UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

RESPONDENT McWANE, INC.'S APPEAL BRIEF

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Dated: June 4, 2013

RECORD REFERENCES

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

JX# – Joint Exhibit

CX# – Complaint Counsel Exhibit

RX# – Respondent Exhibit

Name of Witness, Tr. xx – Trial Testimony

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

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

JSLF ¶ x – Joint Stipulations of Law and Fact

Complaint ¶ x – Complaint Counsel's Complaint filed January 4, 2012

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

RRFA No. x - Respondent's Response to Complaint Counsel's Requests for Admission.

CRFA No. x – Complaint Counsel's Response to Respondent's Requests for Admission

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

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

RB # - Respondent's Post Trial Brief

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

CCB # - Complaint Counsel's Post Trial Brief

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

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

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STATEMENT OF THE CASE

The Federal Trade Commission ("FTC" or "Commission") issued the Administrative Complaint ("Complaint") in this matter against Respondent McWane, Inc. ("McWane"), Star Pipe Products, Ltd. ("Star") and Sigma Corporation ("Sigma") on January 4, 2012, and approved consent decrees with Sigma and Star on February 27, 2012, and May 8, 2012, respectively. The Complaint alleged that McWane, Sigma, and Star violated FTC Act Section 5 by entering into an agreement in 2008 to fix, raise, and stabilize the prices for ductile iron pipe fittings ("Fittings"), engaged in price signaling, and "facilitated coordination" by submitting tons-shipped data to an accounting firm for an industry trade association. Complaint Counts 1-3. The Complaint also alleged that McWane violated Section 5 by monopolizing a small portion of the overall Fittings market—the purported market for "Domestic Fittings." It alleged McWane did so by issuing a rebate policy in September 2009 that excluded Star from Domestic Fittings and by entering into a Master Distribution Agreement ("MDA") with Sigma that excluded Sigma from Domestic Fittings. Complaint Counts 4-7.

McWane filed its Answer on February 2, 2012, denying that it conspired to raise and stabilize Fittings prices (Answer ¶¶ 29, 32), denying that there was a separate Domestic Fittings market (Answer ¶¶ 21, 39), and denying that it eliminated Sigma as a potential entrant and excluded Star from the purported Domestic Fittings market. Answer ¶¶ 47-63. The administrative hearing in this matter began on September 4, 2012 and concluded on November 2, 2012. The Administrative Law Judge ("ALJ") issued his Initial Decision on May 1, 2013. The ALJ dismissed Counts 1-3, finding that McWane priced independently at all times. Initial Dec. at 292 (finding "substantial evidence" that McWane priced independently and routinely priced below rival suppliers "in order to beat prices being offered being offered by its competitors, which is a pro-competitive purpose.").

The ALJ found that the government's horizontal case amounted to nothing more than "weak" "unsupported speculation" and that its "daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement involving McWane." Initial Dec. at 286, 300, 306. On Counts 4-7, however, the ALJ recommended a ruling in Complaint Counsel's favor. Respondent files this Appeal Brief because the ALJ's own fact-findings, and long-standing antitrust precedent, should lead to judgment in McWane's favor as a matter of law on Counts 4-7. Indeed, former Commissioner Rosch already dissented from this enforcement action twice because mainstream antitrust law "bless[ed] the conduct the complaints charge as exclusive dealing" and because "under any objective standard . . . the undisputed facts demonstrate that Star's entry was no de minimis or trivial." Statement of Commissioner J. Thomas Rosch, Concurring in Part and Dissenting in Part, Administrative Complaint, FTC File No. 101 0080, January 4, 2012 ("Rosch Statement"); Statement of Commissioner J. Thomas Rosch, Dissenting in Part to the Opinion of the Commission on Complaint Counsel's and Respondent's Motions for Summary Decision ("Rosch Dissent"), Aug. 9, 2012 at 5. "Thus, the fact that Star attained a 10 percent share of the domestic-only DIPF market—from zero share—in less than three years undermines Complaint Counsel's basic theory" and "would not lead a trier of fact to find for Complaint Counsel." *Id.*

STATEMENT OF FACTS

I. THERE IS NO DOMESTIC FITTINGS MARKET

A. Imported And Domestic Fittings Are Fungible Commodities And End-Users Have A Choice In Writing Their Specifications

The ALJ determined that Fittings are commodity products produced to American Water Works Association ("AWWA") standards. F. 322. As a result, any Fitting, Domestic or Imported, that meets an AWWA specification is functionally interchangeable with any other Fitting

that meets the same specification. F. 323. The ALJ determined that "[i]n form and functionality, [Imported] and Domestic Fittings are completely interchangeable." F. 517.

The ALJ also determined that end-users, either project engineers or municipalities, have a choice regarding the specification of Fittings for a particular waterworks project. F. 332-335, 346. The specification can be "open," permitting both Domestic and Imported Fittings, or the specification can be limited to either Domestic or Imported Fittings. F. 346-347, 349. The choice to use a "domestic only" specification may be the result of either end-user preference (because of patriotism, for example) or legal rules. F. 347. The vast majority of end-user specifications for Domestic versus Imported Fittings are based on preference, however, and not legal requirements; thus, Domestic and Imported Fittings regularly compete to win engineers' specifications and, when the specifications are open, for the jobs. Schumann, Tr. 4535-36, 4634-35; RX 712A (Normann Rep. at 28-30); RX 741. The ALJ found that virtually all specifications are now open, and that imports constitute the vast majority of fittings purchased (roughly 80-85%). F. 1028-29.[1]

The "Buy American" provisions of the American Recovery and Reinvestment Act ("ARRA") did not create a separate market for Domestic Fittings because its domestic "requirements" were subject to numerous waivers. F. 526, 531. For example, ARRA contained three types of blanket waivers permitting Imported Fittings to be used when it was in the public inter-

[1] The ALJ identified only Pennsylvania, certain federal government projects such as Air Force bases, and some unidentified municipalities as having domestic-only legislative or regulatory requirements. F. 348. Both Respondent's expert Dr. Parker Normann and Complaint Counsel's expert Dr. Laurence Schumann agreed that these legal "requirements" are only a very small portion of all specifications—and that they are typically not "requirements" at all, but have exceptions allowing the purchase of Imported Fittings for particular reasons (for example, they are a *de minimis* part of the overall job) or for particular jobs (such as availability and price). Schumann, Tr. 4535-36, 4634-35; RX 712A (Normann Rep. at 28-30); RX 741 (no state, including Pennsylvania, purchased exclusively Domestic Fittings).

est, or the cost differential with Domestic Fittings hit certain levels, or Domestic Fittings were not available. F. 531. ARRA was designed to stimulate "shovel ready" jobs. Thus, the Environmental Protection Agency ("EPA"), the federal agency with authority for granting or approving ARRA waivers, issued several nationwide waivers in the public interest right at the start of ARRA, including broad waivers effective April 2009 and June 2009 for *all projects* that had incurred debt *or* solicited bids on or after October 1, 2008 and before February 17, 2009 and were financed (or refinanced) through Clean or Drinking Water State Revolving Funds using assistance from ARRA. RX 727; Schumann, Tr. 4577-4581; RX 728; Schumann, Tr. 4585-4586. The EPA also granted a blanket, nationwide *de minimis* waiver from ARRA's Buy American requirement for components, such as Fittings, that comprise no greater than 5% of the total cost of the materials used in a waterworks project. F. 535-36. Finally, the EPA granted several public interest and other waivers allowing local municipalities to purchase Imported Fittings for use on a number of ARRA-funded waterworks projects. F. 530, 532; CX 1592, CX 1590, & CX 1591 (waivers).

As a result, Imported Fittings were routinely bid on ARRA jobs—and they outsold Domestic Fittings more than two-to-one during the ARRA period. The ALJ found that Imported Fittings comprised more than 70% of all Fittings sold in 2010, while Domestic Fittings were less than 30%. F. 1030, 1033-35.[2] Star internally reported numerous ARRA jobs that accepted bids of Imported Fittings. Schumann, Tr. 4621 ("It shows examples in which decision makers had changed their mind and allowed for imports"). Complaint Counsel's expert literally ignored that evidence and it is not mentioned in the ALJ opinion. Schumann, Tr. 4569-71; 4620-23.

ARRA expired in February 2010 and the effects of its funding were largely over by Fall

[2] This was only a modest shift from the years before ARRA when Imported Fittings were estimated at roughly 80% and Domestic Fittings at roughly 20%, as discussed *supra*.

2010. F. 1036. Since then, demand for Domestic Fittings has fallen back to pre-ARRA levels of 15-20%. F. 1031. Because of ARRA's numerous waivers and its short duration, it had limited impact on demand and, as a result, the competition between Domestic and Imported Fittings continued unabated. F. 1037-39.

B. Cheap Imports Have Won The Competition For Specifications And Decimated The Producers Of Domestic Fittings

In the past 15 to 20 years, Imported Fittings have consistently won the competition for specifications, and cheap imports from China, India, Korea, and Mexico have flooded the U.S. market. F. 462-64, 468. The ALJ determined that, beginning in the mid-1980s, Imported Fittings suppliers "began to successfully convert End Users' specifications for domestically produced Fittings to open specifications." F. 463. "Spec-flipping" accelerated in the 1990s and 2000s, and today Imported Fittings make up the overwhelming majority of the Fittings market. *Id.*; JX 638 (McCutcheon, IHT) at 96 ("I would say it was a regular responsibility of our salespeople to flip specs to import"); F. 467. Between 2003 and 2008, the percentage of Domestic Fittings fell from roughly 70% to 15-20%. F. 464; RX 740. In 2003, the International Trade Commission ("ITC") unanimously determined that a flood of cheap (and entirely interchangeable) Fittings from China was causing "market disruption" and "material injury" to Domestic Fittings producers. F. 469-71. President Bush declined to impose tariffs, however, and the flood of cheap Imported Fittings continued.

