Initial Decision

IN THE MATTER OF

MCWANE, INC.
AND
STAR PIPE PRODUCTS, LTD.

INITIAL DECISION IN REGARD TO ALLEGED VIOLATIONS OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. 9351; File No. 101 0080
Complaint, June 4, 2012 – Initial Decision, May 1, 2013

In January 2012, the Commission issued an administrative complaint against respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star Pipe"), alleging that McWane and Star Pipe, along with their competitor Sigma Corporation, conspired in 2008 to raise and stabilize prices for imported ductile iron pipe fittings ("DIPF") and to maintain a monopoly in the market for domestic DIPF. Ductile iron pipe fittings are used in water distribution systems for the installation of valves, water meters, and hydrants, and to change the flow of water. The complaint alleged seven counts of violating Section 5 of the FTC Act, including restraint of trade, unfair methods of competition, conspiracy to monopolize, monopolization, and attempted monopolization. Prior to issuing its complaint, the Commission entered a separate consent agreement settling charges against Sigma Corporation. After the complaint issued, respondent Star Pipe also entered into a consent agreement with the Commission, resolving the Commission's competitive concerns.

Following an administrative trial, Administrative Law Judge D. Michael Chappell issued an Initial Decision dismissing the first three counts of the complaint and upholding the remaining four counts. In dismissing the first three counts of the complaint, the court found the Commission failed to establish (1) that McWane illegally conspired with Sigma Corporation and Star Pipe to raise and stabilize prices for imported DIPF; (2) that McWane conspired with its competitors to exchange competitively sensitive sales information; and (3) that McWane invited competitors to collude on prices in the imported DIPF market. However, the court held that the preponderance of the evidence showed that McWane engaged in monopolistic practices, attempted to monopolize, engaged in a conspiracy to monopolize and engaged in an unreasonable restraint of trade with Sigma Corporation in the market for domestic DIPF. The court further found that the evidence supported the existence of a separate product market for domestic DIPF

The court further issued an order requiring McWane to cease and desist from certain conduct within the DIPF market, including allocating or dividing DIPF markets; agreeing with competitors not to compete in the DIPF market; entering into certain types of exclusivity agreements; entering into certain retroactive customer sales incentives; and retaliating or discriminating against customers.

Participants

For the *Commission*: *J. Alexander Ansaldo, Joseph Baker, Michael J. Bloom, Thomas Brock, Monica Castillo, James W. Frost, Geoffrey Green, Edward Hassi, Linda Holleran, Michael Kades, Mika Ikeda*, and *Priya Viswanath.*

For the *Respondents*: *Heather Choi, Erik Koons, Joseph Ostoyich, Andreas Stargard*, and *William Lavery, Baker Botts LLP*; *Shannon Dacus, The Dacus Firm*; and *Gregory S.C. Huffman, William M. Katz, Jr, Brian W. Stoltz*, and *Nicole Williams, Thompson and Knight LLP*.

INITIAL DECISION

By CHAPPELL, D. MICHAEL, Chief Administrative Law Judge.

I. INTRODUCTION

This is the Initial Decision on an administrative complaint issued by the Federal Trade Commission ("FTC" or "Commission") charging that Respondent McWane, Inc. ("Respondent" or "McWane") engaged in collusive and exclusionary conduct in violation of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45.

As explained herein, McWane is a manufacturer of ductile (easily molded) iron pipe fittings. Pipe fittings are used in water distribution systems for the installation of valves, water meters, and hydrants and to change the flow of water. Three companies – McWane, Sigma Corporation ("Sigma"), and Star Pipe Products, Ltd. ("Star") – account for the overwhelming majority of ductile iron pipe fittings sales in the United States. The Complaint alleges that these three companies entered into an agreement beginning in 2008 to fix, raise, and stabilize the prices for ductile iron pipe fittings. The Complaint also alleges that McWane, the largest of the three suppliers, has a monopoly in the market for ductile iron pipe fittings made in the United States and that McWane illegally sought to maintain its monopoly after Sigma and Star tried to enter the market in 2009. Respondent denies these allegations, as explained below.

A. Summary of the Complaint and Answer

The Commission issued an administrative complaint against Respondent McWane on January 4, 2012 ("Complaint"). The Complaint also named Star as a Respondent. However, by Order dated February 23, 2012, the Commission withdrew the matter from adjudication as to Star for the purpose of considering a proposed consent agreement. The Commission issued its Decision and Order withdrawing the matter from adjudication as to Star and accepting an executed consent decree with Star on May 8, 2012. Also on the same date that it issued this Complaint, the Commission issued a proposed complaint and consent order against Sigma. Final approval of the Sigma consent order was granted on February 27, 2012. *In re Sigma Corp.*, Decision and Order, Docket No. C-4347 (Feb. 27, 2012).

The Complaint in this case alleges seven separate counts of unfair competition in violation of Section 5 of the FTC Act, which Complaint Counsel refers to as the First through Seventh Violations (hereafter, "Counts"), including agreements in restraint of trade, invitation to collude, exclusionary conduct, and monopolization. These Counts are further described below.

COUNTS ONE, TWO AND THREE

The first three Counts are based upon Respondent's alleged conduct in: (i) announcing certain pricing changes in 2008, which were allegedly followed shortly thereafter by substantially similar announcements by its competitors; and (ii) participating, with certain of its competitors, in the collection, aggregation and dissemination of certain sales related information. As to these violations, the Complaint alleges that "beginning in January 2008," McWane conspired with its competitors Sigma and Star (collectively, the "Suppliers") to raise and stabilize prices at which small and medium diameter pipe fittings (24 inches and under) (hereafter "Fittings"), were sold in the United States. Complaint ¶¶ 2, 21, 22, 29. Specifically, the Complaint alleges that on January 11, 2008, and again on June 17, 2008, McWane "publicly announced" price increases, which were followed by Sigma and Star, and that such price increases were "the result of a

combination and conspiracy among" McWane, Sigma, and Star. Complaint ¶¶ 31-34.

The Complaint further alleges that, prior to McWane's announced price increases in January 2008, McWane had a plan to "trade its support for higher prices in exchange for" Sigma and Star's changing their "business methods" to "reduce the risk" of their local sales personnel selling Fittings "at prices lower than published levels"; that McWane communicated the terms of its plan to Sigma and Star, including through a letter to its distributor customers ("Distributors"), with the intent to conspire with Sigma and Star to restrain price competition; and that Sigma and Star "manifested their understanding and acceptance of McWane's offer by publicly taking steps to limit their discounting from published price levels in order to induce McWane to support higher price levels." Complaint ¶ 32 a.-c. The Complaint also alleges, with respect to the June 2008 price increase, that prior to McWane's announcement, McWane "planned to trade its support for higher prices in exchange for information from Sigma and Star documenting the volume of their monthly sales" of Fittings through the Ductile Iron Fittings Research Association ("DIFRA"); that "McWane communicated the terms of its plan to Sigma and Star" through a letter to its Distributor customers, with the intent to conspire with Sigma and Star; and that Sigma and Star "manifested their understanding and acceptance of McWane's offer by initiating their participation in the DIFRA" data reporting system in order to induce McWane to raise prices; and that McWane "then led a price increase, and Sigma and Star followed." Complaint ¶¶ 34 a.-d.

The Complaint next alleges that through DIFRA, the Suppliers "submitted a report of their previous month's sales" to an accounting firm that aggregated and distributed the data submissions to the Suppliers, that the reporting system facilitated collusion by enabling each of them "to monitor its own market share and, indirectly, the output levels of its rivals," and that the reporting system had no legitimate procompetitive efficiencies outweighing its anticompetitive effects in facilitating collusion. Complaint ¶¶ 35-36. The Complaint also alleges that the foregoing acts and practices "have the purpose, capacity, tendency and effect of (i) fixing, maintaining and raising prices" of Fittings

and "(ii) facilitating collusion" in the relevant Fittings market. Complaint ¶ 37.

Based on the foregoing, the Complaint charges conspiracy to restrain price competition in the relevant Fittings market (Count One); conspiracy to exchange competitively sensitive sales information (Count Two); and invitation to collude (Count Three).

COUNTS FOUR, FIVE, SIX, AND SEVEN

In addition to a relevant Fittings market, Complaint ¶ 21, the Complaint alleges a narrower relevant market comprised of domestically produced small and medium diameter Fittings for use in projects specified as domestic only (the "Domestic Fittings" market). Complaint ¶ 22. The Complaint alleges that, at the time of the passage of the American Recovery and Reinvestment Act in February 2009 ("ARRA"), which allocated federal funds for waterworks projects so long as the projects used domestically produced materials, including Fittings, Complaint ¶ 3, McWane had monopoly power in the Domestic Fittings market, as the sole supplier of a full line of domestically produced Fittings in the most commonly used size ranges. Complaint ¶¶ 4, 39-40.

The violations charged in Counts Four and Five arise in connection with a 2009 Master Distribution Agreement ("MDA") between McWane and Sigma. The Complaint alleges that prior to the MDA, Sigma took steps to evaluate entry into the market for the production of Domestic Fittings; that McWane perceived that Sigma was preparing to enter the Domestic Fittings market; and that McWane sought to eliminate the risk of competition from Sigma by inducing Sigma to be a distributor of McWane's Domestic Fittings, rather than a competitor. Complaint ¶¶ 47-48. Pursuant to the MDA, as alleged in the Complaint, McWane and Sigma agreed that McWane would be Sigma's exclusive source for Domestic Fittings; that Sigma would resell Domestic Fittings at or very near McWane's published prices; and that Sigma would resell McWane's Domestic Fittings to Distributors only on the condition that the Distributor agreed to purchase Domestic Fittings exclusively from McWane or Sigma. Complaint ¶¶ 49-51. Thus, the Complaint alleges, the MDA was intended to, and did, serve to transfer a share of McWane's sales and monopoly

profits in Domestic Fittings to Sigma in exchange for Sigma's commitment to abandon its plans to enter into the relevant Domestic Fittings market. Complaint ¶ 54. In addition, the Complaint charges that, through the MDA, McWane and Sigma conspired to exclude competitors from the Domestic Fittings market. Complaint ¶ 55.

Based on the foregoing, the Complaint charges that the MDA was an agreement in restraint of trade (Count Four) and a conspiracy between McWane and Sigma to monopolize the Domestic Fittings market (Count Five). Complaint ¶¶ 67-68.

Counts Six and Seven allege unlawful exclusionary acts and practices toward Star. Complaint ¶¶ 69-70. The Complaint alleges that Star announced its intent to enter into the relevant Domestic Fittings market in June 2009 and that McWane responded by adopting certain policies intended to impede and delay Star's entry. Complaint ¶¶ 56-57. Specifically, the Complaint alleges that McWane "threatened" Distributors with delayed or diminished access to McWane's Domestic Fittings and the loss of accrued rebates, if such Distributors purchased from Star; and that a "similar distribution policy" was provided for under McWane's MDA with Sigma. Complaint ¶ 57.

The Complaint alleges that the foregoing policies were intended to, and did, compel the majority of Distributors to deal with McWane and Sigma on an exclusive or nearly exclusive basis for Domestic Fittings, and to foreclose Star from a substantial volume of sales opportunities with Distributors. Complaint ¶¶ 58-59. Further, the Complaint alleges that, by foreclosing Star from a substantial volume of sales opportunities with Distributors, McWane's policies tended to minimize and delay Star's ability to compete and constrain prices in the Domestic Fittings market. Complaint ¶ 60.

The Complaint concludes that McWane's alleged exclusionary acts constitute willful practices to acquire, enhance, or maintain McWane's alleged monopoly power in the relevant Domestic Fittings market (Count Six), and were specifically intended to monopolize the Domestic Fittings market (Count Seven). Complaint ¶¶ 69-70.

RESPONDENT'S ANSWER

Respondent filed its Answer to the Complaint on February 2, 2012. Respondent denies that it conspired to raise and stabilize Fittings prices, Answer ¶¶ 29, 32, and specifically denies each of the Complaint's allegations detailing the alleged conspiracy, including that the January and June 2008 alleged price increases were the result of a conspiracy, that McWane "planned to trade its support for higher prices in exchange for" Sigma and Star "reducing the risk" of pricing below published prices and participating in DIFRA; that McWane communicated any such plan to Sigma and Star, or that the actions of Sigma and Star were "manifestations of assent" to McWane's "offer" or "plan." Answer ¶¶ 32, 34.

Respondent further denies that the data collected and distributed through DIFRA was sales data, but was only aggregated shipment tonnage. Answer ¶ 35. Respondent also denies that the aggregated tons-shipped data allowed it to monitor the output of its rivals or that the data facilitated coordination. Answer ¶ 36. In addition, Respondent denies that it "invited" its competitors to "collude," as alleged in the Complaint. Answer ¶ 66.

Respondent further denies that there is a relevant market consisting of Domestic Fittings and that Respondent has monopoly power in that market. Answer ¶¶ 21, 39. In addition, Respondent denies that Respondent eliminated Sigma as a potential entrant to the Domestic Fittings market. Answer ¶¶ 47-55. Respondent also denies that Respondent excluded Star from the Domestic Fittings market through exclusive dealing. Answer ¶¶ 56-63.

As affirmative defenses, Respondent asserts that the Complaint fails to state a claim upon which relief can be granted; the alleged conduct is procompetitive and benefits consumers; and the causes of action alleged in the Complaint are barred by mootness because ARRA expired more than a year ago, DIFRA ceased operations more than three years ago, and the MDA terminated more than a year ago.

B. Procedural History

On June 1, 2012, Respondent filed with the Commission a Motion for Summary Decision on all seven alleged violations. On the same date, Complaint Counsel also filed with the Commission a Motion for Partial Summary Decision on its conspiracy claim related to an alleged telephone conversation between an executive of Star and an executive of McWane in April 2009.[1] The Commission, on August 9, 2012, issued an Opinion and Order denying both motions. *In re McWane, Inc.*, Docket 9351, 2012 FTC LEXIS 155 (Sept. 14, 2012).

The administrative trial in the instant case began on September 4, 2012 and concluded on November 2, 2012. By Order dated November 7, 2012, the hearing record was closed. Over 2,000 exhibits were admitted into evidence, 53 witnesses testified, either live or by deposition, and there are 6,045 pages of trial transcript. The parties' proposed findings of fact, replies to proposed findings of fact, post trial briefs, and reply briefs total 3,052 pages.

Rule 3.51(a) of the Commission's Rules of Practice states that "[t]he Administrative Law Judge shall file an initial decision within 70 days after the filing of the last filed initial or reply proposed findings of fact, conclusions of law and order . . . ." 16 C.F.R. § 3.51(a). The parties filed concurrent post trial briefs and proposed findings of fact on December 14, 2012. The parties filed replies to the other's proposed findings and briefs on January 18, 2013. Pursuant to Commission Rule 3.41(b)(6), closing arguments were held on January 24, 2013. On March 28, 2013, pursuant to Commission Rule 3.51(a) and based upon a finding of good cause, an order was issued extending the 70-day period for the filing of the initial decision in this case by an additional 30 days. *See* Rule 3.51(a) ("The Administrative Law Judge may extend any of these time periods by up to 30 days for good

[1] The Commission, in 2009, amended its Rules of Practice to require that motions to dismiss the Complaint filed before the evidentiary hearing and motions for summary decision shall be directly referred back to the Commission, who issued the Complaint, rather than to the Administrative Law Judge assigned to adjudicate the Complaint, and "shall be ruled on by the Commission unless the Commission in its discretion refers the motion to the Administrative Law Judge." 16 C.F.R. § 3.22(a).

cause."). This Initial Decision is filed in accordance with Commission Rule 3.51(a).

C. Evidence

This Initial Decision is based on a consideration of the whole record relevant to the issues, including the exhibits properly admitted into evidence, deposition transcripts, and the transcripts of testimony at trial, and addresses the material issues of fact and law. The briefs and proposed findings of fact and conclusions of law, and the replies thereto, submitted by the parties were thoroughly reviewed. Proposed findings of fact submitted by the parties, but not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto. The Commission has held that Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, No. 9018, 102 F.T.C. 1362, 1670, 1983 FTC LEXIS 17, *566-67 (Nov. 2, 1983). Further, administrative adjudicators are "not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are 'material.'" *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). *Accord Stauffer Labs., Inc. v. FTC*, 343 F.2d 75, 89 (9th Cir. 1965). *See also Borek Motor Sales, Inc. v. National Labor Relations Bd.*, 425 F.2d 677, 681 (7th Cir. 1970) (holding that it is adequate for the Board to indicate that it had considered each of the company's exceptions, even if only some of the exceptions were discussed, and stating that "[m]ore than that is not demanded by the [Administrative Procedure Act] and would place a severe burden upon the agency").

Under Commission Rule 3.51(c)(1), "[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. § 3.51(c)(1); *see In re Chicago Bridge & Iron Co.*, No. 9300, 138 F.T.C. 1024, 1027 n.4, 2005 FTC LEXIS 215, at *3 n.4 (Jan. 6, 2005). Under the Administrative Procedure Act ("APA"), an Administrative Law Judge may not issue an

order "except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence. Citations to specific numbered findings of fact in this Initial Decision are designated by "F."[2]

Pursuant to Commission Rule 3.45(b), several orders were issued in this case granting *in camera* treatment to material, after finding, in accordance with the Rule, that its public disclosure would likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment. 16 C.F.R. § 3.45(b). In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session.

Commission Rule 3.45(a) allows the Administrative Law Judge ("ALJ") "to grant *in camera* treatment for information at the time it is offered into evidence subject to a later determination by the [administrative] law judge or the Commission that public disclosure is required in the interests of facilitating public understanding of their subsequent decisions." *In re Bristol-Myers Co.*, Nos. 8917-19, 90 F.T.C. 455, 457, 1977 FTC LEXIS 25, at *6 (Nov. 11, 1977). As the Commission later reaffirmed in

[2] References to the record are abbreviated as follows:

CX – Complaint Counsel's Exhibit
RX – Respondent's Exhibit
JX – Joint Exhibit
Tr. – Transcript of testimony before the Administrative Law Judge
Dep. – Transcript of Deposition
IHT – Investigational Hearing Transcript
CCB – Complaint Counsel's Post Trial Brief
CCRB – Complaint Counsel's Post Trial Reply Brief
CCFF – Complaint Counsel's Proposed Findings of Fact
CCRRFF – Complaint Counsel's Reply to Respondent's Proposed Findings of Fact
RB – Respondent's Post Trial Brief
RRB – Respondent's Reply Brief
RFF – Respondent's Proposed Findings of Fact
RRCCFF – Respondent's Reply to Complaint Counsel's Proposed Findings of Fact

another leading case on *in camera* treatment, since "in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions." *In re General Foods Corp.*, No. 9085, 95 F.T.C. 352, 356 n.7; 1980 FTC LEXIS 99, at *12 n.7 (March 10, 1980). Thus, in instances where a document or trial testimony had been given *in camera* treatment, but the portion of the material cited to in this Initial Decision does not in fact require *in camera* treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the ALJ "may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding"). Where *in camera* information is used in this Initial Decision, it is indicated in bold font and braces ("**{ }**") in the *in camera* version and is redacted from the public version of the Initial Decision, in accordance with Commission Rule 3.45(e).

D. Summary of Initial Decision

The preponderance of the evidence in the record, viewed as a whole, fails to demonstrate a conspiracy among McWane, Sigma, and Star to raise and stabilize prices in the Fittings market. Among other things, the evidence fails to prove that McWane had a "plan" to conspire with Sigma and Star; that McWane communicated to Sigma and Star an "offer" or "plan" to trade price increases in exchange for Sigma and Star reducing price discounting and increasing price transparency through DIFRA; or that Sigma's and Star's actions with regard to price discounting or DIFRA constituted their "manifestations" of "assent" to McWane's "offer." Accordingly, Count One is dismissed. The dismissal of Count One is not, however, a finding that no price fixing conspiracy existed in the Fittings market, or that Complaint Counsel's conspiracy theory is implausible. Rather, Count One is dismissed because the greater weight of the evidence failed to prove the alleged conspiracy.

In addition, the evidence fails to show that McWane issued any "invitation to collude," and therefore Count Three is

dismissed. Count Two is also dismissed, because the evidence fails to prove that the tons-shipped data, collected, aggregated, and reported through DIFRA, constitutes concerted action in restraint of trade. Specifically, the evidence fails to demonstrate that the aggregated tons-shipped data has the likely anticompetitive effect of "facilitating collusion."

The preponderance of the evidence in the record, viewed as a whole, demonstrates that Domestic Fittings is a relevant product market and that Respondent has monopoly power in the Domestic Fittings market. The preponderance of the evidence also shows that McWane announced and implemented an exclusionary policy to forestall Star's entry into the Domestic Fittings market. In addition, the preponderance of the evidence shows that McWane entered into a Master Distribution Agreement with Sigma that unreasonably restrained trade in the Domestic Fittings market and that was designed to and did further exclude Star from the Domestic Fittings market.

Counts One, Two, and Three of the Complaint have not been proven by a preponderance of the evidence, and are dismissed. Counts Four, Five, Six, and Seven of the Complaint have been proven by a preponderance of the evidence. An appropriate remedial order is entered herewith.

II. FINDINGS OF FACT

A. Background

1. Jurisdiction

1. Respondent McWane, Inc. ("McWane") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2900 Highway 280, Suite 300, Birmingham, Alabama 35223. (Answer ¶ 8).

2. McWane manufactures, imports, markets, and sells products for the waterworks industry, including ductile (easily molded) iron pipe fittings that are 3" to 24" in diameter

("Fittings")[3]. (Joint Stipulations of Fact, JX0001 ¶ 1; Answer ¶ 8).

3. At all times relevant herein, McWane has been, and is now, a corporation, as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Joint Stipulations of Law, JX0001 ¶ 1).

4. McWane's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44. (Answer ¶ 10 (McWane sells Fittings in interstate commerce)).

2. Key Terms

5. Fittings are used in pressurized water distribution and treatment systems to join pipes, valves and hydrants, and to change, divide or direct the flow of water. (Joint Stipulations of Fact, JX0001 ¶ 6).

6. Domestic Fittings are Fittings that are manufactured in the United States and sold into domestic-only specifications.[4] (F. 347).

7. The American Recovery and Reinvestment Act of 2009, known as "ARRA," enacted by Congress in February 2009 and signed into law by the President in early 2009, included stimulus funds for waterworks projects. (Joint Stipulations of Fact, JX0001 ¶ 19; Tatman, Tr. 610-611; Pais, Tr. 1732-1733; Thees, Tr. 3075). ARRA contained certain "Buy American" provisions applicable to Fittings. (Joint Stipulations of Fact, JX0001 ¶ 21).

8. The Ductile Iron Fittings Research Association ("DIFRA") was incorporated as a nonprofit corporation in

[3] Except where otherwise noted or where the context otherwise requires, and, as explained *infra* II.B., the term "Fittings" as used herein refers to ductile iron pipe fittings of 24 inches or less in diameter.

[4] Except where otherwise noted or where the context otherwise requires, the term "Domestic Fittings" as used herein refers to Domestic Fittings sold into domestic-only specifications.

Alabama on January 12, 2007. (CX 1480 at 007; Brakefield, Tr. 1220, 1227-1228). DIFRA's four members were McWane; Sigma Corporation ("Sigma"); Star Pipe Products, Ltd. ("Star") and United States Pipe and Foundry ("U.S. Pipe"). (Joint Stipulations of Fact, JX0001 ¶ 17; Brakefield, Tr. 1227-1228).

9. The American Water Works Association ("AWWA") is a waterworks industry trade association. (CX 2537 (McCutcheon, IHT (Vol. 1) at 29-30)). The AWWA establishes certain standards for the production of fittings for use in the United States; all fittings have to comply with AWWA standards. (Minamyer, Tr. 3136-3137; Tatman, Tr. 878; CX 2522 (Agarwal, Dep. at 37); CX 2508 (Kuhrts Dep. at 30-31), *in camera*. The AWWA hosts an annual convention and trade show that is widely attended by suppliers, distributors, municipalities, contractors, and engineers. Industry participants (almost 500 exhibitors) exhibit their products at booths, and there are technical sessions as well. (Pais, Tr. 1899-1901).

10. "End Users" of Fittings are typically municipalities, regional water authorities, and the contractors they engage to construct waterworks projects. (Joint Stipulations of Fact, JX0001 ¶ 12; Saha, Tr. 1156; CX 2502 (Prescott, Dep. at 14); CX 2489 (Morrison, IHT at 29); McCutcheon, Tr. 2257; Rybacki, Tr. 3487).

11. Wholesale waterworks distributors ("Distributors") purchase Fittings from suppliers and resell them to End Users. (Webb, Tr. 2707, 2726-2727; Thees, Tr. 3051, 3082).

12. Ductile iron foundries ("foundries") are businesses that produce castings pursuant to purchase orders for producers of Fittings and other iron products. (CX 2505 (Frazier, Dep. at 23, 26-27); CX 2507 (Glidewell, Dep. at 21, 138); RX 658 (Keffer, Dep. at 14); RX 657 (Teske, Dep. at 22).

3. Fittings industry participants

a. McWane, Inc.

i. Company basics

13. Fittings are a small segment of McWane's business, representing about 5% of McWane's overall business. (Tatman, Tr. 218-219; RX 642 (Page, Dep. at 42)).

14. McWane estimates that it manufactures approximately 2,000 fittings. (RX 637 (Jansen, Dep. at 87)).

15. McWane has manufactured Fittings in the United States in two locations: its Union Foundry Company in Anniston, Alabama, and its Tyler Pipe & Foundry Co. South Plant in Tyler, Texas. (Tatman, Tr. 209, 212-214, 301-302).

16. McWane started producing Fittings at a foundry in China, Tyler Xian Xian ("TXX") in 2005. (Tatman, Tr. 210-212).

17. In a 2007 corporate reorganization, McWane consolidated all its fittings business, both domestically and in China, into a single division, "Tyler/Union." (Tatman, Tr. 209-214).

18. Faced with high inventory levels and insufficient demand for Domestic Fittings, McWane closed its foundry in Tyler, Texas, in November 2008. (Tatman, Tr. 210-212).

19. In 2009, McWane did not manufacture any Fittings larger than 30 inches in diameter at Union Foundry. Clow Water, a division of McWane, made 36 inch fittings, and McWane sourced 42 inches to 48 inches fittings externally. (Tatman, Tr. 591-592).

ii. Key employees

RICHARD (RICK) TATMAN

20. Richard Tatman joined McWane in May 2006 as the General Manager of McWane's Tyler Pipe division. (Tatman, Tr. 208-209).

21. Following a 2007 reorganization of McWane's fittings business, Mr. Tatman became Vice President and General Manager in charge of McWane's Tyler/Union division. (Tatman, Tr. 212-214).

22. In approximately July or August 2007 when the McWane reorganization was complete, Mr. Tatman reported to Mr. Thomas Walton and Mr. Leon McCullough. (CX 2484 (Tatman, Dep. at 10); Tatman, Tr. 216-217). Since Mr. Walton's departure from McWane in 2009, Mr. Tatman has reported directly to Mr. McCullough. (CX 2483 (Tatman, IHT at 10)).

23. Since the 2007 McWane reorganization, Mr. Tatman has had day-to-day responsibilities for the Fittings Division at McWane. (CX 2479 (McCullough, Dep. at 17)).

24. Since the 2007 McWane reorganization, Mr. Tatman shared responsibility for pricing and strategy with other McWane employees, including Mr. McCullough and Mr. Jerry Jansen. (Tatman, Tr. 218-219, 253-254, 306).

25. Because Fittings represent a small portion of McWane's business, Mr. Tatman did not normally discuss Fittings pricing with Mr. G. Ruffner Page. (Tatman, Tr. 218-219).

26. Mr. Tatman has ultimate responsibility for the pricing of Fittings sold through the Fittings Division, including the authority to issue new list prices. McWane's letters to customers were drafted and reviewed by Mr. Tatman and Mr. Jansen. (CX 2479 (McCullough, Dep. at 21, 23); Tatman, Tr. 218-219, 254, 306.

27. During the 2008 through 2009 time period, Mr. Tatman, with input from McWane's national sales manager, Mr. Jansen, also developed the sales strategy at McWane. (CX 2479 (McCullough, Dep. at 18); CX 2477 (Jansen, Dep. at 154-155)).

28. Leon McCullough is an executive Vice President of McWane in charge of its valve and hydrant group, as well as the waterworks Fittings Division. (CX 2479 (McCullough, Dep. at 8, 15-17); Tatman, Tr. 217).

29. Mr. McCullough has worked for McWane since 1973, and has been in his current position for 12 to 15 years. Mr. McCullough acquired responsibility for the Fittings Division of McWane in 2007. (CX 2479 (McCullough, Dep. at 8, 16)).

30. Mr. McCullough does not have day-to-day responsibilities on the operational side of McWane's Fittings Division, but provides strategic direction for the division. (CX 2479 (McCullough, Dep. at 17)).

31. Mr. Tatman reports to Mr. McCullough, who reports directly to Mr. Page. (CX 2479 (McCullough, Dep. at 18-19)).

JERRY JANSEN

32. Jerry Jansen is the national sales manager for Tyler/Union. Mr. Jansen has worked for various McWane subsidiaries since 1979, and has been the national sales manager for Tyler/Union since August 2004. (CX 2477 (Jansen, Dep. at 10-11); Tatman, Tr. 219 (describing Mr. Jansen as having a long history in the fittings industry)).

33. Mr. Jansen reports to Mr. Tatman. (CX 2477 (Jansen, Dep. at 12)).

34. Mr. Jansen's responsibilities include managing the Tyler/Union's sales team, as well as providing market reports and recommendations for market actions to his superiors. (CX 2477 (Jansen, Dep. at 11)). Mr. Jansen also provides input on any new sales strategy, and is responsible for implementing those policies. (CX 2477 (Jansen, Dep. at 154-155)).

VINCENT NAPOLI

35. Vincent Napoli is a pricing coordinator at McWane. He has held that position since it was first created in January 2008. (CX 2480 (Napoli, Dep. at 9-10, 35)).

36. Mr. Napoli has worked for McWane since 1991 in a variety of positions, including as an inside sales manager, a national sales manager, a quality manager, a position in accounting, and as a pricing manager. (CX 2480 (Napoli, Dep. at 9-10)).

37. As quality manager, Mr. Napoli was responsible for all aspects of quality control, including internal audits, day-to-day quality supervision, inspection, and shipping inspections. Mr. Napoli continues to use his technical expertise in Fittings to answer field personnel questions relating to interpreting specifications, product usage, product applications, and product quality. (CX 2480 (Napoli, Dep. at 32-33, 50-51)).

38. As pricing manager, Mr. Napoli has responsibility for approving Project Pricing (F. 428) for discounts of up to a couple of percentage points, and keeping track of annual bids and Project Pricing. (CX 2480 (Napoli, Dep. at 44-45, 47, 49-50).

G. RUFFNER PAGE

39. G. Ruffner Page is the President and Chief Executive Officer ("CEO") of McWane. Mr. Page became the President and CEO of McWane in 1999. Previously, Mr. Page worked for McWane's venture fund and bank, beginning in 1986. (CX 2482 (Page, Dep. at 11-14); Tatman, Tr. 218).

40. Mr. Page's primary responsibilities as the CEO of McWane are to oversee the McWane family's interests, and to provide top-level strategy, such as how to allocate capital, whether to build new plants, or whether to make any acquisitions or diversify any acquisitions. (CX 2482 (Page, Dep. at 14-15)).

41. Generally, Mr. Page is not actively involved in McWane's day-to-day Fittings business and can go weeks without speaking to Mr. McCullough, and "never" talks to Mr. Tatman except at general manager meetings. (CX 2482 (Page, Dep. at 44-46); Tatman, Tr. 218-219).

Initial Decision

DAVID GREEN (FORMER EMPLOYEE)

42. David Green was the Executive Vice President of McWane's soil pipe utility division, with responsibility for the Tyler Pipe, Union, Bibby, and AB&I subsidiaries, along with rubber couplings. Mr. Green was in charge of McWane's Fittings business until he was dismissed by Mr. Page in 2007. (Tatman, Tr. 210-212; CX 2118 at 001).

CHARLES F. NOWLIN

43. Charles F. Nowlin is the senior Vice President and Chief Financial Officer of McWane, and has been at the company since 1980. (CX 2481 (Nowlin, Dep. at 7); Tatman, Tr. 215). Mr. Nowlin oversees all financial reporting for McWane, including "blue books," income statements, balance sheets, and sales and gross profit analyses. (CX 2481 (Nowlin, Dep. at 8-9, 15)).

THOMAS WALTON (FORMER EMPLOYEE)

44. Thomas Walton began working at a division of McWane, Inc. as a management trainee in 1991. Mr. Walton was promoted throughout McWane's valve and hydrants business until becoming Vice President and General Manager of McWane's M&H and Kennedy Valve divisions in 2001. In late 2007, Mr. Walton was promoted to Senior Vice President, where he gained responsibilities for McWane's Fittings Division for the first time. (CX 2485 (Walton Dep. at 8-9, 17-18)).

45. As Senior Vice President overseeing the Fittings Division, Mr. Walton had ultimate responsibility for operations and sales, and participated in strategic decisions. Mr. Walton reported directly to Mr. McCullough, and Mr. Tatman reported directly to Mr. Walton. (CX 2485 (Walton Dep. at 18-19)).

JOHN SPRINGER

46. In the 2008 through 2009 time period, John Springer was the controller for Tyler Pipe and Tyler/Union, and was

responsible for publishing McWane's "blue books." (Tatman, Tr. 818).

47. Blue books are prepared by McWane's controller's office, are provided to Mr. McCullough and other executives within the company, and are important financial documents used in running the waterworks business. (Tatman, Tr. 497-498, 844-845, *in camera*).

LAURA ALVEY

48. Laura Alvey is an Administrative Assistant at McWane. (Tatman, Tr. 208).

49. Ms. Alvey was in McWane's sales department from 1995 until 2001. In 2001, she was promoted to her current position, Administrative Assistant for the general manager, Mr. Tatman, and Mr. Jansen. (RX 636 (Alvey, Dep. at 7); CX 2476 (Alvey, Dep. at 7-8, 10)).

50. Ms. Alvey's responsibilities include compiling the Tyler/Union Monthly Sales Reports, the Weekly Highlight Report, the Weekly Competitive Feedback Report (including the Domestic Activity Report), the DIWF [Fittings] report, and the Nondomestic versus Domestic Report, and the DIWF Nondomestic Pricing by the month for Mr. Tatman and Mr. Jansen. (CX 2476 (Alvey, Dep. at 10-13)).

b. Sigma Corporation

i. Company basics

51. Since about 1985, Sigma Corporation ("Sigma") has imported and sold Fittings and other waterworks products in the United States. (Joint Stipulations of Fact, JX0001 ¶ 2; Pais, Tr. 1722-1723). Sigma's headquarters are in Cream Ridge, New Jersey. (Rybacki, Tr. 1090).

52. Fittings are Sigma's main product line, and comprised approximately 40% of Sigma's business in the 2008 through 2009 time period. (Rybacki, Tr. 1090-1091; Pais, Tr. 1731 (in 2008

and 2009, Fittings were Sigma's largest-selling product, accounting for 40 to 45% of revenues)). Sigma currently sells approximately 3,000 distinct Fittings items (or SKUs). (Pais, Tr. 1723).

53. In 2007, 2008 and 2009, Sigma's net sales were [redacted] million, respectively. (CX 2026 at 066, *in camera*). Sigma has approximately 250 to 260 employees. (Pais, Tr. 1722).

54. On October 10, 2007, the Frontenac Group purchased a 60% ownership interest of Sigma. (Pais, Tr. 1725; Rybacki, Tr. 1084; CX 2523 (Bhattacharji, Dep. at 8)).

55. Walter Florence is a Frontenac managing director and a member of Sigma's board of directors. (CX 2523 (Bhattacharji, Dep. at 152, 197-198)).

56. Sigma imports Fittings from China, India, and Mexico. (CX 2524 (Box, Dep. at 16); Pais, Tr. 1731-1732 (all Fittings Sigma sold in 2008 were manufactured by its "virtual manufacturing" partners in China, India and Mexico)).

57. Sigma has used a "virtual manufacturing" model for over twenty years. (CX 2530 (Rona, Dep. at 211-212)). While Sigma is responsible for the technical know-how that goes into producing its Fittings, the Fittings are actually made overseas at foundries in China, Mexico and India. Sigma handles administration, engineering, drawings, inspection, testing, quality control, and transportation, and has engineering groups in China and India. (Rybacki, Tr. 1092, 1094; *see also* Pais, Tr. 1732; Rona, Tr. 1466-1467).

58. Sigma has sourced a small portion of its Fittings from McWane. (Pais, Tr. 1731).

59. Sigma's original equipment manufacturer ("OEM") business involves the sale of products to original equipment manufacturers (as opposed to Distributors), including pipe, valve, and hydrant manufacturers and other Fittings suppliers. Sigma's OEM business sells some products unrelated to waterworks, as well as parts used for assembly of waterworks valves and hydrants, and both industry standard and proprietary Fittings to

companies in the waterworks industry. (Rona, Tr. 1440-1441; Rybacki, Tr. 1094-1095; Brakefield, Tr. 1215).

60. Sigma's OEM business in 2008 had approximately $50 million in sales to customers such as McWane, U.S. Pipe, American Cast Iron Pipe Company, Griffin Pipe Products Co., and Star. (Rona, Tr. 1440-1442). Sigma's OEM business accounted for approximately 10% of its sales of Fittings. (Rona, Tr. 1442; CX 2530 (Rona, Dep. at 24-25)).

61. Sigma has approximately 23 territory sales managers across the United States and approximately 25 inside customer service personnel supporting the sales force. (Rybacki, Tr. 1089-1090).

62. Sigma has five regional managers, who manage the outside Fittings sales force: Al Richardson (southwest), Dave Pietryga (midwest), Greg Fox (southeast), Mike Walsh (northeast and Eastern Canada), and Chris King (northwest). (Rybacki, Tr. 1090, 1093).

63. Beginning in September 2009, Sigma began selling Domestic Fittings that it sourced from McWane. (CX 0803 at 001-002).

ii. Key employees

VICTOR PAIS

64. Victor Jerome Pais was one of the founders of Sigma in 1985. (Pais, Tr. 1721-1722; Rybacki, Tr. 1085). Mr. Pais worked for Star before the founding of Sigma. (Rybacki, Tr. 1117-1118; Pais, Tr. 1860-1862).

65. Mr. Pais currently owns approximately 6% to 7% of Sigma. In 2008, Mr. Pais' ownership share in Sigma was 1 to 2 percentage points higher. (Pais, Tr. 1726; Rybacki, Tr. 1085). Prior to Frontenac's purchase of Sigma in 2007, Mr. Pais held an 18% share. (CX 2527 (Pais, IHT at 19-20)).

66. Mr. Pais is a current member of Sigma's board and was also a member in 2008 and 2009. (Pais, Tr. 1725).

67. In the 2008 and 2009 time period, Mr. Pais was the President and CEO of Sigma. (Rybacki, Tr. 1085; Pais, Tr. 1723). Mr. Pais stepped down as President and CEO of Sigma in January 2010. (Pais, Tr. 1725). Mr. Pais remains an employee of Sigma. (Pais, Tr. 1721).

68. Mr. Pais' responsibilities in 2008 and 2009 included growing Sigma, monitoring profits and costs, helping the supply chain, and setting strategy relating to growth and profitability, including pricing strategy. (Pais, Tr. 1724-1725; CX 2528 (Pais, Dep. at 192-193)).

69. Mr. Pais was actively involved in Sigma's Fittings pricing strategy and would discuss pricing strategy with Mr. Lawrence Rybacki and others at Sigma. (CX 2528 (Pais, Dep. at 193-194)).

SIDDARTH BHATTACHARJI

70. Siddarth Bhattacharji was a founder of Sigma. Mr. Bhattacharji worked for Star before the founding of Sigma. (Rybacki, Tr. 1117-1118; Pais, Tr. 1860-1862).

71. In 2007, Mr. Bhattacharji became Executive Vice President of Sigma following Frontenac's acquisition of interest in Sigma. Mr. Bhattacharji had been vice president of Sigma from its founding in 1985. (CX 2523 (Bhattacharji, Dep. at 8-11)).

72. During 2008 and 2009, as Executive Vice President of Sigma, Mr. Bhattacharji was responsible for engineering and supply chain. (CX 2523 (Bhattacharji, Dep. at 8-9); Rybacki, Tr. 1087).

73. Mr. Bhattacharji is a shareholder of Sigma, owning less than 10% of the company, and is the Secretary of the Sigma board of directors. (CX 2523 (Bhattacharji, Dep. at 9-10, 23)).

LAWRENCE (LARRY) RYBACKI

74. Larry Rybacki is the President of Sigma and has held that position since approximately August 2011. Prior to becoming President of Sigma, Mr. Rybacki was Sigma's Vice President of sales for 21 years. (Rybacki, Tr. 1082-1083).

75. Mr. Rybacki owns about 3.5% of Sigma's shares. (Rybacki, Tr. 1085).

76. In the 2008 through 2009 time period, Mr. Rybacki was vice president of sales for Sigma, responsible for Fittings sales to Distributors (as distinct from OEM customers), all of Sigma's warehouses, regional managers, and outside salespeople reported to him. (Rybacki, Tr. 1086; Rona, Tr. 1453-1454).

77. Mr. Rybacki had authority over Sigma's pricing decisions, with input from Mr. Pais and Mr. Bhattacharji. (Brakefield, Tr. 1332; Rybacki, Tr. 1096; CX 2530 (Rona, Dep. at 198)).

78. Mr. Rybacki and Mr. Pais would be responsible for drafting list price and price multiplier change letters to customers, which would be sent to customers by regional managers under Mr. Rybacki's signature. (Rybacki, Tr. 1099-1100).

79. It was Mr. Rybacki's practice, before sending out a price increase letter, to share a draft with Sigma's top 20 managers to get their feedback. (Rybacki, Tr. 3489-3491).

80. Sigma's regional managers sometimes discuss Project Pricing (F. 428) with Mr. Rybacki. (Rybacki, Tr. 3527-3528).

MITCHELL RONA

81. Mitchell Rona has worked for Sigma since September 1988. Mr. Rona is also a shareholder of Sigma. (CX 2523 (Bhattacharji, Dep. at 9-10); Rona, Tr. 1438).

82. Mr. Rona was a Sigma sales representative and regional manager from 1988 to 1998. From about 1999 through July 2011, Mr. Rona was Sigma's OEM business manager, reporting to

Mr. Pais. (Rona, Tr. 1439-1440). Mr. Rona was not involved in setting prices for Fittings at Sigma and did not have authority or responsibility for sales into the distribution channel. (Rona, Tr. 1453-1454, 1627-1628).

83. In July 2011, Mr. Rona was promoted to Sigma's Vice President of operations. (Rona, Tr. 1438). Mr. Rona currently reports to Sigma's CEO, Jim McGivern. As Vice President of operations, Mr. Rona oversees Sigma's engineering and IT departments, manages global supplier relationships, controls inventory and supply chain, and runs Sigma's OEM business. (Rona, Tr. 1438-1439).

84. Mr. Rona worked on the Sigma Domestic Production ("SDP") team, along with Stuart Box, Gopi Ramanathan, Victor Pais and Siddarth Bhattacharji. (CX 2530 (Rona, Dep. at 40-41)).

85. Mr. Rona was significantly involved in the Master Distribution Agreement negotiations between Sigma and McWane (F. 1540) as the Sigma contact point for negotiations. His level of involvement diminished somewhat following execution of a letter of intent for the MDA, but he continued to play a liaison role interacting with McWane, even after the MDA was signed and went into the operation phase. (Rona, Tr. 1562-1571; CX 1436 at 001-003).

JIM MCGIVERN

86. Jim McGivern succeeded Mr. Pais as CEO of Sigma. Mr. McGivern was selected by Frontenac, first joined Sigma in July 2009, and gradually took over aspects of the business. (Pais, Tr. 1723-1724, 1772-1773). By June 2010, Mr. McGivern was acting as CEO of Sigma. (Rybacki, Tr. 3490-3491).

TOMMY BRAKEFIELD

87. Tommy Eugene Brakefield was the national sales manager at Sigma from November 2003 through December 2011. (Brakefield, Tr. 1214).

88. Although Mr. Brakefield's title did not change, his responsibilities evolved over time. In 2005, Mr. Brakefield's

responsibilities shifted predominantly to consulting for Sigma's OEM business rather than dealing with Sigma's distribution business. From about 2005 to 2008, Mr. Brakefield's role at Sigma was as an OEM consultant with Mr. Rona, with a focus on non-Distributor OEM Fittings customers. (Brakefield, Tr. 1214-1216).

89. From 2008 to December 2011, Mr. Brakefield took on a special projects role for Sigma, taking on projects for Mr. Rybacki, Mr. Pais, Mr. Bhattacharji, or Mr. McGivern, while reporting to Larry Rybacki, the Vice President of sales. (Brakefield, Tr. 1214, 1216-1217).

90. Mr. Brakefield was Vice President of sales and marketing at U.S. Pipe before his employment at Sigma. (Brakefield, Tr. 1219-1220; CX 2496 (Brakefield, Dep. (Vol. 2) at 9-10)).

91. In 2005, Mr. Pais approached Mr. Brakefield and asked if he knew anything about how to start a trade association. This was Mr. Brakefield's first involvement in conversations about forming a trade association that later became known as DIFRA. (Brakefield, Tr. 1220).

92. Mr. Brakefield became involved with organizing DIFRA on Sigma's behalf. (Brakefield, Tr. 1220-1221; Rybacki, Tr. 3546-3547). He became DIFRA's President in January 2007, and was the first and only President of DIFRA. (Brakefield, Tr. 1221-1222, 1227).

93. Mr. Brakefield is currently a Fittings consultant for McWane's pipe division under Jeff Otterstedt and Dennis Charko, and the executive director of the National Association of Pipe Fabricators. (Brakefield, Tr. 1212-1213).

STUART BOX

94. Stuart Jackson Box was Sigma's OEM operations manager from May 2007, when he started with the company, until July 2011. (CX 2524 (Box, Dep. at 8)). As OEM operations manager, Mr. Box reported to Mitchell Rona and had responsibility for customizing Fittings for Sigma OEM customers. (CX 2524 (Box,

Dep. at 11, 12)). Mr. Box was promoted to Sigma's director of engineering in July 2011. (CX 2524 (Box, Dep. at 7-8)).

95. Prior to joining Sigma, Mr. Box held positions as plant manager and manufacturing manager at foundries for Mueller Water Company, the parent of U.S. Pipe. (CX 2524 (Box, Dep. at 9-10)).

96. Mr. Box was involved in Sigma's decision to explore the feasibility of production of Domestic Fittings, and in carrying out that evaluation through the SDP project. (CX 2524 (Box, Dep. at 20-22)).

97. Mr. Box was not involved in negotiating the MDA, but was aware that MDA negotiations were ongoing while he evaluated SDP. (CX 2524 (Box, Dep. at 62-63)).

98. Mr. Box was responsible for making sure that the Fittings Sigma received from McWane met specification. (CX 2524 (Box, Dep. at 67-68)).

OTHER SIGMA EMPLOYEES

99. George Liu (Liuguang) is Sigma's production manager for China. (Pais, Tr. 1853).

100. Yin Baohai is the owner of Sigma's primary Fittings supplier in China, which Sigma refers to as "A1," and Yin Zhenhao is his son. (Pais, Tr. 1881-1882; CX 2118 at 001).

101. Iona Shenoy is an executive secretary at Sigma. (Rybacki, Tr. 3494).

iii. Sigma email distribution lists

102. Sigma's M20 email distribution list was a distribution list for Sigma's approximately top 20 managers. (Pais, Tr. 1750; Rybacki, Tr. 3490). Mr. Brakefield was a member of the M20 email distribution list. (Brakefield, Tr. 1218).

103. Sigma's RM6 email distribution list included Sigma's regional managers and Mr. Rona. (Brakefield, Tr. 1218-1219).

104. Sigma's M11 email distribution group is comprised of approximately 11 or 12 Sigma managers, including regional managers, and senior managers such as Mr. Pais, Mr. Bhattacharji, Mr. McGivern, Mr. Rybacki, and Mr. Brakefield. (Pais, Tr. 1837-1838; Brakefield, Tr. 1219).

105. Sigma's M3 email distribution list included Mr. Bhattacharji, Mr. Pais and Mr. Rybacki, and then Mr. McGivern when he joined Sigma. (CX 2527 (Pais, IHT at 14)).

106. Sigma's OEM5 email distribution list included Mr. Pais, Mr. Bhattacharji, Mr. Rybacki, Mr. Brakefield, and Mr. Rona. (Rona, Tr. 1491).

107. Sigma's SIGALL distribution list included the entire Sigma team. (Pais, Tr. 1790).

c. Star Pipe Products Ltd.

i. Company basics

108. Star Pipe Products Ltd. ("Star") imports and sells Fittings and other waterworks products. (Joint Stipulations of Fact, JX 0001 ¶ 3; Answer ¶ 11; Minamyer, Tr. 3131-3132).

109. Star was founded in 1981, and it has sold Fittings since approximately 1985. (RX 694 (Bhutada, Dep. at 6, 7)). Star's current annual revenues are approximately $135 million. (McCutcheon, Tr. 2250). Star has approximately 300 employees. (McCutcheon, Tr. 2249).

110. In 2007 and 2008, Star's waterworks division sold Fittings, joint restraints, municipal construction castings, nuts and bolts, flanges, flange packs, and accessories. (Minamyer, Tr. 3129-3131; McCutcheon, Tr. 2249).

111. In 2007 and 2008, Star's main product was Fittings, and accounted for approximately 50% of Star's annual revenues. (Minamyer, Tr. 3132-3133; McCutcheon, Tr. 2250).

112. Beginning in 2009, Star has contracted with foundries in the United States to manufacture Domestic Fittings. (Joint Stipulations of Fact, JX0001 ¶ 4).

113. Star has a controlling interest in Chinese foundries that manufacture Fittings for Star and imports Fittings manufactured at five foundries in China. ((McCutcheon, Tr. 2251-2252; RX 694 (Bhutada, Dep. at 8)). Star does not own the foundries in China. (CX 2539 (McCutcheon, Dep. at 8); RX 694 (Bhutada, Dep. at 8)).

114. Star does not have any joint ventures with, or ownership interests in, any of the foundries in the United States that produce Fittings on Star's behalf. (McCutcheon, Tr. 2251-2252).

115. Prior to 2009, Star did not sell Domestic Fittings and had not considered selling Domestic Fittings. It sold only imported Fittings. (CX 2533 (Bhargava, Dep. at 11); *see also* McCutcheon, Tr. 2267; Minamyer, Tr. 3136).

116. Star is responsible for quality assurance and quality control in Fittings production at both the domestic and foreign foundries from which it obtains Fittings. Quality assurance involves establishing the production processes at the foundry necessary to assure the quality of the product. (Bhargava, Tr. 2924-2926, 2936; CX 2533 (Bhargava, Dep. at 13)). Quality control involves conducting routine reviews, after production, to determine that the product meets the specifications. (Bhargava, Tr. 2924; CX 2533 (Bhargava, Dep. at 14)).

117. In the 2007 through 2009 time period, Star's waterworks division had an outside sales force of approximately 22 sales representatives (territory managers) and approximately six division managers, who supervised the territory managers. (Minamyer, Tr. 3129-3132, 3178; McCutcheon, Tr. 2253).

118. In 2008, Star had an inside sales force of approximately 15 people. (McCutcheon, Tr. 2253-2254; Minamyer, Tr. 3132). Star's inside sales force oversees customer

service, including checking inventory, fielding inquiries, and arranging shipping. (McCutcheon, Tr. 2253-2254).

119. Star has around 10 distribution centers throughout the United States where it stocks product in order to provide faster delivery times to its customers. (McCutcheon, Tr. 2264-2265); CX 2535 (Bhutada, Dep. at 10)).

ii. Key employees

120. Star's management team consists of three key people – Ramesh Bhutada, Daniel McCutcheon, and Navin Bhargava. Most of Star's major decisions are made by consensus of these three people. (Bhargava, Tr. 2926-2927).

DANIEL MCCUTCHEON

121. Daniel Ward McCutcheon has been employed by Star since approximately 1995. (CX 2537 (McCutcheon, IHT (Vol. 1) at 6); McCutcheon, Tr. 2247).

122. Mr. McCutcheon is currently the President of Star, and has held that position since the beginning of 2012. (McCutcheon, Tr. 2246-2247; CX 2539 (McCutcheon, Dep. at 6)).

123. Before becoming Star's President, Mr. McCutcheon was the Vice President of sales and operations at Star for 14 years, reporting to Ramesh Bhutada. (McCutcheon, Tr. 2247; CX 2537 (McCutcheon, IHT (Vol. 1) at 6)). In that position, Mr. McCutcheon was responsible for all sales, marketing, sales strategies, operations, and the distribution center operations. Mr. McCutcheon also had responsibility for the sales of Fittings in that position. (CX 2537 (McCutcheon, IHT (Vol. 1) at 7)). Mr. McCutcheon managed the sales department and Star's distribution centers. Star's outside and inside sales forces reported up to Mr. McCutcheon. (McCutcheon, Tr. 2254).

124. In 2008 and 2009, Mr. McCutcheon and Ramesh Bhutada together were responsible for setting Star's pricing strategy. (McCutcheon, Tr. 2252; CX 2538 (McCutcheon, IHT (Vol. 2) at 398)).

MATTHEW MINAMYER (FORMER EMPLOYEE)

125. Matthew Patrick Minamyer is currently the national sales manager for the Piping Products Division of Sigma (which includes Sigma's Fittings business), and he has held that position since July 2009. (Minamyer, Tr. 3127-3128; CX 2525 (Minamyer, IHT at 5)).

126. From approximately 2004 until he joined Sigma in July 2009, Mr. Minamyer was Star's national sales manager, with responsibility for managing Star's sales force, interfacing with customers, and increasing Star's sales. (McCutcheon, Tr. 2254; Minamyer, Tr. 3128; CX 2525 (Minamyer, IHT at 5-6)).

127. From approximately 1999 through 2005, Mr. Minamyer was a territory manager (December 1999 through mid-2000) and a division manager (mid-2000 through mid-2004) at Star. (Minamyer, Tr. 3128-3129; CX 2525 (Minamyer, IHT at 6-7); CX 2526 (Minamyer, Dep. at 9-10)).

128. As Star's national sales manager in 2007 and 2008, Mr. Minamyer reported to Daniel McCutcheon. (Minamyer, Tr. 3130; CX 2526 (Minamyer, Dep. at 11-12)).

129. When Mr. Minamyer was the national sales manager for Star's waterworks division, only the waterworks division sales force reported to him. (Minamyer, Tr. 3131-3132). Mr. Minamyer had six division managers reporting to him, covering five territories within the United States and one in Canada. (Minamyer, Tr. 3130).

130. When Mr. Minamyer was national sales manager at Star (F. 128), Mr. Minamyer and Mr. McCutcheon were in charge of setting and changing Star's list prices and multipliers and approving multiplier letters to customers. (Minamyer, Tr. 3139, 3142; CX 2526 (Minamyer, Dep. at 99-100).

RAMESH BHUTADA

131. Ramesh Bhutada was the President and CEO of Star from 1981 until approximately November 2011. Since November

2011, Mr. Bhutada has been CEO of Star. (CX 2534 (Bhutada, IHT at 6); CX 2535 (Bhutada, Dep. at 5)).

132. In 2008 and 2009, Mr. Bhutada was responsible, together with Mr. McCutcheon, for setting Star's pricing strategy. (McCutcheon, Tr. 2252; CX 2538 (McCutcheon, IHT (Vol. 2) at 398)).

NAVIN BHARGAVA

133. From 2003 to the present, Navin Bhargava has been a Vice President and, later, an Executive Vice President of Star, with responsibility for sourcing, inventory, engineering, quality control, and new product development. (Bhargava, Tr. 2917-2919, 2921; CX 2533 (Bhargava, Dep. at 7-8)).

134. Mr. Bhargava began at Star as a product manager in 1994, responsible for inventory planning and sourcing foundries for manufacturing. (Bhargava, Tr. 2918).

135. Mr. Bhargava was Star's purchasing manager from 1996 to 1998. In this role, Mr. Bhargava was also responsible for sourcing and supervising foundries that manufactured Star's products. (Bhargava, Tr. 2918-2920).

136. Mr. Bhargava was Star's director of manufacturing in 1998 until approximately 2003. His responsibilities in this role related to expanding Star's manufacturing, which was manufacturing in South America, Korea, China, and India at that time. (Bhargava, Tr. 2920).

137. Mr. Bhargava became a Vice President of Star in approximately 2003. He became Executive Vice President in approximately 2011. (Bhargava, Tr. 2917, 2921).

138. Mr. Bhargava's responsibilities included supervision of Star's entry into Domestic Fittings manufacturing. (Bhargava, Tr. 2921). Mr. Bhargava was responsible for locating appropriate domestic third-party foundries for Fittings production, developing tooling for those foundries, setting up quality control procedures,

and assessing the manufacturing capacities of domestic foundries. (Bhargava, Tr. 2925-2926).

139. Mr. Bhargava's quality control responsibilities involve establishing and conducting testing and reporting at Star's third-party foundries. (Bhargava, Tr. 2924).

140. Mr. Bhargava has had responsibilities related to Star's foundry operations in China, including aspects of opening a foundry such as: assessing the capabilities of a third-party foundry, establishing manufacturing processes for foundries, developing and approving product patterns, testing, and troubleshooting inventory and customer service. (Bhargava, Tr. 2921-2923).

LEROY H. LEIDER, JR.

141. Leroy H. Leider, Jr. is a general sales manager for Star. Mr. Leider has been employed by Star since approximately 2004. (CX 2536 (Leider, Dep. at 9-11)).

142. Mr. Leider was a territory manager for Star for approximately four years, from 2004 until 2008. (CX 2536 (Leider, Dep. at 11)).

143. In 2008 and 2009, Mr. Leider was a division manager for the northwestern United States, including Washington, Oregon, Montana, Idaho, Utah, New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Minnesota, and Wisconsin. (CX 2536 (Leider, Dep. at 11, 13)).

144. Mr. Leider became a general sales manager in 2009. (CX 2536 (Leider, Dep. at 13)). As general sales manager, Mr. Leider has responsibility for supervising the division managers in much of the eastern United States. (CX 2536 (Leider, Dep. at 13, 16)).

145. As division manager, Mr. Leider reported to Matt Minamyer. (CX 2536 (Leider, Dep. at 17)). As division manager and as general sales manager, Mr. Leider has not had authority for setting Star's list prices or establishing Star's published multipliers for fittings. (CX 2536 (Leider, Dep. at 22)).

MICHAEL BERRY

146. Michael Berry has been a general sales manager for Star since 2009. (CX 2532 (Berry, Dep. at 12)).

147. Mr. Berry was first employed as a territory manager by Star in approximately 2004. As a territory manager, Berry was a sales person for Star. (CX 2532 (Berry, Dep. at 10)). From approximately 2005 to 2009, Mr. Berry was a division manager for Star, with responsibility for Star's western division, which included portions of the United States including west of Arizona and Utah. As division manager, Mr. Berry had responsibility for supervising the territory mangers in the western United States. (CX 2532 (Berry, Dep. at 13-15)).

148. John Ristine, John Lemoine, and Kris Kadai are territory managers for Star and reported to Mr. Berry in his capacity as division manager. (CX 2532 (Berry, Dep. at 13-14)).

149. As division manager, Mr. Berry did not have responsibility for setting price lists or published multipliers for Star. (RX 691 (Berry, Dep. at 18)). As division manager, Mr. Berry sometimes exercised authority to approve Project Pricing (F. 428), but that authority was sometimes exercised directly by either Mr. McCutcheon or Mr. Minamyer. (CX 2532 (Berry, Dep. at 22)).

OTHER STAR EMPLOYEES

150. Pawan Sharda has been a Senior Financial Analyst at Star since 2007. He has worked at Star since 2004. (CX 2540 (Sharda, Dep. at 6-7)).

151. Kirthi Jain was an accounting manager at Star in 2008. (McCutcheon, Tr. 2500, *in camera*).

152. Narendra Zamwar was a product development manager at Star in 2011, responsible for working with the independent foundries with which Star contracted for the

production of Domestic Fittings. (Bhargava, Tr. 2943, *in camera*).

153. Pam Garey was the inside sales manager at Star in 2008. (Minamyer, Tr. 3159-3160).

d. Other fittings suppliers and pipe suppliers

i. American Cast Iron Pipe Company

154. American Cast Iron Pipe Company ("ACIPCO") is a domestic manufacturer and seller of ductile iron pipe, fabricated pipe, spiral weld steel pipe, steel pipe, fire hydrants, gate valves and Fittings, with a foundry in Birmingham, Alabama. (CX 2486 (Burns, Dep. at 13)).

155. ACIPCO currently manufactures fittings in the United States ranging from 30" to 64" in diameter. ACIPCO exited the manufacture of Fittings under 30" in diameter in 2006. (CX 1897 at 002; CX 2486 (Burns, Dep. at 15, 17, 23-28); CX 2521 (Agarwal, IHT at 19-20)).

156. ACIPCO sells fittings as an ancillary product line; ACIPCO has focused its improvements and investments on ductile iron pipe production over the years. (CX 2486 (Burns, Dep. at 41-42, 49-51)).

157. In 2009, 2010, and 2011, ACIPCO's fittings sales accounted for less than 5% of its overall revenue. (CX 2486 (Burns, Dep. at 16-17)).

158. As an OEM supplier of pipe systems, ACIPCO purchases Fittings from Sigma to sell as part of its packaged sales of pipes and Fittings. (Pais, Tr. 1980-1981; CX 1092 at 005).

159. Jerry Neal Burns has been the division sales manager for the ductile iron pipe division of ACIPCO for the last 22 years. His responsibilities include the promotion and sales of ductile iron pipe and spiral weld steel pipe in the United States. (CX 2486 (Burns, Dep. at 6-7)).

160. Michael Hays has been the director of supply chain management for ACIPCO for the last six years. (CX 2487 (Hays, Dep. at 7-8)).

ii. Backman Foundry

161. Backman Foundry, located in Provo, Utah, is a foundry that has been in operation since 1938. Backman Foundry employs 32 people. (RX 648 (Backman, Dep. at 9, 12)).

162. Backman Foundry manufactures Fittings, which comprise approximately 20% to 25% of Backman Foundry's business, or approximately $3 million in sales annually. (CX 2488 (Backman, Dep. at 14, 18)). Backman Foundry manufactures customized Fittings, niche products that do not compete with McWane or other large Fittings suppliers who sell "standard off-the-shelf, the bread-and-butter [Fittings]." (CX 2488 (Backman, Dep. at 16-17)). Due to the high degree of customization of its Fittings, Backman Foundry produces products on a purchase-order-by-purchase-order basis. (CX 2488 (Backman, Dep. at 33)).

163. Alan Backman is the President, CEO, and primary owner of Backman Foundry. Mr. Backman has had supervisory responsibility for everything that goes on at the foundry for 17 years. (CX 2488 (Backman, Dep. at 11)). Mr. Backman's responsibilities are to oversee operations of the entire facility on a global, long-term basis. Mr. Backman also deals with customers and keeps "an eye on day-to-day operations to some degree." (CX 2488 (Backman, Dep. at 48)).

iii. Griffin Pipe Products

164. Griffin Pipe Products Co. ("Griffin") is a domestic manufacturer of ductile iron pipes and has been in operation since the 1960s. Griffin also resells Fittings as part of packaged sales of pipes and Fittings. (CX 2508 (Kurhts, Dep. at 9-11)).

165. At some point prior to 2002 or 2003, Griffin manufactured Domestic Fittings. However, Griffin no longer possesses the equipment or expertise necessary to manufacture

Fittings in the United States, has not considered re-entering the Domestic Fittings market, and has not studied what the associated costs of reentry would be. (CX 2508 (Kurhts, Dep. at 18-20, 48-50, 73-74), *in camera*).

166. Griffin continues to resell Fittings because some customers prefer to purchase their Fittings and ductile iron pipes from a single source. However, Griffin has attempted to reduce its Fittings sales over the last few years because Griffin loses sales when it cannot supply 100% of all Fittings to a particular job. (CX 2508 (Kurhts, Dep. at 42-45), *in camera*).

167. Griffin purchases the Fittings that it sells from four main sources, McWane, Star, Sigma, and Metalfit, Inc. (CX 2508 (Kurhts, Dep. at 20-21, 24-27), *in camera*).

168. Douglas Kuhrts became the national customer service manager at Griffin. Before that, Mr. Kuhrts was the customer service manager for Griffin's west region for ten years. Mr. Kurhts has been with Griffin for 12 years. (CX 2508 (Kurhts, Dep. at 6-7)).

iv. Metalfit, Inc.

169. Metalfit, Inc. ("Metalfit") is a foundry in Monterrey, Mexico and a manufacturer of flanged fittings from 3" to 48" in diameter and mechanical joint fittings from 4" to 48" in diameter. Metalfit supplies fittings under the Metalfit brand name, and as private label products for ACIPCO, U.S. Pipe, Griffin, and Sigma. (CX 2518 (Meyer, Dep. at 16-23)).

170. In addition to fittings, Metalfit produces municipal castings for the Mexican market and non-waterworks products including valve bodies, butterfly valves, ball valves, plug valves, and pump parts. (CX 2518 (Meyer, Dep. at 21)).

171. Metalfit exports approximately 98% of its fittings to the United States. (CX 2518 (Meyer, Dep. at 20-21)).

172. All of the fittings sold under the Metalfit brand name are sold through Distributors. (CX 2518 (Meyer, Dep. at 23-24)).

173. In 2011, approximately 70% of Metalfit's sales were of Fittings. Over the last five years, Fittings sales have generally been less than 70%. (CX 2518 (Meyer, Dep. at 21-22, 108-109)).

174. Mark L. Meyer has been an owner and Vice President of Metalfit since 2004. As Vice President of Metalfit, Mr. Meyer is responsible for sales, marketing, customer development, new product development, strategic planning, government affairs and all non-manufacturing aspects of the business. (CX 2518 (Meyer, Dep. at 9-12)).

175. Mr. Meyer and his partners built the Metalfit foundry in 1991 and began operations in 1994. In 2000, Mr. Meyer and his partners sold the foundry to Griffin Pipe Products, but they purchased it back in July 2004, and continue to operate the foundry today. (CX 2518 (Meyer, Dep. at 9-11)).

v. NAPAC, Inc.

176. NAPAC, Inc. ("NAPAC") is a Fittings supplier with close to a full product line of non-Domestic Fittings. (CX 2500 (Swalley, Dep. at 135); CX 2526 (Minamyer, Dep. at 14)).

177. NAPAC has three distribution centers, in Massachusetts, Florida, and California. (CX 2500 (Swalley, Dep. at 137)).

vi. NACIP

178. In 2010, North American Cast Iron Products ("NACIP") began selling Fittings in the United States that it imports from India and China. (Saha, Tr. 1152-1153, 1163, 1173-1176). NACIP's corporate headquarters is in New Jersey, and its distribution centers are in New Jersey, Norfolk, Virginia; Covington, Georgia; and Houston, Texas. (Saha, Tr. 1153-1154).

179. NACIP sells Fittings to Distributors. (Saha, Tr. 1153-1154). NACIP currently sells Fittings to approximately 50 separate Distributor branches, primarily third tier and independent distributors. (Saha, Tr. 1167-1168, 1171).

180. The volume of NACIP's Fittings sales is "[i]nsignificant" in comparison to McWane. (Saha, Tr. 1164, 1167-1168 (estimating NACIP's sales to be less than 5% of the overall Fittings distribution network in the United States); CX 2519 (Saha, Dep. at 26)).

181. NACIP Fittings sales are primarily in the eastern and southern parts of the United States. NACIP has no current plans to expand its Fittings sales to other geographical areas. (Saha, Tr. 1163-1164).

182. Suvobrata Saha is the President and part-owner of NACIP, and has worked in the Fittings industry since 1983. Mr. Saha's responsibilities at NACIP include sales planning, purchasing, and finance. (Saha, Tr. 1152-1157).

183. Mr. Saha serves as the joint managing director of Carnation Industries, Limited, a foundry that produces Fittings in China and India for NACIP. (Saha, Tr. 1155-1156).

184. Previously in his career, Mr. Saha worked as an eastern United States regional sales manager for Star. (Saha, Tr. 1157-1158).

185. In 1996, Mr. Saha started a waterworks company called Pipeline Components, Inc. ("PCI"), of which he was Vice President and part owner. (Saha, Tr. 1158). In 2005, Mr. Saha sold PCI to Sigma, at which time Sigma closed down all three of PCI's locations. The agreement by which Sigma purchased PCI included a 3-year non-compete clause binding Mr. Saha. During that time period, Mr. Saha was not permitted to be in the Fittings business. (Saha, Tr. 1161-1162).

vii. Serampore Industries Private

186. Serampore Industries Private ("SIP" or "Serampore") supplies Fittings in the United States that it imports from China, India and Mexico. (CX 2522 (Agarwal, Dep. at 6, 22), *in camera*).

187. SIP began selling Fittings in the United States in 2003 or 2004, and currently sells to approximately 50 to 60 Distributors

in approximately 35 states. (CX 2522 (Agarwal, Dep. at 29, 38), *in camera*).

188. SIP offers a full line of Fittings up to 48" in diameter. (RX 681 (Agarwal, Dep. at 30); CX 2521 (Agarwal, IHT at 64-65)).

189. Bharat Agarwal has been SIP's Vice President for business development since approximately 2007. In that position, Mr. Agarwal is responsible for finding new business opportunities, including new products and markets, and growing sales. (CX 2522 (Agarwal, Dep. at 6-7); RX 681 (Agarwal, Dep. at 9-10)).

viii. United States Pipe and Foundry Company, LLC

190. United States Pipe and Foundry Company, LLC ("U.S. Pipe"), headquartered in Birmingham, Alabama, currently manufactures ductile iron pipe. In the 2005 through 2012 time period, U.S. Pipe manufactured ductile iron pipe at two plants in Bessemer, Alabama, and a plant in Union City, California. (Morton, Tr. 2809).

191. U.S. Pipe sells complete waterworks systems that include its ductile iron pipe packaged together with related products, including Fittings and accessories. (Morton, Tr. 2809-2812).

192. Until April 2006, U.S. Pipe manufactured Domestic Fittings from 4" to 64" in diameter at its Chattanooga, Tennessee facility. U.S. Pipe stopped manufacturing Fittings in April 2006, and has since sold the Chattanooga facility. (Morton, Tr. 2810).

193. U.S. Pipe currently purchases non-Domestic Fittings primarily from Sigma, with Star as a secondary supplier, and Domestic Fittings from McWane and Star. U.S. Pipe sells the Fittings that it purchases as a part of a bundled package of Fittings and ductile iron pipe. (Morton, Tr. 2810, 2819-2820).

194. Thomas Morton was U.S. Pipe's Vice President of purchasing from 2005 until August 14, 2012. As Vice President of purchasing, Mr. Morton typically had final authority over all purchasing decisions at U.S. Pipe, including which vendors U.S. Pipe used. (Morton, Tr. 2807-2808).

195. Gary Crawford has been U.S. Pipe's sales director since 2010. From 1978 to 1989, Mr. Crawford was a sales representative for various geographic regions in the United States, selling U.S. Pipe products, including Fittings. From 1989 to 1994, Mr. Crawford was the Assistant Eastern Regional Sales Manager. From 1994 to December 2003, Mr. Crawford was the Eastern Regional Sales Manager. From December 2003 through 2010, Mr. Crawford was the Vice President of sales. (CX 2541 (Crawford, Dep. at 6-9)).

ix. Electrosteel USA, LLC

196. In 2009, Electrosteel USA, LLC ("Electrosteel") began selling 4" to 24" Fittings in the United States that were manufactured in India. (CX 2500 (Swalley, Dep. at 8-10, 12-13)).

197. Of approximately 75 Distributor branches in the southeastern United States, Electrosteel currently sells to only 7 to 10 branches. Those 7 to 10 branches purchase approximately 10% of their Fittings needs from Electrosteel. (CX 2500 (Swalley, Dep. at 152-153)).

198. Electrosteel estimates its own market share in the southeast as one percent after two and a half years. (CX 2500 (Swalley, Dep. at 33, 131)).

199. Robert Daniel Swalley has been the business development manager at Electrosteel since August 2007, when he first began working for Electrosteel. (RX 659 (Swalley, Dep. at 5)).

e. Domestic foundries

200. Foundries sell to (or are owned by) Fittings suppliers, not Distributors or End Users. (CX 2505 (Frazier, Dep. at 68-69);

CX 2507 (Glidewell, Dep. at 122-123); CX 2517 (Hall, Dep. at 148-150)).

i. EBAA Iron, Inc.

201. EBAA Iron, Inc. ("EBAA"), originally Earl Bradley and Associates, is a domestic joint restraint manufacturer with two domestic iron foundries in Texas and one in Georgia. (RX 658 (Keffer, Dep. at 7-8)).

202. EBAA does not produce any Fittings. (CX 2499 (Keffer, Dep. at 9)).

203. Jim Keffer is the sales division President for EBAA, where he has worked for 35 years. (RX 658 (Keffer, Dep. at 4-6)).

ii. EJ

204. EJ is the successor company to East Jordan Ironworks, a domestic foundry that began making gray iron municipal products in the 1920s, including: fire hydrants, gate valves, construction castings, municipal manhole frames and covers, and gray iron water main fittings. (RX 657 (Teske, Dep. at 8)).

205. EJ does not currently make Fittings, and has never made Fittings. (CX 2498 (Teske, Dep. at 12)).

206. EJ does currently resell McWane Fittings to a few clients in the Midwest which accounts for less than 1% of EJ's overall sales. (CX 2498 (Teske, Dep. at 33-34, 39-40)).

207. Thomas Michael Teske has been at East Jordan Ironworks, now EJ, since 1976, and is currently the company's Vice President and General Manager, responsible for EJ Canada, EJ USA, Inc., and EJ America Latina. (RX 657 (Teske, Dep. at 5-6)).

iii. Frazier & Frazier Industries

208. Frazier & Frazier Industries ("Frazier & Frazier") is a domestic foundry that was founded in 1972. Frazier & Frazier produces castings for Domestic Fittings for suppliers like McWane and Star. (RX 664 (Frazier, Dep. at 6-8, 14, 19-20)).

209. Frazier & Frazier produces unfinished Domestic Fittings; the castings that Frazier & Frazier makes for Fittings still require finishing, such as bolts, fasteners, and paint. (CX 2505 (Frazier, Dep. at 71-72)).

210. Frazier & Frazier typically produces castings for Domestic Fittings through metal patterns that are sometimes provided to Frazier & Frazier by its customers. (CX 2505 (Frazier, Dep. at 24-25) (noting that Frazier & Frazier may still incur expenses to set up the new pattern, including adapting the pattern to the foundry's flask and sampling)).

211. Charles W. Frazier, Jr. has been Frazier & Frazier's President and Chief Operating Officer since 2000. Mr. Frazier has been involved in the foundry business all of his life. (RX 664 (Frazier, Dep. at 5-6)).

212. VJ Gupta is the sales manager at Frazier & Frazier. (RX 665 (Gupta, Dep. at 6)).

213. Lee Ann Ewing has been the secretary and treasurer at Frazier & Frazier since approximately 2001, and has been employed by Frazier & Frazier since 1978. Ms. Ewing oversees Frazier & Frazier's accounting functions, including billing, bill payment, and profit and loss statement preparation. (RX 706 (Ewing, Dep. at 4-5)).

iv. Glidewell Foundry

214. Glidewell Foundry ("Glidewell") makes ductile iron castings for a wide variety of industries, including the waterworks industry. (RX 666 (Glidewell, Dep. at 13-14)).

215. Approximately 50% of Glidewell's total castings sales are for waterworks industry customers and products, including

Star, McWane, ACIPCO, and valve manufacturers. (RX 666 (Glidewell, Dep. at 14-15)).

216. Glidewell began making Domestic Fittings castings in 2009, and sold Domestic Fittings castings to Star in 2010. (RX 666 (Glidewell, Dep. at 16, 54); CX 2507 (Glidewell, Dep. at 95-96)).

217. Since 2009, Glidewell has cast only large-diameter Domestic Fittings of 30" to 48" in diameter. Glidewell has never had the equipment necessary to efficiently make Domestic Fittings castings smaller than 30". (CX 2507 (Glidewell, Dep. at 63)).

218. David Glidewell has worked in the foundry business since 1974, and has been the President and CEO of Glidewell Foundry since 1991. (RX 666 (Glidewell, Dep. at 8-10)). Mr. Glidewell oversees Glidewell's operations and handles all quoting and estimating for the company, including reviewing all requests for quotes. (RX 666 (Glidewell, Dep. at 11-12)).

v. Mabry Castings

219. Mabry Castings ("Mabry") manufactures castings for Domestic Fittings. (RX 676 (Hall, Dep. at 18-19)).

220. In 2009, Mabry began producing Domestic Fittings castings for Star. (CX 1581; RX 676 (Hall, Dep. at 67-68)). Mabry currently makes mechanical joint bend Domestic Fittings that are 8" in diameter and larger for Star. (RX 676 (Hall, Dep. at 19)).

221. Eddie N. Hall, Jr. is the sales manager at the Mabry foundry in Beaumont, Texas, where he has worked for over 29 years. As sales manager, Mr. Hall provides quotes to Domestic Fittings castings customers. Before 2011, Mr. Hall was Mabry's plant operations manager. (RX 676 (Hall, Dep. at 5, 7-12, 17, 18)).

f. Distributors

i. HD Supply

222. HD Supply is the largest waterworks Distributor in terms of sales in the United States. (Joint Stipulations of Fact, JX0001 ¶ 24). HD Supply sells all waterworks products, including polyvinyl chloride ("PVC") plastic pipe, ductile iron pipe, valves, hydrants, brass items, appurtenances, and Fittings. (Webb, Tr. 2706).

223. HD Supply is a national Distributor with 235 branches in major metropolitan areas in 44 states. Each branch stocks Fittings and other products for HD Supply's customers. (Webb, Tr. 2698-2699).

224. Jerry L. Webb was President and CEO of HD Supply's Waterworks Division from 2007 through December 2011. (Webb, Tr. 2694-2695). Mr. Webb reports to Joe DeAngelo, who is the CEO for all of HD Supply, and also gives monthly updates to the board on performance, long range forecasting, initiatives and sales. Mr. Webb's direct reports are the HD Supply waterworks division's president, the chief financial officer, the chief information officer, the vice president of market development, and the strategic business development director. (Webb, Tr. 2695-2696). Prior to December 2011, HD Supply's six waterworks regional vice presidents (including one vice president of fire protection) reported to Mr. Webb. (Webb, Tr. 2696-2697).

225. As CEO of the HD Supply Waterworks division, Mr. Webb is responsible for strategic growth, new markets, market and product initiatives, and vendor relations. (Webb, Tr. 2696-2697; CX 2514 (Webb, Dep. at 9-10)). Mr. Webb exerts final authority over which Fittings suppliers HD Supply selects. (Webb, Tr. 2746).

226. Rob Hixon and Don Taylor were employees of HD Supply in 2008. (CX 2536 (Leider, Dep. at 83)).

ii. Ferguson Enterprises

227. Ferguson Enterprises ("Ferguson") is the second largest waterworks Distributor in terms of sales in the United States. (Joint Stipulations of Fact, JX0001 ¶ 25). Ferguson serves the water and wastewater industry, supplying primarily pipe, valves, and fittings to contractors and municipalities. (CX 2503 (Thees, IHT at 15)). Ferguson has an approximately 25% market share nationwide. (Tatman, Tr. 952-953; Thees, Tr. 3059).

228. Ferguson is a national Distributor with approximately 167 branches throughout the country that distribute waterworks products, including Fittings. (Thees, Tr. 3042, 3045-3046).

229. Ferguson employs a sales force of over 300 outside sales people and 250 inside sales people. (Thees, Tr. 3060).

230. Ferguson and HD Supply are McWane's two largest Fittings customers. (Tatman, Tr. 953; Thees, Tr. 3042).

231. William Taylor Thees, Jr. is the Vice President of waterworks at Ferguson, where he has worked for the last 22 years. (Thees, Tr. 3032-3033). Before becoming Vice President in August 2009, Mr. Thees held a series of positions at Ferguson, including branch manager, district manager, and business group owner of Ferguson's waterworks group, with responsibilities similar to his Vice President responsibilities. (Thees, Tr. 3034-3035).

232. As Vice President of Ferguson's waterworks division, Mr. Thees has profit and loss and strategy development responsibilities for the waterworks group. These responsibilities include deciding what initiatives to pursue or ways to grow the waterworks group, and deciding whether to acquire or open new Ferguson branches. (Thees, Tr. 3039).

233. Mr. Thees regularly interacts with his district managers, gathering intelligence in order to understand relationships with suppliers, the relative sales volumes of each district, and potential growth areas. (Thees, Tr. 3040-3041).

234. Mr. Thees often has the final authority in the selection of waterworks suppliers, including Fittings suppliers, though he discusses waterworks decisions with other Ferguson divisions when the supplier sells non-waterworks products to Ferguson as well. (Thees, Tr. 3041-3042).

235. Mr. Thees participates in negotiating rebates with Ferguson's waterworks suppliers. The corporate rebate department takes the lead when it is a corporate rebate, and the local or regional office takes the lead on regional rebates. (Thees, Tr. 3041).

iii. WinWholesale

236. WinWholesale, which does business as WinWater Works ("WinWater"), is the third largest waterworks Distributor in the United States with 43 local companies or branches in 22 states. (CX 2162 at 001; CX 2546 (Gibbs, Dep. at 11, 15-16)). WinWater sells waterworks products, including Fittings, to End Users. (CX 2546 (Gibbs, Dep. at 7-8)).

237. In 2008, WinWholesale purchased approximately $9.5 million in Fittings. In 2009, WinWholesale purchased approximately $8.7 million in Fittings. In 2010, WinWholesale purchased approximately $9.0 million in Fittings. In 2011, WinWholesale purchased approximately $9.0 million in Fittings. (CX 2546 (Gibbs, Dep. at 12)).

238. Eddie Gibbs has been the Vice President of vendor relations for WinWholesale since 2005. (CX 2546 (Gibbs, Dep. at 7-8)). As the Vice President of vendor relations, Mr. Gibb's responsibilities include negotiating programs for all of WinWholesale's products, including Fittings, with vendors, gaining access to vendor lines, and dealing with disputes with local companies (branches) and vendors. (CX 2546 (Gibbs, Dep. at 7)).

iv. Hajoca Corporation

239. Hajoca Corporation ("Hajoca") distributes plumbing, heating, and industrial products. (Pitts, Tr. 3291-3292). Hajoca

sells waterworks products including flanged pipes and fittings, saddles, valves, and Fittings. (Pitts, Tr. 3297).

240. Hajoca has 351 locations. Approximately nine of these locations sell waterworks products. Three branches sell waterworks exclusively: Tulsa, Oklahoma; Salt Lake City, Utah; and Olathe, Kansas. Lansdale, Pennsylvania also sells waterworks products. (Pitts, Tr. 3296-3297).

241. Compared to Ferguson and HD Supply, Hajoca's presence in the waterworks distribution business, with three dedicated waterworks locations, is very small. (Pitts, Tr. 3299-3300).

242. Roy Lee Pitts has been the director of vendor relations at Hajoca for the last fifteen years. (Pitts, Tr. 3292). As director of vendor relations, Mr. Pitts negotiates programs with Hajoca's vendors, supervises Hajoca's supplier rebate programs, and represents Hajoca at industry events. Mr. Pitts' responsibilities include waterworks. (Pitts, Tr. 3293-3294).

243. Mr. Pitts regularly communicates with waterworks suppliers about Hajoca's waterworks purchasing goals. (Pitts, Tr. 3294). Mr. Pitts advises individual Hajoca branches about supplier corporate rebate programs, cash discounts, and shipping terms, and the branch managers of those branches make final decisions on which products to purchase. (Pitts, Tr. 3295-3296).

v. The Distribution Group (TDG)

244. The Distribution Group, also known as "TDG," is a group of distributors that collectively negotiates with suppliers, which TDG refers to as vendors, on behalf of the 32 independent Distributors that make up the membership of TDG. (CX 2494 (R. Fairbanks, Dep. at 10); Sheley, Tr. 3380; Minamyer, Tr. 3188).

245. TDG pools its members' buying power together to jointly earn rebates based on group purchases from vendors. (CX 2494 (R. Fairbanks, Dep. at 10); Minamyer, Tr. 3188). The purpose of TDG is to increase the negotiating power of individual Distributors who would otherwise not receive terms as favorable

to them as the terms that suppliers extend to larger Distributors like HD Supply. (Sheley, Tr. 3394-3395).

246. TDG collectively negotiates for freight terms, payment terms, rebate programs, and extended purchasing agreements with 68 suppliers for various products, including Fittings. (Sheley, Tr. 3378-3379; CX 2494 (R. Fairbanks, Dep. at 11)).

247. TDG negotiates rebate terms, but not product prices, with vendors. Individual members negotiate price with their suppliers. (CX 2494 (R. Fairbanks, Dep. at 21), *in camera*; Sheley, Tr. 3393).

248. Vendors pay earned rebates to TDG and TDG then distributes those rebates back to the member Distributors in proportion to their purchases. (CX 2494 (R. Fairbanks, Dep. at 21, 57-58), *in camera*; Sheley, Tr. 3379-3380).

249. TDG's Vendor Committee reviews proposals from vendors and selects the vendors with whom TDG will have rebate programs. (CX 2494 (R. Fairbanks, Dep. at 12); Sheley, Tr. 3379-3380). The Vendor Committee consists of nine members, each with an equal vote. (CX 2494 (R. Fairbanks, Dep. at 12-14)). Members of the Vendor Committee include, Dennis Sheley, Illinois Meter Company; Curtis Porter, Utility Supply Company; Michael Coryn, Utility Equipment Company; Jenks Hayes, Hayes Pipe & Supply; Peter Prescott, E.J. Prescott Company; Wayne Johnson, Dana Kepner Company; Dennis Johnson, Atlas Utility; Hod Fowler, H.D. Fowler Company; and Jeff Konen, Consolidated Supply Company. (CX 2494 (R. Fairbanks, Dep. at 13)).

250. Currently, TDG has contracts with 72 different waterworks vendors. (Sheley, Tr. 3396-3397). TDG members must purchase certain percentages of their purchases from TDG vendors, but members are not required to purchase products from any specific vendor just because the vendor has a rebate program with TDG. (CX 2494 (R. Fairbanks, Dep. at 33); Sheley, Tr. 3395-3396).

251. Richard Frank Fairbanks II is the President of TDG. (CX 2494 (R. Fairbanks, Dep. at 10)). His primary

responsibilities are to manage relationships between members and vendors, to facilitate negotiations between members and vendors, to manage the numbers of purchases and rebates, and to oversee the purchasing goals and commitments. (CX 2494 (R. Fairbanks, Dep. at 58-59, 61)).

252. Mr. Fairbanks has relationships with Larry Rybacki at Sigma, Dan McCutcheon at Star, and Rick Tatman and Jerry Jansen at Tyler/Union. (CX 2494 (R. Fairbanks, Dep. at 65-66)). Previously Mr. Fairbanks had relationships with Victor Pais at Sigma and Matt Minamyer at Star. (CX 2494 (R. Fairbanks, Dep. at 65-66)).

vi. E.J. Prescott, Inc.

253. E.J. Prescott, Inc. ("E.J. Prescott") is a waterworks Distributor headquartered in Gardiner, Maine. (CX 2501 (Prescott, IHT at 7-9)). E.J. Prescott has 27 branches located throughout Maine, New Hampshire, Rhode Island, Vermont, Massachusetts, Connecticut, Indiana, Ohio, and New York. (CX 2502 (Prescott, Dep. at 9); CX 2501 (Prescott, IHT at 8)).

254. Right before the passage of ARRA, 20% of E.J. Prescott customers were "[a] hundred percent domestic." (CX 2501 (Prescott, IHT at 41)). E.J. Prescott's fitting inventory in 2012 was 50% domestic and 50% imported. (CX 2502 (Prescott, Dep. at 11)).

255. E.J. Prescott purchases ductile iron pipe fittings from McWane, Sigma, Star, and SIP. (CX 2502 (Prescott, Dep. at 15, 20)).

256. E.J. Prescott is a member of TDG. (RX 661 (Prescott, Dep. at 40)).

257. Peter Prescott has been the CEO of E.J. Prescott for ten years. (CX 2502 (Prescott, Dep. at 6-7)). From 1978 until he became CEO, Mr. Prescott was the President of E.J. Prescott. (CX 2502 (Prescott, Dep. at 7)).

vii. Groeniger & Company

258. Groeniger & Company ("Groeniger") was a waterworks Distributor that had 14 branches before it had to close five branches due to the economy. (CX 2509 (Groeniger, IHT at 24)). Ferguson purchased Groeniger in 2011. (CX 2510 (Groeniger, Dep. at 125)).

259. Groeniger was a member of TDG. (CX 2510 (Groeniger, Dep. at 58-59)).

260. Groeniger purchased Fittings from McWane, Sigma, and Star. (CX 2510 (Groeniger, Dep. at 44)).

261. Michael Groeniger was the President of Groeniger from 1984 to 2011, when Groeniger was purchased by Ferguson. (CX 2509 (Groeniger, IHT at 7); CX 2510 (Groeniger, Dep. at 125)). Mr. Groeniger became the Chairman of the Board in 1988 or 1989. (CX 2509 (Groeniger, IHT at 7)). Mr. Groeniger's responsibilities as President were to oversee the entire company; which he did by visiting his branches to make sure things were running well. (CX 2509 (Groeniger, IHT at 7-8)).

viii. Illinois Meter, Inc.

262. Illinois Meter, Inc. ("Illinois Meter") is a Distributor of waterworks, utility, sewer, and gas products, including Fittings. (Sheley, Tr. 3376-3378). Illinois Meter purchases Fittings from McWane and Star. (CX 2516 (Sheley, Dep. at 11, 133)).

263. Illinois Meter is a member of TDG. (Sheley, Tr. 3378). Illinois Meter has five branches, located in Missouri and Illinois. (Sheley, Tr. 3382).

264. In 2008, approximately 35% of Illinois Meter's Fittings sales consisted of Domestic Fittings. (Sheley, Tr. 3433, *in camera*).

265. Dennis James Sheley is the President and owner of Illinois Meter, and has been the owner of Illinois Meter for the last 28 years. (Sheley, Tr. 3375-3376).

266. Mr. Sheley's responsibilities at Illinois Meter include: visiting with customers, overseeing purchasing and sales decisions, and ultimate authority on the selection of waterworks suppliers, including Fittings suppliers. (Sheley, Tr. 3376-3378).

267. Mr. Sheley is also the Chairman of the Board of TDG, and one of nine equal voting members of TDG's Vendor Selection Committee. (Sheley, Tr. 3379).

ix. C.I. Thornburg Company, Inc.

268. C.I. Thornburg Company, Inc. ("C.I. Thornburg") is a waterworks Distributor, and is a member of TDG. (CX 1362 at 002; CX 2489 (Morrison, IHT at 6-8)).

269. C.I. Thornburg has grown from one branch in 1973 to five branches in West Virginia, Kentucky, and Tennessee. (CX 2489 (Morrison, IHT at 19)).

270. C.I. Thornburg purchases 85% of their imported Fittings from Sigma, 10% from Star and 5% from Tyler. (CX 2489 (Morrison, IHT at 60)).

271. Edward Morrison Jr. is the President of C.I. Thornburg and has been since 1991. (CX 2489 (Morrison, IHT at 6)). Mr. Morrison's role as president includes overseeing administrative functions, serving on various industry boards, vendor relations, helping with pricing and contractor sales, and municipal sales. (CX 2490 (Morrison, Dep. at 15)).

x. Utility Equipment Company

272. Utility Equipment Company ("UECO") is a Distributor that sells all materials related to underground water, sewer, and storm water retention and detention systems. (CX 2544 (Coryn, Dep. at 8)).

273. UECO has seven branches located in Iowa, Nebraska, and Illinois. (CX 2544 (Coryn, Dep. at 8-9)). UECO is a member of TDG. (CX 1362 at 002; RX 703 (Coryn, Dep. at 47-48)).

274. Michael R. Coryn is the President of UECO, which is a family company, and has been for 17 years. (CX 2544 (Coryn, Dep. at 6)). Mr. Coryn's responsibilities as President include making all major business decisions and involvement in purchasing and inventory decisions and sales. (CX 2543 (Coryn, IHT at 8-9); CX 2544 (Coryn, Dep. at 7)).

xi. Dana Kepner Company

275. Dana Kepner Company ("Dana Kepner") is a Distributor that sells waterworks products, including Fittings, to End Users. (CX 2492 (Johnson, Dep. at 9, 39, 79)).

276. Dana Kepner has 15 branches in Montana, Wyoming, Colorado, Texas, Arizona, and Nevada. (CX 2492 (Johnson, Dep. at 9)). Dana Kepner is a member of TDG. (CX 1362 at 001).

277. Wayne Edward Johnson is President and part owner of Dana Kepner. Mr. Johnson has been President since 1994 and has worked for the company since 1991. (CX 2492 (Johnson, Dep. at 6)). Mr. Johnson's responsibility as President of Dana Kepner is "[t]he overall supervision of the company," including overseeing the purchasing of Fittings. (CX 2492 (Johnson, Dep. at 7-8)).

4. Industry background

a. Fittings basics

i. Applications

278. Fittings are used in pressurized water distribution and treatment systems to join pipes, valves and hydrants, and to change, divide or direct the flow of water. (Joint Stipulations of Fact, JX0001 ¶ 6; Tatman, Tr. 219-220; CX 2494 (R. Fairbanks, Dep. at 79); CX 2502 (Prescott, Dep. at 51); CX 2489 (Morrison, IHT at 40); Thees, Tr. 3052-3053).

279. Pressurized pipe applications, which include all potable water lines and some sewer lines, almost always use Fittings. (Webb, Tr. 2710-2711). Pressurized applications are those applications where the flow is not caused by gravity, and include pressurized water, pressurized reclaimed water, pump

stations, treatment plants, and pressurized force main sewers. (Thees, Tr. 3053).

280. All water lines are pressurized and some sewer lines are pressurized. (Thees, Tr. 3053).

281. Fittings are rarely used in gravity pipe lines; plastic fittings are more prevalent in those applications. (Webb, Tr. 2711-2712; CX 2489 (Morrison, IHT at 40)).

282. Fittings are used for both "line" (*i.e.*, underground) and "plant" waterworks projects. (Webb, Tr. 2710).

283. "Plant" work refers to waterworks projects for water treatment plants, pumping stations, or wastewater treatment plants, which process water so that it can be consumed and process sewage so that it is clean when it is dumped. (CX 2502 (Prescott, Dep. at 48-49); Webb, Tr. 2710; Tatman, Tr. 227-228). Plant work often involves the use of Fittings in systems that are indoors. (CX 2480 (Napoli, Dep. at 19-20)).

284. Plant work generally uses the largest sized fittings; uses many different, uncommonly used configurations; and has special coating and painting requirements. (Pais, Tr. 1913-1914).

285. "Line" work refers to waterworks projects related to pipes that are located under the street in order to move water from water supply facilities to neighborhoods, or from neighborhoods to sewage facilities. (CX 2502 (Prescott, Dep. at 48); Webb, Tr. 2710). In comparison to plant work, "underground" distribution network waterworks projects use more predictable configurations and numbers of Fittings. (Pais, Tr. 1913; CX 2480 (Napoli, Dep. at 19-20)).

ii. Shapes, sizes, and configurations

286. There are several thousand unique configurations of Fittings in different shapes, sizes and coatings. (Joint Stipulations of Fact, JX0001 ¶ 8). Each unique configuration has its own identifier and is a unique item or stock-keeping unit ("SKU"). (Tatman, Tr. 463; CX 2500 (Swalley, Dep. at 104-105)).

287. Fittings come in several shapes, including elbows, reducers and "T's." (Tatman, Tr. 220-221).

288. Typically, ductile iron pipe fittings range in size from two or three inches to 48 inches. (CX 2521 (Agarwal, IHT at 64-65), *in camera*; CX 2491 (Johnson, IHT at 19-20); CX 2525 (Minamyer, IHT at 95-96); CX 2483 (Tatman, IHT at 23)).

289. Two to twelve inch Fittings, or "small-diameter" Fittings, are predominately used for housing subdivisions and private contracting work. (Brakefield, Tr. 1279-1280; CX 1479; CX 2477 (Jansen, Dep. at 89)).

290. Fittings 24" in diameter and below make up around 90% of the overall market for ductile iron pipe fittings. (*See* CX 1895 at 001, 005, *in camera*; RX 127 at 002; CX 2502 (Prescott, Dep. at 76-77); CX 2510 (Groeniger, Dep. at 160-161); CX 2492 (Johnson, Dep. at 71); CX 2504 (Thees, Dep. at 135); CX 2502 (Prescott, Dep. at 76-77).

291. Fittings 24" in diameter or smaller are commonly used in underground water distribution networks. (Brakefield, Tr. 1279-1281; CX 1479; Pais, Tr. 1913).

292. Fittings above 24" in diameter, or "large-diameter" fittings, are predominately used for public works jobs for large treatment plants or for moving water through large transmission lines. (Brakefield, Tr. 1281; CX 1479; CX 2477 (Jansen, Dep. at 90)).

293. There are several different types of Fittings "end configurations," including "flanged," "mechanical joint," and "push-on." (Webb, Tr. 2712-2713; Thees, Tr. 3052-3055).

294. "Flanged" Fittings are flat faced Fittings that connect to a flanged ductile iron pipe with nuts and bolts and a flat rubber gasket sandwiched between the two flanges that provides a sealed joint. (Thees, Tr. 3054; Webb, Tr. 2713). Flanged fittings do not require an external restraint, and bolt directly onto a pipe. (CX 2480 (Napoli, Dep. at 22-23)).

295. Flanged Fittings are typically used in above-ground applications, such as plants and lift stations. (Webb, Tr. 2713; Tatman, Tr. 227-228; Thees, Tr. 3054; CX 2502 (Prescott, Dep. at 18); CX 2480 (Napoli, Dep. at 22-23); CX 2477 (Jansen, Dep. at 78- 80).

296. "Mechanical joint" ("MJ") Fittings do not employ nuts and bolts to connect to the ductile iron pipe, but use a gland that compresses the Fitting gasket against the ductile iron pipe as pressure flows through the system and an external restraint that secures the pipe to the fitting. (Tatman, Tr. 228; Webb, Tr. 2713; Thees, Tr. 3054-3055; CX 2480 (Napoli, Dep. at 22-23)).

297. MJ Fittings are typically used for non-plant, underground applications. (Tatman, Tr. 228; Webb, Tr. 2713; CX 2502 (Prescott, Dep. at 50); CX 2522 (Agarwal, Dep. at 84), *in camera*).

298. "Push-on" Fittings are Fittings that connect only by being pushed on to the pipe. (Webb, Tr. 2713).

299. Push-on Fittings are used in underground applications. (Webb, Tr. 2713-2714; CX 2522 (Agarwal, Dep. at 84), *in camera*).

300. There are "full-body" and "short-body" Fittings. (Webb, Tr. 2712). Short-body Fittings are smaller and have thinner walls than full-body Fittings. Full-body Fittings are used less often than short-body Fittings. (Webb, Tr. 2712-2713; CX 2477 (Jansen, Dep. at 83)).

301. Full-body Fittings are commonly referred to as C110 Fittings. (CX 2510 (Groeniger, Dep. at 159-160)). A C110 Fitting is a longer, thicker, and heavier Fitting used in approximately 10% of Fittings jobs. C110 is a type of AWWA specification. (McCutcheon, Tr. 2292; CX 2477 (Jansen, Dep. at 83)).

302. Short-body Fittings are commonly referred to as C153 Fittings. A C153 Fitting is thinner and lighter than a C110

Fitting. C153 is a type of AWWA specification. (McCutcheon, Tr. 2292; CX 2477 (Jansen, Dep. at 83-84)).

303. C110 and C153 Fittings are pressure rated up to 350 pounds per square inch ("PSI'). (Thees, Tr. 3053).

304. Suppliers generally line flanged Fittings with cement, but can also line them with polyethylene or epoxy to prevent corrosion. (Thees, Tr. 3055; CX 2509 (Groeniger, IHT at 42); CX 2491 (Johnson, IHT at 18)).

305. Of the many configurations of Fittings, a small number of Fittings cover a large percentage of the volume of Fittings sold in the market. (Tatman, Tr. 225).

306. Approximately 80% of the demand for Fittings may be serviced with approximately 100 or fewer commonly used sizes and configurations of Fittings. These Fittings are commonly referred to in the industry as "A" or "B" Fittings. (Joint Stipulations of Fact, JX0001 ¶ 9; CX 0120 at 10; Tatman, Tr. 225; Bhargava, Tr. 3010-3011, *in camera*; CX 2522 (Agarwal, Dep. at 73), *in camera*).

307. "A" and "B" Fittings are generally relatively fast-moving Fittings items that require approximately 120 patterns to make, and are primarily 4" in diameter to 12" in diameter. (Bhargava, Tr. 3010-3011, *in camera*; CX 2477 (Jansen, Dep. at 91); Webb, Tr. 2720-2722; Thees, Tr. 3057-3058; CX 2533 (Bhargava, Dep. at 62), *in camera*; CX 2522 (Agarwal, Dep. at 73), *in camera*).

308. "C" and "D" Fittings are very low volume items (*e.g.*, items for which McWane sells 50 or fewer per year), and are relatively expensive to manufacture. (Tatman, Tr. 225-226; *see* McCutcheon, Tr. 2292-2293; CX 2533 (Bhargava, Dep. at 62), *in camera*).

309. "Oddball" Fittings are Fittings that are not routinely used on every project and are Fittings that End Users might request once a year or every five years. Distributors generally prefer not to stock Oddball Fittings. (Webb, Tr. 2721-2722; CX 2513 (Webb, IHT at 160); Thees, Tr. 3057-3058).

iii. Manufacturing

310. Generally, a Fitting is manufactured through the following steps: melting scrap metal in a cupola; transferring the molten metal to a casting area via a transfer ladle; fitting cores into molds so that the molded fitting is hollow; pouring the molten iron; shaking the casting out of the mold; machining off gates and risers, and creating bolt holes; cleaning; preparing for cement lining; painting; packaging; and shipping. (Brakefield, Tr. 1412-1414; Rona, Tr. 1488).

311. "Patterns" are molds made of aluminum, stainless steel, or wood. Manufacturers use patterns to make impressions in sand for pouring molten iron that takes the shape of the pattern. (CX 2522 (Agarwal, Dep. at 74), *in camera*).

312. Disamatic ("DISA") molding lines are automated and represent the most efficient and economical manufacturing process for small diameter Fittings. DISA is a brand of fittings molding equipment. (Tatman, Tr. 435, 447; Rona, Tr. 1489).

313. McWane's DISA automated molding unit for Fittings castings in Anniston, Alabama cost $20 million, and can produce fittings up to 8" in diameter. (Tatman, Tr. 435).

314. "Cope and drag" is a type of molding process for Fittings production. Cope and drag patterns are molds where the Fitting casting is produced in halves that are put together. (Rona, Tr. 1509-1510). The foundry pours molten iron into the cope and drag pattern to produce a Fitting. A foundry cannot produce a casting that is larger than the heights of the cope and drag put together. (CX 2505 (Frazier, Dep. at 55-56)).

315. "Lost foam" is another Fittings production method, and involves placing styrofoam replicas of Fittings in casting sand. Molten metal is then poured into the sand, and the metal replaces the styrofoam. (Rona, Tr. 1510).

316. A flask is a steel vessel that holds a Fittings pattern during the manufacture of a Fitting. (Rona, Tr. 1511, 1549-1550; CX 0282 at 008, 011).

iv. Related waterworks products

317. The primary products used in most waterworks projects are ductile iron pipe and PVC pipe. Other waterworks products include the following: high density polyethylene pressurized pipe; drainage pipe; concrete pipe; gate valves; fire hydrants; butterfly valves; service brass; marking tape; water meters; joint restraints; glands; and mechanical joint and flanged Fittings. (Thees, Tr. 3050-3051; *see also* Sheley, Tr. 3386; CX 2477 (Jansen, Dep. at 63-64)).

318. "Glands" are made of ductile iron, and are used to create a seal between a pipe and a mechanical joint Fitting. (Tatman, Tr. 458-461; CX 1653 at 004; CX 2477 (Jansen, Dep. at 67)).

319. "Joint restraints," like glands, are made of ductile iron and also create a seal between a pipe and a fitting. In addition, a joint restraint is bolted on to both the pipe and the fitting in order to keep the pipe from blowing out of the fitting when the pipe is under pressure. (Tatman, Tr. 460-461; CX 2477 (Jansen, Dep. at 66-67)).

320. "Accessories" include various products associated with Fittings, such as bolts, nuts, gaskets, and flanges. (McCutcheon, Tr. 2255). Glands are considered to be a Fitting accessory. (Tatman, Tr. 461). McWane sometimes sells Fittings with accessories. Fittings alone and Fittings with accessories have different price points and SKUs associated with them. (Tatman, Tr. 462-463).

321. "Municipal castings" is a category that consists of products such as manhole covers and drainage grates. (CX 2539 (McCutcheon, Dep. at 8), *in camera*; CX 2543 (Coryn, IHT at 21-22)).

b. Fitting sales

i. Fittings as commodity products

322. Fittings are commodity products produced to American Water Works Association ("AWWA") standards and specifications. (Joint Stipulations of Fact, JX0001 ¶ 7; Answer ¶ 27(a); Rybacki, Tr. 1114; CX 2477 (Jansen, Dep. at 18)).

323. Any Fitting that meets an AWWA specification is functionally interchangeable with any other Fitting that meets the same specification. (Tatman, Tr. 878-879 (referring to Domestic versus imported Fittings: "They're exact one for one. . . . There's no difference in how you apply or use the product."); Pais, Tr. 1922-1923 ("[T]he product is interchangeable. It's a common product. Yes, we like to believe our quality is better, our service is better, but at the end of the day, that really doesn't translate into a premium."); CX 2477 (Jansen, Dep. 141); Rybacki, Tr. 3572).

324. Fittings produced by Sigma, McWane and Star that meet the same AWWA specifications are interchangeable with each other. (CX 2477 (Jansen, Dep. at 86)).

ii. Demand inelasticity

325. Demand for Fittings is largely driven by housing-related infrastructure construction and by construction of wastewater treatment plants, which in turn are driven by such factors as the rate of housing growth, and the age and condition of existing systems. (Joint Stipulations of Fact, JX0001 ¶ 11; CX 2480 (Napoli, Dep. at 20-21)).

326. Fittings typically comprise 5% or less of the total cost of a typical waterworks project. (Joint Stipulations of Fact, JX0001 ¶ 10; Tatman, Tr. 220-221; CX 2477 (Jansen, Dep. at 61)). Fittings account for only 1.5% to 2% of the cost of the materials in a typical line job. (CX 2538 (McCutcheon, IHT (Vol. 2) at 344-345), *in camera*).

327. The price of Fittings is not a major factor in determining whether a Distributor wins a bid. (CX 2489

(Morrison, IHT at 37-38)). The price of the pipe (either PVC or ductile iron) is the primary factor when pricing a bundle of goods. (CX 2489 (Morrison, IHT at 37)).

328. End User demand for Fittings is not impacted by the price of Fittings. (CX 2477 (Jansen, Dep. at 81-82) (testifying that he has not observed the demand of Fittings being affected by the price of Fittings); *see also* Webb, Tr. 2723 (testifying that he has "never seen a correlation with any of our product lines up or down that impacted the demand side."); Thees, Tr. 3058 ("Q. When the price of fittings go down, do your sales of fittings go up? A. No. Q. And when the price of fittings go up, do your sales of fittings go down? A. No."); *see also* CX 2538 (McCutcheon, IHT (Vol. 2) at 344), *in camera*; (testifying that a 10% increase in price of Fittings would not prompt an End User to forego the purchase of Fittings because the Fittings are a small portion of the total cost of the project to the End User)).

iii. Bidding process

329. Some municipalities stock inventory and when they buy inventory they put out a list and purchase by line items. (CX 2502 (Prescott, Dep. at 16)).

330. Some municipalities put up for bid an annual contract for specific items, such as Fittings, hydrants, valves, PVC pipe or ductile iron pipe. (CX 2480 (Napoli, Dep. at 37-41) (describing the annual contract bidding process for some municipal governments and municipal water authorities)). Whoever is the low bidder on the contract holds the price for that item and supplies the item to the municipality for the year. (CX 2509 (Groeniger, IHT at 46)).

331. Most waterworks projects are individual projects subject to a bidding process. (CX 2516 (Sheley, Dep. at 108-109), *in camera*; CX 2504 (Thees, Dep. at 139)).

iv. Specifications

332. The Fittings bidding process on an individual waterworks project typically begins with an End User completing

a specification and publicly or privately requesting bids from contractors. (Thees, Tr. 3065-3066).

333. When a municipality or regional water authority undertakes a waterworks project, it will generally issue specifications for all of the pipes, valves, hydrants, Fittings, and related waterworks equipment needed for the project, and seek bids from contractors for its completion. (CX 2546 (Gibbs, Dep. at 61-62); CX 2504 (Thees, Dep. at 138-140) (Once a project is "put on a bid list," the contractor begins "soliciting bids from suppliers for the various components that make up that project.")).

334. Either project consulting engineers or municipal water districts (or both) write Fittings specifications. (Minamyer, Tr. 3136).

335. Once contractors receive the specification, they solicit bids and other assistance from Distributors that can supply the various products for that project. (CX 2504 (Thees, Dep. at 139)).

v. Material takeoffs

336. A contractor may request a "material takeoff" from a Distributor when the contractor wants to submit a bid for the project. (CX 2502 (Prescott, Dep. at 96).

337. A "material takeoff" is a process whereby a Distributor's sales personnel look at a project's blueprints and gather a list of materials that the End User will need to build the project. After performing a material takeoff, the Distributor provides the bidding contractor with a quotation for all of the waterworks products needed to complete the project. (Thees, Tr. 3037, 3066-3067).

338. Distributors typically do not specify the manufacturer of the Fittings when providing a material takeoff. (Thees, Tr. 3048 ("[I]t's not out of the realm of possibility that fittings may be specified by brand, but that is not as common as what you would see on . . . valves, hydrants and service brass."); CX 2492 (Johnson, Dep. at 82) ("Q. Do you ever see a supplier's name for fittings? A. Very seldom if at all.")).

vi. Submittals

339. A "submittal" is a packet of information provided by a Distributor to an End User after the Distributor has been selected that identifies the types of products and brands that are being supplied. The End User will review the submittal to make sure it conforms to the specifications. (Thees, Tr. 3066-3069; CX 2489 (Morrison, IHT at 38)). Distributors supply whatever brand was listed on the submittal documents. (*See* CX 2489 (Morrison, IHT at 38)).

vii. The sale

340. After a contractor wins its bid, it contacts the Distributor to discuss scheduling and to submit either a verbal or written purchase order. (Thees, Tr. 3069-3070). After it places the purchase order, the contractor will call to request that the Distributor release product, and the Distributor will supply product to the waterworks project either from its stock, or via a direct purchase order from the Distributor to a supplier who will deliver the product to the project site. (Thees, Tr. 3069-3070).

341. Because Fittings are a commodity, price and relationship are the dispositive factors in making a Fittings sale. (Minamyer, Tr. 3135).

342. According to Mr. Jansen of McWane, price was becoming more important than relationship and Distributors' customers were becoming more price sensitive. (CX 2477 (Jansen, Dep. at 143-144)).

343. Typically, the Fittings supplier with the lower price wins the job. (CX 2480 (Napoli, Dep. at 60)).

viii. Shipping

344. There is generally a time lag between the date of the Fittings bid and order to the date of shipment or delivery. The time period between order and delivery varies depending on the market. Delivery can take place any time from immediately to as long as 1 year, but typically is between two or three weeks to two

months. (CX 2502 (Prescott, Dep. at 16); CX 2504 (Thees, Dep. at 93); CX 2522 (Agarwal, Dep. at 89), *in camera*).

345. The prices reflected in Fittings invoice data typically reflects market pricing of 30 to 60 days prior to the invoice. (CX 1181 at 003).

c. Domestic and open specifications

346. End Users and/or their consulting engineers who write the specifications determine whether a job requires Fittings that are manufactured domestically in the United States. (Answer ¶ 19; Webb, Tr. 2732-2733).

347. A "Domestic" or "domestic-only" specification or project requires Fittings manufactured in the United States to be used for that waterworks project, either because of End User preference or because it is required by municipal, state, or federal law. (Joint Stipulations of Fact, JX0001 ¶ 13; Tatman, Tr. 236, 273; McCutcheon, Tr. 2265-2266).

348. The Commonwealth of Pennsylvania, federal government projects, Air Force bases, and some municipalities around the country require Domestic Fittings, even without the Buy American provisions in ARRA. (McCutcheon, Tr. 2267-2268; CX 2523 (Bhattacharji, Dep. at 127); CX 2531 (Rybacki, Dep. at 270-272); Rona, Tr. 1520-1521; Webb, Tr. 2732-2733; RX 637 (Jansen, Dep. at 99-100)).

349. Projects that do not require that Domestic Fittings be used – *i.e.*, that allow Fittings manufactured anywhere in the world – are referred to as "open specification" projects. (Tatman, Tr. 273-274; McCutcheon, Tr. 2266).

350. Domestically manufactured Fittings can be used in open specification projects, but imported Fittings cannot be used in domestic-only projects. (CX 2516 (Sheley, Dep. at 155-156), *in camera*; CX 2501 (Prescott, IHT at 41); Thees, Tr. 3056, 3078; Webb, Tr. 2717-2718; CX 2510 (Groeniger, Dep. at 171)).

351. At various times, McWane has referred to the mix of imported and domestically manufactured Fittings that it supplies to open specification projects as "blended" or "non-Domestic" Fittings. (Tatman, Tr. 273-274 (discussing RX410, 2008 blended and domestic multiplier maps); CX 2440 at 002 ("Non-Domestic" multiplier map); Tatman, Tr. 320-321 (discussing CX 2440)).

352. Waterworks jobs that require Domestic Fittings generally will also require domestically manufactured restraints, glands, and other accessories. (Tatman, Tr. 463).

d. Market Structure

i. Suppliers

353. McWane, Sigma, and Star each sell Fittings, joint restraints, castings, and accessories. (McCutcheon, Tr. 2254-2255; CX 2528 (Pais, Dep. at 7-8); CX 2442-A at 001; Tatman, Tr. 319, 1009-1010).

354. In 2008 and 2009, and "historically for a number of years," McWane's primary competitors in the Fittings market in the United States were Sigma and Star. (Tatman, Tr. 245; CX 2480 (Napoli, Dep. at 59-60); Pais, Tr. 1904, 2005-2006; CX 2536 (Leider, Dep. at 18)).

355. Over 90% of all Fittings sold in the United States are sold by three suppliers, McWane, Sigma, and Star. (Tatman, Tr. 240-242, 559-560 (estimating 2008 through 2009 combined market share of 90% to 92%, including Fittings above 24" in diameter); Pais, Tr. 1981-1982 (estimating combined market share of 91% or 92%); McCutcheon, Tr. 2256 (estimating combined market share between 90% and 95%); CX 1163 at 006 (August 4, 2008 Pais email describing McWane, Sigma, and Star as the three suppliers of AWWA fittings, with McWane holding a 45% market share, Sigma holding about 30% and Star holding about 20%)).

356. McWane, Sigma, and Star had the following shares of United States Fittings sales, by tonnage, for the years 2007 through 2011:

	2007	2008	2009	2010	2011
McWane	[redacted]				
Sigma	[redacted]				
Star	[redacted]				

(CX 2260-A (Schumann Rep. at 18 tbl. 1), *in camera*).

357. McWane and Star had the following shares of United States Domestic Fittings sales, by tonnage, for the years 2010 and 2011:

	2010	2011
McWane	[redacted]	
Star	[redacted]	

(CX 2260-A (Schumann Rep. at 19 tbl. 2), *in camera*).

358. Suppliers Metalfit, SIP, NAPAC, NACIP, Electrosteel and ACIPCO constitute the share of the United States Fittings market not belonging to McWane, Star and Sigma. (CX 2260-A (Schumann Rep. at 18); McCutcheon, Tr. 2255-2256 (estimating combined market share of these companies at 5% to 10% of Fittings sales (in tons)).

359. As described in a 2009 McWane budget planning document, McWane's "primary competitors" in Fittings are Sigma and Star, with SIP and NAPAC as "[s]econd tier" competitors. (RX 618 at 004 (noting that Electrosteel was a potential entrant in 2009)).

360. Pricing decisions of companies such as ACIPCO, NAPAC, and Metalfit do not affect the ability of McWane, Sigma, and Star to implement a price increase. (CX 2538 (McCutcheon, IHT (Vol. 2) at 394), *in camera*).

361. Sigma and Star have larger shares in the market for large fittings (over 24" in diameter), in which McWane is not as significant a competitor. (Schumann, Tr. at 4111 ("only about 5 percent of the large fittings were produced by McWane in 2008 . . . ."); CX 2531 (Rybacki, Dep. at 198) (large fittings "was [Sigma's] strong point and Star's strong point as well . . . ."); Pais,

Tr. 1915 (McWane "never had a plant work specialty" and "[f]or a long time they did not even produce most of the fittings used in plant work, such as the larger ones")).

362. The Fittings Market is an oligopoly. (F. 353-361; Schumann, Tr. 5796-5797; CX 2260-A (Schumann Rep. at 25).

ii. End Users

363. Municipalities typically outsource large waterworks projects to contractors. (CX 2489 (Morrison, IHT at 31) ("Typically a municipality is not going to have enough people on the payroll to be able to do a major project.")).

364. The relationship between Distributors and contractors is very important, although this has deteriorated due to the economic decline in the United States and pricing pressure. Contractors typically deal with a limited number of waterworks Distributors and tend to use some Distributors more than others. (CX 2477 (Jansen, Dep. at 18-19); CX 2480 (Napoli, Dep. at 15); CX 2489 (Morrison, IHT at 22-23) (explaining that 75% to 80% of C.I. Thornburg's contractor customers are giving 80% to 90% of their business to them); CX 2501 (Prescott, IHT at 30, 32) (some contractor customers give all of their business to one Distributor)).

365. Contractors typically look to work with Distributors with whom they have relationships and that are close geographically. (*See* CX 2489 (Morrison, IHT at 10); CX 2480 (Napoli, Dep. at 13-15); CX 2477 (Jansen, Dep. at 18-19)).

366. End Users may shift their business to a different Distributor if a Distributor fails to provide them with all the goods they require. (CX 2501 (Prescott, IHT at 58); CX 2489 (Morrison, IHT at 29); CX 2489 (Morrison, IHT at 75) (It would be "devastating" to a Distributor if it could not supply Fittings on a project: "I'm choosing the word 'devastating.' I mean, it would not be good to not be able to supply fittings.")).

iii. Distributors

GENERALLY

367. McWane, Sigma, Star, and others sell Fittings directly to Distributors, which then resell the Fittings to End Users. (Joint Stipulations of Fact, JX0001 ¶ 14; Tatman, Tr. 251-252 (99% of McWane's sales of ductile iron pipe fittings are through Distributors, rather than direct to contractors); McCutcheon, Tr. 2256-2257).

368. Distributors generally obtain quotes for specific projects from more than one Fittings supplier, in order to negotiate lower net prices. (RX 643 (Tatman, IHT at 77-78)).

369. In 2008, Illinois Meter played Fittings suppliers off one another in order to try and negotiate better prices. (Sheley, Tr. 3444-3445).

370. Distributors sell pipe, valves, hydrants, and other waterworks products, appurtenances, and accessories, in addition to Fittings. (Webb, Tr. 2706; Thees, Tr. 3050-3051; RX 705 (Gibbs, Dep. at 10-13); RX 675 (Sheley, Dep. at 11); RX 650 (Morrison, Dep. at 18-19); RX 661 (Prescott, Dep. at 8-9)).

371. Fittings typically comprise a relatively small portion of a Distributor's business. (Thees, Tr. 3111; RX 705 (Gibbs, Dep. at 12-13); RX 672 (Webb, IHT at 42); RX 652 (Johnson, Dep. at 9-10); RX 661 (Prescott, Dep. at 10-11); RX 703 (Coryn, Dep. at 11-12); RX 669 (Groeniger, Dep. at 13)).

372. The relationship between Fittings suppliers and Distributors is important to the success in selling Fittings because Fittings are a commodity product. (CX 2477 (Jansen, Dep. at 18-19); CX 2480 (Napoli, Dep. at 13-15)).

373. Sigma and Star sell almost all of their Fittings to Distributors. (Rybacki, Tr. 1094-1095; CX 2531 (Rybacki, Dep. at 290); CX 2527 (Pais, IHT at 38-39); CX 2534 (Bhutada, IHT at 9), *in camera*; McCutcheon, Tr. 2256-2257, 2260, 2263; Minamyer, Tr. 3134; CX 2526 (Minamyer, Dep. at 110)).

374. All or virtually all of McWane's sales of Fittings are to Distributors. (Joint Stipulations of Fact, JX0001 ¶ 15; Tatman, Tr. 252; CX 2477 (Jansen, Dep. at 17)).

NUMBERS AND MARKET SHARE OF DISTRIBUTORS

375. There are at least 630 separate waterworks Distributors in the United States. Most of these Distributor customers are small, local companies with just one or a few distribution yards. There are a few regional waterworks Distributors, with multiple branches, and two national waterworks Distributors. Collectively, all of these customers make up thousands of branch locations throughout the United States. (CX 2564 (McWane sales data); CX 2504 (Thees, Dep. at 14-15); Saha, Tr. 1170 (noting 3,000 to 4,000 branches nationwide)).

376. Regional waterworks Distributors with multiple branches serving specific regions of the country include E.J. Prescott, Groeniger & Company, C.I. Thornburg Company, and Illinois Meter Company. (F. 253, 258, 262-263, 268-269).

377. HD Supply and Ferguson are the two largest Fittings Distributors and each has a national presence. (McCutcheon, Tr. 2261; Thees, Tr. 3045). Together, HD Supply and Ferguson have about 50% of the Fittings distribution market share in the United States. (F. 378-379).

378. HD Supply's Fittings distribution market share is approximately 28% to 35%. (McCutcheon, Tr. 2261; Webb, Tr. 2703-2704). HD Supply carries as much as $174,000,000 in inventory at any given time. (RX 673 (Webb, Dep. at 48)).

379. Ferguson is the second largest waterworks Distributor in terms of sales in the United States, with a share of the overall waterworks distribution market of approximately 25%. (Joint Stipulations of Fact, JX0001 ¶ 25; RX 663 (Thees, Dep. at 15); Thees, Tr. 3045-3046).

380. McWane sells its Fittings to about 250 to 300 Distributors that have approximately 1200 total branches. (CX 2477 (Jansen, Dep. at 139-140)).

DISTRIBUTORS' RELATIONSHIPS WITH END USERS

381. It is beneficial for End Users to purchase waterworks products from Distributors rather than directly from suppliers because Distributors bundle waterworks products together, provide a single point of contact for all products, find alternate supply sources when needed, and have local relationships and local specification knowledge. (Thees, Tr. 3058-3059; CX 2510 (Groeniger, Dep. at 202); CX 2504 (Thees, Dep. at 145-146); CX 2480 (Napoli, Dep. at 29-31)).

382. End Users typically source all of their waterworks for a particular project from a single Distributor, as a "one stop shop," because doing so allows them to access service, payment and delivery from a single source, rather than duplicating administrative effort with various sources. (Webb, Tr. 2723, 2707; Thees, Tr., 3060; CX 2489 (Morrison, IHT at 31-32); CX 2501 (Prescott, IHT at 25); Sheley, Tr. 3388; CX 2537 (McCutcheon, IHT (Vol. 1) at 73-74), *in camera*; CX 2544 (Coryn, Dep. at 102); CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2513 (Webb, IHT at 135-136); CX 2502 (Prescott, Dep. at 81); CX 2480 (Napoli, Dep. at 30)).

383. Most waterworks distribution business is conducted on a bid-by-bid basis. Infrequently, Distributors will sometimes enter into contracts for up to one year with a municipality. (Thees, Tr. 3052). These up to one year contracts require Distributors to supply specific items at an agreed upon price for a customer, primarily municipalities. (CX 2509 (Groeniger, IHT at 46)).

384. Most End Users deal primarily with two or three Distributors, rather than fielding bids from a broader array of Distributors, in order to receive the best service and price. (Webb, Tr. 2725-2726; Sheley, Tr. 3392).

385. The vast majority of Ferguson's and HD Supply's customers are repeat customers. (Thees, Tr. 3064-3065; Webb, Tr. 2726).

386. Distributors compete with each other on the basis of price, service, and relationship with the End User. (Sheley, Tr. 3390-3391; Thees, Tr. 3062; CX 2502 (Prescott, Dep. at 12-13) ("price gets involved, but if it was just price a small company like this we would have a hard time surviving"); CX 2489 (Morrison, IHT at 37) (along with price, "there's no doubt service is a factor and your personal relationship . . .")).

387. End Users demand a high level of service such as timely delivery, trouble-shooting during the job, and competitive pricing. (Thees, Tr. 3061; Webb, Tr. 2723-2726 (Distributor's ability to "provide on time deliveries, 95% order fill rates, zero errors" is the most important factor to End User Fittings customers in selecting a Distributor, followed by price and relationship); CX 2502 (Prescott, Dep. at 12)).

LOCAL NATURE OF DISTRIBUTION BUSINESS

388. A Distributor's service area is generally 50 to 200 miles from its branch location, depending on population, geography, and driving patterns. Branch service areas tend to be smaller in more densely populated areas. (CX 2502 (Prescott, Dep. at 58); Webb, Tr. 2701-2702; Thees, Tr. 3044; Sheley, Tr. 3382; CX 2501 (Prescott, IHT at 9-10); CX 2489 (Morrison, IHT at 9); CX 2509 (Groeniger, IHT at 28-31)).

389. Distributors primarily service waterworks projects in their own service area but may also serve another area, when a customer has a project outside the service area. (CX 2502 (Prescott, Dep. at 59); Sheley, Tr. 3383).

390. Generally, it is difficult for an out-of-area Distributor to compete with the logistics and service of a local branch, local sales people, and locally stocked product. Delivery is also more expensive for out-of-area Distributors. (Webb, Tr. 2700-2701; Sheley, Tr. 3382).

DISTRIBUTORS' RELATIONSHIPS WITH FITTINGS SUPPLIERS

391. Distributors consider price, service, relationship, financial stability, warranty, and product quality when selecting a

Fittings supplier. (Thees, Tr. 3082-3083; Webb, Tr. 2746-2747; CX 2489 (Morrison, IHT at 61)).

392. Distributors generally purchase Fittings from at least two different suppliers. (McCutcheon, Tr. 2258-2259; Webb, Tr. 2746 (HD Supply purchases imported Fittings from McWane, Sigma, and Star); Thees, Tr. 3082 (Ferguson purchases imported Fittings from McWane, Sigma, and Star); *but see* Sheley, Tr. 3406 (Illinois Meter purchases Domestic Fittings from McWane only).

393. Distributors generally can obtain better pricing on Fittings when they have the option of purchasing Fittings from multiple suppliers. (Sheley, Tr. 3444-3445; CX 2489 (Morrison, IHT at 61-63); CX 2513 (Webb, IHT at 172)).

394. A Distributor generally will purchase Fittings from another Distributor only as a last resort when it is required to service a customer. Purchasing from competitors is more expensive and not routine. (Webb, Tr. 2726-2727; Thees, Tr. 3065).

DISTRIBUTOR PRICING

395. Higher Fittings prices are helpful to Distributors from a revenue standpoint, but are not helpful from a profit margin standpoint. Generally, higher dollars obtained from higher prices can be advantageous for a Distributor. (RX 672 (Webb, IHT at 144-146)).

396. Some Distributors may prefer higher market prices for Fittings because decreases in Fittings prices decreases the value of their inventory. (Rybacki, Tr. 1110-1111; Minameyer, Tr. 3246).

397. The senior managers of some Distributors will pressure suppliers to take price increases, but lower pricing is preferred by those at the branch level. (Minameyer, Tr. 3246-3247).

398. Distributors pass along to customers increases in wholesale prices of Fittings; and when wholesale prices go down, the competitive forces of the market will demand that such

reductions also be passed on to End Users. (CX 2489 (Morrison, IHT at 98-99); CX 2513 (Webb, IHT at 144-145)).

399. Distributors make higher profit margins on sales of valves, hydrants, and Fittings, than on sales of pipe. (Sheley, Tr. 3387; CX 2503 (Thees, IHT at 22); CX 2489 (Morrison, IHT at 32)).

DISTRIBUTOR BENEFITS TO FITTINGS SUPPLIERS

400. For McWane, Distributor benefits include offering better sales coverage than McWane would have with its sales force alone; Distributors have more local influence and more local knowledge of projects in their market area; Distributors carry local inventory; Distributors offer one-stop shopping for all needed waterworks products for the End User; Distributors help McWane's products be included in specifications; and Distributors streamline McWane's account receivables by taking the risk of non-payment from contractors. (CX 2477 (Jansen, Dep. at 139-141, 144-145); CX 2480 (Napoli, Dep. at 29-31)).

401. McWane views Distributors as being "critical to [its] success." (CX 2477 (Jansen, Dep. at 139-141, 144-145, 150); CX 0169 at 003; CX 2480 (Napoli, Dep. at 29-31)).

402. Distributors are critical to Star. (CX 2537 (McCutcheon, IHT (Vol. 1) at 41-46), *in camera* (listing efficiencies Distributors provide to suppliers and describing the cost to replicate these efficiencies as "astronomical"); CX 2534 (Bhutada, IHT at 9-15), *in camera* (Distributors perform a variety of functions at a local level that would be prohibitively expensive for Star to perform)).

403. Distributors' carrying Fittings inventory frees up the suppliers' working capital; and it provides much faster delivery service from the Distributors' local branches to End Users than a Fittings supplier could achieve by selling directly to End Users. (Webb, Tr. 2728-2730; Thees, Tr. 3059-3060; CX 2534 (Bhutada, IHT at 10, 19-20), *in camera*; CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2504 (Thees, Dep. at 145-146); CX 2494 (R. Fairbanks, Dep. at 95-96) ("Distributors are stocking distributors, and so there's just a wide

variety of fittings that can be on a project. And so the advantage is, is that, one is it could be in stock, and two is it can be almost immediate deliveries due to stock. And also deliveries, because there might be other products going out on the job site."); Sheley, Tr. 3398 ("A manufacturer can't reasonably service a small municipality or a small contractor. There has to be local inventory, local delivery, a local contact person, if you will. It would be . . . uneconomical for every party involved . . . ."); CX 2477 (Jansen, Dep. at 145)).

