No.

IN THE

# Supreme Court of the United States

MCWANE, INC.,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI


JOSEPH A. OSTOYICH
WILLIAM C. LAVERY
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 639-7700

MIGUEL A. ESTRADA
*Counsel of Record*
CYNTHIA E. RICHMAN
LUCAS C. TOWNSEND
JACOB S. SILER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
mestrada@gibsondunn.com

*Counsel for Petitioner*
(Additional Counsel Listed on Inside Cover)

AARON M. STREETT
BAKER BOTTS L.L.P
910 Louisiana Street
Houston, TX 77002
(713) 229-1234

EVAN A. YOUNG
BAKER BOTTS L.L.P.
98 San Jacinto Boulevard
Austin, TX 78701
(512) 322-2506

LEE E. BAINS, JR.
J. ALAN TRUITT
THOMAS W. THAGARD III
PRIM F. ESCALONA
MAYNARD, COOPER & GALE, P.C.
1901 Sixth Avenue North
2400 Regions/Harbert Plaza
Birmingham, AL 35203
(205) 254-1000

## QUESTION PRESENTED

Petitioner McWane, Inc., is a manufacturer of ductile iron pipe fittings. In 2009, McWane introduced a partial exclusive-dealing program designed to preserve the last dedicated pipe fittings foundry in the United States. Notwithstanding the fact that a competitor entered and acquired 10% of the alleged relevant market within two years, the Federal Trade Commission concluded that McWane violated the Federal Trade Commission Act because McWane was a monopolist whose exclusive-dealing program foreclosed a substantial share of the market.

The Commission and the Eleventh Circuit both rejected McWane's arguments that the successful entry and expansion of a competitor precludes a finding of monopoly power, and that McWane's normal business purpose of maintaining sufficient sales to make efficient use of excess capacity defeats antitrust liability. As the Eleventh Circuit recognized, the courts of other circuits hold that the successful entry of a competitor precludes antitrust liability "as a matter of law," *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998), and that a seller's desire to make use of "considerable excess [industrial] capacity" is sufficient to justify exclusive-dealing arrangements, *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 237 (1st Cir. 1983) (Breyer, J.).

The question presented is:

Whether McWane's partial exclusive-dealing arrangement is unlawful under antitrust principles as implemented in Section 5 of the FTC Act, notwithstanding the successful entry of a competitor in the relevant market during the period at issue and notwithstanding McWane's nonexclusionary business justifications for the conduct.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, who was defendant-petitioner below, is McWane, Inc.

Respondent, who was plaintiff-respondent below, is the Federal Trade Commission. Star Pipe Products, Ltd. and Sigma Corporation were respondents before the Federal Trade Commission, but entered consent decrees with the Commission in 2012 and were not parties to the proceedings before the United States Court of Appeals for the Eleventh Circuit, whose judgment is sought to be reviewed.

Pursuant to Rule 29.6 of the Rules of this Court, petitioner McWane, Inc. states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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## PETITION FOR A WRIT OF CERTIORARI

McWane, Inc. ("McWane") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-51a) is reported at 783 F.3d 814. The opinions of the Federal Trade Commission (App. 68a-108a) and the administrative law judge (App. 161a-636a) are unreported. The order of the court of appeals denying rehearing (App. 52a-53a) is unreported.

## JURISDICTION

The judgment of the court of appeals was entered on April 15, 2015. A timely petition for rehearing en banc was denied on August 6, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The relevant provision of the Federal Trade Commission Act, 15 U.S.C. § 45, is reproduced at App. 54a-67a.

## STATEMENT

Exclusive-dealing arrangements are commonplace and widely beneficial to the American economy. Such arrangements are "procompetitive" because they help to "ensur[e] stable markets and encourag[e] long-term, mutually advantageous business relationships." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring in the judgment); *see also Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 306-07 (1949). Because companies are free to "compet[e] for the [exclusive]

contract," exclusive-dealing arrangements typically pose little threat to competition. *Menasha Corp. v. New Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004).

Recognizing these principles, courts uphold exclusive dealing under the federal antitrust laws except in narrow circumstances. First, the defendant must "possess[] monopoly power in the relevant market," which this Court has defined as "the power to control prices or exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966) (citation omitted). Second, any "competition foreclosed" by the arrangement must "constitute a substantial share of the relevant market. That is to say, the opportunities for other traders *to enter into or remain in* that market must be significantly limited." *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 328 (1961) (emphasis added). Third, the challenged exclusionary arrangement cannot be "justified by any normal business purpose." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985).

In this case, however, the Federal Trade Commission concluded—without conducting any serious economic inquiry—that McWane, Inc. had monopoly power and that competitors were foreclosed from the market despite the successful entry and rapid growth of a competitor. App. 84a-85a. The Commission also concluded that McWane's natural desire for sufficient sales to retain its last domestic fittings foundry was not a "normal business purpose" that would justify the arrangement, because it did not "promote consumer welfare by increasing overall market output." App. 97a-98a. The Eleventh Circuit expressly acknowledged the substantial disagree-

ment among the courts of appeals on these issues. App. 29a. Yet that court simply deferred to the conclusions of the Commission by applying a highly "deferential review." App. 51a.

That deference was misplaced and cannot be reconciled with decisions of the Second and Ninth Circuits, both of which have correctly recognized "*as a matter of law*" that a competitor's "successful entry . . . itself refutes any inference of the existence of monopoly power." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) (emphasis added). And the Eleventh Circuit's deference to the Commission's conclusion that any valid business justification must affirmatively "promote consumer welfare by increasing overall market output" (App. 50a (quoting App. 97a)) cannot be squared with this Court's decision in *Aspen* or with the law of at least four other circuits.

This Court should grant review to resolve these conflicts and clarify whether, in the face of actual, successful entry, a partial exclusive-dealing arrangement can amount to unlawful monopolization.

1. McWane is a fourth-generation, family-run company headquartered in Birmingham, Alabama, that produces ductile iron pipe fittings. Fittings are used to join pipes and help direct the flow of pressurized water in pipeline systems. App. 3a. Any fitting that meets American Water Works Association standards is interchangeable regardless of the country of origin. *Id.* Approximately 80% of the demand is for about 100 commonly used fittings. *Id.*

Historically, most fittings used in waterworks projects in the United States were manufactured domestically. App. 72a. Beginning in the 1980s, however, foreign suppliers of fittings made signifi-

cant inroads into the market by importing lower-priced fittings produced in countries where the regulatory environment and cheaper labor result in far lower production costs than domestically produced fittings. App. 4a. Sales of imported fittings quickly skyrocketed; by 2005, imported fittings made up "the vast majority of" sales. *Id.* Today, "the majority of fittings sold (approximately 80-85%) are imported." *Id.*

These developments nearly eliminated domestic manufacturing of fittings, as McWane's competitors "dramatically reduced or ceased domestic fittings production." App. 72a. Meanwhile, McWane was forced to close its foundry in Tyler, Texas, leaving its foundry in Anniston, Alabama as the last remaining dedicated fittings foundry in the United States. App. 5a. Even that foundry, however, was operating at a small fraction of its capacity. *See* App. 234a. By 2006, McWane was the "only supplier of domestic fittings." App. 5a.

McWane's two largest competitors are Star Pipe Products, Ltd. and Sigma Corporation. Star and Sigma utilize a so-called "virtual manufacturing" model, whereby they provide the specifications and quality control, but contract with third-party jobber foundries to manufacture the fittings. *See* App. 5a, 412a-413a. Though the Commission adverted to some evidence that Star may own a "controlling interest" in foundries in China (App. 194a), it was undisputed that the "virtual manufacturing" model allowed both Star and Sigma to achieve a substantial share of the fittings market (App. 412a-413a).

Manufacturers (whether virtual or traditional) have not typically sold fittings directly to end users. App. 74a. Instead, manufacturers sell fittings to dis-

tributors who, in turn, resell them for use in waterworks projects. *Id.* Many manufacturers, McWane included, offer distributors a percentage discount "rebate" on all purchases made within a specified time period. App. 231a.

End users generally do not specify where the pipe fittings used in waterworks projects must be manufactured. *See* App. 3a-4a. Some projects, however, specify that any fittings must be manufactured in the United States; and certain municipal, state, and federal laws require waterworks projects to use domestic-only fittings. *Id*. Nevertheless, the vast "majority of specifications" do not require domestically produced fittings. App. 4a.

In February 2009, Congress enacted the American Recovery and Reinvestment Act ("ARRA"), a one-year stimulus program that allocated more than $6 billion to water infrastructure projects. App. 74a-75a. ARRA substantially expanded the percentage of waterworks projects with domestic-only specifications for pipe fittings to nearly 30%. App. 324a. Seeking to take advantage of this demand, Star announced in June 2009 that it would begin offering domestic fittings in September of that year. App. 5a. Star used "virtual manufactur[ing]" by contracting with six third-party foundries in the United States to produce fittings to Star's specifications. *Id.*

McWane became concerned that its competitors, like Star, would "cherrypick" the most frequently purchased fittings without incurring the additional costs required to manufacture a full line of fittings products in the United States, as McWane does. *See* App. 345a. Because McWane's last domestic fittings foundry was operating below capacity, any further reduction would threaten McWane's ability to keep

the foundry open. *See* App. 338a-339a. If McWane was forced to shutter the last dedicated domestic foundry and lay off hundreds of employees, of course, end consumers might lose the option of McWane's full line of domestically produced fittings.

To avoid this fate, on September 22, 2009, McWane modified its rebate policy through a letter to distributors. App. 5a. Under the rebate policy, distributors who elected not to support McWane's full line of domestic fittings "may forgo participation in any unpaid rebates [they had accrued] for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of [McWane] products for up to 12 weeks." App. 5a-6a (alterations in original). The policy also contained two exceptions, which permitted the companies to purchase from McWane's competitors while still maintaining compliance with the partially exclusive program. App. 6a. McWane would continue to provide rebates and deliver products if a distributor purchased from a competitor when McWane products were not readily available, or when the distributor purchased a competitor's domestic fittings and accessories along with another manufacturer's ductile iron pipe. *Id*. In addition, McWane would continue to fulfill orders for non-domestically produced fittings, even if the distributor purchased domestic fittings from a competitor. App. 346a.

Shortly after McWane's letter to distributors, Star began selling domestically produced fittings, and quickly gained a substantial share of domestic fittings sales. App. 8a. Within twelve months of its first sale of domestic fittings, Star accounted for approximately 5% of all domestic fittings sales. *Id.* That figure doubled to just under 10% in 2011. *Id.*

By 2012, Star was on pace "to have its best year ever" for domestic fittings sales. *Id.* (internal quotation marks omitted).

2. On January 4, 2012, the Federal Trade Commission issued a seven-count administrative complaint charging McWane, Star, and Sigma with violating Section 5 of the Federal Trade Commission Act. App. 10a. The Commission's primary theory was that all three competitors had conspired to raise prices.[1] App. 10a n.5. The Commission separately alleged that McWane held monopoly power in the domestic pipe fittings market, and that, through McWane's rebate policy—which the Commission dubbed the "Full Support Program"—McWane had unlawfully maintained that power. App. 10a.

a. The Commission's claims were tried before an administrative law judge. After a two-month trial, the ALJ issued an initial decision squarely rejecting the Commission's collusion claims, but ruling in favor of the Commission on its claims that McWane's Full Support Program was an unlawful exclusive-dealing arrangement under Section 5. App. 161a-636a.

The ALJ first defined the relevant market as one limited to domestically manufactured pipe fittings. In his analysis, the ALJ specifically found that all pipe fittings, regardless of origin of manufacture, are standardized (i.e., functional substitutes), and that even on projects with a domestic preference the requirements are sometimes waived. App. 420a-424a. Nevertheless, the ALJ concluded that there are two

[1] In February and May of 2012, Star and Sigma entered consent decrees with the Commission without admitting any wrongdoing. App. 10a.

separate markets: one for fittings sold for use in open-specification waterworks projects, and a separate market for domestically manufactured fittings used in projects with domestic-only specifications. App. 235a, 239a. The ALJ then found that McWane was the only manufacturer in the domestic fittings market between 2006 and late 2009, before enactment of ARRA, and held 100% of that market. App. 326a.

The ALJ also found that Star's entry in 2009 had significantly eroded McWane's sales of domestic fittings. Specifically, Star had sold domestically produced fittings to more than 100 distributors, even convincing dozens of them to purchase from Star exclusively. *See* App. 338a. "Clearly," the ALJ concluded, "Star entered the Domestic Fittings market." App. 554a.

Despite this entry, the ALJ concluded that McWane had monopoly power in the domestic fittings market because it had the "ability to control prices or exclude competitors." App. 555a. It based this conclusion primarily on the fact that McWane's market share was high (though eroding), and on the belief that "barriers to entry" are "high" because new entrants would need to make a "significant capital investment" to either build a dedicated foundry or contract with third-party foundries to produce the fittings, and would still need to compete for the business of distributors. *See* App. 548a-549a.

The ALJ further concluded that the Full Support Program was an unlawful exclusive-dealing arrangement that foreclosed a "substantial share of the market." App. 579a. Notably, however, neither the ALJ nor the Commission's Complaint Counsel attempted to test this purported foreclosure through

rigorous or quantitative economic analysis; nor could the ALJ quantify the percentage of the market foreclosed. *See* App. 579a-582a.

b. The Commission unanimously dismissed six of the seven counts against McWane, but sharply divided in affirming the ALJ's conclusion that the Full Support Program was an unlawful exclusive-dealing arrangement under Section 5 of the FTC Act. App. 69a.

Like the ALJ, the Commission believed that McWane had monopoly power in the domestic fittings market because any new entrant would need either "to build its own foundry" or "develop a supply chain of foundries" and the expertise needed to produce a full line of fittings. App. 84a. And although Star in fact had successfully developed a supply chain and the needed expertise, the Commission dismissed Star's entry and rapid growth because its "market share remained below 10%" before 2012 and its entry "did not produce lower prices." App. 85a. At the same time, the Commission recognized that Star's entry occurred at a time of "anticipated increase in domestic fittings demand due to ARRA funding" (App. 75a), which would as an economic matter lead to higher prices assuming other factors remained constant. The Commission also surmised that Star had been foreclosed from a substantial share of the market (App. 89a-90a), but again could not quantify the amount of foreclosure (*see* App. 91a n.10).