The ALJ found that imports have grown to dominate all Fittings sold. F. 465-66. Star and Sigma went from start-up importers in the mid-1980s to significant players by 2011, obtaining [redacted]% and [redacted]% of the overall Fittings market, respectively. F. 356. A number of smaller importers also sell in the U.S., including Serampore, Metalfit, NAPAC, and NACIP. F. 169, 176-78, 186.

The flood of cheap Imported Fittings led traditional U.S. manufacturers such as U.S. Pipe, Griffin, and ACIPCO to dramatically reduce their production of Domestic Fittings or exit the business entirely. McWane itself was forced to open a foundry in China and close its Tyler, Texas foundry due to unsustainably low production levels. F. 477-479. Roughly 200 remaining employees lost their jobs as a result of the Tyler South plant closure. F. 479. Following the closure of the Tyler South plant, McWane was the "last guy standing" with a foundry (Union Foundry in Anniston, Alabama) dedicated to making small and medium diameter Domestic Fittings. But Union Foundry itself was operating at only 30% capacity and desperately needed additional tonnage to survive. F. 472-76.

C. The ALJ Did Not Rely On Any Economic Evidence Demonstrating A Domestic-Only Fittings Market

The ALJ found that Complaint Counsel failed to produce any economic evidence in the entire case. Initial Dec. at 338 ("Rather than offer its own expert testimony analyzing economic data, Complaint Counsel chose an 'attack-the-other-expert' strategy."). His finding of a separate Domestic Fittings market is thus unsupported by any economic test because Complaint Counsel flatly failed to proffer one. Complaint Counsel's expert did not perform a SSNIP test, elasticity test, or any other economic test sufficient to find a separate Domestic Fittings market. He did not study actual sales to ARRA-funded jobs and he literally ignored ample evidence of blanket nationwide and ad hoc ARRA waivers—and evidence that Star and Sigma bid upon and won ARRA-funded jobs with Imported Fittings. Schumann, Tr. 4569-71; 4580-4583; 4585-4597; 4615-16; 4618-24 ("Q. You have no idea sitting here today . . . how many nondomestic fittings were sold under the various ARRA waivers and exemptions, do you, sir? A. That is correct. . . . Q. And you don't know because you didn't bother to tabulate how many of them are ARRA waivers and exemptions or not; right? A. No."); CX 2294 (domestic bid log). He did not study

sales under Pennsylvania law or any municipal regulation to determine the extent of domestic "requirements" and whether and when imports were purchased under waivers and exemptions to such "requirements." He did not study municipality or contractor specifications or the few entirely non-binding patriotic or other preferences for Domestic Fittings that still remain.

In contrast, Respondent's expert, Dr. Normann, presented substantial analyses demonstrating that competition for the specification meant Imported and Domestic Fittings were part of a single Fittings market, and that ARRA did not change the demand curve and create a Domestic-only market. Dr. Normann analyzed the share of Domestic Fittings within the overall Fittings market as well as McWane's Domestic Fittings sales by state and determined that the demand for Domestic Fittings is driven largely by consumer preference rather than legal requirement, and thus was subject to systematic competition from imports which opened the specifications to foreign Fittings. RX 712A (Normann Rep. at 30). Because Domestic and Imported Fittings regularly compete against each other for the specification and are functionally interchangeable, there is no separate market for Domestic Fittings. The Initial Decision fails to consider or address Dr. Normann's economic analyses and findings of a single Fittings market.

II. MCWANE DID NOT EXCLUDE STAR

A. Star "Clearly" Entered Virtual Domestic Production Quickly And Successfully

The ALJ found that "[c]learly, Star entered the Domestic Fittings market." Initial Dec. at 383. "Star was able to and did enter the Domestic Fittings market" during tough economic times when "[n]o other supplier of imported Fittings" and "no pipe supplier or domestic foundry . . . [even] considered entering the market for manufacturing and selling Domestic Fittings." *Id.* at 377. The ALJ also found that Star did so in only six months. Shortly after ARRA was passed in February 2009, Star decided to become a virtual manufacturer of Domestic Fittings. By June

2009, Star announced its new, domestic product line to the industry at an AWWA trade show. F. 1095-96. "By September 2009, Star recorded its first sales of domestically manufactured Fittings to customers." The ALJ found that Star was able to successfully and quickly enter production of Domestic Fittings because there was substantial excess foundry capacity in the U.S. and Star had "the expertise needed to operate its own fittings foundry" and "the network of Distributor customers required to enter and compete effectively." F. 1051-52. Star's entry "did not require any changes to Star's relationships with its existing Distributor customers" and "Star already had in place the back office support needed to sell a line of Domestic Fittings." F. 1052, 1055.

The ALJ found that Star's entry was significant. "Since its entry in 2009 . . . Star has sold Domestic Fittings every month and every year," and grew its sales of Domestic Fittings month after month. F. 1127-28, 1134-35. "Star sold Domestic Fittings to many distributors during the last quarter of 2009, and throughout 2010 and 2011," including the largest national waterworks distributors in the United States, HD Supply and Ferguson, and dozens and dozens of large regional and local distributors, including WinWholesale, Dana Kepner, Illinois Meter, and E.J. Prescott—many of which purchased hundreds of thousands of dollars in Domestic Fittings from Star in 2010 and 2011. Initial Dec. at 390-96; F. 1136. In 2010, TDG, a large buying cooperative with more than two dozen regional distributors across the country, selected Star, but not McWane, as its "Domestic Fittings vendor partner," "giv[ing] its members an incentive to buy from Star. F. 1351.

Star was a fierce competitor who "endeavored to and did 'pick off' orders of Domestic Fittings from McWane." F. 1134-35. By the end of 2010, Star's first full year as a Domestic Fittings supplier, ***Star had over*** [redacted] ***individual customers*** (nearly as many as McWane's 187

customers), including ***over*** [redacted] ***exclusive customers*** (also nearly as many as McWane).[3] The ALJ found that "[s]ince entering the market, Star has made sales of Domestic Fittings to more than 100 Distributors" including over "[redacted] million dollars in Domestic Fittings sales in both 2010 and 2011, and expect[ed] to sell more Domestic Fittings in 2012." F. 1141, 1143. "[S]ince its determination in 2009 to enter the Domestic Fittings market, Star's market share went from zero to close to 5% in 2010. Star's share nearly doubled the following year, to approximately 9% in 2011." Initial Dec. at 382, F. 1042-1043. "Star was on pace, at the time of trial, to have its best year ever for Domestic Fittings sales in 2012." F. 1144.[4]

McWane's expert, Dr. Normann, concluded that Star's steady growth and doubling of its share was "inconsistent with a rebate policy that effectively forecloses them from the market and forces them to sell oddball fittings and not be—not have access to distributors and end customers." Normann, Tr. 5041. He found, for example, that Star's top-selling items were the same as McWane's and thus concluded that Star was not relegated to oddball fittings. RX 754B. He also found that Star successfully won domestic business across the country in 2010 and accounted for more than 10% of all sales in a number of states. RX 764.

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[3] The ALJ's finding that "there was no competition to become the exclusive supplier" (Initial Dec. at 407) of domestic fittings for distributors is thus factually erroneous: Star successfully won more than 50 exclusive distributors for its Domestic Fittings in 2010, its first year with domestic product. *See* RB at 3; RFF ¶ 497. In post-trial briefing, Complaint Counsel conceded the point, but argued that it was "of no consequence." *See* CCRFF ¶ 497.

[4] The ALJ did not address substantial evidence at trial that demonstrated that Star itself touted its successful expansion into Domestic Fittings. RX 231 (November 10, 2009 Email from Bhutada: "Our domestic quote log is ***very impressive*** at $14+ million . . . Congratulations to you and your team for the same."). In February 2010, Mr. McCutcheon enthusiastically responded to the news that Star had won all of the Domestic Fittings business of Dana Kepner, a large regional distributor: "***Yahoooooo!!***" McCutcheon, Tr. 2612-2613, 2595; CX 0585. In April 2010, a Star sales manager hailed yet another new customer, Mainline Supply, and expressly underscored that Tyler's rebate letter was "***all bark and no bite.***" McCutcheon, Tr. 2615-2617; JX 695; Leider, Dep. at 176-181; RX 280.

The ALJ noted that Complaint Counsel's expert, on the other hand, did not employ any economic test of exclusion. Moreover, Dr. Schumann was unable to identify a single distributor—out of the "at least 630 separate waterworks Distributors in the United States"—who wanted to purchase Star Domestic Fittings but could not because of McWane's rebate policy. F. 375; Schumann, Tr. 4440.

Commissioner Rosch concluded that summary decision should have been granted in McWane's favor on Counts 6 and 7 because "the undisputed facts demonstrate that Star's entry was not *de minimis* or trivial [which] is dispositive as a matter of law." Rosch Dissent at 5. The ALJ's recommendation on Counts 6 and 7, however, was made "[r]egardless of the economic expert testimony," which was one-sided in McWane's favor, and regardless of Star's "clear[]" entry. Initial Dec. at 338, 380.

