No. 14-20267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

On Appeal from the United States District Court
For the Southern District of Texas, Houston Division
No. 4:12-CV-1227

REPLY BRIEF OF APPELLANT JSW STEEL (USA) INCORPORATED

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SUMMARY OF THE REPLY

In its Opening Brief, JSW demonstrated that MM's conspiracy case against it did not satisfy the proof requirements for antitrust conspiracies. Having had the chance to marshal its proof, MM still misses the mark. MM failed to show that JSW even knew that American Alloy and Reliance/Chapel were collaborating to eliminate MM's steel supply. JSW chose to end its relationship with MM based on a number of understandable, permissible factors—including the uncontroverted behavior of Schultz and Hume in inducing JSW to enter into the Agreement by misrepresenting that Chapel would have "no issue" with their departure to form a competing service center. MM does not contest the other signs of trouble permissibly supporting JSW's decision—the Chapel suit, the stop-shipment request, and questions as to MM's ethics and financial stability.

For an alleged conspirator, moreover, JSW was extremely reticent: JSW never communicated its decision to anyone other than MM—not to American Alloy, Reliance/Chapel, or any other steel mill. Nothing supports the jury's finding that JSW knowingly participated in a conspiracy to destroy MM's steel supply. MM was reduced at trial to suggesting that counsel for the defendants' having to sit at the same table in the courtroom proved a conspiracy.[1]

[1] ROA.7810-11 ("[Y]ou have American Alloy's lawyers and JSW's lawyers on the third table. They're still close.")

Running from the law, MM barely mentions a controlling precedent from this Court that should prove dispositive, *Viazis v. American Association of Orthodontists*, 314 F.3d 758 (5th Cir. 2002). Both JSW and Nucor discussed *Viazis* extensively in their opening briefs. And the Court has recently reaffirmed its applicable principles. *See Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 330, 331, 332-33 (5th Cir. 2015) (citing and quoting *Viazis*, 314 F.3d at 763). But MM essentially ignores *Viazis*, presumably because there is no way to justify the antitrust judgment against JSW in its wake. Because—as MM aptly characterized it—JSW was a "target" of American Alloy and Reliance/Chapel's purported ploy,[2] JSW should never have been an antitrust defendant—much less subjected to treble damages.

Separately, the district court erred in subjecting the entire case to a *per se* analysis. In doing so, the court foreclosed consideration of JSW's many permissible, independent reasons for its conduct and lumped JSW in with the horizontal defendants. Only by relying on dated and discounted precedent can MM find any support for its arguments. But MM fails to engage JSW's modern authorities analyzing vertical restraints under the rule of reason.

MM's defense of the damages award also falls short. Despite recognizing huge differences between Chapel-Houston (a well-funded and supported branch of

[2] MM Br. at 7.

a giant national company) and MM (a start-up with four employees and limited capital), MM's expert—Magee—used Chapel-Houston's performance as the comparator with no adjustments to account for these disparities. And despite his admission that the steel plate market for years 2011, 2012, and 2013 was "a weak—relatively weak market," Magee looked only to performance data from 2001-2011—a period that predates MM's formation and includes some of the best years for the steel business in recent history—without making any adjustments to the damage model to reflect contemporaneous market conditions in 2011-13. Neither MM's expert nor its argument fulfills the requirement of a "just and reasonable estimate of the damage based on relevant data." *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc*., 213 F.3d 198, 207 (5th Cir. 2000).

Perhaps appreciating the legal and factual vulnerabilities of its contract claim against JSW, MM suggests that the claim is now moot. JSW is willing to so stipulate if MM agrees to forego judgment on the contract claim in the event of a remand. But MM won't do that. So short of a binding agreement, JSW is entitled to have this Court consider the infirmities of the claim and set it aside. MM's cited authorities do nothing to support a right of contract recovery here.

ARGUMENT

I. Because MM failed to prove JSW knowingly joined a conspiracy, judgment should be rendered for JSW.

MM has no evidence that JSW knew of a conspiracy between American Alloy and Reliance/Chapel to drive MM out of business by forcing steel mills to stop selling steel to MM. Its efforts to concoct the necessary proof are barred by settled legal rules in the antitrust context.

A. MM ignores what the jury actually found.

The evidence does not comport with the jury findings. The first interrogatory asked the jury whether "American Alloy and Reliance/Chapel conspire[d] ***to persuade, induce, or coerce any steel mill not to sell steel plate to MM Steel***."[3] The jury was then asked whether JSW had "knowingly join[ed] the conspiracy" found in answer to the first interrogatory.[4] So the jury found that JSW had knowingly joined the conspiracy between American Alloy and Reliance/Chapel to dissuade steel mills from selling to MM.

