UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MM STEEL, LP, Plaintiff, v. RELIANCE STEEL & ALUMINUM CO., CHAPEL STEEL CORP., AMERICAN ALLOY STEEL, INC., ARTHUR J. MOORE, JSW STEEL (USA) INC., & NUCOR CORP., Defendants.	§ § § § § § § § § § § §	CASE NO. 4:12-CV-01227

DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND SPECIAL INTERROGATORIES

Defendants Reliance Steel & Aluminum Co. ("Reliance"), Chapel Steel Corp. ("Chapel"), Arthur J. Moore ("Moore"), American Alloy Steel, Inc. ("American Alloy"), JSW Steel (USA) Inc. ("JSW"), and Nucor Corp. ("Nucor") submit the attached Proposed Jury Instructions and Special Interrogatories. By submitting these instructions and interrogatories, Defendants are not conceding that there are any factual issues for the jury to decide with respect to the asserted claims or causes of action of Plaintiff MM Steel LP ("Plaintiff"). To the contrary, Defendants contend that there is no legally sufficient evidence to support any of Plaintiff's claims, and Defendants each reserve the right to move for judgment as a matter of law (JMOL) on Plaintiff's claims at the appropriate time. Defendants further reserve the right to modify, supplement, or eliminate instructions and interrogatories as the case proceeds through trial and based on this Court's rulings on the admissibility of evidence and other matters.

In addition, Plaintiff has contended that its antitrust claim is a per se claim and should not be analyzed under the rule of reason. Throughout this case, Defendants have argued that

Plaintiff's claim is not a per se claim. However, the Court has ruled that Plaintiff's claims are per se claims, Doc. 379 at 7, and thus Defendants' proposed charge does not include instructions or interrogatories under the rule of reason.[1] If Plaintiff's causes of action change in any way, Defendants reserve the right to request additional or revised instructions and interrogatories for the charge.

March 12, 2014

Respectfully submitted,

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[1] By submitting these proposed instructions in accord with the Court's order, Defendants do not waive their argument that this claim should be analyzed under the rule of reason.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on March 12, 2014, the foregoing document was transmitted to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing for this filing to all registered counsel of record.

/s/ Andrew Macurdy
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DEFENDANTS' PROPOSED JURY INSTRUCTIONS AND SPECIAL INTERROGATORIES

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JURY INSTRUCTIONS

1. Improper Questioning

You should disregard any questioning or testimony that concerned whether certain conduct would be ethical, proper, appropriate, suspicious, legal, or lawful, or that concerned similar characterizations. Any such questioning or testimony is irrelevant. The question to you is whether you find, under the facts presented, that defendants' conduct was illegal under the instructions on the law I am about to give you.

SHERMAN ACT SECTION 1

2. Purpose of the Sherman Act

The purposes of the antitrust laws are to preserve and advance the system of free and open competition, and to secure to everyone an equal opportunity to engage in business, trade, and commerce. This policy is the primary feature of the private free enterprise system. The law promotes the concept that free competition produces the best allocation of economic resources. However, it recognizes that in the natural operation of the economic system, some competitors are going to lose business while others prosper. The law therefore protects competition, not competitors. An act becomes unlawful only when it constitutes an unreasonable restraint on interstate commerce.[2]

3. Per Se Violation of the Sherman Act

Plaintiff has alleged a per se violation of the Sherman Act. For the type of claim Plaintiff is making in this case, Plaintiff's claim may be evaluated as a per se violation only if Plaintiff proves by a preponderance of the evidence that (1) Defendants engaged in anticompetitive conduct by virtue of holding a dominant position in a relevant market that enabled Defendants to cut off Plaintiff's access to a supply of steel plate that was necessary for Plaintiff to compete; and (2) no generally plausible argument exists that Defendants' conduct had a procompetitive effect.[3]

4. "Relevant Market" Defined

Plaintiff must prove the relevant market by a preponderance of the evidence. There are two aspects you must consider in determining whether Plaintiff has met its burden the relevant

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[2] Fifth Circuit 2006 Civil Pattern Jury Instructions 6.1; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 488 (1977).

[3] *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 414 (5th Cir. 2007); *Nw. Wholesale Stationers v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293-98 (1985); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877,886 (2007).

market by a preponderance of the evidence. The first aspect is the relevant product market; the second aspect is the relevant geographic market.[4] If you find the Plaintiff failed to prove a relevant market, then you must find in the Defendant's favor on this claim.

A relevant market for a product includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes.[5]

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant permanent increase in the price of one product would result in a substantial number of consumers switching from that product to another. Generally speaking, a small but significant permanent increase in price is approximately a five percent increase in price not due to external cost factors, but you may conclude in this case that some other percentage is more applicable to the product at issue. If you find that such switching would occur, then you may conclude that the products are in the same product market.[6]

In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence or absence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of Plaintiff and

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[4] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), C-6.

[5] *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *see also United States v. Microsoft Corp.*, 253 F.3d 34, 52-54 (D.C. Cir. 2001); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1355 (Fed. Cir. 1999); *AD/SAT, A Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999).

[6] *See du Pont*, 351 U.S. at 400; *see also Telecor Communs., Inc. v. Southwestern Bell Tel. Co.*, 305 F.3d 1124, 1131 (10th Cir. 2002).

Defendants regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.[7]

In deciding whether Plaintiff has proven a relevant product market, you may also consider what the law refers to as "the cross-elasticity of supply" or, in other words, the extent to which the producers of one product would be willing to shift their resources to producing another product in response to an increase in the price of the other product.[8]

The relevant geographic market is the area in which a Defendant faces competition from other firms that compete in the relevant product market and to which customers can reasonably turn for purchases.[9] When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller.[10]

In determining whether Plaintiff has met its burden and demonstrated that its proposed geographic market is proper, you may consider several factors,[11] including: (1) the geographic

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[7] *See* ABA Section of Antitrust Law, 1 Antitrust Law Developments 537-39 (5th ed. 2002) (collecting cases); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

[8] *AD/SAT, A Division of Skylight, Inc. v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999). *See generally* ABA Section of Antitrust Law, 1 Antitrust Law Developments 553-55 (5th ed. 2002) (collecting cases).