B. The ALJ Found That Star Was An Inefficient Competitor

Long before McWane's rebate letter, Star decided not to buy or build its own foundry, which would have been very expensive and very risky in light of ARRA's short-term and uncertain effect. Instead it expanded into domestic by engaging in virtual domestic manufacturing, *i.e.*, by hiring numerous third-party jobber foundries to make Domestic Fittings for Star with patterns sourced in China and shipped to the U.S. Initial Dec. at 400; F. 1409-10. The multiple jobber foundries producing Star's Domestic Fittings made small volumes of Fittings and their costs were, thus, higher than McWane's. In addition, each foundry added a [redacted] mark-up to cover costs and profit. F. 1413. The additional shipping costs necessary to transport Fittings from the independent foundries to Star's Houston facility for finishing added another [redacted] to Star's overall costs. F. 1411.

The ALJ found, as a result, that Star was "a less efficient supplier of domestic Fittings than McWane because of its use of multiple jobber factories, rather than its own, dedicated foun-

dry." Initial Dec. at 411. He found that Star's decision to expand via a more costly means of production had significant ramifications for Star's prices: for example, there were "numerous states where Star's average price is higher than McWane's," and Star generally "failed to price at a discount to McWane." F. 1089-90. Thus, Star's high-cost entry did not enhance consumer welfare: "the presence of Star in the Domestic Fittings market in various states did not result in lower prices. In those states where McWane had effectively one hundred percent of the Domestic Fittings sales, McWane's pricing was not higher than in those states where McWane had a lower share of Domestic Fittings sales." F. 1090.

Star's inefficiency compared to McWane means that its high-cost entry was not beneficial to consumers (and its non-exclusion was, thus, meaningless to competition). The ALJ found no measureable harm to consumers. Instead, he found only a theoretical (and attenuated) potential harm: "[w]ithout sufficient sales volume, Star was unable to purchase its own foundry. Without its own foundry, Star's costs were higher, and therefore its prices were higher," which "hindered Star's ability to compete effectively." Initial Dec. at 411. The ALJ did not find that Star was poised to buy a foundry, let alone a foundry as efficient as McWane's Union Foundry, and Star witnesses testified they would have had to purchase and modify multiple foundries to make a full line of Domestic Fittings. F. 1102, 1106; Bhargava, Tr. 2946 ("The foundries normally that are in contract manufacturing, they are not totally suitable for in the most cost-effective manner to make the fittings"). That would have taken years and required substantial investments (and risk)—with no guarantee, of course, that their costs would be as low as Union Foundry.

Moreover, the ALJ expressly found that Star's failure to win sufficient business to justify purchasing a foundry (or foundries) was attributable to many shortcomings that had nothing to

do with McWane: "It cannot be disputed that Star was unable to capture more Domestic Fittings sales for reasons other than McWane's Full Support Program." Initial Dec. at 403, 411-413 ("Star was unable to capture more business for reasons entirely unrelated to McWane's" rebate letter"). The ALJ found, for example, numerous "reasons for Distributors choosing not to purchase Domestic Fittings from Star other than McWane's Full Support Program, including concerns about Star's inventory, the quality of fittings produced at several different foundries, and the timeliness of delivery." *Id.* at 399-400. Indeed, Star's domestic bid log contained dozens of jobs it lost in the Fall of 2009 and well into Spring 2010 because it did not have product available or had delays in shipping. McCutcheon, Tr. 2632-2634.

A number of distributors were cautious about purchasing Domestic Fittings from Star because of its poor reputation among the distributors and a general lack of confidence based on prior experiences. For example, the ALJ found that Ferguson, the second-largest waterworks distributor nationwide, "was reluctant to purchase Domestic Fittings from Star" because of "past business dealings with Star that put a strain on the relationship between the two companies"—this strain (and not McWane's rebate letter) was the "leading component in Ferguson's decision to not purchase Domestic Fittings from Star." F. 1272-75. Illinois Meter, likewise, had a "negative experience with Star's reliability as a supplier" and "would have purchased 90-plus percent of its Domestic Fittings from McWane" regardless of its rebate policy, which "did not affect Illinois Meter's decision to not buy Domestic Fittings from Star." F. 1359-60. The largest distributor in the industry, HD Supply, "had concerns" about Star's lack of track record with Domestic Fittings which it believed posed "risks to HD Supply's ability to service its own customers." F. 1253-57.

Nonetheless, each of these distributors and 100-plus additional distributors purchased Domestic Fittings from Star, and with no consequence at all: McWane "never withheld rebates from or refused to sell to these Distributors." Initial Dec. at 403; F. 1250, 1257, 1277-1279, 1320, 1344.

C. The ALJ Found That McWane's Rebate Policy Was Short-Term And Allowed Union Foundry To Continue Operating More Efficiently Than Star

McWane's rebate letter was issued in September 2009 and was changed less than six months later. F. 1595-96; Tatman, Tr. 707-709. The letter merely stated that McWane would adopt a rebate policy where customers who elected not to support the program "may" forgo participation in any unpaid rebates for Domestic Fittings "or" shipment of their Domestic Fittings "for up to 12 weeks." F. 1173. By January 2010, McWane changed its policy to eliminate the provision that distributors "may" forego shipments for "up to 12 weeks." Tatman, Tr. 707-709.

The ALJ acknowledged that McWane's letter was purposely written with the words "may" and "or" because the author of the letter was taking "a weak stance" against the more powerful distributors. F. 1178 ("I know when I write this letter that I'm a Chihuahua barking at Rottweiler and I know who has the power here"). McWane's customers were at all times free to purchase Domestic Fittings from Star, and as the ALJ found, dozens and dozens of McWane's customers did so. Initial Dec. at 382

The rebate letter had significant pro-competitive benefits: it kept the most efficient producer of Domestic Fittings alive. The ALJ found cheap imports had decimated the U.S. foundry business and forced other producers to shut down. In November 2008, "faced with high inventory levels and insufficient demand for domestic Fittings, McWane [] closed its Tyler South plant." Initial Dec. at 414; F. 477. "Prior to closing Tyler South, both of McWane's U.S. plants were 'throttled down as low as you could throttle them . . . we can't keep two plants limping

along, not meeting our inventory objectives and bleeding millions of dollars a year.'" F. 478. McWane had one dedicated domestic foundry left—Union foundry—which was operating at less than one-third of its rated capacity. Thus, "[b]ecause its last remaining domestic foundry had high inventory levels and insufficient demand," McWane implemented its September 2009 rebate policy "to persuade McWane's customers to support McWane's full line of Domestic Fittings" in an effort to keep the foundry open. Initial Dec. at 415.

The simple fact was that cheap imports had decimated the Domestic Fittings industry, and there was insufficient demand to keep McWane's last domestic foundry afloat. When confronted with Star's announcement in June 2009 that it planned to offer Domestic Fittings, "McWane was concerned that if Star entered the Domestic Fittings market, McWane would not be able to generate enough business to operate its last foundry." Initial Dec. at 416. McWane simply wanted to incentivize customers not to "cherry-pick" it "by purchasing the highest-selling, fastest-moving items (the 'A' and 'B' items) from Star, while purchasing from McWane only the slower-moving, infrequently-needed and higher-cost 'C' and 'D' items." *Id.*; F. 1147, 1175.

At the same time, as the ALJ found, "McWane had little or no ability to dictate terms to Distributors, who held significant market power over it." F. 1178. McWane "understood that the impact of the ARRA would be short-lived and did not want to overcharge for Domestic Fittings in the short term at the expense of harming its position in the overall Fittings market." F. 1086. The ALJ found that "McWane's Domestic Fittings prices were essentially flat, even during the ARRA period." Initial Dec. at 380.

III. THE MDA DID NOT EXCLUDE SIGMA

A. The ALJ Found That Sigma Was Not A Viable Potential Domestic Fittings Competitor

The ALJ determined that "Complaint Counsel has not shown that Sigma was a potential competitor." Initial Dec. at 29. ARRA was a one-year statute enacted in February 2009 to provide a modest stimulus for "shovel-ready" jobs. F. 524. But Sigma was in dire financial straits throughout 2009. By Summer 2009—halfway through ARRA's short life—Sigma had not taken sufficient steps to begin manufacturing Fittings in the United States and thus, "Sigma did not have a viable domestic production option" for taking advantage of ARRA's remaining days other than buying from McWane. F. 1473.

1. Sigma's Dire Financial Straits Crippled Its Ability To Virtually Manufacture Domestic Fittings

By Sigma's own estimates, the total cost to begin manufacturing Domestic Fittings was between $5-10 million. F. 1480. However, in 2009 Sigma was in a "precarious" and "grave" financial position. F. 1483-1484. Sigma's sales were down [redacted] million dollars and its EBITDA was [redacted] F. 1485. Sigma's long-term debt was approximately [redacted] million dollars and the company breached its bank covenants in 2009. F. 1488-90. A significant amount of Sigma's debt carried extremely high interest rates. F. 1489. For example, Sigma was required to pay interest in the high double digits on a loan from Ares Capital, an unsecured lender who held [redacted] million dollars of Sigma's debt. F. 1493-94. Simply put, Sigma lacked sufficient funds to invest in a Domestic Fittings operation on its own and its Board of Directors and lenders never authorized it to invest in becoming a Domestic Fittings supplier. F. 1499-1503.

