IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MM STEEL, L.P., Plaintiff, v. RELIANCE STEEL & ALUMINUM CO., CHAPEL STEEL CORP., AMERICAN ALLOY STEEL, INC., ARTHUR J. MOORE, JSW STEEL (USA) INC., NUCOR CORP. & SSAB ENTERPRISES, LLC D/B/A SSAB AMERICAS, Defendants.	§ § § § § § § § § § § § §	CIVIL ACTION NO. 4:12-CV-01227

DEFENDANT NUCOR CORPORATION'S
MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

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Defendant Nucor Corporation ("Nucor") hereby moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all claims against Nucor in Plaintiff MM Steel, LP's ("MM Steel" or "Plaintiff") Original Complaint.

SUMMARY OF THE ARGUMENT

MM Steel claims that Nucor, a steel manufacturer, violated the antitrust laws by declining to enter into a new business relationship with it. MM Steel's founders previously worked for Reliance/Chapel, the largest steel distributor in the country and one of Nucor's most valued customers, and abruptly left under hostile circumstances to set up their own competing distributor. According to MM Steel, Nucor declined to do business with MM Steel in order to maintain goodwill with Reliance/Chapel, which had accused MM Steel's founders of egregious misconduct and was locked in a bitter vendetta with them.

Nothing about any of those alleged facts remotely suggests a violation of the antitrust laws. To the contrary, a century of precedent upholds the "'right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Verizon Commc'ns v. Trinko*, 540 U.S. 398, 408 (2004) (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)); *accord Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984) ("A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently."). If that right means anything, it must encompass the prerogative to choose one customer over another, or to decline to do business with one customer when doing so might jeopardize another, far more important relationship.

While the antitrust laws forbid companies from entering into certain types of *agreements* with other companies that unreasonably restrain trade, the Complaint fails to allege facts from which it could plausibly be inferred that Nucor *agreed* with any other company to do what would

come naturally to any business confronted with the same situation. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Particularly farfetched, and lacking any support whatsoever in the Complaint, is the notion that Nucor entered into the type of "horizontal" agreement with one of its own competitors (*i.e.*, other steel manufacturers) that the antitrust laws might, in some circumstances, deem *per se* illegal. *See Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 223 (5th Cir. 2001) ("only horizontal boycotts can be *per se* violations of the Sherman Act").

To the extent that the Complaint alleges that Nucor entered into a "vertical" agreement with Reliance/Chapel or any other *customer* (as opposed to competitor), claims relating to such an agreement would not be illegal *per se*, but rather judged under the Rule of Reason standard. *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138 (1998); *Spectators'*, 253 F.3d at 223. That standard requires, among other things, allegations of (1) a relevant market and (2) market power, both of which are entirely absent from the Complaint. *See, e.g.*, *PSKS, Inc. v. Leegin Creative Leather Prods.*, 615 F.3d 412, 417-18 (5th Cir. 2010). Because the antitrust laws "were enacted for the protection of competition not competitors," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted), a bare allegation that one particular competitor was forced out of the arena does not amount to an antitrust claim unless accompanied by facts suggesting a general diminishment of competition in some properly defined relevant market. The Complaint is totally devoid of such facts.

Finally, MM Steel's state-law tort claims consist of threadbare allegations that do little more than parrot the elements of each type of claim. These conclusory allegations fail to state a plausible claim that Nucor entered into any conspiracy, tortiously interfered with any existing or

prospective contract, or published any false statements giving rise to business disparagement. The Court should dismiss all claims against Nucor.

NATURE AND STAGE OF THE PROCEEDING

MM Steel filed its Original Complaint on April 19, 2012. Plaintiff alleges principally that Nucor and the other Defendants engaged in a horizontal "group boycott" of Plaintiff that supposedly constitutes a *per se* violation of § 1 of the Sherman Act. *See* Compl. ¶¶ 17, 89-97. Specifically, MM Steel alleges that Nucor and other Defendants "entered into horizontal and related agreements to harm [Plaintiff] by depriving it of its ability to purchase or sell steel." Compl. ¶ 91. MM Steel also asserts several state-law claims against all Defendants, namely tortious interference with existing contracts (Count 3); tortious interference with prospective contracts (Count 4); business disparagement (Count 5); and civil conspiracy (Count 6). *See* Compl. ¶¶ 100-113. The initial pretrial and scheduling conference is set for July 30, 2012. This motion seeks dismissal of all claims against Nucor pursuant to Fed. R. Civ. P. 12(b)(6).

STATEMENT OF THE ISSUE AND STANDARD OF REVIEW

A. ISSUE

The issue is whether, under the standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the facts pled in the Complaint plausibly suggest legally viable claims against Nucor for unreasonable restraint of trade in violation of § 1 of the Sherman Act, tortious interference with existing contracts, tortious interference with prospective contracts, business disparagement, or civil conspiracy.