Finally, the Commission rejected McWane's argument that the Full Support Program was consistent with McWane's normal business purposes of maintaining sufficient sales to keep open its dedicated domestic foundry and responding to Star's strate-

gy of "cherrypicking" sales of only the most commonly sold and profitable fittings. App. 97a-98a. These business purposes were not "cognizable," the Commission ruled, because they were insufficiently tied to any "benefit to consumers." *Id.* The Commission also pointed to statements by certain McWane executives that they were concerned that Star's entry might drive down prices, which, according to the Commission, "belie[d]" any claim that McWane's "motivat[ion]" was procompetitive. App. 98a.

c. Commissioner Wright strongly dissented. According to Commissioner Wright, the "undisputed evidence that Star was able successfully to enter the domestic fittings industry and to succeed in expanding in its business once it did enter"—including "sales to more than 100 distributors"—was "especially probative" of the *lack* of competitive harm. App. 152a-154a. Moreover, Commissioner Wright noted, "[c]ourts 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." App. 131a. Star's entry thus flatly "contravenes the precise point—exclusion" from the relevant market—that the Commission must establish to deem an exclusive-dealing arrangement unlawful. App. 154a. In Commissioner Wright's view, Star's successful entry meant that the Commission had failed to establish that McWane's Full Support Program "resulted in harm to competition." App. 155a.

3. The Eleventh Circuit affirmed. App. 2a. The panel first concluded that the key issues—monopoly power and harm to competition—should be viewed as "factual or economic conclusions" that receive only "deferen[tial]" review. App. 15a-16a (internal quotation marks omitted). These "factual building blocks

and economic conclusions," the Eleventh Circuit reasoned, need only be supported by "substantial evidence." App. 19a.

Having defined monopoly power and harm to competition as factual issues, the Eleventh Circuit held that the Commission's conclusions were supported by substantial evidence. On monopoly power, the Eleventh Circuit credited the Commission's conclusions that evidence of McWane's 90% (but eroding) market share and of barriers to entry established McWane's monopoly power in the domestic fittings market. App. 26a-28a. In particular, the Eleventh Circuit cited the Commission's conclusions that a new entrant would need to "overcome existing relationships between existing manufacturers" and would need to develop or acquire the "patterns and moldings" required to produce fittings. App. 28a (internal quotation marks omitted). At the same time, however, the Eleventh Circuit observed that there were a number of competitors—including Star itself—that would not need to overcome "these obstacles in entering the domestic fittings market" because of their "pre-existing relationships" with distributors and the fact that they produced functionally identical fittings in other countries. *Id.*

The Eleventh Circuit rejected McWane's argument that Star's successful entry and expansion into the domestic fittings market precluded the conclusion that McWane exercised monopoly power. App. 29a-30a. Despite expressly recognizing that "caselaw from other circuits" supported McWane's argument, the panel declined to follow that precedent because "not all courts agree." *Id.*

The Eleventh Circuit also affirmed the Commission's holding that the Full Support Program harmed

competition. The court again recognized that "caselaw from other circuits" supported McWane's argument that exclusive-dealing arrangements that are voluntary and terminable at will are presumptively lawful because their "'short duration and easy terminability . . . negate substantially their potential to foreclose competition.'" App. 34a (quoting *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997)). Dismissing these opinions as relying on "formalistic distinctions" rather than "market realities," the Eleventh Circuit concluded that such arrangements deserve no presumptive legality. App. 35a.

Finally, the Eleventh Circuit summarily rejected McWane's argument that the Full Support Program was lawful because it reflected McWane's normal business purposes of maintaining sufficient sales to keep open its domestic foundry and countering Star's strategy of "cherrypicking" the most profitable products. App. 49a-50a. The court concluded as a matter of law that maintaining a dedicated foundry that produced a full range of pipe fittings was not a "procompetitive justification[]" because it did not "'promote consumer welfare by increasing overall market output.'" *Id.* (quoting App. 97a). The Eleventh Circuit also emphasized certain "damning internal documents" in which McWane executives worried that Star's entry might lead to an "[e]rosion of domestic pricing" or otherwise "drive profitability out of [the] business." App. 51a (internal quotation marks omitted) (first alteration in original). The Eleventh Circuit concluded that these documents constituted "evidence that" McWane's "procompetitive justifications" were "'merely pretextual.'" *Id.*

## REASONS FOR GRANTING THE PETITION

The Eleventh Circuit's decision chills competition and sows uncertainty regarding the legality of ordinary business practices. Exclusive-dealing arrangements are presumptively *lawful*, especially when they are terminable at will and short-term, yet the Eleventh Circuit erroneously condemned the very type of competitive arrangement that the antitrust laws were designed to protect. Simply put, short-term, nonbinding, partial exclusive-dealing arrangements like McWane's cannot pose unlawful barriers to market entry where, as here, *there was actual and successful entry*.

Having recast important questions of law as questions of fact, the Eleventh Circuit invoked agency deference to support its contrary conclusion. But that is insufficient to inoculate the Eleventh Circuit's legal error from scrutiny. The Eleventh Circuit's decision is sharply at odds with this Court's precedents on exclusive-dealing arrangements and exacerbates circuit splits over (1) whether successful entry precludes a finding of monopoly power, and (2) the standard for determining what constitutes a valid business justification for allegedly anticompetitive conduct.

### I. The Eleventh Circuit's Decision Highlights Growing Confusion Over How To Analyze Exclusive-Dealing Arrangements Under The Antitrust Laws

#### A. Short-Term Exclusive-Dealing Arrangements Have Significant Benefits For Competition

Exclusive-dealing arrangements—whereby a buyer agrees to make all its purchases from the con-

tracting seller—are "quite common," *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 65 (1st Cir. 2004), and often provide "economic advantage to buyers as well as to sellers," *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 306 (1949). When structured as requirements contracts, for example, exclusive-dealing arrangements can benefit buyers by securing a reliable supply of goods from a dedicated seller, enhancing buyers' "long-term planning," and minimizing the "expense and risk" of keeping large inventories of goods for which there is "fluctuating demand." *Id.* Simultaneously, exclusive-dealing arrangements can help sellers to reduce expenses, hedge against "price fluctuations," and ensure a "predictable market" for their products. *Id.* at 307. Exclusive-dealing arrangements also align the incentives of manufacturers and distributors by encouraging distributors "to promote each manufacturer's brand more vigorously than would be the case under nonexclusive dealing." *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984). A distributor "who expresses his willingness to carry only one manufacturer's brand of a particular product indicates his commitment to pushing that brand; he doesn't have divided loyalties." *Id.*; *cf. Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 891 (2007) ("The promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect this type of competition.'" (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997) (alterations omitted))).

These "'highly efficient'" arrangements generally "'pose no competitive threat at all.'" *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) (quoting *E. Food Servs., Inc. v. Pontifical*

*Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 8 (1st Cir. 2004)). Indeed, they often *promote* interbrand competition by encouraging companies to compete to become an exclusive supplier, "a vital form of rivalry" that "the antitrust laws encourage rather than suppress." *Menasha Corp. v. New Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004); *see also Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 (9th Cir. 2010). For example, exclusive-dealing arrangements can stimulate competition not only on price but also on innovation and selection, because consumers naturally will prefer exclusive suppliers with a range of product offerings.

Only exclusive-dealing arrangements that actually "foreclose competition in a substantial share of the line of commerce affected" are anticompetitive and potentially unlawful. *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). But where "there is no exclusion of a significant competitor, the agreement cannot possibly harm competition." *Roland Mach.*, 749 F.2d at 394. Moreover, short-term exclusive-dealing arrangements that are easily terminable generally cannot foreclose competition to any significant degree and are "presumptively lawful." *Id.* at 395.

Applying these principles, the courts of appeals routinely reject antitrust liability for short-term, partial exclusive-dealing arrangements that are terminable at will, like McWane's. The Seventh Circuit has held that exclusive-dealing arrangements do not foreclose competition as a matter of law where competitors can access the market through direct sales or by attracting their own distributors. *Roland Mach.*, 749 F.2d at 394-95. Similarly, the Ninth Circuit rejected liability for an exclusive-dealing ar-

rangement that was terminable within a year because "a competing manufacturer need only offer a better product or a better deal to acquire their services." *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997). In *CDC Technologies, Inc. v. IDEXX Laboratories, Inc.*, the Second Circuit rejected a challenge to exclusive-dealing contracts that "were easily terminable on short notice" and where "any distributor that preferred to promote CDC's machine could switch allegiance with ease." 186 F.3d 74, 81 (2d Cir. 1999). And in *Ryko Manufacturing v. Eden Services*, the Eighth Circuit reversed a jury verdict where the exclusive-dealing provisions had no "impact on the ability of" an alleged monopolist's "competitors to make sales presentations to any potential customer through their own distributors or through direct sales representation." 823 F.2d 1215, 1235 (8th Cir. 1987); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) (holding that a company's "discount program was [not] in any way exclusive" because buyers "were free to walk away from the discounts at any time").

Here, however, the Eleventh Circuit disagreed with the overwhelming weight of authority. The court of appeals affirmed liability even though McWane's Full Support Program did not contractually bind any distributor, which all remained free to walk away from the rebates at any time. Indeed, distributors were free to opt for, or out of, claiming McWane's rebates for any quarter they chose, and the ALJ's findings of fact confirm that some distributors did just that. *See* App. 337a (describing how Star was able to "pick off" domestic-fittings orders from McWane). Moreover, McWane's policy did not prevent Star from entering the market and capturing

a 10% (and growing) market share within just two years. Star's successful entry and growth trajectory is fully consistent with the short-term, nonbinding nature of the Full Support Program, and utterly inconsistent with the Eleventh Circuit's conclusion that the Full Support Program presented an anticompetitive barrier to entry.

### B. The Eleventh Circuit's Decision Deepens A 2–2 Circuit Split Over Whether, As A Matter Of Law, A Firm Can Have Monopoly Power Without The Ability To Exclude Significant Competitors

1. A monopolization claim under Section 5 of the FTC Act premised on an exclusive-dealing arrangement requires proof of "(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."[2] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). The legal standard for monopoly power, moreover, requires "the power to control prices or exclude competition." *Id.* at 571 (citation omitted). Without the power to exclude new competitors from the market, it is "inconceivable" that the alleged monopolist can control price: new competitors can enter, sell their own products at a discount, and drive down the incumbent's prices.

[2] As this Court has recognized, exclusive-dealing "device[s]" that "fall[] within the prohibitions of the Sherman Act" also constitute "'unfair methods of competition'" under Section 5 of the FTC Act. *FTC v. Motion Picture Advert. Serv. Co.*, 344 U.S. 392, 395 (1953).

*United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956). Mere exclusionary *practices* are not sufficient to demonstrate a violation without actual harm to *competition* (as opposed to competitors). *See Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

Accordingly, whether successful and substantial entry precludes a finding of monopoly power is a question of law. *See FTC v. Ind. Fed. of Dentists*, 476 U.S. 447, 455 (1986) (stating that the "legal question before" the Court was "whether the [Commission's] factual findings, if supported by evidence, make out a violation"). If a competitor has successfully and substantially entered the market despite the existence of exclusionary practices, then those practices manifestly do not give rise to the market power needed to sustain a monopolization claim. In that scenario, where "market circumstances or deficiencies in proof" prohibit a finding of monopoly power, "summary disposition of the case is appropriate." *Brooke Grp.*, 509 U.S. at 226.

Here, the undisputed historical facts preclude the conclusion that McWane exercised monopoly power. After McWane adopted the alleged exclusionary practice (the Full Support Program) in September 2009, a new competitor, Star, successfully entered the domestic fittings market and captured a sizeable—and rapidly growing—share of the market. App. 8a. Before Star's entry, McWane was the only manufacturer of domestic fittings and held 100% of the market. *Id.* Within a year of entering the market, Star commanded approximately 5% of the market, a market share that quickly doubled to 10% by 2011. *Id.* Star's meteoric growth continued into 2012, when Star was on pace "to have its best year

ever" in domestic sales. *Id.* (internal quotation marks omitted).

The Eleventh Circuit acknowledged Star's successful entry in the market for domestic pipe fittings and its 100% growth year over year. *See* App. 8a. The Eleventh Circuit also conceded that Star's significant growth occurred "[*d*]*espite* McWane's Full Support Program." *Id.* (emphasis added). The Eleventh Circuit further admitted that, on the question of whether McWane can even possess monopoly power in these circumstances, "[s]ome caselaw from other circuits appears to support McWane." App. 29a (citing *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998)). Nevertheless, concluding that "not all courts agree," *id.*, the Eleventh Circuit parted ways with precedent because "we are unprepared to say that Star's entry and growth foreclose a finding that McWane possessed monopoly." App. 30a.

2. The Eleventh Circuit's standard for monopoly power cannot be squared with decisions from at least the Second and Ninth Circuits.

In *Tops Markets*, the Second Circuit considered a claim that a supermarket violated Section 2 of the Sherman Act by monopolizing the market for supermarket retail sales in Jamestown, New York. 142 F.3d 90. The defendant's share of the market at all times exceeded 72 percent, but a new competitor had opened a supermarket and quickly gained a "respectable share of the market." *Id.* at 98-99. Critically, the Second Circuit held that this fact *alone* refuted the defendant's market power:

> [*A*]*s a matter of law*, despite evidence of Quality's high market share, consideration of other relevant factors does not support a conclusion that Quality did, in fact, possess

> monopoly power. We cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry. Had Wegmans not gained such a high market share within such a short period, we might recognize at least a *genuine* issue of material fact as to monopoly power, in light of Quality's over-70 percent market share. Wegmans' successful entry, however, *itself refutes* any inference of the existence of monopoly power that might be drawn from Quality's market share. If Quality were to raise its prices above their competitive level, new competitors could and would enter the market and, by undercutting those prices, quickly erode Quality's market share.

*Id.* at 99 (first and third emphases added). Thus, the Second Circuit concluded, "*as a matter of law*," that the competitor's successful entry and capture of substantial market share "*dispositively refutes*" a finding of monopoly power. *Id.* (emphases added).

Decisions of the Ninth Circuit have similarly held that a competitor's successful market entry is "conclusive" on the issue of monopoly power. *United States v. Syufy Enters.*, 903 F.2d 659, 665 (9th Cir. 1990). In *Syufy*, the Ninth Circuit rejected the existence of monopoly power despite the defendant's large market share by focusing on "a single" factor: the successful entry of a competitor in the market. *Id.* at 665. As the Ninth Circuit recognized, because other competitors "could (and did) enter the market successfully, Syufy lacked the ability to maintain market share, the power to control prices, and the capability of excluding competitors." *Id.* at 671 n.21 (in-

ternal quotation marks omitted) (alterations omitted).

Similarly, in *Omega Environmental*, the Ninth Circuit upheld a contractual exclusive-dealing arrangement between an alleged monopolist and its distributors that had a one-year initial term and was terminable upon 60 days' notice. 127 F.3d at 1160. The court explained that "exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern," because if competitors can reach end-users through alternative distribution channels, "it is unclear whether such restrictions foreclose from competition *any* part of the relevant market." *Id.* at 1162-63. Thus, the Ninth Circuit again held that "undisputed evidence" of "actual entry and expansion" of a competitor that captured 8% of the market "*precludes* a finding that exclusive dealing is an entry barrier of any significance." *Id.* at 1164 (emphasis added).

