IN THE SUPREME COURT OF THE UNITED STATES

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No. 23A965

UNITED STATES OF AMERICA, APPLICANT

v.

BRENT BREWBAKER

____

APPLICATION FOR A FURTHER EXTENSION OF TIME
WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Pursuant to Rules 13.5 and 30.2 of the Rules of this Court, the Solicitor General, on behalf of the United States, respectfully requests a further, 28-day extension of time, to and including July 12, 2024, within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case. The opinion of the court of appeals (App., infra, 1a-33a) is reported at 87 F.4th 563. An order of the district court (App., infra, 34a-43a) is not published in the Federal Supplement but is available at 2022 WL 391310. An additional order of the district court (App., infra, 44a-67a) is not published in the Federal Supplement but is available at 2021 WL 1011046.

The court of appeals entered its judgment on December 1, 2023. A petition for rehearing was denied on February 15, 2024 (App., infra, 68a). 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. The jurisdiction of this Court would be invoked under 28 U.S.C. 1254(1).

1. The North Carolina Department of Transportation (Department) contracted with private firms to build aluminum structures that prevent flooding. See App., infra, 2a. Contech Engineered Solutions LLC (Contech), Pomona Pipe Products (Pomona), and Lane Enterprises (Lane) typically submitted bids to compete for those contracts. See ibid. When Pomona won a contract, it would complete the project using aluminum that it bought from Contech. See id. at 2a-3a.

In 2009, Contech put respondent, one of its corporate officials, in charge of its bids. See id. at 3a. Over the next decade, respondent orchestrated a bid-rigging conspiracy with Pomona. See id. at 3a-4a. Pomona would communicate to Contech the amount that Pomona intended to bid for particular projects, and respondent would ensure that Contech's bid was higher so that Contech would lose the contract. See id. at 3a. Respondent believed that the Department would not award an aluminum-structure project without receiving at least three bids -- and thus believed that Contech's losing bids were necessary to prevent contracts from going un-awarded when Pomona and Lane were the only other

competitors. See id. at 4a. And because Contech supplied the aluminum for the contracts that Pomona won, Contech benefited financially from the awards to Pomona. See id. at 3a-4a.

2. A federal grand jury indicted respondent on one count of conspiring to rig bids, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and on five other counts that are not relevant here. See App., infra, 4a. The Sherman Act count alleged that the charged bid-rigging scheme was per se unlawful. See id. at 5a. Respondent filed a motion arguing that the alleged conspiracy should be analyzed under the antitrust rule of reason, rather than the per se rule, because Contech and Pomona had a vertical manufacturer-distributor relationship insofar as Contech supplied the aluminum that Pomona used to fulfill aluminum-structure contracts. See id. at 44a, 61a.

The district court construed respondent's filing as a motion to dismiss the indictment and denied the motion. See App., infra, 44a-67a. While acknowledging that Contech and Pomona had a vertical relationship with respect to the supply of aluminum, the court explained that the bid-rigging conspiracy alleged in the indictment involved the companies' horizontal relationship as competing bidders for aluminum-structure projects. See id. at 61a-67a. The court reaffirmed that ruling in a later order denying a subsequent motion to dismiss the Sherman Act count. See id. at 42a.

Following a trial, a jury found respondent guilty on all counts. See App., infra, 42a. The district court sentenced respondent to 18 months of imprisonment. See id. at 8a.

3. The Fourth Circuit reversed respondent's conviction on the Sherman Act count, affirmed his convictions on the other counts, and remanded the case for resentencing. See App., infra, 1a-34a.

As relevant here, the court of appeals held that "[t]he factual allegations in the indictment did not state a per se violation of the Sherman Act." App., infra, 10a. The court observed that Pomona and Contech's relationship had both a horizontal aspect (they were "competitors within the aluminum-project market") and a vertical aspect ("Contech suppl[ied] Pomona [with] aluminum"). Id. at 15a-16a. The court characterized the bid-rigging agreement as a "hybrid restraint" rather than a purely "horizontal" restraint. Id. at 16a. The court concluded that "this type of restraint has possible procompetitive effects," id. at 24a, and that the restraint therefore is not subject to per se condemnation, see id. at 29a.