B. STANDARD OF REVIEW

To avoid dismissal pursuant to Rule 12(b)(6), plaintiffs must "plead enough facts to state a claim for relief that is plausible on its face," rather than merely possible. *Twombly*, 550 U.S. at 570. "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more

than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (internal quotation marks, citations, and alterations omitted). A complaint should be dismissed if it "'merely creates a suspicion [of] a legally cognizable right of action.'" *Id*. (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1216, at 235-36 (3d ed. 2004)). Pleading facts that "are merely consistent" with liability "stops short of the line between possibility and plausibility of entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In other words, the allegations must contain "enough heft," *Twombly*, 550 U.S. at 557, to nudge the inference of illegal conduct "across the line from conceivable to plausible." *Id*. at 570.

Although the Court is required to accept all well-pleaded facts as true, "courts 'are not bound to accept as true a legal conclusion couched as a factual allegation.'" *Twombly*, 550 U.S. at 555 (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)); *accord Iqbal*, 556 U.S. at 678 (legal conclusions "are not entitled to the assumption of truth" and "must be supported by factual allegations").

The principles set forth in *Twombly* are particularly well-suited for application to cases, like this one, alleging an antitrust conspiracy. *Twombly*, too, involved claims of an "agreement" in violation of Section 1 of the Sherman Act. "[T]he crucial question" in such a case is whether the challenged conduct "stems from independent decision or from an agreement," and mere "parallel conduct or interdependence" that is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" does not establish an agreement. *Twombly*, 550 U.S. at 553-54. Thus, "an allegation of parallel conduct and a bare assertion of conspiracy" do not suffice to "render a § 1 conspiracy plausible." *Id.* at 556. To the contrary, allegations of parallel conduct

"must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent." *Id.* at 557. That context is missing if "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway." *Id.* at 566.

STATEMENT OF FACTS

This Statement of Facts focuses primarily on the facts alleged in the Complaint relating to the claims against Nucor. On this Rule 12(b)(6) motion, the Court must take the factual allegations of the Complaint -- but not legal conclusions or unwarranted inferences -- as true. Nucor does not concede the truth of any facts alleged in the Complaint and reserves the right to dispute Plaintiff's allegations in any different procedural posture.

Nucor makes steel. Compl. ¶ 42. Nucor sells some of its steel products directly to end users who use them to build or manufacture other products, and some of its steel products to distributors, known in the industry as "steel service centers." Compl. ¶¶ 43, 44. "Service centers are the largest customer group for steel mills, taking nearly 50%" of aggregate output of steel products. Compl. ¶ 45.

Defendant Reliance is the "largest metals service center in the country," Compl. ¶¶ 3, 46, and Nucor's "biggest customer." Compl. ¶ 81. Reliance "operates more than 220 locations in 38 states and nine foreign countries." Compl. ¶ 46 (internal quotation marks omitted). "The metals service center business is all about relationships and meeting customer needs." Compl. ¶ 49. Chapel is a wholly owned division of Reliance. Compl. ¶ 3.

Plaintiff MM Steel is owned by Mike Hume and Matt Schultz. Compl. ¶ 6. Hume and Schultz worked at Defendant American Alloy, "one of the largest such metal service centers in the United States," Compl. ¶ 3, until 1999. Compl. ¶¶ 6, 52-53. Chapel recruited Hume and

Schultz away from American Alloy to start up a Houston branch for Chapel in 1999, and Hume and Schultz ran Chapel's Houston office until September 2011. Compl. ¶¶ 6-7, 20, 53. Hume and Schultz's departure from American Alloy in 1999 was not amicable and led to prolonged ill will between them and American Alloy and its owner, Defendant Arthur J. Moore. Compl. ¶¶ 20, 60.

In September 2011, Hume and Schultz abruptly left Chapel to launch their own competing Houston steel service center, MM Steel. Compl. ¶ 6. This action led to intense hostility between Hume, Schultz, and MM Steel, on the one hand, and Reliance/Chapel on the other, including litigation charging that Hume and Schultz were violating non-competition agreements, had stolen proprietary trade secrets, and had breached their fiduciary duties to the company. Compl. ¶¶ 16, 56-57. Nucor was aware of that litigation. Compl. ¶¶ 80-81.

Plaintiffs alleges that after Hume and Schultz's hostile departure from Reliance/Chapel, they reached out to Nucor about starting a business relationship with their new venture but Nucor did not respond. Compl. ¶ 68. Plaintiff further alleges that a Nucor employee later explained that Nucor did not want to "support" MM Steel because Reliance/Chapel was "Nucor's biggest customer." Compl. ¶ 81.

American Alloy's president and owner, who as noted had his own reasons for disliking Hume and Schultz, stated in internal emails to his employees that he wanted to make things difficult for MM Steel, that he was invited to meet with the president of Chapel, and that Chapel and Reliance planned on "notifying any mill that is selling [MM Steel] that they can no longer expect any business from Chapel/Reliance." Compl. ¶ 12.

In addition to Nucor not selling steel to MM Steel, Plaintiff alleges that the other steel mill Defendants (JSW and SSAB) also refused to sell steel to MM Steel. JSW's president

allegedly explained its refusal by stating "I have to do what's good for my business." Compl. ¶ 64. JSW's refusal allegedly breached a contract with MM Steel. *Id.* An SSAB salesperson had initially seemed open to doing business with MM Steel, but later declined out of concern about the impact on its relationship with Reliance/Chapel. Compl. ¶¶ 65-67. Notably, Plaintiff admits that other companies in the steel industry, who are not named as Defendants and not alleged to have made or participated in any agreement or conspiracy, also declined to deal with MM Steel out of concern for not disrupting other relationships. Compl. ¶ 81.

