

No. 14-11363

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

McWANE, INC.,  
Defendant-Appellant,

v.

FEDERAL TRADE COMMISSION,  
Plaintiff-Appellee.

---

ON APPEAL FROM THE FEDERAL TRADE COMMISSION

---

**BRIEF FOR AMICUS CURIAE UNITED STEEL, PAPER AND  
FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED  
INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION IN  
SUPPORT OF DEFENDANT-APPELLANT URGING REVERSAL**

---

Richard P. Rouco  
Quinn, Connor, Weaver,  
Davies, & Rouco, LLP  
2700 Highway 280, Ste. 380E  
Birmingham, AL 35223  
(205) 870-9989

David Balto  
Law offices Of David Balto  
1325 G Street, N.W.,  
Suite 500  
Washington, D.C. 20005  
(202) 577-5424

*Attorneys for Amicus Curiae USW*

**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, Amicus Curiae United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC certifies that the following persons or entities are known to have an interest in the outcome of this appeal:

United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC

Richard Brean- USW General Counsel

Daniel Kovalik- USW Senior Associate General Counsel

David Balto- Counsel to the USW

Matthew Lane- Counsel to the USW

Richard P. Rouco- Counsel to the USW

Quinn, Connor, Weaver, Davies & Rouco- Counsel to the USW

Pursuant to 11<sup>th</sup> Cir. R. 26.1-1, the Counsel for the USW certify that they believe the certificate of interested persons contained in Petitioner McWane's initial brief is (with the exception of the names and entities noted above) complete.

Pursuant to Fed. R. App. P. 26.1, the USW states that it is not a corporate entity and issues no stock.

**TABLE OF CONTENTS**

STATEMENT OF AMICUS CURIAE INTERESTS .....1

STATEMENT OF THE ISSUES.....2

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....5

I. The preservation of a domestic skilled workforce is an important and procompetitive goal essential to US industry.....5

    A. Antitrust law should recognize that retaining a skilled U.S. workforce is vital to competition and the continued prosperity of the U.S. economy.....5

    B. Foreign dumping and subsidies are practices that harm U.S. competitiveness, labor and the economy.....9

    C. U.S. companies have a right to come up with creative means of protecting domestic jobs.....12

II. The Commission failed to properly analyze McWane’s actions as a procompetitive response to preserve a domestic skilled workforce in a market severely weakened by foreign dumping.....15

    A. McWane was the last company to own a domestic foundry that produced a full line of ductile iron pipe fittings after cheap imports and foreign dumping ruined the domestic market.....15

    B. Star was likely entering the market simply to capitalize on the short term ARRA program and was unlikely to produce meaningful long term domestic skilled labor employment.....19

    C. Star’s entry without a serious full line commitment to domestic production was likely to cause irreversible disruption to domestic industry without producing a sufficient countervailing benefit to competition.....21

CONCLUSION.....22

## TABLE OF CITATIONS

### Cases Cited

<i>Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.</i> , 441 U.S. 1 (1979).....	5
<i>Data Gen. Corp. v. Grumman Sys. Support Corp.</i> , 36 F.3d 1147 (1st Cir. 1994).....	5
<i>F. Hoffmann-La Roche Ltd v. Empagran SA</i> , 542 US 155 (2004).....	6
<i>FTC v. Indiana Federation of Dentists</i> , 476 US 447 (1986).....	5
<i>National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.</i> , 468 US 85 (1984).....	5
<i>US v. Dentsply Intern., Inc.</i> , 399 F. 3d 181 (3rd Cir. 2005).....	5

