Dissenting Statement of Commissioner Joshua D. Wright

In the Matter of
MCWANE, INC. ET AL.
Docket No. 9351

Introduction[1]

I dissent from the Commission's holding that McWane unlawfully monopolized the Domestic Fittings market.[2] In my view, Complaint Counsel has not met its burden to show by a preponderance of the evidence that McWane's Full Support Program harmed competition in the Domestic Fittings market.[3]

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

CC Answering Brief – Complaint Counsel's Answering Brief filed July 2, 2013
Commission Opinion
Complaint – Complaint filed January 4, 2012
CX# – Complaint Counsel Exhibit
IDF – Numbered Findings of Fact in ALJ's Initial Decision
McWane Brief – Respondent McWane, Inc.'s Appeal Brief filed May 31, 2013
Name of Witness, Tr. – Transcript of Trial before the ALJ
Oral Argument Tr. – Transcript of Oral Argument before the Commission August 22, 2013
RX# – Respondent Exhibits

[2] I concur with the Commission's decision to reverse the Initial Decision on Counts 4 and 5 and join the Commission's Opinion with respect to those Counts. I also concur with the Commission's decision to dismiss Counts 1 and 2 in the public interest and join the Commission's Opinion with respect to those Counts. I concur with the Commission's decision to dismiss Count 7 but I do so for separate reasons explained below.

[3] Though I do not discuss whether Complaint Counsel established that there is a separate relevant market for domestic fittings, I do not join that portion of the Commission's Opinion.

Antitrust law has evolved dramatically over the past several decades to incorporate established economic learning.[4] One of the most important developments at the Supreme Court was the Court's recognition that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[5] The federal antitrust laws, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, have proved enormously flexible in this regard. Perhaps the greatest shift in antitrust jurisprudence since the bad old days has occurred in the area of vertical restraints, the subject of the Supreme Court's decision in *GTE Sylvania* in 1977, which changed the focus of antitrust from achieving a hodgepodge of economic, social, and political goals, to a legal regime concerned entirely with the "market impact" of business conduct.[6] With regard to vertical restraints, it is well-accepted that the economic learning accumulated since *GTE Sylvania* has taught that such restraints, a category that includes vertical territorial restrictions, resale price maintenance, exclusive dealing, loyalty discounts, tying, and

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[4] Leah Brannon & Douglas H. Ginsburg, *Antitrust Decisions of the U.S. Supreme Court 1967 to 2007*, 3 COMPETITION POL'Y INT'L 1 (2007).

[5] Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (quoting R. BORK, THE ANTITRUST PARADOX 66 (1978)).

[6] Cont'l TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51-52 (1977); *see also* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 53 (2000) (describing *GTE Sylvania* as the "pivotal event" in the evolution of antitrust doctrine because the Court "emphasized that the analysis of economic effects provided the proper basis for evaluating conduct under the antitrust laws"). In *GTE Sylvania*, the Court also declared interbrand competition "the primary concern of antitrust law." 433 U.S. at 52 n.19.

other related business practices, rarely harm competition and often benefit consumers by increasing demand and/or creating a more efficient distribution channel.[7]

Complaint Counsel has asked the Commission to conclude that McWane's Full Support Program – a vertical restraint – violates Section 2 of the Sherman Act, and the Commission has acquiesced by so holding. This appeal comes to the Commission after a full trial on the merits, which yielded a 464-page opinion from the Administrative Law Judge. The posture of this case is not a motion to dismiss or a motion for summary judgment. The standard of review the Commission is to apply is *de novo*.[8] Accordingly, the Commission's task on appeal is not to determine whether Complaint Counsel asserts a plausible theory of competitive harm or whether there is *some* evidence in the record that tends to show the Respondent was seeking impermissibly to maintain a monopoly position. Rather, the Commission's task is to look at all the evidence in the record and to decide whether Complaint Counsel has carried its burden to prove that

[7] James C. Cooper et al., *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639, 658 (2005) (stating that although "some studies find evidence consistent with both pro- and anticompetitive effects . . . virtually no studies claim to have identified instances where vertical practices were likely to have harmed competition"); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy in* HANDBOOK OF ANTITRUST ECONOMICS 391 (Paolo Buccirossi ed., 2008) ("[I]t appears that when manufacturers choose to impose restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision"); Daniel O'Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems in* THE PROS AND CONS OF VERTICAL RESTRAINTS 40, 72-73 (2008) ("[W]ith few exceptions, the literature does not support the view that [vertical restraints] are used for anticompetitive reasons" and vertical restraints "are unlikely to be anticompetitive in most cases") .

[8] 16 C.F.R. § 3.54 (2013).

McWane's conduct harmed competition. That is, whether the evidence in the record matches and is sufficient to support Complaint Counsel's theory of harm.

At the most basic level, Complaint Counsel's task is to prove that McWane's conduct caused harm to competition.[9] This is a simpler task than typical merger analysis, which requires Complaint Counsel to offer and the Commission to evaluate a *prediction* about *future consequences*. That forward-looking exercise requires a prediction and subsequent comparison of two different futures: one with and one without the allegedly unlawful merger. Here, the Commission is faced with evaluating allegedly anticompetitive conduct that has already taken place. Indeed, the Commission's task is to assess whether the Full Support Program – conduct that first began in 2009 – harmed competition. Precisely because the market has already experienced McWane's allegedly anticompetitive conduct, the Commission has access to a source of critical evidence not usually available in the typical scenario. Specifically, the Commission is able to test Complaint Counsel's theory of competitive harm against evidence of actual market impact.

There is ample record evidence demonstrating that the Full Support Program harmed McWane's rival Star. But, in my view, Complaint Counsel fails totally to

[9] Rambus v. FTC, 522 F.3d 456, 466-67 (D.C. Cir. 2008) (conduct cannot cause an anticompetitive outcome unless plaintiff can show that outcome would not have occurred but for the challenged conduct); United States v. Microsoft, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc) (per curiam) (plaintiff must show that defendant's conduct made a "significant contribution" to an anticompetitive outcome).

establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*. Complaint Counsel could have taken either or both of two general approaches to demonstrate McWane's conduct harmed competition: direct or indirect evidence of anticompetitive effect. Complaint Counsel makes no effort to establish harm to competition directly, such as by demonstrating that McWane's conduct had a deleterious effect upon price or output in the Domestic Fittings market.[10] Instead, Complaint Counsel and the Commission rely upon indirect evidence including market share estimates and imprecise estimates regarding how much the Full Support Program "foreclosed" Star from access to distributors. This evidence is only indirectly relevant to establishing the Full Support Program harmed competition in the Domestic Fittings market because it requires a number of inferences to be drawn and assumptions to be made to establish such a connection. Indeed, the most probative indirect evidence in the record – evidence of Star's successful entry in the Domestic Fittings market and its growing market share – undermines Complaint Counsel's theory of harm. If the challenged conduct that occurred in 2009 and 2010 harmed competition, Complaint Counsel ought to be able to prove it with evidence that *consumers of domestic pipe fittings*

[10] Such direct evidence of an impact upon price or output might be, for example, a comparison of actual prices and industry output during the relevant time period against an estimate of the prices and output that would have occurred during the relevant time period had McWane not engaged in the challenged conduct. If price was higher or output was lower and the difference could be properly attributed to McWane's conduct rather than to other contemporaneous changes in the market, then this evidence would constitute direct evidence that McWane's conduct harmed competition.

are worse off as a result of McWane's conduct. The record is clear that there is no such proof.

The well-established economic learning setting forth the limited theoretical conditions under which a firm can use vertical restraints to monopolize a market, and the state of empirical economic literature demonstrating that such restraints rarely harm competition make clear that although vertical restraints such as the Full Support Program certainly can harm competition under some circumstances, those circumstances are the exception to the general rule that vertical restraints are a normal part of the competitive process and benefit consumers. The Commission should be skeptical of attempts to establish competitive harm in vertical cases solely through the use of indirect evidence and inferences of competitive injury.[11] That skepticism should be heightened in cases, such as this one, involving allegations of anticompetitive conduct that has been occurring in the marketplace for some time, which ought to enable the Commission to ascertain its competitive footprint. Given the dearth of record evidence demonstrating that McWane's conduct has had an adverse effect on competition, I do not believe Complaint Counsel has carried its substantial burden.[12]

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[11] *See* Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693, 723 (2000) (emphasizing that allowing evidence of harm to a competitor to suffice in monopolization cases "would make it too easy to infer injury to competition from the fact of injury to competitors").

[12] Because Complaint Counsel has not carried its *prima facie* burden of establishing anticompetitive effect, I do not consider whether Respondent has asserted a non-pretextual procompetitive justification for the Full Support Program.

Accordingly, I respectfully dissent from the Commission's holding that McWane unlawfully monopolized the Domestic Fittings market.

I. Count 6: Unlawful Monopolization

Section 2 of the Sherman Act prohibits acts to "monopolize."[13] The Supreme Court has explained that "[t]he offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 570-71 (1966). I dissent from the Commission's decision because in my view Complaint Counsel has failed to establish the second element of a monopolization claim: that McWane's conduct was exclusionary.[14]

A. **The Law of Exclusionary Conduct**

To reach the conclusion that unilateral conduct is exclusionary and therefore a potential violation of Section 2 of the Sherman Act, a trier of fact must undertake the

[13] 15 U.S.C. § 2 (2012).

