Appeal No. 14-20267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

On Appeal from the United States District Court
for the Southern District of Texas
No. 12-01227 (Hon. Kenneth M. Hoyt)

REPLY BRIEF OF APPELLANT NUCOR CORPORATION

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INTRODUCTION

Antitrust law encourages manufacturers to do exactly what Nucor did: stick with its longtime distributor Chapel rather than help new distributor MM seize Chapel's business. The Nucor-Chapel relationship is good for Nucor and good for the economy—distribution restrictions promote interbrand competition, the main goal of antitrust law. MM's brief confirms the absence of any justification for applying the *per se* bludgeon to Nucor. No evidence showed that Nucor knew of the purported horizontal conspiracy MM says Nucor joined. No matter, MM says. "[M]arket intelligence" "would have" revealed that alleged conspiracy to Nucor (MM 33). No case has ever found that a company joined a horizontal conspiracy on the basis of such rank speculation.

Rather, antitrust law has emphasized for decades that excessive *per se* liability chills the exercise of independent business judgment, and the importance of protecting the rights of manufacturers like Nucor to choose their own distributors. That law requires judgment outright for Nucor. Alternatively, the Court must order a new trial in light of the avalanche of significant, prejudicial errors.

ARGUMENT

I. Antitrust Law Forecloses the Judgment Against Nucor

Three independent arguments mandate judgment outright for Nucor. First, the evidence did not tend to exclude the possibility that Nucor acted independently

in declining to sell through MM. Second, the evidence did not tend to exclude the possibility that any Nucor agreement was solely a vertical agreement with Chapel. Third, even had Nucor joined a horizontal conspiracy, *per se* liability was improper.

A. MM Cannot Evade the Controlling Law

The Court must reverse the judgment absent evidence that "tend[ed] to exclude the possibility that [Nucor was] acting independently" in refusing to sell steel through MM. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 763 (5th Cir. 2002). There cannot be "other, equally plausible explanations" for Nucor's conduct. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 596 (1996). Nucor's opening brief explained that, under binding, on-point Supreme Court and Fifth Circuit precedent, the evidence against Nucor is legally insufficient to prove any conspiracy, much less a horizontal one.

MM asserts that Nucor's reliance on binding precedent "reverse[s] the burden of proof and the standard of review." MM 30. But it was MM's burden to prove an unlawful conspiracy by introducing evidence supporting an inference of conspiracy and tending to exclude independent conduct. *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass'n*, 776 F.3d 321, 331 (5th Cir. 2015) ("*A&V*"). Nucor does not bear the "burden of proof," nor do the jury verdict or

"jury instructions" excuse MM from satisfying the "tends to exclude" standard in this court (MM 29-30). Were that so, there would be no cases like *A&V*, which reversed a jury verdict because plaintiff's evidence did not permit the jury to infer antitrust conspiracy. *See* Nucor 17 (additional cases).

Nucor argues that it is entitled to judgment *even assuming* American Alloy and Reliance/Chapel conspired between themselves. Nucor 15 n.3. That is no "admission," and would not "increase[] the plausibility" of Nucor's liability if it were. *Cf.* MM 31. Proof that Company A and Company B conspired does not lower plaintiff's evidentiary burden with respect to Company C. "Obviously, evidence sufficient to allow a jury to conclude that illegal agreements existed among [the manufacturer's distributors] does not establish that [the manufacturer] itself was a party to an agreement that violated §1." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 221 (3d Cir. 2008).

MM argues that Nucor and JSW engaged in unspecified "parallel conduct" (32). But parallelism does not excuse MM from presenting evidence tending to exclude the possibility of independent action. *Matsushita*, 475 U.S. at 579, 588. Anyway, Nucor indisputably declined to sell through MM *in September* when Nucor knew JSW *was* selling through MM. Nucor 5, 34. That is conscious divergence, not parallelism.

MM wrongly contends (at 32) that Nucor relies "largely on cases addressing the details required in a pleading." Nucor relied on 24 cases addressing the evidence plaintiffs must offer to survive summary judgment or sustain a verdict. Nucor 14-35. "Plausibility" is insufficient at trial (*cf.* MM 32), where plaintiffs' evidence must "rule out" other plausible possibilities besides conspiracy. *Anderson News, L.L.C. v. Am. Media Inc.*, 680 F.3d 162, 184 (2d Cir. 2012).

B. Nucor Never Joined Any Conspiracy

1. MM Failed To Prove Action Against Economic Interest

No evidence suggested that declining to sell through MM was "contrary to [Nucor's] own economic interests," a prerequisite to imposing liability on manufacturers that decline to sell through a distributor. *Aviation Specialties, Inc. v. United Techs. Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978); *see Viazis*, 314 F.3d at 763; Nucor 16-18. Enforcing this prerequisite is critical to protect a manufacturer's "right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto*, 465 U.S. at 761. MM ignores binding precedent in arguing that Nucor is liable even if Nucor's conduct was consistent with its independent economic self-interest. MM 33.

MM alternatively contends that Nucor would have been better off selling through MM because Nucor "planned to build a new mill" and "was looking for a new distributor west of the Mississippi." MM 10, 36. This is fabrication. In 2012,

Nucor *considered* building another plate mill. PX519. Nucor was not "looking for a new distributor" in 2011 to distribute steel from a mill that did not yet exist and that Nucor never built. *See also* ROA.19071-72. MM also contends that Nucor was "jeopardizing its relationship with" Greens Bayou by "pressur[ing]" North Shore, but cites zero record support. MM 36 (cross-referencing MM §6.3, which does not discuss North Shore). MM offers no other evidence that it was in Nucor's interest to sell through MM.

