In the United States Court of Appeals for the Eighth Circuit

Nos. 98-3732 & 98-4042

CONCORD BOAT CORPORATION, *et al.*,

Plaintiffs/Appellees/Cross-Appellants,

v.

BRUNSWICK CORPORATION,

Defendant/Appellant/Cross-Appellee.

REDACTED VERSION OF BRIEF FILED UNDER SEAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION,
HON. JAMES M. MOODY, NO. LR-C-95-781

BRIEF FOR DEFENDANT-APPELLANT BRUNSWICK CORPORATION

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Brunswick Corporation appeals from a jury verdict finding violations of §§ 1 and 2 of the Sherman Act and § 7 of the Clayton Act and awarding plaintiffs more than $133,000,000 in damages after trebling. The plaintiff boatbuilders, which compete with Brunswick in the boatbuilding business and also purchase marine engines from it, contend that Brunswick's discounts off engine prices, as well as several boatbuilder acquisitions, unlawfully foreclosed competition in the marine engine market. Plaintiffs' case rested on the theory of their expert witness that any market share above 50% *necessarily* resulted from anticompetitive conduct and *necessarily* caused plaintiffs to pay monopolistic "overcharges."

Brunswick will demonstrate that plaintiffs' claims conflict with settled antitrust precedent. Brunswick's acquisitions and modest discounts did not (and could not) foreclose competing engine manufacturers from access to boatbuilder customers, given the lack of entry barriers in the boat market and the unfettered ability of efficient rival engine manufacturers to compete for engine sales based on price, quality, and service. The antitrust laws favor such discounts and acquisitions because they spur competition, enhance efficiency, and reduce prices to consumers. In addition, the opinion of plaintiffs' expert witness was factually unsupported, economically unsound, self-contradictory, and contrary to fundamental antitrust principles.

Oral argument in this appeal, with its large trial record, will enable the parties adequately to address these issues. In light of the chilling impact of the jury's massive damages award on future discount programs and industry integration generally, oral argument also will ensure that the Court's questions and concerns are fully addressed. Brunswick requests that the Court allot 30 minutes per side for oral argument.

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fed. R. App. P. 26.1 and Circuit Rule 26.1A, the undersigned certifies that the following listed persons or entities have a pecuniary interest in the outcome of this case:

Defendant:

Brunswick Corporation

Plaintiffs:

Independent Boat Builders, Inc.
Albemarle Boats, Inc.
Armada Manufacturing Co., Inc.
Caravelle Marine, Inc.
Campion Marine, Inc.
Century Craft Industries, Ltd. f/k/a Vanguard Industries
Concord Boat Corp.
F.R.P. Industries, Inc. d/b/a Baha Cruisers
G.W. Invader
Galaxie Boat Works, Inc.
Harbour Ventures, Inc. d/b/a Avenger Marine
Harris Kayot, Inc.
KCS International, Inc. d/b/a Cruisers Division of KCS International, Inc. and Shamrock Division of KCS International, Inc.
Malibu Boats West
Mariah Boats, Inc.
Marine Manufacturing Corp.
Maverick Boat Co.
Mirage Manufacturing, LLC
Palm Beach Marinecraft, Inc.
Play Time Manufacturing by Ohio Marine Distr., Inc.
Powerquest Boats, Inc.
Sea Arrow Marine, Inc.
Silverton Marine Corp.
Thompson Marine Products, Inc.
Weeres Industries Corp.

In addition, Brunswick Corporation has a non-controlling interest in one publicly traded company, MarineMax, Inc.

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One of the attorneys for
Brunswick Corporation

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PRELIMINARY STATEMENT

Judge James M. Moody of the United States District Court for the Eastern District of Arkansas presided over this antitrust case brought by plaintiff recreational boatbuilders against defendant Brunswick Corporation, a marine engine manufacturer that sells engines to plaintiffs and also sells boats in competition with plaintiffs. The jury returned its verdict on June 19, 1998 (Ad. 106-13), awarding plaintiffs more than $133,000,000 in damages after trebling.[1] The district court's August 19, 1998 opinion and order denying Brunswick's Renewed Motion for Judgment as a Matter of Law and Motion for a New Trial, which reiterated Brunswick's directed verdict contentions, is reported at 21 F. Supp. 2d 923 and is set forth at Ad. 1-36; see also A105. The September 4, 1998 opinion and order granting in part Brunswick's Motion for Judgment as a Matter of Law on Count I of its Counterclaim, finding that certain plaintiffs engaged in a *per se* illegal boycott of Brunswick's engines, is set forth at Ad. 37-58; see also Ad. 83-84. The court's October 16, 1998 opinion and order denying plaintiffs' request for divestiture of Brunswick's boatbuilder acquisitions and other equitable relief is set forth at Ad. 64-82. The November 3, 1998 opinion and order denying plaintiffs' motion for reconsideration of the ruling that some plaintiffs had engaged in a *per se* illegal boycott is set forth at Ad. 85-104. These opinions and orders are not reported.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337(a). Its judgment became final on November 4, 1998. Ad. 59-63, 105. Brunswick timely filed its appeal on November 4, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

[1/] "Ad." refers to the Addendum, which includes the jury verdict, the district court's post-trial opinions and orders, and its order denying Brunswick's *Daubert* motion. "A" refers to Brunswick's Separate Appendix, which includes portions of the trial transcript, exhibits, and deposition excerpts that were read to the jury and are part of the trial record.

STATEMENT OF ISSUES

As an aid to understanding the issues presented in this appeal, we briefly summarize plaintiffs' claims. Brunswick's Mercury Marine Division manufactures "MerCruiser" stern drive and inboard engines. The plaintiffs are builders of boats equipped with such engines and their buying cooperative, Independent Boat Builders, Inc. ("IBBI"). Plaintiffs claim that by acquiring three boatbuilders and two small engine component manufacturers, and by offering boatbuilders and boat dealers "market share" discounts if they bought certain percentages of their engine needs from Brunswick, Brunswick monopolized the market for stern drive and inboard engines, and unreasonably restrained trade in that market, contrary to Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1 and 2. Plaintiffs also allege that Brunswick's acquisitions substantially reduced competition in that market in violation of Clayton Act § 7, 15 U.S.C. § 18.

According to plaintiffs, in a competitive market with two engine manufacturers, each would have an equal market share and any market share above 50% necessarily results from anticompetitive conduct. Based solely on that theory, plaintiffs contended that Brunswick's higher market share was attributable to unlawful discounts and acquisitions that resulted in monopolistic "overcharges" for MerCruiser engines. While plaintiffs asserted that Brunswick's prices were so "high" that they constituted monopolistic overcharges, they also claimed that those same prices were so "low" that equally efficient rivals could not match them. The jury found for plaintiffs on that theory. The issues on appeal are:

1. Whether the voluntary market share discounts that Brunswick offered to engine buyers—small discounts that did not require plaintiffs to deal exclusively with Brunswick,

that did not obligate plaintiffs to buy *any* MerCruiser engines, and that could be and were matched or bettered by rival engine manufacturers competing vigorously for sales—constitute exclusionary conduct sufficient to support a verdict of liability for unlawful monopolization or restraint of trade.

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

Morgan v. *Ponder*, 892 F.2d 1355 (8th Cir. 1989)

Barry Wright Corp. v. *Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983)

Northeastern Tel. Co. v. *AT&T*, 651 F.2d 76 (2d Cir. 1981)

2. Whether plaintiffs' claims for damages based on Brunswick's acquisitions (principally those of boatbuilders Sea Ray and Bayliner in 1986) are barred by the 4-year statute of limitations in Clayton Act § 4B; alternatively, whether Brunswick's acquisitions can be condemned as anticompetitive where there were no barriers to entry or expansion in the boatbuilding business, the acquisitions left 70% of the engine-buying market available to competing engine makers, powerful boatbuilders continued to exert pressure on engine suppliers after the acquisitions, and Brunswick's competitors made similar acquisitions.

15 U.S.C. § 15b (Clayton Act § 4B)

Klehr v. *A.O. Smith Corp.*, 117 S. Ct. 1984 (1997)

Paschall v. *Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984)

Becker v. *Egypt News Co.*, 713 F.2d 363 (8th Cir. 1983)

3. Whether Brunswick possessed monopoly power in the relevant engine market where it faced competition from numerous rivals (some of which were large multinational corporations with far greater resources than Brunswick), a joint venture between two of its

major competitors possessed substantial excess capacity, there were no legally significant barriers to entry, and engine buyers were powerful, sophisticated, and well organized.

Morgenstern v. *Wilson*, 29 F.3d 1291 (8th Cir. 1994)

Ryko Mfg. Co. v. *Eden Servs.*, 823 F.2d 1215 (8th Cir. 1987)

Rebel Oil Co. v. *Atlantic Richfield, Inc.*, 51 F.3d 1421 (9th Cir. 1995)

United States v. *Baker Hughes, Inc.*, 908 F.2d 981, 990 (D.C. Cir. 1990)

4. Whether the liability and damages theory of plaintiffs' expert—that in a competitive market two engine suppliers each would hold 50% shares, that anticompetitive conduct is the only means by which Brunswick could achieve market share above 50%, and that "overcharges" to plaintiffs increased in exact correlation with each point by which Brunswick's market share exceeded 50%—was factually unsupported, unreasonable, and inconsistent with antitrust principles; and whether the failure of plaintiffs' expert to disaggregate the economic effects of lawful from alleged unlawful conduct contravenes settled precedent.

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)

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

St. Louis Convention & Visitors Comm'n v. *National Football League*, 154 F.3d 851 (8th Cir. 1998)

Amerinet, Inc. v. *Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992)

Standard of Review. Given the lack of dispute over the dispositive facts, this Court reviews these issues *de novo*. The Supreme Court and this Court have frequently overturned jury verdicts and required entry of judgment as a matter of law in closely similar antitrust cases. *E.g.*, *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S.

209 (1993) (ordering judgment as a matter of law in case challenging price discounts notwithstanding the jury's $149 million trebled antitrust verdict); *Morgan* v. *Ponder*, 892 F.2d 1355, 1357-64 (8th Cir. 1989) (setting aside jury verdict and ordering entry of judgment for defendant on Sherman Act claims alleging aggressive price discounting by a dominant provider). As Professors Areeda and Hovenkamp explain, "the legality of many arrangements depends upon their 'reasonableness' under Sherman Act § 1 or upon an effect 'substantially to lessen competition' under Clayton Act §§ 3 or 7. * * * Such issues are questions of law that must be decided by the court." 2 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 321b, at 55 (rev. ed. 1995); accord *Los Angeles Land Co.* v. *Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993).

The Supreme Court and this Court likewise have overturned antitrust verdicts as a matter of law when they rested on unsupported or unreasonable expert testimony. *E.g.*, *Brooke Group*, 509 U.S. at 242 (verdict cannot stand when plaintiff's "expert opinion is not supported by sufficient facts * * * or when indisputable record facts contradict or otherwise render the opinion unreasonable"); *Amerinet, Inc.* v. *Xerox Corp.*, 972 F.2d 1483, 1505 (8th Cir. 1992) (judgment as a matter of law "'must be granted when the non-movant's case rests solely upon speculation and conjecture lacking in probative evidentiary support'"). These cases exemplify the principle that the denial of a motion for judgment as a matter of law cannot stand if "'no reasonable juror could have returned a verdict for the non-moving party.'" *Roberts* v. *Unidynamics Corp.*, 126 F.3d 1088, 1092 (8th Cir. 1997).

STATEMENT OF THE CASE

Introduction. The district court's condemnation of Brunswick's price discount programs and acquisitions is a serious misapplication of federal antitrust law that clashes with Supreme Court and Eighth Circuit precedent. In a suit brought by its competitors in the boatbuilding business, Brunswick has been penalized more than $133,000,000 for engaging in precisely the sort of vigorous competition that the antitrust laws aim to promote. This unprecedented punishment of legitimate business conduct in a competitive market—based on plaintiffs' demonstrably incoherent theory that Brunswick's prices were so "high" as to be monopolistic overcharges, yet so "low" that equally efficient rivals could not match them—threatens to chill pro-consumer price competition and deter efficient vertical integration. On the facts of this case, which we draw from plaintiffs' evidence and other undisputed sources, Brunswick is entitled to judgment as a matter of law or, at minimum, a new trial.

1. Development of the Stern Drive and Inboard Engine Business

The relevant market found by the jury is the North American market for inboard and stern drive marine engines. Ad. 103. These engines, which are reasonable substitutes for each other (A40, A294), use standard automobile engine blocks available from auto makers like General Motors. Marine engine manufacturers "marinize" those blocks and attach a drive system. Ad. 68; A9, A272. Neither engine type involves "high technology." A129. The market is dynamic, with a history of fluctuating market shares and recent instances of market entry and exit.

Brunswick's share of inboard engine sales—which totaled 19,000 industry-wide in 1996—has ranged from 22% to 35%. A186, A340-41, A553, A555. Its competition includes inboard manufacturers PCM and Indmar (each with about 20% of sales), Crusader (12%),

Volvo, Marine Power, MTU, Caterpillar, Detroit Diesel, and Cummins. A33, A340-41, A553-55, A1084. In addition, Toyota, a $100 billion company with "unlimited resources" and "a great brand," entered the market in 1998 with an inboard powered boat. A33, A308-10, A432-33; *infra*, p. 57, n.18. Toyota entered on a "vertically integrated" basis: it makes and marinizes the Lexus automobile engine used in its name-branded boat, has an exclusive contract with a boatbuilder, and has its own boat dealers. A122-25.

Brunswick has earned a larger but unstable share of stern drive engine sales. Volvo, a $20 billion company that is six times the size of Brunswick and the market leader in Europe, commercialized the first stern drive in the U.S. in the late 1950s. Outboard Marine Corporation ("OMC"), a company that was significantly larger than Brunswick's Mercury Marine Division, with many more dealers, entered the business a few years later. Brunswick entered the business in 1961 by acquiring a financially distressed stern drive manufacturer for $35 million. Despite Brunswick's late entry, smaller size, and obligation to pay to use Volvo's patented stern drive technology, Brunswick achieved the largest share of sales by the early 1970s with a good product and superior service. In the mid-1970s, Brunswick's sales "exploded" when it combined its stern drive with a V-8 automobile engine block to produce enough power to drive larger boats. OMC, meanwhile, continued to produce obsolete stern drives that "weren't selling." By 1983—*before* the conduct about which plaintiffs complain—Brunswick had earned 75% of stern drive sales, compared to OMC's 10% and Volvo's 15%. A126-28, A182-85, A360-63, A468-75, A743-53; *infra*, p. 57, n.18.

Market shares changed rapidly after OMC introduced its popular "Cobra" stern drive engine in 1985, at the beginning of a cyclical boom in the industry that saw total stern drive sales reach 160,000 in 1988. A94-95, A754-55. Plaintiffs concede that Brunswick's share

of stern drive sales plunged "almost to 50%" in 1988 and 1989—*after* Brunswick initiated market share discounts in model year 1984 and acquired boatbuilders Bayliner and Sea Ray in 1986. A605; see A94, A404. At the same time, OMC's share surged as it repeatedly increased production to meet demand. A130-31, A136, A765. At the height of the boom in 1988, Yamaha entered the market with a stern drive engine. A79-80, A363-64.

After the Cobra's early success, OMC received complaints that the engine's shift-cable made it difficult or impossible to change gears. OMC, its CEO admitted, took "a number of wrong roads" investigating this problem, alienating boatbuilders and dealers by initially blaming them. A768; see A140-43, A444-45. OMC concluded after more than a year that the cable was defective and in 1989 "recalled every Cobra stern drive we had manufactured." A766-69; see A76, A142, A786-88a. OMC executives attributed Brunswick gains in market share after 1988 to the Cobra "disaster." A773-76, A786, A788, A790-92; see also A412-14, A489-91, A521-24. Plaintiffs' expert Dr. Robert Hall agreed that the Cobra debacle "had a lingering effect," "cost OMC engine sales," and "resulted in market share gains" by Brunswick. Aug. 19, 1998 Order, Ad. 6; A76, A142.

Beginning in 1989, a recession in the marine business caused the collapse of the stern drive/inboard engine market, which fell to half its 1988 size by 1991 and has remained well below peak levels ever since. A148, A365. Brunswick's marine sales plunged nearly 50% between 1988 and 1991. Brunswick had to shut boat plants and lay off employees. A95-96, A139, A487-88, A1042. Yamaha, having entered the market at its peak and made poor "business decisions," withdrew from the market in 1993. A34, A79-80, A364-65, A501-02. OMC, already suffering from the Cobra "fiasco" (A793), incurred such "severe losses" that it "consider[ed] dropping out of the stern drive business." A775-77. Instead, OMC entered

into a joint venture with Volvo (the majority partner in the venture) in 1993. The OMC/Volvo joint venture built stern drive engines at OMC's existing Tennessee plant and sold those engines, eventually under the Volvo brand, through OMC/Volvo's combined "5,000 plus" boat dealer network. A164, A176-77, A777-78, A794-95, A867, A886.

The joint venture, plaintiffs concede, suffered "transition problems" without which it would have achieved a "higher[] market share." A171, A249. Uncertainty and lack of information about the venture led some OMC customers to shift to Brunswick (A14, A174-75, A264-65, A446, A549-50, A859, A869, A1124); OMC and Volvo were still competing against each other years after they had become partners; and OMC dealers could not honor Volvo warranties or vice versa. A883; see A176-80, A260-64. Plaintiff IBBI's president admitted that Brunswick gained more than ten points of market share "due to the chaos created by the" joint venture. A548.

2. Brunswick's Current Market Position

Plaintiffs offered evidence indicating that Brunswick currently has earned back about 75% of combined stern drive/inboard sales. Volvo has a 20% share and other manufacturers 5%. A41-42. The record shows that OMC's Cobra problems and the Volvo/OMC joint venture's transition difficulties contributed to Brunswick's improved position. Aided by these competitors' missteps, Brunswick has established its Mercury Marine products and service as the most desirable in the eyes of boatmakers, dealers, and consumers. See Ad. 5-6.

