No. _____

In The

Supreme Court of the United States

GULF STATES REORGANIZATION GROUP, INC.,

Petitioner,

v.

NUCOR CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The setting of this Sherman Act case is as follows:

Dominant firm in a regional market, while it is in the process of acquiring its only significant regional competitor, learns that an investor group is planning on purchasing a dormant facility in the region in order to go into competition with it. In order to protect its near-monopoly status, dominant firm secretly contracts with an equipment broker to outbid the group, dismantle the facility, and ship it out of the country. Upon learning from an informant of the dominant firm's involvement, investor group sues, alleging (in addition to an attempt to monopolize) a contract in restraint of trade (the broker acting at the behest of the dominant firm). In its defense, dominant firm offers a business justification, not for its own anticompetitive conduct, but rather an assertion that the *broker* had a valid business reason – a profit motive – for entering into the contract.

The courts below, relying on the *Matsushita*/*Monsanto* line of cases, placed the burden of proof on the plaintiff to offer evidence that would "tend to exclude the possibility" of a "legitimate" reason for the broker having *entered into* the contract at issue. On the basis of a factual finding that the broker's objective was simply to make money, the courts below granted summary judgment in favor of the dominant firm.

QUESTIONS PRESENTED – Continued

The questions presented are:

1. Where a market exclusion arises out of the performance of an express contract, in order to meet the "contract, combination . . . and conspiracy" element of § 1 of the Sherman Act, does the plaintiff (the excluded party) bear the burden of offering proof, *in addition* to the contract itself, that "tends to exclude the possibility" that the second party may have *entered into* the contract for a legitimate reason?

2. In light of substantive antitrust law evaluating the reasonableness of an alleged restraint of trade in light of the "commercial realities" of the industry at issue, may a plaintiff properly offer industry experts who are not economists to supplement the testimony of its economist for the purpose of addressing the nature of competition in the industry?

3. Is it proper to reject a proposed relevant product market as a matter of law on the basis of a theoretical supply substitution by a further processed version of the same product, where there is a total lack of evidence of demand substitution?

4. Is a theoretical possibility of an increase in out-of-region purchases in response to an in-region price increase sufficient, as a matter of law, to defeat the existence of a regional relevant geographic market, particularly where there is substantial evidence of a lack of price competition between regions?

PARTIES TO THE PROCEEDINGS BELOW

There were only two parties to the proceedings below, both of which are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Gulf States Reorganization Group, Inc. has no parent corporation, and no publicly held company owns any of the corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gulf States Reorganization Group, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The first appeal in this matter, reversing the District Court's first grant of summary judgment, is reported at 466 F.3d 961 (11th Cir. 2006). This Court denied certiorari, 555 U.S. 1103 (2007). The District Court's opinion again granting summary judgment, on remand, is reported at 822 F.Supp.2d 1201 (N.D. Ala. 2011) (App. 13). The Court of Appeals' opinion is reported at 721 F.3d 1281 (11th Cir. 2013) (App. 1).

JURISDICTION

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1337, based on claims under 15 U.S.C. §§ 1, 2 and 15, 26. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). A timely petition for rehearing/rehearing *en banc* was denied on September 13, 2013 (App. 188).

STATUTES AND RULE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, in pertinent part provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2, in pertinent part provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of trade or commerce among the several States . . . shall be deemed guilty of a felony. . . .

Rule 56(c) of the Federal Rules of Civil Procedure in pertinent part provides:

> . . . The [summary] judgment sought shall be rendered forthwith if the [evidence shows] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

STATEMENT OF THE CASE

A. Introduction

This Petition raises an important and recurring issue concerning the proper application of the *Matsushita*/

Monsanto[1] burden of proof to establish the threshold "contract, combination . . . or conspiracy" element of § 1 of the Sherman Act in Rule of Reason cases.

This antitrust case involves a market exclusion of a nascent competitor in the steel industry. The exclusion of the Petitioner arose out of an express, written, fully executed contract, pursuant to which a regional near-monopolist (Nucor Corporation) secretly arranged, through a steel mill broker (Casey Equipment Company) for the Nucor-funded acquisition of steel-production assets that plaintiff/Petitioner, Gulf States Reorganization Group, Inc., had contracted to purchase and which the Group required in order to establish what would have been the near-monopolist's only significant competition in the region.

The exclusion of the Petitioner resulted in exactly the harm the antitrust laws are intended to prevent: restricted output, limited consumer choice and higher regional prices. The anticompetitive impact of Nucor's scheme, however, was never reached in the courts below, because summary judgment was granted in favor of Nucor for failure to rebut the steel mill broker's claim of a business justification (a very

[1] *Monsanto Co. v. Spray-Rite Service Co.*, 465 U.S. 752 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

substantial profit) for entering into the contract in question.[2]

The primary issue raised is the standard of proof required on summary judgment to meet the threshold "contract, combination . . . or conspiracy" element of § 1 of the Sherman Act, specifically whether, when injury to competition results from the performance of a written contract, that *in addition to the contract itself*, a Sherman Act plaintiff also bears the *Matsushita*/*Monsanto* burden of proof to offer evidence, in rebuttal to the "other" contractual party's claim of business justification, which "tends to exclude the possibility" that such entity had a legitimate business reason, such as making money, for entering into the contract.

It is important to make clear that this Petition in no way challenges the propriety of the *Matsushita*/*Monsanto* burden of proof where the existence of a *per se* collusive agreement is at issue. Not only is that burden of proof entirely proper in *per se* cases where proof of agreement establishes liability, a high standard of proof of agreement is *necessary* in those types of cases in order to avoid possible antitrust liability

[2] The District Court recognized that Nucor had an anticompetitive objective – the exclusion of a competitor. App. 56. Summary judgment in favor of Nucor, however, was granted based on a lack of proof that "tended to exclude the possibility" that the "other" party to the contract, the steel mill broker (Casey) with whom Nucor secretly contracted for the actual purchase of Gulf States Steel, had a profit motive for entering into the contract. App. 62-64.

for lawful conduct. Thus the focus of this Petition is not on the *Matsushita/Monsanto* burden of proof *itself,* but rather the erroneous extension of that burden to the merits of Rule of Reason cases where proof of agreement has already been established in the form of an express contract or other direct evidence, and the proper focus of the courts should be on the anticompetitive effect of performance of the contract or combination in the relevant market.

Despite over fifty petitions to this Court asserting the contrary, in *per se* cases involving alleged horizontal price fixing, concerted refusals to deal and distributorship terminations, all of the circuit courts faithfully apply the same analytical process mandated by *Matsushita* and *Monsanto.* In those types of cases, the differences among the circuits have nearly all involved disputes over the application of the proper standard to what is often a complex factual record of a type not suitable for review by this Court.[3] In contrast, this case does not involve a claim of a split of circuits in the application of *Matsushita* and *Monsanto* to *per se* cases, which is well established in all circuits and entirely proper, but rather

[3] The most dramatic example of different interpretations of the factual record is *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir.) (*en banc*), *cert. denied sub nom. Hahnahan Albrecht, Inc. v. Potash Corp. of Saskatchewan, Inc.*, 531 U.S. 815 (2000), a horizontal price fixing case based on parallel price increases, where six members of the Eighth Circuit found sufficient evidence to affirm an award of summary judgment, where five members dissented.

involves the inappropriate application of the principles set forth in *Matsushita* and *Monsanto* in those same circuits to the merits of Rule of Reason cases.[4]

The crux of the problem faced by the lower courts is as follows: With respect to the threshold issue of concerted action, there is a critical difference between *per se* and Rule of Reason cases. In *per se* cases, proof of agreement *is the violation.* In those types of cases, it is entirely proper for the courts to require strong evidence rebutting a reasonable explanation why a defendant acted independently of its competitors. As this Court explained in *Matsushita* and *Monsanto,* and a legion of lower courts have properly recognized, anything less than proof that "tends to exclude the possibility" of unilateral and independent action would risk imposing antitrust liability for lawful conduct.

In contrast, however, proof of agreement in Rule of Reason cases is merely the starting point of analysis. It is true that even in Rule of Reason cases, a business justification is relevant, of course, to the threshold issue of concerted action if the existence of an agreement is contested. But once a "contract, combination . . . or conspiracy" has been established

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[4] For example, as is true throughout the Circuit Courts, the Eleventh Circuit consistently and faithfully applies the *Matsushita* and *Monsanto* formulation in *per se* horizontal price fixing and distributorship termination cases. *See, e.g., Williamson Oil Co. v. Philip Morris USA*, 346 F.2d 1287 (11th Cir. 2003) and *Winn v. Edna Hibel Corp.*, 858 F.2d 1517 (11th Cir. 1988).

(as it was in this case, in the form of a written contract), a business justification for the antitrust violation itself (an injury to competition in a relevant market *effected by* an agreement) is entirely improper.

There is no precedent in antitrust law for recognizing a business justification as an excuse for an anticompetitive merger or acquisition, an anticompetitive tying arrangement, an anticompetitive exclusive dealing arrangement, or (as here) a contract between a dominant firm and a third party that unreasonably restricts the competitive opportunities of a direct competitor.

For many years, the lower courts have been gradually expanding the "tends to exclude the possibility" standard to ever wider application, erroneously applying *Matsushita/Monsanto* (as was done in this case) beyond the threshold issue of concerted action, to the antitrust merits. This case marks the broadest application yet.

B. Summary of Plaintiff/Petitioner's Case

1. Introduction

Had Nucor attempted to acquire the steel-producing assets of Gulf States Steel directly, such an acquisition would have been subject to immediate antitrust challenge as an anticompetitive acquisition. Rather than acting as the buyer itself, however, Nucor effected the acquisition by means of a secret

contract with a steel mill broker to act as a shill for Nucor.

The steel mill broker, Casey Equipment Company, played a critical role in the scheme. Successful accomplishment of Gulf States' exclusion without antitrust challenge depended on the ability of the parties to keep Nucor's involvement confidential.

When the Group raised its suspicion at the bankruptcy auction that it was Nucor that was secretly funding Casey, the attorney ostensibly representing Casey lied to the bankruptcy judge, representing that there was "no evidence" of Nucor's involvement. Both Nucor and the broker issued similar false denials to the trade press. It was only later, when an informant revealed to the Group Nucor's involvement, that this action was filed. Discovery revealed that Nucor had documented its anticompetitive scheme in a formal, fully executed written contract.

2. The Market Setting

Prior to 1999, the Southeast was a competitive market for hot rolled coil steel. Southeast manufacturers which used hot rolled coil in their products had a choice of four suppliers. There were two large "mini-mill" producers whose primary end product was commodity-grade hot rolled coil, in head-to-head competition. Nucor operated two mini-mills, one in Arkansas and the other in South Carolina, and "Trico" – a joint venture between LTV Corporation and two Japanese steel companies – operated a mini-mill in

Alabama. In addition, there were two traditional-type ("integrated") mills operating in the Southeast – Gulf States Steel and U.S. Steel-Fairfield – both located in Alabama.

In the early 2000's both Gulf States Steel and Trico filed for bankruptcy and shut down. Nucor entered into a contract with the Trico bankruptcy trustee to acquire what had previously been its only mini-mill competitor. The transaction was scheduled to close on July 22, 2002. Prior to July 2002, an auction had been held by Gulf States Steel's debtor-in-possession lender, which had been attended by much of the world steel industry in person or by web-cast. The auction failed to attract the minimum bid for the steel producing assets. As a result, at the time Nucor was poised to acquire Trico, it appeared that Gulf States would remain closed.

Thus in July 2002 the structure of the Southeast market was changing from a competitive one, with four producers, to only two producers – Nucor with three mini-mills, with 92% of Southeast hot rolled coil production, and U.S. Steel, with an integrated mill that sold only a minimal quantity of its hot rolled coil as an end product.[5]

[5] In 2004, Nucor's three Southeast mills sold 4,220,000 tons of hot rolled coil, compared with 335,000 tons sold by its only remaining Southeast competitor, U.S. Steel Fairfield.

3. The Market Exclusion

One can only imagine Nucor's consternation when it learned from an article in the trade press on July 17, 2002 – just five days before Nucor was scheduled to acquire the Trico mini-mill and gain near-monopoly control of the Southeast market – that the Group had entered into a contract with the Gulf States Steel bankruptcy trustee to purchase Gulf States Steel and rehabilitate and reopen it *as a mini-mill,* concentrating on commodity-grade hot rolled coil in direct competition with what would soon be Nucor's three Southeast mini-mills.

Immediately upon learning of the Group's plans to purchase and reopen Gulf States Steel, Nucor contacted a steel mill broker, Casey Equipment Corporation. Don Casey, the President of the Casey company, advised Nucor that he was quite familiar with the Gulf States assets, having attended and participated in the auction. Don Casey was also familiar with the Group's plans to reopen Gulf States Steel, having reviewed the Group's business plan and having met with the Group's President to discuss supplying the additional equipment needed to convert Gulf States Steel to a mini-mill, in exchange for stock in Gulf States Reorganization Group, Inc.

Notwithstanding that Don Casey advised Nucor that a broker would risk no more than $500,000 on such assets, Nucor offered a contract to the Casey company to secretly "loan" Casey the money to purchase the Gulf States Steel assets, up to $8,000,000,

with no obligation to repay the loan. The contract which Nucor offered to Casey was the ultimate sweetheart deal. The contract contained none of the standard provisions that would have been favorable to Nucor, and provided for an exceptionally large commission to Casey – 25% of the entire sales price – whether or not the re-sale price was in excess of the purchase price. The contract also provided Nucor with veto power over a sale to a "domestic buyer" – a clear indication that Nucor wanted Gulf States Steel to be dismantled and shipped out of the country.

In performance of its contractual obligations to Nucor, Casey outbid the Group, dismantled the plant, and shipped it to China, the effect of which was to prevent the Group from entering into competition with Nucor, and leaving Nucor without meaningful Southeast competition.

4. The Impact of the Market Exclusion on Competition in the Southeast

The effect of the exclusion of Gulf States was reduced output, reduced consumer choice (two Southeast producers instead of three), and increased prices for hot rolled coil in the Southeast. Historically, prices in the "spot" sales market in the Gulf region had been equal to or lower than Mid-West/Great Lakes prices. After the events at issue, Gulf prices increased, to equal to or higher than the price in the Mid-West/Great Lakes market.

C. The Decision Below

With the exception of the definition of the relevant product market, the Court of Appeals affirmed the District Court's opinion without discussion, thus the operative opinion as to the "contract, combination . . . or conspiracy" issue is that of the District Court, whose opinion largely adopted the recommendation of a Special Master.

It was the Group's contention that since the exclusion of what otherwise would have been Nucor's only significant competitor arose out of the performance of an express, fully executed written contract, the contract itself met the § 1 threshold requirement of proof of concerted action, and as for the antitrust merits, the anticompetitive impact of the market exclusion established the restraint of trade. The District Court, App. 53, at the recommendation of a Special Master, rejected that contention, treating the *threshold* question of concerted action and the *merits* issue of an unreasonable restraint of trade as if it were a single issue of "conspiracy."

At the time Nucor's Motion for Summary Judgment was filed, Nucor was the sole defendant, and only Nucor's liability was at issue.[6]

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[6] Although Casey Equipment Company was a defendant when the case was originally filed, when the summary judgment motion at issue in this Petition was filed by Nucor Corporation, Casey had been voluntarily dismissed. Thus Casey's liability was not at issue.

In the District Court's view, proof of an anticompetitive intent on Nucor's part alone was insufficient to establish a "conspiracy" (i.e., the antitrust merits), absent proof that the "other" party to the contract, Casey (not then a party to the lawsuit) shared in that objective. The District court concluded (App. 56):

> Nucor may well have had an ulterior objective in entering the contract – to exclude GSRG from the market. But there is nothing in the contract, its terms, or the circumstances of its agreement that indicates (much less presents substantial evidence that) *Casey's* objective was anything other than the acquisition of steel assets for resale.
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> * * *
>
> Proof that Nucor alone may have had an intent to monopolize or restrain trade is not enough to establish the contract, combination or conspiracy in restraint of trade. (App. 61).

The District Court placed the burden of proof on Gulf States to rebut Casey's assertion of a profit motive as its purported "legitimate" reason for entering into its contract with Nucor, citing the *Matsushita*/*Monsanto* standard, as adopted in the Eleventh Circuit opinion in *U.S. Anchor,*[7] for the proposition that "[f]ederal antitrust law requires a plaintiff to

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[7] *U.S. Anchor Manufacturing Co. v. Rule Industries*, 7 F.3d 986 (11th Cir. 1993), *cert. denied*, 512 U.S. 1221 (1994).

introduce evidence that *tends to exclude the possibility* that the defendants acted independently or legitimately." (App. 61-62).

On the basis of that principle of law, the District Court, applying the *Matsushita/Monsanto* burden of proof with respect to the purported failure of the plaintiff/Petitioner to offer an adequate rebuttal to Casey's assertion of a business justification, concluded that Nucor was entitled to summary judgment:

> GSRG has simply fallen short of the required showing that Casey/Park's reasons for entering into the agreement were anything but legitimate. Here, Casey/Park's "conduct [is] as consistent with permissible [activity] as with illegal conspiracy, [and therefore] does not, standing alone, permit the inference of conspiracy."

(App. 64).

D. The Exclusion of the Petitioner's Industry Experts

The second important issue raised by this case is how Federal Rules of Evidence, Rule 702 and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and its progeny apply to non-economist industry experts in Rule of Reason antitrust cases, where substantive antitrust law recognizes the critical role that "market facts" of the type typically addressed by industry experts play in evaluating whether particular conduct constitutes

an unreasonable restraint of trade or an attempt to monopolize.

The District Court awarded summary judgment in favor of Nucor on the Group's § 2 claim of attempt to monopolize by excluding critical market facts offered by the Group's steel industry experts, on the primary basis that they were not trained as economists.

The practical effect of such rejection was the elimination from the record of substantial evidence concerning the unique nature of competition in the hot rolled coil industry, and the reasons why the exclusion of Gulf States had such a devastating impact on competition in the Southeast. As a result, summary judgment was granted in a vacuum, with no consideration given by the courts below to the effect which the market exclusion had on competition in the relevant market.

The reasoning underlying the exclusion of the Group's experts was as follows: Eleventh Circuit precedent requires that in a Rule of Reason case, relevant market must be established by the testimony of an economist. The Group's two steel industry experts were not economists. Since in the view of the District Court their proposed testimony "related to" the issue of relevant market, they were deemed not qualified to testify due to their lack of training as economists. Their testimony was excluded on those grounds, as a matter of law, pursuant to F.R.E. 702 and this Court's decision in *Daubert* and related decisions. (App. 76-79).

As a matter of antitrust law, when applying the Rule of Reason the factfinder "weighs all the circumstances of a case" and evaluates the "real market forces" in deciding whether the challenged conduct imposes an unreasonable restraint on competition. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877 (2007), quoting *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). The courts must ordinarily consider "the facts peculiar to the business" to which the restraint is applied. *Chicago Bd. of Trade v. United States,* 246 U.S. 231 (1918). Proper market definition can be determined only after a factual inquiry into the "commercial realities" faced by consumers. *United States v. Grinnell Corp.,* 384 U.S. 563 (1966).

In its attempt to fully educate the jury concerning the intricacies of the hot rolled coil industry, economic issues were addressed by Dr. Robert W. Crandall, Senior Fellow in Economic Studies, Brookings Institution, Washington, DC, and a nationally-recognized antitrust scholar. In addition to extensive research and writing in antitrust economics, Dr. Crandall has written two books and numerous articles on the steel industry.

In supplement to the testimony of the Group's economist (whose reports were accepted by the District Court), the Group offered the testimony of two steel industry experts, for the purpose of explaining to the jury the nature and uses of hot rolled coil, and how competition in hot rolled coil steel works in actual practice.

The Group's first steel industry expert, John D. Correnti, was the former President of Nucor Corporation, and the former President of Birmingham Steel. On the basis of his analysis of the need in the Southeast for a producer of high quality hot rolled coil for use in the growing Southeast auto industry, Mr. Correnti was the co-founder in 2006, with Russian steel producer Severstal, of an $880,000,000 hot rolled coil facility in Mississippi named "SeverCorr," which uses new mini-mill technology to produce high-grade steel.

The Group's other steel industry expert was Michael D. Locker, a New York City business consultant specializing in the steel industry, and the publisher, for over 20 years, of the newsletter *Steel Industry Update*. Among the unique perspectives that Mr. Locker offered was how the practice of "price leadership" in the hot rolled coil market operated.

The testimony of Mr. Correnti, combined with that of Mr. Locker, was intended to educate the jury concerning the "commercial realities" of the hot rolled coil industry, as required by the Rule of Reason. There is nothing in either expert report that involves scientific or technical opinions of the type that could be subject to testing or peer review, or which involves a "methodology." Moreover, given the ease with which Nucor could have offered rebuttal testimony by its own executives if there was anything inaccurate in Mr. Correnti's or Mr. Locker's proposed testimony, there was no danger of misleading the jury.

E. The Relevant Market Issues

As yet another basis for granting summary judgment in favor of Nucor, applicable to both the Group's Sherman Act § 1 restraint of trade claim and its § 2 attempt to monopolize claim, the District Court rejected, as a matter of law, the Group's proposed relevant product market and relevant geographic market. In both cases, in addition to evaluating relevant market without reference to the "market facts" offered by the Group's industry experts, the rejection was based on clear and straightforward errors of law, which should be corrected if this matter is remanded for trial.

1. The Product Market

The relevant product market was the only issue directly addressed by the Court of Appeals. The legal issue raised with respect to relevant product market is whether summary judgment should be granted based on an entirely theoretical possibility of supply substitution of the product itself by a further processed version of the same product.

Relevant product market in an antitrust case is established by application of the "test of substitutability." Products that are reasonable substitutes for each other (demand substitution) must be included in the relevant market. Products that are not substitutes are properly excluded. *United States v. E. I. du Pont de Nemours & Co.,* 351 U.S. 377, 394-95 (1956); *Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962).

The product that Gulf States would have produced and sold in direct competition with Nucor, if it had not been excluded from the market, was unprocessed hot rolled coil steel. The uncontroverted evidence in this case established that there are no substitutes for unprocessed coil for firms that use that product in their manufacturing process (i.e., no demand substitution).

Supply substitution is only relevant to interchangeable products. The decision of the court below (App. 8-12), holding that a proposed relevant product market could be defeated as a matter of law on the basis of theoretical supply substitution where there is no threshold proof of demand substitution, constituted a marked deviation from established precedent.

2. The Geographic Market

The relevant geographic market where an adverse impact on competition is alleged to arise out of an anticompetitive merger or acquisition is the particular geographical area affected by the acquisition. *See, e.g.*, *United States v. Pabst Brewing Co.,* 384 U.S. 546, 549-50 (1966); *United States v. Philadelphia National Bank,* 374 U.S. 321, 360-62 (1963). There was substantial evidence offered by the Group that the hot rolled coil steel industry consists of two regions, the Mid-West/Great Lakes and the Southeast. There is also substantial evidence in the record that for multiple reasons, there is no meaningful price competition between regions, and that the Southeast is

largely insulated from competition from Mid-West/ Great Lakes producers.

The Court of Appeals affirmed without discussion the District Court's rejection of the Southeast as the relevant geographic market as a matter of law. The rejection was based on Nucor's expert economist's theoretical speculation of the market impact if Nucor were to attempt to raise its price in the Southeast.

There was unrebutted evidence, established by Dr. Crandall's sales pattern charts that sales patterns in both markets were exceptionally stable, despite numerous price changes. Further, in its discovery responses, Nucor consistently took the position that the final price of each transaction was specially negotiated, hence no market price existed. Further, there was uncontroverted evidence that the "published" prices were subject to entrenched price leadership. Despite all of the foregoing, Nucor's economist's offered a *theory,* backed up by *no* evidence, that if Nucor were to raise its price in the Southeast, out-of-area producers might divert their production to the Southeast and defeat such price increase – and thus all domestic producers were in the same relevant geographic market.

The District Court ignored all of the other relevant factors, each of which supported the existence of two regional markets, and based summary judgment solely on the basis of theoretical responses of out-of-area producers to a Southeast price increase, holding that the relevant geographic market, as a matter of

law, had to include both Mid-West/Great Lakes and Southeast producers. (App. 88-90).

With respect to relevant geographic market, the decision below is directly contrary to the decisions of this Court involving anticompetitive acquisitions, and is further contrary to well-established case law involving regional submarkets.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

The compelling reason for granting the writ is the pressing need for clarification that the *Matsushita*/*Monsanto* "tends to exclude the possibility" burden of proof applies only to the threshold Sherman Act § 1 issue of the existence of a "contract, combination . . . or conspiracy," and that a defense based on a supposed "business justification" is not available in evaluating on summary judgment the underlying antitrust merits.

The decision of the lower courts in this case represents an erroneous extension of that burden of proof to the merits of Rule of Reason Sherman Act § 1 cases, and constitutes a departure from the objective underlying the *Matsushita*/*Monsanto* standard. If permitted to continue, the confusion generated by this issue will result in a significant waste of judicial resources and a burden of proof that virtually no future plaintiff will be able to meet.

In the *amicus* brief filed by 29 States in *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451 (1992), the attorneys general warned of the dangers of extending the *Matsushita*/*Monsanto* standard of proof to cases where there is direct evidence of an agreement. This is exactly the type of decision that the attorneys general feared would happen.

There is no other phrase in the opinions of this Court in Sherman Act § 1 cases that has generated more confusion and controversy than the obligation of the plaintiff, in establishing the "contract, combination . . . or conspiracy" element, to offer evidence that "tends to exclude the possibility" of lawful independent conduct.[8] Indeed, reliance by defendants in § 1 cases on the "tend to exclude" standard has become so ubiquitous that the origin and intended scope of the standard is frequently overlooked.[9] This case

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[8] *See, e.g.*, *United States v. Apple, Inc.*, ___ F.Supp.2d ___, 2013 WL 3454986 (S.D.N.Y. 2013), in which the District Court characterizes the defendant's (unsuccessful) reliance on the *Monsanto* "tends to exclude the possibility" formulation as "the crown jewel of its defense." The District Court rejected Apple's attempt to apply *Matsushita* and *Monsanto* where the anticompetitive conduct arose out of a series of contracts. The District Court in *Apple* properly focused on the effect of the agreements at issue on the relevant market, rejecting Apple's contention that a supposed legitimate business reason for entering into the contracts constituted a defense as a matter of law.

[9] One of the most common misapplications of the *Matsushita*/*Monsanto* formulation involves Sherman Act § 1 cases concerning activities of industry trade associations. Every industry standard promulgated by a trade association is perforce effected by a combination: collective action by competitors. Moreover, the

(Continued on following page)

represents an extreme example of the misapplication of that standard.

This Court recently took the first step towards a rational approach to this issue in *American Needle, Inc. v. National Football League,* 560 U.S. 183 (2010), by separating out the threshold requirement of proof of a "contract, combination . . . or conspiracy" from the ultimate issue of whether particular conduct constitutes an unreasonable restraint of trade. This Court in *American Needle* noted:

> Whether an arrangement is a contract, combination or conspiracy is different from and

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issuance of a standard by very definition excludes those who fail to meet the standard. This does not mean that trade associations are "walking conspiracies." The vast majority of trade association activities have been deemed by the courts to be reasonable and lawful. What it *does* mean (as in all situations where injury to competition is alleged to have arisen from collective conduct of competitors) is that the proper focus of the courts should be on the merits of the case, not on the threshold, "antecedent" issue of concerted action. A business justification for collaborative conduct that unreasonably injures competition should be rejected out of hand. *Matsushita* and *Monsanto* cannot be properly interpreted to place the burden of proof on a plaintiff to offer evidence that "tends to exclude the possibility" that direct competitors had a business justification for unlawful collaborative conduct. *Compare American Soc'y of Mechanical Engineers v. Hydrolevel*, 456 U.S. 556 (1982) *with Wilk v. American Medical Ass'n*, 895 F.2d 353 (7th Cir.), *cert. denied*, 496 U.S. 927 (1990); and *Super Sulky, Inc. v. U.S. Trotting Association*, 174 F.3d 733 (6th Cir.), *cert. denied*, 528 U.S. 871 (1999).

> antecedent to whether it unreasonably restrains trade.

560 U.S. at 183.

This case provides the Court with an opportunity to go the next step, and to clarify explicitly what has been implicit in numerous decisions, but misinterpreted by the courts below: that where an anticompetitive effect is alleged to result from the performance of an express contract, the *Matsushita*/*Monsanto* "tends to exclude" standard is not applicable. Rather, the proper role of the courts in ruling on a motion for summary judgment where the "contract, combination . . . or conspiracy" element has been satisfied by an express agreement or other direct evidence is simply the application of the well-established proof requirements of the Rule of Reason. The parties' reasons for *entering into* the contract are of no consequence.

The decision below also raises an important issue concerning the application of Rule 702 of the Federal Rules of Evidence and this Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993) and its progeny, in light of substantive antitrust law which requires application of the Rule of Reason to market facts of the type that can properly be offered by industry experts.

The decision below also raises two issues of law with respect to relevant market, each of which should be corrected if this matter is remanded by this Court for trial.

II. THE ORIGIN AND PROPER SCOPE OF THE "TENDS TO EXCLUDE THE POSSIBILITY" STANDARD

Antitrust law, much like Fourth Amendment law, is formed and shaped by the judiciary on a case-by-case basis. In making a judicial determination whether particular conduct constitutes a "contract, combination . . . or conspiracy" and amounts to an "unreasonable restraint of trade," there are certain circumstances where the courts are faced with a delicate balancing act: setting the bar low enough that it results in sanctions for conduct that is truly anticompetitive, while at the same time avoiding setting a standard that creates the perverse result of inhibiting conduct that enhances the vigorous competition that is the fundamental objective of antitrust law. It was this concern – which is not present in the instant case – which the *Monsanto* and *Matsushita* cases addressed in formulating the "tends to exclude the possibility" test.

A. The *Monsanto* Decision

Monsanto involved a typical pre-*Leegin*[10] distributorship termination case, where a group of distributors

[10] At the time *Monsanto* was decided, vertical price fixing was still a *per se* violation, hence proof of agreement was the practical equivalent of proof of liability. This Court has since determined that vertical price fixing is more properly evaluated on the basis of the Rule of Reason. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

complained to their supplier that a competing distributor was undercutting them by selling Monsanto herbicide at discount prices. This type of case presents a particularly delicate balancing act because of this Court's recognition that restricted distribution systems, while perhaps negatively impacting intrabrand competition, can enhance interbrand competition.[11]

The factual question presented in *Monsanto* was whether the distributorship termination at issue was the result of Monsanto's unilateral decision (lawful)[12] or pursuant to an agreement with its complaining distributors (unlawful). Since there was no direct proof of agreement, the Court was faced with the question of the quantum of circumstantial evidence required for an inference of agreement. Although affirming the judgment below, this Court held that the Court of Appeals had applied an erroneous standard, specifically that evidence of the competing distributor's complaints was sufficient to infer proof of an unlawful agreement. This Court observed in *Monsanto* that permitting inference of agreement from highly ambiguous evidence created a danger of deterring or

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[11] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-57 (1977).

[12] It has long been established that a manufacturer generally has a right to deal, or to refuse to deal, with whomever it likes, so long as it does so independently. *United States v. Colgate Co.*, 250 U.S. 300, 307 (1919).

penalizing perfectly legitimate conduct. It was in that setting that this Court held:

> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective.". . . .

465 U.S. at 752.

B. The *Matsushita* Decision

Matsushita involved a highly unusual theory: an alleged horizontal conspiracy to fix *low* prices. The case involved a suit by domestic manufacturers of televisions and related consumer products, alleging that for over twenty years competing Japanese manufacturers had engaged in a conspiracy to sell their products in the U.S. market at prices that were so low as to constitute predatory conduct, with the ultimate objective to drive domestic producers out of the market. Similar to *Monsanto,* the presenting issue in *Matsushita* was whether each Japanese defendant had set its prices independently (lawful) or in agreement with the other defendants (unlawful).

The District Court had granted summary judgment in favor of the defendants, and the Court of

Appeals had reversed and remanded for trial. On review this Court reversed and remanded to the Court of Appeals to consider any evidence that the defendants had conspired to price predatorily despite the lack of any apparent motive to do so.

With respect to whether the plaintiffs had offered sufficient evidence to meet the "contract, combination . . . or conspiracy" element of Sherman Act § 1, after reviewing the appropriate standard for summary judgment this Court stated:

> It follows from these settled principles that if the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

475 U.S. at 587.

In *Matsushita,* this Court cited *Monsanto* for the proposition that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct." *Id.* at 593. Moreover:

> . . . cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.

Id. at 595.

It was in the foregoing context that this Court, citing *Monsanto* and *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253 (1968), stated in *Matsushita*:

> . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. [*Monsanto*] at 764. See also *Cities Service, supra,* at 280. **To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence that "tends to exclude the possibility" that the alleged conspirators acted independently.** 465 U.S., at 764.

Id. at 588.

It is the proper scope of the highlighted portion of the *Matsushita* decision that is the primary focus of this Petition.

C. Application of the *Matsushita/Monsanto* Burden of Proof in the Lower Courts

The issue raised in this Petition is not the application of the *Matsushita/Monsanto* burden of proof in *per se* cases where proof of agreement is the critical, outcome determinative issue, but rather the erroneous extension of that burden of proof as a general proposition applicable to the merits of Sherman Act

§ 1 cases, where proof of agreement is already established by an express contract or other direct evidence.

