

**UNITED STATES OF AMERICA**

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UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of: )  
McWANE, INC., ) Docket No. 9351  
a corporation. )  
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THURSDAY, AUGUST 22, 2013

2:00 p.m.

ORAL ARGUMENT

BEFORE:

EDITH RAMIREZ, CHAIRWOMAN

JULIE BRILL, COMMISSIONER

MAUREEN K. OHLHAUSEN, COMMISSIONER

JOSHUA D. WRIGHT, COMMISSIONER

Reported by: Susanne Bergling, RMR-CRR-CLR

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 EDWARD HASSI, ESQ.

5 LINDA HOLLERAN, ESQ.

6 Federal Trade Commission

7 601 New Jersey Avenue, N.W.

8 Washington, D.C. 20001

9 ehassi@ftc.gov

10

11

12

13 ON BEHALF OF McWANE, INC.:

14 JOSEPH A. OSTOYICH, ESQ.

15 ERIC T. KOONS, ESQ.

16 WILLIAM C. LAVERY, ESQ.

17 Baker Botts LLP

18 1299 Pennsylvania Avenue, N.W.

19 Washington, D.C. 20004-2400

20 (202) 639-7905

21 joseph.ostoyich@bakerbotts.com

22

23

24 and

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P R O C E E D I N G S

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CHAIRWOMAN RAMIREZ: Good afternoon, everyone.

4

1           This case did not add up. It's that simple.  
2       The case did not add up. The complaint in this case  
3       alleged a conspiracy -- a conspiracy -- but the evidence  
4       shows that my client consistently underpriced the  
5       published prices of Sigma and Star. In winter 2008,  
6       underpriced substantially; in spring 2008, underpriced  
7       substantially; spring of 2009, underpriced again. The  
8       complaint alleged a conspiracy, but the evidence showed  
9       that my client continued to offer thousands of price  
10      concessions below the published price, hundreds and  
11      hundreds and hundreds of job prices to win particular  
12      jobs.

13           I have a spreadsheet here which we used with the  
14      witnesses, which is a single-spaced, multipage spread



1 and no one gave any evidence of net prices in the case.  
2 Now, the reason we look at a longer time period is  
3 because Complaint Counsel's expert said that the pricing  
4 data reflected shipment on a certain date, which might  
5 actually reflect price formation months and months in  
6 advance. So, if you pick February through October, you  
7 have absolutely no way of knowing, as Complaint Counsel  
8 put on no evidence, of when the prices on those  
9 shipments were formed. It could have been at the end of  
10 '07; could have been in the middle of '07.

11 COMMISSIONER BRILL: Yeah, but we know that  
12 going from January of '08 all the way through sometime  
13 in '09 would be well outside of the period of the  
14 alleged conspiracy. We know that.

15 MR. OSTOYICH: I'm not sure I follow you. The  
16 alleged conspiracy in the complaint was January '08  
17 through early '09.

18 COMMISSIONER BRILL: But given the fact the  
19 price formation -- first of all, that there was a price  
20 guarantee until I think it was around March, and so if  
21 the conspiracy begins in January, there was a certain  
22 time lag before the reduction or curtailment of project  
23 pricing began. That's the allegation.

24 MR. OSTOYICH: That's the allegation. So,  
25 that's why --





1           COMMISSIONER BRILL: Should we talk about the 13  
2 plus factors that are a key element of Complaint  
3 Counsel's case? I mean, yes, it's true they may not  
4 have used -- and we'll certainly ask Complaint Counsel  
5 about how the economic evidence came out when it's their  
6 turn. But there is a lot of evidence that was offered  
7 here in terms of the plus factors that would lead to the  
8 conclusion that there was an agreement.

9           MR. OSTOYICH: Which particular plus factor?  
10 Which particular plus factor? I mean, a plus factor --

11           COMMISSIONER BRILL: Do you want to go through  
12 them?

13           MR. OSTOYICH: Plus factors exist in markets  
14 regardless. Plus factors are often structured by how  
15 many players are in a market and have absolutely nothing  
16 to do with my client's conduct. So, yes, there are plus  
17 factors. There are plus factors in virtually every  
18 market out there.

19           COMMISSIONER BRILL: Well, let's talk about one  
20 of the most significant plus factors, and I'll then stop  
21 and let my fellow Commissioners ask some questions.

22           Former Chairman Bill Kovacic wrote a very  
23 interesting article called "Plus Factors and Agreements  
24 in Antitrust Law," which came out in 2011, and what he  
25 cited as a super plus factor was when firms, in an

1 oligopoly situation, centralize pricing authority, take  
2 away authority from their field and bring it into a  
3 central location.

4 And isn't that what happened here? And why  
5 shouldn't we consider that a super plus factor, which  
6 would lead to a strong inference, according to Professor  
7 Kovacic, of explicit collusion?

8 MR. OSTOYICH: Well, first, as a legal matter,  
9 I'm not sure there's case law to support that, though in  
10 Federal Court, it is not assumed a plus factor.

11 COMMISSIONER BRILL: Let's assume that we find  
12 that all three participants in this alleged collusion  
13 did pull authority from their fields and centralize  
14 pricing authority at something similar to a  
15 headquarters --

16 MR. OSTOYICH: Yeah, I don't want to quibble  
17 with you.

18 COMMISSIONER BRILL: -- at the same time.

19 MR. OSTOYICH: The evidence is clear, and there  
20 was clear testimony from Mr. Rybacki and Mr. Pais from  
21 Sigma, that Sigma never pulled pricing from the field,  
22 so that premise is wrong.

23 But, assuming, companies can unilaterally decide  
24 to consolidate pricing authority in a given person for  
25 lots of legitimate reasons. For example, if I'm selling

1 products whose raw material prices are going up 50  
2 percent in six months, I have a perfectly legitimate  
3 reason -- and my customers are very sophisticated, like  
4 HD Supply, which dwarfs all of these suppliers -- but  
5 customers are very sophisticated. I have a perfectly  
6 legitimate, independent, unilateral reason for pulling  
7 prices away from my sales, and that is I am not going to  
8 be in business much longer because the customers know  
9 how to game us and beat us down in price, and raw  
10 materials have gone up and demand has dropped. So, I  
11 can independently decide to do that for perfectly  
12 legitimate reasons.

13 COMMISSIONER BRILL: Possibly, possibly, but  
14 when you have got that plus 12 other plus factors  
15 present here, you know, this reminds me of the situation  
16 when a friend of mine might say, "Gosh, you know, my  
17 husband keeps coming home every Friday night, lipstick  
18 on his, you know, collar, he smells of perfume, and  
19 every time he seems to have a reason for it." You know,  
20 after the 13th time, you've got to figure something's  
21 going on. You can take each one of these separately --  
22 you can take each one of these separately and you have  
23 got a reason for it and an excuse for it, but at some  
24 point, you add them all together, and it looks like you  
25 have got a story.

1 MR. OSTOYICH: Well, Commissioner, I can't speak  
2 to the specific hypothetical, obviously.

3 COMMISSIONER BRILL: It was a girlfriend of  
4 mine. It wasn't me.

5 MR. OSTOYICH: To be candid, a year ago, roughly  
6 a year ago at this time, the Chairwoman wrote a 30- or  
7 40-page opinion denying my summary judgment motion, and  
8 at the time, she said, "There are fact questions here.  
9 Let's send this to the Judge to make fact findings.  
10 Let's defer to the Judge's understanding of what the  
11 witnesses say live and how they look in their demeanor  
12 and credibility. That's what happened.

13 I stood in this courtroom for two months, from  
14 the day after Labor Day to Election Day. The Government  
15 brought in its best case, 15 live witnesses. Some of  
16 those witnesses were on the stand for days and days and  
17 days, longer than any case I've ever heard of. My only  
18 witness was on the stand for roughly 25 hours.

19 The Judge sat in that chair and watched every  
20 minute of it, and he looked at the witnesses, and he  
21 looked them in the eye, and at the end of the day, 6000  
22 pages of transcript, 25 days of courtroom time,  
23 thousands of exhibits, the Judge wrote the opinion he  
24 did. And what he found was no conspiracy participation  
25 by my client.



1 one for Federal Court that's robust, that requires  
2 economic evidence and admissible evidence, and another  
3 which is not.

4 COMMISSIONER BRILL: This would be up to us to  
5 determine, de novo, how we feel about each of the  
6 factors. That's our job.