Meanwhile, MM Steel attempted to develop a "partnership" with another Houston steel distributor known as North Shore Supply, which would "buy steel on behalf of MM Steel." Compl. ¶¶ 69-71, 74-76. North Shore Supply was a Nucor customer. Compl. ¶ 73. Plaintiff alleges that when Nucor discovered that steel sales it thought it was making to North Shore Supply were in fact going to MM Steel, Nucor employee Jerrell Vinson advised a North Shore Supply manager, Byron Cooper, that Nucor could not sell to MM Steel. *Id.* At a March 2012 meeting between Nucor and North Shore Supply about potentially expanding their business relationship, Vinson allegedly told Cooper that "any ongoing relationship between North Shore and MM Steel would be an 'issue' for Nucor." Compl. ¶¶ 77-79. In another discussion with Cooper, Vinson allegedly referred to an internal Nucor meeting regarding MM Steel. Compl. ¶ 80.

A higher-ranking Nucor employee, Jeff Whiteman, also allegedly told Cooper that "all eyes were on MM Steel"; "Mittal, JSW, Nucor, Reliance, Chapel . . . American Alloy, and Ranger" were "monitoring" MM Steel; that "the powers that be at Nucor would not sell steel" to MM Steel; that if North Shore Supply did any business with MM Steel or Hume or Schultz, Nucor would not do business with North Shore Supply; that MM Steel was also on other mills'

"radar" and no other mill would "support" it; that "higher ups at Nucor" had given him a "mandate" not to "support MM Steel"; and that "Reliance/Chapel, American Alloy, and Ranger Steel" could "cut off Plaintiff MM Steel's supply of steel." Compl. ¶ 81.

Defendant American Alloy also allegedly told North Shore Supply that if North Shore Supply did business with MM Steel, Hume, or Schultz, American Alloy would not do business with North Shore Supply and would pressure steel manufacturers not to do business with North Shore Supply. Compl. ¶ 83. A representative of Defendant Chapel attempted to contact the President of North Shore Supply, and North Shore Supply believes the attempted contacts were for the purpose of exerting "the same kind of pressure on it." Compl. ¶ 84.

North Shore Supply then told MM Steel "it is time to shut things down between them" because North Shore Supply was concerned about losing the mills' support. Compl. ¶ 85. Even though North Shore Supply thus did essentially the same thing that the Complaint accuses Nucor of doing -- declining to enter into a relationship with MM Steel because it did not want to jeopardize a more important business relationship with someone else -- the Complaint goes out of its way to emphasize that MM Steel has "nothing but praise and respect for Cooper and North Shore." Compl. ¶ 86.

As important as what the Complaint alleges is what it does *not* allege about Nucor:

- The Complaint does *not* allege that anyone at Nucor *ever* communicated with anyone at *any other defendant* about MM Steel, or for that matter about any subject at all.

- The Complaint does *not* allege that Nucor was aware of any alleged agreement between Reliance/Chapel and American Alloy, or was aware of any contacts or discussions between Reliance/Chapel and American Alloy about MM Steel.

- The Complaint does *not* allege that Nucor was aware of any alleged agreement between either Reliance/Chapel or American Alloy and any other steel mill.

- The Complaint does *not* allege that Nucor had any business relationship at all with American Alloy.

ARGUMENT AND AUTHORITIES

I. PLAINTIFF'S FEDERAL ANTITRUST CLAIM AGAINST NUCOR (COUNT 1) SHOULD BE DISMISSED.

The Sherman Act makes two fundamental distinctions that are central to this case and motion. The first is a "basic distinction between concerted and independent action." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Section 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints *effected by a contract, combination, or conspiracy*." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (internal quotes omitted) (emphasis added). In refusal-to-deal or "boycott" cases in particular, the Supreme Court has emphasized that "[a] manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto*, 465 U.S. at 761. As such, the critical threshold question in a § 1 case is whether the challenged conduct "stems from independent decision or from an agreement." *Twombly*, 467 U.S. at 553 (internal quotation marks omitted).

As exemplified in *Twombly*, to withstand a 12(b)(6) motion, a complaint alleging a Section 1 violation must contain "enough factual matter (taken as true) to suggest that *an agreement* was made" by the moving defendant. *Id.* at 556 (emphasis added). This requires far more than mere parallel conduct; such conduct must be supplemented with "context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent." *Id.* at 557.

If an agreement is shown, Section 1 of the Sherman Act makes a second major distinction: between "horizontal" and "vertical" agreements. "Restraints imposed by agreement

between *competitors* have traditionally been denominated as *horizontal* restraints, and those imposed by agreement between *firms at different levels of distribution* as *vertical* restraints." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988) (emphasis added); *see Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 223 n.2 (5th Cir. 2001); *Royal Drug Co. v. Group Life & Health Ins. Co.*, 737 F.2d 1433, 1436-37 (5th Cir. 1984). Thus, in the context of the steel industry, an agreement between steel manufacturers in competition with one another would be horizontal, and an agreement between steel distributors in competition with one another would be horizontal. But an agreement between a steel manufacturer and its customer, *e.g.*, a distributor, would be vertical.