By way of illustration, consider the following examples of *per se* antitrust cases,[13] stripped down to their bare bones, where the defendant raises a business justification for its conduct:

> *Manufacturers A, B and C all raise their prices at the same time, in the same amount. Consumers sue, asserting unlawful collusion. Each manufacturer, individually, offers a business justification, explaining that it unilaterally decided to raise its price because its raw material prices went up.*
>
> *Three competitors, X, Y and Z, each refuse to deal with Company A. A sues, asserting that the three companies agreed among themselves not to do business with A, resulting in an unlawful group boycott. Each defendant offers a business justification, explaining that company A's poor credit rating was the basis for its unilateral decision to decline to do business with A.*

The common element in each of the foregoing types of cases is an allegation of an unlawful *agreement.* As is noted in *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan,* 203 F.3d 1028, 1061 (8th Cir.

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[13] The same principles apply to the threshold "contract, combination . . . or conspiracy" element of Sherman Act § 1 with respect to distributorship terminations, which are now analyzed, post-*Leegin*, under the Rule of Reason.

2000), in such cases "the only difference between legal and illegal conduct is the existence of an agreement to do the same thing the parties could have done legally without an agreement." In those types of cases, a defendant's explanation why it acted as it did is an important if not critical consideration. Requiring the plaintiff to offer convincing evidence to rebut the defendant's business justification or suffer dismissal is entirely reasonable, and commonly recognized in cases applying *Monsanto* and *Matsushita* to be necessary in order to avoid imposing antitrust liability for lawful conduct.

The problem raised by this case is the improper extension of the *Matsushita*/*Monsanto* burden of proof to the *merits* of antitrust cases where the threshold issue of a "contract, combination . . . or conspiracy" is already established by an express contract or other direct proof of agreement, and the defendants inappropriately offer a business "justification" for engaging in anticompetitive conduct.[14]

[14] For a more detailed description of the different proof requirements for concerted action for different types of antitrust cases, *see generally* Philip C. Jones, Litigating Private Antitrust Actions, at chapter 24.

III. CLARIFICATION OF THE LIMITS OF THE *MATSUSHITA/MONSANTO* BURDEN OF PROOF IS NECESSARY FOR THE PROPER APPLICATION OF SHERMAN ACT JURISPRUDENCE

A. Introduction

In determining the outer limits to which the *Matsushita* and *Monsanto* formulation should apply, this matter presents by far the easiest and least factually complicated case one could imagine. First, this is one of those rare situations where the proof requirement of the threshold issue of a "contract, combination . . . or conspiracy" is established by a fully executed written contract. Most antitrust violators do not document their scheme in writing. Thus consideration by this Court of the legal issue presented will not require evaluation of a complex factual record of the type that would have been involved in the dozens of prior cert. petitions which have sought clarification of the *Matsushita* and *Monsanto* standard. Secondly, the conduct at issue – an anticompetitive acquisition – is a type of violation that depends entirely on proof of an anticompetitive effect, without regard for the intent of the parties in contracting for the acquisition. Thus this case presents, for the first time, the clear-cut issue of the proper limits of the *Matsushita* and *Monsanto* burden of proof where the "antecedent" requirement of proof of a "contract, combination . . . or conspiracy" has already been established.

B. *Matsushita* and *Monsanto* Have No Application to Anticompetitive Acquisitions

In applying the type of functional analysis mandated by the Court's recent decision in *American Needle*, *supra,* it is apparent that the "central substance" of this case involves an anticompetitive acquisition. Had Nucor acquired the steel-production assets at issue directly, there would be no question that such a transaction would have properly been subject to antitrust sanction. As the Areeda treatise[15] observes, a dominant firm's acquisition of a nascent rival "bears a very strong presumption of illegality that should rarely be defeated." The technicality that the acquisition was effected by means of a contract with a third party rather than directly does not change the practical result.

Anticompetitive mergers and acquisitions have long been recognized as being subject to Sherman Act § 1 as "combinations" in restraint of trade. In the leading case on the scope of Sherman Act § 1, *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 776 (1984), this Court noted that "[a] corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act." Indeed, as the Eleventh Circuit observed in the prior appeal *in this case,* in the course of finding that it met the threshold hurdle

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[15] Philip Areeda and Herbert Hovenkamp, Antitrust Law, 3d Ed., at ¶ 912a.

of antitrust injury, that "under the merger laws, the propriety of mergers and asset acquisitions is measured by the *competitive effects* such acquisitions would have in the relevant market." 466 F.3d at 968.

Whether an acquisition constitutes an unreasonable restraint of trade depends on the effect of the acquisition on competition in the relevant market. The underlying reason why an entity consented to be acquired or why it sold its assets is wholly irrelevant to the analysis. To engraft onto the proof requirements for the "contract, combination . . . or conspiracy" element in acquisition cases a requirement that the plaintiff offer proof that "tends to exclude the possibility" that the acquired entity had a legitimate reason to consent to be acquired would, of course, be entirely inconsistent with settled antitrust law. There is no reason not to apply the same standard where an acquisition is secretly routed through a third party rather than accomplished directly. To treat this matter any differently would create a substantial loophole to Sherman Act enforcement, and would give unjustified deference to form over substance.

C. The "Tends to Exclude" Burden of Proof Should Not Be Extended to Apply To Exclusionary Contracts

Although the issue is rarely the subject of explicit discussion, there is also abundant case law that implicitly recognizes that the *Matsushita/Monsanto*

standard of proof for a "contract, combination . . . or conspiracy" is inapplicable to exclusionary contracts.

The proper application of Sherman Act § 1 in "direct evidence" cases is implicit in this Court's decision in *Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46 (1990). The Eleventh Circuit's expansive view of the *Matsushita*/*Monsanto* standard for summary judgment was discussed and rejected by Judge Clark in his dissent in the Court of Appeals' opinion, 874 F.2d 1417, 1430-31 (11th Cir. 1989). Although in reversing the Eleventh Circuit's decision this Court did not address that issue, Petitioner's position in this case was implicitly adopted in this Court's *per curiam* decision in *Palmer,* which found a Sherman Act violation based on an anticompetitive effect arising out of an express contract, without any reference to the reasons why the parties entered into the contract at issue.

In this matter, the Eleventh Circuit went even further, awarding summary judgment in favor of defendant Nucor Corporation based on a purported failure to offer evidence that "tended to exclude the possibility" that the "other" party to the contract had a business justification (a profit motive) for entering into the contract, despite the fact that a severe anticompetitive effect was a direct result of the performance of an express contract.

The best example of the proper role of proof of the "contract, combination . . . or conspiracy" in cases where an anticompetitive effect arises from one or more express contracts is this Court's decision in

Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451 (1992). The antitrust theory underlying the *Kodak* decision is analogous to the facts presented in this matter.

Kodak involved a Sherman Act suit, under both § 1 and § 2, brought by a group of independent service organizations ("ISOs") which specialized in repair of photocopiers and micrographic equipment, including Kodak equipment. In *Kodak*, the ISO's were denied access to the needed spare parts as the result of contracts entered into between Kodak and the Original Equipment Manufacturers (OEMs), which agreed not to sell such parts to ISOs, and contracts between Kodak and its service department customers, which contained a clause under which the customers agreed to only use parts purchased from Kodak in its own Kodak equipment.

In its motion for summary judgment, Kodak vigorously argued to the trial court that it had valid business reasons for its conduct, and that the ISOs had failed to offer sufficient evidence that "tends to exclude the possibility" that Kodak had acted for legitimate, independent reasons. *See* Appendix to the Petitioner's Brief, at 121-123.

In *Kodak,* the Court of Appeals determined that the concerted action element of the ISO's § 1 claim was satisfied by the contracts between Kodak and the OEMs, and the contracts between Kodak and its customers. 903 F.2d 612, 619 (9th Cir. 1990). The existence of concerted action was simply assumed, without

discussion, in this Court. Implicit in the opinion of this Court is the recognition that where an anticompetitive effect arises out of express contracts, (a) the contracts meet the Sherman Act § 1 requirement of proof of a "contract, combination . . . or conspiracy," and (b) a business justification for entering into the contracts is not a defense to antitrust liability.

In reversing the District Court's grant of summary judgment, which in turn was affirmed by this Court, the Court of Appeals rejected out of hand Kodak's contention that it acted unilaterally, observing that in its "Terms of Sale" in its contracts with its customers, Kodak had included a clause that it would provide parts only to users "who service only their own Kodak equipment." *Id.* In its petition for a writ of certiorari, Kodak did not even raise the existence of concerted action as an issue. The entire focus of the case before this Court was the effect on competition in the market for repair services of the exclusion of the ISOs.

Regardless whether the antecedent issue of concerted action is established by an express contract or other direct evidence, once proof of agreement as to the restraint at issue has been established, the reason why each of the parties entered into the agreement, whether characterized as motive, intent, goal or objective, is irrelevant. *United States v. Paramount Pictures, Inc.,* 334 U.S. 131 (1948) (co-conspirators need not share the same motive or goal; it is sufficient that the co-conspirators "acquiesced in an illegal scheme." *See also*, *Perma Life Mufflers, Inc. v.*

International Parts Corp., 392 U.S. 134 (1968) (In a tying case, concerted action can properly be found in the contract between the plaintiff and defendant); *Duplan Corp. v. Deering Millikin, Inc.,* 594 F.2d 979, 982 (4th Cir. 1979) (Where defendants are "knowing participants *in a scheme whose effect* was to restrain trade, the fact that their motives were different from or even in conflict with those of the other conspirators is immaterial").

To extend the *Matsushita* and *Monsanto* burden of proof beyond its intended purpose would provide an unintended defense to Sherman Act § 1 cases involving market exclusion arising out of express contracts. The decision below constitutes a dangerous precedent, which should be overruled by this Court.

IV. NON-ECONOMIST INDUSTRY EXPERTS OFFERED TO SUPPLEMENT ECONOMIC EXPERT TESTIMONY SHOULD NOT BE SUBJECT TO EXCLUSION BECAUSE SUCH TESTIMONY "RELATES TO" AN ECONOMIC ISSUE

In order for a jury to understand the critical role which Gulf States Steel would have played in the competitive infrastructure of the Southeast hot rolled coil industry had it not been excluded, an in-depth understanding is required of how competition works in the industry. The foundational evidence upon which this case is based demonstrates that the hot rolled coil steel industry consists of two separate regions; that the Southeast is largely insulated from

outside competition; and that as a result of the exclusion of Gulf States Steel, Nucor was able to operate its three Southeast mills without any meaningful competition. A substantial portion of the "market facts" necessary to such an understanding was offered by the Group through its two steel industry experts.

Although the District Court came to the unsupported and unexplained conclusion that the Group had failed to offer proof that the "methodology" followed by Correnti and Locker was reliable and that their opinions were "conclusory," it is apparent that the exclusion of their testimony was based on the fact that "neither individual has any relevant training in antitrust economics." (App. 77).

Petitioner respectfully submits that "market facts" of the type offered by the Group's non-economist industry executives to explain how competition works in practice are admissible under substantive antitrust law, given the critical role which market facts play in the application of the Rule of Reason, and that F.R.E. 702 and this Court's decision in *Daubert* provide no basis for excluding such testimony.

V. THE DECISIONS BELOW WITH RESPECT TO RELEVANT MARKET CONSTITUTE ERRONEOUS PRECEDENT THAT SHOULD NOT BE PERMITTED TO STAND

There can be no serious debate whether a scheme by a near-monopolist to block new competition constitutes exclusionary conduct. This matter falls

comfortably within this Court's description, in *American Needle, supra,* 560 U.S. at 195, (quoting Areeda, *supra*, at ¶ 1462b), of the "central evil addressed by Sherman Act § 1" as being the "elimin[ation of] competition that would otherwise exist." In addition to offering exceptionally strong proof of concerted action in restraint of trade in violation of Sherman Act § 1, the exclusionary nature of Nucor's conduct also constituted an attempt to monopolize in violation of § 2. Summary judgment also was granted in favor of Nucor based on the rejection by the courts of the Group's proposed relevant product and geographic market as a matter of law. The grounds for the award of summary judgment are in direct conflict with established precedent, and need to be corrected.

With respect to relevant product market, the notion that supply substitution can occur by "not" engaging in processing that changes the nature and function of a product makes no logical sense – particularly where the further processing catapults the base product into a different market category with different uses and a higher price. If such a theory were valid, any relevant product market involving commodities that are subject to further processing could be defeated, as it was here, by the wholly theoretical musings of an expert economist. Rejection of petitioner's proposed market as a matter of law was clear error.

Secondly, to exclude a regional relevant geographic market as a matter of law based solely on an entirely theoretical possibility that an in-region price

increase could be defeated by out-of-region suppliers would read out of the law the existence of regional markets. This was also clear error that needs to be corrected in order to avoid a precedent that would defeat as a matter of law all proposed regional relevant geographic markets.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-14983

D.C. Docket No. 1:02-cv-02600-RDP

GULF STATES REORGANIZATION GROUP, INC.,

Plaintiff-Appellant,

versus

NUCOR CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(July 15, 2013)

Before TJOFLAT, CARNES and JORDAN, Circuit Judges.

JORDAN, Circuit Judge:

Like a swallow returning to Capistrano, this antitrust case is before us again. In 2006, we ruled that Gulf States Reorganization Group had sufficiently alleged injury, and reversed the district court's dismissal of its complaint against Nucor Corporation. *See Gulf States Reorganization Group v. Nucor Corp.,*

466 F.3d 961, 967-68 (11th Cir. 2006). In so ruling, we explicitly noted that we were not addressing the merits of GSRG's claims. *See id.* at 967, 968 n.4. On remand, GSRG amended its complaint, abandoning any claim that Nucor was a monopolist.

The claims in the amended complaint – like those in the initial complaint – arose from the purchase, by Nucor and Casey Equipment Company, of the assets of Gulf States Steel in a Chapter 7 bankruptcy liquidation proceeding in Alabama. After discovery, Nucor moved for summary judgment, and, in two reports, a special master recommended that the district court grant Nucor's summary judgment motion. The district court considered GSRG's objections but nonetheless accepted the reports in a published order. *See Gulf States Reorganization Group v. Nucor Corp.,* 822 F. Supp. 2d 1201 (N.D. Ala. 2011).

GSRG now appeals the grant of summary judgment in favor of Nucor. After a thorough review of the parties' briefs and the extensive record, and with the benefit of oral argument, we affirm. We write on one of the issues relevant to GSRG's attempted monopolization claim, in order to explain why cross-elasticity of supply is critical to defining the relevant market in this case. On all other issues raised by GSRG, we affirm based on the special master's reports and the district court's order.

I

Because the special master and the district court catalogued the relevant facts, we set out only those that are necessary for our discussion. Where the facts are disputed, we of course view the evidence in the light most favorable to GSRG. *See, e.g., Ricci v. DeStefano,* 557 U.S. 557, 586 (2009).

A

Depending on how it is processed and cooled, steel can have a variety of forms. One popular type of steel, black hot rolled coil steel, is a form of plain black sheet steel which is rolled into a coil for ease of storage, handling, and transportation. When new black hot rolled coil steel is bathed in acid and coated with oil, the resulting type of steel is called pickled and oiled steel.[1]

Nucor is a leading manufacturer of black hot rolled coil steel. In 1999, Gulf States Steel, one of Nucor's main competitors in the Southeast – a region that GSRG defines as Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas – filed for bankruptcy under Chapter 11. In 2000, after

[1] As described by some courts, the "pickling" process removes rust and scale and makes the surface of the steel white. *See Crucible Steel Co. v. United States,* 132 F. 269, 270 (C.C.N.Y. 1904); *Ohio Steel Tube Co. v. Limbach,* 1987 WL 14301, *2 (Ohio Ct. App. 1987).

reorganization proved unsuccessful, the bankruptcy court converted the Chapter 11 case into a Chapter 7 liquidation proceeding. This conversion meant that the assets of Gulf States Steel – including a steel plant in Gadsden, Alabama – would be sold.

GSRG, a newly-formed entity, wanted to enter the black hot rolled coil steel market by purchasing the assets of Gulf States Steel, and it decided to bid for those assets at a bankruptcy auction. According to GSRG's internal analysis, these assets had a book value of at least $13.3 million.

B

At a bankruptcy auction held in May of 2001, GSRG purchased the non-steel-producing assets of Gulf States Steel for almost $2 million. The steel-producing assets of Gulf States Steel, however, went unsold because no one met the reserve price of $7.1 million.

In early July of 2002, GSRG signed a contract with the bankruptcy trustee to purchase the steel-producing assets for $5 million unless another party submitted a higher bid, in which case there would be a second public auction. When Nucor found out about GSRG's contract with the trustee, it executed a confidential agreement (through its acquisition entity, Stenroh, Inc.) with Casey, an entity which buys used steel-related equipment (for resale to steel manufacturers) and develops industrial parks (i.e., areas zoned for industrial development).

The agreement between Nucor and Casey essentially required the two entities to form a limited liability company, Gadsden Industrial Park, LLC. Pursuant to the agreement, Park could bid up to $8 million, a sum which Nucor would loan on a non-recourse basis, to buy the steel-producing assets of Gulf States Steel. If Park won the auction, Casey would then sell the assets, pay 75% of the proceeds to Nucor, and keep the remaining 25%. Casey would also be allowed to recover the substantial costs of dismantling and loading the plant and the steel-producing assets. Nucor could reject any sale to any domestic third-party purchasers, and all other sales were subject to Nucor's "reasonable approval." According to GSRG, the agreement gave Casey a far higher remuneration than the average commission for such transactions.

On September 12, 2002, Park bid $5.25 million for the steel-producing assets, thereby triggering a second public auction. That auction was held four days later, and this time Park bid $6.3 million in cash. GSRG bid $7 million, but its bid did not conform with the auction's rules because it included forgiveness of the bankruptcy estate's debt to GSRG. As a result, GSRG's bid was rejected. Although GSRG was given another opportunity to submit a bid that conformed with the auction's rules – and had the cash to make a conforming bid – it chose not to do so. Park's cash bid of $6.3 million therefore won the day. The bankruptcy court later rejected GSRG's challenge to the result of the auction.

After the auction, Casey sold the steel-producing assets to an Asian buyer for $18 million (net of dismantling and loading costs, which totaled $9 million). Park kept the bankruptcy estate's land and transformed it into an industrial park. In the end, Casey and Nucor made a total profit of almost $12 million from the sale of the assets.

GSRG sued Nucor, Casey, and Park, alleging that they contracted and combined to purchase the steel-producing assets of Gulf States Steel in order to block competition in the black hot rolled coil steel market, in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. GSRG also alleged that, through its actions, Nucor created a dangerous probability that it would obtain monopoly power over the black hot rolled coil steel market in the Southeast, which, if true, would constitute an attempt to monopolize in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. Finally, GSRG alleged that Nucor, Casey, and Park conspired to monopolize that same market, in violation of § 2.[2]

II

The Sherman Act, among other things, outlaws the "attempt to monopolize . . . any part of the trade

[2] GSRG, in the words of the district court, "resolved [its] differences" with Casey and Park. *See Nucor Corp.,* 822 F. Supp. 2d at 1219 n.17. We therefore have no occasion to address any of the claims GSRG asserted against Casey and Park.

or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. As defined by the Supreme Court, "[t]he phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it[.]" *Am. Tobacco Co. v. United States,* 328 U.S. 781, 785 (1946). Thus, to establish a violation of § 2 for attempted monopolization, "a plaintiff must show (1) an intent to bring about a monopoly and (2) a dangerous probability of success." *Levine v. Cent. Fla. Med. Affiliates, Inc.,* 72 F.3d 1538, 1555 (11th Cir. 1996) (internal quotation marks omitted).

A dangerous probability of success arises when the defendant comes close to achieving monopoly power in the relevant market. *See id. See also Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 459 (1993) ("We hold that petitioners may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific intent to monopolize."). A plaintiff can show this dangerous probability of success only if it can properly define the relevant market, which has both product and geographic dimensions. *See T. Harris Young & Assocs. v. Marquette Elecs.,* 931 F.2d 816, 823 (11th Cir. 1991).

GSRG's proposed relevant product market – black hot rolled coil steel – did not account for the fact that manufacturers of pickled and oiled steel could,

without much difficulty or cost, switch their production to that of black hot rolled coil steel. Therefore, the district court reasoned, GSRG did not define a proper product market. *See Nucor Corp.,* 822 F. Supp. 2d at 1235-36. We agree with the district court's analysis.

Key to comprising a relevant market, a product market is defined in part by whether a group of manufacturers, "because of the similarity of their products, have the ability – actual or potential – to take significant amounts of business away from each other." *U.S. Anchor Mfg. v. Rule Indus.,* 7 F.3d 986, 995 (11th Cir. 1993). GSRG steadfastly asserts that pickled and oiled steel is not the equivalent of black hot rolled coil steel from the perspective of purchasers, but this assertion misses the point. *See, e.g., Rebel Oil Co. v. Atlantic Richfield Co.,* 51 F.3d 1421, 1436 (9th Cir. 1995) ("[D]efining a market on the basis of demand considerations alone is erroneous. A reasonable market definition must also be based on 'supply elasticity.' ") (internal citation omitted).

One way to decide if producers or manufacturers can take business away from a monopolist (or an attempted monopolist) is to analyze the concept of cross-elasticity of supply, which "looks at competition from the production end instead of the consumer end." *Spectrofuge Corp. v. Beckman Instruments, Inc.,* 575 F.2d 256, 280 n.79 (5th Cir. 1978). *See also Brown Shoe Co. v. United States,* 370 U.S. 294, 325 n.42 (1962) ("The cross-elasticity of production facilities may also be an important factor in defining a product

market. . . .”). The black hot rolled coil steel market, we conclude, has a high cross-elasticity of supply.

Picked and oiled steel is essentially black hot rolled coil steel that a manufacturer bathes in acid and coats with oil. A pickled and oiled steel manufacturer necessarily produces black hot rolled coil steel and can, without much or any cost (and maybe even at less cost), switch and produce black hot rolled coil steel. That equates to a high cross-elasticity of supply, and a “[h]igh cross-elasticit[y] of supply . . . deter[s] monopoly pricing.” *Spectrofuge Corp.,* 575 F.2d at 280 n.79. As we explained in *Spectrofuge Corp.,* a “‘very high cross-elasticity of supply is a way of describing a condition in which the cost and rapidity of new entry are such that a monopolist of the product would have negligible power to increase its price above the competitive level. The increase would evoke a prompt and substantial increase in the output of the product, as manufacturers of other products switched to production of his product.’” *Id.* (quoting RICHARD POSNER, ANTITRUST 441 (1974)).[3]

[3] Although *Spectrofuge Corp.* is now 35 years old, its articulation of the concept of cross-elasticity of supply remains sound. *See* JULIAN VON KALINOWSKI ET AL., 2 ANTITRUST LAWS AND TRADE REGULATION § 24.02[1][c], at 24-55 (2d ed. 2012) (“Another important factor in defining a product market is the ability of existing companies to alter their facilities to produce the defendant’s product. The Supreme Court has long recognized the significance of this factor, often referred to as cross-elasticity of supply.”) (footnote omitted); PHILLIP AREEDA, HERBERT HOVENKAMP, & JOHN SOLOW, IIB ANTITRUST LAW ¶ 561, at 360 (3d

(Continued on following page)

Assume, for example, that Nucor obtains a monopoly of the black hot rolled coil steel market. Through its monopoly, Nucor inflates prices (by, say, lowering the supply of black hot rolled coil steel, which, given a constant demand, increases the price). Such a move would present pickled and oiled steel manufacturers with two options. They could continue to produce pickled and oiled steel at the same cost and continue to sell that product at the same price. Or they could cut the "pickling" processing short (thereby saving the costs of converting black hot rolled coil steel into pickled and oiled steel) and sell the black hot rolled coil steel at the higher price to earn significant profits. In a world of rational economic actors, *see U.S. Anchor Mfg.,* 7 F.3d at 997, one would expect that many, if not all, of these manufacturers would choose the latter course. As the district court explained, "[p]roducers of pickled and oiled hot rolled coil [steel] already have the appropriate substitute product by simply foregoing the one additional process required to produce the pickled and oiled product." *Nucor Corp.,* 822 F. Supp. 2d at 1236.

GSRG argues that the record is devoid of evidence to support the district court's analysis as to cross-elasticity of supply, but it is mistaken. One of Nucor's experts expressly opined that there was high

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ed. 2007) ("[I]f *B* producers can costlessly switch production to product *A* in a short time and can readily distribute the resulting output, they will constrain the prices of *A* firms in virtually the same way as another *A* firm.").

cross-elasticity of supply between black hot rolled coil steel and pickled and oiled steel, and one of GSRG's own experts conceded that, all things being equal, manufacturers of pickled and oiled steel would produce black hot rolled coil steel if the latter product was selling at a higher price. *See, e.g.,* Report of Nucor's Expert, Dr. Seth Kaplan, at 5 ("If black bands become more profitable than processed downstream steel products, producers will cease processing black band and sell the band on the commercial market."); Deposition of GSRG's Expert, Dr. Michael Locker, at 61 ("Q: And if the price of black were to change so that you could make more profit on black than you could on, say, a pickled and oiled product, there is nothing that would prevent the mill from saying, I'm just going to sell more black and cut back on producing pickled and oiled, correct? A: As long as they could satisfy their customer base that had been established and they wanted to retain, in black."). GSRG simply did not present evidence to create an issue of material fact with respect to the cross-elasticity of supply.[4]

[4] We do not mean to suggest that companies always act to maximize profits in the short term. Indeed, conduct that appears unprofitable – such as a dominant player flooding the market with its product in order to bring prices down – may actually be rational and profit maximizing because it is part of a large and/or long-term anticompetitive scheme to drive competitors from the market or enforce cartel discipline. *See, e.g.,* Christopher Leslie, *Rationality Analysis in Antitrust,* 158 U. PA. L.REV. 261, 273, 274-85, 327-28 (2010).

In sum, GSRG's definition of the product market is too restrictive, for it refuses to acknowledge that pickled and oiled steel manufacturers could (and likely would) enter the fray in order to enrich themselves on the inflated prices of black hot rolled coil steel. That would, in turn, increase the supply, and lower the price, of black hot rolled coil steel. It would also sap Nucor's potential monopoly power. GSRG ignores this "actual or potential" economic construct, *U.S. Anchor Mfg.,* 7 F.3d at 995, and its failure to account for cross-elasticity of supply is fatal to the attempted monopolization claim under § 2.

III

We affirm the district court's grant of summary judgment in favor of Nucor.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

GULF STATES REORGANIZATION GROUP, INC.,	}	
Plaintiff,	}	**Case No.: 1:02-CV-2600-RDP**
v.	}	
NUCOR CORPORATION, et al.,	}	
Defendants.	}	

MEMORANDUM OPINION

(Filed Sep. 29, 2011)

This matter is presently before the court on the Third Report and Recommendation of the Special Master Regarding Summary Judgment on Counts I and III of Gulf States Reorganization Group's Amended Complaint[1] ("Third Report") (Doc. #249), and the

[1] The Special Master also issued two other reports: (1) a Report and Recommendation of the Special Master Regarding Summary Judgment on Counts I and III of GSRG's Amended Complaint ("First Report") (Doc. #188) in which he recommended that the court grant summary judgment to Defendants Casey Equipment Corporation and Gadsden Industrial Park, LLC ("Casey/Park"); and (2) a Report and Recommendation of the Special Master ("Second Report") in which he recommended that Plaintiff be permitted to supplement the Rule 56 record in this case but indicated that his recommendation in the First Report would not be changed after consideration of the new evidence.

(Continued on following page)

Report and Recommendation of the Special Master Regarding the Admissibility of Expert Testimony and Nucor's Motion for Summary Judgment ("Fourth Report") (Doc. #305).

I. Introduction

A. Appointment of the Special Master

In light of the novelty of Plaintiff's theories in this case,[2] and with the full consent of the parties (*see* Federal Rule of Civil Procedure 53(a)(1)(A)), the court appointed James F. Rill, Esq. as Special Master and referred certain matters – including the motions addressed herein – to him for report and recommendation. (Doc. #181). The parties had jointly proposed Mr. Rill as the best qualified candidate for Special Master. (Doc. #180). Mr. Rill has served as Assistant Attorney General in charge of the U.S. Department of Justice's Antitrust Division and as the Chairman of

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(Doc. #207). However, except to the extent that the recommendations in the Special Master's First and Second Reports affects the court's analysis of the claims against Nucor, those reports are moot. Plaintiff voluntarily dismissed its claims against Casey/Park, leaving Nucor the sole remaining Defendant. (Doc. #209). Accordingly, only those aspects of those Reports that dealt with Nucor's liability are at issue here. And that analysis has been readopted by the Special Master in his Third Report. (Doc. #249 at 3).

[2] Although the background and facts of this case are novel, as will be seen below, the elements Plaintiff must establish are well-established and analyzed both in the Special Master's Report and herein.

the ABA's Antitrust Section. (Doc. #180). He is without question one of the leading antitrust lawyers in the United States. The court is indebted to him for his high quality service and excellent work in this case.

B. Procedural History

In 2002, Gulf States Reorganization Group, Inc. ("GSRG" or "Plaintiff") filed suit against Nucor Corporation ("Nucor"), Casey Equipment Corporation ("Casey"), and Gadsden Industrial Park, LLC ("Park") alleging that they conspired to restrain trade and assist Nucor to monopolize the hot rolled coil steel industry. (*See* Doc. #17). This court first dismissed this case upon Defendants' motion to dismiss; however, on appeal, the Eleventh Circuit found that Plaintiff had pled a cognizable antitrust injury and had standing to bring suit. *Gulf States Reorganization Group, Inc. v. Nucor Corp.,* 466 F.3d 961, 966-68 (11th Cir. 2006).

Upon remand, the court permitted Plaintiff to amend its complaint. (*See* Doc. #115). GSRG's Amended Complaint alleges three counts. Count I alleges that Casey/Park and Nucor violated Section 1 of the Sherman Act by entering a contract or combination in restraint of trade. (Doc. #115 at ¶¶ 39-42). Count II alleges that Nucor violated Section 2 of the Sherman Act by an "attempt to monopolize." (Doc. #115 at ¶¶ 43-45). Count III alleges that Nucor and Casey/Park violated Section 2 of the Sherman Act by a

conspiracy to monopolize. (Doc. #115 at ¶¶ 46-48). The First Amended Complaint makes no claim of "actual monopolization" in violation of Section 2 of the Sherman Act.[3]

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[3] This is the case despite GSRG's previous repeated assertions – to this court, the Eleventh Circuit, and the Supreme Court – that Nucor is a monopolist. *See, e.g.,* Opposition to Defendants' Motion for Summary Judgment at 4, *Gulf States Reorganization Group, Inc. v. Nucor Corp.,* No. 02-2600 (N.D. Ala. 2005) ("propounding . . . well established principals [sic] of antitrust law which establish liability where a dominant firm protects its *monopoly position* (emphasis added)"); *id.* (contending that "end users of hot rolled coil steel [ ] are being forced to pay a *monopoly price*" (emphasis added)); *id.* at 23 (discussing the "social cost[s]" of "protecting the marketplace from the negative effects of abuse of *monopoly power*" (emphasis added)); Appellant's Corrected Brief at 24, *Gulf States Reorganization Group, Inc. v. Nucor Corp.,* 466 F.3d 961, 965 (11th Cir. 2007) (11th Cir. 2006) (No. 05-15976) (contending "there is but one producer in the market"); *see* Respondents' Brief in Opposition to the Petition for Writ of Certiorari at 3, *Nucor Corp. v. Gulf States Reorganization Group, Inc.,* 127 S. Ct. 2920 (2007) (No. 06-1383) (arguing that "this case is about suppression of potential competition by a *monopolist*" (internal quotation marks and brackets omitted) (emphasis added)).

To the contrary, GSRG's original Complaint never asserted any unambiguous claim of actual monopolization under the Sherman Act, Section 2. Nevertheless, GSRG repeatedly argued an "actual monopolization" theory at each prior stage of this litigation. Indeed, the court of appeals, in reversing this court's order granting summary judgment to Defendants, appeared to understand (or perhaps misunderstand) that GSRG's case arose from actual monopolization under Section 2. *See Gulf States Reorganization Group, Inc.,* 466 F.3d at 965 (understanding GSRG to have "alleged that . . . Nucor violated Section 2 of the Sherman Act, prohibiting monopolization"); *id.* (stating that GSRG "alleges that Nucor enjoys a monopoly in the relevant market");

(Continued on following page)

The Special Master reviewed the record and the briefs submitted by the parties, and entertained oral argument. Thereafter, the Special Master submitted his Reports and Recommendations. (Docs. #249, 305). After intense motions practice in this case, the court conducted a thorough review of the copious materials submitted in support of, and in opposition to, those motions.

The Special Master issued his First Report on Casey/Park's Motion for Summary Judgment recommending summary judgment in favor of Casey/Park. (Doc. #188). Thereafter, GSRG sought to have the Special Master consider supplemental evidence in connection with Casey/Park's Motion. (Doc. #199). The Special Master then re-considered Casey/Park's

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id. at 969 (Cudahy, J., concurring in part and, perhaps, dissenting in part) (discussing GSRG's allegation that Nucor sought "to protect its 85 percent market share and hence its effective monopoly"). Moreover, the panel (or at least the concurring judge) appears to have based its conclusions about causation and antitrust standing on the premise that Nucor enjoyed a monopoly and therefore caused GSRG's antitrust injury by participating in the court-supervised bankruptcy auction to protect that monopoly. *See id.* at 969 (Cudahy, J., concurring in part and, perhaps, dissenting in part) (describing the case as "about suppression of potential competition by a monopolist"); *id.* at 970 (stating that "Nucor and its coconspirators allegedly took an action having the effect of excluding [GSRG] from the market and maintaining Nucor's monopoly, which injured [GSRG] and is the source of its damages"). In its First Amended Complaint, filed five years after this litigation began, GSRG has now unambiguously abandoned any claim of actual monopolization under the Sherman Act, Section 2.

motion in light of the supplemental evidence, and issued his Second Report and Recommendation affirming that summary judgment was still appropriate on Counts I and III even in light of the additional evidence. (Doc. #207). Thereafter, GSRG and Casey/Park resolved all issues between them. (Doc. #208).