404. Providing inventory within a close proximity to the waterworks projects that the Distributor is servicing can help prevent expensive work delays if a Fitting is missing or malfunctioning. (CX 2502 (Prescott, Dep. at 79); CX 2489 (Morrison, IHT at 55); CX 2509 (Groeniger, IHT at 26-28)).

405. Distributors maintain an inventory and aggregate small orders and shipments from contractors, which typically purchase small numbers of Fittings for individual projects. (CX 2502 (Prescott, Dep. at 81); Sheley, Tr. 3387; CX 2534 (Bhutada, IHT at 19), *in camera*).

406. Distributors provide local freight for deliveries from the Distributor's warehouse to the contractor's job site. (CX 2534 (Bhutada, IHT at 10), *in camera*).

407. Contractors often purchase on credit, and Distributors carry the resulting credit risk. Suppliers avoid credit costs by dealing through Distributors. (CX 2534 (Bhutada, IHT at 12-13), *in camera*; Webb, Tr. 2729; CX 2502 (Prescott, Dep. at 81); McCutcheon, Tr. 2260; CX 0169 at 003 (January 2010 McWane Sales Managers Conference Call minutes noting benefits of distribution to include Distributors "carry[ing] the paper and inventory and once in a great while do spec work")).

408. Distributors employ sales personnel dedicated to identifying business opportunities and servicing End Users, saving suppliers from having to employ their own large, nationwide sales forces. (CX 2480 (Napoli, Dep. at 31); McCutcheon, Tr. 2260-2261; Webb, Tr. 2728; CX 2534 (Bhutada, IHT at 12-13, 19-20), *in camera*; CX 2544 (Coryn, Dep. at 103);

CX 2546 (Gibbs, Dep. at 65-66); CX 2502 (Prescott, Dep. at 46); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2504 (Thees, Dep. at 145-146)).

409. Distributors support End Users through technical assistance and training regarding waterworks jobs, and by packaging up the discrete waterworks components and making sure that all pieces that the customer needs have the correct characteristics and arrive on time. In addition, End Users pay Distributors directly, rather than paying individual suppliers, and provide a higher level of service than a supplier would, including small-volume deliveries and 24-hour service. (Sheley, Tr. 3399-3401).

410. Distributors handle returns of products from the contractor. (CX 2534 (Bhutada, IHT at 11, 20), *in camera*; Webb, Tr. 2729-2730).

411. Distributors manage the extension of credit, invoicing, and collection, which saves suppliers the costs and risks of these functions. (CX 2544 (Coryn, Dep. at 102-103); CX 2510 (Groeniger, Dep. at 202); CX 2516 (Sheley, Dep. at 127-128), *in camera*; CX 2504 (Thees, Dep. at 145-146); CX 2494 (R. Fairbanks, Dep. at 96); CX 2502 (Prescott, Dep. at 81)).

412. Distributors have local knowledge of what is required in each specific market that they are servicing. (CX 2489 (Morrison, IHT at 55); CX 2480 (Napoli, Dep. at 30).

e. How Prices Are Set

i. List Prices and multipliers

413. Published Fittings prices have two components: a nationwide list (or catalog) price, and a regional "multiplier" that reduces the list price. (Tatman, Tr. 277; Rybacki, Tr. 1096-1097; CX 2535 (Bhutada, Dep. at 102); Webb, Tr. 2770-2771).

414. The "published price" or "standard price" for a given Fittings item in a given state is the list price multiplied by the then-applicable multiplier for that state. For example, if a Fitting has a $1,000 list price, and the Texas multiplier is .28, the

published price for that individual Fitting in Texas will be $1,000 x .28, or $280. (Tatman, Tr. 277; Rybacki, Tr. 1096-1097; CX 2535 (Bhutada, Dep. at 102); Webb, Tr. 2770-2771).

415. McWane publishes its list price for its Fittings on the Tyler/Union website. (RX 644 (Tatman, Dep. at 15)).

416. Historically, Fittings suppliers have published list price increases once per year, or once every couple of years. (Tatman, Tr. 256-257).

417. List price changes usually occur during the first quarter of a calendar year. (Sheley, Tr. 3421-3422, 3436-3437).

418. Virtually no Fittings customer pays list price for Fittings. (RX 639 (McCullough, Dep. at 170); McCutcheon, Tr. 2269; Rybacki, Tr. 1096-1097).

419. Multipliers are published discounts off a Fittings supplier's published list price. (RX 639 (McCullough, Dep. at 170-171); RX 644 (Tatman, Dep. at 15)).

420. Multipliers vary from state to state based upon the prevailing competitive environment in each state. (Tatman, Tr. 277; CX 2526 (Minamyer, Dep. at 102)).

421. Distributors prefer that Fittings suppliers like McWane, Sigma, and Star have identical list prices because it is easier for Distributors to compare the suppliers' multipliers and discounts to determine net prices when the suppliers' published list prices are the same. (Tatman, Tr. 257-258; McCutcheon, Tr. 2527-2528, 2271; RX 694 (Bhutada, Dep. at 101-102)).

422. Multiplier changes are cheaper to implement than list price changes, because the cost of printing and distributing new list pricing booklets to customers can cost tens of thousands of dollars. (Tatman, Tr. 255-257; RX 644 (Tatman, Dep. at 43-46); Rybacki, Tr. 3542).

423. Fittings suppliers typically announce multiplier changes to their customers by letter. (Sheley, Tr. 3437).

424. McWane typically announces increases in published prices four weeks before the increase goes into effect. (Tatman, Tr. 325). Customers normally want four weeks' notice, three weeks is "on the verge" of acceptable notice, and two weeks is too little notice. (Tatman, Tr. 519).

425. Typically, the highest price at which a Fitting can be sold is the published multiplier. (Tatman, Tr. 258).

426. Although not normally the case, on occasion, McWane sells Fittings at a price higher than the published multiplier; for example, if there is a special add-on, such as a special coating or added piece, or if there is special handling, such as a rush order. (Tatman, Tr. 443-444, 448).

427. The primary factor driving McWane's pricing decisions is the competitive price level in the marketplace. A secondary factor is that the pricing level must be above a minimum margin that allows McWane to make money. (Tatman, Tr. 289-290).

ii. Project Pricing and other discounts

428. "Job prices," "special prices," or "project prices" are discounts off the published multiplier. (RX 643 (Tatman, IHT at 37-38); McCutcheon, Tr. 2271-2272 (collectively, "Project Pricing")).

429. Historically, Project Pricing has been the standard practice in the Fittings market. (RX 639 (McCullough, Dep. at 189-190); RX 638 (McCullough, IHT at 220); Rybacki, Tr. 1101-1108).

430. In addition to its published multipliers, McWane has historically offered its customers a variety of further price reductions for Fittings, including special, project or job-pricing discounts off the published multipliers, as well as other price concessions including freight concessions, cash discounts, extended payment terms, cash-backs, corporate rebates, and branch rebates. (Tatman, Tr. 257-260; *see* F, 441, 443-456).

431. Project Pricing generally takes the form of a price multiplier that is lower than the published multiplier and may be negotiated for an entire project or job, or on a one-time basis for a single order. (CX 2535 (Bhutada, Dep. at 105-106)).

432. Approximately 90 to 95% of Star's net realized prices to the customer have some type of discount variable to them. (McCutcheon, Tr. 2509-2510).

433. Star further offers a discount called a "buy plan," which is "a negotiated price" with a Distributor that constitutes that Distributor's "everyday" purchase price and is not necessarily attached to a project. (McCutcheon, Tr. 2274).

434. A sales person will often convey a job price verbally to a customer, but then may also provide the customer with a copy of a written proposal or quotation. (Sheley, Tr. 3437; RX 698 (McCutcheon, Dep. at 57)).

435. Project Pricing is not published and is therefore less transparent than the published list prices and multipliers. (Tatman, Tr. 266-268, 927 (describing responding to Project Pricing as "shooting in the dark")).

436. If Star was offering a Project Price for a particular project, it would not want its competitors to know what Project Price it was offering, for the fear that the competitors would price lower than Star to try to take the project. (Minamyer, Tr. 3145).

437. At times, McWane, Sigma, and Star have provided additional discounts and price concessions to Distributors, separate from Project Pricing, in the form of rebates, reductions in freight charges, and/or extensions of credit or payment terms. The foregoing concessions are part of the "total deal." (Joint Stipulations of Fact, JX0001 ¶ 16; Minamyer, Tr. 3266-3267).

438. Once the various forms of price discounts are combined, including Project Pricing, corporate rebates, branch rebates, cash discounts and freight terms, are taken into account, a Fittings supplier's "net price is all over the map." (RX 694 (Bhutada, Dep. at 17-18)).

439. Even if a sale is made at the published price, the net price may be lower based upon other concessions, such as rebates, timely payment discounts, or freight allowances. (Tatman, Tr. 257-260; RX 644 (Tatman, Dep. at 15-17)).

440. Project Pricing is generally negotiated in relation to a specific job and is a reaction to the competitive environment. Price concessions such as rebates and payment terms are generally not negotiated on a job-by-job basis, but rather on an annual basis. Negotiation of the multiplier is the big factor, because other terms such as payment terms and rebates are already set. (Minamyer, Tr. 3143-3144; RX 644 (Tatman, Dep. at 27); Webb, Tr. 2774; *see also* F. 443-449).

441. Fittings suppliers may agree to lower freight costs, or provide a discount in exchange for timely payment, as part of arriving at a final transaction price. Competing suppliers try to hide these terms from one another. As Mr. Tatman of McWane stated: "Because of rebates or we agreed to take his payment terms to 90 days or we agreed to lower his freight terms or we said if you pay us on time, rather than taking a 2 percent cash discount, we'll give you 5. There's all sorts of mechanisms for driving price. And the reason why that's there is, quite frankly, we're all trying to hide from our competitors what we're doing." (Tatman, Tr. 1017-1019, *in camera*; *see also* Minamyer, Tr. 3266-3267).

442. Price competition among Fittings suppliers takes place principally through Project Pricing, and to a lesser extent, through other price concessions such as rebates, reductions in freight charges, and/or extensions of credit or payment terms. (F. 428-441, 443-456).

iii. Rebates

443. A "rebate" is a percentage discount on all purchases by a Distributor from a supplier during a specific time period, typically for a year. (Minamyer, Tr. 3143; RX 655 (Brakefield, Dep. (Vol. 2) at 28-29); Tatman, Tr. 297-298; CX 2480 (Napoli, Dep. at 102-103)).

444. A "corporate rebate" is a percentage discount based on all purchases by all branches of a Distributor. A corporate rebate is generally negotiated between the supplier and the corporate headquarters of a Distributor. (CX 2535 (Bhutada, Dep. at 107-108), *in camera*).

445. A "branch rebate" is a percentage discount based on purchases by an individual branch of a Distributor. (CX 2535 (Bhutada, Dep. at 109), *in camera*; Tatman, Tr. 298-299).

446. McWane offers one-year to three-year corporate rebate agreements to its largest Distributor customers that are based on the Distributors' total purchases of Fittings and other products manufactured by McWane, such as ductile iron pipes, hydrants, and valves. (Tatman, Tr. 297-298).

447. The value of rebates to Distributors on Fittings can be greater than the Distributors' net profits from the sales of Fittings. (CX 2534 (Bhutada, IHT at 57-58)).

448. Gross sales figures in McWane's financial reports are netted out of rebates. If a sale is for $100 and there is a $15 rebate, the sale will be booked for $85. (CX 2481 (Nowlin, Dep. at 22-23, 111-112)).

449. Distributors look at rebates differently than Project Pricing because rebates do not apply to a specific job that a Distributor is bidding, and are instead usually applied on an annual basis. (Webb, Tr. 2774).

iv. Freight terms

450. Each supplier has standard freight terms pursuant to which it will pay for shipping of Fittings to Distributors and may also negotiate separate agreements with Distributors whereby the supplier will pay for freight outside of the standard terms for a specific project. (Tatman, Tr. 303-304; CX 2531 (Rybacki, Dep. at 24); CX 2535 (Bhutada, Dep. at 110)).

451. McWane's standard freight term is "full freight allowed," or free shipping, for all purchases of at least 5,000

pounds of McWane products, including Fittings. (Tatman, Tr. 303-304). McWane sometimes offers shipping "discounts" to customers, by providing free shipping for quantities less than 5,000 pounds. (Tatman, Tr. 304).

v. Payment terms

452. Payment terms are discounts that suppliers provide to Distributors for payment within a fixed amount of time. (Minamyer, Tr. 3143; Tatman, Tr. 304-305).

453. A "cash discount" is a discount that a supplier extends to an individual purchase by a Distributor if payment is made within a certain period of time, *e.g.*, 2% off if payment is made within 60 days. Generally, the terms of a cash discount are negotiated between the supplier and a Distributor at the start of the fiscal year. (CX 2535 (Bhutada, Dep. at 109), *in camera*).

454. The majority of McWane's customers are subject to McWane's standard payment terms, which provide a 2% discount for payment by the 15th of the month following the order. Most Distributor customers pay within McWane's standard payment terms. (Tatman, Tr. 304-305; CX 2479 (McCullough, Dep. at 174-175)).

455. McWane has offered longer payment terms – up to 90 days – to some customers, as well as discounts of up to 6% for on time payments. (Tatman, Tr. 305).

456. Star also extends cash discounts for paying within Star's payment terms. Star extends such cash discounts to 95% or more of its customers. (CX 2535 (Bhutada, Dep. at 109-110), *in camera*).

vi. Effects of Project Pricing

457. Project Pricing lowers the prevailing transaction price in a given geographic area. This happens when one supplier offers a Project Price, and the other suppliers seek to match or beat it, or when as other Distributors in the region learn of the Project Price, Distributors demand the same discount, so as to be competitive on their bids to the End User for the same job.

(Rybacki, Tr. 1107-1108; CX 2484 (Tatman, Dep. at 27); CX 2480 (Napoli, Dep. at 84-85)).

458. Mr. Tatman defines pricing "instability" as occurring when Project Pricing in a region results in average invoice prices 10% or more below published pricing. (Tatman, Tr. 283-284, 332-333).

459. Project Pricing can bring down the market price because if a supplier offers a special price to one Distributor, then the supplier needs to be prepared to offer that special price to all Distributors bidding on that project. Those Distributors then expect that lower price in later projects, and the spiral of declining prices can lead to zero gross margin. (CX 2480 (Napoli, Dep. at 46-47)).

460. Project Pricing can cause price erosion and thereby contributes to a lower "bottom line" for suppliers. To the extent that Project Pricing causes price erosion and lower profits, Project Pricing is not good for a supplier's long-term health, and therefore, suppliers would prefer not to offer Project Pricing. (Rybacki, Tr. 1105, 1107-1108; CX 2531 (Rybacki, Dep. at 221, 224); *see also* CX 2480 (Napoli, Dep. at 46, 83-85); CX 2485 (Walton, Dep. at 31-34)).

461. Project Pricing is inconsistent with consistent and disciplined pricing. (Rybacki, Tr. 3523).

5. Economic background

462. A few decades ago, most Fittings used in waterworks projects in the United States were manufactured in the United States. Full line Fittings manufacturers included U.S. Pipe, Griffin, and ACIPCO. (Tatman, Tr. 1046-1047; RX 644 (Tatman, Dep. at 191); RX 675 (Sheley, Dep. at 57)).

463. Beginning in the mid-1980s, importers began to successfully convert End Users' specifications for domestically produced Fittings to open specifications, which permitted the use of both domestic and imported Fittings. (RX 644 (Tatman, Dep. 192-93); RX 694 (Bhutada, Dep. 12-13)). This process

accelerated during the 1990s and 2000s, with non-domestic Fittings comprising the vast majority of the Fittings market by 2005. (Tatman, Tr. 879).

464. During the past 15 to 20 years, Domestic Fittings sales in the United States have declined, while non-domestic Fittings sales have increased. (RX 675 (Sheley, Dep. 53-54); RX 646 (Burns, Dep. at 20-21); Normann, Tr. 4836-4837).

465. Over the past 25 years, Sigma's non-domestic fittings sales in the United States have steadily grown. (Pais, Tr. 1977-1978; RX 687 (Pais, Dep. at 9-10)).

466. Since Star started selling Fittings in the United States in 1985, Star's non-domestic sales have steadily grown. (RX 694 (Bhutada, Dep. at 6-7); McCutcheon, Tr. 2578, 2584-2585.

467. Non-domestic Fittings have accounted for the majority of sales of Fittings in the United States in the last five years. (Joint Stipulations of Fact, JX0001 ¶ 5).

468. In the 1990s and early 2000s, Fittings manufactured in countries such as China, India, Korea and Mexico were far less expensive than Fittings produced in the United States, because production costs in those countries are lower. (Tatman, Tr. 275, 879; RX 642 (Page, Dep. at 112); RX 646 (Burns, Dep. at 20-21); RX 658 (Keffer, Dep. at 58); RX 672 (Webb, IHT at 71-73)).

469. In 2003, McWane filed a complaint before the International Trade Commission ("ITC") to challenge dumping by Fittings importers, seeking to have tariffs imposed on non-domestically produced fittings. (RX 730 at 009, 011).

470. In December 2003, the ITC determined that Fittings from China were "being imported into the United States in such increased quantities or under such conditions as to cause market disruption" to domestic Fittings producers. (RX 730 at 009).

471. In December 2003, the ITC found that imported Fittings manufactured in China were materially injuring the domestic Fittings producers in the United States, but the President

declined to impose the recommended tariff. (RX 730 at 011, 023-026; RX 642 (Page, Dep. at 18-19)).

472. U.S. Pipe, Griffin, and ACIPCO either dramatically reduced or exited domestic Fittings production in the face of cheap imports from China, Korea, India, Mexico, and Brazil. (Tatman, Tr. 275; RX 730; RX 646 (Burns, Dep. at 25-28); RX 643 (Tatman, IHT at 47-51); RX 701 (Morton, Dep. at 10)). ACIPCO continues to make Fittings in the United States ranging from 30 in diameter" to 64" in diameter. (CX 1897 at 003; CX 2486 (Burns, Dep. at 15, 17, 23-28); CX 2521 (Agarwal, IHT at 19-20)).

473. ACIPCO exited the manufacture of Fittings under 30" in diameter in 2006. (CX 1897 at 002; CX 2486 (Burns, Dep. at 15, 17, 23-28); CX 2521 (Agarwal, IHT at 19-20)).

474. U.S. Pipe ceased domestic production of Fittings at its Chattanooga, Tennessee manufacturing facility in 2006 because it concluded that it could not justify the continued operation of the plant given the low volumes of domestic fittings being sold. (Morton, Tr. 2863-2864; RX 701 (Morton, Dep. at 10)).

475. Griffin ceased domestic production of Fittings several years ago. (Tatman, Tr. 198; RX 643 (Tatman, IHT at 47); CX 2508 (Kurhts, Dep. at 18-20)).

476. By late 2007, McWane was "the last guy standing producing fittings domestically" in the under 30-inch diameter segment of the Fittings market. (RX 643 (Tatman, IHT at 47)).

477. In the fall of 2008, McWane closed its Domestic Fittings manufacturing facility in Tyler, Texas, in part because of cheaper imports, which caused underutilization of McWane fittings plants and unsustainable production levels. (Tatman, Tr. 963-968 ("I've got high inventory levels and I don't have enough demand, domestic only, to keep up with production. And if I start substituting domestic product with my import sales, I have to wrap a dollar bill around it. And if I did that, then I don't know what to do with the plant I just opened in China that's got to

produce tons and has to sell something there also."); RX 643 (Tatman, IHT at 46-51)).

478. Prior to closing its Tyler South Foundry, both of McWane's United States plants were "throttled down as low as you could throttle them. . . . we can't keep two plants limping along, not meeting our inventory objectives and bleeding millions of dollars a year in idle plant." (Tatman, Tr. 964-965; RX 616).

479. Roughly two hundred employees lost their jobs as a result of the Tyler South plant closure in 2008. (Tatman, Tr. 968).

B. Relevant Market

1. Relevant product markets

a. Fittings for use in open specification projects

480. Based on the findings below, ductile iron pipe fittings of 24 inches or less in diameter for use in open specification applications, whether manufactured within or outside the United States, for use in projects within the United States constitute a relevant product market (the "Fittings market"). (F. 481-516; *see also* CX 2260-A (Schumann Rep. at 13-14, 16-17); Schumann, Tr. 3769-3770, 3788-3789).

i. Functional interchangeability with other products

481. The principal potential substitute for Fittings is polyvinyl chloride (PVC) plastic fittings. (Minamyer, Tr. 3133). In some applications, a ductile iron pipe fitting is used on PVC pipe, but a PVC fitting cannot be used on ductile iron pipe. (Tatman, Tr. 249-250; CX 2501 (Prescott, IHT at 36) (pressure rated PVC fittings are not used with ductile iron pipe); CX 2538 (McCutcheon, IHT (Vol. 2) at 343) (PVC fittings are rarely used on ductile iron pipe); CX 2480 (Napoli, Dep. at 27) (PVC not a substitute for Fittings)).

482. PVC fittings are more expensive than Fittings. (CX 2538 (McCutcheon, IHT (Vol. 2) at 340); Webb, Tr. 2715).

483. PVC fittings do not have as high of a pressure rating as Fittings. (CX 2521 (Agarwal, IHT at 54-55) ("[T]hey [PVC fittings] do not hold up the pressure"); CX 2489 (Morrison, IHT at 41) ("The pressure rating on the plastic water fitting is a little less. It's a 200-pound max rating, whereas a ductile waterworks fitting is 250-pound max. So, depending on the pressure, it's going to exclude the PVC fitting."); CX 2480 (Napoli, Dep. at 27-28) ("I don't recall ever seeing a PVC fitting even attempt to be used by an engineer.")).

484. PVC fittings are susceptible to fracture. (*See* CX 2480 (Napoli, Dep. at 27-28) ("No one, to my knowledge, has come up with a good plastic substitute for the strength of ductile iron.")).

485. PVC fittings are limited in size to 12" and below. (Webb, Tr. 2714-2715 (PVC fittings are "just not made in the sizes and configurations that mechanical joint fittings are."); CX 2491 (Johnson, IHT at 44-45); CX 2525 (Minamyer, IHT at 95-96); CX 2489 (Morrison, IHT at 42) (PVC pressure-rated fittings are only a potential substitute for small diameter applications: "2-inch, maybe 3-inch, but anything above that, 99 percent would be a ductile iron waterworks fitting over a PVC fitting.")).

486. Certain markets do not allow PVC fittings to be used. (CX 2501 (Prescott, IHT at 33-34); CX 2515 (Sheley, IHT at 65)).

487. PVC fittings are harder to restrain and install. (CX 2543 (Coryn, IHT at 53); Webb, Tr. 2715).

488. Other than the limited, rare use of PVC pressure-rated fittings, there are no other products that are substitutes for Fittings in pressurized applications. (CX 2489 (Morrison, IHT at 41-42); CX 2538 (McCutcheon, IHT (Vol. 2) at 342-343); CX 2525 (Minamyer, IHT at 95)).

489. Brass fittings are typically threaded and do not come larger than 2" in diameter. (Thees, Tr. 3057-3058; Webb, Tr. 2720).

490. Steel fittings are not used underground because the steel fitting would rust. (Thees, Tr. 3057, 3058; CX 2538 (McCutcheon, IHT (Vol. 2) at 343)).

491. Cast iron or gray iron fittings are an older fittings technology that use a different iron component than ductile iron fittings and are not as easily molded. Distributors receive only a negligible demand for these products from End Users. (Webb, Tr. 2719; Thees, Tr. 3056; CX 2513 (Webb, IHT at 59-60); CX 2498 (Teske, Dep. at 68-69); CX 2501 (Prescott, IHT at 37)).

492. There are no widely used functional substitutes for Fittings. (F. 482-491; Answer ¶ 23; Saha, Tr. 1177-1178 (other types of fittings are not interchangeable with ductile iron Fittings)).

ii. Price constraints of other products

493. Fittings suppliers do not track prices of PVC fittings or take them into account when setting prices of Fittings. (Tatman, Tr. 250-251; CX 2477 (Jansen, Dep. at 69-70, 77, 94); Minamyer, Tr. 3133-3134; CX 2538 (McCutcheon, IHT (Vol. 2) at 341); Saha, Tr. 1177).

494. Fittings suppliers do not track the price of cast iron fittings when setting ductile iron Fittings prices. (CX 2477 (Jansen, Dep. at 94)).

495. Distributors do not seek to use prices of PVC fittings to negotiate prices of Fittings. (Webb, Tr. 2718; CX 2480 (Napoli, Dep. at 28); Saha, Tr. 1177).

496. The prices of PVC fittings have no bearing on the prices of Fittings. (Saha, Tr. 1177-1178). If the price of ductile iron pipe fittings went up 5 to 10 percent from suppliers, Distributors would not switch to pressure-rated PVC fittings. (Webb, Tr. 2718-2719).

497. When the price of Fittings goes down, sales of Fittings do not go up. (Webb, Tr. 2723 ("I've never seen a correlation with any of our product lines up or down that impacted the demand side."); CX 2538 (McCutcheon, IHT (Vol. 2) at 344) (A

10% increase in price of Fittings would not prompt an End User to forego the purchase of Fittings because the Fittings are a small portion of the total cost of the project to the End User)).

iii. Cluster of Fittings of 24 inches or less in diameter

498. There are several thousand unique configurations of Fittings in different sizes, shapes and coatings. (Joint Stipulations of Fact, JX0001 ¶ 8).

499. Each Fitting must have a diameter appropriate for the pipe to which it is attached and a shape or design appropriate for its intended function. (Tatman, Tr. 220-221).

500. Fittings of different shapes and different diameters are not substitutes for one another. For example, a 6" 90-degree bend mechanical joint pipe fitting cannot substitute for an 8" "T" fitting. (Schumann, Tr. 3790-3791).

501. The primary suppliers, customers, and Distributors of each Fitting are the same and the materials and other inputs used to produce the products are the same. (*E.g.*, F. 2, 51, 108, 310, 322-324; *see also* CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792).

502. Each size and shape of Fittings of 24" or less in diameter is made of the same material and by the same methods. F. 310; *see also* CX 2260-A (Schumann Rep. at 13).

503. Each size and shape of Fittings of 24" or less in diameter is sold and marketed together by the same suppliers, through the same distribution channels, to the same customers, for use in the same or similar projects. (F. 505-509; *See also* RX 712A (Normann Rep. at 23)).

504. All Fittings must comply with AWWA standards. (CX 2522 (Agarwal, Dep. at 37), *in camera*; McCutcheon, Tr. 2292).

505. McWane, Sigma, and Star each supply a full line of Fittings of 24" or less in diameter. (Rybacki, Tr. 3572-3573;

Tatman, Tr. 589; McCutcheon, Tr. 2254-2255; Joint Stipulations of Fact, JX0001, ¶¶ 1-3).

506. Fittings prices are set as a package, through the announcement of price multipliers and the negotiation of Project Pricing multipliers and other pricing terms that apply across all of the different Fittings included in a given purchase. (*See* CX 2535 (Bhutada, Dep. at 102, 106); Tatman, Tr. 258-259, 277; Rybacki, Tr. 1096-1097, 1103-1104; Webb, Tr. 2770-2771; CX 1147 at 001).

507. Distributors purchase Fittings from suppliers, and then further incorporate the Fittings into a bundle with other waterworks products for resale to End Users. (CX 2502 (Prescott, Dep. at 15); CX 2490 (Morrison, Dep. at 66); CX 2504 (Thees, Dep. at 114, 149); CX 2503 (Thees, IHT at 71)).

508. Virtually all Fittings are sold through waterworks Distributors. F. 373-374.

509. The typical End Users of all Fittings are municipalities, regional water authorities, and the contractors they engage to construct waterworks projects. F. 10.

510. Fittings up to 12" in diameter are typically used for residential work, and Fittings 14" to 24" in diameter are typically used by municipalities or plants with long transmission lines. (Brakefield, Tr. 1279-1281; CX 1479).

511. Fittings over 24" in diameter are considered to be a large diameter and are a more unusual size for the industry. (CX 2538 (McCutcheon, IHT (Vol. 2) at 322)). They are used for large treatment plants or large transmission lines. (Brakefield, Tr. 1281; CX 1479).

512. ACIPCO currently manufactures Domestic Fittings ranging only from 30" in diameter to 64" in diameter. ACIPCO exited the manufacture of Fittings under 30" in diameter in 2006. (CX 1897 at 002; CX 2486 (Burns, Dep. at 15, 23-28)). ACIPCO does not have any interest in extending its product scope to include small and medium diameter Fittings. (CX 2486 (Burns, Dep. at 15, 30)).

513. For 2008, in the market consisting of ductile iron pipe fittings with diameters greater than 24" (*i.e.*, 30" and above), ACIPCO's share of United States sales was approximately around 40%. (*See* CX 1895 at 001, 005, *in camera* (ACIPCO data showing 2008 sales of [redacted] tons); CX 2486 (Burns, Dep. at 159-160) (describing CX 1895); RX-127 at 002 (DIFRA data showing the other suppliers' combined 2008 sales of fittings greater than 24" in diameter to be [redacted] tons).

514. McWane's internal documents grouped Fittings into categories of 24" or less and 24" or greater. (RX 632 at 028-029 (Tyler/Union Waterworks Fittings Financial Statements containing fittings sales and gross profit analysis by three size ranges: 3" to 12", 14" to 24", and 30" and up); CX 0622 at 008-010 (Tyler/Union 2009 Sales Meeting presentation, separating out market share by size categories of 3" to 12" diameter, 14" to 24" diameter, and > 24" diameter)).

515. Historically, the waterworks industry has differentiated Fittings of 3" in diameter to 24" in diameter from Fittings of 30" or greater diameter. (CX 2533 (Bhargava, Dep. at 43), *in camera*).

516. The January 2009 DIFRA Schedule of Ductile Iron Waterworks Fittings (Trade Tons Shipped) Comparison For the Years Ended 2007 and 2008 analyzed shipments by three size ranges: 2" to 12", 14" to 24", and over 24". (CX 1339 at 003).

b. Fittings for use in domestic-only specification projects

517. In form and functionality, non-domestic and Domestic Fittings are completely interchangeable. (Tatman, Tr. 878-879 ("There's no difference in how you apply [or] use the product."); McCutcheon, Tr. 2528 ("For the most part, the fittings are interchangeable. … we all provide an interchangeable fitting."); Webb, Tr. 2730-2731 ("Q. Is there a difference between domestic fittings and import fittings? A. In functionality, no."); RX 694 (Bhutada, Dep. at 14); RX 659 (Swalley, Dep. at 63); RX 669 (Groeniger, Dep. at 36); RX 650 (Morrison, Dep. at 57-58); RX

661 (Prescott, Dep. at 29); RX 646 (Burns, Dep. at 147); RX 701 (Morton, Dep. at 13-14); RX 675 (Sheley, Dep. at 51-52)).

518. Based on the findings below, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, that are sold for use on jobs with domestic-only specifications ("Domestic Fittings") constitute a relevant product market (the "Domestic Fittings market"). (F. 519-550; *see also* CX 2260-A (Schumann Rep. at 15-16); Schumann, Tr. 3769-3770, 3789-3791).

i. Domestic-only requirements other than ARRA

519. At times, some waterworks projects require that only Domestic Fittings be used because of either End User preference or because it is required by municipal, state, or federal law ("Domestic-only projects"). (Joint Stipulations of Fact, JX0001 ¶ 13).

520. The Commonwealth of Pennsylvania requires the use of Domestic Fittings. (CX 2523 (Bhattacharji, Dep. at 127-128) (Pennsylvania has a Buy American law); CX 2531 (Rybacki, Dep. at 270-272); RX 637 (Jansen, Dep. at 99-100) (attributing Pennsylvania's Domestic Fittings requirements to the Pennsylvania Steel Act)).

521. New Jersey has a Buy American law. (CX 2523 (Bhattacharji, Dep. at 127-128); N.J. Stat. § 52:33-3 (requiring that "[e]very contract for the construction, alteration or repair of any public work in this state shall contain a provision that in the performance of the work the contractor and all subcontractors shall use only domestic materials in the performance of the work")).

522. Some federal government projects and air force bases require Domestic Fittings, even without the Buy American provisions (F. 526) in ARRA. (McCutcheon, Tr. 2267; Tatman, Tr. 449).

523. Some municipalities require the use of domestically-manufactured products as a matter of preference or as a matter of law. If a particular municipality has a preference or law that says

that only Domestic Fittings can be used, the specification will state that the Fittings need to be "domestic only." (Webb, Tr. 2732-2733; McCutcheon, Tr. 2267; CX 2537 (McCutcheon, IHT (Vol. 1) at 84, 90-91), *in camera*; Thees, Tr. 3068).

ii. Requirements of ARRA

524. The American Recovery and Reinvestment Act of 2009, known as "ARRA," allocated more than $6 billion to water infrastructure products. (Joint Stipulations of Fact, JX0001 ¶¶ 19, 20).

525. Waterworks projects receiving ARRA funds were required to be "under contract or construction within 12 months of the date of enactment of this Act." (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))).

526. ARRA contained certain Buy American provisions applicable to Fittings. (Joint Stipulations of Fact, JX0001 ¶ 21). ARRA's Buy American provisions required that all ARRA-funded projects use products made in the United States. (Brakefield, Tr. 1401; Sheley, Tr. 3402; Morton, Tr. 2816).

527. Domestic Fittings were required and used on ARRA-funded projects. (CX 2513 (Webb, IHT at 95); CX 2501 (Prescott, IHT at 66-67)).

528. Star looked into the possibility of whether Star could satisfy the ARRA Buy American requirement with Fittings produced in Mexico or Korea, but concluded in early 2009 that Fittings produced in Mexico or Korea would not satisfy ARRA's Buy American requirement. (McCutcheon, Tr. 2277, 2279; Bhargava, Tr. 2927-2928; RX 694 (Bhutada, Dep. at 39); CX 2537 (McCutcheon, IHT (Vol. 1) at 102-103), *in camera*).

529. Sigma also considered the possibility that Fittings manufactured in Korea or Mexico might satisfy the Buy American requirement of ARRA, but concluded that such Fittings would not

be ARRA-compliant. (CX 0214 at 004; CX 1998 at 003; Pais, Tr. 1738-1739).

iii. Waivers of ARRA's Buy American requirement

530. The United States Environmental Protection Agency ("EPA") was the sole authority for granting or approving waivers of ARRA's Buy American requirement for any ARRA-funded waterworks project. (Respondent's Supplemental Response to Complaint Counsel's Requests for Admission, July 16, 2012 ("Supp. Response to RFA") at ¶ 2).

531. ARRA contains three types of waivers or exceptions to the Buy American requirement for ARRA-funded waterworks projects (also referred to by the EPA as "Regional Project Waivers" or "Regional Waivers"): public interest; insufficient and not reasonably available quantities; and cost. (American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 §1605(b), 123 Stat. 115 (codified as amended in scattered sections of 6, 19, 26, 42, and 47 U.S.C. (2006 Supp. III))).

532. The EPA granted three public interest waivers of ARRA's Buy American provision for Fittings, which allowed three local municipalities to purchase imported Fittings for use on ARRA-funded waterworks projects. (CX 1592 (waiver for City of Lewiston, ME and the Auburn, Maine Water District for purchase of 33 imported Fittings); CX 1590 (waiver for Lowell, MA for purchase of an imported 30" diameter pipe tee fitting); CX 1591 (waiver for Richland, WA for purchase of an imported 42" by 24" AWWA C153 cement lined mechanical joint reducer tee fitting)).

533. The EPA did not issue any Regional Waivers for Fittings under the authority of Section 1605(b)(3), which allows for waivers due to overall cost increases of more than 25 percent. (Clean Water and Drinking Water State Revolving Funds: ARRA Implementation,
http://water.epa.gov/grants_funding/eparecovery/index.cfm
(listing waivers)).

534. McWane informed its customers in an April 8, 2009 letter that an exception from ARRA's Buy American requirements related to the cost impact of a project would only be available if domestic sourcing would increase the cost of an entire project (as opposed to the cost of a given component) by at least 25%: "[T]he exception does not apply if the cost of the pipe or valves for a project will be 25% greater than foreign products; rather the use of U.S. made pipe or valves must increase the cost of the *entire project* by more than 25%." (CX 1886 (emphasis in original); CX 2498 (Teske, Dep. at 57) (discussing CX 1886)).

535. On August 10, 2009, the EPA granted a revised *de minimis* waiver from the requirements of ARRA Section 1605(a) for any incidental components that comprise a total of no more than five percent of the total cost of the materials used in and incorporated into a project. (RX 195; *see also* RX 155 (original *de minimis* waiver)). Those using this waiver did not have to apply for the waiver and be granted such a waiver, but they were required to retain documentation as to these incidental items in their project files, and to "summarize in reports to the State the types and/or categories of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project." (RX 195). The Federal Register Notice setting out the revised *de minimis* waiver described incidental goods as "'nuts and bolts'-type components whose origins cannot readily be identified prior to procurement." (RX 195).

536. Fittings typically comprise five (5) percent or less of the total cost of a typical waterworks project. (Joint Stipulations of Fact, JX0001 ¶ 10).

537. With few exceptions, non-Domestic Fittings were not used on ARRA-funded projects. (CX 2501 (Prescott, IHT at 66) ("Q. Did you ever get a waiver or try to get a waiver to allow the use of imported fittings on stimulus projects? A. To my knowledge, no."); CX 2510 (Groeniger, Dep. at 173), *in camera* ("Q. So you never used a *de minimis* waiver for fittings? A. Not that I can recall."); CX 2489 (Morrison, IHT at 51) (there were no waivers or exemptions that allowed the use of imported Fittings

on Domestic-only ARRA-funded projects); CX 2489 (Morrison, IHT at 51)).

538. McWane did not sell any imported Fittings for use in any ARRA-funded waterworks projects. (Supp. Response to RFA at ¶ 5 (admitting that McWane possesses no first-hand knowledge of the use of an imported Fitting in an ARRA-funded waterworks project under a *de minimis* waiver)).

539. To the extent that Sigma's imported Fittings were used on any ARRA-funded waterworks projects, the quantities were few and the circumstances limited. (Pais, Tr. 1742-1744; CX 2523 (Bhattacharji, Dep. at 222-223) (*de minimis* waivers on ARRA projects were "few and far between")).

540. Star did not sell any imported Fittings for use in any ARRA-funded waterworks projects under either a public interest waiver or a *de minimis* waiver. (CX 2535 (Bhutada, Dep. at 43-44)).

541. Ferguson does not know of any instance in which Ferguson used the *de minimis* waiver to use an imported Fitting in a domestic-only waterworks project. (Thees, Tr. 3081). Ferguson believed that the *de minimis* waiver did not apply to Fittings because the waiver only applied to products where the country of origin for such products was not readily identifiable, such as nuts and bolts, not Fittings. (Thees, Tr. 3078-3080) (Fitting's country of origin is readily identifiable because suppliers stamp this information on the side of the Fitting).

542. HD Supply believed that the EPA's *de minimis* waiver did not apply to Fittings based on information gathered from End Users. (Webb, Tr. 2740-2742). HD Supply never sold an imported Fitting to any customer for use on an ARRA-funded waterworks project, and its President is unaware of any instance where any Distributor supplied imported Fittings into an ARRA-funded waterworks project under any circumstances. (Webb, Tr. 2742-2744; CX 2514 (Webb, Dep. at 66-67)).

543. SIP worked with End Users to apply for two or three waivers for specific ARRA-funded projects, but was unsuccessful in obtaining a single waiver. (CX 2522 (Agarwal, Dep. at 92-93),

in camera). SIP is unaware of any sales of its imported Fittings that were used for ARRA-funded projects. (CX 2522 (Agarwal, Dep. at 92), *in camera*).

544. Illinois Meter is unaware of anyone using imported Fittings as a substitute for Domestic Fittings on any ARRA-funded waterworks projects. (Sheley, Tr. 3405-3406).

545. Metalfit is unaware of any project for which Metalfit, a Mexican manufacturer, provided imported Fittings for use on an ARRA-funded waterworks project. (CX 2518 (Meyer, Dep. at 66, 71-72, 133-134)).

546. Electrosteel does not know of any instance in which a customer used an imported Fitting for an ARRA-funded waterworks project, or any instance in which a customer received a waiver of ARRA's Buy American requirement for a Fittings purchase. (CX 2500 (Swalley, Dep. at 62-63, 159)).

iv. Price correlation between Domestic and non-domestic Fittings

547. Domestic Fittings are sold at substantially higher prices than non-domestic Fittings. F. 1075-1076.

548. Due to the price differential between Fittings sold into open and domestic specifications, McWane does not provide quotes for Domestic Fittings to be used for open specification. (CX 2477 (Jansen, Dep. at 96)).

549. Regardless of price, a Distributor will not purchase an imported Fitting if the End User's specification calls for a Domestic Fitting. (*See* Webb, Tr. 2716-2718; Thees, Tr. 3056; CX 2516 (Sheley, Dep. at 156); Saha, Tr. 1173-1174).

550. Some End Users who specify Domestic Fittings because of preference are aware of, but not sensitive to, the price differential between Domestic Fittings and import Fittings. (CX 2489 (Morrison, IHT at 46) ("Well, they're aware of [the price differential], but in the overall cost of a project, the cost of your fittings is minimal. Now, they may be twice as much, but if

you're doing a million-dollar project and you're paying $10,000 more for the fittings, that's negligible in some people's eyes."); CX 2527 (Pais, IHT at 36-37) (engineers deciding whether to have a domestic-only specification are not sensitive to prices of Fittings)).

2. Relevant geographic market

551. Fittings suppliers ship their products nationally from multiple locations. (Rybacki, Tr. 1089-1092 (Sigma has five main warehouses, some satellite warehouses, and distribution centers in Florida, California, Washington, and Arizona); McCutcheon, Tr. at 2264 (Star has 13 distribution centers in North America in order to "stock product closer to [customers] for better delivery times"); RX 637 (Jansen, Dep. at 144-145); CX 2483 (Tatman IHT at 60-61) (McWane has distribution centers in Texas, Alabama, California, Oregon, and Illinois, enabling one to two day delivery to 95 percent of the country)).

552. From the perspective of a local Distributor, the Fittings of one manufacturer/supplier are interchangeable with those of another manufacturer/supplier located elsewhere in the United States. (CX 2477 (Jansen, Dep. at 86) (Fittings produced by Sigma, McWane and Star that meet the same AWWA specifications are interchangeable with each other)).

553. Both Complaint Counsel's and Respondent's expert witnesses opined that the geographic market is no larger than the United States; however, it may be smaller than the whole United States, as there may be separate regional markets. (RX 712A (Normann Report at 30-31); Schumann, Tr. 3794-3795).

554. The relevant geographic market in this case is the United States. F. 551-553.

C. Competitive environment

1. Market characteristics

a. Pricing interdependence

555. McWane is an industry leader with respect to pricing, and other suppliers try to follow McWane as best they can. (Pais, Tr. 1920; 1923-1924).

556. Historically, when McWane announces new list prices, Sigma and Star generally follow with substantially matching list prices. (Tatman, Tr. 257, 336-337; McCutcheon, Tr. 2269; Rybacki, Tr. 1098). Sigma and Star generally also try to match new multipliers published by McWane. (Minamyer, Tr. 3138-3142; McCutcheon, Tr. 1098, 2270; Rybacki, Tr. 3576-3577).

557. Any published price increase by one supplier that is not adopted by the other suppliers will not be accepted in the market and will not be sustained. As Mr. McCutcheon of Star explained: "[I]f you're the highest-priced fitting in a commodity market, you're not going to sell a lot of fittings." (McCutcheon, Tr. 2425; Pais, Tr. 1936-1937; Rybacki, Tr. 1113-1114; *see also* Tatman, Tr. 1070 (if not adopted by the other suppliers, a published price increase "isn't going to work because, number one, you're going to have to sit there, it's your published multipliers for at least three months while your competitors pick you clean job-pricing and it will be at least three months or more until you know where you're at . . .")).

558. McWane, Sigma, and Star generally received and read each other's letters to customers announcing price changes. These letters were typically provided to a supplier by its Distributor customers, and then circulated internally at the supplier. (CX 2450 at 002; Tatman, Tr. 306-307; Minamyer, Tr. 3148; Rybacki, Tr. 3487; Pais, Tr. 2058-2060; CX 2526 (Minamyer, Dep. at 125-126); CX 2531 (Rybacki, Dep. 205-206)).

559. McWane, Sigma, and Star consider each other's customer letters, along with other relevant information, when

making their own pricing decisions. (Tatman, Tr. 287; CX 2526 (Minamyer, Dep. at 126-127); Rybacki, Tr. 1108-1109).

b. Price transparency

i. List and multiplier prices

560. All major Fittings suppliers publish their list prices in price books or catalogues that are widely disseminated to all of their customers. Suppliers also post their list prices on their public websites. (Tatman, Tr. 255-256; Rybacki, Tr. 1097-1096, 1099; Minamyer, Tr. 3137-3138; CX 2535 (Bhutada, Dep. at 100)).

561. Any changes in multipliers are widely disseminated through pricing letters that are transmitted via fax or email to Distributors, either on an individual state or region basis, or, in the case of the large national Distributors, via "multiplier maps" that identify local multipliers for each state across the United States. (Tatman, Tr. 262-263, 305, 322; CX 2440; RX 410 (sample McWane multiplier map); Rybacki, Tr. 1100; McCutcheon, Tr. 2270).

ii. Project Pricing

562. For a specific project, Distributors commonly seek bids from multiple Fittings suppliers. (RX 650 (Morrison, Dep. at 68); RX 703 (Coryn, Dep. at 36)).

563. Suppliers do not want their competitors to know when a Project Price is being offered, for fear that their competitors will offer a lower price and take the project. (Minamyer, Tr. 3145).

564. Suppliers do not want their competitors to know about freight terms, payment terms, cash discount or rebates being provided to a Distributor. (Tatman, Tr. 1017-1019, *in camera*, ("There's all sorts of mechanisms for driving price. And the reason why that's there is, quite frankly, we're all trying to hide from our competitors what we're doing."); RX 396).

565. Suppliers attempt to learn from their Distributor customers the amount a competitor has bid; however, the supplier

may not trust information provided by the Distributor because the Distributor has a financial incentive to "trick" the supplier into offering a lower price. As Mr. Tatman explained with the following example:

> [The contractor] goes to now multiple distributors saying, What's your price? What's your price? And he's probably getting the best price, and then he's probably calling a second time and a third time, saying, Oh, you're close, but I need an extra 3 percent, I need an extra 4 percent. The distributor now, because he's making no money selling to the contractor anymore, he's going back to the supplier, and he calls me up and he says, Hey, look, I've got this job. It's got 20 tons of fittings on it. It's 12" product. What's your best price? I'll give him a price. He's going to come up to Star. He's going to call Sigma. He's going to call Metalfit. He's going to call Serampore. He's going to call NACIP. He's going to call Electrosteel. He's going to get a number from them. And then he's going to come back and he's going to call me again. Maybe he wants to buy from Tyler/Union, but, you know, maybe my price is equal, but he's going to try. Well, [the distributor would say] "I'd like to give you that job, but you're off by 5 percent. You've got to give me a little bit more.["] And then we cough it up again. And that's why I'm saying by auction. I'm not aware of what the other person is bidding except for the information that I'm getting from my customer, the distributor. And you will see in this case we don't believe what the distributor is telling us because he has a personal and a financial incentive to trick me into giving a lower price.

(Tatman, Tr. 266-267; *see also* F. 434 (Project Prices are often conveyed verbally).

566. Project Pricing in the "auction" environment described in F. 565 results in losing "visibility" as to where the true competitive price level is, or as Mr. Tatman said, bidding in this environment is "shooting in the dark." (Tatman, Tr. 267-268, 342, 926-927).

567. McWane prefers to have greater visibility into where the true competitive market level is, *i.e.*, the actual purchase and

sale prices, so it can know what it's "shooting at." As Mr. Tatman stated: "If I can see it, I can shoot it." (Tatman, Tr. 332, 361, 376-377).

568. Project Pricing was a significant part of Star's competitive strategy, because it was the smallest competitor in the market and it needed to Project Price to remain competitively viable. Project Pricing helped Star grow its market share. (McCutcheon, Tr. 2387; RX 685 (Minamyer, Dep. 26-27)).

569. Sigma perceived Star to be very aggressive in its pricing and believed that Star had taken prices to a depressed level at which it was hard to compete. (Rybacki, Tr. 1136-1137).

570. Mr. Pais of Sigma was of the opinion "that Star was most aggressive in their pricing under this special pricing or job or whatever it's called." (Pais, Tr. 1937).

iii. Gathering competitive information

571. In 2008, one way that McWane obtained competitive information was through its sales force, including through weekly narrative reports, submitted by the sales force, which reported information learned in the field. These "competitive feedback reports" were submitted to, and reviewed by, Mr. Jansen and Mr. Tatman. (RX 598; Tatman, Tr. 330, 333-334, 915-916, 919-920).

572. Sigma learns about what its competitors are charging for Fittings "[t]hrough the marketplace, through my salespeople, through my regional managers and through my customers." (Rybacki, Tr. 1108).

573. Although they reviewed and considered each other's customer letters, McWane, Sigma, and Star, did not necessarily trust that the pricing announced in a competitor's letter, especially multipliers, would actually be used by that competitor in the market, and they preferred to rely on competitive input received from customers, rather than competitors. (Tatman, Tr. 306-307, 415-416, 899-901; Rybacki, Tr. 1108-1109, 3559-3660; Minamyer, Tr. 3240-3242; McCutcheon, Tr. 2507-2509).

574. McWane knows that its competitors receive McWane's customer letters. (Tatman, Tr. 377, 1067 ("My competitors are going to pick up this letter through normal competitive channels")).

575. When Mr. Minamyer of Star would read McWane's pricing letters, he would consider whether the letters contained signals to Star. (CX 2525 (Minamyer, IHT at 77)).

576. Mr. Tatman received a copy of Sigma's December 20, 2007 Customer Letter (F. 615) and read it, in part, as "bashing" McWane. (Tatman, Tr. 351-352; CX 0627 at 001, 012).

577. Mr. Rybacki of Sigma reads McWane and Star letters carefully to determine their intentions, and he expects his competitors to do the same with Sigma letters. (CX 2531 (Rybacki, Dep. at 205-206)).

578. Customer letters served to communicate to competitors, as well as customers. (F. 571-577).

2. Competitive Environment prior to January 2008

579. Demand for Fittings is largely driven by housing-related infrastructure construction and by construction of wastewater treatment plants, which in turn are driven by such factors as the rate of housing growth, and the age and condition of existing systems. (Joint Stipulations of Fact, JX0001 ¶ 11).

580. The collapse of the housing market in 2007 through 2008 had a particularly adverse impact on the waterworks industry, which depends on new housing starts to drive demand. (Tatman, Tr. 271-272; McCutcheon, Tr. 2654, *in camera*; RX 675 (Sheley, Dep. at 58); Rybacki, Tr. 3664, *in camera*).

581. During 2007, with the economic decline, the Fittings industry experienced a period of declining demand, increased price competition resulting in price erosion, and increased costs. (RX 690 (Rybacki, Dep. at 66-67); Tatman Tr. 263-265; CX 2457).

582. Beginning in 2007, demand for Fittings was falling because of the economic downturn and decreased demand for new housing. Business continued to drop off, particularly by the summer of 2008, when the economic crisis really hit "full steam." (Tatman, Tr. 269-272; Rybacki, Tr. 1105; McCutcheon, Tr. 2654, *in camera*).

583. With the economic decline, the Fittings market became more price competitive, as Distributors demanded discounts off published multipliers in order to compete for the limited number of jobs available with Contractors. (Tatman, Tr. 263-265; *see also* CX 2477 (Jansen, Dep. at 248-249) (the use of Project Pricing increased in or around August 2006 as the market started to decline)).

584. The price erosion in the Fittings market occurred not in published list prices or multipliers, but in the effective or "actual" multipliers. (CX 1138 at 001; Pais, Tr. 2079). The effective multiplier is the average weighted multiplier at which Fittings products are sold in a given area and includes Project Pricing but not other discounts such as rebates. (Tatman, Tr. 329, 393-395).

585. Historically, McWane's two United States plants had a higher cost of production than its Chinese plant and the overseas plants of its competitors. (Tatman, Tr. 431-432).

586. In 2007, the costs of doing business overseas, particularly in China, increased due to the withdrawal of the China export rebate, strengthening of the Chinese currency, increases in the costs of labor, raw materials, such as pig iron and scrap iron, commodity price increases, and energy price increases affecting freight and fuel. (RX 687 (Pais, Dep. at 39-40); McCutcheon, Tr. 2515-2516; Tatman, Tr. 870-875; Rybacki, Tr. 1113).

587. Prior to January 2008, the cost of producing Fittings in China was lower than the cost of domestic production, although with China costs increasing, domestic production of small diameter "A" items on a high speed Disamatic ("DISA") line was competitive with Fittings produced in China. (RX 642 (Page, Dep. at 111-112)).

588. On November 29, 2007, McWane's CFO, Mr. Nowlin, transmitted to Mr. Walton a model Mr. Nowlin prepared, called a "sensitivity analysis." The model looked at cost variables in China such as the Chinese currency, the Chinese Value Added Tax ("VAT"), and Chinese cost of inflation, and concluded that if the Chinese currency heats up and strengthens, that would not be good for McWane, because McWane produces in China, but that this would hurt importers a lot more than McWane. (CX 2481 (Nowlin, Dep. at 107-109); CX 2143).

589. In a December 22, 2007 internal email to Mr. McCullough and Mr. Walton, Mr. Tatman described "accelerated inflation in China compared to Domestic cost," (CX 1702), and in an internal email three days later to Mr. McCullough, Mr. Jansen, and Mr. Walton, Mr. Tatman again stated that "China inflation [is] out pacing domestic costs." (CX 2327).

590. Rather than scaling back production and reducing inventory in the face of declining demand, the then-manager of McWane's Fittings business, David Green, increased production to spread fixed costs over a higher production volume, thereby creating the appearance of reducing manufacturing costs in the short term. (RX 642 (Page, Dep. at 165-167)).

591. When Mr. Tatman assumed responsibility for the management of McWane's Fittings business unit after Mr. Green's departure at the end of 2007, McWane had "runaway inventory levels" in the face of declining demand. Mr. Tatman stated: "When I took over that facility or those operations, we had inventory levels that were three times normal. Every yard was full of fittings as far as the eyes could see. We had fittings sitting out in grass yards. We had just had more inventory than we could handle, and the marketplace was going down." (Tatman, Tr. 214-215).

592. In 2007, McWane had excess inventory, creating "pressure on volume." Pressure on volume refers to a smaller market, declining volume, and the need to increase volume. (Tatman, Tr. 346-347 ("the market place is tanking . . . I need

volume. My competitors need volume. Everybody needs volume.")).

593. Mr. Tatman's main concern in late 2007 was to increase McWane's sales volume in order to reduce excess inventory. Increasing volume was needed to justify keeping McWane's foundries open. Mr. Tatman was more concerned about volume than price. (Tatman, Tr. 215-216).

594. McWane had lost market share from 2006 through 2007. (CX 0622 at 003; *see also* Tatman, Tr. 262-264, 342 (McWane was losing share year over year)).

595. By late 2007, Sigma and Star each had Fittings sales forces that were approximately twice as large as McWane's sales force of 8 to 10 persons. Mr. Tatman believed that McWane was losing share because McWane's smaller sales force inhibited its ability to detect and respond to Project Prices being offered in the field. Due to this lack of visibility, McWane was getting "beat at the pricing game." (Tatman, Tr. 262-264, 342 (McWane was losing share year over year, due to others price undercutting); 269-270, 281-283, 285-286, 1025, *in camera*).

596. Mr. Tatman believed that salespeople for Sigma and Star were "better than ours . . . . I think they had more boots on the ground. I think they had better people at that point in time. And it is my understanding that their people were on an incentive-based [pay scale], which made them more aggressive probably than our salespeople, who were on fixed salaries." (Tatman, Tr. 285).

597. Net pricing for McWane in 2007 was not keeping up with cost inflation. (CX 0627 at 001). As Mr. Tatman explained:

> Inflation is 10 percent. We're only getting 5 percent in price because everybody needs volume and they're beating the crap out of one another.
>
> So if you're looking there, we did not recover . . . inflation in 2007 because we gave up more in price than what inflation was or we didn't recover enough in price to offset inflation

because of pressure on volume. Everybody is trying to get volume at this point.

(Tatman, Tr. 346).

D. January and February 2008 Pricing Events

1. January 11, 2008 Customer Letter

a. Background

598. In a letter to its customers on October 5, 2007, McWane, citing rising costs, especially for off-shore operations, announced a multiplier increase to be effective November 5, 2007, as follows:

Blended Utility Fitting and Accessory Orders: +0.020
Domestic Utility Fitting and Accessory Orders: +0.010

(RX 401).

599. The McWane October 5, 2007 letter to customers further noted that the then-current list price would be retained and that it "is our intention to address future price actions with adjustments to invoice multiplier levels" rather than through list price changes. (RX 401).

600. On October 11, 2007, Star followed McWane by announcing in a letter to its customers that it was raising its multiplier on Fittings and accessories by +0.02, effective November 5, 2007, and that Star was retaining its then-current list prices. (RX 402).

601. In an internal email dated October 19, 2007 Mr. Pais of Sigma noted a prior meeting with Mr. Page of McWane. According to the email, the discussion included "changes that [Mr. Page] has initiated to respond to the weak market conditions" which were "publicly known in the AWWA industry," including that Mr. Green had been removed as part of a restructuring at McWane "to be more efficient and manage their overall capacity more effectively" and that Mr. Green would be replaced by Mr.

Tatman. In a subsequent internal email by Mr. Pais regarding his September 2007 meeting with Mr. Page, Mr. Pais stated his believe that Mr. Page was "disappointed at our failure to get a better landscape." (CX 2118 at 001-002).

602. On October 23, 2007, Sigma announced in a letter to its customers that, due to a difficult market and increased costs, it would be implementing a price increase for Fittings, accessories and municipal castings, in "the next few months," with the first increase being a multiplier increase on Fittings of "two or three" points, effective November 5, 2007, and the second being a list price increase for all Sigma's products, to be effective January 2, 2008, which would be "a minimum of 6%." (RX 015).

603. On November 30, 2007, Star announced in a letter to its customers that Star would be publishing a new price list, effective January 1, 2008, although Star did not state a percentage increase. (CX 0627 at 013).

604. On or about December 3, 2007, Mr. Page, of McWane and Mr. Pais of Sigma met in Birmingham, Alabama. (Pais, Tr. 1886-1887; CX 2482 (Page, Dep. 107-108); *see also* CX 2037; CX 2038).

605. Mr. Page, although President and CEO of McWane, was not responsible for determining Fittings pricing, although he inquired about pricing or considered price increases, every couple of years. Mr. Pais testified they discussed Sigma potentially supplying McWane with metric sized fittings that were needed for international markets and that McWane did not have. (Pais, Tr. 1886-1887; CX 2037).

606. Mr. Pais of Sigma believed that he had developed a good relationship with Mr. Page of McWane. (Pais, Tr. 1871-1872; CX 2538 (McCutcheon, IHT (Vol. 2) at 229) (In conversation with Mr. McCutcheon of Star, Mr. Pais suggested he was friendly with Mr. Page of McWane)).

607. Mr. Page of McWane described his relationship with Mr. Pais of Sigma as follows:

> Different. Victor really seems to be a kind of – or seemed to be desirous of being really entrepreneurial and an idea guy, I guess would be a good way to say it. And – and, periodically, off and on it would go in spurts where he would think he would have some good ideas. He would want to get together and discuss those ideas about joint ventures, selling his company to us, us doing business together in the Middle East. Usually, it involved his ideas, McWane money, and him making money on it. So we didn't do any of them.

(RX 642 (Page Dep. p. 30); *see* RX 642 (Page Dep. p. 116-17 ("Victor [Pais] was very repetitive in his – in his focus and requests. Many, many times he would call or e-mail and talk about this. And, then I would say 'Well, we're not interested in that' or 'Yeah, give me more information on that.' And he would say, 'In response to your feedback, here's – here's an opportunity.' So, it was all exploratory. None of these things existed. They were all opportunities in Victor's mind that once again, with his relationships and – McWane's business, that there might be something for us to do together that would be successful"; *see also* RX 642 (Page Dep. p. 275 ("[A]s we've seen a number of things, Victor lives in LaLa Land. He lives an illusion that he thinks he is running around getting things done, and he just has an oversized pair of pants on.")).

608. Mr. Page and Mr. Pais testified that their December 3, 2007 meeting concerned international opportunities for McWane. In addition, Mr. Pais mentioned in this meeting forming an industry association, which was one of what Mr. Page called Mr. Pais' "many . . . ideas" but Mr. Page testified he had had nothing to say on the topic because he did not know any facts on the matter. Mr. Pais and Mr. Page denied discussing domestic Fittings; prices being charged in the market place; pricing discipline; McWane's or Sigma's costs; or ways they could work together in the marketplace in this regard. (Pais, Tr. 1886-1887; RX 642 (Page, Dep. 80-82)).

609. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to McWane's office for two minutes at 2:04 p.m. on December 19, 2007. (CX 1621-A at 124, *in camera*; Rybacki, Tr. 3617, *in camera*).

610. Calls from a cell phone issued to Mr. Rybacki of Sigma were placed to a cell phone issued to Mr. McCutcheon of Star at 1:46 p.m., 2:20 p.m., 2:39 p.m., and 2:55 p.m. on December 19, 2007 for one minute each. Calls were placed from a cell phone issued to Mr. McCutcheon to a cell phone issued to Mr. Rybacki at 3:33 p.m. and 4:09 p.m. on December 19, 2007. Another call was placed from a cell phone issued to Mr. Rybacki to a cell phone issued to Mr. McCutcheon for two minutes at 5:03 p.m. on December 19, 2007. (CX 1621-A at 124, *in camera*; McCutcheon, Tr. 2474, *in camera*; Rybacki, Tr. 3616-3618, *in camera*).

611. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to McWane's office at 2:16 p.m. on December 20, 2007, which lasted 12 minutes. (CX 1621-A at 125, *in camera*; Rybacki, Tr. 3622-3623, *in camera*).

612. Mr. Rybacki testified he did not recall having a telephone conversation with Mr. Tatman on the dates set forth in F. 610-611, but that one call to Mr. Tatman might have been to welcome Mr. Tatman to the industry. (Rybacki, Tr. 3625-3626).

613. Mr. Rybacki's responsibilities for Sigma in 2008 and 2009 did not require him to communicate with anyone at Star or McWane. (Rybacki, Tr. 1087-1089).

614. During the relevant period, Mr. Rybacki of Sigma had a personal friend and former colleague, named Tom Frank, who worked at McWane, and with whom he periodically spoke. (Rybacki, Tr. 3610, 3650-365; RX 467).

615. On December 20, 2007, Sigma issued a letter to its customers delaying implementation of Sigma's Fittings list price increase (previously scheduled for January 2, 2008), explaining in part:

> Unfortunately for <u>you</u> and <u>us</u> one of our competitors in the <u>Fitting</u> <u>Industry</u> has not announced a New List Price increase for 2008 despite the fact that they are subject to the same cost pressures as the rest of us. As a result the New List Price Sheet as it pertains to Fittings only will be delayed for the

> time being. It is our sincere hope that the delay will be short term and that this Price Increase which is healthy for all of us will be implemented in the very near future.

(CX 2455 at 001 (emphasis in original); Rybacki, Tr. 1114-1116).

616. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. McCutcheon of Star for 22 minutes at 9:37 a.m. on December 21, 2007. (CX 1621-A at 112, *in camera*; McCutcheon, Tr. 2476, *in camera*).

617. On December 22, 2007, Mr. Tatman sent an internal email to Mr. McCullough, with a copy to Mr. Walton, with the subject line "DIWF List Price Change." The email stated as follows:

> Leon, I just wanted to put something on your radar in case it comes up before we have a chance to speak.
>
> Sigma recently posted a new List Price effective Jan 2nd and they've been pulsing sources trying to see if Tyler/Union will follow.
>
> Like the last one, the % increases vary greatly by item with no apparent pattern.
>
> Star previously announce[d] their intent to publish a new LP effective Jan 2nd and now they've just posted a letter stating the effective date has been changed to Feb 4th. Unlike Sigma Star has yet to post any actual LP numbers. I believe they are waiting to see what Tyler/Union will do before actually posting numbers or printing books.
>
> As you may recall, our Nov multiplier increase announcement stated that our intent was to manage any future required market pricing with multiplier adjustments rather than LP changes.
>
> Given both the change in the Tyler/Union leadership structure and the accelerated inflation in China compared to Domestic

> cost, I believe we're in a unique position to help drive stability and rational pricing with the proper communication and actions.
>
> I have a concept that I believe will work if properly executed. There are some additional data points to review, but I should be in a position to discuss with you in detail during the sales meeting or potentially before if needed. I don't believe with our silence and Star's push announcement that Sigma will hold to their Jan 2nd effective date so we have some time to get it right. Enjoy the holiday.

(CX 1702).

618. Mr. Tatman explained price "stability" and its effects as follows:

> [I]f the published multiplier is a .25, and on a weighted average of all the jobs that we sell over a period of time I see that where we're selling at is on average 10 percent below where we're published at, . . . we're starting to get in the unstable environment, which means there's a very high variation between where we're publishing at and where we're actually selling at . . . [This is] on average – that's not on a given job. That's on everything that you're selling in a market region over a period of time[. I]f the weighted average is more than a 10 percent discount off of published multipliers, then . . . I'm going to have a tough time finding out where the true competitive price is because there's too big of a spread.

(Tatman, Tr. 284 (*see also* F. 567 ("If I can't see it I can't shoot it")).

619. In late December, Star revised its November 30, 2007 list price change announcement (F. 603) to change the effective date of the price change to February 4, 2008. (CX 0627 at 0014).

620. On December 25, 2007, Mr. Tatman sent a McWane internal email to Mr. McCullough, with a copy to Mr. Jansen and Mr. Walton, attaching a PowerPoint file titled, "Draft Presentation for 1Q 2008 DIWF LP Review.ppt." The email referred to the draft presentation as "a concept we might want to discuss in

regards to our pricing strategy for utility fittings." Mr. Tatman's email continued:

> This is a draft presentation as there's additional analysis required before a final recommendation could be made.
>
> Our past attempts to drive stable pricing haven't been too successful. However, our new leadership structure coupled with China inflation out pacing domestic costs may provide a unique opportunity for success provided our strategy and execution is correct.
>
> Please let me know if this concept is something you want me to scope further.

(CX 2327).

621. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. Tatman of McWane for three minutes at 10:15 a.m. on December 27, 2007. (CX 1621-A at 113, *in camera*; Tatman, Tr. 367; Rybacki, Tr. 3624-3626, *in camera*).

622. A call from a cell phone issued to Mr. Tatman of McWane was placed to a cell phone issued to Mr. Rybacki of Sigma for six minutes at 12:11 p.m. on December 27, 2007. (CX 1621-A at 113, *in camera*; Tatman, Tr. 367-368; Rybacki, Tr. 3626, *in camera*).

623. Mr. Tatman testified that he did not recall speaking with Mr. Rybacki on December 27, 2007, or what they might have spoken about. (Tatman, Tr. 367-368).

624. Mr. Rybacki testified that he had "no clue" what he and Mr. Tatman might have spoken about on December 27, 2007. (Rybacki, Tr. 3626).

625. Mr. Tatman prepared a set of 14 PowerPoint slides, which comprise CX 0627, for purposes of a McWane internal discussion among himself, Mr. Walton, and Mr. McCullough

regarding how to competitively react to what was going on in the marketplace. (Tatman, Tr. 345-346).

626. The 14 slides comprising CX 0627 were: a summary of the then-current competitive environment (CX 0627 at 001); a graphed comparison of Sigma's new price list to McWane's existing price list, (CX 0627 at 002); data regarding cost increases in China (CX 0627 at 003); a slide titled "Desired Message to the Market & Competitors" (CX 0627 at 004); a slide assessing inflation data against announced price increases (CX0627 at 005); two draft customer letters (CX0627 at 006-007); a slide titled "back up reference material" (CX 0627 at 008); McWane's last published national multiplier map for "blended" Fittings (CX 0627 at 009); and copies of customer letters sent by McWane, Sigma, and Star in the October and November 2007 time period. (CX 0627 at 010-014).

627. Mr. Tatman prepared a spreadsheet in connection with determining Fittings price multipliers for January 2008, which comprises CX 1664. The analysis set forth, for every state, and for both blended and domestic Fittings, McWane's then-effective multiplier (*i.e.*, the multiplier at which Fittings were actually selling in the marketplace, F. 584) current published multiplier, and a proposed multiplier; and identified whether or not the proposed multiplier was an increase over the effective multiplier. The spreadsheet also contains Mr. Tatman's analysis of the financial impact of those multiplier changes. (CX 1664; Tatman, Tr. 329, 885).

628. Mr. Tatman analyzed Sigma's list prices, obtained from Sigma's website, by entering them into a spreadsheet and applied them to the mix of products and volume McWane would likely sell. (Tatman, Tr. 348).

629. Based on his analysis, Mr. Tatman determined that the weighted average of Sigma's announced list price increase amounted to a 25% increase. (Tatman, Tr. 348).

630. Mr. Tatman believed that if McWane followed Sigma's 25% increase, McWane would lose more visibility into where the competitive level was. The "competitive level" refers to the price level at which the actual market is selling, *i.e.*, the

actual net price level in the marketplace. (Tatman, Tr. 348, 379 ("So if I'm offering a published price of $20, where is the actual net price in the marketplace? Is it $15? Is it $14? Is it $10. I'm trying to figure out where competitors are taking business away from me", what are they doing with twelve different price mechanisms going on. Job pricing is one of twelve ways to sneak price out of there. I'm just trying to figure out where they're at. And wherever they are at, wherever the customers are truly buying at, I call that the competitive level, sir")).

631. Mr. Tatman recommended to his bosses that McWane not follow Sigma's proposed 25% list price increase, but instead publish an average multiplier increase of approximately 8% over McWane's effective multipliers. (Tatman, Tr. 215-216, 340,354-359).

632. Mr. Tatman's pricing strategy for McWane was designed to reduce the "wiggle room that they had from a financial standpoint so that I could see what was going on." (Tatman, Tr. 361) ("If I can see it, I can shoot it.")).

633. Mr. Tatman's pricing strategy for McWane was designed to put financial pressure on its competitors. As Mr. Tatman explained, reduced "wiggle room" affects the amount of discounting the competitor can do because if it "is making 50 percent profit on something, he's got a lot of things he can do. If he's making 20 percent profit on something, he doesn't have near the amount of flexibility." (Tatman, Tr. 361).

634. Mr. Tatman's concept was to narrow the range between the published price and actual prices and thereby give his competitors less "headroom," within which Star and Sigma could maneuver to undercut McWane on price. (Tatman, Tr. 346-349).

635. Mr. Tatman's objective was to stabilize market pricing by compressing the spread between published pricing and actual pricing, so as to achieve greater pricing transparency. (Tatman, Tr. 1072).

636. McWane's strategy was designed to serve its goal of increasing volume and gaining market share. (Tatman, Tr. 521-522).

637. A McWane internal document, CX 0627 at 001, titled "Current Competitive Environment" read as follows:

General:
- Net pricing in 2007 lagged inflation due to pressure on volume
- The July LP increase wasn't fully realized by Sigma/Star due to lower multipliers and allowing specific accounts to continue buying off prior LP
- Continued inflation out of China is increasing pressure for netting real price

Tyler/Union:
- Oct 5th: Announcement stated that any future price actions would be handled with multiplier changes rather than by publishing new List Price books.
- Due to Domestic Mfg our average inflation is well below Sigma and Star's

Sigma:
- Oct 23rd: Announce a minimum LP increase of 6% for Jan 2nd
- Mid Dec: Posted new LP files on their website (16% to 46%) increase ~ 25% on average
- **Dec 20th: Delayed their effective date while bashing Tyler/Union for not following**

Star:
- Nov 30th: List Price increase announced for Jan 2nd effective date
- Late Dec: Revised effective date to Feb 4th
- No actual values or % changed have yet to be announced or posted

(CX 0627 at 001 (emphasis in original)).

638. A McWane internal document, CX 0627 at 004, titled "Desired Message to the Market & Competitors" read as follows:

- **Tyler/Union will be consistent and follow through with what we've formally communicated.**

- **T/U will encourage/drive both price stability and transparency.**

- **T/U will adjust multipliers as required to remain competitive within any given market area. (Consistent Job Pricing will be met with general market actions)**

- **For 2008, we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level.**

Due to their now more desperate need for price, I believe that Sigma and Star will mimic and verbally follow any program we publish. However the keys to actual success are:

1. T/U being consistent with what we say for an extended period (> 3 months)

2. Sigma & Star's mgt pulling price authority away from front line sales and customer service personnel to add discipline to the process

3. Support from our major customers to abandon the current process of branches calling multiple suppliers to auction for price. (We'll need face to face meetings)

4. The Big 3 not allowing 3rd tier suppliers like Serampore to disrupt the process

(CX 0627 at 004 (emphasis in original)).

639. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. Tatman of McWane for three minutes at 11:03 a.m. on January 3, 2008. Mr. Rybacki acknowledged that it appeared from telephone records

that he spoke to Mr. Tatman for a couple of minutes on January 3, 2008 but testified he had no idea what they talked about. Mr. Tatman also testified he had no recollection of what was discussed. (CX 1621-A at 114, *in camera*; Tatman, Tr. 369-370; Rybacki, Tr. 3627, *in camera*).

640. A call from a cell phone issued to Mr. Tatman of McWane was placed to a cell phone issued to Mr. Rybacki of Sigma for nine minutes at 4:30 p.m. on January 4, 2008. Mr. Rybacki and Mr. Tatman testified they did not remember or know what they discussed. (CX 1621-A at 115, *in camera*; Tatman, Tr. 370, *in camera*; Rybacki, Tr. 3627-3628, *in camera*).

641. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. McCutcheon of Star for 26 minutes at 5:47 p.m. on January 9, 2008. (CX 1621-A at 116, *in camera*; Rybacki, Tr. 3628-3629, *in camera*).

642. Mr. Tatman spoke with Mr. Rybacki "a couple of times" but he did not know what they discussed. (Tatman Tr. 364).

643. Mr. Tatman was unable to remember those calls, and did not know what was discussed. (Tatman, Tr. 367-370 ("Q. But you don't know what you and Mr. Rybacki might have talked about on December 27? A. I don't know if he said, 'Merry Christmas. Welcome to the rat race.' I have no clue.")).

644. One of the calls from Mr. Rybacki may have been to welcome Mr. Tatman to the industry. Otherwise, Mr. Rybacki could not recall what was discussed. (Rybacki, Tr. 3626-3628, *in camera* ("Q. Do you know what you and Mr. Tatman spoke about for six minutes on the afternoon of December 27? A. Not a clue."; "Q. And what did you and Mr. Tatman talk about for a couple of minutes on January 3? A. I have no idea."; "Q. And what did you and Mr. Tatman talk about for nine minutes on the afternoon of January 4, 2008? A. I have no idea. None."); Rybacki, Tr. 1088-1089).

b. McWane's January 11, 2008 Customer Letter

645. On January 11, 2008, McWane announced in a letter to its customers, the following:

> Dear Valued Customer,
>
> Due to continued rising costs, especially within our off-shore operations, we find it necessary to increase pricing on Utility Fittings and Accessories.
>
> As per our prior letter of October 5, 2007, we will adjust pricing by increasing multipliers while retaining our current List Price, LP-5072. Letters stating the new region specific multipliers will be mailed January 18, 2008. The increase will be 10% to 12% above the current prevailing multiplier levels on Blended Fittings and Accessories and 3% to 5% on Domestic Fittings effective February 18, 2008.
>
> To help our distribution customers better manage their inventory valuations and compete on a more level playing field, it is our intention going forward to sell all products only off the newly published multipliers. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing.
>
> All annual municipal bid contracts will be honored per the terms of the contract. Jobs quoted prior to this announcement will be honored through March 1, 2008, with acceptable documentation provided to your local Tyler/Union sales representative.
>
> If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.
>
> We thank you for your business and as always we remain committed to providing you with quality products and service at competitive prices.
>
> Sincerely,

/s/
Jerry Jansen
National Sales Manager

(CX 1178).

646. The January 11, 2008 Customer Letter was the result of Mr. Tatman's internal McWane discussions with Mr. McCullough and Mr. Walton. (Tatman, Tr. 371).

647. McWane knew internally that in order to meet its objectives of increasing volume and share, it would have to Project Price. Mr. Tatman hoped that by declaring a purported intent to stop Project Pricing, McWane might lull (or "head fake," as Mr. Tatman called it) Star and Sigma into temporarily reducing their Project Pricing, leaving McWane to price however it deemed appropriate, and thereby gain a competitive advantage. (Tatman, Tr. 893-894).

648. Mr. Tatman wrote the January 11, 2008 Customer Letter. (CX 2477 (Jansen, Dep. at 254-255)).

649. Regarding the date of March 1, 2008, stated in CX 1178 (F. 645) as the last date prior quotes would be honored, Mr. Tatman explained:

> [W]e would honor old job pricing as long as you got your orders in by March 1 because you -- some of that pricing is twelve months old. There's a long time between when you quote it and then the time you actually sell at, so what we were trying to do is get customers on our new pricing and flush out the old pricing that could be twelve months old there. So what we said is we've given you any sort of incremental job price in the past, could be 12 months ago, could be 18 months ago. You have until March 1 to enter that order. We'll honor that price. But after March 1, we want to requote that business.

(Tatman, Tr. 419-420).

650. In an email transmitting the January 11, 2008 Customer Letter to Mr. Webb and others at HD Supply, Mr. Tatman explained the key points, as follows:

- The % change is significantly lower than the List Price change Sigma posted on their website which appears to be in the range of ~25% on average
- We are going to maintain our List Price Book and make the adjustment with multipliers
- The lower % for Domestic Product reflects both lower cost inflation in the US compared to China and our desire to support Domestic Specifications
- Distributors are ultimately better served with adherence to published pricing as instability and the corresponding price erosion only reduces your profitability

(CX 2172).

651. McWane communicated its new region-specific multipliers, effective February 18, 2008, in letters to customers dated January 18, 2008. (Tatman, Tr. 389-390, 411-412; *e.g.*, CX 0896 at 001; CX 1672 at 001; RX 608; CX 0035 at 001, 003).

652. The multipliers that Mr. Tatman proposed in CX 1664, Mr. Tatman's spreadsheet which he prepared in connection with his recommendations for multiplier changes in December 2007 (F. 627), were used in the final multiplier map announced by McWane on January 18, 2008. (Tatman, Tr. 1054-1055; *compare* CX 1664 *with* CX 0035 at 003).

653. The non-domestic Fittings multipliers announced in McWane's January 18, 2008 customer letters were below the then-current effective multipliers in eight states: New Hampshire, New Jersey, Delaware, Maryland, Virginia, Arkansas, South Dakota, and Idaho. (Tatman, Tr. 403-404; CX 1664 ("final regional multipliers" worksheet)).

654. The non-domestic Fittings multipliers announced in McWane's January 18, 2008 customer letters were above the then-current effective multipliers in at least 40 states or territories: Connecticut (3.6% increase), New York (10.5% increase), Rhode

Island (10.7% increase), Massachusetts (20.8% increase), Vermont (19.2% increase), Pennsylvania (8.8% increase), West Virginia (11.9% increase), Ohio (16% increase), Indiana (13.3% increase), Kentucky (3.7% increase), Alabama (7.4% increase), Georgia (15.3% increase), North Carolina (7.7% increase), South Carolina (9.5% increase), Florida (5.5% increase), Tennessee (2.7% increase), Mississippi (6.7% increase), Louisiana (3.0% increase), Oklahoma (16.2% increase), Missouri (7.6% increase), Kansas (13.1% increase), Nebraska (13.4% increase), Michigan (6.5% increase), Minnesota (6.1% increase), North Dakota (11.9% increase), Iowa (5% increase), Illinois (1-80 north) (13.3% increase), Wisconsin (6.9% increase), Arizona (5.8% increase), New Mexico (7.2% increase), Texas (8.2% increase), Utah (33.3% increase), Wyoming (9.9% increase), Colorado (8.6% increase), Montana (8.6% increase), Washington (35.5% increase), Oregon (31% increase), California (10.7% increase), Nevada (9.3% increase); Puerto Rico (12.5% increase). (CX 1664 ("final regional multipliers" worksheet); Tatman, Tr. 405-406 (walking through calculation for 35.5% increase in Washington)).

655. McWane's January 2008 multiplier adjustment, *vis a vis* the previous published multipliers, resulted in reductions in 28 states and no change in another 8 states. (Tatman, Tr. 885; CX 1664; *see also* Normann, Tr. 4778).

656. In late 2007, Mr. Jansen of McWane approached Vincent Napoli, whose position as an accountant with McWane was being eliminated, about taking a newly created position, eventually called "pricing coordinator" and/or "pricing manager." Mr. Napoli's responsibilities in 2008 were to assist Mr. Jansen with handling product claims, and keeping track of, and verifying, individual job pricing on submitted orders, as middleman between the salespeople and the order entry people. Mr. Napoli also had limited authority to approve pricing adjustments, in the range of one to three discount points off the multiplier. As Mr. Napoli stated: "There's nothing wrong with [giving a discount] except you sure want to know what -- when it's happening, or you like to know before it happens, because they [the sales persons] don't know what the ramifications are as far as profitability." Unusual pricing requests or requests for approval outside Mr. Napoli's limited approval authority went to Mr. Jansen for approval. (RX

640 (Napoli, Dep. 35-36, 43-44, 46, 49-50); Tatman, Tr. 931, 1007).

657. Once Mr. Napoli became the pricing coordinator for McWane, the local sales agents were instructed to "run [discounts] through" him and forms were designed for this purpose. According to Mr. Napoli, not all sales agents complied with the system. (RX 640 (Napoli, Dep. 47-48); *see also* CX 2485 (Walton, Dep. 12-122) ("I think there was a move to go to a more centralized decision-making structure for pricing instead of having individual salespeople make decisions in individual markets . . . I would say they probably had to ask for approval from somebody.")).

658. Mr. Walton of McWane was a proponent of making pricing decisions at a centralized location, so as to get a national view of what was happening. As he explained:

> [I]f we have a salesperson in California making a pricing decision, it may not be in our best interest for what -- how that affects Texas or Missouri or Florida or New York, . . . [O]ftentimes when somebody makes a local decision here, it has effects in other places that may or may not be in our best interest.

(CX 2485 (Walton, Dep. 32)).

659. Mr. McCutcheon of Star received a copy of McWane's Friday, January 11, 2008 letter from a customer on or about Monday, January 14, 2008, and forwarded the letter to Mr. Minamyer. Sigma executives received a copy of the letter on or about January 14, 2008, from one of its sales agents. (CX 0038; McCutcheon, Tr. 2505-2507; Rybacki, Tr. 3557-3558; CX 1291; Minamyer, Tr. 3156).

660. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. McCutcheon of Star on January 15, 2008 for two minutes. A call was placed from Mr. Rybacki's cell phone to Star's general 800 number on January 16, 2008 for ten minutes. A call was placed from a cell phone issued to Mr. Rybacki to a cell phone issued to Mr. McCutcheon

on January 24, 2008 for nine minutes. Neither Mr. McCutcheon nor Mr. Rybacki recalled any details about these calls, or even whether any communication between them actually took place. (CX 1621-A at 108, 117, *in camera*; McCutcheon 2475-76, *in camera*; Rybacki, Tr. 3629-3632).

2. Sigma's reaction to McWane's January 11, 2008 Customer Letter

661. After receiving McWane's January 2008 pricing letter, the letter was reviewed and discussed among the regional managers and the sales team at Sigma. Mr. Rybacki consulted with Mr. Fox and others to discuss what McWane was doing with multipliers and to address how to respond. (Rybacki, Tr. 3692-3695).

662. Sigma did not receive McWane's January 11, 2008 Customer Letter from anyone at McWane. (Pais, Tr. 2058-2059; McCutcheon, Tr. 2506-2507).

663. On January 24, 2008, Mr. Pais of Sigma sent an internal email to "M20." The email group "M20" consists of Sigma's top managers. The email attached a spreadsheet analysis identifying Sigma's fittings sales in each territory in December 2007 and each multiplier level, and McWane's new multiplier, in order to determine if McWane's new multipliers "present a real improvement over" Sigma's "actual current" multiplier levels. Mr. Pais noted that the analysis showed the spread of multiplier levels and also computed the weighted average multiplier for each territory. According to Mr. Pais, the analysis showed that most of Sigma's selling prices were at "very, very low multipliers." Mr. Pais concluded based on the analysis that when comparing "apples to apples" McWane's new multipliers did not provide much improvement in many areas, reasonable improvement in some areas, only marginal or no improvement in many territories, and a lowering in some territories. (CX 1145; *see also* Rybacki, Tr. 3695 (analysis showed that some multipliers were lower than Sigma's at that time); Brakefield, Tr. 1218).

664. In the January 24, 2008 Sigma internal email referred to in F. 663, Mr. Pais continued:

> It's likely that [McWane] did wish to make a definite effort to improve the multiplier levels -- but, may have based their choices for the NEW multipliers on the actual documented competitive pricing that they are known to procure proof for, from the customers. Unfortunately, the illogical pricing approach used by Star -- and hence SIGMA -- for 'Plant quotes' with lower 'special' multipliers may have biased [McWane's] decisions in pegging the NEW multipliers at where they are. Though Tyler is beginning to pay attention to PW jobs too, they just don't understand why PW jobs need to be given LOWER pricing -- when in fact, for Soil Pipe, Tyler and CP are known to offer HIGHER prices, since they feel the Distributors don't commit their resources to stock and usually order direct job-site shipments!
>
> I HAVE URGED LARRY TO INITIATE A NEW COMMITTED AND SERIOUS EFFORT TO NORMALIZE ALL PRICING FOR FITTINGS -- AT SAME LEVELS -- PW AS WELL AS OTHER ORDERS, TO ELIMINATE THE CONFUSION WE ARE CREATING WITH CUSTOMERS AND COMPETITORS, LEADING TO LOWER OVERALL PRICING LEVELS.
>
> Though Tyler's NEW multipliers are discouraging, this is both a lesson and an opportunity [for] Sigma and Star to develop a patient and disciplined Marketing approach and demonstrate to [McWane] that we are capable of being part of a stable and profitability conscious industry. This is the 'leadership capital' we created when we acquired PCI and reduced the supply base to just 3 -- but, so far, we have NOT been astute enough to derive any returns from this capital!
>
> Let's ***get-it-done*** in 08 . . .

(CX 1145 at 001-002 (emphasis in original)).

665. "PW" as used in Sigma's January 24, 2008 internal email referred to in F. 664, means "plant work," such as water treatment plant work. Plant work generally uses the largest size fittings and a lot of different, very uncommonly used configurations. (Pais, Tr. 1912-1913; Rybacki, Tr. 1129).

666. Historically, Sigma charged different prices for plant work fittings than for the smaller fittings used in the underground, housing subdivision-related, business. (Pais, Tr. 1913-1915).

667. Sigma's smaller fittings were generally sold into Distributor inventory and managed by Distributors, because the configurations and volume used were relatively predictable. Over the years, however, for financial reasons, Distributors reduced fittings purchased for stock. When Distributors submitted a single list for all requirements, without stocking for inventory, they were confused by the dual pricing system and were demanding that discounted prices apply to all requirements. (Pais, Tr. 1913-1915; *see also* CX 2528 (Pais, Dep. at 263-267) (Sigma sought to turn back the practice of special pricing, which had spread from the plant work segment into stocking orders); RX 687 (Pais, Dep. at 82-83)).

668. Through his January 24, 2008 email (F. 663-664) Mr. Pais wanted to encourage Sigma's sales force to minimize the practice of plant quotes with lower special multipliers because, if too aggressive, such special pricing causes a vicious cycle of price erosion and keeps prices at a depressed level, which hurts Sigma and its competitors. (Pais, Tr. 1920-1922). As Mr. Pais explained:

> Our sales -- like any salesperson, they hate to lose any order. They somehow think that there is only that order that they're chasing, and there may not be another one coming the next day. And as a result, they get all anxious, . . . if they feel that from their regular good customers they're losing business . . . So in that -- in that anxiety, if they just lower prices too aggressively, then they could prompt the competitors also to react and start a vicious cycle. So this is all in attempt to make them aware one of the way of how to be a smarter salesperson by not giving into too many requests for discounts.

(Pais, Tr. 1921-1922; *see also* Pais, Tr. 1920 ("So because we were indulging in this practice which was not smart anymore, not relevant, we felt this was forcing our other competitors to

keep the price at a depressed level and hurting us and perhaps themselves, too.")).

669. Mr. Rybacki interpreted Mr. Pais' January 24, 2008 email to be asking the sales team to pull back on job pricing. Mr. Rybacki did not disagree with Mr. Pais that Sigma needed to pull back. (Rybacki, Tr. 1129-1130).

670. Mr. Rybacki interpreted McWane's pricing changes to "squeeze . . . the multipliers [making] it very difficult for [Sigma] to make very much margin." (Rybacki, Tr. 1131).

671. Mr. Pais had "always suggested" that Sigma firm up or eliminate Project Pricing, in order to be more profitable and consistent in its pricing approach. (Rybacki, Tr. 3545).

672. Sigma was always trying to curtail Project Pricing, including in 2008. Since Mr. Rybacki joined Sigma in 1990, Project Pricing was an "ongoing battle within Sigma, within the industry." Sigma was trying to be more consistent and disciplined in pricing "every year, every day to today" and were "always trying to curtail project pricing." Project Pricing is inconsistent with consistent and disciplined pricing. (Rybacki, Tr. 3523-3524, 3545).

673. Sigma knew that it could not eliminate Project Pricing. (Rybacki, Tr. 1130; Pais, Tr. 2139-2140 ("[W]e were not trying to eliminate a special pricing, we were trying to minimize it . . . ."); Pais, Tr. 1921 ("[E]liminating the practice is wishful thinking. I was just trying to have them minimize it.")).

674. On or about January 29, 2008, Sigma issued a letter to its customers, signed by Mr. Rybacki, as follows:

Dear Valued Customers,

As you are all aware, SIGMA Corporation was intending to put out a new list price sheet on January 2, 2008 which showed a significant increase in all our products due to the increased cost of raw materials, freight, personnel, etc. When one of our competitors chose not to have a list price increase

> but rather a multiplier increase, we decided to follow suit and on February 25th your new multipliers will be in effect for almost every territory. The key word is "almost" as a few of [the] territory multipliers are below what you currently receive from us and some are in fact well below.
>
> It is our intent to raise prices in 2008, not because we arbitrarily feel like raising them but because every manufacturer in the Waterworks Industry that has Iron products needs one. Manufacturing needs a price increase, distribution needs a price increase, and with product links such as Ductile Iron Pipe and Valve & Hydrants you've already witnessed significant charges.
>
> We think it's unwise and irresponsible to lower multipliers and devalue your inventory, so your Regional Managers will send you new multipliers in the next few days as long as they exceed your current ones. We apologize for the confusion and lack of discipline our segment of the Industry has shown as we at SIGMA Corporation are committed to make this a more profitable business for all. Thanks for your support and understanding and we wish you success throughout 2008 and beyond.

(CX 1189).

675. In the January 29, 2008 letter to its customers, in apologizing for "the confusion and lack of discipline," shown by Sigma's "segment of the market," Mr. Rybacki was referring to Sigma's lack of consistency in pricing, which confuses customers as to what price they are expected to pay, and that being "disciplined" means trying to stick to published prices. (CX 1189; Rybacki, Tr. 3520-3522).

676. Sigma's January 29, 2008 customer letter did not announce any change in Sigma's practice of quoting plant work with lower special multipliers, as referred to in Mr. Pais' January 24, 2008 internal email. (F. 663-664, 674).

677. Sigma did not follow all of McWane's multipliers. Sigma's changes followed some of McWane's January 2008 multiplier changes, but Sigma did not follow those that would

result in a multiplier lower than Sigma's then-existing published multipliers. Sigma "could not afford to follow [McWane] down." (CX 1189; Rybacki, Tr. 1126-1127; 3694-3697).

678. On or about February 1, 2008, Sigma sent letters to its customers announcing new region-specific multipliers, effective February 18, 2008, pursuant to its January 29, 2008 customer letter. The letters noted that "[a]ll municipal bids will be honored through the length of the contract," and that "[j]obs quoted prior to this announcement will be honored through March 1, 2008." (CX 0848 at 002; Minamyer, Tr. 3196).

3. Star's reaction to McWane's January 11, 2008 Customer Letter

679. Historically, Star followed McWane's price increases. (Minamyer, Tr. 3185, 3243-3244).

680. It is normal procedure for Star that if McWane comes out with a price increase, Star wants to be ready to follow as quickly as possible. (CX 2538 (McCutcheon, IHT (Vol. 2) at 424)).

681. Star received a copy of McWane's January 11, 2008 Customer Letter from one of Star's customers. (McCutcheon, Tr. 2506-2507).

682. Mr. Minamyer, of Star, read the statement in McWane's January 11, 2008 letter to its customers that "it is our intention going forward to sell all products only off the newly published multipliers" (F. 645) to mean that McWane was telling its customers that they want to sell at the multiplier and stay there; in practice, no Project Pricing. Mr. Minamyer acknowledged that it was possible this was a communication to Sigma and Star as well. (CX 2525 (Minamyer, IHT at 71, 76-77)).

683. Mr. McCutcheon of Star did not believe "for one second" that McWane would, in fact, stop Project Pricing, despite what was said in McWane's January 11, 2008 Customer Letter. (McCutcheon, Tr. 2386-2387).

684. In time periods prior to McWane's January 11, 2008 Customer Letter, Star's National Sales Manager, Mr. Minamyer, had delegated some of the authority for Project Pricing to his division managers. In the period of time encompassing Mr. Minamyer's January 22, 2008 email (F. 686), Mr. McCutcheon had asked Mr. Minamyer to be more involved and diligent in the future with regard to the Project Pricing approval process than he had been in earlier periods, because Star was experiencing dramatic cost increases. (McCutcheon, Tr. 2393-2394, 2512; CX 2539 (McCutcheon, Dep. at 152)).

685. Mr. McCutcheon was "all over" Mr. Minamyer to stop delegating authority for Project Pricing and that he needed to "tighten up." (CX 2538 (McCutcheon, IHT (Vol. 2) at 424-425)).

686. On January 22, 2008, Mr. Minamyer sent an internal email to Star's division managers to advise them of Star's plan for reacting to McWane's pricing changes. (CX 0752 at 001; Minamyer, Tr. 3159-3560 (e-mail was a plan to react to information from McWane)). The email stated:

> To: All DM's
>
> The Tyler multiplier letters are hitting the streets. We need to be able to react quickly to be at the right prices.
>
> I will be putting out some instructions on our plans to change state multipliers in the case that we don't get much advance warning.
>
> **Our goal is to take a price increase and to stop project pricing.**
>
> For now here is the plan:
>
> Once we know what a state or area's multiplier is, if it goes up, we will change to that number. If it goes down, we will discuss it.
>
> Later today we will E-mail the procedure for multiplier changes. It will be simple[.] (So that you all can understand it J)

We will not be project pricing unless we see firm documentation that there is a project price or a buy plan that is off of the state multiplier.

All project pricing has to go through me.

Tell your TM's not to ask unless they have solid documentation. I have to be very strict on this as we will not be the ones to drag the market down.

You and your TM's need to be able to tell your customers that we need written documentation with project names, dates, and pricing before we move off of the buy plan This is an effort to do the right thing for the industry.

Your TM's need to start cleaning up their existing project pricing.

The Tyler letter states that they will honor their existing project pricing only until March 1st. We will do the same. If we go past that it will cause disruptions and may result in the increases to be soft or not hold at all.

Start preparing yourselves and your TM's to hold strong and get their projects ordered and shipped before March 1st.

Train them that this is what is best for the industry and that we need to be part of the effort to help our industry. We will not part of damaging the industry due to lack of discipline. We all need to be able to explain this to our customers and to take it to whatever level of management within that customer's organization that is required.

I'm all good with you guys using me as the bad guy. (Stop snickering! J)

You need to know that we are strong in revenue and profit. We will have no problems weathering any price wars, even if they are prolonged. What we are doing is what is right for the industry. So, don't think we need the price increases, as that

> is not the case. A price increase will be good for us on the short and long term profit situation but are not vital to our strength. The truth is that we would come out of a price war stronger than ever and with a bigger market share, but we don't think the industry needs that right now.
>
> Deal from strength and commitment and always take the high road when discussing the industry and our competitors. If we do this, we will emerge as the most solid partner in the industry.
>
> Let me know if you have any questions as it is important that we manage this correctly. I know this will take major effort but that is where we need to be focused until the crazy pricing levels out. Make this your priority.
>
> Thanks,
> Matt
>
> Matt Minamyer
> National Sales Manager

(CX 0752 (emphasis in original)).

687. On February 23, 2008, Mr. Minamyer sent an email to Star's division managers reminding them that they were to obtain documentation and justification before submitting a special pricing request for approval, known internally at Star as "pinks" (F. 874). The email stated in pertinent part:

> As you know we are trying to manage the multiplier increase so we don't let it slide back.
>
> We all know that Sigma will be very slippery and manipulate it in many ways in many areas.
>
> We all agreed to take the high road and get documentation and justification before sending any pinks to me.
>
> "Per the salesman" is not and never has been justification. If you have been approving pinks with that as justification then you are just as responsible for price erosion as anyone.

> . . .
>
> If you can't get some type of documentation from your customer then call me and we can do some more training as we are all in senior management positions and should be able to have that conversation with our customers. We agreed that if your branches asked for pricing and would not give us documentation then we would take it up their management chain. Are you doing that? . . . .
>
> I have always been clear that we will always keep our customers at the right price but we need to be diligent at finding out the right price or shipping restrictions. . . .
>
> Don't send me any more pinks without proper justification and documentation. If I get called on the floor by our customers[']' Sr. Management for not taking the increase I will have data to show how we made our decision. So go get it and you can have your pricing.
>
> Let's not get lazy or scared of our customers. Let's show maturity and do the right thing as mature business people.

(CX 0815).

688. Mr. Minamyer knew that a price increase would not hold, or "stick," if Star or any of its competitors undercut the price increase with Project Pricing. (Minamyer, Tr. 3258-3259; *see also* CX 0525 (May 5, 2008 email from Star Western Division Manager Michael Berry noting with respect to upcoming price increase: "There is some flexibility [with pricing after a price increase] but here is the problem. The more flexible we are the less it holds and it won't work. That said, if you document that the competition is not holding, then match and don't lose the orders.")).

689. In 2008, Star was facing rising production costs in China. If Star "took [the] price increase" and could limit Project Pricing, it would make more money. (McCutcheon, Tr. 2516-2518; Minamyer, Tr. 3246-3247).

690. Star's plan in January 2008 was to stabilize its pricing; that is, to have more consistent pricing at the published multiplier. (Minamyer, Tr. 3170, 3173).

691. Mr. Minamyer believed that all of the Fittings competitors would have to make an effort to stabilize Fittings prices for the effort to be successful. (Minamyer, Tr. 3174; CX 2526 (Minamyer, Dep. at 141-142)).

692. Star's plan at the time Mr. Minamyer sent the January 22, 2008 internal email (F. 686) was to follow McWane's new published multipliers. (CX 0752; Minamyer, Tr. 3243).

693. Star's plan in 2008, when Mr. Minamyer sent the January 22, 2008 internal email referred to in F. 686, was to try to stop project pricing. Star was also hoping that McWane and Sigma would stop project pricing as well. However, if a customer told Star that its competitors were Project Pricing below Star, then Star planned to Project Price also. (CX 2526 (Minamyer, Dep. 119-120); Minamyer, Tr. 3259; *see also* CX 2526 (Minamyer, Dep. at 168) ("If McWane did the same, that would be okay; if they didn't, then we would have to follow their price down.")).

694. Star's plan in 2008 was not to "stop" Project Pricing, but to require firm documentation that a competitor was Project Pricing before Star would Project Price itself. (CX 0752; Minamyer, Tr. 2517, 3243).

695. The procedure of requiring documentation before Star gives a project price had been Star's policy for at least ten years prior to January 2008 and Mr. Minamyer's January 22, 2008 email reflected a change in monitoring and managing Project Pricing. (McCutcheon, Tr. 2517-2519).

696. The January 22, 2008 internal email (F. 686) made Mr. Minamyer the central authority for approving Star's Project Pricing. (CX 0752 at 001; Minamyer, Tr. 3167-3168; CX 0034 at 001).

697. Regarding the statement in Mr. Minamyer's January 22, 2008 email (F. 686) that Star's goal was to "take a price

increase and to stop project pricing," according to Mr. McCutcheon, it was neither "logical or reasonable" for Star to think that Project Pricing would actually stop. Stopping Project Pricing would "shut [Star] down." However, because Star was facing dramatic cost increases, Mr. McCutcheon encouraged Mr. Minamyer to minimize Project Pricing by tightening up his sales force and being more involved in the Project Pricing process. (McCutcheon, Tr. 2393; CX 2538 (McCutcheon, IHT (Vol. 2) 425-426)).

698. Mr. Minamyer's language in his January 22, 2008 internal email to the Star division managers regarding "stopping" project pricing was unusual but telling them that Star needs to minimize Project Pricing, "is normal, happens every time there's a [price] increase. There a new rash of emails concerning let's do better this time, every time there's a price increase. [Minamyer's] language is too strong and it's irrational, to me." (CX 2538 (McCutcheon, IHT (Vol. 2) at 452); CX 2539 (McCutcheon, Dep. at 155)).

699. The phrase, "lack of discipline," as used in Mr. Minamyer's January 22, 2008 internal email, referred to pricing discipline, and controlling Project Pricing is a form of pricing discipline. (Minamyer, Tr. 3170).

700. Mr. Minamyer's January 22, 2008 internal email to Star's division managers was his attempt to minimize Project Pricing by Star's sales force. (CX 0752 at 001; McCutcheon, Tr. 2390; CX 2538 (McCutcheon, IHT (Vol. 2) at 425)).

701. On January 29, 2008, Mr. Minamyer forwarded to Star's division managers a copy of McWane's new national blended Fittings multiplier map, effective February 18, 2008. (CX 0035 at 001, 003; Minamyer, Tr. 3184-3185).

702. On January 30, 2008, Bud Leider of Star sent an email to HD Supply, Star's largest customer, stating that "Star is raising or matching all fitting numbers to match [McWane] effective Feb. 18th. . . . NO UTILITY PROJECT PRICING NATION WIDE." (CX 1566 (emphasis in original); McCutcheon, Tr. 2409-2410;

see also CX 2537 (McCutcheon, IHT (Vol. 1) at 56) (HD Supply is Star's largest customer)).

703. Mr. McCutcheon thought telling customers that Star was going to stop Project Pricing (F. 702, 704) was "bizarre." (CX 2538 (McCutcheon, IHT (Vol. 2) at 452)).

704. On February 2, 2008, Mr. Minamyer sent an email to distributor group TDG (F. 244) stating in pertinent part that Star's "plan is to adjust multipliers to be on an even playing field on up front pricing with our competitors. We will adjust various multipliers across the country to be effective on 2-18-08, ship all existing special projects before March 1st, and have no more project pricing after March 1st. Municipal contracts will be honored through the length of the contract. We will begin sending "Multiplier letters" to all of our customers beginning Monday, Feb. 4th . . . . We are working extremely hard to bring stability to the fitting market and we are asking for your support in this effort." (CX 2300; Minamyer, Tr. 3188).

705. "Up-front pricing" in Mr. Minamyer's February 2, 2008 email referred to the standard list price as adjusted by the published multiplier. (Minamyer, Tr. 3190).

706. When Mr. Minamyer wrote in his February 2, 2008 email that Star was "working extremely hard to bring stability to the fitting market," he was referring to price stability. (Minamyer, Tr. 3192).

707. On February 6, 2008, Star issued letters to its customers specifying the new multipliers that it would implement to match McWane's multiplier changes, effective February 18, 2008. (CX 2336 at 001; CX 0035 at 001-003; McCutcheon, Tr. 2408).

708. Star sought to convey the message that Star would no longer offer Project Pricing after March 1, 2008 to all of Star's customers. (Minamyer, Tr. 3193; CX 2526 (Minamyer, Dep. at 156)).

709. Star wanted everybody, principally its customers, but also McWane and Sigma and other competitors, to know that Star

was increasing its multipliers and curtailing Project Pricing. (CX 2526 (Minamyer, Dep. at 168-169)).

E. DIFRA

1. Background

710. Mr. Pais of Sigma initiated the effort to form DIFRA in or around 2004. In 2005, Mr. Pais asked for Mr. Brakefield of Sigma to assist in forming a trade association. Mr. Pais sought the participation of various Fittings suppliers, including McWane and Star. (CX 1225 at 004; Pais, Tr. 1969-1970; Brakefield, Tr. 1220-1221; McCutcheon, Tr. 2411).

711. The concept for DIFRA was modeled after industry groups formed by manufacturers of ductile iron pipe and cast iron soil pipe, such as DIPRA (the Ductile Iron Pipe Research Association) and CISPI (the Cast Iron Soil Pipe Institute). (Tatman, Tr. 469; Pais, Tr. 1968-1969; CX 2527 (Pais, IHT at 57-58)).

712. Star initially declined to join DIFRA because Mr. McCutcheon did not see a benefit for Star and he was not comfortable trusting Star's competitors. Over the course of approximately a year, Mr. Pais, Mr. Rybacki, and Mr. Brakefield of Sigma continued to ask Mr. McCutcheon if Star would join DIFRA, but he declined. Mr. McCutcheon eventually changed his mind and accepted after his colleagues at Star convinced him it would be nice to know what Star's market share was, and he no longer saw any negative impact. (McCutcheon, Tr. 2412-2413; CX 2538 (McCutcheon, IHT (Vol. 2) at 242-243), *in camera*).

713. Beginning in or before 2005, the DIFRA members engaged the law firm of Bradley Arant Rose & White LLP ("Bradley Arant"). DIFRA obtained legal advice from the Bradley Arant lawyers in connection with DIFRA, including with regard to the formation, organization, and activities of DIFRA and the formation of the tons-shipped data reporting system, discussed in more detail below. (*See, e.g.*, F. 718, 726, 733-734, 741-755). (CX 1473; Brakefield, Tr. 1229-1230, 1236-1237, 1244-1245, 1337-1338, 1341, 1343, 1346-1347, 1350-1351, 1358, 1371-1373,

RX 40, RX 43; RX 12; CX 1333; CX 1473; CX 0048; CX 1480; CX 0158; CX 1486; CX 1479; CX 1090; CX 0052; CX 1081; RX 654 (Brakefield, Dep. at 13-17, 19)).

714. A formal meeting was held for DIFRA at the offices of Bradley Arant on March 18, 2005 to explore the possibilities and issues involved in establishing a trade association relating to ductile fittings for the waterworks industry. In addition to the Bradley Arant lawyers, the Fittings suppliers that attended included McWane, Sigma, and Star. (CX 1473).

715. DIFRA was incorporated by David Green of McWane as an Alabama nonprofit corporation on January 12, 2007. (CX 1480 at 007; Brakefield, Tr. 1227, 1349 (DIFRA was incorporated in Alabama in January 2007)). At that time, DIFRA's initial Board of Directors had seven members, consisting of two individuals each from McWane (Tatman, Leonard), Sigma (Brakefield, Pais), and Star (Bhutada, McCutcheon), and one from U.S. Pipe (Crawford). (CX 1480 at 006; Tatman, Tr. 616-617).

716. DIFRA's articles of incorporation set forth various purposes for the organization, including, for example, "to promote the interests of the ductile iron fittings industry and to promulgate policies and conduct activities for the betterment of the ductile iron fittings industry, provided that all policies and activities of the association be consistent with applicable federal, state and local antitrust, trade regulation and other laws and regulations." (CX 0158 at 002-003; Brakefield, Tr. 1229-1230).

717. Mr. Brakefield, then National Sales Manager for Sigma (F. 87), became DIFRA's president in January 2007, and was the first and only president of DIFRA. (Brakefield, Tr. 1221-1222, 1227).

718. On January 8, 2007, DIFRA engaged the accounting firm, Sellers Richardson, of Birmingham, Alabama, as the association's auditor. As part of its duties, Sellers Richardson would "compile on a monthly basis, the data submitted by the members reporting their respective sales of ductile iron fittings" in the form of tons shipped "and will prepare and issue to the members' monthly reports" showing the aggregate tons of ductile

iron fittings shipped (hereafter, "DIFRA data reporting system"). (CX 1333 at 003, 005, and Exhibit A thereto; Brakefield, Tr. 1236-1238).

719. The accounting firm retained by DIFRA, Sellers Richardson, was overseen by the Bradley Arant law firm. (Pais, Tr. 2109-2110).

720. DIFRA had four members: McWane, Sigma, Star, and U.S. Pipe. (Joint Stipulations of Fact, JX0001 ¶ 17; Brakefield, Tr. 1227-1228, 1259-1260).

721. Although DIFRA had articles of incorporation and bylaws in 2007, DIFRA was largely dormant and the DIFRA data reporting system referred to in F. 713 and further described *infra* was not operational in 2007. (CX 1083 at 002; CX 1088 at 001 (DIFRA "stalled" in 2007); *see* F. 738).

722. Sigma decided to revive efforts to establish DIFRA after McWane's CEO in charge of the Fittings business, Mr. Green (F. 42), was replaced and new management (Mr. Tatman, F. 21-22) was in place. (CX 1088 at 001).

723. On February 7, 2008, Mr. Tatman reported to his superiors at McWane that Mr. Rybacki of Sigma had called him that day and advised him that Sigma was interested in participating in a trade association for Fittings. Among other things, Mr. Tatman relayed that Mr. Rybacki told him that DIFRA should become active, that Sigma would support DIFRA, that Mr. Rybacki had discussed DIFRA with Star, and that Star would also consider participating. (CX 1284 at 001; Tatman, Tr. 466-467; Rybacki, Tr. 3536-3538).

724. On February 7, 2008, Mr. Tatman emailed Mr. Brakefield stating: "It appears there is renewed interest in making another attempt to form an industry association for Fittings similar to DIPRA or CISPI. When you're available, I'd like to get your inputs on what the potential next steps should be." In the event "face to face meeting with [pro]spective members would be constructive," Mr. Tatman provided his available dates and suggested possible locations, and further noted: "Of course

we'll need to make sure we have the appropriate legal representation available for any discussions." (CX 1284 at 002; Tatman, Tr. 466-467, 470-471; CX 1081 at 002-003; Brakefield, Tr. 1257).

725. The four DIFRA members held an organizational meeting on March 27, 2008 ("March 27, 2008 DIRFA meeting") in the Birmingham, Alabama offices of Bradley Arant. (CX 1486 at 001).

726. The agenda for the meeting referred to in F. 725 included 20 items, one of which was to discuss the status of a data reporting system, including "frequency, dissemination, and form of reports based on reports input, and proper and improper utilization of the data." (CX 1486 at 002; Brakefield, Tr. 1272).

727. In attendance at the March 27, 2008 DIFRA meeting were representatives of all four DIFRA members: Mr. Brakefield, Mr. Pais, Mr. Bhattacharji, and Mr. Rybacki of Sigma; Mr. McCutcheon of Star; Mr. Crawford or Mr. Murray of U.S. Pipe; Mr. Tatman (and possibly Mr. Leonard and Mr. Walton) of McWane, and Mr. Herren, an attorney with the Bradley Arant firm. (Brakefield, Tr. 1270-1271 (listing attendees); Tatman, Tr. 475 (Mr. Tatman attended); McCutcheon, Tr. 2416; CX 1486 at 001; CX 1477 at 001).

728. After the March 27, 2008 DIFRA meeting, Mr. Tatman had dinner alone with Mr. McCutcheon. (Tatman, Tr. 475; McCutcheon, Tr. 2418; RX 698 (McCutcheon, Dep. at 41)).

729. Mr. Tatman did not recall specifically what was discussed at the dinner referred to in F. 728, but he did not recall discussing Fittings at all. (Tatman, Tr. 475-476).

730. McWane's policy was not to have pricing discussions with competitors. (Tatman, Tr. 475-476).

731. Based on what transpired at the March 27, 2008 DIFRA meeting, it appeared that the association would move forward, and that the four members would report tons-shipped

data for 2006, 2007, and January through March of 2008. (CX 1560 at 001; Tatman, Tr. 476-477; CX 2267 at 002).

732. On the morning of April 25, 2008, Mr. Tatman, Mr. Pais, Mr. Brakefield, and Mr. McCutcheon, along with DIFRA's attorney, Mr. Long, held a conference call. (CX 0160 at 002; Tatman, Tr. 485-486; CX 1479 at 001; McCutcheon, Tr. 2418; Brakefield, Tr. 1276-1277).

733. On the April 25, 2008 conference call referred to in F. 732, the DIFRA members approved a tons-shipped reporting format, and it was further agreed that each member would submit its Fittings tons-shipped data to DIFRA's accounting firm, Sellers Richardson, which would then aggregate the data and provide reports to the DIFRA members reflecting industry-wide tons-shipped by the 20th of the month. It was further agreed that the data would be submitted "no later than" May 15, 2008, and that going forward, members would report their prior months' shipment data by the 15th of each month. (CX 0160 at 002; Tatman, Tr. 486-487; CX 1479 at 001; Brakefield, Tr. 1276-1277; *see also* CX 1186 (Tatman May 23, 2008 email stating that: "Nearly four weeks ago all members agreed on a conference call to report by the 15th."); Brakefield, Tr. 1281-1282 (describing "consensus" on conference call as to May 15 submission of data); McCutcheon, Tr. 2417).

734. It was agreed during the April 25, 2008 conference call, referred to in F. 732, that the tons-shipped data that was to be submitted to the accounting firm Sellers Richardson by May 15, 2008 would include short-tons of Fittings shipped within the United States in the following six categories: 2"-12" Flanged; 2"-12" All Other; 14"-24" Flanged; 14"-24" All Other; Greater than 24" Flanged; Greater than 24" All Other. Members' initial submissions would include annual data for 2006, monthly data for 2007, and monthly data for January through April 2008. An April 25, 2008 email by Mr. Long to the DIFRA members summarized the results of the conference call. (CX 1479 at 001; CX 1329 at 009; CX 0160 at 002; McCutcheon, Tr. 2417).

735. On May 5, 2008, DIFRA's attorney, Mr. Long, noted that he had not heard back from the DIFRA members in response

to his summary of the agreements reached in the April 25, 2008 conference call (F. 732) and asked the DIFRA members to confirm their concurrence with the reporting procedures and parameters he outlined in his April 25, 2008 email (F. 734), so that reporting could begin by mid-May, 2008. McWane, Sigma, and Star each replied that they concurred. McWane and Sigma replied on May 5, 2008 and Star replied on May 7, 2008. (CX 0160 at 001; Tatman, Tr. 487; RX 0580).

736. The most recent DIFRA conference call took place on April 25, 2008. (Brakefield, Tr. 1422; F. 732).

737. The most recent DIFRA meeting took place on March 27, 2008. (Brakefield, Tr. 1422; F. 725).

738. The first DIFRA tons-shipped report was issued by Sellers Richardson on June 17, 2008. (CX 0052; Brakefield, Tr. 1395; RX 679 (Haley, Dep. at 24)).

739. The last DIFRA tons-shipped report was circulated in January 2009, for the month of December 2008. (Brakefield, Tr. 1228, 1400).

740. McWane did not submit tons-shipped data to DIFRA's accountants after January 2009, and Star did not submit tons-shipped data to DIFRA's accountants after December 2008. (Brakefield, Tr. 1400, 1419-1420; CX 1339).

2. The data reported through DIFRA

741. The data collected and reported by Sellers Richardson for DIFRA was organized in categories of Fittings (2" to 12", 14" to 24", larger than 24" in diameter, and flanged versus non-flanged) that McWane used in its blue books, and that are common in the industry. (CX 0052; Tatman, Tr. 535-536).

742. DIFRA's accountants, Sellers Richardson, collected and aggregated tons-shipped data across broad product size ranges containing thousands of different SKUs – all with unique physical attributes and pricing points – that mirrored major size groupings of pipe, and disseminated the aggregated totals to DIFRA members. (RX 113; Brakefield, Tr. 1396-1397).

743. The tons-shipped data gathered by DIFRA's accountants, Sellers Richardson, did not distinguish between Domestic Fittings and non-domestic Fittings and did not indicate whether the tonnage was sold into open preference or domestic preference jobs. (Joint Stipulations of Fact, JX0001 ¶ 18).

744. The DIFRA accountants' report did not break down the tons-shipped data by state. (RX 694 (Bhutada, Dep. at 111-112)).

745. Neither DIFRA nor its accountants, Sellers Richardson , ever collected sales price data. (McCutcheon, Tr. 2561-2562; RX 679 (Haley, Dep. at 18)).

746. The DIFRA reports provided by Sellers Richardson did not include or reveal any sales prices. (Brakefield, Tr. 1352-1353; CX 0052 at 005; McCutcheon, Tr. 2562).

747. The DIFRA data reporting system did not report any dollar figures. (CX 0052 at 005; RX 054; McCutcheon, Tr. 2561-2562; Pais, Tr. 2109-2110).

748. No DIFRA member was permitted to review the tons-shipped data of any other member; the reports revealed only the aggregate total tons-shipped during the relevant reporting period. (RX 679 (Haley, Dep. at 22)).

749. The reporting format used by DIFRA's accountants referred only to past tons-shipped, which would then be aggregated, before being disseminated by the independent accountants to the DIFRA members. (CX 1479).

750. A draft format for a DIFRA reporting document from January 2007, a year and a half before the first DIFRA report (CX 1333 at 007; CX 1467 at 005), contained a blank column where prices, in dollars, could be reported but the members never approved or used that form. (Brakefield, Tr. 1240-1241, 1251, 1352-1353; *compare* CX 0052 (June 17, 2008 DIFRA report)).

751. No DIFRA data was exchanged directly between the supplier members. (RX 694 (Bhutada, Dep. at 26)).

752. The tons-shipped data upon which the DIFRA accountant reports were based represented sales that were made anywhere from a few weeks to a year before the date of shipment. Shipment of public works projects were particularly prone to delay, with an initial 60 to 120 day period after the sale in which the supplier had to wait for a notice to proceed. Thereafter, once the purchase order was received by the supplier it would take between eight and ten weeks to ship. Private jobs varied, but most were shipped within a month of the sale. (RX 654 (Brakefield, Dep. (Vol. 1) at 109-111, 134)).

753. In a June 2008 McWane internal email exchange, Mr. McCullough expressed a concern to Mr. Tatman that the DIFRA reports may be inaccurate due to underreporting. Mr. Tatman agreed. (CX 1187).

754. The data provided by Sigma to DIFRA's accountants, Sellers Richardson, for periods through May 2008 contained errors for every prior month it reported, which errors Sigma corrected by email to Sellers Richardson on June 30, 2008. The affected reports were revised and reissued by Sellers Richardson. (RX 086 at 001-002; RX 090; Brakefield, Tr. 1318, 1391-1394).

755. On November 11, 2008, Mr. Tatman advised Sellers Richardson that McWane had discovered an underreporting in McWane's May 2008 data, and submitted corrected tonnage. (RX 113; Brakefield, Tr. 1396-1397).

3. Uses for aggregated tons-shipped data

a. Generally

756. The DIFRA aggregated tons-shipped reports (F. 741-755), if accurate, allowed a member to figure out its own market share, as well as the total size of the industry. (RX 638 (McCullough, IHT at 209)).

757. One purpose of the DIFRA aggregated tons-shipped data reporting system was to help suppliers determine their market

share. (Tatman, Tr. 558-559; CX 1712 at 001, *in camera*; McCutcheon, Tr. 2477-2479, *in camera*; CX 1088 at 003).

758. The DIFRA aggregated tons-shipped reports were not sufficiently detailed to enable a DIFRA member to determine the respective market shares of any other DIFRA member; or the timing or dollar amount of any sales. (RX 694 (Bhutada, Dep. at 28); RX 654 (Brakefield, Dep. (Vol. I) at 82-83); RX 638 (McCullough, IHT at 209); Joint Stipulations of Fact, JX0001 ¶18).

759. Having a better idea of its own market share helps a supplier to plan future business strategy, and determine if the strategy is on the right track. As Mr. Bhutada of Star stated: "[I]f market share is going down, then you know that you're on the wrong path. If it is stable or going up, then you know that you're on the right path." (RX 694 (Bhutada, Dep. at 20-21)).

760. Because different types of jobs use different types of Fittings sizes, (*i.e.*, plant work use vs. subdivision use), the DIFRA tons-shipped data can help detect market trends, and thereby can help to plan production schedules and better manage supply chain. In other words, identification of how various market segments are moving helps in understanding the "product you need to be making and the size range you need to be dwelling on and having inventory to meet customers' needs." (RX 694 (Bhutada, Dep. at 21); Brakefield, Tr. 1305-1306; RX 687 (Pais, Dep. at 27-28, 126)).

b. Sigma

761. Sigma's motivation for participating in the DIFRA aggregated tons-shipped reporting system included confirmation of Mr. Rybacki's assessment of Sigma's share of the Fittings market. (Rybacki, Tr. 3557).

762. In a June 19, 2008 email to Sigma's "M20" management group, Mr. Pais of Sigma provided comments on the DIFRA data. He further described the establishment and benefits of DIFRA:

> This is a huge step by Sigma and Star, in being able to demonstrate our willingness and commitment to strengthen our industry and signal our willingness to grow in a responsible manner. Though most of the initial benefit is intangible such as increased trust and respect between members, it is also the first step f[or] more substantial economic benefits in the future.

(CX 1092 at 001).

763. In addition to confirming market share, Mr. Pais believed that having a view of the total market size would help Sigma, among other things, view what products were being sold most, and thereby better manage inventory and mitigate problems that arise from long-lead times in obtaining Fittings from overseas. (Pais, Tr. 1971-1972, 1975-1976; RX 687 (Pais, Dep. at 27-28, 126)).

764. Having DIFRA data available helped Sigma to prepare presentations for its bankers. (RX 694 (Bhutada, Dep. at 20)).

765. Having DIFRA data available helped Sigma make a decision whether or not to go into Domestic Fittings in 2009. (RX 694 (Bhutada, Dep. at 20)).

766. Mr. Bhattacharji, who was responsible for sourcing Fittings and managing Sigma's supply chain, found the yearly aggregated DIFRA data useful. Knowing whether the market is growing, flat, or dropping helped Sigma determine its production needs for the following year. (CX 2523 (Bhattacharji, Dep. at 9, 259-264)).

767. On October 1, 2008, Mr. Pais directed Raju Kakani, Sigma's IT Director, to prepare monthly reports of Sigma's market share using DIFRA data. Mr. Kakani prepared such reports monthly under Mr. Brakefield's supervision. (Brakefield, Tr. 1299, 1304-1305; CX 1848 at 001)

768. In a letter dated February 9, 2009 from Mr. Pais to Sigma's lender, Ares Capital, under the heading, "Discuss competitive landscape, market share trends, pricing actions in marketplace and any other changes given the current

environment," Mr. Pais discussed the aggregated tons-shipped data produced by DIFRA. He stated his opinion that "monthly market size data produced by DIFRA" had the benefit of helping to "maintain the pricing discipline, as the market and market share data point to a relatively consistent and stable market pattern. It has helped us not to allow the sharp market decline to be mistaken as a 'loss of market share,' which mostly causes price reaction." The foregoing statements represented Mr. Pais' "very broad assessment as [Mr. Pais] saw it as one of" the intangible benefits of DIFRA that he communicated to Ares Capital in order to reassure the lender, which was concerned about recent declines in Sigma's pricing and volume, that the DIFRA aggregated data will provide visibility into market demand and help prevent panic selling based on misinformation. (CX 0313 at 004; Pais, Tr. 1983, 1993-1996).

769. Mr. Pais further explained further his use of the phrases "maintain market discipline" and "price reaction" in the letter to Sigma's lenders set forth in F. 768: "If the [DIFRA] data point to a significant loss of market share, then Sigma would generally use price to get share back. If Sigma wanted to grow volume, Sigma would also use price to attract sales. [T]hat's always been the case, but it's a question of degree." A "mistaken diagnosis" about the reasons for a loss of market share makes it more difficult for Sigma to make the correct decision going forward, including decisions as to whether to lower price and/or to seek additional volume from existing customers. (CX 2527 (Pais, IHT at 85-87)).

770. In a December 2008 internal email from Mr. Pais to Mr. Walsh, Mr. Bhattacharji and Mr. Rybacki, Mr. Pais stated his belief that DIFRA data showed Suppliers that the severe decline in sales volume being experienced was likely due to "market weakness" rather than "losing to the competition." (CX 1077 at 002; Pais, Tr. 2005-2006).

771. Sigma used the DIFRA data to measure Sigma's market share and to help formulate its pricing strategy. (Pais, Tr. 1986, 2002-2003; CX 1088 at 004).

772. In May 2009, Mr. Pais was reassured by the DIFRA data that Sigma was maintaining its share of the market in a declining market, when Sigma was losing volume. (CX 0319 at 002).

773. Sigma used the DIFRA data to examine demand trends, *i.e.*, whether or not the trend is for small diameter or large diameter or intermediate diameter fittings, which helped Sigma determine product ordering, and thereby better manage its inventory. Mr. Brakefield further explained:

> It just basically helped us in establishing a much better flow of product. If you have what the customer is looking for and the trends in the marketplace, and you have that product and it's available and not having to wait and then see the availability, get an order and then get it shipped from China or India, which obviously it's a long time, we can do a little better forecasting to have what the customer is looking for when he needs it and we had it. And a lot of times that was the basis of a sale, availability.

(Brakefield, Tr. 1305-1306, 1308, 1389-1391).

c. Star

774. Star's motivation for participating in the DIFRA aggregated tons-shipped data reporting system was to obtain good data on the size of the Fittings market and thereby get a better sense of Star's share of the market. Previously, because the industry consists largely of privately held companies, good data was absent. As Mr. McCutcheon stated, absent good data, "it's difficult to plan that way." (CX 2538 (McCutcheon, IHT (Vol. 2) at 241-243, 245), *in camera*; McCutcheon, Tr. 2413). As Mr. McCutcheon further explained:

> [The DIFRA report] was the only confirmation that . . . we thought was accurate. . . . [W]e would try to download data from different government websites on housing starts and we just would do the best job that we could, but we always knew it was an educated guess, . . . [Star liked getting] DIFRA data . . . because it gave us a real-live measuring stick on how we were performing as a company. . . .

(CX 2538 (McCutcheon, IHT (Vol. 2) at 334), *in camera*).

775. According to Mr. McCutcheon, Star's decision to notify its customers of multiplier changes in May 2008 had nothing to do with the fact that the DIFRA tons-shipped data reporting system was in place. (CX 0037; McCutcheon, Tr. 2554-55).

776. Star used the DIFRA data, along with other data, to prepare internal reports estimating and tracking Star's Fittings market share in the United States, in each state and regionally, by division manager. These internal reports were carefully reviewed and used by Star. (McCutcheon, Tr. 2445-2449, 2477-2482, 2492-2496, *in camera*; CX 1712 at 001, 004, *in camera*; CX 1707 at 001, 006, *in camera*; CX 1711 at 001, 002, 004, 006, *in camera*).

d. McWane

777. The DIFRA aggregated tonnage report helped McWane decide, in June 2008, to choose the low end of the 8% to 12% range of multiplier increases that Mr. Tatman had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share, and showed that McWane's market share loss was worse than Mr. Tatman had suspected. (Tatman, Tr. 536-540, 958).

778. McWane relied on DIFRA aggregated tons-shipped data to help prepare an internal report tracking McWane's market share. (CX 1562 at 001; Tatman, Tr. 546).

779. On September 9, 2008, Mr. Tatman concluded using the DIFRA data that McWane's "[l]eading price stability has been detrimental to [market] share." (RX 616 at 005; CX 1188 at 005).

780. In a June 18, 2008 internal email from Mr. McCullough of McWane to Mr. Page transmitting the June 17, 2008 DIFRA aggregated tons-shipped report, Mr. McCullough noted that given McWane's "dismal" share loss, McWane would be announcing an 8% increase in Fittings prices and will not

support the 25% increase announced by Sigma and Star. "My gut feel is that we will be seeing increased cost pressures from China that will impact Sigma/Star more than us. . . . I believe that until [Sigma and Star] feel prolonged profit margin pressures they will continue their historical practice of undisciplined market pricing. . . . " Mr. McCullough concluded that he was not in favor of any price increase support in the Fittings market until McWane's market share improved. (CX 0139 at 001; CX 2479 (McCullough, Dep. at 230-231); CX 2482 (Page, Dep. at 207-209)).

781. A September 19, 2008 internal PowerPoint presentation prepared by Mr. Tatman in connection with McWane's evaluation of whether to close its South plant, included the statement "DIFRA will eventually add some increased stability . . ." (RX 616 at 012).

782. On January 21, 2009, Mr. Tatman sent an internal email to Mr. Walton, Mr. McCullough, and Mr. Jansen forwarding and summarizing a spreadsheet titled "McWane, Inc. DIFRA Market Share Analysis" covering DIFRA data from 2006 through December 2008. In his cover email Mr. Tatman noted: "December was clearly our worst share performance for the year!" and that: "Our share performance for the Sept-Dec. period is noticeably off from the May-Aug. period." (CX 0656; Tatman, Tr. 560-564).

783. In a January 23, 2009 McWane internal email regarding McWane's market share based upon the December 2008 DIFRA data, Mr. Page stated: "Trying to not be emotional about it. But these numbers are infuriating. We have serviced our customers I assume and have the product they need, we are just being discounted against?" Mr. Page further explained: "Are . . . Leon, Rick and our salespeople not keeping our customers competitive and -- or do we not have the right product? Why are we losing market share? The question is, are we overpriced? Do we have the wrong mix of products? We don't have what people need? But I'm upset with our people for not . . . managing their business." (CX 1226 at 001; RX 642 (Page, Dep. at 238-239)).

784. Mr. Tatman used the DIFRA tons-shipped data in McWane's internal analysis of its pricing for Fittings, in

connection with McWane's restructuring of list prices for medium and large diameter Fittings in early 2009. (F. 995, 997). Specifically, McWane was able to determine that McWane's market share was strong or growing in some segments, but weak or falling in others, and changed prices accordingly. (CX 0569; Tatman, Tr. 279-280, 594-595, 972-973).

