing restraints have been held to require the rule-of-reason analysis. *See, e.g., Nat’l Collegiate Athletic Ass’n v. Bd. of Regents*, 468 U.S. 85, 104 (1984); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979). But these are exceptions to the rule that purely horizontal price-fixing restraints are *per se* unreasonable. *See Leegin*, 551 U.S. at 886.

⁸ In an earlier decision, we suggested that the horizontal-vertical distinction turned not on the relationship but on the “purpose” of the agreement. *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16-17 (4th Cir. 1981). That dicta cannot survive the Supreme Court’s later pronouncements.

cause it has horizontal effects, but because it is the product of a horizontal agreement.”).

b. The indictment alleged a hybrid restraint that hasn’t been held to be *per se* unlawful.

Going off the Supreme Court’s definitions, the indictment here alleged a restraint that was both horizontal *and* vertical. On the one hand, it alleged Pomona and Contech both submitted bids for NCDOT aluminum projects. That would make them competitors within the aluminum-project market, suggesting their agreement was a horizontal restraint. On the other hand, the indictment alleged that Pomona “served as a dealer” for Contech, with Contech supplying Pomona aluminum that Pomona then used to compete against “others” in NCDOT aluminum-structure projects. J.A. 46. And the indictment alleged that the benefit Contech got from the agreement was that “it supplied aluminum pieces to [Pomona] for use in” the projects Pomona won. J.A. 56. That means Contech was a manufacturer and Pomona its dealer, placing them at different levels of distribution, and indicating that their agreement was vertical. In short, the restraint alleged in the indictment doesn’t fit neatly into either the horizontal or vertical definition—it fits into both.

But does the *per se* rule apply to such a hybrid restraint? The Supreme Court has not yet told us.⁹

⁹ The only restraints that the Supreme Court has held to be *per se* unreasonable are purely horizontal, or, in other words, are agreements between entities who are *only* related as competitors. See, e.g., *Arizona v. Maricopa Med. Soc’y*, 457 U.S. 332 (1982) (holding that price fixing between medical organizations is *per se* unreasonable); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 364 (1980) (same for beer wholesalers); *United States v. Topco Assocs.*,

Still, we are not without guidance. We must begin with a “presumption in favor of a rule-of-reason standard.” *Bus. Electrs.*, 485 U.S. at 730. And we know that “problems in differentiating vertical restrictions from horizontal restrictions” do not alone “justify a *per se* rule.” *GTE Sylvania*, 433 U.S. at 58 n.28. Displacing the presumptive rule-of-reason analysis is possible only when demonstrable economic evidence shows that the type of restraint at hand “always or almost always” has “manifestly anticompetitive effects” and “lack[s] . . . any redeeming virtue.” *Leegin*, 551 U.S. at 886-87.

Before turning to these economic effects, however, we address the government’s three arguments for why we should apply the *per se* rule without considering economics.

The government first argues that the restraint alleged in the indictment isn’t a hybrid restraint at all. Rather, it contends that the restraint is simply a horizontal restraint. That’s because, from the government’s view, whether a restraint is horizontal or vertical depends not on the relationship of the parties to the agreement *en total*; it only depends on which part of their relationship is restrained by the agreement. And the government asserts the restraint alleged in the indictment only limited how Contech and Pomona could

405 U.S. 596, 608-10 (1972) (same for supermarket chains); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 166 (1940) (same for oil companies); *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (same for market division between bar-review companies). These include restraints between competitors and nominally vertically related entities that are, in reality, instrumentalities the competitors use to facilitate the restraint among them. See *Topco*, 405 U.S. at 602-05, 608-09; *United States v. Sealy*, 388 U.S. 350, 352-56 (1967).

act when bidding on aluminum-structure projects—*i.e.*, in their relationship as competitors. It did not, in the government’s perspective, limit how they could act when Contech sold its aluminum pieces to Pomona. So the government urges us to ignore the vertical aspect of Contech and Pomona’s relationship and see the restraint as straightforward horizontal bid rigging between Contech-as-bidder and Pomona-as-bidder.

We decline to do so, however, because we cannot disregard the parties’ broader relationships when classifying a restraint. As explained above, when determining whether a restraint is horizontal or vertical, we are instructed to look at the *relationship* of the parties, not just the nature of the limitation imposed. *See Bus. Electrs.*, 485 U.S. at 730 & n.4. This is because agreements that otherwise look identical in form produce different economic effects based on how the parties relate to one another. *Cf. Leegin*, 551 U.S. at 888 (warning against analogizing between similar restraints in different contexts). A price-fixing agreement between two competing parties involves different dynamics and produces different effects on competition than one between parties who simultaneously compete and collaborate. We cannot simply ignore this relational difference because of the specific form that the agreement itself takes.

Moreover, the government’s approach would force us to engage in arbitrary and likely impossible line-drawing. We do not normally artificially split a business entity into pieces in order to conclude that only one part of the entity—for example, the part that acted as the other party’s competitor—was the actual “party” to the agreement. The Sherman Act doesn’t ignore real-

ity; it treats the entire business entity as the single party it is. See *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 771-74 (1984); *Texaco*, 547 U.S. at 5-6. But this artificial division is what the government would have us do here. Contech is acting as both manufacturer and co-distributor in its arrangement with Pomona. The government would ask us to parse the form of agreement to see which part of Contech is affected.¹⁰ Antitrust law does not turn on such artificial mental gymnastics.

The government next attempts to classify the restraint as *per se* unlawful by relying on cases in which the *per se* rule has been applied to conspiracies involving competing companies and their vertical supplier or distributor. See, e.g., *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Kotteakos v. United States*, 328 U.S. 750, 755 (1946); *United States v. Apple*,

¹⁰ For instance, imagine if Contech required Pomona to bid its aluminum at a certain price, and then Pomona required Contech to bid its services at a certain price. Or imagine that Contech required Pomona to bid at a certain price, and then set its own bid price to be slightly higher. Would we have a horizontal restraint between competitors to fix the aluminum-structure bid? Or would we have vertical, minimum-price restraint? The Supreme Court tells us that the agreements like the former are *per se* illegal, while those like the latter must be assessed under the rule of reason. Yet the government offers no principled way to distinguish between the two. This only goes to show that focusing on the form of the restraint, instead of the relationship between the parties, is a fool's errand. See Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1208, 1238-40 (2008) (noting that classifying a restraint between parties related both vertically and horizontally "as either horizontal or vertical" by looking to the restraint's purpose, effect, or source is a "laborious process" that requires "significant resources" and is "exactly backwards").

Inc., 791 F.3d 290, 322-25 (2d Cir. 2015). In these so-called hub-spoke-and-rim conspiracies, competitors agree to restrain trade and are encouraged to do so by a shared vertical entity. But—crucially—the vertical entity is not a party to the competitors’ agreement; it is merely an encourager of it, for example, through separate vertical agreements. In other words, *the parties to the competitors’ agreement are related only horizontally*. The vertical entity’s relationship to the competitors is separate from the agreement. It is to this purely horizontal restraint that the *per se* rule applies. See *Apple*, 791 F.3d at 323 (noting that “the relevant ‘agreement in restraint of trade’” determined to be *per se* unlawful was “not Apple’s vertical Contracts with the Publisher Defendants” but “the horizontal agreement that Apple organized *among the Publisher Defendants*” (emphasis added)); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1402c (4th ed. 2013) (stating that hub-and-spoke conspiracies have only been assessed as *per se* Sherman Act violations where there is a “traditional horizontal conspiracy” with a “vertically related facilitator”). The separate vertical agreements between the vertical entity and each competitor, however, “if challenged, [would] have to be evaluated under the rule of reason.” *Apple*, 791 F.3d at 323.

So the restraints in hub-spoke-and-rim conspiracies to which the *per se* rule applies are purely horizontal restraints that a vertical entity encouraged. The restraint alleged in this indictment is of a different kind. It alleges a single agreement between two parties related *both* vertically and horizontally. The government’s attempted analogy thus fails.

Lastly, the government argues that the indictment alleged a *per se* unlawful restraint because it stated that Brewbaker and Contech “rigged bids” and we have held that bid rigging is *per se* unlawful. *See Portsmouth Paving*, 694 F.2d at 325 & n.18. But, in so holding, we defined *per se* unlawful bid rigging as an “agreement between competitors.” *Id.* That is precisely how the Supreme Court defines a horizontal restraint. *Am. Express*, 138 S. Ct. at 2283. So, for the same reasons the indictment doesn’t simply allege a horizontal restraint, it doesn’t allege what we have held to be *per se* unlawful bid rigging. This is reinforced because the restraint in *Portsmouth Paving* was between parties with a purely horizontal relationship. The parties to the agreement were all paving companies that rigged bids for certain paving projects. *See* 694 F.2d at 315-16. None had a vertical relationship with another party. *See id.*

More pointedly, *Portsmouth Paving* predates *Leegin*. That is, it was decided when both horizontal and vertical price fixing were *per se* unlawful. Thus, even if it could be read to prohibit price fixing beyond that between purely horizontal parties, *Leegin* mandates it be assessed anew.

In sum, the Supreme Court has instructed that vertical price restraints are subject to the rule of reason and that horizontal price restraints are *per se* illegal. To determine which applies, we must look to the relationship of the parties to the agreement. Doing so here shows that Contech and Pomona had a hybrid relationship with both vertical and horizontal components. And the Supreme Court has not told us how to analyze an agreement between two parties with that type of re-

lationship.¹¹ But it has instructed that, before we apply the *per se* rule to a new category of restraint, we must apply a presumption in favor of the rule of reason that may be overcome only with demonstrable economic effect.

c. Dr. Elzinga’s affidavit addressing the economic effect of this category of restraint should be considered.

Before addressing the demonstrable economic effect of the category of restraint the indictment alleged (*i.e.*,

¹¹ We note that *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956), does not respond to our question. There, the Supreme Court interpreted an exception to the Miller-Tydings Act. *Id.* at 311. That Act exempted certain retail-price-maintenance contracts from the *per se* rule—because, at that time, such manufacturer-mandated price restraints would have been *per se* unreasonable. *See id.* The exception that the Court interpreted stated that the Act “shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices . . . between persons, firms, or corporations in competition with each other.” *Id.* According to the Court, the last five words of the exception meant a restraint between a manufacturer who acted as a wholesaler and its other wholesalers still faced the *per se* rule, as the agreeing parties were, in part, competitors. *Id.* at 312-15. But this, at most, shows that the Court read the Miller-Tydings Act to exempt only purely vertical restraints from the *per se* rule at a time when *all* price-fixing restraints were *per se* illegal. Thus, per the Act, any price-fixing restraints between parties with any other type of relationship remained *per se* unreasonable. However, the Miller-Tydings Act was repealed in 1976, and post-*Leegin*, vertical restraints are subject to the rule of reason without a statutory exemption. So *McKesson* doesn’t illuminate whether hybrid restraints are subject to the *per se* rule or the rule of reason. *See also* Areeda & Hovenkamp, *supra*, at ¶ 1605a (noting that *McKesson* “has little bearing” on the problem of deciding whether restraints are subject to the *per se* rule).

a hybrid price-fixing agreement), we pause to ask whether the district court erred by categorically refusing to consider Dr. Elzinga's affidavit in addressing Brewbaker's motion to dismiss the Sherman Act count.

The district court was right so far as it held that it was prohibited from considering any extrinsic factual evidence—including any portions of Dr. Elzinga's affidavit that outlined Contech and Brewbaker's version of the facts. *See United States v. Engle*, 676 F.3d 405, 415 (4th Cir. 2012). A district court is limited to considering the factual allegations in the indictment and must accept them as true in ruling on a motion to dismiss. *Id.* That is because a district court “lack[s] authority to review the sufficiency of the evidence supporting the indictment.” *United States v. Wills*, 346 F.3d 476, 488 (4th Cir. 2003); *cf. Kaley v. United States*, 571 U.S. 320, 333 (2014). Just as we do on appeal, the district court had to accept the facts as found by the grand jury in the indictment.

But the district court, and not the grand jury, must decide questions of law. *Cf. Papasan v. Allain*, 478 U.S. 265, 286 (1986) (explaining that, on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). So, while an indictment may not be dismissed simply because the district court doesn't think the government can prove what it has alleged, an indictment may be dismissed if the district court concludes that the allegations in the indictment—even if proven—would not satisfy the elements of the charged offense. *Engle*, 676 F.3d at 415 (recognizing that a “district court may dismiss an indictment under Rule 12 where there is an infirmity of law in the prosecution” (cleaned up)). Here, we must determine

whether the indictment’s factual allegations, if true, stated the charged *per se* violation of the Sherman Act. And that is a legal question—both when asking whether the alleged agreement falls in a category of restraint that has already been held to be *per se* unlawful, and when asking whether the *per se* rule should be extended to a new category of restraint in which the alleged agreement falls. *See Areeda & Hovenkamp, supra*, at ¶ 1909b.

When making that second legal determination—whether the *per se* rule should be applied to a new category of restraint—the Supreme Court instructs that courts must consult economic evidence to determine whether the category of restraint has plausible procompetitive effects. *See Leegin*, 551 U.S. at 885-87.¹² And to properly evaluate *economic* effects, courts may look to *economic* analysis by *economists*. We, of course, may look at caselaw or academic literature when making any other legal determination. So too may caselaw and academic literature be consulted when making the legal determination of whether the *per se* rule should be ex-

¹² To be clear, a court may not consider economic evidence when ruling on a motion to dismiss an indictment if the restraint alleged in the indictment falls into a category that has already been held to be *per se* illegal, such as purely horizontal price-fixing restraints. *See United States v. Aiyer*, 33 F.4th 97, 118-19 (2d Cir. 2022). Based on binding legal precedent, that restraint would be properly charged as a *per se* criminal violation without more. So consideration of that particular restraint’s economic effect or reasonableness would be prohibited. *Id.* Here, however, the indictment alleges a category of restraint that hasn’t been held to be *per se* illegal—hybrid price-fixing restraints. And the answer to the question that *Leegin* thus requires us to ask—whether to extend the *per se* rule to this new category of restraint—depends on the competitive effects of that category of restraint.

panded to a new category of restraint. And an economist’s analysis of the competitive effects of the category of restraint is equally relevant, given how the Supreme Court has defined the question. *See Leegin*, 551 U.S. at 896-98. So the district court should not have categorically excluded Dr. Elzinga’s academic analysis drawing on supporting literature about the competitive effects of the category of restraint alleged in the indictment.

d. Economic evidence shows the category of restraint alleged in the indictment wouldn’t have solely anticompetitive effects.

