No. 22-4544

IN THE
United States Court of Appeals for the Fourth Circuit

UNITED STATES,

Plaintiff-Appellee,

v.

BRENT BREWBAKER,

Defendant-Appellant.

On Appeal from the
United States District Court for the Eastern District of North Carolina
No. 5:20-cr-00481-FL-1 (Hon. Louise Wood Flanagan)

OPPOSITION OF THE UNITED STATES TO APPELLANT'S MOTION FOR RELEASE PENDING APPEAL PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 9(b) AND REQUEST FOR EXPEDITED CONSIDERATION

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INTRODUCTION

Brent Brewbaker is not entitled to bail pending appeal because he has not overcome the presumption in favor of detention. Specifically, he has not demonstrated that his appeal raises a substantial question likely to result in reversal or a new trial on all counts of his conviction. 18 U.S.C. § 3143(b)(1). He alleges errors only in his conviction under Section 1 of the Sherman Act, and his challenges to that conviction are meritless—one has been forfeited, and both are foreclosed by precedent. In any event, even if successful, those challenges would not disturb his five remaining fraud convictions. Nor do "exceptional reasons" separately justify his release; the provision of 18 U.S.C. § 3145(c) on which he relies does not apply in his case. Accordingly, the Court should deny his motion for release pending appeal.

BACKGROUND

1. On February 1, 2022, after a week-long trial, a jury convicted Brewbaker of six counts: one count of conspiring to rig bids in violation of 15 U.S.C. § 1 (Count 1); one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 1349 (Count 2); three counts of mail fraud in violation 18 U.S.C. § 1341 (Counts 3-5); and one count of wire

fraud in violation of 18 U.S.C. § 1343 (Count 6). Judgment at 1 (Dkt. 261).[1] On September 8, 2022, the court sentenced Brewbaker to concurrent terms of 18 months' imprisonment and concurrent terms of two-years' supervised relief; it also ordered him to pay a fine of $111,000. *Id.* at 3-4, 7. The court ordered him to surrender not sooner than 90 days after judgment. *Id.* at 3.

On December 9, 2022, Brewbaker filed a motion for release pending appeal, requesting expedited consideration. Mot. 1 (Dkt. 269). On December 13, 2022, the district court denied the motion. Order (Dkt. 272). Late on December 16, 2022, Brewbaker filed the instant motion for release pending appeal, again requesting expedited consideration. Mot. at 1. This Court ordered the United States to respond no later than noon on December 20, 2022.

2. Brewbaker's convictions stem from a scheme to defraud the North Carolina Department of Transportation (NCDOT). NCDOT, which maintains North Carolina's roads and bridges, uses aluminum structures, sometimes referred to as aluminum headwalls, to control the

[1] References to filings in the district court are denoted by "Dkt." followed by the ECF docket number.

flow of water around certain roads, bridges, and overpasses. Amended Presentence Investigation Report (PSR) ¶ 11 (Dkt. 252). NCDOT solicited bids for these aluminum-structure projects, and all bid responses included a signed certification from each bidder that the bid was made "competitively and without collusion." *Id.* ¶ 14.

Contech Engineering Solution, LLC, submitted its own, independent bids to NCDOT for aluminum-structure projects. PSR ¶¶ 13-14. Brewbaker was the Contech employee responsible for creating and submitting aluminum-structure project bids on behalf of Contech; he directed the preparation, execution, and submission of each bid package, including the competitiveness certification. *Id*.

Pomona Pipe Products also submitted independent bids to NCDOT for aluminum structure projects. PSR ¶ 14. Contech regularly supplied aluminum pieces to Pomona, which Pomona then used, along with Pomona's design, fabrication, and installation of the pieces, to complete the aluminum-structure projects that it won. Order at 22 n.6 (Dkt. 79).

Pomona and Contech competed for aluminum-structure projects, with Contech sometimes winning the bidding. PSR ¶ 21. However, at least as early as 2009 and continuing through at least June 2018,

Brewbaker orchestrated a conspiracy to eliminate that competition. *Id.* ¶ 13.

