Nos. 12-1109, 12-1224

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH COURT

In re Sulfuric Acid Antitrust Litigation
Ohio Chemical Services et al.,
Plaintiffs-Appellants

v.

Falconbridge Ltd. et al.
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
Case No. 1:03-cv-4576
The Honorable James F. Holderman

COMBINED BRIEF OF DEFENDANTS-APPELLEES IN 12-1109 AND DEFENDANTS-CROSS-APPELLANTS IN 12-1224

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-1109, 12-1224

Short Caption: In re Sulfuric Acid Antitrust Litigation, appeal and cross appeal

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Noranda, Inc., Falconbridge Limited

Noranda and Falconbridge are now known as Xstrata Canada Corporation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Freeborn & Peters, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Xstrata PLC

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Xstrata PLC

Attorney's Signature: s/ David C. Gustman Date: February 8, 2012

Attorney's Printed Name: David C. Gustman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Case: 12-1109 Document: 8 Filed: 02/08/2012 Pages: 3

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

NorFalco LLC, n/k/a NorFalco Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Freeborn & Peters, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

NorFalco Finance Holdings, Inc., which is wholly owned by Xstrata Canada Corporation

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Xstrata Canada Corporation is wholly owned by Xstrata PLC

Attorney's Signature: s/ David C. Gustman Date: February 8, 2012

Attorney's Printed Name: David C. Gustman

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Koch Sulfur Products Company LLC, Koch Sulfur Products Company

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Howrey LLP; McDermott, Will & Emery; McLawhorn Law Offices, P.C.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Koch Industries, Inc.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Joel G. Chefitz Date: February 8, 2012

Attorney's Printed Name: Joel G. Chefitz

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Pressure Vessel Service, Inc.; PVS Chemicals, Inc. (Ohio); PVS Nolwood, Inc., PVS Chemical Solutions, Inc.,

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

The Mike Cox Law Firm PLLC; Dykema Gossett PLLC; Dickinson Wright PLLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Pressure Vessel Service, Inc., is the parent for the other PVS parties.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Michael A. Cox Date: February 8, 2012

Attorney's Printed Name: Michael A. Cox

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Intertrade Holdings, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Rock Fusco & Connelly, LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Michael P. Connelly Date: February 9, 2012

Attorney's Printed Name: Michael P. Connelly

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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JURISDICTIONAL STATEMENT

Plaintiffs' jurisdictional statement is complete and correct.

On January 25, 2012, Defendants timely filed their notice of conditional cross-appeal of the district court's determination to maintain class certification.[1] This cross-appeal need only be addressed if the court reverses the December 22, 2011 judgment. *Fields v. Smith*, 653 F.3d 550, 559 (7th Cir. 2011).

ISSUES FOR REVIEW

Plaintiffs' Appeal

1. Where Defendants established plausible procompetitive justifications for the challenged conduct, did the district court correctly conclude that the conduct would be judged under the presumptive Rule of Reason standard?

2. May the judgment also be affirmed because Plaintiffs' claims are time-barred?

Defendants' Conditional Cross-Appeal

Where the district court certified a class based upon the opinions of an expert that Plaintiffs later replaced, and Plaintiffs concede that the class is improper based upon their new expert's opinions, did the district court err by maintaining certification and refusing to consider Defendants' *Daubert* challenges?

STATEMENT OF THE CASE

This appeal is about whether to affirm the district court's ruling that the Rule of Reason standard applied at trial, which Plaintiffs concede is a question of law. It is

[1]The relevant orders are dated March 21, 2007 (granting motion to certify), April 11, 2007 and December 12, 2011 (denying motions to decertify).

not about whether a jury might find that the challenged conduct, in fact, violated the antitrust laws.

Plaintiffs, a class of sulfuric-acid purchasers between January 1, 1988 and January 16, 2003, challenge transactions dating back to 1988. They brought this case after the Canadian and U.S. governments issued subpoenas to some of the Defendants. (Neither government took any action against any defendant.) Plaintiffs admit that they decided to proceed under a *per se* theory, to the exclusion of the Rule of Reason, "shortly after" filing their complaint. (A79)

On May 5, 2004, Plaintiffs moved for class certification. (R.55) Three years later, Judge Coar granted the motion. (R.536) Defendants moved for decertification, partly because Plaintiffs had abandoned the expert upon whom they relied for class certification in favor of another whose theories were inconsistent with the class that Plaintiffs proposed in 2004 and Judge Coar certified in 2007. (R.537,539) Judge Coar summarily denied Defendants' motion. (R.540)

In July 2006, Defendants moved for summary judgment on several grounds. Among other things, Defendants sought rulings that the challenged conduct was subject to the Rule of Reason as a matter of law.[2] (R.419,427,435) Because Plaintiffs had eschewed analysis under the Rule of Reason and could prove no actual anticompetitive effects, Defendants argued that this would entitle them to summary judgment. Additionally, Defendants argued that Plaintiffs' claims were untimely, as they accrued more than four years before February 21, 2003, the first filing date. (R.425)

[2] Each defendant filed its own motion and joined those filed by co-defendants.

On September 24, 2010, the district court granted in part and denied in part Defendants' summary-judgment motions. (A1-50) Judge Coar held that the resale "zone contracts" between Falconbridge and its distributors were subject to the Rule of Reason, and "[s]ince Plaintiffs have eschewed rule of reason analysis, summary judgment on this issue… must be granted." (A40) Regarding the remaining challenged conduct, Judge Coar determined that the selection of the mode of analysis should be left for the jury, holding that "outstanding factual disputes preclude a decision at this point on the applicable legal rule in this case," and that at "this stage of the proceedings," it "is not this Court's task to determine whether Defendants' conduct would be subjected to the rule of reason if the facts are as they claim." (A29-30)

The court also denied Defendants' statute-of-limitations motion. Defendants, citing Supreme Court precedent, argued that the injury-accrual rule applied. The court, citing contrary language in *In re Copper Antitrust Litigation*, 436 F.3d 782 (7th Cir. 2006), applied the discovery rule. (A19)

On June 6, 2011, the case was reassigned to Chief Judge Holderman. (R.635) Defendants immediately renewed their class-decertification motion. (R.641) The court denied it on December 12, 2011. (R.786)

On August 22, 2011, Plaintiffs moved for class modification "consistent with the damages evidence of their trial experts." (R.695) The court denied the motion, noting that Plaintiffs knew the class was defined erroneously upon certification in

2007, and "intentionally decided not to provide that information to Judge Coar." (R.788, A68-69)

On November 14, 2011, Plaintiffs moved for reconsideration of the determination that the zone contracts were subject to the Rule of Reason, and argued that *all* of the challenged conduct was *per se* illegal. (R.751) Defendants responded that Judge Coar's decision regarding the zone contracts was correct, and moved under Federal Rule of Civil Procedure 16 for a determination of which mode of analysis would apply at the upcoming trial. (R.760) At a November 22 hearing, the court scheduled both motions for November 29 to give the court "a full chance to review it all." (R.767 at 4)

On that date, the court denied Plaintiffs' motion to reconsider and asked to hear from Plaintiffs' counsel regarding Defendants' motion. (A54-55) Plaintiffs' counsel responded that the issue "was briefed two times already," and argued that Judge Coar correctly ruled that factual issues precluded determination of which mode of analysis applied. (A55-56) Judge Holderman stated: "It became clear to me upon reviewing Judge Coar's opinion, applying the Seventh Circuit law as well as the Supreme Court law, that this is a case in which the 'rule of reason' analysis should be the analysis presented to a jury for its determination in connection with the conduct that is alleged to have been wrongful." (A58) Plaintiffs did not seek further briefing, but moved to certify the court's decision for interlocutory appeal. (R.783)

On December 13, the court denied Plaintiffs' motion (R.788), but invited them to submit special interrogatories to address their concerns. (A71-72) Rejecting this opportunity, Plaintiffs' counsel admitted that "we cannot try a 'rule of reason' case" (A73), and requested that judgment be entered against the class. (A77) The court entered judgment against Plaintiffs, by agreement, on December 22, 2011. (A105-08) Plaintiffs appeal that judgment. Defendants conditionally cross-appeal the determination to maintain the certified class.

STATEMENT OF FACTS

Too frequently to be catalogued, Plaintiffs' factual account violates Circuit Rule 28, which requires record support for each fact, and "a fair summary without argument or comment."

Below are undisputed facts described in Judge Coar's summary judgment opinion (cited at A1-50) and additional evidence bearing upon the plausibility of Defendants' procompetitive justifications and this appeal.

Background: 1985-1988

Sulfuric acid is a corrosive chemical used in many industrial processes. (A4) It is costly to transport. (A4-5) Demand for acid is not always responsive to its price, but is mostly driven by the demand for the products in which it is used. (A4-5)

Acid is generally produced either voluntarily, by burning elemental sulfur, or involuntarily, as a byproduct from smelting ores into metals. (A4) Smelting produces sulfur-containing gases, which, if not recaptured, produce acid rain. (A4-5)

Defendant Noranda was a Canadian mining company and involuntary producer of smelter acid.[3] (A3) Smelting, not acid, is Noranda's core business. (A5) In the

[3] Noranda and Falconbridge merged in 2005 and are now known as Xstrata Canada.

1980s, Canadian environmental legislation designed to prevent acid rain forced smelters to capture increasing amounts of acid. (A5)

In 1987, *The Wall Street Journal* reported Noranda's "plans to build a $125 million (Canadian) sulfuric acid plant... in an effort to clean up a major source of acid rain pollution." (SA304)[4] The plant was expected to produce hundreds of thousands of additional tons annually. (A5)

Because there are no commercially-viable methods for disposing of or storing acid, involuntary producers have no reasonable alternative to selling it. (A4) A smelter is forced to shut down if acid inventories exceed storage capacity, and the costs of a forced shutdown are "quite high." (A4)

Acid supply in eastern Canada, where Noranda's smelters were located, exceeded demand. (A5) Although fertilizer producers in Florida were large consumers of acid, transport costs were very high due to their distance from the smelters.[5] (SA90,131) Consultants at Manderson Associates were hired to evaluate market outlets for Noranda's increased production. (A5)

The Manderson report remarked on the legislation requiring Noranda to build its plant, and that "[t]he Quebec Government and Noranda jointly decided to retain a qualified outside consultant to make a preliminary investigation of the market opportunities which will likely exist" for the resulting acid. (SA37)

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[4] References to SA-- are to Defendants' short appendix and supplemental appendix.

[5] Plaintiffs ignore this in suggesting (at 6) that Noranda found the Florida fertilizer market "unattractive" because of "competition." Fertilizer plants often have sulfur-burning capacity on-site to supply acid directly with little to no additional transportation cost. (SA131)

Manderson observed that netbacks to the U.S. market from the new plant in eastern Canada would be lower than those of "most (and possibly all) other locations that produce and market smelter acid in the U.S." (A5) A "netback" is the return on a sale, net of freight costs. (A5) Given the low netbacks and danger of antidumping complaints by U.S. producers, Manderson concluded:

> [T]he most prudent marketing approach would be for Noranda to work with existing U.S. producers of discretionary (sulphur-based) acid who, because of declining margins or other reasons, are willing to shut or throttle down their existing acid production in exchange for purchasing smelter acid. DuPont recently followed this tactic in the Chicago market - by closing its local plant… and becoming a marketer of smelter acid from Arizona.[6] Such a move helps to preserve the existing price structure, because the existing local marketer(s) would continue not only to maintain contact with the customer(s) but also to provide delivery and related services.

(A5-6)

In October 1985, the Canadian federal government solicited a meeting with Noranda and Manderson to discuss Noranda's marketing strategy and whether any "producers-sellers" were "likely candidates" for the arrangements discussed in the report. (A6)

For smelters, the marginal cost of producing acid is essentially zero. (R428¶6) For voluntary producers, marginal costs include the costs of sulfur and operating the plant. (A4) Noranda knew that certain U.S. voluntary producers had old, inefficient plants. (A6) Accordingly, Noranda proposed a strategy of selling acid to voluntary producers at a price *lower* than the producer's manufacturing cost.[7] (A6)

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[6] Notably, Plaintiffs do not challenge this shutdown as illegal.

[7]Plaintiffs quote misleadingly (at 7) from a memo articulating Noranda's "displacement by agreement" strategy, omitting key language reflecting Noranda's concern that antidumping

At the time, Noranda had no sales force capable of selling acid to U.S. customers on a large scale. (SA90) Noranda also lacked U.S. brand recognition and customer service facilities. (SA95,127) Noranda "didn't know who the customers were," "didn't know who the carriers were," and "didn't know who the terminals were really." (SA82) And because most acid was produced and sold by chemical companies whose customers purchased a variety of chemical products, Noranda would not be able to attain "important economies" achieved by those one-stop shops. (SA120)

Noranda also lacked the infrastructure to move its increased volume into the U.S. market on its own.[8] (SA87) Noranda could deliver acid by rail or vessel (SA81-82), but could not transport acid from rail points by truck; another reason it could not sell directly to smaller-volume U.S. customers. (SA87-88,91)

On the other hand, the Defendant distributors had existing sales and distribution infrastructure, as well as customer relationships, that made them ideal distributors. A Noranda employee explained: "Our business model was to move large quantities of volume through resellers because they had the customers, they had the customer knowledge, they had the infrastructure, they had the carriers…

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laws would keep their cheap acid from the U.S. (A169) Because U.S. antitrust and antidumping laws "operate at odds" with one another, foreign suppliers like Noranda often find themselves between the proverbial rock and a hard place. Christopher Barbuto, *Toward Convergence of Antitrust and Trade Law*, 62 Fordham L. Rev. 2047, 2048 (1994) ("while antitrust protects consumers by promoting vigorous competition between producers, [antidumping] laws protect domestic industry"). Defendants' expert economist details the effect of antidumping concerns in this case at SA175-177.

