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

MM STEEL, LP,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Civil Action No. 4:12-cv-01227
	§	
RELIANCE STEEL & ALUMINUM CO., CHAPEL STEEL CORP., AMERICAN ALLOY STEEL, INC., ARTHUR J. MOORE, JSW STEEL (USA) INC., and NUCOR CORP.,	§	
	§	
Defendants.	§	Jury Trial Demanded

PLAINTIFF MM STEEL'S AMENDED
PROPOSED JURY CHARGE

Plaintiff submits this amended proposed jury charge for the Court's consideration. This amended proposed charge is significantly shorter than MM Steel's prior proposed charge because it omits MM Steel's state-law tort claims.

Plaintiff respectfully requests that the Court instruct the jury in conformity with the attached general and special instructions, as well as such other instructions submitted by Plaintiff during trial. Plaintiff submits these proposed definitions and instructions without prejudice to or waiver of its right to request judgment as a matter of law, to submit amended or additional definitions or instructions or to omit any definitions or instructions, or to otherwise exercise all other rights it possesses at or after trial consistent with the evidence at trial.

Dated: March 10, 2014

Respectfully submitted,

/s/ Mo Taherzadeh

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served on all counsel of record this 10th day of March, 2014, in compliance with the Federal Rules of Civil Procedure via the Court's ECF system for filing.

/s/ *Marc S. Tabolsky*
Marc S. Tabolsky

General Instruction

During this case, you have heard references to a lawsuit that Chapel filed against MM Steel on September 15, 2011. That lawsuit ended by mutual agreement of the parties on October 14, 2011. The state court did not decide whether the claims in that case were true or false.

Question 1

Did American Alloy and Reliance/Chapel conspire to persuade, induce, or coerce any steel mill not to sell steel plate to MM Steel?[1]

American Alloy and Reliance/Chapel conspired if they agreed to act together to persuade, induce, or coerce any steel mill not to sell steel plate to MM Steel. You should treat Reliance and Chapel as one defendant. While you should treat Reliance and Chapel as one defendant, American Alloy may conspire with Reliance/Chapel if it conspired either with Reliance or Chapel. It is not necessary for American Alloy to conspire with both of them.

An agreement exists if the parties, in some way, came to an agreement to accomplish a common purpose. It is not necessary that there be a formal or written agreement; that the participants met together; or that the participants directly stated their object, purpose, or the details or means by which they would accomplish their purpose. An agreement can be entirely unspoken. It does not matter whether the agreement is successful.[2]

It is not necessary that the evidence show that all of the means or methods claimed by MM Steel were agreed upon to carry out the alleged conspiracy; nor that all of the means or methods that were agreed upon were actually used or put into operation; nor that all the persons alleged to be members of the conspiracy actually were members. What the evidence must show is that the alleged conspiracy of two or more persons existed, that one or more of the means or methods alleged was used to carry out its purpose, and that the defendant knowingly became a member of the conspiracy.[3]

A person or business cannot participate in a conspiracy to refuse to sell to another business to exclude the other business from the market even if they do so in response to what they believe is the wrongful conduct of the other business, its owners, or employees.[4]

Answer "Yes" or "No":

Answer: _____

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[1] *Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (describing group boycotts as "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relation-ships the competitors need in the competitive struggle."); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959).

[2] ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, B-3-B-4.

[3] ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, B-3-B-4.

[4] *United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966) ("Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed.").

If you answered "Yes" to Question 1, then answer the following question. Otherwise, do not answer the following question.

Question 2

Did Arthur Moore approve, authorize, ratify, or participate in American Alloy conspiring with Reliance/Chapel to persuade, induce, or coerce any steel mill not to sell steel plate to MM Steel?[5]

Answer "Yes" or "No":

Answer: _____

[5] *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 852 (N.D. Cal. 1979) (noting that personal liability by corporate officer for antitrust violations requires "participation in the tort by the executive," which may consist of "knowing approval or ratification of unlawful acts"); *Bergjans Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 482 (E.D. Mo. 1965) ("Corporate officers, directors and agents are personally liable for acts of the corporation that violate the antitrust laws if they participate in those actions or authorize them"); *Brown v. Donco Enters., Inc.*, 783 F2d 644, 646 (6th Cir. 1986) ("It is undisputed that a corporation's officers and agents may be held individually liable for corporate actions that violate the antitrust laws if they authorize or participate in the unlawful acts").

