

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of:)
McWANE, INC.,) Docket No. 9351
a corporation.)
-----)

THURSDAY, AUGUST 22, 2013

2:00 p.m.

ORAL ARGUMENT

BEFORE:

EDITH RAMIREZ, CHAIRWOMAN

JULIE BRILL, COMMISSIONER

MAUREEN K. OHLHAUSEN, COMMISSIONER

JOSHUA D. WRIGHT, COMMISSIONER

Reported by: Susanne Bergling, RMR-CRR-CLR

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 EDWARD HASSI, ESQ.

5 LINDA HOLLERAN, ESQ.

6 Federal Trade Commission

7 601 New Jersey Avenue, N.W.

8 Washington, D.C. 20001

9 ehassi@ftc.gov

10

11

12

13 ON BEHALF OF McWANE, INC.:

14 JOSEPH A. OSTOYICH, ESQ.

15 ERIC T. KOONS, ESQ.

16 WILLIAM C. LAVERY, ESQ.

17 Baker Botts LLP

18 1299 Pennsylvania Avenue, N.W.

19 Washington, D.C. 20004-2400

20 (202) 639-7905

21 joseph.ostoyich@bakerbotts.com

22

23

24 and

25

1 APPEARANCES:

2

3 J. ALAN TRUITT, ESQ.

4 THOMAS W. THAGARD, III, ESQ.

5 Maynard Cooper & Gale PC

6 1901 Sixth Avenue North

7 2400 Regions Harbert Plaza

8 Birmingham, Alabama 35203-2618

9 (205) 254-1000

10 atruitt@maynardcooper.com

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

P R O C E E D I N G S

- - - - -

CHAIRWOMAN RAMIREZ: Good afternoon, everyone.

The Commission is meeting today in open session to hear oral argument in the matter of McWane, Incorporated, Docket Number 9351, on the appeal of the Respondent and the appeal of counsel supporting the complaint from the initial decision issued by the Administrative Law Judge.

The Respondent is represented by Mr. Joseph Ostoyich, and Complaint Counsel are represented by Mr. Edward Hassi.

During this proceeding, each side will have 45 minutes to present their arguments. Counsel for the Respondent will make the first presentation and will be permitted to reserve up to ten minutes for rebuttal. Counsel supporting the complaint will then make his presentation, followed by any rebuttal by Respondent's counsel.

Mr. Ostoyich, do you wish to reserve any time for rebuttal?

MR. OSTOYICH: Yes. I am going to reserve ten minutes, Chairwoman.

CHAIRWOMAN RAMIREZ: You may begin.

MR. OSTOYICH: Chairwoman, Commissioners, thank you.

1 This case did not add up. It's that simple.
2 The case did not add up. The complaint in this case
3 alleged a conspiracy -- a conspiracy -- but the evidence
4 shows that my client consistently underpriced the
5 published prices of Sigma and Star. In winter 2008,
6 underpriced substantially; in spring 2008, underpriced
7 substantially; spring of 2009, underpriced again. The
8 complaint alleged a conspiracy, but the evidence showed
9 that my client continued to offer thousands of price
10 concessions below the published price, hundreds and
11 hundreds and hundreds of job prices to win particular
12 jobs.

13 I have a spreadsheet here which we used with the
14 witnesses, which is a single-spaced, multipage spread
15 sheet, hundreds and hundreds and hundreds of discounts
16 below the published prices. Myriad rebates below that.
17 They absorbed freight for customers. They extended
18 credit terms for customers.

19 The complaint alleged a conspiracy, but my
20 client's prices went down roughly 12 percent while raw
21 material costs were going up about 50 percent, while the
22 other guys' prices went in the opposite direction.

23 COMMISSIONER BRILL: What period of time are you
24 referring to when you say your prices went down 12
25 percent?

1 MR. OSTOYICH: You can start from January '07 to
2 November two thousand -- August 2010, they went down
3 about 30 percent.

4 COMMISSIONER BRILL: Okay. And isn't that --
5 the use of that measure, that time period, hotly
6 contested? And, in fact, doesn't Complaint Counsel and
7 Complaint Counsel's expert challenge the logic of using
8 that time period, given, for instance, the fact that the
9 alleged conspiracy began in January, prices were already
10 set for jobs that were committed through, say, February,
11 March?

12 Isn't it a much better time period -- isn't it
13 much better to use the time period March through around
14 October? And if you use that measure or that time
15 period, in fact, didn't prices for all three alleged
16 co-conspirators go up?

17 MR. OSTOYICH: Well, the answer is we don't
18 actually know, because Complaint Counsel's expert,
19 Dr. Schumann, put on no study at all of our prices.

20 COMMISSIONER BRILL: Okay, but didn't the ALJ
21 find -- I mean, there were findings, with respect to
22 that period of time, of prices having gone up. You may
23 disagree with it, but the ALJ found that to be the case.

24 MR. OSTOYICH: The ALJ found, for that period of
25 time, average invoice prices went up. He did not study

1 and no one gave any evidence of net prices in the case.
2 Now, the reason we look at a longer time period is
3 because Complaint Counsel's expert said that the pricing
4 data reflected shipment on a certain date, which might
5 actually reflect price formation months and months in
6 advance. So, if you pick February through October, you
7 have absolutely no way of knowing, as Complaint Counsel
8 put on no evidence, of when the prices on those
9 shipments were formed. It could have been at the end of
10 '07; could have been in the middle of '07.

11 COMMISSIONER BRILL: Yeah, but we know that
12 going from January of '08 all the way through sometime
13 in '09 would be well outside of the period of the
14 alleged conspiracy. We know that.

15 MR. OSTOYICH: I'm not sure I follow you. The
16 alleged conspiracy in the complaint was January '08
17 through August '09.

18 COMMISSIONER BRILL: But given the fact the
19 price formation -- first of all, that there was a price
20 guarantee until I think it was around March, and so if
21 the conspiracy begins in January, there was a certain
22 time lag before the reduction or curtailment of project
23 pricing began. That's the allegation.

24 MR. OSTOYICH: That's the allegation. So,
25 that's why --

1 COMMISSIONER BRILL: So, you're using a measure
2 that's way too broad.

3 MR. OSTOYICH: Well, that's why you take the
4 broadest measure possible. The data in this case went
5 back to '07 and went through the middle of 2010.
6 Looking at the entire time period, it's a steady slide
7 in prices.

8 COMMISSIONER BRILL: Let's just say that this
9 particular Commissioner disagrees with your broader
10 measure.

11 MR. OSTOYICH: Well, Commissioner, to be honest,
12 it's Complaint Counsel's burden.

13 COMMISSIONER BRILL: Sure.

14 MR. OSTOYICH: Complaint Counsel put on no
15 pricing evidence. If they put on no pricing evidence,
16 it is not my burden to disprove every conceivable
17 permutation of an alleged conspiracy. Their burden is
18 to prove a price effect. The Judge in this case, after
19 hearing this evidence and watching the performance of
20 their expert on the stand, literally doesn't mention the
21 expert at all in his 460-page opinion, because he put no
22 evidence in, and he says that prices were going down --

23 COMMISSIONER BRILL: Don't we have -- excuse me.

24 MR. OSTOYICH: -- prices were going down, going
25 in the opposite direction of Sigma and Star.

1 COMMISSIONER BRILL: Should we talk about the 13
2 plus factors that are a key element of Complaint
3 Counsel's case? I mean, yes, it's true they may not
4 have used -- and we'll certainly ask Complaint Counsel
5 about how the economic evidence came out when it's their
6 turn. But there is a lot of evidence that was offered
7 here in terms of the plus factors that would lead to the
8 conclusion that there was an agreement.

9 MR. OSTOYICH: Which particular plus factor?
10 Which particular plus factor? I mean, a plus factor --

11 COMMISSIONER BRILL: Do you want to go through
12 them?

13 MR. OSTOYICH: Plus factors exist in markets
14 regardless. Plus factors are often structured by how
15 many players are in a market and have absolutely nothing
16 to do with my client's conduct. So, yes, there are plus
17 factors. There are plus factors in virtually every
18 market out there.

19 COMMISSIONER BRILL: Well, let's talk about one
20 of the most significant plus factors, and I'll then stop
21 and let my fellow Commissioners ask some questions.

22 Former Chairman Bill Kovacic wrote a very
23 interesting article called "Plus Factors and Agreements
24 in Antitrust Law," which came out in 2011, and what he
25 cited as a super plus factor was when firms, in an

1 oligopoly situation, centralize pricing authority, take
2 away authority from their field and bring it into a
3 central location.

4 And isn't that what happened here? And why
5 shouldn't we consider that a super plus factor, which
6 would lead to a strong inference, according to Professor
7 Kovacic, of explicit collusion?

8 MR. OSTOYICH: Well, first, as a legal matter,
9 I'm not sure there's case law to support that, though in
10 Federal Court, it is not assumed a plus factor.

11 COMMISSIONER BRILL: Let's assume that we find
12 that all three participants in this alleged collusion
13 did pull authority from their fields and centralize
14 pricing authority at something similar to a
15 headquarters --

16 MR. OSTOYICH: Yeah, I don't want to quibble
17 with you.

18 COMMISSIONER BRILL: -- at the same time.

19 MR. OSTOYICH: The evidence is clear, and there
20 was clear testimony from Mr. Rybacki and Mr. Pais from
21 Sigma, that Sigma never pulled pricing from the field,
22 so that premise is wrong.

23 But, assuming, companies can unilaterally decide
24 to consolidate pricing authority in a given person for
25 lots of legitimate reasons. For example, if I'm selling

1 products whose raw material prices are going up 50
2 percent in six months, I have a perfectly legitimate
3 reason -- and my customers are very sophisticated, like
4 HD Supply, which dwarfs all of these suppliers -- but
5 customers are very sophisticated. I have a perfectly
6 legitimate, independent, unilateral reason for pulling
7 prices away from my sales, and that is I am not going to
8 be in business much longer because the customers know
9 how to game us and beat us down in price, and raw
10 materials have gone up and demand has dropped. So, I
11 can independently decide to do that for perfectly
12 legitimate reasons.

13 COMMISSIONER BRILL: Possibly, possibly, but
14 when you have got that plus 12 other plus factors
15 present here, you know, this reminds me of the situation
16 when a friend of mine might say, "Gosh, you know, my
17 husband keeps coming home every Friday night, lipstick
18 on his, you know, collar, he smells of perfume, and
19 every time he seems to have a reason for it." You know,
20 after the 13th time, you've got to figure something's
21 going on. You can take each one of these separately --
22 you can take each one of these separately and you have
23 got a reason for it and an excuse for it, but at some
24 point, you add them all together, and it looks like you
25 have got a story.

1 MR. OSTOYICH: Well, Commissioner, I can't speak
2 to the specific hypothetical, obviously.

3 COMMISSIONER BRILL: It was a girlfriend of
4 mine. It wasn't me.

5 MR. OSTOYICH: To be candid, a year ago, roughly
6 a year ago at this time, the Chairwoman wrote a 30- or
7 40-page opinion denying my summary judgment motion, and
8 at the time, she said, "There are fact questions here.
9 Let's send this to the Judge to make fact findings.
10 Let's defer to the Judge's understanding of what the
11 witnesses say live and how they look in their demeanor
12 and credibility. That's what happened.

13 I stood in this courtroom for two months, from
14 the day after Labor Day to Election Day. The Government
15 brought in its best case, 15 live witnesses. Some of
16 those witnesses were on the stand for days and days and
17 days, longer than any case I've ever heard of. My only
18 witness was on the stand for roughly 25 hours.

19 The Judge sat in that chair and watched every
20 minute of it, and he looked at the witnesses, and he
21 looked them in the eye, and at the end of the day, 6000
22 pages of transcript, 25 days of courtroom time,
23 thousands of exhibits, the Judge wrote the opinion he
24 did. And what he found was no conspiracy participation
25 by my client.

1 COMMISSIONER BRILL: But what I find in reading
2 his decision -- and, of course, we look at this de novo
3 -- is that he looked at each one of those factors
4 separately but never looked at them or gave -- gave
5 extremely quick lip service to looking at them as a
6 whole. And isn't it our obligation to do both, to look
7 at each one separately and then examine it as a whole?

8 MR. OSTOYICH: Obviously, it is your obligation.
9 You have to do a de novo review. I don't know how you
10 can reach the conclusion that he gave it quick lip
11 service.

12 COMMISSIONER BRILL: It was, like, three
13 sentences when he looked at it.

14 MR. OSTOYICH: Well, how else would he
15 describe -- he parsed the evidence that was put in front
16 of him. He could have not written about each individual
17 aspect of the evidence, but then he would have been
18 criticized for not addressing the details. So, he
19 addressed the details, and he said, in addition -- I
20 find the details pretty important -- but in addition,
21 collectively, all of it together doesn't add up to a
22 hill of beans. That's what he found.

23 We can toss it. We can toss it out. It's de
24 novo standard review, but I submit if we do, we are
25 living in a world where there are two antitrust regimes:

1 one for Federal Court that's robust, that requires
2 economic evidence and admissible evidence, and another
3 which is not.

4 COMMISSIONER BRILL: This would be up to us to
5 determine, de novo, how we feel about each of the
6 factors. That's our job.

7 MR. OSTOYICH: Of course. But there does have
8 to be a substantial weight of the evidence.

9 CHAIRWOMAN RAMIREZ: Counsel, isn't there a
10 reading of the evidence here in which one can see the
11 facts playing out as they have been set out in the
12 so-called Rick Tatman plan? Is that just mere
13 coincidence?

14 MR. OSTOYICH: Well, no, no. I would hope that
15 there's some plausible reading of the evidence that
16 could at least support the complaint. Otherwise, it
17 would be frivolous, and if we were in Federal Court, we
18 would file a Rule 11 motion. So, that wouldn't surprise
19 me at all.

20 The question is, having watched the witnesses'
21 testimony for probably dozens of hours, maybe a
22 hundred-plus hours, having watched the testimony, heard
23 the explanations of all those documents, the Judge
24 reached the conclusions he did. To disregard that, I
25 think, would be improper.

1 CHAIRWOMAN RAMIREZ: But you don't disagree that
2 we are looking at this de novo, as Commissioner Brill
3 noted.

4 MR. OSTOYICH: Obviously you have the authority
5 to look at it de novo. The question is, is there a
6 principal basis for disregarding the person you sent it
7 to, at summary judgment, to make the determinations he
8 made, the credibility of the witnesses, hearing the
9 witnesses live in the courtroom.

10 COMMISSIONER BRILL: Well, can we talk about the
11 head fake issue?

12 COMMISSIONER OHLHAUSEN: Can I --

13 COMMISSIONER BRILL: No, no, no, please go
14 ahead.

15 COMMISSIONER OHLHAUSEN: Thank you.

16 Talking about the plus factors, I would like to
17 address the interfirm communications, because there do
18 seem to be a substantial number of them.

19 MR. OSTOYICH: Yeah. The interfirm
20 communications involving my client were limited, nothing
21 substantive, of consequence. So, what we're talking
22 about is --

23 COMMISSIONER OHLHAUSEN: When you say "limited,"
24 you mean of duration? Because we don't really know what
25 was discussed.

