No. 14-20267

In the United States Court of Appeals for the Fifth Circuit

MM STEEL, L.P.,
Plaintiff-Appellee,

v.

JSW STEEL (USA), INCORPORATED,
AND NUCOR CORPORATION,
Defendants-Appellants.

On Appeal from the United States District Court for the
Southern District of Texas, Houston Division, No. 4:12-cv-01227

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Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not necessary because this case raises no novel legal questions. If the Court decides that oral argument will be helpful, then Appellee requests the opportunity to respond to Appellants' arguments.

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ABBREVIATIONS

MM Steel, L.P. (MM)

American Alloy Steel, Inc. (AmAlloy)

Reliance Steel & Aluminum Co. and its division Chapel Steel Corp. (Reliance, Chapel, or Reliance/Chapel)

North Shore Steel, Inc. (NShore)

Nucor Corp. (Nucor)

SSAB Enterprises, LLC (SSAB)

JSW Steel (USA), Inc./Jindal (JSW)

ArcelorMittal USA (Arcelor)

Statement of Facts (SF)

Plaintiff's Exhibit (PX)

Nucor's Brief (NBr.)

JSW's Brief (JBr.)

ISSUES PRESENTED

Nucor's Statement of Issues omits the issues argued in sections III.B-E of its Brief. JSW's Issues Presented includes breach-of-contract issues not before the Court given no judgment on that claim.

STATEMENT OF THE CASE

The jury found for MM on its antitrust claim against all defendants and its breach-of-contract claim against JSW. ROA.5575-91. The district court rendered judgment on the antitrust claim, and MM elected not to recover on the contract claim. ROA.32589-90. After defendants entered into a judgment-sharing

agreement, AmAlloy and Reliance/Chapel settled. ROA.5791-96, 6440-47. This appeal concerns Nucor's and JSW's antitrust liability.

STATEMENT OF FACTS

1. The Gulf Coast carbon-plate-steel market.

In the Gulf Coast carbon-plate-steel market, domestic steel accounts for about 90% of sales. ROA.14263, 15168-69, 16605-06, 16990, 19214-16. Foreign steel, despite price advantages (ROA.18407), has problems with quality, lead time, and delivery. ROA.18164-65. The major domestic steel mills in this market are Nucor, JSW, SSAB, and Arcelor. ROA.14260-62.

About half of carbon plate steel is sold by mills to end-users; the rest is sold through distributors often called service centers. ROA.14220, 14264, 15928. The term distributor will be used in this brief. Nucor sells 70% of its steel through distributors like Reliance. ROA.17690.

In 2005 Reliance acquired Chapel, which operates as a division and has a Houston branch. ROA.15031-32. Another Houston distributor is AmAlloy. ROA.18304. Despite heavy competition, new distributors can succeed, as Griffin Trade recently did. ROA.14264, 15512, 15924, 16638, 18729-32.

2. Successful salesmen Matt Schultz and Mike Hume opened MM.

MM opened on September 1 of 2011. PX705. Its founders, Matt Schultz and Mike Hume, had spent years in the industry, working for AmAlloy and then for

Chapel Steel, both before and after its acquisition by Reliance. ROA.16439-46, 16467-68, 16495-99.

Matt and Mike had always succeeded. ROA.16591. Praise for their talents came from many witnesses. *E.g.*, ROA.15188, 15885, 16340, 18706. NShore's manager, Byron Cooper, called Mike the "best in the business" because of his excellent customer service. PX243. SSAB's Steve Dunn said Matt and Mike were successful and respected because of their customer relationships. ROA.15638-39.

Given their "strong customer relationships" and "product knowledge," Matt and Mike did a "superior job" at AmAlloy, where they led a specialty-products division and developed expertise with "API steel" for offshore applications. PX70; ROA.15182-88, 16443-44, 16454, 16461-62, 17055.

Matt and Mike left AmAlloy to open Chapel's Houston branch in 1999. ROA.16467, 16463-64. The branch was successful, even during economic downturns, because Matt and Mike maximized every sale, averaged a healthy 8-10 annual inventory turns, and excelled at developing customer relationships. ROA.15008, 15016, 16493-94, 16636, 16604, 16735, 16745, 16886.

In this commodity steel market, customer relationships represent the key to success, according to industry expert James Mahoney. ROA.14275; PX678; ROA.15036. Mahoney said MM was positioned for success, based on Matt's and Mike's accomplishments, their impressive customer list, and Mahoney's

conversations with customers on that list. ROA.14283-87, 14357-65, 14443-45. Likewise, Matt and Mike saw plenty of opportunity at MM. ROA.16719.

Wells Fargo and JSW agreed. The bank gave MM a $750,000 letter of credit, and JSW doubled that amount in a credit line when it signed an agreement to supply MM. ROA.14373-76, 16615-16, 16742. Matt and Mike added $1.2 million in cash they had saved, giving them ample capital—$2.1 million—with other assets to commit if needed. ROA.16742, 17470.

3. MM unexpectedly failed because it could not buy steel.

As detailed in section 6 below, Nucor would not return MM's calls, SSAB said it would not quote MM, Arcelor would not give MM competitive quotes, and JSW breached its supply agreement. That left MM with no steel supply from any of the four major domestic mills in the market. ROA.16643-44.

To survive, MM began brokering steel for NShore, largely a fabricator that bought steel from other distributors and the mills, including but not limited to Nucor. ROA.15941-42, 17022-23, 17025-27, 17108-10, 19494. But brokering steel only paid some overhead. ROA.14593, 15943, 16771, 17506-07, 17108-10. And NShore began curtailing its relationship with MM, refusing to buy steel for MM, which meant that MM could only buy whatever NShore had in its inventory. PX241; PX626; ROA.15957-58, 15961, 16011-12, 16022-23, 17204-05. When it

became almost impossible to communicate or work with NShore, MM closed in August 2013. ROA.16652.

4. The conspiracy was revealed, resulting in this suit.

NShore's general manager Cooper finally told Matt and Mike what was happening at a March 19, 2012 lunch. Cooper reported what he had just heard minutes before from Nucor sales manager Jeff Whiteman: the mills were being pressured not to supply MM by their biggest customers, who were "terrified" of MM. PX599; PX9; ROA.15991-94, 15998-99, 16000-02. That revelation, along with emails supplied by a former AmAlloy employee (ROA.16647) led to this suit, which uncovered even more evidence.

5. Reliance/Chapel and AmAlloy openly plotted to destroy MM.

Reliance/Chapel attempted to rob MM of its customer base by filing a lawsuit alleging that Matt and Mike had violated a non-compete agreement (the "restrictive" agreement) incorporated into the employment agreement that Reliance had canceled when it bought Chapel. DX257; PX28; PX80; PX256; ROA.16472-77, 16839, 16498-501, 16704, 17062-65, 17087-89, 17093.

The lawsuit caused one Chapel customer to complain. Kiewet's Colby Clanton told Chapel that the lawsuit was interfering with his business because he could not deal with MM, the only company that could provide the service Kiewet needed. PX621; ROA.17844-48.

The lawsuit soon settled with MM's agreement not to solicit certain Chapel customers for six months. DX257; ROA.16921, 16966, 16998-99. Matt and Mike were pleased; even during those six months, they had plenty of customers, including many on a nine-page list of customers that had been excepted from Chapel's canceled non-compete. PX28; ROA.16472-77, 16924. But Reliance/Chapel had another plan.

5.1. Reliance/Chapel and AmAlloy agreed to shut MM down.

Matt's and Mike's departure from Chapel brought its President Altman to Chapel's Houston office, where this question-and-answer was overheard: David Chamberlain asked Altman, "How are you going to do that?" Altman replied, "If you don't have any steel, you can't sell any steel." ROA.19544.

On September 8, Altman met AmAlloy's President Moore and his assistant, Jo Ann Kotzur. PX233; ROA.17937-38. This meeting at Chapel's office was the first business between the companies since Matt and Mike left AmAlloy in 1999, and it signaled a wholesale change in their relationship. PX159; PX226; PX501; PX701; ROA.15072, 15076.

As Moore left the September 8 meeting, he called out to Chapel employees: "Don't worry. We're going to get them." ROA.19549. The same day, Moore emailed all his employees: "Chapel, along with Reliance, plan on taking all available courses of action, legally and otherwise, including notifying any mill that

is selling them, that they can no longer expect any future business from Chapel/Reliance." PX226.

The next day, Arlene Waters at Texas Steel Processing emailed Chapel's Chamberlain a statement attributed to her friend and former colleague, AmAlloy's Kotzur: "AA [is] going to try to help chapel shut them down!" PX244. That agreement could succeed only by getting the mills to join.

5.2. The mills got pressure from their biggest customers.

On September 5, Chapel President Altman called Arcelor's John Sergovic to say: (1) Reliance/Chapel would not do business with Arcelor if it supplied MM, (2) Altman had said the same to Nucor's Jeff Whiteman, and (3) Altman would deny saying this if asked. PX235. On September 7, Moore called Arcelor to trash Matt and Mike and to discuss his investigation of the price JSW was charging MM. PX235.

Supplying MM made JSW a target. On September 7, Reliance VP Sheldon Tenebaum emailed Altman about "deliver[ing] a message [to JSW] about your new competition in Houston." PX219. Tenebaum was already setting up a JSW meeting. PX219. A week later, AmAlloy President Moore emailed about his own meeting to tell JSW that AmAlloy would not support JSW if it supported MM. PX281. Moore added, "I think Chapel and Reliance are going to tell them the same thing, and any other mill that sells them." PX281.