785. DIFRA aimed to include as members the five largest suppliers, McWane/Tyler, Sigma, Star, U.S. Pipe, and ACIPCO. (CX 1088 at 001 (Pais describing DIFRA membership: "Though we had aimed at enlisting the 5 largest members - McWane/Tyler, Sigma, Star, US Pipe and ACIPCO, the latter chose not to join. No effort was made to invite smaller suppliers . . . .").

786. In February 7, 2008 email from Mr. Tatman of McWane to DIFRA's President, Mr. Brakefield of Sigma, Mr. Tatman stated:

> To have a viable association we'd need at a minimum McWane, Sigma and Star to be members. You have a historical perspective from the last attempt, but I would think ACIPCO and U.S. Pipe would bring some value to the association. There's probably going to be some minimum requirement in terms of volume to join. Is 5,000 tons the appropriate level? If so who do you feel would be potential members?

(CX 1081 at 001; Tatman, Tr. 471-472).

787. U.S. Pipe did not participate in the DIFRA conference call on April 25, 2008 (F. 732), reporting to Mr. Long that U.S. Pipe's representative would be out of the country, and that it would accept whatever decision was made by the others regarding reporting issues. (CX 0160 at 002; CX 1479 at 001).

788. U.S. Pipe submitted its tons-shipped data for DIFRA tons-shipped data reporting system, including after January 2009 and into July 2010. (CX 2232 at 001, 006; CX 1343).

F. May and June Pricing Events

1. Sigma notifies its customers of a price increase on April 24, 2008, to be effective May 19, 2008

789. In April 2008, Sigma was continuing to feel the pressure from costs, as it had in 2007. Fittings volume continued to be weak. Sigma was looking for a way to increase prices and at the same time not lose market share. (Pais, Tr. 1926; CX 1138 at 001; Rybacki, Tr. 3541-3542).

790. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to McWane's telephone number for two minutes at 3:49 p.m. on April 4, 2008. A call from a cell phone issued to Mr. Rybacki was placed to someone at McWane for eight minutes at 4:16 p.m. on April 4, 2008. Mr. Rybacki testified that he does not recall what was discussed. (CX 1621-A at 099, *in camera*; Rybacki, Tr. 3635-3636, 3610, 3617, *in camera*).

791. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a cell phone issued to Mr. Tatman of McWane for 16 minutes at 8:45 a.m. on April 7, 2008. Mr. Rybacki testified that he did not recall what was discussed. (CX 1621-A at 100, *in camera*; Rybacki, Tr. 3636, *in camera*).

792. On April 11, 2008, Mr. Pais wrote an internal email to Sigma's management team urging that Sigma take the lead in implementing a Fittings price increase of between two and ten multiplier points, to be effective in May 2008. Mr. Pais referred to his proposal as "big, bold, moves" by Sigma. Mr. Pais' email to his team stated in pertinent part:

> Keeping with our ongoing effort to boost our Prices and hence GMs as our AIC keep rising due to sharp overseas raw material increases, which have finally caught up with the domestic scrap costs too, please find the proposed MULTIPLIER MAP that LR and I discussed 4/8 . . .
>
> Despite the gloomy assessment -- both about the market and competition -- we have a very strong opportunity to lead and be a catalyst in boosting the Multipliers to another level, in

> ONE SHOT! It's time BIG BOLD MOVES (BBM, baby!) and this M[ultiplier]Map aims at just that...
> . . .
>
> It's definitely time for some 'BBM's and SIGMA will have to make them as our two competitors lack the imitative, credibility and leadership...

(CX 1138 at 001-002 (emphasis in original); Pais, Tr. 1926-1927; Rybacki, Tr. 3541-3546).

793. Mr. Pais and Mr. Rybacki denied discussing Sigma's spring 2008 pricing intentions with anyone at McWane. (RX 687 (Pais, Dep. at 76); Pais, Tr. 2080-2081, 2101-2102; Rybacki, Tr. 3708).

794. In the week following Mr. Pais' April 11, 2008 internal email to Sigma's regional managers (F. 792), there was an internal email discussion among Mr. Rybacki, Mr. Pais, and some of Sigma's regional managers regarding the merits of Mr. Pais' proposal, including whether or not the competition was likely to follow Sigma's lead. (CX 1134; CX 1137).

795. A call from a cell phone issued to Mr. Rybacki of Sigma was placed to a telephone number in Tyler, Texas for two minutes at 2:46 p.m. on April 15, 2008. A call was received by a cell phone issued to Mr. Rybacki from a phone number in Tyler, Texas for five minutes at 8:11 a.m. on April 16, 2008. Mr. Rybacki testified he had no idea who he called or what was discussed. (CX 1621-A at 104-105, *in camera*; Rybacki, Tr. 3638, 3610, 3617, *in camera*).

796. Sigma ultimately decided that it would announce to its customers an increase in its published multipliers of up to ten multiplier points over prior published levels. Mr. Pais noted that the planned multiplier increase was one of the "BIGGEST" one-time increases Sigma had ever had, "almost 40% depending on the current base multipliers." (CX 1134 at 001). Mr. Pais expressed his opinion that Star was "bound" to follow Sigma, "as they too are hit with sharp cost increases from China, from our reports . . . ." Mr. Pais expressed his belief that McWane would

be more cautious because of its years-long excess inventory problem. (CX 1134 at 001-002; *see also* CX 1137).

797. In a customer letter dated April 24, 2008, Sigma notified its customers of a published multiplier increase of "up to10 multiplier points," to take place on May 19, 2008:

> Dear Friends,
>
> To say this year has been a challenge is a gross understatement. With rising costs in transportation, labor, medical benefits, raw materials. etc., 2008 will certainly be a difficult year for all of us. Hopefully we will learn something from it and be better businesses in the future for having endured this very tough downturn.
>
> SIGMA Corporation, like all manufacturers in the Waterworks Industry, has been hit with unprecedented increases in scrap iron prices which have increased 7 fold in just a few short years. As a result we will be raising multipliers up to 10 multiplier points depending on your region. The increase will take place on May 19, 2008 and your SIGMA Regional Manager will inform you by letter before the end of April of your new multiplier.
>
> We've cut the number of different multipliers across the country down to four or five with the ultimate goal of one multiplier for Fittings (MJ & Push-on, C-153, Flanged C-110) nationwide in the not too distant future. We can't promise that this will be the last increase in 2008, but we can promise that we will give you ample warning of any future changes.
>
> Only orders that are placed before May 19, 2008 with a specific shipping date will be honored and any jobs that are held for release will be subject to the new multipliers.
>
> In conclusion, we at SIGMA thank you for your loyalty and friendship and we wish you all the best during these trying times in our marketplace.

(CX 1858 at 002 (emphasis in original) ("April 24, 2008 Customer Letter")).

798. The multiplier increase of up to ten multiplier points set forth in Sigma's April 24, 2008 Customer Letter (F. 797) was equal to a price increase for Sigma of approximately 25 to 30 percent, depending on the geographic region. (Rybacki, Tr. 3710-3711).

799. Although discussed in Mr. Pais' internal email of April 11, 2008 (F. 792), Sigma's April 24, 2008 Customer Letter did not refer to any changes in Sigma's Plant Work or Special Price policies. (CX 1858; *compare* CX 1138 at 001, 004).

800. Sigma's April 24, 2008 Customer Letter was faxed to Sigma's customers on or about April 25, 2008. (CX 1858 at 001; RX 052).

801. Sigma hoped its other competitors, including McWane, would follow Sigma's price increase. (Pais, Tr. 2080-2081).

2. Star's and McWane's reaction to Sigma's April 24, 2008 Customer Letter

802. Star learned of Sigma's April 24, 2008 Customer Letter on April 25, 2008, noting that the letter had "just hit the streets today." (CX 0862 at 001).

803. On May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of a similar magnitude to that announced by Sigma, effective May 19, 2008. (CX 0037 at 001; McCutcheon, Tr. 2419-2420; CX 0819; CX 2538 (McCutcheon, IHT (Vol. 2) at 457-458); CX 0816; CX 0817; CX 0818; CX 0819; CX 0820; CX 0821; CX 0822; CX 0823).

804. McWane learned of Sigma's price increase on April 25, 2008. Mr. Tatman forwarded the letter internally, which also attached one of Sigma's regional multiplier maps, to Mr. McCullough and Mr. Walton of McWane. Mr. Tatman noted, among other things, that Sigma's April 24, 2008 Customer Letter reflected a published multiplier increase of up to ten multiplier points, and that the multiplier map showed an increase of 18%

and 40% over Sigma's prior published multipliers. Mr. Tatman further stated:

> I believe this is great for helping us achieve our business objective of regaining share while netting price. We can talk more next week about strategy. We'll try to gather the other Sigma regional letters and multiplier maps.
>
> I don't think any of us truly believe that degree of net price will stick. Just this week we had a pretty solid input from a Mainline regional manager stating that when Sigma came in pitching the need for this increase[,] they then offered to increase the cash discount from 2% to 5% if Mainline would sign up for some incremental volume.

(CX 0176 at 001; Tatman, Tr. 490-491).

805. On May 5, 2008, Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton attaching proposed new multipliers for McWane and a draft McWane customer letter, which would "align with the approach of waiting until the DIFRA data is available before announcing any price actions." Mr. Tatman recommended against following Sigma's price increase, regardless of what the DIFRA data would show: "Although the Sigma announcement represented an increase range of 20% to 40%, I don't believe we would follow that lead regardless of the DIFRA data as it would lead to instability." Mr. Tatman instead proposed that McWane publish multiplier increases in the range of 8% to 12%. (CX 0137 at 001, 005-007; *see* F. 458, 618 (Mr. Tatman's defining instability to mean selling prices that are 10% or more below published prices)).

806. Mr. McCullough of McWane believed that it was important to review the DIFRA tons-shipped report, which was due mid-May 2008, before announcing any price actions. Accordingly, on Mr. McCullough's instructions, Mr. Tatman waited for the DIFRA data before issuing any price increases. (Tatman, Tr. 494-495, 519 ("On something like this that [Mr. McCullough] wants, I'm not going to challenge him on it."); CX 0137; *see* F. 734 (targeting May 15, 2008 for submittal of data to DIFRA's accountants)).

807. Mr. Tatman believed that Mr. McCullough wanted to wait for the DIFRA tons-shipped data because Mr. McCullough believed the data to be a more accurate reference point for assessing McWane's market share than other reference points, such as DIPRA statistics and Valve Manufacturers Association (VMA) data, which Mr. Tatman had provided to Mr. McCullough to support Mr. Tatman's price increase recommendation set forth in F. 805. (Tatman, Tr. 946, 950).

808. On May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of a similar magnitude to Sigma's April 24, 2008 Customer Letter (F. 797), to be effective May 19, 2008. Star needed a price increase at the time because market prices had declined, while costs had increased for Star. Mr. McCutcheon denied that Star's May 7, 2008 Customer Letter had anything to do with DIFRA. (Minamyer, Tr. 3209; CX 819; McCutcheon, Tr. 2555).

809. On May 7, 2008, McWane sent a customer letter which stated as follows:

> Dear Valued Customer,
>
> You have likely heard or read about continued increases in factors of production impacting both domestic and global operations. The foundry industry has been hit particularly hard with sharp increases in scrap iron, alloys and transportation costs.
>
> While the financial impact to our business is real, we also recognize there are restrictions as to the level and timing at which pricing can be accommodated in the market.
>
> We are sending this general communication to our waterworks distribution customers to more clearly define our intention in regards to future pricing actions.
>
> Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate

> being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.
>
> For planning purposes only, we expect for regions with a change that multipliers will increase in the range of 6% up to 16% effective June 16th.

("May 7, 2008 Customer Letter") (CX 2170 at 002).

810. Mr. Tatman acknowledged that it was unusual to send out a letter that stated intentions as to a future price increase, but not the actual price increase, and explained: "It's not too often that you have to respond to a competitor putting out a 40 percent price increase, so these are unusual times." (Tatman, Tr. 501-502).

811. Mr. Tatman denied that the point of McWane's May 7, 2008 Customer Letter was to "reinforce" the point that Star and Sigma needed to submit their DIFRA data. (Tatman, Tr. 505-506).

812. In addition to the anticipated May 2008 DIFRA report, Mr. Tatman planned to review and analyze McWane's monthly financial data for April 2008, as set forth in McWane's monthly financial reports known as "blue books," which are prepared by McWane's accountants on a monthly basis for management purposes. Mr. Tatman expected to receive this report by mid-May and be able to prepare a spreadsheet analysis by the end of May. Also, Mr. Tatman wanted to review all of the competitive inputs collected from the field. (Tatman, Tr. 497-498, 501-502).

813. Mr. Tatman's email transmitting McWane's May 7, 2008 Customer Letter to McWane's customers explained: "Given the market environment, we feel any pricing action warrants careful consideration and analysis. We simply needed more time beyond the competitive May 19th date to feel comfortable that we properly considered all factors." (CX 2170 at 001).

814. Being given a range of an anticipated price increase does not help a Distributor negotiate a price increase from its own customers (the End Users), and in this regard, McWane's May 7,

2008 Customer Letter was not helpful to Distributors. (CX 2510 (Groeniger, Dep. at 231-234, *in camera*)).

815. Mr. Minamyer of Star received a copy of McWane's May 7, 2008 Customer Letter, via Stars' customer HD Supply, on the afternoon of May 7, 2008. (CX 0863 at 001; McCutcheon, Tr. 2422-2423).

816. Approximately two hours after Mr. Minamyer received a copy of McWane's May 7, 2008 Customer Letter, Mr. McCutcheon sent an email confirmation to Mr. Long, DIFRA's attorney, confirming that Star agreed with the DIFRA reporting procedures, as requested by Mr. Long in an email to DIFRA members dated May 5, 2008. Later in the afternoon of May 7, 2008, Mr. McCutcheon forwarded a copy of Mr. Long's April 25, 2008 email regarding DIFRA's agreed tons-shipped data reporting procedures to Navin Bhargava, who would assemble Star's tons-shipped data. (RX 580; F. 828; CX 0530).

817. Mr. McCutcheon of Star found McWane's May 7, 2008 Customer Letter unusual because he had not seen anything like it before. As Mr. McCutcheon explained: "[H]istorically, when the leader in an industry chooses to take an increase he announces we're taking an increase. This was just written as an explanation to me. It was just worded odd and it looked arrogant and it looked humorous to me." Mr. McCutcheon similarly stated with regard to his impression of the McWane letter: "Third paragraph, I don't know why they did it. I mean, it looks like a -- I took it as being a minor poke at us, because we weren't going to do careful analyzing -- we did our own analysis and we quickly determined that we were getting ready to lose money if we didn't take an increase. . . . Other than an attempt to try to look more sophisticated . . . I don't know." (CX 2539 (McCutcheon, Dep. at 178-179, *in camera*); CX 2538 (McCutcheon, IHT (Vol. 2) at 320, *in camera*)).

818. Mr. McCutcheon denied making any connection between McWane's May 7, 2008 Customer Letter and submission of DIFRA data by Star. (RX 698 (McCutcheon, Dep. 201) ("Q. And it's your testimony here today that you made no connection between . . . the submission of your DIFRA data and this letter,

the May 7th, 2008, letter? A. Absolutely none. As a matter of fact, the first time that thought -- I've even ever heard that was today. Of linking that to DIFRA? Q. Linking this May 7th letter to the need to submit your DIFRA data. A. No, sir.")).

3. Star's and Sigma's reaction to McWane's May 7, 2008 Customer Letter

819. Sigma reviewed McWane's May 7, 2008 Customer Letter. (Rybacki, Tr. 3568-3569).

820. Mr. Rybacki of Sigma thought the language in McWane's May 7, 2008 Customer Letter regarding McWane's "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics" was notable because the language looked "a little quirky for Jerry Jansen" and not Mr. Jansen's "style." Mr. Rybacki had "no idea" what the language meant. (Rybacki, Tr. 3568-3570).

821. Mr. Rybacki thought that McWane's May 7, 2008 Customer Letter was ambivalent as to whether McWane was going to issue a price increase and Mr. Rybacki was "leery" of the May 7, 2008 Customer Letter. (Rybacki, Tr. 3570-3571).

822. Mr. Pais of Sigma denied having any understanding that McWane was not going to increase prices on Fittings until all of the DIFRA members submitted their data and DIFRA issued the report, or that McWane was waiting to increase prices until after it had the DIFRA data and the DIFRA report, stating: "It is so farfetched and ridiculous, what can I say? No, no." (RX 687 (Pais, Dep. at 381-382)).

823. Sigma's regions have flexibility regarding the timing of multiplier changes. When Sigma's regional managers saw that McWane was not following Sigma's multiplier increase that Sigma announced in its April 24, 2008 Customer Letter, some regional managers opted to wait for McWane and just kept pricing at the old multipliers. The northeast regional manager chose to go ahead with Sigma's new multipliers in May and June 2008, although the region lost sales as a result because it was higher priced than McWane during that period. (Rybacki, Tr. 3571-

3572; RX 076 (noting that Sigma was delaying its price increase because Sigma was going to match McWane, but McWane had not notified the marketplace of its increase or timing for an increase)).

824. On May 12, 2008, Star put its planned price increase on hold. Mr. Minamyer of Star explained in an email to his district managers:

> Our current multiplier changes on fittings have been put on hold for the time being. The fittings market pricing is just coming off the last increase so we want to evaluate the market conditions for the next few weeks, let the market settle down a little bit, and then make a decision in early to mid June on to how to proceed.
>
> Please let our customers know that we are on hold and will let them know what our plan is in time for them [to] prepare.

(RX 060).

4. Star's submittal of its tons-shipped data to DIFRA's accountants

825. McWane submitted its tons-shipped data to DIFRA's accountants on May 14, 2008. (CX 1303 at 002).

826. On May 16, 2008, a four minute phone call was placed from a cell phone issued to Mr. Rybacki of Sigma to a telephone number at McWane. Mr. Rybacki testified that he does not know who he called that day, or what they spoke about. (Rybacki, Tr. 3642-3643, 3610, 3617 *in camera*; CX 1621-A at 095, *in camera*).

827. On May 16, 2008, Mr. McCutcheon of Star sent an email to Mr. Brakefield of Sigma, DIFRA's president, (F. 717) with the subject line "Star's tonnage data," stating: "Hello Tom, sorry for the delay. The info should be in next week." Mr. Brakefield forwarded that message to Mr. Pais and Mr. Rybacki. (CX 1129; Rybacki, Tr. 3561-3563).

828. On May 19, 2008, Mr. Bhargava, who had been tasked to assemble Star's tons-shipped data submission, sent Star's tons-shipped data to Mr. McCutcheon. (CX 0530 at 001; McCutcheon, Tr. 2427).

829. On May 24, 2008, Mr. McCullough of McWane stated in an internal email to Mr. Tatman and Mr. Walton that he "still believe[d] we stand pat until market share info is available." Mr. Tatman responded that he and Mr. Walton agreed with Mr. McCullough, stating: "Although somewhat painful to the bottom [line] in the short term, that would re[i]nforce the message we've been trying to drill in which when successful will pay long term dividends." (CX 1186).

830. Mr. Tatman denied that the message he was trying to "drill in" (as stated in the email referred to in F. 829) was a message to the DIFRA members that they must get their DIFRA data in before McWane would announce a price increase. The message McWane was trying to "drill in" was that McWane was "not going to lose visibility of where the competitive marketplace is." Mr. Tatman explained:

> [L]et's go back to our core strategy.
>
> If someone announced a 40 percent price increase and I follow it, I'm going to get a lot of price in the short term. That's going to be a significant benefit in the short term to my bottom line. But do I believe that is in my best interest of my longer-term goal, which is gaining volume and gaining share? No.
>
> So if I have a competitor that announces a 40 percent price increase, if I want to put money in my pocket for the next three months or the next six months, I'm going to jump on that.
>
> So that is painful to the bottom line, on a relative basis, that I'm not going to jump on and support a 40 percent price increase because you're going to get some traction off of that. It's not like you're -- you might not get 38-39 percent, but you're going to get some traction on that.

> And what I'm saying here is consistent with what we said all along, was we were not going to lose visibility of where the competitive marketplace is, and our primary focus at this point in time is volume, share.

(Tatman, Tr. 521-522).

831. On the afternoon of May 27, 2008, two calls were placed between a cell phone issued to Mr. Rybacki of Sigma and a cell phone issued to Mr. McCutcheon of Star for a combined duration of ten minutes. That afternoon, a call was placed from a cell phone issued to Mr. Rybacki to a telephone number at McWane for two minutes. Mr. Rybacki testified that he has no idea what he and Mr. McCutcheon talked about, although it could have been the DIFRA data, and that he does not know who in Tyler Texas he called that day, or what they spoke about. (Rybacki, Tr. 3643-3644, 3610, 3617, *in camera*; CX 1621-A at 084, *in camera*).

832. On May 29, 2008, McWane already had a draft of a price increase letter ready to send to its customers, announcing a weighted average increase in published multipliers for blended Fittings of approximately 8%. Mr. Tatman had already reviewed various reference points to assess market share, such as McWane's sales data, and he knew McWane was losing market share. (CX 1193 at 001; Tatman, Tr. 516-517).

833. On May 30, 2008, the president of DIFRA, Mr. Brakefield of Sigma, forwarded an email from Mr. Herren, of the Bradley Arant law firm, dated May 28, 2008, reminding members to submit their data, to Mr. Rybacki, Mr. Bhattacharji, and Mr. Rona of Sigma, noting, "I will follow up on this and advise." Thereafter, Mr. Brakefield, DIFRA's President, spoke with Mr. McCutcheon regarding Star's late submission of data. (CX 1090 at 001; Brakefield, Tr. 1291-1292; McCutcheon, Tr. 2430).

834. Mr. McCutcheon submitted Star's tons-shipped data to Sellers Richardson at 12:37 p.m. on June 5, 2008, which, per the agreement of the DIFRA members, included tons-shipped data for 2006, 2007, and January 2008 through April 2008. (CX 0049;

McCutcheon, Tr. 2427; CX 2538 (McCutcheon, IHT (Vol. 2) at 303-304), *in camera*).

835. At 12:48 p.m. on June 5, 2008, Mr. McCutcheon notified Mr. Brakefield and Mr. Rybacki of Sigma by email that Star had submitted its tons-shipped data, and included a quote from McWane's May 7, 2008 Customer Letter, stating:

> Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?).

(CX 1091; CX 0138).

836. Mr. McCutcheon testified that his quoting of the portion of McWane's May 7, 2008 Customer Letter in his June 5, 2008 transmittal email to Mr. Brakefield, described in F. 835, was an attempt at humor. Mr. McCutcheon testified the quote was designed to "poke fun" at McWane for what Mr. McCutcheon thought was arrogant language by McWane, "poking" at Star for Star's earlier attempt to lead a price increase with Sigma and not using a "careful analysis." (CX 2538 (McCutcheon, IHT (Vol. 2) at 311-313, 315); McCutcheon, Tr. 2431-2432).

837. Mr. McCutcheon denied that one of the reasons Star did not submit its tons-shipped data until June 5, 2008 was a reluctance to share the information with its competitors. "Probably not at that time. Once we decided that Star was going to join, I had every intention of being a member. I do remember it taking us a while to figure out how to do it, running it back through our purchasing people. I know that took a couple of weeks, easy." (RX 698 (McCutcheon, Dep. at 197-198)).

5. McWane's receipt of DIFRA aggregated tons-shipped report and McWane's transmittal of June 17, 2008 Customer Letter

838. McWane and the other DIFRA members received the first DIFRA aggregated tons-shipped report from Sellers

Richardson at 2:41 p.m. on June 17, 2008. The report set forth the aggregated total of tons shipped for the year 2006, for each month of 2007, and for January 2008 through April of 2008. (CX 0052; Tatman, Tr. 534-536, 936; Brakefield, Tr. 1297-1298; Pais, Tr. 2121; McCutcheon, Tr. 2444-2445, *in camera*).

839. Upon receiving the June 17, 2008 DIFRA tons-shipped report (F. 838), Mr. Tatman conducted an analysis to determine McWane's market share. Mr. Tatman spent approximately 40 minutes reviewing the DIFRA tons-shipped data, comparing it to other reference points on McWane's market share, such as McWane sales data, and DIPRA and VMA statistics, and prepared a spreadsheet of relevant data points. Mr. Tatman transmitted the DIFRA report and his spreadsheet analysis internally to Mr. McCullough, Mr. Walton, and Mr. Jansen. Mr. Tatman's email observed:

1. 2006 baseline total DIFRA tonnage tracks very well with what we would have expected based upon walking the 2001 market data from the 421 hearings forward using the change in VMA units.

2. Our share loss for 2007 and Apr YTD 2008 is actually larger than what I expected. Note the DIFRA tonnage is not down as much over those period as the VMA unit data.

3. The "backed into" non DIFRA tonnage appears to be on the lower end of what we would have expected.

4. All points above suggest that data is accurate within reason which was probably the resistance to sending it out before we announced any price.

5. The larger than expected share loss will make the task of getting it back more difficult, but of course will make victory all the more sweater [*sic*] in terms of the incremental financial benefits.

(CX 0139; Tatman, Tr. 536-537, 946-950).

840. In the early evening of June 17, 2008, approximately four hours after receiving the DIFRA aggregated tons-shipped report from DIFRA's accountants, McWane sent a customer letter dated June 17, 2008, notifying McWane's customers of an increase in Fittings multipliers effective July 14, 2008, and stating that the weighted average increase on blended Fittings and accessories was "approximately 8%." ("June 17, 2008 Customer Letter") (CX 1191 at 001 (letter to Glenn Fielding at HD Supply); CX 1576 at 001 (email to Mr. Doane and Mr. Thees at Ferguson); Tatman, Tr. 538-539, 544, 952; RX 644 (Tatman, Dep. at 155); CX 0047 (multiplier increase letter to southeastern states)).

841. McWane's June 17, 2008 Customer Letter included the language: "This increase does not fully absorb the level of cost inflation that has occurred over the past few months, especially within our off-shore operations. As such, we will continue to a[ss]ess market & competitive conditions in addition to our internal operating metrics and advise you if additional actions will be required before year end." (CX 1576 at 003; CX 1191 at 001; CX 0047 at 001).

842. In an email to Mr. Doane and Mr. Thees of Ferguson attaching McWane's June 17, 2008 Customer Letter, Mr. Tatman stated that "[t]he increase is significantly smaller than what I believe others have proposed, but we believe this level is rational given all factors considered." (CX 1576 at 001).

6. Star's and Sigma's reactions to McWane's June 17, 2008 Customer Letter

843. On June 27, 2008, Star sent a letter to its customers notifying them of the new published multipliers to be effective July 14, 2008, thereby effectively rescinding Star's May 2008 price increase announcement that Star had previously put on hold. Star's new multipliers followed McWane's new lower multipliers. (McCutcheon, Tr. 2424, 2448, *in camera*; CX 2430; Minamyer, Tr. 3217-3218).

844. On or about July 8, 2008, Sigma sent a letter to its customers notifying them of an increase in published multipliers, to be effective July 14, 2008, thereby effectively rescinding Sigma's May 2008 price increase that Sigma had previously

delayed implementing. Sigma's new multipliers essentially followed McWane's. (CX 2253 at 001-003; Rybacki, Tr. 3573-3577).

G. Competitive Environment in 2008

1. Facts related to alleged curtailment of Project Pricing

a. Expert opinion

845. If there a were parallel reduction in Project Pricing, there would be an increase in the amount of product sold at multiplier and a decrease in the amount of product sold under special pricing, and a decrease in the "variation" of pricing, ***i.e.***, the dispersion of price points. (RX 712A (Normann Rep. at 15-16), *in camera*; Normann, Tr. 4749).

846. Dr. Normann calculated the "standard deviation" in price for Star, McWane, and Sigma, for the most common products sold, from 2007 to 2010, based on the Suppliers' invoice data for these products. Dr. Normann concluded from this data that McWane's price variation was largely unchanged until late 2008, while Star's price variation increased. In addition, Dr. Normann concluded that price variation during 2008 was "generally higher" than any other time from 2007 to 2010. (RX 712A (Normann Rep. at 15-16 and Figure 4), *in camera*; Normann, Tr. 4749; 4817-4821).

847. The results set forth in F. 846 contradict a parallel curtailment of Project Pricing. The data does not suggest a reduction in job pricing. (RX 712A (Normann Rep. at 15-16 and Figure 4), *in camera*; Normann, Tr. 4749; 4817-4821, 4824).

b. McWane

848. McWane had used Project Pricing to sell Fittings prior to January 2008. (CX 2485 (Walton, Dep. at 114) ("[T]here was job pricing somewhere in the country all the time.").

849. Historically, at McWane, control of Project Pricing by sales persons was a little tighter under David Green, Mr. Tatman's

predecessor, than during Mr. Tatman's tenure in which authority over Project Pricing was more flexible and control varied depending upon the extent to which the sales person could be trusted to exercise good judgment. (Tatman, Tr. 282-283).

850. McWane continued to offer its customers Project Pricing as well as other price concessions to its customers throughout 2008, 2009, 2010 and into the present. (RX 396, *in camera*; RX 399; Tatman, Tr. 387, 904-905, 907, 909-910, 914-915; RX 598; Tatman, Tr. 921, 930-931, 933-934, 995-998, *in camera* ; Tatman, Tr. 1071-1072. ("We continued to job-price every stinking month and we've never stopped.").

851. Mr. Sheley of Illinois Meter, a Distributor, found McWane to be extremely aggressive on pricing in 2008, including pricing below published multipliers. (Sheley, Tr. 3445).

852. Beginning in 2008, McWane kept a "pricing protection log," on which it tracked, in the normal course of business, instances of price protection (*i.e.*, where McWane quotes a price to a customer and agrees to hold that price for a customer for some period of time, thereby "protecting" the price against increases) and Project Pricing. Mr. Napoli was responsible for maintaining the pricing protection log. (Tatman, Tr. 931-933; 1007, 1012-1013, *in camera*; RX 396, *in camera*).

853. McWane did not track Project Pricing in 2007, when Mr. Green was in charge. Mr. Tatman's preference was to have data for use in his decision making. (RX 644 (Tatman, Dep. 109); Tatman, Tr. 1007-1008).

854. The pricing protection log (F. 852) is based upon information received from sales persons in the field. (Tatman, Tr. 1008), *in camera*).

855. The pricing protection log (F. 852) shows, among other things, the Fittings multiplier that was bid; the expiration date of the bid; and the published multiplier when the bid was issued. (RX 396, *in camera*).

856. The pricing protection log (F. 852) tracks other products in addition to Fittings. (Tatman, Tr. 1009, *in camera*; RX 396, *in camera*).

857. The pricing protection log (F. 852) does not separate "protected" prices from one-time "job prices," but if the time period until expiration of the prices is short, for example, one month, that price is likely to be a Project Price, rather than a protected price. (Tatman, Tr. 1014-1015, *in camera*).

858. The pricing protection log (F. 852) does not include information on cash discounts, changes in freight terms, quarterly rebates, annual rebates, branch-level rebates, but only shows what is charged by invoice. (Tatman, Tr. 1018, *in camera*).

859. The pricing protection log (F. 852) includes a "comments" field. In some cases, the "comments" field states "to match Star" or "to match Sigma." Such a comment indicates that McWane quoted the customer a discounted multiplier in order to match a discounted multiplier that the sales person reported had been quoted by Sigma or Star, according to the customer. (Tatman, Tr. 1022-1023, *in camera*; RX 396, *in camera*).

860. The "comments" field on the pricing protection log (F. 852) included notations regarding "matching" Sigma or Star more often between January 2009 and March 2009 than between January 2008 and March of 2008. Mr. Tatman agreed that such notations appeared in the log "far more" often between January 2009 and March 2009 than between January 2008 and March 2008. (RX 396, *in camera*; *compare* Tab '2008,' Column W, Rows 8-807, *with* Tab '2009,' Column W, Rows 9-750; Tatman, Tr. 1028-1029, *in camera*.)

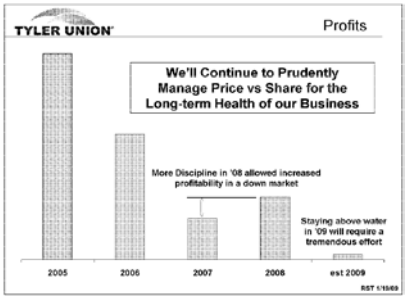
861. During 2008, McWane provided approximately [redacted] different job prices to its customers. (RX 396, *in camera* (McWane 2008 price protection log); RX 644 (Tatman, Dep. at 109)).

862. McWane provided Project Pricing to Illinois Meter in 2008, and offered better pricing to get jobs "aggressively." (Sheley, Tr. 3445).

863. Based on the "comments" field, the pricing protection log (F. 852) reflects fewer instances of McWane Project Pricing to match Star or Sigma in the second and third quarters of 2008 (between [redacted]), compared to the fourth quarter of 2008 (between [redacted]), and the first quarter of 2009 (between [redacted]). (RX 396.xls, *in camera*, Tabs "2008" and "2009," column W) (reflecting the following numbers of entries with comments referencing Sigma or Star: [redacted]).

864. An internal Tyler Union PowerPoint slideshow presentation titled "2009 Sales Meeting," contained a graph showing McWane's share of the Fittings market in the years 2005 through 2008. The graph shows a decline in market share from 2006 through 2007 and again from 2007 through 2008. The graph also contains a notation: "Slight Share Erosion Due to Pricing Discipline." (CX 0622 at 004).

865. An internal Tyler Union PowerPoint slideshow presentation titled "2009 Sales Meeting," contained a graph showing an increase in profitability between 2007 and 2008, and attributed the increased profitability to "more discipline," but does not indicate what products are included or excluded.



(CX 0622 at 005; Tatman, Tr. 853, *in camera*).

866. In an internal September 2008 presentation to Mr. McCullough and Mr. Walton regarding "State of the Business and Potential Options," a slide on the "Current Environment" noted, *inter alia*, that McWane's share was down approximately 8 points since 2006 and that "[l]eading price stability has been detrimental to share." Mr. Tatman explained that its effort to increase share

by compressing pricing "didn't work." (RX 616 at 005; Tatman, Tr. 971-972).

867. In a February 9, 2009 email to Mr. Tatman summarizing past and present pricing actions, Mr. Jansen reported that McWane had "stayed firm on pricing" for the better part of 2008, and had started to give out job pricing in a few territories in late 2008. Mr. Jansen reported as follows:

> **Stayed Firm on Pricing** = for better part of 2008 held pricing to try to stabilize market pricing.
>
> - Consequence = Lost market share due to competitors playing pricing games and having distributors keep it quiet either on the front and/or backside.
>
> - Customer Reaction = Customers had large scale reduction in inventory which is what we were getting and were relying more on regional distribution yards to supply jobs and support inventory.
>
> **Job Pricing** = Gave out pricing on jobs in few territories late 2008.
>
> - Consequences = started to get some support from customers that wondered where we had been. Too little too late since the jobs were few and far between.
>
> - Customer Reaction = Numbers are dropping rapidly and they had been long before we started to move. They know it's ugly but they are in survival mode and have very little loyalty. They would like to work with us but need to know we will support them.

(CX 1223 at 002 (emphasis in original); Tatman, Tr. 1074-1076).

c. McWane statements regarding curtailment of Project Pricing by Sigma and Star

868. Mr. Tatman of McWane stated in his Executive Report for the first quarter of 2008, among other things, on the "Sales/Market/Competitive Environment" that:

> Based upon our competitive feedback log, the level of multiplier discounting by both Star and Sigma appears to have died down significantly. As we understand it, both have removed pricing authority from the front line sales team and pushed it up higher within their organizations. Discounting is still available, but it now requires a more structured decision process. In an effort to drive some volume, they also both selectively honored prior job pricing beyond their published March 1st cut-off date. Our hard stance on that date certainly appears to have cost us some short term tonnage.
>
> . . .
>
> Somewhat off-setting the higher degree of price stabilization is [Star's and Sigma's] greater flexibility with extending terms," to selected accounts.

(CX 1564 at 004).

869. Mr. Tatman based the statement in the McWane 2008 first quarter Executive Report that "the level of multiplier discounting by both Star and Sigma appears to have died down significantly" (F. 868) upon competitive feedback provided by sales persons in the field. (CX 1564 at 004; Tatman, Tr. 1063-1064; *see* RX 598 (competitive feedback log)).

870. Mr. Tatman of McWane stated in his 2008 second quarter Executive Report, among other things, under the heading, "Sales/Market/Competitive Environment" that:

> We continue to track the level of confirmed discounting and job pricing within our competitive action file. The level of activity appears to have slowed over the past several months probably driven by a combination of rising costs putting more pressure on price and more creative use of programs.

(CX 1562 at 004).

d. Star

871. Prior to 2008, Star had always used Project Pricing to sell Fittings. (CX 2539 (McCutcheon, Dep. at 164) ("Being number three, we have to give a value to the customer; and we have chosen for that value to be price. And we have always project priced.").

872. Project Pricing was a significant part of Star's competitive strategy. As the smallest competitor in the market, Star needed to Project Price to remain competitively viable, and Project Pricing helped Star grow its market share. (McCutcheon, Tr. 2387; RX 685 (Minamyer, Dep. at 26)).

873. Throughout 2008 and up until at least November 2008, Star wanted to see documentation of prices in the field before Star offered Project Pricing, and Mr. Minamyer reminded his sales force that this is what he wanted on more than one occasion. Star would hold to the published multiplier unless it learned that a competitor was pricing lower. (CX 2526 (Minamyer, Dep. at 157, 174-176); *see also* CX 0815).

874. In 2007 and in 2008, Star's process for approving Project Pricing was that the territory manager who negotiates a Project Price had to submit a request in writing for approval (the "Pink" sheets) to his division manager, and most of the time the special price also had to be approved by the national sales manager and/or the VP of sales. (CX 2535 (Bhutada, Dep. at 103-106), *in camera*; McCutcheon, Tr. 2272; Minamyer, Tr. 3144-3145).

875. While Mr. Minamyer was the national sales manager, Mr. Minamyer or Mr. McCutcheon approved Project Pricing, although sometimes the discretion was delegated to Star's divisional managers. There were instances where Mr. Minamyer would "push down" approval to the division managers, and sometimes even to the territory managers, if Mr. Minamyer had faith in them to make the correct judgment. (Minamyer, 3147;

CX 2538 (McCutcheon IHT (Vol. 2) at 373); RX 685 (Minamyer, Dep. at 26-27)).

876. If the request for Project Pricing was approved, Star and the Distributor calculated the price Star charged for the product by multiplying the catalog price by the negotiated multiplier (the Project Price) rather than Star's published multiplier. (Minamyer, Tr. 3143-3144).

877. Star's internal process for approving a special price for a customer uses a special pricing request – "SPR" – or "a pink, like the color." (McCutcheon, Tr. 2273).

878. In the course of the FTC's investigation in this matter, Star produced a spreadsheet dated July 23, 2011, titled "2008_Pinks-final.xls." ("RX 557.xls Pinks-final"). (McCutcheon, Tr. 2550-2551).

879. The spreadsheet referred to in F. 878 includes all of the 2008 special pricing requests ("SPRs") or "pinks" that were approved by Star in 2008 for all products, including Fittings. (McCutcheon, Tr. 2550-2552, 2673, 2692-2693; RX 557.xls).

880. The information in the spreadsheet referred to in F. 878 was drawn from the information in Star's "pinks." (F. 874, 877-878; McCutcheon, Tr. 2548).

881. The spreadsheet referred to in F. 878 shows 2,669 total instances of special pricing, including projects, "buy" programs, and "one-time-only" prices. (RX 557.xls).

882. Mr. McCutcheon requested the same information as set forth in F. 879 for 2008 for 2007 through 2009, all of which he reviewed in summary "graph" form. (McCutcheon, Tr. 2553, 2684; CX 2570).

883. The data reflected by the spreadsheet referred to in F. 878 and the summary graph referred to in F. 882 are drawn from data provided in Star's "Special Project Pricing Reports" ("SPPRs"), which are provided periodically by the Star's sales force. (McCutcheon, Tr. 2673; *see e.g.*, RX 444, RX 444.xls (utility spreadsheet, December 2008); RX 548, RX 548.xls (utility

spreadsheet, November 2008); RX 446, RX 446.xls (utility spreadsheet, September 2008); RX 448, RX 448.xls (utility spreadsheet, August 2008); RX 449, RX 449.xls (utility spreadsheet, May 2008); RX 558, RX 558.xls (utility spreadsheet, March 2008); *see* RX 695 (Leider, Dep. at 36); CX 2532 (Berry, Dep. at 38-39)).

884. The SPPRs and the spreadsheet referred to in F. 878 include some entries for Project Prices offered to Distributors that involved other products and not Fittings, such as plumbing products, joint restraints, bolts and accessories, castings, and valve boxes. (McCutcheon, Tr. 2673-2676; RX 557.xls at Row 567 (plumbing products); CX 3033 at 002 (showing project receiving special pricing reflected in RX 557.xls at Row 567 referred to plumbing products); RX 558.xls at Row 69-71 (joint restraints); RX 558.xls at Row 2-3 (bolts and accessories); RX 558.xls at Row 33 (castings); RX 557.xls at Row 1452 (valve boxes); CX 3041 at 001 (showing project receiving special pricing reflected in RX 557.xls at Row 1452 referred to valve boxes)).

885. Star's SPPRs include sales to Canadian customers. (McCutcheon, Tr. 2405; *E.g.*, RX 446.xls, Row 106 (sale to Howie Bird for project in New Brunswick); RX 446.xls, Row 10 (sale to Wolseley for project in Quebec); RX 446.xls, Row 104 (sale to Marcel Baril for project in Quebec); RX 446.xls, Row 150 (sale to Temispal Val D'or for project in Quebec); RX 446.xls, Row 56 (sale to Real Huot for project in Quebec)).

886. Star sells very few Fittings outside the United States. (McCutcheon, Tr. 2405).

887. The overall number of instances in which Star engaged in Project Pricing on all products, including Fittings, dropped from 3,226 instances in 2007 to 2,669 in 2008. (CX 2570 at 001; McCutcheon, Tr. 2685).

888. During the time period from February 2008 through March 2008, the number of instances of Star's Project Pricing on all products, including Fittings, was 20% higher than the same period in 2007. (CX 2570 at 001; *see* McCutcheon, Tr. 2402-2403).

889. The number of instances of Star's Project Pricing on all products, including Fittings, was lower in January 2008 than January 2007; higher in February 2008 than in February 2007; lower in March 2008 than in March 2007; higher in April 2008 than April 2007. (CX 2570 at 001).

890. The instances of Star's Project Pricing on all products, including Fittings, were fewer in each month from May 2008 through November 2008, than May 2007 through November 2007. (CX 2570 at 001).

891. The number of instances of Project Pricing on all products, including Fittings, was higher in December 2008 than in December 2007. (CX 2570 at 001).

892. In an internal email to Mr. McCutcheon and to Star's division managers dated August 25, 2008, Mr. Minamyer stated: "I know we have been very careful on special pricing and it seems to be working pretty good." (CX 0814; McCutcheon, Tr. 2570-2571).

893. On November 25, 2008, Mr. Minamyer wrote an email to his sales team, with the subject line, "Pricing Strategy Changes." The email stated:

> TO: All
>
> We have all been extremely diligent in protecting the stability of our market pricing. So much so that we have earned the reputation of being the best at protecting the market pricing and at times, to the extent that some think us inflexible in that area. You have all done a great job and deserve credit for these effort and results.
>
> However, some of our competition has not performed as admirably nor are we now certain that it was ever part of their strategy. Considering that, we need to change our plan in how we are setting our multipliers. We have many instances where we have documented the competition being irresponsible (Mostly Sigma) and selling under our multipliers in almost

every market with varying strategies. We have lost too much revenue to tolerate it any longer.

Please get with your teams to be sure we are all clear on the following plan.

We will take every order we can after exhausting all avenues to document the competitors pricing. Please be diligent while talking to your customers that we want to continue being good stewards in the market but we will no longer tolerate the competition being irresponsible in the market and being undersold as a result. The reason is that we have documented so much under market pricing that we have to react to protect our partners', and our own market shares. Do it with a combination of buy plans, short term buys, and project pricing. Do this quietly and selectively and as much under the radar as you can but, <u>if it is necessary</u>, be sure to do it. Go get every order!!!!!

You should also go after the competitors' partners to try and gain some of that market share. This doesn't give us the go ahead to be irresponsible on the market but rather the ability to be more flexible in pricing. If we are moving pricing we need to get more revenue as a result.

Your teams will need to be sure they are tracking every project in their territory so that they know what is going on and how to react.

. . .

To manage I will have all the pinks come through me again for awhile so we can measure the results.

. . .

(CX 0831(emphasis in original); Minamyer, Tr. 3226 (describing email as "asking them to get more aggressive on pricing to get more orders."); *see also* CX 2526 (Minamyer, Dep. at 69-71, 72-73), *in camera* ("I'm telling them to take off the gloves and looks like we lost a market share and my patience had run out with that

and we were going to go take it back."; "Q. So what are you directing your sales folks to do? You said take off the gloves; what does that mean? A. It means we were attempting to hold our pricing and it looks like the competition was not, and we're not going to do that anymore. We're going to go out and we're going to take that business back by using pricing.")).

894. On February 3, 2009, Mr. Minamyer wrote an email to his sales team stating that "Divisional Managers will now be able to approve pinks without my approval" for certain specified products within specified multipliers. (CX 0884).

e. Sigma

895. Within Sigma, regional managers had authority to approve a Project Price to some extent, with ultimate authority resting with Mr. Rybacki. Sigma sales people had this authority in every region for all of 2008. (Rybacki, Tr. 1105-1106, 3696).

896. After receiving Mr. Pais' January 24, 2008 email referred to in F. 663-664, Mr. Rybacki told his regional managers "once again that we needed to try to . . . make us more profitable because it was getting to the point where we couldn't make any money at the prices we're selling at." (Rybacki, Tr. 1105-1106, 1137).

897. There was no special effort made in 2008 at Sigma to reduce Project Pricing. As Mr. Rybacki further explained: "I think there's an effort every single . . . quarter every single year to try to reduce it because job pricing has a tendency to get out of hand." (Rybacki, Tr. 1107).

898. Sigma continued to Project Price throughout 2008. Sales persons continued to have some latitude in offering Project Pricing, although they had to prove to their regional manager that the price was necessary. Sigma's pricing was "all over the map." (RX 1002 at 004-006; Rybacki, Tr. 3579, 3653-3659, *in camera*; Rybacki, Tr. 3696-3697Pais, Tr. 1918-1919).

899. In the second half of 2008, Sigma observed a sharp erosion in market pricing. (RX 116; Pais, Tr. 2129-2131).

900. On November 24, 2008, Mr. Pais stated in an email:

> I am sure Tyler is as guilty of 'starting' the price decline as any of the other two of us. But, generally, their record holds that 'they may not make a price . . . but, will meet one'. Here, the culprit again may be the 'PW or Job' pricing which is still priced as in a different manner and this dual pricing practice could be continuing to harm our overall pricing as it has over the past 3-4 years! For sure, with their inventories climbing due to their commitment to a domestic production at 2 plants til 9/08 (mercifully, they closed Tyler, which is sure to relieve some pressure), Tyler had severe pressure to maintain their market share.

(RX 115 at 002).

2. Alleged "monitoring" and "cheating" documents

901. Mr. Minamyer received weekly activity reports from his divisional sales managers. (Minamyer, Tr. 3199). These weekly activity reports included paragraphs under several different category headings, including "Trends"; "Major Events/Happenings"; "Competition Update and/or New Information"; "Customer Service Issues (Good or Bad)"; and "Successes or issues from your sales people." (*See, e.g.*, CX 1692, CX 1693, CX 1696).

902. A two page weekly activity report was provided by Star divisional sales manager Mr. Prado on March 6, 2008, for the week ending February 29, 2008. One of the four points under "Competition Update and /or New Information" included Mr. Prado's statement: "It is still early, but it doesn't appear that Sigma or Tyler is cheating on the new fitting multipliers being quoted after 2/18." (CX 1692 at 002; Minamyer, Tr. 3199-3201; CX 2526 (Minamyer, Dep. at 201-202) ("Q. And what he was telling you here is that they were adhering to the published multipliers? A. I believe that is what he meant. Q. They weren't cheating by undercutting them? A. It's still early, but it doesn't appear that they are. Right.")).

903. "Cheating" is an internal Star term used to refer to any pricing that was below the published multiplier, including among other things, Project Pricing. (Minamyer, Tr. 3201, 3218-3219, 3222, 3255, 3269-3273).

904. In a Star internal email on March 11, 2008, Mr. Minamyer requested his sales force to advise him of "any issues we had with Sigma on how they are handling the Mult increases. . . . Just give me major things that you [hear] of like: - No shipping restriction on NJ; - No letter out on MA; - Letter out late in XX; - Sales guys saying they didn't know; - Honoring all previously priced jobs in OH; - Etc." Mr. Minamyer requested the report because Star was "trying to figure out if Sigma was taking an increase or not." (CX 0856 at 001-002; Minamyer, Tr. 3198). In the same email, Mr. Minamyer shared information he had acquired concerning Sigma quotes in various areas, as well as quotes by McWane and Star. (CX 856 at 001).

905. In response to Mr. Minamyer's March 11, 2008 email asking for any reports on any issues with Sigma "handling the Mult increases" (F. 904), Star's Southwestern Division Manager, Shaun Smith, responded on March 11, 2008 that: "It seems as though they have been pretty discipline[d] in my Division" and "everyone seems to be playing fair." (CX 0856 at 001). By "playing fair," Mr. Minamyer believed Mr. Smith meant "pricing per their published multiplier letters." (Minamyer, Tr. 3199).

906. On April 2, 2008, Mr. Minamyer reported to Mr. McCutcheon that Star had lost a bid for a project with Winwater (referred to as the "Tulsa Bid Sleeves" project) because Star had not given Winwater special pricing, but "It looks like Sigma did, or at least that's what [Winwater] told us. Sigma may be trying to buy some of our business. They should be very careful if they want to hold this price increase as we will not lose our partners or any more orders because they are not responsible in the market." In referring to Sigma "trying to buy" Star's business, Mr. Minamyer meant Sigma may be trying to undercut Star's price to sell to one of Star's better customers. In calling Sigma "not responsible," Mr. Minamyer was referring to the fact that Sigma was pricing below its published multiplier letters. (Minamyer, Tr. 3204-3207; CX 0044 at 001; RX 697 (McCutcheon, IHT (Vol. 2) at 453-454)).

907. In response to Mr. Minamyer's April 2, 2008 email (F. 906), Mr. McCutcheon asked for additional information. (CX 0044 at 001 ("Please give me more info. Bid date, value, selling price, etc…")).

908. In a weekly activity report dated April 21, 2008 for the week ending April 18, 2008, under the category "Major Events/ Happenings" it was reported, among other things, that HD Supply was seeking price help on an order it was preparing to place with Star for a bid it had won. Mr. Smith, a Star divisional sales manager, stated in response: "You know the gig, ask them why? If they give you proof the other guys are cheating, then we will match!" (CX 1696 at 001). This was consistent with Star's Project Pricing policy at that point in time. (Minamyer, Tr. 3203-3204).

909. On May 6, 2008, Mr. Minamyer in an email to his division managers, with a copy to Mr. McCutcheon, wrote: "We have to keep our focus on the pricing and continue to be diligent. I see it getting a little looser and am concerned that we won't hold this increase. Don't let our competitors[']practices force us to fail. One competitor is being pretty strong and one is being pretty weak on pricing. Continue to have the talks with your customers at the highest level to try to hold pricing. All Mfg's are taking increases so it is not an unfamiliar conversation to them." (CX 0525).

910. In a weekly activity report dated June 30, 2008 for the week ending June 27,2008, under "Major Events/Happenings" Mr. Prado reported, among other things, "Received confirmation that Sigma is selling fittings in Florida below the state number of .25. [T]hey have made some verbal agreements to price certain customers 2 points below the state number. Developed plan to strategically lower committed fitting partners to the same level until further notice." (CX 1693 at 001).

911. In a weekly activity report dated June 30, 2008 for the week ending June 27, 2008, under the heading "Competition Update and/or New Information," Mr. Prado included the statement: "Confirmed that Sigma has been cheating in Florida

with fitting multipliers. Also pretty certain that Tyler is doing the same." (CX 1693 at 002).

912. On August 18, 2008, Mr. Smith sent an email to his sales force, with the subject line "weekly report," which stated in pertinent part:

> We need to stay on the high road, but with our relationships, we should be able to react when necessary. I know it sometimes becomes a difficult discussion, but because of how manufactures/ distributors/contractors have acted over the years with (I need a better price!) it created this spiraling price erosion that needed to stop. It doesn't help that the market is soft, but let's be as diligent as we can gathering the proper data needed if the other suspects are cheating. We will react, just need to make sure it is real.

(CX 1695 at 001; Minamyer, Tr. 3219-3221).

913. On August 25, 2008, Mr. Minamyer wrote an email to his sales force and Mr. McCutcheon, regarding "Pricing in the Market." Mr. Minamyer stated:

> I have noticed that recently we have been seeing more pricing pressure in these forms:
>
> - Ford, Smith Blair, and Romac being very low on multipliers.
> - Sigma getting tricky with special local deals.
> - Tyler has been pretty good but a couple of instances where they don't respect the market price in markets where they get no business and have nothing too lose.
>
> My guidance is:
>
> - Don't let anyone take your JR (or fittings) business on price. Confirm the price and match it to get it back. The JR market may be changing due to all the new players. Watch for Tyler and Bulldog very closely and don't let them, or anyone, in.

> - If it is a customer who will shop the price back to the competitor you need to use good judgment on how and if to match price.
> - Do the same thing to Tyler that they do to you. Maybe it will get back to them and they will stop.
> - Continue to report what's going on.
>
> I know we have been very careful on special pricing and it seems to be working pretty good. But, the competitors are starting to get weak and we can't sit back and let them play games and lose our market share. Be aggressive when it happens.

(CX 0814).

914. On September 4, 2008, Mr. Smith of Star wrote an email regarding "BPU Pricing" and stating with regard to a bid, in part: "Both of these guys would be getting the standard .30 number from us. Is this an old contract price or did it just bid, with or without accy's? We have seen Sigma cheat on larger projects in other parts of the country and have responded accordingly when we see something. As you know, we will always cover you in these situations, just [want] to make sure we don't have a bidding mistake or [Distributors] HD and WW just getting stupid in the market." (CX 1694 at 001).

915. On September 9, 2008, Mr. Minamyer received a report from a Star sales representative regarding HD Omaha:

> Tyler has slid back to a .28 in Omaha per Joe … at HD. Municipal took the Omaha annual bid a month after the price increase below a .30 and called out Tyler I think with the market in NE being soooo [*sic*] bad if we don't protect our partner we may loose [*sic*] them. I know we would like to keep the market up but Tyler and Sigma keep cheating and costing our partners in a baddddd [*sic*] market where they are down substantially already. I think we need to go to a .28 with HD. . . .Let me know, but I think after the beating our partners took last year for us trying to lead the market, we are going to loose [*sic*] market share by continuing the tough stance. Tyler got to where they are by being staunch and arrogant. I don't

> want to be looking back a year from now with a 2% [price] increase and 25% less biz.

(CX 1697; Minamyer, Tr. 3222-3226 ("keep the market up" referred to prices, and "tough stance" refers to Star's effort to not offer Project Prices); *see also* CX 1694 at 001).

916. At the end of a 3-page Star internal email exchange among Mr. McCutcheon, Mr. Minamyer and Mr. Smith on October 22, 2008, regarding "Quote 10707007," and whether to offer a customer a lower multiplier than Sigma had offered Mr. Smith stated: "I'm not sure about the market being already there. . . . I really only think this will affect the Houston market, but I am catching Sigma cheating more and more." (CX 1698).

917. A weekly activity report from Mr. Smith for the week ending October 24, 2008, noted a number of jobs where Star was pricing to compete with prices from Sigma and McWane. A final entry under the heading "Competition," noted "My team is in major attack mode – as reported, we are seeing cheating all over from Sigma – they have been instructed not to lose any orders." (CX 1699).

918. On October 29, 2008, Mr. Minamyer wrote an email to his sales force, with the subject, "Sigma Antics." Mr. Minamyer asked "off the top of your heads, please give me no more than the top five things Sigma does or has done in your division that is out of the market pricing or any weird stuff. Make sure they are legit." As examples, Mr. Minamyer stated, "In New Mexico they keep dropping the fitting number to xx. The salesman says that is because they don't get any share and have nothing to lose" and "The[y] put out a letter in TX and OK announcing a truck load special. Any full trucks get xx points off the s[t]ate mult." (CX 0871).

919. On January 31, 2008, Mr. Tatman of McWane, received a copy of the Star January 30, 2008 email to HD Supply in which Mr. Leider of Star, informed HD Supply it would match McWane's multipliers and would be providing "NO UTILITY PROJECT PRICING NATIONWIDE" (F. 702 (emphasis in original)). Mr. Tatman forwarded the email to Mr. McCullough and Mr. Walton, both of McWane, stating:

> Per the e-mail chain below Star is following the [McWane] Multiplier Maps also effective Feb 18th. Also note comment on NO UTILITY PROJECT PRICING NATION WIDE that was sent to HDS regional reps. The proof will be if they actually hold to what they say.
>
> Note that Star has our actual maps, which isn't a bad thing.
>
> We heard a similar announcement is out from Sigma but we've yet to receive a copy.

(CX 0178 at 001 (emphasis in original); Tatman, Tr. 412-418).

920. Three minutes after receiving Mr. Tatman's email referred to in F. 919, Mr. McCullough forwarded the email to McWane's CEO, Mr. Page, writing that "[t]he first tentative baby steps are encouraging but the proof will be in 'saying no' to customer requests for special pricing." (CX 0178 at 001; Tatman, Tr. 417). Mr. McCullough explained:

> [S]omeone makes the comment, "NO UTILITY PROJECT PRICING NATION WIDE." You know, whereas I read that, and I know that this has never happened. So, regardless of what someone is saying, you know, the proof is in the pudding . . . I'm not certain now, but perhaps it would be that at least they're giving the illusion of there will be no special project pricing, whereas in actuality, there's always [been] project pricing . . . at least they were saying visibly that there's no utility project pricing nation wide . . . . Maybe . . . they would carry through on what they're saying here, and that there would be no project pricing. But I don't know that anyone ever had any real belief that that was going to happen.

(CX 2479 (McCullough, Dep. at 197-199)).

921. On March 10, 2008, Mr. Tatman sent an email to Mr. McCullough and Mr. Walton, regarding "VMA data compared to Tyler/Union YTD sales." Mr. Tatman reported that while year-to-date valve sales were up 81% of 2007, "YTD fitting sales are lagging behind @ 69% of 2007." Mr. Tatman's email continued:

> March 1st was the last published date for Tyler/Union, Sigma and Star to honor any job pricing. Market inputs suggest that both Sigma and Star put out some pretty low numbers in Feb trying to grab incremental tonnage prior to the March 1st date. We on the other hand honored existing job quotes but didn't throw out any new low numbers after the increase was announced. In hindsight this might have been a tactical error given our soft tonnage.
>
> Jerry is getting mixed competitive reports ranging from adherence to published pricing by Sigma and Star to cutting deals and extending terms. I have asked Jerry to work with his team on getting qualified competitive information rather than verbal inputs from branches who could be feeding false information to get us to budge.
>
> I'll nervously wait for the March data to come in, but if we're not seeing a recovery trend towards aligning with the general market we'll have to discuss what options are appropriate.
>
> Even with the reduced production schedule, YTD inventory levels are up nearly 4,000 tons.

(CX 0339; Tatman, Tr. 421-422).

922. On March 10, 2008, Mr. Rona, OEM Manager for Sigma, forwarded to Mr. Pais and others at Sigma, an email from Mr. Tatman at McWane regarding "3"-8" DIWF from Tyler/Union." Mr. Rona reported in his email a number of points from a conversation he had with Mr. Tatman, including matters pertaining to McWane's selling certain Fittings to Sigma. According to the Mr. Rona's email, Mr. Tatman "said he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [sic] do our part." (CX 1124 at 002; Rona, Tr. 1609-1613; CX 2530 (Rona, Dep. at 137)).

923. Mr. Tatman testified that he has no recollection of the conversation referenced in F. 922. (CX 2484 (Tatman, Dep. at 106-107); Tatman, Tr. 422).

924. On August 22, 2008, Mr. Rona sent a Sigma internal email to "OEM5" re "Short talk with Rick Tatman." The email stated:

> Guys,
>
> Rick was upset by the numbers in Florida and California based on what he has seen from us and Star.
>
> He said the .26 and .30 respectively were available from us both with any second thought.
>
> Just FYI

(CX 1149).

925. Mr. Rona recalled nothing about the conversation referenced in F. 924, including whether Mr. Tatman asked him to do anything, or why he used the word "upset." Mr. Tatman also had no recollection of the call with Mr. Rona referred to in Mr. Rona's August 22, 2008 email. (Rona, Tr. 1613; Tatman, Tr. 364).

926. Mr. Rona acknowledged that his August 22, 2008 email (F. 924) does not refer to any buying or selling between McWane and Sigma. (Rona, Tr. 1718).

927. Mr. Rona is not involved in setting prices at Sigma. (Rona, Tr. 1437-1440, 1453-1454).

928. Mr. Rybacki had authority over pricing at Sigma during the relevant period. (Rybacki, Tr. 1096).

3. Economic data

a. Background

929. With the economic decline during 2007, the Fittings industry experienced a period of declining demand, increased price competition resulting in price erosion, and increased costs.

(RX 690 (Rybacki, Dep. at 66-67); Tatman Tr. 263-265; CX 2457).

930. Demand for Fittings was falling beginning in 2007 because of the economic downturn and decreased demand for new housing. Business continued to drop off, particularly by the summer of 2008, when the economic crisis really hit "full steam." (Tatman, Tr. 269-272; Rybacki, Tr. 1104-1105; McCutcheon, Tr. 2654, *in camera*).

931. In August 2008, the housing market declined precipitously, creating additional pricing pressure. (Rybacki, Tr. 1105, 3578 (testifying that "[a]fter the third week of August of 2008, I alerted my team that the demand was starting to weaken" and that is when the "demand for all waterworks products started to get soft"); CX 1651 at 026, *in camera* (graph showing drop in housing starts over the summer of 2008); CX 2531 (Rybacki, Dep. at 134-35, 157-58) ("That's when housing had just stopped and the economy had taken -- in August of 2008, the market, somebody just shut the faucet off."; "[W]e had a big July. I remember we had a big July and good first half of August, and that's when it started to go down. It started to go down mid to late August 2008.")).

932. In late 2007 and into 2008, McWane had excess capacity while demand was declining, and idle plant charges were negatively affecting profitability. (Tatman, Tr. 1036-1037, 1040, *in camera*; CX 2416 at 0015, 0035, *in camera*).

933. Market pricing eroded sharply in the second half of 2008. Mr. McCutcheon of Star described Fittings pricing in the second half of 2008 as "chaotic." (McCutcheon, Tr. 2568; RX 116; Pais, Tr. 2129-2131, 2151; Tatman, Tr. 971-972).

b. Expert analysis

934. Dr. Normann was charged, *inter alia*, with determining whether there was economic evidence consistent with the allegations of the Complaint; specifically, whether there was economic evidence consistent with collusive behavior among McWane, Sigma, and Star, to stabilize and increase prices for Fittings. Based on his review of the evidence and his analysis, Dr.

Normann concluded that there was no economic evidence that the price changes in January or June of 2008 were coordinated, or that there was an agreement to reduce job pricing as would be reflected in a decrease in price variance; that there was economic evidence that contradicted a conclusion that prices were raised anticompetitively in the Fittings market; and that the pattern of sales and inventory contradicts the notion of quantity withholding, as would be needed to effect a price increase. (RX 712A (Normann Rep. at 1-3)).

935. Dr. Normann analyzed whether there was reduced price variation and whether prices were increased, as part of an agreement, as alleged in the Complaint. (RX 712A (Normann Rep. at 2)).

936. Dr. Normann examined, *inter alia*, McWane's multiplier maps associated with the January and June 2008 multiplier changes. Dr. Norman found that McWane's multipliers changed in different directions and by different amounts on a state-by-state basis, and concluded that this pattern is more consistent with competitive, independent decision-making by McWane than with concerted action. Moreover, Dr. Normann found that McWane's published multipliers announced in January and June 2008 actually did not increase in most States, which is inconsistent with the Complaint's allegation that the January and June 2008 price changes were coordinated "price increases." (RX 712A (Normann Rep. at 10, Figure 1); Normann, Tr. 4777-4779).

937. Dr. Normann examined the Suppliers' invoice data, kept in the ordinary course of business and produced by the Suppliers in this case. The invoices record the sales price for the transaction in dollars, which includes any discounts off the published multiplier (*i.e.*, Project Pricing), but does not include additional discounts that may arise from rebates, freight terms, or cash discounts. (Normann, Tr. 4740-4741, 4781).

938. Because the alleged conspiracy in this case involves published multipliers and discounts from published multipliers given through Project Pricing, and there are no allegations involving other discounts, the invoice price is exactly the correct price measure. (Normann, Tr. 4741).

939. To control for product mix when analyzing the Suppliers' invoice data, Dr. Normann created an index of Fittings, consisting of a "basket" of the 24 most common types of Fittings that are sold by McWane, Sigma, and Star, as determined by volume. According to Dr. Normann, any conspiracy to raise Fittings prices would be reflected in the invoice prices for this basket of products. (Normann, Tr. 4783-4785).

940. Dr. Normann found, based on McWane's invoice prices for McWane's portion of the common Fittings basket (F. 939), that McWane's average non-domestic (*i.e.*, open specification) Fittings prices declined over the course of a multi-year period from January 2007 through November 2010, including before, during, and after the period of January 2008 to February 2009. The period of January 2008 to February 2009 is the period that Dr. Normann derived from his review of the Complaint and other materials in the case to encompass the "conspiracy period." (RX 712A (Normann Rep. at 12, Figure 2A); Normann, Tr. 4789, 5780).

941. Dr. Normann's use of a multi-year time series (F. 940) captures a rolling average and thereby captures the potential effect of time lags between the date a price was agreed to with a customer, and the date the order was invoiced and shipped. (Normann, Tr. 5144).

942. For the period from January 2008 through February 2009, Dr. Normann found that McWane's average Fittings prices decreased by [redacted]%, Sigma's average Fittings prices increased by [redacted]%, and Star's average Fittings prices increased by [redacted]%. A price decline by McWane during the same period as price increases by Sigma and Star is inconsistent with a conspiracy to raise prices involving McWane. (RX 712A (Normann Rep. at 13, Figure 2B), *in camera*; Normann, Tr. 4789).

943. During a period beginning February 1, 2008 and ending October 1, 2008 McWane's Fittings prices increased by [redacted]%; Sigma's increased by [redacted]%; and Star's increased by [redacted]%. (Normann, Tr. 5776-5782, *in camera*

(as corrected by Nov. 7, 2012 Joint Stipulation Regarding Trial Transcript Errata)).

944. Even when there is evidence of price increases, it is important in a conspiracy case to look at input costs to determine if there are competitive explanations for the price increases, such as needing to keep up with rising costs. (Normann, Tr. 4779-4780).

945. Dr. Normann measured cost changes through an index he created of metal (such as scrap and pig iron) and energy costs. Metal costs, such as scrap and pig iron, and energy costs are variable costs that constitute the primary cost inputs in the manufacture of Fittings. These costs comprise about 30 percent of the total cost of McWane's production of ductile iron pipe fittings. (Normann, Tr. 4779-4780, 4792).

946. The cost data for Dr. Normann's analysis (F. 949-951) came from McWane's "blue books." (Normann, Tr. 4792-2793).

947. "Blue books" are prepared by McWane's controller's office, are provided to Mr. McCullough and other executives within the company, and are important financial documents used in running the waterworks business. (Tatman, Tr. 497-498, 844-845, *in camera*; *see e.g.*, CX 2416, *in camera*).

948. Costs increased earlier and were more pronounced for Sigma and Star, compared to McWane, because of McWane's domestic production. Inflation started earlier in China. (Normann, Tr. 4793).

949. The metal and energy cost input line on Figure 2B of Dr. Normann's report is based upon McWane's actual metal and energy cost data, but because metal and energy costs represent input costs that go into all fittings sold into the open-specification market, McWane's input cost data is a good proxy for input costs incurred by Sigma and Star as well. (Normann, Tr. 4793-4794).

950. The metal and energy cost input line on Figure 2B, of Dr. Normann's Report, included McWane's metal and energy cost figures for its domestic product sold into open specification jobs

and for its imported product (*i.e.*, McWane's "blended" Fittings). (Normann, Tr. 4792-4794).

951. Metal and energy input costs went up 40% to 50% during 2008, and were up 70% to 80% from 2007, which is a dramatic increase. (Normann, Tr. 4794-4795; RX 712A (Normann Rep. at 13, Figure 2B), *in camera*).

952. In a competitive environment, the cost increases referred to in F. 951 would result in significant pressure to increase price. In a competitive environment, it would be expected to see some changes in price because of increases in cost. Thus, when examining whether price increases are indicative of collusion, it is necessary to control for the underlying costs. (Normann, Tr. 4746-4749, 4795-4796).

953. Dr. Normann's analysis showed declining prices for McWane and modest price increases for Sigma and Star during the period from January 2008 through February 2009. Dr. Normann did not find the price increases to be significantly more than the cost increases in the same time period. (RX 712A (Normann Rep. at 13, Figure 2B), *in camera*; Normann, Tr. 4746-4749).

954. Dr. Normann's analysis concluded that during the January 2008 through February 2009 period the Suppliers' price movements were not in parallel and that the Suppliers' prices moved independently of one another. (Normann, Tr. 4747-4748; RX 712A (Normann Rep. at 12-13, and Figure 2B), *in camera*).

955. Dr. Normann's data analysis shows that from the period of mid-2007 through 2008 and into 2009, McWane's non-domestic Fittings prices declined while its costs increased. (Normann, Tr. 4791-4792).

956. The decline in McWane's pricing (F. 940), given the rise in input costs (F. 951), is inconsistent with a conspiracy and consistent with independent pricing behavior. (Norman Tr. 4746-4749; RX 712A (Norman Rep. at 12-13 and Figure 2B), *in camera*).

957. A price increase for imported Fittings would show up as an increase in the price of Fittings sold into open specification jobs relative to domestic-only jobs. Over a multi-year period, including the period from January 2008 through February 2009, the price of open specification Fittings declined relative to the price of domestic-only Fittings, which is also inconsistent with the alleged conspiracy. (Normann, Tr. 4748, 4801-4804; RX 712A (Normann Rep. at 14-15 and Figure 3), *in camera*).

958. Dr. Normann looked at the Suppliers' inventory data to see if there was any evidence of withholding, which would facilitate a cartel's ability to raise prices. He found no evidence of withholding, and instead found an increase in output. (Normann, Tr. 4748-4749; 4805-4808; RX 712A (Normann Rep. at 19-21 and Figures 5, 6), *in camera*).

959. Dr. Normann's findings, conclusions, and opinions regarding price movements in the Fittings market during 2008 constitute substantial, probative, economic evidence that is not consistent with an inference of a conspiracy among McWane, Sigma, and Star, to raise and stabilize prices in the Fittings market. (F. 934-958; *see generally* RX 712A (Normann Rep.) at 1-21).

c. Other financial evidence

i. McWane

960. Mr. Tatman's 2008 second quarter Executive Report showed that the gross invoice price-per-ton for 2007 for "blended" Fittings (*i.e.*, the Fittings sold for open source jobs, including imported or domestically produced Fittings) was [redacted] per ton, and the gross invoice price-per-ton for the first quarter of 2008 was [redacted] per ton; April 2008 was [redacted] per ton; May 2008 was [redacted] per ton; and June 2008 was [redacted] per ton. (Tatman, Tr. 546-548; CX 1562 at 002).

961. McWane's prices for non-domestic Fittings in 2008 did not keep pace with the level of inflation in McWane's costs. (Tatman, Tr. 879-881, 971 ("Q. And you say you're lagging inflation due to competitive actions, and what did you mean by

that? A. Pricing. We couldn't get enough price out there in what we were selling things for to cover our rising cost.")).

962. McWane's average price-per-ton for non-domestic Fittings for the year 2008 declined relative to inflation, because its non-domestic production costs rose by roughly [redacted]% , while price-per-ton for the year increased only by [redacted]% over 2007. (Tatman, Tr. 859-862, *in camera*, CX 2416 at 035, *in camera*).

963. Mr. Tatman's April 29, 2008 General Manager's Meeting presentation included a graph showing a 50% increase in profit for the period from January through April 2008, on a 14% decline in sales volume. The graph does not attribute this to an increase in Fittings prices and states: "inventory write-up & blended-mix shift overriding volume impact." (CX 2047 at 004).

964. McWane's gross profit margin on non-domestically produced Fittings fell from [redacted], which Mr. Tatman attributed in part to job pricing. (CX 2416 at 043, *in camera*; Tatman, Tr. 991-994, *in camera*).

965. McWane's average blended Fittings price (the price of imported or domestic Fittings sold for open source jobs) for its 24 most commonly sold Fittings products declined throughout 2008, 2009, and 2010. (Normann, Tr. 4791-4797).

966. An internal McWane "variance analysis" report comparing 2008 sales and profit figures to 2007 includes a line item for "Sell price – Prior" and "Sell price – Current" for domestic utility fittings and non-domestic utility fittings, on a per-ton basis. Non-domestic refers to imports shipped for an open or import specification. Domestic refers to domestic fittings shipped. Price-per-ton refers to aggregate dollars per ton of product sold. Variance analyses are prepared by McWane's controller. The data in McWane's variance analyses also appear in McWane's "blue book" sales records. (CX 2126 at 004, *in camera*; CX 1569, *in camera*; Tatman, Tr. 818-819, 823-824, 834, 844-846, *in camera*).

967. The McWane variance analysis referred to in F. 966, comparing sales and profit figures for 2008 to 2007, stated with

regard to Utility Fittings: "Utility Fittings have contributed an additional [redacted] of gross profits over the prior year. This is in spite of a [redacted]% reduction in volume. Pricing gains, primarily on domestic product, have contributed an additional [redacted] of gross profits. Increased product costs of both domestic and non-domestic product have eroded profits by [redacted]. Although volume is down substantially, increased sales of the more profitable non-domestic product have reduced the overall volume loss to [redacted]." . . . Idle Plant Expenses of [redacted] were incurred in 2008, which were [redacted] less than 2007. (CX 2126 at 006, *in camera*; Tatman, Tr. 818-819, *in camera*).

968. The gross profits figures for fittings reflected in the variance analysis referred to in F. 967 do not include idle plant costs. "Idle plant" costs are the fixed overhead costs associated with running a Fittings manufacturing facility when the plant is not running on all days of the week. McWane reports this cost as a separate line item on its income statements called "idle plant." (Tatman, Tr. 432-433, 832).

969. McWane's variance analysis report comparing 2008 sales and profit figures to 2007 (F. 967) reflects an increase in non-domestic Fittings prices-per-ton between 2007 and 2008 from [redacted] per ton, and an increase in Domestic Fittings prices-per-ton between 2007 and 2008 from [redacted] per ton. (CX 2126 at 004, *in camera*; Tatman, Tr. 834, *in camera*; *see also* CX 2416 at 043, *in camera* (McWane blue book for year end 2008)).

970. Specifically, McWane's average price-per ton for non-domestic Fittings were as follows: [redacted] in January 2008; [redacted] in February 2008; [redacted] in March 2008; [redacted] in April 2008; [redacted] in May 2008; [redacted] in June 2008; [redacted] in July 2008; [redacted] in August 2008; [redacted] in September 2008; [redacted] in October 2008; [redacted] in November 2008; and [redacted] in December 2008}. (CX 2416 at 043, *in camera*; Tatman, Tr. 846-847, *in camera*).

971. McWane's variance analysis reports stating price-per-ton do not break out fittings by size, or by where the fittings were sold. As Mr. Tatman explained, the price-per-ton figures reflect:

> [T]hat's a big ball of iron that you sold that quarter. It doesn't say what the mix is. We just said before that -- remember before we restructured the list price. There's a huge variance, 250 percent, between the dollar-per-ton list price on a large-diameter fitting versus a small-diameter fitting[.] . . . [A]nd this also doesn't say what area this was closed in. If you look at the multiplier map, . . . the Pacific Northwest is 30 or 40 percent higher in price than what is Florida here. So when you look at that variance, you have to understand what's in there. The year before, did you happen to sell more small diameter versus large diameter? That's going to swing it.
>
> Did you happen to sell -- the year before, did you have heavy sales in Florida and California and Arizona because those were the hot markets, and they were hot markets because they were growing in housing, and housing is small-diameter fittings? What that does on a dollar-per-ton basis, that drives that number down. Now you move forward here. If Arizona and California and Florida housing markets are falling off and you're selling more product in the Pacific Northwest, it's not a price increase with respect to the Pacific Northwest, but in aggregate it's a price increase. Are you now selling more large-diameter product because the housing market has tanked and you're selling into municipalities for lines? That's going to switch it.
>
> So you can't jump to the inference that you have based on this simple number. And this is the exact thing in my executive summary dashboard with that graph that you looked at that we walked through. It's the exact same reference. You have to dig down about three levels deeper and take a look at did a 6" MJ fitting in Indiana over this period, what happened to time, what happened to price, if you really want to understand whether price was going up or whether it was going down. You just don't have enough granularity in what you see here to make that judgment.
>
> . . .

> It -- all it reflects is the big ball of iron that we sold the year prior and the big ball of iron we sold here went up -- I'll agree. It is what it is, but it doesn't give you any insights as to what happened and why.

(Tatman, Tr. 828-831).

972. Dr. Normann opined that price-per-ton is not a proper measure of price increases because selling a higher volume of higher priced items will create the illusion of an overall price increase. (Normann, Tr. 4782-4783).

973. A draft internal presentation prepared by Mr. Tatman dated October 20, 2008 included a chart with McWane's gross profitability stated as a percentage, for each year from 1999 through 2007, and for the first nine months of 2008. According to this document, the gross profitability of McWane's fittings business on a percentage basis for the first nine months of 2008 was higher than for the full year figures for each year from 1999 through 2007. (CX 0120 at 006; Tatman, Tr. 840-841).

974. Mr. Tatman explained the higher gross profitability in the first nine months of 2008 in comparison to prior years, as shown on the draft document described in F. 973, as follows:

> [W]hy is gross profit negative in 2001, 2002, even 2003[?] [B]ecause what did we have there, we had only domestic production. We are trying to fight import prices with only domestic production. What happens when you do that, you have poor profitability.
>
> Starting in about 2004 I believe is when we start sourcing product from overseas, started bringing in product. Sigma helped us out with that, so we had the ability now, rather than using a hundred percent domestic product to serve both the domestic-only spec market and the import market, we started having the ability to source product just like our competitors and sell that lower-cost Chinese product into open specs. [Mr. Tatman's predecessor] David Green starts overproducing the plant, so you get an impact that helps you there. He's running

> up the plants in 2005-2006. He's overproducing compared to what demand is. Inventory levels go up. But when you do that, your gross margins get better because your manufacturing costs go down. I show up in 2007. We got an inventory problem. . . . In 2007 we had heavy substitution of domestic product in blended sales.
>
> Getting the inventory down, being able to run the plants, that's going to drive your gross margin down. In the first nine months of 2008, I suspect if you look at the records and I think if you go through my analysis of the thing, I'll bet you our substitution rate for the first nine thousand -- first nine months of 2008 substituting domestic product against import specs is at a lower rate than it was in 2008, and that's what drives your gross margin up.

(Tatman, Tr. 839-840).

975. Because of the higher cost of producing domestic fittings, providing domestic Fittings for jobs with open specifications was like "wrapping a dollar bill around that fitting" because it is shipped against an import price. Where a specification was open, and therefore did not require domestic product, McWane "would ship a portion of that [order] with import fittings, and . . . partial domestic product," to reduce inventory and keep the domestic plants running. This is the basis for McWane's use of the term "blended" fittings. (Tatman, Tr. 274-275).

976. McWane's variance analysis report comparing the first nine months of 2009 to the prior period stated with regard to fittings: "Non-Domestic Utility Fittings have experienced a [redacted]% drop in volume resulting in a [redacted] of gross profits. Increased costs reduced profits by [redacted]. . . . pricing has deteriorated over the past two months. On a year-to-date basis, pricing reductions have lowered profits by [redacted] with [redacted] of that coming in October. Domestic Utility Fittings have experienced a [redacted]% drop in volume resulting in a [redacted] of gross profits. However, improved pricing and lower manufacturing costs have offset this and enabled domestic fittings to show a [redacted] improvement from the prior year. Additionally, in October, only [redacted] of the domestic fittings

were substituted and sold at non-domestic prices, vs. the year-to-date-substitution average of [redacted]%. . . . Idle Plant Expenses have been reduced by [redacted] due to the closing of the Tyler South plant." (CX 2153 at 006).

ii. Star

977. Star made [redacted] million in gross profit on its sales of 3" to 24" diameter Fittings in January 2008, representing a gross margin of [redacted]%. (McCutcheon, Tr. 2500-2501, *in camera*; CX 0042, *in camera*).

978. Star's Fittings gross margin per pound can be calculated by subtracting its per pound cost of goods sold from its per pound realization. In January 2008, Star's gross margin per pound for all fittings sold was [redacted]. (McCutcheon, Tr. 2657-2658, *in camera*; CX 2470 at 004, *in camera*).

979. In the first four months of 2008, Star's gross profits in the 3" to 24" diameter Fittings segment were at [redacted]%, approximately the same as the same period in 2007. (McCutcheon, Tr. 2501-2502, *in camera*; CX 0528 at 003, *in camera*).

980. In 2008, Star had a gross profit margin of approximately [redacted]%, on all fittings. (McCutcheon, Tr. 2653, *in camera*; CX 2470 at 002, *in camera*).

981. Star's gross profit margins as to all fittings, for each month of 2008, were as follows: [redacted] (January), [redacted] (February), [redacted] (March), [redacted] (April), [redacted] (May), [redacted] (June), [redacted] (July), [redacted] (August), [redacted] (September), [redacted] (October), [redacted] (November), and [redacted] (December)}. (McCutcheon, Tr. 2653, *in camera*; CX 2470 at 002, *in camera*).

982. Star's Fittings net profits decreased in the fourth quarter of 2008 as a result of reduced sales caused by the global financial crisis and the seasonal nature of the Fittings business, with relatively few sales occurring in December. (McCutcheon, Tr. 2656, *in camera*; CX 2470 at 004, *in camera*).

983. Star uses a per pound realization calculation to measure the health of its fittings business. Over the course of 2008, Star's per pound realization, as to all of Star's fittings sales, increased. Star's per pound realization for each month of 2008 were as follows: [redacted] (January), [redacted] (February), [redacted] (March), [redacted] (April), [redacted] (May), [redacted] (June), [redacted] (July), [redacted] (August), [redacted] (September), [redacted] (October), [redacted] (November), and [redacted] (December). (McCutcheon, Tr. 2656-2657, *in camera*; CX 2470 at 004, *in camera*).

984. In August 2008, Star's gross margin per pound for all its fittings was [redacted], approximately [redacted]% higher than in January 2008. (McCutcheon, Tr. 2657-2658, *in camera*; CX 2470 at 004, *in camera*).

iii. Sigma

985. According to data collected and provided by Sigma in connection with a "broad estimate" appraisal of Sigma's orderly liquidation value, Sigma's average selling price (per metric ton) for its "group A" products, which includes all fittings sold by Sigma rose [redacted]% from 2007 into 2008, from [redacted] for 2007 to [redacted] for 2008 through July. By December 2008 the year-to-date price had fallen approximately [redacted]% from its height in July 2008 to [redacted] per metric ton. (CX 0974 at 003, 009; Pais, Tr. 2006-2008; *see also* Pais, Tr. 2122-2123).

986. Sigma's average "effective" multipliers (the average multipliers at which products were actually sold) ("actual transactional multiplier") for small diameter mechanical joint Fittings in its southeast (ALX) region increased from [redacted] in February 2008 to [redacted] in October 2008. (Rybacki, Tr. 3599-3601, *in camera*; CX 1002 at 004, in *camera*).

987. Sigma's average actual transactional multipliers for all Group-A Fittings (*i.e.*, "standard," "fast-moving" items (Rybacki, Tr. 3600) in its southeast (ALX) region increased from [redacted] in February 2008 to [redacted] in October 2008). (Rybacki, Tr. 3652, 3737, *in camera*; CX 1002 at 004, *in camera*).

988. Sigma's average actual transactional multipliers for small diameter mechanical joint Fittings in its midwest (CHI) region increased from [redacted] in February 2008 to [redacted] in October 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3601, *in camera*).

989. Sigma's average actual transactional multipliers for all Group-A Fittings in its midwest (CHI) region increased from [redacted] in February 2008 to [redacted] in October 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3737, *in camera*).

990. Sigma's average actual transactional multipliers for small diameter mechanical joint Fittings in its southwest (HTN) region increased from [redacted] in February 2008 to [redacted] in October 2008, with a peak of [redacted] in August 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3602, *in camera*).

991. Sigma's average actual transactional multipliers for all Group-A Fittings in its southwest (HTN) region increased from [redacted] in February 2008 to [redacted] in October 2008, with a peak of [redacted] in August 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3738, *in camera*).

992. Sigma's average actual transactional multipliers for small diameter mechanical joint Fittings in its western (ONT) region increased from [redacted] in February 2008 to [redacted] in October 2008. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3602-3603, *in camera*).

993. Sigma's average actual transactional multipliers for all Group-A Fittings in its western (ONT) region increased from [redacted] in February 2008 to [redacted] in October 2008}. (CX 1002 at 004, *in camera*; Rybacki, Tr. 3739, *in camera*).

994. The transactional multipliers shown by CX 1002 (F. 986-994) reflect only average transactional multipliers; the actual day-to-day multipliers differed "a lot" from region-to-region, product-to-product, day-to-day. (Rybacki, Tr. 3656-3658, *in camera*).

H. McWane's Spring 2009 List Price Changes

995. In a letter to its customers dated April 13, 2009, McWane announced that it would begin using a new price list, to be effective May 1, 2009 ("April 13, 2009 Customer Letter"). The April 13, 2009 Customer Letter stated that the price list would be made available on McWane's website, or if the customer preferred, a hard copy of the new lists would be made available. (CX 0569 at 002).

996. The cost of printing a new price list is expensive, with a cost of roughly $30,000. (Tatman, Tr. 257; RX 644 (Tatman, Dep. at 45-46); Rybacki, Tr. 3542).

997. McWane's announced list price changes (F. 995) resulted in average Fittings list price changes as follows:

a. (3" - 12") fittings up 7.5%
b. (14" - 24") fittings down 16.6%
c. (30" - 48") fittings down 31.4%

(CX 1563; Tatman, Tr. 279-280; Pais, Tr. 2011).

998. The DIFRA data through December 2008 showed that McWane's market share was strongest in the 3"-12" Fittings segment, and weaker in the 14"-24" and over 24" segments. McWane's restructured prices went up in the 3"-12" segment and went down in the other segments. (Tatman, Tr. 594; CX 0656).

999. Prior to McWane's April 13, 2009 Customer Letter, Mr. Tatman had conducted a product weight analysis to determine McWane's dollars per pound in various product categories. (Tatman, Tr. 976).

1000. Mr. Tatman did not share the results of his product weight analysis (F. 999) with Star or Sigma. (Tatman, Tr. 976-977).

1001. McWane's list price restructuring would increase prices for small diameter Fittings (where McWane's market share was highest) and would lower prices for medium and large diameter Fittings (where McWane had little or no market share

and Sigma and Star were stronger). The "net effect" across all Fittings size ranges was "near zero." (CX 0569 at 001-002; CX 1669; CX 1563; Tatman, Tr. 595-597).

1002. McWane designed its new price list to be revenue neutral across all Fittings size ranges. McWane restructured its price list to (1) realign its prices among different Fittings size ranges in order to better align McWane's prices with its production costs; (2) squeeze its competitors' margins and give less "wiggle room" to its competitors for Project Pricing on larger diameter Fittings, where Star and Sigma had significantly larger market shares; and (3) attempt to compress the range between published pricing and actual market pricing, and thereby get McWane better visibility of pricing. (CX 0171 at 001-002; Tatman, Tr. 595).

1003. The purpose of McWane's 2009 list price restructuring was to try to win back market share that it had been losing to Star and Sigma and to compete in the segments of the market where Sigma and Star were strongest. (Tatman, Tr. 972-975; CX 569; McCutcheon, Tr. 2584-2585; CX 532).

1004. McWane did not consult with Star or Sigma before restructuring its list prices in 2009. (Tatman, Tr. 978).

1005. On or about April 23, 2009, McWane learned that Star had sent a customer letter stating that it would change its price list, effective May 19, 2009, and that the new price list would be available on Star's website "shortly." (CX 2349).

1006. Star had internally decided to follow McWane's new price list shortly after learning of McWane's new price list. (McCutcheon, Tr. 2462).

1007. Sigma received word of McWane's price restructuring on or about April 15, 2009. (CX 0989 at 003, 005; Rybacki, Tr. 3581-3583).

1008. Sigma determined that McWane's price cut in larger Fittings (F. 997) was designed to hit Sigma and Star in products

where they performed strongly. (CX 2531 (Rybacki, Dep. at 197-198); CX 0985).

1009. After learning about McWane's new price list, Sigma undertook an analysis and determined that McWane's new price list would have a fairly drastic impact upon Sigma's bottom line. Mr. Pais considered Sigma's options and perceived only two possible options – either follow McWane's published prices as it normally did, or try to hold on to the previous prices. (Pais, Tr. 2011-2012).

1010. Sigma was upset about McWane's price restructuring. Mr. Rybacki discussed with Mr. McCutcheon of Star the possibility of suing McWane for predatory pricing. (Rybacki, Tr. 3580-3581, 3719).

1011. Sigma wanted to stay with the prior price list and tried to keep to its existing price list in hopes that McWane would rescind its new price list. On April 27, 2009, Sigma sent a letter to its customers announcing that Sigma planned to continue to use its existing price list for Fittings. (CX 1454; Pais, Tr. 2012, 2022-2024; Rybacki, Tr. 3587-3588).

1012. Mr. Pais of Sigma met with Mr. McCullough of McWane on or about April 29, 2009 regarding whether McWane would sell private-label, domestically-manufactured Fittings to Sigma following ARRA's enactment. (Pais, Tr. 1744-1745; 1756-1757; RX 639 (McCullough, Dep. at 61-64); RX 687 (Pais, Dep. at 188-189)).

1013. Mr. Pais denied that he discussed McWane's new price list at the meeting referred to in F. 1012. Mr. McCullough recalled only discussing Mr. Pais' desire to buy private label Fittings from McWane, and nothing else. (Pais, Tr. 2028-2029; RX 639 (McCullough, Dep. at 61-63)).

1014. Mr. Pais of Sigma met with Mr. Page of McWane in Birmingham on or about May 1, 2009 with regard to the possibility of Sigma selling McWane's Domestic Fittings. Mr. Pais denied discussing McWane's list price restructuring or Sigma's reaction to it. (Pais, Tr. 2035; *see* RX 642 (Page, Dep. at

117-124 (Mr. Pais made various proposals for joint ventures with McWane over the years)).

1015. After Sigma sent out its customer letter stating that Sigma was staying with its prior price list (F. 1011), McWane did not know whether Star would follow McWane's new price list or whether Star would retract its customer letter announcing a new price list and stay at the old price list, with Sigma. In an internal email dated April 27, 2009 to Mr. McCullough and Mr. Walton, Mr. Tatman wrote: "Note that Star announced late last week that they would have a new List Price effective May 19th. It will be interesting to see what they do in light of Sigma's announcement." (CX 0651 at 001; Tatman, Tr. 604-607; *see also* CX 1180; CX 2349 (Mr. Tatman advised Mr. Walton in an internal email that he was assuming Star's new price list announced April 23, 2009 would follow McWane's)).

1016. In late April or early May 2009, Mr. Pais of Sigma conveyed an impression to Mr. McCutcheon of Star that McWane might change its mind about changing the price list, as McWane had announced. Mr. McCutcheon advised Mr. Pais that Star had decided to follow McWane's price list, because McWane was the market leader and that is what Star's customers require. (CX 2539 (McCutcheon, Dep. at 229-231), *in camera*).

1017. The impression that Mr. Pais of Sigma gave Mr. McCutcheon of Star McWane might change its mind about changing the price list created some doubt in Mr. McCutcheon's mind as to whether McWane would stick with its previously announced new price list, and Mr. McCutcheon "wanted to make sure before [Star] moved ahead and printed all these price lists." At some point in the late April or early May 2009 time period, Mr. McCutcheon decided to call Mr. Tatman to "make sure" McWane was going to stick with McWane's previously announced new price list. (CX 2539 (McCutcheon, Dep. at 231), *in camera*).

1018. Mr. McCutcheon described his telephone conversation he had with Mr. Tatman, referred to in F. 1017, as follows:

> It cost[s] us about $25,000 to print a new price list. So, I picked up the phone and I called Rick Tatman. And I said, **I'm only going to ask you one question, are you guys going to come out with a new price list, because I'm getting ready to approve it and spend $25,000 to do it.** And he said, we absolutely are, and he says, I'm so sure that I'll pay the $25,000 if we don't. And I said, I appreciate that, nice talking to you, and hung up the phone.

(CX 2538 (McCutcheon, IHT (Vol. 2) at 257-258, *in camera* (emphasis added); RX 698 (McCutcheon, Dep. at 232-234)).

1019. Mr. Tatman testified that he has no recollection of the telephone call with Mr. McCutcheon, referred to in F. 1018. (CX 2484 (Tatman, Dep. at 179-180); Tatman, Tr. 610).

1020. On the morning of April 28, 2009, Mr. Tatman sent an internal email to Mr. Walton and Mr. McCullough regarding Sigma's April 27, 2009 customer letter announcing Sigma was staying with its existing price list (F. 1011). In response to Mr. Walton's request for Mr. Tatman's recommendation as to McWane's strategy going forward, Mr. Tatman recommended staying the course for a variety of reasons, including that it "goes against what the importers want." Mr. Tatman also advised that Star had put out a letter stating they would have a new list price, effective May 19 and that it would be posted to Star's website "shortly" (*see* F. 1005). Referring to Star as a "wild card," Mr. Tatman explained: "We assumed given the language and timing they would be following our List Price, but they very well may post their own List Price as an act of defiance. Star and Sigma don't like each other but they will band together against the common enemy so there is now some probability that Star may change direction and retract their list price change." Later in the day in response to Mr. McCullough's request for a conference call, Mr. Tatman replied: We can discuss in more detail tomorrow, but I am now highly confident that Star will follow our List Price." (CX 1180 at 001-002).

1021. On April 30, 2009, in a McWane internal email exchange between Mr. Jansen and Mr. Tatman, Mr. Jansen advised Mr. Tatman that he had heard conflicting information from the field about whether Star was having new list prices. Mr.

Tatman replied that he had heard from a Mr. Fielding (a customer), that Star was following McWane's new price list. Mr. Tatman concluded: "I think it will be mid next week until the dust settles. If they stick with the old List . . . the[n] we should sell alot in the Northwest." (CX 3027).

1022. On May 1, 2009, Mr. Minamyer of Star sent an internal email to Star's division managers (copying Mr. McCutcheon of Star), setting out an implementation plan for Star to match McWane's new prices. (CX 0890; McCutcheon, Tr. 2464).

1023. In a customer letter dated May 4, 2009, Star announced a new price list for Fittings, as well as new multipliers, to be effective May 12, 2009. The letter stated among other things that the new price list would be made available on Star's website "shortly," and that hard copies would be distributed upon request. Star adopted Fittings list prices and multipliers that were substantially identical to McWane's. (RX 620 at 001-002; CX 2358; CX 2359).

1024. On May 11, 2009, Sigma sent letters to its customers announcing that it would adopt McWane's restructured list prices and multipliers. (CX 1060 at 001, 002; Rybacki, Tr. 3588, 3591).

1025. McWane kept its 2009 list price reductions for medium and large diameter Fittings in place. (Rybacki, Tr. 3664-3665, *in camera*; RX 242 at 004, *in camera*; Pais, Tr. 2046).

I. Monopoly Power

1. Percentage of the Fittings market that is Domestic Fittings

1026. In 2003, Buy American preference provisions applied to 10% to 20% of all ductile iron fittings shipments in the United States. (RDX 012 at 033) (U.S. International Trade Commission report on Certain Ductile Iron Waterworks Fittings From China, Dec. 2003; ITC's finding based on testimony of McWane (the petitioner in the ITC matter, *see* RDX 012 at 009) and Sigma)).

1027. "Domestic-only spec[ification]s have done nothing but erode over time." (Tatman, Tr. 280-281). HD Supply observed

that imports had been taking market share from domestics consistently. (RX 673 (Webb, Dep. at 23)).

1028. Less than approximately 5% of municipalities in Illinois Meter's service area have domestic-only specifications today. (Sheley, Tr. 3447). In the view of Illinois Meter, in the absence of a strong union and municipal push for domestic-only specifications, fewer municipalities require domestic-only Fittings. (RX 674 (Sheley, IHT at 71-72)).

1029. Prior to the passage of ARRA in 2009, domestic-only Fittings projects comprised approximately 15% to 20% of the overall Fittings market. (CX 2260-A (Schumann Rep. at 15); *see also* Tatman, Tr. 236 (15% to 18%); McCutcheon, Tr. 2279-2280 (Star estimated 15% to 20%); CX 2535 (Bhutada, Dep. at 11), *in camera* (approximately 20%); CX 2501 (Prescott, IHT at 41) (20% of customers were "a hundred percent domestic"); Webb, Tr. 2732).

1030. Respondent's expert, Dr. Normann, estimates that Domestic-only Fittings projects grew from 20% of Fittings sales in 2009 to 28% in 2010. (RX 712A (Normann Rep. at 26, 40 fig. 7, 12), *in camera*; Normann, Tr. 5685-5686), *in camera*).

1031. Following the end of ARRA funding for waterworks projects in 2011 (F. 1033-1036), the demand for Domestic Fittings reverted back to where it had been before the ARRA period, approximately 15% to 20% of the overall Fittings market. (Schumann, Tr. 4632; RX 712A (Normann Rep. at 26, 40 fig. 7, 12 (20% in 2011), *in camera*)). *See also* Schumann, Tr. 4632 (total tons of Domestic Fittings dropped in half in 2011 from 2010 because ARRA ended).

2. The impact of ARRA on the Domestics Fittings Market

1032. According to the EPA publication "Implementation of the American Recovery and Reinvestment Act of 2009," all ARRA funded projects were to be under contract by February 2010. As a result, Dr. Normann used March 2009 to February 2010 as "the ARRA period." (RX 712A (Normann Rep. at 40-41)). Industry participants use the term "the ARRA period" to refer to sales made through 2010. F. 1035-1036.

1033. The total number of waterworks projects that were built, repaired, or otherwise commissioned in the United States increased during the period that ARRA funding was available. (Joint Stipulations of Fact, JX0001 ¶ 22).

1034. Distributors' sales of Domestic Fittings increased during the period when ARRA funding was available. (CX 2502 (Prescott, Dep. at 89); RX 663 (Thees, Dep. at 54-55); CX 2492 (Johnson, Dep. at 73-75)).

1035. Market participants felt the majority of the impact of ARRA and its resulting increase in the number of Domestic Fittings sales in 2010. (Tatman, Tr. 1003, *in camera*; Sheley, Tr. 3402 ("Q. Are you still bidding on ARRA jobs today? A. No. Q. When did you see those jobs stop coming through? A. Mid to late 2010."); CX 2502 (Prescott, Dep. at 90)).

1036. While ARRA-funded jobs were primarily serviced during the 2010 calendar year, there were some projects that continued into 2011. (McCutcheon, Tr. 2614; Supp. Response to RFA at ¶ 8 (McWane competed for sales of Domestic Fittings for use in ARRA projects after February 2010); CX 2500 (Swalley, Dep. at 60-61) (While ARRA expired in February 2010, there were still ongoing, unfinished projects that are using ARRA funds)).

1037. ARRA had only a short-term impact on Domestic Fittings, as testified to by each of the suppliers of Fittings:

- "ARRA was a blip in the map. Demand went up for about a six-month period, and then it evaporated as soon as it came." (McWane, Tatman, Tr. 281).

- "For domestic fittings specifically associated with ARRA, we knew that it was not forever." (Sigma, Rona, Tr. 1671).

- "By the definition of that law and the scope, we knew it was going to be a short-term impact." (Sigma, Pais, Tr. 1738).

- ARRA "had a limited life." (U.S. Pipe, Morton, Tr. 2888).

- By fall of 2010, bidding on ARRA jobs had ceased. (Electrosteel, RX 659 (Swalley, Dep. at 158)).

- ARRA funded only "a finite amount of jobs." (Backman Foundry, RX 648 (Backman, Dep. at 109-110)).

1038. ARRA had only a short-term impact on Domestic Fittings, as testified to by each of the Distributors of Fittings:

- ARRA's impact on demand for Domestic Fittings was "mild, at best." (HD Supply, RX 673 (Webb, Dep. at 29); Webb, Tr. 2731-2732) (ARRA's impact was "very minimal and mostly played out in 2009 and 2010").

- ARRA "had a small effect" on sales of Fittings. (Illinois Meter, Sheley, Tr. 3446; RX 674 (Sheley, IHT at 74-75) ("[I]n reality, I don't believe that's [ARRA's] impacted our business at all.").

- ARRA's impact was "minimal." (Dana Kepner, RX 652 (Johnson, Dep. at 30)).

- ARRA did not have much impact on Fittings sales. (WinWholesale, RX 705 (Gibbs, Dep. at 23, 106)).

1039. Given ARRA's limited effect, former Domestic Fittings manufacturers and specialty Domestic Fittings manufacturers did not believe that ARRA made it worthwhile for them to expand or return to a full line of Domestic Fittings production. (Morton, Tr. 2875 (Q: "And despite this history and the fact that it owned patterns in Mexico, it decided in the spring of '09 that it did not make financial sense to try to get back in the domestic market; correct?" … A: "That's correct."); RX 646 (Burns, Dep. at 30-31, 35-36, 176-177); RX 667 (Kuhrts, Dep. at 38, 49-50, 74); RX 648 (Backman, Dep. at 109-110) (Backman

Foundry never considered expanding its production as a result of ARRA "when anybody and their dog can see that this market is going to end at some point.")).

3. Market share in the Domestic Fittings market

1040. From at least 2006 and until Star entered the Domestic Fittings market in late 2009, McWane was the only source of Domestic Fittings. (Answer ¶ 40; Tatman, Tr. 1047; CX 2513 (Webb, IHT at 178); Thees, Tr. 3078; Sheley, Tr. 3401-3402 (when ARRA was enacted in 2009, only McWane sold Domestic Fittings, with the exception of Backman Foundry in Utah, which only sold "some specialty stuff…the real oddball fitting"); Morton, Tr. 2817-2818 (after U.S. Pipe closed its Chattanooga, Tennessee plant in April 2006, McWane was the only producer of Domestic Fittings)).

1041. The only firms that currently manufacture a full line of Domestic Fittings are McWane and Star. (Supp. Response to RFA at ¶ 10; *see* Tatman, Tr. 238-240, 1047; CX 2488 (Backman, Dep. at 16)).

1042. In 2010, after Star entered the Domestic Fittings market, McWane's approximate share of the Domestic Fittings market was [redacted]%. Star's approximate share of the Domestic Fittings market was [redacted]%. (CX 2260-A (Schumann Rep. at 19 tbl. 2), *in camera* (basing market share calculations on supplier sales data); Tatman, Tr. 240-241 (estimating that McWane's share of the Domestic Fittings market in early 2009 was "around 90 percent")).

1043. In 2011, McWane's approximate share of the Domestic Fittings market was [redacted]%; Star's approximate share of the Domestic Fittings market was [redacted]%. (CX 2260-A (Schumann Rep. at 19 tbl. 2), *in camera*).

4. Barriers to entry

a. Barriers for new entrants

1044. A new entrant must make a significant capital investment to enter the Fittings market. (CX 2530 (Rona, Dep. at

256-257); CX 2500 (Swalley, Dep. at 102-107 (describing costs of obtaining certifications and develop molds)). A new entrant into the Fittings market must also either build its own foundry or develop a supply chain of foundries that can produce its Fittings. (Saha, Tr. 1166-1167).

1045. A new entrant into the Fittings market must develop expertise in design engineering. (Rybacki, Tr. 1092, 1094 (even as a "virtual manufacturer," Sigma's engineering staff produces the drawings to make Fittings patterns, and Sigma maintains engineering groups in China and India to oversee the production process)).

1046. A new entrant into the Fittings market must secure the testing and approval of its Fittings by the municipalities or other End Users. (CX 2538 (McCutcheon, IHT (Vol. 2) at 348), *in camera*; *see also* Saha, Tr. 1166-1167, 1163 (to begin selling Fittings, NACIP needed to obtain warehouses, obtain AWWA Underwriters Laboratories ("UL") certification and National Sanitation Foundation ("NSF") approvals, acquire patterns or molds, source foundries that produced Fittings, and establish Distributors through which to sell); CX 2522 (Agarwal, Dep. at 77-78), *in camera,* (to sell Fittings, SIP first needed to obtain UL and NSF certification; SIP also received municipality approvals and placement on engineers' approved lists before supplying Domestic Fittings)).

1047. A new entrant into the Fittings market would need to develop hundreds of patterns and moldings. (CX 2533 (Bhargava, Dep. at 88-89); Saha, Tr. 1166-1167; CX 2500 (Swalley, Dep. at 102-107)).

1048. Because Fittings are commodity products, Distributors base their purchasing decisions in part on relationships, so developing relationships with Distributors is an important part of the business of Fittings suppliers. (Minamyer, Tr. 3135; CX 2538 (McCutcheon, IHT (Vol. 2) at 348)). A new entrant must overcome existing relationships between existing manufacturers and the Distributors and End Users. (CX 2525 (Minamyer, IHT at 99, 102, 103-104)). When SIP began offering Fittings, SIP had existing relationships with waterworks suppliers due to its sale of municipal castings. (RX 681 (Agarwal, Dep. at 77)).

1049. A new entrant into the Fittings market would need about three to five years to enter the market. (CX 2538 (McCutcheon, IHT (Vol. 2) at 348)). SIP took approximately three years to offer a full line of 3500 unique Fittings up to 48" in diameter. (RX 681 (Agarwal, Dep. at 30); CX 2521 (Agarwal, IHT at 64-65)).

1050. The Fittings and Domestic Fittings markets have high barriers to entry. (F. 1044-1049; CX 2260-A (Schumann Rep. at 37).

b. Star did not face the same barriers as new entrants

1051. Through its import business, Star already had the expertise needed to operate its own fittings foundry. (Bhargava, Tr. 2979-2980, *in camera*) (describing his own 35-plus years of experience manufacturing, Star's 20 engineers who have worked in manufacturing in different capacities, and Star's past work setting up foundries).

1052. As an existing supplier of non-Domestic Fittings, Star already had in place the network of Distributor customers required to enter and compete effectively in the Domestic Fittings market. (*See* F. 110, 117-119, 402; Answer ¶ 25 ("[A]ll suppliers of [Fittings] have distribution relationships or other abilities within the United States sufficient to enable them to compete effectively throughout the country.")). Star's entry into the Domestic Fittings market did not require any changes to Star's relationships with its existing Distributor customers, who would also be its customers for Domestic Fittings. (McCutcheon, Tr. 2287).

1053. Star's entry into the Domestic Fittings market did not require any changes to Star's existing regional distribution centers, which Star would also use for Domestic Fittings. (McCutcheon, Tr. 2287).

1054. Star's entry into the Domestic Fittings market did not require any changes to Star's sales team. (McCutcheon, Tr. 2287).

1055. In 2009, Star already had in place the back office support needed to sell a line of Domestic Fittings. (McCutcheon, Tr. 2288).

c. Domestic foundries, pipe suppliers, and other suppliers are not potential entrants

DOMESTIC FOUNDRIES

1056. Frazier & Frazier, Glidewell, EBAA, and East Jordan, which are all domestic foundries that have produced unfinished Domestic Fittings or castings, have no plans to enter the market for selling finished Domestic Fittings. (CX 2505 (Frazier, Dep. at 69-70); CX 2507 (Glidewell, Dep. at 127); CX 2499 (Keffer, Dep. at 13-14); CX 2498 (Teske, Dep. at 33-34)).

1057. Currently, Frazier & Frazier, Glidewell, and Mabry are each producing Domestic Fittings castings, or unfinished Fittings, for suppliers like Star. (CX 2505 (Frazier, Dep. at 68-69); CX 2507 (Glidewell, Dep. at 122-123); RX 676 (Hall, Dep. at 16-20)).

1058. Frazier & Frazier, Glidewell, and Mabry do not sell Domestic Fittings or Domestic Fittings castings to any End User. (CX 2505 (Frazier, Dep. at 68-69); CX 2507 (Glidewell, Dep. at 122-123); CX 2517 (Hall, Dep. at 148-150)).

1059. Backman Foundry "never even considered" producing large quantities of Domestic Fittings in response to the demand created by ARRA because of the "many million dollars" it would cost to "make the expansion to be able to get into the market." (RX 648 (Backman, Dep. at 109-110)).

1060. While EBAA and East Jordan produce waterworks products, neither foundry currently produces Domestic Fittings castings. (RX 658 (Keffer, Dep. at 7-9); CX 2498 (Teske, Dep. at 12)).

1061. To enter into the manufacturing of Domestic Fittings would require major equipment additions and an economic investment at EBAA, including: molding machines; equipment

for producing cored or hollow castings; and new furnaces. (CX 2499 (Keffer, Dep. at 13-14)).

1062. EBAA considered expanding into Domestic Fittings production three or four years ago and estimated that the required expansion would cost at least $10 to $12 million and take two years to realize. (CX 2499 (Keffer, Dep. at 49-51)).

1063. Manufacturing Domestic Fittings at East Jordan would require an extremely expensive capital investment including a major conversion of EJ's East Jordan, Michigan melt facility, the purchase of core-making equipment, and an investment in Domestic Fittings tooling. (CX 2498 (Teske, Dep. at 31-34)).

1064. To manufacture finished Domestic Fittings, a domestic foundry already making Domestic Fittings castings would have to design and develop a Domestic Fittings product line, identify customers, and invest in the equipment and expertise required to finish Domestic Fittings. (CX 2505 (Frazier, Dep. at 69-72); CX 2507 (Glidewell, Dep. at 125-126)).

PIPE MANUFACTURERS

1065. Griffin, ACIPCO, and U.S. Pipe have no plans to begin manufacturing Domestic Fittings under 24" in diameter. (CX 2508 (Kuhrts, Dep. at 19-20, 49, *in camera*); CX 2486 (Burns, Dep. at 70-71, 123-124); CX 2542 (Morton, Dep. at 56)).

1066. ACIPCO presently lacks the equipment necessary for producing Domestic Fittings of less than 30" in diameter. (CX 2486 (Burns, Dep. at 84)).

1067. U.S. Pipe evaluated re-entering domestic production in 2009 and chose not to re-enter because it was cost prohibitive. (RX 701 (Morton, Dep. at 47-49, 56-57)).

1068. To produce Domestic Fittings under 24" in diameter would require a major overhaul of Griffin's existing foundries. (CX 2508 (Kuhrts, Dep. at 19-20, 49, *in camera*)).

OTHER SUPPLIERS OF IMPORTED FITTINGS

1069. Metalfit, a Mexican Fittings producer and supplier to the United States market, has no plans to begin manufacturing Domestic Fittings under 24" in diameter. Even a 10% increase in the price of Domestic Fittings would not induce Metalfit to invest in entering the Domestic Fittings market. (CX 2518 (Meyer, Dep. at 184-185)).

1070. SIP, a supplier of imported Fittings, does not intend to enter the Domestic Fittings market for numerous business reasons, including the fact that ARRA presented a very short time window, that SIP believed it needed to offer a full line of fittings to be considered a viable supplier, that it had taken SIP a full three years to develop a full line of imported fittings, the uncertainties of success, the high cost of developing patterns for a full line of fittings, the fact that there was not one single foundry available to make all the fittings, the vagaries of long term supply given the changing capacity of jobber foundries, the $5 to 10 million cost estimated to develop the line, the need/cost to develop drilling and machining capabilities, the uncertainties of the ARRA demand, and the uncertainties about the post-ARRA domestic demand. (CX 2522 (Agarwal, Dep. at 54-68), *in camera*). *See also infra* II.J.14.

1071. Electrosteel is not poised to make an investment in entry into the Domestic Fittings market. (CX 2500 (Swalley, Dep. at 184-185), *in camera*).

5. Ability to control prices

1072. In 2008, McWane did not typically offer Project Pricing for Domestic Fittings because the less competitive Domestic Fittings market did not require it. (Tatman, Tr. 334-335; CX 2199 at 001 (McWane's Pricing Coordinator's email refusing a sales person's request for Project Pricing for Domestic Fittings because "We are the only one who makes the full line of 24" and down. No need to drop the price unless Star is an issue."); CX 2480 (Napoli, Dep. at 73)).

1073. McWane was not willing to negotiate the price of Domestic Fittings after the passage of ARRA. (CX 2489

(Morrison, IHT at 45) ("[U]ntil the stimulus project came around, everything was negotiable. When the stimulus project came around, the price became firm on the domestic fitting. There has been little if any that I'm aware of negotiation on what you're going to pay for the domestic fitting and the spread widened."); CX 2515 (Sheley, IHT at 28) ("Well, on that import product you can negotiate prices. Domestic product, there's a price and that's what you pay."); CX 2513 (Webb, IHT at 99-100) (explaining that after ARRA was passed McWane "changed and reduced" the rebate on Domestic Fittings which is "effectively" an increase in price for Domestic Fittings)).

1074. In a November 3, 2009 internal McWane email to the McWane sales team, McWane's National Sales Manager, Mr. Jansen, instructed: "when you have someone say that we need to match pricing due to the other guys we need to take a firm stance and ask who is going to use them. **There can be a price out there but if no one uses it then it becomes a [moot] point.**" (CX 0108 at 001 (emphasis in original)).

1075. Domestic Fittings are sold at higher prices than non-Domestic Fittings. (Answer ¶ 20 (admitting that McWane's Domestic Fittings sold into Domestic-only Specifications are generally sold at higher prices than non-Domestic Fittings); CX 2535 (Bhutada, Dep. at 13); Webb, Tr. 2733; Sheley, Tr. 3402-3404 (both before and after passage of ARRA, the price of Domestic Fittings was higher than the price of imported Fittings); Thees, Tr. 3074).

1076. McWane's February 2008 price multipliers for domestically manufactured fittings sold into Domestic-only Specifications were substantially higher than its February 2008 "blended" multipliers (for Fittings sold into Open Specification projects). For example, whereas a given non-Domestic Fitting might sell in Texas for $280, the corresponding Domestic Fitting would sell for $440, an approximately 57% higher price. (RX 410 at 0001, 0002 (Domestic and blended multiplier maps)). Further examples of the price differences between Domestic and non-Domestic Fittings according to McWane's February 2008 price multiplier maps include the following:

State	Non-Domestic Multiplier	Domestic Multiplier	Percentage Difference
California	.33	.44	33.3%
Colorado	.33	.49	48.5%
Florida	.25	.49	96.0%
Michigan	.33	.45	36.4%
Minnesota	6.28	.45	60.7%
New York	.31	.44	41.9%
Ohio	.25	.45	80.0%
Oregon	.42	.51	21.4%

(RX 410 at 0001, 0002).

1077. Non-domestic Fittings manufactured in countries such as China, India, Korea and Mexico are less expensive, by approximately 25%, than Fittings produced in the United States. (RX 658 (Keffer, Dep. at 58-59); RX 675 (Sheley, Dep. at 55); *see also* RX 661 (Prescott, Dep. at 29-30, 33); RX 673 (Webb, Dep. at 24-25); RX 646 (Burns, Dep. at 20-21)).

1078. McWane's costs to produce Domestic Fittings are higher than its costs to produce imported Fittings. (Tatman, Tr. 275, 879, 881; RX 642 (Page, Dep. at 112)).

1079. There are two components of McWane's costs of production of Domestic Fittings: (1) manufacturing costs (F. 1080) and (2) idle plant charges (F. 968, 1081). (Tatman, Tr. 275-276).

1080. Manufacturing costs are the costs of producing an item based on raw material, including labor and direct overhead. McWane's manufacturing costs to produce Domestic Fittings are higher than its costs to produce imported Fittings. (Tatman, Tr. 275-278).

1081. Idle plant costs reflect the overhead costs it takes to have a foundry not running at full capacity. If a plant is normally supposed to run five days a week, but it is only running three days a week, idle plant costs are the costs associated with running a

facility for those other two days of the week. (Tatman, Tr. 432-433).

1082. In 2007, McWane booked $7 million in idle plant charges. McWane produced approximately 25,000 to 30,000 tons domestically in 2007. The $7 million idle plant charges divided by the tons produced amounts to about $650 a ton idle plant cost. That amount is more than half the cost of producing a fitting in China. (Tatman, Tr. 275-277).

1083. On December 21, 2009, Mr. Tatman sent out customer letters announcing multiplier increases for Domestic Fittings, effective January 22, 2010. (Tatman, Tr. 811; CX 1656 at 001-003).

1084. When McWane issued the December 21, 2009 price increase for Domestic Fittings, it also issued a price increase for non-domestic Fittings. (Tatman, Tr. 811; CX 1656 at 001-003).

1085. McWane's manufacturing costs for producing Domestic Fittings began to increase fairly steadily from early 2009 through 2010. (Normann, Tr. 4894).

1086. In June 2009, McWane understood that the impact of the ARRA would be short-lived and did not want to overcharge for Domestic Fittings in the short term at the expense of harming its position in the overall Fittings market. (Tatman, Tr. 979-981) (We didn't really understand the impact of the ARRA, but we all knew that it was a short-term event. And . . . because we think long term[,] . . . we didn't want to overcharge in the short term, make a large business profit off the situation and set ourselves up for the long term where people felt that we took advantage of the situation or we overcharged, and that would be more pressure to work against domestic specs, so Leon is really there -- is really saying always keep your mind on the long term (explaining RX 595 (a June 5, 2009 internal McWane email from Leon McCullough, stating "It has never been our intent to 'over charge' because of the [Buy American] provision [of ARRA].")).

1087. In preparing the budget for 2010 in the fall of 2009, Mr. Tatman expected to have an overall growth of 2 percent due

to Domestic Fittings and made a core assumption that pricing on Domestic Fittings would be flat or fixed to what it was at the time he prepared the budget. (Tatman, Tr. 983-986; CX 0102).

1088. Since Star entered the Domestic Fittings market in 2009, prices eroded. (Tatman, Tr. 988-989).

1089. Looking at sales data on Domestic Fittings in 2010, Respondent's expert concluded that Star failed to price at a discount to McWane. There are numerous states where Star's average price is higher than McWane's. (Normann, Tr. 4979-4980; RX 712A (Normann Rep. at 68-69, Figure 27, *in camera*)).

1090. Looking at sales data on Domestic Fittings from January 2009 to November 2011 by state, Respondent's expert concluded that the presence of Star in the Domestic Fittings market in various states did not result in lower prices. In those states where McWane had effectively one hundred percent of the Domestic Fittings sales, McWane's pricing was not higher than in those states where McWane had a lower share of Domestic Fittings sales. McWane's prices on Domestic Fittings were relatively constant state by state, regardless of the presence of Star in certain states. (Norman, Tr. 4975-4976; RX 712A (Normann Rep. at 70-72, Figure 28, 29, *in camera*)).

1091. Since 2009, the first year for which McWane's blue books report gross profits for Fittings sold into domestic-only projects, McWane has sold Domestic Fittings at prices that earn it significantly higher gross profits than it has earned in the same time period on the sale of non-Domestic Fittings. For year-end 2009, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-Domestic Fittings of [redacted]%. (RX 721 at 0041, 0043, *in camera*). For year-end 2010, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-Domestic Fittings of [redacted]%. At these levels, McWane earned [redacted]% higher gross profits from the sale of Domestic Fittings than for non-Domestic Fittings sales in 2009; and [redacted]% higher gross profits in 2010. (RX 632 at 0027, 0029, *in camera*; Tatman, Tr. 1004, *in camera*).

1092. McWane's blue book financials for year-end 2010 reported its 2010 Domestic Fittings sales increased [redacted]% in volume by tons, and [redacted]% in unit price, compared to 2009. (RX 632 at 027, *in camera*; Tatman, Tr. 1004, *in camera*).

1093. McWane's blue book financials for year-end 2010 reported [redacted] in costs from 2009 to 2010 for its Domestic Fittings. (RX 632 at 027, *in camera*).

6. Entry by Star into the Domestic Fittings market

a. Star's announcement to enter the Domestic Fittings market

1094. In reaction to ARRA's passage in February 2009, Star began to develop plans to expand its product lines to include Fittings that satisfied the "Buy American" provisions of the ARRA. (Bhargava, Tr. 2927 ("Q. And what prompted Star to first consider entering the domestic market? A. In 2008, there was a recession and then there was a stimulus package, the ARRA, which specified there will be a significant amount of funds available for projects that would require only domestically produced product, so that made us look at the possibility of going into the domestic market."); McCutcheon, Tr. 2603-2604; CX 2533 (Bhargava, Dep. at 11) (Star first considered producing fittings domestically in 2009 after the passage of ARRA, because projects funded by ARRA had to be made in the United States.)).

1095. At a June 2009 AWWA industry conference, Star publicly announced that it would offer Domestic Fittings starting in September 2009. (Joint Stipulations of Fact, JX0001 ¶ 23; McCutcheon, Tr. 2603-2604).

1096. On or about June 15, 2009, Star sent a letter to customers stating, "Look for our . . . Fitting inventories to start arriving in September." (CX 1674 at 002).

b. Star's contracts with domestic foundries

1097. Star concluded by March or April of 2009 that ARRA's "Buy American" provisions would require the products

to be manufactured in the United States. Star then focused on three possible courses of action in order to manufacture Fittings in the United States: (1) building a foundry from "ground zero"; (2) buying an existing foundry in the United States; or (3) contracting with existing domestic foundries to produce the desired Fittings. (Bhargava, Tr. 2928-2929).

1098. Star realized that ARRA provided a limited time window of opportunity and, in March or April 2009, elected to pursue contract manufacturing as the option that would allow it to get product to the marketplace in the shortest amount of time. (Bhargava, Tr. 2930-2931, 2989-2990, *in camera*).

1099. Star had a preference for owning its own foundry and did not rule out buying a foundry in March or April 2009, but made the deliberate decision in the spring of 2009 to pursue contract manufacturing instead, so that they could enter the market more quickly. (Bhargava, Tr. 2930, 2990, *in camera*).

1100. Domestic foundries had substantial excess capacity in 2009. (Bhargava, Tr. 2931, *in camera*; CX 2535 (Bhutada, Dep. at 26-27, 118-119), *in camera*; McCutcheon, Tr. 2284).

1101. Star began phoning and emailing potential foundry candidates in the spring of 2009 that could make domestic castings for Star. Star initially contacted 60 to 70 domestic foundries, and from May 2009 through September 2009, Star visited at least 20 domestic foundries to identify those that could produce Domestic Fittings for Star. (Bhargava, Tr. 2931-2932, 2997-2999, *in camera*; CX 2535 (Bhutada, Dep. at 56), *in camera*).

1102. Star sought domestic foundries that could produce Fittings from 2" in diameter to 48" in diameter. No single contract foundry could make the entire size range of Domestic Fittings, so Star utilized multiple foundries in different locations. (Bhargava, Tr. 3000, *in camera*; CX 2535 (Bhutada, Dep. at 57, 118-119), *in camera*).

1103. Once Star decided to use a particular foundry for its Domestic Fittings production, it took approximately two months for that foundry to begin producing Domestic Fittings for Star,

and it took approximately three to six months for that foundry to begin producing all the different types of Fittings that Star required from that foundry. (Bhargava, Tr. 2945-2946, *in camera*).

1104. None of the contract foundries that produced Fittings for Star were capable of the finishing operations necessary to transition a raw casting into a finished Fitting. Finishing is the process, after the foundry makes a casting, of drilling holes, adding lining, and painting the Fitting. Star shipped the castings to its Houston facility to perform the finishing process. (Bhargava, Tr. 2937-2940, 2999-3000, *in camera*; McCutcheon, Tr. 2618-2620; RX 572).

1105. Star invested approximately $[redacted] million in the expansion of its finishing facility in Houston. (McCutcheon, Tr. 2288-2289; Bhargava, Tr. 2937-2939, *in camera*; RX 694 (Bhutada, Dep. at 62-63)).

1106. Star ultimately contracted with multiple domestic foundries to produce Domestic Fittings, including among others, Frazier & Frazier, Glidewell and Mabry. The foundries with which Star contracted made different size Fittings. (Bhargava, Tr. 2933, *in camera*; CX 2535 (Bhutada, Dep. at 60-61), *in camera*).

1107. Star and Frazier & Frazier, a domestic foundry, signed a confidentiality agreement on June 2, 2009, and a supply chain agreement on June 12, 2009. (RX 665 (Gupta, Dep. at 16, 20, 43-44)).

1108. On July 2, 2009, Star submitted a purchase order to Frazier & Frazier for $328,599 worth of Domestic Fittings castings. (RX 665 (Gupta, Dep. at 48, 49)). Frazier & Frazier sold its first Domestic Fitting casting to Star in approximately August 2009. (RX 665 (Gupta, Dep. at 57-58)).

1109. Frazier & Frazier produced 70 to 80 patterns of Domestic Fittings castings for Star by the end of 2009, which increased to approximately 300 unique patterns with a 9” diameter or smaller by 2012. (CX 2506 (Gupta, Dep. at 75-76, 89-90)).

1110. Star first contacted Glidewell about making Domestic Fittings castings at the end of 2009 or the beginning of 2010, and Glidewell began producing Domestic Fittings castings for Star less than one month later. (RX 666 (Glidewell, Dep. at 29-30, 58)).

1111. In 2010, Glidewell sold $635,439 worth of products, and 34 different types of Fittings castings to Star in 2010. (RX 666 (Glidewell, Dep. 54); CX 1417 at 007). In 2011, Glidewell sold $590,773 worth of products, and 46 different types of Fittings castings to Star in 2011. (RX 666 (Glidewell, Dep. at 55-57); CX 1418 at 008). From January 1, 2012 through March 23, 2012, Glidewell sold $83,878 worth of products to Star. (RX 666 (Glidewell, Dep. at 58); CX 1419 at 002).

1112. Star and Mabry entered into an agreement for the production of Domestic Fittings castings on November 2, 2009, and Mabry began producing at least three types of Domestic Fittings castings for Star by the end of 2009. (RX 676 (Hall, Dep. at 32-33, 36-38, 67-68)).

1113. In 2010, Mabry produced at least 135 types of Domestic Fitting castings for Star. To date, Mabry has produced at least 177 types of Domestic Fitting castings for Star, resulting in approximately $2.9 million in invoices from Mabry to Star. (CX 1581; RX 676 (Hall, Dep. at 69-70)).

1114. In March or April 2009, Star recognized that contract manufacturing its Fittings from domestic foundries would result in inefficiencies and higher costs to Star. (Bhargava, Tr. 2990-2992, *in camera*).

1115. Star understood that the contract foundries manufacturing Fittings for Star would build a profit margin into the price that they charged Star. (Bhargava, Tr. 2991, *in camera*).

1116. Having multiple foundry locations and a separate finishing facility would result in additional freight charges and materials handling inefficiencies for Star. (Bhargava, Tr. 2991, *in camera*).

1117. Rather than shipping finished goods directly to a customer or distribution yard, Star's process necessitated raw castings from six locations across the country being shipped to the Houston finishing facility. (Bhargava, Tr. 2991, 2998-3000, *in camera*).

1118. Star recognized that one of the risks of sourcing Domestic Fittings from six different foundries was that it would not control its supply chain, and that the foundries it contracted with might later raise prices or elect not to do business with Star at all. (Bhargava, Tr. 2991-2992, *in camera*).

c. Star's acquisition of patterns to make Domestic Fittings

1119. Star decided that it would be a full line supplier and acquired patterns from China in the summer of 2009. (Bhargava, Tr. 2999-3000, 3011, *in camera*; McCutcheon, Tr. 2605-2606; RX 234).

1120. Star planned to enter the Domestic Fittings market by offering the most popular Fittings items first. Star developed a priority for the patterns it constructed by identifying the best-selling Fittings, which require approximately 150 to 200 patterns, but account for approximately 80% of Fittings sales. (CX 2535 (Bhutada, Dep. at 52-53)).

1121. Star planned to offer a relatively full line of the more commonly used C153 Domestic Fittings, and a more limited line of C110 Fittings, for which Star would stock the common "A" items, (F. 306) and otherwise produce on a per-project basis. (McCutcheon, Tr. 2292-2293).

1122. By May 2012, Star had invested approximately $3.5 million to secure the patterns necessary for producing Domestic Fittings. (RX 694 (Bhutada, Dep. at 62)).

1123. By the end of 2009, Star had more than [redacted] patterns in place at third-party domestic foundries. (Bhargava, Tr. 3010, *in camera*).

1124. Star gradually added patterns after 2009, irrespective of whether Star had an order for the specific Fittings. (CX 2533 (Bhargava, Dep. at 66), *in camera*).

1125. By June 2010, Star had a Domestic Fittings pattern stock comparable to McWane's Domestic Fittings items. (Bhargava, Tr. 3012, *in camera*).

1126. By the end of 2010, Star had close to [redacted] patterns in stock. (Bhargava, Tr. 3011-3012, *in camera*).

d. Star's sales of Domestic Fittings

1127. By September 2009, Star recorded its first sales of domestically manufactured Fittings to customers. (Bhargava, Tr. 3002, *in camera*).

1128. Star began shipping Domestic Fittings to Distributors in late 2009. (CX 2535 (Bhutada, Dep. at 60), *in camera*).

1129. By September or October of 2009, Star was building product for its inventory of Domestic Fittings. (McCutcheon, Tr. 2300; RX 692 (Bhargava, Dep. at 113)).

1130. Star's target, in November 2009, was to develop a full line of Domestic Fittings equal to the stock offered by McWane. By June 2010, Star had come close to that goal, but there were still quite a few odd patterns that Star decided not to make. (Bhargava, Tr. 3010-3013), *in camera*).

1131. Star recognized that it would not have the full range of Domestic Fittings it intended to supply available to its customers on day one, and that a ramp-up period would be required. (McCutcheon, Tr. 2606).

1132. Star recognized that some Distributors were cautious about purchasing Domestic Fittings from Star in 2009 and early 2010 because of delays in filling orders. (Bhargava, Tr. 3003, *in camera*; McCutcheon, Tr. 2634).

