~~PUBLIC~~

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of	)	**PUBLIC**
MCWANE, INC., **a corporation,** and **STAR PIPE PRODUCTS, LTD.,** **a limited partnership.**	)	**DOCKET NO. 9351**

RESPONDENT McWANE, INC.'S REPLY BRIEF IN SUPPORT OF APPEAL

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Dated: July 16, 2013

RECORD REFERENCES

References to the record are made using the following citation forms and abbreviations:

JX# – Joint Exhibit

CX# – Complaint Counsel Exhibit

RX# – Respondent Exhibit

Name of Witness, Tr. xx – Trial Testimony

JX/CX/RX# (Name of Witness, Dep. at xx) – Deposition Testimony

JX/CX/RX # (Name of Witness, IHT at xx) – Investigational Hearing Testimony

Complaint ¶ x – Complaint filed January 4, 2012

Answer ¶ x - Respondent McWane, Inc's Answer to Complaint

Initial Dec. # - Administrative Law Judge's May 1, 2013 Initial Decision

F. # - Administrative Law Judge's Findings of Fact

RB # - Respondent's Post Trial Brief

RFF ¶ - Respondent's Post Trial Proposed Findings of Fact

RAB # - Respondent's Appeal Brief

CCB # - Complaint Counsel's Post Trial Brief

CCFF ¶ - Complaint Counsel's Post Trial Proposed Findings of Fact

CCRFF ¶ - Complaint Counsel's Reply To Respondent's Proposed Findings of Fact

CCAB # - Complaint Counsel's Answering Brief

Rosch Dissent # - Statement of Commissioner J. Thomas Rosch, Dissenting in Part to the Opinion of the Commission on Complaint Counsel's and Respondent's Motions for Summary Decision ("Rosch Dissent"), Aug. 9, 2012

{ bold } - In Camera Material

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INTRODUCTION

This case does not add up. It is an exclusion case with no exclusion. It is a consumer harm case with no actual consumers claiming harm. It is an antitrust case with no economic support. The government's expert conceded he did not empirically test any of the critical allegations in the case: not the alleged market definition, the alleged exclusion, or the alleged consumer injury (or any other proposition, for that matter). It is a case alleging a separate domestic market for Fittings even though another federal agency unanimously determined that cheap imports had surged into the U.S. and "were materially injuring the domestic Fittings producers." F. 471. In the real world, the very idea that there is a separate domestic market is laughable: a flood of cheap imports from China, India, Korea, and Mexico has driven the domestic industry to the brink of extinction, grabbed the lion's share of all fittings sold in the U.S. and forced every major domestic Fittings foundry to shut down or cut way back. This is a case in which the government seeks to protect an inefficient and high-cost re-seller (not consumers) and to enjoin a rebate and a contract that were not only short-term (*e.g.*, "for up to 12 weeks"), but ended more than three years ago (the rebate letter was revoked in January 2010, the MDA terminated in Summer 2010). There is zero evidence either is likely to recur.

Counts 6 and 7 fail because Judge Chappell found that "Star was able to and did enter the Domestic Fittings market," and that it did so very, very quickly: it sold its first Domestic Fittings in September 2009, only six months after deciding to become a virtual domestic manufacturer. Initial Dec. at 377; F. 1095-96. Star's entry was not only fast, it was extraordinarily successful: it sold [redacted] million in Domestic Fittings to more than [redacted] individual distributors—including more than [redacted] exclusive customers—in its very first year with domestic product and grabbed 5% of all domestic sales. F. 1141-43. In 2011, Star's share "nearly doubled" to almost 10%. Initial Dec. 382; F. 1042-43. At the time of trial, Star was on pace "to have its best year

ever for Domestic Fittings sales." F. 1144. Its [redacted] customers included the two major national distributors (HD Supply and Ferguson) and dozens and dozens of regional and local distributors (e.g., WinWholesale, Dana Kepner, Mainline, TDG). "Clearly, Star entered the Domestic Fittings market." Initial Dec. 383. The government's expert did not employ any empirical test of exclusion, let alone any test demonstrating substantial foreclosure, and was unable to identify even one distributor—out of 630 total—that wanted to buy Domestic Fittings from Star, but could not because of McWane's September 2009 rebate letter. Initial Dec. 338, F. 375; Schumann Tr. 4440. Indeed, Star's own witnesses conceded that McWane's rebate letter was "all bark and no bite" as they piled up a "very impressive" average of two new customers every week and steadily grew their business. RX 231, McCutcheon Tr. 2612-17, 2595, CX 0585 ("Yahooooo!!"); RX 280.

McWane agrees with former Commissioner Rosch's repeated dissents in this matter: "under any objective standard . . . the undisputed facts demonstrate that Star's entry was not *de minimis* or trivial" and its quick and successful capture of 10% of all Domestic Fittings sold "undermines Complaint Counsel's basic theory" and "would not lead a rational trier of fact to find for Complaint Counsel." Rosch Dissent at 6. But, even if Star had not entered so successfully, there would have been no consumer injury: Judge Chappell found that Star's virtual manufacturing effort was "less efficient" and higher cost than McWane's dedicated production—and, thus, that its prices were consistently higher. F. 1089-90, 1411, 1413, Initial Dec. 411.