The Eleventh Circuit cited two other Ninth Circuit cases in support of its position that successful entry does not preclude a finding of monopoly power. *See* App. 29a-30a (citing *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995); *Oahu Gas Serv., Inc. v. Pac. Res. Inc.*, 838 F.2d 360, 366-67 (9th Cir. 1988)). But neither case is contrary to *Syufy* or *Omega Environmental*—nor do they have much bearing on the issues in this case.

In *Oahu Gas*, the Ninth Circuit considered claims that a defendant engaged in unlawful monopolization and attempted monopolization between 1974 and 1982. 838 F.2d at 362. The record reflected a "virtual lack of entry by new firms . . . during the relevant time period." *Id.* at 366. In those cir-

cumstances, the Ninth Circuit held, new entrants *outside* the relevant period did not preclude a finding that the defendant had the power to exclude *during* the relevant period. *Id.* at 367.

Likewise, in *Rebel Oil*, the Ninth Circuit concluded that the entry of two rivals that operated "one gas station apiece" during the relevant period, did not preclude a finding of monopoly power on behalf of a firm that operated 53 gas stations because a "juror could reasonably conclude that two gasoline stations would have insufficient capacity to" challenge the alleged monopolist's dominant status. 51 F.3d at 1441. In other words, any entry by two gas stations was too insignificant to affect the alleged monopolist, in contrast to Star's entry here, which involved sales to more than 100 customers, Star's capture of nearly 10% of McWane's market share in two years, and its continuing growth. *See* App. 8a, 338a. Contrary to the Eleventh Circuit's suggestion, *Rebel Oil* did not hold that monopoly power could exist despite the alleged monopolist's inability to exclude a successful new entrant that captures a significant share of the market.

3. Despite acknowledging that "[s]ome caselaw from other circuits appears to support McWane," App. 29a, the Eleventh Circuit provided scant support for its departure from the legal rule articulated in *Tops Markets*, *Syufy*, and *Omega Environmental*, all of which are firmly rooted in sound economic doctrine and legal principles articulated by this Court. Instead, looking past the legally dispositive fact of Star's significant market entry, the Eleventh Circuit emphasized McWane's high-percentage share of the domestic pipe fittings market and the allegedly "large capital outlays required to enter" that market.

App. 30a. Yet this analysis ignores that "virtual manufacturers" have succeeded in United States fittings sales *without* relying on expensive, dedicated foundries. Like other foreign manufacturers, Star *already* had the relationships with distributors and know-how to begin sales of domestically manufactured fittings without facing these supposed barriers. As Star's successful entry showed, these competitors served as a limit on McWane's ability to extract supracompetitive pricing. *See* App. 5a-8a. Indeed, *Tops Markets* squarely rejected, "as a matter of law," the notion that courts should be "blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry." 142 F.3d at 99. Similarly, the Ninth Circuit correctly held that "[i]n evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share." *Syufy*, 903 F.2d at 665-66. The Second and Ninth Circuits' focus on the ability of competitors to enter stands in stark contrast with the Eleventh Circuit's conclusion, which effectively renders exclusive deals unlawful if adopted by companies with high market shares.

The Eleventh Circuit instead joined the Tenth Circuit, which recently held that successful entry does not preclude a finding of monopoly power. *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1125-26 (10th Cir. 2014). In *Lenox MacLaren*, the district court had granted a defendant's summary judgment motion, holding that a competitor's new entry and capture of market share was "indisputable proof" of a lack of monopoly power. *Id.* at 1125. The Tenth Circuit reversed, holding that a "single competitor's breakthrough does not preclude a finding" of monopoly power. *Id.* The Tenth Circuit speculated that a competitor could be "atypi-

cal" and could enjoy certain "attributes" that "provide[] a competitive edge uniquely suited" to a particular market. *Id.* at 1126.

The Eleventh Circuit's decision below, like the Tenth Circuit's decision in *Lenox MacLaren*, represents a troubling departure from this Court's precedents. As this Court has recognized, "a plaintiff's case has failed" if a competitor has the ability to easily enter the market and thereby limits the ability of an alleged monopolist to charge supracompetitive prices. *Brooke Grp.*, 509 U.S. at 226. This is because, without the ability to exclude new entry into the market, "monopoly pricing may breed quick entry by new competitors eager to share in the excess profits." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986). And this new entry would make it "impossible to maintain supracompetitive prices." *Id.* at 591 n.15. The Eleventh Circuit concluded otherwise only by ignoring evidence that Star had higher average prices than McWane in most states (*see* App. 9a), and instead assuming that Star would have had even *better* results absent McWane's rebate policy (*see* App. 45a-46a). In adopting a deferential standard under which even evidence *disproving* the existence of monopoly power can be viewed as confirming the Commission's theories, the Eleventh Circuit provided no convincing rationale explaining how an alleged monopolist could maintain supracompetitive prices and reap monopoly profits when a competitor has entered the market, rapidly eroded the alleged monopolist's market share, and grown its own market share year over year. *See Tops Markets*, 142 F.3d at 99.

4. The Eleventh Circuit's speculation about what Star might have done in the absence of the Full Sup-

port Program does not save its faulty legal analysis. Neither the ALJ nor the Commission relied on any economic test to define the relevant market or guide the inquiry into McWane's monopoly power. *See* App. 510a ("Rather than offer its own expert testimony analyzing economic data, Complaint Counsel chose an 'attack-the-other-expert' strategy."). Instead, the Commission—and on review the Eleventh Circuit—relied almost exclusively on self-serving testimony from Star executives that "the Full Support Program deprived Star of the sales and revenue needed to invest in a domestic foundry of its own." App. 45a. In similar contexts, the courts of appeals have repeatedly rejected this type of lay analysis as insufficient to support antitrust liability. *See*, *e.g.*, *Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 919 (6th Cir. 2009) (reliance on "lay testimony and internal" documents "does not provide a sound economic basis for assessing the market"); *Menasha Corp.*, 354 F.3d at 664 (rejecting antitrust claim based on "armchair economics"). The Commission applied no expertise to which the Eleventh Circuit should have given deference, and certainly none that could overcome the legal rule that successful entry negates any inference of monopoly power.

### C. The Eleventh Circuit's Rejection Of McWane's Valid Business Justifications Deepens An Entrenched Circuit Split Over The Proper Legal Standard For Demonstrating A Valid Business Justification

The Eleventh Circuit's decision also exacerbates an entrenched circuit split on the proper standard for

determining what constitutes a valid business justification for allegedly anticompetitive conduct.

1. An alleged monopolist may not be liable for exclusionary conduct that is "justified by any normal business purpose." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985). In *Aspen*, the defendant monopolist, a ski slope operator, ceased cooperating with the plaintiff, a rival operator, to offer a multi-venue skiing package for Aspen skiers. Importantly, the defendant offered no "efficiency justification whatever for its pattern of conduct." *Id*. In fact, the record suggested that the defendant's conduct was *harmful* to its business, and that the defendant was "willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610-11. Thus, the defendant's conduct simply made no sense outside of its anticompetitive effect. In that circumstance, the Court held, the jury was entitled to find that the monopolist's actions were exclusionary and anticompetitive. *Id*. As this Court later described its holding in *Aspen*, "[t]he unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 409 (2004) (emphasis in original).

Although *Aspen* "is at or near the outer boundary of § 2 liability," 540 U.S. at 409, this Court has recognized elsewhere that any non-pretextual "legitimate competitive reasons" for the alleged anticompetitive conduct will suffice to defeat a monopolization claim. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483-84 & n.32 (1992). Ac-

cordingly, the relevant inquiry is whether McWane's actions made business sense *apart* from the opportunity to charge monopoly prices in the future.

The Eleventh Circuit, by contrast, concluded that McWane had failed to offer a valid business justification because the Full Support Program did not "'promote consumer welfare by increasing overall market output.'" App. 49a-50a (quoting App. 97a). The Eleventh Circuit's heightened standard goes well beyond this Court's precedents.

2. The Eleventh Circuit falls on the short side of a 4–2 circuit split over the proper standard for assessing a valid business purpose. The First, Seventh, Eighth, and Tenth Circuits all require nothing more than a reasonable business decision, consistent with *Aspen*'s "normal business justification" standard. Only the Third and Eleventh Circuits require an *additional* showing of affirmative benefit to consumers.

In *Barry Wright Corp. v. ITT Grinnell Corp.*, the First Circuit presaged *Aspen*'s "normal business purpose" standard by evaluating the lawfulness of exclusive buy-sell contracts "from the perspectives of both buyer and seller." 724 F.2d 227, 237 (1st Cir. 1983) (Breyer, J.). In upholding the agreements, the court of appeals specifically credited the seller's desire to make use of its "considerable excess [industrial] capacity," as well as to engage in "production planning that was likely to lower costs." *Id.* Both of those justifications were normal business decisions of the type this Court has repeatedly recognized justify exclusive-dealing arrangements. *See Tampa Electric*, 365 U.S. at 334; *Standard Oil*, 337 U.S. at 306-07. The First Circuit did *not* require proof that the agreements actually furthered consumer welfare.

Similarly, the Seventh Circuit requires only that a valid business justification be "an objectively reasonable business decision" that is "consistent with efficiency." *Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1482 (7th Cir. 1991) (internal quotation marks omitted). In *Panhandle Eastern*, the Seventh Circuit upheld an alleged monopolist's efforts to enforce its exclusive-dealing contracts with customers by expressly crediting the monopolist's "'self-serving' business justification," *id.* at 1484, of trying to avoid legal liability and higher costs, *see id.* at 1483 & n.13. That justification was sufficient, the Seventh Circuit held, even though "consumers might be better off (at least in the short run) if" the monopolist were forced to break its contracts. *Id.* at 1484. As the Seventh Circuit explained, "a monopolist's duties are negative – to refrain from anticompetitive conduct – rather than affirmative – to promote competition." *Id.*; *see also id.* at 1481-82 ("the presence of a legitimate business justification reduces the likelihood that the conduct will produce undesirable effects on the competitive process"); *accord Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986) (monopolist's "clear business justification" of seeking to liquidate inventory was sufficient).

The Eighth Circuit applies the same standard, asking only whether the challenged practice has a "'legitimate business purpose that makes sense'" for a reason other than "'because it eliminates competition.'" *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 549 (8th Cir. 2007) (quoting *Morgan v. Ponder*, 892 F.2d 1355, 1358 (8th Cir. 1989)); *see also id.* at 550 ("rational business justification"). Applying that standard, the court of appeals in *HDC Medical* upheld the alleged monopolist's refusal to honor its

warranties where competitors' products were used in the monopolist's medical devices. *See id.* at 549-50. The court did not require the monopolist to show that its actions actually promoted consumer welfare. *See id.*

Similarly, in *Christy Sports, LLC v. Deer Valley Resort Co.*, the Tenth Circuit concluded that a monopolist's "desire to make more money for itself" was a sufficient business justification for a ski resort's decision to revoke permission for third parties to operate a ski rental business. 555 F.3d 1188, 1197 (10th Cir. 2009). The Tenth Circuit explained that in *Aspen*, "there were no valid business reasons for" the defendant's conduct. *Id.* The resort's profit motive was sufficient "even if [plaintiff] is correct that" the monopolist's actions "could increase the price and decrease the output of ski rentals at Deer Valley." *Id.* at 1198. "The antitrust laws should not be allowed to stifle a business's ability to experiment in how it operates, nor forbid it to change course upon discovering a preferable path." *Id.*

In sharp contrast to the First, Seventh, Eighth, and Tenth Circuits, only the Third Circuit and now the Eleventh Circuit require an alleged monopolist to prove that its actions affirmatively promote consumer welfare—effectively an "*Aspen*-plus" standard. Under the Third Circuit's standard, "a defendant's assertion that it acted in furtherance of its economic interests *does not constitute* the type of business justification that is an acceptable defense to § 2 monopolization." *LePage's Inc. v. 3M*, 324 F.3d 141, 163-65 (3d Cir. 2003) (en banc). Rather, according to the Third Circuit, a company must demonstrate not only that it acted in "furtherance of its economic interests," but also that its behavior relates "'to the en-

hancement of consumer welfare.'" *Id.* at 163 (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994)).[3] Applying that heightened standard, the en banc Third Circuit concluded that a monopolist's actions taken "to benefit its own economic interests" were not a valid business justification. *Id.* at 164.

By adopting a heightened "*Aspen*-plus" standard, the Eleventh Circuit erroneously transformed McWane's normal, efficiency-enhancing, business purposes—purposes that would be valid in at least four other circuits—into anticompetitive conduct. McWane instituted the Full Support Program to reduce costs by (1) making efficient use of considerable excess production capacity at its Alabama foundry, and (2) limiting the likelihood that it would bear the expense of carrying a full range of pipe fittings and accessories only to have its core offerings "cherrypicked" by competitors who opted to limit production to the most popular fittings. These justifications are efficiency-enhancing, and should easily have been sufficient. *See*, *e.g.*, *Barry Wright Corp.*, 724 F.2d at 237 (efficient "use of considerable excess

[3] Contrary to the Third Circuit's belief, the First Circuit in *Data General Corp.* did not purport to adopt a heightened standard. Its reference to the need for business justifications to relate to the "enhancement of consumer welfare," 36 F.3d at 1183, appeared in a general summary of background principles and was not necessary to the court's holding that "the desire of an author to be the exclusive user of its original work is a presumptively legitimate business justification for the author's refusal to license to competitors," *id.* at 1182. As explained above, the law in the First Circuit is clear that a normal business purpose need not affirmatively enhance consumer welfare. *See Barry Wright Corp.*, 724 F.2d at 237.

[manufacturing] capacity" was a sufficient justification).

Indeed, McWane's business purposes are particularly salutary because the Full Support Program also allowed McWane to keep open the last domestic foundry dedicated to the production of pipe fittings. That purpose cannot be understated: Congress enacted the ARRA stimulus program to *expand* the number of public water works projects with domestic-only specifications for pipe fittings and thereby preserve domestic manufacturing employment. Star itself succeeded in this market by utilizing excess capacity at jobber foundries to create domestic manufacturing positions. *See* App. 5a. Similarly, the Full Support Program sought to utilize McWane's excess foundry capacity while preserving American manufacturing jobs. McWane's business purposes were therefore fully consistent with public policy as enacted in the ARRA, a fact that compels the conclusion that those purposes were valid as a matter of law.

