No. 14-20267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

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

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

This complex appeal involves multiple parties raising multiple issues of liability and damages. The district court held JSW jointly and severally liable for more than $160 million based on a conspiracy finding related to a conclusive presumption of illegal antitrust behavior. The record from the six-week jury trial is voluminous. Oral argument would aid the Court's decision making.

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JURISDICTIONAL STATEMENT

The district court had original jurisdiction because the complaint alleged a question of federal law under the Sherman Act, 15 U.S.C. § 1. ROA.68. JSW timely appeals from an amended final judgment entered on June 1, 2014. ROA.32589-90 (RE.24); ROA.7406-09 (RE.21); ROA.33158-61 (RE.23). Accordingly, this Court has appellate jurisdiction under 28 US.C. §1291.

ISSUES PRESENTED

1. Under antitrust law's stringent limitations on inferences of conspiracy, does JSW's termination of its vertical relationship with MM, and choosing instead to do business with other customers, allow an inference that JSW both knew of and agreed to join a horizontal conspiracy between American Alloy and Reliance/Chapel to drive MM out of business?

2. Alternatively, should a vertical member of a horizontal conspiracy be subject to *per se* liability—a conclusive presumption of illegality—or should its conduct be judged under the rule of reason?

3. Alternatively, as a start-up business, did MM prove—with a reliable methodology and sufficient evidence—that the conspiracy caused lost net future profits of $52 million projected over ten years?

4. By terminating its agreement with MM, did JSW breach an enforceable contract?

5. Alternatively, did MM prove—with a reliable methodology and sufficient evidence—that it suffered $2 million in future lost profits as a result of the alleged breach of contract?

STATEMENT OF THE CASE[1]

Plaintiff, MM Steel, was a steel distributor.[2] MM alleged that two competing steel distributors, now-settled defendants American Alloy and Chapel (a division of defendant Reliance), conspired to run it out of business by pressuring steel mills, such as defendants JSW Steel and Nucor, not to sell steel to MM.[3] MM alleged only *per se* liability under the antitrust laws, based on the theory that all defendants were participating in a horizontal group boycott to put MM out of business.[4]

I. MM approaches JSW about starting a business relationship.

During spring 2011, two twelve-year employees of Chapel, Mike Hume and Matt Schultz, approached JSW.[5] They were planning to leave Chapel to form a new, competing service center, MM, and wanted to have a supplier in place.[6] JSW specifically asked them whether there would be any "issue" about their leaving Chapel. They assured JSW "[t]here would be no issue, that there was no worry."[7]

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[1] All record references are in footnotes; the footnotes contain ***only*** record references.

[2] ROA.68.

[3] ROA.69.

[4] ROA.71-73; ROA.90-91.

[5] ROA.18578-80.

[6] ROA.16897-98; ROA.18578-80.

[7] ROA.18593; *see also* ROA.16897-98.

JSW and MM entered into an "Agreement" that MM would "attempt to buy, or cause[] to be bought" an average of 500 tons of steel per month from JSW for one year—expressly subject to the parties' agreeing on price, quantity, grade, and time of delivery when each order was placed.[8]

For the first order—placed in August 2011 before Schultz and Hume left Chapel—MM and JSW agreed on a price and other terms for a shipment of 1,035 tons worth $1.07 million.[9] MM gave JSW a standby letter of credit for $750,000,[10] and JSW began to manufacture and ship the steel in allotments.[11] About six weeks into the deal, however, MM directed JSW to hold all other shipments "until further notice."[12]

II. JSW's customers separately contact JSW.

Three days later, on September 19, JSW's long-time customer American Alloy asked JSW for a meeting.[13] During that meeting American Alloy's owner,

[8] PX127; ROA.24175-77 (RE.12).

[9] ROA.18591-92; DX674 (RE.16).

[10] ROA.16672; DX124; ROA.27999-28000; ROA.18591-92.

[11] ROA.18598; ROA.18606-07.

[12] ROA.16902-03; ROA.18598; DX216; ROA.24132-33.

[13] ROA.18599-600.

Arthur Moore, discussed MM—specifically its founders, Hume and Schultz.[14] Moore accused them of stealing confidential customer information from American Alloy when they left the company many years prior to join Chapel.[15] Moore stressed how upset he was with Schultz and Hume, feeling that they had been "unethical in their dealings with him at the end."[16] Moore told JSW that American Alloy was "not going to do business with people that chose to do business with Mr. Hume and Mr. Schultz."[17] Nothing else was said.[18]

The next day, Schultz and Hume informed JSW that they had been sued over "noncompete issues."[19] They explained that the lawsuit and a court order had prompted their unexplained stop-shipment request.[20] They indicated that MM might have to return some of the steel JSW had already manufactured for MM.[21]

More than two weeks later, on October 4, JSW had a dinner meeting with representatives of another long-time customer, Reliance, to discuss expanding their

[14] ROA.18601-02.

[15] ROA.18602-03; ROA.18648.

[16] ROA.18602.

[17] ROA.18603.

[18] ROA.18603.

[19] ROA.18604.

[20] ROA.18604.

[21] ROA.18605; ROA.16906-07.

business relationship.[22] When everyone was about to leave, Greg Mollins (President and COO of Reliance) indicated he knew JSW was selling steel to MM.[23] He accused Hume and Schultz of violating employment agreements, taking Reliance/Chapel's customer book and other sales information when they left Chapel, noting "we have some real serious problems with that."[24] Mollins added that "we'll find it very difficult to do business with people that work with companies that have [MM's] type of an ethical code."[25] Nothing else was said.[26]

III. JSW makes its own decision.

Two weeks later, on October 19, 2011, after receiving a request for a quote from MM, JSW held an internal meeting with its top executives to consider its relationship with MM, finally deciding that it would no longer sell to MM.[27] JSW based its decision on several factors:

[22] ROA.18608-10.

[23] ROA.18609-10.

[24] ROA.18610.

[25] ROA.18611.

[26] ROA.18611.

[27] ROA.18612-14.

- Having already shipped $950,000 worth of material to MM before receiving the stop-shipment order, JSW had been "uncovered" on the $200,000 over MM's $750,000 letter of credit;[28]
- JSW had learned that MM's stop-shipment request was due to a lawsuit against Hume and MM's contact with Chapel's customers;[29]
- Hume and Schulz had previously assured JSW there would be "no issue" with Chapel and initially provided no reason for asking JSW to stop shipments;[30]
- Two respected, long-time customers, American Alloy and Reliance, had separately warned JSW about the business ethics of MM's principals;[31]
- JSW's reputation in the marketplace could be tainted by selling to MM;[32] and

[28] ROA.18605-06; ROA.18612.

[29] ROA.18604-05; ROA.18610; ROA.18734-35; ROA.18734-36.

[30] DX216; ROA.24132-33; ROA.16898; ROA.18592-93; ROA.18612; ROA.18733-34.

[31] ROA.18602-03; ROA.18611-12.

[32] ROA.18620.

- JSW wanted to keep the business of two large, long-standing customers rather than risk losing it by selling to a new, upstart company with smaller orders that had already been dishonest its dealings with JSW.[33]

Later that day, JSW emailed Chapel about expanding their mutual business.[34]

The next day, MM met JSW to discuss "going forward" after settling with Chapel.[35] JSW informed MM that JSW would no longer do business with it.[36] JSW told MM about its separate, unsolicited meetings with third parties raising serious concerns about MM.[37] JSW's Fitch indicated that he understood "the gravity of the situation."[38] But JSW had to make a decision in the best interests of JSW's business.[39] MM then asked JSW to release MM's letter of credit, which JSW promptly did.[40] JSW never told anyone outside of MM and JSW about its decision

[33] ROA.18612-13; ROA.18733-35.

[34] PX386; ROA.21209

[35] ROA.18613-14; DX715; ROA.24253-54.

[36] ROA.18614-15.

[37] ROA.16642-43; ROA.18614-15.

[38] ROA.18715-16.

[39] ROA.18614.

[40] ROA.18617-19.

not to do further business with MM.[41] MM then bought JSW steel through another distributor.[42]

IV. MM asserts antitrust claims.

MM filed suit in federal court, alleging an antitrust horizontal conspiracy between American Alloy and Reliance/Chapel to drive MM out of business through a group boycott.[43] MM also alleged that Nucor and JSW knowingly joined that conspiracy.[44] And MM alternatively alleged that JSW had breached a contract by terminating their Agreement.[45] MM also alleged other state-law tort claims, including business disparagement, defamation, and tortious interference with contract.[46]

JSW filed extensive motions for summary judgment, along with a *Daubert* challenge about MM's damages expert, all of which the district court, Hon. Kenneth Hoyt, denied.[47] The case proceeded to trial before a jury.

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[41] ROA.18615; ROA.15441-42; ROA.18006-07; ROA.18423-24.

[42] ROA.18620.

[43] *E.g.*, ROA.68-95.

[44] ROA.72; ROA.90-91.

[45] ROA.91.

[46] ROA.91-92.

[47] *E.g.*, ROA.23994-4778; ROA.22458-881; ROA.1852-53 (RE.2); ROA.1804 (RE3.).

V. The trial.

At trial, MM introduced e-mails revealing that American Alloy's President, Arthur Moore, wanted to cripple MM. He promised to "go to all extremes . . . to take business away from these bums."[48] American Alloy's wrath was not limited to MM: Inside sales manager, Greg van Wagner, also indicated that the company "would like to throw [JSW] under the bus" for selling steel to MM.[49]

Shortly after MM opened, Moore met with a Chapel executive. Moore understood that Chapel was filing a lawsuit against MM, Schultz, and Hume and understood that Chapel was planning to "notify[] any mill that is selling [to MM], that they can no longer expect any future business from Chapel/Reliance."[50] Moore believed that Reliance/Chapel also intended to pursue "all available courses of action, legally and otherwise" against MM and its principals.[51] Chapel's CEO was reported to have explained, "If [they] don't have any steel, [they] can't sell any

[48] ROA.18490; PX189; ROA.28218-20.

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

[50] PX226; ROA.28222; ROA.18433-35.