So we turn to asking whether demonstrable economic evidence showed that the category of restraint alleged in the indictment “always or almost always” has “manifestly anticompetitive effects” and “lack[s] . . . any redeeming virtue.” *Id.* at 886-87 (quotations and citations omitted). To the contrary, economic analysis—including that provided by Dr. Elzinga, academic literature, and Supreme Court opinions—shows that this type of restraint has possible procompetitive effects.¹³

¹³ We need not, and do not, decide whether the particular restraint here was actually procompetitive. That determination could be made only after applying the rule of reason to this particular restraint. *See* Robert Zwirb, *Dual Distribution and Antitrust Law*, 21 Loy. L.A. L. Rev. 1273, 1342 n.219 (1988) (“The first step is concerned mainly with an arrangement’s ‘potential,’ while the second step (the rule of reason balancing inquiry) is concerned with resolving whether the potential is ‘actual.’ The analysis in the first step, therefore, is not and need not be as comprehensive as that required in the second step of the rule of reason inquiry.”). And the indictment did not allege an antitrust offense based on the rule of reason.

The vertical-horizontal setup alleged in the indictment is known in antitrust law and economics as a “dual distribution” arrangement: Contech was both supplying Pomona with aluminum and competing against Pomona for aluminum projects. *See* Areeda & Hovenkamp, *supra*, at ¶ 1600c2 (“[A] manufacturer practices ‘dual distribution’ by selling its product directly to some consumers in competition with the independent dealers handling its product.”).

Although couched in economic terminology, dual distribution is something we’re all familiar with. To illustrate, let’s say you want some new Nikes. There’s more than one way you could buy them. You can order them online at Nike.com. Or you can drive to Foot Locker and buy them. If you go with the first option, you are buying directly from the manufacturer. If you go with the second, you are buying from the manufacturer’s dealer. So Nike is both supplying Foot Locker with shoes to sell (a vertical relationship) and is competing with Foot Locker when selling the shoes directly to consumers (a horizontal relationship).

The indictment here alleged nothing different. It stated that Contech was both supplying Pomona with aluminum to sell to NCDOT and competing with Pomona to sell that aluminum to NCDOT. Despite this straightforward analogy, the district court concluded (and the government argues on appeal) that the indictment doesn’t allege a Nike-Foot-Locker-type relationship because the bids Contech and Pomona were competing for were not for the exact product Contech supplied to Pomona—aluminum pipe—but for completed aluminum-pipe *projects*. That may be true. Yet, as an economic matter, it is beside the point. Part of the

reason for dual-distribution arrangements is that a retailer can offer services alongside the manufacturer's products that the manufacturer cannot (or doesn't want to) offer itself. With Nike and Foot Locker, Foot Locker offers the added service of in-person customer assistance. And you need only think of the car you'd need to drive to Foot Locker to have another example: You could buy a tire online directly from a manufacturer, but unless you're particularly handy, you are more likely to buy it from the auto shop that installs it for you.

Of course, the alleged Sherman Act violation here is not the mere fact that Contech and Pomona had a dual-distribution arrangement. It's that they imposed a price-fixing restraint within it. The government doesn't dispute that, post-*Leegin*, if a manufacturer like Contech wasn't also selling directly to a customer (here, NCDOT), any price restraint it imposed on its distributors would be adjudged under the rule of reason. The inquiry is thus whether the fact that a manufacturer is also selling directly to consumers eliminates the potential interbrand procompetitive effects that supported the Supreme Court's holding in *Leegin*.

It does not. Start with the general economic reason for dual distribution: It increases distributive efficiency. See J.A. 110. More sellers means it's easier to find a product. If it is easier to find a product, then it is easier to buy. And if it's easier to buy, then, presumably, sales will increase. See J.A. 117; Gregory T. Gundlack & Alex G. Loff, *Dual Distribution Restraints: Insights from Business Research and Practice*, 58 Antitrust Bull. 69, 79 (2013). Further, as mentioned, retailers can provide services the manufacturer cannot or

will not, further increasing consumer reach. J.A. 114-15; see *Leegin*, 551 U.S. at 891. Plus, if distributors fail to make their sales (or, as relevant here, fail to place a bid), the manufacturer's sales serve as a stopgap to ensure the manufacturer still makes money. J.A. 118, 138. This can be good for intrabrand competition, as more outlets are selling the same good. And it can be good for interbrand competition, because the greater reach of a certain brand means greater competition between that brand and other, competing brands.

But a manufacturer selling alongside a distributor may cause issues that undermine the economic efficiencies of the vertical relationship between them, harming manufacturers and interbrand competition alike. Economists call these "channel conflicts." J.A. 119; Andy A. Tsay & Narendra Agrawal, *Channel Conflict and Coordination in the E-Commerce Age*, 13 *Prod. & Op. Mgmt. Soc.* 93 (2004). For example, if a manufacturer cuts its own prices, the independent distributor may lose the incentive to provide valuable additional services or to market—and thus sell—the product itself. J.A. 118; Malcolm B. Coate & Mark R. Fratrik, *Dual Distribution as a Vertical Control Device* 14 (Fed. Trade Comm'n, Working Paper No. 143, 1986). More than that, a distributor may become so upset with the manufacturer for undercutting it that it decides to stop distributing the manufacturer's product completely. See J.A. 115-16 ("To undercut one's distributor . . . would be the business equivalent of shooting oneself in the foot."). And this would be especially detrimental in a market where the number of potential distributors is limited. Coate & Fratrik, *supra*, at 15. In both scenarios, consumers and competition lose out. When fewer distributors sell one manufacturer's goods, other

manufacturers' goods face less interbrand competition. J.A. 119; Tsay & Agrawal, *supra*, at 94 (“Elimination of intermediaries may cause an erosion of profits, market share, or both.”).

So manufacturers have to find ways to mitigate these conflicts. One way is by ensuring their direct-sale prices are equal to or higher than their distributors' prices by fixing the distributors' resale prices or the manufacturer's own. J.A. 119; *see* Reuben Arnold, Neill Norman & Daniel Schmierer, *Resale Price Maintenance and Dual Distribution*, Distrib. and Franchising Comm.: ABA Section of Antitrust L. 12 (2016). As stated, outside of a dual-distributor setup, this type of vertical price fixing would not be subject to the *per se* rule after *Leegin*. Yet the same potential boons to interbrand competition don't disappear just because a manufacturer also acts as a distributor. J.A. 119-20; *cf. Leegin*, 551 U.S. at 890-91. The price restraints still incentivize distributors to continue to vigorously sell the manufacturer's product and to offer additional services, therefore increasing interbrand competition. Arnold, Norman & Schmierer, *supra*, at 12 (explaining that a dual-distribution manufacturer that sets its direct sale price equal to its distributors “may strengthen the competitiveness of [its] brand and thereby enhance interbrand competition”). In fact, on remand, the Fifth Circuit recognized that the restraint in *Leegin* was a dual-distribution restraint but noted that the manufacturer's position in the retail market made it “no different from a manufacturer that does not have retail stores.” *See PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 421 (5th Cir. 2010). So the *per se* rule was inapplicable. *Id.*

The same logic applies to the restraint alleged in this indictment. The alleged bid rigging (a type of price fixing) could allow Contech to maintain its relationship with Pomona by making sure it never undercut, and thus upset, its distributor. J.A. 115. So—just like in *GTE Sylvania*, *Leegin*, and *Khan*—while the bid rigging had the effect of eliminating intrabrand competition between Contech and Pomona, it also could benefit interbrand competition. By increasing Pomona’s sales of Contech’s aluminum, the restraint could lead to greater competition between Contech and other aluminum manufacturers. J.A. 115-16.

The potential interbrand procompetitive effects show that the category of restraint alleged in the indictment would not invariably lead to anticompetitive effects. Yes, it may lead to some. *See Leegin*, 551 U.S. at 892-94. But it is exactly that economic uncertainty that shows the indictment did not allege a *per se* violation. For we cannot “predict with confidence that” the dual-distribution bid rigging alleged in the indictment “would be invalidated in all or almost all instances under the rule of reason.” *Id.* at 886-87; *see also id.* at 894.¹⁴

¹⁴ While sometimes applying different analyses, this Court and nearly all other lower courts have adjudged hybrid restraints with vertical and horizontal aspects under the rule of reason. *See, e.g., Donald B. Rice*, 638 F.2d at 16; *Hampton Audio Electrs., Inc. v. Contel Cellular, Inc.*, 966 F.2d 1442 (4th Cir. 1992) (unpublished); *Electr. Com. Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243-44 (2d Cir. 1997); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348, 1357 (9th Cir. 1982); *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1481 (9th Cir. 1986); *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006); *Abadir & Co. v. First Miss Corp.*, 651 F.2d 422, 428 (5th Cir. 1981); *Davis-Wakins Co. v. Serv. Merch.*, 686 F.2d 1190, 1197-1202 (6th Cir. 1982); *see also Areeda &*

When the government indicted Brewbaker, it decided to include detailed factual allegations. It wasn't required to. See *United States v. Quinn*, 359 F.3d 666, 673 (4th Cir. 2004). But the government did. It alleged that that Pomona wasn't only Contech's co-bidder on NCDOT projects; it was also its distributor, and the restraint between them benefited Contech *because of* the vertical nature of its relationship with Pomona. Supplied with these allegations, the district court had the responsibility to ensure that the indictment stated a *per se* violation. Yet the indictment alleged neither a restraint previously held subject to the *per se* rule nor one that economics showed would invariably lead to anticompetitive effects. So Count One of the indictment should have been dismissed for failing to state an offense, and we reverse Brewbaker's Sherman Act conviction.

B. Brewbaker's fraud convictions stand.

Brewbaker makes two arguments for why reversing his Sherman Act conviction also requires reversing his wire- and mail-fraud convictions. We disagree with both arguments and affirm the fraud convictions.

Brewbaker was convicted of conspiracy to commit mail and wire fraud, as well as four counts of mail and wire fraud relating to specific misleading submissions. As the jury was instructed here, mail fraud (18 U.S.C. § 1341) and wire fraud (18 U.S.C. § 1343) require the defendant to have (1) knowingly devised or participated in a scheme or artifice to obtain money or property by

Hovenkamp, *supra*, ¶ 1600c2 (noting that dual-distribution “restraints are generally tested by the rules governing ordinary vertical restraints”).

means of false or fraudulent pretenses, representations, or promises that were material; (2) acted with the intent to defraud; and (3) used the mails or wire communication in furtherance of the scheme. J.A. 1674, 1681.

Brewbaker does not assert that there was insufficient evidence for the jury to convict him of each fraud count. Rather, he argues that the jury instructions on the Sherman Act count “infected” the jury’s consideration of the fraud counts. Appellant’s Br. at 63.

The trouble with Brewbaker’s argument is that we operate under the “crucial assumption that jurors carefully follow instructions.” *United States v. Rafiekian*, 991 F.3d 529, 550 (4th Cir. 2021); *see also Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (“The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court’s instructions . . . and follow the instructions given them.”). And here, the fraud instructions did not incorporate or reference the Sherman Act instructions. Nor did the fraud counts depend on finding Brewbaker guilty under the Sherman Act. Plus the court specifically instructed the jury that they “must consider each count separately” and that guilt on one count “shouldn’t control your verdict as to the other counts.” J.A. 2588.

We see nothing that sufficiently undercuts our assumption that the jury followed these instructions. As the indictment alleged, the fraud counts turned on the false certification that the bids were “submitted competitively and without collusion.” J.A. 53, 55. That certification was materially false, the government argued, because Brewbaker and Contech colluded with Pomona to obtain their total bid price and submit a non-competitive, intentionally higher bid. *See* J.A. 55-56. The falsity

of the certifications thus turned on whether Brewbaker submitted competitive and non-collusive bids—not on whether doing so was a *per se* Sherman Act violation. Brewbaker doesn't contest that, at trial, the government proved he obtained Pomona's bid prices and used them to submit Contech's higher bids. *See, e.g.*, J.A. 1834-35, 2320. So the jury had good reason—independent of any Sherman Act instruction or violation—to believe the certifications were materially false. As a matter of common parlance, it'd be hard to say a bid was submitted “competitively” when Contech's bid was intentionally higher, or “without collusion” when it was previously agreed-upon. Therefore, we refuse to find that the jury disregarded the court's instructions to consider these charges separately.

Making one last-ditch effort, Brewbaker points to the jury's request during deliberation for an explanation of “collusion” regarding the NCDOT certification. J.A. 2641. With Brewbaker's assent, the district court told the jury that collusion was mentioned with regard to the nature of the crime charged in Count 2 (mail- and wire-fraud conspiracy). It then explained: “There isn't a legally defined explanation of collusion. . . . I remind you to consider all the facts and circumstances in evidence in reaching your understanding of the crime charged, and *consider all of the Court's instructions as a whole.*” J.A. 2645(emphasis added). According to Brewbaker, the reference to the instructions as a whole directed the jury to consider the Sherman Act instructions and conviction.¹⁵ Yet, as we have explained, the

¹⁵ Notably the Sherman Act instructions directed that “the exchange of information about bid prices is not, by itself, illegal. The fact that defendant and alleged co-conspirators exchanged such in-

jury was instructed to consider each count separately. In the face of our assumption that juries follow instructions, we will not presume that the jury understood “consider all of the Court’s instructions as a whole” to mean “abandon the Court’s instruction to consider the counts separately.”

