PUBLIC REDACTED VERSION

No. 14-11363

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MCWANE, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL TRADE COMMISSION
(FTC DOCKET NO. 9351)

BRIEF OF THE FEDERAL TRADE COMMISSION

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Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Pursuant to 11th Cir. R. 26.1-2, Respondent Federal Trade Commission ("FTC") certifies that the following persons or entities are known to have an interest in the outcome of this appeal:

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STATEMENT REGARDING ORAL ARGUMENT

The Federal Trade Commission ("FTC" or "Commission") believes oral argument will assist the Court and thus requests it.

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ISSUE PRESENTED FOR REVIEW

Whether substantial evidence supported the FTC's adjudicatory ruling that an incumbent monopolist used an exclusivity mandate to impede market entry and expansion by its sole competitor, unlawfully maintaining its monopoly.

STATEMENT OF THE CASE

In mid-2009, McWane was the only supplier in the market for domestically manufactured ductile iron pipe fittings. Like many monopolists, it charged high prices with large profit margins. Star Pipe Products then announced it would enter the market. McWane responded not by competing more vigorously, but by threatening to cut off any customer that dealt with Star, with only limited exceptions. McWane knew its customers would be reluctant to move all their business to a new entrant and could not risk losing access to McWane's full line of fittings, including those that Star could not yet produce. McWane's strategy worked. It reduced Star's sales opportunities, raised its costs, and deprived it of the scale necessary to operate efficiently and compete effectively with McWane. Star therefore remained a fringe supplier of domestic fittings, and McWane faced no need to lower its monopoly prices.

McWane's internal documents described this exclusivity mandate for what it was: an anticompetitive strategy to preserve McWane's monopoly profits by impeding new competition. As the architect of McWane's strategy explained:

- "[w]hether we end up with Star as a complete or incomplete domestic supplier my chief concern is that the domestic market gets creamed from a pricing standpoint just like the non-domestic market has been driven down in the past";
- "we need to make sure that they [Star] don't reach any critical market mass that w[ould] allow them to continue to invest and receive a profitable return"; and

- McWane's exclusivity mandate thus "[f]orce[d]" Star "to absorb the costs associated with having a more full line before they can secure major distribution."

Comm'n 8-9, 31 (internal quotation marks omitted).[1]

As those documents and the rest of the trial record confirm, "the domestic market"—the market for domestically manufactured fittings—is the relevant market and is separate from "the non-domestic market." They also confirm that McWane maintained its monopoly not by competing on the merits, but by raising Star's costs and keeping it from "reach[ing] any critical market mass that will allow [it] to continue to invest and receive a profitable return." And McWane did not even compete for exclusivity. It offered customers no new discounts or other procompetitive inducements; it simply mandated exclusivity as a unilateral condition on continued access to its full line of fittings. That mandate was all stick and no carrot. It inflicted competitive harm with no procompetitive benefits.

After a two-month trial, an ALJ found McWane liable for unlawful monopoly maintenance under Section 5 of the FTC Act, 15 U.S.C. § 45. The Commission affirmed in the decision now under review.

[1] "Comm'n __" identifies pages in the Commission's opinion. "ALJ pp. __" identifies page numbers in the opinion of the Administrative Law Judge, whereas "ALJ ¶ __" identifies his numbered factual findings.

A. Statement of Facts

1. The Domestic Pipe Fittings Market

Ductile iron pipe fittings connect the pipes in large-scale water distribution systems to valves, hydrants, or other pipes, and split, join, and direct water flow.[2] Comm'n 5; ALJ ¶¶ 5, 278. They come in a range of sizes, configurations, and finishes. ALJ ¶¶ 286-88. About 100 fittings varieties can fulfill most project needs, but a full line includes many less-commonly used pieces that are nonetheless essential in some projects. ALJ ¶¶ 306-08.

The typical fittings end users are municipal and other governmental water authorities and their contractors. ALJ ¶ 509. McWane and other manufacturers almost never sell fittings directly to end users. Instead, they sell them to middleman distributors, who in turn sell them to end users. ALJ ¶¶ 367, 373-74, 508. Distributors maintain relationships with end users by providing services that manufacturers cannot replicate. ALJ ¶¶ 400-412. Because manufacturers cannot sell directly to end users, and there is no viable alternative sales channel, access to distributors is critical to manufacturers' business success. Comm'n 22-23, ALJ ¶¶ 381, 400-402.

A waterworks project typically begins when a water authority issues a "specification" of the pipes, fittings, and other products required for the project.

[2] In this brief, "fittings" refers to small- and medium-diameter (24 inches and under) ductile iron pipe fittings.

ALJ ¶¶ 332-33. Competing contractors solicit bids for the specified products from distributors, who in turn seek quotes from manufacturers like McWane. ALJ ¶¶ 333, 368. Most end users issue "open specifications," which permit the use of products manufactured anywhere in the world. Other end users issue "domestic-only specifications" that require the use of U.S.-made products. Since 2003, such domestic-only projects have accounted for approximately 15%-20% of all U.S. fittings sales. ALJ ¶¶ 517-19, 1029-31; *see* Comm'n 16.

Domestic-only specifications often, but not always, arise from "Buy American" legal obligations. For example, Pennsylvania and New Jersey law requires the use of domestic materials in public projects. Comm'n 14; ALJ ¶¶ 520-21. So do Air Force bases, certain federal programs, and various municipalities. Comm'n 14; ALJ ¶¶ 522-23. The demand for American-made fittings increased when Congress enacted the American Recovery and Reinvestment Act of 2009 ("ARRA"), Pub. L. No. 111-5, 123 Stat. 115. As part of its larger stimulus package, ARRA provided more than $6 billion to fund water infrastructure products, conditioned on the use of U.S.-made products. Comm'n 7-8; ALJ ¶¶ 524-29. Because waivers of the Buy-American requirement were rarely granted, "neither McWane nor Star sold any imported fittings for use in any ARRA-funded projects." Comm'n 8 n.4, 16; *see also* ALJ p. 249; ALJ ¶¶ 527, 531-34, 537-46.

Given these end-user requirements, distributors "will not purchase" imported fittings for specifications that require domestic fittings, "[r]egardless of price." ALJ ¶ 549; *accord* Comm'n 14. That is so even though domestic and imported fittings are functionally indistinguishable and imported fittings are much less expensive. ALJ ¶¶ 323, 547. In short, although domestic and imported fittings are physically identical, they are not economic substitutes for projects with domestic-only specifications. Comm'n 14; ALJ p. 249.

The manufacture of ductile iron pipe fittings is a highly concentrated industry. Three companies supply nearly all the fittings (domestically manufactured or imported) used in U.S. waterworks projects. ALJ ¶ 355. McWane, by far the largest of the three, manufactures fittings both in the United States and in China and accounts for nearly half of total fittings sales. ALJ ¶¶ 15-16. Fittings are "about 5% of McWane's overall business," which includes pipe and other iron products. ALJ ¶¶ 12-15. Fittings are the primary product line of Sigma Corporation and Star, each of which supplies about a quarter of the fittings used in all U.S. waterworks projects (including open and domestic-only specifications). ALJ ¶¶ 13, 356.

During the relevant period, McWane owned the only U.S. foundry devoted to fittings production, and until 2009, both Star and Sigma sold only imported fittings. Thus, until 2009, McWane was the sole supplier of fittings for projects

with domestic-only specifications. Comm'n 5; ALJ ¶ 1040. Because it faced no competition for such projects, McWane charged high prices and enjoyed large profit margins. ALJ ¶¶ 547, 1075, 1091. McWane's prices for fittings in domestic-only projects were { } higher than its prices for physically identical fittings sold for projects with open specifications. ALJ ¶ 1076 & RX410. The price difference did not simply reflect the higher costs of domestic manufacturing—McWane's profit margins were also substantially greater for domestic fittings. ALJ ¶ 1091. Moreover, McWane maintained and increased its monopoly-level prices after Star entered the domestic-only market. *See* Comm'n 18.

2. Star's Entry Prompts McWane's Exclusivity Mandate

In the wake of the 2009 stimulus legislation, Star decided to enter the market for supplying U.S.-made fittings to domestic-only projects. Comm'n 7-8; ALJ ¶¶ 1094, 1421. It proceeded on two tracks. First, Star investigated building its own U.S. foundry or buying one and adapting it to manufacture fittings. ALJ ¶ 1097. Second, Star jump-started its market entry by immediately contracting with six third-party "jobber" foundries located in the United States, which produced raw fittings to Star's specifications and sent them to Star's Houston facility for finishing. ALJ ¶¶ 1098-1118. As McWane concedes, this outsourcing arrangement was much less operationally efficient in the long run than owning a foundry tailored to fittings production. *See id.*; Comm'n 10-11; McWane Br. 2,

29, 52-53. But because stimulus-related procurement had begun, Star proceeded with this plan in the short term while investigating options for acquiring its own foundry.[3]

Star entered the market in the second half of 2009 with the ability to sell the most commonly used domestic fittings and a plan to expand its offerings over time. ALJ ¶¶ 1120, 1130-31. Because Star's initial domestic product line was limited, most major distributors were willing to give Star some of their domestic fittings business, but few could do without McWane's fuller line. ALJ pp. 390-97. Some were also "reluctant to rely on a supplier without its own foundry." Comm'n 25.

McWane recognized that effective competition from Star would lead to lower prices and narrower margins. In its words, McWane's "chief concern" was that such competition would cause "the domestic market" (*i.e.*, the market for U.S.-made fittings used in domestic-only projects) to "get[] creamed from a pricing standpoint just like the non-domestic market has been driven down in the past," in part because of Star's aggressive pricing in the latter market. ALJ ¶ 1149 (quoting CX0074 at 1); *see* ALJ ¶¶ 568-70.[4] McWane believed that if Star emerged as a

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[3] Sigma also considered manufacturing fittings domestically, but ultimately agreed with McWane to purchase and resell McWane domestic fittings—to customers that purchased McWane domestic fittings exclusively. Comm'n 12; ALJ ¶¶ 1423, 1425-26, 1537-41.