Moore did have his JSW meeting; on September 19, he gave JSW's Fitch the "choice"—either do business with AmAlloy or MM. ROA.17104-06, 18645-50. Moore then emailed Chapel's Altman about JSW's ridiculously low sales prices to MM, which Moore described as "not good for you or us," adding, "hope you are successful in shutting these guys down." PX336. Moore sent this email to prompt action. *Id.*

Moore succeeded: Reliance's Tenebaum set up a JSW dinner. PX331; PX343; ROA.16309-12, 18654-55, 18725-76. At that October 4 dinner—also attended by Reliance higher-ups Greg Mollins and Steve Koch—JSW's Fitch again got the "choice": do business with MM or Reliance/Chapel. ROA.18649-50, 18725-26. The next day, Nucor's VP Stratman dined with Mollins and Tenebaum (ROA.17722-23), and Chapel's Altman, Tocci, and Nolan dined with Nucor's Vinson and Charles. ROA.16305-06, 17852

The evidence that Reliance/Chapel pressured the fourth mill, SSAB, is circumstantial. As discussed, AmAlloy President Moore reported Chapel's intention to pressure the steel mills. PX281. Further, Nucor's Whiteman told NShore's Cooper that the mills were getting pressure from their biggest customers not to support MM because the customers were "terrified" of MM. SF§5. So it is no surprise that internal SSAB emails reveal concern about Reliance's reaction if SSAB quoted MM. PX289; ROA.15672-74, 18267-70.

6. The mills joined the boycott.

The mills all joined the conspiracy with AmAlloy and Reliance/Chapel. Otherwise, no mill would have refused to supply a promising distributor that had all of its competitors "terrified" (ROA.16003), and MM would have remained in business.

6.1. Arcelor quoted high.

Knowing that "we cannot say we won't quote them," Arcelor decided: "we quote high!" PX235. So Arcelor gave MM no competitive quotes. PX374; ROA.14865, 16625, 16644, 16775-76. Once, however, Arcelor's Taylor Groth mistakenly quoted the spot matrix (the regular price), so he exclaimed in an email, "OH NO! I quoted . . . the spot matrix . . . . What do I do now?" PX382. Another internal email echoed: "[S]ome of these prices may start to hit. BOOM …the next thing you know we have an order." PX374. So the price was increased. *Id.* Groth later asked, will this "no-business hiatus last forever?" PX615.

6.2. SSAB decided not to quote.

SSAB's Steve Dunn wanted to quote MM. But a slowdown was ordered. PX291; ROA.15638-39, 15693-98, 15700, 15848-59. Next came a "cease and desist order" from SSAB's president, who did not want to have to "explain any relationship with [MM] to Reliance." PX289; ROA.15674, 18270. The cease-and-desist order was conveyed by Christine Osvenar without any reference by her to

any of SSAB's usual reasons for deciding whether to do business with another company—price, quality, delivery, and lead time. ROA.18270, 18281. Dunn told Matt and Mike that doing business with MM was a "political football" (PX456), and eventually said he could not quote MM. PX291; PX456; ROA.15693, 15859. Shortly before that communication, Reliance VP Tenebaum contacted SSAB about MM. ROA.15873.

6.3. Nucor would not quote.

Nucor planned to build a new mill in the Gulf Coast area and find a new distributor west of the Mississippi to expand on API steel sales in the "virtually untapped" offshore market. PX519; ROA.17736. MM would have been a perfect distributor to fill this competitive need. ROA.15187, 16461-62, 17055. But Nucor refused to deal with MM.

On MM's opening day, the industry's "market intelligence" informed Nucor that MM had started with a supply of steel from JSW, Nucor's new competitor. PX160; PX185; PX220; ROA.17657. Emailing Chapel President Altman, Nucor manager Jeff Whiteman offered support, "Just ask," he said. PX146. The "ask" was reported a few hours later in the earlier-mentioned Arcelor email: Altman told Whiteman that Nucor would lose Chapel as a customer if Nucor did business with MM. PX235.

So Nucor complied—by never engaging in meaningful talks with MM. Mike's contacts at Nucor would not even return calls. PX418, 424; ROA.17245-46, 17255, 17270-71, 17264, 17267, 17290. One return call did come from Nucor sales manager Randy Charles—while Charles was in the family car with his children. ROA.17258-60. Charles said he would get back with Mike. ROA.17263-71. He never did; nor did he ever discuss any "nice quote" that MM requested from Nucor. ROA.17258-60.

6.4. JSW breached its supply agreement.

JSW President Fitch was always looking for new customers. ROA.18725-26. Yet Fitch ended JSW's agreement to supply MM without giving the required 60-days' notice at an October 20 meeting with Matt and Mike. PX127; ROA.16927-36, 16933-34. Thus, JSW became the last mill to boycott MM.

Never before had Fitch refused to supply another company or honor a contract. ROA.18718. Fitch told Matt and Mike he was acting on information from unsolicited visitors that he refused to identify—later revealed to be AmAlloy and Reliance/Chapel. ROA.16642-43, 18715.

Am Alloy was a regular JSW customer. PX309. The day before Fitch cut off MM, JSW solicited business from the other visitor, Chapel Steel. PX383, 386. Chapel VP Matt Tocci noted the solicitation's "[i]nteresting timing." PX381. About a week later, Chapel requested a quote from JSW. PX419.

When Mike said in the October 20 meeting that JSW's decision would put MM out of business (ROA.18716-18), Fitch did not ask Mike to explain. Instead, Fitch said he understood the "gravity of the situation," which signaled his knowledge that the other mills were also joining the boycott of MM. ROA.16643-44.

6.5. Nucor's active enforcement of the boycott.

In December 2011, about two months after JSW stopped supplying MM (SF§§3, 6.4), Nucor focused on MM's remaining supplier, NShore. Where NShore was selling its steel was of intense interest to Nucor, as shown by Nucor's reaction to the order it received from NShore for steel to be delivered to MM. That order generated emails to NShore's Cooper from Nucor Alabama account manager Jerrell Vinson, as well as emails between Vinson and Jeff Whiteman, Nucor's North Carolina manager.

Inquiring about that order, Vinson emailed Cooper asking why the order was being shipped to MM and for Cooper to call. PX485. In the resulting call, Vinson said it would be a problem for NShore to direct the steel to MM. ROA.15951-53. In response, NShore ceased ordering for delivery to MM. PX241; ROA.15955-56.

Nucor's interest in NShore increased. In early 2012, Nucor got a quote request from "M and M Steel." Whiteman emailed Chapel President Altman, asking, "Are these our boys?" Altman said no, but thanked Whiteman. PX532.

In February, NShore sent a request for a quote to JSW. PX570. The next day, Cooper sent the quote he got from JSW to Vinson and Whiteman at Nucor, asking if they could beat the quote. PX570. Cooper's inquiry generated emails between Vinson and Whiteman. PX570. Whiteman asked whether NShore had hired Matt and Mike or if it was financially backing them. Vinson assured Whiteman that NShore had not hired them fearing the "ramifications . . . from us" and said he would ask about financial backing when he met Cooper the next day. PX570.

A few days later, NShore mistakenly sent an email about an order to Mike's old Chapel email address. PX587 (RE.2). Chapel's Greg Nolan forwarded the email to Chapel VP Tocci, saying: "You might want to send this to the guys at Nucor [H]ertford [where Whiteman worked]. They have told this Byron guy from [N]orth [S]hore on a couple of occasions not to support mms [*i.e.*, MM]." PX587. Whether this was news to Tocci is not revealed by the record. The record does show that, a month before Nolan's email, Tocci emailed a reminder to himself to talk with Whiteman about MM and NShore. PX563.

The day after Nolan forwarded the misaddressed email to Tocci, NShore sent Nucor a quote request. PX589 (RE.1). Whiteman again expressed concern to Vinson: "Word is they [referring to NShore] are fronting tons for MM." PX589. Vinson replied that Cooper was "afraid of the repercussion" that may come to his

entire company. PX589. Vinson added, "If we make it seem that North Shore as a whole will be affected, then this may come to a halt." PX589.

Six days later, on March 19, Whiteman told Cooper that all the mills were getting pressure not to supply MM from their biggest customers who were "terrified" of MM. ROA.16002-03; SF§4. Whiteman gave Cooper the "choice": If NShore supplied MM, Nucor would not supply NShore. ROA.16000-01, 16194. Minutes later, Cooper recounted this conversation when meeting with Matt and Mike. SF§4.

Four days later, AmAlloy's Wendell Hilton set up a lunch with Cooper to deliver a "subtle threat" that NShore should not supply MM. PX608; PX619; ROA.16015-17. Like Reliance/Chapel, AmAlloy was a Nucor customer. PX417 (showing attendance by AmAlloy's VP Smith at Nucor's extended customer-appreciation event five days after JSW had shut MM off.)

On the day Cooper lunched with Hilton, Cooper left Whiteman a message about a "good development." Cooper's deposition testimony revealed what the "good development" was—NShore was winding down its relationship with MM. ROA.16008-09.

7. Inconsistencies in the Appellants' evidence.

In this long trial, the jury heard many inconsistent statements by Appellants' witnesses, including:

JSW President Fitch	
Said he cut off MM because of Chapel's lawsuit. ROA.18614.	Was unconcerned about the suit a month earlier, and did not give the suit as his reason for ending the supply agreement. ROA.16640, 16642-43, 16904-09, 16912, 16926-27, 17228-29, 18711, 18604, 18607. Admitted on cross-examination that he did not know enough about the suit to use it as a basis for his decision. ROA.18643.
Denied that Mike had said JSW's decision would put MM out of business. ROA.18716-18.	Conceded that a JSW pleading recounted that very statement by Mike. ROA.18618.
Denied that Moore gave him a "choice" between AmAlloy and MM. ROA.18648-50.	Conceded that he so testified to the "choice" in his deposition. ROA.18648-50
Denied that demand for steel was increasing in 2011. ROA.18728-79.	Admitted saying so in his deposition. ROA.18728-79.
Nucor's Alabama Account Manager Vinson	
Emailed that NShore's Cooper feared "ramifications" from Nucor for supporting MM. PX570.	Said he was interpreting body language and was typing as fast as he could between exercise sets at the gym. ROA.16403-05.
Said he sent NShore's Cooper a "call me" email about shipping direct to MM because of price concerns. ROA.16398-99.	Pricing not discussed in any email message between Vinson and Whiteman, and Cooper said pricing was never raised. ROA.15951-60, 16063.