[9] *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d. 1003, 1026-27 (10th Cir. 2002); *ReMax Int 'l, Inc. v. Realty One, Inc.*, 173 F.2d 995 (6th Cir. 1999); *Morgenstern v. Wilson*, 29 F.3d 1291 (8th Cir. 1994); *see also* ABA Section of Antitrust Law, 1 Antitrust Law Developments 577-89 (5th ed. 2002).

[10] *See, e.g., Grinnell*, 384 U.S. at 563 (finding a national geographic market); Morgenstern, 29 F.3d at 1291 (finding geographic market that included Lincoln and Omaha, Nebraska); *Battle v. Liberty Nat 'l Life Ins. Co.*, 493 F.2d 39, 45 (5th Cir. 1974); *see also Apani Southwest, Inc. v. Coca- Cola Enters., Inc.*, 300 F.3d 620, 626 (5th Cir. 2002) (finding alleged geographic market of 27 city-run facilities insufficient to support Clayton Act and Sherman Act§ 1 claims).

[11] *See, e.g.*, ABA Section of Antitrust Law, 1 Antitrust Law Developments 577-89 (5th ed. 2002) (discussing these factors and collecting relevant cases).

area in which Defendants sell and where Defendants' customers are located; (2) the geographic area to which customers turn for supply of the product; (3) the geographic area to which customers have turned or have seriously considered turning; and (4) the geographic areas that suppliers view as potential sources of competition.[12]

5. "Dominant Position" Defined

A "dominant position" in the market is the power to control prices and exclude competition in a relevant antitrust market. One or more firms have a dominant position if that firm or those firms can profitably raise prices substantially above the competitive market level for a significant period of time.[13]

6. Group Boycott

Plaintiff claims that Defendants violated the antitrust laws by agreeing with each other to prevent Plaintiff from buying steel.[14]

A business has the right to deal, or refuse to deal, with whomever it likes, as long as it makes that decision on its own. The antitrust laws, however, prohibit two or more persons or businesses from agreeing with each other not to sell a product to another where certain circumstances, defined below, are shown to exist. This situation is sometimes referred to as a "group boycott."[15]

7. Sherman Act Section 1 – Elements of Claim

Plaintiff challenges the conduct of Defendants under Section 1 of the Sherman Act. Section 1 prohibits contracts, combinations and conspiracies that unreasonably restrain trade.

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[12] *See also FTC v. Tenet Health Care*, 186 F.3d 1045 (8th Cir. 1999) (holding that the government must present evidence concerning where consumers could practicably go for care, not where they actually do go).

[13] *See Microsoft*, 253 F.3d at 51.

[14] Fifth Circuit 2006 Civil Pattern Jury Instructions 6.1.

[15] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-50.

To prevail on this claim against any Defendant, Plaintiff must prove as to that Defendant each of the following elements by a preponderance of the evidence:

First, that the Defendant joined a contract, combination, or conspiracy that the Defendant knew included two or more direct competitors to prevent Plaintiff from buying steel;

Second, that the refusal to deal was pursuant to a contract, combination, or conspiracy between the Defendant and one or more other persons or businesses;

Third, that at least two of the parties to the contract, combination, or conspiracy are direct competitors with each other;

Fourth, that the refusal to deal unreasonably restrained trade by denying Plaintiff access to a supply of product necessary for Plaintiff to compete effectively;

Fifth, that the refusal to deal occurred in or affected interstate commerce; and

Sixth, that Plaintiff suffered injury in his business or property as a proximate result of the alleged refusal to deal.[16]

8. Conspiracy – Definition, Existence, and Evidence

Plaintiff alleges that Defendants participated in a conspiracy to engage in a group boycott by depriving Plaintiff of its ability to purchase steel.

To prove that a Defendant joined a conspiracy, if any, Plaintiff must prove both of the following elements of a conspiracy by a preponderance of the evidence:

First, that the alleged conspiracy existed; and

Second, that the Defendant knowingly became a member of that conspiracy; knowingly means voluntarily and intentionally becoming a member of that conspiracy, and not because of mistake or accident or other innocent reason.

[16] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-50 to B-51.

To create a conspiracy, two or more persons must enter into an agreement that they will act together for some unlawful purpose or to achieve a lawful purpose by unlawful means.[17]

A conspiracy cannot be formed unless at least two separate persons or corporations reach an agreement or understanding. A single corporation cannot agree, combine, or conspire with its own officers or employees. So for example, American Alloy cannot conspire with Arthur J. Moore because he is the president and CEO of American Alloy. Similarly, Chapel is a wholly-owned subsidiary of Reliance, and thus no agreement, combination, or conspiracy can occur between Chapel and Reliance because they are commonly owned and controlled. You may not find a conspiracy between American Alloy and Arthur J. Moore, or between Chapel and Reliance.[18]

Mere similarity of conduct among various persons, however, or the fact that they may have associated with one another and may have met or assembled together and discussed common aims and interests, does not establish the existence of a conspiracy unless the evidence tends to exclude the possibility that the persons were acting independently. If they acted similarly but independently of one another without any agreement among them, then there would not be a conspiracy.

In determining whether an agreement has been proved, you must view the evidence as a whole and not piecemeal. In considering the evidence, you should first determine whether or not the alleged conspiracy existed. If you conclude that the conspiracy did exist, you should next

[17] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-2.

[18] Fifth Circuit 2006 Civil Pattern Jury Instructions 6.1 (with factual assertion added).

determine whether each party knowingly became a member of that conspiracy with the intent to further its purposes.[19]

9. Conspiracy - Multiple Conspiracies

Whether there existed a single agreement, or many such agreements, or indeed, no agreement at all, is a question of fact for you, the jury, to determine.

When two or more people join together to further one common design or purpose, a single agreement exists. By way of contrast, multiple agreements exist when there are separate unlawful agreements to achieve distinct purposes.

Proof of several separate and independent agreements is not proof of the single, overall agreement alleged by Plaintiff, unless one of the agreements proved happens to be the single agreement described by Plaintiff.