Counts 4 and 5 fail because Judge Chappell found that "Complaint Counsel has not shown that Sigma was a potential competitor." Initial Dec. at 429. Sigma was crippled by debt—including [redacted] at double-digit interest rates. It had already breached its bank covenants and was in danger of doing so again. It owned no foundries, no core boxes, and no

finishing line, and had only a handful of the 730 patterns it needed for domestic production. In sum, "Sigma did not have a viable domestic production option" to take advantage of ARRA's brief assistance for shovel-ready jobs. F. 1473. Sigma—like U.S. Pipe, Griffin Pipe, and other well-established foundry owners with long histories making Domestic Fittings—made a rational decision not to undertake the risky and expensive effort to try to get into Domestic Fittings during the brief ARRA period because "anybody and their dog" could see that it was a bad idea. JX 648 (Backman Dep. at 109-110).

ARGUMENT

I. THERE IS NO DOMESTIC FITTINGS MARKET

Judge Chappell's legal conclusion of a Domestic-only Fittings market is simply inconsistent with his underlying Findings of Fact that Imported and Domestic Fittings are fungible commodities that have vigorously competed in the battle for end-user specifications and jobs. Complaint Counsel in its Answering Brief impermissibly seeks to shift its burden and to rely on its discredited expert's conclusory opinion about what the SSNIP analysis *might* show about market definition. Dr. Schumann conceded he did not actually empirically test his hypothesis about the SSNIP—and that he utterly ignored evidence of significant real-world competition between imports and Domestic Fittings both for specifications and for jobs. Schumann, Tr. 4569-71; 4620-23. His opinion is nothing more than self-serving *ipse dixit* with no empirical basis whatsoever. Complaint Counsel has not, and cannot, point to sufficient economic evidence to demonstrate a domestic-only fittings market. To the contrary, Dr. Normann's rigorous (and unrebutted) empirical analysis demonstrated a single market for all Fittings regardless of where they are manufactured.

A. All Fittings Are Fungible Commodities That Compete For Specifications and Jobs

Complaint Counsel concedes that any Fitting that meets AWWA specifications is functionally interchangeable with any other Fitting that meets the same AWWA standard, regardless of where it is made. CCAB 7. It is also undisputed that, since all Fittings are fungible, Imported Fittings producers have successfully convinced end-users to open their specifications to accept the cheaper, foreign-made Fittings. F. 463-479. Indeed, the vast majority of specifications were opened to such an extent that long-time domestic manufacturers such as Griffin, U.S. Pipe, and ACIPCO largely abandoned the market over time, and McWane was eventually forced to shutter its Tyler, Texas fittings foundry. *Id*.

Conceding that Imported and Domestic Fittings "are fungible," Complaint Counsel argues that they are nevertheless not substitutes ***after*** the End User has specified that Domestic Fittings are to be used for a particular job. But that misses the point. Just as a waffle from IHOP is not a substitute for a waffle from Waffle House to a patron already sitting in a Waffle House, the competition in the case at hand (and consideration of possible substitutes) takes place at an earlier point in time. Further, the price difference between Domestic and Imported Fittings does not, by itself, create a separate product market. The fact that some customers are, at times, willing to pay more for one product versus another product—which is functionally the same—does not mean there is a separate market. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 513 (3rd Cir. 1998) ("Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively") (quotation omitted); *McLaughlin Equip. Co. v. Servaas*, No. IP 98-127-C-T/K, 2004 WL 1629603, at *18 (S.D. Ind. Feb. 18, 2004) ("a mere preference for a specific manufacturer's brand bus is not sufficient for purposes of establishing a

relevant product market."). It only becomes a separate market if a cross elasticity study—which Complaint Counsel's expert did not conduct—shows a separate demand curve. *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002) (affirming exclusion of expert where he "did not calculate the cross-elasticity of demand to determine which products were substitutes"); *McLaughlin*, 2004 WL 1629603 at *7 (expert testimony was "insufficient to establish the relevant product market" where the expert "did no statistical analysis of the cross-elasticity of price, demand or supply.").

The record here was unambiguous: end-users have a choice with respect to the specifications of Fittings for a particular project. F. 332-335. In the majority of instances, the choice is made based on preference (patriotism or low cost, for example). After the preference has been exercised and a Domestic Fitting specified, of course an Imported Fitting is not a substitute at that juncture. The fact that Domestic Fittings have declined from roughly 70% of all Fittings sold in the U.S. to only 15-20% in the last decade demonstrates vigorous competition at the specification level. F. 1028-1031. Indeed, not only is there competition, but Importers have won the battle for specifications—and the vast majority of jobs for more than a decade.