While Vinson testified that price concerns motivated his pointed conversations with Cooper (ROA.16398-400), other Nucor witnesses gave a different reason—an "incumbency policy." Supposedly, the policy was not to sell to a distributor for an end-user that was already a customer of another distributor that brought business to Nucor. ROA.18803. Yet the incumbency policy was not in

writing (ROA.17732-33, 18899), and these facts at least showed its inconsistent application if not its non-existence in this business unit of Nucor:

- According to NShore's Cooper, Nucor's Whitman never gave an incumbency policy as the reason for telling him that doing business with MM would end his relationship with Nucor ROA16000-02.
- Whiteman never mentioned the policy in his deposition. ROA.18896.
- The policy was never referenced in Nucor emails about MM. *E.g.*, PX160; PX241; PX424; PX589 (RE.1).
- Before trial, Nucor VP Stratman had never used the term "incumbency policy." ROA.18803.
- Nucor sold direct to Greens Bayou (NShore's sister company), and it hid that fact from Chapel, even though Greens Bayou was supposedly an end-user incumbent to Chapel. PX580; PX582; ROA.15932.
- Matt testified on rebuttal that, while at Chapel, Nucor was supplying Ranger, Chapel's head-to-head competitor for the same customers. ROA.19486-89.
- Nucor failed to respond to MM quotes without inquiring about the identity of MM's customers, even though Nucor's Whiteman said that his company always made that inquiry. ROA.18902, 18931, 19490.
- Nothing in the incumbency policy prevented Nucor from returning MM's phone calls or discussing its quote requests. ROA.18901. In fact, the policy would require some discussion (ROA.18901), although Whiteman claimed he could tell the policy applied just from an order. ROA.18920.
- An internal Chapel email reflects the attitude that it is none of Nucor's business who Chapel's intended customer is, and Chapel's Greg Nolan says he rarely provides the information. PX450.

The jury, of course, was entitled to consider these inconsistencies, among many others, in making credibility decisions. ROA.5577.

8. Finally, deprived of steel, "you die."

Industry expert Mahoney had never seen such conduct in the steel plate industry—distributors discussing prices and ways to pressure mills not to supply distributors, or mills refusing to supply distributors without any explanation. ROA.14287-92, 14794. Echoing Mahoney was Arcelor's Mike Martin, who said, "in my 40 years, this is the first time it has ever happened," referring to the pressure that AmAlloy and Reliance/Chapel exerted on the mills. ROA.18256-57. Without steel from Nucor, JSW, or SSAB, Mahoney said, MM would be "as good as dead." ROA.14278-81. He added, if the fourth supplier, Arcelor, would not quote, "you die." ROA.14280-81, 14382. MM died in August 2013.

SUMMARY OF THE ARGUMENT

After Matt and Mike started MM, their horizontal competitors—Reliance/Chapel and AmAlloy—conspired with each other to shut down MM by cutting off its steel supply. They succeeded by pressuring the four major domestic-steel suppliers to join their conspiracy. JSW had originally agreed to supply MM, but it breached that agreement without giving the required notice. Nucor not only refused to quote MM, but it also sought to enforce the boycott by pressuring NShore to end its relationship with MM. SSAB adopted a no-quote position, and Arcelor only quoted high prices.

The Supreme Court brands such group boycotts as per se antitrust violations. In arguing for the rule of reason, Appellants rely on isolated case-law quotations addressing very different conduct. Established law holds all members of a group boycott to be equally liable. Appellants' arguments to the contrary lack precedential support.

Also lacking support are Appellants' other three challenges. First, in their sufficiency-of-the-evidence point, Appellants advance their own evidence, which the jury rejected—primarily denials by their witnesses of statements they made or that were attributed to them in emails. Second, the district court did not commit an abuse of discretion or reversible error in its decisions on evidence and trial management, nor did it err in instructing the jury. Third, despite Appellants' argument, the jury was entitled to find damages at the low end of MM's damages model, a model based on ample facts and an accepted methodology used also by the defense expert.

ARGUMENT

I. The District Court Correctly Imposed Liability Based on the Jury Finding That Nucor and JSW Knowingly Participated in a Group Boycott.

A. This Group Boycott Was Per Se Illegal.

Not contested on appeal is the jury's finding that two horizontal, direct competitors of MM conspired to pressure the four major domestic steel mills not to supply MM. ROA.20267. The jury further found that two of those mills, the

Appellants, knowingly joined the horizontal conspiracy, preventing MM from effectively competing. *Id.* As a matter of law, on those facts, the rule of reason does not apply, and no court has held otherwise.

The Supreme Court condemns as per se antitrust violations "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading suppliers or customers to deny relationships the competitors need in the competitive struggle." *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294-95 (1985) (internal quotation marks omitted); *accord NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998). Two on-point Supreme Court decisions are *Fashion Originators' Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941) (cited as *FOGA*), and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

In *FOGA*, textile and garment manufacturers formed a guild to boycott fashion copycats. Joining the boycott were other manufacturers and thousands of retailers. The guild was a per se violation because of its "potential power," its "tendency to monopoly," "the coercion it could and did practice upon a rival," and its "purpose and objective," namely the "intentional destruction" of competitors. *Id.* at 467-68.

FOGA rejected the notion that an antitrust violation is excused by an acceptable motive, such as foiling copycats. 312 U.S. at 467-68. Equally irrelevant

are the motives presented here—which the jury was entitled to find pretextual. *See also Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) (noting that "good motives" cannot justify antitrust violation).

Reaffirming *FOGA* was *NYNEX*, 525 U.S. at 135. *NYNEX* described *FOGA* as "involv[ing] what may be called a group boycott in the strongest sense: A group of competitors threatened to withhold business from third parties unless those third parties would help them injure their directly competing rivals." Such a conspiracy to boycott a direct competitor is per se invalid under the Sherman Act. *Id.* (collecting numerous exemplar cases); *see* Lawrence A. Sullivan, *Handbook of the Law of Antitrust* 261-62 (1977) (noting that the classic boycott to which the Court has applied the per se rule involves an "effort[] by a firm or firms at one level to drive out competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need").

The conspiracy here is the same. Reliance/Chapel and AmAlloy threatened to withhold business from mills that did not boycott MM. *See Nw. Wholesalers*, 472 U.S. at 294 (explaining an illegal "boycott often cut[s] off access to a *supply*, facility, or market"; emphasis added); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 231, ¶1901 (3d ed. 2007) (explaining that an illegal group boycott may enlist suppliers or customers to cut off dealings with a rival).

It is immaterial that the pressure was exerted upstream here but downstream in *FOGA*. Indeed, upstream pressure constituted the per se violation in *Klor's*.

Klor's was a family-run appliance store. *Klor's*, 359 U.S. at 208. Like MM, Klor's could not buy the appliances it needed to sell. Major appliance manufacturers either would not sell to Klor's or would quote it unusually high prices. *Id.* at 208 & n.2. Klor's sued, alleging that that a national chain coerced manufacturers into a per se illegal group boycott. *Id.* at 208, 213.

The Supreme Court agreed: "Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category." *Id.* at 212 (citing *FOGA*, *inter alia*); *see also United States v. Gen. Motors Corp.*, 384 U.S. 127, 145-46 (1966) (observing that the group boycott in *Klor's* violated antitrust laws "without regard to the reasonableness of the conduct in the circumstances"); *Fed. Mar. Comm'n v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 250 (1968) (explaining *Klor's* as holding that "any agreement by a group of competitors to boycott a particular buyer or group of buyers is illegal per se").

In condemning evils that flowed from defendants' conduct, *Klor's* noted the irrelevance of the victim's size: A group boycott "is not to be tolerated merely because the victim is so small that his destruction makes little difference to the economy." *Klor's*, 359 U.S. at 213.

B. Suppliers Like Nucor and JSW Are Liable When They Join an Illegal Group Boycott.

Klor's made another point important here—suppliers pressured into joining a group boycott are part of that per se unlawful conspiracy. The boycott in *Klors'* involved only one horizontal competitor. The other boycotters were suppliers. *See* 359 U.S. at 212-13. Here, two direct competitors initiated the boycott that suppliers joined. SF§5.

Reaffirming *Klor's* is, again, *NYNEX*, 525 U.S. 128. "Although *Klor's* involved a threat made by a *single* powerful firm, it also involved a horizontal agreement among those threatened, namely, the appliance suppliers, to hurt a competitor of the retailer who made the threat," thus justifying "the *per se* rule in the boycott context" for cases involving collusion among horizontal competitors. *Id.* at 135. Indeed, if the appliance suppliers in *Klor's* did not act unlawfully in joining the group boycott, the collusion required for §1 liability would be missing *altogether*. As this Court has explained, "[t]o make a per se case, the horizontal agreement need not be between competitors of the victim." *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 223 (5th Cir. 2001) (discussing *Klor's*). Therefore, when suppliers knowingly join a group boycott, they are part of the conspiracy and are equally liable per se. *Gen. Motors*, 384 U.S. at 142-43.

Further, when, as here, the vertical restraint has been coerced by a horizontal agreement among distributors, the vertical restraint "is in reality a horizontal restraint." *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988). This Court has in fact branded "[c]onspiracies between a manufacturer and its distributors" as "horizontal" if "the source of the conspiracy is a combination of the distributors." *H&B Equip. Co. v. Int'l Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978). The unchallenged fact in this appeal is a "combination of distributors" to destroy MM; the issue is whether the jury was entitled to find that Nucor and JSW joined that conspiratorial combination, and it was. Nucor cannot insulate itself by claiming that no per se antitrust violation arose from its pre-joinder conduct, particularly when the jury finding was in no way limited to that conduct.

Further, the horizontal nature of the combination here is even more pronounced since mills sell to end users and thus compete with distributors (SF§1; PX580; PX582; ROA.15932). Analogously, in *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 1084 (7th Cir. 1970), the court found evidence of a horizontal agreement reached with tacit approval by manufacturer Beech, "which also participated therein through its own distributor companies." *See. e.g.*, PX580; PX582; ROA.19486-89.

C. JSW and Nucor Cite No Authority that Would Exempt Them from Liability for Joining an Illegal Group Boycott.

Missing from Appellants' briefing is any case exempting a conspirator from liability for an illegal group boycott. That gap is not filled by the case Appellants principally rely on, *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). *Leegin* concerned a manufacturer's resale-price-maintenance arrangement (*id.* at 881), or as the Third Circuit would later describe in a case that Nucor relies on—a vertical agreement that impose[d] a restriction on the dealer's ability to sell." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008).