What you must do is determine whether the single agreement alleged by Plaintiff existed. If it did, you then must determine the nature of the agreement and who were its members. If it did not, and you determine that there were multiple agreements, then you must find for Defendants.[20]

10. Direct Competitors

As I instructed previously, at least two parties to a group boycott must be direct competitors. Direct competitors are entities that occupy the same level of distribution in a supply chain. When a manufacturer sells to a distributor, the manufacturer and the distributor are not

[19] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-2 to B-4.

[20] Sand, Modern Federal Jury Instructions, § 19.05 (modified); *Kotteakos v. United States*, 328 U.S. 750 (1946); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1059, 1064 (N.D. Cal. 2007).

considered direct competitors even if the manufacturer also sells some product directly to end users.[21]

You may find that a mill defendant entered into an agreement individually with one distributor defendant, or entered into multiple separate agreements individually with multiple distributors. Such an individual agreement between one mill defendant and one distributor defendant, or multiple separate agreements, would not constitute the type of agreement between direct competitors that Plaintiff MM Steel has alleged in this case.[22]

11. Conspiracy – Conscious Parallelism

Plaintiff contends that the existence of a conspiracy can be inferred from the fact that some Defendants have refused to sell Plaintiff steel.[23]

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, do not necessarily establish proof of the existence of a conspiracy. Likewise, a mere similarity of competitive business practices between Defendants and others, or the fact some Defendants may have refused to sell Plaintiff steel, does not necessarily establish a conspiracy. This is because the refusal to sell steel to Plaintiff may be based on independent business judgment.[24] An independent business decision cannot violate the antitrust laws. This is true

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[21] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988); *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 615 F.3d 412, 420-21 (5th Cir. 2010); *Abadir & Co. v. First Mississippi Corp.*, 651 F.2d 422 (5th Cir. 1981); *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1005 (5th Cir. 1981); *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006); *Elecs. Comm'ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243-44 (2d Cir. 1997).

[22] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988); *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 222-25 (5th Cir. 2001); *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 295 (5th Cir. 1981); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1059, 1064 (N.D. Cal. 2007).

[23] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-7.

[24] Fifth Circuit 2006 Civil Pattern Jury Instructions 6.1.

even if the Defendant's independent decision is not smart, correct, or effective. What matters is that the Defendant's decision be independent.[25]

A Defendant is entitled to refuse to deal with the Plaintiff or any person for any reason, no matter how good or bad the reason, so long as the Defendant's decision was arrived at independently and not as a result of an agreement, combination, or conspiracy, if any, with any of the alleged co-conspirators. Thus, unless a Defendant acted as a result of an agreement, combination, or conspiracy with another Defendant, its actions in refusing to sell to the Plaintiff were not illegal.[26]

Therefore, the fact that some Defendants have refused to sell Plaintiff steel is not by itself sufficient to prove the existence of the alleged agreement. You may consider some Defendants' refusal to sell Plaintiff steel along with other evidence in deciding whether those Defendants' conduct was the result of an agreement, and not the result of independent decisions made by each Defendant on its own. [27]

To establish the existence of an agreement, Plaintiff must produce evidence that tends to exclude the possibility that Defendants acted independently. You should consider all of this evidence as a whole against the entire background in which the alleged behavior took place. After considering all of the evidence, if you conclude that Plaintiff has failed to carry its burden of producing evidence that tends to exclude the possibility that Defendants acted independently, then you must find for Defendants. On the other hand, if you conclude that Plaintiff has carried its burden of producing evidence that tends to exclude the possibility that certain Defendants

[25] Modern Federal Jury Instructions – Civil, Instruction 79-48.

[26] *Coughlin v. Capital Cement Co.*, 571 F.2d 290, 301 n.20 (5th Cir. 1978).

[27] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-7 to B-8.

acted independently, then you must find for Plaintiff and against those certain Defendants on the question of whether those Defendants participated in a conspiracy.[28]

12. Conspiracy – Distributor's Right to Choose with Whom It Will Do Business

A distributor has the right to choose with whom it will and will not do business, just as a manufacturer has the right to make the same choice. A distributor may announce the conditions under which it will do business with a manufacturer and also may try to persuade the manufacturer to meet those conditions. To establish a contract, combination, or conspiracy in such a situation, Plaintiff must show that the distributor and manufacturer reached an agreement committing each to take future action, rather than the two merely continuing to do business together. Mere persuasion, argument, or pressure by the distributor is not the equivalent of a contract, combination, or conspiracy.[29]

A response to complaints from a customer is insufficient to establish the existence of a conspiracy. The antitrust laws permit a company to hear concerns of a customer and to make a business decision in response to those concerns without risking being deemed to have entered into a conspiracy with its customer.[30]

To establish the existence of a conspiracy involving a manufacturer and one or more customers to boycott another customer, a plaintiff must show, in addition to any customer communications, that the manufacturer's decision to cease dealings with the other customer was

[28] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-8.

[29] *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 761, 104 S. Ct. 1464, 1469 (1984); *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465 468 (1919); *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 17-18 (1st Cir. 2004); ABA Model Jury Instructions in Civil Antitrust Cases (2005 ed.) B-74 to B-75.

[30] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); *National Marine Electronic Distributors, Inc. v. Raytheon Co.*, 778 F.2d 190, 192-93 (4th Cir. 1985); *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1158 (9th Cir. 1988); *Abraham v. Intermountain Health Care Inc.*, 461 F.3d 1249, 1259 (10th Cir. 2006); *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 19-20 (1st Cir. 2004); *Burlington Coat Factory Warehouse Corp. v. Esprit De Corp.*, 769 F.2d 919, 923-24 (2d Cir. 1985); *Bailey's, Inc. v. Windsor Am., Inc.*, 948 F.2d 1018, 1030 (6th Cir. 1991); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1059, 1077 (N.D. Cal. 2007).

inconsistent with the manufacturer's independent self-interest. One legitimate reason for a manufacturer to terminate a relationship with a customer is to avoid losing the business of other disgruntled customers.[31]

13. Conspiracy – Participation and Intent

Before you can find that any Defendant was a member of the conspiracy alleged by Plaintiff, the evidence must show that the Defendant knowingly joined in the unlawful plan at its inception or at some later time with the intent to advance or further some object or purpose of the conspiracy.