Before submitting a bid to NCDOT, Brewbaker—or a subordinate, at his direction—obtained Pomona's total bid price. PSR ¶ 14. Pomona provided that information with the understanding that Brewbaker would use it to submit a higher, losing bid. Tr. 159:23-160:2 (Dkt. 238). Brewbaker did just that, causing Contech to submit separate bids priced approximately 10 percent higher than Pomona's bids. PSR ¶ 14. Contech benefitted from this scheme because, when Pomona won, Contech supplied the aluminum pieces for use in the project. *Id.* ¶¶ 20, 23. And, over the period of the conspiracy, Brewbaker earned significant bonuses. *Id.* ¶ 20.

Brewbaker took steps to conceal his activities and defraud NCDOT. He, or his subordinate at his direction, manipulated the percentage increase above Pomona's bids to conceal the conspiracy and make it appear to NCDOT that Contech had competed with Pomona. PSR ¶ 22. He, or his subordinate at this direction, then falsely certified that Contech's bid was "submitted competitively and without collusion." *Id.* ¶ 14; Tr.74:15-19 (Dkt. 238). Additionally, Brewbaker advised one co-

conspirator that he preferred to communicate by phone rather than email, Tr. 297:4-12 (Dkt. 239), and told another that text messages with Pomona's prices are the "kind of stuff I always delete," PSR ¶ 22.

Pomona won over 300 contracts, totaling over $23 million, for projects on which Contech submitted an intentionally losing bid. PSR ¶ 18. NCDOT would not have awarded any of those contracts had it known of the scheme. *Id.* ¶ 15.

ARGUMENT

I. Legal Standard

When a defendant seeks bail pending appeal, "the conviction is presumed correct and the burden is on the convicted defendant to overcome that presumption." *United States v. Giancola*, 754 F.2d 898, 901 (11th Cir. 1985); *see also United States v. Steinhorn*, 927 F.2d 195 (4th Cir. 1991) (per curiam) (adopting *Giancola*'s interpretation of Section 3143(b)(1)). Thus, a court "shall order" the defendant detained unless he establishes, among other requirements,[2] that the appeal (1)

[2] In addition, the defendant must show by "clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community if released" and that "the appeal is not for the purpose of delay." 18 U.S.C. § 3143(b)(1). The United States does not dispute Brewbaker's showings on these requirements.

"raises a substantial question of law or fact" (2) "likely to result in" "reversal," "an order for a new trial," "a sentence that does not include a term of imprisonment," or "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1)(B). This Court has explained that a "substantial question" is "a 'close' question or one that very well could be decided the other way," and that the substantial question must be "important enough to warrant reversal or a new trial on all counts" if decided in the defendant's favor. *Steinhorn*, 927 F.2d at 196 (quoting *Giancola*, 754 F.2d at 901).

II. Brewbaker Fails to Show That the Alleged Errors in His Sherman Act Conviction Likely Would Warrant Reversal or a New Trial on His Fraud Convictions

Brewbaker claims to have raised substantial questions concerning his conviction of Count 1 of the Indictment, the Sherman Act count. Mot. 14-20. To obtain release under Section 3143(b)(1), however, he must demonstrate a "substantial question [that] is important enough to warrant reversal or a new trial on *all* counts for which the district court imprisoned [him]." *Steinhorn*, 927 F.2d at 196 (emphasis added); *see also United States v. Miller*, 753 F.2d 19, 24 (3d Cir. 1985) ("In this case,

defendants have been sentenced to concurrent terms of imprisonment on more than one count. Obviously, if the question deemed substantial is not related to all of those counts, then the statutory criteria for bail pending appeal would not be met as to the unaffected counts, and bail may be denied."). Brewbaker was also convicted of five fraud counts (Counts 2-6), and he was sentenced to "18 months on each of Counts 1, 2, 3, 4, 5 and 6, all to be served concurrently." Judgment 3 (Dkt. 261). Accordingly, he can be released under Section 3143(b)(1) only if reversal of his Sherman Act conviction would also result in reversal of the five other convictions.

Brewbaker's argument that the Sherman Act conviction tainted the fraud convictions (Mot. 21-22) is meritless. His argument disregards the basis of the fraud counts, as well as the jury instructions. The government alleged (and proved) that Brewbaker caused bids to be submitted to NCDOT with the false certification that the bids were "submitted competitively and without collusion." Tr.74:15-19 (Dkt. 238). These certifications do not reference the Sherman Act, and there is no basis to conclude that the jury would have understood that a bid is uncompetitive or collusive only if it violates the Sherman Act.

