Nos. 12-1109, 12-1224

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

In re Sulfuric Acid Antitrust Litigation

Ohio Chemical Services *et al.*,
Plaintiffs-Appellants

v.

Falconbridge Ltd. *et al.*
Defendant-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 RESPONSE OF PLAINTIFFS-APPELLEES IN 12-1224 AND REPLY OF PLAINTIFFS-APPELLANTS IN 12-1109

Joseph C. Kohn
Robert J. LaRocca
William E. Hoese
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

Solomon B. Cera
Charles Andrew Dirksen
GOLD BENNETT CERA & SIDENER LLP
595 Market Street, Suite 2300
San Francisco, CA 94105-2835
Telephone: (415) 777-2230
Facsimile: (415) 777-5189

Mary Jane Fait
Theodore Bell
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, IL 60603
Telephone: (312) 984-0000
Facsimile: (312) 984-0001

Steven A. Asher
David H. Weinstein
Mindee J. Reuben
WEINSTEIN KITCHENOFF & ASHER LLC
1845 Walnut Street, Suite 1100
Philadelphia, PA 19103
Telephone: (215) 545-7200
Facsimile: (215) 545-6535

Plaintiffs' Co-Lead Counsel/Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL STATUTES

OTHER AUTHORITIES

I. REPLY TO DEFENDANTS' RESPONSE IN NO. 12-1109

INTRODUCTION

This case presents a clear example of horizontal output restriction and price fixing, conduct long ago condemned by the courts as illegal *per se* under the antitrust laws. The defendants seek to alter decades of antitrust law. Using a dictionary definition of the word "plausible," they contend that the rule of reason, and not the *per se* rule, applies in *every* antitrust case—including horizontal price fixing, horizontal market allocation, and horizontal output restrictions—so long as a defendant can advance a "plausible" argument that the conduct is "pro-competitive," with "plausible" meaning a "superficially fair. . . but often specious" or a "superficially pleasing" argument. (Def.Br. 32-33) .[1]

This is not how courts determine whether to apply the *per se* rule. Rather, courts examine the structural nature of the anticompetitive conduct to determine: (1) if it involves an agreement among horizontal competitors; (2) that affects price, output, or involves a territorial allocation. If so, it is a *per se* offense. This is the structural analysis this Court used in *United States v. Andreas,* 216 F.3d 645, 666-668 (7th Cir. 2000) (horizontal output restriction); *Denny's Marina Inc. v. Renfro Productions, Inc.,* 8 F.3d 1217, 1220 (7th Cir. 1993) (horizontal boycott and price fixing); and *General Leaseways*, *Inc. v. National Truck Leasing Association,* 744

[1] Appellants'/Plaintiffs' opening brief in 12-1109 is referred to as "Pl.Br. __". Appellees/Defendants response and opening brief in 12-1224 is referred to as "Def.Br. __." Plaintiffs' opening appendix is numbered "A___; defendants' opening appendix is "SA___"; plaintiffs' responsive/reply appendix submitted with this brief is "A___" and continues from the last number of plaintiffs' opening appendix.

F.2d 588, 595 (7th Cir. 1984) (horizontal territorial allocation) to determine these were *per se* offenses.

General Leaseways explicitly rejected defendants' contention:

> The per se rule would collapse if every claim of economies from restricting competition, however implausible, could be used to move a horizontal agreement not to compete from the per se to the Rule of Reason category.

744 F.2d at 595.

This Court would have to overrule these decisions, and ignore decades of Supreme Court precedent, to hold that the present case is judged under the rule of reason.

REPLY TO DEFENDANTS' STATEMENT OF THE CASE

Defendants claim that plaintiffs "could prove no actual anticompetitive effects" of defendants' scheme. (Def.Br. 2). To the contrary, plaintiffs' trial experts, Drs. McClave and Tollison, amply proved very significant anti-competitive effects of defendants' scheme. (See *infra* at 14-18).

Defendants also distort the procedural history, claiming that Chief Judge Holderman supposedly scheduled two "hearings" (on November 22, 2011 and November 29, 2011) on their rule of reason motion to give it "a full chance to review it all." (Def.Br. 4). Rather, on November 22nd there was a "presentment" of two motions by plaintiffs. (R.750 and R.753, presented at R.762). The evening before, defendants filed their motion to have the rule of reason govern (R. 759-761), with a notice that this motion would be presented (*i.e.* have the briefing schedule set) on November 29, 2011 (R.761). On that date, however, Chief Judge Holderman orally granted defendants' motion, without permitting merits briefing by plaintiffs, and with only the oral colloquy that appears at A51-58. The ultimate issue on appeal is whether he was substantively correct in so ruling, not whether it was procedurally precipitous. However, the fact that defendants mischaracterize this procedure suggests that even they are uncomfortable with how the ruling was made.

Defendants claim that plaintiffs "rejected" Chief Judge Holderman's "invitation" "to submit special interrogatories" is incorrect. (Def.Br. 4). By that point (December 3, 2011), Chief Judge Holderman had repeatedly held that only the rule of reason standard would govern the trial. (A58,71-72). Plaintiffs sought to alert the court that they were proceeding solely on a *per se* theory, and that therefore any rule of reason interrogatories would be under the wrong standard. Plaintiffs do not oppose special jury interrogatories under the correct legal standard.

With respect to their cross-appeal, defendants assert that plaintiff "abandoned" their class certification expert, and that plaintiffs' trial expert's report was "inconsistent with the class" that was certified. (Def.Br. 2). This is incorrect. Plaintiffs address what actually occurred in responding to defendants' cross-appeal at pages 41-55 below.

REPLY TO DEFENDANTS' STATEMENT OF FACTS

Plaintiffs reply in the order outlined in plaintiffs' original brief.

A. Defendants' Agreements to Restrict Output

Plaintiffs set forth record evidence showing explicit written agreements to reduce output. (Pl.Br. 5-13). Defendants answer this under a heading "Distribution Agreements" (Def.Br. 9), as though Noranda/Falconbridge innocently came upon the scene *after* each U.S. company had unilaterally decided to close its respective plants, and merely entered into "distribution arrangements" with them. This is contrary to the record. Defendants also portray the U.S. defendants as deciding to shut down older or less profitable plants. (Def.Br. 9-16). However, as Judge Coar noted, "there is no requirement under the antitrust laws that plaintiffs prove only the most profitable capacity be eliminated." (A33). Defendants' strategy was "displacement by agreement" (A169). Judge Coar held there was more than sufficient evidence of collusion to present to the jury (A21-26). Chief Judge Holderman did not revisit this ruling.[2]

At pages 5-9, defendants provide 1985-1988 "background," pointing the finger at Manderson Consultants and even at the Canadian government (anyone but themselves) for supposedly blessing the scheme at issue. Defendants ignore the

[2] Defendants refer to the singular "Noranda" throughout brief pages 5-13. Rather, Noranda and Falconbridge illegally colluded with each other. Judge Coar held these Canadian defendants could conspire. (A46-49). Defendants have not challenged that ruling on appeal.

testimony whereby the Canadian official expressly denied any input in defendants' marketing decisions. (A499-507).[3]

B. Defendants Jointly Set Customer Prices

Defendants jointly set customer prices for the smelter acid. (Pl.Br. 13-14). Defendants' only response is to quote one instance where a Boliden witness stated it set customer prices without input from Noranda. (Def.Br., p. 17, quoting SA105). This does not negate evidence of the effect of their agreement on supply and price, and the degree and extent of impact is a jury issue.

C. Defendants Were Horizontal Competitors

Plaintiffs quoted numerous admissions by the Canadian and U.S. defendants that they were horizontal competitors. (Pl.Br. 14-16). Defendants ignore all of them, and instead claim that Noranda/Falconbridge supposedly "had no sales force" to sell to U.S. customers, and that they supposedly "could not transport acid from rail points by truck. . . ." (Def.Br. 8). Those statements are refuted by the Noranda/Falconbridge marketing video (A200-05), which explicitly states that their dedicated marketing team has extensive knowledge of customers' needs, and can ensure delivery of any unit size, including truckloads, to any market in the eastern United States. ("...[W]hether the order is for a single truckload or a virtually continuous flow, Noranda works in partnership with the transportation industry to ensure the most efficient delivery mode.") (A202). Moreover, if Noranda initially

[3] Defendants do not contend they were granted immunity from the U.S. antitrust laws. (Pl.Br. 34-35).

lacked truck capacity, it was only because it "chose not to develop that capability." (SA88). Noranda admitted it subsequently developed this capacity. (SA83).

D. Defendants' Large Market Share

Plaintiffs' economist showed that defendants' collective market share approached 80%. (Pl.Br. 16).[4] Defendants' economist corroborated this (75% market share). (*Id.*) Defendants do not controvert these statistics, but state that "[b]etween 1985 and 2003, forty-one plants were closed or idled, and five reduced capacity" unconnected with defendants' scheme. (Def.Br. 9). But this would prove that the market had become *more* concentrated by these 46 closures or reductions, thus *intensifying* the effect of defendants' scheme.

Further, a closer examination of defendants' statement about 46 plants (SA174, referencing SA250-52), reveals that:

- 28 of them, or 60%, were closed between 1985 and 1988, before defendants' "displacement by agreement" scheme took root (Pl.Br. 8-13);
- of the remaining 18 plants, 11 were outside the territorial scope of this lawsuit (4 were in Canada, and 7 were west of the Mississippi River or in Florida, areas not at issue) ;[5]

---

[4] The extensive backup data is found at R.510, Ex.71.

[5] Before the joint venture began, the conspiracy principally impacted the industrial-merchant market east of the Mississippi, and damages were confined to that area. (A621-22). The conspiracy always excluded the Florida fertilizer market. (*Id.* and A862).

- of the remaining 7 plants, one was a plant in Claymont, Delaware (SA252) that participated in collusion (*e.g.* A163, "General---To turn down production at Claymont");
- of the remaining 6 plants, two were owned by oil refiners (Shell Oil in Wood River, Illinois, and Phelps Dodge in Monmouth Junction, New Jersey, SA251), and were therefore "captive" plants that never sold to the industrial-merchant market (*e.g.* R.407 Ex. 6 p.75);
- of the remaining 4 plants, the largest on defendants' chart (Rhodia in Hammond, Indiana) sold only 10,000 tons/year to the merchant market (and sold the rest captively). (R.510 Ex. 71).

In short, nothing about these plants alters the market share findings of plaintiffs' and defendants' economists.

