Appeal No. 14-20267

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

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

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

BRIEF OF APPELLANT NUCOR CORPORATION

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CERTIFICATE OF INTERESTED PERSONS

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

- **Defendant-Appellant Nucor Corporation.** Nucor is a publicly-traded Delaware corporation headquartered in Charlotte, North Carolina. Nucor does not have a parent corporation and no publicly-held corporation owns 10% or more of its stock. The following attorneys have appeared on behalf of Nucor in this Court or in the district court:

  Robert J. Katerberg, David P. Gersch, Lisa S. Blatt, Elisabeth S. Theodore, Donna E. Patterson, Jason C. Ewart, Andrew S. Macurdy, Rosemary Szanyi, and S. Albert Wang, Arnold & Porter LLP.

  Walter M. Berger, Winston & Strawn LLP.

  Douglas R. Gunson, Nucor Corporation.

- **Defendant-Appellant JSW Steel (USA) Inc.** The following attorneys have appeared on behalf of JSW:

  Gregory S.C. Huffman, Scott P. Stolley, Nicole L. Williams, Hunter Mac Barrow, Emily W. Miller, Wade A. Johnson, Thompson & Knight LLP.

  Roger D. Townsend, Dana Livingston, Marcy Hogan Greer, Alexander Dubose Jefferson & Townsend LLP.

- **Plaintiff-Appellee MM Steel L.P**. MM Steel is a Texas limited partnership; its owners are Michael Hume and Matthew Schultz. The following attorneys have appeared on behalf of MM:

  Mo Taherzadeh, Taherzadeh Law Firm.

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/s/ Lisa S. Blatt
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STATEMENT REGARDING ORAL ARGUMENT

Nucor Corporation respectfully requests oral argument. Nucor appeals from a judgment exceeding $150 million following a complex, six-week antitrust trial. The appeal involves significant, recurring legal questions concerning a manufacturer's right to choose its distributors and the application of evidentiary standards under the Sherman Act. Oral argument will assist this Court in resolving these and other questions.

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STATEMENT OF JURISDICTION

Nucor Corporation appeals from a judgment under Section 1 of the Sherman Antitrust Act. The district court had jurisdiction under 28 U.S.C. § 1331. The court entered final judgment on April 29, 2014, and an amended final judgment on June 1, 2014. ROA.5783-5784; ROA.32589-32590. Nucor timely filed a notice of appeal on May 2, 2014, and an amended notice on June 24, 2014. ROA.5788-5789; ROA.32772-32774. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether Nucor is entitled to judgment as a matter of law, because the evidence did not show that Nucor entered into an antitrust conspiracy, or because Nucor's conduct did not support *per se* antitrust liability.

2. Whether the district court abused its discretion in excluding Nucor's expert as "irrelevant" while permitting MM's expert to testify on the same topics.

3. Whether the district court abused its discretion by permitting MM's counsel to misstate the law in closing and to invent facts not in evidence, by admitting hearsay, by allowing witnesses to testify that Nucor's conduct was "unlawful," and by issuing additional erroneous, inconsistent rulings.

4. Whether the $52 million award, trebled to $156 million, unlawfully includes post-complaint damages and was based upon factual assumptions the record forecloses.

STATEMENT OF THE CASE

Nucor is America's largest steel manufacturer. For over a decade, Nucor has distributed steel plate through Chapel Steel, a large distributor with offices nationwide. On September 1, 2011, the co-managers of Chapel's Houston office abruptly quit to open a competing distributor, plaintiff MM Steel. That same day, MM asked Nucor to start selling to Chapel customers through MM rather than Chapel, and Nucor said no.

In April 2012, MM sued under Section 1 of the Sherman Act, 15 U.S.C. § 1. MM alleged that, on September 8, 2011, Chapel and its parent Reliance Steel (collectively Chapel), formed a horizontal conspiracy—*i.e.*, a conspiracy among competitors—with distributor American Alloy Steel. MM alleged that the distributors aimed to boycott MM by persuading manufacturers not to sell steel through MM, and that Nucor and manufacturers JSW Steel and SSAB Enterprises joined the conspiracy. Though it was undisputed that Nucor refused to sell steel through MM on September 1, before the alleged horizontal conspiracy began, the district court allowed the case to go to trial without ever addressing whether the evidence "tends to exclude the possibility" that Nucor was "acting independently," as antitrust law requires. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

During trial, the court permitted MM to put on an expert witness who testified that Nucor had no independent business reason to refuse to take MM on as a distributor. Remarkably, the court excluded Nucor's expert, on the theory that his testimony about Nucor's independent rationale would be "irrelevant." The jury found that Chapel and American Alloy entered into a horizontal conspiracy and that Nucor and JSW joined that conspiracy. (SSAB settled pre-trial.) The jury awarded $52 million in damages, or $156 million after trebling.

A. Nucor and Chapel

Nucor produces 20 to 25 million tons of steel annually, including 2.3 million tons of steel plate. ROA.17645. Like many large manufacturers, Nucor sells most of its plate through large, established distributors like Chapel—who have a nationwide footprint, buy lots of steel, and use Nucor as their primary supplier. ROA.17635-17637; ROA.17641-17649; ROA.18790-18796; ROA.19070-19072. The Nucor-Chapel relationship is longstanding, loyal, and successful. Chapel buys 75 percent of its steel from Nucor, and has worked with Nucor since Nucor first began selling plate in 2000. ROA.17643-17644; ROA.17984.

B. MM's Formation and Nucor's Response

On September 1, 2011, Matt Schultz and Mike Hume quit Chapel-Houston without notice to open MM, taking two other Chapel-Houston salesmen with them. ROA.16677-16687; ROA.16708-16710. Their plan was to buy most of their steel

plate from Nucor's competitor, JSW, and to distribute that plate to Chapel's customers. ROA.16612; ROA.16952-16954; ROA.17159-17161; ROA.17236-17239. Hume and Schultz began secretly meeting with JSW in April 2011, signed a year-long supply agreement with JSW in August, and ordered $1.1 million of JSW steel—all while still on Chapel's payroll. ROA.16612-16613; ROA.16668-16669; ROA.16672; ROA.16882-16884; PX127.

MM's plan immediately collapsed. Within two weeks of MM's September 1 launch, Chapel obtained a restraining order enforcing non-compete agreements Hume and Schultz had signed at Chapel. ROA.17965-17969; ROA.17169; ROA.16902-16905. Hume admitted that the restraining order alone essentially "shut down" MM. DX239-014; ROA.17172-17173. Within six weeks, on October 14, MM and Chapel signed a settlement enjoining MM from selling to approximately 200 of Chapel's top 250 customers for five additional months. ROA.16710-16719; DX257. And on October 20, JSW told MM that the supply deal was over. MM had relied on the JSW deal; in MM's view, JSW "effectively put[] [it] out of business." ROA.19788.

Nucor, by contrast, simply chose not to *start* selling steel through MM. On September 1, Hume left a voicemail informing Nucor's Jeff Whiteman that Hume and Schultz had just left Chapel-Houston, and noting that MM hoped to sell Nucor steel to a longtime Chapel customer. ROA.18824-18827; ROA.17798-17799.

Whiteman, the sales manager at Nucor's plate mill in Hertford, North Carolina, immediately emailed Chapel's president to unilaterally pledge Nucor's "fullest support. Just ask." PX146; ROA.17985-17986; ROA.18829-18830; ROA.19915. Nucor's unilateral communication to Chapel occurred before anyone at Nucor spoke with anyone at Chapel or Reliance, Chapel's parent company.

Later on September 1, Nucor employees spoke with Chapel and Reliance executives about the situation in Houston. Chapel and Reliance informed Nucor that MM had partnered with Nucor's competitor, JSW. PX160; PX185. Nucor reiterated Whiteman's initial assurance of support. ROA.17984-17987; ROA.18151; ROA.17798-17799; ROA.18832-18833; PX160. Nucor's Joe Stratman, who oversaw plate manufacturing, emailed sales managers that Nucor would "continue to support our existing customers," and Randy Charles, Nucor's sales manager in Tuscaloosa, immediately emailed his staff: "M&M Steel we'll not be quoting nor extending credit right now." PX160. When Hume emailed Charles about a potential sale the next day, September 2, Charles called Hume back to decline. ROA.17262-17263.

Nucor introduced evidence that selling through MM was incompatible with Nucor's distribution strategy. MM had no national footprint, little capital, and had signed up JSW, Nucor's *competitor*, as its lead supplier. ROA.17410; *supra* pp.3-4. And Hume and Schultz testified that MM planned to target end-users Nucor

was already supplying through Chapel. ROA.16954; ROA.17159-17161. That plan conflicted with Nucor's longstanding "incumbency" practice. If a distributor brings Nucor business from a particular end-user—for example, a construction company—that distributor is the "incumbent." Nucor then rejects offers from other distributors that want to sell Nucor's steel to the same construction company. ROA.17649-17652; ROA.18798-18821; ROA.19074-19076; *e.g.*, DX52; DX72; DX102; DX530.

Nucor's loyalty encourages distributors to develop and bring new business to Nucor rather than to a competing steel manufacturer, because distributors can be confident that Nucor won't give that business away. ROA.17649-17652; ROA.18803-18804; ROA.18816-18817. Consistent with the incumbency practice, new Nucor distributors must offer new business, *i.e.*, end-users Nucor does not already supply through existing distributors. ROA.19072-19074; ROA.19086; ROA.18797-18800. It is undisputed that the only potential end-user MM *ever* presented to Nucor was Greens Bayou, an end-user Nucor was already supplying through Chapel. ROA.16969-16970; ROA.17259; ROA.17266-17267.

MM contended at trial that Nucor declined to sell steel through MM because of an ultimatum from Chapel. ROA.19774-19775. Over Nucor's hearsay objection, MM introduced a September 5 email from John Sergovic, an employee of non-party steel manufacturer ArcelorMittal, to his colleagues. ROA.3214-3215.

His email purported to recount what Chapel's Stan Altman allegedly told Sergovic about what Altman allegedly told Nucor on September 1 or 2: "[Altman] said 'If ArcelorMittal sells to M&M - then Chapel will not buy anything from [ArcelorMittal].' [Altman] said he made the same comment to Jeff Whiteman at Nucor." PX235. The email added, "[Altman] said he will not put this in writing and he will deny it if asked." *Id.* Sergovic did not testify; every relevant witness who did confirmed that Chapel never asked Nucor not to sell to MM and was in no financial position to issue an ultimatum to Nucor. ROA.17658-17659; ROA.17984-17991; ROA.18031-18033; ROA.18151-18152; ROA.18834-18836.

C. The Alleged Horizontal Conspiracy Between Distributors

MM brought this case under a *per se* theory, meaning MM had to show that Nucor joined a *horizontal* conspiracy between competitors. ROA.3217-3218. MM did not contend that Nucor conspired with its own competitors. Rather, MM contended that on September 8, 2011, Chapel met with another distributor, American Alloy, and formed a horizontal conspiracy to boycott MM. ROA.14113; ROA.17543; ROA.19760. MM argued that defendant manufacturers SSAB and JSW initially were eager to do business with MM, but stopped after pressure from distributors American Alloy and/or Chapel in the weeks after September 8. ROA.15649-15678; ROA.18647-18660. By contrast, it was undisputed that Nucor never showed any interest in doing business with MM, before or after September 8.