1 MR. OSTOYICH: Both, yes. So, there were
2 telephone records that were produced pursuant to a
3 third-party subpoena, and I think the -- prior to the
4 formation of the alleged conspiracy, there were a
5 whopping grand total of four phone records from
6 Mr. Rybacki at Sigma to Mr. Tatman, of my client, four.
7 One was three minutes in duration, one was six, one was
8 nine minutes, one was three minutes.

9 Now, nobody -- nobody remembers exactly what
10 they discussed five years ago; however, Mr. Rybacki
11 testified that I'm pretty sure I called him at some
12 point around the holidays to welcome him to the industry
13 and just say, you know, happy holidays. In his
14 deposition he said I'm pretty sure I called him once, we
15 were looking at purchasing some domestic drains,
16 completely different products, and I called Tatman to
17 see if he had them available. I know I called him once
18 to say, hey, are we ever going to do anything with
19 DIFRA? We had been trying to do something for several
20 years.

21 Beyond that, nobody remembers the details. Both
22 men did testify multiple times -- multiple times -- the
23 one thing they know they didn't talk about was prices.
24 There is no evidence beyond that. It's -- in legal
25 parlance, it is an opportunity to conspire, possibly,

1 but it's not legally sufficient to infer a conspiracy.

2 COMMISSIONER OHLHAUSEN: But some of the timing
3 was right around when pricing decisions were made.
4 Isn't that right?

5 MR. OSTOYICH: It depends how you define this.
6 The timing of the phone calls was between late December
7 and early January. The pricing decisions, depending
8 which company, were made mid to late January and
9 subsequently, obviously.

10 CHAIRWOMAN RAMIREZ: They took place shortly
11 before the issuance of the McWane January 11th letter.
12 Isn't that right?

13 MR. OSTOYICH: I believe they were within a
14 month of the letter coming out, and there is nothing
15 that connects those phone records to the letter.

16 COMMISSIONER BRILL: Aren't we allowed to make
17 reasonable inferences?

18 MR. OSTOYICH: Well, that's what the very large
19 body of case law in Federal Court says. The mere
20 opportunity to conspire may be a plus factor, but that,
21 by itself, is not sufficient to --

22 COMMISSIONER BRILL: Again, by itself, right.
23 Can I ask about the head fake issue? Did you want to
24 follow up?

25 COMMISSIONER OHLHAUSEN: Go ahead.

1 COMMISSIONER BRILL: Okay, because I don't want
2 to monopolize the conversation here, but I have to say
3 that I find the finding that Mr. Tatman -- and I don't
4 know if Mr. Tatman's in the room or not -- but I find
5 that finding to be incredible, the notion that
6 Mr. Tatman would develop an entire plan, which was
7 evidenced in CX-627, what has been termed the "Tatman
8 plan," and he talks about the need for everybody to
9 follow it, everyone to be engaging in centralized
10 pricing, for instance, and the other elements of the
11 plan.

12 He gets -- allegedly -- the other two companies
13 to go along with it, and all he was engaged in was a
14 head fake and he wasn't really going to follow it? I'm
15 not -- I have a lot of trouble buying it. I'm sure
16 Mr. Tatman is a lovely gentleman. I'm sure he is deeply
17 credible in many regards, but this aspect, which
18 actually seems to me to be a key aspect of whether or
19 not McWane was engaged in an effort to further some sort
20 of collusion or not, this is a key aspect of it.

21 MR. OSTOYICH: I understand --

22 COMMISSIONER BRILL: I just can't buy it.

23 MR. OSTOYICH: -- and you have raised a critical
24 issue in my mind. Do we have a process that makes
25 sense? Do we have a Part 3 process that makes sense?

1 If, in fact -- as you said, you don't recognize

2 Mr. Tatman here --

3 COMMISSIONER BRILL: I don't. I don't know who
4 he is.

5 MR. OSTOYICH: -- and he may or may not be
6 credible on any given issue, because you don't know
7 anything about the man. The Judge, who was tasked by
8 the Chairwoman and the other Commissioners a year ago to
9 make those determinations, made the determination
10 that --

11 COMMISSIONER BRILL: Are there any business
12 documents --

13 MR. OSTOYICH: Can we toss that out?

14 COMMISSIONER BRILL: Are there any -- well, you
15 seem to be saying that we don't have a job to do. You
16 seem to be saying that we just buy whatever the ALJ says
17 wholesale. And that's not our job, as I see it.

18 Let me ask you, more particularly.

19 MR. OSTOYICH: Can I address that?

20 COMMISSIONER BRILL: I would like you to address
21 that, but can I also add it in -- just one second -- I
22 would like to know, in addition to Mr. Tatman's say-so,
23 that it was a head fake, are there any business
24 documents that support the head fake theory? Because I
25 didn't see any.

1 MR. OSTOYICH: Here's a sample. Here's a sample
2 of the company's job pricing, a sample, 20 pages,
3 single-spaced, month after month after month throughout
4 2008 of job prices.

5 COMMISSIONER BRILL: Okay. My understanding is,
6 if we're talking about the same document, that a great
7 deal of the entries on that document are with respect to
8 what's known as price protection; that is, if you order
9 at a certain time, the price won't go up. And that's a
10 document that's actually entitled, if it's the same
11 thing, "Price Protection."

12 The issue here that's the alleged collusion is
13 about project pricing, which is something entirely
14 different, discounts off of list price. That's what the
15 alleged collusion is about.

16 Going back -- so, let's just say for a moment I
17 reject that as a business document that supports the
18 head fake theory. Is there anything else?

19 MR. OSTOYICH: Sure. Oh, there's a lot. First
20 of all, price protection is a job price. That says, for
21 the next year, every job you bid, I'm willing to pay --
22 charge you a certain price.

23 COMMISSIONER BRILL: No, I don't think so.
24 Project pricing was discount off of list price.

25 MR. OSTOYICH: Again, we can have a regime --

1 COMMISSIONER BRILL: Project pricing is off of
2 discount price. I mean, excuse me, off of list price.

3 MR. OSTOYICH: With all due respect, we can have
4 a regime where what the witnesses testified really
5 doesn't mean anything, but there is no principal basis
6 for disregarding what the witnesses said and what the
7 Judge found. Now, is there anything beyond that? Yes,
8 there is. My expert put on a very detailed pricing
9 analysis.

10 COMMISSIONER BRILL: Business documents.
11 Business documents.

12 MR. OSTOYICH: Price data -- of course.

13 COMMISSIONER BRILL: Business documents from
14 McWane's business executives --

15 MR. OSTOYICH: Sure, Yes.

16 COMMISSIONER BRILL: -- that say, "Oh, we're
17 going down this road, but really, guys, it's a head
18 fake."

19 MR. OSTOYICH: Every document in the files that
20 shows that job pricing continued to be offered, by
21 definition, shows that that statement was a head fake.
22 So, there are monthly reports, which I walked through
23 those with Mr. Tatman, monthly reports in my client's
24 files. There are voluminous emails and other documents
25 from Sigma and Star where they are reporting, "I've

1 heard that McWane's offering a discount."

2 COMMISSIONER BRILL: Sure, there was cheating.
3 There was cheating going on, sure, but that doesn't mean
4 that there wasn't a -- that doesn't mean there wasn't a
5 tacit -- there wasn't tacit collusion.

6 MR. OSTOYICH: Well, you are flipping the burden
7 here. You are asking me to disprove something in some
8 other company's documents.

9 COMMISSIONER BRILL: We both agree that the head
10 fake theory is critical, right? You said that a moment
11 ago. And what I'm asking you is whether there are any
12 business documents, business records, other than that
13 price list, which we've talked about and I'm sure
14 Complaint Counsel will talk about, if there are any
15 business records that support the testimony from
16 Mr. Tatman that it was a head fake theory.

17 MR. OSTOYICH: Every document that shows -- we
18 did this repeatedly with every pricing witness in the
19 case, that showed that McWane continued to offer
20 discounts and drop prices throughout the year.

21 CHAIRWOMAN RAMIREZ: Counsel, what --

22 MR. OSTOYICH: Can I back up for one minute,
23 Your Honor? I will not concede the head fake issue is
24 critical. Companies can price whatever way they want.
25 If I walk down here, I will see two or three restaurants

1 that are saying, "Special Price for D.C. Lunch Week," or
2 if I go to Wal-Mart, I see an everyday low price, but
3 there are companies who say I'm not going to take
4 anything off, because I'm giving you a rock bottom
5 price. There is nothing inherently wrong with doing
6 that.

7 So, the question is not, did they issue that
8 policy? The question is, was it agreed upon? Was there
9 a communication? We're in a conspiracy case where the
10 Judge found, after sitting through 25 days of courtroom
11 trial, no evidence of an advance price communication,
12 where the plaintiff's own expert conceded that there
13 were no communications, no discussions, no smoke-filled
14 rooms, and the only thing he could point to were a
15 couple of letters we sent to customers, which he said
16 had terms from the alleged conspiracy.

17 When I cross examined him, he recanted. He
18 said, "I guess it's not in there. I just interpret it
19 that way." Well, if that's what makes me liable,
20 because the Government can find an economist who can
21 interpret something the way he wants to? Then I --
22 we're not --

23 COMMISSIONER BRILL: Are you saying we can never
24 find collusion with regard to prices unless we have a
25 whistleblower? I mean, I do not think that we need to

1 find evidence of an explicit conversation. I think that
2 we can infer an agreement from activity that takes place
3 between an offer of -- you know, like the January
4 letter, and then follow-up actions by the other -- by
5 all the players policing, monitoring, and many of the
6 other plus factors that are identified.

7 And I think if we place a greater burden on
8 ourselves, then that could be a serious harm to the
9 economy in terms of the kind of price collusion that
10 would go on and would be unpoliced.

11 MR. OSTOYICH: To make it stand up on appeal,
12 you would have to disregard 465 pages of the Judge's
13 findings after he was explicitly tasked with judging the
14 credibility and the demeanor of the witnesses. You
15 would also, if you found it on these circumstances, you
16 would have to convince an Appellate Court. There is no
17 direct evidence, and the circumstantial evidence is weak
18 and probably doesn't survive summary judgment in Federal
19 Court.

20 CHAIRWOMAN RAMIREZ: Counsel, let's turn back to
21 the evidence, if we may, and go back to the
22 so-called head fake issue. What are we to make of
23 documents in which McWane itself assesses its actions as
24 having stayed firm on pricing? I'm looking at Exhibit
25 1223, page 2, in which a McWane employee says, "For the

1 better part of 2008, held pricing to try to stabilize
2 market pricing." So, what are we to make of those types
3 of statements in McWane's own documents?

4 MR. OSTOYICH: I don't have them all memorized,
5 Chairwoman, but, look, you can find 50 more documents
6 that say the exact opposite, price is going to hell in a
7 handbasket. Picking one document and one line from a
8 witness who wasn't called live, I would submit,
9 obviously, that that's not very credible evidence,
10 certainly doesn't amount to substantial evidence.

11 The fact is the Judge heard all the live
12 testimony, the Judge heard the pricing testimony, the
13 Judge heard my expert, the Judge heard their expert, and
14 he reached the conclusions he reached. So, the case, I
15 hope -- I hope we're not in a situation where the case
16 depends on is there anything out there that supports the
17 Government's theory? Because if we are, that's not
18 substantial evidence, and it makes no sense, and it's
19 counter to mainstream antitrust economics and mainstream
20 antitrust law and wouldn't survive in Federal Court.

21 COMMISSIONER OHLHAUSEN: I wanted to ask a
22 question about exclusive dealing. So, you, in your
23 argument, relied pretty heavily on Star's sales levels
24 in 2010 and 2011 and its projections for 2012, but given
25 that the FTC's investigation got started in January of

1 2010, wouldn't the sales data after that kind of present
2 a different picture than before the FTC's investigation?

3 MR. OSTOYICH: I'm not sure what your question
4 is. So, the data -- by the way the data was --

5 COMMISSIONER OHLHAUSEN: I mean, was McWane
6 enforcing the full support requirement --

7 MR. OSTOYICH: Oh, the testimony was -- so the
8 letter came out on September 22nd, roughly, and
9 September 23rd or 24th -- I don't remember exactly --
10 Star --

11 COMMISSIONER OHLHAUSEN: Of 2009?

12 MR. OSTOYICH: -- 2009, Star sold its first
13 domestic fitting, and it continued to sell every week,
14 week after week after week, adding an average of two new
15 customers a week for the next year. And the graph that
16 our expert witness put in, which their expert agreed
17 with, of their share shows essentially steady growth
18 throughout. So, I'm not sure what you're asking about
19 the data, per se, but --

20 COMMISSIONER OHLHAUSEN: Well, what I'm asking
21 is the fact that you're relying that after -- that a lot
22 of this growth may have occurred after you probably --
23 McWane probably wasn't enforcing --

24 MR. OSTOYICH: All of the growth. All of the
25 growth occurred essentially after the letter came out,

1 because that's when --

2 COMMISSIONER OHLHAUSEN: I'm not asking after
3 the letter came out. What I'm asking is, after it's
4 likely to have stopped -- you said McWane ended any
5 exclusive dealing policy in January of 2010. So, what
6 I'm trying to discern is what was the effect of the
7 exclusive dealing policy while it was in effect.

8 MR. OSTOYICH: Yeah. I would say the exclusive
9 dealing policy was never in effect. There was a letter
10 that was sent that was one very --

11 COMMISSIONER OHLHAUSEN: But didn't a number of
12 distributors say that they felt that they couldn't buy
13 from Star without being cut off?

14 MR. OSTOYICH: No. No. Every single
15 distributor who testified in this case, live or via
16 deposition, bought domestic fittings from Star. Every
17 single one.

18 COMMISSIONER OHLHAUSEN: But under some of the
19 provisions that the letter allowed.

20 MR. OSTOYICH: There is no evidence of that.
21 That's the assertion by Complaint Counsel, but their
22 expert didn't study it.

23 COMMISSIONER OHLHAUSEN: So, all the
24 distributors ignored that letter is what you're saying.

25 MR. OSTOYICH: Well, exactly the --

1 COMMISSIONER BRILL: Counsel, are we supposed to
2 just ignore contemporaneous documentary evidence on this
3 point? I have an email, a directive from HD Supply in
4 which HD Supply, one of their managers directs employees
5 not to purchase from anyone other than McWane or Sigma.
6 So, are we to just ignore that?

7 MR. OSTOYICH: Well, the testimony at trial was
8 they did, in fact, purchase from Star.

9 CHAIRWOMAN RAMIREZ: Are you saying that I am to
10 ignore -- and I'll cite the exhibit -- Exhibit 552, page
11 1?

12 MR. OSTOYICH: Yes, that is --

13 CHAIRWOMAN RAMIREZ: So, this type of
14 contemporaneous documentary evidence, you are saying we
15 should just disregard it?

16 MR. OSTOYICH: No, not disregard it.

17 CHAIRWOMAN RAMIREZ: Okay. And what are we to
18 make of it?

19 MR. OSTOYICH: However, the test for foreclosure
20 was were they frozen out of a substantial portion of a
21 line of commerce.

22 CHAIRWOMAN RAMIREZ: That's a different point.

23 MR. OSTOYICH: In Federal Court, the test is 30
24 or 40 percent or more. HD Supply purchased. Did they
25 purchase as much as Star wanted? No. Did they buy less

1 than McWane wanted? No.

