

13-19  
No. \_\_\_\_\_

Supreme Court, U.S.  
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**In the Supreme Court of the United States**

IN RE: SULFURIC ACID ANTITRUST LITIGATION

OHIO CHEMICAL SERVICES, *et al.*,  
*Petitioners,*

v.

FALCONBRIDGE LTD., *et al.*,  
*Respondents.*

*On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Seventh Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

- 1) Whether an agreement among horizontal competitors to curtail their output of a commodity chemical to facilitate market entry by certain of those competitors so as not to "disrupt prices" in a "balanced market" is a *per se* violation of the antitrust laws.
  - 2) Whether a joint venture formed by horizontal competitors which: (a) has no assets; (b) produces no product; (c) is formed to jointly price and market its parents' output; (d) avoids preclearance by the Department of Justice and Federal Trade Commission under the Hart-Scott-Rodino Act despite being "the largest single marketing entity of sulfuric acid in the world;" and (e) uses its market power to convince other horizontal competitors to curtail production facilities, is judged by the *per se* rule of antitrust liability.
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## LIST OF PARTIES

Petitioners are privately owned chemical companies: Ohio Chemical Services, Inc., Independent Chemical Corporation, National Alum Corporation, Producers Chemical Company, Old Bridge Chemicals, Inc., and AG RX. None issues public stock and none is owned by another entity.

Respondents are: (1) Noranda, Inc., Falconbridge, Ltd., and NorFalco LLC (now known as Xstrata Canada Corporation); (2) Intertrade Holdings, Inc.; and (3) Koch Sulfur Products Company LLC and Koch Sulfur Products Company.

Other companies were parties defendants in the district court, but settled their cases and therefore do not have an interest in this Petition. They are: E. I. du Pont de Nemours and Company; Marsulex, Inc.; Chemtrade Logistics (U.S.); Pressure Vessel Services, Inc.; PVS Chemicals, Inc. (Ohio); PVS Nolwood, Inc.; and PVS Chemical Solutions, Inc.

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## **CORPORATE DISCLOSURE STATEMENT**

No petitioner has any corporate parent. Respondent Xstrata Canada Corporation is wholly owned by Xstrata PLC. Respondents Koch Sulfur Products LLC and Koch Sulfur Products Company are owned by Koch Industries, Inc. Respondent Intertrade Holdings, Inc., does not have any corporate parent.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the decision by the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The Seventh Circuit opinion is reported at *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004 (7th Cir. 2012), Appendix A. The opinion of the District court is reported at *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827 (N.D. Ill. 2010), Appendix D.

## JURISDICTION

The Seventh Circuit panel rendered its decision on December 27, 2012. A timely petition for rehearing and rehearing *en banc* was filed on January 10, 2013. This petition was denied on February 1, 2013. Justice Kagan extended until July 1, 2013, the time for this Petition to be filed. Jurisdiction of this Court is sought pursuant to 28 U.S.C. § 1254(1). This Petition is timely pursuant to Supreme Court Rule 13.3.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section One of the Sherman Antitrust Act, 15 U.S.C. § 1, provides in pertinent part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

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## STATEMENT OF THE CASE

### (1) Introduction

This Court has consistently applied the *per se* rule of antitrust liability to three types of agreements among horizontal competitors: (1) to fix prices, *FTC v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411, 433 (1990); (2) to reduce output, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); and (3) to divide territories, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990). An agreement among horizontal competitors to eliminate or reduce output is economically and legally the equivalent of horizontal price fixing. As recently as *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007), this Court stated: “A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful.”

Application of the *per se* rule has always been made on this structural analysis. The decision by the Seventh Circuit is a radical departure and plainly inconsistent with this rule. It substitutes hypothetical theorizing about possible motivations among the horizontal competitors for this structural analysis (and for the actual record), and on this unprecedented basis holds that an output reduction cartel among horizontal competitors is to be judged under the “rule of reason.” The decision repudiates *Socony-Vacuum*.

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## (2) The Shutdown Agreements

Sulfuric acid is a commodity chemical used to manufacture steel, paper, pharmaceuticals, and fertilizer, among other products. Respondents Noranda and Falconbridge smelted metals in Canada (such as copper and zinc), and produced sulfuric acid as a necessary byproduct. By the 1980s, they produced more sulfuric acid than they could sell in the Canadian market, and needed to expand to U.S. markets.

They had two options. One was to sell their sulfuric acid to the Florida fertilizer market known as the "Tampa Market," one of the largest markets for sulfuric acid in the world, where 20-30 million tons of sulfuric acid were used annually to make fertilizer. Metal smelters sold their byproduct sulfuric acid in this market. Because the market drew from sources worldwide, price competition was keen and prices were low. As Noranda stated, "[t]here is always a market for Noranda/Falconbridge acid in the fertilizer market. . .," but this was unattractive because of "[l]ow pricing due to competition. . . ." App. 158a. Noranda realized prices "would have been much lower if Noranda was pushing close to a million tons annually into a sometimes reluctant market." App. 151a.