[14] The Commission has also decided that Complaint Counsel established the first element of the offense: that McWane has monopoly power in the Domestic Fittings market. Because both elements must be established for Complaint Counsel to succeed on appeal and it has not, in my view, established the second element, I need not decide whether Complaint Counsel has proven that McWane has monopoly power in a relevant market. For purposes of my Dissenting Statement, I assume but do not decide that McWane has monopoly power in the Domestic Fittings market. Nevertheless, I decline to join the Commission's decision that McWane has monopoly power in the Domestic Fittings market.

difficult task of separating *bona fide* anticompetitive conduct from competition on the merits. In the words of the D.C. Circuit, "[w]hether any particular act of a monopolist is exclusionary, rather than merely a form of vigorous competition, can be difficult to discern: the means of illicit exclusion, like the means of legitimate competition, are myriad." *Microsoft*, 253 F.3d at 58. Though this exercise is often fact-intensive, courts have laid out some helpful guidelines. Judge Bork observed that exclusionary or predatory conduct "involves aggression against business rivals through the use of business practices that would not be considered profit maximizing except for the expectation that (1) actual rivals will be driven from the market, or the entry of potential rivals blocked or delayed, so that the predator will gain or retain a market share sufficient to command monopoly profits, or (2) rivals will be chastened sufficiently to abandon competitive behavior the predator finds threatening to its realization of monopoly profits." *Neumann v. Reinforced Earth Co.*, 786 F.2d 424, 427 (D.C. Cir. 1986).

The D.C. Circuit in *Microsoft* set forth the general burden-shifting procedure a court should undertake in deciding whether conduct is exclusionary under the meaning of Section 2:

> First, to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice. The Sherman Act directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself . . .

> Second, the plaintiff, on whom the burden of proof of course rests must demonstrate that the monopolist's conduct indeed has the requisite anticompetitive effect. In a case brought by . . . the Government, it must demonstrate that the monopolist's conduct harmed competition, not just a competitor.
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> Third, if a plaintiff successfully establishes a *prima facie* case under § 2 by demonstrating anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct. If the monopolist asserts a procompetitive justification — a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal — then the burden shifts back to the plaintiff to rebut that claim.
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> Fourth, if the monopolist's pro-competitive justification stands unrebutted, then the plaintiff must demonstrate that the anticompetitive harm of the conduct outweighs the procompetitive benefit . . .
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> Finally, in considering whether the monopolist's conduct on balance harms competition and is therefore condemned as exclusionary for purposes of § 2, our focus is upon the effect of that conduct, not upon the intent behind it. Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.

Microsoft, 253 F.3d at 58-59. The point of contention between my position and that of the Commission is whether Complaint Counsel can proceed beyond the second step, that is whether, assuming McWane is a monopolist, the Full Support Program has anticompetitive effect. In my view, Complaint Counsel has failed to carry its burden to show that the Full Support Program has had anticompetitive effect.

B. **Exclusive Dealing as a Form of Exclusionary Conduct**

Economic theory shows that exclusive dealing, like most vertical restraints, can harm competition under certain circumstances but can also result in procompetitive efficiencies that benefit consumers. Modern economic theory teaches that exclusive contracts can harm competition when a monopolist uses exclusivity provisions in contracts with suppliers or distributors to raise the cost its rival faces in buying supply or contracting with distributors. Absent these contracts, the rival (or entrant) could cover its fixed costs by attracting a large enough mass of suppliers or distributors.

Economists have developed theories under the moniker of "raising rivals' costs" to articulate the conditions under which it is theoretically possible for a monopolist to use exclusive dealing to harm competition. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983). The critical issue is "[w]hether the exclusionary rights arrangement will so limit remaining supply available to rivals that it will lead them to bid up the price of that supply, thereby increasing their costs to the point that the purchaser obtains power over price." Krattenmaker & Salop, 96 YALE L.J. at 259. These economic models make clear that exclusive dealing cannot result in the acquisition or maintenance of market power and harm competition unless the contracts foreclose a rival from access to a critical input necessary to achieve minimum efficient scale

(MES).[15] In other words, a coherent theory of exclusion involving exclusive dealing contracts requires an analytical link between the contracts and the MES of production.[16]

The "foreclosure rate" contemplated by the economic paradigm of raising rivals' costs can provide this analytical link in the absence of direct evidence that the exclusive dealing contracts have caused the maintenance or acquisition of market power and have resulted in higher prices and reduced output. Whereas earlier and now discredited formulations of foreclosure raised the concern that exclusive dealing contracts between an input supplier and a buyer foreclosed rival buyers from access to that input seller, Krattenmaker & Salop, 96 Yale L.J. at 231-32, the modern economics of raising rivals' costs recognizes that determining a rate of foreclosure is not the end of the economic analysis, but rather is a starting point for a broader inquiry into whether

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[15] Minimum efficient scale is "the size plant that can produce the smallest amount of output such that long-run costs are minimized." DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 783 (4th ed., 2004). The concept of "raising rivals' costs" underlying modern anticompetitive theories of exclusion generally requires input foreclosure sufficient to deprive a rival from achieving minimum efficient scale. *See* Krattenmaker & Salop, 96 YALE L.J. at 247 ("[E]xcluded rivals no longer produce at minimum cost if the exclusionary rights agreement compels them to substitute less efficient inputs."); Benjamin Klein, *Exclusive Dealing as Competition for Distribution "On the Merits,"* 12 GEO. MASON L. REV. 119, 122-28 (2003) ("[I]f exclusive contracts foreclose a sufficient share of distribution to rivals for a significant time so that what remains to serve competitors cannot support a manufacturer of minimum efficient scale, the exclusive will force existing competitors and potential new entrants to operate at a cost disadvantage. The exclusives then may have the effect of driving out and/or preventing entry of manufacturing competitors until sufficient distribution becomes available.").

[16] Klein, *supra* note 15, at 126 ("Th[is] economic analysis . . . implies that the critical market share foreclosure rate should depend upon the [MES] of production.").

the contracts raise a rival supplier's costs sufficiently to impact the competitive process.[17]

C. Exclusive Dealing and the Antitrust Statutes

Complaint Counsel has alleged and the Commission has concluded that McWane's Full Support Program is illegal exclusionary conduct because it is a form of exclusive dealing. Complaint ¶ 57; CC Answering Brief at 14-15; Commission Opinion at 22-29. Though the Full Support Program is not part of an agreement between McWane and any of its distributors, Complaint Counsel argued and the Commission concluded that the Full Support Program operated like an exclusive dealing arrangement. CC Answering Brief at 14-15; Commission Opinion at 20-22. Though I agree with Complaint Counsel and the Commission that the Full Support Program presents the same antitrust issues as would a case involving an explicit exclusivity arrangement, I disagree with their conclusion that the Full Support Program caused harm to competition. To understand why I disagree, it is worthwhile first to consider the evolution of the legal treatment of exclusive dealing claims under the antitrust laws.

Historically, exclusive dealing arrangements have been attacked under multiple provisions of the antitrust laws: Section 1 of the Sherman Act, which prohibits contracts, combinations, and conspiracies in restraint of trade,[18] Section 2 of the Sherman Act,

[17] Krattenmaker & Salop, *supra* note 15, at 275.
[18] 15 U.S.C. § 1 (2012).

which prohibits unlawful monopolization,[19] and Section 3 of the Clayton Act, which prohibits exclusive sales arrangements where the effect may be to substantially lessen competition or tend to create a monopoly.[20] Prior to the passage of the Clayton Act in 1914, exclusive dealing arrangements were typically upheld both under the common law and in cases brought under the Sherman Act, which was passed in 1890.[21] After the Clayton Act was passed, however, plaintiffs began to use Section 3 of that statute to prosecute exclusive dealing arrangements, and courts began to interpret the Sherman Act more broadly to prohibit certain exclusive dealing arrangements.[22] The three statutory provisions have different requirements, which led courts to apply different standards depending upon the statutory provision under which the plaintiff pursued its claim. For example, Section 1 requires concerted action between two separate entities, whereas Section 2 does not. Section 2, on the other hand, requires some analysis of monopoly and monopoly power, whereas Section 1 and Section 3 focus instead on

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[19] 15 U.S.C. § 2 (2012).

[20] 15 U.S.C. § 14 (2012). Exclusive dealing arrangements can also be prosecuted by the Commission as an unfair method of competition under Section 5 of the FTC Act. 15 U.S.C. § 45(a).

[21] PHILLIP E. AREEDA & HERBERT H. HOVENKAMP, ANTITRUST LAW ¶ 1800c (3d ed. 2011) (citing Mogul Steamship Co. v. McGregor, Gow & Co., [1892] A.C. 25, 66 Law Times 1 (1892); Whitwell v. Continental Tobacco Co., 125 F. 454 (8th Cir. 1903) (approving tobacco company's granting of rebates to dealers who did not sell competing brands)) [hereinafter *AREEDA*].

[22] Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 ANTITRUST L.J. 311, 317 (2002) ("Passage of the Clayton Act did in fact result, almost immediately, in more and successful challenges to exclusive dealing arrangements."); United States v. Am. Can Co., 230 F. 859, 875 (D. Md. 1916) (holding an exclusive dealing arrangement unlawful under the Sherman Act).

