STATEMENT OF COMMISSIONER J. THOMAS ROSCH, CONCURRING IN PART AND DISSENTING IN PART *IN THE MATTER OF MCWANE, INC. AND STAR PIPE PRODUCTS, LTD.*

Docket No. 9351

August 9, 2012

This matter, which has been in Part 3 adjudicative proceedings before Chief Administrative Law Judge D. Michael Chappell, comes before the Commission on Complaint Counsel's motion for partial summary decision and Respondent McWane, Inc.'s ("McWane") cross-motion for summary decision on all counts of the Administrative Complaint.[1] The trial of this matter is currently scheduled to begin on September 4, 2012. While I join my colleagues in denying parts of McWane's cross-motion based on the existence of genuine issues of material fact for trial, I would grant McWane's cross-motion as it relates to the sixth and seventh counts of the Complaint for monopolization and attempted monopolization. Those counts relate to McWane's alleged exclusion of its rival, Respondent Star Pipe Products, Ltd. ("Star"), from the relevant market for domestically produced, small- and medium-size, ductile iron pipe fittings ("DIPFs") for use in water infrastructure projects that are specified as domestic only (hereinafter, "domestic-only DIPF market"). *See* Compl. ¶¶ 22, 56–63, 69–70. Additionally, although I join my colleagues in denying Complaint Counsel's motion, I do so for slightly different reasons. Below are my reasons for deciding these two issues differently.

I.

In its cross-motion, McWane has argued that Star's entry into the domestic-only DIPF market—with more than 130 customers and $6.5 million in sales in its first full year of business—conclusively demonstrates as a matter of law that McWane did not engage in any alleged "exclusive dealing" that blocked or deterred Star's entry. Resp't McWane's Mem. Supp. Mot. for Summ. Decision 31–32. In my view, the basic facts and figures concerning Star's entry, which are not seriously controverted by Complaint Counsel, warrant the grant of partial summary decision to McWane on this issue.

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[1] Under the Commission's Rules of Practice for Adjudicative Proceedings ("Part 3 Rules"), motions for summary decision made under Rule 3.24(a)(1) are directly referred to and ruled on by the Commission, unless the Commission chooses to refer them back to the Administrative Law Judge for disposition. 16 C.F.R. § 3.22(a) (2012).

Supreme Court case law[2] provides that a party may move for summary decision either by affirmatively producing evidence that negates an essential element of the opposing party's claim, or by demonstrating that the opposing party's evidence is insufficient to establish an essential element of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153–56 (1970). But these two options are not necessarily binary and mutually exclusive. "Courts are rightfully cautious about requiring a defendant to effectively 'prove a negative' in order to avoid trial on a specious claim. . . . Thus, if the summary judgment record satisfactorily demonstrates that the plaintiff's case is, and may be expected to remain, deficient in vital evidentiary support, this may suffice to show that the movant has met its initial burden." *Carmona v. Toledo*, 215 F.3d 124, 133 (1st Cir. 2000) (citations omitted).

In this case, by raising the undisputed fact and extent of Star's entry, McWane challenges Complaint Counsel's ability to prove at trial that McWane's alleged "exclusive dealing" practices have caused a "significant" degree of foreclosure. *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) ("Though what is 'significant' may vary depending upon the antitrust provision under which an exclusive deal is challenged, it is clear that in all cases the plaintiff must both define the relevant market and prove the degree of foreclosure."); *see also id.* ("Because an exclusive deal affecting a small fraction of a market clearly cannot have the requisite harmful effect upon competition, the requirement of a significant degree of foreclosure serves a useful screening function."). Importantly, at least two circuit courts have held that the standard for proving "significant" foreclosure should be higher "[w]here the exclusive dealing restraint operates at the distributor level, rather than at the consumer level, . . . because it is less clear that a restraint involving a distributor will have a corresponding impact on the level of competition in the consumer market." *Ryko Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1235 (8th Cir. 1987). *Accord Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162–63 (9th Cir. 1997).