Without sufficient financial support, Sigma was incapable of taking the necessary steps to implement domestic manufacturing. Sigma estimated it needed 730 patterns and hundreds of

core boxes to have a full line of Domestic Fittings. F. 1468. As of mid-2009, it had no core boxes and only a few sample patterns. F. 1465, 1471-1472. Moreover, Sigma owned no domestic foundries and had no contracts with existing domestic foundries. F. 1470. Sigma owned no machining or finishing facilities. F. 1465, 1471-72. According to Sigma's CEO, Victor Pais, the company's investigation of potential virtual domestic manufacturing had not advanced significantly and, by mid-2009, was "a not very discrete or quantifiable effort." F. 1466. Indeed, in late Summer 2009, Sigma informed U.S. Pipe that it "has not made any concrete plans to either invest in all the required tooling or not invest at all." F. 1467.[5]

2. Sigma Was Unable To Manufacture Domestic Fittings Within The Short ARRA Window

ARRA was a one-year statute enacted in February 2009 that provided modest stimulus funds for "shovel-ready" jobs. F. 1032. The ALJ determined that "[r]egardless of whether Sigma had the financial capability to produce Domestic Fittings by contracting with independent, domestic foundries, it did not have the time required to do so" in time to compete for ARRA-funded jobs. Initial Dec. at 427. The ALJ found that making a full line of Domestic Fittings required a lead time of at least 18-24 months; making a partial line of the highest-volume items still required at least 6-8 months before even one Domestic Fitting might be commercially available. F. 1421, 1476. Thus, even if Sigma's dire financial condition were magically cured and it had decided to go forward with virtual manufacturing in Fall 2009, it would not have had its first Domestic Fittings commercially available until at least Spring 2010 (right as ARRA expired) and

[5] The difficulties and risks of getting into virtual domestic production are underscored by Sigma's contemporaneous attempt to get into domestic pipe restraints, a much simpler product with only a few dozen SKUs (rather than the thousands needed for fittings). Sigma's domestic restraint effort utterly failed: the company overran its budget by millions and even today has produced only a handful of restraints. The effort was a "disaster" and "very unsuccessful." F. 1506-07.

it would not have had a complete Domestic Fittings line until a year or more later, long after ARRA funding had dried up. F. 1476.

B. The MDA Allowed McWane To Keep Its Efficient Union Foundry In Business

Union Foundry, McWane's last remaining U.S. facility, operated at only 30% capacity in 2008-09 and desperately needed the additional tonnage provided by the MDA. Tatman, Tr. 964. The MDA not only allowed McWane to keep Union Foundry open (and its people employed), it allowed it to continue producing Domestic Fittings more efficiently than Star—and, thus, McWane was able to benefit customers with lower prices than Star. Indeed, the ALJ found that McWane's Domestic Fittings prices were lower than Star's in virtually every state. F. 1089; Normann, Tr. 4979-4980; RX 712A; Normann Rep. at 68-69, Figure 27, *in camera*. Notably, Complaint Counsel did not proffer any measure of economic evidence of harm to consumers as a result of the MDA, and the ALJ likewise found none. The ALJ also did not find, and Complaint Counsel did not proffer any evidence, that the MDA affected Star's entry. F. 1141.

SUMMARY OF ARGUMENT

The ALJ was very clear that his Count 4-7 recommendations were ***not based on any economic evidence*** on any element of Complaint Counsel's claims: Complaint Counsel utterly failed to proffer any economic evidence to support its theory that McWane monopolized a purported Domestic Fittings market (or attempted or conspired to do so). Initial Dec. at 338. That failure was complete. Complaint Counsel failed to offer any elasticity test (or any other economic test) demonstrating a Domestic Fittings market. It failed to offer any economic test of exclusion or any other type of monopoly conduct. It failed to offer any economic test demonstrating any actual or likely injury to consumers from McWane's rebate letter or the MDA.

This appeal thus presents a test case: can the Commission find a violation of Section 5 without any robust economic test supporting the key elements of claimed antitrust violations? It also presents the Commission with an opportunity to determine whether Section 5 has limits or whether it is utterly unbounded—and whether it is flatly inconsistent with mainstream antitrust law.

The ALJ's fact-findings compel a ruling in McWane's favor on Counts 4-7 for the reasons articulated by Commissioner Rosch in his two dissents from this enforcement action: mainstream antitrust laws "bless[]" McWane's rebate letter and the MDA, and the "undisputed facts" demonstrate that neither of the two "excluded" companies was excluded by McWane. Indeed, the ALJ found Star "clearly" entered into virtual production of Domestic Fittings quickly and successfully, and that Sigma's financial straits rendered it unable to enter production in a timely manner. These undisputed facts, "[e]valuated under any objective standard," "would not lead a rational trier of fact to find for Complaint Counsel" and requires a ruling in McWane's favor. Rosch Dissent at 5.

Indeed, to find a violation of Section 5 on Counts 6 and 7, the Commission would have to conclude that common sense words are meaningless: that Star's "clear[]" entry into Domestic Fittings—and thus its non-exclusion—somehow constituted exclusion; that Star's "less efficient" and higher-cost production (and higher prices) were somehow beneficial to consumers; and that McWane's weakly worded rebate letter ("may" or "or" "for up to 12 weeks")—and the complete lack of any sustained enforcement—was somehow a hard refusal to deal.

I. Counts 6 and 7 Fail Because McWane Did Not Monopolize Domestic Fittings Or Exclude Star

ALJ found that Imported and Domestic Fittings are entirely interchangeable and, indeed, a flood of cheap imports surged into the U.S. over the last decade and drove the once-thriving

domestic industry to the brink of extinction. ARRA did not change any of that. It was short-term in nature, modest, and had numerous waivers permitting imported product to be bid on ARRA-funded jobs. As the ALJ found, and every fact witness testified, ARRA had little or no effect on demand for Domestic Fittings during its short life. There is, thus, no separate Domestic Fittings market.

Nor did McWane somehow exclude Star from expanding into Domestic Fittings. On the contrary, the ALJ found that Star "[c]learly" succeeded in expanding into virtual manufacturing of Domestic Fittings quickly and effectively in roughly six months between Spring and Fall 2009. Initial Dec. at 383. In 2010, its first full year with domestic product, ***Star had [redacted] domestic customers***—including [redacted] exclusive customers. F. 1141-43. It sold to the two national distributors (HD Supply and Ferguson) and dozens of large regional and local distributors. F. 1136. "[S]ince its determination in 2009 to enter the Domestic Fittings market, Star's market share went from zero to almost 10% in 2011." Initial Dec. at 382; F. 1042-1043. "Star was on pace, at the time of trial, to have its best year ever for Domestic Fittings sales in 2012." F. 1144. All of that growth was accomplished *after* McWane's September 2009 rebate letter—which Star's own witnesses testified was "more bark than bite." McCutcheon, Tr. 2615-2617; RX 280. Indeed, Complaint Counsel's expert conceded that he was unable to identify even a single distributor—out of 630—which wanted to buy Star domestic, but did not because of McWane's rebate letter. Star's quick and successful entry—its "sales of Domestic Fittings to more than 100 Distributors" and over "[redacted] million dollars in Domestic Fittings sales in both 2010 and 2011"—precludes a finding that McWane is a monopolist or that it somehow "foreclosed" Star. What is left is nothing but pro-competitive conduct: a rebate letter that very "weak[ly]" tried to prevent Star from cherry-picking high-volume Fittings sales in order to preserve the survival of

the last dedicated Fittings foundry in the U.S. which—as the ALJ found—was more "efficient" than Star's use of six or seven higher-cost jobber foundries, which had "higher" costs, required additional transportation costs, and thus led Star to charge "higher" prices than McWane's and "hindered [its] ability to compete effectively." Initial Dec. at 411.

Star's successful entry into the production of Domestic Fittings affirmatively disproves any allegations that McWane exercised monopoly power, and is dispositive here. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) ("[W]here new entry is easy . . . summary disposition of the case is appropriate"). It is well-established that actual entry of a new competitor or actual expansion by an existing competitor "precludes a finding that exclusive dealing is an entry barrier of any significance" *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997), and easy entry conditions "rebut inferences of market power." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998). Thus, the ALJ's findings regarding Star's actual successful entry—the fact that it has been able to source a full line of Domestic Fittings and bid for jobs across the country—mandates the conclusion that McWane did not (and could not) exercise monopoly power.

Exclusive deals are only problematic if they "foreclose competition in a substantial share of the line of commerce affected," *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961), which requires that they "foreclose so large a percentage of the available . . . outlets that entry into the concentrated market is unreasonably constricted," *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004), and significant sellers are "frozen out of a market by the exclusive deal." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring). Here, that clearly was not the case.

II. Counts 4 and 5 Fail Because The MDA Did Not Exclude Sigma Or Restrain Trade

The ALJ also found that McWane did not exclude Sigma from Domestic Fittings, as Sigma was never an actual "potential competitor." Initial Dec. at 29. Thus, the ALJ's recommendation of liability against McWane on Counts 4 and 5 are likewise erroneous as a matter of law.

Sigma was in dire financial straits in 2009 and it did not take the "concrete steps" necessary to expand into Domestic Fittings. F. 1467. Saddled with at least [redacted] million in debt (including tens of millions at extraordinarily high interest rates) and plummeting revenue, the company was hamstrung. F. 1488-90. Neither its board of directors nor its banks authorized the company to exceed its capital expense limits. F. 1499-1503. Without sufficient financial support, Sigma was incapable of taking the necessary steps to implement domestic manufacturing during ARRA's brief and modest stimulus for "shovel-ready" projects, and it was thus never an "actual potential competitor" in the alleged domestic fittings market.

