IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MM STEEL, LP,	§	
	§	
Plaintiff,	§	
	§	
	§	
RELIANCE STEEL & ALUMINUM CO., CHAPEL STEEL CORP., AMERICAN ALLOY STEEL, INC., ARTHUR J. MOORE, JSW STEEL (USA) INC., NUCOR CORP. & SSAB ENTERPRISES, LLC D/B/A SSAB AMERICAS,	§	Civil Action No. 4:12-cv-01227
	§	
	§	
Defendants.	§	Jury Demanded

PLAINTIFF MM STEEL'S COMBINED RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS

MO TAHERZADEH
TAHERZADEH LAW FIRM
Texas Bar No. 24028022
Federal Bar No. 29596
1001 West Loop South, Suite 700
Houston, Texas 77027
Telephone: (713) 360-6055
Facsimile: (713) 626-7113
ATTORNEY-IN-CHARGE FOR PLAINTIFF

OF COUNSEL:
R. TATE YOUNG
TATE YOUNG LAW FIRM
Texas Bar No. 22207100
Federal Bar No. 4808
1001 West Loop South, Suite 700
Houston, Texas 77027
Telephone: (713) 626-7112
Facsimile: (713) 626-7113

July 20, 2012

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS …………………………………………………………….…..…….II

INDEX OF AUTHORITIES ……………………………………………..…………...…...IV

NATURE AND STAGE OF THE PROCEEDINGS ……………………………………....1

SUMMARY OF THE ARGUMENT …………………………...……………………………..2

STATEMENT OF THE FACTS ………………………………………………………...….8

STATEMENT OF THE ISSUES ………..………………………………………………..….17

ARGUMENT ……………………………………………………………………………...….18

I. The Complaint States a Claim Under Section 1 of the Sherman Act ………….. 19

A. The Complaint Directly Alleges that Defendants Conspired…………....20

B. Defendants Improperly Attempt to Offer "Innocuous Interpretations"….21

C. The Complaint's Well-Pleaded Factual Allegations Implicate Each Defendant Individually…………………………………………….23

II. MM Steel Has Alleged a Group Boycott in Violation of Section 1………...…...26

A. A Brief History of the Per Se Rule in Group Boycott Cases ………...….27

1. What is the Per Se Rule?...28

2. *Fashion Originator's* and *Klor's* Solidify the Per Se Rule for Group Boycotts ………………………………...…...29

3. The Current State of the Per Se Rule…………………………….30

a. This Case Does Not Involve a Regulatory Boycott…..….31

b. Defendants Executed a "Classic" Group Boycott—Subject to the Per Se Rule ……......……...…...32

4. *Klor's*, *Fashion Originators'*, and Similar Group Boycott Cases Have Not Been **Secretly** Overruled 32

B. This Case Does Not Involve a "Vertical Restraint" 33

1. *Business Electronics* Bars Defendants' "Vertical Restraint" Label....33

2. There is No Hybrid Rule in Classic Group Boycott Cases 34

3. The Ancillary Restraint Doctrine Also Bars Defendants' "Vertical Restraint" Argument 37

C. Defendants Erroneously Engraft Onto the Per Se Rule a Categorical "Market Power" Element 37

D. Group Boycott Law Presumes Antitrust Injury 39

III. The State Law Claims are Sufficiently Alleged.................................40

A. JSW's Contract is Subject to the UCC's "Open Price Term" Provision 40

B. The Complaint Sufficiently Alleges the Elements of Plaintiff's Tortious Interference Claims 41

1. Defendants Interfered with MM Steel's JSW Contract 42

2. Defendants Interfered with MM Steel's North Shore Contract 43

C. Defendants' Remaining Arguments Miss the Point 45

PRAYER FOR RELIEF 46

CERTIFICATE OF SERVICE 47

APPENDIX

IDENTITY OF RELEVANT PERSONS AND ENTITIES ....Tab 1

Tracbeam, LLC v. AT & T Inc....Tab 2

In re Electronic Publishers..Tab 3

TEXAS PATTERN JURY CHARGES ....Tab 4

INDEX OF AUTHORITIES

Cases: **Pages:**

Agostini v. Felton,
521 U.S. 203 (1997) 28

Anderson News, L.L.C. v. American Media, Inc. et al.,
680 F.3d 162 (2d Cir. April 3, 2012) 5, 18, 22, 24

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 17, 23, 24

Bell Atl. Corp. v. Twombly,
550 U.S 544 (2007) 3, 5, 17, 18, 23, 26

Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.,
441 U.S. 1 (1979) 31

Business Elecs. Corp. v. Sharp Elecs. Corp.,
485 U.S. 717 (1988) 6, 33, 34, 35

Butnaru v. Ford Motor Co.,
84 S.W.3d 198, 207 (Tex. 2002) 42

California Dental Ass'n v. Federal Trade Comm'n,
526 U.S. 759 (1999) 26, 31

Carroll v. Timmers Chevrolet, Inc.,
592 S.W.2d 922 (Tex. 1979) 40

CF & I Steel Corp. v. Pete Sublett & Co.,
623 S.W.2d 709 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) 43

Chavers v. Morrow,
2010 WL 34447687 (S.D. Tex. Aug. 30, 2010) ……….4

Eastman Kodak Co. v. Image Technical Servs., Inc.,
504 U.S. 451 (1992) 28

Exxon Corp. v. Allsup,
808 S.W.2d 648 (Tex. App.—Corpus Christi 1991, writ denied) 41

Fashion Originator's Guild of America v. Federal Trade Comm'n,
312 U.S. 457 (1941) 5, 6, 18, 28, 29, 30, 32, 33, 36

Federal Trade Comm'n v. Indiana Fed'n of Dentists,
476 U.S. 447 (1986) 39

Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n,
493 U.S. 411 (1990) 38

Fields & Co., Inc. v. United States Steel Int'l, Inc.,
426 Fed. Appx. 271 (5th Cir. 2011) 41

Fort Worth Indep. Sch. Dist. v. City of Fort Worth,
22 S.W.3d 831 (Tex. 2000) 40

Goss v. Memorial Hosp. Sys.,
789 F.2d 353 (5th Cir. 1986) 39

Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.,
480 S.W.2d 607 (Tex. 1972) 44

H&B Equip. Co. v. International Harvester Co.,
577 F.2d 239 (5th Cir. 1978) 6, 34

Holloway v. Skinner,
898 S.W.2d 793 (Tex. 1995) 42

Hurlbut v. Gulf Atl. Life Ins.,
749 S.W.2d 762 (Tex. 1987) 46

In re Electronic Books Antitrust Litig.,
2012 U.S. Dist. LEXIS 68058 (S.D.N.Y. May 15, 2012) 5

In re Potash Antitrust Litig.,
667 F. Supp. 2d 907 (N.D. Ill. 2009) 24

In re Retail Freight Fuel Surcharge Antitrust Litig.¸
587 F. Supp. 2d 27 (D.D.C. 2008) 18

In re Text Messaging Antitrust Litig.,
630 F.3d 622 (7th Cir. 2010) 4

Juliette Fowler Homes, Inc. v. Welch Assocs.,
793 S.W.2d 660 (Tex. 1990) 43

Kadco Contract Design Corp. v. Down Chem. Corp.,
198 F.3d 214, 1999 WL 824530 (5th Cir. 1999) 45

Khan v. State Oil Co.,
93 F.3d 1358 (7th Cir. 1996) 28

Klor's, Inc. v. Broadway-Hale Stores, Inc.,
359 U.S. 207 (1959) 1, 5, 6, 18, 28, 29, 30, 31, 32, 33, 36, 39

Leegin Creative Leather Prods., Inc. v. PSKS, Inc.,
551 U.S. 877 (2007) 35, 36

L.G. Motorsports, Inc. v. NGMCO, Inc.,
2010 U.S. Dist. LEXIS 91895 (E.D. Tex. Mar. 6, 2012) 43

Mathis v. Exxon Corp.,
302 F.3d 448 (5th Cir. 2002) 41

NCAA v. Board of Regents of University of Oklahoma,
468 U.S. 85 (1984) 31

Northern Pac. Ry. Co. v. United States,
356 U.S. 1 (1958) 28

North Texas Specialty Physicians v. Federal Trade Comm'n,
528 F. 3d 346 (5th Cir. 2008) 26

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,
472 U.S. 284 (1985) 7, 28, 31, 32, 33, 38, 39

Nynex Corp. v. Discon, Inc.,
525 U.S. 128 (1998) 6, 27, 33, 36

Panama-Williams, Inc. v. Lipsey,
576 S.W.2d 426 (Tex. Civ. App.—Houston 1978, writ ref'd n.r.e) 43

Perry Motors v. Chrysler Corp.,
13 F. Supp. 845 (N.D. Tex. 1936) 42

Rothery Storage & Van Co. v. Atlas Van Lines, Inc.,
792 F.2d 210 (D.C. Cir. 1986) 37

Specialties of Mexico, Inc. v. Masterfoods, U.S.A.,
2010 WL 2488031 (S.D. Tex. June 14, 2010) 44

Spectators' Comm'n Network Inc. v. Colonial Country Club,
253 F.3d 215 (5th Cir. 2001) 36

Standard Iron Works v. ArcelorMittal et al.,
639 F. Supp. 2d 877 (N.D. Ill. 2009) 5, 17, 25

Starr v. Sony BMG Music Entm't,
592 F.3d 314 (2d Cir. 2010) 26

Suprise v. DeKock,
84 S.W.3d 378 (Tex. App.—Corpus Christi 2002, no pet.) 45

Tellabs, Inc. v. Makor Issues & Rights, Ltd., ...17
551 U.S. 308 (2007)

Toledo Mack Sales & Serv. Inc. v. Mack Trucks, Inc.,
530 F.3d 204 (3d Cir. 2008) 4, 21, 22, 35, 36

Toys "R" Us, Inc. v. Federal Trade Comm'n,
221 F.3d 928 (7th Cir. 2000) 30, 36, 39

Tracbeam, LLC v. AT&T Inc. et al.,
2012 U.S. Dist. LEXIS 76310 (E.D. Tex. March 27, 2012) 4

Trianco, LLC v. International Bus. Machs. Corp.,
271 Fed. Appx. 198 (3d Cir. 2008) 40

Tunica Web Adver. v. Tunica Casino Operators Ass'n,
496 F.3d 403 (5th Cir. 2007)....................1, 4, 7, 20, 22, 37, 38, 40

United States v. General Motors Corp.,
384 U.S. 127 (1966) 30, 34

United States v. Topco Assocs.,
405 U.S. 596 (1972) 8

Verizon Commc'ns, Inc. v. Trinko,
540 U.S. 398 (2004) 34

West Penn Allegheny Health Sys. v. UPMC,
627 F.3d 85 (3d Cir. 2010) 2

Statutes:

15 U.S.C. § 1 1

15 U.S.C. § 15(a) 39

TEX. BUS. & COM. CODE § 2.305 ....7, 41

Plaintiff MM Steel, LP (MM Steel) respectfully files this Combined Response to Defendants' five separate Motions to Dismiss for Failure to State a Claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff[1] filed its Complaint on April 19, 2012, alleging an illegal group boycott by Defendants in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and four state law claims.[2] On June 8, 2012, Defendants filed their respective Motions to Dismiss, which are grouped as follows:

1. Reliance Steel & Aluminum Co. & Chapel Steel Corp. (Reliance/Chapel) 2. American Alloy, Inc. & Arthur J. Moore (American Alloy)	**Metals Service Center Defendants**
3. JSW Steel (USA) Inc. (JSW) 4. Nucor Corp. (Nucor) 5. SSAB Enterprises, LLC d/b/a SSA Americas (SSAB)	**Steel Mill Defendants**

1 For the convenience of the Court, Tab 1 of the Appendix to this Response is a chart identifying the persons and entities mentioned in this Response.

