

In the United States Court of Appeals  
for the Eighth Circuit

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Nos. 98-3732 & 98-4042

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CONCORD BOAT CORPORATION, *et al.*,

Plaintiffs/Appellees/Cross-Appellants,

v.

BRUNSWICK CORPORATION,

Defendant/Appellant/Cross-Appellee.

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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

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**REPLY BRIEF AND RESPONSE FOR DEFENDANT-APPELLANT-  
CROSS-APPELLEE BRUNSWICK CORPORATION**

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## STATEMENT OF RELATED ACTIONS

Brunswick's opening brief noted that after the \$133,000,000 judgment in the district court, two new lawsuits were filed against Brunswick—*KK Motors, Inc. v. Brunswick Corporation*, No. 98-2307 (D. Minn.) (filed Oct. 23, 1998), and *Volvo Penta of the Americas, Inc. v. Brunswick Corporation*, No. 98-CV1473 (E.D. Va.) (filed Dec. 22, 1998)—which seek to predicate additional antitrust liability and treble damages on the jury verdict in this case through invocation of collateral estoppel. Three more class action lawsuits asserting collateral estoppel now have been filed against Brunswick—*AMO Marine Products, Inc. v. Brunswick Corp.*, No. 99 CV 243 (D. Minn.) (filed Feb. 10, 1999), *Couch v. Brunswick Corp.*, No. 19646 (Circuit Court for Washington County, Tenn.) (filed Feb. 16, 1999), and *Jack's Marina, Inc. v. Brunswick Corp.*, No. 99 CV 512 (D. Minn.) (filed Mar. 31, 1999).

## I. INTRODUCTION.

Pointing to their bulky appendix, plaintiffs claim that disagreements over the facts preclude entry of judgment for Brunswick. But this Court repeatedly has reversed jury verdicts imposing antitrust liability where, despite a lengthy record, the *relevant* facts were uncontroverted and did not as a matter of law support the verdict. *Read*, 110 F.3d at 546; *Morgenstern*, 29 F.3d at 1295-96; *Travel Arrangers*, 991 F.2d at 1395-96; see *Matsushita*, 475 U.S. at 576-77 (40-volume appendix raised no issue of material fact; antitrust defendant entitled to summary judgment in price discounting case). The only disagreements here are over the *legal significance* of undisputed facts. Established law applied to those undisputed facts mandates reversal.

Plaintiffs cannot escape the force of controlling precedent by resort to pejorative labels or rhetorical characterizations. *E.g.*, *Valley Disposal, Inc. v. Central Vermont Waste Dist.*, 31 F.3d 89, 95 (2d Cir. 1994); *Banks v. NCAA*, 977 F.2d 1081, 1093 (7th Cir. 1992). Yet plaintiffs offer this Court nothing more than a pejorative label when they argue (at 28-29) that Brunswick's discounts and acquisitions created "anticompetitive synergy." Plaintiffs' cited cases, *Continental Ore, Workers' Compensation*, and *National Farmers' Organization* (Br. 27), hold only that in a *conspiracy* case individual lawful acts may become unlawful if they are integral components of an unlawful conspiracy. But in Sherman Act cases alleging monopolization and contracts in restraint of trade, courts consistently hold that if individual claims are legally deficient the "claims collectively cannot have any synergistic effect." *Northeastern Tel.*, 651 F.2d at 95 n.28; *California Computer Prods. v. IBM*, 613 F.2d 727, 745-46 (9th Cir. 1979); *Southern Pac. Comm. v. AT&T*, 556 F. Supp. 825, 888-89 (D.D.C. 1982), *aff'd*, 740 F.2d 980 (D.C. Cir. 1984).

And here there is no legal validity to any of plaintiffs' claims. Controlling case law encourages even a putative monopolist to boost sales through above-cost price discounts and to improve efficiency through

vertical integration. Plaintiffs' rhetorical assertion (at 20) that Brunswick's discounts and acquisitions together "foreclosed" 78% of the market is baseless. Brunswick's voluntary discount programs removed no buyer from the reach of rivals; rivals used equal or larger discounts and integrated vertically to win sales from Brunswick; and rivals faced no barriers to entry or expansion in the boatbuilding business. In these circumstances, whether considered individually or collectively, the discounts and acquisitions resulted in no meaningful foreclosure. "Nothing plus nothing times nothing still equals nothing." *Matsushita*, 513 F. Supp. at 1311, *aff'd*, 475 U.S. at 594.

There is no dispute over the terms of Brunswick's discount programs during the relevant time period. The district court expressly found that "none" of those programs "obligated" *anyone* to "purchase engines," and "none" of the programs contained provisions "restricting [boatbuilders'] or dealers' ability to deal with other engine suppliers." They merely offered buyers small additional discounts "if their purchases reached the stated levels." Ad. 10-11. Dr. Hall conceded that a buyer who signed a market share or long-term agreement with Brunswick was free to shift business to Brunswick's competitors "the next day," losing only future Brunswick discounts. A203. Such a buyer did not even have to repay unearned discounts it had received. A202, A382-85, A393-94, A891.

There also is no dispute that Brunswick's large and sophisticated engine rivals offered the same inducements to buyers. They gave *deeper* market share discounts, based on *equal or larger market shares*, to boatbuilders and dealers alike. Ad. 118-19; A137, A1230; Brun. Br. 7-8, 14. Plaintiffs do not deny that buyers often switched back and forth among suppliers to take advantage of the best deals or that rivals with excess production capacity had the incentive and ability to take business away from Brunswick. Ad. 120-24; A15-20, A291, A306, A524, A528-29, A672-75, A699, A702-03, A784, A791-92. Plaintiffs themselves shifted purchases to Volvo when they boycotted Brunswick's engines. Ad. 37-41,

89-98. Plaintiffs insist that Volvo made better engines (Br. 2, 23-24) and had lower manufacturing costs than Brunswick (Br. 42 n.45), and that Brunswick charged high prices (Br. 3, 15, 19, 21, 33, 40, 60)—all factors that would give Volvo an enormous *advantage* in winning sales from Brunswick.

In these circumstances it is empty rhetoric for plaintiffs to say that Brunswick’s modest discounts were “binding” or “foreclosed” rivals. Plaintiffs label the loss of discounts a “tax” that chained buyers to Brunswick with “golden handcuffs.” But rivals’ deeper discounts had greater “taxing” effects on their customers who considered switching to Brunswick. See Brun. Br. 8. Plaintiffs offer not a word to explain why they did not simply shift more (or all) of their engine purchases to Brunswick’s rivals to get larger discounts and a supposedly superior product. And plaintiffs cannot explain how Brunswick’s competitors were hamstrung when boatbuilders could buy 20%-30% of their engines from rivals without losing *any* Brunswick discount, and could buy 100% from a rival, in which case they would receive the rival’s larger discount and not be affected at all by loss of Brunswick’s discount. A51-52, A1231.

Brunswick is entitled to judgment as a matter of law on plaintiffs’ discount claims, not because of any debatable economic “presumption” (Pl. Br. 28), but because recent Supreme Court and Eighth Circuit decisions establish that above-cost discounts for increased purchases benefit consumers and, unless tainted by independently unlawful restraints, are “legal *per se*” under Sections 1 and 2 of the Sherman Act. *Travel Arrangers*, 991 F.2d at 1394. Plaintiffs do not point to a single case condemning discounts of any kind, or come to grips with the many cases holding that there is no exclusive dealing when a buyer may freely switch all or part of its purchases to other suppliers and no tying when a discount is offered in a single product market.

There is also no dispute over the facts that require judgment for Brunswick on plaintiffs’ dilatory acquisition claims. Plaintiffs do not deny that they waited nine years after Brunswick bought Bayliner and

Sea Ray before filing suit—even though those acquisitions were publicly announced and purportedly harmed them immediately. As a result, the four-year statute of limitations bars their acquisition claims. Plaintiffs likewise do not deny that the FTC reviewed the 1986 acquisitions without objection, that Brunswick’s engine rivals also integrated vertically to ensure engine markets and better serve consumers, or that entry into the boatbuilding market is easy. Condemnation of Brunswick’s acquisitions conflicts irreconcilably with governing case law and DOJ’s Merger Guidelines, which recognize that integration promotes efficiency, benefits consumers, and cannot foreclose rivals absent barriers to entry in both the markets involved.

The facts showing that Brunswick lacks monopoly power likewise are not in dispute. Plaintiffs do not deny that Brunswick faces many engine rivals, including Volvo and Toyota—companies much larger and with far greater resources than Brunswick—as well as inboard manufacturers that could easily expand and huge outboard engine makers that could readily enter the market. Volvo’s president testified without contradiction that Volvo has large amounts of excess capacity and can meet any increase in demand. Plaintiffs themselves bragged about the concerted bargaining clout they exercised in their dealings with Brunswick. See Brun. Br. 14, 57-59. As a matter of law, Brunswick lacks monopoly power because, in these circumstances, it could not conceivably maintain market share while charging supracompetitive prices.