[8] Plaintiffs purport to dispute this (at 16), but rely chiefly upon language from a Noranda marketing video they date "in the early to mid-1990s," *after* the relevant time frame. The referenced language is consistent with Noranda's use of *distributors* to reach the market via rail and truck.

they had the sales. And that's why we sold to resellers. Because we had a lot of product to move very quickly that came on stream back in the early '90s." (SA83)

A Boliden employee explained that selling to a regional sulfur-burner like his company "was a good decision," because "[w]e had customer contacts," and "were very well liked." (SA101-02) A Delta employee noted that his company "had the relationship with the customers," and the ability to provide technical services "made us a desirable supplier." (SA107)

As Noranda's new plant was beginning operations, publications remarked on industry changes. In January 1989, one reported that "[m]any" voluntary producers "scaled down or closed production over the past three years, and producers see this as a long-term trend." (SA305-06) August 1989 brought a report that "Canadian smelter acid is gradually displacing virgin acid, closing US plants," and a prediction that "the additional tonnage [Noranda is] bringing on next year has to take a toll on sulfur burners." (*Id.*)

Between 1985 and 2003, forty-one plants were closed or idled, and five reduced capacity, none of which are associated with a distribution relationship with Noranda, or challenged here. (SA174)

Distribution Agreements

Between 1988 and 1992, Noranda entered distribution agreements with PVS, Delta, Boliden and DuPont, but not Koch. It is undisputed that, during that time, prices decreased from the abundance of smelter acid in the marketplace. (A5)

PVS-Copley

PVS operated a sulfur-burner in Copley, Ohio. (A6). A PVS executive testified that, in 1987, PVS "was going through a decision-making mode, 'Do we keep a losing plant operational?…[T]he basic rule of capitalism is you need to produce a product for less money than you sell it for, and we were producing it at a higher cost than what we were able to obtain in the marketplace, so we were losing money." (R.432, Ex.10 at 32-33) He explained: "It's a very marginal operation at best, and there are options out there… and we should look at long-term entering into a decision whether we should continue to produce or whether we should buy product." (*Id.* at 35)

Before entering discussions with Noranda, PVS conducted an independent make-or-buy analysis for Copley. (A6; R.432, Ex.15 ¶¶8-11) As a result, PVS decided to stop manufacturing acid at Copley and purchase its requirements elsewhere. (A6)

PVS considered five potential suppliers (A6), and ultimately approached Noranda. (SA342) In March 1988, a PVS executive wrote regarding the decision to become a Noranda distributor:

> As I understand the market circumstances in Ohio, our choices are not between running the plant or proceeding with the unit train proposal.[9] Rather, they are apparently between proceeding with the unit train proposal or gradually shutting down the plant and getting out of the sulfuric acid market in Ohio. Apparently, the Noranda acid is destined for the Ohio market, and if we don't control it, someone else will. The latter would apparently result in depressed prices and make it uneconomical to operate the plant.

(A6-7)

[9]Noranda compensated PVS for investing in a unit-train unloading facility to accommodate Noranda's acid. (SA343-44)

That month, PVS contracted with Noranda to purchase about 60,000 tons of acid annually. (A7) It is undisputed that this was 10,000 *more* tons than PVS actually produced in 1987. (SA344) Copley's shutdown and the PVS-Noranda deal were reported in several publications contemporaneously, and into the early 1990s. (SA307-08)

PVS-Bay City

PVS acquired an old sulfur-burning plant in Bay City, Michigan in 1976 to supply one principal customer. (A7) When it lost that customer, Bay City's principal client became PVS's own Detroit facility about 100 miles south. (A7) The additional freight costs combined with the plant's age and inefficiency made continued production at Bay City economically unsound. (A7)

In 1990, PVS conducted a formal make-or-buy analysis for Bay City. (A7; SA345) It is undisputed that the analysis favored buying. (A7) In July 1990, a PVS executive wrote of the Bay City shutdown:

> This decision is the result of several years of struggling with the economics of a non-integrated sulfur burning acid plant vs. the cost of manufacturing at our own integrated facilities and the unit train purchase economics from the various people in the smelter business. The economics have clearly supported this move for some time.

(SA346)

On August 1, 1990, PVS closed Bay City and contracted with Noranda to buy acid for its Detroit facility. (SA110; A7) *Fertecon,* an industry publication, reported contemporaneously that "[i]t is believed that PVS is considering closing its... Bay City... plant, with the tonnage being replaced by incremental acid from Noranda's Horne smelter, the latest in a series of similar deals." (SA313) In 1991, *Fertecon* reported that PVS's "interests have shifted, in line with market trends, from being a producer with five plants to now a distributor role in concert with smelters, now having only two plants open at Chicago and Buffalo." (*Id.*)

Delta-Searsport

Delta had an acid-burning facility in Searsport, Maine. (A7) In the 1980s, when its sales out-paced its production capability, Delta began buying acid for resale from third-parties like Noranda. (A7)

A Delta employee described the Searsport facility as "very small" and "inefficient." (R.417, Ex.2, 8-10) By 1977, environmental problems requiring capital improvements were drawing attention from state officials. (A7; SA291-92) A Delta executive explained that compliance would have cost "millions." (SA108) Defendants' environmental expert estimated costs of $1.7-$4.8 million. (R.417, Ex.21 at 1) In September 1985, Delta's general manager wrote to officials that "[m]odifying our sulfuric acid plants would be an economic hardship," and, if it were required, Delta "would probably conclude that we should discontinue sulfuric acid manufacture, [and] convert our business to being a terminal for Canadian acid." (R.417¶14, Ex.18)

Facing these costs, Delta performed a make-or-buy analysis (A7), and determined that it was more economical to buy. (R417¶18, Ex.2,6)

Delta negotiated its distribution agreement with Noranda for more than a year. (SA295-96) The Searsport facility closed in 1988. (A8) In October 1989, Delta contracted with Noranda for the purchase of Searsport's "total requirement of sulphuric acid." (A8)

By then, the deal was public. In reporting the Noranda/PVS-Copley deal in 1988, *Fertecon* anticipated that a "similar arrangement seems likely with Delta, whose Searsport... plant could be closed." (SA306,309)

Defendants presented evidence that the Delta contract *increased* the total supply of acid in the marketplace (R.417, Ex.2 at 27-28,41-42), and that substituting Noranda's lower-cost product for higher-cost voluntary acid enabled Delta to compete in the Maine market. (R.417, Ex.2 at 28-29) Plaintiffs dispute these conclusions, but not the fact that once Delta began purchasing its requirements from Noranda, Delta's sales increased. (SA297)

Boliden

Defendant Falconbridge was also a Canadian mining company and involuntary acid producer. (A3) In 1991, Falconbridge appointed its affiliate, Noranda, agent for acid sales.[10] (A9-10)

Boliden had a sulfur-burning plant in Copperhill, Tennessee, and considerable infrastructure and expertise in marketing acid in the southeastern U.S. (A14) Boliden also resold smelter acid. (SA104) A Boliden executive testified:

> [W]e were able to supply that marketplace from many different directions, and that gave customers a very high degree of security to place their business with us. So, consequently… if there was more acid needed, Copperhill could go in there and fill the bill, and they could make more acid and supply that. So, yeah, Copperhill was a swing producer or a fly wheel, if you will. We tried to sell as much as we could.

(*Id.*)

[10]As Judge Coar noted, Plaintiffs do not challenge the agency arrangement (A49), which includes the joint pooling of acid by Noranda and Falconbridge. Judge Coar observed that between 1989-2003, Noranda owned between 46.3% and 59.5% of Falconbridge, and in 2005 they merged. (A9)

In 1992, Boliden contracted with Noranda to distribute Falconbridge acid. (A14-15) Falconbridge would pay freight costs and pay a "commission" on Boliden's sales. (A15) The so-called "cutback commission" was designed to increase Boliden's margins so Boliden would buy Falconbridge's acid rather than make it. (A213-14,228-29) Falconbridge received the price the customer paid, less Boliden's commission (A15), and sometimes had to accept negative netbacks. (SA285-86) Boliden, however, was insulated from market fluctuations because it received its commission regardless of the price to the consumer. (A15) Through 1998, Copperhill maintained acid production levels roughly as high or higher than in 1991.[11] (SA173)

The Noranda-Boliden relationship was publicized in contemporaneous industry press. (SA314-18) *Chemical Marketing Reporter* noted in January 1991 that "Boliden can already bring in 500,000 tons from Noranda," and "[t]hey don't need Tennessee's [Copperhill] production." (SA315) In 1995, *Fertecon* noted that "Boliden now essentially acts as sales agent for all Noranda's acid in the southern tier of the U.S." (SA314)

DuPont-Grasselli

DuPont was a sulfur-burner and also resold acid produced by others. (SA332) One of its plants, Grasselli, operated in an expensive labor, tax and regulatory market in New Jersey. (*Id.*) By 1991, Grasselli produced only two products, oleum and sulfuric acid (its lowest-margin product). (SA332-33) The Civil War era plant

[11]Plaintiffs imply (at 11-12) that Noranda and Boliden "agreed" that Copperhill would produce 200,000 tons per year. The cited document, however, establishes that there were no agreements regarding operating levels. (A226)

was DuPont's weakest and required extensive capital investment for continued operations. (SA332,334)

Ultimately, Grasselli lost its key customer for oleum, leaving acid as its only product. (SA333) DuPont conducted an assessment of Grasselli's competitive position (SA74-75), and decided to stop manufacturing acid. (SA74,97-99) It is undisputed that it was costing DuPont more to produce acid at Grasselli than it could recoup through sales. (SA333-34) DuPont decided to convert Grasselli to a terminal for distributing smelter acid. (SA335)

In Spring 1992, Grasselli stopped making acid, and DuPont entered an agreement with Noranda to supply Grasselli with acid for resale. (SA336) It is undisputed that, if DuPont had not decided to convert Grasselli to a terminal, it would have closed the facility altogether. (SA335)

The closure and deal with Noranda were reported multiple times in the industry press. (SA306-07,310-11) In May 1992, *Chemical Marketing Reporter* stated:

> The face of the sulfuric acid market in North America has changed dramatically over the last 10 years with the increased production of smelter acid and subsequent displacement of virgin supplies….The latest casualty in the survival battle was the shut down of [DuPont's]... Grasselli plant.... [Grasselli] will stock acid produced by Canadian metal smelter Noranda Inc. This follows a long string of closures beginning in the mid-1980's.

(SA306-07,310-11)

Marsulex

Before Noranda became its sales agent in 1991, Falconbridge sold all of its acid through CIL, Marsulex's predecessor. (SA283-84) Although Plaintiffs represent (at 13) that by 1991 Falconbridge paid CIL a fee to "have [its Sayreville acid-producing plant] stop production," the document actually shows that Falconbridge paid to maintain the plant "in a state of readiness," in case Falconbridge could not deliver the contracted quantity of acid. (A140).

Koch

Koch operated sulfur-burning plants in the U.S. until exiting the business by 2002. (A8) Koch also bought acid for resale from several sources (A8), and internally discussed and compared its cost of production to its cost of purchasing from others. (A9) Production at Koch's plants fluctuated every year at each of its facilities (A8), based upon Koch's make-or-buy decision. (SA280-81)

Koch closed two plants, Acme (North Carolina) and DeSoto (Kansas). (A9) Koch acquired Acme in 1990 for its contract with International Paper. (SA279) When the contract ended in 1991, the plant closed. (*Id.*) DeSoto was leased from the U.S. Army, and needed significant investment to remain operational. (SA279-80) In June 1999, Koch closed DeSoto after the Army gave notice it would soon terminate the lease. (*Id.*)

"Revenue Sharing"

Some of Noranda's distribution agreements included "revenue-sharing" provisions, which were mechanisms for adjusting the wholesale price of acid based on market fluctuations. For example, the agreement under which Noranda sold acid to PVS-Copley includes the following provision, captioned "Revenue Sharing":

> Effective May 1, 1989 and for each three month period thereafter, the Base Price shall be adjusted by 40% of the average increase or 50% of the average decrease in Net Back achieved by PVS Chemicals in the previous calendar quarter, above or below the base Net Back achieved by PVS Chemicals during the last calendar quarter of 1988.

(A147) A Noranda executive explained these provisions:

> Revenue sharing... was used for some long-term contracts, which was a way to reflect changes in the marketplace while allowing a contractual relationship to survive through the ups and downs of the marketplace. Someone who was going to buy acid did not want to suffer the risk of purchasing acid and then seeing a market decline and they would have to resell acid at a loss.

(SA93)

Distributors, Not Noranda/Falconbridge, Set Resale Prices

Noranda and Falconbridge sold acid to distributors who then independently priced the acid sold to their customers. (*See, e.g.,* SA105) "The negotiations by customer were conducted by [the distributor]."[12] (*Id.*)

Zone Contracts

As of 1995, Falconbridge's acid was sold primarily through Boliden and Marsulex. (A15; SA287) Noranda, Falconbridge's sales agent, became dissatisfied with Marsulex's performance (A15) and concerned that it could force a shutdown of

[12] Despite labeling this all along as an output-restriction case, Plaintiffs now argue in their statement of "facts" that Defendants fixed prices horizontally. Their citations do not support this. For example, Plaintiffs say (at 14) that "Noranda told [GAC] that Noranda 'wants to be more involved on market price setting in the future.'" The cited document reflects Noranda's consideration of agency-type relationships with distributors to allow such involvement. But the distributors rejected this approach. Plaintiffs then assert, that "[i]mmediately after... the U.S. defendants simultaneously announced price increases by uniform amounts." Not so. The document (A244) summarizes varying price increases announced by *many* producers, including some not sued here, over a *four-month* period, with increases ranging from $3-$10. Ultimately, the record reflects at most Noranda monitoring the resale price of its *own* acid, not acid manufactured by others. (SA146) Such communications reflect a vertical effort to get the best prices from its distributors and encourage them to get the best prices in the market. *See Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 762 (1984) ("A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market.").