The distinction between "horizontal" and "vertical" agreements is critical because it can determine which of two very different antitrust standards will be used to judge the agreement's lawfulness: the *per se* approach, or the Rule of Reason. Presumptively, "whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason," *Business Electronics*, 485 U.S. at 723, which requires the plaintiff "to prove that the conduct unreasonably restrains trade in light of actual market forces." *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 271 (5th Cir. 2008).

A few narrow types of agreements fall within "categories of *per se* unreasonableness -- conduct so pernicious and devoid of redeeming virtue that it is condemned without inquiry into the effect on the market in the particular case at hand." *Spectators'*, 253 F.3d at 223. However, the type of agreement alleged in this case, namely a group boycott, can only be deemed *per se* illegal if, among other conditions, it is "horizontal," *i.e.*, between direct competitors. *See, e.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998) ("precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements between direct competitors");

Spectators', 253 F.3d at 223 ("in order to bring its boycott claim within the *per se* rule, Spectators' must point to a horizontal conspiracy, in other words, a conspiracy between competitors, rather than a vertical conspiracy between firms at different levels of distribution"); *Royal Drug*, 737 F.2d at 1436 ("agreements [that] do not run between competitors" do "not constitute a *per se* illegal horizontal combination"). Even if a boycott agreement is "horizontal," that "does not necessarily mean that the agreement is *per se* unlawful." *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 414 (5th Cir. 2007).[1]

The Complaint prominently cites two cases -- *Klor's Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959), and *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941) -- that represent classic *horizontal* group boycotts. In *Fashion Originators' Guild*, 176 clothing manufacturers "combined among themselves" in a guild that created an elaborate "boycott program" denying supplies of clothing to retail stores that also sold knockoffs. 312 U.S. at 461. Likewise in *Klor's*, ten appliance manufacturers "conspired among themselves" not to do business with a particular retailer. 359 U.S. at 209 & n.2; *see NYNEX*, 525 U.S. at 135 (characterizing *Klor's* as "involv[ing] a horizontal agreement among . . . the appliance suppliers"); *Business Electronics*, 485 U.S. at 734 (same).

In contrast, when addressing claims alleging a *vertical* agreement, *i.e.*, an agreement between a supplier and customer, courts reject the *per se* approach and always "assess whether a combination restrains trade unreasonably by use of the 'rule of reason,' weighing all of the

[1] As the Fifth Circuit has explained, the applicability of the *per se* rule to a horizontal group boycott depends on several additional factors: "(1) whether the [defendants] hold a dominant position in the relevant market; (2) whether the [defendants] control access to an element necessary to enable [plaintiff] to compete; and (3) whether there exist plausible arguments concerning pro-competitive effects." *Tunica*, 496 F.3d at 414-15 (citing *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 296 (1985)). If an agreement is not horizontal in the first place, the agreement falls under the Rule of Reason for that reason alone and there is no need to reach these additional factors. *See id.* at 412 (horizontality is a "necessary precondition" for *per se* treatment).

circumstances of the case." *Spectators'*, 253 F.3d at 222. Thus, to state a Section 1 claim for an agreement covered by the Rule of Reason, it is crucial to allege, *inter alia*, a "relevant market" in which the defendant had "market power." *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 417-18 (5th Cir. 2010). The Rule of Reason controls even where multiple competitors are alleged to have each made similar vertical agreements with a common customer. *See Spectators'*, 253 F.3d at 224 (separate parallel vertical agreements do "not establish a horizontal combination" where there is "no evidence of the competitors agreeing among themselves"). Likewise, the Rule of Reason governs "even when . . . the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008).

Here, as discussed below, the allegations of the Complaint are insufficient to state a plausible claim that Nucor entered into *any* agreement -- horizontal or vertical -- with any other party.

A. The Complaint Fails to State a Claim Against Nucor For a Horizontal Agreement

As discussed, horizontal agreements are agreements *between direct competitors*. The only competitors of Nucor referenced in the Complaint are JSW and SSAB. Although the Complaint alleges that Nucor, JSW, and SSAB acted similarly by each declining to sell steel to MM Steel, it is absolutely devoid of any "context that raises a suggestion of a preceding agreement" between them. *See Twombly*, 550 U.S. at 557.

The Complaint merely states in conclusory terms that in addition to an alleged "horizontal agreement among Reliance/Chapel and American Alloy," there were "related agreements with and among co-conspirators, the steel mills JSW, Nucor, SSAB and perhaps

others." Compl. ¶ 18. But such "stray statements speak[ing] directly of agreement" are "merely legal conclusions resting on [other] allegations," which the Supreme Court has made clear should be disregarded. *Twombly*, 550 U.S. at 564 & n.9 (disregarding similar conclusory allegation that phone companies "engaged in a 'contract, combination or conspiracy' and agreed not to compete with one another"). Indeed, unlike the complaint in *Twombly*, which at least alleged direct interactions between competitors at trade association events but still failed to state a claim, *see id.* at 567, the Complaint here *does not even allege that Nucor ever communicated with JSW or SSAB.*

The Supreme Court held in *Twombly* that to support an inference of agreement between competitors, parallel conduct must be of a type that would be unlikely to occur absent an agreement, for example, "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason." *Id.* at 556 n.4. The alleged conduct by Nucor and the other manufacturers does not remotely rise to that level. The Complaint alleges that Reliance/Chapel was Nucor's "biggest customer," Compl. ¶ 81, and that Reliance/Chapel and/or American Alloy were also key customers of JSW and SSAB. With MM Steel embroiled in a dispute with Reliance/Chapel, it was plainly in Nucor's and the other manufacturers' legitimate independent interests not to antagonize their existing accounts by entering into a new business relationship with MM Steel. Any rational businessperson would do exactly the same, especially in an industry that "is all about relationships and meeting customer demands." Compl. ¶ 49.