MM's theory was that Nucor wasn't "fully committed" to declining to use MM as a distributor until Nucor allegedly learned about the horizontal conspiracy, in October. ROA.19790; ROA.19774.

It was undisputed that Nucor never spoke with American Alloy about MM. And MM presented no evidence that Nucor ever learned that American Alloy and Chapel had spoken on September 8 or thereafter, or that Nucor knew other mills had declined to sell to MM. MM's purported evidence that Nucor committed to a horizontal conspiracy after September 8 was instead as follows. Nucor employees dined with Reliance and Chapel employees on October 5, 2011, in connection with a retirement party and Nucor's desire to introduce a new manager to Reliance. ROA.17677-17680; ROA.17722-17724. On October 26, MM emailed a lower-level Nucor salesperson asking whether Nucor would quote MM a price for a small amount of steel for an unidentified end-user. PX424. Nucor did not respond. ROA.19094-19095. That was the last contact between MM and Nucor.

No evidence remotely connected Nucor's failure to respond to MM's October 26 email to an alleged September 8 horizontal conspiracy between American Alloy and Chapel. So MM literally invented some. MM's counsel falsely told the jury in closing that, at the October 5 dinners, Nucor told Reliance, "You need to tell me that this MM Steel group isn't going to get steel from anybody." ROA.19786. MM's counsel then falsely told the jury that Reliance

gave that guarantee and told Nucor about the alleged horizontal conspiracy, and that the guarantee prompted Nucor to join. ROA.19786; ROA.19790. Again, *this was sheer fabrication*. The court overruled Nucor's objection. ROA.19812-19815.

D. Nucor and North Shore

MM presented evidence that in November/December 2011 and March 2012, Nucor learned that MM was indirectly purchasing Nucor steel through a distributor called North Shore. ROA.18860-18863; ROA.15958-15961. Nucor's Whiteman testified that the arrangement—which Whiteman referred to as North Shore's "fronting tons" for MM—could allow MM to circumvent Nucor's incumbency practice, by secretly reselling Nucor steel to Nucor/Chapel customers. PX589; ROA.18865-18871; ROA.16963-16964.

While preparing to file this lawsuit, MM secretly recorded portions of a March 19, 2012 lunch conversation between North Shore general manager Byron Cooper and MM about Cooper's "impressions" of a Cooper-Whiteman conversation. ROA.14124-14126; ROA.16136; ROA.16650-16651; ROA.32483. The court admitted this evidence—Cooper's out-of-court statements to MM—over Nucor's hearsay objection. ROA.3215-3216; ROA.15999-16003. The evidence showed that, at the lunch, Cooper related various impressions from his call with Whiteman: steel companies were "monitoring" MM; manufacturers were facing

customer pressure not to support MM; and Cooper perceived an "unspoken message" that Nucor wouldn't do business with North Shore "to the extent" North Shore does business with MM. ROA.16136; ROA.16001-16003; *see* ROA.32063.

MM's position at trial was that the North Shore evidence showed that Nucor "enforce[d]" the alleged conspiracy, at Chapel's behest, by trying to get North Shore to cut MM off. ROA.19794; *see* ROA.17823-17825; ROA.17864. But MM's own witness, Cooper, testified that no one at Nucor ever told North Shore not to do business with MM. ROA.15997; ROA.16034-16036; ROA.16062; ROA.16136-16137. And it was undisputed that North Shore continued selling to MM, and Nucor continued selling to North Shore, throughout this whole period, until MM closed in August 2013. ROA.15959-15961; ROA.16028-16042; ROA.16066-16067; DX119 (dozens of purchase orders between MM and North Shore from November 2011 to July 2013); DX479; DX373.

E. Proceedings Below

MM filed suit on April 19, 2012, naming Nucor, Reliance, Chapel, JSW, SSAB, American Alloy, and American Alloy's owner. The district court denied Nucor's motion to dismiss and motion for summary judgment without considering whether the evidence against Nucor tended to exclude the possibility of independent action, as *Monsanto* requires, or even acknowledging that standard. ROA.981-982; ROA.1852-1853.

Trial began on February 14, 2014. MM's first witness was its expert, James Mahoney. Over Nucor's objections,[1] Mahoney interpreted dozens of e-mails and overviewed and confirmed facts underlying MM's case. ROA.14391-14424; ROA.14432-14442. Mahoney testified that Nucor lacked any independent economic rationale for declining to sell steel through MM. ROA.14263-14266.

Nucor called an expert, Dr. Allen Jacobs, to testify that Nucor's distribution practices are common, economically advantageous, and furthered Nucor's independent interests. ROA.18752-18784; ROA.19036-19039. Yet the court sustained a surprise objection that Jacobs' testimony was "irrelevant." ROA.18752-18784; ROA.18981-18986. The court reasoned that selling steel through a limited set of distributors is illegitimate "discrimination"—like a company in "1954" saying "[w]e're not going to serve you." ROA.18759-18760.

The court denied Nucor's motion for a directed verdict, again without evaluating whether the evidence tended to exclude the possibility of independent action. ROA.5334-5338. On March 25, 2014, the jury returned a $52 million verdict against all defendants, or $156 million after trebling. ROA.5574-5591.[2] The court summarily denied Nucor's post-trial motions. ROA.5782; ROA.7382.

[1] Objections by one defendant counted as objections by all, ROA.13813-13814; this brief treats any defendant's objection as Nucor's.

[2] The distributor defendants—Reliance, Chapel, American Alloy, and American Alloy's owner—settled post-trial.

SUMMARY OF ARGUMENT

The trial and judgment in this case disregarded the law of antitrust, the rules of evidence, and Nucor's right to mount a defense.

The jury found that Chapel and American Alloy entered into a horizontal conspiracy, and that Nucor joined that conspiracy. As to Nucor, that judgment must be reversed for three alternative reasons. First, Nucor's decision not to distribute steel through MM was overwhelmingly in Nucor's independent self-interest, and the fact that Nucor's decision benefited its longtime distributor Chapel cannot convert the decision into an antitrust violation. Supreme Court and Fifth Circuit precedent holds that no "agreement" or "conspiracy" may be inferred from the kind of evidence MM introduced against Nucor.

Second, even if the law had permitted the jury to find that Nucor and Chapel agreed that Nucor wouldn't sell through MM, the evidence did not show that Nucor joined a *horizontal* conspiracy between Chapel and American Alloy—a prerequisite to application of MM's *per se* antitrust theory. Nucor never spoke with American Alloy about MM and did not know Chapel and American Alloy had spoken.

Third, regardless of the evidence, *per se* liability does not apply. MM's theory was that Nucor joined the alleged horizontal conspiracy by entering into a vertical agreement with Chapel. But the "rule of reason" test—not *per se*

liability—applies to a manufacturer who enters a vertical agreement with its distributor, *even if* that agreement facilitates the distributor's horizontal conspiracy. Because MM disavowed a rule of reason claim, Nucor is entitled to judgment on this ground as well.

Alternatively, a new trial is warranted in light of numerous evidentiary errors that prejudiced Nucor's ability to mount a meaningful defense. Most serious, the district court excluded Nucor's expert, holding it irrelevant for him to testify that Nucor had legitimate, economically rational, and independent reasons to decline to distribute steel through MM. This error was all the more egregious because the court permitted MM to present an expert who testified that Nucor lacked any independent justification for its actions.

The court allowed MM's counsel to invent evidence in closing to fill in substantial gaps in MM's case, and to misstate the law. The court admitted textbook hearsay. The court permitted MM's expert to function as an overview witness who repeatedly told the jury to draw legally impermissible inferences from the evidence. The court impermissibly let MM elicit opinions from lay witnesses that Nucor's conduct was "unlawful" and "unethical." Individually and collectively, these errors require a new trial.

Nucor is independently entitled to a new trial on damages. The law and undisputed record facts preclude the jury's award.

STANDARD OF REVIEW

The denial of Nucor's motion for judgment as a matter of law is reviewed *de novo*. *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 761 (5th Cir. 2002). Although generally courts consider evidence "in the light most favorable" to the non-moving party, courts are especially "cautious in [antitrust] cases as 'antitrust [law] limits the range of permissible inferences from ambiguous evidence.'" *Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc.*, 200 F.3d 307, 312 (5th Cir. 2000) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1996)).

Evidentiary decisions are reviewed for abuse of discretion. The Court must order a new trial unless it is "sure, after reviewing the entire record, that [any] error did not influence the jury or had but a very slight effect on its verdict." *Munn v. Algee*, 924 F.2d 568, 573 (5th Cir. 1991) (internal quotation marks omitted).

ARGUMENT

I. Antitrust Law Forecloses the Judgment Against Nucor

MM's theory was that (A) Nucor and Chapel agreed that Nucor would not sell steel through MM, (B) through that agreement Nucor "joined" Chapel's alleged horizontal conspiracy with American Alloy, and therefore (C) Nucor was

per se liable. ROA.3217-3218; ROA.19771-19776; ROA.19785-19786. This theory is legally flawed at each step.[3]

A. Antitrust Law Forbids The Conclusion That Nucor Entered Into an Agreement With Chapel

1. The Evidence Must Tend to Exclude the Possibility that Nucor Acted Independently

Section 1 of the Sherman Act proscribes conspiracies and agreements in restraint of trade, but does not proscribe independent action. "A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently." *Monsanto*, 465 U.S. at 761. Antitrust law has recognized that right for a century. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). It is common, economically valuable, and pro-competitive for a manufacturer to restrict distribution of its product, rather than to sell through any distributor that comes knocking. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55, 57-58 (1977). Like "[t]he freedom to switch suppliers," the freedom to choose distributors "lies close to the heart of the competitive process that the antitrust laws seek to encourage." *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 137 (1998).

[3] This brief assumes *arguendo* that the evidence was sufficient to support the jury's finding that Chapel and American Alloy entered into a horizontal agreement between themselves.

"[I]t is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business." *Burdett Sound, Inc. v. Altec Corp.*, 515 F.2d 1245, 1249 (5th Cir. 1975). *A fortiori*, manufacturers may *decline to switch* to a new distributor, like Nucor did. Nor is it an antitrust violation for manufacturers and their distributors (like Nucor and Chapel) to discuss potential new distributors (like MM). *Monsanto*, 465 U.S. at 762-64.