The ALJ also found that "[r]egardless of whether Sigma had the financial capability to produce Domestic Fittings by contracting with independent, domestic foundries, it did not have the time required to do so" in time to compete for ARRA-funded jobs. Initial Dec. at 427. Thus, Sigma had no viable option in mid-2009 for getting into Domestic Fittings during the brief Buy-America period, and its decision not to enter domestic production had nothing to do with McWane.

Case law makes clear that a firm is not an "actual or potential competitor" unless it has taken "affirmative steps to enter the business[,]" had an "intention" and "preparedness" to do so. *Gas Utils. Co. of Alabama, Inc. v. S. Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993) (affirming summary judgment because "[i]nquiry into procedures is insufficient to establish prepar-

edness . . .party must take some affirmative step to enter"); *Cable Holdings of Ga., Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (affirming defense verdict because "ample evidence" demonstrated that plaintiff did not have "an intention to enter the business" and a "showing of preparedness"); *Sunbeam Television Corp., v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1354 (S.D.Fla. 2011) ("a would-be purchaser suing an incumbent monopolist for excluding a potential competitor . . . must prove the excluded firm was willing and able to supply it but for the incumbent firm's exclusionary conduct").

QUESTIONS PRESENTED

1. Whether the ALJ's fact findings that Domestic and Imported Fittings are fungible commodities that compete for end users' job specifications (and undisputed facts demonstrating they continued to do so under ARRA) mean that his legal finding of a Domestic Fittings market was error as a matter of law?

2. Whether the ALJ's fact findings that Star clearly entered Domestic Fittings sales, but was simply less efficient than McWane mean that his legal finding of monopolization (and attempt) under Counts 6 and 7 was error as a matter of law?

3. Whether the ALJ's fact findings that Sigma was not a potential Domestic Fittings competitor mean that his legal findings that the MDA unreasonably restrained trade and constituted a conspiracy to monopolize under Counts 4 and 5 was error as a matter of law?

4. Whether the ALJ's fact findings that the MDA and rebate letter ended years ago (and its failure to find they will recur) mean that his entry of injunctive relief was error as a matter of law?

COMMISSION STANDARD OF REVIEW

The Commission's standard of review is de novo. FTC Rule 3.54(a); *In re TransUnion Corp.*, No. 9255, 2000 FTC LEXIS 23 (Feb. 10, 2000). The Initial Decision and ALJ's findings

must be supported by a "preponderance of the evidence" that is "reliable and probative," and "substantial." *In re Chi. Bridge & Iron Co.*, No. 9300, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005); FTC Rule 3.51(c)(I); 5 U.S.C. §556(d) (2011).

ARGUMENT

I. THERE IS NO DOMESTIC FITTINGS MARKET

The ALJ's conclusion that there is a "Domestic Fittings market [] comprised of Domestic Fittings sold into all domestic-only specifications, including domestic-only specifications required by law and those based upon End User preference" is not supported by the ALJ's findings of fact. Initial Dec. at 248. It is Complaint Counsel's burden to define the relevant antitrust product market which must include all products that are "reasonably interchangeable by consumers for the same purposes" from a buyer's point of view at the time it is considering which products to purchase. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Ky. Speedway, LLC v. Nat'l. Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 916-17 (6th Cir. 2009); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436 (3d Cir. 1997); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995).

The relevant market must be defined by an economic test. *See Queen City*, 124 F.3d at 438; *Kentucky Speedway*, 588 F.3d at 919. The most common economic tool used to determine the relevant product market is a test of the "cross-elasticity of demand," which is "a measure of the substitutability of products from the point of view of buyers." It measures the responsiveness of the demand for one product to changes in the price of a different product. *Queen City*, 124 F.3d at 438 n.6.

The ALJ did not find that any cross-elasticity study (or any other economic test) supported a Domestic Fittings market, and Complaint Counsel did not submit any such evidence. Instead, Complaint Counsel's expert, Dr. Schumann, employed no economic test of the relevant

product market: he not perform any analysis of the cross-elasticity of demand between Domestic and non-Domestic Fittings, relying instead on his (admittedly, "controversial") hypothetical application of a theory developed for merger—not monopoly—cases. *See* Schumann, Tr. 4542, 4569, 4571. He admitted he did not determine the extent of ARRA waivers granted by the EPA (including several blanket, nationwide waivers) and that he did not analyze any records of ARRA-funded jobs to determine the extent to which non-Domestic Fittings were used on ARRA jobs. Schumann, Tr. 4569, 4571. He conceded, though, that there was clear evidence Imported Fittings were used on some ARRA jobs—but he ignored that evidence. For example, Star's bid logs contain numerous jobs where Star reported Imported Fittings were bid on ARRA jobs. Schumann, Tr. 4379-4381; McCutcheon, Tr. 2602, 2632-2634; CX 2294.

Dr. Schumann's admitted failure to perform a proper cross-elasticity analysis, using methods which had been tested and subject to peer review, is fatal to Complaint Counsel's market definition. *See Ky. Speedway*, 588 F.3d at 918-19 (rejecting an expert's application of his "own version" of a Small but Significant Non-transitory Increase in Price test because it was not generally accepted within the scientific community); *see also U.S. Anchor Mfg., Inc. v. Rule Inds., Inc.*, 7 F.3d 986, 998 (11th Cir. 1993) (affirming dismissal because relevant market "must be supported by demonstrable empirical evidence").

The ALJ's Conclusion of Law regarding the existence of a so-called "Domestic Fittings market" is thus inconsistent with his own findings of fact that Imported Fittings suppliers have been successfully competing to convert end users' job specifications from domestic to open for years; and that, as a result of their success, Imported Fittings constitute the lion's share of all tons sold in the United States—even during ARRA's short window. *See* F. 463-467, F. 1026-1031, F. 1033-1039.

Although it was Complaint Counsel's burden to present quantifiable economic analyses in order to demonstrate that a so-called domestic-only Fittings market existed, the ALJ instead imposed on McWane the burden of proving that a domestic-only Fittings market did *not* exist. Initial Dec. at 249. This improper shifting of the burden of proof is unsupported by the ALJ's own findings of fact and controlling legal precedent, and therefore should not be accepted. *See Queen City Pizza, Inc.*, 124 F.3d at 436 ("Plaintiffs have the burden of defining the relevant market); *Kentucky Speedway*, 588 F.3d at 916 (holding that the plaintiff bears the burden of defining the relevant product market); 16 C.F.R. § 3.43(a) ("[c]ounsel representing the Commission. . .shall have the burden of proof. . . ."). Moreover, without a Domestic Fittings market, Counts 4-7 fail because the ALJ did not find that McWane monopolized (or attempted or conspired to monopolize) an overall Fittings market. On the contrary, McWane's share of all Fittings has steadily declined while Star and Sigma and other imports have steadily increased.

II. MCWANE'S REBATE LETTER DID NOT VIOLATE SECTION 5

A. Star's Successful Entry Precludes A Finding Of Monopolization (Or Attempt) As A Matter of Law

The ALJ's recommendations of liability for Counts 6 and 7 (alleging monopolization and attempted monopolization in violation of Section 5) are erroneous as a matter of law. Sherman Act Section 2 cases are instructive in analyzing monopolization and attempted monopolization claims under Section 5 of the FTC Act. The elements of monopolization under Section 2 are "(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." Initial Dec. at 370, citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent

to monopolize and (3) a dangerous probability of achieving [or obtaining] monopoly power." Initial Dec. at 370-71, citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

"Monopoly power" is defined as "the ability (1) to price substantially above the competitive level *and* (2) to persist in doing so *for a significant period without erosion by new entry or expansion.*" *AD/SAT v. Associated Press,* 181 F.3d 216, 226-27 (2d Cir. 1999) (emphasis added). If a defendant with large market share is unable to exclude competitors, then it cannot exercise monopoly power. *Tops Mkts*, 142 F.3d at 99; *see also Metro Mobile CTS, Inc. v. New-Vector Commc'ns., Inc.,* 892 F.2d 62, 63 (9th Cir. 1989) (a defendant's possession of even 100% market share does not necessarily establish defendant has power to charge monopoly prices or control output); *Oahu Gas Serv., Inc. v. Pacific Res., Inc.*, 838 F.2d 360, 366 (9th Cir. 1988) (a high market share will not raise an inference of monopoly power).

Here, the ALJ found that "[c]learly" Star "was able to and did enter the Domestic Fittings market," and did so quickly. Initial Dec. at 377, 382. The ALJ found that "Star realized that ARRA provided a limited time window of opportunity and, in March or April 2009, elected to pursue contract manufacturing" to "produce Domestic Fittings." F. 1098, 1106. By Summer 2009, Star acquired the patterns from China and announced its entry into virtual Domestic Fittings manufacturing. "By September 2009, Star recorded its first sales of domestically manufactured Fittings to customers." Initial Dec. at 383.

The ALJ found that "since its entry in 2009, Star has sold Domestic fittings every month and every year" and was able to successfully "pick off" orders of Domestic Fittings from McWane." F. 1134-35. "Star sold Domestic Fittings to many distributors" since it entered production, including the largest waterworks distributors in the United States, such as "HD Supply, Ferguson, WinWater, and Dana Kepner." F. 1136. The ALJ found that "[s]ince entering the

market, Star has made sales of Domestic Fittings to more than 100 Distributors" and at the time of trial, was on pace "to have its best year ever for Domestic Fittings sales in 2012." F. 1141-44. Notably, "since its determination in 2009 to enter the Domestic Fittings market, Star's market share went from zero to almost 10% in 2011." Initial Dec. at 382; F. 1042-1043.

