**No. 22-4544**

IN THE
# United States Court of Appeals for the Fourth Circuit

UNITED STATES OF AMERICA,
*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)

## REPLY IN SUPPORT OF PETITION OF THE UNITED STATES FOR PANEL REHEARING AND REHEARING EN BANC

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To ensure that the Court has the information it needs to make an informed decision on the pending petition for panel rehearing and rehearing en banc, the United States submits this short reply.

1. The response simply does not respond to the petition's central discussion of six Supreme Court cases and eleven out-of-circuit appellate cases that—contrary to the panel's holding, *see* Op. 16-18—treated agreements as horizontal even though the parties had partly vertical relationships, Pet. 11-19. Among those cases is *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (per curiam), which, as the petition explained, "is on all fours" with this case (Pet. 13) but which Brewbaker does not even cite. The response also fails to address three Fourth Circuit cases discussed in the petition that establish—again, contrary to the panel's holding, *see* Op. 29, 33—that the conduct alleged in the indictment is horizontal and per se unlawful under Section 1 of the Sherman Act, 15 U.S.C. § 1, Pet. 20-21. For the now-unrebutted reasons stated in the petition, the panel's "purely horizontal" test contradicts these precedents.

2. Rather than defend the panel's "purely horizontal" test, the response (at 2-8) claims that the panel correctly held the restraint to be subject to the rule of reason based on the panel's discussion of dual-distribution restraints. But the panel rejected application of the established per se rule against

horizontal bid rigging solely on the ground that the restraint was not "purely horizontal." Op. 8-21. The panel discussed dual-distribution cases only in a subsequent portion of the opinion *sua sponte* declining to hold that the restraint fell within "a new category" of per se illegal restraints. Op. 21-29.

Moreover, Brewbaker misreads the indictment when claiming it alleged a dual-distribution restraint. It did not. It alleged only that Contech and Pomona agreed to rig competing bids and separately entered into a distribution agreement with each other. *See* JA46, JA50-51. Contrary to Brewbaker's claim (Resp. 5 n.3), the petition never "abandoned" that reading of the indictment but articulated it expressly (Pet. 24).

Brewbaker also misreads *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), as analyzing whether dual-distribution restraints are horizontal or vertical. Resp. 2-4. This was not even at issue in *Leegin* because the Supreme Court assumed that the restraint was vertical. 551 U.S. at 884 ("On appeal Leegin did not dispute that it had entered into vertical price-fixing agreements . . . ."). And after remand, the Fifth Circuit—in holding that the plaintiff had "not properly alleged its horizontal-restraint claims"—acknowledged that the Supreme Court had "explicitly refused to address the issue" of dual-distribution agreements because that issue "had not been raised

in the lower courts." *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420 (5th Cir. 2010).

Brewbaker asserts incorrectly that "every circuit to address the question at issue of whether price agreements between a dual-distributing manufacturer and a dealer are subject to the *per se* rule has reached the same result as the panel: they are not." Resp. 4 & n.2. On this point Brewbaker again fails to address the directly contradictory cases discussed in the petition. Pet. 21-23 & nn.6-7.

The response illustrates its own error by citing an article that critiques the process of distinguishing between horizontal and vertical restraints in the dual-distribution setting as "laborious." Resp. 7 n.4 (quoting Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 IOWA L. REV. 1207, 1238-40 (2008) ["Lemley & Leslie"]). The response fails to quote the portion of the sentence in which the authors state that "[c]ourts routinely engage" in this process. Lemley & Leslie, *supra*, at 1238. In support of that proposition, the authors cited, among others, cases in the Fourth, Fifth, Sixth, Seventh, and Ninth Circuits. *Id.* at 1238-39 & nn.146, 149, 152-53, 155-56. All of these cases applied tests for determining whether restraints are horizontal in the dual-distribution context, rather than viewing them as necessarily vertical or "hybrid" (as would the response). *Id.*

3. Brewbaker also uses his brief to raise arguments about the ancillary-restraints doctrine that may create a misleading impression for the Court.

Contrary to Brewbaker's claim that he had no opportunity to raise an ancillary-restraints defense below (Resp. 8-9), the United States recognized in a motion *in limine* that "[a] jury may consider" the ancillary-restraints doctrine "if requested by the defense and sufficiently supported by admissible evidence." JA1004. The United States argued that Brewbaker had not satisfied those prerequisites, but the district court *denied* the motion *in limine* without prejudice. JA1069. Brewbaker thus had an opportunity to present evidence supporting his ancillary-restraints argument, and he could have requested—but failed to request—a jury instruction on the ancillary-restraints doctrine. *See* Rule 28(j) Notice (Sept. 26, 2023), ECF No. 54.[1]

4. Finally, Part II of Brewbaker's response is not a response at all, but an untimely cross-petition urging the Court to grant rehearing and reverse Brewbaker's fraud convictions. Resp. 12-16. This portion of the brief does

[1] Brewbaker also claims that treating the ancillary-restraints doctrine "as an affirmative defense would violate the Constitution" because non-ancillarity is an element of a Section 1 violation, Resp. 9, but that is wrong: As multiple circuits recognize, establishing ancillarity excuses criminal liability for otherwise per se offenses, and the defendant thus has the burden of proving ancillarity. *See United States v. Aiyer*, 33 F.4th 97, 120-21 (2d Cir. 2022); *United States v. Sanchez*, 760 F. App'x 533, 536 (9th Cir. 2019); *see also* Rule 28(j) Letter (Sept. 8, 2023), ECF No. 51.

not respond to the United States' petition, but effectively cross petitions for rehearing of the fraud convictions based on arguments already raised (Opening Br. 63-64; Reply Br. 27-30), rebutted (Resp. Br. 66-68), and rejected (Op. 30-32). The deadline for petitions for rehearing was January 16, 2024 (Order (Dec. 4, 2023), ECF No. 59), so the Court should strike this portion of Brewbaker's response as an untimely cross-petition.[2]

[2] *See* Order, *United States v. McRae*, No. 13-7619 (4th Cir. Mar. 24, 2014), ECF No. 21 ("The court strictly enforces the time limits for filing petitions for rehearing and petitions for rehearing en banc in accordance with Local Rule 40(c). The petition in this case is denied as untimely."); Order, *United States v. Thomas*, No. 12-4158 (4th Cir. May 7, 2013), ECF No. 80 (same); Order, *United States v. Batts*, No. 12-7385 (4th Cir. Jan. 23, 2013), ECF No. 15 (same).

Respectfully submitted.

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February 8, 2024

**CERTIFICATE OF COMPLIANCE**

This brief 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)(6) 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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