The price restriction was the sole reason for review in *Leegin*, and its sole holding. 551 U.S. at 885, 907. Not at issue was the fundamentally different issue, which this case presents—whether the defendant had also "participated in an unlawful horizontal cartel with competing retailers." *Id.* at 907-08. Such participation merits per se treatment, unlike *Leegin*'s and *Toledo Mack*'s purely vertical restrictions. *See In re Magnesium Oxide Antitrust Litig.*, 2011 WL 5008090, at *17 n.16 (D.N.J. Oct. 20, 2011) (distinguishing *Toledo Mack* on that point). "[T]he law is settled that where an upstream supplier participates in a conspiracy involving horizontal competitors, it is proper to analyze the entire restraint as one of horizontal price-fixing." *In re Mercedes–Benz Antitrust Litig.*, 157 F.Supp.2d 355, 362 (D.N.J. 2001).

Not affecting that analysis is the passage from *Leegin* that JSW and Nucor emphasize. JBr.36; NBr.36. *Leegin* observed that a resale-price-maintenance agreement would not be per se illegal if "entered upon to facilitate" a "horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition." *Leegin*, 551 U.S. at 893. That passage, however, is merely an observation that a vertical price restraint does not *itself* become illegal per se if used as a tool to facilitate separate conduct that is per se illegal. That observation is irrelevant here; the conduct of the suppliers in this case was not separate; it was an essential part of the boycott that they knowingly joined, as the jury found

Leegin did not, therefore, overrule the per se illegality of group boycotts in general or the boycott in this case. *See id.* In fact, *Leegin* approvingly cited *Northwest Wholesale Stationers*, which identified the boycott in *Klor's*—virtually identical to the one here—as a paradigmatic example of an illegal group boycott. *Leegin*, 551 U.S. at 886.

D. Appellants Cannot Escape the Rule of Per Se Liability.

No doubt recognizing the key distinctions between this case and *Leegin*, JSW says "[t]rends in the law" support overruling the per se rule. JBr.35. Such a decision, though, belongs to the Supreme Court. *E.g.*, *Agostini v. Felton*, 521 U.S. 203, 237 (1997). In attempting to identify such "trends" at page 37 of its brief, JSW primarily cites cases involving trade associations and membership criteria.

For example, in the cited case of *Northwest Wholesale Stationers*, the Court distinguished a boycott that cuts off essential supply sources from the facts of that case—namely, expulsion of a member of a purchasing cooperative for failure to meet membership criteria. 472 U.S. at 294-95.

In another JSW-cited case, Judge Goldberg referred to three different types of boycotts and concluded that "naked" boycotts deserve per se treatment. *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1365-67 (5th Cir. 1980). The boycott here was naked. Its only purpose was to starve MM, not to deny membership for failure to meet criteria or for failure to comply with any safety rules, and not to promote "productive" or "efficiency-creating activity." *Id.* at 1367. In fact, the evidence showed that distributors were "terrified" of MM because it could offer lower prices, provide unique services, and most efficiently respond to customers' needs. PX243; PX336; PX621; ROA.16003.

Nucor takes a different tack—drawing novel lines between those who "*orchestrate*" the boycott, which would be per se liable, and all others. NBr.37 n.6. Nucor's novel distinction conflicts with *Klor's* because the appliance suppliers there were not the orchestrators. More generally, once a conspiracy violates the Sherman Act, all conspirators are equally liable, *see, e.g.*, *MacMillan Bloedel Ltd. v. Flintkote Co.*, 760 F.2d 580, 584 (5th Cir. 1985), and the same is true for common-law conspiracies. *Salinas v. United States*, 522 U.S. 52, 64 (1997); *see*

generally United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 235 (1940). Thus, no distinction exists "between conspirators that fomented the conspiracy and those who only participated because they were coerced." *Spectators' Commc'n*, 253 F.3d at 220-21. What matters, instead, is joinder in a conspiracy. *See NYNEX*, 525 U.S. at 135. "Antitrust law has never required identical motives among conspirators" and "even reluctant conspirators" may be liable. *Spectators' Commc'n*, 253 F.3d at 220. Finally, Nucor never proposed its novel distinction in any jury instruction. The point is, therefore, waived.

E. The District Court Was Not Required to Submit the *Tunica* Factors to the Jury.

JSW alternatively seeks a new trial in which the jury would be instructed on the so-called "*Tunica* factors." JBr.45; *see Tunica Web Advertising v. Tunica Casino Operators Ass'n*, 496 F.3d 403 (5th Cir. 2007). Nucor does not join in this argument, although it too cites *Tunica* as support for applying the rule of reason. NBr.39.

Tunica, however, does not apply here. The *Tunica* factors were developed to determine whether per se illegality attaches when no conspirator is a horizontal competitor of the plaintiff. *See Tunica*, 496 F.3d at 413. *Tunica* is irrelevant when, as here, the conspirators include multiple horizontal competitors of the plaintiff.

If the *Tunica* factors were relevant, the trial judge would apply them, as directed by this Court's mandate in *Tunica* and as initially recognized by JSW and

the other defendants. *See id.* at 415; ROA.1758, 5334 (RE.3&4). Nor does JSW's brief cite authority for requiring jurors to weigh the *Tunica* factors; instead, it cites a case that never mentions *Tunica*. JBr.43 (citing *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728 (8th Cir. 2014)).

Even assuming some role for jurors, JSW cites no requirement for instructing the jury on all three *Tunica* factors, or for submitting any factor that would not benefit from a fact-finding. *Cf. Tunica*, 496 F.3d at 413-14 (noting that all three factors are not required). Here, the second *Tunica* factor was inherent in the jury's finding that "[t]he refusal to deal unreasonably restrained trade by denying the plaintiff access to a supply of steel plate necessary for the plaintiff to compete effectively." ROA.5581; *see* ABA Section of Antitrust Law, *Model Jury Instructions in Civil Antitrust Cases*, at B-50 to B-51 (2005 ed.) (recommending that instruction). Also inherent in that finding was the element of control that JSW claims to have been erroneously omitted (JBr.44). The mills obviously could not deny access to supply absent control. Finally, as to JSW's erroneous suggestion that "market power" is required to trigger per se treatment of a group boycott (JBr.44), the last word belongs to the Supreme Court: "[A]n assumption that, absent proof of market power, the boycott disclosed by this record was totally harmless . . . is flatly inconsistent with the clear course of our antitrust

jurisprudence." *Fed. Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 435-36 (1990).

II. Under the Standard of Review, the Evidence Supported the Verdict.

A. The Jury Was Entitled to Decide Credibility, Weigh Evidence, and Draw Reasonable Inferences.

In reviewing the sufficiency of the evidence, courts assume that all credibility decisions were made, all evidence was weighed, and all reasonable inferences were drawn in favor of the prevailing party. *E.g.*, *Wackman v. Rubsamen*, 602 F.3d 391, 408-09 (5th Cir. 2010). While it is axiomatic that a jury could have simply disbelieved the losing parties' evidence, ample justification for disbelief in this case comes from the many inconsistencies in the defense evidence. SF§7.

B. The Jury Instructions Inform the Standard of Review.

Aside from JSW's misguided *Tunica* compliant, Nucor and JSW accept the district court's jury instructions, which provide the prism through which the Court reviews the evidence. New arguments contrary to those instructions—and contrary to law—do not aid Appellants, such as JSW's suggestion that it should prevail as a matter of law if the evidence disclosed any "plausibl[e]" explanation for its conduct. JBr.31, 41. Nucor essentially makes the same argument in its brief. *See* NBr.15-17.

Both Appellants attempt to reverse the burden of proof and the standard of review. Recovery for antitrust violations is not barred because the defendants offer some evidence that purportedly tends to support an independent reason for anticompetitive conduct, nor is it barred if the plaintiff does not conclusively prove conspiratorial conduct. The plaintiff need only "present evidence that tends to exclude the possibility of . . . independent conduct." *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 2015 WL 178989, at *8 (5th Cir. Jan. 14, 2015) (quotation omitted) (cited as *A&V*).

That standard was articulated by the Supreme Court in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), a case on which Appellants heavily rely. *Monsanto* did not impose a higher burden of proof; it rejected the Seventh Circuit's decision that a conspiracy is proved merely by a manufacturer's positive reaction to customer complaints. *Monsanto*, like *Leegin* and *Toledo Mack*, involved a purely vertical arrangement: A manufacturer terminated a distributor for not maintaining minimum prices. There was no established horizontal agreement that four suppliers were pressured to and did join. Yet even in *Monsanto*, the finding of liability was affirmed because the evidence tended to exclude the possibility of independent action, as it does here.

In this case, the jury instructions (ROA.5581-82) provided the correct standard to the jurors, informing them that that "[m]ere similarity of conduct" is

not sufficient "unless the evidence tends to exclude the possibility that the persons or businesses were acting independently"; that a business may "refuse to deal, with whomever it likes, as long as it makes that decision independently"; and that suppliers are not conspiring when they respond to a distributor's complaint by "decid[ing] on its own and entirely for its own business reasons."

Finally, a jury may find an antitrust conspiracy by drawing reasonable inferences from a combination of "pertinent circumstances, none of which standing alone would be sufficient." *Whaley v. United States*, 141 F.2d 1010, 1010 (5th Cir. 1944); *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012) (conspiracies must ordinarily be proven through inferences). Evidence is sufficient if the jury may reasonably infer "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," or a joining conspirator's adoption of "the goal of furthering or facilitating" the conspiracy. *Anderson News, L.L.C.*, 680 F.3d at 183; *see Salinas*, 522 U.S. 52, 65 (1997).

C. Both Direct and Circumstantial Evidence Proved Nucor's and JSW's Joinder in the Unchallenged Conspiracy to Boycott MM.

Given the facts recounted in the Statement of Facts §5, it is hardly surprising that Appellants do not contest that AmAlloy and Reliance/Chapel conspired. The admitted conspiracy puts this appeal in an unusual posture that is important for at least two reasons.

First, Nucor's and JSW's sufficiency argument rests largely on cases addressing the details required in a pleading and on cases where the existence of a conspiracy was denied. They cite no cases involving an admitted conspiracy, just as they do not cite cases that undermine the jury's rejection of defense witnesses' incriminatingly weak excuses. Second, Nucor's and JSW's acknowledgement of a conspiracy increases the plausibility of their culpable participation in a conspiracy, rather than simply independent conduct. "[A]lthough an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible." *Anderson News*, 680 F.3d at 190.

