REDACTED

CASE NO. 14-11363

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

**McWane, Inc.,
Petitioner,**

v.

**Federal Trade Commission,
Respondent.**

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

REPLY BRIEF OF PETITIONER MCWANE, INC.

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In its opening brief, McWane presented three clear legal issues that require reversal of the Commission's decision as a matter of law.[1] The Commission largely ignores these legal issues, and instead, attempts to re-cast McWane's appeal by suggesting that the petition presents a single issue about the sufficiency of the evidence.[2] The Commission is flatly wrong.

First, the Commission did not rely on any economic test provided by an expert in defining the relevant market, as this Court's precedent requires. This failure alone mandates reversal. *See Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1246 (11th Cir. 2002); *see also American Key Corp. v. Cole Nat'l Corp.*, 762 F.2d 1569, 1579-80 (11th Cir. 1985).

Second, the undisputed fact that Star, a competitor, quickly entered the alleged domestic fittings market and successfully gained a 10% market share in two short years, precludes a finding of monopolization based on exclusive dealing ***as a matter of law***. *See Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997). The Commission has not cited a single decision holding that the foreclosure standard was satisfied when, as here, a competitor quickly and successfully entered the market, grabbed 100-plus customers, steadily

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[1] McWane Brief at 2-3 (identifying three issues presented).

[2] Commission Brief at 1 (identifying a single issue regarding sufficiency of the evidence).

grew its market share to 10% in two years, and was on pace for "its best year yet" at the time of trial.

Third, it is axiomatic that antitrust laws protect *competition*, not competitors. The Commission erroneously equated alleged harm to Star with harm to *competition*, in violation of this Court's precedent. The Commission cannot argue that McWane deprived consumers of lower prices or a superior product, so it instead argues that McWane, in encouraging consumers to purchase McWane's own products, made it more difficult for Star to increase its economies of scale and discouraged Star from investing in its own foundry. The Commission's irrelevant (and inaccurate) argument that McWane prevented Star from purchasing a foundry turns the analysis required by the antitrust laws on its head. *See Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991). Star made the business decision not to take the risk that McWane took in investing in an American foundry. The Commission simply wants to use antitrust law to meddle in the market and subsidize firms who choose to enter a market "on the cheap," with higher-cost production (and higher prices). Such is not the function of antitrust laws.

Because the Commission cannot prevail on these legal issues, it turns to distraction and bombards the Court with irrelevant (and, often, inaccurate) facts. But no amount of diversion by the Commission can evade this Court's clear legal

precedent, and no amount of distraction by the Commission can escape the sound conclusion that the Commission erred as a matter of law and must be reversed.

ARGUMENT

I. The Commission Failed To Establish That "Domestic Fittings" Constitute A Separate Relevant Market.

The Commission's failure to prove a domestic-only fittings market is a failure on a pure question of law. The Commission does not dispute that its domestic-only market definition was unsupported by an expert economic test, as this Court requires. This Court has repeatedly dismissed antitrust plaintiffs, like the Commission here, who failed to test their proffered market definitions with an appropriate ***expert economic test***, such as a cross-elasticity of demand study, and, instead, relied entirely on lay evidence. *See, e.g.*, *Bailey*, 284 F.3d at 1246-47 ("[c]onstruction of the relevant market and a showing of monopoly power ***must*** be based on expert testimony") (emphasis added); *Colsa Corp. v. Martin Marietta Servs., Inc.*, 133 F.3d 853, 855 n.4 (11th Cir. 1998) (holding that lay testimony on a market definition was not sufficient to defeat summary judgment); *American Key*, 762 F.2d at 1579-80 ("Construction of a relevant economic market or a showing of monopoly power in that market ***cannot*** . . . be based upon lay opinion testimony" and, instead, "[plaintiff] was ***required*** to introduce evidence of the 'cross elasticity of demand' for these 'two products'") (emphasis added); *see also Astro Tel, Inc. v. Verizon Fla., LLC*, 979 F. Supp. 2d 1284, 1293 (M.D. Fla. 2013)

(Plaintiff's "position that it may support its antitrust market definitions with lay testimony is in contravention of Eleventh Circuit precedent"); *Gulf States Reorg. Group, Inc. v. Nucor Corp.*, 822 F. Supp. 2d 1201, 1234 (N.D. Ala. 2011) ("Eleventh Circuit precedent ***requires*** an antitrust plaintiff to proffer expert testimony to establish a relevant product market.") (emphasis added).