Falconbridge's smelters. (SA288) Consequently, Falconbridge's U.S. distribution was restructured to incorporate *more* distributors. (A15; SA287)

Noranda divided the northeastern U.S. into sixteen zones and invited prequalified distributors to bid for Falconbridge acid to be *delivered* within those zones. (A15) Noranda offered this opportunity to distributors it believed had efficiencies, infrastructure, and goodwill for marketing in different locations. (A15) Criteria also included safety history, sales experience, and product knowledge. (A15)

Effective January 1996, Noranda entered zone contracts for Falconbridge acid with Marsulex, PVS, Boliden, and DuPont (A15), but not Defendants Koch and GAC/Delta. The contracts did not prevent the distributors from selling Falconbridge acid wherever they wished, and contained no restrictions whatsoever relating to other suppliers. (A15; SA315-16) Plaintiffs do not even claim that the zone contracts eliminated competition between Noranda/Falconbridge distributors.[13] (SA289)

In 1995, *Fertecon* twice reported Noranda's plan to have Falconbridge acid sold in "defined geographic areas" by selected distributors. (SA317-18) Similarly, *Chemical Marketing Reporter* reported Falconbridge's dissatisfaction with Marsulex, and Noranda's plan to "redirect" some acid through other distributors. (SA318) *Fertecon* reported again in 1998: "Four years ago Noranda made a major

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[13] Plaintiffs seize upon a document (at 54) supposedly showing that Noranda/Falconbridge and Boliden jointly agreed to allocate Marsulex's territory, calling it "expressly 'horizontal.'" The document is irrelevant to the challenged zone contracts, pre-dating them by four years. (A224-25) Regardless, discussions between Noranda/Falconbridge and Boliden regarding the sale of Noranda/Falconbridge acid are plainly *vertical*.

shift in its acid marketing when four regional distributors were appointed for its sales into the US market." (SA318)

Joint Venture

In the late 1990s, after years of selling through multiple distributors as discussed above, Noranda sought to change its distribution system. (SA338-39) Noranda believed that forming a joint venture with a single distributor would reduce distribution costs and increase certainty that their acid would be sold. (A10)

Noranda evaluated several potential candidates for their environmental and safety standards, distribution expertise, infrastructure, and market access. (A10) Still concerned about a possible antidumping action, Noranda also considered whether a potential partner could alleviate that threat. (A10) DuPont received the highest overall ranking.[14] (A10)

Noranda hoped to achieve numerous efficiencies through a joint venture with DuPont, including savings on freight and flexible sourcing from plants in multiple locations. (A10)

DuPont saw the joint venture as a way to grow its business. (A10) DuPont stated in a contemporaneous internal memorandum that its intent was to:

- Provide customers with a "greater value offering" by combining the marketing potential of two respected industry players "in a way that reduces costs and increases operational efficiencies."

[14] Seeking to tar the JV's "origin" as "anti-competitive" (at 21), Plaintiffs distort internal Noranda documents, omitting language inconsistent with their story. For example, an internal Noranda memorandum evaluating a direct-marketing approach says: "Assume price war. *Greater dumping risk.*" (A362) Plaintiffs omit the italicized language. They also ignore that an antidumping action against low-priced Canadian smelter acid would drive it from the market or increase its price. The documents Plaintiffs condemn as reflecting an alleged anticompetitive intent are at least as consistent with antidumping concerns.

- "Position the joint venture to serve a larger domestic and international market than either partner could serve alone."

(SA40,340)

To retain confidentiality of each party's competitively-sensitive information, the parties hired Deloitte & Touche to evaluate potential economic benefits. (A11) Deloitte estimated the value gained by selling directly rather than through distributors, calculating an average savings of $9.49/short-ton for direct shipments and $5.95 through terminals. (A11)

In April 1998, the companies issued a press release (SA319), and the formation of the Noranda DuPont LLC ("JV") was widely publicized, from industry journals to *The Wall Street Journal*. (SA319-23) The *Journal* reported:

> Noranda Inc. and DuPont Co. said they will form Noranda DuPont LLC, a venture to market, transport, and distribute sulfuric acid in North America.... Under the agreement, the 50/50 venture will buy and resell to customers all of the North American output of the sulfuric acid operations of DuPont, Noranda, and Noranda's affiliate, Falconbridge Ltd., the companies said.

(SA320)

That summer, they entered an LLC agreement under which each received a fifty-percent interest in exchange for transferring certain assets. (A11) The agreement provides that the JV's purpose "is to engage in the business of purchasing, transporting, distributing, marketing and selling Acid produced in the [U.S.] and Canada." (A11) It required the JV to "do all things necessary to maintain its... existence separate and apart from each Member," including holding regular meetings, and maintaining separate books, records, and bank accounts. (A11) The

JV board included voting representatives from Noranda and DuPont, and a non-voting Falconbridge representative. (A12)

Profits and losses would be split by Noranda and DuPont. (A11) Falconbridge would participate in Noranda's share of any distributions from, or contributions to, the JV, based on its pro-rata supply of acid. (A12)

Noranda, Falconbridge and DuPont entered separate acid supply agreements with the JV. (A13) Noranda and Falconbridge agreed to sell 100% of their productions to the JV. (A13) DuPont contracted to sell its entire production, except for internal consumption. (A13) Each retained the right to increase or decrease the amount of acid available for delivery to the JV, and to acquire or construct additional production facilities. (A13) A 1998 article about the JV in *Sulphur* magazine quoted a DuPont executive: "We can, if needed, utilize our ability to adjust production rates at our plants which will allow us to coordinate shipments from multiple ship points for our customers." (SA323)

DuPont assigned its leases for railcars, barges and tank-trucks. (A12) Noranda and Falconbridge contributed over 2,000 railcars, leases, and other assets. (A12; SA77,85,273) Noranda and DuPont each agreed to advance the JV up to $2 million for operating costs.[15] (A11)

[15]Plaintiffs misrepresent (at 18) as "fact" that the partners contributed only "a combined total of $10,000" to the JV. As reflected in Judge Coar's opinion, Plaintiffs stipulated that (1) the partners "proposed to 'assign certain agreements to [the JV], including… reseller agreements, railcar leases, terminal agreements, vessel charter parties, barge leases and truck destination agreements, and to transfer certain other assets'" (A11), (2) the partners "each agreed to advance the [JV] up to $2 million to cover cash deficits" (A11), and (3) the JV "had a variety of leases assigned to it by involved parties," including "for railcars, barges and tank trucks used to transport…acid" (A12) Plaintiffs falsely state (at 19) that the JV's

The JV contracted with DuPont for use of its sales force, technological support, customer-support infrastructure, railcars, and customer contacts, and overall logistic and distributional experience, and other services. (A12) Similarly, the JV contracted with Noranda for logistical and transportation-related services, including rate negotiations with carriers. (A12)

The JV leased offices in Pennsylvania. (A13) The partners contributed manpower by "seconding" employees. (A12) This allowed the JV employees to preserve their benefits from their respective principals (A12), while providing the JV the benefit of their industry experience. Seconded JV employees from Noranda and Falconbridge had experience in acid sales, transportation, logistics and management. (A12) Seconded employees from DuPont had marketing and sales expertise. (A12-13) The JV paid for its seconded employees' salaries and benefits. (A12) It is undisputed that the job of the seconded employees, "first and foremost," was to look out for the JV's best interest.[16] (A12)

CFO testified that the JV "had no assets on its books." In fact, the accountant's testimony involved only "capitalizable assets" from an accounting perspective. She explained that the JV "had current assets of accounts receivable and inventory," "cash," and assets "that don't from accounting purpose end up on a financial statement, like leases and things like that." (A462-63)

[16]Plaintiffs ignore this in mischaracterizing a document (A393) to suggest that the JV received "daily direction" from its parents. The document reflects only that the JV's managers came *from* its parents.

After formation, the JV began operations by servicing contracts assigned by its principals and new contracts beginning January 1999.[17] (A13) The JV independently entered contracts and set the resale price of all of its acid.[18] (A13)

The JV negotiated favorable rail and transportation contracts and successfully lowered costs. (A13) Defendants showed that the JV's ability to acquire large quantities of acid from DuPont's sulfur-burners *and* Noranda/Falconbridge's smelters allowed it to supply larger customers that previously could not purchase their requirements from a single supplier. (SA274) Supply was less likely to be interrupted by strikes or maintenance shutdowns. (SA78-79) The JV could transport acid more efficiently due to the increased number of production locations and terminals. (SA275) By reducing costs paid to distributors, the JV reduced its marginal marketing costs. (*Id.*)

Additionally, because DuPont's national sales force handled an "unusually broad product line," customers benefitted from "one-stop shopping," *i.e.*, centralized purchasing of various chemical products. (SA265,274,266)

The JV competed with other distributors for business not previously subject to competition. (A13) Contemporaneous publications reported that the JV's emergence

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[17]Plaintiffs erroneously argue (at 19-20) that the partners took steps to avoid Hart-Scott-Rodino scrutiny. At the time of its formation the JV, as an *LLC*, was exempt from HSR reporting requirements because its board members were employees, officers or directors of its owners. *See* F.T.C. Formal Interpretation 15, 6 Trade Reg. Rep. (CCH) ¶ 42,475, at 42,609, n.4 (March 23, 2001).

[18]This is undisputed. (A13) Accordingly, Plaintiffs misstate the record in asserting (at 18) that the JV sold its acid "at a price established by the three partners collectively."

was expected to result in increased competition and lower prices, and in fact did so. (SA46-47)

Documents in the files of other alleged "co-conspirators" reflect that the JV competed aggressively with them and lowered prices. For example, alleged co-conspirator Koch wrote in February 1999 that PVS had "indicated that the JV is lowering prices by $8-10/ton." (A13) Alleged co-conspirator PVS complained that JV was "leaving a path of destruction in [its] wake," as [it] had "not picked up any business without decreasing the pricing at least $10-$15 per ton to the customer, and the threat of [its] participation is causing others to significantly reduce pricing in an effort to maintain." (SA69) Alleged co-conspirator GAC wrote: "In old days, [JV] thought that distributors were getting $10 per ton. [JV] aiming for getting $5.00 per ton so have been accused by others of ruining the market." (SA71) Alleged co-conspirator Marsulex was "complaining that Noranda DuPont's pricing tactics were 'predatory,'" and that a customer "indicated that the savings [he] would gain by going with the JV exceeded their wildest expectations."[19] (SA72)

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[19]Plaintiffs claim (at 23-25) that the JV entered collusive agreements with the same "co-conspirators" that were bemoaning the JV's aggressive competition. The evidence does not support this. Although Plaintiffs say that Marsulex offered "supply demand balancing," it is undisputed that the JV and Marsulex never did business. (SA328) Plaintiffs declare (at 23-24) that the *JV* calculated "the carrot to PVS for shutting down most of their plant." But the cited documents show the JV calculating a price to sell acid to PVS *below* its production cost. (A355-56) A separate document indicates that PVS *previously* shutdown a production unit in Chicago in favor of buying from *Noranda*, not the JV. (A350) Koch internally discussed reducing production at certain plants to buy the JV's cheaper acid (A422), but there is no evidence that this information was shared with the JV or made the basis of any supply agreement. Plaintiffs' cited documents contain no offer from Koch to mothball any plant. Rather, they reflect Koch's intent to keep its plants running in case of supply disruptions. (A337,340-41)

It is undisputed that, on average, acid prices fell after the JV's formation.[20] (A13) Even *Plaintiff* Independent Chemical testified that it was difficult to compete with the JV during the alleged conspiracy period because of the JV's "lower price points." (R.733, Ex.8 at 16,20-21)

Temporary Inventory Bubble

In early 1999, shortly after beginning operations, the JV experienced a short-term inventory bubble. (A14) Several factors contributed, including severe weather conditions preventing shipments from Canada, vigorous competition by other distributors (including alleged co-conspirators) trying to lock up customers in response to the JV's formation, and an oversupply of acid, particularly from overseas. (A14)

In response, the JV secured additional storage, unloaded and returned railcars as expeditiously as possible, and lowered prices to make additional sales (A14), but were still unable to alleviate rising inventories. Rather than voluntarily producing acid that the JV could not store and sell, DuPont temporarily reduced production at one or, at most, two, plants over a two-month period by about 25,000 tons.[21] (A14) The short-term problem was resolved (A14), and Noranda and Falconbridge avoided

[20]Plaintiffs make much of the JV announcing a $5/ton price increase in August 1999 (at 27), but there is no evidence the attempted increase was successful. The undisputed evidence shows prices *fell* overall during the JV period. (A13)

[21] Plaintiffs falsely state that Noranda "directed" DuPont to "burn as little sulfur as possible." Their cited "evidence" is an email from a DuPont executive who sat on the JV's board. (R.405, Ex. 6 at 245-46) Although the executive discusses the short-term inventory problem, he makes no reference to any "directive" from Noranda (A415), nor does the record reflect one.

smelter shutdowns. Defendants presented evidence that such shutdowns, had they occurred, would have removed, at minimum, 51,000 tons from the market. (SA277)

In May 2001, dissatisfied with the financial results and concerned about liabilities associated with transporting three million tons of a hazardous chemical, DuPont withdrew from the JV. (A14)

Economic Analysis

Stanford economist Robert Hall evaluated all of the challenged conduct in this case and performed an economic examination of the U.S. sulfuric-acid markets, as well as the market impact of the challenged conduct. (SA113-261) Dr. Hall found "no evidence of meaningful market power" (SA163),[22] and concluded that "none of the challenged conduct elevated the price of sulfuric acid." (SA117)

Hall observes that Noranda used distributors in part "to lessen the likelihood of an anti-dumping action" and to "avoid the perceived inefficiency of - and smelter shutdown risk from - creating a sales force and storage-distribution infrastructure in the [U.S.] to duplicate these assets already in the hands of the distributors." (SA178) His detailed economic analysis of each challenged shutdown showed that

[22]Plaintiffs misstate the record when they say (at 16) that *their* "economist supervised a study of defendants' share of the industrial/merchant market." Judge Coar concluded that their expert "did not determine the geographic market or markets at issue" here. (A29) In fact, their expert testified repeatedly that he did *nothing* to analyze markets. (SA330-31) Instead, Plaintiffs rely upon unverified statistics from 1996, long after the make-buy agreements took place, covering a broad geographic area they claim Defendants "targeted." Their statistics say nothing about the producers and geographic areas to which customers could turn for acid, and nothing about whether firms outside this "targeted" area could enter quickly in response to a price increase. The "geographic market" is not comprised of the region "where the seller attempts to sell its product," but rather "the area where his customers would look to buy such a product." *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1027 (10th Cir. 2002). Further, high market share alone does not prove market power, especially if the plaintiff cannot also establish impossibility of entry. *See, e.g., Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995).