MM, however, briefs the case as if the jury had been asked "Did JSW agree with American Alloy or Reliance/Chapel to stop selling steel to MM?" But that was ***not*** what MM had the district court ask the jury. Nor would it support antitrust

[3] *Id.* (emphasis added).

[4] RE18, at 12.

liability against JSW. Instead, the jury was basically asked whether JSW knew of American Alloy and Reliance/Chapel's plan to enmesh multiple steel mills in a group boycott and agreed to join that plan.

That distinction is important. To have "knowingly join[ed]" the conspiracy, JSW had to have "a conscious commitment to a common scheme designed to achieve [the] unlawful objective." *Tunica Web Advertising v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 409 (5th Cir. 2007) (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)). There is no such proof.

MM has no evidence that JSW did anything approaching an antitrust conspiracy when it stopped selling steel to MM. The record reveals that JSW did so in complete ignorance of any scheme by American Alloy and Reliance/Chapel to involve other mills to cut off MM's steel supply. JSW was at most an unwitting pawn in their plan. As American Alloy's sales manager admitted, American Alloy wanted to "throw [JSW] under the bus," too.[5]

B. MM lacks direct evidence that JSW knew of a conspiracy between American Alloy and Reliance/Chapel.

MM has no direct evidence as to JSW. "[D]irect evidence is 'tantamount to an acknowledgment of guilt' while circumstantial evidence includes 'everything else, including ambiguous statements.'" *Hyland v. HomeServices of Am., Inc.*, 771

[5] PX189; ROA.28218-20; ROA.15270-71.

F.3d 310, 318 (6th Cir. 2014) (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662 (7th Cir. 2002)); *see also, e.g.*, *Tunica*, 496 F.3d at 409 (requiring an "explicit" understanding).

Here, the evidence shows that JSW never heard about, much less explicitly agreed to, any agreement between American Alloy and Reliance/Chapel. JSW Br. at 18-22. MM argues that should not matter, because JSW has "admitted" the conspiracy. MM Br. at 31. There is no admission. There is only an unchallenged jury finding because American Alloy and Reliance/Chapel settled the case after judgment. JSW's deference to the appellate standard of review about a finding against other parties proves nothing about whether JSW knowingly joined that conspiracy.

C. MM misstates the standard for circumstantial evidence of conspiracy.

For the applicable standard of review, MM cites *Wackman v. Rubsamen*, 602 F.3d 391, 408-09 (5th Cir. 2010). *Wackman*, however, is a wrongful-death case; it does not involve antitrust law. For an antitrust conspiracy, MM "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "Ultimately, any conduct that is 'as consistent with permissible competition as with

illegal conspiracy' cannot support a conspiracy inference." *Abraham*, 776 F.3d at 330 (quoting *Matsushita*, 475 U.S. at 588). MM "must show that circumstantial evidence both supports an inference of conspiracy ***and*** tends to exclude independent conduct." *Id.* at 331 (emphasis added).

Yet MM neither cites *Matsushita* nor acknowledges its exacting standard on circumstantial evidence for antitrust claims. The circumstantial case against JSW would be insufficient even under the deferential *Wackman* standard. This is all the more true when the controlling standard of *Matsushita* and *Viazis* is applied.

1. JSW had several permissible reasons to stop selling to MM.

MM had to establish that JSW's conduct was inconsistent with its independent self-interest as a supplier. *See Viazis*, 314 F.3d at 764. Here, JSW chose to do business with more established, lucrative customers for valid reasons. Not long after it executed the Agreement with MM, JSW discovered that MM had misled it about problems with Reliance/Chapel. JSW was understandably upset when MM suddenly asked JSW to stop shipments—with no explanation—just one month into their relationship. Further, MM was over-extended on its credit with JSW, and at one point, MM informed JSW that it might have to return some of the custom-fabricated steel. Then JSW discovered that the reason for MM's stop-shipment notice was the lawsuit by Reliance/Chapel, claiming theft of proprietary information and violation of non-competes, which resulted in MM being under an agreed injunction for six

months. All these business reasons for termination are permissible and consistent with lawful conduct. *See* JSW Br. at 23-31 (citing record and cases). They forbid an inference of conspiracy.

2. This Court's precedents bar MM's claim.

To rule in favor of JSW, this Court need not look beyond its own precedent. In *Viazis*, the Court rejected any inference that the defendant had joined a conspiracy because the defendant could have concluded that any benefits from dealing with the plaintiff would be outweighed by the loss of other business due to continued association with the plaintiff. *Viazis*, 314 F.3d at 764. That is precisely the present case.

