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

BRIEF AND REQUIRED SHORT APPENDIX
OF PLAINTIFFS-APPELLANTS IN 12-1109

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-1109, 12-1224

Short Caption: In re: Sulfuric Acid Antitrust Litigation, Appeal of Ohio Chemical Services, et al.

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

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

Ohio Chemical Services, Inc.; Independent Chemical Corporation; National Alum Corporation; Producers Chemical Company; Old Bridge Chemicals, Inc.; and AG RX

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

Wolf Haldenstein Adler Freeman & Herz LLC; Kohn Swift & Graf, P.C.; Weinstein Kitchenoff & Asher LLC; Gold Bennett Cera & Sidener LLP; Ross Dixon & Bell, LLP; Malkinson & Halpern, P.C.; Stueve Siegel Hanson LLP

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

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

N/A

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

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Attorney's Signature: /s/ Mary Jane Fait Date: March 30, 2012

Attorney's Printed Name: Mary Jane Fait

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Attorney's Signature: /s/ Robert J. LaRocca Date: March 30, 2012

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Attorney's Signature: /s/ Solomon B. Cera Date: March 30, 2012

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JURISDICTIONAL STATEMENT

The district court had federal question jurisdiction over this antitrust class action pursuant to 28 U.S.C. §§1331 and 1337. This is an appeal from a final judgment entered December 22, 2011. (A105). Plaintiffs filed a timely notice of appeal on January 13, 2012. This Court has jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUE

Did the district court err in holding that no aspect of this case could proceed to trial on the *per se* theory of antitrust liability?

STATEMENT OF THE CASE

Sulfuric acid is a commodity chemical. Plaintiffs assert that the manufacturers of sulfuric acid – horizontal competitors with each other – colluded to close plants and reduce output to balance supply and demand and stabilize prices. Plaintiffs and the plaintiff class purchase sulfuric acid directly from defendants. Plaintiffs' complaint states one Count for violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. §1. (A109-28).

Judge Coar presided over this case from its inception in 2003 until his retirement in December 2010. He oversaw discovery and the submission of expert reports, and certified the plaintiff class of direct purchasers from defendants. (A129-37). He approved class action settlement agreements with certain defendants, including DuPont. (R. 531,589).

Following the conclusion of discovery and the submission of expert reports, the non-settling defendants filed motions for summary judgment. (R. 400-05,412-

44). They argued, *inter alia*, that the case should proceed only under the rule of reason liability standard, and that because plaintiffs had disclaimed this standard, summary judgment should be granted to defendants. Plaintiffs' response identified the *per se* standard as applicable. (R. 510).

Judge Coar rendered an extensive opinion in September 2010 adjudicating these summary judgment motions. (A1-50). He denied virtually the entirety of defendants' motions, holding that there was sufficient evidence from which the jury could find *per se* violations of the antitrust laws. (A23,25,30-38,40-46):

> Plaintiffs allege and produce evidence to support the existence of a garden-variety output limitation scheme… The actual and probable anticompetitive effects of such conspiracies are well established…. It is undisputed that Noranda and Falconbridge, under their 'displacement by agreement' strategy, approached and interacted with co-Defendants, and that co-Defendants thereafter reduced production.

(A25-26). As to one limited issue (territorial allocations or "zone contracts"), the court held that only the rule of reason could apply, and granted summary judgment to defendants on this portion of proof. (A39-40).

Defendants sought to appeal the interlocutory denial of their summary judgment motions under the collateral order doctrine. *Ohio Chemical Services, et al. v. Falconbridge Limited, et al.* No. 10-3486 (7th Cir). This Court dismissed the appeal for lack of jurisdiction on June 10, 2011.

Chief Judge Holderman was assigned after Judge Coar retired, and effectively assumed jurisdiction when the mandate from this Court issued in June 2011. He set a trial date of February 13, 2012. (R. 652). The case was proceeding with trial preparation. On November 21, 2011, defendants noticed for presentment what they termed a motion for "determination of which antitrust mode of analysis applies to this case."(R. 759-61). The motion actually sought to reverse Judge Coar's extensive rulings that the case could proceed to trial on a *per se* theory. Defendants argued that "the rule of reason applies as a matter of law." (R. 760, p.1).

The Northern District of Illinois Local Rules require a "presentment" of all motions to the court on a few days' notice to adversaries, to determine if the motion will be opposed, and if so, to set the schedule for briefing. *See* N.D.Ill. Local Rule 5.3(b).[1] Defendants' motion was filed on November 21, 2011 and set for presentment on November 29, 2011. On that date – and without permitting plaintiffs the opportunity to brief the motion, or providing notice that there would be an adjudication – Chief Judge Holderman orally granted defendants' motion and announced that the case could proceed to trial solely under the rule of reason theory of liability, and not the *per se* theory:

> [T]his case is a case in which the 'rule of reason' analysis should be the analysis presented to the jury for its determination in connection with the conduct that is alleged to have been wrongful.

(A58). This abruptly reversed Judge Coar's summary judgment adjudication. Chief Judge Holderman claimed he was not doing so, and termed Judge Coar's extensive holdings on *per se* liability "dicta." (A55). The court also denied plaintiffs' motion to

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[1] Chief Judge Holderman's motion practice procedures state that at the presentment conference "the court will set the briefing schedule, date to answer or otherwise plead, or discovery completion dates." http://www.ilnd.uscourts.gov/home/JudgeInfo.aspx

permit the territorial allocations to be considered as part of the *per se* violations. (A55, line 3, denying R. 751).

Plaintiffs filed a motion for certification under 28 U.S.C. §1292(b) to permit this Court to determine the basic issue of the *per se* versus rule of reason standard of liability, before the expenditure of further resources by the parties and the district court. (R. 780-82). Defendants filed a cross-motion (R. 775-77). Its guise was ostensibly to "simplify" the rule of reason trial. It actually sought that summary judgment now be granted to defendants *nunc pro tunc*. "Defendants request leave…to file a motion for summary judgment in order to dispose of the case in its entirety." (R. 777, p.2).

At the presentment of both motions on December 13, 2011 – and again without permitting any merits briefing – Chief Judge Holderman affirmed that only the rule of reason standard would apply at trial. (A71-72). He then summarily denied plaintiffs' motion for 28 U.S.C. §1292(b) certification. (A74). At that point, plaintiffs' counsel re-affirmed that they were proceeding only under a *per se* theory, and submitted that the logic of the court's ruling was to now grant summary judgment to defendants. (A77). Chief Judge Holderman termed Judge Coar's rulings on *per se* liability "remarks" that were "unfortunate." (A79). "You then provided a lot of *per se* information to Judge Coar, and he commented in dicta." (A79-80). The parties stipulated to a form of judgment, preserving all of Plaintiffs' rights to appeal. The court modified this slightly at a status hearing on December 22, 2011. (A84-103). As modified, it was entered. (A105-07). The clerk then entered final judgment on December 22, 2011. (A108). Plaintiffs filed a timely notice of appeal on January 13, 2012 (R. 797).

Chief Judge Holderman stated that he would "provide a more fulsome statement" to explain his reasoning. (A77). He subsequently stated there was no need to do so. (A102). Thus, the opinions that exist for this appeal are: (1) Judge Coar's written summary judgment opinion (A1-50); and (2) Chief Judge Holderman's oral statements at the two presentment conferences. (A55,58,71-72,79-80).

STATEMENT OF FACTS

A. DEFENDANTS' AGREEMENTS TO RESTRICT OUTPUT

Defendants Noranda and Falconbridge were Canadian smelters of zinc, copper and lead, and made sulfuric acid (H_2SO_4) from sulfur dioxide, a by-product of this metal smelting. The U.S. defendants (DuPont, Koch, PVS, Delta, Marsulex, and Boliden) made sulfuric acid at their respective plants in the northeastern, southeastern, and midwestern U.S., and sold it in the U.S. "industrial/merchant" market to companies that made steel, pulp and paper, pharmaceuticals, processed foods, and other products. (A236,295). The U.S. defendants made acid largely by burning elemental sulfur to make sulfuric acid at what they termed "on purpose" plants, in contrast to what Noranda and Falconbridge termed their "involuntary" production.

By the late 1980's, the Canadian defendants knew their production of sulfuric acid would be increasing significantly, as they were building a new acid plant referred to as the Horne. (A156,166). They knew the Canadian market could not absorb their increased production. (A5 ¶22). They had available over 400,000 tons/year which they desired to sell in the U.S., where the U.S. defendants operated. (A156) ("Noranda will soon become a major producer and supplier to sulphuric acid markets …in …the Eastern United States.") (*See also* A188-89,191).

Noranda and Falconbridge had various options. One was to sell into the "Florida fertilizer market," one of the largest markets for sulfuric acid in the world, where 20-30 million tons of sulfuric acid were used annually to make fertilizer. (A295). However, because the market drew from sources world-wide, price competition was keen and prices low. (A267). As Noranda stated, "[t]here is always a market for Noranda/Falconbridge acid in the fertilizer market...," but this was unattractive because of "[l]ow pricing due to competition…." (A314).

Instead, Noranda and Falconbridge decided to enter the U.S. industrial/merchant market, where about three million tons were sold annually, mostly by the U.S. defendants described above. (A494-97). Prices were substantially higher in this market. (A267,295).

The U.S. defendants feared price competition from Noranda/Falconbridge.[2] A DuPont witness colorfully testified:

> [W]e knew there was going to be, basically, a tsunami coming at the world full of sulfuric acid…. I think we had years of notice that the tsunami was coming. For anyone

[2] Noranda and Falconbridge were two separate smelting companies. Noranda owned 19% of Falconbridge. Judge Coar held they were separate entities for antitrust purposes. (A46-50). The companies agreed to pool and jointly market their smelter acid through "Noranda Sales" or "NSC," a division of Noranda. The principals' names "Noranda/Falconbridge" are used in this brief.