2 COMMISSIONER BRILL: That's on the assumption
3 that we're talking about a vertical --

4 MR. OSTOYICH: But 100-plus distributors, if
5 they saw the letter at all, said, "Okay, you have your
6 policy. I have mine. I'm buying from whoever I want."
7 And they did. Companies far smaller, companies
8 comparable in size. So, each distributor was free to
9 make its own decision however it wanted. If HD
10 Supply -- which was very satisfied with McWane, had a
11 long history with McWane -- if they chose to send that
12 email out, which by the way their branches still
13 bought -- not a lot, but they still bought -- how is
14 that exclusion?

15 COMMISSIONER OHLHAUSEN: Excuse me. I'm sorry.
16 So, your argument is it has to be complete foreclosure,
17 that there be no -- to have an anticompetitive effect,
18 it has to be 100 percent?

19 MR. OSTOYICH: No, but there is a test, right?
20 There's a test in Federal Court. There has got to be
21 substantial foreclosure.

22 COMMISSIONER OHLHAUSEN: And how would you
23 define substantial?

24 MR. OSTOYICH: Well, the test as defined by the
25 Federal Courts is 30 to 40 percent foreclosure, frozen

1 out.

2 COMMISSIONER OHLHAUSEN: And you don't think
3 that has happened.

4 MR. OSTOYICH: Well, we know it didn't occur. I
5 mean, their expert couldn't identify a single
6 distributor that wanted to buy but did not buy any. My
7 expert analyzed it and said that there are probably 5
8 percent of the overall distributors who only bought
9 domestic from McWane, but there are probably 4 percent
10 who only bought from Star. So, essentially -- obviously
11 they were free to, because the rest of them were buying
12 from one or both companies, whoever they wanted to. So
13 that, by definition, can't be substantial foreclosure.

14 Or thinking of it another way, as Commissioner
15 Rosch said in his dissent on summary judgment, they went
16 from zero to five to ten to -- the vice president of
17 sales testified, in the fall of 2012, they were on pace
18 for their best year yet.

19 COMMISSIONER OHLHAUSEN: But, Counselor, you
20 yourself or in the -- in the brief said that McWane
21 ended any exclusive dealing policy in January of 2010.

22 MR. OSTOYICH: The rebate policy changed. The
23 letter changed, and a different letter came out, right.

24 COMMISSIONER OHLHAUSEN: So, the growth after
25 the end of that policy may not be relevant to the effect

1 when the policy was in action.

2 MR. OSTOYICH: There is no separate evidence in
3 the record that I'm aware of what the growth was between
4 September 23rd and January 20th. I don't know the
5 answer to that.

6 COMMISSIONER OHLHAUSEN: I also wanted to --

7 MR. OSTOYICH: I can only tell you,
8 Commissioner, that the evidence is in the record that
9 two -- an average of two new customers per week were
10 signed up by Star throughout this period. We have email
11 records and internal documents and sales documents
12 showing that --

13 COMMISSIONER OHLHAUSEN: You said two new
14 customers a week, so there were over 100 new customers a year
15 for three years?

16 MR. OSTOYICH: The precise number is under seal,
17 but suffice it to say that, on average, between the fall
18 of 2009, when they first began selling domestic
19 fittings, and the fall of 2010, that first 12-month
20 period, they sold on average to more than two new
21 customers every single week.

22 COMMISSIONER WRIGHT: So, is it your position
23 that the foreclosure rate is zero or five or is it just
24 that it's less than 30 or 40?

25 MR. OSTOYICH: My position is it's not my burden

1 of proof. It's less than a measurable test, and no test
2 was put in by Complaint Counsel.

3 COMMISSIONER WRIGHT: I understand --

4 MR. OSTOYICH: I would say, as my expert said,
5 there was no foreclosure because, by definition, even
6 the 5 percent who only purchased from McWane, they were
7 free, as these others who purchased from Star showed,
8 they were free; they just chose not to. So, that's not
9 foreclosure.

10 COMMISSIONER WRIGHT: So, the answer to my
11 question is zero.

12 MR. OSTOYICH: The answer to your question is,
13 in my personal opinion, is zero, yes, but we didn't put
14 on evidence because it's not my burden of proof to put
15 on that evidence.

16 COMMISSIONER WRIGHT: Understood.

17 COMMISSIONER BRILL: What if we find that Sigma
18 was a substantial competitor? You seem to be
19 disagreeing that it was, which is why you're using the
20 vertical test as opposed to the horizontal test.

21 MR. OSTOYICH: The Judge disagreed. I'm not
22 disagreeing.

23 COMMISSIONER BRILL: Okay. So, let's go through
24 for a moment all the things that Sigma did in order to
25 try to get itself ready to enter the domestic market:

1 pursued a virtual manufacturing option for producing
2 domestic fittings; created a Sigma domestic production
3 plan and assembled high-level executives and engineers
4 responsible for investigating all aspects of domestic
5 fitting production; spent 50 to 75 thousand dollars;
6 identified critical mass of 730 configurations that
7 would need to be produced for domestic; had detailed
8 plans for identifying the top fittings. I could go on.
9 Visited attractive -- visited and received attractive
10 price quotes from foundries to help them.

11 These seem to me to be significant steps, but
12 probably most importantly, doesn't the evidence show
13 that McWane thought Sigma was going to enter? It
14 believed Sigma was going to be a competitor, and that's
15 why it entered into the agreement. And also, Sigma was
16 able to obtain better terms under the MDA after it made
17 clear that it was likely to enter.

18 Isn't that significant? Doesn't it redefine
19 that to be significant?

20 MR. OSTOYICH: You raise two questions, so let
21 me address one. The first is, does McWane's belief shed
22 any light on this? Really? I mean, if you asked five
23 people, five people would have told you they probably
24 had arrangements with us. In fact, we know they had
25 arrangements with us, because they testified under oath

1 at some points, it was highly likely, and at some
2 points, very unlikely.

3 COMMISSIONER BRILL: I'll quote Areeda, okay?
4 Areeda paragraph 2030(b) suggests that "in determining
5 whether a firm is a potential entrant, the inquiry
6 should include consideration of the incumbent's
7 perceptions." And then he goes on to say, "As long as
8 Alpha Company does not know what Beta Company's entry
9 plans are, Alpha must make its pricing and innovation
10 decisions subject to the threat of Beta's entry. But as
11 soon as Alpha and Beta have executed a market division
12 agreement, then Beta is no longer a threat and Alpha can
13 relax."

14 MR. OSTOYICH: So, let me answer the second part
15 of your question, which is, okay, there's a range of
16 opinions inside of McWane. What if they're all wrong?
17 What if the one who's the hard line, who thinks it's
18 highly likely, is wrong? It turns out he was. It turns
19 out he was. Because here was the evidence, because
20 Complaint Counsel took a snippet from one of the
21 depositions I took, not a live witness, because there
22 was no live witness on this that helped them.

23 Now, I want to say one other thing. The
24 evidence was so thin that Sigma was actually poised to
25 enter that the Complaint Counsel asked Dr. Schumann,

1 their expert, to just assume that they would have
2 entered. There were not enough facts --

3 COMMISSIONER BRILL: People do that with experts
4 all the time. Let me ask you this. Let me ask you --

5 MR. OSTOYICH: Can I --

6 COMMISSIONER BRILL: No, no, I want you to focus
7 on one other thing that I'm about to ask you, which is
8 the Bombardier case, which I'm sure you're well familiar
9 with, where the Court found that the potential -- that
10 the facts did meet the potential competitor standard
11 where you had a would-be rival had intent to enter, the
12 would-be rival had developed prototypes and the ability
13 to produce parts, the agreement between the competitor
14 and would-be rival replaced the plans to enter -- and
15 most importantly I think for this case -- the threat of
16 entry improved the agreement terms. Didn't that happen
17 here? Wasn't Sigma able to extract better terms under
18 the MDA because of the threat of entry?

19 MR. OSTOYICH: I'm actually not aware that Sigma
20 made any threat to extract better terms. The terms
21 improved because there were ongoing negotiations for
22 several months.

23 COMMISSIONER BRILL: The threat of entry was
24 perceived by McWane, and that's what brought about
25 better terms under the MDA. Isn't that what Bombardier

1 says?

2 MR. OSTOYICH: If we are going to have antitrust
3 provisions with perceptions, even if they are wrong,
4 that's somehow the basis for liability, I'd submit we're
5 in trouble. Now, let me go back to my --

6 COMMISSIONER BRILL: Because I went through a
7 lot of other things that Sigma did to get ready.

8 MR. OSTOYICH: Sigma undoubtedly took some steps
9 toward that. Complaint Counsel has an excerpt from
10 Mr. Minamyers' deposition. Mr. Minamyers was asked how
11 long it would take, and he said we could flip the
12 switch. And I said, wow, have you ever been to a
13 foundry? I mean, you can explore, you can talk to
14 people, and you can get quotes on things. Running a
15 foundry is not that easy. There are a lot of foundries
16 in this country that have gone out of business in the
17 last five years.

18 So I said, you said you could flip a switch.
19 Did you own a foundry? No. Do you have a contract with
20 a foundry, an actual contract in place? No. Well, how
21 many patterns do you think you need? About 800 or so.
22 Well, how many did you have? Two. I said, well, have
23 you actually used those patterns to cast a fitting?
24 Yeah, we had two sample fittings, which Mr. Pais
25 testified at trial, well, they were too embarrassed to

1 show at a trade show. I said, well, did you have core
2 boxes? Did you have finishing lines? Well, no, we
3 didn't have any of this. So, then I said, well, how
4 long would it take you to flip that switch before the
5 lights went on? Eighteen months to two years.

6 COMMISSIONER BRILL: But they could -- but they
7 could subcontract, and that's what they were doing.
8 They were looking at other foundries to produce for
9 them. Isn't the testimony clear about that?

10 MR. OSTOYICH: Well, I mean, if that day was two
11 years ago, why aren't they in, then?

12 COMMISSIONER BRILL: I don't think that's the
13 test. I don't think that's the test, is what's happened
14 now versus what was happening then. There's lots of
15 market conditions that have taken place between now and
16 then.

17 MR. OSTOYICH: That's the but for world, right?
18 It's a natural experiment. That's the but for world.

19 COMMISSIONER BRILL: No, that's not the but for
20 world.

21 MR. OSTOYICH: U.S. Pipe got out of this
22 business. Griffin Pipe got out of this business.
23 Backman Foundries, which makes domestic fittings in the
24 U.S., said anybody and their dog could see that this was
25 a bad business decision, to try to get into domestic

1 fittings. So, Sigma made a perfectly rational decision.
2 They had no capability to flipping that switch until two
3 years later, if they were lucky, and by the way, they
4 tried at the same time to get into domestic restraints,
5 a different product, far easier --

6 COMMISSIONER BRILL: How much ARRA money is
7 remaining?

8 MR. OSTOYICH: Excuse me?

9 COMMISSIONER BRILL: How much ARRA money is
10 remaining?

11 MR. OSTOYICH: How much --

12 COMMISSIONER BRILL: -- of the Recovery Act
13 money is remaining?

14 MR. OSTOYICH: Zero, as far as I know. There is
15 no evidence on that.

16 COMMISSIONER BRILL: Right. So, isn't that a
17 major change between what was going on in '08, '09
18 versus today?

19 MR. OSTOYICH: I assume it's a major change,
20 sure.

21 COMMISSIONER BRILL: It's a major change.

22 MR. OSTOYICH: Of course, which is another
23 reason why the preconditions for getting an injunction
24 require more.

25 COMMISSIONER OHLHAUSEN: I wanted to follow up

1 on the full support program and get an idea from you
2 what you think the procompetitive justifications were,
3 what were the benefits to consumers for that program?

4 MR. OSTOYICH: The procompetitive justifications
5 were simple. Everybody else in domestic production had
6 gotten out of this business. The ITC found a half dozen
7 years ago that cheap imports from China had decimated
8 domestic purchases. U.S. Pipe, Griffin Pipe. My
9 primary witness literally broke down on the stand,
10 couldn't control himself, and started sobbing
11 uncontrollably, because he had to recount when he had to
12 shut the Tyler facility down in Texas and lay everybody
13 off, okay?

14 The domestic industry is on the verge of
15 extinction. The union foundries, in the last decade,
16 are operating at 30 percent capacity, and in 2008,
17 before ARRA was passed, was at about 10,000 tons of
18 production, and the witness testimony was that if they
19 went to eight, seven-eight, they probably wouldn't
20 survive and they would probably shut down and lay a
21 bunch more people off. So, what they said was, here's a
22 pretty weak letter. We hope you'll support our foundry,
23 and if you don't, we might have to take other decisions,
24 short-term decisions.

25 COMMISSIONER OHLHAUSEN: You are saying that's

1 what they said to distributors?

2 MR. OSTOYICH: That's what the letter said and
3 the reason is --

4 COMMISSIONER OHLHAUSEN: It seemed a little more
5 forceful to me.

6 MR. OSTOYICH: Well, the letter wasn't
7 phrased --

8 COMMISSIONER OHLHAUSEN: But the distributors
9 didn't interpret it that way.

10 MR. OSTOYICH: A hundred plus distributors
11 apparently did, since they turned around and bought from
12 Star.

13 COMMISSIONER OHLHAUSEN: So, the procompetitive
14 justification for the customers --

15 MR. OSTOYICH: It's a much more efficient
16 foundry than Star, that's what the Judge found. If that
17 foundry disappears, customers are at the mercy of jobber
18 foundries, who are much more expensive, cost them
19 approximately 25 percent higher, according to the Judge,
20 and in part --

21 COMMISSIONER OHLHAUSEN: So -- but McWane
22 already had a 90 percent share at that point.

23 MR. OSTOYICH: It depends if there's a domestic
24 only market, its share had gone from 100 percent,
25 because it was the only one left, down to 90 percent or

1 less, yes.

2 COMMISSIONER OHLHAUSEN: Okay.

3 MR. OSTOYICH: Steady decline.

4 COMMISSIONER OHLHAUSEN: And so you think that
5 if they were able to utilize that foundry more, they
6 would have cost savings that would have been passed
7 along to --

8 MR. OSTOYICH: Well, if they were unable to
9 utilize the foundry, if they lost any material tonnage,
10 they would have gone out of business, just like they
11 shut the Tyler plant, just like Griffin Pipe went out,
12 just like U.S. Pipe went out, just like ACIPCO went out.
13 So, it's simple. They were a more efficient producer,
14 and the only way they were going to be able to stay in
15 business was to keep as much tonnage as they could.

16 COMMISSIONER WRIGHT: You cited Copperweld in
17 your brief for the proposition that shifting sales from
18 less efficient to more efficient firms is an efficiency
19 justification. Do you have authority in the -- instead
20 of saying exclusive dealing, I'll say vertical
21 monopolization context -- for that proposition?

22 MR. OSTOYICH: Not off the top of my head. I
23 mean, there are a whole lot of cases. I mean, the whole
24 efficient competitor thesis and bundled rebates were at
25 the entire premise of that, is it only hurts if an

1 efficient competitor was excluded. So, there's a lot of
2 case law in the context of exclusionary conduct.