McWane cited that caselaw in its opening brief,[3] but the Commission's opposition ignored it. That failure dooms the Commission's claim: without an expert economic test proving a domestic-only fittings market, there is no monopolization claim because the Commission did not allege that McWane monopolized an all-fittings market.[4]

The Commission advances three arguments to try to get around this failure. First, it argues in a footnote that "the Commission *did* rely on expert testimony here,"[5] but the testimony the Commission references provides no econometric analysis, or any other analysis requiring expertise. In defining domestic fittings as

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[3] *See* McWane Brief at 32.

[4] *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 242, 113 S. Ct. 2578, 2597-98 (1993), *buttresses* McWane's argument. It held that expert testimony could not support an antitrust claim when—like the Commission's expert here—the expert's testimony lacked factual support; it did not say that expert testimony was unnecessary in defining a market. *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 995 (11th Cir. 1993), likewise did not address any argument about the need for expert testimony in defining a relevant product market, and said nothing that undermined preceding cases from this Court like *American Key* holding that expert analysis is required in defining a market.

[5] Commission Brief at 28 n.11 (emphasis in original).

a separate market, the Commission's "expert" witness said nothing that could not have been said by a layperson.[6]

Indeed, the ALJ found (and it is undisputed) that the Commission's economic expert performed no cross-elasticity study or other economic test demonstrating the existence of a domestic-only fittings market (or any other issue in the case).[7] And it is hornbook law—which McWane cited in its opening brief and the Commission's opposition, again, ignored—that an "expert" who performs no expert analyses is not an expert at all. *Gulfstream Park Racing Ass'n, Inc. v. Tampa Bay Downs, Inc.*, 479 F.3d 1310, 1313 (11th Cir. 2007) (expert testimony that was "conclusory, based upon insufficient expert analysis, and incomplete" failed because "as a matter of law such testimony does not establish the relevant market"); *United States v. Hamaker*, 455 F.3d 1316, 1330-32 (11th Cir. 2006) (financial analyst provided only lay testimony when he summarized the content of documents and did not perform any review beyond the capacity of a lay person).

It has long been the law in this Circuit that an expert's testimony is insufficient to define a market as a matter of law when that testimony is based entirely on the expert's simplistic repetition of lay testimony or a review of lay documents. *American Key*, 762 F.2d at 1580 ("Expert opinions ordinarily cannot

[6] *See also* McWane Brief at 32, 35.

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

be based upon the opinions of others whether those opinions are in evidence or not”). This Court carefully scrutinizes “expert” testimony and, when it is not based upon a sufficiently rigorous economic test, concludes it cannot support a market definition. *See Bailey*, 284 F.3d at 1247 (holding the expert’s opinion “insufficient to establish the relevant product market” where he failed to test how many homes could use an alternative heat source or calculate the cost of doing so). Other Circuits, too, dismiss claims premised on non-expert “expert” opinions of a relevant market. *See, e.g.*, *Menasha Corp. v. News Am. Marketing In-Store, Inc.*, 354 F.3d 661, 664 (7th Cir. 2004) (expert’s testimony of relevant market failed because it was based on “armchair economics” and customer surveys and not any econometric analysis). McWane cited this law in its opening brief, but the Commission’s opposition, again, ignored it.

Second, the Commission argues that it “needed no detailed econometric analysis”[8] in this proceeding because some of the lay testimony and documents in the record, the Commission believes, showed that a domestic-only market exists. The Commission refers to internal e-mails and other documents discussing business strategy but makes no suggestion that the author of any e-mail was providing an expert analysis or even using the term “market” in the way that term

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[8] Commission Brief at 27.

is used in antitrust law.[9] As McWane has explained,[10] there are numerous exceptions to domestic production requirements that could be utilized, and in defining a relevant market for antitrust purposes it is the *potential* ability to use a substitute product that is legally relevant. *See, e.g.*, *Bailey*, 284 F.3d at 1247.

This Court has also held that evidence of consumer preferences, by itself, is insufficient as a matter of law to establish a relevant product market. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) ("Consumer preferences for visco-elastic foam mattresses versus traditional innerspring mattresses, and the costs associated with their sale, may vary widely . . . [O]ur precedent makes clear that [additional unanswered questions] are crucial to understanding whether a separate market exists"); *see also United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 401, 76 S. Ct. 994, 1010 (1956) (holding that cellophane was in the same market as other wrapping materials even though cellophane cost two or three times as much as those other materials); *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 513 (3rd Cir. 1998) ("[i]nterchangeability implies that one product is roughly equivalent to another for the use to which it is put; while there might be some degree of preference for the one over the other, either would work effectively") (quotation omitted). McWane

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[9] Commission Brief at 23.

