REDACTED

CASE NO. 14-11363

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

**McWane, Inc.,
Petitioner,**

v.

**Federal Trade Commission,
Respondent.**

**PETITION FOR REVIEW OF A DECISION OF THE
FEDERAL TRADE COMMISSION
Case No. 9351**

BRIEF OF PETITIONER MCWANE, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, 11th Cir. R. 26.1-1, 11th Cir. R. 26.1-2, and 11th Cir. R. 26.1-3, Petitioner McWane, Inc. certifies that the following persons or entities are known to have an interest in the outcome of this appeal:

Ansaldo, J. Alexander – FTC attorney

Armstrong, Norman A. – FTC attorney

Baker Botts, LLP – McWane attorneys

Baker, Joseph R. – FTC attorney

Balbach, Jeanine – FTC attorney

Bloom, Michael – FTC attorney

Brill, Julie – Commissioner, FTC

Brock, Thomas H. – FTC attorney

Castillo, Monica M. – FTC attorney

Chappell, Hon. D. Michael – Chief Administrative Law Judge

Choi, Heather Souder – McWane attorney

Daly, John F. – FTC Deputy General Counsel

Federal Trade Commission – Respondent in this Court

Feinstein, Deborah L. – FTC attorney

Green, Geoffrey M. – FTC attorney

Hassi, Edward D. – FTC attorney

Holleran, Linda – FTC attorney

Ikeda, Mika – FTC attorney

Koons, Erik T. – McWane attorney

Lavery, William C. – McWane attorney

Mann, Andrew K. – FTC attorney

Maynard Cooper & Gale, PC – McWane attorneys

McSweeny, Terrell – Commissioner, FTC

McWane, Inc. – Respondent below; Petitioner in this Court

Metzler, Theodore (Jack) – FTC attorney

Normann, Parker – McWane expert

Nuechterlein, Jonathan – FTC General Counsel

Ohlhausen, Maureen – Commissioner, FTC

Ostoyich, Joseph A. – McWane attorney

Ramirez, Edith – Chairwoman, FTC

Rosch, J. Thomas – Former Commissioner, FTC

Schumann, Laurence – FTC expert

Sigma Corporation – Respondent in Related Proceeding Below

Star Pipe Products, Ltd. – Respondent in Proceedings Below

Thagard, Thomas – McWane attorney

Truitt, J. Alan – McWane attorney

Wright, Joshua – Commissioner, FTC

Pursuant to Fed. R. App. P. 26.1, Petitioner states that no corporation owns 10% or more of its stock.

/s/ Joseph A. Ostoyich
Joseph A. Ostoyich
Counsel for Petitioner McWane, Inc.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner McWane, Inc. ("McWane") respectfully requests oral argument. The Federal Trade Commission ("FTC" or "Commission") erred when—over a vigorous dissent—it 1) contravened mainstream antitrust law and this Court's own precedent by defining a relevant market for antitrust purposes without reliance on expert testimony and without analysis of the cross-elasticity of demand; 2) adjudged that McWane could be held liable for monopoly exclusion when it is undisputed that a competitor successfully entered the alleged relevant market; and 3) assumed harm to competition despite a clear record that the allegedly excluded competitor was a significantly less efficient producer than McWane and sold product at higher prices.

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GLOSSARY

The following abbreviations and citation forms are used in this brief:

Op. - The Commission's Opinion dated January 30, 2014 (Doc. 289, 290)

Dissenting Op. - Dissenting Statement of Commissioner Joshua D. Wright (Doc. 289, 290)

Initial Dec. - Administrative Law Judge's May 8, 2013 Initial Decision (Doc. 264)

F.# - Administrative Law Judge's Findings of Fact (Doc. 264)

Complaint – Administrative Complaint filed January 4, 2012 (Doc. 1)

Answer – McWane, Inc.'s Answer to Complaint (Doc. 9)

JX# - Joint Exhibit

CX# - Complaint Counsel Exhibit

RX# - Respondent Exhibit

Tr. – Transcript of Trial Testimony before the Administrative Law Judge

Dep. – Deposition Testimony

JURISDICTIONAL STATEMENT

McWane petitions for review of the FTC's final order on the lone remaining count of its Complaint. The FTC initiated this case in January 2012 with a seven-count Complaint against McWane under FTC Act Section 5, 15 U.S.C. § 45(a), (b). Following a full trial before the FTC's administrative law judge in the fall of 2012, the Commission dismissed six of its seven counts in its final order on January 30, 2014.

This Court has jurisdiction to review the lone remaining count. 15 U.S.C. § 45(c), (d). McWane carries on business in this Circuit: it is headquartered in Birmingham, Alabama, and regularly sells fittings and other products in this Circuit.[1] On March 28, 2014, McWane filed a written petition to this Court praying that the FTC's January 30, 2014 final order be set aside. The FTC filed the record of the proceedings with this Court on May 12, 2014.

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[1] F.15; Opinion of the Commission, *In the Matter of McWane, Inc.*, FTC Docket No. 9351 (Jan. 30, 2014) (Doc. 289, 290) ("Op."), at 5.

ISSUES PRESENTED

1. Did the FTC err as a matter of law when it defined the relevant market for antitrust purposes as "domestic fittings" without relying on a cross-elasticity of demand test or any other economic test, particularly where, as here, there is strong evidence that McWane's domestic fittings faced competition from—and lost significant market share to—a flood of cheap and entirely interchangeable imported fittings from China, India, Korea, Brazil, and Mexico that now account for more than 80% of all fittings sold in the U.S.? *See Brown Shoe Co. v. United States,* 370 U.S. 294, 325, 82 S. Ct. 1502, 1523-24 (1962) ("The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it."); *Gulf States Reorganization Group, Inc. v. Nucor Corp*., 721 F.3d 1281, 1286 (11th Cir. 2013); *Bailey v. Allgas, Inc*., 284 F.3d 1237, 1246-47 (11th Cir. 2002); *Am. Key Corp. v. Cole Nat'l Corp*., 762 F.2d 1569, 1579 (11th Cir. 1985).

2. Did the FTC err as a matter of law when it concluded that McWane monopolized the purported relevant "domestic" fittings market despite a competitor "[c]learly" and successfully expanding into domestic fittings production and steadily increasing its sales and market share at McWane's expense? *See Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S.

209, 226, 113 S. Ct. 2578, 2589 (1993); *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997).

3. Did the FTC err when it ignored (a) the requirements of its own precedent in *In re Beltone Electronics Corp*., 100 F.T.C. 68, 209 (1982), and other mainstream antitrust caselaw and the ALJ's undisputed finding that Star Pipe was a "less efficient supplier" than McWane whose "costs were higher, and therefore its prices were higher," and, instead, *assumed* harm to competition despite a "dearth of record evidence" (and not a single customer complaint about McWane's domestic fittings prices), and (b) McWane's evidence that its rebates were pro-competitive and kept the last remaining dedicated domestic fittings foundry—and the most-efficient and lowest-cost producer—alive? *Brooke Group*, 509 U.S. at 226, 113 S. Ct. at 2589-90; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68, 104 S. Ct. 2731, 2740 (1984); *see Spanish Broadcasting Sys. of Fla., Inc. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1076 (11th Cir. 2004); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1570 (11th Cir. 1991).

STATEMENT OF THE CASE

This is a monopoly case in which the alleged monopolist's domestic ductile iron pipe fittings *lost substantial market share* over the last decade to a flood of cheap imports that now account for more than 80% of all U.S. fittings sales.

It is an exclusion case in which *no one was excluded*: the Commission's own ALJ found that an importer of these commodity ductile iron pipe fittings, Star Pipe Products Ltd. ("Star"), "[c]learly" expanded into domestic fittings sales. Star did so quickly (in less than six months) and without buying or building a foundry (it contracted with multiple third-party jobber foundries to make product for it). Star was extraordinarily successful: it grabbed more than {X} new customers, including more than {X} exclusive customers, and 5% of all domestic sales in its first year with product.[2] The next year, it doubled its share to 10%. The year after that, Star was on pace "to have its best year ever for Domestic Fittings sales."[3]

This is supposedly a case in which competition was harmed and consumers injured, but *not a single actual customer complained* at trial about McWane's domestic fittings prices. Instead, the ALJ found that McWane was a more-efficient

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[2] Information contained in brackets throughout this brief is confidential information that was presented to the ALJ, FTC, and McWane's external counsel *in camera*. This information was redacted from the public versions of the ALJ initial decision and FTC final opinion and order. McWane, its competitors, and the public were not privy to this confidential information. Pursuant to this Court's order on June 26, 2014, McWane is filing this brief under seal. McWane has simultaneously filed a redacted version of this brief that removes all confidential, *in camera* information.

[3] F.1144.

producer and that its prices were the same or lower than Star's in virtually every state across the country.

It is an antitrust case, but it is entirely *lacking in economic support*. The government's economic expert conceded he *did not empirically test* any of the critical allegations in the case: not the alleged market definition, the alleged monopoly power, the alleged exclusion, or the alleged consumer harm. Instead, he offered only a lay opinion that is patently insufficient to serve as the basis for the government's monopolization claim.