Moreover, unlike a typical horizontal agreement like price-fixing, which only works if all the competitors join and know the others are joining, here the purpose Nucor allegedly sought to accomplish -- maintaining its own standing with its key customer -- would in no way depend on

any other manufacturer doing the same. If anything, Nucor would be better off if it were the only one among its competitors who was keeping a common customer happy. In short, as in *Twombly*, "there just was no need for joint encouragement" and "no reason to infer that the companies had agreed among themselves to do what was only natural anyway." *Twombly*, 550 U.S. at 566, 567.

The Complaint also does not allege that Nucor made the type of inexplicable *change* in its behavior that, in some other context and combined with other facts, might be suggestive of agreement. In *Twombly*, the Supreme Court rejected the inference that the defendant telephone companies' failure to compete in each other's historical territories resulted from an agreement, observing that the companies were simply maintaining the status quo that had existed before deregulation. *See id.* at 568 ("[t]he [companies] were born in that world [and] doubtless liked the world the way it was" and "a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing"). Similarly here, the Complaint alleges that Nucor's position was consistent throughout the relevant time period, negating any inference of agreement.

Although the Complaint alleges that a Nucor employee knew SSAB and JSW (and others) were not doing business with MM Steel, *see* Compl. ¶ 81, mere *awareness* of one's competitors' parallel action does not, as a matter of law, support an inference that the competitors *agreed with each other* to take that action. As the Supreme Court has emphasized time and again, "[e]ven *conscious* parallelism . . . is not in itself unlawful." *Twombly*, 550 U.S. at 553-54 (emphasis added; internal quotation marks omitted). The same paragraph in the Complaint also indicates awareness by the Nucor employee that *other* companies in the steel industry, neither named as defendants in this case nor alleged to have participated in any

agreement (*i.e.*, Mittal and Ranger), *also were declining to do business with MM Steel*. Of course, the allegation that companies *who were not involved in any alleged agreement* acted similarly to Nucor weighs heavily against any inference that Nucor's actions could only have resulted from an illegal agreement.

In a preemptive effort to distinguish *Twombly*, the Complaint argues that "[t]he evidence in this case goes far beyond the suggestion of 'mere parallel conduct that could just as well be independent action,'" and includes "*detailed allegations* of multiple meetings, agreements, and concerted acts." Compl. ¶ 19 (quoting *Twombly*, 550 U.S. at 566). But the problem for MM Steel is that no matter how "detailed" its allegations may be, the detail is not of the type that could "nudge[] MM Steel's claims" against Nucor "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Simply put, there are no non-conclusory allegations in the Complaint depicting any meeting or agreement between Nucor and any of its competitors. Plaintiff's claim against Nucor for a horizontal, *per se* illegal agreement therefore fails.[2]

[2] To the extent the Complaint seeks to impose liability for a horizontal agreement on Nucor based on a theory that Nucor somehow assisted an agreement between Reliance/Chapel and American Alloy (as opposed to an agreement with Nucor's own competitors), such a claim would be wholly without merit. Any supposed involvement by Nucor in such an agreement would not be "horizontal" because Reliance/Chapel and American Alloy are at "different levels of distribution" from Nucor. *Business Electronics*, 485 U.S. at 730; *accord Spectators'*, 253 F.3d at 224. Moreover, the Complaint does not allege that Nucor was even aware of any agreement between Reliance/Chapel and American Alloy. To the contrary, the Complaint alleges that Nucor declined to do business with MM Steel solely out of concern for its bilateral relationship with Reliance/Chapel, and does not allege that Nucor had anything to do with or cared about American Alloy. One cannot join a pre-existing unlawful conspiracy that one does not know exists. *See, e.g.*, *In re Vitamins Antitrust Litig.*, 320 F. Supp. 2d 1, 15 (D.D.C. 2004) (plaintiff must establish "the requisite knowledge of the conspiracy"). Further, any claim against Nucor for an alleged horizontal conspiracy would be fatally flawed because of the Complaint's omission of the additional elements needed for *per se* treatment of such a claim. *See Tunica*, 496 F.3d at 414; *supra* note 1.

B. The Complaint Fails to State a Claim Against Nucor For a Vertical Agreement

1. The Complaint Does Not Adequately Plead a Vertical Agreement

Nor does the Complaint state a plausible claim against Nucor for any *vertical* agreement *i.e.*, an agreement between Nucor and one of its customers, which would be judged under the Rule of Reason. For starters, the Complaint repeatedly emphasizes that MM Steel is proceeding on a *per se* theory of illegality relating to a *horizontal* agreement, and explicitly disclaims the need to make the showings that would be necessary to sustain a claim under the Rule of Reason. *See, e.g.*, Compl. ¶¶ 8, 17, 92.