Remaining to be decided, however, was Nucor's motion for summary judgment (or, rather, Nucor's joinder in Casey/Park's motion). (Docs. #124, 210). On September 29, 2009, the Special Master issued his Third Report and Recommendation recommending that Nucor be awarded summary judgment on Counts I and III, the Section 1 and Section 2 conspiracy claims. (Doc. #249).

The Special Master then considered the following motions: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261); Nucor's motion to exclude the testimony of Michael Locker (Doc. #172); Nucor's motion to exclude the testimony of John Correnti (Doc. #175); GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235); GSRG's Motion to exclude the testimony of Dr. Seth Kaplan (Doc. #237); and Nucor's motion for summary judgment on all claims (Doc. #269). In his Fourth Report, the Special Master recommended the following: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261) be denied; Nucor's motion to exclude the testimony of Michael Locker (Doc. #172) be granted; Nucor's motion to exclude the testimony of John Correnti (Doc. #175) be granted; GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235) be

granted; GSRG's Motion to exclude the testimony of Dr. Seth Kaplan (Doc. #237) be denied; and that Nucor's Motion for Summary Judgment (Doc. #269) be granted. (Doc. #305).

Having now carefully reviewed and considered *de novo* all of the materials in the court file, including the Third Report and the Fourth Report, the objections, responses, and replies thereto, and oral argument by the parties on the objections to the Third Report,[4] the court has made its own independent determination that the Third and Fourth Reports of the Special Master are due to be adopted and accepted. The court writes further to address some of Plaintiff's objections.

II. Standard of Review

This case is before the court on objections filed by GSRG as to the Reports filed by the Special Master. The court reviews *de novo* all objections to legal conclusions recommended by the Special Master. *See* Fed. R. Civ. P. 53(f)(4). A different standard of review applies to the Special Master's decisions regarding procedural matters. Those rulings may only be set aside for an abuse of discretion. *See* Fed. R. Civ. P. 53(f)(5).

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[4] GSRG also requested oral argument on its objections to the Special Master's Fourth Report, but the court deems further argument unnecessary. Therefore, GSRG's Requests (Docs. #318, 319) are due to be denied.

The principal legal issues presented here are the propriety of summary judgment and the admissibility and effect of certain expert witnesses proffered by GSRG.

A. Summary Judgment Standard

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).[5] "Genuine disputes are those in which the evidence is such that a reasonable jury could return a verdict for the non-movant." *Mize v. Jefferson City Bd. of Educ.,* 93 F.3d 739, 742 (11th Cir. 1996) (quoting *Hairston v. Gainesville Sun Publ'g Co.,* 9 F.3d 913, 918 (11th Cir. 1993)). In making this assessment, the court must view the evidence "in the light most favorable to the nonmoving party." *Thomas v. Cooper*

[5] "As of December 1, 2010, Federal Rule of Civil Procedure 56(a) now contains the summary judgment standard. It reads, in pertinent part, '[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Gortemoller v. Int'l Furniture Mktg., Inc.,* 2011 WL 2899338 at *2 n.2 (11th Cir. July 20, 2011). Because the motions for summary judgment were filed, and the Special Master's Reports and Recommendations were issued, prior to December 2010, we apply the version of the rule effective during that time. *See Gortemoller,* 2011 WL 2899338, at *2 n.2; *see also Siggers v. Campbell,* 2011 WL 3134354 n.6 (6th Cir. 2011).

Lighting, Inc., 506 F.3d 1361, 1363 (11th Cir. 2007) (citing *Damon v. Fleming Supermarkets of Fla., Inc.,* 196 F.3d 1354, 1357 (11th Cir. 1999)). But while that is the case, "[a] court need not permit a case to go to a jury . . . when the inferences that are drawn from the evidence, and upon which the non-movant relies, are 'implausible.'" *Mize,* 93 F.3d at 743 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 592-94 (1986)).

Alternatively, there is no genuine issue of material fact if "the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which the party will bear the burden of proof at trial." *Jones v. Gerwens,* 874 F.2d 1534, 1538 (11th Cir. 1989) (citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-24 (1986)). Consequently, the court "must view the evidence presented through the prism of the [movant's] substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 254 (1986).

To respond, the non-moving party "may not rely merely on allegations or denials in its own pleadings; rather, its response must . . . set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party." Fed. R. Civ. P. 56(e)(2). Importantly, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson,* 477 U.S. at 250.

Contrary to GSRG's suggestion,[6] Rule 56 is no longer a disfavored procedural shortcut. *Celotex Corp.,* 477 U.S. at 327 ("Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'") (quoting Fed. R. Civ. P. 1). This is true even in antitrust cases, "where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464, 473 (1962). *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986); *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752 (1984).

The court candidly acknowledges that, historically, summary judgment was disfavored in antitrust litigation. For example, in *Poller,* the Supreme Court concluded that "summary procedures should be used sparingly in complex antitrust litigation where

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[6] GSRG has flatly misstated the law in suggesting that antitrust conspiracy cases "are [still] particularly ill-suited to disposition on motions for summary judgment." (Doc. #251 at 28). The Supreme Court's subsequent decisions in *Monsanto* and *Matsushita* effectively disavowed the broad language from its 1962 opinion in *Poller v. Columbia Broad. Sys., Inc.,* 368 U.S. 464 (1962), on which GSRG relies. *See e.g., Wallace v. SMC Pneumatics, Inc.,* 103 F.3d 1394, 1396 (7th Cir. 1997) ("In antitrust law . . . early decisions pronouncing it a field inapt for summary judgment were later repudiated.").

motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id.* at 473. However, the cases which indicated that summary judgment is disfavored in antitrust cases have been disavowed.

In 1986, the Supreme Court reversed the denial of summary judgment in a major predatory pricing decision, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986). "The Supreme Court's reversal was based on its conclusions: 1) that the predatory pricing conspiracy was so economically implausible that the defendants had no motive to engage in it; and 2) that the evidence of an agreement to enter into this conspiracy was indirect and ambiguous." *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.,* 817 F.2d 639, 646 (10th Cir. 1987). Although *Matsushita* upheld the traditional view that on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, the opinion is important because it held that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita,* 475 U.S. at 588. Also it held that to survive a motion for summary judgment the plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.* (quoting *Monsanto Co.,* 465 U.S. at 764).

To be sure, while the summary judgment standard of Rule 56 to be applied in an antitrust suit is the same as that for any other action, the application of the rule to antitrust cases is somewhat unique: "[A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case . . . conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita,* 475 U.S. at 587 (citing *Monsanto Co.,* 465 U.S. at 764); *see also Thompson Everett, Inc. v. National Cable Advertising, L.P.,* 57 F.3d 1317, 1323 (4th Cir. 1995) ("[I]nferences which may be drawn vary from one substantive area of the law to another. . . ."). Thus, in the antitrust context, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita,* 475 U.S. at 588 (citing *Monsanto,* 465 U.S. at 764).

"[S]ummary judgment may be especially appropriate in an antitrust case because of the chill antitrust litigation can have on legitimate price competition." *McGahee v. Northern Propane Gas Co.,* 858 F.2d 1487, 1493 (11th Cir. 1988), *cert. denied,* 490 U.S. 1084 (1989) (citing *Matsushita,* 475 U.S. at 595). Therefore, an antitrust plaintiff must present evidence that tends, when interpreted in a light most favorable to plaintiff, to exclude the possibility that defendant's conduct was consistent with permissible competition as with illegal conduct. *Id.* Indeed, *Matsushita* stands for the proposition that summary judgment in the

antitrust context is equally as valid as in other types of cases.

B. Admissibility of Expert Testimony Standard

Federal Rule of Evidence 702 governs the admissibility of expert witness testimony and provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed. R. Evid. 702. The Supreme Court has instructed that Rule 702 compels the district court to act as a "gatekeeper" in determining the admissibility of expert scientific evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 n.7, 597 (1993); *United States v. Frazier,* 387 F.3d 1244, 1260 (11th Cir. 2004) (en banc). "This function 'inherently require[s] the trial court to conduct an exacting analysis' of the *foundations* of expert opinions to ensure they meet the standards for admissibility under Rule 702." *Frazier,* 387 F.3d at 1260 (quoting *McCorvey v.*

Baxter Healthcare Corp., 298 F.3d 1253, 1257 (11th Cir. 2002)).

The Eleventh Circuit employs a "rigorous three-part inquiry" in assessing whether to admit expert testimony: (1) the expert must be qualified to testify competently regarding the matters he intends to address, (2) the methodology must be reliable under Daubert, and (3) the testimony must assist the trier of fact through the application of scientific, technical, or specialized expertise to understand the evidence or determine a fact in issue. *Hendrix ex rel. G.P. v. Evenflo Co.,* 609 F.3d 1183, 1194 (11th Cir. 2010); *accord Frazier,* 387 F.3d at 1260. The proponent of the expert testimony bears the burden of proving that the testimony satisfies each prong by a preponderance of the evidence. *Hendrix,* 609 F.3d at 1194; *Frazier,* 387 F.3d at 1274.

In *Daubert* the Supreme Court provided a list of relevant factors to consider in making a determination that an expert's methodology was reliable: (1) whether the theory or technique "can be (and has been) tested," (2) "whether the theory or technique has been subjected to peer review and publication," (3) "in the case of a particular scientific technique, . . . the known or potential rate of error," and (4) whether the theory or technique is generally accepted in the relevant scientific community. *Daubert,* 509 U.S. at 592-94; *accord Frazier,* 387 F.3d at 1262. Even so, this list is non-exhaustive and district courts have "substantial discretion" in determining how to test an

expert's reliability. *Hendrix,* 609 F.3d at 1194 (quotation marks omitted).[7]

The admissibility of an expert witness' testimony is undoubtedly a procedural matter governed by federal rules. *Heath v. Suzuki Motor Corp.,* 126 F.3d 1391, 1396 (11th Cir. 1997); *Wood v. Morbark Indus., Inc.,* 70 F.3d 1201, 1207 (11th Cir. 1995). Rule 53(f)(5) provides that "[u]nless the appointing order establishes a different standard of review, the court may

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[7] "Unlike an ordinary witness . . . an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert,* 509 U.S. at 592. "[T]his relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Id.* A trial court assessing the reliability of an expert's evidence must therefore perform a "gatekeeping" function by conducting "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. The Eleventh Circuit has offered district courts the following general guidance in determining whether to admit scientific evidence under *Daubert*:

> Given time, information, and resources, courts may only admit the state of science as it is. Courts are cautioned not to admit speculation, conjecture, or inference that cannot be supported by sound scientific principles. "The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it."

Rider v. Sandoz Pharms. Corp., 295 F.3d 1194, 1202 (11th Cir. 2002) (*quoting Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 319 (7th Cir. 1996)). This same analysis applies to expert testimony in the area of economics.

set aside a master's ruling on a procedural matter only for an abuse of discretion." Fed. R. Civ. P. 53(f)(5). *United States v. Douglas,* 489 F.3d 1117, 1124 (11th Cir. 2007) (when reviewing a district court's ruling on the admissibility of expert testimony for an abuse of discretion and the circuit court will "defer to the district court's ruling unless it is manifestly erroneous."). Further, "[t]he subordinate role of the [special] master means that the trial court's review for abuse of discretion may be more searching than the review that an appellate court makes of a trial court." Fed. R. Civ. P. 53 Advisory Committee's Note, 2003 amendments; *Maine People's Alliance v. Holtrachem Mfg. Co., LLC,* 2009 WL 1844990, at *2 (D. Me. June 25, 2009).

III. Background

Plaintiff's allegations in this case have previously been set forth by this court (Doc. #96) and summarized by the Eleventh Circuit. *Gulf States Reorganization Group, Inc. v. Nucor Corp.,* 466 F.3d 961 (11th Cir. 2006). "This is a Sherman Act antitrust case, alleging a contract and combination in restraint of trade and an attempt and conspiracy to monopolize the market for hot-rolled coil steel in the Southeastern United States." (Doc. #115). Specifically, GSRG maintains the following claims against Defendant Nucor Corporation in this case: (1) a claim that Nucor violated Section 1 of the Sherman Act by entering into a contract or combination in restraint of trade (Count I); (2) a conspiracy to monopolize claim

under Section 2 of the Sherman Act (Count II); and (3) an attempted monopolization claim under Section 2 (Count III).

In his Third Report, the Special Master addressed Nucor's potential liability on Counts I and III, despite Casey/Park's dismissal from the case. (Doc. #249). In that Third Report, the Special Master recommended that summary judgment be granted in favor of Nucor on Counts I and III of the Complaint. (Doc. #249 at 3). The Special Master based this recommendation on his conclusion that the record was devoid of evidence that Casey/Park shared with Nucor a common objective to restrain trade, and that Casey/Park was neither aware of, nor acquiesced in, Nucor's alleged anticompetitive intent. (Doc. #249 at 12).[8]

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[8] On June 1, 2010, GSRG moved for leave to submit a supplemental filing addressing a new Supreme Court antitrust case, *American Needle, Inc. v. National Football League,* 130 S.Ct. 2201 (2010). GSRG asserts that *American Needle* is "directly relevant to the issues raised in the pending Motion for Summary Judgment filed by Nucor." (Doc. #297 at 2). Nucor responded to GSRG's Supplemental Brief by stating that although it had no objection to *American Needle* being considered as supplemental authority, GSRG's supplemental brief "misrepresents the issue decided in *American Needle*." (Doc. #299 at 1). The court agrees with Nucor. The sole question addressed by *American Needle* was whether the defendants in that case were "*capable* of engaging in a 'contract, combination . . . , or conspiracy' as defined by Section 1 of the Sherman Act, 15 U.S.C. § 1. . . ." *American Needle,* 130 S.Ct. at 2208 (emphasis added). There is no question that Nucor and Casey/Park are separate entities which would be *legally capable* of conspiring under

(Continued on following page)

In his Fourth Report, the Special Master considered various motions to exclude expert testimony and Nucor's Motion for Summary Judgment on all of Plaintiff's claims. (Doc. #305). The Special Master recommended: (1) that the testimony of Dr. Robert Crandall, GSRG's expert, be allowed; (2) that the testimony of John Correnti and Michael Locker, GSRG's experts, be excluded; (3) that the testimony of Andrew Dick, Nucor's expert, be excluded; (4) testimony of Dr. Seth Kaplan, Nucor's expert should be allowed. (Doc. #305 at 29). Thereafter, considering only the expert testimony he believed properly admitted,

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Section 1. Thus, the holding of *American Needle* really has no application here.

Nonetheless, some of the analysis employed by the Supreme Court in *American Needle* reiterates legal principles which support the Special Master's conclusions in this case. For example, "[n]ot every instance of cooperation between two people is a potential 'contract, combination . . . , or conspiracy, in restraint of trade'" and "therefore, an arrangement must embody concerted action in order to be a 'contract, combination . . . or conspiracy' under § 1." *Id.* at 2208-09 (emphasizing the distinction between an agreement and whether it embodies concerted action). These principles are consistent with and, in fact, support the Special Master's conclusion that the "contract" between Nucor and Casey/Park does not, in and of itself, establish a "contract, combination . . . , or conspiracy, in restraint of trade" under Section 1. "[T]here is not necessarily concerted action simply because more than one legally distinct entity is involved." *American Needle,* 130 S.Ct. at 2209. As explained at the outset of the opinion in *American Needle,* "[t]he question [of] whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Id.* at 2206.

including that of GSRG's primary expert, the Special Master recommended that summary judgment be granted in favor of Nucor on all claims. (Doc. #305 at 38-45). The reasons for this recommendation set forth in the Fourth Report are *in addition to* the grounds that he previously recommended granting summary judgment on Counts I and III in his Third Report. (Doc. #305 at 45).

IV. The Court's Review of the Special Master's Third Report

On December 12, 2007, Casey/Park moved for summary judgment on Counts I and III of GSRG's First Amended Complaint, the Section 1 and Section 2 Conspiracy Claims. (Doc. #118). Before considering the motion, the Special Master afforded the parties the opportunity to present any additional evidence and argument that they wished the Special Master to consider in issuing his report and recommendation. (Doc. #249 at 2). The parties presented oral argument to the Special Master on the motion on November 19, 2008. (*Id.*) The Special Master issued his First Report and Recommendation on Casey/Park's motion on January 5, 2009 recommending summary judgment on Counts I and III.[9] (Doc. #188).

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[9] That is, even before he issued his Third Report, the Special Master considered Casey/Park's motion for summary judgment in this case. (Doc. #118). After affording the parties the opportunity to present additional evidence or arguments, and after conducting an in-person meeting (Doc. #188 at 2), the Special

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After the Special Master's Second Report and Recommendation, GSRG and Casey/Park resolved all

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Master issued his Report and Recommendation. (Doc. #188). In his Report, the Special Master recommended that summary judgment be granted in favor of Casey/Park both as to GSRG's Section 1 claim (*id.* at 16-20) and Section 2 conspiracy claim (*id.* at 20-21). GSRG filed objections and also moved to supplement the Rule 56 record. (Doc. #199). The motion to supplement the record was referred to the Special Master (Doc. #205), and thereafter the Special Master filed another Report and Recommendation. In that Report, the Special Master recommended that GSRG be permitted to supplement the Rule 56 record with a contract between Casey and Zibo Wanji Section Co., Inc. of Shandog, China. (Doc. #207 at 2). Casey/Park objected to the supplementation, and also proffered a different contract, this one between Casey and ACS International. (*Id.*). GSRG did not challenge that supplementation. (*Id.*). After permitting supplementation of the record, the Special Master concluded that such supplementation of the record did not alter his recommendation that Casey/Park be granted summary judgment. (*Id.* at 3-4) ("the Chinese contract does not show that Casey/Park joined with or surrendered its 'resources, rights, or economic power' to Nucor as required for Section 1 claims [*Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.,* 307 F.3d 277 (4th Cir. 2002)], nor does the Chinese contract demonstrate that Casey/Park and Nucor had formed 'a conscious commitment to a common scheme designed to achieve an unlawful objective.'" [*Monsanto,* 465 U.S. at 764.]. Although GSRG argues that the Chinese contract shows that Casey/Park reaped "supranormal profits" on the deal [Doc. #199 at 3], the agreement cannot reasonably be read to prove that Casey/Park had a stake in whether Nucor would be successful in achieving or maintaining monopoly power in the hot rolled coil market."). [7 P. Areeda & H. Hovenkamp, *Antitrust Law,* ¶ 1474(a) (2007)]. The court fully agrees with both components of the Special Master's recommendation: (1) it is appropriate to supplement the record, but (2) that supplemented Rule 56 evidence does not preclude summary judgment in this case.

issues between them. (Doc. #208). Remaining to be decided however was Nucor's Motion for Summary Judgment (or, rather, Nucor's joinder in Casey/Park's motion). (Docs #124 and 210). GSRG briefed the issue of Nucor's potential liability under Counts I and III despite Casey/Park's dismissal, and the parties were afforded the opportunity to argue the issue to the Special Master on July 30, 2009. (Doc. #249 at 3). GSRG argued that Nucor could be held liable under Counts I and III despite Casey/Park's dismissal. GSRG further presented a new theory of liability, *i.e.,* that Nucor could be held liable for Section 1 conspiracy based upon agreements with parties other than Casey/Park. (Doc. #249 at 3). On September 29, 2009, the Special Master issued his Third Report and Recommendation recommending that Nucor be awarded summary judgment on Counts I and III, the Section 1 and Section 2 conspiracy claims.

A. GSRG's Argument That Summary Judgment is Precluded by the Law of the Case Doctrine is Meritless

One of GSRG's objections to the Special Master's Reports on summary judgment is that his recommendations are foreclosed by the law of the case doctrine. In particular, GSRG argues that the Eleventh Circuit's opinion issued prior to remand, *Gulf States Reorganization Group, Inc. v. Nucor Corp.,* 466 F.3d 961 (11th Cir. 2006), *cert. denied,* 551 U.S. 1103 (2007), previously decided, on the merits, the issues

which the Special Master addressed in his Reports. The argument is frivolous.

The law of the case doctrine "operates to create efficiency, finality, and obedience within the judicial system." *Allapattah Servs., Inc. v. Exxon Corp.,* 372 F. Supp. 2d 1344, 1363 (S.D. Fla. 2005) (quoting *Litman v. Mass. Mut. Life Ins. Co.,* 825 F.2d 1506, 1511 (11th Cir. 1987)). Under the doctrine, "the findings of fact and conclusions of law by an appellate court are generally binding in all subsequent proceedings in the same case in the trial court or on a later appeal." *This That & the Other Gift & Tobacco, Inc. v. Cobb County,* 439 F.3d 1275, 1283 (11th Cir. 2006) (quoting *Heathcoat v. Potts,* 905 F.2d 367, 370 (11th Cir. 1990)).

The law of the case doctrine encompasses issues previously "*decided by necessary implication* as well as those decided explicitly." *Wheeler v. City of Pleasant,* 746 F.2d 1437, 1440 (11th Cir. 1984) (quoting *Dickinson v. Auto Center Mfg. Co.,* 733 F.2d 1092, 1098 (5th Cir. 1983))[10]; *see also Schiavo v. Schiavo,* 403 F.3d 1289, 1291 (11th Cir. 2005) ("The doctrine operates to preclude courts from revisiting issues that were decided explicitly or by necessary implication in a prior appeal.").

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[10] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

The issue addressed by the Eleventh Circuit panel prior to remand was whether GSRG had satisfied the requirement of demonstrating antitrust standing, *Gulf States,* 466 F.3d at 968, not whether Nucor and Casey/Park engaged in concerted activity that could violate Section 1, conspired to monopolize, or attempted to monopolize. *Id.* at 967-68. This court's decision, which was reversed by the Eleventh Circuit, concluded that: "(1) The Group lacked Article III standing because it did not show that the defendants had caused its injury; (2) the Group lacked 'antitrust standing' because it failed to demonstrate 'antitrust injury,' that is to say injury of the sort that the antitrust laws are meant to redress; and (3) the defendants' actions could not constitute a violation of the antitrust laws because they increased competition in the bankruptcy auction." *Id.* at 965. What is abundantly clear, however, is that this court's decision, which was reversed by the Eleventh Circuit, was based on the fact that GSRG's injury was essentially self-inflicted. GSRG had the available cash to make a conforming cash bid to purchase the steel mill assets ("Assets") at issue and chose to make a non-conforming bid, despite knowledge that such a bid would be rejected. The bankruptcy trustee even gave GSRG additional time to make a conforming bid. This court's prior decision was issued at an early stage in the litigation after only limited discovery as to most of the factual issues that were eventually presented to the Special Master to consider.

The Eleventh Circuit panel considered only the issues of causality and antitrust injury. The issues addressed by the Special Master were not before the Eleventh Circuit-directly or indirectly. Indeed, as the Eleventh Circuit opinion made absolutely clear: "Our intention is to express no opinion at all with respect to the merits. . . ." *Id.* at 969, n.7; *id.* at 967 ("We decline to address the merits"). Notably, the Eleventh Circuit states that its opinion is based on "assertions" made by GSRG that "if it can prove" might establish that the effect of its conduct lessened competition. *Id.* at 967. Specifically, the Eleventh Circuit's opinion[11] states as follows:

> *The Group asserts the following*: (1) Nucor is by far the dominant producer in the relevant market, enjoying a market share of 85%; (2) the Group wanted to and had the ability both to purchase the Assets and to compete with Nucor in the relevant market; (3) the Assets would constitute substantially all of the assets necessary for a potential entrant into the market to begin operations and compete; (4) Nucor was thus obliged not to bid against the Group, the preferred purchaser for the Assets; (5) Appellees violated the merger laws by having Nucor participate in the bidding by funding Park's bid; and (6) Appellees' conduct was a proximate cause

[11] Throughout its opinion, the panel referred to GSRG as "the Group."

> of the Group's failure to purchase the assets and its exclusion from the relevant market.
>
> . . .
>
> *The Group contends that, if it can prove these assertions,* this would mean that Nucor maintained its purported near-monopoly and denied consumers in the relevant market the benefit of the pressure to lower prices that would likely come about if the Group became a viable competitor, thus substantially lessening competition and violating the antitrust laws.
>
> *We decline to address the merits; that is, we decline to address whether the foregoing contentions of the Group would in fact substantially lessen competition in the relevant market and violate the antitrust laws.* However, we conclude that the district court erred in concluding that the Group had failed to show antitrust standing.

Id. at 967 (emphasis added and footnote omitted).[12]

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[12] Legally and logically, the court of appeals did not – and could not – hold that an exclusion of GSRG, standing alone, was "in restraint of trade." As the Special Master pointed out in his First Report (Doc. #188 at 12), the exact same "exclusion" could have arisen if Casey/Park and anyone other than Nucor had purchased the assets, but such purchase by anyone other than an alleged monopolist would not have caused the injury to competition necessary for an antitrust violation.

And just to drive the point home, the Eleventh Circuit's opinion included footnote 4 which states:

> We decline to address the merits *because the district court has not addressed this issue* as it is properly framed, *and because resolution of the issue will require further development of the record and further fact-finding* with respect to whether the challenged acquisition had the effect of substantially lessening competition in the relevant market. Thus, we vacate the district court's holding on the merits.

Id. at 968, n.4 (emphasis added).[13]

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[13] As the panel also stated:

> *Our intention is to express no opinion at all with respect to the merits – i.e., whether the actions of appellees substantially lessened competition in the relevant market and violated the antitrust laws.* See note 4, supra. Thus, we express no opinion with respect to the remarks in Judge Cudahy's separate opinion, except to say that we agree with Judge Cudahy that if the Group proves on remand that "Nucor substantially lessened competition in the relevant market" for hot rolled coil, the Group will have proved a violation of the antitrust laws. However, we express no opinion on that issue; *we prefer for the district court to conduct the appropriate analysis in the first instance and on a more fully developed record. Nor do we intend to express an opinion on or preempt the district court's discretion with respect to the nature of the appropriate course of action on remand, e.g., immediate trial or further summary judgment proceedings. See* Fed. R. Civ. P. 56(d).

Id. at 969, n.7 (emphasis added).

GSRG's "law of the case" argument assumes that the Eleventh Circuit's decision implicitly decided issues which the Court of Appeals, specifically and by the very terms of its opinion, did not address. Therefore, GSRG's "law of the case" argument is off base.

B. Count I – GSRG's Sherman Act Section 1 Claim

1. Legal Standards

Section 1 of the Sherman Act provides as follows:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

15 U.S.C. § 1. Thus, by its own terms, Section 1 condemns every contract, combination, or conspiracy when these concerted actions are "in restraint of trade or commerce." GSRG frequently uses the words "contract" and "combination" instead of "conspiracy." However, as the Eleventh Circuit has noted that "[d]espite the different terminology, there is no magic unique to each term. Courts use the words 'contract,' 'combination,' and 'conspiracy' interchangeably, and sometimes simply refer instead to an 'agreement.'" *Tidmore Oil Co. v. BP Oil Co./Gulf Products Div.,* 932 F.2d 1384, 1388 (11th Cir. 1991) (citing 6P. Areeda, *ANTITRUST LAW* ¶ 1403 (1978)). Moreover, in his treatise, Professor Areeda notes that in virtually

every case, it is not necessary to distinguish these terms from one another:

> The courts sometimes speak of "combination," sometimes of "conspiracy," or sometimes simply of the non-statutory term "agreement." They usually use these terms interchangeably, and the use of one term does not imply any distinction between them. When there is sufficient concert of action to implicate the purposes of the Sherman Act, the statute is applied without any need or attempt to classify that concerted action as a contract, a combination, or a conspiracy. This is the consistent course of the decisions, and generally it seems correct.

6 P. Areeda & H. Hovenkamp, *Antitrust Law,* ("Areeda") ¶ 1403 at 20 (3d ed.2010) (*citing Bogosian v. Gulf Oil Corp.,* 561 F.2d 434, 445 (3d Cir. 1977), *cert. denied,* 434 U.S. 1086 (1978) ("We perceive no distinction between the terms combination and conspiracy. . . .")).

To be sure, the Sherman Act distinguishes unilateral from concerted action.[14] The Sherman Act contains a "basic distinction between concerted and independent action . . . The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization . . . Section 1 of the

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[14] 7 Areeda at ¶ 1474 at 307. Unilateral action is "unlawful under the Sherman Act when anti competitive conduct is accompanied by monopoly power or its prospect." *Id.* at 307-08.

Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a 'contract, combination . . . or conspiracy' between separate entities. It does not reach conduct that is 'wholly unilateral.'" *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 767-68 (1984) (citations and footnote omitted). Accordingly, while different courts have expressed the elements of a Section 1 claim in different (but not necessarily inconsistent) ways,[15] this much is clear: an essential element of any Section 1 claim is a showing of concerted action. That is, Section 1 applies only to agreements between two or more businesses or persons; it does not cover unilateral conduct. *Fisher v. City of Berkeley,* 475 U.S. 260, 266 (1986) ("Even where a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement.").[16] *See also Monsanto Co.,*

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[15] For example, the Special Master defined the elements as follows:

> Thus, the elements of a Section 1 claim are widely recognized to be (i) the existence of a contract, combination, or conspiracy among two or more separate entities that (ii) unreasonably restrains trade and (iii) affects interstate or foreign commerce.

(Doc. #188 at 3 (footnote omitted)).

[16] However, while concerted action must be shown, not every agreement that restrains competition will violate the Sherman Act. The Supreme Court long ago determined that Section 1 prohibits only those agreements that unreasonably restrain competition, *Standard Oil Co. v. United States,* 221 U.S. 1, 58-64 (1911); therefore, the unreasonableness of the agreement is the second element of a Section 1 claim.

465 U.S. at 761 (noting that it is fundamental that a plaintiff establish an agreement between two or more persons to restrain trade; unilateral conduct is not prohibited by § 1); *American Key Corp. v. Cole,* 762 F.2d 1569, 1579 n.8 (11th Cir. 1985) ("conspiracy is an essential element of all Section 1 violations"); *Todorov v. DCH Healthcare Authority,* 921 F.2d 1438, 1455 (11th Cir. 1991) ("Liability will only attach to *agreements* designed unreasonably to restrain trade in, or affecting, interstate commerce; thus, before analyzing the reasonableness of any alleged restraint on trade, courts must first ensure that an agreement to restrain trade exists."). To be sure, the Supreme Court has cautioned lower courts that Section 1 "does not declare every combination between two 'persons' to be illegal," but only those "'hereby declared to be illegal.'" *Copperweld Corp.,* 467 U.S. at 769 n.15. Thus, concerted action within the meaning of Section 1 conspiracy "cannot be understood as it might be in ordinary parlance, to reach any and all forms of joint activity by two or more persons," *Virginia Vermiculite, Ltd. v. Historic Green Springs,* 307 F.3d 277 (4th Cir. 2002), *cert. denied,* 538 U.S. 998 (2003), but "must be construed in a[ ] refined manner" and "defined consonant with its role in the antitrust analysis." *Id.* at 281-82. To determine whether a given joint activity is an antitrust conspiracy, the Supreme Court has directed courts to "explain the logic underlying Congress' decision to exempt unilateral conduct from [Section] 1 scrutiny, and to assess whether that logic similarly excludes the conduct" challenged by the plaintiff. *Copperweld,* 467 U.S. at 776.

The "logic" underlying the Section 1 ban on collusion between marketplace competitors is that such combinations "deprive[ ] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id.* at 768-69. That is why Section 1 treats concerted activity between multiple actors "more strictly" than Section 2 treats single-party conduct – "[i]n any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." *Id.* at 768-69. The danger is obvious. When "parties combine (*i.e.,* bring into concert) their resources, rights, or economic power in such a way as to counteract naturally competing interests that would otherwise set them at odds," *Virginia Vermiculite,* 307 F.3d at 282, they are able "to avoid . . . market choices that would set them at odds" in the asserted market, *id.* at 283 n.*, to the detriment of competition and consumers. The "core concern" of Section 1 thus is when "competitors cooperate to substitute common action for competition and thereby effect an anticompetitive restraint that could not otherwise be achieved." Areeda, ¶ 1402a3, at 10.

Thus, for example, in *Virginia Vermiculite,* a non-profit historic preservation entity, which was the donee of a gift deed of land containing valuable vermiculite deposits, was the second party that allegedly "conspired" with another defendant that

operated in the vermiculite market. 307 F.3d at 279-80. Judge Luttig, writing for the Fourth Circuit, held that such joint action did not satisfy the "concerted activity" requirement under Section 1, because, "[f]irst and foremost, [the donee's] receipt of the gift did not reflect a merging of the two defendants' rights, resources, or economic power." *Id.* at 283. The court concluded that the mere act of accepting the donation did not create the concerted action required to support a Section 1 claim, because no evidence was presented that the organization – as opposed to the monopolist – had "exercised any form of right, resource, or economic power" of its own to implement the monopolist's allegedly anticompetitive scheme. In so holding, the court "reaffirm[ed] what was made clear by *Copperweld,* that concerted activity susceptible to sanction by section 1 is activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)." *Id.* at 282; *see Copperweld,* 467 U.S. at 769. In such circumstances there is no basis for antitrust conspiracy liability. *Id.; see also Golden v. Kentile Floors, Inc.,* 475 F.2d 288, 290-91 (5th Cir. 1973) ("Supreme Court precedents make clear that participation in a combination is illegal only when, at the minimum, it manifestly results from the family of procompetitive or anticompetitive objectives related to the relevant market."). Here, just as in *Virginia Vermiculite, Ltd.,* there is simply no showing that "the parties combine[d] (*i.e.,* [brought] into concert) their

resources, rights, or economic power in such a way as to counteract naturally competing interests that would otherwise set them at odds. . . ." *Virginia Vermiculite, Ltd.,* 307 F.3d at 282.