3 Off the top of my head, I can't think of a
4 vertical case with that situation, but by definition, if
5 an inefficient competitor is -- does not -- enters but
6 does not do as well as it wants to, by definition,
7 consumers are not harmed. And bear in mind, what the
8 Judge said was the harm was Star didn't make as much
9 profit as it would like, it was unprofitable, and
10 therefore, they couldn't afford to buy a foundry.
11 Star's profits were not consumer-driven. So, the
12 question then becomes a daisy chain of inferences.
13 Well, if Star was more profitable, then maybe it would
14 have been able to buy a foundry, except that its primary
15 witness testified that --

16 COMMISSIONER WRIGHT: But that second line of
17 argument goes to whether or not Complaint Counsel has
18 established its prima facie burden --

19 MR. OSTOYICH: Correct.

20 COMMISSIONER WRIGHT: -- if one finds, for the
21 purpose of assumption in this case, that the burden has
22 been shifted, I mean, that line of argument is not a
23 procompetitive justification, or if it is, I'm asking if
24 you have got a cite for that proposition.

25 MR. OSTOYICH: No. Off the top of my head, I

1 don't have a case, but the justification is the obvious
2 one. Everybody else got out of this market because they
3 were getting killed and they were losing money and this
4 foundry was on the brink. That's what the testimony
5 was.

6 COMMISSIONER WRIGHT: There are occasional
7 obvious propositions that don't find their way into the
8 law, so if you find such a cite, I would like to have
9 it.

10 I have one question about expert testimony, but
11 Commissioner Ohlhausen --

12 COMMISSIONER OHLHAUSEN: No, go ahead.

13 COMMISSIONER WRIGHT: Can I ask one? Back to
14 the conspiracy world for a moment, Complaint Counsel's
15 expert offered -- you've mentioned in passing a couple
16 of -- a couple of times the evidence about whether
17 prices went up or down, right, and your expert has a
18 report in which the claim is, through its pricing
19 analysis, that prices went down during the relevant
20 period. Let's hold aside the questions that we've
21 talked about, about what the right time frame is for the
22 moment and take that analysis as given, that prices went
23 down.

24 Complaint Counsel's expert offers a number of
25 criticisms of your expert's analysis, measurement error,

1 we don't have any regressions that are controlling for
2 any of the supply or demand factors, and so it makes it
3 very difficult to isolate or to make credibly the claim
4 that it is the conduct at issue that caused the price
5 effect we're talking about. And third, no hypothesis
6 testing.

7 What weight -- well, let me ask it more
8 open-ended. Do you have responses to those criticisms,
9 and if yes -- and I presume you do -- at the end of the
10 day, what weight should I give the testimony with
11 respect to Dr. Normann's pricing analysis? And let's
12 also assume for the purpose of the answer I understand
13 whose burden is whose.

14 MR. OSTOYICH: Yeah. So, again, the Judge
15 heard -- and, obviously, my expert disagreed and had his
16 explanation for why his testing was perfectly robust,
17 right? The Judge was here. He heard it all. He heard
18 Dr. Schumann. He watched his performance on the stand.
19 He saw my expert. He said my expert had substantial,
20 reliable, probative, credible evidence.

21 COMMISSIONER WRIGHT: But he didn't watch a
22 regression, right? I've done regressions. I've never
23 watched one on the stand.

24 MR. OSTOYICH: No, and he didn't have a
25 regression analysis, depending on what test you want to

1 use.

2 COMMISSIONER WRIGHT: But do you agree that if
3 we're trying to isolate the conduct, the impact of X
4 upon Y, and we don't control for other stuff that
5 impacts Y, we're in trouble?

6 MR. OSTOYICH: No. It depends on the test.

7 COMMISSIONER WRIGHT: Let's say the impact of an
8 alleged conspiracy on prices.

9 MR. OSTOYICH: The hypothesis was that invoice
10 prices went up -- well, two hypotheses. One is that
11 published prices went up in agreement, and the other was
12 that invoice prices went up, okay, up. Increase is the
13 word in the complaint. So, those both were tested by
14 the expert. Did he do a regression analysis? No, he
15 didn't have to, because it was obvious on the face of
16 just looking at the data that they were going in the
17 opposite direction. So, you don't need a regression
18 analysis --

19 COMMISSIONER WRIGHT: Did he do hypothesis
20 testing? You've mentioned two hypotheses.

21 MR. OSTOYICH: He did. Depending on which test,
22 yes, he did.

23 COMMISSIONER WRIGHT: Is there statistical
24 significance of those hypothesis tests in his report?

25 MR. OSTOYICH: I believe in both cases -- I

1 don't remember specifically. I believe there was. I
2 don't remember off the top of my head.

3 COMMISSIONER WRIGHT: Okay. Again, I think the
4 answer to the question is no.

5 MR. OSTOYICH: The answer to the question is I
6 don't remember. All I know is the Judge was here and he
7 heard it and he reached the conclusion he did, that it
8 was substantially reliable, credible, probative.

9 COMMISSIONER WRIGHT: All right. So, then the
10 answer, to get to the second part of the question, is
11 that I should give weight to the analysis that prices go
12 down if I believe -- right? So, we have two different
13 results using your expert's analysis: one, if we believe
14 your version of the conspiracy period, your expert's
15 version of the conspiracy period, prices went down, and
16 if I believe Complaint Counsel's and I credit your
17 expert's evidence, then they went up. Are you
18 comfortable with that conclusion?

19 MR. OSTOYICH: Well, I think that's an odd
20 situation, for the Government's expert to criticize the
21 data and for the Government to say we would actually
22 like to take a little slice of the data and disregard my
23 own expert's criticism. So, I'm not sure that that
24 follows.

25 COMMISSIONER WRIGHT: I don't think that that

1 answers the question. If we take your expert's analysis
2 and we do it two ways, one with the time period for
3 conspiracy that you think is correct and another with
4 the time period for conspiracy that Complaint Counsel
5 thinks is correct, and I'm not -- and I believe the
6 analysis, I say no regression, no hypothesis testing,
7 that's fine, and I believe it -- I'm stuck in the
8 following situation:

9 If I believe Complaint Counsel's
10 characterization of the time period, then I think where
11 you're taking me is that I should credit the analysis
12 that's suggesting that the pricing evidence went up; if
13 I believe yours, then I should say the evidence is
14 credible and prices went down.

15 MR. OSTOYICH: Yeah, so -- right. The data is
16 what it is. So, the data he believed, he testified, and
17 the Judge found was credible and reliable. The precise
18 numbers that Complaint Counsel has said, I don't
19 actually remember those coming in at trial. I know that
20 that's a -- I think that that's an inference of what
21 they say was in the data, but I don't remember that off
22 the top of my head. If the data works -- which it did,
23 the data is what it is -- I would say, again, I mean,
24 the mere fact that prices go up isn't sufficient to
25 infer a conspiracy, particularly when you see a 50

1 percent increase in raw materials. So, even if you pick
2 a truncated time period, that doesn't prove anything
3 other than you're looking at a narrow slice.

4 COMMISSIONER WRIGHT: There's a slight irony in
5 the position here. What you're telling me is that if
6 prices go up, then I can't infer conspiracy because I
7 have not controlled for other factors, but I should
8 credit your witness' testimony despite failing to
9 control for other factors.

10 MR. OSTOYICH: No, because if the prices move in
11 the opposite direction of the hypothesis, which is where
12 they moved, by definition, they disproved the
13 hypothesis. I think it's pretty straightforward. You
14 don't need a regression analysis to test that
15 proposition. If somebody says the street light is red,
16 and you look at it and say, no, it's green, you don't
17 need to do a test for that. It's obvious.

18 COMMISSIONER WRIGHT: I think my econometrics
19 textbook disagrees, but I'll stop there.

20 CHAIRWOMAN RAMIREZ: All right. Thank you,
21 Counsel. We have eaten up all of your time, but we will
22 give you time for rebuttal.

23 Mr. Hassi, you may begin.

24 MR. HASSI: Thank you.

25 In 2007, the fittings market, which is

1 coincident with the housing starts market, went down.
2 Volume went down, prices went down, and project pricing
3 went up. And that volume continued to go down through
4 the recession. So, in 2008, fittings were down year
5 over year over 2007, and in 2009, they were down again.

6 But in 2008, McWane and the other fittings
7 suppliers had a bright shining moment. In 2008, their
8 prices went up, they managed to put out two price
9 increases, and those price increases stuck. They
10 managed to reduce project pricing, and their profits
11 went up. And I would ask you, rather than looking at
12 the data and the experts' analysis of the data, to look
13 at their ordinary course documents.

14 If you look at McWane's variance analysis, in
15 2008, for the six months, volume was down 24 percent,
16 and profits were up by 5 million. Why? Because in
17 2007, in late 2007, McWane put Mr. Tatman in charge of
18 the fittings division, and he came up with a plan, and
19 it's a written plan -- and you have seen it, it's in
20 CX-627 -- and he put that plan into place.

21 That plan required communication -- it says it
22 right at the top, "Desired Message to the Market &
23 Competitors" -- and he communicated with his
24 competitors, and he communicated that plan. And over
25 the course of 2008, McWane and its competitors carried

1 out that plan in conformity with it as it was set out by
2 Mr. Tatman.

3 Now, the Judge -- first, there was a lot of
4 discussion by Mr. Ostoyich about this Court and what the
5 Judge found. For the most part, the Judge's factual
6 findings are just fine. It's his failure to make
7 inferences that we're concerned with. Judge Chappell
8 found no plus factors, no reasonable inferences. He
9 made not a single inference.

10 And, Terri, if you could bring up slide -- oh, I
11 have got to -- I'm sorry. It's a touch screen. If you
12 could bring up slide 2.

13 There were -- Judge Chappell ignored -- well, he
14 analyzed but didn't make any inferences from ordinary
15 course documents. So, this is an email internal to
16 Sigma in which Mr. Rona of Sigma recounts a conversation
17 with Rick Tatman of McWane. Now, Mr. Tatman
18 testified -- and counsel would like you to credit Mr.
19 Tatman -- he testified that he never talked prices on
20 the phone with his competitors, and yet this is a
21 contemporaneous document in which Mr. Rona records a
22 conversation with one of his competitors, Mr. Tatman,
23 and Tatman says -- excuse me, Rona says about Tatman,
24 "Rick" -- that's Mr. Tatman -- "was upset by the numbers
25 in Florida and California based on what he has seen from

1 us and Star." Mr. Tatman is complaining not only to
2 Sigma about Sigma's prices; he's complaining to Sigma
3 about Star's prices.

4 Now, counsel would have you believe -- and this
5 is at page 38 of your brief -- that this is the ordinary
6 course of their buy-sell range. Mr. Rona testified
7 otherwise, and Judge Chappell's factual finding -- and
8 this is 926 of his factual findings -- was otherwise,
9 that this was not in the ordinary course of a buy-sell
10 arrangement. This was Mr. Tatman and Mr. Rona talking
11 about the prevailing prices in the market and talking
12 about cheating, talking about Sigma's cheating on the
13 agreement, and talking about Sigma and Star cheating on
14 the agreement.

15 Now, this is one piece of evidence in isolation,
16 but as Commissioner Brill pointed out, Judge Chappell
17 made a second mistake, and that second mistake was not
18 to look at the evidence holistically, not to look at it
19 all together.

20 Terri, if you could bring up slide 19, please.

21 Now, there was discussion -- there was a lot of
22 discussion of high-level communications, and
23 Mr. Ostoyich talked about the four phone calls between
24 Mr. Tatman and Mr. Rybacki. To be clear, in the record,
25 there are additional phones calls in the record between

1 these two individuals. These are four in a particularly
2 suspicious period of time. And in isolation, sure, if
3 you just look at these four phone calls and you look at
4 the fact that neither Mr. Rybacki or Mr. Tatman remember
5 what was being discussed, maybe you make an inference;
6 maybe you don't. They don't remember what was
7 discussed.

8 Now, Mr. Rybacki testified that he has no
9 legitimate business reason for speaking with his
10 competitors. Mr. Rybacki, by the way, sets prices at
11 Sigma. Mr. Tatman sets prices at McWane. No legitimate
12 reason for talking to Mr. Tatman. Now, counsel tells
13 you that maybe it was to call him and wish him happy
14 holidays and welcome him to the business.

15 And, Terri, if you could bring up the rest of
16 the bullets and put it in context.

17 So, let's put this in context and look at the
18 evidence a little more holistically. In the late fall
19 of 2007, Sigma announced a price increase and Star
20 indicated it would follow. On September 19th,
21 Mr. Rybacki of Sigma and Mr. McCutcheon, the head of
22 Star, talk. And on December 20th, Sigma postpones its
23 price increase and puts out a letter to the market in
24 which it bashes McWane. And "bash" isn't my word; bash
25 is Mr. Tatman's word, and that's in CX-627.

1 It's also in his written plan. He refers to the
2 fact that Sigma's bashing McWane publicly over their
3 failure to follow on price. That same day, Mr. Rybacki
4 has a call with someone other than Mr. Tatman at McWane,
5 and a few days later, Mr. Tatman and Mr. Rybacki
6 exchange phone calls, and the first of those calls is
7 from Mr. Rybacki to Mr. Tatman's cell phone. How he got
8 Mr. Tatman's cell phone to welcome him to the market and
9 to wish him happy holidays at a time when he was
10 publicly bashing McWane, we don't know the answer to
11 that, because they don't remember what was discussed in
12 the call.

13 But during this period of time, Mr. Tatman was
14 developing a plan, and you have Judge Chappell's
15 finding -- and this is finding 617 -- that he was
16 developing a plan to stabilize prices and that plan
17 required proper communication and actions. And lo and
18 behold, several days later, he is on the phone with one
19 of his rivals, Mr. Rybacki. On the 25th, he emails that
20 plan to his bosses, and his bosses approved of the plan.
21 His bosses tell him, "We like the plan; it prevents
22 cheating and fire sales."

23 And then Mr. Tatman later, on the 6th of
24 January -- excuse me, on the 3rd of January, he has
25 another call with Mr. Rybacki and another call again on

1 the 4th. Then on the 6th of January, he emails the
2 document, 627, which is the "Desired Message to Market &
3 Competitors," and that document has a copy of McWane's
4 January 11th price increase letter. And Mr. Tatman
5 testified that that January price increase letter was
6 the result of this planning process that's set out in
7 CX-627. Indeed, there were drafts of that letter
8 appended to CX-627.

9 And by the way, if you look at those drafts --
10 Commissioner, you asked a question about contemporaneous
11 evidence and whether it was a head fake or not. I would
12 encourage you to look at the drafts that are in CX-627
13 and the one that is dated January 8th. And I have a
14 copy of that which we can pull up in a second. They
15 indicate quite clearly that it was McWane's intent not
16 to project price. So, McWane sends out a letter to the
17 market, which Mr. Tatman admits had a signal in it for
18 Sigma and Star, and soon thereafter, Sigma and Star
19 followed.

20 And they follow not just what's in the letter.
21 The letter talks about not project pricing.

22 And if you could bring up, Terri, slide number
23 8.

24 Now, this is a draft of that letter that
25 Mr. Tatman sent to Mr. Jansen and others on January 8th,

1 so just days before the final letter went out, and he's
2 quite clear. The draft of the letter says, "It is not
3 our intention to provide job pricing." So, how the
4 letter became a head fake, it first became a head fake
5 when Mr. Tatman was on the stand. It was never a head
6 fake before that. Not in the contemporaneous documents,
7 not in his deposition, never before that.