[51] PX226; ROA.28222; ROA.18433-36.

steel."[52] Greg Nolan of Chapel added that he looked forward to seeing MM's principals "homeless."[53]

None of the emails or other documents relating to MM were from or to JSW. Nor was JSW copied on similar correspondence. MM's Schultz admitted that, notwithstanding the voluminous documents produced by all parties, he was not aware of any "e-mails, letters, and memos" from JSW to anyone regarding MM.[54] And Schultz could not recall that anyone at JSW said "anything false or negative" about Schultz, Hume, or MM Steel.[55]

JSW presented the evidence in part III, above, that it decided not to do business with MM after receiving separate, unsolicited complaints from two of JSW's customers about MM's business ethics. MM argued in response that JSW should not have terminated its contract with MM in response to the choice given it by American Alloy and Reliance/Chapel.[56]

[52] ROA.19544.

[53] ROA.18198-99.

[54] ROA.16948-49.

[55] ROA.16945.

[56] ROA.19945-46.

MM ultimately abandoned its state-law tort claims, pursuing only antitrust and contract theories against JSW at trial.[57] MM elected a *per se* antitrust-liability theory so that the jury could not consider whether the defendants' actions were legitimate under the rule of reason.[58] The district court agreed with MM, repeatedly rejecting the defendants' attempts to present evidence of procompetitive justifications for their actions.[59] The defendants were not allowed to present their justification evidence because the district court erroneously equated group boycotts under the Sherman Act with Title VII discrimination claims: "That sounds like discrimination. That sounds like 1954. We're not going to serve you because we have this legitimate business reason why we do not serve certain people. You cannot give that to the jury."[60]

MM's damages expert created a "yardstick" model for projecting future lost-profit damages using Chapel's Houston office (founded in 1999) as the

[57] ROA.17548.

[58] *E.g.*, ROA.68 (¶¶8,17,89-97,120); ROA.602-03; ROA.624-25; ROA.676; ROA.4343; ROA.18754; ROA.18765; ROA.18769-70; ROA.19168-70; ROA.19309-12.

[59] *E.g.*, ROA.14574-80 (RE.6); ROA.17320-24; ROA.18332-37 (RE.25); ROA.18752-60 (RE.26); ROA.19309-12; ROA.19184-90.

[60] ROA.18759-60.

comparator.[61] JSW moved to exclude this testimony under *Daubert*,[62] asserting that the damages model did not fit the facts of MM as a small start-up in the depressed market conditions of 2011 and subsequent years and failed to take into account other, real-world factors that would have impacted MM's performance.[63] JSW's motions were denied.[64]

VI. All defendants are held jointly and severally liable for $160 million.

The court denied the defendants' JMOL motions[65] and refused to submit tendered defensive instructions and interrogatories in its charge.[66] Those decisions were based on its ruling that—as a matter of law—the defendants had engaged in a horizontal group boycott subjecting all defendants to *per se* liability.[67] The jury found a conspiracy between American Alloy and Reliance/Chapel "to persuade, induce, or coerce any steel mill not to sell steel plate to MM Steel."[68] And the jury

[61] ROA.17361-62.

[62] ROA.22458-92 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

[63] *E.g.*, ROA.22477-83; *see also* ROA.4847-53.

[64] ROA.1804; ROA.4855 (RE.4); ROA.17328 (RE.7).

[65] ROA.5334-38 (RE.5); ROA.5782 (RE11); ROA.17557-62 (RE.8).

[66] ROA.5095-5104; ROA.5339-69; ROA.19716 (RE.10).

[67] ROA.5334-38; ROA.17561-62.

[68] ROA.5575-91 (RE.18); *see* ROA.5586.

found that JSW and Nucor had knowingly agreed to join that conspiracy.[69] The jury awarded damages of $52 million for MM's claimed lost profits.[70] The jury also found that JSW had breached a contract with MM and awarded $2 million in damages.[71]

The court denied the defendants' post-trial motions, except for making some corrections to calculations in the judgment.[72] MM elected recovery on its antitrust claims,[73] and the district court trebled the damages, entering a final judgment against all defendants, jointly and severally, for more than $150 million.[74] It awarded attorneys' fees through trial of $7.1 million,[75] leaving appellate fees for later determination.[76] JSW timely noticed its appeal.[77] The co-defendants also timely

[69] ROA.5586.

[70] ROA.5587-88.

[71] ROA.5589-90.

[72] ROA.7362; ROA.7382 (RE.22); ROA.7412; ROA.32589-90.

[73] ROA.5596.

[74] ROA.5783-84 (RE.19); ROA.32589-90.

[75] ROA.7392-93.

[76] ROA.7393.

[77] ROA.5785-87 (RE.20); ROA.7406-09; ROA.33158-61.

appealed, although American Alloy, Mr. Moore, and Reliance/Chapel have since settled with MM.[78]

SUMMARY OF THE ARGUMENT

I. MM's antitrust claim against JSW depends solely on the jury's finding that JSW knowingly agreed to join the conspiracy between its customers American Alloy and Reliance/Chapel. MM tried to prove JSW's knowing joinder by circumstantial evidence, requiring inferences. But the Supreme Court and this Court severely limit the drawing of inferences to prove an antitrust conspiracy. There is nothing in this record from which to draw the necessary inferences. Among the voluminous exhibits, there is not a single document implicating JSW into any plan to drive MM out of business. Not a single witness testified that JSW acted in concert with anyone to cut off MM's steel supply or otherwise harm MM. There is no evidence that JSW informed anyone other than MM when it terminated its business with MM.

Further, JSW had ample, independent reasons for taking the action it did. After MM assured JSW there would be "no issue" with Chapel,[79] MM mysteriously stopped shipment on its first order. JSW later learned the stoppage was due to a lawsuit regarding non-compete covenants with Reliance/Chapel preventing MM

[78] *See* Document#00512806462(10/17/14) & Document#00512811973(10/22/14) (Docket#14-20267).

[79] ROA.18592-93.

from contacting Reliance/Chapel's former customers. MM also informed JSW that it might have to return some of the steel that JSW had previously delivered. And two different, longstanding customers of JSW—in separate meetings, weeks apart—complained to JSW about MM's business ethics in violating non-competition agreements and stealing proprietary information. Each separately required JSW to choose its business over MM's.

After convening its top executives to consider its options, JSW decided to stop doing business with MM. JSW acted independently and for its own economic motives—all of which prevents MM from inferring JSW into a conspiracy. The judgment against JSW should be set aside and judgment rendered for JSW on MM's antitrust claims.

II. Separately, the court erred in treating this as a case of *per se* liability, rather than employing the rule of reason. The *per se* analysis is reserved for restraints having "manifestly anticompetitive effects" and lacking "any redeeming value." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). JSW is a steel manufacturer that supplied steel on an arms-length basis to MM and the other distributors, which meant it was in a vertical—not horizontal—relationship with the distributors. JSW had multiple legitimate and procompetitive reasons to stop dealing with MM. But the court ultimately kept the jury from considering JSW's justifications.

Although some prior opinions from this Court have indicated that vertical members of a horizontal conspiracy could fall under the *per se* rule, those cases have been undermined by recent Supreme Court cases applying the rule of reason to vertical actors, such as JSW. This Court should distinguish, or limit, its precedents to the contrary.

III. Independently, MM failed to prove antitrust damages. MM's damages expert used a "yardstick" analysis. But rather than using a true comparator, he effectively created a fictional company to use as the "benchmark." In championing Chapel-Houston (a well-capitalized branch of a national company) from an earlier time period as the yardstick, MM's expert dismissed all inconveniently dissimilar facts. The expert went so far as to ignore the damaging acts of MM's own principals in leaving Chapel's employ under dubious terms, which led to the injunctive relief that severely restricted their sales from the very inception of MM. He also ignored indications of how other steel companies had actually performed during the relevant time period and undisputed facts regarding MM's operational limitations. And he used gross margins that he admitted no steel company had achieved during the time of the alleged conspiracy.

MM bore the burden to show a legitimate comparison between MM and the yardstick company. Its expert's failure to consider the relevant data and market

indicators renders its antitrust-damages claim fatally infirm, requiring that judgment be rendered in JSW's favor.

IV. The contract theory provides no legitimate, alternative basis for affirming the judgment against JSW. MM and JSW had nothing more than an agreement to agree. MM admitted there was no obligation to make any sale unless the parties agreed on quantity, grade, and price. MM had no basis for binding JSW to supply unspecified amounts of unidentified grades of steel at an unknowable price. And MM's expert testimony as to contract damages was based upon the same flawed damages model. So judgment should also be rendered in favor of JSW on this claim.

ARGUMENT

I. JSW never knowingly joined a conspiracy between American Alloy and Reliance/Chapel.

In answer to Interrogatory 3, the jury found that JSW had knowingly joined a conspiracy between American Alloy and Reliance/Chapel "to persuade, induce, or coerce any steel mill not to sell steel plate to MM Steel."[80] Knowing that it lacked proof as to JSW's knowing joinder, MM painted all the defendants with the same brush. But MM had to sustain its burden of proof specifically as to JSW. Because the jury's answer lacks evidentiary support, it should be vacated.

[80] ROA.5586.

A. To establish a conspiracy, there must be a meeting of the minds about an unlawful plan.

MM must prove "concerted action on the part of the defendants." *Tunica Web Advertising v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 409 (5th Cir. 2007). "To establish concerted action, the plaintiff must present 'evidence that reasonably tends to prove that the [defendants] had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984)).

Said another way, there must be a "'meeting of minds in an unlawful arrangement.'" *H&B Equip. Co. v. Int'l Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978) (quoting *Am. Tobacco Co. v. U.S.*, 328 U.S. 781, 810 (1946)). The plaintiff must prove "a single plan, the essential nature and general scope of which is known to each person." *Id.*

B. MM failed to prove that JSW knowingly joined a conspiracy.

MM was required to prove:

- JSW knew there was a plan between American Alloy and Reliance/Chapel to deprive their competitor MM of steel to force it out of business; and
- JSW agreed to join that plan.

MM lacks proof—direct or circumstantial—of both elements.

1. MM lacks direct evidence that JSW knowingly joined a conspiracy.

Direct evidence "'explicitly refer[s] to an understanding' between the conspirators." *Tunica*, 496 F.3d at 409 (quoting *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 762 (5th Cir. 2002)). Here, there is no "explicit" reference to an agreement between JSW and any other defendant. No document evidences JSW's knowledge of or joinder in any plan to harm MM. Even MM's Schultz acknowledged at trial that he was not aware of any memos, letters, or emails from JSW to "anyone" regarding MM.[81] Nor did any witness testify that JSW was a participant in any such plot.