Moreover, Complaint Counsel's expert conceded that he was unable to identify a single distributor—out of the "at least 630 separate waterworks Distributors in the United States"—who wanted to purchase Star domestic Fittings but could not because of McWane's rebate policy. F. 375; Schumann, Tr. 4440. The ALJ's own opinion chronicles the undisputed fact that every single distributor Complaint Counsel called at trial (or in deposition) purchased Domestic Fittings from Star (and some purchased hundreds of thousands of dollars' worth).

As former Commissioner J. Thomas Rosch noted in his dissents on both the Commission's decision to file the Complaint, and the Commission's decision on McWane's motion for summary decision, "the undisputed facts demonstrate that Star's entry was not de minimis or trivial [which] is dispositive as a matter of law," and and in any event, "the fact that Star attained a 10 percent share of the domestic-only DIPF market—from zero share—in less than three years undermines Complaint Counsel's basic theory" and "would not lead a rational trier of fact to find for Complaint Counsel." Rosch Dissent at 5; *see also Brooke Group*, 509 U.S. at 226 ("where new entry is easy . . . summary disposition of the case is appropriate"). Well-settled case law supports Commissioner Rosch's dissent, and holds that actual expansion by an existing competitor (like entry by a new competitor) "precludes a finding that exclusive dealing is an entry barrier of significance," *Omega Envtl.*, 127 F.3d at1164, and easy entry conditions "rebut inferences of market power." *Top Mkts.*, 142 F.3d at 99.

Although McWane's short-term rebate policy incentivized increased purchases through conditional rebates, and contained a "weak[ly]" worded provision that customers "may" forego shipment of domestic fittings for up to twelve weeks, it did not amount to a "refusal to deal" that required customers to buy exclusively from McWane. F. 1178. While a true refusal to deal might result in exclusivity in some circumstances, here it plainly did not: many, many customers (**more than [redacted] total**) started buying Star's Domestic Fittings after McWane's rebate letter.[6]

Unilateral refusals to deal are also generally legitimate. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer . . . freely to exercise his own independent discretion as to parties with whom he will deal."). Some courts have noted a narrow exception where competition might be injured if a defendant has monopoly power and (a) its customers would lose their right to buy from the defendant for a sustained period of time if they bought from another, more efficient producer, (b) the customers have no other choice, and (c) they are forced to buy at a higher cost from the defendant. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005) (defendant flatly refused to deal with customers if they bought from its rivals, and subsequently imposed significant price increases); *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP*, 592 F.3d 991, 996 (9th Cir. 2010)

[6] The record demonstrates that McWane's prices were above-cost at all times and the ALJ did not find any economic evidence that the letter's statement that customers "may" forego rebates "for up to 12 weeks" was exclusionary—or, indeed, implemented in any sustained manner. Indeed, the policy was invoked only at one small distributor out of hundreds, and that distributor (Hajoca) lost only a very small rebate. The Supreme Court has repeatedly noted that above-cost prices are lawful and cannot cause antitrust injury as a matter of law. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 451 (2009) (plaintiff challenging a defendant's pricing practices must prove that "the prices complained of are below an appropriate measure of [the defendant's] costs").

("Exclusive dealing involves an agreement between a vendor and a buyer that prevents the buyer from purchasing a given good from any other vendor.").

Here, in contrast, McWane's rebate letter was not an exclusive-dealing agreement because dozens and dozens and dozens of McWane customers started buying Star Domestic Fittings after the letter came out. Nothing in McWane's rebate letter required distributors to commit for a long period of time that they would only purchase McWane's Fittings, and the ALJ's findings confirmed that distributors always could, and did, buy from Star. Indeed, more than [redacted] distributors bought Domestic Fittings from Star, including more than [redacted] who exclusively bought from Star—disproving the very idea that McWane forced customers to buy only its Domestic Fittings. Even if Star had been excluded, competition would not have been injured: the ALJ found that Star's reliance on jobber foundries made it a less efficient, higher cost supplier—and thus that McWane's Domestic Fittings prices were lower in virtually every state. On these undisputed facts, as well as the ALJ's findings, there was no "refusal to deal" and McWane's short-term rebate letter cannot be "exclusive-dealing" as a matter of law.[7]

B. Star Was Less Efficient Than McWane And Consumers Were Not Injured By Its Non-Exclusion

The ALJ expressly found that Star was "a less efficient supplier of domestic Fittings than McWane" whose "costs were higher, and therefore its prices were higher," which "hindered [its] ability to compete effectively." Initial Dec. at 411. The ALJ found that Star's inefficiency, higher costs and higher prices hurt its domestic sales, and that "[w]ithout sufficient sales volume, Star was unable to purchase its own foundry" or, more precisely, foundries. *Id.*

[7] Moreover, of course, McWane did not meaningfully enforce its weakly worded letter: again, McWane only temporarily stopped selling to one small distributor (Hajoca)—"[f]rom December 4, 2009 to April 13, 2010." Initial Dec. at 404. Hajoca merely switched its domestic purchases to Star during that time period and testified that there was "No harm, no foul." Pitts Dep. at 164:13-14.

Long-standing Supreme Court predecent holds that the antitrust laws are designed to protect *competition*, not "inefficient rivals." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68 (1984) ("an efficient firm may capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is . . . precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster"); *see also Brooke Group*, 509 U.S. at 224 ("It is axiomatic that the antitrust laws were passed for '"the protection of competition, not competitors'").

Circuit courts have universally followed this precedent and held that competition is only injured by exclusion of an "equally efficient" or more efficient competitor. Exclusion of a less efficient competitor—like Star, according to the ALJ's detailed findings—does not injure consumers. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) ("[V]irtually every contract to buy 'forecloses' or 'excludes' alternative sellers from some portion of the market, namely the portion consisting of what was bought"); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) ("a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition."). Indeed, the purpose of the antitrust laws is to promote vigorous competition so that more efficient competitors (like McWane) thrive and bring the benefits of their greater efficiency (like McWane's lower manufacturing costs and, thus, its lower prices) to consumers. This doctrine has been broadly applied. The Ninth Circuit in *PeaceHealth* firmly held that the antitrust laws should only condemn practices that exclude "equally efficient rivals." *Cascade Health Solutions v. Peacehealth*, 515 F.3d 883, 900, 904-09 (9th Cir. 2008). The Ninth Circuit also rejected a claim of exclusive dealing based on "market-share discount and sole-source agreements," which provided "substantial discounts" to customers that purchased all of their requirements from the defendant—but, as

here, "did not contractually obligate . . . customers to purchase anything." *Allied Orthopedic*, 592. F.3d at 996-97. The court reasoned that the discounts "did not foreclose [the defendant's] customers from competition because a 'competing manufacturer need[ed] only offer a better product or a better deal to acquire their [business]." *Id.* (internal citations omitted). Star was, likewise, free to do the same—but priced its products higher than McWane. The Eleventh Circuit has also recognized that it is "not a function of the antitrust laws" to require monopolists to "support artificially firms that cannot effectively compete on their own." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991). The Eighth Circuit reached the same conclusion regarding alleged de facto exclusive dealing in *Concord Boat* because defendant's above-cost discounts left ample room for efficient competitors to "lure customers away by offering superior discounts." *Concord Boat v. Brunswick Corp.*, 207 F.3d 1039, 1058-59 (8th Cir. 2000).

The ALJ found that McWane's rebate letter did ***not*** exclude Star—which "[c]learly" "was able to and did enter the Domestic Fittings market." Initial Dec. at 377, 382. The ALJ found only that Star might have (theoretically) gained even more market sales, but the chain of speculation the ALJ relies on to reach his conclusion—about what ***might*** have happened ***if*** Star sold sufficient additional Domestic Fittings to justify the purchase of those hypothetical foundries—is insufficient as a matter of law. The findings of fact merely state that "Star was not able to generate a sufficient volume of sales of Domestic Fittings to realize cost efficiencies or justify operating a foundry of its own" and that "McWane's announcement of its Full Support Program on September 22, 2009 impacted Star's decision to not move forward with the potential acquisition" of a foundry. F. 1401, 1408. The ALJ did not find any specific acquisition of any foundry was imminent or likely (or even available for purchase by Star), let alone find a target or

targets that had lower manufacturing and finishing costs. Thus, the ALJ's holding is inconsistent with the well-established principle that the antitrust laws are designed to protect *competition*, not less-efficient competitors.

The speculative nature of the supposed harm to consumers is underscored by the ALJ's conclusion that "[i]t cannot be disputed that Star was unable to capture more Domestic Fittings sales for reasons other than McWane's Full Support Program." Initial Dec. at 413. Star's Domestic Fittings prices were always higher than McWane's, (*id.* at 411), and the ALJ chronicled significant distributor "concerns about Star's inventory, the quality of fittings produced at several different foundries, and the timeliness of delivery." *Id.* at 399-400. Indeed, many distributors were "reluctant to purchase domestic Fittings from Star" because of its poor reputation. F. 1273-79, 1310-12, 1341-45, 1359-61, 1253-57.

C. There Was No Specific Intent To Monopolize And No Dangerous Probability Of Success

To establish an attempted monopoly claim, which is the theory underlying Count 7, a plaintiff must prove that the defendant possessed the specific intent to achieve monopoly power by predatory or exclusionary conduct; that the defendant in fact engaged in such anticompetitive conduct; and that a dangerous probability existed that the defendant might have succeeded in its attempt to achieve monopoly power. *U.S. Anchor Mfg.*, 7 F.3d at 993. The intent to beat a competitor or increase one's share is normal competition, not specific intent to monopolize—which requires an intent to injure competition and a competitor via the same act, *i.e.*, to harm Star and customers (by, for example, excluding Star and then raising prices). *Brown Shoe Co. v. United States,* 370 U.S. 294, 320 (1962) (antitrust laws protect "competition, not competitors"); *A.A. Poultry*, 881 F.2d at 1404 ("Courts should treat with great skepticism complaints by competitors who are injured by the low prices that customer's adore, when the customers are content.").