[4] In this brief, "domestic-only market" means the market for domestically manufactured fittings for projects with domestic-only specifications, and

"legitimate competitor" in the domestic-only market, McWane would "take a hit for decades" because "our distributors will continually pressure us to 'do something' (lower prices)," and the company would "always see downward [pricing] pressure in the future." ALJ ¶¶ 1151-52 (quoting CX0102, CX2192 (hyphens omitted)).

McWane also knew that a new competitor would face, in its words, "significant blocking issues" if, like Star, it could not immediately supply a "full line" of domestic fittings. ALJ ¶ 1155 (quoting CX0067 at 2). As Richard Tatman, the head of McWane's fittings business, explained: "we need to make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return." ALJ ¶ 1150 (quoting CX0074 at 1).

To that end, McWane imposed the exclusivity mandate at issue here, which was originally described as a "full line or no line" approach, ALJ ¶ 1157 (quoting CX0076 at 1), and ultimately became known as the Full Support Program. McWane formally announced this new policy in a letter to its distributors on September 22, 2009. Unless distributors "fully support McWane branded products for their domestic fitting and accessory requirements," McWane declared, they "may forgo participation in any unpaid rebates [they had accrued] for domestic

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"nondomestic-fittings market" means the market for fittings (now mostly imports) for open-specification projects.

fittings and accessories *or shipment of their domestic fitting and accessory order of [McWane] products* for up to 12 weeks." ALJ ¶ 1173 (quoting CX0010) (emphasis added). The policy provided for only two narrow exceptions; the only material one here concerned circumstances where McWane products were not readily available (*e.g.*, out of stock).[5] McWane offered no additional discounts, rebates, or other consideration in exchange. ALJ p. 407. The mandate was simply a new condition on continued access to McWane's products and previously-accrued rebates.

McWane made sure distributors understood "that they would no longer be able to buy domestic fittings from McWane if they purchased domestic fittings from Star." Comm'n 21 (citing ALJ ¶ 1180). For example, McWane's national sales manager explained the new policy to his sales force as follows:

- "What are we going to do if a customer [*i.e.*, a distributor] buys Star domestic? We are not going to sell them our domestic …. This means the customer will no longer have access to our domestic."
- "Once [distributors] use Star, they can't EVER buy domestic from us …."
- "For [distributors] with multiple branches … if one branch uses Star, every branch is cut off."

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[5] McWane provided a separate exception where customers bought domestic fittings and accessories in a package with another manufacturer's ductile iron pipe. ALJ ¶ 1173. Except in limited resale contexts, that exception did not apply to Star because Star did not manufacture pipe. *See* ALJ ¶¶ 110, 1325.

ALJ ¶ 1179 (quoting CX0710 at 1-2). The national sales manager exhorted: "Make sure you are discussing our stance with all customers, every day." *Id.*

This message was highly effective. Mr. Tatman recognized that "[a]lthough the words 'may' and 'or' were specifically used [in the September 22 letter], the market has interpreted the communication in the more hard line 'will' sense. … Access to McWane … requires distributors to exclusively support McWane where products are available within normal lead times." ALJ ¶ 1183 (quoting CX0119 at 2, 4). He concluded: "[v]iolations *will* result in" not only "loss of accrued rebates," but also "[l]oss of access" to McWane products altogether. *Id.* (emphasis added); *see also* ALJ ¶ 1167 ("To protect our domestic brands and market position … we won't provide domestic product to distributors who are not fully supporting our domestic product lines.") (quoting CX0113 (Tatman email)). McWane drove this point home in the fall of 2009 by making an example of one distributor, Hajoca Corporation, for dealing with Star. Comm'n 9. After a single Hajoca branch purchased fittings from Star, McWane cut off sales of domestic fittings to all Hajoca branches. Comm'n 9; ALJ ¶¶ 1206-23.[6]

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[6] In April 2010, after the FTC notified McWane that it was investigating the company's exclusionary policy, McWane allowed some (but not all) Hajoca branches to resume purchasing from McWane. *See* ALJ ¶ 1220 (before a March 2010 negotiation with Hajoca, a senior McWane executive asked his colleagues to consider "[h]ow our potential FTC action might [a]ffect how we do business with [Hajoca]").

Other distributors acquiesced in McWane's exclusivity mandate, later testifying that they were unwilling to risk purchasing from Star lest McWane cut them off too from domestic fittings then available only from McWane. ALJ pp. 405-06; ALJ ¶¶ 1238, 1301, 1317, 1358; *see also* Comm'n 9; ALJ ¶¶ 1184-92, 1296, 1300-02. Distributors canceled orders with Star and withdrew quote requests, and Star thereafter saw a "dramatic reduction" in such requests. Comm'n 10; *see also id.* at 23-24; ALJ ¶¶ 1381-95. Even when Star undercut McWane's prices, customers still refused to deal with Star because they feared losing access to McWane's full line of fittings. Comm'n 10. Apart from Hajoca, the major distributors generally purchased from McWane alone except where an exception applied. Comm'n 9, 21-25, 29-30; ALJ ¶¶ 1231-51, 1259-64, 1299-1304, 1313-18, 1334-40, 1353-58, 1364.

McWane never publicly withdrew the policy or notified distributors of any changes, and its effects persisted for several years. Comm'n 39-40. Some distributors learned in 2010 that the FTC had begun investigating McWane, and suspected the investigation would make McWane less likely to hold a hard line on its exclusivity policy. ALJ ¶ 1311. But other distributors testified at trial that they believed the policy was in effect even then and that they continued to buy only from McWane as a result. Comm'n 39-40.

McWane's exclusivity mandate not only deprived Star of access to efficient distribution channels, but also—as McWane intended and expected—kept Star from "reach[ing] any critical market mass that w[ould] allow [it] to continue to invest and receive a profitable return." ALJ ¶ 1150 (quoting CX0074 at 1). In mid-2009, Star believed it might promptly achieve the scale to justify the large fixed costs of procuring its own fittings foundry. *See* ALJ ¶¶ 1097, 1402-04. Because McWane had not yet announced its exclusivity policy, this was a reasonable expectation. Given its presence in the nondomestic-fittings market, Star had preexisting relationships with distributors, *id.* ¶ 1052, and it already had early orders and quote requests in hand for sales of U.S.-made fittings, *id.* ¶ 1395. By early fall, Star had also identified one foundry as a serious candidate for acquisition and specialization. ALJ ¶ 1404. As Star understood, this major capital investment would have reduced its production and shipping costs, improved its manufacturing efficiency, and allowed it to compete more effectively and profitably with McWane on price. ALJ ¶¶ 1099, 1409-14.

McWane's exclusivity policy destroyed Star's justification for that investment. Comm'n 25, 27; *see* ALJ ¶¶ 1400-08. After distributors canceled orders and withdrew bid requests, Star reduced its sales projections and concluded that it no longer made economic sense to incur many millions of dollars in sunk costs to acquire the target foundry. ALJ ¶¶ 1381-95; *see* ALJ ¶ 1401; n.15, *infra*

(discussing relevant figures). In short, once McWane issued its all-or-nothing mandate to distributors, "Star was not able to generate a sufficient volume of sales of Domestic Fittings to realize cost efficiencies or justify operating a foundry of its own." ALJ ¶ 1401; *see also* Comm'n 10-11, 27; CX02260-A at 78 & 61 n.177.

Star did sell *some* domestically manufactured fittings, albeit on a smaller and less efficient scale. First, it sold fittings to Hajoca, the distributor that McWane cut off as a warning to the rest. Second, Star met the limited demand of other distributors for fittings that McWane could not readily supply and thus fell within that narrow exception to its exclusivity mandate. Comm'n 10; ALJ ¶¶ 1137, 1142, 1242, 1305. Third, Star sold small quantities—as little as a single fitting—to various small distributors with such limited demand for domestic fittings that they needed no relationship with McWane's domestic-fittings business. *See* ALJ ¶¶ 1141-42.

Overall, though, Star remained a fringe player in the sale of domestically manufactured fittings. By comparison, it sold **{ }** of fittings for all U.S. projects in 2011, and its specific share of the nondomestic-fittings market was thus even higher—more than **{ }** of the market. *See* ALJ ¶ 356. But Star captured only **{ }** of the domestic-only market in 2011; the remaining **{ }** remained with McWane. ALJ ¶¶ 356-57; Comm'n 1, 7. And Star did not attain even that limited market share until a full year after news of the FTC

investigation in early 2010 tempered McWane's enforcement of its exclusivity requirement. *See* ALJ ¶¶ 1220, 1311.

B. Procedural History

On January 4, 2012, the Commission issued a seven-count administrative complaint charging McWane with violating Section 5 of the FTC Act. Section 5 prohibits "unfair methods of competition" and encompasses, *inter alia*, practices that violate Section 2 of the Sherman Act, 15 U.S.C. § 2; *see* Comm'n 13 n.7 (incorporating Section 2 analysis). Count six—the only count on appeal—charged that McWane's exclusivity mandate constituted unlawful monopoly maintenance. Compl. ¶ 69.[7]

After the Commission denied motions for summary judgment by McWane and FTC complaint counsel, the ALJ conducted a two-month trial.[8] On May 1, 2013, he issued his 464-page decision. He found that the market for domestic

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[7] After splitting evenly on the merits, the Commission dismissed the first two counts, which alleged an earlier (2008) conspiracy among McWane, Sigma, and Star to stabilize prices in the nondomestic-fittings market. Count three, related to the same conspiracy allegations, was dismissed by the ALJ without appeal. The Commission dismissed counts four and five (reversing the ALJ), which alleged that the distribution agreement with Sigma (*see* n.3, *supra*) violated the antitrust laws. Comm'n 32-37. Lastly, the Commission dismissed count seven, *attempted* monopolization. Having already found that McWane unlawfully monopolized the domestic fittings market, the Commission deemed it "unnecessary to ask whether McWane attempted to monopolize the market." Comm'n 32 n.16.

[8] FTC rules separate the Commission's adjudicatory and prosecutorial roles by walling off the Commission from "complaint counsel" (enforcement staff) once an administrative complaint has been issued.

fittings is the relevant market, that McWane has monopoly power in that market, and that McWane's exclusivity mandate—its Full Support Program—was anticompetitive and unlawful.