Instead, the evidence is undisputed that:

- American Alloy and Reliance approached JSW separately;[82]
- Neither American Alloy nor Reliance/Chapel mentioned each other, other distributors, or other mills to JSW;[83]
- JSW never informed American Alloy, Reliance/Chapel, or any other distributor that JSW had decided not to do business with MM;[84]

[81]ROA.16948-49.

[82] ROA.18601-03; ROA.18608-12.

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

[84] ROA.15352; ROA.15441-42; ROA.18423-24; ROA.18615-17.

- JSW never mentioned MM to another mill;[85]

- There is no evidence that JSW knew about any contacts American Alloy and Reliance/Chapel may have had with any other mill; and

- JSW did not know other mills were not selling to MM.[86]

Thus, there is no direct evidence that JSW knowingly joined a conspiracy.

2. MM lacks circumstantial evidence that JSW knowingly joined a conspiracy.

Instead, MM resorts to "circumstantial evidence [which] requires additional inferences in order to support a claim of conspiracy." *Tunica*, 436 F.3d at 409 (quoting *Viazis*, 314 F.3d at 762, and *Southway Theatres, Inc. v. Ga. Theatre Co.*, 672 F.2d 485, 493 n.8 (5th Cir. 1982)). Specifically, MM infers that JSW's subsequent decision to stop doing business with MM proves JSW's conscious agreement to knowingly join an existing conspiracy between American Alloy and Reliance/Chapel to drive MM out of business. But the law forbids MM's inference.

[85] ROA.18619; *see also* ROA15772-73 & ROA.18275-76 (SSAB); ROA.16410-11; ROA.17684-86 (Nucor); ROA18245-46 (Arcelor-Mittal).

[86] ROA.18619.

a. Antitrust law severely limits permissible inferences of a conspiracy.

An exacting standard of review applies to antitrust-conspiracy cases: "Circumstantial evidence of a conspiracy in restraint of trade must be strong . . . because 'antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.'" *Tunica*, 496 F.3d at 409 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Monsanto*, 465 U.S. at 764.

Further, a party "generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919), *quoted in Monsanto*, 465 U.S. at 761. Thus, the plaintiff's evidence "must tend to rule out the possibility that the defendants were acting independently." *Tunica*, 436 F.3d at 409 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007)). If a plausible inference is that the defendant acted independently, then the jury is not allowed to infer from that evidence that the defendant acted in concert with others. *Id.* at 414-15.

b. MM's "circumstantial evidence" is insufficient to support an inference that JSW joined a conspiracy.

In summarizing the case as to JSW in closing argument, MM relied on: (i) the "coincidence" that two different large customers came to JSW and each gave JSW

a choice to deal with them or with MM;[87] (ii) the timing of an October 19, 2011, email from JSW to Chapel/Reliance about expanding their existing business relationship;[88] and (iii) what MM called a "confession" from Jeff Whiteman of Nucor to Byron Cooper of North Shore (an unrelated third party) that certain companies supposedly were "monitoring" MM.[89] None of these circumstances gives rise to a legitimate inference that JSW joined a conspiracy.

Reliance and American Alloy's separate outreaches to JSW show only that both service-center customers—each of which claimed to have been grievously wronged by MM—did not want JSW to support a company they felt was unethical. As explained in part I.B.2.c.(1), JSW had the privilege to choose its customers.

The October 19 email does not mention MM. Its recipient at Chapel was unaware that JSW had stopped doing business with MM.[90] Consequently, the email proves no illicit quid pro quo. Instead, the email was one in a series of multi-year communications where JSW tried to expand its relationship with Reliance/Chapel.[91]

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[87] ROA.19784.

[88] ROA.19788-89.

[89] ROA.19797; *see also* ROA.16194.

[90] ROA.17834.

[91] ROA.18607-09; ROA.18740-43.

Finally, what MM called a "confession" was the secret recording of part of a conversation in which Cooper of North Shore told MM that a number of distributors and mills were "monitoring what you guys are going to do."[92] Cooper testified that he did not know the circumstances of the activity he reported and did not recall whether his source at Nucor had even mentioned JSW as one of the "monitoring" companies.[93] Thus, even if this double-hearsay could be considered—which it cannot[94]—it proves nothing. *See, e.g., U.S. v. Cisneros-Gutierrez,* 517 F.3d 751, 761 (5th Cir. 2008) (stating "[t]he rule in this Circuit" that a party "may not use [a hearsay] statement under the guise of impeachment for the primary purpose of placing before the jury substantive evidence which is not otherwise admissible." (internal quotations omitted)). Cooper also admitted that although his company North Shore was purchasing JSW steel for MM, JSW never mentioned any issues with MM to North Shore.[95]

[92] ROA.16193-94.

[93] ROA.16167-68; ROA.16173.

[94] ROA.3215-16; ROA.15827-28; ROA.15842; ROA.31864-70.

[95] ROA.16173-74.

c. JSW had independent reasons to stop selling to MM.

As mentioned, MM must present proof that "tend[s] to rule out the possibility" of independent action. *Tunica*, 436 F.3d at 409. MM must show that JSW's conduct was ***inconsistent*** with its independent self-interest as a supplier. *Viazis*, 314 F.3d at 764. MM's proof fell short.

(1) JSW had the right to choose more established customers.

Antitrust law does not impose liability when a party chooses to do business with a more lucrative customer over other customers. *See Viazis*, 314 F.3d at 764. In *Viazis*, for example, the plaintiff alleged a conspiracy because one defendant terminated his marketing agreement "in response to threats made by" other defendants. *Id.* at 762. The letter on which the plaintiff relied did not explicitly reference an agreement and amounted to nothing more than circumstantial evidence. *Id.* But the evidence did not permit even an inference of a conspiracy because there could have been independent business reasons for the conduct, such as preferring the more lucrative business. *See id.* at 764 (holding that conspiracy inference could ***not*** be drawn "because [the defendant] could have determined that the potential benefits from its marketing agreement with [the plaintiff] would be outweighed by the loss of business that would result from its continued association with him").

The First, Fourth, Sixth, and Eleventh Circuits hold likewise:

- "The most natural inference from the evidence—that the manufacturer took sides as between two dealers and chose the more lucrative of them—makes manifest a legitimate, independent reason for terminating the less desirable distribution relationship." *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 20 (1st Cir. 2004);

- "One [legitimate reason for terminating a relationship -with a dealer] is to avoid losing the business of disgruntled dealers." *Garment Dist., Inc. v. Belk Stores Servs., Inc.*, 799 F.2d 905, 909 (4th Cir. 1986);

- A plaintiff "can adduce evidence from which it would be reasonable to infer that the defendant manufacturer terminated direct sales to one customer in order to retain or increase the volume of business it did with other customers. But it is not illegal to terminate a sales relationship 'to avoid losing the business of disgruntled dealers.'" *Bailey's, Inc. v. Windsor Am., Inc.*, 948 F.2d 1018, 1030 (6th Cir. 1991) (quoting *Garment Dist.*, 799 F.2d at 909); and

- "[A] manufacturer may legitimately respond to pressure from a dealer in order to avoid losing that dealer's business." *Winn v. Edna Hibel Corp.*, 858 F.2d 1517, 1520 (11th Cir. 1988).

"Permitting an agreement to be inferred merely from the existence of [customer] complaints, or even from the fact that termination came about 'in response to' [customer] complaints, could deter or penalize perfectly legitimate conduct." *Monsanto*, 465 U.S. at 763. Complaints "arise in the normal course of business and do not indicate illegal concerted action." *Id.* "[T]o permit the inference of concerted action on the basis of receiving complaints alone and thus to expose the defendant to treble damage liability would both inhibit management's exercise of independent business judgment and emasculate the terms of the statute." *Id.* at 764 (internal quotation marks omitted).

The Second, Ninth, and Tenth Circuits have agreed:

- "Direct complaints from [one defendant] to [another] would be, by themselves, insufficient to show a conspiracy . . . even if [the defendant receiving the complaints] cancelled [the plaintiff] immediately thereafter. *Burlington Coat Factory v. Esprit de Corp.*, 769 F.2d 919, 923 (2d Cir. 1985);

- "[D]ealer complaints and a responsive termination by a manufacturer are not sufficient, standing alone, to raise an

inference of conspiracy." *The Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1156 (9th Cir. 1988); and

- "[I]t is well-established in antitrust cases that a manufacturer's exclusion of a buyer-distributor in response to another buyer-distributor's complaints is insufficient as a matter of law to establish conspiracy." *Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249, 1259 (10th Cir. 2006).

The rationale is economic efficiency. A manufacturer must have the flexibility to choose which distributors will best sell its products and promote its brand. *See Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in distribution of his products."); *cf. NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998) ("The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage."). This flexibility not only involves pricing issues, but also includes issues of quality, reputation, advertising, responsiveness, and countless other factors that affect a brand. *GTE*, 433 U.S. at 55 n.23 (identifying "other legitimate reason[s]" that a manufacturer would want "to exert control over the manner in which his products are sold and serviced.").

Here, the contemporaneous evidence confirmed that JSW decided to do business with longstanding and more lucrative customers.[96] Taking sides in a dispute between two rival dealers and choosing the more lucrative one is a well-recognized, legitimate justification. *See, e.g.*, *Aladdin Oil Co. v. Texaco, Inc.*, 603 F.2d 1107, 1117 (5th Cir. 1979) ("[M]erely changing from one exclusive distributor to another is permitted."); *Nw. Power Prods., Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 86 (5th Cir. 1978) ("A supplier may switch dealers and conspire with a new dealer to take the place of an established one.").

To use the words of the Supreme Court, there is nothing "manifestly anticompetitive" about JSW's choosing between customers in litigation with one another, particularly when it chooses not to do further business with a dealer like MM that JSW considered to be unscrupulous in its dealings with JSW itself. *Leegin*, 551 U.S. at 886. That is why the jury is not entitled to draw an inference that JSW knowingly joined a conspiracy from JSW's actions that were necessary to protect its products and brand. *E.g.*, *Viazis*, 314 F.3d at 764.