Brunswick and Volvo both make good engines (A1126), but Volvo's quality is the industry's "best-kept secret" because of poor product promotion. A796-97. The product support and service offered by Brunswick's Mercury Marine Division are recognized as better than Volvo's and more readily available. A77, A118, A225, A289-90, A431, A443,

A531-39, A630-31, A1087, A1089-90. Volvo has sometimes priced its engines higher than the normal market range. A1138, A1147, A119-20. Volvo's economic problems even extend to Europe, where, despite its market-leader position and large scale, its marine engine business has not been profitable. A1161-62. In addition, Volvo has acknowledged problems with timely delivery. A1158. When IBBI and its members unlawfully boycotted Brunswick engines and shifted orders to Volvo, Volvo could not deliver. A218, A236, A251, A296, A546-47. Volvo also has been hurt by its foreign identity, because customers prefer American products. A867; see A168-73, A447, A612-14.

Surveys conducted by Volvo's own consultants found that dealers and consumers regard MerCruiser as better than other engine brands in every important respect. A1125, A220-23, A1085-90; Ad. 131-32. Independent boatbuilders preferred Brunswick engines because consumers wanted them and because Brunswick has superior engine and parts distribution. A1127. Boatbuilders and dealers did not have the same confidence in Volvo. A1128-29. "[A] big part" of why Mariah Boats and other plaintiffs buy nearly all their engines from Brunswick is because consumers prefer them. A20, A222-23, A303.

Plaintiffs contend that Brunswick gained its leading market share not as a result of the factors described above but through allegedly illegal discount programs and acquisitions.

3. Brunswick's Discount Programs

Brunswick and its competitors each offered multi-component discount programs to induce boatbuilders to buy their engines. In addition to discounts for prompt payment, truckload orders, and the like, these programs offered small discounts from list prices if a boatbuilder bought a high proportion of its engine needs from the manufacturer over the course of one year ("market share" discounts) or two or three years ("long-term" discounts),

or purchased a large quantity of engines ("volume" discounts). Ad. 9; A137, A271-75, A378-84, A937-46. A boatbuilder qualifying for every discount typically received an aggregate 13-15% discount. A162-63, A276-77. Brunswick's competitors offered much steeper discounts. *E.g.*, A802 (21% Volvo discount).

Market share discounts. From the 1984 through 1994 model years, Brunswick offered a 1% discount to boatbuilders that bought 60% of their engines from Brunswick ("60% market share"), a 2% discount for 70% market share, and a 3% discount for 80% market share. A373-74, A939-40, A1229. Brunswick first offered these market share discounts to small boatbuilders who could not qualify for volume discounts. Beginning in the 1987 model year, at the request of larger boatbuilders, market share discounts were made available to all builders. A376-77.

For the 1995 model year, Brunswick proposed to increase to 95-100% the share of engine needs that a boatbuilder would have to buy from Brunswick to obtain the largest market share discount. IBBI objected and negotiated a *reduction* in market share levels for 1995, whereby the maximum 3% discount could be earned for buying 70% of a builder's engine needs from Brunswick, 2% for 65% market share, and 1% for 60% market share. Ad. 9-10; A232-33, A1229. For model year 1997, Brunswick introduced an alternative program that had no market share component but offered the same total discount. Few boatbuilders elected that program; plaintiffs all chose to continue to earn market share discounts. A279, A333, A354, A454-63. Brunswick eliminated market share discounts entirely in mid-1997. Ad. 73; A334. There has been no significant change in boatbuilders' buying patterns since then. A287-88, A335, A354-55. IBBI buys no more from Volvo now than when Brunswick offered market share discounts. A701.

Volvo first offered a market share discount program at the same time as Brunswick, in model year 1984. A371-72. OMC soon matched their discounts. A257-58, A265-66, A276-77, A374-75, A584, A1230. Brunswick's rivals frequently offered higher discounts predicated on larger market shares. Volvo gave a 4% discount to boatbuilders who bought 90% Volvo (A372) and a 5% or 6% discount to boatbuilders who bought 100% Volvo. A1229a, Ad. 118; see A161, A274-75, A390-92, A800-01, A821-25, A865, A870, A872, A882, A1035-36. Yamaha likewise offered a discount for 100% market share. A375, A389. Brunswick refused plaintiff IBBI's request in 1990 that it offer a 4% discount for 100% market share. A227-28, A1229.

Early on, Brunswick paid the market share discounts as a rebate based on actual purchases. Later, to enable it to offer a discount from invoice, Brunswick asked boatbuilders to sign "market share agreements" indicating the percentage of MerCruiser engines they expected to buy. *E.g.*, A383-84, A1024-34. Brunswick then applied the appropriate market share discount to each invoice, based on that prediction. No boatbuilder ever had to repay Brunswick if it failed to qualify for a discount it had received. Future discounts were simply adjusted to reflect the buyer's actual purchases. A202, A382-85, A393-94, A891.

In three years only, Brunswick also offered modest market share rebates to boat dealers (the boatbuilders' customers). Ad. 73. Only about 10% of dealers participated in this rebate program. A331-32. In model year 1992, dealers received a ½% rebate on the cost of an engine if 75% of their boat purchases had MerCruiser engines, and a 1% rebate for 100% market share. In 1995-96, dealers received rebates only for "off season" purchases, up to a maximum of $150 per engine if 100% of the dealer's boat purchases had MerCruiser engines, with smaller rebates for lower market shares. A62-65, A331-32, A593-99, A1232;

see also A709 (dealers requested a 100% market share program). Volvo offered larger discounts (up to $300 per engine for preferred dealers and 4% for 100% market share) over a longer period (4 years). Ad. 119; A156-59, A594-95, A1233; see A137 (OMC offered dealer incentives).

The district court acknowledged that Brunswick's market share agreements did not "obligat[e anyone] to purchase engines. Rather, they provided that [boatbuilders] and dealers would receive the discounts if their purchases reached the stated levels." Ad. 10; A12, A57-58, A382-83, A504. Nor, the court found, did the agreements "restric[t] the [boatbuilders'] or dealers' ability to deal with other engine suppliers." Ad. 11; A464-66. Boatbuilders remained free to buy 20-30% of their engine needs from other manufacturers without losing *any* discount—more if they were part of a buying group that collectively reached market share levels (A350-51); a boatbuilder or dealer could buy a greater proportion of its needs from Brunswick's competitors if it chose (A18-19, A291, A406, A580, A583); and competitors were free to (and did) meet or beat Brunswick's discounts. *E.g.*, A208, A585-87, A1231. A boatbuilder that switched all its engine business to another supplier would not care about Brunswick's discounts at all. A51-52.

In fact, plaintiffs bought a far higher proportion of their engines from Brunswick than the 70% or 80% needed to qualify for the largest market share discount. Plaintiff Powerquest bought 95-100% of its engines from Brunswick. A300-01. Plaintiff Mariah bought about 95% Brunswick engines because its customers wanted them and because Volvo was not a dependable supplier, making Brunswick's market share minimums "of no significance" to Mariah. A86, A204-07, A217, A219, A225, A235, A248. Plaintiff IBBI and a larger buyer co-op, the American Boatbuilders Association ("ABA"), continued to buy more than 80% Brunswick after Brunswick cut the level for maximum market share discounts to 70%. A601.

Long-term discounts. Beginning in model year 1989, Brunswick offered boatbuilders who signed 2- or 3-year market share agreements an additional 1-2% discount if their purchases reached market share levels. Ad. 10; A50, A405, A892, A941. Brunswick was not the first engine maker to seek longer-term relationships with its customers. Volvo executed a 3-year requirements contract to supply Bayliner with *all* its engine needs in 1983; OMC did the same in 1986; and Yamaha also offered a long-term contract discount. A137, A366-69, A506. By contrast, Brunswick's long-term agreements, like its market share agreements, did not obligate boatbuilders to buy *anything* from Brunswick, but merely specified terms upon which they could obtain a discount. A512-13, A664. Plaintiffs' expert Hall acknowledged that a boatbuilder who signed a long-term agreement "the next day" could "say 'Forget the contract, I'm going a different way,' and there is no penalty for that except that you don't get the benefits of the contract." A203. While long-term discounts, market share discounts, and a 1½% "alliance" discount (offered in model years 1995-97) were in effect, a boatbuilder that did not meet its market share predictions would forgo a discount of between 3% and 7%. A50, A54, A336, A892-93.

Brunswick also entered into contracts with four financially "troubled" boatbuilders that agreed to buy 50, 99, or 100% of their engines from Brunswick for 3-5 years in exchange for financial assistance. These very small companies, the largest of which accounted for only 2.8% of the stern-drive/inboard engine market, were not competitively "significant." Ad. 10; A59-61, A67-68, A152-55.

Volume discounts. Brunswick, Volvo, and OMC also offered boatbuilders discounts of up to 5% based on the quantity of engines purchased. Ad. 10; A50, A370, A419, A937-38. After increasing the threshold level necessary to obtain maximum volume discounts in 1990

(as IBBI requested, A543-44, A861), Brunswick reduced that threshold to 2500 engines in 1995 in response to lower levels set by Volvo and OMC. Ad. 10; A370-71 (Volvo's threshold was 1000 engines in 1993 and 1500 in 1994; OMC's threshold was 1600 engines in 1992 and 2200 in 1993), A890.

Purpose of market share discounts. Brunswick employees and its expert, Dr. Frederick Warren-Boulton, former Chief Economist for the Antitrust Division, Department of Justice ("DOJ"), testified without contradiction that Brunswick's discount programs served efficiency and business purposes. The market share program made discounts available to small boatbuilders who did not qualify for volume discounts, thereby enabling this important segment of Brunswick's customer base (A661, A1048-49) to compete more effectively against larger builders like plaintiffs. A31, A230-31, A278, A280, A328-39, A352-53, A376-77, A424, A505, A637-38, A1151. The chairman of the board of plaintiff IBBI admitted that large boatbuilders and buying groups like IBBI preferred volume to market share discounts and wanted high volume discount thresholds, which gave them a "competitive edge" over smaller competitors. A250, A826-27; see A229-31 (lower thresholds meant "that a company or buying group that was smaller than you * * * could have got a better discount"), A543-44 and A861 (IBBI asked Brunswick to raise volume discount thresholds), A669 (IBBI wanted to eliminate market share discounts and increase volume levels to disfavor smaller competitors), A514, A627.

Brunswick's market share discounts also helped to improve the predictability of demand for MerCruiser engines. A311, A326-27, A654-57. By helping Brunswick plan "long term manufacturing capacity and production," the discounts allowed it to maintain "efficiencies" and "keep our cost of manufacturing as low as possible." A375-77; see A343-49 and A620-

22 (discount programs helped Brunswick keep plants and employees working, order engine blocks and parts efficiently, manage inventory, and avoid delivery delays), A581-82 (discounts "smoot[h] out the production cycle," leading "to lower costs" and "prices"), A610.

Finally, by encouraging boatbuilders and dealers to concentrate sales and service efforts on Brunswick's products, market share discounts produced "alignment," "a seamless approach to the consumer" from engine manufacturer, boatbuilder, and dealer that enabled Brunswick to "go to market in a more cohesive fashion." A438, A595-98, A639-53, A662, A708. Focusing builder and dealer efforts on MerCruiser engines meant better product promotion, a "higher level [of] skill," "better quality of installation," and improved "consumer satisfaction." A683-84; see A595, A693 (discount programs were "a way of improving the quality [of dealer service] to the consumer"). Builders and dealers also achieved efficiencies by handling a high proportion of MerCruiser engines. A166-67, A330, A423, A426-30, A435-37.

4. Brunswick's Vertical and Product Extension Acquisitions

A fundamental industry shift towards selling a boat and motor "package" that was easier for consumers to understand and buy, as well as Brunswick's desire to provide "more consistent quality," led Brunswick to acquire boatbuilders Bayliner and Sea Ray in 1986 for $775 million. A26-27, A476-83, A511, A722-23. These acquisitions made Brunswick a competitor of its boatbuilder customers—as plaintiffs have often complained. Oct. 16, 1998 Order, Ad. 71 (IBBI protests that "boat manufacturers not affiliated with an engine manufacturer should not have to compete with boat manufacturing operations owned by engine manufacturers"), A216 (Mariah competes "primarily" with Sea Ray); see A292, A302, A862-64. Fearing that independent boatbuilders might refuse to buy engines from

a competitor, Brunswick was committed to buying both Sea Ray and Bayliner—or neither—because together they ensured sufficient demand to keep Brunswick's stern drive engine plant operating at break-even level. A69, A407-08, A479-80, A492-93, A511, A713-19. In 1986, Brunswick informed the Federal Trade Commission ("FTC") and DOJ, under the Hart-Scott-Rodino Act, that it was buying both companies; neither the FTC nor DOJ, which "examine and evaluate the competitive impact (if any) of proposed mergers and acquisitions," raised any objection. Oct. 16, 1998 Order, Ad. 17; A481-82, A1164-225.

At the time of the 1986 acquisitions, Sea Ray was Brunswick's largest engine customer (A24), while Bayliner had a long-term contract to buy OMC engines until 1989, which Brunswick honored. A25, A734-35. Since then, Bayliner and Sea Ray have used MerCruiser engines. Ad. 71. In 1995, Brunswick acquired Baja, a "competitor" of plaintiff Powerquest, out of bankruptcy. A153-54, A302, A510, A1012. Plaintiffs' expert conceded that Baja was not "significant." A67-68.

Other marine engine manufacturers also integrated vertically, starting with Chrysler in the 1960s. A679-80. Shortly before Brunswick bought Bayliner and Sea Ray, OMC negotiated to buy both boatbuilders, declining to go forward only because it thought them overpriced. A132, A481, A497, A758-62. After Brunswick's acquisitions, OMC immediately bought 5 (and later about 17) boatbuilders and "br[ought] up the production of our captive boat companies to offset" the loss of Bayliner's business. A758, A779-81; see A21, A32, A36, A120-21, A131. Among OMC's acquisitions were Four Winns, a fast-growing builder that had been Brunswick's third largest stern drive customer, and major builders like ChrisCraft and Sea Swirl. A366, A485, A497, A785. OMC's captive boatbuilders bought OMC engines exclusively, and after the joint venture bought 100% Volvo. A415-16, A704,

A763-64. Volvo purchased a $100 million equity stake in Genmar, which had previously been Brunswick's second largest customer and had bought 90% of its engines from Brunswick. Volvo expected that deal to result in Genmar buying 50% of its engine needs from Volvo. A409, A491, A499, A816, A932. Like Brunswick, the Volvo/OMC joint venture sells about half its output to captive boatbuilders. A34, A42.

With hundreds of competitors in the boatbuilding business (A13, A798-99) and—as plaintiffs conceded—no barriers to entry or expansion in the boatbuilding business (A1236 n.36), Brunswick's engine rivals could easily expand their captive markets to increase sales of their engines. A211-14, A218a, A268-69, A299, A579, A758, A779-81; see *infra*, pp. 46-48 (documenting recent entry). New entrants into the upstream engine market could readily enter the downstream boatbuilder market as well (as Toyota has done). At the boat dealer level, there are thousands of competitors and entry is easy. A331, A596.

Brunswick also made two small product-extension acquisitions. In 1987, it bought the assets of BMW Diesel (which made and sold diesel engines in Europe), in a failed attempt to compete with Volvo's European diesel sales. A71, A506-07, A623-24, A667-68, A729-31. It also bought Kiekhaefer, a niche producer of the drive component for $50,000 high performance stern drive engines, in 1990. A45, A72, A506-09, A687.

5. Competition in the Stern Drive/Inboard Engine Market

The market was highly competitive when Brunswick first offered its disputed discounts and made the challenged acquisitions and is highly competitive today, with independent boatbuilders shifting purchases from one engine manufacturer to another to take advantage of the best products and prices or to support alternative suppliers. Ad. 120-24; A15-19, A291, A306, A524, A528-29, A672-75; see also A20 and A784, A791-92 (boatbuilders and dealers

switch freely between suppliers). Brunswick's competitors engage in "marketing warfare." A316-18; see A297, A410, A441-42, A588-91. Volvo, backed by its huge scale outside the U.S. (A503), frequently tries to match or undercut Brunswick's prices (A297, A316, A585-87, A634-35, A657, A665-66, A705, A930), dramatically slashes prices for selected products to "cherry pick" business (A636, A665-66), and provides cash payments and other benefits to win sales to dealers. A319-25. See A290, A319-22, A1046 (Volvo is "a highly aggressive competitor with tactical pricing attacks at key customers"), A1140. Studies prepared for Volvo describe specific plans to attack Brunswick by focusing on up-scale products, courting a few large builders, improving product image and service, and increasing Volvo's dealer base; and they conclude that Volvo has an advantage over Brunswick because boatbuilders do not see Volvo as a competing seller of boats. A1130-31, A1146-47. Volvo could easily expand output to handle increased sales. It has "considerable" excess capacity—its plant built 76,000 stern drives in 1988 but builds only 20,500 today. A699, A702-03; see A148-51, A252, A738, A765, A930, A1039-40.

In addition to Volvo, many inboard makers also compete in the market; Toyota, with "[t]remendous resources," is a powerful new competitor for inboard engine sales that could expand into "the sterndrive business overnight" (A433); and any auto or outboard engine maker "is a potential competitor." A309; see A189, A312-13, A690, A888. The evidence showed that outboard engines, though the jury found them not to be in the relevant market, compete with stern drives in widely used applications such as family "runabout" boats. A38-39, A188-201, A259, A270, A310, A338-39, A395-98, A421, A453, A520, A556, A602, A697-98, A756.

Competition is intensified by powerful buying groups like IBBI and ABA, which pool the clout of independent builders to insist on favorable prices. A37, A284, A295, A517, A826-27. These groups buy 25% of Brunswick's engines and are among its "best customers." A663, A858, A1226. They exert "tremendous pressure" on manufacturers to "mee[t] competitive prices" (A518, A617) and "extract significant economic concessions" from Brunswick. A337, A406a-b; see A232-33, A285-86. IBBI not only urged its members to buy Volvo instead of Brunswick as a "bargaining chip" to get what it wanted, but also went so far as to initiate a *per se* illegal boycott of Brunswick's engines. Ad. 64-104; A237-48, A253, A305, A551.

Intense competition, powerful buyers, and falling demand have constrained price increases by Brunswick. A387-88, A418, A918-19, A922. In setting prices, Brunswick considers its costs, competitors' prices, and customer reactions. A314-17, A356-57. Its modest price increases have been in line with or below inflation indices, and on average lower than increases in both the price of engine blocks—the costliest component of Brunswick's engines—and of outboard engines. A411, A422, A574-76, A1043-44, A1064, A1234.