The government filed a petition for rehearing. See App., infra, 68a. The court of appeals denied the petition. See ibid.

4. The Solicitor General is still considering whether to file a petition for a writ of certiorari in this case. The additional time sought in this application is needed to continue consultation within the government and to assess the legal and

practical impact of the court of appeals' ruling. Additional time is also needed, if a petition is authorized, to permit its preparation and printing.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MAY 2024

APPENDIX

Court of appeals opinion
(4th Cir. Dec. 1, 2023) 1a

District court order (E.D.N.C. Jan. 13, 2022) 34a

District court order (E.D.N.C. Mar. 13, 2021) 44a

Court of appeals order denying petition
for rehearing (4th Cir. Feb. 15, 2024) 68a

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4544

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

BRENT BREWBAKER,

Defendant - Appellant.

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)

Argued: September 22, 2023 Decided: December 1, 2023

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

Reversed in part, affirmed in part, and remanded by published opinion. Judge Richardson wrote the opinion, in which Judges Gregory and Giles joined.

ARGUED: Elliot Sol Abrams, CHESHIRE, PARKER, SCHNEIDER, PLLC, Raleigh, North Carolina, for Appellant. Peter Matthew Bozzo, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Jonathan S. Kanter, Assistant Attorney General, Doha G. Mekki, Principal Deputy Assistant Attorney General, Maggie Goodlander, Deputy Assistant Attorney General, Adam Ptashkin, Rachel Kroll, Alison Friberg, Daniel E. Haar, Stratton C. Strand, Scott McAbee, Patrick M. Kuhlmann, Antitrust Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee.

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* antitrust 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

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

services using Contech's aluminum. *See* J.A. 1843 (aluminum from Contech accounted for around 75% of Pomana'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.

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;
- Pomona[2] 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 Pomona's. As alleged, Contech "held itself out as a competitor to" Pomona when submitting bids,

[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.

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

[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.

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 antitrust 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 anticompetitive. *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). Despite 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] 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).

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[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)).

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 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

[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.

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 intrabrand 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 intrabrand competition, because they increased 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 competitors 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 horizonal,

[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.

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 because 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

[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.

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] 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

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[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.*, 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).

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 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 reality; 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.

[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. Lesli, *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").

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, 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 relationship.[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.*, 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

[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).

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 expanded 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

[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.

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]

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)

[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.

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 & Fratrick, *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 inter-

brand 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]

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.

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

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 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 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.

[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 information 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.

* * *

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, 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.

IN THE 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.	)	
	)	ORDER
BRENT BREWBAKER,	)	
	)	
Defendant.	)	

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 violation 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

[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.

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

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.

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 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). 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. Elecs. 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 otherwise uncertain 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 courts," 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 recognized 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. 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

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

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.

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.

LOUISE W. FLANAGAN
United States District Judge

IN THE 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.	)))))))	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 "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

[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)).

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 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.

[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.

(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 Distribs. 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 under 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 horizontal 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 []his 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 company[3] also placed bids does not 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 argue that the

[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 market." (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).

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]

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

[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, 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.

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 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 preselecting 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 Antitrust 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 bid-rotation 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 intended 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.

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,

[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).

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 agreement 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 nature 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 differentiating 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

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[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).

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

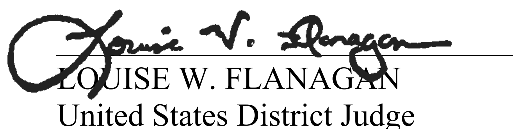
intersected with and gave rise to the horizontal arrangement at issue, the actual bid-rigging agreement. Cf. Koppers, 652 F.2d at 296-97 (holding that the vertical component of the co-conspirators' relationship only furthered the objective of the horizontal conspiracy "to raise prices and deceive state and local officials into the belief that [the co-conspirators] 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, [defendant'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 Contech 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.



LOUISE W. FLANAGAN
United States District Judge

FILED: February 15, 2024

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

O R D E R

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