[10] McWane Brief at 13-14.

cited this law in its initial brief,[11] but the Commission's opposition, again, ignored it.[12]

With its argument, the Commission is simply attempting to recast McWane's legal argument as a factual argument, and acting as if the Commission's ruling should be affirmed as long as there is some evidence—be it internal e-mails or anecdotal testimony from a lay person—that is consistent with a finding that domestic fittings constitute a separate market.[13] But there is no need to trudge through the record. The Commission does not dispute that there was no economic test by an expert showing the existence of a separate market for domestic fittings, and this Court has rejected the Commission's suggestion that lay testimony on market definition is an adequate substitute for expert testimony, *see, e.g.*, *Colsa*, 133 F.3d at 855 n.4. The Commission cites no authority suggesting otherwise, and thus the market definition applied by the Commission cannot stand as a matter of law.

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[11] McWane Brief at 36.

[12] The Commission's related argument, that domestic fittings are more expensive than imported fittings and that is sufficient to make them a separate market, was also squarely rejected by *Jacobs*. There, this Court held that the mere existence of a price gap between two products was insufficient as a matter of law to define a relevant product market. *Jacobs*, 626 F. 3d at 1337-38.

[13] *Polypore Int'l, Inc. v. F.T.C.*, 686 F.3d 1208 (11th Cir. 2012), does not suggest otherwise. That opinion did not address whether an economic test by an expert was required to support a market definition and the appellant did not raise that issue.

Third, the Commission argues that a domestic-only market is appropriate because its expert based his opinion "on the demonstrated inability of distributors to substitute imports when domestically manufactured fittings are required."[14] The Commission cites a treatise for the unremarkable proposition that a regulation "may" define a relevant product market "[t]o the extent that regulation limits substitution."[15] The key part of that citation, of course, is that it is *qualified* on its face. That is because a proper market definition requires a ***test*** of the facts to determine the actual "extent" to which a regulation "may" define the market.

Here, though, the Commission's expert conducted no such assessment. And evidence—which the expert ignored in stating in conclusory fashion that a domestic-market exists—shows that there were exceptions to the statutory domestic-production requirements. For example: the ARRA statute, on its face, included, among others, a *de minimis* waiver for products, like fittings, that accounted for less than 5% of the costs of a waterworks job, and a *public interest* exemption where the EPA would grant a waiver if it found that "applying [the Buy American Requirement] would be inconsistent with the public interest."[16] In fact, the EPA granted multiple exemptions permitting imported products to be used on

[14] Commission Brief at 28.

[15] *Id*. at 24.

[16] ALJ Initial Dec. at 67-69.

ARRA-funded jobs, including several nationwide blanket waivers. But the Commission's expert conceded he did not consider any of those exemptions permitting imported product in forming his opinion regarding the relevant market and had no idea how many imported fittings were sold under the exemptions because he did not bother to study it:

> Q. You have no idea how many jobs were funded under ARRA, which jobs they were; correct?
>
> A. That is correct.
>
> * * *
>
> Q. Now, you didn't consider this waiver at all, did you, sir?
>
> A. No.[17]

The Commission's expert, likewise, ignored additional factual evidence at trial demonstrating that imported fittings were sold to numerous ARRA jobs.[18]

Finally, the Commission's expert acknowledged that he failed to consider any testimony from even a single ARRA "project owner"—the only parties with first-hand knowledge of the extent to which imported fittings were used on ARRA-funded jobs—and, indeed, the Commission's counsel failed to introduce such evidence at trial. That, combined with the undisputed findings that imported and

[17] Schumann Tr. at 4572, 4582-83 ("Q. I understand, because you didn't study this. Right? A. No, I did not.").

[18] Schumann Tr. at 4618-25 (citing numerous examples of imported fittings being sold to ARRA jobs); 4623 ("Q. And you don't know because you didn't bother to tabulate how many of them are ARRA waivers and exemptions or not; right? A. No.").

domestic fittings were interchangeable commodities and that imports outsold domestic fittings two-to-one before, during, and after ARRA, should have led the Commission's expert to actually test "the extent" to which ARRA "may" have affected the relevant product. But, instead, he turned a blind eye to hard evidence suggesting that the market remained an all-fittings market.[19]

Because an analysis by an expert that provides only a "cursory assessment of reasonable substitutes" cannot establish a market definition as a matter of law, *Bailey*, 284 F.3d. at 1247, the witness' testimony, which utterly failed to *study* the use of imported fittings, certainly cannot establish a market definition. This Court should not permit the Commission to prove a market definition by proffering an expert whose opinion was based on such willful blindness to the real-world facts.[20]

* * *

Fundamental caselaw from the Eleventh Circuit and numerous other courts flatly rejects the kind of "armchair" opinion the Commission's expert offered here.