Indeed, multiple witnesses defined the terms without reference to the antitrust laws, and did not limit those terms to conduct that qualifies as bid rigging under the Sherman Act. *E.g.*, Tr.78:1-9 (Dkt. 238) (NCDOT procurement director testifying that a bid based on "the nonpublic pricing of a competitor" "would not have been competitively submitted, and it would have been with collusion"); Tr.419:11-16 (Dkt. 239) (Contech employee testifying that "'without collusion' would mean you didn't talk to any of your competitors about their bid price"); Tr.619:24-620:3 (Dkt. 240) (Brewbaker's former coworker testifying that the certifications were false because "we knew of [Pomona's] price").

In any event, the jury instructions eliminated any possibility of confusion. The district court properly instructed the jury on the fraud counts, specifying that the government must prove that Brewbaker knew "the certifications submitted with each bid stating the bids had been submitted competitively and without collusion" were false. Tr. 899:18-22; 900:2-18 (Dkt. 241).[3] The court further instructed the jury "to

[3] Moreover, when the jury asked for a definition of "collusion," Tr. 940:5-7 (Dkt. 242), the district court instructed, "Collusion is mentioned in the indictment and in the Court's instructions with respect to the nature of the crime charged in Count Two. There isn't a legally defined explanation of collusion of which the Court is aware. So in answering

consider each count separately." Tr. 887:7 (Dkt. 241). Jurors, of course, are presumed to follow their instructions. *United States v. Myers*, 280 F.3d 407, 412 (4th Cir. 2002).

Accordingly, even if Brewbaker were to prevail on his challenges to the Sherman Act conviction, *contra infra* Section III, his five remaining convictions would stand. He thus has not raised an issue likely to warrant "reversal or a new trial on all counts," and he is not eligible for release under Section 3143(b)(1). *Steinhorn*, 927 F.2d at 196; *see also Morison v. United States*, 486 U.S. 1306, 1306-07 (1988) (Rehnquist, C. J., sitting as Circuit Justice) (denying bail because, "regardless of whether Morison has raised a 'substantial question' with respect to the propriety of his conviction under the Espionage Act, he has not done so with respect to his conviction for theft of Government property").

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your question, 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 as you continue your deliberations," *Id.* 944:8-18.

III. Brewbaker Has Not Raised a Substantial Question as to His Sherman Act Conviction

A. Brewbaker's Forfeited Argument that the Per Se Rule Creates a Conclusive Evidentiary Presumption Does Not Raise a Substantial Question

1. Brewbaker argues that the per se rule creates an unconstitutional conclusive evidentiary presumption—an argument he made for the first time in his post-judgment bail motion.[4] Having failed to raise the argument at trial, Brewbaker must show plain error to obtain relief on appeal. *United States v. Gillespie*, 27 F.4th 934, 940 (4th Cir. 2022); *cf. United States v. Desu*, 23 F.4th 224, 230-31 (3d Cir. 2022) (argument raised for first time in motion for a new trial is subject to plain-error review). But he has not even argued—and thus has abandoned any claim—that the purported error was plain, affected his substantial rights, or seriously affected the fairness, integrity, or public reputation of the proceedings. *Gillespie*, 27 F.4th at 940. For this reason alone, he cannot show that the alleged error is "likely to result in" "reversal" of his Sherman Act conviction. 18 U.S.C. § 3143(b)(1)(B).

[4] In his motion to dismiss the Sherman Act count, Dkt.128, Brewbaker contended that Section 1 was unconstitutionally vague as applied to him—not that the per se rule creates an unconstitutional conclusive evidentiary presumption.