8 Now, Star and Sigma followed, and they didn't
9 just follow, as I said, what was in the letter and the
10 price increase and the decision not to job price, but
11 they also -- and this is most evident with Star -- they
12 centralized pricing.

13 COMMISSIONER OHLHAUSEN: Counsel, before you
14 turn away from the following, whether Sigma
15 and Star followed, in an oligopolistic market, I mean,
16 to have sort of a follow-the-leader kind of
17 situation, is that unusual? Is that unlawful?
18 What makes that unlawful compared to
19 the pricing and that kind of stuff?

20 MR. HASSI: What makes it unlawful, Commissioner
21 Ohlhausen, is the communications. In other words, it's
22 not unusual to have follow-the-leader pricing in an
23 oligopoly, and if McWane had simply done this without
24 communicating with its rivals, perhaps it would have
25 been legal. We don't like it, but it's legal.

1 But when you communicate, you cross that line
2 into collusion. In other words, you're making a
3 conscious commitment to a common scheme. You're asking
4 someone to do something. And that's what Mr. Tatman was
5 asking his rivals to do. And one of the things he asked
6 his rivals to do was to pull back price authority.

7 COMMISSIONER OHLHAUSEN: And you say that's from
8 the calls. That's not from the letter that went out in
9 January; that's the -- that's --

10 MR. HASSI: How it was all communicated, we
11 don't know. Some of it was in the letter, and Mr.
12 Tatman admitted some of it was in the letter, but Star's
13 actions against its interests and Star's decision to
14 pull back pricing authority and centralize it in the
15 person of Mr. Minamyer, that is technically not in the
16 January 11th letter.

17 Now, there were other conversations and, indeed,
18 Mr. McCutcheon testified -- he's the head of Star. He
19 testified to a meeting that he had with Mr. Pais early
20 in 2008, and Mr. Pais said to him, he said that we need
21 to stay within a couple of multiplier points of McWane.
22 If we do that, they'll be happy, we'll be happy, and it
23 will all go -- you know, we will all be happy. I'm
24 paraphrasing, but we will sort of all be happy in the
25 market after that.

1 COMMISSIONER OHLHAUSEN: And that was a
2 conversation between Sigma and Star?

3 MR. HASSI: Yes, it was. It was a conversation
4 between Sigma and Star, but it shows that Sigma had an
5 understanding of this plan, Mr. Tatman's plan,
6 Mr. Tatman's plan -- he testified to this a half dozen
7 times on the stand -- that he wanted to compress prices.
8 He didn't necessarily want to make project pricing go
9 away entirely, but his sales staff wasn't as good as the
10 other two, and so he wanted to get the pricing close to
11 -- close to published. If it was close to published,
12 that was good enough. As he said, if it's close to
13 that, I can shoot at it. I mean, he wanted something he
14 could shoot at.

15 CHAIRWOMAN RAMIREZ: Counsel, I have a question
16 with regard to what Star did in reference to project
17 pricing. The Administrative Law Judge points to facts
18 suggesting that Star's project pricing was actually
19 higher in February '08 and even as far as April of '08
20 than it had been in '07. So, how do you -- is that a
21 correct interpretation of the evidence? And if it is,
22 how do you account for that?

23 MR. HASSI: If I know which document the ALJ is
24 referring to, Star, in the course of this litigation,
25 prepared a document where they went back through their

1 project pricing log -- McWane was showing you their
2 project pricing log, which, by the way, McWane initiated
3 for the first time in 2008, at the same time when
4 Mr. Tatman was coming up with his plan. But Star
5 created for this litigation -- they sort of went through
6 their project pricing log and came up with the number of
7 project prices offered in each of the months in, I
8 believe, 2007, 2008, at least partly into 2009.

9 And in early 2008, I believe they did show an
10 increase, and then they show a dramatic drop-off after
11 that. But it's important to remember that project
12 pricing -- there are a couple things. One, Star
13 testified -- and there was lengthy cross examination on
14 that issue -- that that log included project prices in
15 Canada, it included project prices on restraints and
16 other products. So, they didn't -- when they did --
17 they did sort of a quick and dirty count of all of the
18 things on their log. They didn't restrict it to the
19 U.S. market, they didn't restrict it just to fittings,
20 and it also included project prices that had been agreed
21 to before the March 1st cut-off but continued after
22 that.

23 CHAIRWOMAN RAMIREZ: So, in your view, that
24 doesn't undermine your theory that this conspiracy
25 started in January?

1 MR. HASSI: No. And to be clear about this, the
2 conspiracy started in January in the sense that the
3 communications and the acceptance by Star and Sigma took
4 place at that point in time. If you look at what they
5 agreed to do, they -- and this comes out also in their
6 public letters and in their communications -- is that
7 they could still offer project prices up until March
8 1st. After March 1st, there would be no more project
9 pricing.

10 So, while the conspiracy started in January, it
11 frankly didn't become effective as to project pricing
12 until March. And that's why with this issue that we
13 talked about earlier about the timing of when you should
14 look at the pricing, it's not -- you don't start in
15 January.

16 CHAIRWOMAN RAMIREZ: Understood.

17 MR. HASSI: You start in February.

18 CHAIRWOMAN RAMIREZ: It still does appear that
19 project pricing in April of '08 is still higher
20 than it had been a year prior. So, I want to make sure
21 that I understand how you think that fits into your
22 allegations.

23 MR. HASSI: And I think that's correct. I think
24 there are some questions about how useful those numbers
25 are, but at the end of the day, Star could agree to

1 prices up to March -- prior to March 1st, that they
2 might protect those projects for a period of time going
3 forward, but they weren't to agree to any more project
4 prices. In other words, after March 1st, if a bid came
5 in, they were no longer supposed to project price.

6 And, indeed, there was some cheating. There is
7 a call -- another call between Mr. Tatman and
8 Mr. Rona -- and, again, this is one Mr. Tatman doesn't
9 remember -- but on March 8th, Mr. Tatman called
10 Mr. Rona, this time in the context of the buy-sell
11 agreement, but he says prices in the market are being
12 compromised, and he told Sigma, we hope you do your
13 part. In other words, don't you be the one compromising
14 prices. Don't you be the one offering project prices
15 now after we've agreed that you shouldn't.

16 COMMISSIONER OHLHAUSEN: Actually I wanted to
17 ask a question about project pricing in general. One of
18 the criticisms offered of the Respondent's expert is
19 that they only looked at invoice pricing; that would
20 include project pricing, but it didn't include rebates
21 and other things.

22 So, my question is, if there are all these other
23 factors that could affect price, how effective is it to
24 come to an agreement just on project pricing, when
25 there's all these other methods of, sort of

1 cheating or reducing prices that weren't part of the
2 actual conspiracy?

3 MR. HASSI: I'll answer that in three ways.

4 First of all, the testimony was project pricing was the
5 primary form of competition. These three play off the
6 same music sheet. In other words, when they put out
7 published prices, the published prices are the same and
8 the distributors testified they want the published
9 prices to be the same. So, this discounting to project
10 pricing is the primary form of competition between these
11 three.

12 Second, the business documents demonstrate that
13 it was effective. In other words, again, Mr. Tatman
14 told his bosses at the end of the first quarter that it
15 appeared project pricing has died down significantly,
16 and as I mentioned earlier, McWane's documents show they
17 made more money during those first six months of the
18 year. Their profits were up, their returns were up, and
19 2008 was a good year for them.

20 And, finally, legally the issue is whether the
21 agreement was effective. It's was there an agreement
22 agreeing on any form of price -- and this is Catalano
23 vs. Target -- on any form of price is sufficient to be
24 per se illegal.

25 COMMISSIONER OHLHAUSEN: And just to close the

1 loop on this, so if there was evidence that looked just
2 at the effect on project pricing during the alleged
3 conspiracy period, that alone would be pertinent to
4 whether there was an agreement? I mean, that doesn't
5 make it deficient --

6 MR. HASSI: Yes. And focusing just on project
7 pricing, an agreement simply to curtail project prices
8 should be per se illegal, and looking just at project
9 prices should be an effective way of viewing the
10 effectiveness of this agreement, if you will.

11 COMMISSIONER OHLHAUSEN: Thank you.

12 COMMISSIONER WRIGHT: But you do agree, in light
13 of your expert's testimony criticizing the lack of
14 controls -- I think you've hinted at this, but just to
15 confirm -- that you don't think that we should give
16 weight to the data either to show that prices went down
17 or that they went up.

18 MR. HASSI: I do agree. I think what the
19 Commission should look at is the ordinary course
20 documents from the companies. There are a lot of
21 problems with the data. I won't go through them all
22 here. It's not just the lack of control, but there were
23 significant problems with the data itself.

24 Indeed -- I just said I wouldn't go into it and
25 now I am. But the biggest problem -- and I think this

1 is very important -- is that when we got the data, we
2 asked McWane, through counsel, in January of 2008, fully
3 20 percent of the prices that are recorded in that data
4 are above the published price. And we said, who pays
5 above published price? They said nobody. It's got to
6 be an error. And then they used the data anyway.

7 And by the way, their expert never asked a
8 question of McWane about that. We asked the question.
9 We decided not to use the data. Their expert just went
10 ahead and used the data as best he could.

11 Now, to go back to Star for a minute, Star is
12 helpful also in sort of book-ending this conspiracy, and
13 Star's actions against interests are an important lens
14 through which to look at this and an important plus
15 factor. Star had a strategy for project pricing. Star
16 was the last of these three companies to enter the
17 market. It was the smallest of these three companies.
18 And Star had made it a cornerstone of its strategy to
19 project price.

20 On January 22nd, Star sent out an email to its
21 entire sales force saying we're not going to project
22 price anymore.

23 And if you could bring up slide number -- yeah,
24 thank you -- 11, Terri.

25 So, this is Mr. Minamyers' email -- he's the

1 head of sales for Star -- and he's telling the entire
2 sales force, "Our goal is to take a price increase and
3 stop project pricing."

4 And if you could go to the next slide, please,
5 Terri.

6 And then he said, "All project pricing has to go
7 through me." This is Mr. Minamyer centralizing pricing
8 in himself, just as Mr. Tatman indicated was a key to
9 success in CX-627. He says, "One of the keys to success
10 is for these two to centralize pricing." And that's
11 exactly what Mr. Minamyer does here. And why does he do
12 it?

13 Terri, if you could go to the next slide.

14 He didn't do it because it was good for Star.
15 He did it because it was good for the industry. He
16 tells his territory managers and the division
17 managers -- that's the three-level sales force that he
18 had -- he says, "Train them this is what is best for the
19 industry and that we need to be part of the effort to
20 help our industry. We will not be part of damaging the
21 industry due to lack of discipline."

22 He goes on to say (as read): "You need to know
23 that we are strong in revenue and profit. We will have
24 no problems weathering any price wars, even if they are
25 prolonged. What we are doing is right for the industry.

1 So, don't think we need the price increases, as that is
2 not the case. A price increase will be good for us on
3 the short and long term profit situation but are not
4 vital to our strength. The truth is that we would come
5 out of a price war stronger than ever and with a bigger
6 market share, but we don't think the industry needs to
7 do that right now."

8 He's doing what's right for the industry. Star
9 is doing not what's right for itself, but what's right
10 for the industry. And Mr. Minamyer also testified --
11 I'm sorry, do you have a question?

12 COMMISSIONER OHLHAUSEN: I do, actually.

13 MR. HASSI: Let me just finish. What he also
14 testified to was he understood they couldn't do this
15 alone. All three companies agreed that if they stopped
16 project pricing alone, they would get slaughtered in the
17 market. Their competitors would eat their lunch,
18 because project pricing was the primary form of
19 competition.

20 I'm sorry, Commissioner.

21 COMMISSIONER OHLHAUSEN: That was my question.
22 Did Star actually stop project pricing, regardless of
23 whatever they said about doing that, given that it looks
24 like the numbers in the project pricing that they did in
25 2007 and 2008 don't look that different, particularly

1 when you factor in the economic factors -- conditions in
2 2008?

3 MR. HASSI: Star did a couple of things. Number
4 one, in addition to telling its sales force that they
5 need to stop project pricing, Star told its customers it
6 was stopping project pricing.

7 For example -- if you could bring up slide 16,
8 Terri -- TDG is a buying group that represents a number
9 of the regional distributors, and here is Mr. Minamyers'
10 email to TDG. And he says, "Our plan is to adjust
11 multipliers to be on an even playing field on up front
12 pricing with our competitors." And he goes on to say
13 "no more project pricing after March 1st." He sent a
14 similar message to other customers, including his
15 largest customer, HD Supply, said we're not going to
16 offer you project pricing anymore. So, clearly, he
17 intended to stop project pricing.

18 Now, the policy that he put in place was if you
19 see somebody else project pricing, go ahead and match it
20 and get the sale, but we're not going to initiate it.
21 Now, if all three do that, if nobody initiates it, there
22 is no project pricing. So, to the extent that Star saw
23 somebody cheating, they had the ability to respond, but
24 they -- and remember, Star was the maverick here, Star
25 was the one that initiated project pricing -- agreed not

1 to initiate it. They told their sales force not to
2 initiate it, and they told their customers that they
3 weren't going to do it.

4 So, we think that that's powerful evidence. I
5 would agree that the evidence that Star created in the
6 process of this litigation shows -- it shows a decrease
7 in project pricing; it doesn't show it going away.

8 COMMISSIONER OHLHAUSEN: Because it kind of
9 bounces around, right? If you do comparisons from '07
10 to '08, some months are higher, some months are lower?

11 MR. HASSI: Yes, it bounces around. It's not --
12 we don't think its definitive of anything. If we had a
13 definitive measure, believe me, we would have presented
14 it, but we think the best evidence, again, is what the
15 company was telling its sales force, what the company
16 was telling its customers.

17 And if you could go to slide 29, Terri.

18 If you look at the evidence when they
19 essentially stopped -- now, this is a November 25th,
20 2008, email from Mr. Minamyer, and he testified at his
21 deposition, he said, "This was us taking the gloves
22 off." And he says to his entire sales force, "We have
23 all been extremely diligent in protecting the stability
24 of our market pricing. So much so that we have earned a
25 reputation of being the best at protecting the market

1 pricing and at times, to the extent that some think us
2 inflexible in that area." And he suggests that, in the
3 next paragraph, that maybe the others weren't really
4 trying as hard to protect project pricing.

5 And at this point in November of 2008, he says
6 we are going to take the gloves off and we are going
7 to -- I am going to loosen you to go back out and
8 project price again, and he allows them to do it. And
9 he tells them to do it quietly as a recognition of we're
10 cheating; let's not get caught cheating, but let's go
11 out and grab market share under the -- grab market share
12 and cheat under the agreement. And we think that that's
13 powerful evidence that Star, in fact, did this.

14 COMMISSIONER BRILL: Mr. Hassi, I wanted to ask
15 you a little bit about this standard that you are urging
16 upon us, this Commission, in terms of whether or not,
17 you know, you're asking us to -- well, what I want you
18 to do is discuss the Williamson Oil standard and whether
19 or not this evidence meets that, or are you urging a
20 standard along the lines of what Page and Kaplow talk
21 about in terms of a much lower burden to show an
22 agreement, or is it something in between?