To act knowingly means that the Defendant joined the conspiracy voluntarily and intentionally, and not because of mistake or accident or other innocent reason. Knowledge of the essential nature of the plan is enough. On the other hand, a person who has no knowledge of a conspiracy, but happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby join the conspiracy.

The membership of a person in a conspiracy must be based only on evidence of that person's own statements or conduct. In determining whether any Defendant was a member of the conspiracy alleged by Plaintiff, you should consider only the evidence of that Defendant's statements and conduct, including any evidence of that Defendant's knowledge or lack of knowledge, status, and participation in the events involved, and any other evidence of participation in the conspiracy alleged.[32]

[31] *Viazis v. American Ass'n of Orthodontists*, 314 F.3d 758, 763-64 and n.8 (5th Cir. 2002).
[32] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), B-13 to B-14.

14. Exercise of Legal Rights is Not an Unlawful Restraint on Trade

Plaintiff claims that Reliance and Chapel acted unlawfully in filing a lawsuit against Plaintiff. In that lawsuit, Reliance and Chapel sued Plaintiff and Plaintiff's founders, Matt Schultz and Mike Hume, alleging that Schultz and Hume, when they were still employees of Chapel, had breached fiduciary duties that Schultz and Hume owed to their then-employer Chapel. An employee owes several fiduciary duties to his employer. First, the employee has a fiduciary duty to act primarily for the benefit of his employer with regard to matters connected to the employment relationship. Second, the employee has a fiduciary duty not to compete with his employer in matters relating to the employment relationship. Third, the employee has a fiduciary duty to deal fairly with his employer in all transactions between them. Fourth, the employee has a fiduciary duty to disclose fully to his employer any information about matters affecting the employer's business.[33]

There are several possible ways an employee can violate his fiduciary duties to his employer. For example, an employee violates his fiduciary duties to his employer if the employee (1) appropriates his employer's trade secrets; (2) solicits his employer's customers or suppliers; (3) solicits the departure of other employees while still working for the employer; or (4) carries away confidential information, such as customer lists.[34] Reliance and Chapel's lawsuit against Plaintiff, Schultz, and Hume alleged that Schultz and Hume, both of whom had signed non-compete agreements with Chapel, had violated those non-compete agreements and violated their fiduciary duties owed as employees to their then-employer Chapel.

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[33] *Navigant Consulting Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007); *Abetter Trucking Co. v. Arizpe*, 113 S.W.3d 503, 510 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

[34] *Navigant Consulting*, 508 F.3d at 284; *Abetter Trucking*, 113 S.W.3d at 512 (citing *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202 (Tex. 2002)).

Unless a lawsuit is purely and simply a sham, to file a lawsuit does not violate the Sherman Act, is not evidence of an agreement, combination, or conspiracy to restrain trade, and is not evidence of a group boycott, even if such lawsuit is made as a joint and concerted action, and even if the intent or purpose of the lawsuit is to eliminate competition. A lawsuit is a sham only if (1) the lawsuit was objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits, and (2) the baseless lawsuit conceals an attempt to interfere directly with the business relationship of a competitor.[35]

15. Group Boycott - Firm Demand and Firm Refusal

To recover against any Defendant for that Defendant's refusal to sell to Plaintiff, first, Plaintiff must have made a firm demand to deal with that Defendant, and second, that same Defendant must have responded to Plaintiff by making a firm refusal to deal with Plaintiff. If both a firm demand and a firm refusal did not occur, Plaintiff cannot recover against that Defendant. General communications and casual inquiries are insufficient to constitute a firm demand or a firm refusal.[36]

16. Effect of Instruction on Damages

I am now going to instruct you on the issue of damages. The fact that I am giving you instructions concerning the issue of Plaintiff's damages does not mean that I believe that Plaintiff should, or should not, prevail in this case.

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[35] *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 57, 60 (1993); *Bayou Fleet, Inc. v. Alexander*, 234 F.3d 852, 862 (5th Cir. 2000).

[36] *Assoc. News, Inc. v. Curtis Circulation Co., Inc.*, 1986 WL 13791, at *6 (S.D. Tex. Dec. 4, 1986); *Cleary v. Nat'l Distillers & Chem. Corp.*, 505 F.2d 695, 697 (9th Cir. 1974); *Windy City Circulating Co., Inc. v. Charles Levy Circulating Co.*, 550 F. Supp. 960, 963-64 (N.D. Ill. 1982); *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 560-61 (5th Cir. 1980); *Tate v. Pacific Gas & Elec. Co.*, 230 F. Supp. 2d 1086, 1090 (N.D. Cal. 2002); *Ayers v. Pastime Amusement Co.*, 283 F. Supp. 773, 792 (D.S.C. 1968).

If, for any reason, you reach a verdict for Defendants on the issues of liability, you should not consider the issue of damages, and you may disregard the damages instructions that I am about to give. Instructions as to the measure of damages are given for your guidance in the event you should find in favor of Plaintiff based on a preponderance of the evidence in accordance with the other instructions I have given you. You should only consider calculating damages if you first find that Defendants violated the antitrust laws and that this violation caused injury to Plaintiff, as explained above.[37]

17. Injury and Causation

If you find that Defendants have violated Section 1 of the Sherman Act as alleged by Plaintiff, then you must decide if Plaintiff is entitled to recover damages from Defendants.

Plaintiff is entitled to recover damages for an injury to its business or property if it can establish three elements of injury and causation:

First, that Plaintiff was in fact injured as a result of Defendants' alleged violation of the antitrust laws;

Second, that Defendants' alleged illegal conduct was a material cause of Plaintiff's injury; and

Third, that Plaintiff's injury is an injury of the type that the antitrust laws were intended to prevent.