A. Course of Proceedings Below

The FTC issued the Complaint in this matter against McWane, Star, and Sigma Corporation ("Sigma") on January 4, 2012.[4] In February and May of 2012, Star and Sigma entered consent decrees with the FTC without any admission of wrongdoing. The FTC then proceeded to trial solely against McWane.

The Complaint alleged that McWane, Sigma, and Star violated FTC Act Section 5, 15 U.S.C. § 45, by entering an agreement in 2008 to fix the prices for ductile iron pipe fittings, engaging in price signaling, and facilitating coordination by submitting tons-shipped data to an accounting firm for an industry trade association.[5] The Complaint also alleged that McWane violated Section 5 by

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[4] *See* Complaint (Doc. 1).

[5] *See* Complaint, Counts 1-3.

monopolizing a small portion of the overall fittings market—the purported market for "Domestic DIPF."[6] It alleged McWane did so by issuing a rebate letter in September 2009 that excluded Star from the alleged domestic fittings market and by entering into a Master Distribution Agreement ("MDA") with Sigma that excluded Sigma from the alleged domestic fittings market. McWane filed its Answer on February 2, 2012, denying the allegations in the Complaint.[7]

The administrative hearing on the FTC's claims began on September 4, 2012, and lasted until November 2, 2012. The ALJ issued his 464-page Initial Decision on May 8, 2013.[8] After extensive fact-finding, the ALJ squarely rejected Counts 1-3 and found "ample credible and probative evidence," including "substantial, probative economic evidence," that McWane independently and repeatedly underpriced Sigma and Star with "extremely aggressive" prices designed "to beat prices being offered by its competitors, which is a procompetitive purpose."[9] In contrast, he found the FTC's case a "complex web" of "weak," "noneconomic," "unverified," "unpersuasive," and "strained" inferences piled upon inferences, and a "daisy chain of assumptions" and "pure

[6] *See* Complaint, Counts 4-7.

[7] *See* Answer (Doc. 9).

[8] Initial Decision of Chief Administrative Law Judge D. Michael Chappell, *In the Matter of McWane, Inc.*, No. 9351, at 1 (May 8, 2013) (Doc. 264) ("Initial Dec.").

[9] Initial Dec. 292 & n.23, 349, 284; F.959.

speculation."[10] On Counts 4-7 (monopolization), however, the ALJ recommended a ruling in Complaint Counsel's favor.[11] Both McWane and Complaint Counsel appealed the ALJ's decision to the Commission.[12]

The Commission issued its final opinion and order on January 30, 2014.[13] The order dismissed six of the seven counts against McWane.[14] The lone remaining count (Count 6), which is the subject of this appeal, concerned the allegation that McWane had monopolized a domestic fittings market by using a rebate letter to exclude Star. The decision sharply split the Commission.[15] Commissioner Wright strongly disagreed with the Commission's conclusion in a 52-page dissent. He found "undisputed evidence that Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter."[16] Star's 100-plus customers in its first year with domestic product and its quick and steady growth to 10% of all domestic fittings sales were "especially probative" because it was an "observable fact that contravenes the precise point—

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[10] Initial Dec. 322 n.25, 286, 338, 339, 347, 305-07, 300, 279, 342, 350.

[11] Initial Dec. at 9-10.

[12] Op. at 2. Complaint Counsel appealed the ALJ's decision dismissing Counts 1 and 2 but did not appeal the dismissal of Count 3, which "alleged that McWane invited Sigma and Star to collude to fix prices." Op. at 2 n.1.

[13] Op. at 41.

[14] Op. at 2.

[15] Op. at 2.

[16] Dissenting Statement of Commissioner Joshua D. Wright, *In the Matter of McWane, Inc. et al.*, Docket No. 9351 at 45-47 (Feb. 6, 2014).

exclusion—Complaint Counsel [was] seeking to establish."[17] He found that the government did not meet its burden of proving Star was excluded and that its "very weak" "indirect evidence" confirmed that McWane's rebate letter "had almost no impact on Star's ability to enter and grow its business, which, under the case law, strongly counsels against holding that McWane's conduct was exclusionary."[18]

Commissioner Wright also dissented from the majority's assumption of harm to competition. He noted that it was "well-accepted" that exclusive dealing and other vertical restraints "rarely harm competition and often benefit consumers."[19] As a result, long-standing federal court caselaw and the Commission's own prior administrative precedents—which the majority ignored—mandate that the Commission "must tread lightly" before condemning rebates as exclusionary and must require "'reasonably clear evidence of probable overall competitive harm.'"[20] He also noted that the government's economic expert "d[id] not endeavor" to test the theory of competitive harm with any economic analysis and that the government's economist flatly ignored facts contradicting his theory (that Star was denied a sufficient volume of sales to be viable) and demonstrating that real-world suppliers, like Sigma and Star itself, were entirely viable—and,

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[17] *Id*. at 46.

[18] *Id*. at 46-47.

[19] *Id*. at 2-3.

[20] *Id*. (quoting *In re Beltone Elec. Corp.*, 100 F.T.C. 68, 209 (1982)).

indeed, successful participants with substantial market share—despite not owning a foundry anywhere in the world. The FTC thus "fail[ed] totally to establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*."[21]

Former FTC Commissioner Rosch had previously leveled the same criticisms in dissents that he issued at both the pleading and summary judgment stages of the case.[22]

McWane filed a timely petition seeking review of the Commission's order on the lone remaining Count to this Court on March 28, 2014.

B. Statement of the Facts

This appeal involves the manufacture and sale of ductile iron pipe fittings ("DIPF" or "fittings"). McWane is a fourth-generation, family-run company headquartered in Birmingham, Alabama, that produces fittings, primarily for municipal water suppliers, that make up the nation's water infrastructure.[23]

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[21] *Id*. at 4-6, 25.

[22] Former Commissioner Rosch found Count 6 defective as a matter of law under well-settled caselaw "blessing the conduct that the complaints charge as exclusive dealing." Statement of Commissioner J. Thomas Rosch, Concurring in Part and Dissenting in Part, Administrative Complaint, FTC File No. 101 0080, at 1 (Jan. 4, 2012) (Doc. 1). Commission Rosch also explained that "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." 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, at 5-6 (Aug. 9, 2012) (Doc. 184).

[23] *See* Op. at 1, 5-6.

1. All Fittings Are Interchangeable Commodities, and a Flood of Cheap Imports Decimated the Domestic Industry and McWane's U.S. Foundries.

Fittings are commodity products that are functionally interchangeable regardless of who produces them. All fittings are "produced to American Water Works Association ('AWWA') standards and can be made anywhere in the world."[24] "Any fitting that meets AWWA specifications is functionally interchangeable with other fittings made to the standard, regardless of the country of origin."[25]

Historically, fittings were made by a number of American companies, including McWane, U.S. Pipe and Foundry Co., Griffin Pipe Products Co., and American Cast Iron Pipe Co. ("ACIPCO"), which all offered full-lines of domestic fittings.[26] Beginning in the 1980s, however, importers began bringing cheap fittings in from multiple countries, including China, India, Korea, Brazil, and Mexico. Imported fittings suppliers, such as Star and Sigma, "began to successfully convert End Users' specifications for domestically produced Fittings to open specifications"—known as "spec-flipping."[27] "Spec-flipping" accelerated in the 1990s, and by the early 2000s, importers had successfully opened the vast

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[24] Op. at 5.

[25] Op. at 5.

[26] Op. at 5.

[27] F.463.

majority of municipal and private specifications to foreign product, and imported fittings had grown to be a substantial share of the fittings purchased in the United States.[28]

The flood of cheap imported fittings decimated domestic production of fittings. In 2003, the International Trade Commission unanimously ruled that cheap imports from China had caused "market disruption" and "material injury" to the domestic fittings manufacturers.[29] Within a few years, the only other major U.S. manufacturers, U.S. Pipe, Griffin, and ACIPCO, exited the 3-24" domestic fittings segment entirely, leaving McWane as the last dedicated fittings manufacturer in the United States.[30]

Between 2003 and 2008, the percentage of fittings sold that were domestically produced tumbled from roughly 70% to 15-20%, and imports continue to dominate the market today.[31] The ALJ found that virtually all specifications are now open, and the vast majority of fittings purchased (roughly 80-85%) are now imports.[32]

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[28] *See* F.463.

[29] F.469-71; F.471 ("In December 2003, the ITC found that imported Fittings manufactured in China were materially injuring the domestic Fittings producers in the United States, but the President declined to impose the recommended tariff.").

[30] Op. at 5; F.472-76.

[31] F.464; *see* F.1029.

[32] F.1029, 1031; Initial Dec. at 373. The remaining domestic fittings demand is almost entirely based on the preferences of municipal engineers for domestic product, whether out of patriotism

(*Footnote continued on next page*)

Until 2005, McWane produced fittings at two domestic foundries—one in Anniston, Alabama, and the other in Tyler, Texas.[33] But the flood of cheap imported fittings eventually took its toll on McWane. In order to continue to compete in the fittings market, McWane was forced to open a foundry in China and close its Tyler, Texas foundry because of unsustainably low production levels.[34] McWane's Union Foundry in Alabama was the last dedicated fittings foundry in the United States and was operating at roughly 30% of its capacity.[35]

Star and Sigma were the two most successful importers capitalizing on this shift in demand toward cheap foreign fittings. Both companies went from start-up importers in the mid-1980s to significant players by 2011. By that time, Star had obtained {X}% of the overall fittings market, and Sigma accounted for another {X}%.[36] Sigma and Star do not own or operate foundries anywhere in the world.