Adding to that backdrop for sufficiency review is the parallel conduct of the boycotters, including Appellants. Parallel conduct is not itself sufficient to prove joinder in a conspiracy, but it is evidence to consider along with "plus" factors. *See, e.g.*, *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004); *Apex Oil Co. v. DiMaurio*, 822 F.2d 246, 253-54 (2d Cir. 1987) (citing *In re Plywood Antitrust Litig.*, 655 F.2d 627, 634 (5th Cir. 1981). Plus factors enable a jury to infer collusive rather than "one-sided" conduct. *A&V*, 2015 WL 178989, at *8-9.

As discussed below, plus factors exist here. First, Nucor and JSW "responded to [the] economic threat [of Reliance/Chapel and AmAlloy] with some action." *Id.* at 9. Second, joint rather than one-sided conduct was essential here in

two respects. Reliance/Chapel and AmAlloy needed the cooperation of the mills, and all four mills had to provide that cooperation for MM to be cut off from its steel supply. Conduct against economic interest is a third factor—but not a prerequisite factor as Nucor suggests (NBr.18). *See Standard Iron Works v. ArcelorMittal*, 639 F.Supp.2d 877, 896 (N.D. Ill. 2009). After all, a group boycott can certainly be in the economic interest of all boycotters.

As the following narrative discussions show—without repeating the detailed factual statement at the beginning of this brief—the facts of this case support the verdict. SF§§6.3 & 6.5 (evidence as to Nucor), §6.4 (evidence as to JSW), §7 (evidence as to both).

1. The evidence supported Nucor's joinder in the conspiracy.

Nucor was eager to do Reliance/Chapel's bidding. PX146. No doubt, Nucor knew that Reliance/Chapel was acting in concert with AmAlloy. The same "market intelligence" that revealed JSW's supply agreement with MM (PX160) would have also revealed the new-found cooperation between once-estranged Reliance/Chapel and AmAlloy. After all, Moore and Altman openly plotted to destroy MM. *See, e.g.*, PX235; ROA.19549. Further, the attendance by AmAlloy VP Smith at an extended Nucor customer appreciation event signaled that Nucor had a relationship with AmAlloy as well as Reliance/Chapel. PX417. Then there were the confabulatory dinners in early October involving Nucor, Reliance/Chapel, and

JSW. At one of those dinners, JSW got its ultimatum from Reliance/Chapel, having already gotten AmAlloy's same ultimatum. SF§5.2.

Any possible doubt about Nucor's knowing joinder in the conspiracy was erased by its conduct in pressuring NShore, as confirmed by the email from Chapel employee Nolan to Chapel VP Tocci: "the guys at Nucor [H]ertford . . . have told this Byron guy from [N]orth [S]hore on a couple of occasions not to support [MM]. PX587.

Nucor focused its first enforcement activity on NShore's orders for direct shipments of steel to MM. PX485. The enforcement activity then escalated, as shown by internal Nucor email traffic about NShore's support of MM, its "fronting tons" for MM, the pressure put on NShore not to hire Matt and Mike for fear of ramifications from Nucor, and the need to put NShore's entire relationship with Nucor in jeopardy as a way to stop that support. PX587. These efforts were not limited to stopping Nucor steel from indirectly reaching MM. Nucor intended to end NShore's entire relationship with MM, which can be explained only by Nucor's joinder in the admitted horizontal conspiracy.

Nucor's efforts culminated in the phone call that Whiteman made to Cooper on March 19, 2012. Whiteman told NShore's Cooper that "the steel mills" were being pressured by their "biggest customers" not to deal with MM because its prospects for success "terrified" them." ROA.16000-03, 16914. Then Whiteman

gave NShore the same type of "choice" that JSW and Nucor had themselves received—do business either with MM or with Nucor. ROA.16001.

Whiteman's March 19 phone call occurred almost at the same time as AmAlloy's "subtle threat" from Wendell Hilton. The tandem pressure from AmAlloy and Nucor succeeded. NShore began winding down its relationship with MM. SF§6.5.

Nucor's explanations for refusing to quote MM were conflicting and contrary to fact. SF§7. The pressure resulted from price concerns, said Vinson, yet there was no evidence to support that excuse, and NShore's Cooper flatly denied that Vinson had mentioned price. As to the incumbency policy, it was an unwritten policy that, even if it existed, was not followed consistently, as when Nucor sold around Chapel to Greens Bayou. Further, Nucor could not have been enforcing its incumbency policy when it never asked MM the identity of its customers and never informed MM that it was refusing to quote for that reason. *Cf. Monsanto*, 465 U.S. at 767 (finding evidence of conspiratorial conduct when manufacturer terminated distributor without alluding to the distributorship criteria as a basis for the termination). And of course, an incumbency policy has nothing to do with pressuring NShore to end its relationship with MM.

The incumbency policy is itself inconsistent with Nucor's third excuse—that it decided prior to any conspiracy not to sell to MM in a show of support for

Reliance/Chapel. NBr.20. That excuse, again, cannot explain why Nucor strong-armed NShore.

Finally, Nucor was acting against its economic interest. Nucor was looking for a new distributor west of the Mississippi to sell API steel, and MM was the perfect choice. In addition, by applying pressure to NShore, Nucor was jeopardizing its relationship with a good customer, Greens Bayou, a sister company of NShore. SF§6.3.

For all those reasons, the jury could reasonably infer that Nucor knew what was going on and made a calculated decision to join and enforce the boycott.

2. The evidence supported JSW's joinder in the conspiracy.

JSW got ultimatums from both AmAlloy and Reliance/Chapel, within a matter of weeks, although Fitch denied on the stand AmAlloy's ultimatum until confronted with his deposition testimony. SF§§6.4, 7. At the time of AmAlloy's mid-September meeting with JSW, AmAlloy was already a JSW customer. PX309. Just before the October 20 meeting when JSW ended its supply arrangement with MM, JSW was seeking business from Chapel. "Interesting timing" was Chapel's observation about JSW's solicitous email. PX 381. And JSW got that business from Chapel as soon as it shut MM off. PX419.

Shutting off a customer was something JSW's Fitch had never done before. Nor had he ever before just refused to honor a contract. Fitch did not even give the 60-days' notice required in the contract.

When Mike Hume told Fitch that ending the supply agreement would kill MM's business—something that Fitch denied until confronted with a pleading that JSW filed recounting the statement—Fitch did not mention the existence of other supply sources. Nor did he inquire why Mike made such a dire prediction when three other mills were in the market. Instead, Fitch said he understood the gravity of the situation. ROA.16643-44. He understood, the jury could reasonably infer, because he knew that the other mills were likewise boycotting MM.

Another inquiry Fitch did not make was about the lawsuit filed by Chapel against MM. If he had inquired, he would have found out that the suit was based on a terminated non-compete agreement and that the settlement left MM with plenty of customers. SF§5. Fitch tried to say that the lawsuit was the reason for ending the supply agreement, but he finally agreed under cross-examination that he did not know enough about the lawsuit for it to have been a basis for walking away from the supply agreement. SF§7.

Finally, JSW's breach of the supply agreement was against its economic interest. If JSW had wanted to avoid the risk of a breach-of-contract claim, it could have given 60 days' notice. Instead, it incurred that risk, which resulted in an

adverse jury finding. It matters not in antitrust analysis whether JSW is correct in its briefing on the breach-of-contract claim. Those later-fashioned legal arguments were never given by JSW as a reason for ending the contract. Instead, Fitch recognized that he had, for the first time, dishonored a contract.

As to JSW's briefing of the contract claim, that claim is not before the Court because it was not included in the judgment below. Further, the claim is moot. JSW's conduct in ending the contract is part of the conspiratorial conduct (SF§6.4), so the damages from the breach fall within the damages caused by the boycott, and MM has received in settlements on the antitrust claim far more than the damages awarded for breach of contract.

Nevertheless, open-price contracts—typical in this industry (ROA.14373-76)—are enforceable. Section 2.305 of the Texas Business & Commerce Code allows the parties to conclude a sale at a "reasonable price" when "the price is left to be agreed by the parties and they fail to agree." *See Mathis v. Exxon Corp.*, 302 F.3d 448, 453-56 (5th Cir. 2002), *declined to follow on other grounds*, *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 433-36 (Tex. 2004). Whether JSW and MM intended not to be bound under section 2.305(d), is a fact question that the jury resolved against JSW. *See J.D. Fields & Co. v. U.S. Steel Int'l, Inc.*, 426 Fed.Appx. 271, 277 (5th Cir. 2011) (contract formation is a fact question in Texas).

The existence of a supply source was vital to MM, and JSW agreed to be that source. JSW's breach of the agreement is as clear as the harm it caused MM. Instead of being willing to accept quotes from MM, JSW informed Matt and Mike, without the required advance notice, that JSW would not do any business with MM. JSW's initial delivery under the supply agreement of 1,000 tons of steel demonstrated that JSW and MM would have no difficulty agreeing on a price. Indeed, one concern of AmAlloy President Moore was JSW's quote of such low prices to MM. Finally, JSW was MM's first supplier and had extended MM a line of credit. Therefore, MM's damages expert had ample support for assuming that a majority of MM's steel supply would come from JSW during the period of the agreement.

The relevant point in this appeal, however, is that JSW's abrupt cancellation of the supply agreement is part of the evidence that justifies the jury finding that JSW directly participated in the group boycott.

III. The District Court Properly Excluded Alan Jacobs's Testimony.

The district court acted within its discretion in excluding opinion testimony from Alan Jacobs, an economist with no prior steel-industry experience, who would have testified about the "incumbency policy" urged by Nucor as "independent justification" for its conduct. ROA.18753, 18803.

The district court was entitled to exclude Jacobs's testimony for two reasons: (1) it would not have "assist[ed] the trier of fact to understand the evidence or determine a fact in issue," and (2) its probative value was substantially outweighed "by considerations of . . . needless presentation of cumulative evidence." Fed.R.Evid. 403, 702; *Mercado v. Austin Police Dep't*, 754 F.2d 1269 (5th Cir. 1985); *Guy v. Crown Equip. Corp.*, 394 F.3d 320, 324 (5th Cir. 2004).