Complaint Counsel argues that some jobs have "Domestic-only Specifications," such as ARRA's Buy-American preference, which are supposedly "mandated by law," and thus are not open to Imported Fittings. But ARRA contained a host of blanket nationwide and individual waivers. RAB 3-4. A serious economist would have studied the data—including numerous examples in Star's own domestic bid log of ARRA-funded jobs it lost to imported Fittings—to determine how often and when the waivers were used. But Dr. Schumann literally turned a blind eye to that evidence and assumed it away. Schumann, Tr. 4569-71; 4620-23. Complaint Counsel asserts that such waivers must have been "commercially insignificant" because McWane

cannot prove their use. CCAB 9-10. But that is backwards. Complaint Counsel bears the burden of proof, not McWane. And, indeed, McWane had no information regarding the use of waivers simply because it was not a project owner or recipient of ARRA funds. Its "admission" was properly qualified based on its lack of first-hand knowledge and is thus meaningless. Most significantly, the evidence is undisputed that the vast majority of specifications and tons sold were imported before, during, and after ARRA. Indeed, Imported Fittings outsold Domestic Fittings by more than a two-to-one margin during 2010, the ARRA period. F. 1030, 1033-35. Given the extraordinary evidence that Imported Fittings have consistently won the battle for specifications and the lion's share of all tons sold for more than a decade, it is irresponsible to assume a Domestic-only market. Complaint Counsel could have tried to meet its burden of proof by actually conducting an elasticity study using the available data. But its expert chose to assume that hard work away and simply posit a market definition without conducting any empirical test of his assumption at all. His *ipse dixit* does not pass basic muster under *Daubert*, *Joiner*, and their progeny.[1]

B. Complaint Counsel Failed To Proffer Sufficient Economic Evidence Demonstrating A Domestic-Only Fittings Market

Complaint Counsel blithely asserts that "markets may be defined without algorithmic precision" and defends the Initial Decision's legal conclusion of a Domestic-only Market in the absence of <u>any</u> economic evidence. CCAB 8. Such a weak response is all that is left to Complaint Counsel since its expert performed no economic tests. Initial Dec. 338. Critically, Dr.

[1] Complaint Counsel also tries to flip the burden to McWane by arguing that McWane "does not address any of the Domestic-only Specifications required by laws other than ARRA." CCAB 9; *but see* RAB 3. But neither did Complaint Counsel—and it was its burden of proof. Moreover, Complaint Counsel's contention is simply wrong: McWane's expert, Dr. Normann, reviewed the Pennsylvania Steel Act and each of the few additional discrete instances of Buy-American specifications and concluded that, like ARRA, they generally contain a host of exceptions permitting the purchase of imported Fittings.

Schumann performed no SSNIP test, elasticity test or any other economic test using any actual data to find a separate Domestic Fittings market. Instead, he borrowed a hypothetical monopolist analysis from the Horizontal Merger Guidelines that he readily conceded he had never previously used in a non-merger case.[2] In contrast, as discussed in McWane's opening brief, its expert, Dr. Normann, did conduct an economic analysis of the competition for specifications and concluded that Imported and Domestic Fittings were part of a single Fittings market, regardless of place of origin. RX 712A (Normann Rep. at 30); RAB 7.

II. STAR "CLEARLY" ENTERED: MCWANE DID NOT ATTEMPT TO OR MONOPOLIZE DOMESTIC FITTINGS (COUNTS 6 AND 7)

Judge Chappell's legal conclusion that "Star was substantially foreclosed from competing in the Domestic Fittings market" is error, given his conclusion that Star "[c]learly" entered and his numerous Findings of Fact supporting that conclusion. Star's actual successful entry—capturing over [redacted] customers, including more than [redacted] exclusive customers, and jumping from zero to 10% market share in under two years, and being on pace for its "best year yet" in 2012—means as a matter of long-standing, mainstream antitrust precedent that McWane did not exclude Star or exercise monopoly power over Domestic Fittings.

A. McWane Did Not Have Monopoly Power Over "Domestic Fittings" As A Matter Of Law

Even if Complaint Counsel proved that Domestic Fittings was a separate relevant market—which it did not—and McWane had a high share of the purported market, that does not support a finding of monopoly power here. The definition of monopoly power is "the ability (1) to price substantially above the competitive level ***and*** (2) to persist in doing so for a significant

[2] Complaint Counsel improperly suggests that McWane described Dr. Schumann's hypothetical approach as controversial. CCAB 7 n. 3. That is wrong: Dr. Schumann described his approach as "controversial." "It is a more difficult application in nonmerger cases than in merger cases and somewhat more controversial." Schumann, Tr. 4538 (emphasis added).

period without erosion by new entry or expansion." *AD/SAT v. Associated Press,* 181 F.3d 216, 226-27 (2d Cir. 1999) (emphasis added). Given the Judge's Findings of Fact, the situation here does not meet either element of this definition. There is no evidence in the record suggesting that McWane ever priced supra-competitively—a question Dr. Schumann did not empirically test at all—let alone that it did so for a "significant," "extended" period. To the contrary, Judge Chappell found McWane's expert "reliable" and "persuasive" in concluding McWane's Domestic Fittings prices were flat and not a single customer complained about Domestic Fittings prices at trial. Normann, Tr. 4768; Initial Dec. 318, 339. Monopolization claims fail where, as here, the defendant did not exclude a competitor and did not raise prices to supra-competitive levels. *See Metro Mobile CTS, Inc. v. NewVector Commc'ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989) (100% market share did not establish monopoly power where defendant did not charge monopoly prices or control output); *Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (reversing jury verdict in favor of plaintiff because low entry barriers and other evidence of defendant's inability to control prices or exclude competitors disprove monopolization).