E. Defendants' Territorial Allocation

Plaintiffs showed that defendants allocated territories for sale of smelter acid to prevent "overlap" which "[l]eads to erosion in prices." (Pl.Br. 17). Defendants claim that this only involved Falconbridge acid, and only post-1995. (Def.Br. 17-18). To the contrary, the seminal 1988 Noranda memo (A155) stated that "[e]xtreme care will be taken to insure that Noranda acid is not resold by more than one supplier in the same market area. . . ." (A157). This territorial allocation scheme was part and parcel of the output restriction scheme. Defendants also claim that these zone contracts permitted the U.S. defendants to sell "acid wherever they wished." (Def.Br. 18). Defendants ignore contrary evidence ("only Marsulex can sell Falconbridge in this zone") (A253). Defendants also ignore the clear evidence that the purpose was to stabilize prices among all defendants, both Canadian and U.S. (A231, quoted at Pl.Br. 17-18).

F. The Joint Venture

(1) This "Strategic Alliance" Had No Assets or Employees

Plaintiffs showed that the joint venture was merely a sham vehicle to continue the output restrictions. The "JV" had no assets and no employees. (Pl.Br. 18-19). Defendants' statement to the taxing authorities said explicitly "[t]here are no direct employees." (A440). Defendants do not dispute this, claiming merely the joint venture covered their salaries. (Def.Br. 22). As to assets, plaintiffs showed that defendants contributed only $5,000 each. (A491-92 ¶27). Defendants take umbrage, terming this a misrepresentation. (Def.Br. 21 n.15). But Noranda's Vice President George Jones states in his declaration: "To form the Joint Venture, Noranda made an initial cash contribution of $5,000 in exchange for a 50% membership interest in the Joint Venture" (SA273 ¶18), and that DuPont did the same. (*Id.* ¶20). Defendants contend the parents "agreed" to advance up to $2 million, but there is no evidence in the record the parents ever did so. Most significantly, it is undisputed that the parents contributed no manufacturing plants, equipment, or other assets. (A491-92 ¶27,A393).

(2) The Joint Venture Avoided Scrutiny Under the Hart-Scott-Rodino Act

Defendants do not dispute that they circumvented Hart-Scott-Rodino preclearance. Defendants state, without legal or factual support, that they were "exempt" from such filing. (Def.Br. 23 n.17). Defendants cite the FTC's Formal Interpretation 15 concerning LLC's, found at 6 *Trade Reg.Rep.* (CCH) ¶42,475 at 42,609-613 (hereafter "CCH at ______").[6]

Defendants filed their Certificate of Formation with the Delaware Secretary of State as an LLC on April 15, 1998. (A11 ¶109). Yet Formal Interpretation 15 was not published until October 13, 1998, to become effective December 14, 1998. It was then postponed and had an actual effective date of March 1, 1999. (CCH at 42,609). Thus, defendants cannot contend they relied upon this Formal Interpretation.

And defendants do not do so. In the Formal Interpretation, the DOJ/FTC explain that LLCs are relatively new creatures of state law, a hybrid between a partnership and a corporation. *Id.* In many cases, LLCs are start-ups which do "not raise antitrust concerns." *Id.* However:

> The use of LLCs has evolved, and . . . they are now often used to combine competing businesses under common control. . . . *[T]he union of competing businesses under common control is of obvious potential antitrust concern.*

Id. at 42,610 (emphasis supplied). In Formal Interpretation 15, the DOJ/FTC announced that an LLC *must* report for pre-clearance under the following circumstances:

> The [DOJ/FTC] will henceforth treat as reportable the formation of an LLC if: (1) two or more preexisting, separately controlled businesses will be contributed, and

[6] These Formal Interpretations are also available on the FTC website at http://www.ftc.gov/bc/hsr/frmlintrps/index.shtm and are published in the *Federal Register*. *See* 64 FR 34804-02, 1999 WL 429226 (June 29, 1999).

> (2) at least one of the members will control the LLC (i.e. have an interest entitling it to 50 percent of the profits of the LLC or 50 of the assets of the LLC upon dissolution.

Id. at 42,610. The Noranda/DuPont joint venture clearly met this test. Pre-existing, separately controlled businesses were combined, and Noranda and DuPont each had a 50% ownership interest. (SA273, ¶¶18,20). Hence, the joint venture was required to report.

Defendants rely upon a position that was *repudiated* in that Formal Interpretation. Defendants cite page 42,609 n. 4. (Def.Br. 23 n.17). In footnote 4, the DOJ/FTC explain that they had, prior to the adoption of Interpretation 15, given "informal advice" that LLCs only had to report for pre-clearance when the LLC had an independent board of directors (a board composed of "other than their employees, officers or directors."). If there was no "independence" by the LLC's board, it was informally treated as a "partnership" and not required to report.

The record does not contain any evidence that defendants sought or received any informal advice from the FTC/DOJ, nor, if they did, what they told the government about this "largest single marketing entity of sulfuric acid in the world" (A436) which "[o]n a volume basis . . . is easily the largest business in the portfolio of either DuPont or Noranda." *Id.* However, the thrust of defendants' claim for exemption is ironic, because it advances plaintiffs' claim of anticompetitive conduct. In a brief that seeks to argue that the joint venture was independent from its parents (Def.Br. 22), defendants assert that they avoided submitting for Hart-Scott-Rodino preclearance on the grounds that the board had no scintilla of independence from its parents, horizontal competitors, and was merely a "partnership" among horizontal competitors.[7]

(3) The Joint Venture's Origin Was Anti-Competitive

Plaintiffs showed that the joint venture originated in explicit anti-competitive discussions among Noranda, DuPont and Falconbridge. (Pl.Br. 21-22). Defendants ignore these documents in their response, except to claim that certain documents also reflect that Noranda/Falconbridge sought a partner to insulate themselves from anti-dumping charges. (Def.Br. 19, n.14). Plaintiffs agree. This argument, however, is no defense to antitrust liability, as Judge Coar held. (A35).

(4) The Joint Venture Continued and Rewarded the Shutdown Strategy

Plaintiffs showed that the joint venture rewarded and perpetuated the displacement by agreement strategy, by offering shutdown economics to PVS and Koch, and wooing Marsulex, whose claim was "supply demand balancing at on purpose plants." (Pl.Br. 22-25,43). Defendants seek to counter this in two ways. First, they claim that these U.S. defendants feared the joint venture's power. (Def.Br. 24). But that argument is consistent with these defendants then agreeing to yield to that power.

---

[7] The joint venture's board was composed of two Noranda members and two DuPont members (George Jones, Noranda's senior Vice President, and Noranda's Daniel Hamilton; Edward Brown, DuPont's manager for sulfur products and DuPont's William Pickett). A Falconbridge marketing officer, Joseph Laezza, subsequently replaced Mr. Hamilton, and Robert Gilsdorf, a DuPont finance manager, replaced Mr. Pickett. (R436,Ex.24,p.14; R.510,Ex.134). There were no independent members.

Second, they claim that plaintiffs misread the documents, which supposedly show that PVS previously shut its Chicago plant before the joint venture formed. (Def.Br. 24 n.19). To the contrary, the joint venture proposed in July, 1998 (three months after it was formed) to "make PVS Chicago an offer . . . and *allow them to shut* their plant at Chicago down." (A353, (emphasis added)). This is prospective, not retrospective. (*Accord,* A354 (August, 1998, "shutting down most of their plant.")). As to Koch, the evidence has been accurately summarized (*see* Pl.Br. 24-25), and shows written communications and meetings between Koch and the joint venture. Judge Coar found that "[d]iscussions took place in 1998 and 1999 between Koch and the Noranda DuPont Joint Venture" and Koch's DeSoto plant "ceased manufacturing sulfuric acid in June 1999." (A9).

(5) The Joint Venture Used DuPont's Assets to Balance Supply and Demand

Plaintiffs showed that all manufacturing assets continued to be owned by the competitor parents (A393), and that DuPont was directed to scale back production to balance supply and demand in the market. (Pl.Br. 25 and A424). Defendants do not deny this, but claim it was a "temporary inventory bubble." (Def.Br. 25). Whether two months is "temporary" (A419) depends upon one's perspective. Defendants also claim only "one or, at most, two plants" were scaled back. (Def.Br. 25). But a DuPont email states: "require our four plants (1) to burn as little sulfur as possible . . . ." (A415).

Defendants also claim that Noranda did not direct DuPont to take this action. (Def.Br. 25 n.21). But the statement is from Kim Ross, Noranda's President to

George Jones, Noranda's Senior Vice President (A412). Mr. Ross states that after his meeting "with the DuPont Sales force today. . . . a key point I have emphasized is the need for DuPont to curtail sulphur burning for awhile to make room for our bulge of acid." (A412). Defendants claim this is an email from a "DuPont executive." (Def.Br. 25 n. 21). It is not.

(6) The Joint Venture Was An Adjunct of the Smelting Business

Defendants do not take issue with the evidence stating "a major goal of the LLC was to make sure we never shut a smelter down." (A450).

(7) DuPont Insulated Noranda/Falconbridge From Dumping Charges

Plaintiffs and defendants agree that one of the purposes of choosing DuPont as a joint venture partner was to insulate Noranda/Falconbridge from anti-dumping complaints. (Pl.Br. 26, Def.Br. 19 n. 14). Judge Coar correctly held it was not a defense to antitrust liability. (A35).

(8) The Joint Venture Sought to Stabilize Prices

Plaintiffs quoted internal memoranda about the joint venture seeking to raise prices. (Pl.Br. 26-27). Defendants do not disavow that intent, but counter that average prices fell. (Def.Br. 25 and n.20). To the contrary, plaintiffs demonstrated anticompetitive impact on price. This matter is addressed in the discussion of the economic expert reports at pages 14-18 below.

(9) No Efficiencies Were Proved

Plaintiffs showed that no efficiencies were proved. (Pl.Br. 27-28). Defendants point to the Deloitte & Touche analysis of savings from the elimination of co-distributors. (Def.Br. 20). This was simply a recapture and redistribution of on-going margins from the other co-conspirators. (Pl.Br. 23).

Defendants point to the assignment of transportation leases from the parents. (Def.Br. 21). Defendants do not claim they had any ability to re-negotiate those lease terms, and hence cannot claim any greater rights or benefits than the parents had under these same leases. (Pl.Br. 28). Defendants claim they "negotiated favorable rail and transportation contracts and successfully lowered costs." (Def.Br. 23). However, the citation for this (A13) is a reference to NorFalco's Statement of Facts ¶60, which plaintiffs disputed as not supported in the record. (R.510-4, ¶60).