(*Footnote continued from previous page*)
or a desire to support American steelworkers, and can easily be flipped. Laws, too, change and very, very few specifications are domestic-only by law today and account for a *de minimis* portion of overall fittings sales. For example, Pennsylvania law requires the purchase of domestic product on certain projects, but it accounts for only a very small portion of all specifications—and that is usually not a "requirement" at all, but has 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 (based on availability and price). *See* RX 712A (Normann Rep. at 28-30); RX 741 (no state, including Pennsylvania, purchased exclusively domestic fittings).

[33] Op. at 5.

[34] F.477-79; Op. at 5.

[35] F.476-479; F.930-933; Tatman, Tr. 960.

[36] F.356. A number of smaller importers also sell in the United States, including Serampore, Metalfit, NAPAC, and NACIP. F.169, 176-78, 186.

Instead, they buy fittings from a number of third-party jobber foundries in China, India, Mexico, and Korea and consider themselves only "virtual manufactur[ers]."[37]

The government conceded that McWane did not have monopoly power over all fittings and that its domestic fittings accounted for only a very small portion of all fittings sold in recent years, roughly 15-20%.[38]

2. The American Recovery and Reinvestment Act.

In February 2009, Congress enacted the American Recovery and Reinvestment Act ("ARRA").[39] ARRA was a stimulus program aimed at helping American businesses, like McWane, increase employment and production. ARRA aimed to jump-start "shovel-ready" waterworks infrastructure projects with low-interest federal financing for jobs using domestic products and domestic workers.[40] ARRA was specifically designed to be short-term—all projects were required to be under contract by February 2010, 12 months after ARRA's passage.[41]

ARRA contained a number of statutory waivers permitting assistance-recipients to buy imported product, and the Environmental Protection Agency

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[37] Op. at 6.

[38] *See* F.356; F.1029-1031.

[39] Op. at 7.

[40] *See* F.524-27.

[41] F.1032; F.525

("EPA") granted multiple blanket nationwide waivers and multiple project-specific waivers. For example, ARRA contained three types of blanket waivers permitting imported fittings to be used when it was in the public interest, when the cost differential with domestic fittings hit certain levels, or when domestic fittings were not available.[42] The EPA, which had 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.[43] 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.[44] And as the ALJ found, fittings "typically comprise [only] five (5) percent or less of the total cost of a typical waterworks project."[45] 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.[46]

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[42] F.531.

[43] RX 727; Schumann, Tr. 4577-4581; RX 728; Schumann, Tr. 4585-4586.

[44] F.535-36.

[45] F.536.

[46] F.530, 532; CX 1592, CX 1590 & CX 1591 (waivers).

The vast majority of waterworks projects during this time remained private jobs with no federal funding involved, and only a small portion of all waterworks projects implicated ARRA. Moreover, because the vast majority of "domestic" specifications, even during the ARRA period, were based on preference, domestic and imported fittings regularly competed to win the jobs.[47] For example, Star's bid logs contained dozens of examples of domestic bids on ARRA jobs that ended up going with imports.[48]

In reality, ARRA did little to stem the tide of imported fittings. Imported fittings continued to outsell domestic fittings more than two-to-one during the brief ARRA period, and they increased even more after ARRA's expiration.[49]

3. Star "Clearly" and Successfully Expanded into Domestic Fittings.

Star sought to take advantage of ARRA, but it did not want to incur the expense and risk of buying or building its own foundry.[50] Instead, shortly after ARRA was passed in February 2009, Star decided to be a "virtual manufacturer" of domestic fittings.[51] Star knew from its import success that a few dozen fittings

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[47] Schumann, Tr. 4535-36, 4634-35; RX 712A (Normann Rep. at 28-30).

[48] *See* McCutcheon, Tr. 2602, 2632-2634; CX 2294.

[49] *See* F.1029-1031.

[50] F.1097-99.

[51] F.1098, 1409-10; Initial Dec. at 400.

accounted for the vast majority of volume sold,[52] and it quickly commissioned low-cost patterns from China and hired six different third-party jobber foundries in the U.S. to make those fittings.[53] By June 2009, Star announced at a trade show that it would shortly begin selling domestic fittings.[54]

a. McWane's Short-Term and Weakly-Worded Rebate Letter Was "More Bark Than Bite."

When McWane learned about Star's June 2009 announcement at the trade show that it would begin selling domestic fittings, it was concerned that that Star would "cherrypick" the core of its remaining domestic fittings business by making only the top few dozen fittings that account for roughly 80% of all fittings sold—just as Star, Sigma, and other importers had done when they entered with cheap imports.[55] That development would have been devastating to McWane's Union Foundry, which was limping along at 30% utilization, and could not run at lower rates and still make fittings efficiently enough to compete with cheap foreign imports.[56] McWane was concerned that Union Foundry was at risk of being driven

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[52] *See* Op. at 5.

[53] F.1409, 1101-06; Initial Dec. 382.

[54] F.1095.

[55] Initial Dec. at 239, 415; F.306-307.

[56] *See* F.476-479; F.930-933; Tatman, Tr. 960.

from the market, and its employees laid off, just like U.S. Pipe, Griffin Pipe, ACIPCO, and McWane's Tyler foundry before it.[57]

McWane thus sent a letter to its distributors on September 22, 2009, announcing a change to its rebate policy.[58] McWane would continue to offer its traditional 8% rebate for domestic fitting purchases, but the rebates would be paid quarterly and customers would have to choose each quarter whether they wanted to support McWane with sufficient business to keep Union Foundry alive or whether they wanted to support Star and let Union Foundry disappear.[59] Customers, who elected not to support McWane's line of domestic fittings fully, "may" forgo unpaid rebates for domestic fittings "or" shipment of domestic fittings "for up to 12 weeks."[60] McWane's letter, purposely written with the words "may" and "or," was "a weak stance" and really a plea for help from its far more powerful distributors.[61]

McWane's rebate letter, which was in effect for only four months, encouraged distributors to purchase McWane's fittings exclusively, unless

[57] *See* F.1146.

[58] *See* Op. at 9; F.1173.

[59] *See* F.1173, 1175.

[60] F.1173.

[61] F.1178 (Rick Tatman compared McWane's power relative to the power of the large waterworks distributors by stating that "I know when I write this letter that I'm a Chihuahua barking at Rottweiler and I know who has the power here.").

McWane fittings were not available or McWane did not produce the fittings the consumer utilized.[62] "Because its last remaining domestic foundry had high inventory levels and insufficient demand," McWane designed its rebate policy "to persuade McWane's customers to support McWane's full line of Domestic Fittings" in an effort to simply keep the Alabama foundry open.[63] Nonetheless, McWane's rebate letter was ineffective, and McWane changed its policy in early 2010 to eliminate the provision that customers may forego shipments for up to 12 weeks.[64]

b. McWane's Rebate Letter Did Not Impede Star's "Very Impressive" Market Success.

McWane's rebate letter was disregarded by dozens and dozens of customers right from the start.[65] First, there were "at least 630 separate waterworks Distributors in the United States," and only a fraction of those distributors (approximately 187) purchased any domestic fittings from McWane.[66] Thus, the vast majority of distributors did not care at all about McWane's rebate letter.

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[62] *See* Op. at 9; F.1173.

[63] Initial Dec. at 415.

[64] Tatman, Tr. at 707-09.

[65] *See, e.g.*, Tatman, Tr. 714-718; Webb, Tr. 2798-2800; Thees, Tr. 3111-3113; Morton, Tr. 2860-2862; Schumann, Tr. 4440.

[66] *See* F. 375; Schumann, Tr. 4440.

Second, dozens and dozens of the distributors who received the letter and wanted to bid domestic disregarded the letter and bought domestic from Star.

Shortly *after* McWane's rebate letter was issued, Star made its first commercial sales of domestic fittings—and it never looked back.[67] Star's President, Dan McCutcheon, upon learning of McWane's rebate letter in September 2009, immediately commented that "[McWane] tried this 'loyalty' program before and we beat them down."[68] Star was right—since its entry in September 2009, it "sold Domestic Fittings every month and every year" and has grown its sales of domestic fittings month after month.[69]

Star's significant success continued. In its first 12 months with domestic product, Star added an average of more than two new domestic fittings customers per week. By the end of 2010, it had over {X} individual customers (nearly as many as McWane's 187 customers), including over {X} exclusive customers.[70] Some of the largest national waterworks distributors, including HD Supply and Ferguson, and the largest regional waterworks distributors, such as WinWholesale, Dana Kepner, Illinois Meter, and E.J. Prescott, each purchased domestic fittings

[67] F.1127.

[68] CX 9.

[69] F.1127-28, 1134-35.