6. Plaintiffs' Antitrust Claims and Brunswick's Counterclaim

Plaintiffs filed suit in December 1995, alleging that Brunswick's market share and long-term discounts and decade-old acquisitions violated Sherman Act §§ 1 and 2, and that its acquisitions violated Clayton Act § 7. Brunswick counterclaimed that plaintiffs illegally boycotted Brunswick.

Plaintiffs' theory of liability and damages is encapsulated in the pivotal testimony of their sole expert, economist Robert Hall. Hall opined that Brunswick acquired and main-

tained a monopolistic share of the engine market through a combination of discount programs and acquisitions that together foreclosed 78%

of the boatbuilding market to competitors. Ad. 16; A74. Supposedly, by offering a "discount to a company that gives Brunswick a large fraction of its business" (A49), Brunswick locked boatbuilders into buying Brunswick engines with "golden handcuffs" (A6); and the discounts imposed a "tax" on builders that bought engines from other manufacturers. A47-48. The discounts purportedly created "a barrier to entry" because competitors had "to come in with a substantially lower price" to "compensate * * * for the loss of the discount from Brunswick" if they wanted "to get part of the boatbuilders' business." A53-57, A79, A208. In addition, Brunswick's vertical acquisitions allegedly foreclosed outlets to rival engine makers, and its purchases of engine component makers reduced potential competition. Hall claimed that together this conduct denied competitors the ability to achieve minimum viable scale. A82.

Assuming a market of commodity-type products in which engine producers have the same costs and consumers have no preference for one product over another (A113), Hall speculated that "without exclusionary acts" Brunswick's share in a two-manufacturer market "would be about 50%." A81. Hall attributed every point of Brunswick's market share above 50% to anticompetitive conduct. He also opined, as the sole basis for plaintiffs' claim of injury and damages, that any market share above 50% resulted in a substantial "overcharge" on each engine that plaintiffs purchased from Brunswick (A85, A108-116, A1071-74)—an overcharge that increased mechanically with each additional point of market share. A562-65. Hall's theory thus rested on the contradictory proposition that Brunswick's discounted prices could *at the same time* be anticompetitively low (irresistible discounts that were "financially beneficial" to buyers) and anticompetitively high (like a "$9 loaf of bread"). A6, A102-08,

A281, A304, A604a-b. Hall admitted that, although he had the tools to separate the economic effects of lawful from allegedly unlawful conduct, he had not done so. A144-47.

7. The Jury's Verdict and the Rulings of the District Court

The jury found for plaintiffs on their claims and on Brunswick's counterclaim, awarding plaintiffs the $44,371,761 damages calculated by Hall for the period from December 1991 (4 years prior to plaintiffs' filing their complaint) through the trial. Ad. 106-13. The district court trebled that award to $133,115,283. Ad. 59-63.

The district court denied Brunswick's renewed motion for judgment as a matter of law and motion for a new trial. Ad. 1-36. The court rejected Brunswick's contention that its discounts were legitimate above-cost price competition, citing "bundling" cases holding that discounts on one product conditioned on the purchase of *other* products may be unlawful. It analogized the "strings" involved in those tying cases to Brunswick's requirement that buyers purchase a percentage of their engine needs from Brunswick to qualify for a discount—termed by the court "the de facto equivalent of exclusive dealing." Ad. 13, 20. It adopted Dr. Hall's theory in full, including his view that two engine makers would hold equal shares of a competitive market and that Brunswick's discounted prices were both too high to be competitive and too low to be matched by efficient competitors. Ad. 14-17. Judge Moody placed particular weight on documents prepared by Brunswick and its business consultant, McKinsey & Co., that described the discount programs as barriers to entry or protections from market share erosion. Ad. 17-18.

In a subsequent order, the court denied plaintiffs any equitable relief, finding, among other things, that plaintiffs were guilty of laches as a result of their "long and unjustified delay" in filing suit. Ad. 81. In addition, the court entered judgment as a matter of law for

Brunswick on its counterclaim, concluding that plaintiffs had engaged in a concerted boycott against Brunswick that was "a *per se* violation of the antitrust laws." Ad. 46.

Subsequently, plaintiffs' counsel filed a putative class action on behalf of all other independent boatbuilders (a class they assert has claims for damages three times larger than the $133 million awarded here), contending that the verdict in this case has "collateral estoppel" effect and is conclusive as to all major issues in the new suit. *KK Motors, Inc.* v. *Brunswick Corporation*, No. 98-2307 (D. Minn.) (filed Oct. 23, 1998). Similarly, Volvo, Brunswick's principal rival, filed an antitrust suit alleging that the jury's verdict here establishes the illegality of Brunswick's price discounts and acquisitions. *Volvo Penta of the Americas, Inc.* v. *Brunswick Corporation*, No. 98-CV1473 (E.D. Va.) (filed Dec. 22, 1998). Brunswick has moved to stay both actions pending the outcome of this appeal.

SUMMARY OF ARGUMENT

I. Brunswick's discounts were vigorous price competition—the paramount goal of the Sherman Act. They challenged rivals to meet competition, but did nothing to preclude rivalry. Brunswick had a 75% market share before it offered market share discounts. After it began to use market share discounts its share fell to 50% as a result of competition from OMC. Nothing prevented equally efficient rivals from meeting or beating Brunswick's discounted prices, particularly because buyers made *no commitment* to buy *any* number of engines from Brunswick. Rival engine manufacturers used their own market share discounts to undercut Brunswick. As industry members recognized, these discounts were a normal business practice that served important competitive goals. Supreme Court and Eighth Circuit precedent makes clear that above-cost discounts in such circumstances are lawful and pro-competitive. The antitrust laws strongly encourage all competitors, including putative mono-

polists, to lower their prices and increase their output for the benefit of consumers. Brunswick is therefore entitled to judgment as a matter of law on plaintiffs' discount claims.

II. Plaintiffs' challenge to Brunswick's acquisitions also fails as a matter of law. The district court denied plaintiffs equitable relief in part because of their "long and unjustified delay" in bringing suit, as determined by reference to the 4-year statute of limitations. *A fortiori*, plaintiffs' long delay completely disposes of plaintiffs' acquisition-based damages claims, which are governed solely by the 4-year statute. Even if this Court were to reach the substantive merits of those claims, Brunswick is entitled to entry of judgment as a matter of law. Under well-established precedent, vertical acquisitions are presumptively innocuous or competitively beneficial, and cannot be deemed unlawful where there are few barriers to entry in the downstream market, a circumstance concededly present here. It is not surprising that the DOJ and FTC, which reviewed these acquisitions thirteen years ago, permitted them to take place without objection.

III. Plaintiffs' antitrust claims fail for an additional and independent reason. Plaintiffs failed to show that Brunswick possessed substantial market or monopoly power in the marine engine business. Although Brunswick had a large (but fluctuating) share of the market, it faced much larger multinational rivals that could take that market share away if it charged supracompetitive prices. Brunswick's principal rival also had substantial excess capacity, and buyers (such as plaintiffs) coordinated their purchases to place additional downward pressure on price. Recent entry into the market by Toyota, a giant firm 30 times larger than Brunswick, leaves no doubt that Brunswick has no power to prevent entry by new rivals. Actual experience in this market, in which Brunswick lost significant market share to OMC,

conclusively shows that it cannot prevent entry or expansion by rivals offering a popular product at a low price.

IV. Brunswick also is entitled to entry of judgment as a matter of law because plaintiffs' expert witness, Dr. Hall—who was the principal source of evidence on liability, causation, and damages—presented an economic theory that is unsupported by actual market facts, unreasonable, and contrary to fundamental antitrust principles. Assuming homogeneous commodities sold by producers with the same costs—circumstances not present in the marine engine industry—Hall hypothesized that under competitive conditions Brunswick and Volvo would have equal market shares, and that any deviation from this lockstep duopoly must be attributed to anticompetitive conduct. Hall then calculated "overcharge" damages mechanically, based on Brunswick's success in selling its products to consumers and earning more than 50% of the market. Hall's 50-50 theory deviates from the historical performance of the marine engine industry and every other industry selling differentiated products. If accepted by this Court, it would leave successful manufacturers in an impossible dilemma: no manufacturer with a large market share would dare lower its price or improve its product for fear of increasing its market share and facing ruinous treble damages liability. Such a chilling effect would badly disserve consumer welfare. Still worse, Hall persuaded the jury that Brunswick's prices were *both* monopolistic overcharges *and* deeply discounted prices that rivals could not match; and he failed to disaggregate the effects of admittedly lawful from allegedly unlawful conduct. Hall's incoherent theory cannot be accepted as a basis for this staggering $133,000,000 treble damages award.

V. The evidence considered as a whole cannot sustain the jury's verdict. This Court should direct entry of judgment as a matter of law for Brunswick if it finds that plaintiffs'

discount or acquisition claims are legally invalid for any reason; *or* that any aspect of Hall's theory, which was essential to liability and damages, is faulty; *or* that Brunswick lacked monopoly power. At a minimum, because (at plaintiffs' request) the jury returned a general verdict imposing damages without distinction among plaintiffs' numerous claims, Brunswick is entitled to a new trial if this Court finds merit in *any* of its contentions.

ARGUMENT

I. BRUNSWICK'S DISCOUNT PROGRAMS WERE LAWFUL COMPETITION.

To be liable for monopolization under Section 2 of the Sherman Act, a defendant must have acquired or maintained monopoly power by improper means, not through "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). Even if Brunswick had monopoly power in the relevant market (it did not, see Part III, *infra*), the fact that the modest discounts it offered to boatbuilders and dealers for buying more engines made it more difficult for rivals to prosper does not make those discounts anticompetitive. As the leading treatise explains, "[b]uilding a better mousetrap, responding more effectively than rivals to changing consumer tastes, offering higher quality or better service, adopting cost-saving innovations—all competitive moves that enhance one's position vis-a-vis one's rivals—'exclude' those rivals," and "the greater the success, the greater the exclusion." 3 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 611, at 23 (rev. ed. 1996). But competitive actions, including "aggressive but non-predatory pricing," "are welcomed by the Sherman Act" and are not "'exclusionary'" "even though they tend to exclude rivals and may even create a monopoly." *Id.* ¶ 651b, at 76.

Well-financed rivals continued to compete fiercely for sales after Brunswick offered market share discounts. As the district court expressly found (Ad. 10-11), *buyers made no commitment to buy any engines from Brunswick, but were free to (and did) buy engines from its competitors.* Rival engine manufacturers offered their own market share discounts, meeting and beating Brunswick's programs. Rivals took sales away from Brunswick on the basis of price and product features—just as OMC slashed Brunswick's market share from 75% to 50% by aggressively marketing its Cobra engine, *after Brunswick had offered the challenged discounts and been vertically integrated for a number of years.* Rivals also integrated vertically to provide themselves with an assured customer base. Most recently, Toyota, a fully-integrated company thirty times larger than Brunswick, has entered the market with a new engine.

Supreme Court and Eighth Circuit precedents recognize that "'cutting prices in order to increase business often is the very essence of competition.'" *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (judgment for defendant notwithstanding $149 million antitrust verdict); *Morgan* v. *Ponder*, 892 F.2d 1355, 1357-64 (8th Cir. 1989) (judgment for defendant on Sherman Act claims alleging aggressive price discounting by a dominant provider; jury verdict set aside). Because consumers ordinarily benefit from discounting, it is incumbent upon reviewing courts to attend carefully to the pertinent features of the market and the challenged discount. *E.g.*, *National Parcel Servs., Inc.* v. *J.B. Hunt Logistics, Inc.*, 150 F.3d 970, 971 (8th Cir. 1998) ("Unfair pricing antitrust claims should be viewed with 'great caution and a skeptical eye'").

Under the undisputed facts of this case, there can be no doubt that Brunswick's discounts were lawful and procompetitive. The discounts were in all instances above Bruns-

wick's costs, and therefore could not be deemed "predatory." Moreover, because customers were not—either legally or as a practical matter—required to deal exclusively with Brunswick in order to obtain discounts, Brunswick's voluntary discount programs could not constitute "exclusionary" conduct that violates the Sherman Act.

A. Settled Precedent Establishes The Lawfulness Of Brunswick's Above-Cost Discounts.

According to Dr. Hall, Brunswick's market share and volume discounts totaled $500-600 off the $5,000 list price of a Brunswick engine. A50-53, A65-66, A90-91.[2] Brunswick's discounted prices were well above its marginal cost, which Hall asserted was about $3000 per engine. A84. Plaintiffs have not alleged that Brunswick discounted engine prices below *any* measure of cost. Aug. 19, 1998 Order, Ad. 11-12.

The Supreme Court consistently has rejected attempts to turn the Sherman Act against above-cost discounting by sellers with a leading market share. In *Brooke Group*, the Court explained that "'[l]ow prices benefit consumers'" and, "'so long as they are above predatory levels, they do not threaten competition.'" 509 U.S. at 223. An above-cost discount is generally lawful because it "either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting." *Ibid.* Accord *State Oil Co.* v. *Khan*, 118 S. Ct. 275, 282 (1997) ("condemnation of practices resulting in lower prices to consumers is 'especially costly' because 'cutting prices in order to increase business often is the very essence of competition'"); *Cargill, Inc.* v. *Monfort of*

[2/] Plaintiffs did not dispute the lawfulness of Brunswick's volume discounts. In fact, they favored volume discounts because those discounts raised the costs of smaller rivals who could not qualify for them. *Supra*, p. 10.

Colo., Inc., 479 U.S. 104, 116 (1986) ("competition for increased market share" by a dominant firm "is not activity forbidden by the antitrust laws"; it "'is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition'"); *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (condemning "cutting prices in order to increase business" would "chill the very conduct the antitrust laws are designed to protect").

This Court also recognizes that "[a] monopolist may * * * aggressively compete in the marketplace" and, by discounting its prices, acts as "a normal, properly aggressive competitor." *SuperTurf, Inc.* v. *Monsanto Co.*, 660 F.2d 1275, 1280 (8th Cir. 1981); see *Morgan*, 892 F.2d at 1358-59 (above-cost discounts did not violate the Sherman Act; "consumers generally benefit from * * * aggressive price competition"); *International Travel Arrangers* v. *NWA, Inc.*, 991 F.2d 1389, 1394 (8th Cir. 1991) ("'[P]rices above average total cost are legal *per se*'"); *Bathke* v. *Casey's Gen. Stores, Inc.*, 64 F.3d 340, 343-44 (8th Cir. 1995). Other courts of appeals consistently reach the same conclusion. *E.g.*, *Kentmaster Mfg. Co.* v. *Jarvis Prods. Corp.*, 146 F.3d 691, 695 (9th Cir. 1998) (a monopolist may "enlarg[e] its market share" through price discounts; "[t]o beat a competitor's prices is not an offense against the antitrust laws" but "good business and normal business" and "a boon to customers choosing between the competitors"); *Ball Mem. Hosp.* v. *Mutual Hosp. Ins. Co.*, 784 F.2d 1325, 1339 (7th Cir. 1986) ("Even the largest firms may engage in hard competition, knowing that this will enlarge their market shares"); see also W. Holmes, ANTITRUST LAW HANDBOOK 423-25 (1998) (even "firms holding monopoly power" can use "normal competitive behavior," including above-cost "price reductions").

Barry Wright Corp. v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983)—approved by the Supreme Court in *Matsushita*, 475 U.S. at 585 n.8, 594, adopted as the law of this Circuit in *Henry* v. *Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987), and relied on again by this Court in *Morgan*, 892 F.2d at 1358-59—demonstrates the legitimacy of much larger discounts than Brunswick offered, conditioned on purchases of a higher percentage of the customer's needs than was necessary to qualify for Brunswick's highest discount. In a scholarly opinion by now-Justice Breyer, the First Circuit rejected claims that a monopolist manufacturer violated the Sherman Act because the 25-30% discounts it offered in return for a customer's commitment to purchase 86% of its requirements from the manufacturer "dr[ove] out competition" that had higher costs. 724 F.2d at 229, 233, 238. Emphasizing that "lower prices help consumers" and that a hallmark of a competitive marketplace is the willingness of firms "to cut prices in order to take customers from their rivals" (*id.* at 231), the court observed that a "major task" of antitrust courts is to "avoid discouraging desirable price-cutting activity." *Id.* at 231-32.

In the absence of below-cost pricing, the court could not fashion a workable method to distinguish between a firm that cut prices improperly to "discipline" a rival and one that cut prices to compete better. 724 F.2d at 234. To attempt to do so would create too great a risk of "penaliz[ing] a procompetitive price cut, perhaps the most desirable activity (from an antitrust perspective) that can take place in a concentrated industry where prices typically exceed costs." *Id.* at 235; see also *Morgan*, 892 F.2d at 1358-59 (noting the "real danger" in mistaking "highly competitive pricing" for a § 2 violation).

The district court was plainly mistaken in concluding (Ad. 12) that these principles do not apply in this case, where plaintiffs have not come close to proving *any* form of predatory

pricing. In fact, these principles apply *a fortiori*. The Supreme Court has stressed that above-cost discounted prices are generally procompetitive "'regardless of how those prices are set.'" *Brooke Group*, 509 U.S. at 223. In a case where there is neither predation nor exclusive dealing, it is especially important to apply what the Supreme Court has described as a general antitrust principle: that a monopolist's discounting "'to increase business'" at the expense of rivals is "'the very essence of competition'" (*id.* at 226) and "the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Under that principle, above-cost discounting cannot be treated as an illegitimate entry barrier in a case where the record affirmatively establishes that the discounts did not restrict the free choice of buyers among engine suppliers.

It makes no difference if discounts reduced Brunswick's prices below Volvo's cost base. The Supreme Court has "reject[ed] the notion that above-cost prices that are *below* * * * *the costs of a firm's competitors* inflict injury to competition cognizable under the antitrust laws." *Brooke Group*, 509 U.S. at 223 (emphasis added). A market leader's ability to discount below rivals' costs "reflects [its] lower cost structure" and the relative efficiencies of the rival firms (*id.* at 223); antitrust law is not designed to protect high-cost competitors from market forces at the expense of consumers and more efficient rivals. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984) ("An efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster"); *Conoco* v. *Inman Oil Co.*, 774 F.2d 895, 906 (8th Cir. 1985) (that a competitor's higher costs mean it is unable to match a defendant's price cuts "cannot be the basis for a finding that [the defendant's] pri-

cing activity was predatory or anticompetitive"); 11 H. Hovenkamp, ANTITRUST LAW ¶ 1807c, at 120 (1998) (that "a rival cannot match the [discounted] price" is a "stron[g] indicator" that the discount is "efficient" and reflects the defendant's "lower per unit costs").

