PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

In the Matter of	)	**PUBLIC**
MCWANE, INC., a corporation	)	**DOCKET NO. 9351**

RESPONDENT MCWANE, INC.'S PROPOSED CONCLUSIONS OF LAW

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I. BURDEN OF PROOF

1. Complaint Counsel must prove its case under FTC Act Section 5 by "substantial evidence." *FTC v. Cement Institute*, 333 U.S. 683, 705 (1948); *California Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 592 fn.2 (D.C. Cir. 1970); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963).

2. "Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence" of the fact to be established." *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963).

3. To prove a violation under FTC Act Section 5 Complaint Counsel must proffer "substantial evidence" of: (1) an unfair method of competition, (2) that causes substantial injury, (3) to consumers, (4) is not reasonably avoidable by the consumers, and (5) is not outweighed by countervailing benefits to consumers or competition. (15 U.S.C. § 45(n).)

4. Sherman Act Sections 1 and 2 case law is a guide in evaluating whether Complaint Counsel has met its "substantial evidence" burden under Section 5. *See., e.g. California Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999); *Cement Institute*, 333 U.S. at 691-92 (1948).

II. McWane Did Not Constrain Price Competition, Exchange Competitively Sensitive Sales Information, or Invite its Competitors to Collude (Counts 1-3)

A. The Government Must Establish the Existence of an Agreement.

5. Section 1 of the Sherman Act prohibits contracts, combinations, and conspiracies that unreasonably restrain trade. 15 U.S.C. § 1.

6. To establish a horizontal price-fixing claim, a plaintiff must demonstrate the existence of an agreement, combination, or conspiracy among actual competitors with the

purpose or effect of "raising, depressing, fixing, pegging or stabilizing" the price of a commodity product. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223-24 (1940).

7. Section 1 does not prohibit independent decisions, "even if they lead to the same anticompetitive result as an actual agreement among market actors." *White v. R.M. Packer Co., Inc.*, 635 F.3d 571, 575 (1st Cir. 2011) ("*White*").

8. Because the existence of an agreement is the "very essence" of a Section 1 price-fixing claim, the plaintiff must prove that the conduct at issue resulted from an agreement, rather than the defendant's independent decisions. *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3rd Cir. 2004) (citations omitted) ("*Flat Glass*"); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) ("*Twombly*"). At a minimum, this element requires "a 'unity of purpose or a common design and understanding or meeting of minds' or 'conscious commitment to a common scheme." *Flat Glass,* 385 F.3d at 357 (citations omitted).

9. "Unilateral action, regardless of the motivation, is not a violation of Section 1." *Burtch v. Milberg Factors, Inc.,* 662 F.3d 212, 221 (3rd. Cir. 2011) ("*Burtch*").

B. The Government Lacks Direct Evidence of an Agreement.

1. The Nature of Direct Evidence.

10. Direct evidence of an agreement to fix prices is "the most compelling means" of establishing a Section 1 claim. *See Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 465 (3rd Cir. 1998) ("*Rossi*").

11. "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litigation,* 166 F.3d 112, 118 (3rd Cir. 1999) ("*Baby Food*"). *See also In re Citric Acid Lit.,* 191 F.3d 1090, 1093-94 (9th Cir. 1999) ("*Citric Acid*").

12. Evidence demonstrating opportunities to conspire or consciously parallel pricing behavior does not constitute direct evidence of conspiracy, but is, at most, circumstantial *See Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52-53 (3rd Cir. 2007) ("*Cosmetic Gallery*")); *See also, Superior Offshore International, Inc. v. Bristow Group, Inc.*, 2012 WL 3055849, *5 (3rd Cir. July 27, 2012) ("*Superior Offshore*") (vague statements, such as admonitions to competitors to "play by the rules," do not constitute direct evidence).

2. The Government Concedes it Has No Direct Evidence Of An Illicit Agreement.

13. Complaint Counsel and its expert conceded that it lacks evidence "that McWane directly communicated its prices to any other DIWF manufacturer or supplier in advance of communicating them to its customers or potential customers."

14. There is no direct evidence of an agreement to fix prices or to eliminate or reduce job pricing.

C. Circumstantial Evidence Does Not Establish McWane Had An Agreement to Fix Prices or Reduce Job Pricing.

15. To prove a case with circumstantial evidence, the Supreme Court has held that a plaintiff must not only produce evidence that reasonably tends to prove parallel conduct, it must also prove that this conduct was contrary to self interest. *Matsushita*, 475 U.S. at 588; *In re Beef Industry Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990).