The Commission affirmed. Like the ALJ, it found that the relevant market is the supply of domestically manufactured fittings, and that McWane had monopoly power. It explained that domestic-only specifications often arise from municipal, state, and federal laws and policies, and that, given end-user requirements, distributors will not purchase imported fittings for domestic-only projects. Imported fittings are thus not "reasonable substitutes for[] projects with domestic procurement specifications." Comm'n 14. The Commission further found that McWane's share of the domestic-only market "far exceed[ed] the levels that courts typically require to support a *prima facie* showing of monopoly power" and that there are "substantial barriers to entry[.]" Comm'n 16-17. The Commission also found direct evidence of McWane's monopoly power in the higher prices and greater profit margins that McWane enjoyed in the market for domestic fittings than in the more competitive nondomestic-fittings market. Comm'n 17-18.

The Commission next ruled that McWane's exclusivity mandate unlawfully maintained its monopoly. While acknowledging that exclusive dealing has potential benefits, the Commission followed precedent holding that exclusivity poses special concerns in monopoly markets. Specifically, when a monopolist uses

exclusive dealing to "impair[] the ability of rivals to grow into effective competitors," the monopolist can "maintain monopoly prices and thereby harm consumers." *Id.* at 19 (citing, *inter alia*, *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005); *United States v. Microsoft*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (en banc)).

The Commission found that McWane's exclusivity requirement foreclosed Star "from accessing a substantial share of distributors," prevented it from "achiev[ing] efficient scale," and "thereby rais[ed] costs and slow[ed] or prevent[ed] effective entry." Comm'n 22-23. Because of lost sales attributed to that requirement, Star continued to rely on inefficient outsourcing arrangements rather than acquiring its own specialized foundry. *Id.* at 25. Those arrangements raised Star's costs and further eroded its sales because some distributors were reluctant to purchase from a supplier without its own foundry. *Id.* McWane's policy thus "harmed competition by increasing barriers to entry and allowing McWane to maintain its monopoly position." *Id.* at 22. Finally, the Commission found that McWane had failed to demonstrate that the policy had procompetitive efficiencies. *Id.* at 30-32. The Commission issued a cease-and-desist order directing McWane to stop requiring exclusivity from distributors. *Id.* at 39, 41.

Commissioner Wright dissented. He assumed that McWane was a monopolist in the domestic-only market, and on several points he agreed with the

majority. He agreed that McWane's Full Support Program was an "exclusive dealing arrangement" and rejected McWane's contrary arguments. Dissent 28 n.38; *see also id.* at 12. And he concluded that there was "ample record evidence" that the "[p]rogram harmed McWane's rival Star." *Id.* at 4. But he nonetheless found that complaint counsel had fallen short in proving harm to competition. *See* Section II.C.4, *infra.*

STANDARD OF REVIEW

This Court "review[s] issues of law de novo," but "the FTC's findings of fact and economic conclusions" are reviewed "under the substantial evidence standard," which requires only "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1062-63 (11th Cir. 2005) (internal quotation marks omitted); *see* 15 U.S.C. § 45(c). That standard "requires more than a scintilla, but … less than a preponderance of the evidence." *Florida Gas Transmission Co. v. FERC*, 604 F.3d 636, 645 (D.C. Cir. 2010) (internal quotation marks omitted). It is thus not the Court's task to "make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454, 106 S.Ct. 2009 (1986) (internal quotation marks omitted).

"This standard applies regardless whether the FTC agrees with the ALJ." *Schering-Plough*, 402 F.3d at 1062. As McWane observes, this Court has stated that it will "examine the FTC's findings more closely where they differ from those of the ALJ." *Id.*; *see* Br. 26. But the Commission *agreed* with the ALJ on the critical facts relevant to this appeal and affirmed the ALJ's finding of liability for monopoly maintenance.

SUMMARY OF ARGUMENT

McWane's exclusionary strategy satisfies both elements of unlawful monopoly maintenance. First, McWane exercised monopoly power in the relevant market—the market to supply U.S.-made fittings for waterworks projects with domestic-only specifications. McWane argues that there was no such market, but that position contradicts overwhelming record evidence, including McWane's own documents. Distributors will not buy imported fittings for domestic-only projects, which often reflect Buy-American legal requirements. They must and do buy domestically manufactured fittings instead, even though prices for those fittings are much higher than for equivalent imports. Domestic-only projects are thus a distinct fittings market, in which McWane, with its overwhelming market share, exercises monopoly power.

Second, McWane's exclusivity mandate was anticompetitive and meets the second element of the monopolization offense. A monopolist's conduct is

anticompetitive if, "through something other than competition on the merits, [it] has the effect of significantly reducing usage of rivals' products and hence protecting the ... monopoly." *Microsoft*, 253 F.3d at 65. Here, McWane responded to Star's entry not with "competition on the merits," but by raising Star's costs and making it a less efficient competitor. Because of McWane's strategy, Star never achieved the scale economies it needed to justify a foundry acquisition and thereby lower its marginal costs. McWane's exclusivity mandate thus kept Star from effectively competing with McWane and enabled McWane to continue charging monopoly prices. This is textbook anticompetitive conduct. It is irrelevant that Star managed to win *some* business (largely after McWane learned of this investigation). "The test is not total foreclosure," but whether the conduct "slow[s] the rival's expansion" and injures consumers by "delay[ing] … [its] growth." *Dentsply*, 399 F.3d at 191.

Although McWane agrees that Star was inefficient because it relied on third-party foundries, it argues that such inefficiency insulates it from antitrust liability; harm to an inefficient competitor, McWane says, cannot constitute the requisite "harm to competition." That argument illogically ignores McWane's own role in making Star less efficient. By blocking Star's access to the main distribution channels, McWane's exclusivity mandate lowered Star's sales volume and kept its cost structure inefficiently high. As governing antitrust precedent confirms, that

mandate harmed competition by keeping McWane's only rival from disciplining its monopoly prices. In these circumstances, harm to a monopolist's sole competitor *is* harm to competition.

McWane also demonstrates no procompetitive justification for its conduct. Although exclusive dealing can have efficiency benefits in many contexts, it is hornbook law that exclusivity arrangements are more problematic when imposed by monopolists than by non-monopolists. McWane all but ignores key precedents (such as *Dentsply* and *Microsoft*) that address exclusivity arrangements imposed by monopolists and focuses instead on inapposite cases involving exclusive dealing in competitive markets. Also, McWane did not even compete for exclusivity by providing new discounts or other procompetitive inducements to its customers; instead, it unilaterally imposed an exclusivity requirement and threatened to cut off any customer that disobeyed.

In addition, nothing in the record supports McWane's suggestion that Star's entry imperiled McWane's U.S. foundry. In any event, preserving the industrial status quo does not qualify as a procompetitive justification, and the antitrust laws have no "industrial stability" exception. Similarly, McWane does not address the Commission's conclusion that McWane's "cherry-picking" argument was economically flawed and legally irrelevant.

Finally, well-established antitrust precedent undermines McWane's argument that complaint counsel should have been required to prove in greater detail exactly how Star would have developed in the absence of McWane's anticompetitive conduct. In *Microsoft*, the en banc D.C. Circuit unanimously adopted the position of the leading antitrust treatise and concluded that, "as to § 2 *liability* in an equitable enforcement action," the government need not "present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." 253 F.3d at 79. Instead, the government need only show that the monopolist's conduct "reasonably appear[s] capable of making a significant contribution to maintaining monopoly power." *Id.* (internal quotation marks and ellipsis omitted). Complaint counsel easily satisfied that standard.

ARGUMENT

The offense of "monopolization" under Section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power" through anticompetitive means. *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1293-94 (11th Cir. 2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698 (1966)). Both elements are satisfied here. Throughout the applicable period, McWane monopolized the domestic-only market and charged monopoly prices. After Star announced its entry, McWane preserved its monopoly not by reducing

prices or providing better service, but by unilaterally imposing an exclusivity mandate calculated to raise Star's cost structure and keep it from disciplining McWane's prices. And so McWane ended just as it started, with a monopoly, charging monopoly prices. Section 2 of the Sherman Act was enacted to ban precisely such conduct.

I. McWane Has Monopoly Power In The Relevant Market

McWane launched its exclusivity requirement when Star announced that it would enter the market for U.S.-made fittings used in domestic-specifications projects. McWane's senior leadership expressed concerns that "the chance for profitable cohabitation with Star owning a [piece] of the *Domestic market* is slim," ALJ ¶ 1150 (quoting CX0074 at 1) (emphasis added), and that Star's entry would lead "the *domestic market* [to] get[] creamed from a pricing standpoint just like the *non-domestic market* has been driven down in the past," ALJ ¶ 1149 (quoting CX0074 at 1) (emphasis added).

McWane was right then to distinguish between these two markets, and it is wrong now to insist that there is instead only a single market for both domestic and imported fittings. As the Commission found, the relevant market is the one that McWane monopolized: the market to supply fittings to projects with domestic-only specifications. McWane's contrary argument is wrong and indeed implausible. In any event, "[d]efining a relevant product market … is a factual question that [the

Court] review[s] for clear error," *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208, 1217 (11th Cir. 2012), and the Commission's market definition here easily passes that test.