[96] ROA.18612-14; ROA.18733-35: ROA.18738.

(2) JSW had the right to stop selling to MM after discovering that MM had lied to JSW about its "issues" with Chapel.

MM's founders, Schultz and Hume, met with JSW to order steel ***before*** they left their employment at Chapel.[97] Because of the awkward timing, JSW specifically asked them whether there would be "issues" with Chapel, and Schultz and Hume answered "No."[98]

Yet, about two weeks after MM took delivery of 75% of its first order from JSW, MM told JSW to "hold off on any other shipments" of the remainder "until further notice," giving no reason.[99] MM later told JSW the stop shipment was due to "the lawsuit."[100] MM eventually ***agreed*** to an injunction preventing it from contacting a number of Reliance/Chapel's customers for six months.[101] This "issue" with Chapel directly contradicted the reassurance Schultz and Hume had given JSW when first approaching it.[102]

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[97] ROA.16897-98; ROA.18578-80.

[98] ROA.16897-98; ROA.18592-93.

[99] ROA.16903; ROA.18598; DX216; ROA.24132-33.

[100] ROA.18604.

[101] DX257; ROA.27739-59 (RE.27).

[102] ROA.18708; ROA.18733-34.

JSW also learned that American Alloy believed Schultz and Hume stole American Alloy's confidential customer information when they suddenly quit American Alloy without notice in 1999 to join Chapel.[103] And now, Reliance/Chapel was accusing Schultz and Hume of the same conduct.[104] From JSW's perspective, MM's owners had a history of allegedly stealing customers from their prior employers—prior employers who happened to be desirable customers of JSW.[105]

Although it received this information from others, JSW decided—for its own business reasons—not to do business with MM, because JSW did not want its "name damaged in the marketplace."[106] This is precisely the sort of decision protected by *Colgate* and subsequent cases allowing a manufacturer to respond to distributor complaints. *See* part I.B.2.c.(1), above. A manufacturer should not be deterred "from exercising its legal rights merely because its information originated in a dealer complaint." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 780 F.2d 1212, 1217-18 (5th Cir. 1986), *aff'd*, 485 U.S. 717 (1988).

[103] ROA.18602-03.

[104] ROA.18610-11.

[105] ROA.18734-36.

[106] ROA.18735.

(3) JSW had the right to stop selling to MM when MM stopped shipments without explanation after just one month.

JSW also had the right to cease doing business with MM because, as a new company, MM proved unreliable. When MM first placed an order for approximately 1000 tons and took delivery of the initial shipment of 75%, all seemed well. But when MM suddenly—with neither warning nor explanation—said to "hold all shipments . . . until further notice," things no longer looked so good. MM next said that it might even have to return some of the steel it had already received.[107] Then MM declared a "fire sale" and began selling off its inventory.[108]

Not until mid-October did MM tell JSW that it had settled the Chapel litigation and was ready to place more orders.[109] Meanwhile, JSW had learned of American Alloy's and Reliance/Chapel's complaints about MM's business ethics. JSW had every right to decide—in its own economic interest—that MM was not a desirable business colleague.

A party is justified in terminating its dealings with another when there are questions about the other party's financial wherewithal. *Americom Distrib. Corp. v. ACS Commc'ns, Inc.*, 990 F.2d 223, 226 (5th Cir. 1993). It is a matter of "sound

[107] ROA.16906-07; ROA.18605.

[108] DX234 (RE.13); ROA.16747; ROA.17172-73.

[109] DX715; ROA.24253-54; ROA.18661-63.

business policy and was not unreasonable." *Id.* The same should be true when there are legitimate questions about a party's ability to take delivery of the orders it places. The waste of economic resources in manufacturing to fulfill a custom order, but then having to hold and store the shipment, is—by itself—a legitimate business reason that prevents drawing the inference MM requires.

In sum, MM's proffered inferences are all "consistent with permissible competition," and so provide no support for the jury finding that JSW knowingly joined a conspiracy. *Tunica*, 496 F.3d at 409; *Viazis*, 314 F.3d at 764.

C. The proper remedy is to reverse and render judgment.

MM's only antitrust claim against JSW was as an alleged co-conspirator. Because MM lacks direct or circumstantial evidence proving JSW knowingly joined any conspiracy between American Alloy and Reliance/Chapel to drive MM out of business, the judgment for an antitrust violation against JSW should be reversed and rendered.

II. Alternatively, the court erred in subjecting JSW to *per se* liability.

MM's sole antitrust theory at trial was a horizontal group boycott that constituted a *per se* violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Although the defendants argued that the rule of reason applied instead of *per se* liability, the

district court permitted MM to limit the trial to its *per se* theory.[110] Consequently, the jury was not allowed to consider JSW's many justifications for stopping business with MM. *See* part I.B.2.c, above.

Antitrust law subjects horizontal group boycotts to *per se* liability when they utterly lack redeeming economic reasons. *E.g.*, *Nw. Wholesale Stationers, Inc., v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 289 (1985). Under the *per se* rule, a practice is "conclusively presumed illegal without further examination." *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980). In contrast, when the rule of reason applies, the plaintiff must establish that the practice had an adverse effect on competition as a whole in the relevant market after considering several factors. *See, e.g.*, *Bd. of Trade v. U.S.*, 246 U.S. 231, 244 (1918). This reasonableness analysis examines the actor's intent and procompetitive justifications. *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 100 (1984).

Because of the enormous treble damages and other implications of *per se* liability, there is a "presumption in favor of a rule-of-reason standard . . . ." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988). Great care should be taken before applying the *per se* rule. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779

[110] *E.g.*, ROA.5337 ("[T]he Court holds that [MM] has properly alleged and established that the defendants' group boycott, if proved, amounts to a *per se* violation of section 1 of the Sherman Act."); ROA.18754 ("This is a *per se* horizontal boycott. There is no procompetitive justification, excuse, or defense."); ROA.18765; ROA.18769-70; ROA.19168-70; ROA.19309-12 (RE.9); ROA.5587-88 (verdict).

(1999). Its use is appropriate "only after courts have had considerable experience with the type of restraint at issue . . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason." *Leegin*, 551 U.S. at 886-87 (citations omitted).

MM understood that the difference between *per se* and rule-of-reason analysis was case-dispositive, deliberately choosing to try the antitrust claim exclusively as *per se* to preclude the jury from considering both the procompetitive justifications for JSW's conduct and the lack of any anticompetitive effects on the market as a whole.[111] Because *per se* treatment was not justified, the judgment should be reversed and rendered.

A. The *per se* rule is inapplicable to JSW's antitrust liability.

There is neither evidence nor finding that JSW communicated, much less conspired, with any other mill.[112] Instead, JSW was approached by two of its ***distributor customers***—separately[113]—some time after which JSW discontinued

[111] ROA.4343; ROA.14574-80; ROA.17320-24; ROA.18332-37; ROA.18754; ROA.18765; ROA.18769-70; ROA.19168-70; ROA.19309-12.

[112] ROA.15772-73 (SSAB); ROA.16410-11 (Nucor); ROA.18245-46 (Arcelor-Mittal); ROA.18423-24 (American Alloy); ROA.18615; ROA.18619; ROA.5586.

[113] ROA.18599-603; ROA.18608-12.

selling to MM.[114] JSW's alleged antitrust liability was only as a vertical supplier to MM and to two other distributors, Reliance/Chapel and American Alloy.

This appeal thus presents the question whether JSW—as a vertical actor allegedly implicated in a horizontal conspiracy—is subject to *per se* liability (as the district court ruled) or the rule-of-reason test. The Supreme Court has recently stated that the rule of reason applies in this circumstance, and other circuits have followed that analysis. In earlier opinions, this Court had indicated that *per se* liability could attach under certain circumstances. *See Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1004 (5th Cir. 1981); *Jayco Sys., Inc. v. Savin Bus. Machs. Corp.*, 777 F.2d 306, 317-18 (5th Cir. 1985); *H&B*, 577 F.2d at 245. *But see Tunica*, 496 F.3d at 414 ("Sometimes group boycotts are called per se violations, but the label here is only minimally useful since many arrangements that are literally concerted refusals to deal have potential efficiencies and are judged under the rule of reason" (internal quotation marks omitted)). The older cases are inconsistent with recent Supreme Court precedents, which, as explained, have increasingly discredited or expressly overruled the principles on which the prior Fifth Circuit cases relied.

[114] ROA.18613-15.

B. Trends in the law support applying the rule-of-reason test.

In the last 30 years, the Supreme Court has been moving steadily away from *per se* liability. *Leegin*, 551 U.S. at 885-87 (noting the Court's "reluctance to adopt *per se* rules"); *id.* at 901 ("In more recent cases, the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints."). And this reluctance now includes group boycotts: "[T]he category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986); *see also Nw. Wholesale*, 472 U.S. at 295-97 (applying rule of reason to alleged horizontal boycott by members of a purchasing cooperative).

Absent price-fixing, vertical conduct has always been subject to the rule-of-reason analysis. *See, e.g.*, *Leegin*, 551 U.S. at 898-99, 907; *State Oil Co. v. Khan*, 522 U.S. 3, 18-19, 21-22 (1997); *Business Electronics*, 485 U.S. at 724; *GTE*, 433 U.S. at 57-58; *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 615 F.3d 412, 415 (5th Cir. 2010). Rule-of-reason analysis is required because there can be so many legitimate, economic reasons for the conduct:

> The manufacturer has a number of legitimate options to achieve benefits similar to those provided by vertical price restraints. A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. The economic effects

> of unilateral and concerted price setting are in general the same. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability. Even with the stringent standards in *Monsanto* and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures. . . . The increased costs these burdensome measures generate flow to consumers in the form of higher prices.

Leegin, 551 U.S. at 902-04 (citations omitted); *see also Monsanto*, 465 U.S. at 762-64; *GTE*, 433 U.S. at 52-56.