Antitrust law is acutely sensitive to the risk that juries will mistakenly infer an unlawful antitrust conspiracy from such legitimate, independent conduct. *Id.* at 760-64; *Matsushita*, 475 U.S. at 587-88, 593-95; *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 728-29 (1988). For that reason, antitrust plaintiffs must present "evidence that tends to exclude the possibility that the [manufacturer was] acting independently." *Monsanto*, 465 U.S. at 764. Certain types of evidence—like evidence that a distributor "complain[ed]" to a manufacturer about another distributor—are categorically insufficient to support an inference of conspiracy. *Id.*

In a refusal to deal case like this one, the evidence does not "tend[] to exclude the possibility of independent conduct" unless refusing to deal is "*inconsistent* with [the manufacturer's] independent self-interest." *Viazis*, 314

F.3d at 763 (emphasis added); *see Matsushita*, 475 U.S. at 587; *Houser v. Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1232 (3d Cir. 1988) (antitrust plaintiffs must show "defendants acted contrary to their economic interests"); *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1487-1488 (D.C. Cir. 1984) (same).

Enforcing these standards is essential to protect businesses from "mistaken inferences" that "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Courts thus must and do direct or reverse jury verdicts when the evidence fails to exclude the possibility of independent action. *See, e.g.*, *Viazis*, 314 F.3d at 761-62; *Cleveland v. Viacom*, 73 F. App'x 736, 737, 739-41 (5th Cir. 2003); *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1060-61 (5th Cir. 1985); *U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d 986, 1002 (11th Cir. 1993); *Pumps & Power Co. v. Southern States Indus., Inc.*, 787 F.2d 1252, 1256-58 (8th Cir. 1986).

2. The Evidence Did Not Tend to Exclude the Possibility that Nucor Acted Independently

The evidence does not meet the *Monsanto* test—it does not tend to exclude the possibility of independent action—unless refusing to sell to MM was "inconsistent with [Nucor's] self-interest." *Viazis*, 314 F.3d at 763. Yet the court refused to instruct on the *Viazis* standard, ROA.5344-5345, and so the jury never applied that test. Applying the proper standards, Nucor is entitled to judgment as a matter of law.

a. Longstanding Distribution Practices Independently Explain Nucor's Actions

MM "bears a particularly heavy burden" in attempting to satisfy the *Monsanto* and *Viazis* standards. *Aviation Specialties, Inc. v. United Techs. Corp.*, 568 F.2d 1186, 1192 (5th Cir. 1978). In *Monsanto* and *Viazis*, like many refusal-to-deal cases, the defendant terminated an existing relationship with the plaintiff. *Monsanto*, 465 U.S. at 757; *Viazis*, 314 F.3d at 761. But Nucor and MM have never done business before; MM was irrelevant to Nucor's ongoing economic success. Courts have consistently rejected the notion that a company joins a conspiracy by maintaining the status quo. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566, 568 (2007); *Aviation Specialties*, 568 F.2d at 1192. Because Nucor never sold through MM in the first place, Nucor's "refusal to alter its long-established system to confer the advantages of distributorship upon [MM] suggests nothing illegal whatsoever." *Id.*

MM had to present affirmative evidence that refusing to start distributing through MM was "contrary to [Nucor's] own economic interests." *Id.* In other words, MM had to prove "the attractiveness of [MM's] offer" to Nucor. *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 279 (1968). This MM utterly failed to do.

The testimony showed that *doing* business through MM was affirmatively contrary to Nucor's self-interest. Nucor primarily does business through large,

established distributors with nationwide reach who buy most of their steel from Nucor. *Supra* p.3. MM met none of these criteria. Nucor is a Fortune 200 company; MM was a tiny, four-person start-up with at most $2.7 million in capital, operating out of a rented warehouse in Houston. ROA.16727-16728; ROA.17410; ROA.17278-17279. MM had teamed up with Nucor's competitor JSW, and wanted to turn Nucor-Chapel business into JSW-MM business. ROA.16612; ROA.19078-19080; ROA.18836-18837; PX160; PX185. MM could never have met Nucor's credit terms—cash in advance from startups, ROA.18800-18801; it was undisputed that MM sought unusually loose terms from JSW, ROA.17275-17279; DX87-002. And Chapel was Nucor's longstanding, loyal business partner; MM's founders had left Chapel in "crisis" and "crippled [Chapel's] Houston branch" when they quit without notice. PX146; ROA.16658-16659; ROA.16677-16687; ROA.17963.

MM was an unattractive business partner for Nucor for another reason: Nucor wants new business from its distributors—Nucor doesn't grow by selling the same steel to the same end-user through a different distributor. ROA.17669; ROA.18798-18821. Under Nucor's longstanding, independent "incumbency" practice, if a particular distributor brings Nucor a particular end-user, Nucor sticks with that distributor for that business. *Supra* pp.5-6. Documentary evidence, predating the events of this lawsuit, confirmed Nucor's practice. DX52; DX72;

DX102; DX530. The incumbency practice helps Nucor's bottom line. Loyalty is a two-way street, and Nucor's loyalty to distributors increases the chances that distributors will bring new business to Nucor. *Supra* pp.5-6.

Hume and Schultz admitted that their strategy was to go after the same customers they used to serve at Chapel—*i.e.*, incumbent Nucor-Chapel relationships. ROA.16954; ROA.17159-17161. This was immediately obvious to Nucor and everyone who sold steel in Houston. ROA.18827-18828; ROA.18836-18837. MM confirmed this strategy on Day One, when Hume left a voicemail for Nucor's Whiteman asking about Greens Bayou, a Nucor-Chapel client. ROA.18824-18828. It is undisputed that MM never identified new end-users to Nucor. ROA.16969-16970; ROA.17245-17246; ROA.17259; ROA.17266-17267; ROA.18824-18828; ROA.19520. In short, Nucor had overwhelming independent reasons to decline to start selling steel through MM.

All this is why Nucor unilaterally chose Chapel over MM early on September 1, before Nucor had *any* communications with Chapel. Nucor's Whiteman unilaterally emailed Chapel to offer Nucor's "fullest support." PX146. Those two facts—Nucor made its decision on Day One, before even talking to Chapel—distinguish Nucor from every other manufacturer in this case. Juries may not infer conspiracy where the "[e]vidence shows that [the manufacturer] began to formulate [its distribution] policy…before [the distributor's] first complaint about

the plaintiff." *Culberson, Inc. v. Interstate Electric Co.*, 821 F.2d 1092, 1094 (5th Cir. 1987); *see Matrix Essentials v. Emporium Drug Mart*, 988 F.2d 587, 594 (5th Cir. 1993); *Viazis*, 314 F.3d at 762 n.4.

Hume and Schultz were well aware that their prospects with Nucor were bleak, independent of any conspiracy. Hume told a business partner in fall 2011 that MM was "not aggressively pursuing Nucor." ROA.16061-16062. MM knew about Nucor's close relationship with Chapel and chose to partner with JSW even though—as Hume acknowledged—Nucor was "better with the deliveries than JSW." ROA.17244. MM made only a handful of tepid advances to Nucor—the September 1 voicemail about the existing Chapel-Nucor client, and September 2 and October 26 quote requests for about 500 and 160 tons of steel for unidentified customers. ROA.18824-18828; ROA.19093-19094; ROA.19123. Nucor sells 2.3 million tons of steel plate a year; it was hardly contrary to Nucor's economic self-interest to decline to sell through this tiny startup aligned with Nucor's competition. ROA.17633; ROA.17647-17648; ROA.19068.

In lieu of actual facts showing that MM was an attractive prospect for Nucor, MM presented testimony from its expert, James Mahoney. Though Mahoney had never bought or sold steel plate, the court permitted him to testify as an industry expert over Nucor's objection, ROA.23645-23676; ROA.1801, on the basis of his work for a single manufacturer and a single distributor involving other

steel products. ROA.14779; ROA.23661-23662. He testified on direct that refusing to sell to a distributor was "contrary to [a manufacturer's] basic mission," *i.e.*, to sell steel, and that manufacturers "do not refuse" to quote distributors. ROA.14263-14266. Mahoney waffled on cross-examination, agreeing that a manufacturer might refuse a particular distributor for a "good reason," ROA.14780, like failure to pay bills, ROA.14792, or that a manufacturer might be "[un]enthusiastic" about selling through a distributor that preferred a different manufacturer, ROA.14738—as MM preferred JSW to Nucor. But Mahoney nonetheless insisted that manufacturers don't sell through limited distribution networks, because "the mill's mission is to sell." ROA.14794.

This kind of "[c]onclusional testimony from [an] expert witness" based on a "simplistic [economic] assumption" cannot support a finding "that [a] defendant['s] conduct was contrary to [its] economic self-interest." *Cleveland*, 73 F. App'x at 740-41. This Court has expressly rejected Mahoney's simplistic premise that because manufacturers want to sell more product, they necessarily want to sell through more distributors. Such an argument "proves too much. If failure to expand a distribution network composed of a fixed number of primary distributors amounts to action against economic self-interest, every limited distributorship organization would be of dubious legality." *Aviation Specialties*, 568 F.2d at 1192 n.10. This Court "holds to the contrary." *Id.*

So does the Supreme Court. Distribution restrictions—including selling a product through "a smaller and more select group"—are "widely used in our free market economy." *Sylvania*, 433 U.S. at 38, 57. "[T]here is substantial scholarly and judicial authority supporting their economic utility." *Id*. Distribution restrictions allow manufacturers "to compete more effectively against other manufacturers." *Id.* at 55; *Bus. Elecs*., 485 U.S. at 728. The economic benefits of restricting distribution are *why* plaintiffs in refusal-to-deal cases must present evidence excluding the possibility that a manufacturer had independent reasons to restrict distribution. *Monsanto*, 465 U.S. at 761-764. MM cannot satisfy that obligation through "expert" testimony denying that a manufacturer could ever have an independent economic reason to restrict distribution.

Beyond that, the factual record thoroughly discredited Mahoney. Documentary evidence established not only that Nucor's incumbency practice pre-dated the events of this lawsuit, *supra* pp.19-20, but that other steel manufacturers refused to sell through particular distributors for business reasons of their own. DX89; ROA.14738; ROA.17757-17760 (SSAB declined to sell to Chapel). "[W]hen indisputable record facts contradict or otherwise render [an expert] opinion unreasonable, it cannot support a jury's verdict." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993).

In short, not a shred of evidence showed that Nucor acted contrary to its own economic self-interest when it "refus[ed] to alter its long-established system to confer the advantages of distributorship upon [MM]." *Aviation Specialties*, 568 F.2d at 1192. Under Fifth Circuit and Supreme Court precedent, Nucor is entitled to judgment.

b. None of MM's Evidence Tends to Exclude the Possibility of Independent Action

MM's claim is foreclosed not only by its failure to prove that selling through MM was in Nucor's self-interest, but also because none of the evidence MM did present is legally sufficient to exclude the possibility of independent action.

First, MM pointed to various communications between Chapel and Nucor about MM. But "[a] manufacturer and its distributors have legitimate reasons to exchange information," and so "the fact that a manufacturer and its distributors are in constant communication about [a particular issue] does not alone show that the [parties] are not making independent…decisions [about that issue]." *Monsanto*, 465 U.S. at 762; *accord Kreuzer*, 735 F.2d at 1487-88. Whether Chapel complained to Nucor about MM in these communications is irrelevant. "Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints, could deter or penalize perfectly legitimate conduct." *Monsanto*, 465 U.S. at 763. "Distributor complaints [about competing distributors] are to be expected," and

they "fail[] to establish that a manufacturer has imposed restrictions collusively, not based on its independent business judgment." *Culberson*, 821 F.2d at 1093-94; *accord Matrix*, 988 F.2d at 594.