23 And I'm picking up on the reference in your
24 brief that says, "The presence of intercompetitor
25 communications showing intentions, as well as the firm's

1 reliance on their rivals' actions, is what distinguishes
2 concerted action here from simple interdependence." So,
3 are you telling us that -- I mean, was there an
4 agreement that we can find through the various
5 inferences, or do we not need to find that? And if
6 you're taking the latter position, we don't actually
7 need to find that, where do we fit in the Williamson
8 scenario? If you understand my question.

9 MR. HASSI: I think I do, but I think that we've
10 proved that there was an agreement. We've proved it
11 through plus factors, not through direct evidence, but
12 in circumstantial evidence cases, what courts and
13 finders of fact, including Commissioners, are asked to
14 do is to make reasonable inferences. And we think the
15 reasonable inferences here, if you look at those plus
16 factors and you make reasonable inferences, the most
17 reasonable inference is that there was an agreement.

18 Why is Mr. Tatman complaining to his competitor
19 about not only Sigma's prices, but also Star's prices,
20 if there isn't an underlying agreement? What's the most
21 reasonable inference to make from that? Why are they
22 talking at a time where they're coming up with a written
23 plan to stabilize prices in the market? And why do then
24 things happen in conformity with that? There are too
25 many coincidences here that you can't make a single

1 inference.

2 COMMISSIONER BRILL: So, in terms of the
3 Williamson Oil -- excuse me -- Court's caution about how
4 many inferences courts should make, you know, what's
5 your response to that?

6 MR. HASSI: My response to that is that there
7 are 13 plus factors, 13 plus factors here, and you don't
8 have to find all of them, but plus factors, we believe,
9 under the traditional standard, is parallel actions plus
10 plus factors, and some of those plus factors, there's --
11 you mentioned former Chairman Kovacic's super plus
12 factors. Some plus factors get greater weight than
13 others. We understand that. It's not enough just to
14 demonstrate that it's an oligopoly. It's not enough to
15 demonstrate that there is just parallel actions. You
16 have to demonstrate more. We think we have done that.
17 We think we --

18 COMMISSIONER BRILL: So, just to clarify, you
19 are not relying on the Page/Kaplow theory of needing
20 less?

21 MR. HASSI: I think it's a helpful way to look
22 at things, and certainly what Professor Page says about
23 communications we think is very illustrative and
24 important. But, no, we're relying on traditional plus
25 factors.

1 I'd like to take a couple of minutes to talk
2 about DIFRA, which hasn't been mentioned here, in both a
3 facilitative practice as well as a stand-alone count.
4 It facilitated the conspiracy. It's important to
5 recognize that DIFRA had been kicking around for years
6 in this industry, and what finally got it going was soon
7 after this price increase went into place, on February
8 7th -- and this is not one of the four calls, but it
9 demonstrates that there are more than four calls between
10 Mr. Rybacki and Mr. Tatman -- Mr. Rybacki and Mr. Tatman
11 had a phone call and they talked about getting DIFRA
12 started. And soon thereafter, they managed to get DIFRA
13 started.

14 And what DIFRA allowed them to do -- and this is
15 important in a price-fixing conspiracy -- is to monitor
16 what's happening, to monitor cheating. They got
17 real-time information about each other's market shares,
18 and they used that information for both monitoring the
19 conspiracy, as well as separately for their pricing.
20 So, DIFRA was both a plus factor under Count Number 1,
21 but separately, under the rule of reason, DIFRA should
22 be an illegal information exchange under the rule of
23 reason.

24 CHAIRWOMAN RAMIREZ: Counsel, I would like to
25 focus on the DIFRA information exchange as a stand-alone

1 claim. This is, after all, historical, aggregated,
2 nonprice information. As far as I'm aware, there is no
3 authority that holds that that type of information
4 exchange is an antitrust violation. So, let me ask you
5 this.

6 If the Commission were to affirm the ALJ's
7 findings with respect to the conspiracy claims, in your
8 view, tell me why the DIFRA information exchange
9 should constitute a violation.

10 MR. HASSI: Certainly. Information exchanges
11 can be procompetitive, they can be anticompetitive.
12 Here, this information exchange had three real
13 participants. U.S. Pipe was added because of antitrust
14 concerns, but U.S. Pipe wasn't making fittings anymore.
15 It was buying from Sigma and reselling, and even under
16 the DIFRA bylaws, U.S. Pipe didn't fit as a member.
17 They had to sort of create an exception to get a fourth
18 participant. There were three real participants. Those
19 participants represent 90 percent share of the market.
20 So, they have a great deal of market power between the
21 three of them.

22 Number two, it was -- I wouldn't call it
23 historical information. I would call it current,
24 competitively sensitive information. I mean, remember,
25 Star didn't want to join DIFRA because it didn't want to

1 share its information with the others, and ultimately it
2 was persuaded to join DIFRA, but the data that they were
3 getting was in some cases 17 days old. In other words,
4 the first DIFRA report that they got on June 17th had --
5 maybe it's 18 days -- but had May 31st data in it. They
6 got -- on June 17th, they got something from the prior
7 month.

8 Now, yes, they also got 2006 and 2007, but
9 Mr. Tatman made sure that every month, they got
10 something out very, very quickly, and they got the prior
11 month's data. So, this wasn't old data. This was
12 relatively fresh data. And the proof here really is in
13 the pudding in terms of the way they were using the
14 data. I couldn't have put it better than Mr. Pais did
15 in one of his contemporaneous documents.

16 Terri, if you could bring up slide 33, please.

17 What I'm about to show is Mr. Pais' answers to
18 his banker. Ares Capital was a lender that had loaned
19 money to Sigma, and here he is explaining how the DIFRA
20 data was used within Sigma. And he says, "This is where
21 the monthly market size data produced by DIFRA, an
22 industry association that Sigma helped to form, with 4
23 supplier members from Fittings (one, U.S. Pipe, actually
24 is not a producer anymore, but a small player buying
25 almost all their needs from Sigma) helps maintain the

1 pricing discipline, as the market and market share data
2 point to a relatively consistent and stable market
3 pattern. It has helped all of us not to allow the sharp
4 market decline to be mistaken as a 'loss of market
5 share,' which mostly causes price reaction."

6 In other words DIFRA, which was operational in
7 2008, during a market where volume was falling, gave
8 them the confidence to keep their prices up, to keep
9 their prices up above the competitive price. Had they
10 just seen that they were losing sales, without knowing
11 information about the size of the market, they might
12 have made different pricing decisions, but instead they
13 stabilized and kept their prices up.

14 CHAIRWOMAN RAMIREZ: But didn't McWane argue
15 that, in fact, McWane used the information that it
16 obtained from the DIFRA exchange to lower its prices in
17 June of 2008?

18 MR. HASSI: They argued that, but what they did
19 in 2008 was raise prices. They went out on June 17th,
20 2008, and they made the decision to go up by 8 percent
21 on their prices. Now, they argue that it's lower
22 because Sigma had previously announced and then
23 withdrawn a price increase, or perhaps they argue that
24 it's lower because they had two choices on the table, a
25 12 percent price increase or an 8 percent price

1 increase. Yes, they went out with the lower of those
2 two, but make no mistake, they raised prices in June of
3 2008. And that's how they used the data, is to make
4 decisions about price increases. And they did that
5 consistently, and all three did that. All three used it
6 in their pricing decisions, and that's why the DIFRA is
7 illegal.

8 COMMISSIONER OHLHAUSEN: Counsel, would this be
9 a problem in any oligopolistic market, to have market
10 share data like that?

11 MR. HASSI: I think there's a reason that this
12 is done under the rule of reason, and that is it's a
13 very fact-specific inquiry. I would not say that,
14 structurally, this is necessarily a problem. I would
15 say that the data here that was shared was fairly fresh,
16 it was sensitive, and the way it was used demonstrates
17 that here it was being used as a facilitative practice.
18 But, no, we would not urge that all information
19 exchanges be illegal.

20 If I could talk about exclusive dealing now,
21 unless there are other questions on DIFRA? No?

22 In 2009, when the ARRA was announced, Star and
23 Sigma considered entering, and McWane considered what
24 would happen with Star and Sigma entering and, in
25 particular, with Star. And McWane's contemporaneous

1 documents demonstrate that McWane feared its domestic
2 pricing would get -- and I quote -- creamed, creamed by
3 Star if they were allowed to do the same thing in the
4 domestic market that they had done in the imported
5 market.

6 And so Mr. Tatman of McWane set out to prevent
7 Star's entry, and what he ultimately hit upon was an
8 exclusive dealing policy, and that policy -- McWane has
9 referred to it from time to time as a rebate policy, but
10 make no mistake. It's a policy -- it didn't offer a
11 rebate. It took a rebate away. And more importantly,
12 what it did was to take away access to fittings. And
13 the distributors who testified said that really scared
14 us. They viewed this as a threat. It was a threat to
15 their ability to get domestic fittings, and it was a
16 fact.

17 And McWane's made much of the number of
18 customers that Star got, and they bandy about a number
19 of over 100, but that includes anybody who ever bought a
20 domestic fitting from Star. So, it includes, for
21 example, Dennis Sheley of Illinois Meter. Dennis Sheley
22 took the stand and said, "I bought five fittings. I
23 bought five fittings to see the quality and to assess
24 and determine whether I wanted to buy from Star, not to
25 put in the ground but just to get a sense."

1 Well, McWane's expert counts that as a customer.
2 Now, what Mr. Sheley also testified to is that the
3 policy prevented him from buying from Star. He wanted
4 to buy. He didn't. So, he bought those five just to
5 get a sense, but when the policy came out, he realized,
6 "I'm not going to buy from Star. I'm not going to take
7 the risk of getting cut off by McWane." And they did
8 cut people off.

9 They cut off Hajoca, which made a decision --
10 Hajoca made a deliberate decision to buy from Star, and
11 Hajoca got cut off, and Hajoca didn't get reinstated
12 until this Commission was investigating McWane's
13 actions.

14 So, Commissioner Ohlhausen, you asked questions
15 about the effectiveness of the policy and whether the
16 investigation may have tempered it. Certainly as to
17 Hajoca, the reason that they got -- one of the
18 reasons -- and this is, again, in contemporaneous
19 documents -- one of the reasons that they were
20 reinstated was because McWane had concerns about the
21 FTC.

22 COMMISSIONER OHLHAUSEN: Actually, this would be
23 a good opportunity for me to ask you, so, Star did
24 enter, right, came in in September of '09 and did take
25 some market share. So, where do you think the line is

1 for foreclosure? Is it -- how much
2 entry shows that people weren't really deterred that
3 much?

4 MR. HASSI: I think the answer to that is that
5 entry should be similar to the way we look at entry in a
6 merger, is it going to be effective? Does Star's entry
7 have the ability to constrain McWane's prices? And it
8 didn't. Star was not allowed to get to minimum
9 effective share, and Star was not -- was prevented from
10 buying a foundry that would have allowed them to do
11 that. And so Star was not able to play a disciplining
12 role on McWane's prices.

13 Star, in the fall of 2009, was in negotiations
14 to buy a foundry, and Star testified -- I won't get into
15 the numbers, because -- but you should have them, but it
16 was done in camera, but Star testified it would have
17 been significantly cheaper to make fittings on its own,
18 and it could have passed that cost along to customers,
19 but it didn't get there. The reason it didn't get there
20 was because of the policy, the substantial foreclosure
21 here, and under the traditional case method of doing
22 that, if you use the calculations from Omega vs.
23 Gilbarco, in 2010, the foreclosure was 95 percent or 94
24 percent. Excuse me.

25 CHAIRWOMAN RAMIREZ: But certain distributors

1 did, in fact, testify that there were other reasons
2 other than McWane's program for not doing business with
3 Star. So, how do we weigh that evidence and how do
4 we -- what is it that would lead us to find that, in
5 fact, it was McWane's policies that foreclosed Star?

6 MR. HASSI: Well, we think -- again, looking at
7 the evidence, and the best examples of this are Ferguson
8 and HD Supply. Together, they represent 53 percent of
9 the market. And, Chairwoman, you alluded to the letter,
10 and I believe you asked a question about the letter that
11 HD Supply sent. They sent a mandate letter. The CEO --
12 I'm not sure now if it was the CEO of McWane or
13 Mr. Tatman -- who testified it was very unusual. They
14 had never seen HD Supply do this before, because
15 normally they allow their branches to have a certain
16 amount of authority.

17 And the CEO of HD Supply Waterworks took that
18 away from his people and said that nobody is buying from
19 McWane because of this mandate, because of this letter.
20 And so we think that you need to take that into account.
21 Now --

22 COMMISSIONER OHLHAUSEN: I'm sorry, from McWane
23 or from Star? HD said --

24 MR. HASSI: HD said you can't buy from Star
25 because of the McWane mandate. And, I'm sorry, I have

1 the letter in front of me. It says, "We need to adhere
2 to mandate and purchase all of the American-made
3 fittings from Union Tyler" -- which is another name for
4 McWane, their foundry -- "or Sigma." Sigma was at this
5 point, under the MDA, selling McWane's fittings. So,
6 essentially you have got to buy them from McWane anyway.

7 Now, HD Supply, contrary to what was said
8 earlier, the CEO of HD Supply Waterworks, Jerry Webb,
9 who sent out this memo, testified in these proceedings
10 that as far as he knows, the only fittings that
11 HD Supply bought was bought under one of the exceptions
12 to the policy. The policy had a couple of exceptions,
13 one of which was if McWane doesn't have it, can't make
14 it available within a certain period of time, you can
15 buy it, or if you buy it bundled with pipe. And a
16 company out on the West Coast called Ryan did this, to
17 buy some Star fittings. If you buy it bundled with
18 pipe, then it's an exception under the policy.

19 There was a third category, which was called
20 under-the-radar buying. There were some people that --
21 local distributors who thought they could buy a couple
22 from Star and not get caught by McWane, but McWane
23 enforced the policy, enforced it against Hajoca. And
24 both Mr. Thees of Ferguson and Mr. Webb of HD Supply
25 testified that they gave instructions to their branches

1 to keep them from buying from Star because of the McWane
2 policy. And we think you should take that into account,
3 and that alone makes the foreclosure 53 percent.

4 COMMISSIONER WRIGHT: Is there any evidence in
5 the record about how much HD and Ferguson would have
6 bought from Star but for the exclusive policy?

7 MR. HASSI: The only evidence in the record are
8 the requests for proposal that they had in place prior
9 to the McWane letter coming out. So, Star made an
10 announcement in June of 2009 at the Waterworks Show that
11 they were going to offer these fittings. They received
12 a number of sort of requests for quotes, that sort of
13 thing, and those were pulled back. And there's a
14 number -- there's a number, and it's significant. It's
15 more than the number of fittings that Star sold in 2010.
16 I don't want to -- it's, again, in camera, but a
17 significant number worth of awards that were pulled back
18 when McWane's policy went into place.