The other option was to enter the U.S. "industrial/merchant market," where about 3 million tons of sulfuric acid were sold annually, chiefly in the Eastern United States, to industrial manufacturers of pulp and paper, pharmaceuticals, processed foods, steel and other industrial products. DuPont, Koch, PVS, Delta, Marsulex, and Boliden manufactured sulfuric acid from sulfur and sold in this market. Prices were

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higher than in the Florida fertilizer market, because customers needed smaller quantities (truckloads instead of barges) delivered to their manufacturing plants (for example, a pulp and paper mill in Maine). App 151a.

Noranda and Falconbridge (two independent companies) combined and decided to enter the U.S. industrial/merchant market. But instead of competing, they decided to collude with the U.S. sulfuric acid producers. They convinced the U.S. producers to shut certain of their production facilities, to buy Noranda/Falconbridge acid, and to sell the Canadian acid to their existing U.S. customers. The Canadian and U.S. producers agreed to split the revenue and profits from this arrangement. App. 162-163a.

Noranda and Falconbridge termed this strategy "Displacement by Agreement." They wrote that they intended to prevent "price disruption" and an "oversupply" in the "balanced" industrial/merchant market:

The strategy to market sulphuric acid production...remains as articulated at the outset, namely: to develop and conclude sales in the target market area of the Northeastern United States by approaching sulphur burning acid producers to purchase acid from Noranda and *thereby shutdown sulphur burning acid plants*. It is a strategy of displacement by agreement. This strategy is being followed so *as not to force an oversupply into a balanced market with predictable price disruption* and to minimize the risk of inviting trade action by

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U.S. authorities. It is more realistic to believe that a U.S. based company which is working with us will actively discourage rather than support the launching of a trade action against us.

App. 83-84a and App. 152a (emphasis added).

Noranda and Falconbridge approached the U.S. manufacturers and entered into explicit written agreements with them to reduce production. There was no genuine dispute that this occurred. Noranda wrote: "discussions with a number of U.S. producers of acid from sulphur, led to their decision to curtail their sulphur-based production in favour of purchasing smelter acid from Noranda for internal use and/or sale." App. 160-161a. As the district court found: "It is undisputed that Noranda and Falconbridge, under their 'displacement by agreement' strategy, approached and interacted with co-Defendants, and that co-Defendants thereafter reduced production." App. 90-91a. These agreements included:

- An agreement with DuPont to close its sulfuric acid plant near Newark, New Jersey. ("DuPont shall permanently cease production of acid and oleum at Grasselli [New Jersey]....") App. 131a;
  - An agreement with PVS to close its sulfuric acid plant outside Akron. ("Confirmed contracts with PVS in Copley, Ohio...involving closure of sulphur burning acid plants, have provided working models
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for future acid supply agreements.”) App. 84a;

- An agreement with PVS to close its plant north of Flint and Detroit. (“PVS agrees to arrange to have its affiliate discontinue production of sulphuric acid at its Bay City Michigan acid plant no later than October 15, 1990.”) App. 84a;
  - An agreement with Delta to close two sulfuric acid plants south of Bangor, Maine. App. 91a. A former Delta officer testified: “As a direct result of this agreement, Delta closed down its sulfuric acid plants in approximately 1989, removing annual capacity of approximately 65,000 metric tons of sulfuric acid from the merchant marketplace.” App. 162a.
  - An agreement with Boliden to cut back production at its large Copperhill plant in Tennessee. App. 84a. Noranda wrote: “[the] ability to curtail/increase output at Copperhill has been invaluable in smoothing fluctuations in output from Noranda and Falconbridge smelters; this also acts as a barrier to entry of acid by others, who risk finding market flooded by acid from a scaled-up Copperhill.” App. 154a;
  - Discussions with Koch about closure of plants. (“Koch could displace acid currently in the market with Noranda acid so as to maintain industry structure.”) App. 84a.
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As the district court summarized: "Plaintiffs' evidence is consistent with allegations that, in anticipation of a looming tide of Canadian smelter acid and attendant price erosion, Defendants clandestinely conspired to preserve a market in which supply met demand by scaling back production or shutting down facilities." App. 83a.

These agreements were made in the context of defendants' joint exercise of very substantial market power. Petitioners' and respondents' economists agreed that respondents' collective market share in the industrial/merchant market was about 75%. App. 157a. Two years after the first of these agreements, Noranda and Falconbridge had displaced 450,000 tons/year from the market. App. 154a.

These agreements had the desired effect of preventing price disruption. U.S. producers were able to maintain high price levels, which they shared with Noranda and Falconbridge through the revenue-sharing formulae. App. 162-163a. In contrast, if Noranda and Falconbridge had sold this acid into the Florida fertilizer market, they would have realized substantially less profit. App. 151a.

Noranda and Falconbridge argued in the courts below that they were not horizontal competitors with the U.S. defendants because they had no independent ability to sell to U.S. customers. Defendants' own internal documents refute the argument. "Noranda and DuPont currently compete in the sale of sulfuric acid." App. 103a. Noranda's marketing video extolled its "specialized acid marketing team" that could deliver "a single truckload or a virtually continuous flow" to

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“all markets” in the “Eastern United States.” App. 103a; App. 150a. As the district court found, “[t]he record shows that Noranda had enough infrastructure to supply 52% of its acid directly to end users in the United States.” App. 104a. Large customers like Georgia Pulp and Paper could have been won. App. 110-111a. Instead, Noranda expressly (and secretly) agreed not to compete for customers. App. 163a.