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[19] The expert's refusal to consider evidence contradicting his opinions was not an isolated instance. For example, the very first sentence of the Commission's opposition repeats its expert's canard that "[in] mid-2009, McWane was the *only* supplier" of domestic fittings. Commission Brief, at 2 (emphasis added). That is simply not true, and their expert admitted it. Schumann Tr. at 4565. He also conceded that his opinion on the topic was written by a "paralegal or lawyer" at the FTC and he never bothered to verify it. Schumann Tr. at 4553 ("You know, I was preparing for my direct testimony, and ***there's always never enough time. I did the best I could.***") (emphasis added).

[20] The Commission has also failed to explain why it is entitled to enjoin *future* conduct in a purported relevant market that has not been in existence for several years under its own theory of market definition.

It is ironic that the Federal Trade Commission, an agency founded to exercise responsibility over antitrust and consumer protection claims, so aggressively disavowed the need for any expert economic tests to support its case. This complete disavowal of the need for expert evidence, in stark contrast to governing antitrust precedent, would leave defendants in an unwinnable position and make the Commission's decisions unchallengeable. This Court should exercise its review authority to check such excesses and make sure the Commission, like all litigants, adheres to governing antitrust precedent.

II. Star's Successful Entry Into The Domestic Fittings Market Requires Reversal Of The Commission's Monopolization Decision As A Matter Of Law.

The Commission ignores the well-settled caselaw cited in McWane's opening brief holding that actual and successful entry by a competitor or expansion by an existing competitor disproves monopolization and exclusion. *See Brooke Group*, 509 U.S. at 226, 113 S. Ct. at 2589 ("where the market is highly diffuse and competitive, or where new entry is easy . . . summary disposition of the case is appropriate"); *Cargill, Inc. v. Monfort of Colorado, Inc.,* 479 U.S. 104, 119, 107 S.Ct. 484, 494 n.15 (1986) ("It is also important to examine the barriers to entry into the market, because "without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time"); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 99 (2d Cir. 1998) ("Wegmans'

successful entry, however, itself ***refutes any inference*** of the existence of monopoly power that might be drawn from Quality's market share . . . and in fact, Wegmans' quick garnishment of such high market share dispositively refutes such a conclusion") (emphasis added); *Omega,* 127 F.3d at 1164 (successful entry and expansion "***precludes*** a finding that that exclusive dealing is an entry barrier of any significance.") (emphasis added).[21]

The Commission concedes—as it must—that Star successfully entered the alleged domestic fittings market and quickly gained market share.[22] As the ALJ found, Star "[c]learly . . . entered the Domestic Fittings market" and successfully gained a 10% market share in two years.[23] Notably, Star's executives consistently touted its immediate and continued domestic fittings success throughout the Spring of 2010 (Star's President responded to that success with a robust "Yahoooooo!"),[24]

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[21] *See also Sterling Merchandising, Inc. v. Nestle, S.A.*, 656 F.3d 112, 123 (1st Cir. 2011); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) (refusing to find impermissible exclusive dealing when "[a competitor] had entered the market recently and was on its way to competing with established manufacturers like [defendant]"); *Metro Mobile CTS, Inc. v. NewVector Commc'ns, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989). Commissioner Rosch reached the same conclusion and explained that "the fact that Star attained a 10 percent share of the domestic-only DIPF market—from zero share—in less than three years undermines Complaint Counsel's basic theory" and "would not lead a rational trier of fact to find for Complaint Counsel." Statement of Commissioner J. Thomas Rosch, Dissenting in Part to the Opinion of the Commission on Complaint Counsel's and Respondent's Motions for Summary Decision, at 5-6 (Aug. 9, 2012) (Doc. 184).

[22] Commission Brief at 14.

[23] ALJ Initial Dec. at 377, 382; McWane Brief at 21; Commission Brief at 14.

[24] CX 585.