Complaint Counsel's argument that it met its burden with "***circumstantial*** evidence of McWane's high market shares" of Domestic Fittings thus misses the point (even if there is a Domestic market). CCAB 10-11 (emphasis added). Market share "is only a starting point for determining whether monopoly power exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share." *Am. Counsel of Certified Pediatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999). Without showing the ability to "price substantially above the competitive level" and do so "for a significant period" of time without new expansion, McWane's purported

high share is insufficient to prove monopoly power. *AD/SAT*, 181 F.3d at 226-27. That is precisely the evidence that is missing here.

Complaint Counsel's failure to meet its burden of proving monopoly power in a separate "Domestic Fittings" market dooms Counts 4-7. McWane's approximate 40-45% share of all Fittings does not rise to the level of "monopoly power"—as its own expert conceded. Schumann, Tr. 4535-37 ("I do not believe they are a monopolist"); *see Barr Labs., Inc. v. Abbott Labs.*, 978 F.2d 98, 112-13 (3d Cir. 1992) (market share of 50% did not establish monopoly power).

B. Star's Successful Entry Disproves Monopolization Or Attempted Monopolization As A Matter Of Law

Star's successful expansion into Domestic Fittings also affirmatively disproves the allegation that McWane possessed monopoly power and excluded Star. Here, Judge Chappell found that Star "[c]learly" entered the Domestic Fittings market, and did so quickly (in six months) and successfully with more [redacted] plus customers, including more than [redacted] exclusive customers, millions in revenue, and a 5% share in its first full year with product—which doubled to 10% in its second year and was on pace for its "best year yet" in its third year. Initial Dec. 377, 382.[3]

Actual, successful entry by a competitor "precludes" and fully "rebuts" Complaint Counsel's monopolization claims. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 226 (1993) ("where new entry is easy . . . summary disposition of the case is appropriate"); *Omega Envtl., Inc. v. Gilbarco, Inc*., 127 F.3d 1157, 1164 (9th Cir. 1997)

[3] Complaint Counsel argues, wrongly, that "McWane's contention [is] that Star sold at least one Domestic Fitting to [redacted] customers," CCAB 19, but that is not what McWane argued and certainly not what the evidence showed. The undisputed record evidence shows that Star had over [redacted] in sales of Domestic Fittings in 2010-2011 alone, including over [redacted] in sales to HD Supply, [redacted] to Hajoca, over [redacted] to Ferguson, over [redacted] each to 22 additional distributors, and over [redacted] each to dozens of others. F. 1134-1144; RX 712A (Normann Report) at Appx. 15 (citing Star's sales data). Complaint Counsel's argument suggesting that Star's 130-plus customers made only "small and sporadic purchases" of Star's Domestic Fittings is flatly inaccurate and borderline frivolous.

(successful expansion by existing competitor "precludes a finding that exclusive dealing is an entry barrier of any significance"); PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 422e3, at 100 (3d ed. 2007) ("Entry while alleged exclusionary conduct is underway may suggest both that entry is easy and that the defendant's conduct is not really predatory at all."). Commissioner Rosch's dissent on the Commission's Summary Decision opinion hit the nail right on the head: "the undisputed facts demonstrate that Star's entry was not *de minimis* or trivial [which] is dispositive as a matter of law," and Star's quick capture of 10% of all domestic Fittings sales not only "undermines Complaint Counsel's basic theory," but "would not lead a rational trier of fact to find for Complaint Counsel on the question of significant foreclosure." Rosch Dissent at 5-6.

Complaint Counsel argues that "[u]nder McWane's Policy, Distributors interested in giving some business to Star would be forced to rely entirely on Star (a company with an incomplete line) for all of their Domestic Fittings needs," and was thus an "exclusive dealing policy" effectively precluding distributors from making ***any*** purchases. CCAB 18. But that argument was not only unsupported by any testimony at trial, it was contradicted by Complaint Counsel's own expert, Dr. Schumann. Dr. Schumann conceded that he was unable to identify a single distributor—out of the "at least 630 separate waterworks Distributors in the United States"—who wanted to purchase Star domestic Fittings but could not because of McWane's rebate policy. F. 375; Schumann, Tr. 4440; RX 707 (Schumann, Dep. 214 ("Q. Sitting here today, can you identify a single distributor company among those 630 that wanted to buy Star domestic fittings but to date has not purchased Star domestic fittings? A. As we sit here today, I cannot.")).[4] Indeed,

[4] Complaint Counsel disingenuously argues that this was a lapse of memory. CCAB 18 n. 8. It was not. Dr. Schumann identified no such customer in his report, his deposition, or at trial—and Complaint Counsel does not identify one now—because not one exists. Complaint Counsel's

every single distributor Complaint Counsel called at trial (or in deposition) ***did purchase*** Domestic Fittings from Star. Initial Dec. 390-97.