Second, MM cited the September 5 email from ArcelorMittal's Sergovic and North Shore's Cooper's March 19 lunch conversation with MM as evidence that Nucor succumbed to a purported ultimatum from Chapel—do business with Chapel or MM. ROA.19758; ROA.19771-19772. This hearsay testimony was inadmissible. *Infra* Section III.B. And a wealth of non-hearsay evidence discredited the notion that Chapel (or its parent Reliance) were in a financial position to threaten the much larger Nucor. ROA.16259; ROA.17984; ROA.17997-17998; ROA.18032-18033; ROA.18835-18836; ROA.19085.

But even if the hearsay testimony was properly before the jury, evidence of an ultimatum is legally irrelevant. *Monsanto* holds that companies are "*free to acquiesce* in [a business partner's] demand in order to avoid termination." 465 U.S. at 761 (emphasis added); *see Colgate*, 250 U.S. at 304-07; *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1582 (11th Cir. 1988). Even "*terminating* a relationship with a dealer…to avoid losing the business of [a] disgruntled dealer[]" does not establish an unlawful "agreement" with the disgruntled dealer. *Viazis*, 314 F.3d at 764 n.8 (emphasis added; internal quotation marks omitted); *Nat'l*

Marine Electronic Distribs., Inc. v. Raytheon Co., 778 F.2d 190, 192-193 (4th Cir. 1985); *Euromodas, Inc. v. Zanella, Ltd.*, 368 F. 3d 11, 20 (1st Cir. 2004).

In other words, accepting an ultimatum is *not* evidence of antitrust conspiracy. This Court's decision in *Viazis* proves the point. An organization "threatened a nationwide boycott to coerce [defendant manufacturer] GAC to end its marketing efforts on behalf of [plaintiff]." 314 F.3d at 763. The threats did not tend to exclude independence: rather, the plaintiff "needed to show both that the [organization] threatened a boycott *and* that GAC's decision to cease marketing [plaintiff's product] was inconsistent with [GAC's] independent self-interest." *Id.* (emphasis added). If, in response to the threats, the defendant "*could have* determined that the potential benefits from its [business arrangement] with [plaintiff] would be outweighed by the loss of business" as a result of the threats, that is an "independent" reason to refuse to deal. *Id.* at 764 (emphasis added). In short, even if the jury could find that Nucor refused to sell through MM because Nucor didn't want to lose Chapel's business, such a refusal, even in response to an ultimatum, does not violate the antitrust laws.

Third, MM argued that Nucor's discussions with North Shore showed that Nucor was "enforc[ing]" the alleged conspiracy, at Chapel's behest, by asking North Shore to cut MM off. ROA.19794. For one thing, Nucor's relationship with North Shore had nothing to do with the conspiracy MM alleged, which was a

conspiracy to prevent MM from buying steel from manufacturers, not from distributors like North Shore. ROA.14802-14804; ROA.5586.

Further, Nucor's contacts with North Shore weren't remotely inconsistent with Nucor's independent self-interest. Nucor worried that North Shore was circumventing Nucor's incumbency practice; as Schultz confirmed, MM was buying Nucor steel through North Shore in order to sell that steel to Chapel customers. ROA.18865-18871; ROA.16963-16964. Cooper, the only North Shore witness, testified that Whiteman expressed concern that North Shore was causing Nucor to "do[] business with MM indirectly," which was "putting [Whiteman] in a difficult position." ROA.16137.

This Court has long treated "enforcement" of a restricted distribution policy as independent conduct that does not support an inference of conspiracy. In *Golf City*, for example, a golf club manufacturer sold only to pro shops, and had an "antileakage" policy preventing pro shops from reselling to the plaintiff, a non-pro shop. *Golf City, Inc. v. Wilson Sporting Goods Co.*, 555 F.2d 426, 429-31 (5th Cir. 1977). This Court held that the manufacturer's anti-circumvention efforts were fully "compatible with [the manufacturer's claim] that the pro only sales policies were formed unilaterally." *Id.* at 435; *accord Matrix*, 988 F.2d at 594 (distribution restriction "believably explain[s] Matrix's having independently both refused to sell its products to Emporium and [having] attempted to insure that its distributors

and retailers did not do so either"); *Culberson*, 821 F.2d at 1093-94. In short, even if Nucor threatened to cut North Shore off if North Shore sold Nucor steel to MM, that is insufficient to show conspiracy.

Finally, every single relevant witness—including North Shore's Cooper—testified that Nucor never threatened North Shore or asked North Shore to cut MM off. ROA.15997; ROA.16136; ROA.18871. In the Cooper-MM hearsay conversation that MM surreptitiously recorded, Cooper had reported an "*unspoken* message" from Whiteman that "to the extent North Shore chooses to do business with [MM], [Nucor's] not going to do business with North Shore." ROA.16136. In other words, Whiteman did *not* say that to Cooper. It was equally clear that Whiteman did not *mean* that—it is undisputed that Nucor continued dealing with North Shore after the conversation, even though North Shore continued dealing with MM. *Supra* p.10. This is hardly the stuff of a conspiracy to put MM out of business.

B. *Per Se* Liability Did Not Apply Because There Was No Evidence That Nucor Joined a Horizontal Conspiracy

Even if the jury could reasonably have concluded that Nucor entered into an agreement with Chapel, the jury's finding that Nucor joined a horizontal conspiracy is entirely unsupported by the evidence. Because MM made a *per se* claim only, and waived any rule of reason claim, Nucor is entitled to judgment on this basis alone. *Texaco v. Dagher*, 547 U.S. 1, 7-8 & n.2 (2006).

1. The *Per Se* Rule Applies To Horizontal Conspirators Only

Antitrust law distinguishes horizontal agreements between direct competitors (such as Chapel and American Alloy) from vertical agreements between suppliers and distributors (such as Nucor and Chapel). Certain horizontal boycotts are "unlawful *per se*." *NYNEX*, 525 U.S. at 133-35; *Tunica Web Adver. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 412-13 (5th Cir. 2007). Under *per se* treatment, liability attaches once an agreement is proven.

It is never *per se* unlawful for a manufacturer and its distributor to agree that the manufacturer will refuse to sell to another distributor. *NYNEX*, 525 U.S. at 135; *Spectators' Commc'n v. Colonial Country Club*, 253 F. 3d 215, 223 (5th Cir. 2001); *Universal Brands, Inc. v. Philip Morris Inc.*, 546 F.2d 30, 33 (5th Cir. 1977). Vertical agreements make distribution more efficient and "stimulate interbrand competition, the primary concern of antitrust law." *Bus. Elecs.*, 485 U.S. at 724-725 (internal quotation marks omitted); *see Sylvania*, 433 U.S. at 54-55. Accordingly, plaintiffs challenging a vertical agreement must satisfy the "rule of reason" test and prove that the specific agreement at issue is "unreasonable and anticompetitive." *Texaco*, 547 U.S. at 5. MM waived a rule of reason claim presumably because the Gulf Coast is crowded with distributors; the loss of MM had no discernible effect on competition. ROA.14588-14589.

Enforcing the distinction is critical. The rule of reason supplies an additional bulwark against the risk that a jury will improperly discount evidence that a manufacturer acted independently. *Bus. Elecs.*, 485 U.S. at 728-29. Even if the jury mistakenly infers an agreement, plaintiffs still must prove that the agreement was anti-competitive. Expansive *per se* liability—particularly coupled with the risk that the jury may find an agreement where none exists—can cause "[m]anufacturers…to forgo legitimate and competitively useful conduct rather than risk treble damages." *Id*. at 728.

2. Nucor Never Joined a Horizontal Conspiracy

Antitrust plaintiffs "must show that [an] inference of conspiracy is reasonable in light of the competing inferences of independent action *or* [lawful] collusive action." *Matsushita*, 475 U.S. at 588 (emphasis added). To show Nucor joined a horizontal conspiracy, the evidence must "tend to exclude" not only the possibility of independent action, but also the possibility that any Nucor agreement to cut off MM was solely a vertical agreement with Chapel. *Monsanto*, 465 U.S. at 764. It did not.

a. No Evidence Showed That Nucor Knew About a Horizontal Conspiracy

In an antitrust conspiracy case, the evidence must "show…a single plan, the essential nature and general scope of which is known to each person who is to be held responsible for its consequences." *H&B Equip. Co. v. Int'l Harvester Co.*,

577 F.2d 239, 245 (5th Cir. 1978) (internal quotation marks omitted). It is undisputed that Nucor never spoke with American Alloy about MM. ROA.15418-15419; ROA.17683; ROA.18462; ROA.18876. No evidence showed that Nucor knew that Chapel ever spoke with American Alloy. No Chapel witness told Nucor about any communications with American Alloy. ROA.15156-15157; ROA.18031. None of the many emails in evidence suggested Nucor was aware of any communication or understanding between Chapel and American Alloy.

None of the evidence respecting North Shore is to the contrary. In the conversation MM secretly recorded, North Shore's Cooper told MM that Nucor's Whiteman told Cooper that American Alloy and others were "monitoring" MM. ROA.16000. Setting aside that this evidence was inadmissible hearsay, *infra* Section III.B, it does not show that Nucor knew of a horizontal conspiracy. Monitoring one's competitors is lawful; witnesses including MM's Hume testified that it was common in the industry. ROA.15569-15570; ROA.17189-17190. For example, Cooper testified that Whiteman thought another distributor, Ranger, was "monitoring" MM, ROA.16000, but MM did not identify Ranger as a conspirator.

The hearsay testimony that Cooper told MM that Whiteman described customer "pressure on the mills to not support [MM]" is not evidence that Nucor

knew American Alloy and Chapel talked either. ROA.16001-16002.[4] "[D]istributor complaints…are not by themselves indicative of an illegal horizontal conspiracy." *Matrix*, 988 F.2d at 594. Even evidence of boycott threats from multiple distributors does "not support the inference that [the distributors] conspired together." *Miles Distribs., Inc. v. Specialty Constr. Brands, Inc.*, 476 F.3d 442, 450 (7th Cir. 2007); *see Spectators'*, 253 F.3d at 224; *Nat'l Marine*, 778 F.2d at 193.

MM thus "totally failed to show that [Nucor] knew of a [horizontal] plan to put [MM] out of business." *H&B*, 577 F.2d at 245. Nucor did not know the "essential nature and general scope" of the alleged conspiracy—that it was a Chapel-American Alloy horizontal conspiracy to deprive MM of supply from all mills—and could not have joined that conspiracy. *Id.*; *see also United States v. MMR Corp.*, 907 F.2d 489, 498 (5th Cir. 1990).

b. Nucor's Decisions Predated Any Horizontal Conspiracy

Even if the jury could have found that Nucor knew of a horizontal conspiracy, the evidence still failed to show that Nucor joined it. Nucor could be liable for joining a horizontal conspiracy only if (1) Nucor made a "conscious commitment" to the alleged horizontal conspiracy, *Monsanto*, 465 U.S. at 768;

[4] Cooper was fuzzy on whether Whiteman actually said this, ROA.16001-16002, and the transcript of the recording shows that, while Cooper referred to pressure, Cooper did not say Whiteman had, ROA.32064.