The first element is sometimes referred to as "injury in fact" or "fact of damage." For Plaintiff to establish that it is entitled to recover damages, it must prove that it was injured as a result of the Defendants' alleged violation of the antitrust laws. Proving the fact of damage does not require Plaintiff to prove the dollar value of its injury. It requires only that Plaintiff prove

[37] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), F-11.

that it was in fact injured by the Defendant's alleged antitrust violation. If you find that Plaintiff has established that it was in fact injured, you may then consider the amount of Plaintiff's damages. It is important to understand, however, that injury and amount of damage are different concepts and that you cannot consider the amount of damage unless and until you have concluded that Plaintiff has established that it was in fact injured.

Plaintiff must also offer evidence establishing as a matter of fact and with a fair degree of certainty that Defendants' alleged illegal conduct was a material cause of Plaintiff's injury. This means that Plaintiff must prove that some damage occurred to it as a result of Defendants' alleged antitrust violation, and not some other cause. Plaintiff is not required to prove that Defendants' alleged antitrust violation was the sole cause of its injury; nor does Plaintiff need to eliminate all other possible causes of injury. It is enough if Plaintiff has proved that the alleged antitrust violation was a material cause of its injury. However, if you find that Plaintiff's injury was caused primarily by something other than the alleged antitrust violation, then you must find that Plaintiff has failed to prove that it is entitled to recover damages from Defendants.

Finally, Plaintiff must establish that its injury is the type of injury that the antitrust laws were intended to prevent. This is sometimes referred to as "antitrust injury." If Plaintiff's injuries were caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers, then Plaintiff's injuries are antitrust injuries. On the other hand, if Plaintiff's injuries were caused by heightened competition, the competitive process itself, or by acts that would benefit consumers, then Plaintiff's injuries are not antitrust injuries and Plaintiff may not recover damages under the antitrust laws. You should bear in mind that businesses may incur losses for many reasons that the antitrust laws are not designed to prohibit or protect against—such as where a competitor offers better products or

services or where a competitor is more efficient and can charge lower prices and still earn a profit. The antitrust laws do not permit Plaintiff to recover damages for losses that were caused by the competitive process or conduct that benefits consumers.

However, if Plaintiff can establish that it was in fact injured by Defendants' conduct, that Defendants' conduct was a material cause of the plaintiff's injury, and that Plaintiff's injury was the type of injury that the antitrust laws were intended to prevent, then Plaintiff is entitled to recover damages for the injury to its business or property.[38]

18. Antitrust Damages – Introduction and Purpose

If you find that Defendants violated the antitrust laws and that this violation caused injury to Plaintiff, then you must determine the amount of damages, if any, Plaintiff is entitled to recover. The law provides that a plaintiff should be fairly compensated for all damages to its business or property that were a direct result or likely consequence of the conduct, if any, that is found to be unlawful under the antitrust laws.

The purpose of awarding damages in an antitrust action is to put an injured plaintiff as near as possible in the position in which it would have been if the alleged antitrust violation had not occurred. The law does not permit you to award damages to punish a wrongdoer—what we sometimes refer to as punitive damages—or to deter a wrongdoer from particular conduct in the future, or to provide a windfall to someone who has been the victim of an antitrust violation. You are also not permitted to award Plaintiff an amount for attorney's fees or the costs of maintaining this lawsuit. Antitrust damages are compensatory only. In other words, they are

[38] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), F-2 to F-4.

designed to compensate a plaintiff for the particular injuries it suffered as a result of the alleged violation of the law.[39]

19. Speculation Not Permitted

Damages may not be based on guesswork or speculation. If you find that a damages calculation cannot be based on evidence and reasonable inferences, and instead can only be reached through guesswork and speculation, then you may not award damages. If the amount of damages attributable to an antitrust violation, if any, cannot be separated from the amount of harm caused by factors other than the antitrust violation except through guesswork and speculation, then you may not award damages.

You are permitted to make reasonable estimates in calculating damages. It may be difficult for you to determine the precise amount of damage suffered by Plaintiff. If Plaintiff establishes with reasonable probability the existence of an injury proximately caused by the Defendants' antitrust violation, if any, you are permitted to make a just and reasonable estimate of the damages. So long as there is a reasonable basis in the evidence for a damages award, Plaintiff should not be denied a right to be fairly compensated just because damages cannot be determined with absolute mathematical certainty. The amount of damages, however, must be based on reasonable, non-speculative assumptions and estimates. Plaintiff must prove the reasonableness of each of the assumptions upon which the damages calculation is based. If you find that Plaintiff has failed to carry its burden of providing a reasonable basis for determining damages, then your verdict must be for Defendants. If you find that Plaintiff has provided a

[39] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), F-12.

reasonable basis for determining damages, then you may award damages based on a just and reasonable estimate supported by the evidence.[40]

20. Causation and Apportionment of Damages

If you find that Defendants violated the antitrust laws and that Plaintiff was injured by that violation, Plaintiff is entitled to recover for an injury that was the direct and proximate result of the violation. Plaintiff is not entitled to recover for injury that resulted from other causes.

Plaintiff here claims that it suffered injury because it lost sales and profits as a result of Defendants' alleged antitrust violation. In the normal course of competitive business activity, competitors will lose sales to each other, and to third parties, for various causes that have nothing to do with antitrust law violations; and businesses can be unprofitable for causes that have nothing to do with the antitrust laws. Plaintiff may not recover for lost sales if it lost those sales because of the superior business acumen or salesmanship of a competitor, because a competitor offered a superior product or service, or because of lawful competition from any Defendant or other companies. Plaintiff also may not recover if it lost profits as a result of causes that had nothing to do with Defendants' alleged unlawful conduct, such as changes in demand, increased competition from new competitors, changes in technology, changes in market conditions, poor management or missed opportunities by Plaintiff, or other factors.