### Other Authorities

David Madland & Karla Walter, <i>Unions are Good for the American Economy</i> , CENTER FOR AMERICAN PROGRESS ACTION FUND (February 18, 2009), <a href="http://www.americanprogressaction.org/issues/labor/news/2009/02/18/5597/unions-are-good-for-the-american-economy-2/">http://www.americanprogressaction.org/issues/labor/news/2009/02/18/5597/unions-are-good-for-the-american-economy-2/</a> .....	6, 9
Greg Mastel, Andrew Szamosszegi, John Magnus & Lawrence Chimerine, <i>Enforcing the Rules 13</i> (2007), <i>available at</i> <a href="http://www.aamfg.org/files/Enforcing-the-Rules.pdf">http://www.aamfg.org/files/Enforcing-the-Rules.pdf</a> .....	9, 10
Import Injury FAQs, UNITED STATES INTERNATIONAL TRADE COMMISSION, <a href="http://usitc.gov/faqs/import_injury_faws.htm">http://usitc.gov/faqs/import_injury_faws.htm</a> .....	4, 9
LORI KLETZER, <i>JOB LOSS FROM IMPORTS: MEASURING THE COSTS</i> (2001).....	10-12
Michael Porter, <i>The Competitive Advantages of Nations</i> 71 (1990).....	8

Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶111 (2006).....13

Richard M. Steuer, *Jobs and Antitrust*, 23 *Antitrust Magazine* 3, (July 15, 2009),  
*available at* <http://ssrn.com/abstract=2175116>.....passim

Robert Ginsburg, *What Plant Closings Cost a Community: The Hard Data*, *Labor  
Research Review*: Vol. 1: No. 22, Article 3 (1994), *available at*  
<http://digitalcommons.ilr.cornell.edu/lrr/vol1/iss22/3>.....12

## **STATEMENT OF AMICUS CURIAE INTERESTS<sup>1</sup>**

This brief is filed with the consent of all the parties.

The United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (“USW”) is the largest industrial union in the United States and Canada. USW represents the majority of workers in the American steel, aluminum, copper, tire, paper and petroleum refining industries. Included among the USW’s many jurisdictions are iron foundries, including foundries producing the iron pipe fittings at issue in this case. At present, USW represents iron foundry workers employed by both Petitioner McWane and a number of other employers.

USW is keenly aware of unfair dumping by foreign producers that has cost the jobs of tens of thousands of its members and other American workers across the broad range of its represented industries. USW has worked to preserve American jobs by successfully participating in anti-dumping litigation before both the U.S. Department of Commerce and the U.S. International Trade Commission involving flat roll and tubular steel, tires, and a variety of paper products. USW supports the legal position of Petitioner McWane because it is aimed at preserving the skilled American workforce, both union and non-union, necessary to the

---

<sup>1</sup> Under Rule 29(c)(5) of the Federal Rules of Appellate Procedure, amici certify that (1) no party to this action, nor their counsel, authored this brief in whole or in part; (2) no party or party’s counsel contributed money to fund preparing or submitting this brief; and (3) no person other than amici curiae contributed money that was intended to fund preparing or submitting this brief.

survival of America's ability to continue to manufacture ductile iron pipe fittings in the face of unfair overseas competition.

### **STATEMENT OF THE ISSUES**

1. Whether the FTC erred in failing to recognize that sustaining a robust workforce in America to compete against workforces of other nations, especially a market harmed by dumping, is a cognizable procompetitive justification for a practice under the U.S. antitrust laws.

## **SUMMARY OF THE ARGUMENT**

A workforce with the proper skills and training is essential to a country's efficient and competitive production of goods and services. Such a workforce represents a pool of talent that any competitor can draw on in order to compete with its rivals, whether the rivals are domestic or abroad. The more skilled the national talent pool, the better the country is able to compete in the global market for high quality goods and services. Companies relying on a U.S. workforce will be more potent competitors if that workforce remains robust, which ultimately is to the benefit of consumers in the U.S. and the world over.

Labor markets can naturally shift from country to country or industry to industry for efficiency reasons, however, they can also be destroyed through mechanisms that exist outside of a healthy and competitive market. For example, a foreign producer of a good may be shielded from price competition and charge monopoly prices within their home country. These artificially high prices will lower consumption beyond the profit maximizing point of production. Such a foreign producer may find it economical to produce goods in excess of what their home country's demand will support for a number of reasons including to reach efficient scale. This producer will then unload, or "dump," their excess goods in a foreign market at a reduced price. This is an example of product dumping. The United States International Trade Commission is tasked with investigating whether



“U.S. industry is materially injured or threatened with material injury” due to the deleterious practices of dumping or subsidization. Import Injury FAQs, UNITED STATES INTERNATIONAL TRADE COMMISSION, [http://usitc.gov/faqs/import\\_injury\\_faws.htm](http://usitc.gov/faqs/import_injury_faws.htm) (last visited June 25, 2014).