Defendants claim they hired DuPont and others to perform virtually all their tasks. (Def.Br. 22). This does not prove enhanced efficiences – quite the contrary.

At bottom, defendants rely upon the vague, conclusory statements made by Mr. Jones of Noranda. (SA273-74). There is not a single concrete example of any actual saving or efficiency contained in his declaration.

G. Plaintiffs Proved Adverse Effects

One of the most serious misrepresentations in defendants' brief is that plaintiffs supposedly "could prove no actual anticompetitive effects" from defendants' conduct. (Def.Br. 2). This misrepresentation pervades defendants' brief. (See Def.Br. 28) ("Plaintiffs concede that they cannot" "*prove* the anticompetitive effects of [the] challenged conduct."); (Def.Br.45) ("Such demonstrable effects are absent here.")

In a section of their brief entitled "Economic Analysis," (Def.Br. 26), defendants put at issue the opinion of their economic expert, Dr. Hall, and attach his report at SA113-261. Defendants barely allude to the reports of plaintiffs' trial experts, Drs. Tollison and McClave, who proved this anticompetitive impact. Dr. Tollison, an economist, is a distinguished professor at Clemson, and former chief economist for the FTC (A683,698-726). Dr. McClave is one of the foremost econometricians in the U.S who has authored widely-used statistics texts. (A665). Because defendants have put their own economists' opinions at issue on this appeal, and have falsely argued that plaintiffs have shown no impact, plaintiffs submit the initial and rebuttal reports of their experts as A616-81 (Dr. McClave opening report); A682-726 (Dr. Tollison opening report); A727-817 (Dr. McClave rebuttal); A818-849 (Dr. Tollison rebuttal); A866-70 (Dr. McClave supplemental declaration).

Plaintiffs' economists used the prices of sulfuric acid in the Florida fertilizer market over time as a competitive benchmark for the industrial-merchant market (A620).[8] The same sulfuric acid was sold in both markets. With 20-30 million tons

[8] Plaintiffs' economists used the price series tabulated by the trade journal *Fertecon.* The Magistrate Judge held this publication was the industry standard, and could be relied upon by plaintiffs' experts. *In re Sulfuric Acid Antitrust Litig.,* 235 F.R.D.
(footnote continued)

of sulfuric acid used a year, including shipments from overseas, the fertilizer market was highly competitive. (A295,619-20,685 ¶10). *Defendants themselves* repeatedly looked to this as an alternative market for their acid, but one that resulted in lower prices and profit margins. *See* A314 (1998 plan stating "[t]here is always a market for Noranda/Falconbridge acid in the fertilizer market"); A224-25 ("acid sales have to be pushed into . . . the Florida fertilizer market"); A210 ("taking all the tons to Florida"); A307 (one joint venture option is "to sell the acid to fertilizer manufacturers"); A359 (Noranda option, mid-1997, is "Simplify---Sell all to Fertilizer Industry"). Noranda and Falconbridge carefully monitored the differences between the two markets over time. (A267).

Plaintiffs' experts recognized there would always be a legitimate, substantial, price difference between these two markets, with the industrial-merchant market commanding substantially higher prices, and built this assumption into their model, because the industrial customers bought in smaller quantities (such as truckloads and railcars) than the fertilizer industry, and because the acid had to be distributed to industrial customers in different concentrations of acid and in a number of different states. (A620,867 ¶5).

Dr. McClave incorporated data from over 300,000 consumer transactions from 1996 to 2004 and constructed econometric models of pricing in the sulfuric acid

---

646,653 (N.D. Ill. 2006) and *In re Sulfuric Acid Antitrust Litig.,* 446 F.Supp.2d 910 (N.D. Ill. 2006).

market for each defendant for which sufficient data were provided to determine whether defendants' conspiracy had an anti-competitive effect. (A868 ¶9).

The dependent variable of the multiple regression equation was the difference in sulfuric acid prices over time between the industrial-merchant market and the fertilizer market. (A867 ¶5). While there was expected to be an *absolute* difference in price *between* the two markets, the assumption was that if both markets were competitive, they would fluctuate in the same manner. (A618-20). The explanatory variables of the regression equation were those factors that could legitimately account for this legitimate price difference: specifically, the mode of transportation (barge, railcar, truck); the state in which the consumer was located; the quantities sold; and the concentration of the acid. (A621,867 ¶5). Dr. McClave showed that his model was statistically reliable and that all the relationships between the variables were economically sensible. (A630-38,868). Dr. Tollison opined that Dr. McClave's damage methodology and estimates were sound and reliable. (A695-96).

The model showed that *after* DuPont withdrew from the conspiracy in 2001, the two markets began to behave in the same manner. In contrast, *during* the conspiracy period they did not, with the industrial-merchant market showing substantially elevated prices that could not be accounted for by the explanatory variables. (A622-25). These overcharges were substantial for every defendant. Dr. McClave calculated that "my models show overcharges for approximately 90% of customers over the entire class period, representing more than 95% of the modeled revenue." (A869 ¶15). Hence, for defendants to pretend in their brief that plaintiffs had not proved "anti-competitive effects" from the scheme is false.[9]

Defendants attacked this regression model in *Daubert* motions before the Magistrate Judge. Part of their motions had been rejected in the opinions cited at n. 8 above. Other portions of their *Daubert* motions had been orally argued but not ruled upon at the time of this appeal.

Defendants also emphasize that prices in the industrial-merchant market declined after the formation of the joint venture, and use this to argue the joint venture was pro-competitive. (Def.Br. 27). To the contrary, plaintiffs' experts demonstrated that any decline was far less than in the benchmark fertilizer market, meaning that the joint venture stabilized and prevented price erosion in the industrial-merchant market. (A732).

REPLY TO ARGUMENT

Defendants' argument for application of the rule of reason has distorted the applicable law. (Def.Br. 29-49). Defendants' argument is basically the following: (1) the rule of reason is to be applied in every case—including naked horizontal interbrand restraints—whenever a defendant can advance a "pro-competitive" justification that is "superficially pleasing" (Def.Br. 29-33); (2) defendants advance such justifications here. For example, as to the output restrictions, defendants state that the U.S. defendants could not compete with the Canadian smelter acid, and

[9] Dr. McClave further corroborated his results with the use of another *Fertecon* price series, for the Southern merchant market. (A733-35).

therefore it was "pro-competitive" for the U.S. defendants to shut down their plants and use their facilities to sell Canadian acid (Def.Br. 32-33, 36); (3) plaintiffs' authorities are off point: *U.S. v. Socony-Vacuum,* 310 U.S. 150 (1940) has been "rejected" since a 1958 book review criticized it; *General Leaseways* was decided upon "an incomplete record"; *Andreas* and *Denny's Marina* did not set forth pro-competitive justifications. (Def.Br. 45-48 and n.31). Each step in this chain falls apart upon examination.

A. When and How the *Per Se* Rule Is Applied

Contrary to defendants' premise, the rule of reason is not invoked every time a defendant articulates a "superficially pleasing" reason for its conduct. (Def.Br. 33). There would be no *per se* rule under that standard, as *General Leaseways* expressly held, 744 F.2d at 595.

Rather, courts examine the structural nature of the conduct, and more specifically whether it is "horizontal" and thus "interbrand" (among competitors at the same distribution level) as opposed to "vertical" and "intrabrand" (among actors at different distribution levels, such as a manufacturer and its wholesale distributors). If horizontal, the Court asks whether the agreement affects price, output, or territorial allocations. If so, it is judged under the *per se* rule.

The reason for this basic distinction is that horizontal, interbrand restraints are far more serious threats to the economy than vertical, intrabrand restraints. This structural analysis has been uniformly employed by this Court and by the Supreme Court to determine the "mode of analysis." *See, e.g. Leegin Creative*

Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) (vertical intrabrand restraint, rule of reason); *Palmer v. BRG of Ga, Inc.*, 498 U.S. 46, 48-49 (1990) (horizontal interbrand market allocation, *per se* rule); *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 422-23 (1990) (horizontal interbrand group boycott to obtain higher prices, *per se* rule); *Arizona. v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344-50 (1982) (horizontal interbrand price fixing, *per se* rule); *Catalano v. Target Sales*, 446 U.S. 643, 647 (1980) (horizontal interbrand credit agreement, *per se* rule); *County Materials Corp. v. Allan Block Corp.,* 502 F.3d 730, 736 (7th Cir. 2007) (vertical intrabrand restriction of manufacturer and its licensee, rule of reason); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002) (horizontal interbrand price fixing, *per se* rule); *Andreas*, 216 F.3d at 666-668 (horizontal interbrand output restraint, *per se* rule); *Generac Corp. v. Caterpillar, Inc.*, 172 F.3d 971, 977 (7th Cir. 1999) (vertical intrabrand supply restriction, rule of reason); *Denny's Marina*, 8 F.3d at 1220-21 (horizontal interbrand price fixing and boycott, *per se* rule); *General Leaseways*, 744 F.2d at 595 (horizontal interbrand territorial allocation, *per se* rule).

Indeed, a major reason for using this structural analysis is to give certainty to businesses as to when the practices constitute *per se* violations. *See, e.g.*, *Leegin*, 551 U.S. at 886 ("the *per se* rule can give clear guidance for certain conduct") and *Arizona v. Maricopa*, 457 U.S. at 344 (*per se* rule exists "[f]or the sake of business certainty"). Under defendants' formulation—where the "mode of analysis" would be determined by whether the defendant could articulate a "superficially pleasing" justification—there could never be any such certainty.

Under the correct structural analysis, this is a *per se* case. All defendants manufactured sulfuric acid and sold it in competition with each other. They were horizontal competitors engaged in interbrand competition. They agreed to restrict output for the following explicit purpose: "so as not to force an oversupply into a balanced market with predictable price disruption." (A169). This was an interbrand output restriction scheme among horizontal competitors, a classic *per se* violation under *Andreas*. As the Supreme Court emphasized in *National Collegiate Athletic Association v. Board of Regents,* 468 U.S. 85 (1984), which defendants cite (Def.Br. 31):

> Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an 'illegal *per se*' approach because the probability that these practices are anti-competitive is so high… the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the per se rule without inquiry into the special characteristics of a particular industry.

468 at 100 and n. 21. *Accord, Superior Court Trial Lawyers' Ass'n*, 493 U.S. at 423 ("This constriction of supply is the essence of 'price-fixing' . . . .").