Although *Viazis* was prominent in both JSW and Nucor's opening briefs, MM cites *Viazis* only once, and then in a section responding to Nucor's complaint about jury arguments. MM Br. at 44. JSW presented similar authorities from almost all circuits, JSW Br. at 23-26, which have likewise been ignored by MM. Those cases endorse the promotion of competition and economic efficiency in allowing a supplier to choose its distributors. *E.g.*, *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998); *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 86 (5th Cir. 1978). The roar of MM's silence about these precedents is deafening.

3. MM's other arguments misread the law.

a. The existence of a conspiracy between American Alloy and Reliance/Chapel merely begs the question whether JSW knowingly joined it.

Without citing authority, MM hints that the Supreme Court's limit on inferences should not apply if there is an admitted conspiracy between American Alloy and Reliance/Chapel. MM Br. at 32. But such a rule would make no sense. The Court limits inferences to protect permissible conduct: "Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Monsanto*, 465 U.S. at 764 (source of original quotation omitted).

Placing joint and several liability for treble damages on a party that did ***not*** join a conspiracy both chills legitimate business conduct and perverts the purpose of anti-trust protections: "To permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Monsanto*, 465 U.S. at 764 (source of quotation omitted).

b. The requirements for pleadings are less stringent than the proof required to survive judgment as a matter of law.

MM confuses the plausibility standard for ***pleading*** a claim to survive dismissal with the ***proof*** required to survive a motion for judgment as a matter of law. MM Br. at 32 (citing *Anderson News, L.L.C. v. Am. Media, Inc.*, 680 F.3d 162, 184 (2d Cir. 2012)). As MM's own authority states: "to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, ***as would be required at*** later litigation stages such as a defense motion for summary judgment or a ***trial***." *Anderson News*, 680 F.3d at 184 (emphasis added) (citation omitted). MM's retreat to the plausibility standard applicable for pre-trial dismissal further suggests that it lacks the proof required to survive appellate review of the denial of JSW's post-trial JMOL.

c. MM's reliance on "plus" factors is misplaced.

MM asserts "parallel" conduct by JSW as a "plus" factor for finding JSW was a conspirator. MM's Br at 32-33. The doctrine does not go so far as MM suggests. For example, *In re Plywood Antitrust Litig.*, 655 F.2d 627, 635 (5th Cir. 1981), does not involve a vertical supplier and also pre-dates the Supreme Court's decades-old overhaul of permissible inferences in antitrust cases. *See* JSW Br. at 20 (collecting cases). And MM ignores what the "plus" factors recognized by other circuits are—

all absent here: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004) (source of quotation omitted). For various reasons, however, "[t]he most important evidence will generally be non-economic evidence 'that there was an actual, manifest agreement.'" *Id*. at 361 (source of original quotation omitted).

MM's other case affirms summary judgment for many defendants, despite the existence of "plus" factors and those defendants having more knowledge of a conspiracy than MM proved. *See Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987). So the "plus"-factors analysis essentially boils down to whether MM proved JSW knew of, and agreed to join, a conspiracy between American Alloy and Reliance/Chapel to drive MM out of business, without having permissible business reasons of its own for its conduct. MM did not prove that.

Nevertheless, MM quotes a recent decision from this Court, saying: "Plus factors enable a jury to infer collusive rather than 'one-sided' conduct." MM Br. at 32 (citing *Abraham*, 776 F.3d at 333). This Court, however, did ***not*** mention "plus factors" in that opinion. The only phrase supporting MM's selective quotation is "one-sided." *See Abraham*, 776 F.3d at 333. And there, the Court used the phrase to ***exonerate*** the defendant from a claim of conspiracy. *See id.*

D. MM's ultimate problem is the undisputed evidence.

Here is the relevant undisputed evidence:

- American Alloy and Reliance approached JSW separately, about two weeks apart;[6]
- American Alloy never mentioned Reliance/Chapel to JSW;[7]
- Reliance/Chapel never mentioned American Alloy to JSW;[8]
- Nothing indicates JSW knew that American Alloy and Reliance/Chapel had talked to one another, much less discussed pressuring a group of mills to cut off MM's steel supply;[9]
- Nothing indicates JSW knew that American Alloy and Reliance/Chapel allegedly discussed MM with other suppliers;[10]
- JSW never said anything about MM to anyone;[11] and
- JSW never knew other suppliers were refusing to sell to MM, until—at the earliest—***after*** JSW had already decided to terminate its dealings with MM.[12]

Notwithstanding all the above, MM tries to try to draw the necessary inference from the following:

> (1) just before terminating its relationship with MM, JSW asked Chapel for more business, MM Br. at 36;
>
> (2) MM impeached JSW's president on a few matters, *id*. at 36-37;

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[6] ROA.18600-03; ROA.18608-12.