Spectators', 253 F.3d at 220, and (2) the alleged horizontal conspiracy was the "source" of Nucor's actions, *H&B*, 577 F.2d at 245.

But MM alleged that the horizontal conspiracy began on September 8, and the undisputed evidence showed Nucor decided not to distribute through MM well before that date. By close of business on September 1, Nucor had assured Chapel of Nucor's support and that Nucor would continue to supply Greens Bayou through Chapel. ROA.17798-17799; ROA.17984-17986; ROA.18151-18152. Nucor's Stratman had emailed both Nucor plate mills instructing them "to support our existing customers." PX160. And Nucor's Charles had declared that Nucor wouldn't be "quoting []or extending credit right now" to MM. PX160. By September 2, Charles told MM that Nucor was "not going to be able to sell to [MM] right now." ROA.17262.

After September 8, Nucor simply continued not doing business with MM. Nucor (1) did not respond to an October 26 email from MM, and (2) later told North Shore that Nucor didn't want to do business indirectly with MM through North Shore. Antitrust law forbids the inference that a company joins a horizontal conspiracy by persisting in its pre-conspiracy conduct—by doing "what was only natural anyway" absent a horizontal agreement. *Twombly*, 550 U.S. at 566-67; *see Pumps*, 787 F.2d at 1258. It was at least "equally plausible" that Nucor's post-September 8 conduct was motivated by an earlier, presumptively lawful agreement

with Chapel—not any horizontal agreement between Chapel and American Alloy on September 8. *Matsushita*, 475 U.S. at 596-97; *see Culberson*, 821 F.2d at 1094; *Matrix*, 988 F.2d at 594; *Viazis*, 314 F.3d at 762 n.4.

There was simply no evidence—none—that Nucor made a "conscious commitment" to a *horizontal* antitrust conspiracy. MM's sole theory for *why* Nucor would have joined a horizontal conspiracy was nonsensical. MM told the jury in closing that, on the one hand, Nucor issued a September 1 company-wide "order" directing its staff not "to support MM." ROA.19774. On the other, MM theorized, Nucor only "fully committed" after purportedly learning, over dinner in October, that other steel mills wouldn't sell to MM either, because only then could Nucor be sure that "MM Steel would[n't] be taking [Nucor's] great customers like Greens Bayou to other steel mills." ROA.19790; ROA.19785-19786. But there was no evidence Nucor learned anything of the sort—participants testified that no one discussed any other mill or any conspiracy to boycott MM, and there was no contrary evidence. ROA.17678-17679; ROA.19096-19103. MM's theory also made no sense because it was undisputed that Nucor had already refused to work with MM on the Greens Bayou account in September, when Nucor knew that JSW *was* selling to MM.

Upholding the judgment against Nucor would cast a pall of uncertainty over manufacturer-distributor relations across the Fifth Circuit. Essentially, the

judgment means that a company's lawful refusal to sell on Monday turns into a $156 million *per se* antitrust violation on Tuesday, if *someone else* entered into an agreement the company knew nothing about. A manufacturer could never safely choose to restrict distribution in such a world. Persisting in *any* refusal to deal would raise the specter of *per se* liability. Legitimate business judgment would be "indistinguishable, except perhaps to a mind reader, from what [antitrust law] prohibits." *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 780 F.2d 1212, 1218 (5th Cir. 1986), *aff'd*, 485 U.S. 717 (1988).

C. *Per Se* Liability Did Not Apply to Nucor Even if Nucor Joined a Horizontal Conspiracy

Even assuming sufficient evidence supported the jury's finding that Nucor joined a horizontal conspiracy, the *per se* rule *still* would not apply to Nucor. As noted above, MM's theory was that Chapel pressured Nucor into agreeing not to sell to MM, ROA.19758; ROA.19771-19972, and that, by entering into the vertical agreement with Chapel, Nucor also "joined" Chapel's alleged horizontal agreement with American Alloy. ROA.19685. The district court held that this theory—that Chapel "enlisted" Nucor's "assistance" in Chapel's horizontal conspiracy with American Alloy—was MM's "only" viable theory for how Nucor

"joined" a horizontal conspiracy, and that on this theory *per se* liability applied. ROA.3217-3218.[5]

Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877 (2007), forecloses the court's ruling. *Leegin* holds that manufacturers like Nucor do not face *per se* liability merely because they enter into a vertical agreement "facilitat[ing]"—*i.e.*, assisting— a horizontal conspiracy. 551 U.S. at 893. The decision contemplates the precise circumstances of this case: a horizontal conspiracy between retailers who "then compel a manufacturer to aid the unlawful arrangement." *Id.* The Court explained that, while "a horizontal cartel among…competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful[,] *[t]o the extent a vertical agreement…is entered upon to facilitate either type of [horizontal] cartel, it…would need to be held unlawful under the rule of reason*." *Id.* (emphasis added). While the vertical restraint at issue in *Leegin* involved prices, the analysis fully applies to the nonprice restraint alleged here. *Leegin* expressly held that vertical price and nonprice restraints should be treated alike. *Id.* at 901-904.

Leegin later reiterates: if the horizontal conspirators (here, distributors) "were the impetus for a vertical price restraint" by non-competitors (here,

[5] The court referred to Chapel and American Alloy collectively because the opinion covered all the manufacturer defendants. It is undisputed that, if any distributor enlisted Nucor, it was Chapel.

manufacturers like Nucor) and hence "there is a greater likelihood that the restraint facilitates a [horizontal] cartel," that fact simply informs the rule of reason analysis as to the vertical restraint. *Id.* at 897-98. In other words, had MM not disavowed a rule of reason theory, the extent to which Nucor assisted a horizontal agreement would have been relevant in determining whether Nucor's conduct was anti-competitive and prohibited under the rule of reason. But *Leegin* rejects the district court's notion that a manufacturer faces *per se* liability if a distributor "enlisted" the manufacturer's "assistance" with a horizontal agreement. ROA.3217.[6]

The only circuit to consider the issue post-*Leegin* holds that "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." *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225 & n.15 (3d Cir. 2008). This makes sense: unlike the horizontal actors in a conspiracy, vertical actors can have any number of motivations, many legitimate. *Sylvania*, 433 U.S. at 55, 57-58.

The district court's contrary ruling relied on pre-*Leegin* Fifth Circuit precedents that are readily distinguishable. *MMR Corporation* did not involve the

[6] *Leegin* did not address cases holding that manufacturers who *orchestrate* a horizontal arrangement among distributors may be *per se* liable. *E.g.*, *United States v. Gen. Motors Corp.*, 384 U.S. 127, 144 (1966). But MM did not allege that Nucor orchestrated any conspiracy.

situation *Leegin* covers: a non-competitor who (like Nucor) enters into a presumptively lawful (alleged) vertical arrangement with its distributor. 907 F.2d at 497. *H&B* is a case rejecting *per se* liability. 577 F.2d at 245. In any event, *Leegin* would prevail in the event of a conflict with these pre-*Leegin* decisions.

Moreover, even horizontal competitors themselves are "not necessarily" subject to *per se* liability for a group boycott. *Tunica*, 496 F.3d at 415. *Per se* liability for horizontal parties turns on "(1) whether the [boycotting firms] hold a dominant position in the relevant market; (2) whether the [boycotting firms] control access to an element necessary to enable [plaintiff] to compete; and (3) whether there exist plausible arguments concerning pro-competitive effects." *Id.* at 414-15 (citing *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985)). The district court held that it was unnecessary to consider those factors because *per se* liability automatically applied to all the defendants, adding in the alternative that "at least one of the *Tunica* factors cuts in the plaintiff's favor." ROA.5337. The parties were left guessing which—and how.

That was error. *Tunica* is neither optional nor a one-out-of-three test. Substantial evidence under each relevant factor pointed toward rule-of-reason analysis. *See, e.g.*, ROA.14588-14589 (highly unconcentrated relevant market); ROA.16761 (access to alternate sources of steel, including imports). The court

should not have allowed *per se* liability as to *any* defendant absent meaningful analysis of those factors. *A fortiori*, there was no basis for imposing *per se* liability on Nucor, a purely vertical actor.

II. The Erroneous Exclusion of Nucor's Expert Requires a New Trial

Even if this Court does not reverse outright, it must order a new trial. The lower court's exclusion of Nucor's expert, Dr. Jacobs, was egregious, reversible error. Jacobs was a centerpiece of Nucor's defense: that Nucor's pre-existing distribution practices, including its practice of favoring incumbent distributors, explained Nucor's decision not to distribute through MM, independent of any conspiracy. Jacobs is an MIT-trained expert in the economics of supply chains and distribution; he has taught at Harvard, MIT, and the University of Texas at Austin and has consulted for hundreds of companies. ROA.5163; ROA.5175. No one questioned his qualifications. MM did not file a *Daubert* motion, let alone a motion to exclude Jacobs' testimony on relevance grounds. Yet midway through trial and minutes after Jacobs took the stand, the court sustained an objection from MM and excluded Jacobs's testimony as irrelevant. ROA.18752-18784; ROA.18981-18986.[7] That incorrect ruling caused irreparable prejudice.

Nucor offered Jacobs to explain that Nucor's distribution practices are common across industries and economically advantageous. ROA.5164;

[7] The court irrelevantly stated that Jacobs could testify about geographic markets or damages—topics Nucor never offered him for. ROA.18983; ROA.19034.

ROA.5177. Jacobs planned to testify that "there is overwhelming economic justification for Nucor to not have sold to MM." ROA.5192. Jacobs would have explained why Nucor's strategy of selectively selling steel through established distributors made economic sense. ROA.5164. Jacobs would have testified that Nucor's incumbency practice creates a competitive advantage. Distributors know that bringing new customers to Nucor carries long-term benefits, because Nucor will not entertain competing bids for the same end-user in the future. ROA.5185; ROA.5188-5189. And incumbency practices encourage distributors to provide better service to end-users. ROA.5185. Jacobs would also have testified that Nucor's communications with North Shore reflected the "normal [manufacturer-distributor] dynamic" and that "[i]t is natural for a manufacturer to be concerned if it" learns "that one of its distributors is fronting for someone else in an arrangement" that could circumvent the manufacturer's distribution practices. ROA.5165.

This testimony was admissible and relevant to assist the jury in weighing the parties' warring "versions of the facts," *Pipitone v. Biomatrix, Inc.*, 288 F.3d 239, 249 (5th Cir. 2002), and in particular the pivotal question whether Nucor had independent reasons not to sell through MM. Testimony that restricting distribution is a common, economically advantageous strategy clearly "has a[] tendency to make…more…probable" Nucor's claim that Nucor followed such a

strategy. Fed. R. Evid. 401 (defining relevance). Expert testimony is admissible if it merely "put[s] facts in context," 4 Weinstein's Federal Evidence § 702.03[1] (2d ed. 2006), by explaining whether conduct comports with common practice—which Jacobs planned to do. *United States v. Riddle*, 103 F.3d 423, 430 (5th Cir. 1997).