Although MM and the district court repeatedly characterized the conspiracy as horizontal, JSW is a vertical appendage at best, and its liability should have been analyzed under the rule of reason: "A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful." *Leegin*, 551 U.S. at 893. But "[t]o the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful ***under the rule of reason***." *Id.* (emphasis added); *see also In re Tableware Antitrust Litig.*, 484 F. Supp.2d 1059, 1077 (N.D. Cal. 2007) (holding that alleged vertical boycott between manufacturers of a retailer, at the instigation of two rival dealers, was subject to the rule of reason, separate and apart from an alleged horizontal group boycott orchestrated by rival dealers). Under the rule of reason, the jury would have considered JSW's multiple legitimate and independent reasons to discontinue its relationship with MM. *See* part I.B.2.c., above.

The quoted statement from *Leegin* is consistent with the current trend of the Supreme Court and other federal courts in moving away from the *per se* standard—for any arrangement with a vertical component, and even in cases of group boycotts solely of competitors at the same level. *See, e.g.*, *Indiana Fed'n of Dentists*, 476 U.S. at 458-59 (applying rule-of-reason to horizontal group boycott by dentists); *Nw. Wholesale*, 472 U.S. at 295-97 (applying rule of reason to alleged horizontal group boycott by members of a purchasing cooperative); *Tunica*, 496 F.3d at 414 ("That the casinos' alleged agreement was a horizontal one does not necessarily mean that the agreement is *per se* unlawful. . . . The Supreme Court has recently reiterated that '[t]o justify a *per se* prohibition a restraint must have manifestly anticompetitive effects and lack any redeeming value.'" (quoting *Leegin*, 551 U.S. at 886)); *Realty Multi-List, Inc.*, 629 F.2d at 1367-69 (applying rule of reason to alleged horizontal group boycott because of procompetitive justifications for established membership criteria); *see also Craftsmen Limousine, Inc. v. Ford Motor Co.*, 363 F.3d. 761, 776 (8th Cir. 2004) (applying rule of reason to alleged horizontal group boycott when refusal to deal was based on safety, a procompetitive justification); *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613, 617 n.4 (4th Cir. 1991) (applying rule of reason to mixed horizontal and vertical group boycott of supplier by its competitors and several customers).

The Supreme Court has expressly overruled prior *per se* decisions—despite concerns about *stare decisis*—when modern economic circumstances and academic and judicial critiques persuade it that those precedents are unwise. *Leegin*, 551 U.S. at 907 (overruling prior precedent that minimum price agreements between manufacturer and distributor were *per se* illegal and holding that "[v]ertical price restraints are to be judged according to the rule of reason); *GTE*, 433 U.S. at 58 ("Accordingly, we conclude that the *per se* rule stated in *Schwinn* must be overruled.").

The district court did not address the rule that a vertical supplier's conduct toward a distributor-customer is judged under the rule of reason; instead, it carved out an exception when a manufacturer takes action after receiving complaints from more than one distributor-customer.[115] In so holding, the court relied on *H&B*, 577 F.2d at 245, *NYNEX*, 525 U.S. at 135, and *U.S. v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990).[116] None of these opinions supports the ruling because JSW had reasons of its own to stop dealing with MM; the court's ruling contravenes the well-established rule that *per se* analysis must be limited to those egregious situations which "always or almost always tend to restrict competition and decrease output." *Leegin*, 551 U.S. at 885-86; *see also Monsanto*, 465 U.S. at 763 (complaints by

[115] ROA.5335-37.

[116] ROA.5335-36.

retailers regarding other retailers are "natural—and from the manufacturer's perspective, unavoidable—reactions by distributors to the activities of their rivals").

The district court characterized *H&B* as ruling that "[c]onspiracies between suppliers and distributors are treated as horizontal when the conspiracy originates among the distributors."[117] But that is ***not*** what *H&B* held. Instead, it considered the manufacturer-distributor relationship before it to be vertical and applied the rule of reason. *Id.* at 245-46 ("Here the asserted originator of the plan to eliminate H&B was the manufacturer . . . . Consequently, antitrust law treats the conspiracy as a vertical restraint, and those restrictions are now judged under the rule of reason." (citing *GTE*, 433 U.S. 36)). Moreover, *H&B* relied on the U.S. Supreme Court's opinion in *Schwinn* for the referenced dictum on horizontal treatment, *see H&B*, 577 F.2d at 245 (citing *U.S. v. Schwinn & Co.*, 388 U.S. 365 (1967)), and *Schwinn's per se* holding was expressly overruled by the Supreme Court in *GTE*. *Schwinn*, 388 U.S. at 372-73, *overruled, Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 (1977).

Nor does *NYNEX* support the district court's holding. *NYNEX* did not involve a horizontal boycott, but instead circumstances where "a single buyer favors one seller over another, albeit for an improper reason." *NYNEX*, 525 U.S. at 135. The statement

[117] ROA.5335-36 (citing *H&B Equip. Co. v. Int'l Harvester Co.*, 577 F.2d 239, 245 (5th Cir. 1978)).

regarding group boycotts in no way addressed treatment of a vertical appendage to an alleged horizontal conspiracy, which *Leegin* indicated was subject to the rule of reason. Further, this statement in no way suggests that a third party could become implicated in a horizontal conspiracy if separately contacted by more than one customer.

Finally, *MMR*, which predates *Leegin* by 17 years, did not involve any vertical actor at all. 907 F.2d at 498. The statement quoted by the district court—"If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors"[118]—did not address an alleged vertical conspirator's liability or the economic and competitive considerations of a vertical relationship and is no support for application of the *per se* rule.

Before the *per se* analysis will apply, an antitrust plaintiff must first "present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects." *Nw. Wholesale*, 472 U.S. at 298; *accord Tunica*, 496 F.3d at 414. That threshold showing must now also satisfy the *Leegin* requirements of manifestly anticompetitive effects and no redeeming virtue. MM failed to make this threshold showing. Instead, the uncontested record shows that JSW had numerous procompetitive justifications for JSW's refusal to sell additional

[118] ROA.5336 (quoting *U.S. v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990)).

steel to MM—some of which were of MM's own making—entirely independent from any conspiracy and all of which make application of the *per se* rule inappropriate. *See* part I.B.2.c.

Given the Supreme Court's rulings in the last 30 years applying the rule of reason even in purely horizontal situations and upholding suppliers' vertical decisions as procompetitive, this Court should hold that JSW's conduct as a vertical supplier is subject to the rule-of-reason test.

C. Rendition is appropriate.

The Supreme Court stated that the choice of whether to apply the *per se* rule or the rule of reason can be a question of law. *California Dental*, 526 U.S. at 779-81 (explaining the depth of analysis a court should undertake before deciding on which rule to apply as a matter of law).

JSW's status as a vertical supplier and the legal plausibility of its justifications for refusing further orders from MM are matters of law that warrant reversal and rendition, without regard to any other factor. *See Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 408 (2004) (holding that even an alleged monopolist may "exercise his own independent discretion as to parties with whom he will deal" except in very limited circumstances (quoting *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

Rendition is particularly appropriate because MM chose to rely entirely on the *per se* standard and to disavow any rule-of-reason claim.[119] MM's entire antitrust claim fails as a matter of law since the *per se* rule does not apply. *E.g.*, *Texaco v. Dagher*, 547 U.S. 1, 5, 7 & nn.2, 8 (2006) (after *per se* liability was held inappropriate, the Court concluded that plaintiffs could not prevail on their Section 1 claim because they chose not to put forth a rule-of-reason claim); *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1006 (7th Cir. 2012) (same); *AT&T Corp. v. JMC Telecom, Inc.*, 470 F.3d 525, 531 (3d Cir. 2006) (affirming dismissal after finding *per se* analysis inapplicable where plaintiff did not attempt to address rule-of-reason considerations). Like the plaintiffs in *Dagher*, *Sulfuric Acid*, and *AT&T*, MM fatally staked its claim solely on a *per se* analysis.

D. The district court failed to submit the *Tunica* factors.

Alternatively, if this Court were to consider rule-of-reason treatment as dependent on a matter of fact, the case should be remanded for a new trial because the district court failed to properly submit the *Tunica* factors to the jury.

This Court, following *Nw. Wholesale*, 472 U.S. at 294, has identified three factors to be used in deciding the applicability of the rule of reason to group boycotts:

[119] ROA.68-98 (¶¶8,17,89-97,120); ROA.602-03; ROA.624-25; ROA.676; ROA.4343; ROA.19754; ROA.18765; ROA.18769-70; ROA.19168-70.

(1) "whether the [defendants] hold a dominant position in the relevant market";

(2) "whether the [defendants] control access to an element necessary to enable [the victim] to compete"; and

(3) "whether there exist plausible arguments concerning procompetitive effects."

Tunica, 496 F.3d at 414-15. The third factor, ***plausible*** justification, is a legal issue that alone should be legally determinative in requiring rule-of-reason treatment. But even if any of the three factors were considered matters of fact, they should have been presented to the jury, as defendants requested.[120] *In re Wholesale Grocery Prods. Antitrust Litig.*, 752 F.3d 728, 735 (8th Cir. 2014). The district court gave the jury a question whether MM was "den[ied] access to a supply of steel plate necessary for [MM] to compete effectively,"[121] but that question failed to present properly the second *Tunica* factor as to defendants' control of steel supply.[122]

JSW's evidence as to all three *Tunica* factors was substantial and precluded a legal finding that a *per se* analysis applied. As to the first two factors, MM's own industry expert conceded that Reliance/Chapel and American Alloy did ***not*** possess

[120] ROA.5339-40; ROA.5348; ROA.5350.

[121] ROA.5587.

[122] ROA.5350-53.

market power and were only two of more than 100 service centers operating around the Gulf Coast where "there's fierce chaotic competition between service centers pursuing end customers."[123] JSW was only one of dozens of manufacturers supplying steel in the region.[124] During the entire period of the alleged boycott, MM (1) had access to foreign steel plate at comparable quality and usually at a discount to domestic steel plate,[125] (2) had access to both domestic and foreign steel plate,[126] and (3) purchased over 16 million pounds and over $10 million of domestic and foreign steel plate from 19 suppliers.[127] MM's industry expert admitted "[t]here's a high degree of competition" among mills and that domestic mills' prices for steel plate are highly vulnerable to the volatility of the prices charged by foreign mills and producers, resulting in aggressive, "foreign fighter prices" that are used to negotiate with domestic mills.[128]

The evidence as to the third factor—plausible justification—was similarly strong, *see* part I.B.2.c., above, even though JSW was prevented from presenting

[123] ROA.14273-74; ROA.14287.