U.S. industry can be destroyed by foreign companies who are unfairly competing with cheap products priced below what would naturally exist in a competitive market. When a domestic industry can no longer compete it is put out of business and its investments in fixed capital and skilled labor are lost. Consumers are also harmed. During a dumping or subsidy period prices are artificially lowered and consumers may enjoy some benefit from this. However, once this period ends prices are no longer artificially lowered and the market returns to a competitive state but with far fewer competitors. Capital investments that have been lost, such as skilled labor, become difficult to rebuild which create new barriers to entry. Both producers and consumers of countries that are the victims of dumping or subsidies are thus harmed.

Companies that are committed to retaining efficient domestic production, and thus increased competition, must have the freedom to experiment with solutions to preserve our national skilled workforce from foreign threats. As such, the Federal Trade Commission (“Commission”) was in error for failing to recognize the preservation of skilled jobs in Anniston, Alabama as a procompetitive justification.

## ARGUMENT

In an antitrust case analyzed under the rule of reason, if a plaintiff successfully demonstrates that a challenged activity harms competition, then the burden shifts to the defendant to show that the action “promotes a sufficiently pro-competitive objective.” *US v. Dentsply Intern., Inc.*, 399 F. 3d 181, 196 (3rd Cir. 2005). The Supreme Court has identified such procompetitive justifications as those that, for example: create “efficiencies in the operation of a market or the provision of goods and services,” *FTC v. Indiana Federation of Dentists*, 476 US 447, 459 (1986); are “designed to ‘increase economic efficiency and render markets more, rather than less, competitive,’” *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (quoting *United States v. United States Gypsum Co.*, 438 U. S. 422, 441 n. 16 (1978)); and “widen consumer choice,” *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 US 85, 102 (1984). “In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare.” *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994).

### **I. The preservation of a domestic skilled workforce is an important and procompetitive goal essential to US industry**

#### **A. Antitrust law should recognize that retaining a skilled U.S. workforce is vital to competition and the continued prosperity of the U.S. economy**

A skilled workforce is the backbone of the U.S. economy. A company needs a team of workers with the appropriate skills in order to compete with its rivals, no matter the product or service it sells, and consumers need jobs in order to purchase the goods and services companies sell. This creates a virtuous cycle that is essential to competition. The loss of jobs “can be as harmful to America’s overall economic welfare as inflated prices.” Richard M. Steuer, *Jobs and Antitrust*, 23 *Antitrust Magazine* 3, 98 (July 15, 2009), *available at* <http://ssrn.com/abstract=2175116>. “Maximizing consumer welfare for consumers who are out of work is an empty promise” and “[m]aximizing producer welfare for producers faced with shrinking consumer demand is equally hollow.” *Id.* Workers’ prosperity is a significant factor in the health of the U.S. economy. David Madland & Karla Walter, *Unions are Good for the American Economy*, CENTER FOR AMERICAN PROGRESS ACTION FUND (February 18, 2009), <http://www.americanprogressaction.org/issues/labor/news/2009/02/18/5597/unions-are-good-for-the-american-economy-2/>. “Consumer activity accounts for roughly 70 percent of our nation’s economy.” *Id.* Yet “[i]ncome for the median working age household fell by about \$2,000 between 2000 and 2007,” shrinking the amount of money available for U.S. consumption. *Id.*

Antitrust law serves domestic interests. *See e.g. F. Hoffmann-La Roche Ltd v. Empagran SA*, 542 US 155 (2004). The economy, on the other hand, is global.