### **(3) The “Output” Joint Venture**

Once Noranda and Falconbridge had successfully entered and stabilized the U.S. industrial/merchant market, they entered into a joint venture with DuPont, the largest U.S. producer in that market. Although the three parent companies had collective assets of \$54.3 billion at the time, they put a total of \$10,000 into this joint venture. App. 156a.<sup>1</sup> The joint venture had no employees of its own, and existed in a few cubicles of rented office space in Delaware. It was an “output” joint venture, because it jointly priced and marketed the entire three million ton output of sulfuric acid produced by Noranda, Falconbridge and DuPont. App. 159a. A DuPont financial employee wrote: “essentially, nothing was contributed to the LLC, but rather the LLC was formed to simply market acid produced by Noranda and DuPont.” App. 160a.

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<sup>1</sup> Consolidated financial documents filed in the record below showed that in 1998 (the year the joint venture was formed) DuPont had assets of \$38.5 billion, Noranda had assets of over \$11 billion, and Falconbridge had assets of nearly \$4.8 billion. Dist. Ct. Docket 510, PX 98.

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DuPont internally acknowledged that this was “the largest single marketing entity of sulfuric acid in the world” and “on a volume basis...easily the largest business in the portfolio of either DuPont or Noranda.” App. 159a. Notwithstanding, it admittedly failed to file for regulatory preclearance with the Federal Trade Commission or Department of Justice under the Hart-Scott-Rodino Act.<sup>2</sup>

The joint venture originated from discussions among Noranda, Falconbridge and DuPont about not competing. DuPont wrote that “Noranda has been steadily inquiring about ways to encourage us NOT to burn sulfur at our plants.” App. 131a. (emphasis in original). The district court found that the record contains “evidence that the joint venturers were motivated by a desire to avoid a price war and a ‘ruinous battle for market share.’” App. 132a (quoting a joint venture document). A memorandum summarizing a meeting between Noranda and Dupont states: “We do not want to enter a price war w[ith] DuPont = Lose; Lose.” App. 152a. Another states that the joint venture “avoids the chaos, risk, and

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<sup>2</sup> Preclearance by a joint venture was required in 1999 if one parent had assets of \$100 million, another had assets of \$10 million, and the joint venture had assets of \$10 million, or alternatively if either parent had assets of \$10 million and the joint venture had assets of \$100 million. 16 C.F.R. § 801.40 (1999). Here, the parents had combined assets of \$54.3 billion, and the joint venture was selling 3 million tons of acid annually. The “largest single marketing entity of sulfuric acid in the world” (App. 159a) avoided preclearance scrutiny and 16 C.F.R. § 801.40 by respondents creating a shell with no assets of its own.

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embarrassment of reverting to competing against one another." App. 103-104a.

In April, 1997, DuPont told Noranda that DuPont was willing to cease production permanently of 100,000 tons/year at DuPont's Burnside, La. plant. ("DuPont has offered to substitute smelter acid for Burnside S[ulfur] burned acid for up to the entire Monsanto requirement of 100,000 stpa [standard tons per annum]." App. 158a. DuPont also offered to cut back production by 15,000 tons/year at its Virginia plant. App. 159a. That same month, DuPont wrote internally: "We have to do everything we can to get others to stop burning sulfur, and we have to burn as little as possible." App. 158a. When Noranda/Falconbridge sought to convince Allied to "cease S[ulfur] burning," they stated that "DuPont has set precedent for this as they convinced Allied to shut down S[ulfur] burner in Geismar, La." App. 159a.

The joint venture convinced horizontal competitors to shut down their production facilities, just as Noranda/Falconbridge had done pre-joint venture. PVS (which earlier closed plants in Ohio and Michigan in agreement with Noranda and Falconbridge) now closed a third plant in Chicago at the joint venture's request. App. 153a. The joint venture rewarded PVS with a contract to sell substantial quantities. App. 153a. Marsulex told the joint venture that one of the "services" it provided was "supply demand balancing via operating rates" at its plants. App. 155a. Koch told the joint venture that its Minnesota and Kansas plants could each be decreased by 200 tons per day. App. 155a. The joint venture also instructed DuPont to curtail production at plants that DuPont (not the joint

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venture) owned to balance supply and demand in the market. App. 132a.

#### **(4) Anti-Competitive Effect**

Plaintiffs' economist and econometrician showed that defendants' behavior had an anti-competitive effect in the industrial/merchant market. Plaintiffs' experts used the prices of sulfuric acid in the Florida fertilizer market as a competitive benchmark. The same sulfuric acid was sold in both markets, and with 20-30 million tons used a year, including shipments from overseas, the fertilizer market was highly competitive. Defendants themselves repeatedly looked to this as an alternative market for comparison purposes. App. 151a.