It is particularly implausible to think that Brunswick's conduct was anticompetitive when, as plaintiffs' expert conceded, *all* of Brunswick's rivals used the "same tools" to compete, including market share discounts and vertical integration. A13738, A181. Volvo introduced market share discount programs at the same time as Brunswick; OMC and Yamaha both offered market share discounts; and Volvo and OMC entered into long-term requirements contracts with boatbuilders before Brunswick offered its first long-term discount. Brunswick's engine rivals offered *larger discounts* than Brunswick, for *higher market share*. *Supra*, pp. 7-8.

This sort of competitive, industry-wide use of discounts inevitably causes prices to *fall* and industry output to *increase* relative to what output would be without discounts. And buyers, especially smaller boatbuilders who cannot qualify for volume discounts, benefit from market share discounts that reduce their costs. Even plaintiffs, though they preferred volume to market share discounts to disadvantage smaller rivals (*supra*, p. 10), *asked* Brunswick to match the larger 4% discount for 100% market share that its rivals offered. A227-28. Under settled Eighth Circuit law, "ordinary business practices typical of those used in a competitive market," like the market share discount programs used in the stern drive/inboard engine industry, "do not constitute anticompetitive conduct violative of Section 2." *Trace X Chem., Inc.* v. *Canadian Indus., Ltd.*, 738 F.2d 261, 266 (8th Cir. 1984) (reversing jury verdict for § 2 plaintiff); see *Conoco*, 774 F.2d at 905-06; *Houser* v. *Fox Theatres Mgt. Corp.*, 845 F.2d 1225, 1231 (3d Cir. 1988) ("common [industry] practice"

could not support "an inference of anticompetitive behavior"); *Equipment Distribs. Coalition* v. *FCC*, 824 F.2d 1197, 1202 (D.C. Cir. 1987) ("routine commercial * * * practice[s]" also used "by competitors" are not anticompetitive); *Souza* v. *Bishop Estate*, 821 F.2d 1332, 1336 (9th Cir. 1987); *Northeastern Tel. Co.* v. *AT&T*, 651 F.2d 76, 92-93 (2d Cir. 1981).

Unsurprisingly, given their industry-wide use, the record shows that Brunswick's market share discounts enhanced efficiency. See *supra*, pp. 10-11. Uncontested evidence showed that the discounts improved the predictability of engine demand, which aided parts ordering, inventory control, and other aspects of production planning, and helped keep manufacturing costs to a minimum and plants and employees working productively. Discounts also produced "alignment" by encouraging boatbuilders and dealers to focus their efforts on a particular manufacturer's engines, which meant better quality and more committed service for the consumer. And market share discounts put boatbuilders that were too small to qualify for volume discounts—an important segment of Brunswick's business—on a more even footing with large buyers and buying groups like plaintiffs. Because Brunswick's discounts served these important business purposes, they cannot be condemned under the Sherman Act. *Trace X*, 738 F.2d at 266 ("[a]nticompetitive conduct is conduct without legitimate business purpose" that "makes sense only because it eliminates competition"); *Barry Wright*, 724 F.2d at 230 ("conduct reasonable in light of [defendant's] business needs" is not anticompetitive); *Johnson* v. *Nyack Hosp.*, 964 F.2d 116, 121 (2d Cir. 1992).

Courts are especially wary of *competitors'* claims that a rival has acted anticompetitively. *Barr Lab., Inc.* v. *Abbott Lab.*, 978 F.2d 98, 109 (3d Cir. 1992) (courts "'carefully scrutiniz[e]'" such claims because a "'competitor['s] * * * interests are not necessarily con-

gruent with the consumer's stake in competition'"). Plaintiffs compete with Brunswick's boatbuilding divisions and admit that they resent having to do so. See *supra*, pp. 11-12. The district court ignored this troubling aspect of plaintiffs' suit, seemingly oblivious to plaintiffs' strong incentive to contort the antitrust laws to hobble Brunswick's ability to compete effectively (just as Volvo also seeks to do in its new suit alleging that the verdict here establishes Brunswick's antitrust liability to Volvo, *supra*, p. 18). Improper treble damages awarded at the behest of disgruntled rivals are "very dangerous for the workings of our economy." Baumol & Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 252 (1985). In the words of Judge Easterbrook, "[w]hen a business rival brings suit, it is often safe to infer that the arrangement is beneficial to consumers" (*The Limits of Antitrust*, 63 Tex. L. Rev. 1, 18, 35 (1984)), a point emphasized by former DOJ Antitrust Division chief Thomas Kauper in *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. 551 (1991).

B. Brunswick's Discount Programs Had No Anticompetitive Effects.

The district court refused to follow *Brooke Group*, *Barry Wright*, *Henry*, and *Morgan* on the ground that "this case has never been about 'low prices.'" Ad. 12. In doing so, the court accepted Dr. Hall's theory that Brunswick's engine prices were simultaneously so *high* as to be monopoly overcharges even after the discounts were applied (the basis for plaintiffs' damages claim), yet so *low* as to be irresistible inducements that locked engine buyers into Brunswick and prevented its rivals from competing (the basis for plaintiffs' claim that Brunswick's discount programs were anticompetitive).

That theory is incoherent. Selling the equivalent of a "$10 loaf of bread" at a $1 discount would not erect a barrier to entry or expansion. A46-48, A281, A604a-b. To the

contrary, a "$9 loaf" would *invite* market entry by auto and other engine manufacturers and expansion by Volvo or any of the numerous inboard engine makers. See *Matsushita*, 475 U.S. at 589 ("monopoly pricing" invites "quick entry by new competitors eager to share in the excess profits"); *Tops Markets* v. *Quality Markets*, 142 F.3d 90, 99 (2d Cir. 1998) ("prices above their competitive level" mean that "new competitors could and would enter the market and, by undercutting those prices, quickly erode [the monopolist's] market share"). Hall testified that Brunswick charged $4400, *after* discounts, for an engine that cost $3000 to produce. A52-53, A65-66, A90-91. That left any equally efficient rival with an ample margin to undercut Brunswick's prices to win sales. Given this stark inconsistency in plaintiffs' theory of the case, it is not surprising that the district court found "no existing case law" condemning "anything even close to the unique situation" here. Ad. 19.[3]

Ignoring the self-contradictory nature of plaintiffs' theory, the district court held Brunswick's discounts unlawful because they were conditioned upon a boatbuilder's buying up to 70% (80% in earlier years) of its engine needs from Brunswick—a condition that the court believed deprived rivals of the ability to compete and made Brunswick's programs "the de facto equivalent of exclusive dealing." Ad. 19-20. That analysis is legally erroneous.

Brunswick's discount programs were not unlawful exclusive dealing. "Exclusive dealing" is ordinarily lawful and procompetitive, particularly at the manufacturer level. *E.g.*, *Omega Envtl., Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1162-65 (9th Cir. 1997). Exclusive dealing occurs, moreover, when customers are contractually *unable* to deal with rivals, so

[3/] Plaintiffs' theory is doubly incoherent. Plaintiffs attack Brunswick's market share discounts as irresistible, yet applaud volume discounts that create the same incentives to buy more engines from a single supplier and impose, under Hall's theory, the same "tax" on boatbuilders who shift to rival engine makers. See *supra*, p. 10.

that those rivals are "frozen out of [the] market." *Jefferson Parish Hosp. Dist.* v. *Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, Burger, Powell, and Rehnquist, JJ., concurring). It does not result when discount programs, like Brunswick's, leave a buyer *free to cease dealing with the seller at any moment*. See *Omega*, 127 F.3d at 1163-64 ("easy terminability" of an agreement "negate[s]" its "potential to foreclose competition"); *Roland Mach. Co.* v. *Dresser Indus.*, 749 F.2d 380, 395 (7th Cir. 1984) ("contracts terminable in less than a year are presumptively lawful"); accord *Paddock Publ'g, Inc.* v. *Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1996); *U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993). Nor does exclusive dealing occur when a purchaser is free to buy 20-30% of its needs from *other sellers without any loss of discount*. See *Magnus Petrol. Co.* v. *Skelly Oil Co.*, 599 F.2d 196, 200-01 (7th Cir. 1979) (there was no exclusive dealing arrangement where the "quantity specified in the agreements amounted to less than 60-80 per cent of plaintiffs' total requirements"); *Barr Lab.*, 978 F.2d at 110 n.24 ("An agreement affecting less than all purchases does not amount to true exclusive dealing"); *Paddock Publ'g*, 103 F.3d at 46 ("An exclusive dealing contract obliges a firm to obtain its inputs from a single source"); *McElhenney Co.* v. *Western Auto Supply Co.*, 269 F.2d 332, 338 (4th Cir. 1959).[4]

[4/] The cases relied on by plaintiffs below—cases so far off the mark that the district court did not discuss them—are actual exclusive dealing cases in which a monopolist barred customers from dealing with competing suppliers. In *United Shoe Mach. Corp.* v. *United States*, 258 U.S. 451, 456-58 (1922), the dominant manufacturer of machinery for making shoes "effectually prevent[ed lessees of its equipment] from acquiring the machinery of a competitor" by requiring lessees of machines "absolutely essential to the prosecution and success of [their] business" to agree (1) that United Shoe could cancel the lessee's right to use its machinery "if the lessee fails to use exclusively" United Shoe's machines; (2) that the lessee would not use United Shoe's equipment on shoes on which they had also used rivals' machines; (3) that the lessee would lose the right to retain the leased machines if it did not "take all additional machinery" from United Shoe; and (4) that the lessee would pay

Brunswick's discount programs were not "exclusive" in *any* sense of the term, and certainly did not make buying a high proportion of Brunswick engines "the buyers' only viable economic option." Aug. 19, 1998 Order, Ad. 19. The district court recognized that Brunswick's market share and long-term discount agreements did not "obligat[e anyone] to purchase MerCruiser engines," but merely "provided that [boatbuilders] and dealers would receive the discounts if their purchases reached the stated levels." Ad. 10. It also found that nothing in the agreements "restrict[ed boatbuilders'] or dealers' ability to deal with other engine suppliers" (Ad. 11)—as buyers' frequent switching among engine suppliers demonstrates. *Supra*, pp. 13-14. Boatbuilders could buy 20-30% of their engine needs from Brunswick's rivals without losing any Brunswick discount and remained perfectly free to (and did) buy more from rivals if they so desired. *Supra*, pp. 8-9. Brunswick's rivals (huge companies many times Brunswick's size) could compete for some or all of a boatbuilder's or dealer's business by meeting or beating Brunswick's discounts across the board or on a targeted basis—as Volvo, OMC, and Yamaha each did (*supra*, pp. 7-8, 14)—or by offering something else that consumers wanted, like OMC's new Cobra engine or Volvo's "duo-prop" feature. A10, A254, A499. The notion that Brunswick's discounts operated like exclusive dealing that foreclosed engine competitors from boatbuilder customers is belied both by the fact that, years after market share discounts were introduced, OMC used its Cobra engine to drive Brunswick's share of the stern drive market *down from 75% to nearly 50%*, and by Volvo's aggressive, targeted marketing to boatbuilders and dealers. *Supra*, pp. 2-3, 14.

United Shoe a royalty "on shoes operated upon by machines made by competitors." These "drastic provisions," totally unlike anything alleged here, "practically compel[led]" the exclusive use of United Shoe's machinery. *Id.* at 457-58. See also *Carter Carburetor Corp.* v. *FTC*, 112 F.2d 722, 732-33 (8th Cir. 1940) (manufacturer fixed discounts "upon the condition that [service stations] should cease and refrain from dealing in a new competing line of carburetors," "a condition that the purchaser should not deal in the goods of a competitor").

To be sure, like all efforts to win over customers, Brunswick's discount programs were "exclusionary" in the sense that rivals had either to compete—by reducing prices or offering better product features or service—or risk failure. But it "'is the nature of competition that at some point there are winners and losers, and the losers are excluded.'" *Balaklaw* v. *Lovell*, 14 F.3d 793, 801 (2d Cir. 1994). See also *Barry Wright*, 724 F.2d at 236 ("virtually every contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought"); *Brooke Group*, 509 U.S. at 223. Accordingly, the leading antitrust treatise concludes that above-cost discounts that "attac[h] merely to the quantity of goods purchased, and not to exclusivity itself," lack the "competitive impact" of exclusive dealing arrangements "because any equally efficient rival can take the customer by bidding a better price and even by compensating the customer for the loss of discount from the defendant." 11 H. Hovenkamp, ANTITRUST LAW ¶ 1807c, at 120 (1998). In consequence, conditional discounts like Brunswick's are "lawful and not subjec[t] to the laws of exclusive dealing." *Ibid.*[5]

[5/] The district court wrongly believed that Brunswick's use of dealer market share rebates along with boatbuilder discounts created an exclusionary "'two-tiered' effect." Ad. 16-17, 19. Brunswick offered dealers rebates in only three years; its competitors offered *larger* rebates to dealers over a *longer* period. *Supra*, pp. 7-8. Volvo—which used the Volvo/OMC joint venture's vast network of dealers—competed for dealer business by meeting or beating Brunswick's rebates and offered cash and other benefits to dealers to switch to Volvo. *Supra*, p. 14. Because dealers made no commitment to buy boats with even a single Brunswick engine (as the district court acknowledged, Ad. 10), any equally efficient rival could always obtain a dealer's business by lowering prices or offering attractive features or services. Plaintiffs' claim that Brunswick's rebates impeded competition is also thoroughly implausible given the existence of some ten thousand boat dealers, only about 10% of which ever qualified for Brunswick's rebates, and ease of entry at the dealer level. A331-332, A596, A599-600. Indeed, Toyota recently entered the relevant market and has rapidly established its own boatbuilder and dealer network. *Supra*, p. 2.

Brunswick's offer of incentives to buy more products that consumers desired cannot be deemed unlawful exclusive dealing in this context. *Northeastern Tel. Co.*, 651 F.2d at 91-93, is instructive. A competitor complained that the defendant monopolist's new pricing system, introduced in "segments of its business as they came under competitive attack," created strong "incentives" for the buyer to remain a customer of defendant and operated as an "economic lock-in." The Second Circuit agreed that the incentives (which plaintiffs called economic "penalties") made customers "unlikely to switch" to a rival during a contract period that could be ten years, but it nonetheless set aside a jury verdict for plaintiff, holding as a matter of law that the incentives did not violate the Sherman Act *because they were freely used by rivals*. See also *Stitt Spark Plug Co.* v. *Champion Spark Plug Co.*, 840 F.2d 1253, 1257-58 (5th Cir. 1988). The result should be no different here.[6]

"Tying" and "bundling" cases have no application here. In straining to sustain the jury's verdict, the district court wrongly analogized this case to "bundling" or "tying" cases condemning "package" discounts predicated on the purchase of different products. Ad. 12-14. The potential evil of "bundled" discounts is that an equally efficient rival, to compete, must either offer the full range of bundled products or match the aggregated discount on

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[6/] Two former Antitrust Division chief economists demonstrate that even substantial "penalty clauses" in true exclusive dealing contracts are problematic only if the seller has an unopposed opportunity to negotiate exclusive contracts because it is the first entrant into the market (a "first mover" advantage); buyers "find it difficult to coordinate" among themselves; there are "scale economies" and the incumbent seller uses staggered long-term contracts "with exclusivity provisions"; and "there are strong network effects in the market." R. Gilbert & C. Shapiro, *Antitrust Issues in the Licensing of Intellectual Property*, Brookings Papers on Economic Activity: Microeconomics 283, 333 (1997). None of those conditions existed here. Brunswick had no first mover advantage, but instead faced "active competition" from "substitute technologies and products." *Id.* at 306. Its customers formed powerful buying groups. Buyers could abandon Brunswick's non-exclusive "market share agreements" at *any* time. And there are no network effects in this traditional manufacturing industry.

products that it does sell. Thus, the antitrust problem in *SmithKline Corp.* v. *Eli Lilly & Co.*, 575 F.2d 1056 (3d Cir. 1978)—as the court explained in *LePage's Inc.* v. *3M*, 1997 WL 734005, at *8 (E.D. Pa. Nov. 14, 1997)—was that Lilly's discounts "linked [two] products which faced no competition" with a third product that competed with plaintiff's product. "[T]o compete, [plaintiff] would have had to offer on its one product the same rebate Lilly was offering on all three of its products bundled together." *Ibid.* Plaintiffs have never alleged that Brunswick's discounts operated in a similar way. "[S]ingle product cases," like this one, are controlled not by *SmithKline* but by the Supreme Court's recent decision in *Brooke Group*. See *Ortho Diagnostic Sys.* v. *Abbott Lab.*, 920 F. Supp. 455, 467-68 (S.D.N.Y. 1996); see also *Jefferson Parish Hosp.*, 466 U.S. at 21 ("a tying arrangement cannot exist unless two separate product markets have been linked").

Comments of Brunswick's business personnel and consultants are legally irrelevant and show no anticompetitive intent. The district court also placed reliance on comments from some Brunswick personnel and consultants to the effect that Brunswick's discounts protected its market share and were barriers to entry, holding that these remarks showed "the anticompetitive intent and effect" of the discount programs. Ad. 17-18. That was legal error. See *Barry Wright*, 724 F.2d at 232 ("intent to harms [rivals] * * * offers too vague a standard in a world where executives may think no further than 'Let's get more business'"). Indeed, plaintiffs' counsel advised the district court, in reference to "inflammatory language" in plaintiffs' own documents, that "inflammatory statements" and "hyperbole" "are not evidence of an antitrust violation." A1251, A1254.