Once a Court determines that the *per se* rule applies, then "pro-competitive" justifications are irrelevant:

> The respondents' principal argument is that the *per se* rule is inapplicable because their agreements are alleged to have procompetitive justifications. The argument indicates a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing

> agreements justifies their facial invalidation even if procompetitive justifications are offered for some.

Arizona v. Maricopa County, 457 U.S. at 351. Thus, defendants have the argument exactly backwards. A Court does not look at a "superficially pleasing" justification to determine if the case is *per se* or not. Rather, it makes a structural analysis, and if it is *per se*, these supposed "pro-competitive" justifications are irrelevant.

Defendants' brief intimates that application of the *per se* rule has diminished. Defendants are correct as to vertical intrabrand restraints, which are now subject to the rule of reason. *See Cont'l T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (intrabrand vertical territorial restriction between manufacturer and distributors); *State Oil Co. v. Khan*, 522 U.S. 3 (1997) (vertical intrabrand agreement setting maximum prices); *Leegin*, 551 U.S. at 886 (vertical intrabrand agreement setting minimum price). The rationale in each case has been the same: that intrabrand restraints actually *increase interbrand competition*, and therefore benefit consumers. *See Sylvania*, 433 U.S. at 54 ("vertical restrictions promote interbrand competition…"); *State Oil*, 522 U.S. at 15 ("the primary purpose of the antitrust laws is to protect interbrand competition"); *Leegin*, 551 U.S. at 890 ("Minimum resale price maintenance can stimulate interbrand competition . . . ."). If anything these decisions, and their rationale, have *re-affirmed* why the interbrand horizontal restraints at issue in this lawsuit are *per se* offenses.

Defendants rely heavily upon *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979). (Def.Br. 30-31). In that case, BMI and ASCAP sold non-exclusive blanket licenses for libraries containing tens of thousands of songs, which the thousands of individual composers could not effectively negotiate with CBS, nor monitor to receive royalties. 441 U.S. at 20-24. Defendants criticize plaintiffs for describing this as a "new product" case. (Def.Br. 31 n.24). That is Judge Posner's description in *General Leaseways* (quoted at Pl.Br. 37). And it is exactly how the Supreme Court itself described *Broadcast Music*: "Here, the whole is truly greater than the sum of its parts; it [a blanket license] is, to some extent, *a different product,* " 441 U.S. at 21-22 (emphasis supplied). The Court further held that the agreement on price "is necessary to market the product at all." *Id.* at 23. Here, defendants were not collaborating to market a new and unique product; the whole was not greater than the sum of its parts; and collaboration was not necessary to bring the product to market.

Defendants also rely upon *NCAA*. (Def.Br. 31). There, the NCAA limited certain Division I colleges in televising football games. A truncated rule of reason standard (which condemned the practice) was employed for one reason: "[W]hat is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." 468 U.S. at 101. That is not true of the sulfuric acid industrial-merchant market.

Defendants' remaining distinctions are equally unconvincing. They claim *Socony-Vacuum* has been rejected, citing a 1958 book review that criticized it. (Def.Br. 46 n. 33). To the contrary, the Supreme Court has repeatedly cited it with approval, *e.g.*, *Palmer v. BRG*, 498 U.S. at 48; *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. at 435; *Arizona v. Maricopa County*, 457 U.S. at 351 n.23.

This Court cited it with approval in *Andreas,* 216 F.3d at 667. Defendants claim that *Andreas* involved a "cartel" that offered no "pro-competitive" justifications (Def.Br. 45 n.31). Rather, it involved a horizontal out-put restriction, like the case at bar. 216 F.3d at 666-668.

Defendants misrepresent the law (again) (Def.Br. 45) by citing *Car Carriers, Inc. v. Ford Motor Co.,* 745 F.2d 1101 (7th Cir. 1984), and arguing that, to constitute a *per se* offense, an economic expert must "facially" determine the actual adverse anti-competitive impact without economic analysis. This argument is absurd. *Car Carriers* was a vertical restraint case that was dismissed on a Rule 12(b)(6) motion, and stands for no such proposition. The determination of *per se* analysis is based upon a structural analysis of the conduct, as described above. The analysis of whether that *per se* conduct has an adverse impact upon consumers is a separate issue, which obviously requires expert economic analysis. Plaintiffs' experts proved abundant adverse impact from defendants' scheme (pp. 14-18 above and A616-81 (Dr. McClave opening report); A682-726 (Dr. Tollison opening report); A727-817 (Dr. McClave rebuttal); A818-49 (Dr. Tollison rebuttal); A866-70 (Dr. McClave supplemental declaration)).

B. Defendants' Supposed "Pro-Competitive" Justifications Are Off Point

Defendants' efforts to articulate "pro-competitive justifications" are irrelevant if this is a *per se* case. But it bears note that defendants have not even articulated any true justifications. Defendants argue that the U.S. defendants could not compete with Noranda/Falconbridge ("only one producer would prevail"), and therefore it was "pro-competitive" for the U.S. defendants to shut down their plants but "continue using [their] distribution infrastructure and employing [their] sales personnel." (Def.Br. 35-36).

This is, in short, a justification of "ruinous competition" which is no justification at all. "[Congress] has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to a price-fixing conspiracy." *Socony-Vacuum*, 310 U.S. at 221.

The justifications offered here have been squarely rejected as inimical to the antitrust laws:

> Most of the . . . asserted justifications must be rejected on principle. Maximizing revenues and "protecting the value" . . . are not legitimate justifications by themselves for restraining trade by limiting output. 'We do it because it's more profitable" is not a defense under the Sherman Act.'

Chi. Proof's Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 754 F. Supp. 1336, 1359 (N.D.Ill. 1991), *aff'd* 961 F.2d 667 (7th Cir. 1992). Rather, the correct focus is upon enhanced competition, benefitting consumers. *NCAA*, 468 U.S. at 107.

Defendants also argue that the U.S. defendants' plants "would have shutdown anyway," and quote Dr. Hall's opinion. (Def.Br. 35). This is a disguised, and inadmissible, opinion on liability. Colluders who fix prices or reduce output cannot claim as a defense that "we would have engaged in this same conduct unilaterally, so our collusion doesn't matter." *See, e.g. United States v. Phillips Petroleum Co.*, 367 F.Supp. 1226, 1258-60 (C.D. Cal. 1973), where a merger between Phillips and a smaller company was declared illegal. The court rejected the defense that the merger didn't matter because the smaller company would have gone out of business anyway. "Phillips, however, could have entered the market by an alternative means – unilateral entry – that would have had a substantial procompetitive effect upon the marketplace...." *Id.* at 1259.

C. The Joint Venture Is Judged Under the *Per Se* Standard

"[J]oint ventures have no immunity from the antitrust laws . . . ." *NCAA*, 468 U.S. at 113 and cases at n. 51. Defendants' main argument is that they have articulated some "superficially plausible" justifications for the joint venture being "pro-competitive", and that is sufficient to escape the *per se* rule. But defendants fail to address the U.S. DOJ/FTC *Guidelines,* which stress that savings (even assuming *arguendo* any true savings appeared of record) without true economic "integration" do not avoid the *per se* rule. (Pl.Br. 46-47).

Second, defendants are estopped from claiming this was a true joint venture. They claim to have wriggled through a loophole to avoid Hart-Scott-Rodino preclearance by casting themselves as a "partnership" because they had no independent board of directors. (*See* pages 8-10 above). But a "partnership" of horizontal competitors cannot escape *per se* condemnation where, as here, the partnership engages in naked *per se* illegal acts. (Pl.Br. 21-26 and pages 11-13 above).[10]

---

[10] Dr. McClave separately computed damages for the time period before the joint venture and during the joint venture. (A621). In the event this Court holds that the pre-joint venture conduct is judged under the *per se* rule but the joint venture is *(footnote continued)*

D. The Zone Contracts Are Judged Under the *Per Se* Standard

Plaintiffs stand upon their arguments for why the "zone contracts" are judged under the *per se* rule. (Pl.Br. 52-56). Defendants respond to only one of those arguments, by trying to confuse the issue under *Spray-Rite Service Corp. v. Monsanto Co.,* 684 F.2d 1226, 1237 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984). (Def.Br. 47-48).

Spray-Rite held that where what would otherwise be "rule of reason" conduct is intertwined with *per se* conduct, the entire conduct is subject to the *per se* rule. 684 F.2d at 1237. The Supreme Court agreed. 465 U.S. at 759 n.6. Defendants argue that what *Spray-Rite* treated as the underlying *per se* conduct (price fixing between a manufacturer and its dealers) is now, under *Leegin*, no longer *per se*, and is subject to the rule of reason. (Def.Br. 47-48). Whether or not this is correct (this Court considered it a group boycott by horizontal competitors and a *per se* violation, 684 F.2d at 1236) is irrelevant here and confuses the issue. In the case at bar, there were unquestionably *per se* horizontal output restrictions as there were in *Andreas*. The "territorial allocations" were inextricably intertwined with this *per se* conduct. Under the rule of *Spray-Rite,* as affirmed by the Supreme Court, the territorial allocations are therefore subject to the *per se* rule.

---

subject to the rule of reason, this case can still proceed to trial for the pre-joint venture conduct.

REPLY TO ALTERNATIVE GROUNDS OF STATUTE OF LIMITATIONS

Evidently sensing that plaintiffs are correct in arguing that the *per se* standard of liability applies in this case, defendants ask the Court to affirm the judgment on the alternative basis that the district court erred in not granting summary judgment on statute of limitations grounds. The action is timely, however, under any of four different standards: the discovery rule stated in *In re Copper Antitrust Litigation*, 436 F.3d 782 (7th Cir. 2006), equitable tolling, equitable estoppel, and the continuing violation doctrine. The district court properly denied summary judgment on limitations grounds.

A. Facts Concerning the Statute of Limitations Defense.

The Globe and Mail of Toronto revealed on January 16, 2003, that Noranda, Falconbridge, and DuPont were included in a U.S. Department of Justice ("DOJ" investigation) into anticompetitive activities involving sulfuric acid. (A857 ¶171,A535). The next day, under the headline "Big U.S. probe shocks sulphuric acid industry," *The Globe and Mail* quoted a spokeswoman for a trade organization of fertilizer companies, who are major sulfuric acid purchasers, who said "[t]his is the first we have heard about [the U.S. antitrust investigation]." (A857 ¶172,A536). Kathy Hayward, the publisher of Sulfuric Acid Today, was quoted as saying she did not "think [the antitrust investigation] is common knowledge in the industry." (A858 ¶173, A536).