“Competition today is not simply among companies . . . , but among nations to attract more production and jobs.” Steuer, *supra*, at 98. This competition for production and jobs becomes the basis for competition between companies. “American producers continue to depend far more on domestic wages than on exports to drive consumption.” *Id.* There can be no competition without consumption. “[T]he growth of America’s economic welfare,” which drives consumption, “depends heavily on domestic jobs.” *Id.* Because economic welfare and consumer welfare are closely intertwined, competition law must take into account its impacts on domestic economy. Therefore, each nation’s antitrust laws have a responsibility “to help expand job growth and avoid aggravating unemployment” in its own country. *Id.* Following these principles does not mean that the U.S. is resorting to protectionism. The key is to “sustain efficient domestic jobs.” *Id.* at 99. This simply means “afford[ing] the correct consideration to jobs in performing antitrust analysis.” *Id.*

Domestic employment offers other benefits to competition as well. Companies compete with each other to hire talented individuals and then they compete with each other to give these individuals the training necessary to produce the products and services demanded by consumers. Employees often move between companies and take their education and training with them to apply to new tasks and new positions. This cross pollination of employees allows companies to continue to

innovate and compete effectively. Companies also compete to retain their most talented workers by offering promotions, raises, and increased benefits. The opportunities for advancement encourage workers to learn new skills and improve their existing ones. These are all signs of a healthy economy. However, if rivals have to eliminate their workforce then there is no pool of skilled labor to draw from in order for this cross pollination to occur. In addition, there is no longer risk for existing employees to be hired away, which reduces the incentive to reward talented workers. This in turn reduces workers' incentives to improve while also lowering their ability to consume. Even worse, the lack of a pool of existing skilled workers can make it cost prohibitive for a new entry because new companies will have to train a brand new workforce from scratch.

Professor Michael Porter has stated that one of the four determinants of national advantage is factor conditions, such as the skilled labor or infrastructure necessary to compete. Michael Porter, *The Competitive Advantages of Nations* 71 (1990). Most factor conditions “must be developed over time through investment.” *Id.* at 77. Advanced factors, such as skilled labor, are more significant for competitive advantage because they are scarcer and require sustained investment in human and physical capital. *See Id.* at 77-78. For example, both educators and education facilities are required to produce skilled labor.

Workers who have steady employment can become more efficient through both experience and learning new technologies. This helps the economy grow by increasing worker productivity. Nationwide, worker productivity grew by 75.0 percent from 1980 to 2008. Madland & Walter, *supra*. This increased productivity translates into higher output and lowers costs, which in turn lowers prices. When workers leave an industry, productivity gains achieved through experience and training in new technologies are lost.

In short, industries are only as competitive as their workforce allows.

**B. Foreign dumping and subsidies are practices that harm U.S. competitiveness, labor and the economy**

Dumping occurs when manufacturers in a foreign country export a product into the U.S. at a price that is either lower than the price charged in the manufacturer's home market or below the cost of production. Import Injury FAQs, UNITED STATES INTERNATIONAL TRADE COMMISSION, (USITC) [http://usitc.gov/faqs/import\\_injury\\_faws.htm](http://usitc.gov/faqs/import_injury_faws.htm) (last visited June 25, 2014). Dumping is dangerous because it distorts markets and makes efficient domestic production seem inefficient in comparison to foreign competition. Injurious long-term dumping is usually a result of “maintenance of a sanctuary home market, the application of subsidies, or the consequences of a non-market economy government.” Greg Mastel, Andrew Szamosszegi, John Magnus & Lawrence Chimerine, *Enforcing the Rules 13* (2007), *available at*

<http://www.aamfg.org/files/Enforcing-the-Rules.pdf>. Dumping can lead to a cessation of domestic production of the dumped goods as domestic companies exit the market due to not being able to compete. Under these conditions prices will skyrocket once the dumping ends. Therefore, dumping can be seen as analogous to predatory pricing.

A study of the effects of dumping on various industries showed a significant impact on revenues and wages in the US. *See Id.* In the cement market, dumping caused the “lack of capital investment for new plant construction or capacity modernization and expansion.” *Id.* at 60. This led to both a lack of new job creation, and the reduction of cement production jobs in the U.S.. *Id.* In the ball bearing market, dumping “prevented domestic producers from increasing prices to deal with higher costs.” *Id.* at 80. This ultimately led to a shrinking of employment levels and domestic capacity. *Id.* In the softwood lumber market, dumping from Canada caused sharp decreases in the number of U.S. mills in operation and production workers, hours worked, and wages paid. *Id.* at 87.