We can only overcome the presumption that a jury follows instructions in “extraordinary situations.” *Francis*, 471 U.S. at 324 n.9. This is no such situation. See *Bruton v. United States*, 391 U.S. 123, 136-37 (1968) (jury instruction to disregard co-defendant’s confession that inculpated the defendant as hearsay was insufficient); *Jackson v. Denno*, 378 U.S. 368, 377-78 (1964) (improper to have jury decide, simultaneously with the defendant’s guilt, whether defendant’s confession was voluntary); *United States v. Lindberg*, 39 F.4th 151, 164-65 (4th Cir. 2022) (erroneous jury instruction on one count was repeated during the instructions on another count, and therefore “infected” the latter). So we hold fast to our trust in the jury and conclude that the Sherman Act instructions did not bear on Brewbaker’s mail- and wire-fraud convictions.

* * *

Whether an indictment states an offense “is a question of law, to be decided by the court, not the prosecutor.” *United States v. Cruikshank*, 92 U.S. 542, 559 (1875). This indictment did not state a *per se* antitrust violation under the Sherman Act. So that count should have been dismissed. But the fraud convictions stand,

formation does not establish an agreement to rig bids. There may be other legitimate reasons that would lead competitors to exchange information about bid prices.” J.A. 1658.

35a

and we remand to the district court for resentencing on those counts alone. The district court's judgment is

*REVERSED IN PART,
AFFIRMED IN PART,
AND REMANDED.*

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:20-CR-481-FL-1

UNITED STATES OF AMERICA

v.

BRENT BREWBAKER, DEFENDANT

Filed: Jan. 13, 2022

ORDER

This matter, set for trial commencing January 24, 2022, is before the court on defendant's motion to dismiss count one of the indictment, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B)(v) and the Fifth Amendment to the United States Constitution (DE 128).¹ The issues raised have been briefed fully, and in this posture are ripe for ruling. For the following reasons, the motion is denied.

STATEMENT OF THE CASE

Indictment returned October 21, 2020, charges defendant with one count of conspiracy to rig bids in viola-

¹ Also pending before the court are defendant's motions in limine, (DE 134, 140, 146), and related motions to seal (DE 135, 138, 141, 144, 147, 150). These motions will be addressed by separate order.

tion of Section 1 of the Sherman Act, 15 U.S.C. § 1 (the “Sherman Act count”), one count of conspiracy to commit mail and wire fraud, three counts of mail fraud, and one count of wire fraud. Defendant pleaded not guilty to all six counts upon arraignment December 14, 2021.²

On October 31, 2021, defendant filed the instant motion to dismiss the Sherman Act count of the indictment, arguing that 15 U.S.C. § 1 is unconstitutional under the Fifth Amendment as applied to him and that the indictment fails to state an offense under 15 U.S.C. § 1.

STATEMENT OF THE FACTS

The facts alleged in the indictment are as follows. The North Carolina Department of Transportation (“the Department”) solicits bids for various infrastructure projects including, as relevant here, completion of civil engineering projects related to the flow of water around highways and roads. These projects can be completed using aluminum structures, for which Contech Engineered Solutions LLC (“Contech”), an Ohio corporation, is in the business of manufacturing aluminum pieces. Defendant, during the time period relevant to this case, was a North Carolina-based employee of Contech responsible for preparing and submitting Contech’s bids for the Department’s projects. Similarly, an unindicted Company A, which designs aluminum structures and provides installation services, purchases aluminum pieces from Contech and uses these pieces to complete projects for the Department, serving as Contech’s distributor.

² The indictment also charged co-defendant Contech Engineered Solutions LLC, which has since pleaded guilty and been sentenced, with the same crimes.

Company A and Contech both regularly participated in the bidding process for the Department's projects. Contech would solicit Company A's bid price prior to submitting its own bid, a process orchestrated by defendant, and then use this information to submit bids priced higher than Company A's to the Department. For example, the indictment alleges that while initially defendant called Company A "directly to obtain Company A's bid prices for aluminum structure projects prior to" submitting Contech's bids, he eventually directed an unindicted Contech employee to solicit this information by email, in-person, and by phone. (Indictment (DE 1) ¶ 16). Company A would provide this information, but it did not solicit Contech's price in return because the understanding was that Contech would always bid higher than Company A's bid price. The actual bids submitted by Contech and Company A were accompanied by certifications that stated the companies' bids were submitted competitively and without collusion.

Further relevant facts raised by the parties will be discussed in the analysis herein.

DISCUSSION

A. Standard of Review

Rule 12 of the Federal Rules of Criminal Procedure allows a party to "raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Rule 12 also requires certain types of "defenses, objections, and requests" to "be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the mer-

its,” including “a defect in the indictment or information.” Fed. R. Crim. P. 12(b)(3)(B). One such infirmity is “failure to state an offense.” Fed. R. Crim. P. 12(b)(3)(B)(v). Courts also regularly entertain motions to dismiss indictments in whole or in part where a defendant asserts the underlying statute or its instant application is unconstitutional. See, e.g., United States v. Hill, 700 F. App’x 235, 236 (4th Cir. 2017); United States v. Mudlock, 483 F. App’x 823, 828 (4th Cir. 2012) (per curiam).

Motions challenging “the sufficiency of the indictment . . . [are] ordinarily limited to the allegations contained in the indictment.” United States v. Engle, 676 F.3d 405, 415 (4th Cir. 2012); Hill, 700 F. App’x at 237.

B. Analysis

Every statute passed by Congress is presumed to be constitutional. United States v. Morrison, 529 U.S. 598, 607 (2000). The statute at issue here prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1. The Supreme Court has interpreted this potentially expansive language to only “outlaw unreasonable restraints.” State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). As relevant here, some practices are considered to, in and of themselves, unreasonably restrain trade and “are deemed unlawful *per se*” under § 1. Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007). This “small group of restraints are unreasonable *per se* because they ‘always or almost always tend to restrict competition and decrease output.’” Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018) (quoting Bus. El-

ecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)).

1. Section 1's Constitutionality as Applied to Defendant

The United States Constitution, through the Fifth Amendment, requires that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend V. “[T]he Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” Johnson v. United States, 576 U.S. 591, 595 (2015). Defendant argues that “Section 1 of the Sherman Act is unconstitutionally vague as applied to [defendant]” because “[t]here are no standards or elements to guide law enforcement or the courts in evaluating allegations of bid rigging.” (Def.’s Mem. (DE 129) at 6). The court disagrees.

In Nash v. United States, the Supreme Court rejected a challenge to Section 1 of the Sherman Act as unconstitutionally vague, explaining that “there is no constitutional difficulty in the way of enforcing the criminal part of the act.” 229 U.S. 373, 378 (1913). This was because “commonlaw precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute.” Cline v. Frink Dairy Co., 274 U.S. 445, 460 (1927). Accordingly, courts in the intervening years since Nash have rejected unconstitutional vagueness challenges to criminal application of 15 U.S.C. § 1. See, e.g., United States v. Penn, No. 20-CR-00152-PAB, 2021 WL

4521904, at *4 (D. Colo. Oct. 4, 2021); United States v. Harwin, No. 220CR00115JLBMRM, 2021 WL 719614, at *7-9 (M.D. Fla. Feb. 24, 2021); United States v. Aiyer, 470 F. Supp. 3d 383, 402 n.23 (S.D.N.Y. 2020); see also United States v. Caputo, 517 F.3d 935, 941 (7th Cir. 2008) (“The Supreme Court has rejected vagueness challenges to the antitrust laws.”); Columbia Nat. Res., Inc. v. Tatum, 58 F.3d 1101, 1107 (6th Cir. 1995) (“No one will claim that the Sherman Act is a model of specificity. . . . However, the claims of void for vagueness lodged against it have failed.”); K-S Pharmacies, Inc. v. Am. Home Prod. Corp., 962 F.2d 728, 732 (7th Cir. 1992) (“Long ago the [Supreme] Court deemed the Sherman Act sufficient, and it has never questioned that conclusion.”).

Against this weight of case law, defendant does not cite any cases holding the Sherman Act unconstitutionally vague in any application. Instead, defendant asserts that intervening Supreme Court cases have abrogated Nash, namely, Johnson, 576 U.S. 591, Sessions v. Dimaya, 138 S. Ct. 1204 (2018), and United States v. Davis, 139 S. Ct. 2319 (2019). (See Def.’s Mem. (DE 129) at 20, 22).

However, the Supreme Court has made clear that it “does not normally overturn . . . earlier authority sub silentio.” Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 18 (2000). When the Court’s precedent has “direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [courts] should follow the line of cases which directly controls, leaving to [the] Court the prerogative of overturning its own decisions.” Agostini v. Felton, 521 U.S. 203, 237 (1997). Agostini has been interpreted by

the United States Court of Appeals for the Fourth Circuit as “unequivocally ‘reaffirm[ing]’ that lower courts are not to ‘conclude’ that the Court’s ‘more recent cases have, by implication, overruled [its] earlier precedent.” Columbia Union Coll. v. Clarke, 159 F.3d 151, 158 (4th Cir. 1998) (quoting Agostini, 521 U.S. at 237).

In fact, Johnson cited Nash with approval for the proposition that “the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree,” noting that it did “not doubt the constitutionality of laws that call for the application of a qualitative standard such as ‘substantial risk’ to real-world conduct.” Johnson, 576 U.S. at 603-04 (quoting Nash, 229 U.S. at 377); see also id. at 618 (Kennedy, J., concurring) (explaining that the Supreme Court has “repeatedly rejected vagueness challenges to penal laws addressing . . . anticompetitive conduct.” (citing Nash, 229 U.S. 373)).

Defendant further argues that Nash is distinguishable because it, ostensibly, concerned a facial challenge to Section 1 of the Sherman Act rather than an as-applied challenge, as defendant brings. Even presuming defendant’s distinction is correct and that defendant is not in actuality bringing a facial challenge, (see, e.g., Def.’s Mem. (DE 129) at 11 (“Section 1 is unconstitutionally vague on its face.”)), Nash is still instructive as to why Section 1 is not unconstitutionally vague as applied to defendant.

As has long been recognized, courts’ interpretations of statutes can provide the fair notice and standards required by the Fifth Amendment. See United States v. Lanier, 520 U.S. 259, 266 (1997) (“[C]larity at the requisite level may be supplied by judicial gloss on an other-

wise unceliain statute.”); Kolender v. Lawson, 461 U.S. 352, 358 (1983) (explaining that a statute was unconstitutionally vague where, “as presently drafted and construed by the state comis,” it “contained no standard for determining what a suspect has to do in order to” fall within its criminal prohibitions (emphasis added)); Frink Dairy. 274 U.S. at 460 (“[C]ommonlaw precedents as to what constituted an undue restraint of trade were quite specific enough to advise one engaged in interstate trade and commerce what he could and could not do under the statute.” (citing Nash, 229 U.S. 373)). Further, that a statute “require[s] a person to conform his conduct to an imprecise but comprehensible normative standard” does not mean that it does not specify a “standard of conduct.” Doe v. Cooper, 842 F.3d 833, 842 (4th Cir. 2016) (quoting Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)).

At the time of defendant’s alleged conduct, Section 1 of the Sherman Act, as interpreted by the Fourth Circuit and the Supreme Court, gave him fair notice of the conduct it punishes and was not so standardless as to invite arbitrary enforcement. See also Salman v. United States, 137 S. Ct. 420, 425, 428-429 (2016) (holding that even where two circuit courts disagreed on what the relevant legal standard required, that standard was not “unconstitutionally vague as applied to th[at] case”). Price-fixing, see, e.g., Texaco Inc. v. Dagher, 547 U.S. 1, 4 (2006); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940); United States v. Trans-Mo. Freight Ass’n, 166 U.S. 290, 339 (1897), and contract-allocation agreements between competitors, United States v. Md. & Va. Milk Producers Co-op. Ass’n, Inc., 974 F.2d 1333 (4th Cir. 1992); cf. Midland Asphalt Corp. v. United States, 489 U.S. 794, 795 (1989), have long been recog-

nized as per se unreasonable restraints of trade under 15 U.S.C. § 1. Big-rigging is a species of price-fixing and contract-allocation. United States v. Portsmouth Paving Corp., 694 F.2d 312, 317 (4th Cir. 1982) (describing “collusive big rigging” as a “contract allocation agreement”); United States v. Bensinger Co., 430 F.2d 584, 589 (8th Cir. 1970) (holding bid rigging is “a price-fixing agreement of the simplest kind”), abrogated on other grounds by Bourjaily v. United States, 483 U.S. 171 (1987).

Long before defendant’s conduct is alleged to have begun in 2009, (Indictment (DE 1) ¶ 2), bid-rigging, violative of the Sherman Act, was defined as “[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party,” inclusive of “an agreement between competitors in a bidding contest to . . . preselect[] the lowest bidder” or “to abstain from all bona fide effort to obtain the contract.” Portsmouth, 694 F.2d at 325 & n.18.³ “[W]here two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act.” United States v. W.F. Brinkley & Son Const. Co., 783 F.2d 1157, 1161 (4th Cir. 1986) (describing this as an “accurate statement of the law”).

The indictment alleges, meaning the court takes as true for the purposes of this motion, Hill, 700 F. App’x at 237, that defendant engaged in bid-rigging conduct.

³ Throughout this order, internal citations and quotation marks are omitted from citations unless otherwise specified.