2 Section 1 of the Sherman Act prohibits "[e]very contract, combination … or conspiracy[] in restraint of trade …." 15 U.S.C. § 1. "Group boycotts, or concerted refusals by traders to deal with other traders, have long held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances …." *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 213 (1959) (stating that the group boycott involved a conspiracy among "manufacturers, distributors and a retailer"); *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 412 (5th Cir. 2007) ("Some types of agreements have, however, been found to be almost inherently anticompetitive. Such agreements can be considered *per se* violations of *section 1*, meaning that the law does not require a plaintiff to provide the usual proof that the agreement at issue is actually anticompetitive in the particular case."). Plaintiff's state law claims are (1) breach of contract against JSW, tortious interference with (2) existing and (3) prospective contracts, and (4) business disparagement. The Complaint also alleges a civil conspiracy involving all Defendants.

SUMMARY OF THE ARGUMENT

This case arises out of the concerted actions of the Metals Service Center Defendants and Steel Mill Defendants to cut off MM Steel's supply of steel. The result of Defendants' conspiracy is a group boycott in violation of Section 1 of the Sherman Act. The most salient fact at this stage is that the Complaint alleges *direct evidence* of Defendants' horizontal agreement in violation of Section 1:

- In an email, Defendant American Alloy's owner Arthur J. Moore states that he and his employee Jo Ann Kotzur "were invited to meet with Stan Altman, President of Chapel." Moore then provides the purpose of that meeting: "Chapel, along with Reliance, plan on taking all available courses of action, legally *and otherwise*, *including notifying any mill that is selling them* [Plaintiff MM Steel], that they can no longer expect any future business from Chapel/Reliance." (Emphasis added.) (Compl. ¶ 11-12.)
- In another email, Defendant American Alloy confirms the existence of the agreement: "We *will do all we can to help Reliance in going after them* [Plaintiff MM Steel]…. I would like to throw Jindal [Defendant JSW] under the bus *on this deal with Reliance* but I think it would be lost on Rajesh [Khosla, a JSW salesman]." (Emphasis added.) (*Id.* ¶ 22.)

There is much more evidence of Defendants' conspiracy, though more is not needed to get beyond the pleading stage. *See West Penn Allegheny Health Sys. v. UPMC*, 627 F.3d 85, 99 (3d Cir. 2010) (reversing 12(b)(6) motions in Section 1 case and observing: "If a complaint includes non-conclusory allegations of direct evidence of an agreement, a court need go no further on the question whether an agreement has been adequately pled."). As explained further below, Defendants' meritless Motions to Dismiss completely disregard the proper standard by which to review a motion to dismiss, unnecessarily expending the Court's and the parties' time and resources. Even a summary review of the factually-detailed Complaint and the standard by which to review a motion to dismiss for failure to state a claim makes that conclusion obvious.

The Complaint alleges direct evidence of the Steel Mill Defendants *participating* in the conspiracy—Defendant American Alloy's "deal with Reliance" to boycott MM Steel. (Compl.

¶ 22.) Defendant Nucor's Jeff Whiteman threatened a business partner of Plaintiff, telling it that "no mill would support MM Steel or anyone who did business with it." (Compl. ¶ 81.) Defendant JSW breached its own one-year contract with Plaintiff MM Steel immediately after Defendant American Alloy and Reliance/Chapel met and agreed to "threaten any mill that is selling to" MM Steel. JSW's president even acknowledged that his breach of JSW's contract with MM Steel (pursuant to which JSW had already sold over $1,080,000.00 in steel) was because JSW was threatened by "unsolicited persons," one of whom was from American Alloy. When pressed further by MM Steel, Defendant JSW's Fitch said, "I understand the gravity of the situation," but "I have to do what's best for my business." (Compl. ¶ 64.) Defendant SSAB abruptly cut off its ongoing relationship with Plaintiff MM Steel shortly after the Metals Service Center Defendants met and agreed to threaten the mills, and SSAB's employee told MM Steel the matter was a "political football." (Compl. ¶ 67.)

Context matters in conspiracy cases, as does the evidence. *Bell Atl. Corp. v. Twombly*, 550 U.S 544, 549, 556, 562, 565 n.10 (2007) (discussing "context" in four different sections of the opinion). Defendants ignore both in their Motions, as they do the proper standard for judging the sufficiency of a pleading.[3]

Defendants basically make two arguments against the Section 1 claim, and both lack merit. *Twombly* is the first, and all in all, Defendants obfuscate the issues by ignoring whole parts of the Complaint, disregarding context (largely by taking each fact or allegation and

---

3 By and large, all five of Defendants' Motions to Dismiss advance many of the same arguments; only the order of arguments and degree of emphasis distinguishes the Motions. Accordingly, with a few exceptions this Response does not distinguish which Defendant is advancing which argument, especially given that the Motions expressly incorporate each others' arguments. References to Defendants' Motions to Dismiss are by the Court's docket number and their internal pagination.

divesting it of any relationship to any other fact), and ignoring and/or distorting basic legal arguments. No wonder. The issues in this case are far easier, and the ***direct and circumstantial*** evidence of the group boycott is straightforward.

Defendants will have the opportunity to explain away their agreements and inculpatory statements with their innocuous interpretations, but their Motions to Dismiss ***are not*** the proper place for such explanations.[4] *See Chavers v. Morrow*, 2010 WL 34447687, at *2 (S.D. Tex. Aug. 30, 2010) (Hoyt, J.) (stating that in a review of a motion to dismiss for failure to state a claim, "the factual allegations contained in the plaintiff's complaint are to be taken as true") [Document 33-2, App. 1-6.]; *see also In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628-29 (7th Cir. 2010) (Posner, J.) (describing "direct evidence as that "which would usually take the form of an admission by an employee of one of the conspirators" and "that officials of the defendants had met"); *Tracbeam, LLC v. AT&T Inc. et al.*, 2012 U.S. Dist. LEXIS 76310, at *11 (E.D. Tex. March 27, 2012) ("The Moving Defendants' Rule 12(b)(6) motion amounts to improperly requiring an 'assessment that [Tracbeam] will fail to find evidentiary support for [its]

4 Defendants generally put a lot of stock in two cases, but on the whole both cases hurt Defendants' arguments, especially on the proper analysis of direct versus circumstantial evidence. *See Toledo Mack Sales & Serv. Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 220 n.10 (3d Cir. 2008) ("We have held that the strictures on circumstantial evidence in antitrust cases only appl[y] when the plaintiff has failed to put forth direct evidence of conspiracy. Thus, in direct evidence cases, the plaintiff need not adduce circumstantial evidence that tends to exclude the possibility that the alleged conspirators acted independently, and there need not be an inquiry into the plausibility of the defendants' claim or the rationality of defendants' economic motives.") (quotations and citation omitted); *Tunica*, 496 F.3d at 409 ("Direct evidence of concerted action is that which explicitly refer[s] to an understanding between the alleged conspirators, while circumstantial evidence requires additional references in order to support a claim of conspiracy.") (quotations and citations omitted). These cases, which involve **appeals of a summary judgment and a judgment as a matter of law (after a trial)** are further discussed in the Arguments Section of this Response.

allegations or prove [its] claim to the satisfaction of the factfinder.'") (quoting *Twombly*, 550 U.S. 563 n.8) [App., Tab 2.]

Defendants' stock approach to the pleading standard for a motion to dismiss recurs with high frequency. Across the country courts are looking at the whole picture and reviewing the evidence under the proper standard. This is especially true in antitrust cases, where defendants often erroneously ignore the direct evidence alleged and then claim everything else alleged is implausible. *See, e.g.*, *Anderson News, L.L.C. v. American Media, Inc. et al.,* 680 F.3d 162, 184-85 (2d Cir. April 3, 2012) (reversing 12(b)(6) motions and rejecting defendants' *Twombly* arguments that mirror the ones here); *In re Electronic Books Antitrust Litig.*, 2012 U.S. Dist. LEXIS 68058, at *38-51 (S.D.N.Y. May 15, 2012) (denying defendants' *Twombly* motions to dismiss in Section 1 case and rejecting arguments virtually identical to the ones here) [App., Tab 3]; *Standard Iron Works v. ArcelorMittal et al.*, 639 F. Supp. 2d 877 (N.D. Ill. 2009) (denying *Twombly* motions in a price fixing case involving the steel industry and two of the defendants in this case).

Defendants' second Section 1 argument is a long-shot gamble and unfounded. Defendants claim this "classic" group boycott case must be judged under the rule of reason, not the per se rule. (Translation: the stakes are high and Defendants are in trouble if this case is correctly judged under the per se rule.) Defendants' Motions try to smother the issues by going into detail about the rule of reason and many principles of antitrust law that have no bearing to this case.[5] The Court should reject their faux suggestions. This case is to be judged under the

5 The Complaint cites *Klor's* and *Fashion Originator's Guild of America v. Federal Trade Comm'n*, 312 U.S. 457 (1941), well-known per se Supreme Court cases that are squarely on point and controlling precedent. *See Anderson News*, 680 F.3d at 183 (discussing *Klor's* in a group boycott case and reversing granting of motions to dismiss). *Klor's* or *Fashion Originator's* alone

per se rule as held by solid and established precedent from the United States Supreme Court, the Fifth Circuit, and many other courts. *See, e.g.*, *Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (reaffirming the principles of *Klor's* and stating, "The Court has found the *per se* rule applicable in certain group boycott cases"). Although this issue is settled, to put the matter to rest for the duration of this litigation this Response addresses it in some detail below.[6] (*See*, *infra*, Argument, II.A.)

Defendants also erroneously contend that this case involves a vertical restraint subject to the rule of reason, but that contention is also foreclosed by settled law. *See, e.g.*, *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988) ("[A] facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l] agreement among [competing] distributors is in reality a horizontal restraint") (second bracket is the Court's); *H&B Equip. Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978) ("Conspiracies between a manufacturer and its distributors are … treated as horizontal … when the source of the conspiracy is a combination of the distributors.").

---

puts an end to Defendants' arguments, so Defendants take a different tack. They virtually ignore them, barely mustering the resolve to even cite them in their Motions (a single citation of each, with virtually no discussion, by Defendant Nucor). Indeed, in perhaps the oddest statement contained in all five Motions, Defendants American Alloy and Moore's Motion (Document 36 at p. 9) *dismisses Klor's* and *Fashion Originators'* (without naming them) as cases "from the middle of the last century." Perhaps these defendants can point us to some opinion or brief that shows why, for example, *Brown v. Board of Educ.* (same decade as *Klor's*) or, better yet, *Marbury v. Madison* (two centuries ago) is not good law solely because of its age.

6 Although this Response provides fuller context to Plaintiff's claim that the per se rule applies to Defendants' illegal group boycott, the contention does not appear to be in doubt any longer. Defendants' Joint Motion to Stay Discovery (Document 42) all but concedes the point, instead focusing, albeit mistakenly, on whether the Complaint meets the pleading standard for a per se claim. As explained both in this Summary of Argument section and later in this Response, that contention, too, is without merit and a misrepresentation of the law.