> in the sulfuric acid business to be standing there, watching the wave come in and do nothing, not run, not do anything, was – didn't make sense.

(A467-69).

Noranda/Falconbridge decided, rather than competing with the U.S. defendants, to have the latter cease production and buy Noranda/Falconbridge acid to deliver to their U.S. customers. The Canadian and U.S. defendants would share the revenue from this arrangement through "revenue sharing" formulae.

The Canadian defendants made explicit this "Displacement by Agreement" strategy, stating that its purpose was to prevent "price disruption" by preventing "oversupply" in the "balanced" industrial/merchant market:

> The strategy to market sulphuric acid production from the Horne remains as articulated at the outset, namely: to develop and conclude sales in the target market area of the Northeastern United States by approaching sulphur burning acid producers to purchase acid from Noranda *and thereby shutdown sulphur burning acid plants. It is a strategy of displacement by agreement. This strategy is being followed so as not to force an oversupply into a balanced market with predictable price disruption….*

(A169) (emphasis added). Noranda/Falconbridge thought this strategy would allow them to become "the dominant acid supplier in [the Eastern United States]." (A156). It came to light in 2003 when the Canadian police seized records from their offices.

Noranda/Falconbridge documented their progress in internal memos and formal agreements with the U.S. defendants, summarized below. As they stated in an internal report in 1994:

> [d]iscussions with a number of U.S. producers of acid from sulphur led to their decision to curtail their sulphur-based

> production in favour of purchasing smelter acid from Noranda for internal use and/or resale.

(A235). They implemented the strategy as follows:

(1) Shutdown Agreements with PVS

PVS operated a sulfuric acid plant in Copley, Ohio (seven miles west of Akron) with a capacity of 60,000 tons/year. In an agreement with Noranda/Falconbridge in March 1988:

> PVS Chemicals agrees to discontinue production of sulphuric acid at its Copley, Ohio acid plant.

(A143). The agreement spanned at least eight years, and if terminated required PVS to negotiate to sell the plant to Noranda/Falconbridge. (A144). PVS and Noranda/Falconbridge shared price increases to PVS' customers through a "revenue sharing" formula. (A147). The "effective closure date" was August 1, 1988. (A159,167-68). In May 1988, PVS told Koch: "Copley to shut down in July of '88." (A154,482).

PVS operated another sulfuric acid plant in Bay City, Michigan, north of Flint and Detroit. It had a capacity of 33,000 tons/year. (A175). Noranda/Falconbridge also targeted this plant. (A160). "A meeting has been scheduled for the week of January 30 in Toronto with PVS to formalize discussions on the closure of their Bay City, MI plant…." (A175). They concluded negotiations in June 1990. (A188). "PVS agrees to arrange to have its affiliate discontinue production of sulphuric acid at its Bay City, Michigan acid plant no later than October 15, 1990." (A23, quoting PVS Ex. 27).

(2) Shutdown Agreements with DuPont

DuPont operated a sulfuric acid plant in Grasselli, New Jersey, near Linden, Elizabeth, and Newark, in the heart of the northeast New Jersey industrial area. It had a capacity of up to 200,000 tons/year. (A220). The Noranda/Falconbridge 1988 Plan stated that DuPont "[h]as expressed a much stronger interest in scaling down production at this facility by as much as 50-100,000 STPY [Standard Tons Per Year]." (A159). They reported "successful negotiations" with DuPont for "replacing sulphur burned acid with smelter acid." (A157).

By June 1990, this had expanded to the complete and permanent closure of Grasselli. "Negotiations were concluded with DuPont in February…." (A188). Noranda/Falconbridge wrote to DuPont in October, 1991:

> [W]e feel that the development of a 'partnership/strategic alliance' between Noranda and DuPont on acid is a very sound and mutually beneficial way to proceed.
>
> ….
>
> *DuPont shall permanently cease production of acid* and oleum at Grasselli [New Jersey] prior to commencement of shipments by Noranda.

(A215)(emphasis added). In exchange, DuPont agreed to take 123,000 tons per year of the Canadian defendants' acid and to share profits with them. (A216). Noranda/Falconbridge told defendant Boliden about "our confidential discussions with DuPont relative to the eventual… closing of the Grasselli sulphur burner and hence the elimination of this 200,000 mt [metric tons] of acid production from the market." (A220). In March 1992, Noranda/Falconbridge told defendant Koch that the DuPont agreement "will allow Noranda to displace 200,000 tpy [tons per year] of sulfur burned acid production…." (A227).

(3) Shutdown Agreements with Delta

Delta operated two sulfuric acid plants in Searsport, Maine, south of Bangor, that together produced 65,000 tons/year, which Delta sold throughout New England. (A452). In 1988, Noranda/Falconbridge stated that "an agreement in principle has been reached between Delta and Noranda to close this sulphur burning facility." (A159). The 1989 Plan touted this agreement as one of the "working models for future acid supply agreements." (A168). A Delta employee wrote that Noranda's strategy was "keeping the price up in Maine Market." (A138).

A former Delta officer declared that "Noranda's primary goal became persuading Delta to shut down its sulfuric acid plants…." (A452 ¶4). He stated that "[a]s a direct result of this agreement, Delta closed down its sulfuric acid plants in approximately 1989, removing annual capacity of approximately 65,000 metric tons of sulfuric acid from the merchant marketplace." (A453 ¶9). The parties agreed to a revenue-sharing provision to "allocate between them the revenue from the sales to [Delta's] customers." (*Id.* at ¶10).[3]

[3] Judge Coar held that General Alum ("GAC"), which purchased Delta's assets in 1994, did not incur successor liability for these actions. (A26-28). Plaintiffs subsequently agreed to dismiss GAC and therefore do not challenge this ruling on appeal. Because liability under the antitrust laws is joint and several, this has no effect on the liability of Noranda/Falconbridge or any other remaining defendant for these actions. *See Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646 (1981).

By October 1990, Noranda/Falconbridge reported that the foregoing agreements with PVS, DuPont, and Delta had displaced 450,000 tons/year: "The remaining 450,000 [tons] is sold through existing U.S. acid producers such as PVS, Delta and DuPont to replace sulphur burned acid production." (A196-97).

(4) Cut-Back Agreements with Boliden Intertrade

In the late 1980's Boliden purchased Tennessee Chemical Co., acquiring a 500,000+ ton/year sulfuric acid plant in Copperhill, Tennessee. (A195). In 1990, Boliden met with Noranda and discussed a "production cutback at Copperhill." (A194). In December 1990, they again met and "[w]e all agreed that a stable and maximum price realization [profit margin] should be our prime target in pooling our [sulfuric acid] interests on the U.S. market." (A199). Noranda/Falconbridge told Boliden that Copperhill acid should not be "'aggressively' marketed in competition with ourselves and to the detriment of our anticipated revenues." (A221). Boliden's corporate strategy was "[a]ccommodate Noranda acid." (A208).

In September, 1991, Boliden offered to substantially reduce Copperhill's annual production in exchange for Noranda/Falconbridge paying "cutback fees." (A209-10). They negotiated a payment of $6.40/ton for "Cut Back Copperhill." (A218). "Boliden have just recently conceded they will cut back Copperhill by 112,500 MT [metric tons]…." (*Id.*).

Boliden confirmed its objective to pursue "shut down agreements…in order to maximize the realizations on this tonnage." (A214). Noranda/Falconbridge demanded further tonnage cut-backs, stating that Copperhill should only produce "in the 200,000+ ton-per-year range and that is the reason why Noranda is paying Boliden an extra $5/ton commission on sulfuric acid traded." (A226). In 1993, Noranda/Falconbridge confirmed that its commission "is to compensate Boliden for cutting back their sulphur burner…." (A229). In 1995, Boliden stated it was "coordinating with overseas competition," which has "been effective with Noranda/Falco." (A249).

Noranda acknowledged Boliden's cooperation in a 1998 strategy report:

> [Boliden's] ability to curtail/increase output at Copperhill has been invaluable in smoothing fluctuations in output from Noranda and Falconbridge smelters; this also acts as a barrier to entry of acid by others, who risk finding market flooded by acid from a scaled-up Copperhill.

(A255).

(5) Shutdown Agreements with Koch

In 1988, Noranda/Falconbridge discussed with Koch the closure of its plants in Wilmington, North Carolina and St. Paul, Minnesota, and Koch "expressed an interest in partial closure of both plants with particular emphasis on the Wilmington facility." (A161-62). Noranda/Falconbridge told Koch that they wanted "production to either cease or be scaled back for Noranda's acid to enter the market," and informed Koch that Boliden's Copperhill plant was being "scaled down." (A163). Koch replied that it "would be receptive to shutting down one unit at Wilmington…." (A477). Noranda/Falconbridge told Koch that the "PVS Copley deal is working fine." (A479).

In June 1990, Noranda/Falconbridge met with Koch to discuss "75,000 nt/yr of acid sales without disturbing [the Southeast U.S.] market." (A186). Koch told

Noranda/Falconbridge that it could "displace acid currently in the market with Noranda acid, so as to maintain industry structure." (A192). Noranda/Falconbridge also stated they were "fully prepared to work with Koch on the Wisconsin market and able to do so starting July 1st." (A192). Less than a month later, Koch's St. Paul, Minnesota plant began to receive Noranda/Falconbridge's smelter acid. (A182).

(6) Shutdown Agreements with Marsulex/Chemtrade

Noranda/Falconbridge discussed with Marsulex's predecessor, CIL, closure of its plant in Sayreville, NJ, south of the Newark/Elizabeth/Bayonne industrial areas. (A159). Falconbridge initially paid $315,000 yearly to keep this plant on "standby," *i.e.* to have it stop production. (A140). By 1991, Falconbridge paid Marsulex over $400,000 per year as a "Sayreville Standby fee." (A212). In October 1994, Falconbridge told Boliden that Marsulex had "at least one" contract for "closure of sulphur burning acid plants." (A242).