[70] *See* F.1141-42; Normann, Tr. 5042-43; *see also* F.1138-40.

from Star in 2010 and 2011.[71] In 2010, TDG, a large buying cooperative with more than two dozen multi-branch distributor members across the country, selected Star as its domestic fittings vendor partner.[72] In February 2010, Star's President enthusiastically responded to news that the company had won all of the domestic fittings business of Dana Kepner, a large regional waterworks distributor, with "yahoooooo!!"[73] In April 2010, a Star sales manager celebrated yet another new customer, MainLine, a large regional waterworks distributor, and noted that "[McWane's] program seems to be all bark and no bite."[74] McWane's expert, Dr. Normann, found that Star's top-selling items were the same as McWane's and Star was not relegated to oddball fittings.[75] He also found that Star successfully won domestic business across the country in 2010 and its domestic fittings accounted for more than 10% of all domestic fitting sales in a number of states.[76]

In fact, Star was doing so well that in September 2010 it touted on its website that it was celebrating its "1st Year of Domestic Products" and was "very proud of what we have been able to achieve in such a short period, and we could

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[71] Initial Dec. at 390-97.

[72] F.1351.

[73] CX 585.

[74] RX 280; McCutcheon, Tr. 2615-2617.

[75] RX 754B.

[76] RX 764.

not have done it without the support and backing of our customer partners."[77] Indeed, it is no surprise that Star was celebrating its success, having gone from 0% to 5% share that first year, capturing approximately ${X} million in domestic sales.[78]

Star's success continued in 2011 and 2012. Star again grabbed more than {X} customers and {$X} in sales and its share nearly doubled to "almost 10% in 2011."[79] The company's success continued in 2012. Star's Executive Vice President testified that it was "on pace, at the time of trial, to have its best year ever for Domestic Fittings sales in 2012."[80]

As the ALJ found—and Star's success confirmed—"McWane had little or no ability to dictate terms to the Distributors, who held significant market power over it."[81] McWane's customers were at all times free to purchase domestic fittings from other suppliers, and as the ALJ found, dozens and dozens of McWane's customers did in fact purchase domestic fittings from Star.[82]

If Star's success was not as great as it hoped (or, more accurately, as the government seems to want), that was due to many reasons unrelated to McWane's

[77] RX 572.

[78] Initial Dec. at 382; F.1141, 1143; Op. at 10.

[79] Initial Dec. at 374; F.1143; Normann, Tr. 5042-43.

[80] Initial Dec. at 382; F.1144.

[81] F.1178.

[82] Initial Dec. at 382.

rebate letter. The ALJ determined that the distributors who did not purchase from Star had legitimate concerns about Star's ability to supply a full-line of domestic fittings in a timely manner, concerns that were completely unrelated to McWane's rebate letter.[83] There were numerous "reasons for Distributors choosing not to purchase Domestic Fittings from Star other than McWane's [rebate letter], including concerns about Star's inventory, the quality of fittings produced at several different foundries, and the timeliness of delivery."[84] For example, Ferguson, one of the largest waterworks distributors in the country, testified that it "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," which was the "leading component in Ferguson's decision to not purchase Domestic Fittings from Star."[85] Illinois Meter 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."[86] HD Supply "had concerns" about Star's lack of track record with domestic fittings

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[83] Initial Dec. at 399-400.

[84] Initial Dec. at 399-400.

[85] F.1272-75

[86] F.1359-61.

which it believed posed "risks to HD Supply's ability to service its own customers."[87]

Not a single customer testified that it was prevented from purchasing domestic fittings from Star because of McWane's rebate letter. Complaint Counsel's expert could not identify a single customer—out of the "at least 630 separate waterworks Distributors in the United States"[88]—who wanted to purchase domestic fittings from Star but was unable to because of McWane's letter.[89]

The ALJ specifically found that "many Distributors bought Domestic Fittings from Star and that McWane "never withheld rebates from or refused to sell to these Distributors."[90] In fact, McWane enforced the rebate policy only once,[91] and the result was that the customer, Hajoca, simply switched its business to Star and became Star's largest customer.

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[87] F.1253-55; Initial Dec. at 392.

[88] F.375

[89] Schumann, Tr. 4440.

[90] Initial Dec. at 403; *see also* F.1250, 1257, 1277-79, 1320, 1344.

[91] McWane did withhold a single quarter's rebate of $3,563 from Hajoca Corporation – a billion dollar company – in 2009. F.1224, 1226. Except for that single quarter, "McWane continued to pay rebates to Hajoca as Hajoca's Lansdale branch purchased McWane Domestic Fittings, even though its Tulsa branch purchased Star Domestic Fittings." F.1227. The FTC Opinion states that "Distributor Hajoca Corporation provides one example." Op. at 9. It provides the *only* example. McWane never enforced the rebate program against any other distributor. *See, e.g.*, F.1278-79 (Although Ferguson purchased Domestic Fittings from Star, "McWane has never refused to pay Ferguson a rebate it earned on Domestic Fittings purchased from McWane" and "McWane has never threatened not to sell Domestic Fittings to Ferguson.").

c. Star Was a Less-Efficient and Higher-Priced Producer of Domestic Fittings.

While the virtual manufacturing approach allowed Star to quickly enter the market, Star's business decision to contract fittings from six different foundries was very inefficient, and Star thus had higher manufacturing and transportation costs than McWane.[92] As the ALJ determined, "[r]ather than shipping finished goods directly to a customer or distribution yard, Star's process necessitated raw castings from six locations across the country being shipped" to Star's Houston facility for finishing into fittings.[93] The third-party foundries used less specialized and less efficient equipment, produced smaller batch sizes, and had increased logistical costs associated with inventory, finishing, and freight.[94] Third-party foundries also have higher labor costs compared to dedicated fittings foundries because jobber foundries use a less efficient and non-specialized labor force.[95] Each of the jobber foundries added a {X}% mark-up to cover costs and profit plus

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[92] F.1114-1118; Op. at 10-11; *see also* Initial Dec. at 411 (Star was "a less efficient supplier of domestic Fittings than McWane because of its use of multiple jobber factories, rather than its own, dedicated foundry, like McWane.").

[93] F.1117.

[94] F.1410.

[95] F.1412.

an additional {X}% for shipping.[96] Additionally, Star had less control over inventory levels and a reduced ability to expedite customer orders.[97]

Star's successful entry also had little effect on the price of fittings. The ALJ found that Star "failed to price at a discount to McWane" and that "the presence of Star in the Domestic Fittings market in various states did not result in lower prices."[98] In fact, Star's average price for domestic fittings was higher than McWane's in 28 states, and approximately the same in the remaining states.[99] 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."[100] As expert testimony at trial confirmed, "McWane's Domestic Fittings prices were essentially flat, even during the ARRA period."[101]

C. Standard of Review

This Court reviews the Commission's legal conclusions, and its application of facts to law, *de novo*. *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1213 (11th Cir. 2012). This Court may only accept the Commission's legal rulings if they are

[96] F.1411-13.

[97] F.1410.

[98] F.1089-90.

[99] *See* F.1089-90; RX 712B at 69-70, Fig. 27.

[100] F.1086.

[101] *See* Initial Dec. at 380.

consistent with this Court's precedent, *see Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065-66 (11th Cir. 2005), and may only accept the Commission's findings of fact if they are "supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.;'" *Polypore Int'l,* 686 F.3d at 1213 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 459 (1951)). In conducting its review, this Court cannot turn a blind eye to the ALJ's fact findings. Indeed, this Circuit has long held that "[w]e must take into account, however, evidence that fairly detracts from the Commission's findings." *Equifax Inc. v. FTC*, 678 F.2d 1047, 1052 (11th Cir. 1982) (citing *Universal Camera*, 340 U.S. at 488, 71 S. Ct. at 464). This Court has observed that it should "examine the FTC's findings more closely where they differ from those of the ALJ." *Schering-Plough Corp.*, 402 F.3d at 1062.

SUMMARY OF THE ARGUMENT

The Commission's finding that McWane's short-term and modest rebate letter violated Section 5 of the FTC Act is flatly inconsistent with mainstream antitrust law. The Commission's majority opinion ruled that a separate relevant market exists for domestic fittings and that McWane's rebate program was anticompetitive because, the majority believed, Star did not gain as large a market share as Star had hoped it would obtain. The FTC reached this conclusion despite the ALJ's findings that: (1) 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, including McWane, to the brink of extinction; (2) Star "[c]learly" succeeded in expanding into virtual manufacturing of domestic fittings quickly and effectively in roughly six months between Spring and Fall 2009, with {X-plus} domestic customers—including {X} exclusive customers—going from zero to almost 10% share in less than two years; and (3) McWane was more "efficient" than Star, which had "higher" costs, required additional transportation costs, and thus led Star to often charge "higher" prices than McWane. The Commission erred.

First, the initial step in an antitrust analysis is to define the relevant market—a complex analysis that this Court has held should involve expert testimony and evaluation of the cross-elasticity of demand, particularly where, as here, there is strong evidence that McWane's domestic fittings faced competition from—and lost significant market share to—a flood of cheap and entirely interchangeable imported fittings. The Commission did not engage in such a rigorous analysis and instead concluded, based on cherry-picked lay evidence and an observation of the prices of domestic fittings, that a separate market existed for domestic fittings. In doing so, the majority disregarded powerful contradictory evidence that cut the other way, including ample evidence that imported fittings successfully competed for—and won—the vast majority of jobs over the past decade, and utterly failed to perform any elasticity test or any other economic test to determine the appropriate product market definition.