3. The Eleventh Circuit also suggested that McWane's business purposes were "pretextual" because McWane's internal documents evinced a fear of falling prices due to Star's entry and a desire to "prevent[]" Star from becoming an effective competitor. App. 50a-51a. According to the Eleventh Circuit, these documents suggested that McWane did not "design[]" "the Full Support Program . . . for any procompetitive benefit." App. 50a. But the Eleventh Circuit's suggestion of "pretext" is merely an extension of its failure to apprehend the legitimacy of McWane's proffered justifications. The Eleventh Circuit did *not* suggest that McWane had no reason for concern about preserving its ability to offer a full line of fittings or keeping its foundry open. Rather,

the Eleventh Circuit deemed McWane's justifications "pretextual" merely because contemporaneous documentation reflected competitive animus. App. 51a.

Here again, the Eleventh Circuit departed from elementary principles of antitrust liability. The types of communications cited by the Court are ordinary and commonplace. Courts have long recognized that even a company's "desire to crush a competitor" does not negate an otherwise valid business justification. *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989). As the First Circuit has aptly noted:

> As long as [an alleged monopolist's] course of conduct was itself legitimate, the fact that some of its executives hoped to see [a competitor] disappear is irrelevant. Under these circumstances [the monopolist] is no more guilty of an antitrust violation than a boxer who delivers a perfectly legal punch – *hoping* that it will kill his opponent – is guilty of attempted murder.

*Id.*; *Olympia Equip.*, 797 F.2d at 379 ("Most businessmen don't like their competitors, or for that matter competition."). The Eleventh Circuit's heightened standard—requiring McWane to prove that its actions "'promote consumer welfare by increasing overall market output,'" App. 50a (citation omitted)—simply cannot be squared with these principles.

## II. The Question Presented Is Recurring And Important To The American Economy, And This Case Is An Ideal Vehicle To Reaffirm The Proper Standards For Evaluating Exclusive-Dealing Arrangements Under The Antitrust Laws

Allowing the Eleventh Circuit's decision to stand will result in more, not less, harm to competition. As this Court has repeatedly recognized, "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Verizon*, 540 U.S. at 414 (quoting *Matsushita*, 475 U.S. at 594). The risk of "false positives," *id.*, is especially great here, because, as this Court's precedents confirm, exclusive-dealing arrangements *promote* competition and efficiency—exactly as McWane's Full Service Program did. The Eleventh Circuit's decision throws that common business practice in considerable doubt.

The Eleventh Circuit's decision has far-reaching implications for other antitrust causes of action. Monopolization claims under the Sherman Act, the Clayton Act, the FTC Act, and even state-law theories often rely on the same or substantially similar elements and reasoning. These antitrust provisions must apply consistent legal standards because they all seek to regulate the same competitive conduct. A judicial precedent under one antitrust cause of action is therefore likely to have broader implications for other legal theories. Courts must enforce a consistent understanding of whether particular business arrangements are exclusionary and of which justifications for such arrangements are legally adequate; the answer to these legal questions govern important

primary behavior and cannot be left to the vagaries of misplaced agency "deference," especially when the agency result here is not rooted in the sort of economic expertise that the agency is expected to bring to bear.

This case is a particularly compelling vehicle to address these issues because the challenged business practice was far less restrictive than many widely used—and routinely upheld—exclusive-dealing measures. The Full Support Program simply reserved McWane's right to withhold rebates and sales to distributors "for up to 12 weeks," App. 6a (internal quotation marks omitted); it was not, nor did it purport to be, a long-term or indefinite exclusion of competitors. Moreover, it was only a *partial* exclusive-dealing arrangement because it exempted purchases from competitors where McWane products were not readily available or where the customer brought domestic fittings and accessories along with another manufacturer's ductile iron pipe. Significantly, distributors also were not contractually bound to purchase their requirements from McWane; they could switch their allegiance to Star (or any other manufacturer) at will. And many did. *See* App. 338a. The absence of any contractual barrier to entry meant that Star and others were perfectly free to compete with McWane for their own exclusive-dealing arrangements with distributors.

Accordingly, this case presents an extremely clean, clear-cut example of how condemning normal business practices can chill the very competition the antitrust laws were designed to promote. If McWane's Full Support Program—a short-term, non-contractual, terminable at will, partial exclusive-dealing arrangement—can be deemed an unlawful

barrier to entry, then so, too, can thousands of far more restrictive arrangements that until now have been regarded as unquestionably lawful. It is difficult to imagine a more apt example of the danger that flows from "false positives." *Verizon*, 540 U.S. at 414.

The question presented is undoubtedly ripe for this Court's review. It has been decades since this Court last provided significant guidance on exclusive-dealing arrangements. In that time, the topic has received significant attention in the courts of appeals. Courts of appeals have readily concluded that exclusive-dealing arrangements pose no barrier to market entry where, as here, there is actual and significant entry. In the last two years alone, however, two circuits—the Tenth and now the Eleventh—have turned sharply away from this view. *See Lenox MacLaren*, 762 F.3d at 1125-26; App. 30a. Moreover, the courts of appeals are intractably divided over the standard for determining whether a purported monopolist's challenged practice has a valid business justification. Those clear circuit splits will not disappear without this Court's intervention; allowing these important issues to percolate would only sow more confusion and chill competitive activity in the meantime.

Correct answers to these questions are vitally important to the American economy. American manufacturers face increasing competition from foreign sources. Domestic manufacturers like McWane must have the business tools and flexibility needed to compete effectively with rivals across all aspects of their respective product lines, and should not be artificially cabined to competing based only on the price of a few cherrypicked products. Exclusive-

distribution incentives are essential to robust competition that ultimately benefits sellers, buyers, and consumers alike.

Few questions are more important than uniform, national standards for regulating procompetitive market arrangements. Businesses rely on national standards to plan for growth and economic activity, and market rules must be enforced evenly across all markets to make that system work. McWane's Full Support Program would be entirely proper in most circuits that have passed on these questions; the result should be no different simply because McWane's foundry happens to be located in the Eleventh Circuit. This Court should grant the petition and clarify the circumstances under which an exclusive-dealing arrangement like McWane's may be deemed anticompetitive.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JOSEPH A. OSTOYICH
WILLIAM C. LAVERY
BAKER BOTTS L.L.P.
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 639-7700

MIGUEL A. ESTRADA
*Counsel of Record*
CYNTHIA E. RICHMAN
LUCAS C. TOWNSEND
JACOB S. SILER
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
mestrada@gibsondunn.com

AARON M. STREETT
BAKER BOTTS L.L.P
910 LOUISIANA STREET
HOUSTON, TX 77002
(713) 229-1234

EVAN A. YOUNG
BAKER BOTTS L.L.P.
98 SAN JACINTO BOULEVARD
AUSTIN, TX 78701
(512) 322-2506

LEE E. BAINS, JR.
J. ALAN TRUITT
THOMAS W. THAGARD III
PRIM F. ESCALONA
MAYNARD, COOPER & GALE, P.C.
1901 SIXTH AVENUE NORTH
2400 REGIONS/HARBERT PLAZA
BIRMINGHAM, AL 35203
(205) 254-1000

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# APPENDIX

# APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11363

Agency No. 9351

MCWANE, INC.,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of a Decision of the
Federal Trade Commission

(April 15, 2015)

Before MARCUS, and JILL PRYOR, Circuit Judges, and HINKLE,* District Judge.

MARCUS, Circuit Judge:

* Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

This antitrust case involves allegedly anticompetitive conduct in the ductile iron pipe fittings ("DIPF") market by McWane, Inc., a family-run company headquartered in Birmingham, Alabama. In 2009, following the passage of federal legislation that provided a large infusion of money for waterworks projects that required domestic pipe fittings, Star Pipe Products entered the domestic fittings market. In response, McWane, the dominant producer of domestic pipe fittings, announced to its distributors that (with limited exceptions) unless they bought all of their domestic fittings from McWane, they would lose their rebates and be cut off from purchases for 12 weeks. The Federal Trade Commission ("FTC") investigated and brought an enforcement action under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Administrative Law Judge ("ALJ"), after a two-month trial, and then a divided Commission, found that McWane's actions constituted an illegal exclusive dealing policy used to maintain McWane's monopoly power in the domestic fittings market. The Commission issued an order directing McWane to stop requiring exclusivity from distributors. McWane appealed, challenging nearly every aspect of the Commission's ruling.

After thorough review, we affirm the Commission's order. The Commission's factual and economic conclusions – identifying the relevant product market for domestic fittings produced for domestic-only projects, finding that McWane had monopoly power in that market, and determining that McWane's exclusivity program harmed competition – are supported by substantial evidence in the record, as required

by our deferential standard of review, and their legal conclusions are supported by the governing law.

I.

A.

The essential facts developed in this extensive record are these. Pipe fittings join together pipes and help direct the flow of pressurized water in pipeline systems. They are sold primarily to municipal water authorities and their contractors. Although there are several thousand unique configurations of fittings (different shapes, sizes, coatings, etc.), approximately 80% of the demand is for about 100 commonly used fittings.

Fittings are commodity products produced to American Water Works Association ("AWWA") standards, and any fitting that meets AWWA specifications is interchangeable, regardless of the country of origin. Ductile iron pipe fittings manufacturers rarely sell fittings directly to end users; instead, they sell them to middleman distributors, who in turn sell them to end users. An end user (e.g., a municipal water authority) will issue a "specification" for its project, detailing the pipes, fittings, and other products required. Competing contractors solicit bids for the specified products from distributors, who in turn seek quotes from various manufacturers like McWane.

End users issue either "open specifications," permitting the use of fittings manufactured anywhere in the world, or "domestic specifications," requiring the use of fittings made in the United States. An end user might issue a domestic specification either because of its preference or due to legal pro-

curement requirements: certain municipal, state, and federal laws require waterworks projects to use domestic-only fittings.[1] Domestic fittings sold for use in projects with domestic-only specifications command higher prices than imported fittings or domestic fittings sold for use in projects with open specifications. The majority of specifications are open, and the majority of fittings sold (approximately 80-85%) are imported.

Historically, fittings were made by a number of American companies, most of which offered a full line of domestic fittings. However, beginning in the 1980s, importing fitting suppliers – including Star Pipe Products and Sigma Corporation – began to make significant inroads into the market. By 2005, imported fittings made up the vast majority of ductile iron pipe fittings sales, and the competition from lower-priced and lower-cost imports drove most domestic manufacturers out of the market.

Today, the overall market for fittings sold in the United States – whether manufactured domestically or abroad, sold into both open-specification and domestic-only projects – is an oligopoly with three major suppliers: McWane, Star, and Sigma. Together

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[1] In particular, the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115, provided more than $6 billion to fund water infrastructure projects, all with domestic-only specifications. Pennsylvania and New Jersey state laws also require domestic materials in public projects, as do Air Force bases, certain federal programs, and various municipalities. *See, e.g.*, 73 Pa. Cons. Stat. § 1884, 1886; N.J. Stat. Ann. § 52:33-3; *McWane, Inc.* (*McWane I*), 155 F.T.C. 903, 994-95 (2013).

they account for approximately 90% of the fittings sold in the United States. There are two national distributors, HD Supply and Ferguson, which together account for approximately 60% of the overall waterworks distribution market.

From April 2006 until Star entered the domestic fittings market in late 2009, McWane was the only supplier of domestic fittings. Until 2008, McWane produced fittings at two domestic foundries, one in Anniston, Alabama, ("Union Foundry") and the other in Tyler, Texas. In 2005, McWane opened a foundry to produce fittings in China, and in 2008 it closed its Texas foundry.

In 2009, looking to take advantage of the increased demand for domestic fittings prompted by ARRA, Star decided to enter the market for domestic DIPFs. In June 2009, Star publicly announced at an industry conference and in a letter to customers that it would offer domestic fittings starting in September 2009. Star became a "virtual manufacturer" of domestic fittings, contracting with six third-party foundries in the U.S. to produce fittings to Star's specifications. Star also investigated acquiring its own U.S. foundry, which the Commission found would have been a decidedly less costly and more efficient way to produce domestic fittings.

In response to Star's forthcoming entry into the domestic DIPF market, McWane implemented its "Full Support Program" in order "[t]o protect [its] domestic brands and market position." This program was announced in a September 22, 2009 letter to distributors. McWane informed customers that if they did not "fully support McWane branded products for

their domestic fitting and accessory requirements," they "may forgo participation in any unpaid rebates [they had accrued] for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of [McWane] products for up to 12 weeks." In other words, distributors who bought domestic fittings from other companies (such as Star) might lose their rebates or be cut off from purchasing McWane's domestic fittings for up to three months.[2] The Full Support Program did contain two exceptions permitting the purchase of another company's domestic fittings: where McWane products were not readily available, and where the customer bought domestic fittings and accessories along with another manufacturer's ductile iron pipe.

Internal documents reveal that McWane's express purpose was to raise Star's costs and impede it from becoming a viable competitor. McWane executive Richard Tatman wrote, "We need to make sure that they [Star] don't reach any critical market mass that will allow them to continue to invest and receive a profitable return." In another document, he "observed that 'any competitor' seeking to enter the domestic fittings market could face 'significant blocking issues' if they are not a 'full line' domestic supplier." *McWane I*, 155 F.T.C. at 1134. In yet another, McWane employees described the nascent Full Sup-

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[2] McWane emphasizes that the policy deliberately used the words "may" and "or" to convey "a weak stance." However, McWane's Vice President and General Manager Richard Tatman recognized that "[a]lthough the words 'may' and 'or' were specifically used, the market has interpreted the communication in the more hard line 'will' sense."

port Program as a strategy to "[f]orce [d]istribution to [p]ick their [h]orse," which would "[f]orce[] Star[] to absorb the costs associated with having a more full line before they can secure major distribution." Mr. Tatman was concerned about the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor," and another McWane executive wrote that his "chief concern is that the domestic market [might] get[] creamed from a pricing standpoint" should Star become a "domestic supplier."

Initially, the Full Support Program was enforced as threatened. Thus, for example, when the Tulsa, Oklahoma branch of distributor Hajoca Corporation purchased Star domestic fittings, McWane cut off sales of its domestic fittings to all Hajoca branches and withheld its rebates.[3] Other distributors testified to abiding by the Full Support Program in order to avoid the devastating result of being cut off from all McWane domestic fittings. For example, following the announcement of the Full Support Program, the country's two largest waterworks distributors, HD Supply (with approximately a 28-35% share of the distribution market) and Ferguson (with approximately 25%), prohibited their branches from purchasing domestic fittings from Star unless the purchases fell into one of the Full Support Program exceptions, and even canceled pending orders for do-

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[3] McWane maintains that this was the only example of the Full Support Program's enforcement: "McWane never enforced the rebate program against any other distributor." Of course, the goal of the program was not necessarily to enforce the punishments but to dissuade customers from leaving McWane in the first place.

mestic fittings that they had placed with Star. Indeed, the Commission found that "Star was rebuffed by some distributors even after offering a more generous rebate than McWane." However, some distributors also identified other factors that contributed to their decision not to purchase from Star, including "concerns about Star's inventory, the quality of fittings produced at several different foundries, . . . the timeliness of delivery," and negative past business dealings with Star.