Jacobs's testimony was independently relevant to counter testimony from MM's expert, James Mahoney. *Huss v. Gayden*, 571 F.3d 442, 455 (5th Cir. 2009); *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411, 416 (5th Cir. 1985). Mahoney stated that Nucor had no "good reason" to decline to quote MM; that refusing to sell through every distributor is economically irrational because "the mill's mission is to sell"; that Nucor violated "normal every day practice of how mills sell"; and that a mill that declines to quote a distributor is not "compet[ing] appropriately." ROA.14264-14266; ROA.14397-14399; ROA.14409; ROA.14444; ROA.14794. Mahoney opined that it was "not customary" for "a steel mill to be telling a service center like, North Shore, not to do business with another service center." ROA.14442. Jacobs would have countered these points.

The court first dismissed Jacobs's testimony on the theory that limiting distribution through an incumbency practice was tantamount to "discrimination" in "1954." ROA.18759-18760. That offensive comparison ignores the law: a manufacturer's decision to sell through one distributor rather than another is not

only lawful, it benefits consumers. *Monsanto*, 465 U.S. at 761; *Viazis*, 314 F.3d at 763.

The court also reasoned that there was no "head-on collision" or mutual exclusivity between Nucor's distribution policies and a conspiracy. ROA.18775-18777; ROA.18781; ROA.18982. But that is not the test for relevance and turns the burden in antitrust law on its head. It was *MM's burden* to exclude the possibility of independent action, not Nucor's burden to exclude the possibility of conspiracy. *Monsanto*, 465 U.S. at 768. The court stated that Nucor's practices could not "trump" a jury finding that Nucor joined a conspiracy. ROA.18772. But Nucor invoked its distribution policies to show Nucor never joined a conspiracy in the first place. Courts routinely allow expert economic testimony in antitrust cases for that purpose. *E.g.*, *Fleischman v. Albany Med. Ctr.*, 728 F. Supp. 2d 130, 166 (N.D.N.Y. 2010).

The court later offered yet another rationale for excluding Jacobs: "whether or not [a distribution practice] is common in the market, it's just not a matter for which expert testimony should be given." ROA.19033-19034. That explanation was breathtakingly inconsistent with the court's prior treatment of Mahoney, and obviously wrong. *Riddle*, 103 F.3d at 430 (excluding expert who would offer "the defense…version of how banks operate" was reversible error).

A new trial is required unless this Court can "say with positive assurance that the jury would have decided the same way had [Jacobs' testimony] been admitted." *Brazos River Auth. v. GE Ionics, Inc.*, 469 F.3d 416, 424 (5th Cir. 2006). The Court cannot say so here. Jacobs was the *only* expert on why Nucor's practices were common and economically rational. That testimony went to the heart of Nucor's case—as MM recognized in closing, telling the jury that "Nucor didn't follow any incumbency policy." ROA.19791. Jacobs' testimony that such a policy was in Nucor's economic self-interest was "information that, if the jurors found…credible, might have been determinative." *Huss*, 571 F.3d at 456.

Jacobs also would have "act[ed] as a counterpoint" to Mahoney's testimony that turning away MM made no economic sense for Nucor. *Id*. at 455; *accord Riddle*, 103 F.3d at 429-30. The court's explanation for its differential treatment of MM and Nucor confirms the skewed playing field: MM's expert could attack Nucor's incumbency practice as "illegitimate," but Nucor's expert could not explain why the policy was legitimate. ROA.18985. Trials in America, however, permit both sides to present their story to the jury.

Excluding Jacobs precluded Nucor "from effectively presenting [its] defense." *United States v. Cavin*, 39 F.3d 1299, 1309 (5th Cir. 1994). And it did so midway through trial, after MM introduced expert testimony attempting to discredit Nucor's distribution policies, and when Nucor could not "adapt the

presentation of [its] case." *Campbell v. Keystone Aerial Surveys, Inc.*, 138 F.3d 996, 1000-01 (5th Cir. 1998). A new trial is required.

III. Numerous Additional Errors Require a New Trial

This trial involved a remarkable number of additional erroneous and prejudicial rulings that individually and cumulatively mandate a new trial.

A. MM's Improper Closing Arguments Require a New Trial

MM's counsel used closing argument to paper over the very legal and factual deficiencies that required judgment for Nucor. MM wrongly informed the jury that Nucor broke the law if Nucor accepted an ultimatum from Chapel not to do business with MM. MM then invented purported evidence—in the form of imaginary snippets of incriminating conversations between Nucor and Reliance and Chapel executives. These misstatements so patently exceed the boundaries of proper argument that a new trial is required on this basis alone.

1. A misstatement of law in closing alone "can [] invalidate" a verdict. *United States v. Fierro*, 38 F.3d 761, 771 (5th Cir. 1994); *Wilson v. NHB Indus., Inc.*, 219 F. App'x 851, 853-54 (11th Cir. 2007) (per curiam). MM's counsel told the jury, "[W]hen you get a choice…You either do business with MM[] or you do business with us, you got an offer…[E]ach one of those steel mills said, I accept…And I'm willing to cut off MM[] to do it…That's an agreement. That's a partnership. That's a conspiracy." ROA.19945. The law is the opposite:

accepting a distributor's ultimatum is *not* evidence of an agreement, or a partnership, or a conspiracy. *Supra* pp.25-26.

This misrepresentation went to the central contested question whether Nucor acted independently or entered into an unlawful conspiracy. Worse, counsel used it to sway jurors' emotions: "[I]f big powerful companies…can go to their suppliers and say, You have a choice…you either cut them off, or I'll cut you off—if that's okay in our country, then entrepreneurs and small businesses have a very short life ahead." ROA.19948.

Worse still, MM made this misstatement during rebuttal, when the jury is most likely to be misled. *Gilster v. Primebank*, 747 F.3d 1007, 1011 (8th Cir. 2014). When "the jury heard the parties' closing arguments after [being] instructed on the law," when "improper comments occurred during…rebuttal when [defendant] had no further opportunity to speak to the jury," and when "the comments constituted a misstatement of the law which went directly to the very issues contested," the comments "cast an impermissible taint over the jury's verdict." *Wilson*, 219 F. App'x at 853-54.

Worse yet, the judge refused curative instructions, deeming the existing instructions sufficient. ROA.5380-5383; ROA.5387. But the instructions seriously misstated the law. Over Nucor's objection, ROA.5343, the Court instructed the jury: "The antitrust laws prohibit two or more persons or businesses

from agreeing with each other not to sell a product to another in violation of Section 1…, or to engage in a conspiracy to deprive a company or individual of the ability to purchase a product." ROA.5582. This was wrong. Any Nucor-Chapel agreement not to sell to MM would be presumptively lawful and could not support MM's *per se* claim. *Supra* pp.29-30. A new trial is required.

2. This Court considers it "particularly indefensible" for counsel to "bring before the jury damaging facts not in evidence." *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 284-85 (5th Cir. 1975); *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 778 (5th Cir. 2009). MM's counsel invented fictions not in evidence and brought them before the jury. MM represented that Nucor made specific, wholly fabricated admissions in conversations with Reliance and Chapel. Counsel recited this purported October 5 conversation:

> Nucor wanted to know, "Okay, I hear you, Gregg Mollins [Reliance]. So far we've done what you've told us. But if JSW is going to continue to sell steel to MM Steel, those guys are really good, and we [Nucor] may start to lose business…
>
> And so what the Nucor people told to the Reliance people is, "You need to tell me that this MM Steel group isn't going to get steel from anybody."… And so on that day…Reliance…went to Nucor and said, "It's done. We now have all four. There's no source of supply for MM."

ROA.19785-19786. *See also* ROA.19771-19773 (inventing September 1 dialogue between Reliance, Chapel, and Nucor).

These imagined dialogues had zero foundation; all evidence contradicted them. ROA.17677-17679; ROA.17658-17659. Yet the court rejected Nucor's objections, stating that "reasonable inferences can be drawn where the evidence is not direct." ROA.19813-19815; *see* ROA.19809-19810.

That was wrong. The fact that parties conversed is not license for counsel to represent that Nucor made specific, incriminating statements in those conversations. The Tenth Circuit granted a new trial in similar circumstances, when counsel "presented [the jury with]…a detailed and fabricated image" by imagining a letter that "introduced a number of invented admissions by [defendant]." *Whittenburg v. Werner Enters. Inc.*, 561 F.3d 1122, 1128 (10th Cir. 2009); *accord Edwards*, 512 F.2d at 284-85 (granting new trial where counsel misrepresented key admission).

There is no special exception for conspiracy cases; verdicts cannot "rest only on…speculation and conjecture." *Zervas v. Faulkner*, 861 F.2d 823, 837 (5th Cir. 1988). Counsel's inventions were especially prejudicial because the actual evidence showed that Nucor and American Alloy never spoke about MM; that Nucor and the other mills never spoke; that Nucor and Chapel never spoke about American Alloy; and that Nucor and Chapel never spoke about any mill's decision not to sell to MM. In other words, there was no evidence Nucor knew about the horizontal conspiracy that MM alleged, and that absence required

judgment for Nucor. So MM filled in the gap by inventing a conversation in which Nucor asked Chapel to confirm that a horizontal conspiracy existed.

B. The Court Admitted Plainly Inadmissible Hearsay

MM's principal evidence against Nucor was inadmissible hearsay. Testimony about North Shore's Cooper's March 2012 conversation with Hume and Schultz about Cooper's separate conversation with Nucor's Whiteman was classic hearsay. So was John Sergovic's email purporting to recount a conversation with Chapel's Altman about a conversation Altman had with Nucor's Whiteman.

1. Cooper's Statements to MM Were Inadmissible

The district court abused its discretion in allowing MM to question North Shore's Cooper about out-of-court statements that Cooper made to Hume and Schultz over lunch on March 19, 2012. By February 2012, MM was preparing this lawsuit, and "repeatedly" asked Cooper to phone Nucor's Whiteman to talk about MM. ROA.14124-14126; ROA.16134; ROA.16650-16651. Cooper obliged, then reported back to MM over lunch. ROA.16650-16651. Schultz surreptitiously made an iPhone recording of portions of Cooper's account of Cooper's call with Whiteman. ROA.32050; ROA.32062-32071. At trial, MM's counsel narrated selections from a transcript of the lunchtime recording and asked Cooper some

variation of, "That's what you said to [Schultz] and [Hume]; isn't it"; Cooper responded, "That's what I said to [Schultz] and [Hume], yes." ROA.15999-16003.