In the January 17th article, a spokesperson for Noranda and Falconbridge denied any wrongdoing. (A858 ¶174,A536). According to the article, neither

Noranda nor Falconbridge had publicly disclosed that their offices had been searched by the Royal Canadian Mounted Police and Canadian Competition Bureau officials or that documents had been seized in connection with the U.S. antitrust investigation. (A858 ¶175,A536).

Robert Boyd, the author of a sulfuric acid newsletter called Fertecon (later renamed Penstasul), first reported on January 17, 2003 that "[t]he national press in Canada has been reporting on a topic that has been under wraps until now, the US federal investigation of sulphuric acid pricing in the early and mid-1990s . . . [w]hat has now brought it public is that documents seized from Noranda/Falconbridge by Canadian federal authorities in 1999 at the request of the US are the subject of a court hearing in Canada January 30 . . . Noranda also has in place an injunction barring the files being made public. Now the US feds. have petitioned for the documents to be released to them . . . ." (A859 ¶182,A537).

The Canadian press reports were apparently spawned by Noranda and Falconbridge's attempt to prevent the transmission of their materials seized by Canadian authorities to the DOJ. In 1999, the U.S. had requested the Canadian government to assist with a sulfuric acid antitrust investigation being conducted in the U.S. Canadian search warrants were issued and the searches were completed by October 15, 1999. (A858 ¶176,A539).

The basis for the U.S. investigation was information about Noranda, Falconbridge and Noranda DuPont's anticompetitive activities apparently provided by confidential informers to the DOJ. (A858 ¶177,A540-44). However, until sometime in 2003, the seized documents and the records of the Canadian court proceedings were kept under seal and secret while Noranda and Falconbridge fought to stop the Canadian authorities from sending the seized documents to the DOJ. (A858 ¶178,A556-57). Noranda pleaded to keep the documents under seal so that facts would not come to light that would provide a basis for class action antitrust cases in the U.S. (A858 ¶179,A557).

Because the facts could constitute violations of U.S. antitrust law, the Canadian court unsealed the documents in 2003. (A858 ¶180,A557).

Defendants kept their dealings secret. The negotiations and the terms of shut down agreements between Defendants were kept confidential and not disseminated to Plaintiffs or the public. For example, the acid purchase contract between Delta and Noranda contained a confidentiality provision requiring both companies to keep the terms of the contract confidential. (A859 ¶184,A509). Likewise, the contract between Noranda and DuPont contained a confidentiality provision requiring Noranda and DuPont to keep the terms of their contract confidential. (A859 ¶185,A514). Kim Ross of Noranda testified that he had never seen publicly reported the details of an agreement between Noranda (or any other acid seller) and any acid purchaser. (A859 ¶183,A608-09). Mark Dullea of Delta testified that he also did not publicly disclose the details of Delta's contracts with Noranda. (A859 ¶183,A611-15).

Defendants issued misleading public explanations for their actions as pursuing purposes other than their anticompetitive goal. For example, in a

February 1992 press release, DuPont explained its decision to shut down its Grasselli plant as follows: "A decrease in demand for sulfuric acid within DuPont and from our external customers resulted in the decision to end production at our Grasselli plant." (A859-60 ¶187,A510). Noranda stated publicly that its smelter acid plant at Horne was an environmental project to reduce SO_2 emissions and that Noranda was not expecting to make any money from it. In October 1999, Noranda was reported as saying "[t]he project wasn't constructed to satisfy the sulfuric acid market." (A859 ¶186,A534).

Throughout the class period Defendants issued announcements explaining price increases in terms other than Defendants' anticompetitive agreements. (A860 ¶188,A515-32). For example, on April 18, 1994, PVS published a $10.00 per ton increase effective June 1, 1994 citing "[i]ncreased costs of production and distribution" as the reason for the increase. (A860 ¶190,A233). This was just after Noranda met with PVS on March 23, 1994, and informed PVS that "Noranda [was] looking at raising PVS' price. Increase would be realized thru the [revenue sharing] price mechanism in the contract. In other words, Noranda would realize half the increase." (A860 ¶189,A230). PVS provided Noranda with PVS's delivered pricing to various PVS customers and subsequently wrote to Noranda: "We [PVS] were very successful in increasing pricing to the levels you [Noranda] had requested." (A860 ¶191,A251).

Plaintiffs purchased sulfuric acid from defendants at supracompetitive prices between August 3, 1989 and June 29, 2001. (A860 ¶¶192-93,A854,616-726). There is no evidence that Plaintiffs knew about or had reason to suspect Defendants' unlawful conduct before January 2003. (A860-61 ¶¶194-98,A582-84,586,851-52,855,879-80).

B. The Action Is Not Barred by the Statute of Limitations.

(1) The Action Is Timely Under *Copper*.

Defendants argue that the Court should not follow its own precedent in *Copper*, where the Court "applied the discovery rule in an antitrust action." (Def.Br. 51). According to defendants, that is "the wrong rule." (*Id*). The only authority, however, that Defendants cite for calling *Copper* "a discrepancy in the law" (*Id.*) is an off-hand footnote remark in a student note on RICO.[11]

Contrary to Defendants' contention, the Court in *Copper* did not stray from the correct antitrust accrual rule. *See*, *e.g.*, *Rx.com v. Medco Health Solutions, Inc.*, 322 Fed. Appx. 394, 396-97 (5th Cir. 2009) (discovery rule applied in antitrust case). While *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), upon which Defendants rely, addresses when the antitrust cause of action accrues, *Copper* addresses when the period of limitations begins as to any specific plaintiff. The two decisions are compatible.

In *Copper*, the Court started with the accrual standard formulated in *Zenith*. There the Supreme Court stated,

---

[11] *See* Carli McNeill, Note, *Seeing the Forest: A Holistic View of the RICO Statute of Limitations*, 85 Notre Dame L. Rev. 1231, 1249 n.121 (2010) (describing this Court as having "gone completely off the tracks").

> The basic rule is that damages are recoverable under the federal antitrust acts only if suit therefor is "commenced within four years after the cause of action accrued," 15 U. S. C. § 15b, plus any additional number of years during which the statute of limitations was tolled. Generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.

401 U.S. at 338. The Supreme Court qualified this formulation with the term "generally." There was no reason in *Zenith*, however, to address the discovery rule, since Zenith clearly knew it had been injured on the very date the injury occurred.[12] In *Copper*, by contrast, the plaintiffs only became aware that the defendant, Morgan, had injured them after a series of events in which its coconspirator, Sumitomo, had first publicly disclosed improper futures manipulation by one of its traders and then, much later, unsealed its complaint that implicated Morgan.

The discovery rule is certainly not "the wrong rule" as Defendants contend. Even before *Copper*, in *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446 (7th Cir. 1990), this Court summarized the discovery rule which obtains "in the absence of a contrary directive from Congress,"[13] *Id.* at 450, as follows:

> Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date — often the same, but sometimes later — on which the plaintiff discovers that he has been injured.

---

[12] Hence the Court spoke in terms of "if a plaintiff *feels* the adverse impact of an antitrust conspiracy on a particular date, a cause of action immediately accrues to him . . . ." *Id.* at 339 (emphasis added).

[13] Defendants do not contend that Congress has directed that the discovery rule not apply.

Id.[14] The Court subsequently amplified: "the general rule [is] that accrual occurs when the plaintiff discovers that he has been *injured* and who *caused* the injury." *Barry Aviation Inc. v. Land O'Lakes Mun. Airport Comm'n*, 377 F.3d 682, 688 (7th Cir. 2004) (italics in original; citations and quotation marks omitted); *accord*, *Jay E. Hayden Found. v. First Neighbor Bank, N.A.*, 610 F.3d 382, 386 (7th Cir. 2010) (limitations period "starts running when the prospective plaintiff discovers (or should if diligent have discovered) both the injury that gives rise to his claim and the injurer or (in this case) injurers."). *See Rotella v. Wood*, 528 U.S. 549, 556 (2000) (statute is triggered when "a plaintiff [is] in possession of the critical facts that he has been hurt and who has inflicted the injury").

Thus, *Copper* is properly grounded on the very concept of accrual that *Zenith*, *Rotella*, *Cada*, and *Barry Aviation* collectively address:

> Generally, an antitrust cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business.… As in other areas of the law, however, in the absence of a contrary directive from Congress this rule is qualified by the discovery rule, which postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured.… This principle is based on the general rule that accrual occurs when the plaintiff discovers that he has been *injured* and who *caused* the injury.

436 F.3d at 789 (emphasis in original; citations and quotations omitted). This Court has recently reiterated the *Copper* rule in *Asher v. Chase Bank United States, N.A.*,

---

[14] The Supreme Court has cited with approval and quoted *Cada*. *See Holland v. Florida*, — U.S. —, 130 S. Ct. 2549, 2561, 177 L. Ed. 2d 130, 144 (2010).

310 Fed. Appx. 912, 916 (7th Cir. 2009) ("a claim arising under federal law accrues when the plaintiff has discovered or reasonably should have discovered the injury").

Consistent with this standard, Plaintiffs commenced this litigation on February 21, 2003. (SA 298). This was promptly after the facts of Defendants' conspiracy were first published in *The Globe and Mail* on January 16, 2003. (A857 ¶171,A535). That is when Plaintiffs were first on notice of the injury they had suffered and who caused it. In short, the district court properly viewed the evidence in the light most favorable to plaintiffs and held that the discovery rule applies in this case, precluding summary judgment for defendants.

(2) The Action is Timely Due to Equitable Tolling.

Irrespective of the accrual rule under *Zenith* and *Copper*, the present case was timely under equitable tolling. Courts distinguish between when a cause of action accrues and when the limitations period on that claim commences to run. *Zenith* only addressed the former. Defendants argue for an inflexible four-years-from-injury limitations rule, but *Zenith* itself recognized, as did the Court in *Copper* and the district court in this case, that the four-year rule is not inflexible but instead is subject to tolling. *See Zenith*, 401 U.S. at 338 ("four years. . . *plus any additional number of years during which the statute of limitations was tolled*") (italics supplied).

Equitable tolling "permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada*, 920 F.2d at 451. Equitable tolling differs from the discovery rule "in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Id.*

Recently, the Supreme Court reiterated that "a nonjurisdictional federal statute of limitations," such as Clayton Act § 4B, "is normally subject to a rebuttable presumption in *favor* of equitable tolling." *Holland v. Florida*, — U.S. —, 130 S. Ct. 2549, 2560 (2010) (emphasis in original; internal quotations omitted); *accord*, *Young v. United States*, 535 U.S. 43, 49 (2002) ("It is hornbook law that limitations periods are customarily subject to equitable tolling") (internal quotations omitted). As the Court observed in *Holland*, "[w]e must . . . distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute of limitations . . ." 130 S. Ct. at 2561 (emphasis in original).