19 COMMISSIONER WRIGHT: The theory -- excuse me.
20 In the brief, you talk about minimum efficient scale a
21 number of times, and you have said that the theory of
22 the case is deprivation of the ability to compete for a
23 minimum efficient scale. What's minimum efficient
24 scale? Is there any evidence in the record about what
25 minimum efficient scale here is? Does Complaint Counsel just mean it's a

1 foundry?

2 MR. HASSI: In this case, the minimum efficient
3 scale would be Star having its own foundry, which would
4 allow Star -- Star was using jobber foundries instead,
5 and that was less efficient. If it could have had its
6 own foundries, it could have brought its costs down, and
7 it could have -- and, again, there are numbers in the
8 record.

9 COMMISSIONER WRIGHT: Is there evidence in the
10 record to establish that minimum efficient scale is
11 equivalent to a foundry?

12 MR. HASSI: No, I don't think -- I think that
13 was Star's view of what minimum efficient scale was. I
14 don't think they phrased it that way, but I think that's
15 the closest thing in the record.

16 COMMISSIONER WRIGHT: And there is a difference
17 between saying they would be more efficient if they had
18 a foundry and deprivation from achieving minimum
19 efficient scale, which is the underlying basis of our
20 theory. I'm wondering if there is anything you can
21 point me to in the record that would help me distinguish
22 between the two.

23 MR. HASSI: I can't think of anything. I mean,
24 Star's testimony was this is what we thought we needed,
25 but no, I can't -- there is not, for example, any

1 comments that spoke to what minimum efficient scale
2 would be.

3 COMMISSIONER WRIGHT: One more question about --
4 maybe more than one more question -- about measuring
5 foreclosure. So, the full support program itself had
6 some exceptions. One of the things I've been trying to
7 understand is the size of those exceptions. In
8 particular -- and I think now this is going to be
9 difficult to do -- the relative sizes of the exceptions
10 under the full support program or the size of those
11 exceptions relative to minimum efficient scale.

12 Now, not knowing what the latter is would make
13 that comparison difficult, so let's just focus on the
14 first part. Do we know what the size of those
15 exceptions are?

16 MR. HASSI: We don't. We know that, for
17 example, HD Supply bought more than -- excuse me, that
18 Star supplied more than 30 percent of HD Supply's import
19 business and provided less than 1 percent of its
20 domestic business. That may be one way to look at it.
21 But, no, we don't have a specific measure of the size.

22 COMMISSIONER WRIGHT: Do you agree that counting
23 fittings that were excepted from the full support
24 program probably should not go into the foreclosure
25 measure, are not foreclosed in any reasonable sense of

1 the word?

2 MR. HASSI: If fittings were sold under an
3 exception to the policy, no, I don't think they should
4 be counted as foreclosure. I think that's right.

5 COMMISSIONER WRIGHT: What about sales that Star
6 competed for but did not win? Should those be counted
7 in the foreclosure measure? The 53 percent that you
8 used presumes that they should have. I just want to be
9 clear whether your position is that sales that Star
10 competed for and had the opportunity to compete for but
11 did not win either should go in the foreclosure measure
12 or should not.

13 MR. HASSI: I think it's difficult to say,
14 because -- without knowing how -- why they were lost.
15 In other words, someone might use --

16 COMMISSIONER WRIGHT: A bid that wasn't as good.
17 Let's assume that.

18 MR. HASSI: Well, if the bid simply wasn't as
19 good -- and I don't think we have a way of knowing
20 that -- perhaps it shouldn't be counted. I guess what I
21 was getting at is to the extent Star is being used for a
22 foil with McWane in an effort to get a price reaction,
23 notwithstanding the policy, when the person doesn't have
24 a good faith intent to violating a policy, I'm not sure
25 that that shouldn't be count -- that that should be

1 counted out of the foreclosure, if I'm making sense.

2 COMMISSIONER WRIGHT: It was a double and a half
3 negative.

4 MR. HASSI: Exactly. I could draw a diagram,
5 but --

6 COMMISSIONER WRIGHT: So, let me -- a related
7 and maybe a repeat of the question. You've said the
8 foreclosure rate is very important. I agree the
9 foreclosure rate is important. I want to know what it
10 is. I don't think it's 53. I don't think that under
11 your answer to the question about exceptions you think
12 it's 53.

13 What do I do with the sales -- and not as a
14 quantitative matter, conceptually, let's say -- what do
15 I do with the sales that Star competed for but don't
16 fall into these exceptions, good faith competition and
17 they lost? Do I count those in foreclosure? Is it your
18 position that I should or your position that I should
19 not?

20 MR. HASSI: It's our position that you should
21 count them. And one other thing I want to point out,
22 the 53 is at least 53. The 53 is just those two major
23 distributors. There are a number of other distributors,
24 I mentioned Illinois Meter, but Illinois Meter, E.J.
25 Prescott, WinWholesale, Groeniger. There were a number

1 of people that testified that they didn't buy from Star
2 because of the policy, but we didn't have the market
3 share. We didn't have the market share data for them.
4 So, it's 53 plus --

5 COMMISSIONER WRIGHT: It's 53 plus --

6 MR. HASSI: -- some other number --

7 COMMISSIONER WRIGHT: -- minus --

8 MR. HASSI: -- the exceptions to the policy.

9 COMMISSIONER WRIGHT: -- plus, maybe -- well, I
10 guess not plus things that Star competed for. We're
11 going to presume that units that Star competed for but
12 lost were foreclosed from competition.

13 MR. HASSI: If I understand your question
14 correctly, yes.

15 COMMISSIONER WRIGHT: Okay.

16 MR. HASSI: I see that my time is up. I don't
17 know whether there are questions on the MDA or others.

18 COMMISSIONER OHLHAUSEN: I actually have -- oh.

19 CHAIRWOMAN RAMIREZ: Please.

20 COMMISSIONER OHLHAUSEN: Is McWane's exclusive
21 dealing policy still in effect now?

22 MR. HASSI: So, McWane testified that they had
23 withdrawn the policy, and I think what they meant by
24 that is they have reformulated their rebates. They have
25 never sent anything out formally withdrawing the policy,

1 and certainly some of the distributors who testified in
2 this action, as I mentioned -- I keep going back to
3 Mr. Sheley -- Dennis Sheley testified that he thought
4 the policy was still in effect. So, there are
5 absolutely distributors out there that still think it's
6 in effect. McWane doesn't seem to think it's in effect.

7 COMMISSIONER OHLHAUSEN: So, assuming that at
8 some point some of the distributors started saying,
9 well, we don't necessarily think it's in effect anymore,
10 what did Star's market share do after that?

11 MR. HASSI: I don't think -- the problem is,
12 because we --

13 COMMISSIONER OHLHAUSEN: Do you know?

14 MR. HASSI: We don't know. So, another
15 example -- and, again, this is anecdotal as opposed to
16 empirical -- but Tom Morton of U.S. Pipe took the stand,
17 and they started to -- U.S. Pipe -- and by the way, this
18 addresses the rebate policy. U.S. Pipe doesn't get a
19 rebate from McWane, but they buy some domestic fittings.

20 He said that after the FTC -- sometime after the
21 FTC's investigation, they got more comfortable with the
22 idea that they could buy from Star and started buying
23 from Star, but because of this information deficit that
24 as to -- there wasn't a clear ending of the policy, we
25 can't look at this empirically and say, as of that

1 point, Star's sales took off or didn't take off or
2 address that.

3 COMMISSIONER OHLHAUSEN: Okay, thank you.

4 CHAIRWOMAN RAMIREZ: I want to make sure that
5 I'm clear as to what you consider to be the requisite
6 level of foreclosure.

7 If the argument is that in order to be effective here,
8 Star had to purchase its own --
9 have its own foundry, what level of sales did it need to
10 attain in order to take that step?

11 MR. HASSI: I'm trying to remember whether
12 that's in camera. It's a double digit million number,
13 but not that much higher than if you put two of their
14 years' of sales together.

15 CHAIRWOMAN RAMIREZ: And I guess I would also
16 like to understand as a basis of comparison, but
17 for the policy, what level of sales is it your
18 position that Star would have attained but for the
19 policy?

20 MR. HASSI: So, I don't think we have to
21 reconstruct the but for world with precision. That
22 said, if you look at --

23 CHAIRWOMAN RAMIREZ: Or you tell me how you
24 think this analysis ought to be. What are the
25 appropriate benchmarks in order to determine the level

1 of foreclosure that's relevant here?

2 MR. HASSI: I think I mentioned one of the
3 benchmarks. If you look at -- if you compare Star's
4 import sales with Ferguson and HD Supply, where they've
5 got between a quarter and a third of those two
6 significant customers' import fittings, and they've got
7 less than 1 percent of their domestic sales, it probably
8 would have been somewhere in between.

9 Would it have been enough to achieve minimum
10 efficient scale with those two alone? Probably. But it
11 certainly would have been greater than it was. It
12 probably wouldn't have immediately jumped right up to
13 where they were on imports, where they had proven
14 themselves over a number of years. So, it's somewhere
15 in that range.

16 CHAIRWOMAN RAMIREZ: Okay. I wanted to turn to
17 the MDA and talk a little bit about that.

18 In your brief, there are a number of different
19 arguments that are being made. You take the position
20 that Sigma was, indeed, a potential competitor, but then
21 there's also an argument about nascent competition and
22 a citation to the Actavis matter and the
23 agreement putting an end to the -- the risk of
24 competition. So, I would like to get a better handle on
25 what you believe to be the relevant standard here and

1 how we ought to be evaluating that issue.

2 MR. HASSI: So, for starters, we think they
3 should be evaluated as a horizontal potential
4 competitor, and we think that they would -- they meet
5 the standard for actual potential competition. So, they
6 had the intent to enter; they had the ability to enter.
7 Judge Chappell went through the facts on all that. The
8 only place he found any question was with respect to
9 their financial ability, and I'll come back to that.

10 He ultimately didn't address -- didn't make a
11 decision as to whether they had the financial ability to
12 enter or not. In other words, he found they had the
13 intent, he found they had the experience, et cetera,
14 et cetera. He did not make a decision -- he said there
15 was conflicting testimony and conflicting evidence on
16 financial ability, but ultimately, he decided, because
17 the ARRA was a short time horizon, they couldn't have
18 entered in time for the ARRA.

19 The problem with that is twofold: Number one,
20 the ARRA was not and is not the domestic market. It's a
21 share in the domestic market, and it was an incentive
22 for people to enter, but what Sigma testified to is they
23 were concerned that the Buy American sentiment would
24 last beyond the ARRA, and there are -- there is a market
25 for domestic fittings here today. The Pennsylvania

1 Steel Act is still in place. If you want to put a
2 fitting in the ground in an Air Force base, it's got to
3 be domestic. There are places in New Jersey where it's
4 got to be domestic.

5 That market continues to exist, and Sigma was
6 worried about that market when it made the decision to
7 enter. So, the measure should not be whether they could
8 have done it in time for the ARRA. And in any event,
9 while it might have taken 18 to 24 months to get a full
10 line of fittings, Sigma testified that the first
11 fittings would be rolling off the line in four to six
12 months, and that would have given them time to get in
13 during the ARRA period, and it would have been partial
14 entry.

15 And Judge Posner, among others, has said partial
16 entry is the way most people do get into business, so
17 that should have counted. So, we think Sigma meets the
18 actual potential competitor test.

19 CHAIRWOMAN RAMIREZ: How do you define the
20 relevant test for an actual potential competitor?

21 MR. HASSI: I would say it's a fact-based test,
22 and one should look at whether the company has the
23 intent to enter and whether the company has the ability
24 to enter. I don't think there's sort of a be-all and
25 end-all of checklists below that. I know Judge Chappell

1 went through whether they had the experience, whether
2 they had the financing, whether they had the contracts.

3 We think it's a little bit like the rule of
4 reason. You should look at the facts together and make
5 a decision as to whether they were going to enter.
6 Certainly Sigma thought they were going to enter, and
7 Sigma testified that but for the MDA, they would have
8 entered. And certainly McWane thought they were going
9 to enter, and, indeed, it would be past constraint to
10 allow McWane to escape liability for buying off Sigma as
11 a potential entrant based on now looking backwards and
12 saying, gee, they couldn't have entered. We know we
13 bought an insurance policy against them entering, but
14 they couldn't have entered anyway, so don't worry about
15 it. I mean, that, to me, is a very strange outcome for
16 this Commission to come to.

17 COMMISSIONER OHLHAUSEN: I wanted to ask you
18 though about Mr. Pais' statement to the board in
19 September '09. I understand that Sigma was
20 looking into it and they brought a team
21 together, invested some money. But by September '09, he
22 was telling the board that it just really wasn't
23 feasible; that's not something they were going to be
24 able to do.

25 So, how do we weigh that compared to

1 maybe when they first started investigating it, they
2 thought maybe it was a possibility, but the
3 leadership of Sigma, by September '09, was saying it's
4 not really feasible?

5 MR. HASSI: I think the leadership of Sigma was
6 following two paths all the way through. They were
7 interested in buying from McWane or entering on their
8 own, and they were going to make a decision. By
9 September, they had an agreement with McWane, and for
10 him then to say, well, we probably wouldn't -- you know,
11 he had a bunch of disappointed executives that had spent
12 the summer working through, and Mr. Rona chief among
13 them, but others on what they called the Sigma Domestic
14 Production Team.

15 They had flown around the country visiting
16 foundries, they had gone ahead and made fittings, they
17 had done all these things, and there were a lot of
18 people within Sigma that were disappointed that Sigma
19 had made the decision to do this and get in bed with a
20 competitor, if you will, rather than making fittings on
21 their own. So, I think there's a little bit of apology
22 in that as well.

23 So, I think what you should look at is the
24 events of the summer of 2009 leading up to the decision
25 and whether Sigma showed itself to be a committed

1 entrant during that period of time.

2 CHAIRWOMAN RAMIREZ: Thank you.

3 MR. HASSI: Thank you.

4 CHAIRWOMAN RAMIREZ: Mr. Ostoyich, you may begin
5 your rebuttal, and you have ten minutes.

6 MR. OSTOYICH: Thank you, Chairwoman.

7 I want to go back to a couple of questions you
8 asked. The first is, what's the right measure of
9 exclusion? There's really no dispute that Star entered.
10 The Judge found clearly Star entered. Their share went
11 up steadily throughout. After the letter came out, it
12 went up steadily throughout.

13 What I heard from Mr. Hassi was, well, it wasn't
14 meaningful. What standard, what case is that from?
15 None. How would we judge that? Because meaningful to
16 my mind, my client lost a substantial amount of its
17 share. It was meaningful to Star. Internally, Star's
18 CEO said they were very happy with their success. The
19 vice president of sales said, "Yahoo, we're signing up
20 customers left and right." It was meaningful to the
21 parties, both parties. So, how do we judge meaningful?

22 Mr. Hassi said, well, it didn't discipline
23 McWane's domestic prices because McWane's prices were
24 lower. Higher-priced competitors don't discipline
25 pricing. Now we're asked, now we're told, well, maybe

1 they would have bought a foundry. But they could have
2 bought a foundry when they decided to enter. They
3 decided not to. The policy came out nine months later.
4 Well, maybe they would have bought a foundry based on
5 when -- during ARRA. Maybe, but the evidence doesn't
6 show that.