A. The Relevant Market Consists of Domestically Manufactured Fittings

"To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant's products or services." *Levine v. Cent. Fla. Med. Affiliates*, 72 F.3d 1538, 1552 (11th Cir. 1996) (internal quotation marks omitted). Here, the relevant market consists of fittings sold for use in projects with domestic-only specifications—*i.e.*, projects in which end users demand fittings manufactured in the United States, often to comply with Buy-American legal requirements. Comm'n 13-16. Because distributors must comply with that end-user demand, they will not buy imported fittings for domestic-specification projects, and suppliers such as McWane and Star therefore cannot sell imported fittings for such projects. ALJ ¶¶ 547-50. For example, "neither McWane nor Star sold any imported fittings for use in any ARRA-funded projects." Comm'n 16. As the leading antitrust treatise recognizes, "[t]o the extent that regulation limits substitution, it may define the extent of the

market." IIB Phillip E. Areeda, Herbert Hovenkamp, & John Solow, *Antitrust Law* ¶572b at 430 (3d ed. 2007).[9]

McWane contends (Br. 35) that there "was ample evidence" in the record that customers "flip" their demand from domestic to imported fittings in response to pricing pressures. That is incorrect. As the Commission found, flipping is exceedingly rare, and typically "occurs when domestic fittings are unavailable, rather than as the result of competition between domestic and imported fittings." Comm'n 16. That fact alone is dispositive. Markets are defined principally by the sensitivity of customers to modest price variations ("cross-elasticity of demand"). *See, e.g.*, *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008); *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986 (11th Cir. 1993). They are *not* defined by whether customers can be forced to buy product X if product Y is completely unavailable. Here, the Commission and ALJ found that distributors are insensitive

[9] When a substantial group of customers can be identified, segregated, and charged monopoly prices for a significant period, sales to that group constitute a relevant market. *See* IIB Areeda & Hovenkamp, *Antitrust Law* ¶534d.1, at 269-70. The federal enforcement agencies term this a "price discrimination" market. *See* Comm'n 14; DOJ & FTC, Horizontal Merger Guidelines §4.1.4 (2010); *see also In re Polypore Int'l*, 2010 WL 9933413 at *14-15 (FTC Dec. 13, 2010), *aff'd*, 686 F.3d 1208, 1217-18. Here, projects with domestic-only specifications can be targeted for higher pricing, and a hypothetical monopolist could raise prices by reducing its output because imported fittings cannot satisfy domestic-only specifications. *See generally FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008) (discussing the "hypothetical monopolist" construct for market-definition purposes).

to price variations because they simply will not buy imports for projects with domestic-only specifications when domestic fittings are available, "[r]egardless of price." *E.g.*, ALJ ¶¶ 547-50. That fact confirms the existence of a distinct domestic-only market.

McWane's appeal to history (Br. 10-12) cannot support its contrary argument. A few decades ago, nearly all fittings for U.S. waterworks projects were manufactured in the United States. Comm'n 5; ALJ ¶ 462. Less expensive imported fittings were introduced in the 1980s. Since the early 2000s, however, the percentage of waterworks projects with domestic-only specifications has held fairly steady in the range of 15%-20% (measured by sales volume). *See* Comm'n 16.[10] Again, that market reality reflects the entrenched demand for American-made waterworks products. *See* ALJ ¶¶ 1029-1031. Distributors and suppliers must take that demand as they find it. ALJ ¶¶ 547-50.

McWane also asserts that domestic fittings are "a small minority" of all fittings sales and that imported fittings "dominate" domestic fittings. Br. 32, 34. But that observation shows only that the nondomestic-fittings market is larger than the separate domestic-only market. Comm'n 16. That a given market is bigger

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[10] McWane asserts that the share of domestically manufactured fittings as a percentage of fittings sold overall continued falling in the early 2000s. Br. 11. But "any growth in import sales likely came from the greater use of imports *in open-specification jobs* and not from a decline in domestic-only projects." Comm'n 16 (emphasis added).

than another does not somehow make them the same market. Neither does the fact that domestic and imported fittings are physically identical. *See U.S. Anchor*, 7 F.3d at 995-96 (finding separate markets for "virtually identical," "functionally interchangeable" anchors).

Any remaining question would be resolved by the uncontradicted pricing and profitability evidence. McWane charged **{ }** more for domestic-specification projects than for open-specifications projects, even though the fittings supplied were functionally indistinguishable. ALJ ¶ 1076 & RX410. McWane's profits were also much higher in the domestic-only market. *See* Section I.B, *infra.* McWane can charge higher prices (and earn greater profits) for domestically manufactured fittings only because certain identifiable customers demand American-made products instead of imports and will pay significantly more for them. As discussed, McWane's internal documents also confirm that its senior executives understood the obvious: that "the domestic market" is separate from "the non-domestic market" and is subject to much less price competition. ALJ ¶ 1149 (quoting Tatman).

Finally, McWane argues that the Commission's market-definition analysis was insufficiently rigorous because it did not rest on expert econometric analysis. Br. 32-33. Given the overwhelming record evidence, the Commission needed no detailed econometric analysis to draw the economic conclusion that cross-elasticity

between domestic and imported fittings was very low because customers do not buy imports for waterworks projects with domestic-only specifications. Comm'n 13-16. Complaint counsel's expert testified about the economic basis for market definition and grounded his analysis on the demonstrated inability of distributors to substitute imports when domestically manufactured fittings are required. CX2260-A at 15-16. The Commission reasonably relied on that testimony and other market-based evidence to draw economic conclusions about market definition. Nothing more was required. Antitrust cases turn on "market facts," not merely expert testimony, which is "useful as a guide to interpreting market facts, but … is not a substitute for them." *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S. Ct. 2578 (1993).[11]

B. McWane Monopolized the Domestic-Only Market

Both before and after Star's entry, McWane had monopoly power in the domestic-only market. McWane does not and cannot seriously dispute that this

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[11] *See also U.S. Anchor*, 7 F.3d at 995 (reliance on "practical indicia" appropriate for market definition); ABA Section of Antitrust Law, *Mergers & Acquisitions* 55 (3d ed. 2008) ("qualitative evidence of a buyer's willingness to substitute one good or service for another often provides the principal evidence of the boundaries of a relevant market"). McWane's citations for the proposition that expert testimony is required (Br. 31-34) are inapposite—not only because the Commission *did* rely on expert testimony here, but also because the cited cases involved more complex market-definition issues. The cases establish no one-size-fits-all evidentiary requirement.

conclusion follows once the relevant market is identified as the supply of fittings for domestic-only projects.

Monopoly power is "the power to raise prices to supra-competitive levels" or "to exclude competition in the relevant market either by restricting entry of new competitors or by driving existing competitors out of the market." *U.S. Anchor*, 7 F.3d at 994 (internal quotation marks omitted). Where, as here, there is direct evidence that a firm has profitably raised prices above competitive levels, "the existence of monopoly power is clear." *Microsoft*, 253 F.3d at 51. Because cases with "direct proof" of the exercise of market power are rare, "courts more typically examine market structure in search of circumstantial evidence of monopoly power." *Id.* Consequently, "[t]he principal measure of actual monopoly power is market share." *U.S. Anchor*, 7 F.3d at 999.

Here, both direct and indirect evidence confirm McWane's monopoly power. *First*, McWane had 100% of the domestic-only market for more than three years before Star's first sales in 2009, and its share never fell below **{ }** during any relevant period. Comm'n 16. This is a monopoly by any standard. *See, e.g.*, *Dentsply*, 399 F.3d at 188 (market share between 75% and 80% is "more than adequate to establish a prima facie case" of monopoly power); *Grinnell*, 384 U.S. at 571 (87% share); *American Tobacco Co. v. United States*, 328 U.S. 781, 797-98, 66 S.Ct. 1125 (1946) (over two-thirds share). McWane's market share is also

protected by substantial barriers to entry—another reliable indication of monopoly power. *See, e.g.*, *Microsoft*, 253 F.3d at 54-55. As the Commission found, new competitors face numerous hurdles to entering this capital-intensive market. Comm'n 17 (citing ALJ pp. 375-77; ALJ ¶¶ 1044-55, 1119-26, 1130-32); *see also* Section II.A, *infra* (refuting McWane's argument that Star's entry was easy or successful).

Second, direct evidence shows that McWane exercised monopoly power by controlling prices. Again, McWane commanded much higher prices on fittings for projects with domestic-only specifications than on fittings for projects with open specifications. Comm'n 18; ALJ ¶¶ 1075-76, 1091. Indeed, during the relevant period, McWane *increased* prices on domestic fittings and refused to negotiate prices. Comm'n 18; *see also* n.14, *infra*. And as McWane's expert conceded, Star's entry failed to constrain McWane's pricing. ALJ ¶ 1090; *see* Comm'n 18.

Third, McWane's profit margins similarly reflect its monopoly power. Although domestic fittings cost more to produce than foreign ones, ALJ ¶ 1080, McWane also earned higher profits on them. For example, in 2009, McWane reported gross profits of **{ }** on fittings for open-specifications projects, while its profits on fittings for domestic-only projects were **{ }**, a **{ }** differential. ALJ ¶ 1091. The next year, *after* Star's entry into the domestic-only

market, McWane's gross profits in that market rose to **{ }**, more than **{ }** the new, lower profit margin for nondomestic fittings, **{ }**. *Id.*

Fourth, McWane further manifested its monopoly power by exploiting its dominance to "restrict[] entry of new competitors." *U.S. Anchor*, 7 F.3d at 994 (internal quotation marks omitted). As discussed below, McWane did not respond to Star's entry by offering customers better prices or other procompetitive inducements. Instead, McWane "unilaterally imposed" its all-or-nothing mandate on distributors and told them that, if they dealt with its competitors, they would lose access to McWane's full line of fittings and forfeit their "accrued rebates under preexisting rebate agreements." ALJ p. 407. Only a monopolist would anticipate that this uniform one-way edict would make customers more obedient rather than less.

II. MCWANE UNLAWFULLY MAINTAINED ITS MONOPOLY

McWane's conduct also satisfies the second element of the two-part test for unlawful monopoly maintenance: "the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *Morris*, 364 F.3d at 1294 (quoting *Grinnell*, 384 U.S. at 570-71). This element "requires predatory or exclusionary acts or practices that have the effect of preventing or excluding competition within the relevant market." *Id.*

A monopolist's conduct is anticompetitive if, "through something other than competition on the merits, [it] has the effect of significantly reducing usage of rivals' products and hence protecting [the] ... monopoly." *Microsoft*, 253 F.3d at 65. In particular, as the leading antitrust treatise summarizes, a monopolist's conduct threatens harm to competition if it involves "(a) exclusive dealing or similar arrangements covering a significant portion of [distribution]; (b) entry barriers or equivalent impediments making it difficult for rivals or potential rivals … to obtain efficient access to [distribution]; and (c) resulting prolongation of the dominant firm's ability to earn monopoly profits[.]" XI Areeda & Hovenkamp, *Antitrust Law* ¶1802b at 75-76 (footnote omitted); *see also* Comm'n 19 (citing additional authorities). These formulations exactly describe McWane's conduct.