2. Setting aside his silence on plain error, on the merits his question is not "close"—it is closed. *Steinhorn*, 927 F.2d at 196 (quoting *Giancola*, 754 F.2d at 901). Brewbaker ignores a line of Supreme Court precedent establishing that the per se rule is an interpretation of Section 1, not an evidentiary presumption, and that the per se rule is constitutionally applied in criminal antitrust prosecutions.

a. Section 1 of the Sherman Act proscribes "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. The "'statutory policy'" embodied in the Sherman Act "is one of competition," and Congress's adoption of that policy "'precludes inquiry into the question whether competition is good or bad.'" *NCAA v. Alston*, 141 S. Ct. 2141, 2159 (2021) (citation omitted). In one of its first Sherman Act cases, the Supreme Court read Section 1 to prohibit any agreement that restrained trade. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 312 (1897). The Court soon clarified that, in light of its common-law origins, Section 1 was properly understood to cover only unreasonable restraints of trade. *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60 (1911).

At the same time, the Supreme Court reiterated its earlier holding that price-fixing agreements by their "nature and character" categorically fall "within the purview of" Section 1 because they necessarily "operate[] to produce the injuries which the statute forbade." *Standard Oil*, 221 U.S. at 64-65 (citing *Trans-Missouri Freight*). That interpretation reflected the common-law principle that certain kinds of anticompetitive restraints, including price fixing, and thus bid rigging, were categorically unlawful, with no "question of reasonableness [left] open to the courts." *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 238 (1899) (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898) (Taft, J.), *aff'd* 175 U.S. 211 (1899)). As a result, the "inquiry . . . end[s] once a price-fixing agreement [i]s proved." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982).

The Supreme Court applied that settled interpretation of Section 1 to a criminal prosecution in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). There, the government prosecuted multiple individuals and corporations for forming "a combination to fix and maintain uniform prices for the sale of sanitary pottery." *Id.* at 394. The district court instructed "the jury that [] if it found the agreements or combination

complained of, it might return a verdict of guilty without regard to the reasonableness of the prices fixed." *Id*. at 395. In issuing that charge, the court rejected the defendants' request for an instruction that the jury could convict only if it found "an undue and unreasonable restraint of trade." *Id.* The Supreme Court subsequently held that the district court "correctly withdrew from the jury the consideration of the reasonableness of the" charged conspiracy. *Id.* at 396; *see id.* at 407.

In explaining its holding, the Supreme Court emphasized that the "aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition." *Id.* at 397. Accordingly, such "[a]greements . . . may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable." *Id.* The Court emphasized that it has "always [been] assumed that uniform price-fixing by those controlling in any substantial manner a trade or business in interstate commerce is prohibited by the Sherman [Act], despite the reasonableness of the particular prices agreed upon." *Id.* at 398. And the Court accordingly concluded that the district court's instruction was correct, and the defendants' proposed charge "rightly refused," because

"[w]hether the prices actually agreed upon were reasonable or unreasonable was immaterial." *Id.* at 401.

The Supreme Court applied the same approach to the criminal prosecution for a price-fixing conspiracy in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). As in *Trenton Potteries*, the district court in *Socony-Vacuum* instructed the jury that it could find guilt "if [the alleged] illegal combination existed," regardless of "how reasonable or unreasonable" it might be. *Id.* at 210. The Supreme Court upheld the instruction on the ground that "it would per se constitute" such an unlawful "restraint if price-fixing were involved," and no reasonableness instruction was therefore required. *Id.* at 216. The Court explained that "for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act." *Id.* at 218; *see id.* at 212 (citing *Trans-Missouri Freight*). "Whatever economic justification particular price-fixing agreements may be thought to have," the Court added, "the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *Id.* at 224 n.59; *see id.* at 221 (explaining that having

"reasonableness" as "an issue in every price-fixing case" would be anathema to the Sherman Act).

b. These decisions establish that the per se rule defines the offense—which does not include an element of factual unreasonableness—rather than creating an evidentiary presumption of unreasonableness. *See also FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 432-433 (1990) (per se rule is an "interpretation[] of the Sherman Act" to categorically prohibit certain types of conduct). Thus, instructing a jury that it may find a defendant guilty of violating Section 1 based on a finding that he entered into a per se illegal agreement—without a separate inquiry into whether the agreement was reasonable—does not "deny a jury decision as to an element of the crime." *United States v. Mfr.'s Ass'n of the Relocatable Bldg. Indus.*, 462 F.2d 49, 52 (9th Cir. 1972); *see also United States v. Aiyer*, 33 F.4th 97, 120 (2d Cir. 2022) (noting "the absence of a 'reasonableness' element in a *per se* violation"). It instead reflects the basic principle that juries resolve questions of fact, and "any agreement for price-fixing, if found, [is] illegal as a matter of law." *Trenton Potteries*, 273 U.S. at 400; *see, e.g.*, *Cline v. Frink Dairy Co.*, 274 U.S. 445, 461 (1927) (explaining that, at common law, the