Defendants also falsely argue the Complaint cannot get past the pleading stage because it does not plead Defendants' "market power," which, by the way, the Complaint does, but the very case they cite for that proposition squarely rejects Defendants' contention that market power is (1) required or (2) that it must be shown at the pleading stage. *Tunica*, 496 F.3d at 414-15 ("The [Supreme Court has] set out a number of factors that it found relevant to the determination of whether the *per se* rule should apply to a particular group boycott. **The Court further stated that 'a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment.'")** (quoting *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985)).

Defendants also challenge the Complaint's state law claims, but these arguments are equally without merit. Defendant JSW's challenge to the breach of contract claim rests on its mistaken belief that a missing price term is fatal to the contract's enforceability, but JSW forgets that the contract is governed by Section 2.305 ("Open Price Term") of the Texas Uniform Commercial Code. Defendants' challenges to the tort claims fail to see that all members of a conspiracy are liable for the acts of the primary actor, and the Complaint is replete with direct evidence of actions taken pursuant to a common cause, including interfering with contracts and disparaging MM Steel, which JSW's president has admitted to. Defendants also falsely claim "no contract" in challenging the contracts allegedly interfered with, but this a quintessential state law issue reserved, when contract formation is in doubt, for a consideration of the circumstances surrounding formation. As with Defendants' challenges to MM Steel's Section 1 cause of action, Defendants' arguments to dismiss MM Steel's state law causes of action also fail.

Plaintiff MM Steel is entitled to have its day in Court, having alleged sufficient facts to withstand Defendants' Motions to Dismiss. This case is about Defendants' concerted efforts to

crush a competitor, by not allowing it to even compete. The antitrust laws were created to protect businesses like Plaintiff MM Steel:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete ….

United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

STATEMENT OF FACTS

The Complaint sets forth in detail the "who, when, and what" of Defendants' group boycott. Those facts must be taken as true for now. This section elaborates on the facts to provide the Court with more context; additional pertinent facts will be cited and discussed as they relate to the specific legal issues.

This Case Involves the Buying and Selling of Steel Products

Raw steel, an alloy of iron and carbon, is a commodity good that is the primary input for a variety of steel products manufactured and sold by defendants in the United States. Defendants JSW, Nucor, and SSAB manufacture raw steel, which they convert into steel products such as flat sheets, coils, plates, beams, rails, bars, rods, wire, wire rods, or pipes for sale to purchasers, both metals service centers and end users, in a variety of industries. (Compl. ¶ 42.)

Defendants Reliance/Chapel & American Alloy are Metals Service Centers

Defendants Reliance and Chapel, which is wholly owned by Reliance, are metals service centers. Defendant American Alloy, which is owned by Defendant Moore, is also a metals service center. Reliance/Chapel and American Alloy are competitors of each other and Plaintiff MM Steel, a metals service center. (Compl. ¶¶ 2, 3, 43 & 45.)

Reliance "is the largest metals service center company in North America." According to its December 2011 10-K, its "network of metals service centers operates more than 220 locations in 38 states" and nine foreign countries. It provides "metals processing services and distribute[s] a full line of more than 100,000 metal products, including alloy, aluminum, brass, copper, carbon steel, stainless steel, titanium and specialty steel products, to more than 125,000 customers in a broad range of industries." (Compl. ¶¶ 45-47.)

MM Steel's Hume and Schultz Together Have Decades of Experience in the Industry

By 1999, Mike Hume and Matt Schultz, the owners of Plaintiff MM Steel, had been in the steel business for decades collectively and built great relationships, both among customers and steel mills. At the time, Hume and Schultz worked for Defendant American Alloy. (Compl. ¶ 52.)

Chapel did not have an office in Houston until 1999, although it sold steel products in the Houston market and desired a larger presence. To obtain a Houston presence, Chapel's then owner, James Sutow, heavily recruited Hume and Schultz, who eventually left American Alloy to start Chapel's Houston metals service center. Within a few years, Chapel's Houston center became one of its most successful in the country and had remained so even after Reliance purchased Chapel in 2004. (Compl. ¶ 53.) Hume and Schultz left Chapel on September 1, 2011.

Hume & Schultz Form MM Steel to Chase the American Dream

Hume and Schultz dreamed of having their own steel business. They formed MM Steel. MM Steel started doing business in September 2011, though its operation was brought to a halt on September 15, 2011 when Chapel obtained a temporary restraining order against Hume, Schultz, and two other MM Steel employees based on alleged covenants not to compete. That case was settled, with an agreed permanent injunction prohibiting MM Steel and its employees

from soliciting a select list of Chapel customers until March 15, 2012, when the agreed permanent injunction would terminate. (Compl. ¶ 56-57.)

Defendants Enter Into a Horizontal Agreement to Boycott MM Steel

Reliance/Chapel and American Alloy were not satisfied with the settlement—the permanent injunction—in the state court action. Not long after the ink had dried on the settlement and the agreed permanent injunction, a concerted campaign by the Defendants to squash their competitor, MM Steel, commenced. (Compl. ¶ 61.)

"I don't give up easily on ones that I know are not worthy of being in this business, so I will continue to go to all extremes with ones I know to make the trip a rough one [for Plaintiff MM Steel]…. We will sell at cost, if necessary, to take business away from these bums [Plaintiff]. *I plan to have a conversation with the President of Reliance*," wrote Defendant Moore in an email to his American Alloy employees.[7] (Emphasis added.) (Compl. ¶¶ 11, 58.) American Alloy's Moore and Jo Ann Kotzur "were invited to meet with Stan Altman, President of Chapel" to form an agreement to "take all available courses of action, legally and otherwise, including notifying any mill that is selling [Plaintiff MM Steel], that they can no longer expect any future business from Chapel/Reliance…. They will have a rough go of the futue [sic] in the steel industry." (Compl. ¶ 59.) To achieve the goal of cutting off MM Steel's supply, Defendant Moore offered Defendants Reliance/Chapel his full cooperation. "Now that these bums are no longer with Chapel, I informed Stan that [American Alloy] would welcome their inquiries and orders," wrote Moore in an email. "While Chapel competes with us in several grades, mostly the as rolled, they can be a good source for us on some of the A.R. grades." (Compl. ¶ 60.)

---

7 Gregg J. Mollins is the President of Reliance.

The illegal agreement between American Alloy and Reliance/Chapel is further confirmed by an American Alloy employee: "We will do all we can to help Reliance in going after them [Plaintiff MM Steel]…. I would like to throw Jindal [JSW] under the bus *on this deal with Reliance* but I think it would be lost on Rajesh [Khosla, a JSW salesman]." (Compl. ¶ 22.) (Emphasis added.)

Despite a Contract, Defendant JSW Refuses to Sell Steel to MM Steel

None of this was known to Plaintiff MM Steel, so it naturally resumed doing business, albeit subject to an agreed permanent injunction. JSW and Plaintiff MM Steel had entered into a one-year agreement in August 2011. Among other terms, that agreement required "MM Steel … to attempt to buy, or caused to be bought [from JSW], a minimum of 500 tons per month average at a price as agreed upon by both parties." In turn, JSW agreed "to supply this quantity as per the [sic] MM Steel's requirements and material specification guidelines …." JSW had already sold steel to MM Steel under their agreement. (Compl. ¶ 62.)

In mid-October 2011, MM Steel attempted to purchase additional steel from Defendant JSW. However, at a meeting in October 2011, JSW's President, Mike Fitch, and Rajesh Khosla, a JSW salesman, told Plaintiff MM Steel that JSW would no longer honor its contract. This was because, according to Fitch, *multiple persons* had made "unsolicited" visits to JSW to disparage Hume, Schultz, and MM Steel. Because of these unsolicited visits, JSW cut off supply to MM Steel. Hume told Fitch that he was effectively putting MM Steel out of business. (Compl. ¶ 63.) When Hume told Fitch that he (Hume) sensed Fitch and JSW had been threatened, Fitch's only response was this: "I understand the gravity of the situation," but "I have to do what's best for my business." The end result was that despite an existing contract and an established business relationship with Hume and Schultz, Defendant JSW was going to enter into a conspiracy to shut

down MM Steel, not to mention breach its contract. MM Steel later learned that it was Defendants American Alloy and Moore who had threatened JSW. (Compl. ¶ 64.)

Defendants SSAB and Nucor Also Refuse to Do Business with MM Steel

MM Steel, of course, reached out to other steel mills with which it had relationships, including Defendants SSAB and Nucor. The results were the same. Initially, SSAB had quoted prices and was in the process of setting up a line of credit for MM Steel. Indeed, SSAB's Steve Dunn, the main contact for MM Steel, was very excited for Hume and Schultz. (Compl. ¶ 65.) After Defendant JSW breached its contract with MM Steel, Hume reached out again to Dunn to buy steel from Defendant SSAB.

Hume and Dunn met in person to talk about Defendant SSAB selling steel to MM Steel. When Hume asked Dunn why SSAB had stopped quoting MM Steel, Dunn said the higher ups at SSAB did not want to find themselves sitting in a meeting with Reliance/Chapel and having to answer questions about doing business with Plaintiff MM Steel. Apparently it was easier for SSAB to engage in the group boycott. (Compl. ¶ 66.)

MM Steel continued to push for business with SSAB, but it was clear that it was not up to Dunn, because, according to him, "It's a real political football and I need to be careful how I approach this." Despite repeated inquiries from Plaintiff MM Steel, SSAB refused to do business with it. (Compl. ¶ 67.)

MM Steel also reached out to Nucor in October and November 2011, namely through Lisa McCollum, with whom MM Steel's principals have had a long-term business relationship. Nucor would not even respond to MM Steel's inquiries. (Compl. ¶ 68.)

Defendants Threaten an MM Steel Customer & Partner

By December 2011, MM Steel's fate appeared to be sealed. It therefore appealed to a well-established customer, North Shore Supply (North Shore), in an effort to get around Defendants' illegal group boycott. (Compl. ¶ 69.) North Shore agreed to buy steel on behalf of MM Steel at a small markup, allowing MM Steel to sell that steel as its own. North Shore also allowed MM Steel to sell North Shore's inventory of steel, with North Shore paying MM Steel a commission on the sale. (Compl. ¶ 70.)

Although partnering with North Shore was not the American dream of ownership or financial success Hume and Schultz had envisioned for themselves and Plaintiff MM Steel, it was, in their view, enough to keep it going until perhaps the alliance between Reliance/Chapel and American Alloy dissipated. But it soon became clear that the conspiracy did not have a short-term goal. (Compl. ¶ 71.) Starting in December 2011 and continuing into January, February, and March 2012, North Shore was repeatedly threatened and harassed by Defendant Nucor, Reliance/Chapel, and American Alloy.

Nucor's Ultimatum to North Shore—Stop Doing Business with MM Steel or Suffer the Same Fate as MM Steel

In late 2011, Nucor discovered that North Shore was in fact purchasing steel for MM Steel. Nucor's Jerrell Vinson, a District Manager, contacted North Shore's Byron Cooper in December 2011 and said that he (Nucor) could not sell steel to Plaintiff MM Steel. North Shore's Cooper was concerned enough to tell Hume and Schultz that he "can't do anymore Nucor orders that ship directly to you guys." Despite Nucor's threat, North Shore remained interested in continuing to work with Hume and Schultz, given their past success and the potential for financial gain. (Compl. ¶ 73.)

In January 2012, Hume and Schultz continued their talks with North Shore, largely about growing their partnership, given that MM Steel was being "blacklisted." It was never an issue whether Plaintiff MM Steel could generate business. The only obstacle was the group boycott. (Compl. ¶ 74.)