The sorts of remarks that the district court cited—which this Court has observed are "often legitimately used by business people in the heat of competition"—are "ambiguous or

misleading" as evidence of "predatory conduct" and "*provide no help* in deciding whether a defendant" has gone beyond "aggressive competition" to engage in unlawful conduct. *Morgan*, 892 F.2d at 1359 (emphasis added). "[I]f portrayed by plaintiffs' attorneys as damning evidence of predatory intent," as they were here, they "may lead juries to erroneously condemn competitive behavior." *Ibid.* Even when there is evidence of anticompetitive intent, this Court has held, a plaintiff must make "'a separate showing of predatory conduct'" to prevail—something plaintiffs conspicuously failed to do. *Ibid.*; see *International Travel Arrangers*, 991 F.2d at 1396; *National Parcel Servs.*, 150 F.3d at 971; *Ball Mem. Hosp.*, 784 F.2d at 1338-39 ("Vigorous competitors intend to harm rivals, to do all the business they can. To penalize this intent is to penalize competition"); *A.A. Poultry Farms, Inc.* v. *Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-02 (7th Cir. 1989) ("If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden 'intent,' they run the risk of penalizing the motive forces of competition").

Beyond this, the statements on which plaintiffs relied to sway the jury, read in context, show no anticompetitive intent at all. The aggressive business vernacular used by Brunswick employees and consultants signaled efforts to promote customer loyalty in a competitive marketplace by providing a good product and service at a good price. A603; *e.g.*, A910 (recommending that Brunswick "[s]trengthen barriers at boat builders and dealers through more creative marketing programs and more responsive customer service"), A913 ("a barrier [to] entry is having a better product and better service"), A967 (Brunswick could "strengthen relationships [with distributors] which translate into barriers"). These documents, including those that talk about "barriers to entry," recognize that Brunswick faced an onslaught of intense competition from vertically integrated rivals aggressively offering sales inducements

to targeted segments of the market, which Brunswick was "essentially powerless" to prevent. A907-908; see A911, A915, A918, A925-26, A931-33, A965-70, A986-93, A1018. This is the same highly competitive marketplace, with sophisticated rivals fighting over every sale, described in contemporaneous Volvo documents. *E.g.*, A1022-23, A1039-40, A1139-40.

It is particularly untenable to regard these businessmen's and consultants' characterizations as signaling that Brunswick's market share discounts had an anticompetitive purpose and effect because undisputed evidence shows that those discounts imposed no restraint on the freedom of buyers. Brunswick's stern drive market share plunged from 75% to 50% when OMC introduced the Cobra, even though *Brunswick had already offered market share discounts for five years*. Plaintiffs consistently bought substantially *more* engines from Brunswick than was necessary to obtain the largest discount, because their customers *preferred* Brunswick engines. And after Brunswick eliminated market share discounts entirely, *boatbuilders' buying patterns remained unchanged*. *Supra*, pp. 2-3, 6-9. Clearly, Brunswick's discounts did nothing to constrain the free choice of engine buyers.

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The $133,000,000 judgment in this case "threatens to 'chill' highly desirable procompetitive price cutting" by signaling to businesses that above-cost discounts by a market leader are fraught with the risk of huge damages awards at the instance of competitors—even when discounting is the normal practice in the industry and rivals can and do continue to compete on the basis of price and other factors. *Barry Wright*, 724 F.2d at 235-36. By condemning a "decision by a firm to cut prices in order to increase market share," the jury's verdict— misinformed by Dr. Hall's untenable theory—"perverse[ly]" makes a vice of conduct that is a competitive virtue and thwarts an important goal of the antitrust

laws. *Cargill*, 479 U.S. at 116. Under settled Supreme Court and Eighth Circuit authority, the verdict should not be allowed to stand.[7]

II. PLAINTIFFS' CHALLENGES TO BRUNSWICK'S ACQUISITIONS ARE TIME-BARRED AND THE CHALLENGED ACQUISITIONS WERE LAWFUL.

A. Plaintiffs' Acquisition Claims Are Barred By The 4-Year Statute Of Limitations.

Plaintiffs' "long and unjustified delay" in filing suit led the district court to reject all their equitable claims addressed to Brunswick's acquisitions. Ad. 81. The statute of limitations bars plaintiffs' damages claims addressed to those same acquisitions. Private antitrust actions for damages are "forever barred unless commenced within four years after the cause of action accrued." 15 U.S.C. § 15b (Clayton Act § 4B). Plaintiffs' acquisition claims focused on Brunswick's publicly announced and highly visible 1986 purchases of Bayliner and Sea Ray, which Hall testified were "by far" the most "important" and the "really significant ones." A67-78. Yet plaintiffs did not bring suit until December 1995—*nine years later*.

Plaintiffs' claims accrued as soon as Brunswick's acquisitions purportedly injured them. That occurred, plaintiffs asserted at trial, almost immediately after the 1986 acquisitions. Because the jury rejected plaintiffs' argument that fraudulent concealment tolled the statute (A104, ¶ 7), plaintiffs' damages claims directed to Brunswick's acquisitions are time-barred as a matter of law.

The district court held that "the statute of limitations clearly does not act as a bar to Plaintiffs' claims," but failed to supply a single reason. Ad. 32. The court's conclusory ruling is at odds with the "[i]mportant policies" underlying statutes of limitations, including "rapid

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[7] Brunswick's above-cost discounts comport with the requirements of both § 1 and § 2 of the Sherman Act. See, *e.g.*, *Barry Wright*, 724 F.2d at 239.

resolution of disputes" and "repose for those against whom a claim could be brought." *Union Pac. R.R.* v. *Beckham*, 138 F.3d 325, 330 (8th Cir. 1998). Its finding of laches should have barred plaintiffs' acquisition-based claims for damages as well, because, as the court itself recognized, the laches inquiry looks to the "analogous" 4-year limitations period. Ad. 76.

Plaintiffs' cause of action accrued upon their purported injury from Brunswick's 1986 acquisitions. In actions governed by § 4B of the Clayton Act, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Klehr* v. *A.O. Smith Corp.*, 117 S. Ct. 1984, 1990 (1997). In *Klehr*, the Supreme Court squarely rejected the contention that the statute did not run until the "last predicate act" in an unlawful course of conduct was completed (*id.* at 1989):

> Because a series of predicate acts * * * can continue indefinitely, such an interpretation, in principle, lengthens the limitations period dramatically. It thereby conflicts with a basic objective—repose—that underlies limitations periods. Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait, "sleeping on their rights."

Klehr reaffirms this Court's understanding that "[a] cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business." *Information Exch. Sys., Inc.* v. *First Bank Nat'l Ass'n*, 994 F.2d 478, 484 (8th Cir. 1993).[8]

Thus, plaintiffs' acquisition claims accrued as soon as they were injured by Brunswick's acquisitions, which the district court found were "public information at the time" and "generally known throughout the recreational boat manufacturing industry." Ad. 71. Plaintiffs' asserted injury—reduced competition in the marine engine market that caused plaintiffs to pay supracompetitive prices (4th Am. Cmplt. ¶¶ 58(e)-(g), 69(d), 106)—occurred

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[8/] This "pure injury accrual rule always applies without modification" to antitrust claims. *Klehr*, 117 S. Ct. at 1990; *Granite Falls Bank* v. *Henrikson*, 924 F.2d 150, 153 (8th Cir. 1991).

long before the December 1991 limitations bar. The fact that plaintiffs sought damages for these purported overcharges going back to 1986 (A1060, A1075) is *a clear admission that the acquisitions injured them (if at all) in 1986.*

Plaintiffs were aware of their purported injury well before December 1991. The district court found that IBBI "expressed dissatisfaction" with Brunswick's ownership of Bayliner and Sea Ray "[b]eginning no later than 1990." Ad. 71. In January 1990, IBBI advised its members to declare Brunswick's practices to be a violation of the Sherman Act. A809. Thus, by their own admission, plaintiffs' claims accrued before December 1991.

Plaintiffs cannot evade the injury accrual rule of § 4B. In the district court, plaintiffs defended their belated filing by relying on cases, including *United States* v. *du Pont de Nemours & Co.*, 353 U.S. 586 (1957), in which the *government* sought *equitable* relief more than four years after the challenged acquisitions. But those cases were not private suits for damages, and the courts had no occasion to consider the statute of limitations in § 4B. See *California* v. *American Stores Co.*, 495 U.S. 271, 296 (1990) ("consummated transactions" are protected "from belated attacks by private parties when it would not be too late for the Government to vindicate the public interest"). Nor can plaintiffs rely on any exceptions to the § 4B injury accrual rule. There are but "two grounds for allowing an antitrust suit to be brought more than four years after the events that initially created a cause of action." *Kaiser Alum. & Chem. Sales* v. *Avondale Shipyards*, 677 F.2d 1045, 1051 (5th Cir. 1982); see 1 C. Corman, LIMITATION OF ACTIONS § 6.5.5.1, at 447 (1991). Both exceptions derive from *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971). Neither applies here.

The first exception, for a "continuous violation," applies only to a "continuing conspiracy." *Zenith*, 401 U.S. at 338; *Lomar Wholesale Grocery* v. *Dieter's Gourmet Foods*,

824 F.2d 582, 588 (8th Cir. 1987) (*Zenith* "requires 'an overt act in furtherance of an antitrust conspiracy'"); Corman, *supra*, § 6.5.5.2. The widely publicized and government-reviewed acquisitions at issue here obviously do not constitute a conspiracy. The second exception applies when damages are too speculative to be provable within four years of injury. *Zenith*, 401 U.S. at 339-42; Corman, *supra*, § 6.5.5.3. Plaintiffs never made that allegation, and "since *Zenith* most circuit courts have declined to label future damage claims speculative." *North Carolina Elec. Corp.* v. *Carolina Power & Light Co.*, 780 F. Supp. 322, 333 (M.D.N.C. 1991). *E.g.*, *Pace Indus., Inc.* v. *Three Phoenix Co.*, 813 F.2d 234, 240 (9th Cir. 1987); *Brunswick Corp.* v. *Riegel Textile Corp.*, 752 F.2d 261, 271 (7th Cir. 1984). Plaintiffs cannot plausibly contend that their purported damages from the 1986 acquisitions were too speculative to be provable before December 1991, for they presented expert testimony specifying the precise amount of their alleged damages for each year beginning with 1986. A1053-61, A1068-76. Those figures depended solely on Brunswick's market share (see *infra,* p. 66), which plaintiffs could have quantified in 1986 as readily as at trial. As in *Klehr*, plaintiffs' supposed injuries "have always been specific and calculable." 117 S. Ct. at 1991.

Plaintiffs also argued that at most § 4B should limit their damages to the 4-year period before suit. But § 4B bars plaintiffs' acquisition-based claims *completely*, unless one of the *Zenith* exceptions applies. *Klehr*, 117 S. Ct. at 1991. The statute commands that damages "*actions*" are "forever barred unless commenced within four years" of accrual. Moreover, plaintiffs' proposal would permit litigants to sit on their rights, wait for a 4-year period that maximizes damages, and sue years or even decades after the challenged acquisitions—just as plaintiffs did here. To permit such calculated delay would undermine the important policies that statutes of limitations serve. See *Riegel*, 752 F.2d at 271; *IT&T* v. *General Tel.*

& Elecs. Corp., 518 F.2d 913, 929 (9th Cir. 1975) (warning of "abuses" if plaintiffs could "challenge at their pleasure any possible violations, no matter how old").

Brunswick's 1995 acquisition of Baja cannot lift the statutory bar to damages for its pre-December 1991 acquisitions. As the Supreme Court explained in *Klehr*, in "antitrust cases, [plaintiffs] cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period." 117 S. Ct. at 1991. At most, this December 1995 lawsuit might have been timely as to Baja alone. But with Baja purchasing just 2.8% of stern drive and inboard engines, the Baja transaction, as plaintiffs' expert admitted, was not "significant." A59-60, A68. Thus, the Baja transaction alone cannot make plaintiffs' acquisition claims timely.[9]

B. The Challenged Acquisitions Were Lawful And Procompetitive.

In addition to being untimely, plaintiffs' acquisition claims fail as a matter of law. As plaintiffs conceded, there are no barriers to entry into the boatbuilding business. Competition flourished after Brunswick's acquisitions, with hundreds of boatbuilding companies available to buy engines from Brunswick's competitors. These undisputed facts refute plaintiffs' contention that Brunswick's acquisitions foreclosed efficient engine suppliers from finding boats in which to install their engines. Significantly, Brunswick's acquisitions did not increase its market share. Brunswick's 75% share of stern drive sales before the challenged acquisitions declined sharply to 50% in 1988, soon after the acquisitions were completed. Subsequently, its share rose back to its pre-acquisition level. *Supra*, pp. 2-4.

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[9] Plaintiffs' challenges to Brunswick's product extension acquisitions of Kiekhaefer and of assets from BMW Diesel also are barred by the statute of limitations. Both acquisitions took place before December 1991. *Supra*, p. 13.

Established antitrust principles, which recognize that vertical and product extension acquisitions generally benefit consumers, confirm the lawfulness of Brunswick's acquisitions. An antitrust plaintiff must marshal hard economic evidence of the anticompetitive effect of each challenged acquisition.[10] Instead, plaintiffs offered only a conclusory and entirely speculative opinion from Dr. Hall. A70, A73. Nevertheless, the district court dismissed—again, in one sentence—undisputed evidence and settled case law demonstrating the invalidity of plaintiffs' acquisition claims: "[T]he jury's finding that Brunswick's multiple acquisitions, considered collectively, violated Section 7 of the Clayton Act is fully supported by the evidence and applicable authority." Ad. 32. That perfunctory ruling ignores the record, antitrust precedent, and sound economic theory.[11]

1. Brunswick's vertical acquisitions were not anticompetitive.

Plaintiffs focused principally on Brunswick's vertical acquisitions of boatbuilders Bayliner, Sea Ray, and Baja. Those are the type of transaction that the antitrust laws favor, because consumers generally benefit from them. "[V]ertical acquisitions are the most likely to produce efficiencies and the least likely to enhance the market power of the merging firms." Hovenkamp, *Merger Actions for Damages*, 35 Hastings L.J. 937, 961 (1984). See 4A

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[10] The Supreme Court "has cut * * * back sharply" on earlier cases hostile to mergers. *United States* v. *Baker Hughes, Inc.*, 908 F.2d 981, 990 (D.C. Cir. 1990). *Baker Hughes*, two of whose panel members—Justice Thomas (author of the opinion) and Justice Ginsburg —now sit on the Supreme Court, explained that courts must consider a "multiplicity of relevant factors," including "the absence of significant entry barriers in the relevant market" and the prospect of efficiencies. *Id.* at 984-86; see *FTC* v. *Freeman Hosp.*, 69 F.3d 260, 272 (8th Cir. 1995) (rejecting § 7 claim for failure to show "a substantial threat to competitive hospital prices").

[11] Because plaintiffs' acquisition claims fail as a matter of law under the Clayton Act, they necessarily fail to support plaintiffs' Sherman Act claims. *International Travel Arrangers*, 991 F.2d at 1399; see H. Hovenkamp, FEDERAL ANTITRUST POLICY § 7.2, at 261 (1994) ("Sherman Act treatment of mergers to monopoly has become all but superfluous").

P. Areeda, H. Hovenkamp, & J. Solow, ANTITRUST LAW ¶ 1021, at 209 (rev. ed. 1998) ("the most common result of vertical mergers [is] savings in either the cost of production or the cost of using the market"); R. Bork, THE ANTITRUST PARADOX 226 (2d ed. 1993) (vertical mergers "are means of creating efficiency, not of injuring competition"); R. Posner, ANTITRUST LAW 200 (1976) ("the case for prohibiting vertical mergers is very weak"). As this Court has held, even "vertical integration by monopolists can have procompetitive effects." *Becker* v. *Egypt News Co.*, 713 F.2d 363, 366 (8th Cir. 1983); see also *Fruehauf Corp.* v. *FTC*, 603 F.2d 345, 351-52 (2d Cir. 1979) (acquisition of leading maker of truck wheels by leading maker of truck bodies did not violate § 7; because a vertical merger "does not eliminate a competing buyer or seller from the market," it may "operate to increase competition"). Summarizing the modern outlook, the Seventh Circuit explained that "vertical integration is not an unlawful or even a suspect category under the antitrust laws." *Jack Walters & Sons Corp.* v. *Morton Bldg., Inc.*, 737 F.2d 698, 710 (7th Cir. 1984).

This Court rendered a landmark *en banc* decision applying current antitrust standards in *Paschall* v. *Kansas City Star Co.*, 727 F.2d 692 (8th Cir. 1984). The Court rejected independent newspaper distributors' claims that a newspaper monopolist's plan to vertically integrate into distribution and refuse to deal with the plaintiff-competitors would violate the Sherman Act. Applying "fundamental principles of antitrust law," the Court concluded that the procompetitive effects of vertical integration outweighed any alleged anticompetitive effects. *Id.* at 701-02. The Court reached that conclusion even though—unlike here, where plaintiffs continue to buy engines from Brunswick—the newspaper monopolist's vertical integration put hundreds of independent distributors out of business.

Rational economic evaluation also underlies the government's authoritative vertical merger guidelines, which explain that "most mergers do not threaten competition [but] are in fact procompetitive and benefit consumers." 1984 Merger Guidelines, 4 TRADE REG. REP. (CCH) ¶ 13,103. Thus, the government "exercise[s] caution in taking action against vertical transactions to avoid chilling efficiency-enhancing mergers." Steven Sunshine, Deputy Asst. Atty. Gen'l, Antitrust Div., Address to ABA Section of Antitrust Law (Apr. 5, 1995), 7 TRADE REG. REP. (CCH) ¶ 50,147, at 49,123. The reviewing federal agencies raised no objection to the acquisitions now challenged by plaintiffs. A481-82, A1164-1225; *supra*, p. 12. That "neither the DOJ nor the FTC have challenged the merger [is] a telling sign that the merger raises no significant anticompetitive concerns." *Advocacy Org. for Patients & Providers* v. *Mercy Health Servs.*, 987 F. Supp. 967, 974 (E.D. Mich. 1997); accord *Pearl Brewing Co.* v. *Miller Brewing Co.*, 1993 WL 424236, at *3 (W.D. Tex. Mar. 31, 1993), aff'd mem., 52 F.3d 1066 (5th Cir. 1995) (reprinted at A1265).

a. The lack of entry barriers in the boatbuilding business refutes plaintiffs' theory of foreclosure in the engine business.