"reasonableness" of price-fixing agreements was not "left to the . . . jury"); *Addyston Pipe*, 175 U.S. at 238 (similar).[5]

Indeed, all six circuits to address the jury-right issue have upheld the constitutionality of the per se rule's application in criminal cases. *See United States v. Giordano*, 261 F.3d 1134, 1143-44 (2d Cir. 2001) (rejecting argument that per se rule creates an unconstitutional presumption in violation of Supreme Court's decision in *Francis v. Franklin* because argument "in effect asks us to overrule *Socony-Vacuum*"); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1196 (3d Cir. 1984); *United States v. Cargo Serv. Stations, Inc.*, 657 F.2d 676, 683 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *United States v. Koppers*, 652 F.2d 290, 293 (2d Cir. 1981) (rejecting the argument that a jury instruction on per se rule "improperly withdrew question of

[5] The Supreme Court and this Court have occasionally referred to the per se rule as a "conclusive presumption" or with similar phrases. *E.g.*, *Maricopa Cnty. Med. Soc'y*, 457 U.S. at 344; *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001) (certain agreements are "conclusively presumed to be unreasonable and therefore illegal" under the per se rule (quoting *Cont'l T.V., Inc. v GTE Sylvania*, 433 U.S. 36, 50 (1977)). None of those references, however, indicates that the rule creates an *evidentiary* presumption of the kind giving rise to constitutional concerns in criminal cases. Indeed, the per se rule "is not even a rule of evidence." *Mfr.'s Ass'n*, 462 F.2d at 52.

reasonableness from the jury"); *United States v. Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979); *Mfr.'s Ass'n*, 462 F.2d at 52 (the per se rule proscribes "certain classes of conduct, such as price-fixing, are, without more, prohibited by the Act" and "does not establish a presumption"). In light of these decisions, and the underlying Supreme Court decisions, Brewbaker's constitutional challenge (even if preserved) does not raise a substantial question.[6]

B. Brewbaker's Argument That the Rule of Reason Should Have Applied to the Sherman Act Count Does Not Raise a Substantial Question

Brewbaker challenges the district court's denial of his pretrial motion to apply the rule of reason to the Sherman Act count, which the court treated as a motion to dismiss for failure to state an offense. Order at 6 (Dkt. 79). This challenge ignores the conduct actually charged, and does not raise a substantial question.

The Sherman Act count charged that Contech and Pomona both submitted bids to NCDOT for aluminum-structure projects, and that the

[6] Brewbaker's contention that an absence of Fourth Circuit precedent makes his argument substantial (Mot. 17) is meritless. *See Giancola*, 754 F.2d at 901 ("Similarly, there might be no precedent in this circuit, but there may also be no real reason to believe that this circuit would depart from unanimous resolution of the issue by other circuits.").

companies agreed to eliminate the competition between them by rigging those bids. Indictment ¶¶ 13-17, 22 (Dkt. 1). Specifically, Brewbaker obtained Pomona's bid prices for upcoming projects and submitted intentionally losing bids on behalf of Contech, creating the illusion of competition between Contech and Pomona. Indictment ¶¶ 16-17, 24 (Dkt. 1).

This scheme was a per se violation of Section 1. This Court has stated that "any agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party constitutes bid rigging per se violative of 15 U.S.C. § 1." *United States v. W.F. Brinkley & Son Constr. Co., Inc.*, 783 F.2d 1157, 1160 (4th Cir. 1986) (quoting *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982)) (cleaned up). By alleging "an agreement between competitors in a bidding contest . . . by preselecting the lowest bidder, to abstain from all bona fide effort to obtain the contract," the government alleged a per se violation of Section 1. *Portsmouth Paving*, 694 F.2d at 325 n.18 (quoting 1 Rudolf Callman, *The Law of Unfair Competition, Trademarks and Monopolies* § 4.34 (4th ed. 1981)).