16. "When an antitrust plaintiff relies on circumstantial evidence of conscious parallelism to prove a § 1 claim, he must first demonstrate that the defendants' actions were parallel. . . . . The cattlemen have not done this.").

17. Courts are cautious about inferring antitrust conspiracies from circumstantial evidence, because such an inference could "chill the very conduct the antitrust laws are designed

to protect," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("*Matsushita*").

18. According to the well-established "theory of interdependence," any rational firm in a oligopolistic market, such as DIWF, must take into account the anticipated reaction of its competitors when making its own pricing decisions. *Flat Glass*, 385 F.3d at 359.

19. In a concentrated market like DIWF, parallel pricing by competitors "can be a necessary fact of life but be the result of independent pricing decisions" rather than illicit agreement. *Baby Food*, 166 F.3d at 121-22.

20. Even if Complaint Counsel was able show parallel behavior - - which they did not - - "follow-the-leader" pricing is normal oligopoly behavior and is perfectly lawful. *Blomkest Fertilizer*, 203 F.3d at 1032-33 (affirming summary judgment because "[e]vidence that a business consciously met the pricing of its competitors does not prove a violation of the antitrust laws"); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 50 (7th Cir. 1992) ("the mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws"); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry"); *In re Citric Acid Litigation*, 191 F.3d 1090, 1102 (9th Cir. 1999) ("A section 1 violation cannot, however, be inferred from parallel pricing alone, nor from an industry's follow-the-leader pricing strategy") (internal citations omitted).

21. Because interdependent pricing behavior is not an "agreement" as defined by the Sherman Act, such conscious parallelism is not prohibited under the antitrust laws, despite its "noncompetitive nature." *Id.* at 359-60 (citations omitted). *See also Citric Acid*, 191 F.3d at

1102-03; *Burtch*, 662 F.3d at 226-27; *In re Travel Agent Commission Antitrust Litg.*, 583 F.3d 896, 903 (6th Cir. 2009) ("*Travel Agent*"). *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) ("*Brooke Group*"); *Twombly,* 550 U.S. at 553-54, 556-57.

22. Such conscious parallelism, while *possibly* indicative of a conspiracy, is "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Burtch*, 662 F.3d at 227 (quoting *Twombly*, 550 U.S. at 554).

23. As a result of the inherent economic realities of oligopolistic markets, courts require a plaintiff relying on evidence of conscious parallelism to establish that certain "plus factors" also exist. *Flat Glass*, 385 F.3d at 360.

24. Requiring plaintiffs to meet this heightened standard of proof "tends to ensure that courts punish 'concerted action' – an actual agreement – instead of the 'unilateral, independent conduct of competitors.'" *Id.* (citing *Baby Food*, 166 F.3d at 122); *see also Intervest,* 340 F.3d at 159-60 (plaintiff relying on circumstantial evidence must meet heightened burden of proof).

25. Thus, to distinguish between legitimate parallel conduct and an illegal price-fixing scheme, an antitrust plaintiff must present "plus factor" evidence that "tends to exclude the possibility" that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360

26. Plus factors include: (i) a motive to conspire; (ii) noncompetitive behavior contrary to the defendant's own economic self-interest; and (iii) hallmarks of traditional conspiracy. *Baby Food*, 166 F.3d at 121-22.

27. The overwhelming evidence is that McWane, lacking any motive to conspire with Star and Sigma, acted independently and in its own economic self-interest.

28. The government has failed to establish the existence of any plus factors.

1. McWane lacked motive or incentive to collude, no conspiracy can be inferred.

29. The government has failed to adduce any evidence to establish the plus factor of motive in this case.

30. "An inference of conspiracy is impermissible if the defendants 'had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations." *Cohlmia v. St. John Medical Center*, 693 F.3d 1269, 1284 (10th Cir. 2012) (citing *Matsushita*, 475 U.S. at 596). *See also In re Ins. Brokerage Antitrust Lit.*, 618 F.3d 300, 322 n. 20 (3rd Cir. 2010); *Southway Theatres v, Georgia Theatre Co.*, 672 F.2d 485, 494 (5th Cir. Unit B 1982).

31. McWane stood to gain the most by charting its own independent course to lower prices in order to gain share from its competitors, move volume, and significantly reduce its inventory. McWane stood to gain nothing by colluding with Star and Sigma, because such collusion would only have "locked in" McWane's severely eroded and unsustainably low share of the Fittings market, which led to the idling and ultimate closure of one of McWane's two domestic manufacturing facilities and the lay off of hundreds of workers. McWane's legitimate business justifications are the more plausible explanation for its pricing actions than the alleged conspiracy posited by the government.