7 MR. OSTOYICH: Of course. But there does have  
8 to be a substantial weight of the evidence.

9 CHAIRWOMAN RAMIREZ: Counsel, isn't there a  
10 reading of the evidence here in which one can see the  
11 facts playing out as they have been set out in the  
12 so-called Rick Tatman plan? Is that just mere  
13 coincidence?

14 MR. OSTOYICH: Well, no, no. I would hope that  
15 there's some plausible reading of the evidence that  
16 could at least support the complaint. Otherwise, it  
17 would be frivolous, and if we were in Federal Court, we  
18 would file a Rule 11 motion. So, that wouldn't surprise  
19 me at all.

20 The question is, having watched the witnesses'  
21 testimony for probably dozens of hours, maybe a  
22 hundred-plus hours, having watched the testimony, heard  
23 the explanations of all those documents, the Judge  
24 reached the conclusions he did. To disregard that, I  
25 think, would be improper.

1                   CHAIRWOMAN RAMIREZ: But you don't disagree that  
2 we are looking at this de novo, as Commissioner Brill







1           COMMISSIONER BRILL: Okay, because I don't want  
2 to monopolize the conversation here, but I have to say  
3 that I find the finding that Mr. Tatman -- and I don't  
4 know if Mr. Tatman's in the room or not -- but I find  
5 that finding to be incredible, the notion that  
6 Mr. Tatman would develop an entire plan, which was  
7 evidenced in CX-627, what has been termed the "Tatman  
8 plan," and he talks about the need for everybody to  
9 follow it, everyone to be engaging in centralized  
10 pricing, for instance, and the other elements of the  
11 plan.

12           He gets -- allegedly -- the other two companies  
13 to go along with it, and all he was engaged in was a  
14 head fake and he wasn't really going to follow it? I'm  
15 not -- I have a lot of trouble buying it. I'm sure  
16 Mr. Tatman is a lovely gentleman. I'm sure he is deeply  
17 credible in many regards, but this aspect, which  
18 actually seems to me to be a key aspect of whether or  
19 not McWane was engaged in an effort to further some sort  
20 of collusion or not, this is a key aspect of it.

21           MR. OSTOYICH: I understand --

22           COMMISSIONER BRILL: I just can't buy it.

23           MR. OSTOYICH: -- and you have raised a critical  
24 issue in my mind. Do we have a process that makes  
25 sense? Do we have a Part 3 process that makes sense?



1           MR. OSTOYICH: Here's a sample. Here's a sample  
2 of the company's job pricing, a sample, 20 pages,  
3 single-spaced, month after month after month throughout  
4 2008 of job prices.

5           COMMISSIONER BRILL: Okay. My understanding is,  
6 if we're talking about the same document, that a great  
7 deal of the entries on that document are with respect to  
8 what's known as price protection; that is, if you order  
9 at a certain time, the price won't go up. And that's a  
10 document that's actually entitled, if it's the same  
11 thing, "Price Protection."

12           The issue here that's the alleged collusion is  
13 about project pricing, which is something entirely  
14 different, discounts off of list price. That's what the  
15 alleged collusion is about.

16           Going back -- so, let's just say for a moment I  
17 reject that as a business document that supports the  
18 head fake theory. Is there anything else?

19           MR. OSTOYICH: Sure. Oh, there's a lot. First  
20 of all, price protection is a job price. That says, for  
21 the next year, every job you bid, I'm willing to pay --  
22 charge you a certain price.

23           COMMISSIONER BRILL: No, I don't think so.  
24 Project pricing was discount off of list price.

25           MR. OSTOYICH: Again, we can have a regime --



1 heard that McWane's offering a discount."

2 COMMISSIONER BRILL: Sure, there was cheating.  
3 There was cheating going on, sure, but that doesn't mean  
4 that there wasn't a -- that doesn't mean there wasn't a  
5 tacit -- there wasn't tacit collusion.

6 MR. OSTOYICH: Well, you are flipping the burden  
7 here. You are asking me to disprove something in some  
8 other company's documents.

9 COMMISSIONER BRILL: We both agree that the head  
10 fake theory is critical, right? You said that a moment  
11 ago. And what I'm asking you is whether there are any  
12 business documents, business records, other than that  
13 price list, which we've talked about and I'm sure  
14 Complaint Counsel will talk about, if there are any  
15 business records that support the testimony from  
16 Mr. Tatman that it was a head fake theory.

17 MR. OSTOYICH: Every document that shows -- we  
18 did this repeatedly with every pricing witness in the  
19 case, that showed that McWane continued to offer  
20 discounts and drop prices throughout the year.

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1 that are saying, "Special Price for D.C. Lunch Week," or  
2 if I go to Wal-Mart, I see an everyday low price, but  
3 there are companies who say I'm not going to take  
4 anything off, because I'm giving you a rock bottom  
5 price. There is nothing inherently wrong with doing  
6 that.

7 So, the question is not, did they issue that  
8 policy? The question is, was it agreed upon? Was there  
9 a communication? We're in a conspiracy case where the  
10 Judge found, after sitting through 25 days of courtroom  
11 trial, no evidence of an advance price communication,  
12 where the plaintiff's own expert conceded that there  
13 were no communications, no discussions, no smoke-filled  
14 rooms, and the only thing he could point to were a  
15 couple of letters we sent to customers, which he said  
16 had terms from the alleged conspiracy.

17 When I cross examined him, he recanted. He  
18 said, "I guess it's not in there. I just interpret it  
19 that way." Well, if that's what makes me liable,  
20 because the Government can find an economist who can  
21 interpret something the way he wants to? Then I --  
22 we're not --

23 COMMISSIONER BRILL: Are you saying we can never  
24 find collusion with regard to prices unless we have a  
25 whistleblower? I mean, I do not think that we need to



1 find evidence of an explicit conversation. I think that  
2 we can infer an agreement from activity that takes place  
3 between an offer of -- you know, like the January  
4 letter, and then follow-up actions by the other -- by  
5 all the players policing, monitoring, and many of the  
6 other plus factors that are identified.

7 And I think if we place a greater burden on  
8 ourselves, then that could be a serious harm to the  
9 economy in terms of the kind of price collusion that  
10 would go on and would be unpoliced.

11 MR. OSTOYICH: To make it stand up on appeal,  
12 you would have to disregard 465 pages of the Judge's  
13 findings after he was explicitly tasked with judging the  
14 credibility and the demeanor of the witnesses. You  
15 would also, if you found it on these circumstances, you  
16 would have to convince an Appellate Court. There is no  
17 direct evidence, and the circumstantial evidence is weak  
18 and probably doesn't survive summary judgment in Federal  
19 Court.

20 CHAIRWOMAN RAMIREZ: Counsel, let's turn back to  
21 the evidence, if we may, and go back to the  
22 so-called head fake issue. What are we to make of  
23 documents in which McWane itself assesses its actions as  
24 having stayed firm on pricing? I'm looking at Exhibit  
25 1223, page 2, in which a McWane employee says, "For the

1 better part of 2008, held pricing to try to stabilize  
2 market pricing." So, what are we to make of those types  
3 of statements in McWane's own documents?

4 MR. OSTOYICH: I don't have them all memorized,  
5 Chairwoman, but, look, you can find 50 more documents  
6 that say the exact opposite, price is going to hell in a  
7

1 2010, wouldn't the sales data after that kind of present  
2 a different picture than before the FTC's investigation?

3 MR. OSTOYICH: I'm not sure what your question  
4 is. So, the data -- by the way the data was --

5 COMMISSIONER OHLHAUSEN: I mean, was McWane  
6 enforcing the full support requirement --

7 MR. OSTOYICH: Oh, the testimony was -- so the  
8 letter came out on September 22nd, roughly, and  
9 September 23rd or 24th -- I don't remember exactly --  
10 Star --

11 COMMISSIONER OHLHAUSEN: Of 2009?

12 MR. OSTOYICH: -- 2009, Star sold its first  
13 domestic fitting, and it continued to sell every week,  
14 week after week after week, adding an average of two new  
15 customers a week for the next year. And the graph that  
16 our expert witness put in, which their expert agreed  
17 with, of their share shows essentially steady growth  
18 throughout. So, I'm not sure what you're asking about  
19 the data, per se, but --

20 COMMISSIONER OHLHAUSEN: Well, what I'm asking  
21 is the fact that you're relying that after -- that a lot  
22 of this growth may have occurred after you probably --  
23 McWane probably wasn't enforcing --

24 MR. OSTOYICH: All of the growth. All of the  
25 growth occurred essentially after the letter came out,

1 because that's when --

2 COMMISSIONER OHLHAUSEN: I'm not asking after  
3 the letter came out. What I'm asking is, after it's  
4 likely to have stopped -- you said McWane ended any  
5 exclusive dealing policy in January of 2010. So, what  
6 I'm trying to discern is what was the effect of the  
7 exclusive dealing policy while it was in effect.