This is textbook hearsay. It is hornbook evidence law that a witness's own out-of-court statements (here, Cooper's statements to MM) are inadmissible when offered for the truth of the matter asserted (here, that Whiteman had made purportedly damaging statements to Cooper). *Tome v. United States*, 513 U.S. 150, 157-59 (1995); *United States v. Gregory*, 472 F.2d 484, 487 (5th Cir. 1973); 2 McCormick on Evid. § 251 (7th ed.). Relying on Cooper's "unsworn" lunchtime statements to MM "runs counter to the notions of fairness on which our legal system is founded." *Bridges v. Wixon*, 326 U.S. 135, 153-54 (1945).

The district court ruled pre-trial that the evidence was admissible "as a past recollection recorded" under Federal Rule of Evidence 803(5), "to the extent that [Cooper] claims that he does not remember making the statements in the recording." ROA.3215-3216. But the statements in the recording—Cooper's out-of-court statements to MM—were *themselves* hearsay. Cooper could not have testified to making those statements even had he remembered them perfectly. MM's act of secretly recording someone else's inadmissible statement does not render that statement admissible. 4 Federal Rules of Evidence Manual § 803.02[6][d] (Matthew Bender 10th ed.) (witness's recorded, out-of-court statement is inadmissible unless it satisfies a "separate hearsay exception"); *Rock*

v. Huffco Gas & Oil Co., 922 F.2d 272, 280 (5th Cir. 1991) (similar); Fed. R. Evid. 805.

Nor were Cooper's out-of-court statements to MM, and the recording/transcript thereof, admissible as a recorded recollection of what Whiteman told Cooper (as opposed to what Cooper told MM). For one thing, Cooper never testified that he could not recall Whiteman's statements "well enough to testify truthfully and accurately," as the recorded recollection exception requires. Fed. R. Evid. 803(5)(A); *accord Corrugated Container*, 756 F.2d at 414. Quite the contrary: when Cooper began recalling "[w]hat [Whiteman] said to me," MM's counsel quickly cut Cooper off. ROA.15997.

For another, the lunch conversation was wholly unreliable: it did not "accurately reflect" Whiteman's statements to Cooper. Fed. R. Evid. 803(5)(C). To the contrary, Cooper testified, the lunch reflected his own characterizations and "impressions" of Whiteman's comments. ROA.16136. On the recording, for example, Cooper said Whiteman had conveyed an "unspoken message" that Nucor would stop doing business with North Shore to the extent North Shore was doing business with MM. ROA.32063. In other words, the jury heard Cooper's out-of-court description of something Whiteman *did not say*. ROA.16001; ROA.16136-16317. Elsewhere in the recording, Cooper described Whiteman's message "in so many words." ROA.16003; ROA.32065. Cooper liberally interspersed his own

gloss and thoughts throughout the lunch conversation—often without differentiating what Whiteman actually did and didn't say. ROA.15999; ROA.32061-32071.

The recording was not even a reliable account of Cooper's lunchtime statements *to MM*. Cooper had no idea he was being recorded, contrary to the requirement that the record be "made or adopted by the witness." Fed. R. Evid. 803(5)(B). Key portions were "unintelligible." ROA.32063-32071. The tape was incomplete: Schultz started secretly recording Cooper mid-conversation, ROA.32062, and stopped before the conversation ended, ROA.32071. Only Schultz knows why the recording began and ended when it did. ROA.32053-32054. The strict limitations on the recorded recollection exception are designed to prohibit the "use of statements carefully prepared for purposes of litigation"—precisely the purpose for which Schultz elicited and recorded Cooper's statements. Fed. R. Evid. 803(5), advisory committee's notes.

Even had the court correctly applied the recorded recollection exception—*i.e.*, even if the iPhone recording fully and accurately reflected what Cooper said at lunch, and even if what Cooper said at lunch was admissible evidence—Cooper's trial testimony about the lunch was *still* inadmissible. MM never asked Cooper whether he remembered "making the statements in the recording" (which he clearly did), ROA.3216, nor did MM play the recording to the jury "in lieu of live

testimony," as Rule 803(5) requires. *Rock*, 922 F.2d at 280. Rather, MM introduced the lunchtime statements through Cooper's live testimony.

MM had an easy enough way to elicit what Whiteman said to Cooper on March 19, 2012—simply asking Cooper to tell the jury directly what Whiteman said. But the Rules of Evidence prevented MM from instead eliciting Cooper's unsworn statements to MM over lunch.

2. Sergovic's Email Was Inadmissible

The district court admitted another piece of rank hearsay: John Sergovic's September 5 out-of-court email to his colleagues at non-party mill ArcelorMittal, describing Sergovic's conversation with Chapel's Stan Altman. The email stated: "[Altman] said, 'If ArcelorMittal sells to M&M - then Chapel will not buy anything from [ArcelorMittal].' [Altman] said he made the same comment to Jeff Whiteman at Nucor." PX235. Contrary to the court's ruling, the email did not satisfy Rule 801(d)(2)(E)'s "co-conspirator" exception.

To admit hearsay under the co-conspirator exception, the district court must find, *by a preponderance of the evidence*: "(1) that a conspiracy existed, (2) that the coconspirator [Sergovic/ArcelorMittal] and the defendant against whom the coconspirator's statement is offered [Nucor] were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy." *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1979) (en banc).

The court noted the "preponderance" standard, but inexplicably failed to make a preponderance finding, instead holding only that evidence of conspiracy was "sufficient" "[a]s evidenced by the order denying summary judgment," and that "the ultimate determination must be made by the [jury]." ROA.3214. An order denying summary judgment does not constitute a preponderance finding. ROA.1852-1853. This is reversible error. *Park*, 764 F.2d at 1065. The error is particularly prejudicial because ArcelorMittal was not a party, and the jury made no "ultimate determination" that ArcelorMittal was a conspirator.

Further, the court never addressed the critical question whether Sergovic sent *his email* "in furtherance of" the alleged conspiracy. The co-conspirator exception focuses on "the declarant's intent in making the statement," *United States v. Nazemian*, 948 F.2d 522, 529 (9th Cir. 1991), and whether "he somehow intended to further the scheme," *United States v. Means*, 695 F.2d 811, 818 (5th Cir. 1983). But the court focused exclusively on what authors of *other* emails on the same chain intended. ROA.3215 (referencing comments Sergovic did not make); PX235. The court never found that "the proper predicate had been laid" as to Sergovic's email, and "did not have discretion to allow the statement into evidence." *United States v. McConnell*, 988 F.2d 530, 534 (5th Cir. 1993); *United States v. DeRoche*, 726 F.2d 1025, 1029 (5th Cir. 1984).

And Sergovic did not send his email in furtherance of the conspiracy, because there was no evidence he "intended to further the scheme." *Means*, 695 F.2d at 818. Sergovic's email purported to recount his conversation with Chapel's Altman. Sergovic did not recommend that ArcelorMittal boycott MM, or otherwise evince an "inten[t] to promote the conspiracy's objectives." *United States v. Graham*, 711 F.3d 445, 453 (4th Cir. 2013); *accord McConnell*, 988 F.2d at 533-34. The email was "merely [a] narrative declaration," *Nazemian*, 948 F.2d at 529, of "what had occurred," and does not satisfy the co-conspirator exception's *mens rea* requirement, *Fratta v. Quarterman*, 536 F.3d 485, 504 (5th Cir. 2008).

Under MM's own theory, the September 5 email *predated* the alleged conspiracy. The court held that the email was sent "during the course of the conspiracy" because the conspiracy "began on September 1." ROA.3215. But MM insisted that its allegations stem from a Chapel-American Alloy *horizontal* conspiracy beginning *September 8* that steels mills later joined. ROA.14113; ROA.19760; ROA.19770; ROA.27840; ROA.27842; ROA.27848. MM never alleged that Nucor and ArcelorMittal conspired together by September 5.

A "statement…made prior to the beginning of the conspiracy charged" is not made "during…the conspiracy," Fed. R. Evid. 801(d)(2)(E), and "[is] not admissible under the [co-conspirator] exception." *Hawkins v. United States*, 417 F.2d 1271, 1273 n.1 (5th Cir. 1969); *accord United States v. Johnson*, 767 F.2d

1259, 1271 (8th Cir. 1985). MM cannot have it both ways: because MM based its case on a horizontal agreement between distributors, the conspiracy could only have begun when that bargain was struck. *Id.*

3. Admitting This Evidence Was Highly Prejudicial

The erroneous admission of Cooper's statements and Sergovic's email seriously prejudiced Nucor. To be clear, neither proved that Nucor acted contrary to its self-interest, or that Nucor joined a horizontal conspiracy between Chapel and American Alloy. But the sensational nature of the evidence surely influenced the jury. MM referred to Cooper's lunchtime statements as Nucor's "confession" during closing argument. ROA.19792; ROA.19797. MM harped on Sergovic's email with virtually every witness (even witnesses who had nothing to do with it), and described the email as key evidence purporting to show that Chapel issued an ultimatum prompting Nucor to allegedly join the conspiracy. ROA.14084; ROA.14110-14111; ROA.14830-14836; ROA.15280-15283; ROA.16300-16301; ROA.19758. A new trial is required: there can be no assurance that this evidence "did not influence the jury or had but a very slight effect on its verdict." *Munn*, 924 F.2d at 573.

C. Allowing MM's Expert to Narrate and Weigh the Evidence Was Prejudicial Error

Mahoney's testimony was rife with inherently inadmissible statements that independently caused prejudice.

1. Mahoney was MM's first witness and functioned as an improper overview witness for much of his testimony. Mahoney nodded along as MM's counsel recited dozens of e-mails at the heart of MM's case, taking the jury through MM's story from the beginning, and asking Mahoney to confirm facts and interpret evidence in ways favorable to MM. ROA.14389-14423; ROA.14432-14442. Mahoney told the jury that he inferred from this evidence that Nucor was the "enforcer" of defendants' boycott. ROA.14389-14391.

This Court "unequivocally condemn[s]" the use of "overview witness[es]" for good reason. *United States v. Griffin*, 324 F.3d 330, 349 (5th Cir. 2003). Overview testimony "paint[s] a picture of guilt before the evidence has been introduced," and is especially "unacceptable" when, as here, the witness "give[s] tendentious testimony," which "greatly increase[s] the danger that a jury might rely upon the alleged facts…as if [they] had already been proved." *Id.* (quotations omitted). "The dangers inherent in using a summary witness…are only exacerbated…where the witness was also testifying in the role of an expert." *United States v. Johnson*, 54 F.3d 1150, 1162 (4th Cir. 1995).

Compounding the problem, Mahoney's testimony flagrantly violated the rule that expert testimony is admissible only if it "serves to inform the court about affairs not within the full understanding of the average man." *United States v. Webb*, 625 F.2d 709, 711 (5th Cir. 1980); *accord Andrews v. Metro N. Commuter*

R.R. Co., 882 F.2d 705, 708-09 (2d Cir. 1989). Mahoney's factual narrative required nothing beyond basic literacy skills and reprised MM's opening statement. *E.g.*, ROA.14405 ("Q: Do you see that?…A: You can read it in the e-mail, yes."). This process allowed MM to introduce dozens of emails without any foundation—including pure hearsay. *E.g.*, ROA.14402-14405 (Sergovic email).