1133. As of March 2010, although Star could supply most of the fast-moving items in a timely manner, it still had some

problems in supplying the very slow-moving items for which Star may not yet have developed a pattern. In addition, Star was still building inventory in March 2010. (Bhargava, Tr. 3008-3010, *in camera*).

1134. Since its entry in 2009 into the Domestic Fittings market, Star has sold Domestic Fittings every month and every year. (Bhargava, Tr. 3027, *in camera*).

1135. Star endeavored to and did "pick off" orders of Domestic Fittings from McWane where it could. Mr. McCutcheon asked his division managers to send him lists of Distributors who were purchasing from Star and those who were committed to purchasing from McWane. The report that Mr. McCutcheon received from his Southwest Division Manager on October 9, 2009, listed 44 Distributors or branches of Distributors. Of those 44, the report indicated that 17 were going with Star, about half that amount were going with McWane/Sigma, and the remaining were "on the fence." (McCutcheon, Tr. 2606-2612).

1136. Star sold Domestic Fittings to many distributors during the last quarter of 2009, and throughout 2010 and 2011, including HD Supply, Ferguson, WinWater, and Dana Kepner. (McCutcheon, Tr. 2590-2592; Webb, Tr. 2798-2800; Thees, Tr. 3084, 3111-3112; RX 652 (Johnson, Dep. at 17-18)).

1137. Some of Star's sales of Domestic Fittings were made in circumstances in which McWane could not provide Domestic Fittings in a timely fashion (*e.g.*, large-diameter Fittings), or where the End User needed a special coating, such as "Protecto 401," that Star specialized in. (McCutcheon, Tr. 2666-2667).

1138. Hajoca's Tulsa branch had ordered over [redacted] million dollars' worth of Domestic Fittings from Star as early as January 2010. (RX 671 (Pitts, Dep. at 102-103)).

1139. Dana Kepner determined in February 2010 that it would use Star for all of its Domestic Fittings needs. (CX 0585; McCutcheon, Tr. 2612-2613).

1140. TDG, in 2010, selected Star as a TDG Domestic Fittings vendor partner. (JX 694 (Bhutada, Dep. at 155); RX 675 (Sheley, Dep. at 68); *see infra* F. 1346 (discussing TDG vendor partner program)).

1141. Since entering the market, Star has made sales of Domestic Fittings to more than 100 Distributors. (Normann, Tr. 5042-43, *in camera*).

1142. In calculating the number of Distributors to whom Star sold Domestic Fittings to be 130, Dr. Normann did not differentiate Distributors based on size of the Distributor, the number of projects for which the Distributor sought bids, the number of locations the Distributor operated, the amount of Domestic Fittings the Distributor purchased from Star, the circumstances of the purchase or whether it fell into one of the exceptions to the Full Support Program (F. 1173). (Normann, Tr. 5626-5634).

1143. Star had [redacted] million dollars in Domestic Fittings sales in both 2010 and 2011, and expects to sell more Domestic Fittings in 2012. (Bhargava, Tr. 3027-3028, *in camera*; McCutcheon, Tr. 2597).

1144. Star was on pace, at the time of trial, to have its best year ever for Domestic Fittings sales in 2012. (Bhargava, Tr. 3028, *in camera*).

J. McWane's Full Support Program[5]

1. McWane's Views on Star's Entry into the Domestic Fittings market

1145. In June 2009, McWane was deeply concerned about the viability of its sole remaining domestic Fittings plant, Union Foundry. (RX 643 (Tatman, IHT at 151)).

1146. Because its last remaining domestic foundry had high inventory levels and insufficient demand (F. 18, 477-478), McWane was concerned that if Star entered the Domestic Fittings market, McWane would not be able to generate enough business to operate its foundries. (RX 638 (McCullough, IHT at 34-36)).

1147. McWane was concerned that Star would choose to manufacture only the highest-selling, fastest-moving Fittings. (RX 643 (Tatman, IHT at 152-153) ("The worst case scenario for me is that Sigma or Star comes into the domestic segment of the waterworks fittings market with a cherry-picking strategy. They bring in 50 patterns or 100 patterns, and they get those A items, and they go after those, and I lose volume on those items that I need for my plant . . .").

1148. On June 24, 2009, Mr. McCullough sent an internal McWane email to Mr. Tatman, with a copy to Mr. Walton, requesting information about Star's entry and Sigma's potential entry into the Domestic Fittings market. Mr. McCullough raised questions regarding McWane's "position short term/long term on sharing distribution of our domestic fitting line. Just because we share our blended fittings does not require us to share our domestic, especially if the competition is a short line domestic supplier." (CX 0074 at 002; Tatman, Tr. 646-647).

[5] As defined *infra* F. 1173, McWane sent a letter to its Distributor customers on September 22, 2009, which advised that customers who do not fully support McWane for their Domestic Fittings needs may forego participation in rebates or shipments of their Domestic Fittings orders. (CX 0010 at 001).

1149. In a June 24, 2009 internal email, Mr. Walton responded to Mr. McCullough's email (F. 1148) stating:

> Whether we end up with Star as a complete or incomplete domestic supplier my chief concern is that the domestic market gets creamed from a pricing standpoint just like the non-domestic market has been driven down in the past. That would dramatically [a]ffect our profit potential. Further, I have a sense there is a slim to none possibility that we would ever be able to sell Star domestic product at this point, one I do not think they would ever trust us and, two they seem to be so far down the road that I do not think they will be willing to turn back. I do agree whole heartedly that we need to evaluate our options and plot a comprehensive strategy going forward.

(CX 0074 at 001; CX 2485 (Walton, Dep. at 91-92) (email accurately reflected Mr. Walton's "chief concern" regarding Star's entry at the time); Tatman, Tr. 647).

1150. Mr. Tatman's initial response to Mr. McCullough's and Mr. Walton's emails (F. 1148-1149) was an internal email on June 24, 2009 stating:

> I agree that at this stage the chance for profitable cohabitation with Star owning a pc of the Domestic market is slim. Their actions in soil pipe are a good indication. . . . If their claims are ahead of their actual capabilities we need to make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return. . . . I don't sense that Sigma is yet fully committed and
>
> they will be watching our response very closely to assess their strategy and probability of financial success.

(CX 0074 at 001; Tatman, Tr. 649-652).

1151. In the narrative for McWane's 2010 budget, Mr. Tatman listed the biggest risk factor for McWane's Fittings business in 2010 as the "Erosion of domestic pricing if Star emerges as a legitimate competitor." (CX 0102 at 002).

1152. In an August 2, 2010 internal email, Mr. Napoli wrote to Mr. Tatman:

> It's the take-a-hit now vs take-a-hit-for-decades argument as in 1984-1990. We chose to not to react then and know the result. We may not be losing business now but I am concerned about the future. Those dist. not aligned with us or Sigma will be aggressive with Star backing them against our people. . . . When that happens our distributors will continually pressure us to 'do something' (lower prices). If they stay in the business we will always see downward pressure in the future.

(CX 2192; CX 2480 (Napoli, Dep. at 90-95) (discussing CX 2192 and that, in order to avoid the loss of business and lower prices that occurred when imported Fittings first entered the U.S. market, McWane should lower their Domestic Fittings prices so that Star will become convinced that the Domestic Fittings business is unprofitable and exit the market)).

1153. McWane's National Sales Manager, Mr. Jansen, wrote an email on November 3, 2009 to his sales representatives regarding Domestic Fittings, "We don't want the market tumbling and if we keep everyone on board we shouldn't have to drop prices." (CX 0107 at 001; CX 2477 (Jansen, Dep. at 228-229) (explaining that "market tumbling" means prices falling; and "keep everyone on board" refers to Distributors being loyal to McWane under the Full Support Program)).

1154. In a September 3, 2010 email to a McWane sales representative, Mr. Jansen wrote: "We need to make sure we are getting into the smaller [Distributors] up there and keep them from Star. That's how a cancer starts is by letting them get in with one, two, then three, and it crumbles from there." (CX 2261 at 002). Mr. Napoli explained this email as follows:

> Like any -- any competitive situation in any industry, I mean, they'll start with the small ones. They won't go after the big fish first. They'll go to the small ones and build their -- build their reputation. You know, a competitor is not going to go to -- a new competitor in something is not going to go to

> Walmart from day one. They'll go to somebody smaller. Maybe that's not a good analogy, but they'll go to somebody smaller and build reputation and build a -- you know, a base and then go from there to bigger ones, makes them a little more legitimate, let's say, if they have a history or a track record.

(CX 2480 (Napoli, Dep. at 104-107)).

2. McWane's strategic responses to Star

1155. In a May 26, 2009 brainstorming document to spark discussion of McWane's possible strategic responses to potential competitive entry into the Domestic Fittings market and whether to sell Domestic Fittings to Sigma, Mr. Tatman observed that "any competitor" seeking to enter the Domestic Fittings market could face "significant blocking issues" if they are not a "full line" domestic supplier. (CX 0067 at 002; Tatman, Tr. 620-621; *see also* CX 2529 (Rona, IHT at 195-196) ("Q. Do you think McWane's policy that we're discussing here, this exclusivity with respect to distributors, is something that could erect a roadblock to a new entrant coming into the market with less than a full line? A. There's -- there's no question for any entrant that requiring exclusivity on those parts would be inherently more difficult than without it.")).

1156. On or about June 29, 2009, after Star had announced its planned entry into the Domestic Fittings market (F. 1095), Mr. Tatman drafted and sent an internal PowerPoint Presentation ("June 29, 2009 PowerPoint Presentation") to Mr. McCullough and Mr. Walton, intended as a brainstorming document based on a series of assumptions to spark discussion. (CX 0076; Tatman, Tr. 653-656).

1157. In a cover email transmitting his June 29, 2009 PowerPoint Presentation, Mr. Tatman stated that if McWane could keep Sigma from establishing an independent source for Domestic Fittings, leaving Star as the only Domestic entrant, then "the appropriate response to distribution is probably fairly hard line approach like a full line or no line approach." (CX 0076 at 001; Tatman, Tr. 653-655).

1158. Among the series of assumptions in the June 29, 2009 PowerPoint Presentation were that Star might "drive profitability out of our business," and that Star "would not be a responsible competitor [in the Domestic market] as long as incremental sales generate incremental margins for their business." (CX 0076 at 006, 009; Tatman, Tr. 653-656).

1159. Mr. Tatman's June 29, 2009 PowerPoint Presentation described as topics for discussion, three potential options for McWane's response to Star's entry: employ a "Wait and See approach," "Handle on a Job by Job basis," or "Force Distribution to Pick their Horse." (CX 0076 at 009; Tatman, Tr. 658).

1160. With respect to the "Wait and See approach," identified as a topic for discussion in the June 29, 2009 PowerPoint Presentation, a disadvantage identified by Mr. Tatman was that it would give Star "time to continue building their business model." (CX 0076 at 009).

1161. With respect to the "Handle on a Job by Job basis" identified as a topic for discussion in the June 29, 2009 PowerPoint Presentation, a disadvantage was that it would allow Star to "drive profitability out of our business." (CX 0076 at 009; Tatman, Tr. 658).

1162. With respect to the "Force Distribution to Pick their Horse" approach identified as a topic for discussion in the June 29, 2009 PowerPoint Presentation, the advantages listed as topics for discussion by Mr. Tatman included:

- It "[a]voids the job by job auction scenario within a particular distributor"

- It "[p]otentially raises the level of supply concern among contractors" and

- It "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution"

(CX 0076 at 009; Tatman, Tr. 658-666; *see also* CX 2483 (Tatman, IHT at 242-243) (explaining, in the context of this language, that it is quicker to build business through large national Distributors such as HD Supply and Ferguson); Tatman, Tr. 676-679 (Tatman does not recall the intent behind the discussion point "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution"); Tatman, Tr. 679-680 (Tatman does not recall whether he considered "major distribution" to be major national Distributors)).

1163. The "Pick your Horse" topic identified in the June 29, 2009 PowerPoint Presentation, described a "Soft Approach – Rebates at 100% or 0%" whereby a "domestic rebate would require exclusivity," and a "Hard Approach – Full Line or No Line," under which access to Domestic product line would "require[] exclusivity for Domestic fitting items we manufacture" – *i.e.*, if a customer did not support McWane's full Domestic Fittings line, McWane would not sell to them. (CX 0076 at 010; Tatman, Tr. 672-674).

1164. Listed as a topic for discussion in the June 29, 2009 PowerPoint Presentation under both the "Soft Approach" and the "Hard Approach" under the "Pick your Horse" option (F. 1163) was "Applied on a corporate not branch by branch basis." (CX 0076 at 010; Tatman, Tr. 675).

1165. On July 2, 2009, when asked by Mr. Walton for a recommended course of action with respect to Domestic Fittings, Mr. Tatman responded that the June 29, 2009 PowerPoint Presentation "was more for information sharing rather than trying to obtain agreement on a specific course of action which is probably premature at this point." Mr. Tatman further wrote, "[f]rom the information currently available, a Full Line or No Line approach would be the preferred approach and certainly the best option against Star." (CX 0329 at 001). Mr. Tatman testified that when he wrote that, he was "floundering in the dark" and that the information in the document was based on speculation. (Tatman, Tr. 749-750) (regarding Star's entry into the domestic segment, "[t]here's never been a hard game plan").

1166. On August 5, 2009, regarding McWane's relationships with foundries, Mr. McCullough wrote:

> As we establish or continue existing casting sourcing relationships we need to emphasize with our casting suppliers that we are not interested in sharing their foundry production with Star/Sigma as we feel it will weaken the "McWane" brand recognition in the market place.

(CX 0354 at 001).

1167. On August 24, 2009, Mr. Tatman sent an internal email to Dennis Charko, head of Clow Water (a subsidiary of McWane) that sells a limited number of Fittings, regarding "McWane Domestic Fittings 2010 brand/market protection" stating:

> Star, has announced a Domestic line of waterworks fittings and restraints. . . .
>
> To protect our domestic brands and market position we are going to adopt a distributor exclusivity program for 2010 wherein we won't provide domestic product to distributors who are not fully supporting our domestic product lines.

(CX 0113 at 001; Tatman, Tr. 686-687).

3. McWane's 2009 revisions to its corporate rebate programs

1168. McWane's waterworks fittings division has always had rebate programs with its customers which typically expire on an annual basis ("corporate rebate programs"). McWane's rebate programs with individual Distributors are based on the Distributor's specific needs and sizes. McWane's major customers, including WinWholesale, Ferguson, Hajoca, HD Supply and Mainline, have participated in McWane's corporate rebate program during the relevant period. TDG has a separately negotiated rebate program. (CX 2479 (McCullough, Dep. at 27-28, 33-34); Tatman, Tr. 708-711).

1169. McWane's corporate rebate program has specific requirements that participating Distributors must meet in order to earn a 2% rebate. If a Distributor fails to comply with a requirement, Mr. McCullough speaks to that Distributor and asks it to correct its non-complying conduct. (CX 2479 (McCullough, Dep. at 28, 33-34, 45-47)).

1170. In a document described as the "final" corporate rebate program for HD Supply for 2010 through 2012, one of the provisions lists as one of the requirements for HD Supply to get its 2% corporate rebate, which is based on all of HD Supply's purchases of Fittings, soil pipe, iron pipe, and valve and hydrants, is: McWane "require[s] HD Supply to support its efforts to maintain and promote domestic specifications, when McWane domestically made products are available." (CX 0131 at 001, 002).

1171. In a draft corporate rebate program for Hajoca for 2010, one of the provisions states: McWane "will share Hajoca's valve, hydrant, soil pipe & soil fitting and domestic requirements for ductile iron waterworks fittings with only other historical, domestic, national, and full line manufacturers." In his November 17, 2009 transmittal email to Mr. McCullough, Mr. Tatman wrote that the proposed modification to McWane's corporate rebate program was to "essentially eliminate Star as a supplier of domestic fittings." (CX 0100 at 001, 002).

1172. On December 8, 2009, Mr. McCullough wrote to Mr. Tatman and Mr. Walton that he was "thinking of implementing a 3 year [corporate rebate] program, basically the same as the 2009 programs for [McWane's] national accounts. Most everyone [h]as asked about extended programs." One of Mr. McCullough's stated reasons for this idea was: "My interest [in] getting everyone on board and committed for the next three years is to remove the opportunity for Star to introduce their domestic made fittings into our major national accounts." There were other reasons for extending the duration of the corporate rebate program unrelated to Star, including that customers did not want to have to renegotiate corporate rebate programs on an annual basis. (CX 0126 at 001; CX 2479 (McCullough, Dep. 146-148)).

4. McWane's September 22, 2009 Letter to Distributors regarding Full Support Program

1173. On September 22, 2009, McWane sent a letter to Distributors that stated as follows:

> [E]ffective October 1, 2009, McWane will adopt a program whereby our domestic fittings and accessories will be available to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements. This applies whether these products are purchased through Tyler Union, Clow Water or through Sigma.
>
> Exceptions are where Tyler Union or Clow Water products are not readily available within normal lead times or where domestic fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacture's ductile iron pipe.
>
> Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks.

("Full Support Program"). (CX 0010 at 001; Tatman, Tr. 659, 687-688).

1174. In the same September 22, 2009 letter through which McWane announced its Full Support Program, McWane also announced to its Distributors that it had entered into a Master Distribution Agreement ("MDA") with Sigma, through which Sigma would sell McWane Domestic Fittings. (CX 0010 at 001 ("We are pleased to announce that McWane domestic fittings . . . will now be available through Sigma."). *See infra* II.K.

1175. A purpose of McWane's Full Support Program was to persuade McWane's customers to support McWane's full line of domestic Fittings, rather than "cherry picking" and buying only oddball items from McWane, while purchasing the most

commonly used Fittings from Star, in order to generate enough sales volume to sustain McWane's last remaining domestic foundry. (RX 638 (McCullough, IHT at 34-36); RX 643 (Tatman, IHT at 151); *see also* CX 2203 at 002; Morton, Tr. 2844-2846 (According to U.S. Pipe, Mr. Tatman explained to U.S. Pipe that U.S. Pipe could not cherry pick high volume configurations from other domestic suppliers; *i.e.*, if Star was capable of producing A and B items, the high-volume configurations, but couldn't produce the C and D items, U.S. Pipe could not buy the high-volume configurations from Star and then turn to McWane for only the C and D items.).

1176. Mr. Tatman referred to the Full Support Program as an "exclusivity" policy both before and after the policy was announced on September 22, 2009. (CX 0340 (referring to "pending policy on supply exclusivity" on September 8, 2009); Tatman, Tr. 692; CX 1246 (referring to "exclusivity policy" on September 23, 2009); Tatman, Tr. 697).

1177. Mr. Tatman purposefully included the language "may" and "or" in the Full Support Program. (Tatman, Tr. 687-689 ("Q. And the potential consequences for customers were: Customers who elect not to support this program may forgo in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler/Union or Clow Water products for up to twelve weeks; correct, sir? A. With the words "may" and "or" specifically put in there by me. Q. That's a yes, sir? A. Yes, sir.")).

1178. Mr. Tatman believed that McWane had little or no ability to dictate terms to the Distributors, who held significant market power over it. (Tatman, Tr. 660 ("This is a weak -- a weak stance in this letter because I know when I write this letter that I'm a Chihuahua barking at Rottweiler and I know who has the power here.")).

5. McWane's communications to Distributors regarding the Full Support Program

1179. In preparation for the rollout of the September 22 Full Support Program, McWane's National Sales Manager, Mr. Jansen, led an internal conference call with the McWane sales

force on August 28, 2009, where he explained to his sales force the "new policy on Star Domestic" as follows:

- What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic. . . .
    - This means the customer will no longer have access to our domestic. They can still buy [non-Domestic] from us.
    - Once they use Star, they can't EVER buy domestic from us. . . .
    - For companies with multiple branches (HD, Ferguson, Winwater, Hajoca, etc) - if one branch uses Star, every branch is cut off.

      . . .

- Make sure you are discussing our stance with all customers, every day.

(CX 0710 at 001, 002 (summarizing sales conference call); *see also* CX 2477 (Jansen, Dep. at 164-169) (confirming that CX 0710 accurately reflects Mr. Jansen's statements during conference call)).

1180. McWane communicated to customers that the Full Support Program would be applied on a company-wide basis, such that if one branch purchased Domestic Fittings from Star, all branches would be cut off. (CX 0108 at 001; CX 2477 (Jansen, Dep. at 177-178); CX 2501 (Prescott, IHT at 50-51)).

1181. Mr. Jansen wrote to his sales force on November 3, 2009:

> Team, I think we have made it very clear in the market regarding our stance on supporting the McWane domestic brand of fittings whether purchased through Tyler/Union, Clow or Sigma. If one branch buys f[ro]m someone other

> than this then the whole company will be [a]ffected not just that branch.

(CX 0108 at 001; CX 2477 (Jansen, Dep. at 177-178) (explaining that he wanted to make sure that the sales people expressed this "one clear message" to the market); *see also* CX 1599; CX 2477 (Jansen, Dep. at 173-176) (two regional vice presidents of HD Supply expressed concern to McWane's National Sales Manager, Mr. Jansen, that they did not want to be "punished" under the McWane policy if another HD Supply branch bought Star Domestic Fittings)).

1182. The McWane sales force was tasked with compiling logs to document communicating the Full Support Program to Distributors. (CX 2477 (Jansen, Dep. at 179); CX 1600, CX 1601, CX 1602 (sales force logs of "Star Domestic Conversation with customers")).

1183. In a presentation which was apparently prepared by Mr. Tatman after implementation of the September Full Support Program, Mr. Tatman stated: "Although the words 'may' and 'or' were specifically used, the market has interpreted the communication in the more hard line 'will' sense. . . . Access to McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times. Violations will result in: Loss of access, loss of accrued rebates." (CX 0119 at 002, 004; Tatman, Tr. 704-707, 723-725).

1184. Hajoca believed that, despite the terms "may" and "or" in the Full Support Program, it would lose its rebates or be cut off from purchasing from McWane if Hajoca purchased from Star. (CX 2511 (Pitts, IHT at 78) ("Q. So, even though this letter, as written, suggests that you may or may not be penalized and that if you are penalized, it could be for -- it could be one or the other -- A. Yeah, um-hum. Q. -- or essentially both -- A. Selective enforcement, yeah. Q. -- the -- the message that Hajoca received, and specifically that Mr. Tatman and Mr. Jansen relayed to you, was that it would be – both would be implemented against Hajoca -- A. Correct. Q. -- and it would happen indefinitely -- A. Correct. Q. -- if -- if -- A. That's right. Q. -- you started purchasing from Star. A. Correct."); CX 2511 (Pitts, IHT at 76-79, 137-139) (stating: "It wasn't an either/or. It was both."; and:

"we were told right away that our Lansdale location would be cut off. They couldn't buy the fittings anymore." Mr. Pitts further stated that to him, "may" meant "would", and "or" meant "and.").

1185. HD Supply believed that under the Full Support Program, HD Supply would fully support McWane's domestic line of fittings, and that HD Supply would purchase all of its domestic Fittings from McWane except where McWane was unable to fill an order. (Webb, Tr. 2769-2770). *See also* CX 2514 (Webb, Dep. at 90) ("My understanding is that we would lose the rebate on the domestic fittings . . . .").

1186. Ferguson did not view the Full Support Program as preventing Ferguson from purchasing Domestic Fittings from Star and believed that the rebate terms and lead times mentioned in the September 2009 Rebate Policy could be negotiated. (Thees, Tr. 3109-3111).

1187. Groeniger viewed the Full Support Program as a threat that if Groeniger purchased Domestic Fittings from Star, McWane would not sell any Domestic Fittings to them. (CX 2510 (Groeniger, Dep. at 92) ("We were informed that they [McWane] were going to pull everything away from us, a threat.")).

1188. Illinois Meter believed it had been threatened by Mr. Jansen, in January 2010, with loss of access to McWane's Domestic Fittings if Illinois Meter bought Domestic Fittings from Star. (Sheley, Tr. 3411-3412 ("The implied threat that if we bought anybody else's fittings, they [McWane] wouldn't do business with us in any way, shape or form.); CX 2515 (Sheley, IHT at 76-78, *in camera* ("Rick [Tatman] made the statement that he expected a hundred percent support for domestic product . . . if we bought any domestic from Star, they would not sell us anything. And the statement I made to Rick . . . I asked the question, 'So you're telling us all or none?' And he said, 'That's correct.'")). *See also* Sheley, Tr. 3456-3458 (the Full Support Program does not accurately reflect the policy as communicated to Illinois Meter in conversations that Mr. Sheley had with Mr. Jansen and Mr. Tatman).

1189. Illinois Meter interpreted the Full Support Program to mean that Illinois Meter would lose any unpaid rebates on both Domestic and imported Fittings. "[S]o if a rebate had been earned in January through, say, September and you chose not to participate, you would lose all those previous rebates that were unpaid." (Sheley, Tr. 3456-3458; CX 2515 (Sheley, IHT at 85), *in camera*).

1190. E.J. Prescott explained the Full Support Program as follows: "The understanding is in writing. If you bought one [Domestic] fitting [from Star] in one of our 26 places, we're out, simple. . . . They [McWane] said it's all or nothing." (CX 2501 (Prescott, IHT at 50)).

1191. Utility Equipment Company explained the Full Support Program as follows: "Q. And was it your understanding that if you did purchase [Star Domestic Fittings] that you would lose your rebate dollars? A. Yes. Q. The policy on its face states that they may forego participation in any unpaid rebates. Was it your understanding, though, that you would forego them and that it wasn't a 'may forego'? A. Well, I took this as that we were going to lose it." (CX 2544 (Coryn, Dep. at 113-114); CX 2543 (Coryn, IHT at 126) ("There was . . . a veiled threat out there that if . . . [McWane] found out you were buying from [Star], something would happen.")).

1192. CI Thornburg explained its understanding of the Full Support Program as follows: "Q. What did you think the letter meant as a practical matter? A. Well, I knew what it meant was: You better not buy anything from Star. . . . [McWane's] message was clear, both written and verbally, that if you buy a project from Star, you're going to go on our, I'm picking the term 'bad list.'" (CX 2489 (Morrison, IHT at 72); CX 2490 (Morrison, Dep. at 79-80) ("When I read the letter that they [McWane] sent out . . . I interpreted that as a threat.")).

6. Full Support Program as it relates to Hajoca

a. Hajoca elected not to participate in the Full Support Program

1193. Hajoca has nine profit centers or branches that sell waterworks products, three of which sell waterworks exclusively: Tulsa, Oklahoma ("Tulsa"); Salt Lake City, Utah; and Olathe, Kansas. Hajoca's Lansdale, Pennsylvania ("Lansdale") branch also sells waterworks products. (Pitts, Tr. 3296-3297).

1194. At the time of McWane's September 22, 2009 Full Support Program, almost all of Hajoca's purchases of Domestic Fittings were made by Hajoca's Tulsa and Lansdale branches. (CX 0023).

1195. Each of Hajoca's branches makes its own vendor selection decisions, including those regarding Domestic Fittings purchases. (Pitts, Tr. 3306-3307).

1196. In a September 22, 2009 email from Mr. Tatman to Mr. Pitts, Hajoca's director of vendor relations, attaching the Full Support Program, Mr. Tatman stated: "[t]he policy announced is intended to apply at the corporate level, which I understand will give you a few more challenges to manage compared to other nationals." (CX 0021-A at 001).

1197. The week before McWane announced the Full Support Program, Mr. Jansen, McWane's National Sales Manager, met with Mr. Pitts. Mr. Pitts reported that meeting as follows:

> I had heard from Jerry Jansen last week that [McWane] would be taking a hard stance regarding domestic fittings manufactured for Star. . . .
>
> Jerry had told me last week that if any PC [profit center or branch] in the US purchases domestic fittings from Star, all PCs would lose access to McWane's fittings and possibly lose rebates.

(CX 0021-A at 001; Pitts, Tr. 3296, 3304-3305).

1198. Based on McWane's September 22, 2009 Full Support Program and his conversation with Mr. Jansen, Mr. Pitts believed that if any branch of Hajoca purchased Domestic Fittings from Star, the consequences would include loss of rebates from McWane and an interruption of Domestic Fittings shipments from McWane to all of Hajoca's branches. (Pitts, Tr. 3300-3303; CX 0021-A at 001).

1199. Mr. Pitts had conversations with Mr. Tatman, in addition to Mr. Jansen, about the Full Support Program, both before and after the September 22, 2009 announcement, and Mr. Tatman reinforced the nationwide all-or-nothing nature of the policy – that if one Hajoca branch purchased from Star, all branches would be subject to the consequences. (Pitts, Tr. 3305-3306).

1200. On September 30, 2009, Mr. Pitts asked Mr. Tatman to modify McWane's Full Support Program so that McWane would not hold all Hajoca branches responsible if a single branch purchased Domestic Fittings from Star. Mr. Tatman explained that McWane applies the policy at the corporate level because "that's where the [rebate] check is sent," and did not agree to alter McWane's policy. Hajoca also offered to change its rebate model so that checks would be sent to the individual branches, but Mr. Tatman did not agree to change the policy. (CX 0022 at 002; Pitts, Tr. 3306-3308).

1201. In a November 3, 2009 email to Mr. Kelly and Mr. Pitts of Hajoca, Mr. Jansen reiterated the all-or-nothing nature of McWane's Full Support Program:

> [I]f any Hajoca location chooses to buy another domestic fitting supplier[']s product Hajoca will not have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date.

(CX 0024 at 001; Pitts, Tr. 3311-3313 (CX 0024 accurately reflects September 2009 Rebate Policy as described to Mr. Pitts by Mr. Tatman and Mr. Jansen in multiple conversations)).

1202. In an email exchange between Mr. Jansen of McWane and Mr. Kelly of Hajoca between November 3, 2009 and November 7, 2009, Mr. Jansen reiterated the company-wide application of the Full Support Program, and acknowledged that Hajoca would have to make a decision as to whether to purchase exclusively from McWane. (CX 0024 at 001; Pitts, Tr. 3308-3310).

1203. Hajoca's Lansdale, Pennsylvania location purchased a higher volume of Domestic Fittings than other Hajoca branches and anticipated losing business if it lost access to McWane's Domestic Fittings. (Pitts, Tr. 3314).

1204. Hajoca chose to continue to allow each of its branches to make its own Domestic Fittings vendor selections. (Pitts, Tr. 3313 ("Our decision was to stand by our [business model] and let the manager of the [Tulsa] location purchase those fittings if he chose to.")).

1205. On November 16, 2009, Mr. Kelly informed Mr. Jansen that Hajoca "will not be changing our current business practice that allows our managers in the field to determine where or from whom they buy their product," and "cannot in good conscience support a program where the actions of one manager somewhere in the country could undermine an entire rebate program for the balance of the business." (CX 0731 at 001).

1206. The day after Mr. Kelly's communication with Mr. Jansen (F. 1205), November 17, 2009, Greg Dill of Hajoca's Tulsa branch contacted Ms. Susan Schepps of Star and informed her that he would be placing a Domestic Fittings stock order the following day. (CX 0731 at 001; *see also* Pitts, Tr. 3309 (the Tulsa branch was buying Domestic Fittings from Star)).

b. McWane did not accept new orders for Domestic Fittings from Hajoca

1207. As a result of Hajoca's decision to continue allowing its branches to make its own Domestic Fittings vendor selections, all of Hajoca's branches, including Hajoca's Lansdale, Pennsylvania location, were not able to place new orders from

McWane for Domestic Fittings. (Pitts, Tr. 3313-3315; Tatman, Tr. 730 ("Q. And you were enacting this policy [September 2009 Rebate Policy] here by telling Hajoca, you're cut off; right? A. At this moment in time, that's what we did."); *see also* CX 0173 at 001 (Jansen January 19, 2010 email to a customer of Hajoca's Lansdale branch explaining McWane's cutoff of Hajoca: "We don't like the situation either but feel we can't support someone who is helping our competition build a line against us."); CX 2477 (Jansen, Dep. at 223-225)).

1208. On November 23, 2009, Mr. McCullough informed Sean Kelly of Hajoca that McWane would "discontinue selling Hajoca domestic fittings since they are supporting Star's domestic line." (CX 1800; Tatman, Tr. 729).

1209. Based on his November 23, 2009 discussion with Sean Kelly (F. 1208), Mr. McCullough reported that Sean Kelly understood "[that] Lansdale will be also cut off on domestic. They had hoped to be able to buy Tyler/Union domestic at a higher price, but I advised this was not an option." (CX 1800; CX 2479 (McCullough, Dep. at 152) (CX 1800 accurately describes Mr. McCullough's conversation with Sean Kelly of Hajoca)).

1210. Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton, on November 23, 2009, to confirm that all Hajoca orders had been placed on hold, that Sigma had been advised to do the same per the terms of the Master Distribution Agreement (*infra* II.K.11.), and that Jeff Otterstedt and Scott Frank of Clow Water had also been advised. (CX 1800; Tatman, Tr. 729-730).

1211. On November 24, 2009, Mr. Jansen confirmed to a member of the McWane sales team that the Hajoca decision (F. 1204) was the "[f]inal word unless they change direction corporately." (CX 0702 at 001).

1212. On November 26, 2009, Mr. Tatman sent an email to Mr. Pitts and Mr. Kelly of Hajoca, stating:

> If the PA branch or other Hajoca branches – excluding Tulsa – have in process domestic jobs that require near term

> shipments, please send those into your normal customer service points before December 4th. . . . While you certainly don't agree with our stance, I hope that at least you will consider the broader market view under which we have to make these decisions.

(RX 237; Tatman, Tr. 730-731). *See also* Tatman, Tr. 715 ("So November 26 I'm saying, if you got anything in-house, I'll ship it. If you have any new requirements that you want, just get the orders in-house by -- and I gave a date -- and we'll ship those.").

1213. Hajoca's Tulsa branch was excluded from the allowance for final Domestic Fittings orders (F. 1212) because it was the Hajoca location that had purchased Domestic Fittings from Star. (Pitts, Tr. 3316).

1214. McWane allowed Hajoca's Lansdale branch to place orders to cover existing commitments and provided an extension to the December 4, 2009 date referenced in Mr. Tatman's November 26, 2009 email (F. 1212) to enable Hajoca's Lansdale branch to place orders to satisfy the known requirements of an existing contract with a municipality. (Pitts, Tr. 3314-3320; Tatman, Tr. 714-718 ("the financials records said we shipped Hajoca November, December, January, February, March. We continued shipping Hajoca product all the way through 2009, all the way through 2010. McWane continued to honor the orders Hajoca had previously placed.").

1215. An Hajoca business document listing "all the Union Foundry purchases (receipts) from 1/1/10 through 09/29/10" indicates that Hajoca's Lansdale Branch received Domestic Fittings at the Lansdale branch in January, February and March 2010. (RX 0289 at 001, 004; Pitts, Tr. 3320, 3351-3355).

1216. On December 14, 2009, Mr. Tatman informed Sigma that Sigma could not supply Domestic Fittings to Hajoca per the terms of the Master Distribution Agreement (F.1540) because Hajoca's Tulsa branch "elected to support another brand for some of their Domestic fitting needs," and that McWane therefore had "elected not to supply any of the Hajoca branches with our

domestic product." (CX 1801 at 001; Tatman, Tr. 720, 729-730, 739-740).

1217. On December 15, 2009, Mr. Tatman instructed Clow Water not to accept any Hajoca orders. (CX 0477 at 001; Tatman, Tr. 721; *see also* Tatman, Tr. 730 (when McWane cut off Hajoca, Mr. Tatman, as a matter of policy, told Clow Water not to sell to Hajoca)).

1218. Mr. Scott Frank of Clow Water responded to Mr. Tatman's December 15, 2009 instruction (F. 1217) that "All of Clow is aware to NO QUOTE and REFUSE all Hajoca orders." (CX 1802 (emphasis in original); Tatman, Tr. 738-739).

1219. Between December 4, 2009 and April 13, 2010, Hajoca's Lansdale, Pennsylvania branch was unable to place new Domestic Fittings orders with McWane. (Pitts, Tr. 3314-3315, 3326-3327, 3363; CX 0027 at 001 (internal Hajoca email dated March 9, 2010: "I can no longer purchase from [McWane] and have an immediate need for a large quantity of flanged fittings that must be Tyler Union.").

1220. On March 27, 2010, prior to McWane executives meeting with Hajoca executives to discuss negotiations with Hajoca, Mr. McCullough sent an internal email asking others at McWane "[h]ow our potential FTC action might [a]ffect how we do business with [Hajoca]." (RX 628) (referring to January 22, 2010 letter from FTC to McWane informing McWane that the FTC was conducting an investigation to determine whether McWane had engaged in unfair methods of competition, attached as Attachment B to CCFF).

1221. In April 2010, Hajoca and McWane negotiated regarding McWane's Full Support Program and came to an agreement whereby McWane agreed to allow Hajoca's Lansdale, Pennsylvania branch to resume buying Domestic Fittings from McWane. (Pitts, Tr. 3325, 3347-3348, 3355).

1222. On April 13, 2010, Mr. Kelly reported within Hajoca that he had spoken with Mr. Tatman, and that "we will be moving forward with Tyler Union in Lansdale and perhaps some other waterworks locations depending on how the local relationships

fare." (CX 0030 at 001; Pitts, Tr. 3324-3325). *See also* CX 0028 at 001 (April 1, 2010 internal Hajoca email reporting meeting with McWane and that Hajoca's Lansdale, Pennsylvania branch "will be reinstated as a full stocking distributor of [McWane] fittings.").

1223. McWane did not reinstate Domestic Fittings service to Hajoca's Tulsa, Oklahoma branch. (CX 0030 at 001 (April 13, 2010 internal Hajoca email: "Tulsa is excluded from the deal and will not have access to Tyler Union."); Pitts, Tr. 3325-3326).

c. McWane withheld Hajoca's rebate

1224. McWane withheld Hajoca's rebate in the fourth quarter of 2009 because that was the quarter when Hajoca violated the Full Support Program. (Pitts, Tr. 3322).

1225. In a February 4, 2010 email to Roy Pitts of Hajoca, Mr. Tatman confirmed that McWane had withheld Hajoca's fourth quarter 2009 Domestic Fittings rebate as a result of Hajoca's decision to sell Star products in Tulsa. (CX 1803 at 001; Tatman, Tr. 740; Pitts, Tr. 3322-3323).

1226. Hajoca's fourth quarter of 2009 rebate for non-domestic fittings, which was withheld (F. 1224), was $3,563. (Pitts, Tr. 3323; Tatman, Tr. 726, 740).

1227. With the exception of the fourth quarter of 2009, McWane continued to pay rebates to Hajoca as Hajoca's Lansdale branch purchased McWane Domestic Fittings, even though its Tulsa branch purchased Star Domestic Fittings. (Pitts, Tr. 3366).

d. Hajoca continued to purchase from Star

1228. Since September 2009, Hajoca's Domestic Fittings purchases have been split about 50/50 between McWane and Star. (Pitts, Tr. 3337).

1229. After negotiating McWane's Full Support Program in April 2010, McWane allowed Hajoca's Lansdale branch to purchase McWane's Domestic Fittings, even though Hajoca's

Tulsa branch was continuing to buy Domestic Fittings from Star. (Pitts, Tr. 3325, 3337, 3347-3348, 3355); *see also* Tatman, Tr. 715-718 ("[Hajoca] kept buying from Star, and we kept selling them product. . . . And regardless of what we said with Hajoca, we continued to ship them product. They continued to buy from Star.").

1230. By January 2010, the Tulsa branch of Hajoca had ordered over [redacted] million dollars' worth of Domestic Fittings from Star. (RX 671 (Pitts, Dep. at 102-103); RX 61).

7. Full Support Program as it relates to HD Supply

a. Communications between McWane and HD Supply in advance of the Full Support Program

1231. Before issuing its Full Support Program in September 2009, Mr. Tatman of McWane met with HD Supply. (Tatman, Tr. 689).

1232. By internal McWane email dated September 8, 2009, Mr. Tatman informed Mr. McCullough that Mr. Jansen had been discussing McWane's "pending policy on supply exclusivity" for Domestic Fittings with Distributors, and that he was "starting to pick-up some negative reaction from the HD Supply Region, District, and Branch managers." The "negative reaction" at HD Supply was not universal and depended upon "what level at HD Supply you would talk to." (CX 0340; Tatman, Tr. 689-693).

1233. In his September 8, 2009 email to Mr. McCullough and Mr. Jansen (F. 1232), Mr. Tatman suggested to Mr. McCullough that HD Supply's CEO, Jerry Webb, should send a communication within HD Supply that HD Supply had elected to use McWane Domestic Fittings as its sole supply source through 2010. Mr. Tatman provided Mr. McCullough with draft language for an email or communication to Mr. Webb. (CX 0340; Tatman, Tr. 693-694).

1234. On September 22, 2009, Glenn Fielding, HD Supply's Director of Sourcing and Price Management, sent an email to Jerry Webb, CEO, and Darrin Anderson, Vice President of Sourcing and Operations of HD Supply, forwarding the text of the

Full Support Program and recounting a conversation with Mr. Tatman in which Mr. Tatman informed Mr. Fielding that the policy "must be adhered to by entire company -- if one branch buys domestic from someone else it affects the whole compan[y's] program." (CX 2173 at 001; Webb, Tr. 2750-2753).

1235. Mr. Fielding of HD Supply expressed concern about a reduction in rebate dollars as a result of McWane's Full Support Program and even greater concern about the impact to customer satisfaction in the event that McWane cut off HD Supply's access to McWane's Domestic Fittings. (CX 2173 at 003).

1236. On September 23, 2009, Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton relaying a report he had received from Mr. Jansen. Mr. Jansen had met with Jack Shaller of HD Supply, who told Mr. Jansen that HD Supply had held a manager's meeting "and the McWane exclusivity policy for domestic fittings was discussed at length," and that "nobody from Jerry [Webb] on down was happy about it." Mr. Tatman noted that "I suspect Jerry [Webb] sold this as a 'We have to do' rather than a 'In the big picture this is best for our business.'" (CX 1246; Tatman, Tr. 696-697).

1237. HD Supply interpreted McWane's Full Support Program to require HD Supply to purchase "all" of its Domestic Fittings from McWane, except where McWane was unable to supply the Domestic Fittings in question. (Webb, Tr. 2768-2770 ("Q. And was this an all-or-nothing support? A. This was all to the extent other than the exceptions where they had a service or inability to fill an order.")).

1238. HD Supply interpreted McWane's Full Support Program to mean that if HD Supply purchased Domestic Fittings from Star that HD Supply "would lose the rebate on the domestic fittings and potentially lose access to the domestic line. . . . [I]t could be a significant event." (CX 2514 (Webb, Dep. at 90-91); Webb, Tr. 2760-2761 ("Q. How did you interpret this policy from Tyler/Union? A. That if their domestic line was not fully supported, there could be implications to your rebate and access to domestic fittings."); CX 2173 at 001).

1239. On September 23, 2009, HD Supply's Jerry Webb sent a memorandum to HD Supply's district managers, branch managers and operations managers stating: McWane has "established their position to not support any company purchasing American made fittings from any other source [besides Sigma and McWane]." (CX 0552; Webb, Tr. 2763-2765).

1240. Mr. Webb's September 23, 2009 memorandum (F. 1239) further stated: "Due to the 'Buy American' requirements in the ARRA funded jobs and with the expectation that the flow of money to these projects will pick up the latter part of 2009 through 2010; we need to adhere to this mandate and purchase all of our American made fittings through Union-Tyler or Sigma. This will ensure . . . continued compliance with the [f]ederal requirements." (CX 0552; Webb, Tr. 2765-2766) (explaining that the "mandate" was McWane's Full Support Program).

1241. Without McWane's September 22, 2009 Full Support Program, Mr. Webb would not have issued his September 23, 2009 company-wide policy requiring HD Supply managers to only purchase Domestic Fittings from McWane (or Sigma). (Webb, Tr. 2804).

b. Impact of Full Support Program on HD Supply

1242. With the exception of items that McWane did not have available or that had been committed to prior to September 22, 2009, HD Supply's then-pending Domestic Fittings orders with Star were canceled. (McCutcheon, Tr. 2310-2311; CX 2539 (McCutcheon, Dep. at 248-250) ("[Webb] asked me for a list of the outstanding quotes that we had with his company. So we put together the list of projects that we had worked with his company and sent it to him. And to my knowledge, all of those were canceled.")).

1243. After September 22, 2009, based on conversations between Mr. McCutcheon of Star and Mr. Webb of HD Supply, Mr. McCutcheon believed that HD Supply could not buy Star's Domestic Fittings because of the Full Support Program. (McCutcheon, Tr. 2302-2303).

1244. Mr. McCutcheon believed that HD Supply could not purchase Domestic Fittings from Star because McWane's Full Support Program required HD Supply to buy 100% of its Domestic Fittings requirements from McWane. (CX 2539 (McCutcheon, Dep. at 248-249)).

1245. On September 28, 2009, in response to a request from Mr. Webb of HD Supply, Mr. McCutcheon of Star sent Mr. Webb a list of orders and inquiries that HD Supply had pending with Star, noting that "I have instructed our people not to pursue these because of the recent events." (CX 0013 at 001). Mr. McCutcheon instructed Star's sales team not to pursue the listed items, based on his conversation with Mr. Webb regarding McWane's Full Support Program. (McCutcheon, Tr. 2307-2312; CX 2539 (McCutcheon, Dep. at 250)).

1246. Two HD Supply Regional Vice Presidents and two HD Supply District or Branch Managers each relayed to Mr. Michael Berry, a general manager of Star that they could not purchase Domestic Fittings from Star because of McWane's Full Support Program and that they did not have the discretion to do so under the HD Supply corporate policy. One of those Regional Vice Presidents also indicated that he could not purchase Domestic Fittings from Star for a project in Arkansas because he could not be the reason that HD Supply lost its rebate for purchases from McWane. (CX 2532 (Berry, Dep. at 138-141)). Mr. Berry believed that the reason that HD Supply refused to purchase Domestic Fittings from Star for these and other projects, such as the Hughson Modesto WWTP, because of the HD Supply corporate policy to not purchase from Star. (CX 2532 (Berry, Dep. at 169-170)).

1247. Star maintained and used a "domestic quote log" to track won and lost Domestic Fittings bids. (McCutcheon, Tr. 2312; CX 2294). Ms. Pam Garey of Star compiled the log on a regular basis at Mr. McCutcheon's request, and used information provided by Star's sales department. (McCutcheon, Tr. 2315).

1248. Star's domestic quote log indicated that between September 22, 2009 and February 22, 2010, Star lost about 25 Domestic Fittings jobs for which Star submitted a quote to HD

Supply, but where HD Supply purchased from McWane or Sigma rather than Star. In the "status/update" field of the domestic quote log on some of these jobs are the following comments: "HD mandate letter," "mandate letter," "letter directing fitting purchases," "Tyler-Sigma announcement," or "HD will not buy from Star." (CX 2294 at 010-011, 013, 015, 017-019; McCutcheon, Tr. 2313 (explaining that "lost due to mandate letter" on the log refers to the fact that Star lost an HD order due to the McWane Full Support Program)).

1249. Star's domestic quote log indicated that between September 22, 2009 and February 22, 2010, Star lost many Domestic Fittings jobs for which Star submitted a quote to HD Supply where in the "status/update" field of the domestic quote log are the following comments: "lost due to delivery times," "lost due to delivery requirement," "lost, lead times were too long." (CX 2294 at 012-014; see also McCutcheon, Tr. 2632-2634) (Star lost lots of Domestic Fittings jobs due to delay in delivery).

1250. Since September 2009, no one at McWane ever threatened to cut HD Supply off from Domestic Fittings, refused to sell or deliver Domestic Fittings to HD Supply, or refused to pay HD Supply rebates that it earned on Domestic Fittings. (Webb, Tr. 2800; RX 673 (Webb, Dep. at 46-47)).

1251. McWane's Full Support Program made HD Supply less willing to do business with Star. (Webb, Tr. 2766-2767; CX 2514 (Webb, Dep. at 95)).

c. HD Supply's views on and purchases from Star

1252. HD Supply believed that Star did not have the capacity to service HD Supply's needs for Domestic Fittings in the fall of 2009 because HD Supply believed that Star did not have a full line of Domestic Fittings to offer and it was important to HD Supply to be able to offer a full line of product to its customers. (Webb, Tr. 2788-2790).

1253. HD Supply had concerns about Star's ability to service Domestic Fittings in the fall of 2009. (Webb, Tr. 2792).

1254. HD Supply had concerns about Star's use of various foundries, as opposed to use of one central foundry, to manufacture its Domestic Fittings in the fall of 2009. (Webb, Tr. 2794-2795).

1255. There were risks to HD Supply's ability to service its own customers if HD Supply were to do business with Star in Domestic Fittings. (Webb, Tr. 2795-2796).

1256. HD Supply views McWane as a known, full line Fittings supplier with a good track record. (RX 673 (Webb, Dep. at 123-125)).

1257. HD Supply, the largest distributor in the industry, has purchased some amount of Domestic Fittings from Star regardless of McWane's Full Support Program. (Webb, Tr. 2798-2800; McCutcheon, Tr. 2591-2592).

1258. HD Supply is Star's largest customer. Star estimates that it has greater than a [redacted]% share of HD Supply's non-Domestic Fittings business. Star estimates that it has less than a [redacted]% share of HD Supply's Domestic Fittings business. (McCutcheon, Tr. 2651-2652, *in camera*).

8. Full Support Program as it relates to Ferguson

a. Impact of Full Support Program on Ferguson

1259. Ferguson received notice of McWane's Full Support Program from McWane on September 22, 2009. (Thees, Tr. 3086; CX 0506).

1260. When Mr. William Thees, Vice President of the Waterworks Division at Ferguson, received notice of the Full Support Program, Ferguson's concerns about the possibility of foregoing unpaid rebates or the potential to lose access to McWane's Domestic Fittings were only secondary concerns. (Thees, Tr. 3086-3089). *See* F. 1271-1275 (Ferguson's primary concerns).

1261. When Mr. Thees received notice of McWane's Full Support Program, he called his district managers to ensure that Ferguson communicated support for McWane's Domestic Fittings by continuing to purchase Domestic Fittings from McWane and not purchasing Domestic Fittings from Star. To his knowledge, his district managers followed his instruction. (Thees, Tr. 3091-3092, 3095).

1262. After McWane's Full Support Program was announced, Star's Mr. Berry had negotiations with Darryl Case and Phil Selby, who are Ferguson district managers, and Dan Warner, who is a Ferguson general manager, for the sale of Star's Domestic Fittings to Ferguson. Mr. Berry of Star believed that there was a corporate edict that no Ferguson employees purchase Star Domestic Fittings unless McWane did not have the Domestic Fittings. (CX 2532 (Berry, Dep. at 131-133)).

1263. In a Star sales person's weekly report to Mr. Berry, the sales person noted that Star had been awarded a job to supply Domestic Fittings for a certain project, but that Ferguson cancelled that job after Ferguson issued its corporate policy notifying its employees that they should not purchase Star Domestic Fittings. (CX 2532 (Berry, Dep. at 164-165); CX 2288).

1264. Star's domestic quote log (F. 1247) indicated that between September 22, 2009 and February 22, 2010, Star lost numerous Domestic Fittings jobs for which Star submitted a quote to Ferguson, but where Ferguson purchased from McWane or Sigma rather than Star. In the "status/update" field of the domestic quote log on some of these jobs are comments including: "letter threatening to cut off if they use Star domestic," "Ferguson will not buy domestic from Star currently," and "All Ferguson are lost-they only get quotes from us for reference." (CX 2294 at 013-018).

1265. Star's domestic quote log indicated that between September 22, 2009 and February 22, 2010, Star lost many Domestic Fittings job for which Star submitted a quote to Ferguson where in the "status/update" field of the domestic quote log are the following comments: "lost due to delivery requirements," "lost ftgs due to delivery," "cust. required

immediate shipment," and "lost due to lead time." (CX 2294 at 007-013).

1266. At the time Ferguson received notice of McWane's Full Support Program, Ferguson was already planning to purchase all of its Domestic Fittings from McWane regardless of the Full Support Program. (Thees, Tr. 3108-3109).

1267. The Full Support Program did not prevent Ferguson from purchasing Domestic Fittings from Star. (Thees, Tr. 3109-3110).

1268. When Ferguson's Mr. Thees received notice of McWane's Full Support Program, he thought it was unlikely that McWane would withhold rebates from Ferguson and believed that the rebate terms and lead times stated in the Full Support Program could be negotiated. (Thees, Tr. 3110).

b. Ferguson's views on and purchases from Star

1269. When Star began selling Domestic Fittings in 2009, Ferguson had already been purchasing Domestic Fittings from McWane for over twenty years. Ferguson viewed McWane as a good, reliable supplier of Domestic Fittings with whom Ferguson was comfortable. (Thees, Tr. 3101-3102).

1270. Ferguson has historically increased its purchases of McWane's Fittings (and other products) in order to maximize its rebate under McWane's rebate programs. (CX 2503 (Thees, IHT at 139-141) ("Q. Is . . . this the rebate structure that you're pointing to as preferable to the programs offered by Sigma or Star? A. Yes. Q. The share tier, the 50-percent share and 55-percent share, do those incentives shape your purchasing activity in any meaningful way? A. Yes. Q. Do you on occasion direct the branches to maximize their purchases and fittings from Tyler in order to qualify for the next tier? A. Yes.")).

1271. Star entering as an unknown in the Domestic Fittings market was Ferguson's primary concern in determining whether to purchase Domestic Fittings from Star. (Thees, Tr. 3096).

1272. Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned about Star's ability to produce a complete line of Domestic Fittings without having their own manufacturing facility. Because Star was not using one central foundry, Ferguson was concerned that Star was not controlling the manufacturing process of its Domestic Fittings. (Thees, Tr. 3087, 3103).

1273. Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned that Star was using jobber facilities with extra capacity to produce Domestic Fittings for them, Star would not disclose to Ferguson which foundries it was using, and Ferguson was concerned that any of these domestic foundries could abandon Star, leaving Star unable to supply Ferguson with Domestic Fittings. (Thees, Tr. 3102-3103).

1274. At the time Star began producing Domestic Fittings, Star did not have the depth and breadth of inventory to supply Ferguson with all of Ferguson's Domestic Fittings needs. (Thees, Tr. 3103-3104).

1275. Ferguson has had past business dealings with Star that put a strain on the relationship between the two companies. This strain was a leading component in Ferguson's decision to not purchase Domestic Fittings from Star. (Thees, Tr. 3105-3107 (discussing RX 255, a January 21, 2010 email from Mr. McCutcheon of Star to Mr. Thees stating "It is obvious we dropped the ball the last couple years" and explaining that Star's actions were a "breach of trust.")).

1276. After McWane announced its Full Support Program, Star sold Domestic Fittings to Ferguson. (McCutcheon, Tr. 2591-2592; Thees, Tr. 3111-3112).

1277. In 2011, Ferguson purchased hundreds of thousands of dollars' worth, but less than a million dollars' worth, of Domestic Fittings from Star. (Thees, Tr. 3112).

1278. McWane has never refused to pay Ferguson a rebate it earned on Domestic Fittings purchased from McWane. (Thees, Tr. 3112).

1279. McWane has never threatened not to sell Domestic Fittings to Ferguson. (Thees, Tr. 3112-3113).

1280. Ferguson is Star's second largest customer. Star estimates that it has a [redacted]% share of Ferguson's non-Domestic Fittings business. Star estimates that it has less than a [redacted]% share of Ferguson's Domestic Fittings business. (McCutcheon, Tr. 2652, *in camera*).

1281. According to records maintained by Ferguson, in the first four months of 2010, Ferguson purchased [redacted]% of its Domestic Fittings from Star, while purchasing approximately [redacted]% from McWane and [redacted]% from Sigma. (CX 0502, *in camera*; CX 2503 (Thees, IHT at 146-147)).

9. Full Support Program as it relates to U.S. Pipe

a. U.S. Pipe's purchasing history and reaction to ARRA

1282. U.S. Pipe sells complete waterworks systems that include its ductile iron pipe packaged together with related products, including Fittings and accessories. Until April 2006, U.S. Pipe manufactured Domestic Fittings. (Morton, Tr. 2809-2812).

1283. In 2008, U.S. Pipe's primary source for non-Domestic Fittings was Sigma, with Star as its secondary Supplier. Currently, U.S. Pipe purchases non-Domestic Fittings primarily from Star, with Sigma as a secondary supplier. (Morton, Tr. 2819-2820).

1284. After U.S. Pipe stopped manufacturing Fittings in April 2006 until 2010, U.S. Pipe's sole source for Domestic Fittings was McWane. (Morton, Tr. 2810, 2818, 2820, 2857).

1285. Following the passage of ARRA in 2009, U.S. Pipe needed to ensure that it had sources for Domestic Fittings. (Morton, Tr. 2826).

1286. U.S. Pipe believed that it would benefit from having more than one supplier for Domestic Fittings because it wanted to, among other reasons, ensure supply and enjoy the benefits of competition. (Morton, Tr. 2826-2827).

1287. U.S. Pipe began investigating small and medium Domestic Fittings sources other than McWane in early 2009. (Morton, Tr. 2825-2826).

1288. U.S. Pipe initially considered manufacturing its own Domestic Fittings in response to ARRA. U.S. Pipe stopped investigating that option in part because Sigma contacted it in June of 2009 and made a commitment to produce Domestic Fittings. (Morton, Tr. 2876-2877).

1289. The primary reason U.S Pipe decided not to manufacture its own Domestic Fittings in response to ARRA was that it would be cost prohibitive given ARRA's "limited window." (Morton, Tr. 2867-2877, 2876, 2888; RX 701 (Morton, Dep. at 47-49, 56-57)).

1290. Sigma told U.S. Pipe in August 2009 that Sigma had no concrete plans to begin producing Domestic Fittings. (Rona, Tr. 1693-1694).

1291. In September 2009, U.S. Pipe and Star discussed the potential purchase by U.S. Pipe of Domestic Fittings from Star. (Morton, Tr. 2834-2835; CX 2215 at 001).

1292. On September 3, 2009, Mr. McCutcheon of Star sent an email to Mr. Thomas Morton, U.S. Pipe's Vice President of purchasing, and others at U.S. Pipe, thanking them for meeting the day before, and setting forth a schedule for the availability of Star's Domestic Fittings. (CX 2215 at 002-003; *see also* RX 207 (same schedule as sent to Ferguson in more legible form)).

1293. On September 15, 2009, Mr. Morton wrote an email to Ms. Susan Schepps of Star's sales group stating: "We are definitely interested in pursuing the purchasing of our domestic requirements from Star and are looking forward to receiving the list of configurations that will be available." (Morton, Tr. 2834-2835; CX 2215 at 001).

1294. On September 28, 2009, Mr. Morton met with Ms. Schepps in Birmingham, Alabama regarding U.S. Pipe's interest in purchasing Domestic Fittings from Star. Ms. Schepps provided a detailed list of Domestic Fittings products that Star was committed to having available by the end of 2009. (Morton, Tr. 2835-2837; CX 1936).

1295. Star initially proposed to U.S. Pipe pricing for 3" to 12" in diameter Domestic Fittings that matched McWane's Domestic Fittings multipliers. In response to U.S. Pipe's statement to Star that it needed to incentivize U.S. Pipe to leave McWane, Ms. Schepps further committed to U.S. Pipe that Star would offer Domestic Fittings pricing significantly below McWane's in exchange for a major portion of U.S. Pipe's volume. (CX 1936 at 001; Morton, Tr. 2837-2838).

b. Impact of Full Support Program on U.S. Pipe

1296. After U.S. Pipe received notice of McWane's September 22, 2009 Full Support Program, Stephen Gables of U.S. Pipe's sales group forwarded the letter to Mr. Crawford, Mr. Morton, and U.S. Pipe's President Ray Torok, noting as follows:

> There was a lot of buzz last week about [McWane] preparing to "cut off" certain wholesale distributors if they were found to have purchased any STAR domestic product. These letters make that buzz more like the sound of a 757.

(CX 2205 at 001; Morton, Tr. 2849).

1297. U.S. Pipe has never had a Fittings rebate program in place with McWane. (Morton, Tr. 2849, 2862).

1298. On October 13, 2009, Mr. Morton met with Mr. Tatman in Birmingham, Alabama regarding how McWane wanted to conduct business with U.S. Pipe going forward. In that meeting, Mr. Tatman explained to Mr. Morton that McWane's agreement with Sigma (F. 1540, 1571-1573) would not allow Sigma to supply U.S. Pipe with McWane manufactured Domestic

Fittings and that U.S. Pipe would have to buy Domestic Fittings from McWane directly. (Morton, Tr. 2840-2842).

1299. In the October 13, 2009 meeting between Mr. Morton and Mr. Tatman (F. 1298), Mr. Tatman explained that U.S. Pipe would be required to purchase 100% of its domestic requirements from McWane, and not purchase Domestic Fittings from Star, unless McWane did not have the needed items or its lead times were too long. (Morton, Tr. 2842-2845; *see also* CX 2203 at 002 (Morton meeting notes indicating "Tatman - expect customers including USP to be loyal and purchase 100 percent of their requirements from [McWane]")).

1300. In the October 13, 2009 meeting between Mr. Morton and Mr. Tatman, Mr. Tatman also explained that U.S. Pipe could not "cherry pick" "A" or "B" items, or high volume Domestic Fittings from Star, and expect McWane to supply the balance. (CX 2203 at 002; Morton, Tr. 2845-2846). In notes Mr. Morton took of that meeting, Mr. Morton recorded: "if USP strays and purchases any of these fittings from Star, don't come back to [McWane] and expect [McWane] to sell any of the AWWA 4" to 24" fittings to USP." (CX 2203 at 002).

1301. Because U.S. Pipe needed access to a full line of Domestic Fittings, not just the "A" and "B" items initially being offered by Star, Mr. Morton's recommendation to his boss after meeting with Mr. Tatman in October 2009 was to continue to look for alternative sources, but unless U.S. Pipe was convinced that those sources could provide 100% of U.S. Pipe's requirements for Domestic Fittings, U.S. Pipe needed to take the notification from Mr. Tatman very seriously and buy its Domestic Fittings from McWane. (Morton, Tr. 2846, 2848).

1302. Mr. Morton instructed his purchasing manager not to purchase Domestic Fittings from Star unless McWane could not provide the needed Domestic Fittings. (Morton, Tr. 2915-2916).

1303. Around November 12 or 13, 2009, Mr. Morton and Stephen Gables of U.S. Pipe met with Mr. McCutcheon and Ms. Schepps of Star. At that meeting, U.S. Pipe conveyed to Star the message that U.S. Pipe received from McWane that if U.S. Pipe purchased any of its Domestic Fittings requirements from

anyone other than McWane, then McWane would not sell U.S. Pipe any Domestic Fittings. (CX 2217 at 002; Morton, Tr. 2853-2854).

1304. U.S. Pipe further conveyed to Star in the November 2009 meeting that "[w]e must have 100% confidence in Star's ability to deliver all of our domestic requirements" before moving away from McWane. (CX 2217 at 002; Morton, Tr. 2854-2855).

1305. With the exception of minor purchases falling within the limited exceptions to McWane's Full Support Program (*e.g.*, where McWane's lead time to supply the requested Fitting was too long, or if McWane didn't make a particular Fitting configuration), U.S. Pipe did not purchase significant amounts of Domestic Fittings from Star until September of 2010. (Morton, Tr. 2856-2859, 2915-2916).

c. U.S Pipe's views on and purchases from Star

1306. Prior to the end of 2009, Star was not manufacturing many of the Fittings that U.S. Pipe required. (Morton, Tr. 2860, 2899-2901 ("Q. And then below is literally eight pages of single-spaced references to many, many domestic fittings that Star was anticipating producing; correct? A. Correct. . . . Q. And it's true, sir, isn't it, that many of the different item numbers listed on these eight pages were in fact not available by the end of 2009; correct? . . . A. I do not believe they were.)).

1307. Early in Star's domestic development process, U.S. Pipe, had concerns about Star's ability to provide a full line of Domestic Fittings. (Morton, Tr. 2892-2894 (certain Domestic Fittings, for example, the C153s up to 24 inches would not be available until as late as February 15, 2010 and other Domestic Fittings, for example, the DI full-body MJ fittings up to 24 inch would be available only "by project," meaning that if U.S. Pipe had a requirement for that type of Fitting, U.S. Pipe would submit it, and Star would provide U.S. Pipe with a lead time of up to 90 days)).

1308. In 2009, U.S. Pipe was concerned that Star would not commit to putting the tooling in place in advance of getting a requirement for volume. (Morton, Tr. 2893-2894).

1309. From January 2010 to September 2010, U.S. Pipe purchased a minor number of Domestic Fittings from Star in instances where McWane could not provide the required fittings. (Morton, Tr. 2915-2916).

1310. In September 2010, U.S. Pipe was purchasing "a significant portion" of its Domestic Fittings from Star. (Morton, Tr. 2856-2857).

1311. In September 2010, U.S. Pipe "decided as an executive team that the risk of [McWane] not selling us [Domestic Fittings] even if [U.S. Pipe] bought from Star, given the announced FTC investigation, would be significantly less . . . . We believed that [McWane] would not refuse to sell us [Domestic F]ittings." (Morton, Tr. 2857-2858; CX 2210 at 001 ("We also believe that with the current FTC investigation that it is unlikely that McWane will deny selling domestic fittings to USP.")).

1312. McWane never cut off U.S. Pipe from sales of Domestic Fittings. (Morton, Tr. 2861-2862).

10. Full Support Program as it relates to Groeniger

a. Impact of Full Support Program on Groeniger

1313. Prior to the Full Support Program, in September 2009, Groeniger gave Star Domestic Fittings business on "two sizeable projects" to "test[] to find out if Star could produce the domestic fittings." (CX 2509 (Groeniger, IHT at 110); CX 2510 (Groeniger, Dep. at 213-214)).

1314. Groeniger awarded the two projects (F. 1313) to Star for Domestic Fittings "[b]ecause they were more competitive." Groeniger wanted another supplier of Domestic Fittings for "competitive pricing" and "better availability" and "better service." (CX 2509 (Groeniger, IHT at 111-112)).

1315. After McWane's Full Support Program was announced, Groeniger was reluctant to purchase Domestic Fittings from Star "[b]ecause of the inherent threats of retaliation" from McWane. (CX 2510 (Groeniger, Dep. at 207) ("Q. Have you considered purchasing more [ductile] iron pipe fittings from Star on the domestic side? A. Yes. Q. And did you purchase more domestic [ductile] iron pipe fittings from Star? A. Probably not. Q. Why not? A. Because of the inherent threats of retaliation. Q. Who was threatening you? A. Tyler."); CX 2509 (Groeniger, IHT at 116-118) ("Q. Sir, you testified just now I asked you why you haven't purchased any more domestic fittings from Star and you responded, well, because of the potential retribution. Do you recall that? A. Yes. Q. Did you mean because of the potential retribution from Tyler? A. Yes.")).

1316. In 2009, Groeniger needed access to McWane's Domestic Fittings in order to service customers with McWane-only Domestic Fitting requirements. (CX 2510 (Groeniger, Dep. at 214-215) ("There are one or two districts that are big . . . [that have a] Tyler requirement, they didn't approve Star domestic, they wouldn't approve them. . . . So the realization is if we were going to be in that ballgame during that period of time when that was the biggest entity of anything going on in the Hayward region, and to support two of our major contractors in the area that were bidding work down there, we had to have Tyler. And Tyler knew that, it was pretty obvious.")).

1317. Groeniger was concerned about "[b]eing shut out" from McWane if it purchased Domestic Fittings from Star. (CX 2509 (Groeniger, IHT at 119) ("Q. What's your understanding of the possible consequences of purchasing domestic fittings from Star in terms of what Tyler might do? A. Being shut out.")).

1318. Groeniger described the Full Support Program as "the hammer" that "could [a]ffect you price-wise and availability-wise" and could put Groeniger "theoretically out of business." (CX 2509 (Groeniger, IHT at 142-143)).

1319. McWane never withheld rebates from Groeniger, even though Groeniger bought Domestic Fittings from Star. (RX 669

(Groeniger, Dep. at 99) ("Q. In the 2009 time frame after receiving [the Full Support Program] and later, did Tyler ever not pay you a rebate that you were due because you had a relationship with Star? A. I don't think so.")).

1320. McWane never refused to sell Domestic Fittings to Groeniger, even though Groeniger bought Domestic Fittings from Star. (RX 669 (Groeniger, Dep. at 99) ("Q. In the 2009 time frame after receiving [the Full Support Program], Mr. Groeniger, did Tyler ever refuse to sell you something because you had a relationship with Star? A. Not to my knowledge.")). *See also* RX 643 (Tatman, IHT at 197-198 (Groeniger was "using Star product. We talked to Mike the owner -- nice guy -- at a trade show, and Mike basically said, Look, we're going to do what we have to do, and you guys do what you have to do. And we left it that way. We never -- we wanted them to support us. We made a little bit of rumbling to have them support us, but in the end, we kept selling Groeniger material.")

1321. McWane increased prices on Domestic Fittings it sold to Groeniger in 2010. (CX 2509 (Groeniger, IHT at 143); CX 2510 (Groeniger, Dep. at 216)).

b. Groeniger's views on and purchases from Star

1322. The two projects that Groeniger awarded to Star in September 2009 (F. 1313) "were difficult jobs," but Star performed to Groeniger's satisfaction. (CX 2509 (Groeniger, IHT at 110)).

1323. After McWane announced its Full Support Program, Mr. Berry of Star had at least three conversations with representatives of Groeniger, including Mike Groeniger, President of Groeniger. (CX 2532 (Berry, Dep. at 111-113)).

1324. After September 22, 2009, Star perceived that Groeniger had fears that it would not be able to purchase Domestic Fittings from McWane if Groeniger purchased Domestic Fittings from Star. As a result, Star pursued selling Domestic Fittings to Groeniger indirectly, through Griffin Pipe. (CX 2532 (Berry, Dep. at 110-114); RX 224).

1325. In October 2009, Groeniger and Star negotiated a sale whereby Groeniger purchased Star's Domestic Fittings indirectly through Griffin. (CX 2532 (Berry, Dep. at 114-115)).

1326. In an internal email from Mr. Berry to Mr. McCutcheon and others at Star dated October 29, 2009, Mr. Berry reported: "All 24" fittings will be excluded on this [Groeniger] order, because of our delivery dates." (RX 224; McCutcheon, Tr. 2625-2626) (These fittings were excluded by Groeniger because Star couldn't meet the delivery dates.).

1327. In the October 29, 2009 email (F. 1326), Mr. Berry also reported: "They [Groeniger] want this material brought into Sacramento, so they can will call. . . . They will commit all domestic/import business to us if we do so." (RX 224; McCutcheon, Tr. 2625-2526) (Groeniger was willing to buy from Star in October 2009).

1328. In a March 10, 2010 internal email to Mr. McCutcheon, Mr. Berry reported that Groeniger wanted to purchase Domestic Fittings from Star for another project, but had committed to McWane because of the Full Support Program. (CX 2532 (Berry, Dep. at 163-164); CX 2288).

1329. After October 2009, Groeniger did purchase Domestic Fittings from Star, but not frequently. (CX 2532 (Berry, Dep. at 114-115); *see also* McCutcheon, Tr. 2591-2594) (Groeniger purchased Domestic Fittings from Star following the issuance of McWane's Rebate Policy.).

1330. In 2010, Groeniger would have given Star more of its Domestic Fittings business if McWane had not announced the September 2009 Full Support Program. (CX 2510 (Groeniger, Dep. at 219) ("Q. So had Tyler not issued this letter in September 2009, you would have purchased 50 percent of your domestic fittings needs from Star? A. I would think we would have. Knowing personalities involved, knowing the history involved and the sales people that Star had currently in effect in the Central Valley coming out of Sacramento who were very astute to our needs and our capabilities, I think so, yeah.")).

11. Full Support Program as it relates to WinWater

1331. Mr. Eddie Gibbs, vice president of vendor relations for WinWholesale, which does business as WinWater Works ("WinWater") (F. 236), visited Star's Houston, Texas facility on September 10, 2009. WinWater was potentially interested in purchasing Domestic Fittings from Star and wanted to access "how fast they were ramping up production, when product would be able to be shipped." (CX 2545 (Gibbs, IHT at 41-42)).

1332. On September 22, 2009, Mr. Gibbs received notice of McWane's Full Support Program from Mr. Tatman. (CX 2167 at 001).

1333. On September 24, 2009, Mr. Gibbs emailed all the WinWater local companies (branches), Regional Vice Presidents, Area Coordinators and Area Leaders, forwarding McWane's Full Support Program announcement. (CX 2166 at 001-002; CX 2546 (Gibbs, Dep. at 72)).

1334. On November 2, 2009, Mr. Gibbs emailed Mr. Tatman stating: "This email will serve as our official acceptance of the terms of the [Full Support Program]. Any violation of this agreement that Tyler identifies will be brought to WinWholesale corporate's . . . attention before any punitive action takes place against the local company." (CX 2167 at 001).

1335. On April 14, 2010, Mr. Gibbs emailed all the WinWater local companies, Regional Vice Presidents, Area Coordinators and Area Leaders, again forwarding McWane's Full Support Program and stating: "It has come to my attention that I had failed to put out a specific notice concerning **Star Pipe** being given **Not Approved** status on their new line of [Domestic Fittings]." (CX 2166 at 001 (emphasis in original); CX 2546 (Gibbs, Dep. at 72)).

1336. Star was verbally notified of WinWholesale's intention to place Star on its "not approved" list for Domestic Fittings in early December 2009 and received "written notice on February 5, 2010 in the form of our 2010 Preferred Vendor letter listing them as NOT APPROVED . . . ." (CX 2166 at 001 (emphasis in original); CX 2546 (Gibbs, Dep. at 72-73); *see also* RX 601 at

001 (internal McCutcheon email stating "WinWholesale VP, Eddie Gibbs sent letter to their people telling them that Star can not be a provider on Domestic fittings.")).

1337. At WinWholesale, "any vendor that receives not approved status means that the local companies are not to buy from them under any circumstances unless they seek board approval." (CX 2546 (Gibbs, Dep. at 73)).

1338. Although it placed Star on the "Not Approved" vendor list for Domestic Fittings, WinWholesale instructed the WinWater companies that they could purchase Domestic Fittings from Star "if, because of Tyler's inability to perform, they have to buy domestic fittings from Star." (CX 2166 at 002).

1339. WinWholesale was not concerned about the overall WinWater locations being able to get product from Tyler/Union, if an individual WinWater local company purchased Domestic Fittings from Star. (CX 2546 (Gibbs, Dep. at 82-83); RX 705 (Gibbs, Dep. at 35-36) (Gibbs did not interpret the Full Support Policy as McWane telling WinWholesale that they would not sell Domestic Fittings to WinWholesale)).

1340. WinWholesale had some concerns that if the WinWater local companies, "on an ongoing basis," purchased Domestic Fittings from Star, they would lose their rebate and "be placed at the back of the line when [they] place [their] Tyler/Union orders." (CX 2546 (Gibbs, Dep. at 82-83)).

1341. In 2010, WinWholesale had concerns about Star's reliability as a domestic Fittings supplier that were independent of McWane's Full Support Program. WinWholesale was concerned about whether Star had the capacity and quality, whether Star could ship the product, and whether the product would be consistent. (RX 705 (Gibbs, Dep. at 87-88, 93-94) ("[I]f Tyler/Union had never written this letter, I would still have the same issues that I've stated.")).

1342. Mr. Gibbs put Star on the "not approved" list not because of the rebate element of the Full Support Program, but because WinWholesale had no background on where Star was

making its product, because Star had not produced any test data or anything that would lead WinWholesale to believe that Star was as credible a vendor on Domestic Fittings as it was on imported Fittings, or that they could do a good, consistent job making Domestic Fittings using seven foundries. (RX 705 (Gibbs, Dep. at 85-88)).

1343. After McWane announced its Full Support Program, Star sold Domestic Fittings to WinWater. (McCutcheon, Tr. 2591-2592).

1344. McWane has never withheld a rebate to WinWholesale even though WinWholesale bought Domestic Fittings from Star. (RX 705 (Gibbs, Dep. at 35-39); RX 638 (McCullough, IHT at 173)).

1345. McWane has never cut off or threatened to cut off WinWholesale from purchasing Domestic Fittings from McWane even though WinWholesale bought Domestic Fittings from Star. (RX 705 (Gibbs, Dep. at 36)).

12. Full Support Program as it relates to TDG

a. TDG Vendor Committee negotiations on rebates

1346. The Distribution Group ("TDG") collectively negotiates various terms, including rebates, with suppliers, which it refers to as vendors, on behalf of its 32 independent Distributors. Vendors pay earned rebates to TDG and TDG then distributes those rebates back to the member Distributors in proportion to their purchases. TDG members must purchase certain percentages of their purchases from TDG vendors, but members are not required to purchase products from any specific vendor just because the vendor has a rebate program with TDG. F. 244-249.

1347. McWane had a rebate program in place with TDG for Domestic Fittings in 2007, 2008, and 2009. (CX 2494 (R. Fairbanks, Dep. at 107-108), *in camera*; CX 1361 at 004, 018, 034, *in camera*). In negotiating terms with TDG, McWane did not include a rebate for Domestic Fittings in its 2010 proposal.

(CX 2494 (R. Fairbanks, Dep. at 107-108), *in camera*; CX 1366 at 002).

1348. The TDG Vendor Committee wanted to have a rebate proposal on Domestic Fittings from McWane. (CX 2494 (R. Fairbanks, Dep. at 107), *in camera*).

1349. In September of 2009, at the annual TDG Vendor Committee negotiations, McWane explained that its new rebate program for TDG required TDG to police its members' Domestic Fittings purchases to ensure that all locations for all TDG Distributors purchase all of their Domestic Fittings from McWane. Unless all TDG members purchased their Domestic Fittings solely from McWane, McWane would cut off all TDG members' access to McWane's Domestic Fittings. (Sheley, Tr. 3408-3409).

1350. TDG did not accept McWane's September 2009 Domestic Fittings rebate proposal, in part, because TDG refused to police its members' Domestic Fittings purchases. (Sheley, Tr. 3409; CX 2494 (R. Fairbanks, Dep. at 113-114), *in camera*).

1351. In 2010, TDG selected Star, but not McWane, as a TDG Domestic Fittings vendor partner. Selecting Star as a vendor partner did not require TDG members to buy any Domestic Fittings from Star, nor did it preclude TDG members from buying Domestic Fittings from McWane. However, by selecting Star as a vendor partner, TDG did give its members an incentive to buy from Star. (RX 694 (Bhutada, Dep. at 155; CX 2494 (R. Fairbanks, Dep. at 17-18, 33, 37-38), *in camera*; RX 675 (Sheley, Dep. at 68); RX 652 (Johnson, Dep. at 35-36)).

1352. The 2010 proposal that Star offered to give all members of TDG, and that TDG accepted, was a [redacted]% rebate on all purchases of Domestic fittings 3" to 48" mechanical joint, push-on, and flanged. (RX 601 at 025-027, *in camera*; McCutcheon, Tr. 2646-2647, *in camera*).

b. Various TDG members' views and purchases from Star

1353. C.I. Thornburg, in 2010, purchased 95-98% of its Domestic Fittings from Tyler Union or Sigma, which sold Tyler Union Domestic Fittings. Towards the end of 2010, C.I. Thornburg started purchasing small amounts of Star Domestic Fittings that would "not get McWane's attention." (CX 2489 (Morrison, IHT at 64-67)). C.I. Thornburg would have been interested in purchasing "A" item Fittings from Star and then purchasing odd ball Fittings from McWane and would have given a third to a half of all its domestic business to Star, but for McWane's Full Support Program. (CX 2489 (Morrison, IHT at 83-86)).

1354. Western Waterworks' Mr. Jim McDowell, a sales manager and now part owner of Western Waterworks, informed Mr. Berry of Star in the course of its negotiations with Star that Western Waterworks was willing to purchase Domestic Fittings from Star only if the transaction could "fly under the radar," *i.e.*, that McWane would not find out about the sales. (CX 0011; CX 2532 (Berry, Dep. at 124)).

1355. HD Fowler Company informed Mr. Berry of Star in January 2010 that it would not purchase Star's Domestic Fittings because it was afraid that McWane would not sell Domestic Fittings to HD Fowler if HD Fowler purchased Domestic Fittings from Star. (CX 2532 (Berry, Dep. at 134)). Star submitted bids for Domestic Fittings to HD Fowler for a project called "Shelton WWTP." HD Fowler purchased large Domestic Fittings from Star for this project because, at the time, Star could deliver the product more quickly than McWane. (CX 2532 (Berry, Dep. at 168)). However, for the same project, HD Fowler was unable to purchase smaller Domestic Fittings from Star because McWane could supply the product. (CX 2532 (Berry, Dep. at 167-169) (also testifying that HD Fowler did not purchase Domestic Fittings from Star for its Coeur d'Alene, Idaho WWTP project; its Pendleton, Oregon WWTP project, or its HD Valley-Brownsville project); CX 2288).

1356. Hayes Pipe informed Star that it would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (CX 2537 (McCutcheon, IHT (Vol. 1) at 163), *in camera*).

13. Full Support Program as it relates to Illinois Meter

a. Impact of Full Support Program on Illinois Meter

1357. Illinois Meter, a member of TDG, was informed independently of TDG, by Mr. Tatman, Mr. Jansen, and Ms. Jennifer Heys of McWane, that the terms of McWane's Full Support Program applied to Illinois Meter. Mr. Tatman and Mr. Jansen told Mr. Sheley of Illinois Meter that if Illinois Meter purchased Domestic Fittings from anyone but McWane, it "would lose the right to buy [McWane's Domestic Fittings] completely" and would also lose its rebate from its purchases of non-domestic Fittings. Mr. Tatman and Mr. Jansen told Mr. Sheley this in September 2009 at a TDG meeting, and Mr. Jansen reiterated the message in January of 2010 at the TDG meeting in Dallas. (Sheley, Tr. 3407-3411).

1358. Losing access to McWane's Domestic Fittings was a more serious consequence to Illinois Meter than losing McWane's rebates because Illinois Meter needs to have access to a full line of Domestic Fittings in certain locations and McWane carries a complete line. (Sheley, Tr. 3412).

b. Illinois Meter's views on and purchases from Star

1359. Illinois Meter still would have purchased 90-plus percent of its Domestic Fittings from McWane, whether the Full Support Program existed or not. (RX 674 (Sheley, IHT at 90) ("Q: Had McWane not implemented this policy, would you have purchased domestic Fittings from Star? A: Probably not. I'd probably still be buying 90-plus percent of all my stuff from [McWane].")).

1360. In 2009, when Star first announced its Domestic Fittings product line, McWane's Full Support Program did not affect Illinois Meter's decision to not buy Domestic Fittings from Star. (RX 675 (Sheley, Dep. at 162-163) ("Q. But you also said that unequivocally you would not be purchasing Star's domestic? A. In 2009, that's correct. Q. So McWane's -- or Tyler's rebate policy had no effect whatsoever on your decision? A. At that point when they first come out with it, no, it did not.")).

1361. Illinois Meter had a negative experience with Star's reliability as a supplier when Star first entered the joint restraint business, and was not willing to give Star any Domestic Fittings orders in early 2010 until Star had demonstrated it had sufficient inventory to meet Illinois Meter's needs. (Sheley, Tr. 3448-3451).

1362. Illinois Meter did not think that Star could supply Illinois Meter with a complete line in early 2010 and Illinois Meter was not willing to risk coming up short on a project if it could not turn to McWane for Domestic Fittings because of McWane's Full Support Program. In the summer of 2010, Illinois Meter was interested in purchasing Domestic Fittings from Star for an ARRA-funded water treatment plant in Winchester, Illinois, and for a Domestic specification job in Macomb, Illinois. Both projects required smaller-diameter Domestic Fittings that Illinois Meter believed Star could provide. (Sheley, Tr. 3413, 3417-3418).

1363. Illinois Meter did purchase a half dozen Domestic Fittings from Star to evaluate their quality and because it had a couple of engineers who wanted to see what they looked like. Although Illinois Meter found the quality of Star's Domestic Fittings to be very good, Illinois Meter does not buy or supply them. (Sheley, Tr. 3419-3420).

1364. Illinois Meter does not buy Domestic Fittings from Star and has been unwilling to stock or ship Star's Domestic Fittings because it does not want to lose the ability to buy McWane's Domestic Fittings. (Sheley, Tr. 3407-3408).

14. Serampore Industries Private decides not to enter the Domestic Fittings market

1365. Serampore Industries Private ("SIP") supplies Fittings in the United States that it imports from China, India, and Mexico, and currently sells to approximately 50 to 60 Distributors in approximately 35 states. (CX 2522 (Agarwal, Dep. at 6, 22, 29, 38), *in camera*; CX 2521 (Agarwal, IHT at 13), *in camera*).

1366. From May 2009 to September 2009, SIP evaluated entering the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 56, 107, *in camera*)).

1367. When Star announced in June 2009 that it would begin producing Domestic Fittings, SIP began to look more closely at entering the Domestic Fittings market because SIP did not want to be left behind as a supplier without a Domestic Fittings offering. SIP was concerned that Star could increase its import sales if it had a domestic offering also. (CX 2522 (Agarwal, Dep. at 93-94), *in camera*; CX 2521 (Agarwal, IHT at 158-159), *in camera*).

1368. SIP interviewed foundries and customers as SIP evaluated whether to enter the Domestic Fittings market. (RX 681 (Agarwal, Dep. at 56-57), *in camera*).

1369. Customers, including HD Supply, informed SIP that they wanted another source of Domestic Fittings, because McWane was currently the only source, and it was better to have multiple choices. (CX 2522 (Agarwal, Dep. at 111-112), *in camera*).

1370. SIP had a preexisting relationship with U.S. Foundry. These companies had bought and sold municipal castings and other products from one another for 30 years. In 2009, U.S. Foundry had the equipment and excess capacity to produce for SIP Domestic Fittings up to 12 inches, but did not have the immediate capacity to produce Domestic Fittings up to 24 inches. (CX 2522 (Agarwal, Dep. at 101-103), *in camera*).

1371. U.S. Foundry quoted SIP approximately [redacted] cents per pound for the production of Domestic Fittings castings under 12". Mr. Bharat Agarwal, SIP's Vice President for business development, believed that this production cost would allow SIP to meet its margin requirements. (CX 2522 (Agarwal, Dep. at 103), *in camera*; *see also* CX 0004 at 001, *in camera*).

1372. SIP never entered into any contract or agreement with U.S. Foundry to produce fittings for SIP. (CX 2522 (Agarwal, Dep. at 62-63), *in camera*).

1373. SIP estimated that manufacturing Domestic Fittings would require a 5 to 10 million dollar investment. SIP had sufficient internal financing available to cover its estimated costs to enter the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 60, 100-101), *in camera*).

1374. To be viable in the Domestic Fittings market, SIP estimated that it needed a minimum gross margin of approximately [redacted]%, and a minimum net margin of about [redacted]%. SIP believed it could meet those margin targets if SIP entered the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 95-96), *in camera*).

1375. While SIP had a spare set of Fitting patterns up to 24" in diameter in China available for producing Domestic Fittings, it was not known whether those patterns could be used for domestic production and even if they could be used, substantial rework would have been required. (CX 2521 (Agarwal, IHT at 152-154), *in camera*; CX 2522 (Agarwal, Dep. at 97), *in camera*).

1376. SIP viewed the implications of McWane's Full Support Program as significant to the Distributors that were SIP's potential Domestic Fittings customers. SIP believed that McWane's policy would deter Distributors from purchasing Domestic Fittings from SIP because forgoing Domestic Fittings shipments from McWane for up to 12 weeks, and delaying an End User's project, were significant penalties. (CX 2521 (Agarwal, IHT at 199-200), *in camera*).

1377. Given SIP's evaluation of the consequences to Distributors of McWane's Full Support Program, SIP believed it would have difficulty acquiring Domestic Fittings Distributor customers if it entered the market with something less than a full line of Domestic Fittings, and it therefore decided not to enter. (CX 2521 (Agarwal, IHT at 200-202), *in camera* ("[I]f it's a domestic job, then you need to have a domestic fitting, and if [the Distributor is] buying from either SIP or Star and you only had A fittings let's say and even if it was a B fitting, even if it was an A fitting which was 24 inches in diameter, . . . so the distributor would be stuck for twelve weeks. They could not live with that.")).

1378. SIP made its determination to not enter the Domestic Fittings market for numerous business reasons, including the fact that ARRA presented a very short time window, that SIP believed it needed to offer a full line of fittings to be considered a viable supplier, that it had taken SIP three years to develop a full line of imported fittings, the uncertainties of success, the high cost of developing patterns for a full line of fittings, the fact that there was not one single foundry available to make all the fittings, the vagaries of long term supply given the changing capacity of jobber foundries, the 5 to 10 million dollar estimated cost to develop the line, the need/cost to develop drilling and machining capabilities, the uncertainties of the ARRA demand, and the uncertainties about the post-ARRA domestic demand. (CX 2522 (Agarwal, Dep. at 56-68), *in camera*).

1379. McWane's Full Support Program was not the only reason SIP decided not to enter the Domestic Fittings market. (CX 2522 (Agarwal, Dep. at 68), *in camera* ("I would like to clarify something at this point: I think in my previous testimony there has been a place where I mentioned that this letter was the reason why we stopped exploration of domestic production. I'd like to further clarify: This letter wasn't the only cause. All these other reasons which we just went through in this deposition all added up and summed up to that.")).

1380. While McWane's Full Support Program was not the only reason SIP decided not to enter the Domestic Fittings market, it was a significant reason. (CX 2522 (Agarwal, Dep. at 67-68), *in camera* ("That was the straw that broke the camel's back.")).

15. Impact of McWane's Full Support Program on Star

a. Star's perception of McWane's Full Support Program

1381. After McWane announced its Full Support Program on September 22, 2009, Star observed a decline in the number of requests for quotes that resulted in customer orders after McWane's announcement. (Bhargava, Tr. 2958-2960, *in camera*).

1382. After McWane announced its Full Support Program on September 22, 2009, numerous Distributors, including HD Supply, Ferguson, Winwater, and independent customers pulled their requests for quotes from Star. (CX 2535 (Bhutada, Dep. at 80, 87-88), *in camera*; *see also* F. 1242 (HD Supply); F. 1263 (Ferguson)).

1383. Star believed that HD Supply would not buy Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2329-2330; *see also* CX 2537 (McCutcheon, IHT (Vol. 1) at 168-169); *see also* Bhargava, Tr. 2976-2977, *in camera*).

1384. Star believed that Ferguson would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2326-2327; Bhargava, Tr. 2976-2977, *in camera*).

1385. Star believed that Distributor Custom Fab would not purchase Star's Domestic Fittings because of McWane's Full Support Program. (McCutcheon, Tr. 2321-2324).

1386. Star believed that Distributor Dana Kepner would not purchase Star's Domestic Fittings because of McWane's Full Support Program. (McCutcheon, Tr. 2324-2326).

1387. Star believed that Distributor Prescott Supply, PJP would not purchase Star's Domestic Fittings because of McWane's Full Support Program. (McCutcheon, Tr. 2326).

1388. Star believed that Distributors Illinois Meter and C.I. Thornburg would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2327-2328 (Mr. McCutcheon received reports from his sales force that Distributors Illinois Meter and C.I. Thornburg would not purchase Domestic Fittings from Star because of McWane's Full Support Program)).

1389. Star believed that Distributor WinWater would not buy Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2329 (Eddie Gibbs, an employee at Distributor WinWater, informed Mr. McCutcheon that WinWater

could not buy Domestic Fittings from Star because of McWane's Full Support Program, and that he had instructed his employees not to purchase Domestic Fittings from Star)).

1390. Star believed that Distributors Western Water Works and Wells Supply would not purchase Domestic Fittings from Star because of McWane's Full Support Program. (McCutcheon, Tr. 2330-2333 (Star Territory Manager John Ristine informed his superiors that Distributor Western Water Works reported that if it purchased Star's Domestic Fittings, McWane would cut them off, and that Distributor Wells Supply reported that if it purchased Star's Domestic Fittings McWane would either double the sell price for shorts or cut them off altogether); CX 0011).

1391. Even when Star offered a rebate program to TDG Distributors that was more generous than McWane's rebate program (F. 1347), some TDG members were still unwilling to buy from Star. F. 1353-1356; 1364. Star believed that these Distributors were unwilling to purchase from Star because of the "all-or-nothing domestic fitting policy from McWane." (McCutcheon, Tr. 2648-2650, *in camera*).

1392. Star believed that McWane's Full Support Program made Distributors less willing to take the risk of purchasing Domestic Fittings from Star. As Mr. Berry, Star's Regional Sales Manager explained in his deposition:

> Every distributor -- every customer distributor that we talked to or that I talked to after this letter came out, wanted to talk about it. And they all wanted to know what I had seen in other parts of the countr[y] or if any distributors were purchasing our domestic. And if so, had Tyler punished them. And -- and I had not seen anywhere or heard from anybody that -- that there was any repercussions for people buying our fittings anywhere from anybody. But the fear that something could happen in -- in areas that actually buy domestic fittings, customers are afraid. They don't want to take the chance of the what-if.

(CX 2532 (Berry, Dep. at 144)).

1393. Star would not have been able to compensate Distributors for taking the risk of buying Domestic Fittings from Star created by McWane's Full Support Program. (CX 2513 (Webb, IHT at 204-205) ("not enough money . . . that could be offered" to compensate HD Supply for assuming the risk of dealing with Star under the terms of McWane's Full Support Program); CX 2491 (Johnson, IHT at 66-67) ("Q. [I]s there any way that Star could have compensated you for taking that risk on before July of 2010? A. I don't think so. I mean you can have all the guaranties from a money standpoint, but you're still not servicing your customer. And the long-term fallout from that could have been much more than a million dollars."); *see also* CX 2537 (McCutcheon, IHT (Vol. 1) at 196) (Star's cost structure would not allow it to cut prices further); CX 2537 (McCutcheon, IHT (Vol. 1) at 156-157) (Star could not compensate a Distributor for purchasing any Domestic Fittings from Star by charging the Distributor a lower price, because a Distributor would not accept the risk of losing access to any supply from McWane)).

1394. Star estimated that, absent McWane's Full Support Program, Star would have [redacted] million dollars in sales of Domestic Fittings in 2010, potentially rising to an annual rate of [redacted] million dollars in 2011. (CX 2537 (McCutcheon, IHT (Vol. 1) at 110), *in camera*; CX 2535 (Bhutada, Dep. at 79), *in camera;*).

1395. Star's estimated lost sales due to McWane's Full Support Program (F. 1394) were based in part on 10 million dollars in requests for quotes for Domestic Fittings that Star received between June 15, 2009, when it announced its Domestic Fittings entry, and September 22, 2009, when McWane announced its Full Support Program. The requests for quotes included requests by HD Supply, Ferguson, Mainline, WinWater, and a variety of independent customers. (CX 2535 (Bhutada, Dep. at 79-80, 87), *in camera*).

b. Star did not generate enough sales to purchase its own foundry

1396. Star had approximately [redacted] million dollars in sales of Domestic Fittings in 2010. (CX 1801-A at 002, *in*

camera; CX 2535 (Bhutada, Dep. at 68), *in camera*; RX 698 (McCutcheon, Dep. at 136)).

1397. Star had approximately [redacted] million dollars in sales of Domestic Fittings in 2011. (CX 1801-A at 003, *in camera*; CX 2535 (Bhutada, Dep. at 68), *in camera*; RX 698 (McCutcheon, Dep. at 137)).

1398. Star had approximately [redacted] million dollars in sales of Domestic Fittings in the first quarter of 2012. (CX 1801-A at 004, *in camera*; CX 2535 (Bhutada, Dep. at 68-69), *in camera*).

1399. [redacted]. (Bhargava, Tr. 2970-1972, *in camera*; CX 1801-A at 002, *in camera*; CX 1801-A at 003, *in camera*).

1400. In 2009, Star estimated that it needed between [redacted] million dollars in sales of Domestic Fittings to justify purchasing its own domestic foundry. Since then, Star has estimated that it needs between [redacted] million dollars to justify purchasing its own foundry. (Bhargava, Tr. 2961-2963, *in camera*).

1401. Star was not able to generate a sufficient volume of sales of Domestic Fittings to realize cost efficiencies or justify operating a foundry of its own. (CX 2535 (Bhutada, Dep. at 84-85), *in camera*; CX 2537 (McCutcheon, IHT (Vol. 1) at 117-121, 179-181), *in camera*).

c. Star considered purchasing a dedicated foundry for Domestic Fittings production

1402. Star had been considering the purchase of its own domestic foundry in the spring of 2009. (CX 2533 (Bhargava, Dep. at 26), *in camera*).

1403. While there were no foundries for sale in 2009 that were equipped exclusively to produce Fittings, there were foundries available that could be converted for the exclusive production of Fittings. (CX 2535 (Bhutada, Dep. at 83-84), *in camera*).

1404. In September or October 2009, Star began considering the potential acquisition of the [redacted] foundry and entered into acquisition discussions with them. (Bhargava, Tr. 2956, *in camera*; CX 2535 (Bhutada, Dep. at 136-137), *in camera*; CX 2533 (Bhargava, Dep. at 67), *in camera*).

1405. Star estimated it would have to make an investment of approximately [redacted] million dollars to acquire the [redacted] foundry and to convert it to be a dedicated foundry for Fittings. (CX 2535 (Bhutada, Dep. at 138-139), *in camera*).

1406. Star had the financial reserves and borrowing ability to acquire the [redacted] foundry and to convert it to a dedicated foundry for Fittings. (CX 2535 (Bhutada, Dep. at 138-139), *in camera*).

1407. When evaluating whether to acquire the [redacted] foundry, Star considered whether it would have enough volume to support owning its own foundry. (Bhargava, Tr. 2959, *in camera*).

1408. McWane's announcement of its Full Support Program on September 22, 2009 impacted Star's decision to not move forward with the potential acquisition of [redacted] foundry. (CX 2535 (Bhutada, Dep. at 137), *in camera*; Bhargava, Tr. 2957-2958, 3020, *in camera*).

d. Star's costs of contracting with other foundries

1409. Rather than owning its own foundry, Star contracted with six foundries to produce raw castings for Domestic Fittings for Star, which Star then shipped to its Houston facility to perform the finishing process. (Bhargava, Tr. 2937-2940, 2999-3000, *in camera*; McCutcheon, Tr. 2618-2620; RX 572).

1410. Independent foundries are more costly and less efficient than a foundry owned and operated by Star would be because using independent foundries involves: less specialized and less efficient equipment; smaller batch sizes; additional logistical costs associated with inventory, finishing, and freight; less control over inventory levels; less ability to expedite orders;

and inefficiencies resulting from dealing with multiple foundries. (Bhargava, Tr. 2946-2949, 2974, *in camera*; CX 2535 (Bhutada, Dep. at 74, 126-127), *in camera*).

1411. Shipping costs from the six foundries utilized by Star (F. 1409) to Houston alone added approximately [redacted]% to the cost of Star's Domestic Fittings. (CX 2534 (Bhutada, IHT at 91), *in camera*).

1412. Independent foundries have higher labor costs because a dedicated foundry would have a labor force trained in producing Fittings and would therefore be more efficient than a non-specialized labor force at an independent foundry. (CX 2535 (Bhutada, Dep. at 129), *in camera*).

1413. Fittings produced at independent foundries are more costly than a Star operated foundry would be because the independent foundries add an estimated [redacted]% markup or profit margin for the production of Fittings sold to Star. (Bhargava, Tr. 2950, 2954, *in camera*; CX 2535 (Bhutada, Dep. at 74, 91, 128, 131), *in camera*)).

1414. Star's relationship with the independent foundries it uses for the production of Domestic Fittings is on a purchase order basis for the specific Fittings it seeks to have made. (CX 2533 (Bhargava, Dep. at 47), *in camera*).

1415. Star does not have long term, guaranteed price or minimum quantity supply contracts with the independent foundries utilized by Star for Domestic Fittings. (Bhargava, Tr. 2935-2936, *in camera*; CX 2533 (Bhargava, Dep. at 55), *in camera*).

1416. In 2010, Star had to stop using two of the six independent foundries that it had initially used for producing Domestic Fittings. In one case, the foundry lost its excess capacity and told Star that the foundry would stop filling orders within 30 days. In another case, the foundry determined that it had underestimated its costs of production, and asked for a price increase. (Bhargava, Tr. 2933, 2954-2955, *in camera*).

1417. As the overall economy has improved, particularly in 2012, the independent foundries that Star used for producing Domestic Fittings have become increasingly busy with work for other customers, which has impacted Star's Domestic Fittings delivery schedules and increased its costs. (Bhargava, Tr. 2941-2942, *in camera*; *e.g.*, CX 2375 at 001, 002, *in camera*).

1418. Star has little option but to accept surcharge and price increases from its independent foundries because there are fewer foundries with capacity that are willing to undertake the learning curve required to make Star's Domestic Fittings. (Bhargava, Tr. 2942-2945, *in camera* ("[W]hen they come to you with these demands, in the foundry environment you really don't have a choice . . . ."); CX 2375 at 001, *in camera*).

1419. Star estimated that the cost of producing Domestic Fittings at its own foundry would be [redacted]% lower than the cost of contracting with independent foundries. (Bhargava, Tr. 2963, 2995, *in camera*; *see also* CX 2535 (Bhutada, Dep. at 127), *in camera*; McCutcheon, Tr. 2343).

1420. Star estimated that if it owned its own foundry that produced its Domestic Fittings, Star could have lowered its Domestic Fittings prices by [redacted]%. (McCutcheon, Tr. 2343, 2348-2350; Bhargava, Tr. 2963-2964, *in camera*).

K. McWane and Sigma Enter into a Master Distribution Agreement[6]

1. Sigma's initial reaction to ARRA

1421. After ARRA was enacted, Sigma believed that it needed to offer Domestic Fittings. (CX 2524 (Box, Dep. at 22, 61, 82); CX 2530 (Rona, Dep. at 39-40, 239-240); Rona, Tr. 1457 (Sigma believed demand for Domestic Fittings would increase as a result of ARRA and that Sigma therefore "needed to explore the

[6] As defined *infra* F. 1540, on September 17, 2009, McWane entered into an OEM Distribution Agreement (commonly referred to as the "Master Distribution Agreement," or "MDA") for McWane to supply Domestic Fittings to Sigma for resale. (CX 1194 (signed MDA)).

option of being in a position to produce fittings for oursel[ves]"); CX 0219 at 001 (Rona writing in May 2009 that the ARRA Buy American requirement was an "extremely real threat" and that "[i]t is quite clear now that we need a credible plan"); RX 688 (Rona, IHT at 176-178 (After ARRA, there was "an immediate demand for fittings.")).

1422. Sigma knew that ARRA was a short term stimulus program. (RX 687 (Pais, Dep. at 182) ("It was intended as a shovel-ready stimulus. So there was a lot of emphasis on now. In fact, rightly speaking, we should have had that [domestic] capability on day one for us to have any capacity to supply the projects. So we were already behind the eight ball on day one, because it was just a ball from the blue.")).

1423. Sigma considered two potential avenues for entering the Domestic Fittings market: (1) purchasing "private label" Domestic Fittings from McWane (*i.e.*, Fittings manufactured by McWane for Sigma and branded as Sigma); or (2) producing Domestic Fittings using the "virtual manufacturing" model that it used for imported Fittings (*i.e.*, contracting with independent, domestic foundries). (Rona, Tr. 1630; Pais, Tr. 1752; CX 2528 (Pais, Dep. at 184-185)).

1424. Sigma pursued both private label and virtual manufacturing options for entering the Domestic Fittings market simultaneously because "the conditions were just so urgent." (Pais, Tr. 1758; CX 0231; CX 2530 (Rona, Dep. at 211-212)).

2. Sigma's initial discussions with McWane

1425. In the first half of 2009, Mr. Pais of Sigma asked McWane's CEO, Mr. Page, to supply Sigma with "private label" Domestic Fittings. (*See* CX 1225 at 003, 004; Pais, Tr. 1744-1745).

1426. In the spring of 2009, Mr. Pais told Mr. Page and Mr. McCullough of McWane that Sigma would pursue its own Domestic Production if McWane did not supply it with Domestic Fittings. (CX 2527 (Pais, IHT at 100-101, 105-106)).

1427. Mr. McCullough met with Mr. Pais in April 2009. After that meeting, Mr. McCullough believed that Sigma had the ability to enter into domestic production of fittings, had access to the needed capital, and "also had the contacts and the talent [as] they've been importing for a very long time." (CX 2479 (McCullough, Dep. at 76-78).

1428. As of April 25, 2009, McWane had decided not to sell Domestic Fittings to Sigma. (CX 1289; CX 2479 (McCullough, Dep. at 76)).

1429. In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais reported that Sigma had initially received approval from McWane's top management to a "private label" Domestic Fittings supply agreement, but that the McWane operational/sales team persuaded McWane's management not to do this. (CX 0214 at 001, 004; *see also* Pais, Tr. 1744-1745; CX 0908 (April 9, 2009 email from Mr. Page to Mr. Pais stating that "after significant internal discussion," McWane's Fittings team had "decided not to sell Sigma private label product from our domestic foundries")).

1430. After being initially turned down, Sigma's Mr. Pais traveled to two separate meetings with top McWane executives in an effort to convince them to offer private label Fittings to Sigma. Mr. Pais spoke with Mr. McCullough in Iowa on April 28, 2009, and with Mr. Page in Birmingham, Alabama on May 1, 2009. (Pais, Tr. 1756-1757, 2035; CX 0209 at 001, 004; CX 0728; CX 0314).

3. McWane's initial response to Sigma

1431. In May 2009, Mr. Tatman suggested that continued exploration of a limited Domestic Fittings supply arrangement with Sigma may be worthwhile, informing Mr. Page in a May 18, 2009 email that "we could [still] continue to creatively explore whether or not there could be a healthy relationship structure established between McWane, Sigma and ACIPCO." (CX 0456 at 001).

1432. Mr. McCullough, Mr. Walton, and Mr. Tatman scheduled an internal McWane meeting on May 26, 2009 to

discuss "supplying Domestic product to our competitors." (CX 0067 at 001).

1433. In preparation for that meeting, on or about May 26, 2009, Mr. Tatman circulated a memorandum ("May 26, 2009 memorandum") containing the notes he jotted down as discussion points to weigh the advantages and disadvantages of supplying Domestic Fittings to Sigma ("May 26, 2009 memorandum"). (CX 0067 at 003; Tatman, Tr. 621, 623).

1434. In his May 26, 2009 memorandum, Mr. Tatman included as a discussion point that if McWane choose not to sell Domestic Fittings to Sigma, McWane would "[r]etain the full margin for Domestic product within McWane." (CX 0067 at 003; Tatman, Tr. 621, 623).

1435. In his May 26, 2009 memorandum, Mr. Tatman estimated that Sigma would need a 20% discount from McWane's published prices to be "viable," *i.e.*, to be able to resell the Fittings profitably. (CX 0067 at 004; Tatman, Tr. 624-626 (referring to the estimates as "back of the napkin")).

1436. The 20% minimum discount required by Sigma that Mr. Tatman estimated in his May 26, 2009 memorandum included matching McWane's 8% rebate, 2% payment terms, and 4% on freight, to arrive at a total of 14% with zero absorption of any operating expenses. (CX 0067 at 004; Tatman, Tr. 632-633).

1437. In his May 26, 2009 memorandum, Mr. Tatman also estimated that the "break even" point for McWane selling Domestic Fittings to Sigma would be a 12% discount from published prices, *i.e.*, McWane would earn the same profits selling Domestic Fittings to Sigma at a 12% discount as it would from selling at full price to Distributors in light of freight and Distributor rebate savings. (CX 0067 at 004; Tatman, Tr. 624-626, 634-636 (referring to the estimations as "back of the napkin")).

1438. Using Mr. Tatman's estimations (F. 1437), for McWane to sell to Sigma at greater than a 12% discount from

published prices, McWane would be losing money. (Tatman, Tr. 624-626).

1439. In his May 26, 2009 memorandum, Mr. Tatman also noted as a conversation topic that one reason for McWane to sell Domestic Fittings to Sigma was to "eliminate the probability" that Sigma would secure another domestic source option. (CX 0067 at 003; CX 2479 (McCullough, Dep. at 86-87)).

1440. Mr. Tatman's May 26, 2009 memorandum contained the following discussion points in conclusion: McWane's decision to sell Domestic Fittings to Sigma "probably comes down to two factors:

1. How legitimate of a risk is there with a competitor successfully introducing a Domestic product line?

2. Do we believe that in the bigger picture, supporting competitors with
Domestic product would result in a healthier industry on the non-Domestic side of the business?"

(CX 0067 at 002, 004; Tatman, Tr. 627-629).

1441. On May 29, 2009, in a follow up email to the May 26, 2009 memorandum, Mr. Tatman provided to Mr. McCullough a list of "all the potential reasons to not sell domestic product to Sigma." Among the reasons for not selling Domestic Fittings to Sigma, Mr. Tatman's May 29, 2009 email listed:

- Loss of margin because "any incremental margin $ retained by Sigma would be incremental margin $ lost by McWane";

- Loss of business growth opportunities as ARRA and Domestic Fittings sales could be a "foot in the door" to regain former customers;

- Upsetting McWane's most loyal customers, particularly if they lost an ARRA-funded job to a competitor who obtained Domestic Product from Sigma;

- The possible erosion of blended Fittings sales as Distributors placed import Fittings orders to fill the truck for a Domestic Fittings order with Sigma; and

- Losing the ability to leverage its position in Domestic Fittings to benefit its other business lines, including non-Domestic Fittings.

(Tatman, Tr. 634; CX 0070 at 001-002 (emphasis in original) (also noting other reasons, such as losing McWane's identity as "the Domestic supplier," and placement of Domestic Fittings in regional yards could backfire if McWane has less responsive service); Tatman, Tr. 635-637; CX 2479 (McCullough, Dep. at 98-99); CX 1209 (McCullough February 2009 email suggesting need to "leverage our domestic position" to require Distributors to acquire non-Domestic Fittings from McWane)).

1442. In Mr. McCullough's view:

> [U]ltimately [McWane's] decision [of whether to sell Domestic Fittings to SIGMA] was SIGMA has the ability to get into domestic made manufacturing of waterworks fittings, just as Star did. If we had the choice between their not being in it and us selling them, or them being in it and us not selling them, that ultimately, we made the decision it's under our best interest to sell them.

(CX 2479 (McCullough, Dep. at 104-105)).

1443. On June 5, 2009, McWane made its initial offer to sell Domestic Fittings to Sigma at 5% off McWane's published prices ("June 5, 2009 offer"). (CX 1434; CX 0225 at 003; Rona, Tr. 1490; Pais, Tr. 1760-1761).

1444. Sigma was not satisfied with McWane's June 5, 2009 offer, as it would not allow Sigma enough margin to cover operating costs. (CX 0909; CX 2531 (Rybacki, Dep. at 149-150) ("5 percent wouldn't even cover the freight, let alone handling; and not only would we not make money, we would lose money; and we couldn't afford to lose money for two years on a deal. It

was a terrible deal."); Pais, Tr. 1760-1761 (describing offer as "nominal" because it did not provide Sigma the opportunity to make any margin off the resale of Domestic Fittings); Rona, Tr. 1492, 1489-1490).

1445. Sigma did not accept McWane's June 5, 2009 offer. (Pais, Tr. 1761).

4. Sigma's efforts to enter the Domestic Fittings market

1446. In early 2009, Sigma pursued the virtual manufacturing option for producing Domestic Fittings by forming a Sigma Domestic Production ("SDP") plan and assembling a team of executives responsible for investigating and exploring the possibility of Sigma producing Fittings domestically. (Rona, Tr. 1457, 1470).

1447. The SDP team, consisting of Mr. Pais, Mr. Bhattacharji, Mr. Rona, Mr. Box, and Mr. Ramanathan, investigated the possibility of Sigma entering the Domestic Fittings market by producing fittings through independent, domestic foundries and evaluated the costs, foundry capabilities, and time it would take for Sigma to produce Domestic Fittings in response to ARRA. (Rona, Tr. 1462-1463; Pais, Tr. 1751-1752).

1448. In a May 4, 2009 memorandum to the Sigma Board, Mr. Pais described the ARRA "Buy-American" provision and declared that "it behooves SIGMA to review the feasibility of producing a line of 'domestic' Fittings, to meet this growing need, in order to reassure our customer base and retain their loyalty and their business at the current levels." (CX 0214 at 001-002, 005; Pais, Tr. 1751-1752).

1449. Sigma spent between $50,000 and $75,000 investigating domestic production options. (CX 2529 (Rona, IHT at 142-143); CX 0958 at 001 (request to establish accounting mechanism for Sigma's SDP expenses)).

1450. Sigma investigated all aspects of the processing steps necessary to make Fittings, from beginning to end: casting, machining, transportation, and finishing. (CX 2524 (Box, Dep. at 28) (describing how Sigma "looked at all aspects of the

processing steps necessary from the beginning to the end; casting, machining, transportation, finishing.")).

1451. Sigma had personnel who could supervise a virtual manufacturing operation for Domestic Fittings such as Stuart Box, who had extensive experience in United States foundry work and Fittings manufacturing before joining Sigma, and Gopi Ramanathan, who also had extensive foundry experience. (CX 2530 (Rona, Dep. at 213-214); Rona, Tr. 1469-1470).

1452. Sigma's SDP team considered using factories and independent foundries to produce Domestic Fittings based on Sigma's drawings and tooling, similar to Sigma's existing methods of producing Fittings overseas. Sigma contemplated doing the finishing, or lining and painting, of its Domestic Fittings itself. (Rona, Tr. 1469-1470; CX 2524 (Box, Dep. at 41)).

1453. By May 20, 2009, Mr. Pais asked the SDP team to prepare a project plan, including economical, logistical, and financial plans, and including the cost of production. (Pais, Tr. 1759; CX 0307 at 001).

1454. On or about June 5, 2009, Mr. Box summarized the results of SDP planning meetings held on June 3 and 4, 2009, which included detailed action plans for identification of top Fittings, foundries, molding machines, cost modeling, testing of lost foam production technology, and visits to potential foundry partners. (CX 0963 at 001; Rona, Tr. 1482-1486 (Sigma identified top Fittings for production, identified and visited foundries, identified machinery, prepared to produce a sample Fitting for the AWWA show, and purchased equipment)).

1455. In an update by Mr. Pais to Sigma's Board after Sigma had rejected McWane's June 5, 2009 offer, Mr. Pais wrote: "We now need to go all out and implement a SDP plan - replicating SIGMA's 'virtual manufacturing' model working with a collection of domestic foundries who have ample idle capacity, to produce the range of Fittings, just as we do thru a collection of facilities overseas." (CX 1997 at 001, 008, *in camera*).

1456. As of June 5, 2009, Sigma identified over 50 potential foundries in the United States as potential sources of domestic production capacity. (CX 2524 (Box, Dep. at 27-28); CX 0963 at 001; CX 0964 at 001-002).

1457. By June 18, 2009, Sigma's SDP team was working on obtaining patterns for producing Domestic Fittings from Metalfit, and had placed orders for foam patterns and other equipment, such as cope and drag patterns, flasks and vibration tables, to be used in Domestic Fittings production. (Rona, Tr. 1507-1511; CX 0978 at 002).

1458. By June 18, 2009, Sigma was arranging foundry site visits by Mr. Rona. (Rona, Tr. 1507-1508, 1511-1512; CX 0978 at 002).

1459. Mr. Rona visited at least five different domestic foundries as a part of Sigma's investigation of the production of Domestic Fittings: Pryor Foundry, Quality Foundry, Eureka Foundry, and two foundries in eastern Pennsylvania. (Rona, Tr. 1508-1509).

1460. Sigma purchased two large flasks for large Domestic Fittings production trials. (Rona, Tr. 1485-1486; CX 0963 at 001).

1461. By the time of the June 2009 AWWA conference, Sigma had produced two large sample Domestic Fittings at the Eureka Foundry in Tennessee, using patterns supplied by Metalfit. (Rona, Tr. 1480, 1485-1486; Pais, Tr. 2173-2175 (describing the Fittings as trial runs, *i.e.*, not commercially ready)).

1462. U.S. Pipe and ACIPCO, two important OEM customers that owned foundries and had expertise casting fittings domestically, were working cooperatively with Sigma to help Sigma set up domestic production. (CX 2527 (Pais, IHT at 140)).

1463. As of July 11, 2009, Sigma was still pursuing its SDP plan to produce Domestic Fittings, although it was proceeding more "deliberately and thoughtfully" because Sigma was finding the plan more and more difficult to implement. (CX 1505 at 001; Pais, Tr. 1780-1781; Rona, Tr. 1538).

1464. On August 11, 2009, Sigma received a quote from Metalfit for the production of tooling to be used in Sigma's Domestic Fittings production. (CX 0257 at 001; Rona, Tr. 1593-1594).

1465. As of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries, no core boxes, no machining facilities, and no finishing facilities or contracts for coating, painting, and lining, for Domestic Fittings. (Pais, Tr. 2173-2175; Rona, Tr. 1672-1673).

1466. In the summer of 2009, "[t]here were no really good options. The SDP plans were a not very discrete or quantifiable effort. It was -- we were at the early stages." (Pais, Tr. 1761-1762).

1467. In August 2009, Sigma informed its customer, U.S. Pipe: "To date Sigma has not made any concrete plans to either invest in all the required tooling or not invest at all." (CX 0258 at 002; Rona, Tr. 1693-1694).

1468. Sigma believed it needed to be able to offer around 730 different types of Domestic Fittings and that it needed a minimum of 450 core patterns to produce those 730 types of Fittings. (Rona, Tr. 1671-1674).

1469. Sigma contemplated beginning Domestic Fittings production incrementally, increasing the number of Fittings available each month. (Rona, Tr. 1555-1556).

1470. In September 2009, Sigma had very few of the patterns it needed for making Fittings in the United States. (Rona, Tr. 1674-1675; Brakefield, Tr. 1417-1418).

1471. In September 2009, Sigma did not have any contracts with any pattern shops to build the patterns it would need to produce Fittings in the United States. (Rona, Tr. 1674-1675).

1472. In September 2009, Sigma did not have any contracts with any domestic foundries to produce Fittings in the United States. (Rona, Tr. 1672-1673).

1473. In September 2009, Sigma did not have a viable domestic production option. (Pais, Tr. 1799).

1474. In a September 9, 2009 report to the Sigma Board, Mr. Pais stated:

> For Fittings, the range of sizes and complexities of the line items required even at a certain select level is rather huge and along with the additional processing required for machining, coating and packing etc. the entire project was found to be too overwhelming and cumbersome, calling for a sizable Capital Expenditure in the range of $6M to $8M as per the initial estimates. The likely sales volume we could garner from our [Buy American] capability was uncertain at best and far less than what we had originally feared. But most importantly, in the end, the time it would have taken for us to come on line and our inability to service our customers with the [Buy American] requirements over the next 12 months and of course the huge [capital expenditures], made us wish for an alternate viable option and as such, we responded when McWane too revived our dialog to accommodate us as a Master Distributor with better terms.

(CX 1022 at 003).

1475. If Sigma had started producing Domestic Fittings in September of 2009, Sigma could not have sold its first Domestic Fittings until some time between February and May 2010. (Rona, Tr. 1676-1677).

1476. Sigma would have required lead time of at least 18 to 24 months to begin production of a full range of Fittings, and approximately 6 to 8 months to produce even one Domestic Fitting. (Rona, Tr. 1673).

1477. Sigma recognized that the time window for selling Domestic Fittings into ARRA funded projects was a short time window. (Rona, Tr. 1671). *See also* Pais, Tr. 1800-1801 ("This

is a very difficult time when the customers are looking to Sigma to come up with . . . a so-called domestic option from a company which had no domestic capability, and it was only mandated because the U.S. government forced it down to us overnight.").

1478. The SDP team modeled the costs of producing Domestic Fittings using estimates of key variables, including the size of the Domestic-only market, production costs (based on quotes from numerous domestic foundries), and market prices, and arrived at estimated gross margins for the various size categories of Fittings. (CX 2529 (Rona, IHT at 22-23); Rona, Tr. 1522-1523, 1533-1537; CX 0237 at 001, 002).

1479. Sigma estimated that it could develop the tooling required for the full line of approximately 700 Domestic Fittings items for approximately $3 to $5 million. (Rona, Tr. 1517; CX 2530 (Rona, Dep. at 214-215) ("[T]he bulk of all the capital expenditure would be in actual tooling, so the budget of three to five million likely covered just tooling and equipment related to manufacturing the fittings and foundries."); *see also* CX 0258 at 002 (Sigma letter to U.S. Pipe stating, our estimates for conventional tooling would run in excess of 6 million dollars)).

1480. Sigma's estimates for its costs to enter the Domestic Fittings market were between about 5 and 10 million dollars. (RX 0163 at 007; CX 2531 (Rybacki, Dep. at 138-139) (estimating a full line of Fittings would cost between 10 to 12 million dollars); CX 2523 (Bhattacharji, Dep. at 63-64) ("it would take between $5 and $10 million to have a domestic fitting supply chain."); CX 1997 at 008, *in camera* (June 5, 2009 memorandum from Mr. Pais informing the Sigma Board that "[w]e expect the total investment in a SDP capability to be about $5M."); CX 2523 (Bhattacharji, Dep. at 194) ($5 million for SDP was "a placeholder for the board."); CX 1022 at 003 (September 9, 2009 presentation to the Sigma Board stating the capital expenditure was in the range of 6 to 8 million dollars)).

5. Sigma's financial position in 2009

1481. Sigma's financial condition in the second half of 2008 was very poor. (RX 687 (Pais, Dep. at 153-154) ("2008 was a

tale of two halves, if you will. The first half was respectable. And the second half was very poor, because most of the problems we faced from the poor market and the increasing costs and the reduced lower prices, all coalesced into the second half, and especially the last quarter. So the year as a whole was off, compared to plan and compared to '07. Q. When you say the year as a whole was off, what do you mean by the year was off compared to plan and compared to '07? A. In terms of the profitability.")).

1482. Sigma had a loss of [redacted] million dollars in 2008. (Pais, Tr. 2193, *in camera*).

1483. Throughout 2009, Sigma was in a "precarious position overall in financial terms." (Pais, Tr. 1760).

1484. In a May 5, 2009 Market Review update, Mr. Pais warned that Sigma was in a "grave" financial situation, pointing out that the market "update can be deemed to be definitely and mostly bleak." (Pais, Tr. 2163-2164; CX 214 at 002).

1485. In 2009, Sigma was "in survival mode" because its sales were down [redacted] million dollars and its EBITDA was [redacted]. (Rybacki, Tr. 3672, *in camera*).

1486. Sigma's 2009 year-end financial information, which was discussed at a Board meeting, described 2009 as an "extremely challenging" year for Sigma. Sigma's financial condition in 2009 was "horrendous" in part because of the collapse of municipal spending and the lowest residential construction rates since World War II. (RX 242 at 003, *in camera*; Rybacki, Tr. 3663-3664, *in camera*).

1487. As a result of the "very, very difficult" financial environment it faced in 2009, Sigma was forced to lay off employees, cut salaries and benefits for employees who remained, and cut numerous other expenses. (Rybacki, Tr. 3670-3671, *in camera*).

1488. Sigma had a very large amount of debt at the end of 2008, and even breached some of its bank covenants in 2009. (Pais, Tr. 2195-2196, *in camera*; Rybacki, Tr. 3730, *in camera*).

1489. In 2009, a significant portion of Sigma's substantial debt was unsecured and carried high interest rates. (Rybacki, Tr. 3672 *in camera*).

1490. Sigma's long-term debt was approximately [redacted] million dollars at the end of 2008, which it reduced to approximately [redacted] million dollars at the end of 2009. (Pais, Tr. 2195-2196, 2206-2207, *in camera*; CX 1749 at 004, *in camera*).

1491. Sigma's paying down of debt (F. 1490) was mostly a by-product of reduction of inventories. (Pais, Tr. 2207, *in camera*).

1492. In 2009, Sigma's lead bank for loans was PNC Bank. Sigma had a long-term revolving credit loan with PNC Bank of [redacted] million dollars at the end of 2008, which it paid down to [redacted] million dollars at the end of 2009. (Pais, Tr. 2211, *in camera*; CX 1749 at 014, *in camera*).

1493. In 2009, Sigma had extremely high interest rate loans with Ares Capital, an unsecured lender, who attended Sigma's quarterly Board of Director meetings. (Pais, Tr. 2153-2154, Rybacki, Tr. 3672, *in camera*; CX 2523 (Bhattacharji, Dep. at 198-200); CX 1749 at 015, *in camera*).

1494. Ares Capital held [redacted] million dollars of Sigma's debt, which constituted roughly 20% of Sigma's total debt at the end of 2008 and 27% at the end of 2009, when Sigma had reduced its first-lien debt. (CX 1740 at 015, *in camera*). The interest rate on the second lien term loan was [redacted]%. (Pais, Tr. 2208-2209, *in camera*).

1495. In April 2009, Sigma negotiated amendments to the financial covenants applicable to a second long-term debt facility it had entered into in 2007. (Pais, Tr. 2211, *in camera*; CX 1749 at 015, *in camera*; CX 2523 (Bhattacharji, Dep. at 169-171); CX 1998 at 002 (Sigma April 2009 Board minutes)).

1496. In June 2009, Mr. Pais issued an update to Sigma's Board of Directors outlining his "SOS" plan to save Sigma. In that update, Mr. Pais notes the decline of about [redacted] percent in earnings level in 2008 and that Sigma stood to lose another [redacted] percent in 2009; that Sigma will barely be able to meet its second quarter 2009 covenants; that the second quarter 2009 results were "marginal at best," which "may cause a lot of concern to all, especially the banks, as we would be unable to assure them of the future performance trends." (Pais, Tr. 2199-2203, *in camera*; RX 163 at 002-003, *in camera*).

1497. In Mr. Pais' June 2009 update to Sigma's Board, Mr. Pais reviewed Sigma's bank covenants and wrote, "as unthinkable and unpleasant it may be, it's amply evident that without a major infusion of additional equity, 'internal measures alone' will NOT allow us to function in any semblance of normalcy and clear focus." Mr. Pais listed two measures, lease buybacks of real estate holdings and a special effort to reduce inventory through aggressive sales, to pay down Sigma's debt. (Pais, Tr. 2202-2203, *in camera*; RX 163 at 005) (emphasis in original).

1498. In July 2009, Sigma "came to the conclusion that it [Sigma Domestic production] would be a tough investment but something that we had to make if this is the only option that we would go ahead with." (CX 2527 (Pais, IHT at 158); CX 0240 (July 11, 2009 SDP Domestic Fittings budget); Pais, Tr. 1762-1765 (discussing CX 0240); CX 0246 (July 20, 2009 SDP Domestic Fittings budget)).

1499. Capital expenditure limits imposed by Sigma's lenders in 2009 were extremely low. (Rybacki, Tr. 3670, *in camera*).

1500. The Frontenac Group, a private equity firm, which purchased a 60% ownership interest in Sigma in 2007, was the largest shareholder of Sigma in 2009. (F. 54; Pais, Tr. 2149).

1501. Frontenac and the shareholders said at Sigma's July 2009 Board meeting that Sigma did not have the capability to invest in Domestic Fittings production and that Frontenac would not have provided the finances for Sigma's domestic production plan. (Pais, Tr. 2222, *in camera*).

1502. On July 27, 2009, following the July 15, 2009 Sigma Board meeting, Walter Florence, a Frontenac managing director and a member of Sigma's Board of Directors (F. 55), sent an email to Sigma management regarding strategy for upcoming lender meetings. In this email, he noted that Sigma's liquidity was fine, that it had recently received an injection of capital from investors and shareholders, and that these investors and shareholders were prepared to invest $7.5 million more to fund the SDP program and strategic business additions, which will enhance credit quality and help Sigma grow and build equity value. (CX 0099 at 001, 006-007).

1503. Sigma's lenders never authorized it to invest in becoming a domestic Fittings supplier, and Sigma lacked sufficient funds to invest in such an operation on its own. (Pais, Tr. 2184).

1504. At the same time as it was considering entering production of Domestic Fittings in 2009, Sigma attempted to become a supplier of domestic pipe restraints, a product distinct from Fittings which required less initial investment. (Rybacki, Tr. 3672-3673, *in camera;* Pais, Tr. 1781-1782, 2184-2186).

1505. To enter domestic production of pipe restraints, Sigma acquired a portion of The Unique Company in the first quarter of 2010 for approximately [redacted] million dollars. (Pais, Tr. 2211-2212, *in camera*).

1506. Domestic production of pipe restraints is a much simpler, smaller and less expensive venture with a much smaller range of product than Domestic Fittings and thus was an easier market for Sigma to try to enter. (Pais, Tr. 1781-1782, 2184-2186, 2212, *in camera*).

1507. Mr. Rybacki described Sigma's domestic restraints project as "a disaster for us because we were very unsuccessful at it." (Rybacki, Tr. 3672-3673, *in camera*).

1508. Mr. Rybacki believed that it was inadvisable for Sigma to attempt to become a domestic Fittings supplier in 2009,

because "we proved it with the domestic restraint [effort] that we weren't real good at it." (Rybacki, Tr. 3677).

6. Renewed negotiations between McWane and Sigma

1509. After Sigma rejected McWane's June 5, 2009 offer (F. 1445), in mid-July 2009, Mr. Pais reported that he had directly informed McWane's Mr. Page of Sigma's plans to develop its own Domestic Fittings capability. (CX 1018 at 001) (July 13, 2009 email from Mr. Pais to Mr. McGivern explaining that Mr. Pais' negotiations included "My own with the CEO announcing our 'SDP' plans . . . ")).

1510. Mr. Rona of Sigma told Mr. Tatman in mid-July 2009 that "Sigma's preference is to work something out with McWane but we are committed and have the financial backing to move forward either way." (CX 0568 at 003; Tatman, Tr. 760-761; CX 2530 (Rona, Dep. at 218-220)).

1511. McWane viewed Sigma's entry into the Domestic Fittings market to be more likely after Star announced its intended entry at the June 15, 2009 AWWA conference. (CX 0076 at 008 ("Sigma is now in a position where they will feel the need to react. . . . Rybacki said at AWWA their program would announce[] in 4 weeks"); CX 2479 (McCullough, Dep. at 103-104) (explaining that McWane believed Sigma would announce entry plans within four weeks of AWWA)).

1512. In evaluating whether to enter into the MDA with Sigma, Mr. Tatman believed that Sigma was in a "much better position" to develop its own Domestic Fittings capability than Star, in part because of Sigma's existing OEM relationships (with ACIPCO and U.S. Pipe) and Sigma's access to financial backing. (CX 0067 at 003; Tatman, Tr. 618-619).