[124] ROA.19148-50.

[125] ROA.14478-80; ROA.16761; ROA.16763; ROA.16776-77.

[126] ROA.14293-94; ROA.14467-68; ROA.15393-94; ROA.15625; ROA.15941; ROA.15970; ROA.16027; ROA.16030; ROA.16151-52; ROA.16966-67; ROA.17771.

[127] ROA.16832-35; DX119; ROA.22273-97.

[128] ROA.14263-64; ROA.14273-74; ROA.14287; ROA.14560; ROA.17192-93.

additional evidence about its business justifications and the procompetitive effects of its actions.[129] In numerous bench conferences and rulings the court made clear that it did not believe that JSW could show or should even be allowed to present evidence of its independent business justifications, repeatedly construing MM's Sherman Act claim as a discrimination claim.[130] The district court's many evidentiary and charge rulings based on this erroneous conclusion amount to reversible error.

Thus, if the Court does not render judgment in JSW's favor, it should remand for a new trial where the evidence can be fully developed, and the jury can be instructed on the *Tunica* factors.

III. The jury's damages findings are fatally defective.

The jury's damages finding of $52 million rests only on an impermissibly flawed yardstick analysis that should have been excluded.

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[129] *Compare* direct examination at ROA.14264-65; ROA.14399; ROA.14404; ROA.14409; ROA.14423; ROA.14432-36; ROA.14443-44 *with* cross examination at ROA.14570-71; ROA.14574-84; *compare* admitted testimony at ROA.14513-14; ROA.14870-71; ROA.15639; ROA.15937; ROA.16346-47 *with* excluded testimony at ROA.15606-24; ROA.17540-42; *see* excluded testimony and exhibits at ROA.14073-74; ROA.14182-86; ROA.14992-97; ROA.16655; ROA.16922-23; ROA.17032-39; ROA.17169-72; ROA.17185-86; ROA.17188-89; ROA.18752-84; ROA.18981-86; ROA.19033-46; ROA.19183-90; ROA.19307-15.

[130] *E.g.*, ROA.14574-80; ROA.17320-24; ROA.18332-37; ROA.18754-60; ROA.19309-12; ROA.19184-90.

A. Standard of review.

Before and during trial, JSW moved to exclude the testimony of MM's sole damages expert, Stephen P. Magee, on the grounds that he employed unreliable methodology and unreasonable assumptions and engaged in pure speculation to construct his damages model.[131] But the court denied those motions.[132]

The standard for reviewing the admission of this expert testimony is an abuse of discretion, though it must be both relevant and reliable, which "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Wells v. SmithKline Beecham Corp.*, 601 F.3d 375, 378 (5th Cir. 2010) (citing *Daubert v. Merrell Dow Pharms., Inc*. 509 U.S. 579, 592-93 (1993)). When the expert has failed to "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field," *id.*, his testimony should be excluded.

Because Magee's opinions were patently unreliable and incompetent, JSW also raised several challenges to MM's damages claims in its motions for judgment as a matter of law, all of which were denied.[133] The Court reviews those rulings *de novo*,

[131] ROA.22477-83; ROA.17328.

[132] ROA.1804; ROA.4855; ROA.17328.

[133] ROA.5291-94; ROA.5334-38; ROA.5730-34; ROA.5782.

under the *Boeing* standard, meaning it "consider[s] the entire trial record in the light most favorable to [MM], drawing reasonable inferences in its favor." *Fluorine on Call, Ltd. v. Fluorogas Ltd.*, 380 F.3d 849, 855 (5th Cir. 2004).

Post-trial, JSW filed a motion for new trial,[134] which was also denied.[135] The appellate standard of review for a ruling on a motion for new trial depends on the nature of the question. This Court "[will] normally reverse . . . only for an abuse of discretion. However, when the district court's ruling is predicated on its view of a question of law, it is subject to *de novo* review." *Munn v. Algee*, 924 F.2d 568, 575 (5th Cir. 1991).

B. MM's damages model was sheer speculation and unbridled optimism devoid of legitimate grounding.

Magee's expert opinions should have been excluded from the jury. MM was a start-up company with no established history of profitability that began business four months after the steel business took a downturn due to the influx of imports.[136] Almost from its inception, MM was subject to severe restrictions on sales—stemming from Reliance/Chapel's suit against Schultz and Hume alleging theft of

[134] ROA.7108-26.

[135] ROA.7382.

[136] ROA.17489-91.

trade secrets and other confidential customer information and documents.[137] Magee ignored these indisputable facts and instead piled assumption on assumption to arrive at his so-called "conservative" lost-profits damages model for the start-up company of $52 million and his "most reasonable damage number" of $67 million.[138] The jury apparently chose Magee's "conservative" number,[139] but neither is supported by the record.

1. Magee improperly applied a yardstick model for antitrust damages.

Magee used a yardstick damages model,[140] which is supposed to be "a study of the profits of business operations that are closely comparable to the plaintiff's." *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n, Inc.*, 213 F.3d 198, 207 n.17 (5th Cir. 2000). A yardstick model is a reliable method for calculating lost profits ***only*** if the benchmark (or yardstick) is sufficiently comparable that it may be used as an accurate predictor of what business the plaintiff would have done. *Id.* at 207. In a yardstick model, "the business used as a standard must be ***as nearly identical to the plaintiff's as possible***." *Id.* at n.17 (emphasis added). A yardstick model is properly

[137] ROA.16710-12; ROA.18610-11.

[138] ROA.17365-66.

[139] ROA.5588.

[140] ROA.17361-62.

excluded whenever these comparability requirements are not met, or the expert "made no effort to demonstrate the reasonable similarity of the plaintiffs' firms and the businesses whose earnings data he relied on for a benchmark." *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 F. App'x 450, 453 (5th Cir. 2005); *see also Eleven Line*, 213 F.3d at 208-09.

Here, Magee effectively created his own yardstick by ignoring market conditions during the period of the alleged conspiracy and failing to take into account compelling differences between Chapel and MM, a start-up venture comprised of two individuals and relatively limited capital. Ignoring these critical distinctions, Magee evidenced an unshakable, but wholly unjustifiable, assumption that MM could not fail.

Magee's lost-profits analysis should have been excluded under *Daubert* because

(a) the model relies upon an insufficiently comparable yardstick—one branch of a nationwide company during a completely different time period than the alleged conspiracy period;

(b) it ignores real-world data for the performance of the market during the alleged damage period;

(c) it requires an unsupported assumption as to gross-profit margin—assuming a gross-profit margin that ***no*** other company achieved during the alleged damage period; and

(d) it fails to account for alternative causes of MM's lost sales due to the influx of foreign imports and MM's financial and legal impediments as a start-up subject to an injunction for its principals' misconduct.

a. Chapel-Houston is not a valid comparator.

Magee used Chapel's Houston office in an earlier time period as his yardstick.[141] He chose that office because Schultz and Hume had opened it in 1999 and led the office until they formed MM in September 2011.[142] Magee concluded that Schultz's and Hume's 12-year history at Chapel's Houston office was an ideal comparator because both Chapel-Houston and MM had the same management, market, home city, geographic territory, business model, and products.[143] Magee assumed that MM would have the same customer base as Chapel-Houston.[144]

Magee's analysis relied upon artificially isolating a branch of a nationwide firm (Chapel, which was acquired by an even larger national company, Reliance, in 2005). He recognized that Reliance/Chapel itself was not an appropriate comparator.[145] And it is not. Reliance/Chapel is an established, national steel

[141] ROA.17362-63; ROA.17373-74; ROA.17443-44.

[142] ROA.17355.

[143] ROA.17378-79.

[144] ROA.17477-78.

[145] ROA.17439.

distributor with a corporate office and significant financial backing and purchasing power.[146] When Chapel opened its Houston branch in 1999, Chapel was a national company with existing sales and credit relationships with mills in the Houston area and was able to hire 23 employees.[147] Chapel also bought several million dollars of assets from an existing Houston distribution with 10,000 tons of inventory and a large warehouse and equipment.[148] Chapel had significant buying power with the mills, especially after it became part of Reliance, the largest steel service center in the country with significant resources and buying power.[149] Chapel and its parent Reliance buy over a million tons of steel per year.[150] Chapel also sold product internationally, at a higher margin than domestic sales.[151]

MM, by contrast, was a start-up selling out of a small, rented office with four employees and only $1.1 million of inventory and working capital.[152] Despite these huge differences between Chapel's Houston branch and MM, Magee used Chapel's

[146] ROA.16731-33; ROA.17444-48.

[147] ROA.14669-70; ROA.16728-29; ROA.17380; ROA.17445-47.

[148] ROA.14669-71; ROA.16725-29; ROA.16728; ROA.17444-48.

[149] ROA.14423; ROA.17451-52.

[150] ROA.16725-26; ROA.17751-52; ROA.17767.

[151] ROA.14668-69; ROA.17462.

[152] ROA.14666-71; ROA.16727-30; ROA.16883-84; ROA.17503-04.

Houston branch as a yardstick with no adjustments to calculate lost profits for MM.[153]

Magee admitted that each of the differences listed above led to a competitive advantage for Chapel over a small start-up such as MM.[154] Magee admitted that "a larger company would certainly be a somewhat safer bet."[155] He agreed that the financial backing of a large company was important during the start-up period because a company without this financial backing may not be able to survive.[156] MM's Hume confirmed that "[m]anaging inventory when you're new is tough, ***not to mention we don't have funds like we did at Chapel***."[157] Even MM's own industry expert acknowledged that "[i]t is tough as a start-up" and "presumably, the bigger you are, the better the deal you get in terms of price or payment terms."[158] Both mills and service centers, including third parties to this case, confirmed the realities of buying power.[159] Yet no adjustments were made.

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[153] ROA.17499.

[154] ROA.17444-48; ROA.17496-99.

[155] ROA.17494-95; ROA.17499.

[156] ROA.17445.

[157] DX307 (RE.15) (emphasis added).

[158] ROA.14602-03; ROA.14622.

[159] ROA.14927-28; ROA.15372-73; ROA.15750-51; ROA.18266-67.