If you answered "Yes" to Question 1, then answer the following question. Otherwise, do not answer the following question.

Question 3

Did JSW or Nucor join the conspiracy you found in Question 1?

JSW or Nucor joined the conspiracy if they agreed with American Alloy and/or Reliance/Chapel not to sell steel plate to MM Steel.

An agreement exists if the parties, in some way, came to an agreement to accomplish a common purpose. It is not necessary that there be a formal or written agreement; that the participants met together; or that the participants directly stated their object, purpose, or the details or means by which they would accomplish their purpose. An agreement can be entirely unspoken. It does not matter whether the agreement is successful.[6]

It is not necessary that the evidence show that all of the means or methods claimed by MM Steel were agreed upon to carry out the alleged conspiracy; nor that all of the means or methods that were agreed upon were actually used or put into operation; nor that all the persons alleged to be members of the conspiracy actually were members. What the evidence must show is that the alleged conspiracy of two or more persons existed, that one or more of the means or methods alleged was used to carry out its purpose, and that the defendant knowingly became a member of the conspiracy.[7]

A person or corporation joins a conspiracy even if they did so reluctantly or were coerced into doing so.[8] This is because acquiescing to an illegal scheme violates the law just as much as creating or promoting the scheme.[9]

At least two participants in the conspiracy must be competitors at the same level of the market.[10] But not every participant in the conspiracy must be direct competitors.[11]

A person or business cannot participate in a conspiracy to refuse to sell to another business to exclude the other business from the market even if they do so in response to

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[6] ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, B-3-B-4.

[7] ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, B-3-B-4.

[8] *Spectators' Commc'n Network Inc. v. Colonial Country Club*, 253 F.3d 215, 220-21 (5th Cir. 2001) (stating that "[a]ntitrust law has never required identical motives among conspirators, and even reluctant participants have been held liable for conspiracy" and further stating that "[c]onspirators 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.").

[9] *Id*. (quoting *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 161 (1948) ("For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."),

[10] *See, e.g., Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088 (9th Cir. 2000).

[11] *See NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 135 (1998); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959); *United States v. MMR Corp. (La.)*, 907 F.2d 489, 498 (5th Cir. 1990) ("If there is a horizontal agreement between A and B, there is no reason why others joining that conspiracy must be competitors."); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000).

what they believe is the wrongful conduct of the other business, its owners, or employees.[12]

Answer "Yes" or "No" as to each defendant:

Nucor: _____

JSW: _____

[12] *United States v. General Motors Corp.*, 384 U.S. 127, 146 (1966) ("Exclusion of traders from the market by means of combination or conspiracy is so inconsistent with the free-market principles embodied in the Sherman Act that it is not to be saved by reference to the need for preserving the collaborators' profit margins or their system for distributing automobiles, any more than by reference to the allegedly tortious conduct against which a combination or conspiracy may be directed.").

If you answered "Yes" to Question 1 or any part of Question 3, then answer the following question. Otherwise, do not answer the following question.

Question 4

Did one or more steel mills refuse to sell steel plate to MM Steel as a result of the conspiracy which refusal, if any, disadvantaged MM Steel by denying it access to a supply of steel plate necessary for it to compete effectively? [13]

Answer "Yes" or "No":

Answer: _____

[13] ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, B-50; Final Jury Instructions, *In re Tableware Antitrust Litig.*, C-04-3514 (N.D. Cal.) (Dkt. #384);(Adapted); *see also Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 209 (1959); *FTC v. Toys R Us, Inc.*, 221 F.3d 928, 931 (7th Cir. 2000).

If you answered "Yes" to Question 4, then answer the following question. Otherwise, do not answer the following question.