Here, as the ALJ found, McWane did not have any intent to gouge its customers by raising prices to supra-competitive levels. F. 1086 (McWane "did not want to overcharge for Domestic Fittings"). McWane was merely competing aggressively in an attempt to keep its last remaining domestic foundry open. Moreover, the ALJ did not find that McWane ever charged supra-competitive prices for Domestic Fittings, or that it intended to do so. Initial Dec. at 381. Thus, McWane's rebate letter does not amount to anything other than "intent" to beat a competitor, which is insufficient as a matter of law to establish "specific intent" to monopolize.

III. THE MDA DID NOT UNREASONABLY RESTRAIN TRADE AND WAS NOT A "CONSPIRACY TO MONOPOLIZE" DOMESTIC FITTINGS

Counts 4 and 5 of the Complaint allege that the MDA constituted an unreasonable restraint of trade and a conspiracy to monopolize in violation of Section 5 of the FTC Act. Complaint ¶¶ 67-68. The elements of a conspiracy to restrain trade in violation of Sherman Act Section 1 are (1) a contract, combination, or conspiracy among two or more separate entities, that (2) unreasonably restrains trade. Initial Dec. at 420; *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824 (6th Cir. 2011). The elements of a claim for conspiracy to monopolize are (1) concerted action, with (2) the specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy. Initial Dec. at 438; *Levine v. Cent. Fla. Med. Affiliates*, 72 F.3d 1538, 1556 (11th Cir. 1996); *Thompson v. Metro. Multi-List, Inc.*, 934 F.2d 1566, 1582 (11th Cir. 1991). The Initial Decision's finding that "Complaint Counsel has not shown that Sigma was a potential competitor" is dispositive of both counts. All that is left is, at most, a single exclusive contract between McWane and one of 630 distributors that was in effect for less than one year. Initial Dec. at 429.

A. The ALJ's Finding That Sigma Was Not An Actual Or Potential Domestic Fittings Competitor Is Dispositive

The ALJ's finding that Sigma was not an actual or potential competitor in the market for Domestic Fittings means that Sigma was not excluded as a matter of law. *See Gas Utils.*, 996

F.2d at 283 (affirming summary judgment because plaintiff failed to demonstrate that it was prepared to enter the relevant market and, thus, was not excluded by defendant); *Cable Holdings*, 825 F.2d at 1563 (affirming jury verdict that defendant did not violate Sections 1 and 2 of the Sherman Act where there was "ample evidence" that defendant lacked preparedness). The ALJ determined that Sigma was in a "grave" and "precarious position overall in financial terms" and entering domestic manufacturing was simply not a viable option. F. 1483, 1470-72. The ALJ also determined that even if Sigma had the financial capability to enter domestic manufacturing, it simply did not have the time to manufacture Domestic Fittings within the ARRA period. Initial Dec. at 427.

The evidence at trial demonstrated that it was Sigma—*not McWane or the MDA*—that excluded itself from the purported Domestic Fittings market. The ALJ's finding that as of September 2009, Sigma simply did not have a viable domestic production option demonstrates that the MDA did not exclude Sigma from the market for Domestic Fittings as a matter of law. F. 1473; *see Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) (requiring "available feasible means" for entering the relevant market); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979) (requiring "intent and ability); *Conergy AG v. MEMC Elec. Materials, Inc.*, 651 F. Supp. 2d 51, 57-58 (S.D.N.Y. 2009) (requiring "affirmative acts" to enter the proposed business); *Cable Holdings of Ga.*, 825 F.2d at 1562 (requiring "an intention to enter the business" and a "showing of preparedness"); *Sunbeam Television*, 763 F. Supp. 2d at 1354 ("a would-be purchaser suing an incumbent monopolist for excluding a potential competitor . . . must prove the excluded firm was willing and able to supply it but for the incumbent firm's exclusionary conduct").

B. The MDA Was A Buy-Sell Arrangement Between McWane And One Of Over 600 Distributors And Not An Unreasonable Vertical Restraint Of Trade Nor A Conspiracy To Monopolize

Because the Sigma was not an actual potential competitor in the market for Domestic Fittings, the MDA is properly analyzed as an exclusive vertical buy-sell arrangement between one supplier (McWane) and one of over 600 distributors (Sigma). Exclusive deals are only anticompetitive if there is proof that competition has been foreclosed in a substantial share of the line of commerce affected. *Standard Oil Co. v. United States*, 337 U.S. 293, 314 (1949); *Thompson Everett, Inc. v. Nat'l Cable Adver., L.P.*, 57 F.3d 1317, 1326 (4th Cir. 1995) (short-term exclusive contracts upheld where plaintiff failed to advance evidence of substantial anticompetitive effect). A single vertical buy-sell arrangement between a supplier and one of 600+ distributors—particularly a distributor who purchased only 3,432 (RX 763) domestic tons out of approximately 36,058 (RX 762) domestic tons and 146,712 (*Id.*) tons overall—does not foreclose a substantial share of the line of commerce as a matter of law. *See Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 123-24 (1st Cir. 2011) ("foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent, and while high numbers do not guarantee success for an antitrust claim, low numbers make dismissal easy."). In *Sterling Merchandising*, the plaintiff ice cream distributor sued a larger, competing distributor alleging that the defendant's exclusivity agreements with local grocery stores injured competition and violated the Sherman and Clayton Acts. *Id.* at 117. The First Circuit found that the exclusivity agreements did not foreclose a substantial share of the line of commerce because the amount of foreclosure reached only 30.8% of the relevant market in a single year but otherwise remained below 30%. *Id.* at 124. Additionally, despite the exclusive dealing arrangements, the plaintiff managed to sell to several of the largest retailers and increased its market share during the relevant period. *Id.* Here, the ALJ did not rely on any economic test showing how consumers were harmed by the MDA. Indeed, the

ALJ did not even find that Star was harmed by the MDA. Complaint Counsel did not proffer any evidence that Star wanted to sell Domestic Fittings to Sigma or that Sigma wanted to purchase Domestic Fittings from Star. The ALJ's findings and the undisputed evidence regarding the level of foreclosure preclude a finding of substantial foreclosure as a matter of law. *See B & H Med. L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 262-63, 266-67 (6th Cir. 2008) (foreclosure of 6.5% of statewide sales and 12.5% of metropolitan sales insufficient to prove anticompetitive effect); *Satellite Television & Associated Res., Inc. v. Cont'l Cablevision,,* 714 F.3d 351, 357 (4th Cir. 1983) (foreclosure of 8% of households insufficient to prove anticompetitive effect).

The ALJ did not find any other unreasonable restraint. For example, he did not find, nor could he, that the pricing provisions of the MDA constituted resale price maintenance. The Supreme Court has held that the rule of reason analysis applied to minimum resale price maintenance claims. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007). On its face, the MDA allowed Sigma to "resell McWane Domestic Fittings at any price it deems appropriate." CX 1194. As the Initial Decision correctly found, Sigma was free under the MDA to sell individual jobs at any price and it was also free to offer any rebates, cash discounts, freight, and payment terms it wanted. F. 1551. The MDA simply suggested an average price for all sales in a given quarter: it is the "*unilateral* policy of McWane not to appoint or continue any OEM distributor who resells McWane Domestic Fittings at any price less than 98% of McWane's published pricing on a weighted average basis for all customers and items sold during any given quarterly period"—the "Suggested Resale Price." CX 1194 (emphasis added). Even if Sigma had always followed McWane's Suggested Resale Price, it is well established that such a decision is lawful because a distributor may "independently decide[] to observe specified resale prices." *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *Monsanto Co. v. Spray-Rite Serv.*

Corp., 465 U.S. 752, 761 (1984) (manufacturer can announce resale prices in advance and refuse to deal with non-complying dealings; distributors can independently decide to acquiesce to such prices to avoid termination); *Santa Clara Valley Distrib. Co. v. Pabst Brewing Co.*, 556 F.2d 942, 945 (9th Cir. 1977) (no coercion where plaintiff testified that dealers felt free not to follow suggested prices). Finally, following a suggested resale price does not imply harm to competition (and may, in fact, be pro-competitive). Here, the ALJ did not find any harm to competition from the suggestion (and Complaint Counsel did not proffer any economic evidence of any such harm).

C. McWane Did Not Have The Specific Intent To Monopolize

The ALJ's finding that the MDA was motivated by an intent to beat Star is insufficient to establish specific intent to monopolize as a matter of law. Initial Dec. at 232. Put simply, the intent to beat competition is not specific intent to monopolize, which requires an intent to injure competition and a competitor via the same act. As noted above, the ALJ found that McWane lacked intent to overcharge for Domestic Fittings during ARRA. F. 1086. McWane's intent was to put "tons in the plant" and to keep the doors of its remaining domestic foundry open. F. 1590. The desire to maintain or increase one's market share is not in itself an antitrust violation. Finally, the Commission cannot infer a conspiracy to monopolize from Sigma's reasoned business decision to buy under the MDA rather than embark on the prohibitively expensive and very risky effort to virtually manufacture its own domestic fittings—particularly since it was not a viable domestic competitor in any reasonable time frame, according to the ALJ's own findings. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 569 (2007) (holding that a company's failure to expand beyond its traditional business and enter a new segment of the market was inconsistent with its self-interest and was not suggestive of any anticompetitive scheme); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 127 (3d Cir. 1999) (affirming summary judgment for defendants in part be-

cause company's decision not to enter a market was "more plausibly explained as an exercise of independent business judgment").