[7] ROA.18417-18; ROA.18423; ROA.18438; ROA.18464.

[8] ROA.18609-12.

[9] ROA.18417-18; ROA.18423; ROA.18438; ROA.18464; ROA.18619.

[10] ROA.18417-18; ROA.18423; ROA.18438; ROA.18464; ROA.18619.

[11] ROA.18619.

[12] ROA.18619.

(3) JSW's president told MM he understood "the gravity of the situation," and did not recommend other suppliers; *id*. at 37;

(4) JSW didn't ask MM for more details about its lawsuit and had never before ceased dealing with a customer, *id*.; and

(5) JSW terminated its relationship with MM without giving the allegedly required 60 days' notice, *id*.

Examining each of its arguments under the applicable standard of review, MM has still failed to prove JSW knowingly joined a conspiracy between American Alloy and Reliance/Chapel.

1. The "interesting timing" of JSW's e-mail to Chapel proves nothing.

MM trumpets an e-mail from JSW to Chapel saying JSW would like to do more business with it. MM Br. at 11, 36 (citing PX381). The e-mail was sent around the time that JSW terminated its relationship with MM. But the e-mail does ***not*** mention MM, any agreement with Reliance/Chapel to stop selling to MM, any agreement with American Alloy to stop selling to MM, or—most important—any knowledge that any mills were not selling to MM.[13]

For a long time, JSW had been working on expanding its relationship with Reliance/Chapel.[14] JSW had a longstanding relationship with Delta Steel, a Chapel

[13] PX381.

[14] ROA.18723-25; ROA.18607-08.

affiliate.[15] The referenced e-mail was not the first communication; JSW and Reliance/Chapel had already been talking about potential business for some time.[16] Seeking business from potential customers is permissible conduct: As JSW put it, "We look for business all the time."[17]

2. MM cannot establish a conspiracy by arguing the jury's right to disbelieve JSW's president.

MM repeatedly criticizes so-called "inconsistencies" in the testimony of JSW's president, Mike Fitch. MM Br. 14-15. MM's attack on Fitch cannot prove MM's case because a factfinder's disbelief of a witness does not establish the opposite of what he said:

> [D]isbelief of a witness's testimony is not sufficient to carry a plaintiff's burden or support the district court's finding to the contrary.

Travelhost, Inc. v. Blandford, 68 F.3d 958, 965 (5th Cir. 1995); *see also Moore v. Chesapeake & Ohio Ry.*, 340 U.S. 573 (1951). The rule is logical because there can be many possible explanations for the witness's testimony other than the truth of its opposite.

Further, the "inconsistencies" simply reflect a witness whose memory was being refreshed about what had happened years earlier. In fact, during trial, MM's

[15] ROA.18607-08.

[16] ROA.18607-09; ROA.18741-43.

[17] ROA.18725.

attorney repeatedly said he was—"refresh[ing] [Fitch's] recollection."[18] If Fitch were really dishonest, he would not have previously admitted those facts in his deposition or JSW's pleading; yet, that is what MM used "to refresh his recollection" at trial.[19] *See* MM Br. at 14-15. Nor would he have corrected his testimony at MM's counsel's suggestion.

Moreover, MM's short list of "inconsistencies" does not address the undisputed testimony that JSW also terminated MM because JSW

(1) had concerns about MM's finances,

(2) felt MM had lied about the circumstances of its principals' departure from Chapel,

(3) believed continuing business with MM could harm JSW's reputation, and

(4) chose to do business with more lucrative customers.

See JSW Br. at 23-31.

3. Understanding the "gravity of the situation" proves nothing.

Fitch's "gravity" statement is at worst ambiguous. Losing its principal supplier was undoubtedly a blow to MM, and Fitch's statement merely

[18] ROA.18717 ("I'm just trying to refresh his recollection. . . . [D]oes this refresh your recollection?")

[19] ROA.18717.

acknowledged as much. No evidence proves JSW knew other mills were refusing to sell to MM.[20]

The statement occurred only ***after*** JSW had decided not to deal with MM and so informed its principals.[21] So, even if one could read the statement to show Fitch learned that MM would be put out of business, it proves only that he learned of that prediction after he had told MM that JSW would no longer sell to it. Knowledge acquired only after-the-fact does not prove JSW previously had knowingly agreed to join a conspiracy between American Alloy and Reliance/Chapel to force MM out of business.