Without "significant barriers to entry," a merger cannot injure competition. *E.g.*, *United States* v. *Syufy Enters.*, 903 F.2d 659, 664 (7th Cir. 1990). Thus, the "greatly exaggerated and overused 'foreclosure' theory" has no application to vertical mergers absent substantial entry barriers in both the upstream and downstream markets. 4A P. Areeda, et al., ANTITRUST LAW at 148. "[A] vertical merger *cannot* cause significant foreclosure of existing firms" unless "*each market independently has significant entry barriers.*" *Id.* ¶ 1032a, at 229 (emphasis added). The 1984 Merger Guidelines (§§ 4.21, 4.212) agree that vertical acquisitions are not anticompetitive unless, as a result of barriers to entry in the acquired firm's market, the

acquisition significantly raises barriers to entry in the acquiring firm's market. See also *Fruehauf*, 603 F.2d at 359 (vacating FTC's finding of § 7 violation where record did not show substantial entry barriers); *United States* v. *Hammermill Paper Co.*, 429 F. Supp. 1271, 1293-94 (W.D. Pa. 1977) (holding, based on ease of downstream entry, that manufacturer's acquisition of wholesalers did not substantially lessen competition).[12]

Plaintiffs did not even attempt a threshold economic showing of significant entry barriers in the boatbuilding, or "downstream," market. To the contrary, they admitted that "*there are few barriers to entering the boat-building business.*"[13] Nor did plaintiffs address the boundaries of a boat market, failing both to "define and measure the market for each product or service * * * of each of the merging firms" and to "determine the geographic market or markets in which [each] firm sells." 1984 Merger Guidelines §§ 2.0, 2.31. Without such a showing, plaintiffs' theory that engine manufacturers—with worldwide operations—were foreclosed from the opportunity to find customers must fail. See *Ryko Mfg. Co.* v. *Eden Servs.*, 823 F.2d 1215, 1232 (8th Cir. 1987) (plaintiff's anecdotal evidence held insufficient

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[12] Plaintiffs relied below on early merger decisions, such as *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), that deferred to the *government*'s expert views. As the Merger Guidelines show, the government's views have changed substantially since that time. The Supreme Court today incorporates economic principles into its analysis and takes a far more accommodating approach to vertical transactions. See *State Oil Co.* v. *Khan*, 118 S. Ct. 275 (1997); *Continental T.V., Inc.* v. *GTE Sylvania, Inc.,* 433 U.S. 36, 54 (1977) (vertical agreements "promote interbrand competition"). "Given the close connection between vertical restraints law and vertical merger law," the "shift in approach" that began in *Sylvania* "has strong implications for the continued viability of the foreclosure doctrine in vertical merger antitrust analysis." ABA Antitrust Section, NON-HORIZONTAL MERGERS LAW & POLICY 62 (1988). The cases cited by plaintiffs reaffirm, moreover, that unless the percentage of foreclosure "approaches monopoly proportions, [it] cannot itself be decisive." *Brown Shoe*, 370 U.S. at 328-29.

[13] A1236 n.36 (emphasis added). See also A211 ("What it costs to enter, what it costs to close up for awhile is minuscule. * * * If you have the molds, you can enter or exit the business").

to establish relevant market or foreclosure); *Balaklaw*, 14 F.3d at 799 (same); *Fruehauf*, 603 F.2d at 354 (carefully analyzing downstream market).

Plaintiffs' own testimony reveals just how easy it is to enter and expand in the boat-building business. Jimmy Fulks, owner of plaintiff Mariah, started his company in 1989 in "a temporary garage"—*after* Brunswick's acquisitions and initiation of its discount programs—and quickly grew it into one of the largest independent boat companies. A213, A218a. Francis Hawkins, a machinist, found a partner and easily launched plaintiff Concord Boats. A268-69. Kevin Hirdes started plaintiff Powerquest with a water skiing friend and developed it into a substantial business. A299. These admissions confirm the lack of entry barriers. See *Advo, Inc.* v. *Philadelphia Newspapers, Inc.*, 51 F.3d 1191, 1200-01 (3d Cir. 1995) (finding "no barrier to entry" where the start-up capital required is "a couple of million dollars," a sum "not so high that it would prevent new competitors from jumping in if [the defendant] tried to charge supracompetitive prices").

With such low entry barriers, it is no surprise that, according to the president of Four Winns (a boatbuilder owned by OMC), "hundreds of competitors" make boats. A798. As Hall admitted, there are "numerous independent boatmakers [and] many, many companies make boats." A32; see also A448-52. This plenitude of potential engine buyers refutes plaintiffs' contention that Brunswick's acquisitions foreclosed sales by rival engine makers. Sea Ray and Bayliner together accounted for less than 30% of stern drive (and a much smaller percentage of inboard) purchases. A68. That left 70% or more of the market for competing engine makers. As in *Fruehauf*, such limited market foreclosure is "not one that deprives rivals [of] major channels of distribution, much less one that excludes them from the market altogether." 603 F.2d at 360. Efficient engine competitors remained free to

compete for the remaining 70%, take existing share away from Brunswick's boat companies, or acquire and expand boat companies of their own.[14]

Brunswick's acquisitions thus represented a "'realignment of existing market sales without any likelihood of a diminution in competition.'" *Alberta Gas*, 826 F.2d at 1246; see also 4A P. Areeda, et al., ANTITRUST LAW ¶ 1004c, at 160 (if the market of even one of the merging firms is competitive, "[n]othing more than mere realignment can occur"). Indeed, all of Brunswick's engine-making rivals extensively employed vertical integration. Most notably, soon after the Sea Ray and Bayliner acquisitions, OMC sought to replace the lost Bayliner business by acquiring 14 to 17 boat companies, including some of Brunswick's then-largest customers, such as Four Winns, ChrisCraft, and Sea Swirl. A131, A485, A497, A757-58; see *supra*, pp. 12-13. As Hall admitted, OMC made its acquired boat companies every bit as "captive" as Brunswick did. A32, A42. He further admitted that "OMC aggressively pursued an acquisition strategy similar to Brunswick's * * * [a]nd *customers benefited from the competition.*" A135 (emphasis added).

Volvo, too, after its advisors recommended that it obtain captive boat companies to increase engine sales (A121), invested $100 million in Genmar, which previously had been Brunswick's second largest account. A409, A499. Thus, the subsequent OMC/Volvo joint venture benefited from *both* companies' prior acquisitions. *Ibid*. Volvo's consultants noted the industry trend towards vertical integration, including Volvo's investment in Genmar, and

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[14/] Moreover, the 30% "foreclosure" figure is grossly inflated because, as plaintiffs' expert admitted, Sea Ray "had been purchasing significant volumes" of Brunswick engines *before* Brunswick acquired it. A134; see A24 (Sea Ray was Brunswick's largest customer in the mid-1980s). The "market share represented by the acquiring company's previous supply to the acquired firm is not part of the foreclosure." *Alberta Gas Chem. Ltd* v. *E.I. du Pont de Nemours & Co.*, 826 F.2d 1235, 1245 (3d Cir. 1987).

observed that Brunswick was powerless to combat its rivals' acquisitions of boatbuilders to obtain greater market share. A906-08.

This record is one of fierce competition, with all the major engine companies pursuing vertical integration as a market strategy. As Dr. Warren-Boulton explained in unrebutted testimony, "all the engine suppliers vertically integrated to some extent, either through buying" or "acquir[ing] partial interests" in boat companies. A578. Such a race to integrate vertically demonstrates that Brunswick's vertical acquisitions were not, as plaintiffs claimed, *anti*competitive but rather entirely *pro*competitive. See 1984 Merger Guidelines (§ 4.24) (recognizing that "[a]n extensive pattern of vertical integration may constitute evidence that substantial economies are afforded by vertical integration").

b. The continued presence of powerful engine buyers refutes plaintiffs' "disruptive buyer" theory.

Plaintiffs argued below that Brunswick acquired Bayliner and Sea Ray to eliminate "disruptive buyers" and thereby reduce competition in the engine market. Because no court has ever adopted this "disruptive buyer" theory, plaintiffs relied on the 1984 Merger Guidelines and the Areeda-Hovenkamp treatise. But the Merger Guidelines (§ 4.222) stress that there is nothing anticompetitive about acquiring a major buyer unless "the allegedly disruptive firm differs substantially in volume of purchases or other relevant characteristics from the other firms in the market." The Areeda-Hovenkamp treatise expresses skepticism that a "disruptive buyer" theory ever could be proven, and notes that "[w]here several disruptive buyers are present," all or most must be eliminated "before the beneficial effect of their presence would be lost." 4A P. Areeda, et al., ANTITRUST LAW ¶ 1006f, at 173; *id.* ¶ 1006a, at 169. The record demonstrates that there was nothing uniquely "disruptive" about

Bayliner and Sea Ray, and that large and sophisticated buyers continued to flourish after Brunswick's acquisitions.

Those buyers included Genmar, which had more "purchasing clout" than Sea Ray or Bayliner (A720), other large boatbuilders, and several buyers' cooperatives, including plaintiff IBBI and ABA. A515-16, A858. Buying groups had significant "economic clout" (A284), enabling them to extract "economic concessions" from Brunswick. A337, A406a-b. It would be hard to imagine a more "disruptive buyer" than IBBI, which illegally boycotted Brunswick to force pricing concessions. Here, as in *United States* v. *Archer-Daniels-Midland Co.*, 781 F. Supp. 1400, 1422 (S.D. Iowa 1991), "[t]he existence of large and sophisticated purchasers 'makes any anticompetitive consequences very unlikely.'"

c. Plaintiffs' other objections to Brunswick's vertical acquisitions are baseless.

Plaintiffs raised two additional grounds for their antitrust challenge to Brunswick's vertical acquisitions—Brunswick's acquisition of Baja Boats in August 1995, and Brunswick's decision to discontinue development of a stern drive engine on which Bayliner had been working before its acquisition by Brunswick. Neither supports plaintiffs' claim.

An acquisition that has a *"de minimis"* impact on the market cannot sustain an antitrust claim. *Alberta Gas*, 826 F.2d at 1246. Baja's engine purchases accounted for a negligible and declining 2.8% of the market. A59-60. Even plaintiffs' expert conceded that this acquisition was not significant. A67-68. Moreover, Baja was in bankruptcy when Brunswick purchased it. A510. See *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 503 (1974) (rejecting § 7 claim based on merging firm's "weakness as a competitor").

Plaintiffs' contention that there was something devious about Brunswick's discontinuing the Bayliner stern drive engine is refuted by the record. Brunswick initially continued the

development work begun by Bayliner, but the engine "was a flop, and we ended up putting it on the shelf [because] it didn't work." A497, A724-25, A727-28 (Bayliner engine had poor "durability," was "louder," and lacked "the endurance characteristics" of Mercury products). Especially given the severe industry recession at the time (A726), it would have been economically irrational to continue developing an engine that "added nothing to the market but would have added extra production cost redundancy." A618-19, A981 (further development made no "economic sense").

d. Brunswick's vertical acquisitions were efficient and procompetitive.

"[C]ourts should be careful not to condemn mergers that create efficiencies that will benefit consumers." Hovenkamp, *Merger Actions for Damages*, 35 Hastings L.J. at 956. Such efficiencies are especially likely from vertical acquisitions. Thus, "the most common result" of vertical mergers is "resource saving or more competitive pricing." 4A P. Areeda, et al., ANTITRUST LAW ¶ 1001, at 144-45. This Court has upheld vertical integration even by an acknowledged monopolist on the ground that it enabled "the integrated monopolist [to] operate more efficiently" and "meet legitimate business needs." *Becker*, 713 F.2d at 369-70.

Brunswick made its acquisitions in response to changes in consumer and dealer demand. As its then-chairman testified, "there was a general consensus in the industry that you would get a more consistent quality product" by having the boat and motor put together by one organization and shipped to the dealers "so all [the customer] had to do was put in gasoline and put the boat in the water." A483. The new boat-buying consumers, who lacked marine experience, demanded the same prompt, high-quality service they received at auto dealers. A26. Brunswick's vertical acquisitions helped create that "unified seamless approach to * * * the consumer." A65; see also A26-27.

The Sea Ray and Bayliner acquisitions also were economically efficient, given Brunswick's heavy investment in engine facilities and the potential that independent boat-builders would shift engine purchases away from a perceived competitor. Together, Bayliner and Sea Ray could provide sufficient demand so that the capacity of Brunswick's stern drive engine plant would be utilized even if Brunswick lost the business of competing boatbuilders. *Supra*, pp. 11-12; A407-08 (acquisitions provided "a base level of volume to help us from a manufacturing point of view [to] rationalize our capacity").

These efficiency justifications for Brunswick's vertical acquisitions further support their lawfulness.

2. Brunswick's product extension acquisitions were not anticompetitive.

Plaintiffs also challenged two small product extension acquisitions. Neither had any competitive impact because, as plaintiffs recognized, the acquired firms were "small players" (A607), and neither acquisition involved products that competed in the relevant market.

Brunswick made a small asset purchase from BMW Diesel in 1987, which it hoped would enable it to compete with Volvo in Europe. See A506-07, A973-80. The acquired assets never were used by either BMW or Brunswick in the United States, where diesel engines have not been popular. See A30, A507, A623-24. Because it had no impact on the relevant geographic market, the BMW Diesel acquisition is irrelevant to plaintiffs' claim. Brunswick's 1990 acquisition of Kiekhaefer, which made stern drives for specialized, high-performance racing engines, also had no impact on the relevant product market. Kiekhaefer produced only about 60 drives annually, and their price of more than $50,000 each limited potential sales. Lacking "high performance" capacity, Brunswick believed Kiekhaefer would be "a good fit." A687; see A507-09.

Recognizing that neither BMW Diesel nor Kiekhaefer competed in the relevant market, plaintiffs relied on a "perceived potential competition" theory. But they made no attempt to satisfy the necessary criteria, established in *United States* v. *Marine Bancorp., Inc.*, 418 U.S. 602 (1974). The would-be competitor must have had "the characteristics, capabilities, and economic incentive to render it a perceived potential de novo entrant," and "its premerger presence on the fringe of the target market [must have] in fact tempered oligopolistic behavior on the part of existing participants in that market." *Id.* at 624-25. Instead of trying to satisfy those criteria, plaintiffs offered only a conclusory pronouncement from Hall. A73. Indeed, "[t]he difficulty of meeting these criteria has resulted in almost uniform rejection of potential competition theories in market extension cases subsequent to *Marine Bancorporation*." *Lektro-Vend Corp.* v. *Vendo Corp.*, 500 F. Supp. 332, 362 (N.D. Ill. 1980), aff'd, 660 F.2d 255 (7th Cir. 1981).

Plaintiffs also relied on an "actual potential entrant" doctrine that no court ever has adopted in a private action for damages. See *Marine Bancorp.*, 418 U.S. at 639 (declining to decide the viability of this theory). This Court, in *Yamaha Motor Co.* v. *FTC*, 657 F.2d 971, 977 (8th Cir. 1981), recognized two preconditions to that doctrine's use *in a government enforcement action*: "First, it must be shown that the alleged potential entrant had 'available feasible means' for entering the relevant market, and second, 'that those means offered a substantial likelihood of ultimately producing deconcentration of that market'" (quoting *Marine Bancorp.*, 418 U.S. at 633). Even in government enforcement cases, those conditions cannot be satisfied by speculation. *FTC* v. *Atlantic Richfield Co.*, 549 F.2d 289, 295 (4th Cir. 1977) ("prohibition is appropriate" only when entry "would appear to have been certain"); see *Marine Bancorp.*, 418 U.S. at 630-31; *Yamaha*, 657 F.2d at 977; *J.E.K. Indus. Inc.* v.

Shoemaker, 763 F.2d 348, 353 (8th Cir. 1985). Plaintiffs did not offer non-speculative proof of *either* condition.

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At bottom, plaintiffs complain that Brunswick's acquisitions made it their direct (and effective) competitor. See Oct. 16, 1998 Order, Ad. 71. Plaintiffs' hostility to efficient competition underlies their lawsuit and cannot be hidden by their status as engine buyers. See Snyder & Kauper, *Misuses of the Antitrust Laws: The Competitor Plaintiff*, 90 Mich. L. Rev. at 551-52 ("Cases filed by competitors may be particularly harmful, as firms may sue to prevent their rivals from [offering] aggressive pricing"); *Alberta Gas*, 826 F.2d at 1239 ("Mergers that promote efficiency and lower prices in the marketplace [may] cause economic loss to competitors"). Plaintiffs did not, as a matter of law, show any anticompetitive impact from Brunswick's acquisitions, which paralleled the conduct of its engine rivals and satisfied consumer demand for unified production of boats packaged with engines.

III. BRUNSWICK DID NOT POSSESS MONOPOLY POWER.

Brunswick is entitled to judgment as a matter of law for an independent reason. Plaintiffs did not prove that it possessed substantial market power, or "monopoly power." Monopoly power is "the power of a firm to restrict output and thereby increase the selling price of its goods." *Ryko*, 823 F.2d at 1232. The district court uncritically viewed Brunswick's share of stern drive and inboard engine sales as enough to establish monopoly power. Ad. 15. Not only was that ruling legally wrong, but undisputed evidence affirmatively

establishes Brunswick's *lack* of monopoly power. "Absent monopoly power, [a] monopoly claim must fail." *Morgenstern* v. *Wilson*, 29 F.3d 1291, 1297 (8th Cir. 1994).[15]

A. Market Share Alone Cannot Establish Monopoly Power.

"The relative effect of percentage command of a market varies with the setting in which that factor is placed." *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528 (1948).[16] Thus, "exclusive and uncritical focus on market share data tends to produce an exaggerated impression of market power." Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 950 (1981); see also 2A P. Areeda, H. Hovenkamp, & J. Solow, ANTITRUST LAW ¶ 502, at 90 (1995) (market power "depends not only on [market] share but also on market elasticities of demand and supply"). While antitrust plaintiffs must prove a defendant's "dominant" market share (*Assam Drug Co.* v. *Miller Brewing Co.*, 798 F.2d 311, 318 (8th Cir. 1986)), "market share alone is insufficient to establish market power." *Bright* v. *Moss Ambulance Serv.*, 824 F.2d 819, 824 (10th Cir. 1987). In short, courts should not "be blinded by market share figures and ignore marketplace realities." *Tops Markets*, 142 F.3d at 99. See *Los Angeles Land Co.* v. *Brunswick Corp.*, 6 F.3d 1422, 1425-29 (9th Cir. 1993) (defendant lacked market power despite 100% market share); *Colorado Interstate Gas Co.*

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[15] Establishing market power is "essential" to *each* of plaintiffs' claims "because '[f]irms lacking market power * * * cannot adopt restraints that have anticompetitive effects.'" *Ryko*, 823 F.2d at 1231; see *ibid.* (§ 1); *Midwest Radio Co.* v. *Forum Publ'g Co.*, 942 F.2d 1294, 1297 (8th Cir. 1991) (§ 2); *United States* v. *Archer-Daniels-Midland Co.*, 866 F.2d 242, 246 (8th Cir. 1988) (§ 7). When evaluating monopoly power "does not require resolution of sharp factual disputes," as here, the court "rule[s] on a claim * * * as a matter of law." *Broadway Delivery Corp.* v. *UPS, Inc.*, 651 F.2d 122, 129 (2d Cir. 1981).