8 MR. OSTOYICH: Yeah. I would say the exclusive  
9 dealing policy was never in effect. There was a letter  
10 that was sent that was one very --

11 COMMISSIONER OHLHAUSEN: But didn't a number of  
12 distributors say that they felt that they couldn't buy  
13 from Star without being cut off?

14 MR. OSTOYICH: No. No. Every single  
15 distributor who testified in this case, live or via  
16 deposition, bought domestic fittings from Star. Every  
17 single one.

18 COMMISSIONER OHLHAUSEN: But under some of the  
19 provisions that the letter allowed.

20 MR. OSTOYICH: There is no evidence of that.  
21 That's the assertion by Complaint Counsel, but their  
22 expert didn't study it.

23 COMMISSIONER OHLHAUSEN: So, all the  
24 distributors ignored that letter is what you're saying.

25 MR. OSTOYICH: Well, exactly the --

1                   COMMISSIONER BRILL: Counsel, are we supposed to  
2 just ignore contemporaneous documentary evidence on this  
3





1 when the policy was in action.

2 MR. OSTOYICH: There is no separate evidence in  
3 the record that I'm aware of what the growth was between  
4 September 23rd and January 20th. I don't know the  
5 answer to that.

6 COMMISSIONER OHLHAUSEN: I also wanted to --

7 MR. OSTOYICH: I can only tell you,  
8 Commissioner, that the evidence is in the record that  
9 two -- an average of two new customers per week were  
10 signed up by Star throughout this period. We have email  
11 records and internal documents and sales documents  
12 showing that --

13 COMMISSIONER OHLHAUSEN: You said two new  
14 customers a week, so there were over 100 new customers a year  
15 for three years?

16 MR. OSTOYICH: The precise number is under seal,  
17 but suffice it to say that, on average, between the fall  
18 of 2009, when they first began selling domestic  
19 fittings, and the fall of 2010, that first 12-month  
20 period, they sold on average to more than two new  
21 customers every single week.

22 COMMISSIONER WRIGHT: So, is it your position  
23 that the foreclosure rate is zero or five or is it just  
24 that it's less than 30 or 40?

25 MR. OSTOYICH: My position is it's not my burden



1 of proof. It's less than a measurable test, and no test  
2 was put in by Complaint Counsel.

3 COMMISSIONER WRIGHT: I understand --

4 MR. OSTOYICH: I would say, as my expert said,  
5 there was no foreclosure because, by definition, even  
6 the 5 percent who only purchased from McWane, they were  
7 free, as these others who purchased from Star showed,  
8 they were free; they just chose not to. So, that's not  
9 foreclosure.

10

1 pursued a virtual manufacturing option for producing  
2 domestic fittings; created a Sigma domestic production  
3 plan and assembled high-level executives and engineers  
4 responsible for investigating all aspects of domestic  
5 fitting production; spent 50 to 75 thousand dollars;  
6 identified critical mass of 730 configurations that  
7 would need to be produced for domestic; had detailed  
8 plans for identifying the top fittings. I could go on.  
9 Visited attractive -- visited and received attractive  
10 price quotes from foundries to help them.

11           These seem to me to be significant steps, but  
12 probably most importantly, doesn't the evidence show  
13 that McWane thought Sigma was going to enter? It  
14 believed Sigma was going to be a competitor, and that's  
15 why it entered into the agreement. And also, Sigma was  
16 able to obtain better terms under the MDA after it made  
17 clear that it was likely to enter.

18           Isn't that significant? Doesn't it redefine  
19 that to be significant?

20           MR. OSTOYICH: 17

1 at some points, it was highly likely, and at

1 their expert, to just assume that they would have  
2 entered. There were not enough facts --

3 COMMISSIONER BRILL: People do that with experts  
4 all the time. Let me ask you this. Let me ask you --

5 MR. OSTOYICH: Can I --

6 COMMISSIONER BRILL: No, no, I want you to focus  
7 on one other thing that I'm about to ask you, which is  
8 the Bombardier case, which I'm sure you're well familiar  
9 with, where the Court found that the potential -- that  
10 the facts did meet the potential competitor standard  
11 where you had a would-be rival had intent to enter, the  
12 would-be rival had developed prototypes and the ability  
13 to produce parts, 21/TT1 1 Tf 9.96 0 0 9.96 33 427.4greem.728Its

1 says?

2 MR. OSTOYICH: If we are going to have antitrust  
3 provisions with perceptions, even if they are wrong,  
4 that's somehow the basis for liability, I'd submit we're  
5 in trouble. Now, let me go back to my --

6 COMMISSIONER BRILL: Because I went through a  
7 lot of other things that Sigma did to get ready.

8 MR. OSTOYICH: Sigma undoubtedly took some steps  
9 toward that. Complaint Counsel has an excerpt from  
10 Mr. Bhattacharji's deposition. Mr. Bhattacharji was asked how  
11 long it would take, and he said we could flip the  
12 switch. And I said, wow, have you ever been to a  
13 foundry? I mean, you can explore, you can talk to  
14 people, and you can get quotes on things. Running a  
15 foundry is not that easy. There are a lot of foundries  
16 in this country that have gone out of business in the  
17 last five years.

18 So I said, you said you could flip a switch.  
19 Did you own a foundry? No. Do you have a contract with  
20 a foundry, an actual contract in place? No. Well, how  
21 many patterns do you think you need? About 800 or so.  
22 Well, how many did you have? Two. I said, well, have  
23 you actually used those patterns to cast a fitting?  
24 Yeah, we had two sample fittings, which Mr. Pais  
25 testified at trial, well, they were too embarrassed to

1 show at a trade show. I said, well, did you have core  
2 boxes? Did you have finishing lines? Well, no, we  
3 didn't have any of this. So, then I said, well, how  
4 long would it take you to flip that switch before the  
5 lights went on? Eighteen months to two years.

6 COMMISSIONER BRILL: But they could -- but they  
7 could subcontract, and that's what they were doing.  
8 They were looking at other foundries to produce for  
9 them. Isn't the testimony clear about that?

10 MR. OSTOYICH: Well, I mean, if that day was two  
11 years ago, why aren't they in, then?

12 COMMISSIONER BRILL: I don't think that's the  
13 test. I don't think that's the test, is what's happened  
14 now versus what was happening then. There's lots of  
15 market conditions that have taken place between now and  
16 then.

17 MR. OSTOYICH: That's the but for world, right?  
18 It's a natural experiment. That's the but for world.

19 COMMISSIONER BRILL: No, that's not the but for  
20 world.

21 MR. OSTOYICH: U.S. Pipe got out of this  
22 business. Griffin Pipe got out of this business.  
23 Backman Foundries, which makes domestic fittings in the  
24 U.S., said anybody and their dog could see that this was  
25 a bad business decision, to try to get into domestic

1 fittings. So, Sigma made a perfectly rational decision.  
2 They had no capability to flipping that switch until two  
3 years later, if they were lucky, and by the way, they  
4 tried at the same time to get into domestic restraints,  
5 a different product, far easier --

6 COMMISSIONER BRILL: How much ARRA money is  
7 remaining?

8 MR. OSTOYICH: Excuse me?

9 COMMISSIONER BRILL: How much ARRA money is  
10 remaining?

11 MR. OSTOYICH: How much --

12 COMMISSIONER BRILL: -- of the Recovery Act  
13 money is remaining?

14 MR. OSTOYICH: Zero, as far as I know. There is  
15 no evidence on that.

16 COMMISSIONER BRILL: Right. So, isn't that a  
17 major change between what was going on in '08, '09  
18 versus today?

19 MR. OSTOYICH: I assume it's a major change,  
20 sure.

21 COMMISSIONER BRILL: It's a major change.

22 MR. OSTOYICH: Of course, which is another  
23 reason why the preconditions for getting an injunction  
24 require more.