The clear prerequisites to avoiding summary judgment in antitrust conspiracy cases have been established by the Supreme Court and consistently applied by our circuit court. *See Matsushita,* 475 U.S. at 588 ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"); *Monsanto,* 465 U.S. at 764 ("the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that [the alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective'") (quoting *Edward J. Sweeney,* 637 F.2d at 111).

These standards were summarized by the Eleventh Circuit in *Seagood Trading Corp.*:

> The threshold requirement of every conspiracy claim, under both Section 1 and Section 2, is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946). We recognize that it is only in rare cases that a plaintiff can establish the existence of a conspiracy by showing an

explicit agreement; most conspiracies are inferred from the behavior of the alleged conspirators. *DeLong Equip. Co. v. Washington Mills Abrasive Co.,* 887 F.2d 1499, 1515 (11th Cir. 1989), *cert. denied,* 494 U.S. 1081, 110 S.Ct. 1813, 108 L.Ed.2d 943 (1990). Antitrust law, however, limits the range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To make out a conspiracy, and thus survive a motion for summary judgment, the circumstantial evidence must reasonably "tend[ ] to exclude the possibility" that the alleged conspirators acted independently. *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764 (1984). This means that "conduct as consistent with permissible [activity] as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita,* 475 U.S. at 588. For example, the mere opportunity to conspire among antitrust defendants does not, standing alone, permit the inference of conspiracy. *Bolt v. Halifax Hosp. Medical Center,* 891 F.2d 810, 827 (11th Cir. 1990), *cert. denied,* 495 U.S. 924 (1990). Thus, when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred. *Todorov v. DCH Healthcare Auth.,* 921 F.2d 1438, 1456 (11th Cir. 1991).

Seagood Trading Corp. v. Jerrico, Inc., 924 F.2d 1555, 1573-74 (11th Cir. 1991) (parallel citations omitted). *See also U.S. Anchor,* 7 F.3d at 1002 ("Federal antitrust law requires a plaintiff to introduce evidence that tends to exclude the possibility that the defendants acted independently or legitimately."); *Todorov,* 921 F.2d at 1456 ("Thus, when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred; the plaintiff must produce more probative evidence that the law has been violated."); *Bolt,* 891 F.2d at 819 ("When relying on circumstantial evidence to prove the existence of a conspiracy, a plaintiff must first show a non-legitimate motive for entering into such a conspiracy.") These are precisely the evidentiary standards applied by the Special Master here. (*See* Doc. #188 at 4-5, 16-19). Thus, the first element of a Section 1 claim is proof of an agreement to restrain trade, and significant probative evidence of a conspiracy is an essential element of all Section 1 violations. *First National Bank v. Cities Service Co.,* 391 U.S. at 290.

2. Analysis of GSRG's Conspiracy Claim

As noted above, "[a] key inquiry in any case brought under Section 1 is whether the challenged conduct consists of concerted action or of the merely unilateral behavior of separate actors . . . " William C. Holmes, *Antitrust Law Handbook* § 2:2 (*2008-2009 Edition*). "For an agreement to constitute a violation

of Section 1 of the Sherman Act, a 'conscious commitment to a common scheme designed to achieve an unlawful objective' must be established." *Toscano v. Professional Golfers Association,* 258 F.3d 978, 983 (9th Cir. 2001) (quoting *Monsanto,* 465 U.S. at 764). As the Special Master aptly noted "[t]he facts of this case present the infrequent, but not unprecedented, question of whether a company's agent [here, Casey/Park][17] should be held liable for Section 1 conspiracy where the agent had some role in facilitating the restraint."[18] (Doc. #188 at 5). The Areeda treatise draws a distinction between "pawns" and "principal actors" due to the pawn's "subordinate role in performing a discrete, designated task at the direction of [its] principal." 7 Areeda ¶ 1474 at 308. As is the case

[17] Again, although Casey/Park have resolved their differences with GSRG, the question of whether they can be liable under Section 1 is still at the forefront. This is the case because Plaintiff's theory for holding Nucor liable under Section 1 is the claim that Nucor and Casey/Park conspired with one another.

[18] Contrary to GSRG's assertion, the Special Master's legal analysis is plainly not misdirected advocacy expounding on "why . . . 'pawns' are not liable for their conduct." (*See* Doc. #190 at 23-24). What GSRG misunderstands (or perhaps fails to acknowledge) is that the Special Master's "pawn liability" analysis is simply another way to analyze the courts' respective decisions in *Copperweld* and *Virginia Vermiculite.* (Doc. #188 at 5-6) (citing 7 P. Areeda, *ANTITRUST LAW,* ¶ 1474 (2007)). The key point is this – if GSRG's analysis is correct, Section 1 liability would potentially attach to a broad range of ancillary service providers – bankers, lenders, lawyers, and accountants to mention a few – who lack the requisite competitive interest and stake in the relevant market and who do not have any conscious commitment to achieve the alleged restraint of trade in that market.

here with Casey/Park, "[t]he pawn is not a competitor whose rivalry is being coordinated. Nor is the pawn a marketplace actor whose . . . behavior is being constrained. Rather, the pawn is relevant to antitrust policy only because it assists the principal actor's marketplace behavior." *Id.* The Areeda treatise also explains why findings of pawn liability under Section 1 are rare.

> In our economy sales through brokers or other intermediaries are ubiquitous, and they are not complicity in vertical restraints simply because they were employed in a transaction later challenged as anticompetitive.

Id. at ¶ 1474(c), p. 317.[19]

Simply put, GSRG's claim that Casey/Park conspired with Nucor does not trigger the "core concern" addressed by Sherman Act Section 1. That is the case because Casey/Park and Nucor do not compete with each other and Casey/Park lacks any economic interest in the state of competition in the relevant market. The Special Master correctly determined that Section 1 only prohibits "activity in which multiple parties

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[19] To be clear, while Areeda considers that an essential element of proving pawn liability is a showing that the pawn intended to restrain trade, *id.* at ¶ 1474, p. 308, the Special Master recognized that this requirement is inconsistent with Eleventh Circuit precedent. (Doc. #188 at 6, n.31). If this court were writing on a clean slate, it would conclude Areeda has the better reasoned position. However, the Eleventh Circuit's case law is clear and the Special Master applied it faithfully.

join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)."[20] (Doc. #188 at 7, quoting *Virginia Vermiculite Ltd.,* 307 F.3d at 282). GSRG has expressly admitted that neither Casey nor Park have ever had an economic interest in any market for the sale of hot rolled coil steel or in the state of competition in any such market.[21] (Doc. #120 ¶¶ 3-15). And notwithstanding GSRG's strained arguments[22] that Casey

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[20] GSRG's objections do not challenge the Special Master's determination that GSRG failed to provide substantial evidence that Nucor and Casey/Park ever "join[ed] their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices)." (Doc. #249 at 12, quoting *Virginia Vermiculite Ltd.,* 307 F.3d at 282). This requisite combination of rights, resources or economic power can only occur when the combination "diminshe[s] competing interests of the two entities." (Doc. #188 at 8, quoting *Virginia Vermiculite Ltd.,* 307 F.3d at 283). The Special Master restated this principle somewhat differently: concerted activity is unlawful under Section 1 if it "deprives the marketplace of the independent centers of decision-making that competition assumes and demands." First Report at 6 (quoting *Copperweld Corp.,* 467 U.S. at 769).

[21] The claim that Nucor exploited its otherwise routine business arrangement with Casey/Park to effect an anticompetitive result – in a market in which Casey did not participate – simply does not transform that ordinary business arrangement into an antitrust conspiracy.

[22] It is not surprising, therefore, that GSRG has not cited to a single case upholding a Section 1 claim based on an agreement between an agent (*i.e.,* a pawn) who does not participate in or

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contributed "resources" in the transaction with Nucor (Doc. #190 at 6, 16), there is no evidence that Casey or Park ever acted in a way that was inconsistent with their respective usual business activities or contributed resources that reflected any economic power or other interest in the purported relevant market. "[T]he Sherman Act does not prohibit unreasonable restraints of trade as such – but only restraints effected by a contract, combination, or conspiracy. . . ." *Copperweld Corp.,* 467 U.S. at 775. The Special Master properly held that part of the proof of the "contract, combination, or conspiracy" requires proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.,* 465 U.S. at 764. Under the circumstances of this case, the Special Master properly concluded that this required some showing of Casey/Park's objective, separate and apart from the fact of entering into the facially neutral contract with Nucor. Eleventh Circuit precedent is in agreement, despite GSRG's attempts to distinguish the relevant cases. *See U.S. Anchor Mfg.,* 7 F.3d at 1002; *Seagood Trading Corp.,* 924 F.2d at 1573-74. In both of these cases, evidence of written agreements between the alleged conspirators was insufficient to

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have any economic interest in the state of competition in the relevant market and a single principal that operates in that market. Extending Section 1 under circumstances like this to parties outside the relevant market would dramatically alter the scope of the antitrust laws by "presag[ing] liability for a host of servicing agents only fortuitously connected with Sherman Act defendants." *Golden,* 475 F.2d at 290.

obviate the need for some proof of an objective to restrain trade on the part of the alleged pawn or subordinate. The same is true here as to Casey/Park's objective. As the Third Circuit explained in *Fineman v. Armstrong World Industries, Inc.,* 980 F.2d 171, 212 (3d Cir. 1992), "the emphasis is upon the participant's '*commitment to [the] scheme* [which is] designed to achieve an unlawful purpose' which is crucial." Thus, the Special Master properly recommended summary judgment based on the lack of proof of Casey/Park's "commitment to the scheme."

The court concludes that the Special Master applied the proper standards in assessing summary judgment, requirements that are firmly established by controlling Supreme Court and Eleventh Circuit precedent, and which call upon GSRG to present evidence (1) that tends to exclude the possibility that the alleged unlawful conduct of Casey and Park was the result of legitimate business activity rather than an unlawful conspiracy and (2) that demonstrates that those companies made a conscious commitment to a common scheme designed to achieve an unlawful objective. *See, e.g., Matsushita,* 475 U.S. at 588; *Seagood Trading,* 924 F.2d at 1573-74.

Perhaps sensing the difficulty it would have in meeting the requirements of *Monsanto* and *Matsushita,* GSRG makes the astounding argument that the written contract between Nucor and Casey/Park is itself direct evidence of concerted conduct causing

anticompetitive harm.[23] (*See* Doc. #255 at 4-5). The Special Master rejected that argument and this court similarly finds that it is off the mark.[24] That is, the

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[23] The former Fifth Circuit noted over thirty years ago the infrequency of an antitrust case with direct evidence:

> [A] major factual question in this case is whether there was a conspiracy. Even a successful antitrust plaintiff will seldom be able to offer a direct evidence of a conspiracy and such evidence is not a requirement. *See, e.g., Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.,* 394 U.S. 700, 703-04 (1969). However, to survive a motion for summary judgment the evidence must suggest reasonable inferences of conspiracy. *First National Bank of Arizona v. Cities Service Co.,* 391 U.S. 253, 266-70 (1968); *American Telephone & Telegraph Co. v. Delta Communications Corp.,* 590 F.2d 100, 102 (5th Cir. 1979), *cert. denied,* 444 U.S. 926 (1979). "Rarely, if ever, can a plaintiff point to a 'smoking gun' in (conspiracy) cases such as this. Yet, a plaintiff must convince the court that it is reasonable to infer the existence of the gun from the facts shown." *Aladdin Oil Co. v. Texaco, Inc.,* 603 F.2d 1107, 1117 (5th Cir. 1979).

General Chemicals, Inc. v. Exxon Chemical, 625 F.2d 1231, 1233 (5th Cir. 1980).

[24] Not only is the contract between Casey/Park not direct evidence of a Section 1 violation, for the reasons already explained, it does not provide "circumstantial" evidence of Casey's conscious commitment to monopolize the alleged relevant hot rolled coil steel market. GSRG's contention otherwise cannot withstand analysis under the well-established antitrust summary judgment standard that circumstantial evidence "must be strong in order to survive summary judgment, because 'antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case,' " *Tunica Web Advertising v. Tunica Casino Operators Ass'n, Inc.,* 496 F.3d 403, 409 (5th Cir. 2007) (quoting *Matsushita,* 475 U.S. at 588 (emphasis added)). The key

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court concludes that the contract at issue does not in itself restrain trade.

Again, in *Seagood Trading,* the Eleventh Circuit made clear that analyzing concerted action is the starting point in assessing a Section 1 claim:

> The threshold requirement of every conspiracy claim, under both Section 1 and Section 2, *is an agreement to restrain trade.* To prove that such an agreement exists between two or more persons, a plaintiff must demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement."

924 F.2d at 1573 (emphasis added) (quoting *American Tobacco Co. v. United States,* 328 U.S. 781, 810 (1946)).

As GSRG has indicated in its briefing, "[t]he primary legal issue in this case . . . concerns how the requirement of proof of a common 'objective' should be applied" in the context of this case.[25] (Doc. #251 at 8).

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point here is that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita,* 475 U.S. at 588 (citing *Monsanto,* 465 U.S. at 764). Imposing Section 1 liability on the basis of conduct that is "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy," *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 554 (2007), would "often [ ] deter procompetitive conduct," *Matsushita,* 475 U.S. at 593.

[25] Plaintiff argues that the context of this case involves an "anticompetitive acquisition which is accomplished by means of

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Plaintiff argues that the *objective* of the contract[26] between Nucor and Casey/Park was anticompetitive, *i.e.,* to exclude GSRG from the hot rolled steel coil market. (*Id.* at 8, 9). More specifically, GSRG argues that "the apparent objective of the Nucor-Casey contract was dismantling and export of the former Gulf States Steel plant. Where the objective of a contract

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an express, written contract with a third party." (Doc. #251 at 8). Plaintiff's argument is off the mark. And not surprisingly, GSRG has offered no precedent or authority whatsoever to support its position that Section 1 criminal and treble damages liability may be automatically imposed on ancillary service providers that have no knowledge, stake or interest regarding another party's alleged anticompetitive objective.

[26] GSRG's lengthy analysis (Doc. #251 at 11-13) of the Third Circuit's decision in *Fineman v. Armstrong World Indus., Inc.,* 980 F.2d 171 (3d Cir. 1992), misstates both the holding and the facts of that case. As the Special Master correctly noted in his First Report, *Fineman* stands for the proposition that, in order to be liable under Section 1, "co-conspirators need not share the same *motive* for the restraint of trade so long as they both share the *objective* to restrain trade." (Doc. #188 at 14 (original emphasis); *accord* Doc. #249 at 9). Indeed, *Fineman* expressly confirms the Special Master's discussion of "objective" – as opposed to motive and intent. *See Fineman,* 980 F.2d at 212 (although motives may differ, a Section 1 claim requires proof that alleged conspirators must share a "conscious commitment to a common scheme designed to achieve an unlawful objective."). In this manner, the Special Master's analysis is wholly consistent with Eleventh Circuit law, and contrary to GSRG's assertions, the *Fineman* opinion also confirms the Special Master's ruling that: "At a minimum, a determination of a common objective to restrain trade would require the Court to find that the subordinate party *has knowledge* of the principal party's anticompetitive goal and *acquiesce* in its realization." (Doc. #249 at 10 (emphasis added)).

is the elimination of nascent competition in the relevant market, Section 1 is properly invoked." (*Id.* at 10). And it is that passage from GSRG's written argument that demonstrates the critical flaw in its argument on this point. That is, GSRG has made a leap in logic that is simply not supported by the record because the contract's purpose is to purchase goods, not eliminate competition or restrain trade.

In other words, the contract's purpose was to define the relationship between Nucor and Casey regarding the acquisition of the steel mill assets, and the terms under which that asset acquisition would take place. *That* was the objective of the contract – the purchase of the steel mill assets. Nucor may well have had an ulterior objective in entering the contract – to exclude GSRG from the market. But there is nothing in the contract, its terms, or the circumstances of its agreement that indicates (much less presents substantial evidence that) *Casey's* objective was anything other than the acquisition of steel assets for resale.[27]

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[27] GSRG takes issue with the Special Master's statement that "[t]he written agreement between Casey/Park and Nucor . . . appears neutral on its face." (Doc. #190 at 20; *see also id.* at 12-14). Each provision of that agreement questioned by GSRG, however, readily can be explained as part of an entirely reasonable and appropriate business deal, and accordingly provides no evidence that tends to exclude the possibility that the agreement derived from legitimate business conduct, which resulted in multi-million-dollar profits for Casey/Park upon resale of the key Gulf States Steel assets.

Obviously there is no requirement that GSRG establish "an intent on the part of the coconspirators to restrain trade or to build a monopoly" for a Section 1 conspiracy claim. *Bolt,* 891 F.2d at 819-20 (internal citation omitted). To avoid the swing of the summary judgment axe, however, GSRG is required to present "evidence that reasonably tends to prove" that Casey/Park and Nucor "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Monsanto Co.,* 465 U.S. at 764. And while GSRG is certainly permitted to rely upon circumstantial evidence to support its Section 1 claim, Supreme Court precedent has limited the "range of inferences that may be drawn from circumstantial evidence to prove an unlawful conspiracy." *Seagood,* 924 F.2d at 1574.

It bears repeating that "[c]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita,* 475 U.S. at 588.[28] Indeed, "the mere opportunity to conspire among

[28] Citing its earlier decision in *First National Bank v. Cities Service Co.,* 391 U.S. 253, 288-89 (1968), the Court in *Matsushita* identified two separate inquiries that are relevant to this issue: (1) whether the defendant had "any rational motive" to join the alleged conspiracy, and (2) whether the defendant's conduct was consistent with the defendant's independent interest," *Matsushita,* 475 U.S. at 587, citing 391 U.S. 253 (1968), the Court stated that "if [the defendants] had no rational motive to conspire, and if [their] conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy." *Id.* at 596-97.

antitrust defendants does not, standing alone, permit the inference of conspiracy." *Seagood,* 924 F.2d at 1574. As the Eleventh Circuit has also warned, "when the defendant puts forth a plausible, procompetitive explanation for his actions, we will not be quick to infer, from circumstantial evidence, that a violation of the antitrust laws has occurred." *Id.* GSRG has not presented the required evidence that "tend[s] to exclude the possibility that the alleged conspirators acted independently." *Id.* (quoting *Monsanto,* 465 U.S. at 764).

The Special Master succinctly articulated the essence of (and the flaw in) Plaintiff's argument regarding the contract[29] between Nucor and Casey:

> Plaintiff incorrectly adumbrates that somehow "contract, combination, and conspiracy" and "restraint of trade" are independent elements such that once an agreement regarding the economic event is shown, all that is needed for liability is evidence of one party's illegal act affecting the economic event. The correct interpretation is that the joint meeting of the minds must incorporate the illegal restraint and, thus, those elements are inextricably intertwined.

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[29] *Albrecht v. Herald Co.* emphasized that Section 1 "covers combinations in addition to contracts and conspiracies." 390 U.S. 145, 149 (1968). But again, neither there nor anywhere else has the Court defined "contract" as a different concept. As the lower courts have consistently held, this statutory concept of contract, combination, or conspiracy is a unity rather than a trinity.

(Doc. #188 at 4). In this case, the only joint action agreed to by Casey/Park on the one hand, and Nucor on the other was an ordinary commercial brokerage arrangement. GSRG's assertion that any "concerted activity" can be deemed a Section 1 violation without evidence of a conscious commitment to an unlawful objective is, quite simply, not just off the market's not the law.[30] One need look no further than the Eleventh Circuit's *Seagood* decision to understand this point. In *Seagood,* the alleged conspirators, Long John Silver's ("LJS") and Martin-Brower ("M-B"), had entered into contracts for M-B to provide services to LJS. 924 F.2d at 1558-60. Nevertheless, applying the standards established in *Matsushita* and *Monsanto,* the court of appeals affirmed the grant of summary

[30] Both Supreme Court and Eleventh Circuit case law require a plaintiff relying upon the consequential affects of a contract that does not restrain trade by its own terms to show that the contracting parties "shared a common objective to restrain trade" in order to establish a Section 1 violation. *Monsanto,* 465 U.S. at 764 (Section 1 claim requires proof of a "conscious commitment to a common scheme designed to achieve an unlawful objective"), quoting *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir. 1980); *Seagood Trading,* 924 F.2d at 1573-74 (in order to establish an agreement to restrain trade, plaintiff must show a meeting of the minds to accomplish anticompetitive objective); *U.S. Anchor,* 7 F.3d at 1002 (no evidence that defendants shared a mutual objective to restrain trade in the relevant market). Indeed, in both *Seagood* and *U.S. Anchor,* there was evidence of a competitively neutral written agreement between the allegedly conspiring defendants, but that did not dispense with the requirement that the antitrust plaintiff establish a shared "common objective" to restrain trade in the relevant market. (*See* Doc. #249 at 7-8).

judgment for M-B, concluding that there was no direct evidence of the alleged conspiratorial conduct and that the inferences drawn by the plaintiff from circumstantial evidence were not sufficient to implicate M-B in the alleged unlawful conspiracy. *Id.* at 1573-76.

In *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.,* one of the cases cited by GSRG,[31] the Eleventh Circuit held that there was "insufficient evidence linking [the pawn] with Rule's scheme to constitute a conspiracy under the substantive proof requirements of federal antitrust law" *despite* the existence of a contract between which was related to the alleged restraint of trade. 7 F.3d 986, 1002 (11th Cir. 1993). Notwithstanding GCRG's citation to it, *U.S. Anchor* simply does not support its argument. In *U.S. Anchor,* the plaintiff alleged that the principal defendant, Rule, allegedly had conspired with one of its suppliers, Tie Down, to drive Rule's competitor out of the relevant market by predatory pricing. The focus of the conspiracy claim was a report from Tie Down to Rule regarding the plaintiff's costs of production, which allegedly was used by Rule to carry out its anticompetitive, below-costs pricing tactic. 7 F.3d at 989-90, 1002. Again, therefore, "joint action . . . was a given." The Eleventh Circuit, however, concluded that Tie

[31] GSRG cites *U.S. Anchor Mfg.* for the proposition that evidence of the contract between Nucor and Casey/Park eliminates the need to show a common objective to restrain trade. As will be explained below, that argument is far wide of the mark.

Down was entitled to judgment as a matter of law, holding that there was insufficient evidence of the alleged conspiracy involving that company. *Id.* at 1001-02. As in *Seagood,* the court stated that "a section 1 claim and a section 2 conspiracy to monopolize claim require the same threshold showing – the existence of an agreement to restrain trade." *Id.* at 1002 (quoting *Seagood,* 924 F.2d at 1576).

3. Analysis of the Contract

The contract at issue in this case does not, by its own terms, link the "pawn" with Nucor's alleged scheme in order to establish a conspiracy. Accordingly, as the Special Master correctly noted, it is incumbent upon GSRG to present evidence *in addition to the contract* that tends to link Casey/Park to Nucor's scheme to survive summary judgment. (Doc. #249 at 11). Proof that Nucor alone may have had an intent to monopolize or restrain trade is not enough to establish the contract, combination or conspiracy in unreasonable restraint of trade. *U.S. Anchor Mfg., Inc.,* 7 F.3d at 1002 (although there was sufficient evidence to show an intent to achieve an unlawful objective on Rule's part, there was insufficient evidence linking the pawn to Rule's efforts to support a finding of conspiracy between them).

In *U.S. Anchor,* the Eleventh Circuit further stated that "[f]ederal antitrust law requires a plaintiff to introduce evidence that *tends to exclude the possibility* that the defendants acted independently or

legitimately." *U.S. Anchor Mfg., Inc.,* 7 F.3d at 1002 (citing *Bolt v. Halifax Hosp. Medical Ctr.,* 891 F.2d 810, 820 (11th Cir. 1990), *cert. denied,* 495 U.S. 924 (1990), *appeal after remand,* 980 F.2d 1381 (11th Cir. 1993) and *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764 (1984)) (emphasis added). There are a myriad of undisputed legitimate reasons for Casey/Park to enter into the agreement in question with Nucor. Don Casey has testified about his extensive involvement in evaluating the Gulf States Steel assets long before he had any contact with Nucor about those assets, and that he initially contacted Nucor about the possible purchase of those assets before he was later contacted by Nucor's Vice President, Mr. Rutkowski. Mr. Casey also described Casey's purchase of various assets from the Gulf States Steel plant and his company's efforts to be involved in some manner in the liquidation of those assets. (Doc. #12 at ¶¶ 23-30, 36-38, 40-41).

Moreover, the mere fact that Casey/Park entered into an agreement to perform its usual business, even if it was at a higher profit than usual, does not show that it conspired to do anything other than make money. GSRG argues that the profit margin should have alerted it to the fact that Nucor had ulterior motives in hiring Casey/Park, but that is not enough and there is no evidence that Casey/Park entered into the agreement with a shared objective to achieve those alleged unlawful ends.

Casey's business is buying and selling used steel manufacturing equipment. It not only had prior

dealings with Nucor, but also did business with most steel manufacturers in the United States. Casey's business was in no way dependent on Nucor and, in fact, Casey had made its own independent efforts to be appointed by the Bankruptcy Judge and Bankruptcy Trustee to be the liquidator for the Gulf States equipment. Moreover, for approximately two years prior to the September 2002 bankruptcy auction, Casey had tried repeatedly to get a contract with Gulf States Steel and the Trustee to liquidate the Gulf States Steel property and equipment. (Doc. #96 at 11). Casey inspected the Gulf States Steel property and equipment on a number of occasions in 2000 and 2001 and was very familiar with those assets. Mr. Casey attended the May 2001 auction on Casey's behalf, bid on several items at the auction, and successfully purchased some of the Gulf States Steel assets that were auctioned. Casey also purchased additional assets from the Gulf States Steel bankruptcy estate before the May 2001 auction. (Doc. #96). Here, there is no evidence at all (direct or otherwise) that Casey/Park knew of any objective of Nucor other than to participate in the purchase and resale of the Gulf States Steel assets in order to make a profit. And as GSRG admits, the two sides ultimately made a profit.[32]

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[32] Inexplicably, GSRG has questioned the Special Master's "factual finding" that "[t]here is also evidence within the record that there existed at least some opportunity to resell the assets in the international market for a profit." (Doc. #190 at 18-19; *see*

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Furthermore, Casey/Park had an independent reason for wishing to sell off Gulf States's assets: it would provide the financing to purchase the property and develop it into an industrial park, something that the record indicates Casey/Park is currently doing on a profitable basis. In light of these facts, GSRG simply has fallen short of the required showing that Casey/Park's reasons for entering into the agreement with Nucor were anything other than legitimate. Here, Casey/Park's "conduct [is] as consistent with permissible [activity] as with illegal conspiracy [and therefore] does not, standing alone, permit the inference of conspiracy." *Seagood Trading,* 924 F.2d at 1574 (citations omitted). In its response to GSRG's objections to the Special Master's Third Report, Nucor outlines the reasons that Plaintiff's objections to the

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also id. at 10). The Special Master simply made a Rule 56 finding based upon undisputed facts. GSRG acknowledges, as it must, that this "finding" is supported by the "fact that (ultimately) Casey did in fact sell the assets for a profit." *Id.* at 19. *See also* (Doc. #120 at ¶ 82) (assets were resold to customers in Asia for approximately three times the purchase price). GSRG's suggestion that there supposedly are "contrary facts in the record" about the state of the Asian used equipment market in 2001 and 2002 not only is incorrect but also irrelevant. The key question is whether Casey recognized an opportunity to resell the Gulf States Steel assets in an overseas market, and the evidence is undisputed that Casey did. (*See* Doc. #120 at ¶¶ 36-37, 39-41). Moreover, given that there was a three-year window of time for resale of the assets under the Casey/Nucor agreement, the fact that the assets were resold at a substantial profit in about half that time (Doc. #120 at ¶¶ 81-82) certainly suggests that Casey's market perception was spot on.

Rule 56 determinations made in the Report are without merit. (Doc. #253 at 14-17). Nucor's response is right on target. Moreover, in each instance, this is the critical failure in GSRG's objections: Whether they are taken individually or together, Casey/Park's acceptance of the contract provisions complained of by GSRG is explained just as much by its normal business practice as by GSRG's assertions of anticompetitive objective. In this case, and in light of GSRG's shotgun arguments, the legal point cannot be overstated: Where the evidence supporting a conspiracy claim is this equivocal, the Supreme Court has determined that it is insufficient to avoid summary judgment. *Matsushita,* 475 U.S. at 588 (citing *Monsanto* and holding that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy").[33]

Finally, GSRG's repeated contention that Casey/Park "should have known" or "suspected" Nucor's "apparent" objective (*e.g.,* Doc. #190 at 8, 11-12, 14-15, 20) is not only speculative[34] but also invokes a

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[33] Certainly, there is no evidence that Casey/Park's stated legitimate reasons for entering into the agreement were either fabricated or contrived. *See Boczar v. Manatee Hosps. & Health Sys., Inc.,* 993 F.2d 1514, 1518-19 (11th Cir.1993) (finding sufficient evidence to support conspiracy claim when defendant's supposed legitimate reasons for acting were shown to be fabricated and contrived).

[34] Evidence that is "speculative or ambiguous" does not require a trial. *Matsushita,* 475 U.S. at 595.

negligence standard that is simply foreign to any requirement under the antitrust laws. To survive a Rule 56 challenge, GSRG must present evidence that Casey knew of and "consciously committed" to Nucor's allegedly anticompetitive objective to monopolize a relevant antitrust market. There is simply no such evidence in the record.

C. To Whatever Extent It Has Attempted To Do So, GSRG May Not Assert a Brand New Theory of Section 1 Liability

The Special Master also recommended that the court find untimely any attempt by GSRG to assert a new theory of liability – namely, that GSRG can avoid summary judgment here by asserting that Nucor conspired with other actors besides Casey/Park.[35] The court agrees with the Special Master that "[a]t this stage of the case, it would be manifestly un[fair] to entertain GSRG's argument that Section 1 conspiracies could be found to exist with other actors." (Doc.

[35] As the Special Maser noted, "GSRG has pled only one 'contract and combination' in restraint of trade. In order to protect and extend its near-monopoly dominance in the relevant market, Nucor contracted and combined with Casey to cause the creation of Gadsden Industrial Park, LLC [. . .] [Doc. #115 at ¶ 35]. Nucor contracted and combined with Casey Equipment Corporation and Gadsden Industrial Park, LLC to purchase the Gulf States Steel Plant with the common intention and objective of blocking a perceived competitive threat to Nucor. [Doc. #115 at ¶ 40]." (Doc. #249 at 3). There is no mention of any additional conspirator in GSRG's pleadings, nor is there any reference to other contracts or combinations.

#249 at 4; Doc. #305 at 4) (footnotes omitted). GSRG did not put forward its new theory until July 30, 2009, almost seven years after it filed this case. (*Compare* Doc. #1, *and* Doc. #115, *with* Doc. #305, p. 4). There was never a single mention by GSRG of any additional conspirators or other contracts anywhere in the Complaint or Amended Complaint (*see* Docs. #1, 115), nor in any of the summary judgment papers (*see e.g.,* Docs. #129, 216). Indeed, it was not until the July 30, 2009 oral argument before the Special Master that GSRG first advanced this contention. At that point GSRG was a day late and a dollar short; it is too late in the game for it to hatch a new theory of liability.[36]

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[36] Similarly, the court fully agrees with the Special Master's recommendation that, to the extent GSRG has attempted to assert a claim under Section 7 (or quasi-Section 7 claim), that assertion is untimely. As an initial matter, the court notes that in its objections to the Special Master's Third Report (Doc. #251), GSRG plainly states it is *not* asserting that Nucor is liable under that section. (*Id.* at 11). Nevertheless, for completeness of the analysis, the court will address the arguments. The Amended Complaint contained no such allegation even though GSRG was told in no uncertain terms that any claim under Section 7 of the Clayton Act must be expressly asserted in the Amended Complaint:

> Unless a claim under Section 7 of the Clayton Act, 17 U.S.C. § 18, is expressly asserted in Plaintiff's amended complaint, discovery on matters unique to Section 7 shall not be permitted. This shall not preclude discovery on matters common to Section 7 and Sections 1 and 2 of the Sherman Act.

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For these reasons, the court agrees with the Special Master's conclusion that GSRG failed to meet its burden of establishing that Casey/Park shared Nucor's alleged objective to restrain trade. Therefore, GSRG's Section 1 claim fails as a matter of law.

D. Count III – Sherman Act Section 2 Conspiracy Claim

In Count III, GSRG alleges a *conspiracy* to monopolize the market for hot rolled coil in the Southeast. To establish a Section 2 conspiracy to monopolize claim, a plaintiff must show: "(1) concerted action deliberately entered into with the specific intent of achieving a monopoly; and (2) the commission of at least one overt act in furtherance of the conspiracy." *Levine v. Central Florida Medical Affiliates, Inc.,* 72 F.3d 1538, 1556 (11th Cir. 1996) (citing *Todorov v. DCH Healthcare Auth.,* 921 F.2d 1438, 1460 n.35 (11th Cir. 1991)). A claim for conspiracy to monopolize does not require a showing of monopoly power.

In Section IV of the Third Report, the Special Master reaffirmed his ruling in the First Report that

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(Doc. #109 at ¶ 3). To be clear, this language was inserted into the court's August 14, 2007 Case Management Order because, in its decision remanding this case, the Eleventh Circuit panel (somewhat curiously) opined that Plaintiff's claims under Sections 1 and 2 of the Sherman Act "implicated" Section 7, *Gulf States Reorganization Group,* 466 F.3d at 966-67, despite the fact that no such claim was asserted in the pleadings. As with the multiple actors theory, any Section 7 claim is too late.

"GSRG simply has not adduced sufficient evidence to enable a rational fact-finder to find in favor of GSRG on its Section 2 Conspiracy [Count III] claims." (Doc. #249 at 15). Accordingly, the Special Master recommended that the court grant summary judgment on GSRG's conspiracy-to-monopolize claim under Section 2 of the Sherman Act. (*Id.*). That recommendation is due to be adopted for two reasons: (1) GSRG has not challenged the recommendation in its objections (Doc. #251); and (2) the recommendation is correct on the merits.