As already explained by the court, the indictment alleges factual matter to the effect that “Contech formed an agreement with its fellow bid competitor Company A, pursuant to which bids to complete infrastructure projects, contract offers, were submitted to a third-party, NCDOT.” (Mar. 16, 2021, Order (DE 79) at 13). Defendant had fair notice that his conduct constituted bid-rigging that is recognized as a conspiracy in restraint of trade under 15 U.S.C. § 1 and that is defined by “application of a qualitative standard . . . to real-world conduct,” which does not invite arbitrary or discriminatory enforcement. See Johnson, 576 U.S. at 604.

Finally, defendant makes passing reference to the “rule of lenity,” such that “ambiguities about the breadth of a criminal statute . . . be resolved in . . . defendant’s favor.” (Def.’s Mem. (DE 129) at 24-25 (quoting Davis, 139 S. Ct. at 2333)). However, defendant’s conclusory reference to “[t]he totality of the circumstances presented by the allegations here,” (id.), fails to establish the requisite “grievous ambiguity or uncertainty” for application of that rule in interpreting 15 U.S.C. § 1. See Huddleston v. United States, 415 U.S. 814, 831 (1974).

In sum, Section 1 of the Sherman Act is not so vague in its application to defendant’s alleged conduct as to infringe on his guarantee of due process of law prior to deprivation of life, liberty, or property under the Fifth Amendment to the United States Constitution. His motion to dismiss is denied in this part.

2. Failure to State an Offense

Defendant also argues that the indictment fails to state an offense for a Sherman Act violation. (Def.’s

Mem. (DE 129) at 6). Defendant’s argument in this remaining part lacks merit, too. Defendant will recall that the court denied previous motion in this case in which he joined, construed as “a motion to dismiss the Sherman Act count for failure to state an offense pursuant to Rule 12(b)(3)(B)(v).” (Mar. 16, 2021, Order (DE 79) at 6-7). To the extent the instant motion sounds as one that seeks the court to reconsider that decision, it fails.

Here, relying on the facts alleged in the indictment, the essential elements of a Sherman Act violation have been charged. As previously summarized by the court,

When defendant “Brewbaker called Company A directly to obtain Company A’s bid prices for aluminum structure projects prior to submitting a bid on behalf of [d]efendant Contech,” and “Company A[’s] representatives . . . understood that [d]efendant Contech . . . would submit rigged bids that were intentionally higher than those submitted by Company A” based on the two companies’ communications, an agreement cognizable under Section 1 of the Sherman Act as bid rigging had been formed.

(Mar. 16, 2021, Order (DE 79) at 12 (quoting Indictment (DE 1) ¶¶ 16-17)). Defendant’s arguments in support of the instant motion retread grounds already rejected by the court, and he provides no good cause to reconsider that decision. Defendant’s arguments for dismissal of the Sherman Act count for failure to state an offense lack merit. Therefore, his motion in this remaining part is also denied.

47a

CONCLUSION

Based on the foregoing, defendant's motion to dismiss count one of the indictment (DE 128) is DENIED.

SO ORDERED, this the 13th day of January, 2022.

/s/ LOUISE W. FLANAGAN
LOUISE W. FLANAGAN
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:20-CR-481-FL

UNITED STATES OF AMERICA

v.

BRENT BREWBAKER AND CONTECH ENGINEERED
SOLUTIONS LLC, DEFENDANTS

Filed: Mar. 16, 2021

ORDER

This matter is before the court on motion of defendant Contech Engineered Solutions LLC (“Contech”) to have the court apply the “Rule of Reason” in this case. (DE 35).¹ The issues raised have been briefed fully, and in this posture are ripe for ruling. For the following reasons, the motion is denied.

STATEMENT OF THE CASE

Indictment returned October 21, 2020, charges defendants with one count of conspiracy to rig bids in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (the

¹ Defendant Brent Brewbaker (“Brewbaker”), an employee of defendant Contech, responded in support of defendant Contech’s motion. (Def. Brewbaker’s Resp. Supp. (DE 49)).

“Sherman Act count”), one count of conspiracy to commit mail and wire fraud, three counts of mail fraud, and one count of wire fraud.

On December 4, 2020, defendant Contech filed the instant motion seeking the court to apply a “rule of reason” legal standard to the Sherman Act count. Defendant Contech relies upon an affidavit by Kenneth G. Elzinga (“Elzinga”), a professor of economics at the University of Virginia; declarations by defendant Brewbaker and Douglas A. Witten, who is also an employee of defendant Contech; and examples of the bids allegedly underlying the instant charges. Extensive briefing followed. Defendant Contech’s motion, joined in by defendant Brewbaker, is vigorously opposed by the government.²

STATEMENT OF THE FACTS

The facts alleged in the indictment are as follows. The North Carolina Department of Transportation (“NCDOT”) solicits bids for various infrastructure projects including, as relevant here, completion of civil engineering projects related to the flow of water around highways and roads. These projects can be completed using aluminum structures, for which defendant Contech, an Ohio corporation, is in the business of manufacturing aluminum pieces. Defendant Brewbaker, during the time period relevant to this case, was a North Carolina-based employee of Contech responsible for

² A joint status report is due from the parties on March 31, 2021, in response to the court’s March 1, 2021, order regarding defendant’s motion to compel. Issues raised in that report for the court’s consideration will be addressed in a separate order entered after such report is filed.

preparing and submitting defendant Contech's bids for NCDOT projects. Relevant, too, is unindicted Company A, which designs aluminum structures and provides installation services. Company A purchases aluminum pieces from defendant Contech and uses these pieces to complete projects for NCDOT, serving as defendant Contech's distributor.

Company A and defendant Contech both regularly participated in the bidding process for NCDOT projects. Defendant Contech would solicit Company A's bid price prior to submitting its own bid, a process orchestrated by defendant Brewbaker, and then use this information to submit bids priced higher than Company A's to NCDOT. For example, the indictment alleges that while initially defendant Brewbaker called Company A "directly to obtain Company A's bid prices for aluminum structure projects prior to" submitting defendant Contech's bids, he eventually directed an unindicted Contech employee to solicit this information by email, in-person, and by phone. (Indictment (DE 1) ¶ 16). Company A would provide this information, but it did not solicit defendant Contech's price in return because the understanding was that defendant Contech would always bid higher than Company A's bid price. Actual bids submitted by defendant Contech and Company A were accompanied by certifications that stated the companies' bids were submitted competitively and without collusion.

Further relevant facts raised by the parties will be discussed in the analysis herein.

DISCUSSION**A. Standard of Review**

Rule 12 of the Federal Rules of Criminal Procedure allows a party to “raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” Fed. R. Crim. P. 12(b)(1); see also United States v. Shortt Accountancy Corp., 785 F.2d 1448, 1452 (9th Cir. 1986) (“A pretrial motion is generally ‘capable of determination’ before trial if it involves questions of law rather than fact.”). Rule 12 also requires certain types of “defenses, objections, and requests” to “be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits,” including “a defect in the indictment or information.” Fed. R. Crim. P. 12(b)(3)(B). One such infirmity is “failure to state an offense.” Fed. R. Crim. P. 12(b)(3)(B)(v).

Rule 12(b)(1) motions are governed by Rule 47, which allows for the moving party to “serve any supporting affidavit with the motion.” Fed. R. Crim. P. 12(b)(1); Fed. R. Crim. P. 47(d). In contrast, motions challenging “the sufficiency of the indictment . . . [are] ordinarily limited to the allegations contained in the indictment.” United States v. Engle, 676 F.3d 405, 415 (4th Cir. 2012). While “there is no provision for summary judgment in the Federal Rules of Criminal Procedure,” this does not prevent a district court from “consider[ing] a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts.” United States v. Weaver, 659 F.3d 353, 355 n.* (4th Cir. 2011); see also United States v. Sampson, 898 F.3d 270, 279 (2d Cir.

2018) (“Conspicuously absent from the Federal Rules of Criminal Procedure, however, is an analogue for summary judgment under Federal Rule of Civil Procedure 56.”).

Here, the proper procedural vehicle for the instant type of motion is unclear, where the defendant seeks not to dismiss the indictment but rather seeks to have the applicable law decided in advance of trial. Defendant Contech’s motion specifically cites Federal Rule of Criminal Procedure 12(b)(1) as the operative rule. The government contends in opposition that the instant motion should be construed as a motion to constructively amend or dismiss a charge in the indictment because the indictment alleges that the conspiracy engaged in by defendants and their co-conspirators was a “per se unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of the Sherman Antitrust Act.” (Government’s Resp. Opp’n (DE 47) 7 (quoting Indictment (DE 1) ¶ 22)). Further, the parties represent that the Antitrust Division of the U.S. Department of Justice does not typically pursue criminal antitrust charges under a “rule of reason” legal theory and would not do so here. (Def. Contech’s Memo. Supp. Mot. (DE 36) 23; Government’s Resp. Opp’n (DE 47) 3).

The court’s research does not reveal a clearly accepted or required procedural practice for bringing this type of motion. Courts have decided similar motions typically presented in the form of motions to dismiss indictments and to alternatively, or in addition, apply the “rule of reason.” See, e.g., United States v. Kemp & Assocs., Inc., 907 F.3d 1264, 1272 (10th Cir. 2018) (considering appeal of “Rule of Reason Order” entered after the “defendants’ motion for the case to be subject to the

rule of reason” that was joined by a motion to dismiss the indictment on statute of limitations grounds); United States v. Suntar Roofing, Inc., 897 F.2d 469, 472 (10th Cir. 1990) (considering, on appeal after trial, “government’s pre-trial motion to prevent the defendants from offering evidence of the reasonableness and/or economic justification for the alleged activities or evidence of the defendants’ lack of intent to violate the law or to restrain trade”); United States v. Hsuan Bin Chen, No. CR 09-110 SI, 2011 WL 332713, at *3 (N.D. Cal. Jan. 29, 2011) (considering a motion to dismiss indictment that requested application of rule of reason, which would require an allegation of specific intent to produce anticompetitive effect that the indictment lacked), aff’d sub nom. United States v. Hui Hsiung, 778 F.3d 738, 744 (9th Cir. 2015); United States v. Lischewski, No. 18-CR-00203-EMC-1, 2019 WL 2251104, at *1 (N.D. Cal. May 24, 2019) (denying motion to dismiss indictment on duplicity grounds or apply rule of reason); United States v. Usher, No. 17 CR. 19(RMB), 2018 WL 2424555, at *2 (S.D.N.Y. May 4, 2018) (considering defendants’ motion to dismiss indictment, which argued that the indictment failed to describe the conspirators as operating as competitors and that the per se rule was inapplicable, and concluding that “the indictment sets forth a per se violation of the Sherman Act”).

However, even when faced with such motions to dismiss an indictment or apply the rule of reason, courts have typically restricted their review to the indictment. For example, in United States v. Kemp & Associates, Inc., while the court ultimately decided to dismiss the government’s appeal of a “Rule of Reason Order” due to lack of jurisdiction, it considered only the indictment’s description of the conduct at issue and noted that “were

the merits of the rule of reason order before [the court, it] might very well reach a different conclusion than did the district court,” which had found the rule of reason applicable. See 907 F.3d at 1277; see also United States v. Kemp & Assocs., Inc., No. 2:16CR403 DS, 2019 WL 763796, at *1 (D. Utah Feb. 21, 2019) (finding, on remand, the per se rule applicable in light of the Tenth Circuit’s guidance).

Similarly, in United States v. Suntar Roofing, Inc., the panel, in considering the government’s pretrial motion to exclude rule of reason evidence, reviewed the “activity alleged in the indictment.” 897 F.2d at 473. The district court had “ruled that the indictment did in fact allege a per se violation of the Sherman Act, and that, assuming the government could present evidence establishing the violation charged in the indictment, the defendants would therefore be precluded from introducing evidence of reasonableness or justification at trial.” Id. at 472-73. Subsequently, “[a]t trial, the court concluded that the government had established the violation charged and therefore precluded defendants’ additional evidence.” Id. at 473. The Tenth Circuit affirmed, holding that “the activity alleged in the indictment in this case . . . constitutes a per se violation of § 1 of the Sherman Act.” Id. (emphasis added).

While the foregoing cases support restricting review to the indictment, the government’s argument that allowance of the motion would effect a constructive amendment of the indictment is unavailing. The government has not pointed the court to any authority standing for the proposition that constructive amendment may be accomplished by a defendant. Rather, as typically understood, a “constructive amendment” or

“fatal variance” occurs “[w]hen the government through its presentation of evidence or its argument, or the district court, through its instructions to the jury, or both, broadens the bases for conviction beyond those charged in the indictment.” United States v. Malloy, 568 F.3d 166, 178 (4th Cir. 2009) (emphasis added).

While the answer is far from clear, the court finds treatment of defendant Contech’s motion as a motion to dismiss the Sherman Act count for failure to state an offense pursuant to Rule 12(b)(3)(B)(v) to be the closest procedural analogue. Cf. United States v. Thomas, 367 F.3d 194, 197 (4th Cir. 2004) (noting “some uncertainty regarding the procedural posture of this claim” and treating motion to dismiss indictment instead “as a challenge to the adequacy of the factual basis supporting [defendant’s] plea”). The indictment charges a per se violation of the Sherman Act. (Indictment (DE 1) ¶ 22). Defendants contend that the conduct described by the indictment is not a per se unreasonable restraint of trade. Accordingly, the instant motion, in effect, argues that the indictment has failed to state an offense constituting a per se Sherman Act violation as the indictment purports to charge and, instead, charges an antitrust offense controlled by the “rule of reason.” Cf., e.g., United States v. Milk Distrib. Ass’n, Inc., 200 F. Supp. 792, 795 (D. Md. 1961) (“The individual defendants moved to dismiss Count II as to them, on the grounds that their alleged participation in the conspiracy charged an offense punishable only under section 14 of the Clayton Act, while the indictment charged them only under section 1 of the Sherman Act.”). This conclusion is not based on the government’s representation that it does not prosecute antitrust cases involving allegations of violations of the Sherman Act analyzed under

the “rule of reason,” which is its due prerogative. The government’s stated practice does not control the legal import of the instant motion.