In early February 2012, North Shore and MM Steel, who now had access to North Shore's inventory, were finalizing a memorandum of understanding regarding their partnership. Again, while this would have provided Hume and Schultz a living, it was now clear that their dream of ownership had been destroyed by Defendants' concerted actions. (Compl. ¶ 75.)

Not long after that, however, Chapel's Ginny Lindsey contacted Leslie Brown of North Shore and questioned Brown about the relationship between Plaintiff MM Steel and North Shore. Lindsey said that Chapel had an internal meeting concerning MM Steel and North Shore's business partnership, the suggestion being that a continuation of that relationship would bode ill for North Shore. Leslie Brown relayed the conversation to her boss, Byron Cooper of North Shore. (Compl. ¶ 76.)

In early March 2012, North Shore and Defendant Nucor had a meeting in Houston about growing their relationship. At this meeting, Nucor discussed selling products directly to North Shore's sister-company Greens Bayou Pipe Mill (Greens Bayou). Up to that point, Nucor had directed Greens Bayou to metals service centers such as Chapel and Ranger Steel. Cutting out metals service centers such as Chapel and Ranger Steel, and dealing with Nucor directly, carried great weight with North Shore and Greens Bayou. (Compl. ¶ 77.)

At this March 2012 meeting were representatives of Greens Bayou, North Shore's Cooper, North Shore's President Buzzy Bluestone, Jeff Whiteman, a high level Nucor executive, Jerrell Vinson, and Phil Bischof, a Nucor product specialist. After the meeting was over, they all

headed to a group lunch. As they were about to drive off, Vinson jumped into Cooper's car. (Compl. ¶ 78.)

Vinson told Cooper that any ongoing relationship between North Shore and MM Steel would be an "issue" for Nucor, implying that if North Shore continued its relationship with MM Steel or Hume or Schultz, North Shore would lose Nucor's support, not only with respect to direct sales to North Shore but Nucor's proposal relating to Greens Bayou. Given North Shore's and MM Steel's ongoing business discussions, Cooper relayed that conversation to Hume and Schultz, and also conveyed his own concerns. Cooper said he would contact Nucor's Whiteman to discuss the issue further. (Compl. ¶ 79.)

Nucor's Whiteman is Unequivocal About the Group Boycott of MM Steel

Despite repeated attempts, Whiteman was not returning Cooper's calls. Before Cooper and Whiteman eventually talked, however, Cooper had another discussion with Vinson on Monday March 19, 2012. (Compl. ¶ 80.) Vinson called Cooper and again raised the issue of Plaintiff MM Steel and mentioned a meeting at Nucor about MM Steel. Vinson specifically referenced the agreed permanent injunction between Chapel and MM Steel, Hume, and Schultz, and the fact that it had terminated on March 15, allowing Plaintiff MM Steel to compete without any restrictions. The injunction had nothing to do with Nucor. Cooper told Vinson he needed to discuss the issue further with Whiteman. (Compl. ¶ 80.)

Later that morning, Cooper finally got a hold of Whiteman. Whiteman was very careful in his choice of words, but he made it clear that "all eyes were on" MM Steel. Whiteman mentioned "Mittal, JSW, Nucor, Reliance, Chapel … American Alloy, and Ranger" as "monitoring" Plaintiff MM Steel. He further stated that "the powers that be at Nucor would not sell steel" to MM Steel. Whiteman was very clear in stating that should North Shore continue

doing any business with MM Steel, even simply employing Hume and Schultz, Nucor would stop selling it steel. According to Whiteman, MM Steel was on everyone's radar and being watched closely, and that no mill would support MM Steel or anyone who did business with it. Whiteman also said that although he had no problem with Hume and Schultz, he was given a "mandate" from his higher ups at Nucor to not support Plaintiff MM Steel because of Reliance, Nucor's biggest customer. Furthermore, Whiteman told Cooper that Reliance/Chapel, American Alloy, and Ranger Steel are "terrified" that Plaintiff MM Steel will take business away from them. Like Vinson, Whiteman also brought up March 15 as having been the last day of the agreed permanent injunction. In that context, Whiteman said that Reliance/Chapel, American Alloy, and Ranger Steel could not stop MM Steel from going after that business, but they (Defendants) could cut off Plaintiff MM Steel's supply of steel. (Compl. ¶ 81.)

Defendant Moore Sends a Similar Message to North Shore—That It Can Get Any Steel Mill to Stop Doing Business with North Shore

Not long afterward, American Alloy also threatened North Shore, and the timing of its *parallel action* is more evidence about the horizontal agreement between American Alloy and Reliance/Chapel to engage in a group boycott of Plaintiff MM Steel. After all, Defendant Moore's emails already show that he had meetings with the Presidents of Chapel and Reliance, among other high level executives, on the subject of threatening "any mill that is selling [Plaintiff MM Steel]" with the loss of business from Reliance/Chapel and American Alloy. (Compl. ¶ 82.)

In late March, American Alloy's Wendell Hilton set up a lunch meeting with North Shore's Cooper. During that meeting, Hilton asked Cooper about any relationship between North Shore and MM Steel. Cooper was told that should North Shore continue to have any relationship with MM Steel, Hume, or Schultz, American Alloy's Moore would put an end to

any relationship between American Alloy and North Shore. (North Shore is one of American Alloy's customers.) Hilton also stated that Defendant Moore had contacts at all of the mills and would use them, especially his contacts at ArcelorMittal, against MM Steel and North Shore and anyone else who worked with MM Steel. (Compl. ¶ 83.)

The *same day* Hilton met with Cooper, Ginny Lindsey of Chapel was calling Buzzy Bluestone, the president of North Shore, to set up a meeting. Given Lindsey's and Bluestone's positions within their respective companies, they would have no reason to set up a meeting, and despite repeated calls by Lindsey to Bluestone, he did not return her calls. North Shore believes that Lindsey, who formerly worked for American Alloy, was intending to exert the same kind of pressure on it that American Alloy's Hilton had when he met with Cooper. (Compl. ¶ 84.)

STATEMENT OF THE ISSUES

Two issues lie at the core of this Response. The first is whether, under the familiar rules set forth in cases such as *Twombly* and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the Complaint alleges a conspiracy in violation of Section 1 of the Sherman Act, where it has alleged direct and circumstantial evidence showing the who, what, and specific meetings and agreements among Defendants, including quoting specific inculpatory statements by Defendants' employees and executives; and where Plaintiff has alleged that the Steel Mill Defendants would not have unilaterally ceased doing business with Plaintiff MM Steel or its agents absent advance agreement with the Metals Service Centers.

As has been the long-standing law for Rule 12(b)(6) motions, the court must read the Complaint in its entirety, and must not "scrutinize each allegation in isolation but to assess all the allegations holistically." *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326 (2007); *Standard Iron Works*, 639 F. Supp. 2d at 902 (same; denying 12(b)(6) motions in antitrust price-

fixing case); *In re Retail Freight Fuel Surcharge Antitrust Litig.*¸ 587 F. Supp. 2d 27, 33 n.4 (D.D.C. 2008) (same; denying 12(b)(6) motions in Section 1 price fixing case).

Defendants offer scattered objections to the sufficiency of the allegations, but no reasonable reader can ignore the facts alleged. Defendants repeatedly utter the phrase "plausible" to give the impression they are challenging the pleadings based on *Twombly*, but as the Court knows, challenging the *plausibility* of the pleadings and the factual or legal sufficiency of the allegations are not the same. *See, e.g., Anderson News*, 680 F.3d at 190 (reversing trial court and observing, "[A]lthough an innocuous interpretation of the defendants' conduct may be plausible, that does not mean that the plaintiff's allegation that that conduct was culpable is not also plausible."). To Defendants, *Twombly* is an afterthought, and their summary judgment-like sufficiency arguments should not be entertained at this time. Defendants similarly assail the Complaint's state law claims using largely the same approach they employ for the Sherman Act claim.

The second issue is Defendants' dire and futile attempt (which at best is premature, anyway, *see* footnote 8, *infra*) to escape the impact of decades of established group boycott law, including the well-settled principles of *Klor's* and *Fashion Originator's*, among other cases, that foreclose any arguments Defendants may have to justify their illegal group boycott.

ARGUMENT

The law of antitrust, like American law in general, creates incentives to engage in good behavior and to avoid bad behavior. It champions competition, but abhors conduct that has no redeeming value but to injure competition or a competitor by banding together. This case is about such conduct, and this Court is unlikely to see any worse display of it at the Complaint

stage. The emails and inculpatory conversations referenced in the Complaint are a harbinger of what is likely to be revealed further in discovery about the wide web of culpability in this case.

In reaction to the Complaint, Defendants have filed Motions to Dismiss that read more like trial briefs or motions for summary judgment than motions to dismiss. Perhaps as a foreshadowing of the manner of their defenses, the Metals Service Center Defendants have nearly as much to say about MM Steel's principals, Mike Hume and Matt Schultz, as they do the relevant law. (At least these Defendants have not charged Hume and Schultz with insurrection and leading the charge against America itself, plundering the countryside and attacking it at sea.) Defendants' charges are all bogus, and the facts will bear that out.

The principals of MM Steel have been very successful in their careers selling steel. For some time, Reliance/Chapel and American Alloy reaped the benefits of that success. However, Hume and Schultz wanted to pursue the American dream, so they decided to start their own business. Reliance/Chapel and American Alloy feared the competition, so they hatched a plan to deprive MM Steel of its ability to buy steel from the Steel Mill Defendants. All Defendants went along and coordinated the illegal group boycott. The Complaint lays out far more than enough facts to get beyond the pleading stage, and respectfully it deserves this Court's endorsement.

I. THE COMPLAINT STATES A CLAIM UNDER SECTION 1 OF THE SHERMAN ACT

MM Steel has stated a claim under Section 1 of Sherman Act because it alleges that Defendants' collective decision to cut off its supply of steel is the product of prior agreements and not merely unilateral action. The question in a Section 1 case is "whether the challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express." *Twombly*, 550 U.S. at 553 (quotations and citation omitted). A plaintiff can state a Section 1 claim either by directly alleging such an agreement or by alleging facts that "are

suggestive enough to render a § 1 conspiracy plausible." *Id.* at 556; *Tunica Web Adver.*, 496 F.3d at 409 (discussing direct versus circumstantial evidence in Section 1 case). MM Steel's Complaint contains both.

A. The Complaint Directly Alleges that Defendants Conspired

MM Steel's Complaint alleges directly that the Defendants reached an agreement to take concerted action to restrain trade. Here is some of the ***direct evidence*** alleged:

- ***Meetings*** between the presidents of Defendants Reliance, Chapel and American Alloy about "taking all available courses of action, legally or otherwise, including notifying any mill that is selling [to] them [plaintiff MM Steel] that they can no longer expect any future business from Chapel/Reliance." (Compl. ¶¶ 11-12.)
- American Alloy's Moore's acknowledgment of the agreement with Reliance/Chapel. (*Id.* ¶ 23.)
- An American Alloy employee acknowledges the agreement with Reliance/Chapel: "We will do all we can to help Reliance in going after them [Plaintiff MM Steel]…. I would like to throw Jindal [JSW] under the bus on this deal with Reliance …." (*Id.* ¶ 22.)
- JSW's president admitting that a group boycott was in effect, and going along with it in violation of JSW's express, one-year contract with MM Steel. (*Id.* ¶¶ 62-64.)
- Nucor threatening MM Steel's customer and partner North Shore in furtherance of the agreement between Reliance/Chapel and American Alloy. (*Id.* ¶¶ 73-81.) Nucor tells North Shore that the mills will threaten *anyone* who does business with MM Steel.
- The Steel Mill Defendant SSAB was prepared to do business with MM Steel, even asking it for bank documentation to set up a line of credit. At that time, SSAB already knew MM Steel would be competing with Reliance/Chapel, yet it went forward with the application process and price quotes. Only after the group boycott was executed did SSAB cease moving forward with MM Steel. (*Id.* ¶¶ 65-68.) SSAB's Dunn admitted to threats by Reliance/Chapel in furtherance of the group boycott. (*Id.*) SSAB cut off MM Steel at about the same time JSW did and shortly before Nucor began threatening North Shore.
- American Alloy's Wendell Hilton tells North Shore that American Alloy has and will threaten any mill who attempts to do business with MM Steel. (*Id.* ¶ 83.)
- Nucor's Whiteman tells North Shore that he knows that other steel mills (he mentions "Mittal" and "JSW") are monitoring MM Steel. (*Id.* ¶ 81.)