By 1996, Marsulex had acquired two sulfuric acid plants in Ohio which "will produce approximately 120,000 mt. of acid for the merchant market in 1997." (A265). Noranda/Falconbridge proposed a reduction of 40,000 tons. (*Id.*). Marsulex stated it was "prepared to reduce acid production through their sulphur burner at Toledo's Coulton plant if they could purchase more [Falconbridge] acid." (A268).

B. DEFENDANTS JOINTLY SET CUSTOMER PRICES

The Canadian and U.S. defendants jointly set the prices to the U.S. customers. In March 1994 Noranda/Falconbridge told PVS to increase the price to customers, and this "[i]ncrease would be realized thru the [revenue sharing] price mechanism in the contract. In other words, Noranda would realize half the increase." (A230). Two weeks later, PVS published a $10.00 per ton increase, telling customers that "[i]ncreased costs of production and distribution" were the reason for the increase (A233).

That same month, Noranda told another defendant that Noranda "wants to be more involved on market price setting in the future…." (A231). Immediately after, in May and June, 1994, the U.S. defendants simultaneously announced price increases to customers by uniform amounts of either $5 or $10 per ton. (A244).

In January, 1996, PVS reported to Noranda/Falconbridge on its "successful negotiations" with its various customers for 1996: "We were very successful in increasing pricing to the levels you had requested." (A251). By 1997, the U.S. defendants were selling the Noranda/Falconbridge acid in a range of $50 to $55/ton. (A302):

	Active States	**Market Price**
Boliden	Direct NC,MS,TN,SC,NC,VA	47
DuPont	Direct MO,VA,WV,NY,IN,RI,NH,MA,CT,OH,KY	50-55
General Alum [Delta]	Direct ME,NY,NH	55-60
PVS	Direct IN,OH,WV,MI,IL,PA,MN,NB	50
Marsulex	Direct IL,MI,WI,IN,MN,IA,NY	50-55
Koch	Direct WI,MN,IA,NC	50

C. DEFENDANTS WERE HORIZONTAL COMPETITORS

Noranda and Falconbridge argued that they were not horizontal competitors with the U.S. defendants because they "lacked the personnel and physical infrastructure necessary to sell hundreds of thousands of tons of acid directly to U.S. industrial customers…." (R. 419, p.2). They were obviously competing producers. They were also competing sellers, as their own admissions establish.

Noranda/Falconbridge:

- stated that "Noranda and DuPont currently compete in the sale of sulphuric acid." (A294);
- told Boliden that its acid should not be "'aggressively' marketed in competition with ourselves…." (A221);
- referred to DuPont as a "reseller and competitor" (A256) and stated that "we do not want to enter price war [with] DuPont = Lose; Lose" (A260);
- threatened a "price war" in the U.S. (A362), and stated that "a ruinous internecine battle for market share could occur" (A334);
- stated that they "compete directly with Marsulex in selling Noranda acid…." (A229);
- wrote as to DuPont that it sought to "avoid the chaos, risk and embarrassment of reverting to competing against one another." (A438);
- stated that: "[I]t makes sense for Falconbridge and Noranda acid to be sold jointly so as to avoid mutually damaging competition…" (A331).

These were not idle threats or boasts. The Noranda sales marketing video, made in the early to mid-1990's, explicitly stated that Noranda/Falconbridge had a "specialized acid marketing team" with "a solid grasp of the technologies and priorities of the industrial user of sulfuric acid and access to dedicated information and transportation networks for total customer service." (A200). It continued:

> And whether 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. Our trucking partners provide flexibility to serve any location. Rail options range from Noranda's single car fleet of 200 line railcars to the 40-car unit trains dedicated to large volume sulfuric acid customers. In total over 400 cars make up our fleet.
>
> Marine transportation includes the Norcab, Noranda's 7,000-ton custom designed acid carrier, serving acid customers on the eastern seaboard all year round. So with the complete range of transportation modes operating from high capacity loading facilities, port facilities on the St. Lawrence Seaway, and a year around port at [Gaspe,] on-time deliveries at competitive rates to all markets in Eastern Canada and the Eastern United States are assured.

(A202-03). Defendants' economist stated that Noranda/Falconbridge supplied 52% of the acid directly to U.S. customers from its smelters. (A487-88). *Accord* (A237).

D. DEFENDANTS' LARGE MARKET SHARE

Plaintiffs' economist supervised a study of defendants' share of the industrial/merchant market, which showed that, by 1996, defendants collectively controlled 79% of the market: 83% in the northeastern U.S; 78% in the southeastern U.S.; and 77% in the Midwest. (A494-97).

Defendants' economist corroborated this, calculating that in 1995 and 1998 defendants had market shares of 75% and 74.3%, respectively. (A493).

E. DEFENDANTS' TERRITORIAL ALLOCATIONS

Simultaneous with the shut-down agreements, Noranda/Falconbridge and the U.S. defendants agreed to territorial allocations. In 1988, Noranda/Falconbridge stated:

> Extreme care will be taken to insure that Noranda [Sales] acid is not resold by more than one supplier in the same market area….

(A157). The purpose was to prevent "overlap" which "[l]eads to erosion in prices." (A315). Defendants divided the industrial/merchant market into territories in which the U.S. defendants could sell Noranda/Falconbridge smelter acid. (A245-48,302,316). The chart on page 14 above reflects these territorial allocations.

A 1992 memo states that Noranda, Falconbridge and Boliden jointly assigned certain territories:

> [A]cid sales have to be pushed into the southern USA and ultimately the Florida fertilizer market. A decision was made by Noranda/Boliden whereby Marsulex would concentrate on the Canadian/North Eastern USA and Boliden would handle the Southern USA.

(A224-25). An April 8, 1996 memo confirmed the exclusivity of zones: "…only Marsulex can sell Falconbridge acid in this zone…." (A253).

In 1994, Noranda admitted that the purpose was to stabilize prices in the industrial/merchant market:

> Noranda wants Agency Agreements so that they can assign the market by segments, areas, or by customers to their agents. Their hope is by doing this, they will eliminate their distributors from beating up Noranda for price reductions while competing with the same acid (Noranda's).

(A231). Defendants sold in a price range of $50-55/ton. (A302).

F. THE JOINT VENTURE

In April 1998, Noranda/Falconbridge and DuPont formed a purported joint venture, a limited liability company that began to operate in January 1999, and from which DuPont withdrew in 2001. The joint venture bought the entire output of sulfuric acid produced by Noranda, Falconbridge and DuPont (A324), which by then was 3 million tons (A381), and was the exclusive marketing entity for that acid. It sold that acid in the merchant/industrial market at a price established by the three partners collectively.

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

These three companies had combined total assets of nearly $50 billion at the time of formation of the joint venture. (A318-20). Yet they contributed a combined total of $10,000 to the joint venture. (A491-92 ¶27). A memorandum prepared by defendants' expert stated: "No physical assets were contributed by either party to the JV." (*Id.*).

A DuPont financial employee wrote: "essentially, nothing was contributed to the LLC, but rather, the LLC was formed to simply market acid produced by DuPont and Noranda." (A425). Noranda officer Kim Ross candidly recognized that "a mere marketing alliance is probably not acceptable [with respect to] anti-trust…." (A300). Yet the partners explicitly termed this: "A Mutually Beneficial Strategic Alliance." (A279). It was designed to "[expand] market share for little/no capital cost…." (A369). Its "key objective" was "to secure market share from competitors…." (A395).

The chief financial officer of the joint venture testified that the joint venture had no assets on its books:

> Q. Well, the joint venture actually owned no property, not even a single car; is that right?
>
> A. From a financial perspective, there were no capitalizable assets on the books of the [joint venture].[4]

(A463).

The joint venture had no employees. (A440) ("There are no direct employees."). Its headquarters were rented rooms in Chadds Ford, Pa., close to DuPont. (A436,440). Its "staff" consisted of 6-8 employees on loan from the partners (A392), who received "daily direction" from each parent. (A393). It sought to assign railcar and tankcar leases from Falconbridge after the joint venture had been formed "so [the joint venture] is perceived as a real as opposed to a shell company." (A343). It did not have its own sales force. (A437). Yet it claimed: "This venture is the largest single marketing entity of sulfuric acid in the world," responsible for the marketing and distribution of over 3 million tons per year of sulfuric acid. (A436).

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

Participants in joint ventures of a certain size are required to submit to pre-clearance by the U.S. Department of Justice and the Federal Trade Commission under the 1976 Hart-Scott-Rodino Act, just as proposed mergers do. *See* 16 C.F.R.

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[4] Defendants argued that by the end of 2000 "the joint venture had total assets of $14.7 million." However, virtually all of this was for accounts receivable, with a cash deficit of $5 million, and no plant, equipment or other fixed assets. (A492 ¶28).

§801.40 ("Formation of a joint venture or other corporation."). They must file reports and wait a specified period of time before consummating the transaction to permit meaningful antitrust scrutiny. Defendants conceded they filed no such pre-clearance. In 1998-1999, the years this joint venture was formed and began operation, Hart-Scott-Rodino preclearance was required if either of the following alternatives (1) or (2) were satisfied:

1. Either Noranda, Falconbridge or DuPont had annual net sales or total assets of $100 million;
   Another of them had annual net sales or total assets of $10 million; and
   The joint venture itself had total assets of $10 million; or

2. Either Noranda, Falconbridge or DuPont had net sales or total assets of $10 million;
   Another of them also has net sales or total assets of $10 million; and
   The joint venture itself had total assets of $100 million.