1513. McWane believed that Sigma wanted to enter the Domestic Fittings market either through developing their own sourcing options or through a purchasing arrangement with McWane. (Respondent's Response to RFA at ¶ 34 (McWane "believed Sigma wished to obtain access to domestically-manufactured fittings after ARRA's enactment, either by manufacturing, through sourcing, or pursuant to a purchasing

arrangement with McWane"); (CX 1179 at 002) (Tatman's October 2009 Q&A document circulated to McWane's sales force stating: "in the absence of the MDA with TylerUnion, Sigma was going to develop their own domestic sourcing options to the extent they could")).

1514. The likelihood of Sigma contracting with independent, domestic foundries to produce Domestic Fittings using the "virtual manufacturing" model that it used for imported Fittings was part of the discussion within McWane as it considered whether to sell Domestic Fittings to Sigma. (CX 2485 (Walton, Dep. at 71-72); CX 0329 at 001 (McWane email stating that Mr. Tatman's main intent in discussion with Mr. Rona of Sigma was "to flush out where SIGMA is in their process of securing Domestic production sources")).

1515. In a June 24, 2009 internal McWane email, Mr. McCullough asked for Mr. Tatman's opinion on Sigma's likely reaction to Star's announced entry into the Domestic Fittings market:

> Sigma's reaction to [Star's entry] and their future positioning, develop their own line as Star does? Align with McWane,? Establish buy/sell relationship with Star that is better than our last offer?

(CX 0074 at 002).

1516. Mr. Tatman believed that there was a "probability" that Sigma would enter the Domestic Fittings market through developing its own sourcing options because Sigma communicated that intention to McWane. (CX 2483 (Tatman, IHT at 175) ("[Y]ou've got SIGMA coming in saying that they're going to do something, and it's a little bit of chest-beating. . . . [Sigma] say[s] that they're coming in. We don't know if they're really doing it. So it's a probability. Is what they're saying true? Are they going to execute on that? Yes or no, I don't know.")).

1517. Mr. Tatman noted on July 27, 2009, "the correct decision really depends upon whether on their own Sigma truly does have the resolve and financial backing to make a long term

strategic commitment to being a supplier of domestic products." (CX 0465 at 010).

1518. In a June 29, 2009 brainstorming slide to spark discussion within McWane, Mr. Tatman noted:

> If [Sigma is] truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for [Sigma] is probably of greater financial benefit to our business than having them source elsewhere.

(CX 0076 at 008 ("Tatman June 29, 2009 strategy presentation")).

1519. Mr. Tatman's June 29, 2009 strategy presentation included the remarks: "[t]he only reason for [Sigma] not to pursue [Domestic entry] is if they feel McWane's response will make Star's or their programs un-successful which may cause them to hold off making any heavy investments[.]" (CX 0076 at 008).

1520. On July 13, 2009, Mr. Pais informed Sigma's senior management that he believed McWane would be motivated to enter an agreement with Sigma to avoid having Sigma add new capacity to the Domestic Fittings market:

> [T]he high profile publicity by Star as to their domestic plans and our own (low key) plans may have finally convinced [McWane] that addition of new capacity isn't good for them or the industry . . . It's wait and see . . . one step at a time, chess play . . . ."

(CX 1018 at 001; Pais, Tr. 1774 ("[I]t was just my assessment that all these factors would finally sort of persuade them to come up with an agreement to accommodate us.")).

1521. On July 16, 2009, in response to an update of Star's progress in entering the Domestic Fittings market, Mr. Pais wrote to Sigma's management team speculating that Star's very public entry strategy "may induce McWane to think that they may have long term competition even in the BA [Buy American] segment and may create some unique market realignment and hence opportunities for us." (CX 1505 at 001; Pais, Tr. 1779-1780).

1522. In late June and early July 2009, Mr. Rona approached Mr. Walton of McWane with the idea of resuming discussions regarding Sigma's desire to have McWane supply Domestic Fittings to Sigma. (RX 688 (Rona, IHT at 184-188); RX 643 (Tatman, IHT at 149-150)).

1523. Between June 30 and July 2, 2009, Mr. Tatman suggested to Mr. Rona that he make a counterproposal to McWane's June 5, 2009 Domestic Fittings supply offer. Mr. Tatman also communicated that McWane would require two conditions: First, McWane would have to be Sigma's exclusive supplier of Domestic Fittings; and second, the Domestic Fittings would have to be branded Tyler/Union, not Sigma (*i.e.*, it would not be a private-label arrangement). (CX 0329 at 001 (Tatman email to McCullough and Walton reporting on conversation); Tatman, Tr. 747-748).

1524. On July 2, 2009, Mr. Tatman reported to Mr. McCullough and Mr. Walton regarding his conversation with Mr. Rona of Sigma:

> Mitchell Rona called and we had a fairly lengthy discussion. I can fill in the details if needed but the takeaway is that Mitchell/Sigma will come back to us with a counter proposal under the conditions that we would be their exclusive supplier of Domestic fittings and the product would be branded Tyler/Union not Sigma. My main intent was to flush out where Sigma is in their process of securing Domestic production sources and I was somewhat surprised by his non-resistance to those two conditions. If Sigma's counter does comply with those two conditions it would be pretty good indication that at present they don't have a very strong hand to play.

(CX 0329 at 001; Tatman, Tr. 747).

1525. On July 14, 2009, Mr. Rona transmitted Sigma's counterproposal to McWane's June 5, 2009 offer to Mr. Walton and Mr. Tatman, and noted: "As promised please find a simple but straight forward proposal from Sigma for master distribution of your domestic fittings. I hope McWane will find this offer

favorable and respond with further discussions about how we can move this forward." (CX 0243 at 001; Rona, Tr. 1560-1561).

1526. Sigma's July 14, 2009 counterproposal consisted of a one-page term sheet titled "Master Distributor Agreement for AWWA domestic pipe fittings" and described an agreement under which "Sigma would have access to Tyler, Union, and Clow branded domestically produced fittings for a minimum of 3 years beginning August 1st 2009." The counterproposal included the following provision:

> Sigma in turn will not seek any other sources either directly or through 3rd party for the production or distribution of domestic fittings with the following exceptions -- Sigma shall have the right to produce or purchase fittings which are outside the McWane domestic range or which cannot be provided by McWane within a reasonable and customary time frame.

(CX 0243 at 002; Rona, Tr. 1560-1561).

1527. In a July 21, 2009 email to McWane's CFO, Mr. Nowlin, Mr. Tatman described the discussions with Sigma regarding selling McWane's Domestic Fittings to Sigma as follows:

> We are having some discussions with Sigma as to providing them with Domestic fittings as an alternative to them securing their own source option such as Star has done.
>
> This is certainly a choice of evils as having more Domestic suppliers doesn't really increase the size of the pie. Our ultimate decision will be based upon:
>
> - If we say No, would Sigma really spend the $ required to execute a domestic product option
>
> - Would providing Sigma with access to Tyler/Union domestic [product] help us either better protect our brand/share against Star or promote more stable market prices.

(CX 0729 at 001; Tatman, Tr. 754-756; CX 2481 (Nowlin, Dep. at 138-139) (calling the idea of having more domestic suppliers does not really increase the size of the pie "a fairly obvious statement")).

1528. In a July 27, 2009 draft presentation sent to Mr. McCullough and Mr. Walton, Mr. Tatman listed:

> Mitchell [Rona] now understands that we will most likely require "all" distributor customers to be exclusive to the Tyler/Union brand for Domestic fittings. That seemed to catch him by surprise. He said he understood and would discuss internally. . . .
>
> My sense is they don't yet have a cost-competitive option for the [below] 24". The [disamatic] product quote from last year is probably a concern for them as to our cost position.

(CX 0568 at 003; Tatman, Tr. 761-762).

1529. On July 29, 2009, McWane responded to Sigma's July 14, 2009 counterproposal for the sale of McWane's Domestic Fittings to Sigma. Among other provisions, McWane's response:

- Offered to sell Domestic Fittings to Sigma at a 20% discount off published multipliers;
- Required Sigma to agree to only sell to customers that are in an exclusive supply relationship with McWane;
- Required Sigma to agree to sell at McWane's suggested published price levels; and
- Had a term of three years unless earlier terminated by agreement or for cause.

(CX 1805 at 002).

1530. On August 18, 2009, Mr. Tatman sent an internal email to Mr. McCullough and Mr. Walton with an attached

presentation ("August 17, 2009 presentation") that provided an update on the status of negotiations with Sigma. Mr. Tatman was "leaning towards not throwing too much [money]" at what he referred to as an "insurance policy" against Sigma's entry, noting that he is "not picking up any strong sense that they have a strong alternate path at this point that they'd be willing to invest significant $ into." (CX 1184 at 001; Tatman, Tr. 771-772, 783-785).

1531. In his cover email attaching his August 17, 2009 presentation, Mr. Tatman reported that he and Mr. Rona were discussing the final issues in the agreement -- the discount percentage and duration of the agreement. (CX 1184 at 001-002; Tatman, Tr. 771-772).

1532. Mr. Tatman's August 17, 2009 presentation provided an update on two conversations Mr. Tatman had with Mr. Rona after Sigma received McWane's July 29, 2009 offer letter:

- Sigma has now agreed in principle to our requirement for Distributor exclusivity . . .

- Sigma has agreed in principle to selling at Published pricing . . .

- Sigma has agreed to be exclusive to [McWane] for all sales to Distributors . . .

- I sense our distributor exclusivity requirement might have rocked them back a bit on what would be required to enter this market on their own[.]

(CX 1184 at 004; Tatman, Tr. 778-783).

1533. Mr. Tatman's August 18, 2009 presentation included a "Pro Forma" analysis in which Mr. Tatman estimated that by selling Domestic Fittings to Sigma at a 20% discount, McWane would lose approximately 5% of gross profit margin. This estimation was "simplistic" and did not include provision for idle plant costs, inventory reduction or "anything else." (CX 1184 at 003; Tatman, Tr. 778).

1534. On August 24, 2009, Mr. Tatman sent a letter of intent to Mr. Rona with the following "core agreement elements:"

- "McWane shall be Sigma's exclusive source of supply";
- Sigma may only sell McWane's Domestic Fittings to Distributors that are "in an exclusive relationship with McWane branded Product for all of their domestic requirements where McWane branded Products are available";
- McWane will sell its Domestic Fittings to Sigma at an effective 20% discount from McWane's published pricing;
- Disputes will be handled through non-binding dispute resolution process; and
- The agreement will have a 1-year term, with automatic 1-year extension, unless either party provides 90 days' notice prior to the anniversary date or McWane has cause.

(CX 1806 at 002; Rona, Tr. 1571-1572).

1535. McWane's August 24, 2009 letter of intent sent by Mr. Tatman to Mr. Rona stated that Sigma was "expected" to:

- Support any pending or existing Buy American legislation;
- "Independently adhere" to McWane's published pricing, and maintain prices at or above 98% of McWane's published pricing on a weighted average basis;
- Provide significant Sigma customers with an appropriate rebate program, with the "expectation [of] an 8% annual rebate for customers with annual purchases of greater than $100,000"; and

- "Not introduce your own domestic product while the Master Distributorship is active."

(CX 1806 at 003).

1536. In a September 8, 2009 email to Sigma's OEM5 management group, Mr. Pais acknowledged the potential impact of McWane's Full Support Program, as applied to Distributors who purchased Domestic Fittings through Sigma as follows:

> What intrigues me is how customers like Ferguson would even toy with Star when they can risk total exclusion from [Buy America] service from Tyler on the strength of their passionate commitment to the '1C' clause -- Exclusivity! SO, actually, it may generate a steady loyalty to MCW/SIG if it is thoughtfully and effectively introduced and promoted! Sensing the pivotal importance of this clause, I have disguised it as an issue of 'fairness' -- helping SIG/McW thru their loyalty in return of our service of them thru delivery of the ENTIRE job!

(CX 0948 at 001) (emphasis in original)).

7. McWane and Sigma enter into the MDA

1537. On or about September 17, 2009, Mr. Tatman, on behalf of McWane, and Mr. Pais, on behalf of Sigma, signed the MDA. (CX 1194 at 001, 013-014; Tatman, Tr. 791; Pais, Tr. 1807-1808; CX 0278 at 001, 015; CX 0950 at 001).

1538. In its September 22, 2009 letter to Distributors announcing its Full Support Program, McWane also announced to its Distributors that it had entered into an MDA with Sigma, through which Sigma would sell McWane Domestic Fittings, and informed Distributors that the Full Support Program applies to Domestic Fittings whether purchased through McWane or Sigma. (CX 0010 at 001).

1539. Sigma announced the MDA on September 22, 2009, the same day as McWane. (CX 0803; Pais, Tr. 1821).

1540. Under the MDA, McWane and Sigma agreed as follows:

> a. Appointment: McWane hereby appoints Sigma, and Sigma hereby accepts appointment, as an authorized OEM Distributor of McWane Domestic Fittings upon the terms and conditions of this Agreement.
>
> b. Exclusivity: Sigma agrees that McWane shall be Sigma's sole and exclusive source for Domestic Fittings, with the exception that:
>
> (1) Sigma may purchase Domestic Fittings in the 30"- 48" diameter size range from other manufacturers so long as Sigma is the sole owner of the patterns for such Domestic Fittings, but only for resale to other domestic foundry manufacturers of ductile iron pipe and fittings;
>
> (2) If McWane does not own patterns for a particular Domestic Fitting, Sigma may purchase that Domestic Fitting from an alternative source, but only until such time as McWane acquires the pattern for that Domestic Fitting; and
>
> (3) Sigma may purchase Domestic Fittings from alternative sources on an order by order basis only if McWane cannot deliver McWane Domestic Fittings to the designated delivery point by the time specified in the order or within 30 days after the order has been received and processed by McWane, whichever occurs later.

(CX 1194 at 001).

1541. Under the MDA, Sigma became a master distributor of Tyler brand Domestic Fittings. (Pais, Tr. 1830). The MDA explicitly provided, "Sigma shall not relabel any McWane Domestic Fittings prior to sale without written consent from McWane." (CX 1194 at 007).

1542. The initial term of the MDA was for one year, from September 2009, expiring in September 2010. Either party to the MDA could terminate it with or without cause by giving the other

party one hundred eighty days' advance written notice. (CX 1194 at 007).

8. Sigma stopped its efforts to enter the Domestic Fittings market

1543. By agreeing to the MDA, Sigma agreed to stop its efforts to produce its own Domestic Fittings. (CX 2529 (Rona, IHT at 173-175) ("As part of our agreement with McWane for the MDA, we agreed that we wouldn't produce -- it's in the agreement that we wouldn't produce other small-diameter fittings -- again, I think it's 24" and down").

1544. Mr. Rona believed that Sigma's pursuing its own domestic production would be a breach of the MDA agreement:

> [O]nce the MDA was signed, we did not pursue [Sigma's SDP efforts] at that point to go ahead. And we knew that, again, understanding the agreement as it was written, if we decided to continue to go ahead, we technically could go ahead and could, but we would then be in breach of the contract[.]

(Rona, Tr. 1581-1582; CX 0278 at 002 § 1(b) ("Sigma agrees that McWane shall be Sigma's sole and exclusive source for Domestic Fittings")).

1545. Upon agreeing to the MDA, Sigma stopped its efforts to try to develop its own Domestic Fittings production capacity. (Rybacki, Tr. 3729; Rona, Tr. 1548; CX 2523 (Bhattacharji, Dep. at 221-222); CX 2530 (Rona, Dep. at 296-297) ("[O]nce we had the MDA, we were satisfied we had a source of domestic fittings for ARRA, period."); CX 2524 (Box, Dep. at 81) (Mr. Box recommended that Sigma not go forward with domestic production of small Fittings in light of the availability of Fittings from McWane via the MDA)).

1546. On October 3, 2009, Mr. Bhattacharji informed Sigma's China production manager that Sigma's "development plans for domestic fittings are taking a back seat for the moment. This is because we have an MDA (Master Distributor Agrmt) deal with McWane for the fittings." (CX 0934 at 001; Pais, Tr. 1853-1856).

1547. After signing the MDA, Sigma continued its development of larger-sized Domestic Fittings since McWane did not provide larger-sized Domestic Fittings. (Pais, Tr. 1804; CX 1166; CX 1194 at 001 § 1(b) (excepting from exclusive source position Fittings for which McWane does not have the patterns)).

9. Pricing requirements of the MDA

1548. The provision of the MDA relating to pricing of McWane's Domestic Fittings set forth:

> Pricing. McWane will sell McWane Domestic Fittings to Sigma at a discount of twenty percent (20%) off McWane's published distributor pricing in effect at the time the order is received by McWane.
>
> While Sigma may resell McWane Domestic Fittings at any price it deems appropriate, it is the unilateral policy of McWane not to appoint or continue any OEM distributor who resells McWane Domestic Fittings at a price less than 98% of McWane's published pricing on a weighted average basis for all customers and items sold during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"), or who fails to establish a rebate program of 8% or greater for customers, excluding manufacturers of ductile iron pipe, who purchase more tha[n] $200,000 annually of McWane Domestic Fittings or who stock McWane Domestic Fittings in the normal course of business.
>
> The determination of whether an OEM distributor has met these requirements shall be made in accordance with the formulas and method set forth in the attached Exhibit A. This agreement shall terminate immediately and without notice in the event that Sigma resells McWane Domestic Fittings at a price below the Suggested Resale Price, or fails to implement and maintain the Suggested Rebate for eligible customers; provided, however, that the Suggested Rebate shall not apply to customers who are domestic manufacturers of ductile iron

> pipe. McWane reserves the right to audit Sigma's compliance with this paragraph at any time through a third party . . . auditor chosen by McWane.

(CX 1194 at 002 § 1(d)).

1549. The MDA provided that McWane would sell McWane Domestic Fittings to Sigma at a discount of 20% off McWane's published pricing. (CX 1194 at 002 § 1(d); CX 2479 (McCullough, Dep. at 121) (McWane agreed to sell Domestic Fittings to Sigma under the MDA at a 20% discount off McWane's published multiplier terms for truckload shipments)).

1550. The MDA required that Sigma resell McWane Domestic Fittings at a weighted average of no less than 98% of McWane's published prices during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"). (Tatman, Tr. 798-803; Pais, Tr. 1829-1830; CX 1194 at 002§ 1(d)).

1551. Under the MDA, by using a weighted average, Sigma could sell particular jobs at different percentages off McWane's published prices, so long as all of the prices of the jobs over the quarterly period amounted to within 98% of McWane's published prices. Sigma was also allowed to give rebates, cash discounts, and to set freight terms and payment terms that they wanted. (Tatman, Tr. 801-802).

1552. Under the MDA, if Sigma did not resell McWane's Domestic Fittings at McWane's suggested resale price, McWane could immediately terminate the MDA without notice. (CX 1194 at 002 § 1(d); Tatman, Tr. 802-803).

1553. Mr. Pais described the pricing provision of the MDA as follows: "with the pricing, we are obliged to be as close to the published multiplier as possible. Our hands are not tied – but we cannot sell below, because it will undermine McWane's own sales." (CX 0997 at 004 (September 22, 2009 message dictated by Mr. Pais)).

1554. On December 21, 2009, McWane announced multiplier increases for Domestic Fittings effective January 22, 2010. (CX 1544 at 002).

1555. Mr. Tatman forwarded McWane's December 21, 2009 price increase announcement to Mr. Rona of Sigma: "Per our MDA this will impact Sigma orders as of the effective date." (CX 1662 at 001; *see also* Rona, Tr. 1602-1604 (discussing CX 1662)).

1556. Mr. Greg Fox of Sigma forwarded the McWane December 21, 2009 price increase announcement within Sigma, noting:

> Under the terms and agreements of our Master Distribution Agreement with [McWane], we will mirror the multiplier and implementation dates of this letter. We have no latitude for exceptions.

(CX 1519 at 002; *see also* CX 1544 at 001 (Mr. Rona forwarding McWane price announcement within Sigma); CX 2530 (Rona, Dep. at 300)).

1557. Sigma announced the same price increase as McWane did (F. 1554), effective January 22, 2010. (CX 1519 at 001 (Mr. Pais email December 29: "I am glad to comply" with McWane price increase); CX 1852 at 001 (Mr. Pais December 30 email attaching "our version of the Customer Letter to announce the price increase.")).

10. The MDA limited the Distributors to whom Sigma could resell McWane Domestic Fittings

1558. The MDA limited Sigma's ability to resell McWane Domestic Fittings as follows:

> Markets. Sigma may only resell McWane Domestic Fittings to:
>
> (1) American Cast Iron Pipe Company; and

> (2) Other customers, including distributors, contractors and fabricators, but excluding manufacturers of ductile iron pipe that have agreed to purchase McWane Domestic Fittings as their sole source of Domestic Fittings when McWane Domestic Fittings are available at the time of order.
>
> McWane shall from time to time provide Sigma with a list of customers who have not agreed to source their Domestic Fittings solely from McWane. Sigma agrees not to sell McWane Domestic Fittings to any customer so listed by McWane, or to any other customer who Sigma actually knows has purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days.
>
> McWane reserves the unconditional right in its sole discretion to (i) call upon and sell McWane Domestic Fittings directly to any prospective customers or existing customers, (ii) investigate and resolve customer complaints, (iii) distribute sales and advertising information and (vii) perform other services. McWane reserves the right in its sole discretion to appoint or designate other distributors or representatives other than Sigma to sell McWane Domestic Fittings.

(CX 1194 at 001-002 § 1(c)).

1559. Under the MDA, McWane prohibited Sigma from selling McWane Domestic Fittings to any customer listed by McWane as not having agreed to purchase their Domestic Fittings solely from McWane or Sigma, through the MDA. (CX 1194 at 001-002 § 1(c); Tatman, Tr. 798).

1560. Under the MDA, Sigma agreed not to sell McWane Domestic Fittings to any customer identified by McWane as having "purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days." (CX 1194 at 001-002 § 1(c); Pais, Tr. 1816-1819).

1561. The MDA provided that:

> Sigma shall . . . take reasonable efforts to monitor its customer's sources of supply of Domestic Fittings, and shall notify McWane as soon as possible if Sigma becomes aware

> of any purchases of non-McWane Domestic Fittings by any such customer.

(CX 1194 at 004 § 3(c)(v)).

1562. Sigma believed that under the MDA, if a customer wanted to buy Domestic Fittings through Sigma, they could, but they would have to buy all their Domestic Fittings from Sigma and that if a customer purchased Domestic Fittings from Star, Sigma could no longer sell them McWane's Domestic Fittings. (Pais, Tr. 1817-1819).

1563. McWane informed major Distributor customers that Sigma would not sell McWane's Domestic Fittings to customers who purchased Domestic Fittings from Star. (CX 2479 (McCullough, Dep. at 142); CX 2477 (Jansen, Dep. 179-180); CX 0108). *See also* CX 2479 (McCullough, Dep. 142-144) (testifying that he "probably" told Distributors Ferguson, Groeniger, and WinWater that, pursuant to the MDA, Sigma could not sell to customers who bought from Star).

1564. Mr. Jansen of McWane conveyed to his sales force that Sigma would enforce the MDA, writing on November 3, 2009:

> Team, I think we have made it very clear in the market regarding our stance on supporting the McWane domestic brand of fittings whether purchased through Tyler Union, Clow or Sigma. If one branch buys from someone other than this then the whole company will be [a]ffected not just that branch.

(CX 0108 at 001).

1565. Mr. Tatman described Sigma's role in McWane's Full Support Program as follows:

> Access to McWane domestic product either through McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times.

> Violation will result in: Loss of access [and] Loss of accrued rebates.

(CX 0119 at 002, 004; Tatman, Tr. 722-723).

11. Sigma implemented McWane's Full Support Program

1566. In Sigma's September 22, 2009 announcement to its customers, Sigma informed its customers as follows:

> As per this MDA, we are now Master Distributors of [McWane] domestic Fittings. As such, we will follow [McWane's] distribution and pricing policies as they are announced from time to time.
>
> As mentioned in their own letter from [McWane] to their customers, which you too may have received, we wish to supply the [McWane] domestic Fittings to any customers who elect to commit to fully support [McWane] branded Fittings for their requirements of domestic Fittings, purchased thru [McWane] or SIGMA. We appeal to you to accept this requirement of exclusive choice, as a fair and reasonable one, in light of the considerable investment by [McWane] to provide this range of domestic production, which is now being expanded to offer domestic Fittings up to 48".
>
> Please note that customers who elect not to fully support this program may forgo any unpaid volume incentive rebates applicable to only the domestic Fittings and delivery of domestic Fittings up to 12 weeks.

(CX 0803 at 002 (emphasis in original); Pais, Tr. 1821).

1567. In the Q & A document that Mr. Tatman prepared and circulated to the McWane sales force after execution of the MDA, Mr. Tatman described Sigma's participation in McWane's Full Support Program in response to a hypothetical customer question:

> Question: Can I utilize another domestic fitting and accessory brand other than Tyler Union or Clow Water products and then still purchase Tyler Union or Clow Water products through Sigma?

> Answer: No, Sigma will be adhering to the same distribution program and policies as the Tyler Union and Clow Water divisions of McWane.

(CX 1179 at 004; Tatman, Tr. 807).

1568. On December 14, 2009, McWane informed Sigma that it was cutting off Hajoca under its Full Support Program and that Sigma must do the same. Mr. Tatman told Mr. Rona: "Per the terms of our MDA I need you to acknowledge that Sigma will also not supply any Hajoca branch with Domestic fittings or accessories until further notice." (CX 1801 at 001; Tatman, Tr. 720 (Mr. Tatman told Sigma not to sell to Hajoca). *See* II.J.6. (McWane's enforcement of its Full Support Program against Hajoca).

1569. Mr. Rona forwarded the email to Sigma's CEO, who responded that Sigma had "no choice but to agree to abide by the rules of the MDA." (CX 0940; Rona, Tr. 1606, 1608 (Rona forwarded to Sigma's distribution group the instruction not to sell McWane-produced domestic fittings to any Hajoca branch); CX 2530 (Rona, Dep. at 258) (McWane told Sigma that it could not sell to Hajoca)).

1570. As requested by McWane, on December 15, 2009, Mr. Rona confirmed to McWane that Sigma was "clear about Hajoca" and would not sell Domestic Fittings to any Hajoca branch. (CX 1801 at 001; Rona, Tr. 1606).

12. Sigma was not permitted to sell to U.S. Pipe

1571. The MDA precluded Sigma from selling McWane's Domestic Fittings to U.S. Pipe. (CX 2203 at 001; Morton, Tr. 2850-2851).

1572. McWane agreed to permit Sigma to resell McWane Domestic Fittings to ACIPCO, but not to U.S. Pipe. As Mitchell Rona explained in the course of the MDA negotiations:

> McWane will not amend to formally include U.S. Pipe. [Mr. Tatman] is firm that they will not share their profit here too and feel they already did so with Acipco who is formally in the agreement now.

(CX 1046 at 001; Rona, Tr. 1587-1590).

1573. At his October 13, 2009 meeting in Birmingham, Alabama with Mr. Morton of U.S. Pipe, Mr. Tatman conveyed to Mr. Morton that under the MDA between McWane and Sigma, U.S. Pipe would not be able to source its Domestic Fittings through Sigma, but would instead have to purchase McWane's Domestic Fittings directly from McWane. (Morton, Tr. 2842; CX 2203 at 001 ("Tatman informed me that Sigma was forbidden from selling to USP as per the Master Distributio[n] Agreement signed between Union [and] Sigma.")).

1574. Mr. Morton had met with Sigma about procuring Domestic Fittings, and believed that Sigma expected to be able to provide U.S. Pipe with Domestic Fittings pursuant to the MDA. (Morton, Tr. 2852-2853).

13. Sigma's intent to block Star through the MDA

1575. As early as February 20, 2009, when Sigma began assessing its options for offering Domestic Fittings, Mr. Pais wrote to Walter Florence, a Sigma Board Member, the following:

- With our relationship with McWane, it is also fully conceivable to get part of our needs produced with SIGMA label, once we establish ourselves as the '2nd choice' for the [Buy American] segment, as they may privately prefer it to be just a 2-supplier market! Besides, this may marginalize Star. . .

(CX 1003 at 004).

1576. In a September 9, 2009 report to the Sigma Board, Mr. Pais noted that Sigma's "strategy to team up with McWane" through the MDA was "likely to have the intended effect of marginalizing Star whose ability to deliver jobs will be highly

suspect, at least over the next 12 months or so." (CX 1022 at 004, *in camera*).

1577. As Mr. Pais explained in a September 22, 2009 dictated voice message:

> [I]f we do our job right, it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility. . . . We need to develop an exclusive agreement arrangement with each customer . . . or we will end up strengthening Star.

(CX 0997 at 003-004; Pais, Tr. 1842-1848).

14. McWane's intent to block Star through the MDA

1578. Mr. McCullough, Mr. Tatman, Mr. Jansen, and Mr. Walton had an internal McWane meeting on August 20, 2009 at which they discussed, among other things, McWane's decision to sell Domestic Fittings to Sigma through the MDA. (CX 2353 (Mr. Walton's handwritten notes from that meeting); CX 2485 (Walton, Dep. at 36-38)).

1579. At the August 20, 2009 meeting (F. 1578), as recorded in the handwritten notes of Mr. Walton, Mr. McCullough made the following points about selling Domestic Fittings to Sigma through the MDA:

> LM [Leon McCullough] want[s] to sell SIGMA to put pressure on Star. LM hopefully to drive Star out of business. Would rather have competition other than Star.
>
> LM thinks that we should sell SIGMA as an insurance policy and to continue to put pressure on Star. . . . LM approved Rick [Tatman]'s recommendation page of his PowerPoint presentation on selling SIGMA.

(CX 2353 at 004 (Mr. Walton handwritten notes of August 20, 2009 meeting); CX 2485 (Walton, Dep. 42-43) ("I wrote down that Leon said that. . . . I remember it more as comments that Leon made towards the end of the meeting.")).

1580. In evaluating the decision to sell Domestic Fittings to Sigma, Mr. Tatman wrote, on June 29, 2009, as a "brainstorming slide" for purposes of discussion, that he did not think that Sigma would be "willing to generate little to no incremental margin $ just to help us block Star." (CX 0076 at 008; Tatman, Tr. 653-654).

1581. In a July 27, 2009 PowerPoint Presentation titled "Sigma - Domestic Review Session," intended for brainstorming and spurring discussion within McWane, Mr. Tatman wrote that having Sigma sell McWane branded product should (1) "reduce Star's ability to grow share," (2) "[k]eep[] additional overcapacity from being added to the industry," and (3) "help drive some additional level of price stability." (CX 0465 at 002, 010; *see also* CX 0170 at 009 (subsequent version of the same presentation sent to Mr. McCullough and Mr. Walton)).

15. Benefits of the MDA

1582. Sigma entered into the MDA with McWane because Sigma saw the MDA as its only viable option for supplying Domestic Fittings to Sigma's customers during ARRA's short time window. (Rona, Tr. 1481; Pais, Tr. 1800-1801 ("[W]e had finally found a recourse by going to our competitor because we thought that was the only option that was viable because the service of the customer was imminent. . . . There was no other option that we could -- this is not a premeditated three or four-year plan that we had to enter a new product."). *See also* Pais, Tr. 1803 ("I would say . . . with the certitude with respect to the requirements of ARRA that we were facing [in September 2009 that] yes, we could not meet the domestic supply option to start complying with the requirements of our customers.").

1583. Sigma perceived that if it was unable to supply Domestic Fittings to its customers, it might also lose some portion of its non-domestic business with those customers. (RX 689 (Rona, Dep. at 118-120) ("I perceived that without domestic fittings, that it could hurt our other fitting or our other products' business. . . . The ARRA period was a very volatile time in a down economy, and if people call you and say do you have any fittings for this, no, I don't have any fittings for that job. The

same customers were buying domestic fittings, other fittings, accessories or restraint products, manholes, and people could potentially forget about you. And as a result, I felt that it was important that we offer a solution to people that they would not forget about us, so I thought it was critical for us. . . . Entering into the master distribution agreement with McWane was a solution to the problem we had.")).

1584. Sigma, with its network of regional distribution yards and larger field sales force, was better able than McWane to provide certain servicing benefits, such as faster delivery to Distributors. (RX 689 (Rona Dep. at 120-124, 133-134); RX 643 (Tatman, IHT at 176-178) ("We have customers that SIGMA has a better relationship [with] than we did. Potentially that could -- volume could be sold from SIGMA versus Star being able to sell that volume. So it's all kind of protecting that volume scenario."); RX 688 (Rona, IHT at 176-78) ("We felt, as a distributor for McWane, that we could take their production as they ramped up and help ourselves and in essence help the market and help them to distribute the fittings through our 14 locations nationwide. That, to us, we perceived as a value.)).

1585. Sigma's distribution centers were more strategically located for more efficient customer delivery than McWane's. (RX 689 (Rona, Dep. at 311-313)).

1586. ACIPCO preferred to buy Domestic Fittings from Sigma rather than McWane, because Sigma provided additional specialty services, including coatings, linings, taps and other add-ons, that ACIPCO felt McWane could not provide as effectively. (RX 688 (Rona, IHT 95-96); Tatman, Tr. 797-798).

1587. ACIPCO benefitted logistically from buying McWane Domestic Fittings from Sigma, rather than McWane, and found the pricing to be competitive. (RX 646 (Burns, Dep. 139-140, 175)).

1588. Groeniger preferred buying Domestic Fittings from Sigma, because Groeniger preferred Sigma's service to both Star and McWane. (RX 669 (Groeniger, Dep. 87-88 ("SIGMA was our prime supplier of foreign product, but understanding that they

were now part of this domestic application, we felt that SIGMA's support, SIGMA's service would now reflect a domestic forehand, that we really did not need Tyler. And . . . we could simply buy the Tyler from SIGMA which was potentially great for us. Because SIGMA had the best service, service, service by far, not even close. Better than Star, much better than Tyler.").

1589. EJ Prescott preferred to buy Domestic Fittings from Sigma when it was concurrently ordering non-domestic Fittings, because Sigma was its preferred non-domestic supplier and it could efficiently round out blended orders. (RX 661 (Prescott, Dep. at 35-36)).

16. The MDA did not increase output or expand the market for Domestic Fittings

1590. McWane's CEO, Ruffner Page, was in favor of entering into the MDA with Sigma because McWane needed "tons in the plant." (RX 642 (Page, Dep. at 61-63)).

1591. McWane had not expected that entry by Sigma into the Domestic Fittings market – through the MDA or independently – would increase the size of the Domestic Fittings market. (CX 0729 at 001 (Tatman July 21, 2009 email: "having more Domestic suppliers doesn't really increase the size of the pie."); CX 2481 (Nowlin, Dep. at 138-139) (calling the idea of having more domestic suppliers does not really increase the size of the pie "a fairly obvious statement")).

1592. In a June 29, 2009 internal McWane PowerPoint Presentation, Mr. Tatman noted as a discussion topic that "[w]hat we 'Assume' to be true at this point" is that having multiple domestic suppliers would not significantly increase the overall Domestic Fittings market size and that a net tonnage gain scenario for McWane was unlikely. (CX 0076 at 006; Tatman, Tr. 656).

1593. The MDA did not increase the size of the Domestic Fittings market. (CX 2531 (Rybacki, Dep. at 160-161) ("Q. The fact that Sigma had access to McWane fittings under the MDA, that didn't cause there to be more domestic jobs; is that right? A. Correct." "Q. . . . By having access to those fittings, you didn't

expand the size of the pie, if you will, you expanded Sigma's ability to service a piece of that pie, is that fair? A. Yes.")).

17. The scope of the MDA

1594. The MDA was a one-year agreement, terminable by either party with 180 days' notice. (Rona, Tr. 1699-1700; CX 1194).

1595. On February 17, 2010, McWane provided Sigma with 180 days' notice that McWane wished to terminate the MDA. (RX 689 (Rona, Dep. at 303-304); CX 1435).

1596. The MDA was in effect for less than a year, from September 2009 to August 2010. (RX 689 (Rona, Dep. at 303-304)).

1597. Through the MDA, Sigma's sales of Domestic Fittings were approximately eight to ten million dollars. (CX 2531 (Rybacki, Dep. at 29).

III. ANALYSIS

A. Jurisdiction

The Complaint charges Respondent McWane, Inc. ("Respondent" or "McWane") with violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . . ." 15 U.S.C. § 45(a)(2); *Kaiser Aluminum & Chem. Corp. v. FTC*, 652 F.2d 1324, 1327 n.2 (7th Cir. 1981). Respondent McWane, Inc. manufactures, markets and sells products for the waterworks industry, including ductile iron pipe fittings that are 3" to 24" in diameter ("Fittings"). F. 2. Respondent is a corporation, as "corporation" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. F. 3.

Respondent's challenged activities relating to the sale of Fittings are in or affect commerce in the United States, as

"commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44. F. 4. Thus, the Commission has jurisdiction over Respondent and the subject matter of this proceeding, pursuant to Section 5 of the FTC Act.

B. Burden of Proof and Statutory Framework

The parties' burdens of proof are governed by Federal Trade Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act ("APA"), and case law. Pursuant to Commission Rule 3.43(a), "[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. § 3.43(a). Under the APA, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). The APA, "which is applicable to administrative adjudicatory proceedings unless otherwise provided by statute, establishes '. . . the traditional preponderance-of-the evidence standard.'" *In re Rambus Inc.*, 2006 FTC LEXIS 101, at *45 (Aug. 20, 2006) (quoting *Steadman v. SEC*, 450 U.S. 91, 95-102 (1981)), *rev'd on other grounds,* 522 F.3d 456 (D.C. Cir. 2008), *cert. denied*, 129 S. Ct. 1318 (2009). *See In re Automotive Breakthrough Sciences, Inc.*, 1998 FTC LEXIS 112, at *37 n.45 (Sept. 9, 1998) (holding that each finding must be supported by a preponderance of the evidence in the record); *In re Adventist Health System/West*, 1994 FTC LEXIS 54, at *28 (Apr. 1, 1994) ("Each element of the case must be established by a preponderance of the evidence.").

Respondent asserts that Complaint Counsel must prove its case under Section 5 of the FTC Act by "substantial evidence," and that Complaint Counsel must prove substantial injury. RB at 64 (citing *FTC v. Cement Inst.*, 333 U.S. 683, 705 (1948); *California Dental Ass'n v. FTC*, 224 F.3d 942, 957 (9th Cir. 2000); *Cinderella Career & Finishing Sch., Inc. v. FTC*, 425 F.2d 583, 592 n.2 (D.C. Cir. 1970); *Rayex Corp. v. FTC*, 317 F.2d 290, 292 (2d Cir. 1963)). In *Steadman*, the Supreme Court held that the requirement under Section 556(d) of the APA that agency orders be "supported by and in accordance with the reliable, probative and substantial evidence" is satisfied by "the traditional preponderance-of-the-evidence standard." *Steadman*, 450 U.S. at 99, 102. *See also In re Chicago Bridge & Iron Co.*, 138 F.T.C.

1024, 1027 n.4 (2005) ("[W]e take it as settled law that regardless of the standard under which a reviewing court must accept the Commission's findings of fact, the Commission (and the Administrative Law Judge ("ALJ") normally must base findings upon a 'preponderance of the evidence.'") (citing *Carter Prods., Inc. v. FTC*, 268 F.2d 461, 487 (9th Cir. 1959)).

Respondent further asserts that Complaint Counsel must prove substantial injury to consumers. RB at 64 (citing 15 U.S.C. § 45(n)). *See also* RB at 60-63 (asserting Complaint Counsel failed to prove McWane's actions caused "substantial injury" to consumers). The statute upon which Respondent relies provides that "[t]he Commission shall have no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." 15 U.S.C. § 45(n). The Commission originally articulated the Section 5(n) [15 U.S.C. § 45(n)] standard in a 1980 policy statement, which was drafted in response to a Congressional inquiry regarding the limits of the Commission's consumer protection authority. Federal Trade Commission Statement of Policy on the Scope of Consumer Unfairness Jurisdiction (December 17, 1980) at n.4, *reprinted in In re Int'l Harvester Co.*, 1984 FTC LEXIS 2, at *304 & n.3. The 1980 policy statement explicitly stated that it did not address the Commission's "competition or antitrust mission," which is guided by "a considerable body of antitrust case law." *Id.* The 1980 policy statement was later codified as Section 5(n) of the FTC Act, 15 U.S.C. § 45(n), and consistent with its applicability to the Commission's consumer protection jurisdiction, has the heading: "Definition of unfair acts or practices." *See* Pub. L. No 103-312, 108 Stat. 1695 (codified at 15 U.S.C. § 45(n)); *see also Rambus*, 2006 FTC LEXIS 102, at *35. Because none of the claims in this case is brought under the Commission's "unfair acts or practices" authority, Section 5(n) does not apply.

The provision of the FTC Act under which this case does proceed, Section 5(a) of the FTC Act, prohibits "unfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a). Unfair methods of competition under Section 5 of the FTC Act

include any conduct that would violate Sections 1 or 2 of the Sherman Act. *See*, *e.g.*, *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 & n.3 (1999); *Cement Inst.*, 333 U.S. at 691-92 (stating that "soon after its creation the Commission began to interpret the prohibitions of § 5 as including those restraints of trade which also were outlawed by the Sherman Act, and . . . this Court has consistently approved that interpretation of the Act); *Rambus Inc. v. FTC*, 522 F.3d 456, 462 (D.C. Cir. 2008). Although the Commission does not directly enforce the Sherman Act, conduct that violates the Sherman Act is generally deemed to be a violation of Section 5 of the FTC Act as well, and principles of antitrust law developed under the Sherman Act apply to Commission cases alleging restraint of trade or unfair competition. *E.g.*, *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986). Accordingly, it is appropriate to rely upon Sherman Act jurisprudence in determining whether the challenged conduct violated Section 5 of the FTC Act. *E.g.*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005) ("[T]he analysis under § 5 of the FTC Act is the same . . . as it would be under § 1 of the Sherman Act."); *Rambus*, 522 F.3d at 462 (holding that Section 5 of the FTC Act reaches all conduct that violates Section 2 of the Sherman Act).

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . ." 15 U.S.C. § 1. Despite its broad language, the ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*, restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and combination or conspiracy to monopolize. 15 U.S.C. § 2. The specific standards applicable to the violations alleged in the Complaint are set forth in more detail, *infra*.

C. The Relevant Market

In a Section 1 case, the first step in determining if a respondent unreasonably restrained trade in the relevant market "is determining the relevant market." *Wampler v. Southwestern Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010). In a Section 2

case, as well, the first step in assessing whether a respondent possesses monopoly power is establishing the relevant market. *Spectrum Sports v. McQuillian*, 506 U.S. 447, 456 (1993) ("without a definition of th[e relevant] market there is no way to measure [the defendant's ability] to lessen or destroy competition"). A relevant market is comprised of a relevant product market and a relevant geographic market. *Brown Shoe Co. v. United States*, 370 U.S. 294, 325-26 (1962); *H.J., Inc. v. Int'l Tel. & Tel.*, 867 F.2d 1531, 1537 (8th Cir. 1989).

The Complaint alleges that there are two relevant product markets: (1) the supply of ductile iron pipe fittings of 24" and smaller in diameter, that are sold for use on open specification jobs ("Fittings"); and (2) the supply of ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, that are sold for use on jobs with domestic-only specifications ("Domestic Fittings"). Complaint ¶ 21; CCB at 59. Respondent does not challenge the allegation that Fittings are a relevant product market. *See* RB at 83-87; Answer ¶ 21 ("McWane admits . . . that the 'marketing and sale of DIPF' may be a relevant product market and that all DIPF [ductile iron pipe fittings], whether imported or domestic, compete for all or virtually all jobs."). Respondent does, however, dispute the allegation that there is a separate relevant product market for Domestic Fittings. RB at 83-87. Specifically, Respondent asserts, imported Fittings and Domestic Fittings that meet American Water Works Association standards are entirely interchangeable commodities that are metallurgically and functionally the same. RB at 83. Respondent further asserts that the American Recovery and Reinvestment Act of 2009, discussed below, had little or no impact on Domestic Fittings and had insufficient impact on the interchangeability of non-domestic and Domestic Fittings. RB at 84-86.

To analyze the alleged relevant markets requires first a discussion of background information on fittings, market participants, and the bidding process. Second, to frame the analysis of the relevant market, a discussion of the economic backdrop and the competition between Domestic Fittings and imported Fittings is required.

1. Background

a. Fittings

Ductile (easily molded) iron pipe fittings ("Fittings") are a small but essential part of any waterworks project that involves pressurized water distribution and treatment systems, such as potable water lines that connect water supply facilities to neighborhoods and certain sewer lines. F. 5, 278-279; *see also* F. 328, 371. Fittings attach to the ends of pipes in order to: change the direction of water flow; connect pipes of different sizes; merge two pipelines into one, or branch one pipeline off into two; and attach pipes to valves, fire hydrants, or water meters. F. 5, 278-279. There are thousands of different types and sizes of Fittings that each serve a different purpose, such as connecting to different sized pipes or providing various degrees of "bend." F. 286-287, 293; *see also* F. 288-292.

Fittings that are 24" or less in diameter are commonly used in underground water distribution networks. F. 291. Larger diameter fittings (above 24" in diameter) are more commonly used in water treatment plants or large transmission lines. F. 292. As discussed below, the relevant product markets in this case consist of ductile iron pipe fittings of 24" and smaller in diameter. Thus, the term, "Fittings," as used in this Initial Decision, refers to Fittings that are 24" or less in diameter, except where otherwise indicated.

Although Fittings come in thousands of configurations of shape, size, and coating, there are around 100 commonly used configurations (referred to as "A" and "B" items) that account for approximately 80% of all Fittings sales. F. 306; *see also* F. 307.

Fittings are homogeneous commodity products produced to standards and specifications of the American Water Works Association ("AWWA"). F. 322. Any Fitting that meets an AWWA specification is functionally interchangeable with any other Fitting that meets the same specification. F. 323.

b. Market Participants

i. Suppliers

There are three main Fittings suppliers in the United States: Respondent, McWane, Inc. ("McWane"), Sigma Corporation ("Sigma"), and Star Pipe Products, Ltd. ("Star"). *See* F. 2, 51, 108, 505. Together, McWane, Sigma, and Star accounted for between 90 and 97 percent of United States Fittings sales in 2008 and 2009. F. 355-356.

McWane has manufactured Fittings at two domestic foundries: its Tyler Pipe & Foundry Company South Plant in Tyler, Texas and its Union Foundry Company in Anniston, Alabama. F. 15. Faced with high inventory levels and insufficient demand for Domestic Fittings, McWane closed its Tyler facility in the fall of 2008 and opened a foundry in China, Tyler Xin Xin. F. 16, 18. In 2007, McWane consolidated internal management of all of its Fittings operations, both domestically and in China, into a single division, "Tyler/Union." F. 17.

McWane had more than a 40% share of the United States Fittings market in both 2008 and 2009. F. 356 ([redacted]% in 2008; [redacted]% share in 2009). From April 2006 until Star began manufacturing Fittings in the United States in 2009, McWane was the only significant supplier of Fittings manufactured in the United States. F. 1040.

Sigma imports and sells Fittings and other waterworks products that are made in China, India, and Mexico. F. 56. Sigma engages in "virtual manufacturing" whereby it provides engineering support to foundries that make its Fittings. F. 57. Sigma had more than a 30% share of the United States Fittings market in both 2008 and 2009. F. 356 ([redacted]% in 2008; [redacted]% in 2009).

Star also imports Fittings from China for sale in the United States. F. 108, 113. Star had nearly a 20% share of the United States Fittings market in both 2008 and 2009. F. 356 ([redacted]% in 2008; [redacted]% in 2009). In 2009, Star began

contracting with foundries in the United States to manufacture Fittings domestically. F. 112.

In addition to McWane, Sigma, and Star, there are a few small suppliers of Fittings, including Serampore Industries ("SIP"), NAPAC, Inc., North American Cast Iron Products ("NACIP"), Metalfit, Backman Foundry, and, starting in 2009, Electrosteel. F. 358; *see also* F. 162, 169, 176, 178, 186, 196. Combined, these other sellers represented between three and ten percent of the United States Fittings market in 2008 and 2009. F. 358.

ii. End Users

End users of Fittings are typically municipalities, regional water authorities, and the contractors they hire to construct waterworks projects (collectively, "End Users"). F. 10; *see also* F. 363-366.

iii. Distributors

McWane, Sigma, and Star sell "all or virtually all" of their Fittings to a relatively unconcentrated group of wholesale waterworks distributors ("Distributors"), who then resell the Fittings to End Users. F. 373-374. There are two large national Distributors, HD Supply and Ferguson, which have 235 and 167 locations nationwide, respectively. F. 223, 228, 377. Together, they account for approximately 50% of all Fittings sales in the United States. F. 377-379. The remaining direct purchasers of Fittings consist of a number of regional waterworks distributors with multiple branches that service specific regional areas, and hundreds of small, local companies with just one or a few distribution yards. F. 375.

c. Bidding Process

When a municipality or regional water authority undertakes a waterworks project, it will generally issue specifications for all of the pipes, valves, hydrants, Fittings and related waterworks equipment needed for the project, and seek bids from contractors for its completion. F. 333. These specifications may identify which brands can be used for the project, as well as whether domestically manufactured Fittings are required. F. 339, 346.

Once contractors receive the specifications, contractors will solicit bids and other assistance from Distributors that supply the various components for that project. F. 340.

d. Open Specifications v. Domestic-only Specifications

Waterworks projects specifications that do not specify the country of origin are referred to as "open specifications." F. 349. Either imported or Domestic Fittings can be used in open specification projects. F. 349, 350. When a mix of imported and domestically manufactured Fittings are sold into open specifications projects, the mix is referred to as "blended." F. 351.

Waterworks projects specifications that require the use of domestically manufactured Fittings are referred to as "domestic-only specifications." F. 347. Imported Fittings cannot be used in domestic-only specifications. F. 350. A project may have a domestic-only specification either because of an End User preference or because municipal, state, or federal law imposes a "Buy American" requirement. F. 347. Domestic Fittings sold for use in domestic-only specifications are sold at higher prices than Fittings (whether imported or domestically manufactured) that are sold into open specification jobs. F. 1075.

e. Economic Backdrop

A few decades ago, most Fittings used in waterworks projects in the United States were manufactured in the United States. F. 462. Beginning in the mid-1980s, importers began to successfully convert End Users' specifications for domestically produced Fittings to open specifications, which permitted the use of both domestic and imported Fittings. F. 463. This process accelerated during the 1990s and 2000s, with non-domestic Fittings comprising the vast majority of the Fittings market by 2005. F. 463.

Prior to the entry of importers into the Fittings market, in addition to McWane, full line domestic manufacturers included U.S. Pipe and Foundry Company ("U.S. Pipe"), Griffin Pipe

("Griffin"), and American Cast Iron Pipe Company ("ACIPCO"). F. 462. These other domestic foundries either dramatically reduced or exited domestic Fittings production in the face of the flood of cheap imports from China, Korea, India, Mexico, and Brazil. F. 472-475. Fittings manufactured in foreign countries such as China are far less expensive than Fittings manufactured domestically because labor and wages are cheap and environmental, health, and safety protocols are much less onerous than those of the United States. F. 468.

In response to what it saw as a flood of cheap imports, McWane filed a complaint before the International Trade Commission ("ITC"). F. 469. In December 2003, the ITC determined that Fittings from China had surged "into the United States in such increased quantities or under such conditions as to cause market disruption to the domestic producers[,]" but the President declined to impose the recommended tariffs. F. 470-471. Believing that it could not remain competitively viable with only its United States manufacturing operations, McWane made the decision to build its own foundry in China. F. 16, 477.

With this background in mind, the Initial Decision turns to the issue of the relevant product markets in this case.

2. Relevant product markets

a. General legal standards

A relevant product market consists of "products that have reasonable interchangeability for the purposes for which they are produced - - price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). "In determining relevant product markets, courts have traditionally considered two factors: '(1) the reasonable interchangeability of use and (2) the cross-elasticity of demand between the product itself and substitutes for it.'" *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 38 (D.D.C. 2009) (quoting *Brown Shoe*, 370 U.S. at 325).

Two products are reasonably interchangeable if they can be used for the same purpose. *FTC v. Staples*, 970 F. Supp. 1066, 1074 (D.D.C. 1997). Cross-elasticity of demand refers to the

"responsiveness of the sales of one product to price changes of the other." *du Pont*, 351 U.S. at 400. Thus, "[i]nterchangeability of use and cross-elasticity of demand look to the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000) (citing *du Pont*, 351 U.S. at 393); *In re Evanston Nw. Healthcare Corp.*, 2007 FTC LEXIS 210, at *144 (Aug. 6, 2007).

b. Fittings for use on open specification jobs

The first relevant product market in this case is the supply of ductile iron pipe fittings of 24" and smaller in diameter, that are sold for use on open specification jobs ("Fittings"). F. 480. As explained below, it is appropriate to group ductile iron pipe fittings of 24" and smaller in diameter into a cluster market and there are no widely available substitutes for ductile iron pipe fittings. As discussed in the following section, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States and that are sold for use on jobs with domestic-only specifications ("Domestic Fittings") are another relevant product market, a submarket of the Fittings market.

i. Fittings 24" and smaller are an appropriate cluster

While there are thousands of different Fittings, as discussed below, it is appropriate to group all Fittings (24" and smaller in diameter) into a single product market. A cluster of products can constitute a relevant market, even if the individual components of the cluster may not all be – and likely are not – interchangeable or substitutable. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 356 (1963) (holding that cluster of products and services constituting "commercial banking" constituted a relevant market); *Staples*, 970 F. Supp. at 1074. "[C]luster markets [are] based on analytical convenience [and] are [both] useful and appropriate for evaluating competitive effects" under appropriate circumstances. *In re Promedica Health Sys., Inc.*, 2012 FTC LEXIS 58, at *48-49 (Mar. 28, 2012).

Using cluster markets is appropriate when the applicable competitive conditions are identical or nearly so for the entire class of products. For example, in *Brown Shoe*, the defendant appealed the district court's finding that children's shoes represented one relevant product market, arguing that such a market includes products that are not reasonably interchangeable for one another: "Brown argues, for example, that 'a little boy does not wear a little girl's black patent leather pump' and that '[a] male baby cannot wear a growing boy's shoes.'" 370 U.S. at 327. The Court reached the pragmatic conclusion that to subdivide the children's shoe market on the basis of size, age, and sex would not advance the antitrust analysis, and therefore was unnecessary:

> Further division does not aid us in analyzing the effects of this merger. . . . Appellant can point to no advantage it would enjoy were finer divisions than those chosen by the District Court employed. Brown manufactures significant, comparable quantities of virtually every type of nonrubber men's, women's, and children's shoes. Thus, whether considered separately or together, the picture of this merger is the same.

Id.

The thousands of different types and sizes of Fittings in this case generally are not substitutes for each other. F. 498, 500. For example, a four inch diameter Fitting cannot substitute for an eight inch Fitting because it would not fit on an eight inch pipe; and a Fitting with a ninety degree "bend" cannot substitute for a Fitting with a forty-five degree bend (or for a straight Fitting). *See* F. 500. However, all Fittings sized 24" and smaller in diameter are manufactured in substantially the same manner and with the same inputs, are sold to the same network of wholesale waterworks distributors for resale to the same End Users, are sold for the same end uses, and are sold in every state in the country. F. 501-503.

It is not necessary to analyze each size and shape of ductile iron pipe fittings in the range of 24" and below as a separate market. CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792. The market analyses of each of these Fittings items

would be essentially identical because the primary suppliers, customers, and Distributors are the same and the materials and other inputs used to produce the products are the same. CX 2260-A (Schumann Rep. at 13); Schumann, Tr. 3791-3792.

The rationale supporting a cluster market of Fittings 24" in diameter and smaller does not support the inclusion of large ductile iron pipe fittings in the same market. Fittings of 24" in diameter and smaller are sold for different uses than fittings over 24" in diameter. *See* F. 289-292, 510-511. Whereas Fittings of 24" or less are typically used underground, for residential work, and by municipalities or plants with long transmission lines, fittings over 24" in diameter are used for large treatment plants or large transmission lines and are a more unusual size for the industry. F. 289-292, 510-511. Fittings 24" in diameter and below make up around 90% of the overall market for ductile iron pipe fittings. F. 290.

Historically, the waterworks industry has differentiated Fittings of 3" to 24" in diameter from fittings of 30" or greater in diameter. F. 515. Moreover, McWane's internal documents group Fittings into categories of 24" or less and 24" or greater. F. 514. The January 2009 DIFRA Report (F. 8, 741-742) also grouped shipments of Fittings by three size ranges: 2"-12", 14"-24", and over 24". F. 516.

In addition, whereas over 90% of Fittings below 24" are sold by three manufacturers, McWane, Sigma, and Star, there is a fourth substantial supplier of ductile iron pipe fittings of 30" and larger, ACIPCO. F. 154-155. ACIPCO has an approximate market share of around 40 percent in ductile iron pipe fittings of 30" and larger in diameter. F. 513. ACIPCO exited the manufacture of fittings under 30" in diameter in 2006 and does not have any interest in extending its product scope to include small and medium diameter Fittings. F. 155, 1065. For these reasons, fittings above 24" in diameter are not properly included in the relevant product market in this case. *See also* CX 2260-A (Schumann Rep. at 14).

Thus, for the above stated reasons, ductile iron pipe fittings with a diameter of 24" or less can be analyzed as if they are part

of a single product market. *See also* CX 2260-A (Schumann Rep. at 13); RX 712A (Normann Rep. at 23 ("domestic and imported product are routinely sold to the same distributors, sold for the same end use, and . . . sold in every state in the country")).

ii. No widely used substitutes for ductile iron pipe Fittings

Products are included in the same relevant market only if they are both functionally and reasonably interchangeable. *United States v. Chas. Pfizer & Co.*, 246 F. Supp. 464, 468 n.3 (E.D.N.Y. 1965); *accord FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 119 (D.D.C. 2004). *See Brown Shoe*, 370 U.S. at 325 (identifying "reasonable interchangeability of use" between products as determinative of product market parameters); *Swedish Match*, 131 F. Supp. 2d at 157 (considering both the "similar in character or use to the product in question" and whether "buyers are willing to substitute those similar products" when analyzing substitution).

There are no widely used substitutes that constrain the price of ductile iron pipe Fittings. F. 492. Indeed, McWane admits that there are no "widely used substitutes" for Fittings. (Answer ¶ 23). The closest substitute for Fittings are fittings made from a type of plastic: polyvinyl chloride ("PVC fittings"). F. 481. However, as explained below, PVC fittings are not reasonably interchangeable with Fittings.

In the view of consumers, PVC fittings are more expensive, have lower pressure ratings, are more difficult to restrain and install, and are viewed as more susceptible to fracture than Fittings. F. 482-484, 487. In addition, PVC fittings are limited in size to 12" and below and some jurisdictions do not allow plastic fittings. F. 485-486.

In the view of the manufacturers of Fittings, PVC fittings are not reasonable substitutes for Fittings. McWane's Price Coordinator and Quality Manager, Mr. Vince Napoli, who has over 20 years of industry experience and was formerly responsible for interpreting product specifications and suitable product applications at McWane, testified at his deposition that: "[n]o one, to my knowledge, has come up with a good plastic substitute for the strength of ductile iron." F. 484. Mr. Napoli further

explained that, in connection with high-pressure applications, "I don't recall ever seeing a PVC fitting even attempt to be used by an engineer [End User]." F. 483.

Further, Fittings suppliers do not track the price of PVC fittings and do not take the price of PVC fittings into account when setting Fittings prices. F. 493. This indicates that Fittings and PVC fittings are not sensitive to each other's price changes, and therefore are in separate markets. (CX 2260-A (Schumann Rep. at 10)). *See Beatrice Foods v. FTC*, 540 F.2d 303, 309 (7th Cir. 1976) (finding separate market when manufacturers of one product did not consider price of other product in setting prices); *Staples*, 970 F. Supp. at 1075-79 (failure to track or react to prices of other products is evidence of separate markets); *see also Brown Shoe*, 370 U.S. at 325 (identifying "sensitivity to price changes" of other products as a factor for market definition); *Staples*, 970 F. Supp. at 1076 (defendant's internal documents comparing its prices to some companies' prices, but not to other companies' prices, indicate the boundaries of the product market).

Fittings are a small sub-segment of the overall waterworks market, comprising 5% or less of the total cost of a typical waterworks project. F. 326. An increase in price in Fittings does not lead to a reduction in demand for Fittings. F. 327-328. McWane's economic expert, Dr. Parker Normann, confirmed that "industry demand for [Fittings] is likely inelastic," *i.e.*, that demand does not decline significantly as price increases. (RX 712A (Normann Rep. at 24)). This acknowledgment that consumers cannot substitute an alternative product when faced with a price increase for Fittings indicates that Fittings constitute a relevant antitrust product market. *See FTC v. Whole Foods Mkt.*, 548 F.3d 1028, 1038 (D.C. Cir. 2008). For the reasons set forth above, ductile iron pipe fittings of 24" and smaller in diameter, that are sold for use on open specification jobs, constitute a relevant product market ("the Fittings market").

c. Fittings for use with domestic-only specification jobs

There is also a separate relevant product market for ductile iron pipe fittings of 24" and smaller in diameter that are made in

the United States, for use in waterworks projects with domestic-only specifications (the "Domestic Fittings market"). F. 518. Domestic Fittings are properly clustered into Fittings sized 24" and smaller in diameter for the same reasons as Fittings sold into open specifications. The Domestic Fittings market is comprised of Domestic Fittings sold into all domestic-only specifications, including domestic-only specifications required by law and those based upon End User preference.

i. No reasonable substitutes for Domestic Fittings in domestic-only specifications

In form and functionality, imported and Domestic Fittings are completely interchangeable: they are manufactured with the same general materials; meet the same AWWA standards; and provide the same functionality and role in waterworks projects. F. 517. Thus, in waterworks projects with open specifications, imported and Domestic Fittings are substitutes for each other. F. 349-350.

However, in waterworks projects where the End User's specification calls for a Domestic Fitting, a Distributor will not purchase an imported Fitting; only Domestic Fittings can be used. F. 350. Thus, for a buyer, *i.e.*, the Distributor having to supply Fittings for a domestic-only waterworks specification, imported Fittings are not interchangeable or a reasonable substitute for Domestic Fittings on domestic-only specifications. Accordingly, because there are no reasonable substitutes, Domestic Fittings sold into waterworks projects with domestic-only specifications are a relevant product market. *See du Pont*, 351 U.S. at 394-95 (defining relevant product market to include all products that are reasonable substitutes for the same purpose for a buyer); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995) (same).

The evidence in this case demonstrates that some waterworks projects are legally required to use only Domestic Fittings. F. 519-523, 526. Indeed, Respondent's expert witness acknowledges: "There are some locations that have a preference or legal requirements for American-made fittings, but this segment is no more than 20% of the market, is declining, and the preferences only apply at certain price ranges." (RX 712A (Normann Rep. at 24)). Jurisdictions that legally require Buy

American specifications include the State of Pennsylvania, the State of New Jersey, the United States Air Force, and various municipalities located across the United States. F. 520-523. In addition, in February 2009, Congress passed the American Recovery and Reinvestment Act of 2009 ("ARRA"). F. 7. ARRA allocated more than $6 billion to water infrastructure projects. F. 524. Waterworks projects funded by ARRA were required by federal law to use Domestic Fittings. F. 526-527.

Respondent contends that the United States Environmental Protection Agency ("EPA") granted a number of waivers permitting imported Fittings to be used on ARRA-funded jobs (RRB at 57). The evidence demonstrates that the use of such waivers was insignificant. F. 531-533, 537. Neither McWane nor Star sold any imported Fittings for use in any ARRA-funded waterworks projects. F. 538, 540. To the extent that Sigma's imported Fittings were used on any ARRA-funded waterworks project, the quantities were few and the circumstances limited. F. 539. Other suppliers, Metalfit, SIP, and Electrosteel, each were unaware of any instances where imported Fittings were used for ARRA-funded projects. F. 543, 545-546. Distributors HD Supply, Ferguson, and Illinois Meter, did not know of any instance in which a customer used an imported Fitting for an ARRA-funded waterworks project, or any instance in which a customer received a waiver of ARRA's Buy American requirement for a Fittings purchase. F. 541-542, 544.

"To the extent that regulation limits substitution, it may define the extent of the market." Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 572b at 430 (3d ed. 2007); U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines, § 4.2.2 (example 15, describing where "[c]ustomers in the United States must use products approved by U.S. regulators[,] . . . [t]he relevant product market consists of products approved by U.S. regulators") (Aug. 19, 2010) available at http://www.ftc.gov/os/2010/08/100819hmg.pdf (hereafter "Merger Guidelines § __"); *Apani Southwest, Inc. v. Coca-Cola Enters.*, 300 F.3d 620, 626 (5th Cir. 2002) (regulatory constraints impeding the free flow of competing goods may be considered in defining relevant market). Here, not only were there legal requirements that only Domestic Fittings be used in some waterworks projects, the evidence

overwhelming showed these regulations did in fact limit substitution.

Respondent further contends that, while there are municipal engineers or other customers who prefer to buy Domestic Fittings, "preferences alone . . . are insufficient as a matter of law to serve as the basis for a finding that domestic Fittings constitute a separate relevant antitrust market." RB at 86. However, consumer preference is critical in defining the market. "After all, market definition focuses on what products are *reasonably* substitutable; what is reasonable must ultimately be determined by 'settled consumer preference.'" *Whole Foods*, 548 F.3d at 1039 (emphasis in original) (citation omitted). Other cases cited by Respondent (RB at 86-87) illustrate the importance of consumer preference in defining markets. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1338 (11th Cir. 2010) (consumer preferences are "crucial to understanding whether a separate market exists"); *Buehler AG v. Ocrim S.p.A.*, 836 F. Supp. 1305, 1325-26 (N.D. Tex. 1993) (defining relevant market to consist of both American and European roller mills, rather than a European-only market, because consumers "typically consider both types before purchase"). Furthermore, Distributors consistently testified that Distributors will not purchase an imported Fitting if the End User's specification calls for a Domestic Fitting. F. 527, 537, 542, 544. Additionally, in light of the Buy America legal requirements, it is not "preferences alone" that creates the separate domestic only market.

Respondent also contends that the vast majority of specifications are open to both imports and Domestic Fittings, that cheap imports now constitute the lion's share of all Fittings purchased in the United States today, and that ARRA had little or no impact on Domestic Fittings during its short lifespan. RB at 83-84. Even if the vast majority of specifications are open to imports and Domestic Fittings and even if ARRA had little impact on Domestic Fittings (*infra* III.G.2.), such points go to the size of the Domestic Fittings market, and not to the issue of whether such a market exists.

ii. Fittings sold into domestic-only specifications are priced differently than Fittings sold into open specifications

McWane charges different prices for Fittings sold into open specifications than it does for Fittings sold into domestic-only specifications. F. 1075; *see also infra* Section III.G.2.b.ii.(a). For example, in McWane's February 2008 price multipliers[7], domestically manufactured fittings sold into domestic-only specifications were substantially higher than its February 2008 "blended" multipliers (a mix of imported and domestically manufactured Fittings sold into open specifications projects). F. 1075-1076.

A substantial gap in pricing can be indicative of separate markets. *Geneva Pharms. Tech. Corp. v. Barr Labs.*, 386 F.3d 485, 497 (2d Cir. 2004). In *Geneva Pharmaceuticals*, the court found that generic and branded drugs were not in the same market despite therapeutic equivalence because sustained price differential showed that neither product constrained the other's pricing. *Id.* at 496-97. Similarly, in *U.S. Anchor Mfg. v. Rule Indus.*, 7 F.3d 986, 997-98 (11th Cir. 1993), where there was "no reasonable possibility that a significant number of consumers would have switched to [patented products], many of which were offered at nearly double the price of their generic substitutes, in response to more modest increases in generic prices," "distinctly higher prices, a distinct group of customers, strongly inelastic demand and limited substitution of supply" weighed heavily in determining the relevant product market. *Id.* "Moreover, the higher prices charged for [the patented product] are evidence that a distinct group of customers was unwilling to switch away from the prestigious branded product in response to price increases above competitive levels." *Id.* *See also* Merger Guidelines at § 4.1.4 ("If a hypothetical monopolist could profitably target a subset of customers for price increases, the Agencies may identify relevant markets defined around those targeted customers, to whom a hypothetical monopolist would profitably and separately impose at least a [small but significant and non-transitory increase in price] SSNIP."); *United States v. Aluminum Co. of America*,

[7] Multipliers are published discounts off a Fittings supplier's published list price. F. 419.

377 U.S. 271, 276 (1964) ("[W]here insulated aluminum conductor pricewise stands so distinctly apart, to ignore price in determining the relevant line of commerce is to ignore the single, most important, practical factor in the business.").

The evidence establishes that, regardless of price, a Distributor will not purchase an imported Fitting if the End User's specification calls for a Domestic Fitting. Where the price of Domestic Fittings sold into domestic-only specifications stands so distinctly apart from Fittings sold into open specifications, this important, practical factor is further evidence that Domestic Fittings sold into domestic-only specifications make up a separate product market. For the reasons set forth above, ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, for use in waterworks projects with domestic-only specifications, constitute a relevant product market ("the Domestic Fittings market").

3. Geographic market

Complaint Counsel contends that the relevant geographic market for both the Fittings market and the Domestic Fittings market is the United States. CCB at 70-81. Respondent does not address this issue in either its Post Trial Brief or Reply Brief. Respondent's expert witness opines that the geographic market is no larger than the United States; however, it may be smaller than the whole United States, as there may be separate regional markets. F. 553.

A relevant geographic market is defined as "the 'area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.'" *Philadelphia Nat'l Bank*, 374 U.S. at 359 (quoting *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)); *see also Morgenstern v. Wilson*, 29 F.3d 1291, 1296 (8th Cir. 1994) (defining the relevant geographic market as the "area to which consumers can practicably turn for alternative sources of the product and in which the antitrust defendants face competition").

The market area in which the Fittings suppliers operate and to which the purchasers can practicably turn for supply, is the United States. F. 554. For example, McWane, Sigma, and Star each use

warehouses and distribution centers located throughout the United States to supply Fittings to waterworks distributors across the United States. F. 551. Specifically, McWane has distribution centers that enable one to two day delivery to 95 percent of the United States. F. 551. Sigma has five main warehouses, some satellite warehouses, and distribution centers in Florida, California, Washington, and Arizona. F. 551. Star has thirteen distribution centers in the United States, in order to "stock product closer to [customers] for better delivery times." F. 551. From the perspective of a local Distributor, the Fittings of one manufacturer are interchangeable with those of another manufacturer located elsewhere in the United States. F. 552. Both Complaint Counsel's and Respondent's expert witnesses opined that the geographic market is no larger than the United States; however, it may be smaller than the whole United States, as there may be separate regional markets. F. 553.

Defining the relevant geographic market as the United States is common where, as here, firms use competing distribution networks supplying the entire nation. *E.g.*, *FTC v. Cardinal Health*, 12 F. Supp. 2d 34, 50 (D.D.C. 1998) ("the wholesale [drug] industry is largely driven by the competition that takes place on a national level"); *Frito-Lay, Inc. v. Bachman Co.*, 659 F. Supp. 1129, 1138 (S.D.N.Y. 1986) ("Defendant's contention that the entire United States constitutes the relevant geographic market is a logical one since Frito-Lay distributes [salted snack foods] throughout the United States.").

For the above stated reasons, in the Fittings market, the relevant geographic market is the United States. By definition, purchasers of Fittings in the Domestic Fittings market can turn only to manufacturers that produce fittings in the United States. It follows that, in connection with the supply of Domestic Fittings, the relevant geographic market is the United States. Accordingly, the relevant geographic market for both the Fittings market and the Domestic Fittings market is the United States.

D. Count One: Alleged Conspiracy with Sigma and Star to Stabilize and Raise Fittings Prices

1. Overview

a. Conspiracy law

Count One of the Complaint charges that McWane conspired with Sigma and Star to raise and stabilize prices in the Fittings market. Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. A violation of Section 1 of the Sherman Act also constitutes an unfair method of competition under Section 5 of the FTC Act, 15 U.S.C. § 45. *See California Dental Ass'n*, 526 U.S. at 762 & n.3; *FTC v. Motion Picture Adver. Service Co.*, 344 U.S. 392, 394-95 (1953).

To prevail on this Count, Complaint Counsel must prove: "(1) the existence of an agreement, combination or conspiracy, (2) among actual competitors (*i.e.*, at the same level of distribution), (3) with the purpose or effect of 'raising, depressing, fixing, pegging, or stabilizing the price of a commodity,' (4) in interstate or foreign commerce." *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361 (10th Cir. 1989) (citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 216-19 (1940); *National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679 (1978)).

A conspiracy to raise and stabilize prices is illegal *per se* under Section 1. *Socony-Vacuum Oil Co.*, 310 U.S. at 223 ("[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."); *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969) (stating that "interference with the setting of price by free market forces is unlawful *per se*"). *See also Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958) (stating that price fixing agreements are among those "certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be

unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use"); *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) ("Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices . . . .").

"The existence of an agreement is 'the very essence of a section 1 claim.'" *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 356 (3d Cir. 2004) (quoting *Alvord-Polk, Inc. v. Shumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994)). Section 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade[;] . . . only restraints effected by a contract, combination, or conspiracy. . . ." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775 (1984). As the First Circuit Court of Appeals has summarized:

Section 1 by its plain terms reaches only "agreements" -- whether tacit or express. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). It does not reach independent decisions, even if they lead to the same anticompetitive result as an actual agreement among market actors. 15 U.S.C. § 1; *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2208-09, 176 L. Ed. 2d 947 & n.2 (2010); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988). The statute "does not require sellers to compete; it just forbids their agreeing or conspiring not to compete." *In re Text Messaging Antitrust Litig.*, No. 10-8037, 630 F.3d 622, 2010 U.S. App. LEXIS 26299, 2010 WL 5367383, at *4 (7th Cir. Dec. 29, 2010) (Posner, J.). *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011).

Thus, the crucial question in determining conspiracy is "whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement . . . .'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007). An "agreement" is "a unity of purpose or a common design and understanding, or a meeting of minds" as to the alleged unlawful arrangement at issue. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946). In other words, there must be a "conscious commitment to a common scheme designed to achieve an unlawful objective."

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764 (1984).

A conspiracy may be demonstrated by direct or circumstantial evidence. *See Monsanto*, 465 U.S. at 768. "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). As a practical matter, however, it is rare to be able to prove a conspiracy with direct evidence, such as explicit agreements or admissions of conspiracy; more typically, the proponent of an alleged conspiracy will rely upon inferences drawn from circumstantial evidence, such as the conduct of the parties. *City of Tuscaloosa v. Harcros Chemicals*, 158 F.3d 548, 569 (11th Cir. 1998); *ES Dev., Inc. v. RWM Enterprises*, 939 F.2d 547, 553-54 (8th Cir. 1991); VI Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 1410c at 71 (3d ed. 2010) (hereafter, "Areeda"). Such circumstantial evidence will "usually be . . . of two types -- economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002).

b. Complaint Counsel's conspiracy theory

Complaint Counsel posits a complex, multi-phase conspiracy among McWane, Sigma, and Star (hereafter, the "Suppliers"[8]), engineered by McWane, to raise and stabilize Fittings prices by curtailing certain discounting practices and increasing price transparency. Complaint Counsel argues that this agreement manifested itself in three separate "episodes." CCB at 107. The first "episode" claimed by Complaint Counsel is that in or around January 2008, McWane, Sigma, and Star formed an agreement to "curtail" Project Pricing, a form of discounting off published multipliers that is common in the Fittings market. CCB at 107-108. The second "episode," according to Complaint Counsel, is that in or around May 2008, in an effort to further increase the

[8] The capitalized term "Suppliers" refers only to McWane, Sigma, and Star. In instances where the term is used to encompass other manufacturers of Fittings, the lowercase term "suppliers" is used.

transparency of Fittings prices, McWane, Sigma, and Star "unlawfully exchanged assurances related to" the formation of the Ductile Iron Fittings Research Association ("DIFRA") and the "exchange of" certain Fittings tons-shipped data. CCB at 108. The third "episode," charged by Complaint Counsel, is that in or around April 2009, McWane and Star exchanged mutual assurances to adhere to McWane's newly announced price list. CCB at 108. Complaint Counsel seeks to prove the single, overall price fixing conspiracy by proving one or more of the foregoing "sub-agreements." *Id.*

McWane responds that: there is no direct evidence of conspiracy and the circumstantial evidence fails to demonstrate any agreement involving McWane; the evidence at best demonstrates oligopolistic conscious parallelism, which is legal; the evidence shows McWane acted independently and competitively at all times and it did not engage in any pricing discussions with its competitors; the economic evidence shows the Fittings market was competitive during the relevant time period; and prices were neither "raised" nor "stabilized" in the Fittings market.

In determining whether the behavior at issue in this case "stemmed from independent decision or from an agreement, tacit or express," *Theatre Enterprises v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 540 (1954), the duty of the fact finder is "to look at the whole picture and not merely at the individual figures in it." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). "[C]ircumstantial evidence alone cannot support a finding of conspiracy when the evidence is equally consistent with independent conduct. In such a case, the evidence of conspiracy would not preponderate." *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1009 (6th Cir. 1999). Thus, "an inference of a conspiracy to restrain trade must be more probable than the inference of independent action in order for the inference of conspiracy to be drawn." *Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1488 n.14 (D.C. Cir. 1984). Indeed, where "taken as a whole, the evidence points with at least as much force toward unilateral actions . . . as toward conspiracy," a fact finder cannot reach the latter conclusion without engaging in "impermissible speculation," and such

evidence is "insufficient as a matter of law to support a finding of conspiracy." *Venture Technology, Inc. v. National Fuel Gas Co.*, 685 F.2d 41, 48 (2d Cir. 1982) (reversing jury verdict). Before analyzing the evidence and applicable law in more detail, a preliminary discussion of the nature of oligopolies is set forth below.

c. Oligopoly

The Fittings market is an oligopoly. F. 362. The term "oligopoly" means few sellers. Areeda, ¶ 1429a at 221. An oligopoly has been further defined as "an economic condition where only a few companies sell substantially similar or standardized products." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1031 n.3 (8th Cir. 2000) (quoting Black's Law Dictionary 1086 (6th ed. 1990)); *see also* Areeda, ¶ 404a at 9 ("An oligopoly market is one in which a few relatively large sellers account for the bulk of the output.").

An oligopoly is distinctly characterized by "recognized interdependence" among the firms in the oligopoly. Areeda, at ¶ 404a; *see also Rebel Oil*, 51 F.3d at 1443 ("[b]y definition, oligopolists are interdependent . . ." (citation omitted)). The term, "'interdependent' merely describes the phenomenon of sequential pricing decisions that are each made (1) in response to the ones preceding it and (2) in hope or expectation of the ones that follow it." *In re Petroleum Products Antitrust Litig.*, 906 F.2d 432, 442 n.5 (9th Cir. 1990). A participant in an oligopoly market dominated by a small number of firms is aware that "any single firm's 'price and output decisions will have a noticeable impact on the market and on its rivals.'" *Flat Glass*, 385 F.3d at 359 (citation omitted). It follows, according to the theory of interdependence, that a rational oligopolist "must take into account the anticipated reaction" of its rivals when making decisions about price and other issues. *Id.* As the Areeda treatise further explains:

In a market inhabited by 1,000 small firms, for example, a single firm could double its output without any expectation that total supply would be so affected as to cause any price change; the effects of the firm's increased sales would be so diffused among its numerous competitors that they would not be aware of any

change. By contrast, in a market served by three large companies, each firm must know that if it reduces its price and increases its sales at the expense of its rivals, they will notice the sales loss, identify the cause, and probably respond. In short, each firm is aware of its impact upon the others. Though each may independently decide upon its own course of action, any rational decision must take into account the anticipated reaction of the other two firms. Whenever rational decision making requires an estimate of the impact of any decision on the remaining firms and an estimate of their response, decisions are said to be "interdependent." *Id.* ¶ 1429a at 221-222.

It is possible for sellers in an oligopoly to "in effect share monopoly power, setting their prices at a profit-maximizing, supracompetitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). "An oligopolist can increase market price, but only if the others go along." *Rebel Oil*, 51 F.3d at 1443 (citation omitted). Through "recognizing their shared economic interests and their interdependence with respect to price and output decisions' . . . , [e]ach producer may independently decide that it can maximize its profits by matching one or more other producers' price, on the hope that the market will be able to maintain high prices if the producers do not undercut one another." *White*, 635 F.3d at 576 (quoting in part *Brooke Group*, 509 U.S. at 227). However, because such conduct, variously referred to as "conscious parallelism," "tacit collusion," or "oligopolistic price coordination," may stem from independent decision making, it is well established that the Sherman Act does not prohibit it. *Brooke Group*, 509 U.S. at 227; *see E.I. du Pont de Nemours & Co., v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) ("[T]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws."); *Twombly*, 550 U.S. at 553-54 (reiterating rule of *Brooke Group* that evidence of parallel behavior or even conscious parallelism alone, without more, is insufficient to establish a Section 1 violation); *Baby Food*, 166 F.3d at 122 ("In an oligopolistic market, . . . interdependent parallelism can be a necessary fact of life but be the result of

independent pricing decisions."); *Flat Glass*, 385 F.3d at 359 ("[A]ccording to the theory of interdependence, . . . firms in a concentrated market may maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action.").

"Because of their mutual awareness, oligopolists' decisions may be interdependent although arrived at independently." Areeda, ¶ 1429 at 221. Accordingly, as the court stated in *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988): "Courts . . . have almost uniformly held, at least in the pricing area, that . . . individual pricing decisions (even when each firm rests its own decision upon its belief that competitors will do the same) do *not* constitute an unlawful agreement under section 1 of the Sherman Act. . . . That is not because such pricing is desirable (it is not), but because it is close to impossible to devise a judicially enforceable remedy for 'interdependent' pricing. How does one order a firm to set its prices *without regard* to the likely reactions of its competitors?" *Id*. at 484 (italics in original).

The particular analytical challenge when evaluating an alleged conspiracy in an oligopolistic market, such as is presented in this case, is to distinguish between mere tacit collusion, on the one hand, which is a function of interdependence, and is not unlawful, *Brooke Group*, 509 U.S. at 227, and an agreement, which requires finding a "conscious commitment" to a common, unlawful plan. *See* Areeda, ¶ 1410a at 68; *Monsanto*, 465 U.S. at 764. Although the language of Section 1 is broad enough to encompass a "tacit agreement," *i.e.*, an agreement that is reached through conduct rather than express words, "tacit coordination" is not unlawful. *See High Fructose Corn Syrup*, 295 F.3d at 654-55. Tacit coordination in an oligopoly market "need not imply even a weak commitment or prior understanding as to how each will behave. The price leader may assume that others have made a similar calculation about which price will maximize profits. Or the leader may simply proceed by trial and error: raise the price and see what happens, especially where reversing an unfollowed price rise is not very costly." Areeda, ¶ 1410b at 71. "Notwithstanding the many difficulties in appraising the sufficiency of circumstantial evidence, we know what we are looking for: some level of commitment to a common course of action." Areeda, ¶ 1410c at 72. Conduct indicating an agreement, particularly in the context

of conscious parallelism, is "'conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement.'" *Twombly*, 550 U.S. at 557 n.4 (quoting with approval Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N.Y.L.S. L. Rev. 881, 899 (1979)). Where interdependence seems likely, the finder of fact must "weigh all the evidence in the actual business context to decide whether a traditional agreement emphasizing commitment is more probable than not." *Id.* At all times, "the ultimate burden of persuading the factfinder that a conspiracy exists is on the plaintiff." *Kreuzer*, 735 F.2d at 1488.

2. Alleged agreement to curtail Project Pricing (Complaint Counsel's "episode one")

Complaint Counsel's "episode one" of the alleged conspiracy to raise and stabilize prices is an asserted agreement among McWane, Sigma, and Star to "curtail" Project Pricing. Complaint Counsel seeks to prove this agreement to curtail Project Pricing by proving parallel conduct and certain "plus" factors, which, according to Complaint Counsel, demonstrate that the parallel conduct was the result of an agreement to curtail Project Pricing. This agreement, according to Complaint Counsel, began in January 2008 and "largely fell apart in the fall of 2008." CCB at 114. Respondent denies any such agreement and contends that Complaint Counsel has failed to meet its burden of proving any agreement involving McWane.

A summary of the material facts regarding the asserted agreement to curtail Project Pricing follows. Thereafter, the facts are analyzed in relation to the parties' detailed arguments, in which additional facts are addressed as necessary. Finally, the evidence is weighed to determine whether, viewed as a whole, the inference of an agreement to curtail Project Pricing is more likely than not.

a. Summary of Facts

i. Fittings Pricing

(a) Published pricing

The published prices for Fittings have two components: a nationwide list (or catalog) price, and a regional "multiplier" that reduces the list price. F. 413, 418-419. The "published price" or "standard price" for a given Fittings item in a given state is the list price multiplied by the then-applicable multiplier for that state. For example, if a Fitting has a $1,000 list price, and the Texas multiplier is .28, the published price for that individual Fitting in Texas will be $1,000 x .28, or $280. F. 414. Multipliers vary from state to state, based upon the prevailing competitive environment in each state. F. 420.

McWane, Sigma, and Star each publish their list prices in price books or catalogs that are widely disseminated to all of their customers (Distributors). F. 560. List prices are also posted on their public websites. F. 560. Any changes in multipliers are widely disseminated through letters sent from the Suppliers to Distributor customers, via fax or email, either on an individual state or region basis, or, in the case of the large national Distributors, via "multiplier maps" that identify local multipliers for each state across the United States. F. 423, 561.

McWane is an industry leader with respect to pricing, and the other Suppliers try to follow McWane as best they can. F. 555. Historically, when McWane announces new list prices, Sigma and Star generally follow with substantially matching list prices. F. 556. Sigma and Star generally also try to match new multipliers published by McWane. F. 556. Any published price increase by one Supplier that is not adopted by the other Suppliers will not be accepted in the market and will not be sustained. F. 557. As Mr. Daniel McCutcheon, then Vice President of Sales and Operations of Star explained: "[I]f you're the highest-priced fitting in a commodity market, you're not going to sell a lot of fittings." F. 557.

(b) Project Pricing

"Job prices," "special prices," or "project prices" are discounts off the published multiplier that are offered to Distributors bidding on a project ("Project Pricing"). F. 428, 430. Project Pricing, which is typically expressed in the form of a multiplier that is lower than the published multiplier, is generally negotiated in relation to a specific job and is a reaction to the competitive environment.[9] F. 431, 440. Most waterworks projects are individual projects subject to a bidding process. F. 331. For a specific project, Distributors commonly seek bids from multiple Fittings suppliers, including McWane, Sigma, and Star. F. 562. Distributors play the Suppliers off one another in an attempt to procure a lower price, by calling each of them, contending that another Supplier has offered a particular discount, and trying to get Suppliers to match or beat each other's offers. F. 368-369, 565. Distributors consider price, service, relationship, financial stability, warranty, and product quality when selecting a Fittings supplier. F. 391. Price competition among Fittings suppliers takes place principally through Project Pricing, and to a lesser extent, through other price concessions such as rebates, reductions in freight charges, and/or extensions of credit or payment terms.[10] F. 442.

Project Prices are not published, and the Suppliers do not want their competitors to know when a Project Price is being offered, or the amount of any other price concessions, for fear that their competitors will offer a lower price and take the project. F. 435-436, 563-564. Thus, the Suppliers each work to gather competitive information from the field, typically through their sales persons, who attempt to learn from Distributors and then report back, prices being bid in the market. F. 571-573.

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[9] For example, in a state with a published multiplier of .30, the Supplier and Distributor may agree that, for a particular project, the multiplier will be .27.

[10] In addition to its published multipliers and Project Pricing, McWane and the other Suppliers have historically offered customers a variety of other price concessions including freight concessions, cash discounts, extended payment terms, cash-backs, corporate rebates, and branch rebates. F. 430. The alleged conspiracy does not involve these other discounts.

However, the Suppliers may not trust information provided by the Distributor, because the Distributor has a financial incentive to "trick" Suppliers into offering a lower price. F. 565, 573.

When one Supplier learns of a Project Price, the other Suppliers seek to match or beat it. F. 457. In addition, when Distributors in a given region learn of a Project Price being offered, other Distributors demand the same discount, so as to be competitive on their bids to the End User for the same job. F. 457. Furthermore, if a Supplier offers a special price to one Distributor, then the Supplier needs to be prepared to offer that special price to all Distributors bidding on that project. F. 459. Those Distributors then expect that lower price in later projects, and the spiral of declining prices can lead to zero gross margin. F. 459. To the extent that spiraling Project Pricing leads to price erosion and squeezed profits, Project Pricing is not good for a supplier's long-term health. F. 457, 459-460. Therefore, suppliers would prefer not to offer Project Pricing. F. 460. Moreover, Project Pricing in the "auction" environment described above creates greater price instability and a loss of "visibility" as to where the true competitive price level is. F. 566. As described by McWane's Fittings division Vice President and General Manager, Mr. Richard Tatman, bidding in this environment is "shooting in the dark." F. 566. McWane prefers to have greater visibility into where the true competitive market level is, *i.e.*, the actual selling prices, so it can know what price it is "shooting at." As Mr. Tatman stated: "If I can see it, I can shoot it." F. 567. Notwithstanding the problems with Project Pricing, described above, Project Pricing has been a standard practice in the Fittings market. F. 429.

ii. Economic conditions in 2007

During 2007, with the economic decline, the Fittings industry experienced a period of declining demand, which resulted in increased price competition to the point of price erosion, and increased costs. F. 581. The price erosion in the Fittings market occurred not in published list prices or published multipliers, but in the effective or "actual" multiplier, which is the average weighted multiplier at which Fittings products are sold in a given area and includes Project Pricing, but not other discounts, such as rebates. F. 584. In summary, beginning in 2007, demand for

Fittings was falling because of the economic downturn and decreased demand for new housing, which is the principal driver in Fittings demand. F. 579, 582. Rather than scaling back production and reducing inventory in the face of declining demand, the then-manager of McWane's Fittings business, Mr. David Green (F. 42), increased production to spread fixed costs over a higher production volume, thereby creating the appearance of reducing manufacturing costs in the short term. F. 590. Thus, as of late 2007, when Mr. Tatman replaced Mr. Green as general manager of McWane's Fittings business (F. 21-23, 42), McWane had excess inventory and a need to increase volume. F. 591-593.

With the economic decline, the Fittings market became more price competitive, as Distributors demanded discounts off published multipliers in order to compete for the limited number of jobs available with contractors. F. 583. Star, in particular, was known to be especially aggressive with its Project Pricing prior to 2008. F. 568-570. Project Pricing had been a key method through which Star, as the smallest of the Suppliers, grew its business and its market share. F. 568. At the same time as demand was declining and prices were eroding, the costs of doing business overseas, particularly in China, were increasing. F. 586. The acceleration of cost inflation overseas was greater than the cost inflation for domestic production, and thus was poised to affect importers, such as Sigma and Star, more severely than McWane and, to this extent, gave McWane a cost advantage. F. 588-589. McWane also found itself losing share in this market because McWane's sales force was smaller than that of Sigma and Star, which inhibited McWane's ability to detect and respond to Project Prices being offered in the field. F. 594-595. Due to this lack of visibility, and Sigma's and Star's more "aggressive" sales force, McWane was getting "beat at the pricing game." F. 595-596.

iii. McWane's pricing strategy for 2008

On October 23, 2007, Sigma announced in a letter to its customers that, due to a difficult market and increased costs, it planned to implement a published multiplier increase on Fittings of "two or three" points, effective November 5, 2007, and a list price increase for all Sigma's products, to be effective January 2,

2008, which would be "a minimum of 6%." F. 602. On November 30, 2007, Star announced in a letter to its customers that Star would be publishing a new price list, effective January 1, 2008, although Star did not state a percentage increase. F. 603. McWane obtained copies of Sigma's and Star's customer letters. F. 617; *see* CX 0627 at 010, 013 (F. 626).[11] In late 2007, McWane needed to decide what its competitive strategy would be going forward, including how to react to the pricing information contained in Sigma's and Star's earlier customer letters, described above. F. 617, 625.

As part of the decision making process within McWane, Mr. Tatman undertook a detailed analysis, which included the preparation of a spreadsheet in which he assessed and compared, for every state, McWane's then-published multiplier, McWane's "effective" multiplier (*i.e.*, the multipliers at which McWane's Fittings were being actually sold); a proposed new multiplier; and the percentage change and effect on revenue from the proposed multiplier. F. 627. Mr. Tatman included data for both blended Fittings (*i.e.*, imported or U.S. made Fittings sold into open specification jobs (F. 349-351)) and Domestic Fittings (U.S. made Fittings sold into domestic-only specification jobs (F. 347)). F. 627. In addition, Mr. Tatman entered Sigma's proposed new list prices, obtained from Sigma's website, into a spreadsheet and applied them to the mix of products and volume McWane would likely sell, and determined that the weighted average of Sigma's announced list price increase amounted to a 25% increase. F. 628-629.

On December 22, 2007, Mr. Tatman sent an internal email to Mr. Leon McCullough, Executive Vice President of McWane in charge of the Fittings division (F. 28), with a copy to Mr. Thomas Walton, then Senior Vice President overseeing the Fittings division (F. 44), notifying them that Sigma had recently posted its new list prices, to be effective January 2, 2008, and that Sigma was "pulsing sources" to see if McWane would follow. F. 617. Mr. Tatman further noted that Star had not yet published its new

[11] There is no allegation or proof that McWane obtained any of customer letters at issue in this case directly from Sigma or Star, and the evidence demonstrates that these letters were typically provided to a supplier by its Distributor customers, and then circulated internally at the supplier. F. 558.

list prices and had delayed any implementation to February 4, 2008, and that he believed Star was "waiting to see" what McWane was going to do before it posted new prices or printed any new list price books. F. 617. The internal email continued:

> Given both the change in the Tyler/Union leadership structure and the accelerated inflation in China compared to Domestic cost, I believe we're in a unique position to help drive stability and rational pricing with the proper communication and actions.
>
> I have a concept that I believe will work if properly executed. There are some additional data points to review, but I should be in a position to discuss with you in detail during the sales meeting or potentially before if needed.

F. 617. An unstable market to Mr. Tatman means a market in which, based upon a weighted average of all the jobs sold over a period time, there is a high variation between the published multiplier and the average, actual multiplier at which jobs are being sold. F. 618. Mr. Tatman believes that a market begins to become unstable when the average weighted multiplier is 10% or more below the published multiplier. F. 458, 618.

Mr. Tatman prepared and transmitted a PowerPoint Presentation to Mr. Walton and Mr. McCullough on December 25, 2007 ("December 25, 2007 PowerPoint Presentation"). F. 620. Mr. Tatman's transmittal email referred to the PowerPoint Presentation as a "draft presentation," reflecting "a concept we might want to discuss in regards to our pricing strategy for utility fittings." F. 620. The email continued:

> Our past attempts to drive stable pricing haven't been too successful. However, our new leadership structure coupled with China inflation out pacing domestic costs may provide a unique opportunity for success provided our strategy and execution is correct.

> Please let me know if this concept is something you want me to scope further.

F. 620.

Based on his analysis of the competitive environment and the available pricing data, summarized above, Mr. Tatman recommended to his bosses that McWane not follow Sigma's proposed 25% list price increase, but instead publish an average multiplier increase of approximately 8% over McWane's then-effective multiplier levels. F. 631. Mr. Tatman believed that following Sigma's 25% increase would result in even less visibility as to the true competitive level of prices in the market. F. 630. Mr. Tatman's strategy was to publish a lower multiplier increase, which was closer to the true market price. F. 634-635. If Sigma and Star followed McWane's published multipliers, which they historically did, F. 555-557, 679, this would compress the "headroom" between published prices and actual market prices, and result in a narrower range in which Sigma and Star could maneuver to undercut McWane on price. F. 630-634. To the extent this strategy increased "visibility" and "stability" of Fittings prices, McWane would thereby be in a better position to detect and beat Sigma's and Star's pricing in the marketplace, and, hopefully, gain sales volume and market share. F. 566-567, 592-594, 630-636. Mr. Tatman's pricing strategy for McWane was designed to put financial pressure on Sigma and Star, who Mr. Tatman believed were more desperate for a price increase than McWane. F. 633, 638; *see also* F. 586, 588-589 (accelerated cost inflation for China production was outpacing domestic production costs). As Mr. Tatman explained, reduced "wiggle room" affects the amount of discounting the competitor can do because if it "is making 50 percent profit on something, he's got a lot of things he can do. If he's making 20 percent profit on something, he doesn't have near the amount of flexibility." F. 632-633. Accordingly, if Sigma and Star followed McWane's lead, then McWane would benefit competitively.

Mr. Tatman's strategy, summarized above, was reflected in his December 25, 2007 internal PowerPoint Presentation. F. 626. Mr. Tatman, Mr. McCullough, and Mr. Walton discussed the various points of the strategy, including what specifically would be stated in the customer letter that would ultimately announce

McWane's new published multipliers. F. 625; *see* CX 0627 at 006-007 (draft customer letters (F. 626)). McWane knew that its competitors, Sigma and Star, would obtain and review McWane's customer letter and make their decisions about what they each would do, in part, based on the information contained in McWane's customer letter. F. 558-559, 574, 647. The Suppliers read each other's letters with a critical eye, however, and do not necessarily believe that what is said in a customer letter with respect to pricing will necessarily be implemented in the market. F. 573. McWane's January 11, 2008 Customer Letter, described in more detail below, was the result of McWane's internal discussions, including the resolution of what message to send to the market and its competitors. F. 646.

Also in late 2007 or early 2008, McWane created a position at the company, referred to as "pricing coordinator" or "pricing manager," and gave the job to Mr. Vince Napoli, an accountant and McWane employee whose then-position with McWane was being eliminated. F. 656. Mr. Napoli's responsibilities included, among others, keeping track of, and verifying, individual job prices as stated on submitted orders, and, in this way, serving as a middleman between the sales persons and the order entry people. F. 656. Mr. Napoli also had limited authority to approve pricing adjustments, in the range of one to three discount points off the multiplier. F. 656. McWane created forms for sales persons to use when requesting pricing approval that sales persons were supposed to complete and submit to Mr. Napoli; however, not all sales persons complied. F. 657. The degree of control that was exerted over sales persons at McWane with respect to Project Pricing varied depending on the extent to which the individual sales person could be trusted to exercise good judgment. F. 849.

iv. McWane's January 11, 2008 Customer Letter

On January 11, 2008, McWane issued a letter to its customers announcing new pricing. ("January 11, 2008 Customer Letter"). The January 11, 2008 Customer Letter stated in pertinent part:

> Dear Valued Customers
>
> Due to continued rising costs, especially within our off-shore operations, we find it necessary to increase pricing on Utility Fittings and Accessories.
>
> As per our prior letter of October 5, 2007, we will adjust pricing by increasing multipliers while retaining our current List Price, LP-5072. Letters stating the new region specific multipliers will be mailed January 18, 2008. The increase will be 10% to 12% above the current prevailing multiplier levels on Blended Fittings . . . effective February 18, 2008.
>
> To help our distribution customers better manage their Inventory valuations and compete on a more level playing field, it is our intention going forward to sell all products only off the newly published multipliers. We will continue to monitor the competitive environment and adjust regional multipliers as required to provide you with competitive pricing.
>
> All annual municipal bid contracts will be honored per the terms of the contract. Jobs quoted prior to this announcement will be honored through March 1, 2008 . . . .
>
> If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.

F. 645.

McWane knew that in order to meet its objectives of increasing volume and gaining market share it would have to engage in Project Pricing. F. 647. Mr. Tatman also believed that Sigma and Star were more desperate for a price increase than McWane was. F. 586, 588-589, 638. Thus, according to Mr. Tatman, the hope was that by declaring a purported intent to stop Project Pricing, McWane might lull (or "head fake," as Mr. Tatman called it) Star and Sigma into temporarily reducing their Project Pricing, leaving McWane to price however it deemed appropriate, and thereby gain a competitive advantage. F. 647.

McWane communicated its new region-specific multipliers, effective February 18, 2008, in letters to its customers dated January 18, 2008. F. 651. For most states, McWane's new published multipliers, for non-domestic Fittings, reflected an increase over McWane's then-effective multipliers. F. 627, 631, 652-654. Compared to McWane's 2007 published multipliers, however, the new 2008 published multipliers constituted reductions in 28 states and no change in 8 states. F. 655. Overall, the new published multipliers reflected an approximate 8 percent increase over McWane's then-effective multipliers. F. 627, 631, 652.

v. Sigma's reaction after McWane's January 11, 2008 Customer Letter

After learning of McWane's January 11, 2008 Customer Letter, the letter was reviewed and discussed among the regional managers and the sales team at Sigma. F. 661. Mr. Larry Rybacki, then Vice President of Sales for Sigma, with responsibilities for Fittings sales to Distributors (F. 76), consulted with others at Sigma to discuss what McWane was doing with multipliers and to address how to respond. F. 661. Mr. Rybacki interpreted McWane's pricing changes to "squeeze . . . the multipliers [making] it very difficult for [Sigma] to make very much margin." F. 670.

A spreadsheet was prepared within Sigma for the purpose of analyzing whether McWane's newly published multipliers would provide any real price improvement for Sigma, compared to Sigma's then-current, actual multipliers. F. 663. Using the data from all Fittings sales in December 2007, the spreadsheet identified the multiplier for each sale, to see the price "spread," and further computed the weighted average multiplier for each territory. F. 663. On January 24, 2008, Mr. Victor Pais, then President and CEO of Sigma (F. 67), sent an internal email to his "M20" management team, comprising Sigma's top managers, and attached the spreadsheet. F. 663-664. Mr. Pais noted that, based on the spreadsheet, most of Sigma's sales were at "very, very, low multipliers!" F. 663. Mr. Pais further concluded that when McWane's new published multipliers were compared to Sigma's

multipliers "apples to apples," McWane's new multipliers did not provide much improvement in many areas, with "reasonable improvement" in just eight states and territories, "marginal to no improvement" in many other territories, and "even a lowering" of multipliers in some areas. F. 663. Mr. Pais referred to McWane's new multipliers as "discouraging." F. 664.

Mr. Pais surmised in his email that while McWane may have wanted to make an improvement to multiplier levels, McWane "may have" based their multiplier choices on the "actual documented competitive pricing that they are known to procure proof for, from the customers." F. 664. Mr. Pais' email continued:

> Unfortunately, the illogical pricing approach used by Star -- and hence SIGMA -- for 'Plant quotes' with lower 'special' multipliers may have biased [McWane's] decisions in pegging the NEW multipliers at where they are. Though Tyler is beginning to pay attention to PW [plant work] jobs too[12], they just don't understand why PW jobs need to be given LOWER pricing -- when in fact, for Soil Pipe, Tyler and CP are known to offer HIGHER prices, since they feel the Distributors don't commit their resources to stock and usually order direct job-site shipments!
>
> I HAVE URGED LARRY [RYBACKI] TO INITIATE A NEW COMMITTED AND SERIOUS EFFORT TO NORMALIZE ALL PRICING FOR FITTINGS -- AT SAME LEVELS -- PW AS WELL AS OTHER ORDERS, TO ELIMINATE THE CONFUSION WE ARE CREATING WITH CUSTOMERS AND COMPETITORS, LEADING TO LOWER OVERALL PRICING LEVELS.

[12] "Plant work" refers to waterworks projects for water treatment plants, pumping stations, or wastewater treatment plants. Plant work projects generally use the largest sized Fittings. F. 283, 665.

> Though Tyler's NEW multipliers are discouraging, this is both a lesson and an opportunity [for] Sigma and Star to develop a patient and disciplined Marketing approach and demonstrate to [McWane] that we are capable of being part of a stable and profitability conscious industry.

F. 664.

Mr. Pais explained that sales persons, anxious to make sales and not to lose business from regular customers, can "lower prices too aggressively," which causes competitors to react in a "vicious cycle" of price erosion, and keeps prices at a depressed level. F. 668. Thus, Mr. Pais was encouraging his sales force to try to minimize the practice. F. 668. Further, Mr. Rybacki interpreted Mr. Pais' email to be asking the sales team to pull back on Project Pricing. F. 669. Mr. Rybacki did not disagree with Mr. Pais that Sigma needed to pull back on Project Pricing. F. 669. However, Sigma had always been trying to curtail Project Pricing, including in 2008. F. 671-672. Since Mr. Rybacki joined Sigma in 1990, Project Pricing was an "ongoing battle within Sigma, within the industry." F. 672. Sigma was trying to be more consistent and disciplined in pricing "every year, every day to today" and was "always trying" to curtail Project Pricing. F. 672. After receiving Mr. Pais' January 24, 2008 email, Mr. Rybacki told his regional managers "once again that we needed to try to . . . make us more profitable because it was getting to the point where we couldn't make any money at the prices we're selling at." F. 896. Despite this directive, there was no special effort made in 2008 at Sigma to reduce Project Pricing. F. 895, 897-898.

On or about January 29, 2008, Sigma sent a letter to its customers, signed by Mr. Rybacki, notifying them that, because one of its competitors chose not to have a list price increase and instead to implement a multiplier increase, Sigma would "follow suit" and implement a multiplier increase for "almost every territory" on February 25, 2008. F. 674. Sigma's January 29, 2008 customer letter explained: "The key word is 'almost' as a few of [the] territory multipliers are below what you currently receive from us and some are in fact well below. . . . We think it's unwise and irresponsible to lower multipliers and devalue your inventory, so your Regional Managers will send you new

multipliers in the next few days as long as they exceed your current ones." F. 674. The letter also included the language: "We apologize for the confusion and lack of discipline our segment of the Industry has shown as we at SIGMA Corporation are committed to make this a more profitable business for all." F. 674.

On or about February 1, 2008, Sigma sent letters to its customers announcing new region-specific multipliers, effective February 18, 2008, pursuant to its January 29, 2008 Customer Letter. F. 678. These letters noted that: "All municipal bids will be honored through the length of the contract," and that "[j]obs quoted prior to this announcement will be honored through March 1, 2008." F. 678. Sigma did not follow all of McWane's multipliers. F. 677. Sigma's announced changes to its multipliers matched some of McWane's January 2008 multiplier changes, but Sigma did not match those that would result in a multiplier lower than Sigma's then-existing published multipliers. F. 677. Sigma "could not afford to follow [McWane] down." F. 677.

vi. Star's reaction after McWane's January 11, 2008 Customer Letter

Star became aware of McWane's January 11, 2008 Customer Letter through a customer. F. 659. Star's then National Sales Manager, Mr. Matthew Minamyer (F. 126), read McWane's statement that "it is our intention going forward to sell all products only off the newly published multipliers" to mean that McWane was telling its customers that McWane wanted to stop Project Pricing, although Mr. Minamyer acknowledged that it was possible this was a communication to Sigma and Star as well. F. 682. Historically, Star followed McWane's price increases, and it was normal procedure for Star to get ready to follow McWane as quickly as possible. F. 679-680.

On January 22, 2008, Mr. Minamyer sent an internal email to Star's division managers advising them that McWane's "multiplier letters [were] hitting the streets. . . . We need to be able to react quickly to be at the right prices." F. 686. Mr. Minamyer's email addressed plans and procedures with respect to putting into place new multipliers and with respect to Project Pricing. F. 686. With respect to multiplier changes, the email

stated in pertinent part: "Once we know what a state or area's multiplier is, if it goes up, we will change to that number. If it goes down, we will discuss it. Later today we will E-mail the procedure for multiplier changes." F. 686.

With respect to Project Pricing, Mr. Minamyer's January 22, 2008 email advised the division managers, with bold letter emphasis, that Star's "goal" was "to take a price increase and to stop project pricing." F. 686. Mr. Minamyer knew that a price increase would not hold, or "stick," despite an increase in published multipliers, if Star or any of its competitors undercut such increase with Project Pricing. F. 688. At the same time, Mr. Minamyer's January 22, 2008 email set out the procedures by which Project Pricing would be approved, notwithstanding the stated "goal" to take a price increase and "stop" Project Pricing. F. 686. The described procedure was that "[a]ll project pricing" was to "go through" Mr. Minamyer; and that the sales persons in the field, known as territory managers, must obtain from their customers, and provide in support of the Project Pricing request, "solid," written documentation of the competing bid, before Star would "move off the buy plan" with the customer. F. 686. In addition, the email advised that Star would follow McWane in honoring existing pricing through March 1, 2008, and that, therefore, the territory managers should "clean up" their Project Pricing and get orders in and shipped before March 1, 2008. F. 686.

Mr. Minamyer's January 22, 2008 internal email to the division managers also included language indicating that Star was taking the foregoing steps regarding Project Pricing not because Star needed a price increase, but because disciplined pricing was "good for the industry"; that Star could weather any price wars; and that although "this will take a major effort," "that is where we need to be focused until the crazy pricing levels out." F. 686.

In letters and emails to its customers, Star advised that it would be matching McWane's multipliers effective February 18, 2008, and that Star would no longer offer Project Pricing after March 1, 2008. F. 702, 704.

As noted above, Star had been perceived to be the most "aggressive" discounter in the marketplace, and Star used Project Pricing in the years prior to 2008 in order to gain market share. F. 568-570. Prior to 2008, Mr. Minamyer or Mr. McCutcheon were responsible for approving Project Pricing, although sometimes the discretion to approve Project Pricing was delegated to Star's divisional managers. F. 875. There were instances where Mr. Minamyer would "push down" approval to the division managers, and sometimes even to the territory managers, if Mr. Minamyer had faith in them to make the correct judgment. F. 875. Prior to Mr. Minamyer's January 22, 2008 email to the division managers, Mr. McCutcheon had asked Mr. Minamyer to be more involved and diligent in the future with regard to the Project Pricing approval process because Star was experiencing dramatic cost increases. F. 684, 697. Indeed, Mr. McCutcheon had been "all over" Mr. Minamyer to stop delegating authority for Project Pricing and, because Star was facing dramatic cost increases, told Mr. Minamyer that he needed to "tighten up" the Project Pricing process. F. 685, 697. Although Mr. McCutcheon had previously encouraged Mr. Minamyer to minimize Project Pricing by tightening up his sales force and being more involved in the Project Pricing process, Mr. McCutcheon thought it was "bizarre" for Mr. Minamyer to tell Star's customers that Star was going to "stop" Project Pricing. F. 703. Further, Mr. McCutcheon thought it was not "logical or reasonable" for Star to even think that Project Pricing would actually stop. In Mr. McCutcheon's view, "stopping" Project Pricing would "shut [Star] down." F. 697. In Mr. McCutcheon's view, Mr. Minamyer's language that Star's goal was to "stop" Project Pricing was too strong and "irrational." F. 698. However, it was "normal" after a price increase to communicate to the division managers the message that Project Pricing needed to be minimized. F. 698. As Mr. McCutcheon stated, this "happens every time there's a [price] increase." F. 698.

Notwithstanding the language in Mr. Minamyer's January 22, 2008 email regarding a goal to "stop" Project Pricing, Star's plan was to try to limit its Project Pricing to those situations where there was firm documentation from a customer that Star's competitors were Project Pricing below Star. F. 694. Thus, Mr. Minamyer's email made clear that Star planned to engage in Project Pricing, so long as there was "firm" documentation of a

competitor's bid, and further made clear that, provided there was such documentation, Star would price as necessary to obtain the job. F. 686. The procedure of requiring documentation before Star gives a Project Price had been Star's policy for at least ten years prior to January 2008. F. 695. In Mr. McCutcheon's view, Mr. Minamyer's email reflected Mr. Minamyer's attempt to minimize Project Pricing by the sales force, and was more of a change in monitoring and managing the Project Pricing process, rather than a direction to "stop" Project Pricing. F. 695. That Star's plan was to engage in Project Pricing, so long as there was "firm" documentation of a competitor's bid, is also evidenced by Mr. Minamyer's email dated February 23, 2008, in which he reminded the division managers that "documentation and justification" were required in order to obtain pricing approval. "I have always been clear that we will always keep our customers at the right price but we need to be diligent at finding out the right price or shipping restrictions . . . . So go get it and you can have your pricing." F. 687; *see also* F. 688 (May 5, 2008 email from Star Western Division Manager Mr. Michael Berry noting with respect to upcoming price increase: "There is some flexibility [with pricing after a price increase] but here is the problem. The more flexible we are the less it holds and it won't work. That said, if you document that the competition is not holding, then match and don't lose the orders."). Furthermore, on August 25, 2008, in an email with the subject line "Pricing in the Market," Mr. Minamyer observed, among other things, that Sigma and McWane were contributing to "pricing pressure" in the market with special pricing. F. 913. Mr. Minamyer advised his divisional sales managers, "[d]on't let anyone take your JR [Joint Restraint] (or fittings) business on price. Confirm the price and match it to get it back. . . . Do the same thing to [McWane] that they do to you. Maybe it will get back to them and they will stop." F. 913.

Additional material facts and evidence pertaining to the asserted agreement to curtail Project Pricing will be addressed in the context of the parties' arguments, in the analysis that follows.

b. Analysis

i. Introduction

Complaint Counsel's asserted "episode one" of the alleged price fixing conspiracy among McWane, Sigma, and Star, is an "agreement to curtail Project Pricing" formed in January 2008. To prove this agreement, Complaint Counsel contends that McWane, Sigma, and Star engaged in parallel conduct by curtailing project pricing (the asserted "parallel conduct") and that this conduct was the result of an agreement. CCB at 107-110. As noted above, proof of parallel conduct, including conscious parallel conduct, can constitute "circumstantial evidence from which an agreement, tacit or express, can be inferred but . . . such evidence, without more, is insufficient . . . ." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977). This is because tacit collusion, achieved in an oligopoly through consciously parallel conduct, without any preceding agreement, is not unlawful. *White*, 635 F.3d at 576 n.3 (noting that tacit coordination, which is legal, should not be "conflated" with an unlawful "tacit agreement"); *see Twombly*, 550 U.S. at 556-57. To ensure that the law punishes only unlawful agreements by competitors, Complaint Counsel must prove that the asserted parallel behavior was the result of an actual, manifest agreement. *High Fructose Corn Syrup*, 295 F.3d at 661; *Flat Glass*, 385 F.3d at 360; *see also Blomkest Fertilizer*, 203 F.3d at 1032-33; *City of Tuscaloosa*, 158 F.3d at 570. This requires Complaint Counsel to prove certain "plus" factors, which are designed to serve as "proxies for direct evidence of an agreement." *Flat Glass*, 385 F.3d at 360.

Respondent contends that the evidence fails to show parallel pricing conduct among McWane, Sigma, and Star; that Complaint Counsel's inferences of a conspiracy involving McWane are not supported by the greater weight of the evidence; and that the greater weight of the evidence shows that McWane made its pricing decisions independently and for procompetitive reasons. Specifically, Respondent argues that the Supplier witnesses denied any agreement to curtail Project Pricing, and that the evidence shows that all Suppliers continued to provide Project Pricing, as well as other discounts, such as freight, payment terms, and rebates, throughout the alleged conspiracy period. RB at 66-68. Respondent contends that Complaint Counsel's theory

requires assigning nefarious interpretations to selected conduct, and selected language, in selected documents, contrived to fit into Complaint Counsel's conspiracy hypothesis, and that the record is filled with evidence that is consistent with competition and/or inconsistent with an inference of conspiracy, which Respondent refers to as "minus" factors. RB at 70-77. According to Respondent, the inference of independent, or merely interdependent, conduct is just as likely, if not more likely, than the inference of conspiracy. RB at 75.

As more fully discussed below, the greater weight of the evidence fails to show an agreement among McWane, Sigma, and Star to curtail Project Pricing. Accordingly, Complaint Counsel has failed to prove its "episode one" of the alleged price fixing conspiracy.

ii. Parallel pricing related conduct

In support of its claim that McWane, Sigma, and Star engaged in parallel conduct in curtailing Project Pricing, Complaint Counsel cites to the following: (1) McWane's January 11, 2008 Customer Letter stating, *inter alia,* its "intention going forward to sell all products only off the newly published multipliers"; (2) a January 24, 2008 email by Sigma's then President and CEO Mr. Pais to Sigma's management team, stating, among other things, that Mr. Pais had urged Mr. Rybacki to "initiate a new and committed and serious effort to normalize all prices for fittings . . ."; (3) a January 22, 2008 email by Star's then National Sales Manager, Mr. Minamyer, to Star's division managers, stating, among other things, that Star's "goal" going forward was "to take a price increase and to stop project pricing"; and (4) Star's emails in January and February 2008 to its major customers notifying them of Star's coming multiplier increases and that there would be "no more" Project Pricing. CCB at 111-114.

The foregoing documents, read in their entirety, and summarized in Section III.D.2.a.(iv-vi), *supra*, fail to show that the Suppliers engaged in parallel conduct by curtailing Project Pricing, as Complaint Counsel argues. These documents show, at best, that in early 2008, McWane, Sigma, and Star each had some level of intent to stop or minimize Project Pricing. Complaint

Counsel also alludes to parallel "steps" or "efforts" taken by McWane and Star in early 2008 that Complaint Counsel infers were taken in order to "curtail" Project Pricing. Complaint Counsel cites no authority for the proposition that parallel "intentions" or "steps" related to pricing policy is the type of parallel conduct from which an unlawful agreement can be inferred.

In this regard, it must be noted that Complaint Counsel's conspiracy theory has evolved from the time of the Complaint, especially with regard to the particular parallel conduct upon which the government relies as circumstantial evidence of an unlawful agreement. The Complaint alleged a relatively straightforward conspiracy to raise and stabilize prices beginning in January 2008, Complaint ¶ 30, involving two parallel price increases by the Suppliers, in January 2008 and June 2008, Complaint ¶¶ 31, 33, that were alleged to be the "result of" an agreement. Complaint ¶¶ 32, 34. Complaint Counsel's Post Trial Brief appears no longer to rely on any alleged parallel price increases. Instead, Complaint Counsel deemphasizes any parallel pricing, and relies instead upon parallel "pricing related" conduct, *i.e.*, parallel "curtailment" of Project Pricing, as circumstantial evidence of an agreement to curtail Project Pricing. CCB at 111-114.[13] However, Complaint Counsel provides little guidance to define what constitutes a "curtailment," of Project Pricing, either factually or legally. Complaint Counsel did not proffer any expert (or other) testimony as to how a "curtailment" in Project Pricing should be measured, nor did Complaint Counsel offer any expert analysis of pricing data to show that McWane, Sigma, and Star engaged in a parallel curtailment of Project Pricing. Further, Complaint Counsel does not cite a case where a conspiracy

[13] Although Complaint Counsel clearly asserts that the Suppliers engaged in parallel conduct by curtailing Project Pricing, Complaint Counsel simultaneously argues that it need not prove that McWane, Sigma, and Star engaged in parallel curtailment of Project Pricing, because it need not prove that the agreement to curtail Project Pricing was "successful" or "effective." CCB at 144-145. Given that Complaint Counsel is endeavoring to prove an agreement to curtail Project Pricing based upon circumstantial evidence of parallel conduct in curtailing Project Pricing, this position is curious, at best. *See* 16 C.F.R. § 3.43(a) ("[T]he proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.").

finding has been based on similarly vague and undefined parallel conduct.

(a) Parallel "intentions" or "steps" regarding Project Pricing

To the extent Complaint Counsel is arguing that circumstantial evidence of parallel "intentions" proves actual parallel curtailment of Project Pricing, or otherwise constitutes circumstantial evidence of an agreement to curtail Project Pricing, the argument is rejected. It will not be presumed that intentions resulted in corresponding conduct. Moreover, McWane denied having any actual intent to stop or restrict its Project Pricing, notwithstanding the statement in its January 11, 2008 Customer Letter indicating an intent to price only off published multipliers. F. 645, 647.

With respect to asserted parallel "steps" or "efforts" to curtail Project Pricing, Complaint Counsel relies on the fact that McWane hired Mr. Napoli in late 2007 or early 2008 to oversee, among other things, the Project Pricing approval process. CCB at 26 n.110; CCFF 925; *see* F. 656-657. The evidence shows that McWane's goal in having a central location for the Project Pricing approval process was to have someone with a "national view" involved in McWane's discounting decisions. F. 658. As Mr. Walton explained:

> "[I]f we have a salesperson in California making a pricing decision, it may not be in our best interest for what -- how that affects Texas or Missouri or Florida or New York, . . .[O]ftentimes when somebody makes a local decision here, it has effects in other places that may or may not be in our best interest."

F. 658; *see also* F. 656 (Mr. Napoli testifying that "there's nothing wrong with [giving a discount] except you sure want to know what -- when it's happening, or you like to know before it happens, because they [the sales persons] don't know what the ramifications are as far as profitability"). Some sales persons did not use the approval process put in place, however, and the degree of authority given to sales persons regarding Project Pricing

varied depending upon the extent to which the sales person could be trusted to exercise good judgment. F. 657, 849. Complaint Counsel's inference that hiring Mr. Napoli was a "step" taken by McWane to "curtail" Project Pricing is unsupported and is no more likely than the inference of a legitimate effort to interject a national view on discounting decisions. Thus, the evidence fails to support Complaint Counsel's requested inference.

The evidence shows that Star took steps in early 2008 to tighten up and manage its Project Pricing process, including by requiring Mr. Minamyer to review and approve all Project Pricing and by requiring firm documentation of competitor pricing before a Project Price would be approved. F. 686-687, 694. However, the evidence fails to show any steps taken by Sigma to implement a curtailment of Project Pricing, including any "centralization" of Project Pricing authority. *See* F. 895, 898 (Sigma regional managers retained authority to approve Project Pricing throughout 2008). Rather, the uncontradicted evidence is that Sigma was "always" trying to curtail Project Pricing (F. 671-672, 896); and that notwithstanding Mr. Pais' internal "announcement" that he had asked Mr. Rybacki to make a "new effort" to "normalize" pricing between plant work and other work, Sigma made no special efforts to reduce its Project Pricing in 2008. F. 895, 897-898. Furthermore, the evidence fails to show that Sigma "announced" to its customers any intention to stop or curtail Project Pricing, as argued by Complaint Counsel. CCB at 3, 25. Sigma's January 29, 2008 customer letter said nothing about "normalizing" Fittings prices between plant work and other work, as alluded to in Mr. Pais' January 24, 2008 internal email to Sigma's management team.[14] *See* F. 674. Accordingly, regardless of what the evidence may show as to Star's intentions and efforts to reduce its Project Pricing in 2008, the evidence that McWane or Sigma had similar "parallel" intentions or took "parallel" steps is lacking. Similarly, evidence of "intentions" or "steps" do not justify Complaint Counsel's broad assertion that the Suppliers' conduct amounted to "significant" or "complex and

[14] Mr. Pais made another "push" to implement a single track Fittings price structure for plant work and other work in Mr. Pais' internal email to M20 in April 2008 (F. 799; *see* CX 1138 at 001), indicating that his prior ideas in this regard had not been implemented.

historically unprecedented changes" in the pricing structure of the Fittings market. CCB at 113.

Based on the foregoing, to the extent Complaint Counsel is arguing that parallel "intentions," "steps," or "efforts" to "curtail" Project Pricing constitute circumstantial evidence of parallel curtailment of Project Pricing, or of an agreement to curtail Project Pricing, the evidence fails to demonstrate that the Suppliers had parallel intentions or took parallel steps or made parallel efforts to curtail Project Pricing.

(b) Parallel conduct by McWane, Sigma, and Star in curtailing Project Pricing

It is undisputed that Project Pricing did not "stop" in 2008. *See* CCB at 36, 144. McWane had used Project Pricing to sell Fittings prior to January 2008, and continued to offer its customers Project Pricing as well as other price concessions throughout 2008, 2009, 2010 and to the present time. F. 848, 850. The evidence shows, for example, that McWane provided several hundreddifferent job prices to its customers in 2008. F. 861 (approximately [redacted]). The material issue is whether this is a "curtailment" by McWane, which along with a parallel curtailment by Sigma and Star, constitutes circumstantial evidence of a conspiracy with respect to Project Pricing.

(c) McWane's Pricing Protection Log

In support of a finding that several hundred (approximately [redacted]) different instances of Project Pricing by McWane in 2008 constitute a "curtailment" of McWane's Project Pricing, Complaint Counsel relies on McWane's "pricing protection log." CCB at 145. By way of background, beginning in 2008, McWane kept a pricing protection log, on which it tracked, in the normal course of business, instances of price protection (*i.e.*, where McWane quotes a price to a customer and agrees to hold that price for a customer for some period of time, thereby "protecting" the price against increases) and Project Pricing. F. 852. Mr. Napoli, McWane's pricing "coordinator" or "manager," F. 656, was responsible for maintaining the pricing protection log. F. 852. McWane's pricing protection log shows, among other

things: the Fittings multiplier that McWane bid; the expiration date of the bid; and McWane's published multiplier when the bid was issued. F. 855. There is also a "comments" field in the pricing protection log. F. 859. In some cases, the comments field states "to match Star" or "to match Sigma." F. 859. Such a comment indicates that the sales person reported that the customer advised of a particular discounted multiplier being quoted by Sigma or Star, and that McWane's quoted multiplier was discounted to match the competing quote. F. 859; *see also* F. 854 (pricing protection log is based upon information received from sales persons in the field).

Complaint Counsel argues that it should be inferred that McWane curtailed Project Pricing in 2008 because the comments appearing in the comments field of the pricing protection log reflect more instances of McWane offering a multiplier "to match Star or Sigma" in the fourth quarter of 2008 (between [redacted]), and the first quarter of 2009 (between [redacted]), compared to the second and third quarters of 2008 (between [redacted]). CCB at 145; *see* F. 863. These time frames selected by Complaint Counsel appear designed to support its theory that the alleged agreement to curtail Project Pricing "fell apart" beginning in the fall of 2008, which then lead to increased Project Pricing. However, this does not answer the question whether Project Pricing was "curtailed" by McWane in the 2008 time period prior to the fall of 2008. Complaint Counsel points to nothing identifying the extent of Project Pricing by McWane in 2007, which would be a more significant benchmark against which to determine whether McWane's instances of Project Pricing were "reduced" or "curtailed" in 2008.[15] To be clear, the fact that Complaint Counsel may have shown that Project Pricing increased from 2008 to 2009 does not demonstrate that Project Pricing decreased from 2007 to 2008. Logic dictates that one cannot prove a curtailment or reduction in Project Pricing without proof of a starting point for comparison. *See In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007) (dismissing conspiracy complaint and holding that allegations of conduct occurring after alleged conspiracy

[15] Complaint Counsel states, without citation to any supporting evidence, that McWane did not keep a pricing protection log in 2007 because it did not offer a price protection program until 2008. CCB at 145.

were insufficient where plaintiff failed to allege how it differed from conduct prior to alleged conspiracy). In addition, the information in the comments field concerning competitor pricing comes from sales persons in the field and from the customers. F. 854, 859. Customers have a motive to "auction" suppliers against one another, F. 565, and the sales person has an incentive to close the sale. F. 668. Although the information in the comments field is not necessarily unreliable evidence, as shown above, the comments field reflects multiple levels of unverified and potentially inaccurate information, which detracts from its weight in proving a curtailment of Project Pricing by McWane.

Moreover, there is evidence in the record that the Fittings market experienced a significant downturn in the second half of 2008, which would also contribute to increased discounting as Suppliers chased ever-decreasing volume. F. 931, 933; *see also* F. 1026 (Mr. Pais testifying that "2008 was a tale of two halves, if you will. The first half was respectable. And the second half was very poor, because most of the problems we faced from the poor market and the increasing costs and the reduced lower prices, all coalesced into the second half, and especially the last quarter"). It is no more likely that an increase in Project Pricing by McWane during the time period selected by Complaint Counsel, from the fourth quarter of 2008 through the first quarter of 2009, was due to a "collapse" of a "conspiracy" than for other reasons attributable to the competitive environment in the second half of 2008 going into 2009. Indeed, to accept Complaint Counsel's inference that any increase in Project Pricing during this period was the result of a collapsed conspiracy, rather than a common reaction to the competitive environment, would require presuming the existence of the conspiracy in the first instance, which is improper. *See Blomkest Fertilizer*, 203 F.3d at 1033 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.").

(d) "Observations" of McWane curtailing Project Pricing

Complaint Counsel also relies on what it refers to as "observations" by Star and by Sigma of a reduction of Project Pricing by McWane, allegedly contained in various internal

documents of Star and Sigma. CCB at 37-38. However, none of the cited documents address Project Pricing by McWane. For example, Complaint Counsel cites a Star internal email dated March 11, 2008 from Star's Southwestern Division Manager, Mr. Shaun Smith. F. 905. Mr. Smith was responding to an email from Mr. Minamyer asking for any reports on any issues with Sigma "handling the Mult increases." F. 904. Mr. Smith responded that: "It seems as though they have been pretty discipline[d] in my Division" and "everyone seems to be playing fair." F. 904-905. Regardless of what Mr. Smith's "observation" from the field might say about whether Star and Sigma were curtailing Project Pricing in March of 2008, Mr. Smith's vague, ambiguous language on its face does not imply McWane was curtailing Project Pricing. Mr. Smith was not called as a witness at trial, nor was any deposition testimony from Mr. Smith offered into evidence to explain what he meant, and it will not be assumed that he was referring to McWane, especially given that Mr. Minamyer's email requested information about Sigma, not McWane. F. 904. Similarly, Complaint Counsel relies on a Star internal email from Mr. Minamyer to Mr. McCutcheon and to Star's division managers dated August 25, 2008, in which Mr. Minamyer stated: "I know we have been very careful on special pricing and it seems to be working pretty good." F. 892. This document does not on its face reflect anything other than Star's observation of its own unilateral behavior, and does not imply a curtailment of Project Pricing by any other Supplier. Finally, Complaint Counsel cites a Sigma internal email from Mr. Pais dated December 7, 2008 regarding his belief that relatively steady market shares among the Suppliers through October 2008 "should bode well for a more mature and responsible pricing strategy for 09 which focuses on realizing higher prices and hence better GMs to offset the loss of volume, which is inevitable for most of 09." CX 1174 at 001. Mr. Pais' belief about the future of Fittings demand and prices "for 09" implies nothing about McWane (or any other Supplier) curtailing Project Pricing in 2008.

(e) Evidence regarding Star and Sigma curtailing Project Pricing

The evidence shows that both Star and Sigma continued to provide Project Pricing throughout 2008. F. 873, 881, 897-898. To show that the extent of Project Pricing by Sigma and Star was

"curtailed," Complaint Counsel first relies on Mr. Tatman's statement in his April 2008 Executive Report for the first quarter of 2008, that: "Based on our competitive feedback log, the level of multiplier discounting by both Star and Sigma appears to have died down significantly." F. 868. Mr. Tatman's statement is equivocal and based on unexplained statements from sales persons in the field that may not be accurate. F. 565, 668, 868-869.