25 COMMISSIONER OHLHAUSEN: I wanted to follow up

1 on the full support program and get an idea from you  
2 what you think the procompetitive justifications were,  
3 what were the benefits to consumers for that program?

4 MR. OSTOYICH: The procompetitive justifications  
5 were simple. Everybody else in domestic production had  
6 gotten out of this business. The ITC found a half dozen  
7 years ago that cheap imports from China had decimated  
8 domestic purchases. U.S. Pipe, Griffin Pipe. My  
9 primary witness literally broke down on the stand,  
10 couldn't control himself, and started sobbing  
11 uncontrollably, because he had to recount when he had to  
12 shut the Tyler facility down in Texas and lay everybody  
13 off, okay?

14 The domestic industry is on the verge of



1 what they said to distributors?

2 MR. OSTOYICH: That's what the letter said and  
3 the reason is --

4 COMMISSIONER OHLHAUSEN: It seemed a little more  
5 forceful to me.

6 MR. OSTOYICH: Well, the letter wasn't  
7 phrased --

8 COMMISSIONER OHLHAUSEN: But the distributors  
9 didn't interpret it that way.

10 MR. OSTOYICH: A hundred plus distributors  
11 apparently did, since they turned around and bought from  
12 Star.

13 COMMISSIONER OHLHAUSEN: So, the procompetitive  
14 justification for the customers --

15 MR. OSTOYICH: It's a much more efficient  
16 foundry than Star, that's what the Judge found. If that  
17 foundry disappears, customers are at the mercy of jobber  
18 foundries, who are much more expensive, cost them  
19 approximately 25 percent higher, according to the Judge,  
20 and in part --

21 COMMISSIONER OHLHAUSEN: So -- but MTBDC /TT1 1 Tf 9.96 0 0 9.96 33 252

1 less, yes.

2 COMMISSIONER OHLHAUSEN: Okay.

3 MR. OSTOYICH: Steady decline.

4 COMMISSIONER OHLHAUSEN: And so you think that  
5 if they were able to utilize that foundry more, they  
6 would have cost savings that would have been passed  
7 along to --

8 MR. OSTOYICH: Well, if they were unable to  
9 utilize the foundry, if they lost any material tonnage,  
10 they would have gone out of business, just like they  
11 shut the Tyler plant, just like Griffin Pipe went out,  
12 just like U.S. Pipe went out, just like ACIPCO went out.  
13 So, it's simple. They were a more efficient producer,  
14 and the only way they were going to be able to stay in  
15 business was to keep as much tonnage as they could.

16 COMMISSIONER WRIGHT: You cited Copperweld in  
17 your brief for the proposition that shifting sales from  
18 less efficient to more efficient firms is an efficiency  
19 justification. Do you have authority in the -- instead  
20 of saying exclusive dealing, I'll say vertical  
21 monopolization context -- for that proposition?

22 MR. OSTOYICH: Not off the top of my head. I  
23 mean, there are a whole lot of cases. I mean, the whole  
24 efficient competitor thesis and bundled rebates were at  
25 the entire premise of that, is it only hurts if an

1 efficient competitor was excluded. So, there's a lot of  
2 case law in the context of exclusionary conduct.

3 Off the top of my head, I can't think of a  
4 vertical case with that situation, but by definition, if  
5 an inefficient competitor is -- does not -- enters but  
6 does not do as well as it wants to, by definition,  
7 consumers are not harmed. And bear in mind, what the  
8 Judge said was the harm was Star didn't make as much  
9 profit as it would like, it was unprofitable, and  
10 therefore, they couldn't afford to buy a foundry.

1 don't have a case, but the justification is the obvious  
2 one. Everybody else got out of this market because they  
3 were getting killed and they were losing money and this  
4







1       answers the question.  If we take your expert's analysis  
2       and we do it two ways, one with the time period for  
3       conspiracy that you think is correct and another with  
4       the time period for conspiracy that Complaint Counsel  
5       thinks is correct, and I'm not -- and I believe the  
6       analysis, I say no regression, no hypothesis testing,  
7       that's fine, and I believe it -- I'm stuck in the  
8       following situation:

9                If I believe Complaint Counsel's  
10       characterization of the time period, then I think where  
11       you're taking me is that I should credit the analysis  
12       that's suggesting that the pricing evidence went up; if  
13       I believe yours, then I should say the evidence is  
14       credible and prices went down.

15               MR. OSTOYICH:  Yeah, so -- right.  The data is  
16       what it is.  So, the data he believed, he testified, and  
17       the Judge found was credible and reliable.  The precise  
18       numbers that Complaint Counsel has said, I don't  
19       actually remember those coming in at trial.  I know that  
20       that's a -- I think that that's an inference of what  
21       they say was in the data, but I don't remember that off  
22       the top of my head.  If the data works -- which it did,  
23       the data is what it is -- I would say, again, I mean,  
24       the mere fact that prices go up isn't sufficient to  
25       infer a conspiracy, particularly when you see a 50



1 percent increase in raw materials. So, even if you pick  
2 a truncated time period, that doesn't prove anything  
3 other than you're looking at a narrow slice.

4 COMMISSIONER WRIGHT: There's a slight irony in  
5 the position here. What you're telling me is that if  
6 prices go up, then I can't infer conspiracy because I  
7 have not controlled for other factors, but I should  
8 credit your witness' testimony despite failing to  
9 control for other factors.

10 MR. OSTOYICH: No, because if the prices move in  
11 the opposite direction of the hypothesis, which is where  
12 they moved, by definition, they disproved the  
13 hypothesis. I think it's pretty straightforward. You  
14 don't need a regression analysis to test that  
15 proposition. If somebody says the street light is red,  
16 and you look at it and say, no, it's green, you don't  
17 need to do a test for that. It's obvious.

18 COMMISSIONER WRIGHT: I think my econometrics  
19 textbook disagrees, but I'll stop there.

20 CHAIRWOMAN RAMIREZ: All right. Thank you,  
21 Counsel. We have eaten up all of your time, but we will  
22 give you time for rebuttal.

23 Mr. Hassi, you may begin.

24 MR. HASSI: Thank you.

25 In 2007, the fittings market, which is

1 coincident with the housing starts market, went down.  
2 Volume went down, prices went down, and project pricing  
3 went up. And that volume continued to go down through  
4 the recession. So, in 2008, fittings were down year  
5 over year over 2007, and in 2009, they were down again.

6 But in 2008, McWane and the other fittings  
7 suppliers had a bright shining moment. In 2008, their  
8 prices went up, they managed to put out two price  
9 increases, and those price increases stuck. They  
10 managed to reduce project pricing, and their profits  
11 went up. And I would ask you, rather than looking at  
12 the data and the experts' analysis of the data, to look  
13 at their ordinary course documents.

14 If you look at McWane's variance analysis, in  
15 2008, for the first six months, volume was down 24 percent,  
16 and profits were up by 5 million. Why? Because in  
17 2007, in late 2007, McWane put Mr. Tatman in charge of  
18 the fittings division, and he came up with a plan, and  
19 it's a written plan -- and you have seen it, it's in  
20 CX-627 -- and he put that plan into place.

21 That plan required communication -- it says it  
22 right at the top, "Desired Message to the Market &  
23 Competitors" -- and he communicated with his  
24 competitors, and he communicated that plan. And over  
25 the course of 2008, McWane and its competitors carried



1 us and Star." Mr. Tatman is complaining not only to  
2 Sigma about Sigma's prices; he's complaining to Sigma

1 these two individuals. These are four in a particularly  
2 suspicious period of time. And in isolation, sure, if  
3 you just look at these four phone calls and you look at  
4 the fact that neither Mr. Rybacki or Mr. Tatman remember  
5 what was being discussed, maybe you make an inference;  
6 maybe you don't. They don't remember what was  
7 discussed.

8 Now, Mr. Rybacki testified that he has no  
9 legitimate business reason for speaking with his  
10 competitors. Mr. Rybacki, by the way, sets prices at  
11 Sigma. Mr. Tatman sets prices at McWane. No legitimate  
12 reason for talking to Mr. Tatman. Now, counsel tells  
13 you that maybe it was to call him and wish him happy  
14 holidays and welcome him to the business.