16 C.F.R. §801.40 (1998-1999).

At the time, DuPont had assets of $40 billion. (A280,320). Noranda had assets of $11 billion. (A319). Falconbridge had assets of $4.8 billion. (A318). DuPont wrote that: "[o]n a volume basis, the [joint venture] is easily the largest business in the portfolio of either DuPont or Noranda." (A436). Its purpose was to market 3 million tons (A381) which were then selling in a range of $50-55/ton (A302), a total of $150-165 million annually. The "largest single marketing entity of sulfuric acid in the world" (A436) avoided preclearance scrutiny and 16 C.F.R. §801.40 by putting only $10,000 into the joint venture itself.

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

The joint venture originated from explicit discussions among Noranda, Falconbridge and DuPont about combining forces to curtail output and prevent price competition. In a conference call in October 1996, Noranda told DuPont it wanted to "work [with] DuPont as an acid resale partner," and that if DuPont increased its production, the "consequences could be very detrimental to both [Noranda] and DuPont.... We do not want to enter price war [with] DuPont = Lose; Lose." (A260). A month later, DuPont admitted that "Noranda has been steadily inquiring about ways to encourage us NOT to burn sulfur at our plants." (A262).

In April 1997, DuPont offered to cease production permanently of 100,000 tons/year at DuPont's Burnside, La. plant. ("DuPont has offered to substitute smelter acid for Burnside S burned acid for up to the entire Monsanto requirement of 100,000 stpa [standard tons per annum].") (A275). DuPont also offered to cut back production by 15,000 tons/year at its Virginia plant. (*Id.*). That same month, DuPont wrote internally: "We have to do anything we can to get others to stop burning sulfur, and we have to burn as little as possible." (A270). When Noranda/Falconbridge sought to "convince Allied to cease S [sulphur] burning" (A277), they stated that "DuPont has set precedent for this as they convinced Allied to shut down S burner in Geismar, La." (*Id.*).

While the joint venture was the "carrot," Noranda/Falconbridge also used the "stick" of threatened competition. In April 1998 – the month the memorandum of understanding was signed and papers were filed in Delaware to create the joint venture – Noranda stated to DuPont in a joint briefing:

> If Noranda and DuPont are unable to conclude agreement on joint venture then Noranda will withdraw & will set up its own US company to sell directly to customers.

(A328). May 1998 documents stated that without the joint venture a "ruinous internecine battle for market share could occur." (A334). An August 1998 presentation said the alternative to a joint venture was a "price war" (A362). In September 2000, after the joint venture had been operating for 18 months, its vice president (Noranda's Kim Ross) wrote that the joint venture was needed to "avoid the chaos, risk and embarrassment of reverting to competing against one another." (A438).

(4) The Joint Venture Continued and Rewarded the Shut-Down Strategy

In the preceding decade, Noranda/Falconbridge had agreed with DuPont, PVS, Delta, Koch, Boliden, and Marsulex to cease or cut-back production and to sell Noranda/Falconbridge acid through "revenue sharing" formulas in agreed-upon territories. (pp. 5-17 above).

By 1997, Noranda and Falconbridge were dissatisfied with this arrangement. They projected their future profit margins to be declining in an industrial/merchant market that was "stagnant to shrinking." (A313-14). They believed that the "revenue sharing" formulas were providing too much money to the U.S. companies and too little to Noranda/Falconbridge (A390), and that having six companies selling acid created too much "competition" and "erosion in prices." (A297,315-16).

They thought they could stabilize and increase prices in the industrial/merchant market, and extract more profit for themselves, by decreasing the role of five of these companies, and increasing a "partnership" role with a sixth. But which one? They evaluated each in turn (A310-11,372-75), and chose DuPont as the partner.

One purpose was to capture for Noranda/Falconbridge a larger share of the profits that were going to all six. They retained Deloitte to analyze the prices and profit margins of the U.S. producers that sold Noranda/Falconbridge acid. (A302,304,306). The three partners agreed to split this $13 million/year re-captured "reseller margin" on a 60/40 basis, with 60% going to Noranda and Falconbridge. (A306).

> It is agreed that the current distributors' cut is about $13 MM/yr, and Noranda agrees to give DuPont 40% of that margin as a fixed obligation.

(A379). The contracts with the last of the six expired on December 31, 1998, (A289,317,360) and the joint venture began operation the next day. (A343).

The other five companies were not eliminated entirely. The joint venture, which now had nearly 3 million tons of acid to market (2.3 million from Noranda/Falconbridge, 600,000 from DuPont) (A381) sought an "alliance partnership" with remaining defendants, offering to allow them to distribute acid **if** they agreed to additional shutdowns or cutbacks of their own production.

In July 1998, three months after it was formed, the joint venture proposed: "Make PVS Chicago an offer to supply them with all their acid needs at an attractive 5 year price and allow them to shut their plant at Chicago down." (A353). A month later, the joint venture calculated "the carrot to PVS for shutting down most of their plant…." (A354). PVS responded, telling the joint venture that the "Core Values" of PVS' relationship were:

- PVS Chemicals shutdown two Sulfuric Acid production facilities in favor of Noranda production
  - Copley, Ohio
  - Bay City, Michigan
- PVS shutdown a production unit in Chicago in favor of Noranda production.

(A350). The joint venture rewarded PVS with a contract to supply 200,000 tons/year. (A406).

Marsulex told the joint venture in June 1998, that one of the "services" it provided was "supply demand balancing via operating rates at 'on purpose' plants" (A339).

In July 1998, the joint venture proposed:

> 22. Offer shutdown economics to Koch Southeast plant in return for alliance partnering.

(A352 ¶22). In April 1997, Koch had offered to cease operations at three plants in the Midwest and North Carolina to benefit Noranda/Falconbridge. (A276). Now, the joint venture was following through with this offer. Koch offered to market 400-700,000 tons/year of joint venture acid in exchange for a revenue sharing arrangement with the joint venture, stating that its own "capacity" in the Southeast and upper Midwest would be used only as a "back-up to smelter acid if needed," *i.e.* that it would be mothballed. (A337,340-41). The joint venture agreed to supply all of the acid Koch previously made at its Wilmington, North Carolina plant. (A357,408). On March 7, 1999, Koch met with the joint venture, and agreed that Koch's Minnesota plant "could be decreased to ~220 tpd" and that Koch's DeSoto, Kansas plant "could be decreased to ~200 tpd…." (A422). In the spring of 1999, DuPont reported that Koch's DeSoto plant "will shutdown later this spring…." (A417).

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

Because the companies put no assets into the joint venture, each of the participants owned all of their respective sulfuric acid plants. "Manufacturing stays with partners." (A393). Noranda and Falconbridge – horizontal competitors with DuPont – directed DuPont to curtail its production. In January and February 1999, the first months of the joint venture's operation, DuPont's four sulfuric acid plants were directed by Noranda's officers to "burn as little sulfur as possible." (A415). DuPont complied. (A424). *Accord* (A411,415,417,419-20,424). Noranda/Falconbridge officers directed this reduction, writing: "[A] key point I have emphasized is the need for DuPont to curtail sulphur burning for a while to make room for our bulge of acid…." (A412).

As of April 1997, DuPont produced 1.5 million tons of sulfuric acid yearly. (A281). That month, it offered to cut back substantially at two plants to benefit Noranda/Falconbridge. (A275). By October 1998, a joint venture "update" stated that DuPont was producing 580,000 tons for 1998.(A381).

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

Consistent with (5) above, "a major goal of the LLC was to make sure we never shut a smelter down." (A450):

> Any benefits to Noranda or Falconbridge from forming NDLLC will be eliminated by any acid-induced shutdowns.

(A411). The cost of a smelter shutdown was calculated as $1 million per day. (A432). The joint venture agreed to "[h]ave a documented plan to manage smelter inventories," (A410), and stated that the joint venture "needs to receive value for managing inventories."(A434). These "inventories" were not part of the joint venture's assets, but belonged to the parents, horizontal competitors.

(7) DuPont Insulated Noranda/Falconbridge from Dumping Charges

Noranda and Falconbridge also chose DuPont as a partner to insulate themselves from dumping charges. In the early to mid-1990's, DuPont publicized its willingness to bring legal action over possible "dumping" of smelter acid in the U.S. market. (A471-73). In May 1997, Noranda stated:

> **Noranda remains vulnerable to anti-dumping action in the USA** as long as it is not allied to sufficient production capacity there to preclude potential complainants demonstrating enough market share to launch an action.

(A289)(bold in original). The next month, Noranda wrote that a joint venture "[r]educed risk of dumping allegations in future." (A298). In November, 1997 Noranda stated that one criterion for selecting a joint venture partner was: "Trade/AntiDumping Protection." (A310). DuPont scored highly. (A375).

(8) The Joint Venture Sought to Stabilize Prices

A joint venture "Business Intent" was:

> On Day ONE both partners will be better off than they were before the JV. This will be reflected in the price of ACID.

(A388). In August 1999, eight months after the joint venture began operation, it announced a $5/ton price increase. (A427). A senior DuPont executive stated that the price increase could "get us in trouble with the antitrust department" and "raise restraint of trade concerns." (A446). This was "more than a 10% increase for many customers. …when sulfur [was] going down by $4/lt.…" (A429). The joint venture was also structured to protect the partners against market price declines. (A307).