"market power." Finally, Section 3 requires a "sales" arrangement whereas neither of the other two statutory provisions includes such a requirement.[23]

Today, though the statutory provision under which the claim is pursued makes some difference depending upon the circumstances, the law of exclusive dealing under the three provisions has largely converged in recent years. One commentator has opined that "[t]he focus today is whether exclusive dealing is unreasonably anticompetitive. Which statute is used as the basis for challenge no longer really matters."[24]

In any event, though the statute under which a plaintiff pursues its claim can have some effect on whether its claim is successful, a plaintiff must *always* establish that the exclusive dealing arrangement harms competition as understood under the familiar antitrust rule of reason.[25]

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[23] *See AREEDA*, *supra* note 21, ¶ 1800c.

[24] Jacobson, *supra* note 22, at 327 (describing the collapse of any distinction between jurisprudence under Section 1 of the Sherman Act and Section 3 of the Clayton Act); *see also* Microsoft, 253 F.3d at 70 ("The basic prudential concerns relevant to §§ 1 and 2 are admittedly the same: exclusive contracts are commonplace—particularly in the field of distribution—in our competitive, market economy, and imposing upon a firm with market power the risk of an antitrust suit every time it enters into such a contract, no matter how small the effect, would create an unacceptable and unjustified burden upon any such firm. At the same time, however, we agree with plaintiffs that a monopolist's use of exclusive contracts, in certain circumstances, may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation.").

[25] Jacobson, *supra* note 22, at 323 (more recent exclusive dealing cases have "reduced the focus on foreclosure and placed greater emphasis on the need to prove market power and actual consumer harm."); *cf.* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224-25 (1993) (injury to a competitor is "of no moment to the antitrust laws if competition is not

D. The Law of Exclusive Dealing and Anticompetitive Effect

As with many business practices once routinely condemned by courts, antitrust law has become more hospitable toward exclusive dealing arrangements – less likely to hold them to be anticompetitive – as time has passed.[26] The Supreme Court first held certain exclusive dealing arrangements to be unlawful under Section 3 of the Clayton Act in 1922 in *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922) and *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922). In the 1949 *Standard Stations* case, the Supreme Court introduced quantitative "foreclosure" analysis into the law of exclusive dealing. *Standard Oil Co. (Cal) v. United States*, 337 U.S. 293 (1949). A rival is said to be "foreclosed" from access to a distributor if the distributor has committed to deal with a specific supplier exclusively. The Court held that all that was necessary for there to be a violation of Section 3 of the Clayton Act was "proof that competition has been foreclosed in a substantial share of the line of commerce affected." *Id.* at 314. What constitutes a "substantial share" of the line of commerce occupied courts' attention for much of the last half of the twentieth century.

The last time the Court squarely considered an exclusive dealing claim was in 1961 in *Tampa Electric* in which it upheld a 20-year exclusive arrangement that the Court determined foreclosed only a very small percentage of the market. There the Court

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injured . . . . Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws.").

[26] Jacobson, *supra* note 22, at 323-325.

essentially repeated the same standard, announcing that "the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961). Providing some guidance to lower courts, the Court stated that "[t]o determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence." *Id.* at 329. In *Tampa Electric* the Court therefore made clear that some "measure" of foreclosure is not the "be all end all" of exclusive dealing jurisprudence and that the probative value of any foreclosure measurement must be interpreted in the context of its relationship to the likely market impact of the restraint at issue.

The Commission itself ushered in the modern era of exclusive dealing analysis in 1982 by holding explicitly that exclusive dealing arrangements are governed by the rule of reason and not subject to a special rule that weighs some measure of foreclosure above all other factors. In *Beltone*, recognizing a trend that courts had been "employ[ing] a fuller rule-of-reason analysis" in exclusive dealing cases, we held that

that exclusive dealing ought to be governed by the same legal standard – the rule of reason – the Supreme Court had applied to all nonprice vertical restraints five years earlier in *GTE Sylvania*: "A proper analysis of exclusive dealing arrangements should take into account market definition, the amount of foreclosure in the relevant markets, the duration of the contracts, the extent to which entry is deterred, and the reasonable justifications, if any for the exclusivity." *In re Beltone Electronics Corp.,* 100 F.T.C. 68, 204 (1982).

We went on to observe that, "in weighing the potentially diverse effects of a distributional restriction, it should be recognized that the process is not conducive to fine line drawing. Given the limited state of knowledge (especially empirical information) we now have about the actual effects of these practices on competition, *it seems desirable to require reasonably clear evidence of probable overall competitive harm before condemning their use in a particular case*." *Id*. at 209 (emphasis supplied). We observed explicitly that foreclosure is "only one of several variables to be weighed in the rule-of-reason analysis applied to all nonprice vertical restraints." *Id.* at 204. The empirical knowledge accumulated about the competitive impact of exclusive dealing and related practices in the thirty-two years since *Beltone* suggests the practices can but generally do not harm competition,[27] a development that underscores the appropriateness of the

[27] *See supra* note 7.

Commission's conclusion that clear evidence of anticompetitive effect should be required before condemning any particular business arrangement.

After *Beltone*, the modern approach is to analyze exclusive dealing under the rule of reason, considering a host of factors, of which foreclosure is only one. A modern statement of the general rule is offered by Judge Posner:

> First [the plaintiff] must prove that [the challenged restraint] is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition. Second, [the plaintiff] must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it.

Roland Machinery Co. v. Dresser Indus., 749 F.2d 380, 394 (7th Cir. 1984). This statement of the law illustrates that exclusion of a competitor is necessary but not sufficient for liability: an exclusive dealing plaintiff must also establish harm to competition. In this sense, modern antitrust law has merged with modern economic theory: substantial foreclosure is necessary but not sufficient for plausible successful exclusion and is also required by the law.[28] The fundamental question as to whether a particular example of exclusive dealing is lawful has merged with the fundamental economic inquiry: does the arrangement harm competition?

[28] Klein, *supra* note 15, at 125 ("[a]ntitrust law is consistent with economic analysis, in that an exclusive must cover a substantial share of the market for liability").

The best and most straightforward way to establish harm to competition is, of course, direct evidence that the exclusive dealing arrangement caused prices to rise and output to fall relative to a but-for world in which the defendant did not employ exclusive dealing contracts. The procedural posture and the facts unique to a given case are undoubtedly relevant to whether such direct evidence will exist. A plaintiff is given much more leeway on a motion to dismiss or a motion for summary judgment.[29] For example, at the motion to dismiss phase, the plaintiff cannot be expected to have evidence that price rose or output fell as a result of the defendant's exclusive dealing arrangements. The plaintiff need only allege a set of facts that would allow a court to conclude that anticompetitive effects are the plausible result of the defendant's exclusive dealing arrangements.[30] Indeed, the procedural posture in *Roland Machinery* was a motion for a preliminary injunction against the defendant's exclusive dealing arrangements, which presumably is why Judge Posner was concerned about the "probable (not certain) effect of the exclusion." *Roland Machinery*, 749 F.2d at 394. When considering an exclusive dealing arrangement that occurred in the past and examining a record developed after lengthy discovery and a trial on the merits, a

[29] *See* Bennett v. Spear, 520 U.S 154, 167-68 (1997) ("[W]hile a plaintiff must set forth by affidavit or other evidence specific facts to survive a motion for summary judgment, and must ultimately support any contested facts with evidence adduced at trial, at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim") (internal citations omitted).

[30] Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

plaintiff has had ample opportunities to develop direct evidence of anticompetitive effects. Similarly, the Commission and the Department of Justice recognize the value of direct evidence when it is available, such as when examining mergers that have already taken place, as opposed to the normal merger review process that requires predictions about the future, "[e]vidence of observed post-merger price increases or other changes adverse to customers is given *substantial weight*." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf (emphasis supplied).

Though direct evidence of anticompetitive effects is the most persuasive type of evidence in an antitrust case,[31] courts in exclusive dealing cases have held that a plaintiff may prove its case indirectly by considering various observable market factors that allow a court to infer whether anticompetitive effect is likely to have occurred in the market at issue. One of these factors is an estimate of the significance of market foreclosure caused by the exclusive dealing arrangement, but the law is clear that market foreclosure is but one of several factors.[32] *See e.g., Ryko Mfg. Co. v. Eden Services*,

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[31] *See* FTC v. Indiana Fed'n of Dentists, 476 U.S 447, 460-61 (1987) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effect, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.") (internal citations omitted).

[32] This is because it can be difficult to separate foreclosure that is caused by the exclusive dealing arrangement – the foreclosure the antitrust laws are concerned with – from the consequences of actual competition. *See* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.) ("[V]irtually every contract to buy 'forecloses' or 'excludes'

823 F.2d 1215 (8th Cir. 1987) ("[W]here, as here, the foreclosure rate is neither substantial nor even apparent, the plaintiff must demonstrate that other factors in the market exacerbate the detrimental effect of the challenged restraints"); *Beltone*, 100 F.T.C. at 204 (foreclosure is "only one of several variables to be weighed in the rule-of-reason analysis now applied to all nonprice vertical restraints."); *cf. Microsoft*, 253 F.3d at 69 ("the requirement of a significant degree of foreclosure serves a useful screening function").