2. No Evidence Tended to Exclude the Possibility of Independent Action

a. MM Ignores Independent Reasons for Reversal

Nucor chose Chapel over MM on September 1, before Nucor ever spoke with Chapel. Nucor 20. Juries may not infer conspiracy where the manufacturer "*began* to formulate" its distribution policy before even hearing from the distributor. *Culberson v. Interstate Electric Co.*, 821 F.2d 1092, 1094 (5th Cir. 1987) (emphasis added); Nucor 20-21. Instead of responding, MM attempts to obfuscate by drafting its statement of facts in reverse chronological order. *Compare, e.g.*, MM Facts § 4 (March 2012 lunch) *with* § 5.1 (September 8, 2011 alleged Chapel-American Alloy conspiracy) *with* § 6.3 (Nucor activities on September 1-2). Do not be fooled. Nucor's Whiteman heard about MM on MM's "opening day" and *spontaneously* "offered support" to Chapel, before Chapel contacted Nucor. MM 10. That offer applied existing Nucor policy. Nucor 5-6.

Even had Chapel first approached or threatened Nucor, accepting an ultimatum or "choice" about losing a distributor's business (MM 35) fails to support conspiracy. Nucor 25-26. Companies are "free to acquiesce in a [business partner's] demand…to avoid termination." *Monsanto*, 465 U.S. at 761; *Viazis*, 314 F.3d at 764 n.8.

MM ignores this authority, and contends that Nucor "responded to [the] economic threat [of Reliance/Chapel and AmAlloy] with some action." MM 32 (quoting *A&V*, 776 F.3d at 333). Whatever the improper "action" contemplated by *A&V*, it is not merely accepting an ultimatum and declining to sell to another company. *A&V* applies *Viazis*, which held that "GAC's decision to alter its relationship with Viazis [following threats] is not evidence tending to exclude the possibility of independent behavior." 314 F.3d at 764. The Chapel-to-Nucor-ultimatum theory is MM's sole theory for how Nucor joined the alleged conspiracy; MM's brief fails even to address how that theory survives *Viazis* and *Monsanto*. Nucor 26. Meanwhile, American Alloy never discussed MM with Nucor, let alone made a threat. Nucor 31.

b. Nucor's Distribution Strategies Independently Explained Its Conduct

MM never responds to uncontested record evidence showing Nucor's independent, self-interested reason to decline to sell through MM. Nucor prefers to sell through large, established distributors with ample capital and nationwide

reach that buy most of their steel from Nucor. MM met none of those criteria. Nucor 3, 18-19.

Nucor's independent incumbency practice likewise showed that refusing to sell through MM was "as consistent with permissible competition as with illegal conspiracy." *A&V*, 776 F.3d at 331; *see* Nucor 19-20 (citing documentary evidence predating this lawsuit). MM argues (at 35) that Nucor inconsistently applied its incumbency practice, but never explains why inconsistent application would tend to exclude the possibility that Nucor followed the practice with respect to MM. MM's purported "inconsistencies" (at 16) are also imaginary. Taking MM's bullets in order:

- North Shore's Cooper testified that Nucor's Whiteman worried that the MM/North Shore relationship was indirectly circumventing Nucor's distribution preferences. ROA.16137; ROA.16003. That is consistent with the incumbency practice.
- Whiteman described the incumbency practice at length in his deposition. ROA.18962-64. He just didn't use the word "incumbency."
- Nucor emails about MM stated that Nucor wanted to "continue to support our existing customers." PX160; *see* PX185. That's the incumbency practice in a nutshell.
- Nucor's Stratman testified that Nucor's incumbency practice was the "way [Nucor has] done business for a very long time." ROA.17649-51.
- The incumbency practice means Nucor does "not…sell *to a distributor* for an end-user that was already a customer of another distributor." MM 15 (emphasis added). Nucor's selling *directly* to Greens Bayou comported with the practice—Nucor wasn't using another distributor (like MM) as middleman. *See also* ROA.18968-70.

- MM's Schultz *heard* from unspecified nonparties that distributor Ranger sold Nucor steel to Greens Bayou, but admitted he had "no firsthand knowledge." ROA.19516-17; *see* ROA.19487 (Nucor hearsay objection). Admissible evidence showed that Nucor didn't sell Greens Bayou through Ranger. ROA.18966.

- Whiteman didn't need to inquire about MM's proposed end-users because Hume *had already identified Greens Bayou*. Nucor 20.

- Nucor returned MM's initial calls and informed MM that it wasn't interested. ROA.17260-63. Again, the incumbency practice at work.

- Chapel's Nolan's email about "discuss[ing] it before we reply" to Nucor about end-users is hardly inconsistent with Nucor following an incumbency practice; that Nucor asked confirms the practice. PX450. Emails with Chapel's president confirmed that Nucor and Chapel cooperated to preserve Nucor/Chapel customers. *E.g.*, PX270; Nucor 19-20.[1]

c. The North Shore Evidence Does Not Support Conspiracy

MM contends that "Nucor intended to end N[orth]Shore's entire relationship with MM." MM 34. This is demonstrably false and no reasonable jury could have believed otherwise based on MM's evidence:

- Cooper testified that Nucor "didn't tell" North Shore that "should North Shore continue to do business with MM, North Shore's supply would be cut off." ROA.16136.