Fall 2010 (company "very proud of what we have been able to achieve in such a short period"),[25] and right up to the time of trial in Fall 2012 (REDACTED).[26] Indeed, ***Star*** concluded that McWane's rebate letter was "all bark and no bite,"[27] and it is undisputed that McWane *lost* market share based on Star's rapid success.[28] These undisputed facts about Star's successful entry preclude the Commission's monopolization claim as a matter of law. *See Omega*, 127 F.3d at 1164.

Ignoring this case authority, the Commission focuses on three cases as the linchpin for its argument,[29] but none of the three trumps the Supreme Court and Circuit caselaw McWane cites. Moreover, all three decisions are completely distinguishable from the situation here because—in stark contrast to Star's "clear" and successful entry and steady growth[30]—they concern cases where the rival competitor was "killed" by the defendant's business practices (*ZF Meritor*), or so significantly excluded that it dwindled to the point of near death (*Dentsply* and *Microsoft*). *See, e.g.*, *ZF Meritor*, 696 F.3d at 267 ("Meritor's market share dropped to 4% by the end of fiscal year 2005, and Meritor exited the business in

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[25] RX 572.

[26] REDACTED.

[27] RX 280; McCutcheon, Tr. 2615-2617; JX 695, Leider, Dep. at 176-181.

[28] *See* Commission Brief at 14.

[29] *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012), *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005), and *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[30] ALJ Initial Dec. at 377, 382.

January 2007"); *Dentsply*, 399 F.3d at 190, 193 (Dentsply's exclusionary conduct limited its primary competitors to "minuscule 5% and 3% market shares"); *Microsoft*, 253 F.3d at 54, 70-71 (Microsoft's "greater than 95% share" limited Netscape to less than 5% share and "substantially excluded" it "through exclusive deals with fourteen of the top fifteen access providers in North America.") (internal quotations marks omitted).

The Commission's three cases are also distinguishable because all three involved *long-term* exclusion. In *Dentsply*, the restriction at issue extended over a "considerable time" and wholly prohibited dealers from "add[ing] further tooth lines to their product offering." 399 F.3d at 185, 190. In *ZF Meritor*, the alleged contracts at issue lasted between five and ten years. *ZF Meritor*, 696 F.3d at 286-87. Here, in contrast, McWane's rebate program was short-term, lasting for only 12 weeks, and did not prohibit distributors from purchasing from Star.

In stark contrast to the rivals that were excluded in *ZF Meritor*, *Microsoft*, and *Dentsply*, Star was growing robustly. This dispositive fact easily distinguishes this case from *ZF Meritor*, *Dentsply*, and *Microsoft*, and alone is fatal to the Commission's monopoly claim as a matter of law. In fact, courts have refused to find exclusive dealing arrangements illegal in the face of much more minimal increases than Star's 10%. *See Omega*, 127 F.3d at 1164 (refusing to find an antitrust violation based on exclusive dealing when the competitor's market share

had increased from "approximately 6% to 8%."). If a 2% increase in market share can "preclude[] a finding that exclusive dealing is an entry barrier of significance," *id.*, then surely Star's increase of 10% merits the same result.[31]

The Commission has not cited *any* case in the 100-year history of the antitrust laws where a company that so "clearly" and successfully entered the market was somehow "excluded." Not a single case. That is because there is none, and to the contrary, based on Star's quick entry and rapid expansion, the *only* "reasonable inference" is that McWane "lack[ed] monopoly power." *Tops Markets*, 142 F.3d at 99; *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) ("[i]f there is no exclusion of a significant competitor, the agreement cannot possibly harm competition," as required for a monopolization claim). That sound legal conclusion requires reversal of the Commission's decision.

A. The Commission's Newly-Created "Entry Is Efficient Entry Only" Standard Finds No Shelter In The Law.

Star's actual entry into the purported domestic fittings market is dispositive, and the Commission's attempt to apply a heightened legal standard is completely unsupported by case law. *See supra* at 14-18. Unable to prevail under the current legal standard, the Commission cobbles together a single academic article, dicta

[31] *See also* McWane Brief at 41-47.

from two non-binding decisions,[32] and a dissent to argue that McWane, as a monopolist by historic accident, is held to "stricter limits on exclusivity than non-monopolists."[33] The Commission is overreaching and cites no case supporting its theory that Star's "clear" and successful entry, and steady growth, should be meaningless under the law unless Star also obtains enough new business to justify (in its opinion) investing in production capacity that is as efficient as McWane's dedicated foundry.