Rhetoric cannot mask the harm to competition that would result if this Court were to accept plaintiffs’ extravagant antitrust claims. Brunswick has suffered a staggering \$133,000,000 penalty—which Volvo and plaintiffs’ other allies seek to multiply many times over in five “me too” suits asserting collateral estoppel—for offering customers price breaks for buying more product (in a manner that benefitted large and small buyers alike) and for integrating efficiently into a downstream market. The National Association of Manufacturers has protested this unprecedented ruling in an *amicus* brief filed on behalf of the business

community. Threatened with ruinous treble damages, what successful business would dare offer discounts for larger purchases or acquire downstream producers? This verdict's chilling message is greatly magnified because liability and damages rested on the self-contradictory testimony of Dr. Hall, who asserted that Brunswick's success in serving more than 50% of the market conclusively proved illegal conduct and that the *same prices* were at once monopolistic overcharges and golden handcuffs. Hall's testimony clashes with undisputed record facts showing that this industry never has maintained a lockstep 50/50 market division, and cannot be reconciled with established antitrust law. See *Blomkest Fertilizer, Inc. v. Potash Corp.*, 1999 WL 280497, \*6 (8th Cir. 1999) (consumer welfare "benefits from competition, not peaceful coexistence between suppliers").

Regardless of the propriety of the jury instructions (Pl. Br. 42), this Court follows "the applicable law" to determine if Brunswick is entitled to JAML. *Coca Cola Bottling Co. v. Hubbard*, 203 F.2d 859, 862 (8th Cir. 1953); see *Grand Labs v. Midcon Labs*, 32 F.3d 1277, 1280-81 (8th Cir. 1994). This Court should reverse the ruling below not only because it contravenes governing case law, but also because it sends a message that is unambiguously harmful to consumer welfare and economic efficiency.

## **II. BRUNSWICK'S DISCOUNTS WERE LAWFUL AND PROCOMPETITIVE.**

For a "dominant" firm to "cut prices" to "increase market share," the Supreme Court has held, is the "essence of competition" and "the very conduct the antitrust laws are designed to protect." *Brooke Group*, 509 U.S. at 226; *Cargill*, 479 U.S. at 116; *Matsushita*, 475 U.S. at 594. This Court also regards "aggressive price competition" by a "monopolist" as "legal *per se*" provided prices remain above "average total cost." *Travel Arrangers*, 991 F.2d at 1394; *Morgan*, 892 F.2d at 1358-59; *Henry*, 809 F.2d at 1346; *SuperTurf*, 660 F.2d at 1280. Other courts of appeals uniformly agree. *E.g.*, *Barry Wright*, 724 F.2d at 231-35; *Kentmaster*, 146 F.3d at 695; *Ball*, 784 F.2d at 1339. This authority

mandates reversal because plaintiffs contend that Brunswick's discounted prices were 50% (\$1500) above its marginal cost—a price plaintiffs say was monopolistically *high* (yet also, inconsistently, so *low* that customers could not resist it and rivals could not compete). Pl. Br. 22 n.28, 33, 40; Brun. Br. 23.

We demonstrated (at 31-34) that the “strings” attached to Brunswick's discounts—that a boatbuilder had to buy 70% or 80% of its engine needs from Brunswick if it wanted to earn a 3%-7% discount—in no way resembled “exclusive dealing” that “froze [competitors] out of the market.” *Jefferson Parish*, 466 U.S. at 45. Boatbuilders and dealers were free to buy any or all of their engines from rivals, and rivals were free to and did aggressively compete for business using their own discounts and other inducements. Ad. 10-11, A203; Brun. Br. 7-8, 14-15.

In response, plaintiffs do not identify *any* decision holding that above-cost price discounts are anticompetitive *or* that discounts conditioned on voluntarily purchasing more of a product constitute exclusive dealing. The district court acknowledged that there is no precedent for penalizing such conduct. Ad. 19. Plaintiffs' defense of this verdict rests on rhetorical characterizations and fallacious legal distinctions, which are easily refuted.

**A. Plaintiffs' discount claims clash with controlling precedent.** Plaintiffs dismiss the host of decisions establishing the lawfulness of price discounts as “inapposite” because they involve “predatory pricing” claims. Pl. Br. 40. But plaintiffs attack Brunswick's *above-cost price discounts*, so the unbroken line of cases holding that dominant firms may compete aggressively by lowering prices down to the level of actual cost apply *a fortiori* here. See Brun. Br. 23-36; *ARCO v. USA Petroleum*, 495 U.S. 328, 339 (1990) (“in the context of pricing practices, only predatory pricing has \* \* \* anticompetitive effect”). Plaintiffs offer no reason why the antitrust principle that a monopolist may take as much business from rivals as it can by cutting prices—because discounts benefit consumers—should refute a predatory pricing but not an above-cost discount claim, when above-cost discounts leave *more*

room for rivals. Condemning these discounts on plaintiffs' open-ended theory would create "intolerable risks of chilling legitimate price-cutting." *Brooke Group*, 509 U.S. at 223. And it would prevent a firm like Brunswick from matching aggressive discounts offered by rivals, even though a putative monopolist clearly may compete vigorously to maintain sales by offering bargain prices. See 3 P. Areeda, et al., ANTITRUST LAW ¶ 748, at 461 (rev. ed. 1996) (hereinafter, ANTITRUST LAW).

Plaintiffs' perfunctory treatment of *Brooke Group* and *Barry Wright* is astonishing. Both cases flatly rejected challenges to discounts conditioned on buying more of the product. In *Brooke Group*, "higher volume purchases entitled customers to higher discounts" from B&W, so "customers opting to [buy from B&W's rivals] would in effect be penalized." 748 F. Supp. 344, 360 (M.D.N.C. 1990). Customers "would buy exclusively from" B&W "to avoid this penalty" (plaintiffs' "tax"). *Ibid.* But the Supreme Court held B&W's graduated discounts lawful, explaining that discounted, above-cost prices "do not threaten competition," "regardless of how [they] are set" or "the type of antitrust claim involved." 509 U.S. at 215-16, 223. Now-Justice Breyer's opinion in *Barry Wright*—approved in *Matsushita, Morgan, and Henry*—rejected Sherman Act challenges to 25%-30% discounts geared to the buyer's purchasing 86% of its needs from the defendant monopolist. The court thus sustained a much larger discount than any Brunswick ever offered, predicated on supplying a larger share of the customer's needs. The verdict here collides head on with *Brooke Group, Barry Wright*, and numerous other cases holding that above-cost price cuts benefit consumers and are not antitrust violations.

At the same time they attack market share discounts, plaintiffs inexplicably laud volume discounts as "economically justified" because manufacturers "enjoy economies of scale as the quantity produced increases." Pl. Br. 7-8, 33 n.37. But volume and market share discounts provide exactly the same disincentive for buyers to send business elsewhere (see *Brooke Group*, 748 F. Supp. at 360), and both types of discount generate efficiencies for manufacturers, including the "economies of scale," planning

benefits, and closer alignment among engine manufacturer, boatbuilder, and dealer that result when buyers purchase more units from a manufacturer to maximize either volume or market share discounts. See Brun. Br. 10-11.

The *difference* between volume and market share discounts, plaintiffs admit (at 8 n.14), is that large boatbuilders and buying groups like plaintiffs benefit from volume discounts, while small independent boatbuilders cannot qualify for them and need market share discounts. There is no conceivable antitrust reason why Brunswick should be prohibited from structuring some of its discounts to come within the reach of smaller builders, which are an important part of its customer base (A661, A1048-49), or why plaintiffs should be able to raise smaller rivals' costs or coerce them to join a buying group by outlawing market share discounts. According to plaintiffs (at 11, 36), the volume discounts they prefer are entirely permissible, but market share discounts beneficial to small boatbuilders expose the seller to huge treble damage penalties. Plaintiffs' only evidence that Brunswick acted to "break up the buying groups" (Pl. Br. 11) is that Brunswick offered voluntary market share discounts and lowered the qualification level for volume discounts after Volvo did so first—in other words, that it flexibly modified its discounts so that more buyers could participate. Perversely, plaintiffs would twist the antitrust laws to condemn discounts that benefit a broader group of purchasers.

**B. Plaintiffs have not shown exclusive dealing or tying.** We do not suggest that a firm "may do whatever it pleases" provided it "prices above cost." Pl. Br. 40 n.47, 39-41. Above-cost pricing does not excuse a firm that engages in an independent anticompetitive restraint such as price fixing or tying. But there is a world of difference between those practices and simply offering bargains that "incentiviz[e] customers to not purchase [rival] products" (Pl. Br. 45 n.50), which has never been held unlawful. If it were, every form of competition would be forbidden.