In reversing the district court's admission of a yardstick-damage model in *Eleven Line*, this Court stated that "[t]o apply those arenas' average rates of return indiscriminately to [plaintiff] is like arguing that because McDonald's franchises earn a certain average rate of return, a particular franchise will perform to the average. Neither the yardstick arenas' rates of return nor their average was shown to be as nearly identical to [plaintiff] as possible." 213 F.3d at 208-09 (internal quotations omitted); *see also El Aguila*, 131 F. App'x at 454; *MyGallons LLC v. U.S. Bancorp*, 521 F. App'x 297, 307 (4th Cir. 2013) (finding abuse of discretion in admitting expert testimony lacking comparability in the companies used and consideration of plaintiff's "resources, financing, or experience necessary for such growth or, indeed, even as necessary to carry out its own business plan"). Magee's yardstick-damage model amounts to the same type of improper, incompetent, and inadmissible speculation and guesswork.

b. Magee used the wrong time period.

Instead of analyzing the period of the alleged conspiracy, Magee used an earlier time period of 2011–11—a period encompassing some of the best years for the steel business before the economic downturn (though he did exclude 2004 as an extraordinary year).[160] Using this model, he predicted that MM would have

[160] ROA.17354-55; ROA.17425-26; ROA.17376; ROA.17385-86; ROA.17481.

performed ***better than any other participant in the market*** during the period starting in September 2011, including the allegedly comparable Chapel branch on which he based the model.[161]

Magee's chosen time period was inappropriate. The comparable Magee used for the damage model was nine of ten years during the period 2001–11—before MM came into existence—rather than the actual time period the alleged conspiracy is said to have existed.[162] Magee admitted that the steel plate market for years 2011, 2012, and 2013 was "a weak—relatively weak market."[163] He also admitted that between 2011 and 2013, "the fact the market is going down was not positive for [a] start-up" and that imported steel was surging, further driving down prices.[164] In fact, Magee conducted no economic analysis at all of the market during this period and did not adjust the damage model to reflect actual market conditions.[165]

Magee's deliberate avoidance of actual data from 2011 forward dooms his model. "[D]amages must have a reasonable and fair relationship to the type, extent, ***and period*** of the restraint applied." *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d

[161] ROA.17456-57; ROA.17487-88; ROA.17492-94; ROA19624.

[162] ROA.17354-56; ROA.17385-86; ROA.17425-26; ROA.17458-60.

[163] ROA.17481.

[164] ROA.17489-91.

[165] ROA.17487-88.

709, 715 (9th Cir. 1959) (emphasis added). MM's damages claims—and therefore its damage model—must be assessed in the time frame that MM came into existence and the conspiracy is alleged to have occurred.

Further, Magee ignored the performance of other market participants during the alleged conspiracy period, including the alleged yardstick, Chapel's Houston branch.[166] During the relevant time after September 1, 2011, ***no company*** in the steel-distribution business achieved anywhere near the 18.19% gross margin that was used in MM's damage analysis—as Magee conceded.[167] Most were below even 13%.[168]

These undisputed facts should have played a vital role in Magee's analysis. His refusal to consider this available, real-world data further dooms his conclusions. *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000) (rejecting an economic model that constructed a hypothetical market that was not grounded in economic reality, ignored inconvenient evidence, failed to account for market trends unrelated to anticompetitive conduct, and did not incorporate all

[166] ROA.17452-58; ROA.17487-88; ROA.17492-94.

[167] ROA.17454-57; ROA.17487 ("Q. You didn't change – adjust the gross margins that actually occurred in this 30 percent declining market from the 18.19 percent gross margins that you projected for your damage calculation? A. Correct. . . ."); ROA.17492-94; ROA19624.

[168] ROA.17457; ROA.17492-94.

aspects of the economic reality of the market); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1068 n.23 (5th Cir. 1985).

c. Magee assumed a gross-profit margin that, indisputably, no company achieved during the alleged damage period.

Magee's model is based on an unvarying hypothetical gross-profit margin of 18.19%[169] He assumed a hypothetical initial inventory amount of $2.7 million, and then calculated how much steel could have been sold at an unvarying hypothetical inventory turn rate of 8.9 turns per year.[170] He subtracted certain expenses from those profits and then effectively reinvested the retained earnings in new inventory for the next year.[171] He repeated this process without variation across ten years, assuming that MM would sell all the steel shown in the model subject to an annual growth cap of 23% for the first five years and then 3% per year afterwards.[172]

None of Magee's assumptions is based on the performance of any steel company during the time of the alleged conspiracy. As Magee explained:

[169] ROA.17454-55; ROA.17484.

[170] ROA.17410-13.

[171] ROA.17442-43.

[172] ROA.17442.

> Q: And you're not aware of any company in the service center business that was achieving margins that high in these years--2011 after September, through 2012, through 2013?
>
> A: No, sir.[173]

Magee based the hypothetical gross-profit margin in his damage model solely on the performance of Chapel's Houston branch for an earlier time period of 2001-11, when the steel business was at record levels and during which the Houston branch was part of two national firms with hundreds of millions in capital and hundreds of employees around the country. *See* part III.B1.a.&b., *supra*. And, despite these advantages, the Houston branch of Chapel still lost money for most of its first year.[174]

d. Magee failed to account for alternative causes of MM's lost sales

Magee's assumptions also fail to consider the severe customer restrictions placed on MM by the temporary restraining order and agreed injunction, and the effects on the industry due to the influx of foreign steel.[175] MM was prevented from selling to 200 of its principals' former top 250 customers at Chapel/Reliance for half of MM's start-up year—not by any alleged conspiracy, but by a state-court TRO and

[173] ROA.17456-57; ROA.17490-91.

[174] ROA.17445.

[175] ROA.16710-12; ROA.17353; ROA.17421; ROA.17449-50; ROA.17490-91.

later an agreed injunction.[176] In the words of MM's principals, these restrictions "shut down" MM for its first six months of operation.[177] Magee completely disregarded these facts,[178] just as he ignored the depressed market conditions when MM started up operations.[179]

These failures to account adequately for alternative causes of lost sales further sully Magee's conclusions. *See El Aguila*, 131 F. App'x at 454 (affirming exclusion of expert who "failed adequately to account for alternative causes" of plaintiffs' alleged injury); *see also, e.g.*, *MyGallons*, 521 F. App'x at 307 (in reversing district court's admission of expert evidence, noting that the expert "did not consider the real circumstances that could cause [plaintiff's] business plan to fail," including not taking "into account the viability of [plaintiff's] plan *if gas prices dropped*, a puzzling omission given the fact that gas prices actually fell in the months after [plaintiff] announced its business plan."); *Craftsmen Limousine*, 363 F.3d at 777 (trial court abused its discretion in admitting expert testimony who did not determine whether other factors were responsible for plaintiff's alleged lost growth).

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[176] DX257; ROA.16710-12; ROA.16717-18.

[177] ROA.16721-23; ROA.16831-32; ROA.16905; ROA.16910; ROA.16994; ROA.17093; ROA.17162-63; ROA.17174; ROA.17195; DX239 (RE.14).

[178] ROA.17383; ROA.17421-22.

[179] ROA.17481-88.

2. Magee's collective errors invalidated his opinions, which was MM's only antitrust-damages evidence.

This Court has rejected damage analyses as "speculative or purely conjectural" whenever their assumptions are "so abusive of the known facts, and so removed from any area of demonstrated expertise, as to provide no reasonable basis for calculating [damages]." *In re Air Crash Disaster at New Orleans*, 795 F.2d 1230, 1233-35 (5th Cir. 1986) (finding assumed salary increase to be "unsupported by the record and completely incredible" and loss of inheritance damages to be "premised…on assumptions without basis in the real world"); *see also Eleven Line*, 213 F.3d at 209 (rejecting damages analysis that was contradicted by evidence of plaintiff's consistently negative cash flows).

Because of the many errors in MM's yardstick analysis, MM's damage-model evidence should have been excluded. The same fatal deficiencies with MM's sole damages proof require that judgment should be rendered for JSW on the antitrust claim—or alternatively remanded.

IV. The alternative award of $2 million for breach of contract should be reversed.

The jury also found a breach of contract for which it awarded damages of $2 million.[180] MM elected to recover on the antitrust claim.[181] MM's alternative breach-of-contract claim is equally flawed.

A. Standard of review.

JSW raised several challenges to the contract claim in its motions for judgment as a matter of law, all of which were denied.[182] The Court reviews those rulings *de novo*, meaning it "consider[s] the entire trial record in the light most favorable to [MM], drawing reasonable inferences in its favor." *Fluorine on Call*, 380 F.3d at 855.

B. There is no enforceable agreement.

The parties really just had an agreement to agree.[183] The Agreement neither committed MM to purchase steel from JSW, nor committed JSW to supply it. Instead, it set out the general terms for purchases expressly conditioned on if and

[180] ROA.5589-90.

[181] ROA.5596.

[182] ROA.5300-11; ROA.5740-51; ROA.5337; ROA.5782.

[183] PX127; ROA.24175-77.

when the parties agreed to the essential terms, including price, quantity, and method of delivery.

1. The Agreement itself set out only a framework for future agreements.

In particular, the Agreement provides that:

- "MM Steel agrees to ***attempt to buy, or caused [sic] to be bought***, a minimum of 500 tons per month average ***at a price as agreed upon by both parties*** . . ."
- JSW agrees to supply this quantity "***subject to availability, terms hereof and other customary and reasonable terms*** that do not conflict with this Agreement"
- "MM Steel is ***only obligated to buy if both parties agree on pricing***"
- "The ***price*** for the steel plate ***will be agreed [upon] by the parties at the time of order placement***"[184]

The Agreement also provides that MM was to pay within 45 days from the date of shipment and obtain an irrevocable standby letter of credit.[185]

2. The Agreement lacks essential terms.

The "essential terms" for a steel purchase are nowhere found in the Agreement. For example, the Agreement contains neither price terms nor a method or formula for determining price. The Agreement does not contain specific quantities of steel

[184] PX127 ¶¶ 1, 2; ROA.24175 (emphasis added).

[185] PX127 ¶ 2; ROA.24175.

for purchase. It is merely an agreement to agree that, as JSW's President and CEO, Michael Fitch, testified, still required the purchase-order process.[186] Nor are its terms sufficiently definite to afford a "reasonably certain basis for giving an appropriate remedy" for nonperformance. TEX. BUS. & COM. CODE ANN. § 2.204(c). Any one of these bases causes the Agreement to fail to provide a legally sufficient basis for a breach-of-contract claim against JSW.

a. The parties intended there would be no obligation absent an agreement on price.