Plaintiffs' experts built into their regression model the legitimate factors that would account for the price differential between the two markets (such as volume purchased, location of delivery, method of delivery, acid concentration). They incorporated data from over 300,000 consumer transactions. The model showed that after DuPont withdrew from the conspiracy in 2001, the two markets began to behave in the same manner. In contrast, *during* the conspiracy period they did not, with the industrial/merchant market showing substantially elevated prices resulting from defendants' anti-competitive conduct.<sup>3</sup>

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<sup>3</sup> These expert reports are too lengthy to excerpt in the appendix hereto. They are filed in the district court at Docket Nos. 510 Exs. 4, 72, 172, 173 and Docket No. 701-1. They are also filed in the appellate appendix at A616-849 and A866-70.

## PROCEDURAL HISTORY

The district judge who presided over the case from inception through summary judgment authored a comprehensive opinion, denying virtually the entirety of defendants' motions for summary judgment and holding that plaintiffs had sufficient evidence to go to trial on a *per se* theory as to both the output restriction agreements and the subsequent sham joint venture. *In re Sulfuric Acid Antitrust Litig.*, 743 F. Supp. 2d 827 (N.D. Ill. 2010). Appendix D. He held, *inter alia*, that "plaintiffs...produce evidence to support the existence of a garden-variety output limitation scheme." App. 90a.

Plaintiffs allege and produce evidence to support the existence of a garden-variety output limitation scheme. . . The actual and probable anticompetitive effects of such conspiracies are well established. . . . It is undisputed that Noranda and Falconbridge, under their 'displacement by agreement' strategy, approached and interacted with co-Defendants, and that co-Defendants thereafter reduced production.

*Id.* The court held as to the joint venture that the record evidence showed "the Joint Venture merely simplified [respondents'] industry-wide price fixing

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scheme by reducing the number of conspirators required to achieve the desired result.” App. 132a.<sup>4</sup>

After Judge Coar retired, and with trial preparations underway, these rulings were abruptly reversed at a status conference by the newly assigned judge. Without explaining his reasoning, he incorrectly termed “dicta” the prior judge’s rulings, and stated that only the rule of reason could apply:

As I said, I believe Judge Coar had some dicta in his decision. Having denied the motion for summary judgment, having analyzed the facts as he did, it became clear to me upon reviewing Judge Coar’s opinion, applying the Seventh Circuit law as well as the Supreme Court law, that this case is a case in which the ‘rule of reason’ analysis should be the analysis presented to the jury for its determination in connection with the conduct that is alleged to have been wrongful.

App. 26a. Plaintiffs and their experts had relied upon the *per se* theory throughout the litigation, and this abrupt change of the liability standard on the eve of trial was highly prejudicial. Defendants moved for summary judgment *nunc pro tunc*. Dist. Ct. Docket No. 777, p. 2. Plaintiffs agreed that, under this new standard, summary judgment *nunc pro tunc* should be

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<sup>4</sup> The judge held that only one facet of the scheme, the assignment of exclusive territories, was subject to the rule of reason, and granted defendants’ motion for summary judgment as to this facet. App. 120-123a.

granted to defendants, with plaintiffs preserving all appellate rights. Final judgment was therefore entered. Appendix B.

Although petitioners asserted this was a *per se* case, the Seventh Circuit affirmed the rule of reason theory of liability and the subsequent judgment. *In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004 (7th Cir. 2012). Appendix A.

## **REASONS FOR GRANTING THE WRIT**

### **A. The *Per Se* Rule in Antitrust Jurisprudence**

As Justice Scalia has explained, the *per se* rule has a necessary and important place in antitrust jurisprudence:

It is rare, however, that even the most vague and general text cannot be given some precise, principled content—and that is indeed the essence of the judicial craft. One can hardly imagine a prescription more vague than the Sherman Act's prohibition of contracts, combinations or conspiracies in restraint of trade but we have not interpreted it to require a totality of the circumstances approach in every case. The trick is to carry general principle as far as it can go in substantial furtherance of the precise statutory or constitutional prescription. I say "substantial furtherance" because, as I suggested earlier, *no* general principle can achieve a perfect fit. It may well be possible to envision some divisions of territory between competitors that do not, in the peculiar

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circumstances, reduce competition—but such phenomena would be so rare that the benefit of a rule prohibiting divisions of territory far exceeds the harm caused by overshooting slightly the precise congressional goal. As we have correctly expressed the test for per se Sherman Act illegality, it is whether the type of conduct in question “would always *or almost always* tend to restrict competition and decrease output.” Such reduction of vague congressional commands into rules that are less than a perfect fit is not a frustration of legislative intent because that is what courts have traditionally done, and hence what Congress anticipates when it legislates.

A. Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chicago L.Rev. 1175, 1183 (1989) (Oliver Wendell Holmes Lecture at Harvard) (emphases in original).

As this Court has stated: “Without the per se rules, businessmen would be left with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act.” *United States v. Topco Associates*, 405 U.S. 596, 609 n.10 (1972). *Accord FTC v. Superior Court Trial Lawyers Ass’n.*, 493 U.S. 411, 433 (1990) (“The per se rules also reflect a longstanding judgment that the prohibited practices by their nature ‘have a substantial potential for impact on competition.’”).