This case is thus timely. The evidence showed that plaintiffs brought suit on February 21, 2003, promptly after they could with reasonable diligence have known on January 16, 2003, that they were injured by anticompetitive prices they had paid for sulfuric acid and that this injury was caused by Defendants' unlawful conduct. *See Copper*, 436 F.3d at 789; *In re Ready-Mixed Concrete Price Fixing Litig.*, No. 1:05-cv-00979-SEB-VSS, 2006 U.S. Dist. Lexis 71874, at 14 (S.D. Ind. Sept. 29, 2006) (class had no knowledge of wrongful conduct or of facts that might have led to discovery thereof until prosecutors announced a guilty plea). The evidence shows, for example, that even the highly specialized, limited circulation, sulfuric acid trade newsletter, Fertecon, first reported on January 17, 2003, that the information about Defendants' cartel, including the 1999 seizure of documents by Canadian authorities, "ha[d] been under wraps until now." (A859 ¶182,A537). Hence, there is no evidence that Plaintiffs knew about Defendants' unlawful conduct before January 2003. (A860-61 ¶¶194-98,A582-84,586,851-52,855,879-80).

Since defendants do not even address equitable tolling, they have failed to show error by the district court in denying their summary judgment motion.

(3) The Action is Timely Due to Equitable Estoppel.

This case is also timely under equitable estoppel, which "comes into play if the defendant takes active steps to prevent the plaintiff from suing in time." *Cada*, 920 F.2d at 450; *see Thelen v. Marc's Big Boy Corp.*, 64 F.3d 264, 267 (7th Cir. 1995). Equitable estoppel is broader than fraudulent concealment and does not require fraud, misconduct, or trickery. *See Singletary v. Cont'l Ill. Nat't Bank*, 9 F.3d 1236, 1241 (7th Cir. 1993). Active steps of concealment alone are sufficient. *See id.* Tolling "protects 'both the diligent and the non-diligent plaintiff . . . from the expiration of claims the factual basis for which was shrouded by the veil of fraudulent concealment.'" *Copper*, 436 F.3d at 792 (quoting *Morton's Market, Inc. v. Gustafson's Dairy, Inc.,* 198 F.3d 823, 836 (11th Cir. 1999).

After active concealment, "the statute is tolled until actual discovery" by the plaintiff. *Sperry v. Barggren*, 523 F.2d 708, 711 (7th Cir. 1975). The limitations period does not resume merely because the plaintiff "may have smelled a rat." *Gaiman v. McFarlane*, 360 F.3d 644, 657 (7th Cir. 2004). "[M]ore than merely suspicious circumstances" is required to end tolling; rather, "ready access" by the plaintiff to "the essential facts that he needs in order to be able to sue" is required. *Fujisawa Pharm. Co. Ltd v. Kapoor*, 115 F.3d 1332, 1337 (7th Cir. 1997). Moreover, a plaintiff is deemed to have ready access only to facts that are obtainable "without the use of legal process." *Marks v. CDW Computer Ctrs.*, 122 F.3d 363, 367 (7th Cir. 1997) (internal quotations and citation omitted).

There is a "'stringent' standard of review at summary judgment for determining whether the defendants' conduct 'prevented the plaintiff from discovering his claim prior to the expiration of the limitations period.'" *Copper*, 436 F.3d at 792 (quoting *Morton's Market*, 198 F.3d at 832).

> [I]t is not enough for summary judgment to point to facts which *might* have caused a plaintiff to inquire, or *could* have led to evidence supporting his claim. A defendant who does this has succeeded in demonstrating only that there is a jury question . . . .

Id. (quoting *Morton's Market*, 198 F.3d at 832-33 (emphasis in original)).

In *Morton's Market*, a widely publicized government investigation of a conspiracy among dairies to rig bids for school contracts was an insufficient basis for summary judgment against plaintiffs who alleged that the dairies also had conspired to fix wholesale prices. The dairies had "shown only that there was information in 1988 that *might* have led plaintiffs to inquire, and [had] made virtually no showing at all regarding what plaintiffs would have discovered had they done so." 198 F.3d at 833 (emphasis in original). *See also Conmar Corp v. Mitsui & Co.*, 858 F.2d 499, 503 (9th Cir. 1988) (newspaper articles were insufficient to start the statute of limitations running after the defendant engaged in concealment).

The knowledge required to start the statute of limitations following active concealment must be specific to the defendant. Simply because a person knows he has been injured by one party does not mean he knows of every other participant. *See Drazen v. United States*, 762 F.2d 56, 58-59 (7th Cir. 1985) (statute of limitations did not begin to run until the plaintiff knew that particular defendant was responsible for the alleged injury); *Hobson v. Wilson*, 737 F.2d 1, 36 (D.C. Cir. 1984) ("simply because a person knows he has been injured by one person cannot reasonably mean he should be held to know of every other participant"); *Wenneman v. Brown*, 49 F. Supp. 2d 1283, 1293 (D. Utah 1999) (notice of defendants' relationship with indicted entities is not notice of defendants' participation in the wrongdoing).

"When the information in the public domain only contains reports of activities that are within the defendant's normal, non-illegal activities, a fact question exists as to when the plaintiff was put on inquiry notice of defendants' wrongdoing." *In re Energy Transfer Partners Natural Gas Litig.*, No. 4:07-cv-3349, 2009 U.S. Dist. Lexis 75859, at 50 (S.D. Tex. Aug. 26, 2009) (citing *Copper*, 436 F.3d at 790). Summary judgment was denied because the plaintiffs could show it was impossible to discover the unlawful conduct before the CFTC filed its complaint. *Id.* at *51.

Defendants here actively sought to keep their activities secret at every turn. The shut downs and acid purchases were kept confidential. (A859 ¶¶183-85,A608-09,611-15,882-86). Although Canadian authorities seized documents in 1999, those proceedings – just like the Sumitomo suit against Morgan in *Copper* – were kept secret for years, until 2003. (A858 ¶¶177-80,A540-44,556-57). Noranda had pleaded to keep the matter under seal to prevent an antitrust class action in the U.S. (A858 ¶179,A557). Meanwhile, Defendants resorted to misleading and false public explanations for their actions. (A859-60 ¶¶186-91,A230,233,251,510,515-32,534). Examples include false attribution of an agreed price increase to "[i]ncreased costs of production and distribution" (A860 ¶190,A233) and the false description of the Horne smelter acid plant as an environmental project. (A859 ¶186,A534). When defendants' scheme was disclosed publicly in January 2003, plaintiffs promptly brought suit. (A858-59 ¶¶173-82,A536-37,539,540-44,556-57,888; SA298).

As in *Copper*, this evidence creates a genuine issue of material fact precluding summary judgment under equitable estoppel.

(4) The Action is Timely Under the Continuing Violation Doctrine.

In *Zenith*, the Supreme Court held that "[i]n the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act." 401 U.S. at 338. Thus, each time plaintiffs purchased sulfuric acid at prices inflated by defendants' anticompetitive conduct, plaintiffs suffered a new injury. *See Klehr v. A.O. Smith Corp.,* 521 U.S. 179, 189 (1997) ("each sale to the plaintiff . . . starts the statutory period running again"); *U.S. Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623, 628 (7th Cir. 2003) ("The statute … runs from the most recent injury caused by the defendants' activities rather than from the cartel's inception.... The parties' decision to keep a joint venture in operation or manage the operations in ways that may violate antitrust rules is one that may be challenged when adverse effects are felt.") (citations omitted).

The evidence shows that the output restrictions and price fixing – both before and during the joint venture – brought about sales of sulfuric acid at supra-competitive levels and that plaintiffs purchased sulfuric acid at such levels at least through June 2001, when DuPont left the joint venture. (A860 ¶192,A616-726). Accordingly, this litigation, commenced February 21, 2003 (SA298), is timely.

II. RESPONSE TO CROSS APPEAL IN NO. 12-1224

STATEMENT OF THE CASE

Plaintiffs moved for class certification in October, 2003 (R.17-18), and refiled at the court's direction on May 5, 2004 (R.55-57), for a class of direct purchasers from defendants. In support of their motion, plaintiffs submitted the expert opinions of Dr. Martin Asher, a Wharton finance professor. (A558-80,A587-606). Dr. Asher concluded that plaintiffs' claims of antitrust injury could be adjudicated on a class-wide basis and proposed a methodology for doing so using multiple regression analysis. (A135). As discovery was incomplete (defendants had not produced their transaction data of sales to class members), Dr. Asher could not prepare a final expert report. His report however, demonstrated that commonly accepted multiple regression analysis was appropriate and could be used. *See, e.g. In re Linerboard Antitrust Litigation,* 305 F.3d 145, 153-54 (3d Cir. 2002), in which the Third Circuit upheld class certification in an antitrust class action where, as here, the expert report of the economist opined that multiple regression analysis could be used to demonstrate common impact. Defendants did not move to exclude Dr. Asher's opinions on *Daubert* grounds.

On March 21, 2007, the district court granted plaintiffs' motion for class certification. The court cited "Dr. Asher's testimony" as a factor supporting its decision, as well as "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." (A136). Defendants moved for decertification. (R.538). The court denied the motion on April 11, 2007 (R.540). Each of the supposedly new developments cited by defendants in their motion had been known to them more than a year before Judge Coar's decision (R. 684 at 1), but defendants had raised none of them in supplemental briefing prior to Judge Coar's decision. Judge Coar found that Defendants' motion "rehash[ed] matters that have already been considered" and denied it. (SA4). Defendants did not seek leave to appeal under Fed. R. Civ. P. 23(f).

While the motion for class certification was still pending, plaintiffs retained Drs. McClave and Tollison as trial experts. Their opinions are summarized on pages 14-18 above. Defendants misrepresent that Dr. McClave had not shown "impact" (Def.Br. 60), but Dr. McClave did in fact opine that defendants' conspiracy had classwide impact. (A866 ¶2,A868 ¶13). He explained that his model can be used to find impact and damages on an individual basis. (A868-69 ¶14.) According to Dr. McClave's calculations, "my models show overcharges for approximately 90% of customers over the entire class period, representing more than 95% of the modeled revenue." (A869. ¶15).[15]

Defendants moved to exclude Drs. McClave and Tollison on *Daubert* grounds. Their motion was argued before the Magistrate Judge in 2006. He partially denied the motions, in the decisions cited on page 15, n. 8 above. He deferred ruling on the remainder of the motions until after Judge Coar adjudicated summary judgment. Following that September 2010 adjudication, the Magistrate Judge heard re-argument in the fall of 2011 (R. 726,730). No decision had been rendered at the time of the present appeal and cross-appeal.