Plaintiff bears the burden of showing that its injuries were caused by Defendants' alleged antitrust violation—as opposed to any other factors, such as those that I just described to you. If you find that Plaintiff's alleged injuries were caused by factors other than Defendants' alleged antitrust violation, then you must return a verdict for Defendants. If you find that Plaintiff's alleged injuries were caused in part by Defendants' alleged antitrust violation and in part by

[40] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), F-15 to F-16.

other factors, then you may award damages only for that part of Plaintiff's alleged injuries that were caused by Defendants' alleged antitrust violation. Plaintiff bears the burden of proving damages with reasonable certainty, including apportioning damages between antitrust violations and other causes. If you find that there is no reasonable basis to apportion the Plaintiff's alleged injury between antitrust violations and other causes, or that apportionment can only be accomplished through speculation and guesswork, then you may not award any damages at all. If you find that Plaintiff has proven with reasonable certainty the amount of damage caused by Defendants' alleged antitrust violation, then you must return a verdict for Plaintiff.[41]

21. Damages for Competitors – Lost Past Net Profits

Plaintiff claims it was harmed because it lost profits as a result of Defendants' alleged antitrust violation. If you find that Defendants committed an antitrust violation and that this violation caused injury to Plaintiff, you may calculate the net profits, if any, that Plaintiff lost in the past as a result of Defendants' antitrust violation. To calculate lost past net profits, you must determine the amount by which Plaintiff's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues. You may calculate Plaintiff's lost past net profits only under the yardstick measure, as explained below.

22. Yardstick Measure for Calculating Lost Past Net Profits

Plaintiff has proposed to calculate the net profits it would have earned if there had been no antitrust violation by showing evidence of other businesses that were not affected by the antitrust violation. If you find that the other businesses whose performance is compared to Plaintiff's business are a reliable guide to estimate what Plaintiff's actual net profits would have been in the absence of the antitrust violation, then you may calculate Plaintiff's lost profits by

[41] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), F-18 to F-20.

comparing (a) the actual profit performance of Plaintiff with (b) the profit performance of the comparable businesses.

You may find, however, that the businesses proposed by Plaintiff as a yardstick for its performance are not representative of what Plaintiff's profits would have been in the absence of the antitrust violation, such as if Plaintiff's profits were impacted by different economic conditions, mismanagement, difference levels of competition, or other factors. The two businesses do not have to be identical; they need only be sufficiently similar that a conclusion as to Plaintiff's profits may be drawn within the bounds of reasonableness. However, if you find that the businesses proposed by Plaintiff as a yardstick for its performance are not representative of what Plaintiff's profits would have been, and that Plaintiff's lost profits may only be calculated using speculation or guesswork, you may not award damages for lost profits based on this yardstick measure.

23. Damages for Competitors – Lost Future Net Profits

Plaintiff further claims that it was harmed because, had it not been for Defendants' alleged antitrust violation, Plaintiff would have earned additional profits five or ten years into the future.

In considering whether Plaintiff is entitled to recover lost future profits, you should consider whether Plaintiff's claimed future losses would arise from a one-time final, and irrevocable refusal to deal or from a refusal that was of a continuing nature. If you find that each Defendant's refusal to deal with Plaintiff was final and irrevocable, you may award lost future profits under the standards I am about to instruct you on. If you find that the refusal-to-deal was

continuing and not a one-time past event, you may award lost profits only up to the time of trial.[42]

If you find that Defendants committed a past antitrust violation and that this past violation will cause future injury to Plaintiff, you may calculate the future net profits, if any, that Plaintiff lost as a result of Defendants' antitrust violation. If you find that the fact of future losses is speculative or their amount is unproven, then you may not award damages for lost future net profits.

To calculate lost future profits, you must make a reasonable estimate of (1) the amount of profits, if any, that plaintiff would have earned in future years, and (2) the length of time for which it would have earned those profits. In making this calculation, you must not engage in guesswork or speculation. You must consider the various uncertainties that could affect the future success of Plaintiff's business, such as general market or economic conditions, lawful competition Plaintiff would face in the future, Plaintiff's management of the business, changes in technology of other business conditions, and other factors affecting Plaintiff's future performance. If there is no evidence from which you can make a reasonable estimate of lost future profits, or if the uncertainties are such that speculation and guesswork is required, you may not award damages for lost future profits.

In calculating lost future profits, you must calculate lost net profit: the amount by which Plaintiff's gross revenues would exceed all of the costs and expenses that would be necessary to produce those revenues. You may only calculate Plaintiff's lost future net profits under the yardstick measure, as defined above.

[42] *Borger v. Yamaha Int. Corp.*, 625 F.2d 390, 398 (2d Cir. 1980).

If you award damages for lost future profits, you must discount the amount to its present value, using a discount rate of interest that you find reasonable. This is because the right to receive a certain sum of money at a future date is worth less than the same amount of money in hand today—this is known as the time value of money. For example, if you had a choice to receive $1,000 today or a year from now, you would be better off receiving the money today and earning interest on it for a year – you would then have something more than $1,000 in a year from now. Similarly, if you had a right to $1,000 a year from now and you asked for the money today, the person owing you the money a year from now could properly give you a lower amount, reflecting the value that could be earned on that money over the next year. This lower amount is known as an amount discounted to present value.[43]

24. Expert Testimony

You have heard testimony from Plaintiff's expert, Stephen Magee, and from Defendants' expert, Steven Wiggins, regarding the amount of damages to which Plaintiff claims it is entitled, and the proper amount of damages. If you find that any of the pertinent underlying assumptions made by one of these experts in preparing a damage report is not reasonable or is not proven by a preponderance of the evidence, or if you find that one of these expert's conclusions depends on a comparison of things which have not been proven to be comparable, then you should consider this in determining the weight, if any, you will give to these assumptions and the effect they have on Plaintiff's damages claim.

[43] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), F-33 to F-37 (modified to reduce some of the redundancy with the general lost profits instructions).

25. Mitigation

Plaintiff may not recover damages for any portion of its injuries that it could have avoided through the exercise of reasonable care and prudence. Plaintiff is not entitled to increase any damages through inaction. The law requires an injured party to take all reasonable steps it can to avoid further injury and thereby reduce its loss. If Plaintiff failed to take reasonable steps available to it, and the failure to take those steps resulted in greater harm to Plaintiff than it would have suffered if it had taken those steps, then Plaintiff may not recover any damages for that part of the injury it could have avoided.

Defendants have the burden of proof on this issue. Defendants must prove by a preponderance of the evidence that Plaintiff acted unreasonably in failing to take specific steps to minimize or limit its losses, that the failure to take those specific steps resulted in Plaintiff's losses being greater than they would have been had Plaintiff taken such steps, and the amount by which Plaintiff's loss would have been reduced had Plaintiff taken those steps.