- MM inexplicably argues that, after the March 19 Whiteman-Cooper call, Cooper left Whiteman a voicemail referencing a "good development,"

[1] There is no "inconsisten[cy]" between Nucor's Vinson's email that Cooper feared "ramifications" and Vinson's testimony about the gym and Cooper's body language. MM 14-15. Nor is it inconsistent that Vinson questioned one particular order's pricing—which he *did* discuss internally, ROA.16388-89; *cf.* MM 15—while other Nucor witnesses offered broader reasons for Nucor's posture toward MM.

meaning "North Shore was winding down its relationship with MM." MM 14. That grossly mischaracterizes the record:

> [MM's Counsel]: Well, the good development that you said you wanted to tell to Mr. Whiteman was that North Shore was going to wind down its relationship with MM Steel?
>
> [Cooper]: I don't think that's accurate, no.
>
> ROA.16008-09.

- Cooper testified that the "good development" was "[t]hat North Shore was going to *alter* its business relationship with MM Steel in a way [Cooper] thought was going to alleviate *some* of [Whiteman's] concerns." ROA.16010 (emphasis added). That meant North Shore was "not going to send [orders] to Nucor on behalf of MM." ROA.16009; *see* ROA.16011-12. That way, "Nucor [wouldn't be] doing business with MM indirectly through North Shore"—Whiteman's concern. ROA.16137.

- Cooper testified that North Shore "never cut MM off," ROA.16139, and was "always open to doing business" with MM, ROA.16024.

MM points to Cooper's lunchtime statement to MM about Whiteman's "unspoken message" that Nucor wouldn't do business with North Shore "to the extent North Shore chooses to do business with [MM]." ROA.16136. But it is at minimum "equally plausible," *Matsushita*, 475 U.S. at 596, that Cooper meant Nucor wouldn't sell to North Shore to the extent North Shore was reselling *Nucor's steel* to MM. This meaning is crystal clear in light of Cooper's in-court testimony and the fact that, after the Cooper-Whiteman conversation, Nucor continued selling to North Shore and North Shore continued selling to MM. Nucor 10, 28. Nor does MM explain how "ramifications" from Nucor if North Shore

hired Schultz and Hume tends to exclude the possibility that Nucor had independent reasons not to sell to MM (MM 34). If North Shore hired Schultz and Hume, selling *any* steel to North Shore would mean Schultz and Hume could try to resell it to Nucor/Chapel customers.

In short, Cooper's testimony confirms that Nucor worried that North Shore would help MM circumvent its distribution practices. A multitude of Fifth Circuit cases, dispositive here yet ignored by MM, hold that "enforcing" a restricted distribution policy like Nucor's does not support an inference of conspiracy. Nucor 27-28.

C. Nucor Never Joined a Horizontal Conspiracy

Even if this Court rejects all the preceding arguments and concludes that the evidence supported an inference that Nucor and Chapel agreed to cut MM off, Nucor is entitled to judgment unless the evidence was sufficient to show that Nucor knowingly joined a *horizontal* conspiracy between American Alloy and Chapel. Nucor 30-31 (citing cases). In other words, MM's evidence had to tend to exclude the possibility that any Nucor agreement to cut MM off was solely a vertical agreement with Chapel. Nucor 30. MM does not argue otherwise.

1. Nucor's Decision Predated Any Horizontal Conspiracy

MM has no response to the fatal flaw in its theory: timing. Nucor made its decision about MM by September 1, before the horizontal conspiracy allegedly

began on September 8. Nucor 32-35; *see* MM 10-11. MM's evidence therefore did not tend to exclude the possibility that any agreement Nucor entered was a presumptively lawful vertical arrangement with Chapel. Nucor 33-34. Indeed, assuming (counterfactually) that Nucor agreed with Chapel to boycott MM, it is wholly implausible that Nucor then made the requisite "conscious commitment," *Monsanto*, 465 U.S. at 768, to a subsequent horizontal Chapel/American Alloy conspiracy. Nucor had no need or reason to "join" a horizontal agreement given that Nucor's conduct toward MM was the same before and the horizontal agreement was formed, including when JSW *was* selling to MM. MM argues that Nucor's "inten[tion] to end N[orth]Shore's entire relationship with MM…can be explained only by Nucor's joinder in the…horizontal conspiracy." MM 34. But ending North Shore's relationship with MM would have been perfectly consistent with a vertical arrangement with Chapel. MM offers no explanation or citation for its contrary suggestion. Further, the evidence forecloses MM's reading of Nucor's intent. *Supra* pp.8-10.

2. No Evidence Showed Nucor Knew of Any Horizontal Conspiracy

MM introduced zero evidence that Nucor even knew of any horizontal American Alloy-Chapel conspiracy. American Alloy never contacted Nucor about MM, and vice versa. No American Alloy email mentioned Nucor. No Nucor

email mentioned American Alloy. No document or testimony reflects that Nucor ever knew that Chapel spoke with American Alloy about MM. Nucor 31.

MM disputes none of this. That is presumably why MM resorts to "No doubt, Nucor knew" that American Alloy and Chapel conspired, because "market intelligence" "would have" revealed that alleged horizontal conspiracy. MM 33. This is paradigmatic improper speculation, insufficient even to state a claim. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see Zervas v. Faulkner*, 861 F.2d 823, 837 (5th Cir. 1988) (reversing conspiracy verdict based "on no more than speculation and conjecture"). MM next contends that Chapel's Altman and American Alloy's Moore "openly plotted to destroy MM." MM 33. "Openly"? MM relies on an Altman-Moore conversation at Chapel's offices for which Nucor was not present, ROA.19546-50; ROA.18875, and an internal ArcelorMittal email that Nucor never saw and that never referenced joint American Alloy/Chapel action, PX235. No evidence showed "open" plotting, much less "open" to Nucor.