"the cause... was the unfavorable cost of producing sulfuric acid, either standing alone or as compared to the alternative of purchasing acid from Noranda." (SA116) Hall explained that the "driving force" of the challenged shutdowns "was that the continued operation of the burners in the presence of the smelter acid would cost the owners money relative to shutting down." (SA142) "In other words," he explained, "the owners would have chosen to shut down or cut back anyway." (*Id.*) He further explained that requirements contracts, like those Noranda entered with PVS, DuPont and Delta, are efficient and benefit consumers. (SA143) He found no patterns of price increases following the challenged shutdowns. (SA174)

Regarding the zone contracts, Hall explains that "modern economic antitrust analysis views territorial assignments as potentially efficiency-enhancing." (SA181) He also noted the efficiency of Noranda's competitive process in awarding the contracts. (*Id.*)

Hall found the JV had "substantive, beneficial economic functions," and was "unambiguously good for sulfuric acid customers in the [U.S.]." (SA117) Together, "Noranda and DuPont could accomplish the marketing, selling, distribution, and customer services more efficiently through the joint venture than as separate sellers." (SA150) Quantifying these efficiencies, Hall found that "customers of the joint venture benefited by at least $3 per ton relative to [customers of other sellers]," and that prices during the JV period were $3 per ton lower than prices before or after the JV. (SA151,195) He determined that "[t]he only substantive effect of the [JV] was to reduce Noranda's costs," which benefited consumers by reducing prices by about eight percent. (SA193)

SUMMARY OF ARGUMENT

The Rule of Reason is the presumptive mode of antitrust analysis and applies whenever a defendant offers plausible arguments that challenged conduct is procompetitive. Here, the district court found that Defendants had offered "volumes" of evidentiary support for their argument that the challenged conduct was procompetitive. Accordingly, it correctly ruled that the case must be tried under the Rule of Reason, which requires plaintiff to *prove* the anticompetitive effects of challenged conduct. Plaintiffs concede that they cannot do so.

The judgment may also be affirmed because Plaintiffs' claims are time-barred. The district court's denial of summary judgment on this basis resulted from its application of the discovery rule, rather than the injury-accrual rule that applies in antitrust cases. Further, Plaintiffs cannot show that Defendants engaged in fraudulent concealment or that they exercised due diligence.

ARGUMENT

Plaintiffs' Appeal

I. The Court Correctly Held That Rule Of Reason Applies Here.

"The selection of a mode of antitrust analysis is a question of law over which [this court] exercise[s] plenary review." *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 829 n.7 (3d Cir. 2010).

A. The Rule of Reason is the presumptive standard.

The Sherman Act prohibits only "unreasonable" restraints of trade. *See Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007). A restraint is "unreasonable" if its competitive harms outweigh its benefits. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

The "prevailing standard" for determining whether a restraint, on balance, harms competition is the Rule of Reason. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). Its application is "presumptive[]." *Texaco Inc. v. Dagher,* 547 U.S. 1, 5 (2006).

With experience, the courts developed a "short-cut" for certain restraints that were found to be always, or almost always, anticompetitive under the Rule of Reason. Such "manifestly anticompetitive" conduct, *i.e.,* conduct that has a "pernicious" effect without "any redeeming virtue," is condemned as "*per se*" illegal without the need to weigh its effects or possible justifications. *Sylvania*, 433 U.S. at 50. *See also Leegin*, 551 U.S. at 886 (*per se* condemnation appropriate "only if courts can predict with confidence that [restraint] would be invalidated in all or almost all instances under the rule of reason"). Few restraints qualify.[23]

The Rule of Reason fairly puts a plaintiff to its proof and invites the jury to "weigh[] all of the circumstances" in deciding whether conduct "should be prohibited as imposing an unreasonable restraint on competition." *Sylvania*, 433 U.S. at 49. Factors include information about the relevant industry, the restraint's history, nature and effect, and whether the defendants have market power. *Leegin*, 551 U.S. at 885-86. Ultimately, the jury decides whether a restraint's anticompetitive effects outweigh its procompetitive benefits.

B. Departure from the Rule of Reason must be based on demonstrable economic effects, not formalistic line-drawing.

In *Sylvania*, the Court held that any departure from the Rule of Reason must be based on demonstrable economic effects rather than "formalistic line drawing." 433 U.S. at 58-59. The Court explained this concept in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979) (*"BMI"*).

There, competing owners of copyrighted music formed associations to license the sale of their individual compositions. *Id.* at 4-6. The associations sold a license for users to own the entire repertoire of all members for a set fee. *Id.* The plaintiffs labeled this *per se* illegal price-fixing. The Second Circuit agreed. *Id.* at 6.

The Supreme Court reversed. It acknowledged that the conduct was literally price-fixing. But explaining that "easy labels do not always supply ready answers,"

[23]The Supreme Court has consistently narrowed *per se* applicability to safeguard conduct that may have legitimate procompetitive benefits, most recently in *Leegin*, 551 U.S. 877 (vertical price-fixing agreements subject to Rule of Reason).

the Court found the literal approach alone did not establish that the practice is "plainly anticompetitive," and "very likely without redeeming virtue." *Id.* at 8-9. "Literalness," the Court noted, "is overly simplistic and often overbroad." *Id.* at 9. The question is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output… or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Id.* at 19-20 (citations omitted).

The Court considered that the challenged practice developed from the practical, real-world needs of a marketplace with thousands of users and millions of compositions. *Id.* at 20. Responding to these needs, the erstwhile competitors integrated their sales, monitoring and copyright-enforcement activities. The result was substantially lowered costs, benefiting sellers and buyers. *Id.* at 21. Although the conduct was *literally* price-fixing, the Court determined the Rule of Reason nonetheless applied.[24]

Thus, even where a plaintiff labels conduct as categorically *per se*, some analysis is needed to determine whether the Rule of Reason applies. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) ("*Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct.");*Generac Corp. v. Caterpillar Inc.*, 172

[24] Plaintiffs dismiss *BMI* as a "new product" case. Not so. In *NCAA*, 468 U.S. at 103, the Court described *BMI* as "squarely hold[ing] that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." *See also Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (describing *BMI* as "assess[ing] under the Rule of Reason horizontal agreements that also involve cooperation among rivals that might produce larger output and more desirable products").

F.3d 971, 977 (7th Cir. 1999) ("The Supreme Court has made it clear for some time now that we should not throw labels like *per se* around loosely, without some appreciation for the economic arrangement we are evaluating.").

C. If the defendant offers a plausible argument that the challenged conduct is procompetitive, the Rule of Reason applies.

In assessing whether the Rule of Reason applies, courts ask whether there are plausible arguments that the challenged conduct is procompetitive. If there are, the Rule of Reason applies. *See Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (noting that practices condemned under *per se* approach "were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive"); *Am. Needle, Inc. v. N.F.L.*, 130 S. Ct. 2201, 2207, 2217 (2010) (holding Rule of Reason applied to joint venture between teams to market jointly their separately-owned assets where defendants showed plausible procompetitive justification of "maintaining a competitive balance"). *See also Deutscher,* 610 F.3d at 833 ("[Plaintiffs] misapprehend the reasonableness analysis. Once a defendant comes forward with plausible procompetitive justification… the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis."); *M.L.B. Prop., Inc. v. Salvino, Inc.*, 542 F.3d 290, 337 (2d Cir. 2008) (Sotomayor, J., concurring) (noting that where defendant argued that "price fixing" restraints achieve procompetitive benefits, court must determine whether they should "nevertheless be reviewed under a rule of reason" in light of proffered benefits).

The reasoning is obvious: "When a defendant advances plausible arguments that a practice enhances overall efficiency and makes markets more competitive, per se treatment is inappropriate, and the rule of reason applies," because such arguments "make us unable to conclude the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote." *Paladin Assocs., Inc. v. Mont. Power Co.*, 328 F.3d 1145, 1155 n.8 (9th Cir. 2003).

It follows that, when determining the mode of analysis, the court does not decide whether, on balance, the facts support or refute the defendant's proffered justifications. That question is reserved for the jury under the Rule of Reason. The threshold legal question is simply whether the proffered justifications are "plausible." By definition, a justification is "plausible" if it is "superficially fair, reasonable, or valuable, but often specious," "superficially pleasing or persuasive," and "appearing worthy of belief."[25] It is an arguable explanation that may or may *not* hold up when all the facts are in. *See Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 778 (1999) (noting that Rule of Reason applies even where "restrictions might in the final analysis be anticompetitive"). So long as the proffered justification is "not implausible," the Rule of Reason applies.[26] *Id.* at 775.

[25]Webster's New Collegiate Dictionary 873 (9th ed. 1981).

[26]Plaintiffs ignore this, arguing (at 27) of the JV that 'no efficiencies were *proved*." This is false, and beside the point. The question is whether the JV was "arguably" procompetitive at formation. *See Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d 761, 776 (8th Cir. 2004) ("At this juncture, we cannot and need not determine whether defendants' alleged restraint actually had procompetitive effects…. [W]hen determining whether to apply the rule of reason analysis…the issue is not whether the restrictions *were* procompetitive, but whether they *could be*.") (emphasis in original).

Polk Brothers, Inc. v. Forest City Enterprises, Inc., 776 F.2d 185 (7th Cir. 1985), is instructive. The district court condemned as *per se* illegal an agreement not to compete by horizontal competitors. The defendant appealed, arguing the agreement was potentially procompetitive. This court held that the relevant question was whether the restraint "*arguably*" promoted enterprise "*at the time it was adopted*":

> A court must ask whether an agreement promoted enterprise and productivity at the time it was adopted. If it arguably did, then the court must apply the Rule of Reason to make a more discriminating assessment.

Id. at 189. Finding the restraint "at least potentially beneficial to consumers," the court concluded that "[t]he Rule of Reason therefore applies." *Id.* at 190.

D. There are plausible procompetitive justifications for all of the challenged conduct.

As here, the plaintiffs in *Polk Brothers*, *BMI* and other cases all alleged *per se* violations. The courts in those cases nevertheless determined the Rule of Reason applied, not because the *plaintiffs'* proof was unconvincing, but because the defendants offered plausible procompetitive justifications.

Plaintiffs here focus entirely on their own proposed proofs of an alleged conspiracy, ignoring the critical issue of whether Defendants have offered evidence of plausible procompetitive justifications. Many of their inflammatory "statements of fact" are outright misrepresentations or argumentative extrapolation from documentary fragments. This court has noted that "little weight" should be attached to such documents because "though they sometimes dazzle a jury, they cast only a dim light on what ought to be the central question in an antitrust case: actual or probable anticompetitive effect." *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 744 F.2d 588, 595-96 (7th Cir. 1984).

The current posture of this case is that none of Plaintiffs' flamboyant allegations informs this court's determination as to whether the Rule of Reason is the appropriate mode of analysis. That determination depends on Defendants' evidence and Defendants' plausible procompetitive justifications, not Plaintiffs' argumentative allegations.

"Shutdown agreements"[27]

Professor Hall analyzed each challenged shutdown and concluded the cause was the unfavorable cost of production, either standing alone or compared to the cost of buying from Noranda. Due to industry changes, the voluntary producers would have shutdown anyway. But by buying cheaper smelter acid, a voluntary producer could continue using its distribution infrastructure and employing its sales personnel. The smelter, in turn, benefited from the marketing expertise and customer relationships of an established reseller, rather than building such an operation from scratch. This arrangement could increase total output in the local market by allowing a distributor with the physical infrastructure and customer relationships to sell a lower-cost product efficiently in the U.S. industrial markets.

Plaintiffs flaunt (at 7) language from a 1989 memorandum regarding Noranda's strategy of "displacement by agreement," as though it reflects anticompetitive

[27] Defendants also contend that these make-buy transactions were not "agreements" to restrain trade within the meaning of Section 1, but the result of independent business decisions by the voluntary producers to buy Noranda's lower-cost acid rather than make it. Regardless, the Rule of Reason applies for the reasons discussed herein.

intent. It does not. Rather, it reflects the economic reality that byproduct smelter acid and voluntary acid cannot coexist in a market where total volume exceeds demand. Demand in the industrial marketplace is driven mostly by demand for the product for which acid is an input. Acid's demand is not always responsive to its price. As a corrosive chemical, it is difficult to store. A paper mill, for example, will buy only what it needs to produce the quantity of paper demanded by the market. Storage difficulties make it unlikely, if not impossible, to stock acid when prices are low. As such, if the mill were purchasing Delta's voluntary acid, and Noranda entered the market with byproduct acid, the mill would not purchase twice its needs. Only one producer would prevail. And the involuntary producer, which must sell its acid to keep its smelter operating, will drive its price below the voluntary producers' cost, even if it means selling at a loss. A rational voluntary producer would cease production and buy cheap smelter acid, thereby keeping its distribution infrastructure in place. The 1989 memo, and Noranda's marketing strategy, reflect these economic truths. (*See also* SA119,133,141-44)

Further, the distributor would choose to buy acid at a price less than the cost of making it. This court has recognized such decisions as legitimate: "Firms constantly face 'make or buy' decisions -- that is, decisions whether to purchase a good or service in the market or to produce it internally -- and ordinarily the decision, whichever way it goes, raises no antitrust concerns." *Univ. Life Ins. Co. of Am. v. Unimarc Ltd.*, 699 F.2d 846, 852 (7th Cir. 1999).

The firm's decision to stop producing would assure the smelter that the voluntary-producer-turned-reseller would be a committed distributor. Such assurances were critical to Noranda, which risked a smelter shutdown if its acid were not sold. Otherwise, Noranda might have been forced to adopt less-efficient solutions. The resellers would be assured of Noranda's supply commitment. Hall explained that requirements contracts tailor the "amount supplied to the actual demand of the purchaser while giving as much assurance of stable demand to the seller." (SA143) "End-user customers benefit from efficient relations between their immediate suppliers (distributors) and the primary suppliers upstream," and "[n]o antitrust harm to customers arises from these efficient contracts." (*Id.*)

Joint venture

As Plaintiffs admitted below (A10), Noranda anticipated numerous efficiencies from the JV. Among other things, as discussed, the JV was expected to:

- transport acid more efficiently due to increased source locations;
- eliminate distributors, lowering sales costs;
- leverage DuPont's sales force and product line, offering consumers centralized purchasing of multiple products;
- provide Noranda critical certainty that its byproduct acid would be sold; and
- enjoy lower marginal costs so that customers would benefit from cheaper acid.