(9) No Efficiencies Were Proved

Defendants sought to justify the "pro-competitive efficiencies" of the joint venture. They claimed that the joint venture offered "new products." (R. 435, p.6). To the contrary, it sold the exact same sulfuric acid these companies had made for decades. Defendants claimed that the joint venture created "numerous efficiencies" such as "the contributions of the participants made it possible for the Joint Venture to leverage key services such as accounting, invoicing, sales and transportation services." (*Id.* p. 5). That opaque sentence meant that the joint venture, which had its headquarters in cubicles it rented near DuPont, contracted with DuPont or others for its services, because it had no assets or employees for tasks such as accounting, extending credit, taxes, or a sales force. (A323,326-37,392,437,457). The argument also contradicts the record. "Noranda have indicated little likelihood of a cost savings in the first year, so we assumed nil in 1999." (A344).

Defendants also claimed there were "transportation efficiencies" that the joint venture created, but there was no evidence of this. The same sulfuric acid was sent from the same plants over railroad lines, interstate highways, and waterways as before the joint venture. The existing resources of DuPont and Noranda were used. The joint venture "will use DuPont LCD programmes to plan routes, sources, terminals" and use both Noranda and DuPont "transportation groups for leverage on vessel, rail, truck rates." (A327).

Defendants also touted that, to avoid the joint venture from being perceived as a "shell," Falconbridge had quickly assigned certain rail leases to the joint venture. (A343). However, many of the leases extended until 2004, 2006 or even 2008. (A396,402). As assignees, the joint venture merely stepped into Falconbridge's shoes, and had no right to renegotiate them.

SUMMARY OF ARGUMENT

An agreement by horizontal competitors to restrict output is a classic *per se* antitrust violation. *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940). Chief Judge Holderman committed legal error by holding that these output restrictions must be tried under the rule of reason standard. (Section B, pp. 31-42 below).

The "joint venture" was in reality a horizontal cartel among the three largest producers that continued the Noranda/Falconbridge "displacement by agreement" strategy. It committed explicit *per se* violations, by inducing PVS, Koch, and DuPont to eliminate or curtail output. Again, Chief Judge Holderman committed legal error by holding the joint venture must be assessed under the rule of reason. (Section C, pp. 43-52 below).

Judge Coar made one error in an otherwise thorough and correct analysis, by holding that the territorial allocation agreements were subject to the rule of reason. (A39-40). These were horizontal allocation restraints subject to the *per se* rule under *General Leaseways, Inc. v. National Truck Leasing Association,* 744 F.2d 588, 595 (7th Cir. 1984). Moreover, his ruling contravenes the controlling decision in *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *aff'd,* 465 U.S. 752 (1984), which holds that even purely "vertical" restraints are subject to the *per se* rule when they are part of a larger *per se* scheme. (Section D, pp. 52-56 below).

ARGUMENT

STATEMENT OF APPLICABLE STANDARD OF REVIEW

Whether the *per se* standard of antitrust liability applies is a legal issue as to which this Court exercises *de novo* review. *In re Cardizem CD Antitrust Litigation*, 332 F.3d 896, 905-06 (6th Cir. 2003). Further, this Court reviews all grants of summary judgment *de novo, Eaton v. Indiana Dept. of Corrections,* 657 F.3d 551, 552 (7th Cir. 2011), and Chief Judge Holderman in effect overturned Judge Coar's ruling and granted defendants' summary judgment motions *nunc pro tunc.*[5]

THE DISTRICT COURT ERRED BY REJECTING THE *PER SE* STANDARD

It is a fundamental principle of antitrust jurisprudence that defendants' conduct should be judged as a whole, and not dismembered into separate parts:

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[5] "[I]n general, the successor judge is discouraged from reconsidering the decisions of the transferor judge." *Gilbert v. Illinois State Board of Education,* 591 F.3d 896, 902-903 (7th Cir. 2010). However, since the issue on appeal is "exclusively one of law," *de novo* review requires that "we must decide only whether the ultimate result reached in the district court was the right one." *Id.*

> [T]he Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 698-99 (1962). *Accord In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651, 655 (7th Cir. 2002).

That principle must be kept steadfast in mind. Nevertheless, because defendants' numerous summary judgment briefs sought to "dismember" the conduct by attacking discrete facets, and Judge Coar's summary judgment opinion addressed these arguments *seriatim,* it is analytically easier to discuss certain phases of the overall conspiracy.

A. THE *PER SE* STANDARD OF ANTITRUST LIABILITY

"We are told, therefore, to apply the per se rule when 'the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.' " *General Leaseways*, 744 F.2d at 595 (applying *per se* rule). Three classic *per se* antitrust restraints are: (1) price fixing among horizontal competitors, *Denny's Marina, Inc. v. Renfro Productions, Inc.,* 8 F.3d 1217,1220-21 (7th Cir. 1993); (2) output restrictions among horizontal competitors, *U.S. v. Socony-Vacuum Oil Co*., *supra,* and (3) territorial agreements among horizontal competitors, *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46, 49-50 (1990) and *General*

Leaseways, supra. These restrictions are inherently inimical to the free-enterprise system and to consumer welfare.

As the Supreme Court held, the *per se* standard gives certainty to business decisions:

> Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.

United States v. Topco Associates, 405 U.S. 596, 609 n.10 (1972). *Accord Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 354 (1982) (*per se* rule grounded on "economic prediction, judicial convenience, business certainty"); *Broadcast Music, Inc. v. CBS, Inc.* 441 U.S. 1, 9 (1979) ("This *per se* rule is a valid and useful tool of antitrust policy and enforcement.")

B. THE OUTPUT RESTRICTIONS ARE *PER SE* VIOLATIONS

Noranda/Falconbridge entered into a series of agreements with U.S. defendants to have the latter shut down or curtail production of sulfuric acid plants (pp. 5-13 above). Noranda's own antitrust compliance manual states these are *per se* violations of the U.S. antitrust laws:

> "UNITED STATES: Price-fixing, output limitation and market allocation agreements are illegal, regardless of their impact on competition…."

(A258).

(1) The Legal Standard As to Output Restrictions

The seminal decision, *Socony*, *supra,* involved major oil companies' buying gasoline on the spot market during the Depression to prevent price erosion. The oil industry was in distress because of an oversupply of oil. The smaller independent refiners were in a production bind. They had limited storage space, and long-term supply contracts with oil wells, which wells could not cease operations for geological reasons. 310 U.S. at 170-71. Thus, the independent refiners had to refine the oil into gasoline and sell it on the spot market at distressed prices. By 1933, oil and gasoline were at times selling below the cost of production. *Id.* at 171.

The large, vertically integrated oil companies, such as Standard Oil of New York ("Socony"), Gulf and Shell, arranged to buy the surplus gasoline from the independent refiners. They formed a loose association (the "Tank Car Stabilization Committee") and created a "dancing partners" program, whereby one major company was paired with an independent refiner to buy up its monthly tank car surplus of distressed gasoline. *Id.* at 181-82.[6] The amount of gasoline the majors purchased from the small independents was relatively small: less than 20% of what the independents produced. *Id.* at 189, 196-98. There was no price set for purchasing this gasoline; the majors were not required to participate; nor to buy any set amount; nor to buy at any fixed price; and the prices they paid varied widely. *Id.*

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[6] The "dancing partners" drew its name from a speech by an industry executive, comparing the oil industry to an "economic ball" where the major oil companies were the "strong dancers" who asked the "wallflowers" (the small independent refiners) to dance. "I think it is going to be one of the jobs of this Committee to introduce some of these wallflowers to some of the strong dancers, so that everybody can dance." 310 U.S. at 179 n.20.

The trial court submitted this criminal case to the jury based upon *per se* instructions. The jury returned convictions, against both the "majors" and the small independent refiners. This Court reversed, holding the instructions erroneous because the rule of reason standard, and not the *per se* standard, governed. *United States v. Socony-Vacuum Oil Co.,* 105 F.2d 809, 826-27, 832 (7th Cir. 1939). The Supreme Court granted *certiorari,* and reversed. The Court held this was a *per se* violation. In words that describe the case at bar, the Court held: "For it is indisputable that *competition was restricted through the removal by respondents of a part of supply which but for the buying programs would have been a factor in determining the going prices on those markets.*" 310 U.S. at 220 (emphasis supplied). The Supreme Court explained why this output restriction was a *per se* violation, and therefore why defendants' purported "justifications" (the distressed condition of the oil industry, the lack of overall market power, the reasonableness of the prices paid) were legally off point:

> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such

> schemes than it has the good intentions of the members of the combination.

Id. at 221-22.

Socony puts to rest four major contentions that defendants made in the district court. First, it makes explicit that an "output restriction" is simply a form of price fixing. Second, defendants here claimed the relationship was "vertical" (and thus not *per se*) because the U.S. defendants bought sulfuric acid from Noranda/Falconbridge. In *Socony,* the majors bought gasoline from the independents: that was the whole purpose of the dancing partners program. Both the buyers and sellers were criminally liable.

Third, to the extent Noranda/Falconbridge argued they were in a production bind – they had to dispose of their smelter acid in order to keep the smelters running, and this somehow justified the agreements they made with the U.S. defendants – *Socony* squarely holds this is irrelevant and unavailing as a defense. That was the same argument advanced by the independent refiners.

Fourth, Noranda/Falconbridge contended their actions were encouraged or sanctioned by the Canadian government. While discovery showed this to be inaccurate,[7] in any event in *Socony* there is no question but that the New Deal administration had initially set up the "dancing partners" program. 150 U.S. at 175-80, 200-07. The Court held that the only legal issue was whether the government

[7] Noranda/Falconbridge relied upon an affidavit by a Canadian government employee concerning an event in 1985. However, he then testified that the Canadian government had nothing to do with any marketing strategy in the U.S. by Noranda or Falconbridge. (A499-507).

had "granted immunity" to defendants. *Id.* at 225-27. Here, no government granted any immunity to defendants.