In any event, even if MM Steel were to latch onto a Rule of Reason theory that it has until now disavowed, the allegations in the Complaint are insufficient to yield a plausible inference that Nucor entered into any vertical agreement. The Complaint does not allege that Nucor communicated with either Reliance/Chapel or American Alloy (and does not allege that Nucor had any business relationship with American Alloy at all). But even if it did, the Supreme Court has cautioned that because "manufacturers and distributors constantly must coordinate their activities," it is improper to infer a vertical *agreement* from such naturally occurring communications. *Monsanto*, 465 U.S. at 763-64.

Indeed, a seller can announce in advance that it will only sell to buyers who adhere to certain conditions (and a buyer can announce that it will only buy from sellers who adhere to conditions). A buyer's or seller's subsequent acquiescence in those conditions is insufficient as a matter of law to infer an agreement. *See United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *Monsanto*, 465 U.S. at 761. In *Monsanto*, for example, the Supreme Court held that a manufacturer's termination of one distributor in response to complaints from another distributor was *not* sufficient to infer that the termination resulted from an *agreement* between the

manufacturer and the complaining distributor. *See Monsanto*, 465 U.S. at 764; *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 19 (1st Cir. 2004) ("The raw fact that a distributor's actions are an attempt to pressure a manufacturer into terminating a distribution relationship with a price-cutting competitor is not enough . . . to show concerted action . . . .").

Here, the Complaint does not even allege that Reliance/Chapel complained or otherwise discussed MM Steel with Nucor. The facts alleged are equally consistent with Nucor making a common-sense judgment on its own that it would not be a good idea to embark on a new business relationship with individuals who Nucor's biggest customer had accused of breach of contract and theft of trade secrets. But even if MM Steel's allegations could support an inference that Reliance/Chapel contacted Nucor about MM Steel, such contact could not, as a matter of law, serve as the basis for inferring an *agreement* between Nucor and Reliance/Chapel. *See Monsanto*, 465 U.S. at 764.

For similar reasons, any claim the Complaint might be read to assert against Nucor for a vertical agreement with non-defendant North Shore Supply is also not plausible. The Complaint alleges that after catching MM Steel trying to buy Nucor steel surreptitiously by using North Shore Supply as a front, Nucor told North Shore Supply that a future "partnership" (Compl. ¶¶ 74-76) between MM Steel and North Shore Supply could be an "issue" affecting Nucor and North Shore Supply's own relationship. *See* Compl. ¶ 79; *see also id.* ¶¶ 80-81. North Shore Supply ultimately declined to proceed with MM Steel. As a matter of law, those alleged facts -- that Nucor effectively told North Shore Supply it had to choose between growing its relationship with Nucor and "partner[ing]" with MM Steel, and North Shore Supply chose Nucor -- are insufficient as a matter of law to infer any *agreement* between Nucor and North Shore Supply. *See Monsanto*, 465 U.S. at 764. To read the Complaint as including such a claim is also dubious

because it would make a co-conspirator and Sherman Act violator out of North Shore Supply, for which MM Steel professes to "have nothing but praise and respect." Compl. ¶ 86.

2. The Complaint Does Not Contain the Necessary Relevant Market or Market Power Allegations

The Complaint also fails to make out any viable claim for any vertical agreement for yet another reason. "To allege a vertical restraint claim sufficiently, a plaintiff must plausibly allege the defendant's market power." *Leegin*, 615 F.3d at 418-19; *accord, e.g., Apani Sw., Inc. v. Coca-Cola Enters., Inc.*, 300 F.3d 620, 624 (5th Cir. 2002); *Digital Equip. Corp. v. Uniq Digital Techs., Inc.*, 73 F.3d 756, 761 (7th Cir. 1996) ("[S]ubstantial market power is an indispensable ingredient of every claim under the Rule of Reason."). After all, vertical agreements "do not create concern unless the relevant entity has market power." *Leegin*, 615 F.3d at 418; *see also Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. Unit A July 1981) ("if a firm lacks market power, it cannot affect the price of its product, and thus any vertical restraint could not be anticompetitive"). To plead market power, the Complaint must, as an initial matter, "plausibly define the relevant product and geographic markets," with reference to product interchangeability and the cross elasticity of demand. *Leegin*, 615 F.3d at 417. When a plaintiff fails to define a relevant market with sufficient rigor or defines "too broad and vague" a market, dismissal is warranted. *See id*. at 417-18; *accord Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 746 (5th Cir. 2010); *Apani*, 300 F.3d at 628.

Here, the Complaint is devoid of any allegations that could sufficiently establish a relevant product or geographic market. Although the Complaint lists ten examples of "steel products" manufactured by Defendants, Compl. ¶ 42, and describes the "Gulf Coast [as] . . . a large market for buying and selling steel," *id.* ¶ 51, these facts do not come remotely near what is necessary to define a relevant market. *See Leegin*, 615 F.3d at 417 ("A proposed product market

must include all 'commodities reasonably interchangeable by consumers for the same purposes.'") (quoting *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956)). Nor are there allegations of any firm's market share or market power. These omissions are fatal to any Rule of Reason claim.