The law does not impose a heightened standard on monopolists. *See Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-16, 124 S.Ct. 872, 883 (2004) (the Sherman Act "does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition."). The law is clear that "the lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors." *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986); *Gulf States Reorganization Grp., Inc. v. Nucor Corp.*, 466 F.3d 961, 967 n.3 (11th Cir. 2006) ("The antitrust laws allow legal monopolies to compete vigorously on the merits in the relevant market, even if such competition drives out competitors."). "A

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[32] Commission Brief at 46-47. The Commission relies again on *Dentsply* and *Microsoft*, but those cases are neither controlling nor persuasive. *See supra* at 14-18.

[33] Commission Brief at 46.

monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits . . . ." *Olympia*, 797 F.2d at 375; *Gulf States*, 466 F.3d at 967 n.3.

The Supreme Court has steadfastly held that exclusive dealing is judged under the same "rule of reason" standard and requires the same proof that actual anticompetitive effects outweigh pro-competitive effects, regardless of the defendant's supposed monopoly power. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 44-45, 104 S. Ct. 1551, 1575 (1984) ("Exclusive dealing arrangements are . . . analyzed under the Rule of Reason"); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 628 (1961) (under the rule of reason, an exclusive dealing arrangement violates Section 1 only if its effect is to "foreclose competition in a substantial share of the line of commerce affected."); *see also Levine v. Cent. Florida Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996). The Commission itself, and courts across the country, uniformly apply this same market-effects standard regardless of whether or not the defendant is an alleged monopolist. *See In re Beltone Elecs. Corp.*, 100 F.T.C. 68, 209 (1982) ("reasonably clear evidence of probable overall competitive harm"); *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998 (9th Cir. 2010) (refusing to find impermissible exclusive dealing by a monopolist under the standard advanced in *Omega*); *Concord Boat*, 207 F.3d at 1059 (applying

Roland and *Tampa Electric* when refusing to find impermissible exclusive dealing by a defendant who controlled 75% of the market).[34] The Commission's newly-created "entry is efficient entry only" standard is thus error as a matter of law. And, indeed, it cites no case to support it.[35]

B. The Commission Cannot Prevail Even Under Its Novel Standard.

Even if this newly-created theory applied, the Commission's decision still could not stand. As *Dentsply* explained, "it is not market share that counts, but the ability to *maintain* market share." 399 F.3d at 188-89 (quoting *United States v. Syufy Enters*., 903 F.2d 659, 665-66 (9th Cir. 1990)). Here, McWane ***lost*** 10% of its market share—directly after its September 2009 rebate program—once Star successfully entered the purported domestic fittings market and steadily grew to capture a 10% share.[36] The Commission is wrong to discount Star's success and

[34] Even *Microsoft*, relied on heavily by the Commission, cites non-Section 2 case authority on the standard for assessing exclusive dealing. *See Microsoft*, 253 F.3d at 68 (citing *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 81 S. Ct. 623 (1961); *Roland Mach.*, 749 F.2d at 393).

[35] To make its point, the Commission cites only a dissent and an academic article, but no case adopting its theory in this context. On the contrary, Commissioner Wright's dissent correctly noted that the Commission's expert utterly failed to study what the minimum efficient scale was in this industry, and failed to show that Star could have met this minimum efficient scale.

[36] The Commission argues that Star's 10% share of domestic fittings sales "pales in comparison" to Star's X% share of imported fittings. But The Commission conveniently ignores that it took Star almost ***30 years to obtain that share—or roughly 1% share growth per year***. ALJ Initial Dec. at 22, 49. To put that number into perspective, Star's ability to go from 0% share to 10% in two short years (and to be on pace for its "best year yet" in its third year) is ***500% steeper growth*** than its success with imported fittings—and borders on meteoric.

steady growth and McWane's commensurate loss of market share, and cites no case to support its theory.[37]

If the Commission's novel theory—that Star's actual entry is not "true entry" because Star was not as efficient a supplier as McWane—was correct, then this Court still must consider whether Star was actually poised to enter *efficiently* (and blocked by McWane's letter) or whether the possibility that Star would enter efficiently was simply that: a mere speculative possibility. The antitrust laws refer to this using a term of art and inquire whether the non-entrant was an "actual potential competitor." *Gas Utilities Co. v. Southern Natural Gas Co.*, 996 F.2d 282, 283 (11th Cir. 1993). If Star was not actually poised to enter with efficient production capacity, then it was not "excluded" by McWane and its failure to get into the market was meaningless from an antitrust perspective.