A. Jacobs's Testimony Was Not Helpful or Relevant.

Jacobs's testimony related to a non-issue—whether the alleged incumbency policy was "economically advantageous" and "procompetitive." NBr.40; ROA.5177. MM never argued the economics of an incumbency policy; it contended that the policy did not exist or was a pretext.

The irrelevance of Jacobs's testimony was recognized by Nucor itself. Nucor moved to preclude MM expert Mahoney on the possibility that he would testify about the effectiveness of Nucor's distribution strategy (*i.e.*, its incumbency policy). Nucor argued that such testimony would be "irrelevant" because "the business effectiveness of Nucor's strategy is not at issue in this case." "It is enough that Nucor's plate mills employ this particular distribution method, which explains Nucor's lack of interest in selling to MM." ROA.4271-73 (RE.5). Nucor reiterated that position when Mahoney took the stand. ROA.14186-89 (RE.7) (testimony

regarding whether Nucor's strategy is effective is "irrelevant to the lawsuit"). Those representations are absent from Nucor's brief.

Jacobs's testimony was also legally irrelevant. "Procompetitive justifications" "will not be considered" as a justification for a per se violation, as the district court ruled. *N. Tex. Specialty Physicians v. Fed. Trade Comm'n*, 528 F.3d 346, 360 (5th Cir. 2008); ROA.18754. The district court recognized that principle of law. Responding to Nucor's analogy that "this is like an employment discrimination case," the court observed that the purported incumbency policy could not justify a group boycott any more than pretexts could justify racial discrimination in 1954. ROA.18759.

Nucor now claims that Jacobs's testimony was relevant as a "counter" to Mahoney. NBr.41. But Mahoney's testimony was distinct from Jacobs's opinions about "economic justifications for Nucor's conduct." ROA.2040. In the snippets of testimony cited by Nucor, Mahoney testified, based on his extensive industry experience, that it was not customary for mills to engage in the conduct shown in this case, which included refusing to provide quotes to a distributor without providing an explanation, or directing suppliers and other distributors not to quote or supply steel. ROA.14264-66, 14397-99, 14409, 14442-44, 14794; *see also* ROA.14232, 14446. If Nucor wanted to attempt to rebut such testimony, it could

have called on John Campo, a jointly-retained defense expert on "practices in the steel industry generally." ROA.2038.

The distinction between Mahoney and Jacobs is apparent from Nucor's motion to exclude Mahoney because he had not "even attempted to address the explanation of Nucor's distribution strategy" in Jacobs's report. ROA.4272. Nucor was right: Mahoney never addressed or even mentioned Nucor's touted incumbency policy or its distribution strategy. That is why Nucor's door-opening argument fails.

Finally, Jacobs was not entitled to bolster Nucor's case by citing the testimony of its witnesses as supposed proof that Nucor's "actions" were "consistent" with its incumbency policy. *See United States v. Cruz*, 981 F.2d 659, 663 (2d Cir. 1992).

B. Jacobs's Testimony Was Cumulative.

Jacobs would have testified that Nucor's alleged incumbency policy created incentives for parties in the distribution chain to invest time and money to ensure efficient production and distribution. ROA.5186-87. Such testimony, however, was cumulative of what the jury heard from Nucor fact witnesses Stratman, Vinson, Whiteman, and Charles and defense expert Shehadeh. ROA 16367-70, 17650-52, 18800-21, 19074-77, ROA.19177-78. For example:

Witness	Testimony
Whiteman	Incumbency created "loyalty" with distributors and built "a stronger account base and relationships" in the long-term. ROA.18803-04. Cited supposed examples of the policy's operation, and claimed it protected Nucor's profit margins by ensuring that it did not "compet[e] against ourselves" by backing competing distributors "vying for the same piece of business." ROA.18807-21.
Stratham	By remaining "loyal" to the distributor that originated a business opportunity, Nucor ensured "long-term sustainable profits." ROA.17649-51.
Shehadeh	A "vertical distribution strategy" existed in the steel-plate industry: mills, distributors, and end-users, "work together" through mutual investments to achieve "efficient distribution" and "price quality." This vertical alignment prevents "free riding," whereby a second seller (or distributor) receives the benefit of an investment made a previous incumbent seller. ROA.5187 (Jacobs report stating that incumbency eliminates "free rider problem."), ROA.19177-78.

Such testimony was more than "enough" to enable Nucor to argue to the jury that it had "employ[ed] this particular distribution method." ROA.4272. The jury just disbelieved the argument—for good reasons. SF§7.2.

IV. The District Court Did Not Abuse Its Discretion by Overruling Nucor's Often-Waived Objections to Evidence and Arguments.

A. MM's Closing Argument Was Proper.

1. MM's Closing Argument Did Not Misstate the Law.

Nucor's selective quotes show nothing more than permissible argument that defendants reached an "agreement" to a group boycott, in line with the instructions given by the court and Nucor's own proposed instructions. *Compare* ROA.19945 (Nucor received an "offer" and responded "I accept"), *with* ROA.5582 (jury

instruction that a conspiracy exists when two or more persons enter into an "agreement" to act together for some unlawful purpose), *and* ROA.5022 (Nucor proposed instruction that a conspiracy requires an "agreement"). In an important part of closing arguments that Nucor omits, MM referred to the offer by AmAlloy and Reliance/Chapel that Nucor and JSW perhaps "couldn't refuse." ROA.19945. Thus, MM merely argued that Nucor and JSW acceded to threats, which constitutes an actionable antitrust conspiracy. *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 763-64 (5th Cir. 2002). Regardless, Nucor waived its complaints by not objecting until after jury deliberations had commenced. ROA.5387, 19948 (no objection to argument regarding effect on entrepreneurs and small businesses).

Finally, the court properly denied Nucor's corrective instruction—that a "vertical agreement (between a supplier and customer) not to sell a product to another is not necessarily illegal." NBr.45-46, ROA.5343. The court had already instructed the jury on this point, telling the jury that a business has a right to refuse to deal "as long as it makes that decision independently." ROA.5581-5582.

2. MM's Closing Argument Was Based on the Factual Record.

Reasonable inferences supported MM's argument concerning Nucor's October 5 dinner conversations with Reliance/Chapel. SF§5.2. Reliance/Chapel held dinners on successive evenings on October 4-5 with JSW and Nucor, and

JSW received at one dinner the same ultimatum from Reliance/Chapel that AmAlloy had delivered to JSW a couple of weeks earlier.

In argument, MM's counsel accurately recounted the testimony related to those dinners. Counsel did not invent conversations about MM but asked whether witnesses's *denials* of conversations were "believable." ROA.19785-86. As the court instructed, the jury was entitled to weigh credibility and draw evidentiary inferences. ROA.19813-14. Based on inferences reasonably drawn from the evidence of the preceding evening's dinner with JSW, MM's counsel properly argued that Nucor agreed to the Reliance/Chapel ultimatum and was told that had JSW also agreed. Nor was it any invention, as Nucor claims (NBr.47-48), for MM's counsel to argue that Nucor communicated with other conspirators. NBr.47-48. Conspiratorial communications were proved by direct evidence (PX532, 563, 587), and such communications are the only explanation for Whiteman's ability to say, when delivering Nucor's threat to NShore, that all mills were getting pressure from their biggest, terrified-of-MM customers. ROA.16000-03.

MM's closing argument is far removed from Nucor's sole cited case—*Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122 (10th Cir. 2009)—where over half of plaintiff counsel's closing argument was the reading of a fictitious letter by the defendant that admitted liability and disparaged counsel. Here, the jury was entitled to find that Nucor "had a unity of purpose or a common design and

understanding, or a meeting of minds in an unlawful arrangement." *Am. Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

B. Cooper's Statements Were Admissible.

Cooper testified concerning his March 2012 lunch conversation with Matt and Mike about what Nucor's Whiteman had just told him—namely, that all the mills were being pressured not to do business with MM by their biggest customers who were "terrified" of MM and that NShore had to decide between doing business with Nucor or MM. SF§§6.3, 6.5. Nucor did not make and thus waived any objection to Cooper's courtroom testimony. Nucor elected to object only to the recording that Matt had made of Cooper's lunchtime conversation, obviously calculating that Cooper's testimony would be less damaging than the recording. ROA.32061-71 (RE.8) (transcript of recording). The importance to Nucor of excluding the recording was apparent from its motion to exclude, which resulted in the court's ruling that the recording would be admissible if Cooper could not remember his statements or denied making them. ROA.3215-16. When Cooper testified, Nucor again objected only to the recording. ROA.15839-43. Cooper then testified—without resort to the recording and without any objection—affirming his lunchtime statements to Matt and Mike. ROA.15996-16004.

Even if Nucor had objected, its objection would have been meritless. Cooper affirmed that what he told Matt and Mike was his "honest memory" of what

Whiteman had told him. ROA.16004. Since Whiteman was Nucor's agent, Cooper provided to the jury a party opponent's non-hearsay statements. *See* Fed.R.Evid. 801(d)(2); *Moss v. Ole S. Real Estate, Inc.*, 933 F.2d 1300, 1312 (5th Cir. 1991).

Finally, since Cooper recalled his conversation with Whiteman, the recording was never played, rendering pointless Nucor's argument about whether the tape would have satisfied the recorded-recollection hearsay exception in Rule 803(5)(B).

C. Sergovic's Email Was Proper Evidence.

Arcelor's Sergovic sent an email stating that Chapel's Altman had warned both Arcelor and Nucor that Chapel would not buy from either if they supplied MM. PX235. The district court rightly concluded that the email was a coconspirator's statement, admissible under Rule 801(d)(2)(E). That determination was supported by the requisite evidentiary findings: (1) a conspiracy existed; (2) Sergovic's employer Arcelor and Nucor were members of the conspiracy; and (3) the statement made by Sergovic was made during the course and in furtherance of the conspiracy. *United States v. Rodriguez*, 689 F.2d 516, 518 (5th Cir. 1982).