Second, the Commission erred as a matter of law when it concluded that McWane monopolized the alleged domestic fittings market by excluding Star via its rebate letter. As well-settled case law holds, competitor Star's successful entry into the production of domestic fittings affirmatively disproves any allegations that McWane exercised monopoly power and is dispositive here. Thus, the ALJ's undisputed 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 and win a substantial share of all jobs across the country—mandates the conclusion that McWane did not (and could not) exercise monopoly power.

Third, the antitrust laws are designed to protect competition, not "inefficient rivals." It was undisputed that Star was less efficient than McWane and frequently charged higher prices than McWane. Here, the Commission did not show harm to competition as a whole, or—given Star's remarkable success—even a single less-efficient competitor. The majority opinion thus incorrectly contravenes its own prior precedent and well-established, governing case law.

ARGUMENT

The sole count to survive the Commission's review is Complaint Counsel's allegation that McWane's rebate letter violated Section 5 of the FTC Act, 15 U.S.C. § 45 ("Section 5"), which prohibits "[u]nfair methods of competition in or affecting commerce." A violation of Section 5 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."[102] *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704 (1966).[103] A violation of Section 5 may also not be found absent a showing of harm to competition itself. *Rambus, Inc. v. FTC*, 522 F.3d 456, 466-67 (D.C. Cir. 2008); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984). In the case of an alleged exclusive dealing arrangement, this requires "reasonably clear evidence of probable overall competitive harm." *In the Matter of Beltone Elec. Corp.*, 100 F.T.C. 68, *96 (1982). As discussed below, Complaint Counsel failed to satisfy these essential elements, and the Commission's conclusions to the contrary are flawed as a matter of law.

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[102] The Commission conceded that a finding of monopolization under Section 5 of the FTC Act requires the same elements as Section 2 of the Sherman Act, and held that "[a]ccordingly, we rely on case law and other authority applying the Sherman Act for our analysis of the relevant claims." Op. at 13 n.7.

[103] *See also* Op. at 13.

I. The FTC Failed To Establish "Domestic Fittings" Constitute a Separate Relevant Market.

The Commission bears the burden of proving each element of its claim by a preponderance of evidence. Defining the relevant market is the first step in an antitrust analysis, and an antitrust claim fails if the complaining party fails to establish the relevant market. *See Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 721 F.3d 1281, 1287 (11th Cir. 2013); *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246-47 (11th Cir. 2002). The relevant market must include all products that are "reasonably interchangeable by consumers for the same purposes" from a buyer's point of view. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395, 76 S. Ct. 994, 1007 (1956). "To have separate markets, one must find that a significant price increase beyond the competitive level in the A price would neither induce customers of A to buy B instead nor induce B producers to make A." IIA Phillip E. Areeda, et al., *Antitrust Law* ¶ 561 (1995). Here, there was substantial evidence—including a unanimous determination by the ITC and ample testimony from suppliers and customers—that customers did, in fact, shift their purchases from domestic fittings to cheap imported fittings.[104]

Courts have held that a relevant antitrust market must be defined by an economic test in antitrust cases. *See Bailey*, 284 F.3d at 1246 ("Construction of the

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[104] Initial Dec. at 372; F.463-65, 470-71.

relevant market . . . ***must*** be based on expert testimony.") (emphasis added); *American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579 (11th Cir. 1985) ("Construction of a relevant economic market or a showing of monopoly power in that market cannot . . . be based upon lay opinion testimony."). That is particularly critical where, like here, there were ample findings of fact by the ALJ demonstrating that the vast majority of customers have specifications that are open to all fittings, wherever made, and where imported fittings compete with, and in fact dominate, domestic specifications and sales. *See Ky. Speedway, LLC v. Nat'l Ass'n of Stock Car Auto Racing, Inc.*, 588 F.3d 908, 916-19 (6th Cir. 2009); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 436-38 (3d Cir. 1997); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995).

Here, though, it is undisputed that the government's expert economist did no economic test of any of the relevant product markets (or any of the issues in the case).[105] Instead, his opinion was based on his cursory review of cherrypicked documents and testimony and his willful blindness toward strong evidence contradicting his theory. That does not amount to "expert" testimony at all. *See Brooke Group*, 509 U.S. at 242, 113 S. Ct. at 2598 ("Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we

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[105] Initial Dec. at 338 ("Rather than offer its own expert testimony analyzing economic data, Complaint Counsel chose an 'attack-the-other-expert' strategy.").

observed in *Matshushita*, 'expert opinion evidence . . . has little probative value in comparison with the economic factors' that may dictate a particular conclusion") (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 n.19, 106 S. Ct. 1348, 1360 n.19 (1986)). Not surprisingly, then, this Court has repeatedly found such non-expert expert testimony to be insufficient as a matter of law. *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 479 F.3d 1310, 1313 (11th Cir. 2007) (expert testimony with insufficient economic analysis cannot establish the relevant market); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 998 (11th Cir. 1993) (affirming dismissal because relevant market "must be supported by demonstrable empirical evidence"); *see also Menasha Corp. v. News Am. Marketing In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004) (Easterbrook, J.) (holding that expert report based on survey research and "armchair economics" but that contained no "econometric analysis" did not provide sufficient evidence of a market)

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. *U.S. Anchor*, 7 F.3d at 998. Analysis of the cross-elasticity of demand includes consideration of "the responsiveness of the sales of one product to price changes of the other." *Du Pont*, 351 U.S. at 400, 76 S. Ct. at 1010. "[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).

The Commission's only response was that some customers apparently still *prefer* domestic fittings whether out of patriotism or a desire to keep domestic steelworkers employed.[106] The record does not indicate who those customers are; the Commission's economist did not identify them. The strength (or weakness) of these unidentified customers' preferences is unknown; the government's economist did not study them. It is known only that they are a small minority of all purchasers (roughly 15-20%, at the most, as that is the percentage of domestic fittings out of total fittings sales). It is not even known if this small minority of customers purchasing domestic fittings in recent years are the same purchasers each year or whether they are a mix of different customers each year, some of whom vacillate between buying domestic or imported fittings as their preferences change job-by-job. Finally, it is unknown what a proper economic test of the market would show about market definition: although the Commission bears the burden of proving its market definition, its expert performed no economic test of the market at all.

[106] Op. at 5, 14, 40.

The Commission thus did not address, and 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 using any actual data: he did not perform any analysis of the cross-elasticity of demand between domestic and non-domestic fittings, did not properly perform the "small but significant and non-transitory increase in price" ("SSNIP') test, and instead, relied on his admittedly "controversial" hypothesis that *if* he had applied a theory developed for merger cases—not monopoly—cases, it *might* have shown a domestic-only market.[107] But, he conceded, he did not actually run that controversial test with real pricing data.[108]

Instead, the government's economist admitted he relied solely on his vague belief that some customers *prefer* (and specify) domestic, without studying which customers and under what circumstances, and without testing the strength (or weakness) of their preferences. That is not sufficient as a matter of law, particularly where there was ample evidence—which the government's expert did not address at all in forming his opinion—that customers routinely opened their specifications and flipped their purchases from domestic fittings to imports and

[107] *See* Schumann, Tr. 4542, 4569-71.

[108] Schumann, Tr. 4546 ("I did not think in either case I had the data to do it or it was necessary.").

that imports constituted the vast majority of all fittings sold in the United States *even during the ARRA period*.

This Court and other circuits have long held that customer preference alone, and the fact that some customers are, at times, willing to pay more for one product versus another product—even though they are functionally the same—does not mean there is a separate market. *Jacobs*, 626 F.3d at 1337-38 ("Consumer preferences for visco-elastic foam mattresses versus traditional innerspring mattresses, and the costs associated with their sale, may vary widely, may vary little, or may vary not at all. . . . [O]ur precedent makes clear [additional unanswered questions] are crucial to understanding whether a separate market exists."); *LiveUniverse, Inc. v. MySpace, Inc.*, 304 F. App'x 554, 557 (9th Cir. 2008) (no antitrust injury under theory of reduced consumer choice); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 513 (3rd Cir. 1998) ("Interchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively") (internal quotation marks and citation omitted); *McLaughlin Equip. Co. v. Servaas*, No. IP98-127-C-T/K, 2004 WL 1629603, at *18 (S.D. Ind. Feb. 18, 2004) ("a mere preference for a specific manufacturer's brand bus is not sufficient for purposes of establishing a relevant product market."). It only becomes a separate market if sufficient economic evidence, such as a cross-elasticity study, shows a separate demand curve. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1247 (11th Cir. 2002) (affirming summary judgment when the plaintiff's expert in defining the relevant market failed to adequately examine the cross-elasticity of demand); *Am. Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1580 (11th Cir. 1985) ("[The complaining party] was required to introduce evidence of the 'cross elasticity of demand' for these two 'products.'"); *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1025-26 (10th Cir. 2002) (affirming exclusion of expert where he "did not calculate the cross-elasticity of demand to determine which products were substitutes"); *McLaughlin*, 2004 WL 1629603, at *7 (expert testimony was "insufficient to establish the relevant product market" where the expert "did no statistical analysis of the cross-elasticity of price, demand or supply.")