Despite McWane's Full Support Program, Star entered the domestic fittings market and made sales to various distributors. From 2006 until Star's entry in 2009, McWane was the only manufacturer of domestic fittings, with 100% of the market for domestic-only projects. By 2010, Star had gained approximately 5% of the domestic fittings market, while McWane captured the remaining 95%. Star grew to just under 10% market share in 2011, leaving the remaining 90% for McWane, and Star was "on pace, at the time of trial, to have its best year ever for [d]omestic [f]ittings sales in 2012." The Commission noted that "many distributors made purchases under the exceptions allowed by the Full Support Program," but that Star's sales in total "were small compared to the overall size of the market." Star estimated that if the Full Support Program had not been in place, its sales would have been greater by a multiple of 2.5 in 2010 and by a multiple of three in 2011.

Star never ended up building or buying a domestic foundry of its own. The Commission found that this was because Star "believed its sales level was insufficient to justify running its own foundry." Star

estimated that the cost of producing fittings at its own domestic foundry would have been significantly lower than the cost of contracting with independent foundries, and that operating its own foundry would have allowed it to appreciably reduce its domestic fittings prices. (This is because the third-party foundries used less specialized and less efficient equipment, had increased logistical costs and higher labor costs, and charged a markup plus a fee for shipping.) The Commission and the ALJ also found that the Full Support Program was a "significant reason" that another distributor, Serampore Industries Private, decided not to enter the domestic fittings market.

During 2009-2010, following Star's entry into the market and the Full Support Program's implementation, McWane's production costs for domestic fittings remained flat, but it raised its prices for domestic fittings and increased its gross profits. These prices were relatively consistent across all states, regardless of whether Star had entered the domestic fittings market as a rival; Star's presence in various states did not result in lower prices. McWane "continued to sell its domestic fittings into domestic-only specifications at prices that earned significantly higher gross profits than for non-domestic fittings, which faced greater competition." *McWane, Inc.* (*McWane II*), 2014-1 Trade Cas. (CCH) ¶ 78670, 2014 WL 556261, at *17 (F.T.C. Jan. 30, 2014). Star's average prices, however, were higher than McWane's in several states.

The duration of the Full Support Program is a matter of some dispute. McWane contends that it ended the Full Support Program in early 2010, elim-

inating the provision that customers might forego shipments for up to 12 weeks. But the Commission found that McWane had never "publicly withdrawn the policy or notified distributors of any changes," and that some distributors believed that the policy was "still in effect." There is also evidence that some distributors started to ignore the Full Support Program in 2010 after they learned of the FTC's investigation into McWane's practices.

B.

On January 4, 2012, the FTC issued a seven-count administrative complaint charging McWane, Star, and Sigma[4] with violating Section 5 of the Federal Trade Commission Act. (In February and May of 2012, Star and Sigma entered consent decrees with the FTC without any admission of wrongdoing, leaving McWane as the sole defendant.) The only charge at issue on appeal is found in count six,[5] which alleged that McWane's exclusivity mandate (the Full Support Program) constituted unlawful maintenance of a monopoly over the domestic fittings market.

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[4] In a series of events irrelevant to the resolution of this appeal, Sigma entered the domestic fittings market as an authorized distributor of McWane's domestic fittings. *See McWane II*, 2014 WL 556261, at *10-11.

[5] Counts 1, 2, and 3 alleged an earlier conspiracy among McWane, Sigma, and Star to stabilize prices in the non-domestic fittings market. Counts 4 and 5 alleged that McWane's distribution agreement with Sigma violated the Federal Trade Commission Act. Count 7 alleged that the same conduct targeted in Count 6 amounted to *attempted* monopolization.

The ALJ conducted a two-month trial. On May 8, 2013, he issued a 464-page decision ruling in favor of the complaint counsel on count 6.[6] He specifically found that the sales for projects requiring domestic fittings constituted a separate product market in which McWane had monopoly power. *McWane I*, 155 F.T.C. at 1239-40, 1375-88. He ruled that McWane's Full Support Program was an exclusive dealing arrangement that foreclosed Star from a substantial share of the domestic fittings market and, thereby, unlawfully maintained McWane's monopoly. Both McWane and the complaint counsel appealed the ALJ's decision to the Commission.

A divided Commission affirmed as to count 6.[7] Like the ALJ, the Commission found that the relevant market was the supply of domestically manufactured fittings for use in domestic-only waterworks projects, because imported fittings are not a substitute for domestic fittings for such projects. *McWane II*, 2014 WL 556261, at *13. The Commission noted that this conclusion was bolstered by the higher prices charged for domestic fittings used in domestic-only projects. *Id.* at *14. The Commission also found that McWane had monopoly power in that market, with 90-95% market share from 2010-11 (a much higher share than courts usually require for a prima

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6 The ALJ dismissed counts 1-3 but ruled in favor of the complaint counsel on counts 4-7.

7 The Commission dismissed the other six counts. As to Count 7, attempted monopolization, the Commission deemed it "unnecessary to ask whether McWane attempted to monopolize the market" since it had found that McWane had actually done so. *McWane II*, 2014 WL 556261, at *31 n.16.

facie showing of monopoly power) and substantial barriers to entry in the form of major capital outlays required to produce domestic fittings. *Id.* at *15-18.

The Commission agreed that McWane's Full Support Program was an unlawful exclusive dealing arrangement that foreclosed Star's access to distributors for domestic fittings and harmed competition, thereby contributing significantly to the maintenance of McWane's monopoly power in the market. *Id.* at *18-28. It noted that HD Supply and Ferguson, the country's two largest waterworks distributors (with a combined 60% market share), prohibited their branches from purchasing domestic fittings from Star after the Full Support Program was announced, except through the program's limited exceptions. *Id.* at *23. The practical effect of the program, the Commission found, "was to make it economically infeasible for distributors to drop McWane[] . . . and switch to Star." *Id.* at *24. Unable to attract distributors, Star was prevented from generating the revenue needed to acquire its own foundry, a more efficient means of producing domestic fittings; thus, its growth into a rival that could challenge McWane's monopoly power was artificially stunted. *Id.* at *25.

Moreover, the Commission found that there was evidence that McWane's exclusionary conduct had an impact on price: after the Full Support Program was implemented, McWane raised domestic fittings prices and increased its gross profits despite flat production costs, and it did so across states, regardless of whether Star had entered the market as a competitor. *Id.* at *27.

Commissioner Wright filed a lengthy dissent. He assumed that McWane was a monopolist in the domestic-only fittings market, agreed that the Full Support Program was an exclusive dealing arrangement, and concluded that there was "ample record evidence" that the program harmed Star. *Id.* at *46 (Wright, dissenting). However, he contended that the government "failed to carry its burden to demonstrate that the Full Support Program resulted in cognizable harm to *competition*." *Id.* at *62. He argued that according to modern economic theory, exclusive dealing is harmful to competition (as opposed to merely harmful to a competitor) *only* if it prevents rivals from attaining a minimum efficient scale needed to constrain a monopolist's exercise of monopoly power. *Id.* at *48. Commissioner Wright contended that the government had failed to demonstrate such harm to competition, either through direct or indirect evidence. Specifically, he suggested that the government had failed to show that Star's inability to afford its own foundry was the equivalent of its being unable to achieve minimum efficient scale, failed to link the market foreclosure to McWane's alleged maintenance of monopoly power, and miscalculated the relevant foreclosure share. *Id.* at *58-60. Moreover, he noted that other forms of indirect evidence – including Star's ability to enter the domestic fittings market and expand despite the existence of the Full Support Program, as well as the short duration and terminability of the exclusive

dealing arrangement – cut against a finding that McWane's conduct was exclusionary.[8] *Id.* at *61-62.

McWane filed a timely petition in this Court seeking review of the Commissioner's order on the lone remaining count.

## II.

This Court "review[s] the FTC's findings of fact and economic conclusions under the substantial evidence standard." *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062 (11th Cir. 2005); *see* 15 U.S.C. § 45(c) ("The findings of the Commission as to the facts, if supported by evidence, shall be conclusive."). "Substantial evidence is more than a mere scintilla, and [this Court] require[s] such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Schering-Plough*, 402 F.3d at 1062 (quotation omitted). This standard "forbids a court to 'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences.'" *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1213 (11th Cir. 2012) (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)). Indeed, "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

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[8] Former FTC Commissioner Rosch – whom Commissioner Wright replaced on the Commission in January 2013 – had issued similar criticisms in his dissents at both the pleading and summary judgment stages of the case.

We review *de novo* the Commission's legal conclusions and the application of the facts to the law. *Polypore Int'l*, 686 F.3d at 1213. However, "we afford the FTC some deference as to its informed judgment that a particular commercial practice violates the Federal Trade Commission Act." *Schering-Plough*, 402 F.3d at 1063; *see FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) ("[T]he identification of governing legal standards and their application to the facts found . . . are . . . for the courts to resolve, although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair' [under the Federal Trade Commission Act].").

McWane challenges three particular determinations by the Commission: its market definition; its finding that McWane monopolized the domestic fittings market; and its finding that the Full Support Program harmed competition. Because the standard of review is essential to our analysis, we explain the applicable standard for each of the Commission's conclusions. All three determinations are factual or economic conclusions reviewed only for substantial evidence.

First, our caselaw makes clear that "[t]he definition of the relevant market is essentially a factual question." *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 994 (11th Cir. 1993). Thus, we review the FTC's determination of market definition – like all its factual findings – for substantial evidence. *See Jim Walter Corp. v. FTC*, 625 F.2d 676, 682 (5th Cir. 1980) (applying the substantial evidence stand-

ard in reviewing the FTC's finding of market definition).[9]

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[9] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this Court adopted as binding precedent all decisions of the old Fifth Circuit handed down prior to October 1, 1981.

A recent opinion of this Court stated that we review the FTC's finding of market definition for "clear error." *Polypore Int'l*, 686 F.3d at 1217. Clear error is the traditional standard used to review a district court's factual findings, and we employ it in reviewing a finding of market definition by a district court judge. *See, e.g.*, *United States v. Engelhard Corp.*, 126 F.3d 1302, 1305 (11th Cir. 1997); *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1563 (11th Cir. 1987); *Nat'l Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 779 F.2d 592, 604 (11th Cir. 1986). *Polypore* drew its "clear error" language from just such a case. 688 F.3d at 1217 (citing *Engelhard*, 126 F.3d at 1305). But substantial evidence, not clear error, is the "traditional . . . standard used by courts to review agency decisions." *Am. Tower LP v. City of Huntsville*, 295 F.3d 1203, 1207 (11th Cir. 2002). Indeed, *Polypore* itself noted the correct standard of review for the FTC's factual findings earlier in the opinion. *See* 686 F.3d at 1213.

Other circuits follow this distinction, reviewing the FTC's market definition finding for substantial evidence while reviewing a district court's market definition finding for clear error. *Compare, e.g.*, *Olin Corp. v. FTC*, 986 F.2d 1295, 1297-98 (9th Cir. 1993) (reviewing FTC's market definition for substantial evidence), *and ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 566 (6th Cir. 2014) (same), *petition for cert. filed*, No. 14-762 (Dec. 30, 2014), *with, e.g.*, *JBL Enters., Inc. v. Jhirmack Enters., Inc.*, 698 F.2d 1011, 1016 (9th Cir. 1983) (reviewing district court's market definition for clear error), *and United States v. Cent. State Bank*, 817 F.2d 22, 24 (6th Cir. 1987) (per curiam) (same).

Moreover, *Polypore*'s language cannot be squared with the old Fifth Circuit's approach in *Jim Walter*. In that case, the Court asked "whether there is substantial evidence to support

[Footnote continued on next page]

Second, the FTC's determination that a defendant possesses monopoly power is a factual or economic conclusion that we also review for substantial evidence. No prior case of ours appears to hold this specifically, but this conclusion follows from previous cases that have treated a determination that a defendant possesses market power – a lesser-included element of monopoly power – as a factual finding. *See NaBanco*, 779 F.2d at 605. Again, other circuits agree. *E.g.*, *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 829 (6th Cir. 2011) (applying substantial evidence standard to FTC's finding that defendant possessed substantial market power); *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 13 (7th Cir. 1971) (applying substantial evidence standard to FTC's finding that defendant possessed monopoly power).

Finally, so too with the Commission's determination that McWane's conduct harmed competition and lacked offsetting procompetitive benefits. Again, no binding case of ours appears to deal with the particular type of Federal Trade Commission Act violations at issue here, but we have applied the substantial

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the FTC's finding of a national market for tar and asphalt roofing products." 625 F.2d at 683. After determining that the FTC's market definition was founded "primarily on the casual observations of industry representatives and an economist," the Court held that the FTC's proposed market was "not supported by substantial evidence" and remanded "for reconsideration of the appropriate . . . market." *Id.* *Jim Walter* plainly held that the FTC's market definition is reviewed for substantial evidence. Although *Polypore* may be read to say otherwise, in the case of an intra-circuit conflict, the earlier case is binding. *See Morrison v. Amway Corp.*, 323 F.3d 920, 929 (11th Cir. 2003).

evidence standard to analogous findings under that same act and other antitrust statutes. *See Schering-Plough*, 402 F.3d at 1068 (examining "whether there is substantial evidence to support the Commission's conclusion that [defendant's conduct] restrict[ed] competition" in violation of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 678-79 (5th Cir. 1965) (applying substantial evidence standard to FTC's finding of injury to competition under the Robinson-Patman Act).