In determining whether Plaintiff failed to take reasonable steps to limit its damages, you must remember that the law does not require an injured party to have taken every conceivable step that might have reduced its damages. The evidence must show that Plaintiff failed to take commercially reasonable measures that were open to it. Commercially reasonable measures mean those measures that a prudent businessperson in Plaintiff's position would likely have adopted, given the circumstances as they appeared at that time. A plaintiff should be given wide latitude in deciding how to handle the situation, so long as what the plaintiff did was not unreasonable in light of the existing circumstances.[44]

[44] ABA Model Instructions in Civil Antitrust Cases (2005 ed.), F-47 to F-48.

26. Plaintiff's Waiver of Antitrust Claim Against Reliance and Chapel

Plaintiff settled with Defendants Reliance and Chapel in a Settlement and Mutual Release Agreement with an effective date of October 14, 2011. As a result of that agreement, Plaintiff has waived its ability to recover from Reliance or Chapel any antitrust damages incurred before October 14, 2011.

TEXAS BREACH OF CONTRACT

27. Elements of a Breach of Contract Claim

Plaintiff has alleged that it entered into a valid, enforceable contract with JSW and that JSW breached that contract, thereby causing Plaintiff to incur contract damages. To establish a claim for breach of contract, Plaintiff must prove that (1) the existence of a contract; (2) that Defendant JSW failed to comply with that contract; and (3) damages resulting from JSW's failure to comply.[45]

28. Existence of a Contract

Plaintiff claims that a contract existed between Plaintiff and JSW based on the August 2, 2011 Agreement. That Agreement says:

> WHEREAS, Seller and MM Steel desire to enter into a steel plate supply agreement. . . at prices to be agreed at the time of order placement.
>
> * * *
>
> During the term of this Agreement, MM Steel agrees to attempt to buy, or cause to be bought, a minimum of 500 tons per month average at a price as agreed upon by both parties.
>
> * * *
>
> MM Steel is only obligated to buy if both parties agree on pricing.
>
> * * *
>
> The price for steel plate will be agreed by the parties at the time of order placement.

In deciding whether a contract existed between Plaintiff and JSW, you must decide whether the parties intended to be bound by any purchase order under the August 2, 2011

[45] Texas Pattern Jury Charges PJC 101.1 & 101.2 (2012).

Agreement. In deciding whether Plaintiff and JSW intended to be bound, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealing. You may not consider the parties' unexpressed thoughts or intentions.[46]

29. Defense of Excuse for Defendant JSW

Any failure by Defendant JSW to comply with the contract, if any, is excused if you find that Defendant JSW proved by preponderance of the evidence any of the following defenses.

(a) Waiver – Defendant JSW's failure to comply, if any, is excused by Plaintiff's waiver of JSW's compliance with the contract. Waiver is an intentional surrender of a known right or intentional conduct inconsistent with claiming that right.

(b) Prior Breach – Defendant JSW's failure to comply, if any, is excused by Plaintiff's previous failure to comply with a material obligation of the agreement.

(c) Quasi-Estoppel – Defendant JSW's failure to comply, if any, is excused by Plaintiff's quasi-estoppel. Quasi-estoppel precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken. Quasi-estoppel applies when it would be unconscionable to allow a party to maintain a position inconsistent with one to which the party acquiesced, or from which the party accepted a benefit.

(d) Equitable Estoppel – Defendant JSW's failure to comply, if any, is excused if the following circumstances occurred:

1. Plaintiff

[46] Texas Pattern Jury Charges PJC 101.1, 101.3; Texas U.C.C. § 2.305(d); August 2, 2011 Agreement ¶¶ 1, 2; *Quaker State Mushroom Co. v. Dominick's Finer Foods, Inc.*, 635 F. Supp. 1281, 1286 (N.D. Ill. 1986); *Fleetwash Sys., Inc. v. Peyton* (*In re Glover Constr. Co.*), 49 B.R. 581, 583 (Bankr. W.D. Ky. 1985); *United Foods, Inc. v. Hadley-Peoples Mfg. Co.*, No. 02A01-9305-CH-00111, 1994 WL 228773, at *5-6 (Tenn. Ct. App. May 20, 1994); *Wagner Excello Foods, Inc. v. Fearn Int'l, Inc.*, 601 N.E.2d 956, 960-61 (Ill. App. Ct. 1992).

a. by words or conduct made a false representation or concealed material facts,

b. with knowledge of the facts or with knowledge or information that would lead a reasonable person to discover the facts, and

c. with the intention that JSW Steel would rely on the false representation or concealment in acting or deciding not to act, and

2. JSW

a. did not know and had no means of knowing the real facts, and

b. relied to its detriment on the false representation or concealment of material facts.[47]

30. Damages for Breach of Contract

If you find that Plaintiff proved all of the elements of breach of contract and Defendant JSW was not excused from failing to comply with the contract, you should then determine whether Plaintiff sustained any damages resulting from JSW's failure to comply. You may find only those damages necessary to put Plaintiff in the same economic position it would have been in had JSW performed the contract, which in this case means Plaintiff may recover only lost net profits sustained in the past. Net profits means the amount by which Plaintiff's gross revenues would exceed all of the costs and expenses that would be necessary to produce those revenues.

Lost past net profits are not recoverable unless Plaintiff proves that the lost past net profits were a natural, probable, and foreseeable consequence of the breach of contract.[48] If lost

[47] Texas Pattern Jury Charges PJC 101.21-.25; *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000).

[48] Texas Pattern Jury Charges PJC 115.5 (2012).

past net profits are not proven with reasonable certainty but are merely speculative, you may not award lost past net profits.[49]

[49] Texas Pattern Jury Charges PJC 115.5 cmt; *Texas Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 278-81 (Tex. 1994).

JURY INTERROGATORIES

SHERMAN ACT SECTION 1

INTERROGATORY NO. 1A

Did Plaintiff prove by a preponderance of the evidence that one or more of the Defendants listed below held a dominant position in the relevant market and thereby controlled access to an element (steel plate) necessary to enable Plaintiff to compete?