A. McWane Used Exclusivity To Impede Competition

When Star announced its imminent entry in mid-2009, McWane understood that, in its words, "any competitor" seeking to enter the domestic-only market would confront "significant blocking issues" if it could not initially produce a "full line" of fittings. ALJ ¶ 1155 (quoting CX0067 at 2). McWane thus searched for a way to force Star "to absorb the costs associated with having a more full line before they can secure major distribution." ALJ ¶ 1162 (quoting CX0076 at 9). McWane wished to "make sure that they don't reach any critical market mass that

will allow them to continue to invest and receive a profitable return." ALJ ¶ 1150 (quoting CX0074 at 1).

The result was the exclusivity mandate at issue here. McWane required distributors, with narrow exceptions, to buy *all* of their domestic fittings from McWane as a condition for buying *any* domestic fittings from McWane. If distributors balked, McWane would deny them access to less common fittings that were initially available only from McWane. This was a highly effective threat. If McWane cut any distributor off from its full line of fittings, it would imperil the distributor's ability to meet its own customers' needs, and the end-user customers could take the entirety of their business to rival distributors, with "devastating" consequences for the cut-off distributor. *See* ALJ ¶ 366. This fear led many distributors to accede to McWane's exclusivity demand. ALJ ¶¶ 1203, 1235, 1252, 1301, 1316, 1358, 1393.

McWane implausibly mischaracterizes this exclusivity mandate as a mere "rebate program," *e.g.*, Br. 27, as though it related only to the *prices* at which McWane would sell its goods rather than *whether* it would sell those goods on any terms to distributors who did business with Star. But McWane intended—and distributors understood—the exclusivity mandate as a "hard line" policy, under which "[v]iolations will result in" not only "loss of [previously] accrued rebates," but also "*[l]oss of access*" to McWane products altogether. ALJ ¶ 1183 (quoting

CX0119 at 2, 4 (McWane document)) (emphasis added). As Mr. Tatman emphasized: "To protect our domestic brands and market position … we won't provide domestic product to distributors who are not fully supporting our domestic product lines." ALJ ¶ 1167 (quoting CX0113). And McWane's national sales manager likewise told his sales force to warn distributors "every day" that "[o]nce they use Star, they can't EVER buy domestic from us[.]" ALJ ¶ 1179 (quoting CX0710 at 1-2). In sum, as the ALJ found, "the Full Support Program is not a mere rebate from which Distributors can walk away at any time, as argued by [McWane]"; instead, "overwhelmingly, Distributors viewed [it] as an all-or-nothing exclusive dealing arrangement and acted accordingly." ALJ pp. 405-06.

Just as McWane predicted, this exclusivity requirement kept Star from reaching "any critical market mass" that would "allow them to continue to invest" in becoming a more efficient competitor. ALJ ¶ 1150 (quoting CX0074 at 1). Although many distributors would have been willing to buy Star's domestically manufactured fittings, and many solicited bids soon after Star announced it would enter the market, few could afford to bet their business on Star's budding operation once McWane threatened to pull its entire domestic-fittings line if they did any prohibited business with another supplier. Comm'n 21-25, 29-30. The distributors thus cancelled orders from Star and withdrew bid requests. *Id.* at 10, 23, 25. With the exception of Hajoca—which McWane made a cautionary example of

disobedience—all major distributors fell in line and generally bought from Star only when McWane so permitted under the limited exceptions to its exclusivity mandate. *Id.* at 22-23.[12]

Star's relationship with HD Supply exemplifies how McWane's exclusive dealing marginalized Star and relegated it to fringe sales. HD Supply is the nation's largest fittings distributor and accounts for 28% to 35% of fittings distribution overall. ALJ ¶¶ 222, 378. According to Star's undisputed estimates at trial, it had **{ }** of HD Supply's business for fittings in projects with open specifications, but less than **{ }** of HD Supply's business for domestic fittings. ALJ ¶ 1258. That lopsided ratio is no accident. One day after McWane announced its exclusivity requirement, HD Supply instructed its district, branch, and operations managers not to buy from Star, lest the company lose access to all of McWane's fittings. ALJ ¶¶ 1238-41. HD Supply thereafter cancelled pending orders it had with Star for domestic fittings. Comm'n 23; ALJ ¶ 1242. McWane's exclusivity announcement likewise caused both the second and third largest distributors (Ferguson and WinWholesale) to cancel business that Star otherwise

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[12] McWane contends that its decision to punish Hajoca "completely backfired" (Br. 41), but that makes no sense: McWane cut off Hajoca, not the other way around, and Hajoca then had no choice but to buy Star's domestic fittings and risk losing access to less-common fittings that only McWane could supply. That Hajoca was the only distributor McWane felt the need to cut off (Br. 41 n.114) suggests that the example effectively deterred other distributors.

would have won, and other major distributors reacted similarly. Comm'n 23-24.[13] Even when Star offered better pricing terms than McWane, distributors remained unwilling to buy from Star given "the 'all-or-nothing domestic fitting policy from McWane.'" ALJ ¶ 1391; *see* Comm'n 10.

As a result, Star's share of the domestic-only market never { }, culminating in a { } share for calendar year 2011. That figure pales in comparison to Star's share of the market to supply fittings to projects with open specifications, which exceeded { }. *See* p. 14, *supra*. Moreover, even the { } figure does not fully reflect the anticompetitive impact of McWane's exclusivity mandate as originally imposed: it describes Star's sales volume a full year after the FTC notified McWane of this investigation in early 2010 and McWane tempered its enforcement efforts in response. *See* ALJ p. 405; ALJ ¶ 1311. And although McWane extols every sale captured by Star, McWane did not need to reduce prices to compete; it *raised*

[13] HD Supply and Ferguson alone handle 53-60% of fittings distribution. Comm'n 7, 23; ALJ ¶¶ 378-79. Although there is some evidence that Ferguson would have favored McWane over Star even without McWane's exclusivity requirement, that requirement "nonetheless cost Star some Ferguson business. A Ferguson Vice President called district managers after McWane's policy was announced to ensure that [they] did not buy from Star, and at least one job Ferguson initially awarded to Star was canceled." Comm'n 23.

prices and earned higher margins during the relevant period. Br. 25, 53; Comm'n 18, 29; ALJ pp. 379-81; ALJ ¶¶ 1073, 1083, 1090.[14]

McWane's exclusivity requirement also kept Star from achieving operational efficiencies that would have made it a more effective competitor in the long run. Absent that requirement, Star likely would have achieved sales sufficient to justify a specific foundry acquisition that it began seriously considering in the early fall of 2009.[15] Star then could have lowered its marginal costs and competed on prices more effectively. But once Star revised its projected sales figures downward in light of McWane's exclusivity mandate, Star concluded that the purchase no longer made economic sense. *See* Comm'n 25; ALJ ¶¶ 1394-1408; *see* ALJ

[14] McWane cites the ALJ's opinion for the proposition that prices did not rise during the relevant period. Br. 57 (citing ALJ ¶ 958). But the cited passage discusses evidence relating only to the competitive *nondomestic*-fittings market. *See* ALJ ¶ 957. The ALJ separately found that McWane did raise prices in the *domestic-only* market. ALJ pp. 380-81.

[15] Star's sales of domestically manufactured fittings were { } million in 2010. Comm'n 25. Star testified without contradiction that, based on refinements of earlier estimates, sales of { } were necessary to support the acquisition of the foundry. ALJ ¶¶ 1400, 1405. Star further estimated that, absent McWane's exclusivity mandate, it would have had { } in sales of domestic fittings in 2010, rising to { } in 2011—figures it based in part on quotes distributors made to Star and later withdrew after McWane issued its exclusivity mandate. ALJ ¶¶ 1394-95. McWane criticizes Star's evidence as "self-serving" (Br. 47), but that is no basis for impeaching it. McWane could have responded with its own evidence; it did not. In any event, as discussed in Section II.C.4 below, antitrust law places no burden on the government, for liability purposes, "to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct." *Microsoft*, 253 F.3d at 79.

pp. 400, 411. Star thus continued using a less efficient manufacturing process that imposed higher logistical costs, relied on jobber foundries, entailed middleman markups, and gave Star less control over inventory and production. In short, McWane's exclusivity mandate raised Star's costs and made it less capable of profitably underselling McWane in the domestic-only market. Comm'n 28.[16]

McWane objects that the harm it did to Star is somehow irrelevant because "[t]the antitrust laws are intended to protect competition, not competitors[.]" Br. 48 (quoting *Levine*, 72 F.3d at 1551). But it makes no sense to invoke that distinction on these facts. "[I]n a concentrated market with very high barriers to entry, competition will not exist without competitors," *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 951 (6th Cir. 2005), and Star was McWane's only potential rival. McWane's exclusivity mandate kept Star from achieving the efficiency and scale it needed to discipline McWane's monopoly prices, so McWane went on charging those prices, with accompanying injury to consumers. That is classic harm to competition: McWane "denie[d] consumers the benefit of the pressure to lower prices that would likely accompany [the

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[16] McWane contends that the ALJ "f[ou]nd that Star had the resources to purchase a foundry … but simply made a business decision not to make an investment that could have improved its efficiency." Br. 58 (citing ALJ ¶ 1406) (emphasis omitted). That is a mischaracterization. The ALJ found only that "Star had the financial reserves and borrowing ability" to obtain a foundry, ALJ ¶ 1406, *not* that it would have made business sense to do so after McWane's exclusivity mandate undermined Star's cost justification for that major capital investment.

excluded firm] becoming a viable competitor." *Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 466 F.3d 961, 967-68 (11th Cir. 2006).[17]

McWane also repeatedly suggests that its exclusivity mandate was ineffective and widely ignored. The Commission's contrary factual findings are correct and, in any event, subject to the deferential substantial-evidence standard. *See Polypore*, 686 F.3d at 1213, 1217. McWane cannot meet the burden imposed by that standard.