First, GSRG has not asserted any objection to Section IV of the Special Master's Third Report. Nor has GSRG even attempted to argue that the Special Master misstated the law or improperly analyzed the record evidence with regard to the "specific intent" element of its Section 2 conspiracy-to-monopolize claim in Count III of the Amended Complaint. Accordingly, any such objections have been waived – twice over.[37] Therefore, Section IV of the Third Report (Doc. #249) is due to be summarily affirmed and adopted.

Second, to prevail on a Section 2 conspiracy claim, GSRG had to present some evidence that Casey/Park

[37] *See also* Response of Casey Equipment Corporation and Gadsden Industrial Park, LLC, to Plaintiff's Objections to Report and Recommendation of Special Master (Doc. #191 at 24-25) (noting that none of GSRG's objections to the First Report challenged the Special Master's original recommendation that GSRG's conspiracy-to-monopolize claim under Sherman Act § 2 in Count III must be dismissed).

– or, for that matter, any other actor – had a "*specific intent* to help Nucor monopolize the hot rolled steel coil industry." (Doc. #188 at 20). (emphasis added). After the Special Master issued his Third Report, GSRG failed to present any new evidence or argument regarding "specific intent" in support of Count III. The record is devoid of any evidence that Casey/Park had any interest in whether Nucor monopolized the market for hot rolled coil in the Southeast. Casey/Park had its own legitimate reasons for entering into the agreement with Nucor. Therefore, even if GSRG's objections to the Special Master's Report related to its Section 2 claim was not waived (and to be clear, it was), the court agrees on the merits with the Special Master's conclusion that GSRG's Count III conspiracy claim fails – for essentially the same reasons that its Section 1 claim fails.

V. The Court's Review of the Special Master's Fourth Report

Following the issuance of the Special Master's Third Report and Recommendation recommending that Nucor be awarded summary judgment on Counts I and III, the Section 1 and Section 2 conspiracy claims, the court referred the following motions to the Special Master: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261); Nucor's motion to exclude the testimony of Michael Locker (Doc. #172); Nucor's motion to exclude the testimony of John Correnti (Doc. #175); GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235); GSRG's

Motion to exclude the testimony of Dr. Seth Kaplan (Doc. #237); and Nucor's Motion for Summary Judgment on all claims (Doc. #269).

In his Fourth Report, the Special Master recommended the following: Nucor's motion to exclude the testimony of Robert Crandall (Doc. #261) be denied; Nucor's motion to exclude the testimony of Michael Locker (Doc. #172) be granted; Nucor's motion to exclude the testimony of John Correnti (Doc. #175) be granted; GSRG's motion to exclude the testimony of Andrew Dick (Doc. #235) be granted; GSRG's Motion to exclude the testimony of Dr. Seth Kaplan (Doc. #237) be denied; and that Nucor's Motion for Summary Judgment (Doc. #269) be granted. (Doc. #305). The Special Master recommended that Correnti and Locker's testimony be excluded because they would offer opinions for which they are not qualified. He recommended that Dick's testimony be precluded because he cannot testify as to any decisions made by the DOJ and the probative value of his testimony is outweighed by its unfair prejudice. The Special Master also recommended that Crandall's and Kaplan's testimony be allowed despite certain omissions and/or problems associated with such.

In evaluating Nucor's motion for summary judgment, the Special Master evaluated all three of the claims in Plaintiff's Amended Complaint. The Special Master recommended that summary judgement be entered in favor of Nucor on Count II, which he had not previously addressed, as well as counts I and III. The grounds on which the Special Master

recommended summary judgment on Counts I and III in his Fourth Report and Recommendation are in addition to the reasons he recommended summary judgment on those claims in his Third Report and Recommendation. (Doc. #305).

A. The Law of Attempted Monopolization

Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . . .

15 U.S.C. § 2. Thus, Section 2 makes it unlawful for a Defendant to monopolize, to attempt to monopolize, or to conspire to monopolize any part of interstate or foreign trade. This statutory provision covers behavior by a single business entity as well as coordinated action taken by more than one business.

A claim of attempted monopolization involves three distinct elements: "(1) the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spanish Broadcasting System of Fla., Inc. v. Clear Channel,* 376 F.3d 1065 (11th Cir. 2004) (quoting *Spectrum Sports,* 506 U.S. at 456).

> To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power. Monopoly power is "the power to raise prices to supra-competitive levels or . . . the power to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market."

U.S. Anchor Mfg., Inc., 7 F.3d at 994, quoting *American Key Corp. v. Cole Nat'l Corp.,* 762 F.2d 1569, 1581 (11th Cir. 1985).

The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success.[38] *Quality Foods v. Latin Am. Agribusiness Dev. Corp.,* 711 F.2d 989, 996 (11th Cir. 1983). Furthermore, like the monopolization offense itself, the attempt must happen in a defined relevant market. *Id.* The relevant market is defined by both a product and a geographic dimension. *Spectrofuge Corp. v. Beckman Instruments, Inc.,* 575 F.2d 256, 276 (5th Cir. 1978), *cert. denied,* 440 U.S. 939 (1979); *Heatransfer Corp. v. Volkswagenwerk, A.G.,* 553 F.2d 964, 980 (5th Cir. 1977).

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[38] Specific intent to monopolize is a necessary element of a Section 2 offense of actual monopolization. Von Kalinowski at § 9.01(1). Monopoly power is a critical element of a Section 2 offense of actual monopolization, *Id.* at § 8.02(1)

"The offense of [actual] monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.,* 384 U.S. 563, 570-71 (1966).[39]

The first element, monopoly power, requires a showing that the Defendant has the power to control prices in or to exclude competition from the relevant market.[40] *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956). Monopoly power, defined as "the power to control price or exclude

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[39] *See also T. Harris Young,* 931 F.2d at 823; *Austin v. Blue Cross & Blue Shield,* 903 F.2d 1385, 1391 (11th Cir. 1990). "Monopoly power under [Section] 2 requires, of course, something greater than market power under § 1." *Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 480 (1992).

[40] In *United States v. E.I. du Pont de Nemours & Co.,* the Supreme Court stated the classic test for determining the relevant market: "In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce,' monopolization of which may be illegal." 351 U.S. at 395. Factors such as functional interchangeability, responsiveness of the sales of one product to the price changes of the other, and degree of competition from the potential substitute are all relevant to the market inquiry. *See, e.g., Yoder Bros., Inc. v. California-Florida Plant Corp.,* 537 F.2d 1347 (5th Cir. 1976).

competition," is measured with reference to a relevant market.

The second element requires evidence of predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market. *See United States v. Microsoft,* 253 F.3d 34, 58 (D.C. Cir. 2001). A practice is exclusionary if it "harm[s] the competitive *process* and thereby harm[s] consumers." *Id.* "[H]arm to one or more competitors will not suffice" for a Section 2 violation. *Id.*; *see also Consultants & Designers, Inc. v. Butler Serv. Group, Inc.,* 720 F.2d 1553, 1562 (11th Cir. 1983) ("The relevant inquiry is not whether [a company's] present attempt to exclude adversely impacts competition but rather whether its acquisition of the power to exclude competitors had a sufficiently adverse impact on competition to constitute a [Sherman Act] violation.").

A plaintiff bringing a monopolization claim under Section 2 of the Sherman Act must define and prove the relevant market. *See U.S. Anchor Mfg., Inc.,* 7 F.3d at 994 ("Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization or attempt case arising under section 2").

B. The Special Master's Expert Witness Recommendation

1. GSRG's Expert Crandall

The Special Master correctly applied the appropriate legal standards relating to the admissibility of expert testimony under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). Specifically, the Special Master evaluated Crandall's proposed testimony under appropriate Eleventh Circuit analysis: "whether (i) an expert is qualified to testify regarding the matters he intends to address, (ii) the expert's methodology is sufficiently reliable under *Daubert,* and (iii) the expert's testimony assists the trier of fact to understand the evidence or to determine a fact in issue." (Doc. #305 at 3 (citing *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1340-41 (11th Cir. 2003))). Under these standards, the Special Master correctly determined that, although Crandall's proposed testimony was subject to certain deficiencies, those issues went to the weight of his testimony, not its admissibility. (Doc. #305 at 24). Therefore, the Special Master correctly determined that Crandall's testimony should be admitted.

2. GSRG's Experts Correnti and Locker

To evaluate the admission of expert testimony, courts engage in a *three part* inquiry to determine the admissibility of expert testimony under Federal Rule of Evidence 702. Specifically, courts consider whether:

> (1) [T]he expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue.

City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589 (1993)).

In his Fourth Report, the Special Master concluded that the testimony of GSRG's proposed experts, Locker and Correnti, should be excluded under Rule 702 and *Daubert* and its progeny. Specifically, the Special Master found that although both proposed experts opine on how relevant antitrust markets should be defined and whether Nucor possessed market power, neither individual has any relevant training or experience in antitrust economics. Thus, the Special Master concluded that neither individual is qualified under the first prong of the inquiry. Furthermore, the Special Master concluded that even if they had appropriate qualifications, neither person's testimony is based on reliable methodology and thus fails the second prong of the inquiry as well.

The Special Master applied the proper analysis under Rule 702 and *Daubert* in holding that these proposed experts are not qualified. Further, and in

any event, even if one were to assume their status as industry experts qualified them to opine on relevant antitrust market issues, GSRG failed to establish that their opinions were based on reliable methodology. The *Daubert* inquiry is "a flexible one," but the primary focus should be "on principles and methodology, not on the conclusions that they generate." *Daubert,* 509 U.S. at 594-95.

"[T]he proponent of the testimony does not have the burden of proving that it is scientifically correct," but must establish "by a preponderance of the evidence, it is reliable." *Allison v. McGhan Medical Corp.,* 184 F.3d 1300, 1312 (11th Cir. 1999) (citing *In re Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 744 (3d Cir. 1994)). The court's gatekeeping obligation requires that it evaluate a proposed expert's qualifications and methodology in light of what is necessary to explain a particular subject matter to the jury. Interestingly, GSRG's objections to the Special Master's recommendation that the court exclude Correnti and Locker focus solely on the first prong of the inquiry, their alleged qualification to testify as to antitrust market matters based on their status as industry experts; GSRG does not even attempt to argue that Correnti and Locker applied proper and reliable methodologies in reaching their opinions. (*See generally* Doc. #313). Thus, even if the court were to conclude that the Special Master was incorrect in his conclusion that Correnti and Locker did not possess appropriate qualifications to opine on the relevant antitrust market, their proposed testimony is still

due to be excluded due to GSRG's failure to establishing that their methodology is sufficiently reliable under *Daubert. Daubert,* 509 U.S. at 594-95; *see also Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.,* 326 F.3d 1333, 1340-41 (11th Cir. 2003).

Furthermore, there is yet a third prong of the inquiry which these experts' proffered testimony fails to satisfy. The *Daubert* inquiry also requires that the proposed expert's testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Daubert,* 509 U.S. at 589. Thus, even if an expert's testimony were admissible under the first two prongs of the *Daubert* analysis, it may still be insufficient to create an issue of fact to overcome summary judgment. 11B Areeda at ¶ 309; *see also Rebel Oil Co., Inc. v. Atlantic Richfield Co.,* 146 F.3d 1088, 1097 (9th Cir. 1998). In this case, the court finds that Correnti and Locker's proposed testimony not only fails the first two *Daubert* prongs, but also that it is too conclusory to satisfy the third prong, and even if considered, would be insufficient to create an issue of fact precluding summary judgment for Nucor.

3. Nucor's Expert Andrew Dick

Nucor proffered the testimony of Andrew Dick, who had previously served as a staff economist, and later Assistant Chief and Acting Chief of the United States Department of Justice's Antitrust Division,

Competition Policy Section. (Doc. #305 at 24). In particular, he oversaw the Steel Industry Task Force established in 2001 to address consolidation in the steel industry. (*Id.*). Nucor sought to have Dick testify, based upon his experience with the DOJ, about a decision in which he had no involvement. The Special Master correctly concluded that Dick was neither qualified, nor in possession of sufficient data or facts, to offer an opinion on the basis for a particular decision in which he did not participate.

4. Nucor's Expert Kaplan

Kaplan's testimony was proffered by Nucor as an expert of antitrust economic issues and in rebuttal to GSRG's expert Crandall. GSRG's objection to Kaplan's testimony centers on its allegation that Nucor's counsel prepared Kaplan's report for him, rather than on the report's substance. However, the Special Master correctly determined that the communications at issue merely reflected appropriate communication and consultation between attorneys and their expert. Therefore, the Special Master correctly determined that Kaplan's testimony was admissible.

C. The Special Master's Summary Judgment Recommendation

After ruling on the various motions to exclude experts, the Special Master considered Nucor's Motion for Summary Judgment on all claims in GSRG's Amended Complaint. (Doc. #305 at 30). The Special

Master recommended that summary judgment be granted in favor of Nucor on all claims, for reasons *in addition to* those in his Third Report. (Doc. #305 at 45). The court has carefully reviewed the Special Master's Report regarding GSRG's Section 2 attempt to monopolize claim. Mr. Rill's analysis is right on target. Moreover, a review of Nucor's response to GSRG's objections (Docs. #314, 315) shows the flaws and shortcomings of GSRG's arguments. In light of these observations, the court need not devote much time to addressing the parties' arguments, but writes briefly to make a few points.

Nucor raised the following additional arguments in support of its motion for summary judgment: (1) GSRG failed to produce sufficient evidence to prove a relevant product market, an essential element of each of GSRG's claims; (2) GSRG cannot prove its alleged geographic market, also another essential element of each claim; and (3) GSRG cannot establish that Nucor possessed a dangerous probability of achieving monopoly power, an essential element of Counts II and III. (Doc. #305 at 30-31).

As the Eleventh Circuit stated so succinctly in *T. Harris Young,* "Where there is no Market, there is no Monopoly." 931 F.2d 816, 823 (11th Cir. 1991). There, the Eleventh Circuit compared an attempt claim with an actual monopolization claim:

> The offense of monopolization under Section 2 of the Sherman Act contains two elements: "(1) the possession of monopoly power in the

> relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.,* 384 U.S. 563, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). The offense of attempted monopolization requires specific intent on the defendant's part to bring about a monopoly and a dangerous probability of success. *Quality Foods v. Latin Am. Agribusiness Dev. Corp.,* 711 F.2d 989, 996 (11th Cir. 1983). Furthermore, like the monopolization offense itself, the attempt must happen *in a defined relevant market. Id. The relevant market is defined by both a product and a geographic dimension. Spectrofuge Corp. v. Beckman Instruments, Inc.,* 575 F.2d 256, 276 (5th Cir. 1978), cert. denied, 440 U.S. 939, 99 S.Ct. 1289, 59 L.Ed.2d 499 (1979); [*Heatransfer Corp. v. Volkswagenwerk, A.G.,* 553 F.2d 964, 980 (5th Cir. 1977)].

T. Harris Young & Assoc., 931 F.2d at 823 (emphasis added).[41] Proof of a (1) relevant product market and

[41] Proof of these same elements – relevant product market and geographic market – is also required with respect to a Section 1 rule of reason claim such as that asserted by GSRG in Count I of the First Amended Complaint. E.g., *Levine v. Central Florida Medical Affiliates, Inc.,* 72 F.3d 1538, 1551 (11th Cir. 1996) (in Sherman Section 1 case, in order to prove that the alleged conspiracy or agreement had a "potential for genuine adverse effects on competition," the plaintiff must define the relevant market and establish that defendants possessed power in that market). Thus, while the Special Master previously recommended

(Continued on following page)

(2) relevant geographic market are each essential elements to the "attempted monopolization" claim. *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447, 459 (1993) ("Demonstrating the dangerous probability of monopolization in an attempt case . . . requires inquiry into the relevant product and geographic market"); *T. Harris Young,* 931 F.2d at 823 (attempt to monopolize "must happen in a defined relevant market" that is "defined by both a product and a geographic dimension"); *American Key,* 762 F.2d 1569, 1579 ("proof of the relevant product and geographic market is absolutely essential" to plaintiff's attempt to monopolize claims under Sherman Act § 2); *U.S. Anchor Mfg.,* 7 F.3d at 994 (defining the market is a

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summary judgment dismissing GSRG's Section 1 claims based on GSRG's failure to provide significant probative evidence of a conspiracy/agreement to restrain trade, (Docs. #188, 207, 249; *accord American Key Corp.,* 762 F.2d at 1579 n.8 ("significant probative evidence of a conspiracy is an essential element of all Section 1 violations and of a conspiracy to monopolize in violation of Section 2")), GSRG's failure to establish either relevant product market or relevant geographic market is a separate and independent alternative ground for dismissing its Section 1 claims. *E.g., Levine,* 72 F.3d at 1553; *Gulfstream Park Racing Ass'n,* 479 F.3d at 1313 (affirming summary judgment dismissing § 1 claim because expert testimony regarding relevant market was legally insufficient). That is because the relevant market is also an element of a Sherman Act Section 1 claim. *See Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing,* 588 F.3d 908, 919 (6th Cir. 2009) (quoting *Worldwide Basketball & Sport Tours, Inc. v. NCAA,* 388 F.3d 955, 962 (6th Cir. 2005) (listing the requisite elements for a claim under Section 1 of the Sherman Act, the second being unreasonable restraint of trade "in the relevant market")).

"necessary step" in any "monopolization or attempt case arising under Section 2").

Moreover, Eleventh Circuit precedent requires an antitrust plaintiff to proffer expert testimony to establish a relevant product market and a relevant geographic market. E.g., *American Key,* 762 F.2d at 1579 (construction of a relevant economic market cannot be based upon lay testimony); *Colsa Corp. v. Martin Marietta Servs., Inc.,* 133 F.3d 853, 855 n.4 (11th Cir. 1998); *Bailey v. Allgas,* 284 F.3d 1237, 1246 (11th Cir. 2002).

If GSRG fails to proffer such testimony or if GSRG's proffered economic expert testimony is unreliable, legally unsound or unsupported by sufficient facts and data, summary judgment must be granted in Nucor's favor as matter of law under Sherman Act Sections 1 and 2. E.g., *Levine,* 72 F.3d at 1553; *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.,* 479 F.3d 1310, 1313 (11th Cir. 2007); *Bailey v. Allgas,* 284 F.3d at 1247, 1249 (affirming summary judgment where economic expert's evidence was insufficient to establish either relevant product market or relevant geographic market); *American Key,* 762 F.2d at 1581 (affirming summary judgment where plaintiff failed to establish relevant geographic market); *T. Harris Young,* 931 F.2d at 823-25 (affirming grant of JNOV because of plaintiff's failure to define either the geographic dimension or the product dimension of the relevant market). For the reasons explained by the Special Master (and as discussed briefly below), Plaintiff's failure to provide the necessary proof

regarding either an appropriate product market or geographic market is fatal to its claims here.

1. The Relevant Product Market

The Special Master recommended that summary judgment be entered against GSRG because its expert, Dr. Crandall, failed to present sufficient evidence regarding the relevant product market. (Doc. #305 at 43-45). GSRG insists that the relevant product market is black hot rolled coil. Nucor contends that it is necessary to examine both the product at issue, black hot rolled coil, and all reasonable substitutes available to consumers. Specifically, Nucor contends that GSRG's evidence on the relevant product market was insufficient because it failed to consider pickled and oiled hot rolled coil as a substitute for hot rolled coil. The Special Master agreed, as does the court. *See Brown Shoe Co. v. United States,* 370 U.S. 294, 325 (1962); *T. Harris Young & Assoc.,* 931 F.2d at 824; *Heatransfer,* 553 F.2d at 980.

The factors governing definition of relevant product market are discussed in the Eleventh Circuit's opinions in *U.S. Anchor* and *Bailey.* The Eleventh Circuit has noted that any economically meaningful relevant product market definition must take into account evidence of virtually complete "supply substitution." *See U.S. Anchor Mfg.,* 7 F.3d at 995 ("cross-elasticity of production facilities may also be an important factor in defining a product market"); *Bailey v. Allgas, Inc.,* 284 F.3d at 1247 (affirming

failure of proof on relevant product market where plaintiff's expert failed to consider costs of switching); *Rebel Oil v. Atlantic Richfield Co.,* 51 F.3d 1421, 1436 (9th Cir. 1995) (citing Areeda treatise for proposition: "If producers of product X can readily shift their production facilities to produce product Y, then the sales of both should be included in the relevant market."). Whether the relevant product market in this case can be limited solely to "black" HRC, or whether it must also include pickled and oiled HRC and other standard finishes, requires examination of a number of factors, including: (a) demand substitution; (b) supply substitution; (c) price sensitivity; (d) specialized distribution channels; and (e) industry recognition. *See U.S. Anchor,* 7 F.3d at 995; *Bailey,* 284 F.3d at 1246-47.

Dr. Crandall's evidence concerning relevant product market is purely conclusory,[42] not supported by actual data (or evidence) in the record, and does not take into account demand-side or supply-side substitution. For example, the Rule 56 evidence is undisputed that producers can readily increase their black HRC output by simply not pickling and oiling or

[42] For this reason the Special Master correctly determined that even if Dr. Crandall's assertions regarding product market were to be considered, given the overwhelming and undisputed record evidence to the contrary, no reasonable trier of fact could find that the relevant product market in this case is limited solely to black HRC. (Doc. #305 at 44-45).

performing other standard finishing processes.[43] Pickled and oiled hot rolled coil is essentially hot rolled coil that is subjected to one additional process. When pickled and oiled HRC is sold, the price increase is small and based upon a fixed cost-based price differential (as compared to black HRC). Accordingly, if there were a black HRC price increase in the market, producers could (and would) immediately increase their black HRC output.

GSRG argues that because one cannot use both products as substitutes, the pickled and oiled should be ignored. However, this argument ignores the realities of the marketplace. Producers of pickled and oiled hot rolled coil already have the appropriate substitute product by simply foregoing the one additional process required to produce the pickled and oiled product. In light of GSRG's expert's failure to consider the cross-elasticity of supply between these two products, the report is fundamentally flawed and fails to consider the relevant product market. For this reason, GSRG failed to present evidence that Nucor would possess market power in the relevant product market. The court agrees with the Special Master's conclusion that, GSRG's proposed product market definition fails as a matter of law and for this reason

[43] As the Special Master found based upon the undisputed evidence, "producers of 'pickled and oiled' hot rolled coil need only refrain from running black hot rolled coil through the additional process to change production in response to a price increase for black hot rolled coil." (Doc. #305 at 44).

Nucor is entitled to summary judgment on all of GSRG claims.

2. The Relevant Geographic Market

Contrary to GSRG's assertions otherwise, the Special Master faithfully applied the controlling test for geographic market definition in the Eleventh Circuit:[44]

> A geographic market is only relevant for monopoly purposes where [the evidence] show[s] that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area.

T. Harris Young, 931 F.2d at 823, (Doc. #305 at 34). GSRG has the burden of showing that its proposed market definition is correct. To state a Sherman Act claim under either section 1 or section 2, the plaintiff

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[44] In one of its objections, GSRG asserts that the Special Master "compounds his error" by applying the Elzinga-Hogarty LIFO test rather than utilizing an applicable analysis. (Doc. #312 at 8). However, the Special Master referenced the Elzinga-Hogarty test, but only to illustrate a point. (Doc. #305 at 37). The Special Master applied and conducted his analysis under applicable Eleventh Circuit precedent pronounced in *T. Harris Young,* 931 F.2d at 823. (Doc. #305 at 33-36). GSRG is in error on one other point (albeit a moot one here). Courts, including the one cited by GSRG, have utilized the Elzinga-Hogarty as part of an appropriate analysis. *See, e.g., California v. Sutter Health System,* 130 F. Supp. 2d 1109, 1120-21 (N.D. Cal. 2001); *see also U.S. v. Oracle Corp.,* 331 F. Supp. 2d 1098, 1161 (N.D. Cal. 2004).

bears the burden of proof on the alleged relevant market. *Ad-Vantage Tel. Dir. Consult. v. GTE Directories,* 849 F.2d 1336, 1341 (11th Cir. 1987); *see also Double D Spotting Serv., Inc. v. Supervalu, Inc.,* 136 F.3d 554, 560 (8th Cir. 1998). "A relevant market consists of both a product market and a geographic market." *Little Rock Cardiology Clinic PA v. Baptist Health,* 591 F.3d 591, 596 (8th Cir. 2009); *see also Ad-Vantage Tel. Dir. Consult.,* 849 F.2d at 1341; *Community Hosp. of Andalusia, Inc. v. Tomberlin,* 712 F. Supp. 170, 172 (M.D. Ala. 1989). The Special Master correctly applied the test formulated by our court of appeals. In doing so he found that there were at least four independent reasons that GSRG's proposed geographic market does not pass muster. GSRG proposes that the relevant geographic market in this case consists of 10 states in the Southeast (Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Texas), without consideration of any sources which could ship hot rolled coil into the Southeast Region. (Doc. #305 at 33). However, GSRG's expert report indicates that several steel mills outside the Southeast shipped large quantities of hot rolled coil into the Southeast during the relevant time period. In fact, GSRG's expert has also indicated that at least some foreign-produced hot rolled coil enters these Southeast states. (Doc. #305 at 34-36). Therefore, GSRG's 10-state Southeast market is unrealistic.

The undisputed evidence of shipments hot rolled coil into the proposed market suggests that the mills

that previously made these shipments, and others – including domestic and foreign suppliers – could expand production capacity and/or divert hot rolled coil into the Southeast region. As noted by the Special Master, a "geographic market is only relevant for monopoly purposes where these factors show that consumers within the geographic area cannot realistically turn to outside sellers should prices rise within the defined area." (Doc. #305 at 34) (quoting *T. Harris Young & Assoc.,* 931 F.2d at 823). Indeed, some evidence supporting the inference that consumers within the proposed geographic market *could not* turn to sellers outside the geographic market is necessary to survive summary judgment. *See T. Harris Young & Assoc.,* 931 F.2d at 824. GSRG provided no such evidence. To the contrary, the record is replete with evidence that sellers outside GSRG's proposed geographic market could, and did, ship significant quantities of hot rolled coil into GSRG's proposed geographic market. Applying the Eleventh Circuit's teaching in *T. Harris Young* here to the undisputed evidence, it is clear "that consumers within [GSRG's proposed] geographic area can[ ] realistically turn to outside sellers should prices rise within the defined area." 931 F.2d at 823. Therefore, the court agrees with the Special Master's conclusion that GSRG has failed to establish that the relevant geographic market should be limited to the region proposed by GSRG.

3. No Dangerous Probability of Achieving Monopoly Power

For GSRG to establish Counts II and III, the Section 2 attempted monopolization claim and the conspiracy to monopolize claim, GSRG must establish that there was a "dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power." *U.S. Anchor Mfg.,* 7 F.3d at 993 (citing *Spectrum Sports, Inc. v. McQuillan,* 506 U.S. 447 (1993)). "To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power." *U.S. Anchor Mfg., Inc.,* 7 F.3d at 994. Where the alleged monopolist's market share is "less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success . . . as a matter of law." *U.S. Anchor Mfg., Inc.,* 7 F.3d at 1001. There can be no "dangerous probability of success" if the defendant "was never able to maintain a majority position in the market." *U.S. Anchor Mfg.,* 7 F.3d at 1001.

> [B]ecause [defendant] possessed less than 50% of the market at the time alleged predation began and throughout the time it was alleged to have continued, there was no dangerous probability of success . . . as a matter of law.

Id.; *see* Fourth Report at 41 & n.196 (quoting U.S. Anchor).

Applying *U.S. Anchor* to the Rule 56 facts in this case, the Special Master correctly found that:

> Like the plaintiffs in *U.S. Anchor,* GSRG cannot prove that Nucor's market share ever surpassed 50% during the relevant time period, even on the basis of current shipments into GSRG's postulated 10-State market. GSRG concedes that it cannot show Nucor's market share at the inception of the alleged anticompetitive activity in 2002, or in 2003, and that Nucor's market share had only reached *42.7%* by 2004 – *two years after the alleged anticompetitive activity began [and was completed].* Thus, GSRG cannot demonstrate that Nucor ever held a majority position in the market and, like the plaintiff's claim in *U.S. Anchor,* its attempted monopolization claim fails as a matter of law.

Id. at 41 (footnote omitted) (emphasis added).

Second, the Special Master also held that GSRG could not establish a "dangerous probability" of successful monopolization in its proposed "10 Southeast state" hot rolled coil market because it failed to prove that firms located outside that area could not expand or divert capacity to serve the 10-state area in the event of a Nucor-instigated price increase. *Id.* at 42; *see also Bailey,* 284 F.3d at 1256; *Rebel Oil Co.,* 51 F.3d at 1443. For those reasons, the Special Master correctly concluded that GSRG has failed to show that Nucor *ever* surpassed the 50% threshold during the relevant time period following the alleged anticompetitive conduct. Therefore, the court agrees with

the Special Master's recommendation that GSRG has failed as a matter of law to show that Nucor had a dangerous probability of achieving monopoly power.

VI. Conclusion

For all the foregoing reasons, the court finds no error in the Reports of the Special Master and each Report is due to be adopted and the recommendations accepted. A separate order in accordance with this memorandum opinion will be entered.

DONE and **ORDERED** this 29th day of September, 2011.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

Gulf States Reorganization Group, Inc., Plaintiff, v. Nucor Corp., et al., Defendants.	)	Case No.: 1:02-cv-2600-RDP

REPORT AND RECOMMENDATION OF THE SPECIAL MASTER REGARDING THE ADMISSIBILITY OF EXPERT TESTIMONY AND NUCOR'S MOTION FOR SUMMARY JUDGMENT

(Filed Sep. 2, 2010)

In 2002, Gulf States Reorganization Group, Inc. ("GSRG") filed suit against Nucor Corporation ("Nucor"), Casey Equipment Corporation ("Casey"), and Gadsden Industrial Park, LLC ("Park" alleging that they conspired to restrain trade and assist Nucor to monopolize the hot rolled coil steel industry.[1] This Court first dismissed GSRG's case upon the defendants' motion to dismiss; however, on appeal, the Eleventh Circuit

[1] Compl. (D.I. 1).

found that GSRG had pled a cognizable antitrust injury and had standing to bring suit.[2]

GSRG's amended complaint alleges three counts.[3] Count I alleges that Casey/Park and Nucor violated Section I by agreeing to restrain competition in the market for not rolled coil in the Southeast. Count II alleges that Nucor violated Section 2 of the Sherman Act by attempting to monopolize the market. Count III alleges that Nucor and Casey/Park violated Section 2 of the Sherman Act by conspiring to monopolize that market. Casey/Park previously moved for summary judgment on Counts I and III against them,[4] and the Special Master has recommended granting that motion.[5]

This matter is now before the Court on i) Nucor's motion to exclude the testimony of Dr. Robert Crandall; ii) Nucor's motion to exclude the testimony of Michael Locker; iii) Nucor's motion to exclude the testimony of John Correnti; iv) GSRG's motion to exclude the testimony of Andrew Dick; adn v) GSRG's motion to exclude the testimony of Dr. Seth Kaplan. Nucor has also moved for summary judgment on all of GSRG's

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[2] *Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 466 F.3d 961, 966-68 (11th Cir. 2006).

[3] Am. Compl. D.I. 115).

[4] Casey/Park Mot. for Summary Judgment (D.I. 118).

[5] Report and Recommendation of Special Master (D.I. 249).

claims.[6] The Court has ordered each of these motions to be heard by the Special Master.

Having reviewed the record and the briefs submitted by the parties addressing these motions, and having conducted oral argument on May 18, 2010, Special Master James F. Rill respectfully submits this report and recommendation to U.S. District Judge the Honorable R. David Proctor.

I. STATEMENT OF CONTROLLING LEGAL PRINCIPLES FOR ADMITTING EXPERT TESTIMONY

The admissibility of expert testimony is governed by Federal Rule of Evidence ("FRE") 702, which reads:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.[7]

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[6] Nucor Mot. for Summary Judgment (D.I. 269).

[7] Fed. R. Evid. 702.

FRE 702 is meant to reflect, and should be read in conjunction with, the Supreme Court's decisions on expert testimony.[8] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court explained that district courts, before admitting expert scientific testimony, should ensure that the expert's testimony is reliable and relevant.[9] Subsequently, in *General Electric Co. v. Joiner*, the Supreme Court reaffirmed that the district court must act as a "gatekeeper" to ensure that unreliable testimony does not reach the jury.[10] Then, in *Kumho Tire Co. v. Carmichael*, the Supreme Court confirmed that *Daubert* applies to non-scientific expert testimony as well.[11] Further, the Supreme Court emphasized that the district court retains substantial discretion in deciding whether to admit expert testimony.[12]

Thus, under FRE 702, *Daubert*, and its progeny, the district court serves a gatekeeper function in determining whether expert testimony is allowed into evidence. To perform its role as a gatekeeper, the Court must consider whether (i) an expert is qualified to testify regarding the matters he intends to address, (ii) the expert's methodology is sufficiently

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[8] *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

[9] 509 U.S. at 589-92.

[10] 522 U.S. at 148.

[11] 526 U.S. at 150-51.

[12] *Id.* at 152-53.

reliable under *Daubert*, and (iii) the expert's testimony assists the trier of fact to understand the evidence or to determine a fact in issue.[13] These principles guide the consideration of each of the proffered testimony by the putative experts.

In any *Daubert* motion, the party offering the expert testimony bears the "burden of laying the proper foundation for the admission."[14] The expert testimony's "admissibility must be shown by a preponderance of the evidence."[15]

A. John D. Correnti

GSRG has designated John D. Correnti as an expert witness on the commercial practices of the steel industry. Correnti earned an engineering degree and has worked in the steel industry for 39 years. During that time, he has overseen the construction and operation of several steel plants. Correnti also served as the President and CEO of three different steel companies, including Nucor.[16]

GSRG contends that Correnti will testify as an expert on commercial practices in the steel industry.