Indeed, the *per se* rule allowed Noranda to categorically and explicitly state in its own internal antitrust compliance manual that output reductions are *per se* offenses:

UNITED STATES: Price-fixing, output limitation and market allocation agreements are illegal, regardless of their impact on competition. . . .

App. 160a.

In applying the *per se* rule, this Court asks two basic structural questions: First, is the agreement among horizontal competitors? Second, if so, does the agreement fix prices, reduce output, or allocate territories? When both answers are yes, the *per se* rule is applied.

#### **B. Defendants' Horizontal Output Reductions Are Judged Under the *Per Se* Rule**

This Court has long condemned output restrictions among horizontal competitors as *per se* violations. *See Leegin*, 551 U.S. at 893; *Socony-Vacuum, supra*; *FTC v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. at 423 (“This constriction of supply is the essence of ‘price-fixing,’ whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered.”); *Nat. Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984) (“Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an ‘illegal per se’ approach because the probability that these practices are anticompetitive is so high....”). Petitioners justifiably relied upon these decisions throughout the litigation.

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The present case involves: (1) admitted horizontal competitors who produced sulfuric acid, a commodity chemical; (2) explicit written agreements among them to restrict output by shutting down their production facilities; and (3) a purpose and intention on the part of the competitors to prevent price disruption in the market. ("This strategy is being followed so as not to force an oversupply into a balanced market with predictable price disruption."). App. 83-84a. As such, defendants' conduct falls squarely within a well established category of *per se* violations of Section 1 of the Sherman Act. As the district court correctly held, in denying defendants' summary judgment motions:

Conspiring to reduce industry output as a means of stabilizing or raising prices is proto-typical of conduct that has time and again been condemned by courts as *per se* illegal.

App. 107a.

The *per se* rule has been applied to agreements among competitors to reduce output in order to stabilize price since *Socony-Vacuum*. The Seventh Circuit decision flies in the face of that case—one that Westlaw shows has been cited in more than 6,200 judicial decisions and legal periodicals. *Socony-Vacuum* is particularly pertinent because there, as here, an oversupply of a commodity product (there oil, here sulfuric acid) led to competitors agreeing to output restrictions.

In that case, there was an oversupply of oil and gasoline because of "involuntary" production. Smaller independent oil refiners were forced to acquire and

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refine more oil than they could store because they had limited storage space and long-term supply contracts with oil wells, which wells had to keep producing to prevent physical collapse. 310 U.S. at 170-71. The small refiners therefore “dumped” their excess production of gasoline on the spot market, where the oversupply caused price erosion, with gasoline being sometimes sold below cost. *Id.* To stabilize prices, the major oil companies (Standard Oil, Gulf, Shell) agreed to buy gasoline from the small producers to remove it from the spot market. *Id.* at 181-82. There were no prices or quantities set for the purchases, and the prices varied. *Id.* at 189, 196-98.

The trial court in *Socony-Vacuum* gave the jury a *per se* charge, under which the jury convicted both the major and small refiners. The Seventh Circuit reversed, holding that the “rule of reason” standard of liability applied. *United States v. Socony-Vacuum Oil Co.*, 105 F.2d 809, 826-27, 832 (7th Cir. 1939). This Court granted *certiorari* and reversed, holding that defendants’ conduct was a *per se* violation: “For it is indisputable that competition was restricted through the removal by respondents of a part of supply which but for the buying programs would have been a factor in determining the going prices on those markets.” *Socony-Vacuum*, 310 U.S. at 220.

In *Palmer v. BRG of Ga.*, this Court in 1990 unanimously re-emphasized the controlling vitality of *Socony-Vacuum*:

In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), we held that an agreement among competitors to engage in a program of

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buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful, even though there was no direct agreement on the actual prices to be maintained. We explained that '[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.'

498 U.S. at 48.

The district court here correctly recognized the applicability of *Socony-Vacuum*, stating it was directly "on point." App. 109a.

The Seventh Circuit, in contrast, eschewed *Socony-Vacuum*'s holding. The panel began by correctly identifying defendants as horizontal competitors who wanted to avoid price competition, stating that "the U.S. producers were afraid. . . the Canadian companies. . . would create their own distribution network and underprice the U.S. producers, thereby driving them out of the sulfuric acid market. . . ." App. 7a. The panel also recognized that these horizontal competitors *agreed* to curtail output: "The effort at persuasion was successful. The U.S. producers were willing to curtail production. . . ." *Id.*

However, the Seventh Circuit rejected using the *per se* rule through a curious chain of hypothetical reasoning. Whereas the *actual* motivation of defendants and their *actual* conduct were stated plainly in their internal documents, the panel ignored these and instead speculated on possible motivations

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and hypothetical conduct. The panel began by emphasizing that if the Canadian and U.S. manufacturers competed, there would be lower prices through price competition:

Suppose the U.S. distributors of sulfuric acid, being themselves producers, decided to continue producing. Supply, being augmented by the shipments of the Canadian companies into the United States, would now greatly exceed demand, and prices might plummet to a level at which it was no longer profitable for the Canadian companies to incur the costs of trying to sell their sulfuric acid in the United States.