4. JSW knew enough about Chapel's lawsuit against MM.

Although it was disputed how many details JSW knew about MM's lawsuit with Chapel, JSW knew enough to know MM had misled it. Before ever doing business with MM, JSW pointedly asked whether its principals were leaving Chapel on good terms, specifically if there would be "any issue."[22] They assured JSW there was nothing to worry about; they were leaving on good terms.[23]

[20] ROA.18619.

[21] ROA.18613-14; ROA.18715-16.

[22] ROA.16898; ROA.18592-93; ROA.18612; ROA.18733-34.

[23] ROA.18593; *see also* ROA.16898.

Later, of course, MM stopped JSW's shipment of custom-fabricated steel on its first order without explanation.[24] Only after that very concerning incident did MM tell JSW that Chapel had sued it and obtained an injunction.[25] All Fitch needed to know was the names of the parties to the lawsuit to understand that Schultz and Hume had misrepresented the circumstances of their departure. This was enough for JSW to independently conclude MM was not trustworthy—regardless of any separate statements from American Alloy or Reliance/Chapel.

MM's other argument—that JSW had never before ceased dealing with a customer—proves only the obvious: JSW had never before faced a customer who had

- misled JSW about a key condition for entering into a relationship,
- stopped JSW's shipment without explanation on its first transaction,
- faced financial uncertainty,
- threatened to impair JSW's reputation, and
- stood in a position to cost JSW the business of much more lucrative customers.

A supplier should not be forced to choose between risking substantial business losses and treble damages under the antitrust laws.

[24] ROA.16902-03; ROA.18597-98; DX216; ROA.24132-33.

[25] ROA.18604.

5. JSW's cessation of future sales to MM should not give rise to antitrust liability.

MM's next argument is that JSW's termination of the Agreement evidences JSW's having knowingly joined a conspiracy. MM Br. at 37-38. MM's argument necessarily assumes that there was in fact a breach, but, as JSW has previously demonstrated, there was no breach as a matter of law. *See* JSW Br. at 60-68. By its own terms, the MM-JSW Agreement did not bind either party to a single sale until they agreed on price, quantity, and other necessary terms. *See* JSW Br. at 62-64; *see also* part IV.

Even if this argument were not foreclosed by the terms of the Agreement, JSW's violation of the 60 days' notice-of-termination provision does not evidence its knowledge of a conspiracy because MM had already acknowledged the termination of the Agreement in a face-to-face meeting with JSW on October 20, 2011.[26] After that meeting, MM paid for the steel that had already been delivered, and the parties concluded their relationship.[27] MM knew that the agreement was terminated on October 20[28] and asked JSW to reconsider.[29] But MM understood the message.[30] And MM asked for a return of its letter of credit, which JSW immediately

[26] ROA.18617-18.

[27] ROA.18617.

[28] ROA.16927.

[29] ROA.16935-36; PX392.

[30] ROA.16935-38; PX463.

accommodated; then, the parties had no further contact.[31] MM never asserted that the Agreement was breached or sent any kind of demand to JSW—until this lawsuit was filed.[32] The 60-day notice argument is simply an ineffectual and after-the-fact attempt to create evidence to link JSW to a conspiracy when no other evidence exists.

E. Conclusion: The judgment should be reversed and rendered in favor of JSW.

MM's sole antitrust theory against JSW was based on a conspiracy. Without that finding, the antitrust liability evaporates. Because MM has now possibly abandoned its contract claim, *see* MM Br. at 38, this Court should render judgment for JSW.

II. The district court improperly applied the *per se* rule.

A. *Per se* was an inappropriate standard for JSW.

MM predicates its defense of the *per se* rule upon a false analytical construct—that the "admitted" horizontal agreement found by the jury between American Alloy and Reliance/Chapel somehow renders all ancillary relationships with these two entities presumptively illegal. MM Br. at 18-19, 31. First, as noted, there has been no admission of any such conspiracy. *See* part I.B. And the district

[31] ROA.16936-37; ROA.18618.

[32] ROA.18618; ROA.16942-43.

court could not have known during trial that the jury would find a conspiracy or that the service center defendants would settle on appeal. The existence of the alleged conspiracy was still vehemently contested when the trial court erroneously applied the *per se* standard to all defendants.

MM's theory is a conspiracy with an alleged horizontal component—American Alloy and Reliance/Chapel—and alleged vertical legs—JSW and the other mills. Such relationships are not the stuff of *per se* liability. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 901 (2007) (stating that the Court had previously "overturned the *per se* rule for vertical non-price restraints, adopting the rule of reason in its stead") (citing *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977)); *see also* JSW Br. at 35-38. In fact, as JSW previously pointed out, *Leegin* addressed and rejected the precise argument MM makes here—that a supplier becomes tainted by *per se* liability when it becomes involved with a horizontal conspiracy of customers:

> To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason.