First, McWane misrepresents that "the ALJ found" that "McWane had little or no ability to dictate terms to the Distributors, who held significant market power over it." Br. 21. The ALJ found no such thing; indeed, he found the opposite. *E.g.*, ALJ p. 383 ("Star's access to Distributors was impeded by McWane's Full Support Program" to the point that it "limited Star's ability to constrain McWane's monopoly power"). In the passage cited by McWane, the ALJ simply recounted Mr. Tatman's trial testimony that "he believed" his threats to distributors would be unavailing because he supposedly thought of McWane, the gatekeeper of essential

[17] *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991), on which McWane relies (Br. 59), is inapposite. The defendant there—not a monopolist—had entered into a distribution agreement with one of many distributors, and the ensuing arrangement was efficient because the defendant had achieved scale economies. The Court rejected an attempt by the defendant's rivals to "free ride" on the defendant's greater "size and [existing] capital outlays" by joining the same distribution arrangement. *Id.* at 1572. Here, Star never sought to "free-ride" on McWane's operations; it simply wished to avoid anticompetitive interference in the development of its own operations.

inputs, as "a Chihuahua barking at [a] Rottweiler." ALJ ¶ 1178. This self-serving characterization was also implausible. When McWane issued its exclusivity mandate, it was the sole supplier of the full line of fittings for domestic-only specifications, including otherwise unavailable fittings, and these distributors could disregard that mandate only at their peril—which is why they generally acquiesced. *See generally Dentsply*, 399 F.3d at 195-96 (monopolist supplier can induce even large multi-product distributors to cooperate in excluding monopolist's rivals).[18]

McWane also claims that "dozens and dozens of McWane's customers did in fact purchase domestic fittings from Star," in supposed disobedience to McWane's exclusivity demand. Br. 21. That mischaracterizes the record: those customer purchases were a byproduct of McWane's limited exception for fittings that McWane did not have in stock. The marginal sales that Star made under that exception were substantially smaller than the sales Star otherwise could have made absent McWane's exclusivity mandate. *See* Comm'n 22-24, 29. Again, Star's relationship with HD Supply—which accounted for nearly one-third of fittings

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[18] McWane implies that the ALJ found that "the FTC's own expert failed to identify a *single* distributor … who wanted to purchase Star domestic Fittings but could not because of McWane's rebate policy." Br. 44-45 (citing ALJ ¶ 375). The ALJ made no such finding and, to the contrary, indicated that numerous distributors likely would have given Star more business but for McWane's exclusivity mandate. *See* Statement of Facts, Section A.2, *supra* (citing findings).

distribution—illustrates that effect. Star had **{ }** of HD Supply's business for nondomestic fittings, but less than **{ }** of its business for domestic fittings. ALJ ¶ 1258.

Finally, contrary to McWane's repeated suggestion (Br. 4, 27, 43), Star had no exclusive agreements with any distributor. The fact that some distributors who bought in small volumes from Star never purchased domestic fittings from McWane suggests only that those distributors were insignificant market participants with negligible demand for domestically manufactured fittings.

B. McWane Demonstrates No Procompetitive Justification

Once the government "demonstrate[s] a harm to competition, the burden falls upon [the defendant] to defend its exclusive dealing … by providing a pro-competitive justification[.]" *Microsoft*, 253 F.3d at 71. McWane demonstrates no such justification.

Although McWane devotes an entire section of its brief to the supposed "[p]rocompetitive [e]ffects" of its exclusivity mandate (Br. 54), its argument on that point is simply illogical. McWane argues that (1) it was more efficient than Star because it owned a foundry, whereas Star made a "business decision" not to buy one; (2) Star's resulting higher cost structure kept it from competing on the basis of price; (3) "[c]ompetition is not injured by the 'exclusion' of a less efficient, higher priced competitor"; and (4) because Star was excluded,

"customers could continue to benefit from the lower prices offered by the most efficient domestic foundry" (*i.e.*, McWane's). Br. 54-55, 58.

This argument ignores McWane's role in *depriving* Star of the scale needed for efficient operations. Having prevented Star from achieving the sales volume needed to justify a foundry investment, McWane may not seek refuge in the very fact that its anticompetitive conduct succeeded in making Star less efficient. "The fundamental concern with monopoly maintenance is that dominant firms may adopt policies that prevent the development of effective competition." Comm'n 30. As the D.C. Circuit has explained, "it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors" before they can become effective rivals. *Microsoft*, 253 F.3d at 79; *accord Dentsply*, 399 F.3d at 191. Such "free reign to squash" entrants is precisely what McWane seeks here.

Of course, sales retention—McWane's proffered justification—"is not an unlawful end" for a monopolist to pursue. *Microsoft,* 253 F.3d at 71. But "neither is it a procompetitive justification … for [anticompetitive] exclusive dealing." *Id.*; *see also id.* at 72. As the Commission explained, "[c]ognizable justifications are typically those that reduce cost, increase output or improve product quality, service, or innovation." Comm'n 30 (collecting cases). Instead of preserving its sales volume by reducing prices, however, McWane simply took sales from Star

by increasing Star's costs and reducing its efficiency. Comm'n 30-31. That is the antithesis of pro-competitive conduct, and it is not a cognizable efficiency justification. *See* Horizontal Merger Guidelines § 10 ("Cognizable efficiencies … do not arise from anticompetitive reductions in output or service."); *In re Polygram Holding, Inc.*, 136 F.T.C. 310, 345-46 (2003) (antitrust tribunal may "reject proffered justifications … incompatible with the goal of antitrust law to further competition"), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005); *see also* Section II.C.1, *infra* (refuting McWane's reliance on the general observation that exclusive dealing can have efficiency benefits, particularly in competitive markets).

McWane also argues that it had to keep Star from becoming a serious competitor lest Star "'cherrypick' the core of [the] domestic fittings business by making only the top few dozen fittings that account for roughly 80% of all fittings sold," while leaving McWane alone to sell the less common 20% of fittings. Br. 16. The premise is that, as a monopolist, McWane uses extra-high profit margins on the more common fittings to cross-subsidize its prices (and, presumably, somewhat lower profit margins) for the less common fittings. Comm'n 31-32. But McWane has never explained how protecting this cross-subsidy scheme could qualify as a pro-competitive justification for excluding competition. As the Commission observed, "If a limited supplier undersells a full-line supplier for more common products, there is no reason in principle why the full-line supplier

could not compete for that business by lowering its price for those products and increasing its price for the less common products," and "McWane offers no reason why … consumers are necessarily worse off" under that outcome. Comm'n 32. McWane still offers no reason. Indeed, it does not even address, let alone challenge, the Commission's reasoning on this point.[19]

Finally, McWane intimates that effective competition by even one rival would imperil McWane's efforts to "keep [its] foundry open (and its workforce employed)." Br. 55. Even if this were a pro-competitive justification, which it is not, *see* Comm'n 32, it lacks any factual foundation. McWane cites no record evidence that its foundry was in danger of closing. And McWane's internal planning documents likewise voiced no concern that successful entry by Star would force McWane to close its foundry. Instead, the documents simply warned that, if Star "stay[s] in the business," McWane's "distributors will continually pressure us to 'do something' (lower prices)," and "we will always see downward pressure in the future." ALJ ¶ 1152. Of course, competition-induced "downward pressure" in the face of monopoly pricing is the central aim of the antitrust laws,

[19] Although the amicus brief filed by McWane's supporting professors (at 27 n.13) speculates in passing about theoretical conditions that might explain a hypothetical cross-subsidization strategy, it relies on a string of assumptions that have no basis in this record and have never been asserted by McWane.

and anticompetitive measures to eliminate such downward pressure are the key evil that the antitrust laws target.[20]

C. McWane's Legal Arguments Contradict Governing Antitrust Precedent Concerning Exclusive Dealing By Monopolists

The Commission broke no new doctrinal ground in holding McWane liable for unlawful monopoly maintenance on this record. In contending otherwise, McWane props up and knocks down various straw men, implying that the Commission resorted to expansive views of antitrust liability at odds with the last fifty years of antitrust precedent. But it is McWane, not the Commission, that ignores the governing law of exclusive dealing in the monopoly-maintenance context. Of the two leading precedents in that area most relevant here, McWane cites one of them (*Dentsply*) only once, and the other (*Microsoft*) not at all. By themselves, *Microsoft* and *Dentsply* refute most of the legal arguments that McWane presses on appeal.

[20] In an amicus brief, the labor union for McWane's employees suggests, in effect, that labor's interests in industrial stability should outweigh the antitrust laws' emphasis on competition. *E.g.*, United Steelworkers Br. 14. But the antitrust laws are not subject to this proposed weighing of policy interests. *See, e.g.*, *National Soc'y of Prof'l Eng'rs, v. United States*, 435 U.S. 679, 689, 695, 95 S.Ct. 1355 (1978) ("the statutory policy precludes inquiry into the question whether competition is good or bad" and forecloses any argument that "monopolistic arrangements will better promote" social welfare "because of the special characteristics of a particular industry"). In any event, any concern for employment seems misplaced here. By definition, domestic fittings production will always require U.S.-based workers, whether employed by McWane, Star, or some other entrant.

1. Monopolists Are Subject To Stricter Limits On Exclusivity Than Non-Monopolists

In both *Microsoft* and *Dentsply*, the courts condemned exclusive-dealing strategies by monopolists even though, in each case, the strategy marginalized the monopolist's rivals rather than excluding them altogether. *See Microsoft*, 253 F.3d at 64; *Dentsply*, 399 F.3d at 191. As the courts explained, exclusive dealing has a "significant effect in preserving [a] monopoly" if it keeps competitors "below the critical level necessary ... to pose a real threat" to the monopoly. *Microsoft*, 253 F.3d at 71. Similarly, exclusive dealing can harm competition by "slow[ing] the rival's expansion by requiring it to ... rely at least temporarily on inferior or more expensive outlets." *Dentsply*, 399 F.3d at 191.[21] In such circumstances, "[c]onsumer injury results from the delay that the dominant firm imposes on the smaller rival's growth." *Id.* (quoting XI Areeda & Hovenkamp, *Antitrust Law* ¶1802c, at 64 (2d ed. 2002)).