Professor Hall found the JV to be "unambiguously good" for U.S. customers. (SA117) Together, "Noranda and DuPont could accomplish the marketing, selling, distribution, and customer services more efficiently through the joint venture than as separate sellers." (SA150)

Plaintiffs assert (at 25) that DuPont dramatically decreased its production in connection with the JV. This is a fabrication. Pointing to a chart captioned "market profile" (A281), Plaintiffs proclaim that DuPont "*produced*" 1.5 million tons of acid in 1997, and then point to a different document (A381) to "prove" DuPont produced far less in 1998. On its face, however, the 1997 figure represents DuPont's total "market profile," which includes acid bought from others for resale, in addition to acid DuPont produced voluntarily. Other than its early-1999 temporary reduction in response to the short-term inventory bubble, the record does not show that DuPont reduced its production in connection with the JV.

Further, Plaintiffs' assertion (at 43) that the JV "began to commit serious *per se* violations of the antitrust laws" finds no support in the record. The JV never did business with Marsulex, and there is simply no evidence it "convinc[ed]" PVS and Koch "to eliminate substantial production."[28]

Zone contracts

The antitrust laws have long recognized that vertical non-price restraints like the zone contracts may stimulate interbrand competition for a manufacturer's goods

[28] *See supra* n.19. Any make-or-buy agreements would, regardless, be evaluated under the Rule of Reason.

by protecting the distributor from intrabrand competition.[29] *Sylvania*, 433 U.S. at 55 (summarizing procompetitive benefits of vertical restraints). Further, as Professor Hall explained, Noranda's competitive bid process allowed it to "harness the power of competition" to "induc[e] the most favorable performance from its distributors." (SA181)

E. Judge Coar recognized Defendants' justifications were plausible.

At summary judgment, Defendants presented Judge Coar with evidence of the foregoing plausible procompetitive justifications. He found the zone contracts subject to the Rule of Reason. But he declined to decide which mode of analysis applied to Plaintiffs' challenge to the distributor "shutdown" agreements and JV. This was *not* because he found Defendants' procompetitive justifications to be implausible. Rather, Judge Coar denied summary judgment because he thought a reasonable juror might be unconvinced, in view of Plaintiffs' competing evidence. He made the following observations:

- "Summary judgment on this point is inappropriate because whether Defendants' justifications are true is a question of fact." (A32)
- "Since a reasonable juror might find no redeemable, overarching purpose to Defendants' arrangements, a dispute remains as to whether the shutdowns were ancillary, and thus whether Defendants' alleged violations should receive *per se* treatment or rule of reason analysis." (A37)
- "To be sure, Defendants have produced ample evidence indicating that, at least on paper, the joint venture aimed to legitimately pair up the

[29]Plaintiffs purport to dispute (at 54-55) whether *sales* were restricted within zones, citing a lone document (A253) commenting that "only Marsulex can sell Falconbridge acid in this zone." The context was another buyer asking for delivery within Marsulex's assigned territory. The remark related to where Falconbridge could *ship* acid, not where it could thereafter be resold. Regardless, even *restrictive* vertical territorial restraints are subject to the Rule of Reason. *Sylvania*, 433 U.S. at 58.

> complementary strengths of constituent firms in a single entity. Plaintiffs' evidence, on the other hand, is relatively slim. Still, the Court cannot conclusively say that the evidence is insufficient to shake a reasonable juror's faith in Defendants' representations." (A43)

Yet, when discussing the legal question of which mode of analysis applied, Judge Coar acknowledged that Defendants had offered "volumes" of evidentiary support for their argument that all of the challenged conduct was procompetitive. He also expressly found that the "cumulative weight" of this evidence "may certainly" result in a verdict for *Defendants*:

> Defendants generally argue that the unique nature of the sulfuric acid industry, the complexity of Defendants' relationships, and the procompetitive effects of their actions prevent the Court from holding that their actions would always or almost always tend to restrict competition and decrease output, so as to warrant *per se* treatment. Defendants offer volumes of evidentiary support, including economic data, expert testimony, and industry publications, to show that their methods were not only ancillary to a plainly lawful purpose, but also necessary for the benefit of the consumer. These justifications, Defendants reason, contradict a finding that their conduct was 'manifestly anticompetitive.'
>
> The cumulative weight of Defendants' evidence may certainly bear fruit at trial, when a factfinder must decide whether Plaintiffs have satisfied their burden of proof.

(A30) (citations omitted).

A judicial determination that Defendants' procompetitive justifications "may certainly bear fruit at trial," means they must be *plausible*. The Rule of Reason therefore applies as a matter of law, inviting Plaintiffs to convince a jury that the restraints *actually* damaged competition. The *per se* shortcut, which would exclude all such evidence at trial, cannot be used.

Regarding the JV, the court acknowledged that Defendants produced "ample evidence" of procompetitive justifications that outweighed Plaintiffs' "relatively slim" evidence. (A43) Where there is "ample evidence" of plausible procompetitive justifications, the challenge must be tried under the Rule of Reason.

In denying summary judgment, Judge Coar erroneously conflated the legal question of whether the Rule of Reason applied with the ultimate jury function of balancing anticompetitive effects against procompetitive benefits.[30] Applying the restrictive summary-judgment standard to the mode of analysis determination, Judge Coar refused to decide this legal questsion because "a factfinder resolving all disputes in Plaintiffs' favor could conclude that the alleged shutdown agreements did not support some higher goal." (A36) This was error, and Judge Holderman corrected the error based on his review of the evidence of plausible justifications in the record.

F. Plaintiffs cannot even show the challenged conduct fits a per se category.

"A plaintiff seeking application of the *per se* rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Nw. Wholesale Stationers*, 472 U.S. at 298. Because Defendants have offered plausible procompetitive justifications for the challenged conduct, the Rule of Reason applies whether or not the *per se* label might otherwise

[30]The conflation is evident. Were this a *per se* case, as Plaintiffs erroneously insist, the jury would not consider the "volumes" of evidence that the court found "may certainly bear fruit at trial." "In cases where the per se rule applies…the only inquiry is whether there was an agreement to restrain trade, since the unreasonableness of the restraint is presumed." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1455 n.28 (11th Cir. 1991).

seem apt. The court need go no further. But *per se* condemnation is also inapplicable because none of the conduct fits the *per se* mold in the first place.

The zone contracts are the sharpest example. Judge Coar concluded that "[a]t best, Plaintiffs' evidence suggests a vertical market allocation arrangement." (A40) Vertical territorial restrictions, of course, are categorically subject to the Rule of Reason, not the *per se* rule. *Sylvania*, 433 U.S. at 58. Judge Coar concluded that the Rule of Reason applied and "[n]o reasonable juror could find otherwise." (A40)

Joint ventures likewise fall outside the *per se* realm. *See Texaco,* 547 U.S. at 6, n.1 (because joint ventures often result in "numerous synergies and cost efficiencies," the Rule of Reason applies). In fact, U.S. regulatory agencies apply rule-of-reason analysis where competitors form "joint venture[s]" to perform functions including "distribution," and "marketing," "thereby benefit[ing], or potentially benefit[ing], consumers by expanding output, reducing price, or enhancing quality, service, or innovation." *See* F.T.C. and the U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations among Competitors* (April 2000) at 8, http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

Finally, the "shutdown" transactions, too, defy neat categorization such that *per se* condemnation is inapplicable. Where unique attributes distinguish a restraint from those traditionally categorized as *per se* illegal, summary condemnation is inappropriate, whether or not the defendant offers procompetitive justifications. *See California ex rel. Harris v. Safeway, Inc.*, 651 F.3d 1118, 1134-37 (9th Cir. 2011) (refusing to condemn horizontal market allocation as *per se* illegal where restraint had "distinguishing attributes" that prevented "easy label[ing]"). That is the case here.

First, the Rule of Reason is appropriate for business relationships with horizontal *and* vertical elements. *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir. 2006) (noting that "[v]ertical restraints are generally not *per se* violations of the Sherman Act, even where a distributor and manufacturer also compete at the distribution level, *i.e.,* have some form of horizontal relationship"). As Professor Hall noted, the make-buy agreements arose from a "vertical issue - Noranda's need for U.S. distribution which it was not well-suited to providing itself on a vertically integrated basis." (SA179)

Second, no U.S. court had yet considered the competitive effects accompanying the displacement of a product with an essentially costless byproduct, where there is no evidence of output reduction. "A particular course of conduct will not be termed a *per se* violation… until the courts have had considerable experience with that type of conduct and application of the rule of reason has inevitably resulted in a finding of anticompetitive effects." *Bunker Ramo Corp. v. United Bus. Forms, Inc.*, 713 F.2d 1272, 1284 (7th Cir. 1983).

Third, to the extent this conduct has undergone any judicial analysis, it weighs against summary condemnation. A Canadian court examined a transaction materially identical to what Plaintiffs allege and found *no* undue lessening of competition. *R. v. Allied Chem. Can. Ltd.*, [1975] 6 W.W.R. 481. (SA14-35) Applying the Canadian antitrust-law version of the Rule of Reason by examining the market and competitive factors (including declining prices), the court concluded that an agreement by a voluntary producer to halt production and purchase acid from a smelter with an oversupply "had no resulting undue effect by lessening competition." (SA33)

Fourth, that the Canadian government knew of Noranda's strategy and was involved in its conception also "cautions against" *per se* invalidation. *See BMI*, 441 U.S. at 12-16 (governmental involvement is "unique indicator" that practice "may have redeeming competitive virtues"). Here, the Quebec government co-sponsored a study that recommended Noranda distribute its involuntary acid in the U.S. industrial corridor through existing voluntary producers willing to distribute smelter acid rather than produce it at higher costs. The Canadian federal government solicited a meeting to discuss these issues. Such facts, together with the Canadian court's decision in *Allied Chemical*, and Noranda's demonstrable concern about antidumping actions, further show that the these arrangements cannot be quickly condemned as naked restraints.

In sum, the unique features of these arrangements make their competitive effects uncertain and the *per se* shortcut inappropriate. The Rule of Reason applies.

G. Plaintiffs' formalistic labeling of Defendants' conduct is insufficient.

In contrast with the analysis described above, Plaintiffs want the court to apply the *per se* shortcut, accepting their narrow and self-serving characterization of the underlying facts and the same formalistic line-drawing condemned in *Sylvania* and *BMI*. Pointing to evidence that certain producers ceased production in favor of becoming distributors, they cry "output restraint," ignoring that the production of other "conspirators" was simultaneously skyrocketing.[31] The inescapable problem for Plaintiffs is that "departure from the rule-of-reason standard must be based upon demonstrable economic effect." *Sylvania*, 433 U.S. at 58-59.

Such demonstrable effects are absent here. Even with respect to the shutdowns, Plaintiffs' economist admitted that the competitive effects cannot be readily determined. Rather, his conclusion is that, absent further analysis, "you can't know" whether the transaction would "lead to no change in price or a reduction in price because it was efficient... to shut down." (SA268) Of course, if "you can't know" whether an agreement likely has anticompetitive effects on its face, then it is not *per se* unlawful. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1108 (7th Cir. 1984) (*per se* rule applies only if practice "facially" appears to be "always or almost always" anticompetitive). Plaintiffs' economist simply assumed the agreements resulted in reduced total output without analyzing the question. (SA112)

Plaintiffs are dismissive of Defendants' procompetitive justifications, sometimes pointing to *other* evidence that they believe might lead a jury to conclude that Defendants are wrong. Plaintiffs miss the point.[32] After all, they could have

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[31] As such, *United States v. Andreas*, 216 F.3d 645 (7th Cir. 2000) does not apply here. *Andreas* involved a classic cartel in which competing producers agreed to reduce the worldwide output of lysine. There were no plausible procompetitive justifications. Here, there are, and *no* evidence that total output in any market was reduced. The court in *Andreas* also noted that even horizontal production agreements may be procompetitive and subject to rule-of-reason analysis. *Id.* at 668.

[32]Plaintiffs' focus on Defendants' alleged motives is telling. Motive is relevant only under the Rule of Reason. *See Chicago Bd. of Trade*, 246 U.S. at 238 (noting that "reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant"

presented such evidence to a jury under the Rule of Reason. Were Plaintiffs correct that Defendants' conduct was so *obviously* anticompetitive that the *per se* rule applies, one might expect them to be ready to show those effects. But they admit they cannot. This is unsurprising, given the ample evidence of declining prices, increased output and competition in an industry undergoing a major transition. As the district court correctly held, the Rule of Reason applies.

H. Plaintiffs rely on discredited principles and inapposite cases.

Plaintiffs' cited cases do not apply here. The centerpiece of their legal argument is the seventy-year-old statement that "[a]ny combination which tampers with price structures is engaged in an unlawful activity." *United States v. Socony-Vacuum*, 310 U.S. 150, 221 (1940). This sweeping pronouncement has long since been rejected as overbroad,[33] as evidenced by *BMI*, *Leegin*, and other intervening cases. And unlike this case, *Socony-Vacuum* did not involve a market entrant with cheap, involuntary supply inducing other producers to become its distributors in lieu of their own production, displacing one product for another, but ultimately *increasing* total output. Rather, in *Socony-Vacuum,* a group of horizontal competitors agreed on a method of removing output from the market entirely, with demonstrated

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under the Rule of Reason, "because knowledge of intent may help the court to interpret facts and to predict consequences").