32. Because McWane lacked a rational business motive to enter an unlawful conspiracy, an inference of conspiracy is unwarranted. *See Matsushita,* 475 U.S. at 596-97 (if defendant had no rational economic motive to conspire, or if colluding would offend the

defendant's self interest, then conspiracy should not be inferred from ambiguous evidence or mere parallelism). *See also Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249, 1257-58 (10th Cir. 2006) ("the antitrust defendants' economic motive is highly relevant;" if the defendant has no economic motive to conspire, an inference of conspiracy is not proper); *Burtch,* 662 F.3d at 228.

2. Because McWane refused to act contrary to its own economic self-interest, a conspiracy cannot be inferred.

33. Complaint Counsel has failed to establish the "plus factor" of noncompetitive behavior, because McWane's pricing actions were completely consistent with its own legitimate, economic self-interest: namely, to increase sales volume, reduce excess inventory, keep its foundries operational, and ultimately increase profits. *See Burtch*, 662 F.3d at 229 (citing *Baby Food*, 166 F.3d at 137) (all businesses have a "legitimate understandable motive to increase profits" and such motive is not evidence of a "plus factor").

34. The alleged conspiracy would have been directly contrary to McWane's legitimate, economic self-interest. As stated, a conspiracy would have locked McWane into an unsustainable share of the Fittings market, whereas undercutting competition to drive sales and therefore volumes, and reduce inventory, was in McWane's economic self-interest.

35. The conspiracy inference Complaint Counsel has asked this Court to draw is not only not the most likely inference to be drawn from the evidence, it is actually the *least likely* inference to be drawn from the evidence and, as a result, the requested conspiracy inference should be rejected. *See In re Ins. Brokerage Antitrust Lit.*, 618 F.3d at 322 n. 20, 330 (evidence equally consistent with unconcerted action does not support an inference of conspiracy).

3. The Government has Failed to Establish Hallmarks of Traditional Conspiracy involving McWane.

36. Ordinarily in an oligopolistic market, motive and noncompetitive behavior are present. *See Flat Glass,* 385 F.3d at 360.

37. Even when the first two plus factors are present, a plaintiff also must present substantial evidence of "customary indications of traditional conspiracy," which "tends to exclude the possibility" that the defendant acted independently of its competitors. *Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360

38. Customary indications of traditional conspiracy can include ambiguous participant admissions, solicitations of agreement, pricing or output communications between parties, and parallelism that is difficult to explain absent an agreement. VI Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1434b, at 243 (2d ed. 2003); *See Matsushita*, 475 U.S. at 588; *Flat Glass*, 385 F.3d at 360.

39. Where a defendant's actions are equally consistent with a plausible, non-collusive explanation, as with a conspiracy, the defendant is entitled to judgment in its favor. *See Burtch,* 662 F.3d at 228; *In re Ins. Brokerage Antitrust Lit.*, 618 F.3d at 330. In this case, McWane's actions are much *more* consistent with a plausible, non-collusive explanation than with the conspiracy alleged by the government.

40. Because courts recognize that it is perfectly legitimate for a firm to receive its competitors' pricing information from customers, *Citric Acid*, 191 F.3d at 1103, the fact that McWane, Sigma, and Star each came to possess copies of each other's customer pricing letters does not support an inference of a conspiracy. *See Baby Food,* 166 F.3d at 126.

41. In an oligopolistic market like fittings, a competitor's decision to follow an industry leader's price increase is legitimate, *Baby Food,* 166 F.3d at 128, and it is well

established that such "bare 'conscious parallelism' is 'not in itself unlawful.'" *White*, 635 F.3d at 575 (quoting *Brooke Group Ltd.*, 509 U.S. at 27)).

42. To distinguish a tacit price-fixing agreement from legitimate conscious parallelism, Complaint Counsel must proffer evidence of "uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable or accompanied by other conduct that in context suggests that each competitor failed to make an independent decision." *White*, 635 F.3d at 576.

43. Courts have held that evidence of "opportunity to conspire" is insufficient to infer an antitrust conspiracy. *Travel Agent,* 583 F.3d at 905; *Cosmetic Gallery*, 495 F.3d at 53.

44. It is well-established that competitor communications alone are insufficient evidence of a price-fixing conspiracy. *White,* 635 F.3d at 583-84. *See also Baby Food,* 166 F.3d at 133 (competitors' "chit chat" and "chance meetings" do not constitute plus factors); Appendix of Horizontal Cases.

45. On the record before this Court, as Complaint Counsel is "[f]acing the sworn denial of the existence of conspiracy, it [is] up to plaintiff to produce ***significant probative evidence***" that a conspiracy existed, even to avoid summary judgment, let alone judgment after a full-blown trial. *City of Moundridge v. Exxon Mobil Corp.*, 429 F. Supp. 2d 117, 130 (D.D.C. 2006) (emphasis added) (citation omitted).