For purposes of the coconspirator exception, a conspiracy may be shown by engaging in a "joint plan." *United States v. Nelson*, 732 F.3d 504, 516 (5th Cir. 2013). That "joint plan" is sufficiently described in the remaining emails in PX235. They show that, on September 5, at Chapel's request, Arcelor decided to lend its

support ("We can not piss off Chapel"), which culminated in a plan of action ("we quote high!"). PX235. In addition, the district court correctly relied upon the summary-judgment record, which showed the joint plan whereby Reliance/Chapel and AmAlloy contacted the mills and conditioned future business on their joining the boycott of MM. ROA.1852-53, 27831-37. The district court did not commit reversible error by describing this evidence as "sufficient" rather than "a preponderance."

The district court also rightly concluded that the Sergovic email was "in furtherance of" the joint plan. In the communications reflected by PX235, Sergovic provided vital, new information—namely, that he had been contacted by Chapel and informed that Chapel would cease doing business with Arcelor if it sold to MM and that the same message had been delivered to Nucor. Sergovic provided this information in response to an inquiry made in the previous email that "we have to figure out how we are going to handle [MM]." PX235. Sergovic's email was the answer to that inquiry and clearly advanced the conspiracy. In responding, Sergovic included three additional recipients to the email discussion, thus ensuring company-wide participation in the boycott.

Nucor never asserted below, and thus waived, its new argument that the Sergovic email was not made "during" the conspiracy. The argument lacks merit anyway, because the remaining emails in PX235 showed a "joint plan" as of

September 5. Support in the evidence for other start-dates of a conspiracy is irrelevant, including the district court's observation that the conspiracy "allegedly" began on September 1 and counsel's argument regarding the Moore/Altman September 8 meeting. ROA.3215; NBr.54.

The Sergovic email was also admissible under the coconspirator exception as to other defendants, including Chapel. The evidence showed that a "joint plan" existed, beginning with a solicitation of support from Chapel and resulting in a strategy to execute the boycott; that Chapel joined the plan; and that the acts of Sergovic and others were committed in furtherance of the joint plan. By failing to request a limiting instruction that the Sergovic email should be considered only as to other defendants, Nucor waived any complaint. *See* 21A Wright & Miller, *Federal Practice & Procedure* §5066 (2d ed. 2013).

Finally, Sergovic's email was alternatively admissible as a business record, as shown by Arcelor's business records affidavit. Fed.R.Evid. 803(6); ROA.31717-18; *see United States v. Towns*, 718 F.3d 404, 408-09 (5th Cir. 2013). While the district court found no evidence that "making a record of the subject matter discussed in the emails" was a regular practice of Arcelor (ROA.3213-14), the affidavit stated that PX235 was made or received in its "course of business," a fact that is self-evident from the exhibit.

D. Mahoney's Testimony Was Admissible.

Before trial, defendants did not challenge the qualifications of MM expert Mahoney or the subject matter of his opinions, other than to attempt to preclude him from testifying about Nucor's distribution strategy and opining on whether a conspiracy existed. ROA.4271-73 (RE.5). After a bench conference, the defendants represented they did not object to Mahoney, provided he did not address the conspiracy issue, and he did not. ROA.14186-89. Therefore, Nucor's current objections are waived after-thoughts.

The objection that Mahoney was an "overview" and "narrative" witness came at the near-completion of Mahoney's direct (ROA.14432), even though Nucor knew that Mahoney would be MM's first witness (ROA.4271). Further, Nucor never objected that Mahoney's testimony concerned the meaning of "ordinary words" or constituted lay testimony, so that appellate review is waived absent plain error. *Foradori v. Harris*, 523 F.3d 477, 508 (5th Cir. 2008).

Nucor's newly-minted arguments lack merit and certainly do not establish plain error. In response to defendants' belated objection, the district court correctly ruled that Mahoney was merely providing the "foundation" of his opinions, which as an expert on custom and practice in the steel industry included emails and other case documents. ROA.14433. That evidence was also properly before the jury because it had been pre-admitted by the parties' agreement, unlike the case

authority that Nucor cites. ROA.13792-93, 14424-31. *Cf. United States v. Griffin*, 324 F.3d 330, 348-49 (5th Cir. 2003) (evidence not admitted prior to testimony by overview witness, but finding no reversible error). Finally, Mahoney's testimony did not concern "ordinary words" or otherwise represent improper lay testimony (NBr.57-58); defendants conceded that he was a qualified expert to render opinions concerning steel industry custom and practice. To the extent Nucor identifies any testimony supporting this argument, it either failed at trial to make an objection (ROA.14405, 14398, 14391), or elicited the allegedly objectionable testimony itself (ROA.14778).

E. Opinion Testimony Concerning Defendants' Conduct Was Proper.

Nucor complains that scattered testimony over the course of the six-week trial constituted impermissible lay-opinion testimony. Lay opinion, of course, is proper under Rule 701 when the opinion has a rational connection to underlying facts within a witness's personal knowledge. Further, the rule "does not exclude testimony by corporate officers or business owners on matters that relate to their business affairs, such as industry practices and pricing." *Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc.*, 414 F.3d 546, 551-52 (5th Cir. 2005).

The witnesses that Nucor cites permissibly testified from personal experience that normal practice in the steel industry does not include the conduct shown here, including refusals to quote without explanations, ultimatums not to

deal with other distributors, and a breach of a supply agreement. ROA.14588, 14815, 15316, 15560-62, 16004, 16020, 18044. Such testimony is admissible under Rule 701.

If any testimony expressed legal or ethical opinions, it was insignificant. AmAlloy's Smith was asked, "you're not a lawyer, but [AmAlloy's ultimatum] probably wouldn't be lawful either, would it?" He responded, "I don't know. You could tell me that." ROA.15316. Smith likewise failed to answer whether, in his business experience, an ultimatum not to deal was "ethical." ROA.15316 ("I've never done that."). In recounting his statement to MM that the defendants' conduct was not "right legally," Cooper said he spoke as a businessman, not a lawyer. ROA.16020, 16207. Such insignificant snippets of testimony fall far short of the wholesale expressions of legal and ethical opinions found in Nucor's cited cases. NBr.59-61.

Nucor waived many complaints by not contemporaneously objecting. ROA.14815, 15316, 16004, 18044. In any event, the court cured any complaint by its instruction—which tracked Nucor's proposed instruction verbatim (ROA.50164)—for the jury to disregard testimony concerning "whether certain conduct would be ethical, proper, appropriate, suspicious, legal, or lawful." ROA.5580.

F. The Court's Other Rulings Were Neither Erroneous Nor Prejudicial.

Nucor seeks reversal based on its statistical analysis of evidentiary rulings. Nucor cites no legal authority for that argument. Nor does it have any factual support, as shown by a random sampling of Nucor's comparison rulings:

MM could lead Cooper, since his employer was coerced into joining the boycott. ROA.15939-40, 15953-54.	SSAB participated in the conspiracy, so defense counsel could not lead its sales manager. ROA.15776-77.
Mahoney relied entirely on evidence pre-admitted by agreement. ROA.13793, 14424-31.	The single document that Nucor references—an internal SSAB email forwarding a quote from Chapel—was not only irrelevant, but also inadmissible hearsay as Mahoney had no independent knowledge of its contents. ROA.14786-90.
The court properly allowed MM's examination of adverse witnesses Whiteman, Smith, and Cooper concerning matters within their knowledge. *E.g.*, ROA.18942-43, 15280-81, 15971-73.	Nucor claims that it was barred from examining Whiteman concerning the contents of a single email, when in fact Whiteman testified extensively concerning the email, and he appears to have completed his testimony on the email before any objection. ROA.18866-69.
The court correctly limited the scope of testimony from MM's principals concerning third-party credit terms and Nucor's purported incumbency policy. Matt testified that MM did not submit a credit application to Nucor because MM could never get a response from Nucor, not because he knew MM's credit terms would not satisfy Nucor. ROA.19523-24. Accordingly, credit terms with other parties were irrelevant.	Nucor cross-examined Mike extensively concerning its purported incumbency policy. ROA.17245-52. It was barred only from asking, after repeated inquiries, that Mike speculate as to what Whiteman was "thinking" when MM called him about doing business with Greens Bayou. ROA.17251-52.

Such rulings were neither erroneous nor prejudicial.

V. The Jury's Lost-Profits Award Was Fully Supported.

Lost future profits are recoverable in antitrust cases when, as here, a business has been destroyed. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir. 1972); *see Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 199, 207 (5th Cir. 2000) (failed company entitled to recover lost profits but did not prove them); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452 (3d Cir. 1998) (failed company entitled to future damages); s*ee also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971) (if "a plaintiff feels the adverse impact of an antitrust conspiracy on a particular date," the plaintiff can "recover all damages incurred by that date and all provable damages that will flow in the future from the acts of the conspirators on that date"); *Greene v. Gen. Foods Corp.*, 517 F.2d 635, 663 (5th Cir. 1975) (permitting recovery of lost profits under antitrust laws "in appropriate cases"). A destroyed company cannot be the target of the continuing antitrust violations that were at issue in the cases that Nucor cites on this point. NBr.63. Under Nucor's argument, group boycotters would owe no damages if they could destroy a start-up quickly enough.

After antitrust injury is proved, as here, the burden of proving damages is more relaxed than in other civil cases, because the "wrongdoer must bear the risk of the uncertainty in measuring the harm he causes." *Lehrman*, 464 F.2d at 45;

accord Eleven Line, 213 F.3d at 206-07; *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 669 (5th Cir. 1974). Courts take "a charitable view of the difficulties of proving damages in a case when a treble-damage plaintiff must try to prove what would have accrued to him in the absence of the defendant's anticompetitive practice." *Lehrman*, 464 F.2d at 46. *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 879 (5th Cir. 2013), analogously endorsed in the theft-of-trade-secrets context a "very flexible" standard for measuring damages when the defendant's wrongful conduct destroyed a start-up. The evidence need only show damages as a "'just and reasonable inference, although the result be only approximate.'" *N. Texas Producers Ass'n v. Young*, 308 F.2d 235, 245 (5th Cir. 1962) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931)).

The law will not tolerate "speculation," *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 438 (5th Cir. 1985), but none was presented here. Professor Magee, MM's damages expert, applied an accepted methodology to ample facts to calculate past and future lost profits.

Defense expert Wiggins opined that MM had no future losses because Matt and Mike were good salesmen and defendants would no longer boycott MM. ROA.19247-48, 19428-30. The jury was entitled to credit reality: With all that had happened to them, Matt and Mike could not simply start over. ROA.16616, 19496.