[33] *See* Herbert Packer, *Antitrust in Perspective: The Complementary Roles of Rule and Discretion*, 67 Yale L. J. 1141, 1143 (May, 1958) (book review) (describing *Socony-Vacuum fifty years ago* as "too broad to be workable," observing that "[l]ater Supreme Court and lower court decisions indicate that it is simply not true that 'any combination which tampers with price structures is engaged in an unlawful activity' or that 'a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate…commerce is illegal *per se*").

increases in industry prices. 310 U.S. at 219. Here, there is no evidence of increased prices, *or* even that total output decreased in any market. In fact, the evidence is to the contrary.

General Leaseways, 744 F.2d 588, is also inapposite. There, the court concluded at the preliminary-injunction stage, on an "incomplete record," *id.* at 597, that the defendant had "not yet" offered a plausible justification for the restraint, and the *per se* rule therefore applied. *Id.* at 593. Here, by contrast, Defendants have offered volumes of evidence supporting plausible procompetitive benefits. Acknowledging that its application of the *per se* rule might be wrong, the court in *General Leaseways* also conducted a rule-of-reason analysis and concluded the injunction should be upheld under that standard as well. *See id.* at 596-97.

Similarly, Plaintiffs find no support in *Denny's Marina, Inc. v. Renfro Productions, Inc.,* 8 F.3d 1217 (7th Cir. 1993), *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46 (1990), *Citizen Publ'g Co. v. United States*, 394 U.S. 131 (1969) or *Virginia Excelsior Mills, Inc. v. F.T.C.*, 256 F.2d 538 (4th Cir. 1958). None of these involved plausible procompetitive justifications.

Particularly erroneous is Plaintiffs' argument (at 55-56) that Judge Coar's application of the Rule of Reason to the "zone contracts" contravened *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982). Plaintiffs ignore entirely the Supreme Court's more recent decision in *Leegin*.

In *Spray-Rite*, a manufacturer allegedly conspired with certain distributors to vertically fix retail prices by terminating the plaintiff, a price-cutting distributor. *Id.*

at 1232-33. Critically, vertical resale price maintenance was then *per se* illegal, and vertical non-price restraints were analyzed under the Rule of Reason. Monsanto argued that the Rule of Reason should have applied to its distributor-compensation scheme because it was a vertical *non-price* restraint. *Id.* at 1237. The court disagreed and held that when vertical non-price restraints are part of a vertical *price* restraint the *per se* rule applied. *Id.*

Leegin, 551 U.S. 877, supplants this aspect of *Spray-Rite.* Overturning 96 years of precedent, the Court reflected modern economic thinking and held that vertical price-fixing must be analyzed under the Rule of Reason. In so holding, the Court acknowledged that vertical resale-price maintenance could result from a horizontal cartel of manufacturers (or dealers). *Id.* at 892-93. Such a cartel, the Court noted is, and ought to be, unlawful. *Id.* at 893. Regardless, if parties enter a vertical agreement setting minimum resale prices to facilitate such a cartel, the vertical agreement should be analyzed under the Rule of Reason. *Id.* Why? Because of the possibility that the vertical price fixing imposed by a manufacturer has plausible procompetitive justifications.

Judge Coar followed *Leegin* in applying the Rule of Reason to the zone contracts. He noted *Leegin*'s recognition that reducing intrabrand competition with vertical territorial restraints allowed suppliers to achieve distributional efficiencies that stimulate interbrand competition. (A39-40) He concluded that what was essentially an internal system of managing intrabrand competition could not be deemed manifestly anticompetitive. (A40) Consequently, despite Plaintiffs' allegations that the zone contracts might have originated from a horizontal cartel, because of plausible procompetitive justifications, the Rule of Reason applies.

Plaintiffs (at 30), citing *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), warn against judging a conspiracy by "dismembering" it. But Plaintiffs ignore that the challenged conduct here comprises fundamentally different transactions involving some but not all alleged "conspirators," separated temporally (in many instances by years) and geographically. Regardless, *Continental Ore* is not a talisman for avoiding the question of whether the Rule of Reason or the *per se* rule applies at trial. As *Leegin* demonstrates, where there are plausible procompetitive benefits, the entirety of the conduct should be considered under the Rule of Reason so the jury may weigh all of the evidence, rather than a *per se* short-cut.

Ultimately, Plaintiffs identify no basis to overturn the court's decision that the Rule of Reason applies here. The judgment should be affirmed.

II. The Judgment May Also Be Affirmed Because Plaintiffs' Claims Are Time-Barred.

This court may "affirm a judgment on any ground the record supports and the appellee has not waived." *Barton v. Zimmer, Inc.*, 662 F.3d 448, 454 (7th Cir. 2011). The district court used the wrong accrual rule in denying summary judgment on statute-of-limitations grounds. Application of the proper rule results in judgment for Defendants.

Review of the district court's application of a statute of limitations at summary judgment is *de novo. Horn v. A.O. Smith Corp.*, 50 F.3d 1365, 1369 (7th Cir. 1995).

A. The injury-accrual rule applies here.

An antitrust claim is "forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b. The claim "accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 338 (1971). *See also Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 188, 190-91 (1997) (recognizing that "a pure injury accrual rule" applies "without modification" in antitrust cases, which "start[s] the limitations period at the point the act first causes injury"). The "injury-focused accrual rule" is "well established" in antitrust. *See Rotella v. Wood,* 528 U.S. 549, 557 (2000).

By contrast, the "discovery accrual rule… is (and has been thought to be) the antithesis of the Clayton Act injury accrual rule." *Klehr,* 521 U.S. at 201 n.3 (Scalia, J., concurring). *See also Mathews v. Kidder, Peabody & Co.,* 260 F.3d 239, 246 n.8 (3d Cir. 2001) ("antitrust claims are subject to the less plaintiff-friendly 'injury occurrence' accrual rule," as opposed to the "more lenient 'injury discovery' rule"); *Connors v. Hallmark & Son Coal Co.,* 935 F.2d 336, 342 n.10 (D.C. Cir. 1991) (Ginsburg, J.) ("An exception [to the applicability of the discovery rule] is in the area of antitrust, where the Supreme Court has held, as a matter of statutory interpretation, that a cause of action accrues at the time of injury").

B. Departure from the injury-accrual rule in *In re Copper Antitrust Litigation*.

This court has historically applied the injury-accrual rule in antitrust cases. *See Brunswick Corp. v. Riegel Textile Corp.,* 752 F.2d 261, 271 (7th Cir. 1984). In 2006, however, a panel applied the discovery rule in an antitrust action. *In re Copper Antitrust Litig.,* 436 F.3d 782, 789 (7th Cir. 2006). The electronically-available briefs indicate that the parties assumed a discovery rule applied and failed to identify the correct rule for the panel. The result is a discrepancy in the law. *See* Carli McNeill, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 Notre Dame L. Rev. 1231, 1249 n.121 (March 2010) (remarking that Seventh Circuit "has gone completely off the tracks and applied the discovery rule to claims under the Clayton Act").

C. The district court applied the wrong rule.

The district court denied Defendants' summary judgment motion (R425), applying the discovery rule. (A20-21) Acknowledging the inconsistency, Judge Coar decided that, if *Copper* is wrong, "[i]t is for the Seventh Circuit or the Supreme Court to overturn that precedent, not this Court." (A18-19)

D. Plaintiffs' claims are time-barred under the injury-accrual rule.

Under the injury-accrual rule, Plaintiffs' claims accrued before February 1999, and are time-barred. It is undisputed that (1) each of the so-called "shutdown" agreements were executed between 1988 and 1992 (SA302-04); (2) the "zone contracts" were executed in 1996-97, and terminated by 1998, (SA315-16); and (3) the JV was formed and extensively publicized in 1998, nearly five years before Plaintiffs sued. (SA319-24)

Although Plaintiffs below attempted to invoke the continuing-violation doctrine (SA351), it is unavailing. "Before a subsequent act can be said to preserve an antitrust claim, that act must be based on some injurious act actually occurring during the limitations period, not merely the abatable but unabated inertial consequences of some pre-limitations action." 2 Phillip Areeda, *et al.*, Antitrust Law, ¶320c (3d ed. 2007) (quotations omitted). Plaintiffs must show output-restricting conduct during the limitations period. They cannot.

For instance, the JV's post-formation operations within the limitations period are, at best, the inertial consequences of pre-limitations action. The same characteristics that Plaintiffs contend made the JV a "sham," its structure, ownership, and operational methods, including the possibility of adjusting production rates based on market conditions, were in place and publicized before February 1999. Any "sham" claim is therefore untimely,[34] and Plaintiffs show no specific injury-causing conduct after February 1999. Although now they proclaim (at 23) that the JV entered "shutdown" agreements, their cited documents do not support this.[35] Notably, the policy of requiring timely challenges is "particularly strong" for "publicly announced joint ventures," as to "minimiz[e] the social costs of any antitrust violation," and "giv[e] the parties repose" for lawful conduct. 2 Areeda ¶320a.

Regardless, the continuing-violation doctrine generally "does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Klehr,* 521 U.S. at 189. Accordingly, even if Plaintiffs could show injury-

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[34] *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623 (7th Cir. 2003), is not to the contrary, as it is not a "sham" case.

[35] For further explanation, *see* R.528¶¶26, 71-77; SA110,328; R.519 at 4-6, and *supra* n.19.

causing conduct after February 1999, Defendants are still entitled to summary judgment for pre-limitations conduct and damages.

E. Plaintiffs cannot show fraudulent concealment.

Because Plaintiffs' claims accrued outside the limitations period, they are barred. Nevertheless, relying on a handful of "public statements" by certain defendants, Plaintiffs claim tolling by fraudulent concealment. This is ironic, because the challenged conduct was public, open and obvious. Far from efforts at concealment, the record shows affirmative public disclosures. In finding a factual question regarding fraudulent concealment (A19), the district court erred.

At summary judgment, "the burden is on the plaintiff to present facts which, if true, would justify equitable tolling of the statute of limitations." *Stark v. Dynascan Corp.*, 902 F.2d 549, 551 (7th Cir. 1990). Plaintiffs must show "efforts" by Defendants, "above and beyond the wrongdoing upon which the plaintiff's claim is founded" that "prevent[ed] the plaintiff from suing." *Chapple v. Nat'l Starch & Chem. Co. & Oil*, 178 F.3d 501, 506-07 (7th Cir. 1999). The delay must be "in reliance on the defendant's fraudulent conduct." *Id.* at 507. And, in an antitrust case, an affirmative showing of diligence is essential. *See Klehr,* 521 U.S. at 193-196 (noting that, in antitrust/RICO cases, diligence is required to invoke fraudulent concealment, because statutes encourage victims to uncover unlawful activity).

1. Plaintiffs cannot show affirmative concealment, or that such conduct actually prevented them from timely suing.

Plaintiffs have no evidence that Defendants engaged in fraudulent concealment. Their chief argument was that Defendants failed to announce their alleged wrongdoing. For example, they complained that "Defendants did not share with plaintiffs the contracts" that allegedly violated the law, nor did they "disseminate[]" their negotiations to Plaintiffs. (SA348) But "silence" and "failure to disclose" are not fraudulent concealment. *Davenport v. A.C. Davenport & Son Co.*, 903 F.2d 1139, 1142 (7th Cir. 1990),*overruled on other grounds*, *Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). A denial of an accusation of wrongdoing is also "not sufficient." *Ecodyne Corp. v. Guthrie N. Am., Inc.*, 716 F.Supp. 1132, 1137 (N.D. Ill. 1989). Further, where, as here, the conduct is visible, a plaintiff cannot invoke fraudulent concealment by alleging a hidden intent. *See Laundry Equip. Sales Corp. v. Borg-Warner Corp.,* 334 F.2d 788 (7th Cir. 1964) (rejecting fraudulent concealment in antitrust case where conduct was known, but fact of conspiracy was allegedly hidden).

Nevertheless, the district court concluded that Plaintiffs created a fact issue by pointing to a few business-related public statements by DuPont and others (R.510 Ex.30,75,154,155,157), which Plaintiffs labeled as misleading for not disclosing the alleged conspiracy. (A19-20) This cannot be squared with cases holding that nondisclosure of an alleged conspiracy does not toll the statute. Were the rule otherwise, an antitrust defendant could never avail itself of summary judgment on limitations grounds. A plaintiff could always pluck from the record a contemporaneous statement by the defendant about its business (say, a pricing announcement) and declare it to be "fraudulent concealment" because it did not disclose the alleged conspiracy, the existence of which plaintiff assumes, and defendants deny. That is what Plaintiffs did here.

The Fourth Circuit repudiated this approach in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.,* 828 F.2d 211 (4th Cir. 1987). The plaintiff alleged an antitrust conspiracy and claimed fraudulent concealment. During the alleged conspiracy, the plaintiff had "inquired" why a defendant had refused to accept deliveries and why prices were so low. "Instead of responding that [these matters] were the result of concerted, illegal antitrust activity," the defendant offered a mundane response. *Id.* at 218. The court found no fraudulent concealment, reasoning that, if "an alleged failure to own up to illegal conduct upon this sort of timid inquiry" were sufficient, it "would effectively nullify the statute of limitations in these cases." *Id.* at 218-19. The plaintiff's argument, said the court, "borders on sophistry." *Id.* at 218. The same reasoning applies here.

Plaintiffs also failed to show that *any* supposedly "misleading" statement was responsible for the failure of *any* Plaintiff to sue on time. They never suggest actual, contemporaneous knowledge of *any* of the statements. Instead, invoking the inapplicable discovery rule, they essentially pleaded ignorance of *all* of Defendants' public statements. (SA349-50)

Further, the district court failed to consider the context of the allegedly "deceptive" statements. For example, the court identified as potentially misleading articles quoting DuPont's statement that Grasselli closed due to a decrease in demand. (A19) Contemporaneous reports also expressly tie the closure with the challenged distribution agreement with Noranda. (SA306,310-11) In fact, all of the challenged conduct was the subject of similar public reports. Under these circumstances, any claim of "deception" rings hollow.

Finally, although the district court cited *Copper*, it does not compel a different result. There, the defendant bank, which was not a direct participant in the relevant industry, was portrayed in reports as a "victim" of the conspiracy, "not [an] intentional participant[]." *Southwire Co. v. J.P. Morgan Chase & Co.*, 307 F.Supp.2d 1046, 1057 (W.D. Wis. 2004). A plaintiff may reasonably be less suspicious of "innocent" statements of a behind-the-scenes, non-competitor. Additionally, the bank entered a confidentiality agreement to keep lawsuits and investigations secret, lied to regulatory agencies, and destroyed evidence, none of which happened here. *Copper*, 436 F.2d at 791.