Dentsply and *Microsoft* likewise undermine McWane's reliance, in this monopoly context, on arguments concerning the general efficiency benefits of exclusive dealing. It is undisputed that exclusive dealing can have procompetitive benefits, particularly in non-monopoly markets. *See* Comm'n 18. Also, exclusive

[21] Although McWane dismisses *Dentsply* on the ground that "the competitors [there] held 'minuscule' market shares" (Br. 46), their collective market share was in fact greater than Star's ever became, and the *Dentsply* defendant's market share (67% to 80%) was much lower than McWane's. *See* 399 F.3d at 184.

dealing generally presents limited potential for harm in competitive markets because "the loss of a single rival or constraints on its expansion may have little impact if there is sufficient continued competition by other rivals that prevents the excluding firm from gaining the power to raise or maintain supra-competitive prices."[22]

In contrast, exclusivity requirements trigger special antitrust concerns in *monopoly markets* where a monopolist imposes them to hobble new rivals and thereby maintain its monopoly. *See* Salop, Pozen & Seward at 40. As the *Dentsply* court explained, "[b]ehavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist." 399 F.3d at 187 (internal quotation marks omitted). "[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior." *Id.*; *accord ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012); *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 488, 112 S. Ct. 2072 (1992) (Scalia, J., dissenting on other grounds) ("Behavior that might otherwise not be of concern to the antitrust laws—or that might be viewed as

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[22] *See* Steven C. Salop, Sharis A. Pozen, and John R. Seward, *The Appropriate Legal Standard and Sufficient Economic Evidence for Exclusive Dealing Under Section 2: the FTC's McWane Case*, at 40, http://ssrn.com/abstract=2477448 (Geo. L. Ctr. 2014) ("Salop, Pozen & Seward").

procompetitive—can take on exclusionary connotations when practiced by a monopolist.”). The *Microsoft* court further noted that exclusive dealing by a monopolist “may give rise to a § 2 violation even though the contracts foreclose less than the roughly 40% or 50% share usually required in order to establish a § 1 violation” for agreements between non-monopolists. *Microsoft*, 253 F.3d at 70.

Tellingly, the key exclusive-dealing decisions on which McWane relies are inapposite because—unlike *Microsoft*, *Dentsply*, and this case—they involved defendants that lacked monopoly power. For example, McWane asserts (Br. 51) that the Commission's decision here conflicts with its prior decision in *In re Beltone*, 100 F.T.C. 68 (1982). *Beltone*, however, was not a monopoly-maintenance case; indeed, the respondent's market share during the period at issue dropped from 21% to 16%, entry was “not especially difficult,” manufacturers had “many outlets,” and there was “vigorous” competition from foreign manufacturers. *Id.* at 185, 211. McWane's other cases—*e.g.*, *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), and *Roland Machinery Co. v. Dresser Industries*, 749 F.2d 380 (7th Cir. 1984)—likewise did not involve monopoly maintenance. *Omega* and *Roland* are also inapposite because the defendants' rivals did not need independent distributors to reach customers. *See Omega*, 127 F.3d at 1163 (“direct sales to end-users” were “an alternative” to distributors); *Roland*, 749 F.2d at 395 (rival supplier could “establish its own dealership” and

bypass existing distribution channels). Here, distributors are essential; manufacturers cannot effectively sell directly to end users. Comm'n 22-23.

In short, McWane violated the antitrust laws not simply because it engaged in exclusive dealing, and not simply because it harmed a rival. It violated the antitrust laws because it was a *monopolist* that harmed its *only* rival by unilaterally imposing an exclusivity requirement that diminished competition and perpetuated McWane's monopoly power with no countervailing efficiency justification.

2. *Anticompetitive Exclusivity Does Not Require Formal Long-Term Contracts*

Well-established precedent similarly undermines McWane's argument (Br. 40) that its exclusivity mandate "lacked the hallmarks of impermissible exclusive dealing" found by antitrust courts, such as long-term contractual obligations that bind the defendant's customers. All four Commissioners (including Commissioner Wright at 28 n.38) rejected McWane's arguments on this point, and for good reason. As the *Dentsply* court explained, non-contractual exclusivity mandates can constitute unlawful monopoly maintenance if, as here, "the economic elements involved" in the monopolist-distributor relationship "make the arrangements … as effective as those in written contracts." *Dentsply*, 399 F.3d at 193; *accord ZF Meritor*, 696 F.3d at 270 ("*de facto* exclusive dealing claims are cognizable under the antitrust laws"); *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 149-50, 72 S.Ct. 181 (1951) (unilateral conduct of indefinite duration by a

monopolist with a "practically indispensable" service "forced numerous [customers] to refrain from" dealing with a rival).

Indeed, McWane's unilateral threat to deprive any errant distributor of access to its products was *more* anticompetitive than conventional exclusive contracts. In such contracts, a company typically competes for exclusivity for a defined period in exchange for some pro-competitive inducement that moves prices closer to cost. McWane cites various cases for the proposition that such "competition to become an exclusive supplier should actually be encouraged, as it can result in lower prices[.]" Br. 39 n.111 (internal citation, emphasis, and quotation marks omitted). But that proposition is irrelevant here because McWane "unilaterally imposed" its exclusivity mandate, engaged in "no competition to become the exclusive supplier," and offered no "additional discount, rebate or other considerations" in exchange for exclusivity. ALJ p. 407. Indeed, McWane threatened to *revoke* benefits under existing rebate agreements with any distributor who bought from another supplier. *Id.* In short, this exclusivity program came without any benefits for McWane's customers; it was simply a threat to line up with McWane in opposition to Star.

There is likewise no merit to McWane's assertion that its exclusive dealing mandate was "easily terminable by [a] distributor at any time." Br. 40. A distributor could not opt out of (let alone "terminate") that unilateral mandate,

other than by ceasing to do business with McWane—the very sanction that McWane used to enforce the program. Thereafter, the distributor could not do business with McWane again unless, implausibly, it stopped buying domestically manufactured fittings from any other source—*i.e.*, stopped buying them altogether—for another "12 weeks." ALJ ¶ 1173. As McWane's national sales manager aptly remarked, when instructing his sales force how to describe this policy to distributors, "[o]nce [distributors] use Star, they can't EVER buy domestic from us[.]" ALJ ¶ 1179 (quoting CX0710 at 1-2). In short, the Commission reasonably concluded that "the practical effect of [McWane's mandate] was to make it economically infeasible for distributors to drop McWane's full line of domestic fittings and switch to Star." Comm'n 24. That finding was correct, and it easily withstands substantial-evidence review.

Finally, contrary to its suggestion (Br. 40), McWane never placed any time horizon on its exclusivity mandate (let alone "four months"), and it never withdrew that mandate. Indeed, some distributors testified that they believed it was still in effect at the time of trial. Comm'n 39-40. McWane does appear to have begun enforcing that mandate less rigidly in early 2010, once it learned that the Commission had begun this investigation. *See* ALJ p. 405; ALJ ¶¶ 1220, 1311. But McWane cannot plausibly cite the promptness of that antitrust intervention as a basis for claiming that its exclusive-dealing mandate was short-term in nature.

McWane required exclusivity and thereby impeded competition "for as long as McWane desired." Comm'n 24. It warrants an antitrust remedy no less today because prompt antitrust intervention mitigated some of the intended harm.

3. *A Monopolist Can Be Liable For Impeding A New Entrant's Growth Even If The Entrant Makes Some Sales*

In a similar vein, McWane suggests that it could not possibly have violated the antitrust laws because Star managed to win *some* business after starting from a market share of zero in mid-2009. Br. 42. As *Microsoft* and *Dentsply* make clear, however, a monopolist's anticompetitive exclusion of a new rival violates Section 2 even if the rival is not "completely blocked from distributing its products." *Microsoft*, 253 F.3d at 64. "The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply*, 399 F.3d at 191; *accord ZF Meritor*, 696 F.3d at 271. Courts have likewise found monopolists liable for anticompetitive conduct even where the disadvantaged entrant gained some market share during the relevant period, but less than it likely would have gained absent the conduct. *E.g.*, *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789-90 (6th Cir. 2002). Courts reject the contrary position taken by McWane here because a monopolist can harm competition and consumer welfare by implementing "'strategically planned exclusive-dealing'" measures that do not altogether exclude a rival from the market but "'slow the rival's expansion,'" producing "'[c]onsumer injury [that] results from the delay

that the dominant firm imposes on the smaller rival's growth.'" *Dentsply*, 399 F.3d at 191 (quoting XI Areeda & Hovenkamp, *Antitrust Law* ¶1802c, at 76); *see also* Salop, Pozen & Seward at 13 (courts properly find liability where "the entrant remains viable but with limited output").[23]

McWane's reliance on Star's ability to "double" its market share between 2010 and 2011—but still not **{ }**—is particularly untenable given the timing of antitrust intervention. Again, the FTC notified McWane in January 2010 that it had opened an investigation into whether McWane's exclusivity requirement violated the antitrust laws. McWane promptly considered "[h]ow our potential FTC action might [a]ffect how we do business" with distributors that purchased from Star—*i.e.*, whether to soften enforcement of the exclusivity mandate to avoid antitrust liability. *See* ALJ p. 405. McWane *did* soften its approach immediately thereafter by resuming some previously discontinued business with Hajoca. ALJ ¶¶ 1221-23. And some other distributors

[23] McWane relies for its contrary proposition on Judge Posner's 1984 opinion in *Roland*, *see* Br. 42, but that case is inapposite. The defendant was not a monopolist and was not accused of excluding new rivals. Indeed, the only rival supplier in the picture was "four times" larger than the defendant in sales of the relevant product, had ample alternative distribution channels, and—tellingly—"[wa]s not even a party to th[e] case." 749 F.2d at 394-95. As Judge Posner's own antitrust scholarship confirms, exclusivity mandates imposed by monopolists to exclude new rivals pose much more serious antitrust concerns. Richard A. Posner, *Antitrust Law* 229 (2d ed. 2001) (exclusive dealing may "increase the scale necessary for new entry" and "increase the time required for entry and hence the opportunity for monopoly pricing").