Even true exclusive dealing generally furthers competition and is lawful. 11 ANTITRUST LAW ¶ 1810, at 121 (1998). As the Seventh Circuit recently explained: “Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common. Every year or two, General Motors, Ford, and Chrysler invite tire manufacturers to bid for exclusive rights to have their tires used in the manufacturers’ cars. Exclusive contracts make the market hard to enter in mid-year but cannot stifle competition over the longer run, and competition of this kind drives down the price of tires, to the ultimate benefit of consumers.” *Paddock Publications*, 103 F.3d at 45. Moreover, exclusive dealing occurs only when a buyer must take all its requirements from a single source, whereas Brunswick’s boatbuilder discounts topped out at 70% or 80% and prevented no rival from obtaining a competitive foothold. See *Omega*, 127 F.3d at 1167 n.13 (conduct that was not true exclusive dealing did not violate § 1 or § 2 of the Sherman Act). But wholly apart from those fatal defects in plaintiffs’ position (discussed at Brun. Br. 31), Brunswick’s discount programs were not “exclusive” in *any* sense.

Brunswick’s offer of modest discounts for increased purchases did not “force” plaintiffs to buy even one Brunswick engine or make those engines plaintiffs’ “only economically viable option.” Pl. Br. 31. Brunswick’s voluntary programs left customers free to buy as many engines from other suppliers as they wished; free to buy 20%-30% of their engines from rivals without any loss of Brunswick’s discount; free to switch 100% of their engine purchases to a rival without any net loss of discount (because Volvo, OMC, and Yamaha matched or beat Brunswick’s discounts); and free to drop Brunswick’s programs without notice at any time. Ad. 10-11, 118-19; Brun. Br. 7-9, 31; *Omega*, 127 F.3d at 1163-64 (“easy terminability” refutes exclusive dealing claim). In addition, customers shifting an intermediate quantity of their purchases from Brunswick could recoup any modest loss of market share discounts by bargaining for offsetting discounts from Brunswick’s rivals. Many buyers switched back and forth between engine

suppliers to take advantage of special deals or more desirable products, which manufacturers eager for new business aggressively promoted. This is the essence of free, price-based competition. Plaintiffs themselves shifted business to Volvo during their boycott of Brunswick, belying any notion that Brunswick was their “only option.” See Brun. Br. 14-15.

This is not, therefore, like *Microsoft*, where each customer agreed “not [to] offer” a competing product to its clients. Pl. Br. 30-31. Nor is it like other cases cited by plaintiffs (at 43 n.48, 45 n.50), which involved exclusivity agreements that actually prevented customers from dealing with rivals. *E.g.*, *Carter Carburetor*, 112 F.2d at 732-33 (discounts were available only to service stations that agreed to “cease and refrain from dealing in a new competing line of carburetors”; contracting parties were subject to “a condition that the purchaser should not deal in the goods of a competitor”); see Brun. Br. 31 n.4. Under Brunswick’s discount programs, no boatbuilder or dealer ever agreed to refuse to deal or limit its dealings with other engine suppliers. Builders and dealers simply received better “discounts if their purchases reached the stated levels.” Ad. 10. It is not “exclusive dealing” to offer discounts so attractive that customers want to buy more product to obtain greater benefits. That theory of liability would leave businesses in hopeless uncertainty about how to comply with the law, and juries would be free to invalidate virtually *any* type of discount on a standardless and subjective basis, which would chill desirable, procompetitive discounting. Even “dominant firms” may “engage in vigorous competition, including price competition,” which is “not activity forbidden by the antitrust laws” but “is in the interest of competition.” *Cargill*, 479 U.S. at 116.

**C. Plaintiffs failed to prove foreclosure.** Precisely because Brunswick’s discounts did not restrain any customer from dealing with competing engine manufacturers, they did not “foreclose” any part of the market to rivals. Pl. Br. 28-29. Plaintiffs say (at 2-3) that Volvo is a more efficient producer than Brunswick and makes better engines, and that Brunswick’s discounted prices were

monopolistically high. Those circumstances, coupled with Volvo's excess capacity, *invited* Volvo to boost sales by undercutting Brunswick's purported "high prices" for "inferior" engines. A699-700. Plaintiffs say Brunswick overcharged for its engines by 13% to 20% most years (A1073), yet claim (Br. 19) that boatbuilders were somehow deterred from switching to rivals because they might lose a modest 3% to 7% discount. But nothing constrained buyers from switching business to Brunswick's rivals to avoid Brunswick's "overcharge." There is no dispute that Volvo, OMC, and Yamaha offered *larger* discounts than Brunswick, conditioned on a *larger* share of engine purchases. Brun. Br. 7-9. Using discounts and other marketing strategies, large and sophisticated rivals could—and did—win sales from Brunswick. Brun. Br. 7-10, 14-15. Rivals also could compete with new engines (like OMC's Cobra and Volvo's Duo-Prop) or better service. A10, A254, A499. Plaintiffs' foreclosure theory cannot be squared with the undisputed fact that years after Brunswick began offering market share discounts, OMC slashed Brunswick's market share to 50%. Pl. Br. 7; Brun. Br. 2-3. Brunswick's discounts did not remove a single customer from the reach of competitors, who were free to bid for 20%-30% of a buyer's business in order to prove the "superiority" of their product, and then bid for 100% of that same business—with no "tax" effect whatever.

Moreover, Volvo and OMC integrated vertically to obtain customers for their engines, and nothing stopped Brunswick's rivals from acquiring, expanding, or forming more boatbuilders or dealers. Brunswick's discounts could not foreclose sales in a highly competitive downstream market in which there were no significant barriers to entry—as Toyota's recent market entry and development of a builder and dealer base demonstrates. See 11 ANTITRUST LAW ¶ 1802e; Brun. Br. 2. In short, Brunswick won sales by giving customers what they wanted at a good price, not by foreclosing price competition or by using some other anticompetitive trick.

Plaintiffs nonetheless argue (at 16-17) that rivals would have had to offer a 14% discount to obtain half the business of a 100% Brunswick customer. Plaintiffs' table, narrowly focused on a customer that shifts only 50% of its engine needs to a competitor, fails to inform the Court that rivals could get *all* of a boatbuilder's business by matching or *slightly* bettering Brunswick's discounts (as rivals frequently did). Plaintiffs also fail to mention that virtually no buyer wanted to divide purchases evenly between suppliers. See Brun. Br. 11; A166-67, A330, A423, A426-30, A435-37. Moreover, even the highly unusual situation described in plaintiffs' table fails to show anything resembling "foreclosure" because, under plaintiffs' own theory, Brunswick's prices were 50% above its costs. See Brun. Br. 23. Any equally efficient rival—and plaintiffs say Volvo was more efficient (Br. 42 n.45)—could easily have offered a 14% discount to obtain half of a boatbuilder's business. Finally, the need to match discounts affected all industry members in an identical fashion. In fact, Volvo, OMC, and Yamaha imposed a *larger* "tax" on any customer who shifted to Brunswick because they gave deeper discounts for larger shares of engine purchases. Ad. 118-19; A1230; Brun. Br. 7-9. No rival was fenced out by discounts that every seller used and all were free to meet or beat. See 11 ANTITRUST LAW ¶ 1807c, at 120.

Plaintiffs also complain that in three years Brunswick offered boat dealers small rebates—up to \$150 per engine, usually much less (Brun. Br. 7-8)—if specified percentages of the boats they bought had Brunswick engines. Pl. Br. 11-12, 29. Like boatbuilders, dealers made no commitment to buy Brunswick engines and remained free to purchase any and all of their needs from other manufacturers. Ad. 10-11. Brunswick cannot be penalized for offering more discounts—at the dealers' request (A709)—when courts consistently hold that discounts benefit consumers and are encouraged. Volvo and OMC also offered dealer discounts, cash bonuses, and prizes including Volvo automobiles. A319-25. As Dr. Hall testified (A137), "anyone that sells anything to a dealer provides incentives. They won't sell them without an incentive." Volvo paid *larger* dealer rebates over a *longer* period than Brunswick, which offered

rebates in only three years; and rivals used rebates to cement relationships with dealer networks as large or larger than Brunswick's. See Brun. Br. 2, 7-8. Brunswick was not required, because of its success in the marketplace, to forgo dealer incentives that all competitors freely utilized and that benefit consumers. Dueling incentives are but another form of competition that the antitrust laws encourage rather than punish. *E.g., Northeastern Tel.*, 651 F.2d at 91-93.

In any event, Brunswick's dealer discounts could not possibly have foreclosed competition because there are 10,000 dealers (only 10% of which got Brunswick rebates) and no barriers to entry or expansion in the dealer business. A331-32, A596, A599-600. Offering discounts at a second level can have no foreclosure effect in those circumstances. See 11 ANTITRUST LAW ¶ 1802e2, at 77. Even under plaintiffs' flawed theory (at 20) that 25% of the dealer market was "foreclosed" by Brunswick's discounts, that left fully 75% of the dealer market wide open. See *U.S. Healthcare*, 986 F.2d at 596 (25% foreclosure is immaterial because "this still leaves a much larger number not tied to [the defendant]").