The Commission's argument goes too far. If entry only counts when it is efficient, then the Commission's argument fails because it did not apply the correct standard of for evaluating whether Star could have entered efficiently. The "actual potential competitor" doctrine has real requirements of proof: a plaintiff must show that the would-be rival not only had the intent to enter, but also that it had taken concrete steps and was poised to do so. *See Gas Utilities Co.*, 996 F.2d at 283 ("The law clearly requires a showing of an intention and preparedness to enter

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[37] Commission Brief at 36, 52-53.

the business to give a plaintiff a cause of action for being foreclosed from the market."); *Cable Holdings of Georgia, Inc. v. Home Video, Inc.*, 825 F.2d 1559, 1562 (11th Cir. 1987) (quoting *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979) (". . .there are two significant requirements for establishing an entitlement to recovery; a demonstration of '(1) an intention to enter the business, and (2) a showing of preparedness to enter the business'"); *see also Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981) (requiring "available feasible means" for entering the relevant market).

The Commission ignores the case law regarding preparedness to enter the relevant market, and Star does not meet the applicable legal standard even under the Commission's newly-created "entry is efficient entry only" standard. Mere "inquiry into procedures is insufficient to establish preparedness;" instead, a potential entrant "must take some affirmative step to enter." *Gas Utilities Co.*, 996 F.2d at 283. The record is clear that Star did not take the necessary affirmative steps to efficiently enter and stopped after making only the most preliminary inquiry of buying a foundry.[38] In reality, the ALJ determined that Star decided to pursue virtual manufacturing in spring 2009 precisely because it allowed the company to produce and sell domestic fittings more quickly than purchasing a

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[38] REDACTED.

foundry.[39] Star made that decision knowing full well it would, thus, be a higher cost, less efficient supplier of domestic fittings. The Commission's arguments simply assume that Star might have been able to purchase a foundry and that it would have been able to do so in time to take advantage of ARRA.

The Commission did not put forward any evidence regarding typical negotiations to purchase foundries, and there is no evidence regarding when that purchase could have occurred. Even if Star had purchased a foundry within the ARRA period, it is pure speculation that it would have operated as efficiently as McWane's Union Foundry. The Commission's expert did not study the costs and timing involved in purchasing a foundry, and as a result, there is no evidence that consumers would have been better off had Star purchased a foundry.

As discussed above, the Commission did not—and cannot—meet the applicable standard. The Commission's argument that Star could enter efficiently was nothing more than speculation piled on a "very preliminary" discussion with a single foundry with a very limited product line[40] and higher manufacturing costs than McWane's dedicated Union Foundry. The Commission's reliance on hypotheticals establishes that, even under its novel standard, the Commission

[39] F.1099.

[40] REDACTED. There was no expert study, and no evidence that any of the work necessary to make the [REDACTED] foundry operational was imminent or in any way doable within the ARRA time frame.

failed as a matter of law to demonstrate "reasonably clear evidence of probable overall competitive harm." *Beltone*, 100 F.T.C. at 209.

If the Commission wants to change the standard for actual entry, the appropriate means would be to issue a policy statement under Section 5 of the FTC Act, not by seeking to upend its own longstanding precedent and the rulings of this Court.

III. McWane's Rebate Letter Was Pro-Competitive And Did Not Harm Competition.

The Commission concedes, as it must, longstanding caselaw holding that even true exclusive deals are often pro-competitive and, thus, are permissibly entered even by true monopolists. Courts have consistently held that exclusive deals (even exclusive deals of multi-year duration—which McWane's rebate policy was not) "should actually be encouraged," as they can lead to greater efficiency and lower costs. *See Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76, 83 (3d Cir. 2010) (using a single supplier of tires "lead[] to increased safety, and lower[ed] the costs of tires"); *Menasha*, 354 F.3d at 663 ("the most natural inference is that the complained-of practice promotes rather than undermines competition, for what helps consumers often harms other producers"); *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 8 (1st Cir. 2004) ("exclusive dealing contracts are not disfavored by the antitrust laws. . . . in many circumstances they may be highly efficient."). The Commission likewise

does not dispute—nor could it—the long-standing Supreme Court precedent holding that "[it] is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not competitors.'" *Brooke Group*, 509 U.S. at 224, 113 S. Ct. at 2588; *Spectrum Sports Inc. v. McQuillan*, 506 U.S. 447, 458, 113 S. Ct. 884, 891-92 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market"); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-68, 104 S. Ct. 2731, 2740 (1984) (the antitrust laws protect competition, not "inefficient rival[s].").