This Court's decision in *General Leaseways,* explains why out-put restrictions are *per se* violations. Relatively small truck-leasing companies formed a national franchise association to compete with Hertz and Avis. Each agreed to service each other's trucks, creating a nationwide repair organization. 744 F.2d at 589. However, the franchise association imposed two restrictions on its members: (1) each franchisee could do business only at one designated location; and (2) the locations were spaced 10 to 20 miles apart by the association. *Id.* at 590. These restrictions damped the ability of members to compete with each other.

Judge Posner explained for this Court why horizontal territorial restrictions, output restrictions, and price fixing are identical economically, and why all are judged under the *per se* standard:

> *An agreement on output also equates to a price-fixing agreement*. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too – in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects.

Id. at 594-95 (emphasis supplied).

General Leaseways addresses, and disposes of, several arguments made by the defendants. *General Leaseways* explained that companies can be in a buyer/seller relationship without transforming a horizontal relationship into a vertical one:

> But firms often have both a competitive and a supply relationship with one another. A manufacturer of aluminum might both sell aluminum to fabricators and do its own fabrication in competition with its customers…. It does not follow that because two firms sometimes have a cooperative relationship there are no competitive gains from forbidding them to cooperate in ways that yield no economies but simply limit competition.

Id. at 594.

Present defendants attempted to invoke the "ancillary restraints" doctrine to avoid liability, arguing that their scheme to restrict the output of sulfuric acid was supposedly "ancillary" to some larger, legitimate purpose (which purpose they never clearly articulated). In *General Leaseways,* there was no question that the overall purpose of the association was pro-competitive and lawful: to enable smaller trucking companies to provide a nation-wide system of reciprocal repair service, to compete with Hertz and Avis. *Id.* at 590. However, the "restraints" that were imposed were not "ancillary" to that lawful purpose. There must be an "organic connection" between the overall lawful purpose and the "ancillary restraint", which was missing in *General Leaseways* (just as it is non-existent in the case at bar):

> But in this case the organic connection between the restraint and the cooperative needs of the enterprise that would allow us to call the restraint a merely ancillary one is missing. Although some degree of cooperation among members of the National Truck Leasing Association in providing reciprocal services may well promote competition in the truck-leasing industry, no reason has been suggested why that cooperation requires that members be forbidden to compete with each other in leasing trucks.

Id. at 595.

Defendants here also relied heavily upon *Broadcast Music,* to argue the present case should be judged under the "rule of reason." *Broadcast Music* involved the "blanket licenses" by which associations of composers sold musical performance rights to radio stations. Defendants claimed this decision meant that "an agreement among horizontal competitors to fix prices – previously a paradigmatic *per se* violation – was properly analyzed under the Rule of Reason" (R. 419, p.6). But the defendant in *General Leaseways* made this same argument. "National Truck Leasing Association argues in effect that after *Broadcast Music* no reasonable cartel agreement can be a per se violation of section 1." 744 F.2d at 593. This Court rejected this argument:

> Access to a repertoire of thousands of songs is not something the individual composer can give, so what the performing-rights associations are engaged in is not (or not just) the suppression of price competition among composers. It is the provision of a distinctive product – access to a vast musical repertoire….
>
> There is nothing distinctive about the product involved in this case.

744 F.2d at 593-94.[8] Similarly there is nothing distinctive about sulfuric acid, a commodity chemical.

As this Court summarized, in rejecting these purported defenses:

> *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***….** In other words, if the elimination of competition is apparent on a

[8] In fact, the Court in *Broadcast Music* identified *Socony* as a "simple" application of the *per se* standard. 441 U.S. at 9 n.14.

> quick look, without undertaking the kind of searching inquiry that would make the case a Rule of Reason case in fact if not in name, the practice is illegal per se.
>
> Taking a quick look here… the division of markets among [defendant association members] is a per se violation of Section 1 of the Sherman Act. It is a horizontal market division that does not appear to be ancillary to the reciprocal provision of service or any other lawful activity.

Id. at 595 (emphasis supplied).

This Court returned to output restrictions in *United States v. Andreas,* 216 F.3d 645 (7th Cir. 2000). Three Asian companies controlled the world's production of lysine, a commodity product. Archer Daniels Midland constructed a large lysine plant to compete, and drove prices down. All of the competitors then met, and agreed to a maximum amount each would produce and sell yearly. *Id.* at 667. Defendants were criminally convicted for violating Sherman Act §1 for two separate counts: fixing prices and restricting output (termed "allocating sales volumes"). Defendants argued that the jury charge on allocating and restricting sales volumes was erroneous because it was not a *per se* violation. *Id.* at 666.

Judge Kanne, writing for this Court, disagreed:

> At bottom, the lysine cartel's agreement was a conspiracy to limit the producers' output and thereby raise prices. Functionally, an agreement to restrict output works in most cases to raises prices above a competitive level, *see General Leaseways*, and for this reason, *output restrictions have long been treated as per se violations.*

Id. (emphasis supplied).[9]

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[9] *Accord, Westinghouse Electric Corp. v. Gulf Oil Corp.,* 588 F.2d 221, 226 (7th Cir. 1978): "[A]n agreement to restrict the production of uranium unquestionably is a

(Footnote cont'd)

Here, Noranda/Falconbridge admitted they sought to "shutdown sulphur burning acid plants" through a strategy of "displacement by agreement" so as "not to force an oversupply into a balanced market with predictable price disruption…." (A169). It is difficult to imagine a more graphic admission of a *per se* restraint.

(2) Judge Coar's Decision

Judge Coar characterized these output restrictions:

> Plaintiffs' evidence is consistent with allegations that, in anticipation of a looming tide of Canadian smelter acid and attendant price erosion, Defendants clandestinely conspired to preserve a market in which supply met demand by scaling back production or shutting down facilities. Such collusion would undeniably constitute a *per se* violation of §1 of the Sherman Act.

(A22). He further held:

> Defendants' attempts to characterize the alleged conspiracy as 'economically implausible' fails. Plaintiffs allege and produce evidence to support the existence of a garden-variety output limitation scheme…. The actual and probable anticompetitive effects of such conspiracies are well established…. It is undisputed that Noranda and Falconbridge, under their 'displacement by agreement' strategy, approached and interacted with co-Defendants, and that co-Defendants thereafter reduced production.

(A25.)

Judge Coar's extended discussion of the *per se* nature of defendants' output restriction scheme is found at A30-39. He examined each of defendants' purported arguments, and found in each case plaintiffs had presented substantial evidence of

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price fixing arrangement…. In fact all serious attempts to establish a supracompetitive price must necessarily include an agreement to restrict output."

per se violations. The first was whether defendants were "horizontal" competitors or were merely in a "vertical" distribution relationship. (A31). The court pointed to the significant record evidence from which a jury could find it was horizontal. (A31-32). The court concluded:

> While the resulting conspiracy… incorporates vertical elements as a vehicle for restraining trade, it substantively amounts to the concerted action of actual or potential competitors eliminating some avenue of rivalry among them.

(A32). This was clearly correct under *Socony-Vacuum* and *General Leaseways, supra.* He stated:

> Conspiring to reduce industry output as a means of stabilizing or raising prices is proto-typical of conduct that has time and again been condemned by courts as *per se* illegal (citing *Socony-Vacuum* and *Westinghouse, supra*)

(A33).

Judge Coar next addressed defendants' argument that the U.S. defendants shut down only their less profitable plants. (A33). He held there was neither logic nor legal support for the proposition that an output restriction scheme had to eliminate only the most profitable facilities. (A33). He further held that defendants' argument was counter-intuitive:

> Voluntary producers could have colluded to reduce output and stabilize acid prices precisely to salvage profit–indeed stay in business–in a dire economic climate. (A33).

He then correctly held that under *Socony-Vacuum,* "ruinous competition" is no defense. (A34).

Judge Coar next addressed Noranda/Falconbridge's argument that they needed to keep smelting metals, and "therefore" had no alternative but to do what they did. (A34). He held this was no defense to collusion. He pointed to the substantial record evidence that these defendants had legitimate alternatives, including selling in competition with the U.S. defendants in the industrial/merchant market, and/or selling in the Florida fertilizer market. (A34).

Judge Coar next addressed the Noranda/Falconbridge argument that they risked "dumping" charges if they sold directly to industrial/merchant companies in competition with the U.S. defendants. (A35). He held this argument to be without legal support as a defense to antitrust liability. "Defendants offer no authority for the position that a company is immune from antitrust actions simply because it engaged in anticompetitive behavior as a means of diminishing the probability of other types of lawsuits." (A35).

The court next addressed defendants' argument that this was an "ancillary restraint" to some larger, pro-competitive activity. (A35-37). Judge Coar correctly explained that "a restraint is only ancillary if it is necessary to achieve otherwise unattainable precompetitive benefits," which did not exist here. (A36). The court stated:

> [A] factfinder resolving all disputes in Plaintiffs' favor could conclude that the alleged shutdown agreements did not support some higher goal, but rather served the naked and objectively intended purpose of reducing output to buoy declining market prices. Under those circumstances, Defendants' agreements could not be considered ancillary to a lawful, productivity-enhancing cooperative venture.

(A36-37).

Finally, Judge Coar rejected defendants' argument that the sulfuric acid industry was "unique." (A37-38). He held that the sulfuric acid industry "is not so markedly different from other industries in which the *per se* rule has been applied that the Court is prevented from applying the rule here." (A37). The court correctly distinguished decisions defendants relied upon, such as *National College Athletic Association v. Board of Regents,* 468 U.S. 85 (1984), where, because of the nature of college athletics, the horizontal restraints were "essential if the product is to be made available at all." (A37, quoting 468 U.S. at 101). In contrast, Judge Coar stated that:

> In the sulfuric acid industry, the commodity can be produced at a much cheaper price by some competitors than others and it must be offloaded through sale. These factors are common in many industries.
>
> ....
>
> …The restraint at issue is not distinguishable from the sort normally considered under the *per se* rule simply because it occurs in the context of the sulfuric acid industry. Defendants' argument to that effect is unavailing.