Job loss from cheap foreign imports can be devastating for skilled workers. Generally speaking, manufacturing workers do not fare as well as non-manufacturing workers post job loss. LORI KLETZER, JOB LOSS FROM IMPORTS: MEASURING THE COSTS 31 (2001). A study of displaced workers by economist Lori Kletzer found that “[m]anufacturing . . . workers experience large earnings

losses on average, 12 percent at the mean, in comparison of just under 4 percent for nonmanufacturing ones.” *Id.* at 32. “Approximately 25 percent of manufacturing workers report earnings losses of 30 percent or more.” *Id.* This risk of “very large earnings losses is insensitive to business cycle and labor market fluctuations.” *Id.* Manufacturing workers’ losses are even larger when compared to what they would have earned had they not been displaced. These studies show average earnings losses of 40 percent in the first year after displacement and remaining at 25 percent five years after job separation. *Id.* at 33. Even worse, workers from industries in which there is high import-competition are reemployed in lower numbers – 63.4 percent – than in other manufacturing industries. *Id.* at 35. Women are disproportionately impacted by job loss in high import-competing industries due to greater levels of female employment in import-competing industries. *Id.*

For manufacturing workers in high import-competing industries, job loss also represents the loss of years of skill, experience, and training. Only about half of the manufacturing workers who find new employment are reemployed in manufacturing. *Id.* at 65. Only workers who are able to return to their old sector have the potential to “retain the value of some specific skills, keep earning union rents, and maintain their position in internal job ladders.” *Id.* Even those workers that return to manufacturing “may find themselves unfamiliar with [new] standards, processes, and procedures.” *Id.* at 67.



In short, job loss from displacement represents a blow to competition. The sudden loss of many jobs, from an event like the closing of a manufacturing facility for example, leads to a shrinking of the pool of available skilled labor due to the industry not being able to absorb all of the displaced workers. Almost half of these workers will have to learn a new skill or trade, *Id.* at 65, and the future growth of competitors in the industry will be slowed by the need to replenish the pool of skilled workers lost.

Furthermore, the closing of manufacturing facilities has a huge impact on their local community. A study by the Midwest Center for Labor Research of the Milwaukee Briggs & Stratton plant found that a sudden loss of 5,400 workers would lead to the loss of an additional 6,700 workers through ripple-effects. Robert Ginsburg, *What Plant Closings Cost a Community: The Hard Data*, Labor Research Review: Vol. 1: No. 22, Article 3 (1994), available at <http://digitalcommons.ilr.cornell.edu/lrr/vol1/iss22/3>. The study estimated that even after two years, 24 percent of the plant workers and 13 percent of the ripple-effect workers would still be unemployed. *Id.* The loss of these workers would ultimately cost taxpayers \$197.8 million or about \$36,000 per laid-off plant worker. *Id.*

**C. U.S. companies have a right to come up with creative means of protecting domestic jobs**

Companies have the right to act to preserve their workforce. “Too often, concern over antitrust consequences has discouraged creativity in conceiving measures to make jobs more efficient and therefore more likely to remain in the United States.” Steuer, *supra*, at 100. In the case of vertical exclusionary agreements:

Vertical agreements that foreclose competitors, such as exclusive dealing and tying agreements, may reduce jobs if they result in so much foreclosure as to be anticompetitive. However, such agreements have the potential to bolster employment by assuring producers of sales and allowing them to plan production more efficiently. If exclusionary agreements strengthen employment, that itself may be a sign that they are procompetitive. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶111, at 118 (2006) (“full employment and productivity and price stability are sometimes regarded as incidents of effective competition”). If, on the other hand, they eliminate jobs, that may be a sign that they either are unreasonably exclusionary or are creating greater efficiency that eliminates relatively inefficient jobs. If the former, prices can be

expected to rise and output fall; if the latter, the opposite should occur.<sup>2</sup>

*Id.* at 102.