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[13] *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1340-41 (11th Cir. 2003).

[14] *See Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999).

[15] *Id.*

[16] Correnti Expert Rep. at 1.

Correnti's expert report consists of answers to the following six questions:

1. To what extent, if any, is unprocessed hot rolled coil a separate and distinct product?

2. To what extent, if any, are there regional markets for steel products generally, and specifically hot rolled coil, in the United States?

3. How, if at all, did competitive conditions in the market for hot rolled coil in the Southeast change between 1999 and 2003?

4. To what extent, if any, did Nucor gain the power to control prince in 2003?

5. What would the probable effect on competitive conditions in the Southeast market have been if Gulf States had reopened?

6. Was GSRG's plan to revitalize and reopen the former Gulf States Steel mill feasible?[17]

Nucor disputes GHZSRG's characterization of Correnti's testimony, arguing that Correnti's testimony relates to the relevant geographic market, the relevant product market, and Nucor's market power. Thus, Nucor asks the Court to exclude Correnti's testimony under FRE 702 because i) he is not qualified to offer expert testimony on antitrust markets because he is not an economist; ii) he is not qualified to offer testimony about the hot rolled coil market

[17] *Id.* at 2-6.

during the 2002-04 time period because he was not involved in the market; and iii) his opinions are unreliable.[18]

1. Qualifications

a. Is Correnti testifying about antitrust markets or commercial practices in the steel industry?

As an initial matter, it must be determined whether Correnti's testimony relates to the relevant antitrust markets and Nucor's market power, as Nucor claims, or to commercial practices in the steel industry, as GSRG claims.

Five of the six questions posed to Correnti relate to the relevant antitrust markets or to Nucor's market power. Issue 1 in Correnti's report addresses whether hot rolled coil is "a separate and distinct product," which relates to the relevant product market.[19] In Issue 2, Correnti opines that there are regional markets for hot rolled coil, which addresses the relevant geographic market.[20] Similarly, Issue 3, Issue 4, and Issue 5 address competitive conditions in the market for hot rolled coil in the Southeast, Nucor's ability to control price in 2003, and what effect Gulf States would have had on competitive conditions had

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[18] Nucor Mot. to Exclude Correnti at 7-15.

[19] Correnti Expert Rep. at 1.

[20] *Id*. at 3-4.

it reopened, respectively.[21] Each of these issues relates to Nucor's market power.

Only Issue 6, whether GSRG had a feasible business plan, addresses an area not related to the relevant antitrust markets or Nucor's market power. That issue, however, relates to damages, which the Case Management Order (Dkt. No. 109) deferred until a later date.

Correnti's proposed testimony goes to antitrust economic issues, not to commercial practices of the industry. The Eastern District of Missouri faced similar facts in *Self v. Equilon Enterprises.*[22] In *Self*, the plaintiffs were gas station owners that brought discriminatory pricing and other claims against gasoline providers. The plaintiffs hired an executive from a gasoline company, Richard Berliner, to visit 29 different locations and offer expert testimony on which of those locations competed with the plaintiffs. The defendants moved to strike his testimony because the witness was not qualified to opine on antitrust economics. Like GSRG, the plaintiffs characterized their witness as an industry expert rather than an economic expert:

> In response, Plaintiffs contend that Berliner does not purport to be an antitrust economist, but he should be permitted to testify as

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[21] *Id.* at 4-6.

[22] *Self v. Equilon Enterprises*, No. 4:00-cv-1903, 2007 U.S. Dist. LEXIS 47381 (E.D. Mo. 2007).

> an industry expert. Plaintiffs represent that Berliner's testimony would cover the scope of competition between gasoline retail outlets "as perceived" by those in the gasoline industry. Plaintiffs argue that Berliner is qualified to testify regarding the facts a gasoline marketing executive would consider in evaluating Plaintiffs' station locations, including the locations with which they competed.[23]

The court rejected plaintiffs' characterization of the witness's testimony. In reviewing the testimony, the court found "Berliner's expert report clearly purports to render an expert opinion defining the relevant geographic market."[24] Thus, the court required that the plaintiffs demonstrate that Berliner was qualified to testify about antitrust economics.[25] Here, Correnti should be held to the same standard.

b. Is Correnti qualified to testify about antitrust markets?

Correnti is not qualified to testify as an expert witness about the relevant product market, the relevant geographic market, or whether Nucor possesses market power. Generally, proving a relevant market, either product market or geographic market, requires

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[23] *Id.* at *7.

[24] *Id.* at *8.

[25] *Id.*

providing expert testimony.[26] Similarly, proving market power requires expert testimony.[27] Thus, the witness must be qualified to offer an opinion, not on the economic issues in the industry generally, but on the particular antitrust economic issues.[28]

Although Correnti has significant expertise in the steel industry, he has no economic training. Practical business experience does not qualify someone as an expert in antitrust economics.[29] In *Self*, discussed above, the plaintiff proffered Richard Berliner, as an expert on the gas stations/convenience stores industry. Berliner had eighteen years experience in the industry and worked as the chief operations manager for a firm that owned numerous gas stations/ convenience stores. But Berliner's practical experience failed to qualify him to address the antitrust aspects of the industry:

> The record before the Court fails to establish how Berliner has specialized "knowledge, skill, experience, training, or education," regarding the subjects to which he proffered opinions as mandated by Rule 702. Accordingly, the

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[26] *American Key Corp. v. Cole National Corp.*, 762 F.2d 1569, 1579 (11th Cir. 1985).

[27] *Id.*

[28] *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 799-800 (4th Cir. Md. 1989).

[29] *Self*, 2007 U.S. Dist. LEXIS 47381; *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 214 F. Supp. 2d 530 (D. Md. 2002); *aff'd*, 73 Fed. Appx. 576 (4th Cir. 2003).

> Court finds that Berliner is unqualified to offer an opinion as to the relevant market due to his lack of training and expertise in economics and antitrust.[30]

Similarly, in *Berlyn, Inc. v. Gazelle Newspapers, Inc.*, the plaintiffs alleged antitrust violations in the newspaper industry.[31] The proposed expert, Shaffer, had an MBA and had worked in the newspaper industry for 30 years, including as CFO of the Los Angeles Times, Executive Vice President for the Chicago Sun Times, and Chief Executive of Guy Gannett Communications. He had performed and analyzed predatory pricing analysis for different newspapers throughout his career, and taught courses on media economics, and newspaper costs and pricing.

Despite his background, the court found him unqualified to testify as an expert witness on the relevant market definition. Although Shaffer unquestionably knew the newspaper industry, and the economic issues facing it, that did not qualify him to offer an opinion on antitrust issues: "The experience one has in a given trade, however extensive and however closely related to the 'business side' of that industry, does not render one presumptively qualified to define that industry's relevant markets."[32] Thus,

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[30] *Self*, 2007 U.S. Dist. LEXIS 47381 at *9.

[31] 214 F. Supp. 2d 530 (D. Md. 2002).

[32] 214 F. Supp. 2d at 538.

the Court granted the motion to exclude his testimony.

Here, Correnti does not possess the relevant experience or training to serve as an expert on antitrust economic issues. Thus his testimony as proffered should be excluded.

2. Reliability

Correnti has not offered a reliable methodology to opine on Nucor's alleged market power during 1999-2003. To be admissible, this opinion must be based on a reliable methodology to evaluate Nucor's market power, not simply on steel industry practices.

In both *Self* and *Berlyn*, the courts found that, in addition to being unqualified under FRE 102, the proposed expert witness failed to offer a reliable methodology.[33] In *Self*, the court noted that any expert opinion regarding antitrust markets must be based on a reliable methodology, not simply industry experience and knowledge:

> [T]he principles and methods used by Berliner in reaching his opinion are unreliable inasmuch as Berliner based his opinion on his own experience in the retail motor fuel field, drawing on his observations of the twenty-nine stations over a two-day period of time

[33] *Self*, 2007 U.S. Dist. LEXIS 47381, at *10; *Berlyn*, 214 F. Supp. 2d at 538-39.

> without properly formulating his methodology based on specific facts, research, and established economic principles. Indeed, the Report is devoid of any analysis of economic principles of customer buying patterns in relation to retail price differences between Plaintiffs' stations and the alleged competitor stations.[34]

The court in *Berlyn* reached the same conclusion, finding Shaffer's methodology unreliable because he "based this opinion to a great extent on his own experience in the newspaper industry, drawing on instinct and intuition to patch holes in his methodology that properly should be filled with specific facts, research, and established economic principles."[35]

GSRG has not identified any reliable methodology that Correnti used to evaluate Nucor's market power other than his business experience. Accordingly, Correnti's testimony about Nucor's market power should be excluded.[36]

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[34] *Self*, 2007 U.S. Dist. LEXIS 47381, at **10-11.

[35] *Berlyn*, 214 F. Supp. 2d at 539.

[36] It should also be noted that Correnti had no involvement in the putative relevant market during the 2002-04 time frame. Thus, even were he qualified and had he employed a reliable methodology, he lacks a sufficient grounding in the facts related to the transaction in question to apply those facts to the method of analysis. *See* Correnti Dep. Tr. at 151-55, 250-52.

B. Michael D. Locker

GSRG has identified Michael D. Locker as an expert witness. Locker earned an undergraduate degree in history and a master's degree in sociology. Locker currently is the President of Locker Associates, Inc., which performs consulting and analytical services for the steel industry. Locker also edits and publishes *Steel Industry Update*, a newsletter about the steel industry. Nucor moves to exclude Locker from testifying because he is unqualified under FRE 702 and because he employs an unreliable methodology.[37]

1. Is Locker offering testimony on antitrust economic issues or commercial practices in the steel industry?

As with Correnti, the parties disagree on what topics Locker offers his opinion. Nucor characterizes Locker as offering opinions on the relevant antitrust markets and on Nucor's market power.[38] GSRG disagrees, claiming that it offers Locker as an expert on "commercial practices in the steel industry."[39]

The substance of Locker's report demonstrates that he is offering an opinion on antitrust economic issues. Locker's report concludes:

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[37] Nucor's Mot. to Exclude Locker at 3-13.

[38] *Id.* at 4-6.

[39] GSRG Opp. to Nucor's Mot. to Exclude Locker at 2.

> (a) The appropriate market in which to evaluate the impact of Nucor Corporation's acquisition and disposition of the assets of the former Gulf States Steel, thereby preventing Gulf States Reorganization Group from re-opening the plant, is the market for hot rolled coil steel in the Southeastern United States.
>
> (b) During the 2003-06 period, Nucor Corporation had the power to initiate and sustain increases in the price of hot rolled coil in the Southeastern region without losing sales to its competitors. In contrast, Nucor's competitors lacked the power to initiate price increases without Nucor's concurrence.[40]

These opinions expressly relate to product market and monopoly power, respectively.

Locker also opines that GSRG's business plan to reopen the Gulf States steel mill would have succeeded. That opinion does not invoke antitrust economic issues; consideration of that issue has been postponed.

2. Qualifications

Locker is unqualified to opine on the relevant geographic market or Nucor's market power. Assuming Locker's relevant experience is as GSRG contends – Nucor disputes the quality and quantity of Locker's

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[40] Locker Expert Rep. at 5.

experience[41] – that experience fails to qualify him to testify about antitrust economic issues.

As discussed above, a witness cannot rely on his business background or industry experience to offer an opinion on antitrust economic issues.[42] Locker's experience is similar to that of the expert witness in *Virginia Vermiculite*.[43] In *Virginia Vermiculite*, the plaintiff offered an expert report and testimony from Seth Schwartz, who worked as a consultant in the energy industry. He had provided advice to numerous energy companies that required market analysis and pricing forecasts.[44] Schwartz had even served as an expert witness in other, non-antitrust, cases.[45] But Schwartz had never performed any economic analysis required to determine a relevant antitrust market.[46]

The court granted the defendant's motion to exclude Schwartz under FRE 702. The court found that Schwartz's background analyzing the energy market for investment decisions did not qualify him to render an expert opinion on the energy market as required for antitrust issues:

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[41] Nucor Mot. to Exclude Locker at 4.

[42] *See* § II.A.2 above.

[43] *Virginia Vermiculite v. W.R. Grace & Co.-Conn.*, 98 F. Supp. 2d 729 (W.D. Va. 2000).

[44] *Id.* at 731.

[45] *Id.*

[46] *Id.*

> Schwartz' market analyses generally are utilized "to define a market for investment purposes to best understand the ability to earn profits on different investments in different market situations." . . . Though related to a relevant market determination in an antitrust issue, there are differences between an analysis for business investment and an analysis for antitrust purposes.[47]

For example, defining markets for industry analysis did not require the detail necessary to define an antitrust market.[48] Further, expertise in antitrust markets usually requires experience in industrial organization.[49] Because Schwartz lacked such experience and training, the court excluded Schwartz as unqualified under FRE 702.

In this case, Locker's background and experience suffer the same defects. At his deposition, Locker testified that he is not "an expert in the economic antitrust principles for market definition."[50] Instead, Locker's proffered qualificatoins arise from his consulting work in the steel industry. But Locker's steel industry clients use his market analysis to evaluate business plans and evaluate possible investments.[51] As the court explained in *Virginia Vermiculite*, that

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[47] *Id.* at 732.

[48] *Id.* at 733.

[49] *Id.*

[50] Locker Dep. Tr. at 22.

[51] Locker Dep. Tr. at 26.

market analysis does not provide the experience necessary to opine on antitrust economic issues.[52]

3. Reliability

Nucor also moves to exclude Locker's testimony because his opinions fail to meet FRE 702's reliability requirement. Nucor argues that Locker's proposed testimony on the relevant markets and Nucor's market power are based on an unreliable methodology.

Locker's opinions are unreliable under FRE 702. Despite GSRG's characterization, Locker's expert reports opine on the relevant geographic market, and Nucor's ability to raise prices above the competitive level – market power. Thus, Locker's methodology must be reliable to perform antitrust analysis.[53]

Locker has not used any particular methodology other than relating his experience with the steel industry, which is insufficient. Locker bases his relevant market opinion on i) a "rule of thumb;" ii) hot rolled coil shipment data; iii) his knowledge about shipments from northern mills; and iv) telephone interviews. Similarly, Locker bases his opinion on Nucor's market power on public announcements about price increases in the industry, and his opinion that Nucor was a price leader.

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[52] *Virginia Vermuculite*, 98 F. Supp. 2d at 732.

[53] *Self*, 2007 U.S. Dist. LEXIS 47381, at *10; *Berlyn*, 114 F. Supp. 2d at 538-39.

Locker's "methodology" is based almost entirely on his experience in the steel industry, not applied antitrust economic principles. As discussed above, that fails to meet FRE 702's reliability requirement, and his testimony covering the conclusions he reaches should be excluded on grounds of both lack of qualification and lack of reliable methodology.

C. Dr. Crandall

GSRG designated Dr. Robert W. Crandall as an expert witness. Dr. Crandall's expert report offers his opinion on the relevant geographic market, the relevant product market, and Nucor's market power.[54] Nucor moves to exclude Dr. Crandall's opinion on several grounds:

- *First*, Nucor argues that all of Dr. Crandall's testimony should be excluded because he bases his opinions on insufficient facts or data.
- *Second*, Nucor also argues that Dr. Crandall's testimony about the relevant product market should be excluded because his opinion is conclusory and unsupported by any data in the record.
- *Third*, Nucor argues that Dr. Crandall's testimony about the relevant geographic market should be excluded because it is based on insufficient facts or data, and because he did not reliably apply that data.

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[54] Dr. Crandall Expert Rep. at 1-2.

- *Fourth*, Nucor argues that Dr. Crandall's testimony about Nucor's market power should be excluded because it relies on market share alone, because it relies on insufficient data, and because the data he did rely on does not suggest market power.
- *Fifth*, Nucor argues that Dr. Crandall should not be permitted to testify that Nucor possesses monopoly power because Nucor abandoned their actual monopolization claim.[55]

1. Sufficiency of Facts or Data

Nucor argues that the Court should exclude Dr. Crandall's testimony on 1) geographic market, 2) product market, and 3) market power – his entire report – because those opinions are based on insufficient data or testimony.[56]

Rule 702 allows an expert witness to testify only if that testimony is grounded in "sufficient facts or data."[57] When a court "review[s] the sufficiency of the facts, the court's role is to determine whether sufficient facts exist to support the witness's conclusion, not whether one party's version of the facts should be credited."[58] Similarly, the expert's "data and testimony

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[55] Nucor Mot. to Exclude Dr. Crandall's Testimony at 7-27.

[56] *Id.* at 3.

[57] Fed. R. Evid. 702.

[58] *Allstate Ins. Co. v. Hugh Cole Builder, Inc.*, 137 F. Supp. 2d 1283, 1289 (M.D. Ala. 2001).

need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury."[59] Otherwise, "the weaknesses in the underpinnings of the expert's opinion go to its weight rather than its admissibility."[60]

Courts recognize a difference between an expert lacking certain data, which Nucor alleges, and an expert relying on manipulated data, using irrelevant facts, or ignoring critical factors in determining market power or relevant market.[61] For example, in *Bailey v. Allgas*, the court excluded an expert witness's testimony whose opinion "ignored the location, pricing practices, and transportation costs of plaintiffs' competitors."[62] Similarly, in *NAACP v. Florida*, the court noted that *Daubert* concerns arise when "challenging an expert's opinion based on falsely manufactured data or data not ordinarily relied upon by experts."[63] Otherwise, the completeness of the data is "a determination left to the trier of fact and not the

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[59] *City of Tuscaloosa v. Harcros Chems, Inc.*, 158 F.3d 548, 564-65 (11th Cir. 1998).

[60] *Allstate Ins.*, 137 F. Supp. 2d at 1289 (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir.1988)).

[61] *NAACP v. Florida*, No. 5:00-cv-100Oc-10GRJ, 2002 WL 34419684, at *2 (M.D. Fla. 2002).

[62] *Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, 1245 (N.D. Ala. 2000).

[63] *Id.*

court as the gatekeeper."[67] For example, in *Platypus Wear, Inc. v. Clark Model & Co., Inc.*, the court rejected a *Daubert* challenge based on whether the expert used a sufficiently large data sample.[68] Such a challenge "goes to the weight of the evidence and not its admissibility."[69]

a. Dr. Crandall did not admit that he could not perform his analysis without price to cost data

Nucor claims that Dr. Crandall admitted that he could not opine on whether Nucor had market power because he lacked price and cost data. Dr. Crandall, however, only conceded that he would have liked to have more data:

> A. Well, there's lots of different ways of approaching it The way which I have approached it, because they're the only data I have, is to look at the degree of market concentration and the relevant product and geographic market. *It would be nice to have other indexes such as the relationship of price to cost, the ability to raise price without others expanding output and defeating the price increase, but there are no market price*

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[67] *Id.*, *see also Platypus Wear, Inc. v. Clarke Model & Co., Inc.*, No. 06-cv-20976, 2008 WL 4533914, at *6 (S.D. Fla. Oct. 7, 2008).

[68] 2008 WL 4533914, at *6.

[69] *Id.*

> *data in the market in these proceedings, so I couldn't use it.*[70]

This testimony is consistent with the other excerpts of Dr. Crandall's testimony that Nucor cites – Dr. Crandall would have liked more data, but worked with what he had.[71]

b. Specific facts or data Nucor alleges is missing

Nucor argues that Dr. Crandall should have considered pricing data, price-cost relationship, sales data from years other than 2004, and Nucor's competitors' ability to expand output.[72]

Price data. Nucor argues that. Dr. Crandall's testimony about Nucor's market power should be excluded because he failed to consider any price data from Nucor or other hot rolled coil producers. According to Nucor, failure to consider this data renders his opinion on market power unreliable.[73]

Price-cost relationship. Nucor argues that Dr. Crandall's opinion about the product market definition is not based on sufficient facts or data because Dr. Crandall did not have data on the price-cost relationship between black hot rolled coil and "pickled

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[70] Dr. Crandall Dep. Tr. at 21:4-13.

[71] Nucor Mot. to Exclude Dr. Crandall at 4 (citing Dr. Crandall Dep. Tr. at 53-54, 72-76, 120-21, 155-56).

[72] Nucor Mot. to Exclude Dr. Crandall at 4.

[73] *Id.*

and oiled" hot rolled coil. Without such data, according to Nucor, Dr. Crandall could not reliably determine the cross-elasticity of supply or cross-elasticity of demand between the two products.[74]

Ability to expand output. Nucor states that Dr. Crandall failed to obtain any data about Nucor's competitors' ability to expand output. According to Nucor, that lack of data means that Dr. Crandall cannot reliably testify about Nucor's market power.[75]

2004-only market data. Nucor argues that Dr. Crandall's limiting his data to 2004 – two years after the alleged anticompetitive conduct – precludes him from testifying about Nucor's market power.[76]

* * *

Nucor's criticisms of Dr. Crandall's report are certainly valid to varying degrees. Nucor's challenge to Dr. Crandall's supporting data goes beyond the situation in *Platypus Wear*, which involved a simple challenge to the size of the data sample. But Nucor cites no authority to suggest that any of the deficiencies identified above justify excluding Dr. Crandall. Further, this is not a case, like *Bailey v. Allgas*, where Dr. Crandall ignored data or refused to analyze relevant factors.[77] Rather, Dr. Crandall obviously lacks

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[74] *Id.* at 4-5.

[75] *Id.* at 5-6.

[76] *Id.* at 6-7.

[77] *Bailey*, 148 F. Supp. 2d at 1245.

some data that he would like to have had and that would be important in reaching a definitive antitrust economic conclusion.

The question before the Court, however, is whether "sufficient facts exist to support the witness's conclusion."[78] Because, as discussed below, Dr. Crandall's opinions are based on reliable methodology, properly applied, Nucor's challenges to the facts or data underlying his opinions should not preclude his testimony. Rather, they are "weaknesses in the underpinnings of the experts opinion go to its weight rather than its admissibility."[79] As the Eleventh Circuit has said, to be admissible, Dr. Crandall's "data and testimony need not prove the plaintiffs' case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble.[80]

2. Relevant product market opinion is not based on supply elasticity

Nucor argues that DT. Crandall cannot testify about the relevant product market because he "devotes only a few sentences to a discussion of relevant product market in his original report.[81] Nucor cites Dr. Crandall's conclusion that:

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[78] *Allstate Ins.*, 137 F. Supp. 2d at 1289.

[79] *Allstate Ins.*, 137 F. Supp. 2d at 1289 (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988)).

[80] *City of Tuscaloosa*, 158 F.3d at 565.

[81] Nucor's Mot. to Exclude Dr. Crandall at 7.

> This is a distinct antitrust product market – *i.e.*, it likely reflects the narrowest definition of the market in which a hypothetical monopolist of that product could raise the price of the product by a small but significant and non-transitory amount. While there may be other industrial materials that could be used as a substitute in some downstream uses, these substitutes are not likely to be sufficient to discipline a price increase imposed by the hypothetical markets.[82]

Although that particular passage appears conclusory, Dr. Crandall did consider some appropriate factors to determine a relevant product market.[83] In determining the product market, an expert should take into account "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."[84] Although he relies on general principles regarding the steel industry, Dr. Crandall weighed both the elasticity of supply and the elasticity o demand in his expert report. Dr. Crandall explained that hot rolled coil exhibits a low elasticity of demand because, as a producer's good used in manufacturing, it has few ready substitutes.[85] Similarly, he considered that hot rolled coil also has a

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[82] Dr. Crandall Expert Rep. at 9.

[83] *Id.* at 5.

[84] *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246 (11th Cir. 2002); *see also Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

[85] Dr. Crandall Expert Rep. at 5.

low elasticity of supply due to its high fixed costs and other factors.[86] Thus, he applied all appropriate methodology to address the relevant product market.

3. Dr. Crandall's geographic market definition

Nucor next argues that Dr. Crandall's testimony that the relevant geographic market for black hot rolled coil consists of 10 Southeastern states must be excluded because it lacks a reliable methodology or sufficient data.

a. Elzinga-Hogarty test

Nucor alleges that Dr. Crandall based his geographic market definition on a version of the Elzinga-Hogarty test which has been discredited.[87] Under that test, an economist selects an area and measures what percentage of the relevant product made in the area is shipped outside of that area. The economist then measures what percentage of goods bought within that area were made outside of that area. If there is significant movement into and out of the region, the economist expands the area until the data shows that a low percentage of goods bought in that area came from outside the area ("little in from outside" or

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[86] *Id.*

[87] *See* Kenneth Elzinga & Thomas Hogarty, *The Problem of Geographic Market Delineation in Antitrust Suits*, 18 Antitrust Bull. 45 (1973).

"LIFO"), and that a low percentage of goods made in the area are sold outside that area ("little out from inside" or "LOFI").

Although Dr. Crandall does not specifically refer to the Elzinga-Hogarty test, he bases his geographic market opinion on actual sales patterns. Courts routinely recognize that actual sales patterns are a reliable method to address a relevant geographic market.[88]

Nucor is correct that some courts and commentators have questioned the Elzinga-Hogarty test, but it is not discredited to the point where its use would preclude Dr. Crandall from testifying. Some commentators have criticized specific applications of the Elzinga-Hogarty test, such as applying it to cases of heterogeneous goods, because the test was designed for commodity products. Other courts caution that the Elzinga-Hogarty test, by itself, cannot support a relevant geographic market.[89] The Elzinga-Hogarty test,

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[88] *See*, *e.g.*, *United States v. Marine Bancorp.*, 418 U.S. 602, 619 (1974); *United States v. Pabst Brewing Co.*, 384 U.S. 546, 559 (1966) (fact that 90% of beer sold in state came from brewers in Wisconsin or Minnesota supported limitation of geographic market to Wisconsin); *United States v. Rice Growers Ass'n*, 1986 U.S. Dist. LEXIS 30507 (E.D. Cal. Jan. 13, 1986) (in light of transportation costs and low level of purchases from or sales to other areas, California is a relevant geographic market for purchase of paddy rice for milling).

[89] *See California v. Sutter Heath Sys.*, 84 F. Supp. 2d 1057, 1072 (N.D. Cal. 2000) ("Plaintiff's E-H tests results do not end

(Continued on following page)

however, is an accepted tool in evaluating a relevant geographic market. For example, in *United States v. Oracle*, the court applied the Elzinga-Hogarty test to determine that the relevant geographic market for software sales was a global market.[90] That court found the test to be "an appropriate method of determining the area of effective competition."[91] Other courts similarly have found it appropriate to use the Elzinga-Hogarty test to help define the relevant geographic market.[92]

Moreover, Dr. Crandall did not rely exclusively on sales patterns or the Elzinga-Hogarty test. Dr. Crandall referred to transportation costs, albeit generally, noting that "[t]ransportation costs limit the geographic scope of the market."[93] Dr. Crandall also considered the industry concentration and locations of potentially competing steel producers.[94] Both of these

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the Court's analysis, in any event, as the E-H test is only a starting paint in analyzing a geographic market.")

[90] 331 F. Supp. 2d 1098, 1164-65 (N.D. Cal. 2004).

[91] *Id.* at 1165.

[92] *United States v. Rockford*, 717 F. Supp. 1251 (N.D. Ill.), *aff'd*, 898 F.2d 1278 (7th Cir. 1989); *In re Cola Bottling Co.*, 118 F.T.C. 452, 581-82 (1994).

[93] Dr. Crandall Expert Rep. at 3.

[94] *Id.* at 3-4.

are proper factors to include in addressing the relevant geographic market.[95]

Thus, Dr. Crandall used a reliable methodology in addressing the relevant geographic market.

4. Market Power

Nucor moves to exclude Dr. Crandall from testifying about whether Nucor possesses market power. Nucor argues that i) market share data alone is insufficient to establish market power; ii) Dr. Crandall failed to consider imports in his analysis of market power; iii) a single year market share calculation is insufficient to determine market power, or its ability to obtain market power; and iv) Nucor's market share under Dr. Crandall's analysis is insufficient for Dr. Crandall to conclude that Nucor possesses market power.

Although Nucor makes valid criticisms of the sufficiency of Dr. Crandall's report, his methodology is sufficiently reliable so that it should not be excluded. The criticisms are appropriate in evaluating the weight to be accorded Dr. Crandall's conclusions.

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[95] *United States v. General Dynamics Corp.*, 415 U.S. 486, 491 (1974) observing that a geographic market for coal must consider freight and delivery costs).

a. Market share only

Nucor is correct that market share alone cannot support a finding of market power, but Dr. Crandall does not rely only on market share to determine monopoly power. Dr. Crandall considered several other factors in reaching his opinion on Nucor's market power, or its potential to obtain market power. Dr. Crandall's report lists several general factors about the steel industry that effect whether Nucor could obtain monopoly power:

- High transport costs that limit the geographical scope of the market
- Industry consolidation through bankruptcies and mergers
- A low price elasticity of demand
- A low price elasticity of supply
- Substantial barriers to entry
- Ready availability of information about rivals' costs and capabilities
- A cost advantage over principal rivals

  Restrictions on the supply of imported steel[96]

Although he does not go into great detail, Dr. Crandall discusses each of these factors in support of his opinion about whether Nucor has market power or the

[96] Dr. Crandall Expert Rep. at 3.

ability to obtain market power.[97] Thus, Dr. Crandall's methodology does not rely on market share alone.

b. Competition from imports

Nucor argues that Dr. Crandall improperly excluded 1.3 million tons of imported hot rolled coil from his calculation of market share in the relevant geographic market. As an initial matter, whether Dr. Crandall failed to consider 1.3 million tons of hot rolled coil or a different, much smaller, number is open to question. The 1.3 million tons figure comes from Nucor's expert, Dr. Kaplan. But Dr. Crandall argues that Dr. Kaplan erroneously arrived at that figure because he assumed that all imports that reach a region are consumed in that region.[98]

Further, Dr. Crandall considered whether imports would affect Nucor's market power. Dr. Crandall discussed that the International Trade Commission restricted importing steel within the relevant time period.[99] Dr. Crandall also evaluated data provided by Beddows & Company, and concluded that very little imported steel remained in the Southeastern region.[100] Moreover, Dr. Crandall's expert report that addressed

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[97] *Id.* at 3-8.

[98] Dr. Crandall Dep. Tr. at 204:11-19.

[99] Dr. Crandall Expert Rep. at 6-7.

[100] Dr. Crandall Dep. Tr. at 205:16-20.

imports in his proposed geographic market.[101] Thus, Dr. Crandall refers to imports in determining whether Nucor possessed market power.

c. Single year market share

As noted above, Dr. Crandall's ability to review market data from years other than 2004 does not render his methodology, or its application, unreliable.[102] Rather, it affects the weight that might be given to those opinions.

d. Market share too low as a matter of law

Nucor moves to exclude Dr. Crandall's testimony because Nucor's market share is too low as a matter of law to support a finding of market power. According to Nucor, Dr. Crandall's expert report shows that Nucor possessed market shares or 26% in 2002, 35% in 2003, and 36% in 2004. Thus, Nucor argues he should be precluded from testifying about Nucor's ability to obtain monopoly power because courts often find a 30% market share too low as a matter of law to support an attempted monopolization claim.

Nucor is correct that courts often find such market shares of 30% too low as a matter of law to support an

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[101] Dr. Crandall Expert Rep. at 7-8; Dr. Crandall Dep. Tr. at 150-52.

[102] *See* §V.A.II above.

attempted monopolization claim.[103] Further, other courts have excluded expert testimony regarding market power where the expert found a market share at levels presumed too low to find monopoly power.[104] GSRG, however, disputes Nucor's characterization of Dr. Crandall's findings. In fact, Nucor's brief implicitly acknowledges that by stating that Dr. Crandall asserted in his revised report that Nucor's market share was 56%.[105] GSRG also argues that Dr. Crandall's report suggests a market share of up to 76%.[106]

Further, those cases that find a market share below 30% insufficient as a matter of law stop short of imposing a bright-line rule. For example, the Ninth Circuit has observed that a market share below 30% is presumptively invalid, suggesting that the presumption can be overcome: "most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price."[107] Leading treatises similarly stop short of declaring a bright

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[103] *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1438 (9th Cir. 1995) ("When the claim involves attempted monopolization, most cases hold that a market share of 30 percent is presumptively insufficient to establish the power to control price."); *Bailey*, 148 F. Supp. 2d at 1246 (excluding experts opinion on market power when market share was too low as a matter of law to find market power).

[104] *Bailey*, 148 F. Supp. 2d at 1245-46.

[105] Nucor Mot. to Exclude Dr. Crandall's Testimony at 25.

[106] GSRG Opp. to Mot. to Exclude Dr. Crandall's Testimony at 25 (citing Dr. Crandall Expert Rep. at p. 12, Table 4).

[107] *Rebel Oil*, 51 F.3d at 1438.

line rule: "Although there are no precise market share boundaries, and while other factors discussed below affect the analysis, courts . . . virtually never find shares of less than 30% sufficient."[108]

Although it is an extremely close question, the fact that parts of Dr. Crandall's report suggest market shares around 30% should not require excluding his testimony but goes to the weight to be accorded it.

5. Testimony as to actual monopolization

Finally, Nucor argues that Dr. Crandall should not be able to offer testimony in support of an actual monopolization claim because GSRG abandoned that claim.[109] Nucor then argues that, because Dr. Crandall admitted that Nucor's alleged actions could only sustain, but not create, monopoly power, Dr. Crandall has admitted that Nucor's alleged attempted monopolization could not work.[110] Thus, GSRG has no attempted monopolization claim.

Of course, Dr. Crandall should not be permitted to offer irrelevant testimony.[111] But nothing in Dr. Crandall's report or testimony suggests that he will

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[108] ABA Antitrust Law Developments, 313-14 (6th ed. 2007).

[109] Nucor Mot. to Exclude Dr. Crandall's Testimony at 26-31.