2. Plaintiffs cannot show due diligence.

Although *essential* in an antitrust case, Plaintiffs made no attempt to establish due diligence. The district court forgave this failure by concluding that "it remains unclear whether a reasonable investigation would have revealed incriminating evidence sufficient to support an antitrust claim against Defendants." (A20)

This was error. No reasonable sulfuric-acid purchaser could profess ignorance of the facts underlying these claims. "[I]f a reasonable person in the plaintiff's position would have been aware within the limitations period of the possibility that its rights have been violated," there is no due diligence. *Chapple,* 178 F.3d at 506. The transformation of the sulfuric-acid industry due to changing environmental laws, the influx of smelter acid, and the displacement of voluntary acid generally (and with Noranda's acid particularly) were in the public domain long before February 1999, as were the zone contracts, and the JV's formation. Far from being actively concealed, the challenged conduct was actively disclosed. A comparison between key facts Plaintiffs say support their case and public disclosures outside the limitations period is set forth at R.521 at 12-15.[36]

When the proper rule is applied, and the burdens properly assigned, Defendants are entitled to summary judgment. The judgment below may be affirmed on this independent basis.

Conditional Cross-Appeal

I. The District Court Erred In Maintaining The Certified Class..

A. Summary of argument

In "provisionally" certifying the class in 2007 (A136), Judge Coar held that Plaintiffs needed only to make a "threshold showing that what proof they will offer will be sufficiently generalized in nature" that class treatment "will provide a tremendous savings of time and effort." (A135) The court relied upon the opinions of Plaintiffs' proffered expert from 2004. Plaintiffs never alerted the court that they had retained a new expert to testify on class issues at trial. Defendants sought decertification based upon Plaintiffs' decision to switch experts, arguing, *inter alia*, that the class opinions of the new expert and prior expert were inconsistent. Defendants also informed the court of their *Daubert* motion challenging the new expert. Judge Coar refused to consider the decertification motion. Defendants later

[36] Accordingly, Plaintiffs' unsupported assertion (at 7) that Noranda's displacement strategy "came to light in 2003 when the Canadian police seized records from their offices" is incredible.

moved to decertify in light of *American Honda*. Judge Holderman denied Defendants' motion. Maintaining a certified class under these circumstances, and without considering Defendants' *Daubert* challenge, was an abuse of discretion.

B. Rule 23 standards

Class certification orders are reviewed for abuse of discretion. *See Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 493 (7th Cir. 2012).

An order certifying a class action is "not cast in stone," *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 896 (7th Cir. 1981), as it "may be altered or amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C). Courts have "a continuing obligation to review whether proceeding as a class action is appropriate." *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415, 419 (N.D. Ill. 2003). "If the certification of the class is later deemed to be improvident, the court may decertify." *Eggleston,* 657 F.2d at 896.

In evaluating certification, the court "should make whatever factual and legal inquiries are necessary under Rule 23," even if they overlap the merits. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Presented with a motion challenging expert opinions impacting class issues under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), the court "must conclusively rule on any challenge" before assessing certification. *Am. Honda Motor Co. v. Allen*, 600 F.3d 813, 815-16 (7th Cir. 2010). "If a district court has doubts about whether an expert's opinions may be critical for a class certification decision, [it] should make an explicit *Daubert* ruling." *Messner v. Northshore Univ. Healthsystem,* 669 F.3d 802, 812 (7th Cir. 2012).

C. The court certified the class relying upon Asher's opinion.

Under Rule 23(b)(3), certification is appropriate "only if the questions of law or fact common to class members 'predominate' over questions that are individual to members of the class." *Messner*, 669 F.3d at 814. Plaintiffs must prove that Defendants caused them injury, *i.e.*, "impact" or "fact of damage," (as distinct from the amount of damage). *Id.* at 816. Proof of impact is "a predicate to liability." *Martino v. McDonald's Sys., Inc.*, 86 F.R.D. 145, 147 (N.D. Ill. 1980). Plaintiffs must show that "it [is] possible to use common evidence to prove that [Defendants' alleged antitrust violations] injured the members of the proposed class." *Messner*, 669 F.3d at 816.

Judge Coar relied upon Asher's opinion that he would be able to establish impact on a class-wide basis *sometime in the future*. (A136) Asher had not actually performed this analysis. (R.76 at 13-14) Plaintiffs argued that it was enough for Asher to conclude that the available data was of the type that "could be used at the appropriate time to conduct an impact and damage analysis." (R.64 at 18) They also represented that Asher could show impact class-wide by employing a common methodology to calculate a "but-for" price for each class member.[37] (*Id.* at 10)

[37]Antitrust "impact" is typically established by determining (1) the price each putative class member would have paid but for the alleged conspiracy and (2) whether the actual purchase price was above the respective "but-for" price. *See Sample v. Monsanto Co.*, 218 F.R.D. 644, 650 (E.D. Mo. 2003). Asher opined that impact could be determined on a class-wide basis with a regression analysis. (R.698, Ex.B ¶28)

D. Plaintiffs replaced Asher with McClave, whose class opinions are substantially different.

When required to designate their trial experts, Plaintiffs identified a statistician, James McClave, and an economist, Robert Tollison. (R.682) Asher was omitted. Plaintiffs have confirmed their intention to call McClave (not Asher) at trial on class issues.[38] (R.682)

McClave's methodology, however, is inconsistent with Asher's opinions upon which the class-certification order was based. Significantly, McClave admitted that he had not performed *any* studies to determine impact. (R.659 Ex.9 at 393) Nor did he perform a "but-for" analysis as Asher proposed (and Plaintiffs promised), saying it was unfeasible. (R.659 Ex.10 at 218) Remarkably, his analysis also excludes entire categories of persons who were part of the original class, including purchasers after July 2001 and persons with "ship-to" locations west of the Mississippi. (R.695 at 2-4, Ex.4 at 3) *See Messner*, 669 F.3d at 824 (class defined "as to include a great number of members who… could not have been harmed" is "defined too broadly to permit certification"). McClave's model also cannot distinguish between the effects of lawful and unlawful conduct. (R.351 at 11-12) McClave also ignored several key factors that Asher testified were necessary to determine impact.[39]

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[38] Plaintiffs acknowledged that Asher conducted a preliminary analysis: "He didn't purport to do the regression analysis himself. He said he thought it could be done." (R.714 at 20)

[39] *Compare* R.698 Ex.A ¶¶19,25,27-28, Ex.B ¶¶18,28 *with* R.351 at 13-15, R.659 at 19-20,25,27.

For these and other reasons, Defendants challenged McClave under *Daubert*.[40]

The differences were not lost on Plaintiffs. In August 2011, Plaintiffs moved to alter the existing class to make it "consistent" with McClave's opinions. (R.695) They proposed to redefine the class from those who purchased acid from January 1, 1988 through January 16, 2003 to those who purchased from January 1, 1988 through June 30, 2001 (when McClave's model terminates). (R.695 at 2-4) Additionally, Plaintiffs sought to alter the nationwide class by excluding purchasers between 1988 and January 1, 1999 west of the Mississippi, consistent with McClave's analysis. (R.695 at 7) Judge Holderman denied the motion (R788), noting Plaintiffs' lack of candor to the court.[41]

E. The district court abused its discretion by refusing to evaluate McClave's class opinions and Defendants' *Daubert* motion.

Shortly after the 2007 certification order, Defendants moved to decertify, alerting the court that Plaintiffs had switched experts. (R.537) Defendants noted that Plaintiffs had since "abandoned Dr. Asher and his promises of generalized proof in favor of a statistician who has failed to make good on those promises." (R.539 at 1) Defendants urged the court to consider that McClave's methodology differed substantially from Asher's, and noted their pending *Daubert* motion.

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[40] Defendants argued, *inter alia*, that McClave flunked *Daubert*'s "fit" requirement. (R.351) He undertook no impact (or "but-for") analysis of prices. Instead, McClave calculated "average" overcharges (R.351 at 15), which is insufficient. *Reed v. Advocate Health Care*, 268 F.R.D. 573, 591 (N.D. Ill. 2009). And his inability to disaggregate the effects of lawful and unlawful conduct violates *MCI Commc's Corp. v. AT&T*, 708 F.2d 1081, 1161 (7th Cir. 1983). McClave also ignored data for certain Defendants, including Koch, using other, non-comparable data instead. (R.358)

[41] Judge Holderman noted that, although Plaintiffs knew in October 2005 that the class was erroneously defined, they intentionally withheld that information from the court to obtain class certification. (A68-69)

Judge Coar summarily denied the motion without considering its merits, assuming that it "rehash[ed] matters that have already been considered."(SA4) This was error. Despite Plaintiffs' continuing burden to prove the appropriateness of certification, they had elected not to inform the court of McClave's opinions. Given the court's continuing obligation to ensure the appropriateness of certification, it was an abuse of discretion to summarily reject Defendants' motion and fail to consider the effects of those opinions.

Defendants later renewed their decertification motion in light of *American Honda*. (R.659) Defendants again informed the court that Plaintiffs were relying upon a new expert (R.659 at 7), explaining that *American Honda* required the court to decide Defendants' pending *Daubert* motion when considering whether Plaintiffs could satisfy Rule 23. (R.659 at 8,21 n.16) Citing law-of-the-case principles, Judge Holderman denied the motion because he lacked a "strong conviction" that Judge Coar's ruling was incorrect. (SA10-11) He also deferred consideration of the *Daubert* motion until trial. (SA12-13)

This, too, was an abuse of discretion. The law-of-the-case doctrine "does not prevent courts from revisiting matters that are avowedly preliminary or tentative." *In re Friedman's, Inc.*, 363 B.R. 629, 634 (Bankr. S.D. Ga. 2007). Class certification orders are inherently tentative. Accordingly, the doctrine does not apply. *Ellis*, 217 F.R.D. at 419-20. Even if it did, it is "prudential" rather than "jurisdictional," and applies only where an issue is "litigated and decided." *Lightfoot v. District of Columbia*, 246 F.R.D. 326, 333 (D.D.C. 2007). Given that the court has never determined the sufficiency of McClave's class opinions under Rule 23, the doctrine has no application.

CONCLUSION

For the foregoing reasons, Defendants request the judgment be affirmed on the ground that the Rule of Reason applies to the challenged conduct as a matter of law, and that Plaintiffs' claims are in any event time-barred.

If and only if the court reverses the judgment, Defendants request it also vacate the class certification order and remand for adjudication of Defendants' *Daubert* motions, followed by consideration of the appropriateness of certification.

Respectfully submitted:

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On behalf of all Defendants-Appellees-Cross-Appellants

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(1)(7)(B). As indicated by the word-count function of Microsoft Word, the brief contains 16,365 words, including both text and footnotes, but excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The text is in 12-point Century typeface, and the footnotes are in 11-point Century typeface.

Dated April 30, 2012

/s/David C. Gustman

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CIRCUIT RULE 30(d) STATEMENT

I certify that all of the appendix materials required by Circuit Rules 30(a) and 30(b) are contained in the annexed Short Appendix, and in the separately bound Supplemental Appendix for Appellees-Cross-Appellants.

Dated April 30, 2012

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Circuit Rule 34(f), Defendants-Appellees-Cross-Appellants believe oral argument is appropriate under Federal Rule of Appellate Procedure 34(a) because the decisional process may be aided by oral argument.

Dated April 30, 2012

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REQUIRED SHORT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.0
Eastern Division

Sulfuric Acid Antitrust Litigation, et al.

Plaintiff,

v.

Case No.: 1:03–cv–04576
Hon. David H. Coar

E.I. du Pont de Nemours and Company, Inc., et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Wednesday, April 11, 2007:

MINUTE entry before Judge David H. Coar : Motion hearing held on 4/11/2007 regarding motion for reconsideration, [537]. MOTION by Defendants ChemTrade Logistics (U.S.), Inc., Intertrade Holdings, Inc., Koch Industries Inc., Falconbridge Ltd., Noranda, Inc., Norfalco, LLC, Pressure Vessel Services, Inc., GAC Chemical Corporation, Marsulex, Inc. for reconsideration to decertify the class and/or for reconsideration of order certifying class (Gustman, David) [537] is denied. Motion to decertify is denied. Mailed notice(pm,)

ATTENTION: This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re: SULFURIC ACID ANTITRUST LITIGATION	)	MDL 1536 No. 03 C 4576
THIS DOCUMENT RELATES TO: ALL ACTIONS	)	Chicago, Illinois April 11, 2007 9:00 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE DAVID H. COAR

APPEARANCES:

For the Plaintiffs:	WOLF HALDSTEIN ADLER FREEMAN & HERZ LLC 656 West Randolph Street Suite 500W Chicago, Illinois 60661 BY: MR. THEODORE B. BELL
For the Defendants Noranda, Norfalco, and Falconbridge:	FREEBORN & PETERS LLP 311 South Wacker Drive Suite 3000 Chicago, Illinois 60606-6677 BY: MR. DAVID C. GUSTMAN
For the Defendants Marsulex and ChemTrade:	WINSTON & STRAWN 33 West Wacker Drive Suite 500 Chicago, Illinois 60606 BY: MR. R. MARK McCAREINS

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THE CLERK: 03 C 4576, In Re: Sulfuric Acid, motion for reconsideration.

MR. GUSTMAN: Good morning, Your Honor. David Gustman on behalf of the Noranda defendants.

THE COURT: All right.

MR. McCAREINS: Good morning, Your Honor. Mark McCareins on behalf of Marsulex and ChemTrade.

MR. MC LAWHORN: Todd McLawhorn on behalf of Koch Sulfur Products.

MR. BELL: Good morning, Your Honor. Theodore Bell on behalf of the plaintiffs.

MR. GUSTMAN: Your Honor --

THE COURT: The motion for reconsideration is denied. You can disagree with the ruling, but you're not going to rehash matters that have already been considered. Motion's denied. All right.