- Nucor's Whiteman tells North Shore that he knows that both Reliance/Chapel and American Alloy are "terrified" of MM Steel's potential as a competitor. (*Id.*) The only way Whiteman and Nucor would know that fact is by communications with both Reliance/Chapel *and* American Alloy.
- Nucor's Whiteman tells North Shore ***that no mill would support MM Steel or anyone who did business with it***. (*Id.*)

Here is some of the circumstantial evidence alleged:

- On the same day American Alloy's Hilton threatens North Shore, Ginny Lindsey of Chapel attempts to contact the president of North Shore, a call North Shore finds extremely unusual but for the inference that it was in parallel with Hilton's threat. (*Id.* ¶ 84.)
- Nucor's Whiteman tells Reliance's Koch that Gary Stein of Triple S, a Houston-based service center, had contacted Whiteman to inquire whether Stein could talk to Hume or Schultz about their future employment. Koch then calls Hume to show the power Defendants wield and the reach of the illegal group boycott. (*Id.* ¶ 88.)
- Chapel's Ginny Lindsey calls North Shore's Leslie Brown and questions her about North Shore's business relationship with MM Steel. Lindsey tells Brown of a Chapel internal meeting concerning MM Steel and North Shore. (*Id.* ¶ 76.)

There is more, but there is no reason to belabor the point, because it would not matter to Defendants' perfunctory and incorrect analysis, which takes two forms, addressed below.

B. Defendants Improperly Attempt to Offer "Innocuous Interpretations"

All of the Defendants review the allegations and try to spin them, but their efforts at cross examining the evidence only helps MM Steel. Defendants cannot have it both ways; "explaining" evidence is not a one-way street, and certainly not at this early juncture. One of the cases Defendants rely upon explains the proper analysis, and it is a Section 1 case:

> While admitting that the record before us contains statements about agreements between dealers, [defendant] Mack argues that [plaintiff] Toledo's evidence is insufficient to give to a jury because the record does not reveal the exact extent of any such agreements. Viewing the evidence in the light most favorable to Toledo, Mack's argument is unpersuasive. **It may well be that Toledo's inability to present the details of any agreement among dealers would leave a jury unpersuaded that such agreements did in fact exist**. That, however, is not our inquiry. Instead, **we must consider whether the evidence entitles Toledo to place that question before the jury at all**. We believe it does. Simply put, Toledo's evidence was sufficient because a jury considering it

> could believe it and reasonably conclude that agreements not to compete did exist among Mack dealers. The possibility that a jury might not believe ***the direct evidence*** does not, in itself, mean that the jury should not consider it.

Toledo Mack Sales, 530 F.3d at 222 (reversing judgment as a matter of law) (internal footnote omitted) (emphasis and brackets added). *Toledo Mack Sales* goes on to reject virtually every argument advanced here by Defendants regarding the sufficiency of the allegations. *Id*. at 219-22. *Toledo Mack*, of course, is a review of a judgment as a matter of law, not a motion to dismiss, making its analysis even more supportive of Plaintiff's Complaint.

Defendants also rely on the Fifth Circuit's *Tunica* opinion, but it, too, does not fare any better for Defendants on this point. *Tunica* is a Section 1 refusal to deal case. The plaintiff there alleged a conspiracy by defendant casinos because they did not want to pay the plaintiff fees for the use of the web address "tunica.com." 496 F.3d at 408. The Fifth Circuit first considered "whether [plaintiff] TWA has presented sufficient evidence of a conspiracy or concerted action on the part of the casinos to survive summary judgment." *Id*. at 410. In reversing summary judgment on that ground, among others, the court observed:

> Although, as the district court found, the casinos might well have had a number of valid, independent reasons why they might decline to do business with TWA and "tunica.com," those plausible reasons for independent action do not establish that appellees are entitled to summary judgment where the plaintiff has come forward with direct, rather than circumstantial, evidence of concerted action, since direct evidence of agreement necessarily tends to exclude the possibility of independent action.

Id. at 411 n.11.

Tunica and *Toledo Mack*, neither of which is a motion to dismiss case, alone ought to dispense with any challenges to the sufficiency of the allegations at the summary judgment stage, much less the pleading stage. *See also Anderson News,* 680 F.3d at 189 ("The question at the pleading stage is not whether there is a plausible alternative to the plaintiff's theory; the question

is whether there are sufficient factual allegations to make the complaint's claim plausible."). Nothing in *Iqbal* or *Twombly* purport to alter the settled principles that apply to factual allegations: "When there are well-pleaded factual allegations, *a court should assume their veracity* and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 664 (emphasis added).

C. The Complaint's Well-Pleaded Factual Allegations Implicate Each Defendant Individually

Defendants, especially the Steel Mill Defendants, contend the allegation of a conspiracy is not plausible because the Complaint does not allege specific communications between each Steel Mill Defendant and a Metals Service Center Defendant. (*See* Document 33 at 17 ["Here, the Complaint does not even allege that Reliance/Chapel complained or otherwise discussed MM Steel with Nucor."], Document 34 at 4 ["First, there is no allegation that SSAB ever communicated with Nucor or JSW – or any other steel mill – regarding MM."], Document 37 at 1 ["MM Steel's Original Complaint contains *no fact* showing any communication between JSW and Nucor, SSAB, or Reliance/Chapel …."].)

The Complaint contains direct allegations of Defendants Reliance/Chapel and American Alloy *meeting and agreeing* to threaten "any mill" considering doing business with MM Steel with loss of business. (Compl. ¶¶ 11, 22, 22.) Not long after the meetings between Reliance/Chapel and American Alloy, the Steel Mill Defendants cut off MM Steel. JSW's Mike Fitch even admitted it and acknowledged he was threatened. SSAB's Dunn and Nucor's Whiteman acknowledged communications between their respective companies and the Metals Service Center Defendants about boycotting MM Steel.

Defendants' contentions that these meetings and communications did not in fact take place or that the topic of the conversation had nothing to do with the group boycott of MM Steel

may be borne out by the evidence, but that is not the question before this Court now. *See Iqbal*, 556 U.S. at 664 ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *Twombly*, 550 at 565 (observing that a complaint meets the standard when it provides enough details regarding the conspiracy such that "[a] defendant wishing to prepare an answer … would know what to answer"—for example, a direct allegation of conspiracy specifying which defendants "supposedly agreed, or when and where the illicit agreement took place").

"[C]conspiracies are rarely evidenced by explicit agreements, but nearly always must be proven through inferences that may fairly be drawn from the behavior of the alleged conspirators[.]" *Anderson News*, 680 F.3d at 183 (quotations and citation omitted). Thus, when the allegation is that the Steel Mill Defendants in "lock-step" ceased to deal with MM Steel (in the case of Nucor, even going further and threatening North Shore), and that this illegal boycott was preceded by meetings and agreements between Reliance/Chapel and American Alloy having that very purpose as the goal, there can be no question about plausibility. In short, conspiracies are not explicit and the evidence not always accessible at the pleading stage. The following three points further show how the pieces fit together.

First, if JSW had independent reasons not to enter into business dealings with MM Steel, namely because it was worried about how its customers Reliance/Chapel and American Alloy would react, it would never have entered into a one year contract with MM Steel. After all, it was already in possession of those facts when it entered into the contract with MM Steel. It was only after the meeting between Reliance/Chapel and American Alloy (and Moore) that JSW acted against its self-interest by breaching its contract with MM Steel. *See In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 935 (N.D. Ill. 2009) (denying 12(b)(6) motions and observing,

"[A]llegations which demonstrate that defendants acted against self-interest enhance the plausibility of the conspiracy."); *Standard Iron Works*, 639 F. Supp. 2d at 896 ("Giving up … profit[] at least plausibly infers that Defendants agreed to do so."). Of course, JSW's Mike Fitch has admitted the fact of the illegal group boycott.

Second, SSAB would never have quoted prices to MM Steel and taken steps to cement their relationship, by, for example, asking MM Steel to provide letter of credit information, if it feared its largest customers' reactions. After all, SSAB was already in possession of that information—that Reliance/Chapel is a big customer and MM Steel would be competing with it—when it was negotiating with MM Steel. It was only after the illegal agreement by Reliance/Chapel and American Alloy that SSAB abruptly ceased all contact with MM Steel, calling the issue a "political football" and acknowledging the pressure on it by Reliance/Chapel.

Third, Nucor would not have gone to great lengths to further its relationship with North Shore and its related entity Greens Bayou only to place that very lucrative relationship in jeopardy by threatening North Shore about its business relationship with MM Steel. It is one thing to say that Nucor could have unilaterally refused to do business with MM Steel, but it is another to say Nucor would threaten its own good customer for independent reasons. Context matters, and Nucor's explanation (which is irrelevant, anyway, at this juncture) is not only implausible, it is incredible. Of course, the fact that Nucor's Jeff Whiteman has provided direct evidence of the conspiracy should render moot Nucor's arguments. As recounted above, Whiteman goes far beyond acknowledging Nucor's involvement in the group boycott; he has stated that *no mill would sell to MM Steel*. How else would Nucor know that unless *it communicated* with SSAB and JSW? Perhaps Reliance/Chapel told Nucor that fact, and Nucor

simply passed it on to North Shore. Whatever the answer to that question, the result is the same: direct evidence of a conspiracy among Defendants.

In summary, the Complaint is replete with direct evidence of the illegal group boycott. But it also has alleged that the Defendants engaged in consciously parallel conduct—the Steel Mill Defendants refusing to do business with MM Steel—in circumstances that would make unilateral action unlikely for any individual Defendant in the absence of an illegal agreement. *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 901 (2011) (rejecting defendants' contention that *Twombly* "requires that a plaintiff identify the specific time, place, or person related to each conspiracy allegation").