McWane's rebate policy was "weak[ly]" worded and said only that customers "may" forego shipments or rebates "for up to twelve weeks." F. 1178. It was not widely enforced and, plainly, did not "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co*., 365 U.S. 320, 327 (1961). On the contrary, Star grabbed more than [redacted] customers, including more than [redacted] exclusive customers, in the year following the letter. F. 1142. That is an average of more than two new customers every single week—and it is not foreclosure at all, let alone foreclosure of "so large a percentage" of the distributors that Star was "frozen out" and its entry "unreasonably restricted." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring); *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc*., 357 F.3d 1, 8 (1st Cir. 2004). Indeed, Star was internally thrilled with its "very impressive" success: "Yahooooo!!" McCutcheon Tr. 2612-13; RX 231; RX 280.

Moreover, "exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern." *Omega Envtl.*, 127 F.3d at 1162; *see also Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1235 (8th Cir. 1987) ("Where the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, we require a higher standard of proof of 'substantial foreclosure.'"). "If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant

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claim that U.S. Pipe did not buy Star domestic Fittings is simply wrong. U.S. Pipe purchased over $800,000 in Domestic Fittings from Star after McWane's rebate letter and "McWane never cut off U.S. Pipe from sales of Domestic Fittings." F. 1312; RX 712A (Normann Report) at Appx. 15.

market." *Omega Envtl.*, 127 F.3d at 1163. Here, given Star's success, Complaint Counsel did not establish ***any*** foreclosure, let alone substantial foreclosure of all distribution channels. *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 124 (1st Cir. 2011) ("'foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent,' and while high numbers do not guarantee success for an antitrust claim, 'low numbers make dismissal easy.'").

McWane's rebate letter also did not contractually obligate customers to purchase anything from McWane. Customers were free to disregard it entirely—and did, in droves. Star concluded the letter was "more bark than bite" and grabbed more than [redacted] Domestic Fittings customers in its first year with product. McCutcheon, Tr. 2615-2617. When customers are free to buy from a rival and do, no exclusion occurs as a matter of law. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 997 (9th Cir. 2010) (market-share and sole source agreements did not foreclose competition because "'a competing manufacturer need[] only offer a better product or a better deal to acquire their [business]'"); *Omega Envtl.*, 127 F.3d at 1163-64 ("easy terminability" of an exclusive dealing arrangement "negated" any potentialforeclosure); *Roland Mach.*, 749 F.2d at 394-95 (exclusive dealing contracts are isn't this a quote? presumptively legal if one year or less).

There is no evidence the rebate portion of the letter foreclosed competition and, in any event, McWane's prices were above cost at all times. Above-cost prices are presumptively lawful and cannot cause antitrust injury as a matter of law, regardless of its market share. *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009) (plaintiff must prove that "the prices complained of are below an appropriate measure of [the defendant's] costs"); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000) (reversing jury verdict because above-cost prices are presumptively legal and represent competition on the merits.). Be-

cause discounts are beneficial to consumers, "price cutting is a practice the antitrust laws aim to promote." *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 896 (9th Cir. 2008); *see NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 452 (6th Cir. 2007) ("[c]utting prices in order to increase business often is the very essence of competition"). Too much judicial oversight of discounting creates "intolerable risks of chilling legitimate price cutting." *Brooke Group,* 509 U.S. at 223.

C. Star Was A Less Efficient, Higher-Cost Supplier And Consumers Were Not Injured

Judge Chappell found that Star was "a less efficient supplier of domestic Fittings than McWane" whose "costs were higher, and therefore its prices were higher," which "hindered [its] ability to compete effectively." Initial Dec. at 411. The antitrust laws are not designed to protect higher-cost and inefficient suppliers. They are designed to protect efficient companies with lower prices—like McWane. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767 (1984) ("an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is . . . precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster"); *see also Brooke Group*, 509 U.S. at 224 ("It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'"); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991) (it is "not a function of the antitrust laws" to require a competitor to lend a helping hand to its rivals to "support artificially firms that cannot effectively compete on their own.").

Complaint Counsel argues that "entry by a less efficient rival can stimulate competition," CCAB 26-27, but it cites no case law for this proposition. Its only source is two provocative articles from the Antitrust Law Journal, but not endorsed by any court. *Id*. Thus, well-settled antitrust precedent holds that competition is only injured by exclusion of an "equally efficient" or

more efficient competitor, which, as the Judge found, Star clearly was not. Even if McWane had excluded Star—which it did not—exclusion of a less efficient competitor such as Star does not injure consumers and is not illegal. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) ("[V]irtually every contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought"). As noted above, McWane had lower manufacturing costs and lower prices than Star, and it brought these benefits to consumers. Initial Dec. 411. McWane's rebate policy simply offered substantial discounts if customers purchased all of their requirements from McWane. Star was free to do the same, but it priced its products higher than McWane and therefore did not gain as much share as it had hoped.