The Commission pointed to evidence of "price differences" between domestic and imported fittings that, it asserted , "confirm that domestic fittings for use in projects with domestic-only specifications are a separate product market."[109] But that is legally wrong. The mere existence of an average price difference between domestic and imported fittings does not confirm a separate product market. *Jacobs*, 626 F.3d at 1337-38 (dismissing complaint based on allegations that price differences created a separate product market: "The allegations that

[109] Op. at 15.

visco-elastic foam mattresses are more expensive than traditional innerspring mattresses and . . . have 'unique attributes' are similarly of little help.").

II. The Commission's Monopolization Claim Fails as a Matter of Law Because Star "Clearly" and Successfully Expanded into Domestic Production.

The Commission's conclusion that McWane monopolized the alleged domestic fittings market is fundamentally flawed as a matter of law.[110] The Commission's sole surviving monopolization claim fully rests on the shoulders of McWane's rebate program. Taking aim at a legitimate, short-term rebate program designed to reward customer loyalty, the Commission attempts to contort a simple rebate policy into an illegal exclusive dealing arrangement. The Commission's efforts, however, fall short of the requirements of the precedent of both this Court and its sister Circuits.

A. McWane's Rebate Policy Was Short-Term on Its Face and Presumptively Lawful.

As an initial matter, even true exclusive dealing arrangements (which, as the ALJ found, McWane's rebate policy was not) are common, procompetitive, and not disfavored by the antitrust laws. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010); *E. Food Servs., Inc. v. Pontifical*

[110] McWane makes no concession that a separate relevant market for domestic fittings exists. In Part II and Part III of its argument, McWane establishes that, even if the FTC's decision that a separate market for domestic fittings exists can be affirmed (it should not), the FTC's Order should still be reversed for the additional, independent reasons discussed in the remainder of this brief.

Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 8 (1st Cir. 2004) ("[E]xclusive dealing contracts are not disfavored by the antitrust laws."). As this Court has observed, "[i]t is well established that a party 'may choose with whom he will do business and with whom he will not do business,' and that this behavior, referred to as 'exclusive dealing,' will not give rise to liability absent a showing of actual competitive injury." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1567 (11th Cir. 1991) (quoting *Constr. Aggregate Transp., Inc. v. Fla. Rock Indus., Inc.*, 710 F.2d 752, 772-73 (11th Cir. 1983)). In fact, "in many circumstances [exclusive dealing arrangements] may be highly efficient . . . and pose no competitive threat at all." *E. Food Servs.*, 357 F.3d at 8.[111] Moreover, 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 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);

[111] A number of courts have commented that competition to become an exclusive supplier "should actually be *encouraged*[,]" *Race Tires*, 614 F.3d at 83 (emphasis in original), as it can result in lower prices because suppliers may be willing to reduce prices in exchange for higher sales volume. *See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 62 (1st Cir. 2004). The Third Circuit in *Race Tires* held that "competition to be an exclusive supplier may constitute 'a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress.'" 614 F.3d at 76 (quoting *Menasha Corp. v. News Am. Marketing In–Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004)).

CDC Techs., Inc. v. IDEXX Labs., Inc., 186 F.3d 74, 81 (2d Cir. 1999) (one year agreement with 60 day term inability clause was not anticompetitive).[112]

McWane's rebate policy lacked the hallmarks of impermissible exclusive dealing and was presumptively legal. McWane's rebate policy—which was only in effect for four months—was completely voluntary, short-term ("for up to 12 weeks"), and easily terminable by the distributor at any time.[113] *See Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1996) ("[T]he FTC and the Supreme Court concluded [in *FTC v. Motion Picture Adver. Serv. Co.*, 344 U.S. 392, 395-96, 73 S. Ct. 361, 363-64 (1953)] that even exclusive dealing contracts are lawful if limited to a year's duration."); *Roland Mach.*, 749 F.2d at 394-95 ("Exclusive-dealing contracts terminable in less than a year are presumptively lawful under section 3."). McWane's rebate letter did not contractually obligate customers to purchase anything from McWane for any period of time. *Omega Envtl., Inc. v. Gilbarco, Inc*., 127 F.3d 1157, 1163 (9th Cir. 1997) ("[T]he short duration and easy terminability of these [exclusivity] agreements negate substantially their potential to foreclose competition."); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) (no

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[112] *See also 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).

[113] F.1173.

foreclosure of a substantial share of the market when the exclusive dealing programs "did not require [customers] to commit to [the defendant] for any specified period of time").

Customers were also free to disregard McWane's rebate letter entirely—and did, in droves. *See Concord Boat*, 207 F.3d at 1059 (discount program was not illegal exclusive dealing agreement when customers "were free to walk away from the discounts at any time, and [customers] in fact switched to [a competitor's product] at various points"). The undisputed evidence reveals that dozens and dozens of McWane's customers started buying Star domestic fittings *after* the rebate program was announced and steadily increased their purchases with no consequence. Only once did McWane even attempt to enforce the rebate program, and that effort completely backfired with the distributor—Hajoca—simply moving its business to Star.[114] Thus, on its face McWane's voluntary, short-term, and procompetitive rebate policy was presumptively lawful.

B. Star's Clear and Successful Entry into the Domestic Fittings Market Precludes a Finding of Monopolization.

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, 81 S. Ct. 623, 628 (1961), which requires that they

[114] Initial Dec. at 390 ("No other Distributor was cut off by McWane after purchasing Domestic Fittings from Star or had its rebate withheld.").

"foreclose so large a percentage of the available . . . outlets that entry into the concentrated market is unreasonably constricted," *E. Food Servs., Inc.*, 357 F.3d at 8, 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, 104 S. Ct. 1551, 1576 (1984) (O'Connor, J., concurring). Thus, **actual entry** of a new competitor or expansion by an existing competitor "precludes a finding that exclusive dealing is an entry barrier of any significance." *Omega Envtl.*, 127 F.3d at 1164; *Sterling Merchandising, Inc. v. Nestle, S.A.*, 656 F.3d 112, 122-23 (1st Cir. 2011) ("that [a competitor's] sales, profits, and market share have increased during the relevant period provides further indication that no antitrust injury exists here."). As Judge Posner explained for the Seventh Circuit, "[i]f there is no exclusion of a significant competitor, the agreement cannot possibly harm competition," as required for a monopolization claim. *Roland*, 749 F.2d at 394.

Star's successful entry into the production of domestic fittings affirmatively disproves any allegations that McWane exercised monopoly power and is dispositive here. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226, 113 S. Ct. 2578, 2589 (1993) ("[W]here new entry is easy . . . summary disposition of the case is appropriate"). The ALJ found that "[c]learly, Star entered the Domestic Fittings market,"[115] and this single, undisputed fact is fatal to the Commission's monopolization claim as a matter of law. In fact, Star not only entered the market but rapidly expanded its business to gain nearly 10% of the market.[116] Shortly after entering domestic production, Star successfully made sales of domestic fittings to more than {X} customers, including more than {X} exclusive customers.[117] The undisputed evidence—taken from Star's own sales records—established that Star had over {$X} in sales of domestic fittings in 2010-2011 alone.[118]

With these sales, Star quickly obtained 5% of the market in its first full year producing domestic fittings and increased its share to nearly 10% of the market in its second year. At the time of trial, Star was on pace "to have its best year ever for Domestic Fittings sales in 2012"—only its third year in the market.[119] Star's rapid success was remarkable, and its "successful entry . . . itself refutes any inference of the existence of monopoly power that might be drawn from [McWane's] market

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[115] Initial Dec. at 382; *see also id.* at 377.

[116] Initial Dec. at 382; F.1042-43; Dissenting Op. at 45 (the "undisputed evidence" establishes that "Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter.").

[117] *See* F.1141-42; Normann, Tr. 5042-43; *see also* F.1138-40.

[118] F.1143; RX 712A (Normann Report) at Appx. 15 (citing Star's sales data). And was Star not relegated to selling only isolated fittings that McWane could not supply: indeed, Star sold the same top 40 most popular fittings McWane sold to dozens of customers. RX 754B, RX 764.

[119] F.1144; Initial Dec. at 377, 382.

share." *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998).

Star's ability to quickly grab more than {X} customers in the year following McWane's September 2009 rebate letter—averaging more than two new customers every single week—also utterly refutes, as a matter of law, any conclusion that Star was frozen out of the market or that its entry was unreasonably constricted. *See Tampa Elec. Co.*, 365 U.S. at 334, 81 S. Ct. at 631; *E. Food Servs.*, 357 F.3d at 8 & n.4. Indeed, Star was internally thrilled with its very impressive success and declared "yahooooo!!"[120]

As Commissioner Wright recognized, McWane's rebate program "had almost no impact on Star's ability to enter and grow its business, which, under the case law, strongly counsels against holding that McWane's conduct was exclusionary."[121] In fact, the FTC's own expert failed 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

[120] McCutcheon Tr. 2612-13; CX585.

[121] Dissenting Op. at 46.