Accordingly, considering only the indictment, the court reviews whether defendants have “demonstrate[d] that the allegations therein, even if true, would not state an offense.” United States v. Thomas, 367 F.3d 194, 197 (4th Cir. 2004); see also United States v. Portsmouth Paving Corp., 694 F.2d 312, 317 (4th Cir. 1982) (explaining that “a necessary predicate to defining the essential elements of the crime” is noting that the “scheme alleged in the indictment is illegal per se under section 1 of the Sherman Act”); Dickson v. Microsoft Corp., 309 F.3d 193, 202 (4th Cir. 2002) (holding, in the civil context that “[t]o establish a violation of § 1 of the Sherman Act, [plaintiff] must prove the following elements: (1) a contract, combination, or conspiracy; (2) that imposed an unreasonable restraint of trade”); United States v. Rubbish Removal, Inc., No. 3143, 1985 WL 1605, at *2 (N.D.N.Y. Apr. 11, 1985) (“The essential elements of a Sherman Act indictment are the time, place, manner, means and effect of the alleged violation.”). “To the extent an indictment relies on a ‘general description based on the statutory language,’ the indictment also should include ‘a statement of the facts and circumstances as will inform the accused of the specific [offense], coming under the general description.’” United States v. Blankenship, 846 F.3d 663, 668 (4th Cir. 2017) (alteration in original) (quoting United States v. Perry, 757 F.3d 166, 171 (4th Cir. 2014)); United States v. Quinn, 359 F.3d 666, 673 (4th Cir. 2004) (“[T]he indictment must also contain a statement of the essential facts constituting the offense charged.” (quotation omitted)). Finally, “[a] district court may dismiss an indictment un-

der Rule 12 where there is an infirmity of law in the prosecution.” Engle, 676 F.3d at 415 (quotation omitted).

With this standard in mind, defendants do not demonstrate that the indictment fails to allege a per se violation of the Sherman Act, as explained below. Therefore, their motion must be denied.

B. Analysis

The Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States.” 15 U.S.C. § 1. The Supreme Court has interpreted this potentially expansive language to only “outlaw unreasonable restraints.” State Oil Co. v. Khan, 522 U.S. 3, 10 (1997). “Restraints can be unreasonable in one of two ways.” Ohio v. Am. Express Co., 138 S. Ct. 2274, 2283 (2018).

First, some practices are considered to, in and of themselves, unreasonably restrain trade and “are deemed unlawful per se” under § 1; the so-called per se rule. Leegin Creative Leather Prod., Inc. v. PSKS, Inc., 551 U.S. 877, 886 (2007). This “small group of restraints are unreasonable per se because they ‘always or almost always tend to restrict competition and decrease output.’” Am. Express Co., 138 S. Ct. at 2283 (quoting Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988)); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) (explaining that certain practices are “conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use”). However, “the per se rule is appropriate only after

courts have had considerable experience with the type of restraint at issue” in order to determine whether it has the requisite “manifestly anticompetitive effect[.]” Leegin, 551 U.S. at 886 (quotation omitted); United States v. Topco, Inc., 405 U.S. 596, 607-08 (1972) (“It is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act.” (emphasis added)).

Second, and in contrast, where the courts have not deemed a specific practice per se unlawful, it will be analyzed under the “rule of reason,” under which a context-specific inquiry must be conducted to “distinguish[] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.” Leegin, 551 U.S. at 885-86 (citing as exemplary, relevant factors “specific information about the relevant business’ and ‘the restraint’s history, nature, and effect” (quoting Khan, 522 U.S. at 10)); see also Am. Express Co., 138 S. Ct. at 2284 (laying out “a three-step, burden-shifting framework” in the civil context). The rule of reason is presumptively applied, Leegin, 551 U.S. at 885-86, and the United States Supreme Court has explained that designation of a practice as per se unreasonable “must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing,” Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58-59 (1977).

“Typically only ‘horizontal’ restraints—restraints ‘imposed by agreement between competitors’—qualify as unreasonable per se.” Am. Express Co., 138 S. Ct. at 2283-84 (quoting Bus. Elecs., 485 U.S. at 730); see also Topco Assocs., 405 U.S. at 608 (explaining that horizon-

tal arrangements are between “competitors at the same level of the market structure”). For example, the Supreme Court has found that horizontal agreements among competitors to fix prices, Texaco Inc. v. Dagher, 547 U.S. 1, 5 (2006), and to divide markets, Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990) (per curiam), are per se illegal. On the other hand “nearly every . . . vertical restraint,” that is, a “restraint[] ‘imposed by agreement between firms at different levels of distribution’ . . . should be assessed under the rule of reason.” Am. Express Co. 138 S. Ct. at 2284 (quoting Bus. Elecs., 485 U.S. at 730)); see also Topco Assocs., 405 U.S. at 608 (“[C]ombinations of persons at different levels of the market structure, e.g., manufacturers and distributors . . . are termed ‘vertical’ restraints.”).

Moreover, the United States Court of Appeals for the Fourth Circuit, in accord with other federal circuit courts, has held that bid rigging is per se violative of the Sherman Act. Portsmouth Paving Corp., 694 F.2d at 317, 325; accord United States v. Fenzl, 670 F.3d 778, 780 (7th Cir. 2012) (describing bid rigging as “a form of price fixing in which bidders agree to eliminate competition among them, as by taking turns being the low bidder”); United States v. Bensinger Co., 430 F.2d 584, 589 (8th Cir. 1970) (holding bid rigging is “a price-fixing agreement of the simplest kind, and price-fixing agreements are per se violations of the Sherman Act”), abrogated on other grounds by Bourjaily v. United States, 483 U.S. 171 (1987); United States v. Koppers Co., 652 F.2d 290, 294 (2d Cir. 1981).

The Fourth Circuit has held unequivocally that “[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a

third party constitutes bid rigging.” Portsmouth, 694 F.2d at 325; see also id. at 325 n.18 (“[C]ollusive bidding is ‘an agreement between competitors in a bidding contest to submit identical bids or, by preselecting the lowest bidder, to abstain from all bona fide effort to obtain the contract.” (emphasis added) (quoting 1 Rudolf Callmann, The Law of Unfair Competition, Trademarks and Monopolies § 4.34, at 203))). To constitute bid rigging, there is no “requirement that coconspirators agree to reciprocate by submitting complementary bids on future projects.” Id. at 625 (explaining that a definition of bid rigging that included such a requirement would be “an erroneous statement of the law”). “[W]here two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust Act.” United States v. W.F. Brinkley & Son Const. Co., 783 F.2d 1157, 1161 (4th Cir. 1986) (describing this statement as an “accurate statement of the law”); see also Koppers, 652 F.2d at 295 (finding bid rigging where competitors acted in concert “to bid according to agreed-upon prices”).

For example, in Portsmouth Paving Corp., the Fourth Circuit described an arrangement between paving companies “[t]o allocate . . . roadway construction and surface paving contracts” and “[t]o refrain from bidding or to submit collusive, non-competitive and rigged bids . . . in connection with . . . roadway construction and surface paving contracts” as an impermissible horizontal restraint in the form of bid rigging. 694 F.2d at 316 (first two alterations and omissions in original) (quoting indictment). The accused companies were able to “trade projects among themselves by

agreeing to withhold bids or to submit artificially high ‘complementary’ bids on certain projects” in conjunction with the designated lowest bidder’s bid, meaning that, in effect, the co-conspirators decided which conspirator would have the lowest, and therefore winning, bid. Id. at 316 & n.2. The panel did “not hesitate to conclude” that the alleged arrangement was the type of per se illegal agreement between competitors condemned by the Sherman Act. Id. at 317-18.

Similarly, in United States v. W.F. Brinkley & Son Construction Co., the Fourth Circuit considered an agreement between companies regarding a contract to complete water infrastructure projects for Elizabeth City, North Carolina. 783 F.2d 1157, 1158 (4th Cir. 1986). In that case, after an initial round of bidding by three companies that did not result in the grant of the contract due to the unexpectedly high bid prices, two of the defendants agreed prior to the next round of bidding that one “would intentionally submit a high or ‘complementary’ bid to ensure that [the other] would again be the low bidder” and that the winner would subcontract certain work to the losing company. Id. at 1159. A third company, who had originally intended to submit a competitive bid, also solicited from the lowest bidder “a ‘safe’ number” to bid, after deciding to submit a non-competitive bid.” Id. The court concluded that “[i]t [was] clear that [defendants’] conduct constituted bid rigging in violation of the antitrust laws.” Id. at 1160.

Here, the indictment alleges facts permitting an inference that defendant Contech, by and through its agent defendant Brewbaker, engaged in an “agreement between competitors pursuant to which contract offers [were] . . . submitted to . . . a third party,” that

is, bid rigging under the foregoing Fourth Circuit precedent. When defendant “Brewbaker called Company A directly to obtain Company A’s bid prices for aluminum structure projects prior to submitting a bid on behalf of [d]efendant Contech,” and “Company A[’s] representatives . . . understood that [d]efendant Contech . . . would submit rigged bids that were intentionally higher than those submitted by Company A” based on the two companies’ communications, an agreement cognizable under Section 1 of the Sherman Act as bid rigging had been formed. See Brinkley, 783 F.2d at 1160 (“[W]hen [the co-conspirator] contacted [defendant] requesting a safe number to bid and he consented to give them one . . . , [a]t that point, there was an agreement between two competitors pursuant to which bids would be submitted to Elizabeth City . . . [and s]uch an agreement is clearly bid rigging.”). There is no dispute that the bid offers by defendant Contech and Company A to complete the NCDOT projects were contract offers. Although defendants vigorously contest that defendant Contech acted as a competitor to Company A in this context, the court concludes that, in submitting bids for the same project, Company A and defendant Contech acted as facially competing for award of the project, for which they would have been competing except for the alleged illegal agreement between the two. Accordingly, all the elements of the Fourth Circuit’s definition of bid rigging have been alleged: Contech formed an agreement with its fellow bid competitor Company A, pursuant to which bids to complete infrastructure projects, contract offers, were submitted to a third-party, NCDOT.

The fact that this was done as to “not undercut its dealer’s price,” (Def. Contech’s Memo. Supp. Mot. (DE 36) 4), or that it had beneficial economic benefits (see

generally Elzinga Aff. (DE 37-1)), is inapposite under the applicable law. Although the conduct may allegedly be procompetitive, there is no need to look at economic impact as described in the Elzinga affidavit because where a practice is per se illegal, like bid rigging is, “further inquiry on the issues of intent or the anti-competitive effect is not required.” Brinkley, 783 F.2d at 1162. That Elzinga does not consider the practice bid rigging economically is not relevant because, in his own words, he is “not an attorney and [h]is affidavit offers no conclusions about antitrust law.” (Elzinga Aff. (DE 37-1) 6).

Defendant Contech urges that because bid rigging does not, it argues, typically involve manufacturer’s additional bids, “the Court must apply the economics mandated by Leegin and provided by [Elzinga].” (Def. Contech’s Reply (DE 53) 5). However, “the machinery employed by a combination for price-fixing is immaterial,” Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647 (1980), and, as already noted, a “bid rigging agreement is [a] price-fixing agreement of the simplest kind.” Portsmouth Paving Corp., 694 F.2d at 318 (quotation omitted); see also Arizona v. Maricopa Cnty. Med. Soc’y, 457 U.S. 332, 351 (1982) (“[T]he argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for per se rules. . . .”). That defendants and their co-conspirators were not able to perfectly fix the price NCDOT would have to pay because an unindicted third company³ also placed bids does not

³ Defendant Contech contends that the government has attempted to “writ[e] an indictment that skillfully sweeps [the third unindicted company] under the rug in its description of the mar-

answer whether the alleged conspirators agreed to a bid rigging or price fixing agreement. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (“It is the ‘contract, combination . . . or conspiracy, in restraint of trade or commerce’ which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.” (omission in original) (quoting United States v. Trenton Potteries Co., 273 U.S. 392, 402 (1927))); see also United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 90 (2d Cir. 1999) (“[A] conspiracy warranting conviction can exist even if, for sentencing purposes, it does not succeed in affecting prices throughout the entire period of the conspiracy, or at all.”); United States v. Hayter Oil Co. of Greeneville, Tenn., 51 F.3d 1265, 1274 (6th Cir. 1995) (noting that “price-fixing” is “illegal per se, without regard to its success, merely because of its plainly anticompetitive effect” (emphasis added)). As defined by relevant and binding Fourth Circuit precedent, defendants are alleged to have engaged in a bid-rigging agreement, which is per se an unreasonable restraint of trade and therefore violative of Section One of the Sherman Act, obviating the applicability of the rule of reason.

Defendants advance two additional arguments against the application of the per se rule to the alleged scheme. First, defendants argue that since bid rotation is not at issue in this case, the per se prohibition on bid rigging is not implicated here. Second, the defendants

ket.” (Def. Contech’s Reply (DE 53) 7). However, the indictment alleges that “[d]uring the conspiracy period, [d]efendant Contech Engineered Solutions LLC, Company A, and others submitted bids for NCDOT aluminum structure projects,” indicating that Company A and defendant Contech were not the sole market participants. (Indictment (DE 1) ¶ 8).

argue that the relationship between defendant Contech and Company A was vertical in nature, implicating the Supreme Court’s guidance that such arrangements are presumptively governed by the rule of reason. The court addresses each argument in turn below.