Other factors are the duration and terminability of the exclusive dealing arrangement. As one court explained, "the short duration and easy terminability of [certain] agreements negate substantially their potential to foreclose competition." *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997); *see also W. Parcel Express v. United Parcel Serv. Of Am., Inc.*, 190 F.3d 974, 976 (9th Cir. 1999) (holding that "termination provisions that allowed a customer to terminate the contract for any reason with very little notice" were relevant to upholding agreements). Many courts have held that exclusive dealing contracts of one year or less are presumptively legal. *See e.g., Roland Machinery*; *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000); *Omega*; *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993); *CDC Techs., Inc. v. IDEXX Lab., Inc.*, 186 F.3d 74 (2d Cir. 1999); *Thompson Everett, Inc. v. Nat'l Cable Adver.*, 57 F.3d 1317, 1325 (4th Cir. 1995). Still, just as the inquiry does

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alternative sellers from some portion of the market, namely the portion consisting of what was bought").

not begin and end once a court has adopted some measure of market foreclosure, some courts have observed that short duration and easy terminability do not preclude liability for exclusive dealing in all cases. *See United States v. Dentsply Int'l*, 399 F.3d 181, 193 (3rd Cir. 2005) ("Although the parties to the sales transactions consider the exclusionary arrangements to be agreements, they are technically only a series of independent sales. Dentsply sells teeth to the dealers on an individual transaction basis and essentially the arrangement is 'at-will.' Nevertheless, the economic elements involved—the large share of the market held by Dentsply and its conduct excluding competing manufacturers—realistically make the arrangements here as effective as those in written contracts").

Some courts have emphasized that exclusive dealing arrangements are less concerning to antitrust courts when the exclusivity is required of end-users rather than of distributor intermediaries. *See Omega*, 127 F.3d at 1162-63 ("[E]xclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern. If competitors can reach the ultimate consumers of the product by employing existing or potential alternative channels of distribution, it is unclear whether such restrictions foreclose from competition *any* part of the relevant market."); *Ryko*, 823 F.2d at 1235 (plaintiff faces higher burden of proving harm to competition "[w]here the exclusive dealing restraint operates at the distributor level, rather than at the consumer level"). Still, other courts have correctly observed that the relevant question is whether the exclusive dealing arrangement prevents a rival from competing for distribution sufficient to reach MES, which can occur through exclusivity commitments made by distributors if distributors are a significant gateway to end-users. *See ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254, 287 (3d Cir. 2012) ("[T]he mere existence of potential alternative avenues of distribution, without an assessment of their overall significance to the market, is insufficient to demonstrate that Plaintiffs' opportunities to compete were not foreclosed") (internal citations omitted).

A final category of indirect evidence is evidence regarding the ease of entry into the industry purporting to be monopolized through exclusive dealing arrangements. Courts are clear that when entry is easy or when there is evidence of actual entry while the exclusive dealing is in force, anticompetitive effect is unlikely to occur. *See Omega*, 127 F.3d at 1164; *AREEDA*, *supra* note 21, ¶ 422e3 ("Entry while alleged exclusionary conduct is underway may suggest both that entry is easy and that the defendant's conduct is not really predatory at all"); *cf. Allen-Myland, Inc. v. IBM Corp.*, 33 F.3d 194, 209 (3d Cir. 1994) ("[T]he ease or difficulty with which competitors enter the market is an important factor in determining whether the defendant has true market power – the power to raise prices").

E. **McWane's Full Support Program**

What separates the pre-*GTE Sylvania* law and economics of the antitrust analysis of exclusive dealing arrangements from the modern era is that to succeed on a claim that exclusive dealing violates the antitrust laws, a plaintiff *must* demonstrate that the conduct harmed competition and not just disadvantaged a competitor.[33] Accordingly, to present a cognizable theory of harm, Complaint Counsel has the burden of showing that McWane's Full Support Program actually harmed the competitive process, not just that the program made it more difficult for Star to gain distribution.

Complaint Counsel's theory of harm is that "McWane's Exclusive Dealing Policy harmed competition by foreclosing a substantial share of the 'critical' distribution channel, thereby impeding entry. More specifically, McWane's Policy *prevented rivals from gaining a sufficient scale to constrain McWane's exercise of monopoly power*." CC Answering Brief at 14 (emphasis supplied). This theory of harm tracks the modern economic understanding of how exclusive dealing might harm competition. Accordingly, Complaint Counsel has articulated a coherent theory of economic harm: McWane's exclusive dealing policy raised Star's distribution costs, which prevented Star from achieving MES, which enabled McWane to maintain power over price, preventing consumers from enjoying the benefit of unfettered competition between McWane and Star.

To match this theory of harm to the facts in the record, Complaint Counsel must show that (1) McWane engaged in an exclusive dealing policy; (2) the policy raised

[33] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) (antitrust laws concerned with the "protection of *competition*, not *competitors*"); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) (holding plaintiff competitor lacked standing to pursue antitrust claim that harmed it as a competitor but did not harm competition).

Star's distribution costs and prevented it from achieving MES; and (3) the policy enabled McWane to maintain its power over price resulting in consumer harm. Complaint Counsel views its burden differently: "[i]n exclusive dealing cases, a *prima facie* case of competitive harm is established by demonstrating: (1) a significant degree of market foreclosure; and (2) the impairment of one or more significant rivals' ability to compete." CC Answering Brief at 16 (citing *ZF Meritor* 696 F.3d at 271; *Dentsply* at 399 F.3d at 188-90, 194-96; *Microsoft*, 253 F.3d at 69). For additional support, Complaint Counsel also cites our prior decision in this case: "[T]he question here is whether McWane's conduct foreclosed a substantial portion of the effective channels of distribution, and whether the conduct had a significant effect in preserving McWane's monopoly." *In re McWane, Inc.*, 2012 FTC Lexis 155, at *63 (Sept. 14, 2012).[34] The Commission articulates a similar though more economically coherent standard: "we examine both the anticompetitive and procompetitive effects of the conduct to determine whether, in light of McWane's monopoly power, its use of exclusive dealing prevented rivals from meaningfully competing and had a substantial anticompetitive effect on competition." Commission Opinion at 20.

Complaint Counsel's statement of the law is, at best, question begging, and, at worst, misleading. As explained, foreclosure is an imprecise tool used by a court to assess whether harm to competition can occur or is likely to occur in a given case; it is

[34] I did not participate in the earlier decision as it predated my term as Commissioner.

but one of several factors relevant to the same question.[35] Like market definition, the purpose of which is to screen for whether a business arrangement can plausibly result in "genuine adverse effects on competition," *Indiana Fed'n of Dentists*, 476 U.S. at 460-61, foreclosure is but a proxy for the real question of whether the arrangement harms competition.[36] How to calculate a foreclosure percentage and what that foreclosure percentage means will invariably depend upon the facts peculiar to each case. And in calculating a foreclosure percentage a tribunal must always be cognizant of the fact that foreclosure is valuable only insofar as it helps the tribunal understand whether the exclusive dealing policy is one that harms the competitive process and causes the firm implementing the policy to acquire or maintain monopoly power. Simply calculating a foreclosure percentage and declaring the percentage significant is insufficient to establish anticompetitive effect, both under existing antitrust jurisprudence and under Complaint Counsel's theory of the case.[37]

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[35] *See e.g.*, Ryko, 823 F.2d at 1233; Barry Wright, 724 F.2d at 236; Beltone, 100 F.T.C. 68.

[36] The Supreme Court recognized this fact when it first adopted foreclosure analysis as part of exclusive dealing jurisprudence in *Standard Stations*: "The issue before us, therefore, is whether the requirement of showing that the effect of the agreements 'may be substantially to lessen competition' may be met simply by proof that a substantial portion of commerce is affected or whether it must also be demonstrated that competitive activity has actually diminished or probably will diminish." *Standard Stations*, 337 U.S. at 299.

[37] The Commission's assertion that I "would apply a standard of evidentiary proof . . . that is far beyond that called for by applicable Section 2 law . . . [and that I] offer[] no legal support for this heightened standard" is simply incorrect. Commission Opinion at n.12. The case law is clear that an antitrust plaintiff must show harm to competition in an exclusive dealing case and that "significant foreclosure" is only a proxy for harm to competition, and only one factor a tribunal is to consider in assessing harm to competition. Indeed, this point is made clear by the

1. The Full Support Program as Exclusive Dealing

In September 2009, McWane sent a letter to its distributors stating that "McWane will adopt a program whereby our domestic fittings and accessories will be available to customers who elect to fully support McWane branded products . . . Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fittings and accessories." CX0010. In discussions with distributors, McWane explained that "if a customer buys Star domestic . . . the customer will no longer have access to" McWane's domestic fittings. IDF 1179; *see also* IDF 1183 (quoting CX0119 at 002, 004) ("Access to McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times. Violations will result in: Loss of access, loss of accrued rebates."). McWane's letter on its face allows distributors to buy from non-McWane sources under certain circumstances: "Exceptions are where [McWane] products are not readily available within normal lead times or where domestic fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacture[r]'s ductile iron pipe." CX0010.

Refusing to deal with a distributor if it also distributes the products of your competitor is a tell-tale sign of an exclusive dealing arrangement. And whether the Full Support Program is a "complete" exclusive dealing arrangement is beside the point. The relevant question from an analytical standpoint is whether the Full Support

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Commission's own precedent in *Beltone*, a case the Commission does not cite a single time in its opinion. *Beltone*, 100 F.T.C. at 204, 209.