[110] *Id.* at 28-30.

[111] Fed. R. Evid. 402.

testify about an abandoned theory. If he does, that will be an issue for the trial court when and if this case gets to trial. Further, Dr. Crandall's deposition testimony that Nucor cites does not concede that Nucor could not obtain monopoly power. Nucor's characterization of his testimony is an argument going to the weight of that testimony.

* * *

In conclusion, there are significant gaps in the data underlying Dr. Crandall's report, but those gaps should go to the weight that should be given to his opinions, not their admissibility. The purpose of FRE 702 is "to make certain that an expert employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[112] Here, Dr. Crandall used the appropriate rigor in formulating his opinions; the deficiencies in his report relate to the lack of data, not to a poor methodology. Thus, those gaps should be evaluated at the summary judgment stage.

D. Dr. Andrew Dick

Nucor submitted an expert report from Andrew R. Dick. Dr. Dick served with the United States Department of Justice's Antitrust Division ("DOJ") from 1996 to 2003.[113] Dr. Dick worked, first, as a staff

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[112] *Kumho Tire*, 526 U.S. at 152, 119 S.Ct. 1167.

[113] Dick Expert Rep. at 3.

economist and later as Assistant Chief and Acting Chief of the Competition Policy Section.[114] During that time, Dr. Dick oversaw the Steel Industry Task Force that the DOJ established in 2001 to address what it expected to be a wave of consolidation in the steel industry.[115]

On March 14, 2002, Nucor submitted a Hart Scott Rodino Act filing in connection with its Trico purchase. After the Steel Industry Task Force reviewed the filing, the DOJ granted early termination to the transaction review.

Although Dr. Dick did not work on the Nucor transaction himself, he reviewed the case file and is familiar with the Steel Industry Task Force's operation, policies, and procedures. Dr. Dick proposes to testify about why the DOJ decided to grant early termination for the transaction.[116] Specifically, Dr. Dick concludes as follows:

> Based on my direct knowledge and experience with the DOJ's merger review practices and procedures, I conclude that the grant of early termination reflected a conclusion by the Steel Task Force and senior DOJ officials that Nucor's proposed acquisition of Trico did not raise any significant antitrust concerns

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[114] *Id.*

[115] *Id.* at 4-5.

[116] Dick Expert Rep. at 17.

> requiring further investigation or enforcement action.[117]

GSRG moves to exclude Dr. Dick's testimony on two grounds. First, GSRG argues that Dr. Dick's opinion lacks reliability under FRE 702.[118] Second, GSRG argues that Dr. Dick's testimony is not relevant under FRE 402 or, if relevant, its probative value would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury under FRE 403.[119]

1. Federal Rule of Evidence 702

Dr. Dick's testimony does not meet the requirements of FRE 702. Dr. Dick is not qualified to offer an opinion on a specific decision made by the DOJ, nor does he possess sufficient data or facts to offer that opinion.

The case cited by GSRG, *Kunz v. City of Chicago*, is on point.[120] In that case, the defendant offered as an expert witness George Andrews, a former prosecutor from the Cook County State's Attorney's office. The witness proposed to testify about why the prosecutor's office would have entered a *nolle prosequi* plea in

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[117] *Id.*

[118] GSRG Mot. to Exclude Dick.

[119] *Id.*

[120] No. 01 C 1753, 2004 WL 2980642, at *5-6 (N.D. Ill. Dec. 23, 2004).

a particular case. Andrews had not worked on the case, but had reviewed the case file. The defendant moved to exclude Andrews because he was not qualified to opine on why the Cook County State's Attorney's office made a decision in a particular case.

The court agreed with the defendant and precluded the witness's testimony. The court acknowledged that Andrews was intimately familiar with the Cook County State's Attorney's office as well as their practices and procedures.[121] Nevertheless, the court found him unqualified to opine on a particular decision made in a specific case:

> However, Andrews is attempting to offer an expert opinion on the practices of that department as they related to a specific case arising after his tenure . . . Andrews's experience does not provide the necessary qualifications under Rule 702 to opine on the reasons for the Assistant State's Attorney's decision to change its election in Kunz's case: Andrews is simply not in a position to determine with any reliability why prosecutors chose to enter a *nolle prosequi* on the PSMV charge.[122]

The court further found that Andrews lacked sufficient facts or data to opine on why the County State's Attorney's office made any particular decision.

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[121] *Id.* at *5.

[122] *Id.*

Despite the fact that Andrews had reviewed the case file, his opinion on the reasons that the prosecutors took any particular action would be mere speculation: "Despite his qualifications, I believe that Andrews's opinion that the State entered a *nolle prosequi* because it believed it could not prove its case is simply too speculative to be relied upon as evidence."[123]

Dr. Dick's proposed testimony suffers from the same defect. Although Dr. Dick has considerable experience at the DOJ, he is not qualified to opine on why his colleagues granted early termination in a particular case. Further, even though he reviewed the case file, he cannot have sufficient facts or data to opine on the reasons behind his colleagues' decision in a particular case.

2. Federal Rules of Evidence 402 and 403

Dr. Dick's testimony should also be excluded under FRE 403. Even if Dr. Dick's testimony would be relevant under FRE 402, relevant evidence is still inadmissible if its "probative value is substantially outweighed by the danger of unfair prejudice."[124]

Here, there is a substantial risk that Dr. Dick's testimony would imply to a jury that the DOJ tacitly

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[123] *Id.* at *6.

[124] Fed. R. Evid. 403.

approved of Nucor's actions and, thus, the merger could not form the basis for any civil liability.

E. Dr. Seth Kaplan

Nucor has offered Dr. Seth Kaplan as an expert witness on antitrust economic issues, including his rebuttal report and testimony to Dr. Crandall's expert report. GSRG moves to exclude his testimony and report on the grounds that the rebuttal report was substantially prepared by Nucor's counsel, Wiley Rein.

Under FRE 702, expert testimony cannot be reliable if the proffered opinions are those of counsel rather than the expert.[125] GSRG claims that Wiley Rein provided the substance of Dr. Kaplan's rebuttal report because Wiley Rein provided Kaplan with an outline for the rebuttal report, and provided a draft "suggested approach" for the report's introduction. Further, the draft outline contains a date stamp suggesting that it was prepared prior to Wiley Rein's meeting with Dr. Kaplan to discuss the rebuttal report. These communications, along with Wiley Rein's longstanding relationship with Kaplan, suggest that Kaplan is merely repeating Wiley Rein's opinion and arguments rather than his own.

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[125] *Trigon Ins. Co. v. United States*, 204 F.R.D. 277, 294 (E.D. Va. 2001).

In response, Wiley Rein explained that the communications that GSRG cites were routine interaction between counsel and an expert witness. With regard to the outline, Wiley Rein submitted a declaration from John Wyss, a Wiley Rein attorney. Mr. Wyss declared that, after receiving Dr. Crandall's expert report from GSRG, he made notes on possible rebuttal points, but he never showed those notes to Dr. Kaplan.[126] Two days later, he and two other Wiley Rein attorneys met with Dr. Kaplan to discuss the rebuttal report.[127] Wyss stated that he took notes at the meeting and, at Dr. Kaplan's request, memorialized them in a bullet point outline.[128] Wyss used his own original notes, dated "5/20/08", to make the outline, and then sent that outline to Dr. Kaplan the next day.[129]

Regarding the draft introduction, Wiley Rein submitted a declaration from Bert Rein. Rein stated that he received draft sections of Dr. Kaplan's rebuttal report for review.[130] Based on those sections, Rein drafted a suggested introduction and provided it to

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[126] Nucor Opp. to GSRG Mot. to Exclude Dr. Kaplan, at Ex. A, Wyss Decl. ¶¶ 2-3.

[127] *Id.*

[128] *Id.* at ¶ 4.

[129] *Id.* at ¶¶ 5-6.

[130] Nucor Opp. to GSRG Mot. to Exclude Dr. Kaplan, at Ex. B, Rein Decl. ¶ 3.

Dr. Kaplan.[131] Rein says that he relied on Dr. Kaplan's own material for the substance of the introduction.[132]

At a meet and confer session on GSRG's motion to exclude Dr. Kaplan, Wiley Rein identified each fact in GSRG's motion with which it disagreed. GSRG filed the motion anyway, and now Nucor asks for sanctions under FRCP 11.

1. Motion to exclude

Although the documents that GSRG attaches to its motion to exclude appear to raise a question as to Wiley Rein's preparation of the report, the firm's affidavits reveal that they reflect the routine interaction between counsel and an expert witness. Further, Dr. Kaplan testified that the report was his work, not Wiley Rein's.[133] Thus, nothing indicates that Dr. Kaplan's expert report was "drafted entirely by counsel" or otherwise represents Wiley Rein's desired opinion rather than Dr. Kaplan's own analysis.[134]

2. Motion for sanctions

Wiley Rein has asked for sanctions under FRCP 11(c). Sanctions are appropriate under FRCP 11 if a

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[131] *Id.*

[132] *Id.*

[133] Dr. Kaplan Dep. Tr. at 23-24.

[134] *Bekart Corp. v. City of Dyersburg*, 256 F.R.D. 573, 578-79 (W.D. Tenn. 2009).

motion is filed, *inter alia*, for an improper purpose, or without any legal or factual support.[135] Here, GSRG was not required to accept Wiley Rein's explanation about its communications with Dr. Kaplan. The fact that the outline was dated before Wiley Rein's meeting with Dr. Kaplan, and Dr. Kaplan's long-standing relationship with Wiley Rein, made GSRG's motion plausible.

F. Conclusion regarding expert witnesses

Correnti and Locker should be precluded from offering expert testimony because they would offer opinions for which they are not qualified. Similarly, Dick should be precluded from offering expert testimony because he cannot opine on a particular decision made by the DOJ. He would he speculating as to the basis of that decision, and any probative value to his testimony would be outweighed by its unfair prejudice.

Dr. Crandall has significant omissions with respect to his expert report, but those gaps are from a lack of data, not a poor methodology. Based on his qualifications, and the fact that he has a legitimate factual basis for the opinions that he reaches, he should not be precluded from testifying.

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[135] Fed. R. Civ. P. 11(b).

Finally, the motion to exclude Dr. Kaplan should be denied, as should the cross-motion for sanctions. What, at first, looked like problematic documents, turned out to be legitimate back-and-forth between counsel and an expert witness.

II. NUCOR'S MOTION FOR SUMMARY JUDGMENT

A. Legal Standard for Summary Judgment

Nucor has moved for summary judgment on all counts of GSRG's First Amended Complaint. Summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[133] As the moving party, Nucor must identify an essential element of GSRG's case that GSRG cannot establish based on the evidence in the record.[134] To meet that burden, Nucor must either i) submit affirmative evidence that negates an essential element of the nonmoving party's claim, or ii) demonstrate to the court that the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim.[135]

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[133] *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. Proc. 56(c)).

[134] *Id.* at 322-23.

[135] *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 249 (1986); *Celotex*, 477 U.S. 322-33 (Rehnquist, J., dissenting).

In determining whether any evidence could support GSRG's claim, the Court "must construe all reasonable inferences in favor of the nonmoving party."[136] To defeat Nucor's motion for summary judgment, however, GSRG may not rely "merely on the allegations or denials in its own pleadings; rather its response must – by affidavits or as otherwise provided in [Rule 56] – set out specific facts showing a genuine issue for trial."[137] "Where the record taken as a whole could not lead a rational trier of fact to find for [GSRG], there is no 'genuine issue for trial.'"[138]

Nucor bases its motion for summary judgment on three grounds. First, Nucor argues that GSRG failed to produce sufficient evidence to prove a relevant product market, which is an essential element for all of GSRG's claims.[139] Second, Nucor argues that all of GSRG's claims should be dismissed because GSRG cannot prove its alleged relevant geographic market.[140] Finally, Nucor argues that GSRG cannot prove its claim for attempted monopolization claim under Count II because GSRG cannot establish that Nucor

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[136] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

[137] FED. R. CIV. P. 56(e).

[138] *Matsushita*, 475 U.S. at 587 (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)).

[139] Nucor Mot. for Summary Judgment at 7-9.

[140] *Id.* at 9-11.

possessed a dangerous probability of achieving monopoly power.[141]

B. Admission of Dr. Crandall's testimony would not in itself create a genuine issue of material fact

Dr. Crandall's testimony, even if admitted under FRE 702, does not preclude summary judgment.[142] The Eleventh Circuit has acknowledged that the Federal Rules permitting expert testimony are "not intended . . . to make summary judgment impossible whenever a party has produced an expert to support its position."[143] A motion to exclude under FRE 702 and *Daubert* tests only the expert's "principles and methodology, not on the conclusions that they generate."[144] Thus, "[w]hether [an expert's] analysis is an economically valid method is [a] different question

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[141] *Id.* at 11-15.

[142] This Report recommends excluding the testimony of Correnti and Locker for lack of qualification and for lack of a reliable methodology. Even if admitted, their testimony is too conclusory to support a finding for GSRG's proposed relevant geographic market, GSRG's proposed product market, or a finding regarding Nucor's market power. *See Bailey,* 148 F. Supp. 2d at 1246 (finding that excluded expert's unreliable opinions, "even if admissible, are insufficient evidence to support a finding of market power").

[143] *Evers v. General Motors Corp.*, 770 F. 2d 984, 986 (11th Cir. 1985).

[144] *Daubert*, 509 U.S. at 595.

from whether it is legally sufficient to support [an antitrust] claim."[145]

Based on these principles, Dr. Crandall's testimony could be admissible under FRE 702, yet insufficient to create an issue of material fact precluding summary judgment. In an antitrust case, "a motion for summary judgment where the relevant economic testimony has not been excluded presumes that the economist's methodology is acceptable," but the Court still may find "that the [expert's] conclusions do not follow, are not appropriate to the facts of the case, demonstrate that there is no 'issue of material fact,' or draw a factual conclusion that is impermissible as a matter of law."[146] As the Ninth Circuit observed in *Rebel Oil*, an expert's testimony may be admissible, but insufficient to support a jury verdict on the elements of the claims about which the expert is testifying:

> The district court's conclusion at summary judgment that [the expert's] testimony was not legally sufficient evidence to create a question of material fact . . . is not inconsistent with its conclusion following the *Daubert* hearing that [the expert's] methodology was sound. An expert witness may be

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[145] *Id.*

[146] IIB Phillip E. Areeda & Herbert H. Hovenkamp, Antitrust Law ¶ 309 (3d ed. 2007).

> qualified to testify even though the expert's conclusions are legally incorrect.[147]

Dr. Crandall, therefore, may be permitted to testify about the relevant geographic market, the relevant product market, and Nucor's market power, yet that testimony may fail to support a jury verdict on those issues. In short, while Dr. Crandall's testimony, if admitted, may supply "a piece of the puzzle," it is not, standing alone, sufficient to provide the answer to the puzzle and, therefore, not enough to prevent the entry of summary judgment, as herein below discussed.[148]

In the event that the Court does exclude Dr. Crandall's testimony under Rule 702, Nucor would be entitled to summary judgment. The Eleventh Circuit requires expert testimony to establish a relevant product market and a relevant geographic market, which are essential elements of GSRG's claim.[149] Thus, without Dr. Crandall's expert testimony, GSRG cannot prove a relevant geographic market or a relevant product market as a matter of law.

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[147] *Rebel Oil*, 146 F.3d at 1097.

[148] *Cf. City of Tuscaloosa*, 158 F.3d at 565 ("As circumstantial evidence, [the expert's] date and testimony need not prove the plaintiff's case by themselves; they must merely constitute one piece of the puzzle that the plaintiffs endeavor to assemble before the jury.").

[149] *See, e.g., Bailey*, 284 F.3d at 1246; *American Key*, 762 F.2d at 1279.

C. Relevant Geographic Market

GSRG alleges that the relevant geographic market consists of 10 states in the Southeast: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas (the "Southeast"). The relevant geographic market is "the area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies."[150] In other words, "[t]he relevant geographic market for antitrust purposes is some geographic area in which a firm can increase its price without 1) large numbers of its customers quickly turning to alternative supply sources outside the area; or 2) producers outside the area quickly flooding the area with substitute products."[151] The boundaries of the relevant geographic market depend on a number of factors, including "[p]rice data and such corroborative factors as transportation costs, delivery limitations, customer convenience and preference, and the location and facilities of other producers and distributors."[152]

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[150] *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *see also Bailey*, 284 F. 3d at 1247 (same).

[151] Herbert H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice* § 3.6, at 113 (2d ed. 1999).

[152] *T. Harris Young & Assocs., Inc. v. Marquette Elecs., Inc.*, 931 F.2d 816, 823 (11th Cir.1991).

1. Shipments from domestic producers

The critical question in testing Dr. Crandall's proposed geographic market is whether his conclusion is based on record evidence about whether steel mills located outside the Southeast could defeat a small but significant nontransitory increase in price ("SSNIP") by Nucor by expanding capacity or diverting production to ship hot rolled coil into the Southeast.[153] Despite GSRG's claim that proving potential competitors' response to a price increase would prove difficult and require speculation, courts and federal regulators consistently require and evaluate such evidence.[154] In *T. Harris Young*, the Eleventh Circuit explained that a "geographic market is only relevant for monopoly purposes where [the evidence] show[s] that consumers within the geographic area cannot realistically turn to outside sellers *should prices rise within the defined area*."[155] Thus, to survive summary judgment, GSRG must present "evidence that could support an inference that consumers within the [proposed geographic market] could not turn to

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[153] *Id.*; *see also* U.S. Dept. of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4.2.2 (Aug. 19, 2010) ("Merger Guidelines"); *see also, FTC v. Tenet Health Care Corp.*, 186 F.3rd 1045 (8th Cir. 1999); *United States v. Country Lake Foods, Inc.*, 754 F. Supp. 669 (D.Minn. 1990); IIB Arreda & Hovenkamp, Antitrust Law ¶¶ 538-538b (3d ed. 2007).

[154] *Id.*

[155] *T. Harris Young*, 931 F.2d at 823.

outside sellers if the prices increased within [that] area."[156]

GSRG concedes, however, that Dr. Crandall does not know whether steel mills outside the Southeast could respond to a price increase by Nucor.[157] In its response to Nucor's statement of facts, GSRG states that Dr. Crandall "could not analyze the ability of mills located outside the postulated 10-state area to increase or divert production in response to an increase in hot rolled coil prices in that area."[158] As a consequence, a critical element in the establishment of a geographic market is absent.

Moreover, undisputed evidence in the record suggests that several steel mills outside the Southeast could, in fact, respond to a SSNIP by Nucor by increasing production or diverting capacity into the Southeast. Dr. Crandall's expert report identifies several steel mills outside the Southeast that shipped large quantities of hot rolled coil into the Southeast during the relevant period.[159] For example, in 2004, U.S. Steel's mill in Granite City, Illinois, shipped 381,000 tons (27% of its total production) of steel into the Southeast.[160] Thus, the Granite City mill shipped

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[156] *Id.* at 824.

[157] *Id.*

[158] GSRG's Revised Objections to Nucor's Statement of Facts ¶ 53.

[159] Dr. Crandall Revised Expert Rep. at p.3, Table 2.

[160] *Id.*

a greater volume of hot rolled coil into the Southeast than two mills – Nucor's mill in Berkeley, South Carolina, and U.S. Steel's mill in Fairfield, Alabama – that are actually located in the Southeast.[161] Similarly, in 2004, Arcelor-Mittal's mill in IWH-West, Indiana, shipped 246,000 tons (22% of its production) of hot rolled coil into the Southeast, and U.S. Steel's plant in Gary, Indiana, shipped 143,000 tons (10% of its production) of hot rolled coil into the Southeast.[162]

In fact, Dr. Crandall identifies 21 different steel mills outside the Southeast that shipped some hot rolled coil into the Southeast during 2004, compared to six mills actually located in the Southeast.[163] Similar shipments occurred in 2002 and 2003. In 2002, 14 steel mills outside the Southeast shipped hot rolled coil into the Southeast, and, in 2003, 15 steel mills located outside the Southeast made shipments into the Southeast.[164]

The number of steel mills located outside the Southeast that shipped hot rolled coil into the Southeast is strong evidence that one or more of those firms could prevent Nucor from sustaining a price increase in the Southeast.[165]

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[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.* at 14, Table 6.

[165] *T. Harris Young*, 931 F.2d at 824.

Eleventh Circuit precedent is directly on point and supports this conclusion.[166] In *T. Harris Young*, the plaintiff prevailed at trial on its claim that the defendant attempted to monopolize the market for paper used in electrocardiograph machines. The jury found that the plaintiff had proven a relevant geographic market of a nine-state area in the southeast based on evidence that customers often needed emergency deliveries and that customers paid the delivery charges for the paper.[167] Those factors, according to the plaintiffs, demonstrated a customer preference for regional suppliers.

On appeal, the Eleventh Circuit overturned the jury verdict because the evidence was insufficient to support the geographic market. In overturning the verdict, the court found that "the evidence indicated that consumers could and did turn to outside suppliers."[168] That evidence included the fact that 6 of the 15 firms that supplied customers inside the proposed geographic market were located outside that market.[169] As explained above, the evidence in Dr. Crandall's expert report and revised expert report similarly indicates that consumers in the Southeast could and did turn to outside suppliers to purchase hot rolled coil.

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[166] *Id.*

[167] *Id.* at 820.

[168] *Id.* at 824.

[169] *Id.*

GSRG argues that the Southeast is a proper geographic market because the majority of producers in the Southeast ship the majority of their hot rolled coil to consumers in the Southeast,[170] but this approach fails to take account of the equally important pattern of shipments into the Southeast from mills located outside the 10-state area. Table 3 in Dr. Crandall's revised expert report shows that for 2004, approximately 40% of the hot rolled coil shipped to locations in the Southeast was produced by steel mills located outside the Southeast.[171] Similarly, GSRG concedes that "21% of commercial black HRC product produced at mills located in the postulated 10-state area in 2004 was shipped to customers located outside that area."[172]

Thus, even if current shipment data were a significant indicator of a relevant market, courts require a higher percentage of a product's sales to originate from suppliers in that area than appears from the evidence in the record.[173] For example, the

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[170] As noted above, Dr. Crandall's analysis relies on actual shipment patterns to determine the relevant geographic area.

[171] Dr. Crandall Revised Expert Rep. at 3, Table 2. Dr. Crandall does not calculate this percentage, but it can be easily calculated by adding the total shipments for Southeastern Plants and for Non-Southeastern Plants listed in Table 2.

[172] GSRG's Revised Objections to Nucor's Statement of Facts ¶ 30.

[173] *See, e.g., Marine Bancorp.*, 418 U.S. at 619; *Heerwagen v. Clear Channel Communications*, 435 F.3d 219, 230-31 (2d Cir. 2006).

Elzinga-Hogarty test, which relies on actual shipment patterns, arose from an article proposing that "an area ***could not*** be a relevant geographic market if more than 25 percent of the product produced in the area was sold outside, or if buyers inside purchased more than 25% from outside [that market.]"[174] Elzinga & Hogarty published a follow-up article suggesting that if less than 10% of the product produced in the area was sold outside, or if buyers inside purchased less than 10% from outside, the area likely constituted a geographic market.[175] Crossover percentages between 10% and 25% are sometimes referred to as "weak" markets.[176]

The Eleventh Circuit does not appear to have accepted evidence of a "weak" market to establish a relevant geographic market. Courts in other Circuits frequently reject percentages suggesting a "weak" market under the Elzinga-Hogarty test as insufficient evidence to support a geographic market. For example, in *Gordon v. Lewistown Hospital*, the Third Circuit rejected a two-county market for hospital services because more than 20% of patients came

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[174] IIB Areeda & Hovenkamp, Antitrust Law at ¶ 550 at p.314 (citing Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation in Antimerger Suits*, 18 Antitrust Bull. 45 (1973)).

[175] *Id.* at p. 314 (citing Kenneth G. Elzinga & Thomas F. Hogarty, *The Problem of Geographic Market Delineation Revisited: The Case of Coal,* 23 Antitrust Bull. 1 (1978).

[176] Areeda & Hovenkamp, Antitrust Law at ¶ 550 at p.314.

from outside those two counties.[177] Similarly, in *California v. Sutter Health System*, the plaintiffs proposed defining a relevant geographic market based on less than 15% crossover, where the defendants argued that the proper test required showing less than 10% crossover.[178] The court rejected the 15% threshold, noting that "[c]ourts have generally acknowledged the 90% level of significance."[179]

As a result of Dr. Crandall's failure to consider fully both the likely response of domestic mills outside the proposed market to make sufficient shipments into the market to defeat a Nucor-imposed SSNIP, as well as the undisputed evidence that current shipments from such domestic mills are sufficient to defeat the price increase, there is insufficient evidence in the record to support GSRG's geographic market and Nucor's motion for summary judgment should be granted on these grounds.

2. Shipments from foreign producers

The shipment data presented by Dr. Crandall suffers in another respect in that he did not include foreign imports in his calculations. The parties differ on the amount of hot rolled coil that was imported into the Southeast from foreign producers, but Dr.

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[177] 423 F.3d 184 (3d Cir. 2005).

[178] 84 F. Supp. 2d 1057, 1069-70 (N.D. Cal. 2000).

[179] *Id.* at 1070.

Crandall concedes that at least some foreign-produced hot rolled coil enters the Southeast. For example, Dr. Crandall's report includes two charts reflecting foreign imports, one taken from Nucor's brief submitted to the ITC, and another derived from an ITC publication.[180] Although the amounts from the two tables do not correspond, both show that some hot rolled coil was imported into the United States from 2001 through 2004. Dr. Crandall's report acknowledges that at least some amount of that hot rolled coil remains in the Southeast, noting that "a large share of these imports move north" and that "imports appear to be well restrained in the Southeast."[181] Thus, the share of hot rolled coil shipped to destinations in the Southeast that was produced outside the Southeast is even higher than Dr. Crandall originally calculated, since those calculations consider only shipments from domestic steel mills.

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Although Dr. Crandall considered other factors in determining the geographic market, such as transportation costs and the location of competing mills,[182] those factors cannot change the uncontested facts that i) customers regularly purchased hot rolled coil

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[180] Dr. Crandall Expert Rep. at 8, Figure 1 & Table 2.

[181] Dr. Crandall Expert Rep. at 8. Significantly, Dr. Crandall does not provide factual support for his statement that a "large share" of foreign imports are exported north from the 10-State area.

[182] Dr. Crandall Expert Rep. at pp. 3-4.

from outside Dr. Crandall's proposed relevant geographic market, and ii) Dr. Crandall cannot determine whether competing steel mills outside the Southeast could increase capacity or divert production to ship even more hot rolled coil in the Southeast if Nucor tried to implement a price increase. The evidence in the record, therefore, is insufficient to support a finding that the Southeast constitutes the relevant geographic market, and in the absence of such evidence, summary judgment for Nucor should be granted.

D. Dangerous probability of Nucor's achieving market power

Nucor also moves for summary judgment on Count II alleging attempted monopolization because GSRG cannot prove that Nucor possessed a dangerous probability of obtaining market power. To prove attempted monopolization under Section 2 of the Sherman Act, the plaintiff must establish "a dangerous probability that the defendant might have succeeded in its attempt to achieve monopoly power."[183]

In determining the "dangerous probability of success element, the estimate of market power is necessarily speculative to some extent because it requires an evaluation of future behavior by market participants, viewed at the time the alleged attempt

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[183] *US Anchor Mfg., Inc. v. Rule Industries, Inc.*, 7 F. 3d 986, 993 (11th Cir. 1993).

began."[184] Courts recognize, however, that "[t]he principal measure of actual monopoly power is market share, and the primary measure of the probability of acquiring monopoly power is the defendant's proximity to acquiring a monopoly share of the market."[185]

1. Nucor's market share of GSRG's proposed market

Nucor's statement of material facts claims that "[e]ven assuming a hypothetical 10-state Southeastern area, Nucor's share of black HRC shipments into that area was 42.7% in 2004."[186] GSRG admits this fact, but states that it must be put into the context of Nucor's share of available production capacity.[187] Further, GSRG concedes that it does not have a reliable estimate of Nucor's market share for 2002 and 2003, but says that fact is not material.[188] Nucor argues that these facts prevent GSRG from establishing

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[184] *Id.*

[185] *Id.* at 999; *see also NicSand, Inc. v. 3M Co.*, 457 F3d 534, 542 (6th Cir. 2006) (noting that "a dangerous probability of achieving monopoly power is normally measured through an analysis of market share"); *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F. 2d 683, 694 (10th Cir. 1989) ("The likelihood of successful monopolization is typically evaluated by examining the defendant's share of the relevant market.").

[186] Nucor's Statement of Facts ¶ 51.

[187] GSRG's Objections to Nucor's Statement of Facts ¶ 51.

[188] GSRG's Objections to Nucor's Statement of Facts ¶ 52.

that Nucor possessed a dangerous probability of achieving market power.[189]

Given these undisputed facts about Nucor's market share, GSRG as a matter of law cannot establish from the record that Nucor possessed a dangerous probability of achieving market power.[190] In *U.S. Anchor*, the plaintiff obtained a jury verdict on its claim that the defendant attempted to monopolize the market for a type of boat anchor. On appeal, the defendant argued that the evidence was insufficient to establish that the defendant ever achieved a dangerous probability of achieving market power. The Eleventh Circuit agreed.

The court noted that "[t]he principal measure of actual monopoly power is market share, and the primary measure of the probability of acquiring monopoly power is the defendant's proximity to acquiring a monopoly share of the market."[191] The court further observed that, "a dangerous probability of achieving monopoly power may be established by a 50% share," and that "it is usually necessary to evaluate the prospects for monopolization as they existed when the alleged attempt began."[192] The evidence in the record suggested that the defendant had a 61.5% market share immediately before the

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[189] Nucor Mot. for Summary Judgment at 11-15.

[190] *U.S. Anchor Mfg.*, 7 F3d. at 1000-01.

[191] *Id.*

[192] *Id*. at 999, 1000.

alleged anticompetitive activity began, but that it dropped below 50% during the relevant period of the alleged anticompetitive conduct.[193] The court found, therefore, that the defendant "was never able to maintain a majority position in the market."[194] That fact meant that the defendant lacked a dangerous probability of success as a matter of law:

> Accordingly, because [defendant] possessed less than 50% of the market at the time the alleged predation began and throughout the time when it was alleged to have continued, there was no dangerous probability of success . . . as a matter of law.[195]

Other courts have similarly found that, as a matter of law, a market share less than 50% is insufficient to create a dangerous probability of success.[196]

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[193] *Id.*

[194] *Id.* at 1001.

[195] *Id.*

[196] *See, e.g., M & M Med. Supplies & Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 168 (4th Cir. 1993) ("claims involving between 30% and 50% shares should usually be rejected"); *Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 112-14 (3d Cir. 1992) (50% share insufficient); *Broadway Delivery Corp. v. UPS*, 651 F.2d 122, 129 (2d Cir. 1981) (market share below 50% precludes finding of dangerous probability absent "significant evidence concerning the market structure to show that the defendant's share . . . gives it monopoly power"); *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d 832, 841 (2d Cir. 1980) (33%-55% market share insufficient); *United States v. Empire Gas Corp.,* 537 F.2d 296, 306-07 (8th Cir. 1976) (47%-50% market share insufficient).

Like the plaintiffs in *U.S. Anchor*, GSRG cannot prove that Nucor's market share ever surpassed 50% during the relevant time period, even on the basis of current shipments into GSRG's proposed 10-State market. GSRG concedes that it cannot show Nucor's market share at the inception of the alleged anticompetitive activity in 2002, or in 2003, and that Nucor's market share had only reached 42.7% by 2004 – two years after the alleged anticompetitive activity began.[197] Thus, GSRG cannot demonstrate that Nucor ever held a majority position in the market and, like the plaintiff's claim in *U.S. Anchor*, its attempted monopolization claim fails as a matter of law.

In response, GSRG claims that Nucor's market share should be considered on the basis of Nucor's share of productive capacity, stated to be from 58.6% to 77.4%, for 2004, depending on whether certain mills are excluded from the calculations. Although productive capacity of incumbent firms is a factor in whether a firm can assert market power, it is not sufficient by itself. Rather, to establish market power, the plaintiff must also show that "existing competitors lack the capacity to expand their output to challenge the [defendant's] high price."[198] As noted above,[199] GSRG concedes that Dr. Crandall cannot

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[197] GSRG's Revised Objections to Nucor's Statement of Facts ¶ 51-52.

[198] *Bailey*, 148 F. Supp. 2d at 1242 (quoting *Rebel Oil*, 51 F.3d at 1439).

[199] *See* Section II.C.1.

testify about the ability of domestic firms outside the proposed market or foreign firms to divert existing capacity or expand capacity to serve the 10-state area in the event of a Nucor-instigated price increase.[200] Thus, his capacity-based shares substantially overstates the shares assigned to Nucor.

As discussed above, the critical question in testing Dr. Crandall's proposed geographic market is whether "consumers within the geographic area cannot realistically turn to outside sellers *should prices rise within the defined area*."[201] The evidence in the record demonstrates that several steel mills outside the Southeast could respond to a price increase by Nucor by expanding the possibility that several other mills throughout the United States could do the same.[202] Accordingly, Nucor's market share is likely much lower than GSRG alleges because it faces competition from a broader market than GSRG claims.

GSRG's failure to take the undisputed evidence regarding shipments of foreign firms into account or consider their divertible capacity to serve the 10-state area is an independent ground for the Court's granting Nucor's motion to summary judgment. Based on the undisputed facts in the record. GSRG cannot

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[200] GSRG's Revised Objections to Nucor's Statement of Facts ¶ 53.

[201] *T. Harris Young*, 931 F.2d at 823.

[202] *Id.*

prove that Nucor possessed a dangerous probability of obtaining market power.