American Alloy's attendance at Nucor's "customer appreciation event" (MM 33) hardly proves Nucor knew about a purported American Alloy/Chapel conspiracy. MM cites dinners in early October purportedly involving "Nucor, Reliance/Chapel, and JSW," but fails to mention that Nucor employees dined only with major customer Reliance/Chapel, never with JSW. MM 33-34. Anyway, American Alloy wasn't at those dinners and no evidence shows that

Reliance/Chapel told Nucor anything about American Alloy then or otherwise. MM implies (at 8) that American Alloy emailed Chapel to "prompt action" about MM, leading to the dinners, but American Alloy's email (PX336) didn't mention Nucor and was sent two days *after* the Nucor-Chapel dinner was set (PX331).

MM argues that Whiteman's March 19, 2012 call with North Shore's Cooper occurred "almost at the same time as" Cooper's conversation four days later with American Alloy. MM 14, 35. This cannot support an inference that Nucor knew of a *Chapel/American Alloy* conspiracy. Besides, Nucor had been talking with North Shore about MM since December 2011. That the first American Alloy-North Shore conversation occurred months later if anything contravenes MM's theory. And Nucor wasn't responsible for the timing of the March 19 call—Cooper called Nucor, at MM's behest. ROA.16007; Nucor 48.

MM relies on Cooper's hearsay testimony that Cooper told MM that Whiteman said that mills were facing "pressure" from their "biggest customers." MM 34. Its inadmissibility aside, that portion of the Cooper-MM conversation doesn't mention American Alloy (which is *not* one of Nucor's biggest customers, ROA.18794; ROA.19071; ROA.17683). Cooper's testimony that he told MM that Whiteman said in "so many words" that "they" are "terrified" of MM likewise doesn't reference American Alloy; indeed the statement concerned Chapel's expiring settlement agreements. ROA.16001-03. Anyway, even if Nucor had

known that American Alloy was pressuring mills, that would not support an inference that Nucor knew that American Alloy had conspired with Chapel. Evidence of complaints from multiple distributors does not prove horizontal conspiracy; it certainly can't prove Nucor knew of a horizontal conspiracy. Nucor 32 (citing cases). MM offers no contrary authority.

D. *Leegin* Requires Reversal Even Had Nucor Joined a Horizontal Conspiracy

MM's theory is that Nucor joined a horizontal conspiracy by entering into a vertical agreement with Chapel that furthered Chapel's alleged horizontal conspiracy with American Alloy. Nucor 35-36 (citing record). "[T]o the extent a vertical agreement…is entered upon to facilitate [a horizontal] cartel, it…would need to be held unlawful under the rule of reason." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007); *see id.* at 897-98. *Leegin* requires judgment for Nucor even had Nucor joined a horizontal conspiracy, because MM brought a *per se* case.

MM argues that *Leegin* refers to a vertical restraint that is "separate" from a horizontal restraint. MM 25. But if a vertical restraint "entered upon to facilitate [a horizontal] cartel," *Leegin*, 551 U.S. at 893, is "separate" from a horizontal restraint, any Nucor/Chapel agreement is likewise "separate" from any Chapel/American Alloy agreement. MM says that *Leegin* didn't consider "whether the defendant had also 'participated in an unlawful horizontal cartel with

competing retailers,'" MM 24 (quoting *Leegin*, 551 U.S. at 907-08), but that sentence concerned the different issue whether the defendant had *directly* conspired with its own competitors.

The only Circuit to consider this question post-*Leegin* would apply the rule of reason to Nucor. *Toledo Mack*, 530 F.3d at 225. MM contends that the restriction in *Toledo* was "purely vertical," MM 24, but if that is true, so is any restriction here. Toledo alleged that dealers entered into a "horizontal agreement," and that Mack, the manufacturer, entered into "[a]n agreement between the dealers and Mack that Mack would support the dealers' illegal conspiracy." *Id.* at 221. That is MM's theory of this case.

Leegin reflects that not all group boycotts are illegal *per se* and that applying the rule of reason is essential to prevent companies like Nucor from foregoing pro-competitive conduct. Nucor 30; *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 728-29 (1988). If this massive $150 million *per se* judgment stands, next time Nucor and other manufacturers would be all but compelled to ditch their current distributors in favor of new distributors like MM. Yet antitrust law actively opposes that result.

MM has recovered from the two alleged direct horizontal conspirators in this case. The essential legal question is whether the case *against Nucor* falls within the narrow exceptions to the general rule that an antitrust plaintiff must show harm

to competition. It does not; in case after case the Supreme Court has held that a distributor challenging a manufacturer's refusal to sell must prove its case under the rule of reason. *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998).

MM relies on cases from the 1940s and 1950s, but those cases do not support *per se* liability here. In *Fashion Originators' Guild of America, Inc. v. FTC*, all defendants were manufacturers that conspired with other manufacturers to boycott a third set of manufacturers. 312 U.S. 457, 461 (1941). In *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, the defendants were multiple suppliers and distributors that had "conspired [horizontally] among themselves," along with a retailer who created the conspiracy to injure its own direct competitor and stifle interbrand competition. 359 U.S. 207, 209 (1959); *NYNEX*, 525 U.S. at 135 ("Although *Klor's* involved a threat made by a *single* powerful firm, it also involved a horizontal agreement among those threatened, namely, the appliance suppliers, to hurt a competitor of the retailer who made the threat."). The *Klor's* suppliers were *per se* liable because they entered into direct horizontal agreements with other suppliers. *Id.*; *cf.* MM 22, 26. MM doesn't argue that Nucor directly conspired with another supplier.

Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co. (cited at MM 19) held that "not all concerted refusals to deal are predominantly anticompetitive" or merit *per se* treatment, 472 U.S. 284, 298 (1985), in line with

Leegin's rule that companies do not face *per se* treatment for making a vertical agreement with a dealer that facilitates the dealer's horizontal agreement. Instead, the *per se* rule applies only to "joint efforts by a firm or firms to disadvantage competitors." *Id.* at 294. *Nucor* did not try to disadvantage any of its competitors.

Business Electronics, which applied the rule of reason, doesn't support MM either. MM relies on a single sentence of dicta in a footnote in *Business Electronics*, but the footnote didn't discuss the *per se* rule. 485 U.S. at 730 n.4. *Spectators' Communication Network Inc. v. Colonial Country Club*, 253 F.3d 215, 225 (5th Cir. 2001), and *H&B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978), likewise rejected *per se* liability and also predated *Leegin*.

In *United States v. General Motors Corp.*, 384 U.S. 127 (1966), the manufacturer orchestrated a horizontal conspiracy, using its "ultimate power," *id.* at 136, to "elicit from all the dealers [boycott] agreements" that were "substantially interrelated and interdependent," *id.* at 144. No one suggests that Nucor "elicit[ed]" a horizontal agreement between American Alloy and Chapel. Nucor 37 n.6. MM argues that Nucor "waived" its legal argument distinguishing *General Motors* by not proposing a jury instruction. MM 27. This is frivolous. Nucor wasn't required to propose jury instructions supporting a different theory of liability than the one MM advanced. *MacMillan Bloedel Ltd. v. Flintkote Co.*

concerned joint and several liability for damages, not whether a company joined an unlawful conspiracy in the first place. 760 F.2d 580, 583 (5th Cir. 1985). And MM's common-law conspiracy cases obviously do not address the *per se*/rule of reason distinction.

Finally, MM halfheartedly suggests that Nucor engaged in a horizontal conspiracy because it sometimes sells directly to end users and "thus compete[s] with distributors." MM 23. The court properly rejected this theory, ROA.3217-3218, which is foreclosed by *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 420-21 & n.8 (5th Cir. 2010).

II. Excluding Nucor's Expert Was Manifest Error

The district court egregiously erred in excluding Nucor's expert. Dr. Jacobs would have testified that Nucor's distribution policies, including its incumbency practice, are common across industries, have substantial economic justifications, and constituted an independent reason for Nucor to decline to sell through MM. ROA.5164-65; ROA.5183-94.

MM fails to cite a single antitrust case excluding an expert on relevancy grounds. And MM misses the point in arguing that Jacobs' testimony concerned "[p]rocompetitive justifications" that cannot excuse the "per se violation" of a "group boycott." MM 41. Nucor's distribution policies were not a "justification" for boycott; they explained why Nucor never entered a boycott in the first place.

Jacobs's testimony was obviously relevant to whether MM's evidence tended to exclude the possibility of independent action.

MM asserts that its expert "never addressed or even mentioned Nucor's touted incumbency policy or its distribution strategy." MM 42. That is wrong, and wouldn't justify excluding Jacobs anyway. Mahoney repeatedly suggested that Nucor's distribution policies were pretextual, Nucor 41 (citing record), to bolster MM's trial argument that the incumbency practice "did not exist or was a pretext," MM 40. The district court said Mahoney's testimony was admissible to show the incumbency practice was "illegitimate" or "nontruthful." ROA.18984-85; *see* ROA.18778-80.

MM argues that Nucor sought to preclude Mahoney from discussing the effectiveness of Nucor's distribution strategies. MM 42; ROA.4271-73. But the court denied Nucor's motion, ROA.7290 (denying ECF No. 436); Mahoney thus testified that a mill would have no legitimate reason to follow Nucor's strategies, ROA.14264; ROA.14399. Judicial estoppel does not apply to an argument a party lost. *In re Ark-La-Tex Timber Co., Inc.*, 482 F.3d 319, 332-33 (5th Cir. 2007). MM implicitly acknowledges that Jacobs' testimony was relevant by suggesting Nucor could have called a different expert on the same topic. MM 41-42. But MM doesn't get to pick Nucor's expert.

Jacobs' testimony was not cumulative of Nucor fact witnesses. *Cf.* MM 42-43. Expert testimony exists to assist fact-finders in evaluating factual disputes. *Pipitone v. Biomatrix, Inc*., 288 F.3d 239, 249 (5th Cir. 2002); *see United States v. Posado*, 57 F.3d 428, 435-36 (5th Cir. 1995); Nucor 41. Nor would Jacobs have improperly "bolster[ed]" Nucor's fact witnesses. MM 42. *United States v. Cruz* barred expert "bolstering" on matters within a lay juror's understanding, which Jacobs' testimony was not. 981 F.2d 659, 664 (2d Cir. 1992). Moreover, *Cruz* does not apply because MM sought "to discredit [Nucor's] version of events as improbable." *Id.*; *see* MM 40.