D. Complaint Counsel Failed To Prove Specific Intent Or A Dangerous Probability Of Success

To establish its attempted monopoly claim, Complaint Counsel was required to prove that McWane possessed the "specific intent" to achieve monopoly power by predatory or exclusionary conduct; that the McWane engaged in such anticompetitive conduct; and that a "dangerous probability" existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg. Inc. v. Rule Indus., Inc*., 7 F.3d 986, 994 (11th Cir. 1993) ("To have a dangerous probability of successfully monopolizing a market the defendant must be close to achieving monopoly power.").

McWane did not have a "dangerous probability" to obtain a monopoly. Its share declined steadily in the face of a flood of cheap imports, from roughly 70% in 2003 to the low 40% at the time of trial, and its domestic foundry was running at a fraction of capacity. Initial Dec. 240; McCutcheon, Tr. 2579, 2585, 2638-39; *see McGahee v. N. Propane Gas Co.*, 658 F.Supp. 189, 197 (N.D. Ga. 1987) ("no evidence that such a scheme had a dangerous probability of success"

where "defendant's market share declined [steadily] during 1981–1983."). Further, there was no evidence presented at trial that McWane has ever charged, or intended to charge, supracompetitive prices. On the contrary, as the Judge found, McWane never had any intent to gouge its customers by overcharging for Domestic Fittings. F. 1086 (McWane "did not want to overcharge for Domestic Fittings"). Thus, McWane's rebate letter was merely "intent" to gain share by offering *lower* prices than Star, which is insufficient as a matter of law to establish "specific intent" to monopolize.

III. THE MDA DID NOT EXCLUDE SIGMA AND WAS NOT A "CONSPIRACY" TO RESTRAIN TRADE (COUNTS 4 AND 5)

At the time of the MDA, Sigma was in dire financial straits and had not taken sufficient steps toward domestic production to be considered an actual competitor. As a result, the MDA was Sigma's only viable option to supply its customers—many of whom preferred to purchase from Sigma rather than McWane—with Domestic Fittings. F. 1582. The MDA was a single exclusive deal between McWane and one of over 600 distributors, and not, a conspiracy to restrain trade. In contrast to the significant record evidence that the MDA had procompetitive benefits, Complaint Counsel cannot point to any anticompetitive impact such as reduced output or supracompetitive prices.

A. Sigma Was Never A Potential Competitor And Was Not "Eliminated"

The Judge's determination that Sigma was not "a potential competitor" in the purported market for Domestic Fittings is dispositive and means that Sigma was not "eliminated" as a matter of law. Initial Dec. 429. Complaint Counsel, in its Answering Brief, conveniently ignores Respondent's Sherman Act case law outlining the applicable legal standard. RAB 33-34. In *Gas Utilities Company of Alabama, Inc. v. Southern Natural Gas Comp.*, the Eleventh Circuit affirmed summary judgment for the defendant and held that the plaintiff had not met its burden to

establish "an intention and preparedness to enter the business" as required by the Sherman Act. 996 F.2d 282, 283 (11th Cir. 1993); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (affirming verdict due to plaintiff's failure to demonstrate "(1) an intention to enter the business, and (2) a showing of preparedness to enter the business."). Even *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979), relied upon by Complaint Counsel, states that, to be a potential competitor, the firm must have "the necessary desire, intent, and capability to enter the market."[5]

By Sigma's own estimates, it was in no position to enter the Domestic Fittings market and compete for ARRA jobs:

1. Sigma estimated it needed 730 patterns and hundreds of core boxes to have a full line of Domestic Fittings. F. 1468.

2. As of mid-2009, it had no core boxes and only a few, sample patterns. F. 1465, 1471-1472.

3. Sigma owned no domestic foundries and had no contracts with existing domestic foundries. F. 1470.

4. Sigma owned no machining or finishing facilities. F. 1465, 1471-72.

5. According to Sigma's CEO, Victor Pais, in the summer of 2009, "The [domestic production] plans were a not very discrete or quantifiable effort." F. 1466.

6. Sigma knew that ARRA was a "short term stimulus program." F. 1422. Sigma required a lead time of at least 18 to 24 months to begin production of a full range of Fittings, and 6 to 8 months to produce a single Domestic Fitting. F. 1476.

7. In August, 2009, *one month before the MDA* was signed, Sigma informed U.S. Pipe that it "has not made any concrete plans to either invest in all the required tooling or not invest at all." F. 1467.

[5] Complaint Counsel's argument that Sigma was a "nascent entrant" is insufficient to change the legal standard. *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1356 (S.D. Fla. 2011), quoting Areeda & Hovenkamp ¶ 349 (3d ed. 2006) (noting that a nascent firm acquires standing "by proving that it has the financial ability to enter the market, the background and experience that makes success possible, and that it has undertaken . . . significant steps toward entry.").