IV. MCWANE'S REBATE POLICY AND THE MDA WERE BOTH SHORT-TERM IN DURATION AND PRESUMPTIVELY LAWFUL

Short-term exclusive agreements, particularly those that are one-year or less (or terminable at-will and on short notice), are presumptively legal because they cannot harm competition. *See Ticketmaster Corp., v. Tickets.com, Inc.* 127 F. App'x. 346, 347-48 (9th Cir. 2005) (attempted monopolization claim failed because a certain percentage of defendant's exclusive contracts came up for renewal each year, permitting competitors to bid); *Indeck Energy Servs., Inc., v. Consumers Energy Co.*, 250 F.3d 972, 977-78 (6th Cir. 2000) (no monopolization because customers free to investigate alternate suppliers upon expiration of short-term supply agreements); *Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42 (7th Cir. 1996); *CDC Techs., Inc. v. IDEXX Labs., Inc.*, 186 F.3d 74 (2d Cir. 1999) (one year agreement with 60 day term inability clause was not anticompetitive); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) ("The exclusion of one or even several competitors, for a short time or even a long time, is not ipso facto unreasonable . . . The exclusion of competitors is cause for antitrust concern only if it impairs the health of the competitive process itself."). Exclusive dealing contracts are only problematic if they are multi-year in length and "foreclose competition in a substantial share of the line of commerce affected." As a result, competition to become an exclusive supplier "should actually be encouraged." *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 83 (3d Cir. 2010).

Both McWane's rebate policy and the MDA were in effect for less than one year. McWane's rebate letter, which was sent to distributors on September 22, 2009 with an effective date of October 1, 2009, was changed in early 2010 to delete the provision that distributors

"may" forego shipments for "up to 12 weeks." F. 1173. Thus, the policy was in place for less than six months. F. 1173. The MDA, likewise, lasted less than a year: it was effective on October 1, 2009, but McWane invoked the 180-day termination clause in the MDA in early 2010. Thus, it ended in Fall 2010. CX 1194. Thus, both McWane's rebate letter and the MDA were presumptively lawful, both on their face and in practical effect. Moreover, even during its short life, McWane's rebate letter was short-term on its face: it simply said that customers were free to choose another supplier, but "may" forego any unpaid rebates for Domestic Fittings or shipments for "up to 12 weeks." F. 1173.

V. MCWANE'S REBATE POLICY AND THE MDA HAD LEGITIMATE PRO-COMPETITIVE EFFECTS

The ALJ found that McWane was a more "efficient supplier of domestic Fittings" with "lower costs" than Star, which was using "multiple jobber factories, rather than its own, dedicated foundry." Initial Dec. at 411-12. The ALJ found that McWane's Union Foundry was the last dedicated domestic foundry, and it was operating at less than a third of its capacity. *Id.* at 414; F. 477. Demand for Domestic Fittings had plummeted in recent years as cheap imports flooded into the U.S. Long-term Domestic Fittings manufacturers such as Griffin Pipe, U.S. Pipe, and ACIPCO had to shut-down. McWane was forced to shut its Tyler South plant, and "[r]oughly two hundred employees lost their jobs as a result" of the closure. F. 479.

The ALJ found that McWane's desire for tonnage was not the desire to benefit McWane by charging higher prices. It was a desire to keep Union Foundry running (and its people employed)—which allowed McWane to benefit customers with lower prices than Star (because of Union Foundry's lower costs). When confronted with Star's announcement in June 2009 that it planned to offer Domestic Fittings, McWane was concerned that it "would not be able to generate enough business to operate its last foundry." Initial Dec. at 416. Specifically, McWane con-

cerned that "customers might 'cherry pick' by purchasing the highest-selling, fastest-moving items . . . from Star, while purchasing from McWane only the slower-moving, infrequently-needed and higher-cost 'C' and 'D' items." *Id.*; F. 1147, 1175. McWane's September 2009 rebate letter was simply a legitimate pro-competitive effort to "persuade McWane's customers to support McWane's full line of Domestic Fittings" in order to keep its Union Foundry—with lower costs and lower prices than Star's jobber foundries—open. Initial Dec. at 415.

The ALJ likewise determined that the MDA between McWane and Sigma had legitimate pro-competitive effects and benefitted customers because it also helped McWane to keep its lower-cost and more efficient manufacturing option to Star open. F. 1590 (the MDA allowed McWane to get "tons in the plant."). As a result of the MDA, customers benefitted from lower prices for Domestic Fittings. F. 1086, 1089. The ALJ also found that the MDA benefitted customers because it was Sigma's *only viable option* for providing its customers with Domestic Fittings during the ARRA period. F. 1582. Sigma's entry thus benefitted its customers, including ACIPCO, Groeniger, E.J. Prescott, and Consolidated Pipe, because they preferred to buy Domestic Fittings from Sigma rather than McWane in part because they believed Sigma provided faster delivery due to its larger network of distribution yards and larger sales force. F. 1584, 1586-1589; JX 659 (Swalley, Dep. 275-276).

The legitimate procompetitive effects of McWane's rebate letter and MDA prohibit a finding against McWane. Courts have routinely recognized that even true exclusive dealing arrangements may have procompetitive effects, including promoting supplier efficiency by creating a stable customer base and consistent volume. *See Standard Oil*, 337 U.S. at 306-307 ("From the seller's point of view, requirements contracts may make possible the substantial reduction of selling expenses."); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373

F.3d 57, 65-66 (1st Cir. 2004) ("Because such agreements can achieve legitimate economic benefits (reduced cost, stable long-term supply, predictable prices), no presumption against such agreements exists today.").

McWane's rebate letter and the MDA would only constitute anticompetitive behavior if they had anti-competitive consequences, such as a reduction in output or a supra-competitive rise in prices, that outweighed the pro-competitive benefits. *Stop & Shop*, 373 F.3d at 65-66; *See CDC Techs.*, 186 F.3d at 80-81. However, the ALJ did not find (and Complaint Counsel presented no evidence) that the rebate letter or MDA caused Domestic Fittings output to fall or prices to rise to supra-competitive levels. Initial Dec. at 349 ("Rather than proffer expert analysis of economic data to support the conspiracy allegations, Complaint Counsel chose simply to attach Respondent's expert analysis.").

VI. THE PROPOSED INJUNCTIVE REMEDY IS MOOT

The proposed injunctive remedy is moot because the both the rebate policy and the MDA were in effect for less than a year and ended over 2 years ago. The rebate policy and the MDA occurred against the backdrop of ARRA, a short-term stimulus statute which expired in February 2010 (and its funding disbursements ended later that year). F. 1032, 1035-38. Thus, ARRA funding is no longer available and its effects are long past. F. 1173. McWane's rebate policy and the MDA were modified or terminated less than a year after implementation. Tatman, Tr. 707-709; F. 1595-96. By January 2010, McWane changed its policy to eliminate the provision that distributors "may" forego shipments for "up to 12 weeks." Tatman, Tr. 707-709. The ALJ determined that the MDA was only in effect from September 2009 until August 2010. F. 1596.

The ALJ did also not find that any purported harm caused by McWane's rebate policy or the MDA was either ongoing or likely to recur. Initial Dec. 445-47. Specifically, there are no Findings addressing any purported current or ongoing impacts on competition or consumers.

Further, the ALJ specifically found that Star clearly entered, quickly and successfully, and its share of overall Domestic Fittings sales grew steadily month after month and year after year. F. 1396-97, 1134, 1140, 1143-1144. Star's Vice President testified that the company was on pace for its best year yet in 2012. Even if Star had been excluded—and clearly, it was not—there was never any injury to competition or consumers because Star was a less efficient, higher cost competitor than McWane—and its prices were thus routinely higher. Because ARRA is no longer in effect and the ALJ did not find that either the rebate policy or the MDA was ongoing or likely to recur, there is nothing to enjoin.

Under Article III, injunctive relief is only appropriate where the plaintiff shows "that he is under threat of suffering 'injury in fact' that is *concrete* and *particularized*" and "the threat must be actual and imminent, not conjectural or hypothetical[.]" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011) ("plaintiffs no longer employed by Wal-Mart lack standing to seek injunctive or declaratory relief against its employment practices"); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983) (past injury at hands of police did not entitle plaintiff to enjoin future police practices). The mere possibility that past conduct *might* occur again is insufficient. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (plaintiff seeking injunctive relief required to show likelihood of harm); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). The same equitable considerations that govern federal courts should apply to the present action. *See United States v. Uniroyal, Inc.*, 300 F. Supp. 84, 88 (S.D.N.Y. 1969) (where "the activity of the kind complained of by the Government has ceased" and "no substantial basis has been established by credible evidence that there is any danger of recurrent violation ...there is no warrant for injunctive relief.").

Under the circumstances presented in the case at hand—wholly past events, no current harm and no threat of recurrence—injunctive relief is simply unavailable.

CONCLUSION

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

Dated: June 4, 2013

Respectfully submitted,

/s/ Joseph A. Ostoyich

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

PROPOSED ORDER

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

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

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

ORDERED:

The Commission

_____, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 4, 2013, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

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

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

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

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