1. Whether the Underlying Conduct Constitutes Bid Rigging

Defendants argue that because, in their view, bid rigging is “typically a bid-rotation scheme designed to trade off the lowest bid on one project in return for a reciprocal trade-off on another bid,” (Def. Contech’s Memo. Supp. Mot. (DE 36) 3), the clear prohibition on bid rigging is not implicated here, further citing United States v. Herrernan for the proposition that “the vast majority of cases in which the term [bid rigging] has appeared have treated it as a synonym for bid rotation.” 43 F.3d 1144, 1146 (7th Cir. 1994).⁴

⁴ The Heffernan court considered the meaning of the United States Sentencing Guideline on antitrust violations, which imposes a one level offense enhancement for defendants “whose offense involves the submission of ‘noncompetitive bids.’” 43 F.3d at 1145 (quoting U.S.S.G. § 2R1.1(b)(1)). However, although finding that “interpreting ‘bid rigging’ (equivalently ‘noncompetitive bids’) . . . as meaning bid rotation” to be the correct result, the court admitted that the interpretation was its “best guess as to the meaning of the antitrust guideline” because “its treatment of bidding is a muddle,” while also recognizing that the guideline’s reference to “‘a bid-rigging case in which the organization submitted one or more complementary bids’ impl[ies] that some bid rigging does not or at least need not involve bid rotation.” Id. at 1148, 1150 (quoting U.S.S.G. 2R1.1(d)(3)). Further, in considering the same issue, the Fourth Circuit came to a different conclusion that Heffernan, stating that it was “not persuaded that § 2R1.1(b)(1) . . . is limited to bid-rotation cases.” United States v. Romer, 148 F.3d 359,

Portsmouth forecloses this argument. The court unequivocally stated that requiring a definition of bid rigging to include an element “that coconspirators agree to reciprocate by submitting complementary bids on future projects” would be erroneous. Portsmouth, 694 F.2d at 325. Instead, the court explained that “[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. section 1.” Id. Admittedly, bid rotation was at issue in Portsmouth. See 694 F.2d at 316 & n.2 (“[T]he conspirators would trade projects among themselves by agreeing to withhold bids or to submit artificially high ‘complementary’ bids on certain projects.”). However, the Fourth Circuit’s opinion in Brinkley did not caveat its use of Portsmouth’s definition with a limitation to bid rotation cases, and that court found that “where two or more persons agree that one will submit a bid for a project higher or lower than the others or that one will not submit a bid at all, then there has been an unreasonable restraint of trade which violates the Sherman Antitrust

371 (4th Cir. 1998) (acknowledging and explicitly declining to reach the same conclusion as Heffernan), abrogated on other grounds by Neder v. United States, 527 U.S. 1 (1999).

Further, Heffernan found that despite Portsmouth stating that “a requirement that coconspirators agree to reciprocate by submitting complementary bids on future projects’ is not part of the definition of bid rigging,” its statement of law was “inapt” because “the case was in fact a standard bid rotation case.” Heffernan, 43 F.3d at 1146 (quoting Portsmouth, 694 F.2d at 325) (citing Portsmouth, 694 F.2d at 316 & n.2). However, as noted in the text above, the Fourth Circuit after its decision in Portsmouth has continued to define bid rigging by the broader definition set forth therein. See Brinkley, 783 F.2d at 1161.

Act.” Brinkley, 783 F.2d at 1160-61 (describing this as “an accurate statement of the law”).

Moreover, scholarly authorities’ definition of bid rigging has not constrained the practice to bid rotation alone. For example, the Portsmouth court cited Rudolf Callman’s The Law of Unfair Competition, Trademarks and Monopolies approvingly for the proposition that “collusive bidding is ‘an agreement between competitors in a bidding contest to submit identical bids or, by pre-selecting the lowest bidder, to abstain from all bona fide effort to obtain the contract.” 694 F.2d at 325 n.18 (emphasis added) (quoting 1. Rudolf Callmann, The Law of Unfair Competition, Trademarks and Monopolies § 4.34, at 203 (4th ed. 1981)). Julian von Kalinowski’s Anti-trust Laws and Trade Regulation explains similarly:

Bidding practices that are judged as per se price fixing include: comparing bids prior to submission, agreeing to fix their bids so that one of them will receive the bid at a non-competitive price, agreeing to make identical bids or bids higher than another submitted bid, agreements to refrain from bidding competitively or against one another, agreeing to utilize a common estimator for calculating and submitting bids, and sham or fraudulent bids to create the illusion of competition.

1 Julian O. von Kalinowski, Antitrust Laws and Trade Regulation § 13.02 (2d ed.), LexisNexis (database updated Dec. 2020) (emphasis added) (footnotes omitted).

As a final example, the United States Sentencing Guidelines indicate that bid rigging and bid rotation are always understood to be synonymous. Within the general “Bid-Rigging, Price-Fixing or Market-Allocation

Agreements Among Competitors” section, the guidelines contain a one-level upward enhancement in offense level “[i]f the conduct involved participation in an agreement to submit noncompetitive bids” as well as a separate special instruction for fines regarding “a bid-rigging case in which the organization submitted one or more complementary bids.” U.S.S.G. § 2R1.1(b)(1), (d)(3); see also Heffernan, 43 F.3d at 1146 (explaining that bidrotation is also sometimes referred to as the submission of “complementary bids”). The distinction in verbiage implies, in the eyes of the Sentencing Commission at least, that bid rigging is not always bid rotation. See also Heffernan, 43 F.3d at 1146 (“Another provision of the guideline, moreover, refers to ‘a bid-rigging case in which the organization submitted one or more complementary bids,’ implying that some bid rigging does not or at least need not involve bid rotation.” (quoting U.S.S.G. § 2R1.1(d)(3))). Further, the Fourth Circuit has found that the sentence’s offense level enhancement for situations where “the conduct involved participation in an agreement to submit non-competitive bids,” “is [not] limited to bid-rotation cases.” United States v. Romer, 148 F.3d 359, 371 (4th Cir. 1998), abrogated on other grounds by Neder v. United States, 527 U.S. 1 (1999).

Defendant Contech’s argument that the fact that this case does not involve bid rotation or “complementary bids” means that it is beyond the purview of bid rigging condemned by the Fourth Circuit is at tension with the plain language of Portsmouth and Brinkley and the reasoning set forth in the non-binding authority above. Here, the indictment alleges defendant Brewbaker solicited and received Company A’s upcoming bid prices and crafted a bid for defendant Contech that was in-

tended to lose because it was intentionally higher than Company A's bid, and defendants admit defendant Contech's bid was designed to always be higher than its distributor's. (See Indictment (DE 1) ¶¶ 2, 14; Def. Contech's Memo. Supp. Mot. (DE 36) 23). This is analogous to the situation in Brinkley in which co-conspirators "contacted [defendant] requesting a safe number to bid and [defendant] consented to give them one." 783 F.2d at 1160. The Fourth Circuit stated that "[a]t that point, there was an agreement between two competitors pursuant to which bids would be submitted" and that "such an agreement is clearly bid rigging." Id. at 1160.

In sum, the conduct alleged in the indictment falls squarely within the Fourth Circuit's definition of bid rigging, if the relevant bidding agreement was entered into by two or more entities competing for that bid, and, as discussed below, Company A and defendant Contech would have been exactly that but for their alleged agreement not to compete.

2. Whether the Underlying Arrangement was Vertical or Horizontal in Nature

Defendants argue that their scheme fails the definition of bid rigging condemned as per unreasonable because defendant Contech and Company A were not competitors and, rather, were engaged in a vertical manufacturer-distributor relationship, and that their alleged agreement, if anything, acted as vertical price fixing. However, the court cannot accept this argument as it ignores the fact that, in their roles as separate bidders for NCDOT projects, defendant Contech and Company A facially competed for award of the projects. Because of that fact, their arrangement to not compete in this process necessarily was horizontal in nature.

Defendants primarily rely on the Supreme Court’s analysis in Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), which the defendants repeatedly imply signaled a pivotal change in antitrust law, as well as relying on the Fifth Circuit’s analysis on remand. See, e.g., (Defendant Contech’s Reply (DE 53) 10 (“We would have a different case . . . if we lived in a pre-Leegin antitrust world arid of the modern teaching of economics.”)). Defendants describe precedent in terms of post- and pre-Leegin, seemingly insinuating that antitrust cases decided before Leegin are limited in the wake of the decision, which defendant Contech describes as holding that “manufacturer-dealer price coordination is, indeed, inherently governed by the rule of reason.” (Def. Contech’s Memo. Supp. Mot. (DE 36) 7; see Def. Brewbaker’s Resp. (DE 49) 4 n.1).

In Leegin, the Supreme Court reversed course on its prior holding that “a vertical agreement between a manufacturer and its distributor to set minimum resale prices”⁵ is per se illegal, relying on its jurisprudential trend of “continu[ing] to temper, limit, or overrule once strict prohibitions on vertical restraints.” 551 U.S. at 887, 901. The economic arrangement in Leegin involved a manufacturer’s policy of requiring retailers to follow its suggested retail prices, which the Court, and both parties, characterized as vertical since the manufacturer and the retailers did not act competitors. Id. at 883-84, 907-08.

⁵ “[R]esale price maintenance is the practice by which a manufacturer and a distributor agree on a minimum price below which the distributor will not sell the manufacturer’s products.” Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282, 286 (4th Cir. 2009).

The Fifth Circuit, on remand, considered the argument of PSKS (the plaintiff in Leegin) that “because Leegin is a dual distributor, operating as both a manufacturer and retailer of Brighton goods, the [resale price maintenance] policy is a horizontal restraint.” PSKS, Inc. v. Leegin Creative Leather Prod., Inc. (Leegin II), 615 F.3d 412, 420 (5th Cir. 2010). The Fifth Circuit rejected this argument, noting that “eight other circuits have applied the traditional rule of reason to dual distribution systems” and that economic logic dictated treatment of the agreement as still vertical. Id. 421 & n.8 (collecting cases).

However, the Fourth Circuit, in the two cases it has discussed Leegin, has not described it as marking any general shift in antitrust law or altering the general analysis of vertical or horizontal trade practices. See TFWS, Inc. v. Franchot, 572 F.3d 186, 192 & n.9 (4th Cir. 2009) (explaining that the relevant arrangement was “a form of horizontal price fixing” and that “Leegin, in contrast, concerned vertical resale price maintenance, holding that such arrangements were no longer subject to the per se rule,” meaning that its “holding is inapposite” and “[i]n fact, Leegin, far from undermining [the court’s] conclusion that horizontal price fixing is per se illegal under the Sherman Act, actually reiterates that rule”); Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282, 286-87 (4th Cir. 2009) (rejecting plaintiff’s argument that the Supreme Court had implicitly overruled its precedent holding “a principal-agent relationship is not an agreement for antitrust purposes” through its holding in Leegin).

Instead, Leegin’s relevance here is limited to the uncontroversial proposition that vertical restraints are

typically viewed under the rule of reason and that “[r]esort to per se rules is confined to restraints . . . ‘that would always or almost always tend to restrict competition and decrease output.’” See Leegin, 551 U.S. at 886 (quoting Business Electronics, 485 U.S. at 723). The Leegin Court’s specific overturning of precedent “establishing a per se rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices” is inapposite to the instant case. Id. at 887. “[R]esale price maintenance . . . [,] the practice by which a manufacturer and a distributor agree on a minimum price below which the distributor will not sell the manufacturer’s products,” Valuepest.com, 561 F.3d at 286, is not at issue in this case. The Leegin Court’s treatment of the arrangement in Leegin as vertical was undiscussed and premised in part on the defendant’s specific, uncontested, contention that the arrangement between it and its distributor that controlled the prices at which the distributor could sell the defendant’s product was vertical. See Leegin, 551 U.S. at 884 (“Leegin did not dispute that it had entered into vertical price-fixing agreements with its retailers.”). The Leegin Court’s discussion of when per se illegality is appropriate is not an invitation for federal district courts to reexamine the economic effects of practices that binding circuit precedent defines as per se illegal, like bid rigging.

Defendants further argue that the instant case is analogous to the arrangement discussed by the district court and the Fifth Circuit on remand from Leegin, 551 U.S. 877. On remand, the district court addressed the plaintiff’s argument that because the defendant-manufacturer was also a distributor and retailer of the relevant product, its resale price maintenance agree-

ment with its retailer/distributor should instead be viewed as a horizontal agreement between competitors. See Leegin II, No. CV 2:03CV107(TJW), 2009 WL 938561, at *2 (E.D. Tex. Apr. 6, 2009), aff'd, 615 F.3d 412 (5th Cir. 2010). The district court explained that “[w]here a manufacturer is both a wholesale distributor and retail distributor it is called a ‘dual distribution system.’” Id. at *6. It further explained that it rejected plaintiff’s horizontal argument, which plaintiff did not raise at trial, because binding Fifth Circuit precedent and multiple other circuits had “held that in situations like Leegin’s, where the manufacturer also distributes some of its own goods, restraints are properly analyzed under the rule of reason,” id., a conclusion which the Fifth Circuit affirmed, explaining that the economic reality of the situation was that “[i]f Leegin sought only to raise its margins, it would raise the price of [the price-controlled] goods at the wholesale level, where it could capture all the gains. Leegin is thus no different from a manufacturer that does not have retail stores.” Leegin II, 615 F.3d at 421 & n.8.

The Fourth Circuit has not explicitly ruled in a published opinion on whether dual distribution systems are inherently vertical or horizontal and instead has suggested any arrangement’s orientation should be examined on a case-by-case basis. See Donald B. Rice Tire Co. v. Michelin Tire Corp., 638 F.2d 15, 16 (4th Cir. 1981) (per curiam) (rejecting the “implication . . . that a restraint may always be regarded as vertical if it is imposed by the manufacturer” and instead instructing courts to “distinguish between a conspiracy . . . that would benefit the dealers and one involving the same parties but redounding primarily to the benefit of the manufacturer” with the former being “horizontal in na-

ture and per se illegal” and “latter would be vertical and analyzed under the rule of reason”).