Question 5

Was MM Steel's business injured because of the conspiracy and did the conspiracy occur in or affect interstate commerce?[14]

The term "interstate commerce" refers to business transacted across State lines or between persons having their residences or businesses in different States. MM Steel is not required to show that the disputed transactions were interstate transactions in and of themselves, if MM Steel shows that such transactions have affected interstate commerce in a substantial way.[15]

Answer "Yes" or "No":

Answer: _____

[14] ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, B-50; Final Jury Instructions.
[15] Fifth Circuit 2006 Civil Pattern Jury Instructions 6.1.

If you answered "Yes" to Question 5, then answer the following question. Otherwise, do not answer the following question.

Question 6

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate MM Steel for the injury to its business or property that you have found in response to Question 1?

Consider the following elements of damages, if any, and none other.

MM Steel's lost net profits.

Net profits are the amount by which MM Steel's gross revenues would have exceeded all of the costs and expenses that would have been necessary to produce those revenues.[16]

Damages must be for injuries which have actually been suffered or are reasonably likely to be suffered in the future. While the amount of damages may not be determined by mere speculation or guess, it is sufficient that the amount can be justly and reasonably inferred, even if the result is only approximate.[17] The evidence of damages may be indirect and it may include estimates based on assumptions, as long as the assumptions rest on adequate data.[18]

The fact that the amount of may be uncertain does not preclude you from finding damages if the uncertainty is due to the conduct you found in question 2.[19]

A new business may recover damages even if it did not have a substantial profit record.[20]

Do not add any amount for interest on damages, if any.

Answer separately in dollars and cents for damages, if any.

Answer: _____

[16] ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases, 2005 Edition, F-27.
[17] *Lehrman v. Gulf Oil Corp.* 500 F.2d 659, 668 (5th Cir. 1974).
[18] *Id.*
[19] *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 45 (5th Cir. 1972) ("Particularly is the calculation of damages difficult when the future profits of an enterprise as young as Lehrman's must be determined, since there is no reliable track record to look back on. But uncertainty cannot end the efforts of the federal courts to redress the harm caused proprietors by violations of the freedom of the marketplace. The wrongdoer must bear the risk of the uncertainty in measuring the harm he causes.").
[20] *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 669 (5th Cir. 1974) ("To deny recovery to a businessman who has struggled to establish a business in the face of wrongful conduct by a competitor simply because he never managed to escape from the quicksand of red ink to the dry land of profitable enterprise would make a mockery of the private antitrust remedy.") (quoting *Terrell v. Household Good Carriers' Bureau*, 494 F.2d 16, n. 12 (5th Cir. 1974)).

Question 7

Did JSW fail to comply with its August 2, 2011 contract with MM Steel?[21]

JSW committed to supply certain quantities and types of steel plate products to MM Steel at prices to be agreed at the time of order placement.[22]

If JSW and MM Steel agreed to other essential terms but failed to specify price, it is presumed a reasonable price was intended.[23]

In addition to the language of the agreement, the law imposes on a party to a contract a duty to perform the contract in good faith. In that connection, good faith means honesty in fact and the observance of reasonable commercial standards of fair dealing.[24]

Answer "Yes" or "No."

Answer: _____

[21] TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INS., EMPLOYMENT 101.2 (2012).
[22] PX127 at 1.
[23] TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INS., EMPLOYMENT 101.13 (2012).
[24] *Id*. at 101.2 comments.

If you answered "Yes" to Question 7, then answer the following question. Otherwise, do not answer the following question.[25]

Question 8

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate MM Steel for its damages, if any, that resulted from such failure to comply?

Consider the following element of damages, if any, and none other.

The net profits that MM Steel would have earned from selling steel that it would have bought from JSW from August 2, 2011 through August 1, 2012.

Do not add any amount for interest on damages, if any.

Answer in dollars and cents for damages, if any.[26]

Answer: _____

[25] TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INS., EMPLOYMENT 115.1 (2012).
[26] TEXAS PATTERN JURY CHARGES—BUSINESS, CONSUMER, INS., EMPLOYMENT 115.3 (2012).