**D. Plaintiffs rely on irrelevant legal and record materials.** There is nothing to plaintiffs' suggestion (at 27-28, 39-41) that the *Kodak* case draws into question the lawfulness of above-cost voluntary discounts offered by a putative monopolist. In *Kodak*, the Supreme Court held that a defendant could not obtain summary judgment on an incomplete record in a *tying* case that did not address discounting. 504 U.S. 451. Here, the record is complete, and plaintiffs offer not a word to explain how Brunswick's programs were tantamount to *per se* illegal tying. Pl. Br. 30 n.35, 43-44. The case law recognizes (see Brun. Br. 34-35) that agreements tying two separate product markets raise competitive concerns not implicated when discounts (like Brunswick's) depend on buying more product in a single market. Plaintiffs offer no response, even though an unexplained and unprecedented analogy to tying

agreements formed the basis for the district court's refusal to grant Brunswick judgment as a matter of law. Ad. 12-14.

Plaintiffs also badly miss the mark when they contend (at 37-38) that they proved their case with statements by Brunswick employees and consultants that discounts were "barriers to entry." The referenced "barriers to entry" were "more creative marketing programs," "more responsive customer service," "having a better product," and developing strong relationships with buyers through voluntary "discounts." A603, A910, A913, A967. Any company may protect its customer base by offering a popular product at an attractive price. Volvo and other rivals aggressively sought to protect and expand their customer bases too, with market share discounts and other sales inducements and numerous boatbuilder acquisitions. See Brun. Br. 7, 12-14, 37. No practice readily duplicated by rivals constitutes an unlawful barrier to entry. See 2A ANTITRUST LAW ¶ 420a (1995). As this Court has held, "ordinary business practices typical of those used in [any] competitive market" do not violate the antitrust laws. *Trace X*, 738 F.2d at 266. And under the case law (Brun. Br. 35-36), the sort of aggressive business rhetoric plaintiffs criticize is of "no help" and is positively "misleading" in determining liability.

The leading antitrust treatise stresses that even "incremental discounts stretching up to very large volumes" which encourage the buyer to "make all its purchases from that seller" are not entry barriers 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 ANTITRUST LAW ¶ 1807c, at 119-20. That point is confirmed in a recent speech by FTC staff attorney Willard Tom, *Anticompetitive Aspects of Exclusive Dealing and Related Practices*, Remarks to the ABA Section of Antitrust Law (Apr. 15, 1999). Although Mr. Tom does not address the Supreme Court's decision in *Brooke Group* and disagrees with this Court's legal analysis in *Henry v. Chloride*, he

nonetheless acknowledges that under current case law exclusive dealing contracts are competitively benign when they apply “for only a limited period of time, leaving other firms the chance to compete for future periods” or represent “something that a competitor could have matched” (pp. 19, 22). Mr. Tom also recognizes that it is important to consider whether new entrants could “start with a foothold by serving a small part of the business \* \* \* and then growing from there” (pp. 7, 19-20 & n.27), as Brunswick’s rivals were always free to do. He observes, moreover, that under the case law a “contract offering special discounts of 5 to 10 percent in exchange for substantially all of the buyer’s business [is] not likely to have ‘significantly interfered’ with the buyer’s ability to have sought new sources of supply” (p. 19). Those observations refute plaintiffs’ entry barrier contentions here.

Finally, the record directly contradicts plaintiffs’ claim (Br. 47) that this is a bona fide “consumer” suit. If plaintiffs wanted to protect their interests as consumers while dealing with someone other than Brunswick, they could have quickly shifted *all* their purchases—the 15% of the market they control—to Volvo. A858. With a stroke of their procurement pen, they could have avoided Brunswick’s “overcharges,” earned Volvo’s higher discounts on its supposedly “superior” engines (Pl. Br. 23-24), and reduced Brunswick’s market share. In fact, plaintiffs bought far more engines from Brunswick than necessary to get its best discounts. Brun. Br. 8-9. See *Stearns Co. v. FMC Corp.*, 170 F.3d 518, 524 (5th Cir. 1999) (rejecting claims of monopolization and exclusionary discounting where acceptance of contracts “was always ultimately in the hands of the consumer”). Plaintiffs’ conduct proves that they *wanted* Brunswick engines and discounts, which makes nonsense of their protestation that this is a consumer protection suit. Rather, it is an attempt to cripple Brunswick because its boat companies, Sea Ray and Bayliner, compete with plaintiffs, and to raise the costs of small boatbuilders that do not want to join plaintiffs’ buying cartel. In other words, plaintiffs seek to carry out through the judicial process a

patently anticompetitive agenda that began with their boycott of Brunswick and continued with their campaign to manipulate volume discount levels to the detriment of smaller rivals.

### **III. PLAINTIFFS' ACQUISITION CLAIMS ARE TIME-BARRED AND MERITLESS AS A MATTER OF LAW.**

**A. Plaintiffs have violated the statute of limitations.** Plaintiffs do not deny the extraordinary nine-year delay between Brunswick's publicly announced acquisitions of Sea Ray and Bayliner and the filing of this suit. Nor do they deny that, throughout this litigation, they have asserted that they incurred antitrust injury immediately after those acquisitions. Based upon these undisputed facts, the four-year statute of limitations in § 4B of the Clayton Act bars all their treble damages claims directed to those acquisitions, under any statutory theory.

This Court's opinion in *Information Exchange* exemplifies the proper application of § 4B. The plaintiffs there filed antitrust claims more than four years after the defendant entered into illegal tying arrangements. This Court held their suit time-barred, explaining that "[a] cause of action accrues under the antitrust laws when the defendant commits an act that injures the plaintiff's business"—specifically, "when the alleged tying arrangement [was] imposed." 994 F.2d at 484. Because plaintiffs here complain about injurious conduct occurring more than four years before they filed suit, their acquisition claims are likewise time-barred. Contrary to plaintiffs' suggestion (at 56), courts routinely bar acquisition-based antitrust claims that accrued more than four years prior to suit. *E.g.*, *Misco v. U.S. Steel Corp.*, 784 F.2d 198, 201 (6th Cir. 1986); *Mulhearn v. Rose-Neath Funeral Home*, 512 F. Supp. 747, 755 (W.D. La. 1981); *Dairy Foods Inc. v. Farmers Coop.*, 298 F. Supp. 774, 777 (D. Minn. 1969).

Plaintiffs attempt to circumvent the statutory time bar by contending (at 55-56) that a suit may be brought at any time, so long as the defendant continues to hold the acquired stock or assets. Plaintiffs' sole support for that radical proposition is *case law that did not involve § 4B at all*. *United States v.*

*E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), involved a claim for equitable relief by the government. *United States v. ITT Continental Baking Co.*, 420 U.S. 223 (1975), and *United States v. Beatrice Foods Co.*, 493 F.2d 1259 (8th Cir. 1974), involved the government’s efforts to enforce equitable consent decrees. *Carlson Cos. v. Sperry & Hutchinson Co.*, 507 F.2d 959, 960 (8th Cir. 1974), concerned “only” a question not at issue here—“the availability of a private right of action” for § 7 violations. And *Midwestern Machinery, Inc. v. Northwest Airlines*, 167 F.3d 439, 442 n.3 (8th Cir. 1999), expressly recognized that “limits such as the statute of limitations” forbid “continual challenge under section 7.”

Plaintiffs’ revision of the “injury accrual rule,” which “always applies without modification” to antitrust claims (*Klehr*, 521 U.S. at 188), would make a dead letter of the statute of limitations. All acquiring companies continue to “hold” acquired stock or assets, leaving them indefinitely open, according to plaintiffs, to treble damage suits. Plaintiffs do not hide their agenda, urging (at 56) that “the four year damages period be expanded” to include each subsequent payment of a supracompetitive price. But *Klehr* squarely rejected such an attempt, holding that a plaintiff “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.” 521 U.S. at 190. The Court explained that expanding the limitations period would encourage those allegedly injured by an antitrust violation to “wait, ‘sleeping on their rights.’” *Id.* at 187. That is the dilatory course followed by plaintiffs, who do not dispute the district court’s finding that they engaged in a “long and unjustified delay.” Ad. 81. Plaintiffs’ suggestion (at 57) that each alleged overpayment retriggers the limitations period conflicts with the rule that the “receipt of benefits within the limitations period from antitrust violations that occurred outside the limitations period does not give rise to a new cause of action.” *Kaw Valley Elec. Coop. v. Kansas Elec. Coop.*, 872 F.2d 931, 933 n.5 (10th Cir. 1989) (citing cases); see *Morton’s Market v. Gustafson’s Dairy*, 985 F. Supp. 1440,

1446 (M.D. Fla. 1997) (“adverse effects” on prices that “lasted beyond the last overt act” did not extend limitations period).