46. A "few scattered communications" and other evidence "falls far short" of overcoming defendants' sworn denials. *City of Moundridge v. Exxon Mobil Corp.*, 409 Fed.Appx. 362, 364 (D.C. Cir. 2011); *see also Superior Offshore,* 2012 WL 3055849, *7 (statement that "everyone more or less agreed to the necessity of a more or less equal rate hike for everyone" insufficient).

47. Complaint Counsel must prove that any alleged exchange of pricing information actually made an impact on pricing decisions. *Id.* at 369; *Baby Food,* 166 F.3d at 125. Complaint Counsel has failed to do so. Complaint Counsel established no evidence if an exchange of price information beyond normal pricing letters to customers.

48. Complaint Counsel has thus failed to meet its burden of presenting evidence which tends to exclude the possibility that insert legal cite/quote.

D. The Short-Lived Trade Association the Ductile Iron Fittings Research Association (DIFRA) Did Not Facilitate Price Coordination

49. It is well established that legitimate trade associations are perfectly legal. *Citric Acid,* 191 F.3d at 1097-98. Courts have also rejected any antitrust liability premised upon the theory that a company's decision to participate in a trade association that gathers and disseminates aggregated tons-shipped data somehow "facilitated" price collusion. *Williamson Oil*, 346 F.3d at 1313 ("exchange [of] information relating to sales . . . does not tend to exclude the possibility of independent action or to establish anticompetitive collusion"). Even if DIFRA had gathered pricing information (which it did not), it is well-settled that "[g]athering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association took almost any action." *Citric Acid,* 191 F.3d at 1097-98.

50. As DIFRA did not disseminate pricing data of its members but rather, only historic, aggregated tons-shipped data, McWane's participation therein is entirely lawful. *Williamson Oil*, 346 F.3d at 1313.

E. Complaint Counsel Has No Evidence of Price-Signaling.

51. Count Three of the Complaint alleges that McWane, through "price signaling" and other unilateral actions, invited its competitors to collude to restrain price competition.

52. Because the existence of an actual agreement is the essence of a Sherman Act § 1 claim, one firm's "price signal" or "invitation to collude" is not actionable under the antitrust laws. *See Twombly*, 550 U.S. at 553.

53. Absent proof that such unilateral actions actually harmed competition, neither are they actionable under Section 5 of the FTC Act. *See Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980).

54. In an oligopolistic industry, even proof that a firm's conduct reduced competition is not sufficient to establish a violation of Section 5. *E.I. DuPont de Nemours & Co. v. FTC*, 729 F.2d 128, 137-40 (2nd Cir. 1984).

55. Labeling an oligopolist's pricing changes as "price signals" does not convert them into "unfair competition." *Id.* at 139.

56. Instead, Complaint Counsel must prove that indicia of oppressiveness existed, such as (i) evidence of the defendant's anticompetitive intent; or (ii) the absence of legitimate business justifications for the defendant's actions. *Id.* at 139.

57. Complaint Counsel failed to meet its burden regarding McWane's alleged intent and lack of legitimate business justification. Moreover, the overwhelming evidence establishes that McWane lacked anticompetitive intent and had legitimate business justifications for its actions.

II. McWane Did not Monopolize, Attempt to Monopolize, or Conspire to Monopolize the Alleged Domestic Fittings Market (Counts 5-7)

A. Standard of Proof

58. Complaint Counsel's Section 5 claims alleging that McWane monopolized, attempted to monopolize, or conspired to monopolize the so-called domestic fittings market must meet the same burden of proof as Sherman Act Section 2 claims. *See, e.g. FTC v. Cement Institute*, 333 U.S. 683, 691-92 (1948).

59. Section 2 of the Sherman Act prohibits a firm from monopolizing, attempting to monopolize, or conspiring to monopolize the relevant market. 15 U.S.C. § 2.

60. "The purpose of the Act is not to protect businesses from the workings of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, ***even severely so***, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993) (emphasis supplied).

61. Because "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects," federal courts have been careful to avoid construing Section 2 in a way that would chill, rather than foster, competition. *Spectrum Sports*, 506 U.S. at 458-59.