7 And then the vice president of Sigma -- Star
8 testified, well, actually, they thought about buying
9 multiple foundries, because no one foundry could make
10 all of the fittings. How much would that have cost? We
11 don't know. There's nothing in the record. Well, which
12 foundries? We don't know. Well, where are they
13 located? What are the transportation costs of those
14 make-believe foundries? Well, we don't know. Well, we
15 don't know the manufacturing costs, we don't know the
16 transportation costs. Well, do we know anything? Do we
17 know that they were actually more efficient? They had
18 never made fittings before, but we don't know that
19 either.

20 So, that's what we're left with. We're left
21 with a case where the aggrieved party entered, clearly,
22 and we have absolutely no idea why consumers care that
23 it wasn't as profitable as it wanted to be. And we can
24 conceive hypothetically, theoretically, from an academic
25 standpoint, well, maybe, maybe, maybe. Maybe they would

1 someday have been able to buy a foundry or foundries and
2 it would have lowered costs and it would have lowered
3 prices. Maybe. In the meantime, we're going after a
4 company that has barely survived, that its domestic
5 business is the last one standing, that is more
6 efficient --

7 COMMISSIONER OHLHAUSEN: Can I ask you a
8 question in response to that line of argument? McWane
9 seemed very concerned about Star.

10 MR. OSTOYICH: Of course.

11 COMMISSIONER OHLHAUSEN: And so if it seems so
12 unlikely to have any effect on the market and not be
13 successful, what was driving McWane's big concern about
14 Star?

15 MR. OSTOYICH: The same thing that drives
16 everybody. I mean, when Arnold & Porter hires a new
17 antitrust lawyer, do you think I sit back and say, "Oh,
18 boy, I don't care"? Of course, the same as a new
19 company coming in. It's a risk.

20 COMMISSIONER OHLHAUSEN: But do you do things
21 against your distributors that your distributors seem to
22 object to?

23 MR. OSTOYICH: Well, I send out rate increases.
24 Do I get them? No. Do customers say, "Well, I have
25 options. I know you told me you want all my business,

1 but I have options and can go elsewhere." Of course.
2 That's competition. That does not require the Federal
3 Government to intervene in a business that apparently
4 can fight its way out because they went from zero to 5
5 to 10 percent to on pace with their best year yet.

6 That's not what's necessary for the Federal
7 Government to get involved in. They're protecting
8 themselves. They have their own way of protecting
9 themselves. They have done it in the marketplace.
10 Would they have done better? Could they have done
11 better? Maybe. We can all guess about that. Now,
12 Mr. Hassi says, well, Illinois Meter's representative
13 testified he only bought five fittings. He also
14 testified he probably would have bought 90 percent plus
15 from McWane anyway because he had a big problem with
16 Star. They had screwed up an order of piping some years
17 earlier and he didn't like them, didn't trust them.

18 The same thing with Ferguson, same thing with HD
19 Supply. So, we can all sit back and second guess what
20 happened, but the reality is the only demonstrable fact
21 we know is exactly what the Judge found. Star went from
22 having an idea in February of '09, to unveiling it and
23 announcing it in June of '09, to selling product in
24 September of '09. Under the Merger Guidelines, quick
25 entry, effective entry, went from zero to 5 to 10

1 percent to on pace for their best year yet. Higher
2 priced, less efficient, not good for consumers. Those
3 are the facts. That's what we know.

4 We had a policy. We intended to hurt Star.
5 Sure. What competitor doesn't want to hurt its
6 competitors? I intend things all the time that don't
7 come to fruition. I can intend to knock out AP's
8 antitrust practice or Latham's antitrust practice. I
9 can't do it. Doesn't make a difference of my intent.
10 What matters is what happens in the marketplace.

11 Markets work. Markets work, and this market
12 worked quite well, and Star's internal executives in
13 their documents were touting, "Yahoo, very impressive
14 success, keep going." The policy that McWane had was
15 more bark than bite. That's what they said. That does
16 not require this Commission to second-guess it and get
17 in the middle of it. They are on pace for their best
18 year yet last year, according to their vice president,
19 under oath.

20 Now, let me go to Sigma. The same thing. Well,
21 maybe Sigma could have flipped the switch and two years
22 later the lights would have gone on. Maybe. Maybe. I
23 mean, they tried to do that with domestic restraints at
24 the same time, which are a far easier product line, 20
25 or 30 SKUs as opposed to 4000, and here they were at the

1 time of the trial, 3 1/2 years later, and they had yet
2 to make a significant commercial sale, because it's not
3 that easy just to go from scratch to making fittings, to
4 making restraints, to actually get to something that's
5 commercially reliable that your customers would want to
6 buy. So, maybe.

7 Is it possible they could have bought a foundry?
8 I don't know. Where? I don't know. What cost
9 structure? I don't know. What transportation cost? No
10 idea. Complaint Counsel's expert didn't look at any of
11 it. He was just asked to assume it all would happen.
12 Maybe they would have lowered prices sometime.

13 CHAIRWOMAN RAMIREZ: Couldn't Sigma have taken
14 Star's approach? I mean, we've just been talking about
15 Star and how easy it was for them, and now you're saying
16 that for Sigma, it would have been a whole different
17 story.

18 MR. OSTOYICH: You're right, they could have,
19 but their finances were a mess, right? I mean, that's
20 the bottom line. They can't get into this, because
21 their finances were a mess. So, theoretically, sure.
22 You're right, I could go out and do this, but I don't
23 have the expertise; neither do they. I don't have a
24 foundry; neither do they. I don't actually know how
25 many foundries I need to buy; neither did they. I don't

1 have the finances; neither did they. Their banks had
2 imposed limits on their capital, because they were below
3 what they estimated they would need, because they
4 breached their bank covenants. How are they going to
5 solve that problem? I don't know.

6 How were they going to get it all done when the
7 guy who was in charge of the project, Mr. Bhattacharji,
8 testified, "I would have flipped the switch. Eighteen
9 to 24 months later, the lights would have gone on." And
10 he said, "but the timing wasn't there." It didn't make
11 any sense. It doesn't matter, because the demand for
12 domestic product had fallen back to levels which was not
13 enough to keep our foundry, the one foundry left,
14 operating at more than 30 percent capacity. So, we can
15 speculate. You can speculate on what the Judge wrote,
16 but it's just speculation. There is no evidence in the
17 record of any of it.

18 COMMISSIONER OHLHAUSEN: Counsel, I actually
19 wanted to ask you about the appropriate market. Do you
20 agree that the domestic fittings market is the
21 appropriate market?

22 MR. OSTOYICH: No, I don't. I mean, I --

23 COMMISSIONER OHLHAUSEN: And why not?

24 MR. OSTOYICH: -- my view is rigorous economic
25 analysis requires a test hypothesis. Complaint

1 Counsel's expert didn't do that test. It's not my
2 burden to disprove the market that --

3 COMMISSIONER OHLHAUSEN: That's a case in the
4 case law?

5 MR. OSTOYICH: I think that's the Daubert case
6 law. I mean, the point of the last 20 years of
7 antitrust Supreme Court jurisprudence is to make
8 economic analysis in the antitrust --

9 COMMISSIONER OHLHAUSEN: But you don't think
10 there's a price discrimination market here between the
11 domestic --

12 MR. OSTOYICH: It wasn't tested. It wasn't
13 tested. The fact that domestic prices were higher than
14 import prices is because, as the Judge correctly found,
15 it costs a lot more in the U.S. to manufacture than it
16 does in China.

17 COMMISSIONER OHLHAUSEN: But there is
18 not arbitrage between the markets, right? Isn't there a
19 requirement for certain jobs that it has to be
20 domestically manufactured?

21 MR. OSTOYICH: I have absolutely no idea,
22 Commissioner.

23 COMMISSIONER OHLHAUSEN: You have no idea what I
24 mean?

25 MR. OSTOYICH: No, no, I know what you mean, but

1 I don't know, because Complaint Counsel didn't meet its
2 burden of proof in putting on the evidence.

3 COMMISSIONER OHLHAUSEN: So, ARRA, the
4 requirements of ARRA?

5 MR. OSTOYICH: Well, here's why economic testing
6 is necessary, and it's not just antitrust jurisprudence,
7 it's Daubert, Joiner, the entire -- it's a whole line of
8 experts. You have to use a scientific method in
9 litigation and test it.

10 CHAIRWOMAN RAMIREZ: But quantitative evidence
11 is not necessary to establish a relevant market. I
12 mean, that's clear from our Merger Guidelines.

13 MR. OSTOYICH: I think it's not in this context,
14 and here's why. ARRA provided financial incentives to
15 some customers. Which customers? We don't know. It's
16 not in the record. At the time ARRA was passed, two
17 blanket, nationwide waivers were endorsed by the EPA,
18 blanket, nationwide waivers for every job that was in
19 progress, for every job that was financed. How many
20 jobs were those? We don't know. They didn't put that
21 evidence in the record.

22 We know that there were additional blanket,
23 nationwide waivers. We know that there were lots of ad
24 hoc waivers. We know that during the ARRA period, that
25 12- to 18-month period, imports outsold domestic two to

1 one. So, we know and we know from the history of the
2 industry, because the ITC found unanimously, imports had
3 killed domestic entry. So, we know the specs flip all
4 the time. In fact, one of the witnesses testified it
5 was like that in a spec (indicating).

6 So, we know specs flip and that there's
7 competition for the specs, and we know that imports have
8 won the lion's share of the market, and we know during
9 ARRA there was lots of legal ability to buy imported
10 fittings, there was no impact, they outsold domestic
11 fittings two to one.

12 What we don't know, because it wasn't tested, is
13 which ones? Which customers? What effect did the price
14 differential between imports and domestic have? Was
15 there a price differential at that time? None of it was
16 tested. We can hypothesize it and assume it.

17 CHAIRWOMAN RAMIREZ: We don't have to
18 hypothesize. We can just look at the ordinary course
19 documents and see that the parties, in fact, do see that
20 there is a relevant market in domestic pipe fittings. I
21 mean, that's something that we do every single day in
22 this building.

23 MR. OSTOYICH: With all respect, Your Honor,
24 Star's -- here's one of our first documents. Star had a
25 domestic bid log. The domestic bid log was a record of

1 all their domestic bids, and, by the way, they made
2 hundreds of them during the ARRA period, so they clearly
3 were in the market and competing. It also recorded
4 dozens and dozens of domestic bid jobs that they lost to
5 imports. That's, as far as we know, the only record or
6 the only document in the evidence -- in the record
7 evidence of this.

8 The reason why none of these suppliers applied
9 for ARRA funds, they had no firsthand knowledge of any
10 of it. Now, Complaint Counsel says, well, McWane didn't
11 disprove that. Of course, it's not my burden of proof.
12 It's their burden of proof. It's not my burden to go
13 find all the people who used ARRA funds and figure out
14 what they bought. It was their burden to show that
15 somebody who used ARRA funds had no choice, but they
16 didn't do that.

17 Then they said, well, you can't disprove it.
18 But of course I can't. I have no firsthand knowledge of
19 that. It would have cost a fortune for us to go figure
20 that out. It's their burden of proof. They didn't do
21 it.

22 COMMISSIONER BRILL: So, what is your test for
23 when we follow what the ALJ found and when we don't?
24 Because when I was discussing with you Counts 1 and 2
25 you said that we've got to follow the ALJ, it would be

1 wrong for us to make our own findings, our own
2 inferences. But now, I mean, we clearly have an ALJ who
3 found a domestic market -- domestic fittings market, but
4 you want us to ignore that. So, what's the test?

5 MR. OSTOYICH: Okay. Here's the difficulty.
6 The de novo standard of review has wide authority;
7 however, the point of having the ALJ, the point of
8 having the Part 3 proceeding, the point of denying
9 summary judgment to send this to the Judge, to have all
10 the witnesses parade in here, at a big expense for
11 everybody, is to allow the Judge to look at the
12 credibility is and to gauge the witnesses.

13 I would submit, actually, that the Judge's fact
14 findings pretty much across the board are the right fact
15 findings. I quibble with the market definition, because
16 it's not economically based. There is no rigorous --

17 COMMISSIONER BRILL: But as the Chairwoman said,
18 there is lots of other evidence that can go into the
19 fact-finding of what is a market and what isn't.

20 MR. OSTOYICH: My only quibble on Counts 4
21 through 7 is not the fact-finding that Star clearly
22 entered; he's right, Star entered. That's clearly a
23 fact. It's not the fact that Sigma could not have
24 entered in a timely fashion; he's right that they could
25 have. My quibble is, what are the legal ramifications

1 of that? I think the legal ramifications he finds are
2 unsupported by the case law and don't make economic
3 sense.

4 That is, somehow, someday, both of them would
5 have otherwise gotten into the market and been more
6 efficient and lower priced for customers, but right now
7 there is no evidence in the record of that. It's just
8 guesswork. So, I think, in sum, his fact findings do
9 deserve deference.

10 COMMISSIONER WRIGHT: What's the evidence, just
11 to go back a couple steps, the evidence of competition
12 at the spec level?

13 MR. OSTOYICH: Well, so, at a basic level, there
14 was a lot of testimony that the specs -- the domestic --
15 it used to be 100 percent domestic back in the eighties.
16 Then Star and Sigma entered, and between the late
17 eighties, early nineties, and today, it's now at least
18 80 to 85 percent -- estimated 80 to 85 percent wide open
19 specs, okay? So, specs, in point of fact, have opened
20 up.

21 In point of fact, the sales are about 70 percent
22 imports, 30 percent domestic, okay? Giving specific
23 examples, there was a guy named Tom Brakefield who
24 testified said, yeah, one of my jobs when I was at Sigma
25 was to open specs. I did it like that (indicating). It

1 was easy. I took a sample in, showed them the quality,
2 showed them the rating, showed price was a lot cheaper,
3 because it was made in China, like that (indicating).
4 So, there is a fair amount of evidence in the record.

5 There is also a clear finding by a sister agency
6 down here, the ITC, that cheap imports from China
7 materially damaged the U.S. industry, so by definition,
8 they compete, and there are findings within that that
9 specs are flipped and opened all the time. So, there is
10 a substantial amount of evidence.

11 CHAIRWOMAN RAMIREZ: Thank you, Counsel.

12 MR. OSTOYICH: Thank you.

13 CHAIRWOMAN RAMIREZ: And with that, we are
14 adjourned. Thank you.

15 (Whereupon, at 3:56 p.m., the oral argument was
16 concluded.)

17

18

19

20

21

22

23

24

25

1 C E R T I F I C A T I O N O F R E P O R T E R

2 DOCKET/FILE NUMBER: 9351

3 CASE TITLE: IN THE MATTER OF MCWANE, INCORPORATED

4 DATE: AUGUST 22, 2013

5
6 I HEREBY CERTIFY that the transcript contained
7 herein is a full and accurate transcript of the notes
8 taken by me at the hearing on the above cause before the
9 FEDERAL TRADE COMMISSION to the best of my knowledge and
10 belief.

11
12 DATED: 8/23/2013

13
14
15
16 SUSANNE BERGLING, RMR-CRR-CLR

17
18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19
20 I HEREBY CERTIFY that I proofread the transcript
21 for accuracy in spelling, hyphenation, punctuation and
22 format.

23
24
25 SARA J. VANCE, CMRS