McWane's rebate policy.[122] And every single distributor Complaint Counsel called at trial (or in deposition) did in fact purchase domestic fittings from Star.[123]

In a closely analogous case, *Omega Environmental*, the Ninth Circuit rejected a monopolization claim when the "undisputed" evidence showed that the competitor's "market share ha[d] increased since its entry by at least one third (from approximately 6% to 8%)." 127 F.3d at 1164. Here, Star's increase — from 0% to 10% in less than two years—was even more dramatic. All of that growth was accomplished *after* McWane's September 2009 rebate letter—which Star's own witnesses testified was "all bark and no bite."[124] "If anything, the undisputed facts — that [McWane's] own market share [was] decreasing, that [Star's] market share [was] steadily on the rise, and that consumer prices have not increased—evidence the . . . conclusion" that no impermissible antitrust practices occurred. *See Sterling Merchandising*, 656 F.3d at 125.[125]

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[122] F.375; Schumann Tr. 4440.

[123] Initial Dec. at 390-97.

[124] McCutcheon, Tr. 2615-2617; RX 280.

[125] Even true exclusive dealing is typically procompetitive and by penalizing McWane's rebate letter here, the FTC is chilling legitimate competition. As a matter of policy, the case law must set and enforce rules with clear boundaries to provide businesses with sufficient guidance so that they are able to craft business strategies, such as rebate policies, that comply with the law and do not subject businesses to later vicissitudes of litigation brought by angry competitors. *Brooke Group*, 509 U.S. at 223, 113 S. Ct. at 2588 (any harm to a competitor from above-cost rebates simply "represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting.").

Tellingly, the FTC's opinion addresses none of this extensive and well-established case authority. Instead, the FTC relies on two inapposite decisions to support the unremarkable proposition that monopolization does not require that "all competition be removed from the market."[126] But in those cases, the penetration of the market by competitors had been "paltry." *United States v. Dentsply Int'l*, 399 F.3d 181, 189 (3d Cir. 2005). In *Dentsply*, the competitors held "minuscule" market shares that had not grown despite "years" of efforts to expand. *Id.* at 193. And in *ZF Meritor*, the court expressly observed the plaintiffs' market share was steadily *decreasing* in the face of exclusivity agreements and that "no significant external supplier ha[d] entered the market for the last twenty years." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 286, 284-85 (3d Cir. 2012). Those specific circumstances—a decline in the plaintiffs' market share and the inability of competitors to actually enter and expand—allowed the "rare" conclusion that "exclusive dealing would pose a threat to competition." *Id.* at 284-85.

Neither *Dentsply* nor *ZF Meritor* involved a competitor's actual and rapid expansion—with the commensurate *increase* in market share—heralded by Star. While total foreclosure may not be required, it stretches the bounds of logic to conclude, as the FTC did, that a market is "severely restrict[ed]" when a

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[126] Op. at 29.

competitor is able to go from 0 to 10% market share in a matter of months.[127] The FTC has identified no case where monopolization was found in the face of such rapid entry and expansion by a competitor, and a review of the pertinent case law reveals none.

C. When It Could Not Establish Market Foreclosure, the FTC Retreated to a New—and Unsupported—Standard.

Unable to grapple with Star's "growth and market share," the Commission attempted to escape those objective markers as "not the relevant benchmark."[128] Instead, the Commission advanced the unadorned proposition that "[t]he appropriate comparison is growth that would have occurred absent [McWane's rebate program]."[129] The Commission offers no authority for this speculative standard. And both this Court and the First Circuit have expressly rejected such an amorphous standard.[130]

Instead, the Commission cites only the vague, self-serving, after-the-fact testimony of the allegedly excluded competitor itself that it believes it would have

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[127] Op. at 29.

[128] Op. at 29.

[129] Op. at 29.

[130] Again the government proffered no evidence at all of what Star's domestic sales would have been absent McWane's rebate letter—its expert did not study the question—and ample testimony from customers themselves established that their purchases would have been the same regardless of the rebate letter. *See supra* at 23-24.

sold more.[131] But that is insufficient as a matter of law. This Court need look no further than the speculative "evidence" relied on by the Commission here to see the failings of an "if only" standard. Rather than offer and rely on economic evidence and expert testimony about the alleged impact of McWane's rebate program, the FTC simply relied on Star's self-serving testimony "estimat[ing] that it would have had {$X} in sales of domestic fittings in 2010, rising to {$X} in 2011, if McWane had not implemented" its rebate program.[132] In *Levine v. Central Florida Medical Affiliates, Inc.*, this Court expressly rejected a competitor's argument that—but for the alleged activity—he would have "been able to 'score a touchdown'" by making more profits. 72 F.3d 1538, 1551 (11th Cir. 1996) (evaluating anticompetitive effects under Section 1 of the Sherman Act). As this Court explained, "The antitrust laws are intended to protect competition, not competitors, and we will not depart from that purpose in order to improve [the plaintiff doctor's] income standings in the physician league or help him win the Super Bowl of remuneration." *Id.* (internal citations omitted).

The First Circuit similarly rejected the "if only" standard in *Sterling Merchandising*. In *Sterling Merchandising*, the plaintiff competitor brought an antitrust action premised, in part, on the defendant's exclusivity agreement. 656

[131] Op. at 25.

[132] Op. at 25.

F.3d at 123 n.5. "Despite its increased sales, profits, and market share, [the plaintiff] argue[d] it suffered damages because it would have earned far more were it not for [the defendant's] exclusive agreements." *Id.* The Court was unpersuaded and found that "these agreements are often efficient and pro-competitive" and "are not illegal in this case." *Id.* The court concluded, "In a market devoid of any exclusivity agreements, [the plaintiff] may perform better, but [the plaintiff] is not entitled to such a market." *Id.*

Like the *Sterling Merchandising* plaintiff, Star may hypothesize that it would have performed better in a market of its own choosing, "but [Star] is not entitled to such a market." *See* 656 F.3d at 123 n.5; *see also Sterling Merch., Inc. v. Nestle, S.A.*, 724 F. Supp. 2d 254, 269 (D.P.R. 2010), *aff'd*, 656 F.3d 112 ("[Plaintiff] argues as if it had a right to an ideal relationship with [distributors]…. Antitrust law does not pretend to provide such a guarantee, rather a competitive marketplace."). *Cf. Tops Markets*, 142 F.3d at 96 (rejecting affidavit testimony that discussed the "market share and the competitive advantages that could have resulted in *potentially* higher prices, but significantly did not allege that prices were *actually* higher").

The undisputed evidence of Star's actual successful entry and steady expansion stands in stark contrast to the speculation and daisy chain of unsupported inferences cited by the Commission. Given Star's quick entry and rapid expansion, the only "reasonable inference" is that McWane "lack[ed] monopoly power," *Tops Markets*, 142 F.3d at 99, and Star's successful entry and expansion "precludes a finding that that exclusive dealing is an entry barrier of any significance." *Omega Envtl.*, 127 F.3d at 1164. Absent such a finding, no claim of monopolization against McWane can survive. The Commission's opinion to the contrary fails as a matter of law.

III. McWane Did Not Harm Competition.

A. The Antitrust Laws Protect Competition, Not Inefficient Competitors.

"The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market." *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 458, 113 S. Ct. 884, 891-92 (1993). The antitrust laws thus protect *competition*, not "inefficient rival[s]." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68, 104 S. Ct. 2731, 2740 (1984). "[A]n 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." *Id.*; *see also Brooke Group*, 509 U.S. at 224, 113 S. Ct. at 2588 ("It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'").

Larger firms often have an efficiency advantage over smaller firms because of economies of scale, but it "is not a function of the antitrust laws" to "equip [a smaller firm] with [a larger firm's] competitive advantage." *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1573 (11th Cir. 1991). "The antitrust laws are not intended to support artificially firms that cannot effectively compete on their own." *Id.*; *see also Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976) ("The Sherman Act is not a subsidy for inefficiency."). Applying these principles, this Court has refused to categorically equate harm to a competitor with harm to competition, *Spanish Broadcasting*, 376 F.3d at 1076. The FTC Opinion in this matter incorrectly equates "harm" to a *single, less-efficient competitor*, with harm to the competitive process.

The FTC has also held that even true exclusive deals have recognized pro-competitive benefits and do not pose antitrust risks unless there is "reasonably clear evidence of probable overall competitive harm." *Beltone*, 100 F.T.C. at *96. Given these pro-competitive benefits, the Commission was "reluctant, other things being equal, to condemn the practice of exclusive dealing. That conclusion is strengthened by the fact that the restraints under scrutiny here have produced no demonstrable adverse effects on interbrand competition." *Id.* at *101.[133]

[133] Commissioner Wright's dissent chastised the majority for failing to follow (or even address) *Beltone*. *See* Dissenting Op. at 26 n.36.

B. Star Produced Fittings Less Efficiently than McWane.

Star had the financial reserves and borrowing ability to purchase a foundry and convert it to produce fittings,[134] but it chose instead to quickly begin production of fittings in the United States by working with independent foundries. Star contracted with six independent foundries to produce fittings.[135] By contrast, McWane produced fittings at its own dedicated foundry in Anniston, Alabama.[136]

As the FTC observed, "[w]ithout its own foundry, Star's costs were higher, and therefore its prices were higher" which "hindered Star's ability to compete effectively."[137] The ALJ found that it was more efficient for a company to produce fittings at its own foundry (as McWane did) than it was for a company to have castings produced by multiple independent foundries and then transported at substantial expense to yet another location for finishing into fittings (as Star did).[138] "The cost of sourcing from independent foundries is higher because they are less specialized, which means they have less efficient equipment, run smaller batch sizes, and have higher labor costs" and "charge a markup on each fitting."[139] Star incurred additional inefficiencies and higher costs from dealing with six different

[134] F.1406.