62. The Supreme Court has made clear that: "[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices – at least for a short period – is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("*Verizon*"). *See also United States v. Microsoft Corp.*,

253 F.3d 34, 51 (D.C. Cir. 2001) ("merely possessing monopoly power is not itself an antitrust violation").

63. Acquiring or maintaining monopoly power through "growth or development as a consequence of a superior product, business acumen, or historic accident" is not a violation of Section 2. *Verizon,* 540 U.S. at 407 (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

64. McWane's share of the Fittings market is not the result of willful misconduct, but of its own business acumen and even historic accident – i.e. the exit of other domestic DIWF manufacturers from an unprofitable industry in the wake of a flood of cheap imports. Thus, Complaint Counsel must establish not only that McWane possessed monopoly power in the relevant market, but also that it willfully acquired or maintained that power through anticompetititve conduct. *See Verizon,* 540 U.S. at 407.

65. Because Complaint Counsel cannot meet this burden, McWane is entitled to judgment in its favor on Counts Five through Seven of the Complaint, and Count Four to the extent it is based on monopoly.

B. McWane Lacked Market Power.

66. McWane's market share does not rise to the level of "monopoly power." *See Barr Laboratories, Inc. v. Abbott Laboratories*, 978 F.2d 98, 112-13 (3rd Cir. 1992) (market share of 50% did not establish monopoly power). As numerous witnesses confirmed at trial, both before ARRA and after ARRA, domestic fittings comprise only about 15-20% of the fittings market.

67. "Monopoly power" is "the ability to (1) price substantially above the competitive level *and* (2) to persist in doing so ***for a significant period without erosion by new entry or***

expansion." *AD/SAT v. Associated Press,* 181 F.3d 216, 226-27 (2nd Cir. 1999) (italics in original, bold supplied).

68. Large market share does not conclusively establish monopoly power. *See, e.g., Tops Markets, Inc. v. Quality Markets, Inc.,* 142 F.3d 90, 99 (2nd Cir. 1998) (70% share); *Epicenter Recognition, Inc. v. Jostens, Inc.,* 81 Fed.App. 910, 911-12 (9th Cir. 2003) (80% share).

69. If a defendant with large market share is unable to control prices or exclude competitors, then it is not a monopoly. *Tops Markets,* 142 F.3d at 99; *see also Metro Mobile CTS, Inc. v. NewVector Comms., Inc.,* 892 F.2d 62, 63 (9th Cir. 1989) ("*Metro Mobile*") (a defendant's possession of even 100% market share does not necessarily establish defendant has power to charge monopoly prices or control output); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) ("*Oahu Gas*")(a high market share will not raise an inference of monopoly power in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors).

70. The ability to maintain prices above a competitive level "for an extended period" is a key element of monopoly power. *Rebel Oil Co., Inc. v. Atlantic Richfield* Co., 51 F.3d 1421, 1434 (9th Cir. 1995) ("*Rebel Oil*").

71. Where barriers to entry[1] into a market are low, a defendant's market power is often much less than its market share would seem to indicate. *Moeckler v. Honeywell International, Inc.,* 144 F.Supp.2d 1291, 1308 (M.D.Fla. 2001).

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[1] Barriers to entry are additional long-run costs that must be incurred by new entrants but not by incumbent competitors, or "factors in the market that deter entry while permitting incumbent firms to earn monopoly returns." *Rebel Oil,* 51 F.3d at 1439. Entry barriers are typically legal licensing requirements, control of an essential or superior resource, entrenched buyer preferences for established brands, capital market evaluations which impose higher capital costs on new entrants, and economies of scale. *Id.* To support a finding of monopoly power, entry barriers must be high enough to constrain the normal operation of the market to the extent that natural market forces cannot self-correct the market. *Id.*

72. "Market share reflects current sales, but today's sales do not always indicate power over sales and price tomorrow." *Ball Memorial Hospital v. Mut. Hospital Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *see also Oahu Gas*, 838 F.2d at 366 (a firm with a high market share may be able to exert market power in the short run, but substantial market power can persist only if there are significant and continuing barriers to entry).

73. The evidence demonstrates that McWane lacks such power.

C. McWane's September 2009 Rebate Policy Did Not Exclude Star and is Pro-competitive.

74. Even if Complaint Counsel could establish that domestic DIWF is a separate relevant market in which McWane has monopoly power (which it cannot), McWane is nevertheless entitled to judgment in its favor because there is no evidence that McWane engaged in anticompetitive conduct to acquire or maintain monopoly power. *See Verizon*, 540 U.S. at 407.

75. Complaint Counsel alleges two instances of supposed anticompetitive conduct: McWane's September 2009 Rebate Policy ("Rebate Policy") and McWane's Master Distributorship Agreement with Sigma ("MDA"). both are pro-competitive.

1. The Rebate Policy is Presumptively Legal

76. "As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing." *Pacific Bell Tel. Co. v. Linkline Comm., Inc.*, 555 U.S. 438, 448 (2009).