The loss of human and fixed capital, like in the closing of a manufacturing plant, can severely weaken a company's competitiveness. Such sudden changes make it impossible for a company to absorb talented workers in other departments and make it difficult to transition to alternative methods of doing business. This is because investment in capital such as facilities and labor is not made linearly. Instead, investment looks more like a staircase with each stair representing an important addition to a company's ability to compete.

Companies need the ability to be creative in responding to the risk of catastrophic job loss. This is especially true when the jobs at risk are the keystone of a domestic industry. Acceptable measures include exclusive dealing which assures producers of a certain number of sales, allows producers to plan more effectively, and aligns customers' interests with the producers. Producers can also attempt to force competitors to make similar investments in human and fixed capital. These measures will ultimately benefit competition as long as they tend to increase output, lower prices, and sustain efficient domestic jobs. "Maximizing

---

<sup>2</sup> The closure of McWane's Anniston, Alabama plant would most surely lead to lower output and higher prices. *See infra* Section II.

America's economic welfare requires an antitrust policy that appreciates the importance of jobs." *Id.* at 103.

Furthermore, the recognition of job preservation as a procompetitive justification will not swallow antitrust law. The profile of a company responding to a real threat to the workforce is significantly different from that of a company merely using preservation of jobs as a cover to engage in anticompetitive activities. A court should be able to easily distinguish between the two based on the facts on record. Examples of these facts include: the existence of foreign dumping or other threat, the closing or moving overseas of domestic facilities, and how close a company's domestic facilities are to the break-even point. The court should also be able to analyze the macro effects of the challenged action to determine if it will ultimately lower output and increase prices or increase output and lower prices. Instead of punishing job retention efforts, "[t]he Federal Trade Commission should seize the initiative to teach the business community how to create more efficient jobs without overstepping the limits of the antitrust laws." *Id.* at 100.

**II. The Commission failed to properly analyze McWane's actions as a procompetitive response to preserve a domestic skilled workforce in a market severely weakened by foreign dumping**

**A. McWane was the last company to own a domestic foundry that produced a full line of ductile iron pipe fittings after cheap imports and foreign dumping ruined the domestic market.**

The domestic iron pipe fittings (“DIPF”) market was formerly dominated by domestic producers, however, that has changed over the past 20 years. Initial Decision of Chief Administrative Law Judge D. Michael Chappell, *In the Matter of McWane, Inc.*, No. 9351, at 61 (May 8, 2013) (Doc. 264) (hereinafter “ALJ”). Since the mid-1980s cheap foreign fittings and dumping has caused most of the demand for domestic fittings to dry up. *See Id.* The period of 2003-2008 saw the biggest decline in domestic DIPF – from about 70% to 15-20%. Administrative Law Judge’s Findings of Fact at 464 (Doc. 264) (hereinafter “F.#”); Respondent Exhibit 740. This led many domestic fittings producers to either dramatically reduce their production or exit the market entirely. (ALJ at 62). The International Trade Commission unanimously determined in 2003 that a flood of cheap fittings from China was causing “market disruption” and “material injury” to domestic fittings producers. *Id.* McWane became the last domestic DIPF producer with a full-line foundry dedicated to DIPF in the United States. *Id.* At the time of the challenged actions, McWane’s foundry was only operating at 30% capacity, which put it in danger of being closed. F. 472-76. McWane was previously forced to shut down its other U.S. foundry and open a foundry in China, measures taken to compete with the low cost of foreign production. (ALJ at 62). Roughly two hundred employees lost their jobs as a result of McWane’s closure of its Tyler, Texas foundry. *Id.* at 63.

Because of the difficulty in competing with foreign iron pipe fittings on cost, most of the remaining DIPF market is due to domestic or domestic-only requirements in projects based on “[e]nd [u]ser preference or because it is required by municipal, state, or federal law.” *Id.* at 47. End users or their consulting engineers can stipulate on a project’s specifications whether the fittings are to be domestically produced, imported, or open to all bids. *Id.* While there are still some specifications that require domestically produced fittings due to preference or legal rules, both of these can change to permit the purchase of imported fittings.

