STATEMENT OF COMMISSIONER J. THOMAS ROSCH, CONCURRING IN PART AND DISSENTING IN PART

F.3d at 69 (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 236 (1st Cir. 1983) (Breyer, J.)). For this very reason, antitrust law requires exclusionary conduct that is the predicate for a monopolization claim actually to impair a rival from entering and competing effectively. *See* IIB PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 422e3, at 100 (3d ed. 2007) ("Entry while alleged exclusionary conduct is underway may suggest both that entry is easy and that the defendant's conduct is not really predatory at all."); III PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 651d, at 116 (3d ed. 2008) ("Exclusionary behavior must be conduct that prevents actual or potential rivals from competing or that impairs their opportunities to do so effectively.").

Against the backdrop of the above recited law, Complaint Counsel's case rests on establishing the following counterfactual—in the domestic-only DIPF market in which Star was a new entrant, how much more market share should Star have obtained within a specified period of time but for McWane's alleged "exclusive dealing" practices? And was this extra market share significant or substantial? In my view, Complaint Counsel has not pointed to any evidence in the record that would allow a rational trier of fact to answer these questions at trial.

As a threshold matter, it cannot be seriously disputed that if McWane possessed putative monopoly power in a domestic-only DIPF market, as Complaint Counsel alleges, then it acquired that power "from growth or development as a consequence of . . . historic accident[,]" *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966)—namely, the passage of the American Recovery and Reinvestment Act of 2009 ("ARRA"), with its "Buy American" requirement, and the fact that McWane happened to be, at that time, the sole supplier of a full line of domestically produced DIPF in the most commonly used size ranges. Compl. ¶¶ 3–4, 39–40; Resp't McWane's Answer to Compl. ¶ 40. Put differently, Star had zero market share in the domestic-only DIPF market when it announced its intent to enter that market in June 2009. Compl. ¶ 56; Resp't McWane's Answer to Compl. ¶ 56; Compl. Counsel's Stmt. of Undisputed Facts ¶ 7; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶ 97.

Yet, Star was able to enter the domestic-only DIPF market within a few months of its announcement without building or buying a domestic foundry. Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶ 98. During that fall of 2009, Star made sales to 29 customers, ending up with almost $300,000 in sales, despite having projected no sales of domestic-only DIPF for that year. *Id.* ¶¶ 100, 102. Complaint Counsel does not dispute Star's volume of sales for 2009. *Id.* ¶ 103.

Nor does Complaint Counsel dispute that in 2010, Star sold approximately $6.5 million in domestic fittings to 132 customers, that 20 customers had increased their purchases from 2009 levels, and that Star made sales to 106 new customers that year. Compl. Counsel's Stmt. of Undisputed Facts ¶ 204; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶ 104. Similarly, there is no dispute that in 2011, Star sold approximately $6.5 million in domestic fittings to 126 customers, that 65 customers had increased their purchases from 2010 levels, and that Star made sales to 28 new customers that year. Compl. Counsel's Stmt. of Undisputed Facts ¶ 204; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶¶ 107–08. Or that Star's sales of domestic fittings for the first quarter of 2012 totaled $1.7 million. Compl. Counsel's Stmt. of Undisputed Facts ¶ 204.

Instead, Complaint Counsel's principal argument is to assert that some of Star's largest customers of domestic fittings had been threatened by McWane with repercussions or had internal corporate policies, out of fear of McWane, not to do business with Star unless they were unable to procure the domestic fittings from McWane. That may be true but it does not change the fact that these customers still accounted for a significant percentage of Star's 2009–12 sales, and many of them have increased their total purchases of domestic fittings from Star year over year since 2009. *See* Compl. Counsel's Stmt. of Undisputed Facts ¶¶ 182, 185, 195–96; Compl. Counsel's Resp. to Resp't's Stmt. of Undisputed Facts ¶¶ 103, 105–06, 109, 111.

It is not enough for Complaint Counsel simply to raise the question whether large waterworks distributors like Ferguson, HD Supply, and WinWholesale might have purchased more domestic fittings from Star but for McWane's alleged "exclusive dealing" practices. The triable issue of material fact is not whether—but how much more—and Complaint Counsel has not pointed to any evidence in the record that would allow a rational trier of fact to answer the latter question at trial. It would be one thing if the record demonstrated that particular distributors made no purchases from Star because of McWane's alleged "exclusive dealing" practices; at least that would be probative of the extent of foreclosure. But even large distributors that supposedly had company-wide policies against doing business with Star still purchased nontrivial amounts of domestic fittings and increased the amounts of those purchases year over year (e.g., HD Supply), and other distributors ignored McWane's threat altogether and chose to do business with Star anyway (e.g., Hajoca).