77. The rebates referenced in the Rebate Policy are customer discounts. Because discounts are beneficial to consumers, "price cutting is a practice the antitrust laws aim to promote." *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 896 (9th Cir. 2008); *see*

Nicsand, Inc. v. 3M Co., 507 F.3d 442, 452 (6th Cir. 2007) ("[c]utting prices in order to increase business often is the very essence of competition").

78. Discounted prices that remain above a firm's average variable cost are presumptively legal, because a firm's ability to offer above cost discounts represents competition on the merits. *Concord Boat v. Brunswick Boat Corp.*, 207 F.3d 1039, 1061 (8th Cir. 2000) ("*Concord Boat*").

79. Too much judicial oversight of discounting creates "intolerable risks of chilling legitimate price cutting." *Id.* at 1061 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993)). *See also Southeast Missouri Hosp. v. C.R. Bard, Inc.*, 642 F. 3d 608, 623 (8th Cir. 2011) (plaintiff must overcome a strong presumption of legality where defendant's discounted prices are above its average variable cost).

80. There is no evidence that the customer discounts McWane offered under its Rebate Policy were below its average variable cost. *See Safeway, Inc. v. Abbott Laboratories*, 761 F.Supp.2d 874, 898 (N.D.Cal. 2011) (granting summary judgment for defendant on predatory pricing monopoly and attempted monopoly claims, where plaintiff failed to present evidence that defendant priced below cost).

81. A defendant's above-cost customer discounts are presumed legal even if those discounts are offered under an exclusive agreement. *See, e.g., Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 903 (9th Cir. 2008); *Concord Boat, 207 F.3d at 1061; Nicsand,* 507 F.3d at 451-52, 457.

82. This presumption of legality even applies where the defendant has a super-majority share of the relevant market, provided the exclusive agreement is terminable at will and

on short notice. *Epicenter Recognition, Inc. v. Jostens, Inc.*, 81 Fed.App. 910, 911-12 (9th Cir. 2003).

83. McWane's Rebate Policy is not only terminable at will and on short notice, it is terminable ***at any time***, because it is not a legally enforceable contract or agreement.

84. The possibility that the Rebate Policy increased Star's costs is of no consequence, because the antitrust laws are designed to protect *competition*, not competitors. *Bacchus Inds., Inc. v. Arvin Inds., Inc.*, 939 F.2d 887, 894 (10th Cir. 1991) (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)) ("Whether or not a practice violates the antitrust laws is determined by its effect on competition and not its effect on an individual competitor.")

85. Although conduct that eliminates rivals reduces competition, "reduction of competition does not invoke the Sherman Act until it harms consumer welfare." *Rebel Oil*, 51 F.3d at 1433.

86. As one circuit court put it: "cutthroat competition is a term of praise rather than condemnation. . . consumers gain when firms try to 'kill' the competition and take as much business as they can." *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper*, 462 F.3d 690, 696 (7th Cir. 2006) (citations omitted).

2. Star's Successful Entry as a Domestic Fittings Supplier Refutes any Inference of Monopoly Power.

87. The trial evidence proves that Star quickly became a supplier of domestic fittings within months of ARRA's passage and dramatically increased its domestic fittings sales.

88. These facts establish that the Rebate Policy is not anticompetitive. *See, e.g., Omega Environmental,* 127 F.3d at 1164 ("actual entry and expansion" of competitor demonstrated that the defendant's policy did not deter entry into the relevant market); *Sterling*

Merchandising, 656 F.3d at 126 (attempted monopolization claim "presumptively implausible where the challenged conduct has been in place for at least two years and the market remains competitive, as evidenced by ongoing entry, profitability of rivals, and stability of their aggregate market share.")

89. The allegation that Star did not increase its domestic fittings sales as much or as quickly as it would have preferred does not support a monopoly claims or prove that the Rebate Policy is anticompetitive. *See, e.g., Roland Machinery,* 749 F.2d at 394-95; *Sterling Merchandising,* 656 F.3d at 123 n.5.

90. First, the antitrust laws are designed to protect competition, not competitors. *Brunswick Corp.*, 429 U.S. at 488.

91. Second, factors other than McWane's Policy explain why Star may not have increased domestic fittings sales as much as it would have liked, including Star's own reputation, distributors' lack of confidence in Star, and Star's own delivery and inventory issues.

92. It is well recognized that "it is sometimes difficult to distinguish robust competition from competition with long-run anticompetitive effects." *Arther S. Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1433 (Sixth Cir. 1990).