Leegin 551 U.S. at 893. Notably, MM does not cite, much less reconcile, this passage from *Leegin*—or for that matter, most of the opinions JSW referenced that applied the rule of reason to similar circumstances.

Leegin marks the culmination of 30 years of Supreme Court precedent holding that a vertical restraint—price or non-price—is subject to the rule of reason. *See Leegin*, 551 U.S. at 901 (stating that the Court had previously "overturned the *per se* rule for vertical non-price restraints, adopting the rule of reason in its stead" (citing *Cont'l*, 433 U.S. at 57-59); *see generally Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988) (noting the "presumption in favor of a rule-of-reason"); *see also* JSW Br. at 35-38. MM does not even mention this presumption, much less try to demonstrate how the alleged conspiracy overcame that presumption.

Instead, MM resorts to authorities more than a half-century old, *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941) ("*FOGA*"), and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), asserting that these opinions are "on-point." MM Br. at 19. They are not—in light of the decades of subsequent cases explaining that "the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 458 (1986).

And *FOGA* involved an elaborate combination effected through a guild of 176 manufacturers representing 38%-60% of the U.S. market for women's garments to "destroy all competition" from copycat designs. 312 U.S. at 461-62, 467. As part of

the scheme, these manufacturers boycotted retailers who also sold copycat designs. *Id.* at 461. The illegal agreement was purely horizontal—the retailers were not claimed to have violated any antitrust laws. MM's quoted passage from *NYNEX*, *see* MM Br. at 20, simply confirms that point by acknowledging that the vertical retailers in *FOGA* were "third parties," not antitrust defendants. 525 U.S. at 135. Moreover, *NYNEX* appreciated that vertical refusals-to-deal should be analyzed differently: "The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage." *Id.* at 137; *see also Cont'l*, 433 U.S. at 54 ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in distribution of his products.").

Klor's considered only whether a group boycott involving both manufacturers and retailer/distributors could be illegal under the Sherman Act even though it affected neither the price nor availability of the products to consumers generally. *Klor's*, 359 U.S. at 210. In *Klor's*, each appliance manufacturer allegedly conspired on a horizontal level with the other appliance manufacturers. *Id.* at 210, 212-14. By contrast, there is no evidence that JSW was aware of any other steel mill's actions.

Moreover, *Klor's* was a summary-judgment case. *Id.* at 209, 212-13. The Supreme Court did not address—much less hold—that the vertical participants were liable *per se* or that evidence such as procompetitive justifications for their conduct could not be considered at trial. *Id.*

Only one cited case arguably supports MM's theory, *U.S. v. Gen. Motors Corp.*, 384 U.S. 127 (1966). Its value is, at best, questionable in light of *Cont'l*. *See, e.g.*, *Flash Elecs., Inc. v. Universal Music & Video Distrib. Corp.*, No. CV-01-0979(RRM)(JMA), 2009 WL 7266571, at *11 (E.D.N.Y. Oct. 19, 2009) (rejecting plaintiffs' reliance on *General Motors* and noting that "vertically-imposed non-price restraints such as those plaintiffs complain of here are now analyzed under the rule of reason" (citing *Cont'l*, 433 U.S. 36)). Although *Cont'l* was cited extensively in JSW and Nucor's opening briefs, MM neither cites nor explains this important decision.

MM then recycles the same citation relied on by the district court, *H&B Equip. v. Int'l Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978). *Compare* MM Br. at 23 *with* ROA.5335-36. JSW has already demonstrated that this authority is both discredited and inapposite. *See* JSW Br. at 39.

MM's suggestion that JSW is also a distributor and thus a horizontal competitor of MM's, MM Br. at 23, was rejected by Judge Hoyt,[33] and so cannot be a basis for application of *per se* liability. And the distinction between *per se* and rule of reason was not addressed in *Fontana Aviation, Inc. v. Beech Aircraft Corp.*, 432 F.2d 1080, 1084 (7th Cir. 1970).

[33] ROA.3217-18.

As to MM's other cases, *In re Mercedes-Benz Anti-Trust Litig.*, 157 F. Supp. 2d 355 (D.N.J. 2001), predates *Leegin* by a decade and relies heavily on *U.S. v. General Motors.* And *In re Magnesium Oxide Antitrust Litig.*, No. 10-5943(DRD), 2011 WL 5008090, at *17 n.16 (D.N.J. Oct. 20, 2011), relies solely on *Mercedes-Benz*. Sounder reasoning is contained in opinions MM ignores—*In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1059, 1077 (N.D. Cal. 2007); *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d. 761, 776 (8th Cir. 2004); and *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613, 617 n.4 (4th Cir. 1991). *See* JSW Br. at 36-37. A similar analysis was adopted in *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 (3d Cir. 2008) ("The rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers.") (citing *Leegin*, 127 S. Ct. at 2717). None of these courts considered it necessary to await further guidance from the U.S. Supreme Court. Nor should this Court.