For Star, in addition to Star's own "observation" of its Project Pricing, referred to above, Complaint Counsel points to a summary document, based upon records of Star's special pricing requests ("Star SPR data"), which shows that that the overall number of instances in which Star engaged in Project Pricing on all products, including Fittings, was 3,226 in 2007, but that in 2008 there were 2,669, which constitutes an overall drop. CCB at 146; F. 881-883, 887. A month-by-month comparison, however, presents a "mixed bag" of both comparative increases and decreases in relation to 2007. F. 888-891. In addition, Complaint Counsel points to a November 25, 2008 internal email written by Mr. Minamyer (F. 893), which Complaint Counsel interprets as an instruction to "resume" Project Pricing, thereby implying that it had been "curtailed" previously. CCB at 147 n.552. In this email, Mr. Minamyer noted that "Star had been diligent in protecting the stability of its pricing," but that Star's competitors, mostly Sigma, had been pricing beneath Star. F. 893. Feeling Star's market share being threatened, Mr. Minamyer instructed the sales force to get more aggressive on pricing to get more orders. F. 893. Even if it is inferred that Star had been making an effort to limit Project Pricing prior to November 25, 2008 to those situations where it could document Project Pricing by the competition, Mr. Minamyer's November 25, 2008 internal email is also evidence that the marketplace was competitive and that Star's efforts had not been in parallel to McWane or Sigma. As Mr. Minamyer stated, Star was attempting to "hold" its prices, but McWane and Sigma were not. F. 893.

Complaint Counsel further argues that the evidence demonstrates Sigma curtailed Project Pricing in 2008 based upon data indicating that Sigma's average, actual transactional multipliers increased for various products in various regions

during the period February 2008 to October 2008. CCB at 147; *see* F. 985-993. An "average" multiplier has limited probative value, however, given the additional evidence that the actual day-to-day multipliers differed "a lot" from region-to-region, product-to-product, and day-to-day. F. 994. To conclude, based on this evidence, that Sigma curtailed Project Pricing in 2008 would require improper speculation.

(f) Evidence inconsistent with curtailment of Project Pricing

There is substantial evidence in the record that is inconsistent with a conclusion of a parallel curtailment of Project Pricing by McWane, Sigma, and Star. Mr. Sheley, of Illinois Meter, a Distributor customer of McWane, testified that McWane was "extremely aggressive" with Project Pricing in 2008. F. 851. Moreover, a McWane internal September 2008 presentation noted, *inter alia*, that McWane's market share was down approximately 8 points since 2006 and that "[l]eading price stability has been detrimental to share." F. 866. This statement indicates that, even if McWane was curtailing Project Pricing in 2008, McWane perceived that it was being underpriced by its competitors, which is both inconsistent with a conclusion of a parallel curtailment of Project Pricing, and consistent with a competitive market. Similarly, on May 6, 2008, Mr. Minamyer stated in an email to his division managers, with a copy to Mr. McCutcheon: "I see [pricing] getting a little looser and am concerned that we won't hold this increase. Don't let our competitors[']practices force us to fail. One competitor is being pretty strong and one is being pretty weak on pricing." F. 909. This document is also inconsistent with a conclusion that the Suppliers, in parallel, curtailed Project Pricing, and is further indicative of non-parallel, independent pricing conduct by the Suppliers.

Also inconsistent with a conclusion that the Suppliers engaged in parallel conduct by curtailing Project Pricing is a data analysis provided by Respondent's economic expert, Dr. Normann, who analyzed actual transaction prices as shown by invoices kept by the Suppliers in the ordinary course of business. F. 937. The price on the invoice reflects the price at which the products were sold, and includes any discounts off the published multiplier, but

does not include any additional concessions, such as rebates, payment terms, freight terms, and cash discounts. F. 937. Dr. Normann opined that if there were a parallel reduction in Project Pricing by McWane, Sigma, and Star, their data would show an increase in the amount of product sold at the published multiplier and a decrease in the amount of product sold under special pricing, as well as a decrease in the "variation" of pricing, *i.e.*, the dispersion of price points. F. 845. To test this hypothesis, Dr. Normann calculated the standard deviation in price for McWane, Sigma, and Star for the most common products sold, from 2007 to 2010, based on the Suppliers' invoice data for these products. F. 846. Dr. Normann concluded from this data that McWane's price variation was largely unchanged until late 2008, while Star's price variation increased. F. 846. In addition, Dr. Normann concluded that price variation during 2008 was "generally higher" than any other time from 2007 to 2010. F. 846. This economic data, according to Dr. Normann, contradicts a conclusion that there was a parallel curtailment of Project Pricing in 2008. F. 847.

Complaint Counsel attacks Dr. Normann's reliance on invoice data in general because, as noted above, the invoice price does not reflect discounts on top of Project Pricing, such as rebates, payment terms, freight terms, and cash discounts. However, the material issue is whether McWane, in parallel with Sigma and Star, curtailed Project Pricing in 2008, not whether it curtailed other discounts. The selling price as shown by the invoice reflects the discount associated with Project Pricing and is therefore precisely the correct measure of changes in the relevant discount. F. 938. Accordingly, the fact that the invoice prices did not include such other discounts does not detract from the probative value of the data for purposes of determining whether there was a parallel curtailment of Project Pricing. Similarly, Complaint Counsel contends that there is a time lag between the time a price is agreed to (price formation) and the date of the invoice, which is generally the date of shipment. This criticism also does not detract from the weight to be given to Dr. Normann's opinion regarding parallel curtailment of Project Pricing, because Dr. Normann examined data from a broad time period, before and after 2008, which effectively captures the alleged time lag between the date of price formation and the invoice date. F. 941.

In conclusion, regardless of what the evidence might show as to a curtailment of Project Pricing by Star and Sigma in 2008, Complaint Counsel's proof that McWane curtailed Project Pricing in 2008, much less in "parallel" with Sigma and Star, is weak at best, and fails to outweigh other competent and reliable evidence summarized herein, including the data analysis provided by Respondent's expert, indicating that McWane, Sigma, and Star did not engage in parallel conduct by curtailing Project Pricing in 2008, in comparison to earlier periods. In any event, the existence of parallel conduct is but one piece of a totality of the evidence, all of which must be weighed to determine whether the preponderance of evidence demonstrates an agreement to curtail Project Pricing. Accordingly, any evidence of parallel conduct will be considered, *infra*, as part of the totality of the evidence to determine whether the preponderance of evidence demonstrates an agreement to curtail Project Pricing.

iii. "Plus" factors

As noted above, "plus" factors are designed to serve as "proxies for direct evidence of an agreement" in a circumstantial case based upon parallel pricing conduct and, therefore, to constitute a "plus" factor, the evidence must be probative of an agreement. *See Flat Glass*, 385 F.3d at 360. There is no exhaustive list of "plus" factors. *Id*. Such evidence is generally grouped into the following three categories: "(1) evidence that the [alleged conspirator] had a motive to enter into a price fixing conspiracy; (2) evidence that the [alleged conspirator] acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *Id*. (citations omitted); *see also Re/Max Int'l*, 173 F.3d at 1009 (listing plus factors); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir. 1987) (same).

It must first be noted that in the context of parallel pricing behavior in an oligopoly, evidence of "motive" and "actions against interest" typically only demonstrate interdependence among the oligopolists. *Flat Glass*, 385 F.3d at 360-61. "[M]ere interdependence unaided by an advance understanding among the parties" does not suggest an unlawful agreement. *See Twombly*, 550 U.S. at 557 n.4 (discussing what allegations are necessary to state a claim under Section 1 and quoting 6 Areeda & Hovenkamp ¶ 1425). The court in *Flat Glass* explained:

> In the context of parallel pricing, the first two factors largely restate the phenomenon of interdependence. We candidly acknowledged as much in *In re Baby Food*, 166 F.3d at 122. *See also* Areeda, supra, P 1434c1, at 245 ("'Conspiratorial motivation' and 'acts against self-interest' often do no more than restate interdependence."); Posner, supra, at 100. Evidence that the defendant had a motive to enter into a price fixing conspiracy means evidence that the industry is conducive to oligopolistic price fixing, either interdependently or through a more express form of collusion. In other words, it is "evidence that the structure of the market was such as to make secret price fixing feasible." *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 655 (7th Cir. 2002). Evidence that the defendant acted contrary to its interests means evidence of conduct that would be irrational assuming that the defendant operated in a competitive market.

385 F.3d at 360-61.

Because the factors of motive and actions contrary to interest may only restate the theory of interdependence among oligopolists, evidence under the third factor above, evidence indicating an "actual, manifest agreement," is the key to a proper determination. *High Fructose Corn Syrup*, 295 F.3d at 661; *Flat Glass*, 385 F.3d at 361. As explained in Section III.D.1., *supra*, an "agreement" for purposes of Section 1, and particularly in the context of an oligopoly market, is revealed by evidence of a prior understanding or commitment, Areeda, ¶ 1410c at 71-74, or "the sort of restricted freedom of action and sense of obligation that one generally associates with agreement." *Twombly*, 550 U.S. at 557 n.4. Moreover, *Twombly* instructs that the purported agreement must precede the parallel conduct at issue. *See id.* at 557 (holding that allegations of parallel conduct, for purposes of stating a Section 1 claim "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action").

Complaint Counsel relies on the following as "plus" factors to prove that the asserted parallel curtailment of Project Pricing was pursuant to an agreement, rather than independent conduct, or mere conscious parallelism unaided by an agreement: (1) the Suppliers had a motive to conspire; (2) curtailing Project Pricing was against the alleged conspirators' unilateral business interests, absent assurances that their competitors would also curtail Project Pricing; (3) the parallel curtailment of Project Pricing was pursuant to a "written plan" for conspiracy; (4) the Suppliers participated in an "information exchange" through their trade association, DIFRA; (5) the Suppliers complained to one another about pricing and "cheating"; (6) the Suppliers monitored their competitors' pricing, in order to detect "cheating"; and (7) interfirm communications. CCB at 114-144. The dispositive issue for determination is whether the greater weight of the credible and probative evidence, with respect to the demonstrated parallel conduct and the demonstrated "plus" factors, makes the inference of a preceding agreement more likely than not. In this regard, pursuant to the legal authorities set forth above, particular attention, and weight, is accorded to whether or not the evidence shows: (1) a prior understanding among the Suppliers, including McWane, that each Supplier would curtail Project Pricing; (2) a commitment to one another to curtail Project Pricing; (3) a restricted freedom of action and sense of obligation to one another to curtail Project Pricing. Moreover, consistent with the applicable burden of proof, conduct "that is equally consistent with collusion as with lawful competition . . . cannot represent a plus factor." *Williamson Oil Co. v. Phillip Morris USA*, 346 F.3d 1287, 1313 (11th Cir. 2003).

(a) Motive

Complaint Counsel contends that the Suppliers' parallel curtailment of Project Pricing occurred in the context of a Fittings market that is "susceptible" or "conducive" to "collusion" which, according to Complaint Counsel, shows a motive to conspire. CCB at 114. In support of this argument, Complaint Counsel relies on oligopoly theory, as relayed by Complaint Counsel's proffered economic expert, Dr. Laurence Schumann, which provides that firms in a market with few sellers and a commodity product subject to inelastic demand can, by recognizing their mutual interdependence, achieve supracompetitive prices and

profits, and then sustain them through systems that build trust and detect cheating on the consensus price. CCFF 651-662. According to Dr. Schumann, the Fittings market has these characteristics and therefore is conducive to collusion. CCFF 663-665. Complaint Counsel argues that "[t]hese market features make conspiracy allegations more plausible . . . ." CCB at 115. Whether the conspiracy "allegations" in this case are "plausible" is beside the point. "Plausibility" refers to the pleading requirements that must be met to avoid dismissal of a conspiracy complaint. Requiring plausibility in order to infer an agreement from circumstantial evidence "simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556. "Plausibility" is not the standard of proof for purposes of prevailing on the merits. Rather, Complaint Counsel's burden is to prove that the asserted "plus factor" evidence tends to make the inference of an agreement more likely than not. *Flat Glass*, 385 F.3d at 360 (holding that "plus" factors are designed to serve as "proxies for direct evidence of an agreement").

Complaint Counsel's assertions regarding the characteristics of the Fittings market largely restate the theory of interdependence, and the ability of interdependent firms to tacitly coordinate. *See Brooke Group*, 509 U.S. at 238 ("Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus."); *see also Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993) (requiring further allegations of "plus" factors, in addition to allegations of oligopolistic characteristics of homogenous service and inelastic demand). The features of the Fittings market relied upon by Complaint Counsel to support an inference of an illegal agreement, are the "same market features [that] make the market susceptible to conscious parallelism. *See, e.g.*, H. Hovenkamp § 4.6a, at 179-80 ('Factors such as high concentration on the seller's side and diffusion on the buyer's side, . . . a standardized product and publicly announced prices and terms, suggest that a market is conducive to express or tacit collusion, as well as non-cooperative oligopoly.')." *In re Florida Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d 1291, 1317 (S.D. Fla. 2010). An agreement is not necessary to

achieve conscious parallelism in a market with these characteristics. *White*, 635 F.3d at 576-77. Thus, Complaint Counsel's contention that the Fittings market is "conducive to collusion," adds little, if anything, to the inquiry into whether the totality of the evidence proves an unlawful conspiracy. Rather, accepting Complaint Counsel's position that oligopolistic interdependence is a "plus" factor would, in effect, foist a nefarious motive upon the Suppliers merely because they conduct their business within an oligopoly market. This is not the law. *See du Pont*, 729 F.2d at 139 (stating that "[t]he mere existence of an oligopolistic market structure in which a small group of manufacturers engage in consciously parallel pricing of an identical product does not violate the antitrust laws").

Complaint Counsel further argues that each Supplier had a motive to conspire because Fittings prices had eroded in 2007 as a result of Project Pricing; that in 2007, McWane had a problem of excess capacity and inventory, was incurring idle plant charges, and was losing volume and market share to its competitors; and because all Suppliers had declining profits and wanted a price increase. Thus, Complaint Counsel argues, McWane had a motive to reduce Project Pricing. CCB at 115-116.

First, as a factual matter, the evidence cited by Complaint Counsel does not show that "all suppliers had declining profits and wanted a price increase," as argued by Complaint Counsel. CCB at 115 & n.427; CCFF 879-883, 917. In addition, Mr. Tatman credibly testified that McWane's goal going into 2008 was primarily to increase volume, rather than price. F. 592-594. Even if McWane was motivated in part to increase profits, this is still a free country and "[i]n a free capitalistic society, all entrepreneurs have a legitimate understandable motive to increase profits," which does not, on its own, constitute a "plus factor" indicating an unlawful agreement. *Baby Food*, 166 F.3d at 137. *See Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 229 (3d Cir. 2011) (affirming dismissal of complaint and holding that defendants' alleged motive to minimize their risks and costs, maintain and stabilize pricing structures, and stabilize market shares did not constitute a "plus" factor).[16] It is also noteworthy

[16] Complaint Counsel's reliance on *In re Blood Reagents Antitrust Litig.*, 756 F. Supp. 2d 623, 631 (E.D. Pa. 2010), is misplaced. In that case,

in this regard, however, that Fittings are a small segment of McWane's business, representing about 5% of McWane's overall business; Fittings typically represent only 5% of the total cost of a waterworks project in which they are used and only 1.5% to 2% of the cost of the materials in a typical underground waterworks ("line") job; and the price of Fittings is not a major factor in determining whether a Distributor wins a bid. F. 13, 285, 326-327. These facts weigh against a conclusion that McWane would be sufficiently motivated to enter into an unlawful conspiracy in order to increase its Fittings profits.

(b) Actions contrary to interest

Complaint Counsel asserts that curtailing Project Pricing was against the Suppliers' unilateral business interests, absent assurances that their competitors would also curtail Project Pricing. As noted above, actions contrary to interest by an alleged participant in a conspiracy means "conduct that would be irrational assuming that the defendant operated in a competitive market." *Flat Glass*, 385 F.3d at 360-61. To constitute a "plus" factor, asserted "actions contrary to interest" means proof that "each defendant," in this case McWane, "would have acted unreasonably in a business sense if it had engaged in the challenged conduct unless that defendant had received assurances from the other defendants that they would take the same action." *Bolt v. Halifax Hosp. Med. Ctr.*, 891 F.2d 810, 826-27 (11th Cir. 1990). Proof of actions contrary to interest for "plus" factor purposes means "showing that the defendants' behavior would not be reasonable or explicable (*i.e.*, not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade - that is, that the defendants would not have acted as they did had they not been conspiring in restraint of trade."

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allegations that one defendant "was losing so much money before the conspiracy that it broke bank covenants, and that [another defendant] was losing so much money it considered leaving the market altogether," pled sufficient motive to make the other allegations of conspiracy claim "plausible" and survive a motion to dismiss. At this stage of the instant case, where Complaint Counsel has a burden of proving a conspiracy, proof that Complaint Counsel's claims are "plausible" substantially misses the mark. Moreover, to the extent *Blood Reagents* holds that a desire to increase profits, without more, constitutes a "plus" factor evincing an agreement, the holding conflicts with that of its governing Circuit Court of Appeals in *Baby Food*.

Harcros Chemicals, 158 F.3d at 572. Put another way, in order to constitute "actions against interest," and therefore be probative of an agreement, the parallel conduct at issue "must be so unusual that in the absence of an advance agreement, no reasonable firm would have engaged in it." *Baby Food*, 166 F.3d at 134-35 (quoting *Coleman v. Cannon Oil Co.*, 849 F. Supp. 1458, 1467 (M.D. Ala. 1993)).

Complaint Counsel argues that McWane, Sigma, and Star each knew that if any one of them "unilaterally stopped" Project Pricing, that company would lose business to the others, yet McWane nevertheless announced an intention to sell only off its new multipliers, *i.e.*, to, in effect, stop Project Pricing in its January 11, 2008 Customer Letter. As Complaint Counsel frequently points out in other contexts, the parallel conduct at issue in this case is not a parallel "stopping" of Project Pricing, which, it is undisputed, did not occur, but an asserted parallel "curtailment," or reduction, of Project Pricing.

In fact, contrary to the government's position, there is substantial evidence demonstrating that McWane's pricing strategy was designed to further its own legitimate business interests of increasing volume and market share in the Fittings market. McWane needed greater visibility of actual market pricing in order to beat prices being offered by its competitors, which is a procompetitive purpose. F. 566-567; 595. Mr. Tatman's concept was to narrow the range between the published prices and actual prices being charged in the market, which would give Sigma and Star less "headroom" within which to maneuver to undercut McWane on price. F. 632-635. McWane's pricing strategy was to "compress" the range of pricing by implementing a published multiplier that was within approximately 8% of the true competitive level (*i.e.*, the actual market price, or "effective" multiplier), F. 631, 635, and not follow the large 25% list price increase that had been announced by Sigma the previous October. F. 630-631. It was rational for McWane to hope or expect that Sigma and Star would follow McWane's published multipliers because Sigma and Star historically followed McWane. F. 555-557, 679. If Sigma and Star did choose to follow, then this would serve McWane's legitimate procompetitive, rather than unlawful anticompetitive, goals. In addition, McWane's January 11, 2008 Customer Letter indicating that it intended to, in effect, stop

Project Pricing was part and parcel of its strategy of trying to increase the visibility of Star's and Sigma's pricing, in order to enable McWane to undercut its competitors' pricing. F. 646-647. If Sigma and Star "took the bait" and "stopped" Project Pricing in order to follow McWane's apparent move, then McWane would be in an even better position to compete with pricing by Sigma and Star, and thereby potentially increase its volume and market share. F. 647.

The evidence upon which Complaint Counsel relies, at best, shows that McWane devised its strategy, in part, based on what it believed or hoped its competitors would do in reaction to McWane's pricing move. This merely restates the doctrine of interdependence. *Flat Glass*, 385 F.3d at 360-61. The greater weight of the evidence fails to show that it would be irrational for McWane to proceed with its pricing strategy absent advance assurances from Sigma and Star that they would follow. McWane was the price leader in the Fittings market and Sigma and Star historically followed McWane. F. 555-556, 679. If Sigma and Star declined to adopt McWane's new multipliers, the new multipliers could be easily withdrawn or revised. *See* F. 615, 674 (Sigma withdrew an October 23, 2007 announced list price increase when McWane did not follow); F. 797, 803, 809, 840, 843-844 (Sigma and Star rescinded multiplier increases announced in April and May 2008 after McWane did not follow). Even if the evidence proved that McWane's announced intent to, in effect, stop Project Pricing by selling only off of its new published multipliers was *bona fide*, as opposed to a "head fake," if Sigma and Star failed to follow McWane, McWane could easily and quickly resume Project Pricing. *See White*, 635 F.3d at 579 (noting that a price leader in an oligopoly risks little in announcing a pricing move).

Where, as here, a pricing decision can be easily changed if competitors do not follow, it is not irrational to proceed without advance assurances of competitor compliance. As Areeda explains:

> If each defendant can easily alter its decision as a physical and contractual matter, and can do so with little or no loss of actual or potential profit, then the defendant may feel

> comfortable in acting without advance agreement with its rivals. It can act, or it can wait and revise its behavior after seeing what the others do. Otherwise, unilateral action will be very uncomfortable. At some point, the discomfort will be so great that no rational businessperson will take the challenged step without advance agreement.

Areeda, ¶ 1425a at 183.

Moreover, Complaint Counsel makes no argument as to why or how Sigma acted contrary to its self-interest with respect to Project Pricing. Indeed, the evidence fails to show that Sigma took any special actions with regard to Project Pricing. F. 895, 897-898. Complaint Counsel focuses principally on Star, arguing that Project Pricing enabled Star to grow its market share and stopping Project Pricing would constitute an abrupt departure from Star's prior business practices. CCB at 125. As noted above, an announced intention is not "irrational" absent advanced assurances, where the decision can be easily changed based on the behavior of competitors. Furthermore, it appears that Star did not stop Project Pricing, and continued to Project Price throughout 2008, including when necessary to respond to its competitors' pricing. F. 873, 881, 912; *see also* F. 687 (Mr. Minamyer instruction: "[G]o get [documentation] and you can have your pricing"); F. 694 (Star's plan was not to "stop" Project Pricing, but to first require documentation from a customer that Star's competitors were Project Pricing below Star). In any event, because Complaint Counsel has failed to demonstrate that the announced intention of McWane, the Respondent in this case, to, in effect, stop Project Pricing was contrary to its own interest, absent advance assurances that its competitors would follow, this Initial Decision need not, and does not, decide whether Star's announced intention to stop Project Pricing was contrary to Star's self-interest.

Regardless of what the evidence might show as to the interests of Sigma and Star, McWane is the respondent in this case, and Complaint Counsel has failed to show that McWane's pricing strategy was contrary to its economic self-interest, absent advance assurances that Sigma and Star would follow.

(c) A "written plan for conspiracy"

Complaint Counsel contends that the evidence shows that the actions of McWane, Sigma, and Star, "comported" with a "written plan," namely, Mr. Tatman's internal December 25, 2007 PowerPoint Presentation. CX 0627; *see* F. 626. Indeed, Complaint Counsel argues that this PowerPoint Presentation constitutes McWane's "blueprint" for conspiracy. Complaint Counsel argues that evidence that conspirators are acting pursuant to a written plan is a "significant" "plus" factor because it is "suggestive" of conspiracy. CCB at 116-122. Respondent asserts that Mr. Tatman's December 25, 2007 PowerPoint Presentation testimony establishes that the document was a "brainstorming" document," that was prepared independently by Mr. Tatman, based upon his own data analysis, and that it is undisputed that the document was not shared with Sigma or Star. Moreover, Respondent contends, the "core tenets" of the strategy indicated by the PowerPoint Presentation were not communicated in McWane's January 11, 2008 Customer Letter, as Complaint Counsel contends.

Contrary to Complaint Counsel's argument, to constitute a "plus" factor evincing a conspiracy, evidence must be more than "suggestive" of conspiracy. The inference of conspiracy must be more likely than not. Having evaluated the document in its entirety, in the context of all the surrounding circumstances, the inference that Mr. Tatman's December 25, 2007 PowerPoint Presentation was a "blueprint for conspiracy" is rejected. As more fully explained below, Complaint Counsel has failed to prove that Mr. Tatman's internal December 25, 2007 PowerPoint Presentation was a "written plan" for conspiracy or that the conduct of Sigma and Star with respect to Project Pricing in 2008 was pursuant to, or in "compliance with," McWane's "plan." Rather, the evidence shows that Mr. Tatman's December 25, 2007 PowerPoint Presentation was an internal McWane discussion document that was not shared with Sigma or Star and, at best, represented an internal plan for McWane's own competitive pricing strategy. In addition, the inference that the conduct of Sigma and Star regarding Project Pricing was in furtherance or "compliance" with an agreement is no more likely than the inference of independent – albeit consciously interdependent –

conduct. Accordingly, the December 25, 2007 PowerPoint Presentation does not constitute a "plus" factor evincing a conspiracy in this case.

Although not a "written plan" for conspiracy, the December 25, 2007 PowerPoint Presentation does provide an informative context for evaluating the conduct that followed it. Mr. Tatman testified, credibly and at length, regarding his independent data analysis undertaken to prepare the document, and the meaning of the language in the document. That testimony, as well as other evidence, demonstrates that Mr. Tatman's December 25, 2007 PowerPoint Presentation was an internal document, prepared independently by Mr. Tatman for the purpose of McWane's internal strategy discussions. F. 620, 625-629. Mr. Tatman's pricing strategy for McWane was to narrow the range between the published price and actual prices being charged in the market and thereby give Sigma and Star less "headroom" within which to maneuver to undercut McWane on price. F. 632-634. Accordingly, based on his independent analysis of available data (F. 627-629), Mr. Tatman recommended, and McWane decided, not to follow Sigma's and Star's large list price increase, and instead to take advantage of McWane's relative cost advantage over Sigma and Star by implementing a lower multiplier increase. F. 620, 630-633. If Sigma and Star followed McWane's new multipliers, which McWane recognized was likely given the market dynamics, F. 555, 679, 638 (PowerPoint slide stating that "due to their now more desperate need for price, I believe that Sigma and Star will mimic and verbally follow any program we publish . . . "), this would potentially increase stability in the range of prices in the market. F. 635. Accordingly, McWane would gain a competitive advantage in detecting and beating its competitors' prices, thereby helping to meet McWane's goal of increasing volume and market share, and put financial pressure on McWane's competitors. F. 632-636. This is competitive, not unlawful, conduct by McWane.

Complaint Counsel's argument relies principally on inferences it draws from language from one slide from the December 25, 2007 PowerPoint Presentation, titled "Message to Market and Competitors"; in particular, the statements that: McWane "will be consistent and follow through with what we've formally communicated"; McWane "will encourage/drive both price

stability and transparency"; McWane will adjust multipliers as required to remain competitive within any given market area, and "[c]onsistent Job Pricing will be met with general market actions"; and that, for 2008, "we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level." F. 638. Complaint Counsel interprets the points listed on this slide as the four "prongs" of "the Tatman Plan." CCB 118-119. On its face, the foregoing language refers only to unilateral conduct by McWane. F. 638. However, Complaint Counsel further notes the statement that one of the four "keys" to "success" of McWane's strategy is "Sigma & Star's [management] pulling price authority away from front line sales . . . to add discipline to the process." CCB at 119; F. 638. This language is at least as reflective of McWane recognizing its interdependence with Sigma and Star as it is with McWane "planning" to procure an unlawful agreement with Sigma and Star.

In re Sulfuric Acid Antitrust Litig., 743 F. Supp. 2d 827 (N.D. Ill. 2010), upon which Complaint Counsel relies, is readily distinguishable. In that case, the alleged co-conspirators, producers and suppliers of sulfuric acid, were parties to certain sales contracts. Plaintiffs contended that there were additional promises and understandings beyond the face of the sales contracts, pursuant to which sulfuric acid producers were required to shut down or curtail acid production as a condition of entering into the sales agreements, in order to stabilize prices, control industry output, and prevent competition. *Id.* at 835. The court denied the defendants' motion for summary judgment on the plaintiffs' claim, holding that "most damaging piece" of evidence was the defendant's "Sulphuric Acid 1989 Plan," in which the defendant clearly articulated a plan to "approach[] sulphur burning acid producers to purchase acid from [defendant] and thereby shutdown sulphur burning acid plants. It is a strategy of displacement by agreement. *This strategy is being followed so as not to force an oversupply into a balanced market with predictable price disruption* and to minimize the risk of inviting trade action by U.S. authorities." 743 F. Supp. 2d at 858 (emphasis in original). This direct evidence of a clear plan to enter into an unlawful, anticompetitive agreement, under the

cover of an ordinary sales contract, is far from the sequential inferences Complaint Counsel seeks to have drawn from Mr. Tatman's December 25, 2007 PowerPoint Presentation, which, on its face, outlined unilateral conduct by McWane, albeit, and understandably, with consideration of the potential reactions by competitors.

Complaint Counsel further asserts an inference that the actions of McWane, Sigma, and Star beginning in January 2008 were taken to "comport" or "comply" with McWane's "plan." This inference is further based on yet other inferences that Complaint Counsel urges be drawn from McWane's January 11, 2008 Customer Letter, which was an outgrowth of McWane's internal pricing discussions in connection with the December 25, 2007 PowerPoint Presentation. F. 646. Complaint Counsel argues that McWane's January 11, 2008 Customer Letter "communicated" the "substance" of McWane's "plan" allegedly shown by the "Message to Market and Competitors" slide in Mr. Tatman's December 25, 2007 PowerPoint Presentation. Specifically, according to Complaint Counsel, McWane's January 11, 2008 Customer Letter communicated that "McWane was increasing its prices, did not intend to offer Project Pricing, and would support future increases in prices only if pricing had stabilized, *i.e.*, only if Sigma and Star also curtailed Project Pricing." CCB at 119. Complaint Counsel's interpretation of the January 11, 2008 Customer Letter is unsupported by the greater weight of the evidence. Regardless of what McWane might have discussed internally about what "message" to send to the "market and competitors" (F. 638; *see also* CX 0627 at 006-007 (draft customer letters announcing multiplier increase), McWane's January 11, 2008 Customer Letter did *not* include any language indicating that McWane would support future increases in prices only if Sigma and Star curtailed Project Pricing, as argued by Complaint Counsel. F. 645. The vague and ambiguous paragraph in the January 11, 2008 Customer Letter upon which Complaint Counsel relies in this regard states: "If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require." F. 645. The January 11, 2008 Customer Letter also did not include any language concerning Sigma's and Star's "pulling price authority away from front line sales," which was also referenced on the "Message to

Market and Competitors" slide upon which Complaint Counsel relies.[17]

As proof that Sigma and Star "complied" with McWane's alleged plan, Complaint Counsel asserts that after McWane's January 11, 2008 Customer Letter was sent, Sigma and Star "announced" that they would curtail Project Pricing, and "centralized their pricing authority away from the front lines of their sales force," in order to "please" McWane. CCB at 120-122. As noted above, the evidence fails to show Sigma "announced" that it would curtail Project Pricing. Mr. Pais' email of January 24, 2008, upon which Complaint Counsel relies, in which he "urged" Mr. Rybacki to renew efforts to "normalize all pricing for fittings" between plant work and other work, was an internal Sigma document, and Sigma's January 29, 2008 customer letter said nothing about "normalizing" Fittings prices between plant work and other work, as alluded to in Mr. Pais' January 24, 2008 internal email. F. 664, 674. Even if Mr. Pais believed that curtailing Project Pricing would "please" McWane, this is not proof that Sigma had any prior understanding with McWane, or that there was any commitment by McWane to Sigma, to raise prices in the future. The inference that Sigma, recognizing its oligopolistic interdependence with McWane, hoped it could influence McWane's conduct, is at least as likely as any inference of an agreement involving McWane. Moreover, Complaint Counsel's evidence that Sigma "centralized" its pricing authority consists of statements by Mr. Tatman in his Executive Report for the first quarter of 2008 that: "As we understand it, both [Sigma and Star] have removed pricing authority from the front line sales team and pushed it up higher within their organizations. Discounting is still available, but it now requires a more structured decision process." CCB at 122 & n.457; CCFF 1054; *see* F. 1068. These statements have little probative value in determining whether Sigma, in fact, "centralized" pricing authority in 2008, as they were based on reports from sales

[17] In addition, Complaint Counsel argues that McWane "complied" with its strategy by hiring a pricing coordinator. CCB at 122. As noted in Section III.D.2.b.ii.(a) above, the purpose of the pricing coordinator position was to get a national view of pricing, and was not an element of the strategy referenced in the December 25, 2007 PowerPoint Presentation. Moreover, even if it were, McWane's complying with its own pricing strategy scarcely gives rise to an inference of conspiracy.

persons in the field of information gleaned from discussions with customers, rather than upon any personal knowledge of Mr. Tatman. F. 571, 869. Moreover, any evidentiary value of Mr. Tatman's "understanding" of Sigma's conduct in this regard is outweighed by direct evidence from Mr. Rybacki that Sigma undertook no special efforts to curtail Project Pricing in 2008, and that Sigma's regional managers retained authority to approve Project Pricing throughout 2008. F. 895, 897-898.

With respect to Star, the evidence shows that Star announced to its sales force, and to its customers, an effort to stop or curtail Project Pricing, and that Star worked to tighten up and better manage its process for approving Project Pricing. F. 686-687, 695, 702, 704, 873. However, the inference that it did so because Star believed that, in exchange for these actions, McWane would reward Star with a price increase in the future, in accordance with the "Tatman plan," is rejected. To support this inference, Complaint Counsel cites an internal email dated January 23, 2008 from Mr. Minamyer to his divisional sales managers noting that McWane "said in its multiplier increase letter that they will require all project priced orders to be shipped by March 1" and directed the division managers to start working on doing the same because otherwise "[McWane] won't be able to figure it out and think we didn't take the increase." CCB at 121 n.452 citing CX 0847. However, this language, which is ambiguous, is inconsistent with the inference of any prior understanding or commitment between McWane and Star with respect to future pricing.

Moreover, contrary to Complaint Counsel's argument, the evidence fails to show that McWane communicated its "plan" to Sigma and Star in meetings or telephone calls. *See* CCB at 21-22. The evidence shows that on December 3, 2007, several weeks before the alleged conspiracy was formed in January 2008, Mr. Page, President and CEO of McWane (F. 39), met with Mr. Pais of Sigma in Birmingham, Alabama. F. 604. Mr. Page and Mr. Pais both testified that their December 3, 2007 meeting concerned international opportunities for McWane. F. 608. Mr. Pais testified that they discussed Sigma potentially supplying McWane with metric sized fittings that were needed for international markets that McWane did not have. F. 605. Mr. Pais and Mr. Page denied discussing domestic Fittings; prices being charged in

the marketplace; pricing discipline; McWane's or Sigma's costs; or ways they could work together in the marketplace in this regard. F. 608. Where there is an independent business justification for a defendant's behavior, an inference of conspiracy is not easily drawn. *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1456 (11th Cir. 1991). Even if the testimony of Mr. Pais and Mr. Page is rejected, mere disbelief of testimony does not "rise to the level of positive proof of agreement . . . ." *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975). It strains credulity to suggest that mere proof of a meeting, together with evidence that pricing was not discussed, equates to proof that McWane's alleged "plan" was discussed. Rather, such a conclusion would be unsupported speculation.

Complaint Counsel also relies upon four telephone calls placed between a cell phone issued to Mr. Tatman and a cell phone issued to Mr. Rybacki, as follows: a three minute call from the Rybacki cell phone to the Tatman cell phone at 10:15 a.m. on December 27, 2007; a six minute call from the Tatman cell phone to the Rybacki cell phone at 12:11 p.m. on December 27, 2007; a three minute call from the Rybacki cell phone to the Tatman cell phone at 11:03 a.m. on January 3, 2008; and a nine minute call from the Tatman cell phone to the Rybacki cell phone at 4:30 p.m. on January 4, 2008. CCB at 120 & n.448; CCFF 923; *see* F. 621-622, 639-640. The short duration of two of the foregoing calls indicates that the inference that a brief voice mail message was left is just as likely as the inference that an actual conversation took place. In any event, Mr. Rybacki and Mr. Tatman both denied having any recollection of the telephone calls and/or denied any recollection of what was discussed. F. 623-624; 639-640. It would be pure speculation on this record to simply assume that Mr. Tatman and Mr. Rybacki discussed McWane's pricing "plan."

Finally, Complaint Counsel points to testimony by Mr. McCutcheon regarding a dinner meeting between Mr. McCutcheon of Star and Mr. Pais of Sigma after an initial meeting of the Ductile Iron Fittings Manufacturers Association ("DIFRA") in Birmingham, Alabama. Specifically, Mr. McCutcheon testified at an investigational hearing in this matter

that Mr. Pais proposed that Sigma and Star agree "to stay within two to three" discount points of McWane; that if Sigma and Star did so, McWane would "not be so overbearing towards" Sigma and Star; and that "if we were good, then they would be good – they would treat us better and we could live happily ever after." CX 2538 (McCutcheon, IHT (Vol. 2) at 227-228); *see also* McCutcheon, Tr. 2373-2374. Complaint Counsel argues this evidence shows that Sigma and Star knew "aspects" of McWane's pricing "plan" and urges that it should be inferred that McWane must have communicated its plan to Sigma and/or Star. Complaint Counsel's argument is based only on unsupported inferences and overreaches. First, Complaint Counsel points to nothing in Mr. Tatman's internal December 25, 2007 PowerPoint Presentation regarding Sigma and Star staying "within two or three points" of McWane. *See* CX 0627; F. 638. In addition, Mr. Pais denied the statements attributed to him by Mr. McCutcheon, and Complaint Counsel cites no reason why Mr. McCutcheon should be believed over Mr. Pais. *See* Pais, Tr. 1957-1959. Even if Mr. McCutcheon's testimony is credited, the initial meeting of DIFRA took place on March 27, 2008 (F. 727), and therefore, the alleged conversation took place more than two months after Sigma and Star had already, ostensibly, "agreed" to McWane's "plan" in January 2008, according to Complaint Counsel. *See* Complaint ¶¶ 2, 29, 32. Moreover, the substance of the conversation is inconsistent with the notion that Sigma and Star had a prior understanding with or commitment from McWane regarding curtailing Project Pricing. Therefore, regardless of what the alleged conversation between Mr. Pais and Mr. McCutcheon says about the conduct of Sigma and Star, this alleged conversation fails to prove that McWane, who is the Respondent in this case, communicated its "plan" to Sigma and Star, or that McWane was party to an agreement to curtail Project Pricing.

For the foregoing reasons, and having fully reviewed and weighed all the evidence on the issue, the evidence fails to demonstrate that Mr. Tatman's December 25, 2007 PowerPoint Presentation constituted a "written plan" for conspiracy, with which McWane, Sigma, and Star all complied, as argued by Complaint Counsel. This internal document is not evidence of the asserted agreement to curtail Project Pricing involving McWane, and therefore does not constitute a "plus" factor in this case.

(d) DIFRA as a "plus" factor

Complaint Counsel next contends that McWane, Sigma, and Star participated in an "information exchange" in order to "detect cheating" on the asserted agreement to curtail Project Pricing, and that, therefore, this constitutes a "plus" factor. CCB at 126-127. Importantly, however, for this evidence to be material under Complaint Counsel's argument, it must first be assumed that there was, in fact, an agreement to curtail Project Pricing, and that McWane was a party to it. An unlawful agreement will not be presumed. *See Blomkest Fertilizer*, 203 F.3d at 1033 ("[A] litigant may not proceed by first assuming a conspiracy and then explaining the evidence accordingly.").

In summary, DIFRA is a trade association with four members, McWane, Sigma, Star, and U.S. Pipe. F. 8. Around the same time as DIFRA's incorporation in January of 2007, DIFRA engaged the accounting firm, Sellers Richardson, of Birmingham, Alabama, as the association's auditor. F. 715, 718. As part of its duties, Sellers Richardson would "compile on a monthly basis, the data submitted by the members reporting their respective sales of ductile iron fittings" in the form of total tons-shipped "and will prepare and issue to the members monthly reports" showing the aggregate tons of ductile iron fittings shipped during the reporting period (hereafter, "DIFRA tons-shipped data reports"). F. 718. On or about April 25, 2008, the members of DIFRA approved a tons-shipped reporting format, which would set forth industry-wide, short-tons of fittings shipped within the United States in the previous month for the following six categories: 2"-12" Flanged; 2"-12" All Other; 14"-24" Flanged; Greater than 24" Flanged; Greater than 24"; and "All Other." F. 732-734. These broad product size ranges contain thousands of different SKUs – all with unique physical attributes and pricing points – and mirror the major size groupings of pipe. F. 742. Members' initial submissions included annual data for 2006, monthly data for 2007, and monthly data for January through April 2008. F. 734. After the members submitted their data to DIFRA's accountants, the accountants aggregated the members' tons-shipped data and disseminated the aggregated totals to DIFRA members. F. 838. The first DIFRA tons-shipped report was issued by the

accountants on June 17, 2008. F. 738. The last DIFRA tons-shipped report was circulated in January 2009. F. 739.

Complaint Counsel's DIFRA "plus" factor argument asserts, but fails persuasively to explain, how historic, aggregated, tons-shipped data reports would disclose the pricing of the Suppliers in such a way as to enable them to "detect cheating" on the presumed agreement to curtail Project Pricing, even if the Suppliers could glean their own individual market share from the data, as Complaint Counsel asserts. CCB at 126. Moreover, the conclusion that the reports would allow the Suppliers to "detect cheating" on the presumed agreement to curtail Project Pricing is not readily apparent. The submitted tons-shipped data was aggregated, and the report did not reveal the tons shipped or market shares of the individual Suppliers. *See* CX 0052 at 005; F. 748-749, 756, 758. No DIFRA member was permitted to review the tons-shipped data of any other member. F. 748. Neither DIFRA nor its accountants, Sellers Richardson, collected sales price data. F. 745. The DIFRA reports provided by Sellers Richardson did not include or reveal any sales prices, or report any dollar figures. F. 746-747. It is far less indicative of a price fixing conspiracy when the information allegedly exchanged pertains to volume rather than prices. *Williamson Oil Co.*, 346 F.3d at 1313. *See also In re Citric Acid Litig.*, 191 F.3d 1090, 1098 (9th Cir. 1999) (holding that gathering information about pricing and competition in the industry is "standard fare" for trade associations and does not warrant an inference of conspiracy).

Also, the fact that the DIFRA members opted to include data for several historic time periods, including all of 2006 and 2007, in addition to a time period during the alleged conspiracy (January through April 2008), is inconsistent with the conclusion that the purpose of the data reporting was to police the alleged conspiracy.

The cases upon which Complaint Counsel relies do not support a holding that the DIFRA tons-shipped data reporting system constitutes a "plus" factor evincing an unlawful agreement. In *In re Petroleum Products*, the issue was whether the defendants conspired to restrict supply, and in this context, the court held that evidence that the defendants, through a trade association, obtained detailed supply projections for individually identifiable suppliers, combined with evidence that the defendants

also individually exchanged their own detailed supply forecasts, among other evidence, made the inference of conspiracy plausible. 906 F.2d at 460-462. In the instant case, in contrast, Complaint Counsel alleges an agreement to curtail Project Pricing, not an agreement to restrict supply, and unlike *Petroleum Products*, the tons-shipped data reported through DIFRA contained only aggregated totals of volume, for broad categories of fittings, and did not set forth the volume of each member. F. 741-744, 748-749. Furthermore, the court in *Petroleum Products* held only that the information exchanges between the defendants contributed to making the inference of conspiracy "plausible." *Id*. at 462. As noted previously, at this stage of the proceedings, Complaint Counsel's burden is to prove that the inference of conspiracy is more likely than not, rather than merely "plausible."

Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 1991), upon which Complaint Counsel also relies, is distinguishable. In *Todd*, the plaintiff alleged that defendants violated Section 1 of the Sherman Act by regularly exchanging detailed information regarding the compensation they paid to their non-union managerial, professional, and technical employees and using this information to set the salaries of these employees at artificially low levels. 275 F.2d at 195-97. The court specifically noted that the plaintiff was not alleging an agreement among defendants to fix salaries, but an unlawful information exchange, based on the exchange's allegedly "facilitating" the fixing of salaries, which claim the court recognized as a distinct Section 1 action. *Id.* at 198. Whether Complaint Counsel's alleged "information exchange" constitutes an unlawful "facilitating practice" (as opposed to a "plus" factor) is the subject of Count Two of the Complaint in this case, and is addressed *infra* in the analysis of that Count.

Accordingly, the evidence fails to support Complaint Counsel's assertion that participation in the DIFRA tons-shipped data reporting system is probative of an agreement to curtail Project Pricing. Therefore, the DIFRA reporting system does not constitute a "plus" factor in this case.[18]

[18] Complaint Counsel's assertion that mere membership in a trade association is a "plus" factor evincing agreement is without merit. *In re Blood Reagents*, 756 F. Supp. 2d at 632, upon which Complaint Counsel relies, held

(e) "Monitoring" of the market for "cheating"

Complaint Counsel argues that internal documents show that the Suppliers were "tracking" the marketplace for "cheating" on the asserted agreement to curtail Project Pricing. The documents upon which Complaint Counsel relies to support this argument have been thoroughly reviewed and examined, and the documents, as discussed below, do not implicate McWane in an agreement to curtail Project Pricing. The inference that McWane was monitoring the market for "cheating" on an agreement with Sigma and Star to curtail Project Pricing is no more likely than the inference that McWane was gathering competitive information from the field, in the ordinary course of business, to enable it to compete against the prices of its competitors, including with Project Pricing. Therefore, these documents fail to constitute circumstantial evidence of an agreement to curtail Project Pricing involving McWane.

Complaint Counsel argues that McWane monitored the market for "cheating" on the alleged agreement to curtail Project Pricing because it "tasked its sales representatives with logging instances of Project Pricing in its 'price protection log' and reporting instances of cheating in its 'competitive feedback log'," which Mr. Tatman used to conclude in an April 2008 quarterly Executive Report that "the level of multiplier discounting by both Star and Sigma appears to have died down significantly." CCB at 129. The evidence shows that McWane's pricing protection log tracked, in the normal course of business, instances of price protection (*i.e.*, where McWane quotes a price to a customer and agrees to hold that price for a customer for some period of time, thereby "protecting" the price against increases) and instances of Project Pricing, as reported by sales persons in the field. F. 852, 854. The "competitive feedback log" is a summary of competitive information learned in the field and reported by

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that a complaint alleging "common membership in trade associations, . . . while not enough by itself to confer plausibility on an allegation of conspiracy, is yet another feature of the factual background," which together with the many other allegations in that case, raised a reasonable expectation that discovery would reveal evidence of an illegal agreement, and therefore the defendants' motion to dismiss was denied. This is not a holding that proof of membership in a trade association constitutes a "plus" factor evincing an unlawful agreement.

McWane's sales persons in weekly narrative "competitive feedback reports." F. 571. Complaint Counsel cites no evidence to support Complaint Counsel's nefarious inference from these facially legitimate, internal business reporting devices, that the pricing protection log and competitive feedback reports were devices for "tracking" "cheating" on a (presumed) prior agreement, and therefore should constitute a "plus" factor evincing an agreement involving McWane.

In re High Fructose Corn Syrup, upon which Complaint Counsel relies, is not analogous. In that case, there was extensive, explicit evidence of an agreement through the defendants' own statements and documents, including a statement by one of the defendant's managers that: "We have an understanding within the industry not to undercut each other's prices," and a document that referred to "support[ing] efforts to limit" competitors' pricing. 295 F.3d at 662. This evidence is not, as argued by Complaint Counsel, "similar" to the evidence upon which Complaint Counsel relies here to show the alleged agreement involving McWane.

To support its "monitoring" for "cheating" inference against McWane, Complaint Counsel relies principally on statements in internal documents of Sigma and Star. In particular, Complaint Counsel cites to several internal documents of Star that use the term, "cheat," or "cheating" in reference to the prices being offered by its competitors in the marketplace. According to Complaint Counsel, these documents are admissions of Star, and these admissions are further attributable to McWane as Star's "co-conspirator." *See* CCB at 127-128. Having fully reviewed and considered all the documents upon which Complaint Counsel relies, Complaint Counsel's argument is unpersuasive. For example, Complaint Counsel relies heavily on one internal document of Star, an email exchange from September 17, 2008 between Star Divisional Sales Manager, Ramon Prado, and Star's then National Sales Manager, Mr. Minamyer, regarding the status of business in the southeast (CX 1691). The relevant passage, in context, reads:

> [Mr. Minamyer] What the heck can we do? [Ramon Prado] We have climbed our way back into contention and Ferguson

> attrition should be mostly gone now. Are we being aggressive enough? [Ramon Prado] I think we are doing better since figuring out that Sigma was cheating on the fitting deal.
>
> Looks like Ryan is doing OK. Is that from the Lynn deal? [Ramon Prado] Yes primarily.
>
> Are [your] guys on the projects? [Ramon Prado] Yes. Are they project pricing to get every order? [Ramon Prado] Yes.

CX 1691.

Complaint Counsel has failed to show that the statement regarding "cheating" on the "fitting deal," upon which it relies, is an "admission" of Star of an agreement to curtail Project Pricing. *See also* F. 902 (Mr. Prado's statement in internal "competition update" dated March 6, 2008: "It is still early, but it doesn't appear that Sigma or Tyler is cheating on the new fitting multipliers being quoted after 2/18."). Mr. Prado was not called as a witness at trial, nor was any deposition testimony from Mr. Prado offered into evidence, to explain what he meant by the term "cheating" or "the fitting deal" or "the Lynn deal." Under Complaint Counsel's theory, it must be inferred that Mr. Prado was referring to "cheating" on an agreement to curtail Project Pricing, which is an admission of Star, and which should further constitute evidence of an agreement involving McWane. Mr. Minamyer's testimony, which is not contradicted, was that "cheating" is an internal Star term used by Star to refer to any pricing that was below the published multiplier, including among other things, Project Pricing. F. 903. There is no evidence that the term had any particular usage for Fittings. Complaint Counsel's daisy chain of assumptions fails to support or justify an evidentiary inference of any unlawful agreement involving McWane, and the multilayered inference is rejected. In addition, it is unlikely that the existence of any unlawful agreement to curtail Project Pricing would be known below the executive level at Star, down to the level of a divisional sales manager, such as Mr. Prado. For this reason as well, the inference that Mr. Prado was referring to an unlawful agreement in his email is unsupported and unpersuasive.

In addition, the email exchange (CX 1691), set forth above, further states that Star was using "project pricing to get every order," which is inconsistent with the existence of an agreement among McWane, Sigma, and Star to curtail Project Pricing. The document also is evidence that Star was Project Pricing to "get every order" as of September 17, 2008, which is inconsistent with Complaint Counsel's theory that Star sales persons only began using Project Pricing to "get every order," when allegedly instructed to do so by Mr. Minamyer in his email of November 25, 2008 (F. 893) over two months later. CCB at 6, 35-36. Other Star documents upon which Complaint Counsel relies are also consistent with the conclusion that Star continued to use Project Pricing throughout 2008 to compete in the marketplace, which is inconsistent with the inference of a conspiracy to restrain price competition by curtailing Project Pricing. *E.g.*, F. 908 (CX 1696 at 001 (weekly activity report from Mr. Smith for week ending April 18, 2008 stating, "You know the gig, ask them why?" If they give you proof the other guys are cheating, then we will match!")); F. 912 (CX 1695 at 001 (email from Mr. Smith to his sales force regarding a weekly report, stating: "[L]et's be as diligent as we can gathering the proper data needed if the other suspects are cheating. We will react, just need to make sure it is real.")).

Furthermore, the September 17, 2008 email exchange, reflected in CX 1691, above, refers to Sigma and does not mention McWane, thereby requiring the further inference that McWane was part of whatever "deal" Mr. Prado meant. Accordingly, Complaint Counsel has failed to prove that this document constitutes an admission of Star of a conspiracy with McWane to curtail Project Pricing.

The remaining Star documents upon which Complaint Counsel relies suffer from the same or similar defects discussed above. For example, Complaint Counsel relies upon documents containing statements of a Star divisional sales manager, Mr. Shaun Smith. At the end of a 3-page Star internal email exchange among Mr. McCutcheon, Mr. Minamyer, and Mr. Smith on October 22, 2008, regarding "Quote 10707007," and whether to offer a customer a lower multiplier than Sigma had offered, Mr. Smith stated: "I'm not sure about the market being already there. .

. . I really only think this will affect the Houston market, but I am catching Sigma cheating more and more." F. 916; *see also* F. 917 (statement by Mr. Smith in weekly activity report for the week ending October 24, 2008, under the heading "Competition," noted "My team is in major attack mode – as reported, we are seeing cheating all over from Sigma – they have been instructed not to lose any orders."). As in the case of Mr. Prado, as previously noted, Mr. Smith did not testify at trial, nor is there any deposition testimony in the record from Mr. Smith, as to what he meant by the above statements. Furthermore, as noted above with regard to statements by Mr. Prado, it is unlikely that the existence of any unlawful agreement to curtail Project Pricing would be known below the executive level at Star, down to the level of a divisional sales manager, such as Mr. Smith, which weighs against any inference that Mr. Smith was referring to an unlawful agreement. In addition, this Star internal email refers only to Sigma. It will not be assumed that Mr. Smith was referring to a conspiracy with McWane to curtail Project Pricing. Moreover, the document is evidence of active price competition between Sigma and Star, and is inconsistent with an agreement to curtail Project Pricing.[19]

Complaint Counsel next argues that Sigma was "monitoring the market for cheating" by using DIFRA reports. CCB at 128. The statement upon which Complaint Counsel relies, from an internal Sigma email authored by Mr. Pais on May 4, 2009, shows that Mr. Pais believed DIFRA data enabled him to track Sigma's own market share. F. 772 (CX 0319 at 002). The inference that Sigma's purpose in tracking market share was to find "cheating" on an agreement to curtail Project Pricing presumes a preexisting agreement, and is rejected for the same reasons set forth in Section III.2.b.iii.(d), *supra*. At a minimum, the inference that Sigma was tracking its market share for legitimate business purposes is at least as likely as the inference that it was "tracking cheating" on an agreement with McWane and Star to curtail Project Pricing.

[19] Complaint Counsel also uses the Star documents referred to herein as evidence that the conspiracy was "falling apart" beginning in the fall of 2008. However, this assertion presumes the existence of a prior conspiracy, which has not been shown.

In summary, regardless of what the evidence may imply as to the conduct of Sigma and Star, the inference that McWane, who is the Respondent in this case, was "monitoring" the market for "cheating" on an agreement with Sigma and Star to curtail Project Pricing is unproven. The inference urged by Complaint Counsel is no more likely than the inference that McWane was gathering competitive information from the field, in the ordinary course of business, to enable it to compete against the prices of its competitors, including by using Project Pricing. Because the evidence upon which Complaint Counsel relies does not merit an inference of an agreement involving McWane, Complaint Counsel has failed to prove the existence of this asserted "plus" factor.

(f) "Complaints" about "cheating"

Complaint Counsel also argues that the evidence shows the Suppliers "complained" to each other about low prices or "cheating" and that this constitutes a "plus" factor evincing an agreement to curtail Project Pricing involving McWane. CCB at 129-132. Complaints about "cheating," Complaint Counsel argues, suggest the breach of an agreement, rather than independent action. However, the cases upon which Complaint Counsel relies held that complaints about cheating implied a breach of an agreement, where there was independent proof of the underlying agreement allegedly "breached." Thus, in *United States v. Giordano*, 261 F.3d 1134 (11th Cir. 2001), evidence that the appellant "on at least one occasion" complained that a co-conspirator was "cheating" contributed to the totality of the evidence that made the inference of conspiracy reasonable, and therefore supported the jury's verdict finding a price-fixing conspiracy. *Id.* at 1139-40. However, in *Giordano*, unlike the instant case, there was also substantial direct evidence that the appellant had met with the purported co-conspirators and agreed to jointly lower prices. *Id*. at 1136-38. There was also direct evidence that one co-conspirator decided afterward not to comply with the agreement and did not lower prices, which prompted the "complaints." *Id.*

Similarly, in *United States v. Beaver*, 515 F.3d 730 (7th Cir. 2008), cited by Complaint Counsel, there was direct evidence of a

meeting between appellant and other co-conspirators where they discussed ways to raise and stabilize prices on concrete and that attendees left the meeting with the "firm understanding that an agreement to limit . . . discounts had been reached." *Id.* at 734. In *Beaver*, there was also direct evidence that, after it appeared that some of the participants were not complying with the agreement, the alleged co-conspirators had more meetings where they "reaffirmed" their agreement, and expressly agreed that if any member of the conspiracy detected discounting, they would confront that member about "his cheating." *Id.* In those circumstances, subsequent complaints about cheating contributed to the legal sufficiency of the evidence of conspiracy. *See also In re Scrap Metal Antitrust Litig.*, 2006 U.S. Dist. LEXIS 75873, at *6-9, *41 (N.D. Ohio 2006) (holding that direct testimony of "unwritten" agreements by scrap metal resellers, *inter alia*, not to compete with each other by selling to accounts that "belonged" to another reseller, along with evidence of complaints about those that failed to comply, as well as other evidence of agreement, was legally sufficient to support jury verdict). The evidence of an agreement, found in the foregoing cases, distinguishes them from the instant case, in which the probative value of Complaint Counsel's "cheating complaints" first requires an assumption that an agreement existed, which is contrary to the government's burden of proof.

Complaint Counsel relies on an internal Star email dated April 2, 2008, in which Mr. Minamyer reported to Mr. McCutcheon, regarding a bid for the "Tulsa Bid Sleeves Project," that Star had lost because Star had not given the customer a "special price" but Sigma did. F. 906. Mr. Minamyer stated, among other things: "They should be very careful if they want to hold this price increase as we will not lose our partners or any more orders because they are not responsible in the market." F. 906. On its face, this is an internal Star email and not a complaint to a competitor about anything, much less about "cheating" on an agreement. However, Complaint Counsel apparently contends that it should nevertheless be inferred that Mr. McCutcheon complained to Sigma about its Project Pricing, which Complaint Counsel further infers is a complaint about "cheating" on an agreement, based on the timing of certain telephone calls placed on April 3, 2008 between a cell phone issued to Mr. McCutcheon of Star and a cell phone issued to Mr. Rybacki of Sigma. CCB at

131. Although there is no evidence in the record indicating what, if anything, Mr. McCutcheon and Mr. Rybacki discussed, Complaint Counsel urges that Sigma's "cheating" was "surely discussed at some point during these conversations." CCB at 131. Complaint Counsel's invitation to speculate and assume that there was a conversation between Mr. McCutcheon and Mr. Rybacki, in which Mr. McCutcheon "complained" to Mr. Rybacki about "cheating" on an unlawful agreement, is declined. Moreover, whatever this may imply about a possible agreement between Sigma and Star, the evidence does not refer to McWane or implicate any involvement by McWane, who is the Respondent in this case.

Complaint Counsel also refers to an internal Sigma email dated March 5, 2008, in which Mr. Jim Stohr, Sigma's Operations Manager in Houston, Texas, reported a discounted multiplier being offered by a "rogue" McWane sales person that Sigma had refused to match. CX 1726; *see* CCB at 27. Mr. Stohr asked: "Can Larry [Rybacki] make a call and see if this can be stopped?" CX 1726 at 001. This was followed by a Sigma manager responding: "Jim should not write that last sentence!" *Id.* Mr. Stohr was not called to testify at trial, nor was any deposition testimony from Mr. Stohr offered into evidence, to explain what he meant. There is insufficient evidence to support an inference that Mr. Stohr was complaining about McWane's cheating on an agreement to curtail Project Pricing. Complaint Counsel also fails to demonstrate that Mr. Rybacki made the requested call to McWane to "see if this can be stopped." Although Complaint Counsel cites a call three weeks later from a cell phone issued to Mr. Rybacki to a cell phone issued to Mr. Jansen on March 26, 2008, Mr. Rybacki testified that he has no idea what they spoke about, and Complaint Counsel does not point to any testimony from Mr. Jansen regarding the phone call. CCFF 1034; *see* CX 1621-A at 096, *in camera* (Rybacki telephone records); Rybacki, Tr. 3634. Mr. Stohr's unexplained request for a phone call, accompanied by an unexplained phone call occurring three weeks after Mr. Stohr's request, is not evidence that Mr. Rybacki complained to McWane about McWane's "cheating." To conclude that Mr. Rybacki in fact complained to McWane about McWane's "cheating" on an unlawful agreement, based on this evidence, would require improper speculation.

Complaint Counsel also cites a November 24, 2008 internal email from Mr. Pais of Sigma to his management staff, which included the language that "our two main competitors in Fittings seem to see SIGMA as 'leading' [the] recent price decline in the market." CCB at 132; *see* RX 116 at 001. Without citing any support from the record, Complaint Counsel then concludes that Mr. Pais' equivocal statement about "the state of mind of 'our two main competitors' can only be the result of complaints from McWane and Star to Sigma about its discounting practices." CCB at 132. However, the record shows that the Suppliers learned information regarding competitors principally from sales persons in the field and Distributors. F. 571-573, 869, 854. It will not be presumed that Mr. Pais' statement was based on complaints by McWane and Star to Sigma, as Complaint Counsel urges.

Complaint Counsel also relies upon two internal emails authored by Sigma's OEM (original equipment manufacturer) business manager, Mr. Mitchell Rona, who was Mr. Tatman's contact at Sigma for McWane's sales of Fittings to Sigma. CCB at 130, 132. In the first email, dated March 10, 2008, Mr. Rona forwarded to Mr. Pais and others at Sigma an email from Mr. Tatman regarding Sigma's purchase of "3"-8" [Fittings] from Tyler/Union." F. 922. Mr. Rona reported in his email a number of points from a conversation he had with Mr. Tatman, including that Mr. Tatman "said he hears that some of the new prices in the market are being compromised with deals. He hopes the market will improve and hopes [sic] do our part." F. 922. Mr. Tatman did not recall the conversation with Mr. Rona, and Mr. Rona recalled nothing more than that which he wrote in his internal email. F. 923, 925.

Mr. Tatman's statement, as reported by Mr. Rona in his March 10, 2008 internal email, while arguably suspicious, is vague and ambiguous, and far from compelling evidence of McWane "complaining" of a breached "agreement." Mr. Tatman's encouraging Sigma to "do [its] part" in helping the new published multipliers implemented in February 2008 to "stick" could be interpreted as a request that Sigma avoid or minimize Project Pricing. At the same time, however, expressing a "hope," which is the precise word used, that Sigma would "do [its] part" is inconsistent with the notion that Mr. Tatman or McWane had any

prior understanding with or commitment from Sigma that Sigma would curtail Project Pricing and, to this extent, is inconsistent with the inference of an existing agreement. The inference that the statement attributed to Mr. Tatman is a "complaint" about Sigma "breaching" an agreement is no more likely than the inference that there was no agreement between Sigma and McWane to refrain from Project Pricing.

Mr. Rona's second email, dated August 22, 2008, which was sent to the OEM5 management group at Sigma, with the subject line, "Short talk with Rick Tatman," stated that "Rick was upset by the numbers in Florida and California based on what he has seen from us and Star. He said the .26 and .30 respectively were available from us both without any second thought." F. 924. This statement attributed to Mr. Tatman by Mr. Rona is also troublesome because Mr. Tatman's apparent displeasure with the multipliers offered by Sigma and Star "without a second thought" could be interpreted as evidence that Mr. Tatman believed Sigma and Star had some obligation to refrain from offering those prices, which is indicative of a prior agreement. However, Mr. Tatman's reported statement also indicates that Sigma and Star, in offering the stated prices "without a second thought," did not perceive any restricted freedom of action with regard to their Project Pricing or perceive any commitment to McWane, or to each other, to refrain from Project Pricing, which is inconsistent with an agreement among McWane, Sigma, and Star, to curtail Project Pricing. Complaint Counsel's conspiracy inference drawn from this document is no more likely than the inference that there was no such agreement.

Complaint Counsel also notes that Mr. Rybacki of Sigma testified that, even though he did not remember seeing Mr. Rona's email regarding Mr. Tatman's being "upset," Mr. Rybacki "already knew that" and also recalled telling Mr. Rona: "Mr. Tatman needs to look in the mirror because pricing from McWane was a little inconsistent as well." CCB at 132, *see* Rybacki, Tr. 3577-3578. Complaint Counsel did not inquire of Mr. Rybacki as to what he specifically knew, or how he knew it, and it will not be presumed that Mr. Rybacki's knowledge was obtained from Mr. Tatman. It is at least as likely that Mr.

Rybacki obtained his information from sales persons in the field. *See* F. 572-573.

Out of all the evidence upon which Complaint Counsel relies, the statements attributed to Mr. Tatman by Mr. Rona in the two cited emails, above, stand out as perhaps the only evidence arguably implicating McWane in any improper pricing discussions. However, the full context of Mr. Tatman's statements described in Mr. Rona's emails is unknown. *See* F. 923, 925. Ultimately, however, Complaint Counsel has failed to persuade that the inference that Mr. Tatman was "complaining" about Sigma "breaching an agreement" with McWane and Star to curtail Project Pricing is more likely than not. Because Complaint Counsel has not demonstrated that either the Rona emails, or the other Sigma and Star documents upon which Complaint Counsel relies, constitute "complaints" between McWane and its competitors about "cheating" on an agreement to curtail Project Pricing, Complaint Counsel has failed to prove this "plus" factor.[20]

(g) Inter-firm communications

Complaint Counsel argues that "a high volume of communications among top level executives [is] a 'plus' factor . . . because this type of evidence provides 'proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan[.]'" CCB at 132-133 (quoting *Flat Glass*, 385 F.3d at 361). Complaint Counsel argues that the "record is overflowing with evidence that McWane, Sigma, and Star executives were communicating frequently with each other."

[20] In addition, the authority upon which Complaint Counsel relies to support the argument that a complaint about "low pricing" is a "plus" factor is inapplicable. Complaint Counsel cites to Areeda, ¶1419a, for the proposition that complaints to a competitor about low pricing are properly interpreted as an effort to induce a higher price. The cited paragraph deals with "solicitations" of an agreement, and not whether such a complaint is evidence of an existing agreement or a breach of an agreement, which is the relevant "plus" factor inquiry. *Flat Glass*, 385 F.3d at 360 (holding that "plus" factors are designed to serve as "proxies for direct evidence of an agreement" in a circumstantial case based upon parallel pricing conduct).

CCB at 133. The evidence upon which Complaint Counsel relies fails to support this assertion.

Complaint Counsel's "inter-firm communications" evidence largely consists of: (1) unexplained telephone calls placed between Sigma and Star (CCB at 141-143); (2) conversations between Sigma and Star allegedly regarding Fittings pricing (CCB at 133-135), including conversations that were denied by either Sigma or Star; and (3) purported communication between Sigma and McWane in 2009 allegedly for the purpose of Sigma "influencing" McWane to retract McWane's April 2009 announced price list restructuring (CCB at 135-138), which is not related to the asserted agreement to curtail Project Pricing that, according to Complaint Counsel, "fell apart" by the end of 2008. Regardless of what the foregoing communications may imply about the conduct of Sigma and/or Star, these communications do not implicate McWane, the Respondent in this case, in the alleged agreement to curtail Project Pricing.[21] Those communications that do involve McWane and that took place during the relevant time period, further discussed below, do not constitute evidence that McWane, Sigma, and Star "got together and exchanged assurances" on an agreement to curtail Project Pricing, as argued by Complaint Counsel.

Complaint Counsel first points to two meetings between Mr. Page of McWane and Mr. Pais of Sigma in September 2007 and December 2007. CCB at 140. Complaint Counsel relies on Mr. Pais' statements in an October 19, 2007 internal email to show what was discussed at Mr. Pais' September 2007 meeting with Mr. Page. *See* CX 2118. According to the email, the discussion included "changes that [Mr. Page] has initiated to respond to the weak market conditions" which were "publicly known in the

[21] For example, Complaint Counsel reasserts an alleged meeting in March 2008 between Mr. Pais of Sigma and Mr. McCutcheon of Star, at which, according to Mr. McCutcheon's investigational hearing testimony, Mr. Pais told Mr. McCutcheon that "Sigma and Star should agree to stay within two or three points of McWane" so that McWane would "treat" Sigma and Star "better." CCB at 134, *see* CCFF 1036-1037, citing CX 2538 (McCutcheon, IHT (Vol. 2) at 227), *in camera*. As noted in Section III.D.2.b.iii.(c), *supra*, Mr. Pais denies the statements attributed to him, and in any event, the conversation does not indicate any agreement involving McWane.

AWWA industry," including that Mr. Green had been removed as part of a restructuring at McWane "to be more efficient and manage their overall capacity more effectively" and that Mr. Green would be replaced by Mr. Tatman. F. 601. None of the foregoing indicates any discussion about Fittings prices, Project Pricing, or an agreement to curtail Project Pricing. Complaint Counsel also highlights a statement by Mr. Pais in a subsequent internal Sigma email by Mr. Pais regarding his September 2007 meeting with Mr. Page, that Mr. Page was "disappointed at our failure to get a better landscape." F. 601. Even if Mr. Pais' perception of Mr. Page's "disappointment" in the "landscape" constitutes evidence of Mr. Page's state of mind, the statement is vague and ambiguous and does not refer to Fittings, Fittings prices, Project Pricing, or any agreement to curtail Project Pricing. As to a meeting between Mr. Pais and Mr. Page on December 3, 2007, as noted in Section III.D.2.b.iii.(c), *supra*, Mr. Page and Mr. Pais both testified that their meeting concerned international opportunities for McWane. F. 608. Mr. Pais testified that they discussed Sigma potentially supplying McWane with metric sized fittings that were needed for international markets and that McWane did not have. F. 605. Mr. Pais and Mr. Page denied discussing domestic Fittings; prices being charged in the market place; pricing discipline; McWane's or Sigma's costs; or ways they could work together in the marketplace in this regard. F. 608.[22]

Complaint Counsel next points to four telephone calls placed between a cell phone issued to Mr. Tatman of McWane and a cell phone issued to Mr. Rybacki of Sigma in late December 2007 and early January 2008, in the same general time frame that Mr. Tatman was working on McWane's pricing strategy for 2008. CCB at 142. As noted in Section III.D.2.b.iii.(c), *supra*, however, the evidence fails to show what was discussed, if anything, in these cell phone calls and it will not be assumed that Mr. Rybacki and Mr. Tatman discussed Fittings pricing, Project Pricing, or an agreement to curtail Project Pricing. F. 623-624; 639-640.

[22] Complaint Counsel alludes to additional meetings between Mr. Page of McWane and Mr. Pais of Sigma "between August 2007 and May 2009" but cites to a range of proposed findings, including proposed findings unrelated to meetings between Mr. Page and Mr. Pais. Moreover, Complaint Counsel's cited proposed findings state nothing about the substance of these meetings. CCB at 153, citing CCFF 788-804.

Similarly, Counsel Counsel points to five telephone calls placed between a cell phone issued to Mr. Tatman and a cell phone issued to Mr. Rybacki in April 2008. CCB at 142; *see also* CCB at 143 (four minute phone call to a number at McWane occurring May 16, 2008). Again, however, there is no evidence showing what Mr. Tatman and Mr. Rybacki discussed, and it will not be presumed that they discussed Fittings pricing, Project Pricing or an agreement to curtail Project Pricing. F. 790-791, 795, 826. Moreover, it is not immediately apparent that the telephone calls in April or May 2008 even demonstrate an opportunity to agree to curtail Project Pricing, since, under Complaint Counsel's theory, that agreement was already formed through the conduct of McWane, Sigma, and Star in January and February 2008.

Finally, Complaint Counsel relies on evidence that in late 2007 and early 2008, McWane and Sigma negotiated the sale of certain Fittings by McWane to Sigma. According to Complaint Counsel, the evidence shows that the sale was made at a low price, and that this communicated to Sigma that McWane had a "cost advantage." CCB at 138-140. Respondent contends that the evidence shows that the sale of Fittings to Sigma by McWane was in McWane's competitive interest, because McWane had excess capacity of the types of Fittings sold and that, because the price was above its variable costs, the tonnage would absorb a portion of the fixed plant costs, and thereby make a positive impact to McWane's "bottom line." RRCCFF 1074-1087. Complaint Counsel fails to persuasively explain or prove how an arms-length buy-sell agreement evinces an agreement to curtail Project Pricing merely because the negotiated price may have indirectly communicated McWane's position as the low-cost Fittings producer.

In conclusion, the evidence shows some communications between McWane and Sigma during the relevant time period. The evidence fails to show that McWane and Sigma discussed Fittings pricing, Project Pricing, or an agreement to curtail Project Pricing. In these circumstances, a further inference that these communications constitute evidence that McWane, Sigma, and Star, "got together and exchanged assurances" on an agreement to curtail Project Pricing is unwarranted and unjustified, and is rejected. At best, Complaint Counsel has proven an *opportunity*

to conspire; however, "communications between competitors do not permit an inference of an agreement to fix prices unless 'those communications rise to the level of an agreement, tacit or otherwise.'" *Baby Food*, 166 F.3d at 126; *see Blomkest Fertilizer*, 203 F.3d at 1036 (holding that opportunity to conspire is not necessarily probative evidence of conspiracy). "[I]t remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred." Areeda, ¶ 1417b at 115.

c. Summary and conclusion as to asserted agreement to curtail Project Pricing

The totality of the evidence, given due weight and viewed as a whole, fails to demonstrate that McWane, together with Sigma and Star, had an agreement to curtail Project Pricing in the Fittings market, as asserted by Complaint Counsel. As analyzed in detail above, Complaint Counsel's evidence of parallel conduct consists principally of arguably similar expressed "intentions" to stop (McWane and Star) or minimize (Sigma) Project Pricing, followed by Star putting systems in place to authorize Project Pricing only when necessary to beat a competing Project Price. Complaint Counsel cites no case in which this sort of pricing-related conduct has constituted "parallel pricing conduct" probative of a conspiracy. Moreover, the greater weight of the evidence fails to show that McWane, Sigma, and Star, engaged in parallel conduct by curtailing Project Pricing, as claimed by Complaint Counsel. Evidence that, according to McWane's pricing protection log, McWane quoted a Project Price "to match" Sigma or Star less frequently in certain periods of 2008 compared to later periods in 2008 and 2009 fails to persuasively demonstrate that McWane "curtailed" Project Pricing beginning in 2008. Moreover, this evidence does not outweigh other evidence that is inconsistent with the inference of an agreement to curtail Project Pricing, including the reliable, persuasive, expert opinion of Dr. Normann, based upon the actual price data kept by McWane, Sigma, and Star from 2007 through 2010, indicating that there was no parallel curtailment of Project Pricing in 2008 among McWane, Sigma, and Star.

Complaint Counsel has also failed to prove the existence of "plus" factors indicating that the asserted parallel conduct was the result of an agreement, rather than independent, or merely interdependent, conduct, as analyzed above. In summary, Complaint Counsel's inferences of an agreement depend largely on interpreting McWane's January 11, 2008 Customer Letter as a "message" to Sigma and Star that if they curtailed Project Pricing, which McWane's Customer Letter indicated McWane was, in effect, doing, then McWane would support a price increase in the future; however, the evidence fails to show that this message was conveyed by McWane to Sigma and Star by the January 11, 2008 Customer Letter, or by any other claimed communications by McWane to Sigma or Star. Evidence that McWane took into account how Sigma and Star might react to McWane's January 11, 2008 Customer Letter, when making their own pricing decisions, reflects only recognized pricing interdependence in the Fittings market, which is not illegal. "How does one order a firm to set its prices *without regard* to the likely reactions of its competitors?" *Clamp-All Corp.*, 851 F.2d at 484 (holding that individual decisions do not constitute an unlawful agreement even when the decisions rest upon a belief that competitors will do the same).

In addition, the evidence fails to demonstrate that any decisions by Sigma and Star with respect to Project Pricing were made because of any understanding with McWane, or perceived commitment to or from McWane; or that any Supplier felt a restricted freedom of action with respect to offering Project Pricing when necessary to compete. These are the evidentiary hallmarks for proving the required "actual, manifest agreement," especially in an oligopolistic market characterized by pricing interdependence, such as the Fittings market. *See Twombly*, 550 U.S. at 557 n.4 (quoting with approval commentator's example of "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement" as conduct allegations that would state a claim under Section 1); *Flat Glass*, 385 F.3d at 361; Areeda, ¶¶ 1410b, 1410c. The conduct of Sigma and Star in response to McWane's January 11, 2008 Customer Letter is at least as consistent with oligopolistic, "follow the leader" behavior, which is not illegal, as it is with an unlawful agreement. "A firm in a concentrated

industry typically has reason to decide (individually) to copy an industry leader. After all, a higher-than-leader's price might lead a customer to buy elsewhere, while a lower-than-leader's price might simply lead competitors to match the lower price, reducing profits for all." *Clamp-All Corp.*, 851 F.2d at 484; *accord Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992); *see Florida Cement & Concrete Antitrust Litig.*, 746 F. Supp. 2d at 1310 & n.14 (noting that price following is natural and rational in a concentrated market).

As explained above, the internal documents upon which Complaint Counsel relies as evidence of an agreement among McWane, Sigma, and Star either fail to implicate McWane in the purported agreement; require multiple, unsupported inferences to implicate McWane in an agreement to curtail Project Pricing; are inconsistent with a conclusion of restricted freedom, or a mutual commitment or understanding among the Suppliers with respect to Project Pricing; and/or are at least as consistent with independent, or merely interdependent, conduct as with an agreement. Moreover, much of the circumstantial "plus" factor evidence upon which Complaint Counsel relies requires that the underlying agreement first be presumed in order for the evidence to be probative of an agreement, which does not satisfy Complaint Counsel's burden of proof.

Further weighing against a finding of an agreement to curtail Project Pricing is sworn testimony from the Suppliers that they made pricing decisions independently and did not discuss and agree to stop or curtail Project Pricing. *E.g.*, Tatman, Tr. 1005-1006, *in camera*; Rybacki, Tr. 3661; Pais, Tr. 2130-2131; McCutcheon, Tr. 2524-2525, 2554, 2689-2690. This is direct evidence contrary to the asserted agreement to curtail Project Pricing and is entitled to weight. Complaint Counsel urges that these denials be dismissed as "self-serving"; however, "[a] plaintiff cannot make his case just by asking the [fact finder] to disbelieve the defendant's witnesses . . . ." *High Fructose Corn Syrup*, 293 F.3d at 655. "[M]ere disbelief [does] not rise to the level of positive proof of agreement" sufficient to meet Complaint Counsel's burden of proof. *Venzie*, 521 F.2d at 1313; *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir. 1981); *accord Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1014 (3d Cir. 1994) (noting that mere disbelief of contrary

testimony does not prove agreement). In addition, as noted above, Respondent presented reliable and persuasive expert opinion, based on pricing data, that the Suppliers did not engage in a parallel curtailment of Project Pricing.

As the Supreme Court noted in *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), mistaken inferences that arise from circumstantial evidence are costly, because they chill competitive conduct – "the very conduct the antitrust laws are designed to protect." *Id*. at 594 (citing *Monsanto*, 465 U.S. at 763-64). "'[We] must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.'"). *Id*. (quoting *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)). Where the evidence points equally to two or more inferences, an objective fact finder would not decide the inference in favor of the party with the burden of proof, in this instance, the government. *See Venture Technology*, 685 F.2d at 48 (holding that where "taken as a whole, the evidence points with at least as much force toward unilateral actions . . . as toward conspiracy," a fact finder cannot reach the latter conclusion without engaging in "impermissible speculation").

Having fully reviewed and weighed the totality of the evidence, Complaint Counsel has failed to meet its burden of proving that it is more likely than not that McWane, together with Sigma and Star, had an agreement to curtail Project Pricing. At best, the evidence shows interdependent or consciously parallel conduct, unaided by any agreement, which is not illegal. *Brooke Group*, 509 U.S. at 227; *Twombly*, 550 U.S. at 557 & n.4.[23]

[23] Complaint Counsel asserts that proof of parallel conduct and at least one "plus" factor entitles it to a "presumption" of an unlawful agreement. CCRB at 31, citing *Baby Food*, 166 F.3d at 122. As shown above, Complaint Counsel has failed to prove parallel conduct in curtailing Project Pricing, and has failed to prove the existence of any "plus" factors. Even if Complaint Counsel did meet this minimal burden, Respondent produced ample credible and probative evidence that McWane, Sigma, and Star, acted independently, even though with consciousness of how their competitors may react, sufficient to rebut a presumption of conspiracy. Unlike *Baby Food*, in which the plaintiffs needed only to produce sufficient evidence to create a dispute of fact sufficient to defeat summary judgment, this case requires a weighing of all the evidence, and a determination of whether or not Complaint Counsel has met its burden of proving that a conspiracy is more likely than not, which burden remains on

The analysis now turns to Complaint Counsel's claimed "episode two" of the alleged price fixing conspiracy, an asserted agreement among McWane, Sigma, and Star to exchange DIFRA tons-shipped data in exchange for a price increase by McWane.

3. Alleged agreement by McWane to increase prices only if Sigma and Star submit DIFRA tons-shipped data (Complaint Counsel's "episode two")

Complaint Counsel argues that McWane's May 7, 2008 Customer Letter (F. 809) communicated an "offer" from McWane to Sigma and Star that McWane would increase prices in exchange for Star and Sigma submitting their tons-shipped data to DIFRA's accountants for aggregation into the DIFRA tons-shipped data report expected on May 20, 2008.[24] Complaint Counsel further argues that Sigma and Star understood and "accepted" the "offer" by their conduct in thereafter submitting their tons-shipped data. CCB at 148-150. Complaint Counsel further characterizes this implied agreement as an exchange of assurances, or a *quid pro quo*, whereby McWane traded its support for a price increase in exchange for Sigma and Star submitting their tons-shipped data, when McWane "rewarded" them with a price increase in June 2008. CCB at 148-150, 156-157. To prove this theory, Complaint Counsel relies principally on inferences drawn from the text of McWane's May 7, 2008

Complaint Counsel at all times. Moreover, even if Complaint Counsel proved parallel curtailment of Project Pricing and one or more plus factors, this would not mandate a finding of an unlawful agreement. "[T]he court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws." *Baby Food*, 166 F.3d at 122 (quoting *Balaklaw v. Lovell*, 822 F. Supp. 892 (N.D.N.Y. 1993)).

[24] As summarized in Section III.D.2.b.iii.(d), the Suppliers were members of DIFRA, a trade association. F. 8. The members agreed to participate in a data reporting system, pursuant to which the members would provide the amount of Fittings tons shipped in the previous month, separated by relevant product categories, to accountants who would then aggregate all the member data and return a report. F. 715, 718, 732-734. The aggregated data that was reported enabled a supplier to see the size of the total market, and was a reference point for determining a supplier's own market share. F. 756, 758, 807.

Customer Letter and a June 5, 2008 email from Mr. McCutcheon of Star to DIFRA's President, Mr. Brakefield of Sigma. [25]

Respondent asserts that there was no agreement among McWane, Sigma, and Star, and that the evidence fails to support Complaint Counsel's theory.

a. Background – Sigma's "big, bold" price increase

The evidence shows that in a customer letter dated April 24, 2008, Sigma notified its customers of an increase in published multipliers of "up to 10 multiplier points," effective May 19, 2008, citing "rising costs in transportation, labor, medical benefits, raw materials, etc." ("April 24, 2008 Customer Letter"). F. 797. This amounted to a price increase of approximately 25 percent to as much as 40 percent over Sigma's then-published multipliers, depending on the region. F. 796, 798, 804. Mr. Pais believed that Sigma's attempt to lead a price increase of this magnitude, which he proposed internally on April 11, 2008, was a "big, bold, move" by Sigma that was necessary to boost its margins, and was one of the biggest one-time increases Sigma had ever had. F. 792, 796. Sigma did not know whether or not Star and McWane would follow Sigma's lead, although Sigma hoped they would. F. 794, 796, 801.

Star learned of Sigma's April 24, 2008 Customer Letter on April 25, 2008. F. 802. On May 7, 2008, Star sent a letter to its customers announcing a multiplier increase of a similar

[25] Complaint Counsel also constructs a complex web of inferences, based largely on the timing of the Suppliers' various pricing moves between mid-April and mid-June 2008 in relation to various DIFRA-related events. For example, Complaint Counsel contends that Sigma sent a price increase letter to its customers on April 25, 2008 because it was the same day as the April 25, 2008 DIFRA conference call (F. 732) and that Sigma and Star must have "misunderstood" that the "*quid pro quo*" required actual submission of data, not just an agreement to submit. *See* CCB at 150-154. Complaint Counsel's inferences and the evidence upon which it relies to draw these supposed connections have all been thoroughly evaluated and considered and they are unpersuasive and/or immaterial to the issue of whether McWane, Sigma, and Star entered into a pricing "*quid pro quo*" involving Sigma's and Star's DIFRA data. Accordingly, the evidence is not probative of the alleged *quid pro quo*, contrary to the argument of Complaint Counsel.

magnitude to that announced by Sigma, effective May 19, 2008. F. 803.

McWane also learned of Sigma's April 24, 2008 Customer Letter on April 25, 2008. F. 804. On May 5, 2008, Mr. Tatman forwarded internally to Mr. McCullough and Mr. Walton, Mr. Tatman's proposal for new McWane multipliers, which reflected an approximate increase of 8 to 12 percent. F. 805. According to Mr. Tatman, Mr. McCullough believed that it was important to first review the DIFRA tons-shipped data report, which was expected by May 20, 2008, before McWane took any price actions. F. 733, 735, 806. Mr. McCullough believed the tons-shipped data would be a more accurate reference point for assessing McWane's market share than other reference points, such as statistics from the Ductile Iron Pipe Research Association ("DIPRA") and the Valve Manufacturers Association ("VMA"). F. 807. Although following Sigma's large price increase could help provide higher prices for McWane, Mr. Tatman recommended against following Sigma, regardless of what the DIFRA data showed. F. 805, 830. Mr. Tatman believed, as he did with respect to Sigma's large list price increase proposed in October 2007, that such a large price increase would not "stick" and would lead to price "instability," which was contrary to McWane's competitive strategy of publishing multipliers that were closer to the true competitive price level in the marketplace. F. 804-805, 830. Accordingly, Mr. Tatman proposed that McWane publish a smaller multiplier increase in the range of 8% to 12%. F. 805.

b. McWane's May 7, 2008 Customer Letter

In accordance with Mr. McCullough's instructions, McWane determined to wait for the DIFRA tons-shipped data report before issuing any price increases. F. 806. Thus, on May 7, 2008, McWane sent the following customer letter, which stated in full:

> Dear Valued Customer,
>
> You have likely heard or read about continued increases in factors of production impacting both domestic and global operations. The foundry industry has been hit particularly

> hard with sharp increases in scrap iron, alloys and transportation costs.
>
> While the financial impact to our business is real, we also recognize there are restrictions as to the level and timing at which pricing can be accommodated in the market.
>
> We are sending this general communication to our waterworks distribution customers to more clearly define our intention in regards to future pricing actions.
>
> Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.
>
> For planning purposes only, we expect for regions with a change that multipliers will increase in the range of 6% up to 16% effective June 16th.

F. 809 ("May 7, 2008 Customer Letter"). The plain language of the May 7, 2008 Customer Letter does not show the "offer" regarding a price increase for DIFRA data that Complaint Counsel asserts.

Complaint Counsel argues that McWane's alleged offer to increase prices in exchange for submittal of DIFRA data should be inferred from the language in the third paragraph, quoted above, that: "Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May." (Hereafter referred to at times as the "factors" language). To support its requested inference, Complaint Counsel argues that DIFRA members were aware that the DIFRA report was expected by May 20; McWane's May 7, 2008 Customer Letter did not announce a price increase (only a range for planning purposes);

and points to testimony that the "factors" language did not communicate something "meaningful" or "helpful" to distributors. CCB at 154-155 & n.551, citing, *e.g.*, Sheley, Tr. 3424-3425, 3441-3442; CX 2516 (Sheley, Dep. at 153); *see also* CX 2544 (Coryn, Dep. at 125); CX 2510 (Groeniger, Dep. at 233-234), *in camera*; CX 2514 (Webb, Dep. at 105) CX 2504 (Thees, Dep. at 96). These assertions, even if true, do not warrant accepting the further inference that the factors language in fact communicated an offer to Sigma and Star: (1) that McWane would follow Sigma's price increase, or even increase prices at all, and/or (2) that McWane wanted to review the DIFRA tons-shipped data for any reason other than as a reference point for assessing McWane's own market share, which is not unlawful. The DIFRA tons-shipped data reporting system did not disclose the market share or prices of any member, but disclosed only aggregated, tons-shipped data. F. 733-734, 745-748, 756, 758.

Complaint Counsel's inference that the "factors" language constituted an offer to trade a price increase in exchange for Sigma and Star submitting their tons-shipped data is against the greater weight of the evidence. The evidence shows that, as stated in the letter, Mr. Tatman did plan to review various "factors" before announcing McWane's price action. F. 812. In addition to the anticipated May 2008 DIFRA report, Mr. Tatman wanted to review and analyze McWane's monthly financial data for April 2008, as set forth in McWane's monthly financial reports known as "blue books," which are prepared by McWane's accountants on a monthly basis for management purposes. F. 812. Mr. Tatman expected to receive this report by mid-May and be able to prepare a spreadsheet analysis by the end of May. F. 812. Also, Mr. Tatman wanted to review all of the competitive inputs collected from the field. F. 812. In an email transmitting the May 7, 2008 Customer Letter to one of its customers, Mr. Tatman explained McWane's position consistently with the language of the customer letter, stating: "Given the market environment, we feel any pricing action warrants careful consideration and analysis. We simply needed more time beyond the competitive May 19th [effective] date [stated by Sigma] to feel comfortable that we properly considered all factors." F. 813. While Mr. Tatman acknowledged that it was unusual to send out a letter that stated intentions as to a future price increase, but not the actual price increase, he explained: "It's not too often that you have to respond

to a competitor putting out a 40 percent price increase, so these are unusual times." F. 810. Mr. Tatman denied that the point of McWane's May 7, 2008 Customer Letter was to communicate to Sigma and Star that they needed to submit their DIFRA data. F. 811.

Complaint Counsel contends that the May 7, 2008 Customer Letter was a "message" to Sigma and Star that McWane was going to wait for the DIFRA data. CCB at 154-155; *see also*, CCFF 1192, 1201. Complaint Counsel quotes from a May 23 and May 24, 2008 internal email exchange among Mr. Tatman, Mr. Walton, and Mr. McCullough, in which Mr. Tatman reported that according to DIFRA's accountants, two of the four DIFRA members had not yet submitted their tons-shipped data, in response to which Mr. McCullough reiterated that he "still believe[d] we stand pat until market share info is available." CCFF 1229; *see* F. 829. Mr. Tatman concurred stating: "Although somewhat painful to the bottom [line] in the short term, that would re[i]nforce the message we've been trying to drill in which when successful will pay long term dividends." F. 829. Complaint Counsel fails to persuasively explain how the message that McWane was waiting for the DIFRA report to finalize its price decision, even if conveyed to Sigma and Star, warrants the further inference of an offer of a "*quid pro quo*" of a price increase. In any event, Mr. Tatman denied that the "message" was a message to DIFRA members that they must get their DIFRA data in before McWane would announce a price increase. F. 830. Mr. Tatman explained further:

> If someone announced a 40 percent price increase and I follow it, I'm going to get a lot of price in the short term. That's going to be a significant benefit in the short term to my bottom line. But do I believe that is in my best interest of my longer-term goal, which is gaining volume and gaining share? No.
>
> So if I have a competitor that announces a 40 percent price increase, if I want to put money in my pocket for the next three months or the next six months, I'm going to jump on that.

> So that is painful to the bottom line, on a relative basis, that I'm not going to jump on and support a 40 percent price increase because you're going to get some traction off of that. It's not like you're -- you might not get 38-39 percent, but you're going to get some traction on that.
>
> And what I'm saying here is consistent with what we said all along, was we were not going to lose visibility of where the competitive marketplace is, and our primary focus at this point in time is volume [and], share.

F. 830.

For all the foregoing reasons, the inference that the language in McWane's May 7, 2008 Customer Letter was a legitimate effort to explain its intentions to its customers is at least as likely as the inference that McWane was communicating a "*quid pro quo*" offer to Sigma and Star of a price increase in exchange for Sigma's and Star's submitting their tons-shipped data for the DIFRA data report. Accordingly, Complaint Counsel has failed to prove that the May 7, 2008 Customer Letter was such an offer.[26]

c. Sigma's and Star's interpretation of McWane's May 7, 2008 Customer Letter

The evidence also fails to show that Sigma understood McWane's May 7, 2008 Customer Letter to communicate anything with regard to DIFRA, much less an offer of a price increase contingent on submission of DIFRA data, as argued by Complaint Counsel.

Upon reviewing McWane's May 7, 2008 Customer Letter, Mr. Rybacki of Sigma thought the language regarding McWane's "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region,

[26] Complaint Counsel also asserts that the "factors" language had not been used in a McWane customer letter before or since. *See* CCFF 1187. However, McWane's June 17, 2008 Customer Letter, discussed *infra*, included very similar "factors" language, noting that "we will continue to [assess] market & competitive conditions in addition to our internal operating metrics and advise you if additional actions will be required before year end." F. 841.

as well as performance against our own internal metrics" was notable because the language looked "a little quirky for [the signer of the Customer Letter, McWane National Sales Manager] Jerry Jansen" and not Mr. Jansen's "style." F. 820. Mr. Rybacki had "no idea" what it meant. F. 820. Moreover, Mr. Rybacki did not interpret McWane's May 7, 2008 Customer Letter to be promising a price increase, finding the Customer Letter ambivalent in this regard. F. 821. When Mr. Pais of Sigma was questioned at his deposition whether he understood that McWane was not going to increase prices on Fittings until all of the DIFRA members submitted their data and DIFRA issued the report, or that McWane was waiting to increase prices until after it had the DIFRA data and the DIFRA report, Mr. Pais responded: "It is so farfetched and ridiculous, what can I say? No, no." F. 822.

Mr. Minamyer of Star received a copy of McWane's May 7, 2008 Customer Letter, via its customer HD Supply, on the afternoon of May 7, 2008. F. 815. Mr. McCutcheon of Star found the wording of McWane's May 7, 2008 Customer Letter to be "odd," "arrogant," and "humorous." F. 817. Moreover, regarding the above quoted third paragraph containing the "factors" language, Mr. McCutcheon testified at the investigational hearing in this matter: "I don't know why [McWane] did it. I mean, it looks like a -- I took it as being a minor poke at us, because we weren't going to do careful analyzing -- we did our own analysis and we quickly determined that we were getting ready to lose money if we didn't take an increase. . . . Other than an attempt to try to look more sophisticated . . . I don't know." F. 817. In addition, when Mr. McCutcheon was questioned about the language in his deposition prior to the hearing in this case, he specifically testified that he had not seen any connection between McWane's Customer Letter and DIFRA, stating: "Absolutely none. As a matter of fact, the first time that . . . I've even ever heard that was today. Of linking that to [the need to submit Star's] DIFRA [data]? . . . No, sir." F. 818.

To show that Star "understood" McWane's "offer" that was allegedly conveyed in McWane's May 7, 2008 Customer Letter, Complaint Counsel relies on the fact that on the same day that McWane sent the Customer Letter, Mr. McCutcheon responded to

an email regarding DIFRA. CCB at 155-156; *see* F. 735. The evidence shows that on April 25, 2008, DIFRA's attorney, Mr. Long, sent an email to the DIFRA members summarizing the results of their conference call of the same day, including the agreed format for tons-shipped data reporting and the agreed date of May 15 for the members' first submissions. F. 734. On May 5, Mr. Long sent an email to the DIFRA members noting that he had not heard back from the DIFRA members in response to his April. 25, 2008 email summary, and asked them to confirm their concurrence with the agreed procedures and parameters he outlined in his April 25, 2008 email. F. 735. McWane, Sigma, and Star each replied to the May 5 email, confirming their prior agreement, but because Star replied on May 7, instead of on May 5, as did Sigma and McWane, F. 735, Complaint Counsel infers that this is evidence of Star's "understanding" that McWane was requiring Star to submit its tons-shipped data as a condition to McWane's issuing a price increase. CCB at 33, 155-156. The far more likely inference is that Mr. McCutcheon, in the ordinary course of business, was responding to a recent email, which had specifically requested a response.

Furthermore, Complaint Counsel's assertion that Star was "reluctant" to participate in the DIFRA tons-shipped reporting system in May 2008 and needed to be "induced" to actually provide the data by McWane's "offer" of a price increase, CCB at 33, 155, is not supported by the greater weight of the evidence. Star had already agreed to join DIFRA by January 2007, having overcome some initial reluctance, and Star had already agreed on April 25, 2008 to submit its tons-shipped data in accordance with the agreed DIFRA tons-shipped data reporting system. F. 712, 714-715, 727, 732-734. A Star employee was tasked with assembling the data. F. 816, 828. On May 16, 2008, Mr. McCutcheon of Star sent an email to Mr. Brakefield of Sigma, DIFRA's President, affirming that Star would be submitting its data and apologizing for the delay. F. 827. Mr. McCutcheon denied that there was a delay in submitting Star's tons-shipped data due to a "reluctance" to participate in the DIFRA tons-shipped data reporting system, stating: "Once we decided that Star was going to join, I had every intention of being a member. I do remember it taking us a while to figure out how to do it, running it back through our purchasing people. I know that took a couple of weeks, easy. F. 837.

Star submitted its ton-shipped data to DIFRA's accounting firm on June 5, 2008, and at the same time advised Mr. Brakefield of Sigma, DIFRA's President, that the submission had been made. F. 834-835. Complaint Counsel argues that Mr. McCutcheon demonstrated Star's understanding and "acceptance" of McWane's "offer" to raise prices in exchange for Star's submission of tons-shipped data, because Mr. McCutcheon's email to Mr. Brakefield quoted McWane's May 7, 2008 Customer Letter, as follows:

> Good morning Mr. President. I just sent our info in. Sorry it took so long, but we were "carefully analyzing all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics." (Does that look familiar?).

F. 835; *see* CCFF 1222-1225; CCB at 156.

According to Complaint Counsel, it should be inferred from Mr. McCutcheon's repetition of the "factors" language in connection with Star's submission of its tons-shipped data that Mr. McCutcheon was aware that "the price increase that was the subject of McWane's May 7, 2008 Customer Letter was contingent upon Star and Sigma participating in the DIFRA information exchange." CCFF 1225. The greater weight of the evidence fails to support this inference. The evidence shows that Mr. McCutcheon thought McWane's "factors" language was arrogant and was "poking" at Star for Star's attempting to lead a price increase with Sigma, and not using a "careful analysis." F. 817. Mr. McCutcheon testified that he quoted the language to "poke fun" at McWane. F. 836. This is a logical and credible explanation for Mr. McCutcheon's statement. Complaint Counsel's inference from Mr. McCutcheon's email is not more likely than Mr. McCutcheon's explanation.

d. McWane's June 17, 2008 Customer Letter

McWane and the other DIFRA members received the first DIFRA aggregated tons-shipped report from DIFRA's accounting

firm at 2:41 p.m. on June 17, 2008. F. 838. As of May 29, 2008, more than two weeks before receiving the DIFRA tons-shipped report, Mr. Tatman had already concluded, based on his review of other reference points, that McWane had lost market share. F. 832. Mr. Tatman had already prepared a customer letter announcing a weighted average increase in published multipliers for blended Fittings of approximately 8 percent. F. 832. Upon receiving the DIFRA report, Mr. Tatman conducted an analysis to determine McWane's market share using the DIFRA data. F. 839. Mr. Tatman spent approximately 40 minutes reviewing the DIFRA tons-shipped data, comparing it to other reference points for assessing McWane's market share that he had already collected, such as McWane sales data, and DIPRA and VMA statistics, and prepared a spreadsheet of relevant data points. F. 839. Mr. Tatman transmitted the DIFRA report and his spreadsheet analysis internally to Mr. McCullough, Mr. Walton, and Mr. Jansen. F. 839. He notified them, among other things, that McWane's share loss for 2007 and through April 2008 was "actually larger than what [he] expected." F. 839. Accordingly, in the early evening of June 17, 2008, approximately four hours after receiving the DIFRA aggregated tons-shipped report from DIFRA's accountants, McWane sent a customer letter dated June 17, 2008, notifying McWane's customers of an increase in Fittings multipliers effective July 14, 2008, and stating that the weighted average increase on blended Fittings and accessories would be "approximately 8%." F. 840 ("June 17, 2008 Customer Letter"). This was the lower range of the 8 to 12 percent increase Mr. Tatman originally considered, in order to account for the lower market share numbers. F. 777, 805. Thereafter, Sigma and Star rescinded their previously announced high multiplier increases and instead followed McWane's lower multiplier increase. F. 843-844.

Complaint Counsel argues that this price increase was McWane's "reward" to Sigma and Star for submitting their DIFRA data and represents McWane upholding its part of the bargain. CCB at 156-157. The strained inferences required to accept this argument are rejected. First, the notion that an 8 percent increase from McWane is a "reward," when Sigma and Star were seeking an increase as high as 40 percent is not logical or persuasive. Complaint Counsel further argues that McWane's rejection of Sigma's and Star's large price increase, in favor of a

smaller increase, was all part of Mr. Tatman's "plan" to support "small" and "staged" increases. CCB at 157; CCRRFF 135; *see also* CCB at 119; CCRRFF 100 (same argument regarding McWane's January 2008 rejection of Sigma's and Star's large list price increase, announced in October and November 2007, in favor of smaller, 8% effective multiplier increase). McWane's acting consistently with its own price strategy does not imply an agreement with Sigma and Star, and the inference that Mr. Tatman's December 25, 2007 PowerPoint Presentation was a "plan" to conspire with Sigma and Star has already been thoroughly reviewed and rejected as unsupported by the greater weight of the evidence. *See* III.D.2.b.iii.(c), *supra*.

In addition, Complaint Counsel attaches undue significance to the facts that McWane sent its June 17, 2008 Customer Letter within just a few hours of receiving the aggregated tons-shipped data report from DIFRA's accountants, and that McWane had already drafted a customer letter announcing the increase. As previously noted, McWane had already internally determined that it would not follow Sigma's "big, bold" price increase, regardless of what the DIFRA data showed, and Mr. Tatman had already recommended a price increase in the range of 8 to 12 percent as better serving McWane's competitive goals. F. 805, 829-830. At the time McWane received the June 17, 2008 DIFRA report, Mr. Tatman had already reviewed many sources of data that indicated that McWane was losing market share; had already concluded that a price increase in the amount of 8 percent was advisable; and had already drafted a customer letter pending review of the DIFRA data. F. 805, 807, 832. In this context, there is nothing suspicious or conspiratorial in the fact that it did not take an extended period to compile a spreadsheet, confer internally, and send the June 17, 2008 Customer Letter. F. 839.

For all the foregoing reasons, Complaint Counsel has failed to prove that McWane's May 7, 2008 Customer Letter was an offer to trade a price increase for Sigma's and Star's submitting their tons-shipped data for inclusion in the DIFRA report; that Sigma and Star understood the Customer Letter to be making such an offer; that Sigma and Star were "accepting" McWane's "offer" by their conduct in submitting their tons-shipped data; or that

McWane's June 17, 2008 Customer Letter was a reward or other "*quid pro quo*" for conduct by Sigma and Star.

4. Spring 2009 telephone conversation between Mr. McCutcheon of Star and Mr. Tatman of McWane (Complaint Counsel's "episode three")

As the third "episode" of the alleged conspiracy among McWane, Sigma, and Star to raise and stabilize Fittings prices, Complaint Counsel argues that in April 2009, McWane and Star reached an illegal agreement through an exchange of mutual assurances that McWane and Star would each adhere to McWane's new list prices, announced April 13, 2009 to be effective May 1, 2009 (hereafter "spring 2009 telephone conversation"). CCB at 157-163 (citing *Sugar Institute v. United States*, 297 U.S. 553, 601-02 (1936)). In support of this claim, Complaint Counsel relies on evidence of a telephone conversation that took place on an unspecified date in April or May 2009 between Mr. Tatman of McWane and Mr. McCutcheon of Star, described more fully *infra*. Respondent argues that the spring 2009 telephone conversation occurred after the alleged conspiracy terminated at the end of 2008; that the evidence shows that McWane acted independently in issuing its April 2009 list price changes; that Star acted independently when it determined to follow McWane's new price list; and that the telephone conversation between Mr. Tatman and Mr. McCutcheon does not constitute an agreement under applicable law. RB at 26-28.

For the following reasons, Complaint Counsel's argument that the spring 2009 telephone conversation constituted an unlawful exchange of mutual assurances to adhere to published prices and constitutes evidence of the "overall" conspiracy to raise and stabilize prices is rejected.

a. Timing of the Spring 2009 telephone conversation in relation to alleged conspiracy

McWane contends that the asserted agreement between McWane and Star to adhere to McWane's list prices, allegedly occurring in April 2009, should not be considered in this case. McWane asserts that the Complaint does not contain any allegations regarding this agreement; that Complaint Counsel

denied at the August 30, 2012 final prehearing conference that it was attempting to prove a separate conspiracy occurring in the spring of 2009; and that Complaint Counsel's expert concluded that the alleged conspiracy began to "collapse" in the fall of 2008 and terminated by the end of 2008. RB at 8-11.[27]

Complaint Counsel's proffered expert, Dr. Schumann, opined that the conspiracy to raise and stabilize prices alleged in this case started to "collapse" in the fourth quarter of 2008 and ended by the end of 2008. Schumann, Tr. 4200-4201, 4298, 4304; *see also* CX 2260-A (Schumann Rep. at 38-39), *in camera* (describing conspiracy to raise and maintain prices, which subsequently collapsed due to "cheating"). Complaint Counsel endeavors to distance itself from the record opinion of its own expert, and takes the position that the conspiracy that ended in the fall of 2008 was a conspiracy to "curtail Project Pricing," CCB at 114, (Complaint Counsel's "episode one") and not the "overall" conspiracy to raise and stabilize prices, which, Complaint Counsel implies, has yet to end. Jan. 24, 2013 (closing argument) Tr. at 16-17; *see also* CCRB at 44. This argument is unpersuasive. Complaint Counsel should be bound by the conclusions of its proffered expert as an admission that the alleged conspiracy to raise and stabilize prices collapsed by the end of 2008. "By the time the trial begins, we may assume that those experts who have not been withdrawn are those whose testimony reflects the position of the party who retains them." *Glendale Fed. Bank, FSB v. United States*, 39 Fed. Cl. 422, 424-25 (Fed. Cl. 1997) (further noting that "[a]t the

[27] This issue was previously addressed in Respondent's August 24, 2012 prehearing Motion to Exclude. Making a substantially similar argument, Respondent urged that evidence pertaining to the spring 2009 conduct, as well as evidence raised by Complaint Counsel in its Pretrial Brief regarding alleged improper pricing communications by McWane, Sigma, and Star in June 2010, be excluded. Complaint Counsel opposed the motion, arguing that the 2009 and 2010 conduct did not constitute separate claims or conspiracies, but constituted "events" tending to prove the "overall" conspiracy; that the Complaint did not allege an end date to the conspiracy; and that Respondent had adequate notice of the evidence and conducted discovery on the evidence. Respondent's Motion to Exclude was denied, *inter alia*, because Respondent had failed to demonstrate that it lacked adequate notice of the 2009 or 2010 conduct, or of its relevance to the case, and therefore the evidence should not be excluded. Order Denying Respondent's Motion to Exclude, September 7, 2012.

beginning of trial we may hold the parties to a final understanding of their case and hence an authorization of their expert witnesses who have not been withdrawn. At this point when an expert is put forward for trial it is reasonable and fair to presume they have been authorized"); *see also Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980). Moreover, Complaint Counsel did not discredit its own expert's conclusions as to the end of the alleged conspiracy when Dr. Schumann testified at trial. The telephone conversation upon which Complaint Counsel relies took place in late April or early May 2009. F. 1017-1018. Complaint Counsel offers no authority to support the proposition that conduct occurring at least four to five months after the conclusion of an alleged conspiracy is probative evidence that such earlier conspiracy existed; nor does Complaint Counsel adequately persuade that such a proposition is even logical.[28]

Even if the spring 2009 telephone conversation is considered in connection with the conspiracy to raise and stabilize prices, as further explained below, the evidence fails to show that McWane and Star "exchanged mutual assurances," and therefore agreed, to adhere to McWane's list prices, as argued by Complaint Counsel.

b. Asserted "agreement to adhere" to McWane's list prices

The evidence shows that on April 13, 2009, McWane, unilaterally and for its own competitive reasons, announced that it would begin using a new price list, to be effective May 1, 2009. F. 995, 998-999, 1001-1003. McWane's new price list would increase prices for small diameter fittings (where McWane's market share was highest), and lower prices substantially for medium and large diameter Fittings (where McWane had little or no market share and Sigma and Star were stronger). F. 1001. The purpose of McWane's 2009 list price restructuring was to try to win back market share that it had been losing to Star and Sigma

[28] Complaint Counsel further alludes to conduct from June 2010 as constituting improper "signaling" communications. CCB at 41-42; CCRB at 31; CCFF 1556, 1566-1571. As with conduct allegedly occurring in April 2009, this June 2010 evidence is not probative of a conspiracy ending in 2008. Complaint Counsel fails to persuasively articulate why or how conduct occurring in 2010 makes the alleged 2008 conspiracy more likely than not.

and to compete in the segments of the market where Sigma and Star were strongest. F. 1003. Prior to this time, McWane had conducted a product weight analysis and designed its pricing strategy to (1) realign its prices among different Fittings size ranges in order to better align McWane's prices with its production costs; (2) squeeze its competitors' margins and give less "wiggle room" to its competitors for Project Pricing on larger diameter Fittings, where Star and Sigma had significantly larger market shares; and (3) serve the goal of compressing the range between published pricing and actual market pricing, to give McWane better visibility of pricing. F. 999, 1002. McWane did not consult with Star or Sigma in connection with the restructuring of McWane's list prices in 2009. F. 1000, 1004. Complaint Counsel does not argue, nor does the evidence demonstrate, that McWane's April 13, 2009 price list restructuring announcement was anything other than a unilateral, procompetitive move by McWane.

The evidence further shows that as of April 23, 2009, after learning of McWane's new price list, Star determined that it would also issue a new price list, and that Star would likely follow McWane, which was Star's usual behavior. F. 556, 679, 1005-1006. On or about April 23, 2009, Star sent a customer letter stating that it would be implementing a new price list, effective May 19, 2009, although the letter did not state that Star's new price list would follow McWane's. F. 1005. Actions by Sigma created some uncertainty about how Star would proceed when, on April 27, 2009, Sigma, upset about the adverse impact that McWane's restructured price list would have on Sigma competitively and hoping to dissuade McWane from implementing the change, announced in a customer letter dated April 27, 2009 that Sigma would stick to its existing price list. F. 1010-1011.[29] McWane assumed that Star would follow McWane, although it did not know this for a fact. F. 1020-1021.

[29] Complaint Counsel's proposed findings of fact refer to internal Sigma emails of Mr. Pais tending to show that Mr. Pais may have intended to try to influence McWane into withdrawing its new price list, at meetings that were planned with McWane regarding McWane's selling private-label, domestically-manufactured Fittings to Sigma. *See*, *e.g.*, CCFF 1509-1510. However, whatever this evidence may imply as to the intentions or conduct of Sigma, the evidence does not demonstrate that anyone from McWane discussed the new price list with anyone from Sigma. F. 1012-1014.

In late April or early May 2009, Mr. Pais of Sigma conveyed the impression to Mr. McCutcheon of Star that McWane might change its mind about implementing McWane's previously announced new price list. F. 1016. Mr. McCutcheon advised Mr. Pais that Star had already decided to follow McWane's price list, because McWane was the market leader and that was what Star's customers require. F. 1016. Nevertheless, this communication with Mr. Pais created some doubt in Mr. McCutcheon's mind regarding whether McWane would stick with its previously announced price list, and Mr. McCutcheon wondered whether Star should move ahead with printing its own new price lists, which would cost Star approximately $25,000. F. 1017-1018; *see also* F. 422 (printing price list books can cost tens of thousands of dollars), 996 (printing price list can cost $30,000).

Mr. McCutcheon testified:

> It cost[s] us about $25,000 to print a new price list. So, I picked up the phone and I called Rick Tatman. **And I said, I'm only going to ask you one question, are you guys going to come out with a new price list, because I'm getting ready to approve it and spend $25,000 to do it.** And he said, we absolutely are, and he says, I'm so sure that I'll pay the $25,000 if we don't. And I said, I appreciate that, nice talking to you, and hung up the phone.

F. 1018 (emphasis added).

The evidence of the complete telephone conversation, quoted above, does not prove an agreement to adhere to published prices, within the rule of *Sugar Institute v. United States*, 297 U.S. 553, and its progeny, upon which Complaint Counsel relies. CCB at 157-158. *Sugar Institute* stands for the proposition that an agreement to adhere to published prices is unlawful under Section 1 of the Sherman Act. 297 U.S. at 601-03. However, unlike the instant case, there was no factual issue presented in *Sugar Institute*, or the other cases upon which Complaint Counsel relies, as to whether such an agreement already existed. In *Sugar Institute*, the unlawful "agreement" was an ethical rule jointly issued by members of a trade association, requiring that "sugar should be sold only upon open prices and terms publicly

announced." 297 U.S. at 579. Similarly, in *Energex Lighting Indus. v. North American Philips Lighting Corp.*, 765 F. Supp. 93 (S.D.N.Y. 1991), the court assumed the existence of an agreement to adhere to published prices, but because such an agreement would be illegal under *Sugar Institute*, the court refused to enforce it and dismissed a claim for its breach. *Id.* at 106-09. The alleged unlawful "agreement" in *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009), also cited by Complaint Counsel, arose from actual state requirements that liquor wholesalers post with the comptroller, and adhere to, a schedule of prices and offer every retailer the same price for any given product, regardless of volume. *Id.* at 189-90; *see also Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895-96 (9th Cir. 2007) (addressing "post and hold" rules issued by state liquor control board).

The foregoing cases are clearly factually distinguishable from the instant case and shed no light on whether the telephone call between Mr. Tatman and Mr. McCutcheon, as an evidentiary matter, demonstrates an agreement to adhere to published prices, which would be illegal under the rule of *Sugar Institute*. Moreover, even if Mr. Tatman's communication to Mr. McCutcheon is read as an "assurance" that McWane would proceed to implement the new price list that it had previously announced, this does not equate to a *commitment* to *adhere* to those list prices in McWane's sales, as was the case in *Sugar Institute*.

Complaint Counsel argues that it should be inferred that Mr. McCutcheon provided Mr. Tatman with "assurances" that Star would adhere to McWane's published prices, based upon evidence that Mr. Tatman stated in an email dated April 28, 2009 that "there is now some probability that Star may change their direction and retract their list price change," but that later that same day, in an internal email to Mr. McCullough, Mr. Tatman reported that he was "now highly confident that Star will follow our List Price." CCB at 159-160; *see* F. 1020. According to Complaint Counsel, "only the phone call explains" the asserted "change" in Mr. Tatman's confidence level as to what Star would do, and therefore, Mr. McCutcheon "must have provided assurances to McWane." CCB at 160. However, Complaint Counsel fails to point to any evidence demonstrating that the date

of the telephone conversation between Mr. Tatman and Mr. McCutcheon was, in fact, April 28, 2009, and the date cannot, and will not, be assumed. Rather, the evidence shows only that the telephone conversation took place sometime in late April or early May 2009. F. 1016-1018. Thus, the inference proposed by Complaint Counsel is not sufficiently logical or persuasive to outweigh the direct evidence, summarized above and set forth in detail at Section II.H., *supra*, that Mr. McCutcheon did not "assure" Mr. Tatman that Star would adhere to McWane's price list and that Star had previously made its own independent decision to follow McWane. F. 1006, 1018. In addition, in an internal email dated April 30, 2009, Mr. Tatman noted that there was continuing uncertainty as to whether Star was following McWane's new price list, which is inconsistent with the inference that Mr. Tatman received "assurances" from Star on April 28, 2009, as Complaint Counsel argues. F. 1021.

Moreover, at best, the substance of the telephone conversation upon which Complaint Counsel relies is more akin to an after-the-fact "verification" of a previous price, than to an "agreement to adhere" to prices within the meaning of *Sugar Institute*. *See Blomkest Fertilizer*, 203 F.3d at 1034 (affirming summary judgment in defendants' favor, and holding that calls between competitors that served to verify prices the companies had already charged on particular sales, which did not cause alleged price increases, failed to constitute a plus factor in support of an alleged conspiracy to fix prices). In addition, as in *Blomkest Fertilizer*, the evidence in the instant case fails to demonstrate that the telephone communication between Mr. Tatman and Mr. McCutcheon had any effect on either McWane's or Star's decisions regarding price list changes; rather, the evidence shows that McWane and Star each proceeded in accordance with plans they formed independently, prior to the spring 2009 telephone conversation. F. 995, 999, 1001-1004, 1006, 1016, 1022-1023.

For all the foregoing reasons, Complaint Counsel has failed to prove that the spring 2009 telephone conversation constituted an agreement to adhere to published prices, and the greater weight of the evidence does not support an inference that McWane, Sigma, and Star conspired to raise and stabilize prices, as alleged in the Complaint.

5. Economic evidence

As the court noted in *In re High Fructose Corn Syrup Antitrust Litigation*, circumstantial evidence to prove a conspiracy to restrain trade will "usually be . . . of two types -- economic evidence suggesting that the defendants were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete." 295 F.3d at 655. Complaint Counsel's conspiracy theory rests overwhelmingly on inferences drawn from noneconomic, circumstantial evidence. There is no direct evidence to support, and no *a priori* reason to believe, that the hypothesis of a conspiracy to raise and stabilize prices in the Fittings market is more likely than the hypothesis of independent conduct or oligopolistic conscious parallelism unaided by an agreement. Therefore, given that Complaint Counsel bears the burden of persuasion, it was incumbent upon Complaint Counsel to present economic evidence to bolster the claim of conspiracy. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 186 F.3d 781, 787 (7th Cir. 1999).

Complaint Counsel did not offer any expert opinion that there was economic evidence indicating a conspiracy to raise and stabilize Fittings prices. Rather than offer its own expert testimony analyzing economic data, Complaint Counsel chose an "attack-the-other-expert" strategy. Complaint Counsel argues that it has no burden to prove that prices in the Fittings market were "raised" and/or "stabilized" during the conspiracy period, which itself has resisted any definition in this case,[30] because it is not legally necessary to show that a conspiracy was "successful." Regardless of whether Complaint Counsel has a legal burden to prove that a conspiracy was "successful," Complaint Counsel still has the burden of proving that the alleged conspiracy existed. In this regard, the absence of persuasive economic evidence that

[30] The complaint alleges that the conspiracy began in January 2008, and was "upset" sometime around the time of the enactment of ARRA in early 2009. Complaint, ¶¶ 2-3. Complaint Counsel's expert opined that the conspiracy began to fall apart in the fall of 2008 and terminated by the end of 2008. Complaint Counsel now argues that only the agreement to curtail Project Pricing (episode "one" of the "overall" conspiracy) terminated by the end of 2008. CCB at 114, and that the "overall" conspiracy has yet to end. Jan. 24, 2013 (closing argument) Tr. at 16-17; *see also* CCRB at 44.

prices in the Fittings market were "raised" and/or "stabilized" and/or otherwise coordinated by the Suppliers, as further explained below, undermines the persuasiveness of Complaint Counsel's circumstantial case.

a. Complaint Counsel's economic evidence

While arguing that it need not prove that the alleged conspiracy to raise and stabilize prices was successful, Complaint Counsel nevertheless argues that the economic data shows the conspiracy was "successful." Specifically, Complaint Counsel argues that Project Pricing was in fact curtailed (*i.e.*, prices were "stabilized") and Fittings prices did in fact increase, resulting in higher profits for all. CCB at 36-39, 145-147; *see also* Complaint ¶ 7 (alleging that Respondent's conduct "led to higher prices for both imported and domestically produced" Fittings).

With regard to proof of curtailment of Project Pricing, as discussed in Section III.D.2.b.ii., *supra*, the evidence upon which Complaint Counsel relies to show that Project Pricing was curtailed in 2008 is hardly persuasive. Complaint Counsel relies principally on inferences drawn from unverified statements of McWane's sales persons in the field, as recorded in McWane's pricing protection log, and from statements in McWane's internal documents regarding McWane's "leading price stability" and using "pricing discipline." This does not constitute persuasive economic data. Complaint Counsel's economic evidence of a "curtailment" of Project Pricing by Sigma and Star is also hardly persuasive. *See* Section III.D.2.b.ii., *supra.* In comparison, Respondent offered credible and persuasive expert opinion, based on actual prices as recorded by the Suppliers' invoice documents, kept in the ordinary course of business, that there was no curtailment of Project Pricing during the period from January 2008 through February 2009 and that pricing was far from stable during this period. F. 845-847, 937-938.

Complaint Counsel relies on McWane's internal "variance analysis" reports of sales volume and profit figures, prepared periodically by McWane's controller, as evidence that McWane raised prices during the alleged conspiracy period. CCB at 38-39. Complaint Counsel relies on a variance analysis comparing McWane's 2008 aggregate price-per-ton for fittings in 2007 to

2008, which noted an increase in the price-per-ton for non-domestic Fittings from [redacted] per ton in 2007 to [redacted] per ton in 2008, and an increase price-per-ton for Domestic Fittings from [redacted] per ton in 2007 to [redacted] per ton in 2008. F. 969. As Mr. Tatman explained, however, the aggregate price-per-ton figure is a revenue measure that does not break down the "product mix," and says nothing about whether prices in fact increased in the Fittings market:

> [The figures show] a big ball of iron that you sold that quarter. It doesn't say what the mix is. We just said before that -- remember before we restructured the list price. There's a huge variance, 250 percent, between the dollar-per-ton list price on a large-diameter fitting versus a small-diameter fitting[.] . . . [A]nd this also doesn't say what area this was closed in. If you look at the multiplier map, . . . the Pacific Northwest is 30 or 40 percent higher in price than what is Florida here. . . The year before, did you happen to sell more small diameter versus large diameter? That's going to swing it.
>
> [T]he year before, did you have heavy sales in Florida and California and Arizona because those were the hot markets, and they were hot markets because they were growing in housing, and housing is small-diameter fittings? What that does on a dollar-per-ton basis, that drives that number down. Now you move forward here. If Arizona and California and Florida housing markets are falling off and you're selling more product in the Pacific Northwest, it's not a price increase with respect to the Pacific Northwest, but in aggregate it's a price increase. Are you now selling more large-diameter product because the housing market has tanked and you're selling into municipalities for lines? That's going to switch it.
>
> So you can't jump to the inference that you have based on this simple number. . . . You just don't have enough granularity in what you see here to make that judgment.
>
> . . .

> It -- all it reflects is the big ball of iron that we sold the year prior and the big ball of iron we sold here went up – I'll agree. It is what it is, but it doesn't give you any insights as to what happened and why.

F. 971. Mr. Tatman's explanation is logical and credible and constitutes persuasive evidence that little, if any, weight should be given to the "price-per-ton" figures as evidence of price increases in the Fittings market. Moreover, Complaint Counsel has not rebutted Mr. Tatman's explanation, including by any expert analysis of the price-per-ton figures. Further, Respondent's expert, Dr. Normann, opined that price-per-ton is not a proper measure of price increases because selling a higher volume of higher priced items will create the illusion of an overall price increase. F. 972. For all the foregoing reasons, the aggregate price-per-ton figures upon which Complaint Counsel relies are entitled to, and given, little weight on the issue of whether prices increased in the Fittings market.

Complaint Counsel also points to evidence that McWane's gross profits were higher in 2008 as compared to 2007, despite a loss in volume, in part due to pricing gains, primarily on domestic product, and that profits were higher in 2008 than in 2009. CCB at 36-38, 147. However, the evidence further shows that McWane's gross profit margin on non-domestically produced Fittings fell from [redacted]% in 2007 to [redacted]% in 2008, which Mr. Tatman attributed in part to Project Pricing, and fell further still in 2009, as volume continued to drop and prices continued to escalate. F. 964. Moreover, Respondent offered reliable and persuasive expert analysis that McWane's average blended Fittings price (the price of imported or Domestic Fittings sold for open source jobs) actually declined throughout 2008, 2009, and 2010. F. 940. Thus, it is not apparent, absent speculation, that McWane's financial performance improved because McWane was involved in an alleged conspiracy to raise and stabilize prices in the Fittings market, as argued by Complaint Counsel.

Nor does an increase in gross profits, even if demonstrated, constitute persuasive evidence that prices increased, or that prices increased because of a conspiracy in the Fittings market, because many variables and factors influence profit levels from year to

year. For this reason as well, the government's evidence of higher profits for McWane, Sigma, and Star carries little if any weight in determining whether Fittings prices were increased. With regard to McWane's profits in particular, Mr. Tatman explained:

> Starting in about 2004 I believe is when we start sourcing product from overseas, started bringing in product. Sigma helped us out with that, so we had the ability now, rather than using a hundred percent domestic product to serve both the domestic-only spec market and the import market, we started having the ability to source product just like our competitors and sell that lower-cost Chinese product into open specs. [Mr. Tatman's predecessor] David Green starts overproducing the plant, so you get an impact that helps you there. He's running up the plants in 2005-2006. He's overproducing compared to what demand is. Inventory levels go up. But when you do that, your gross margins get better because your manufacturing costs go down. I show up in 2007. We got an inventory problem. . . . In 2007 we had heavy substitution of domestic product in blended sales.

F. 974. Because of the higher cost of producing Domestic Fittings, providing Domestic Fittings for jobs with open specifications was, according to Mr. Tatman, like "wrapping a dollar bill around that fitting [because it is shipped] against an import price," thereby depressing profits in 2007. F. 974-975. Accordingly, for the forgoing reasons, Complaint Counsel has failed to demonstrate that the relative change in profits from 2007 to 2008 was more likely due to an increase in prices than to other factors.

b. Respondent's economic evidence

In comparison to Complaint Counsel's indirect and inferential economic evidence of price increases in the Fittings market, Dr. Normann, Respondent's economic expert, analyzed the actual invoice prices charged by McWane, Sigma, and Star, over a multi-year period, including January 2008 through February 2009, as well as cost data and output data, and determined that the evidence is not consistent with the alleged conspiracy. F. 934. Dr. Normann's findings and conclusions in this regard are reliable

and probative, and outweigh Complaint Counsel's proffered economic evidence. F. 959.

Dr. Normann was tasked with determining whether there was economic evidence consistent with the allegations of the Complaint; specifically, whether there was economic evidence consistent with collusive behavior among McWane, Sigma, and Star, to stabilize and increase prices for Fittings. F. 934. Dr. Normann analyzed whether there was reduced price variation and whether prices were increased, as part of an agreement, as alleged in the Complaint. F. 935; *see* Complaint ¶¶ 32-34 (alleging that January and June 2008 "price increase[s] w[ere] the result of a combination and conspiracy among the sellers"). In summary, and as further explained below, Dr. Normann concluded, based on his review and analysis, that there was no economic evidence that the price changes in January or June of 2008 were coordinated, or that there was an agreement to reduce job pricing as would be reflected in a decrease in price variance; that there was economic evidence that contradicted a conclusion of anticompetitive price increases in the Fittings market; and that the pattern of sales and inventory contradicts the notion of quantity withholding, as would be needed to effect a price increase. F. 934.

i. Published prices

Based upon the Complaint's allegations that the announced price changes that occurred in January and June 2008 were coordinated "price increases," Dr. Normann examined, *inter alia*, McWane's multiplier maps associated with the January and June 2008 multiplier changes. F. 936. Dr. Normann found that McWane's multipliers changed in different directions and by different amounts on a state-by-state basis, and concluded that this pattern is more consistent with competitive, independent decision-making by McWane than with concerted action. F. 936. In addition, Dr. Normann found that McWane's published multipliers announced in January and June 2008 actually did not increase in most states, which is inconsistent with the Complaint's allegation that the January and June 2008 price changes were coordinated "price increases." F. 936. Complaint Counsel argues that Dr. Normann's opinion in this regard should be rejected because Dr. Normann failed to consider evidence that McWane's January 2008 multiplier changes constituted an average 8%

increase over McWane's effective multipliers. CCRRFF 279; *see* F. 631, 652. Dr. Normann was charged with evaluating whether there was economic evidence supporting the allegations of the Complaint, and the Complaint in this case clearly alleges that the January and June 2008 published multiplier changes were "price increases" resulting from a conspiracy among McWane, Sigma, and Star. Complaint ¶¶ 32-34. These allegations are not supported by the greater weight of the economic evidence. Dr. Normann could not reasonably be expected to refute and deal with Complaint Counsel's constantly moving targets of when the alleged conspiracy took place and what constituted the alleged conspiracy.

ii. Invoice prices

Dr. Normann also reviewed invoice data, kept in the ordinary course of business and produced by the Suppliers in this action. F. 937. The invoices record the sales price for the transaction in dollars, which includes any discounts off the published multiplier (*i.e.*, Project Pricing), but does not include additional discounts that may arise from rebates, freight terms, or cash discounts. F. 937. To control for product mix when analyzing the Suppliers' invoice data, Dr. Normann created an index of Fittings, consisting of a "basket" of the 24 most common Fittings that are sold by McWane, Sigma, and Star, as determined by volume. According to Dr. Normann, any conspiracy to raise Fittings prices would be reflected in the invoice prices for this basket of products. F. 939.

Dr. Normann found, based on McWane's invoice prices for McWane's portion of the common Fittings basket, that McWane's average prices for non-domestic Fittings (*i.e.*, U.S. made or imported Fittings sold into open specification jobs, *see* F. 349-351) declined over the course of a multi-year period from January 2007 through November 2010, including before, during, and after the period from January 2008 to February 2009, which is the "conspiracy period" that Dr. Normann derived from his review of the Complaint and related materials in this case. F. 940. For the period from January 2008 through February 2009, Dr. Normann found that McWane's average Fittings prices decreased by [redacted] percent, Sigma's average Fittings prices increased by [redacted] percent, and Star's average Fittings prices increased by

[redacted] percent. F. 942. A price decline by McWane during the same period as price increases by Sigma and Star is inconsistent with a conspiracy to raise prices involving McWane. F. 942.