Plaintiffs strain unsuccessfully (at 57) to fit their acquisition claims within the narrow *Zenith Radio* exceptions. See Brun. Br. 41. With respect to the exception for “continuing conspiracies,” plaintiffs concede that no conspiracy is at issue here, contending (at 57) that all they need show is a “continuing violation.” But as this Court has held, “*Zenith Radio* requires an overt act in furtherance of an antitrust conspiracy which is committed *within the limitations period.*” *Lomar Wholesale Grocery*, 824 F.2d at 588 (antitrust claim was time-barred) (emphasis added). As to the exception for damages that are too speculative to be provable within four years of injury, the only “damages” that plaintiffs deem speculative (at 57) are those they sought for the period *after* trial. But the jury did not award such damages and they are not at issue here. Ad. 112-13. Plaintiffs do not (and cannot) argue that the damages awarded below were too speculative to be provable in the four-year period following the 1986 acquisitions. Dr. Hall purported to calculate the precise amount of such damages for each year beginning with 1986. A1053-61, A1068-76. See *Morton’s Market*, 985 F. Supp. at 1447 (*Zenith* exception for “speculative” damages does not apply where purported damages rest on “the difference between competitive market price and actual price” and thus are “calculable at the time of the defendants’ infractions”).

As the Supreme Court has explained, “[s]tatutes of limitations are not simply technicalities [but] have long been respected as fundamental to a well-ordered judicial system.” *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Businesses need to rely on the integrity of their organizational structure a decade after government-reviewed acquisitions are closed. Private plaintiffs may not sit indefinitely on claims as a strategic ploy to strengthen their hand in bargaining or to maximize asserted dam-

ages. Barring plaintiffs' stale claims will give effect to the "important policies" underlying statutes of limitations. *Union Pac. R.R.*, 138 F.3d at 330.

**B. Plaintiffs' acquisition claims fail as a matter of law.** As we have explained (Br. 44-45), the antitrust laws favor vertical acquisitions because they reduce costs and promote consumer welfare. Brunswick's acquisitions enabled it to develop a unified "seamless approach" to consumers (A642) and "rationalize" its production capacity (A407-08). Just as it proved economically rational for automobile engines and bodies to be produced by integrated companies, leading to vertical integration in the auto industry long ago, so Brunswick's move to integrate production of engines and boats was economically rational and responsive to consumer demand.

Plaintiffs offer no rebuttal to the demonstrated efficiencies fostered by Brunswick's acquisitions. They complain (at 6) that the acquisitions helped Brunswick gain market share, but the record discloses an industrywide race to vertically integrate driven by the desire of all engine makers to align with engine buyers and increase market share through improved efficiency. OMC tried to buy Bayliner and Sea Ray before Brunswick did. After OMC decided that it was unwilling to pay the purchase price, it proceeded to buy 17 other boatbuilders believed to be better values. Volvo invested \$100 million in boatbuilder Genmar. Brun. Br. 12, 48-49. Toyota, with unequaled resources, later entered the market on a vertically integrated basis. A433, A124-25. Plaintiffs' suggestion (at 35 n.40) that Toyota does not count because it produces a small number of inboard engines conflicts with their own market definition (which includes inboards) and with their own testimony that inboard manufacturers can quickly expand into stern drives—especially Toyota, which uses its own Lexus engines. A433, A916. The fact that vertical integration has become widespread in the marine industry attests to the fact that integrated production is efficient and a boon to consumers, who prefer a reliable and well-integrated product.

We demonstrated (at 45-46) that plaintiffs' foreclosure theory conflicts with the case law, DOJ's Merger Guidelines, and antitrust scholarship. A vertical acquisition cannot foreclose competition absent substantial entry barriers in the market of *both* the acquiring and acquired firms. 4A ANTITRUST LAW ¶ 1032a, at 229 (1998); 1984 Merger Guidelines § 4.212, 49 Fed. Reg. 26823, 26835 (1984) ("If entry at the secondary level is easy," vertical acquisition, even if it requires simultaneous entry in both markets, "is unlikely adversely to affect entry to the primary market"). Without substantial barriers to entry and expansion in the boat market, engine makers are not foreclosed from finding or developing engine buyers, especially if Brunswick's engines are "overpriced" and rivals' engines are "superior" as plaintiffs claim. See *NYNEX Corp. v. Discon*, 119 S. Ct. 493, 499 (1998) (where downstream "entry was easy," even 100% foreclosure would not harm competition). Plaintiffs conceded below the lack of entry barriers in the boat market. A1236 n.36 ("few barriers to entering the boat-building business"); Pl. Post-Trial Br. 146 (boat market is "competitive"). The record confirms the vast number of boatbuilders and the ease with which new entrants launch and quickly expand their operations. Brun. Br. 47.

Despite the total absence of entry barriers in the competitive boatbuilding market, plaintiffs say that Brunswick somehow "foreclosed" other manufacturers from finding buyers for their engines. Yet Sea Ray and Bayliner together accounted for less than 30% of the stern-drive engine market, and any foreclosure was far below that amount when inboard sales and Sea Ray's position as a longstanding customer of Brunswick are considered. Brun. Br. 48; *Alberta Gas*, 826 F.2d at 1245 (the "market share represented by the acquiring company's previous supply to the acquired firm is not part of the foreclosure"). Plaintiffs' suggestion (at 50-51) that the price Brunswick paid for Bayliner and Sea Ray is "powerful evidence" of high entry barriers is frivolous. That it would be expensive to buy out McDonalds says nothing about entry

barriers in the hamburger business. Companies buy customers, franchisees, and dealers in easy-entry markets all the time.

Unable to demonstrate foreclosure with such a wide-open downstream market, plaintiffs try to divert attention from this fatal defect in their case. *First*, they contend (at 48) that in its pre-verdict JAML motions Brunswick did not raise the argument that the boat market is competitive and lacks entry barriers. But Brunswick's motions denied that its vertical acquisitions "amounted to anticompetitive foreclosure" given the existence of numerous "independent boat companies" (May 13, 1998 Br. 109), and argued that plaintiffs had "presented no evidence that Brunswick actually could exclude competition or restrict output." June 15, 1998 Br. 28. Those motions put plaintiffs on notice of Brunswick's position with respect to their foreclosure theory—as did specific testimony elicited by Brunswick showing the lack of entry barriers in boatbuilding (A218a, A448-52, A579, Tr. 5799-800; see also Tr. 5728, 5856)—and fully preserved Brunswick's arguments. See *Brokerage Concepts*, 140 F.3d at 519 n.18 (pre-verdict motions were sufficient when measured "in context" and by the "tenor" of the movant's "position and theory"); *Rockport Pharm.*, 53 F.3d at 197-98 ("technical precision is not necessary in stating grounds for the [pre-verdict] motion"; no waiver where "somewhat different" grounds raised in a pre-verdict motion were "inextricably intertwined" with those raised post-verdict). Beyond this, Brunswick's thorough argument in its post-trial motion on the lack of entry barriers in the boatbuilding market (July 22, 1998 Br. 30-31), and the district court's ruling on the merits of the acquisition issue (Ad. 32), preclude any notion of waiver. *Urso v. United States*, 72 F.3d 59, 61 (7th Cir. 1995).

*Second*, plaintiffs argue (at 49) that Brunswick's reliance on the lack of entry barriers in both the engine and boat markets "is foreclosed by *Kodak*." But *Kodak* is an irrelevant tying case that had nothing to do with acquisitions. Moreover, the *Kodak* defendant was the sole source for parts needed to run the plaintiffs' business. 504 U.S. at 485. Here, plaintiffs can buy engines from Brunswick or its competitors.

*Kodak* does nothing to help plaintiffs show how Brunswick's acquisitions foreclosed efficient rivals from finding engine customers in the fluid and admittedly competitive boat market, in which 70% of boatbuilders were unaffiliated and remained available to Brunswick's rivals. Plaintiffs' invocation (at 52 n.57) of a "customer foreclosure" theory of Professors Riordan and Salop fails for the same reason: Brunswick's acquisitions left rivals free to compete for the vast bulk of engine customers. A68.