For purposes of this question, you are to treat Reliance and Chapel as one Defendant, and to treat American Alloy and Arthur J. Moore as one Defendant.

Answer "Yes" or "No" for each Defendant listed below:

Reliance/Chapel _____

American Alloy/Arthur J. Moore _____

JSW _____

Nucor _____

If you answered "Yes" for any Defendant in Question No. 1A, then answer the following question as to that same Defendant. Otherwise do not answer this question, and proceed directly to Question No. 2A.

INTERROGATORY NO. 1B

Did Plaintiff prove by a preponderance of the evidence that no plausible argument exists that the Defendant's conduct had a procompetitive effect?

For purposes of this question, you are to treat Reliance and Chapel as one Defendant, and to treat American Alloy and Arthur J. Moore as one Defendant.

Answer "Yes" or "No" for each Defendant listed below as to which you answered "Yes" in Question No. 1A:

Reliance/Chapel _____

American Alloy/Arthur J. Moore _____

JSW _____

Nucor _____

If you answered "Yes" for two or more of the Defendants in Question No. 1A and 1B, then answer the following question. Otherwise do not answer this question, and proceed directly to Question No. 2A. Remember that you should treat Reliance and Chapel as one Defendant and that you should treat American Alloy and Arthur J. Moore as one Defendant.

INTERROGATORY NO. 1C

Did Plaintiff prove by a preponderance of the evidence that any of the following Defendants entered into a conspiracy that the Defendant knew included at least two direct competitors?

For purposes of this question, you are to treat Reliance and Chapel as one Defendant, and to treat American Alloy and Arthur J. Moore as one Defendant.

Answer "Yes" or "No" for each Defendant listed below:

Reliance/Chapel _____

American Alloy/Arthur J. Moore _____

JSW _____

Nucor _____

If you answered "Yes" in two or more blanks in Question No. 1C, then answer Question No. 1D. Otherwise, do not answer Question No. 1D, and proceed directly to Question No. 2A.

INTERROGATORY NO. 1D

Did Plaintiff prove by a preponderance of the evidence that MM Steel made a firm demand to buy steel from each Mill Defendant and that each Mill Defendant made a firm refusal to deal with MM Steel?

Answer "Yes" or "No" for each Mill Defendant listed below:

JSW _____

Nucor _____

If you answered "Yes" in at least one blank in Question No. 1D, then answer Questions Nos. 1E through 1H. Otherwise, do not answer Question Nos. 1E through 1H, and proceed directly to Question No. 2A.

INTERROGATORY NO. 1E

Did Plaintiff prove by a preponderance of the evidence that the Defendants entered into an agreement that unreasonably restrained trade?

Answer "Yes" or "No" _____

If you answered "Yes" to Question No. 1E, then answer the following question. Otherwise do not answer this question, and proceed directly to Question No. 2A.

INTERROGATORY NO. 1F

Did Plaintiff prove by a preponderance of the evidence that the Defendants' anticompetitive conduct, as found by you above, in fact caused injury to Plaintiff's business or property?

Answer "Yes" or "No" _____

If you answered "Yes" to Question No. 1F, then answer the following question. Otherwise do not answer this question, and proceed directly to Question No. 2A.

INTERROGATORY NO. 1G

Did Plaintiff prove by a preponderance of the evidence that the Defendants' anticompetitive conduct, as found by you above, was a material cause of Plaintiff's injuries?

Answer "Yes" or "No" _____

If you answered "Yes" to Question No. 1G, then answer the following question. Otherwise do not answer this question, and proceed directly to Question No. 2A.

INTERROGATORY NO. 1H

Did Plaintiff prove by a preponderance of the evidence that the injury it sustained as a result of Defendants' anticompetitive conduct is the type of "antitrust injury," defined at pp. 17 through 19 above, that the antitrust laws were intended to prevent?

Answer "Yes" or "No" _____

If you answered "Yes" to Question Nos. 1E, 1F, 1G, and 1H then answer the following question. Otherwise, do not answer this question.

INTERROGATORY NO. 1I

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for the past and future net profits lost by Plaintiff as a direct and proximate result of Defendants' anticompetitive conduct, as found by you above?

Do not include any sum that you find could have been avoided by Plaintiff through the exercise of reasonable care and prudence.

Answer with dollars and cents, if any, for past and future lost net profits, if any:

(1) Lost net profits in the past: _____

(2) Lost net profits in the future: _____

If you answered a number greater than zero dollars in subpart (1) of Question No. 1I, regarding lost net profits in the past, then answer the following question. Otherwise, do not answer this question.

INTERROGATORY NO. 1J

Of the past lost net profits you found in subpart (1) of Question No. 1I, how much of those past lost net profits were incurred before the October 14, 2011 effective date of the Settlement and Mutual Release Agreement between Plaintiff, on the one hand, and Reliance and Chapel, on the other hand?

Answer with dollars and cents: _____

TEXAS BREACH OF CONTRACT

INTERROGATORY NO. 2A

Other than the purchase orders delivered and accepted in August 2011, did the Plaintiff prove by a preponderance of the evidence that Plaintiff and JSW reached an agreement as to price, type of steel, quantity, and delivery date for any purchase orders?

Answer "Yes" or "No" _____

INTERROGATORY NO. 2B

Did the Plaintiff prove by a preponderance of the evidence that JSW failed to comply with any such purchase order that was agreed to after August 2011?

Answer "Yes" or "No" _____

INTERROGATORY NO. 2C

Did JSW prove by a preponderance of the evidence that its failure to comply, if any, was excused by waiver, prior breach, quasi-estoppel, or equitable estoppel?

Answer "Yes" or "No": _____

If you answered "Yes" to Question Nos. 2A and 2B and you answered "No" to Question No. 2C, then answer the following question. Otherwise do not answer this question.

INTERROGATORY NO. 2D

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for any injury resulting from JSW's failure to comply?

In answering this question, you may consider only past lost net profits, if any.

Do not include any sum that you find could have been avoided by Plaintiff through the exercise of reasonable care and prudence.

Answer with dollars, and cents, if any for past lost net profits, if any: _____.