The decline in McWane's prices shown by the invoice data is even more remarkable, given that there was a significant corresponding rise in input costs. F. 951. This is inconsistent with a conspiracy and consistent with independent pricing behavior. F. 955-956. Dr. Normann measured cost changes through an index he created of metal (such as scrap and pig iron) and energy costs. F. 945. As Dr. Normann explained, even when there is evidence of price increases, it is important in a conspiracy case to look at input costs to see if there are competitive explanations for the price increases, such as needing to keep up with rising costs. F. 944. Metal and energy costs are variable costs that constitute the primary cost inputs in the manufacture of Fittings. F. 945. These costs comprise about 30 percent of the total cost of McWane's production of ductile iron pipe fittings. F. 945. Metal and energy input costs went up 40 to 50 percent during 2008, and were up 70 to 80 percent from 2007. This is a dramatic increase. F. 951. In a competitive environment, these cost increases would result in significant pressure to increase price. In a competitive environment, it would be expected to see some changes in price because of increases in cost. F. 952. Yet the invoice data for McWane showed declining prices, and the invoice data for Sigma and Star show only modest price increases, that were not significantly more than their cost increases. F. 953. This is also inconsistent with a conclusion of a conspiracy to raise prices involving McWane, Sigma, and Star. F. 952-953, 955-956.

Dr. Normann also concluded that during the January 2008 through February 2009 time period the Suppliers' price movements were not in parallel and that the Suppliers' prices moved independently of one another. This is also not consistent with the allegations of conspiracy in this case. F. 954.

Furthermore, Dr. Normann reviewed the Suppliers' inventory data to see if there was any evidence of withholding, which would facilitate a cartel's ability to raise prices. Dr. Normann found no evidence of withholding, and instead found an increase in output. F. 958.

Dr. Normann further opined that a price increase for imported Fittings would show up as an increase in the price of Fittings sold into open specification jobs relative to domestic-only jobs. F. 957. His data analysis showed that over a multi-year period, including the period from January 2008 through February 2009, the price of open specification Fittings declined relative to the price of domestic-only specification Fittings, which is also inconsistent with the alleged conspiracy. F. 957.

c. Dr. Schumann's rebuttal

Complaint Counsel criticizes Dr. Normann's data and methodology through the rebuttal report and related testimony of Dr. Schumann. In general, Dr. Schumann contends that Dr. Normann's conclusions should be disregarded because the invoice data is unreliable; Dr. Normann failed to control for material factors other than the alleged conspiracy that might affect prices, such as supply and demand changes; and Dr. Normann failed to "follow accepted practices" for statistical analysis. CCRB at 41-42; CCFF 1425-1435. As further explained below, Dr. Schumann's opinions and the evidence upon which he relies to rebut Dr. Normann's opinions and analyses are unpersuasive, and are therefore rejected.

Complaint Counsel argues that the invoice price data of McWane, Sigma, and Star, constitute an unreliable basis for determining actual selling prices because the invoice price includes any discounts off the published multiplier (*i.e.*, Project Pricing), but does not reflect additional discounts that may arise from rebates, freight terms, or cash discounts. *See* CCFF 1425; CX 2265 (Schumann Rebuttal Rep. at 10-11); Schumann, Tr. 5806. However, the alleged conspiracy in this case involves published multipliers and discounts from published multipliers given through Project Pricing, and there are no allegations involving other discounts. *See* Complaint ¶¶ 32-34. Given these circumstances, the invoice price is precisely the correct measure of selling price. F. 938.

Complaint Counsel also argues that the invoice data is not a reliable basis for determining actual selling prices because there is

a "non-systematic" time lag of a few days to a few months between the date a Supplier and a customer agree to a particular price, and the date the order is invoiced at shipment. CCFF 1426; CX 2265 (Schumann Rebuttal Rep. at 5); Schumann, Tr. 5802-5805. The asserted "time lag" does not render the invoice data unreliable. The evidence shows that, although the time period between order and delivery varies, delivery typically takes place between two or three weeks to two months after the bid and order, and the prices reflected in invoice data typically reflect market pricing that is 30 to 60 days prior to the invoice. F. 344-345. In any event, any potential deficiency in this regard is adequately rectified by Dr. Normann's use of a multi-year time series, which captures a rolling average and effectively captures such time lags. F. 941. For the same reason, Dr. Schumann's contention that month-to-month differences in customer mix meaningfully affect the reliability of Dr. Normann's conclusions is unpersuasive. *See* CCFF 1427; CX 2265 (Schumann Rebuttal Rep. at 12).

In addition, Complaint Counsel contends that the invoice data is unreliable because of alleged data entry errors totaling 4.27 percent in 2008, and 21 percent in January 2008. CCFF 1428-1430; CX 2265 (Schumann Rebuttal Rep. at 9, 13-16); Schumann Tr. 5805.[31] Complaint Counsel's argument and evidence in this regard, based on unexplained and unverified information, has been thoroughly examined, and these errors, to the extent they exist, are not fatal and are not sufficiently pervasive to warrant rejecting Dr. Normann's pricing analysis.

Complaint Counsel further argues that there is no way to unambiguously identify domestically made Fittings sold at

[31] The claim that McWane invoice data contains these errors is based upon Complaint Counsel's extrapolation from correspondence between Respondent's counsel and Complaint Counsel in May and June 2012. (CX 2552). Complaint Counsel sent an inquiry to Respondent's counsel concerning the possible reasons for an entry in McWane's sales data spreadsheet that showed an actual multiplier that was greater than the published multiplier stated on McWane's applicable multiplier map. Counsel for Respondent replied that there was "no commercial reason" that an order would be entered above the published multiplier and that this was "most likely an order entry error. . . ." CX 2252 at 001. Instead of deposing a fact witness to discover the reasons for any data entry anomolies, such as an employee responsible for data entry, Complaint Counsel left the question unexamined and chose to follow the equivocal statement of an attorney for Respondent as "evidence."

domestic-only prices versus domestically made Fittings sold at the open specification prices, resulting in errors in classification that "introduce uncertainty and randomness in that the data" that was not further analyzed. CCFF 1431; CX 2265 (Schumann Rebuttal Rep. at 13); Schumann, Tr. 5825-5826. Dr. Schumann's criticisms in this regard have been fully reviewed, and they are unpersuasive. Apart from his general assertions, Dr. Schumann does not quantify or otherwise analyze the extent to which the alleged errors affected Dr. Norman's analysis. In addition, Complaint Counsel attacks the domestic-only price data as having a 9 percent error rate in 2008. CCFF 1432; CX 2265 (Schumann Rebuttal Rep. at 13-14); Schumann, Tr. 5823, 5824-5825. As in the case of the asserted errors in the open specification Fittings price data, to the extent such errors exist, these errors are not fatal and are not sufficiently pervasive to warrant rejecting Dr. Normann's pricing analysis.

Complaint Counsel also contends that Dr. Normann's Fittings price analysis is flawed because he did not control for factors other than the alleged price fixing agreement that might impact prices, such as the 2008 recession. CCFF 1433; CX 2265 (Schumann Rebuttal Rep. at 18-19). Dr. Schumann's rebuttal report, upon which Complaint Counsel relies, argues that Dr. Normann cannot conclude whether or not the price data is consistent with a conspiracy to raise prices unless he can conclude what prices would have been absent the alleged conspiracy. *Id*. at 23-24. The argument that Dr. Normann's data and conclusions are rendered meaningless because he did not speculate as to what prices might have been, absent a presumed conspiracy, defies logic, is unpersuasive, and is rejected.

In addition, Complaint Counsel argues that Dr. Normann's analysis should be disregarded because, according to Dr. Schumann, Dr. Normann fails to report standard errors or confidence intervals of slopes for his hypothesis tests, (CX 2265 (Schumann Rebuttal Rep. at 25); Schumann, Tr. 5801-5802, 5849, 5863, 5871) or report tests for robustness of his data analysis. CX 2265 (Schumann Rebuttal Rep. at 23, 29, 48); Schumann, Tr. 5831-5832. *See* CCFF 1434. These criticisms raised by Dr. Schumann have been thoroughly reviewed and do not constitute persuasive bases for disregarding Dr. Normann's analyses and

opinions in this case. Dr. Schumann fails to explain or quantify how these alleged shortcomings in Dr. Normann's analysis so adversely affected Dr. Normann's conclusions that they should be completely disregarded.

For all the foregoing reasons, and having fully evaluated Dr. Schumann's rebuttal report and related testimony, Dr. Schumann's opinion that Dr. Normann's figures are unreliable, irrelevant or not useful for economic analysis, is rejected.

Complaint Counsel argues in the alternative that if the invoice pricing data and Dr. Normann's methodology for analyzing it is accepted, the data shows that during a period beginning February 1, 2008, the month in which the January 2008 pricing changes became effective, and ending October 1, 2008, when according to Complaint Counsel, the conspiracy began to "fall apart," McWane's Fittings prices increased by [redacted] percent; Sigma's increased by [redacted] percent; and Star's increased by [redacted] percent. F. 943. Moreover, according to Complaint Counsel, "prices plunged after October 2008," which is consistent with Complaint Counsel's theory that the conspiracy "was losing traction at that time." CCRB at 42. It is not enough for there to be evidence that can be interpreted in a way that is consistent with the government's conspiracy theory – the inference of conspiracy must be more likely than not. Here, Complaint Counsel fails to demonstrate that the price increases in the selected period from February 1 through October 1, 2008 are more consistent with the inference of conspiracy than the inference of a legitimate response to dramatic cost increases. In addition, Complaint Counsel's assertion that prices "plunged after October 2008" is not based upon any economic data. Rather, Complaint Counsel cites to various internal documents of the Suppliers referring to intense price competition in the later months of 2008. CCRB at 42; CCFF 1456-1466. In addition, as previously noted, there is evidence in the record that the Fittings market experienced a significant downturn in the second half of 2008, which would also contribute to increased discounting as Suppliers chased ever-decreasing volume. F. 931, 933; *see also* F. 1026. In any event, these "cherry-picked" time periods, while consistent with Complaint Counsel's theory of when the agreement to curtail Project Pricing became "effective" and then began to "fall apart," fail to outweigh the overall findings and conclusions of Dr.

Normann that the totality of the economic evidence is not consistent with the alleged conspiracy.[32]

d. Summary and conclusion as to economic evidence

Dr. Normann examined the available pricing data, analyzed it, and formed conclusions that the data is not consistent with the alleged conspiracy to raise and stabilize Fittings prices. Dr. Normann reviewed and analyzed actual data, instead of merely offering theories in lieu of using the data. Rather than proffer expert analysis of economic data to support the conspiracy allegations, Complaint Counsel chose simply to attack Respondent's expert analysis.

In summary, Dr. Normann's findings, conclusions, and opinions regarding price movements in the Fittings market during 2008 constitute substantial, probative economic evidence that is not consistent with an inference of a conspiracy among McWane, Sigma, and Star, to raise and stabilize prices in the Fittings market. F. 959. Complaint Counsel's economic evidence fails to outweigh the economic evidence presented by Respondent. Therefore, the greater weight of the economic evidence fails to support the inference of conspiracy. Even if Dr. Normann's opinions and pricing analyses were rejected, Complaint Counsel's economic evidence is insufficiently probative of a conspiracy to raise and stabilize prices in the Fittings market, and is therefore unpersuasive on this issue.

6. Conclusion based on totality of the evidence

Complaint Counsel alleges a conspiracy among McWane, Sigma, and Star to stabilize and increase Fittings prices by

[32] Complaint Counsel relies on evidence that Sigma's average transactional multipliers increased in certain regions during the period from February 2008 through October 2008. However, the actual day-to-day multipliers differed "a lot" from region-to-region, product-to-product, day-to-day. F. 994. Moreover, as set forth above, this "cherry-picked" time period does not outweigh the totality of the evidence that is not consistent with the inference of a conspiracy to raise and stabilize prices in the Fittings market. In any event, regardless of what the evidence may show as to Sigma and Star, the greater weight of the economic evidence fails to justify an inference of a conspiracy involving McWane.

curtailing project pricing and increasing price transparency. CCB at 105. As shown above, Complaint Counsel has failed to prove any of the three "episodes" which it contends prove the "overall" conspiracy.

In addition, viewed as whole, the totality of the evidence fails to prove the alleged conspiracy. In this case, the evidentiary "whole" is no more probative or persuasive than its various parts. Accepting Complaint Counsel's conspiracy theory depends on accepting numerous assertions, assumptions, and inferences that are not sufficiently grounded in evidence. In addition, the preponderance of the economic evidence is not consistent with the alleged conspiracy. Among other things, the evidence:

- fails to prove that Mr. Tatman's December 25, 2007 internal PowerPoint Presentation was a "plan" for a "conspiracy" with Sigma and Star to raise and stabilize prices, through curtailing pricing and increasing price transparency, as opposed to an independently formed pricing strategy designed to make McWane more competitive, *see* Sections III.D.2.a.; III.D.2.b.iii.(c);

- fails to prove that McWane "communicated" its pricing strategy to Sigma and Star, including through "offers" in the January 11, 2008 and May 7, 2008 Customer Letters to raise prices in exchange for (a) Sigma's and Star's curtailing Project Pricing; and/or (b) participating in the DIFRA tons-shipped data reporting system, respectively, *see* Sections III.D.2.a.; III.D.2.b.iii.(c); III.D.3.;

- fails to prove that the decisions or conduct of Sigma and Star with regard to Project Pricing or participating in DIFRA reflected an "understanding" with McWane of future price increases, or "acceptance" of an "offer" from McWane of such increases, or constituted acts of "compliance" with McWane's "plan," as opposed to independent conduct or lawful conscious parallelism, *see* Sections III.D.2.a.; III.D.2.b.iii.(c); III.D.3.;

- fails to prove that the DIFRA tons-shipped data reporting system was part of a conspiratorial "plan" to "enforce"

compliance with the alleged price fixing agreement by increasing price transparency, *see* Section III.D.2.b.iii.(d);

- fails to prove that McWane, Sigma, and Star were "monitoring" the market for "cheating" on the alleged price fixing agreement, or "complained" to one another about "cheating" on the alleged price fixing agreement, *see* Sections III.D.2.b.iii.(e) and (f);

- fails to prove that the few unexplained contacts between McWane and Sigma, or McWane and Star, constituted anything more than mere opportunities to conspire, *see* Section III.D.2.b.iii.(g); and

- fails to prove Project Pricing was curtailed, or that prices were increased or stabilized or coordinated in the Fittings market among McWane, Sigma, and Star, *see* Sections III.D.2.a.; III.D.2.b.ii.; III.D.5.

Complaint Counsel's conspiracy theory is not implausible; it is indeed "possible" that there is some truth in the story Complaint Counsel tells. But neither plausibility nor possibility is sufficient to prove a price fixing conspiracy. Furthermore, in evaluating the totality of the evidence, "it is not the quantity of the plaintiff's evidence which is important, but its qualitative value in demonstrating that the parties actually entered into a conspiracy." *Venture Technology,* 685 F.2d at 48. Despite the numerous pleas by the government for inferences to be made where proof is lacking, the fact that a conspiracy may be difficult to prove does not mean that it is fair or appropriate to fill in the blanks where evidence is missing to assist the government in winning its case. When fairly and objectively scrutinized and weighed, the evidence fails to prove that McWane conspired with Sigma and Star to raise and stabilize prices in the Fittings market, as alleged in the Complaint. At best, the evidence shows interdependent or consciously parallel conduct, unaided by any agreement, which is not illegal. *Brooke Group,* 509 U.S. at 227; *Twombly*, 550 U.S. at 557 & n.4.

"The line between lawful interdependent behavior and unlawful commitment is not sharp." Areeda, ¶ 1410c at 72.

"Although the line between coordination through recognized interdependence and some commitment is shadowy, the distinction is important so long as antitrust law allows the former but condemns the latter." Areeda, ¶ 1410c at 74. Such cases therefore "must be resolved by rules of law allocating burdens of proof or creating presumptions that certain behavior will – or will not – be treated as an agreement." *Id*. Accordingly, because the preponderance of the evidence in this case does not prove the alleged conspiracy, Count One is dismissed. *See Re/Max Int'l*, 173 F.3d at 1009 (holding that evidence of conspiracy does not preponderate where the evidence is equally consistent with independent conduct); *see also Kreuzer*, 735 F.2d at 1488 n.14 (holding that inference of conspiracy must be more likely than not); *Venture Technology*, 685 F.2d at 48 (holding that where evidence, taken as a whole, "points with at least as much force toward unilateral actions . . . as toward conspiracy," inference of conspiracy cannot be drawn).

E. Count Two: Alleged Conspiracy to Exchange Competitively Sensitive Sales Information in Restraint of Trade

Count Two of the Complaint alleges that McWane, Sigma, and Star agreed to "exchange competitively sensitive sales information" and that this agreement constitutes an unreasonable restraint of trade. Complaint ¶ 64. Specifically, Complaint Counsel asserts that McWane, along with the other supplier-members of the Ductile Iron Fittings Research Association ("DIFRA"), a trade association, agreed to participate, and did participate, in the DIFRA tons-shipped data reporting system, discussed above and in more detail *infra*. CCB at 166-167; *see generally* Section II.E., *supra*. Complaint Counsel argues that the DIFRA tons-shipped data reporting system constitutes an unlawful "information exchange" because the data provided has the tendency or effect of "facilitating price collusion," in a market already susceptible to tacit coordination, without countervailing procompetitive justification, in violation of Section 1 of the Sherman Act. CCB at 166-177.

Respondent argues that the DIFRA tons-shipped data reporting system did not "facilitate" price coordination, in theory or in practice, because no pricing data was collected or disseminated,

and because the aggregated, tons-shipped data did not give McWane or any other DIFRA member any meaningful insight into competitor pricing or sales. RB at 23-26. Respondent argues that the tons-shipped data collected, aggregated, and disseminated in the DIFRA reports does not disclose sufficient price information to "facilitate" price coordination or collusion. RB at 23-26. Moreover, according to Respondent, the evidence shows that the DIFRA tons-shipped data reports served legitimate, procompetitive purposes by helping each DIFRA member to assess overall market trends, estimate its own market share, and better manage production schedules and inventory. RRB at 48. In addition, Respondent asserts, the only pricing decisions that McWane made after receiving the DIFRA aggregated, tons-shipped data reports, were procompetitive: On June 17, 2008, McWane implemented published multipliers that were lower than those that had been announced by Sigma and Star; and in April 2009, McWane restructured its price list to lower prices in certain product segments where McWane's volume was weak. RRB at 48-49.

In order to establish a Section 1 violation, the evidence must show (1) that the DIFRA tons-shipped data reporting system constitutes a contract, combination or conspiracy between McWane and the other DIFRA members (concerted action), (2) that unreasonably restrains competition. *See, e.g.*, *Valuepest.com of Charlotte, Inc. v. Bayer Corp.*, 561 F.3d 282, 286 (4th Cir. 2009); *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998).

1. The DIFRA tons-shipped reporting agreement

The evidence shows that all four DIFRA members, McWane, Sigma, Star, and U.S. Pipe, collectively approved and adopted the DIFRA tons-shipped data reporting system. F. 720, 732-734, 787. There was a meeting of the members on March 27, 2008, also attended by Mr. Wood Herren of the Alabama law firm that served as DIFRA's attorneys, which addressed the system for reporting tons-shipped data, and at which it was resolved that the members' initial submissions would report tons-shipped data for 2006, 2007, and January through March of 2008. F. 713, 725-727, 731. Thereafter, in a telephone conference on April 25, 2008 among the available DIFRA members and DIFRA's attorney, Mr.

Thad Long, the DIFRA members approved a tons-shipped reporting format, which would include short-tons of Fittings shipped within the United States in the following six categories: 2"-12" Flanged; 2"-12" All Other; 14"-24" Flanged; 14"-24" All Other; Greater than 24" Flanged; Greater than 24" All Other. F.734, 787. The DIFRA members also agreed to a method of reporting data back to the members. It was agreed that each DIFRA member would submit its fittings tons-shipped data for 2006, 2007, and January through April of 2008 to DIFRA's accounting firm by May 15, 2008, which would then aggregate the data and provide reports to the DIFRA members, reflecting industry-wide tons-shipped, by the 20th of the month. F. 733. In addition, the DIFRA members confirmed by email their agreement to the parameters and procedures agreed to in the April 25, 2008 conference call. F. 735. The evidence further shows that each Supplier jointly participated in the aggregated tons-shipped reporting system. F. 738-739, 788, 825, 834.

Accordingly, the evidence demonstrates that the DIFRA tons-shipped reporting system constitutes concerted action by the DIFRA members for purposes of Section 1 of the Sherman Act. *See National Soc'y of Prof'l Engineers*, 435 U.S. at 679; *Indiana Fed'n of Dentists*, 476 U.S. at 447. Respondent does not argue to the contrary. Thus, the dispositive issue is whether the DIFRA tons-shipped data reporting system unreasonably restrains trade.

2. Applicable standard for determining unreasonable restraint

In analyzing whether an agreement unreasonably restrains trade, the Supreme Court has explained that "a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be '*per se*' unreasonable, or because it violates what has come to be known as the 'Rule of Reason.'" *Indiana Fed'n of Dentists*, 476 U.S. at 457-58; *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 825 (6th Cir. 2011). Complaint Counsel does not contend that the DIFRA tons-shipped data reporting agreement is a *per se* unreasonable restraint, and states that the alleged DIFRA "information exchange" is to be assessed under the rule of reason. CCB at166.

Whether an alleged "information exchange" unreasonably restrains trade is assessed under the rule of reason. *See Todd v. Exxon*, 275 F.3d at 198. A "full-blown" rule of reason analysis requires courts to engage in a detailed analysis of the relevant market and the effects of the restraint in that market. *Realcomp*, 635 F.3d at 825 (citing *Ind. Fed'n*, 476 U.S. at 461). Under this analytical approach, if the challenged restraint is shown to have actual anticompetitive effects, then the burden shifts to the proponent of the challenged restraint to provide procompetitive justifications for it. *Id.* Proof of "[m]arket power and the anticompetitive nature of the restraint" has been held "sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [the proponent of the policies] must offer procompetitive justifications." *Id.* at 827.

While there are varying modes of inquiry, the ultimate test of legality "'is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.'" *In re Polygram Holding*, 136 F.T.C. 310, 327 n.14 (2003) (quoting *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918)). "Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." *California Dental Ass'n*, 526 U.S. at 779-80 (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)).

3. Anticompetitive effects

Complaint Counsel does not argue that DIFRA tons-shipped data reporting system had actual anticompetitive effects.[33] Rather, Complaint Counsel argues that the DIFRA tons-shipped data reporting system is likely to have anticompetitive effects because it has the nature or tendency to "facilitate non-competitive or collusive pricing." CCB at 166, 168-169. Proof of

[33] To the extent Complaint Counsel asserts that the DIFRA tons-shipped data reporting system had the actual anticompetitive effect of enabling Suppliers to detect "cheating" on the alleged conspiracy to curtail Project Pricing, as noted in Section III.D., the evidence fails to show this conspiracy and thus fails to show that DIFRA "facilitated" such a conspiracy.

such likely effects is sufficient, Complaint Counsel argues, because the DIFRA members have market power, with a collective market share of almost 97% during the relevant time period, in a market with high barriers to entry. CCB at 168-169. *See Tempur-Pedic, Int'l Inc.*, 626 F.3d at 1339-40 ("[M]arket share is frequently used in litigation as a surrogate for market power." (internal quotation marks and citation omitted)); *United States v. Microsoft Corp.*, 253 F.3d 34, 54-56 (D.C. Cir. 2001). The evidence shows that, collectively, McWane, Sigma, and Star had a combined share of the Fittings market of approximately 90% to 95% in 2008. Sigma and Star are McWane's primary competitors. F. 354-356, 359. The smaller suppliers making up the remaining share of the Fittings market do not affect the Suppliers' ability to implement a price increase. F. 358-360. In addition, the Fittings market has high barriers to entry. *See infra* Section III.G.2.b.i.(b); F. 1050. On these facts, it is readily apparent that McWane, Sigma, and Star, have collective market power, and Respondent does not argue to the contrary. Accordingly, the DIFRA tons-shipped data reporting system is analyzed for its likely anticompetitive effects.

a. Facilitating practice theory

As noted above, Complaint Counsel's theory of likely anticompetitive effects rests on the assertion that the DIFRA tons-shipped data reporting system is a "facilitating practice." A facilitating practice is one that "makes it easier for parties to coordinate price or other anticompetitive behavior in an anticompetitive way. It increases the likelihood of a consequence that is offensive to antitrust policy. The anticompetitive result may in fact ensue, but its actual occurrence is not necessary to the presence of a facilitating practice. The vice of a facilitating practice is its anticompetitive *tendency* in the circumstances rather than a proved anticompetitive *result* in the particular case. . . . [Where] the exchange itself is an agreement that may undesirably facilitate price coordination . . . , prospective injunctive relief may be warranted even though damages cannot be proven." Areeda, ¶ 1407b1 at 38. However, an agreement to behave in a way that facilitates some undesirable result, such as price coordination, "cannot be found unreasonable without considering the offsetting economic or social benefits of the practice. Thus, the label 'facilitating practice' is only an invitation to further analysis, not a

license for automatic condemnation." *Id.* ¶ 1407b2 at 39. *See also Petroleum Products*, 906 F.2d at 448 ("'One may reluctantly tolerate interdependent pricing behavior as such and still condemn [those agreements involving] practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined.'" (quoting P. Areeda, *Antitrust Analysis* ¶ 325, at 381 (3d ed. 1981))). Pursuant to economic theory cited by Complaint Counsel, information exchanges that increase price transparency among oligopolists facilitate coordination by exposing, and thereby discouraging, "cheating" on consensus prices. In this way, according to the economic theory described by Complaint Counsel, the increased transparency can facilitate maintenance of a consensus price. *See* CCB at 171-172.

In *Todd v. Exxon*, 275 F.3d 191, the plaintiff claimed that the defendants routinely gave each other their employees' salary information and used the information to fix and maintain lower salaries for their combined work force. The court laid out the proper approach to analyzing whether an alleged information exchange among competitors is anticompetitive. First, it must be determined whether the structure of the industry is such that it is "'susceptible to the exercise of market power through tacit coordination.'" 275 F.3d at 207-08 (citation omitted); *see United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (holding that one of the two "most prominent" factors in the rule of reason analysis of a data exchange among competitors is "the structure of the industry involved"). This involves a determination of whether the market is oligopolistic, with fungible products subject to inelastic demand. *Todd*, 275 F.3d at 208. The evidence in this case demonstrates that the Fittings market has these characteristics. F. 322-328, 362. Second, "[a]longside the 'structure of the industry involved,' the other major factor for courts to consider in a data exchange case is the 'nature of the information exchanged.' *Gypsum*, 438 U.S. at 441 n.16." *Todd*, 275 F.3d at 211. "There are certain well-established criteria used to help ascertain the anticompetitive potential of information exchanges," including the time frame of the data; the specificity of the data; whether the data is made publicly available; and whether the data is discussed in meetings among the participants. *Id.* at 211-13. These factors are analyzed below.

b. Nature of information exchanged

i. Time frame of the data

"The exchange of past price data is greatly preferred because current data ha[s] greater potential to affect future prices and facilitate price conspiracies. By the same reasoning, exchanges of future price information are considered especially anticompetitive." *Todd*, 275 F.3d at 211 (citing *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 398-99 (1921)). In *Todd*, the complaint was deemed sufficient where the plaintiff alleged that the defendants exchanged past and current salary information, as well as future salary budget information.

In the instant case, in contrast, the reporting format used by DIFRA's accountants referred only to past tons-shipped, and did not include any price data. F. 745-747, 749, 752. The tons-shipped data, upon which the DIFRA reports were based, represented sales taking place at varying past times, from a few weeks, to many months previously in the case of large public works projects, which were particularly prone to delay. Private jobs varied, but most were shipped within a month of the sale. F. 752. Based on *Todd*, the time frame of the DIFRA tons-shipped data does not weigh in favor of concluding that the data reports would facilitate collusive pricing.

ii. Specificity of the DIFRA tons-shipped data

(a) DIFRA data generally

"Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices." *Todd,* 275 F.3d at 212. The court in *Todd* further stated, "[c]ourts prefer that information be aggregated in the form of industry averages, thus avoiding transactional specificity." *Id*. Unlike the information exchange found sufficient to state a claim in *Todd*, the tons-shipped information exchanged through the DIFRA reports was aggregated, and had no transactional specificity. F. 741-744, 748-749. The DIFRA tons-shipped reports consisted of the aggregated totals of tons shipped in the United States during the reporting period, broken down by size

categories (2" to 12", 14" to 24", larger than 24" in diameter, and flanged versus non-flanged). F. 741. These broad categories are commonly used in the industry and mirror the major size groupings of pipe. F. 741-742. They reflect product size ranges containing thousands of different SKUs – all with unique physical attributes and pricing points. F. 742. The reports did not break down the tonnage shipped by state. F. 744. The tons-shipped data gathered by DIFRA's accountants did not distinguish between Domestic Fittings and non-domestic Fittings, and did not indicate whether the tonnage was sold into open preference or domestic preference jobs. F. 743.

Moreover, neither DIFRA nor its accountants ever collected sales price data. F. 745. The DIFRA tons-shipped data reports did not include or reveal any sales prices. F. 746. The DIFRA reports did not show the timing of prior sales or dollar amount of any sales. F. 758. The DIFRA reports did not report any dollar figures. F. 747. However, to the extent the submitted data was accurate, by seeing the aggregated totals of tons shipped during the reporting period, the Suppliers were able to assess the total size of the Fittings market during the reporting period, in the various fittings categories. F. 756. Then, by further analyzing the total tons-shipped data in relation to internal sales information, as other references such as Ductile Iron Pipe Research Association (DIPRA) and Valve Manufacturers' Association (VMA) data, a Supplier could determine its own market share during the reporting period. F. 757, 774-776, 778, 839. A Supplier could then track changes in its market share over time by referencing the monthly DIFRA tons-shipped reports. F. 776-778. Indeed, one of the purposes of the data reporting system was to help each member assess its own individual market share. F. 757. The data was not sufficiently detailed, however, to enable any DIFRA member to determine the respective market shares of any other DIFRA member. F. 758. The tons-shipped data report contained aggregated data, and no DIFRA member was permitted to review the tons-shipped data of any other member. F. 748. Moreover, the evidence shows that there were at least some errors in the data submitted and reported. F. 754-755.

(b) Market share information as "facilitating" price coordination

Complaint Counsel argues that the DIFRA tons-shipped data increases price transparency, notwithstanding the lack of any disclosure of prices, because the DIFRA tons-shipped data enables a Supplier to evaluate changes in market share against the total size of the market, and thereby further enables each Supplier to determine whether one's loss of market share was due to a market decline, or to a loss of business to the competition. CCB at 171. The evidence fails to show that in the Fittings market a loss of business to the competition necessarily means the loss was due to "cheating" or "discounting" by the competition, as Complaint Counsel argues. In fact, the evidence shows, market share loss can be attributed to various factors. As Mr. Page, CEO of McWane, stated in a January 23, 2009 internal email reacting to McWane's apparent loss of market share, as shown in part by the December 2008 DIFRA aggregated, tons-shipped data report: "Trying to not be emotional about it. But these numbers are infuriating. We have serviced our customers I assume and have the product they need, we are just being discounted against?" F. 783. Mr. Page wanted further information: "Are . . . Leon, Rick and our salespeople not keeping our customers competitive and – or do we not have the right product? Why are we losing market share? The question is, are we overpriced? Do we have the wrong mix of products? We don't have what people need? But I'm upset with our people for not managing their business." F. 783; *see also* F. 391 (Distributors consider price, service and relationship, among other things, when selecting a Fittings supplier).

Complaint Counsel further asserts that each of the Suppliers, including McWane, based pricing decisions on its assessment of its market share. The argument that being able to assess one's own market share, and use that information in determining whether to raise or lower one's own price, unlawfully "facilitates" price coordination is without legal support, and is unpersuasive. Furthermore, the evidence supports a conclusion that using one's own market share assessment to determine whether to raise or lower one's own price is rational, competitive behavior, and is indicative of normal competition. As Mr. Pais of Sigma explained: "If the [DIFRA] data point to a significant loss of

market share, then Sigma would generally use price to get share back. If Sigma wanted to grow volume, Sigma would also use price to attract sales." F. 769; *see also* F. 759 (Mr. Bhutada of Star stating: "[I]f market share is going down, then you know that you're on the wrong path. If it is stable or going up, then you know that you're on the right path"). For example, the DIFRA aggregated tons-shipped report in June 2008 helped McWane decide to choose the low end of the 8% to 12% range of multiplier increases that Mr. Tatman had been considering, because the DIFRA report confirmed his suspicion that McWane was continuing to lose market share, and showed that McWane's market share loss was worse than Mr. Tatman had suspected. F. 777. In addition, the evidence shows that Mr. Tatman used the DIFRA tons-shipped data in McWane's internal analysis of its pricing for Fittings, in connection with McWane's restructuring of its price list for medium and large diameter Fittings in early 2009. F. 784. Specifically, McWane was able to determine that McWane's market share was strong or growing in some segments, but weak or falling in others, and changed its list prices accordingly. F. 784.

In further support of the claim that the DIFRA tons-shipped data reports constitute an anticompetitive "facilitating practice," Complaint Counsel relies on a letter dated February 9, 2009 from Mr. Pais of Sigma to Sigma's lender, Ares Capital, in which Mr. Pais stated his opinion that "monthly market size data produced by DIFRA" had the benefit of helping to "maintain the pricing discipline, as the market and market share data point to a relatively consistent and stable market pattern. It has helped [Sigma] not to allow the sharp market decline to be mistaken as a 'loss of market share', which mostly causes price reaction." F. 768. The foregoing statements represented Mr. Pais' "very broad assessment as [Mr. Pais] saw it of one of" the intangible benefits of DIFRA that he communicated to Ares Capital in order to reassure the lender, which was concerned about recent declines in Sigma's pricing and volume, that DIFRA will provide visibility into market demand and help prevent panic selling based on misinformation. F. 768. A "mistaken diagnosis" about the reasons for a loss of market share makes it more difficult for Sigma to make the correct decision going forward, including decisions as to whether to lower price and/or to seek additional

volume from existing customers. F. 769. It makes sense that Mr. Pais would want to communicate to Sigma's lender his opinion that DIFRA data may help prevent Sigma from making a "misdiagnosis" of the competitive environment and pricing mistakes in reliance on such misdiagnosis. Moreover, the evidence fails to show that Mr. Pais was referring to any ability to coordinate with others on price, or to anything other than Sigma's own independent decision-making as to its own pricing conduct. Accordingly, the statements in Mr. Pais' February 9, 2009 letter do not constitute evidence that the DIFRA reports facilitate price coordination.

In summary, the aggregated DIFRA tons-shipped data is far less specific than the individualized salary information allegedly exchanged in *Todd.* In that case, it was alleged that the defendant companies periodically compiled surveys that shared, for each company, the actual salaries paid in thirty different categories of jobs, or "job families," classified according to the nature of the work. The information exchanged for each "family" was further broken down by the job level classification, experience level, and academic background of the employee. 275 F.3d at 196. By periodically updating the foregoing data, it was alleged, each defendant could determine whether the announced budgets of its competitors had been implemented, so that each could consider what adjustments should be made to coordinate salary levels. *Id.* Additional surveys collected further information on starting salaries at the companies for recent college graduates, as well as bonuses and other non-standard payments above base compensation that were not captured in the defendants' other surveys. *Id.* at 197. *Compare also Cason-Merenda v. Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 612-15 (E.D. Mich. 2012) (holding that evidence was sufficient to defeat summary judgment on alleged unlawful information exchange, where evidence showed, among other things, detailed salary surveys and exchanges of information at trade association meetings regarding salary ranges, planned raises, and the timing of annual increases).

For all the foregoing reasons, the DIFRA aggregated data is insufficiently specific to facilitate price coordination, as argued by Complaint Counsel.

iii. Publicly available data

"Public dissemination is a primary way for data exchange to realize its procompetitive potential" and can help mitigate anticompetitive effects. *Todd*, 275 F.3d at 213. It was alleged in *Todd* that the defendants kept their salary surveys confidential, which impeded the ability of employees to bargain competitively with the defendants. *Id.* In the instant case, it is not alleged that the DIFRA tons-shipped data reports were kept confidential by the DIFRA members, nor does the evidence show whether or not the DIFRA tons-shipped data reports were kept confidential by the DIFRA members.

iv. Meetings concerning the data

In *Todd*, the court was troubled by the fact that the defendants "allegedly participated in frequent meetings to discuss the salary information, . . . accompanied by assurances that the participants would primarily use the exchanged data in setting their [employees'] salaries." 275 F.3d at 213. Such frequent meetings, the court explained, tend to "facilitate the policing" of conspiracies. *Id.* In the instant case, in contrast, there is no evidence of any meetings among the DIFRA members after the DIFRA tons-shipped reports were instituted, or of any discussions among the DIFRA members regarding the DIFRA tons-shipped data. The evidence shows that the last DIFRA meeting was a conference call on April 25, 2008, before any data was submitted or reported. F. 736-737. The first DIFRA tons-shipped report was distributed on June 17, 2008. F. 738. The last DIFRA tons-shipped report was circulated in January 2009. F. 739. This dearth of evidence similar to that in *Todd* further distinguishes this case from the alleged information exchange constituting a facilitating practice in *Todd.*

4. Conclusion

As shown above, the evidence fails to prove that the DIFRA tons-shipped data reporting system has the nature and tendency to facilitate price coordination, as argued by Complaint Counsel. Complaint Counsel has therefore failed to prove its theory of likely anticompetitive effects resulting from an information

exchange by competitors. Accordingly, Complaint Counsel has failed to meet its burden of proving that the DIFRA tons-shipped data reporting system is an agreement in restraint of trade, as alleged in Count Two of the Complaint.[34]

F. Count Three: Alleged Invitation to Collude

Count Three of the Complaint charges that McWane engaged in an unfair method of competition in violation of Section 5 of the FTC Act by "inviting Sigma and Star to participate in a *per se* illegal price fixing conspiracy." CCB at 90; Complaint ¶ 66. Specifically, Complaint Counsel argues that McWane's January 11, 2008 and May 7, 2008 Customer Letters, each "unlawfully invited McWane's primary competitors in the Fittings market to participate in a *per se* illegal price fixing agreement." CCB at 92. McWane rejects Complaint Counsel's interpretation of the foregoing customer letters and further argues that no court has held that an invitation to collude violates Section 5.[35]

1. Overview of relevant legal authorities

Although the Commission has previously challenged alleged "invitations to collude" as unlawful under Section 5, Complaint Counsel cites no litigated case that has found the existence of an "invitation to collude" within the purview of Section 5. *See* CCB

[34] Because Complaint Counsel has not demonstrated actual anticompetitive effects, or likely anticompetitive effects, it is not necessary to assess whether Respondent has proved procompetitive justifications for the DIFRA tons-shipped data reporting system. Nevertheless, there is logical and credible evidence of procompetitive effects. As noted above, McWane used the DIFRA data to implement lower published prices in relation to its competitors. F. 777, 784. The evidence also shows that the DIFRA tons-shipped data identifies the extent to which various segments of the market are moving, including over time, which thereby helps each DIFRA member to assess overall market trends, and better manage production schedules and inventory. F. 760, 763, 773.

[35] Contrary to an argument raised by McWane, the fact that customer letters are public documents is not dispositive of whether these letters contained an unlawful invitation to collude. The evidence demonstrates that customer letters served to communicate to customers and competitors. F. 578.

at 90-105. Thus, the type of communications that will prove an unlawful "invitation to collude" is unclear. [36]

Areeda states that a solicitation to enter into an anticompetitive agreement can justify a remedy under Section 5, even if the solicitation does not result in an unlawful agreement under Section 1 of the Sherman Act: "Solicitation to a conspiracy is dangerous to competition even if it cannot be shown that an "offer" has been "accepted." Areeda, ¶ 1419d at 141. "Unaccepted solicitations can facilitate dangerous tacit coordination in oligopolistic markets, even though the solicitor and solicitee do not collectively control the market, and can increase the likelihood of actual price-fixing agreements in all markets." ¶ 1419e at 143. *See also* Calkins, *Counterpoint: The Legal Foundation of the Commission's Use of Section 5 to Challenge Invitations to Collude is Secure*, ANTITRUST Spring 2000 at 69 ("As a matter simply of the English language, intercepting attempted price fixing would seem the quintessential example of restraining a practice that otherwise would ripen into a Sherman Act violation, and of banning a practice that conflicts with the Sherman Act's basic policies.").

According to Areeda, highly ambiguous communications should not be actionable. Areeda, ¶ 1419e4 at 147. It has also been noted that the evidence "must be scrutinized closely to ensure that the communication is no more than a naked invitation to fix prices or divide markets." Joseph Kattan, *Facilitating Practices and Section 5: The Evidence of Life After Ethyl*, ABA

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[36] Complaint Counsel cites to the Commission's opinion denying Respondent's motion for summary judgment on Count Three, which held that there were genuine disputes of fact as to whether the evidence demonstrated an "invitation to collude." *See In re McWane, Inc.*, No. 9351, 2012 FTC LEXIS 155, at *54 (Sept. 14, 2012). The Commission's prehearing ruling has no bearing on the merits of the case as determined in this Initial Decision. Complaint Counsel also refers to an FTC statement supporting the consent order in *In re U-Haul, Int'l Inc.*, FTC File No. 081 0157, published at *75 Fed. Reg. 35033 (June 21, 2010).* FTC statements accompanying a consent order do not constitute regulatory law, which is made either by adjudication, 15 U.S.C. § 45(b); 5 U.S.C. § 556, or by promulgated regulation, 15 U.S.C. § 57b-3; 5 U.S.C. § 553. Consent decrees are not an adjudication, and moreover, "[t]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context." *United States v. E. I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 n.12 (1961).

Section of Antitrust Law, Annual Symposium, at 20-21 (1992) (cited at CCB at 92). The case of *Liu v. Amerco*, 677 F.3d 489 (1st Cir. 2012), is also instructive. In that case, the court upheld a complaint alleging an unsuccessful attempt to fix prices as stating a violation of the Massachusetts unfair competition statute, which is substantially similar to Section 5 of the FTC Act. *Liu* was a follow-on action against U-Haul International, which had entered into a consent order on a complaint issued by the FTC, and the allegations of the Complaint in *Liu* were derived from the FTC's summary of the complaint and consent order, published in the Federal Register. 677 F.3d at 491 (citing *Federal Trade Commission, U-Haul Int'l, Inc. and AMERCO*, 75 Fed. Reg. 35033 (June 21, 2010)).

According to the FTC's summary of the *U-Haul* allegations set forth by the court in *Liu*, U-Haul's chief executive officer issued an instruction to U-Haul regional managers to contact U-Haul's competitor, Budget, to inform Budget of U-Haul's recent conditional truck rate increase, to encourage Budget to follow, and to advise that if Budget did not follow, U-Haul's rates would be reduced to their prior level. In addition, U-Haul's CEO instructed local U-Haul dealers to communicate with their counterparts at competitors Budget and Penske, to reinforce the message that U-Haul had raised its rates and urge that competitors' rates should be raised to match the increased U-Haul rates. *Liu*, 677 F.3d at 491, citing 75 Fed. Reg. at 35034. The complaint further alleged that there were telephone calls from a U-Haul executive to representatives at three major Budget locations, in which the executive identified himself, advised those Budget representatives of U-Haul's recent rate increases, and encouraged them to follow: "[I] told them who I am, I spoke about the [increase to] .40 per mile rates to SE Florida and told them I was killing them on rentals to that area and I am setting new rates to the area to increase revenue per rental. I encouraged them to monitor my rates and to move their rates up." *Id.* In addition, the complaint there alleged that when Budget did not follow U-Haul's rate increases, U-Haul held an earnings conference call, which U-Haul knew would be monitored by Budget representatives, and stated, among other things: that U-Haul was acting as the industry price leader, the company had recently raised its rates, and that its competitors should do the same; that Budget's failure to date to match U-Haul's higher rates

was "unfortunate for the entire industry"; that U-Haul will wait a while longer for Budget to respond, "otherwise it will drop its rates"; that in order to keep U-Haul from dropping its rates, Budget does not have to match U-Haul's rates precisely, and that a 3 to 5 percent price difference is acceptable; that for U-Haul, market share is more important than price; and that U-Haul will not permit Budget to gain market share at U-Haul's expense. *Id.*

With the foregoing legal authorities as reference points, the customer letters that are challenged as invitations to collude in this case are analyzed below. As shown *infra*, the "invitation to collude" alleged in the instant case bears little resemblance to the allegations upheld as stating such a claim in *Liu.*

2. January 11, 2008 Customer Letter

Complaint Counsel asserts that McWane's January 11, 2008 Customer Letter, which notified McWane's customers of upcoming multiplier changes and McWane's intent to, in effect, stop Project Pricing (*see* F. 645), proposed an unlawful price fixing agreement to its competitors Sigma and Star by proposing a "*quid pro quo*." Specifically, Complaint Counsel contends that the January 11, 2008 Customer Letter "offered" to Sigma and Star that McWane would "support a second price increase later in the year (quid) B but only if pricing had stabilized, *i.e.*, Sigma and Star also curtailed Project Pricing (quo)." CCB at 93; *see generally* CCB at 93-96. Complaint Counsel argues that the January 11, 2008 Customer Letter not only announced McWane's intentions with regard to Project Pricing, but also "dangled the prospect" that McWane would support another price increase in order to induce Sigma and Star to curtail Project Pricing along with McWane. CCB at 95. With respect to any future price increase, the January 11, 2008 Customer Letter stated:

> If the current inflationary trends continue as forecasted, we anticipate the need to announce another multiplier increase within the next six months. However, we will only do so as conditions require.

F. 645.

Complaint Counsel urges the inference that "as conditions require" meant "greater pricing stability and transparency in the Fittings market by curtailing project Pricing." CCFF 944. However, the phrase "as conditions require" is vague, highly ambiguous, and on its face does not set forth the alleged "offer" of a second price increase in the future if Sigma and Star curtailed Project Pricing. *See* Areeda, ¶ 1419e4 at 147. To be sure, the letter is hardly a naked invitation to fix prices. *See* Kattan, *supra*, at 20-21. To support its desired inference, Complaint Counsel points to Mr. Tatman's internal December 25, 2007 PowerPoint Presentation, which included a slide titled, "Desired Message to the Market & Competitors," which stated that "[f]or 2008, we will support net price increases but will do so in stepped or staged increments. A prerequisite for supporting the next increment of price is reasonable stability and transparency at the prior level." F. 638. Complaint Counsel also cites language in draft customer letters prepared in connection with the December 25, 2007 PowerPoint Presentation. CCB at 97-98, citing CX 0627 at 006-007; *see* F. 626.

McWane's internal plans or goals as to when, why, or by how much, it might raise prices in the future are not probative or persuasive evidence that the January 11, 2008 Customer Letter, in fact, communicated an "offer" by McWane, to Sigma and Star, to raise prices in the future if Sigma and Star reduced Project Pricing, as contended by Complaint Counsel. Complaint Counsel's argument ignores the fact that the evidence in this case fails to demonstrate that Mr. Tatman's December 25, 2007 PowerPoint Presentation was anything other than an internal discussion document, which was not shared with Sigma or Star. *See* Section III.D.2.b.iii.(c), *supra*. In essence, Complaint Counsel would have Respondent held liable for communicating an "invitation to collude" based upon what McWane may have internally considered or discussed communicating. This is insufficient. If nothing else, the cases and authorities make clear that liability must be based upon the actual communication to a competitor, and not upon a communication that was only considered or discussed internally. Further, the cases and authorities do not support a conclusion that merely "dangling a prospect" of a price increase is the equivalent of an "invitation" to fix prices, as Complaint Counsel argues. *E.g.*, *Liu*, 677 F.3d at 491 (allegations that defendant told competitor, *inter alia*, to

increase prices to match defendant, and threatened a price decrease if the competitor did not do so); *compare also In re Valassis Communs.*, 2006 FTC LEXIS 25, at *5 (2006) (complaint alleging communication to competitor that respondent "will quote all [competitor's] first right of refusal customers at the floor price . . . [and] our net price after ancillary price discounts, rebates, et cetera, will not go below $ 6 [per thousand] for a full page and $ 3.90 [per thousand] for a half page"); *In re Precision Moulding Co.*, *1996 FTC LEXIS 386,* at *3 (1996) (complaint alleging meeting with officer of competitor, in which respondent's Chief Executive Officer stated that competitor's price was "ridiculously low" and that competitor did not need to "give the product away," and threatened a price war if competitor did not match respondent's higher prices).

It should also be noted, as discussed in Section III.D.2.b.iii.(c), *supra*, that Complaint Counsel points to no evidence supporting a finding that Sigma and Star "understood" the January 11, 2008 letter as an offer by McWane to raise prices in exchange for Sigma and Star curtailing Project Pricing. The evidence shows, at most, that Sigma and Star interpreted McWane's letter to be communicating that McWane was raising multipliers from its then-effective multipliers (as opposed to published multipliers) and further announcing to its customers that McWane intended to, in effect, discontinue Project Pricing in the future. F. 663-664, 682; *but see* F. 683 (Mr. McCutcheon of Star did not believe "for one second" that McWane would, in fact, stop Project Pricing, despite what was said in McWane's January 11, 2008 Customer Letter). The greater weight of the evidence does not support an inference that the letter "offered" to raise prices in the future in exchange for Sigma and Star curtailing their Project Pricing.

3. May 7, 2008 Customer Letter

Complaint Counsel argues that McWane's May 7, 2008 Customer Letter (F. 809) also invited Sigma and Star to fix prices. In support of this argument, Complaint Counsel asserts that this customer letter, in which McWane stated that it planned to raise multipliers between 6 and 16 percent, but would not make its final determination until the end of May, was an "offer" by McWane to

its competitors that McWane would raise prices in return for the competitors' submitting their tons-shipped data to DIFRA's accountants. CCB at 100-101. Complaint Counsel relies on the following language from the May 7, 2007 Customer Letter:

> Before announcing any price actions, we carefully analyze all factors including: domestic and global inflation, market and competitive conditions within each region, as well as performance against our own internal metrics. We anticipate being able to complete our analysis by the end of May. At that point, we will send out letters to each specific region detailing changes, if any, to our current pricing policy.

F. 809. As in the case of McWane's January 11, 2008 Customer Letter, the relevant language of the May 7, 2008 Customer Letter, upon which Complaint Counsel relies, is vague, highly ambiguous, and on its face does not set forth the alleged "offer" of a price increase conditioned upon Sigma and Star submitting their tons-shipped data. *See* Areeda, ¶ 1419e4 at 147. The language is also far from "a naked invitation" to fix prices. *See* Kattan, *supra*, at 20-21.

Acknowledging that the alleged offer was not expressly made in the May 7, 2008 Customer Letter, Complaint Counsel asserts that the offer was made "implicitly" in the above-quoted language. CCB at 101. Specifically, Complaint Counsel argues that McWane wanted to wait until after receiving and reviewing the DIFRA tons-shipped data before finalizing its decision on a price increase; the "factors" language, above, was not meaningful to customers, but was meaningful to Sigma and Star, because only they knew that, pursuant to the DIFRA agreement, tons-shipped data reports would not be issued before "the end of May"; Star understood the "offer" because Star quoted the "factors" language in an email regarding Star's submittal of the DIFRA tons-shipped data; and McWane announced a price increase soon after receiving and reviewing the June 17, 2008 DIFRA tons-shipped data report. CCB at 102-105.

Complaint Counsel's arguments that McWane's May 7, 2008 Customer Letter was an illegal "offer" by McWane to its competitors to raise prices if the competitors submitted their tons-shipped data to DIFRA's accountants, are materially identical to

its arguments that McWane, Sigma, and Star reached an agreement to exchange a price increase by McWane for Sigma and Star submitting DIFRA tons-shipped data. *See* CCB at 148-157. Those arguments, and the evidence upon which those arguments were based, were addressed in detail and rejected in Section III.D.3., *supra*. For all the reasons set forth in that Section, the evidence fails to show that McWane's May 7, 2008 Customer Letter was an "offer" by McWane to its competitors to raise prices in return for the competitors' submitting their tons-shipped data to DIFRA's accountants for inclusion in the DIFRA tons-shipped data report. Thus, the evidence fails to prove that McWane's May 7, 2008 Customer Letter constituted an "invitation to collude" in violation of Section 5 of the FTC Act.

4. Conclusion

For all the foregoing reasons, Complaint Counsel has failed to prove any "invitation to collude" by McWane and therefore has failed to meet its burden of proof as to Count Three of the Complaint.

Counts One, Two, and Three, relating to McWane's alleged unlawful conduct in the Fitting market, are dismissed. The Initial Decision next turns to McWane's alleged unlawful conduct in the Domestic Fittings market. Counts Six and Seven, pertaining to McWane's September 22, 2009 Full Support Program, are analyzed first. Counts Four and Five, pertaining to McWane's September 17, 2009 MDA with Sigma, are analyzed second.

G. Counts Six and Seven: Alleged Monopolization and Attempted Monopolization of the Domestic Fittings Market

1. Overview

Counts Six and Seven of the Complaint allege that McWane monopolized or attempted to monopolize the Domestic Fittings market through exclusionary acts and practices. Complaint ¶¶ 69-70. In particular, the Complaint alleges that McWane threatened to withhold rebates, delay deliveries, and refuse to deal with

Distributors who purchased Domestic Fittings from Star. Complaint ¶ 57.

Complaint Counsel asserts that, in response to ARRA's allocation of $6 billion in funds for waterworks projects built with products made in the United States, Star announced at a June 2009 American Water Works Association ("AWWA") show that it would begin selling Domestic Fittings by the fall of 2009. CCB at 206. According to Complaint Counsel, McWane, in response, implemented an exclusive dealing policy (discussed below) with the specific intent of deterring Distributors from dealing with Star and other rivals in the Domestic Fittings market. CCB at 206.

Complaint Counsel charges that McWane has monopoly power in the Domestic Fittings market and that, by denying its competitors a sufficient network of Distributors to whom to sell their Domestic Fittings, McWane effectively prevented its rivals from reaching an efficient scale and, consequently, from constraining McWane's monopoly prices. CCB at 206-07. In addition, Complaint Counsel asserts that no procompetitive efficiencies outweigh the harm caused by McWane's challenged exclusive dealing policy. CCB at 207.

Respondent asserts that even if there is a separate market for Domestic Fittings, McWane did not have monopoly power in that market, as evidenced by McWane's inability to control prices or exclude competition. RB at 89. Respondent further asserts that Star rapidly and effectively entered the Domestic Fittings market and thus McWane did not exclude Star from that market. RB at 90. Finally, McWane asserts that the challenged policy was simply a rebate policy, was not a contract, did not require any customer to buy Domestic Fittings from McWane, is presumptively lawful, and had procompetitive benefits. RB at 92-101, 107-108.

Monopolization requires proof of: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). Attempted monopolization requires proof: "(1) that the defendant has engaged in predatory or

anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving [or obtaining] monopoly power." *Spectrum Sports*, 506 U.S. at 456. These elements are analyzed below.

2. Monopoly power in the relevant market

a. Relevant market

Establishing the relevant market is the first step in assessing whether a respondent possesses monopoly power. *Spectrum Sports*, 506 U.S. at 456. As analyzed in Section III.C.3., *supra*, the relevant geographic market is the United States and, in addition to the relevant Fittings market, consisting of ductile iron pipe fittings of 24" and smaller in diameter, there is a separate market for Domestic Fittings, consisting of ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States and sold for use on jobs with domestic-only specifications. *Supra* Section III.C.2.

b. Monopoly power or the dangerous probability of achieving monopoly power

Monopoly power is defined as "the power to control prices or exclude competition." *du Pont*, 351 U.S. at 391. Monopoly power may be inferred or proven indirectly through proof of high market share in a market protected by barriers to entry. *Microsoft*, 253 F.3d at 51; *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007). Monopoly power may also be proven by direct evidence of a firm's ability to control prices or exclude competitors. *Microsoft*, 253 F.3d at 51; *Broadcom*, 501 F.3d at 307.

i. Market share in a market with high barriers

Complaint Counsel asserts that monopoly power can be inferred from McWane's high Domestic Fittings market share and the existence of high entry barriers in that market. CCB at 207-208. Respondent asserts that it is inappropriate to infer monopoly power from McWane's share of the Domestic Fittings market where that share was thrust on it by historic accident and further

asserts that barriers to entry into the Domestic Fittings market are not high. RB at 88-89, RRB 60.

(a) Market share

Generally, to support a finding of monopoly power, a market share of at least 70% to 80% is sufficient. *duPont*, 351 U.S. at 379, 391 (finding 75% of a relevant market to constitute monopoly power); *Grinnell Corp.*, 384 U.S. at 567, 571 (inferring monopoly power from "predominant share" (87%) of the market). Market share levels sufficient to support a monopolization claim are also sufficient to support an attempted monopolization claim. *McGahee v. Northern Propane Gas Co*., 858 F.2d 1487, 1505 (11th Cir. 1988) ("Determining whether a defendant possesses sufficient market power to be dangerously close to achieving a monopoly requires analysis and proof of the same character, but not the same quantum, as would be necessary to establish monopoly power for an actual monopolization claim.").

The market share statistics for the Domestic Fittings market must be viewed in the context of the overall Fittings market. The Fittings industry has changed dramatically over the last 30 years. *See* F. 462-476. The U.S. International Trade Commission, in December 2003, determined that Fittings from China were "being imported into the United States in such increased quantities or under such conditions as to cause market disruption" to domestic Fittings producers. F. 470. *See also* F. 471. As Mr. Tatman testified, "domestic-only specs have done nothing but erode over time." F. 1027. Distributors confirmed this. For example, less than approximately 5% of municipalities in Illinois Meter's service area have domestic-only specifications today. F. 1028. In the view of Illinois Meter, in the absence of a strong union and municipal push for domestic-only specifications, fewer municipalities require domestic-only Fittings. F. 1028.

Prior to 2007, there were several other domestic manufacturers of Fittings in addition to McWane, including U.S. Pipe, Griffin, and ACIPCO. F. 462. These other domestic manufacturers either dramatically reduced or exited Domestic Fittings production in the face of cheap imports. F. 472. By late 2007, McWane was "the last guy standing producing fittings domestically" in the under 30-inch diameter segment of the

Fittings market. F. 476. McWane admits that it was the only manufacturer of Domestic Fittings since at least 2006 until Star entered the Domestic Fittings market in late 2009. F. 1040.

While End User preferences and legal requirements that waterworks projects use Domestic Fittings in domestic-only specifications existed before the passage of ARRA (F. 519-523), the passage of ARRA in 2009, with its Buy American provisions, temporarily increased the size of the Domestic Fittings market. F. 524, 526, 527, 1029-1030. During the period that ARRA funding was available, the total number of waterworks projects that were built, repaired, or otherwise commissioned in the United States increased and Distributors' sales of Domestic Fittings increased. F. 1033-1035. The majority of the impact of ARRA and its resulting increase in the number of Domestic Fittings sales was felt in 2010. F. 1035. While ARRA-funded jobs were primarily serviced during the 2010 calendar year, some projects continued into 2011. F. 1036.

Prior to the passage of ARRA in 2009, domestic-only Fittings projects comprised approximately 15% to 20% of the overall Fittings market. F. 1029. Domestic-only Fittings projects grew to 28% of the overall Fittings market in 2010. F. 1030. Following the end of ARRA funding for waterworks projects in 2011, the demand for Domestic Fittings reverted back to where it had been before "the ARRA period,"[37] approximately 15% to 20% of the overall Fittings market. F. 1031.

Fittings suppliers agreed that ARRA had only a short-term impact on Domestic Fittings sales. *See* F. 1037 (Electrosteel (by the third quarter of 2010, bidding on ARRA jobs had ceased); Backman Foundry (ARRA funded only "a finite amount of jobs.")). Fittings Distributors also agreed that ARRA had only a short-term impact on Domestic Fittings sales. F. 1038. For example, HD Supply's Mr. Webb testified that ARRA's impact

[37] According to the EPA publication titled, "Implementation of the American Recovery and Reinvestment Act of 2009," all ARRA funded projects were to be under contract by February of 2010. As a result, Dr. Normann used March 2009 to February 2010 as "the ARRA period." F. 1032. Industry participants use the term "the ARRA period" to refer to sales made through 2011. F. 1035-1036.

on the demand for Domestic Fittings was "mild, at best" and "very minimal and mostly played out in 2009 and 2010"; and Illinois Meter's Mr. Sheley testified that ARRA "had a small effect" on sales of Fittings. F. 1038; *see also* F. 1038 ("[I]n reality, I don't believe that [ARRA has] impacted our business at all."). Given ARRA's limited effect, former Domestic Fittings manufacturers and specialty domestic Fittings manufacturers did not believe ARRA made it worthwhile for them to expand or return to production of a full line of Domestic Fittings. F. 1039. For example, Mr. Backman of Backman Foundry never considered expanding production as a result of ARRA, "when anybody and their dog can see that this market is going to end at some point." F. 1039.

Star, however, in reaction to ARRA's passage in February 2009, began to develop plans to expand its product lines to include Fittings that satisfied the Buy American provisions of ARRA. F. 1094-1097. Star publicly announced at a June 2009 AWWA industry conference that it would offer Domestic Fittings starting in September 2009. F. 1095. To achieve this objective, Star contracted with multiple domestic foundries to produce castings for Domestic Fittings and expanded its Houston facility to perform the finishing process (drilling holes, adding lining, and painting the fittings). F. 1104-1106. Star decided that it would be a full line supplier and acquired patterns from China in the summer of 2009 that Star needed for a complete line. F. 1119-1121. By September 2009, Star recorded its first sales of domestically-manufactured Fittings and began shipping Domestic Fittings to Distributors in late 2009. F. 1127-1128. Star had [redacted] million dollars in Domestic Fittings sales in both 2010 and 2011, and, at the time of trial, expected to sell more Domestic Fittings in 2012. F. 1143.

After Star entered the Domestic Fittings market, McWane's share of the Domestic Fittings market in 2010 continued to be over 95%. In 2011, McWane's share of the Domestic Fittings market continued to be over 90%, while Star's share of the Domestic Fittings market rose from 0% in 2009 to almost 10% in 2011. F. 1042-1043.

"A court will draw an inference of monopoly power [based on market share] only after full consideration of the relationship

between market share and other relevant market characteristics." *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 98 (2d Cir. 1998). "These characteristics include the 'strength of the competition, the probable development of the industry, the barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand.'" *Id.* (citation omitted). In *Metro Mobile CTS, Inc. v. NewVector Communications, Inc.*, 892 F.2d 62, 63 (9th Cir. 1989), relied upon by Respondent (RB at 88), the court affirmed the district court's refusal to infer monopoly power from defendant's 100% share of the market where defendant, as successor-in-interest to the traditional wireline carrier in the Phoenix area, was permitted to enter the market as the exclusive supplier of wholesale service while the FCC solicited bids for the non-wireline carrier license. The court explained:

> Blind reliance upon market share, divorced from commercial reality, [can] give a misleading picture of a firm's actual ability to control prices or exclude competition. The commercial reality in this case is that the cellular telephone market in Phoenix is heavily regulated by the Federal Communications Commission (FCC) and the Arizona Corporation Commission (ACC). Reliance on statistical market share in cases involving regulated industries is at best a tricky enterprise and is downright folly where, as here, the predominant market share is the result of regulation. In such cases, the court should focus directly on the regulated firm's ability to control prices or exclude competition.

Id. Unlike the defendant in *Metro Mobile*, McWane did not gain its Domestic Fittings market share as a result of operating in a heavily regulated industry; instead, its predominant market share is the result of all other domestic manufacturers having exited the market in the wake of cheap imports. Then, there was suddenly increased demand for Domestic Fittings as a result of the Buy American provisions of ARRA. Nevertheless, under these circumstances, it is inappropriate to infer monopoly power based solely on McWane's market share, as further explained below.

Monopoly power may not be inferred from a high market share in a market with low entry barriers or other evidence of a defendant's inability to control prices or exclude competitors.

United States v. Syufy Enterprises, 903 F.2d 659, 664 & n.6 (9th Cir. 1990); *see also Eastern Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n*, 357 F.3d 1, 6 (1st Cir. 2004) ("A defendant's high share is only a presumptive basis for inferring market power (entry barriers to the market may be very low")). The Initial Decision therefore turns next to the issue of whether there are low entry barriers and then evaluates whether there is other evidence of Respondent's inability to control prices or exclude competitors.

(b) Barriers to entry and expansion

"Barriers to entry are market characteristics which make it difficult or time-consuming for new firms to enter a market." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 885 F.2d 683, 696 n.21 (10th Cir. 1989). "Entry barriers are 'additional long-run costs that were not incurred by incumbent firms but must be incurred by new entrants,' or 'factors in the market that deter entry while permitting incumbent firms to earn monopoly returns.'" *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410, 428 & n.8 (5th Cir. 2008) (citing *Los Angeles Land Co. v. Brunswick Corp.*, 6 F.3d 1422, 1427-28 (9th Cir. 1993)). Examples of barriers to entry include the construction of large manufacturing plants, regulatory requirements, high capital costs, or technological obstacles. *Colorado Interstate Gas Co.*, 885 F.2d at 696 n.21; *Broadcom*, 501 F.3d at 307.

In addition, a network of exclusive contracts or distribution arrangements designed to lock out potential competitors can be viewed as a barrier to entry. *Syufy Enterprises*, 903 F.2d at 667. *See also United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 194 (3d Cir. 2005) ("Entrants into the marketplace must confront Dentsply's power over the dealers."). However, successful, actual expansion by an existing competitor can preclude a finding that exclusive dealing is an entry barrier of significance. *Omega Envtl. v. Gilbarco, Inc.*, 127 F.3d 1157, 1164 (9th Cir. 1997). These considerations are addressed in the following section, on Respondent's ability to exclude competitors. *Infra* Section III.G.2.b.(ii)(b).

Barriers to entry into the Domestic Fittings market for a *de novo* entrant include a significant capital investment. F. 1044.

The evidence demonstrates that a new entrant must build its own foundry or develop a supply chain of foundries that can produce its Fittings and develop or purchase the hundreds of patterns or moldings necessary for making a full line of Fittings covering thousands of items. F. 1044, 1047. A new entrant would then have to have its products tested and certified to conform to AWWA standards and get on "approved" lists for engineers and municipalities. F. 1046. An entrant must also develop expertise in design engineering, and develop a marketing force and relationships with Distributors that will carry its products. F. 1045, 1048. All of these factors make entry into the market for the manufacturing of Fittings expensive, difficult, and time consuming. *See* F. 1044-1048; *see also* F. 1049 (a new entrant would need three to five years to enter the market). Accordingly, there are high barriers to entry into the Fittings market.

There are, however, fewer barriers to entry for an existing supplier of imported Fittings that wishes to enter the Domestic Fittings market. As exemplified by Star's entry into the Domestic Fittings market, a supplier of imported Fittings would have the necessary expertise from its import business to operate its own fittings foundry and ensure the quality of its products. F. 1051. In addition, a supplier of imported Fittings would have well-established relationships with major Distributors and could leverage its existing sales team, regional distribution centers, and back office support to distribute its products. F. 1052-1055.

As discussed below, Star was able to and did enter the Domestic Fittings market. No other supplier of imported Fittings, with the exception of Sigma and SIP, and no pipe supplier or domestic foundry, however, seriously considered entering the market for manufacturing and selling Domestic Fittings. F. 1056-1071. Indeed, each realized that to enter into the market for manufacturing Domestic Fittings would require an extremely expensive economic investment, including major equipment additions, such as molding machines, equipment for producing cored or hollow castings, and new furnaces. F. 1059, 1061-1064, 1067-1068. The factors that precluded SIP and Sigma, each suppliers of imported Fittings, from entering the Domestic

Fittings market are further discussed *infra* Section III.G.3.a.(v-vi).[38]

"The fact that entry has occurred[,]" in this case, by Star, "does not necessarily preclude the existence of 'significant' entry barriers." *Rebel Oil*, 51 F.3d at 1440. "If the output or capacity of the new entrant is insufficient to take significant business away from the predator, they are unlikely to represent a challenge to the predator's market power." *Id.* (citing *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 367 (9th Cir. 1988); Department of Justice Merger Guidelines Par. 3.0 (1992) (entry must be "timely, likely, and sufficient in magnitude, character and scope to deter or counteract the anticompetitive effects of concern")). As discussed below, Star's entry is inadequate to take significant business away from Respondent and therefore does not represent a challenge to Respondent's market power.

Monopoly power has been proven indirectly through proof of a high market share in a market protected by high barriers to entry. The ultimate focus, however, is not barriers to entry, but whether Respondent could exclude rivals. *Oahu Gas*, 838 F.2d at 367. Thus, "other evidence" (*Syufy Enterprises*, 903 F.2d at 664) of whether Respondent was able to control prices or exclude competitors is next addressed.

ii. Ability to control prices or exclude competitors

Complaint Counsel asserts that direct evidence of McWane's ability to control prices and to exclude Star confirms McWane's power in the Domestic Fittings market. CCB at 209. Respondent asserts that even if ARRA created a temporary, separate domestic market, McWane's inability to control prices or exclude competition over time precludes a finding of monopoly power in that market. RB at 89.

[38] As explained *infra* Section III.H.1., Sigma entered into a Master Distribution Agreement with McWane on September 17, 2009, through which Sigma resold McWane's Domestic Fittings ("MDA").

(a) Ability to control prices

Monopoly power is "the ability '(1) to price substantially above the competitive level *and* (2) to persist in doing so for a significant period without erosion by new entry or expansion.'" *AD/SAT v. Associated Press*, 181 F.3d 216, 227 (2d Cir. 1999) (citation omitted). If a defendant with a large market share is unable to control prices or exclude competitors, then it is not a monopolist. *Tops Mkts.*, 142 F.3d at 99.

In support of its position that McWane has the ability to control prices, Complaint Counsel states that when McWane sells Domestic Fittings into domestic-only specifications, it charges prices that are significantly higher than prices for identical Fittings sold into open specification jobs. CCB at 209-210. The evidence at trial indeed shows that McWane's Domestic Fittings sold into domestic-only specifications are generally sold at much higher prices than non-domestic Fittings. F. 1075. *See also* F. 1073. For example, McWane's February 2008 price multipliers for domestically manufactured fittings sold into domestic-only specifications were substantially higher than its February 2008 "blended" multipliers (for a mix of Fittings sold into open specification projects). F. 1076. In McWane's February 2008 price multipliers maps, whereas a given non-domestic Fitting would sell in Texas for $280, the corresponding Domestic Fitting would sell for $440, an approximately 57% higher price. F. 1076. However, McWane's costs to produce Domestic Fittings were higher than its costs to produce imported Fittings. F. 1077-1078.

Complaint Counsel also points to evidence that, in 2008, McWane did not typically offer Project Pricing for Domestic Fittings because the less competitive Domestic Fittings market did not require it. F. 1072 (McWane's Pricing Coordinator's email refusing a sales person's request for Project Pricing for Domestic Fittings because "We are the only one who makes the full line of 24" and down. No need to drop the price unless Star is an issue."). *See also* F. 1074.

Complaint Counsel next points to evidence that, since 2009, the first year for which McWane's blue books report gross profits for Fittings sold into domestic-only projects, McWane has sold

Domestic Fittings at prices that earn it significantly higher gross profits than it has earned in the same time period on the sale of non-domestic Fittings. CCB at 210. For year-end 2009, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-domestic Fittings of [redacted]%. F. 1091. For year-end 2010, McWane reported gross profits for Domestic Fittings of [redacted]% and reported gross profits for non-domestic Fittings of [redacted]%. F. 1091. These margins are approximately [redacted]% greater on the sale of its Domestic Fittings (sold into domestic-only specifications) than for comparable import Fittings. F. 1091. The significantly higher gross profits that McWane earns from Domestic Fittings, as compared to those it earns from non-domestic Fittings, bolsters Complaint Counsel's argument that McWane has monopoly power in the Domestic Fittings market.

Lastly, Complaint Counsel points to evidence that on December 21, 2009, McWane sent a customer letter announcing multiplier increases for Domestic Fittings, effective January 22, 2010. CCB at 210; F. 1083. Pursuant to the provisions of McWane's Master Distribution Agreement with Sigma, entered into on September 17, 2009 ("MDA"), addressed in more detail *infra* Section III.H.1., when McWane announced these multiplier increases, McWane instructed Sigma that, per the MDA, McWane's price increase announcement would impact Sigma's orders. F. 1555. Sigma, as a distributor of McWane's Domestic Fittings, enacted the same price increase as McWane did for Domestic Fittings. F. 1557. It should be noted, however, that when McWane issued the December 21, 2009 price increase for Domestic Fittings, it also issued a price increase for non-domestic Fittings, and, that McWane's manufacturing costs for producing Domestic Fittings were also increasing at that time. F. 1084-1085. Nevertheless, McWane's ability to increase prices and direct Sigma to do the same provides additional evidence for finding that McWane has monopoly power.

Respondent posits that McWane never attempted to raise prices and that not a single Distributor or End User complained about prices of Domestic Fittings at trial. RRB at 60. The lack of customer complaints on prices for Domestic Fittings may be because the Domestic Fittings market is such a small market (*see* F. 1030) and because Fittings usually comprise less than 5% of

the total cost of a typical waterworks project. F. 326. Moreover, McWane did in fact raise prices on Domestic Fittings when it sent out customer letters on December 21, 2009, announcing multiplier increases for Domestic Fittings. F. 1083. Although Distributors may not have complained about prices of Domestic Fittings at trial, they did complain about McWane's Full Support Program, announced September 22, 2009, which is discussed below.

Respondent's expert, Dr. Normann, testified that McWane's Domestic Fittings prices were essentially flat, even during the ARRA period. Normann, Tr. 4894-4895. In Figure 17 of his expert report, Dr. Normann applied a price series to the bucket of Domestic Fittings for his fixed basket of 24 Fittings (*see* F. 939) to generate an index of weighted average prices for Domestic Fittings. Figure 17 of Dr. Normann's expert report showed that between January 2008 and November 2011, McWane's domestic prices *increased* about 15%, and that nearly half of that (a six or seven percent price increase) occurred during what Dr. Normann called the ARRA period. Normann, Tr. 5525-5529. Dr. Normann explained, however, that prices were largely unchanged for roughly the first half of the ARRA period and then rose slightly along with the upward trend in the cost index as primary input costs were increasing. RX 712A (Normann Rep. at 47); Normann, Tr. 5524-5530.

Complaint Counsel challenges Dr. Normann's opinion as unreliable on the basis that it is methodologically flawed and points out that, even using his data, Dr. Normann's results show that McWane's prices for Domestic Fittings increased. CCRRFF 600. In addition, Complaint Counsel contends that even if Dr. Normann reliably established that Domestic Fittings prices were flat during the ARRA period, Figure 17 does not address whether McWane had pricing power over Domestic Fittings sales independent of ARRA, or whether ARRA increased the size of the preexisting Domestic Fittings market. CCRRFF 600 (citing Normann, Tr. 5524-5525, 5538). Regardless of the economic expert testimony that was offered on this point, the record is replete with instances of Respondent's exercise of monopoly power.

Respondent also contends that McWane did not have the ability to charge monopoly prices for its Domestic Fittings because it knew that the impact of ARRA was limited and McWane did not want to abuse its position in the Domestic Fittings market for fear of losing market share in the Fittings market. Mr. Tatman testified, in reference to an internal McWane email dated June 5, 2009: "It has never been our intent to 'over charge' because of the [Buy American] provision [of ARRA]," and that McWane did not want to overcharge for Domestic Fittings in the short term, at the expense of harming its position in the overall Fittings market in the long term. F. 1086. Irrespective of whether McWane used its dominant position in Domestic Fittings market to overcharge, McWane did use its dominant position to exclude Star from the Domestic Fittings market, as discussed below.

The greater weight of the evidence establishes that even prior to the ARRA period, McWane had increased Domestic Fittings prices to levels substantially higher than non-domestic Fittings prices (F. 1075-1076), that McWane recognized that it did not have to offer Project Pricing on Domestic Fittings to win bids (F. 1072-1074), that McWane was earning substantially higher gross profits from Domestic Fittings than it earned from non-domestic Fittings (F. 1091), and that McWane announced multiplier increases for Domestic Fittings and required Sigma, per the MDA, to do the same (F. 1555, 1557). Monopoly power is "the power to control prices or exclude competition." *du Pont*, 351 U.S. at 391. Thus, Respondent had the ability to control prices, as well as the ability to exclude competitors, as addressed below.

(b) Ability to exclude competitors

Complaint Counsel charges that McWane's ability to exclude Star through its Full Support Program, discussed in detail *infra* Section III.G.3.a., is direct evidence of McWane's monopoly power. CCB at 210. Respondent asserts that Star successfully expanded into the Domestic Fittings market, which disproves the allegation that McWane possessed monopoly power. RB at 90-91.

In reaction to ARRA's passage in February 2009, Star determined it would expand into the Domestic Fittings market. F.

1094. In June 2009, Star publicly announced at an AWWA industry conference and sent a letter announcing to its customers that it would offer Domestic Fittings starting in September 2009. F. 1095-1096.

Star considered three possible courses of action in order to manufacture Fittings in the United States: (1) building a foundry from "ground zero"; (2) buying an existing foundry in the United States; or (3) contracting with existing domestic foundries to produce the desired Fittings. F. 1097. In order to get its product to the marketplace in the shortest amount of time, Star elected to pursue contract manufacturing. F. 1098. Because no single foundry could make the entire size range of Domestic Fittings, Star utilized multiple foundries in different locations to produce castings. F. 1104, 1106. Star then shipped the castings to its Houston facility for the finishing process. F. 1106.

Star decided that it would be a full line supplier and, in the summer of 2009, Star acquired the patterns from China that Star needed for a complete line. F. 1119. By June 2010, Star had a Domestic Fittings pattern stock comparable to McWane's Domestic Fittings items. F. 1125.

By September 2009, Star recorded its first sales of domestically manufactured Fittings to customers. F. 1127. Since its entry in 2009, Star has sold Domestic Fittings every month and every year. F. 1134. Star sold Domestic Fittings to many Distributors during the last quarter of 2009, 2010 and 2011, including HD Supply, Ferguson, Hajoca, WinWater, and Dana Kepner. F. 1136. Star had [redacted] million dollars in Domestic Fittings sales in both 2010 and 2011, and expected to sell more Domestic Fittings in 2012. F. 1143. As stated above, since its determination in 2009 to enter the Domestic Fittings market, Star's market share went from zero to almost 10% in 2011. F. 1042-1043.

Clearly, Star entered the Domestic Fittings market. However, Star's entry was insufficient to constrain McWane's monopoly power. As discussed below, McWane's Full Support Program impeded Star's sales, which made it unprofitable for Star to purchase its own domestic foundry. Because it had to produce

Domestic Fittings through independent foundries rather than its own dedicated foundry, Star's production costs were [redacted] percent higher than they would have been if Star owned its own foundry. F. 1419. Although Star was an aggressive discounter in the overall Fittings market, McWane did not need to respond to price competition from Star in the Domestic Fittings market because Star had a higher cost structure and correspondingly higher prices in that market. *See* F. 1419-1420. Thus, Star's entry was not of sufficient scale to constrain Respondent's monopoly power in the Domestic Fittings market, where McWane has over 90% market share and there are high barriers to entry.

Furthermore, as discussed below, Star's access to Distributors was impeded by McWane's Full Support Program, which further limited Star's ability to constrain McWane's monopoly power. A similar course of conduct was addressed in *United States v. Dentsply International, Inc*. There, in a market where the defendant held 75 to 80 percent of the market selling artificial teeth for use in dentures through a network of dealers, the evidence showed that the defendant operated under a policy that discouraged its dealers from adding its competitors' teeth to their lines of products. 399 F.3d at 185. The Court held that because of Dentsply's blocking of access to the key dealers, its competitors were excluded from the market, which thus demonstrated Dentsply's monopoly power. *Id.* at 189. As analyzed below, McWane's Full Support Program impeded Star's access to Distributors, which demonstrates McWane's ability to exclude competitors and thus demonstrates McWane's monopoly power.

Complaint Counsel has met its burden of proving that Respondent has monopoly power through both indirect evidence – high market share in a market with high barriers to entry – and direct evidence – Respondent's ability to control prices or exclude competitors.

3. Willful maintenance of monopoly power

Having determined that Respondent possesses monopoly power in the Domestic Fittings market, the next step in a monopolization charge requires proof of "the willful acquisition or maintenance of that power as distinguished from growth or

development as a consequence of a superior product, business acumen, or historic accident." *Grinnell Corp.*, 384 U.S. at 570-71. Although Respondent acquired its monopoly power as a consequence of "historic accident" – namely that it was the last remaining domestic manufacturer after other domestic manufacturers exited the market in the wake of cheap imports – Complaint Counsel's challenge here is to the steps that Respondent took to "maintain" that power. CCB at 210-246.

The alleged exclusionary conduct challenged in Counts Six and Seven of the Complaint is based on the letter that McWane sent to Distributors on September 22, 2009 that stated as follows:

> [E]ffective October 1, 2009, McWane will adopt a program whereby our domestic fittings and accessories will be available to customers who elect to fully support McWane branded products for their domestic fitting and accessory requirements. This applies whether these products are purchased through Tyler Union, Clow Water or through Sigma.[39]
>
> Exceptions are where Tyler Union or Clow Water products are not readily available within normal lead times or where domestic fittings and accessories are purchased from another domestic pipe and fitting manufacturer along with that manufacture's [*sic*] ductile iron pipe.
>
> Customers who elect not to support this program may forgo participation in any unpaid rebates for domestic fittings and accessories or shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks.

F. 1173 ("Full Support Program").

Complaint Counsel charges that the Full Support Program was a deliberate effort by McWane to maintain its monopoly power by

[39] Pursuant to the MDA between McWane and Sigma, Sigma agreed to resell McWane's Domestic Fittings to Distributors on the condition that the Distributor agreed to purchase Domestic Fittings exclusively from McWane or Sigma. *Infra* Section III.H.

impeding Star's entry. CCB at 210. Respondent maintains that the Full Support Program was "simply a letter [sent by McWane] asking customers to support its last domestic foundry . . . fully and offering a rebate in exchange." RB at 93.

Before analyzing whether Respondent engaged in anticompetitive conduct to maintain its monopoly power or acted with specific intent to monopolize, with a dangerous probability of success, evidence on the development of McWane's Full Support Program, the communication of McWane's Full Support Program to Distributors, and the effects the Full Support Program had on Distributors and on Fittings suppliers who considered entering the Domestic Fittings market is summarized below.

a. Summary of the facts

i. Development of McWane's Full Support Program

In reaction to ARRA's passage in February 2009, Star began to develop plans to expand its product lines to include Domestic Fittings. F. 1094. Numerous emails and draft documents generated and discussed internally within McWane demonstrate that McWane was concerned about the effect that entry by Star in the Domestic Fittings market would have on McWane's market share and profits and that McWane developed a strategy in response to Star's announced entry. Findings on these issues are set forth in more detail in Section II.J.1-2 *supra*. The most relevant evidence on these points is summarized below.

Mr. Rick Tatman, Vice President and General Manager in charge of McWane's Tyler/Union division, recognized that "any competitor" seeking to enter the Domestic Fittings market could face "significant blocking issues" if it was not a "full line" domestic supplier. F. 1155. On June 24, 2009, Mr. Leon McCullough, Executive Vice President of McWane, sent an internal email to Mr. Tatman, with a copy to Mr. Thomas Walton, Senior Vice President overseeing the Fittings division, raising questions regarding McWane's "position short term/long term on sharing distribution of our domestic fitting line" and writing, "[j]ust because we share our blended fittings does not require us

to share our domestic. . . ." F. 1148. Mr. Walton responded to Mr. McCullough's email on June 24, 2009, stating:

> Whether we end up with Star as a complete or incomplete domestic supplier my chief concern is that the domestic market gets creamed from a pricing standpoint just like the non-domestic market has been driven down in the past. That would dramatically [a]ffect our profit potential. . . . I do agree whole heartedly that we need to evaluate our options and plot a comprehensive strategy going forward.

F. 1149.

Mr. Tatman responded to the above emails on June 24, 2009 stating:

> I agree that at this stage the chance for profitable cohabitation with Star owning a pc of the Domestic market is slim. Their actions in soil pipe are a good indication. . . . If their claims are ahead of their actual capabilities we need to
>
> make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return. . . .

F. 1150.

On or about June 29, 2009, Mr. Tatman drafted and sent an internal PowerPoint Presentation ("June 29, 2009 PowerPoint Presentation") to Mr. McCullough and Mr. Walton intended as a brainstorming document. F. 1156. Described by Mr. Tatman as topics for discussion were three potential options for McWane's response to Star's entry: employ a "Wait and See approach," "Handle on a Job by Job basis," or "Force Distribution to Pick their Horse." F. 1159. With respect to the "Force Distribution to Pick their Horse" approach, the advantages listed as topics for discussion by Mr. Tatman included:

- It "[a]voids the job by job auction scenario within a particular distributor"

- It "[p]otentially raises the level of supply concern among contractors" and

- It "[f]orces Star/Sigma to absorb the costs associated with having a more full line before they can secure major distribution."

F. 1162.

Under the "Pick your Horse" option, Mr. Tatman identified two alternatives: a "Soft Approach," whereby a domestic rebate would require exclusivity, and a "Hard Approach – Full Line or No Line," whereby access to McWane's domestic product line would "require[] exclusivity for Domestic fitting items we manufacture" – *i.e.*, if a customer did not support McWane's full Domestic Fittings line, McWane would not sell to them. F. 1163. Also under the "Pick your Horse" option, under both the "Soft Approach" and the "Hard Approach," listed as a topic for discussion, was: "Applied on a corporate not branch by branch basis." F. 1164. In his cover email transmitting the June 29, 2009 PowerPoint Presentation, Mr. Tatman stated that if Star is the only Domestic entrant, then "the appropriate response to distribution is probably a fairly hard line approach like a full line or no line approach." F. 1157. *See also* F. 1165 (July 2, 2009 email from Mr. Tatman to Mr. Walton ("[f]rom the information currently available, a Full Line or No Line approach would be the preferred approach and certainly the best option against Star.")).

In the same September 22, 2009 letter through which McWane announced its Full Support Program, McWane also announced to its Distributors that it had entered into a Master Distribution Agreement with Sigma, through which Sigma would sell McWane Domestic Fittings, and informed Distributors that the Full Support Program applies to McWane's Domestic Fittings, whether purchased from McWane or through Sigma. F. 1174, 1538. Pursuant to the MDA, discussed in detail *infra* Section III.I., McWane and Sigma agreed that Sigma would not sell McWane Domestic Fittings to any customer listed by McWane as having purchased Domestic Fittings from a source other than McWane, or to any other customer who Sigma actually knows has

purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days. F. 1558.

ii. Communication of McWane's Full Support Program to Distributors

Respondent argues that the Full Support Program "made it clear that customers were free to choose another supplier, and simply noted that if they did so, they 'may' forego any unpaid rebates for domestic Fittings or shipments for a short period of time ('up to 12 weeks')." RB at 93. To that end, Respondent points out that Mr. Tatman purposefully included the "soft" language "may" and "or" in the Full Support Program and explained that his use of the terms "may" and "or" in the Full Support Program is "a weak stance . . . because I know when I write this letter [to Distributors] that I'm a Chihuahua barking at Rottweiler and I know who has the power here." F. 1178.

Despite the soft language of "may" and "or" in the Full Support Program letter to Distributors, McWane communicated a "hard approach" to its Distributors. *See, e.g.*, F. 1179-1183. In preparation for the rollout of the Full Support Program, McWane's National Sales Manager, Mr. Jerry Jansen, led an internal conference call with the McWane sales force on August 28, 2009, where he explained to his sales force the "new policy on Star Domestic" as follows:

- What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic. . . .
  - This means the customer will no longer have access to our domestic. They can still buy [non-Domestic] from us.
  - Once they use Star, they can't EVER buy domestic from us. . . .
  - For companies with multiple branches (HD, Ferguson, Winwater, Hajoca, etc) - if one branch uses Star, every branch is cut off.

. . .

- Make sure you are discussing our stance with all customers, every day.

F. 1179.

McWane executives met with various Distributors to explain McWane's Full Support Program. For example, through conversations between Mr. Roy Pitts, Director of Vendor Relations at Hajoca, and Mr. Tatman and Mr. Jansen of McWane, Hajoca believed that, despite the terms "may" and "or" in the Full Support Program, Hajoca would lose its rebates or be cut off from purchasing Domestic Fittings from McWane if Hajoca purchased from Star. F. 1184, 1197-1199. Mr. Dennis Sheley, President and owner of Illinois Meter, believed from his conversations with Mr. Tatman and Mr. Jansen that if Illinois Meter purchased Domestic Fittings from anyone but McWane, Illinois Meter "would lose the right to buy [McWane's Domestic Fittings] completely" and would also lose its rebate from its purchases of non-domestic Fittings. F. 1357. Mr. Thomas Morton, U.S. Pipe's Vice President of Purchasing, was told by Mr. Tatman that U.S. Pipe would be required to purchase 100% of its domestic requirements from McWane, and not purchase Domestic Fittings from Star, unless McWane did not have the needed items or its lead times were too long, and that U.S. Pipe could not "cherry pick" "A" or "B" items, or high volume Domestic Fittings from Star and expect McWane to supply the balance. F. 1298-1300.

In an internal McWane document describing the Full Support Program, Mr. Tatman stated: "Although the words 'may' and 'or' were specifically used, the market has interpreted the communication in the more hard line 'will' sense. . . . Access to McWane or Sigma [through Sigma's reselling of McWane's Domestic Fittings under the MDA] requires distributors to exclusively support McWane where products are available with normal lead times. Violations will result in: Loss of access, loss of accrued rebates." F. 1183.

iii. Enforcement of McWane's Full Support Program

McWane enforced its Full Support Program against only one of the Distributors who was called to testify either at trial or by deposition – Hajoca Corporation. Hajoca is a national waterworks distributor with several locations, two of which purchase Domestic Fittings regularly: Tulsa, Oklahoma ("Tulsa") and Lansdale, Pennsylvania ("Lansdale"). F. 239-240, 1193-1194. Each of Hajoca's branches makes its own vendor selection decisions, including those regarding Domestic Fittings purchases. F. 1195. Prior to announcing the Full Support Program, Mr. Jansen met with Hajoca's Mr. Pitts. F. 1197. Mr. Pitts reported on that meeting as follows:

> I had heard from Jerry Jansen last week that [McWane] would be taking a hard stance regarding domestic fittings manufactured for Star. . . .
>
> Jerry had told me last week that if any PC [profit center or branch of Hajoca] in the US purchases domestic fittings from Star, all PCs would lose access to McWane's fittings and possibly lose rebates.

F. 1197.

Mr. Pitts asked Mr. Tatman to modify McWane's Full Support Program so that McWane would not hold all Hajoca branches responsible if a single branch purchased Domestic Fittings from Star. F. 1200. In a November 3, 2009 email to Mr. Sean Kelly and Mr. Pitts of Hajoca, Mr. Jansen reiterated the all-or-nothing nature of McWane's Full Support Program:

> [I]f any Hajoca location chooses to buy another domestic fitting supplier['s] product Hajoca will not have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date.

F. 1201-1202.

In November 2009, Hajoca's Tulsa branch began placing orders for Domestic Fittings from Star. F. 1206. On November 23, 2009, Mr. McCullough of McWane informed Mr. Kelly of Hajoca that McWane would "discontinue selling Hajoca domestic fittings since they are supporting Star's domestic line." F. 1208. As a consequence of Hajoca's Tulsa branch ordering Domestic Fittings from Star, McWane discontinued selling Domestic Fittings to Hajoca's Lansdale branch also. F. 1209. In an internal McWane email, Mr. Tatman confirmed to Mr. McCullough and Mr. Walton, on November 23, 2009, that all Hajoca orders had been placed on hold. F. 1210. McWane did allow Hajoca's Lansdale branch to place orders to cover existing commitments and to enable Hajoca's Lansdale branch to place orders to satisfy the known requirements of an existing contract with a municipality. F. 1212, 1214. Apart from those exceptions, between December 4, 2009 and April 13, 2010, Hajoca's Lansdale branch was unable to place Domestic Fittings orders with McWane. F. 1219.

In addition to refusing to sell Domestic Fittings to Hajoca from December 4, 2009 to April 13, 2010, McWane withheld the rebate due to Hajoca based on its non-domestic Fittings purchases from McWane in the fourth quarter of 2009. F. 1224. In a February 4, 2010 email to Mr. Pitts, Mr. Tatman confirmed that McWane had withheld Hajoca's fourth quarter 2009 rebate as a result of the Tulsa branch's decision to purchase Domestic Fittings from Star. F. 1225. With the exception of the fourth quarter of 2009, McWane continued to pay rebates to Hajoca, as Hajoca's Lansdale branch resumed purchasing McWane's Domestic Fittings, even though its Tulsa branch purchased Domestic Fittings from Star. F. 1227.

Hajoca is the only Distributor against whom McWane's Full Support Program was enforced. No other Distributor was cut off by McWane after purchasing Domestic Fittings from Star or had its rebate withheld. *E.g.*, F. 1250 (HD Supply); F. 1278-1279 (Ferguson); F. 1312 (U.S. Pipe); F. 1319-1320 (Groeniger); F. 1344-1345 (WinWholesale).

iv. Impact of McWane's Full Support Program on Distributors' purchases from Star

The evidence at trial demonstrates that, besides Hajoca, Distributors, with some exceptions, complied with McWane's Full Support Program, as summarized below.

(a) HD Supply

In September 2009, executives of McWane met with executives of HD Supply. F. 1231. In an internal September 8, 2009 email to Mr. McCullough and Mr. Jansen, Mr. Tatman suggested to Mr. McCullough that HD Supply's CEO, Mr. Jerry Webb, should send an internal communication within HD Supply that HD Supply had elected to use McWane Domestic Fittings as its sole supply source through 2010. F. 1233. On September 22, 2009, Mr. Glenn Fielding, HD Supply's Director of Sourcing and Price Management, sent an internal email to Mr. Webb, and Mr. Darrin Anderson, Vice President of Sourcing and Operations of HD Supply, forwarding the text of the Full Support Program and recounting a conversation with Mr. Tatman in which Mr. Tatman informed Mr. Fielding that the policy "must be adhered to by entire company -- if one branch buys domestic from someone else it affects the whole compan[y's] program." F. 1234. Mr. Fielding expressed concern about a reduction in rebate dollars as a result of McWane's Full Support Program and even greater concern about the impact on customer satisfaction in the event that McWane cut off HD Supply's access to McWane's Domestic Fittings. F. 1235.

HD Supply interpreted McWane's Full Support Program to require HD Supply to purchase all of its Domestic Fittings from McWane, except where McWane was unable to supply the Domestic Fittings desired. F. 1238. HD Supply also interpreted McWane's Full Support Program to mean that if HD Supply purchased Domestic Fittings from Star, HD Supply "would lose the rebate on the domestic fittings and potentially lose access to the domestic line . . . [which] could be a significant event." F. 1240.

On or about September 23, 2009, Mr. Webb, sent a letter to HD's branch managers, district managers, and operations

managers stating that they needed "to adhere to this mandate and purchase all of our American made fittings through [McWane] or Sigma." F. 1239-1240 (explaining that the "mandate" was McWane's Full Support Program). Without McWane's September 22, 2009 Full Support Program, Mr. Webb would not have issued this company-wide policy requiring HD Supply managers to purchase Domestic Fittings only from McWane. F. 1241.

With the exception of items that McWane did not have available or that had been committed to prior to September 22, 2009, HD Supply cancelled its then-pending Domestic Fittings orders with Star. F. 1242. According to Mr. McCutcheon of Star, Mr. Webb informed Mr. McCutcheon that HD Supply could not purchase Domestic Fittings from Star because McWane's Full Support Program required HD Supply to buy 100% of its Domestic Fittings requirements from McWane. F. 1244. Two HD Supply regional vice presidents and two HD Supply district or branch managers each relayed to Mr. Michael Berry, a general manager of Star, that they could not purchase Domestic Fittings from Star because of McWane's Full Support Program and that they did not have the discretion to do so under the HD Supply corporate policy. F. 1246.

While McWane's Full Support Program made HD Supply less willing to do business with Star, there are also numerous other reasons why HD Supply did not purchase Domestic Fittings from Star. HD Supply believed that Star did not have the capacity to service HD Supply's needs for Domestic Fittings in the fall of 2009 because HD Supply believed that Star did not have a full line of Domestic Fittings to offer (F. 1252-1253); HD Supply had concerns about Star's use of various foundries, as opposed to use of one central foundry, to manufacture its Domestic Fittings in the fall of 2009 (F. 1254); and HD Supply views McWane as a known, full line Fittings supplier with a good track record (F. 1256).

Notwithstanding McWane's Full Support Program, HD Supply purchased some Domestic Fittings from Star. F. 1257. However, although HD Supply is Star's largest customer and Star estimates that it has greater than a [redacted]% share of HD Supply's non-domestic Fittings business, Star estimates that it has

less than a [redacted]% share of HD Supply's Domestic Fittings business. F. 1258.

(b) Ferguson

When Ferguson received notice of the Full Support Program from McWane in September 2009, its concerns pertaining to the possibility of foregoing unpaid rebates from McWane were secondary to the concerns Ferguson had about Star's ability to produce Domestic Fittings. F. 1260. When Mr. William Thees, Vice President of the Waterworks Division at Ferguson, received notice of McWane's Full Support Program, he thought it was unlikely that McWane would withhold rebates from Ferguson and believed that the rebate terms and lead times stated in the Full Support Program could be negotiated. F. 1268.

After receiving notice of the Full Support Program, Mr. Thees called his district managers to ensure that Ferguson communicated support for McWane's Domestic Fittings by continuing to purchase Domestic Fittings from McWane and not purchasing Domestic Fittings from Star. F. 1261. To Mr. Thees' knowledge, Ferguson's district managers followed his instruction. F. 1261.

After McWane's Full Support Program was announced, based on conversations that Star's Mr. Berry had with Ferguson managers, Star believed that there was a Ferguson corporate edict that no Ferguson employees were to purchase Star Domestic Fittings unless McWane did not have the Domestic Fittings. F. 1262.

At the time Ferguson received notice of McWane's Full Support Program, Ferguson was already planning to purchase all of its Domestic Fittings from McWane, regardless of the Full Support Program. F. 1266. Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned about Star's ability to produce a complete line of Domestic Fittings without having its own manufacturing facility. F. 1272. Ferguson was also reluctant to purchase Domestic Fittings from Star because Ferguson was concerned that Star was using jobber facilities with extra capacity to produce Domestic Fittings for

them, Star would not disclose to Ferguson which foundries it was using, and Ferguson was concerned that any of these domestic foundries could abandon Star, leaving Star unable to supply Ferguson with Domestic Fittings. F. 1273. In addition, at the time Star began producing Domestic Fittings, Star did not have the depth and breadth of inventory to supply Ferguson with all of Ferguson's Domestic Fittings needs. F. 1274.

In 2011, Ferguson purchased hundreds of thousands of dollars' worth, but less than a million dollars' worth, of Domestic Fittings from Star. F. 1277. Ferguson is Star's second largest customer. Star estimates that it has a [redacted]% share of Ferguson's non-domestic Fittings business, but less than a [redacted]% share of Ferguson's Domestic Fittings business. F. 1280. According to records maintained by Ferguson, in the first four months of 2010, Ferguson purchased [redacted]% of its Domestic Fittings from Star, while purchasing approximately [redacted]% from McWane and [redacted]% from Sigma. F. 1281.

(c) U.S. Pipe

In September 2009, U.S. Pipe began discussions with Star relating to potential purchases of Domestic Fittings by U.S. Pipe from Star. F. 1291. Star initially proposed to U.S. Pipe pricing for 3" to 12" diameter Domestic Fittings that matched McWane's Domestic Fittings multipliers. F. 1295. In response to U.S. Pipe's statement to Star that Star needed to incentivize U.S. Pipe to leave McWane, Ms. Susan Schepps of Star committed to U.S. Pipe that Star would offer Domestic Fittings pricing significantly below McWane's in exchange for a major portion of U.S. Pipe's volume. F. 1295.

On October 13, 2009, in a meeting between Mr. Morton of U.S. Pipe and Mr. Tatman of McWane, Mr. Tatman explained that U.S. Pipe would be required to purchase 100% of its domestic requirements from McWane, and not purchase Domestic Fittings from Star, unless McWane did not have the needed items or its lead times were too long. F. 1299. Because U.S. Pipe needed access to a full line of Domestic Fittings, not just the "A" and "B" items initially being offered by Star, Mr. Morton's recommendation to his boss after meeting with Mr. Tatman in October 2009 was to continue to look for alternative sources. F.

1301. Mr. Morton also wrote that, unless U.S. Pipe was convinced that those sources could provide 100% of U.S. Pipe's requirements for Domestic Fittings, U.S. Pipe needed to take the notification from Mr. Tatman very seriously and buy its Domestic Fittings from McWane. F. 1301. Mr. Morton instructed his purchasing manager not to purchase Domestic Fittings from Star unless McWane could not provide the needed Domestic Fittings. F. 1302.

In a meeting between Mr. Morton and Mr. Stephen Gables of U.S. Pipe and Mr. McCutcheon and Ms. Schepps of Star in November 2009, U.S. Pipe informed Star that, according to McWane, if U.S. Pipe purchased any of its Domestic Fittings requirements from anyone other than McWane, then McWane would not sell U.S. Pipe any Domestic Fittings. F. 1303. In 2009, U.S. Pipe also had concerns about Star's ability to provide a full line of Domestic Fittings and had concerns about the lead times it would take for Star to fulfill certain orders. F. 1307. In addition, U.S. Pipe was concerned that Star would not commit to putting the tooling in place in advance of getting a requirement for volume. F. 1308.

With the exception of minor purchases falling within the limited exceptions to McWane's Full Support Program (*e.g.*, where McWane's lead time to supply the requested Fitting was too long, or if McWane did not make a particular Fitting configuration) F. 1309, U.S. Pipe purchased only minor amounts of Domestic Fittings from Star until September of 2010. F. 1310. In September 2010, U.S. Pipe "decided as an executive team that the risk of [McWane] not selling us [Domestic Fittings] even if [U.S. Pipe] bought from Star, given the announced FTC investigation, would be significantly less . . . ." F. 1311. In September 2010, U.S. Pipe was purchasing "a significant portion" of its Domestic Fittings from Star. F. 1310.

(d) Groeniger

Prior to the announcement of McWane's Full Support Program, Groeniger gave Star Domestic Fittings business on two sizeable projects. F. 1313. After McWane's Full Support Program was announced, Groeniger was reluctant to purchase

additional Domestic Fittings from Star "[b]ecause of the inherent threats of retaliation" from McWane. F. 1315. In 2009, Groeniger needed access to McWane's Domestic Fittings in order to service customers with McWane-only Domestic Fitting requirements. F. 1316. Groeniger was concerned about "[b]eing shut out" from McWane if Groeniger purchased Domestic Fittings from Star. F. 1317.

After McWane announced its Full Support Program, Mr. Berry of Star had at least three conversations with representatives of Groeniger, including Mr. Michael Groeniger, President of Groeniger. F. 1323. Based on these conversations, Star perceived that Groeniger had fears that it would not be able to purchase Domestic Fittings from McWane if Groeniger purchased Domestic Fittings from Star. F. 1324. *See also* F. 1328 (reporting that Groeniger wanted to buy from Star, but had committed to McWane because of the Full Support Program). Star documents also note, however, that on one order, Groeniger did not purchase from Star because Star could not meet the delivery dates. F. 1326.

Notwithstanding McWane's Full Support Program, Groeniger did purchase Domestic Fittings from Star, but not frequently. F. 1329. Mr. Groeniger testified that in 2010, Groeniger would have given Star 50% of its Domestic Fittings business if McWane had not initiated the Full Support Program. F. 1330.

(e) WinWholesale

In September 2009, WinWholesale had an interest in potentially purchasing Domestic Fittings from Star. F. 1331. On September 22, 2009, Mr. Eddie Gibbs, Vice President of Vendor Relations, for WinWholesale, which does business as WinWater Works ("WinWater"), received notice of McWane's Full Support Program from Mr. Tatman. F. 1332. WinWholesale had some concerns that if the WinWater local companies purchased Domestic Fittings from Star on a consistent basis, those companies would lose their rebate; however, WinWholesale was not concerned about the overall WinWater locations being able to get product from McWane if an individual WinWater local company purchased Domestic Fittings from Star. F. 1338-1340.

Upon receiving notification from McWane of the Full Support Program, WinWholesale "accepted the terms" of it and listed Star's status as a vendor as "not approved." F. 1334. *See also* F. 1335. At WinWholesale, if a vendor receives "not approved" status, the local companies are not to buy from that vendor under any circumstances unless they seek board approval. F. 1337.

Star was verbally notified of WinWholesale's intention to place Star on its "not approved" list for Domestic Fittings in early December 2009 and received written notice on February 5, 2010 in the form of WinWholesale's 2010 Preferred Vendor letter listing Star as "not approved." F. 1336. WinWholesale had reasons other than the Full Support Program for placing Star on its list of not approved vendors, including concerns about Star's capacity, quality, and timeliness in delivery. F. 1342.

After McWane initiated its Full Support Program, Star did have some sales of Domestic Fittings to WinWater local companies. F. 1343.

(f) Illinois Meter

Mr. Sheley of Illinois Meter was informed by Mr. Tatman and Mr. Jansen that if Illinois Meter purchased Domestic Fittings from anyone but McWane, Illinois Meter "would lose the right to buy [McWane's Domestic Fittings] completely" and would also lose its rebate from its purchases of non-domestic Fittings. F. 1357. Losing access to McWane's Domestic Fittings would be a serious consequence for Illinois Meter. F. 1358. Regardless of McWane's Full Support Program, however, when Star first announced its Domestic Fittings line, Illinois Meter probably would have purchased around 90 percent of its Domestic Fittings from McWane. F. 1359. Illinois Meter had previously had a negative experience with Star's reliability as a supplier when Star first entered the joint restraint business. F. 1361. Illinois Meter was not willing to give Star any Domestic Fittings orders in early 2010 until Star had demonstrated it had sufficient inventory, because Illinois Meter was not willing to risk coming up short on a project if it could not turn to McWane to meet its needs. F. 1361-1362.

In the summer of 2010, Illinois Meter was interested in purchasing Domestic Fittings from Star for an ARRA-funded water treatment plant in Winchester, Illinois, and for a Domestic specification job in Macomb, Illinois. F. 1362. Both projects required smaller-diameter Domestic Fittings that Illinois Meter believed Star could provide. F. 1362. Illinois Meter did purchase a half dozen Domestic Fittings from Star to evaluate their quality. F. 1363. Although Illinois Meter found the quality of Star's Domestic Fittings to be very good, Illinois Meter is not buying them or supplying them. F. 1363. Illinois Meter does not buy Domestic Fittings from Star because it does not want to lose the ability to buy McWane's Domestic Fittings. F. 1364.

v. Impact of McWane's Full Support Program on SIP's evaluation of whether to enter the Domestic Fittings market

Serampore Industries Private ("SIP") supplies Fittings in the United States that it imports from China, India, and Mexico, and currently sells to approximately 50 to 60 Distributors in approximately 35 states. F. 1365. From May 2009 to September 2009, SIP evaluated entering the Domestic Fittings market. F. 1366. SIP estimated that manufacturing Domestic Fittings would require a 5 to 10 million dollar investment. F. 1373. To be viable in the Domestic Fittings market, SIP estimated that it needed a minimum gross margin of approximately [redacted] percent, and a minimum net margin of about [redacted] percent. F. 1374.

In evaluating whether to enter the Domestic Fittings market, SIP viewed the implications of McWane's Full Support Program as significant to the Distributors who were SIP's potential Domestic Fittings customers. F. 1376. SIP believed that McWane's Full Support Program would deter Distributors from purchasing Domestic Fittings from SIP because forgoing Domestic Fittings shipments from McWane for up to 12 weeks, thus delaying an End User's project, was a significant penalty. F. 1376. SIP's determination to not enter the Domestic Fittings market was based on numerous reasons, including the fact that ARRA presented a very short time window, that SIP believed it needed to offer a full line of fittings to be considered a viable supplier, that it had taken SIP three years to develop a full line of imported fittings, the uncertainties of success, the high cost of

developing patterns for a full line of fittings, the fact that there was not one single foundry available to make all the fittings, the vagaries of long term supply given the changing capacity of jobber foundries, the 5 to 10 million dollar estimated cost to develop the line, the need/cost to develop drilling and machining capabilities, the uncertainties of the ARRA demand, and the uncertainties about the post-ARRA domestic demand. F. 1378. While there were numerous reasons behind SIP's decision to not enter the Domestic Fittings market, McWane's Full Support Program was "the straw that broke the camel's back." F. 1379-1380.

vi. Impact of McWane's Full Support Program on Star's entry into the Domestic Fittings market

As summarized above, after McWane announced its Full Support Program on September 22, 2009, numerous Distributors pulled their requests for quotes, cancelled orders, or decided not to purchase Domestic Fittings from Star. F. 1381-1382. Based on those actions and conversations Star had with Distributors, Star believed that Distributors would not purchase from Star because of McWane's Full Support Program. F. 1383.

With respect to HD Supply, based on conversations between Mr. McCutcheon of Star and Mr. Webb of HD Supply, Mr. McCutcheon believed that HD Supply could not buy Star's Domestic Fittings because of the Full Support Program. F. 1383. Star's General Sales Manager, Mr. Berry, was advised by several HD Supply regional vice presidents, district managers and branch managers that they could not purchase Domestic Fittings from Star because of McWane's Full Support Program and that they did not have the discretion to do so under the HD Supply corporate policy. F. 1246. Mr. Berry believed that HD Supply refused to purchase Domestic Fittings from Star for various projects because of the HD Supply corporate policy to not purchase from Star. F. 1246. With respect to Ferguson, after McWane's Full Support Program was announced, Star's Mr. Berry had negotiations with district managers and a general manager of Ferguson. F. 1262. Based on those conversations, Mr. Berry believed that there was a corporate edict that no Ferguson employees were to purchase Star Domestic Fittings

unless McWane did not have the Domestic Fittings. F. 1262. *See also* F. 1384. Star also believed that Distributors Custom Fab, Dana Kepner, Prescott Supply, Illinois Meter, C.I. Thornburg, WinWater, Western Water Works and Wells Supply would not purchase Star's Domestic Fittings because of McWane's Full Support Program. F. 1385-1390. Even when Star offered a rebate program to TDG Distributors that was more generous than McWane's rebate program, some TDG members were still unwilling to buy from Star. F. 1391. Star believed that these Distributors were unwilling to purchase from Star because of the "all-or-nothing domestic fitting policy from McWane." F. 1391. As Star's Regional Sales Manager explained in his deposition:

> Every distributor -- every customer distributor that we talked to or that I talked to after this letter came out, wanted to talk about it. And they all wanted to know what I had seen in other parts of the countr[y] or if any distributors were purchasing our domestic. And if so, had Tyler punished them. And -- and I had not seen anywhere or heard from anybody that -- that there was any repercussions for people buying our fittings anywhere from anybody. But the fear that something could happen in -- in areas that actually buy domestic fittings, customers are afraid. They don't want to take the chance of the what-if.

F. 1392.

Star estimated that, absent McWane's Full Support Program, Star would have [redacted] million dollars in sales of Domestic Fittings in 2010, potentially rising to an annual rate of [redacted] million dollars in 2011. F. 1394. Star's estimated lost sales due to McWane's Full Support Program were based in part on 10 million dollars in requests for quotes for Domestic Fittings that Star received between June 15, 2009, when it announced its Domestic Fittings entry, and September 22, 2009, when McWane announced its Full Support Program. F. 1395. The requests for quotes included requests by HD Supply, Ferguson, Mainline, WinWater, and a variety of other independent customers. F. 1395. *See also* F. 1382.

As summarized above, the evidence shows that there were reasons for Distributors choosing not to purchase Domestic

Fittings from Star other than McWane's Full Support Program, including concerns about Star's inventory, the quality of fittings produced at several different foundries, and the timeliness of delivery. Thus, these estimates by Star are viewed somewhat skeptically. However, it is quite clear that Star believed that because of McWane's Full Support Program, Star would not be able to generate a sufficient volume of sales from Domestic Fittings to purchase its own foundry.

In 2009, Star estimated that it needed between [redacted] million dollars in sales of Domestic Fittings to justify purchasing its own domestic foundry. F. 1400. Since then, Star has estimated that it needs between [redacted] million dollars to justify purchasing its own foundry. F. 1400. [redacted]. F. 1399. Star was not able to generate a sufficient volume of sales of Domestic Fittings to realize cost efficiencies or justify operating a foundry of its own. F. 1401.

Rather than owning its own foundry, Star contracted with six foundries to produce raw castings for Domestic Fittings for Star, which Star then shipped to its Houston facility for the finishing process. F. 1409. Independent foundries are more costly and less efficient than a foundry owned and operated by Star would be because using independent foundries involves: less specialized and less efficient equipment; smaller batch sizes; additional logistical costs associated with inventory, finishing, and freight; less control over inventory levels; less ability to expedite orders; and inefficiencies resulting from dealing with multiple foundries. F. 1410.

b. Exclusionary Conduct Law

A firm violates Section 2 of the Sherman Act when it maintains or attempts to maintain a monopoly by engaging in exclusionary conduct. *Microsoft*, 253 F.3d at 58. Exclusionary conduct is "behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985) (citation omitted). "Exclusive dealing can have adverse economic consequences by

allowing one supplier of goods or services unreasonably to deprive other suppliers of a market for their goods[.]" *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45 (1984) (O'Connor, J., concurring), *abrogated on other grounds by Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Barry Wright Corp.*, 724 F.2d at 236 (explaining that "under certain circumstances[,] substantial foreclosure might discourage sellers from entering, or seeking to sell in, a market at all, thereby reducing the amount of competition that would otherwise be available").

"Exclusive dealing arrangements are of special concern when imposed by a monopolist." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 271 (3d Cir. 2012) (cert. pending) (citing *Dentsply*, 399 F.3d at 187 ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist.")). The court in *ZF Meritor* provided the following example:

> [S]uppose an established manufacturer has long held a dominant position but is starting to lose market share to an aggressive young rival. A set of strategically planned exclusive-dealing contracts may slow the rival's expansion by requiring it to develop alternative outlets for its product, or rely at least temporarily on inferior or more expensive outlets. Consumer injury results from the delay that the dominant firm imposes on the smaller rival's growth.

Id. (citing Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1802c, at 64 (2d ed. 2002)).

Due to the potentially procompetitive benefits of exclusive dealing agreements, their legality is judged under the rule of reason. *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 (9th Cir. 1982); *see also Tampa Electric*, 365 U.S. at 327-29. The legality of an exclusive dealing arrangement depends on whether it will foreclose competition in such a substantial share of the relevant market so as to adversely affect competition. *ZF Meritor*, 696 F.3d at 271 (citing *Tampa Electric*, 365 U.S. at 328; *Barr Labs. v. Abbott Labs.*, 978 F.2d 98, 110 (3d Cir. 1992)). "In conducting this analysis, courts consider not only the percentage of the market foreclosed, but also take

into account 'the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market.'" *Id.* (citing *Barr Labs.*, 978 F.2d at 110-11). As the Supreme Court has explained:

> [I]t is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein.

Tampa Electric, 365 U.S. at 329. "In other words, an exclusive dealing arrangement is unlawful only if the 'probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals." *ZF Meritor*, 696 F.3d at 271 (citations omitted).

The court in *ZF Meritor* further explained:

> There is no set formula for evaluating the legality of an exclusive dealing agreement, but modern antitrust law generally requires a showing of significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects . . . . Courts will also consider whether there is evidence that the dominant firm engaged in coercive behavior, and the ability of customers to terminate the agreements.

Id. at 271-72 (citations omitted). With these legal principles in mind, the Initial Decision next analyzes whether the challenged conduct engaged in by McWane was an unlawful exclusionary dealing arrangement.

c. The Full Support Program was an all-or-nothing policy imposed upon Distributors

Respondent characterizes the Full Support Program as a mere rebate program. RB at 98-101. Respondent argues that McWane "did not have any contracts that required its customers to buy its domestic Fittings exclusively" and that "[w]hen a customer is free to walk away from even a monopolist's discounts at any time, no violation of the antitrust laws exists." RB at 92-93. These arguments mischaracterize the nature and effects of the Full Support Program.

Although the September 22, 2009 Full Support Program did contain a provision relating to withholding rebates, it also contained an "all or nothing" component. Specifically, the Full Support Program explicitly stated that customers who did not buy 100% of their Domestic Fittings from McWane "may forgo shipment of their domestic fitting and accessory orders of Tyler Union or Clow Water products for up to 12 weeks." F. 1173. Although the word "may" was used in the Full Support Program, McWane communicated to Distributors that if they purchased Domestic Fittings from Star, they would lose the ability to buy Domestic Fittings from McWane, unless those purchases fell into two narrow exceptions: they were part of a bundled sale with pipes, or McWane did not have the Domestic Fitting available for timely delivery. F. 1173, 1179-1183.

Extensive evidence – including contemporaneous documents surrounding the formation of the Full Support Program (F. 1155-1167); McWane's communication and application of the Full Support Program to U.S. Pipe, which did not participate in any McWane rebate program (F. 1297-1300); and McWane's termination of Hajoca as a Distributor when one of its branches purchased Domestic Fittings from Star (F. 1207-1219) – confirms that McWane's Full Support Program was an all-or-nothing exclusive dealing arrangement.

Respondent argues that the Full Support Program "had about as much force as the piece of paper on which it was written" and argues that McWane paid rebates and shipped Domestic Fittings to various Distributors, despite the fact that those Distributors bought Domestic Fittings from Star. RB at 94. Respondent further argues that the Full Support Program "was not only not a contract, but was enforced weakly – if at all – at one customer (Hajoca) for a period of 12 weeks at the most." RB at 101.

The evidence does show that many Distributors bought Domestic Fittings from Star and that McWane never withheld rebates from or refused to sell to these Distributors. F. 1250, 1257 (HD Supply); F. 1277-1279 (Ferguson); F. 1320 (Groeniger); F. 1344 (WinWholesale). However, the evidence also shows that some Distributors' purchases of Domestic Fittings came under the exceptions allowed in the Full Support Program. F. 1242 (HD Supply); F. 1305 (U.S. Pipe); *see also* F. 1137 (Some of Star's sales of Domestic Fittings were made in circumstances in which McWane could not provide Domestic Fittings in a timely fashion (*e.g.*, large-diameter Fittings), or where the End User needed a special coating such as "Protecto 401" that Star specialized in.).

Regarding Illinois Meter, Respondent asserts that McWane paid rebates and shipped Domestic Fittings to Illinois Meter in 2010 and 2011, despite the fact that Illinois Meter bought Domestic Fittings from Star. RB at 94. The evidence shows that Illinois Meter purchased only "a half dozen" Domestic Fittings from Star to evaluate their quality and because it had a couple of engineers who wanted to see what Star's Domestic Fittings looked like. F. 1363. With the exception of these limited purchases, Illinois Meter does not buy Domestic Fittings from Star and has been unwilling to stock or ship Star's Domestic Fittings because it does not want to lose the ability to buy McWane's Domestic Fittings. F. 1364.

With the exception of Hajoca, Respondent did not need to enforce the Full Support Program because Distributors acceded to heavy economic pressure and, with minor exceptions, purchased all their Domestic Fittings from McWane. F. 1239-1240 (HD Supply's CEO sent a letter to HD's branch managers, district managers, and operations managers stating that they needed "to adhere to this mandate and purchase all of our American made fittings through [McWane] or Sigma."); F. 1261 (Ferguson's Vice President of the Waterworks Division called district managers to ensure that Ferguson continued to purchase Domestic Fittings from McWane and not purchase Domestic Fittings from Star); F. 1302 (U.S. Pipe's CEO instructed his purchasing manager not to purchase Domestic Fittings from Star unless McWane could not provide the needed Domestic Fittings.); F. 1324 (Groeniger

purchased Star's Domestic Fittings indirectly through Griffin Pipe Products Co. ("Griffin"), a manufacturer of ductile iron pipes who also resells Fittings as part of packaged sales of pipes and Fittings.); F. 1334-1336 (WinWholesale informed McWane that it "accepted" the terms of McWane's Full Support Program and subsequently placed Star Pipe on the list of vendors who are "not approved" for sales of Domestic Fittings unless McWane was not able to provide the required Domestic Fittings.). Thus, even though McWane did not enforce the Full Support Program against Distributors other than Hajoca, McWane's Full Support Program nevertheless harmed competition. *See ZF Meritor*, 696 F.3d at 282-83 (concluding that defendant's agreements with customers constituted an unlawful exclusionary dealing arrangement where, "despite the fact that [the defendant] did not actually terminate the agreements on the rare occasion when [a customer] failed to meet its [market-penetration] target, the [customers] believed that it might").

With respect to Hajoca, Respondent argues the policy was "enforced weakly . . . for a period of 12 weeks at the most." RB at 101. From December 4, 2009 to April 13, 2010, a period of 18 weeks, McWane refused to sell Domestic Fittings to Hajoca. F. 1219. Respondent's "weak enforcement" of the Full Support Program must be placed in context. In November 2009, McWane informed Hajoca: "[I]f any Hajoca location chooses to buy another domestic fitting supplier['s] product[,] Hajoca will not have direct access to the McWane ductile iron water main fittings for a period of time as well as loss of any accrued rebate to date." F. 1201. Subsequent to receiving notification on January 22, 2010 that the FTC was investigating McWane, Hajoca and McWane negotiated regarding McWane's Full Support Program and came to an agreement in April 2010, whereby McWane agreed to allow Hajoca's Lansdale branch, but not its Tulsa branch, to resume purchasing Domestic Fittings from McWane. F. 1220-1221. Prior to those negotiations, on March 27, 2010, Mr. McCullough sent an internal email within McWane asking, "[h]ow our potential FTC action might [a]ffect how we do business with [Hajoca]." F. 1220.

Actions that may have been taken to improve one's litigating position are entitled to little or no weight. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986); *see also*

United States v. General Dynamics Corp., 415 U.S. 486, 504-05 (1974) (Because "violators could stave off [government enforcement] actions merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending," probative value of evidence of actions taken post-acquisition was found to be extremely limited.). Thus, in the instant case, Respondent's argument that its "rebate policy" was "enforced weakly . . . for a period of 12 weeks at the most" (RB at 101) is entitled to little or no weight.

Furthermore, the Full Support Program is not a mere rebate from which Distributors can walk away at any time, as argued by Respondent. RB at 93 (citing *Concord Boat Corp. v. Brunswick Corp*., 207 F.3d 1039, 1062-63 (8th Cir. 2000) ("[Defendant's] discount programs were not exclusive dealing contracts . . . [because customers] were free to walk away from [Defendant's] discounts at any time."). Instead, with the exception of Ferguson, Distributors consistently testified that they could not risk McWane refusing to supply them with their Domestic Fittings requirements. F. 1238 (HD Supply interpreting McWane's Full Support Program to mean that if HD Supply purchased Domestic Fittings from Star, HD Supply "would lose the rebate on the domestic fittings and potentially lose access to the domestic line[, which] could be a significant event."); F. 1301 (Because U.S. Pipe needed access to a full line of Domestic Fittings, not just the "A" and "B" items initially being offered by Star, U.S. Pipe needed to take the notification from Mr. Tatman very seriously and buy its Domestic Fittings from McWane.); F. 1317 (Groeniger needed access to McWane's Domestic Fittings in order to service customers with McWane-only Domestic Fitting requirements and was concerned about "[b]eing shut out" from McWane if it purchased Domestic Fittings from Star.); F. 1358 (Losing access to McWane's Domestic Fittings was a serious consequence for Illinois Meter because Illinois Meter needs to have access to a full line of Domestic Fittings in certain locations and only McWane carried a complete line in 2009.). *But see* F. 1260 (Ferguson's concerns about the possibility of the potential to lose access to McWane's Domestic Fittings or foregoing unpaid rebates from McWane were only secondary concerns and Ferguson believed it unlikely that McWane would withhold rebates from Ferguson and that the rebate terms and lead times stated in the Full Support

Program could be negotiated.). Thus, the evidence demonstrates that, overwhelmingly, Distributors viewed McWane's Full Support Program as an all-or-nothing exclusive dealing arrangement and acted accordingly.

Respondent also argues that the Full Support Program was not a contract, did not require any customer to buy Domestic Fittings from McWane, and was short lived. RB at 92, 98-101. A similar argument was rejected in *Dentsply*, where the Court of Appeals for the Third Circuit concluded that "an exclusivity policy imposed by a manufacturer on its dealers violate[d] Section 2 of the Sherman Act . . . based on . . . the nature of the relevant market and the established effectiveness of the restraint despite the lack of long term contracts between the manufacturer and its dealers." *Dentsply*, 399 F.3d at 184. There, the defendant operated "on a purchase order basis with its distributors and, therefore, the relationship [with distributors was] essentially terminable at will." *Id.* at 185. The court found the policy of terminating any dealer that carried its competitor's products (artificial teeth) exclusionary because "the economic elements involved – the large share of the market held by Dentsply and its conduct excluding competing manufacturers – realistically ma[de] the arrangements . . . as effective as those in written contracts." *Id.* at 193-94 ("[I]n spite of the legal ease with which the relationship [could] be terminated, the dealers [had] a strong economic incentive to continue carrying Dentsply's teeth."); *see also ZF Merritor*, 696 F.3d at 278 (upholding jury verdict that rebate policy was *de facto* exclusive dealing and noting, "even if [a customer] decided to forgo the rebates and purchase a significant portion of its requirements from another supplier, there would still have been a significant demand from truck buyers for [the defendant's] products. Therefore, losing [the defendant] as a supplier was not an option.").

In this case, in contrast, McWane's Full Support Program was unilaterally imposed on Distributors; there was no competition to become the exclusive supplier, and McWane did not offer any additional discount, rebate or other consideration to Distributors in exchange for exclusivity. Indeed, McWane threatened to revoke accrued rebates under preexisting rebate agreements with Distributors who chose to violate the Policy.

Distributors viewed McWane's Full Support Program as a threat, and one that they took seriously because of the significant negative impact that losing access to McWane's Domestic Fittings would have on their business. *E.g.*, F. 1192 ("When I read the letter that [McWane] sent out . . . I interpreted that as a threat."); F. 1187 ("We were informed that they [McWane] were going to pull everything away from us, a threat."). Thus, Distributors complied with McWane's Full Support Program because they determined that they could not afford to switch to a competing Domestic Fittings supplier on an all-or-nothing basis – the risk to their business was simply too large. *See Dentsply*, 399 F.3d at 195 (holding similar "all-or-nothing" ultimatum to be exclusionary when it "created a strong economic incentive for dealers to reject competing lines in favor of Dentsply's teeth"). Accordingly, McWane's Full Support Program – even absent long term contracts – significantly foreclosed the Domestic Fittings market to potential competitors.

d. The Full Support Program foreclosed Star from a substantial share of the market

An exclusive dealing arrangement is not unlawful under the antitrust laws unless it is likely to "'foreclose competition in a substantial share of the line of commerce affected.'" *Microsoft*, 253 F.3d at 69 (quoting *Tampa Electric*, 365 U.S. at 327); *see Dentsply*, 399 F.3d at 191 ("The test is . . . whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."). Foreclosure occurs when, pursuant to the exclusive dealing, "'the opportunities for other traders to enter into or remain in that market [are] significantly limited.'" *Microsoft*, 253 F.3d at 69 (quoting *Tampa Electric*, 365 U.S. at 328).

As summarized above, McWane communicated to Distributors that its Full Support Program was an all-or-nothing deal and Distributors understood the policy as such. Because Star did not have a complete line of Fittings when it entered the Domestic Fittings market and Distributors could not risk being unable to supply all required Domestic Fittings and not being able to purchase them from McWane, Distributors were reluctant to purchase Domestic Fittings from Star. This scenario is similar to

the agreements found to unlawfully foreclose competition in *ZF Meritor*, where the evidence showed that due to defendant's "position as the dominant supplier, no OEM could satisfy customer demand without at least some [of defendant's] products, and therefore no OEM could afford to lose [defendant] as a supplier." *ZF Meritor*, 696 F.3d at 283.

For a Fittings supplier, Distributors are an important link in the supply chain and access to Distributors is essential for effectively reaching the End Users. Virtually all Fittings are sold through Distributors because they offer numerous advantages. F. 373-374. For example, Distributors maintain inventories of Fittings, which reduces the need for Fittings suppliers to have local warehouses and distribution facilities across the United States. F. 400, 402-404. Distributors lower Fitting suppliers' costs by handling billing and invoicing to End Users, and by assuming the credit risk from dealing with End Users. F. 407, 411. Distributors also provide one-stop shopping for End Users to purchase the entire bundle of waterworks products (pipe, valves, Fittings, hydrants, and accessories), which allows Fittings suppliers to specialize in one or more product lines and not be at a competitive disadvantage relative to a supplier that may have a broader waterworks products line. F. 400, 409. For these and other reasons, McWane agrees that Distributors are "critical to [its] success" as a Fittings supplier. F. 401. Distributors are likewise critical to Star's success. F. 402.

McWane's Full Support Program substantially foreclosed Star from this key distribution channel. Before McWane's September 22, 2009 announcement, Star had received Distributor requests for quotes for Domestic Fittings worth approximately $10 million. F. 1395. Those requests were from the two largest waterworks distributors in the country, HD Supply and Ferguson, important regional distributors, and from a variety of independent waterworks distributors. F. 1395. Almost immediately after McWane announced its Full Support Program, those Distributors withdrew their requests for quotes from Star and informed Star that they were no longer interested in purchasing Domestic Fittings from Star. F. 1382. Other Distributors who had intended to purchase some of their Domestic Fittings from Star decided not to submit requests for quotes to Star after McWane's announcement. F. 1382.

In *United States v. Microsoft Corp.*, the government challenged Microsoft's exclusive dealing agreements with the top Internet Access Providers (IAPs) in North America, accounting for a majority of all IAP subscribers. *Microsoft*, 253 F.3d at 70. Similar to Distributors in this case, IAPs were one of the most efficient channels for distributing browsing software. *Id.* at 70-71. The excluded rival, Netscape, was compelled to use more costly means for reaching consumers. *Id.* The evidence showed that Microsoft's exclusive dealing arrangements diminished Netscape's ability to obtain the critical mass of users needed to constrain Microsoft's operating system monopoly. *Id.* at 60, 70-71 ("Microsoft's deals with the IAPs clearly have a significant effect in preserving its monopoly; they help keep usage of [Netscape's] Navigator below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly."). Here, too, McWane's Full Support Program has a significant effect in preserving its monopoly by keeping Distributors' purchases of Domestic Fittings from Star below the critical level for Star to pose a real threat to McWane's monopoly.