(though by no means all) thereafter concluded that, "given the announced FTC investigation," the "risk" of rigid enforcement of the exclusivity mandate was "significantly less." ALJ ¶ 1311 (quoting distributor). Against that backdrop, the fact that Star's domestic-fittings share rose from { } in 2010 to { } in 2011, *see* ALJ ¶¶ 356-57, is more reasonably viewed as evidence that early antitrust intervention mitigated the full anticompetitive force of McWane's exclusivity mandate than as evidence that the mandate was ineffectual as originally implemented. *Cf. United States v. General Dynamics Corp.*, 415 U.S. 486, 504-05, 94 S. Ct. 1186 (1974) (actions taken to improve antitrust defendant's litigating position have "extremely limited" probative value).

4. Antitrust Law Does Not Require The Government To Prove How New Competitors Would Have Developed Absent Anticompetitive Conduct

As discussed in Section II.A, the Commission found strong evidence that McWane's industry-wide exclusivity mandate worked just as McWane expected: it kept Star from "reach[ing] any critical market mass that w[ould] allow them to continue to invest and receive a profitable return." ALJ ¶ 1150 (quoting CX0074 at 1); *see* Comm'n 22-29. The Commission's resolution of that evidentiary question was correct and, in any event, certainly supported by "substantial evidence." Echoing the dissent, however, McWane argues that complaint counsel needed to prove with greater certainty exactly how much business Star would have

won in the absence of McWane's exclusivity requirement and exactly how Star would then have improved its operational efficiency to challenge McWane's monopoly power. *See* Br. 57-58 (criticizing the Commission for speculating about "what might have happened" had McWane not targeted Star).[24] But complaint counsel had no such burden of proof, and McWane's contrary assumption runs headlong into the D.C. Circuit's unanimous en banc decision in *Microsoft*.

In *Microsoft*, the D.C. Circuit rejected the proposition—essentially repeated here by McWane—"that, as to § 2 *liability* in an equitable enforcement action, plaintiffs must present direct proof that a defendant's continued monopoly power is precisely attributable to its anticompetitive conduct." *Microsoft*, 253 F.3d at 79 (emphasis in original).[25] The court explained:

> To require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anti-

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[24] In one passage (Br. 47-50), McWane suggests that, so long as an entrant wins *some* business despite anticompetitive conduct, antitrust liability cannot rest even conceptually on "growth that would have occurred." That proposition is wrong, as discussed in Section II.C.3, and the cases McWane cites do not support it. *See Levine*, 72 F.3d at 1550 (no liability because the plaintiff had not shown that the defendants possessed even market power, let alone monopoly power); *Sterling Merch., Inc. v. Nestle, S.A.*, 656 F.3d 112, 122-23 & n.5 (1st Cir. 2011) (Clayton Act plaintiff lacked standing to challenge a merger because its theory of injury rested on an incorrectly conceived but-for world—"one without *any* exclusive agreements," even "efficient and pro-competitive" ones).

[25] "[C]oncerns over causation have more purchase in connection with the appropriate remedy issue," *Microsoft*, 253 F.3d at 80, such as where a private plaintiff seeks to establish damages.

> competitive actions. … *[N]either plaintiffs nor the court can confidently reconstruct a product's hypothetical … development in a world absent the defendant's exclusionary conduct. To some degree, 'the defendant is made to suffer the uncertain consequences of its own undesirable conduct.'"*

Id. (emphasis added) (quoting III Areeda & Hovenkamp, *Antitrust Law* ¶651c, at 78 (2d ed. 1996)). Thus, relying on the leading antitrust treatise, the D.C. Circuit identified the relevant inquiry as whether "a defendant has engaged in anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to maintaining monopoly power.'" *Id.* (quoting III Areeda & Hovenkamp, *Antitrust Law* ¶651c, at 78)(internal ellipsis omitted); *accord Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 830 (6th Cir. 2011); *see also FTC v. Actavis, Inc.*, 133 S.Ct. 2223, 2236 (2013) (firms may be liable for collusive conduct that merely "seeks to prevent *the risk* of competition," even absent proof about how competition would have emerged but for that conduct) (emphasis added).

McWane's conduct easily meets what the D.C. Circuit accepted as antitrust law's "rather edentulous test for causation" for purposes of establishing Section 2 liability. *Microsoft*, 253 F.3d at 79. As McWane's internal documents confirm, the company viewed Star as a long-term threat to its profits in the domestic-only market, and it thus sought to tie up distributors to keep Star from "reach[ing] any critical market mass that w[ould] allow them to continue to invest and receive a profitable return," because otherwise distributors "will continually pressure us to 'do something' (lower prices)." ALJ ¶¶ 1149-54 (quoting internal McWane

documents). That strategy succeeded. The ensuing harm to competition was no "daisy chain of unsupported inferences," as McWane suggests (Br. 49); it was the explicitly intended consequence of McWane's strategy. *See Microsoft*, 253 F.3d at 59 ("'knowledge of intent may help the court to interpret facts and to predict consequences'") (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242 (1918)). In short, McWane's conduct qualifies as "anticompetitive conduct that 'reasonably appear[s] capable of making a significant contribution to maintaining monopoly power.'" *Microsoft*, 253 F.3d at 79 (quoting III Areeda & Hovenkamp, *Antitrust Law* ¶651c, at 78).

Microsoft's holding likewise refutes the chief argument raised in the dissent below and repeated here in the amicus brief of McWane's academic supporters—that complaint counsel fell short in proving that "the Full Support Program actually increased prices and reduced output relative to what they would have been had … McWane not implemented the Full Support Program." Dissent 35. The dissent reasoned that, even though McWane's exclusivity mandate did cause Star to lose substantial sales (Dissent 4), those lost sales might or might not have made any difference to Star's ability to achieve "minimum efficient scale" (MES)—the scale necessary to minimize long-run average costs. Dissent 24-25 & 11 n.15. The dissent concluded that complaint counsel's failure to prove that McWane would have reached MES in the absence of McWane's conduct was "fatal to Complaint

Counsel's case." *Id.* at 31-32. But that position would impose on complaint counsel a burden that, as the *Microsoft* court held, no antitrust plaintiff need bear: the burden to "reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct." *Microsoft*, 253 F.3d at 79.

Moreover, even if complaint counsel *were* required to shoulder that burden, the Commission majority properly concluded that the relevant question would be whether, absent McWane's exclusionary conduct, Star could have more effectively disciplined McWane's monopoly prices—not whether Star would have achieved MES in particular. Comm'n 27-28. The dissent's focus on MES in this context has elicited criticism from, among others, Professor Steven Salop, who originated the analytical framework on which the dissent relied. *Cf.* Dissent 10-12, 34 n.41, 38 n.45 (relying extensively on Prof. Salop's "raising rivals' costs" framework). As Professor Salop explains in a recent article, a new entrant in a monopolistic market can promote consumer welfare by disciplining the monopolist's prices even if the entrant has *not* reached MES, and a monopolist's measures to raise the entrant's costs can reduce price competition and harm consumer welfare *whether or not* the entrant has reached or would otherwise reach MES. *See* Salop, Pozen & Seward at 28-31. The majority's conclusion in this case thus "follows the modern approach to exclusive dealing with respect to both the economics and the law," whereas the dissent's proposed "limitations on the economic theories of exclusion

are not supported by modern economic analysis and [would] serve only to weaken antitrust enforcement." *Id.* at 3, 23.

In any event, this Court need not reach that abstract economic dispute. First, the MES dispute would arise only if complaint counsel had to prove exactly what efficiencies the entrant would have achieved but for the monopolist's conduct. *Microsoft* confirms that complaint counsel bears no such burden. Second, McWane itself preserves no argument on appeal concerning MES; indeed, the term "minimum efficient scale" appears nowhere in McWane's brief. For that matter, McWane's brief affirmatively rejects the dissent's MES logic. As discussed, McWane repeatedly asserts that Star's decision "to contract fittings from six different [third-party] foundries," rather than acquiring its own "dedicated fittings foundr[y]," "was very inefficient." Br. 24. McWane explicitly endorses the ALJ's finding that "'[w]ithout its own foundry, Star's costs were higher, and therefore its prices were higher,' which 'hindered Star's ability to compete effectively.'" *Id.* at 52-53 (quoting ALJ p. 411); *see also id.* at 29. That argument contradicts the dissent's central premise that "an independent foundry [was] *not* necessary to achieving MES." Dissent 31-32.

Granted, after repeatedly attributing Star's inefficiency to its decision not to buy a foundry, McWane does briefly contradict itself by musing, like the dissent, that "owning a foundry is not required to obtain viable scale or compete

effectively." Br. 53-54. McWane notes that Star and Sigma "successfully grew their *import* fittings businesses" through a "virtual manufacturing" model "without owning a foundry anywhere in the world[.]" Br. 54 (emphasis added). But that argument makes no sense, as the Commission found. Comm'n 27 n.14. Import fittings are made in various foundries abroad and benefit from the efficiencies of low-cost, high-volume production. *See* ALJ ¶ 1077. Star and Sigma share in those efficiencies when they import such fittings. But an entrant cannot efficiently compete with McWane for *domestic* fittings production until it dispenses with inefficient reliance on generic U.S. "jobber" foundries and, like McWane, obtains the scale needed to cost-justify acquisition of a *U.S.-based* dedicated fittings foundry. Comm'n 27 n.14. McWane does not address, let alone challenge, the Commission's factual conclusion on that point.

In sum, McWane's exclusivity mandate qualifies as "anticompetitive conduct that 'reasonably appear[ed] capable of making a significant contribution to maintaining monopoly power.'" *Microsoft*, 253 F.3d at 79. That is more than sufficient to support the Commission's liability finding and injunctive relief.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Theodore (Jack) Metzler, certify that the foregoing complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) in that it contains 13,913 words.

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CERTIFICATE OF SERVICE

I certify that I filed the foregoing with the Court's Appellate CM-ECF System on this date, and that I caused the foregoing to be served through the CM-ECF system on counsel of record for Petitioner, who are registered ECF users.

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