[16] As noted in *Broadway Delivery*, 651 F.2d at 128, the Supreme Court has "reaffirmed its unwillingness to base market power determinations simply on market share data" in *United States* v. *Citizens & So. Nat'l Bank*, 422 U.S. 86, 120 (1975), *Marine Bancorp.*, 418 U.S. at 631, and *General Dynamics*, 415 U.S. at 497-98.

v. *Natural Gas* Co., 885 F.2d 683, 695 & n.21 (10th Cir. 1989) ("look[ing] beyond market share statistics" to hold that the defendant lacked market power).

Whatever a firm's market share, "evidence of competitive pressure * * * indicates a lack of market power." *Ryko*, 823 F.2d at 1232. As the Ninth Circuit observed, this Court correctly eschewed "bright-line" percentage rules in *Ryko* and instead adopted the "far wiser approach" to market power, "carefully analyzing certain telltale factors in the relevant market: market share, entry barriers and the capacity of existing competitors to expand output." *Rebel Oil Co.* v. *Atlantic Richfield, Inc.*, 51 F.3d 1421, 1438 n.10 (9th Cir. 1995). "[D]ominant market share alone cannot establish market power * * *. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output." *Id.* at 1439.[17]

B. Undisputed Evidence Shows That Brunswick Did Not Possess Monopoly Power.

Relying solely on market share, the district court ignored "marketplace realities" (*Tops Markets*, 142 F.3d at 99) that, taken together, show Brunswick's lack of monopoly power.

A "significant number of viable competitors." The large array of stern drive and inboard engine suppliers squarely contradicts plaintiffs' claim that Brunswick possessed monopoly power. Brunswick's rivals included such industrial giants as Volvo/OMC, Yamaha, Caterpillar, Cummins, and Detroit Diesel, as well as Indmar, Crusader, PCM, Marine Power, and MTU. *Supra*, pp. 1-2. Toyota's recent entry adds another formidable

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[17] See also *Coastal Fuels, Inc.* v. *Caribbean Petroleum Corp.*, 79 F.3d 182, 197 (1st Cir. 1996) (plaintiff must show "dominant" market share, "significant barriers to entry," and inability of "existing competitors * * * to increase their output"); *Ball Mem. Hosp.* v. *Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1335 (7th Cir. 1986) ("When the supply is highly elastic, existing market share does not signify power").

competitor. Many of these firms are much larger than Brunswick. Volvo is six times the size of Brunswick, with access to a larger dealer sales network; plaintiffs' expert acknowledged that it offers Brunswick "across the board competition." A78-80. Toyota has "[t]remendous resources" exceeding those of anyone in the industry (A433) and is vertically integrated to make full use of its "very big, sophisticated, powerful" Lexus engine. A33, A124-25. Huge outboard engine manufacturers like Honda, Nissan, and Suzuki could readily enter the stern drive/inboard market, and thus already "exert competitive pressure." *Baker Hughes*, 908 F.2d at 989; A189, A312-13, A888.

No firm with such "a significant number of viable competitors" possesses monopoly power (*Ryko*, 823 F.2d at 1232), because consumers "could easily avoid monopolistic or oligopolistic prices by looking to alternative sources." *Bathke*, 64 F.3d at 346. See *National Wrestling Alliance* v. *Myers*, 325 F.2d 768, 774-75 (8th Cir. 1963) (reversing jury verdict where plaintiff failed to prove that the defendant had "the power either to remove or to exclude or keep out, competitors'"); *Bacchus Indus., Inc.* v. *Arvin Indus., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (market power inquiry requires consideration of "[t]he number and strength of other competitors").[18]

Rivals' excess capacity. The excess capacity of engine rivals also negates plaintiffs' monopoly power claim. Market power is refuted by "the ability of existing firms to quickly

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[18/] Towering over Brunswick's annual revenues of $3.16 billion are Volvo's of $25.87 billion and Toyota's of $100 billion. STANDARD & POOR'S REGISTER OF CORPORATIONS 3, 463, 3074 (1998). The current small market shares of some rivals are of no moment. In *Lomar*, 824 F.2d at 599-600, this Court rejected the notion that "peripheral competitors" had "very little competitive influence," explaining that they were "perfectly poised to expand their competitive presence" in response to monopoly pricing. Here, too, competitors backed by large, sophisticated, and well-financed firms are "perfectly poised" for competitive entry.

increase their own output in response to [any] attempt to raise prices above competitive levels." *Rebel Oil*, 51 F.3d at 1441; see 2A P. Areeda, et al., ANTITRUST LAW ¶ 535c, at 189-90 (a firm cannot raise prices by reducing output when its rivals have a large volume of "excess capacity"); *Coastal Fuels*, 79 F.3d at 197 (plaintiff must demonstrate lack of excess capacity); *Indiana Grocery, Inc.* v. *Super Valu Stores, Inc.*, 864 F.2d 1409, 1414 (7th Cir. 1989) (no market power if competitors could increase output); *General Dynamics*, 415 U.S. at 501-04 (evaluating market power by future capacity rather than market share); Landes & Posner, *Market Power*, 94 Harv. L. Rev. at 949.

Volvo has large amounts of excess capacity. The joint venture's Lexington plant produced 76,000 stern drive engines in 1988 (A765), in contrast to 20,500 engines produced at that same plant today. A702-03, A738-39. As Volvo's CEO testified, the plant has a "considerable amount of capability" to meet any increase in demand. A699-700. See *Rebel Oil*, 51 F.3d at 1441 (no market power where "competitors have expanded output in the recent past, or have the ability to expand output in the future").

Low entry barriers. "Unless barriers to entry prevent rivals from entering" the market, "even a very large market share does not establish market power." *Will* v. *Comprehensive Accounting Corp.*, 776 F.2d 665, 672 n.3 (7th Cir. 1985); accord *American Prof'l Testing Serv., Inc.* v. *Harcourt Brace Jovanovich, Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997).

The stern drive/inboard engine business lacks any legally relevant entry barriers. "The disadvantage of new entrants as compared to incumbents is the hallmark of an entry barrier." *Los Angeles Land*, 6 F.3d at 1428. Here, there are no restrictive license requirements; Brunswick controls no inputs; its engines are neither patented nor use "high technology"; the

necessary materials and know-how are easily acquired (as Toyota's recent entry shows); and scale efficiencies cannot deter entry, as shown by the many small-scale manufacturers.

The record affirmatively demonstrates the absence of barriers to entry or expansion, especially for such likely entrants as Toyota, Honda, and Nissan, which already have engine plants. A309 (any engine maker "has to be considered as a potential competitor"), A189, A312-13, A690, A888. See *Clorox Co.* v. *Sterling Winthrop, Inc.*, 117 F.3d 50, 57-58 (2d Cir. 1997) (no entry barriers given lack of evidence that other large suppliers of related products "are incapable of successfully investing their resources" in the relevant market). Even Hall admitted that a firm like Toyota could overcome any barriers to entry. A44.

Buyers' countervailing power. As the court explained in *Baker Hughes*, 908 F.2d at 986, buyer "sophistication" generally "promote[s] competition even in a highly concentrated market." Brunswick faced sophisticated buyers with coordinated bargaining power. This undisputed fact further undermines plaintiffs' claim of monopoly power.

Two large buying groups, IBBI and ABA, accounted for over 25% of Brunswick's stern drive and inboard sales; another large buyer, Genmar, accounted for approximately 7%. A1226. IBBI alone bought 15% of all stern drive engines. A858. Boatbuilders join buying groups to "use our buying leverage to get the best deals that we can get" (A226), "extracting the last pound of flesh out of a supplier." A295. These buying groups "extract[ed] significant economic concessions" from Brunswick (A295), including lower market share requirements. A232-34, A541-44, A658-60. As one Brunswick witness testified: "if we chose not to do business with the buying groups, you would put all your business, or a significant portion of your business, at risk." A386.

Inability to charge excessive prices and maintain market share. "In evaluating monopoly power, it is not market share that counts, but the ability to maintain market share" while charging supracompetitive prices. *Syufy*, 903 F.2d at 665-66; see *National Reporting Co.* v. *Alderson Reporting Co.*, 763 F.2d 1020, 1023-24 (8th Cir. 1985). Brunswick had no ability to maintain its market share while charging excessive prices. *Supra*, p. 15.

Brunswick's share of stern drive sales in the early 1980s was 75%. A753. By 1988, well after the boat company acquisitions and initiation of the discount programs, the success of OMC's Cobra engine had pushed Brunswick's share down to near 50%. *Supra,* pp. 2-3. Only after the Cobra total recall did Brunswick's share again increase. Nothing in the record suggests that Brunswick's current market position is any more secure than in the 1980s, and nothing would prevent a vigorous competitor with a popular product and superior service from again driving Brunswick's market share downward. Plaintiffs' failure to show Brunswick's ability to maintain market share while charging supracompetitive prices —considered along with the other factors described above— defeats their claim of monopoly power.

IV. DR. HALL'S LIABILITY AND DAMAGES THEORY WAS UNSUPPORTED, UNREASONABLE, AND CONTRARY TO ANTITRUST PRINCIPLES.

Notwithstanding plaintiffs' failure to establish the anticompetitive effect of Brunswick's discount programs or acquisitions or its monopoly power, the district court allowed them to present liability and damages claims to the jury that rested on the patently unreasonable testimony of their expert. Dr. Hall told the jury that it *must* find Brunswick liable *simply because* it had a market share above "the benchmark competitive level of 50 percent." A108. He maintained that (i) in a competitive engine market Brunswick and a competitor each

would hold a 50% market share, (ii) every point of Brunswick's market share above 50% necessarily was attributable *entirely* to anticompetitive conduct, and (iii) a Brunswick market share above 50% *necessarily* resulted in an "overcharge" to plaintiffs that increased in exact correlation with each point of market share earned by Brunswick. Ad. 126-30; A108-16. The $133,000,000 judgment below cannot stand because Hall's theory—which was essential to plaintiffs' proof of liability, causation, and damages—is completely out of step with reality and inconsistent with established antitrust law.

Hall's theory that firms behaving competitively would maintain a 50-50 lockstep duopoly was without factual support, wholly speculative, and methodologically unsound. See *General Elec. Co.* v. *Joiner*, 118 S. Ct. 512, 519 (1997); *Daubert* v. *Merrell Dow Pharm.*, 509 U.S. 579, 589 (1993); *Wright* v. *Willamette Indus., Inc.*, 91 F.3d 1105, 1108 (8th Cir. 1996) (expert testimony was "simply speculation"). This Court has criticized Judge Moody's passive approach to his *Daubert* gatekeeping responsibility, reversing as an "abuse of discretion" his admission of "not sufficiently reliable" expert testimony. *Robertson* v. *Norton Co.*, 148 F.3d 905, 907-08 (8th Cir. 1998). Here, too, Judge Moody should have granted Brunswick's motion to exclude Hall's testimony. Ad. 114-16 (denying motion); A209, A1237-49; see *In re Aluminum Phosphide Antitrust Litig.*, 893 F. Supp. 1497, 1507 (D. Kan. 1995) (excluding as "scientifically unsound" an economist's "competitive price" model that was based on unsupported assumptions).

Daubert issues aside, Hall's defective theory requires reversal as a matter of law. A theory of antitrust liability and damages must be reasonable. *Brooke Group*, 509 U.S. at 233 (no evidence supporting "reasonable inference" of predatory pricing); *Eastman Kodak Co.* v. *Image Tech. Servs., Inc.*, 504 U.S. 451, 468-69 (1992) ("If the plaintiff's theory is

economically senseless, no reasonable jury could find in its favor"); *Matsushita*, 475 U.S. at 588-97 (rejecting "implausible" predatory pricing theory). Especially "given the potential for jury confusion in litigation as enormous and esoteric as a billion-dollar antitrust damages action," antitrust liability is precluded "if the plaintiff's theory of violation makes no economic sense." *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614 (7th Cir. 1997); see *St. Louis Convention & Visitors Comm'n* v. *National Football League*, 154 F.3d 851, 863 (8th Cir. 1998) (judgment for defendant as a matter of law where plaintiffs' expert's theory was illogical and unsupported). The district court disregarded these principles, making no effort to evaluate the soundness of Hall's theory. Ad. 7-8 (accepting Hall's 50-50 market-share hypothesis based solely on Hall's *assertion* that it was reasonable).

Courts have not hesitated to set aside jury verdicts that rest on unsupported or specious expert testimony. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group*, 509 U.S. at 242-43; see *Morgenstern*, 29 F.3d at 1297; *Flegel* v. *Christian Hosp.*, 4 F.3d 682, 689 n.6 (8th Cir. 1993); *SCFC ILC, Inc.* v. *Visa USA, Inc.*, 36 F.3d 958, 968-69 (10th Cir. 1994). In this case, Hall's "expertise" unquestionably influenced the jury, which awarded plaintiffs the precise dollar amount for the years 1991-1995 that Hall proposed. As Judge Learned Hand noted long ago, at times an expert's testimony may end up "confusing" jurors and effectively "tak[e] the jury's place if they believe him." Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40, 52-53 (1901). See *Nichols* v. *American Nat'l Ins. Co.*, 154 F.3d 875, 884 (8th Cir. 1998) (overturning jury verdict and noting that "'expert evidence can be both powerful and quite misleading'"); C. Wright & V. Gold,

FEDERAL PRACTICE AND PROCEDURE § 6262, at 182-83 (1997) (jurors frequently are incapable of "critically evaluating the bases for an expert's testimony"). This case cries out for judicial intervention to prevent a total miscarriage of justice based on Hall's testimony.

A. Hall's Theory—That An Engine Manufacturer Can Achieve More Market Share Than Its Rivals Only By Anticompetitive Conduct—Is Contrary To Undisputed Record Evidence.

Hall's theory of liability was simple: If the engine market were competitive, two firms each would hold a 50% share, and neither firm could increase its share except by anticompetitive conduct. Thus, Brunswick's majority share of the relevant market had to be due to its "anticompetitive" discounting and acquisitions. See A112-15 (engine firms would have "the same market share" in the absence of anticompetitive conduct; equal market division is "the benchmark of the absence of the anticompetitive behavior"). Hall grounded his theory in the Cournot model, developed by Augustin Cournot in 1838, which postulates that a firm in a concentrated industry will take its rival's output as a given and settle for a stable equilibrium of fixed output. See H. Hovenkamp, FEDERAL ANTITRUST POLICY § 4.2; F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 200-01 (3d ed. 1990); W. Viscusi, et al., ECONOMICS OF REGULATION AND ANTITRUST 112-17 (2d ed. 1995).

Hall's application of the Cournot model to the marine engine business was plainly improper. The Cournot model predicts equal market shares only for firms that (1) produce an undifferentiated product (Cournot used spring water as his example), (2) have the same costs, and (3) do not aggressively compete against each other. 2A P. Areeda, et al., ANTITRUST LAW ¶ 404c; F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE at 201-02; A557a-c. Brunswick and its rivals satisfied *none* of these conditions. *First*, marine engines are not

interchangeably generic like Cournot's "spring water." To the contrary, these engines differ significantly in technology, features, support, service, and consumer favor. See *supra*, pp. 4-5; Ad. 131-32; A558-61. *Second*, there is no record evidence showing that engine suppliers had even roughly the same costs. A566. In fact, Hall assumed that Brunswick had a cost advantage over its rivals. A82.[19] *Finally*, the record, including Hall's own testimony (A135-37, A157-60), depicts Brunswick and its rivals as vigorously competing to increase sales through aggressive discounting and product and dealer development—not acquiescing in a stable division of market share. *Supra*, p. 14.

Nevertheless, the district court credited Hall's application of the Cournot model, observing that "his opinions in this case are based on a specific analysis of *this* market." Ad. 23. But Hall provided no such analysis, and the historical record directly refutes his conclusion that engine market shares must be equal absent anticompetitive conduct. Brunswick's market share greatly exceeded 50% *before any of its challenged actions*. *Supra*, p. 2; A753. Attributing Brunswick's *preexisting* market share level to its *subsequent* conduct can only be called an illogical theory of causation. See *Metzler* v. *Bear Auto. Serv. Equip. Co.*, 19 F. Supp. 2d 1345, 1362 (S.D. Fla. 1998) (plaintiff's expert "merely assumes the cause-and-effect relationship, rather than substantiates it"). Further, there is no evidence that boat engine firms *ever* sustained equal market shares. Thus, Hall's theory does not fit the facts and cannot support the jury's verdict. See *Brooke Group*, 509 U.S. at 242 (expert opinion "is not a substitute" for "market facts"); *St. Louis Convention*, 154 F.3d at 863

[19] Brunswick's lower cost structure refutes Hall's 50-50 theory because the Cournot model itself predicts that firms with lower costs will have larger market shares than their rivals. H. Hovenkamp, FEDERAL ANTITRUST POLICY § 4.2, at 153 n.10; F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE at 200.

(rejecting testimony of expert who "rested his conclusions on economic theory" of what teams would do in "a freely competitive market" where "there was no evidence which tended to show that this was actually the case").[20]

The fact is that no competitive market *ever* has exhibited the unwavering and equal market share division hypothesized by Hall, even over a short period of time. See F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE at 141 ("firms do not long remain equal in size and market share, even though their growth prospects are identical *ex ante*"); A602a-b (Dr. Warren-Boulton explained, without contradiction, that Gibrat's Law predicts a "wide dispersion of market shares"). Hall's unsupported "*ipse dixit*" (*Joiner*, 118 S. Ct. at 519) that engine suppliers in a competitive market must have equal market shares does not pass legal muster. See also *infra*, pp. 70-72.