15 And, Terri, if you could bring up the rest of  
16 the bullets and put it in context.

17 So, let's put this in context and look at the  
18 evidence a little more holistically. In the late fall  
19 of 2007, Sigma announced a price increase and Star  
20 indicated it would follow. On September 19th,  
21 Mr. Rybacki of Sigma and Mr. McCutcheon, the head of  
22 Star, talk. And on December 20th, Sigma postpones its  
23 price increase and puts out a letter to the market in

1           It's also in his written plan. He refers to the  
2 fact that Sigma's bashing McWane publicly over their  
3 failure to follow on price. That same day, Mr. Rybacki  
4 has a call with someone other than Mr. Tatman at McWane,  
5 and a few days later, Mr. Tatman and Mr. Rybacki  
6 exchange phone calls, and the first of those calls is  
7 from Mr. Rybacki to Mr. Tatman's cell phone. How he got  
8 Mr. Tatman's cell phone to welcome him to the market and  
9 to wish him happy holidays at a time when he was  
10 publicly bashing McWane, we don't know the answer to  
11 that, because they don't remember what was discussed in  
12 the call.

13           But ssed in



1 so just days before the final letter went out, and he's  
2 quite clear. The draft of the letter says, "It is not  
3 our intention to provide job pricing." So, how the  
4 letter became a head fake, it first became a head fake  
5 when Mr. Tatman was on the stand. It was never a head  
6 fake before that. Not in the contemporaneous documents,  
7 not in his deposition, never before that.

8 Now, Star and Sigma followed, and they didn't  
9 just follow, as I said, what was in the letter and the  
10 price increase and the decision not to job price, but  
11 they also -- and this is most evident with Star -- they  
12 centralized pricing.

13 COMMISSIONER OHLHAUSEN: Counsel, before you  
14 turn away from the following, whether Sigma  
15 and Star followed, in an oligopolistic market, I mean,  
16 to have sort of a follow-the-leader kind of  
17 situation, is that unusual? Is that unlawful?  
18 What makes that unlawful compared to  
19 the pricing and that kind of stuff?

20 MR. HASSI: What makes it unlawful, Commissioner  
21 Ohlhausen, is the communications. In other words, it's  
22 not unusual to have follow-the-leader pricing in an  
23 oligopoly, and if McWane had simply done this without  
24 communicating with its rivals, perhaps it would have  
25 been legal. We don't like it, but it's legal.





1           COMMISSIONER OHLHAUSEN:  And that was a  
2           conversation between Sigma and Star?

3           MR. HASSI:  Yes, it was.  It was a conversation  
4           between Sigma and Star, but it shows that Sigma had an  
5           understanding of this plan, Mr. Tatman's plan,

1 project pricing log









1 is very important -- is that when we got the data, we  
2 asked McWane, through counsel, in January of 2008, fully  
3 20 percent of the prices that are recorded in that data  
4 are above the published price. And we said, who pays  
5 above published price? They said nobody. It's got to  
6 be an error. And then they used the data anyway.

7 And by the way, their expert never asked a  
8 question of McWane about that. We asked the question.  
9 We decided not to use the data. Their expert just went  
10 ahead and used the data as best he could.

11 Now, to go back to Star for a minute, Star is  
12 helpful also in sort of book-ending this conspiracy, and  
13 Star's actions against interests are an important lens  
14 through which to look at this and an important plus  
15 factor. Star had a strategy for project pricing. Star  
16 was the last of these three companies to enter the  
17 market. It was the smallest of these three companies.  
18 And Star had made it a cornerstone of its strategy to  
19 project price.

20 On January 22nd, Star sent out an email to its  
21 entire sales force saying we're not going to project  
22 price anymore.

23 And if you could bring up slide number -- yeah,  
24 thank you -- 11, Terri.

25 So, this is Mr. Minamyers' email -- he's the



1 head of sales for Star -- and he's telling the entire  
2 sales force, "Our goal is to take a price increase and  
3 stop project pricing."

4 And if you could go to the next slide, please,  
5 Terri.

6 And then he said, "All project pricing has to go  
7 through me." This is Mr. Minamyer centralizing pricing  
8 in himself, just as Mr. Tatman indicated was a key to  
9 success in CX-627. He says, "One of the keys to success  
10 is for these two to centralize pricing." And that's  
11 exactly what Mr. Minamyer does here. And why does he do  
12 it?

13 Terri, if you could go to the next slide.

14 He didn't do it because it was good for Star.  
15 He did it because it was good for the industry. He  
16 tells his territory managers and the division  
17 managers -- that's the three-level sales force that he  
18 had -- he says, "Train them this is what is best for the  
19 industry and that we need to be part of the effort to  
20 help our industry. We will not be part of damaging the  
21 industry due to lack of discipline."

22 He goes on to say (as read): "You need to know  
23 that we are strong in revenue and profit. We will have  
24 no problems weathering any price wars, even if they are  
25 prolonged. What we are doing is right for the industry.

1 So, don't think we need the price increases, as that is  
2 not the case. A price increase will be good for us on  
3 the short and long term profit situation but are not  
4 vital to our strength. The truth is that we would come  
5 out of a price war stronger than ever and with a bigger  
6 market share, but we don't think the industry needs to  
7 do that right now."

8 He's doing what's right for the industry. Star  
9 is doing not what's right for itself, but what's right  
10 for the industry. And Mr. Minamyer also testified --  
11 I'm sorry, do you have a question?

12 COMMISSIONER OHLHAUSEN: I do, actually.

13 MR. HASSI: Let me just finish. What he also  
14 testified to was he understood they couldn't do this  
15 alone. All three companies agreed that if they stopped  
16 project pricing alone, they would get slaughtered in the  
17 market. Their competitors would eat their lunch,  
18 because project pricing was the primary form of  
19 competition.

20 I'm sorry, Commissioner.

21 COMMISSIONER OHLHAUSEN: That was my question.  
22 Did Star actually stop project pricing, regardless of  
23 whatever they said about doing that, given that it looks  
24 like the numbers in the project pricing that they did in  
25 2007 and 2008 don't look that different, particularly

1 when you factor in the economic factors -- conditions in  
2 2008?

3 MR. HASSI: Star did a couple of things. Number  
4 one, in addition to telling its sales force that they  
5 need to stop project pricing, Star told its customers it  
6 was stopping project pricing.

7 For example -- if you could bring up slide 16,  
8 Terri -- TDG is a buying group that represents a number  
9 of the regional distributors, and here is Mr. Minamyers's  
10 email to TDG. And he says, "Our plan is to adjust  
11 multipliers to be on an even playing field on up front  
12 pricing with our competitors." And he goes on to say  
13 "no more project pricing after March 1st." He sent a  
14 similar message to other customers, including his  
15 largest customer, HD Supply, said we're not going to  
16 offer you project pricing anymore. So, clearly, he  
17 intended to stop project pricing.

18 Now, the policy that he put in place was if you  
19 see somebody else project pricing, go ahead and match it  
20 and get the sale, but we're not going to initiate it.  
21 Now, if all three do that, if nobody initiates it, there  
22 is no project pricing. So, to the extent that Star saw  
23 somebody cheating, they had the ability to respond, but



1 pricing and at times, to the extent that some think us  
2 inflexible in that area." And he suggests that, in the  
3 next paragraph, that maybe the others weren't really  
4 trying as hard to protect project pricing.

5           And at this point in November of 2008, he says  
6 we are going to take the gloves off and we are going  
7 to -- I am going to loosen you to go back out and  
8 project price again, and he allows them to do it. And  
9 he tells them to do it quietly as a recognition of we're  
10 cheating; let's not get caught cheating, but let's go  
11 out and grab market share under the --

1     reliance on their rivals' actions, is what distinguishes  
2     concerted action here from simple interdependence." So,  
3     are you telling us that -- I mean, was there an  
4     agreement that we can find through the various  
5     inferences, or do we not need to find that? And if  
6     you're taking the latter position, we don't actually  
7     need to find that, where do we fit in the Williamson  
8     scenario? If you understand my question.

9             MR. HASSI: I think I do, but I think that we've  
10     proved that there was an agreement. We've proved it

1 inference.





1 claim. This is, after all, historical, aggregated,

2



1 pricing discipline, as the market and market share data  
2 point to a relatively consistent and stable market  
3 pattern. It has helped all of us not to allow the sharp  
4 market decline to be mistaken as a 'loss of market  
5 share,' which mostly causes price reaction."