App. 9a.

The panel then speculated that if that happened, the Canadian companies might decide to keep selling at a loss in the U.S. industrial/merchant market, and might be accused of “dumping” by the U.S. competitors. App. 9a. In *Socony-Vacuum*, there was record evidence of *actual* dumping below cost, which did not excuse the antitrust violation. 310 U.S. at 170-171. Here, the panel pointed to no such evidence. In any case, as the district court correctly held, that is no credible defense to a Sherman Act conspiracy:

Noranda’s argument that they avoided end consumers to prevent antidumping actions, while potentially true, does not avoid antitrust liability. Defendants offer no authority for the position that a company is immune from antitrust actions simply because it engaged in anticompetitive behavior as a means of

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diminishing the probability of other types of lawsuits.

App. 111a.

The Seventh Circuit then conjectured that the Canadian companies might also be “troubled” at the prospect of distributing acid through competitors who were still in business and selling competing acid. App. 9a. In making this surmise, the panel failed to realize that the U.S. competitors did not close all of their plants; rather, they remained as competitors, agreeing to take out of production the output of certain plants necessary to achieve market balance.

The opinion then hypothesized that if the *per se* rule were in effect, it “might” have deterred the Canadian companies from entering the U.S. market. App. 10a.<sup>5</sup> The panel then opined that entering the merchant industrial market by convincing competitors to shut down facilities was their only alternative. App. 10a. If such deterrence occurred by applying the *per se* rule, the panel’s analysis “suggests that” “the price of sulfuric acid in the United States would be higher.” *Id.*

It bears note that the Seventh Circuit’s chain of reasoning is unmoored from any analysis of the actual record. The panel distinguished *Socony-Vacuum* on the following basis:

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<sup>5</sup> Ironically, the opinion failed to realize that this speculation was counter-factual. The Canadian companies’ antitrust compliance manual explicitly told them that output restrictions were *per se* offenses. App. 160a.

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The difference is that the only aim and effect of the price fixing agreement in *Socony-Vacuum* were to raise price; in this case, the aim was to facilitate entry into the U.S. market, which would (and eventually did, as we'll see) lower prices and prevent the shutdown of Canadian smelting operations, which would have reduced output and raised the price of sulfuric acid in the United States. *The overall effect was thus to lower rather than to raise price.* The plaintiffs' claim that the price would have been even lower without the shutdown agreements is doubtful, as we have said, because without the agreements the Canadian companies might not have entered the U.S. market.

App. 13-14a. But the record evidence is to the contrary, namely that the aim of the Canadian defendants from the inception of the scheme was to raise and maintain U.S. prices ("not to force an oversupply into a balanced market with predictable price disruption. . . .") App. 83-84a. As to the "effect" being to "lower" prices, plaintiffs' economic experts opined that the scheme *elevated* prices. The panel reached the opposite conclusion, impermissible in reviewing a grant of summary judgment.

The Seventh Circuit relied on *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1 (1979), to decide that Canadian sulfuric acid was a "new product" entering the U.S. market. App. 11-12a. *BMI* involved the block licensing to radio stations of unique intellectual property (a catalogue containing thousands of copyrighted songs) so that individual composers did not have to individually negotiate

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licenses with the radio stations. This is not remotely comparable to selling sulfuric acid, a commodity product. The district court judge here correctly concluded, based on the record evidence, that Canadian sulfuric acid was not a new product, but instead was a commodity chemical, in the type of market where the *per se* rule has historically been applied. App. 114-115a and App. 117-119a. Indeed, if it were a new product, why would the Canadian companies have to enter into shutdown agreements with the U.S. producers of the old product? Defendants' customers bought sulfuric acid, and did not care if it was made in Canada or the United States.

The Seventh Circuit based its conclusion that the *per se* rule should not apply on a premise that Noranda and Falconbridge essentially had no alternative except to enter the U.S. "merchant market" and that they could only enter this market by persuading U.S. producers to close down their own production facilities so as not to compete with them. Noranda and Falconbridge clearly did have at least two viable alternatives to collusion: direct distribution in the industrial/merchant market, and sales to the Tampa fertilizer market. *See* pages 3-4 above. They chose to collude in the U.S. merchant market for one simple reason: supra-competitive prices and profits.

Because it is based upon speculation, the Seventh Circuit opinion contradicts itself about the Canadian producers' entry to the U.S. market. It states that the Canadian producers had no ability to distribute in the U.S. App. 6a. But on the next page the opinion states that "the U.S. producers were afraid. . .the Canadian companies. . .would create their own distribution

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network” in the U.S. App. 7a. If they had no such ability, why would the U.S. companies fear them? Two pages later the opinion posits a price war in the U.S. based upon the Canadian producers’ entry. App. 9a. This could only occur if they could have entered the market. Finally, the opinion states that the supposed “inevitable trend” of non-collusive economic forces would be “the Canadian companies’ entry into the U.S. market.” App. 10a. This means they were horizontal competitors with the ability to enter the market. These contradictions cannot be reconciled, and occur because the opinion is based upon hypothetical reasoning. The *per se* rule for horizontal output restrictions should not be cast aside in this fashion.