The American Recovery and Reinvestment Act of 2009 (“ARRA”) was passed in the beginning of 2009 and provided more than \$6 billion to water infrastructure projects. *Id.* at 68. ARRA had two provisions that were important to DIPF manufacturers. A waterworks project must be “under contract or construction within 12 months” of ARRA’s enactment and materials used in the projects were subject to certain “buy American” provisions. *Id.* ARRA created a brief increase in the demand of domestically produced fittings. *Id.* at 152-53. However, the numerous waivers and temporary nature meant that the sale of domestic fittings rose only briefly before falling back to their pre-ARRA level. *Id.* at 153. Domestic-only specifications and the ARRA period encouraged foreign fittings companies to consider producing DIPF products domestically. *See Id.* at 161. Star entered shortly after the passage of ARRA and Sigma entered into a Master

Distribution Agreement (MDA) with McWane to supply domestic fittings during the ARRA period. *Id.* at 161; 206-24.

McWane's rebate policy can be viewed as accomplishing three procompetitive goals. First, McWane was ensuring that the continued existence of a domestic skilled workforce that was trained in the production of iron pipe fittings by taking measures to preserve its last remaining foundry. If the foundry were to close the workers would scatter to look for other employment. It would be difficult and costly for another employer to find or train a new workforce with the same skills.

Second, McWane sought commitment from its customers to support the continued existence of a domestic full line foundry. McWane's rebate policy essentially brought the foundry problem to the distributor's door. Distributors could choose to support McWane's full line foundry or seek the creation of a full line foundry elsewhere. These distributors became aware of the problems that would be created if the last full line foundry were to close. Distributors were given the opportunity to support the foundry to the extent it was in their interest to do so.

Finally, McWane's rebate policy ensured that a competitor would have to make an equal commitment to facilities and skilled labor in order to compete. Distributors were unlikely to change suppliers from McWane unless they could be assured that a rival supplier could provide a stable supply of a full line of iron pipe fittings. This means that a rival would need to either invest in or contract with

foundries that have sufficient skilled labor to produce the number of iron pipe fittings required by a distributor. Such a commitment would ensure that the domestic production of iron pipe fittings was not disrupted.

**B. Star was likely entering the market simply to capitalize on the short term ARRA program and was unlikely to produce meaningful long term domestic skilled labor employment**

Star is not a producer of iron pipe fittings in the U.S. or anywhere else in the world. (ALJ at 22). Star owns an interest in five Chinese foundries that manufacture fittings for exportation worldwide. *Id.* Prior to 2009, when ARRA was signed into law, Star did not sell or consider selling domestic pipe fittings. *Id.* In 2009, Star began contracting with domestic foundries to produce iron pipe fittings that would meet the “buy American” provision in ARRA. *Id.* at 22. Thus, Star never owned or operated a domestic foundry, and Star’s interests in domestic production seemed to be primarily motivated by the temporary ARRA program.

ARRA’s impact on the DIPF market was short-term and insufficient to motivate capital investment in domestic production. *Id.* at 153. Both suppliers and distributors of DIPF agreed that ARRA’s impact on demand was small and only lasted for roughly six months. *Id.* “[F]ormer Domestic Fittings manufacturers and specialty Domestic Fittings manufacturers did not believe that ARRA made it worthwhile for them to expand or return to a full line of Domestic Fittings production” due to ARRA’s limited effect. *Id.* This is because entry into the DIPF



market requires “significant capital investment,” and an entrant must “either build its own foundry or develop a supply chain of foundries that can produce its Fittings.” *Id.* at 154. These costs occur regardless of the sophistication of the entrant. *See Id.* at 155.