6 In other words DIFRA, which was operational in  
7 2008, during a market where volume was falling, gave  
8 them the confidence to keep their prices up, to keep  
9 their prices up above the competitive price. Had they  
10 just seen that they were losing sales, without knowing  
11 information about the size of the market, they might  
12 have made different pricing decisions, but instead they  
13 stabilized and kept their prices up.

14 CHAIRWOMAN RAMIREZ: But didn't McWane argue  
15 that, in fact, McWane used the information that it  
16 obtained from the DIFRA exchange to lower its prices in  
17 June of 2008?

18 MR. HASSI: They argued that, but what they did  
19 in 2008 was raise prices. They went out on June 17th,  
20 2008, and they made the decision to go up by 8 percent  
21 on their prices. Now, they argue that it's lower  
22 because Sigma had previously announced and then  
23 withdrawn a price increase, or perhaps they argue that  
24 it's lower because they had two choices on the table, a  
25 12 percent price increase or an 8 percent price

1 increase. Yes, they went out with the lower of those  
2 two, but make no mistake, they raised prices in June of  
3 2008. And that's how they used the data, is to make  
4 decisions about price increases. And they did that  
5 consistently, and all three did that. All three used it  
6 in their pricing decisions, and that's why the DIFRA information  
7 exchange is illegal.

8 COMMISSIONER OHLHAUSEN: Counsel, would this be  
9 a problem in any oligopolistic market, to have market  
10 share data like that?

11 MR. HASSI: I think there's a reason that this  
12 is done under the rule of reason, and that is it's a  
13 very fact-specific inquiry. I would not say that,  
14 structurally, this is necessarily a problem. I would  
15 say that the data here that was shared was fairly fresh,  
16 it was sensitive, and the way it was used T56

1 documents demonstrate that McWane feared its domestic  
2 pricing would get -- and I quote -- creamed, creamed by  
3 Star if they were allowed to do the same thing in the  
4 domestic market that they had done in the imported  
5 market.

6

1           Well, McWane's expert counts that as a customer.  
2           Now, what Mr. Sheley also testified to is that the  
3           policy prevented him from buying from Star. He wanted  
4           to buy. He didn't. So, he bought those five just to  
5           get a sense, but when the policy came out, he realized,  
6           "I'm not going to buy from Star. I'm not going to take  
7           the risk of getting cut off by McWane." And they did  
8           cut people off.

9           They cut off Hajoca, which made a decision --  
10          Hajoca made a deliberate decision to buy from Star, and  
11          Hajoca got cut off, and Hajoca didn't get reinstated  
12          until this Commission was investigating McWane's  
13          actions.

14          So, Commissioner Ohlhausen, you asked questions  
15          about the effectiveness of the policy and whether the  
16          investigation may have tempered it. Certainly as to  
17          Hajoca, the reason that they got -- one of the  
18          reasons -- and this is, again, in contemporaneous  
19          documents -- one of the reasons that they were  
20          reinstated was because McWane had concerns about the  
21          FTC.

22          COMMISSIONER OHLHAUSEN: Actually, this would be  
23          a good opportunity for me to ask you, so, Star did  
24          enter, right, came in in September of '09 and did take  
25          some market share. So, where do you think the line is

1 for foreclosure? Is it -- how much  
2 entry shows that people weren't really deterred that  
3 much?

4 MR. HASSI: I think the answer to that is that  
5 entry should be similar to the way we look at entry in a  
6 merger, is it going to be effective? Does Star's entry  
7 have the ability to constrain McWane's prices? And it  
8 didn't. Star was not allowed to get to minimum  
9 effective share, and Star was not -- was prevented from  
10 buying a foundry that would have allowed them to do  
11 that. And so Star was not able to play a disciplining  
12 role on McWane's prices.

13 Star, in the fall of 2009, was in negotiations  
14 to buy a foundry, and Star testified -- I won't get into  
15 the numbers, because -- but you should have them, but it  
16 was done in camera, but Star testified it would have  
17 been significantly cheaper to make fittings on its own,  
18 and it could have passed that cost savings along to customers,  
19 but it didn't get there. The reason it didn't get there  
20 was because of the policy, the substantial foreclosure  
21 here, and under the traditional case method of doing  
22 that, if you use the calculations from Omega vs.  
23 Gilbarco, in 2010, the foreclosure was 95 percent or 94  
24 percent. Excuse me.

25 CHAIRWOMAN RAMIREZ: But certain distributors

1 did, in fact, testify that there were other reasons  
2 other than McWane's program for not doing business with  
3 Star. So, how do we weigh that evidence and how do  
4 we -- what is it that would lead us to find that, in  
5 fact, it was McWane's policies that foreclosed Star?

6 MR. HASSI: Well, we think -- again, looking at  
7 the evidence, and the best examples of this are Ferguson  
8 and HD Supply. Together, they represent 53 percent of  
9 the market. And, Chairwoman, you alluded to the letter,  
10 and I believe you asked a question about the letter that  
11 HD Supply sent. They sent a mandate letter. The CEO --  
12 I'm not sure now if it was the CEO of McWane or  
13 Mr. Tatman -- who testified it was very unusual. They  
14 had never seen HD Supply do this before, because  
15 normally they allow their branches to have a certain  
16 amount of authority.

17 And the CEO of HD Supply Waterworks took that  
18 away from his people and said that nobody is buying from  
19 McWane because of this mandate, because of this letter.  
20 And so we think that you need to take that into account.  
21 Now --

22 COMMISSIONER OHLHAUSEN: I'm sorry, from McWane  
23 or from Star? HD said --

24 MR. HASSI: HD said you can't buy from Star  
25 because of the McWane mandate. And, I'm sorry, I have



1 the letter in front of me. It says, "We need to adhere  
2 to mandate and purchase all of the American-made  
3 fittings from Union Tyler" -- which is another name for  
4 McWane, their foundry -- "or Sigma." Sigma was at this  
5 point, under the MDA, selling McWane's fittings. So,  
6 essentially you have got to buy them from McWane anyway.

7 Now, HD Supply, contrary to what was said  
8 earlier, the CEO of HD Supply Waterworks, Jerry Webb,  
9 who sent out this memo, testified in these proceedings  
10 that as far as he knows, the only fittings that  
11 HD Supply bought was bought under one of the exceptions  
12 to the policy. The policy had a couple of exceptions,  
13 one of which was if McWane doesn't have it, can't make  
14 it available within a certain period of time, you can  
15 buy it, or if you buy it bundled with pipe. And a  
16 company out on the West Coast called Groeniger did this, to  
17 buy some Star fittings. If you buy it bundled with  
18 pipe, then it's an exception under the policy.

19 There was a third category, which was called  
20 under-the-radar buying. There were some people that --  
21 local distributors who thought they could buy a couple fittings  
22 from Star and not get caught by McWane, but McWane  
23 enforced the policy, enforced it against Hajoca. And  
24 both Mr. Thees of Ferguson and Mr. Webb of HD Supply  
25 testified that they gave instructions to their branches

1 to keep them from buying from Star because of the McWane  
2 policy. And we think you should take that into account,  
3 and that alone makes the foreclosure 53 percent.

4 COMMISSIONER WRIGHT: Is there any evidence in  
5 the record about how much HD and Ferguson would have  
6 bought from Star but for the exclusive policy?

7 MR. HASSI: The only evidence in the record are  
8 the requests for proposal that they had in place prior  
9 to the McWane letter coming out. So, Star made an  
10 announcement in June of 2009 at the Waterworks Show that  
11 they were going to offer these fittings. They received  
12 a number of sort of requests for quotes, that sort of  
13 thing, and those were pulled back. And there's a  
14 number -- there's a number, and it's significant. It's  
15 more than the number of fittings that Star sold in 2010.  
16 I don't want to -- it's, again, in camera, but a  
17 significant number worth of awards that were pulled back  
18 when McWane's policy went into place.

19 COMMISSIONER WRIGHT: The theory -- excuse me.  
20 In the brief, you talk about minimum efficient scale a  
21 number of times, and you have said that the theory of  
22 the case is deprivation of the ability to compete for a  
23 minimum efficient scale. What's minimum efficient  
24 scale? Is there any evidence in the record about what  
25 minimum efficient scale here is? Does Complaint Counsel just mean it's a

1 foundry?