93. Ultimately, by pushing Star to develop a full line of domestic fittings - rather than merely the most commonly used fittings - in order to compete most effectively with McWane, the Rebate Policy had a pro-competitive purpose.

3. The Rebate Policy did Not Cause Anticompetitive Effects.

94. Because the Rebate Policy is not a contract, it is less restrictive than most of the exclusive agreements and arrangements found to be perfectly legal by the courts.

95. Even if the Rebate Policy were a legally enforceable contract, it is well settled that exclusive contracts can have legitimate economic benefits, and must therefore be evaluated in accordance with the rule of reason. *Stop & Shop,,* 373 F.3d at 65-66; *Omega Environmental,* 127 F.3d at 1162; *Roland Machinery,* 749 F.2d at 395.

96. Under the rule of reason, Complaint Counsel must prove that the Rebate Policy caused anti-competitive consequences that outweigh its pro-competitive benefits. *Stop & Shop,* 373 F.3d at 65-66.

97. Anti-competitive consequences would be a reduction in domestic DIWF output or a supracompetitive rise in domestic DIWF prices. *See CDC Technologies,* 186 F.3d at 80-81. Evidence that a competitor such as Star may have been harmed is insufficient. *See Dentsply,* 399 F.3d at 187; *Stop & Shop,* 373 F.3d at 65-66.

98. Complaint Counsel presented no evidence that the Rebate Policy caused domestic DIWF output to fall.

99. To the contrary, the evidence is that domestic DIWF output increased.

100. Complaint Counsel presented no evidence that the Rebate Policy caused the price of domestic DIWF to rise to supracompetitive levels.

101. To the contrary, the evidence is that domestic DIWF prices did not keep place with inflation in 2009-2010.

D. The MDA Did Not Foreclose Sigma as a Competitor and Was Pro-competitive.

102. To succeed on its claims relating to the MDA, Complaint Counsel must prove that – as of September 2009 when the MDA was executed - Sigma was prepared and intended to enter the domestic fittings market. *See Gas Utilities Co. of Alabama, Inc. v. Southern Natural Gas Co.,* 99 6 F.2d 282, 283 (11th Cir. 1993) ("Inquiry into procedures is insufficient to

establish preparedness . . . party must take some affirmative step to enter"). To meet this burden, Complaint Counsel must prove that Sigma had secured financing and consummated contracts to supply domestic Fittings. *See id.* Evidence that Sigma may have had access to financing in the abstract is not sufficient. *Id.*; *see also* Case *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (requiring "an intention to enter the business" and a "showing of preparedness"); *Sunbeam Television Corp., v. Nielsen Media Research, Inc.*, 136 F.Supp.2d 1341, 1354 (S.D. Fla. 2011) ("a would-be purchaser suing an incumbent monopolist for excluding a potential competitor . . . must prove the excluded firm was willing and able to supply it but for the incumbent firm's exclusionary conduct").

103. As Complaint Counsel failed to offer any proof that Sigma was prepared to and intended to enter domestic production and, in fact the evidence unequivocally established that Sigma had taken no concrete steps to produce domestic fittings, liability cannot be founded on the MDA.

E. McWane Is Entitled to Judgment in Its Favor on the Attempted Monopolization and Conspiracy to Monopolize Claims.

104. For all of the reasons Complaint Counsel's monopoly claims fail, as set forth above, its attempted monopoly and conspiracy to monopolize claims also fail. These two claims also fail for the independent reasons set forth below.

1. Attempted Monopolization

105. To establish an attempted monopoly claim, a plaintiff must prove that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct; and that a dangerous probability existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg. Inc. v. Rule Inds., Inc.*, 7 F.3d 986, 993 (11th Cir. 1993).

106. With regard to the specific intent element, the desire to maintain or increase one's market share is not in itself an antitrust violation. *Oahu Gas*, 838 F.2d at 368.

107. For a claim of attempted monopolization, even "[d]irect evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation. It must also be shown that the defendant sought victory through unfair or predatory means." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1028 (9th Cir. 1982).

108. Because Complaint Counsel has failed to establish that McWane engaged in unfair or predatory conduct. McWane is entitled to judgment in its favor on Count Seven of the Complaint.

2. Conspiracy to Monopolize

109. To establish conspiracy to monopolize, a plaintiff must prove: (i) the existence of a conspiracy to monopolize; (ii) overt acts done in furtherance of the conspiracy; (3) an effect upon an appreciable amount of interstate commerce; and (4) a specific intent to monopolize. *Lantec, Inc. v. Novell, Inc., 306 F.3d 1003, 1028 (10th Cir. 2002).*

110. Conduct as consistent with permissible competition as with illegal conspiracy does not support an inference of antitrust conspiracy. *Id.* at 1030.