II. MM STEEL HAS ALLEGED A GROUP BOYCOTT IN VIOLATION OF SECTION 1

Defendants' second argument against the Section 1 claim is that the rule of reason, not the per se rule, governs this case. The amount of time they spend on the matter is unnecessary, but understandable. They believe if they can convince the Court to disregard settled law (that this case involves a "classic" per se group boycott), victory is assured. That also is not correct,[8]

---

8 Sometimes a restraint falls on the continuum between per se condemnation and the more elaborate rule of reason analysis. *California Dental Ass'n v. Federal Trade Comm'n*, 526 U.S. 759, 780 (1999) (observing that when a categorical approach is not possible, the analysis should be conducted under a sliding scale, allowing for different levels of scrutiny depending upon the type of restraint at issue). Paradoxically, however, determining how far outside of the per se rule's box on the continuum lies the restraint leads inevitably into the restraint's economic effects, and thus a rule of reason analysis. To avoid this rule of reason or per se toggling (outside of those instances, like this case, when per se categorization is proper), courts have developed a form of abbreviated or "quick look" rule of reason in an effort to characterize disputed conduct. The quick look approach allows a court to make a decision about whether a form of conduct that appears to be facially anticompetitive should be illegal per se ***by asking the defendant to demonstrate any pro-competitive justification for the conduct***. *Id.* at 769; *see also North Texas Specialty Physicians v. Federal Trade Comm'n*, 528 F. 3d 346, 360-61, 369-70 (5th Cir. 2008) (upholding the FTC's "inherently suspect" or "quick look" analysis of a physician group's efforts to negotiate contracts with payors on its members staff). Thus, even if this case were not governed by established per se precedent, which it is, the amount of time Defendants spend on explaining the rule of reason is needless at the pleading stage, because the Court would need to

though the Complaint makes no secret that this is a per se case through and through. There is good reason for that position. Decades of law supports it. Before covering the law, which will take a few pages, let us briefly describe Defendants' two approaches to their erroneous arguments.

The first is to avoid any meaningful analysis of group boycotts by offering truncated arguments to give the impression the per se standard is dead. This is not true, and many of the cases Defendants' rely upon say so. The second argument, largely advanced by the Steel Mill Defendants, contends that the Steel Mill Defendants' vertical relationship with the Metals Service Center Defendants means the rule of reason governs any restraint they entered into. Defendants' conclusory treatment of the argument shows that even they do not believe it; still, we address it on several levels to leave no doubt as to the argument's emptiness.

A. A Brief History of the Per Se Rule in Group Boycott Cases

A debate has been simmering for decades about whether to categorize an antitrust claim as a per se claim or a rule of reason. The latter is favored by defendants, because it erects a more difficult obstacle for plaintiffs. The former is favored by plaintiffs, because it virtually guarantees success. However, as we explain below, that debate has no place in this case. The allegations of this case fit neatly into the classic group boycott mold, and decades of law teaches that the per se rule applies in such cases.

The United States Supreme Court has itself affirmed the per se rule's continued vitality, and it has repeatedly preserved it for cases like this one. *See Nynex Corp. v. Discon, Inc.*, 525 U.S. 128, 134 (1998) (reaffirming the principles of *Klor's* and stating, "The Court has found the

---

first examine Defendants' business justification for the boycott before applying the sliding scale analysis to the anti-competitive conduct at issue.

per se rule applicable in certain group boycott cases"). Defendants may not like *Klor's*, *Fashion Originators'*, and similar controlling cases, but wishing for their demise is fruitless. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997) (holding unless overruled by the Court itself, a precedent of the Court must be followed by lower courts); *see also Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), *rev'd*, 522 U.S. 3 (1997), (Posner J.) ("And the Supreme Court has told the lower federal court, in increasingly emphatic, even strident, terms, not to anticipate an overruling of a decision by the Court[.]").

1. What is the Per Se Rule?

The per se rule is about categorization; it is about seeing the evils of certain business practices and condemning them. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289 (1985) ("This *per se* approach permits *categorical judgments* with respect to certain business practices that have proved to be predominantly anticompetitive.") (emphasis added). Thus, it provides the most direct mechanism for a plaintiff to establish that a challenged restraint of trade violates the Sherman Act. The Supreme Court has explained that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958); *see also Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 487-88 (1992) (Scalia, J., dissenting) ("*Per se* rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition from the defendant's behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's precompetitive benefits and its anticompetitive costs.").

2. *Fashion Originators'* and *Klor's* Solidify the Per Se Rule for Group Boycotts

Although the Supreme Court's per se and group boycott jurisprudence dates even further back, any doubt as to whether it had adopted a per se rule for group boycotts was erased by the decisions in *Fashion Originators'* and *Klor's*.

In *Fashion Originators'*, defendants, designers and manufacturers of women's garments and the manufacturers of textiles used in the production of the garments, were upset because certain of their competitors were copying their fabrics and clothes without authorization and selling them at lower prices. 312 U.S. at 461-62. The defendants, acting through a guild, instituted a joint protective program. The garment manufacturers agreed not to sell to stores that sold a "pirate's" garments, and the textile manufactures agreed not to sell to any dress manufacturer which subsequently sold to stores selling "pirate" goods. *Id*.

The defendants argued that the boycott program was necessary to protect them from unfair business practices. The Supreme Court disagreed and declined to weigh the asserted benefits against the costs to competitors and consumers: "Under these circumstances … the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination." *Id*. at 468.

In *Klor's*, Broadway-Hale, a retailer of appliances in San Francisco, apparently was disturbed by plaintiff Klor's price-cutting practices. It, therefore, approached several appliance manufacturers who were suppliers to both parties, demanding that they either not sell to Klor's at all or sell to it only at discriminatory prices. After these manufacturers acceded to Broadway-Hale's demand, Klor's sued, claiming their joint refusal to sell to it constituted an illegal group boycott. 359 U.S. at 209.

The defendants in *Klor's* asserted that there had been no public injury, since there were hundreds of stores in San Francisco selling the manufacturers' products even after their refusal to sell to plaintiff. They also claimed their conduct was reasonable because it had no impact on the price, quality, or quantity of goods available. The Court rejected all of these arguments, holding that group boycotts would always be condemned, regardless of actual effect:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances …. Even when they operated to lower prices or temporarily to stimulate competition, they were banned.

Id. at 212 (footnote and internal citations omitted). The Court's opinion pointed out a few of the evils that flowed from defendants' conduct: it deprived Klor's of the right to buy the appliances, resulting in it going out of business; it deprived the sellers of the freedom to sell to Klor's, even if this was a right they had voluntarily forsaken by entering into the conspiracy; and it had the "tendency toward monopoly," because of the possibility of slowly but steadily driving out of business small companies like Klor's. *Id*. at 213.

3. The Current State of the Per Se Rule

A boycott or collective refusal to deal can take different forms. *See, e.g.*, *United States v. General Motors Corp.*, 384 U.S. 127, 133-34 (1966) (involving an agreement among competing auto dealers to pressure General Motors to eliminate sales to discounting dealers); *Klor's*, 359 U.S. at 209 (involving an agreement by manufacturers and competing retailer not to do business with a retailer); *Fashion Originators'*, 312 U.S. at 795 (concluding a per se violation for the members of a textile manufacturers' trade association to agree not to sell their wares to retailers who carried garments whose design was copied, or "pirated," from other designers); *Toys "R" Us, Inc. v. Federal Trade Comm'n*, 221 F.3d 928, 936 (7th Cir. 2000) (upholding finding of per

se violation for conspiracy among toy manufacturers not to deal with club stores, organized by toy retailer).

In the intervening decades since *Klor's* was decided, the Supreme Court has narrowed the types of restraints that are deemed per se violations. The cases illustrate the application of complex economics to *complex business arrangements* (largely in joint ventures, resale price limitations, and distributor arrangements). *See, e.g., Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23-24 (1979) (refusing to apply the per se rule to agreement by musical composers to license their copyrighted compositions at identical prices); *see also Northwest Wholesale Stationers*, 472 U.S. at 296 (holding that a group of competitors' decision to expel a member of a ***buying cooperative*** "does not necessarily imply anticompetitive animus and thereby raise a probability of anticompetitive effect"). As explained further below, the group boycott in this case does not involve any of the economic issues that arise in cases such as *Broadcast Music* and *Northwest Wholesale Stationers*, sometimes called regulatory boycott cases.

a. This Case Does Not Involve a Regulatory Boycott

What emerges from all of these cases is that boycotts come in two forms. The first is to regulate competition among participating firms. *Northwest Wholesale Stationers* is an example of such a case, and it resulted in a rule of reason analysis. *See also California Dental Ass'n*, 526 U.S. at 780 (rejecting per se analysis to regulation on dentists' advertisement); *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 101 (1984) (applying rule of reason to horizontal agreement limiting television broadcasts of college football games; critical fact was that case involved "an industry in which horizontal restraints on competition are essential if the product is to be available at all"). Relevant to this case, such regulatory boycotts do not involve the exclusion of competitors by exerting leverage on suppliers, manufacturers, or customers.

b. Defendants Executed a "Classic" Group Boycott—Subject to the Per Se Rule

The second form is the classic boycott, designed to damage a direct competitor by denying access to suppliers or customers. That is the case here, where a particularly powerful buyer (or buyers—Reliance/Chapel and American Alloy) or seller may coordinate its suppliers or customers in order to deny access to suppliers or customers. *See Northwest Wholesale Stationers, Inc.*, 472 U.S. at 294 ("Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.") (quotations and citation to treatise omitted).

4. *Klor's*, *Fashion Originators'*, and Similar Group Boycott Cases Have Not Been Secretly Overruled

In light of the foregoing analysis, the following syllogism should follow: Supreme Court precedent is controlling until overruled by the Court; far from overruling them, the Court has repeatedly reaffirmed the principles of *Klor's*, *Fashion Originators'*, and similar cases; therefore, it is irrefutable that *Klor's* and *Fashion Originators'* and the per se treatment of classic group boycotts have binding force.

Defendants know this, so they resort to selective reading of cases, but nothing in the cases they rely on—and they largely ignore the per se cases, so their obfuscation of the issues should be obvious—bears out their arguments. Defendants simply have no interest in reading the cases' facts or heed the courts' precise language. Instead, they advance a kind of secret overruling of *Klor's*, *Fashion Originators'*, and the per se rule in group boycott cases. Defendants' approach is especially puzzling given the Supreme Court's approval of the categorical per se rule in *Klor's* and *Fashion Originators'* over the same span of time the rule of

reason gained ascendancy. *See, e.g.*, *Nynex*, 525 U.S. at 134-36 (discussing with approval *Klor's*); *Northwest Wholesale Stationers*, 472 U.S. at 293 (same).

B. This Case Does Not Involve a "Vertical Restraint"

All Defendants in one fashion or another advance an argument that goes like this: the relationship between the Steel Mill Defendants and the Metals Service Center Defendants is a vertical one (basically, that means they are not on the same level in the distribution chain), and the Supreme Court has said that the rule of reason applies to vertical agreements. Defendants also advance a corollary to that argument, which is that the Complaint does not allege a horizontal agreement among the Steel Mill Defendants, who sit at the same distribution level. That reasoning is flawed because it misrepresents the law and misunderstands some of the basic terminology antitrust law employs. Beyond the error in law, however, it also ignores the allegations. The evidence is key, and the Complaint alleges that Nucor's Whiteman said *no mill* would sell to MM Steel. The only way Whiteman would know that is by having communicated with the other Steel Mill Defendants (SSAB and JSW) and affirmed their joint purpose in not selling to MM Steel. (Compl. ¶ 81.) Whiteman even named JSW, among other mills and metals service centers. Importantly, Whiteman said "everybody" was monitoring MM Steel. (*Id.*)

1. *Business Electronics* Bars Defendants' "Vertical Restraint" Label

The Complaint refers to "horizontal" and related agreements. Seeing an apparent opening, Defendants pounce on the phrase "vertical agreement," in the hope of sticking a rule of reason label to the case. They are wrong, and one of the major antitrust cases they rely upon disposes of the argument succinctly: "[A] facially vertical restraint imposed by a manufacturer only because it has been coerced by a 'horizontal carte[l]' agreement among [competing] distributors *is in reality a horizontal restraint*…. [A] restraint is horizontal not because it has

horizontal effects, but because it is the product of a horizontal agreement."[9] *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 n.4 (1988) (emphasis added; second bracket is Court's); *see also General Motors*, 384 U.S. at 144-45 (holding that a group of horizontal competitors who induced the manufacturer to boycott sales to a price discounter constitutes a horizontal group boycott); *H&B Equip. Co. v. International Harvester Co.*, 577 F.2d 239 (5th Cir. 1978) ("Conspiracies between a manufacturer and its distributors are … treated as horizontal … when the source of the conspiracy is a combination of the distributors.").