2 MR. HASSI: In this case, the minimum efficient  
3 scale would be Star having its own foundry, which would  
4 allow Star -- Star was using jobber foundries instead,  
5 and that was less efficient. If it could have had its  
6 own foundries, it could have brought its costs down, and  
7 it could have -- and, again, there are numbers in the  
8 record.

9 COMMISSIONER WRIGHT: Is there evidence in the  
10 record to establish that minimum efficient scale is  
11 equivalent to a foundry?

12 MR. HASSI: No, I don't think -- I think that  
13 was Star's view of what minimum efficient scale was. I  
14 don't think they phrased it that way, but I think that's

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1 the word?

2 MR. HASSI: If fittings were sold under an  
3 exception to the policy, no, I don't think they should  
4 be counted as foreclosure. I think that's right.

5 COMMISSIONER WRIGHT: What about sales that Star  
6 competed for but did not win? Should those be counted  
7 in the foreclosure measure? The 53 percent that you  
8 used presumes that they should have. I just want to be  
9 clear whether your position is that sales that Star  
10 competed for and had the opportunity to compete for but  
11 did not win either should go in the foreclosure measure  
12 or should not.

13 MR. HASSI: I think it's difficult to say,  
14 because -- without knowing how -- why they were lost.  
15 In other words, someone might use --

16 COMMISSIONER WRIGHT: A bid that wasn't as good.  
17 Let's assume that.

18 MR. HASSI: Well, if the bid simply wasn't as  
19 good -- and I don't think we have a way of knowing  
20 that -- perhaps it shouldn't be counted. I guess what I  
21 was getting at is to the extent Star is being used for a  
22 foil with McWane in an effort to get a price reaction,  
23 notwithstanding the policy, when the person doesn't have  
24 a good faith intent to violating a policy, I'm not sure  
25 that that shouldn't be count -- that that should be

1 counted out of the foreclosure, if I'm making sense.

2 COMMISSIONER WRIGHT: It was a double and a half  
3 negative.

4 MR. HASSI: Exactly. I could draw a diagram,  
5 but --

6 COMMISSIONER WRIGHT: So, let me -- a related  
7 and maybe a repeat of the question. You've said the  
8 foreclosure rate is very important. I agree the  
9 foreclosure rate is important. I want to know what it  
10 is. I don't think it's 53. I don't think that under  
11 your answer to the question about exceptions you think  
12 it's 53.

13 What do I do with the sales -- and not as a  
14 quantitative matter, conceptually, let's say -- what do  
15 I do with the sales that Star competed for but don't  
16 fall into these exceptions, good faith competition and  
17 they lost? Do I count those in foreclosure? Is it your  
18 position that I should or your position that I should  
19 not?

20 MR. HASSI: It's our position that you should  
21 count them. And one other thing I want to point out,  
22 the 53 is at least 53. The 53 is just those two major  
23 distributors. There are a number of other distributors,  
24 I mentioned Illinois Meter, but Illinois Meter, E.J.  
25 Prescott, WinWholesale, Groeniger. There were a number

1 of people that testified that they didn't buy from Star  
2 because of the policy, but we didn't have the market  
3 share. We didn't have the market share data for them.  
4 So, it's 53 plus --

5 COMMISSIONER WRIGHT: It's 53 plus --

6 MR. HASSI: -- some other number --

7 COMMISSIONER WRIGHT: -- minus --

8 MR. HASSI: -- the exceptions to the policy.

9 COMMISSIONER WRIGHT: -- plus, maybe -- well, I  
10 guess not plus things that Star competed for. We're  
11 going to presume that units that Star competed for but  
12 lost were foreclosed from competition.

13 MR. HASSI: If I understand your question  
14 correctly, yes.

15 COMMISSIONER WRIGHT: Okay.

16 MR. HASSI: I see that my time is up. I don't  
17 know whether there are questions on the MDA or others.

18 COMMISSIONER OHLHAUSEN: I actually have -- oh.

19 CHAIRWOMAN RAMIREZ: Please.

20 COMMISSIONER OHLHAUSEN: Is McWane's exclusive  
21 dealing policy still in effect now?

22 MR. HASSI: So, McWane testified that they had  
23 withdrawn the policy, and I think what they meant by  
24 that is they have reformulated their rebates. They have  
25 never sent anything out formally withdrawing the policy,

1 and certainly some of the distributors who testified in  
2 this action, as I mentioned -- I keep going back to  
3 Mr. Sheley -- Dennis Sheley testified that he thought  
4 the policy was still in effect. So, there are  
5 absolutely distributors out there that still think it's  
6 in effect. McWane doesn't seem to think it's in effect.

7 COMMISSIONER OHLHAUSEN: So, assuming that at  
8 some point some of the distributors started saying,  
9 well, we don't necessarily think it's in effect anymore,  
10 what did Star's market share do after that?

11 MR. HASSI: I don't think -- the problem is,  
12 because we --

13 COMMISSIONER OHLHAUSEN: Do you know?

14 MR. HASSI: We don't know. So, another  
15 example -- and, again, this is anecdotal as opposed to  
16 empirical -- but Tom Morton of U.S. Pipe took the stand,  
17 and they started to -- U.S. Pipe -- and by the way, this  
18 addresses the rebate policy. U.S. Pipe doesn't get a  
19 rebate from McWane, but they buy some domestic fittings.

20 He said that after the FTC -- sometime after the  
21 FTC's investigation, they got more comfortable with the  
22 idea that they could buy from Star and started buying  
23 from Star, but because of this information deficit that  
24 as to -- there wasn't a clear ending of the policy, we  
25 can't look at this empirically and say, as of that



1 point, Star's sales took off or didn't take off or  
2 address that.

3 COMMISSIONER OHLHAUSEN: Okay, thank you.

4 CHAIRWOMAN RAMIREZ: I want to make sure that  
5 I'm clear as to what you consider to be the requisite  
6 level of foreclosure.

7 If the argument is that in order to be effective here,  
8 Star had to purchase its own --  
9 have its own foundry, what level of sales did it need to  
10 attain in order to take that step?

11 MR. HASSI: I'm trying to remember whether  
12 that's in camera. It's a double digit million number,  
13 but not that much higher than if you put two of their  
14 years' of sales together.

15 CHAIRWOMAN RAMIREZ: And I guess I would also  
16 like to understand as a basis of comparison, but  
17 for the policy, what level of sales is it your  
18 position that Star would have attained but for the  
19 policy?

20 MR. HASSI: So, I don't think we have to  
21 reconstruct the but for world with precision. That  
22 said, if you look at --

23 CHAIRWOMAN RAMIREZ: Or you tell me how you  
24 think this analysis ought to be. What are the  
25 appropriate benchmarks in order to determine the level

1 of foreclosure that's relevant here?

2 MR. HASSI: I think I mentioned one of the  
3 benchmarks. If you look at -- if you compare Star's  
4 import sales with Ferguson and HD Supply, where they've  
5 got between a quarter and a third of those two  
6 significant customers' import fittings, and they've got  
7 less than 1 percent of their domestic sales, it probably  
8 would have been somewhere in between.

9 Would it have been enough to achieve minimum  
10 efficient scale with those two alone? Probably. But it  
11 certainly would have been greater than it was. It  
12 probably wouldn't have immediately jumped right up to  
13 where they were on imports, where they had proven  
14 themselves over a number of years. So, it's somewhere  
15 in that range.

16 CHAIRWOMAN RAMIREZ: Okay. I wanted to turn to  
17 the MDA and talk a little bit about that.

18 In your brief, there are a number of different  
19 arguments that are being made. You take the position  
20 that Sigma was, indeed, a potential competitor, but then  
21 there's also an argument about nascent competition and  
22 a citation to the Actavis matter and the  
23 agreement putting an end to the -- the risk of  
24 competition. So, I would like to get a better handle on  
25 what you believe to be the relevant standard here and



1 Steel Act is still in place. If you want to put a  
2 fitting in the ground in an Air Force base, it's got to  
3 be domestic. There are places in New Jersey where it's  
4 got to be domestic.

5 That market continues to exist, and Sigma was  
6 worried about that market when it made the decision to  
7 enter. So, the measure should not be whether they could  
8 have done it in time for the ARRA. And in any event,  
9 while it might have taken 18 to 24 months to get a full  
10 line of fittings, Sigma testified that the first  
11 fittings would be rolling off the line in four to six  
12 months, and that would have given them time to get in  
13 during the ARRA period, and it would have been partial  
14 entry.