B. Hall's Market-Share Damages Formula Lacks A Rational Basis.

In addition, Hall's damages methodology had no rational basis and so cannot support the jury's award. For each year, he determined an "overcharge percentage" by comparing Brunswick's "average" stern drive engine price to the "competitive" price that Brunswick would have charged if it held 50% of a two-firm market, entering as inputs into this calculation Brunswick's market share, its inferred marginal costs, and an assumed market elasticity. Hall then applied that "overcharge percentage" to the dollar amounts of plaintiffs' annual purchases to derive their damages. A87-108, A187, A1053-61, A1068-76.

[20/] See also *Advo*, 51 F.3d at 1198, 1201 ("bald assertions of [an] expert * * * are without factual significance"); *Mid-State Fertilizer Co.* v. *Exchange Nat'l Bank*, 877 F.2d 1333, 1339 (7th Cir. 1989) ("An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process"); *Merit Motors, Inc.* v. *Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977) (expert "ma[de] unsupported assumptions [and] virtually ignore[d] the impact of the dominant forces in the [relevant] market").

Hall's methodology reduces to a mechanical formula. As Brunswick's damages expert Dr. Richard Rapp demonstrated in unrebutted testimony, one obtains Hall's "overcharge" percentage for any year *simply by multiplying Brunswick's stern drive market share by two, subtracting one, and dividing the result by three*, that is, $\frac{2 \times \text{Market Share} - 1}{3}$. A562. For example, beginning with a 1996 market share of 80% (or .80), Hall computed the 1996 overcharge as follows: Step one: .80 x 2 = 1.6; Step two: 1.6 - 1 = 0.6; Step three: 0.6 ÷ 3 = .2, or 20%. A563-65. The same holds true for each overcharge year. A564, A1053-61, A1068-76. As Dr. Rapp confirmed (A565):

> Q. So under Dr. Hall's analysis, all you need to know for 1996 is MerCruiser's share was 80 percent and, bingo, his formula boils down to, in a matter of straight arithmetic, is always going to be an overcharge of 20 percent?
>
> A. That's correct.
>
> Q. Nothing else matters?
>
> A. Nothing else matters.

The results of Hall's damages theory are astonishing and untenable:

- Not only does the Hall formula produce an overcharge whenever Brunswick's market share is over 50%, as Hall acknowledged (A109), but the overcharge percentage is *precisely the same no matter what price Brunswick actually charged for its engines*. Because the only independent variable in Hall's formula is market share, a given market share produces the same overcharge percentage whether Brunswick sold its engines for $5000 or $1. See A570-73.

- If Brunswick lowered its engine price, thereby raising its market share, the "overcharge percentage" would automatically increase and, being applied to increased purchases, would yield a significantly increased overcharge. In other words, the lower the engine price, the higher the overcharge. *Ibid*.

- If Brunswick had sold its engines at Hall's "competitive price," Hall's formula, dependent on market share alone, still would show an overcharge. *Ibid*.

In addition, there is a fatal disconnect between Hall's damages and liability theories. See 2 P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶ 365e, at 252 (rev. ed. 1995) ("a damage assessment cannot be divorced from thoughtful attention to the rationale for liability and the internal logic of the liability holding"). According to Hall, Brunswick's engine prices were simultaneously irresistible discounts (supporting liability) and monopoly overcharges (supporting damages). See A117 (3% per-engine discount of $150 resulted in $829 overcharge). But if Brunswick's modest discounts were so attractive to buyers, and yet so greatly exceeded cost as to constitute a monopoly overcharge—Hall claimed that Brunswick engines' "cost is about three-fifths of their price" (A104-05)—an efficient rival had plenty of room to offer even greater and more attractive discounts. Hall refuted himself by contending that Brunswick's prices were simultaneously too high and too low.

Hall's formulaic damages theory cannot stand in the face of these absurdities. See *Amerinet* v. *Xerox Corp.*, 972 F.2d 1483, 1510 (8th Cir. 1992) (rejecting expert's damages projections that "have a fairy-tale-like tone to them"); *Blue Cross & Blue Shield United* v. *Marshfield Clinic*, 152 F.3d 588, 593 (7th Cir. 1998) (implausible conclusions of economic experts render their reports "worthless"). Hall's mechanical approach to antitrust damages exemplifies "'expert opinion evidence [that] has little probative value in comparison with the economic factors' that may dictate a particular conclusion." *Brooke Group*, 509 U.S. at 242.

C. Expert Testimony So At Odds With Antitrust Law Principles Cannot Support Antitrust Liability And Damages.

Dr. Hall's 50-50 theory not only was unsupported and unreasonable, but contravenes fundamental principles of antitrust law. A verdict based on that theory must be reversed.

1. Hall failed to disaggregate lawful from unlawful conduct in using market share to establish liability and measure damages.

Hall's mechanical model—attributing any market share above 50% to anticompetitive behavior and assessing damages in exact correlation with each market share point—violates settled law precluding the imposition of antitrust liability and damages for *lawful* behavior. By failing to account for substantial increases in Brunswick's market share that resulted from lawful competition, plaintiffs' claims fail as a matter of law.[21]

Brunswick argued before trial that plaintiffs could not rely on an aggregated market share formula that did not differentiate between gains due to lawful and unlawful conduct. A1257-58. The district court agreed, stating that "the jury has to be in a position without speculation of distinguishing between lawful acts and unlawful acts." A1256. In response, plaintiffs' counsel assured the court that "Dr. Hall's study is going to be based on the fact that the damages that he finds to have been caused were caused only by the defendant's unlawful conduct." A1259. But that is precisely what Hall did *not* do. He failed to account for lawful marketplace developments that contributed significantly to Brunswick's market share. *First*, OMC, Brunswick's head-to-head rival, *recalled every Cobra engine that it ever produced*. *Supra*, p. 3. Witness after witness—including neutral OMC witnesses—testified to the enormity of OMC's Cobra failure.[22] *Second*, missteps associated with the 1992

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[21] See *National Ass'n of Review Appraisers* v. *Appraisal Found.*, 64 F.3d 1130, 1135 (8th Cir. 1995) ("The Associations 'may not recover for losses due to factors other than the [defendant's] anticompetitive violations'"); ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 793 (4th ed. 1997) ("a verdict will be overturned" unless the plaintiff "give[s] the finder of fact a basis to determine and separate out the amount of losses caused by lawful competition, mismanagement, recession, or other lawful factors").

[22] See *supra*, p. 3; A771-74 (OMC's former CEO stated that OMC had "a horrible year of complaints" following the Cobra disaster, followed by "a loss in market share" that was "attributable to the shifting problem in the Cobra"), A789-92 (OMC's former Boat Group President stated that the Cobra problem caused a drop in sales of Cobra engines and boats equipped with Cobra engines), A444-45, A502, A521-525.

OMC/Volvo joint venture caused Brunswick to "pic[k] up over 10" market share points, as IBBI's president admitted. A549-50; see A545 ("Mercury participation in the [IBBI] group jumped from 67.9 to 77 percent since OMC/Volvo announced their intent to merge"); *supra*, p. 4. Hall figured neither event into his calculations.

As the district court found, "Dr. Hall agreed that the Cobra problem cost OMC engine sales and resulted in market share gains" for Brunswick. Ad. 6. Yet Hall admitted that his model "did not numerically attribute—in other words, it wasn't some specific adjustment that you'll see in my computer spread sheet saying, 'Here's what I did because of OMC.'" A144. Hall did not disaggregate—despite acknowledging that he had the "tools that potentially could be used" to do so—because he felt that the "positives" and the "negatives" that might affect a seller's market share somehow balanced out. A146-147. But he offered no evidence of *any* sales lost by Brunswick to support such speculation.[23]

Because plaintiffs failed to eliminate market share gains caused by factors unrelated to Brunswick—and relied instead on aggregate market share to trigger damages—this case should not have gone to the jury:

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[23] Over Brunswick's objection, plaintiffs produced for the first time at trial documents showing recalls by Brunswick that are commonplace in the marine engine, auto, and every other manufacturing business. There was *no* evidence, however, that the effect of those recalls was even remotely comparable to the devastating impact that recalling every Cobra engine ever made had on OMC's business—an impact worsened because, for more than a year before the recall, OMC alienated customers by blaming *them* for the problem. OMC executives testified that the Cobra recall was a "disaster" that resulted in lost sales and market share. Hall admitted that the Cobra recall cost OMC sales, helped Brunswick, and "had a lingering effect." See *supra*, p. 3. In contrast, there was *no* evidence that *any* recall by Brunswick affected its sales.

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of "speculation or guesswork" not permitted for antitrust jury verdicts.

MCI v. *AT&T*, 708 F.2d 1081, 1162-63, 1164 (7th Cir. 1982); see *Amerinet*, 972 F.2d at 1494; *National Ass'n of Review Appraisers*, 64 F.3d at 1135; *National Farmers' Org., Inc.* v. *Associated Milk Producers, Inc.*, 850 F.2d 1286, 1305-08 (8th Cir. 1988). In other words, "the court must have a basis for assuring itself that other causes of plaintiffs' injury have been 'filtered out' of the damage claim." *United States Football League* v. *National Football League*, 842 F.2d 1335, 1379 (2d Cir. 1988). Thus, "[s]tatistical studies that fail to correct for salient factors, not attributable to the defendant's misconduct, that may have caused the harm of which the plaintiff is complaining do not provide a rational basis for a judgment." *Blue Cross*, 152 F.3d at 593; see *Litton Sys., Inc.* v. *Honeywell, Inc.*, 1996 WL 634213 (C.D. Cal. July 24, 1996) (reprinted at A1271). The district court should have applied this case law and refused to impose liability and damages based on Hall's aggregated market share data.

2. Hall's 50-50 market share theory of liability and damages conflicts with the procompetitive policies of federal antitrust law.

"The antitrust laws do not require that rivals compete in a dead heat." *Syufy Enters.*, 903 F.2d at 666. In competitive conditions, "'there are winners and losers.'" *Balaklaw*, 14 F.3d at 801. Even a dominant firm may engage in "competition for increased market share," and "'it is in the interest of competition to permit dominant firms'" to do so. *Cargill*, 479 U.S. at 116.[24] Such efforts benefit consumers, which is the primary goal of the antitrust laws.

[24] See *Kentmaster*, 146 F.3d at 695 (dominant firm's price cuts to "enlarg[e] its market share" were "good business and normal business"); *Ball Mem. Hosp.*, 784 F.2d at 1339 ("Even the largest firms may engage in hard competition [to] enlarge their market shares").

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Hall's central postulate that any market share above 50% is the "benchmark" of anticompetitive behavior (A115) flouts these principles by requiring firms to stop competing once they reach the 50% threshold. See *SCFC*, 36 F.3d at 969 (expert testimony on which jury based verdict was not probative because it showed only competitive intent to "do all the business if they can"). According to Hall's model, Brunswick can avoid continuing antitrust liability only by reducing its market share to 50%—which means either stopping selling engines or raising engine prices. But reduced output and increased prices are the "paradigmatic" *vices* targeted by the antitrust laws. *NCAA* v. *Board of Regents*, 468 U.S. 85, 107 (1984).

Antitrust law regards Hall's artificial market structure as an evil to be combated, not a goal to be realized. If two competitors agreed on a 50-50 market division, they would conform perfectly to Hall's view of proper market performance—yet would be *per se* (and likely criminal) violators of the Sherman Act. Hall would penalize a firm that sought to break out of such a tight oligopoly by lowering its prices to win more sales. "The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition." *Brooke Group*, 509 U.S. at 224. Hall's theory also would discourage innovation. If Brunswick held the 50% market share authorized by Hall, offering a new engine or better service that could result in more sales and higher market share would be fraught with legal peril, including the risk of treble damages.

At bottom, Hall's theory is built on a premise that antitrust law has rejected—a supposed inconsistency between market concentration and flourishing competition. See Hovenkamp, FEDERAL ANTITRUST POLICY § 4.4, at 161 ("highly concentrated markets may in fact perform very competitively"). Although the limited demand for boat engines has pro-

duced a concentrated market—as Hall recognized (A152)—that is no bar to vigorous competition, which inevitably leads to market share differences. These disparities are entirely consistent with vigorous competition. See *Brooke Group*, 509 U.S. at 213, 238 (cigarette firms with market shares of 40%, 28%, 12%, and 2-5% engaged in aggressive price competition); *Omega Envtl.*, 127 F.3d at 1168 (competition not foreclosed despite domination of industry by four firms with 55%, 18%, 16.1%, and 7.7% shares); A568-69 (explaining Gibrat's Law—unequal market shares over time are the norm), A602a-b.

Antitrust liability and damages must be tested against actual market data, not a mechanical and artificial formula. See *Matsushita*, 475 U.S. at 594 n.19 (rejecting "probative value" of expert opinion "not based on actual cost data [but] on a mathematical construction"); *Elder-Beerman Stores Corp.* v. *Federated Dept. Stores, Inc.*, 459 F.2d 138, 149-50 (6th Cir. 1972) (reversing jury verdict based on expert's antitrust damages "formula" that was not tested by actual market data). Permitting the jury verdict to stand in this case would lead to a rash of plug-in-the-numbers antitrust suits based on Hall's unprecedented theory. See *Brokerage Concepts, Inc.* v. *U.S. Healthcare, Inc.*, 140 F.3d 494, 518-19 (3d Cir. 1998) (warning against "establish[ing] a precedent" that "would stand antitrust jurisprudence on its head"). If Hall's theory were endorsed by this Court, it would send a highly perverse signal to businesses throughout this Circuit: stop competing vigorously when consumers strongly favor your product, or face ruinous treble damages liability. The chilling effect of that message would be multiplied many times over because not only other boatbuilders, but also Brunswick's main rival, Volvo, have filed additional antitrust suits alleging that the verdict here is conclusive as to their claims for hundreds of millions of dollars in damages beyond the $133,000,000 awarded in the court below.

* * * * *

Without Hall's fundamentally flawed testimony, plaintiffs' "proof" that Brunswick's discounts and acquisitions *caused* them to pay "overcharges" disappears. Moreover, plaintiffs offered no evidence of damages beyond Hall's fallacious formula. Thus, plaintiffs are left with no ability to establish causation or damages, essential elements of an antitrust cause of action. See *Amerinet* v. *Xerox Corp.*, 972 F.2d 1483, 1495 (8th Cir. 1992) (antitrust claims failed as a matter of law because plaintiff "failed sufficiently to establish the causal connection between its decline and [defendant's] alleged antitrust violations and also failed to establish any reasonable basis for the determination of its damages"). For these reasons, the jury's verdict falls with Hall's testimony.

V. BRUNSWICK IS ENTITLED TO ENTRY OF JUDGMENT AS A MATTER OF LAW OR, AT A MINIMUM, TO A NEW TRIAL.

Because the evidence, considered as a whole, cannot sustain the jury's verdict, this Court should direct entry of judgment as a matter of law for Brunswick. *Read* v. *Medical X-Ray Center*, 110 F.3d 543, 545-47 (8th Cir. 1997); *Ryko*, 823 F.2d at 1233-35. It should do so if it holds that plaintiffs' discount or acquisition claims are legally invalid for any reason; that any aspect of Dr. Hall's theory, which was critical to both liability and damages, is faulty; *or* that Brunswick lacked market power. Plaintiffs repeatedly argued below that Brunswick's antitrust liability rests on the *combination* of Brunswick's challenged conduct. *E.g.*, A606, A1261-64. Accordingly, if this Court deems lawful any component of Brunswick's conduct, Brunswick is entitled to judgment as a matter of law.

There is no merit to plaintiffs' suggestion below, relying on *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), that a cumulation of innocent conduct

can give rise to antitrust liability. *Continental Ore* simply held that evidence relevant to one claim should not be treated as if the claims were "completely separate and unrelated lawsuits." *Id.* at 698. It did not authorize the imposition of antitrust liability by cumulating separate instances of *lawful* conduct. Rejecting a similar argument, the district court in *Matsushita* explained that "[n]othing plus nothing times nothing still equals nothing." 513 F. Supp. 1100, 1311 (E.D. Pa. 1981). As the Supreme Court put it in affirming the district court's decision there, inferences of liability drawn from lawful conduct are "especially costly" because "they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. See also *Northeastern Tel.*, 651 F.2d at 95 n.28 (where proof supporting each monopolization claim was "utterly lacking," treating the "claims collectively cannot have any synergistic effect").

At a minimum, because the jury returned a general verdict imposing damages without distinction among plaintiffs' claims, Brunswick is entitled to a new trial if the Court finds merit in *any* of its contentions. Over Brunswick's objection (Def's Proffer ZZ, Dkt. No. 1187; Tr. 6316-26), the jury entered a general verdict—one that "simply asks the jury to state a legal finding," *Kostelec* v. *State Farm Co.*, 64 F.3d 1220, 1227 (8th Cir. 1995)—imposing damages without distinction among plaintiffs' numerous claims. A general verdict tainted by legal error cannot stand, even where other grounds would support the verdict. *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 459-60 (1993) (§ 2 judgment overturned in light of the possibility that the jury relied on an erroneous attempt to monopolize ground); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962) (general verdict set aside because defendants were exempt from one of the theories of antitrust liability submitted to the jury); *Robertson* v. *Norton Co.*, 148 F.3d 905, 908 (8th Cir. 1998);

Dakota Indus., Inc. v. *Ever Best Ltd.*, 28 F.3d 910, 912 (8th Cir. 1994); *Dudley* v. *Dittmer*, 795 F.2d 669, 673 (8th Cir. 1986); *Northeastern Tel.*, 651 F.2d at 94-95.

CONCLUSION

It was legal error for the district court to deny Brunswick's renewed motions for judgment as a matter of law and for a new trial and to allow Dr. Hall's testimony. The evidence considered as a whole cannot sustain the jury's verdict. The judgment of the district court should therefore be reversed and the case remanded with directions to enter judgment in favor of Brunswick on plaintiffs' Sherman and Clayton Act claims. Alternatively, this Court should order a new trial.

Respectfully submitted.

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One of the attorneys for defendant-appellant Brunswick Corporation

January 29, 1999