It is undisputed that Star's Domestic Fittings sales represent a small portion of the relevant market, rising to less than 10% in 2011. F. 1042-1043. HD Supply and Ferguson are Star's largest and second largest customers, respectively, for overall Fittings. Star estimates that while it has greater than a [redacted]% share of HD Supply's and a [redacted]% share of Ferguson's non-Domestic Fittings business, it has less than a [redacted]% share of its largest customers' Domestic Fittings business. F. 1258, 1280; *see also* F. 1281.

Respondent argues that Star was not foreclosed, but competed very successfully, quickly grabbing 130 customers after entering the Domestic Fittings market. RB at 90, 93-94. In counting the number of customers to whom Star sold Domestic Fittings, Respondent's expert, Dr. Normann, counted each Distributor that may have purchased only a single Domestic Fitting from Star, or whose purchases fell into one of the limited exceptions to McWane's Full Support Program. F. 1142. The number of customers, without more information on the nature and extent of their purchases, is not entitled to substantial weight. *See Insignia*

Systems v. News Am. Mktg. In-Store, Inc., 661 F. Supp. 2d 1039, 1049, 1064-65 (D. Minn. 2009) (plaintiff produced sufficient evidence to survive summary judgment on claim that plaintiff had been foreclosed even though plaintiff sold its services to nearly 60 customers).

Importantly, "[t]he test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit." *Dentsply*, 399 F.3d at 191; *Microsoft*, 253 F.3d at 68-71 (condemning exclusive agreements because they prevented rivals from "pos[ing] a real threat to Microsoft's monopoly"); *see also Tampa Electric*, 365 U.S. at 328 (holding that exclusive dealing arrangement need not cover 100% of the buyer's needs, but only that it forecloses "a substantial share of the relevant market"). In other words, foreclosure does not mean that the rival was prevented from making any sales. *E.g.*, *ZF Meritor*, 696 F.3d at 265, 283-84 (exclusive dealing arrangements can be unlawful even where monopolist permitted customers to purchase up to 20 percent of their requirements from the rival); *Insignia Systems*, 661 F. Supp. 2d at 1064-65.

By threatening to cut off Distributors' access to McWane's Domestic Fittings, thereby materially contributing to Distributors' reluctance to purchase from Star, McWane's Full Support Program severely limited Star's ability to enter the Domestic Fittings market. Accordingly, Star was substantially foreclosed from competing in the Domestic Fittings market.

e. The Full Support Program impaired Star's ability to compete effectively

"In some cases, a dominant firm may be able to foreclose rival suppliers from a large enough portion of the market to deprive such rivals of the opportunity to achieve the minimum economies of scale necessary to compete." *ZF Meritor*, 696 F.3d at 271. *See Microsoft*, 253 F.3d at 70-71 (stating that defendant's exclusionary conduct kept Navigator "below the critical level necessary for Navigator or any other rival to pose a real threat to Microsoft's monopoly"); *Dentsply*, 399 F.3d at 190-91 (competitive harm established when defendant's excluded rivals failed to achieve "the critical level necessary for any rival to pose

a real [competitive] threat"). In *LePage's*, following the introduction of defendant's rebate program, the plaintiff lost a significant amount of sales and lost key large volume customers and as a result, LePage's manufacturing process became less efficient. *LePage's Inc. v. 3M*, 324 F.3d 141, 158-59, 161 (3d Cir. 2003).

As summarized above, Star estimated in 2009 that it needed between [redacted] million dollars in sales of Domestic Fittings to justify purchasing its own domestic foundry. F. 1400. Although Star had received Distributors' requests for quotes for Domestic Fittings worth approximately $10 million prior to McWane's announcement of the Full Support Program (F. 1395), Distributors subsequently withdrew their requests for quotes from Star. F. 1382. In each of 2010 and 2011, Star's Domestic Fittings sales were only [redacted] million dollars. F. 1396-1397. Thus, Star did not generate a sufficient volume of sales of Domestic Fittings to purchase and operate its own foundry. F. 1401. Instead, Star contracted with independent foundries, which was more costly and less efficient. F. 1409-1410. Star estimated that the cost of producing Domestic Fittings at its own foundry would be [redacted]% lower than the cost of contracting with independent foundries. F. 1419. Respondent agrees that Star is "a less efficient supplier of domestic Fittings than McWane because of its use of multiple jobber factories, rather than its own, dedicated foundry, like McWane." RB at 62. Star also estimated that if Star owned its own foundry that produced its Domestic Fittings, Star could have lowered its Domestic Fittings prices by [redacted]%. F. 1420.

Without sufficient sales volume, Star was unable to purchase its own foundry. Without its own foundry, Star's costs were higher, and therefore its prices were higher. In this respect also, the Full Support Program hindered Star's ability to compete effectively.[40]

f. Other issues affecting Star's ability to compete

[40] Similarly, Fittings supplier SIP concluded that McWane's Full Support Program would deter Distributors from purchasing Domestic Fittings from SIP and thus SIP would not be able to generate sufficient sales necessary to cover its estimated costs to enter the Domestic Fittings market. F. 1376-1377.

Respondent correctly asserts that Star was unable to capture more business for reasons entirely unrelated to McWane's Full Support Program. RB at 50. For example, Ferguson was reluctant to purchase Domestic Fittings from Star because Ferguson was concerned about Star's ability to produce a complete line of Domestic Fittings without having its own manufacturing facility. F. 1272. Ferguson was reluctant to purchase Domestic Fittings from Star also because it was concerned that Star was using jobber facilities with extra capacity to produce Domestic Fittings for them, Star would not disclose to Ferguson which foundries it was using, and Ferguson was concerned that any of these domestic foundries could abandon Star, leaving Star unable to supply Ferguson with Domestic Fittings. F. 1273. U.S. Pipe, too, had concerns about Star's ability to provide a full line of Domestic Fittings early in Star's domestic development process, and was concerned that Star would not commit to putting the tooling in place in advance of getting a requirement for volume. F. 1307-1308. In addition, WinWholesale had concerns in 2010 about Star's reliability as a Domestic Fittings supplier that were independent of McWane's Full Support Program. F. 1341. WinWholesale was concerned about whether Star had the capacity, about the quality of Star's Domestic Fittings, whether Star could ship the product, and whether the product would be consistent. F. 1341. Similarly, Illinois Meter had previously had a negative experience with Star's reliability as a supplier when Star first entered the joint restraint business, and was not willing to give Star any Domestic Fittings orders in early 2010 until Star had demonstrated it had sufficient inventory to meet Illinois Meter's needs. F. 1361.

Star acknowledged that it lost Domestic Fittings bids due to reasons other than McWane's Full Support Program. For example, an internal Star email acknowledged that its Domestic Fittings were excluded on an order by Groeniger because Star could not meet the delivery dates. F. 1326.

In its "domestic quote log," used to track won and lost Domestic Fittings bids, Star indicated that between September 22, 2009 and February 22, 2010, Star lost various Domestic Fittings jobs for which Star submitted a quote to a Distributor, but where the Distributor purchased from McWane or Sigma (pursuant to

the MDA, *infra)* rather than from Star. F. 1247. To the extent that comments provided by sales persons regarding the reasons for lost jobs are reliable, the domestic quote log fails to resolve the dispositive issue. Complaint Counsel points to entries in the "status/update" field of the domestic quote log on some of these jobs with the following comments: "HD mandate letter," "letter directing fitting purchases," "Tyler-Sigma announcement," "letter threatening to cut off if they use Star domestic," or "Ferguson will not buy domestic from Star currently." F. 1248 (HD Supply); F. 1264 (Ferguson). Respondent points to entries in the "status/update" field on other jobs with the following comments: "lost due to delivery times," "lost due to delivery requirement," or "lost, lead times were too long." F. 1249 (HD Supply); F. 1265 (Ferguson). Thus, the domestic quote log is inconclusive regarding the reasons Star did not gain a greater share of the Domestic Fittings market.

As of March 2010, although Star could supply most of the fast-moving items in a timely manner, it still had some problems supplying the very slow-moving items for which Star might not have developed a pattern yet. F. 1133. In addition, Star was still building inventory in March 2010. F. 1129. Although Star had set a target in November 2009 to develop a full line of Domestic Fittings equal to the stock offered by McWane, by June 2010 Star had come close to that goal, but there were still quite a few odd patterns that Star did not offer. F. 1130.

It cannot be disputed that Star was unable to capture more Domestic Fittings sales for reasons other than McWane's Full Support Program. However, such evidence does not preclude a finding that McWane's Full Support Program substantially foreclosed Star from the Domestic Fittings market. In *ZF Meritor*, the Third Circuit upheld a jury verdict finding exclusionary conduct notwithstanding evidence that the plaintiff's products required frequent repairs and had incurred millions of dollars in warranty claims during the relevant time period. *ZF Meritor*, 696 F.3d at 266. The plaintiff itself acknowledged "poor product quality image" as one reason for its failures; that it had lost deals due to "lack of product availability"; and that it had refused to lower prices despite requests from customers. *Id.* at 308-09, 334-35 (Greenberg, J., dissenting). Yet, the Third Circuit

focused on the defendant's efforts to exclude the plaintiff from the relevant market, and found that there was substantial foreclosure despite evidence that the plaintiff could have competed more effectively. *Id.* at 285-86. *See also LePage's*, 324 F.3d at 158-59 (upholding jury verdict notwithstanding evidence that plaintiff did not "try hard enough" to retain its large customer).

In *Dentsply*, the Third Circuit rejected the district court's evaluation of defendant's two main rivals' business practices as a cause of their failure to secure more of the market, finding it "not persuasive," and focused, instead on defendant's actions. *Dentsply*, 399 F.3d at 189. "The reality is that over a period of years, because of Dentsply's domination of dealers, direct sales have not been a practical alternative for most manufacturers. It has not been so much the competitors' less than enthusiastic efforts at competition that produced paltry results, as it is the blocking of access to the key dealers." *Id. See also Rome Ambulatory Surgical Ctr. v. Rome Mem'l Hosp.*, 349 F. Supp. 2d 389, 405 (N.D.N.Y. 2004) (denying defendant's motion for summary judgment on exclusive dealing claim despite evidence of plaintiff's incompetence because there was evidence that the defendant had "acted to foreclose competition altogether through improper exclusive dealing," rather than "continuing to compete for patients by simply lowering its rates or offering a better facility").

Here, as in *ZF Meritor* and *Dentsply*, evidence that Star lost orders due to delays in delivery and did not have that same depth and breadth of inventory as McWane does not preclude a finding of exclusionary conduct where McWane's efforts were indeed effective in reducing competitive opportunities for Star. *See Dentsply*, 399 F.3d at 189, 196 ("The apparent lack of aggressiveness by competitors is not a matter of apathy, but a reflection of the effectiveness of Dentsply's exclusionary policy.").

g. Proffered procompetitive justifications

The greater weight of the evidence shows that Respondent's Full Support Program foreclosed competition in such a substantial share of the Domestic Fittings market so as to adversely affect competition. As analyzed above, Respondent held significant

market power and was able to substantially foreclose Star from the Domestic Fittings market.

Before concluding that the Full Support Program is an unlawful exclusive dealing arrangement, the likely or actual anticompetitive effects must be considered in light of any procompetitive effects. *See ZF Meritor*, 696 F.3d at 288 (citing *Barr Labs.*, 978 F.2d at 111 (explaining that courts must "evaluate the restrictiveness and the economic usefulness of the challenged practice in relation to the business factors extant in the market")). "[E]ven if a company exerts monopoly power, it may defend its practices by establishing a business justification." *Dentsply*, 399 F.3d at 196. Once the government demonstrates harm to competition, the burden shifts to Respondent "to show that [the challenged conduct] promotes a sufficiently pro-competitive objective." *Id*. (citing *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993)).

Respondent asserts that the purpose of the Full Support Program was to generate sufficient volume to support its foundries. RB at 47, 59, 74, 107; F. 1175 (Mr. McCullough explaining that the purpose of the Full Support Program was to generate enough business to operate its foundries). In November 2008, faced with high inventory levels and insufficient demand for Domestic Fittings, McWane had closed its Tyler South plant. F. 477. *See also* F. 18, 478. Because its last remaining domestic foundry had high inventory levels and insufficient demand, McWane was concerned that if Star entered the Domestic Fittings market, McWane would not be able to generate enough business to operate its last foundry. F. 1145-1146. Another proffered purpose of McWane's Full Support Program was to persuade McWane's customers to support McWane's full line of Domestic Fittings. F. 1147, 1173. McWane was concerned that customers might "cherry pick" by purchasing the highest-selling, fastest-moving items (the "A" and "B" items) from Star, while purchasing from McWane only the slower-moving, infrequently-needed and higher-cost "C" and "D" items. F. 1147, 1175.

"[A] defendant's assertion that it acted in furtherance of its economic interests does not constitute the type of business

justification that is an acceptable defense to § 2 monopolization." *LePage's*, 324 F.3d at 163. As explained by one court of appeals:

> In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons . . . , while the desire to maintain a monopoly market share or thwart the entry of competitors would not.

Data Gen. Corp. v. Grumman Sys. Support Corp., 36 F.3d 1147, 1183 (1st Cir. 1994) (citing *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 483 (1992); *Aspen Skiing*, 472 U.S. at 608-11)).

McWane's desire to increase sales for its last remaining United States foundry may be a laudable business objective. It is not, however, a valid justification for exclusionary conduct. As explained by the D.C. Circuit in *Microsoft* when it rejected a similar defense, the desire to increase sales "is not an unlawful end, but neither is it a procompetitive justification." 253 F.3d at 71-72 (characterizing the objective as a "competitively neutral goal"). Respondent has proffered no explanation as to how its Full Support Program benefits consumers rather than merely itself. Furthermore, as explained below, there is considerable evidence in the record that McWane implemented the Full Support Program in order to thwart Star from entering the Domestic Fittings market. "Maintaining a monopoly is not the type of valid business reason that will excuse exclusionary conduct." *LePage's*, 324 F.3d at 164.

Because there is no procompetitive justification that outweighs the harm to competition, Respondent's Full Support Program constitutes unlawful exclusionary conduct. Accordingly, Complaint Counsel has established the second step in a monopolization claim: willful maintenance of Respondent's monopoly power.

4. Intent

"The Supreme Court has made clear that intent is relevant to proving monopolization, *Aspen Skiing*, 472 U.S. at 602, and

attempt to monopolize, *Lorain Journal*, 342 U.S. at 154-55." *LePage's*, 324 F.3d at 163. "[K]nowledge of intent may help the court to interpret facts and to predict consequences." *Chicago Bd. of Trade*, 246 U.S. at 238. *Cf Aspen Skiing*, 472 U.S. at 602 ("[E]vidence of intent is merely relevant to the question whether the challenged conduct is fairly characterized as 'exclusionary' or 'anticompetitive' . . ."); *Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct."). Thus, the evidence discussed below, which places McWane's decision to implement its Full Support Program in context, is considered in evaluating whether Respondent's conduct is fairly characterized as exclusionary.

The evidence surrounding McWane's decision to issue the Full Support Program is also evidence of specific intent to monopolize. Whereas for monopolization "the mere intent to do the act" is sufficient, *United States v. Aluminum Co. of America*, 148 F.2d 416, 431-32 (2d Cir. 1945), attempted monopolization requires proof that the defendant had a "specific intent to destroy competition or build monopoly." *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953); *accord Spectrum Sports*, 506 U.S. at 456. "[S]pecific intent may be established not only by direct evidence of unlawful design, but by circumstantial evidence, principally of illegal conduct." *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981) (citations omitted).

McWane recognized that if Star entered the Domestic Fittings market, prices for Domestic Fittings would decrease. *E.g.*, F. 1149, 1151-1153. The June 24, 2009 email exchanges between Mr. Walton, Mr. McCullough, and Mr. Tatman, set forth in F. 1148-1150 and summarized above, Section III.G.3.a.(i), clearly express McWane's concern that if Star were to enter the Domestic Fittings market, prices of Domestic Fittings would be driven down, which prompted McWane to "plot a comprehensive strategy going forward." F. 1149. *See also* F. 1158 (among the series of assumptions in Mr. Tatman's June 29, 2009 PowerPoint Presentation of topics for discussion were, Star might "drive profitability out of our business"). In the narrative for McWane's 2010 budget, Mr. Tatman listed the biggest risk factor for

McWane's Fittings business in 2010 as the "[e]rosion of domestic pricing if Star emerges as a legitimate competitor." F. 1151.

McWane's Mr. Napoli recognized that if Star entered the market, Distributors would seek lower prices from McWane:

> We may not be losing business now but I am concerned about the future. Those [Distributors] not aligned with us or Sigma will be aggressive with Star backing them against our people… When that happens our distributors will continually pressure us to 'do something' (lower prices). If [Star] stay[s] in business, we will always see downward pressure in the future.

F. 1152.

Internal McWane documents also show that Respondent implemented the Full Support Program with the specific intent of preventing Star from entering and lowering prices in the Domestic Fittings market. As summarized above, McWane drafted and implemented its Full Support Program in direct response to Star's entry and because it wanted to "block" Star from entering the Domestic Fittings market. *E.g.*, F. 1155, 1580 (June 29, 2009 PowerPoint Presentation wherein Mr. Tatman considered how to "block Star" from entering the Domestic Fittings market). *See also* F. 1148 (internal McWane email by Mr. McCullough, writing: "Just because we share our blended fittings does not require us to share our domestic.").

That the intent of the Full Support Program was to discourage Distributors from purchasing Domestic Fittings from Star is quite clear in an internal email that Mr. Tatman sent on August 24, 2009 to Mr. Dennis Charko, head of Clow Water (a subsidiary of McWane), which sells a limited number of Fittings, regarding "McWane Domestic Fittings 2010 brand/market protection." The email stated in part:

> Star has announced a Domestic line of waterworks fittings and restraints. . . .
>
> To protect our domestic brands and market position we are going to adopt a distributor exclusivity program for 2010

> wherein we won't provide domestic product to distributors who are not fully supporting our domestic product lines.

F. 1167. McWane's National Sales Manager, Mr. Jansen, expressed this same intent in a November 3, 2009 email to his sales representatives regarding Domestic Fittings, stating: "We don't want the market tumbling and if we keep everyone on board we shouldn't have to drop prices." F. 1153 (Mr. Jansen explained in his deposition that "market tumbling" means prices falling; and "keep everyone on board" refers to Distributors being loyal to McWane under the Full Support Program). *See also* F. 1154 (Mr. Jansen email to sale representatives, writing, "We need to make sure we are getting into the smaller [Distributor] players up there and keep them from Star. That's how a cancer starts, is by letting them get in with one, two, then three, and it crumbles from there.").

McWane's goal to maintain high prices by preventing Star from becoming a legitimate competitor is not a procompetitive reaction akin to pursuing greater sales by increasing quality and service or lowering price. Instead, McWane's goal is a "clear expression[] of a plan to maintain monopolistic power." *See Dentsply*, 399 F.3d at 190. When viewed in its entirety, the greater weight of the evidence demonstrates that McWane had a specific intent to control prices and eliminate competition.

5. Dangerous probability of achieving monopoly power

The last element of an attempted monopolization claim, "dangerous probability of achieving monopoly power," *Spectrum Sports*, 506 U.S. at 456, although listed as a separate and independent element of attempted monopolization, can be inferred from evidence indicating the existence of the first two elements – anticompetitive conduct and specific intent. *William Inglis*, 668 F.2d at 1029. In determining whether there is a dangerous probability of monopolization, courts consider "the relevant market and the defendant's ability to lessen or destroy competition in that market." *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1043 (9th Cir. 2005). As established above, Respondent had the ability to lessen or destroy competition in the Domestic Fittings market. In

addition, Respondent engaged in anticompetitive conduct with specific intent. Thus, the dangerous probability of achieving monopoly power element has been met.

6. Conclusion

Having met its burden of proof on each of the elements, Complaint Counsel has proven Count Six, Monopolization and Count Seven, Attempted Monopolization.

H. Count Four: Alleged Restraint of Trade in the Domestic Fittings Market

1. Overview

Count Four of the Complaint alleges that McWane and Sigma entered into a Master Distribution Agreement, dated September 17, 2009 ("MDA"), that unreasonably restrains trade and constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. Complaint ¶¶ 49, 67. The Complaint alleges that McWane perceived Sigma as preparing to enter the Domestic Fittings market and sought to eliminate the risk of competition from Sigma by inducing Sigma to become a distributor of McWane's Domestic Fittings, rather than a competitor in that market. Complaint ¶ 48.

Complaint Counsel argues that Count Four of the Complaint charges McWane with violating Section 1 of the Sherman Act by entering the MDA with Sigma. CCB at 180. Specifically, according to Complaint Counsel, the MDA, by its terms and by the parties' understanding, barred Sigma from independently entering the Domestic Fittings market in competition with McWane. CCB at 181. The Complaint does not allege that McWane excluded Sigma, but that McWane and Sigma agreed that Sigma would cede the Domestic Fittings market to McWane. CCRB at 93.

Complaint Counsel asserts that "Sigma was first motivated to enter the Domestic Fittings market after Congress passed ARRA." CCB at 185. Complaint Counsel characterizes Sigma as a potential entrant in the Domestic Fittings market and thus asserts that the MDA is properly characterized as a horizontal agreement

among potential competitors, and not as a simple vertical distribution agreement. CCB at 181. Complaint Counsel argues that because Sigma was a potential competitor and the MDA eliminated Sigma as an independent entrant, the MDA is a naked market allocation agreement among potential competitors not to compete with each other, and is *per se* illegal. CCB at 182. Complaint Counsel argues, alternatively, that because the parties have market power and there are no procompetitive efficiencies, the MDA can also be condemned under a more plenary market analysis pursuant to the rule of reason. CCB at 182.

Respondent asserts that McWane did not exclude Sigma from the Domestic Fittings market; Sigma did. RB at 102. Specifically, Respondent asserts that Complaint Counsel must prove, and cannot prove, that, as of September 2009 when the MDA was executed, Sigma intended to expand into the Domestic Fittings market and had taken the necessary concrete steps to do so. RB at 102. Respondent further asserts that Sigma was in a "grave" financial situation and had not taken any concrete steps to manufacture its own Domestic Fittings by September 2009. RB at 102. Accordingly, Respondent asserts that because the MDA was the best, quickest, and only way for Sigma to serve its customers who desired Domestic Fittings, Respondent is entitled to judgment in its favor on Count Four of the Complaint. RB at 104.

2. Elements of restraint of trade

A Section 1 violation requires (1) the existence of a contract, combination, or conspiracy among two or more separate entities (concerted action), that (2) unreasonably restrains trade. *Realcomp*, 635 F.3d at 824; *Law*, 134 F.3d at 1016.

On September 17, 2009, McWane and Sigma entered into a Master Distribution Agreement through which Sigma would resell McWane's Domestic Fittings. They agreed as follows:

> a. Appointment: McWane hereby appoints Sigma, and Sigma hereby accepts appointment, as an authorized OEM Distributor of McWane Domestic Fittings upon the terms and conditions of this Agreement.

b. Exclusivity: Sigma agrees that McWane shall be Sigma's sole and exclusive source for Domestic Fittings, with the exception that:

(1) Sigma may purchase Domestic Fittings in the 30"- 48" diameter size range from other manufacturers so long as Sigma is the sole owner of the patterns for such Domestic Fittings, but only for resale to other domestic foundry manufacturers of ductile iron pipe and fittings;

(2) If McWane does not own patterns for a particular Domestic Fitting, Sigma may purchase that Domestic Fitting from an alternative source, but only until such time as McWane acquires the pattern for that Domestic Fitting; and

(3) Sigma may purchase Domestic Fittings from alternative sources on an order by order basis only if McWane cannot deliver McWane Domestic Fittings to the designated delivery point by the time specified in the order or within 30 days after the order has been received and processed by McWane, whichever occurs later.

F. 1540. The signed MDA between McWane and Sigma meets the concerted action requirement of Section 1. *See, e.g.*, *United States v. Delta Dental*, 943 F. Supp. 172, 175 (D.R.I. 1996) ("[C]oncerted action may amply be demonstrated by an express agreement."). Therefore, the remaining Section 1 inquiry is whether the MDA unreasonably restrains trade.

Under Section 1 of the Sherman Act, agreements among actual or potential competitors at the same level of the market structure (*i.e.*, horizontal competitors) to allocate markets are *per se* unlawful. *See, e.g.*, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49 (1990) (per curiam); *United States v. Topco Assocs.*, 405 U.S. 596, 608-09 & n.9, 612 (1972); *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58 n.28 (1977). "[A]greements not to compete among potential competitors are also illegal per se." *Transource Int'l, Inc. v. Trinity Indus.*, 725 F.2d 274, 280 (5th Cir. 1984) (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973)); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979).

Therefore, the preliminary inquiry focuses on "whether or not each firm alleged to have been a party to [the agreement] was an actual or potential competitor in that market." *United States v. Sargent Electric Co.*, 785 F.2d 1123, 1127 (3d Cir. 1986); *Bombardier*, 605 F.2d at 9 (stating that the first inquiry is whether the parties to the agreement "can be deemed to have been operating at the same horizontal level in the market, thus triggering the per se rule should [market allocation] be found"). If Sigma was not a potential competitor, the MDA does not "constitute a per se violation of section 1 of the Sherman Act as a horizontal restraint." *Transource Int'l Inc.*, 725 F.2d at 280. Thus, if Sigma was not a potential competitor, the MDA must, instead, be analyzed under the rule of reason. *Transource Int'l Inc.*, 725 F.2d at 280; *Bombardier*, 605 F.2d at 9.

To prove that Sigma was a potential competitor, Complaint Counsel must show that Sigma "had the necessary desire, intent, and capability to enter the market at [the manufacturing] level." *Bombardier*, 605 F.2d at 9. Sigma's desire and intent are addressed first. Sigma's capability is addressed second.

3. Whether Sigma was a potential competitor

a. Desire and intent

After the enactment of ARRA in February 2009, with its allocation of $6 billion to shovel-ready water infrastructure projects and requirement that such projects use only Domestic Fittings (F. 524-526), Sigma believed that it needed to offer Domestic Fittings. F. 1421. Sigma considered two potential avenues for entering the Domestic Fittings market: (1) purchasing "private label" Domestic Fittings from McWane (*i.e.*, Fittings manufactured by McWane for Sigma and branded as Sigma); or (2) producing Domestic Fittings using the "virtual manufacturing" model that it used for imported Fittings (*i.e.*, contracting with independent, domestic foundries). F. 1423.

In evaluating both of these options, Sigma recognized that ARRA was a short term stimulus program and that Sigma needed to be able to enter the Domestic Fittings market quickly. F. 1422 ("It was intended as a shovel-ready stimulus. So there was a lot

of emphasis on now."). Notably, as discussed above, with the exception of Star, every current and former Domestic Fittings manufacturer, including Griffin Pipe, U.S. Pipe, and Backman Foundry, concluded that it was not worthwhile to expand or return to Domestic Fittings production. F. 1039. *See also* F. 1037-1038.

Sigma recognized that it had an immediate need to be able to offer its customers Domestic Fittings and thus desired to enter the market. *E.g.*, F. 1421. For example, in a May 4, 2009 memorandum to the Sigma Board, Mr. Pais described the ARRA Buy American provision and declared that "it behooves SIGMA to review the feasibility of producing a line of 'domestic' Fittings, to meet this growing need, in order to reassure our customer base and retain their loyalty and their business at the current levels." F. 1448.

In the first half of 2009, Sigma approached McWane about the possibility of McWane supplying Sigma with "private label" Domestic Fittings that Sigma could resell. F. 1425. On June 5, 2009, McWane made its initial offer to sell Domestic Fittings to Sigma at five percent off McWane's published prices. F. 1443. Sigma was not satisfied with McWane's June 5, 2009 offer, as it would not allow Sigma enough profit margin to cover operating costs, and thus Sigma did not accept McWane's June 5, 2009 offer. F. 1444-1445.

In an update by Mr. Pais to Sigma's Board after Sigma had rejected McWane's June 5, 2009 offer, Mr. Pais wrote: "We now need to go all out and implement a SDP [Sigma Domestic Production] plan - replicating SIGMA's 'virtual manufacturing' model working with a collection of domestic foundries who have ample capacity, to produce the vast range of Fittings, just as we do thru a collection of facilities overseas." F. 1455; *see also* F. 1421 (Sigma believed demand for Domestic Fittings would increase as a result of ARRA and that Sigma therefore "needed to explore the option of being in a position to produce fittings for oursel[ves].").

Thus, the evidence amply shows that Sigma had the desire and had expressed an intent to enter the Domestic Fittings market.

b. Capability

Under the case law advanced by Complaint Counsel, to show that Sigma would "probably have entered the . . . market independently, . . . it must be shown that [Sigma] had 'available feasible means' for entering the relevant market." *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 977 (8th Cir. 1981); *Bombardier*, 605 F.2d at 9 (requiring "intent and ability"). One district court case, in evaluating whether an agreement not to compete was *per se* illegal as between two potential competitors, explained:

Although courts have not defined what a "potential competitor" is for the purpose of determining whether there has been a violation of the Sherman Act, courts have looked to the following factors to determine whether a plaintiff is a potential competitor such that it has standing to sue under the Clayton Act: "1) the background and experience of plaintiff in the prospective business; 2) affirmative acts of plaintiff with the object of entering the proposed business; 3) the ability of plaintiff to finance operation of the business and the purchase of necessary equipment and facilities; and 4) the formation of contracts by plaintiff."

Conergy AG v. MEMC Elec. Materials, Inc., 651 F. Supp. 2d 51, 57-58 (S.D.N.Y. 2009) (citation omitted). These four standards are used herein to evaluate whether Sigma was logistically and financially "capable" of entering the Domestic Fittings market.

i. Sigma's background and experience in the prospective business

First, the evidence of the "background and experience of [Sigma] in the prospective business" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that Sigma has extensive experience in manufacturing and selling imported Fittings, as it has imported and sold Fittings in the United States since 1985, with net sales approaching 200 million dollars in 2009. F. 51, 53. Using a "virtual manufacturing" model, Sigma is responsible for the technical know-how that goes into producing its Fittings and handles administration, engineering, drawings, inspection, testing, quality control, and transportation of the Fittings it imports. F. 57. Sigma has approximately 23 territory sales managers across the

United States and approximately 25 inside customer service personnel supporting the sales force. F. 61. Sigma had personnel who could supervise a virtual manufacturing operation for Domestic Fittings, such as Mr. Stuart Box, who had extensive experience in U.S. foundry work and fittings manufacturing before joining Sigma, and Mr. Gopi Ramanathan, who also had extensive foundry experience. F. 1451.

At the same time that it was considering entering production of Domestic Fittings in 2009, Sigma attempted to become a supplier of domestic pipe restraints, a product distinct from Fittings. F. 1504. Domestic production of pipe restraints is a much simpler, smaller and less expensive venture with a much smaller product range than Domestic Fittings and thus was an easier market for Sigma to try to enter. F. 1506. Mr. Rybacki described Sigma's domestic restraints project as "a disaster for us because we were very unsuccessful at it" and felt that it was inadvisable for Sigma to attempt to become a Domestic Fittings supplier in 2009, because "we proved it with the domestic restraint [effort] that we weren't real good at it." F. 1507-1508.

ii. Sigma's affirmative acts to enter the Domestic Fittings market

Second, the evidence of the "affirmative acts of [Sigma] with the object of entering the proposed business" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that in early 2009, Sigma pursued the virtual manufacturing option for producing Domestic Fittings by forming a Sigma Domestic Production ("SDP") plan and assembling a team of executives responsible for investigating and exploring the possibility of Sigma producing Fittings domestically. F. 1446. The SDP team investigated the possibility of Sigma entering the Domestic Fittings market by producing fittings through independent, domestic foundries and evaluated the costs, foundry capabilities, and time it would take for Sigma to produce Domestic Fittings in response to ARRA. F. 1447. Sigma spent between $50,000 and $75,000 investigating domestic production options. F. 1449. Sigma's SDP team considered using factories and independent foundries to produce Domestic Fittings based on Sigma's drawings and tooling, similar to Sigma's existing methods of producing Fittings overseas. F. 1452. Sigma contemplated doing the finishing, or lining and painting, of its

Domestic Fittings itself. F. 1452. On or about June 5, 2009, Mr. Box summarized the results of SDP planning meetings held in June 2009, which included detailed action plans for identification of top Fittings, foundries, molding machines, cost modeling, testing of lost foam production technology, and visits to potential foundry partners. F. 1454.

Sigma believed that it needed to be able to offer around 730 different types of Domestic Fittings and that it needed a minimum of 450 core patterns to produce those 730 types of Fittings. F. 1468. In June 2009, Sigma's SDP team was working on obtaining patterns for producing Domestic Fittings and had placed orders for foam patterns and other equipment to be used in Domestic Fittings production. F. 1457.

By August 2009, Sigma had visited at least five different domestic foundries as part of its investigation into the production of Domestic Fittings and had purchased two large flasks for large Domestic Fittings production trials. F. 1459-1460. In addition, Sigma had produced two sample Domestic Fittings at the Eureka Foundry in Tennessee, using patterns supplied by Metalfit (F. 1461 (describing the Fittings as trial runs, not commercially ready)); and had received a quote from Metalfit for the production of tooling. F. 1464.

iii. Sigma's ability to finance entry into the Domestic Fittings market

Third, the evidence of the "the ability of [Sigma] to finance operation of the business and the purchase of necessary equipment and facilities" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that throughout 2009, Sigma was in a "precarious position overall in financial terms." F. 1483. Sigma had had a loss of [redacted] million dollars in 2008. F. 1482. In 2009, Sigma's sales were down [redacted] million dollars and its EBITDA was [redacted]. F. 1485. As a result of the "very, very difficult" financial environment it faced in 2009, Sigma was forced to lay off employees, cut salaries and benefits for employees who remained, and cut numerous other expenses. F. 1487.

Sigma had a very large amount of debt at the end of 2008, and even breached some of its bank covenants in 2009. F. 1488. In 2009, a significant portion of Sigma's substantial debt was unsecured and carried high interest rates. F. 1489. Sigma's long-term debt was approximately [redacted] million dollars at the end of 2008, which it reduced to approximately [redacted] million dollars at the end of 2009, mostly as a by-product of reduction of inventories. F. 1490-1491. In June 2009, Mr. Pais issued an update to Sigma's Board of Directors outlining his "SOS" plan to save Sigma. F. 1496. In that update, Mr. Pais noted the decline of about [redacted] percent in its earnings level in 2008; that Sigma stood to lose another [redacted] percent in 2009; that Sigma will barely be able to meet its second quarter 2009 covenants; and that the second quarter 2009 results were "marginal at best," which "may cause a lot of concern to all, especially the banks, as we would be unable to assure them of the future performance trends." F. 1496.

Sigma's estimates for its costs to enter the Domestic Fittings market were between about five and ten million dollars. F. 1480. These estimates are similar to those of both SIP (a supplier of imported Fittings) and EBAA (a domestic foundry). F. 1062, 1070, 1373. Each of these companies, when considering expanding into Domestic Fittings production, estimated that the required expansion would cost up to ten million dollars and take two years to realize. F. 1062, 1378.

Capital expenditure limits imposed by Sigma's lenders in 2009 were extremely low. F. 1499. The Frontenac Group, a private equity firm that purchased a 60% ownership interest in Sigma in 2007, said at Sigma's July 2009 Board meeting, that Sigma did not have the capability to invest in Domestic Fittings production and that Frontenac would not provide the finances for Sigma's Domestic Production Plan. F. 1501. Sigma's lenders never authorized Sigma to invest in becoming a Domestic Fittings supplier, and Sigma lacked sufficient funds to invest in such an operation on its own. F. 1503.

Complaint Counsel presented contrary evidence showing that Sigma did, in fact, have the financial capability to invest in Domestic Fittings production. For example, on July 27, 2009, following the July 15, 2009 Sigma Board meeting, Walter

Florence, a Frontenac managing director and a member of Sigma's Board of Directors, sent an email to Sigma management regarding strategy for upcoming lender meetings. F. 1502. In this email, he noted that Sigma's liquidity was fine, that it had recently received an injection of capital from investors and shareholders, and that these investors and shareholders were prepared to invest 7.5 million dollars more to fund the SDP program and strategic business additions, which will enhance credit quality and help Sigma grow and build equity value. F. 1502. Regardless of whether Sigma had the financial capability to produce Domestic Fittings by contracting with independent, domestic foundries, it did not have the time required to do so, as addressed below.

iv. Sigma's steps to form contracts

Fourth, the evidence on "the formation of contracts by [Sigma]" (*Conergy*, 651 F. Supp. 2d at 57-58) shows that as of mid-2009, Sigma had no domestic foundries, no contracts with existing domestic foundries to produce Fittings in the United States, no core boxes, no machining facilities, and no finishing facilities or contracts for coating, painting, and lining for Domestic Fittings. F. 1465, 1471-1472. Although Sigma believed it needed a minimum of 450 core patterns for Domestic Fittings production, in September 2009, Sigma had very few of the patterns it needed for making Fittings in the United States and, as of September 2009, Sigma did not have any contracts with any pattern shops to build the patterns it would need to produce Fittings in the United States. F. 1468-1471.

c. Summary

It would have taken Sigma approximately 6 to 8 months to produce even one Domestic Fitting and lead time of at least 18 to 24 months to begin production of a full range of Fittings. F. 1476. If Sigma had started producing Domestic Fittings in September of 2009, Sigma could not have sold its first Domestic Fittings until between February and May 2010. F. 1475. Sigma knew that ARRA was a short term stimulus program. F. 1422 ("[R]ightly speaking, we should have had that [domestic] capability on day one for us to have any capacity to supply the projects. So we were already behind the eight ball on day one, because [ARRA]

was just a ball from the blue."). Indeed, according to the EPA publication titled, "Implementation of the American Recovery and Reinvestment Act of 2009," all ARRA funded projects were to be under contract by February of 2010. F. 1032.

In a September 9, 2009 report to the Sigma Board, Mr. Pais explained Sigma's ability to enter the Domestic Fittings market as follows:

> For Fittings, the range of sizes and complexities of the line items required even at a certain select level is rather huge and along with the additional processing required for machining, coating and packing etc. the entire project was found to be too overwhelming and cumbersome, calling for a sizable Capital Expenditure in the range of $6M to $8M as per the initial estimates. The likely sales volume we could garner from our [Buy American] capability was uncertain at best and far less than what we had originally feared. But most importantly, in the end, the time it would have taken for us to come on line and our inability to service our customers with the [Buy American] requirements over the next 12 months and of course the huge [capital expenditure], made us wish for an alternate viable option and as such, we responded when McWane too revived our dialog to accommodate us as a Master Distributor with better terms.

F. 1474.

Weighing the evidence presented at trial, Complaint Counsel has not met its burden of showing that Sigma "had the necessary desire, intent, and capability," *Bombardier*, 605 F.2d at 9, to enter the Domestic Fittings market. Accordingly, Complaint Counsel has not shown that Sigma was a potential competitor.

4. Whether the MDA unreasonably restrained trade

a. Legal standards governing rule of reason inquiries

Because Sigma was not a potential competitor, the MDA must be analyzed under the rule of reason. *Transource Int'l Inc.*, 725 F.2d at 280; *Bombardier*, 605 F.2d at 9. "When restraints are not per se unlawful, and their net impact on competition not obvious,

the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market." *Realcomp*, 635 F.3d at 825 (citing *Ind. Fed'n*, 476 U.S. at 461). "A full rule-of-reason inquiry 'may extend to a "plenary market examination,"' which may include the analysis of 'the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed'" 'as well as the availability of reasonable, less restrictive alternatives.'" *Id.* at 825 (citations omitted).

Complaint Counsel bears the initial burden of demonstrating that the MDA produced adverse, anticompetitive effects within the Domestic Fittings market or sufficient evidence of market power. *See Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065 (11th Cir. 2005) (citing *Ind. Fed'n*, 476 U.S. at 460-61). If the MDA is "shown to have an anticompetitive effect," or if McWane "is shown to have market power and to have adopted policies *likely* to have an anticompetitive effect, then the burden shifts to [McWane] to provide procompetitive justifications for the policies." *Realcomp*, 635 F.3d at 825 (citations omitted).

A "quick-look," or abbreviated, rule of reason analysis applies to those arrangements that "an observer with even a rudimentary understanding of economics could conclude . . . would have an anticompetitive effect on customers and markets." *California Dental Ass'n*, 526 U.S. at 770. In such cases, the nature of the restraint is such that the likelihood of anticompetitive effects "can easily be ascertained" or is "comparably obvious" and no elaborate or detailed market analysis is necessary. *See id.* at 769-71. If the nature of the restraint is deemed facially anticompetitive pursuant to this "quick-look," "the proponent of the restraint must provide 'some competitive justification' for it, 'even in the absence of a detailed market analysis' showing market power or market effects." *Realcomp*, 635 F.3d at 825 (quoting *Cal. Dental Ass'n*, 526 U.S. at 769-71). In all cases, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA*, 468 U.S. at 104.

b. Nature of the restraint

In Count Four, Complaint Counsel charges that the MDA is an unreasonable restraint of trade because, through the MDA, McWane and Sigma agreed that Sigma would abandon its efforts to enter the Domestic Fittings market independent of McWane, and instead distribute McWane's Domestic Fittings under restrictive terms. CCB at 180. Complaint Counsel's charge that McWane and Sigma agreed through the MDA to implement and enforce McWane's Full Support Policy with the specific intent of eliminating competition from Star is evaluated separately in the analysis of Count Five, *infra* Section III.I.

As determined in Section III.G.2.b. *supra*, McWane has market power in the Domestic Fittings market. The evidence here shows that, through the MDA, Sigma agreed to abandon its efforts to produce its own Domestic Fittings. F. 1540, 1543-1544. The evidence further shows that Sigma did, in fact, abandon such efforts. F. 1545. As Mr. Rona, Sigma's OEM business manager, explained, "once we had the MDA, we were satisfied we had a source of domestic fittings for ARRA, period." F. 1545.

Complaint Counsel has presented evidence supporting its position that Sigma would have entered the Domestic Fittings market, but for Sigma's decision to enter the MDA. Complaint Counsel points out that Mr. Pais testified that, absent an agreement with McWane, Sigma would have entered the domestic market. CX 2527 (Pais, IHT at 179-180) ("[I]f [McWane] stuck with that initial offer [of a 5% discount] . . . then we certainly would have gone another – to Plan B, which is our [domestic] production."). However, Mr. Pais also testified that, as of September 2009, Sigma did not have a viable plan for entering the Domestic Fittings market and that Sigma had only "some wishful thinking type of scenarios that we could have struggled through." Pais, Tr. 1799, 1801.

Because the testimony of Mr. Pais is contradictory on this point, the contemporary documents of Sigma and the actions taken by Sigma in furtherance of its plan to enter the Domestic Fittings market are relied upon. Contemporaneous documents addressing a firm's subjective intent to enter are "[t]he best evidence that a firm is an actual potential entrant." *In re B.A.T.*

Industries, 1984 FTC LEXIS 4, *154 (Dec. 17, 1984). As analyzed above, the contemporaneous evidence shows that, as of September 2009, Sigma could not have produced its own Domestic Fittings in time to serve its customers' needs. F. 1470-1477. Consistent with this evidence is Mr. Pais' testimony that, "we had finally found a recourse by going to our competitor because we thought that was the only option that was viable because the service of the customer was imminent. . . . There was no other option that we could -- this is not a premeditated three or four-year plan that we had to enter a new product." F. 1582. *See also* F. 1583 (it was critical for Sigma to offer Domestic Fittings to its customers and "entering into the master distribution agreement with McWane was a solution to the problem we had"). Thus, the evidence shows that the MDA was Sigma's only viable option for supplying Domestic Fittings to Sigma's customers during ARRA's short time window.

This finding, however, does not end the inquiry into whether the MDA was an unreasonable restraint of trade. When a rule of reason inquiry extends to a "plenary market examination," the history of the restraint and the reasons why it was imposed and the availability of reasonable, less restrictive alternatives are also evaluated. *Realcomp*, 635 F.3d at 825. Therefore, the history and the reasons are analyzed below.

i. History of the restraint and reasons why it was imposed

An analysis of "the history of the restraint, and the reasons why it was imposed" (*Realcomp*, 635 F.3d at 825) shows that McWane entered into the MDA because it feared entry by Sigma. Although the evidence shows that Sigma could not have entered the Domestic Fittings market in time to take advantage of the increased demand for Domestic Fittings through ARRA, the evidence also shows that after meeting with Mr. Pais in April 2009, Mr. McCullough believed that Sigma had the ability to enter into domestic production of Fittings, had access to the needed capital, and "also had the contacts and the talent[, as] they've been importing for a very long time." F. 1427. In addition, McWane considered the likelihood of Sigma producing its own Domestic Fittings as part of McWane's internal

discussions regarding whether to sell Domestic Fittings to Sigma. *E.g.*, F. 1439-1440, 1442.

Mr. Tatman, in developing topics for discussion as McWane considered whether to sell Domestic Fittings to Sigma, noted that one reason for McWane to sell Domestic Fittings to Sigma was to "eliminate the probability" that Sigma would secure another domestic source option. F. 1439. A May 26, 2009 memorandum by Mr. Tatman contained the following discussion points in conclusion:

> McWane's decision to sell Domestic Fittings to Sigma "probably comes down to two factors:"
>
> 1. How legitimate of a risk is there with a competitor successfully introducing a Domestic product line?
>
> 2. Do we believe that in the bigger picture, supporting competitors with Domestic product would result in a healthier industry on the non-Domestic side of the business?

F. 1440. *See also* F. 1518 (Mr. Tatman noting: "If [Sigma is] truly committed to make the investment level required to be a viable competitor regardless of our actions, then producing for [Sigma] is probably of greater financial benefit to our business than having them source elsewhere.").

Mr. McCullough expressed his view of McWane's determination to sell Domestic Fittings to Sigma as follows:

> [U]ltimately [McWane's] decision [of whether to sell Domestic Fittings to SIGMA] was SIGMA has the ability to get into domestic made manufacturing of waterworks fittings, just as Star did. If we had the choice between [they're] not being in it and us selling them, or them being in it and us not selling them, that ultimately, we made the decision it's under our best interest to sell them.

F. 1442.

McWane viewed Sigma's ability to produce Domestic Fittings and enter the market to be more likely after Star announced its planned entry at the June 15, 2009 AWWA conference. F. 1511. In evaluating whether to enter the MDA with Sigma, Mr. Tatman believed that Sigma was in a "much better position" to develop its own Domestic Fittings capability than Star, in part because of Sigma's existing OEM relationships (with ACIPCO and U.S. Pipe) and Sigma's access to financial backing. F. 1512.

ii. Availability of reasonable, less restrictive alternatives

Conducting a "plenary market examination" also requires an analysis of "the availability of reasonable, less restrictive alternatives." *Realcomp*, 635 F.3d at 825. Although there were no other alternatives to the MDA for Sigma to enter the Domestic Fittings market in a timely manner, the MDA contains restrictive terms that were not necessary for McWane to sell Domestic Fittings to Sigma. The restrictive terms, as they relate to provisions intended to exclude Star from the market, are the subject of Count Five of the Complaint and discussed *infra* Section III.I. The restrictive terms, as they relate to the agreement between McWane and Sigma through which Sigma ceded the Domestic Fittings market to McWane, are evident in two provisions of the MDA relating to: (1) sources from whom Sigma could purchase Domestic Fittings, and (2) prices Sigma could charge under the MDA.

Under the MDA, "Sigma agree[d] that McWane shall be Sigma's sole and exclusive source for Domestic Fittings," with narrow, limited exceptions. F. 1540. Sigma further agreed to, and did, stop its efforts to produce its own Domestic Fittings. F. 1543-1546. Instead, Sigma became an exclusive distributor of McWane branded Domestic Fittings.[41] The effect of this provision was to preclude Sigma from purchasing Domestic Fittings from Star and to prevent Sigma from developing the capability to produce Domestic Fittings on its own in competition

[41] Although Sigma had originally approached McWane seeking to purchase Fittings manufactured by McWane for Sigma and branded as Sigma, under the MDA, Sigma agreed to become an OEM distributor of Domestic Fittings branded as McWane fittings. F. 1425, 1540.

with McWane. Accordingly, this provision of the MDA has likely anticompetitive effects.

In addition, the MDA contains restrictive terms as they relate to price. Specifically, the MDA provides:

> Pricing. McWane will sell McWane Domestic Fittings to Sigma at a discount of twenty percent (20%) off McWane's published distributor pricing in effect at the time the order is received by McWane.
>
> While Sigma may resell McWane Domestic Fittings at any price it deems appropriate, it is the unilateral policy of McWane not to appoint or continue any OEM distributor who resells McWane Domestic Fittings at a price less than 98% of McWane's published pricing on a weighted average basis for all customers and items sold during any given quarterly period, before rebates, freight and prompt payment discounts (the "Suggested Resale Price"), or who fails to establish a rebate program of 8% or greater for customers, excluding manufacturers of ductile iron pipe, who purchase more that [*sic*] $200,000 annually of McWane Domestic Fittings or who stock McWane Domestic Fittings in the normal course of business.
>
> . . . This agreement shall terminate immediately and without notice in the event that Sigma resells McWane Domestic Fittings at a price below the Suggested Resale Price, or fails to implement and maintain the Suggested Rebate for eligible customers; provided, however, that the Suggested Rebate shall not apply to customers who are domestic manufacturers of ductile iron pipe. McWane reserves the right to audit Sigma's compliance with this paragraph at any time through a third party . . . auditor chosen by McWane.

F. 1548. Although the MDA stated, "Sigma may resell McWane Domestic Fittings at any price it deems appropriate," the MDA also stated that McWane could immediately terminate the MDA without notice in the event that Sigma did not resell McWane's Domestic Fittings at McWane's suggested resale price. F. 1548. *See also* F. 1553 (Mr. Pais describing the pricing provision of the MDA as follows: "with the pricing, we are obliged to be as close

to the published multiplier as possible. Our hands are not tied – but we cannot sell below, because it will undermine McWane's own sales.").

On December 21, 2009, McWane sent a customer letter announcing multiplier increases for Domestic Fittings, effective January 22, 2010. F. 1554. Mr. Tatman forwarded McWane's December 21, 2009 multiplier increase letter to Mr. Rona of Sigma: "Per our MDA this will impact Sigma orders as of the effective date." F. 1555. Mr. Greg Fox of Sigma then forwarded the McWane December 21, 2009 customer letter within Sigma, noting: "Under the terms and agreements of our Master Distribution Agreement with [McWane], we will mirror the multiplier and implementation dates of this letter. We have no latitude for exceptions." F. 1556. Sigma enacted the same multiplier increase as McWane did, effective January 22, 2010. F. 1557.

"While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation." *Leegin*, 551 U.S. at 892. McWane has offered no procompetitive justifications for the provision of the MDA requiring Sigma to resell McWane Domestic Fittings at a weighted average of no less than 98% of McWane's published prices.

The Supreme Court, in *Leegin*, further explained, "[v]ertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed." *Leegin*, 551 U.S. at 893. Here, the circumstances in which the MDA was formed show that the price provision of the MDA has the potential for anticompetitive effects. As determined in Section III.G.2.b., McWane has monopoly power in the Domestic Fittings market. Further, in considering the circumstances in which the MDA was formed, it is also significant that the MDA contains provisions designed to exclude Star from the Domestic Fittings market, addressed *infra* Section III.I. In these circumstances, the price provision of the MDA has the potential for anticompetitive effects.

iii. Summary of competitive impact

Evidence of the history of the MDA, the reasons McWane entered into it, and the restrictive terms contained therein, demonstrate the anticompetitive nature of the MDA. "Market power and the anticompetitive nature of the restraint are sufficient to show the potential for anticompetitive effects under a rule-of-reason analysis, and once this showing has been made, [the respondent] must offer procompetitive justifications." *Realcomp*, 635 F.3d at 827.

c. Procompetitive justifications

Respondent's concerted action with Sigma through the MDA cannot be sustained under the rule of reason analysis "[a]bsent some countervailing procompetitive virtue." *Indiana Fed'n of Dentists*, 476 U.S. at 459. Respondent bears the burden of "establishing an affirmative defense which competitively justifies [an] apparent deviation from the operations of a free market." *NCAA*, 468 U.S. at 113; *Realcomp*, 635 F.3d at 825.

Respondent asserts that the MDA, as well as the Full Support Program, was an effort to keep its Union foundry operating. RB at 107. As determined in Section III.G.3.g., *supra*, McWane's desire to increase sales for its last remaining United States foundry is not a valid procompetitive justification. *See Microsoft*, 253 F.3d at 71-72 (the desire to increase sales "is not an unlawful end, but neither is it a procompetitive justification"). Moreover, McWane had not expected that entry by Sigma into the Domestic Fittings market – either through the MDA or independently – would increase the size of the Domestic Fittings market. F. 1591. And indeed, the MDA did not increase the size of the Domestic Fittings market. F. 1593 ("The fact that Sigma had access to McWane fittings under the MDA, that didn't cause there to be more domestic jobs; is that right? A. Correct." "Q. . . . By having access to those fittings, you didn't expand the size of the pie, if you will, you expanded Sigma's ability to service a piece of that pie, is that fair? A. Yes.").

Respondent next asserts that Sigma was able to reach and service customers that McWane could not. RB at 107-108. *See* F.

1584-1585 (Sigma, with its network of regional distribution yards and larger sales force, was better able than McWane to provide certain servicing benefits); F. 1586-1589 (some Distributors preferred Sigma to McWane). An efficiency defense is valid only if the challenged conduct is reasonably necessary in order to achieve the legitimate objective identified by the respondent. *In re Realcomp II, Ltd.*, 2009 FTC LEXIS 250 at *39-40 (Oct. 30, 2009). *See also Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-21 (1979) (blanket license was "an obvious necessity" for achieving integrative efficiencies, and joint setting of price was "necessary" for the blanket license); *National Soc'y of Prof'l Engineers*, 435 U.S. at 696 (rejecting asserted justification for complete ban on competitive bidding as "simply too broad").

Respondent has not demonstrated that the restrictive provisions of the MDA – requiring Sigma to purchase only from McWane, requiring Sigma to stop its own efforts to produce Domestic Fittings, requiring Sigma to price in accordance with McWane, and requiring Sigma to refuse to sell to Distributors pursuant to McWane's Full Support Program – were reasonably necessary to achieve a legitimate objective. Respondent's proffered justifications are, therefore, rejected.

5. Conclusion

Under a rule of reason analysis, the evidence establishes that the MDA gave rise to potential genuine adverse effects on competition due to McWane's monopoly power and the anticompetitive nature of the MDA. Respondent's proffered procompetitive justifications were insufficient to overcome Complaint Counsel's prima facie case of adverse impact. These findings establish that the MDA was an unreasonable restraint of trade in the Domestic Fittings market. Accordingly, Complaint Counsel has proven Count Four, Unreasonable Restraint of Trade.

I. Count Five: Alleged Conspiracy to Monopolize the Domestic Fittings Market

1. Overview

Count Five of the Complaint alleges that McWane and Sigma entered into the MDA with the specific intent to monopolize the Domestic Fittings market, and took overt acts to exclude their rivals in furtherance of their conspiracy, constituting an unfair method of competition in or affecting commerce in violation of Section 5 of the FTC Act. Complaint ¶¶ 55, 68. The Complaint further alleges that the principal terms of the MDA were that McWane would be Sigma's exclusive source for Domestic Fittings and that Sigma would resell McWane's Domestic Fittings to Distributors only on the condition that the Distributor agreed to purchase Domestic Fittings exclusively from McWane or Sigma. Complaint ¶ 49.

Respondent first asserts that even if there is a separate market for Domestic Fittings, McWane did not have monopoly power in that market. RB at 89. Respondent next asserts that Star rapidly and effectively entered the Domestic Fittings market and thus McWane did not exclude Star from that market. RB at 90. Respondent further asserts that the Full Support Program, as incorporated in the MDA between McWane and Sigma, was merely a rebate policy that did not require any customer to buy Domestic Fittings from McWane or Sigma. RB at 92-101, 107. These arguments have been considered, evaluated, and decided against Respondent, *supra* Sections III.C.2. and III.G.

With respect to the MDA between McWane and Sigma, Respondent asserts that Complaint Counsel must prove that McWane and Sigma possessed the specific intent to confer monopoly power upon McWane by predatory or exclusionary conduct; that McWane and Sigma in fact engaged in such anticompetitive conduct; and that a dangerous probability existed that McWane would succeed in its attempt to achieve monopoly power. RRB at 67-68. Respondent further asserts that Complaint Counsel presented no evidence that McWane or Sigma entered into the MDA with the specific intent to monopolize. RB at 105-106; RRB at 68.

2. Elements of conspiracy to monopolize

"A 'conspiracy to monopolize' means a conspiracy to acquire or maintain the power to exclude competitors from some portion of commerce." *Williams v. 5300 Columbia Pike Corp.*, 891 F.

Supp. 1169, 1175 (E.D. Va. 1995) (citing *American Tobacco Co.*, 328 U.S. at 809). Three elements of a claim for conspiracy to monopolize are: (1) concerted action, with (2) the specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy. *Levine v. Central Fla. Medical Affiliates*, 72 F.3d 1538, 1556 (11th Cir. 1996); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1582 (11th Cir. 1991).

In addition to these elements, Respondent urges a fourth element, "an effect upon an appreciable amount of interstate commerce," citing the decision of the Court of Appeals for the Tenth Circuit in *Lantec, Inc. v. Novell, Inc.*, 306 F.3d 1003, 1028 (10th Cir. 2002). RB at 105. Other circuits require no showing or have been quiet on this issue. *E.g., Int'l Distrib. Ctrs., Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 795 (2d Cir. 1987) (holding that elements of a conspiracy to monopolize are concerted action, deliberately entered into with the specific intent to achieve an unlawful monopoly, and the commission of an overt act in furtherance of the conspiracy); *Baxley-DeLamar Monuments, Inc. v. American Cemetery Ass'n*, 843 F.2d 1154, 1157 (8th Cir. 1988) (same); *Thompson*, 934 F.2d at 1582 (same). As analyzed above, Complaint Counsel has proven that Respondent's Full Support Program substantially foreclosed Star from the Domestic Fittings market (Section III.G.3. *supra*), which thus had an effect upon an appreciable amount of interstate commerce. Further, thousands of tons of Domestic Fittings, worth millions of dollars, were sold throughout the United States under the MDA (F. 1597), which reflects an appreciable amount of interstate commerce. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 225-26 (1947) (observing that "interstate purchases of replacements of some 5,000 licensed taxicabs in four cities . . . is an appreciable amount of commerce under any standard"). The remaining elements of conspiracy to monopolize are addressed below.

3. Concerted action

The MDA is a written agreement, entered into and signed by McWane and Sigma on September 17, 2009. F. 1537. This satisfies the concerted action element for a conspiracy to monopolize claim, which has the same standard for proving an agreement as Section 1. *See, e.g., Howard Hess Dental Labs. v.*

Dentsply Int'l Inc., 602 F.3d 237, 254 n.7 (3d Cir. 2010) (standard governing existence of agreement same for Section 1 and Section 2); *U.S. Anchor Mfg.*, 7 F.3d at 1001-02.

The MDA explicitly states that Sigma may only resell McWane Domestic Fittings to:

> (1) American Cast Iron Pipe Company; and
>
> (2) Other customers, including distributors, contractors and fabricators, but excluding manufacturers of ductile iron pipe that have agreed to purchase McWane Domestic Fittings as their sole source of Domestic Fittings when McWane Domestic Fittings are available at the time of order.
>
> McWane shall from time to time provide Sigma with a list of customers who have not agreed to source their Domestic Fittings solely from McWane. Sigma agrees not to sell McWane Domestic Fittings to any customer so listed by McWane, or to any other customer who Sigma actually knows has purchased Domestic Fittings from a source other than McWane at any time during the previous 60 days.

F. 1558. Under the MDA, McWane required Sigma not to sell, and Sigma agreed not to sell, McWane Domestic Fittings to any customer listed by McWane as not having agreed to purchase their Domestic Fittings solely from McWane. F. 1559-1560.

The MDA further provides that Sigma would assist McWane in the enforcement of McWane's Full Support Program:

> Sigma shall . . . take reasonable efforts to monitor its customer's sources of supply of Domestic Fittings, and shall notify McWane as soon as possible if Sigma becomes aware of any purchases of non-McWane Domestic Fittings by any such customer.

F. 1561. Sigma understood that under the MDA, if a customer wanted to buy Domestic Fittings through Sigma, they could, but they would have to buy all their Domestic Fittings from Sigma and that if a customer purchased Domestic Fittings from Star,

Sigma could no longer sell them McWane's Domestic Fittings. F. 1562.

4. Specific intent

The next element of conspiracy to monopolize is "[s]pecific intent to monopolize the relevant market." *Fleer Corp. v. Topps Chewing Gum*, 658 F.2d 139, 153 (3d Cir. 1981) (citing *Times-Picayune Publ'g Co.*, 345 U.S. at 626) (other citations omitted). A "specific intent to monopolize" means an intent to exclude competition or control prices. *Stanislaus Food Products v. USS-POSCO Indus.*, 2011 U.S. Dist. LEXIS 72764, *34-35 (E.D. Cal. 2011) (citing *Carpet Seaming Tape Licensing Corp. v. Best Seam. Inc.*, 616 F.2d 1133, 1141-42 (9th Cir. 1980) (specific adverse impact on the market); *American Tobacco Co.*, 328 U.S. at 789 (object of a combination or conspiracy to monopolize is "to exclude actual and potential competitors")).

In this case, the object of the conspiracy was to exclude Star from the Domestic Fittings market. Although Sigma has been found not to be a potential competitor in the Domestic Fittings market (Section III.H.3. *supra*), for this cause of action, it is not necessary to determine that Sigma was a potential entrant into the Domestic Fittings market. As a distributor of McWane's Fittings, pursuant to the MDA, Sigma had a vertically oriented agreement with McWane. Traders oriented vertically to each other can be held in violation of Section 2 for conspiracy to monopolize. *Perington Wholesale, Inc. v. Burger King Corp.*, 631 F.2d 1369, 1377 (10th Cir. 1979) ("The fact that [the defendant's] coconspirators competed in markets different from [the defendant's] market does not preclude finding a conspiracy to monopolize [the defendant's] market.").

There is direct evidence of both McWane's and Sigma's specific intent to exclude Star from the Domestic Fittings market. With respect to McWane's specific intent to exclude Star, as previously found, McWane implemented the Full Support Program in order to impede Star's ability to sell to Distributors. Section III.G.4. *supra*. As discussed below, McWane incorporated the Full Support Program into the MDA. That is, through the MDA, McWane required Sigma to enforce McWane's

Full Support Program. *See* F. 1558-1562. From the documents regarding the negotiations between McWane and Sigma leading up to the MDA, it is clear that McWane intended for Sigma to work in concert with McWane to exclude Star from the Domestic Fittings market, as discussed below.

After Sigma rejected McWane's June 5, 2009 offer to supply Sigma with McWane Domestic Fittings at five percent off McWane's published prices, McWane officials continued to debate whether to supply Sigma with McWane's Domestic Fittings. One of the considerations listed in evaluating whether to enter into a master distribution agreement with Sigma was: "Would providing Sigma with access to Tyler/Union domestic [product] help us either better protect our brand/share against Star or promote more stable market prices." F. 1527. *See also* F. 1580 (Mr. Tatman's June 29, 2009, "brainstorming slide," posing that he did not think that Sigma would be "willing to generate little to no incremental margin $ just to help us block Star").

In a July 27, 2009 PowerPoint Presentation titled, "Sigma - Domestic Review Session," intended for spurring discussion within McWane, Mr. Tatman wrote that having Sigma sell McWane branded product should "reduce Star's ability to grow share." F. 1581. On August 20, 2009, McWane held an internal meeting among Mr. McCullough, Mr. Tatman, Mr. Jansen, and Mr. Walton to consider whether to supply Domestic Fittings to Sigma through a master distribution agreement. F. 1578. As recorded in the handwritten notes of Mr. Walton, Mr. McCullough made the following points at that meeting about selling Domestic Fittings to Sigma:

> LM [Leon McCullough (Executive Vice President)] want[s] to sell SIGMA to put pressure on Star. LM hopefully to drive Star out of business. Would rather have competition other than Star.
>
> LM thinks that we should sell SIGMA as an insurance policy and to continue to put pressure on Star. . . . LM approved Rick [Tatman]'s recommendation page of his PowerPoint presentation on selling SIGMA.

F. 1579.

These internal discussions among McWane executives are direct evidence of McWane's specific intent to enter into the MDA with Sigma with the aim of excluding Star from the Domestic Fittings market.

- Sigma also entered into the MDA with the specific intent to exclude Star. When Sigma was first assessing its options for offering Domestic Fittings, Mr. Pais wrote to a Sigma Board member as follows: "With our relationship with McWane, it is also fully conceivable to get part of our needs produced with SIGMA label, once we establish ourselves as the '2nd choice' for the [Buy American] segment, as they may privately prefer it to be just a 2-supplier market! Besides, this may marginalize Star." F. 1575. Mr. Pais also noted in a September 9, 2009 report to the Sigma Board, that Sigma's "strategy to team up with McWane" through the MDA was "likely to have the intended effect of marginalizing Star. . ." F. 1576. In addition, Mr. Pais stated in a September 22, 2009 dictated message: "[I]f we do our job right, it might isolate Star and make them suffer with their investment even more, because they may not be able to gain credibility." F. 1577.

In addition to the foregoing direct evidence, there is circumstantial evidence that McWane and Sigma had specific intent to monopolize the Domestic Fittings market by excluding Star. One court of appeals has stated, specific "intent may be inferred . . . from the proof of actual monopoly power." *Fleer Corp.*, 658 F.2d at 54 (citing *American Tobacco Co.*, 328 U.S. at 789). *See also In re Luria Brothers & Co.*, 1963 FTC LEXIS 97, *112 n.11 (Feb. 13, 1963) (stating that "[w]hile in Section 2 cases involving combinations or conspiracies to monopolize it is necessary to show intent, its proof merges into the proof of unlawful conspiracy. . . . 'Where a conspiracy is proved . . . from the evidence of the action taken in concert by the parties to it, it is all the more convincing proof of an intent to exercise the power of exclusion acquired through that conspiracy'" (quoting *American Tobacco Co.*, 328 U.S. at 809)). Similarly, the court in *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981) explained that because "it is frequently impossible for a plaintiff

to obtain direct evidence of the alleged conspirators' specific intent, . . . the finder of fact must be allowed to infer defendants' intent from their anticompetitive practices." *Id.* at 85.

As determined in Section III.G., McWane has monopoly power in the Domestic Fittings market and McWane's Full Support Program is exclusionary conduct. As discussed below, through the MDA, McWane and Sigma implemented McWane's Full Support Program and thus engaged in anticompetitive conduct from which specific intent may be inferred.

5. Overt acts in furtherance of the conspiracy

The final element of a conspiracy to monopolize claim is that the conspirators take overt acts in furtherance of their conspiracy. *Levine*, 72 F.3d at 1556. Transactions that take place pursuant to an exclusive dealing policy are sufficient to establish the overt act requirement of a conspiracy to monopolize. *Fraser*, 284 F.3d at 68; *see also United States v. Hickok*, 77 F.3d 992, 1005-06 (7th Cir. 1996) ("Under the general conspiracy statute, an overt act is defined as 'any act to effect the object of the conspiracy.'"). Here, McWane and Sigma worked in concert and took overt acts in furtherance of their agreement to control prices and exclude rivals, including Star.

McWane and Sigma worked in concert to control prices of Domestic Fittings. As summarized *supra* Section III.H.4.b., pursuant to the MDA, Sigma was required to resell McWane Domestic Fittings at a weighted average of no less than 98% of McWane's published prices. When McWane announced multiplier increases in Domestic Fittings effective January 22, 2010, Sigma enacted the same increases. F. 1557.

In addition, McWane and Sigma collaborated to make Distributors aware of the MDA and that Sigma would be enforcing McWane's Full Support Program. In the same September 22, 2009 letter through which McWane informed its customers of its Full Support Program, McWane also informed its Distributors that McWane had entered into an MDA with Sigma, whereby Sigma would sell McWane Domestic Fittings, and further informed Distributors that the Full Support Program applies to Domestic Fittings whether purchased through McWane

or Sigma. F. 1173. McWane also met with Distributors to inform them that Sigma would be enforcing McWane's Full Support Program. F. 1538; *see also* F. 1558. Mr. Tatman described Sigma's role in McWane's Full Support Program as follows:

> Access to McWane domestic product either through McWane or Sigma requires distributors to exclusively support McWane where products are available within normal lead times. Violation will result in: Loss of access [and] Loss of accrued rebates.

F. 1183.

Sigma implemented McWane's Full Support Program. In Sigma's September 22, 2009 announcement to its customers, Sigma informed its customers as follows:

> As per this MDA, we are now Master Distributors of [McWane] domestic Fittings. As such, we will follow [McWane's] distribution and pricing policies as they are announced from time to time.
>
> As mentioned in their own letter from [McWane] to their customers, which you too may have received, we wish to supply [McWane] domestic Fittings to any customers who elect to commit to <u>fully</u> support [McWane] branded Fittings for their requirements of domestic Fittings, purchased thru [McWane] or SIGMA. We appeal to you to accept this requirement of exclusive choice, as a fair and reasonable one, in light of the considerable investment by [McWane] to provide this range of domestic production, which is now being expanded to offer domestic Fittings up to 48".
>
> Please note that customers who elect not to fully support this program may forgo any unpaid volume incentive rebates applicable to only the domestic Fittings and delivery of domestic Fittings up to 12 weeks.

F. 1566 (emphasis in original).

On December 14, 2009, McWane informed Sigma that it was cutting off Hajoca pursuant to its Full Support Program and that Sigma must do the same. Mr. Tatman told Mr. Rona: "Per the terms of our MDA I need you to acknowledge that Sigma will also not supply any Hajoca branch with Domestic fittings or accessories until further notice." F. 1568; *see also* Section II.J.6. *supra* (McWane's enforcement of its Full Support Program against Hajoca). Mr. Rona forwarded the email to Sigma's CEO, who responded that Sigma had "no choice but to agree to abide by the rules of the MDA." F. 1569. As requested by McWane, on December 15, 2009, Mr. Rona confirmed to McWane that Sigma was "clear about Hajoca" and would not sell Domestic Fittings to any Hajoca branch. F. 1570.

The actions discussed above constitute overt acts in support of the conspiracy between McWane and Sigma to monopolize the Domestic Fittings market. *See Fraser*, 284 F.3d at 68; *Hickok*, 77 F.3d at 1005-06.

6. Conclusion

Having met its burden of proof on each of the elements, Complaint Counsel has proven Count Five, Conspiracy to Monopolize.

J. Remedy

1. Applicable legal standards

Pursuant to Section 5 of the FTC Act, upon determination that the challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957). Courts have long recognized that the Commission has considerable discretion in fashioning an appropriate remedial order, subject to the constraint that the order must bear a reasonable relationship to the unlawful acts or practices. *See, e.g.*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

Respondent objects to the entry of any remedial order in this case on the ground that "the conduct at issue all ended years ago." RB at 109. Respondent asserts that it changed its "rebate letter" long ago and the MDA with Sigma was terminated in 2010. RB at 109. Respondent further asserts that because courts cannot grant injunctions unless a plaintiff shows ongoing or imminent harm, Complaint Counsel is not entitled to its proposed remedy. RB at 109.

On January 22, 2010, the FTC informed McWane that it was conducting an investigation to determine whether McWane had engaged in unfair methods of competition and sought relevant materials relating to the Full Support Program and the MDA. *See* F. 1220. Less than one month after learning of the Commission's investigation, and only six months into its initial one year term, McWane gave Sigma notice of termination of the MDA. F. 1595. In addition, subsequent to learning of the Commission's investigation, McWane negotiated with Hajoca regarding McWane's Full Support Program and came to an agreement in April 2010 whereby McWane agreed to allow Hajoca's Lansdale branch to resume purchasing Domestic Fittings from McWane. F. 1221; *see also* F. 1220 (internal McWane email from Mr. McCullough asking "[h]ow our potential FTC action might [a]ffect how we do business with [Hajoca]").

Evidence that "is subject to manipulation by the party seeking to use it is entitled to little or no weight" in an antitrust case. *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1384 (7th Cir. 1986). In particular, the probative value of a defendant's evidence is "extremely limited" when the defendant itself can control events; otherwise, violators could "stave off" the government's enforcement efforts "merely by refraining from aggressive or anticompetitive behavior when such a suit was threatened or pending." *General Dynamics*, 415 U.S. at 504-05.

Furthermore, Section 5(b) of the FTC Act expressly authorizes the Commission to issue an administrative complaint whenever it has reason to believe that a person "has been or is using any unfair method of competition . . ." 15 U.S.C. § 45(b). "Voluntary cessation of unlawful activity is not a basis for halting a law enforcement action." *In re The Coca-Cola Company*, 117 F.T.C.

795, 1994 FTC LEXIS 327, at *199 (1994). "To hold otherwise would mean that a Commission law enforcement action could be brought to a halt at any time . . . by an abandonment, even a temporary one, of the challenged conduct." *Id.*

In addition, issuance of a remedy is appropriate even where a respondent no longer engages in the illegal conduct. In *W.M.R. Watch Case Corp. v. FTC*, 343 F.2d 302 (D.C. Cir. 1965), where the respondent voluntarily abandoned the challenged conduct well before the filing of the Commission's complaint, the court rejected the respondent's argument that the matter was moot. The court held that if the danger of recurrence is sufficient, "there is no bar to enforcement merely because the conduct has ceased at least temporarily under the weight of the Commission's hand." *Id.* at 304. *See also Rubbermaid, Inc. v. FTC*, 575 F.2d 1169, 1175 (6th Cir. 1978) (holding that where respondent abandoned the challenged practices and did not intend to resume them, it was, nevertheless, "reasonable to conclude that the effects of [respondent's] illegal agreements with wholesalers may tend to be perpetuated in practice unless affirmative measures are taken to eradicate them"). "A company bears a heavy burden in showing that past conduct will not be repeated." *Id.* at 1173 (citing *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). Respondent has not met that burden here. Accordingly, to the extent Respondent did "voluntarily" cease its illegal conduct, such cessation is not a basis for not issuing a cease and desist order.

2. Specific provisions

Complaint Counsel submitted a proposed order along with its Post Trial Brief containing those provisions it believes are necessary and appropriate to remedy the violations alleged in this case. The provisions of the attached order (hereafter, "Order") are substantially the same as Complaint Counsel's proposed order (hereafter, "proposed order"), except that, because the evidence failed to establish the violations alleged in Counts One, Two, and Three, the Order does not include provisions or definitions pertaining to those Counts. Counts One, Two, and Three – that Respondent conspired with Sigma and Star to raise and stabilize Fittings prices, conspired through DIFRA to exchange

competitively sensitive sales information, and invited Sigma and Star to collude – are dismissed.

Counts Four, Five, Six, and Seven – that Respondent engaged in monopolistic practices, attempted to monopolize, engaged in a conspiracy to monopolize, and engaged in an unreasonable restraint of trade with Sigma in the Domestic Fittings market – have been proven by a preponderance of the evidence. The appropriate remedy is to bring an end to this conduct, rectify past violations, and prevent reoccurrence. In this regard, the Order entered herewith, more fully discussed below, adopts the provisions of Complaint Counsel's proposed order relating to Counts Four through Seven. The Order accomplishes the remedial objectives of the FTC Act and is reasonably related to the proven violations. Thus, the Order also is necessary and appropriate to remedy the violations of law found to exist.

The Order entered herewith imposes pragmatic, effective restrictions on Respondent that are necessitated by its illegal conduct. First, to address the violations arising in connection with Respondent's MDA with Sigma, Section II of the Order requires Respondent to cease and desist from:

A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to allocate or divide markets, Customers, contracts, transactions, business opportunities, lines of commerce, or territories.

B. Communicating to any Person who is not an Insider, that Respondent is ready or willing to forbear from competing for any Customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any Customer, contract, transaction, or business opportunity.

C. Attempting to engage in any of the activities prohibited by Paragraphs II.A or II.B

Order, Paragraphs II. A.-C.

Further, to address the violations arising in connection with Respondent's exclusionary conduct with respect to Star, Section III of the Order precludes Respondent from directly or indirectly monopolizing, or attempting or conspiring to monopolize the market for Domestic Fittings. The Order also prohibits Respondent from financially inducing its customers to deal exclusively with McWane.

In summary, together with the standard provisions of a Commission order, the Order prohibits McWane from engaging in, or attempting thereto, the following conduct:

A. Inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that requires Exclusivity with a Customer including as a condition of McWane's sale of any product, including Domestic Fittings, or conditioning the price it charges or the services it offers based on the customer's purchase or sale of Domestic Fittings from McWane.

B. Instituting, for a period of 10 years, a rebate program in which the rebate a customer receives for a Domestic Fitting in a completed sale is increased retroactively if the customer's total purchases in a designated period meet a specified threshold, except under certain conditions outlined in the Order.

C. Discriminating or retaliating against a customer that purchases or sells a competitor's Domestic Fittings, except under certain conditions outlined in the Order. Prohibited types of retaliation include (i) terminating or threatening to terminate the sale to a customer of any product marketed by McWane; (ii) auditing the customer's Domestic Fittings to determine its purchase of competing Domestic Fittings; (iii) changing the price or services McWane furnishes to the customer; or (iv) refusing to deal with the customer on terms generally available to other customers.

D. Enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of the Order.

Order, Paragraphs III A.-D.

3. Duration

Complaint Counsel has requested that the order issued in this case remain in effect for a period of twenty years. Pursuant to the Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569 (August 16, 1995), the Commission's stated policy is for administrative cease and desist orders to terminate after twenty years. The Order entered in this case shall remain in effect for a period of twenty years.

IV. SUMMARY OF CONCLUSIONS OF LAW

1. Complaint Counsel bears the burden of proving jurisdiction and liability by a preponderance of evidence.

2. The Commission has jurisdiction over Respondent McWane, Inc. ("Respondent" or "McWane") and the subject matter of this proceeding, pursuant to Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45.

3. Respondent is a corporation whose business is in or affects commerce in the United States, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

4. Unfair methods of competition under Section 5 of the FTC Act include any conduct that would violate Sections 1 or 2 of the Sherman Act.

5. Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. 15 U.S.C. § 1.

6. Section 2 of the Sherman Act prohibits monopolization, attempted monopolization, and combination or conspiracy to monopolize. 15 U.S.C. § 2.

7. Because none of the claims in this case is brought under the Commission's "unfair acts or practices" authority, Section 5(n) of the FTC Act, requiring proof of substantial consumer injury does not apply.

8. In a Section 1 case, the first step in determining if a respondent unreasonably restrained trade in the relevant market "is determining the relevant market." In a Section 2 case, as well, the first step in assessing whether a respondent possesses monopoly power is establishing the relevant market.

9. A relevant product market consists of products that have reasonable interchangeability for the purposes for which they are produced - - price, use and qualities considered.

10. The relevant product market is ductile (easily molded) iron pipe fittings that are 24" and smaller in diameter (the "Fittings market").

11. There is also a relevant product market, a submarket of the Fittings market, consisting of ductile iron pipe fittings of 24" and smaller in diameter that are made in the United States, for use in waterworks projects with domestic-only specifications (the "Domestic Fittings" market).

12. A relevant geographic market is defined as the area of effective competition in which the seller operates, and to which the purchaser can practicably turn for supplies.

13. The relevant geographic market for both the Fittings market and the Domestic Fittings market is the United States.

14. To establish a violation of Section 1 of the Sherman Act, the evidence must show: (1) the existence of an agreement, combination, or conspiracy, (2) that unreasonably restrains competition.

15. A restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be *per se* unreasonable, or because it violates what has come to be known as the rule of reason.

16. When restraints are not *per se* unlawful, and their net impact on competition is not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and the effects of the restraint in that market.

17. A full rule-of-reason inquiry may extend to a plenary market examination, which may include the analysis of the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed as well as the availability of reasonable, less restrictive alternatives.

18. A conspiracy to raise and stabilize prices is illegal *per se* under Section 1.

19. The crucial question in determining conspiracy is whether the challenged anticompetitive conduct stems from an independent decision or from an agreement.

20. An "agreement" is a conscious commitment to a common scheme designed to achieve an unlawful objective.

21. A conspiracy may be demonstrated by direct or circumstantial evidence.

22. Circumstantial evidence to prove a conspiracy to restrain trade will usually be of two types -- economic evidence suggesting that the alleged co-conspirators were not in fact competing, and noneconomic evidence suggesting that they were not competing because they had agreed not to compete.

23. Circumstantial evidence alone cannot support a finding of conspiracy when the evidence is equally consistent with independent conduct. An inference of a conspiracy must

be more probable than the inference of independent action in order for the inference of conspiracy to be drawn.

24. Mistaken inferences that arise from circumstantial evidence are costly, because they chill competitive conduct – the very conduct the antitrust laws are designed to protect.

25. Although the language of Section 1 is broad enough to encompass a "tacit agreement," *i.e.*, an agreement that is reached through conduct rather than express words, it is well established that the Sherman Act does not prohibit mere "conscious parallelism," "tacit collusion," or "oligopolistic price coordination." The evidence must prove an actual, manifest agreement.

26. An unlawful agreement will not be presumed.

27. A plaintiff cannot make its case just by asking the fact finder to disbelieve the defendant's witnesses. Mere disbelief does not rise to the level of positive proof of an agreement.

28. An agreement for purposes of Section 1, and particularly in the context of an oligopoly market, is revealed by evidence of a prior understanding or commitment, or the sort of restricted freedom of action and sense of obligation that one generally associates with agreement. Tacit coordination in an oligopoly market need not imply even a weak commitment or prior understanding among the oligopolists.

29. Proof of parallel conduct, including conscious parallel conduct, can constitute circumstantial evidence from which an agreement, tacit or express, can be inferred but such evidence, without more, is insufficient.

30. "Plus" factors are designed to serve as proxies for direct evidence of an agreement in a circumstantial case based upon parallel pricing conduct and, therefore, to constitute a "plus" factor, the evidence must be probative of an agreement.

31. "Plausibility" is not the standard of proof for purposes of prevailing on the merits. Rather, Complaint Counsel's burden is to prove that the asserted "plus" factor evidence tends to make the inference of an agreement more likely than not.

32. There is no exhaustive list of "plus" factors. Such evidence is generally grouped into the following three categories: (1) evidence that the alleged conspirator had a motive to enter into a price fixing conspiracy; (2) evidence that the alleged conspirator acted contrary to its interests; and (3) evidence implying a traditional conspiracy.

33. In the context of parallel pricing behavior in an oligopoly, evidence of motive and actions against interest typically only demonstrate interdependence among the oligopolists. Mere interdependence among oligopolists, unaided by an advance agreement among them, does not suggest an unlawful agreement.

34. Because the "plus" factors of motive and actions contrary to interest may only restate the theory of interdependence among oligopolists, evidence indicating an actual, manifest agreement is the key to a proper determination in a conspiracy case.

35. Proof of actions contrary to interest, for "plus" factor purposes, means showing that the alleged co-conspirators' behavior would not be reasonable or explicable (*i.e.*, not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade - that is, that the alleged co-conspirators would not have acted as they did had they not been conspiring in restraint of trade.

36. Communications between competitors do not permit an inference of an agreement unless those communications rise to the level of an agreement, tacit or otherwise. It remains the plaintiff's burden to prove that the defendant succumbed to temptation and conspired. It is not enough to point out the temptation and ask that the defendants

bear the onerous, if not impossible, burden of proving the negative – that no conspiracy occurred.

37. Even where there is proof of parallel conduct and one or more "plus" factors, this does not mandate a finding of an unlawful agreement. The court may still conclude, based upon the evidence, that the alleged co-conspirators acted independently of one another, and not in violation of antitrust laws.

38. An agreement to adhere to published prices is unlawful under Section 1 of the Sherman Act.

39. In evaluating the totality of the evidence of conspiracy, it is not the quantity of the evidence that is important, but its qualitative value in demonstrating that the parties actually entered into a conspiracy.

40. The line between lawful interdependent behavior and unlawful commitment is not sharp. Although the line between coordination through recognized interdependence and some commitment is shadowy, the distinction is important so long as antitrust law allows the former but condemns the latter.

41. Where evidence, taken as a whole, points with at least as much force toward unilateral actions as toward conspiracy, the inference of conspiracy cannot be drawn

42. Viewed as whole, the preponderance of the evidence fails to prove the alleged conspiracy among McWane, Sigma, and Star, to raise and stabilize prices in the Fittings market and, therefore, Complaint Counsel has not met its burden of proof on Count One of the Complaint.

43. Whether an alleged "information exchange" unreasonably restrains trade is assessed under the rule of reason.

44. A facilitating practice is one that makes it easier for parties to coordinate price or other anticompetitive behavior in an anticompetitive way. It increases the likelihood of a consequence that is offensive to antitrust policy.

45. A facilitating practice cannot be found unreasonable without considering the offsetting economic or social benefits of the practice. Thus, the label "facilitating practice" is only an invitation to further analysis, not a license for automatic condemnation.

46. The proper approach to analyzing whether an alleged information exchange among competitors is anticompetitive is first to determine whether the structure of the industry is such that it is susceptible to the exercise of market power through tacit coordination, and second, to evaluate the nature of the information exchanged.

47. There are certain well-established criteria used to help ascertain the anticompetitive potential of information exchanges, including the time frame of the data; the specificity of the data; whether the data is made publicly available; and whether the data is discussed in meetings among the participants.

48. The preponderance of the evidence fails to show that the DIFRA tons-shipped data reporting system has the nature and tendency to facilitate price coordination and, therefore, Complaint Counsel failed to prove likely anticompetitive effects resulting from an information exchange by competitors. Accordingly, Complaint Counsel has failed to meet its burden of proving that the DIFRA tons-shipped data reporting system is an agreement in restraint of trade, as alleged in Count Two of the Complaint.

49. A solicitation to enter into an anticompetitive agreement (*i.e.,* an "invitation to collude") can justify a remedy under Section 5 of the FTC Act, even if the solicitation does not result in an unlawful agreement under Section 1 of the Sherman Act.

50. The preponderance of the evidence fails to show that Respondent invited its competitors to collude and,

therefore, Complaint Counsel has failed to meet its burden of proof on Count Three of the Complaint.

51. Monopolization requires proof of: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

52. Attempted monopolization requires proof: (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving [or obtaining] monopoly power.

53. Monopoly power is defined as the power to control prices or exclude competition.

54. Monopoly power may be inferred or proven indirectly through proof of high market shares in a market protected by barriers to entry.

55. Complaint Counsel has proven that Respondent has a high market share in a market protected by barriers to entry, and thus has demonstrated that Respondent has monopoly power in the Domestic Fittings market.

56. Monopoly power may also be proven by direct evidence of a firm's ability to control prices or exclude competitors.

57. Complaint Counsel has proven that Respondent has the ability to control prices and exclude competitors, and thus has demonstrated that Respondent has monopoly power in the Domestic Fittings market.

58. A firm violates Section 2 when it maintains or attempts to maintain a monopoly by engaging in exclusionary conduct.

59. Exclusionary conduct is behavior that not only tends to impair the opportunities of rivals, but also either does not further competition on the merits or does so in an

unnecessarily restrictive way. An exclusive dealing arrangement is unlawful only if the probable effect of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals.

60. Exclusive dealing arrangements are of special concern when imposed by a monopolist.

61. An exclusive dealing arrangement is not unlawful unless it is likely to foreclose competition in a substantial share of the line of commerce affected. The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit.

62. The preponderance of the evidence shows that Complaint Counsel has met its burden of proving that McWane's Full Support Program foreclosed Star from a substantial share of the Domestic Fittings market.

63. The likely or actual anticompetitive effects of exclusionary conduct must be considered in light of any procompetitive effects. Once the government demonstrates harm to competition, the burden shifts to Respondent to show that the challenged conduct promotes a sufficiently procompetitive objective.

64. A respondent's assertion that it acted in furtherance of its economic interests does not constitute the type of business justification that is an acceptable defense to Section 2 monopolization.

65. Because the evidence fails to show any procompetitive justification that outweighs the harm to competition, Complaint Counsel has met its burden of proving that Respondent's Full Support Program constitutes unlawful exclusionary conduct and willful maintenance of Respondent's monopoly power.

66. Intent is relevant to proving monopolization.

67. Specific intent is required for proving attempted monopolization.

68. The preponderance of the evidence demonstrates that Respondent intended to substantially foreclose Star from the Domestic Fittings market.

69. Dangerous probability of achieving monopoly power can be inferred from evidence indicating the existence of anticompetitive conduct and specific intent.

70. The preponderance of the evidence shows that Respondent had a dangerous probability of achieving monopoly power.

71. Having met its burden of proof on each of the elements, Complaint Counsel has proven Count Six, Monopolization and Count Seven, Attempted Monopolization.

72. Under Section 1 of the Sherman Act, agreements among actual or potential competitors at the same level of the market structure (*i.e.*, horizontal competitors) to allocate markets are *per se* unlawful.

73. In evaluating an agreement among competitors, the preliminary inquiry is whether or not each firm alleged to have been a party to the agreement was an actual or potential competitor in that market.

74. To be a potential competitor, one must have the necessary desire, intent, and capability to enter the market.

75. Elements for evaluating capability to enter the market are 1) the background and experience of in the prospective business; 2) affirmative acts with the object of entering the proposed business; 3) the ability to finance operation of the business and the purchase of necessary equipment and facilities; and 4) the formation of contracts.

76. The evidence fails to show that Sigma had the necessary capability to enter the Domestic Fittings market in a timely manner and, thus, the evidence fails to show that Sigma

was a potential competitor in the Domestic Fittings market.

77. Because the evidence fails to show that Sigma was a potential competitor in the Domestic Fittings market, the Master Distribution Agreement ("MDA") is evaluated under a rule of reason analysis.

78. Under a rule of reason analysis, including the evaluation of the market power of Respondent, the nature of the restraint, the history of the restraint and the reasons why it was imposed, and the availability of reasonable, less restrictive alternatives, Complaint Counsel has demonstrated the potential for anticompetitive effects of the MDA.

79. Respondent's concerted action with Sigma through the MDA cannot be sustained under the rule of reason analysis unless Respondent meets its burden of establishing some countervailing procompetitive virtue.

80. A desire to increase one's own sales is not a valid procompetitive justification.

81. Respondent has failed to prove any valid procompetitive justification for the MDA.

82. Under a rule of reason analysis, the MDA was an unreasonable restraint of trade in the Domestic Fittings market. Therefore, Complaint Counsel has proven Count Four, Unreasonable Restraint of Trade.

83. A conspiracy to monopolize means a conspiracy to acquire or maintain the power to exclude competitors from some portion of commerce.

84. Three elements of a claim for conspiracy to monopolize are: (1) concerted action, with (2) the specific intent to monopolize, and (3) an overt act in furtherance of the conspiracy. In addition to these elements, some courts

require an effect upon an appreciable amount of interstate commerce.

85. The MDA is a written agreement that satisfies the concerted action element of a conspiracy to monopolize claim.

86. Specific intent to monopolize means an intent to exclude competition or control prices. Specific intent may be inferred from the proof of actual monopoly power and anticompetitive practices.

87. The evidence demonstrates that McWane and Sigma entered into the MDA with an intent to exclude Star from the Domestic Fittings market, McWane had monopoly power, and the Full Support Program was anticompetitive.

88. Transactions that take place pursuant to an exclusive dealing policy are sufficient to establish the overt act requirement of a conspiracy to monopolize.

89. The MDA had an effect on an appreciable amount of interstate commerce

90. The preponderance of the evidence shows that McWane and Sigma worked in concert and took overt acts in furtherance of their agreement to control prices and exclude rivals, including Star.

91. Having met its burden of proving concerted action, specific intent to monopolize, and an overt act in furtherance of the conspiracy, and having shown an effect upon an appreciable amount of interstate commerce, Complaint Counsel has proven Count Five, Conspiracy to Monopolize.

92. Pursuant to Section 5 of the FTC Act, upon determination that a challenged practice is an unfair method of competition, the Commission "shall issue . . . an order requiring such person . . . to cease and desist from using such method of competition or such act or practice." 15 U.S.C. § 45(b).

93. The appropriate remedy is to bring an end to the unlawful conduct found to exist, rectify past violations, and prevent reoccurrence.

94. Issuance of a remedy is appropriate, upon determination that a challenged practice is an unfair method of competition, even where a respondent no longer engages in the illegal conduct. If the danger of recurrence is sufficient, there is no bar to enforcement merely because the conduct has ceased at least temporarily.

95. The attached Order accomplishes the remedial objectives of the FTC Act and is reasonably related to the proven violations. The Order also is necessary and appropriate to remedy the violations of law found to exist.

ORDER

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

A. "Commission" means the Federal Trade Commission.

B. "Respondent" means McWane, Inc., its officers, directors, employees, agents, representatives, successors, and assigns; and the United States based subsidiaries, divisions, groups, and affiliates controlled by it, and the respective officers, directors, employees, agents, representatives, successors, and assigns of each.

C. "Communicate" means to transfer or disseminate any information, regardless of the means by which it is accomplished, including without limitation orally, by letter, email, notice, or memorandum. This definition applies to all tenses and forms of the word "communicate," including, but not limited to,

"communicating," "communicated" and "communication."

D. "Competitor" means Respondent and any Person that, for the purpose of sale or resale within the United States: (1) manufactures DIPF or Domestic DIPF; (2) causes DIPF or Domestic DIPF to be manufactured; or (3) imports DIPF.

E. "Customer" means any Person that purchases any DIPF from Respondent

F. "Designated Manager" means the Executive Vice President, General Manager, National Sales Manager, Pricing Coordinator, Regional Manager, or the OEM Manager for sales of DIPF in and into the United States, and any employee performing any job function relating to the setting of Prices (including offering any discounts) for DIPF sold in or into the United States.

G. "Domestic DIPF" means DIPF that is manufactured in the United States of America.

H. "Ductile Iron Pipe Fittings" or "DIPF" means any iron casting produced in conformity with the C153/A21 or C110/A21 standards promulgated by the American Water Works Association, including all revisions and amendments to those standards and any successor standards incorporating the C153/A21 or C110/A21 standards by reference.

I. "Exclusivity" or "Exclusive" means any requirement, whether formal or informal, or direct or indirect, by the Respondent that a Customer purchase all of their Domestic DIPF from Respondent, or any other requirement that a Customer restrain, refrain from, or limit its future purchases of Domestic DIPF from any Competitor.

Provided, however, that the terms "Exclusivity" or "Exclusive" do not:

1. apply to Respondent's sales of non-Domestic DIPF or any product other than Domestic DIPF; and

2. apply to individual bids of Domestic DIPF for specific jobs or refer to the sale by Respondent to a Customer of any specified number of units during any term, without more. For the avoidance of doubt, the fact that a Customer purchases its full requirements of Domestic DIPF from Respondent does not establish that Respondent has engaged in Exclusivity and is not prohibited by this Order unless the Customer does so because Respondent imposes a requirement of Exclusivity.

J. "Federal Securities Laws" means the securities laws as that term is defined in § 3(a)(47) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(47), and any regulation or order of the Securities and Exchange Commission issued under such laws.

K. "Insider" means a consultant, officer, director, employee, agent, or attorney of Respondent. *Provided, however*, that no other Competitor shall be considered to be an "Insider."

L. "Participate" in an entity or an arrangement means (1) to be a partner, joint venturer, shareholder, owner, member, or employee of such entity or arrangement, or (2) to provide services, agree to provide services, or offer to provide services through such entity or arrangement. This definition applies to all tenses and forms of the word "participate," including, but not limited to, "participating," "participated," and "participation."

M. "Person" means any natural person or artificial person, including, but not limited to, any corporation, unincorporated entity, or government. For the purpose of this Order, any corporation includes the subsidiaries, divisions, groups, and affiliates controlled by it.

N. "Price" means the retail or wholesale price, resale price, purchase price, list price, multiplier price, job price, credit term, freight term, delivery term, service term, or any other monetary term defining, setting forth, or relating to the money, compensation, or service paid by a Customer to Respondent, or received by a Customer in connection with the purchase or sale of DIPF or Domestic DIPF.

O. "Retroactive Incentive" means any flat or lump-sum payment of monies or any other item(s) of pecuniary value based upon a Customer's sales or purchases of Respondent's Domestic DIPF reaching a specified threshold (in units, revenues, or any other measure), or otherwise reducing the Price of one unit of Respondent's Domestic DIPF because of the purchase or sale of an additional unit of that product; provided, however, that Respondent may offer a discount or other item of pecuniary value based upon sales or purchases of Domestic DIPF beyond a specified threshold.

By way of example, Respondent may offer or provide a discount of X% on all purchases of Domestic DIPF in excess of Y units, but it may not offer or provide a discount of X% on all units of Domestic DIPF, including those below Y units, if sales exceed Y units.

P. "Service" means any service, assistance or other support provided by Respondent to a Customer, including without limitation, responsiveness to requests for bids, responsiveness in filling purchase orders, product availability, handling of warranty claims, and handling of returns.

II.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling Domestic DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent

shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Entering into, adhering to, Participating in, maintaining, organizing, implementing, enforcing, or otherwise facilitating any combination, conspiracy, agreement, or understanding between or among any Competitors to allocate or divide markets, Customers, contracts, transactions, business opportunities, lines of commerce, or territories.

Provided, however, that nothing in Paragraph II.A of this Order prohibits Respondent from entering into an agreement with another Competitor regarding the Price of DIPF if, and only if, that agreement relates exclusively to the terms under which Respondent will buy DIPF from, or sell DIPF to, that other Competitor.

B. Communicating to any Person who is not an Insider, that Respondent is ready or willing to forbear from competing for any Customer, contract, transaction, or business opportunity conditional upon any other Competitor also forbearing from competing for any Customer, contract, transaction, or business opportunity.

Provided, however, that it shall not of itself constitute a violation of Paragraph II.B of this Order for Respondent to Communicate:

1. To any Person reasonably believed to be an actual or prospective purchaser of DIPF, the Price and terms of a sale of DIPF; or

2. To any Person reasonably believed to be an actual or prospective purchaser of DIPF that Respondent is ready and willing to adjust the terms of a sale of DIPF in response to a Competitor's offer.

C. Attempting to engage in any of the activities prohibited by Paragraphs II.A or II.B.

III.

IT IS FURTHER ORDERED that in connection with the business of manufacturing, marketing or selling Domestic DIPF in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, Respondent shall cease and desist from, either directly or indirectly, or through any corporate or other device:

A. Inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or understanding that requires Exclusivity with a Customer, including but not limited to:

1. Conditioning the sale or purchase of any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

2. Conditioning any term of Price or Service offered or provided by Respondent to a Customer relating to any product, including Respondent's Domestic DIPF, on a Customer's Exclusivity;

3. Conditioning any term of Price or Service offered or provided to a Customer based upon a requirement that the Customer purchase 50% or more of its purchases (in units, revenues, or any other measure) of Domestic DIPF from Respondent over any period of time; and

4. Conditioning any term of Price or Service offered or provided to a Customer relating to any product marketed by Respondent upon that Customer's purchases or sales of Respondent's Domestic DIPF.

B. For ten (10) years from the date this Order becomes final, inviting, entering into, adhering to, maintaining, implementing, enforcing, or attempting thereto any condition, policy, practice, agreement, contract, or

understanding that offers or provides any Retroactive Incentive.

C. Discriminating against, penalizing, or otherwise retaliating against any Customer, for the reason, in whole or in part, that the Customer engages in, or intends to engage in, the distribution, purchase or sale of a Competitor's Domestic DIPF, or otherwise refuses to enter into or continue any condition, agreement, contract, or understanding that requires Exclusivity. Examples of prohibited discrimination or retaliation against a Customer shall include, but not be limited to:

1. Terminating, suspending, or threatening or proposing thereto, sales of any product marketed by the Respondent to the Customer;

2. Auditing the Customer's purchases or sales of Domestic DIPF to determine the extent of purchases or sales of competing Domestic DIPF;

3. Withdrawing or modifying, or threatening or proposing thereto, any terms of Price or Service offered or provided by Respondent to a Customer relating to any product marketed by Respondent; and

4. Refusing to deal with the Customer on terms and conditions generally available to other Customers.

D. After ninety (90) days from the date this Order becomes final, from enforcing any condition, requirement, policy, agreement, contract or understanding that is inconsistent with the terms of the Order.

Provided, however, that nothing in paragraphs III A-D of this Order prohibits Respondent from providing discounts, rebates, or other Price or non-Price incentives to purchase Domestic DIPF that are (i) volume-based, above average variable cost, and not Retroactive Incentives as defined herein; or (ii) designed to meet

competition, if Respondent determines in good faith that one or more Competitors are offering terms of sale for their Domestic DIPF for which Respondent needs to match in order to win contested business.

Provided, further, that nothing in Paragraph III.D of this Order prohibits Respondent from honoring or providing discounts, rebates, or other Price or non-Price incentives to purchase its Domestic DIPF that a Customer contracted for prior to the date this Order becomes final even if paid or provided by Respondent subsequent to that date.

IV.

IT IS FURTHER ORDERED that Respondent shall:

A. Within sixty (60) days from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each of its officers, directors, and Designated Managers;

B. Within sixty (60) days from the date this Order becomes final, distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, to each Customer of Respondent that has purchased DIPF or Domestic DIPF at any time since September 1, 2012;

C. For ten (10 years) from the date this Order becomes final distribute by first-class mail, return receipt requested, or by electronic mail with return confirmation, a copy of this Order with the Complaint, within sixty (60) days, to each Person who becomes its officer, director, or Designated Manager and who did not previously receive a copy of this Order and Complaint; and

D. Require each Person to whom a copy of this Order is furnished pursuant to Paragraphs IV.A and IV.C of

this Order to sign and submit to Respondent within sixty (60) days of the receipt thereof a statement that: (1) represents that the undersigned has read and understands the Order; and (2) acknowledges that the undersigned has been advised and understands that non-compliance with the Order may subject Respondent to penalties for violation of the Order.

V.

IT IS FURTHER ORDERED that Respondent shall file verified written reports within ninety (90) days from the date this Order becomes final, annually thereafter for ten (10) years on the anniversary of the date this Order becomes final, and at such other times as the Commission may by written notice require. Each report shall include, among other information that may be necessary:

A. Copies of the signed return receipts or electronic mail with return confirmations required by Paragraphs IV.A-D of this Order;

B. A detailed description of the manner and form in which Respondent has complied and is complying with this Order.

VI.

IT IS FURTHER ORDERED that Respondent shall notify the Commission:

A. Of any change in its principal address within twenty (20) days of such change in address; and

B. At least thirty (30) days prior to any proposed: (1) dissolution of Respondent; (2) acquisition, merger, or consolidation of Respondent; or (3) any other change in Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order.

VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, Respondent shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondent, and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession, or under the control, of Respondent relating to compliance with this Order, which copying services shall be provided by Respondent at its expense; and

B. Upon fifteen (15) days' notice, and in the presence of counsel, and without restraint or interference from it, to interview officers, directors, or employees of Respondent.

VIII.

IT IS FURTHER ORDERED that this Order shall terminate twenty (20) years from the date it becomes final.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star) have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in

the public interest, hereby issues this Complaint stating its charges as follows:

NATURE OF THE CASE

1. This action concerns the collusive conduct of Respondents, and the exclusionary conduct of McWane, relating to the marketing and sale of ductile iron pipe fittings ("DIPF").

2. Beginning in January 2008, McWane and Star, along with their competitor Sigma Corporation ("Sigma"), conspired to raise and stabilize the prices at which DIPF are sold in the United States. McWane, Sigma and Star (collectively, the "Sellers") exchanged sales data in order to facilitate this price coordination.

3. The passage of the American Recovery and Reinvestment Act of 2009 ("ARRA") in February 2009 significantly altered the competitive dynamics of the DIPF industry, and upset the terms of coordination among the Sellers. In the ARRA, the United States Congress allocated more than 6 billion dollars to water infrastructure projects, conditioned on the use of domestically produced materials, including DIPF, in those projects (the "Buy American" requirement).

4. At the time the ARRA was passed, McWane was the sole supplier of a full line of domestically produced DIPF in the most commonly used size ranges. Federal stimulus of the domestic DIPF market potentially left McWane in a position to reap a monopoly profit.

5. In response to the passage of the ARRA and its Buy American provision, Sigma, Star and others attempted to enter the domestic DIPF market in competition with McWane.

6. McWane maintained its monopoly in the domestic DIPF market through exclusionary conduct, including (i) entering into a distribution agreement with Sigma that eliminated Sigma as an actual potential entrant into the domestic DIPF market, and (ii) excluding actual and potential competitors, including Star, through the adoption and enforcement of exclusive dealing policies.

7. Respondents' conduct has restrained competition and led to higher prices for both imported and domestically produced DIPF.

THE RESPONDENTS

8. Respondent McWane is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 2900 Highway 280, Suite 300, Birmingham, Alabama 35223. McWane manufactures, imports, markets and sells products for the waterworks industry, including DIPF.

9. At all times relevant herein, McWane has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

10. McWane's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

11. Respondent Star is a limited partnership organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at 4018 Westhollow Parkway, Houston, Texas 77082. Star imports, markets and sells products for the waterworks industry, including DIPF.

12. At all times relevant herein, Star has been, and is now, a corporation as "corporation" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

13. Star's acts and practices, including the acts and practices alleged herein, are in or affect commerce in the United States, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

THE DIPF INDUSTRY

14. DIPF are a component of pipeline systems transporting drinking and waste water under pressurized conditions in municipal distribution systems and treatment plants. DIPF are used to join pipes, valves and hydrants in straight lines, and to change, divide or direct the flow of water. The end users of DIPF are typically municipal and regional water authorities.

15. DIPF are produced in a broad product line of more than 2000 unique configurations of size, shape and coating. The industry differentiates between "A Items," or commonly used fittings used routinely and on almost every job, and "oddball" fittings that are either of unusual configuration or size, or both. Although approximately 80 percent of market demand may be serviced with a product line of 100 fittings, DIPF suppliers must be able to supply more than 1900 additional fittings to serve the remaining 20 percent of demand.

16. Independent wholesale distributors, known as "waterworks distributors," are the primary channel of distribution of DIPF to end users. Waterworks distributors specialize in distributing products for water infrastructure projects, and generally handle the full spectrum of waterworks products, including pipes, DIPF, valves and hydrants. Waterworks distributors employ sales personnel dedicated to servicing the needs of end users, and are generally able to satisfy the needs of end users for rapid service by stocking inventory in relatively close proximity to project sites.

17. Direct sales of DIPF to end users, or to the utility contractors that often serve as the agent of the end user in purchasing and installing DIPF, are uncommon. End users and DIPF suppliers alike prefer to work through waterworks distributors with locations near project sites. As a result, DIPF suppliers need to distribute DIPF through local waterworks distributors in each region of the country in order to compete effectively in that region.

18. Both imported and domestically produced DIPF are commercially available. All of the Sellers sell imported DIPF. Before Star's entry into domestic production in 2009, McWane

was the sole domestic producer of a full line of small and medium-sized DIPF.

19. The end user of DIPF specifies whether, on a particular project, it will accept both imported and domestically produced DIPF, or only domestically produced DIPF. This specification is often mandated by municipal code, or by state or federal law.

20. Domestically produced DIPF sold for use in projects specified as domestic only are sold at higher prices than imported or domestically produced DIPF sold for use in projects not specified as domestic only.

THE RELEVANT MARKETS

21. The relevant product market in which to evaluate Respondents' conduct is the marketing and sale of DIPF, and narrower relevant markets as contained therein (collectively, the "relevant DIPF markets"), including:

a. DIPF for projects not specified as domestic only;

b. DIPF for projects specified as domestic only; and

c. DIPF of certain size ranges (e.g., 24" in diameter and smaller).

22. In particular, the marketing and sale of domestically produced small and medium-sized (3-24" in diameter) DIPF for use in projects specified as domestic only constitutes a separate relevant product market (the "relevant domestic DIPF market").

23. There are no widely used substitutes for DIPF, and no other product significantly constrains the prices of DIPF.

24. Before and after the passage of the ARRA, some end users purchasing DIPF for use in projects specified as domestic only were unable to substitute imported DIPF, or any other product, for domestically produced DIPF. The passage of the ARRA and its Buy American requirement temporarily expanded the relevant domestic DIPF market.

25. The relevant geographic market is no broader than the United States. To compete effectively within the United States, DIPF suppliers need distribution assets and relationships within the United States. DIPF suppliers located outside the United States that lack such assets and relationships are unable to constrain the prices of DIPF suppliers that have such assets and relationships.

26. Each and every state within the United States is also a relevant geographic market, and smaller markets within the boundaries of many states exist as well. DIPF suppliers can and do engage in price discrimination based on customers' location. DIPF end users require local and expeditious service and support, and typically do not purchase DIPF from waterworks distributors located more than 200 miles away. Waterworks distributors typically do not resell DIPF to other waterworks distributors or end users outside their service areas in any substantial quantity. As a result, DIPF suppliers charge different prices in different states, and within certain regions within many states.

THE RELEVANT DIPF MARKETS ARE CONDUCIVE TO COLLUSION

27. The relevant DIPF markets have several features that facilitate collusion among the Sellers, including product homogeneity, market concentration of DIPF suppliers, barriers to timely entry of new DIPF suppliers, inelastic demand at competitive prices, and uniform published prices.

a. DIPF are commodity products produced to industry-wide standards. Product homogeneity enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.

b. The relevant DIPF markets are highly concentrated. In 2008, the Sellers collectively made more than 90 percent of sales in the relevant DIPF markets. A highly concentrated market enhances the Sellers' ability and incentive to collude on prices.

c. Effective de novo entry into the relevant DIPF markets takes several years. Barriers to entry include the need for a new entrant to develop a distribution network and a reputation for quality and service with waterworks distributors and end users. Convincing end users to allow the use of a new entrant's DIPF is often a time consuming process.

d. Demand for DIPF is inelastic to changes in price at competitive levels. DIPF are a relatively small portion of the cost of materials of a typical waterworks project, and there are no widely used substitutes for the product.

e. The Sellers publish nearly identical price books listing per-unit prices for each unique DIPF item carried by a given supplier, and periodically publish uniform multiplier discounts at which they offer to sell DIPF on a state-by-state basis. By simplifying and standardizing published prices, the DIPF price list/multiplier format enhances the Sellers' ability to collude on prices and to detect deviations from those collusive prices.

THE SELLERS RESTRAINED PRICE COMPETITION IN THE RELEVANT DIPF MARKETS

28. Senior executives of the Sellers frequently and privately communicate with one another. These communications often relate to DIPF price and output.

29. Beginning in January 2008, the Sellers conspired to raise and stabilize the prices at which DIPF were sold in the United States.

30. Due to rising input costs, all of the Sellers desired price increases in 2008. However, McWane was concerned that Sigma and Star would not adhere to announced price increases, which would result in lost sales for McWane. The Sellers worked together though 2008 to alleviate McWane's concerns, with the common purpose of clearing the way for McWane to support common price increases.

31. On January 11, 2008, McWane publicly announced its first DIPF price increase of 2008. Sigma and Star followed this price increase.

32. This January 2008 price increase was the result of a combination and conspiracy among the Sellers.

a. Before announcing the January 2008 price increase, McWane planned to trade its support for higher prices in exchange for specific changes to the business methods of Sigma and Star that would reduce the risk that local sales personnel for these competitors would sell DIPF at prices lower than published levels.

b. McWane communicated the terms of its plan to Sigma and Star. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.

c. Sigma and Star manifested their understanding and acceptance of McWane's offer by publicly taking steps to limit their discounting from published price levels in order to induce McWane to support higher price levels.

d. On or about March 10, 2008, McWane and Sigma executives discussed by telephone their efforts to implement the January 2008 price increase.

33. On June 17, 2008, McWane publicly announced its second DIPF price increase of 2008. Sigma and Star followed this price increase.

34. The June 2008 price increase was the result of a combination and conspiracy among the Sellers.

a. Before announcing the June 2008 price increase, McWane planned to trade its support for higher prices in exchange for information from Sigma and Star documenting the volume of their monthly sales of DIPF. This exchange of information was to be

achieved under the auspices of an entity styled as the Ductile Iron Fittings Research Association ("DIFRA").

b. McWane communicated the terms of its plan to Sigma and Star, at least in part through a public letter sent by McWane to waterworks distributors, the common customers of the Sellers. A section of that letter was meaningless to distributors, but was intended to inform Sigma and Star of the terms of McWane's offer. McWane acted with the intent of conspiring with Sigma and Star to restrain price competition.

c. Sigma and Star manifested their understanding and acceptance of McWane's offer by initiating their participation in the DIFRA information exchange in order to induce McWane to support higher price levels.

d. McWane then led a price increase, and Sigma and Star followed.

e. On or about August 22, 2008, executives of McWane and Sigma discussed by telephone their efforts to implement the June 2008 price increase.

DIFRA FACILITATED PRICE COORDINATION AMONG THE SELLERS

35. The DIFRA information exchange operated as follows. The Sellers submitted a report of their previous month's sales to an accounting firm. Shipments were reported in tons shipped, subdivided by diameter size range (e.g., 2-12") and by joint type. Data submissions were aggregated and distributed to the Sellers. Data submitted to the accounting firm was typically no older than 45 days, and the summary reports returned to the Sellers contained data typically no more than 2 months old.

36. During its operation between June 2008 and January 2009, the DIFRA information exchange enabled each of the Sellers to determine and to monitor its own market share and, indirectly, the output levels of its rivals. In this way, the DIFRA information exchange facilitated price coordination among the Sellers on the pricing of DIPF.

37. The acts and practices of Respondents, as alleged herein, have the purpose, capacity, tendency, and effect of (i) fixing, maintaining and raising prices of DIPF in the relevant DIPF markets, and (ii) facilitating collusion in the relevant DIPF markets.

38. There are no legitimate procompetitive efficiencies that justify the conduct of Respondents as alleged herein, or that outweigh its anticompetitive effects.

MCWANE MONOPOLIZED THE RELEVANT DOMESTIC DIPF MARKET

39. At the time of the enactment of the ARRA in February 2009 and thereafter, McWane possessed monopoly power in the relevant domestic DIPF market.

40. At the time of the enactment of the ARRA, McWane was the only manufacturer of a full line of DIPF in the relevant domestic DIPF market and controlled nearly 100 percent of the relevant domestic DIPF market. Despite Star's entry into the relevant domestic DIPF market in late 2009, McWane continues to make more than 90 percent of sales in the relevant domestic DIPF market.

41. McWane's monopoly power in the relevant domestic DIPF market is protected by substantial barriers to effective entry and expansion, including the unfair methods of competition of McWane and Sigma, as alleged in Paragraphs 42 through 63, below.

42. For suppliers of the relevant DIPF that have existing relationships and goodwill with waterworks distributors and established reputations for quality and service in the provision of the relevant DIPF, McWane's unfair and exclusionary methods of competition are the primary barriers to effective entry and expansion in the relevant domestic DIPF market.

43. McWane's monopoly power in the relevant domestic DIPF market is further demonstrated directly by its ability to

exclude competitors, to control prices, and to coercively impose unwanted distribution policies on its customers.

44. Federal stimulus gave Sigma, Star and Serampore Industries Private, Ltd. ("SIP"), another imported DIPF supplier, an incentive to enter the domestic DIPF market.

45. Sigma, Star and SIP all attempted to enter the relevant domestic DIPF market in response to the ARRA.

46. McWane maintained its monopoly in the relevant domestic DIPF market by illegally inducing Sigma to abandon its effort to enter the domestic DIPF market, and by implementing an exclusive dealing policy to prevent other competitors from entering or expanding. Through this conduct, McWane eliminated or delayed competition from the only firms with the ability and incentive to enter the relevant domestic DIPF market in a timely fashion. McWane acted with the specific intent to monopolize the relevant domestic DIPF market.

McWane Eliminated Sigma as an Actual Potential Entrant

47. After the enactment of the ARRA, Sigma took steps to evaluate entry into domestic production of DIPF, including but not limited to (i) formulating a complete or nearly complete operational plan, (ii) arranging for an infusion of equity capital to fund domestic production, (iii) obtaining the approval of its Board of Directors for its entry plans, and (iv) casting prototype product.

48. McWane perceived that Sigma was preparing to enter the relevant domestic DIPF market. McWane sought to eliminate the risk of competition from Sigma by inducing Sigma to become a distributor of McWane's domestic DIPF rather than a competitor in the relevant domestic DIPF market.

49. McWane and Sigma executed a Master Distribution Agreement dated September 17, 2009 ("MDA"). The principal terms of the MDA were as follows:

a. McWane would sell domestic DIPF to Sigma at a 20 percent discount off of McWane's published prices;

b. McWane would be Sigma's exclusive source for the relevant domestic DIPF;

c. Sigma would resell McWane's domestic DIPF at or very near McWane's published prices for domestic DIPF; and

d. Sigma would resell McWane's domestic DIPF to waterworks distributors only on the condition that the distributor agreed to purchase domestic DIPF exclusively from McWane or Sigma.

50. An unwritten term of the MDA was that McWane would also sell its domestic DIPF at or very near its published prices.

51. In the absence of a sufficiently profitable arrangement with McWane, Sigma would likely have entered the relevant domestic DIPF market in competition with McWane.

52. Under the MDA, McWane controlled the price at which Sigma could sell domestic DIPF and the customers to whom Sigma could sell domestic DIPF. Sigma's participation in the relevant domestic DIPF market under the MDA was not equivalent to, and for consumers not a substitute for, Sigma's competitive entry into the relevant domestic DIPF market.

53. Sigma's independent, competitive entry into the relevant domestic DIPF market would likely have benefitted consumers by constraining McWane's prices for the relevant domestic DIPF and otherwise.

54. Through the MDA, McWane transferred a share of its sales and monopoly profits in the domestic DIPF market to Sigma in exchange for Sigma's commitment to abandon its plans to enter the relevant domestic DIPF market as an independent competitor.

55. Both McWane and Sigma entered into the MDA with the specific intent to maintain and share in McWane's monopoly profits in the relevant domestic DIPF market by eliminating competition among themselves and excluding their rivals.

McWane Excluded Star Through Exclusive Dealing

56. Star announced its entry into the relevant domestic DIPF market in June 2009. McWane knew that, initially, Star would have a shorter product line and a smaller inventory than McWane. Star would therefore have difficulty convincing a waterworks distributor to purchase all of its domestic DIPF from Star. McWane nevertheless projected that Star's entry into the domestic DIPF market, if unobstructed by McWane, would place downward pressure on McWane's prices for its domestic DIPF.

57. McWane responded to Star's entry into the relevant domestic DIPF market by adopting restrictive and exclusive distribution policies (collectively, "McWane's exclusive dealing policies"). McWane intended and expected that these policies would impede and delay the ability of Star to enter the domestic DIPF market.

a. McWane threatened waterworks distributors with delayed or diminished access to McWane's domestic DIPF, and the loss of accrued rebates on the purchase of McWane's domestic DIPF, if those distributors purchased domestic DIPF from Star.

b. As part of its MDA with McWane, Sigma agreed to implement a similar distribution policy, as alleged in Paragraph 49, above.

c. McWane threatened some waterworks distributors with the loss of rebates in other product categories, such as ductile iron pipe, waterworks valves, and hydrants, if those distributors purchased domestic DIPF from Star.

d. Beginning in 2011, McWane changed its rebate structure for domestic DIPF to require waterworks distributors to make certain minimum, and high, shares of their total domestic DIPF purchases from McWane in order to qualify for these rebates.

58. The purpose and effect of McWane's exclusive dealing policies has been and is to compel the majority of waterworks

distributors to deal with McWane and Sigma on an exclusive or nearly exclusive basis for their domestic DIPF business.

a. Due to Star's perceived or actual status as an untested supplier of domestic DIPF with a shorter product line and smaller inventory than McWane, many distributors interested in purchasing domestic DIPF from Star were unwilling to switch all of their domestic DIPF business to Star.

b. Instead, many distributors wished to purchase domestic DIPF from both McWane/Sigma and Star, and thereby to garner the benefits of price and service competition.

c. McWane's exclusive dealing policies increased the risk of purchasing domestic DIPF from Star.

d. Distributors otherwise interested in purchasing domestic DIPF from Star were and are unwilling to do so under the terms of McWane's exclusive dealing policies, and have remained exclusive or nearly exclusive with McWane and Sigma, contrary to their preference.

59. McWane's exclusive dealing policies have foreclosed Star from a substantial volume of sales opportunities with waterworks distributors.

60. By foreclosing Star from a substantial volume of sales opportunities with waterworks distributors, McWane's exclusive dealing policies tend to minimize and delay Star's ability to compete in the domestic DIPF market and thereby to benefit consumers by constraining the prices of domestically produced DIPF charged by McWane and Sigma, and otherwise.

61. McWane's exclusive dealing policies have also raised barriers to entry into the relevant domestic DIPF market by other potential entrants, including SIP. This conduct has contributed to McWane's monopolization of the relevant domestic DIPF market.

62. The acts and practices of McWane, as alleged herein, have the purpose, capacity, tendency, and effect of (i) maintaining and stabilizing prices of DIPF in the relevant DIPF markets, (ii) eliminating potential competition from Sigma in the relevant domestic DIPF market, (iii) impairing the competitive effectiveness of Star in the relevant domestic DIPF market, and (iv) raising barriers to entry for potential rivals in the relevant domestic DIPF market. The conduct of McWane is reasonably capable of making a significant contribution to the enhancement or maintenance of McWane's monopoly power in the relevant domestic DIPF market.

63. There are no legitimate procompetitive efficiencies that justify the conduct of McWane as alleged herein, or that outweigh its anticompetitive effects.

FIRST VIOLATION ALLEGED
RESTRAINT OF TRADE

64. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to restrain price competition. These concerted actions unreasonably restrain trade and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SECOND VIOLATION ALLEGED
RESTRAINT OF TRADE

65. As alleged herein, McWane and Star conspired, along with their competitor Sigma, to exchange competitively sensitive sales information. These concerted actions unreasonably restrain trade in and constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

THIRD VIOLATION ALLEGED
UNFAIR METHODS OF COMPETITION

66. As alleged herein, McWane invited its competitors to collude with McWane to restrain price competition. These actions constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FOURTH VIOLATION ALLEGED
RESTRAINT OF TRADE

67. As alleged herein, McWane and Sigma entered into the MDA. The agreement unreasonably restrains trade and constitutes an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

FIFTH VIOLATION ALLEGED
CONSPIRACY TO MONOPOLIZE

68. As alleged herein, McWane and Sigma entered into the MDA with the specific intent to monopolize the relevant domestic DIPF market, and took overt acts to exclude their rivals in furtherance of their conspiracy, constituting an unfair method of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SIXTH VIOLATION ALLEGED
MONOPOLIZATION

69. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices to acquire, enhance or maintain its monopoly power in the relevant domestic DIPF market, constituting unfair methods of competition in or

affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

SEVENTH VIOLATION ALLEGED
ATTEMPTED MONOPOLIZATION

70. As alleged herein, McWane has willfully engaged in anticompetitive and exclusionary acts and practices, with the specific intent to monopolize the relevant domestic DIPF market, resulting, at a minimum, in a dangerous probability of monopolizing the relevant domestic DIPF market, constituting unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Such acts and practices, or the effects thereof, will continue or recur in the absence of appropriate relief.

NOTICE

Notice is hereby given to Respondents that the fourth day of September, 2012, at 10:00 a.m., is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, NW, Washington D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings of fact and conclusions of law under ☐ 3.46 of said Rules.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint, and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after an answer is filed by the last answering Respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington DC 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within five days of receiving the answer of the last answering Respondent, to make certain initial disclosures without awaiting a formal discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that Respondents have violated or are violating Section 5 of the FTC Act, as amended, as alleged in the Complaint, the Commission may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Ordering Respondents to cease and desist from the conduct alleged in the Complaint to violate Section 5 of the FTC Act, and to take all such measures as are appropriate to correct or remedy, or to prevent the recurrence of, the anticompetitive practices engaged in by Respondents.

2. Prohibiting Respondents from agreeing with any competitor to fix prices or to allocate markets, or from soliciting any competitor to enter into such an agreement.

3. Prohibiting Respondents from agreeing with any competitor to exchange competitively sensitive information unless that information exchange meets sufficient criteria to assure that the information exchange will not facilitate collusion among Respondents and their competitors, such conditions to be determined by the Commission, or soliciting any competitor to enter into such an agreement.

4. Prohibiting Respondents from communicating competitively sensitive information to any competitor, except where such communications are the unavoidable result of announcing the terms on which Respondents propose to sell their products to their customers, or where the information communicated by Respondents relates solely to the terms on which Respondents propose to sell any product to, or purchase any product from, the person to whom the information is communicated by Respondents.

5. Requiring, for a period of time, that Respondents document all communications with any competitor, including by identifying the persons involved, the nature of the communication, and its duration, and that Respondents submit such documentation to the Commission.

6. Requiring that Respondents, upon request, provide the Commission with notification of any public price change relating to DIPF, including copies of pricing letters.

7. Prohibiting McWane from conditioning the sale, or any term of sale (including invoice price, delivery terms, credit allowances, rebates, or discounts), of any product on a customer's

dealing, refusal to deal, or terms of dealing with any other supplier of domestically produced DIPF.

8. Prohibiting McWane, for a period of time, from providing any discounts or other incentives that retroactively reduce the price of previously purchased units of McWane's domestically produced DIPF because of the purchase or sale of an additional unit of that product. Provided, however, that McWane shall be permitted to offer discounts or lower prices based solely on volume, provided that these discounts or lower prices are otherwise in accordance with the law.

9. Prohibiting McWane, for a period of time, from offering bundled rebates involving domestically produced DIPF.

10. Requiring that Respondents' compliance with the order shall be monitored at its expense by an independent monitor, for a term to be determined by the Commission.

11. Requiring that Respondents file periodic compliance reports with the Commission.

12. Any other relief appropriate to correct or remedy the anticompetitive effects in their incipiency of any or all of the conduct alleged in the complaint.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of January, 2012, issues its complaint against Respondents.

By the Commission.

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

The Commission has voted separately (1) to issue a Part 3 Administrative Complaint against Respondents McWane, Inc. ("McWane") and Star Pipe Products, Ltd. ("Star"), and (2) to accept for public comment a Consent Agreement settling similar allegations in a draft Part 2 Complaint against Respondent Sigma Corporation ("Sigma"). While I have voted in favor of both actions, I respectfully object to the inclusion—in both the Part 3 Administrative Complaint and in the draft Part 2 Complaint—of claims against McWane and Sigma, to the extent that such claims are based on allegations of exclusive dealing, as explained in Part I below. I also respectfully object to naming Star, a competitor of McWane and Sigma, as a Respondent in the Part 3 Administrative Complaint, which alleges, *inter alia*, that Star engaged in a horizontal conspiracy to fix the prices of ductile iron pipe fittings (DIPFs) sold in the United States, and in a related, information exchange, as described in Part II below.

I.

For reasons similar to those that I articulated in a recent dissent in another matter, *Pool Corp.*, FTC File No. 101-0115, http://www.ftc.gov/os/caselist/1010115/111121poolcorpstatementrosch.pdf, I do not think that the Part 3 Administrative Complaint against McWane and the draft Part 2 Complaint against Sigma adequately allege exclusive dealing as a matter of law. In particular, there is case law in both the Eighth and Ninth Circuits blessing the conduct that the complaints charge as exclusive dealing.

II.

I also object to the allegations in the Part 3 Administrative Complaint and in the draft Part 2 Complaint that name Star as a co-conspirator in the alleged horizontal price-fixing of DIPF sold in the United States and the related, alleged DIFRA information exchange.[1] I do not consider naming Star, along with McWane

[1] *See* McWane/Star Part 3 Administrative Compl. ¶¶ 29–38, 64–65; Sigma draft Part 2 Compl. ¶¶ 23–33.

and Sigma, as a co-conspirator to be in the public interest. There are at least three reasons why this is so. First, although there may be reason to believe Star conspired with McWane and Sigma in this oligopolistic industry, Star seems much less culpable than the others. More specifically, I believe that we must be mindful of the consequences of public law enforcement in assessing whether the public interest favors joining Star as a co-conspirator.[2] Second, I am concerned that a trier of fact may find it hard to believe that Star could be both a victim of McWane's alleged "threats" to deal exclusively with distributors, and at more or less the same time (the "exclusive dealing" program began in September 2009), a co-conspirator with McWane in a price-fixing conspiracy (June 2008 to February 2009). (This concern further explains why I do not have reason to believe that the exclusive dealing theory is a viable one.) Third, I am concerned that Star's alleged participation in the price-fixing conspiracy and information exchange relies, in part, on treating communications to distributors as actionable signaling on prices or price levels.[3] *See, e.g., Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1305–07 (11th Cir. 2003).

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[2] *See* Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264, 281–84 (2007) (questioning the social benefits of private antitrust lawsuits filed in numerous courts when the enforcement-related need is relatively small); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–60 (2007) (expressing concern with the burdens and costs of antitrust discovery, and the attendant *in terrorem* effect, associated with private antitrust lawsuits).

[3] McWane/Star Part 3 Administrative Compl. ¶ 34b; Sigma draft Part 2 Compl. ¶ 29.

Complaint

IN THE MATTER OF

WESTERN DIGITAL CORPORATION

CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF SEC. 7 OF THE CLAYTON ACT AND SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket No. C-4350; File No. 111 0122
Complaint, March 5, 2012 – Decision, May 7, 2013

This consent order addresses concerns that the acquisition by Western Digital of Hitachi Global Storage Technologies ("Hitachi") violates Section 5 of the FTC Act and Section 7 of the Clayton Act. According to the complaint, the acquisition would substantially reduce competition in the worldwide market for desktop hard disk drives and would enable Western Digital to exercise market power, resulting in higher prices for consumers. The consent order requires Western Digital to divest select Hitachi assets to Toshiba within 15 days of the acquisition. The consent order further requires Western Digital to license all intellectual property needed to make and supply desktop hard disk drives to Toshiba and to be available to supply Toshiba with components needed to operate the acquired assets successfully. The consent order further appoints a monitor to oversee the sale of the assets to Toshiba and to keep the Commission informed about the status of the required divestiture.

Participants

For the *Commission*: *Roberta Baruch, Leonor Velazquez Davila, Eric Elmore, Michael Franchak, Benjamin Gris, Sean Hughto, Janet Kim, Jennifer Lee,* and *Danielle Sims*.

For the *Respondent*: *George Cary* and *Jeremy Calsyn, Cleary Gottlieb Steen & Hamilton LLP*; *W. Stephen Smith, Morrison & Foerster LLP*; *David Beddow* and *Rich Parker, O'Melveny & Myers LLP*; and *Alex Chang, Skadden Arps Slate Meagher & Flom LLP*.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act, and its authority thereunder, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Western Digital Corporation ("Western Digital"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire Viviti Technologies Ltd., formerly known as