15 And Judge Posner, among others, has said partial  
16 entry is the way most people do get into business, so  
17 that should have counted. So, we think Sigma meets the  
18 actual potential competitor test.

19 CHAIRWOMAN RAMIREZ: How do you define the  
20 relevant test for an actual potential competitor?

21 MR. HASSI: I would say it's a fact-based test,  
22 and one should look at whether the company has the  
23 intent to enter and whether the company has the ability  
24 to enter. I don't think there's sort of a be-all and  
25 end-all of checklists below that. I know Judge Chappell





1 entrant during that period of time.

2 CHAIRWOMAN RAMIREZ: Thank you.

3 MR. HASSI: Thank you.

4 CHAIRWOMAN RAMIREZ: Mr. Ostoyich, you may begin  
5 your rebuttal, and you have ten minutes.

6 MR. OSTOYICH: Thank you, Chairwoman.

7 I want to go back to a couple of questions you  
8 asked. The first is, what's the right measure of  
9 exclusion? There's really no dispute that Star entered.  
10 The Judge found clearly Star entered. Their share went  
11 up steadily throughout. After the letter came out, it  
12 went up steadily throughout.

13 What I heard from Mr. Hassi was, well, it wasn't  
14 meaningful. What standard, what case is that from?  
15 None. How would we judge that?

1       they would have bought a foundry. But they could have  
2       bought a foundry when they decided to enter. They  
3       decided not to. The policy came out nine months later.  
4       Well, maybe they would have bought a foundry based on  
5       when -- during ARRA. Maybe, but the evidence doesn't  
6       show that.

7               And then the vice president of Sigma -- Star  
8       testified, well, actually, they thought about buying  
9       multiple foundries, because no one foundry could make  
10      all of the fittings. How much would that have cost? We  
11      don't know. There's nothing in the record. Well, which  
12      foundries? We don't know. Well, where are they  
13      located? What are the transportation costs of those  
14      make-believe foundries? Well, we don't know. Well, we  
15      don't know the manufacturing costs, we don't know the  
16      transportation costs. Well, do we know anything? Do we  
17      know that they were actually more efficient? They had  
18      never made fittings before, but we don't know that  
19      either.



1       someday have been able to buy a foundry or foundries and  
2       it would have lowered costs and it would have lowered  
3       prices. Maybe. In the meantime, we're going after a  
4       company that has barely survived, that its domestic  
5       business is the last one standing, that is more  
6       efficient --

7                COMMISSIONER OHLHAUSEN: Can I ask you a  
8       question in response to that line of argument? McWane  
9       seemed very concerned about Star.

10              MR. OSTOYICH: Of course.

11              COMMISSIONER OHLHAUSEN: And so if it seems so  
12       unlikely to have any effect on the market and not be  
13       successful, what was driving McWane's big concern about  
14       Star?

15              MR. OSTOYICH: The same thing that drives  
16       everybody. I mean, when Arnold & Porter hires a new  
17       antitrust lawyer, do you think I sit back and say, "Oh,  
18       boy, I don't care"? Of course, the same as a new  
19       company coming in. It's a risk.

20              COMMISSIONER OHLHAUSEN: But do you do things  
21       against your distributors that your distributors seem to  
22       object to?

23              MR. OSTOYICH: Well, I send out rate increases.  
24       Do I get them? No. Do customers say, "Well, I have  
25       options. I know you told me you want all my business,

1 but I have options and can go elsewhere." Of course.  
2 That's competition. That does not require the Federal  
3 Government to intervene in a business that apparently  
4 can fight its way out because they went from zero to 5  
5 to 10 percent to on pace with their best year yet.

6 That's not what's necessary for the Federal  
7 Government to get involved in. They're protecting  
8 themselves. They have their own way of protecting  
9 themselves. They have done it in the marketplace.  
10 Would they have done better? Could they have done  
11 better? Maybe. We can all guess about that. Now,  
12 Mr. Hassi says, well, Illinois Meter's representative  
13 testified he only bought five fittings. He also  
14 testified he probably would have bought 90 percent plus  
15 from McWane anyway because he had a big problem with  
16 Star. They had screwed up an order of piping some years  
17 earlier and he didn't like them, didn't trust them.

18 The same thing with Ferguson, same thing with HD

1 percent to on pace for their best year yet. Higher  
2 priced, less efficient, not good for consumers. Those  
3 are the facts. That's what we know.

4 We had a policy. We intended to hurt Star.  
5 Sure. What competitor doesn't want to hurt its  
6 competitors? I intend things all the time that don't  
7 come to fruition. I can intend to knock out AP's  
8 antitrust practice or Latham's antitrust practice. I

1 time of the trial, 3 1/2 years later, and they had yet  
2 to make a significant commercial sale, because it's not  
3 that easy just to go from scratch to making fittings, to  
4 making restraints, to actually get to something that's  
5 commercially reliable that your customers would want to  
6 buy. So, maybe.

7           Is it possible they could have bought a foundry?  
8 I don't know. Where? I don't know. What cost  
9 structure? I don't know. What transportation cost? No  
10 idea. Complaint Counsel's expert didn't look at any of  
11 it. He was just asked to assume it all would happen.  
12 Maybe they would have lowered prices sometime.

13           CHAIRWOMAN RAMIREZ: Couldn't Sigma have taken  
14

1 have the finances; neither did they. Their banks had  
2 imposed limits on their capital, because they were below  
3 what they estimated they would need, because they  
4 breached their bank covenants. How are they going to  
5 solve that problem? I don't know.

6 How were they going to get it all done when the  
7 guy who was in charge of the project, Mr. Bhattacharji,  
8 testified, "I would have flipped the switch. Eighteen  
9

1 Counsel's expert didn't do that test. It's not my  
2 burden to disprove the market that --



1 one. So, we know and we know from the history of the  
2 industry, because the ITC found unanimously, imports had  
3 killed domestic entry. So, we know the specs flip all  
4 the time. In fact, one of the witnesses testified it  
5 was like that to open a spec (indicating).

6 So, we know specs flip and that there's  
7 competition for the specs, and we know that imports have  
8 won the lion's share of the market, and we know during  
9 ARRA there was lots of legal ability to buy imported  
10 fittings, there was no impact, they outsold domestic  
11 fittings two to one.

12 What we don't know, because it wasn't tested, is  
13 which ones? Which customers? What effect did the price  
14 differential between imports and domestic have? Was  
15 there a price differential at that time? None of it was  
16 tested. We can hypothesize it and assume it.

17 CHAIRWOMAN RAMIREZ: We don't have to  
18 hypothesize. We can just look at the ordinary course  
19 documents and see that the parties, in fact, do see that  
20 there is a relevant market in domestic pipe fittings. I  
21 mean, that's something that we do every single day in  
22 this building.

23 MR. OSTOYICH: With all respect, Your Honor,  
24 Star's -- here's one of Star's internal documents. Star had a  
25 domestic bid log. The domestic bid log was a record of



1 all their domestic bids, and, by the way, they made  
2 hundreds of them during the ARRA period, so they clearly  
3 were in the market and competing. It also recorded  
4 dozens and dozens of domestic bid jobs that they lost to  
5 imports. That's, as far as we know, the only record or  
6 the only document in the evidence -- in the record  
7 evidence of this.

8 The reason why none of these suppliers applied  
9 for ARRA funds, they had no firsthand knowledge of any  
10 of it. Now, Complaint Counsel says, well, McWane didn't  
11 disprove that. Of course, it's not my burden of proof.  
12 It's their burden of proof. It's not my burden to go  
13 find all the people who used ARRA funds and figure out  
14 what they bought. It was their burden to show that  
15 somebody who used ARRA funds had no choice, but they  
16 didn't do that.

17 Then they said, well, you can't disprove it.  
18 But of course I can't. I have no firsthand knowledge of  
19 that. It would have cost a fortune for us to go figure  
20 that out. It's their burden of proof. They didn't do  
21 it.

22 COMMISSIONER BRILL: So, what is your test for  
23 when we follow what the ALJ found and when we don't?  
24 Because when I was discussing with you Counts 1 and 2  
25 you said that we've got to follow the ALJ, it would be

1 wrong for us to make our own findings, our own  
2 inferences.