The Complaint appears, instead, to take the position that MM Steel's demise, in and of itself, constitutes an adverse impact in some unspecified relevant market. *See* Compl. ¶¶ 85, 114. However, the antitrust laws are "for the protection of competition not competitors." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (internal quotation marks omitted); *accord NYNEX*, 525 U.S. at 139 (a "simple allegation of harm" to a single firm "does not automatically show injury to competition"); *Leegin*, 615 F.3d at 419 (termination of a single retailer not an "anticompetitive effect"); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1109 (7th Cir. 1984) ("it is the function of § 1 to compensate the unfortunate only when their demise is accompanied by a *generalized injury to the market*") (emphasis added).

Although MM Steel alleges that it can no longer compete, it gives no indication that its withdrawal has materially reduced the overall level of competition in the metals service center sector. In *NYNEX*, the Supreme Court observed that "[t]he complaint itself . . . suggests the presence of other potential or actual competitors" that defeated the "likelihood of anti-competitive harm." 525 U.S. at 138-39. The same is true here: the Complaint itself identifies another competing service center in the Houston area (Compl. ¶¶ 77, 81), and a Reliance SEC filing quoted in the Complaint (¶ 50) counts 6,500 companies operating 9,800 metal service center locations in the United States in 2010, with the four largest service center companies

collectively possessing less than 10% market share.[3] As in *NYNEX*, these signs of a healthy, unconcentrated metals service industry with *thousands* of other competitors belie any possible inference that MM Steel's demise harmed competition. Without plausible allegations of a relevant market, market power or harm to competition, Plaintiff cannot possibly sustain a Rule of Reason § 1 claim.

II. PLAINTIFF'S STATE LAW CLAIMS AGAINST NUCOR (COUNTS 3-6) SHOULD BE DISMISSED.

Like MM Steel's federal antitrust claim, MM Steel's state-law claims against Nucor consist of nothing more than "labels and conclusions" and "formulaic recitation[s] of the elements of a cause of action." *Twombly*, 550 U.S. at 555. The Court should dismiss these claims as well.

Tortious Interference with Existing Contracts (Count 3). Under Texas law, a claim for tortious interference with existing contract requires, *first*, "the existence of a valid contract." *See Juliette Fowler Homes, Inc. v. Welch Assocs., Inc.*, 793 S.W.2d 660, 664 (Tex. 1990). An actual contract is required, and a mere business relationship will not suffice.[4] *Second*, the complaint must allege that the act of interference was willful and intentional. *See Juliette Fowler Homes*, 793 S.W.2d at 664. Moreover, the defendant must either intend to "effect a breach of the contract" or believe that "a breach [is] substantially certain to result." *Fluor Enters., Inc. v.*

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[3] *See* Reliance Steel & Aluminum Co., 10-K Annual Report for the fiscal year ended December 31, 2011 at 11, *available at* https://materials.proxyvote.com/Approved/759509/20120330/10K_119658/. This Court may take notice of the full contents of documents of which portions are quoted in the Complaint. *Twombly*, 550 U.S. at 567 n.13.

[4] *See, e.g., M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 775 (S.D. Tex. 2010) ("Without identifying an existing *contract* that is subject to interference, [plaintiff] has failed to plead adequately the first element of a tortious interference with contract claim.") (emphasis added); *Specialties of Mexico Inc. v. Masterfoods USA*, Civ. No. L-09-88, 2010 WL 2488031, at *9 (S.D. Tex. June 14, 2010) ("Without alleging an existing contract, only generally asserting an 'agreement,' Plaintiffs have failed to plead this claim with facts sufficient to move it from 'possible' to 'plausible,' as required under Rule 8 and *Twombly*.").

Conex Int'l Corp., 273 S.W.3d 426, 442, 443 (Tex. Ct. App. 2008). In contrast, merely "induc[ing] another to exercise his right to dissolve a contract at will or to terminate contractual relations on notice does not constitute tortious interference with contract under Texas law." *C.E. Servs., Inc. v. Control Data Corp.*, 759 F.2d 1241, 1248 (5th Cir. 1985); *accord Juliette Fowler Homes*, 793 S.W.3d at 666-67; *Kingsbery v. Phillips Petroleum Co.*, 315 S.W.2d 561, 576 (Tex. Ct. App. 1958). *Third*, that intentional act must be a proximate cause of plaintiff's damage, and *fourth*, actual damage or loss must have occurred. *Juliette Fowler Homes*, 793 S.W.2d at 664.

Here, the Complaint attempts to assert a tortious interference claim against Nucor based on two contracts: a contract with JSW, and a contract with North Shore Supply. As to the alleged JSW contract, the Complaint fails to allege that Nucor was even aware of any such contract. It also fails to allege that Nucor ever communicated with JSW about *anything*, let alone that Nucor ever did anything to interfere *intentionally* with any contractual obligations JSW allegedly owed to MM Steel.