The effect of the Seventh Circuit’s new ruling is to eviscerate the *per se* rule in output restriction cases, and simply encourage defendants, and their economic experts, to speculate on a set of assertions (whether or not cited in the record or even contemplated by the defendants at the time the misconduct was going on), in an effort to persuade the courts to relegate the case to the rule of reason, with a concomitant loss of guidance and certainty in the law, and increase in complexity and burdens on the parties and the courts.

### **C. The Joint Venture Is Judged Under the *Per Se* Rule**

This is an appropriate case for this Court to address the application of the *per se* rule to an “output” joint venture.

Between 1999 and 2001 the three largest defendants (Noranda, Falconbridge and DuPont)

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combined together in what was in reality a horizontal cartel that carried out the previous decade's "displacement by agreement" strategy. The salient facts of the "joint venture" have been set forth at pages 8-11 above. The record contained evidence expressly stating that the purpose of the joint venture was to avoid a "price war" among the joint venturers, to avoid a "ruinous battle for market share," and to "avoid the chaos, risk, and embarrassment of reverting to competing against one another." App. 132a; App. 103-104a. It convinced horizontal competitors (PVS and Koch) to decrease yet more production, and directed DuPont (whose plants were not part of the joint venture) to curtail production to balance supply and demand. The district court held there was sufficient record evidence to support a verdict that "the Joint Venture merely simplified Noranda's industry-wide price fixing scheme by reducing the number of conspirators required to achieve the desired result." App. 132a.

A legitimate joint venture has these characteristics:

[A] joint venture may be defined for antitrust purposes as an integration of operations between two or more separate firms, in which the following conditions are present: (1) the enterprise is under joint control of the parent firms...; (2) each parent makes a substantial contribution to the joint enterprise; (3) the enterprise exists as a business entity separate from its parents; and (4) the joint venture creates significant new enterprise capability in terms of new productive capacity, new

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technology, a new product, or entry into a new market.

Brodley, *Joint Ventures and Antitrust Policy*, 95 Harv.L.Rev. 1521, 1526 (1982). The Noranda/Falconbridge/DuPont “joint venture” did not satisfy (2), (3), and (4). As Professor Brodley explains, “a joint venture can provide a singularly effective vehicle for cartelization.” *Id.* at 1530.

This was an “output” joint venture because it was formed to price and market the output of its parents, horizontal competitors. App. 160a. This poses especial antitrust risks:

An output joint venture obligating parents to market exclusively through the joint venture raises substantial collusive risks, for it prevents competition between the parents in marketing their output. In addition, if the joint venture possesses scale economies or other strategic advantages, it may be able to exclude or disadvantage the parents’ competitors by refusing to deal with them or by demanding unfavorable terms.

*Id.* at 1555. Here, the joint venture *did* use its formidable market power to have the parents’ horizontal competitors agree to curtail production. As Professor Brodley explains:

The risk of collusion is the most serious anticompetitive threat of output joint ventures, and this risk has been the focus of past decisions. Indeed, some output joint ventures are

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such clear cartel arrangements that they ought to be characterized not as joint ventures, but as naked horizontal agreements.

*Id.* Accord Hovenkamp, *Federal Antitrust Policy*, at 217-18 (West 4th Ed. 2011) (“Firms enter into joint ventures for many reasons. If they are competitors or potential competitors, one reason that cannot be overlooked is price fixing or market wide output restrictions.”); Sullivan & Grimes, *The Law of Antitrust*, at 662 (West 2000) (“A [joint] venture between parents both of which operate in the same horizontal market can also do serious structural harm when the parents, rather than fielding a new, jointly owned entrant into that market, limit their joint activity to cooperation.”).

True joint ventures—those that combine and integrate resources to develop new products, expand output, or explore new markets—are judged under the rule of reason standard. See *Antitrust Guidelines for Collaborations Among Competitors* (April 2000), published jointly by the U.S. Department of Justice and Federal Trade Commission<sup>6</sup> and *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006). However, a “joint venture” that does not do so is illegal *per se*. The *Guidelines* state that the degree of actual “integration” of resources to achieve a pro-competitive benefit is the key distinction:

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<sup>6</sup> These *Guidelines* are available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

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### 3.2 Agreements Challenged as Per Se Illegal

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Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve separately. *The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation....*

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[L]abeling an arrangement a “joint venture” will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative.

*Id.* at 8-9 (emphasis supplied). Here, defendants combined no assets, and merely “coordinat[ed] decisions on price, output, customers, territories and the like.” Moreover, this “output” joint venture committed immediate and very serious *per se* offenses by restricting industry-wide output.

The district court in the present case, in denying defendants’ summary judgment motions, held there was sufficient evidence from which a jury could find *per se* violations. App. 124-136a. Summarizing the record evidence of the anti-competitive origins and purpose of

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the collaboration, the district court held: “[A] reasonable factfinder could nevertheless infer from these references that the Joint Venture may have been established to suppress horizontal competition and stabilize acid prices.” App. 132a. The court found the *Guidelines* pertinent. App. 125a n. 29.