Complaint Counsel's assertion that Sigma had "available feasible means" to enter the market for Domestic Fittings is factually incorrect and unsupported by the record. CCAB 31. The Judge determined that Sigma's financial position in 2009 was "precarious" and "grave." F. 1483-1484. Although Complaint Counsel chooses to focus solely on Sigma's debt reduction (CCAB 35), the fact is that Sigma's long-term debt was still approximately [redacted] million dollars and the company breached its bank covenants in 2009. F. 1488-90. Compounding the problem, Sigma's sales were down [redacted] million dollars and a significant amount of the company's debt carried extremely high interest rates. F. 1485, 1489, 1493-94. Sigma lacked sufficient funds to invest in a Domestic Fittings operation on its own and neither its lenders nor its Board authorized it to become a Domestic Fittings supplier. F. 1499-1503.

Despite Complaint Counsel's argument to the contrary, Sigma's clear inability to enter the market for Domestic Fittings within the ARRA period is supported by the evidence in the record. CCAB 35-36. ARRA was a one-year statute enacted in February 2009 designed to provide stimulus funds to jobs that were "shovel-ready." F. 1032. Sigma did not even decide to explore entering the market for Domestic Fittings until February 2009, and by its own estimates needed a lead time of *at least* 18-24 months to begin production of a full range of Fittings. F. 1421, 1476. Sigma was not alone in its inability to enter the market for Domestic Fittings in time to compete for ARRA jobs. Several former Domestic Fittings manufacturers and specialty Domestic Fittings manufacturers, such as Griffin Pipe, U.S. Pipe, and ACIPCO, did not believe ARRA made it worthwhile for them to expand or return to a full line of Domestic Fittings production. F. 1039; Morton, Tr. 2875; JX 646 (Burns, Dep. at 30-31, 35-36, 176-177); JX 667 (Kuhrts, Dep. at 38, 49-50, 74). Even if Sigma had decided to go forward with virtual manufacturing in Fall 2009, it would not have had its first Domestic Fittings commercially available until

Spring 2010 (right as ARRA expired), and it would not have had a complete Domestic Fittings line until a year or more later, long after ARRA funding had dried up. F. 1476. Thus, the Judge's determination that "[r]egardless of whether Sigma had the financial capability to produce Domestic Fittings by contracting with in-dependent, domestic foundries, it did not have the time required to do so" in time to compete for ARRA-funded jobs is fully supported by the record evidence. Initial Dec. 427

B. The MDA Was A Legitimate Buy-Sell Arrangement Between McWane And Sigma, Not A "*Per Se* Unlawful" Restraint Of Trade Or Conspiracy To Monopolize

Because Sigma was not an "actual potential competitor," the MDA between Sigma and McWane is properly analyzed as a single exclusive contract between McWane and one of over 600 distributors. Initial Dec. 429. Complaint Counsel did not produce any evidence at trial that the MDA foreclosed a substantial share of affected commerce. In fact, the opposite is true. Sigma's purchases of Domestic Fittings from McWane—only 3,432 tons out of the approximately 146,712 tons in the Domestic Market overall (RX 763)—does not constitute a "substantial share." *Sterling Merch.*, 656 F.3d at 123-124 ("foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent, and while high numbers do not guarantee success for an antitrust claim, low numbers make dismissal easy."). As a result, the MDA was not anticompetitive as a matter of law. *Thompson Everett, Inc. v. Nat'l Cable Adver.*, 57 F.3d 1317, 1326 (4th Cir. 1995) (short-term exclusive contracts upheld where plaintiff failed to advance evidence of substantial anticompetitive effect).

Further, Complaint Counsel completely ignores the case law cited by Respondent regarding the presumptive legality of short-term exclusivity agreements such as the MDA. Such agreements are presumptively lawful because they are unlikely to harm competition. *See* RAB 38; *see also* Section II(B), *supra*. The MDA became effective on October 1, 2009 but ended less

than a year later after McWane invoked the 180-day termination clause in early 2010. CX 11947. Complaint Counsel cites only one case for its assertion that termination of the MDA is immaterial. CCAB 42. In *PolyGram*, the Commission held that the conduct at issue, despite lasting for only 10 weeks, triggered an obligation by Respondents to demonstrate a procompetitive justification. *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 354 (July 24, 2003). As discussed below, the MDA clearly had procompetitive benefits as required by *PolyGram*. Further, the only case cited by the Commission in support of Complaint Counsel's argument relates to the amount of interstate commerce affected by the purported anticompetitive activity *and not* to the length of time of the allegedly improper agreement. *Id.* at 354 n.51.