Brewbaker does not address these allegations or dispute this law. Instead, he highlights that Contech and Pomona had a vertical relationship—Contech sold aluminum pieces to Pomona, Indictment ¶ 7 (Dkt. 1)—along with a horizontal relationship—as competitors in bidding on NCDOT aluminum-structure projects, *id.* ¶ 8. He maintains that the rule of reason should have governed the Section 1 charge because Contech and Pomona were "partners" in "a 'dual distribution' arrangement in that Contech offered its goods both through its distributor (Pomona) and also directly." Mot. 17, 19.

This argument conflates separate areas of competition—aluminum pieces and aluminum-structure projects. It is not uncommon for companies to have both vertical and horizontal agreements—as would occur, for instance, if GM sold spark plugs to Ford and the companies then agreed to fix prices on the cars they both sold. In such cases, in applying Section 1, a court ascertains whether the challenged agreement is vertical or horizontal—not whether the companies can be described generally as "partners." *See, e.g.*, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (market-division agreement horizontal even though one of the two competitors also became a licensee of the other competitor);

United States v. Apple, Inc., 791 F.3d 290, 323, 325 (2d Cir. 2015) ("the relevant 'agreement in restraint of trade' in this case is not Apple's vertical Contracts with the Publisher Defendants . . . it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices"); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir. 1981) (rejecting the argument that "a restraint may always be regarded as vertical if it is imposed by the manufacturer").

Here, the "alleged arrangement" was not, as Brewbaker suggests, the arrangement whereby Pomona acted as a dealer for Contech's *aluminum*. Mot. 19; Indictment ¶ 7 (Dkt. 1). Rather, it was an arrangement to coordinate bids on *aluminum-structure projects*—projects which involved not just aluminum pieces, but also the fabrication and installation of those pieces. Indictment ¶¶ 3, 7 (Dkt. 1). As the district court observed, "the actual 'product' [] Contech is alleged to offer as a manufacturer and as a bidder differ: as a manufacturer, [] Contech provides aluminum pieces to [Pomona]; as a bidder on NCDOT projects, [] Contech provides installation and completion of aluminum structures." Order at 22 n.6 (Dkt. 79). Because Contech and Pomona were "separate bidders for NCDOT projects" who "facially competed for award of the

projects," "their arrangement to not compete in this process necessarily was horizontal in nature." *Id.* at 18.

Brewbaker insists that there is a substantial question because other circuits have categorized "dual distribution" arrangements as vertical price-fixing agreements. Mot. 19-20. But the cases he cites are inapposite because they involve manufacturers and distributors selling the same product to customers. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 414-15 (5th Cir. 2010) (defendant utilized a "dual distribution system" to sell handbags both in its own retail stores and through independent retailers); *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 528, 531 (3d Cir. 2006) (prepaid telephone cards); *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods., Inc*, 129 F.3d 240, 243-44 (2d Cir. 1997) (cellular telephones); *Glacier Optical, Inc. v. Optique du Monde*, 46 F.3d 1141 (9th Cir. 1995) (unpublished table decision) (designer eyeglass frames); *Smalley & Co. v. Emerson & Cuming, Inc.*, 13 F.3d 366, 367 (10th Cir. 1993) (defendant sold adhesives and sealants directly to some customers but utilized distributors to sell to other customers); *Hampton Audio Elecs., Inc. v. Contel Cellular, Inc.*, 966 F.2d 1142 (4th Cir. 1992) (unpublished table decision) (defendant sold cellular

telephone service itself and through independent agents); *Illinois Corp. Travel, Inc. v. Am. Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989) (airline tickets); *Int'l Logistics Grp., Ltd. v. Chrysler Corp*., 884 F.2d 904 (6th Cir. 1989) (automotive replacement parts); *Ryko Mfg. Co. v. Eden Servs*., 823 F.2d 1215, 1218 (8th Cir. 1987) (antitrust defendant sold car-wash equipment both through a network of distributors and by direct sales to larger purchasers). Here, by contrast, in the bids to NCDOT, Pomona was not acting as Contech's distributor: Pomona and Contech submitted separate bids for aluminum-structure projects, which included aluminum *and* related services. Indictment ¶¶ 3, 7 (Dkt. 1).