Furthermore, it bears repeating here that the standard of proving "significant" foreclosure is necessary because "'[v]irtually *every* contract to buy 'forecloses' or 'excludes' alternative sellers from *some* portion of the market, namely the portion consisting of what was bought.'" *Microsoft*, 253

[2] Supreme Court case law governing summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure applies to summary decision motions under Commission Rule 3.24 as well. *See, e.g., Realcomp II Ltd.*, No. 9320, 2007 FTC LEXIS 67, at *10 (F.T.C. May 21, 2007); *Basic Research, LLC*, No. 9318, 2005 FTC LEXIS 100, at *2–3 (F.T.C. June 27, 2005).

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 Opp. at 26. Neither of those facts is sufficient to create a triable issue concerning the extent of foreclosure.[3] As I pointed out earlier, McWane's high market share is to be expected since it came by its putative monopoly status by historic accident when ARRA imposed a "Buy American" requirement, and McWane happened to be the only DIPF seller with domestic production. But as circuit courts have held, a high market share does not necessarily equate to durable monopoly power if entry is easy or successful. *See Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1997); *United States v. Syufy Enters.*, 903 F.2d 659, 664 & n.6 (9th Cir. 1990).

The fact that prices for domestic fittings are markedly higher than those for open source parts does not create a genuine issue of fact for trial either. One would expect to see higher prices for domestic fittings in what is essentially a price discrimination submarket created by the "Buy American" program. Also, one cannot necessarily expect prices for domestic fittings to go down substantially as a result of Star's entry; after all, Star was entering to get a share of the monopoly profits created by the "Buy American" program. Using a pharmaceutical analogy, Star was entering to compete as another branded company, not as a generic company.

For all of the above reasons, the record taken as a whole, including the undisputed facts concerning Star's entry, would not lead a rational trier of fact to find for Complaint Counsel on the question of significant foreclosure. Accordingly, there is no genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

II.

Complaint Counsel has moved for partial summary decision on the issue whether an April 28, 2009 telephone call between Dan McCutcheon, Vice President of Sales of Star, and Rick Tatman, Vice President & General Manager of Tyler/Union (McWane), violated Section 1 of the Sherman Act, which was interpreted by the Supreme Court in *Sugar Institute, Inc. v. United States*, 297 U.S. 553, 601 (1936), to prohibit as unreasonable restraints "steps taken to secure adherence, without deviation, to prices and terms . . . announced [in advance unilaterally by each competitor]." I would deny Complaint Counsel's motion for the following two reasons.

[3] I should note that Complaint Counsel's Statement of Undisputed Facts fails to cite to any support in the record for McWane's 90% market share. *See* Compl. Counsel's Stmt. of Undisputed Facts ¶ 206. But I assume for the purposes of this opinion that Complaint Counsel could prove the market shares of McWane and Star for sales of domestic-only DIPFs.

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. Philips Corp.*, No. 9209, 1988 FTC LEXIS 161 (F.T.C. Mar. 4, 1988) (order denying respondents' motion for summary decision because complaint counsel was not challenging their advertising of second-generation, replacement filters for the Norelco Clean Water Machine).

In response, Complaint Counsel has argued that although the legality of the April 2009 telephone call is not specifically raised in its Complaint, the issue is reasonably within the scope of the Complaint, and is to be treated in all respects as if it had been raised in the Complaint, as long as it is tried by the express or implied consent of the parties. *See* 16 C.F.R. § 3.15(a)(2) (2012). Commission Rule 3.15(a)(2), invoked by Complaint Counsel, is based on Rule 15(b)(2) of the Federal Rules of Civil Procedure, which makes clear that such amendments to the pleadings relate to issues that have been through trial. FED. R. CIV. P. 15(b) (entitled "Amendments During and After Trial"). Although there has been a split among the circuit courts as to whether Rule 15(b) also applies at the summary judgment stage, *see Ahmad*

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).