B. The *Tunica* factors were improperly ignored by the district court.

Tunica affords another reason for finding error in the *per se* treatment. As *Tunica* recognized, even a horizontal group boycott is not automatically subject to the *per se* rule. *Tunica*, 496 F.3d at 413-14. Instead, the Court identified three factors to consider in deciding whether the rule of reason applies. *Id.* at 414-15.

MM's first defense of the district court's ruling is to argue *Tunica* never applies when a boycott includes multiple horizontal competitors. MM Br. at 27 (citing *Tunica*, 496 F.3d at 413-14). But this Court's focus in *Tunica* was on group boycotts, like the one MM alleges. *Tunica*, 496 F.3d at 412-13. Further, JSW had ample evidence on all three *Tunica* factors—all pointing against use of the *per se* rule. JSW Br. at 43-45. So, whether analyzed under *Leegin* or *Tunica*, the rule of reason should have been applied. MM's deliberate and strategic decision not to present a rule-of-reason case means that the *per se* judgment should be reversed and rendered in JSW's favor.

III. MM lacks adequate proof of its alleged lost profits

Figuring a good offense must be better than defense, MM focuses on attacking the defendants' damages expert, Steven N. Wiggins, MM Br. at 55-57, 59-62, instead of defending its own expert. Regardless, the ultimate burden of proof remains on the plaintiff, MM. So MM's damages proof must be in and of itself sufficient to support the $52 million jury award. *See, e.g.*, *Eleven Line,* 213 F.3d at 207 (even under "tolerant view" of antitrust damages, courts "must at least insist upon a just and reasonable estimate of the damage based on relevant data" (internal quotations and citation omitted)). Because it was not, the antitrust damages award should be set aside.

Magee's creation of a fictional comparator for purposes of his yardstick analysis for MM's start-up business model is contrary to law. *See id.* at 207 n.17 (requiring that "the business used as a standard must be as nearly identical to the plaintiff's as possible"). MM nevertheless defends the "Chapel" comparator because in MM's view, "there was no practical difference at the outset between Chapel's new Houston branch and MM." MM Br. at 57. But that is untrue.

As did their expert, MM fails to account for the facts that Chapel-Houston was just one branch of a nationwide company that had massive resources, buying power, a robust sales and support force, and other competitive advantages; MM, on the other hand, was a start-up company with a small rented office and limited capacity, resources, capital, employees, and market leverage.[34] Because Reliance/Chapel in its entirety was not an appropriate comparator,[35] Magee simply created a fictional "company" in order to find it comparable.

Nor did Magee make any adjustments to take any of these critical distinctions into account,[36] contrary to MM's own authorities. *Cf. William Goldman Theatres, Inc. v. Loew's Inc.*, 69 F. Supp. 103, 108-09 (E.D. Pa. 1946) (detailing and adjusting downward for a number of "unfavorable factors" in determining lost-profit award).

[34] *See* JSW Br. at 50-52.

[35] ROA.17439.

[36] JSW Br. at 50-53; ROA.17499-50.

Instead, MM and its expert have subscribed to an entirely unsubstantiated theory that MM had a can't-lose combination and, despite its start-up challenges, would be nothing but spectacularly successful. *Cf. Eleven Line*, 213 F.3d at 208 ("Lost future profits could hardly be demonstrated by an entity that never made profits to lose.").

MM also defends Magee's choice of earlier historical data by asserting that data from the relevant time-frame, 2011-14, was unusable because it was tainted by the conspiracy. MM Br. at 59-60. This is no justification for Magee's failure to consider industry data during the proper time-frame. There is no claim that other industry participants were harmed by the alleged conspiracy, and therefore no other industry participant data is even arguably tainted. The cases cited by MM referring to "prior experience" were referring to the prior experience of the alleged victim company only.

Magee's speculative damages analysis finds no support from *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867 (5th Cir. 2013). There, this Court upheld a damages verdict supported by an expert who measured damages by comparing the value of a start-up company at the time of the alleged trade-secret misappropriation to its value following the misappropriation. *Id.* at 879-81. But the valuation was based primarily on evidence that an outside venture capital group had invested $8.5M for a 31% stake in the company. *Id.* at 880. Here, however, no outside person invested in MM.

And MM's expert admitted that he knew of no other company that attempted to start up in the market conditions existing when MM did.