On June 30, 2011, defendants filed a puzzling motion to bar testimony by Dr. Asher, who had not opined since 2004, and who was not listed as a trial witness. (R671). This motion, bordering on the frivolous, was denied as "a needless expenditure of judicial time that could and should more profitably be devoted to cases that presently need resolution . . . ." (R689).

[15] In using the term "class period," Dr. McClave was referring to the damages period he modeled, *i.e.* with an end date of June, 2001. (A621).

Defendants renewed their motion to decertify the class on June 7, 2011. (R643). Chief Judge Holderman found that "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" (SA 10) and denied defendants' motion.

In August, 2011, in light of the trial scheduled for February 2012, plaintiffs filed a motion to refine the class definition and to send new notice to class members, to conform to the damage analyses of Drs. McClave and Tollison. (R.694). The purpose was to apprise class members of the damage model that would be presented at trial, so that they would have an additional opportunity to opt-out of the class if they so desired. (A871-77). Although the class as originally certified extended to January 2003 (A862), Drs. McClave and Tollison concluded that damages stopped in June 2001, when DuPont withdrew from the joint venture. (A621). This modification of the class *benefitted defendants because it exposed them to fewer years of damages.* Similarly, Drs. McClave and Tollison limited the impact of the conspiracy during the pre-joint venture years to the industrial-merchant market east of the Mississippi River (while calculating there were attenuated effects in the west). (A621). Again, this limitation *benefitted* defendants.

Chief Judge Holderman denied plaintiffs' motion on December 13, 2011 (R.788). In doing so, he criticized plaintiffs' counsel (A68-69) for supposedly not advising Judge Coar of the existence of these expert reports. But Judge Coar and Magistrate Judge Cole were both well aware of those reports. Judge Coar and the Magistrate Judge jointly supervised the schedule for submitting these expert reports. (R.240, 241, 246, 247, 248). The McClave/Tollison expert reports were the subject of extensive motions and briefing in 2006 (R.350, 353, 356, 388, 495, 498, 502). At oral argument in November, 2006, defense counsel discussed the shortened damage period. (R. 695 at 4-5). When defense counsel moved to decertify the class in 2007, they attached Dr. McClave's reports (R. 539 Exs. 2 and 8). Judge Coar denied defendants' motion because it "*rehash[ed] matters that have already been considered.*" (SA4, emphasis supplied). In short, nothing was withheld and no one was misled.

SUMMARY OF ARGUMENT

Defendants' cross-appeal is without merit. At bottom, it seeks to exploit minor differences between an opinion by one expert (Dr. Asher) who provided initial class certification reports in 2003-2004, and plaintiffs' trial experts (Drs. McClave and Tollison). In fact, defendants *benefit* from those minor differences, because the McClave/Tollison damage analysis *shortened* the time period for which defendants are exposed to damages, and therefore result in *less* damages. The arguments defendants raise are not grounds for decertification. The class was correctly certified, and motions for decertification were twice correctly denied, pursuant to *Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 824 (7th Cir. 2012) and *Kohen v. Pacific Inv. Management Co. LLC*, 571 F.3d 672, 676 (7th Cir. 2009).

STATEMENT OF STANDARD OF REVIEW

"Appellate review of class certification decisions is deferential…" *Council 31 v. Ward*, 978 F.2d 373. 380 (7th Cir. 1992), and such decisions are reviewed for abuse of discretion. *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525, 528 (7th Cir. 2012) ("this Court will reverse a certification decision only when it finds an abuse of discretion.").

ARGUMENT

A. Defendants Challenge the Denial of Their Decertification Motions

Defendants' brief does not challenge Judge Coar's original decision to certify the class (other than obliquely criticizing Dr. Asher on page 59, whose opinion they never sought to exclude at the time on *Daubert* grounds). Rather, defendants argue there was an abuse of discretion in denying their two decertification motions (in 2007 and 2011). (Def.Br. 61-62). Thus, defendants have waived challenges to the initial certification. *See Messner,* 669 F.3d at 824 ("Northshore never developed such an argument in its briefs to this court, thus waiving that argument on appeal.").[16]

Moreover, defendants' assignment of error to these rulings is narrow: defendants assert (incorrectly) that decertification was necessary because of purported inconsistencies between Dr. Asher's and Dr. McClave's opinions, and because the *Daubert* motion as to Dr. McClave is pending. The relief defendants seek, however, overreaches: rather than requesting that the matter be remanded for consideration of their *Daubert* motion or for revision of the class definition,

---

[16] Defendants are also foreclosed from doing so in their reply brief. *Broaddus v. Shields*, 665 F.3d 846, 854 (7th Cir. 2011) ("[A]rguments raised for the first time in a reply brief are waived.")

defendants ask this Court to reverse the district court and hold that a class should not be certified at all. Defendants have failed to justify such drastic action. The district court's decisions to certify and maintain a class in this matter are well supported by testimony of both Dr. Asher and Dr. McClave, as well as the recent decisions of this Circuit, including *Messner*.

B. The District Court's Decision to Certify a Class in This Matter Was, and Remains, Correct.

Judge Coar's original decision in 2007 to certify a class in this matter was a careful, faithful application of the legal standards of Rule 23 and this Circuit's precedent. (A129-37). The class certification proceedings below focused on whether plaintiffs had established the predominance element under Rule 23(b)(3) that "the questions of law or fact common to class members predominate over any questions affecting only individual members."[17] In making this determination, "[i]ndividual questions need not be absent. The text of Rule 23(b)(3) itself contemplates that such individual questions will be present. The rule requires only that those questions not predominate over the common questions affecting the class as a whole." *Messner*, 669 F.3d at 815.

As *Messner* held, "[t]here is no mathematical or mechanical test for evaluating predominance". *Id.* at 814. "[T]he Rule 23(b)(3) 'inquiry trains on the legal or factual questions that qualify each class member's case as a genuine

[17] As Chief Judge Holderman noted, "Defendants do not take issue with Judge Coar's findings" that "Plaintiffs had satisfied the four requirements of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation." (SA7).

controversy,' with the purpose being to determine whether a proposed class is 'sufficiently cohesive to warrant adjudication by representation.'" *Id.* With respect to antitrust class actions specifically, this Court observed:

> …[T]he Supreme Court also commented in *Amchem*: "Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."…We understand the comment to mean that careful application of Rule 23 is necessary in antitrust cases, as in all cases, and that in antitrust cases, Rule 23, when applied rigorously, will frequently lead to certification.

Id. at 814-815 (quotations omitted).

The predominance inquiry "begins, of course, with the elements of the underlying cause of action." *Id.* at 815. The three elements of plaintiffs' antitrust cause of action are: "(1) a violation of the antitrust laws … (2) individual injury resulting from that violation, and (3) measurable damages." *Behrend v. Comcast Corp.*, 655 F.3d 182, 191 (3d Cir. 2011). As in most antitrust class actions, Judge Coar found, and defendants did not seriously contest, that proof of defendants' liability is a common question. (*See* A133 ("[T]he existence of a conspiracy is a common question that can be addressed at the class-wide level and need not be addressed again as a stumbling block for finding predominance."); A136 ("[T]he predominant issue remains the conspiracy itself.")). Individual questions regarding damages do not pose an obstacle to a finding of predominance in antitrust class actions. "It is well established that the presence of individualized questions regarding damages does not prevent certification under Rule 23(b)(3)." *Messner*, 669 F.3d at 815.

The remaining issue of antitrust impact thus becomes the focus of the predominance inquiry in an antitrust class action such as this one. *Messner* holds:

> [P]laintiffs' burden at the class certification stage [was] not to prove the element of antitrust impact, but only to demonstrate that the element of antitrust impact is capable of proof at trial through evidence that is common to the class rather than individual to its members.

Id. at 818 (citations and quotations omitted). The district court applied this standard. Judge Coar correctly noted that the relevant question "is *not* whether [Dr. Asher's] proposed mechanism will ultimately be successful in convincing a fact-finder," but whether he showed that impact could be established on a class-wide basis. (A136); *see also Messner*, 669 F.3d at 811 ("[T]he court should not turn the class certification proceedings into a dress rehearsal for the trial on the merits.")

As this Court held:

> PIMCO argues that before certifying a class the district judge was required to determine which class members had suffered damages. But putting the cart before the horse in that way would vitiate the economies of class action procedure; in effect the trial would precede the certification.

Kohen, 571 F.3d at 676.

Plaintiffs were not required to, prove the existence of class-wide impact itself to justify the certification of a class; Dr. Asher's testimony that "the alleged injury can be treated as a class-wide phenomenon" through the use of multiple regression analysis and yardstick techniques is sufficient. (A135).

C. Dr. McClave's Opinions Confirm That Class Certification Is Proper.

In this appeal, defendants argue that the work done by Dr. McClave, plaintiffs' expert econometrician for trial, somehow undermines the class certification opinion of Dr. Asher. Defendants' argument is fallacious. Dr. McClave's regression models serve at trial as the proof of class-wide impact that Dr. Asher opined would be possible to demonstrate. Indeed, since Dr. McClave successfully constructed a set of robust models of the impact of defendants' conspiracy, they confirm that Dr. Asher's opinions and the district court's class certification rulings were correct.

As an initial matter, defendants' claims that plaintiffs "switched" experts or somehow "abandoned" Dr. Asher (Def.Br. 2, 61) are unsupported by the record. As plaintiffs have clarified on multiple occasions, Dr. Asher was plaintiffs' expert for purposes of class certification. Plaintiffs retained Dr. McClave to carry out the regression analysis and retained Dr. Tollison to work with Dr. McClave regarding certain matters of economics. Far from being inconsistent with Dr. Asher's opinions, Dr. McClave's models bear out Dr. Asher's conclusions that regression models can be used to prove impact on a class-wide basis.

Defendants' primary criticism is that Dr. McClave did not perform a "but-for" analysis of prices that could be used to determine impact separately for each class member. As Dr. McClave explained, his models in fact do allow for such determination. (A868-69 ¶¶14-15). He found that, for the time periods he modelled and for which he had data, virtually all class members had sustained damages. (*Id.* ¶15.).