This approach comports with the law in other circuits in a variety of antitrust contexts. The Seventh Circuit put the point most clearly in a Clayton Act case: "[T]he substantial evidence rule (like the clearly erroneous rule) applies to ultimate as well as underlying facts, including economic judgments. . . . [T]he ultimate question under the Clayton Act – whether the challenged transaction may substantially lessen competition – is governed by the substantial evidence rule." *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986) (internal citation omitted). Our sister circuits have applied the substantial evidence standard to analogous economic conclusions in cases brought under the Federal Trade Commission Act, *e.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013) (applying substantial evidence standard to FTC's determination that defendant's behavior "was likely to cause significant anticompetitive harms" in violation of the Federal Trade Commission Act), *aff'd*, 135 S. Ct. 1101 (2015); *Realcomp II*, 635 F.3d at 831-34 (applying substantial evidence standard to FTC's finding that defendant's policies harmed competition in violation of the

Federal Trade Commission Act), and under other antitrust statutes, *see, e.g.*, *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 370 (5th Cir. 2008) (applying substantial evidence standard to FTC's determination that defendant's conduct "amounted to horizontal price-fixing that is unrelated to competitive efficiencies" under Section 1 of the Sherman Act); *Gibson v. FTC*, 682 F.2d 554, 571 (5th Cir. 1982) (applying substantial evidence standard to FTC's finding of illegal brokerage in violation of Clayton Act § 2(c)); *RSR Corp. v. FTC*, 602 F.2d 1317, 1320, 1324-25 (9th Cir. 1979) (applying substantial evidence standard to FTC's finding under Section 7 of the Clayton Act that merger was anticompetitive); *Fruehauf Corp. v. FTC*, 603 F.2d 345, 355 (2d Cir. 1979) (same); *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 n.7 (8th Cir. 1981) (same, as to a joint venture).

The ultimate legal conclusion that a defendant's conduct violates the Federal Trade Commission Act is an "application of the facts to the law," which we review *de novo*, *Polypore Int'l*, 686 F.3d at 1213, except for the limited deference prescribed by *Indiana Federation of Dentists*, 476 U.S. at 454. But the Commission's factual building blocks and economic conclusions – findings of market definition, monopoly power, and harm to competition – are reviewed for substantial evidence.

III.

The Commission found that McWane adopted an exclusionary distribution policy that maintained its monopoly power in the domestic fittings market in violation of Section 5 of the Federal Trade Commission Act, which prohibits "[u]nfair methods of compe-

tition in or affecting commerce." 15 U.S.C. § 45.[10] Although exclusive dealing arrangements are common and can be procompetitive, particularly in competitive markets, *see Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010), these arrangements can harm competition in certain circumstances, *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring) ("Exclusive dealing can have adverse economic consequences by allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods . . ."), *abrogated on other grounds by Ill. Tool Works Inc. v. Ind. Ink, Inc.*, 547 U.S. 28 (2006); Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 328 (2002) ("The concern [with exclusive dealing arrangements] is . . . that creating or increasing market power through exclusive dealing is the means by which the defendant is likely to increase prices, restrict output, reduce quality, slow innovation, or otherwise harm consumers."). When a

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[10] The Commission acknowledged that violations of Section 2 of the Sherman Act (monopolization) also constitute "unfair methods of competition" under Section 5 of the Federal Trade Commission Act, and therefore relied on Section 2 caselaw in its analysis. *See McWane II*, 2014 WL 556261, at *11 n.7 (citing *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 394-95 (1953)); *see also* William Holmes & Melissa Mangiaracina, *Antitrust Law Handbook* § 7:2 (2014) ("For the most part . . . the [Federal Trade Commission Act] has been held coterminous with the Sherman and Clayton Acts."). Both parties (and the dissenting Commissioner) agree that this is the correct analytical approach.

market is competitive, the "competition for the [exclusive] contract is a vital form of rivalry" that can induce the offering firm to provide price reductions or improved services to buyers, to the ultimate benefit of consumers. *See Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). But, notably, in the absence of such competition, a dominant firm can impose exclusive deals on downstream dealers to "strengthen[] or prolong[] [its] market position." IIIB Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 760b7, at 54 (3d ed. 2008). Thus, while such arrangements are "not illegal in themselves," they can run afoul of antitrust laws as "an improper means of maintaining a monopoly." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005).

A violation of Section 5 of the Federal Trade Commission Act premised on monopolization requires proof of "(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." *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1293-94 (11th Cir. 2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)) (internal quotation mark omitted). Thus, for the Commission's conclusion that McWane violated the Federal Trade Commission Act to stand, it must have successfully defined the relevant market, demonstrated that McWane had monopoly power in that market, and showed that McWane's Full Support Program constituted the illegal maintenance of that monopoly power. McWane challenges all three

of the Commission's determinations, and we address each of them in turn.

A. Monopoly Power in the Relevant Market

1. Market Definition

"Defining the market is a necessary step in any analysis of market power and thus an indispensable element in the consideration of any monopolization . . . case arising under section 2." *U.S. Anchor*, 7 F.3d at 994. A product market consists of "products that have reasonable interchangeability for the purposes for which they are produced." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). "The reasonable interchangeability of use or the cross-elasticity of demand between a product and its substitutes constitutes the outer boundaries of a product market for antitrust purposes." *U.S. Anchor*, 7 F.3d at 995 (footnote omitted). "Cross-elasticity of demand" measures the extent to which modest variations in the price of one good affect customer demand for another good. "[A] high cross-elasticity of demand indicates that the two products in question are reasonably interchangeable substitutes for each other and hence are part of the same market." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1337 n.13 (11th Cir. 2010).

In defining product markets, this Court has long looked to the factors set forth by the Supreme Court in *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized

vendors." *Polypore Int'l*, 686 F.3d at 1217 (quoting *U.S. Anchor*, 7 F.3d at 995). Again, we are obliged to review the Commission's market definition for substantial evidence.

A relevant geographic market also must be defined. *See, e.g.*, *Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579 (11th Cir. 1985). The Commission (and the ALJ) defined the relevant geographic market as the United States. Neither party contests this determination.

As for the product market, the Commission, agreeing with the ALJ, found that the relevant market was one "for the supply of domestically-manufactured fittings for use in . . . projects with domestic-only specifications." *McWane II*, 2014 WL 556261, at *13. It noted that various laws and end-user preferences requiring projects to use domestic fittings precluded imported fittings from being "reasonable substitutes" for those projects, even though the fittings themselves are functionally identical. *Id.*; *see* IIB Phillip E. Areeda, Herbert Hovenkamp & John Solow, *Antitrust Law* ¶ 572b, at 430 (3d ed. 2007) ("To the extent that regulation limits substitution, it may define the extent of the market."). The Commission also noted that McWane charged higher prices for (and reaped greater profits from) domestic fittings in domestic-only projects: the ALJ found that McWane charged approximately 20%-95% more for its domestic fittings for domestic-only projects than for open-specification projects. This price differentiation reflected McWane's ability to target customers with domestic-only project specifications who could not avoid the higher prices by substituting imported fittings. Indeed, *Brown Shoe* specifically identified

"distinct prices" as a factor indicating a separate product market. 370 U.S. at 325.

McWane contends, however, that domestic and imported fittings are, in fact, interchangeable, because some customers (those whose projects' specifications are not dictated by law) can "flip" their projects from domestic-only to open, thereby turning imported fittings into a reasonable substitute. However, the Commission found, based on testimony in the record, that "flipping typically only occurs when domestic fittings are unavailable, rather than as a result of competition between domestic and imported fittings." *McWane II*, 2014 WL 556261, at *15. This is consonant with the ALJ's finding that end users with domestic-only preferences "are aware of, but not sensitive to, the price differential between domestic fittings and import fittings." *McWane I*, 155 F.T.C. at 999.

McWane also alleges that the Commission's definition was insufficient as a matter of law because it "was unsupported by an expert economic test," which McWane claims is a requirement under Eleventh Circuit caselaw. It is true that in some circumstances we have said that a market definition "must be based on expert testimony." *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246 (11th Cir. 2002); *see Am. Key Corp.*, 762 F.2d at 1579 ("Construction of a relevant economic market . . . cannot . . . be based upon lay opinion testimony."). Such testimony can be insufficient when "conclusory" or "based upon insufficient economic analysis." *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 479 F.3d 1310, 1313 (11th Cir. 2007) (per curiam); *see Bailey*, 284 F.3d at 1246-47 (finding that plaintiff's expert testimony,

which failed to consider alternative products in defining relevant market, was insufficient as a matter of law).

But in this case, the Commission did rely in part on the complaint counsel's expert witness, Dr. Laurence Schumann, who considered a hypothetical monopolist test and the lack of interchangeability between domestic and imported fittings in domestic-only projects. Nevertheless, McWane claims that the expert's analysis was insufficient because it did not involve an econometric analysis, such as a cross-elasticity of demand study. However, there appears to be no support in the caselaw for McWane's claim that such a technical analysis is always required. Indeed, as the Commission correctly noted, "[c]ourts routinely rely on qualitative economic evidence to define relevant markets." *McWane II*, 2014 WL 556261, at *14. Thus, for example, in *Polypore*, the Commission's market definition was affirmed by this Court on the basis of the *Brown Shoe* factors, apparently without an econometric study. 686 F.3d at 1217-18. Given the identification of persistent price differences between domestic fittings and imported fittings, the distinct customers, and the lack of reasonable substitutes in this case, there was sufficient evidence to support the Commission's market definition.

2. Monopoly Power

"As a legal matter, Sherman Act § 2 requires that the defendant either have monopoly power or a dangerous probability of achieving it . . ." XI Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1800c5, at 22 (3d ed. 2011); *accord Dentsply*, 399

F.3d at 187 ("A prerequisite for [a § 2 violation] is a finding that monopoly power exists."). Monopoly power is the ability "to control prices or exclude competition." *Grinnell*, 384 U.S. at 571 (quotation omitted). However, "[b]ecause . . . direct proof [of the ability to profitably raise prices substantially above the competitive level] is only rarely available, courts more typically examine market structure in search of circumstantial evidence of monopoly power." *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc) (per curiam). Courts regularly ask whether the firm has a predominant market share, *see Bailey*, 284 F.3d at 1246 ("Because demand is difficult to establish with accuracy, evidence of a seller's market share may provide the most convenient circumstantial measure of monopoly power."), and look to other circumstantial factors such as "the size and strength of competing firms, freedom of entry, pricing trends and practices in the industry, ability of consumers to substitute comparable goods, and consumer demand," *Dentsply*, 399 F.3d at 187.

In determining that McWane had monopoly power, the Commission found that McWane's market share of the domestic fittings market had been 100% from 2006 until Star's entry into the market in 2009. McWane's market share was then approximately 95% in 2010 and approximately 90% in 2011, "far exceed[ing] the levels that courts typically require to support a *prima facie* showing of monopoly power." *McWane II*, 2014 WL 556261, at *16. It also observed that there were "substantial barriers to entry in the domestic fittings market" both for brand new entrants and for those who already supply imported fittings. *Id.* Although Star was able to enter the

market, the Commission noted that its share remained below 10% in 2010 and 2011, and, notably, its entry had no effect on McWane's prices. The Commission reasoned that McWane's "ability to control prices" in the market "provide[d] direct evidence of [its] monopoly power." *Id.* at *18.

The difficulty in this case is that the circumstantial evidence does not all point in the same direction. McWane's market share during the relevant time period is plainly high enough to be considered predominant. *See Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992) (80-95% market share sufficient to establish monopoly power); *Grinnell*, 384 U.S. at 571 (87% sufficient); *Dentsply*, 399 F.3d at 188 (market share between 75-80% is "more than adequate to establish a prima facie case of [monopoly] power"); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) ("[To establish monopoly power,] lower courts generally require a minimum market share of between 70% and 80%."); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 207 n.2 (5th Cir. 1969) ("[S]omething more than 50% of the market is a prerequisite to a finding of monopoly"). Standing alone, this would seem to be sufficient evidence to support the Commission's conclusion that McWane had monopoly power in the domestic fittings market.

However, there is also evidence that, despite the presence of the Full Support Program, Star was still able to enter the domestic fittings market and expand its market share from 0% in 2009 to approximately 5% in 2010 to approximately 10% in 2011, while McWane's market share correspondingly declined. McWane contends that this "clear and suc-

cessful entry" and growth by a competitor precludes a finding of monopoly power by demonstrating a lack of barriers to entry in the market. The Commission disagreed, finding that, despite Star's entry and growth, substantial barriers to entry existed in both the overall fittings market and the domestic fittings market. The ALJ found (and the Commission agreed) that "a significant capital investment" is required to enter the overall fittings market, *McWane I*, 155 F.T.C. at 1113, as "new entrant[s] must overcome existing relationships between existing manufacturers[,] and the [d]istributors[,] and [e]nd [u]sers," in addition to "develop[ing] hundreds of patterns and moldings," *id.* at 1114. All told, the Commission agreed with the ALJ that a *de novo* entrant would need approximately three to five years to enter the fittings market. *McWane II*, 2014 WL 556261, at *16. Star, as an established player in the overall fittings market, did not face all of these obstacles in entering the domestic fittings market. (For example, it had pre-existing relationships with some distributors and did not need to alter its sales team.) Nevertheless, the Commission found that significant barriers to entry existed in the domestic market, as Star still needed to purchase its own foundry or contract with third-party domestic foundries. *Id.*; *see Bailey*, 284 F.3d at 1256 ("Entry barriers include . . . capital outlays required to start a new business . . . ."). Moreover, the Commission found that the Full Support Program itself posed a barrier to entry by shrinking the number of available distributors. In support of this argument, the Commission observed that two other suppliers of imported fittings, Sigma Corporation and Serampore Industries Private, considered entering the domestic fittings mar-

ket but ultimately concluded that the costs and challenges were too high. *McWane II*, 2014 WL 556261, at *17.

Some caselaw from other circuits appears to support McWane. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) ("We cannot be blinded by market share figures and ignore marketplace realities, such as the relative ease of competitive entry. . . . [A competitor's] successful entry . . . refutes any inference of the existence of monopoly power that might be drawn from [the defendant's] market share.").[11] But not all courts agree. *See Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir. 1995) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers. If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power."); *Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 971 (10th Cir. 1990) (rejecting defendant's argument that presence of multiple competitors demonstrated that entry barriers were insubstantial where "no other entrant remotely approached [defendant's] domination of the market"); *Oahu Gas Serv., Inc. v. Pac. Res. Inc.*, 838 F.2d 360,

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[11] It is worth noting, however, that the defendant in *Tops Markets* had a lower market share than McWane – 74% as opposed to over 90% – and the plaintiffs "failed to produce any . . . evidence to rebut [the defendant's] assertion" that the market contained no barriers to entry. 142 F.3d at 99. In this case, as we noted, the complaint alleged and the Commission found significant entry barriers.

366-67 (9th Cir. 1988) ("A declining market share may reflect an absence of market power, but it does not foreclose a finding of such power." (quotation omitted)). No decision of this Court appears to be directly on point.

In addition to McWane's overwhelming (albeit declining) market share, the Commission cited the particular importance of Star's inability to constrain McWane's pricing for domestic fittings. After Star's entry, McWane continued to sell domestic fittings for domestic-only products at prices that "earned significantly higher gross profits than for non-domestic fittings, which faced greater competition." *McWane II*, 2014 WL 556261, at *17. Indeed, McWane's prices and profits for domestic fittings rose in 2010, the year after Star's entry.