This is therefore not a case where Complaint Counsel would be able to prove that Star did not have access to any critical channel of distribution.

Cf. LePage's Inc. v. 3M, 324 F.3d 141, 159–60 (3d Cir. 2003) (describing how 3M cut LePage's off from key retail pipelines, namely, superstores like Kmart and Wal-Mart that provide as cheap, high-volume supply lines to consumers); *Microsoft*, 253 F.3d at 70–71 (describing Microsoft's exclusive deals with 14 of the top 15 Internet access providers in North America, which comprise one of two major channels of distribution for browsers).

Evaluated under any objective standard, and viewing all inferences in a light most favorable to Complaint Counsel (as we must), the undisputed facts demonstrate that Star's entry was not de minimis or trivial. As Complaint Counsel itself points out, Star was the smallest of the three major DIPF sellers, with only a 20 percent share of the DIPF market overall, compared to McWane's 45 percent share. Compl. Counsel's Stmt. of Undisputed Facts ¶¶ 6, 40. Thus, the fact that Star attained a 10 percent share of the domestic-only DIPF market—from zero share—in less than three years, *id.* ¶ 206, undermines Complaint Counsel's basic theory that McWane's alleged "exclusive dealing" practices made entry difficult or ineffective.

McWane is therefore entitled to partial summary decision under the case law. Where a complainant has failed to show that the alleged exclusionary practices have actually created a barrier to entry or expansion into the relevant market, summary judgment dismissing a monopolization claim is appropriate. *See Western Parcel Express v. United Parcel Serv., Inc.*, 65 F. Supp. 2d 1052, 1062–63 (N.D. Cal. 1998), *aff'd*, 190 F.3d 974, 976 (9th Cir. 1999); *CDC Techs., Inc. v. Idexx Labs., Inc.*, 7 F. Supp. 2d 119, 121 (D. Conn. 1998), *aff'd*, 186 F.3d 74, 77 (2d Cir. 1999).

Complaint Counsel's other arguments are unavailing. First, Complaint Counsel argues that Star's entry could have been "better" because Star has thus far not attained the volume of business necessary to justify an investment in its own, low-cost, domestic production facility, which would make it a "fully efficient" competitor. Compl. Counsel's Opp. at 28. But that argument improperly turns the Section 2 question from one about the extent of foreclosure caused by McWane's alleged "exclusive dealing" practices to one about the extent to which Star has been able to realize its own dreams of expansion in the domestic-only DIPF market. *See* Compl. Counsel's Stmt. of Undisputed Facts ¶ 205. That is the wrong inquiry because the antitrust laws were enacted for the protection of competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Complaint Counsel's other argument is to aver that McWane continues to account for over 90% of all domestic-only DIPF sales, and prices for domestic-only DIPFs are 30%–50% higher than prices for identical fittings in

open source projects. Compl. Counsel's Op

First, although *Sugar Institute* may support Complaint Counsel's theory of liability regarding that telephone call, *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979), arguably does not. In *Broadcast Music*, the Supreme Court cautioned, when applying the per se rule, against the use of "easy labels [that] do not always supply ready answers." *Id.* at 8. The Court explained that price-fixing "is not a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.'" *Id.* at 9. Rather, "[a]s generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable." *Id.*

Here, while the April 2009 telephone call may have involved McWane confirming its issuance of a previously announced price list to Star, that confirmation—which perhaps might be literally interpreted as the "fixing" of a price—does not necessarily mean that McWane and Star engaged in a type of business behavior that has been subject to the per se rule. To apply *Sugar Institute* to this situation is arguably to use "easy labels" that *Broadcast Music* eschews. That makes this a close case in my mind.

Second, even if *Broadcast Music* does not call into question the continuing vitality of *Sugar Institute*, Complaint Counsel has not explicitly relied on this theory of liability in its Complaint. The April 2009 telephone call has not been raised in the Complaint as an overt act of the alleged price-fixing conspiracy. McWane has therefore moved to strike Complaint Counsel's motion for partial summary decision on the ground that the issue of the legality of the April 28, 2009 telephone call is not one that is "being adjudicated." *See* 16 C.F.R. § 3.24(a)(1) (2012) (permitting motions for summary decision only as to "the issues being adjudicated"); *see also N. Am. Td [abels [ha[ ]do*

v. Furlong, 435 F.3d 1196, 1203 n.1 (10th Cir. 2006) (citing circuit court cases going either way), as a matter of practicality, I would follow the plain language of Rule 15(b) and remand this issue to be tried based on Complaint Counsel's reliance on Commission Rule 3.15(a)(2).