Program has exclusionary potential, which, in my view, it undoubtedly does. *ZF Meritor*, 696 F.3d at 283 ("[J]ust as 'total foreclosure is not required for an exclusive dealing arrangement to be unlawful, nor is complete exclusivity required with each customer.").[38] Of course, the relevant question on appeal after trial is whether the exclusionary potential resulted in actual exclusion and anticompetitive effects.

2. Minimum Efficient Scale

The second component of Complaint Counsel's theory of harm is that the Full Support Program raised Star's distribution costs and prevented it from achieving MES. If the Full Support Program did not prevent Star from achieving MES, then its distribution costs could not have increased sufficiently to harm competition in the domestic fittings industry. Thus, a necessary predicate for evaluating whether the Full Support Program raised Star's distribution costs and prevented it from achieving MES is establishing what MES is in the domestic fittings industry.

The primary finding of fact that relates to MES is Star's own estimate that it would need between [redacted] in annual fittings sales to justify purchasing its own foundry. IDF 1400, *in camera*. Complaint Counsel claims that "[b]ut for the [Full Support Program], the deterred distributors would have offered Star sufficient sales opportunities for it to achieve economies of scale" and that "[s]imple arithmetic

[38] McWane argues that the Full Support Program was not an exclusive dealing arrangement because some distributors dealt with Star and distributors that did deal with McWane were not contractually obligated to do so. McWane Brief at 29. The Commission, in my view, correctly rejects McWane's argument. Commission Opinion at 20-22.

confirms the anticompetitive exclusion." CC Answering Brief at 19. Here, Complaint Counsel points to the amount of sales Star made in 2010 and 2011, [redacted], and to the additional amount of sales, [redacted], Star would need to justify purchasing a domestic foundry. CC Answering Brief at 19 (citing IDF 1143, *in camera*). The Commission accepts Complaint Counsel's argument wholesale. Commission Opinion at 25 ("Star testified . . . that it needed between [redacted] of domestic fittings sales to justify purchasing its own foundry. IDF 1400, *in camera*; Bhargava, Tr. 2962-63, *in camera*. Star's actual sales of domestic fittings, [redacted] in 2010, were insufficient for Star to justify operating a foundry of its own. IDF 1396, *in camera*, 1401.").

The unstated but implicit assertion in the argument made by Complaint Counsel and accepted by the Commission is that MES in the domestic fittings industry is achieved only when a supplier is able to operate its own foundry. And the basis for that assertion is *Star's own estimate about what a foundry would cost and nothing else*. *See* Oral Argument Tr. 82:2-83:2 ("COMPLAINT COUNSEL: In this case, the minimum efficient scale would be Star having its own foundry, which would allow Star -- Star was using jobber foundries instead, and that was less efficient. If it could have had its own foundries, it could have brought its costs down, and it could have -- and, again, there are numbers in the record. COMMISSIONER WRIGHT: Is there evidence in the record to establish that minimum efficient scale is equivalent to a foundry?

COMPLAINT COUNSEL: No, I don't think -- I think that was Star's view of what minimum efficient scale was. I don't think they phrased it that way, but I think that's the closest thing in the record. COMMISSIONER WRIGHT: And there is a difference between saying they would be more efficient if they had a foundry and deprivation from achieving minimum efficient scale, which is the underlying basis of [the Commission's] theory. I'm wondering if there is anything you can point me to in the record that would help me distinguish between the two. COMPLAINT COUNSEL: I can't think of anything. I mean, Star's testimony was this is what we thought we needed, but no, I can't -- there is not, for example, any comments that spoke to what minimum efficient scale would be."). Such evidence is, as Complaint Counsel recognized, insufficient to establish MES. It is also inadequate, even accepting *arguendo* Complaint Counsel's assertion that Star's own estimate of the cost of a foundry is probative of its efficiency relative to other available sourcing options, to establish that any increase in Star's distribution costs was of sufficient magnitude to impact competitive conditions in the domestic fittings industry.

Complaint Counsel's expert, Dr. Laurence Schumann, explained the economics of exclusive dealing arrangements and how a firm with market power can use exclusive dealing to harm competition by preventing a rival from achieving MES. CX2260-A, ¶120-132. Dr. Schumann's testimony does not endeavor to define MES in the domestic fittings industry, however. He points to evidence that there are economies of scale in producing fittings, ¶163-164, and argues that economies of scale matter in the fittings industry, n.177 ("Greater production levels make the use of the most efficient equipment more economical; accordingly, as the scale of production grows, costs decline through the adoption of more efficient production equipment (Interview with Charles Frazier, May 25, 2012)."). Nor is there any evidence in the record from an industry expert regarding whether MES – as the term is understood in modern economics – is scale sufficient to justify the purchase of a foundry and whether Star's estimate of the amount of sales sufficient to justify the purchase of a foundry is indeed accurate.

In fact, evidence in the record supports the conclusion that owning and operating an independent foundry is not necessary to achieving MES in the fittings industry. Sigma's entire business model is based upon *not* owning production facilities. Sigma's "virtual manufacturing" model is to purchase fittings produced by independent foundries in China, Mexico, and India and to rely on its own employees for technical know-how and quality control. IDF 56-57. Sigma's business model of sourcing production to independent foundries has enabled it to become the second-leading supplier of fittings sold in the United States with a share of [redacted], almost twice as large a share as Star, which owns and operates foundries abroad. IDF 356, *in camera*, 111. Complaint Counsel has made no effort to reconcile the fact that Sigma was able to enter and achieve scale in the fittings industry without owning a foundry with its argument that MES in the *domestic* fittings industry requires owning a foundry.

Not surprisingly given Sigma's success with its virtual manufacturing model, there is evidence in the record that Star was able to enter, compete, and *grow its business* without operating its own foundry. IDF 1041, 1042, *in camera*, 1143, *in camera*, 1144 (noting that Star's share grew from [redacted] in its first year as a domestic supplier to more than [redacted] in its second year, and was on pace to continue its growth into its third year). In other words, for Complaint Counsel's view of MES to make sense on the facts that exist in the record, Star would have to be operating below MES, becoming less efficient over time as McWane's Full Support Program further raised the costs of distribution, and yet remaining in the market and growing its business. Such a position strains credulity.

In my view, Complaint Counsel has simply failed to introduce sufficient evidence to compel the conclusion that MES in the domestic fittings industry is the scale necessary to justify the purchase of a foundry.[39] As preventing a rival from achieving MES is a key element in the case – both articulated by the economic theory of using exclusive dealing to raise rivals' costs and by Complaint Counsel itself – failing to prove this point is fatal to Complaint Counsel's case. Without putting forth some credible

[39] Nor, as explained below, has Complaint Counsel made any other attempt to establish through evidence or analysis the level of foreclosure that would be sufficient to create an impact on prices and output in the relevant market.

evidence regarding MES in the domestic fittings industry, Complaint Counsel cannot logically establish the harm to competition that the antitrust laws require a plaintiff to establish. This is because one thing that is necessary but not sufficient to distinguish mere harm to a competitor from harm to a competitor that also results in harm to competition is that the harm to a competitor prevents that competitor from achieving MES.

3. Harm to Competition

a. Foreclosure Analysis

Complaint Counsel argues that the Full Support Program harmed competition because the program "foreclosed a substantial share of the domestic fittings market," which prevented Star from being able to compete effectively, *i.e.*, achieve MES. CC Answering Brief at 16-23. The Commission largely accepts Complaint Counsel's argument, deciding that Star and other competitors were foreclosed from access to distributors and that this foreclosure impacted their ability to compete. Commission Opinion at 22-25.[40] As discussed, foreclosure in modern exclusive dealing analysis is not itself the end of any complete analysis but rather a starting point for understanding whether the exclusive arrangements at issue are capable of harming competition. What

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[40] In accepting this argument, the Commission finds that "[a] domestic fittings entrant is unable to compete effectively without access to distributors." Commission Opinion at 22 (citing IDF 400-09, 411-12, JSLF ¶ 14, IDF 367, IDF 373-74, IDF 381). I agree with the Commission's conclusion that in the domestic fittings industry, distributors are a key distribution channel and that a supplier cannot compete effectively without having some access to distributors.

is strikingly absent from Complaint Counsel's argument, and the Commission's Opinion, is any evidence establishing the requisite analytical link between what the Commission describes as "foreclosure" and harm to competition. A measure of foreclosure caused by McWane's Full Support Program is relevant to the inquiry under Section 2 only insofar as there is evidence linking the identified foreclosure percentage to McWane's maintenance of its monopoly power.[41]

Complaint Counsel argues that foreclosure is "calculated by determining the percentage of the downstream market subject to the challenged policy." CC Answering Brief at 16. Using this measure, Complaint Counsel says that because "McWane sold [redacted] of all Domestic Fittings in 2010, [and] roughly 99% of those sales were through Distributors, and all Distributors were subject to McWane's Exclusive Dealing Policy . . . [the] foreclosure percentage [is] [redacted]." CC Answering Brief at 17 (citing IDF357, *in camera*; CCPF475).