Here, the ALJ found (and the Commission concedes) that McWane's manufacturing and transportation costs, with its dedicated foundry and finishing machinery on site, were substantially lower than Star's (which chose to enter with multiple jobber foundries in far-flung locations and machining facility in yet another locale and thus had significantly higher manufacturing and transportation costs). The Commission also does not dispute that McWane's average prices for domestic fittings were consistently lower than Star's—and, notably, not a single customer complained at trial about McWane's prices.

The record also demonstrates that a flood of cheap imports drove other long-time domestic fittings producers Griffin Pipe, U.S. Pipe, and ACIPCO to exit domestic production of small and medium diameter domestic fittings and forced McWane to shut down one of its two remaining foundries (and lay off hundreds of

employees) a year before its rebate policy was implemented.[41] McWane's rebate policy was simply designed to obtain additional tonnage for its last remaining foundry which was operating at 30% capacity.[42] That meets McWane's burden of showing a pro-competitive justification. Consumers were better off with McWane's lower-cost, lower-priced domestic fittings from its dedicated foundry, and therefore *competition* was benefitted by McWane's rebate policy. The Commission utterly failed to show that consumers would somehow be better off with McWane's lower-cost foundry out of business, and the mere *possibility* that someday Star would buy and upgrade a foundry (or foundries), which would then hypothetically operate as efficiently as McWane's and thus be able to sell domestic fittings for the same or lower prices.

In the face of the longstanding law blessing exclusive deals that benefit customers, and the well-settled principle that antitrust laws protect competition, not inefficient rivals, the Commission advances a another novel theory. It argues that even though Star "clearly" and successful entered and *steadily grew*, McWane can be held liable for somehow "slow[ing] the rival's expansion."[43] The argument is not only divorced from any case law support, this Circuit and numerous other cases

[41] McWane Brief at 10-14.

[42] McWane Brief at 16.

[43] Commission Brief at 52.

flatly reject it. *Seagood*, 924 F.2d at 1573 (it "is not a function of the antitrust laws" to "equip [a smaller firm] with [a larger firm's] competitive advantage"); *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1234 (8th Cir. 1987) (antitrust law "is not designed to relieve a particular business of the burden of making the difficult choice between manufacturing its own product or distributing the product of another concern"); *Gulf States*, 466 F.3d at 967 n.3 (antitrust laws do not "'hold[] an umbrella over inefficient competitors'" and allow firms—even monopolies—"to compete vigorously . . . even if such competition drives out competitors") (quoting *Olympia*, 797 F.2d at 375). In the face of that precedent, the Commission cites only an academic article co-authored by a member of one of the amici supporting its case.[44] The novel rule of law the Commission argues for would turn the antitrust laws on their head, and notably, the Commission cites no case holding that consumers benefit from having higher-cost, higher-priced alternative suppliers in the marketplace (or that consumers are harmed if they exit entirely).[45] Indeed, it would require monopolists to pull their punches and lend a hand to help less efficient rivals grow their businesses and become efficient.

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[44] Commission Brief at 47, 52-53.

[45] Of course, the Commission is even further out on a limb here when it argues that consumers are harmed if the inefficient supplier with higher prices stays in the market and grows steadily—but just does not grow enough to justify investing (in its opinion or, apparently, in the Commission's view) in production capabilities as efficient as a long-time, dedicated manufacturer.

The Commission's reliance on *Spirit Airlines, Inc. v. Northwest Airlines, Inc.,* 431 F.3d 917 (6th Cir. 2005), in an effort to equate harm to Star with harm to competition, is misplaced. *Spirit Airlines* did not equate harm to a competitor with harm to competition and did not concern the situation here—with a new producer that "clearly" entered and steadily grew. Instead, the rival exited the market and the defendant charged customers "substantially higher prices to travel [certain] routes after Spirit's exit from this market." *Id*. at 925, 951 (consumers "had to pay an almost seven-fold price increase.").

McWane did not "squash" a competitor, as the Commission suggests.[46] If Star had taken the business risk that McWane took in investing in its own American foundry, then it is possible that Star could have achieved greater efficiencies in time to take advantage of the brief ARRA period. But Star made the business decision not to take that risk, and it is not the function of antitrust law to subsidize entrants to a potential market by reducing their business risk.

CONCLUSION

This Court should reverse the order of the Commission and dismiss the final count against McWane.

Respectfully submitted,

/s/ Joseph A. Ostoyich

[46] Commission Brief at 42.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation by the word count of the word-processing system used to prepare the brief. This brief contains 6,788 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of September, 2014, a true and correct copy of the foregoing Reply Brief of Petitioner McWane, Inc. was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record.

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