(A37-39).

(3) Chief Judge Holderman's Decision

Chief Judge Holderman held these output restrictions must be tried under the rule of reason standard of liability. His explanations are those that appear at A55,58,71-72,79-80. He addressed neither the facts of record nor the controlling legal precedents. He termed Judge Coar's careful and extensive analysis of the *per* *se* standard (found at A22,25,30-39) to be "dicta" and "remarks" that were "unfortunate." (A55,79). This ruling was legally erroneous.

C. THE JOINT VENTURE COMMITTED *PER SE* VIOLATIONS

Between 1999 and 2001 the three largest defendants combined together in what was in reality a horizontal cartel that carried out the previous decade's "displacement by agreement" strategy. In *U.S. v. Andreas,* this Court looked past the "clever characteristics" of the scheme to the reality of what had transpired. 216 F.3d at 666-68.

The salient facts of the present "joint venture" have been set forth at pages 18-27 above. The "joint venture": (1) was a mere "marketing alliance" among the three largest players; (2) with no employees and no assets; which (3) evaded Hart-Scott-Rodino scrutiny even though it was by volume "easily the largest business in the portfolio of either DuPont or Noranda" (A436) and "the largest single marketing entity of sulfuric acid in the world" (*id.*); which (4) originated in clear anti-competitive discussions; and which (5) continued the shutdown of competitors. Immediately after forming, it began to commit serious *per se* violations of the antitrust laws, convincing PVS and Koch to eliminate substantial production (pp. 23-25 above), courting Marsulex whose services were "supply demand balancing at 'on purpose' plants" (A339), and directing DuPont to stop manufacturing at all four of its plants (p. 25 above). These are naked output restraints. If a joint venture that commits *per se* violations is not subject to *per se* scrutiny, it would be a license to flout the antitrust law.

Between 1988 and 1997, Noranda/Falconbridge had colluded with six U.S. companies to have them cease their own production of sulfuric acid, and share revenues from this illegal scheme. By 1997, Noranda and Falconbridge were dissatisfied with this arrangement. They thought there was *too much competition* and "erosion of prices" in the sale of their acid. (A279,315-16). They also thought they could extract more profits by "partnering" with one of those colluders, by reducing the role of the other five, and by splitting the $13 million recaptured profits on a 60/40 basis. (A306,379). It was simply a reorganization of the structure of the on-going conspiracy.

In 1990, DuPont agreed with Noranda/Falconbridge to shut down its New Jersey plant, with Noranda/Falconbridge telling DuPont at that time that a "strategic alliance" would be "mutually beneficial." (A215, quoted on p. 9 above). That is *precisely* what these same parties termed the joint venture seven years later. (A279) ("A Mutually Beneficial Strategic Alliance"). One cannot isolate this "joint venture" from the collusion from which it was born and which it perpetuated.

(1) The Legal Standard For Joint Ventures

A legitimate joint venture has these characteristics:

> A joint venture may be defined for antitrust purposes as an integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under joint control of the parent firms… (2) each parent makes a substantial contribution to the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new technology, a new product, or entry into a new market.

Brodley, *Joint Ventures and Antitrust Policy,* 95 Harv.L.Rev. 1521, 1526 (1982). The Noranda/Falconbridge/DuPont "joint venture" did not satisfy (2), (3), and (4).

As Professor Brodley explains, "a joint venture can provide a singularly effective vehicle of cartelization." *Id.* at 1530. Further, the arrangement at issue in this case is an "output joint venture," where the joint venture is the exclusive marketing entity for the collective output of the parents, horizontal competitors. This poses especial antitrust risks:

> An output joint venture obligating parents to market exclusively through the joint venture raises substantial collusive risks, for it prevents competition between the parents in marketing their output. In addition, if the joint venture possesses scale economies or other strategic advantages, it may be able to exclude or disadvantage the parents' competitors by refusing to deal with them or by demanding unfavorable terms.

Id. at 1555. Here, the joint venture *did* use its formidable market power to have the parents', horizontal competitors, agree to curtail production. As the article explains:

> The risk of collusion is the most serious anticompetitive threat of output joint ventures, and this risk has been the focus of past decisions. Indeed, some output joint ventures are such clear cartel arrangements that they ought to be characterized not as joint ventures, but as naked horizontal agreements.

Id. This is one. *Accord,* Hovenkamp, *Federal Antitrust Policy*, at 217-18 (West 4th Ed. 2011) ("Firms enter into joint ventures for many reasons. If they are competitors or potential competitors, one reason that cannot be overlooked is price fixing or market wide output restrictions."); Sullivan & Grimes, *The Law of Antitrust,* at 662 (West 2000) ("A [joint] venture between parents both of which operate in the same horizontal market can also do serious structural harm when the parents, rather than fielding a new, jointly owned entrant into that market, limit their joint activity to cooperation.")

True joint ventures – those that combine and integrate resources to develop new products, expand output, or explore new markets – are judged under the rule of reason standard. *See Antitrust Guidelines for Collaborations Among Competitors* (April 2000), published jointly by the U.S. Department of Justice and Federal Trade Commission, http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf (hereafter "*Guidelines*"). However, a "joint venture" that does not do so is illegal *per se*. The *Guidelines* state that the degree of actual "integration" of resources to achieve a pro-competitive benefit is the key distinction:

> 3.2 Agreements Challenged as Per Se Illegal
>
> ....
>
> Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. *The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation….*
>
> ....
>
> [L]abeling an arrangement a "joint venture" will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative.

Id. at pp. 8-9 (emphasis supplied). Here, defendants combined no assets, and merely "coordinat[ed] decisions on price, output, customers territories and the like."

Moreover, this "output" joint venture committed immediate and very serious *per se* offenses by restricting industry-wide output, an *a fortiori* case for *per se* treatment under the *Guidelines*.[10]

The purported cost savings (pp. 27-28 above) are not "pro-competitive efficiencies" under the *Guidelines*, *supra.* First, there is no evidence there *were* any cost savings. Second, "cost savings without integration are not a basis for avoiding per se condemnation." (*Guidelines,* at 8).

As the Court held in *Timken Roller Bearing Co. v. United States* 341 U.S. 593, 595 (1951), there is no

> support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.' Perhaps every agreement and combination to restrain trade could be so labeled.

Joint "cooperation" which in reality masks a naked horizontal restraint has been condemned as a *per se* violation. *See, e.g., Palmer 498 U.S. 46,49-50 (1990)* (*per se* rule applied to bar review competitors which agreed to share revenue and allocate territories); *Citizen Publishing Company v. United States,* 394 U.S. 131, 134 (1969) (*per se* rule applied to two newspapers that pooled distribution and production operations into jointly-owned entity, through which they collectively set prices for subscription and advertising, and divided profits); *Virginia Excelsior Mills v. FTC,* 256 F.2d 538 (4th Cir. 1958) (organization of horizontal competitors that

[10] The *Guidelines* have examples attached. Example 5 is a collaboration that lacks true integration and which restricts output. It is condemned *per se*.

manufactured packaging materials and joined to set prices and control output condemned as *per se* violation).

In *Polk Bros. Inc. v. Forest City Enterprises, Inc.,* 776 F.2d 185 (7th Cir. 1985), this Court explained under what circumstances a genuinely pro-competitive joint enterprise should be judged under the rule of reason standard. One company (Polk Brothers) owned and operated a chain of stores that sold appliances and home furnishings. The other company (Forest) owned and operated a chain of stores that sold different products – building materials, lumber, tools, and related products. They decided to build and jointly own a large new building (130,000 square feet) which would house two new stores, one for each of them. They agreed that each new store would continue to sell the existing product line of each company, and not the other's. This agreement was judged under the rule of reason, not the *per se* rule, because it expanded consumer welfare, by offering two new stores that sold complementary product lines, at "one stop" shopping. "Polk Bros. and Forest City were cooperating to produce, not to curtail output; the cooperation increased the amount of retail space available and was at least potentially beneficial to consumers; the restrictive covenant made the cooperation possible." *Id.* at 190. In the case at bar, the defendants did not "increase output," but rather intentionally curtailed it.[11]

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[11] DuPont's sulfuric acid team knew how to form a legitimate joint venture. Discovery disclosed a "white paper" for a proposed joint venture to purchase land and to build a sulfuric acid plant in China. (A285-87). The projected costs were $110 million, of which DuPont's contribution would be 50%, or $55 million. This is a

(Footnote cont'd)

(2) Judge Coar's Opinion.

Judge Coar held there was sufficient record evidence from which a jury could find *per se* violations, denying summary judgment to defendants. (A40-46). He first identified the two analytically distinct situations in which *per se* liability could attach to a joint venture: (1) when, by its structure, it "amounts to a sham lacking any reasonable prospect of efficiency-enhancing benefit to society" (A40); or (2) when it had a legitimate "core" purpose, but also had "naked restraints" that were not necessary to that legitimate core, and hence were not genuinely "ancillary." (A41). He held there was sufficient record evidence to support both alternative theories of liability.

The court first distinguished *Texaco, Inc. v. Dagher,* 547 U.S. 1 (2006) (A41-42), a legitimate joint venture judged under the rule of reason. In that case, Texaco and Shell completely consolidated their operations in the western United States. Hence, the joint venture itself had very substantial assets: it "controlled extensive oil refining and marketing assets in the form of 'numerous refineries, lubricant plants, research laboratories, terminals thousands of service stations, miles of pipeline, and employees.'" (A42, quoting 547 U.S. at 7). Significantly, its structure had been approved by the FTC and by state regulators, who required certain divestments and other modifications before approval. In contrast, Judge Coar wrote:

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classic legitimate joint venture – to contribute real assets to a joint enterprise in order to increase output by bringing new products to new markets. It stands in the starkest possible contrast to the one at bar.