MM argues that Jacobs' testimony would have been cumulative of Dr. Shehadeh, a joint defense expert JSW put on *after* the court had already excluded Jacobs. MM 42. Shehadeh never testified about *Nucor's* distribution strategies or whether *Nucor's* actions in this case were consistent with those policies, ROA.19177-78; ROA.19145, and Shehadeh too was prohibited from testifying on the topics Mahoney addressed, ROA.19184-19190. Jacobs would have provided testimony that "none of the other [experts] gave," *Huss v. Gayden*, 571 F.3d 442, 456 (5th Cir. 2009), and his exclusion requires a new trial, *Bocanegra v. Vicmar Servs., Inc.*, 320 F.3d 581, 584, 590 (5th Cir. 2003).

III. Other Errors Necessitate a New Trial

A. Closing Arguments

1. MM does not dispute that misstatements of law in closing can warrant reversal. MM merely argues (at 43-44) that MM's counsel was entitled to inform jurors that Nucor joined a conspiracy just by accepting Chapel's alleged ultimatum. But MM's counsel got the law backwards. Accepting an ultimatum does not establish a vertical agreement, let alone participation in the *per se* *horizontal* conspiracy the verdict rests upon. Nucor 25-26; *supra* p.6. That was the point of Nucor's proposed (but rejected) curative instructions. The court's instructions only magnified the misstatement of law. Nucor 45-46. Nor was there waiver. *Cf*. MM 44. Nucor timely filed a written objection shortly after midnight on March 25, 2014, seeking "an appropriate supplemental instruction before the jury proceeds with its deliberations," which began later that morning. ROA.5383; ROA.19949; *Fonten Corp. v. Ocean Spray Cranberries, Inc.*, 469 F.3d 18, 21-22 (1st Cir. 2006).

2. MM denies "invent[ing] conversations," claiming counsel merely "asked whether witnesses's *denials* of conversations were 'believable.'" MM 45. But the transcript shows that MM's counsel invented out of whole cloth detailed, damning, fake dialogues between Nucor and alleged co-conspirators. ROA.19785-86; ROA.19771-73.

MM's counsel falsely represented that at an October 5 Nucor-Chapel dinner, Nucor demanded assurances that other steel mills would also cut off MM as a condition of boycotting MM, and that Chapel told Nucor that all four mills had agreed. Zero record evidence supported counsel's representation. Nucor 46-47. MM notably does not even attempt to justify its counsel's inventions as to September 1 conversations. Even one misrepresentation about a key admission is one too many. *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 284-85 (5th Cir. 1975). The nature of MM's counsel's fabricated admissions by Nucor is no different, and no less prejudicial, than counsel's fictitious letter in *Whittenburg v. Werner Enterprises, Inc.*, 561 F.3d 1122, 1128 (10th Cir. 2009).

MM claims (at 45) that the jury could "reasonably" infer that *Nucor* agreed to a conspiracy with Chapel at the October 5 dinner because *JSW* purportedly agreed to a Chapel ultimatum at an October 4 dinner. Unsurprisingly, no court has ever permitted a jury to infer that, if A and B formed an agreement, A and C must have done so as well. *Supra* p.3. In any event, a reasonable inference would not entitle counsel to fabricate a specific conversation supported by no evidence. *See also* JSW 4-6 (JSW made decision regarding MM after October 4).

MM is equally wrong (at 45) that counsel could invent detailed conversations about Nucor's purported agreement to a horizontal conspiracy at dinner on October 5 because "Nucor communicated with other conspirators"

months later. MM's so-called evidence is (1) a January 2012 email from Nucor to Chapel, PX532; (2) a February 2012 note to self by Chapel's Tocci that Tocci never acted on, PX563; and (3) March 2012 Chapel emails suggesting Tocci should forward Nucor an email concerning North Shore, PX587. How those 2012 emails remotely show that Nucor in October 2011 knowingly agreed to a horizontal conspiracy involving other mills and American Alloy is anyone's guess. Two are not even from Nucor; none provide even circumstantial evidence of conspiracy, much less "direct" (MM 45). Likewise, MM's evidence about what Whiteman told Cooper in March 2012 (MM 45) establishes nothing about what happened at a dinner between others in October 2011.

B. Hearsay[2]

1. Cooper's Statements to MM

Cooper's testimony about his statements to MM at the March 2012 lunch was hearsay. MM no longer defends this testimony's admissibility under the recorded recollection exception that MM advanced below and the court accepted. Nucor 48-50; *see* ROA.3215-16; MM 46-47.

MM now claims it relied solely on the party-opponent exception. MM 46-47. But MM failed to cite that exception below. ROA.32413-16. And it wouldn't have applied anyways. Cooper's out-of-court statements to MM and Whiteman's

[2] MM inexplicably asserts (at 1) that Nucor's Statement of Issues "omits the issues argued in sections III.B-E of its Brief." *See* Nucor 1 (reciting those issues).

out-of-court statements to Cooper constitute separate levels of hearsay. Each must satisfy its own hearsay exception, Fed. R. Evid. 805, and the party-opponent rule saves Whiteman-to-Cooper, but not Cooper-to-MM. The Cooper-to-MM statements do not fall within the specific, limited situations in which a witness's own out-of-court statements are "not hearsay." Fed. R. Evid. 801(d)(1)(A)-(C) & advisory committee notes.