Nor does defendants' argument that Dr. McClave's models do not entirely coincide with the original class definition justify decertification of the class. His models shortened the end of the damages period (from January 2003 to June 2001) and narrowed the pre-joint venture geographic scope of damages (to the industrial-merchant market east of the Mississippi River). These changes *benefit* defendants by restricting damages.

The fact that the initial certification contours were broader is normal. As this Court held:

> What is true is that a class will often include persons who have not been injured by the defendant's conduct; indeed this is almost inevitable because at the outset of the case many of the members of the class may be unknown, or if they are known still the facts bearing on their claims may be unknown. Such a possibility or indeed inevitability does not preclude class certification.

Kohen, 571 F.3d at 677. *Accord, Messner*, 669 F.3d at 823.

The only possible prejudice from the narrowing of the class definition would be to a class member whose only purchases were after June, 2001 (or, pre joint venture, only west of the Mississippi), and who claimed to have relied upon the original class notice sent in 2007 (A862-65) in deciding to remain in the class through trial. But this is not an issue which the ever-solicitous defendants have any standing to raise. And plaintiffs' counsel sought to cure any possible prejudice by the supplemental class notice and supplemental opportunity to opt out of the class in August 2011 (R.695 and A871-77), which Chief Judge Holderman erroneously denied (R788).

To account for the differences between Dr. McClave's models and the original class definition, the proper remedy is to refine the class definition rather than decertify the class. In its original decision to certify the class, the district court anticipated the need for amending the class definition in light of further development of the appropriate contours of the class. (*See* A136 ("As a practical matter, complications that arise while moving forward can be addressed by altering or amending the class, rather than denying certification at the outset.")). This Court has endorsed this procedure. "In circumstances such as these, involving minor overbreadth problems that do not call into question the validity of the class as a whole, the better course is not to deny class certification entirely but to amend the class definition as needed to correct for the overbreadth." *Messner*, 669 F.3d at 826 n.15.

Defendants' brief also makes cursory references to a number of arguments made in their *Daubert* challenge to Dr. McClave's analysis. (*See* Defs.' Br. at 60 & 61 n.40). These matters have been extensively briefed and argued before the district court, and are not on appeal. Defendants' arguments for exclusion are, at best, misguided, and are fully addressed at R. 388 and 683.

D. This Court's *American Honda* Decision Is Inapplicable.

Defendants argue that *American Honda Motor Co. v. Allen*, 600 F.3d 813 (7th Cir. 2010), mandates decertification of the class. The argument fails because defendants did not challenge Dr. Asher's testimony on *Daubert* grounds. *American Honda*'s holding states only that "when an expert's report or testimony is critical to class certification . . . a district court must conclusively rule *on any challenge to the expert's qualifications or submissions* prior to ruling on a class certification motion." *Id.* at 816–817 (emphasis supplied). The district court's class certification decision relied on Dr. Asher's testimony, not Dr. McClave's, and defendants never challenged Dr. Asher's testimony. Likewise, neither Judge Coar nor Chief Judge Holderman critically relied on Dr. McClave's opinion in their respective rulings to maintain the certified class. Thus, as Chief Judge Holderman noted the factual circumstances of the 2010 *American Honda* decision are not present here. (SA11 n.3).

E. Defendants Have Not Presented Any New Development That Would Warrant Decertification.

Defendants also claim error from Chief Judge Holderman's invocation of the law of the case doctrine. (Def.Br. 62-63). Defendants argue that the law-of-the-case doctrine simply "does not apply" to class certification orders. This is incorrect, and inconsistent with their cited authority, *Ellis v. Elgin Riverboat Resort*, 217 F.R.D. 415 (N.D. Ill. 2003) (*see* Defs.' Br. at 62). The law of the case doctrine requires a change in factual circumstances or legal development to justify revisiting a previously-rendered decision.

The law of the case doctrine has "greater force" where, as here, "there is a change of judges during the litigation and the new judge is asked to revisit the rulings of his predecessor." *HK Sys., Inc. v. Eaton Corp.*, 553 F.3d 1086, 1089 (7th Cir. 2009). Under such circumstances, "[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.'" *Gilbert v. Ill. State Bd. of Educ.*, 591 F.3d 896, 902 (7th Cir. 2010). The law of the case doctrine applies to class certification rulings. *See, e.g.*, *Rolland v. Patrick*, No. 98-30208-KPN, 2008 U.S. Dist. LEXIS 66477, at *10 (D. Mass. Aug. 19, 2008) ("[Defendants] acknowledge that the original class certification was appropriate. That being so, the 'law of the case' doctrine would appear to apply."); *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, No. 93 C 7452, 2005 U.S. Dist. LEXIS 12538, at *5 (N.D. Ill. Mar. 1, 2005) (noting that this Circuit's previous class certification ruling "of course, is the law of the case"); *Langley v. Coughlin*, 715 F. Supp. 522, 553 (S.D.N.Y. 1989) ("Absent some significant intervening event, those findings may be deemed to be the law of the case, and they reflect that plaintiffs have satisfied the requirements of Rule 23(a).").

As Chief Judge Holderman recognized, Rule 23(c)(1) allows the district court to revisit earlier class certification rulings "under appropriate circumstances." (SA10). Thus, in *Ellis*, the district court entertained a motion to decertify "based on evidence developed and revelations produced during three years of discovery and pretrial litigation." 217 F.R.D. at 420. The court in *Ellis* distinguished this motion, however, from "a motion to reconsider requiring a heightened standard of review under the law of the case doctrine," citing to this Court's decision in *Williams v. Commissioner*, 1 F.3d 502, 503 (7th Cir. 1993), that "[t]he second judge may alter previous rulings if new information convinces him that they are incorrect, but he is not free to do so . . . merely because he has a different view of the law or facts from the first judge." *Ellis*, 217 F.R.D. at 420. *See also Gardner v. First Am. Title Ins. Co.*, 218 F.R.D. 216, 218 (D. Minn. 2003) ("Thus, Rule 23(c)(1) provides a limited opportunity to adduce additional facts: It is not a Trojan Horse by which [parties] may endlessly reargue the legal premises of their motion.") As Chief Judge Holderman found, "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." (SA10). Because Defendants did not present any new grounds in support of their motions to decertify, Chief Judge Holderman was correct to apply the law of the case doctrine and deny defendants' motions.

CONCLUSION

This Court should vacate the final judgment, reject defendants' alternative grounds for affirmance, deny their conditional cross-appeal, and remand this case for trial under the *per se* standard. Appellants request the Court to exercise its discretion under Circuit Rule 36 to direct the re-assignment of the case upon remand.

Dated: May 30, 2012

Respectfully submitted,

s/ Robert J. LaRocca
Joseph C. Kohn
Robert J. LaRocca
William E. Hoese
KOHN, SWIFT & GRAF, P.C.
One South Broad Street, Suite 2100
Philadelphia, PA 19107
Telephone: (215) 238-1700
Facsimile: (215) 238-1968

s/ Solomon B. Cera
Solomon B. Cera
Charles Andrew Dirksen
GOLD BENNETT CERA
& SIDENER LLP
595 Market Street, Suite 2300
San Francisco, CA 94105-2835
Telephone: (415) 777-2230
Facsimile: (415) 777-5189

/s/ Mary Jane Fait
Mary Jane Fait
Theodore Bell
WOLF HALDENSTEIN ADLER
FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, Illinois 60603
Telephone: (312) 984-0000
Facsimile: (312) 984-0001

s/ Steven A. Asher
Steven A. Asher
David H. Weinstein
Mindee J. Reuben
WEINSTEIN KITCHENOFF
& ASHER LLC
1845 Walnut Street, Suite 1100
Philadelphia, Pennsylvania 19103
Telephone: (215) 545-7200
Facsimile: (215) 545-6535

Plaintiffs' Co-Lead Counsel/Attorneys for Appellants

CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULES 32(a)(7) and 28.1(e)(2)(A)(i)

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i). The brief contains 13,801 words, including both text and footnotes, but excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). The text and footnotes of this brief are in 12-point Century Schoolbook typeface.

Dated: May 30, 2012

s/ Mary Jane Fait
Mary Jane Fait
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, IL 60603
Telephone: (312) 984-0000
Facsimile: (312) 984-0001

One of the counsel for appellants

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 separately bound Response/Reply Appendix for Appellants submitted with this brief.

/s/ Mary Jane Fait
Mary Jane Fait
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, IL 60603
Telephone: (312) 984-0000
Facsimile: (312) 984-0001

One of the counsel for appellants

CERTIFICATE OF SERVICE

I certify that on May 30, 2012 the Combined Response Of Plaintiffs-Appellees In 12-1224 And Reply Of Plaintiffs-Appellants In 12-1109 and separately bound Response/Reply Appendix for Appellants have been electronically filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit through its CM/ECF system. Counsel of record for all defendants/appellees are registered, active users of the CM/ECF system, and have been served by this method:

David C. Gustman
FREEBORN & PETERS, LLP
311 South Wacker Drive, Suite 3000
Chicago, IL 60606
Telephone: (312) 360-6000
Facsimile: (312) 360-6520
Email: dgustman@freebornpeters.com

Counsel for Falconbridge Limited, Noranda, Inc., and NorFalco, LLC

Michael P. Connelly
ROCK FUSCO & CONNELLY, LLC
321 N. Clark Street, Suite 2200
Chicago, IL 60654
Telephone: (312) 494-1000
Facsimile: (312) 494-1001
mpconnelly@rockfuscoconnelly.com

Counsel for Intertrade Holdings, Inc.

Joel Gerald Chefitz
McDERMOTT WILL & EMERY LLP
227 West Monroe Street, Suite 4400
Chicago, IL 60606
Telephone: (312) 372-2000
Facsimile: (312) 984 7700
Email: jechefitz@mwe.com

Counsel for Koch Industries Inc.

Michael Cox
THE MICHAEL COX LAW FIRM, PLLC
17430 Laurel Park Drive North
Suite 120 E
Livonia, MI 48152
Telephone: (734) 591-4002
Facsimile: (734) 591-4006

Counsel for Pressure Vessel Services, Incorporated

Dated: May 30, 2012

/s/ Mary Jane Fait
Mary Jane Fait
WOLF HALDENSTEIN ADLER FREEMAN & HERZ LLC
55 West Monroe Street, Suite 1111
Chicago, IL 60603
Telephone: (312) 984-0000
Facsimile: (312) 984-0001