On this record, we are unprepared to say that Star's entry and growth foreclose a finding that McWane possessed monopoly power in the relevant market. Although the limited entry and expansion of a competitor sometimes may cut against such a finding, the evidence of McWane's overwhelming market share (90%), the large capital outlays required to enter the domestic fittings market, and McWane's undeniable continued power over domestic fittings prices amount to sufficient evidence that "a reasonable mind might accept as adequate to support" the Commission's conclusion. *Schering-Plough*, 402 F.3d at 1062 (quotation omitted).

B. Monopoly Maintenance

Having established that McWane "possess[es] . . . monopoly power in the relevant market," we turn to the question of whether the government proved that

McWane engaged in "the willful . . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Morris Commc'ns*, 364 F.3d at 1293-94 (quoting *Grinnell*, 384 U.S. at 570-71).

As we've observed, exclusive dealing arrangements are not per se unlawful, but they can run afoul of the antitrust laws when used by a dominant firm to maintain its monopoly. Of particular relevance to this case, an exclusive dealing arrangement can be harmful when it allows a monopolist to maintain its monopoly power by raising its rivals' costs sufficiently to prevent them from growing into effective competitors. *See* XI Areeda & Hovenkamp, *supra*, ¶ 1804a, at 116-17 (describing how exclusive contracts can raise rivals' costs and harm competition); *see generally* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986). The following description seems particularly appropriate here:

> [S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

XI Areeda & Hovenkamp, *supra*, ¶ 1802c, at 76; *see ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012); *Dentsply*, 399 F.3d at 191.

Tracking this economic argument, the Commission's theory is that McWane's Full Support Program was an exclusive dealing policy designed specifically to maintain its monopoly power "by impairing the ability of rivals to grow into effective competitors that might erode the firm's dominant position." *McWane II*, 2014 WL 556261, at *19. To prevail, the FTC must establish that McWane "has engaged in anti-competitive conduct that reasonably appears to be a significant contribution to maintaining monopoly power." *Dentsply*, 399 F.3d at 187; *accord Microsoft*, 253 F.3d at 79 (quoting III Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 650c, at 69 (1996)).

Neither the Supreme Court nor this Circuit has provided a clear formula with which to evaluate an exclusive dealing monopoly maintenance claim, but the D.C. Circuit has synthesized a structured, "rule of reason"-style approach to monopolization cases that has been cited with approval. *See* Jacobson, *supra*, at 364-69; III Areeda & Hovenkamp, *supra*, ¶ 651, at 97 n.1. First, the government must show that the monopolist's conduct had the "anticompetitive effect" of "harm[ing] competition, not just a competitor." *Microsoft*, 253 F.3d at 58-59. If the government succeeds in demonstrating this anticompetitive harm, the burden then shifts to the defendant to present procompetitive justifications for the exclusive conduct, which the government can refute. *Microsoft*, 253 F.3d at 59; *Dentsply* 399 F.3d at 196; *see Eastman Kodak*, 504 U.S. at 482-84 (describing de-

fendant's proffered "valid business reasons" for its actions and plaintiff's rebuttal). If the court accepts the defendant's proffered justifications, it must then decide whether the conduct's procompetitive effects outweigh its anticompetitive effects. *Microsoft*, 253 F.3d at 59. This approach mirrors rule of reason analysis. *See Schering-Plough*, 402 F.3d at 1064-65 (outlining a substantially similar burden-shifting approach in "traditional rule of reason analysis").

The Commission followed this approach. It found that McWane's Full Support Program was an exclusive dealing policy that harmed competition by foreclosing Star's access to necessary distributors and contributed significantly to Star's lost sales and subsequent inability to purchase its own foundry and expand output. It considered McWane's procompetitive justifications but ultimately found them unpersuasive.

McWane challenges each aspect of the Commission's ruling: first, it says that its Full Support Program was "presumptively legal" because it was nonbinding and short-term; second, it contends that the government failed to carry its burden of establishing harm to competition; third, it argues that the Commission wrongly rejected its proffered procompetitive justifications. We address each claim in turn.

1. Presumptive Legality

McWane suggests that the Full Support Program lacked the characteristics of anticompetitive exclusive dealing arrangements. Specifically, it urges that the Full Support Program was "presumptively legal" and "[could not] harm competition" because it was short-term and voluntary (rather than a binding con-

tract of a longer term). No binding precedent from the Supreme Court or this Court speaks specifically to this issue, but McWane hangs its hat on caselaw from other circuits. *See, e.g.*, *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1163 (9th Cir. 1997) ("[T]he short duration and easy terminability of these [one-year] agreements negate substantially their potential to foreclose competition." (footnote omitted)); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) ("Exclusive-dealing contracts terminable in less than a year are presumptively lawful under section 3 [of the Clayton Act]."); Jacobson, *supra*, at 351-52 & n.195.

But not all courts agree. The Third Circuit in *Dentsply* held that where exclusive deals were "technically only a series of independent sales," they nevertheless constituted antitrust violations because "the economic elements involved – the large share of the market held by [the defendant] and its conduct excluding competing manufacturers – realistically ma[d]e the arrangements . . . as effective as those in written contracts." 399 F.3d at 193. The *Dentsply* court noted that "in spite of the legal ease with which the relationship can be terminated, the [distributors] have a strong economic incentive to continue [buying defendant's product]." *Id.* at 194; *see also ZF Meritor*, 696 F.3d at 270 ("*[D]e facto* exclusive dealing claims are cognizable under the antitrust laws."); *Minn. Mining & Mfg. Co. v. Appleton Papers, Inc.*, 35 F. Supp. 2d 1138, 1144 (D. Minn. 1999) (evaluating an exclusive dealing arrangement's "practical effect" rather than "merely . . . its form" in determining whether it was terminable at will (internal quotation marks omitted)). The Third Circuit distinguished

opposing cases by noting that those situations primarily involved markets in which firms could viably sell directly to consumers even when foreclosed from distributors, *Dentsply*, 399 F.3d at 194 n.2, whereas in *Dentsply* direct sales were not "a practical alternative for most [competing] manufacturers," *id.* at 189. Likewise, in the case at hand, both the Commission and the ALJ found that distributors were essential to the domestic fittings market: "No evidence supports the existence of viable alternate distribution channels, including direct sales to end users." *McWane II*, 2014 WL 556261, at *23.

This approach is consistent with the Supreme Court's instruction to look at the "practical effect" of exclusive dealing arrangements. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 326-28 (1961); *see also Eastman Kodak*, 504 U.S. at 466-67 ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" (quoting *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 579 (1925))). The Commission adopted this approach, looking to "the reality of [the] marketplace" and finding that "the practical effect of McWane's program was to make it economically infeasible for distributors to . . . switch to Star." *McWane II*, 2014 WL 556261, at *24. Even the dissenting commissioner agreed with this approach. *Id.* at *55 n.38 (Wright, dissenting). So do we.

Moreover, the nature of the Full Support Program arguably posed a greater threat to competition than a conventional exclusive dealing contract, as it

lacked the traditional procompetitive benefits of such contracts. As we've noted, courts often take a permissive view of such contracts on the grounds that firms compete for exclusivity by offering procompetitive inducements (e.g., lower prices, better service). But not here. The Full Support Program was "unilaterally imposed" by fiat upon all distributors, and the ALJ found that it resulted in "no competition to become the exclusive supplier" and no "discount, rebate, or other consideration" offered in exchange for exclusivity. *McWane I*, 155 F.T.C. at 1414. This is consistent with evidence that McWane's prices rose, rather than fell, in the wake of the program.

We are disposed to follow the Supreme Court's instruction that we consider "market realities" rather than "formalistic distinctions" in rejecting McWane's argument that the specific form of its exclusivity mandate insulated it from antitrust scrutiny.

2. Harm to Competition

We turn then to the first step in the monopolization test: the government must demonstrate that the defendant's challenged conduct had anticompetitive effects, harming competition.

As with many areas of antitrust law, the federal judiciary's approach to evaluating exclusive dealing has undergone significant evolution over the past century. Under the approach laid out by the Supreme Court in *Standard Oil Co. of California and Standard Stations, Inc. v. United States* (*Standard Stations*), 337 U.S. 293 (1949), all that was required for an exclusive deal to violate the Clayton Act was proof of substantial foreclosure – "proof that competi-

tion ha[d] been foreclosed in a substantial share of the line of commerce affected." *Id.* at 314. The Supreme Court amended that approach in *Tampa Electric*, in which it continued to emphasize the importance of substantial foreclosure, but opened the door to a broader analysis. *See* 365 U.S. at 328-29.

Lower federal courts have burst through that door over the past 50 years, interpreting *Tampa Electric* as authorizing a rule of reason approach to exclusive dealing cases. *See, e.g.*, *ZF Meritor*, 696 F.3d at 271 (characterizing *Tampa Electric* as standing for the proposition that "exclusive dealing agreements . . . [are] judged under the rule of reason"); Jacobson, *supra*, at 322 (noting that "later cases have suggested" that *Tampa Electric* "authorize[d] full-scale rule of reason analysis"); XI Areeda & Hovenkamp, *supra*, ¶ 1820b, at 177 ("Most decisions follow the language in the Supreme Court's *Tampa Electric* decision indicating that a complete rule of reason analysis is essential, and foreclosure percentages represent only a first step in the inquiry."). This Court, without specifically citing *Tampa Electric*, has joined the consensus that exclusive dealing arrangements are "reviewed under the rule of reason." *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1508 n.12 (11th Cir. 1989).

The difference between the traditional rule of reason and the rule of reason for exclusive dealing is that in the exclusive dealing context, courts are bound by *Tampa Electric*'s requirement to consider substantial foreclosure. *See Microsoft*, 253 F.3d at 69. But foreclosure is usually no longer sufficient by itself; rather, it "serves a useful screening function" as a proxy for anticompetitive harm. *Id.* Thus, fore-

closure is one of several factors we now examine in determining whether the conduct harmed competition. *See* Jacobson, *supra*, at 361-64; XI Areeda & Hovenkamp, *supra*, ¶ 1821d, at 197 ("[Foreclosure percentages] are seldom decisive in and of themselves. Rather, they provide the jumping-off point for further analysis."). We will also look for direct evidence that the challenged conduct has affected price or output, along with other indirect evidence, such as the degree of rivals' exclusion, the duration of the exclusive deals, and the existence of alternative channels of distribution. XI Areeda & Hovenkamp, *supra*, ¶ 1821d, at 197-209. The ultimate question remains whether the defendant's conduct harmed competition.

To effect anticompetitive harm, a defendant "must harm the competitive *process*, and thereby harm consumers. In contrast, harm to one or more *competitors* will not suffice." *Microsoft*, 253 F.3d at 58; *see also Brooke Grp. Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 224 (1993). This distinction makes good sense, particularly in a competitive market where injury to a single competitor may not have a significant effect on overall competition due to the persistence of other rivals. However, competitors and competition are linked, particularly in the right market settings: "in a concentrated market with very high barriers to entry, competition will not exist without competitors." *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917, 951 (6th Cir. 2005). Indeed, this is one reason that the behavior of monopolists faces more exacting scrutiny under the antitrust statutes. *See Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) ("Behavior that might otherwise

not be of concern to the antitrust laws . . . can take on exclusionary connotations when practiced by a monopolist."); *Dentsply*, 399 F.3d at 187 ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist."); IIIB Areeda & Hovenkamp, *supra*, ¶ 806e, at 423.

Before we proceed, we address a point of disagreement between the Commission, the dissenting commissioner, and the amici: the government's burden of proof in demonstrating harm to competition. The dissenting commissioner insisted that, given the high likelihood that an exclusive dealing arrangement is actually procompetitive, a plaintiff alleging illegal exclusive dealing must show "clear evidence of anticompetitive effect." *McWane II*, 2014 WL 556261, at *51 (Wright, dissenting). Applying that standard, Commissioner Wright concluded that the government had not met its burden for several reasons, including that it had not sufficiently established that the Full Support Program caused the observed price effects. The Commission countered that Commissioner Wright sought "a new, heightened standard of proof for exclusive dealing cases" that had "no legal support." *Id.* at *26 & n.12 (majority). Although McWane does not articulate its proposed burden of proof using the dissenting commissioner's language, it agrees in substance that the Commission did not prove harm to competition with sufficient certainty.

We agree with the Commission. Putting aside the possible economic merits of raising the standard of proof for exclusive dealing cases, we can find no foundation for this conclusion in the caselaw. The

governing Supreme Court precedent speaks not of "clear evidence" or definitive proof of anticompetitive harm, but of "probable effect." *Tampa Elec.*, 365 U.S. at 329 (instructing courts to weigh the "*probable effect* of the [exclusive dealing] contract on the relevant area of effective competition" (emphasis added)); *accord ZF Meritor*, 696 F.3d at 268 ("Under the rule of reason, an exclusive dealing arrangement will be unlawful only if its 'probable effect' is to substantially lessen competition in the relevant market." (quoting *Tampa Elec.*, 365 U.S. at 327-29)). Indeed, this Court has often articulated the rule of reason – the governing standard for evaluating exclusive dealing claims, *DeLong Equip. Co.*, 887 F.2d at 1508 n.12 – by quoting the Supreme Court's instruction in *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918), to analyze the effects of the challenged conduct, "actual or probable." *E.g.*, *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1334 n.8 (11th Cir. 2010); *Schering-Plough*, 402 F.3d at 1064 n.12.

Of course, the FTC's allegation is not merely that McWane engaged in exclusive dealing, but that it used exclusive dealing to maintain its monopoly power. In the monopolization context, courts have articulated the government's burden in terms of the causality that must be shown between the defendant's conduct and the anticompetitive harm. These formulations, too, are framed in terms of probability: "unlawful maintenance of a monopoly is demonstrated by proof that a defendant has engaged in anticompetitive conduct that *reasonably appears* to be a *significant contribution* to maintaining monopoly power." *Dentsply*, 399 F.3d at 187 (emphasis added); *accord Microsoft*, 253 F.3d at 79. In *Microsoft*, the

D.C. Circuit found no case supporting the proposition that Sherman Act § 2 liability requires plaintiffs to "present direct proof that a defendant's continued monopoly power is precisely attributable to its anti-competitive conduct." *Microsoft*, 253 F.3d at 79. It noted that "[t]o require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action." *Id.*; *see also* III Areeda & Hovenkamp, *supra*, ¶ 657a2, at 162 ("[T]he government suitor need not show that competition is in fact less than it would be in some alternative universe in which the challenged conduct had not occurred. It is enough to show that anticompetitive consequences are a naturally-to-be-expected outcome of the challenged conduct.").