*Third*, plaintiffs rely (at 34, 48) on cases antedating the full incorporation of entry barrier analysis into antitrust law. Courts today universally recognize the importance of ease of entry (*e.g.*, *Cargill*, 479 U.S. at 119 n.15), even when evaluating horizontal mergers (which are more threatening to competition than vertical ones). See *Becker*, 713 F.2d at 368 (this Court upheld vertical integration because there was "no evidence of increased entry barriers"); *Baker Hughes*, 908 F.2d at 983 n.3 (Thomas, Ginsburg, JJ.) (upholding merger resulting in foreclosure of 76% of the market). Even the cases cited by plaintiffs show that they cannot prove anticompetitive foreclosure without also proving the presence of entry barriers. *Brown Shoe Co.*, 370 U.S. at 322, explained that courts must consider whether there is the potential for "ready entry of new competition" as opposed to "barriers to prospective entrants." *Ford Motor Co. v. United States*, 405 U.S. 562, 568 (1972), found that Ford's purchase of a spark plug manufacturer "rais[ed] the barriers to entry" in the spark plug market, which the Court found was highly concentrated and contained only one independent producer, and that entry barriers in the automobile manufacturing market were "virtually insurmountable." In *Mississippi River Corp. v. FTC*, 454 F.2d 1083, 1089, 1092 (8th Cir. 1972), the acquired companies were in a concentrated industry "already characterized as having substantial barriers." By contrast, plaintiffs here concede that the boatbuilding industry is highly competitive and *not* characterized by entry barriers. In addition, *Brown Shoe*, *Ford*, and *Mississippi River* all were cases brought by the government. There is no precedent for awarding damages to

a private litigant who challenges a vertical acquisition that the government has reviewed without objection—particularly a competitor with every motive to misapply the antitrust laws to hobble a marketplace rival offering products, prices, and services that consumers strongly prefer. And *no court*, whoever initiated the case, has ever before imposed antitrust liability for a vertical acquisition in the face of a finding of no significant entry barriers in the downstream market.

*Fourth*, plaintiffs contend (at 51) that Brunswick’s acquisitions somehow prevented Volvo, a global giant with enormous resources, from achieving “minimum viable scale,” despite what plaintiffs say (at 2, 42 n.45) was Volvo’s *superior* product and *greater* efficiency, and despite Brunswick’s asserted *high* prices (*id.* at 60). Plaintiffs offer no record support for that illogical contention. Brunswick cannot be blamed for any failure of its rivals to win sales from over 70% of the boatbuilding market that remained after Brunswick’s acquisitions. See *Lomar*, 824 F.2d at 596. Plaintiffs cite the Areeda treatise, but omit the authors’ warning that plaintiffs’ “theory is defeated by any showing of easy, low-cost entry at the [downstream] level.” 4A ANTITRUST LAW ¶ 1008b, at 180. Even if Volvo could not reach “minimum viable scale,” that is not evidence of an antitrust violation. A market leader does not have to pull its punches to try to compete with rivals to a draw. Antitrust law recognizes that in a competitive market “there are winners and losers.” *Balaklaw*, 14 F.3d at 801. See Brun. Br. 26-27, 70-71.

*Fifth*, plaintiffs argue (at 51) that Brunswick’s acquisitions unlawfully eliminated “disruptive buyers.” They cite no case support, because no court ever has adopted their “disruptive buyer” theory. Instead, plaintiffs miscite the Areeda treatise for the proposition that eliminating “several” disruptive buyers by a vertical acquisition is enough to make it unlawful. But the referenced section is entitled “*Most* disruptive buyers eliminated” and states that “[w]here several disruptive buyers are present, several must be eliminated.” 4A ANTITRUST LAW ¶ 1006f, at 173. The authors also limit application of the disruptive

buyer theory to cases of “collusion,” a charge not made here. Many large engine buyers remained after Brunswick’s acquisitions (Brun. Br. 50)—including plaintiffs, who have not appealed from the ruling below that they employed a boycott to pressure Brunswick. Pl. Br. xvii n.3. The continuing presence of these powerful engine buyers refutes plaintiffs’ theory that Brunswick’s acquisitions rendered boatbuilders helpless and left efficient engine suppliers without customers.

*Finally*, plaintiffs claim (at 54-55) that Brunswick’s acquisitions of Bayliner, BMW Marine, and Kiekhaefer had “horizontal effects” because they eliminated potential engine competitors. They cite no case to support their position and do not even try to show how they satisfy the criteria for potential competition claims prescribed by the Supreme Court in *Marine Bancorp*, 418 U.S. at 624-25, and this Court in *Yamaha Motor*, 657 F.2d at 977. Instead, plaintiffs dismiss as a “quibble” (at 54) their complete failure to make the required showing that any acquired company exercised a disciplinary effect on engine pricing or was poised to enter and deconcentrate the market. Beyond this, the record affirmatively establishes that the developmental Bayliner engine, far from being a competitive alternative, was a mere prototype that “didn’t work” and made no economic sense, and that neither BMW Marine’s diesels nor Kiekhaefer’s racing drives ever competed in the relevant market. See Brun. Br. 51-54.

In short, plaintiffs give no valid reason why Brunswick should be severely penalized for deciding, like others in the industry, to offer consumers boat engines together with boats.

#### **IV. BRUNSWICK LACKED MONOPOLY POWER.**

We have shown (at 56-60) that under settled precedent Brunswick did not possess monopoly power. Brunswick faced “across the board competition” in an engine market populated by much larger multinational corporations. The Volvo/OMC joint venture had ample excess capacity and a huge dealer network, the engine market lacked legally significant entry barriers, and Brunswick faced sophisticated and

aggressive buyers. Under similar competitive conditions in the mid-1980s, Brunswick's market share plummeted from 75% to 50%.

Plaintiffs respond with inapposite record citations and unsupported characterizations, hoping that the Court will throw up its hands and conclude that the matter was a jury question. But the dispositive facts are undisputed, permitting resolution of plaintiffs' "claim of monopoly power as a matter of law." *Broadway Delivery*, 651 F.2d at 129; 2A ANTITRUST LAW ¶ 502, at 88 ("How much market power is excessive enough to warrant intervention under the antitrust laws is a question of legal policy").

**A. Brunswick faced powerful rivals with excess capacity.** The record is clear, and plaintiffs do not deny, that Brunswick's competitors were enormous and well financed industrial corporations capable of taking away its business, including Volvo, OMC, Yamaha, Caterpillar, and now Toyota. Plaintiffs cite no evidence suggesting that Volvo's CEO was mistaken when he testified that the joint venture's plant, which once produced 76,000 engines annually compared to just 20,500 engines today, had "considerable" excess capacity to satisfy any increased demand. Monopoly power is negated by "the ability of existing firms to quickly increase their own output in response to [any] attempt to raise prices above competitive levels." *Rebel Oil*, 51 F.3d at 1441. See *Brooke Group*, 509 U.S. at 233, 238 ("Supracompetitive pricing entails a restriction in output"; "excess capacity," by contrast, ensures vigorous "price competition"); *In re Uranium Litig.*, 466 F. Supp. 958, 961 (J.P.M.L. 1979) ("[A]ll serious attempts to establish a supracompetitive price must necessarily include an agreement to restrict output. Otherwise the monopoly price could never be maintained"). Brunswick could do nothing to restrict output in this industry or to prevent rivals from undercutting a supracompetitive price.

**B. Plaintiffs failed to prove the existence of entry barriers.** Plaintiffs' evidence of "natural" entry barriers consists only of their expert's conclusory opinion, unsupported by record facts

and contrary to legal precedent. “An expert who supplies nothing but a bottom line supplies nothing of value to the judicial process.” *Huey v. UPS*, 165 F.3d 1084, 1087 (7th Cir. 1999). Hall told the jury that capital requirements were an entry barrier (A43), even though governing case law makes clear that “difficulty of obtaining financing” is not an entry barrier. *Los Angeles Land*, 6 F.3d at 1428; 2A ANTITRUST LAW ¶421b, at 64. Hall also claimed that entrants must earn a “brand name” (A43), but the cases hold that this is not an entry barrier either. *American Testing Serv.*, 108 F.3d at 1154; *United States v. Waste Management, Inc.*, 743 F.2d 976, 984 (2d Cir. 1984). And even Hall’s purported entry barriers *could not possibly apply to this market’s most likely entrants*. Hall admitted that Toyota could overcome any entry barriers (A44), and major outboard manufacturers like Honda, Nissan, and Suzuki have ready access to capital, engines, know-how, established brand names, and dealer and service networks. Such a market lacks any legally significant entry barriers. *Clorox*, 117 F.3d at 57-58; *Ball Mem. Hosp.*, 784 F.2d at 1335.

Plaintiffs’ reliance on “artificial” entry barriers also is groundless. Plaintiffs refer either to procompetitive behavior like “responsive customer service” (A910) or to claimed bad acts. But “anticompetitive conduct by one firm against another is not an ‘entry barrier.’” *Los Angeles Land*, 6 F.3d at 1427. A plaintiff cannot show the existence of entry barriers by alleging anticompetitive conduct, which would be ineffective without *natural* entry barriers. As this Court held, “[f]irms lacking market power \* \* \* cannot adopt restraints that have anticompetitive effects.” *Ryko Mfg.*, 823 F.2d at 1231. Even Hall admitted that an artificial entry barrier can have no effect absent natural entry barriers. A57. Beyond that, all of Brunswick’s rivals used the *same* competitive practices. Universal business practices are not entry barriers. *Los Angeles Land*, 6 F.3d at 1428.