2. There is No Hybrid Rule in Classic Group Boycott Cases

Although *Business Electronics* alone puts an end to Defendants' vertical restraint argument, another way to see the error in Defendants' argument is to recognize the role of conspiracy under Section 1. In 2004, Justice Scalia, not exactly an advocate for aggressive antitrust enforcement, described "collusion" as "the supreme evil of antitrust." *Verizon Commc'ns, Inc. v. Trinko*, 540 U.S. 398, 408 (2004).

Hybrids may be all the rage, but they have no place in Section 1 group boycott cases. Defendants do not come out and say it, but what follows from their argument is that a conspiracy whose genesis is a horizontal agreement between competitors and involving co-conspirators at a different distribution level (the *alleged* vertical component between the Steel Mill Defendants

---

9 Although not relevant to the discussion here, Justice Scalia's majority opinion and the dissent, by Justice Stevens, both of which have since received a great deal of attention in the relevant literature, represent diametrically opposed views of sub-chapters within antitrust law, including the meaning of horizontal and vertical agreements *as applied to the facts of Business Electronics*. Interestingly, however, the passage quoted in the text to this footnote shows that ***both the majority and dissent agree as settled the principle*** that the restraint of the type alleged here is a *horizontal one*, subject to the per se rule. *See Business Elecs.*, 485 U.S. at 729-30 & n. 4 (majority opinion); 745-46 & n. 10 (Stevens, J., dissenting).

and the Metals Service Center Defendants) must employ a hybrid standard—the per se *and* the rule of reason standard.

Defendants Reliance/Chapel, American Alloy, and JSW faintly make the claim. (*See* Document 35 at 12; Document 36 at 9; and Document 37 at 5.) JSW's argument is representative: "Therefore, any alleged agreement between JSW and the Metals Service Center Defendants would be a vertical agreement, subject to the rule of reason analysis, and not a horizontal one." (JSW cites no cases for support.) None of those Defendants, however, press on. Defendants Nucor and SSAB take a more direct approach, quoting from the following passage from *Toledo Mack*, 530 F.3d at 225, from the Third Circuit: "The rule of reason analysis applies even when, as in this case, the plaintiff alleges that the purpose of the vertical agreement between a manufacturer and its dealers is to support illegal horizontal agreements between multiple dealers." (*See* Document 33 at 12; Document 34 at 7 n.5.) But oddly, they do no more with it, and SSAB even relegates it to a footnote, perhaps because both Defendants know the argument can go nowhere in light of settled Supreme Court precedent (*Business Electronics*, among others).

More importantly, neither Nucor nor SSAB mentions that *Toledo Mack* relies on *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007), for that proposition, and even partially quotes *Leegin* in a parenthetical. Here is the full paragraph (which is dicta because no horizontal dealer cartel was at issue in *Leegin*), from which *Toledo Mack* quoted:

> 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. *To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason*. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Id. at 893 (internal citations omitted) (emphasis added).[10] This case, of course, involves a classic group boycott, not "minimum resale prices."

Even more important than what both *Toledo Mack* and Defendants leave out is that *Leegin* did not involve a conspiracy. The classic group boycott involves a conspiracy among firms, some of which may be at different levels of distribution. *Klor's* itself involved "not simply a 'vertical' agreement between supplier and customer, but a case that also involved a 'horizontal' agreement among competitors." *Nynex*, 525 U.S. at 136. The same vertical-horizontal agreements were at issue in *Fashion Originators'*. *Id*. at 134 ("Thus, in *Fashion Originators'* … this Court considered a group boycott created by an agreement among a group of clothing designers, manufacturers, suppliers, and retailers."); *see also Spectators' Comm'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 221 (5th Cir. 2001) ("Conspirators who are not competitors of the victim may have no interest in curtailing competition in a market in which they do not compete; nevertheless, when they have been enticed or coerced to share in an anticompetitive scheme, there is still a combination within the meaning of the Sherman Act."); *Toys "R" Us*, 221 F.3d at 935-36 (explaining that the per se rule applies to a group boycott that involves a single competitor coercing vertical suppliers so long as a horizontal agreement was present).

---

10 Although *Leegin*'s dicta is not relevant to this case, it should be noted that a reasonable interpretation of that passage is that it is merely painting a situation in which manufacturers A and B enter into a horizontal cartel to set prices, prompting the question how to judge the restraint between A or B, on the one hand, and X, a customer of either on the other hand. In other words, what is the proper analysis when X is not a member of the conspiracy (the cartel)? *Leegin* itself provides the answer.

3. The Ancillary Restraint Doctrine Also Bars Defendants' "Vertical Restraint" Argument

The Steel Mill Defendants' attempt to categorize their agreements with the Metals Service Center Defendants as vertical restraints is also foreclosed by the ancillary restraint doctrine. "To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate, legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose." *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.). An agreement to further the aims of a conspiracy, namely the group boycott, is a classic naked restraint that has no lawful purpose. It is, therefore, deemed per se illegal.

C. Defendants Erroneously Engraft Onto the Per Se Rule a Categorical "Market Power" Element

Defendants take a great deal of liberty with the law, but no place is it more evident than when they claim that the Complaint cannot get beyond the starting gate because "market power" is a necessary element even for a per se claim ***and** that such proof must be offered at the pleading stage*. (*See, e.g.*, Document 35 at 6-7 ["The Fifth Circuit has made clear that allegations of a group boycott will be analyzed under the per se rule only where … [t]he conspirators have a dominant position in the market"].) Not so, and it is startling that Defendants even make the argument.

It is true that the *Tunica* court, the case Defendants cite for this argument, required the district court on remand to consider "whether the casinos hold a dominant position in the relevant market" (the Fifth Circuit reversed the summary judgment), but it was only one factor to be considered in determining the "applicability of the per se rule." 496 F.3d at 414-15. That

conclusion is not speculation on our part; the *Tunica* opinion explains the proper analysis only a page earlier:

> The *Northwest Wholesale Stationers* court set out a number of factors that it found relevant to the determination of whether the *per se* rule should apply to a particular group boycott. First, as noted above, the Court observed that *per se* unlawful boycotts generally involved joint efforts "to disadvantage competitors by either directly denying or persuading or coercing suppliers to deny relationships the competitors need in the competitive struggle." *Northwest Wholesale Stationers*, 472 U.S. at 294 (internal quotation marks omitted). The *Northwest Wholesale Stationers* court went on, however, to discuss three other attributes that were often found in *per se* cases: that "the boycott often cut off access to a supply, facility, or market necessary to enable the boycotted firm to compete;" that "frequently the boycotting firms possessed a dominant position in the relevant market;" and that "the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Id.* **The Court further stated that "a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment."** *Id.* at 295.

Tunica, 496 at 413-14 (bold emphasis added). Lest there be any doubt about the contention that "market power" is not a categorical requirement of a per se claim, the last word on the subject belongs to the United States Supreme Court, in *Federal Trade Comm'n v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990):

> Of course, some boycotts and some price fixing agreements are more pernicious than others; some are only partly successful, and some may only succeed when they are buttressed by other causative factors, such as political influence. **But an assumption that, absent proof of market power, the boycott disclosed by this record was totally harmless … is flatly inconsistent with the clear course of our antitrust jurisprudence. Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws.**

Id. at 435-36 (emphasis added).

But even if establishing market power or "dominant position in the market" is somehow an absolute prerequisite for a per se violation, which it is not, Defendants' Motions to Dismiss

are not the correct place to advance the argument. *See Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (observing that inquiry into market power requires proof); *Tunica*, 496 F.3d at 414-15 (analysis of market power as a factor to be made at the summary judgment stage); *Toys "R" Us*, 221 F.3d at 928 (reviewing the *trial record* and concluding: "[T]his case satisfies the criteria … in *Northwest Stationers* for condemnation without extensive inquiry into market power [because] the boycotting firm possesses a 'dominant' position in the market (where 'dominant' is an undefined term, but plainly chosen to stand for something different from antitrust's term of art 'monopoly')"); *Goss v. Memorial Hosp. Sys.*, 789 F.2d 353, 355 (5th Cir. 1986) (analyzing market share at summary judgment stage).

Lastly, it should be noted that the Complaint does allege that Defendants Reliance/Chapel and American Alloy enjoy a "dominant" position within the metals service center industry. (Compl. ¶¶ 3, 46-48.) Indeed, the Steel Mill Defendants concede the point; namely by attempting to justify their restraint as an offering to their "biggest customer," Reliance/Chapel. (*See, e.g.*, Document 33 at13.)

D. Group Boycott Law Presumes Antitrust Injury

Defendants also want the Complaint dismissed because "MM Steel fails to plead injury-in-fact, antitrust injury, or injury to competition." (*See, e.g.*, Document 37 at 6.) The contention appears to be an afterthought for Defendants JSW and Nucor, as the other Defendants barely make passing reference to the issue. They are right to ignore it, because the injury from a group boycott is "not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Klor's*, 359 U.S. at 213; 15 U.S.C. § 15(a) ("Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue in any district court of the United States ….");

see also Tunica, 496 F.3d at 412 (harm to single competitor sufficient to state a Section 1 refusal to deal claim).

III. THE STATE LAW CLAIMS ARE SUFFICIENTLY ALLEGED

Defendants assail the Complaint's state law claims, but they never see how the pieces fit together, especially at the pleading stage.

Start with context. This case is a conspiracy, which is a way of extending liability in tort beyond the primary actor to those who agreed to act toward a common goal. *Carroll v. Timmers Chevrolet, Inc.*, 592 S.W.2d 922, 925-26 (Tex. 1979). Each person in the conspiracy is responsible for the acts of the others done to further the common goal of the conspiracy. *Id*. at 926. Conspiracy, of course, is not an independent tort. It is sound policy to allow plaintiffs to reach all those who seek to shield themselves by having other actors commit acts on behalf of a common cause. Before addressing Defendants' challenges to the tort claims, JSW's attack on the breach of contract claim against it is quickly disposed of.

A. JSW's Contract is Subject to the UCC's "Open Price Term" Provision

The Complaint's breach of contract claim is solely against JSW. Before getting to the law, however, a word is in order regarding JSW's use of the word "courts." JSW says "Courts have dismissed breach of contract claims under Rule 12(b)(6) as unenforceable agreements to agree." (Document 37 at 9.) The "court" in question is the Third Circuit Court of Appeals *applying New York law*.[11] *Trianco, LLC v. International Bus. Machs. Corp.*, 271 Fed. Appx.

---

11 To be fair, JSW does cite a single Texas case for support, but that case involves two school districts disagreeing about whether a "City Manager's … letter is an enforceable agreement requiring the City to apportion with the School District funds collected from Bell under Ordinance No. 11163." *Fort Worth Indep. Sch. Dist. v. City of Fort Worth,* 22 S.W.3d 831, 846 (Tex. 2000). Although the case is not germane for a number of reasons, it is worth noting that it is a review of a *summary judgment record*. The court's judgment comes only after considering "a

198, 201 (3d Cir. 2008) ("The … Agreement contained a choice of law provision stating that New York law would govern its terms."). We now turn to the governing law and show JSW's argument is without merit.