The Commission does not settle on a specific foreclosure percentage, preferring instead to point to the market shares of all the distributors that could potentially have been foreclosed by the Full Support Program, adding them up, and intimating that such a percentage is significant. "McWane's Full Support Program foreclosed Star and other potential entrants from accessing a substantial share of distributors. Following

[41] *See* Krattenmaker & Salop *supra* note 15, at 259 (the key issue is "[w]hether the exclusionary rights arrangement will so limit remaining supply available to rivals that it will lead them to bid up the price of that supply, thereby increasing their costs to the point that the purchaser obtains power over price.").

announcement of the program, the country's two largest waterworks distributors, HD Supply, with a roughly 28% to 35% share of distribution (IDF 378), and Ferguson, with about 25% of distribution (IDF 379), prohibited their branches from purchasing domestic fittings from Star unless the purchases fell into one of the exceptions specified in the Full Support Program." Commission Opinion at 23. In addition to HD Supply and Ferguson, the Commission points to other distributors such as U.S. Pipe, Groeninger, and WinWholesale and finds that they would have made more purchases from Star had McWane not started the Full Support Program. Commission Opinion at 23-24.

Complaint Counsel and the Commission's foreclosure analysis is incomplete and offers little illumination regarding the competitive effect of the Full Support Program. Most fundamentally, neither Complaint Counsel nor the Commission provides an analytical link between Complaint Counsel's foreclosure analysis and competitive harm.[42] As discussed, one obvious such link entirely absent in the record is direct evidence that the Full Support Program actually increased prices and reduced output relative to what they would have been had Star entered and McWane not implemented the Full Support Program – that is, evidence consistent with Complaint Counsel's

[42] The Commission is correct that "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." Commission Opinion at 29 (citing Dentsply, 399 F.3d at 191; *accord* ZF Meritor, 696 F.3d at 265, 283-84). But the mere fact that the foreclosure rate need not be 100% to violate the law does not obviate the need to connect the identified foreclosure rate with the defendant's ability to maintain monopoly power.

theory and Complaint Counsel and the Commission's assertion that the level of foreclosure was sufficient to cause competitive harm over the time it was in effect. Neither Complaint Counsel nor the Commission makes any attempt to reconcile the absence of actual evidence of anticompetitive effects with the high foreclosure rates they claim are at issue.[43] Because foreclosure rates are relevant only as a proxy for better

[43] The Commission points to certain categories of evidence it considers direct. First, the Commission points out that "McWane itself recognized that if Star entered, prices in the domestic market would likely fall just like in the imported market." Commission Opinion at 27 (citing IDF 1148-49, 1151-53). McWane's own prediction about a "likely" price effect in the future is simply not evidence of what actually happened to prices once Star did enter, evidence the Commission could have acquired and introduced into the record in this case. Second, the Commission points to the fact that "soon after Star entered the market, McWane announced and implemented price increases for domestic fittings." Commission Opinion at 29 (citing IDF 1083). Notwithstanding that there is no evidence suggesting that McWane's announced price increase led to an actual increase in prices, the Commission again misunderstands Complaint Counsel's task in this case. Showing a change in prices or output that corresponds with the timing of some event, say, a firm's entry into a market, is necessary but not sufficient to show that challenged conduct was exclusionary. Complaint Counsel's burden is to show that McWane's conduct *caused* any price effect. That McWane announced a price increase after Star's entry does not satisfy Complaint Counsel's burden. Indeed, Complaint Counsel has made no effort to show that the price increase announced by McWane occurred as a result of the Full Support Program. This is likely because there is ample evidence in the record to suggest that the price increase announced by McWane in 2010 was caused by a host of other factors. There is evidence that McWane's costs were increasing at the time it announced the price increase, which would also explain the fact that it announced a price increase for *all* McWane fittings at the same time it announced a price increase for domestic fittings. IDF 1083-85. Further, the price increase was announced in December 2010, likely within the timeframe for ARRA-funded projects during which demand for domestic fittings increased. It is basic economics that an increase in demand increases prices as well, holding all else constant. Further, there is additional evidence in the record to suggest demand was high in 2010. As the Commission has pointed out, Star's revenue in 2011 was lower than in 2010 despite Star having twice as high a market share in 2011. IDF 1397. One plausible explanation for such facts would be a decrease in demand for domestic fittings in 2011 relative to 2010. This would also be consistent with the fact that ARRA-funded projects were to be under contract or under construction by February 2010. IDF 525-27. Of course, a host of other factors could explain McWane's announcement to increase prices in 2010. The record, including the expert reports,

understanding competitive effects, this failure undermines the Commission's heavy reliance upon inferences drawn from foreclosure rates. By concluding that Complaint Counsel need only demonstrate that Star was foreclosed from some unspecified amount of distributors as a result of the Full Support Program, without linking that foreclosure to the preservation of McWane's monopoly power, the Commission in effect holds that harm to a competitor without more is sufficient to establish a violation of Section 2.[44]

In addition, there are numerous reasons to doubt that the foreclosure claimed by Complaint Counsel and observed by the Commission is measured accurately, or is

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simply does not provide enough evidence to make a reliable conclusion about the cause of the announcement. Accordingly, the simple fact that McWane announced a price increase after Star's entry sheds almost no light on whether the Full Support Program was exclusionary.

[44] The Commission's argument that there is harm to competition because McWane's conduct reduced "choice" fares no better. Commission Opinion at 28 ("McWane's exclusive dealing policy also had another adverse impact on competition: it denied its customers the ability to make a meaningful choice"). There are two problems with the Commission's reliance on a loss of consumer choice as evidence of harm to competition. First, the Commission cites no precedent to support the proposition that a loss of consumer choice, without any *other* evidence of harm to competition, such as an adverse effect upon price or output, is sufficient to establish the harm to competition required under the antitrust laws. *Cf.* Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1202 (9th Cir. 2012) ("[A]llegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition."); *AREEDA*, *supra* note 21, ¶1703 f5 ("To the extent that [a defendant's interference with customers' free will] is relevant to antitrust law, interference has already been covered by diminished product variety resulting from substantial foreclosure or by elevated prices depressing production and use"). Second, the Commission's analysis of consumer choice ignores the fact that pipe fittings are commodity products. The two cases the Commission cites to support its position, *Dentsply* and *ZF Meritor*, both involve markets with differentiated products (artificial teeth and heavy duty truck transmissions). Here, there is no evidence that end-users placed different values on pipe fittings made by different suppliers. To the extent choice is valuable to consumers in a commodity industry, it is because choice begets price competition between suppliers. And if a reduction in consumer choice also results in a reduction in price competition, then one would expect to see some price effect accompanying the loss of choice, and no such price effect can be gleaned from the record.

probative of anticompetitive effects. In other words, the measure is defective for the purpose asserted by Complaint Counsel and the Commission. Under Complaint Counsel's theory of harm – that but for the Full Support Program, distributors would have made enough purchases from Star for Star to achieve MES and threaten McWane's monopoly position – the appropriate measure of foreclosure is not the sum of the market shares of distributors that are "subject" in some way to the Full Support Program, but the dollar value of purchases distributors would have made from Star *but for* the Full Support Program.[45] It makes little sense to conclude that Star was foreclosed from McWane's sales to distributors that would have taken place with or without the Full Support Program, or that McWane's restricting a rival's access to such sales in any way disadvantages the rival by reducing the rival's access to distribution.

Indeed, there is evidence in the record that certain distributors would not have made any purchases from Star even if McWane had not introduced the Full Support Program. A Ferguson executive testified that Ferguson "was planning on purchasing all its needs from [McWane]" regardless of the Full Support Program because Star would not be able to provide Ferguson with a full line of fittings. Thees, Tr. 3108-09; *see also* IDF 1266, 1272. The Commission recognizes this evidence, but concludes "the record suggests that the Full Support Program nonetheless cost Star *some* Ferguson

[45] *See* Krattenmaker & Salop, *supra* note 15, at 259 (defining the net foreclosure rate as "the percentage of the suppliers' capacity that was available to rivals before the exclusionary rights agreement was adopted but that is no longer available as a result of the agreement").

business." Commission Opinion at 23 (emphasis supplied) ("A Ferguson Vice President called district managers after McWane's policy was announced to ensure that it did not buy from Star, and at least one job Ferguson initially awarded to Star was cancelled (IDF 1260-61, 1263)."). Of course, the record does not answer the most relevant question: how much Ferguson business did the Full Support Program cost Star?