**C. Plaintiffs’ arguments about profits and price leadership are frivolous.** Any inference of monopoly power from putative “high profits” would be erroneous as a matter of law. *Blue*

*Cross & Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1411-12 (7th Cir. 1995); *United States v. Empire Gas Corp.*, 537 F.2d 296, 307 (8th Cir. 1976). In addition, plaintiffs do not attempt to explain how their pejorative characterizations of Brunswick’s prices can be reconciled with the fact that those prices were in line with or lower than inflation indices and rose more slowly than the prices of engine blocks and of out-board motors (which are sold in a highly competitive market). See Brun. Br. 15. No authority supports plaintiffs’ fanciful claim that because Brunswick often announced *list* prices before Volvo and Volvo sometimes matched those *list* prices—prices that simply marked the beginning of a cycle of intensive competition through discounts and targeted deals (Brun. Br. 14)—Brunswick could “restrict output” and increase price. *Ryko*, 823 F.2d at 1232. Plaintiffs have, in short, failed to muster any evidence that Brunswick wielded monopoly power. And this is an independently sufficient ground for reversal.

#### **V. DR. HALL’S FIFTY/FIFTY THEORY CANNOT BE SUSTAINED.**

No part of plaintiffs’ case—liability, causation, or damages—can stand without the testimony of their only expert witness, Robert Hall. Hall asserted that Brunswick was liable because its market share exceeded “the benchmark competitive level of 50 percent.” Ad. 126. He went on to assert that, regardless of the actual price of Brunswick’s engines, whenever Brunswick’s market share was above 50% plaintiffs necessarily paid an overcharge that automatically increased as the share increased. Ad. 126-30. Hall thus viewed a 50/50 market division as the competitive norm and treated Brunswick’s success in breaking out of a lockstep duopoly as proof of anticompetitive conduct that necessarily inflicted overcharges.

We previously pointed out (at 66) the many untenable consequences of Hall’s formula. Because Hall’s predicted “overcharge percentage” depends entirely on Brunswick’s market share, the overcharge remains the same no matter what the price of Brunswick’s engines. Because lower prices enlarge market

share, the lower Brunswick's prices the higher the calculated "overcharge." Even an engine sold at Hall's "competitive price" (or at a price of \$1.00) still produces an "overcharge" if Brunswick's market share is above 50%. Still worse, Hall told the jury that Brunswick's prices were at the same time monopolistically high yet too low for buyers to resist or rivals to match. Hall testified that rivals could not win business from Brunswick because buyers feared losing Brunswick's 3%-7% discounts—even though those same buyers supposedly paid much larger "overcharges" (up to 20%) and rivals supposedly offered "superior products." Plaintiffs' inability to offer any defense of these indefensible results speaks volumes and alone requires rejection of Hall's theory.

**A. Hall relied on the fifty/fifty theory to demonstrate liability.** Plaintiffs' denial (at 65) that Hall used the 50/50 theory to assess liability is refuted by Hall's own words. Hall testified in unmistakable terms: "The 50 percent is the *benchmark* of the absence of the anticompetitive behavior. And the *indicator* of the presence is a market share above 50 percent, as I've explained." A115-16 (emphasis added). In other words, market share above the "benchmark competitive level of 50 percent" "signals" the improper "exercise of market power," and any "Brunswick market share above 50 percent" is necessarily "anticompetitive." A108. According to Hall, a market share above the 50% "benchmark" (a term Hall invoked *six times* in his testimony; see A108, A115, A144, A145, Tr. 1356) is tell-tale proof of anticompetitive behavior. The jury could only have understood Hall to say that the objective, scientific measure of "exclusionary acts" was Brunswick's deviation from the 50/50 competitive standard: "[i]n this market without exclusionary acts, I believe that market share would be about 50 percent." A81.

Hall assumed that any deviations from a 50/50 market division must have been caused by anticompetitive conduct, not legitimate marketplace events. Thus, when questioned why his theory penalized Brunswick for market share gains stemming from OMC's recall of every stern-drive engine manufactured between 1986 and 1989, Hall speculated that "it's not fair to single out the negative \* \* \*

if it's a market that could have positives." A147. Hall's conjecture about "a market that could have positives" makes clear that he looked to a 50/50 market division as the competitive norm and then substituted speculation for record facts. In short, the 50/50 formula was central to Hall's analysis of liability, causation, and damages. It is hard to imagine a more perverse theory of antitrust harm than one that identifies a rigid lockstep oligopoly as the "competitive" situation, and a firm's attempt through above-cost discounting to break out of such an oligopoly as anticompetitive; but that is precisely what Dr. Hall told the jury.

**B. The Cournot theory does not apply here.** Hall arrived at his conclusion that this market should be divided evenly between Brunswick and a competitor based on the Cournot theory. We have described (at 63-64) the conditions under which the Cournot theory predicts an evenly divided market, and Hall agreed with these: largely undifferentiated products (the "premise of my analysis is that there would be present in the market at least one seller whose product was regarded as good as but no better than the Brunswick product") and "the same cost[s]." A113-14. The treatise relied on by plaintiffs (at 67 n.76) to support Hall's use of Cournot employed "identical (homogenous) melons" as its illustrative example. D. Carlton & J. Perloff, *MODERN INDUSTRIAL ORGANIZATION* 233 (1994). But engines are not melons. There is no dispute that marine engines are differentiated, with manufacturers offering diverse product features, promotions, support, and service. See Brun. Br. 4-5; Ad. 131-32; A558-61. Plaintiffs admit this when they say (at 24) that "competitors manufacture *better* engines than MerCruiser." And their own evidence confirms dramatic differences in consumer preference. *E.g.*, Ad. 131-32 (Volvo's survey showed that both consumers and dealers regarded Brunswick products and service as superior in all respects to all its rivals); Tr. 1371 (Hall admitted Brunswick has "better dealer support"). Nor is there any doubt that engine manufacturers had different costs. Hall testified that Brunswick held a cost advantage (Tr. 1381). Plaintiffs now volunteer (at 42 n.45) that Volvo is "more efficient than Brunswick." *Either*

*way, these critical differences make clear that the Cournot model would not predict a 50/50 market here.*

If Hall's 50/50 theory were accurate, Brunswick would have had a stable 50% share in 1983, before it acquired any boat companies or implemented market share discounts. But undisputed record facts show that Brunswick's market share was 75% in 1983—almost exactly the same share that Hall opined could *not* be achieved but for the anticompetitive conduct alleged here. A753; see Brun. Br. 2. Plaintiffs protest (at 68) that several Brunswick witnesses could not recall Brunswick's share before 1986. Hall himself conceded, however, that "MerCruiser had approximately 75 percent of the market share in sterndrive engines" at the time. A127-28; see A256 (65-83%); A753 (75%). Plaintiffs also argue (at 4) that Brunswick's rivals could not effectively compete until "Brunswick's patent license" expired in 1985. But it is undisputed that Brunswick's license (gotten from Volvo) was "nonexclusive." A473. Any other rival could have licensed stern-drive technology from Volvo, so Brunswick's license cannot account for its 75% share *before* its allegedly anticompetitive conduct. Brunswick's shifting market share—falling from 75% shortly before it began offering discounts and integrated vertically to 50% a few years later when OMC introduced the Cobra engine—is also flatly inconsistent with the notion that Brunswick's discounts and acquisitions were the cause of Brunswick's superior market share.

Plaintiffs cannot resuscitate their 50/50 theory by pointing (at 65 n.73) to a 1985 document calling for Brunswick—15 years later in the year 2000—to be prepared if its share should drop to 50%, or by noting that Brunswick's market share came close to 50% once during the 15-year period for which they sought damages. Hall insisted that, absent anticompetitive conduct, Brunswick's share should have remained at 50% for each and every year that he computed damages. That theory is irrational, is contradicted by the facts, and "cannot sustain the jury's verdict." *Brooke Group*, 509 U.S. at 242-43.

Faced with inconvenient facts, Hall made up more favorable ones. Thus, he concededly derived Brunswick's marginal cost—which he used in his economic formula (see Brun. Br. 65-66)—by *presuming* that marginal cost “is about three-fifths” of the price of a product sold by a manufacturer with a 75% market share. A104-05. And the notion that Hall “conducted a comprehensive analysis of the engine market” (Pl. Br. 67) is contradicted by the fact that he initially testified that Brunswick overcharged Mariah in 1986-88 and Armada in 1986 and 1989, when in reality neither builder was even in business during those years. Tr. 1601-03.