The district court correctly distinguished *Texaco, supra*, where the parents had truly integrated very substantial assets, and where both federal and state regulators had approved the joint venture (after requiring certain divestments and restructuring). App. 126-127a. Here, there was no economic integration of any kind, and the participants deliberately avoided Hart-Scott-Rodino preclearance. “The indicia of legitimacy and integration so compelling in *Dagher* are not to be found in the instant case.” App. 127a. Moreover, as commentators have noted, in *Dagher* the restraints were imposed solely as to jointly-owned assets. Here, in contrast, the joint venture imposed output restraints upon the parents’ competitors (PVS and Koch), and upon assets not owned by the joint venture itself (DuPont’s four manufacturing plants). *See Hovenkamp, supra*, at 233 (“The important fact in *Dagher* is that it was the joint venture’s *own output* whose price was being fixed. That situation is much different than one in which the venture restrains the separate business of the venture members.”).

Summarizing the record evidence, the district court held: “[T]he undisputed facts remain consistent with Plaintiffs’ contention that the Joint Venture sought to maintain balanced market by reducing output to accommodate Noranda’s smelter acid.” App. 133a.

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When viewing the record in the light most favorable to Plaintiffs, a reasonable juror might conclude that, underneath the elaborate trappings of a joint venture, Noranda and DuPont maintained a relatively unintegrated sales relationship that enabled them to limit market output whenever supply threatened to overshadow demand. The joint activity described in the latter scenario has no prospects for procompetitive effects and would therefore remain vulnerable to *per se* condemnation.

App. 135a.

The district court opinion concluded:

Plaintiffs have submitted evidence that reasonably tends to prove that Noranda, Falconbridge, and DuPont consciously entered an output limitation conspiracy under the artful guise of a joint venture.

App. 136a.

This reasoned conclusion was reversed in a one sentence transcript remark at a status conference by the newly-assigned district court judge, with no explanation and no discussion of any of the above evidence. App. 26a.

The Seventh Circuit opinion devoted three paragraphs to the joint venture. App. 15-16a. It discussed none of the extensive record evidence upon which the district court had relied in denying summary judgment to defendants. It did not refer to, let alone

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apply, the DOJ/FTC *Guidelines*, essentially deeming them irrelevant. It shrugged its shoulders with literally a “but so what” to the respondents’ intentional avoidance of scrutiny under the Hart-Scott-Rodino Act. App. 17a. It incorrectly stated: “The plaintiffs think that if the joint venture violated the [Hart-Scott-Rodino] Act, the defendants must be guilty of per se illegal price fixing.” *Id.* Petitioners do not so contend. Petitioners do contend that structuring this shell with no assets so as to avoid regulatory scrutiny is one—of many—indicia that this “joint venture” was an illegitimate cartel. If there is nothing to hide from the regulatory authorities, then why take elaborate steps to hide it?

The Seventh Circuit also stated as an *ipse dixit* that there were “anticipated economies” of distribution and that the “joint venture enabled substantial economies in transportation and marketing....” App. 15a-16a. The record *does not contain a single concrete example of any efficiency attributable to the joint venture, and the panel’s opinion points to none.*<sup>7</sup> Further, under the DOJ/FTC guidelines “cost savings without integration

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<sup>7</sup> As to transportation leases, the record showed that “Noranda wants to assign these agreements to the JV as quickly as possible . . . in order to have assets in the JV so it is perceived as a real as opposed to a shell company.” App. 134a. These leases merely provided the same transportation terms the parties already had—they did not show any enhanced efficiencies. As to other efficiencies, the joint venture had its offices in a few rented cubicles near DuPont in Delaware. Because it had no assets or employees of its own, it contracted with DuPont for most services. Again, this did not show any increased efficiencies attributable to the joint venture. If anything, it showed the opposite.

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are not a basis for avoiding *per se* condemnation. . . .” *Guidelines*, § 3.2, quoted on page 28 above. Essentially the panel appeared to hold that so long as a horizontal cartel can articulate some possible efficiency, it is exempt from *per se* scrutiny. But all horizontal price-fixers could point to possible “efficiencies” from their price fixing. On this rationale, the *per se* rule would cease to exist.

Finally, the panel stated that “the price of sulfuric acid in the United States dropped significantly” App. 16a, where plaintiffs’ economist and econometrician concluded prices were stabilized and elevated by the joint venture compared with the Florida benchmark prices. In short, to avoid application of the *per se* rule, the Seventh Circuit either ignored all of the probative evidence or inappropriately construed it against petitioners in reviewing summary judgment.

This Court should hold that the *per se* rule applies to this type of joint venture, looking for guidance to Section 3.2 of the DOJ/FTC *Antitrust Guidelines*, and remand for trial under that standard. The Seventh Circuit did not address or apply the correct legal standard.

## CONCLUSION

This Court should grant the writ of certiorari to review the Seventh Circuit’s unfounded assault upon the *per se* rule of antitrust liability and clear deviation from this Court’s precedents.

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Respectfully submitted,

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