Section 2.305 of the Texas Business and Commerce Code (UCC) concerns open price terms in contracts for the sale of goods. It states, in part: "The parties if they so intend can conclude a contract for sale even though the price is not settled." TEX. BUS. & COM. CODE § 2.305 ("Open Price Term"). Steel is a good. *Fields & Co., Inc. v. United States Steel Int'l, Inc.*, 426 Fed. Appx. 271, 276 (5th Cir. 2011) (steel "is considered a 'good'"). The open price term is used by businesses who for valid reasons want to be bound to an agreement, but not to a fixed price at the time of contract. *See, e.g., Mathis v. Exxon Corp.*, 302 F.3d 448, 456 (5th Cir. 2002) ("Some drafters of the UCC worried … for the 'great many industries where sales are not made at fixed prices,' *such as the steel industry* ….") (emphasis added) (citation to UCC editorial board omitted). So what is the real issue here? It is not whether a contract exists—UCC 2.305 answers that. The real issue in this case will be JSW's bad faith breach of contract, especially because JSW had already sold goods to MM Steel pursuant to the very contract it now deems unworthy of protection under the law, but that is an issue for later in the case. *Id.* at 454 (reviewing a sufficiency challenge to the jury's finding of bad faith in commercial transaction).

B. The Complaint Sufficiently Alleges the Elements of Plaintiff's Tortious Interference Claims

The Complaint alleges that Defendants interfered with MM Steel's existing contracts. There are two such contracts identified at this time. One is JSW's; although generally it is true

---

number of factors," including the parties' prior negotiations and their financial status at the time of the letter, among others. *Id.* at 847.

that a party (JSW) cannot interfere with its own contract, *see Holloway v. Skinner*, 898 S.W.2d 793, 795 (Tex. 1995), that is not the rule when the contracting party is a member of the conspiracy. *See Perry Motors v. Chrysler Corp.*, 13 F. Supp. 845, 846 (N.D. Tex. 1936) ("More than thirty years ago, the Supreme Court of Texas, in *Raymond v. Yarrington* [, 80 S.W. 800, 803 (Tex. 1903)], announced the rule that persons who knowingly induce one to break his contract with another give the other a cause of action against *them both* for damages resulting from such breach.") (emphasis added). The other is MM Steel's business relationship with North Shore.

1. Defendants Interfered with MM Steel's JSW Contract

The elements of a tortious interference claim are well-known: (i) the existence of a contract; (ii) defendant's willful and intentional interference; (iii) the interference proximately caused injury; and (iv) damages. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 207 (Tex. 2002). Defendants' attack on the pleadings is based on the first three elements.

MM Steel and JSW entered into a valid, enforceable contract (element i). JSW had already sold steel pursuant to that open terms contract, and Defendants knew about it. How do we know that? American Alloy's emails say that JSW was going to be threatened on behalf of both American Alloy and Reliance/Chapel (elements ii and iii). Immediately after JSW received "unsolicited" ***visits***, JSW stopped selling MM Steel steel. The Complaint alleges that American Alloy threatened JSW. That leaves JSW, Nucor, and SSAB, but they are alleged to be members of the conspiracy, so they are liable for all its action, including the tortious interference. *See Perry Motors*, 13 F. Supp. at 846.

But even outside of the conspiracy context, the Complaint offers direct evidence that Nucor's Whiteman unequivocally said JSW and no other mill would sell to MM Steel. At a minimum, this suggests communications between the Steel Mill Defendants, since there is no

other way for Whiteman to have known of the others mills' decisions (and they of Nucor's) to not sell to MM Steel. *See Exxon Corp. v. Allsup,* 808 S.W.2d 648,656 (Tex. App.—Corpus Christi 1991, writ denied) ("To establish the requisite element of intent, the plaintiff must show either that the interfering party had actual knowledge of the existence of the contract and of the plaintiff's interest in it or that the interfering party had knowledge of such facts and circumstances that would lead a reasonable person to believe in the existence of the contract and the plaintiff's interest in it."). Taken together, the facts suggest that JSW would not have breached its contract without the other mills' involvement in the conspiracy. In other words, Steel Mill Defendants induced JSW to breach its contract, and that is actionable. *See L.G. Motorsports, Inc. v. NGMCO, Inc.*, 2010 U.S. Dist. LEXIS 91895, at *22-25(E.D. Tex. Mar. 6, 2012) (denying motion to dismiss as to tortious interference claims based on allegation that plaintiff's "driver quit the team resulting in a substantial loss" because driver's preferred tire supplier cut off supply at behest of defendant). [Document 34-1, App. 6-13]

2. Defendants Interfered with MM Steel's North Shore Contract

Wanting to salvage its business, MM Steel started partnering with North Shore. They had a real business relationship, in which North Shore's steel was sold by MM Steel. The business relationship resulted in some income. That means a contract was formed. *Juliette Fowler Homes, Inc. v. Welch Assocs.*, 793 S.W.2d 660, 664 (Tex. 1990) (holding at-will contract can be interfered with); *CF & I Steel Corp. v. Pete Sublett & Co.*, 623 S.W.2d 709, 715 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.) (holding supply contract/relationship where customer "purchased pipe directly from [plaintiff] on a regular basis and placed mill tonnage on [defendant's] mill through [plaintiff] could be interfered with); *Panama-Williams, Inc. v. Lipsey*, 576 S.W.2d 426 (Tex. Civ. App.—Houston 1978, writ ref'd n.r.e) (reversing

summary judgment because, inter alia, oral joint venture agreement may be tortiously interfered with).

Moreover, it is indeed strange for Defendants to claim, on the one hand, that MM Steel's dealings with North Shore did not give rise to business dealings worthy of being interfered with, yet, on the other hand, having taken great pains to threaten North Shore about "doing any business with MM Steel." (Compl. ¶¶ 12, 81.)

That MM Steel and North Shore wanted to grow their relationship or memorialize in a document does not mean a business relationship did not already exist. And anyway, whether a contract exists is a fact question. *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co.*, 480 S.W.2d 607, 609-10 (Tex. 1972); *see also* State Bar of Texas, Pattern Jury Charge—Business, Consumer, Insurance, Employment PJC 101.1 (2010) ("Basic Question—Existence [of Contract]").[12] [App., Tab 4.]

Defendants also challenge the sufficiency of the pleadings on the interference with North Shore's contract, but here, too, the conspiracy allegations mean all Defendants are liable for the tortious interference spearheaded by Nucor's Whiteman, with assistance from American Alloy's Wendell Hilton and Chapel's Ginny Lindsey. (Compl. ¶¶ 76, 77-81, & 83-84.)

---

12 Virtually all Defendants cite to *Specialties of Mexico, Inc. v. Masterfoods, U.S.A.*, 2010 WL 2488031, at *9 (S.D. Tex. June 14, 2010) (unpublished), for the proposition that a mere "business relationship" between "purchaser and middle-men" is insufficient as a matter of law to give rise to a tortious interference claim. (*See, e.g.*, Document 35 at 18 & App. 1.) As noted in the text to this footnote, however, no written contract is necessary to sustain a tortious interference claim. That is the basic holding of the cases cited in the text. And anyway, the existence of a business relationship is often a question of fact. We respectfully point out that *Specialties of Mexico* does not cite any cases in support of its conclusion.

C. Defendants' Remaining Arguments Miss the Point

The tortious interference with prospective business relationships is based on future dealings with Nucor, JSW, and SSAB.[13] Defendants challenge the sufficiency of the pleadings by simply regurgitating their "no evidence" points, which are addressed throughout this Response. The one issue that deserves a brief response is Defendants' claim that MM Steel's future contracts with Nucor, SSAB, and JSW were not "reasonably probable." (*See, e.g.*, Document 35 at 12-14.)

Plaintiff does not begrudge Defendants their arguments, but how is an issue—whether a future business relationship is reasonably probable—that requires considering "all of the circumstances" worthy of being addressed, much less disposed of, in a motion to dismiss? *See Suprise v. DeKock*, 84 S.W.3d 378, 381 (Tex. App.—Corpus Christi 2002, no pet.) ("The law does not require absolute certainty that a prospective contract would have been made were it not for the interference; it must reasonably appear so, in view of all of the circumstances."). MM Steel has already alleged that SSAB was moving forward with doing business with it; that JSW had already formed a contract with it and would have likely continue later; and that Hume and Schultz had a pre-existing relationship with Nucor and, absent the conspiracy, would have had one in the future.

Defendants American Alloy and Moore also offer a justification defense to tortious interference, but they carry the burden on that affirmative defense, so raising it now is odd and unnecessary. *See Kadco Contract Design Corp. v. Down Chem. Corp.*, 198 F.3d 214, 1999 WL

---

13 Defendants American Alloy and Moore state that a party cannot claim a "'reasonable probability' of entering into business relationships with unnamed 'third parties.'" (Document 36 at 18 n.10.) We agree. For the time being, the claim is limited to future contracts with Nucor, SSAB, and JSW.

824530, at *3 (5th Cir. 1999) (reviewing summary judgment on "affirmative defense of justification"). [Document 36-5, App. 1-4]

Last is the business disparagement claim. All Defendants basically say the Complaint lacks details implicating each Defendant individually and does not identify the disparaging words that were communicated. At the expense of redundancy, the Complaint alleges (i) a conspiracy (with meetings, agreements, and specific actions in furtherance set forth) among the Defendants and (ii) that JSW's Fitch said that visitors, later revealed to include someone from American Alloy, among others, disparaged MM Steel in the process of threatening JSW. MM Steel does not know what words were exchanged, but for now it must take JSW's Fitch's word *that it was disparaged*. In light of allegations contained in the Complaint, perhaps the following words were used: "not worthy of being in this business" (Compl. ¶ 11) or "bums" (Compl. ¶ 23). Or maybe Defendants called MM Steel's principals "pariahs" or accused them of "taking American Alloy's customer lists, customer bid numbers, and other trade secrets with them" when they left American Alloy's employment. (Document 36 at 1.) All of these give rise to a claim for business disparagement, for which all members of the conspiracy are liable. *See Hurlbut v. Gulf Atl. Life Ins.*, 749 S.W.2d 762, 766-67 (Tex. 1987) (holding that knowingly making false statements that agent "did not have authority to write group life insurance" sufficient to support business disparagement claim).

PRAYER FOR RELIEF

Plaintiff MM Steel respectfully asks this Court to deny Defendants' Motions to Dismiss. It further prays for all other relief to which it may be entitled under law and equity.

Date: July 20, 2012

Respectfully Submitted,

TAHERZADEH LAW FIRM

/s/ Mo Taherzadeh
MO TAHERZADEH
mo@taherzadehlaw.com
Texas Bar No. 24028022
Federal Bar No. 29596
1001 West Loop South, Suite 700
Houston, Texas 77027
Telephone: (713) 360-6055
Facsimile: (713) 626-7113
ATTORNEY-IN-CHARGE FOR PLAINTIFF MM STEEL, LP

OF COUNSEL:
TATE YOUNG LAW FIRM
R. TATE YOUNG
tyoung@tateyounglawfirm.com
Texas Bar No. 22207100
Federal Bar No. 4808
1001 West Loop South, Suite 700
Houston, Texas 77027
Telephone: (713) 626-7112
Facsimile: (713) 626-7113

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was filed electronically in compliance with Local Rule 5.1. As such, notice of filing is being served on the all counsel of record by the Court's electronic filing system:

/s/ Mo Taherzadeh
MO TAHERZADEH