In sum, as the district court correctly concluded, "[a]lthough there are aspects of [Contech and Pomona's] relationship that are vertical (e.g., Contech's selling aluminum pieces to [Pomona] to use), the restraint at issue was horizontal because the two presented themselves as potential competitors for the bidding process for NCDOT projects." Order at 23 (Dkt. 79); *see also Koppers*, 652 F.2d at 297 (bid-rigging agreement was not "automatically transformed into something different" by its vertical elements). Accordingly, the district court correctly held that the

indictment properly charged a per se violation of Section 1 of the Sherman Act. Again, there is no close question.

IV. Freestanding "Exceptional Reasons" Are Not a Basis for Bail Pending Appeal

Brewbaker's argument for release based on "exceptional reasons" (Mot. 22-25) fails because the provision of Section 3145(c) that he relies on does not apply to this case.[7] That subsection provides that, on appeal from a release or detention order, "[a] person subject to detention pursuant to Section 3143(a)(2) or (b)(2)" may be ordered released if, *inter alia*, "it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." 18 U.S.C. § 3145(c).

Brewbaker, however, is not subject to detention under Section 3143(a)(2) or (b)(2). Section 3143(a)(2) applies when a defendant seeks release pending sentencing, 18 U.S.C. § 3143(a)(2), and Section 3143(b)(2) applies only to "a person who has been found guilty of an offense in a case described in subparagraph (A), (B), or (C) of subsection

[7] Brewbaker makes scattered reference to the Due Process Clause, but he has abandoned any such argument by failing to develop it. *See United States v. Miller*, 41 F.4th 302, 313 (4th Cir. 2022). In any event, denial of release under the statutory criteria would not raise due-process concerns. *See United States v. Chilingirian*, 280 F.3d 704, 709-10 (6th Cir. 2002).

(f)(1) of section 3142," 18 U.S.C. § 3143(b)(2). Sections 3142(f)(1)(A)-(C), in turn, encompass only a crime of violence, an offense with a maximum sentence of life imprisonment or death, and certain drug-related offenses.[8] Brewbaker's offenses—bid rigging, conspiracy to commit mail fraud and wire fraud, mail fraud, and wire fraud—do not fall within this limited set of offenses. Hence, the "exceptional reasons" provision of Section 3145(c) is inapplicable. *E.g.*, *United States v. Geddings*, 497 F. Supp. 2d 729, 742 (E.D.N.C. 2007) ("Defendant was not convicted of the offenses referenced in 18 U.S.C. § 3142(f)(1)(A)-(C) and was not subject to detention under 18 U.S.C. § 3143(a)(2) or (b)(2). Thus, section 3145(c) does not apply to defendant's case.").

Of course, even if the "exceptional reasons" provision did apply, Brewbaker would still have to "meet[] the conditions of release set forth

[8] Specifically, Sections 3143(a)(2) and (b)(2) apply if a defendant has been convicted of "a crime of violence, a violation of section 1591, or an offense listed in section 2332b(g)(5)(B) for which a maximum term imprisonment of 10 years or more is prescribed," 18 U.S.C. § 3142(f)(1)(A); "an offense for which the maximum sentence is life imprisonment or death," 18 U.S.C. § 3142(f)(1)(B); or "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46," 18 U.S.C. § 3142(f)(1)(C).

in [Section 3143(b)(1)]." 18 U.S.C. § 3145(c). As shown *supra*, he has not done so.

CONCLUSION

The Court should deny Brewbaker's motion for release pending appeal.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This motion complies with the type-volume limit of Fed. R. App. P. 27(d)(2) because, excluding the parts exempted by Fed. R. App. P. 32(f), the brief contains 5046 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(b) because the brief has been prepared in Microsoft Word 2019, using 14-point New Century Schoolbook font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on December 20, 2022, I caused the foregoing to be filed through this Court's CM/ECF system, which will serve a notice of electronic filing on all registered users, including counsel for Brent Brewbaker.

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