Magee relied on the facts discussed in the Statement of Facts §§1-2 (ROA.17355-56, 17498), which will not be repeated in detail. Essentially, Matt and Mike had a track record of success: they started and successfully ran Chapel's Houston branch, achieving profits even in down times; they had enough capital ($2.1 million); and they averaged 8-10 inventory turns a year. SF§§1-2. Further, Magee knew their profit margins at Chapel-Houston, and he considered the opinion by industry expert Mahoney that MM would have been successful with a normal steel supply. ROA.17372, 17389, 17404; SF§1.

As to methodology, the commonly used "before-and-after approach" does not apply when a start-up like MM is driven out of business before it developed an earnings history. *Eleven Line*, 213 F.3d at 207. So Magee used the other of "the two most common methods of quantifying antitrust damages"—the "yardstick" method. *Id.*

Wiggins also used the yardstick approach, actually two yardsticks—Chapel *after* Matt and Mike had left, and a hypothetical MM reselling as a North Shore broker. ROA.19367 (RE.6), 19373-74 (RE.6), 19391, 19419-21. Magee's yardstick was Chapel during 10 of the 12 years when Matt and Mike were in charge, which Magee described as the most closely comparable yardstick he has been able to use. ROA.17335-56, 17378, 17498. Matt's and Mike's decade at Chapel enabled Magee to estimate what they would have achieved through their remaining work

lives at MM. ROA.17355, 17369. Magee even disregarded 2004, a year of phenomenal profits in the industry, to be conservative. ROA.17376.

The jury was also conservative, accepting the lower end of Magee's calculations, $52 million instead of $67 million. ROA.5588, 17365-66. The jury rejected the defendants' challenge to Magee's calculations, components of which are reasserted on appeal.

A. Magee Used the Right Yardstick.

Defendants challenge the comparability of Chapel and MM, despite evidence supporting the comparison. As Matt testified, there was no practical difference at the outset between Chapel's new Houston branch and MM, except he and Mike brought to MM 11 more years of experience, success, and customer relationships. ROA.16591-98, 16609, 16726-35, 19468-84, 19500-05.

Using Chapel as the yardstick was not the equivalent of applying average rates of return of soccer arenas or McDonald's franchises nationwide, *Eleven Line*, 213 F.3d at 208-09; or "trade association studies of national tortilla markets," *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 Fed.Appx. 450, 453 (5th Cir. 2005); or benchmarking the growth of a startup company selling gas cards to "industry giants" in divergent markets like "Apple, Costco, Netflix, and eHarmony," *MyGallons LLC v. U.S. Bancorp*, 521 Fed.Appx. 297, 307 (4th Cir. 2013). Magee used historical data from an operation in the same business, in the same city,

selling the same products, using the same business model, and run by the same people as MM.

The "requirement of sufficient comparability . . . does not demand strict identity . . . because '[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.'" *Cason-Merenda v. Detroit Med. Ctr.*, 2013 WL 1721651, at *6 (E.D. Mich. Apr. 22, 2013) (quoting *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981)). Thus, the touchstones of admissibility are "reasonable similarity of the business." *Eleven Line*, 213 F.3d at 208, and "sufficient evidence of comparability 'as to permit a legitimate comparison by the trier of fact.'" *Cason-Merenda*, 2013 WL 1721651, at *6 (quoting *Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1206 (1st Cir. 1987)). More than meeting these standards, Magee used a virtually identical comparator.

Unsurprisingly, Appellants cite no case faulting an expert's use of a yardstick as similar as Chapel was to MM. As long recognized, often the best or "only available yardstick is the defendant's own business." Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1575 (1967). Rarely is the comparison so apt as here: Magee used a distributor run by Matt and Mike employing the business

model they intended to use at MM. The jury properly credited that comparison over Wiggins's use of Chapel after Matt's and Mike's departure and a hypothetical MM as broker for NShore. ROA.19419, 19578-80; *cf. William Goldman Theatres, Inc. v. Loew's Inc.*, 69 F.Supp. 103, 105-07 (E.D. Pa. 1946) (plaintiff entitled to lost profits it would have made operating first-run movie theatre as intended, was not obligated to mitigate by operating second-run theatre, and proved damages using first-run theatres as yardstick).

B. Magee Used the Right Historical Data.

Wiggins postulated a paradigmic downward shift in the steel market, which supposedly precluded Magee's use of prior data. ROA.19373-74 (RE.6), 19443. But Wiggins's theory did not match the facts. Defense witnesses, plus Matt and Mike, testified to the industry's continuing robustness. Nucor planned to build a new Gulf Coast mill and expand west of the Mississippi, especially with API steel. PX519. JSW's Fitch and Nucor's Stratman both testified to a strengthening rather than declining market for steel in 2011 and 2012. ROA.17738-39, 18728-79, 19585. Wiggins's unsupported paradigm shift hardly justified his novel calculation of damages from data *post-dating* MM's injury. ROA.19565-67. Essentially, Wiggins used the conspiracy to calculate damages. ROA.19592.

Properly applied, the yardstick method uses the comparator's historical profit data. *See, e.g.*, *Caller-Times Pub. Co., v. Triad Communications, Inc.*, 791

S.W.2d 163, 172 (Tex. App.—Corpus Christi 1990), *aff'd in part, rev'd in part on other grounds*, 826 S.W.2d 576 (Tex. 1992); *Wilko of Nashua, Inc. v. TAP Realty, Inc.*, 379 A.2d 798, 803 (N.H. 1977). Courts prefer evidence of "***prior*** experience with which to make a comparison." *E.g.*, *Webb v. Utah Tour Brokers Ass'n*, 568 F.2d 670, 678 (10th Cir. 1977).

That is what Magee did, rather than speculating about future data. Magee used Chapel's operations during Matt's and Mike's tenure. Defendants cite no support for their suggestion that Magee should have used post-injury data from less similar comparators and speculatively projected future conditions.

Further, Magee accounted for adverse market conditions throughout a decade far more reliably than Wiggins's speculation about future conditions based on a fact-contradicted theory. Magee explained: "baked into my forecast of MM Steel is six years of recessions out of the ten years I'm calculating," including the first three years of the period he used and those following 2008's great recession. ROA.17374-75. And he excluded the boom year of 2004. ROA.17376. Magee's use of pre-injury historical data meets the relevant legal standard and was properly credited by the jury.

C. Magee Appropriately Used an Average Gross Margin.

Magee justified using an average gross margin from past data rather than attempting to predict the margin for "any one year." ROA.17458. As he testified,

to project a ten-year future period from a "ten-year past history . . . we take the average over the entire time period that was achieved in the entire first ten-year period." *Id.* Magee based his 18.9% margin on solid data, including: Chapel's above-18% earnings even in 2001, a recessionary period when prices were much lower than in 2011-13; Chapel's above-20% margins in 2009 after the 2008 crash; and actual price data out to 2013. ROA.17484-85.

The jury heard testimony by Wiggins about inventory turns, decreases in margins, a different discount rate, and market conditions when MM started. But there were always countervailing facts and accounting principles the jury could credit. *E.g.*, *compare* ROA.19242, 19257, 19296-97 *with* ROA.19571-72, 19574, 19579, 19586-87, 19610. Actually, Wiggins never tried to re-do Magee's calculations; he used his own methodology based on the supposed paradigm shift and the cessation of damage upon filing suit to derive a loss below $500,000. ROA.19376-77.

The jury was entitled to reject Wiggins's opinion because his assumptions conflicted with the evidence and he improperly estimated damages from post-injury performance. Yet another reason existed for rejecting Wiggins. He surprisingly revealed reliance on one of two sets of books maintained by Chapel, suggesting that Wiggins used manipulated data. ROA.19270-71, 19424-36 (RE.6).

Finally, on rebuttal, Magee addressed Wiggins's criticisms. Responding to the paradigm-shift theory, Magee even used average Gulf-Coast data available for the most current three years. ROA.19580. Magee did not consider Chapel's performance in recent years because Chapel would not be expected to do as well without Matt and Mike. ROA.19604. Nor did Magee use NShore, as did Wiggins, because of its shaved margins. ROA.19579. Based on the most current data on average industry profit margins, Magee's re-calculations still included the number found by the jury—$47.5 to $60.4 million.

D. Magee Appropriately Considered the Chapel Lawsuit.

In asserting that "Magee failed to account for alternative causes of MM's lost sales," JBr.57, defendants wrongly conflate the issue of *amount* of damage with issues of causation and fact of damage, *see Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 200 (1st Cir. 1996); *Pierce*, 753 F.2d at 435-39. Their assertion is also untrue. As Magee explained, his 10-year projections were unaffected by Chapel's short-lived lawsuit over the canceled non-compete and the inconsequential six-month limitation on MM Steel's sales that still left MM with plenty of big customers. SF§5; ROA.17421-22.

Defendants' cases on the alternative-cause point are inapposite. *El Aguila* faulted an expert who failed to consider alternative causes. 131 Fed.Appx. at 454. Here, causation was straightforward: defendants cut off MM's steel supply.

Similarly, *MyGallons* concerned an expert's failure to consider the plaintiff's flawed reliance on hedging "against rising gas prices." 521 Fed.Appx. at 307. Matt and Mike can sell steel when they have steel to sell.

Because defendants' specific challenges to Magee's analysis fail, so does their assertion of "collective errors." JBr.59.

CONCLUSION

Following a fair trial, the district court properly submitted MM's claim of a per se violation of the Sherman Act, and the jury had ample factual support for its verdict in favor MM. This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that:

1. This appellee's brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,995 words, exclusive of the portions of the brief that are excluded from the type-volume limitation by Rule 32(a)(7)(B)(iii), the word count having been obtained through the word processing system used to create this brief, namely Microsoft Word 2010.

2. This brief further complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)((5-(6), because it was prepared in Microsoft Word 2010 in 14-point, proportionally spaced Times New Roman font, except that 12-point font is used for any footnotes as permitted by Fifth Circuit Rule 32.1.

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CERTIFICATE OF SERVICE

I certify that, on February 23, 2015, this brief was served via the Court's electronic-filing system on the counsel listed below:

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