Cooper's testimony illustrates why. Cooper did not "give [MM] a transcript of what…Whiteman [said]." ROA.16136. He editorialized and speculated, describing purported "unspoken message[s]," ROA.32063, or Whiteman's comments "in so many words," ROA.16003; ROA.32065, including in particular the purported comment that "they" were "terrified" of MM. Yet the court permitted MM to introduce *Cooper*'s speculative out-of-court statements as if they were *Whiteman's* actual statements, and the jury likely treated them that way—exactly what the hearsay rule is designed to prevent. Worse, Cooper's speculation came during a conversation MM engineered in preparation for filing this lawsuit. Nucor 9. The rules preclude a witness from testifying to his own out-of-court statements precisely so parties cannot use a "carefully prepared…statement as a substitute for direct examination in open court." *State v. Sua*, 60 P.3d 1234, 1240 (Wash. Ct. App. 2003).

Nucor did not "waive" its objection, and MM's statement that Nucor "object[ed] only to the recording" (MM 46) is false. Nucor moved pre-trial to exclude Cooper's "out-of-court *statements*…for all purposes," ROA.31864-70 (emphasis added); it was *MM* that raised the recorded recollection argument in response. ROA.32413-16. The court *denied* Nucor's motion, ROA.3215-16, so the argument is preserved. Fed. R. Evid. 103(b); *Mathis v. Exxon Corp.*, 302 F.3d 448, 459 & n.16 (5th Cir. 2002). Nucor focused on recorded recollection in the trial colloquy MM cites (46) because that was the hearsay exception the court had accepted. And no rule required Nucor to re-object during Cooper's testimony. *Cf.* MM 46.

MM led the court and Nucor to believe MM relied on recorded recollection. The morning Cooper testified, MM announced that it was "following the [Court's] ground rules" and would elicit the lunchtime statements only through the recorded recollection exception. ROA.15841; *see* ROA.15840 (same). MM then introduced the statements:

> [Counsel]: [Y]ou've seen a transcript of the tape recording of your conversation with Matt Schultz and Mike Hume; haven't you?
> [Cooper]: Yes.
> …
> [Counsel]: And we're going [to] take it a piece at a time. You started by saying…

ROA.15999.

How this qualifies as testifying "without resort to the recording" (MM 46) is baffling. MM cannot now argue that it introduced Cooper's statements under the (inapplicable) party-opponent exception when under the court-imposed "ground rules" the statements were admissible only under the recorded recollection exception MM has now disavowed.[3]

2. Sergovic's Email

Sergovic's email does not satisfy the co-conspirator hearsay exception. MM does not deny that the court failed to apply the preponderance standard, instead claiming only that the error is not "reversible." MM 48. *Park v. El Paso Board of Realtors* held that precisely this error mandates reversal. 764 F.2d 1053, 1065 (5th Cir. 1985); Nucor 53. MM does not address *Park*.

The court failed entirely to address whether Sergovic sent *his email* in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E); Nucor 53. MM suggests that Sergovic's intent can be inferred because Sergovic responded to a colleague's email that ArcelorMittal had "to figure out how…to handle [MM]." MM 48. At most, this shows Sergovic reported the conversation to facilitate internal ArcelorMittal deliberations. Sergovic wasn't advancing the "common objectives" of a conspiracy already formed. *United States v. Eubanks*, 591 F.2d 513, 520 (9th Cir. 1979).

[3] MM undisputedly did not rely on the alternative the court offered, impeachment. ROA.3216; ROA.15841.

Nor was Sergovic's September 5 email sent "during…the conspiracy." Fed. R. Evid. 801(d)(2)(E); Nucor 54-55. MM now hypothesizes a "'joint plan' as of September 5." MM 48-49. But MM's express theory at trial was that the conspiracy "started" on September 8, when Chapel and American Alloy first met. ROA.19770; Nucor 54. This was not some "other start-date[]" or alternative "argument" (MM 48-49); it was MM's theory of the case. Anyway, MM does not reconcile its "joint [Chapel/ArcelorMittal] plan as of September 5" argument with its argument that ArcelorMittal was still deliberating internally over "how…to handle" MM on September 5. MM contends that Nucor waived its argument that the email predated the conspiracy by failing to raise it in its pre-trial motion-in-limine, MM 48, but MM didn't identify September 8 as the conspiracy's start date until trial. Before trial, MM argued the conspiracy began as early as September 3. ROA.27844; *see* ROA.32410. MM cannot exploit its change in positions to argue waiver. MM next argues that Nucor somehow "waived any complaint" by failing to seek a "limiting instruction" regarding the Sergovic email. MM 49. Nucor moved to exclude the email in its *entirety*; that is enough. Fed. R. Evid. 103(a)-(b); *see* ROA.32124-31.

The district court properly rejected MM's argument that the email was admissible as a business record. MM 49; ROA.3213-14. MM fails to show that "making the record" was "a regular practice" of ArcelorMittal's business, Fed. R.

Evid. 803(6)(C), *i.e.*, that Sergovic's "particular email" was sent as a matter of regular corporate policy. *United States v. Cone*, 714 F.3d 197, 220 (4th Cir. 2013).

***

MM does not argue that admitting the Cooper testimony or Sergovic email was harmless error. Quite the contrary, MM repeatedly relies on this evidence to defend the verdict. MM 5, 7, 8, 14, 34-35. There was insufficient evidence to show Nucor joined a horizontal conspiracy regardless, but the verdict plainly falls if either the Cooper statements or the Sergovic email were inadmissible. Nucor 55.