MR. GUSTMAN: Your Honor, this was also a motion to decertify the class.

THE COURT: The motion's denied.

MR. BELL: Thank you, Your Honor.

THE COURT: All right.

MR. GUSTMAN: One other question, Your Honor.

THE COURT: Yes, sir.

MR. GUSTMAN: With respect to notice, your order didn't specify timing or procedure for notice, and I wondered if --

THE COURT: I assumed that the plaintiff is going to come in promptly with a proposed notice.

MR. BELL: That's correct, Your Honor. We're waiting -- we didn't want to -- you know, to spend the money until this was resolved, but we will do that promptly, Your Honor.

THE COURT: All right.

MR. BELL: Thank you.

CERTIFICATE

I HEREBY CERTIFY that the foregoing is a true, correct and complete transcript of the proceedings had at the hearing of the aforementioned cause on the day and date hereof.

Tracey D. McCullough 4/17/07

Official Court Reporter Date
United States District Court
Northern District of Illinois
Eastern Division

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re SULFURIC ACID ANTITRUST LITIGATION	)	
	)	No. 03 C 4576
	)	MDL 1536
This Document Relates to: ALL RELATED ACTIONS	)	

MEMORANDUM OPINION AND ORDER

JAMES F. HOLDERMAN, Chief Judge:

On March 21, 2007, District Judge David H. Coar, who was then presiding in this case, granted Plaintiffs' motion for class certification in this multi-district antitrust litigation. More than four years later, on June 7, 2011, after Judge Coar's December 31, 2010 retirement and the May 18, 2011 reassignment of this case, defendants Noranda, Inc., Falconbridge Limited, and NorFalco LLC (collectively "Noranda") and defendants Intertrade Holdings Inc., Pressure Vessel Services, Inc., Koch Sulfur Products Company, and Koch Sulfur Products Company, LLC (collectively "Koch") filed "Defendants' Motion to Decertify" (Dkt. No. 641), now pending before this court.

Noranda and Koch (together "Defendants") argue that decertification is warranted in light of "significant developments in Rule 23 jurisprudence," changes in the expert testimony relied on by Plaintiffs, and additional discovery undertaken since the entry of Judge Coar's March 2007 class certification order. For the reasons set forth below, Defendants' motion (Dkt. No. 641) is denied.

JUDGE COAR'S MARCH 21, 2007 OPINION

The class certified by Judge Coar on March 21, 2007, was proposed by Plaintiffs' counsel and certified as follows:

> All persons (excluding federal, state, and local governmental entities and political subdivisions, the Defendants, and their respective parents, subsidiaries and affiliates) who purchased sulfuric acid in the United States directly from one or more of the Defendants or their parents, subsidiaries, affiliates, or joint ventures during the period January 1, 1988 through January 16, 2003.

(Dkt. No. 536 ("Certification Order") at 2.)

In analyzing Plaintiffs' motion for class certification under Federal Rule of Civil Procedure 23, Judge Coar first found that Plaintiffs had satisfied the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. (*Id.* at 3-9.) Defendants do not take issue with Judge Coar's findings, and this court need not further discuss the details of Judge Coar's reasoning on these points.

Judge Coar next analyzed whether Plaintiffs had demonstrated "that common questions of law or fact predominate over individual questions" under Rule 23(b)(3). (*Id.* at 9.) Noting that "questions of impact and damages revolv[ing] around individual determinations" had the potential to "move this case beyond the scope of permissible certification under Rule 23(b)(3)," Judge Coar determined that, at the class certification stage, "Plaintiffs need only establish that they have 'realistic methodologies for establishing damages on a classwide basis.'" (*Id.* at 10-11 (quoting *In re Brand Name Prescription Drugs Antitrust Litig.*, 94 C 897, MDL 997, 1994 WL 663590, at *5 (N.D. Ill. 1994)) (Kocoras, J.).)[1] Specifically, Judge Coar required Plaintiffs to

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[1] Judge Coar acknowledged that "courts have generally refused to let the difficulty of damages determinations stand in the way of class certification." (Certification Order 12 (citations omitted).) At the same time, however, Judge Coar recognized "it is nonetheless possible that determining the *existence* of damage for all members might defy class-wide proof." (Certification Order 12 (emphasis in original).)

make "a threshold showing that what proof they will offer will be sufficiently generalized in nature" to warrant class treatment. (*Id.* at 15 (quoting *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 319 (E.D. Mich. 2000)).)

Judge Coar recognized that the parties' respective experts, Dr. Martin Asher testifying for Plaintiffs and Dr. Lauren Stiroh testifying for Defendants, disagreed on a number of factors relevant to the determination of class-wide damages, including the fungibility of sulfuric acid of different strengths across different geographic regions and "the conformity of the price changes across types and regions." (*Id.* at 15.) Judge Coar declined, however, to engage in a "battle of the experts" at the class certification stage, stating "this is not the right time . . . to launch into an extensive analysis of the facts or weighing of the merits." (*Id.*) Relying on "Dr. Asher's testimony, the likelihood that sulfuric acid can be treated as a fungible good, preliminary evidence that Defendants approached the market as one that was national in scope, and the possibility for adjusting the class mechanism in the future," Judge Coar found that Plaintiffs had made a "threshold showing" that they would be able to establish injury on a class-wide basis, thus satisfying the predominance requirement of Rule 23(b)(3). (*Id.* at 15-16.) Judge Coar also explicitly retained the ability to alter or amend the class certification order "should regional variations make the class untenable as defined." (*Id.* at 17 (citing Fed. R. Civ. P. 23(c)(1)(C).) Finally, Judge Coar found "provisionally" that "class certification presents the most efficient means of adjudicating the controversy," as required by Rule 23(b)(3). (*Id.*)

RELEVANT PROCEDURAL HISTORY

The class certification motion granted by Judge Coar on March 23, 2007, was initially

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filed by Plaintiffs on May 5, 2004, including Dr. Asher's 12-page expert report. (Dkt. No. 659 ("Defs.' Mem.") at 6-7; *see also* Dkt. Nos. 55-57.) During the course of subsequent pretrial discovery, however, Plaintiffs additionally identified two different individuals as their testifying experts: Dr. James McClave and Dr. Robert Tollison. (*Id.*)[2] After Judge Coar issued his March 21, 2007 order granting class certification, Defendants filed a motion to reconsider arguing that Plaintiffs had abandoned Dr. Asher as an expert witness. (*Id.*; *see also* Dkt. No. 537.) Judge Coar summarily denied Defendants' motion to reconsider without elaboration. (*Id.*; *see* Defs.' Ex. 4 ("4/11/2007 Tr.") at 3-4.)

Three and one-half years later, on September 24, 2010, Judge Coar granted in part and denied in part Defendants' motions for summary judgment. (Dkt. No. 601.) Defendants attempted to appeal portions of Judge Coar's Setpember 24, 2010 ruling, but the Seventh Circuit dismissed the interlocutory appeal for lack of jurisdiction on June 10, 2011. (Dkt. No. 674.)

As stated earlier, Judge Coar retired from the federal bench effective December 31, 2010, and the United States Judicial Panel on Multidistrict Litigation reassigned this case to this court's calendar on May 18, 2011. Also as stated earlier, Defendants filed their pending motion to decertify (Dkt. No. 641) on June 7, 2011.

LEGAL STANDARD

Under Rule 23, "[a]n order that grants or denies class certification may be altered or

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[2] Plaintiffs' designation of Dr. McClave and Dr. Tollison took place on October 28, 2005. (Defs.' Mem. 7.) On May 22, 2006, Defendants filed *Daubert* motions challenging the expert opinions of both Dr. McClave and Dr. Tollison. (Defs.' Mem. at 7; *see also* Dkt. Nos. 350, 353, 356.) These motions remain pending before Magistrate Judge Jeffrey Cole.

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amended before final judgment." Fed. R. Civ. P. 23(c)(1)(C); *see also Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982) ("Even after a certification order is entered, the judge remains free to modify it in the light of subsequent developments in the litigation."); *Eggleston v. Chi. Journeymen Plumbers' Local Union No. 130, U.A.*, 657 F.2d 890, 896 (7th Cir. 1981) ("If the certification of the class is later deemed to be improvident, the court may decertify, subclassify, alter the certification, or permit intervention.") (internal citations omitted).

On the other hand, "law-of-the-case principles are applicable when a case is transferred to a new judge midway through litigation." *Gilbert v. Ill. State Bd. of Educ.*, 591 F.3d 896, 902 (7th Cir. 2010). Under these principles, "[t]he successor judge should depart from the transferor judge's decision only 'if he has a conviction at once strong and reasonable that the earlier ruling was wrong, and if rescinding it would not cause undue harm to the party that had benefitted from it.'" *Id.* (quoting *HK Sys., Inc. v. Eaton Corp.*, 553 F.3d 1086, 1089 (7th Cir. 2009)).

ANALYSIS

It is clear that Judge Coar was open to revisiting the class certification question under appropriate circumstances. Judge Coar's holding explicitly depended, in part, on "the possibility for adjusting the class mechanism in the future," and Judge Coar repeatedly suggested that "altering or amending the class" was an appropriate means of addressing "complications that arise while moving forward." (Certification Order 16-17.)

As noted by Plaintiffs, however, the issues of law and fact raised by Defendants in their motion to decertify already existed at the time of Judge Coar's March 2007 order. For example, although Defendants argue that new Seventh Circuit case law "now demand[s] a more rigorous analysis of the requirements of Rule 23," (Defs.' Mem. 8 (citing *American Honda Motor Co. v.*

Allen, 600 F.3d 813 (7th Cir. 2010))), the Seventh Circuit long ago made clear that district judges must resolve competing expert opinions where relevant to Rule 23 class certification:

> A district judge may not duck hard questions by observing that each side has some support, or that considerations relevant to class certification also may affect the decision on the merits. Tough questions must be faced and squarely decided, if necessary by holding evidentiary hearings and choosing between competing perspectives.

West v. Prudential Securities, Inc., 282 F.3d 935, 938 (7th Cir. 2002).[3] In fact, Defendants quoted this very passage from *West* in their briefing before Judge Coar. (Dkt. No. 76 at 10.) Likewise, immediately after Judge Coar's ruling Defendants alerted Judge Coar to the fact that Plaintiffs had "abandoned" Dr. Asher. (Dkt. No. 537 ¶ 7.) Judge Coar declined to revisit his class certification order at that time. Despite being aware of these potential problems with Judge Coar's ruling, Defendants did not seek to obtain appellate review under Federal Rule of Civil Procedure 12(f).

Having reviewed Judge Coar's class certification order and the arguments now before this court, the court is not left with a strong conviction that Judge Coar's approach to the class certification issue in this case was wrong. Despite his stated refusal to "engage in a 'battle of the experts,'" (Certification Order 15), Judge Coar nevertheless resolved the competing expert opinions in this case in favor of Plaintiffs. On the question of whether it is possible to prove a class-wide injury to the sulfuric acid market as a whole, Judge Coar accepted Dr. Asher's expert

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[3] *West* is distinguishable from *American Honda*, insofar as the court in *West* began with the assumption that the plaintiffs had hired a "competent expert." 282 F.3d at 938. *American Honda*, by contrast, addresses "whether a district court must resolve a *Daubert* challenge" to an expert's qualifications "prior to ruling on class certification." *American Honda*, 600 F.3d at 815. Because Defendants did not challenge Dr. Asher's testimony under *Daubert*, the factual basis present in the 2010 *American Honda* decision is not present in Judge Coar's March 21, 2007 class certification order.

opinion in the affirmative:

> Even if Dr. Stiroh's interpretation of the sulfuric acid market is correct and each consumer transaction is negotiated according to a unique set of conditions, it is nonetheless possible for the Plaintiffs to establish that the starting point for such negotiations was set artificially high by the conspiracy.

(Certification Order 15.) Noting that "the predominant issue remains the conspiracy itself," Judge Coar concluded that class certification under Rule 23(b)(3) was appropriate in this case. (*Id.* at 16.) While Judge Coar's use of the term "threshold showing" is, perhaps, unfortunate, this court understands Judge Coar to have used this term only to emphasize that Plaintiffs would eventually need to prove to the satisfaction of a jury that "all putative class members suffered an injury and that the injury resulted from anti-competitive harms to the market as a whole." (*Id.* at 13.)

This court is also convinced that rescinding Judge Coar's certification order at this stage of the litigation would cause undue harm to Plaintiffs. Defendants have had multiple opportunities before Judge Coar or before the Seventh Circuit to raise the issues they now have advocated to this court. To seek decertification more than four years after Judge Coar's class certification order with arguments that either were presented, or could have been presented, to Judge Coar prior to March 21, 2007, when he issued that ruling, is unwarranted and inappropriate. The trial in this eight-year-old case is set to begin in just over two months and is poised to be tried as a class action. Reconsideration of Judge Coar's certification order would undeniably delay the resolution of Plaintiffs' claims at that trial.

To the extent Defendants take issue with Plaintiffs' reliance on Dr. McClave's expert opinion in support of class certification, the court has not considered Dr. McClave's opinion in that regard. If Plaintiffs seek to introduce Dr. McClave's opinion through his testimony at the trial, the court will consider Magistrate Judge Cole's rulings on the *Daubert* motions pending before him.

CONCLUSION

For the reasons set forth above, Defendants' "Motion to Decertify" (Dkt. No. 641) is denied. All pending dates remain as previously scheduled by this court. (Dkt. Nos. 662, 678.) The parties are strongly encouraged to discuss settlement.

ENTER:

JAMES F. HOLDERMAN
Chief Judge, United States District Court

Date: December 12, 2011

CERTIFICATE OF SERVICE

I, David C. Gustman, certify that on April 30, 2012, I electronically filed the COMBINED BRIEF OF DEFENDANTS-APPELLEES IN 12-1109 AND DEFENDANTS-CROSS-APPELLANTS IN 12-1224, the required SHORT APPENDIX, and the separately-bound SUPPLEMENTAL APPENDIX with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Counsel of record for all plaintiffs/appellants are registered, active users of the CM/ECF system, and have been served by this method:

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Dated: April 30, 2012