111. Thus, Complaint Counsel must prove that *both* McWane *and* Sigma had a specific intent to endow McWane with monopoly power. *ID Security Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F.Supp.2d 622, 660-61 (E.D.Pa. 2003).

112. Proof that McWane and Sigma shared an intent to prevail over rivals or to improve market position is insufficient; the shared intent must have been to make McWane a monopolist. *Id.*

113. Further, even if Complaint Counsel could establish that McWane had an intent to achieve a monopoly (which it cannot), Complaint Counsel has no evidence that Sigma shared the same intent.

114. To the contrary, Sigma's focus in signing the MDA was on keeping its own customers happy and providing domestic DIWF to those customers when needed, not on Star.

115. Sigma perceived that if it was unable to supply domestic DIWF to its customers, it might also lose some portion of its non-domestic business with those customers.

116. Thus, McWane is entitled to judgment in its favor on Count Five of the Complaint *See Belfiore v. The New York Times Co.*, 826 F.2d 177,183 (2nd Cir. 1987) (no conspiracy where plaintiff failed to prove that alleged co-conspirator shared intent to make primary conspirator a monopoly).

III. The MDA Was Not a Restraint of Trade in Violation of Section 5 (Count 4)

117. Count Four of the Complaint consists of a bare, conclusory allegation that the MDA unreasonably restrains trade and constitutes an unfair method of competition in violation of Section 5.

118. As established in Section above, the MDA did not violate Section 2 of the Sherman Act, and was actually procompetitive.

119. Complaint Counsel has not presented any other evidence of any other manner in which the MDA has allegedly restrained trade.

120. Moreover, it is well established that vertical agreements such as the MDA can be procompetitive. *See Brantley*, 675 F.3d at 1198, 1202.

121. Without more, even evidence that such an agreement increases consumer prices or reduces consumer choice is not sufficient to establish an antitrust violation. *Id.* at 1202. Therefore, McWane is entitled to judgment in its favor on Count Four.

IV. DR. SCHUMANN'S OPINIONS ARE LEGALLY FLAWED AND SHOULD BE IGNORED

122. Dr. Schumann did not quantify or otherwise provide any economic analyses demonstrating that imported Fittings prices would have been lower but-for the alleged conduct in 2008, nor that domestic Fittings prices would have been lower but-for the rebate letter or the MDA. *St. Francis Medical Center v. C.R. Bard, Inc.*, 657 F.Supp.2d 1069, 1102-03 (E.D. Mo. 2009) (a manufacturer's rebate policy was not anticompetitive where there was no evidence that it led to higher prices or that customers who bought products in various categories under the policy did so unwillingly). His opinion was nothing more than assumption and speculation. That is not enough. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 579-80 (1993) (untestable say-so is not reliable evidence at trial); *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1977) ("Nothing . . . requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242 (1993) ("when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict."). As such, the Court should not consider any of Dr. Schumann's opinions.

V. THE GOVERNMENT IS NOT ENTITLED TO ANY REMEDY

123. The proposed remedy should be denied because there was no proof at trial of any ongoing actual or threatened injury to competition or consumers.

124. Federal judicial power is limited by Article III of the Constitution to live "Cases" or "Controversies."

125. Courts cannot grant injunctions unless a plaintiff shows ongoing or imminent harm. The Supreme Court has repeatedly denied injunctive relief to plaintiffs, like Complaint Counsel here, who cannot meet that proof.

126. The plaintiff "must show that he is under threat of suffering 'injury in fact' that is *concrete and particularized*" and "the threat must be actual and imminent, not conjectural or hypothetical[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009).

127. A plaintiff, like Complaint Counsel here, that fails to meet these requirements is not entitled to injunctive relief. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011) ("plaintiffs no longer employed [by Wal-Mart] lack standing to seek injunctive and declaratory relief against its employment practices"); *City of L.A. v. Lyons*, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices).

128. The mere possibility that past conduct might occur again is insufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)

129. It is undisputed that the conduct that is alleged to be unlawful in the Complaint has long since ended. Complaint Counsel's own expert testified that the alleged conspiracy ended over four years ago in late 2008, and has suggested no conspiratorial conduct beyond June 2010. Likewise, it is undisputed that McWane's 2009 Rebate Policy is terminated in early 2010 and is no longer in effect. Finally, the undisputed evidence also establishes that the MDA executed by McWane and Sigma was terminated in 2010. Thus, there is no possibility that the challenged conduct could reoccur.

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CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2012, I served a copy on the following by hand delivery and email:

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