There is also evidence in the record that WinWholesale's decision not to purchase from Star was unrelated to the Full Support Program. IDF 1342 (Star is not on WinWholesale's approved list of vendors because "because WinWholesale had no background on where Star was making its product, because Star had not produced any test data or anything that would lead WinWholesale to believe that Star was as credible a vendor on Domestic Fittings as it was on imported Fittings, or that they could do a good, consistent job making Domestic Fittings using seven foundries. (RX 705 (Gibbs, Dep. at 85-88)"). There is evidence that another distributor, Illinois Meter, "would have purchased 90-plus percent of its Domestic Fittings from McWane, whether the Full Support Program existed or not. (RX 674 (Sheley, IHT at 90) ("Q: Had McWane not implemented this policy, would you have purchased domestic Fittings from Star? A: Probably not. I'd probably still be buying 90-plus percent of all my stuff from [McWane]."))." IDF 1359. Further, there is evidence in the record that some distributors' decisions not to purchase from Star were a result of their perceptions of the quality of Star's products and services, not because of the Full Support Program. *See*

IDF 1132 ("Star recognized that some Distributors were cautious about purchasing Domestic Fittings from Star in 2009 and early 2010 because of delays in filling orders. (Bhargava, Tr. 3003, *in camera*; McCutcheon, Tr. 2634)"); IDF 1275 ("Ferguson has had past business dealings with Star that put a strain on the relationship between the two companies. This strain was a leading component in Ferguson's decision to not purchase Domestic Fittings from Star (Thees, Tr. 3105-3107)").[46]

Complaint Counsel and the Commission's foreclosure analysis is also defective for another reason: they fail even to attempt to quantify the percentage of domestic fittings that were not subject to the Full Support Program. There is no dispute that the Full Support Program itself contained two exceptions: "where [McWane] products are not readily available within normal lead times or where domestic fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacture[r]'s ductile iron pipe." CX0010. Complaint Counsel concedes

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[46] The Commission asserts that my argument is based upon the assumptions that "the sales a monopolist like McWane has tied up with its distributors are not contestable and that a second meaningful alternative in the market will have no impact on price or other forms of competition, regardless of which supplier customers may ultimately choose." Commission Opinion at 27. I make no such assumptions. The relevant question for purposes of exclusive dealing law is whether the Full Support Program harmed consumers of domestic pipe fittings. The evidence shows that McWane would have won many contests to make deals with distributors *even without the Full Support Program*. If, absent the Full Support Program, Star would have competed for sales to certain distributors and have lost those sales to McWane, then the Full Support Program could not have foreclosed those lost sales. This conclusion is not based on any assumption regarding the impact a second supplier would have on price, output, or quality in the Domestic Fittings market. Star's entry may well have had a positive impact on these economic factors, though there is no direct evidence the record demonstrating such an impact. Regardless, the key inquiry is whether McWane unlawfully excluded Star, not whether two suppliers are better than one, an issue that is of limited relevance to the underlying inquiry.

that there is no credible argument that Star's fittings that fall into these categories are foreclosed from access to distributors through the Full Support Program. Oral Argument Tr. 84:2-84:4 ("COMPLAINT COUNSEL: If fittings were sold under an exception to the policy, no, I don't think they should be counted as foreclose[ed]."). Even though fittings that qualify as exceptions do not belong in the foreclosure analysis, Complaint Counsel failed to quantify the percentage of excepted fittings. The Commission also recognized that the exceptions existed, but asserted with minimal support in the record that the effect of the exceptions was "minor." Commission Opinion at 23.[47] There is no dispute that Star made at least some sales pursuant to the exceptions to the Full Support Program. IDF 1137; 1242; 1309. Of course, the relevant question, which cannot be gleaned from the record is: how much?

The Commission recognizes these issues but brushes them to the side in holding that the foreclosure is substantial in this case.[48] In so holding, the Commission ignores the fact that it is Complaint Counsel's burden to establish that the Full Support Program

[47] For support the Commission points to the testimony of a single distributor that claimed its purchases from Star through the exceptions to the Full Support Program were "minor." IDF 1309-11 (citing Morton, Tr. 2915-2916). The testimony of one distributor (U.S. Pipe) (out of more than 100) is not enough to establish that the sum total of purchases from distributors through the exceptions to the Full Support Program is indeed minor as it relates to assessing foreclosure.

[48] The Commission argues that I "insist[] that Complaint Counsel was required to calculate the specific level of sales Star lost as a result of the Full Support Program." Commission Opinion at n.12. This is a mischaracterization of my position. I discuss the factual defects with Complaint Counsel and the Commission's foreclosure analysis to illustrate that the foreclosure percentage put forward by each is unreliably high, and, most importantly, we have *no idea how large the error is*. It is Complaint Counsel's burden to establish that the foreclosure at issue is significant, and in my view, there is substantial evidence showing that Complaint Counsel has vastly overestimated its claimed foreclosure percentages.

harms competition. Complaint Counsel has chosen to establish harm to competition solely by relying upon foreclosure percentages and indirect evidence. But the evidence in the record demonstrates that the percentages put forward by Complaint Counsel are simply inaccurate. There are exceptions to the Full Support Program – McWane allows distributors to buy from Star if certain conditions are met – but there is no evidence in the record regarding whether the exceptions comprise a significant amount of the Domestic Fittings Market. Further, there is evidence in the record that some distributors that chose to buy from McWane (or chose not to buy from Star) would have done so even without the Full Support Program. Star cannot possibly have been foreclosed from these distributors. The Commission's conclusion that foreclosure was significant enough to impact competitive conditions in the domestic fittings industry relies primarily upon inferences from sales McWane's Full Support Program allegedly foreclosed from Star. Complaint Counsel's failure to quantify sales Star made under the Full Support Program's exceptions and to deduct distributor purchases from McWane that would have occurred with or without the Full Support Program make it impossible accurately to assess the foreclosure rate, much less to determine whether the foreclosure was significant enough to compel the conclusion that the Full Support Program harmed competition.

b. Other Indirect Evidence

Of course, as explained above, the foreclosure rate is not the only type of indirect evidence relevant to assessing whether an exclusive dealing arrangement has anticompetitive effects. However, the other forms of indirect evidence do not overcome the absence of direct evidence or the deficiencies that plague Complaint Counsel's evidence of foreclosure and the Commission's conclusions derived therefrom.

One relevant consideration is the length and terminability of the exclusive dealing arrangements. *Omega*, 127 F.3d at 394 (short duration and easy terminability limit the possibility of anticompetitive effects). Here, the Full Support Program was not an agreement between McWane and its distributors. Distributors were never contractually obligated to make *any* purchases from McWane; they could choose to purchase from Star or another supplier at any time. Though not dispositive – it is possible for a dominant firm to exclude competitors through non-contractual mechanisms that result in distributor exclusivity – this point certainly counsels against a holding that the Full Support Program resulted in anticompetitive effect.

Another issue is whether exclusivity is imposed upon an intermediary or a final consumer. Though some courts have held that exclusivity requirements are more concerning when imposed on the end user rather than on an intermediary, *see Omega*, 127 F.3d at 1162-63, other courts have held that exclusivity requirements imposed on intermediaries can have anticompetitive effects when the intermediary is a significant channel of distribution. *ZF Meritor*, 696 F.3d at 287. Here, in my view, Complaint Counsel has satisfied its burden to establish that in the domestic pipe fittings industry, distributors are a significant channel of distribution. *See* Commission Opinion at 22. Accordingly, I give little weight to the fact that the Full Support Program applied to distributors and not to end users.

A final but important category of indirect evidence is evidence relating to entry.[49] As explained, the case law demonstrates that evidence of entry and expansion by a purportedly excluded rival counsels against a decision that an exclusive dealing arrangement harmed competition. *See Omega*, 127 F.3d at 1164 ("Nor did plaintiffs produce credible evidence to support their contention that Gilbarco's policy actually deterred entry into this market. The actual entry and expansion of Schlumberger in 1991, through the purchase of a small dispenser manufacturer, Southwest, demonstrate the contrary. The record shows that . . . by trial Schlumberger had 'something over ... 100 distributors' . . . . And, although the parties contest the extent of the increase, it is undisputed that Schlumberger's market share has increased since its entry by at least one third (from approximately 6% to 8%), while industry output in the retail dispenser market has expanded substantially. This undisputed evidence precludes a finding that

[49] Statement of Commissioner J. Thomas Rosch, Concurring in Part and Dissenting in Part In the Matter of McWane, Inc. and Star Pipe Products, Ltd., and the Matter of Sigma Corporation, FTC File No. 1010080 (Jan. 4, 2012), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-rosch-concurring-part-and-dissenting-part-matter-mcwane-inc.and-star-pipe-products-ltd.matter-sigma-corporation/120104sigmastatement.pdf.

exclusive dealing is an entry barrier of any significance."). Here there is undisputed evidence that Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter. IDF 1042, *in camera* (Star's market share in its first full year in the Domestic Fittings market was [redacted]); IDF 1043, *in camera* (Star's market share in its second full year in the domestic fittings market doubled to [redacted]). The record shows that Star made sales to more than 100 distributors. IDF 1141 (citing Normann Tr. 5042-43, *in camera*).[50]

Further, the fact that McWane did not enforce the Full Support Program after Star's first year in the domestic market[51] provides an opportunity to examine the impact of the Program. The evidence shows that Star's growth rate was *identical* before and after McWane stopped enforcing the Full Support Program. Neither Complaint Counsel nor the Commission attempts to explain how growth that is equal with and without the Full Support Program is consistent with Complaint Counsel's theory of harm that the Program raised Star's costs of distribution and impaired competition.[52]

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[50] I agree with the ALJ's finding that simply counting the number of distributors Star was able to contract with can be misleading because such a count could include distributors that made only a small number of purchases from Star. IDF 1142. Indeed, the measure of Star's market share over the relevant period is a more relevant piece of information. However, the number of distributors Star was able to deal with is not irrelevant. It illustrates that Star was able to find a significant number of trading partners notwithstanding the Full Support Program. Nevertheless, the key issue is whether Star was able to compete with McWane for enough distributors that, if they agreed to distribute Star's fittings, would enable Star to operate at MES.