[135] Op. at 25.

[136] F.15, 18.

[137] Initial Dec. at 411.

[138] F.1409-1420.

[139] Op. at 10.

foundries and shipping castings from the foundries to a separate plant for finishing.[140] In addition to Star's higher costs and higher prices, distributors had concerns about Star's inventory, quality, and timeliness.[141]

Star's inefficiencies impacted the prices it charged customers.[142] McWane's expert, Dr. Normann, conducted a detailed analysis of prices and found McWane's prices were lower than Star's in the vast majority of states.[143] The ALJ likewise found that McWane's prices for domestic fittings were lower than Star's in virtually every state.[144] The government's expert did no analyses of prices at all, but did not disagree.[145] 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 transportation costs. Indeed, the very premise of the Commission's assumption of harm – that Star was denied the minimum scale necessary to be viable because it was deprived of sufficient volume to justify buying its own foundry – is contradicted by ample facts in the record demonstrating that owning a foundry is not required to obtain viable

[140] Op. at 25.

[141] Initial Dec. at 399-400.

[142] Initial Dec. at 411.

[143] Normann, Tr. 4768 ("in the majority of states McWane actually lowered their published multipliers, they reduced them").

[144] F.1089 ("There are numerous states where Star's average price is higher than McWane's"); Normann, Tr. 4979-4980; RX 712B at 68-69, Figure 27.

[145] F.1089-90.

scale or compete effectively. Indeed, Star itself and Sigma both successfully grew their import fittings businesses without owning a foundry anywhere in the world, and Star's domestic success – without owning a foundry – underscores the viability of selling with a "virtual manufacturing" model. As Commissioner Wright correctly observed, "neither Complaint Counsel nor the Commission provides an analytical link between Complaint Counsel's foreclosure analysis and competitive harm"[146] and the Commission's holding is thus inconsistent with the well-established principle that the antitrust laws are designed to protect *competition*, not less-efficient competitors.

C. The Commission Disregarded the Procompetitive Effects of McWane's Rebate Letter

McWane was the most efficient domestic fittings producer and its average prices were lower than Star's, or the same, in virtually all states. In contrast, Star's manufacturing and transportation costs were substantially higher than McWane's because it chose in early 2009 – long before McWane's September 2009 rebate letter – to expand into domestic fittings by contracting with six jobber foundries, rather than to buy and operate its own foundry.

Despite McWane's cost advantage relative to Star's domestic fittings, its foundry was producing at only a fraction of its capacity because its business had

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[146] Dissenting Op. at 35.

been decimated by a flood of cheap imports over the years. Imports had driven all other domestic fittings manufacturers out of the market and McWane had already closed its Tyler, Texas foundry and laid off its employees. McWane's rebate letter was designed to be a weak means of incentivizing its customers not to let Star cherry-pick McWane's Union Foundry into oblivion, so that McWane could keep the foundry open (and its workforce employed) and customers could continue to benefit from the lower prices offered by the most efficient domestic foundry. Competition and consumers were benefited by McWane's lower domestic fittings prices – and not a single customer complained about McWane's prices at trial.

Competition is injured only when consumers are deprived of lower prices, greater product availability, or a higher quality product. *See Spanish Broadcasting*, 376 F.3d at 1079; *see also Indeck Energy Servs.,* 250 F.3d at 977 (to state an injury to competition, the complaining party must allege "that exclusion of the competitor from the marketplace results in the elimination of a superior product or a lower-cost alternative"). But that is not what happened here. Instead, the record is clear that Star's prices were ***higher*** than McWane's in most states.

Competition is not injured by the "exclusion" of a less efficient, higher priced competitor. Nor is it injured whenever a producer fails to achieve the level of success it believes it might have enjoyed absent allegedly anticompetitive conduct. *Levine*, 72 F.3d at 1551; *see also Spanish Broadcasting*, 376 F.3d at 1076

("[T]he use of unfair means resulting in the substitution of one competitor for another without more does not violate the antitrust laws.") (internal quotation marks omitted). This Court has accordingly refused to categorically equate harm to a competitor with harm to competition. *See, e.g. Levine*, 72 F.3d at 1551.

The FTC's ruling is merely an effort to put its thumb on the scale and help a less efficient competitor; it is not an effort to preserve competition—competition was vigorous throughout this period. In its opinion, the FTC focused on Star's entry into the purported market for domestic fittings and the effect of McWane's rebate letter on Star's efforts to enter that alleged market. But the ALJ did not find that McWane's policies deprived consumers of lower prices or otherwise harmed competition. As Commissioner Wright observed, "Complaint Counsel fails totally to establish, as it must under the antitrust laws, that McWane's conduct harmed *competition*,"[147] and "[t]he record is clear that there is no such proof."[148] "Complaint Counsel [made] no effort to establish harm to competition directly, such as by demonstrating that McWane's conduct had a deleterious effect upon price or output. . . ."[149] The record is completely devoid of customer complaints about McWane's prices, and Complaint Counsel's expert economist could not

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[147] Dissenting Op. at 4-5.

[148] Dissenting Op. at 6.

[149] Dissenting Op. at 5.

identify a single distributor who wanted to purchase domestic fittings from Star but could not because of the rebate letter.[150] Additionally, McWane's expert economist found no evidence of reduced output or increased prices.[151]

The FTC said that McWane's rebate program impacted the price of fittings,[152] but the ALJ did not make such a finding. The FTC instead relied on e-mails among McWane employees indicating their beliefs that Star's entry into the purported market for domestic fittings **could** theoretically affect the price of those fittings.[153] However, in reality, the ALJ noted that Star often charged more for fittings than McWane and did not force McWane to lower its prices.[154] The FTC also said that consumers may have been harmed by being denied "the ability to make a meaningful choice regarding domestic fittings suppliers,"[155] but this Court has rejected the suggestion that the "limiting [of] alternatives" is an injury cognizable under antitrust laws. *Spanish Broadcasting*, 376 F.3d at 1079.

Left with no factual support for its ruling, the FTC was forced to rely on a series of hypotheticals about what might have happened if Star was even more successful : *If* McWane did not have its rebate program, then Star might have been

[150] Schumann, Tr. 4440.

[151] F.958.

[152] Op. at 27.

[153] Op. at 27 (citing F.1148-49, 1151-53).

[154] F.1089-90.

[155] Op. at 28.

able to gain a larger market share. *If* Star had been able to gain a larger market share, then Star *might* have purchased its own foundry (or, more accurately, several foundries). *If* Star had purchased its own foundries, then it *might* have been able to produce fittings more efficiently. *If* Star had been able to produce fittings more efficiently, then it *might* have been able to charge lower prices than McWane. *If* Star had been able to charge lower prices, then it *might* have done so.

This chain of speculation is further undermined by the facts. Star never purchased an American foundry, and the record contains no evidence of how many foundries Star would have needed to make a full line of fittings, whether those hypothetical foundries were for sale and at what price, or whether Star—which had never owned or operated a foundry anywhere in the world—could have run those foundries efficiently enough to lower its manufacturing and transportation costs to the level of McWane's Union Foundry. The ALJ **did not find** that customers would likely enjoy lower prices if Star acquired its own foundry. But the ALJ **did find** that Star had the resources to purchase a foundry,[156] even with McWane's rebate program in place, but simply made a business decision not to make an investment that could have improved its efficiency. The antitrust laws cannot be used to accommodate Star's risk aversion by holding McWane responsible or by restricting its ongoing ability to compete against Star.

[156] F.1406.

The FTC's reasoning that antitrust laws can be used to restrain a company's ability to compete in the hopes that less efficient competitors will gain a larger market share and then improve their efficiency in the future is also inconsistent with this Court's precedent. This Court's *Seagood* decision involved an antitrust claim brought by fish suppliers against a larger fish supplier, LJS, and a food distributor, M-B. M-B delivered fish to restaurants for LJS and developed a highly efficient method of distribution. 924 F.2d at 1559. LJS allegedly discouraged M-B from delivering fish for LJS's competitors, *id.* at 1563, forcing those competitors to use less efficient distribution services, *id.* at 1571. This Court rejected arguments that LJS violated antitrust laws when it discouraged M-B from providing its efficient delivery services to LJS's competitors because "[t]he antitrust laws are not intended to support artificially firms that cannot effectively compete on their own." *Id.* at 1573. It was of no concern to this Court that LJS's competitors may have been able to operate more efficiently and offer lower prices if they could have taken advantage of M-B's services. "It is a harsh reality that when competition occurs, some win and some lose." *Id.* Based on this Court's *Seagood* decision, the FTC's holding in this case was error.

The FTC found McWane liable without finding any actual or likely harm to competition. Its Order should be reversed.

CONCLUSION

The Commission's opinion is fatally flawed as a matter of law and conflicts with precedent of this Court and sister Circuits. Because each of these deficiencies is fatal to the Commission's opinion, this Court should reverse the order of the Commission and dismiss the final count against McWane.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation by the word count of the word-processing system used to prepare the brief. This brief contains 13,248 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of June, 2014, a true and correct copy of the foregoing Brief of Petitioner McWane, Inc. was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record.

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