Under the circumstances, it seems highly unlikely that Star would make a long-term capital investment in facilities that would provide new jobs for skilled workers. Star decided to contract with foundries that had excess capacity to supply its fittings in order to get a DIPF product on the market in the shortest amount of time. *Id.* at 162. This decision was made prior to, and without knowledge of, McWane’s Full Support Program. *See Id.* at 172. Star had little incentive to make the long-term investment in a foundry due to soft demand and the expiration of ARRA. In fact, evidence suggests that there was barely enough demand to operate even one full line foundry. *Id.* at 166-67. Under Star’s current model, “Star was able successfully to enter the domestic fittings industry and to succeed in expanding its business once it did enter.” (Dissent at 45). Star is also easily able to exit the market if demand falls and it is no longer profitable to produce DIPF. Star did not have good reason to own or operate its own foundry, despite testimony that suggests Star would have done so if it reached a certain level of sales. *See Id.* at 29-30. It would be especially unusual considering Star did not even own the foundries in China that produced the majority of its DIPF. (ALJ at 22).

**C. Star's entry without a serious full line commitment to domestic production was likely to cause irreversible disruption to domestic industry without producing a sufficient countervailing benefit to competition**

Star's entry without a long-term commitment to domestic production threatened to cause a chain reaction that could ultimately destroy the DIPF market. In a plausible scenario, Star's partial line entry could have taken from McWane the sales necessary to keep its full line foundry open. The closing of McWane's full line foundry would have put stress on Star's supply chain, which was already experiencing problems with delays in filling orders and supplying slow moving orders. (ALJ at 165). Star was also not able to supply a full range of DIPF. *Id.* Without an adequate full line supply, costs were sure to increase further and there would be delays in customers receiving the fittings they need. Specifications with domestic requirements would be susceptible to "flipping" to open specifications. Exceptions to legal requirements to "buy American" would also be triggered and lack of supply of certain necessary fittings would cause pressure to change laws that mandate the purchase of domestically produced iron pipe fittings to open specifications. Meanwhile, the skilled workers in McWane's Anniston, Alabama would be out of work and statistically only half of them would return to jobs in manufacturing. Without an experienced labor pool, entry costs for new DIPF suppliers would increase. Facing a spiral of increasing costs, DIPF customers

would find it more and more difficult to justify using DIPF over equivalent imported iron pipe fittings.

In an alternative scenario, McWane would remain a competitor but be forced to adopt the same “virtual manufacturer” model that Star uses. This model incurs higher costs and is less efficient than having a dedicated foundry. *Id.* at 411. Contracting with independent foundries means less specialized and efficient equipment, smaller batch sizes, additional logistical costs, more risks, inefficiencies from dealing with multiple foundries, higher labor costs, and an additional markup. Opinion of the Commission, In the Matter of McWane, Inc., FTC Docket No. 9351 (Jan. 30, 2014) (Doc. 289, 290), at 5. McWane was the final supplier using the more efficient dedicated full line foundry model, which means its transition to a virtual manufacturing model would ultimately result in higher costs and lower output in the DIPF market.

Therefore, Star’s entry without a dedicated foundry, even though it “had the financial reserves and borrowing ability” to do so, produced little benefit and was substantially likely to have a deleterious effect on the DIPF market. F. 1406.

### **CONCLUSION**

The Federal Trade Commission’s ruling should be reversed because the decision hampers sound U.S. economic policy which depends on jobs for skilled

labor and an uninterrupted supply of products necessary to maintain our vital infrastructure.

Respectfully submitted,

---

## **CERTIFICATE OF COMPLAINT**

In accordance with Rules 32(a)(7)(B) and (C) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a), the undersigned certifies that the accompanying brief has been prepared using 14-point typeface, proportionally spaced, with serifs. According to the word processing system used to prepare the brief, Microsoft Office Word 2010, the brief contains 4,910 words, exclusive of the table of contents, table of authorities, attorney identification, and certificates of service and compliance.

Dated: July 7, 2014

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing amicus curiae brief was electronically submitted on July 7, 2014, to the Office of the Clerk for the United States Court of Appeals for the Eleventh Circuit via the court's CM/ECF system, which will generate and send by e-mail a Notice of Docket Activity to all CM/ECF registered attorneys participating in this case. Counsel for appellants and appellees are registered CM/ECF users.