Courts must consider “how often” an expert’s “methodology has produced erroneous results.” *Kumho Tire Co. v. Carmichael*, 119 S. Ct. 1167, 1176 (1999). In this case, Dr. Hall’s peculiar use of the Cournot theory led him to predict that in an oligopoly the firms would and should have equal market shares, and that premise became the basis for his theory of liability, causation, and damages. But in concentrated oligopoly markets uneven market shares are not merely common, they are virtually universal. See *Brooke Group*, 509 U.S. at 213 (even a “lockstep” oligopoly had market shares of 28%, 40%, 12%, 2.5%); *Omega*, 127 F.3d at 1168 (“oligopoly” had market shares of 55%, 18%, 16.1%, 7.7%); *E.I. du Pont de Nemours v. FTC*, 729 F.2d 128, 130 (2d Cir. 1984) (oligopoly had market shares of 38.4%, 33.5%, 16.2%, 11.8%); 4A ANTITRUST LAW 115 (describing uneven market share distributions). That the Cournot model predicts a 50/50 market division in a hypothetical market of identical firms with identical products that adhere strictly to lockstep behavior hardly means that 50/50 is an appropriate standard for assessing liability, causation, and damages—particularly where those assumed conditions are flatly contradicted by the facts.

**C. Hall’s unreasonable testimony is legally insufficient.** Plaintiffs contend (at 62) that admission of Hall’s testimony was not an abuse of discretion. But it is precisely this sort of unreliable expert testimony that requires a district court to exercise its “gatekeeping” function consistent with

*Daubert* and *Joiner*. See *Robertson*, 148 F.3d at 907-08 (disapproving Judge Moody’s passive approach to gate-keeping). See also *Kumho Tire Co.*, 119 S. Ct. at 1178-79 (despite the expert’s undoubted “qualifications,” and despite the “general” reasonableness of his methodology, expert testimony was not probative “in deciding the particular issues in the case”; courts must “‘scrutinize’ whether the ‘principles and methods’ employed by an expert ‘have been properly applied to the facts of the case’”). Beyond this, plaintiffs cannot immunize the substance of Hall’s testimony from meaningful review by parroting *Daubert*’s abuse of discretion standard or declaring that this was a jury matter. While plaintiffs argue (at 64) that a jury verdict cannot be overturned if a district court admits expert testimony, well-settled law is to the contrary. See *Weisgram v. Marley Co.*, 169 F.3d 514, 520 (8th Cir. 1999) (reversing jury verdict for plaintiff where district court improperly admitted expert opinion that was “rank speculation”).

In addition, even if testimony is “admissible” under *Daubert* criteria, it may still be *legally insufficient* (as it is here) to establish plaintiffs’ case. See ANTITRUST LAW ¶ 322.1c, at 42 (1998 Supp.). The inquiry into legal sufficiency after the record is complete is more searching than the threshold inquiry into admissibility. *Matsushita*, 475 U.S. at 594 n.19 (although “admissible,” “expert opinion based on a mathematical construction that in turn rests on assumptions about [defendants’] costs” was not “probative” because it was “implausible and inconsistent with record evidence”); *Brooke Group*, 509 U.S. at 242-43 (expert opinion “cannot support” verdict if “record facts contradict” it or render it “unreasonable”).

Nor can plaintiffs defend Hall’s opinions by relying upon a “relaxed standard of proof of damages.” Pl. Br. 66. Plaintiffs’ cases—*J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), and *National Farmers’ Org.*, 850 F.2d at 1293—stand for the proposition that plaintiffs need not prove the *amount* of damages with exactitude. But that “relaxed” standard has nothing to do with proving liability, the fact of injury, or causation. As this Court held in *Amerinet*, 972 F.2d at 1493-94, “[t]he relaxed stan

standard of proof with regard to the amount of antitrust damages does not apply \* \* \* to the plaintiff's burden of proving fact or causation of antitrust injury." Indeed, the Supreme Court in *J. Truett Payne* (451 U.S. at 568) vacated the judgment because the lower court improperly "bypassed the issue of liability and went directly to the issue of damages," just as plaintiffs seek to do here.

Plaintiffs obviously cannot overcome the many glaring defects in Dr. Hall's opinions by criticizing the testimony of Brunswick's experts, Dr. Rapp and Dr. Warren-Boulton. Pl. Br. 69-71. It is axiomatic that *plaintiffs* bear the burden of demonstrating liability, causation and damages. They cannot shoulder that burden simply by disparaging Brunswick's experts.

It would be an extraordinarily dangerous precedent to allow Hall's theory—with its obvious perverse consequences—to escape meaningful appellate review. The stable 50/50 market division championed by Hall is a circumstance that would cause the Justice Department to investigate whether two firms illegally allocated the market. And with good reason: such a market would remain evenly divided only if competitors pulled their punches, avoided hard competition, and declined to take advantage of the mistakes of rivals (such as OMC's disastrous mishandling of its recall of every Cobra engine). Aggressive price competition and product innovation—the goals of antitrust law—would quickly shift the equilibrium. Acceptance of Hall's rigid 50/50 market theory would require Brunswick to *increase* its price to lose market share. Any effort by Brunswick to *reduce* price and *expand* output would only expose it to a large award of treble damages. See Brun. Br. 65-67. Plaintiffs offer no defense of a theory so at odds with the most basic tenets of antitrust law.

**D. Hall's failure to disaggregate requires reversal.** Plaintiffs never come to grips with Hall's failure to disaggregate any losses caused by the challenged conduct from losses caused by the normal rough and tumble of the market. Hall conceded that he "did not numerically attribute" *any*

legitimate market share gains to Brunswick as a result of the undisputed 100% recall of OMC's Cobra or the undisputed missteps in the OMC/Volvo Joint Venture, which IBBI's president admitted accounted for "over 10" market share points for Brunswick. A549-50, A867.

Instead of confronting those facts, plaintiffs argue (at 24) that Brunswick had recalls of its own—as if all recalls exactly balance each other. But plaintiffs adduced no evidence (and cite none in their brief) that Brunswick lost a single sale as a result of recalls. By contrast, OMC's CEO and its Boat Group President conceded that Cobra's disaster was "horrible," cost it "a loss in market share," and cost it sales of OMC engines and boats. A771-74, 789-92. And instead of dealing with the undisputed fact that the subsequently formed joint venture lost ten points of market share because *Volvo* mishandled the joint venture and "sprea[d] the word that OMC Cobra is obsolete" (A260), plaintiffs simply declare without explanation (at 25) that self-inflicted wounds like these were somehow the result of "Brunswick's anticompetitive tactics."

Plaintiffs cannot avoid the legal consequences of their failure to disaggregate by relying (at 71-72) on cases like *Agrashell* and *National Farmers' Organization*, which hold merely that the amount of damages need not be proved with precision *once liability and causation have been established*. Decisions like *Amerinet*, *Review Appraisers*, *Blue Cross*, *MCI*, *Litton*, and the other disaggregation decisions cited by Brunswick (at 70) make clear that "studies that fail to correct for salient factors, not attributable to the defendant's misconduct, \* \* \* do not provide a rational basis for a judgment." *Blue Cross*, 152 F.3d at 593. Those decisions are especially significant here, where plaintiffs conceded below that they were required to disaggregate (see Brun. Br. 68); Hall acknowledged (A146) that he had the "tools that potentially could be used" to do so, but simply chose not to apply them; and the district court, inconsistently, denied Brunswick damages on its counterclaim precisely because Brunswick had not

disaggregated damages. Ad. 50-57. Had the district court applied the same standard to plaintiffs' claims, it could not have allowed this verdict to stand.

## CONCLUSION

Because the jury's general verdict did not distinguish among plaintiffs' claims in awarding lump sum damages of \$133,000,000, Brunswick is entitled to judgment if plaintiffs' discount *or* acquisition claims are invalid, *or* if plaintiffs failed to comply with the statute of limitations, *or* if Dr. Hall's theory is faulty, *or* if Brunswick lacked monopoly power. See Brun. Br. 74-75 (citing cases). Plaintiffs miss the point by responding (at 73) that the verdict form did not require the jury to apportion damages among plaintiffs' claims. If this Court determines that any of plaintiffs' claims is legally defective, the Court would have no way of knowing, based on the verdict form, whether the jury predicated damages on a legally permissible basis. Ad. 106-07, 112-13. Before the jury, plaintiffs insisted that it was Brunswick's conduct *in combination* that violated the antitrust laws. See Brun. Br. 73. After urging the jury to find liability based upon all of Brunswick's challenged conduct, plaintiffs cannot now fragment that conduct in order to try to save the verdict.

For the foregoing reasons and those set forth in our opening brief, the judgment should be reversed and the case remanded with directions to enter judgment for Brunswick. Alternatively, this Court should order a new trial.<sup>\*/</sup>

Respectfully submitted.

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One of the attorneys for defendant-appellant-cross-appellee Brunswick Corporation

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<sup>\*/</sup> Brunswick considers it unnecessary to respond to plaintiffs' cross-appeal arguments (Br. 73-75) challenging the district court's denial of equitable relief (Ad. 64-82), but will, of course, respond to any questions from the Court at oral argument.