E. Relevant Product Market

Dr. Crandall states that the relevant product market is black hot rolled coil steel. Nucor, however, argues that the relevant market should also include pickled and oiled hot rolled coil. At a minimum, Nucor argues that Dr. Crandall's failure to consider pickled and oiled hot rolled coil renders his opinion insufficient as a matter of law to establish his proposed relevant market.

The relevant product market is not limited to the defendant's product.[203] Rather, "it is necessary to examine both the product at issue and all reasonable substitutes available to consumers."[204] It is also necessary to include any product from which a competitor could quickly shift production to offer a competing product in response to a price increase.[205]

Courts often determine the relevant product market based primarily, or solely, on the cross-elasticity of demand without any analysis of the cross-elasticity of supply.[206] Moreover, in this case, Dr.

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[203] *Bailey*, 284 F.3d at 1246.

[204] *Id.*

[205] *Rebel Oil*, 51 F.3d at 1436.

[206] *See* 1 ABA, Antitrust Law Developments (Sixth), at 576 (6th ed. 2007) (collecting cases).

Crandall did consider cross-elasticity of supply, but only with regard to the steel industry generally, not the cross elasticity of supply between different types of steel.

Here, GSRG does not dispute Nucor's statement of material fact that pickled and oiled hot rolled coil is simply hot rolled coil subjected to one additional process.[207] Indeed, GSRG's brief states that pickled and oiled steel is "simply unprocessed coil that is further processed, for an additional fee."[208]

Where the undisputed evidence suggests that switching production from one product to another would be relatively easy, the product market definition must take that fact into account.[209] For example, in *Rebel Oil*, the plaintiff alleged that the product market consisted of full service gasoline sales.[210] The court rejected the plaintiff's proposed product market because the expert witness failed to consider how easily a producer could switch from full serve to self serve gasoline in response to a price change:

> The affidavit of Rebel's expert fails to account for the fact that sellers of full-serve gasoline can easily convert their full-serve

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[207] GSRG Revised Objections to Nucor's Statement of Facts at ¶ 12 (admitting that pickled and oiled steel is black hot rolled coil steel passed through an acid bath and then lightly oiled).

[208] GSRG Opp. to Mot. for Summary Judgment at 7-8.

[209] *Bailey*, 284 F.3d at 1247.

[210] *Rebel Oil*, 51 F.3d at 1436.

> pumps, at virtually no cost, into self-serve, cash-only pumps, expanding output and thus constraining any attempt by ARCO to charge supracompetitive prices for self-serve gasoline. The ease by which marketers can convert their full-serve facilities to increase their output of self-serve gasoline requires that full-serve sales be part of the relevant market; it is immaterial that consumers do not regard the products as substitutes, that a price differential exists, or that the prices are not closely correlated.[211]

Similarly, producers of "pickled and oiled" hot rolled coil need only refrain from running black hot rolled coil through the additional process to change production in response to a price increase for black hot rolled coil.

In response, GSRG asserts that "as a practical matter, it makes little difference whether Nucor's market share is calculated on the basis of unprocessed hot rolled coil or all forms of hot rolled coiled, since the share of productive capacity that he used for his market share determination automatically includes both."[212] In fact, it does make a difference because GSRG must prove market power in the proper relevant product market. For that reason, in *Bailey v. Allgas*, the Eleventh Circuit upheld summary judgment, in part, because an expert witness

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[211] *Id.*

[212] GSRG Opp. to Motion for Summary Judgment at 7.

vacillated between product market definitions, finding that the expert's "affidavit is fundamentally flawed because [the expert] did not estimate market shares for the purportedly relevant market."[213] GSRG has no evidence that Nucor would possess market power in a product market that includes pickled and oiled hot rolled coil; as discussed above, production capacity does not, in and of itself, establish market power.

In this case, the cross-elasticity of supply between black hot rolled coil and pickled and oiled hot rolled coil must be considered to support a product market definition involving hot rolled coil. Without such consideration, GSRG's proposed market definition fails as a matter of law.

F. GSRG's Conspiracy Claims

Nucor previously moved for summary judgment on Counts I and III of GSRG's amended complaint which assert claims for conspiracy to monopolize in violation of Section 1 of the Sherman Act. On September 29, 2009, the Special Master previously recommended that the Court grant Nucor's motion.[214] In addition to the grounds stated in the September 29, 2009, Report and Recommendation, Counts I and III of the amended complaint should be dismissed

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[213] *Bailey*, 284 F.3d at 1250.

[214] Dkt. No. 249.

because GSRG cannot prove on the basis of the record a relevant geographic or product market, or that Nucor possessed a dangerous probability of achieving market power.

III. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the Special Master hereby recommends that this Honorable Court grant summary judgment in favor of Nucor on Counts I, II, and III of GSRG's Amended Complaint.[215]

Date: September 2, 2010.

/s/ James F. Rill
JAMES F. RILL
SPECIAL MASTER

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Report and Recommendation of Special Master were served by regular United States mail, postage prepaid,

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[215] Amended Complaint (D.I. 115), pp. 11-13.

this 2nd day of September, 2010, upon each of the parties listed below:

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SPECIAL MASTER

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA EASTERN DIVISION

Gulf States Reorganization Group, Inc.,	)	
Plaintiff,	)	Case No.:
v.	)	1:02-CV-2600-RDP
Nucor Corporation, et al.,	)	
Defendants.	)	

THIRD REPORT AND RECOMMENDATION OF SPECIAL MASTER REGARDING SUMMARY JUDGMENT ON COUNTS I AND III OF GULF STATES REORGANIZATION GROUP'S AMENDED COMPLAINT

In 2002, Gulf States Reorganization Group, Inc. ("GSRG") filed suit against Nucor Corporation (Nucor"), Casey Equipment Corporation ("Casey"), and Gadsden Industrial Park, LLC ("Park") alleging that they conspired to restrain trade and assist Nucor to attempt to monopolize the hot rolled steel coil industry.[1] Casey/Park[2] moved for summary judgment on Counts

[1] Compl. (Doc. #1).

[2] For the purposes of this Report and Recommendation, Casey and Park will be referred to as one entity ("Casey/Park").

I and III of GSRG's Amended Complaint,[3] and Nucor joined the motion.[4]

On October 22, 2008, James F. Rill was appointed as Special. Master pursuant to the Order of the Honorable R. David Proctor.[5] The Court ordered the Special Master to consider the motion for summary judgment, and submit a Report and Recommendation on that motion.[6] The Special Master afforded the parties an opportunity to present any additional evidence or arguments that the parties wanted the Special Master to consider in issuing his Report and Recommendation. The parties also presented their arguments to the Special Master at an in-person meeting on November 19, 2008. The Special Master issued his report regarding the motions for summary judgment on January 5, 2009, in which he recommended granting summary judgment on Counts I and III of GSRG's Amended Complaint.[7]

While objecting to the Special Master's Report and Recommendation, GSRG asked the Court for leave to supplement the summary judgment record.[8] The Court ordered the Special Master to consider

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[3] Casey/Park's Memorandum in Support of Summary Judgment (Doc. # 119).

[4] Nucor's Notice of Joinder (Doc. # 124).

[5] October 22, 2008 Order (Doc. #181) at 2.

[6] *Id.*

[7] Special Master's Report and Recommendation (Doc. # 188).

[8] GSRG's Motion to Supplement the Record (Doc. # 199).

whether the supplemental materials altered the Special Master's recommendation.[9] On May 28, 2009, the Special Master issued his Second Report and Recommendation, affirming that Counts I and III of the Amended Complaint should be dismissed against both defendants.[10]

GSRG and Casey/Park have since resolved all disputes between them by agreement, and on June 8, 2009 they jointly moved to dismiss all claims against Casey/Park.[11] However, Nucor's motion for summary judgment remained unresolved.[12] GSRG submitted a memorandum concerning Nucor's potential liability despite Casey/Park's dismissal from the case.[13] The Court ordered the Special Master to issue a recommendation regarding Nucor's liability in light, of the dismissal of Casey/Park from the case.[14]

On July 30, 2009, the Special Master again afforded the parties an opportunity to present their arguments at an in-person meeting. During its argument, GSRG contended that Nucor could be held liable without respect to Casey/Park's dismissal.

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[9] April 9, 2009 Second Order Regarding Special Master (Doc. # 205).

[10] Special Master's Second Report and Recommendation (Doc. # 207).

[11] Joint Motion to Dismiss Casey/Park (Doc. # 208).

[12] Notice regarding Summary Judgment Motion (Doc. # 210).

[13] GSRG's Memorandum Concerning Liability of Nucor Corporation under Sherman Act § 1 and 2 (Doc. # 216).

[14] June 16, 2009 Order (Doc. # 215) at 2.

GSRG's argument, at its root, is that a written contract that generates an anticompetitive effect satisfies Section 1, regardless of whether there is any evidence that the parties to the contract share a common objective to achieve an unlawful result. GSRG also argued, for the first time, a new theory of liability: Nucor could be found liable for Section 1 conspiracy based on agreements with *other* parties, such as the bankruptcy trustees from whom Casey/Park purchased the Gulf States steel mill assets.

Special Master James F. Rill respectfully submits this Third Report and Recommendation to U.S. District Judge the Honorable R. David Proctor regarding GSRG's argument for liability against Nucor under Sections 1 and 2 of the Sherman Act.[15] In this Report, the Special Master reaffirms his recommendation that Nucor be awarded summary judgment on Counts I and III of GSRG's Amended Complaint.

I. GSRG'S ASSERTION OF A NEW THEORY OF LIABILITY IS UNTIMELY

As an initial matter, the Court is not obligated to determine whether Nucor conspired, for Section 1 purposes, with any other actors; such facts are not alleged in the Amended Complaint. GSRG has pled only one "contract and combination" in restraint of trade:

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[15] U.S.C. §§ 1 and 2.

> In order to protect and extend its near-monopoly dominance in the relevant market, Nucor contracted and combined with Casey to cause the creation of Gadsden Industrial Park, LLC [. . .][16]
>
> Nucor contracted and combined with Casey Equipment Corporation, and Gadsden Industrial Park, LLC to purchase the Gulf States Steel Plant, with the common intention and objective of blocking a perceived competitive threat to Nucor.[17]

There is no mention of additional conspirators or other contracts and combinations anywhere in the Complaint or the Amended Complaint.[18] Nor can GSRG's new theory of liability be found in any of its papers filed in opposition to summary judgment.[19]

At this stage of the case, it would be manifestly unjust to entertain GSRO's argument that Section 1 conspiracies could be found to exist with other actors.[20] This case was filed on October 23,

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[16] Am. Compl. (Doc. # 115), ¶ 35.

[17] Am. Compl. (Doc. # 115), ¶ 40.

[18] *See generally*, Compl. (Doc. # 1) and Am. Compl. (Doc. # 115).

[19] *See generally*, GSRG's Opposition to Summary Judgment (Doc. # 129) and GSRG's Memorandum Concerning Liability of Nucor Corporation under Sherman Act §§ 1 and 2 (Doc. # 216).

[20] *See Trueman v. City of Upper Chichester*, 289 Fed. Appx. 529, 533 (3d Cir. 2008) (affirming the district court's ruling that allowing Trueman to add "new theories of liability so late in the game would have significantly altered the scope of the case to

(Continued on following page)

2002.[21] GSRG did not articulate its new theory until July 30, 2009. GSRG should not be allowed to spring its entirely new theory of liability against Nucor at such a late date.[22] Nevertheless, this report and recommendation evaluates whether GSRO's case fares any better if its multiplicity-of-actors theory is taken into account.

II. GSRG CANNOT ESTABLISH SECTION 1 LIABILITY AGAINST NUCOR

As GSRO correctly states, its settlement with and dismissal of Casey/Park from this case does not, by itself, affect GSRG's remaining claims against

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the prejudice of the defense."). Importantly, unlike the plaintiff in *Trueman*, GSRG should not be allowed to assert any claims based upon a Section 7 theory now. As with the multiplicity-of-actors theory, this Report and Recommendation will evaluate the merits of GSRG's "quasi-Section 7" theory.

[21] *See* Am. Compl. (Doc. # 115).

[22] During the July 30, 2009 oral presentations, GSRG also suggested that Nucor could be held liable for a violation of Section 7 of the Clayton Act, under a "quasi-Section 7" theory. However, as Nucor correctly states, the Amended Complaint makes no reference to a Section 7 violation. *See, generally*, Am. Compl. (Doc. # 115). Nor the Amended Complaint allege that Nucor could not have purchased the Gulf State Steel Mill assets without facing scrutiny by antitrust regulators. Therefore, for the same reasons stated above, GSRG should not be allowed to assert any claims based upon a Section 7 theory now. As with the multiplicity-of-actors theory, this Report and Recommendation will evaluate the merits of GSRG's "quasi-Section 7" theory.

Nucor.[23] Where there are two or more antitrust conspirators in a case, the plaintiff need not file suit against every conspirator.[24] It is therefore clear that if GSRG was not obligated to bring suit against Casey/Park, it cannot be deleterious to GSRO's case to dismiss its claims against Casey/Park.

Thus, the remaining question is whether Nucor, as the remaining defendant, can be found liable on Counts I and III of the Amended Complaint. As stated in the Special Master's Report and Recommendation, there is insufficient evidence to support liability against Nucor for conspiracy under Section 1 of the Sherman Act.[25]

A. GSRG's argument that the existence of a written contract obviates the need to show a common objective is without merit.

GSRG's Amended Complaint unmistakably identifies Casey/Park as Nucor's sole co-conspirator in the alleged anticompetitive scheme. GSRG argues, however, that Section 1 of the Sherman Act applies to Nucor even if GSRG's claims cannot be maintained

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[23] GSRG's Memorandum Concerning Liability of Nucor Corporation under Sherman Act §§ 1 and 2 (Doc. # 216), at 4-5.

[24] *See, e.g., International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980).

[25] 15 U.S.C. § 1.

against Casey/Park.[26] GSRG argues that Nucor's contract with Casey/Park for the resale of the Gulf States steel mill assets, which allegedly facilitated illegal unilateral conduct, is sufficient to sustain a Section 1 claim, regardless of the lack of record evidence showing that (i) Casey/Park formed a "conscious commitment to a common scheme designed to achieve an unlawful objective,"[27] (ii) Casey/Park had a stake in the outcome of Nucor's alleged designs,[28] or (iii) Casey/Park was not simply pursuing its ordinary business of buying and selling steel mill assets.

This argument was addressed in the first Report and Recommendation:

> Plaintiff incorrectly adumbrates that somehow "contract, combination, and conspiracy" and "restraint of trade" are independent elements such that once an agreement regarding the economic event is shown, all that is needed for liability is evidence of one party's illegal act affecting the economic event. The correct interpretation is that the joint

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[26] For the purposes of the instant motion (Doc. # 216), GSRG was willing to accept the Special Master's decision in the January 5, 2009 Report and Recommendation that Casey/Park cannot be found to be liable under Sections 1 or 2 of the Sherman Act.

[27] *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984).

[28] 7 P. Areeda & H. Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION, ¶ 1474a (2007) (hereafter "Areeda").

> meeting of the minds must incorporate the illegal restraint and, thus, those elements are inextricably intertwined.[29]

Nonetheless, GSRG maintains its claim of a distinction between a "contract" and a "combination or conspiracy" as they are understood under Section 1 of the Sherman Act. Neither the antitrust treatises, nor the case law, support GSRG's distinction.

For example, the leading Areeda & Hovenkamp treatise makes clear that the terms contract, combination, and conspiracy embody the same notion:

> Sherman Act §1 proscribes only a contract, combination . . . conspiracy in unreasonable restraint of trade. The three quoted terms are understood to embrace a single concept. [. . .] The several statutory terms for combined action are usually treated interchangeably.[30]
>
> . . .
>
> The courts sometime speak of combination, sometimes of conspiracy, or sometimes simply of the non-statutory term agreement. They usually use these terms interchangeably, and the use of one term does not imply any distinction between them. When there is sufficient concert of action to implicate the

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[29] Special Master's Report and Recommendation (Doc. # 188), at 4.

[30] Areeda, § 1400a.

> purposes of the Sherman Act, the statute is applied without any need or attempt to classify that concerted action as a contract, a combination, or a conspiracy. This is the consistent course of the decisions, and generally it seems correct.[31]

There does not appear to be any authority contrary to the treatise that stands for the proposition that the existence of a written contract does away with the need to show that the contracting parties shared a common objective to restrain trade in order to establish a Section 1 violation. The mandate in *Monsanto* that a plaintiff must show a "conscious commitment to a common scheme to achieve an unlawful objective" to avoid summary judgment[32] is not limited, as GSRG contends, to instances where the fact of some agreement is dependent on circumstantial evidence.

Two Eleventh Circuit decisions are dispositive in this regard. In *Seagood Trading Corp. v. Jerrico, Inc.*,[33] defendants Long John Silver's, Inc. ("US") and Martin-Brower Co. ("M-B") entered into a written agreement for the distribution of frozen cod and other foods through US's retail locations. Plaintiffs alleged that M-B conspired with US and US's cod suppliers to refuse to deal with US's competitors and to monopolize the supply of food products in violation of Section

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[31] Areeda, § 1430.

[32] *Monsanto*, 465 U.S. at 764.

[33] *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991).

1.[34] Despite the evidence of a written agreement between US and M-B, the district court found that plaintiffs "presented no direct evidence that M-B was a member of the alleged conspiracy among US and its cod suppliers."[35] Instead, the Court concluded that in order to establish an agreement *to restrain trade,* the plaintiff must show a meeting of the minds to accomplish an anticompetitive objective.[36]

Similarly, in *U.S. Anchor Mfg. v. Rule Industries, Inc.,* the defendants Rule Industries, Inc. ("Rule") and Tie Down Engineering, Inc. ("Tie Down") entered into an exclusive agreement with one another for the manufacture and distribution of light weight fluke-style boating anchors.[37] Despite an apparent written agreement between the two defendants, the Eleventh Circuit found that the defendants did not share the mutual objective to restrain trade in the relevant market:

> U.S. Anchor points to evidence of the unlawful intent, necessary to create such an agreement. We have reviewed this evidence and find it sufficient to show an intent to Achieve an unlawful objective on Rule's part, namely the use of predatory means to monopolize the fluke anchor market. Nevertheless,

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[34] *Id.* at 1563.

[35] *Id.* at 1574.

[36] *Id.* at 1573-74.

[37] *U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d 986, 989 (11th Cir. 1993).

> there is insufficient evidence linking Tie Down to Rule's efforts to support a finding of conspiracy between them.[38]

Thus, a written, contract between two parties does not dispense with the need to establish a common objective.

The conflation of the terms contract, combination, and conspiracy is a product both of precedent and reason: If the term "contract" were afforded the unique distinction under Section 1 urged by GSRG an unbounded range of ancillary service providers would be caught in the Section 1 net. Under GSRG's rationale, any written agreement could generate liability under Section 1 of the Sherman Act, even if one of the signatories was a non-market participant with no stake or interest in the relevant economic zone. Non-market participants such as investment bankers, brokers, financial advisors, and even lawyers, could be held liable for providing ancillary services to dominant market participants.[39] Indeed,

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[38] *Id.* at 1002.

[39] As noted in the Special Master's Report and Recommendation (Doc. # 188 at 10), Areeda summarizes the chapter on pawn liability with an analogous example: "Suppose that a firm uses borrowed funds to monopolize the silver market in violation of Sherman Act §2 or to take over another firm in violation of Sherman Act §1 or Clayton Act §7. If these statutes are not independently violated, nothing improper has occurred even if the loan is characterized as a conspiracy. [. . .] Just as we do not regard shareholder investors in a newly formed company as illegal conspirators with each other or the company, we should

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GSRG argued during oral argument that, in this case, even the bankruptcy trustee and auctioneer could be held liable for their dealings with Nucor. The Special Master is unable to find any precedent for such a wide-open theory.[40]

GSRG did not draw this distinction when it filed its Amended Complaint. In the first paragraph of the Amended Complaint, GSRG averred, "[t]his is a Sherman Act antitrust case, alleging a *contract and combination* in restraint of trade . . . , ."[41] Indeed, GSRG itself uses the both terms throughout the complaint to describe Nucor's conduct:

> In order to protect and extend its near-monopoly dominance in the relevant market, Nucor *contracted and combined* with Casey to cause the creation of Gadsden Industrial Park, LLC [. . .][42]
>
> Nucor *contracted and combined* with Casey Equipment Corporation and. Gadsden Industrial Park, LLC to purchase the Gulf States

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not make lender-investors conspirators with their borrowers." Areeda, ¶ 1474(d).

[40] GSRG's attempt in its August 4, 2009 letter brief to recharacterize the object of the alleged conspiracy as "the dismantling and removal of the former Gulf States Steel mill from the market" is equally unavailing. This characterization does not bring GSRG any closer to establishing that Casey/Park and Nucor shared a conscious commitment to a common scheme to achieve an *unlawful* objective," as required under *Monsanto*.

[41] Am. Compl. (Doc. #115), ¶ 1 (emphasis added).

[42] Am. Compl. (Doc. #115), ¶ 35.

Steel Plant with the common intention and objective of blocking a perceived competitive threat to Nucor.[43] Thus, it is only now that GSRG distinguishes the terms.

B. There is no evidence in the summary judgment record to support a finding that Nucor and Casey/Park shared common objective to restrain trade.

GSRG appears to blur the distinction between the concepts of "intent" and "objective.[44] The element of mutual "intent" is not necessary to establish a conspiracy under Section 1;[45] establishment of a mutual objective is essential.[46] Thus, in *Fineman v. Armstrong World Industries, Inc.,* a case relied on by GSRG, the Court of Appeals held that co-conspirators need not share the same motive for restraint of trade so long as they both share the objective to restrain trade.[47] As explained above, this principle is not limited to cases involving circumstantial evidence of collusion.

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[43] Am. Compl. (Doc. # 115), ¶ 40.

[44] August 4, 2009 Letter Brief to Special Master Rill from counsel for GSRG, p. 3-4.

[45] *Seagood*, 924 F.2d at 1573.

[46] *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 212 (3d Cir. 1992).

[47] *Id*.

GSRG acknowledges the distinction between intent, which it equates with "motive," and objective.[48] It would have the Court find a common objective to restrain trade, however, between a principal actor with the intent to restrain trade and any other party who is involved in performing any ancillary service in relation to the transaction in question or a predicate transaction leading to the alleged anticompetitive result. The cases do not support such a conclusion. At a minimum, a determination of a common objective to restrain trade would require the Court to find that the subordinate party has knowledge of the principal party's anticompetitive goal and acquiesce in its realization.

The Eleventh Circuit has provided examples, close to the circumstances here involved, which illustrate the substance of the requirement of a common objective. In *Seagood Trading Corp. v. Jerrico, Inc.,* US and M-B signed a contract for the distribution of food to US's retail locations.[49] Nonetheless, the district court found insufficient evidence to hold MB liable for Section 1 conspiracy.[50] Upholding the district court's finding, the Eleventh Circuit elucidated the standard under which GSRG's case must be evaluated:

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[48] August 4, 2009 Letter Brief to Special Master Rill from counsel for GSRG, p. 3-4.

[49] *Seagood*, 924 F.2d 1555.

[50] *Id.* at 1574.

> The threshold requirement of every conspiracy claim, under both Section 1 and Section 2, is an agreement to restrain trade. To prove that such an agreement exists between two or more persons, *a plaintiff must demonstrate "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement*."[51]

Two years later, in *U.S. Anchor Mfg. v. Rule Industries, Inc.,* involving an allegation that a manufacturer and distributor had conspired to implement a predatory pricing scheme, the Eleventh Circuit reaffirmed the standard for Section 1 conspiracies that it set in *Seagood*: "The elements of a conspiracy to restrain trade under Section 1 are (1) an agreement to enter a conspiracy (2) designed to achieve an unlawful objective."[52]

If anything, the subordinate parties in *Seagood* and *U.S. Anchor* were more closely aligned with the principle defendants' objective in those cases than Casey/Park was with Nucor's alleged objective here. In *Seagood* and *U.S. Anchor,* the secondary defendants

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[51] *Id.* at 1573 (quoting *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946)) (emphasis added). *See also Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1455 (11th Cir. 1991) ("Liability will only attach to agreements designed unreasonably to restrain trade in, or affecting, interstate commerce; thus, before analyzing the reasonableness of any alleged restraint on trade, courts must first ensure that an agreement to restrain trade exists.)".

[52] *U.S. Anchor*, 7 F.3d at 1002.

at least participated in the commercial zone with the principal as manufacturers and distributors of the product at issue: Here, Casey/Park was not involved, in any way, in the market for hot rolled steel coil.

No evidence in the summary judgment record supports a finding that Casey/Park, or any other subordinate actor, had knowledge of, acquiesced in, or had the slightest interest in whether Nucor monopolized or attempted to monopolize the hot rolled steel coil market. GSRG's argument that, notwithstanding this record, Casey/Park's contract to perform an ancillary service – the purchase of idle mill assets in its ordinary course of business – reaches too far and is contrary to law.

The host of cases upon which GSRG relies involving tying, exclusive dealing, and resale price maintenance do not support GSRG's proposed interpretation of Section 1 of the Sherman Act. The common element in all of these cases, where the agreement is the crux of the offense, is simply not present here: the agreements were between participants in the same economic zone, and by the very nature of their involvement were fully aware of the principal actor's objective and the necessary outcome of their conduct. Thus, *Albrecht v. Herald Co.*[53] and *Fineman* are distinguished from this case because all the participants in the alleged scheme were engaged in the manufacture, sale, or purchase of the specific product

[53] *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

that was the subject matter of the collusion, even though they did not participate at the same level as the principal defendant. The alleged joint action involved, respectively, direct implementation of a price-setting program and a refusal to deal by the subordinate parties.

Similarly, in the coerced conspiracy cases cited by GSRG,[54] all of the participants in the conspiracy were fully aware of the principal defendant's objective and acquiesced in the outcome, even if in some instances reluctantly. Thus, GSRG's reliance on cases involving coerced collusion is inapt, since coerced collusion is nevertheless acquiescence in the objective of the primary defendant.

GSRG's reliance upon *dicta* in *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*[55] is misplaced. In *Virginia Vermiculite,* the Fourth Circuit held that Section 1 liability might attach where the subordinate party had surrendered some "resources, rights, or economic power" to achieve an outcome otherwise unachievable because of parties otherwise conflicting

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[54] *See United States v. Paramount Pictures*, 334 U.S. 134 (1968); *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137 (10th Cir. 1997); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230(3d Cir. 1975); *Datagate, Inc. v. Hewlett-Packard Co.*, 160 F,3d 1231 (9th Cir, 1995), *cert. denied*, 517 U.S. 1115 (1996); and *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1536 (11th Cir. 1987).

[55] *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 282 (4th Cir. 2002).

interests.[56] In so holding, the Fourth Circuit was simply following the Supreme Court's ruling in *Copperweld Corp. v. Independence Tube Corp.*:[57]

> We reaffirm what was made clear by *Copperweld,* that concerted activity susceptible to sanction by Section 1 is activity in which multiple parties join their resources, rights, or economic power together in order to achieve an outcome that, but for the concert, would naturally be frustrated by their competing interests (by way of profit-maximizing choices).[58]

However, as stated in the Special Master's first recommendation, there is simply no evidence in the summary judgment record that Casey/Park surrendered any right or power to Nucor, or even that Casey/Park was aware of and acquiesced to Nucor's alleged anti-competitive intent.[59]

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[56] *Id.*

[57] *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

[58] *Id*. at 282.

[59] Special Masters Report and Recommendation (Doc. #188) at 16 ("GSRG has failed to identify any evidence that Casey/Park joined with or surrendered its "resources, rights, or economic power" to Nucor as required for Section 1 claims. Nor has GSRG presented any evidence that demonstrates that Casey/Park and Nucor had formed "conscious commitment to a common scheme designed to achieve an unlawful objective." [. . .] Finally, there is no evidence to support the conclusion that Casey/Park had a stake in whether Nucor would be successful in

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Here, as in *U.S. Anchor,* without Casey, "there was no one with whom [the principal defendant] could have conspired. Hence, its unilateral conduct was not actionable as a conspiracy under federal antitrust law."[60]

C. GSRG's new theories of liability do not preclude summary judgment for Nucor.

GSRG's attempt during oral argument to assert a broader conspiracy from that involving Casey/Park does not elicit a different conclusion. Other putative conspirators, such as the bankruptcy trustee or the auctioneer, as put forward during the oral argument, carry no more weight than Casey/Park in implicating Nucor in an agreement to restrain trade, indeed, there is no evidence in the summary judgment record that any actor shared a joint objective with Nucor's alleged scheme to monopolize the hot rolled steel coil industry. None of these putative actors were doing more than performing their ordinary businesses, not in that industry, and were engaged in conduct, like Casey, with no interest or stake in the industry in question. Without evidence that these firms had knowledge of Nucor's objective and acquiesced in the outcome, GSRG's Section 1 claim must fail.

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achieving or maintaining monopoly power in the hot rolled coil steel market.").

[60] *U.S. Anchor*, 7 F.3d at 1002.

GSRG's "quasi-Section 7" theory similarly does not support denial of summary judgment. First, as noted by Nucor, the Court's Case Management Order required GSRG to plead a Section 7 claim if it intended to pursue one:

> Unless a claim under Section 7 of the Clayton Act, 15 U.S.C. § 18, is expressly asserted in Plaintiff's amended complaint, discovery on matters unique to Section 7 shall not be permitted.[61]

GSRG did not advance a Section 7 theory in its Amended Complaint, and thus has foresworn reliance on this statute.[62]

GSRG now argues that, despite its failure to plead a Section 7 theory, it could still pursue this theory of liability under the body of Section 1 cases challenging mergers. Of course, the legal standard applicable to the acquisition of stock or assets resides in Section 7 of the Clayton Act.[63] Of equal significance, the agreement in the case of a merger or acquisition is the entire alleged offense. The buyer in a Section 7 case is purchasing from a seller who is the

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[61] Case Management Order (Doc. #109), ¶ 3.

[62] The Court also warned that parties would not be able to further amend their pleadings unless they could demonstrate good cause. Case Management Order (Doc. #109) ("Any further amendment of pleadings shall be filed by November 2, 2007. Any motions filed thereafter will be entertained only upon a showing of good cause.").

[63] 15 U.S.C. § 18.

owner and operator of the assets covered by the merger agreement. By definition, the acquired firm not only has knowledge of the objective of the transaction, but also a willing acquiescence in the outcome – a merger which may raise competitive concern. There is no similarity to the facts here. In short, there is no evidence in the record that either the bank trustee or the auctioneer formed an agreement with Nucor or Casey/Park with the common objective of lessening competition in the hot rolled steel coil market.

III. SUMMARY JUDGMENT FOR NUCOR ON THE SECTION 1 AND SECTION 2 CONSPIRACY CLAIMS WOULD NOT LEAVE GSRG WITHOUT A REMEDY

Finally, GSRG's plea that it will be left without a remedy if the Section 1 claim is resolved in Nucor's favor is simply not accurate. Generally, Section 1 of the Sherman act "reaches *concerted* action in unreasonable restraint of trade, while Section 2 covers *unilateral* action only when monopoly power is present or attempted."[64] Count II of GSRG's Amended Complaint alleges that Nucor attempted to monopolize the hot rolled, steel coil industry in violation of Section 2 of the Sherman Act.

Even though the summary judgment record does not contain sufficient evidence of concerted action

[64] Areeda, ¶ 1402a(1) (emphasis added).

between Nucor and Casey/Park or any other actor, the allegations in its Amended Complaint could form the basis of GSRG's unilateral conduct theory against Nucor under Section 2 of the Sherman Act. GSRG has expressly alleged unilateral conduct by Nucor. Paragraph 17 of the Amended Complaint alleges that Nucor, acting by itself, "made a significant shift in corporate policy" to "achieve market dominance."[65] Such allegations are at the heart of a Section 2 attempted monopolization case. GSRG has availed itself of alternate theories of liability, thereby contradicting its claim that its allegations only fit as a Section 1 violation. Thus, there is no need for concern that if the Court dismisses GSRG's Counts I and III there may not be an adequate remedy for GSRG.

IV. SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF NUCOR FOR COUNT III OF GSRG'S AMENDED COMPLAINT

There has been no new evidence presented, nor arguments made, in support of Count III, which claims conspiracy under Section 2 of the Sherman Act.[66] As stated in the first Report and Recommendation, GSRG simply has not adduced sufficient evidence to enable a rational fact-finder to find in favor of GSRG on its Section 2 conspiracy claims. GSRG

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[65] Am. Compl. (Doc. # 115), ¶ 17.

[66] 15 U.S.C. § 2.

has not marshaled any evidence to satisfy the threshold showing of the existence of an agreement to restrain trade, and there is no evidence of Casey/Park's or any other actor's specific intent to assist Nucor in achieving monopoly power. Without sufficient evidence of an agreement to restrain trade or another actor's specific intent to help Nucor monopolize the hot rolled steel coil industry, GSRG's Section 2 conspiracy claim against Nucor must also be dismissed.[67]

V. CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, the Special Master hereby recommends that this Honrable Court grant summary judgment in favor of Nucor on Counts I and III of GSRG's Amended Complaint.

Date: September 28, 2009

/s/ James F. Rill
JAMES F. RILL
SPECIAL MASTER

[67] *U.S. Anchor*, 7 F.3d at 1002; *Spanish Broad. Sys. of Fla. v. Clear Channel Communs.*, 376 F.3d 1065, 1078 (11th Cir. 2004).

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 11-14983-BB

GULF STATES REORGANIZATION GROUP, INC.,
Plaintiff-Appellant,

versus

NUCOR CORPORATION,
Defendant-Appellee,

CASEY EQUIPMENT CORPORATION, et al.,
Defendants.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Sep. 13, 2013)

BEFORE: CARNES, Chief Judge, TJOFLAT and JORDAN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Adalberto Jordan
UNITED STATES
CIRCUIT JUDGE