C. Complaint Counsel Failed To Prove Specific Intent

To establish conspiracy to monopolize, a plaintiff must prove: (i) the existence of a conspiracy to monopolize; (ii) overt acts done in furtherance of the conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Lantec*, 306 F.3d at 1028. Proof that McWane and Sigma shared an intent to prevail over rivals or to improve market position is insufficient; the shared intent must have been to make McWane a monopolist. *Id.* As discussed above, McWane's intent was to put "tons in the plant" and to keep the doors of its remaining domestic foundry open. F. 1590. The desire to maintain or increase one's market share is not in itself an antitrust violation. Further, invoice prices for Domestic Fittings did not increase significantly during the ARRA period. Normann, Tr. 4894-95. The record is clear that McWane *did not want to overcharge* for Domestic Fittings during ARRA. F. 1086; RX 595 ("It has never been our intent to 'over charge' because of the [Buy American] provision [of ARRA]."). The Judge determined that the difference in price between Domestic and Imported Fittings was a result of McWane's higher costs of production, including raw materials, labor, and overhead. F. 1077-78, 1080. Additionally, the Commission cannot simply infer a conspiracy to

monopolize from Sigma's reasoned business decision to buy under the MDA rather than embark on the prohibitively expensive and very risky effort to virtually manufacture its own domestic fittings—particularly since it was not a viable domestic competitor in any reasonable time frame, according to Judge Chappell's own findings. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 569 (2007); *In re Baby Food Antitrust Litigation*, 166 F.3d 112, 127 (3d Cir. 1999).

D. The MDA Had Legitimate Pro-Competitive Effects

Complaint Counsel's claim that the MDA was without legitimate procompetitive benefits is both factually and legally incorrect. The MDA would only constitute anticompetitive behavior in violation of the antitrust laws if it had anticompetitive consequences, such as a reduction in output or supra-competitive prices that outweigh any procompetitive benefits. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 65-66 (1st Cir. 2004). Complaint Counsel does not point to any evidence that the MDA caused Domestic Fittings output to fall or prices to rise to supra-competitive levels. This complete absence of anticompetitive consequences cannot possibly negate the procompetitive benefits of the MDA to customers.

Moreover, it is undisputed that at the time of the MDA, Union Foundry, McWane's last remaining U.S. facility, continued to operate at only 30% capacity and needed the additional tonnage provided by the MDA. Tatman, Tr. 964. The MDA spared Union Foundry from the same fate as Tyler South—McWane's plant in Tyler, TX that shut down due to insufficient tonnage in Fall 2008, resulting in the loss of 200 jobs. F. 477-479. Maintaining Union Foundry—a lower cost and more efficient manufacturing option to Star—resulted in lower prices for Domestic Fittings. F. 1086, 1089. Additionally, the Judge determined that the MDA was Sigma's *only viable option* for providing its customers with Domestic Fittings. F. 1582. Customers who preferred to purchase from Sigma, such as ACIPCO, Groeniger, E.J. Prescott, and Consolidated Pipe, were able to do so because of the MDA. F. 1584, 1586-1589; JX 659 (Swalley, Dep. 275-

276). These customers preferred Sigma's faster delivery and larger sales force, both legitimate procompetitive benefits. *Id*.

IV. COMPLAINT COUNSEL'S PROPOSED REMEDY IS MOOT

Complaint Counsel's proposed remedy in this case is moot because the challenged conduct is long over. Complaint Counsel does not dispute that the subject of the rebate policy ended or that the MDA was terminated. Tatman, Tr. 708; CX 0118. Rather, the crux of Complaint Counsel's response in the "possibility of [McWane] resuming the illegal practices." CCAB 45, 47. This argument is either disingenuous or tone-deaf. As prominently alleged in the Complaint and a focal point at trial, McWane's practices occurred against the backdrop of ARRA, a short-term stimulus which expired in February, 2010. There are no Findings in the Initial Decision suggesting that the re-enactment of the rebate policy or execution of another distribution agreement with Sigma is "actual and imminent." As explained in McWane's opening brief, injunctive relief is not available under the circumstances of this case.

CONCLUSION

For the reasons stated herein, the Judge's findings with respect to Counts 4-7 of the Administrative Complaint should be rejected.

Dated: July 16, 2013

Respectfully submitted,

/s/ William C. Lavery

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Edith Ramirez, Chairwoman**
Julie Brill
Maureen K. Ohlhausen
Joshua D. Wright

In the Matter of	)	
	)	**PUBLIC**
MCWANE, INC.,	)	
a corporation, and	)	
STAR PIPE PRODUCTS, LTD.,	)	
a limited partnership.	)	**DOCKET NO. 9351**
	)	

PROPOSED ORDER

Upon consideration of the briefs submitted by Respondent and Complaint Counsel, the arguments of counsel for the parties before this Commission in Open Session, and the record in this matter, IT IS HEREBY ORDERED that:

1. The Administrative Law Judge's Initial Decision with respect to Counts 4-7 of the Administrative Complaint was premised on erroneous findings of fact and conclusions of law, and is therefore vacated.

2. Counts 1-7 of the Administrative Complaint have not been proven by a preponderance of the evidence, and are dismissed.

ORDERED:

_____
The Commission

_____, 2013

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via hand delivery a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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By: _____/s/ William C. Lavery_____
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