The court overruled multiple objections (ROA.14389; ROA.14402; ROA.14423-14424; ROA.14432-14434), reasoning that reciting emails set the stage for Mahoney's opinions about industry customs. ROA.14432-14434. That ruling was plainly wrong. Expert testimony that "simply rehash[es] otherwise admissible evidence about which [the expert] has no personal knowledge" is inadmissible: "an expert cannot be presented to the jury solely for the purpose of constructing a factual narrative based upon record evidence." *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 468-69 (S.D.N.Y. 2005); *accord Levinson v. Westport Nat'l Bank*, 2013 WL 3280013, at *4, *7 (D. Conn. June 27, 2013).

2. MM's evidentiary narratives became a predicate for Mahoney to testify about the inferences the jury should draw. He extensively testified that under his view of the evidence, Nucor and other defendants acted together to cut off MM. Mahoney claimed he had seen "e-mails from Nucor executives…where there was a refusal to sell to [MM] directly…and there was enforcement…of other third parties

saying, Don't sell to MM." ROA.14389-14390. Mahoney opined that other evidence revealed Nucor "went to North Shore and said, Knock it off…We don't want you doing this, in which you're selling to MM—buying on behalf of MM." ROA.14391; *accord* ROA.14398 (Mahoney testifying that "evidence" showed Nucor was "very unhappy" with North Shore). Mahoney conceded these words were his own spin, but "what I read in the testimony, that's the conclusion I drew, is [that Nucor was] enforcing a boycott." ROA.14778.

None of this is proper expert testimony. "[E]xpert testimony regarding the meaning of ordinary words, which the jury is in as good a position as the 'expert' to interpret, must be excluded." *United States v. Krout*, 66 F.3d 1420, 1433 (5th Cir. 1995); *see United States v. Dicker*, 853 F.2d 1103, 1108-11 (3d Cir. 1988). Such testimony exceeds the expert's competence, invades the jury's exclusive province, and improperly sways the jury. *In re Rezulin Prods. Liab. Litig.*, 309 F. Supp. 2d 531, 541 (S.D.N.Y. 2004); *United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004); *see United States v. Ragano*, 476 F.2d 410, 416-17 (5th Cir. 1973).

Particularly so in conspiracy cases. As the Third Circuit held in an analogous case, expert testimony parsing non-coded conversations was inadmissible because "the only purpose…was to bolster the government's allegations that [an alleged co-conspirator] was an enforcer." *United States v. Gibbs*, 190 F.3d 188, 213 (3d Cir. 1999). Courts have granted new trials in

conspiracy cases for this reason. *United States v. Arenal*, 768 F.2d 263, 269-70 (8th Cir. 1985) (witness's "aura of expertise" made his spin on conversations "prejudicial…on []conspiracy issue"); *Dicker*, 853 F.2d at 1108-11. Here, a new trial is especially imperative because Mahoney's evidentiary interpretations rested on legally impermissible inferences, including that Nucor was "enforcing" a conspiracy in its dealings with North Shore, rather than effectuating Nucor's lawful, pre-conspiracy decisions. *Supra* pp.26-28.

D. Witnesses Improperly Opined That Defendants' Conduct Was Unlawful

Throughout trial, MM elicited statements from lay witnesses opining on whether it was "lawful," "ethical," "proper," or "appropriate" for a distributor to tell a manufacturer to choose between doing business with it or MM, or for a manufacturer to decline to sell steel through a particular distributor. *E.g.*, ROA.14815; ROA.15316; ROA.15560-62; ROA.16004; ROA.16020; ROA.18044. Defendants repeatedly objected. *E.g.*, ROA.4443-4447; ROA.15334-15337; ROA.15841. But the court refused curative instructions, holding that "ask[ing]…a question whether or not something is, in his opinion, illegal…is not a question of law. It's a question of his opinion." ROA.15336; *see also* ROA.16655.

This was manifest error. Rule 701 "generally prohibit[s]…a lay witness [from] giv[ing] legal opinions." *United States v. El-Mezain*, 664 F.3d 467, 511-13 (5th Cir. 2011). Testimony about what is "ethical" is equally inadmissible. *In re*

Rezulin, 309 F. Supp. 2d at 542-45; *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 611 (S.D. W. Va. 2013); *see also In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1053-54 (D. Minn. 2007). The court's impression that lay witnesses were testifying about specialized industry "aware[ness]," ROA.15337, was further reason to *exclude* the testimony. Such testimony is not "the product of reasoning processes familiar to the average person in everyday life," and is inadmissible as lay opinion. *United States v. Yanez Sosa,* 513 F.3d 194, 200 (5th Cir. 2008); *see* Fed. R. Evid. 701(c).

Allowing multiple witnesses to opine that the defendants acted unlawfully and unethically clearly prejudiced Nucor. Again and again, these witnesses effectively told the jury to render a verdict for MM. That key witnesses "didn't believe what was happening was morally right or lawful" was one of MM's central, pervasive themes at trial. ROA.16207-16208; *see* ROA.16020; ROA.15316; ROA.18044; ROA.15283. This testimony was highly misleading: a distributor does *not* violate the law by asking a mill to choose between supplying that distributor or MM. *Supra* pp.25-26.

The final jury charge included a generic instruction to disregard testimony about whether unspecified conduct was lawful or proper. ROA.19734. This was "grossly inadequate" in light of the court's refusal to give a "cautionary instruction at the time." *United States v. McPhee*, 731 F.2d 1150, 1153 (5th Cir. 1984). And

after the court delivered the charge, MM's counsel reiterated to the jury that the defendants were "do[ing] something…they believe was wrong." ROA.19762; *see* ROA.19765-19766; ROA.19772-19773; ROA.19780.

E. The Court Made Additional Inconsistent, Prejudicial Rulings

Many additional rulings throughout trial disregarded the Federal Rules of Evidence, in ways that overwhelmingly favored MM. The statistics are staggering: Defendants objected 126 times to MM's questions or testimony; the court overruled 105 (83%). Yet the court overruled a mere 16% of MM's 103 objections. And the court interjected 33 objections of its own during questioning by defense counsel—but only 3 during questioning by MM. Collectively, these rulings reveal troubling inconsistencies. Here is a flavor:

- The court allowed MM's counsel to lead MM's own witnesses on *direct*, ROA.15939-15940; ROA.15953-15954, but barred Nucor from leading MM witnesses on *cross*. ROA.15776-15777.
- The court barred Nucor from impeaching critical Mahoney testimony via an email not yet in evidence, because Nucor "can't prove up this document with this witness," *i.e.*, Mahoney, the first witness at trial. ROA.14790. But the court permitted MM to question Mahoney about dozens of emails that no other witness had proven up (and that Mahoney, as an expert, could not "prove up" either). ROA.14391-14442.

- The court held that Nucor couldn't ask a witness to "explain[] someone else's email," ROA.18869—yet overruled Nucor's objection, during MM's cross-examination of the *same* witness, that MM was "asking the witness to interpret an e-mail another person wrote," ROA.18942-18943. The court permitted MM's counsel repeatedly to narrate evidence to the jury through leading questions of lay witnesses about emails they'd never seen or received and knew nothing about. ROA.15280-15281; ROA.15971-15973.
- The Court prevented Nucor from cross-examining witnesses on critical issues. For example, the Court prohibited Nucor from questioning Schultz about Schultz's statements suggesting he knew MM's proposed credit terms would not satisfy Nucor. ROA.19524-19527; ROA.19582-19583. And the Court sustained MM's asked-and-answered objection when Nucor tried to cross-examine Hume about Nucor's incumbency practice, stating that Hume's "answer was he cannot think that thought." ROA.17250-17252.

* * *

The errors described in Section III were pervasive and mutually reinforcing; deprived Nucor of the opportunity to mount an effective defense; and wholly undermine any possible confidence in the jury's verdict. Individually they warrant a new trial; cumulatively they plainly do. "Taking these rulings in a different direction would have produced a very different trial." *Riddle*, 103 F.3d at 434-35.

IV. Nucor Is Entitled To A New Trial on Damages

A. MM Cannot Recover Post-Complaint Damages

The $52 million award (pre-trebling) reflected lost profits from 2011 to 2021. ROA.17366; ROA.22524; ROA.5587-5588. But plaintiffs alleging a continuing refusal to deal may not recover lost profits "inflicted by the persistence of the refusal after the date of filing suit." *Poster Exchange, Inc. v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 126 & nn.14, 15 (5th Cir. 1975). An ongoing refusal to deal generates separate causes of action for each refusal; post-suit damages are presumed to arise from post-suit conduct. *Id.*; *see also Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 398-99 (2d Cir. 1980). MM cannot recover lost profits after it filed suit, April 19, 2012. *See* ROA.5036-5037; ROA.5347. The Court should order a new trial or remittitur.

B. The Factual Record Forecloses the Award

MM's damages expert, Stephen Magee, assumed that, but for the conspiracy, MM would have held $2.7 million in steel inventory when it opened on September 1, 2011. ROA.17410; ROA.17440-17741; ROA.22524-22525.[8] That assumption drove Magee's $52 million lost profits estimate: Magee projected MM's sales across all ten years based on an initial $2.7 million inventory.

[8] Magee offered two models; this section describes the model the jury accepted and that was the basis for the $52 million award.

ROA.19617-19619; ROA.22529-22530; ROA.30799. That figure was based on the maximum funds MM had available to invest. ROA.22521-22522; ROA.22525.

But MM had purchased only $1.1 million in inventory by September 1, and had received only $700,000. ROA.17465; ROA.19441; ROA.19598. Magee testified that the conspiracy prevented MM from buying more steel on September 1. ROA.17465. Even were that true, MM's own industry expert testified that orders take 5-9 weeks to deliver. ROA.14285. MM could not have increased its inventory above $1.1 million until months after September 1. Even *Schultz* conceded that for "anyone…to claim that MM Steel started on September 1st with more than $1.1 million of inventory" is "inaccurate." ROA.16882-16884. Schultz further conceded that MM did not even want to *spend* its $2.7 million in capital until well into its first year: MM would start small and "ramp up." ROA.16745.

Had Magee started with $1.1 million instead of $2.7 million, damages would be tens of millions of dollars lower. ROA.19610-19611. A new trial is warranted because Magee's assumption "find[s] no support in the actual facts of the case." *Eleven Line, Inc. v. N. Tex. State Soccer Ass'n*, 213 F.3d 198, 209 (5th Cir. 2000); *accord Park*, 764 F.2d at 1067.

Nucor adopts the additional challenges to the damages awards in Section III of co-appellant JSW's brief. Fed. R. App. P. 28(i).

CONCLUSION

For the foregoing reasons, the judgment should be reversed. Alternatively, the Court should order a new trial.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and 32(a)(6), respectively, because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

Dated: November 20, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2014, the foregoing *Brief of Appellant Nucor Corporation* was electronically filed with the Court via the appellate CM/ECF system, and that copies were served on the following counsel of record by operation of the CM/ECF system on the same date:

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