"The indicia of legitimacy and integration so compelling in *Dagher* are not to be found in the instant case." (A42).

> In contrast, the Noranda DuPont arrangement was not approved by federal or state regulators, and Plaintiffs in this case have questioned whether there is any legitimate purpose or independent structure to the joint venture.

Id. Moreover, as commentators have noted, in *Dagher* the restraints were imposed solely as to jointly-owned assets. Here, in contrast, the joint venture imposed output restraints upon the parents' competitors (PVS and Koch), and upon assets outside of the joint venture itself (DuPont's four manufacturing plants). (pp. 23-25 above). *See* Hovenkamp, *supra,* at 233 ("The important fact in *Dagher* is that it was the joint venture's *own output* whose price was being fixed. That situation is much different than one in which the venture restrains the separate business of the venture members.") In contrast, the "joint venture" at bar was structured to "manage" its parents' inventories. (A410,434).

Next, Judge Coar held that while "on paper" defendants purported to show that the joint venture "was intended to enhance overall efficiency," "the nature and intended purpose of Defendants' collaboration, and the degree to which the Noranda DuPont Joint Venture integrated the participants' operations, remain issues of disputed fact," precluding summary judgment to defendants under the *per se* standard. (A43). Judge Coar pointed to the record evidence that the joint venture originated in anti-competitive discussions in which Noranda had encouraged DuPont "NOT to burn sulfur at our plants," and in which Noranda had previously agreed with DuPont to close its New Jersey plant, and had threatened DuPont with a "ruinous battle for market share." (A44). The court held there was sufficient record evidence to support a verdict that "*the Joint Venture merely simplified Noranda's industry-wide price fixing scheme by reducing the number of conspirators required to achieve the desired result*." (*Id*.) (emphasis supplied).

The court also looked at the evidence that, through the joint venture, DuPont had been directed to idle its own plants, and found it "consistent with Plaintiffs' contention that the Joint Venture sought to maintain a balanced market by reducing output to accommodate Noranda's smelter acid." (A45).

The court then examined the extent to which there was genuine "integration," and found evidence of only a "superficial degree" of integration, that the parties did not desire true integration to achieve their aims, and that "Noranda, DuPont, and Falconbridge continued to function more or less as independent and competing firms entering into an exclusive resale contract as a means of limiting their collective output." (*Id*.). The Court held:

> When viewing the record in the light most favorable to Plaintiffs, a reasonable juror might conclude that, underneath the elaborate trappings of a joint venture, Noranda and DuPont maintained a relatively unintegrated sales relationship that enabled them to limit market output whenever supply threatened to overshadow demand. The joint activity described in the latter scenario has no prospects for procompetitive effects and would therefore remain vulnerable to *per se* condemnation.

(A45-46).

Judge Coar's opinion turned to the alternative theory of liability, that of "ancillary restraints," and found that "[d]efending the Joint Venture's actions as ancillary to a legitimate business purpose does not produce a different result." Since the partners retained all the plants, the joint venture could not control production as a "core" activity, and restricting output could not be considered a legitimate "ancillary" restraint. (A46).

Judge Coar concluded:

> Plaintiffs have submitted evidence that reasonably tends to prove that Noranda, Falconbridge, and DuPont consciously entered an output limitation conspiracy under the artful guise of a joint venture. Because a factfinder is required to decide the Joint Venture's legitimacy, summary judgment must be denied.

(*Id.*).

(3) Chief Judge Holderman's Opinion

Chief Judge Holderman overturned this ruling, holding that the rule of reason standard must be applied. (A55,58,71-72,79-80). He addressed neither the facts of record nor the applicable legal standard. This ruling was legally erroneous.

D. THE TERRITORIAL ALLOCATIONS ARE *PER SE* VIOLATIONS

Judge Coar, in an otherwise carefully-reasoned and correct decision, made one error, holding that the evidence of territorial allocation (termed "zone contracts" at A39-40) could only be judged under the rule of reason, and because plaintiffs and their experts had disclaimed this theory, granting summary judgment to defendants on this facet of the case. (A39-40). Chief Judge Holderman denied plaintiffs' motion to correct this error. (A55, denying R.751). The relevant facts have been summarized on pages 17-18 above.

Judge Coar reasoned that as to this aspect of the scheme, Noranda and the U.S. producers were a "vertical" and not a "horizontal" relationship, and granted summary judgment to defendants under *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), a case that involved solely "vertical" geographical restraints between a manufacturer and its distributors:

> While Noranda stands as a horizontal competitor with Defendants during illegal agreements to limit industry output, it stands in vertical relationships with them insofar as the sale of its own acid is concerned, whether from Noranda or Falconbridge sources.

(A39).

Granting summary judgment to defendants was erroneous for four reasons. First, it ignored the injunction of *Continental Ore* and *In re High Fructose,* page 30 *supra,* not to "dismember" a conspiracy and look at its parts in isolation. The territorial allocations were part and parcel of the contemporaneous output restrictions (indeed appearing on literally the same page, A157). Plaintiffs' complaint had one count (A109-28) for all actions combined. The territorial allocations were part of the overall evidence. Judge Coar correctly analyzed the "revenue sharing" provisions in this manner – as admissible "evidence pointing to collusive activity [and] for their capacity to act as mechanisms through which Defendants allegedly reaped the profits of their conspiracy." (A22, n.9). He erred by not extending this same analysis to the territorial allocations.

Second, these restrictions were in actuality "horizontal," not "vertical," contrary to the court's conclusion. They were agreements among horizontal competitors as to the territories in which sulfuric acid could be sold, sulfuric acid that was the replacement for acid that had previously come from each horizontal competitor's separate plant. It was an artificial distinction, and legally erroneous, to hold that when Noranda and Falconbridge agreed with the U.S. defendants to shut down plants, this was "horizontal," but when these same parties simultaneously allocated territories for sale of the substitute acid it became "vertical." As both *General Leaseways* and *Socony,* hold, the existence of "buy/sell" relationships among competitors does not transform the violation from horizontal to vertical nor from *per se* to rule of reason.

Further, the purpose of the territorial allocations was to prevent "erosion of prices." (A315) "Erosion of prices" means, in context, *in the industrial/merchant market***,** because that was the whole purpose of the "displacement by agreement" strategy. Noranda/Falconbridge stated they wanted to prevent the U.S. defendants "from beating up Noranda for price reductions while competing with the same acid (Noranda's)." (A231). That is *interbrand* price stabilization. Further, the court did not focus on record evidence that Noranda, Falconbridge and Boliden jointly agreed to allocate Marsulex' territory (A224-25). That is expressly "horizontal."

Third, Judge Coar cited only to defendants' statement of facts at A39-40, and ignored plaintiffs' facts, concluding for example that the "zoning policy was essentially a non-restrictive system…." (A40). This inverted the summary judgment standard, where "we must draw all reasonable inferences for the non-moving party, and view the record in a light most favorable to her…." *Eaton,* 657 F.3d at 552.

Plaintiffs produced significant evidence that the arrangement was "restrictive" (*e.g.* "*only* Marsulex can sell Falconbridge acid in this zone" A253).

Fourth, and most importantly, the ruling contravenes the controlling law of this Circuit, which holds that even assuming *arguendo* the conduct would, standing alone, be judged under the rule of reason, it becomes subject to the *per se* standard when coupled in the same scheme with other *per se* violations. *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), *aff'd,* 465 U.S. 752 (1984). *Monsanto* specifically rejected Judge Coar's reading of *GTE Sylvania*. Judge Coar's opinion did not consider *Monsanto*.

Monsanto involved a manufacturer and its distributor (Spray-Rite) who were in a "vertical" relationship. Monsanto had assigned each of its dealers a "primary" area of geographical responsibility, and a "secondary" area. 684 F.2d at 1233. Monsanto also established and modified certain shipment policies and compensation programs for its dealers. *Id.* Each of these activities, standing alone, would under *GTE Sylvania* be judged under the "rule of reason" as purely vertical restraints. However, the case also involved a *per se* element, namely a group boycott of Spray-Rite organized by its fellow dealers, horizontal competitors. *Id.* at 1236. This Court held that *all* of the conduct that was part of the alleged price-fixing scheme, including the territorial allocations, must be considered under the *per se* standard of liability.

This Court construed *Continental T.V. v. GTE Sylvania* in a manner exactly the opposite of Judge Coar's:

> In *Continental T.V.*, the Supreme Court held that the rule of reason, rather than the per se rule, applies in cases involving nonprice vertical location restrictions… Nothing in the Court's opinion, however, implies that it intended to limit *United States v. Sealy*, 388 U.S. 350 (1967), in which it held *that otherwise lawful vertical restrictions imposed as part of an unlawful scheme to fix prices are per se unlawful*….
>
> *United States v. Sealy* rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices… Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of an unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the per se rule…

684 F.2d at 1237 (emphasis supplied). The Supreme Court agreed that submitting this issue to the jury under a *per se* standard was correct. 465 U.S. at 759 n.6. The ruling at bar is squarely contrary to this controlling authority.

Each of the above errors — regarding shut-downs, the sham "joint venture," and territorial allocations — justifies remanding this case for trial on a *per se* basis. Together, they compel that result.

CONCLUSION

This Court should vacate the final judgment, and remand this case for trial under the *per se* standard. Appellants also request the Court to exercise its discretion under Circuit Rule 36 to direct the re-assignment of the case upon remand.

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

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 13,969 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.

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CIRCUIT RULE 30(d) STATEMENT

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

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CERTIFICATE OF SERVICE

I certify that on March 30, 2012 the Brief of Appellants, Required Short Appendix, and separately bound 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:

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