The omission of price terms is no accident. The Agreement could not have set any prices, considering the way that steel is purchased. JSW does not have any set pricelist for the steel that MM anticipated purchasing. Instead, "[p]rice is generally determined by the marketplace. It's what the market will bear based on the cost of steel, the cost of steel scrap, iron, ore, coke, coking coal, metallurgical coal, the availability in the marketplace, the unique characteristics of the steel."[187]

Sales are typically made through a well-defined process. The customer first sends a request for a quote, detailing the manufactured product it needs, and JSW prepares a quotation "based on the steel grade they want, the size of the plate they want, th[e] width, thickness, length and so on, any particular testing that or unique

[186] ROA.18590.

[187] ROA.18589.

testing that they require for certification of the . . . steel, [and] . . . the mode of transportation.[188]

The customer can then accept the quote or may negotiate further on price, delivery, or any other factor included in the quote.[189] Once the customer approves the original or revised, it issues a purchase order.[190] If the purchase order matches the quote, the mill issues an order of acceptance and begins the manufacturing process.[191] Consistent with usual contract law, as MM's Schultz confirmed, it is only at that point—when the order of acceptance is sent back—that the parties "have a deal."[192] That is also the point at which the mill becomes obligated to manufacture the steel, and the purchaser becomes obligated to pay for it.[193]

JSW uses this quote process with all customers—regardless of whether there is a supply or other type of agreement.[194] Quotes are often rejected on price terms, and

[188] ROA.18587.

[189] ROA.18587-88.

[190] ROA.18588.

[191] ROA.18588.

[192] ROA.16929-30.

[193] ROA.16930.

[194] ROA.18593-94.

negotiations "[q]uite frequently" fail; as a result, perhaps only 20% of quotes actually result in purchase orders.[195]

Following this process, Schultz and Hume submitted a series of purchase orders on August 2, 2011, while they were still at Chapel, for approximately 1,000 tons of steel for $1.07 million.[196] Each purchase order included the essential terms and details necessary to consummate a purchase—quantity, grade, thickness, width, weight, delivery terms, etc.[197] JSW confirmed the terms of the purchase orders, and once MM posted the letter of credit, issued orders of acceptance,[198] and began manufacturing the steel.[199] The purchase orders (and offers of acceptance) illuminate what the Agreement itself lacks—price terms, quantities, grades, delivery terms, and the like.

The Agreement is covered by the Texas Uniform Commercial Code, TEX. BUS. & COM. CODE ANN. § 1.101, *et seq.* ("Texas UCC"), because it involves the sale of goods. *See id.* §§ 2.102, 2.105(a). "Where . . . the parties intend not to be bound

[195] ROA.18588-89.

[196] ROA.18590-91; DX674 (RE.16).

[197] DX674 at 1.

[198] DX675 (RE.15); ROA.24225-33.

[199] ROA.18597-98.

unless the price be fixed or agreed and it is not fixed or agreed there is no contract." *Id.* § 2.305(d).

That is precisely the case here: Both parties agreed that they did ***not*** intend to be bound to a purchase until the price was agreed, and a purchase order and acceptance were exchanged by the parties.[200] Their understanding is consistent with the plain language of the Agreement, which expressly and repeatedly states that there is no obligation to purchase absent an agreement on price.[201] As a result, the court should have construed the contract as a matter of law in accordance with the parties' intent as expressed in the document. *See Anglo–Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 451 (Tex. 2011) ("An unambiguous contract will be enforced as written . . . ."); *HECI Exploration Co. v. Neel*, 982 S.W.2d 881, 888 (Tex. 1998) ("Our decisions have repeatedly emphasized that courts 'cannot make contracts for [the] parties.'").

Doing so requires judgment for JSW on the contract claim, because there is no legally binding contract. *See* TEX. BUS. & COM. CODE ANN. § 2.305(d); *accord In re Glover Constr. Co.*, 49 B.R. 581, 583 (Bankr. W.D. Ky. 1985) (applying UCC § 2-305 and finding that the parties "clearly intended not to be bound to the terms of the purchase order unless their interpretation of the price term was accepted by the

[200] ROA.16929-30; ROA.18590.

[201] *E.g.*, PX127 ¶¶ 1, 2; ROA.24175.

opposing party"); *United Foods, Inc. v. Hadley-Peoples Mfg. Co.*, No. 02A01-9305-CH-00111, 1994 WL 228773, at *6 (Tenn. Ct. App. May 20, 1994) (applying UCC § 2-305 and finding no contract because "the evidence . . . establishes that the parties did not intend to be bound unless their price was accepted by the other party"); *see also W.J. Schafer Assocs., Inc. v. Cordant, Inc.*, 493 S.E.2d 512, 515 (Va. 1997); *Billings Cottonseed, Inc. v. Albany Oil Mill, Inc.*, 328 S.E.2d 426, 428, 430 (Ga. Ct. App. 1985).

b. No quantities are specified.

Second, the Agreement lacks any specification of quantity. For this reason, too, it is not enforceable. *See* TEX. BUS. & COM. CODE ANN. § 2.201(a) ("A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.").

The only discussion of quantity in the Agreement is in connection with MM's promise to "attempt to buy, or cause[] to be bought, a minimum of 500 tons per month average at a price agreed upon by both parties."[202] Schultz confirmed his understanding that MM's obligation was an ***aspirational*** "average" that MM would

[202] PX127 ¶ 1; ROA.24175.

to "attempt to place."[203] And in the last sentence of that same paragraph, the parties reiterate that "MM is only obligated to buy [any quantity of steel] if both parties agree on pricing."[204]

c. The terms are not sufficiently definite to allow for a remedy.

"Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." TEX. BUS. & COM. CODE ANN. § 2.204(c). At best, the Agreement set a framework for future purchase orders, but it did not commit JSW to manufacture unspecified quantities of undetermined grades at an unknowable price. The infirmities in MM's contract-damages model, *see* part C, below, show there was no "reasonably certain basis" for "an appropriate remedy" because the parties never negotiated, much less agreed, on any orders after August 20, 2011.[205] Consequently, the jury could only speculate as to what quantities would be purchased by MM at what prices and what delivery and other terms would apply, which is impermissible under Texas law. *See Realpage, Inc. v. EPS, Inc.*, 560

[203] ROA.16930-31.

[204] PX127 ¶ 1; ROA.24175 (emphasis added).

[205] ROA.18621; ROA.16937.

F. Supp. 2d 539, 546-47 (E.D. Tex. 2007) (contract must have basis for determining future sales).

Thus, the Agreement is unenforceable. The judgment based on MM's contract theory should be reversed.

C. Alternatively, there is no proof of contract damages.

MM sought to recover the net profits that it claims it would have earned from selling the steel that it would have bought from JSW had JSW not terminated the Agreement.[206] Under Texas law, damages must be proved with reasonable certainty and cannot be speculative or hypothetical. *See, e.g.*, *Houston Unlimited, Inc. Metal Processing v. Mel Acres Ranch*, No. 13-0084, 2014 WL 4116810, at *5 (Tex. Aug. 22, 2014); *Tex. Instruments, Inc. v. Teletron Energy Mgmt., Inc.*, 877 S.W.2d 276, 278-81 (Tex. 1994).

The jury's $2 million contract-damages finding in answer to Question No. 10, exemplifies the hypothetical, contingent, and speculative recoveries that Texas courts have repeatedly rejected. The Agreement provided no set quantity and no

[206] ROA.5590 ("The net profits that MM Steel would have earned from selling steel that it would have bought from JSW from October 20, 2011 through August 1, 2012.").

price for steel purchases, as Schultz admitted.[207] Although MM hoped to purchase "on average" 500 tons a month from JSW, the Agreement did not bind it to do so.[208]

The parties' intent that there be no purchase obligation of any sort absent an agreement on price means that there is no basis for extrapolating profits.[209] And, as explained more in part III.A, above, MM was a brand-new company with no history of profits from which to draw legitimate conclusions about future profits.

As a result, MM's expert, Stephen Magee, had to pile assumption on top of assumption to hypothecate:

> Okay. I can recall where – it's over 2 million, 2.5 or so million, and I always round these down to the nearest million. And so, in my opinion, the damages for that breach of contract, if the jury so determines, would be $2 million.[210]

Among his invalid and highly speculative assumptions, Magee assumed that MM would purchase 60% of its steel requirements from JSW[211]—even though MM's principals admitted that they "weren't going to just sole-source. We were going to buy from all domestic mills."[212] And Magee made this 60% assumption

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[207] ROA.16929-31.

[208] PX127 ¶ 1; ROA.24175; ROA.16930-31; ROA.19292-93.

[209] ROA.19292-93

[210] ROA.17429.

[211] ROA.19593-94.

[212] ROA.16944.

regardless of whether JSW's prices were competitive or even reasonable. This is the kind of wild conjecture that is no evidence of lost profits under Texas law. *See, e.g.*, *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 50 (Tex. 1998) (expert's assumptions derived from hypothetical bid process was not probative of lost profits and so was not evidence of damages).

Further, MM could at most recover damages for the 60-day period following termination on October 20, 2011.[213] Magee offered no opinion about profits MM supposedly suffered during this 60-day period. Accordingly, MM's contract claim against JSW also fails on this basis.

V. The awards for treble damages, attorneys' fees, interest, and costs should likewise be vacated.

When MM's antitrust and contract claims against JSW are reversed, the awards of treble damages, attorneys' fees, and interest should also be set aside. *See* 15 U.S.C. § 15(a); *see also* TEX. CIV. PRAC. & REM. CODE. ANN. § 38.001.

CONCLUSION

JSW asks this Court to reverse the judgment and either render a take-nothing judgment in its favor or remand for a new trial. The Court should then vacate or

[213] PX127, ¶ 4; ROA.24176; ROA.18614-18.

modify the dependent awards of treble damages, attorneys' fees, interest, and costs. JSW asks also for all other relief to which it is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that a copy of the foregoing document was filed with the Court's electronic case filing (ECF) System on November 20, 2014, which caused an electronic copy of this document to be served on the following counsel of record who have appeared in this matter:

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