As to North Shore Supply, the Complaint does not allege that there was ever any actual *contract* (as opposed to general business relationship) in place between North Shore and MM Steel, let alone a contract that Nucor knew about. To the contrary, North Shore Supply and MM Steel were in the process of "finalizing a memorandum of understanding regarding their partnership" when North Shore Supply decided not to proceed. Compl. ¶ 75. Nor are there any allegations that Nucor tried to persuade North Shore Supply to *breach* any such contract, or that North Shore Supply actually did commit a breach, as opposed to merely ending nascent contractual negotiations or permissibly terminating whatever contract may have existed. Read most favorably to Plaintiff, the Complaint alleges at most that Nucor essentially told North Shore Supply it had to choose between growing its business relationship with Nucor and the potential

"partnership" with MM Steel it was considering. Putting that choice to North Shore Supply does not by any stretch constitute willful inducement of North Shore Supply to breach a known contract.

Tortious Interference with Prospective Contracts (Count 4). In order to state a claim for tortious interference with a prospective contract under Texas law, a plaintiff must allege: (1) a reasonable probability that a contract would have been entered into; (2) that the defendant engaged in "independently tortious conduct that prevented the relationship from occurring"; and (3) that the defendant "committed the act with a conscious desire to prevent the relationship from occurring or knew that the interference was certain or substantially certain to occur." *Fluor*, 273 S.W.3d at 441; *see also Wal-Mart Stores, Inc. v. Sturges*, 52 S.W.3d 711, 726 (Tex. 2001) (requirement that the conduct be "independently tortious" means "[c]onduct that is merely 'sharp' or unfair is not actionable and cannot be the basis for an action for tortious interference with prospective relations").

MM Steel alleges that Nucor interfered with its potential "relationships with SSAB, Nucor, and third parties," as well as its alleged existing relationship with JSW. Compl. ¶ 105. But there is no allegation that Nucor either was aware that MM Steel was close to having any contract with SSAB or JSW, or communicated with SSAB or JSW, let alone that it took any specific action to subvert such a relationship.[5] Finally, MM Steel has not alleged any conduct by Nucor that was "independently tortious." The Court should therefore dismiss Count 4 as to Nucor.

[5] The Complaint's reference to unspecified "third parties" is far too vague to satisfy the pleading requirements established by *Twombly*. And because "a party cannot tortiously interfere with its own contract," *Holloway v. Skinner*, 898 S.W.2d 793, 796 (Tex. 1995), it is logically and legally impossible for Nucor to interfere with a business relationship MM Steel hoped to enter into with Nucor itself. *See Morgan Stanley Inc. v. Texas Oil Co.*, 958 S.W.2d 178, 179 (Tex. 1997) (applying same principle to interference with prospective business relations).

Business Disparagement (Count 5). A business disparagement claim requires (1) the publication of words by the defendant that disparage the plaintiff; (2) falsity of the statement; (3) malice; (4) a lack of privilege; and (5) the causation of special damages by the defendant. *Hurlbut v. Gulf Atl. Life Ins.*, 749 S.W.2d 762, 766 (Tex. 1987); *Chavers v. Morrow*, Civ. No. H-08-3286, 2010 WL 3447687, at *6 (S.D. Tex. Aug. 30, 2010) (Hoyt, J.).

This claim fails because MM Steel has not alleged that any statement by any Nucor employee was false. The only statements the Complaint alleges Nucor made were statements to North Shore Supply along the lines that Nucor could not or would not sell steel to MM Steel, that the potential "partnership" between North Shore Supply and MM Steel could be an "issue" if MM Steel wanted to keep doing business with Nucor, and that other mills were also unlikely to do business with MM Steel. *See* Compl. ¶¶ 73, 79, 80, 81. Far from alleging that any of these statements are *false*, the Complaint itself alleges -- under the standards of Fed. R. Civ. P. 11 -- those *very same facts* as the gravamen of *MM Steel's own claims* against Nucor and the other Defendants. The disparagement claim against Nucor must be dismissed.

Conspiracy (Count 6). In order to state a claim of civil conspiracy, a plaintiff must allege "(1) two or more people; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result." *Plotkin v. Joekel*, 304 S.W.3d 455, 488 (Tex. Ct. App. 2009) (citing *Tri v. J.T.T.*, 162 S.W.3d 552, 556 (Tex. 2005)); *Chavers*, 2010 WL 3447687, at *6. As stated above, MM Steel has failed sufficiently to allege an agreement (*i.e.*, a meeting of the minds) between Nucor and any other Defendant. *See supra* Section I. MM Steel also has failed to allege any unlawful act committed by Nucor in furtherance of "a preconceived plan and unity of design and purpose" as required under Texas law to sustain a civil conspiracy claim. *See Spectators' Commc'n Network*,

Inc. v. Colonial Country Club, 253 F.3d 215, 226 (5th Cir. 2001) (rejecting plaintiff's civil conspiracy claim where the defendant merely "had an intent to quit doing business with [plaintiff], rather than any design or thought of driving [plaintiff] out of business") (internal quotation marks omitted). Finally, since all of MM Steel's other claims are defective, Count 6 must be dismissed for that reason alone. *See Specialties of Mexico*, 2010 WL 2488031, at *11 (dismissing civil conspiracy claim under *Twombly* because civil conspiracy is "premised on an underlying tort" and no separate, independent tort was validly alleged).

CONCLUSION

For the foregoing reasons, the Court should dismiss all claims against Nucor with prejudice.

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