We agree with the Commission and our sister circuits that in these circumstances the government must show that the defendant engaged in anticompetitive conduct that reasonably appears to significantly contribute to maintaining monopoly power. As we've already discussed, because this determination is an economic conclusion, the Commission's finding on this count must be supported by substantial evidence.

a) Substantial Foreclosure

"Substantial foreclosure" continues to be a requirement for exclusive dealing to run afoul of the antitrust statutes. Foreclosure occurs when "the opportunities for other traders to enter into or remain in [the] market [are] significantly limited" by the exclusive dealing arrangements." *Microsoft*, 253 F.3d

at 69 (quoting *Tampa Elec.*, 365 U.S. at 328) (internal quotation marks omitted). Traditionally a foreclosure percentage of at least 40% has been a threshold for liability in exclusive dealing cases. Jacobson, *supra*, at 362. However, some courts have found that a lesser degree of foreclosure is required when the defendant is a monopolist. *See Microsoft*, 253 F.3d at 70 ("[A] monopolist's use of exclusive contracts . . . 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.").

In this case, both the Commission and the ALJ found that the Full Support Program foreclosed Star from a substantial share of the market. Although the Commission did not quantify a percentage, it did note that the two largest distributors, who together controlled approximately 50-60% of distribution, prohibited their branches from purchasing from Star (except through the Full Support Program exceptions) following the announcement of the Full Support Program. Indeed, HD Supply went so far as to cancel pending orders for domestic fittings that it had placed with Star. The Commission also observed that the third-largest distributor was initially interested in purchasing domestic fittings from Star, but followed suit soon after the Full Support Program was announced. Testimony in the record supports the Commission's conclusion that this pattern recurred with other dealers, even when Star promised lower prices than McWane. Thus, for example, U.S. Pipe refused to purchase domestic fittings from Star, despite a promise of lower prices, until September 2010. Likewise with TDG distributors. Executives

at Groeniger and Illinois Meter also testified that the Full Support Program deterred them from dealing with Star. Although the Commission did not place an exact number on the percentage foreclosed, it found that the Full Support Program "tie[d] up the key dealers" and that the foreclosure was "substantial and problematic." *McWane II*, 2014 WL 556261, at *24 n.10.

These factual findings are all consistent with the ALJ's determinations, and all pass our deferential review. Nevertheless, McWane challenges the Commission's conclusion by arguing that Star's entry and growth in the market demonstrate that, as a matter of law, the Full Support Program did not cause substantial foreclosure. As before, when McWane raised a substantially similar claim to rebut the Commission's finding of monopoly power, this argument is ultimately unpersuasive. Again, "[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." *Dentsply*, 399 F.3d at 191. Our sister circuits have found monopolists liable for anticompetitive conduct where, as here, the targeted rival gained market share – but less than it likely would have absent the conduct. *See Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789-91 (6th Cir. 2002). As noted above, exclusive dealing measures that slow a rival's expansion can still produce consumer injury. *See* XI Areeda & Hovenkamp, *supra*, ¶ 1802c, at 76; *accord Dentsply*, 399 F.3d at 191; *ZF Meritor*, 696 F.3d at 271. Given the ample evidence in the record that the Full Support Program significantly contributed to key dealers freezing out Star, the Commission's foreclosure de-

termination is supported by substantial evidence and sufficient as a matter of law.

b) Evidence of Harm to Competition

Having concluded that the Commission's finding of substantial foreclosure is supported by substantial evidence, we turn to the remainder of the Commission's evidence that McWane's Full Support Program injured competition. The record contains both direct and indirect evidence that the Full Support Program harmed competition. The Commission relied on both, and taken together they are more than sufficient to meet the government's burden. The Commission found that McWane's program "deprived its rivals . . . of distribution sufficient to achieve efficient scale, thereby raising costs and slowing or preventing effective entry." *McWane II*, 2014 WL 556261, at *22. It found that the Full Support Program made it infeasible for distributors to drop the monopolist McWane and switch to Star. This, the Commission found, deprived Star of the revenue needed to purchase its own domestic foundry, forcing it to rely on inefficient outsourcing arrangements and preventing it from providing meaningful price competition with McWane. *Id.* at *25.

Perhaps the Commission's most powerful evidence of anticompetitive harm was direct pricing evidence. It noted that McWane's prices and profit margins for domestic fittings were notably higher than prices for imported fittings, which faced greater competition. Thus, these prices appeared to be supracompetitive. Yet in states where Star entered as a competitor, notably there was no effect on McWane's prices. Indeed, soon after Star entered

the market, McWane raised prices and increased its gross profits – despite its flat production costs and its own internal projections that Star's unencumbered entry into the market would cause prices to fall. *Id.* at *27. Since McWane was an incumbent monopolist already charging supracompetitive prices (as demonstrated by the difference in price and profit margin between domestic and imported fittings), evidence that McWane's prices did not fall is consistent with a reasonable inference that the Full Support Program significantly contributed to maintaining McWane's monopoly power.

McWane claims, however, that the government did not adequately prove that the Full Support Program was responsible for this price behavior. But as we've noted, McWane demands too high a bar for causation. While it is true that there could have been other causes for the price behavior, the government need not demonstrate that the Full Support Program was the sole cause – only that the program "reasonably appear[ed] to be a significant contribution to maintaining [McWane's] monopoly power." *Dentsply*, 399 F.3d at 187. Moreover, under our deferential standard of review, the mere fact that "two inconsistent conclusions" could be drawn from the record "does not prevent [the Commission's] finding from being supported by substantial evidence." *Consolo*, 383 U.S. at 620.

The Commission also drew on testimony from Star executives that the Full Support Program deprived Star of the sales and revenue needed to invest in a domestic foundry of its own. These estimates were based in part on distributors' withdrawn requests for quotes or orders in the wake of the Full

Support Program. Indeed, Star had identified a specific foundry to acquire and had entered negotiations to purchase it, but after the announcement of the Full Support Program, decided not to move forward with the purchase. Without a foundry of its own with which to manufacture fittings, Star was forced to contract with six third-party domestic foundries to produce raw casings – a "more costly and less efficient" arrangement on account of higher shipping, labor, and logistical costs; smaller batch sizes; less specialized equipment; and various other factors. *McWane II*, 2014 WL 556261, at *25. Star estimated that with its own foundry, it could have reduced costs and substantially lowered its domestic fittings prices.

Moreover, as the ALJ found, some customers, including HD Supply and Ferguson, were reluctant to purchase from a supplier that lacked its own foundry, thereby further inhibiting any challenge to McWane's market dominance. *McWane I*, 155 F.T.C. at 1157, 1160. Thus, the record evidence suggests that the Full Support Program stunted the growth of Star – McWane's only rival in the domestic fittings market – and prevented it from emerging as an effective competitor who could challenge McWane's supracompetitive prices.

We also consider it significant that alternative channels of distribution were unavailable to Star. In cases where exclusive dealing arrangements tie up distributors in a market, courts will often consider whether alternative channels of distribution exist. *See Dentsply*, 399 F.3d at 193; *Omega Envtl.*, 127 F.3d at 1162-63; XI Areeda & Hovenkamp, *supra*, ¶ 1821d4, at 203-09. If firms can use other means of

distribution, or sell directly to consumers, then it is less likely that their foreclosure from distributors will harm competition. In *Denstply*, the Third Circuit found exclusive deals with distributors to be anticompetitive where direct sales of the market's products (artificial teeth) to consumers was not "practical or feasible in the market as it exists and functions." 399 F.3d at 193. The Commission found the same in the domestic fittings market, and the dissent agreed. Thus, Star's foreclosure from the major distributors was particularly likely to harm competition in this market.

Finally, the clear anticompetitive intent behind the Full Support Program also supports the inference that it harmed competition. Anticompetitive intent alone, no matter how virulent, is insufficient to give rise to an antitrust violation. *See Microsoft*, 253 F.3d at 60. But, as this Court has said, "[e]vidence of intent is highly probative 'not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.'" *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1573 (11th Cir. 1983) (quoting *Bd. of Trade of Chi.*, 246 U.S. at 238). For a monopolization charge, intent is "relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . . . [T]here is agreement on the proposition that 'no monopolist monopolizes unconscious of what he is doing.'" *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 602 (1985) (quoting *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945)); *see also Microsoft*, 253 F.3d at 59 ("Evi-

dence 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.").

In this case, the evidence of anticompetitive intent is particularly powerful. Testimony from McWane executives leaves little doubt that the Full Support Program was a deliberate plan to prevent Star from "reach[ing] any critical market mass that will allow them to continue to invest and receive a profitable return" by "[f]orc[ing] Star[] to absorb the costs associated with having a more full line before they can secure major distribution." Indeed, the plan was implemented as a reaction to concerns about the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor." Although such intent alone is not illegal, it could reasonably help the Commission draw the inference that the witnessed price behavior was the (intended) result of the Full Support Program.

Not all of the evidence adduced in this case uniformly points against McWane. For example, as we've previously noted, Star was not completely excluded from the domestic fittings market; it was able to enter and grow despite the presence of the Full Support Program. However, it is still perfectly plausible to conclude on this record that Star's growth was meaningfully (and deliberately) slowed and its development into a rival that could constrain McWane's monopoly power was stunted. *Cf. Microsoft*, 253 F.3d at 71 (stating that defendant's exclusionary conduct kept the rival's product "below the critical level necessary for [the targeted rival] or any other rival to pose a real threat to [the defendant's] monopoly"). Also, the Full Support Program

was not a binding contract of a lengthy duration. As noted above, these characteristics do not render the program presumptively lawful, but they also do not point in the FTC's favor as an indirect indicator of anticompetitive harm. Nevertheless, the direct and indirect evidence of anticompetitive harm is more than sufficient to pass our deferential review. Again, the Commission's conclusion that the Full Support Program harmed competition is supported by substantial evidence and sound as a matter of law.

3. Procompetitive Justifications

Having established that the defendant's conduct harmed competition, the burden shifts to the defendant to offer procompetitive justifications for its conduct. As the Commission explained, "[c]ognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation." *McWane II*, 2014 WL 556261, at *30 (collecting cases); *see also* XI Areeda & Hovenkamp, *supra*, ¶ 1822a, at 213 ("A justification is reasonable if it reduces the defendant's costs, minimizes risk, or lessens the danger of free riding . . . ."). Such justifications, however, cannot be "merely pretextual." *Morris Commc'ns*, 364 F.3d at 1296; *see Eastman Kodak*, 504 U.S. at 483-84.

McWane offers two; neither is persuasive. First, McWane says that the Full Support Program was necessary to retain enough sales to keep its domestic foundry afloat. The Commission rightly rejected this argument; as other courts have recognized, such a goal is "not an unlawful end, but neither is it a procompetitive justification." *Microsoft*, 253 F.3d at 71. And as the Commission noted, the steps McWane

took to preserve its sales volume "were not the type of steps, such as a price reduction, that typically promote consumer welfare by increasing overall market output." *McWane II*, 2014 WL 556261, at *30. McWane's sales "did not result from lower prices, improved service or quality, or other consumer benefits," but rather from reducing the output of its only rival. *Id.*

Second, McWane offers the more sophisticated argument that the Full Support Program was needed to keep Star from "'cherrypick[ing]' the core of [the] domestic fittings business by making only the top few dozen fittings that account for roughly 80% of all fittings sold," while leaving McWane alone to sell the remaining 20%. But even if McWane had good business reasons to adopt such a strategy, and such conduct could result in increased efficiency in the right market conditions, McWane offers no reasons to think that such conditions exist in this case. As the Commission noted, a full-line supplier like McWane could instead compete "by lowering its price for [the more common] products and increasing its price for the less common products." *Id.* at *31. Again, McWane has not explained why such a strategy would not work, how the collapse of the full line of products would harm consumers, or why full-line forcing was instead necessary. Thus, this argument is also unpersuasive.

Moreover, McWane's internal documents belie the notion that the Full Support Program was designed for any procompetitive benefit. As the Commission noted, McWane executives discussed the Full Support Program in terms of maintaining domestic prices and profitability by preventing Star

from becoming an effective competitor. For example, McWane executive Richard Tatman said that his "chief concern" with Star becoming a domestic fittings supplier was that "the domestic market [might] get[] creamed from a pricing standpoint," and identified the biggest risk factor of Star's entry as the "[e]rosion of domestic pricing if Star emerged as a legitimate competitor." In a document encouraging the adoption of an exclusive dealing arrangement, Tatman opined that not doing so would allow Star to "drive profitability out of our business." And in an e-mail, he stated, with regard to Star, "we need to make sure that they don't reach any critical mass that will allow them to continue to invest and receive a profitable return." The Supreme Court has looked to evidence that proffered justifications for conduct "are merely . . . an excuse to cover up different and anticompetitive reasons." Jacobson, *supra*, at 367-68 (citing *Eastman Kodak*, 504 U.S. at 483). McWane's damning internal documents seem to be powerful evidence that its procompetitive justifications are "merely pretextual."

IV.

All told, the Commission's factual and economic conclusions are supported by substantial evidence and its legal conclusions comport with the governing law. The Commission's determination of the relevant market and its findings of monopoly power and anticompetitive harm pass our deferential review, and we agree that the conduct amounts to a violation of Section 5 of the Federal Trade Commission Act.

Accordingly, we AFFIRM.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 14-11363-CC

MCWANE, INC.,

Petitioner,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of a Decision of the
Federal Trade Commission

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS and JILL PRYOR, Circuit Judges, and HINKLE,* District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en

* Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/_____
UNITED STATES CIRCUIT JUDGE

ORD-42

## APPENDIX C

### 15 U.S.C. § 45. Unfair methods of competition unlawful; prevention by Commission

#### (a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

**(b) Proceeding by Commission; modifying and setting aside orders**

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of com-

petition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as

hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under para-

graph[1] (2) not later than 120 days after the date of the filing of such request.

**(c) Review of order; rehearing**

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission

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[1] So in original. Probably should be "clause".

is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28.

**(d) Jurisdiction of court**

Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

**(e) Exemption from liability**

No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

**(f) Service of complaints, orders and other processes; return**

Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

**(g) Finality of order**

An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed;

except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) of this section and of section 57b(a)(2) of this title, if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

**(h) Modification or setting aside of order by Supreme Court**

If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

**(i) Modification or setting aside of order by Court of Appeals**

If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

**(j) Rehearing upon order or remand**

If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

**(k) "Mandate" defined**

As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration

of thirty days from the date of issuance thereof, means the final mandate.

**(*l*) Penalty for violation of order; injunctions and other appropriate equitable relief**

Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in a case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

**(m) Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure**

(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this subchapter respecting unfair or deceptive acts or prac-

tices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order, with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation,

for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) of this section that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a) of this section.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

**(n) Standard of proof; public policy considerations**

The Commission shall have no authority under this section or section 57a of this title to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the

Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.