Finally, MM, like its expert, fails to consider the effect of the agreed injunction on MM's performance and damages. MM Br. at 62-63. This circumstance adversely affected MM, but can't be blamed on any conspiracy. Nor does MM explain Magee's failure to consider the effects on the industry due to the influx of foreign steel. *See* JSW Br. at 57-58. Instead, MM contends that "Matt and Mike can sell steel when they have steel to sell," *id.* at 63, as if no other financial or logistical impediment were in play. MM and its expert's failure to consider the injunction, market conditions, and limited financial and other resources of MM evidences a refusal to consider possible alternative causes. These omissions run counter to this Court's rules:

> "When a plaintiff improperly attributes all losses to a defendants' illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damages. This is precisely the type of speculation and guesswork not permitted for antitrust jury verdicts."

El Aguila Food Prods., Inc. v. Gruma Corp., 131 Fed. App'x 450, 454 n.8 (5th Cir. 2005) (quoting *MCI Comm'ns v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1162 (7th Cir. 1983)); *see also MyGallons LLC v. U.S. Bancorp*, 521 Fed. App'x 297, 307 (4th Cir. 2013) (expert failed to "consider the real circumstances that could cause [the plaintiff's] business plan to fail," including actual market conditions where gas

prices dropped). "Damage assumptions that find no support in the actual facts of the case cannot support a verdict." *Eleven Line*, 213 F.3d at 209.

IV. The JSW-MM Agreement was not an "open-price" contract.

JSW previously demonstrated that MM's breach of contract claim cannot stand because the Agreement between JSW and MM merely set out the parameters for future negotiated sales of steel. JSW Opening Br. at 60-70. MM asserts that the Court should disregard JSW's arguments because the jury's contract findings: (i) were not incorporated into the Final Judgment; and (ii) are now moot. MM Br. at 38. The fact that the contract claim was not incorporated into the judgment by virtue of MM's election of remedies presents no barrier to this Court's review. As a matter of law, MM has no contract claim against JSW.

As for MM's alternative argument, JSW will agree that the claim is moot if MM would stipulate that it will not seek recovery on the jury's contract findings in the event of a remand. Because MM has refused to stipulate, JSW is entitled to review by this Court. That MM includes a defense of the contract claim in its brief, MM Br. at 38, suggests that MM is hedging its bets.

The authorities on which MM relies, MM Br. at 38, fail to support its argument. *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002), is ***not*** on point because the franchisees there had agreed to purchase a monthly quantity of gas and expressly "allow[ed] Exxon to set the price [they] must pay." *Id.* at 451. The claim

against Exxon was for breach of the UCC duty of good faith in setting the price because the parties had specifically agreed to an open price term. *Id.* at 452-55 & n.1. Here, by contrast, MM was "only obligated to buy if both parties agree on pricing." PX127 ¶ 1. In fact, MM was not required to buy, and JSW was not required to sell, ***any*** steel unless the parties agreed on price, quantity, delivery terms, etc. JSW Br. at 60-68.

Actually supporting JSW, although cited by MM, is *J.D. Fields & Co. v. U.S. Steel Int'l, Inc.*, 426 Fed. App'x 271, 277 (5th Cir. 2011). There, the parties followed a purchase order process for ordering steel like the one used by MM and JSW. *See* JSW Br. at 62-64. The Court held there was no contract until the buyer sent purchase orders to the seller that were accepted in some fashion, *id.* at 273, which is precisely JSW's argument here. Further, the principle from *J.D. Fields* referenced by MM—"[c]ontract formation is a question of fact under Texas law," MM Br. at 38—is immediately preceded by the context: "[A] price quotation, if detailed enough, can constitute an offer capable of acceptance. . . . However, to do so, it must reasonably appear from the price quote that assent to the quote is all that is needed to ripen the offer into a contract." *Id.* at 276-77 (internal quotations and citations omitted). *J.D. Fields* thus proves JSW's point that the parties here were not bound unless and until price and quantity terms were agreed through a specific purchase order.

CONCLUSION

The judgment against JSW should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that a copy of the foregoing document was filed with the Court's electronic case filing (ECF) System on March 12, 2015, which caused an electronic copy of this document to be served on the following counsel of record who have appeared in this matter:

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United States Court of Appeals

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No. 14-20267 MM Steel, L.P. v. Reliance Steel & Aluminum Co., et al
USDC No. 4:12-CV-1227

Dear Mr. Townsend,

The following pertains to your reply brief electronically filed on 3/12/15 for JSW Steel.

You must submit the seven (7) paper copies of your brief required by 5TH CIR. R. 31.1 within five (5) days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Jim deMontluzin

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