[51] IDF 1219 (McWane did not enforce the Full Support Program against any distributor after April 13, 2010).

[52] Complaint Counsel argues that the Full Support Program is still in effect because McWane has not "withdrawn" it and that "it continues to prevent [distributors] from purchasing from Star

The most plausible inference to draw from these particular facts is that the Full Support Program had almost no impact on Star's ability to enter and grow its business, which, under the case law, strongly counsels against holding that McWane's conduct was exclusionary. Further, evidence of Star's successful entry is especially probative because it requires minimal interpretation. Unlike foreclosure, which can be measured in different ways and is subject to different interpretations, a firm's entry is an observable fact that contravenes the precise point – exclusion – Complaint Counsel is seeking to establish.

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In my view, Complaint Counsel has failed to carry its burden to demonstrate that the Full Support Program resulted in cognizable harm to competition and this would doom its case even if it had established that MES in the domestic fittings industry was operating a foundry. Harm to competition can be shown with direct evidence that market prices were impacted by the alleged exclusionary conduct. Such evidence is favored both by courts in evaluating restraints of trade[53] and by the agencies in deciding

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today." CC Answering Brief at 14. This fails to consider evidence that distributors began to ignore the Full Support Program after they learned of the FTC's investigation into McWane's conduct. IDF 1311 (US Pipe not concerned in September 2010 about McWane enforcing the Full Support Program because of FTC investigation).

[53] *See* Indiana Fed'n of Dentists, 476 U.S. at 460-61.

whether to challenge a consummated merger.[54] The record is devoid of direct evidence of competitive harm.

Harm to competition can also be established by indirect evidence, which is the route Complaint Counsel chose to go in this case and the evidence the Commission relied upon in affirming the ALJ's decision that McWane's conduct was exclusionary. My view of the indirect evidence of harm to competition is that it is very weak and does not and cannot satisfy Complaint Counsel's burden. As I have explained, the foreclosure analysis put forward by Complaint Counsel and accepted by the Commission is unpersuasive because the analysis does not properly account for the fact that some distributors would have bought from McWane regardless of the Full Support Program, and that Star could not possibly have been foreclosed from selling fittings that were excepted from the Full Support Program.

The other indirect evidence of competitive harm points in multiple directions. On the one hand, distributors are a key distribution channel, which counsels against following the case law that says exclusive dealing requirements applied to intermediaries are less concerning than exclusive dealing requirements applied to end users. On the other hand, no distributor *agreed* to distribute McWane's fittings exclusively and for a lengthy period of time. Distributors were not contractually forbidden from dealing with Star, which is how Star was able to enter and acquire more

[54] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 2.1.1 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf.

than [redacted] of the market by its second full year in the domestic business. IDF 357, *in camera*.

In my view, the indirect evidence in the record does not point to the conclusion that the Full Support Program resulted in harm to competition. With such a record, Complaint Counsel would need to proffer some direct evidence that McWane's conduct raised price and reduced output in the domestic fittings industry relative to the price and output levels that would have occurred with Star's entry and without the Full Support Program. The Commission has stated in the past that it must tread lightly when condemning an exclusive dealing arrangement, requiring "reasonably clear evidence of probable overall competitive harm." *Beltone*, 100 F.T.C. at 209. Unfortunately for Complaint Counsel and the Commission, there is no such clear evidence in the record.[55]

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[55] Because I conclude Complaint Counsel has not shown the requisite anticompetitive effect, the burden should not shift to McWane to proffer a procompetitive justification for the Full Support Program. *See* Microsoft, 253 F.3d at 59. The Commission rejects McWane's proffered justifications that the Full Support Program was necessary to ensure sales volume and to prevent Star from "cherry picking" sales of the most popular fittings by forcing distributors to accept McWane's full line. Commission Opinion at 29-30. Though I make no decision or conclusion regarding McWane's proffered justifications, I must dispute the Commission's apparent rejection that full-line forcing or block-booking contracts can result in cognizable efficiencies, even if the contracts reduce the full-line supplier's costs or prevent its exit from the marketplace altogether. Commission Opinion at 32 ("If a limited supplier undersells a full-line supplier for more common products, there is no reason in principle why the full-line supplier could not compete for that business by lowering its price for those products and increasing its price for the less common products . . . . Even if selective entry by the full-line supplier's rivals led to the collapse of the full-line seller, that itself would not constitute a harm to the market (as opposed to harm to a single firm)."). Economists have shown that a multi-product monopolist can use full-line forcing or block-booking contracts to prevent buyers from engaging in

II. Count 7 – Attempted Monopolization

Count 7 of the Complaint charges McWane with attempted monopolization of the Domestic Fittings market and relies on the same conduct – the Full Support Program – as part of its claim. The Commission deemed it unnecessary to make a decision on Count 7 in light of its decision to hold McWane liable for actual monopolization under Count 6. Commission Opinion at n.16 ("In view of our conclusion that McWane unlawfully monopolized the domestic fittings market through the same conduct, it is unnecessary to ask whether McWane attempted to monopolize the market. Accordingly, we do not reach this issue and do not adopt the ALJ's analysis."). Though I agree with the Commission's conclusion that a decision on Count 7 is unnecessary in light of its decision on Count 6, because I dissent from the Commission's decision that McWane monopolized the Domestic Fittings market, I must write separately to explain why I agree with the Commission's conclusion that Count 7 ought to be dismissed.

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precisely the sort of "cream-skimming" the Commission describes and thus facilitate efficient distribution. *See* Roy W. Kenney & Benjamin Klein, *The Economics of Block Booking*, 26 J. L. & ECON. 497 (1983); Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature*, 1 J. COMP. L. & ECON. 707 (2005). Consistent with the economics literature exploring the competitive implications of full-line forcing contracts, recent empirical tests confirm the practice can result in increased efficiency and consumer welfare. *See, e.g.*, Katherine Ho, Justin Ho, & Julie Holland Mortimer, *The Use of Full-Line Forcing Contracts in the Video Rental Industry*, 102 AM. ECON. REV. 686 (2012); Katherine Ho, Justin Ho, & Julie Holland Mortimer, *Analyzing the Welfare Impacts of Full-line Forcing Contracts*, 60 J. INDUS. ECON. 468 (2012).

Attempted monopolization, like ordinary monopolization, sounds under Section 2 of the Sherman Act. 15 U.S.C. § 2. "[T]o demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). The ability to prosecute attempted monopolization "provides . . . a mechanism for the control of unilateral behavior by firms *not guilty of monopolization itself*." PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 8.02 (4th ed. 2013) (emphasis supplied).

Both completed monopolization and attempted monopolization require that the defendant engage in exclusionary conduct. *See, e.g.*, *Am. Tobacco Co. v. United States*, 328 U.S. 781, 785 (1946) ("The phrase 'attempt to monopolize' means the employment of methods, means and practices which would, if successful, accomplish monopolization, and which, though falling short, nevertheless approach so close as to create a dangerous probability of it"). Because I have concluded that Complaint Counsel failed to satisfy its burden of proving that McWane engaged in exclusionary conduct required for a finding of completed monopolization, it follows that McWane cannot be found liable for attempted monopolization by engaging in the same conduct.

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Though Complaint Counsel's failure to establish that the Full Support Program was exclusionary precludes it from succeeding on its attempted monopolization claim, the claim itself is somewhat unusual and worthy of additional reflection. Typically, a plaintiff pursues an attempt claim because the defendant lacks the monopoly power required to prove ordinary monopolization under Section 2. Because my view is that Complaint Counsel has failed to prove McWane's conduct was exclusionary, this case presents the rare circumstance of an attempt claim involving a firm that already has monopoly power – a conclusion I assume but do not decide – engaging in conduct that *could have* but did not result in unlawful monopoly maintenance. Such a claim might be called "failed monopoly maintenance."

As a logical matter, such a claim is conceivable. However, there is little settled law on whether a firm with monopoly power can be held liable for attempting to maintain a monopoly position in the same market. At least one court has determined such liability is consistent with the text of Section 2. *See, e.g.*, *In re Mushroom Direct Purchaser Litigation*, 514 F. Supp. 2d 683, 701 (E.D. Pa. 2007) (concluding that "[b]ecause plaintiffs allege[d] that defendants tried to reduce opportunities for new entry into the market, . . . defendants [could] be liable for attempted monopolization even if defendants possessed a monopoly in [the relevant market]"). A better approach in my view, however, is to force a plaintiff to choose between a monopoly maintenance claim and an attempted monopolization claim. I see no benefit in using the offense of attempted monopolization to prosecute conduct that might be viewed as exclusionary *ex ante* but turned out not to be *ex post* once the evidence has been examined. *See* *AREEDA*, *supra* note 21, ¶806a ("exclusionary conduct by a monopolist within its own market, whether successful or not, is best treated as an aspect of the full monopolization offense."). One decision, since vacated, shares this view: "Section 2 of the Sherman Act does not create a cause of action for an attempt to maintain a monopoly." *LePage's Inc. v. 3M*, 277 F.3d 365, 385 (3d Cir. 2002), *vacated on other grounds*, 324 F.3d 121 (3d Cir. 2003) (en banc). In doing so, the court stated any such "claim would be covered by the 'willful maintenance' part of the monopolization offense and would have been encompassed adequately by the monopolization count." *Id.*