Even presuming the instant arrangement resembles dual distribution systems examined in Leegin II and similar cases, inquiry beyond the label “dual distribution”⁶ is needed to ascertain the nature of the conspirators’ arrangement in the context of the agreed-upon restraint. As the Second Circuit has stated, although the distinction between vertical and horizontal agreements under antitrust law “is sharp in theory, determining the orientation of an agreement can be difficult as a matter of fact and turns on more than simply identifying whether the participants are at the same level of the market structure.” United States v. Apple, Inc., 791 F.3d 290, 314 (2d Cir. 2015); GTE Sylvania, 433 U.S. at 58 n.28 (“There may be occasional problems in differen-

⁶ The court finds convincing that dual-distribution systems typically refer to distribution of the same product whereas here defendant Contech sells aluminum products to a distributor and then submits intentionally losing bids on aluminum product installation projects. Compare, e.g., Elecs. Commc’ns Corp. v. Toshiba Am. Consumer Prod., Inc., 129 F.3d 240, 243 (2d Cir. 1997) (explaining that “where, as here, the manufacturer distributes its products through a distributor and independently[,] . . . [this is a] so-called “dual distribution” arrangement[.]” and that “the dispute involves one manufacturer’s product”), with Koppers 652 F.2d 292 (rejecting that because one conspirator “was buying all of its road tar” from the other conspirator at one point during the conspiracy, the agreement between the two to rig bids in state lets for “sale and application of road tar” was not a horizontal bid rigging agreement). Here, the actual “product” defendant Contech is alleged to offer as a manufacturer and as a bidder differ: as a manufacturer, defendant Contech provides aluminum pieces to Company A; as a bidder on NCDOT projects, defendant Contech provides installation and completion of aluminum structures. (See Indictment (DE 1) ¶¶ 7-8).

tiating vertical restrictions from horizontal restrictions originating in agreements among the retailers.”).

The Second Circuit’s analysis of the verticality issue in United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015), is informative. The Second Circuit held that “where the vertical organizer has not only committed to vertical agreements, but has also agreed to participate in the horizontal conspiracy . . . , the court need not consider whether the vertical agreements restrained trade because all participants agreed to the horizontal restraint, which is ‘and ought to be, per se unlawful.’” See id. at 325 (quoting Leegin, 551 U.S. at 893). It further explained that it would look to “the relevant ‘agreement in restraint of trade,’” which in that case was “the price-fixing conspiracy identified by the district court,” “an agreement between [defendant] Apple and the Publisher Defendants to raise consumer-facing ebook prices,” “not [defendant] Apple’s vertical contracts with the Publisher Defendants.” Id. at 325 (emphasis added); see also United States v. Usher, No. 17 CR. 19(RMB), 2018 WL 2424555, at *3 (S.D.N.Y. May 4, 2018) (“[T]he question of what one defendant is doing with another defendant at some random snapshot in time is not the relevant question in a Section 1 Sherman Act case. The relevant question is whether the nature of the restraint, the nature of the collusion that the defendants agreed to is horizontal.” (quotations omitted)).

Looking to the relevant agreement, it restrained horizontal business activity: submitting bids. Defendant Contech admits that “the indictment essentially charges that the manufacturer,” defendant Contech, “submitted an additional direct bid” after conferring with its dealer

on what price the dealer would be using in its bid. (Def. Contech’s Memo. Supp. Mot. (DE 36) 3-4) (emphasis added); see also id. at 10 (describing the indictment as “attack[ing] a manufacturer who sells through a dealer and who also submits its own direct offering price that the dealer expects will not undercut the dealer’s price”). Although there are aspects of defendant Contech and Company A’s relationship that are vertical (e.g., Contech’s selling aluminum pieces to Company A to use), the restraint at issue was horizontal because the two presented themselves as potential competitors for the bidding process for NCDOT projects. (See Def. Brewbaker’s Resp. (DE 49) 2 (describing “bidders for a construction project” as a “‘horizontal’ relationship”); United States v. Reicher, 983 F.2d 168, 170 (10th Cir. 1992) (“The decisive circumstance in defining ‘competitors’ is the simple fact that [defendant] submitted a bid for the . . . contract. Despite its ultimate inability to perform the contract, [defendant] held itself out as a competitor for the purposes of rigging what was supposed to be a competitive bidding process.”). Any vertical relationship, here, only intersected with and gave rise to the horizontal arrangement at issue, the actual bid-rigging agreement. Cf. Koppers, 652 F.2d at 296-97 (holding that the vertical component of the coconspirators’ relationship only furthered the objective of the horizontal conspiracy “to raise prices and deceive state and local officials into the belief that [the coconspirators] were bona fide competitors [in bidding] when in fact . . . they were not”); Am. Steel Erectors, Inc. v. Local Union No. 7, Int’l Assoc. of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, 815 F.3d 43, 64 (1st Cir. 2016) (explaining that “[i]n order to potentially generate per se antitrust liability, [de-

fendant's] vertical relationships would at least need to intersect with or give rise to an unlawful horizontal relationship" and finding such had not been shown). The alleged agreement restrained how the two companies would compete against one another in the bidding process, a horizontal arrangement, despite the fact that the agreement had the vertical benefit for defendant Con-tech of maintaining its relationship with its dealer.

In sum, the indictment alleges what the Fourth Circuit defines as bid rigging, and it alleges the arrangement was horizontal in nature. Accordingly, under Portsmouth, the rule of reason does not apply under the circumstances of this case.

CONCLUSION

Based on the foregoing, the instant motion (DE 35) is DENIED.

SO ORDERED, this the 16th day of March, 2021.

/s/ LOUISE W. FLANAGAN
LOUISE W. FLANAGAN
United States District Judge

78a

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4544
(5:20-cr-00481-FL-1)

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BRENT BREWBAKER, DEFENDANT-APPELLANT

Filed: Feb. 15, 2024

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Gregory, Judge Richardson, and Judge Giles.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:20-CR-481-1FL(2)

UNITED STATES OF AMERICA

v.

BRENT BREWBAKER; CONTECH ENGINEERED
SOLUTIONS LLC

[Filed: Oct. 21, 2020]

INDICTMENT

The Grand Jury charges that, at all times relevant to this Indictment:

1. The North Carolina Department of Transportation (“NCDOT”) was responsible for maintaining the transportation infrastructure for North Carolina. NCDOT solicited bids for transportation projects and improvements, including structures used to control the flow of water around roads, bridges, overpasses, and other civil engineering projects. During the relevant period, NCDOT increasingly used aluminum structures for these purposes, although the structures can also be made from concrete or steel. These structures were funded by the United States Department of Transportation and the state of North Carolina.

2. From at least as early as 2009 and continuing through at least June 2018, Defendant BRENT BREWBAKER and Defendant CONTECH ENGINEERED SOLUTIONS LLC (“Defendants”) obtained bid prices from COMPANY A and submitted bids to NCDOT for aluminum structure projects that were intentionally higher than COMPANY A’s bids. Defendants manipulated the price of those bids to conceal their conspiracy with COMPANY A. Defendants submitted these bids with signed certifications attesting that “. . . this [bid] is submitted competitively and without collusion,” knowing that those bids and certifications were false, fraudulent and misleading.

Defendants and Co-Conspirators

3. Defendant CONTECH ENGINEERED SOLUTIONS LLC, a corporation headquartered in West Chester, Ohio, did business in the Eastern District of North Carolina and elsewhere in the United States. Defendant CONTECH ENGINEERED SOLUTIONS LLC makes products such as iron, steel, plastic and aluminum pipe and fittings used for bridge construction, water drainage, erosion control, sewage management, and stormwater management. From at least as early as 2009 and continuing through at least the fall 2018, Defendant CONTECH ENGINEERED SOLUTIONS LLC submitted bids to NCDOT for aluminum structure projects. Defendant CONTECH ENGINEERED SOLUTIONS LLC manufactured aluminum pieces used to form the structures in Kentucky, and shipped them to North Carolina for fabrication and installation.

4. Defendant BRENT BREWBAKER is a citizen of the United States and a resident of North Carolina. From at least as early as 2009 and continuing through

at least the fall 2018, Defendant BRENT BREWBAKER was the Defendant CONTECH ENGINEERED SOLUTIONS LLC employee responsible for crafting and submitting aluminum structure bids on behalf of Defendant CONTECH ENGINEERED SOLUTIONS LLC to NCDOT and directed the preparation, execution, and submission of each bid package, including the anti-collusion certification.

5. Cooperating witness 1 (“CW-1”), a co-conspirator and a person known to the grand jury, was an employee of Defendant CONTECH ENGINEERED SOLUTIONS LLC who reported to Defendant BRENT BREWBAKER and who prepared, executed, and submitted each aluminum structure bid package to NCDOT, including the signing of the anti-collusion certification, at Defendant BRENT BREWBAKER’s direction.

6. COMPANY A, a co-conspirator and a corporation known to the grand jury, is an aluminum structure design and installation company that did business in the Eastern District of North Carolina, and elsewhere in the United States. From at least as early as 2009 and continuing through at least June 2018, COMPANY A submitted bids to NCDOT for aluminum structure projects.

7. Beginning before 2009 and continuing through at least June 2018, Company A served as a dealer for Defendant CONTECH ENGINEERED SOLUTIONS LLC. As part of that relationship, Defendant CONTECH ENGINEERED SOLUTIONS LLC regularly sold aluminum pieces, manufactured in Kentucky, to COMPANY A. COMPANY A used these aluminum pieces to complete work on behalf of NCDOT, including for aluminum structure projects.

8. During the conspiracy period, Defendant CONTECH ENGINEERED SOLUTIONS LLC, COMPANY A, and others submitted bids for NCDOT aluminum structure projects.

9. Cooperating witness 2 (“CW-2”), a co-conspirator and person known to the grand jury, was an employee of COMPANY A who directed the preparation, execution, and submission of aluminum structure bid packages to NCDOT, including regularly signing the anti-collusion certification.

10. Cooperating witness 3 (“CW-3”), a co-conspirator and person known to the grand jury, was an employee of COMPANY A who assisted with the preparation, execution, and submission of aluminum structure bid packages to NCDOT.

11. Others not made defendants in this Indictment participated as coconspirators in the offenses charged herein and performed acts and made statements in furtherance of the conspiracy.

12. Whenever in this Indictment reference is made to any act, deed, or transaction of any corporation, the allegation means that the corporation engaged in the act, deed, or transaction by or through its officers, directors, agents, employees, or other representatives while they were actively engaged in the management, direction, control, or transaction of its business or affairs.

Factual Background

13. From at least 2009 and continuing until at least June 2018, Defendant CONTECH ENGINEERED SOLUTIONS LLC and COMPANY A regularly submitted bids for aluminum structure projects in response to bid solicitations from NCDOT.

14. During the relevant time period, Defendant CONTECH ENGINEERED SOLUTIONS LLC and COMPANY A, by prior arrangement, rigged those bids so that Defendant CONTECH ENGINEERED SOLUTIONS LLC would submit an intentionally higher bid. To this end, after soliciting COMPANY A's total bid price for a specific project, most often through or at the direction of Defendant BRENT BREWBAKER, Defendant CONTECH ENGINEERED SOLUTIONS LLC submitted a rigged bid to NCDOT that was intentionally higher than COMPANY A's bid.

15. Before submitting bids to NCDOT on behalf of Defendant CONTECH ENGINEERED SOLUTIONS LLC, Defendant BRENT BREWBAKER contacted employees at COMPANY A, including CW-2 and CW-3, among others. Defendant BRENT BREWBAKER requested and received COMPANY A's total bid price for upcoming NCDOT aluminum structure projects. Between 2009 and at least June 2018, Defendant BRENT BREWBAKER solicited from COMPANY A's employees, including CW-2 and CW-3, the price COMPANY A planned to bid for most of the NCDOT aluminum structure projects set out for bid during this period. Defendant BRENT BREWBAKER and his co-conspirators understood that he and Defendant CONTECH ENGINEERED SOLUTIONS LLC would use COMPANY A's total bid price to ensure that Defendant CONTECH ENGINEERED SOLUTIONS LLC submitted rigged bids to NCDOT that were intentionally higher than COMPANY A's bids.

16. Initially, Defendant BRENT BREWBAKER called COMPANY A directly to obtain COMPANY A's bid prices for aluminum structure projects prior to sub-

mitting a bid on behalf of Defendant CONTECH ENGINEERED SOLUTIONS LLC to NCDOT. Defendant BRENT BREWBAKER, on behalf of Defendant CONTECH ENGINEERED SOLUTIONS LLC, later directed CW-1, in-person, on telephone calls, and via e-mail, to solicit COMPANY A's bid information for aluminum structure bids solicited by NCDOT. COMPANY A typically provided their total aluminum structure bid price by phone, but also, at times, provided the information via e-mail, text message, and in-person. CW-2, CW-3, and other COMPANY A employees provided this information to Defendant BRENT BREWBAKER and CW-1.

17. During these communications, COMPANY A provided Defendant CONTECH ENGINEERED SOLUTIONS LLC with its total bid price for upcoming aluminum structure bids to NCDOT, but did not solicit Defendant CONTECH ENGINEERED SOLUTIONS LLC's total bid price because COMPANY A representatives, including CW-2 and CW-3, understood that Defendant CONTECH ENGINEERED SOLUTIONS LLC would submit rigged bids that were intentionally higher than those submitted by COMPANY A. That understanding was formed through communications between Defendant BRENT BREWBAKER and COMPANY A employees, and supported over time by Defendant CONTECH ENGINEERED SOLUTIONS LLC's consistent pattern and practice of submitting rigged bids to NCDOT for aluminum structure projects.

18. Bidders, including Defendant CONTECH ENGINEERED SOLUTIONS LLC and COMPANY A, submitted bid packages to NCDOT by hand or by overnight shipping service.

19. NCDOT made payments to COMPANY A for completed aluminum structure projects by check, mailed via the United States Postal Service to COMPANY A at its home office.