C. Mahoney's Overview Testimony

MM claims (at 50-51) that Nucor is precluded from objecting to Mahoney's overview testimony because Nucor did not challenge and "conceded" Mahoney's expertise about steel industry custom and practices. That too is factually false, ROA.1801; ROA.23645-73 (*Daubert* motion), and legally incomprehensible. Speculating about defendants' motives in emails does not qualify as expert testimony on steel industry custom. Nucor 56-57. MM asserts (at 50) that defendants' objections were belated, but ignores defendants' numerous earlier objections. *E.g.*, ROA.2297-98, 14389, 14402, 14423-24. The court thought defendants objected *too often*. ROA.14423-24; *accord* ROA.14402.

MM defends Mahoney's overview testimony as the "foundation" of his opinions on industry custom. MM 50-51. That is a non-sequitur. Mahoney's spin

on defendants' emails has nothing to do with the question whether refusing to start doing business with MM violates industry norms. Telling the jury, for instance, that Nucor emails showed "enforcement" of a boycott, ROA.14389-90, served only to parrot and bolster MM's factual arguments. Nucor 57-58.

It is irrelevant that Mahoney recited certain emails that were pre-admitted. *Cf.* MM 50. Experts cannot "rehash[] *otherwise admissible* evidence about which [the expert] has no personal knowledge." *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 468-69 (S.D.N.Y. 2005) (emphasis added).

D. Lay Witnesses' Opinions

Lay testimony about whether defendants' conduct was legal or ethical is prejudicial, irrelevant, and beyond witnesses' personal knowledge. Nucor 59-61. MM does not dispute this rule but asserts that such testimony is fine so long as it comes in "snippets." MM 52. Needless to say, witnesses cannot condemn a defendant's conduct as unlawful, immoral, and unethical so long as they do so concisely. A generic jury charge weeks later is insufficiently curative under this Court's precedent, which MM ignores. MM 52; Nucor 60-61.

MM dismisses some testimony (at 51) as reflections on "personal experiences" of steel industry norms. But testifying that "[g]iving a steel mill a choice between" an existing distributor or a new one is "[im]proper," ROA.15316, is a "general claim[] about how [businesses] should conduct their affairs"—and

inadmissible. *United States v. Riddle*, 103 F.3d 423, 428-29 (5th Cir. 1997); *accord Nat'l Hispanic Circus, Inc. v. Rex Trucking, Inc.*, 414 F.3d 546, 551-52 (5th Cir. 2005); *see* ROA.16004-05; ROA.16020; ROA.18044.

MM claims Nucor waived objections. Once more, not so. Nucor categorically objected to questioning "about whether [witnesses] consider any alleged actions to be ethical, proper, appropriate, or legal." ROA.4447. Nucor also promptly objected to specific questioning. *E.g.*, ROA.4453, ROA.15334-37; ROA.15841-42. Nucor did not need to contemporaneously object to each inappropriate question after the court denied Nucor's categorical objection.

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These errors individually and cumulatively warrant a new trial, especially in light of the court's other rulings, which overwhelmingly and arbitrarily favored MM. Nucor § III.E, 61-62. Though none were waived, the errors would in any event satisfy the plain error standard. *United States v. Hope*, 545 F.3d 293, 297 (5th Cir. 2008).

IV. The Damages Award Must Be Vacated

A. MM Does Not Defend the Erroneous Assumption in Its Damages Model

MM fails to respond to Nucor's argument that the undisputed factual record foreclosed MM's damages expert's initial inventory assumption. Nucor 63-64. MM therefore concedes the point. *United States v. Thibodeaux*, 211 F.3d 910, 912

(5th Cir. 2000). This error was extraordinarily consequential. The initial inventory assumption drove the entire damages estimate because MM's expert used initial inventory to project sales for each year of his ten-year model. ROA.19620; ROA.22530. MM's error inflated total damages by *tens of millions of dollars*. Nucor 64. Again, MM does not dispute this. This Court must vacate the award. Nucor 64 (citing cases).

B. MM Cannot Recover Post-Suit Damages

The Court must also vacate the damages award for the independent reason that MM improperly received lost profit damages past the date it filed suit, April 19, 2012. Plaintiffs alleging a continued refusal to deal cannot recover "damages inflicted by persistence of the refusal after the date of filing suit." *Poster Exch., Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 126 (5th Cir. 1975); *id.* at 126 nn.14-15; Nucor 63.

MM ignores *Poster Exchange*. And MM's cases (at 54) are all distinguishable in a critical respect: plaintiffs sued *after* going out of business.[4] In such cases no "wrongful acts" occur "subsequent to suit," and post-suit damages have already accrued by the time of suit. *Poster Exchange*, 517 F.2d at 126. But

[4] *Eleven Line v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 202 (5th Cir. 2000); Amended Complaint, 95-CV-03120 (N.D. Tex. Aug. 18, 1997) (Dkt. 47); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 460 (3d Cir. 1998); Complaint, 92-CV-05377 (D.N.J. Dec. 24, 1992) (Dkt. 1); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 29-30 (5th Cir. 1972); Complaint, Civ-68-4-W (W.D. Tex. Feb. 27, 1968) (Dkt. 1).

MM closed a year-and-a-half *after* filing suit. ROA.1632; ROA.68-94; ROA.1599. And this Court has held that limiting refusal-to-deal plaintiffs to pre-suit damages is entirely consistent with *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971). *See Poster Exchange, Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 129, 131 n.4 (5th Cir. 1975).

Nucor continues to incorporate JSW's additional damages arguments. JSW Reply 25-29.

CONCLUSION

The Court should reverse or order a new trial.

Dated: March 26, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

Dated: March 26, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2015, the foregoing *Reply Brief of Appellant Nucor Corporation* was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on the following counsel of record by operation of the CM/ECF system on the same date:

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