20. Defendant BRENT BREWBAKER sent email correspondence to CW-1 to instruct that CW-1 should reach out to COMPANY A to obtain COMPANY A's total bid price for an upcoming NCDOT aluminum structure project.

COUNT I

21. Paragraphs 1-20 are realleged and incorporated by reference into this Court.

22. From at least 2009 and continuing until at least March 2018, the exact dates being unknown to the Grand Jury, in the Eastern District of North Carolina and elsewhere, Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER, and their co-conspirators, knowingly participated in a combination and conspiracy to suppress and eliminate competition by rigging bids to NCDOT for aluminum structure projects. The combination and conspiracy engaged in by Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER and their co-conspirators was a *per se* unlawful, and thus unreasonable, restraint of interstate trade and commerce in violation of the Sherman Antitrust Act, 15 U.S.C. § 1.

23. The charged combination and conspiracy consisted of a continuing understanding and concert of action among Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER and their co-conspirators, the substantial

terms of which were to rig bids submitted to NCDOT for aluminum structure projects in the Eastern District of North Carolina and elsewhere.

Means and Methods of the Conspiracy

24. For the purpose of forming and carrying out the charged combination and conspiracy, Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER, together with their co-conspirators, did those things that they combined and conspired to do, including, among other things:

- a. participated in discussions and communications about bids for upcoming NCDOT aluminum structure projects, during which COMPANY A provided its total bid price for upcoming NCDOT aluminum structure projects to Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER;
- b. manipulated their bid prices to ensure the bids submitted by and on behalf of Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER were higher than COMPANY A's bids;
- c. submitted intentionally losing bids at manipulated percentages above COMPANY A's total bid price for the same project, to make it appear to NCDOT that Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER had competed, when, in fact, they knew that Defendant CONTECH ENGINEERED SOLUTIONS LLC's bid was intended to lose.

Trade and Commerce

25. During the relevant period, Defendant CONTECH ENGINEERED SOLUTIONS LLC and its co-conspirators supplied and shipped materials for NCDOT aluminum structure projects in interstate commerce. Defendant CONTECH ENGINEERED SOLUTIONS LLC manufactured aluminum pieces used in NCDOT aluminum structure projects in Kentucky, and shipped them to North Carolina for fabrication and installation.

26. During the relevant period, the business activities of Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER and their co-conspirators in connection with aluminum structure bids to NCDOT that are the subject of this Count were within the flow of, and substantially affected, interstate trade and commerce.

All in violation of Title 15, United States Code, Section 1.

COUNT 2

27. Paragraphs 1-20 and 24-26 are realleged and incorporated by reference into this Count.

28. From at least 2009 and continuing until at least June 2018, the exact dates being unknown to the Grand Jury, in the Eastern District of North Carolina and elsewhere, Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER, and their co-conspirators, including CW-1, CW-2, and CW-3, did knowingly combine, conspire, confederate and agree with others known to the Grand Jury, to commit offenses against the United States, that is:

- a. to knowingly and willfully execute and attempt to execute a scheme and artifice to: (1) defraud the NCDOT by submitting false, fraudulent, and misleading aluminum structure bids and certifications; and (2) obtain money and property by means of materially false and fraudulent pretenses, representations, omissions, and promises that were false and fraudulent when made, to wit, false, fraudulent, and misleading aluminum structure bids and the certifications submitted with each bid stating the bids had been submitted competitively and without collusion when Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER knew they were false, fraudulent, and misleading, and to knowingly cause to be delivered certain mail matter by the United States Postal Service and by private or commercial interstate carrier, according to the directions thereon, in violation of Title 18, United States Code, Section 1341.
- b. to unlawfully, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud the NCDOT by submitting false, fraudulent, and misleading aluminum structure bids and certifications and obtain money and property by means of materially false and fraudulent pretenses, representations, omissions, and promises, would and did transmit and caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud: to wit, false, fraudulent, and misleading aluminum structure bids and the certifications submitted with each bid stating the bids

had been submitted competitively and without collusion when Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER knew this was false, fraudulent, and misleading, in violation of Title 18, United States Code, Section 1343.

Purpose of the Conspiracy

29. It was the purpose of the conspiracy for Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER, and other co-conspirators, including CW-1, CW-2, and CW-3, to mislead NCDOT in order to be awarded aluminum structure project contracts and to benefit from the creation and submission of fraudulent and rigged bids to NCDOT.

Means and Methods of the Conspiracy

30. For the purpose of forming and carrying out the charged combination and conspiracy, Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER, together with their co-conspirators, including CW-1, CW-2, and CW-3, did those things that they combined and conspired to do, including, among other things:

- a. shared bid pricing information knowing it would be used to prepare fraudulent, misleading, and rigged bids. Defendant BRENT BREWBAKER, or CW-1 at his direction, would contact COMPANY A directly to obtain COMPANY A's total bid price for aluminum structure projects prior to submitting a bid on behalf of Defendant CONTECH ENGINEERED SOLUTIONS LLC to NCDOT;

- b. after receiving COMPANY A's total bid price for an upcoming NCDOT aluminum structures project, Defendant BRENT BREWBAKER added—or instructed CW-1 to add—a percentage to the price COMPANY A was bidding to create Defendant CONTECH ENGINEERED SOLUTIONS LLC's total bid price. Defendant CONTECH ENGINEERED SOLUTIONS LLC manipulated its bid price in ways to avoid detection and not make it obvious that Defendant CONTECH ENGINEERED SOLUTIONS LLC's bids to NCDOT were fraudulent and misleading bids that were manipulated and rigged pursuant to the scheme;
- c. submitted, or caused to be submitted to NCDOT, false, fraudulent, and misleading bids that were intended to lose. In addition, the bids submitted by Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER were intended to mislead and defraud NCDOT and to rig the NCDOT aluminum structure bidding process. This was intended to give COMPANY A an unfair advantage in bidding on and winning NCDOT aluminum structure projects;
- d. submitted, or caused to be submitted to NCDOT, rigged bids with false and fraudulent certifications stating that “[b]y executing this quote, the undersigned Vendor certifies that this quote is submitted competitively and without collusion . . . ” when in fact Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER knew they had

colluded with COMPANY A to obtain COMPANY A's total bid price, and submitted a non-competitive bid that was intentionally higher than COMPANY A's bid; and

- e. Defendant CONTECH ENGINEERED SOLUTIONS LLC held itself out as a competitor to COMPANY A when submitting aluminum structure project bids to NCDOT, but it also benefited when COMPANY A won NCDOT aluminum structure project bids because it supplied aluminum pieces to Company A for use in those projects.

Overt Acts

31. In furtherance of the conspiracy, and to affect the objects thereof, there were committed in the Eastern District of North Carolina and elsewhere various overt acts, including, but not limited to the following:

32. September 2017

- a. On or about September 28, 2017, Defendant CONTECH ENGINEERED SOLUTIONS LLC contacted COMPANY A to receive its total bid number for NCDOT aluminum structure bid solicitation 11740702.
- b. COMPANY A provided its total bid number of \$190,873.86 to Defendant CONTECH ENGINEERED SOLUTIONS LLC.
- c. On or about September 29, 2017, Defendant BRENT BREWBAKER instructed CW-1 to submit Defendant CONTECH ENGI-

NEERED SOLUTIONS LLC's bid for the same project at \$206,900.

- d. COMPANY A submitted a bid for the NCDOT aluminum structure bid solicitation 11740702 in the amount of \$190,873.86. Defendant CONTECH ENGINEERED SOLUTIONS LLC submitted its bid for the same project in the amount of \$206,900.

33. February 2018

- a. On or about February 9, 2018, Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER contacted COMPANY A to receive its total bid number for NCDOT aluminum structure bid solicitation 11769724.
- b. COMPANY A provided its total bid number of \$47,957.93 to Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER.
- c. COMPANY A submitted a bid for the NCDOT aluminum structure bid solicitation 11769724 in the amount of \$47,957.93. Defendant CONTECH ENGINEERED SOLUTIONS LLC submitted its bid for the same project in the amount of \$54,600.

34. March 2018

- a. On or about March 14, 2018, a representative from COMPANY A provided its total bid number for NCDOT aluminum structure bid solicitation 11782053 to CONTECH ENGI-

NEERED SOLUTIONS LLC. The total bid number was \$124,565.

- b. That same day, Defendant BRENT BREW-BAKER instructed CW-1 to submit a bid for the same NCDOT aluminum structure bid solicitation in the amount of “136,500, or anything in that neighborhood.”
- c. COMPANY A submitted a bid for the NCDOT aluminum structure bid solicitation 11782053 in the amount of \$124,565. Defendant CONTECH ENGINEERED SOLUTIONS LLC submitted its bid for the same project in the amount of \$136,500.

All in violation of Title 18, United States Code, Section 1349.

COUNTS THREE THROUGH FIVE

35. Paragraphs 1-20, 24-26, and 29-34 are realleged and incorporated by reference into this Count.

The Scheme and Artifice

36. Paragraphs 1-20, 24-26, and 29-34 are realleged and incorporated by reference herein as a description of the scheme and artifice.

Use of the Mails

37. On our about the dates enumerated below, Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER and their co-conspirators, known and unknown to the grand jury, for the purpose of executing and in furtherance of the scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudu-

lent pretenses, representations, omissions, and promises, knowing that the pretenses, representations, and promises were false and fraudulent when made, did knowingly cause to be delivered certain mail matter by a private and commercial interstate carrier, according to the directions thereon, as more particularly described below:

Count	Approx. Date	Description of Mailing
3	January 29, 2018	Check # 3902544 from NCDOT sent via U.S. Mail to COMPANY A in North Carolina.
	March 8, 2018	Check # 3916285 from NCDOT sent via U.S. Mail to COMPANY A in North Carolina.
4	August 23, 2018	Check # 3967354 from NCDOT sent via U.S. Mail to COMPANY A in North Carolina.
5	June 11, 2018	Check # 3947637 from NCDOT sent via U.S. Mail to COMPANY A in North Carolina.

All in violation of Title 18, United States Code, Section 1341.

COUNT SIX

38. Paragraphs 1-20, 24-26, and 29-34 are realleged and incorporated by reference into this Count.

The Scheme and Artifice

39. Paragraphs 1-20, 24-26, and 29-34 are realleged and incorporated by reference herein as a description of the scheme and artifice.

Use of the Wires

40. On or about the enumerated date below, Defendant CONTECH ENGINEERED SOLUTIONS LLC and Defendant BRENT BREWBAKER, and their co-conspirators, known and unknown to the grand jury, did unlawfully, willfully, and knowingly, having devised and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of materially false and fraudulent pretenses, representations, omissions, and promises, would and did transmit and caused to be transmitted by wire some communication in interstate commerce to help carry out the scheme to defraud, as more particularly described below:

Count	Approx. Date of Use of Wires	Description of Transmission
6	March 14, 2018	COMPANY A provided its total bid number to Defendant CONTECH ENGINEERED SOLUTIONS LLC for NCDOT aluminum structure bid solicitation 11782053. That same day, Defendant BRENT BREWBAKER instructed CW-1 by e-mail communication to submit a false, fraudulent, and misleading bid for the same NCDOT aluminum

		structure bid solicitation. Defendant BRENT BREW-BAKER caused the e-mail communication to be sent from Tennessee to a recipient in the Eastern District of North Carolina.
--	--	--

All in violation of Title 18, United States Code, Section 1343.

FORFEITURE NOTICE

Each named defendant is given notice that all of their interest in all property specified herein is subject to forfeiture.

Upon conviction of any of the offenses set forth in Counts Two through Six of the Indictment, the Defendants shall forfeit to the United States, pursuant to 18 U.S.C. § 981(a)(1)(C), as made applicable by 28 U.S.C. § 2641(c), any property, real or personal, that constitutes or is derived, directly or indirectly, from proceeds traceable to the offense(s).

The forfeitable property includes, but is not limited to, the gross proceeds of the offenses personally obtained by each defendant.

If any of the above-described forfeitable property, as a result of any act or omission of a defendant:

- (a) Cannot be located upon the exercise of due diligence;
- (b) Has been transferred or sold to, or deposited with, a third party;

97a

- (c) Has been placed beyond the jurisdiction of the court;
- (d) Has been substantially diminished in value; or
- (e) Has been commingled with other property which cannot be divided without difficulty;

it is the intent of the United States, pursuant to 21 U.S.C. § 853(p), to seek forfeiture of any other property of said defendant up to the value of the forfeitable property described above.

A TRUE BILL

REDACTED VERSION

Pursuant to the E-Government Act and the federal rules, the unredacted version of this document has been filed under seal

FORPERSON

Dated: [10/20/20], 2020

/s/ MAKAN DELRAHIM
MAKAN DELRAHIM
Assistant Attorney General

/s/ BERNARD A NIGRO JR.
BERNARD A. NIGRO JR.
Principal Deputy Assistant Attorney General

/s/ RICHARD A. POWERS
RICHARD A. POWERS
Deputy Assistant Attorney General

/s/ MARVIN N. PRICE JR.
MARVIN N. PRICE JR.
Director of Criminal Enforcement

/s/ RYAN DANKS
RYAN DANKS
Chief, Washington Criminal I
Antitrust Division
United States Department of Justice

/s/ DANIELLE M. GARTEN
DANIELLE M. GARTEN
Justin P. Murphy
Tara Shinnick
Trial Attorneys, Antitrust Division
U.S. Department of Justice

450 5th Street, NW
Washington, DC 20350
(202) 532-4156
danielle.garten@usdoj.gov

/s/ ROBERT J. HIGDON, JR.
ROBERT J. HIGDON, JR.
United States Attorney

/s/ WILLIAM GILMORE
WILLIAM GILMORE
Assistant United States Attorney

United States Attorney's Office
Eastern District of North Carolina